No. 02-1674 Vide 02-1675, 02-1676, 02-1702, 02-1727, 02-1733, 02-1734, 02-1740, 02-1747, 02-1753, 02-1755, 02-1756	Status: ARGUED
Title:	Mitch McConnell, United States Senator, et al., Appellants v. Federal Election Commission, et al.
Docketed:	May 15, 2003
Lower Ct:	United States District Court for the District of Columbia
Case Nos.:	(02-581, 02-582, 02-633, 02-751, 02-753, 02-754, 02-781, 02-874, 02-875, 02-877, 02-881)
Decision Date:	May 2, 2003

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 2 2003	Statement as to jurisdiction filed. (Response due June 16, 2003)
May 23 2003	Motion of appellees/cross appellants FEC, et al. for expedited briefing schedule filed by appellee Federal Election Commission, et al.
May 23 2003	Response to jurisdictional statement from appellee Federal Election Commission, et al. filed.
May 23 2003	Response to jurisdictional statement from intervenor- appellees, John McCain, et al. filed. VIDED.
May 27 2003	Response to motion of appellees FEC, et al. from appellants Senator Mitch McConnell, et al. filed.
May 27 2003	Response to motion of appellants FEC, et al. from appellees Emily Echols, et al. filed. VIDED.
May 28 2003	Response to motion of appellees FEC, et al. from appellant Chamber of Commerce of the United States, et al. filed.
May 29 2003	Reply of appellants Senator Mitch McConnell, et al.filed.
May 30 2003	Waiver of right of appellees Emily Echols, et al. to respond filed. VIDED.
May 30 2003	Reply of FEC, et al with respect to motion for expedited briefing schedule filed. VIDED.
Jun 2 2003	Motion Distributed June 5, 2003
Jun 5 2003	Motion of appellees/cross appellants FEC, et al. for expedited briefing schedule GRANTED.
Jun 5 2003	PROBABLE JURISDICTION NOTED In these cases probable jurisdiction is noted. The cases are consolidated and a total of four hours is allotted for oral argument. The briefs of the parties who were plaintiffs in the District Court are to address the questions presented in the jurisdictional statements and are to be filed with the Clerk of the Court and served upon the parties who were defendants in the District Court on or before 3 p.m., Tuesday, July 8, 2003. The briefs of the parties who were defendants in the District Court are to be filed with the Clerk of the Court and served upon the parties who were plaintiffs in the District Court on or before 3 p.m., Tuesday, August 5, 2003. Any reply briefs by parties who were plaintiffs in the District Court are to be filed with the Clerk of the Court and served upon parties who were defendants in the District Court on or before 3 p.m., Thursday, August 21, 2003. The cases are set for oral argument at 10:00 a.m., Monday,

	September 8, 2003.
Jun 6 2003	Supplemental Appendix of appellants Mitch McConnell, United States Senator, et al. filed (Volumes I-IV).
Jun 10 2003	Briefing proposal of NRA received.
Jun 10 2003	Briefing proposal of Adams, et al. received.
Jun 10 2003	Briefing proposal of Republican National Committee and various political party plaintiffs received.
Jun 10 2003	Briefing proposal of McConnell, et al. received.
Jun 10 2003	Briefing proposal of Chamber of Commerce, et al. received.
Jun 10 2003	Briefing proposal of National Right to Life, et al. received.
Jun 10 2003	Briefing proposal of Echols, et al. received.
Jun 10 2003	Briefing proposal of Paul, et al. received.
Jun 10 2003	Briefing proposal of the Solicitor General received.
Jun 10 2003	Briefing proposal of McCain, et al. received.
Jun 10 2003	Blanket consent received from counsel for McConnell, et al. for the filing of amicus briefs in 02-1674, et al.
Jun 10 2003	Briefing proposal of ACLU received.
Jun 10 2003	Briefing proposal of AFL-CIO, et al. received.
Jun 11 2003	Blanket consent received from counsel for McCain, et al. for the filing of amicus briefs in 02-1702, et al.
Jun 12 2003	Blanket consent received from counsel for Chamber of Commerce, et al. for the filing of amicus briefs in 02-1756.
Jun 12 2003	Reply of political party plaintiffs.
Jun 13 2003	Blanket consent received from counsel for NRA, et al. for the filing of amicus briefs in 02-1675, et al.
Jun 13 2003	Blanket consent received from counsel for Adams appellants for filing of amicus briefs in 02-1740, et al.
Jun 13 2003	Blanket consent received from counsel for appellants AFL-CIO, et al. for the filing of amicus briefs in 02-1755, et al.
Jun 16 2003	Blanket consent received from counsel for appellants Ron Paul, et al. for the filing of amicus briefs in 02-1747, et al.
Jun 18 2003	Blanket consent received from counsel for Echols, et al. for the filing of amicus briefs in 02-1676.
Jun 19 2003	The briefs of the parties who were plaintiffs in the District Court are not to exceed 50 pages for the opening briefs and 20 pages for the reply briefs, except that the plaintiffs in No. 02-1674 may file an opening brief not to exceed 75 pages, and the political party plaintiffs in Nos. 02-1727, 02-1733, and 02-1753 may file a consolidated opening brief not to exceed 100 pages. The Solicitor General may file a brief not to exceed 140 pages, and the intervenor-defendants may file a brief not to exceed 75 pages.
Jun 20 2003	Blanket consent received from counsel for California Democratic Party, et al. and Republican National Committee, et al. for the filing of amicus briefs in 02-1727 & 02-1753.
Jun 24 2003	The Clerk has approved the use of the deferred joint appendix in 02-1674, et al.
Jun 25 2003	Blanket consent received from counsel for the appellant ACLU for the filing of amicus briefs in 02-1734, et al.

Jun 30 2003	Brief amicus curiae of American Civil Rights Union filed. (Distributed)
Jul 3 2003	Brief of appellant American Civil Liberties Union filed. VIDED. (Distributed)
Jul 7 2003	Brief amicus curiae of David Moshman filed. VIDED.(Distributed)
Jul 8 2003	Brief of appellant AFL-CIO filed. VIDED.(Distributed)
Jul 8 2003	Brief of appellant National Rifle Association filed. VIDED.(Distributed)
Jul 8 2003	Brief of appellants Political Parties filed. VIDED. (Distributed)
Jul 8 2003	Brief of appellants National Right to Life Committee, et al. filed. VIDED. (Distributed)
Jul 8 2003	Brief of appellants Ron Paul, et al. filed. VIDED. (Distributed).
Jul 8 2003	Brief of appellants Mitch McConnell, United States Senator, et al., Appellants filed. VIDED. (Distributed)
Jul 8 2003	Forty copies of CD-ROM of lower court record received from counsel for appellants McConnell, et al. (Distributed)
Jul 8 2003	Brief of appellees Emily Echols and Barrett Austin O'Brock, et al filed. VIDED. Distributed)
Jul 8 2003	Brief amicus curiae of J. Dennis Hastert filed. VIDED. (Distributed).
Jul 8 2003	Brief amicus curiae of Cato Institute and Institute for Justice filed. VIDED. (Distributed)
Jul 8 2003	Brief amicus curiae of Rodney A. Smith filed. Distributed)
Jul 8 2003	Brief amici curiae of Virginia, et al. filed. (Distributed)
Jul 8 2003	Brief of appellants Victoria Jackson Gray Adams, et al. filed. VIDED. (Distributed)
Jul 8 2003	Brief amicus curiae of Public Campaign filed. VIDED.(Distributed)
Jul 8 2003	Brief of appellees" Business Plaintiffs", Chamber of Commerce of the United States, et al. filed. VIDED. (Distributed)
Jul 9 2003	* Hyperlinked brief of Political Parties available on CD-ROM. (Distributed)
Jul 14 2003	Motion of Echols, et al. for divided argument. filed by appellees Emily Echols, et al.
Jul 14 2003	Motion for divided argument filed by appellant National Rifle Association.
Jul 14 2003	Motion for divided argument filed by appellant Mitch McConnell, United States Senator, et al., joined by plaintiffs Republican Nat. Comm., Nat. Right to Life Comm., ACLU, CA Democratic Party, AFL-CIO, and Chamber of Commerce.
Jul 14 2003	Motion for divided argument filed by appellant Ron Paul, et al.
Jul 14 2003	Motion for divided argument filed by appellee Federal Election Commission, et al.
Jul 14 2003	Motion joining in the FEC et al., motion for divided argument
Jul 14 2003	Motion for divided argument filed by appellant Victoria Adams, et al.,.
Jul 18 2003	Response of Federal Election Commission, et al. to plaintiffs' motion for divided argument filed. VIDED.
Jul 18 2003	Response of appellants, Congressman Ron Paul, et al. in opposition to allocation of oral argument time proposed in motion for divided argument of certain aligned appellants filed. VIDED.
Jul 18 2003	Application (03A61) of intervenor-defendants McCain, et al. for leave to file a response brief in excess of page limits, submitted to The Chief Justice.
Jul 18 2003	Response of appellants Mitch McConnell, et al, to motions of seven groups of plaintiffs for divided argument filed. VIDED.
Jul 18 2003	Response of National Rifle Assn., et al. to motion of seven groups of plaintiffs for divided argument filed. VIDED.
Jul 18 2003	Response to motions for divided argument from Emily Echols, et al. filed.

Jul 18 2003	Response to motions for divided argument from John McCain, United States Senator, et al., filed.
Jul 22 2003	Application (03A61) denied by The Chief Justice.
Jul 23 2003	Notice from Libertarian National Committee regarding the Paul, et al. motion for divided argument.
Jul 28 2003	Brief amicus curiae of Center for Governmental Studies filed. VIDED. (Distributed)
Aug 4 2003	Motion for divided argument filed by defendant FCC, et al. GRANTED.
Aug 4 2003	Motion for divided argument filed by Mitch McConnell, United States Senator, et al., joined by plaintiffs Republican Nat. Comm., Nat. Right to Life Comm., ACLU, CA Democratic Party, AFL-CIO, and Chamber of Commerce GRANTED.
Aug 4 2003	Motion for divided argument filed by petitioner GRANTED in part.
Aug 4 2003	Motion of Echols, et al. for divided argument GRANTED in part.
Aug 4 2003	Motion for divided argument filed by petitioner DENIED.
Aug 4 2003	Motion for divided argument filed by petitioner DENIED.
Aug 4 2003	Motion for divided argument filed by petitioner DENIED.
Aug 4 2003	The motion for divided argument of plaintiffs in Nos. 02-1674, 02-1727, 02-1733, 02-1734, 02-1753, 02-1755, and 02-1756 is granted, except that 60 minutes are allotted for argument on Title I and Section 213 of the Bipartisan Campaign Reform Act of 2002, and 50 minutes are allotted on the remainder of the challenged provisions. The motions of Emily Echols, et al., and Barret Austin O'Brock for divided argument is granted limited to 10 minutes for plaintiffs. The motions for divided argument of plaintiffs in Nos. 02-1675, 02-1740, and 02-1747 are denied. The motion of the Solicitor General for divided argument is granted.
Aug 5 2003	Redacted Brief of Intervenor-Defendants John McCain, et al. filed. VIDED. TBP (Circulated) Original brief FILED UNDER SEAL. (Circulated).(PPV)
Aug 5 2003	Brief amici curiae of Political Scientists Norman J. Ornstein, et al. filed. VIDED. (Circulated)
Aug 5 2003	Brief amicus curiae of Fred Thompson filed. VIDED. (Circulated)
Aug 5 2003	Brief amici curiae of Common Cause and AARP filed. VIDED. (Circulated)
Aug 5 2003	Brief amici curiae of Interfaith Alliance Foundation, et al. filed. VIDED. (Circulated)
Aug 5 2003	Brief amicus curiae of Center for Responsive Politics filed. VIDED.(Circulated)
Aug 5 2003	Brief amicus curiae of League of Women Voters of the United States filed. VIDED. (Circulated)
Aug 5 2003	Brief amici curiae of International Experts, Thomas Grant, et al. filed. VIDED. (Circulated)
Aug 5 2003	Brief of appellants Federal Election Commission, et al. filed. VIDED. (Circulated)
Aug 5 2003	Motion of McCain, et al. for leave to file their brief under seal with redacted copies.
Aug 5 2003	Brief amicus curiae of Bipartisan Former Members of the United States Congress filed. VIDED. (Circulated)
Aug 5 2003	Brief amicus curiae of Former Leaders of ACLU filed. VIDED. (Ciculated).
Aug 5 2003	Brief amici curiae of Iowa, et al. filed. VIDED. (Circulated)
Aug 5 2003	Brief amici curiae of California Student Public Interest Research Group, et al. filed. VIDED. (Circulated)
Aug 5 2003	Brief amici curiae of Representatives Castle and Price, et al. filed. VIDED. (Circulated)
Aug 5 2003	Brief amici curiae of Committee for Economic Development, et al. filed. VIDED.

	(Circulated).
Aug 5 2003	Brief amicus curiae of Community Organizations Dedicated to Defending the Civil Rights of Racial Minorities filed. VIDED. (Circulated.)
Aug 8 2003	Application (03A122) of the political parties in case nos. 02-1727, 02-1733, & 02-1753, to file a consolidated reply brief on the merits in excess of the page limitation, submitted to The Chief Justice.
Aug 8 2003	Motion for reconsideration of their motion for divided argument filed by appellants National Rifle Association, et al. VIDED
Aug 11 2003	Motion for reconsideration of their motion for divided argument filed by appellants Ron Paul, et al. VIDED
Aug 12 2003	Application (03A122) granted by The Chief Justice to file a consolidated reply brief on the merits in excess of the page limitation not to exceed 40 pages.
Aug 15 2003	Joint appendix filed. VIDED. (Distributed)
Aug 15 2003	Application (03A140) to file a reply brief on the merits in excess of page limits, submitted to The Chief Justice.
Aug 15 2003	Volumes I & II of joint appendix filed. VIDED (Distributed)
Aug 16 2003	Volumes III - V of joint appendix filed. VIDED (Distributed)
Aug 16 2003	Motion to file volume VI of the joint appendix under seal filed by appellants Mitch McConnell, United States Senator, et al., Appellants.
Aug 19 2003	Application (03A140) denied by The Chief Justice.
Aug 19 2003	40 copies of enlarged joint appendix material submitted by AFL-CIO plaintiffs. filed.
Aug 19 2003	Motion for reconsideration of motion for divided argument DENIED.
Aug 19 2003	Motion for reconsideration of motion for divided argument. DENIED.
Aug 20 2003	Reply of appellees Emily Echols, et al. filed. VIDED. (Distributed)
Aug 20 2003	Reply of appellants National Right to Life Committee, et al. filed. VIDED. (Distributed)
Aug 21 2003	Reply of appellants Political Parties filed. VIDED. (Distributed)
Aug 21 2003	Reply of appellants National Rifle Association filed. VIDED. (Distributed)
Aug 21 2003	Reply of appellants Ron Paul, et al. filed. VIDED. (Distributed)
Aug 21 2003	Reply of appellants Mitch McConnell, United States Senator, et al., Appellants filed. VIDED.
Aug 21 2003	Reply of appellant ACLU filed. VIDED. (Distributed)
Aug 21 2003	Reply of appellants Victoria Jackson Gray Adams, et al. filed. VIDED. (Distributed)
Aug 21 2003	Reply of appellees Chamber of Commerce, et al. filed. VIDED. (Distributed)
Aug 21 2003	Reply of appellant AFL-CIO filed. VIDED. (Distributed)
Aug 21 2003	Hyperlinked reply brief on the merits of the Political Parties received on CD-ROM. VIDED.
Aug 21 2003	20 copies of CD-ROM "Storyboards of Ads Attacking the NRA" supplemental submission received.
Aug 25 2003	Motion to file volume VI of the joint appendix under seal GRANTED.
Aug 25 2003	Motion to file their brief under seal with redacted copies GRANTED.
Aug 26 2003	Letter from the Solicitor General proposing the order of advocates and the allocation of time for the September 8, 2003, oral argument in these cases.
Sep 8 2003	ARGUED. Kenneth W. Starr, for McConnell, et al. plaintiffs; Bobby R. Burchfield, for Political Party, plaintiffs; Floyd Abrams, for McConnell, et al. plaintiffs; Laurence E.

Gold, for AFL-CIO, plaintiffs; Jay A. Sekulow, for Echols, et al. plaintiffs. Theodore B. Olson, Solicitor General, for FEC, defendant; Seth P. Waxman, for Intervenor, defendant; Paul D. Clement, Deputy Solicitor General, for FEC, defendant.

①

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

JURISDICTIONAL STATEMENT

FLOYD ABRAMS	KENNETH W. STARR
SUSAN BUCKLEY	*Counsel of Record*
BRIAN MARKLEY	EDWARD W. WARREN
CAHILL, GORDON &	KANNON K. SHANMUGAM
REINDEL LLP	KIRKLAND & ELLIS
80 Pine Street	655 Fifteenth Street, N.W.
New York, NY 10005	Washington, DC 20005
(212) 701-3000	(202) 879-5000

(*additional counsel on signature block*)

May 2, 2003

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95 pp

QUESTIONS PRESENTED

1. Whether the district court erred by upholding portions of the "soft money" provision (section 101) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, because it constitutes an invalid exercise of Congress' power to regulate elections under Article I, Section 4, of the Constitution; violates the First Amendment or the equal protection component of the Fifth Amendment; or is unconstitutionally vague.
2. Whether the district court erred by upholding portions of the "electioneering communications" provisions (sections 201, 203, 204, and 311) of BCRA, because they violate the First Amendment or the equal protection component of the Fifth Amendment, or are unconstitutionally vague.
3. Whether the district court erred by holding nonjusticiable challenges to, and upholding, portions of the "advance notice" provisions of BCRA (sections 201 and 212), because they violate the First Amendment.
4. Whether the district court erred by holding nonjusticiable challenges to, and upholding, the "coordination" provisions of BCRA (sections 202, 211, and 214), because they violate the First Amendment.
5. Whether the district court erred by holding nonjusticiable challenges to, and upholding, the "attack ad" provision of BCRA (section 305), because it violates the First Amendment.

PARTIES TO THE PROCEEDINGS

The appellants here, who were plaintiffs in two of the eleven cases consolidated in the district court, are Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; U.S. d/b/a Pro English; the National Association of Broadcasters; and Thomas E. McInerney.

The appellees here, who were defendants or intervenor-defendants in the district court, are the Federal Election Commission; the Federal Communications Commission; the United States of America; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

STATEMENT PURSUANT TO RULE 29.6

None of the appellants has a parent corporation, and no publicly held company owns 10% or more of the stock of any of the appellants.

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INTRODUCTION

This case needs no introduction. It is the constitutional challenge to the "McCain-Feingold" law — known officially, if somewhat misleadingly, as the Bipartisan Campaign Reform Act (BCRA). The statute represents the most comprehensive campaign finance legislation since the Federal Election Campaign Act (FECA), and this case represents the most significant constitutional challenge to such legislation since *Buckley v. Valeo*, 424 U.S. 1 (1976).

At its core, this is a case about the First Amendment. BCRA constitutes a frontal assault on First Amendment values, the likes of which have not been seen since the Republic's infancy. But BCRA also offends other constitutional principles — principles that are no less fundamental. It purports to regulate the activities of political parties and candidates not just with respect to federal elections, but also with respect to state elections, notwithstanding Congress' lack of power so to regulate. It subjects a variety of players in the political process, and a variety of types of political speech, to disparate treatment, despite the absence of any justification for doing so. And it contains an abundance of vague provisions, thereby transforming the Federal Election Commission, the regulatory body tasked with enforcing those provisions, into a board of censors that decides which types of political speech are permitted and which are not. Rarely has Congress acted with such utter disregard for so many constitutional limitations on its power.

Appellants urge this Court to note probable jurisdiction on the questions presented herein, and to reverse the district court on those questions.[1]

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[1] **Other plaintiffs will likely be filing jurisdictional statements of their own, and it is anticipated that defendants will also do so. Where necessary, appellants will file prompt responses to those statements. In addition, appellants shortly intend to file a motion proposing procedures for the**

OPINIONS BELOW

The district court's opinions are not yet reported. *See* Appendix ("App.") 3a. Appellants' notice of appeal is reprinted at App. 1a-2a.

JURISDICTION

The district court entered judgment on May 2, 2003. Appellants filed their timely notice of appeal on May 2, 2003. This Court has appellate jurisdiction pursuant to section 403(a)(3) of BCRA.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is reprinted at App. 7a-68a.

Article I, Section 4, of the United States Constitution is reprinted at App. 4a.

The First Amendment of the United States Constitution is reprinted at App. 5a.

The Fifth Amendment of the United States Constitution is reprinted at App. 6a.

STATEMENT OF THE CASE

1. The history of campaign finance regulation in the United States is relatively brief. In fact, Congress did not attempt systematically to regulate the financing of campaigns until 1971, when it enacted the Federal Election Campaign Act (FECA). *See* Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455). As amended in 1974, *see* Pub. L. No. 93-443, 88 Stat. 1263, FECA had three principal components. First, and most fundamentally, FECA established limits on the amount of money that could be contributed for the purpose of influencing federal elections — money that would come to be known as "hard money." Individuals could

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disposition of this appeal.

contribute up to $1,000 per candidate, and "political committees" (including political action committees, or PACs) could contribute up to $5,000.[2] Second, FECA also imposed limits on the amount of money that could be spent in federal elections, restricting expenditures by any person "relative to a clearly identified candidate" to $1,000. Finally, FECA established limits on "coordinated expenditures": that is, expenditures made on behalf of, and in collaboration with, a federal candidate for express advocacy and related activities. FECA treated coordinated expenditures as "contributions" subject to the applicable limits, and set separate limits for coordinated expenditures by political party committees.

2. In *Buckley*, this Court considered challenges to these and numerous other provisions of FECA. The Court began by recognizing that both contributions and expenditures on behalf of political candidates implicate the First Amendment rights of free speech and free association, although it asserted that limitations on expenditures constituted "significantly more severe" restrictions on those rights than limitations on contributions. *See* 424 U.S. at 19-23. The Court also recognized that the government had a compelling interest in "the prevention of corruption and the appearance of corruption." *See id.* at 25. Although the Court did not define "corruption," it repeatedly referred to "quid pro quo" arrangements in which contributions or expenditures were made

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[2] In 1976, Congress amended FECA to add further limits. *See* Pub. L. No. 94-238, 90 Stat. 475. Under those amendments, individuals could contribute up to $5,000 per year to any particular political committee (including PACs and state political party committees), and up to $20,000 per year to any national party committee. Political party committees, in turn, could contribute up to $5,000 to a candidate's campaign, with national party committees allowed to contribute up to $17,500 to a senatorial candidate's campaign.

The BCRA raises a number of these contribution limits. *See* BCRA §§ 102, 307. Appellants are not directly challenging any of the contribution limits in this appeal.

in order to secure or "influence" a particular action. *See id.* at 26, 27, 45.

The Court upheld FECA's contribution limits as constitutional. *See id.* at 24-38. However, it struck down FECA's limits on independent expenditures. *See id.* at 39-59. In order to address both vagueness and overbreadth concerns, the Court first narrowly construed the expenditure limits to cover only those funds that were spent for what has come to be known as "express advocacy": that is, funds used "in express terms [to] advocate the election or defeat of a clearly identified candidate." *Id.* at 44. This narrowing construction therefore excluded from the reach of government regulation political advocacy that does *not* expressly advocate the election or defeat of a clearly identified candidate (so-called "issue advocacy"). Even after narrowing these provisions, however, the Court struck them down on the ground that independent expenditures did not pose a sufficient threat of corruption or the appearance of corruption. *See id.* at 45. In so doing, the Court expressed approval of FECA's treatment of coordinated expenditures as contributions. *See id.* at 47. The Court applied a similar narrowing construction to a provision of FECA requiring disclosure of certain expenditures, but ultimately upheld that provision. *See id.* at 74-82.

3. In the wake of *Buckley*, the FECA regime for the financing of federal election campaigns peacefully coexisted with the States' regimes for the financing of their own election campaigns. Some States allowed virtually unlimited contributions to, and expenditures by, state candidates and party committees; others imposed even more stringent limits than those imposed by FECA on the federal level.

Questions arose, however, regarding the financing of activities that had effects on *both* federal and state elections, such as voter registration, voter identification, and get-out-the-vote activities. In 1978, the Federal Election Commission (FEC) declared that state and local party committees could use a combination of federally regulated funds (so-called "hard money") and state-regulated funds (so-called "soft money") to fund those activities. *See* FEC Advisory Op. 1978-10. The FEC subsequently allowed national party committees to use a similar "allocation" of federally regulated and state-regulated funds. *See* FEC Advisory Op. 1979-17. Over the next two decades, the FEC extended the allocation regime to cover other activities by party committees, including administrative expenses, party-promoting (or "generic") campaign activities, and, perhaps most critically, issue advocacy. *See* FEC Advisory Op. 1995-25. During the 1990s, the raising and spending of state-regulated funds for party activities, and the use of issue advocacy by political parties and other groups, expanded significantly.

4. It was against this backdrop that BCRA was enacted. The relevant provisions of BCRA are contained in four titles.

a. Title I of BCRA effectively outlaws the use of so-called "soft money": that is, money which has not previously been subject to federal regulation, but which has been raised by political parties in full compliance with applicable state law.

Section 101 of BCRA bans national party committees from receiving or spending state-regulated funds for any purpose — whether for activities affecting *both* federal and state elections, for which an allocation of state-regulated funds could previously be used, or for activities that affect *only* state elections. Section 101 also bans national party committees from soliciting state-regulated funds for, or transferring state-regulated funds to, any other entity, including state and local party committees.

In addition, section 101 bans state and local party committees from spending state-regulated funds for what BCRA euphemistically calls "federal election activity" — a broadly defined phrase that encompasses voter registration, voter identification, get-out-the-vote activity, and generic campaign activity whenever there is a federal election on the ballot, and advertising that contains certain types of references to federal candidates. Because most States hold their state and local elections simultaneously with federal elections, the practical effect of this provision is to ban state and local party committees from using state-regulated funds for covered activities even if those activities solely or primarily affect state and local elections. Although section 101 creates a narrow subcategory of these activities that can be paid for with a new category of federally regulated funds (so-called "Levin" funds), it requires state and local party committees to raise funds for these activities on their own, without engaging in joint fundraising or receiving transfers of funds from other party committees.

Section 101 also severely restricts federal officeholders and candidates from raising state-regulated funds for state and local party committees and candidates. Moreover, it bans state and local candidates from spending state-regulated funds on advertising that contains certain types of references to federal candidates.

b. Title II of BCRA contains a number of challenged provisions. Most notably, sections 201 and 204 ban all corporations and unions, or other entities using funds donated by corporations and unions, from making disbursements for "electioneering communications," which section 203 defines as any advertising, carried by a broadcast, satellite, or cable medium within 30 days of a primary or 60 days of a general election, which "refers to a clearly identified candidate for Federal office." In the event that this definition is held to be unconstitutional, section 203 also contains a "fallback" definition of "electioneering communications," which covers any broadcast advertising, at any time, which "promotes," "supports," "attacks," or "opposes" a federal candidate and "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." In addition to banning corporations and unions from making "electioneering communications" altogether, section 201 requires all persons who spend $10,000 on "electioneering communications" to make disclosures to the FEC regarding those disbursements.

Several other provisions of Title II are also under challenge. Sections 201 and 212 impose disclosure requirements on persons who merely enter into a contract to make disbursements for electioneering communications or other expenditures, even before those outlays are actually made. Section 202 treats coordinated disbursements for electioneering communications, like coordinated expenditures, as contributions to the "supported" candidates, and sections 211 and 214 broadly define the concept of "coordination" and order the FEC to promulgate new regulations concerning that definition. Finally, section 213 bans political parties from making both independent and coordinated expenditures on behalf of any given candidate, and instead forces them to choose which type of expenditures to make.

c. Title III of BCRA is composed of "miscellaneous" provisions, several of which are at issue in this litigation. Section 318 bans minors from contributing federally regulated money in any amount to a federal candidate, and from contributing either federally regulated or state-regulated money to a political party committee. Section 305 requires a federal candidate who wishes to take advantage of the lowest available rate for a broadcast advertisement either to certify that he or she will not refer to another candidate in his or her advertising, or to include a specified identification or visual statement in the ad. Sections 304, 316, and 319 raise the generally applicable limitations on contributions and coordinated expenditures for candidates who face opponents using specified amounts of personal funds in their campaigns. And section 311 establishes detailed identification requirements for the sponsors of advertising that qualifies as express advocacy or "electioneering communications."

d. Title V of BCRA contains one provision under challenge, section 504, which requires broadcasters to collect and disclose records of requests to purchase broadcast time for communications "relating to any political matter of national importance," even if those communications are never actually made.

5. Although noting that BCRA raised "serious constitutional concerns," President Bush signed BCRA into law on March 27, 2002. Eleven complaints were immediately filed in the United States District Court for the District of Columbia, challenging the constitutionality of various aspects of the law. Pursuant to the judicial-review provisions in section 403 of the BCRA, those cases were consolidated before a single three-judge panel (Henderson, Circuit Judge, and Kollar-Kotelly and Leon, District Judges). The court ordered the parties to conduct expedited discovery and a "paper trial," in which witnesses filed written statements and were cross-examined outside court. On November 6, 2002, BCRA took effect. After a voluminous record was compiled and expedited briefing completed, the court heard oral arguments on December 4 and 5, 2002.

On May 2, 2003, the district court issued opinions upholding some provisions of BCRA, striking down other provisions, and holding that appellants' challenges to other provisions were nonjusticiable. *See* App. 3a. This appeal follows.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In BCRA, Congress vested this Court with direct appellate jurisdiction over the district court's resolution of challenges to BCRA's constitutionality, and asked this Court "to expedite to the greatest possible extent the disposition of the * * * appeal." *See* BCRA § 403(a)(3). The district court's decision to reject some of appellants' constitutional challenges was erroneous, and this Court should note probable jurisdiction on those issues.

1. The district court largely struck down the "soft money" provision of BCRA (section 101), but upheld restrictions on the use of soft money by party committees for certain types of advertising, and also upheld restrictions on the solicitation and use of soft money by officeholders and candidates. To the extent the district court held section 101 constitutional, that decision was erroneous and should be reversed.

a. Most significantly, section 101 violates the First Amendment. Section 101 imposes burdens on speech and associational rights that far outweigh those imposed by the contribution and expenditure limits at issue in *Buckley*. By limiting the mere *solicitation* of state-regulated funds by various actors, including officeholders and candidates (provisions upheld by the district court), section 101 directly restricts the speech of those actors. *See, e.g., Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Section 101 also interferes with the ability of party committees to associate with other committees of the same party, officeholders and candidates, and other organizations. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 230-31 (1989). Because of the substantial speech and associational interests implicated, and because the limits on donations of state-regulated funds to national party committees effectively serve as limits on the amounts that national party committees can spend, section 101 of BCRA should be subject to strict scrutiny. *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981).

Section 101 cannot survive strict scrutiny because it is not narrowly tailored to meet a compelling governmental interest. Although appellees will suggest that section 101 was justified to prevent donors of state-regulated funds from securing "access" to federal officeholders and candidates or to prevent circumvention of current campaign finance regulations, this Court has not recognized either of those potentially limitless justifications for regulation as compelling. Instead, the only interest that this Court has recognized as compelling in the campaign finance context is the interest in reducing actual or apparent corruption. *See FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

As a threshold matter, it is questionable whether restrictions on the donation of state-regulated funds to, or the spending of state-regulated funds by, a political party serve that interest at all. As this Court has noted, there are no "special dangers of corruption associated with political parties." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (*Colorado I*) (plurality opinion).[3] Moreover, where funds are being used for activities that do not exclusively serve to get a candidate elected (such as generic party activity), rather than for activities that exclusively do so (such as express advocacy), "the opportunity for corruption * * * is, at best, attenuated." *Id.*

Even assuming that section 101 does serve the government's interest in reducing actual or apparent corruption, however, it is not narrowly tailored to serve that goal. To the extent that Congress was concerned that the *amount* of donations of state-regulated funds gave rise to corruption, it could simply have capped the amount that could be given. And to the extent that Congress was worried about the *use* of state-regulated funds for certain types of advertising, it could perhaps have banned only the disbursement of state-regulated funds for that purpose, as the district court suggests — though, as we will shortly demonstrate, such advertising is in fact constitutionally protected speech.

b. Section 101 is constitutionally problematic for three other reasons. *First*, appellants intend to argue that Congress lacked the power to enact section 101, which restricts the activities of political party committees, officeholders, and candidates not only with respect to federal elections, but also with respect to state and local elections. The Elections Clause in Article I, Section 4, of the Constitution — the traditionally cited source of authority to regulate campaign financing, *see Buckley*, 424 U.S. at 13 — gives Congress the power to regulate only the "Times, Places, and Manner" of holding *federal* elections. Both the contemporary understanding and subsequent case law demonstrate beyond doubt that the Elections Clause does not give Congress the power to regulate state elections as well. *See, e.g.*, The Federalist No. 59, at 363 (Hamilton) (C. Rossiter ed. 1961); *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (opinion of Black, J.); *Ex parte Siebold*, 100 U.S. 371, 393 (1879); *cf. California Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Stevens, J., dissenting) (noting that "[a] State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty").

Section 101 of BCRA constitutes an improper exercise of Congress' Elections Clause power because it fails sufficiently to accommodate the competing state interest in regulating activities that affect state elections. Section 101 prohibits party committees from raising and spending state-regulated funds for many activities that have effects on *both* federal and state elections (including the use of state-regulated funds for advertising that refers to both federal and state candidates, the regulation of which the district court upheld), and other activities that have effects *only* on state elections. Similarly, in provisions upheld by the district court, section 101 dramatically limits the ability of federal officeholders and candidates to raise money for state and local candidates, and imposes unprecedented restrictions on the speech of state and local candidates themselves.

Second, section 101 violates basic principles of equal protection to the extent that it regulates speech by political parties but not identical speech by similarly situated entities. The requirement that the government act neutrally among speakers is embedded not only in the equal protection component of the Fifth Amendment, but also in the First Amendment itself. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). At least as originally written, section 101 unquestionably disadvantages political party committees compared to interest groups: whereas national party committees are banned outright from raising or spending state-regulated funds for contributions to state or local candidates, voter registration, voter identification, get-out-the-vote activity, generic campaign activity, advocacy relating to ballot measures, and even administrative expenses, interest groups will be able to continue to raise and spend non-federally regulated funds for all of these purposes. The predictable result is that interest groups will tend to supplant political party committees with regard to all of these activities, thereby diluting the central role that political parties traditionally have played in our democratic process. *See Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring).

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[3] *See also id.* at 629 (Kennedy, J., concurring in part and dissenting in part) (same); *id.* at 646 (Thomas, J., concurring in part and dissenting in part) (same).

Third, a number of terms in section 101 are unconstitutionally vague, including several terms in the definition of "federal election activity" (such as covered "communications" that "promote," "support," "attack," or "oppose" a federal candidate). Crucially, the FEC's rulemaking on section 101 has failed to cure the vagueness of many of these terms, and in some cases has introduced additional vagueness in the regulatory regime. This vagueness will force party committees and other actors either to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," *Buckley*, 424 U.S. at 41 n.48 (internal quotation omitted), or to seek prior approval from the FEC before engaging in political speech.

2. The district court partially upheld and partially struck down the "electioneering communications" provisions of BCRA.

As to those provisions, appellants intend to argue that the regulation of disbursements for political speech other than

express advocacy violates the First Amendment, as this Court previously held in both *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*). In *Buckley*, the Court considered a provision of FECA restricting expenditures by any person "relative to a clearly identified candidate" to $1,000, and an attendant provision requiring disclosures of certain expenditures made "for the purpose of * * * influencing" federal elections. In both instances, the Court narrowed the statutory provisions to reach only expenditures made for "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office": that is, "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 & n.52, 80. The Court made clear that it was narrowing these provisions not merely to cure vagueness in the statutory language, but also to eliminate constitutional overbreadth. *See, e.g., id.* at 80. Notably, the Court drew the constitutional line at express advocacy while recognizing that the distinction between express advocacy and other advocacy "may often dissolve in practical application" because "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42. In *MCFL*, the Court similarly narrowed a provision that banned corporate expenditures "in connection with" federal elections to cover only expenditures for express advocacy, this time doing so solely on the basis of overbreadth. *See* 479 U.S. at 248-49.

Because both of section 203's definitions of "electioneering communications" — including the fallback definition, as modified and then upheld by the district court — extend far beyond constitutionally regulable express advocacy, the ban on disbursements for "electioneering communications" by corporations and unions in sections 201 and 204, and the attendant disclosure requirements in sections 201 and 311, should be struck down.

Appellees will likely argue that this Court should overrule *Buckley* and *MCFL* on the theory that many ads run in proximity to elections are "sham" issue ads, which are "intended" to influence elections, and therefore should be treated as the constitutional equivalent of express advocacy. As the Court recognized in *Buckley*, it is true that any discussion of issues and candidates "tend[s] naturally and inexorably to exert some influence on voting at elections." 424 U.S. at 42 n.50 (internal quotation omitted). As *Buckley* itself makes clear, however, the distinction between express advocacy and other advocacy was intended precisely to avoid efforts such as appellees' to divine the real "purpose" behind an ad. In any event, the evidentiary record before the district court demonstrates that BCRA reaches a substantial amount of fully protected political speech, even under appellees' redefinition of express advocacy.

Finally, appellants intend to make further arguments regarding the constitutionality of BCRA's "electioneering communications" provisions. Appellants intend to argue that the "fallback" definition of "electioneering communications" in section 203, as modified and then upheld by the district court, is impermissibly vague because reasonable people can differ as to whether any given advertisement "promotes," "supports," "attacks," or "opposes" a federal candidate. Finally, appellants intend to argue that section 203 violates basic principles of equal protection because it regulates speech carried by broadcast media but not by other media, and because it exempts communications by media corporations themselves.

3. The district court struck down some of the "advance notice" provisions of BCRA (sections 201 and 212) and held that challenges to other of those provisions were nonjusticiable. Appellants intend to argue that all of their challenges are justiciable and that all of the "advance notice" provisions

violate the First Amendment. Those provisions impose disclosure requirements on persons who merely enter into a contract to make disbursements for electioneering communications or other expenditures, even before those disbursements or expenditures are actually made, and even if they are ultimately not made. Sections 201 and 212 therefore differ in kind from the FECA reporting provisions upheld in *Buckley*, which required only after-the-fact disclosure. *See Buckley*, 424 U.S. at 74-82.

By requiring disclosure of a mere intention to make disbursements or expenditures, regardless of whether they are actually made, sections 201 and 212 cannot be said to serve any governmental interest in preventing corruption or the appearance of corruption, informing the electorate as to the source of campaign spending, or assisting in enforcement of contribution limits — much less to be narrowly tailored to those interests. These provisions will chill the exercise of free speech by forcing would-be speakers to disclose their plans in advance, thereby potentially subjecting them to harassment and giving their opponents the opportunity either to dissuade media organizations from running the ads at issue or to counter those ads with ones of their own. Such a restraint plainly violates the First Amendment. *Cf. Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002) (striking down ordinance requiring permits for canvassers).

4. The district court upheld some of the "coordination" provisions of BCRA (section 211 and 214) and held that challenges to other of those provisions were nonjusticiable. Appellants intend to argue that all of their challenges are justiciable and that all of the "coordination" provisions violate the First Amendment. Sections 211 and 214 give the concept of "coordination" a new, broader definition, with section 214(c) expressly stating that "agreement or formal collaboration" are not required in order to establish coordination, and ordering the FEC to promulgate new regulations consistent with this

directive. This Court's prior cases on coordinated expenditures, however, make clear that some degree of actual agreement is necessary before an expenditure can be treated as coordinated and therefore as the legal equivalent of a contribution. *See, e.g.*, *Colorado I*, 518 U.S. at 619 (plurality opinion); *Buckley*, 424 U.S. at 47 & n.53. Any definition of coordination that lacks some requirement of actual agreement is therefore unconstitutional.

Moreover, section 202 treats coordinated disbursements for electioneering communications, like coordinated expenditures for express advocacy, as contributions to the "supported" candidates. If this Court strikes down the "electioneering communications" provisions of BCRA, thereby reaffirming that Congress may not regulate advocacy that does not constitute express advocacy, it should also strike down the "coordination" provisions of BCRA insofar as they reach disbursements for speech that does not qualify as express advocacy.

5. The district court next held that challenges to the "attack ad" provision of BCRA (section 305) are nonjusticiable. Appellants intend to argue that their challenges are justiciable and that section 305 violates the First Amendment. Section 305 requires a federal candidate who wishes to take advantage of the statutorily mandated lowest available rate for a broadcast advertisement either to certify that he or she will not refer to another candidate in his or her advertising, or to include a specified identification or visual statement in the ad. There is no question that this provision was designed to discourage, if not eradicate, so-called "negative advertising": the very title of the provision is "Limitation on Availability of Lowest Unit Charge for Federal Candidates Attacking Opposition."

Section 305 violates the First Amendment because it imposes an unconstitutional condition (namely, the requirement that a candidate either engage in "positive" advertising or include certain speech in his or her "negative" advertising) on the availability of a governmental benefit (namely, the "lowest unit" rate). *See, e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Indeed, to the extent that section 305 favors "positive" over "negative" advertising, it constitutes an impermissible viewpoint-based regulation of speech. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). It is beyond question that "negative," like "positive," political speech enjoys the fullest constitutional protection. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

FLOYD ABRAMS
SUSAN BUCKLEY
BRIAN MARKLEY
CAHILL GORDON &
REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

Attorneys for Senator Mitch McConnell and National Association of Broadcasters

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

Attorney for Senator Mitch McConnell

G. HUNTER BATES
1215 Cliffwood Drive
Goshen, KY 40026
(502) 473-7557

Attorney for Senator Mitch McConnell and Thomas E. McInerney

KENNETH W. STARR
Counsel of Record
EDWARD W. WARREN
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Attorneys for Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING
LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Attorneys for Senator Mitch McConnell

APPENDIX

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APPENDIX A

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civ. No. 02-0582 (CKK, KLH, RKL) (and related cases)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the following plaintiffs hereby appeal to the Supreme Court of the United States from any and all adverse rulings incorporated in, antecedent to, or ancillary to the final judgment of the three-judge district court entered in this action on May 2, 2003: Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; U.S. d/b/a Pro English; and Thomas E. McInerney (in No. 02-582, *McConnell v. FEC*); and the National Association of Broadcasters (in No. 02-753, *National Ass'n of Broadcasters v. FEC*).

This appeal is taken pursuant to section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 114.

Respectfully submitted,

________/s/____________

Kenneth W. Starr
Edward W. Warren
Kannon K. Shanmugam
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Attorneys for Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

Floyd Abrams
Susan Buckley
Brian Markley
Cahill Gordon &
Reindel LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

Attorneys for Senator Mitch McConnell and National Association of Broadcasters

(*additional counsel omitted*)

May 2, 2003

APPENDIX B

OPINION OF THE DISTRICT COURT

The district court's opinions can be found on the Internet at http://lsmns2o.gtwy.uscourts.gov/dcd/mcconnell-2002-ruling.html.

APPENDIX C

UNITED STATES CONSTITUTION
ARTICLE I, SECTION 4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such meeting shall be on the first Monday in December, unless they shall by Law appoint a different day.

APPENDIX D

UNITED STATES CONSTITUTION
AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX E

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

BIPARTISAN CAMPAIGN REFORM ACT OF 2002
PUB. L. NO. 107-155, 166 STAT. 81

[March 27, 2002]

An Act To amend the Federal Election Campaign Act of 1971 to provide bipartisan campaign reform.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE. — This Act may be cited as the "Bipartisan Campaign Reform Act of 2002".

(b) TABLE OF CONTENTS. — The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I — REDUCTION OF SPECIAL INTEREST INFLUENCE

Sec. 101. Soft money of political parties.

Sec. 102. Increased contribution limit for State committees of political parties.

Sec. 103. Reporting requirements.

TITLE II — NONCANDIDATE CAMPAIGN EXPENDITURES

Subtitle A — Electioneering Communications

Sec. 201. Disclosure of electioneering communications.

Sec. 202. Coordinated communications as contributions.

Sec. 203. Prohibition of corporate and labor disbursements for electioneering communications.

Sec. 204. Rules relating to certain targeted electioneering communications.

Subtitle B — Independent and Coordinated Expenditures

Sec. 211. Definition of independent expenditure.

Sec. 212. Reporting requirements for certain independent expenditures.

Sec. 213. Independent versus coordinated expenditures by party.

Sec. 214. Coordination with candidates or political parties.

TITLE III — MISCELLANEOUS

Sec. 301. Use of contributed amounts for certain purposes.

Sec. 302. Prohibition of fundraising on Federal property.

Sec. 303. Strengthening foreign money ban.

Sec. 304. Modification of individual contribution limits in response to expenditures from personal funds.

Sec. 305. Limitation on availability of lowest unit charge for Federal candidates attacking opposition.

Sec. 306. Software for filing reports and prompt disclosure of contributions.

Sec. 307. Modification of contribution limits.

Sec. 308. Donations to Presidential inaugural committee.

Sec. 309. Prohibition on fraudulent solicitation of funds.

Sec. 310. Study and report on clean money clean elections laws.

Sec. 311. Clarity standards for identification of sponsors of election-related advertising.

Sec. 312. Increase in penalties.

Sec. 313. Statute of limitations.

Sec. 314. Sentencing guidelines.

Sec. 315. Increase in penalties imposed for violations of conduit contribution ban.

Sec. 316. Restriction on increased contribution limits by taking into account candidate's available funds.

Sec. 317. Clarification of right of nationals of the United States to make political contributions.

Sec. 318. Prohibition of contributions by minors.

Sec. 319. Modification of individual contribution limits for House candidates in response to expenditures from personal funds.

TITLE IV — SEVERABILITY; EFFECTIVE DATE

Sec. 401. Severability.

Sec. 402. Effective dates and regulations.

Sec. 403. Judicial review.

TITLE V — ADDITIONAL DISCLOSURE PROVISIONS

Sec. 501. Internet access to records.

Sec. 502. Maintenance of website of election reports.

Sec. 503. Additional disclosure reports.

Sec. 504. Public access to broadcasting records.

TITLE I — REDUCTION OF SPECIAL INTEREST INFLUENCE

SEC. 101. SOFT MONEY OF POLITICAL PARTIES.

(a) IN GENERAL. — Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) is amended by adding at the end the following:

"SEC. 323. SOFT MONEY OF POLITICAL PARTIES.

"(a) NATIONAL COMMITTEES. —

"(1) IN GENERAL. — A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

"(2) APPLICABILITY. — The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

"(b) STATE, DISTRICT, AND LOCAL COMMITTEES. —

"(1) IN GENERAL. — Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

"(2) APPLICABILITY. —

"(A) IN GENERAL. — Notwithstanding clause (i) or (ii) of section 301(20)(A), and subject to subparagraph (B), paragraph (1) shall not apply to any amount expended or disbursed by a State, district, or local committee of a political party for an activity described in either such clause to the extent the amounts expended or disbursed for such activity are allocated (under regulations prescribed by the Commission) among amounts —

"(i) which consist solely of contributions subject to the limitations, prohibitions, and reporting requirements of this Act (other than amounts described in subparagraph (B)(iii)); and

"(ii) other amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection).

"(B) CONDITIONS. — Subparagraph (A) shall only apply if —

"(i) the activity does not refer to a clearly identified candidate for Federal office;

"(ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;

"(iii) the amounts expended or disbursed which are described in subparagraph (A)(ii) are paid from amounts which are donated in accordance with State law and which meet the requirements of subparagraph (C), except that no person (including any person established, financed, maintained, or controlled by such person) may donate more than $10,000 to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and

"(iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from —

"(I) any other State, local, or district committee of any State party,

"(II) the national committee of a political party (including a national congressional campaign committee of a political party),

"(III) any officer or agent acting on behalf of any committee described in subclause (I) or (II), or

"(IV) any entity directly or indirectly established, financed, maintained, or controlled by any committee described in subclause (I) or (II).

"(C) PROHIBITING INVOLVEMENT OF NATIONAL PARTIES, FEDERAL CANDIDATES AND OFFICEHOLDERS, AND STATE PARTIES ACTING JOINTLY. — Notwithstanding subsection (e) (other than subsection (e)(3)), amounts specifically authorized to be spent under subparagraph (B)(iii) meet the requirements of this subparagraph only if the amounts —

"(i) are not solicited, received, directed, transferred, or spent by or in the name of any person described in subsection (a) or (e); and

"(ii) are not solicited, received, or directed through fundraising activities conducted jointly by 2 or more State, local, or district committees of any political party or their agents, or by a State, local, or district committee of a political party on behalf of the State, local, or district committee of a political party or its agent in one or more other States.

"(c) FUNDRAISING COSTS. — An amount spent by a person described in subsection (a) or (b) to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

"(d) TAX-EXEMPT ORGANIZATIONS. — A national, State, district, or local committee of a political party (including a national congressional campaign committee of a political party), an entity that is directly or indirectly established, financed, maintained, or controlled by any such national, State, district, or local committee or its agent, and an officer or agent acting on behalf of any such party committee or entity, shall not solicit any funds for, or make or direct any donations to —

"(1) an organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code (or has submitted an application for determination of tax exempt status under such

section) and that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); or

"(2) an organization described in section 527 of such Code (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

"(e) FEDERAL CANDIDATES. —

"(1) IN GENERAL. — A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not —

"(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or

"(B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds —

"(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of section 315(a); and

"(ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

"(2) STATE LAW. — Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a State or local office solely in connection with such election for

State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.

"(3) FUNDRAISING EVENTS. — Notwithstanding paragraph (1) or subsection (b)(2)(C), a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.

"(4) PERMITTING CERTAIN SOLICITATIONS. —

"(A) GENERAL SOLICITATIONS. — Notwithstanding any other provision of this subsection, an individual described in paragraph (1) may make a general solicitation of funds on behalf of any organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code (or has submitted an application for determination of tax exempt status under such section) (other than an entity whose principal purpose is to conduct activities described in clauses (i) and (ii) of section 301(20)(A)) where such solicitation does not specify how the funds will or should be spent.

"(B) CERTAIN SPECIFIC SOLICITATIONS. — In addition to the general solicitations permitted under subparagraph (A), an individual described in paragraph (1) may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 301(20)(A), or for an entity whose principal purpose is to conduct such activities, if —

"(i) the solicitation is made only to individuals; and

"(ii) the amount solicited from any individual during any calendar year does not exceed $20,000.

"(f) STATE CANDIDATES. —

"(1) IN GENERAL. — A candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication described in section 301(20)(A)(iii) unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

"(2) EXCEPTION FOR CERTAIN COMMUNICATIONS. — Paragraph (1) shall not apply to an individual described in such paragraph if the communication involved is in connection with an election for such State or local office and refers only to such individual or to any other candidate for the State or local office held or sought by such individual, or both."

(b) DEFINITIONS. — Section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431) is amended by adding at the end thereof the following:

"(20) FEDERAL ELECTION ACTIVITY. —

"(A) IN GENERAL. — The term 'Federal election activity' means —

"(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

"(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

"(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

"(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

"(B) EXCLUDED ACTIVITY. — The term 'Federal election activity' does not include an amount expended or disbursed by a State, district, or local committee of a political party for —

"(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

"(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

"(iii) the costs of a State, district, or local political convention; and

"(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

"(21) GENERIC CAMPAIGN ACTIVITY. — The term 'generic campaign activity' means a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.

"(22) PUBLIC COMMUNICATION. — The term 'public communication' means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.

"(23) MASS MAILING. — The term 'mass mailing' means a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.

"(24) TELEPHONE BANK. — The term 'telephone bank' means more than 500 telephone calls of an identical or substantially similar nature within any 30-day period."

SEC. 102. INCREASED CONTRIBUTION LIMIT FOR STATE COMMITTEES OF POLITICAL PARTIES.

Section 315(a)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(1)) is amended —

(1) in subparagraph (B), by striking "or" at the end;

(2) in subparagraph (C) —

(A) by inserting "(other than a committee described in subparagraph (D))" after "committee"; and

(B) by striking the period at the end and inserting "; or"; and

(3) by adding at the end the following:

"(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000."

SEC. 103. REPORTING REQUIREMENTS.

(a) REPORTING REQUIREMENTS. — Section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434) is amended by adding at the end the following:

"(e) POLITICAL COMMITTEES. —

"(1) NATIONAL AND CONGRESSIONAL POLITICAL COMMITTEES. — The national committee of a political party, any national congressional campaign committee of a political party, and any subordinate committee of either, shall report all receipts and disbursements during the reporting period.

"(2) OTHER POLITICAL COMMITTEES TO WHICH SECTION 323 APPLIES. —

"(A) IN GENERAL. — In addition to any other reporting requirements applicable under this Act, a political committee (not described in paragraph (1)) to which section 323(b)(1) applies shall report all receipts and disbursements made for activities described in section 301(20)(A), unless the aggregate amount of such receipts and disbursements during the calendar year is less than $5,000.

"(B) SPECIFIC DISCLOSURE BY STATE AND LOCAL PARTIES OF CERTAIN NON-FEDERAL AMOUNTS PERMITTED TO BE SPENT ON FEDERAL ELECTION ACTIVITY. — Each report by a political committee under subparagraph (A) of receipts and disbursements made for activities described in section 301(20)(A) shall include a disclosure of all receipts and disbursements described in section 323(b)(2)(A) and (B).

"(3) ITEMIZATION. — If a political committee has receipts or disbursements to which this subsection applies from or to any person aggregating in excess of $200 for any calendar year, the political committee shall separately itemize its reporting for such person in the same manner as required in paragraphs (3)(A), (5), and (6) of subsection (b).

"(4) REPORTING PERIODS. — Reports required to be filed under this subsection shall be filed for the same time periods required for political committees under subsection (a)(4)(B)."

(b) BUILDING FUND EXCEPTION TO THE DEFINITION OF CONTRIBUTION. —

(1) IN GENERAL. — Section 301(8)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(8)(B)) is amended —

(A) by striking clause (viii); and

(B) by redesignating clauses (ix) through (xv) as clauses (viii) through (xiv), respectively.

(2) NONPREEMPTION OF STATE LAW. — Section 403 of such Act (2 U.S.C. 453) is amended —

(A) by striking "The provisions of this Act" and inserting:

"(a) IN GENERAL. — Subject to subsection (b), the provisions of this Act"; and

(B) by adding at the end the following:

"(b) STATE AND LOCAL COMMITTEES OF POLITICAL PARTIES. — Notwithstanding any other provision of this Act, a State or local committee of a political party may, subject to State law, use exclusively funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act for the purchase or construction of an office building for such State or local committee."

TITLE II — NONCANDIDATE CAMPAIGN EXPENDITURES

Subtitle A — Electioneering Communications

SEC. 201. DISCLOSURE OF ELECTIONEERING COMMUNICATIONS.

(a) IN GENERAL. — Section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434), as amended by section 103, is amended by adding at the end the following new subsection:

"(f) DISCLOSURE OF ELECTIONEERING COMMUNICATIONS. —

"(1) STATEMENT REQUIRED. — Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

"(2) CONTENTS OF STATEMENT. — Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

"(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

"(B) The principal place of business of the person making the disbursement, if not an individual.

"(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

"(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

"(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

"(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

"(3) ELECTIONEERING COMMUNICATION. — For purposes of this subsection —

"(A) IN GENERAL. — (i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which —

"(I) refers to a clearly identified candidate for Federal office;

"(II) is made within —

"(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

"(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

"(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

"(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

"(B) EXCEPTIONS. — The term 'electioneering communication' does not include —

"(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

"(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

"(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

"(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii).

"(C) TARGETING TO RELEVANT ELECTORATE. — For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is 'targeted to the relevant electorate' if the communication can be received by 50,000 or more persons —

"(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

"(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

"(4) DISCLOSURE DATE. — For purposes of this subsection, the term 'disclosure date' means —

"(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

"(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

"(5) CONTRACTS TO DISBURSE. — For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

"(6) COORDINATION WITH OTHER REQUIREMENTS. — Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

"(7) COORDINATION WITH INTERNAL REVENUE CODE. — Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986."

(b) RESPONSIBILITIES OF FEDERAL COMMUNICATIONS COMMISSION. — The Federal Communications Commission shall compile and maintain any information the Federal Election Commission may require to carry out section 304(f) of the Federal Election Campaign Act of 1971 (as added by subsection (a)), and shall make such information available to the public on the Federal Communication Commission's website.

SEC. 202. COORDINATED COMMUNICATIONS AS CONTRIBUTIONS.

Section 315(a)(7) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(7)) is amended —

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by inserting after subparagraph (B) the following:

"(C) if —

"(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 304(f)(3)); and

"(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and".

SEC. 203. PROHIBITION OF CORPORATE AND LABOR DISBURSEMENTS FOR ELECTIONEERING COMMUNICATIONS.

(a) IN GENERAL. — Section 316(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441b(b)(2)) is amended by inserting "or for any applicable electioneering communication" before ", but shall not include".

(b) APPLICABLE ELECTIONEERING COMMUNICATION. — Section 316 of such Act is amended by adding at the end the following:

"(c) RULES RELATING TO ELECTIONEERING COMMUNICATIONS. —

"(1) APPLICABLE ELECTIONEERING COMMUNICATION. — For purposes of this section, the term 'applicable electioneering communication' means an electioneering communication (within the meaning of section 304(f)(3)) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

"(2) EXCEPTION. — Notwithstanding paragraph (1), the term 'applicable electioneering communication' does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) made under section 304(f)(2)(E) or (F) of this Act if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))). For purposes of the preceding sentence, the term 'provided directly by individuals' does not include funds the source of which is an entity described in subsection (a) of this section.

"(3) SPECIAL OPERATING RULES. —

"(A) DEFINITION UNDER PARAGRAPH (1). — An electioneering communication shall be treated as made by an entity described in subsection (a) if an entity described in subsection (a) directly or indirectly disburses any amount for any of the costs of the communication.

"(B) EXCEPTION UNDER PARAGRAPH (2). — A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 304(f)(2)(E).

"(4) DEFINITIONS AND RULES. — For purposes of this subsection —

"(A) the term 'section 501(c)(4) organization' means —

"(i) an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code; or

"(ii) an organization which has submitted an application to the Internal Revenue Service for determination of its status as an organization described in clause (i); and

"(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

"(5) COORDINATION WITH INTERNAL REVENUE CODE. — Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of the Internal Revenue Code of 1986 to carry out any activity which is prohibited under such Code."

SEC. 204. RULES RELATING TO CERTAIN TARGETED ELECTIONEERING COMMUNICATIONS.

Section 316(c) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441b), as added by section 203, is amended by adding at the end the following:

"(6) SPECIAL RULES FOR TARGETED COMMUNICATIONS. —

"(A) EXCEPTION DOES NOT APPLY. — Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

"(B) TARGETED COMMUNICATION. — For purposes of subparagraph (A), the term 'targeted communication' means an electioneering communication (as defined in section 304(f)(3)) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in

the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

"(C) DEFINITION. — For purposes of this paragraph, a communication is 'targeted to the relevant electorate' if it meets the requirements described in section 304(f)(3)(C)."

Subtitle B — Independent and Coordinated Expenditures

SEC. 211. DEFINITION OF INDEPENDENT EXPENDITURE.

Section 301 of the Federal Election Campaign Act (2 U.S.C. 431) is amended by striking paragraph (17) and inserting the following:

"(17) INDEPENDENT EXPENDITURE. — The term 'independent expenditure' means an expenditure by a person —

"(A) expressly advocating the election or defeat of a clearly identified candidate; and

"(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."

SEC. 212. REPORTING REQUIREMENTS FOR CERTAIN INDEPENDENT EXPENDITURES.

(a) IN GENERAL. — Section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434) (as amended by section 201) is amended —

(1) in subsection (c)(2), by striking the undesignated matter after subparagraph (C); and

(2) by adding at the end the following:

"(g) TIME FOR REPORTING CERTAIN EXPENDITURES. —

"(1) EXPENDITURES AGGREGATING $1,000. —

"(A) INITIAL REPORT. — A person (including a political committee) that makes or contracts to make independent expenditures aggregating $1,000 or more after the 20th day, but more than 24 hours, before the date of an election shall file a report describing the expenditures within 24 hours.

"(B) ADDITIONAL REPORTS. — After a person files a report under subparagraph (A), the person shall file an additional report within 24 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $1,000 with respect to the same election as that to which the initial report relates.

"(2) EXPENDITURES AGGREGATING $10,000. —

"(A) INITIAL REPORT. — A person (including a political committee) that makes or contracts to make independent expenditures aggregating $10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.

"(B) ADDITIONAL REPORTS. — After a person files a report under subparagraph (A), the person shall file an additional report within 48 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $10,000 with respect to the same election as that to which the initial report relates.

"(3) PLACE OF FILING; CONTENTS. — A report under this subsection —

"(A) shall be filed with the Commission; and

"(B) shall contain the information required by subsection (b)(6)(B)(iii), including the name of each candidate whom an expenditure is intended to support or oppose."

(b) TIME OF FILING OF CERTAIN STATEMENTS. —

(1) IN GENERAL. — Section 304(g) of such Act, as added by subsection (a), is amended by adding at the end the following:

"(4) TIME OF FILING FOR EXPENDITURES AGGREGATING $1,000. — Notwithstanding subsection (a)(5), the time at which the statement under paragraph (1) is received by the Commission or any other recipient to whom the notification is required to be sent shall be considered the time of filing of the statement with the recipient."

(2) CONFORMING AMENDMENTS. — (A) Section 304(a)(5) of such Act (2 U.S.C. 434(a)(5)) is amended by striking "the second sentence of subsection (c)(2)" and inserting "subsection (g)(1)".

(B) Section 304(d)(1) of such Act (2 U.S.C. 434(d)(1)) is amended by inserting "or (g)" after "subsection (c)".

SEC. 213. INDEPENDENT VERSUS COORDINATED EXPENDITURES BY PARTY.

Section 315(d) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(d)) is amended —

(1) in paragraph (1), by striking "and (3)" and inserting ", (3), and (4)"; and

(2) by adding at the end the following:

"(4) INDEPENDENT VERSUS COORDINATED EXPENDITURES BY PARTY. —

"(A) IN GENERAL. — On or after the date on which a political party nominates a candidate, no committee of the political party may make —

"(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in section 301(17)) with respect to the candidate during the election cycle; or

"(ii) any independent expenditure (as defined in section 301(17)) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

"(B) APPLICATION. — For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

"(C) TRANSFERS. — A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate."

SEC. 214. COORDINATION WITH CANDIDATES OR POLITICAL PARTIES.

(a) IN GENERAL. — Section 315(a)(7)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(7)(B)) is amended —

(1) by redesignating clause (ii) as clause (iii); and

(2) by inserting after clause (i) the following new clause:

"(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and".

(b) REPEAL OF CURRENT REGULATIONS. — The regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees adopted by the Federal Election Commission and published in the Federal Register at page 76138 of volume 65, Federal Register, on December 6, 2000, are repealed as of the date by which the Commission is required to promulgate new regulations under subsection (c) (as described in section 402(c)(1)).

(c) REGULATIONS BY THE FEDERAL ELECTION COMMISSION. — The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall address —

(1) payments for the republication of campaign materials;

(2) payments for the use of a common vendor;

(3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and

(4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

(d) MEANING OF CONTRIBUTION OR EXPENDITURE FOR THE PURPOSES OF SECTION 316. — Section 316(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441b(b)(2)) is amended by striking "shall include" and inserting "includes a contribution or expenditure, as those terms are defined in section 301, and also includes".

TITLE III — MISCELLANEOUS

SEC. 301. USE OF CONTRIBUTED AMOUNTS FOR CERTAIN PURPOSES.

Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) is amended by striking section 313 and inserting the following:

"SEC. 313. USE OF CONTRIBUTED AMOUNTS FOR CERTAIN PURPOSES.

"(a) PERMITTED USES. — A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual —

"(1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;

"(2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;

"(3) for contributions to an organization described in section 170(c) of the Internal Revenue Code of 1986; or

"(4) for transfers, without limitation, to a national, State, or local committee of a political party.

"(b) PROHIBITED USE. —

"(1) IN GENERAL. — A contribution or donation described in subsection (a) shall not be converted by any person to personal use.

"(2) CONVERSION. — For the purposes of paragraph (1), a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office, including —

"(A) a home mortgage, rent, or utility payment;

"(B) a clothing purchase;

"(C) a noncampaign-related automobile expense;

"(D) a country club membership;

"(E) a vacation or other noncampaign-related trip;

"(F) a household food item;

"(G) a tuition payment;

"(H) admission to a sporting event, concert, theater, or other form of entertainment not associated with an election campaign; and

"(I) dues, fees, and other payments to a health club or recreational facility."

SEC. 302. PROHIBITION OF FUNDRAISING ON FEDERAL PROPERTY.

Section 607 of title 18, United States Code, is amended —

(1) by striking subsection (a) and inserting the following:

"(a) PROHIBITION. —

"(1) IN GENERAL. — It shall be unlawful for any person to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States. It shall be unlawful for an individual who is an officer or employee of the Federal Government, including the President, Vice President, and Members of Congress, to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election, while in any room or building occupied in the discharge of official duties by an officer or employee of the United States, from any person.

"(2) PENALTY. — A person who violates this section shall be fined not more than $5,000, imprisoned not more than 3 years, or both.'; and

(2) in subsection (b), by inserting "or Executive Office of the President" after "Congress".

SEC. 303. STRENGTHENING FOREIGN MONEY BAN.

Section 319 of the Federal Election Campaign Act of 1971 (2 U.S.C. 441e) is amended —

(1) by striking the heading and inserting the following: "CONTRIBUTIONS AND DONATIONS BY FOREIGN NATIONALS"; and

(2) by striking subsection (a) and inserting the following:

"(a) PROHIBITION. — It shall be unlawful for —

"(1) a foreign national, directly or indirectly, to make —

"(A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election;

"(B) a contribution or donation to a committee of a political party; or

"(C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 304(f)(3)); or

"(2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national."

SEC. 304. MODIFICATION OF INDIVIDUAL CONTRIBUTION LIMITS IN RESPONSE TO EXPENDITURES FROM PERSONAL FUNDS.

(a) INCREASED LIMITS FOR INDIVIDUALS. — Section 315 of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a) is amended —

(1) in subsection (a)(1), by striking "No person" and inserting "Except as provided in subsection (i), no person"; and

(2) by adding at the end the following:

"(i) INCREASED LIMIT TO ALLOW RESPONSE TO EXPENDITURES FROM PERSONAL FUNDS. —

"(1) INCREASE. —

"(A) IN GENERAL. — Subject to paragraph (2), if the opposition personal funds amount with respect to a candidate for election to the office of Senator exceeds the threshold amount, the limit under subsection (a)(1)(A) (in this subsection referred to as the 'applicable limit') with respect to that candidate shall be the increased limit.

"(B) THRESHOLD AMOUNT. —

"(i) STATE-BY-STATE COMPETITIVE AND FAIR CAMPAIGN FORMULA. — In this subsection, the threshold amount with respect to an election cycle of a candidate described in subparagraph (A) is an amount equal to the sum of —

"(I) $150,000; and

"(II) $0.04 multiplied by the voting age population.

"(ii) VOTING AGE POPULATION. — In this subparagraph, the term 'voting age population' means in the case of a candidate for the office of Senator, the voting age population of the State of the candidate (as certified under section 315(e)).

"(C) INCREASED LIMIT. — Except as provided in clause (ii), for purposes of subparagraph (A), if the opposition personal funds amount is over —

"(i) 2 times the threshold amount, but not over 4 times that amount —

"(I) the increased limit shall be 3 times the applicable limit; and

"(II) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to a candidate if such contribution is made under the increased limit of subparagraph (A) during a period in which the candidate may accept such a contribution;

"(ii) 4 times the threshold amount, but not over 10 times that amount —

"(I) the increased limit shall be 6 times the applicable limit; and

"(II) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to a candidate if such contribution is made under the increased limit of subparagraph (A) during a period in which the candidate may accept such a contribution; and

"(iii) 10 times the threshold amount —

"(I) the increased limit shall be 6 times the applicable limit;

"(II) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to a candidate if such contribution is made under the increased limit of subparagraph (A) during a period in which the candidate may accept such a contribution; and

"(III) the limits under subsection (d) with respect to any expenditure by a State or national committee of a political party shall not apply.

"(D) OPPOSITION PERSONAL FUNDS AMOUNT. — The opposition personal funds amount is an amount equal to the excess (if any) of —

"(i) the greatest aggregate amount of expenditures from personal funds (as defined in section 304(a)(6)(B)) that an opposing candidate in the same election makes; over

"(ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

"(2) TIME TO ACCEPT CONTRIBUTIONS UNDER INCREASED LIMIT. —

"(A) IN GENERAL. — Subject to subparagraph (B), a candidate and the candidate's authorized committee shall not accept any contribution, and a party committee shall not make any expenditure, under the increased limit under paragraph (1) —

"(i) until the candidate has received notification of the opposition personal funds amount under section 304(a)(6)(B); and

"(ii) to the extent that such contribution, when added to the aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits under this subsection for the election cycle, exceeds 110 percent of the opposition personal funds amount.

"(B) EFFECT OF WITHDRAWAL OF AN OPPOSING CANDIDATE. — A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

"(3) DISPOSAL OF EXCESS CONTRIBUTIONS. —

"(A) IN GENERAL. — The aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit under paragraph (1) and not otherwise expended in connection with the election with respect to which such contributions relate shall, not later than 50 days after the date of such election, be used in the manner described in subparagraph (B).

"(B) RETURN TO CONTRIBUTORS. — A candidate or a candidate's authorized committee shall return the excess contribution to the person who made the contribution.

"(j) LIMITATION ON REPAYMENT OF PERSONAL LOANS. — Any candidate who incurs personal loans made after the effective date of the Bipartisan Campaign Reform Act of 2002 in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election."

(b) NOTIFICATION OF EXPENDITURES FROM PERSONAL FUNDS. — Section 304(a)(6) of the Federal Election Campaign Act of 1971 (2 U.S.C. 434(a)(6)) is amended —

(1) by redesignating subparagraph (B) as subparagraph (E); and

(2) by inserting after subparagraph (A) the following:

"(B) NOTIFICATION OF EXPENDITURE FROM PERSONAL FUNDS. —

"(i) DEFINITION OF EXPENDITURE FROM PERSONAL FUNDS. — In this subparagraph, the term 'expenditure from personal funds' means —

"(I) an expenditure made by a candidate using personal funds; and

"(II) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

"(ii) DECLARATION OF INTENT. — Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Senator, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed the State-by-State competitive and fair campaign formula with —

"(I) the Commission; and

"(II) each candidate in the same election.

"(iii) INITIAL NOTIFICATION. — Not later than 24 hours after a candidate described in clause (ii) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of 2 times the threshold amount in connection with any election, the candidate shall file a notification with —

"(I) the Commission; and

"(II) each candidate in the same election.

"(iv) ADDITIONAL NOTIFICATION. — After a candidate files an initial notification under clause (iii), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceed $10,000 with —

"(I) the Commission; and

"(II) each candidate in the same election.

Such notification shall be filed not later than 24 hours after the expenditure is made.

"(v) CONTENTS. — A notification under clause (iii) or (iv) shall include —

"(I) the name of the candidate and the office sought by the candidate;

"(II) the date and amount of each expenditure; and

"(III) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

"(C) NOTIFICATION OF DISPOSAL OF EXCESS CONTRIBUTIONS. — In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the candidate's authorized committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under paragraph (1) of section 315(*i*)) and the manner in which the candidate or the candidate's authorized committee used such funds.

"(D) ENFORCEMENT. — For provisions providing for the enforcement of the reporting requirements under this paragraph, see section 309."

(c) DEFINITIONS. — Section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431), as amended by section 101(b), is further amended by adding at the end the following:

"(25) ELECTION CYCLE. — For purposes of sections 315(*i*) and 315A and paragraph (26), the term 'election cycle' means the period beginning on the day after the date of the most recent election for the specific office or seat that a candidate is seeking and ending on the date of the next election for that office or seat. For purposes of the preceding sentence, a primary election and a general election shall be considered to be separate elections.

"(26) PERSONAL FUNDS. — The term 'personal funds' means an amount that is derived from —

"(A) any asset that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had —

"(i) legal and rightful title; or

"(ii) an equitable interest;

"(B) income received during the current election cycle of the candidate, including —

"(i) a salary and other earned income from bona fide employment;

"(ii) dividends and proceeds from the sale of the candidate's stocks or other investments;

"(iii) bequests to the candidate;

"(iv) income from trusts established before the beginning of the election cycle;

"(v) income from trusts established by bequest after the beginning of the election cycle of which the candidate is the beneficiary;

"(vi) gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle; and

"(vii) proceeds from lotteries and similar legal games of chance; and

"(C) a portion of assets that are jointly owned by the candidate and the candidate's spouse equal to the candidate's share of the asset under the instrument of conveyance or ownership, but if no specific share is indicated by an instrument of conveyance or ownership, the value of 1/2 of the property."

SEC. 305. LIMITATION ON AVAILABILITY OF LOWEST UNIT CHARGE FOR FEDERAL CANDIDATES ATTACKING OPPOSITION.

(a) IN GENERAL. — Section 315(b) of the Communications Act of 1934 (47 U.S. C. 315(b)) is amended —

(1) by striking "(b) The charges" and inserting the following:

"(b) CHARGES. —

"(1) IN GENERAL. — The charges";

(2) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively; and

(3) by adding at the end the following:

"(2) CONTENT OF BROADCASTS. —

"(A) IN GENERAL. — In the case of a candidate for Federal office, such candidate shall not be entitled to receive the rate under paragraph (1)(A) for the use of any broadcasting station unless the candidate provides written certification to the broadcast station that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office, in any broadcast using the rights and conditions of access under this Act, unless such reference meets the requirements of subparagraph (C) or (D).

"(B) LIMITATION ON CHARGES. — If a candidate for Federal office (or any authorized committee of such candidate) makes a reference described in subparagraph (A) in any broadcast that does not meet the requirements of subparagraph (C) or (D), such candidate shall not be entitled to receive the rate under paragraph (1)(A) for such broadcast or any other broadcast during any portion of the 45-day and 60-day periods described in paragraph (1)(A), that occur on or after the date of such broadcast, for election to such office.

"(C) TELEVISION BROADCASTS. — A candidate meets the requirements of this subparagraph if, in the case of a television broadcast, at the end of such broadcast there appears simultaneously, for a period no less than 4 seconds —

"(i) a clearly identifiable photographic or similar image of the candidate; and

"(ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast.

"(D) RADIO BROADCASTS. — A candidate meets the requirements of this subparagraph if, in the case of a radio broadcast, the broadcast includes a personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast.

"(E) CERTIFICATION. — Certifications under this section shall be provided and certified as accurate by the candidate (or any authorized committee of the candidate) at the time of purchase.

"(F) DEFINITIONS. — For purposes of this paragraph, the terms 'authorized committee' and 'Federal office' have the meanings given such terms by section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)."

(b) CONFORMING AMENDMENT. — Section 315(b)(1)(A) of the Communications Act of 1934 (47 U.S.C. 315(b)(1)(A)), as amended by this Act, is amended by inserting "subject to paragraph (2)," before "during the forty-five days".

(c) EFFECTIVE DATE. — The amendments made by this section shall apply to broadcasts made after the effective date of this Act.

SEC. 306. SOFTWARE FOR FILING REPORTS AND PROMPT DISCLOSURE OF CONTRIBUTIONS.

Section 304(a) of the Federal Election Campaign Act of 1971 (2 U.S.C. 434(a)) is amended by adding at the end the following:

"(12) SOFTWARE FOR FILING OF REPORTS. —

"(A) IN GENERAL. — The Commission shall —

"(i) promulgate standards to be used by vendors to develop software that —

"(I) permits candidates to easily record information concerning receipts and disbursements required to be reported under this Act at the time of the receipt or disbursement;

"(II) allows the information recorded under subclause (I) to be transmitted immediately to the Commission; and

"(III) allows the Commission to post the information on the Internet immediately upon receipt; and

"(ii) make a copy of software that meets the standards promulgated under clause (i) available to each person required to file a designation, statement, or report in electronic form under this Act.

"(B) ADDITIONAL INFORMATION. — To the extent feasible, the Commission shall require vendors to include in the software developed under the standards under subparagraph (A) the ability for any person to file any designation, statement, or report required under this Act in electronic form.

"(C) REQUIRED USE. — Notwithstanding any provision of this Act relating to times for filing reports, each candidate for Federal office (or that candidate's authorized committee) shall use software that meets the standards promulgated under this paragraph once such software is made available to such candidate.

"(D) REQUIRED POSTING. — The Commission shall, as soon as practicable, post on the Internet any information received under this paragraph."

SEC. 307. MODIFICATION OF CONTRIBUTION LIMITS.

(a) INCREASE IN INDIVIDUAL LIMITS FOR CERTAIN CONTRIBUTIONS. — Section 315(a)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(1)) is amended —

(1) in subparagraph (A), by striking "$1,000" and inserting "$2,000"; and

(2) in subparagraph (B), by striking "$20,000" and inserting "$25,000".

(b) INCREASE IN ANNUAL AGGREGATE LIMIT ON INDIVIDUAL CONTRIBUTIONS. — Section 315(a)(3) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(3)) is amended to read as follows:

"(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than —

"(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

"(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties."

(c) INCREASE IN SENATORIAL CAMPAIGN COMMITTEE LIMIT. — Section 315(h) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(h)) is amended by striking "$17,500" and inserting "$35,000".

(d) INDEXING OF CONTRIBUTION LIMITS. — Section 315(c) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(c)) is amended —

(1) in paragraph (1) —

(A) by striking the second and third sentences;

(B) by inserting "(A)" before "At the beginning"; and

(C) by adding at the end the following:

"(B) Except as provided in subparagraph (C), in any calendar year after 2002 —

"(i) a limitation established by subsections (a)(1)(A), (a)(1)(B), (a)(3), (b), (d), or (h) shall be increased by the percent difference determined under subparagraph (A);

"(ii) each amount so increased shall remain in effect for the calendar year; and

"(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.

"(C) In the case of limitations under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), increases shall only be made in odd-numbered years and such increases shall remain in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election."; and

(2) in paragraph (2)(B), by striking "means the calendar year 1974" and inserting "means —

"(i) for purposes of subsections (b) and (d), calendar year 1974; and

"(ii) for purposes of subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), calendar year 2001".

(e) EFFECTIVE DATE. — The amendments made by this section shall apply with respect to contributions made on or after January 1, 2003.

SEC. 308. DONATIONS TO PRESIDENTIAL INAUGURAL COMMITTEE.

(a) IN GENERAL. — Chapter 5 of title 36, United States Code, is amended by —

(1) redesignating section 510 as section 511; and

(2) inserting after section 509 the following:

"§ 510. Disclosure of and prohibition on certain donations

"(a) IN GENERAL. — A committee shall not be considered to be the Inaugural Committee for purposes of this chapter unless the committee agrees to, and meets, the requirements of subsections (b) and (c).

"(b) DISCLOSURE. —

"(1) IN GENERAL. — Not later than the date that is 90 days after the date of the Presidential inaugural ceremony, the committee shall file a report with the Federal Election Commission disclosing any donation of money or anything of value made to the committee in an aggregate amount equal to or greater than $200.

"(2) CONTENTS OF REPORT. — A report filed under paragraph (1) shall contain —

"(A) the amount of the donation;

"(B) the date the donation is received; and

"(C) the name and address of the person making the donation.

"(c) LIMITATION. — The committee shall not accept any donation from a foreign national (as defined in section 319(b) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441e(b)))."

(b) REPORTS MADE AVAILABLE BY FEC. — Section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434), as amended by sections 103, 201, and 212 is amended by adding at the end the following:

"(h) REPORTS FROM INAUGURAL COMMITTEES. — The Federal Election Commission shall make any report filed by an Inaugural Committee under section 510 of title 36, United States Code, accessible to the public at the offices of the Commission and on the Internet not later than 48 hours after the report is received by the Commission."

SEC. 309. PROHIBITION ON FRAUDULENT SOLICITATION OF FUNDS.

Section 322 of the Federal Election Campaign Act of 1971 (2 U.S.C. 441h) is amended —

(1) by inserting "(a) IN GENERAL. —" before "No person"; and

(2) by adding at the end the following:

"(b) FRAUDULENT SOLICITATION OF FUNDS. — No person shall —

"(1) fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or

"(2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1)."

SEC. 310. STUDY AND REPORT ON CLEAN MONEY CLEAN ELECTIONS LAWS.

(a) CLEAN MONEY CLEAN ELECTIONS DEFINED. — In this section, the term "clean money clean elections" means funds received under State laws that provide in whole or in part for the public financing of election campaigns.

(b) STUDY. —

(1) IN GENERAL. — The Comptroller General shall conduct a study of the clean money clean elections of Arizona and Maine.

(2) MATTERS STUDIED. —

(A) STATISTICS ON CLEAN MONEY CLEAN ELECTIONS CANDIDATES. — The Comptroller General shall determine —

(i) the number of candidates who have chosen to run for public office with clean money clean elections including —

(I) the office for which they were candidates;

(II) whether the candidate was an incumbent or a challenger; and

(III) whether the candidate was successful in the candidate's bid for public office; and

(ii) the number of races in which at least one candidate ran an election with clean money clean elections.

(B) EFFECTS OF CLEAN MONEY CLEAN ELECTIONS. — The Comptroller General of the United States shall describe the effects of public financing under the clean money clean elections laws on the 2000 elections in Arizona and Maine.

(c) REPORT. — Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit a report to the Congress detailing the results of the study conducted under subsection (b).

SEC. 311. CLARITY STANDARDS FOR IDENTIFICATION OF SPONSORS OF ELECTION-RELATED ADVERTISING.

Section 318 of the Federal Election Campaign Act of 1971 (2 U.S.C. 441d) is amended —

(1) in subsection (a) —

(A) in the matter preceding paragraph (1) —

(i) by striking "Whenever" and inserting "Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever";

(ii) by striking "an expenditure" and inserting "a disbursement";

(iii) by striking "direct"; and

(iv) by inserting "or makes a disbursement for an electioneering communication (as defined in section 304(f)(3))" after "public political advertising"; and

(B) in paragraph (3), by inserting "and permanent street address, telephone number, or World Wide Web address" after "name"; and

(2) by adding at the end the following:

"(c) SPECIFICATION. — Any printed communication described in subsection (a) shall —

"(1) be of sufficient type size to be clearly readable by the recipient of the communication;

"(2) be contained in a printed box set apart from the other contents of the communication; and

"(3) be printed with a reasonable degree of color contrast between the background and the printed statement.

"(d) ADDITIONAL REQUIREMENTS. —

"(1) COMMUNICATIONS BY CANDIDATES OR AUTHORIZED PERSONS. —

"(A) BY RADIO. — Any communication described in paragraph (1) or (2) of subsection (a) which is transmitted through radio shall include, in addition to the requirements of that paragraph, an audio statement by the candidate that identifies the candidate and states that the candidate has approved the communication.

"(B) BY TELEVISION. — Any communication described in paragraph (1) or (2) of subsection (a) which is transmitted through television shall include, in addition to the requirements of that paragraph, a statement that identifies the candidate and states that the candidate has approved the communication. Such statement —

"(i) shall be conveyed by —

"(I) an unobscured, full-screen view of the candidate making the statement, or

"(II) the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate; and

"(ii) shall also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

"(2) COMMUNICATIONS BY OTHERS. — Any communication described in paragraph (3) of subsection (a) which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: '________ is responsible for the content of this advertising.' (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds."

SEC. 312. INCREASE IN PENALTIES.

(a) IN GENERAL. — Subparagraph (A) of section 309(d)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 437g(d)(1)(A)) is amended to read as follows:

"(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure —

"(i) aggregating $25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both; or

"(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both."

(b) EFFECTIVE DATE. — The amendment made by this section shall apply to violations occurring on or after the effective date of this Act.

SEC. 313. STATUTE OF LIMITATIONS.

(a) IN GENERAL. — Section 406(a) of the Federal Election Campaign Act of 1971 (2 U.S.C. 455(a)) is amended by striking "3" and inserting "5".

(b) EFFECTIVE DATE. — The amendment made by this section shall apply to violations occurring on or after the effective date of this Act.

SEC. 314. SENTENCING GUIDELINES.

(a) IN GENERAL. — The United States Sentencing Commission shall —

(1) promulgate a guideline, or amend an existing guideline under section 994 of title 28, United States Code, in accordance with paragraph (2), for penalties for violations of the Federal Election Campaign Act of 1971 and related election laws; and

(2) submit to Congress an explanation of any guidelines promulgated under paragraph (1) and any legislative or administrative recommendations regarding enforcement of the Federal Election Campaign Act of 1971 and related election laws.

(b) CONSIDERATIONS. — The Commission shall provide guidelines under subsection (a) taking into account the following considerations:

(1) Ensure that the sentencing guidelines and policy statements reflect the serious nature of such violations and the need for aggressive and appropriate law enforcement action to prevent such violations.

(2) Provide a sentencing enhancement for any person convicted of such violation if such violation involves —

(A) a contribution, donation, or expenditure from a foreign source;

(B) a large number of illegal transactions;

(C) a large aggregate amount of illegal contributions, donations, or expenditures;

(D) the receipt or disbursement of governmental funds; and

(E) an intent to achieve a benefit from the Federal Government.

(3) Assure reasonable consistency with other relevant directives and guidelines of the Commission.

(4) Account for aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements.

(5) Assure the guidelines adequately meet the purposes of sentencing under section 3553(a)(2) of title 18, United States Code.

(c) EFFECTIVE DATE; EMERGENCY AUTHORITY TO PROMULGATE GUIDELINES. —

(1) EFFECTIVE DATE. — Notwithstanding section 402, the United States Sentencing Commission shall promulgate guidelines under this section not later than the later of —

(A) 90 days after the effective date of this Act; or

(B) 90 days after the date on which at least a majority of the members of the Commission are appointed and holding office.

(2) EMERGENCY AUTHORITY TO PROMULGATE GUIDELINES. — The Commission shall promulgate guidelines under this section in accordance with the procedures set forth in section 21(a) of the Sentencing Reform Act of 1987, as though the authority under such Act has not expired.

SEC. 315. INCREASE IN PENALTIES IMPOSED FOR VIOLATIONS OF CONDUIT CONTRIBUTION BAN.

(a) INCREASE IN CIVIL MONEY PENALTY FOR KNOWING AND WILLFUL VIOLATIONS. — Section 309(a) of the Federal Election Campaign Act of 1971 (2 U.S.C. 437g(a)) is amended —

(1) in paragraph (5)(B), by inserting before the period at the end the following: "(or, in the case of a violation of section 320, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation)"; and

(2) in paragraph (6)(C), by inserting before the period at the end the following: "(or, in the case of a violation of section 320, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation)".

(b) INCREASE IN CRIMINAL PENALTY. — Section 309(d)(1) of such Act (2 U.S.C. 437g(d)(1)) is amended by adding at the end the following new subparagraph:

"(D) Any person who knowingly and willfully commits a violation of section 320 involving an amount aggregating more than $10,000 during a calendar year shall be —

"(i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);

"(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of —

"(I) $50,000; or

"(II) 1,000 percent of the amount involved in the violation; or

"(iii) both imprisoned under clause (i) and fined under clause (ii)."

(c) EFFECTIVE DATE. — The amendments made by this section shall apply with respect to violations occurring on or after the effective date of this Act.

SEC. 316. RESTRICTION ON INCREASED CONTRIBUTION LIMITS BY TAKING INTO ACCOUNT CANDIDATE'S AVAILABLE FUNDS.

Section 315(i)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(i)(1)), as added by this Act, is amended by adding at the end the following:

"(E) SPECIAL RULE FOR CANDIDATE'S CAMPAIGN FUNDS. —

"(i) IN GENERAL. — For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (D)(ii), such amount shall include the gross receipts advantage of the candidate's authorized committee.

"(ii) GROSS RECEIPTS ADVANTAGE. — For purposes of clause (i), the term 'gross receipts advantage' means the excess, if any, of —

"(I) the aggregate amount of 50 percent of gross receipts of a candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held, over

"(II) the aggregate amount of 50 percent of gross receipts of the opposing candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held."

SEC. 317. CLARIFICATION OF RIGHT OF NATIONALS OF THE UNITED STATES TO MAKE POLITICAL CONTRIBUTIONS.

Section 319(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441e(b)(2)) is amended by inserting after "United States" the following: "or a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act)".

SEC. 318. PROHIBITION OF CONTRIBUTIONS BY MINORS.

Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.), as amended by section 101, is further amended by adding at the end the following new section:

"PROHIBITION OF CONTRIBUTIONS BY MINORS

"SEC. 324. An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party."

SEC. 319. MODIFICATION OF INDIVIDUAL CONTRIBUTION LIMITS FOR HOUSE CANDIDATES IN RESPONSE TO EXPENDITURES FROM PERSONAL FUNDS.

(a) INCREASED LIMITS. — Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) is amended by inserting after section 315 the following new section:

"MODIFICATION OF CERTAIN LIMITS FOR HOUSE CANDIDATES IN RESPONSE TO

PERSONAL FUND EXPENDITURES OF OPPONENTS

"SEC. 315A. (a) AVAILABILITY OF INCREASED LIMIT. —

"(1) IN GENERAL. — Subject to paragraph (3), if the opposition personal funds amount with respect to a candidate for election to the office of Representative in, or Delegate or Resident Commissioner to, the Congress exceeds $350,000 —

"(A) the limit under subsection (a)(1)(A) with respect to the candidate shall be tripled;

"(B) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to the candidate if the contribution is made under the increased limit allowed under subparagraph (A) during a period in which the candidate may accept such a contribution; and

"(C) the limits under subsection (d) with respect to any expenditure by a State or national committee of a political party on behalf of the candidate shall not apply.

"(2) DETERMINATION OF OPPOSITION PERSONAL FUNDS AMOUNT. —

"(A) IN GENERAL. — The opposition personal funds amount is an amount equal to the excess (if any) of —

"(i) the greatest aggregate amount of expenditures from personal funds (as defined in subsection (b)(1)) that an opposing candidate in the same election makes; over

"(ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

"(B) SPECIAL RULE FOR CANDIDATE'S CAMPAIGN FUNDS. —

"(i) IN GENERAL. — For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (A), such amount shall include the gross receipts advantage of the candidate's authorized committee.

"(ii) GROSS RECEIPTS ADVANTAGE. — For purposes of clause (i), the term 'gross receipts advantage' means the excess, if any, of —

"(I) the aggregate amount of 50 percent of gross receipts of a candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held, over

"(II) the aggregate amount of 50 percent of gross receipts of the opposing candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held.

"(3) TIME TO ACCEPT CONTRIBUTIONS UNDER INCREASED LIMIT. —

"(A) IN GENERAL. — Subject to subparagraph (B), a candidate and the candidate's authorized committee shall not accept any contribution, and a party committee shall not make any expenditure, under the increased limit under paragraph (1) —

"(i) until the candidate has received notification of the opposition personal funds amount under subsection (b)(1); and

"(ii) to the extent that such contribution, when added to the aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits under this subsection for the election cycle, exceeds 100 percent of the opposition personal funds amount.

"(B) EFFECT OF WITHDRAWAL OF AN OPPOSING CANDIDATE. — A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

"(4) DISPOSAL OF EXCESS CONTRIBUTIONS. —

"(A) IN GENERAL. — The aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit under paragraph (1) and not otherwise expended in connection with the election with respect to which such contributions relate shall, not later than 50 days after the date of such election, be used in the manner described in subparagraph (B).

"(B) RETURN TO CONTRIBUTORS. — A candidate or a candidate's authorized committee shall return the excess contribution to the person who made the contribution.

"(b) NOTIFICATION OF EXPENDITURES FROM PERSONAL FUNDS. —

"(1) IN GENERAL. —

"(A) DEFINITION OF EXPENDITURE FROM PERSONAL FUNDS. — In this paragraph, the term 'expenditure from personal funds' means —

"(i) an expenditure made by a candidate using personal funds; and

"(ii) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

"(B) DECLARATION OF INTENT. — Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed $350,000.

"(C) INITIAL NOTIFICATION. — Not later than 24 hours after a candidate described in subparagraph (B) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of $350,000 in connection with any election, the candidate shall file a notification.

"(D) ADDITIONAL NOTIFICATION. — After a candidate files an initial notification under subparagraph (C), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceeds $10,000. Such notification shall be filed not later than 24 hours after the expenditure is made.

"(E) CONTENTS. — A notification under subparagraph (C) or (D) shall include —

"(i) the name of the candidate and the office sought by the candidate;

"(ii) the date and amount of each expenditure; and

"(iii) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

"(F) PLACE OF FILING. — Each declaration or notification required to be filed by a candidate under subparagraph (C), (D), or (E) shall be filed with —

"(i) the Commission; and

"(ii) each candidate in the same election and the national party of each such candidate.

"(2) NOTIFICATION OF DISPOSAL OF EXCESS CONTRIBUTIONS. — In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the candidate's authorized committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under subsection (a)) and the manner in which the candidate or the candidate's authorized committee used such funds.

"(3) ENFORCEMENT. — For provisions providing for the enforcement of the reporting requirements under this subsection, see section 309."

(b) CONFORMING AMENDMENT. — Section 315(a)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a), as amended by section 304(a), is amended by striking "subsection (i)," and inserting "subsection (i) and section 315A,".

TITLE IV — SEVERABILITY; EFFECTIVE DATE

SEC. 401. SEVERABILITY.

If any provision of this Act or amendment made by this Act, or the application of a provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act and amendments made by this Act, and the application of the provisions and amendment to any person or circumstance, shall not be affected by the holding.

SEC. 402. EFFECTIVE DATES AND REGULATIONS.

(a) GENERAL EFFECTIVE DATE. —

(1) IN GENERAL. — Except as provided in the succeeding provisions of this section, the effective date of this Act, and the amendments made by this Act, is November 6, 2002.

(2) MODIFICATION OF CONTRIBUTION LIMITS. — The amendments made by —

(A) section 102 shall apply with respect to contributions made on or after January 1, 2003; and

(B) section 307 shall take effect as provided in subsection (e) of such section.

(3) SEVERABILITY; EFFECTIVE DATES AND REGULATIONS; JUDICIAL REVIEW. — Title IV shall take effect on the date of enactment of this Act.

(4) PROVISIONS NOT TO APPLY TO RUNOFF ELECTIONS. — Section 323(b) of the Federal Election Campaign Act of 1971 (as added by section 101(a)), section 103(a), title II, sections 304 (including section 315(j) of Federal Election Campaign Act of 1971, as added by section 304(a)(2)), 305 (notwithstanding subsection (c) of such section), 311, 316, 318, and 319, and title V (and the amendments made by such sections and titles) shall take effect on November 6, 2002, but shall not apply with respect to runoff elections, recounts, or election contests resulting from elections held prior to such date.

(b) SOFT MONEY OF NATIONAL POLITICAL PARTIES. —

(1) IN GENERAL. — Except for subsection (b) of such section, section 323 of the Federal Election Campaign Act of 1971 (as added by section 101(a)) shall take effect on November 6, 2002.

(2) TRANSITIONAL RULES FOR THE SPENDING OF SOFT MONEY OF NATIONAL POLITICAL PARTIES. —

(A) IN GENERAL. — Notwithstanding section 323(a) of the Federal Election Campaign Act of 1971 (as added by section 101(a)), if a national committee of a political party described in such section (including any person who is subject to such section under paragraph (2) of such section), has received funds described in such section prior to November 6, 2002, the rules described in subparagraph (B) shall apply with respect to the spending of the amount of such funds in the possession of such committee as of such date.

(B) USE OF EXCESS SOFT MONEY FUNDS. —

(i) IN GENERAL. — Subject to clauses (ii) and (iii), the national committee of a political party may use the amount described in subparagraph (A) prior to January 1, 2003, solely for the purpose of —

(I) retiring outstanding debts or obligations that were incurred solely in connection with an election held prior to November 6, 2002; or

(II) paying expenses or retiring outstanding debts or paying for obligations that were incurred solely in connection with any runoff election, recount, or election contest resulting from an election held prior to November 6, 2002.

(ii) PROHIBITION ON USING SOFT MONEY FOR HARD MONEY EXPENSES, DEBTS, AND OBLIGATIONS. — A national committee of a political party may not use the amount described in subparagraph (A) for any expenditure (as defined in section 301(9) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(9))) or for retiring outstanding debts or obligations that were incurred for such an expenditure.

(iii) PROHIBITION OF BUILDING FUND USES. — A national committee of a political party may not use the amount described in subparagraph (A) for activities to defray the costs of the construction or purchase of any office building or facility.

(c) REGULATIONS. —

(1) IN GENERAL. — Except as provided in paragraph (2), the Federal Election Commission shall promulgate regulations to carry out this Act and the amendments made by this Act that are under the Commission's jurisdiction not later than 270 days after the date of enactment of this Act.

(2) SOFT MONEY OF POLITICAL PARTIES. — Not later than 90 days after the date of enactment of this Act, the Federal Election Commission shall promulgate regulations to carry out title I of this Act and the amendments made by such title.

SEC. 403. JUDICIAL REVIEW.

(a) SPECIAL RULES FOR ACTIONS BROUGHT ON CONSTITUTIONAL GROUNDS. — If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

(b) INTERVENTION BY MEMBERS OF CONGRESS. — In any action in which the constitutionality of any provision of this Act or any amendment made by this Act is raised (including but not limited to an action described in subsection (a)), any member of the House of Representatives (including a Delegate or Resident Commissioner to the Congress) or Senate shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment. To avoid duplication of efforts and reduce the burdens placed on the parties to the action, the court in any such action may make such orders as it considers necessary, including orders to require intervenors taking similar positions to file joint papers or to be represented by a single attorney at oral argument.

(c) CHALLENGE BY MEMBERS OF CONGRESS. — Any Member of Congress may bring an action, subject to the special rules described in subsection (a), for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act.

(d) APPLICABILITY. —

(1) INITIAL CLAIMS. — With respect to any action initially filed on or before December 31, 2006, the provisions of subsection (a) shall apply with respect to each action described in such section.

(2) SUBSEQUENT ACTIONS. — With respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action.

TITLE V — ADDITIONAL DISCLOSURE PROVISIONS

SEC. 501. INTERNET ACCESS TO RECORDS.

Section 304(a)(11)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C. 434(a)(11)(B)) is amended to read as follows:

"(B) The Commission shall make a designation, statement, report, or notification that is filed with the Commission under this Act available for inspection by the public in the offices of the Commission and accessible to the public on the Internet not later than 48 hours (or not later than 24 hours in the case of a designation, statement, report, or notification filed electronically) after receipt by the Commission."

SEC. 502. MAINTENANCE OF WEBSITE OF ELECTION REPORTS.

(a) IN GENERAL. — The Federal Election Commission shall maintain a central site on the Internet to make accessible to the public all publicly available election-related reports and information.

(b) ELECTION-RELATED REPORT. — In this section, the term "election-related report" means any report, designation, or statement required to be filed under the Federal Election Campaign Act of 1971.

(c) COORDINATION WITH OTHER AGENCIES. — Any Federal executive agency receiving election-related information which that agency is required by law to publicly disclose shall cooperate and coordinate with the Federal Election Commission to make such report available through, or for posting on, the site of the Federal Election Commission in a timely manner.

SEC. 503. ADDITIONAL DISCLOSURE REPORTS.

(a) PRINCIPAL CAMPAIGN COMMITTEES. — Section 304(a)(2)(B) of the Federal Election Campaign Act of 1971 is amended by striking "the following reports" and all that follows through the period and inserting "the treasurer shall file quarterly reports, which shall be filed not later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter, except that the report for the quarter ending December 31 shall be filed not later than January 31 of the following calendar year."

(b) NATIONAL COMMITTEE OF A POLITICAL PARTY. — Section 304(a)(4) of such Act (2 U.S.C. 434(a)(4)) is amended by adding at the end the following flush sentence: "Notwithstanding the preceding sentence, a national committee of a political party shall file the reports required under subparagraph (B)."

SEC. 504. PUBLIC ACCESS TO BROADCASTING RECORDS.

Section 315 of the Communications Act of 1934 (47 U.S.C. 315), as amended by this Act, is amended by redesignating subsections (e) and (f) as subsections (f) and (g), respectively, and inserting after subsection (d) the following:

"(e) POLITICAL RECORD. —

"(1) IN GENERAL. — A licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that —

"(A) is made by or on behalf of a legally qualified candidate for public office; or

"(B) communicates a message relating to any political matter of national importance, including —

"(i) a legally qualified candidate;

"(ii) any election to Federal office; or

"(iii) a national legislative issue of public importance.

"(2) CONTENTS OF RECORD. — A record maintained under paragraph (1) shall contain information regarding —

"(A) whether the request to purchase broadcast time is accepted or rejected by the licensee;

"(B) the rate charged for the broadcast time;

"(C) the date and time on which the communication is aired;

"(D) the class of time that is purchased;

"(E) the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers (as applicable);

"(F) in the case of a request made by, or on behalf of, a candidate, the name of the candidate, the authorized committee of the candidate, and the treasurer of such committee; and

"(G) in the case of any other request, the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person.

"(3) TIME TO MAINTAIN FILE. — The information required under this subsection shall be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years."

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FILED
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No. 02-1674

In the Supreme Court of the United States

MITCH MCCONNELL, UNITED STATES SENATOR,
ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

RESPONSE OF APPELLEES FEDERAL ELECTION COMMISSION, ET AL.

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

MALCOLM L. STEWART
GREGORY G. GARRE
Assistants to the Solicitor General

DOUGLAS N. LETTER
JAMES J. GILLIGAN
MICHAEL S. RAAB
DANA J. MARTIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

STEPHEN E. HERSHKOWITZ
DAVID KOLKER
Assistant General Counsels
Federal Election Commission
Washington, D.C. 20463

GPP

QUESTIONS PRESENTED

In 2002, the President signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. BCRA is designed to address various abuses associated with the financing of federal election campaigns and thereby protect the integrity of the federal electoral process. The questions presented by this appeal are as follows:

1. Whether the limitations on political parties imposed by Section 101 of BCRA are constitutional.

2. Whether BCRA's funding limitations and disclosure requirements pertaining to "electioneering communications" are constitutional.

3. Whether the district court correctly held that appellants' challenges to Sections 212, 214(b) and (c), and 305 of BCRA are not justiciable at this time.

In the Supreme Court of the United States

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MITCH MCCONNELL, UNITED STATES SENATOR,
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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

RESPONSE OF APPELLEES FEDERAL ELECTION COMMISSION, ET AL.[1]

OPINIONS BELOW

The opinions of the district court are not yet reported. See J.S. App. 3a.

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[1] This response is filed on behalf of the Federal Election Commission (FEC) and David M. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their capacities as Commissioners of the FEC; John Ashcroft, in his capacity as Attorney General of the United States; the United States Department of Justice; the Federal Communications Commission; and the United States of America. Those parties are appellants in *Federal Election Commission* v. *Mitch McConnell, United States Senator*, No. 02-1676.

JURISDICTION

The judgment of the district court was entered on May 2, 2003. Appellants' notice of appeal (J.S. App. 1a-2a) and their jurisdictional statement were filed on May 2, 2003. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATEMENT

This case presents a facial challenge to the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. A three-judge panel of the District Court for the District of Columbia held that several provisions of BCRA violate the First Amendment to the Constitution, while sustaining other BCRA provisions against various constitutional challenges. The district court also held that the plaintiffs' challenges to certain BCRA provisions are not justiciable at the present time. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. See BCRA § 403(a)(3), 116 Stat. 114.

Appellants challenge various rulings of the district court that (a) rejected some of appellants' constitutional challenges on the merits, or (b) held certain of their claims to be non-justiciable. As of this date, three other jurisdictional statements arising out of the same district court judgment are pending before this Court. See *National Rifle Association* v. *Federal Election Commission*, No. 02-1675; *Federal Election Commission* v. *Mitch McConnell, United States Senator*, No. 02-1676 (see note 1, *supra*); *John McCain, United States Senator* v. *Mitch McConnell, United States Senator*, No. 02-1702.

DISCUSSION

Under Section 403(a)(3) of BCRA, the final decision of the district court in this case is "reviewable only by appeal directly to the Supreme Court of the United States." 116 Stat. 114. Pursuant to Section 403(a)(4) of BCRA, this Court is directed "to advance on the docket and to expedite to the greatest possible extent the disposition of the * * * appeal." 116 Stat. 114. In addition to filing our own jurisdictional statement (see note 1, *supra*) to appeal the district court's rulings declaring certain provisions of BCRA to be invalid, appellees will defend on appeal those provisions of the statute that were sustained against appellants' constitutional challenges. Appellees agree, however, that appellants' jurisdictional statement identifies substantial questions of federal law and that this Court should note probable jurisdiction over the appeal.[2]

Appellants' jurisdictional statement summarizes the merits of their constitutional challenges to the various BCRA provisions that were placed at issue by their suit. As appellants recognize (see J.S. i, 8, 14, 15, 16), however, the district court found that certain of appellants' constitutional claims are not justiciable at this time. Although appellants state that they intend to challenge those justiciability rulings (see J.S. i, 14, 15, 16), their jurisdictional statement offers *no* explanation whatever—however brief—of why those holdings are wrong. As to those aspects of the district court's decision, appellants have therefore failed to identify any substantial question of federal law implicated by their appeal. In order to facilitate expeditious resolution of this case in accordance with the statutory mandate, however, appellees do not seek dismissal of the appeal, or summary affirmance of the district court's judgment, with respect to the court's justiciability rulings.

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[2] Contemporaneously with this response, appellees are filing a motion for expedited briefing schedule applicable to this appeal and to the other pending appeals (see p. 2, *supra*) from the district court's judgment in this case.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

MALCOLM L. STEWART
GREGORY G. GARRE
Assistants to the Solicitor General

DOUGLAS N. LETTER
JAMES J. GILLIGAN
MICHAEL S. RAAB
DANA J. MARTIN
Attorneys

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

STEPHEN E. HERSHKOWITZ
DAVID KOLKER
Assistant General Counsels
Federal Election Commission

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Nos. 02-1674 and 02-1675

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SENATOR MITCH MCCONNELL, *et al.*,
Appellants,
v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

NATIONAL RIFLE ASSOCIATION, *et al.*,
Appellants,
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FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeals from the
United States District Court
for the District of Columbia

INTERVENOR-APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENTS

ROGER M. WITTEN
WILMER, CUTLER & PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
ERIC J. MOGILNICKI
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Additional Counsel Listed On Inside Cover

19 pp

BURT NEUBORNE
FREDERICK A.O. SCHWARZ, JR.
BRENNAN CENTER FOR
JUSTICE
161 Avenue of the Americas,
12th Floor
New York, NY 10013

CHARLES G. CURTIS, JR.
DAVID J. HARTH
MICHELLE M. UMBERGER
HELLER EHRMAN WHITE &
MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

BRADLEY S. PHILLIPS
MUNGER, TOLLES &
OLSON LLP
355 South Grand Ave.
35th Floor
Los Angeles, CA 90071

E. JOSHUA ROSENKRANZ
HELLER EHRMAN WHITE &
MCAULIFFE LLP
120 West 45th Street
New York, NY 10036

ALAN B. MORRISON
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, N.W.
Washington, D.C. 20009

MICHAEL D. LEFFEL
A. KRISAN PATTERSON
JENNIFER L. MUELLER
STACY E. BECK
JERROD C. PATTERSON
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

FRED WERTHEIMER
ALEXANDRA EDSALL
DEMOCRACY 21
1825 Eye Street, N.W.
Suite 400
Washington, D.C. 20006

TREVOR POTTER
GLEN M. SHOR
CAMPAIGN LEGAL CENTER
1101 Connecticut Ave., N.W.
Suite 330
Washington, D.C. 20036

QUESTIONS PRESENTED

1. Whether the Court should summarily dispose of the McConnell appellants' constitutional challenges to Sections 211, 212, and 214 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, because those challenges were either waived below, or are plainly nonjusticiable or insubstantial under settled law.

2. Whether, in other respects, the Court should note probable jurisdiction over the McConnell and NRA appellants' constitutional challenges to BCRA, and set the appeals on those issues for briefing and oral argument.

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  § 214 ... *passim*
  § 214(a) ... 12
  § 214(b) ... 2, 7, 9
  § 214(c) ... 2, 8, 11
  § 401 ... 3
  § 403(a) ... 10
  § 403(a)(3) ... 2
  § 403(a)(4) ... 2
  § 403(b) ... 1
Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3
  2 U.S.C. § 434(f) ... 3
  2 U.S.C. § 441a(a)(7)(B)(i) ... 12
Administrative Procedure Act, Pub. L. No. 103-272, 80 Stat. 392
  5 U.S.C. § 701 *et seq.* ... 8, 9
11 C.F.R. § 100.23 (2002) ... 7
65 Fed. Reg. 76138 (Dec. 6, 2000) ... 7
66 Fed. Reg. 23537 (May 9, 2001) ... 7
68 Fed. Reg. 404 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.10) ... 4
68 Fed. Reg. 421 (Jan. 3, 2003) ... 8
68 Fed. Reg. 455 (Jan. 3, 2003) ... 12
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148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) ... 8, 12
Fed. R. Civ. P. 24(a)(1) ... 1

MISCELLANEOUS

Statement of Reasons of Commissioner Thomas & Chairman McDonald in *In re The Coalition, et al.*, MUR 4624 (FEC Sept. 7, 2001) ... 8
Statement of Reasons of Commissioners Thomas and McDonald in *In re Republicans for Clean Air*, MUR 4982 (FEC Apr. 23, 2002) ... 8

IN THE

Supreme Court of the United States

No. 02-1674

SENATOR MITCH MCCONNELL, *et al.*,
Appellants,
v.
FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

No. 02-1675

NATIONAL RIFLE ASSOCIATION, *et al.*,
Appellants,
v.
FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

INTERVENOR-APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENTS

INTRODUCTION

Although intervenor-appellees take issue with the positions taken on the merits by Senator McConnell, *et al.*, and the National Rifle Association, *et al.*, in their jurisdictional statements, we agree that most of the questions presented in their jurisdictional statements warrant plenary consideration by this Court.[1] In light of

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[1] Intervenor-appellees are Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords. They were granted leave to intervene as of right in the proceedings below pursuant to BCRA § 403(b) and Fed. R. Civ. P. 24(a)(1). *See* Orders of May 3 and May 10, 2002 (granting intervention). The intervenors are also appellants in No. 02-1702, *McCain* v. *McConnell*. *See* 02-1702 J.S. 15 & n.17.

Sections 403(a)(3) and (a)(4) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, which provide for direct and expedited review in this Court of any final decision of a three-judge district court hearing a challenge to the constitutionality of BCRA, and in light of the importance of the issues to the nation, intervenor-appellees agree with the McConnell and NRA appellants that the Court should note probable jurisdiction over these appeals and set the case for briefing and oral argument.

Some of the questions presented in Senator McConnell's jurisdictional statement (No. 02-1674), however, do not warrant plenary consideration by this Court. Those questions seek (in whole or in part) to raise challenges to BCRA that were unequivocally waived below, or are clearly nonjusticiable under well-settled principles of constitutional and administrative law, or are otherwise so insubstantial as not to justify further briefing and argument (particularly given the number and complexity of the other issues properly before the Court). Summary disposition of those issues at this stage of the case would focus the briefing on the remaining issues that do warrant this Court's plenary review, and may assist in the orderly resolution of these appeals. Accordingly, the Court may wish to consider summarily disposing of the following issues:

First, the Court should summarily dispose of Senator McConnell's challenge to a provision in BCRA Section 212 requiring disclosure of contracts to make disbursements with respect to independent expenditures. *See* McConnell J.S. Question Presented 3 and pp. 14-15. Under settled law, that challenge is clearly nonjusticiable.

Second, the Court should summarily dispose of all challenges to the "independent" and "coordinated" expenditure provisions in BCRA Sections 211 and 214. *See* McConnell J.S. Question Presented 4 and pp. 15-16. Appellants waived all claims with respect to Section 211; their challenges to Section 214(b) and (c) are clearly nonjusticiable; and their other challenges to Section 214 are insubstantial under settled law.

ARGUMENT

I. APPELLANTS FAIL TO RAISE JUSTICIABLE OR SUBSTANTIAL QUESTIONS WITH RESPECT TO ANY "ADVANCE NOTICE" REQUIREMENT IN BCRA SECTION 212

The third question presented in Senator McConnell's jurisdictional statement is "[w]hether the district court erred by holding nonjusticiable challenges to, and upholding, portions of the 'advance notice' provisions of BCRA . . . because they violate the First Amendment." The targeted provisions are disclosure requirements in BCRA Section 212 applicable to "independent expenditures."[2] Appellants contend that, because the statutory language refers to the disclosure not only of disbursements but also of contracts to make such disbursements, the statute must be read as requiring disclosure in advance of any actual independent expenditures. That requirement, they assert, "will chill the exercise of free speech by forcing would-be speakers to disclose their plans in advance." McConnell J.S. 15.

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[2] Senator McConnell has also presented a constitutional challenge to the "advance notice" requirement of BCRA § 201 in his jurisdictional statement, *see* McConnell J.S. Question Presented 3 and pp. 14-15. In fact, Senator McConnell prevailed on that challenge in the district court. Section 201 of BCRA amended 2 U.S.C. § 434(f) to add disclosure requirements with respect to disbursements for "electioneering communications" "if the person has executed a contract to make the disbursement." The district court ruled that appellants' constitutional challenge to Section 201 was ripe, *see* Supplemental Appendix to Jurisdictional Statement (JSSA) 109-11sa (per curiam), and ruled in their favor on the merits as well, JSSA 115sa (per curiam). The government has appealed from that aspect of the district court's decision. *See* No. 02-1676, Gov't J.S. 26-27. Senator McConnell, however, may not appeal from the district court's ruling in his favor on that point. *See Perez* v. *Ledesma*, 401 U.S. 82, 87 n.3 (1971); *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939).

The district court also held that the challenged "advance notice" requirement of BCRA § 201 is severable from the remainder of that section. JSSA 115-16sa (per curiam); *see* BCRA § 401 (severability provision). Senator McConnell's jurisdictional statement does not mention, let alone contest, that severability ruling, which applied well-established law.

That challenge warrants summary disposition. The FEC's regulations implementing Section 212 unambiguously construe the statute *not* to require such advance disclosure. *See* 68 Fed. Reg. 404, 452 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.10). The district court therefore found no current threat that appellants, or anyone else, will have an advance-notice requirement enforced against them under Section 212. *See* Supplemental Appendix to Jurisdictional Statement (JSSA) 130-34sa (per curiam).[3]

Nowhere in Senator McConnell's Jurisdictional Statement is there any argument explaining why appellants think the district court's opinion was wrong on this point. Nor is there any apparent argument to be offered. It is black-letter law that "an actual and well-founded fear that the law will be enforced" is a prerequisite to a finding of a case or controversy when a plaintiff seeks pre-enforcement review of the constitutionality of a statute on First Amendment grounds. *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 393 (1988).[4] In light of the FEC's regulations, there can be no credible threat that Section 212 will be enforced to require appellants to give "advance notice" of their disbursements as they have contended. The district court therefore correctly concluded that appellants' challenge to Section 212 is nonjusticiable, and this Court should summarily dispose of that challenge.

II. Appellants Fail To Raise Justiciable Or Substantial Questions With Respect To The Coordination Provisions Of BCRA Sections 211 And 214

The fourth question presented in Senator McConnell's jurisdictional statement is "[w]hether the dstrict court erred by holding nonjusticiable challenges to, and upholding, the 'coordination' provisions of BCRA (sections 202, 211, and 214), because they violate the First Amendment." The Court should summarily dispose of appellants' challenges to Sections 211 and 214 because (a) appellants expressly waived all challenges to Section 211; and (b) the rulemaking provisions of Section 214 present no justiciable issues, and the remaining provisions raise no substantial issue warranting plenary consideration.[5]

A. Section 211 amends FECA to include, in the definition of "independent expenditure," any expenditure that is "not made in concert or cooperation with or at the request or suggestion of [a] candidate, the candidate's authorized political committee, or their agents, or a political party or its agents." Senator McConnell now seeks to challenge Section 211 on First Amendment grounds. *See* McConnell J.S. Question Presented 4 and pp. 7, 15-16. In the district court, however, Senator McConnell and other plaintiffs challenging BCRA waived all challenges to Section 211. Neither the Per Curiam opinion's "Chart of the Court's Rulings" nor Judge Henderson's comprehensive "catalogue" of all challenges to BCRA's provisions contains any reference to Section 211. *See* JSSA 10-15sa (per curiam); JSSA 186-214sa (Henderson). The reason for this omission is spelled out on page 128sa, note 81 of the Per Curiam opinion:

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[3] In the district court, another of the parties challenging Section 212 on this basis argued that the FEC regulations offered no assurance against enforcement of an "advance notice" requirement because the regulations "may not be approved by Congress" or the Commission might later change its mind. JSSA 134sa (per curiam). The congressional review period has now passed, however, and the regulations remain in effect. And the FEC could not, of course, change its mind without notice-and-comment rulemaking. If it did so, a case or controversy might then be presented, but that purely speculative possibility does not create a present threat that the statute will be construed in the manner the challengers claim to fear.

[4] *See also Renne* v. *Geary*, 50 U.S. 312, 323 (1991); *Wisconsin Right to Life, Inc.* v. *Paradise*, 138 F.3d 1183, 1185 (7th Cir. 1998) (holding that a challenge to a state election law did not present a case or controversy where an opinion of the state attorney general and a regulation of the state elections board precluded application of the law to the challenger).

[5] Appellants' constitutional challenge to the coordination provisions of Section 202, although flawed, does present a substantial question insofar as that section is linked to the "electioneering communications" provisions of BCRA that are before the Court. *See* McConnell J.S. 16. As the district court majority noted, however, some of the Section 202 arguments made below also "challenge[] the scope of activities covered by BCRA's definition of 'coordination' "; the majority concluded that those arguments "are not ripe given the statutory construction of Section 214 and the recent promulgation of final regulations by the FEC." JSSA 130sa (per curiam). If any appellant presses such arguments in this Court, the Section 202 questions are to that extent nonjusticiable and insubstantial for all the reasons set forth in this response with respect to appellants' claims regarding Section 214.

> Although Plaintiffs ask for judgment as to BCRA's Section 211, . . . at oral argument they stated that they were not challenging the provision. *See* Tr. at 341-42 (Judge Henderson: Mr. Starr, I've got down that you all are challenging [Section] 211. Am I wrong about that? . . . [Mr.] Baran: We are not challenging section 211[.]). Furthermore, other than a description of the provision, . . . Plaintiffs' briefs are silent on the provision. (Second alteration in original.)

It is difficult to imagine a more plain case of waiver.[6] *See, e.g., United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to allow a challenger "to assert new substantive arguments attacking . . . the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Dothard* v. *Rawlinson*, 433 U.S. 321, 323 n.1 (1977).

B. The heart of Section 214 is Congress's repeal of what it deemed to be an errant FEC rule defining "coordination" between a candidate or party and an outside spender, with instructions to the agency to go back to the drawing board and prepare new regulations. This Court and Congress have long recognized that, to prevent evasion of the campaign finance laws through "wink or nod" arrangements, "coordination" must be defined in a broad and realistic manner. *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 (2001) (*Colorado II*); *see also Buckley* v. *Valeo*, 424 U.S. 1, 46-47 & n.53, 78 (1976) (per curiam).

In December 2000, however, a divided FEC promulgated new regulations redefining "coordination" much more narrowly in the context of "general public political communications." *See* 65 Fed. Reg. 76138 (Dec. 6, 2000); *see also* 66 Fed. Reg. 23537 (May 9, 2001) (final rule and effective date); 11 C.F.R. § 100.23 (2002), *repealed by* BCRA § 214(b). The FEC's December 2000 rules provided in material part that coordination could be found between a candidate and a third party only where the third party's communication was "created, produced or distributed" (1) "[a]t the request or suggestion of the candidate," (2) after the candidate "has exercised control or decision-making authority" with respect to the communication, or (3) "[a]fter *substantial discussion or negotiation ... the result of which is collaboration or agreement*" between the third party and the candidate. 11 C.F.R. § 100.23(c)(2)(i)-(iii) (emphasis added).

The new rules drew immediate and extensive criticism both on and off the Commission. A recurrent complaint was that the rules were "far too narrowly drafted and [would] make evasion of [FECA] commonplace"—for example, through the use of inside information by consultants and employees who could achieve *de facto* coordination through informal means while purporting to avoid the more formal arrangements that triggered coverage under the FEC rules.[7] Section 214 followed directly from these criticisms. Section 214(a) repeals the Commission's former rules, effective December 22, 2002; (b) provides that the Commission "shall promulgate new regulations on coordinated communications" addressing at a minimum four specific situations;[8] and (c) directs that the new rules "shall not require agreement or formal collaboration to establish coordination."

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[6] The waiver at oral argument was carefully considered. Judge Henderson had earlier asked an attorney from the FEC a question about BCRA § 211, and he responded: "They haven't challenged that. There's been no briefing on that. That's not part of their lawsuit." Tr. at 316 (Mr. Kolker). In response to Judge Henderson's question quoted above, Mr. Starr responded: "I need to double-check our list of provisions . . . . If it deserves to be challenged, we will challenge it. (Laughter)." *Id.* at 341. Following a 15-minute recess during which plaintiffs' counsel conferred among themselves, Mr. Baran reported back that "[w]e are not challenging section 211[.]" *Id.* at 342.

Rather than await the product of the mandated FEC rulemaking (which would, of course, be subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*), appellants flocked directly to the three-judge district court to insist that it would be impossible for the new, not-yet-drafted coordination rules *ever* to comply with the First Amendment. Meanwhile, the Commission proceeded with its coordination rulemaking, as directed by Congress. The FEC issued its Notice of Proposed Rulemaking on September 24, 2002, received written comments and held a public hearing in October, and adopted its replacement rules on December 5—the very day of oral argument on appellants' challenge to Section 214 in the district court. The Commission transmitted its new rules to Congress on December 18 and published them in the *Federal Register* on January 3, 2003. *See* 68 Fed. Reg. 421 (detailing rulemaking history). Many of the appellants participated actively in the rule-making (as did many of the intervenor-appellees).[9]

The district court correctly held appellants' challenge to the rulemaking mandate of Section 214 to be nonjusticiable. *See* JSSA 144-56sa (per curiam). Whether evaluated under principles of standing, ripeness, finality pursuant to 5 U.S.C. § 704, exhaustion of administrative remedies, or subject-matter jurisdiction, appellants' challenges to Section 214's rulemaking provisions were not properly before the three-judge district court.[10] To begin, appellants lack Article III standing, for they can have suffered no "specific objective harm" from a mere congressional instruction to the FEC to rewrite its coordination rules. JSSA 145sa (per curiam); *see generally* JSSA 145-48sa (per curiam). Until final rules were in place, it was entirely speculative whether any particular conduct in which an appellant wished to engage might be covered by the revised rules or not.

It is also well-settled under principles of ripeness, finality, and exhaustion that litigants may not attempt to end-run congressionally established rulemaking procedures for resolving an issue by seeking to litigate that issue directly in court. *See* JSSA 148-56sa (per curiam); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 430, 437-39 (1977) (matters subject to pending rulemaking were "not ripe for review," because final rules might "eliminate, limit, or cast [the constitutional claims] in a different light")

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[7] Statement of Reasons of Commissioner Thomas and Chairman McDonald in *In re The Coalition, et al.*, MUR 4624, at 8, 12 (FEC Sept. 7, 2001); *see also* Statement of Reasons of Commissioners Thomas and McDonald in *In re Republicans for Clean Air*, MUR 4982, at 9-10 (FEC Apr. 23, 2002); 148 Cong. Rec. 2144-45 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

[8] Section 214(c) directs the Commission to address (a) "payments for the republication of campaign materials"; (b) "payments for the use of a common vendor"; (c) "payments for communications directed or made by persons who previously served as an employee of a candidate or a political party"; and (d) "payments for communications made by a person after substantial discussion about the communication with a candidate or a political party."

[9] Portions of the new coordination rules have been challenged under the APA by Reps. Shays and Meehan. *See Shays* v. *FEC*, Civ. Action No. 02-CV-1984 (D.D.C.). To our knowledge, that is the only challenge that has been brought against the new coordination rules.

[10] Some of these challenges are also now moot. For example, appellants argued below that Section 214(b), which repealed the FEC's former rules, "substantially aggravated the constitutional violation" by creating a period when there were no definitional rules in place. *See* JSSA 144sa (per curiam). As the district court majority held, the Commission's promulgation of new rules rendered this "aggravation" claim moot. JSSA 136sa n.88, 144sa (per curiam).

(internal quotation marks omitted).[11] These ripeness principles apply fully in the First Amendment context. *See* JSSA 145sa, 149-55sa (per curiam); *Renne* v. *Geary,* 510 U.S. 312, 320-324 (1991).[12]

In addition, any challenge to the outcome of the FEC rulemaking on coordination must be brought in a single-judge district court in an action for judicial review under the APA. BCRA's special jurisdictional grant "does not extend to the consideration of FEC regulations." JSSA 144sa (per curiam); *see* JSSA 155-56sa (per curiam). The special jurisdictional provisions of BCRA Section 403(a) for a three-judge district court are limited to "any action . . . brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act." Those provisions do not extend the subject-matter jurisdiction of the three-judge district court to challenges to administrative rules promulgated pursuant to BCRA. Thus, there is no basis for challenging such rules outside the usual APA framework. *See also FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("[l]itigants may not evade" statutory procedures for judicial review of matters committed to agency's rulemaking process by commencing *de novo* actions in district court).[13]

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[11] *See also New Mexicans for Bill Richardson* v. *Gonzales*, 64 F.3d 1495, 1504 n.5 (10th Cir. 1995); *Public Citizen Health Research Group* v. *FDA*, 740 F.2d 21, 29 (D.C. Cir. 1984).

[12] *See also Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 378 (D.C. Cir.) (affirming dismissal of First Amendment challenges to allegedly ambiguous FECA language as "nonjusticiable as a constitutional matter and inappropriate for adjudication as a prudential matter," given the opportunities for clarification through the FEC), *cert. denied*, 449 U.S. 954 (1980); *Clark* v. *Valeo*, 559 F.2d 642, 647 (D.C. Cir.) (per curiam) (judicial review of various FECA issues inappropriate "because the unripeness of the action is so pervasive"), *aff'd*, 431 U.S. 950 (1977).

[13] Judge Henderson appears to have concluded that BCRA's jurisdiction should be extended to the FEC's rules on the theory that "extreme" hardship would otherwise result "because ordinary APA review of the regulations could take several months or even years." JSSA

Appellants have argued that they are not required to await the outcome of the FEC's rulemaking because (they contend) the First Amendment *requires* an outright "agreement" for any expenditure to be treated as "coordinated," whereas Section 214(c) *prohibits* the FEC from requiring an agreement to demonstrate "coördination." *See* JSSA 136-37sa & n.89, 146sa (per curiam); McConnell J.S. 16. The district court majority dissected this argument at length and correctly found it to be "inconsistent with the holdings of *Buckley* and its progeny." JSSA 146sa (per curiam); *see also* JSSA 138-43sa (per curiam). As the district court stressed, *Buckley* expressly endorsed treating expenditures made " 'at the request or suggestion of the candidate or his agent[ ]' " as "coordinated," a standard that clearly does *not* "equate to agreement." JSSA 139sa (per curiam) (quoting *Buckley*, 424 U.S. at 47 n.53) (internal citations omitted); 143sa (per curiam).[14]

It is therefore untenable to assert that any provision of Section 214 *requires* the FEC to violate any constitutional principle articulated in this Court's decisions applicable to coordinated expenditures. Accordingly, appellants have no basis for disregarding the rulemaking procedures established by Congress, which may well have resolved many if not all of their practical concerns without the need for litigation on this issue. *See* JSSA 148sa, 150-52sa, 155-56sa (per curiam). Of course, if appellants are dissatisfied with the outcome of the FEC's rulemaking, they can challenge the Commission's coordination rules in an action

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396sa. As the majority explained, that position does not take account of the fact that expedition and interim relief are available in APA challenges. JSSA 155-56sa & n.98-99 (per curiam). In any event, that argument cannot supply subject-matter jurisdiction to review rulemaking issues where no such jurisdiction has been granted by Congress.

[14] *See also Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 614 (1996) (plurality opinion) (*Colorado I*); (recognizing need to reach "general . . . understanding[s]"); *Colorado II*, 533 U.S. at 442 (same, with respect to "wink or nod" arrangements).

under the APA, in which they may raise both constitutional and statutory challenges to those rules.[15]

C. Section 214 makes two other minor changes to FECA outside the rulemaking context. Any challenges to those provisions that might be raised by appellants are insubstantial.

First, Section 214(a) extends FECA's longstanding regulation of coordination with candidates and candidate committees to include coordination with any "national, State, or local committee of a political party" as well. As the district court majority explained, Congress simply took the "same definition [that] has been applied to expenditures coordinated with political candidates for over 25 years," and applied it to coordination with parties. JSSA 135sa (per curiam). In doing so, Congress acted on the need to avoid circumvention of FECA's contribution limits, a necessity long recognized by both this Court and Congress.[16] Congress has found that, to enforce those contribution limits effectively, it is necessary to apply the coordination regulations to coordination with both candidates and parties. There is no basis in law or in the record to set aside this congressional judgment. As the district court majority concluded, "[appellants] have provided no explanation as to why the application of this coordination formula to the context of political parties chills political speech any more than when applied to expenditures coordinated with political candidates." JSSA 137sa (per curiam).

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[15] Judge Henderson expressed the view that vague coordination standards could threaten to interfere with protected lobbying and information-gathering activities. *See* JSSA 280-86sa, 386-96sa. Again, that point is a question for APA review of the FEC's coordination regulations rather than this litigation. Moreover, the sponsors of BCRA repeatedly emphasized that any rule that sought to find "coordination" based on genuine lobbying activities would be contrary to Congress's intent. *See, e.g.*, 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Consistent with that legislative intent, the FEC's new rules contain a safe-harbor provision for "responses to inquiries about legislative or policy issues." 68 Fed. Reg. at 455 (quoting new 11 C.F.R. § 109.21(f)). Thus, as the district court majority explained, appellants' claims that their genuine lobbying activities could be in jeopardy are speculative at best, and are insufficient to meet Article III standing requirements. *See* JSSA 147sa n.95. (per curiam).

[16] *See Colorado II*, 533 U.S. at 447, 464; *Buckley*, 424 U.S. at 46-47 & n.53, 78; 2 U.S.C. § 441a(a)(7)(B)(i).

Second, appellants may raise a First Amendment constitutional challenge to BCRA Section 214(d). As the district court majority explained, however, that provision simply amends 2 U.S.C. § 441b to bring its definitions into alignment with other sections of FECA. JSSA 156-57sa (per curiam). Thus, any challenge to Section 214(d) is likewise insubstantial and does not warrant this Court's plenary consideration.

CONCLUSION

In No. 02-1674, the Court should summarily dispose of appellants' challenges to Sections 211, 212, and 214. In other respects, the Court should note probable jurisdiction of the appeals in No. 02-1674 and No. 02-1675 and set those cases for plenary review.

Respectfully submitted,

ROGER M. WITTEN
WILMER, CUTLER &
PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
ERIC J. MOGILNICKI
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL RIFLE ASSOCIATION, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RESPONSE OF APPELLEES FEDERAL ELECTION COMMISSION, ET AL.

THEODORE B. OLSON
Solicitor General
Counsel of Record

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

STEPHEN E. HERSHKOWITZ
DAVID KOLKER
Assistant General Counsels
Federal Election Commission
Washington, D.C. 20463

ROBERT D. McCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

MALCOLM L. STEWART
GREGORY G. GARRE
Assistants to the Solicitor General

DOUGLAS N. LETTER
JAMES J. GILLIGAN
MICHAEL S. RAAB
DANA J. MARTIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

In 2002, the President signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. BCRA is designed to address various abuses associated with the financing of federal election campaigns and thereby protect the integrity of the federal electoral process. The question presented by this appeal is as follows:

Whether BCRA's funding limitations and disclosure requirements pertaining to "electioneering communications" are constitutional.

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-1675

NATIONAL RIFLE ASSOCIATION, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RESPONSE OF APPELLEES FEDERAL ELECTION COMMISSION, ET AL.[1]

OPINIONS BELOW

The opinions of the district court are not yet reported. See J.S. App. 4a.

JURISDICTION

The judgment of the district court was entered on May 2, 2003. Appellants' notice of appeal (J.S. App. 1a-3a) was filed on May 5, 2003. Appellants' jurisdictional statement was filed on May 6, 2003. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

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[1] This response is filed on behalf of the Federal Election Commission (FEC) and David M. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their capacities as Commissioners of the FEC; John Ashcroft, in his capacity as Attorney General of the United States; the United States Department of Justice; the Federal Communications Commission; and the United States of America. Those parties are appellants in Federal Election Commission v. Mitch McConnell, United States Senator, No. 02-1676.

STATEMENT

This case presents a facial challenge to the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. A three-judge panel of the District Court for the District of Columbia held that several provisions of BCRA violate the First Amendment to the Constitution, while sustaining other BCRA provisions against various constitutional challenges. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. See BCRA § 403(a)(3), 116 Stat. 114.

Appellants challenge various rulings of the district court rejecting appellants' constitutional challenges in part. As of this date, three other jurisdictional statements arising out of the same district court judgment are pending before this Court. See _Mitch McConnell, United States Senator_ v. _Federal Election Commission_, No. 02-1674; _Federal Election Commission_ v. _Mitch McConnell, United States Senator_, No. 02-1676 (see note 1, _supra_); _John McCain, United States Senator_ v. _McConnell, United States Senator_, No. 02-1702.

DISCUSSION

Under Section 403(a)(3) of BCRA, the final decision of the district court in this case is "reviewable only by appeal directly to the Supreme Court of the United States." 116 Stat. 114. Pursuant to Section 403(a)(4) of BCRA, this Court is directed "to advance on the docket and to expedite to the greatest possible extent the disposition of the * * * appeal." 116 Stat. 114. In addition to filing our own jurisdictional statement (see note 1, _supra_) to appeal the district court's rulings declaring certain provisions of BCRA to be invalid, appellees will defend on appeal those provisions of the statute that were sustained against appellants' constitutional challenges. Appellees agree, however, that appellants' jurisdictional statement identifies substantial questions of federal law and that this Court should note probable jurisdiction over the appeal.[2]

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[2] Contemporaneously with this response, appellees are filing a motion for expedited briefing schedule applicable to this appeal and to the other pending appeals (see p. 2, _supra_) from the district court's judgment in this case.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

LAWRENCE H. NORTON
General Counsel

ROBERT D. McCALLUM, JR.
Assistant Attorney General

RICHARD B. BADER
Associate General Counsel

PAUL D. CLEMENT
Deputy Solicitor General

STEPHEN E. HERSHKOWITZ
DAVID KOLKER
Assistant General Counsels
Federal Election Commission

MALCOLM L. STEWART
GREGORY G. GARRE
Assistants to the Solicitor General

DOUGLAS N. LETTER
JAMES J. GILLIGAN
MICHAEL S. RAAB
DANA J. MARTIN
Attorneys

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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *et al.*
Appellants

vs.

SENATOR MITCH MCCONNELL, *et al.*
Appellees.

On Appeal from the United States
District Court for the District of Columbia

Joint Motion to Affirm Summarily

JAMES BOPP, JR.
RICHARD E. COLESON
THOMAS J. MARZEN
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
(812) 232-2434

Attorneys for Barrett Austin O'Brock

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
COLBY M. MAY
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street SE
Washington, DC 20003
(202) 546-8890

Attorneys for Appellees Emily Echols, et al.

31 pp

QUESTIONS PRESENTED

Prior to the effective date of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, minors had the right to contribute to the committees of political parties and to candidates for federal office, subject to the same limitations that also applied to persons that had attained their majority. Section 318 of BCRA completely prohibits donations to committees and to candidates by minors. In the view of these Appellees, all of whom are minors, the question presented is:

> Whether the three judge district court erred in its judgment that the absolute ban on donations by minors was unconstitutional?

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In the Supreme Court of the United States

No. 02-1676
FEDERAL ELECTION COMMISSION, *et al.Appellants*
vs.
SENATOR MITCH MCCONNELL, *et al., Appellees.*

On Appeal from the United States District Court
for the District of Columbia

Joint Motion to Affirm Summarily

The minor Appellees, by their next friends, move this Court pursuant to Supreme Court Rule 18.6 for an Order summarily affirming the judgment of the three judge court of the United States District Court for the District of Columbia, which held that Section 318 of BCRA is unconstitutional.

As set forth within, the questions regarding the constitutionality of Section 318 of BCRA are so well-settled in the precedents of this Court that plenary review of the judgment striking Section 318 as unconstitutional is unwarranted.

STATEMENT OF THE CASE

1. Section 318 of the Act–

The Federal Election Campaign Act ("FECA") directly prohibits any person from making political contributions in the name of another. Title 2 U.S.C. § 441f (2002). That prohibition encompasses contributions made by a parent in the name of their minor child. FECA also directly prohibits any person from exceeding the maximum permitted political contribution. 2 U.S.C. § 441a. That limitation prevents the parent or guardian of a minor child from exceeding limitations on contributions by the ruse of donating in the name of their minor child. Thus, prior to the enactment of BCRA, federal law already prohibited circumventing campaign limits by making gifts in the names of children.

There was no evidence to suggest the need for such a flat ban. In fulfillment of its statutory enforcement responsibilities, the Federal Election Commission ("FEC") has investigated only the barest handful of instances of parental donations in the names of minor children.[1] Moreover, Congress made no factual findings in BCRA regarding problems related to donations by minors to the committees of political parties or to candidates in BCRA. Section 318 was added to the Act while the proposal was pending in the House. No explanation for the provision was offered during debate there.[2] The only explanation offered for the ban came during the Senate debate on the Act.[3] There, Senator John McCain stated that the ban was needed

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[1] The Federal Election Commission admitted in discovery below that one percent or fewer of its investigatory "Matters Under Review" "involved covered political contributions by minors or by parents made in the name of the minor children."

[2] The Appellants acknowledged below the absence of any explanation related to this provision in the House debates on BCRA.

[3] *See* 148 Cong. Rec. S2145-46 (daily ed. March 20, 2002) (statement of Sen. McCain).

to address the problem of parental circumvention of donation limitations by giving contributions in the names of their minor children.[4]

Nonetheless, when it enacted BCRA, Congress included Section 318, which amends FECA by adding to it a new section 324, prohibiting anyone seventeen years of age or younger from making any contribution to a candidate, or a contribution or donation to a national or state political party committee:

> An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution to a committee of a political party.

Title III, § 318, H.R. 2356, 107th Cong. (2002) (enacted); FEC Jurisdictional Statement at 71a. Judge Henderson, in her separate opinion below, described Section 318 as "fall[ing] into the category of 'who knows where it came from.'" *See* Op. of Henderson, J., at 326; Supplemental Appendix to Jurisdictional Statements at ___ ("Supp. App.").

2. The Decision Below–

The three-judge panel unanimously agreed that Section 318 violated the Constitution:

> Section 318 prohibits donations by minors to federal candidates, or to a committee of a political party. All three judges agree that this section is unconstitutional.

---

[4] *See* 148 Cong. Rec. S2145-48 (daily ed. March 20, 2002) (statement of Sen. McCain).

> Each judge writes a separate concurrence setting forth his/her reasoning as to this section.

Per Curiam Op. at 11; Supp. App. ___. As indicated, all three judges wrote separately to explain their reasoning for that conclusion.

Judge Henderson concluded that whether analyzed under strict scrutiny or under "*Buckley* scrutiny," Section 318 was unconstitutional. In Judge Henderson's view, the Appellants' arguments for the constitutionality of Section 318 failed for two principal reasons:

> First, section 318 does not serve any governmental interest, much less a "sufficiently important" or "compelling" one.
>
> * * * *
>
> Second, even if section 318 served to prevent actual or apparent corruption of federal candidates in a material way not served by existing law, the provision could not be sustained because—far from being "closely drawn" or "narrowly tailored"—it is grossly overbroad.

Op. of Henderson, J. at 328, 331; Supp. App. ___-___. In addition, Judge Henderson found that the evidence proffered to justify Section 318 as a tool to prevent corruption "is remarkably thin." Op. of Henderson, J. at 329, Supp. App. ___.

Judge Kollar-Kotelly, like Judge Henderson, found it unnecessary to decide between strict scrutiny or "*Buckley* scrutiny." In Judge Kollar-Kotelly's view, "Defendants have failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important government interest." Op. of Kollar-Kotelly at 611, Supp. App. ___. *See also id.*; Supp. App. ___ ("the evidence presented is insufficient to support government action that abridges constitutional freedoms").

Judge Leon, while concurring in the conclusion of Judges Henderson and Kollar-Kotelly that Section 318 was unconstitutional, wrote "only to explain why [he] believe[d] th[e] Court should evaluate this provision under the strict-scrutiny standard of review." Op. of Leon, J., at 106; Supp. App. ___.

3. Facts Relevant to the Challenge to Section 318

a. *Echols v. FEC*

Appellees Emily Echols, Daniel Solid, Hannah and Isaac McDow, Jessica Mitchell, and Zachary White are citizens of the United States. Echols, Solid and White reside in Georgia, the McDows reside in Alabama, and Mitchell resides in Florida. Each of them is aged seventeen years or younger. These Appellees are seriously interested in government, politics, and campaigning. Their interest is demonstrable, having, amongst them, participated in campaigns as volunteers, assembled signs, distributed literature, walked precincts, even traveling great distances to campaign door-to-door for candidates they support. In such ways and others, they have shown their commitment to using their rights to freedom of association and expression to effect political changes in accord with their beliefs and opinions.

These minors possess monies that they have earned – either by working outside their homes or by performing chores around their homes for pay – or that they received as gifts. No portion of these monies consists of funds given to them for the purpose of making political contributions. The parents of the Echols plaintiffs are aware of the federal campaign laws and the restrictions they impose; and they have obeyed those laws.

For these young citizens, contributing money to candidates and to the committees of political parties are forms of expression of support for those candidates and committees. Moreover, by making such contributions of money, they have already associated with those selected candidates and committees of political parties. The minors Appellees plan to, and intend to, exercise their rights of political association and expression by making candidate and committee contributions, during their minority, into the future. But for the enactment of Section 318 and its ban on such political contributions by them, they would be free to do so.

b. *McConnell v. FEC*

Appellee Barret Austin O'Brock is a minor living in Louisiana.[5] He declared his general intention to contribute to federal candidates in future elections, including in the 2002 and 2004 election. Specifically, he stated his intention to contribute at least $20 of his own money (not received from any other person for purposes of the contribution) to John Milkovich, a candidate for U.S. Representative for the Fourth Congressional District of Louisiana, prior to the November 2002 general election. Barret knows candidate Milkovich personally because the candidate was Barret's Sunday School teacher for two years.

SUMMARY OF ARGUMENT

The day is long past when America's teenagers and children may be consigned to constitutional steerage, there to "enjoy" all the benefits of third class citizenship. As early as *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), it has been without question that American children are "whole persons" in the constitutional sense. Concomitantly, they possess the same constitutional rights and liberties as adults, even if, in certain circumstances, such as the special case of public schools, the contours of those rights vary slightly from the rights of their adult counterparts. *See Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969).

---

[5] In the court below, Trevor M. Southerland, then a minor, also challenged Section 318. On May 28, 2003, Mr. Southerland attained his majority. Consequently Section 318 no longer deprives him of the rights to freedom of speech and association that he complained of, and vindicated below. Although he has reached his majority, the claim in the *McConnell* litigation was brought by him and by Barret O'Brock, who is still in his minority, and by the plaintiff minors in the *Echols* litigation, all of whom are also still in their minority. Consequently, the apparent mootness of Mr. Southerland's claim does not render moot the judgment below that Section 318 is unconstitutional; nor does his majority warrant an Order vacating the injunction against enforcement of Section 318 as to those Appellees still in their minority.

Nonetheless, in a stunning strike against those rights, Congress enacted the complete ban embodied in Section 318. All three of the judges below agreed that Section 318 was unconstitutional. A majority – Judges Henderson and Kollar-Kotelly – agreed that it was unnecessary to decide whether a more or less stringent standard of review applied because of the flagrant unconstitutionality of the flat ban. Judge Leon did not disagree with that view, but instead focused on the reasons for applying strict scrutiny to Section 318.

The flat ban on donations by minors to political party committees and to candidates flouts several constitutional norms relevant to laws affecting associational freedoms and expression. In accord with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976), the ban on all political contributions by minors is subject to the closest scrutiny.[6] But even if the ban is subjected to the lesser scrutiny applied to donation limitations in *Buckley*, the court below correctly concluded that it could not withstand such scrutiny.

The ban is severely flawed. It is not drawn in service of a sufficiently important government interest. Even assuming a sufficiently compelling justification for Congress to act, the ban on political contributions by minors is not drawn narrowly in service of the government interests at stake.

ARGUMENT

I. SECTION 318 VIOLATES MINORS' CONSTITUTIONAL RIGHTS

As a matter of first principles, a complete ban on political contributions strikes directly at the heart of the First Amendment. As this Court explained, in addressing statutory ceilings on the amount of personal contributions: "The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Nothing in *Buckley* or its progeny suggests that the injury of such a flat prohibition on even token contributions is felt any less keenly by, or inflicts less grievously a wound upon the rights of, citizens of the United States who are in their minority.

A. MINORS POSSESS FIRST AMENDMENT RIGHTS OF FREEDOM OF ASSOCIATION AND SPEECH.[7]

If, as this Court has said, student do not "shed their Constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969), then there can be no question that they possess those rights before they pass through those gates. Here, as with analogous contributions by their adult counterparts, the political contributions of minors are, at a minimum, an exercise of the constitutional right to political association. *Buckley*, 424 U.S. at 15 ("The First Amendment protects political association as well as political expression;" "[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas") (citations and internal quotation marks omitted). For these minors, contributions to candidates and committees of political parties serve to express support for and association with selected candidates and committees.[8]

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[6] As explained in *Buckley*, 424 U.S. at 16-18, Section 318 must be subjected to something more than the scrutiny embodied in *United States v. O'Brien*, or the time, place and manner analysis employed in the Public Forum cases, *e.g.*, *United States v. Grace*, 461 U.S. 171 (1983).

[7] This case does not address the lawful authority of parent or guardians over minors in their care and under their control, but rather, it addresses the imposition by Congress of a complete ban on the exercise by minors of rights of speech and association.

In *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), the Court noted that government intrusion into a minor's fundamental

rights may be justified based on "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." None of those special circumstances, however, is implicated by this statutory restriction on core First Amendment rights.

The Government makes the novel argument, see Jurisdictional Statement at 28, FEC v. McConnell (docketed May 15, 2003), that "any First Amendment interests that minors may have in participating in the financing of federal elections is substantially limited by the fact that minors have no constitutional right to vote in such elections." Unsurprisingly, the Government does not rely on any decision of this Court (or, for that matter, of any other court) for this proposition. It is insupportable and without merit. While it is true that minors do not possess the right to vote, it is just as true that they pay taxes and possess the right to freedom of speech and of association. No limiting principle is enunciated in the Government's standard to prevent the suppression of rights of expression in a variety of circumstances.

In the absence of such a limiting principle, the most unacceptable and unconscionable results follow in any case where a government program or action affects selected groups or individuals, but leaves unaffected others who may, nonetheless, hold views or opinions that they would express about the Government's action. Women, for example, are not required to register for selective service. In this sense, women are not affected by the registration requirement.

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[8] Of course, special circumstances exist in which the exact dimensions of the constitutional rights enjoyed by minors vary from those of their adult counterparts. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975). Most of the cases discussing the questions related to minors' First Amendment rights, for example, arise in the special environment of the school. But even there, this Court has stated that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect[.]" *Tinker*, 393 U.S. at 511. Other special circumstances include, for example, restricting minors' access to obscene materials, *see, e.g.*, *Ginsberg v. New York*, 390 U.S. 629, 637-38 (1968); restricting minors' access to abortion, *see, e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). *Cf. Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (upholding City's adoption of special use classifications for dance halls to prevent juvenile crime and victimization) (classification subject to rational basis scrutiny because no fundamental right impinged or suspect category created).

According to the Government's approach, the federal government could suppress the speech and associational rights of a group of mothers of draft-eligible young men. Other examples clamor for attention. Men, using the Government's rationale, could be silenced in either their support for or opposition to abortion rights, because, after all, men cannot become pregnant. All persons in the United States who are not the descendants of African Americans once held in involuntary servitude could be silenced on the question of whether a government program of reparations should be undertaken.

The Government's rationale fails to account for the terms of the First Amendment, which do not admit of an entire exception from protection for minors. Nor does the Government seek to square its approach with the decisions of this Court that have recognized that minors are persons in the constitutional sense and possess rights under the First Amendment. The Government casually ignores the certainty that even if minors are not protected from discrimination on the basis of age in voting, every federal election in this Nation is a matter of significance to them and to their future. The examples cited above, and the multitude more that can readily be drawn from a topical index of cases decided by this Court or the Popular Names Table of United States Statutes, adequately dispose of the simplistic "they can't vote so they don't count" approach taken by the Government.

B. There Is No Sufficiently Compelling Governmental Interest to Justify the Denial of Minors' Constitutional Rights of Speech and Association.

To discern whether Congress has gone too far in banning political contributions by minors, it is essential to ask what Congress sought to accomplish. Apparently, Congress sought to address parental circumvention of donation limitations and channeling of gifts. In the court below, the Appellants offered various justifications in defense of Section 318, including avoiding corruption and the appearance of it, assuring the legitimacy of the electoral system, preventing circumvention of campaign contribution limits, facilitating deterrence and detection of violations of federal campaign limitations, and restoring public faith in the system.

The concern about circumvention of donation limitations by wealthy parents using the names of their minor children – to which Senator McCain adverted on the Senate floor[9] – is unsupported by any substantial evidence. Both Judge Henderson and Judge Kollar-Kotelly took note of the "thinness" of the evidence supporting the need for Section 318. Judge Henderson found "the government's evidence of corruption-by-conduit . . . remarkably thin . . . ." Op. of Henderson, J., at 329; Supp. App. ___. Judge Kollar-Kotelly noted, the Government "failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important governmental interest . . . ." Op. of Kollar-Kotelly, J., at 611; Supp. App. ___. In light of that failure, Judge Kollar-Kotelly concluded, "the minimal evidence presented does not establish that circumvention of campaign finance laws by parents of minors supports the required governmental interest." Op. of Kollar-Kotelly, J., at 612; Supp. App. ___.

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[9] *See* nn. 3-4 , *supra* and accompanying text.

Even assuming that a statutory regimen may have been necessary to remediate the unsubstantiated problems of parental circumvention and excess giving, Section 318 is unjustifiable. A statutory ban on political contributions by minors burdens substantially more political association and speech than necessary precisely because its proscriptions apply to individuals who never have engaged in prior unlawful behavior.

The minors' donations to committees and candidates embody classic exercises of the right to freedom of political association and freedom of speech. No *valid* government interest supports this ban. Such a complete ban was not at issue in *Buckley*. Instead, because FECA permitted a contribution in some amount, this Court concluded that the ceiling on such contributions survived scrutiny. Here, Congress utterly prohibits even a token donation. That complete prohibition, to the contrary of the FECA *limitations* at stake in *Buckley*, encompasses so much speech and association unrelated to any regulable evil that it is "substantially broader than necessary to achieve the interests justifying it." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989).

Nor can concerns about abuses by a few parents, who

might circumvent restrictions on their own donations by using their minor children as surrogates, justify a flat ban on contributions by minors. Such circumvention is already illegal under FECA provisions predating BCRA and not challenged in this litigation. *See* Title 2 U.S.C. §§ 441a and 441f (2002). Moreover, the gift of money by a minor need not come *from* parental sources or *at* parental direction. For example, Jessica Mitchell, one of the minor Appellees in this case, donated money to a candidate for the United States House of Representatives that she had earned from a small pet care business that she and a friend started in their neighborhood. Each of the other minors, likewise, has monies that were not received as part of a scheme or plan of their parents to circumvent FECA's limitations on contribution amounts. Yet donations by the minor Appellees are barred by Section 318.

Oddly absent from the justifications proffered by the Appellants below is any assertion that money from minors is, in its essence, corrupting or evil. In fact, the proffered justifications exclusively focus on the alleged abuses of parents, which abuses already are directly prohibited by FECA. Moreover, the Government's interest in preventing corruption or the appearance of corruption is no greater (and arguably much less) with respect to minors than with respect to adults. If any contribution is corrupting, then all contributions should be banned: contributions of all sizes, contributions from all sources.

Plainly, the government interest in preventing parents from circumventing contribution limits by channeling additional contributions through their children is not sufficiently compelling to justify Section 318.

C. Section 318 Is Not Narrowly Tailored to the Asserted Governmental Interest.

Two aspects on the statute are significant to an appropriate constitutional analysis of the fit between the asserted government purposes of the ban and the means chosen to serve them. First, the ban applies to individual minors whether or not their exercise of associational expression and free speech have threatened the interests identified by the Appellants. These minors are barred from symbolically expressing their association with candidates and committees by even token donations despite the utter lack of evidence that these minors have subverted campaign finance limitations, or that their parents or guardian have used them for that purpose. The ban applies to all gifts by minors even though there is no reason to conclude that such gifts, taken individually or in the aggregate, either by their nature or practice, works injury to the identified government interests.

Second, unlike the direct bans on giving contributions in the name of another, 2 U.S.C. § 441f (2002), and on exceeding limitations on contribution amounts, 2 U.S.C. § 441a(a)(1)(A), the ban on contributions by minors works a *prophylactic* suppression of constitutionally protected rights of minors. As this Court has repeatedly admonished, however, "broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 458 (1963).

In *Buckley*, of course, this Court upheld personal contributions *ceilings*, not a complete ban. A *ban* on such gifts could not, however, pass muster. In fact, one of the signal justifications offered in *Buckley* for a contribution ceiling was that a ceiling left donors free to make some donation:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution . . . .

424 U.S. at 21. A *ban* that entirely prevents a minor from giving "to a candidate or campaign," does not "permit[] the symbolic expression of support evidenced by a contribution."

What is called for in this analysis is an examination of the fit between purpose and means. For example, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), the Court upheld an ordinance that prohibited the posting of signs on public property, but only after concluding that the ordinance "responds precisely to the substantive problem [of visual blight] that concerns the City." That cannot be said of the contribution ban; it closely resembles the anti-littering law struck down in *Schneider v. State*, 308 U.S. 147 (1939). There, as here, the state "could have addressed the substantive evil without prohibiting expressive activity," or adopting a "prophylactic rule." *Taxpayers for Vincent*, 466 U.S. at 810. Similarly, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), also assume a fit between means and ends that is lacking here. Thus, in *Ward*, an ordinance requiring that city employees operate sound amplification equipment was upheld because it directly advanced the city's interest in controlling noise. 491 U.S. at 800. Likewise, in *Clark*, a regulation barring protesters from sleeping in a park was upheld because it "narrowly focused on the Government's substantial interest in maintaining the parks in the heart of our Capitol in an attractive and intact condition." 468 U.S. at 296.

These cases all show that Congress must craft its statutes narrowly when regulating constitutional rights, and must limit its interests to those unrelated to the suppression of expression. *Buckley*, 424 U.S. at 17-18. Below, the Appellants identified the interests supposedly served by the statute. Unfortunately, the ban is not closely drawn to promote those interests. Instead, it focuses directly on expressive activities. It thus burdens substantially more speech than necessary to accomplish the state's goal and cannot be sustained.

The interests identified by the Appellants go to abuses by persons other than minors. But the ban targets constitutional exercises by minors. Consequently the ban does not target the "evil" – namely, circumvention or corruption – that motivated Congress to enact it. *Cf. Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil"). Of course, Congress can address circumvention and corruption problems directly; indeed, it already has done so with its enactment of 2 U.S.C. §§ 441a and 441f (2002).

Neither the minor Appellees nor their parents have challenged those existing provisions of FECA. Those unchallenged and existing restrictions directly serve the interests that are, at best, only obliquely served by Section 318's ban on political contributions by minors. Instead, the minors' ban goes further and in a different direction entirely. Section 318 prohibits minors' political contributions, even when such contributions are not made in circumvention of FECA's contribution limits. It prohibits contributions of emancipated minors. It prohibits contributions by orphaned minors. And it prohibits contributions of those minors who, with consent of their parents, have enlisted in the United States Armed Forces.[10]

These minors "are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *FEC v. National Conservative PAC*, 470 U.S. 480, 501 (1985). The First Amendment freedoms put in jeopardy by Section 318 are supremely precious. This Court has explained, "because First Amendment freedoms need 'breathing space' to survive, government may regulate in this area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). While this Court has instructed that "[p]recision of regulation must be the touchstone" when regulating activities protected by the First Amendment, Section 318 apes that precision and instead broadly bans the exercise of pristine constitutional freedoms.

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[10] *See* Title 10 U.S.C. § 505 (2002) (authorizing enlistment of minors).

Ready and less burdensome alternatives exist to ensure that current election laws are not manipulated by means of the channeling of funds through minors. In fact, the Federal Election Commission never recommended such a ban to Congress, preferring instead to suggest less drastic means.[11]

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[11] The FEC has proposed to Congress that it adopt legislation related to contributions by minors to federal candidates and committees of political parties. The FEC has submitted Annual Reports to Congress and to the President as required by law. Those Reports provide information about the regulatory and enforcement activities of the Commission, and they also communicate proposals for legislative action.

In its 1992 Annual Report, the FEC recommended that Congress establish a minimum, but unspecified, age for contributors. *See* 1992 Annual Report at 64. In support of that recommendation, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another." *Id.*

In each of its Annual Reports for the years 1993-98, the FEC recommended that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf. *See, e.g.*, 1993 Annual Report at 50. The FEC explained, "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another." *Id.*

In its 1999 and 2000 Annual Reports, the FEC recommended that Congress establish a minimum age of 16 for making contributions.

Going beyond the all-or-nothing approach of the ban, Congress could have established a family contribution cap or employed a rebuttable presumption regarding the voluntariness of minors' contributions.[12] In fact, Congress

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See 1999 Annual Report at 50; 2000 Annual Report at 43. Regarding this proposal, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age of 16 for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another." *Id.*

[12] The States have undertaken such less burdensome regimens of regulation, by which minors are permitted to continue making donations while the putative harms of circumvention and corruption are avoided by less draconian means. At least fourteen States have enacted less cumbersome and prohibitive regimes for the regulation of political donations by minors to candidates for state election:

Alaska: A minor may not contribute money or anything of value given to the child by a parent for that purpose. *See* 2 Alaska Admin. Code 50.258 (2002).

Arizona: A contribution from an unemancipated minor is treated as a contribution from his parents. *See* A.R.S. § 16-905 (2001).

Arkansas: When a person provides his/her dependent child with funds to make a contribution to a candidate, the contribution shall be attributed to such person for purposes of applying the contribution limit. *See* A.C.A. § 7-6-205 (2002).

Connecticut: No individual who is less than 16 years of age shall make a contribution or contributions, in excess of thirty dollars. *See* Conn. Gen. Stat. § 9-333m (2001).

Florida: No unemancipated child under the age of 18 years may

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make a contribution to any candidate or political committee in excess of $100. *See* Fla. Stat. § 106.08 (2002).

Hawaii: A contribution by a dependent minor is reported in the name of the minor but counts against the contribution of the minor's parent or guardian. *See* HRS § 11-204 (2002).

Kansas: Contributions made by unemancipated children under 18 years of age are considered contributions made by the parent or parents of such children. *See* K.S.A. § 25-4153 (2001).

Kentucky: Minors' contributions may not exceed $100. *See* KRS § 121.150.

Massachusetts: Persons under age 18 may not contribute more than $25 per calendar year, in the aggregate. *See* Mass. Ann. Laws ch. 55, § 7 (2002).

Michigan: A contribution of expenditure by a dependent minor shall be reported in the name of the minor but shall be counted against the contribution limitations ofthe minor's parent or guardian. *See* MCLS § 169.253 (2002).

Oklahoma: For the purposes of limitations on contributions, those made by husband, wife and all unemancipated children under the age of 18 are aggregated to a single family unit. *See* 21 Okl. St. § 187.1 (2002).

South Carolina: Contributions by unemancipated children under 18 years of age are considered contributions by their parents. *See* S.C. Code Ann. § 8-13-1330 (2001).

Texas: A contribution by a child under the age of 18 of an individual is considered to be a contribution by the individual. *See* Tex. Elec. Code § 253.158 (2002).

West Virginia: Minors under the age of 18 may make a contribution if (a) the decision to contribute is made knowingly and

could simply require the FEC and the Attorney General to enforce the current restrictions.

II. THE BAN ON CONTRIBUTIONS BY MINORS IS OVERBROAD.

Judge Henderson correctly concluded that Section 318 is unconstitutionally overbroad." Op. of Henderson, J., at 331-33; Supp. App. ___. Section 318 prohibits every contribution of money by a minor to a federal candidate or a committee of a political party. The prohibition applies to servicemen and women who are defending our Nation, 10 U.S.C. § 505 (2002), to emancipated minors, and to minors – such as these Appellees – who possess independence of judgment and separate financial means to make such donations. The ban is not limited to parents or guardians with a history of bad conduct; it assumes that no minor is to be trusted not to abuse his or her rights.

This is a case, not of mere "substantial overbreadth" but of *inherent* overbreadth: "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Secretary of State v. J. H. Munson Co.*, 467 U.S. 847, 865-66 (1984). *See id.* at 864-65 (in case of *inherent* overbreadth, the more demanding "substantial

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voluntarily by the minor child; (b) the funds, goods or services are owned and controlled exclusively by the minor child; (c) the contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or not in any other way controlled by another individual. *See* W. Va. Code § 3-8-12 (2002).

overbreadth" test does not apply). This ban "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of [constitutional] freedom[s]." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Such an "overbroad" law "directly restricts protected expressive activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Munson*, 467 U.S. at 965 n.13. The ban flies in the face of established doctrine:"Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 801 (1988) (internal quotation marks and citation omitted).

III. SECTION 318 VIOLATES THE MINORS' RIGHTS TO EQUAL PROTECTION.

Because Section 318 is a complete prohibition, not merely a limitation on the amount of a permissible contribution, it is subject to strict scrutiny, *see Buckley*, 424 U.S. at 24-25. In addition to the associational freedom and free speech claims that they have presented, Section 318 also violates these Appellees' rights to equal protection guaranteed to them by the Fifth Amendment Due Process Clause. They have been selectively subjected to the burdensome provisions of the ban solely because of the age. Put another way, their exercise of fundamental First Amendment rights is differentially burdened, in an unjustifiable manner, because of their age. Consequently, for this separate reason, Section

318 is subject to strict scrutiny, which it cannot survive.[13]

CONCLUSION

For all the foregoing reasons, the judgment of the District Court below, holding that Section 318 of the Bipartisan Campaign Reform Act is unconstitutional, should be affirmed summarily by this Court.

Respectfully submitted,

JAMES BOPP, JR.
RICHARD E. COLESON
THOMAS J. MARZEN
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
(812) 232-2434

Attorneys for Barrett Austin O'Brock

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
COLBY M. MAY
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street, SE
Washington, DC 20003
(202) 546-8890

Attorneys for Appellee Emily Echols, et al.

May 30, 2003.

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[13] Because, in most respects, the analysis here would track the analysis applied in Argument I(B) and (C), it is unnecessary to duplicate those arguments here.

(4)

Supreme Court, U.S.
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MAY 29 2003

OFFICE OF THE CLERK

No. 02-1674

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

REPLY BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

FLOYD ABRAMS SUSAN BUCKLEY BRIAN MARKLEY CAHILL GORDON & REINDEL LLP 80 Pine Street New York, NY 10005 (212) 701-3000	KENNETH W. STARR *Counsel of Record* EDWARD W. WARREN KANNON K. SHANMUGAM KIRKLAND & ELLIS 655 Fifteenth Street, N.W. Washington, DC 20005 (202) 879-5000

(*additional counsel on signature block*)

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INTRODUCTION

Consistent with the congressional mandate that the appeals in the campaign finance litigation be "advance[d] on the docket and expedite[d] to the greatest possible extent," BCRA § 403(a)(4), appellants filed their jurisdictional statement within hours of the decision below. Appellants did so because they believed that this Court should note probable jurisdiction on all of the questions presented in an expedited manner, thereby leaving the Court as much time as possible to consider the case on the merits. The Executive Branch appellees share this view, having urged this Court to note probable jurisdiction on all of the questions presented "[i]n order to facilitate expeditious resolution of this case in accordance with the statutory mandate," Executive Branch Resp. 7, and having further proposed that this Court note probable jurisdiction on an expedited basis, *see* Mot. of Executive Branch Defendants for Expedited Briefing Schedule 2.

The Intervenor appellees, however, have taken a dramatically different approach. While agreeing on the one hand that this Court should note probable jurisdiction within a matter of days, *see id.* at 1, they suggest on the other, in a voluminous and at times belligerent filing, that this Court should "summarily dispose of appellants' challenges" to certain statutory provisions, Intervenors Resp. 13. Leaving aside the curious fact that the intervenors repeatedly stop short of asking this Court to *affirm* the district court's decision as to those provisions — which is the appropriate course where a party believes that this Court should not set issues in an appeal for briefing and oral argument, *see* S. Ct. R. 18.6 — intervenors' attempt to put points on the board is both imprudent and unwise. Intervenors' arguments regarding the justiciability of appellants' challenges to certain provisions of BCRA go directly to the *merits* of the district court's rulings on those provisions — rulings on which the three members of the district court did not even agree. Those justiciability rulings themselves present substantial questions of law, and this Court should await plenary briefing on those questions rather than attempting to resolve them at this abbreviated preliminary stage. The Court should thwart intervenors' scorched-earth litigation strategy, and note probable jurisdiction on all of the questions presented in this appeal.

ARGUMENT

1. Intervenors first insinuate that this Court should refuse to note probable jurisdiction on appellants' challenge to section 212 of BCRA, which imposes disclosure requirements on persons who merely enter into a contract to make disbursements for independent expenditures, even before those outlays are actually made.[1] To be sure, the district court did conclude that appellants' challenges to section 212 were unripe in light of the FEC's implementing regulations, *see* Supplemental Appendix ("Supp. App.") 132sa-133sa, which seemingly construe section 212, contrary to the plain language of the statute, *not* to require advance disclosure, *see* 68 Fed. Reg. 421, 452-53 (2003) (to be codified at 11 C.F.R. § 109.10). One would never know from intervenors' response, however, that Judge Henderson dissented from that holding, and would have struck down section 212 in its entirety. She noted that section 212 would "in many instances * * * require reporting of expenditures not yet made." Supp. App. 381sa. She reasoned that this Court has long held that "advance reporting and registration requirements are 'quite incompatible with the requirements of the First Amendment.'" *Id.* at 383sa (quoting *Thomas v. Collins*, 323 U.S. 516, 540 (1945)). And she specifically rejected the defendants' reliance on the FEC's regulations, noting that it was a "dubious proposition" whether the FEC could read the "advance notice" requirement out of the statute altogether. *Id.* at 383sa n.154.[2]

The three-judge court plainly disagreed, therefore, as to whether a narrowing regulation always renders a challenge to a statutory provision unripe, even where, as here, the statutory provision unambiguously infringes on important First Amendment values and the saving construction proffered by the regulation "press[es] statutory construction to the point of disingenuous evasion." *United States v. Locke*, 471 U.S. 84, 96 (1985) (internal quotation omitted). In light of this substantial disagreement, the Court should note probable jurisdiction on appellants' challenge to section 212 of BCRA, and resolve that challenge only after full briefing and argument.

2. Intervenors next imply that this Court should refuse to note probable jurisdiction on appellants' challenges to the "coordination" provisions of BCRA. Those provisions, however, are some of the most important in BCRA, and appellants' challenges to those provisions are both justiciable and substantial.

a. As a threshold matter, intervenors suggest that any challenge to section 211 of BCRA, which defines "independent expenditure" as "an expenditure * * * that is not made in concert or cooperation with or at the request or suggestion of" a candidate or political party committee, has been waived. *See*

---

[1] Intervenors suggest that appellants have "challenge[d]" the analogous "advance notice" requirement of BCRA § 201, which adds similar disclosure requirements with respect to disbursements for "electioneering communications." *See* Intervenors Resp. 3 n.2. Notwithstanding the references to that provision in the jurisdictional statement, *see* J.S. i, 14-15, it is clear that appellants prevailed as to that provision, and that appellants therefore do not seek to "appeal" from the district court's decision themselves. As intervenors note, *see* Intervenors Resp. 3 n.2, the government has appealed from the district court's decision on section 201, *see* Executive Branch J.S. 26-27, and appellants agree that this Court should note probable jurisdiction on that issue. And intervenors correctly note that appellants do not contest the district court's ruling that the "advance notice" provision of section 201 can be severed from the remainder of that section.

[2] Judge Henderson further noted that she would have struck down section 212 even if the provision could be narrowed to exclude advance disclosure, on the ground that the stringent deadlines for reporting even expenditures that were actually made were not narrowly tailored to a compelling governmental interest. *See* Supp. App. 383sa n.154.

Intervenors Resp. 5-6. That argument, however, is nothing more than a strawman. Appellants are plainly not challenging section 211, as counsel made clear before the district court. Tr. 342. To the extent that appellants cite section 211 at all in their jurisdictional statement, *see* J.S. i, 15, they do so only descriptively, because the definition of "independent expenditure" in section 211 — which closely tracks the preexisting definition of "independent expenditures" in FECA — provides the backdrop for the new, broader definition of "coordinated" expenditures in section 214.

b. The heart of appellants' challenge to BCRA's coordination provisions is their challenge to section 214. That section (in apparent contradiction to section 211) treats any expenditure made merely in *consultation* with a political party committee as coordinated, rather than independent, *see* BCRA § 214(a); repeals prior FEC regulations narrowly defining coordination, *see* BCRA § 214(b); and demands that the FEC promulgate new regulations that do "not require agreement or formal collaboration to establish coordination," *see* BCRA § 214(c).

The district court rejected plaintiffs' challenge to section 214 on the ground that an agreement is not constitutionally required as a predicate for a finding of coordination, *see* Supp. App. 138sa-143sa, and further rejected plaintiffs' challenge to section 214(c) on standing and ripeness grounds, *see id.* at 144sa-156sa. Intervenors suggest that these conclusions are so unimpeachable as not to warrant plenary review. Once again, however, intervenors virtually ignore Judge Henderson's dissenting opinion, which took issue with all of the majority's conclusions. Judge Henderson began by noting that this Court has never specifically defined what makes an expenditure "coordinated," and therefore subject to the limits applicable to contributions. *See id.* at 386sa. However, relying heavily on the key lower-court decision in the area, *see FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), she concluded that mere

consultation with a candidate or political party was insufficient to render an expenditure "coordinated" for constitutional purposes, *see* Supp. App. 385sa-392sa. As to section 214(c) more specifically, Judge Henderson agreed with appellants that *any* regulation that did not require "agreement or formal collaboration" to establish coordination would be invalid, noting this Court's command that "'simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one.'" *Id.* at 392sa-395sa (quoting *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 621-22 (1996) (plurality opinion) (*Colorado I*)). And she specifically rejected the majority's holding on justiciability, on the grounds that, under the test articulated in this Court's seminal case on pre-enforcement review, *no* FEC regulation could be promulgated that would pass constitutional muster, and the parties would suffer hardship absent immediate judicial review because of the risk that current activity could render future expenditures "coordinated." *See id.* at 395sa-396sa (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)).

The judges below reached different conclusions, therefore, not only as to the justiciability of appellants' challenges to one of BCRA's coordination provisions, but also as to the merits of appellants' First Amendment challenges to that provision and others. The Court should note probable jurisdiction on appellants' challenges to sections 202 and 214 of BCRA,[3] and await full briefing and argument before ruling on them.[4]

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[3] Section 202 applies the coordination provisions of BCRA to disbursements for electioneering communications. As intervenors themselves recognize, *see* Intervenors Resp. 5 n.5, appellants' challenge to section 202 rises or falls with appellants' other challenges.

[4] Inexplicably, given the ardor with which they argue that this Court should not consider other claims that the district court held to be nonjusticiable, intervenors do not suggest that this Court should refuse to note probable jurisdiction over appellants' challenge to section 305, which burdens the ability of federal candidates to refer to other candidates in their advertising.

CONCLUSION

The Court should note probable jurisdiction on all of the questions presented, and set the case for briefing and oral argument.

Respectfully submitted,

Floyd Abrams
Susan Buckley
Brian Markley
Cahill Gordon &
Reindel LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

Attorneys for Mitch McConnell and National Association of Broadcasters

Kathleen M. Sullivan
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

Attorney for Mitch McConnell

G. Hunter Bates
1215 Cliffwood Drive
Goshen, KY 40026
(502) 473-7557

Attorney for Mitch McConnell and Thomas E. McInerney

Kenneth W. Starr
Counsel of Record
Edward W. Warren
Kannon K. Shanmugam
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Attorneys for Mitch McConnell; Southeastern Legal Foundation, Inc.; Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

Jan Witold Baran
Thomas W. Kirby
Lee E. Goodman
Wiley, Rein & Fielding
LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Attorneys for Mitch McConnell

Valle Simms Dutcher
L. Lynn Hogue
Southeastern Legal
Foundation, Inc.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

Attorneys for Southeastern Legal Foundation, Inc.; Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

May 29, 2003

02-1674

June 6, 2003: Supplemental Appendix of appellants Mitch McConnell, United States Senator, et al. filed (Volumes I-IV).

Appendices located on fiche 56

FOR ARGUMENT

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No. 02-1676 and consolidated cases

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *et al.*
Appellants

vs.

SENATOR MITCH MCCONNELL, *et al.*
Appellees.

On Appeal from the United States
District Court for the District of Columbia

Joint Brief on the Merits of Appellees Emily Echols and Barret Austin O'Brock, *et al.*, Urging Affirmance of the Judgment that BCRA Section 318 is Unconstitutional

(FINAL VERSION)

JAMES BOPP, JR.
RICHARD E. COLESON
THOMAS J. MARZEN
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
(812) 232-2434

Attorneys for Appellee Barrett Austin O'Brock

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
STUART J. ROTH
COLBY M. MAY
JOEL H. THORNTON
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue NE
Washington, DC 20002-5703
(202) 546-8890
Attorneys for Appellees Emily Echols, et al.

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APPELLEES' COUNTER-STATEMENT OF QUESTION PRESENTED

Prior to the effective date of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, minors had the right to contribute to the committees of political parties and to candidates for federal office, subject to the same limitations that also applied to persons who had attained their majority. Section 318 of BCRA completely prohibits donations to committees and to candidates by minors. In the view of these Appellees, all of whom are minors, the question presented is:

> Whether the three judge district court erred in its judgment that the absolute ban on donations by minors was unconstitutional?

PARTIES

These Appellees incorporate by reference the listing of the parties set out in the Jurisdictional Statement of the FEC, *et al.*, at II-IV. In addition to the Appellees listed on the cover, this brief is joined by Appellees Daniel Solid, Hannah and Isaac McDow, Jessica Mitchell, and Zachary White.

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GLOSSARY

BCRA:	Bipartisan Campaign Reform Act
FECA:	Federal Election Campaign Act
FEC:	Federal Election Commission
FEC JS:	Jurisdictional Statement of the FEC, *et al.*
FEC Resp.:	FEC Response to Joint Motion to Affirm Summarily
JA:	Joint Appendix
Supp. App.:	Supplemental Appendix

In the Supreme Court of the United States

No. 02-1676 and consolidated cases

FEDERAL ELECTION COMMISSION, *et al.*,

Appellants

vs.

SENATOR MITCH MCCONNELL, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

Joint Brief on the Merits of Appellees Emily Echols and Barret Austin O'Brock, *et al.*, Urging Affirmance of the Judgment that BCRA Section 318 is Unconstitutional

The minor Appellees, by their next friends, urge this Court to affirm the judgment of the three judge court of the United States District Court for the District of Columbia that Section 318 of BCRA is unconstitutional.

CITATIONS TO THE DECISION BELOW

The decision below is published at 2003 U.S. District Lexis 7912 (D.D.C. May 2, 2003), and is available on the website of the United States District Court at http://www.dcd.uscourts.gov/mcconnell-2002-ruling.html. As directed by this Court, the Appellants in the consolidated cases have filed a four-volume Supplemental Appendix to Jurisdictional Statement, in which are reproduced the four opinions of the three judge panel below.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS

The relevant constitutional provisions, statutes and regulations are set out in the appendix to the FEC's Jurisdictional Statement. *See* FEC JS at 1-2 (and appendix pages cited).

STATEMENT OF THE CASE

1. Course of Proceedings

Following the enactment by Congress of BCRA, and its signature into law by President Bush, more than six dozen individuals and organizations filed suits challenging the constitutionality of the Act.[1] Section 403 of BCRA required the District Court to expedite its consideration of challenges to the constitutionality of BCRA. In keeping with that requirement, the three-judge district court consolidated the suits and imposed an expedited schedule for discovery and trial.[2]

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[1] The lawsuits, in order of their filing, were: *NRA v. FEC*, No. 02-cv-581 (D.D.C. filed Mar. 27, 2002); *McConnell v. FEC*, No. 02-cv-582 (D.D.C. filed Mar. 27, 2002); *Echols v. FEC*, No. 02-cv-633(D.D.C. filed Apr. 4, 2002); *Chamber of Commerce v. FEC*, No. 02-cv-751 (D.D.C. filed Apr. 22, 2002); *National Association of Broadcasters v. FEC*, No. 02-cv-753(D.D.C. filed Apr. 22, 2002); *American Federation of Labor v. FEC*, No. 02-cv-754 (D.D.C. filed Apr. 22, 2002); *Paul v. FEC*, No. 02-cv-781 (D.D.C. filed Apr. 23, 2002); *Republican National Committee v. FEC*, No. 02-cv-874 (D.D.C. filed May 7, 2002); *California Democratic Party v. FEC*, No. 02-cv-875 (D.D.C. filed May 7, 2002); *Adams v. FEC*, No. 02-cv-877 (D.D.C. filed May 7, 2002); *Thompson v. FEC*, No. 02-cv-881 (D.D.C. filed May 7, 2002).

[2] *See* Order (D.D.C. Apr. 24, 2002) (consolidating cases), JA 1655-58; Order (D.D.C. May 13, 2002) (consolidating subsequently filed cases), JA 1661-64; Order (D.D.C. Apr. 24, 2002) (discovery schedule), JA 1659-60; Order (D.D.C. July 26, 2002) (amending discovery schedule), JA 1691-93; Order (D.D.C. Oct. 15, 2002) (briefing schedule), JA 1802-06; Order (D.D.C. Nov. 15, 2002) (setting oral argument), JA 1807-08; Order (D.D.C. Nov. 26, 2002) (setting schedule for oral argument), JA 1809-11.

2. Decision Below

A. *The Judgment Below*

All three judges below concluded that Section 318 violates the Constitution:

> Section 318 prohibits donations by minors to federal candidates, or to a committee of a political party. All three judges agree that this section is unconstitutional. Each judge writes a separate concurrence setting forth his/her reasoning as to this section.

Per Curiam Op. at 11; Supp. App. 9sa.

B. *The Opinions of the Judges Below*

(1) Judge Henderson

Judge Henderson concluded that whether analyzed under strict scrutiny or under "*Buckley* scrutiny," Section 318 was unconstitutional. Supp. App. 462sa (concluding that, because Section 318 failed scrutiny under the less strict standard of *Buckley*, it was unnecessary to decide whether strict scrutiny applied to it). In Judge Henderson's view, the Appellants' arguments for the constitutionality of Section 318 failed for two principal reasons:

> First, section 318 does not serve any governmental interest, much less a "sufficiently important" or

> "compelling" one.
>
> * * * *
>
> Second, even if section 318 served to prevent actual or apparent corruption of federal candidates in a material way not served by existing law, the provision could not be sustained because—far from being "closely drawn" or "narrowly tailored"—it is grossly overbroad.

Supp. App. 462sa, 465sa. In addition, Judge Henderson found that the evidence proffered to justify Section 318 as a tool to prevent corruption to be "remarkably thin." Supp. App. 463sa.

(2) Judge Kollar-Kotelly

Judge Kollar-Kotelly, like Judge Henderson, found it unnecessary to decide between strict scrutiny or "*Buckley* scrutiny." In Judge Kollar-Kotelly's view, "Defendants have failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important government interest." Supp. App. 1009sa. *See also* Supp. App. 1010sa ("the evidence presented is insufficient to support government action that abridges constitutional freedoms").

(3) Judge Leon

Judge Leon, while concurring in the conclusion of Judges Henderson and Kollar-Kotelly that Section 318 was unconstitutional, wrote "only to explain why [he] believe[d] th[e] Court should evaluate this provision under the strict-scrutiny standard of review." Supp. App. 1177sa.

3. Statement of Relevant Facts

A. *Prior to Enactment of BCRA, Both So-Called "Conduit" Contributions and Excess Contributions Violated Existing Provisions of FECA*

FECA directly prohibits any person from making political contributions in the name of any other person. Title 2 U.S.C. § 441f (2002). That prohibition encompasses every contribution made in the name of another, including those made by a parent in the name of their minor child. FECA also directly prohibits any person from exceeding the maximum permitted political contribution. 2 U.S.C. § 441a. That limitation prevents the parent or guardian of a minor child from exceeding limitations on contributions by the ruse of donating in the name of their minor child. Thus, prior to the enactment of BCRA, federal law already prohibited circumventing campaign limits by making gifts in the names of children.

B. *Prior to the Enactment of BCRA, The FEC Had Limited Experience with Parental Conduit Giving, and Resolved Those Instances It Has Reported*

No evidence suggested the need for Section 318.

In fulfillment of its statutory enforcement responsibilities, the FEC has investigated only the barest handful of instances of parental donations in the names of minor children.[3] The FEC has acknowledged that one percent or fewer of its investigatory "Matters Under Review" "involved covered political contributions by minors or by parents made in the name of the minor children."[4]

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[3] Judge Kollar-Kotelly summarized the FEC's regulatory enforcement experience in this area. *See* Supp. App. 772sa, 773sa-

C. *The FEC Has Recommended Narrow Statutory Adjustments to Congress to Address the Potential of Conduit Giving By Parents but not a Complete Prohibition on Political Contributions by Minors*

The FEC proposed to Congress that it adopt legislation related to contributions by minors to federal candidates and committees of political parties. The FEC has submitted Annual Reports to Congress and to the President as required by law. Those Reports provide information about the regulatory and enforcement activities of the Commission, and they also communicate proposals for legislative action. In its 1992 Annual Report, the FEC recommended that Congress establish a minimum, but unspecified, age for contributors.[5] In support of that recommendation, the FEC stated:

> The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

Id.

In each of its Annual Reports for the years 1993-98, the FEC recommended that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.[6] In its 1999 and 2000 Annual Reports, the FEC recommended that Congress establish a minimum age of 16 for making contributions.[7] Regarding this proposal, the FEC stated:

> The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age of 16 for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

Id.

D. *BCRA Section 318*

BCRA incorporates no factual findings about problems related to donations by minors to the committees of political parties or to candidates. Section 318 was added to the Act while the proposal was pending in the House. No explanation for the provision was offered during debate there.[8] The only explanation offered for the ban

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774sa (findings of fact ¶¶ 3.5 and 3.8 (including subparts thereof)).

[4] *See* JA 1767 (FEC Responses to Requests to Admit, ¶ 64).

[5] *See* 1992 Annual Report at 64; JA 1868.

[6] *See, e.g.*, 1993 Annual Report at 50, JA 1869.

[7] *See* 1999 Annual Report at 50, JA 1875; 2000 Annual Report at 43, JA 1876.

[8] The FEC acknowledged below the absence of any explanation related to this provision in the House debates on

came during the Senate debate on the Act.[9] There, Senator John McCain stated that the ban was needed to address the problem of parental circumvention of donation limitations by giving contributions in the names of their minor children.[10]

Section 318, which amends FECA by adding to it a new section 324, prohibits anyone seventeen years of age or younger from making any contribution to a candidate, or a contribution or donation to a national or state political party committee:

> An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution to a committee of a political party.

See Title III, § 318, H.R. 2356, 107th Cong. (2002) (enacted), (FEC Jurisdictional Statement at 71a).

E. *The Minors in Echols and in McConnell*

Emily Echols, Daniel Solid, Hannah and Isaac McDow, Jessica Mitchell, and Zachary White are citizens of the United States. Echols, Solid and White reside in Georgia, the McDows reside in Alabama, and Mitchell resides in Florida. Each of them is aged seventeen years or

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BCRA. *See* JA 1755-56 (FEC Responses to Requests to Admit, ¶ 18).

[9] *See* 148 Cong. Rec. S2145-46 (daily ed. March 20, 2002) (statement of Sen. McCain).

[10] *See* 148 Cong. Rec. S2145-48 (daily ed. March 20, 2002) (statement of Sen. McCain).

younger.[11]

These Appellees are seriously interested in government, politics, and campaigning. They demonstrate that interest by participating in campaigns as volunteers, assembling signs, distributing literature, walking precincts, even traveling great distances to campaign door-to-door for candidates they support. In doing so, they have shown their commitment to using their rights to freedom of association and expression to effect political changes in accord with their beliefs and opinions.[12]

These minors possess funds that they have earned – either by working outside their homes or by performing chores around their homes for pay – or that they received as gifts. No portion of these funds consists of monies given to them for the purpose of making political contributions. The parents of the Echols plaintiffs are aware of the federal campaign laws and the restrictions they impose; and they have obeyed those laws.[13]

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[11] *See* JA 212, Declaration of Emily Echols, ¶¶ 1-2,5; JA 819, Declaration of Daniel Solid, ¶¶ 1-2,5; JA 408, Declaration of Hannah McDow, ¶¶ 1-2,5; JA 412, Declaration of Isaac McDow, ¶¶ 1-2, 5; JA 582, Declaration of Jessica Mitchell, ¶¶ 1-2; JA 831, Declaration of Zachary White, ¶¶ 1-2, 5.

[12] *See* JA 213, Declaration of Emily Echols, ¶¶ 11-13; JA 820, Declaration of Daniel Solid, ¶¶ 11-13; JA 409, Declaration of Hannah McDow, ¶¶ 11-13; JA 413, Declaration of Isaac McDow, ¶ 11; JA 583-84, Declaration of Jessica Mitchell, ¶ 9; JA 832-33, Declaration of Zachary White, ¶¶ 11,13.

Jessica Mitchell and Zachary White have previously donated to candidates for office.[14] For them, and for each of these young citizens, contributing money to candidates and to the committees of political parties are forms of expression of support for those candidates and committees. Moreover, by making such contributions of money, they have already associated with those selected candidates and committees of political parties. The minors Appellees plan to, and intend to, exercise their rights of political association and expression by making candidate and committee contributions, during their minority, into the future. But for the enactment of Section 318 and its ban on such political contributions by them, they would be free

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[13] *See* JA 215, Declaration of Emily Echols, ¶¶ 27-32; JA 821-22, Declaration of Daniel Solid, ¶¶ 24-27; JA 411, Declaration of Hannah McDow, ¶¶ 24-26; JA 414-15, Declaration of Isaac McDow, ¶¶ 23-25; JA 585-87, Declaration of Jessica Mitchell, ¶¶ 15, 21-22; JA 834, Declaration of Zachary White, ¶ 27; JA 217, 220, Declaration of Tim Echols, ¶¶ 10,11,20; JA 817, Declaration of Bonnie Solid, ¶¶ 9-11; JA 409, Declaration of Donna McDow, ¶¶ 11-13; JA 589, Declaration of Pamela Mitchell, ¶¶ 18-20; JA 832-33, Declaration of Cynthia White, ¶¶ 11-13.

[14] *See* JA 584, Declaration of Jessica Mitchell, ¶ 9(k); JA 833, Declaration of Zachary White, ¶ 13(g).

to do so.[15]

Appellee Barret Austin O'Brock is a minor living in Louisiana.[16] He declared his general intention to contribute to federal candidates in future elections, including in the 2002 and 2004 election.[17] Specifically, he stated his intention to contribute at least $20 of his own money (not received from any other person for purposes of the contribution) to John Milkovich, a candidate for U.S. Representative for the Fourth Congressional District of Louisiana, prior to the November 2002 general election.[18] Barret knows candidate Milkovich personally because the candidate was Barret's Sunday School teacher for two years.[19]

SUMMARY OF ARGUMENT

The day is long past when America's teenagers and children may be consigned to constitutional steerage, there to "enjoy" all the benefits of third class citizenship. As early as *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), it has been without question that American children are "whole persons" in the constitutional sense. Concomitantly, they possess the same constitutional rights and liberties as adults, even if, in certain circumstances, such as the special case of public schools, the contours of those rights vary slightly from the rights of their adult counterparts. *See Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969).

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[15] *See* JA 214-16, Declaration of Emily Echols, ¶¶ 18-36; JA 820-22, Declaration of Daniel Solid, ¶¶ 17-28; JA 409-11, Declaration of Hannah McDow, ¶¶ 16-27; JA 413-15, Declaration of Isaac McDow, ¶¶ 14-26; JA 584-86, Declaration of Jessica Mitchell, ¶¶ 11-22; JA 833-34, Declaration of Zachary White, ¶¶ 15-27.

[16] *See* Declaration of Barret Austin O'Brock, ¶¶ 1, 2.

[17] *See id.*, ¶¶ 3, 6.

[18] *See id.*, ¶ 4.

[19] *See id.*, ¶ 5.

Nonetheless, in a stunning strike against those rights, Congress enacted the complete ban embodied in Section 318. The House of Representatives adopted that new provision without explanation. In the Senate, only Senator McCain offered any explanation, one that was abbreviated at best. This new provision of federal law, as Judge Henderson observed, "falls into the category of 'who knows where it came from.'" *See* Supp. App. at 461sa.

All three of the judges below agreed that Section 318 was unconstitutional. A majority – Judges Henderson and Kollar-Kotelly – agreed that it was unnecessary to decide whether a more stringent standard of review applied because of the flagrant unconstitutionality of the flat ban. Judge Leon did not disagree with that view, but instead focused on the reasons for applying strict scrutiny to Section 318.

The flat ban on political donations by minors flouts several constitutional norms relevant to laws affecting associational freedoms and expression. As this Court instructed in *Buckley v. Valeo*, 424 U.S. 1, 16-18 (1976), Section 318 must be subjected to something more than the scrutiny embodied in *United States v. O'Brien*, or the time, place and manner analysis employed in the Public Forum cases, e.g., *United States v. Grace*, 461 U.S. 171 (1983).

The court below correctly concluded that it could not withstand such scrutiny. As an initial matter, the breadth of Section 318 is extreme. Under it, a 17 year old working as a church secretary or attending basic training at the Marine Corps Recruit Depot at Paris Island are lumped in with infants and toddlers and treated like babies. Likewise, because it bars *all* minor citizens from making political contributions, Section 318 lumps hard-working young people whose industry and thrift enables them to make small contributions, perhaps five dollars at a time, into the specially burdened category of persons less than 18 years of age, there to suffer the diminution of their constitutional rights along with a very few children whose parents have violated existing laws and were caught in the FEC's pre-existing regulatory net.

The ban is severely flawed. It is not drawn in service of a sufficiently important government interest. Even assuming arguendo such a justification for Congress to act, the ban on political contributions by minors is not drawn narrowly in service of the government interests at stake. In these respects, the judgment below and the opinions of Judges Henderson and Kollar-Kotelly comport entirely with this Court's recent decision in *FEC v. Beaumont*, 2003 U.S. Lexis 4595 (June 16, 2003).

The Government seeks support for the complete ban on contributions by minors by resorting to the fact that gifts by minors are *voidable*. That voidability, the Government intimates, bears significance in the analysis of Section 318. The Government's approach is "uncommonly silly," *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). It cannot be squared with the Constitution, which this Court has frequently construed to protect the right to hold opinions and the right to change one's opinions. Nor can the Government's approach be squared with American political history, riddled as that history is with indicia of the "voidability" of party affiliations and candidate endorsements.

ARGUMENT

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court subjected the Federal Election Campaign Act of 1971 and certain Internal Revenue Service regulations to constitutional scrutiny. *Buckley* affirmed the constitutionality of a *cap* on the amount of money that any person may contribute to any candidate for federal office, the candidate's authorized political committee, or the authorized committees of political parties. 424 U.S. at 29. In doing so, this Court acknowledged that contributing money to a candidate or the committee of a political party is an exercise of fundamental rights protected by the First Amendment:

> *The Act's contribution* and expenditure *limitations operate in an area of the most fundamental First Amendment activities*. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.

424 U.S. at 14 (emphasis added).

To be sure, expressive and associational aspects of *contributions* have been accorded different levels of examination by this Court than used in analyzing expenditure limitations, *see Buckley*, 424 U.S. at 20-21, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000), *FEC v. Beaumont*, 2003 U.S. Lexis 4595, *29-*30 (June 16, 2003). Nevertheless, the constitutional dimensions of political contributions have compelled this Court to scrutinize closely restrictions affecting the right to make those contributions. *See, e.g., Buckley*, 424 U.S. at 25.

Here, Congress has entirely abrogated the right of citizens of the United States, solely by reason of their age, to contribute money to federal candidates and the committees of political parties. *See* BCRA § 318. In doing so, Congress has denied to all minor citizens their right to political expression and to political association through the act of making contributions, even in token, nominal amounts. Unlike *Buckley*, in which this Court upheld a *donation cap*, the present case addresses an "*absolute ban* on campaign contributions," FEC Resp. at 9 n.4 (emphasis added). As *Buckley* intimates, the difference between a cap on donations and a ban of them is not a mere distinction without a difference. 424 U.S. at 21-22, 28. That difference here lends substantial support to the judgment below.

I. SECTION 318 VIOLATES MINORS' CONSTITUTIONAL RIGHTS

As a matter of first principles, a complete ban on political contributions strikes directly at the heart of the First Amendment. As this Court explained, in addressing statutory ceilings on the amount of personal contributions: "The Act's contribution *and* expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14 (emphasis added). Nothing in *Buckley* or its progeny suggests that the injury of such a flat prohibition on even token contributions is felt any less keenly by, or inflicts less grievously a wound upon the rights of, citizens of the United States who are in their minority.

A. Minors Possess First Amendment Rights of Freedom of Association and Speech.

If, as this Court has said, students do not "shed their Constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969), then there can be no question that they possess those rights before they pass through those gates. Here, as with analogous contributions by their adult counterparts, the political contributions of minors are, at a minimum, an exercise of the constitutional right to political association. *Buckley*, 424 U.S. at 15 ("The First Amendment protects political association as well as political expression;" "[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas") (citations and internal quotation marks omitted). For these minors, contributions to candidates and committees of political parties serve to express support for and association with selected candidates and committees.[20]

The Government makes the novel argument, see FEC Jurisdictional Statement at 28, *FEC v. McConnell* (docketed May 15, 2003), that "any First Amendment interests that minors may have in participating in the financing of federal elections is substantially limited by the fact that minors have no constitutional right to vote in such elections." Unsurprisingly, the Government does not rely on any decision of this Court (or, for that matter, of any other court) for this proposition. It is insupportable and without merit.

While it is true that minors do not possess the right to vote, it is certainly true that they possess the right to freedom of speech and of association. And while it is true that minors do not possess the right to vote, it is just as true that they pay taxes on the income they earn. But Section 318 tramples these fundamental rights of every minor. Worse, the Government offers no limiting principle for the "standard" it applies to prevent the suppression of rights of expression in a variety of circumstances.

Absent such a limiting principle, unacceptable and unconscionable results are threatened in any case where a government program or action affects selected groups or individuals, but leaves unaffected others who may, nonetheless, hold views or opinions that they would express about the Government's action. Women, for example, are not required to register for selective service. In this sense only, women are not affected by the registration requirement. By the Government's reasoning, then, Congress could suppress the speech and associational rights of a group of mothers of draft-eligible young men. Other examples clamor for attention. Men, for example, could be silenced in either their support for or opposition to abortion rights, because, after all, men cannot become pregnant. Anyone who is not the descendants of African Americans once held in involuntary servitude could be silenced on the question of whether a government program of reparations should be undertaken.

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[20] None of the special circumstances that this Court has found sufficient to justify governmental intrusion into the exercise of fundamental rights by minors is present here. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) ("the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing").

This unprincipled approach is dangerous for another reason. It confuses the fact of certain express constitutional dimensions of the right to vote with the larger aspirations of republican democracy. Then the Government uses that confusion as cover to justify the denial of other express, and fundamental, rights.

There are three express provisions in the Constitution respecting the right to vote. The Constitution guarantees the right of citizens to vote free from discrimination based on "race, color, or previous condition of servitude," U.S. Const. amend. XV, § 1, the right of citizens to vote in elections regardless of "failure to pay any poll tax or other tax," U.S. Const. amend XXIV, § 1, and the right of citizens aged 18 years or older to vote free from

discrimination "on account of age," U.S. Const. amend. XXVI, § 1. Oddly, perhaps, there is no express provision of the Constitution granting a generalized right to vote to citizens. But, because of the foregoing provisions, citizens cannot be turned away from the ballot box because of their race or color, poll tax evaders may vote if they please, and 18 year olds are not required to wait until they are 21 to vote in federal elections. These assurances of access to the vote as against certain previously enforced barriers are welcome indeed. In the Government's hands, however, they become the tools by which the right to freedom of speech and the right of association are deconstructed.

The Government's rationale fails to account for the terms of the First Amendment, which do not admit of an entire exception from protection for minors. Nor does the Government seek to square its approach with the decisions of this Court that have recognized that minors are persons in the constitutional sense and possess rights under the First Amendment. *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Tinker*. The Government ignores the certainty that even if minors are not protected from discrimination on the basis of *age* in voting, every federal election in this Nation still holds significance for them. The examples cited above, and a host of others readily drawn from the cases decided by this Court or the United States Statutes, adequately dispose of the simplistic "they can't vote so they don't count" approach taken by the Government.

B. There Is No Sufficiently Compelling Governmental Interest to Justify the Denial of Minors' Constitutional Rights of Speech and Association.

To discern whether Congress has gone *too far* in banning political contributions by minors, it is essential to ask what Congress sought to accomplish and to compare the purpose of Section 318 with its effect. Section 318 prohibits *all* contributions by *all* minors to *every* candidate for *every* federal office and to *every* committee of *every* political party. Section 318 does not simply prohibit parents of infants from surreptitiously evading their own donations limitations by the fiction of making contributions in the name of their infant sons and daughters. Section 318 bars 16 and 17 year old minors from making political contributions:

- even though they may no longer be subject to compulsory school attendance requirements
- even though they may no longer be required to obtain a worker's permit to obtain employment
- even though they are emancipated minors under State law
- even though they are enlisted members of the United States military, and
- even though their wages are subject to federal income taxation.

These are the effects of Section 318.

It is undisputed that Congress sought to address parental circumvention of donation limitations and channeling of gifts. In the court below, the Appellants offered various

justifications in defense of Section 318, including avoiding corruption and the appearance of it, assuring the legitimacy of the electoral system, preventing circumvention of campaign contribution limits, facilitating deterrence and detection of violations of federal campaign limitations, and restoring public faith in the system.

The concern about circumvention of donation limitations by wealthy parents using the names of their minor children – to which Senator McCain adverted on the Senate floor[21] – is unsupported by any substantial evidence.[22] Both Judge Henderson and Judge Kollar-Kotelly took note of the meagerness of the evidence supporting the need for Section 318. Judge Henderson found that "the government's evidence of corruption-by-conduit . . . remarkably thin . . . ." Supp. App. 463sa. Judge Kollar-Kotelly observed that the Government "failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important governmental interest . . . ." Supp. App. 1009sa. In light of that failure, Judge Kollar-Kotelly concluded, "the minimal evidence presented does not establish that circumvention of campaign finance laws by parents of minors supports the required governmental interest." Supp. App. 1011sa.

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[21] *See* nn. 8-9 , *supra* and accompanying text.

[22] In his floor statement explaining Section 318, Senator McCain erroneously asserted that the FEC has reported a substantial problem in this area. *See* JA 1756-57, (FEC Responses to Requests to Admit, ¶¶ 19-20) (noting Senator McCain's error; admitting that the FEC has never asserted that "substantial evidence" of this problem exists).

Even assuming that a remedy was needed for the unsubstantiated problems of parental circumvention and excess giving, Section 318 is unjustifiable. The ban on political contributions burdens substantially more political association and speech than necessary precisely because its proscriptions apply to individuals who have never engaged in prior unlawful behavior.

Minors' donations to committees and candidates embody classic exercises of the freedom of political association and the freedom of speech. No *valid* government interest supports this ban. Such a complete ban was not at issue in *Buckley*. Instead, because FECA permitted a contribution in some amount, this Court concluded that the ceiling on such contributions survived scrutiny. Here, Congress utterly prohibits even a token donation. That complete prohibition, to the contrary of the FECA *limitations* at stake in *Buckley*, encompasses so much speech and association unrelated to any regulable evil that it is "substantially broader than necessary to achieve the interests justifying it." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989).

Nor can concerns about abuses by a few parents, who might circumvent restrictions on their own donations by using their minor children as surrogates, justify a flat ban on contributions by all minors. Such circumvention is already illegal under FECA provisions predating BCRA and not challenged in this litigation. *See* Title 2 U.S.C. §§ 441a and 441f (2002). Moreover, the gift of money by a

minor need not come *from* parental sources or *at* parental direction. For example, Jessica Mitchell, one of the minor Appellees in this case, donated money to a candidate for the United States House of Representatives that she had earned from a small pet care business that she and a friend started in their neighborhood.[23] Each of the other minors, likewise, has monies that were not received as part of a scheme or plan of their parents to circumvent FECA's limitations on contribution amounts. Yet, donations by the minor Appellees are barred by Section 318.

In assessing the purported problem of parental circumvention of FECA restrictions, Congress operated largely in the dark. The record-keeping and reporting requirements of FECA do not require that the age of donors to candidates or committees of political parties be revealed.[24] Consequently, other than anecdotal information from newspaper articles of the bare handful of FEC Matters Under Review touching on this area,[25] Congress neither possessed nor sought out facts and statistics to shed light in this area.

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[23] *See* JA 583-34, 586-87, Declaration of Jessica Mitchell, ¶¶ 9, 22.

[24] *See McConnell v. FEC*, No. 02-cv-582, Defendants' Opening Brief at 202 (D.D.C. *filed* Nov. 6, 2002) ("FECA does not require political committees to seek or report the age of contributors, the reports filed with the Commission do not reveal the number of contributions by children").

[25] *See* Supp. App. 772sa-773sa, Findings of Fact ¶ 3.6 (Kollar-Kotelly, concurring) (citing newspaper articles).

As those anecdotal reports explain, donation reporting information frequently used the term "student" interchangeably with the term "minor" in response to the requirement that an employer be identified for donors.[26] The category "student" could not shed any light on the putative problem of parental circumvention of donations limitations for at least three reasons. First, as the FEC acknowledged below, an adult who is a student may identify themselves as a "student."[27] Second, as the FEC also acknowledged, not all persons identified as "students" on political donation reporting forms are minor children.[28] Third, not all minors are students, and thus, when making contributions may not list their occupations as students.[29] Consequently, this uninformative category, "student," used in describing conduit contribution activities in anecdotal newspaper reports relied on by Senator McCain suffered from the twin defects of being both under- and over-

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[26] *See* Supp. App. 772sa-773sa, Findings of Fact ¶ 3.6 (Kollar-Kotelly, concurring) (citing newspaper articles).

[27] *See* JA 1760-61, Responses of the FEC to Requests for Admission, ¶ 30 ("The Commission admits that certain adults whose occupation is that of student might choose to identify their occupation on a donation report as 'student'").

[28] *See* JA 1761, Responses of the FEC to Requests for Admission, ¶ 31.

[29] *See* Title 10 U.S.C. § 505 (2002) (authorizing the United States military to accept the enlistment of minors).

inclusive with respect to minors who make political contributions. The Government conceded this defect of the "student" category below.[30]

That Congress operated in the dark in assessing the problem and in crafting the solution cannot be surprising. The lack of evidence of a problem in this area was confirmed by the responses of the FEC and the United States to discovery in the trial court. Despite having "made a reasonable inquiry," the FEC and the United States were each unable to find any information in their possession sufficient to allow them to admit or deny that any "present member of Congress and other elected federal officer ha[d] engaged in any corrupt act as a result of contributions by minors . . . ."[31] Nor could they find any information in their possession sufficient to allow them to admit or to deny that any "present member of Congress or any other elected federal officer has an appearance of corruption as a result of contributions by minors to candidates or contributions or donations by minors . . . ."[32] And, although preventing corruption and the appearance of corruption have been identified as a goal of the BCRA, and of Section 318, in responding to discovery below, the FEC asserted that the terms, "any corrupt act" and "an appearance of corruption" are vague.[33]

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[30] *See McConnell v. FEC*, No. 02-cv-582, Defendants' Opening Brief at 202 n. 140 (D.D.C. *filed* Nov. 6, 2002).

[31] *See* JA 1762-63 (Response of FEC to Requests to Admit, ¶ 41; JA 1786-87 (Response of the United States to Requests to Admit, ¶ 41).

[32] *See* JA 1763 (Response of FEC to Requests to Admit, ¶ 42; JA 1787 (Response of the United States to Requests to Admit, ¶ 42).

Oddly absent from the justifications proffered by the Appellants below is any assertion that money from minors is, in its essence, corrupting or evil. In fact, the proffered justifications exclusively focus on the alleged abuses of parents, which abuses already are directly prohibited by FECA. Moreover, the Government's interest in preventing corruption or the appearance of corruption is no greater (and arguably much less) with respect to minors than with respect to adults. Obviously, it is not the view of Congress that *any* donation in *any* amount is *per se* corrupting. Were that the case, all donations would be proscribed.

Plainly, the interest in preventing parents from circumventing contribution limits by channeling additional contributions through their children is not sufficiently compelling to justify Section 318.

C. Section 318 Is Not Narrowly Drawn to Serve the Asserted Governmental Interest.

Two aspects of Section 318 are of particular import to an appropriate constitutional analysis of the fit between the asserted government purposes for the ban and the means chosen to serve them.

First, the ban applies to individual minors even though

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[33] *See* JA 1762-63 (Response of FEC to Requests to Admit, ¶¶ 41-42.

their exercise of associational expression and free speech has not threatened the Government's interests. These minors are barred from expressing their association with candidates and committees by even symbolic, token donations despite the utter lack of evidence of subversion or corruption, or of their being used by their parents or guardian for that purpose. The ban applies to *all* donations by *all* minors even though there is no reason to conclude that such donations, taken individually or in the aggregate, either by their nature or practice, injures to relevant government interests.

Second, unlike the direct bans on giving contributions in the name of another, 2 U.S.C. § 441f (2002),[34] and on exceeding limitations on contribution amounts, 2 U.S.C. § 441a(a)(1)(A),[35] the ban on contributions by minors is a *prophylactic* suppression of constitutionally protected rights of minors. As this Court has admonished, however,

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[34] Title 2 U.S.C. § 441f provides:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

[35] Title 2 U.S.C. § 441a provides, in pertinent part:

> Except as provided in subsection (i) and section 315A, no person shall make contributions . . . to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $ 2,000 . . . .

"broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 458 (1963).

In *Buckley*, of course, this Court upheld personal contribution *ceilings*, not a complete ban. A *ban* on such gifts could not, however, pass muster. In fact, one of the justifications offered in *Buckley* for a contribution ceiling was that a ceiling left donors free to make some donation:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution.

424 U.S. at 21. A *ban* that entirely prevents a minor from giving "to a candidate or campaign," does not "permit[] the symbolic expression of support evidenced by a contribution."

(1) When First Amendment Freedoms are at Risk, The Constitution Demands that Congress Draw its Legislative Solutions Narrowly

What is called for in this analysis is an examination of the fit between purpose and means. For example, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), the Court upheld an ordinance that prohibited the posting of signs on public property, but only after concluding that the ordinance "responds precisely to the substantive problem [of visual blight] that concerns the City." That cannot be said of the contribution ban; it closely resembles the anti-littering law struck down in *Schneider v. State*, 308 U.S. 147 (1939). There, as here, the state "could have addressed the substantive evil

without prohibiting expressive activity," or adopting a "prophylactic rule." *Taxpayers for Vincent*, 466 U.S. at 810. Similarly, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), also assume a fit between means and ends that is lacking here. Thus, in *Ward*, an ordinance requiring that city employees operate sound amplification equipment was upheld because it directly advanced the city's interest in controlling noise. 491 U.S. at 800. Likewise, in *Clark*, a regulation barring protesters from sleeping in a park was upheld because it "narrowly focused on the Government's substantial interest in maintaining the parks in the heart of our Capitol in an attractive and intact condition." 468 U.S. at 296.

(2) The Court Below Correctly Concluded that Section 318 was not Narrowly Drawn

These cases all show that Congress must craft its statutes narrowly when touching upon constitutional rights, and must limit itself to interests unrelated to the suppression of expression. *Buckley*, 424 U.S. at 17-18. Below, the Appellants identified the interests supposedly served by the statute. Unfortunately, the ban is not closely drawn to promote those interests. Instead, it focuses directly on expressive activities. It thus burdens substantially more speech than necessary to accomplish the state's goal and cannot be sustained.

The interests identified by the Appellants go to abuses by persons other than minors. But the ban targets constitutional exercises by minors. Consequently the ban does not target the "evil" – namely, circumvention or corruption – that motivated Congress to enact it. *Cf. Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil"). Of course, Congress can address circumvention and corruption problems directly; indeed, it already has done so with its enactment of 2 U.S.C. §§ 441a and 441f (2002).

Neither the minor Appellees nor their parents have challenged those existing provisions of FECA. Those restrictions directly serve the interests that are, at best, only obliquely served by Section 318's ban on political contributions by minors. Instead, the minors' ban goes further and in a different direction entirely. Section 318 prohibits minors' political contributions, even when such contributions are not made in circumvention of FECA's contribution limits. It prohibits contributions of emancipated minors. It prohibits contributions by orphaned minors. And it prohibits contributions of those minors who, with consent of their parents, have enlisted in the United States Armed Forces.[36]

The Government asserts that Congress merely drew a line in choosing the ages to be affected by the ban embodied in Section 318. *See* FEC Resp. at 8 n.3. To buttress its claim, the Government invokes *Buckley*'s teaching that the Court will respect lines drawn by Congress in this area. *Id.* (quoting *Buckley*, 424 U.S. at 83 n.111). The *Buckley* language appropriated by the Government expressed this Court's view of the deference due to Congress' judgment about where to draw a line that still left contributors free to make donations in some amount, even in not as large as they might have preferred. That is not the case here. Section 318 is not a "cap." It is a ban. *See* FEC JS at 9 n.4 (describing ban as absolute). The Government invokes no decision of this Court to support its presumption that this Court will treat as "mere line drawing" a decision by Congress to abrogate wholesale constitutional rights of citizens.

These minors "are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *FEC v. National Conservative PAC*, 470 U.S. 480, 501 (1985). The First Amendment freedoms put in jeopardy by Section 318 are supremely precious. This Court has explained, "because First Amendment freedoms need 'breathing space' to survive, government may regulate in this area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). While this Court has instructed that "[p]recision of regulation must be the touchstone" when regulating activities protected by the First Amendment, Section 318 lacks that precision and instead broadly bans the exercise of pristine constitutional freedoms.

(3) The Failure of Congress to Draw this Provision Narrowly is Attested to by the Wide Variety of Alternatives That are Drawn Narrowly to the Asserted Interests

Ready and less burdensome alternatives exist to ensure that current election laws are not manipulated by a few parents who use their guardianship to channel funds through their minor children. In fact, the FEC never recommended such a ban to Congress, preferring instead to suggest less drastic means.[37] Going beyond the all-or-nothing approach of the ban, Congress could have established a family contribution cap or employed a rebuttable presumption regarding the voluntariness of minors' contributions. In fact, Congress could have required the FEC and the Attorney General to enforce the current restrictions.

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[36] *See* Title 10 U.S.C. § 505 (2002) (authorizing enlistment of minors).

(4) Congress Could Have Succeeded in Drawing its Provision Narrowly by Following One of the Varied Approaches Taken by the Several States.

In addition to the less burdensome approaches we suggest, the "real world" experience of the States suggests that ready, less burdensome, and more precisely drawn alternatives exist to serve any interest at stake. Several of the States have undertaken such less burdensome regimens of regulation. Under those regimens minors continue to make donations *and* the putative harms of circumvention and corruption are avoided by less draconian means. At least fourteen States have enacted less cumbersome and prohibitive regimes for the regulation of political donations by minors to candidates for state election. The variety of approaches reflects the Founders' genius for separate sovereignties and demonstrates the clumsy carelessness evinced by Section 318.

(a) West Virginia

One State, West Virginia, allows political contributions by minors subject to the same cap as applies to the donations of adults. *See* W. Va. Code § 3-8-12 (2002). As under federal law prior to the enactment of Section 318, West Virginia only requires that the minor acts knowingly and voluntarily, that the funds donated be under the minor's exclusive ownership and control, and that the funds are not derived from a gift made for the purpose of contribution. *Id.*

(b) Alaska

Another State, Alaska, has enacted a statute that directly and precisely addressed the problem of conduit giving by parents through their minor children. *See* 2 Alaska Admin. Code § 50.258 (2002). Under that provision, a minor is barred from making a contribution of money or other valuables if the funds or goods were given to the minor by the parent for the purpose of that contribution. *Id.*

(c) Connecticut, Florida, Kentucky, and Massachusetts

Four States – Connecticut, Florida, Kentucky, and Massachusetts – impose a separate cap on the amount of money that minors may contribute. *See* Conn. Gen. Stat. § 9-333m (2001) (minors under 16 limited to $ 30 per year in contributions); Fla. Stat. § 106.08 (2002) (unemancipated minors under 18 limited to contributions of $ 100 per candidate or political committee); Ky. Rev.

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[37] *See supra* nn. 5-7 and accompanying text (discussing Annual Reports and FEC recommendations for legislation).

Stat. Ann. § 121.150 (minors' contributions may not exceed $ 100); Mass. Ann. Laws ch. 55, § 7 (2002) (minors under age 18 limited to $ 25 per calendar year). Under each of these provisions, a minor remains free to engage in the symbolic act of giving that this Court recognized in *Buckley* to be an exercise of the fundamental right of association. The choice of smaller amounts, while respecting the constitutional exercise at stake, reflects a better choice, and one consistent with the Constitution.

(d) Arizona, Arkansas, Hawaii, Kansas, Michigan, Oklahoma, South Carolina, and Texas

Eight States – Arizona, Arkansas, Hawaii, Kansas, Michigan, Oklahoma, South Carolina, and Texas – demonstrate their respect for the constitutional rights at stake in the act of making political donations *and* their appreciation for the possibility, however remote, that some parents may make conduit contributions through their children. By various approaches, these States *allow* minors to make political donations. The amounts of those donations are included in calculating the total contributions, either of a particular parent or of a family unit. *See* Ariz. Rev. Stat. § 16-905 (2001) (contributions of an unemancipated minor treated as contributions from parents); Ark. Code Ann. § 7-6-205 (2002) (attributing amount of contribution by dependent child to the parent when the parent has provided funds for the purpose of making such a contribution); Haw. Rev. Stat. § 11-204 (2002) (minors may contribute in their own name, but the amount of the contribution counts in calculating the total contributions of the minor's parent or guardian); Kan. Stat. Ann. § 25-4153 (2001) (unemancipated children under 18 years of age may make contributions but the contributions are treated as made by the parent or parents of such children); Mich. Comp. Laws § 169.253 (2002) (dependent minors may make contributions and have them reported in their name but the amount of such contributions is attributed to the parent or guardian for purposes of compliance with contribution limitations); 21 Okla. Stat. § 187.1 (2002) (contribution limits treat donations by husband, wife and all unemancipated children under the age of 18 in the aggregate as a single family unit); S.C. Code Ann. § 8-13-1330 (2001) (contributions by unemancipated minors under 18 years of age are treated as contributions by their parents); Tex. Elec. Code Ann. § 253.158 (2002) (children under age of 18 permitted to contribute but the donation is treated as the contribution of the parent or guardian).

D. The Judgment Below Comports with This Court's Decision in *FEC v. Beaumont*.

The judgment that Section 318 is unconstitutional comports entirely with this Court's recent decision in *FEC v. Beaumont*, 2003 U.S. Lexis 4595 (U.S. June 16, 2003).[38]

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[38] Unlike the ban on political contributions by corporations, the application of which to nonprofit advocacy corporations was at stake in *Beaumont*, Section 318 is, in fact, a complete ban on money donations by individuals who are in their minority. For this reason, unlike the challenge brought by a nonprofit advocacy corporation in *Beaumont*, this Court should apply strict scrutiny in

In *Beaumont*, this Court concluded that the ban on direct corporate political contributions applied to nonprofit advocacy corporations, and survived constitutional scrutiny. 2003 U.S. Lexis 4595, *7 ("We hold that applying the prohibition [on corporate contributions directly to political candidates] to nonprofit advocacy corporations is consistent with the First Amendment"). To the point, *Beaumont* reaffirmed the so-called *Buckley* intermediate level of scrutiny, concluding that the corporate direct contribution ban passed muster because it was closely drawn to match a sufficiently important interest. *Beaumont*, 2003 U.S. Lexis 4595, *29-*33. This Court rejected an argument that the corporate contribution ban was not closely drawn, concluding that the argument incorrectly characterized federal law as completely prohibiting corporate political contributions. *Id.* Importantly, in *Beaumont*, this Court noted that within the larger category of political contributions, corporate contributions were further from the heart of the First Amendment than those of individuals:

> Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, . . . and of the public in receiving information . . . . A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.

Beaumont, 2003 U.S. Lexis 4595, *30 n.8 (citations omitted). Of course, Section 318 does not leave individual minors "free to make their own contributions."

In reaching their conclusion that Section 318 of BCRA was unconstitutional, Judges Henderson and Kollar-Kotelly concluded that it was unnecessary to resolve the question whether Section 318 was subject to strict scrutiny because the statute failed scrutiny under *Buckley*. Instead, Judges Henderson and Kollar-Kotelly concluded that there was not a sufficiently important interest at stake. And they concluded that evidence gathered by the Government to buttress the enactment of Section 318 was either "minimal" or "remarkably thin." Thus, they found that the flat ban on contributions was not narrowly drawn to the asserted interest in averting parental subversion of contribution limits. As demonstrated by their opinions, Section 318 could not survive even relatively "complaisant review under the First Amendment," *Beaumont*, 2003 U.S. Lexis 4595, *29.

Congress did not enact Section 318 to respond to any allegedly corrupting influence resulting from political contributions by minors. In the Government's view,

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its analysis of the ban on contributions by minors. As demonstrated within, *see* Argument IV, *infra*, Section 318 cannot survive strict scrutiny. Judge Leon below concluded both that strict scrutiny applied for this reason and that Section 318 failed such scrutiny. *See* Supp. App. 1177sa (Leon, J., concurring) (discussing *Buckley* and the application of strict scrutiny to flat bans on contributions).

Section 318 was enacted to address the potential evasion of contribution limits by parents through the device of making contributions in the name of minor children. *See* FEC JS at 28 ("Section 318 is a valid means of preventing adults from circumventing FECA's contribution limits by making surrogate contributions through minors under their control"). The ban on corporate campaign contributions, however, reflected the well-founded concerns of Congress regarding the corrupting influences of such contributions. *See* 2003 U.S. Lexis 4595, *12-*20 (discussing advent and history of corporate contributions limitations).

As this Court explained in *Beaumont*, federal laws have barred direct corporate contributions for nearly a century, and since that original enactment, Congress has continued to attend to the problem of the corrupting potential of corporate contributions by strengthening and improving the prohibition on such contributions. *See Beaumont*, 2003 U.S. Lexis 4595, *14-*16 (discussing legislative developments related to prohibitions on corporate contributions). In complete contrast, here, there is neither a claim nor the evidence supporting such a claim that political contributions by minors constitute the particular source of a corruption or distortion of the federal election process. Nor is there a history of Congress attacking the problems of that fictional corruption. Section 318 bars all political contributions by all minors – not because of a well-recognized and long-known problem of corruption resulting or being threatened by such donations – but because Congress chose to abrogate the constitutional rights of *all* minors rather than demand that the FEC and the Department of Justice enforce existing laws against known malefactors.

Instead, as the Government would have it, some parents will use their status as guardians of their minor children to direct contributions to candidates or committees. FEC JS at 28. In turn, the Government believes, the use of such conduit contributions will allow such parents to exceed the individual contribution limitations. *Id.* Thus, as the Government has always argued this point, the purpose of Section 318 is to address a category of abuses by parent-donors, not to cure a problem of corruption or distortion that is inherent in donations from minors.

Moreover, the ban on corporate contributions effectively prevents the earnings of corporations from being transformed into political "war chests," thereby avoiding "corruption or the appearance of corruption." *Beaumont*, 2003 U.S. Lexis 4595, *16-*17 (discussing *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)). No comparable threat emanated from the political donations of minors, which donations were, after all, subject to the same cap applicable to all other individuals.

Prior to the effective date of Section 318, minors were subject to precisely the same contribution limitations as others. *Buckley* affirmed that limitation, and this Court concluded that Congress acted within reason in allowing contributions while capping their amounts. Section 318 stands in stark contrast to that reasonable approach.

The corporate contribution ban is also directed to the service of other interests that are not at stake when minors make political contributions. Chief among those interests is protection of those individuals who have paid money into a corporation or union for other purposes, insuring that the money they have paid in for other reasons is not converted into support for political candidates to whom they may be opposed. *Beaumont*, 2003 U.S. Lexis 4595, *17-*18. Section 318 does not serve any comparable purpose. As the evidence in this case demonstrated, Section 318 prevents minors who have earned their own money from giving it to candidates of their choosing. No pockets are picked, as it were, when minors donate money they have earned by working as a church secretary[39] or from selling home-made crafts.[40]

Finally, in *Beaumont*, this Court concluded that while the provision in dispute barred direct contributions, the ban on donations by corporations was not a complete prohibition on donations. This Court reasoned that the ban was not complete because corporations were permitted to establish and pay the administrative expenses of PACs that, in turn, can make such contributions. *Beaumont*, 2003 U.S. Lexis 4595, *32 ("NCRL is simply wrong in characterizing [the provision] as a complete ban . . . . The PAC option allows corporate political participation

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[39] JA 411 (Declaration of Hannah McDow, ¶ 25) ("I work as a secretary in the office at our church, and have income regularly from that job").

[40] JA 415 (Declaration of Isaac McDow, ¶ 24(b)) ("I make small Christmas crafts and sell them").

without the temptation to use corporate funds for political influence").

In contrast here, Section 318 is admittedly a complete prohibition, *see* FEC Resp. at 9 n.4 (describing Section 318 as imposing an "absolute ban on campaign contributions by minors"). Worse, while this Court has rejected the claim that "regulatory burdens on PACs, including restrictions on their ability to solicit funds, rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political contributions," *Beaumont*, 2003 U.S. Lexis 4595, *33, there is no cognate activity available to minors that this Court has concluded equates so closely with contributions that it renders the prohibition in Section 318 as something less than complete. Thus, unions and corporations – including nonprofit advocacy ones such as in *Beaumont* – have an outlet for their expressed desire to support candidates and committees of political parties, by establishing and paying the expenses of PACs. But Congress has stripped from minors their right to make political contributions without any similar other avenue that this Court has passed upon as not imposing excessive regulatory burdens.

II. THE VOIDABILITY OF MINORS' GIFTS DOES NOT JUSTIFY SUPPRESSING MINORS' CONSTITUTIONAL RIGHTS

The FEC asserts that the right of minors to rescind a gift provides a basis for concluding that Section 318 is constitutional. *See* FEC Resp. at 4 and n.2. The FEC asserts that the common law incapacity of a minor results in a rule the logic of which dictates that

> a minor who contributed money to a candidate for federal office might retain the right to 'disaffirm' the contribution and to insist upon the return of the funds at any time before he reached majority if (for example) he became dissatisfied with the candidate's performance during the campaign or in office.

Id. That contention is flawed for at least two reasons. First, there is nothing in BCRA – not in its text nor its legislative history – to indicate that donation rescission concerned the Congress at all. Second, the FEC's argument fails to account for the fact that the right to hold an opinion and to express it to others serves no valid function in a democracy if persuasion cannot be followed by conversion.[41] Thus, the fact that a minor chooses to support a candidate one day, and changes her mind the next, perhaps in response to new information about the positions taken by the candidate on issues of public policy, cannot be the basis for denying a constitutional right.

There are now, and have been for many years, two forms of equivocation in political alignment and support that are directly relevant to the questions raised by the FEC's claim. First, there are the cases of politicians, office-holders and office-seekers, who switch political parties. Second, there are the cases of candidate endorsements made and withdrawn.

Both of these practices affirm the healthy volatility of the political process in our Nation. On this practical level, the Nation has witnessed and welcomed a steady train of party-switching and endorsement-withdrawal. Indeed, the present membership of the United States Congress includes six members, three in each House, that have exercised this cherished right to change political affiliations.[42] In fact, "party-switching" has a venerable history.[43] Nor is party-switching limited to members of

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[41] Even this Court reserves to itself the prerogative of changing its mind. *See Lawrence v. Texas*, 2003 U.S. Lexis 5013, *35-*36 (U.S. June 26, 2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); 2003 U.S. Lexis 5013, *35-*36 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled").

[42] Present members of Congress that have changed party affiliations are: James Jeffords of Vermont; Ben Nighthorse Campbell of Colorado; Richard Shelby of Alabama; Virgil Goode of Virginia; Billy Tauzin of Louisiana; and, Nathan Deal of Georgia. *See Inside Politics: Party Switchers, Past and Present,* http://www.cnn.com/2001/ALLPOLITICS/05/23/switchers.list; *Biographical Directory of the United States Congress,* http://bioguide.congress.gov/biosearch/biosearch.asp.

[43] Senators Bob Smith of New Hampshire; Phil Gramm of Texas; Harry Byrd Jr. of Virginia; Strom Thurmond of South Carolina; Wayne Morse of Oregon; Henrik Shipstead of Minnesota; George Norris of Nebraska; Robert La Follette Jr. of Wisconsin; Miles Poindexter of Washington; Fred Dubois of Idaho; Frank Cannon of Utah; Richard Pettigrew of South Dakota; Lee Mantle of Missouri; Henry Teller of Colorado; John P. Jones of Nevada; and, William M. Stewart of Nevada. Representatives Matthew Martinez of California; Michael Forbes of New York;

Congress.[44]

Moreover, beyond party realignment, the practice of making and then withdrawing an endorsement is well-known.[45] Both acts – expressing support for a candidate

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Jimmy Hayes of Louisiana; Mike Parker of Mississippi; Greg Laughlin of Texas; Tommy Robinson of Arkansas; Bill Grant of Florida; Andy Ireland of Florida; Phil Gramm of Texas; Eugene Atkinson of Pennsylvania; and, Bob Stump of Arizona. *See Inside Politics: Party Switchers, Past and Present,* http://www.cnn.com/2001/ALLPOLITICS/05/23/switchers.list; *Biographical Directory of the United States Congress,* http://bioguide.congress.gov/biosearch/biosearch.asp.

[44] Other notables include Ronald Reagan and Justice Joseph Story and at least three Governors, Mike Foster of Louisiana, George Hoadly of Ohio, and, John Connally of Texas. *See* Encyclopedia Americana: *Ronald Reagan* http://gi.grolier.com/presidents/ea/bios/40preag.html; R. Kent Newmyer, *Supreme Court Justice Joseph Story*, 71 Cornell L. Rev. 726, 728 (1996); Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States*, 36 Tulsa L.J. 59, 112-13 (2000); Michael Les Benedict, *Salmon P. Chase and Constitutional Politics*, 22 Law & Soc. Inquiry 459, 497 n.7 (1997); Marianne Means, *Parties Reward Converts; Voters Don't*, South Coast Today, http://www.s-t.com/daily/04-96/04-15-96/5convert.htm.

[45] Recent examples abound. *See* Jim Tharpe, *Abortion Foes Split On Chambliss*, Atlanta Journ. and Const., October 22, 2002, at 5B (Georgia pro-life organization withdraws support for Senate candidacy of Saxby Chambliss); Frank Bruni, *Gary Condit Is Still Running*, N.Y. Times, February 17, 2002, § 6, at 30

and changing one's mind and withdrawing that support – embody the exercise of constitutional rights of freedom of speech and association. In fact, those acts are indistinguishable in effect from the voidability of minors' gifts that so troubles the FEC here. Without the right to express a change in views, the right to hold an opinion and to express it to others is of doubtful value. While it is true, as Justice Holmes famously explained, "every idea is an incitement," the application of that constitutional *bon mot* commands the liberty to change one's mind, to withdraw previously pledged support, and to communicate one's change of heart or mind to others:

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence

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(Representatives Nancy Pelosi and John Kasich withdraw their endorsements of Gary Condit); B. Drummond Ayres, Jr., *Campaign Briefing*, N.Y. Times, June 6, 2000, § A, at 21 (Teamsters Union withdraws endorsements of Lois Capps and Tom Sawyer over the China trade bill); *Inside*, N.Y. Times, February 14, 2000, § A, at 1 (Guy Molinari withdraws support for George W. Bush); Wayne King, *Anti-Florio Fever Is Giving Headache to a Democrat*, N.Y. Times, October 27, 1990, § 1, at 25 (the Women's Political Caucus of New Jersey withdraws endorsement of Dan Mangini over his stance on abortion).

> may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

Gitlow v. New York, 268 U.S. 652, 673 (1925).

The FEC is wrong, plain and simple. As the FEC acknowledges, the common law approach did not treat gifts by minors as *void* but merely *voidable*. FEC Resp. at 4 n.2. The common law voidability of a minor's gift does not present a ground for suppressing the constitutional rights of expression and association that are evinced by the contributions of minors. Not unless the right of candidates to change parties justifies a federal law prohibiting persons who change their minds from holding office. Not unless the right of political endorsers to withdraw their endorsements justifies a federal law suppressing freedom of political expression.

III. THE BAN ON CONTRIBUTIONS BY MINORS IS OVERBROAD.[46]

Judge Henderson correctly concluded that Section 318 is unconstitutionally overbroad. Supp. App. 465sa. Section 318 prohibits *every* contribution of money by *every* minor to *every* candidate for *every* federal elective office and to *every* committee of *every* political party. The ban – the "absolute prohibition" as the FEC describes it, *see* Response of FEC to Joint Motion at 9 n.4 – is quite broad.

Unlike 2 U.S.C. §§ 441a and 441f, which precisely target conduit giving and excess contributions, Section 318 fails to narrowly focusing on the problem of conduit contributions by parents and guardians through their minor children. The ban demonstrates no facile sensitivity in its casting at all. Caught up alike in the Government's net are the young Democrats, the young Libertarians, and even the young Republican whose work in her own pet sitting service makes possible small donations to congressional candidates.[47] True enough Section 318 prohibits those donations, few in number by the Government's own admission, that are directed by their parents and violated existing law before the adoption of Section 318.

This same dragnet sweeps in the servicemen and women who defend our Nation while still in their minority, 10 U.S.C. § 505 (2002). Even *emancipated* minor females – whose judgments about such life and death matters as abortion are bound to be respected by the law – are treated like infants. *But see, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 507 (1990) (affirming constitutionality of Ohio law criminalizing abortions performed on *unemancipated* minors, except in circumstances comporting with the constitutional requirements). Minors – such as these Appellees – who

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[46] This separate ground for affirmance is fully supported by the record.

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[47] *See* JA 586-87 (Declaration of Jessica Mitchell, ¶ 22).

possess independence of judgment and separate financial means to make such donations fall prey to Section 318.[48] This ban is not limited to parents or guardians with a history of bad conduct; it assumes that no minor is to be trusted not to abuse his or her rights.

This is a case of *inherent* overbreadth. Section 318 does not take aim at a suspect behavior and have the unfortunate side effect of collateral damage to constitutionally protected conduct: "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Secretary of State v. J. H. Munson Co.*, 467 U.S. 847, 865-66 (1984). *See id.* at 864-65 (in case of *inherent* overbreadth, the more demanding "substantial overbreadth" test does not apply).

This ban "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of [constitutional] freedom[s]." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Such an "overbroad" law "directly restricts protected expressive activity and does not employ means

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[48] The view that categories of minors possess judgmental maturity and independence of judgment animated Congress when it enacted the Equal Access Act of 1984, Title 20 U.S.C. § 4071, *et seq*. *See Westside Comm. Schools v. Mergens*, 496 U.S. 226, 250-51 (1990) (discussing judgmental maturity of minors and congressional determination regarding it). Unsurprisingly, experts in adolescent psychology and development affirm the important developmental value of inclusion in the political process. *See* Brief Amicus Curiae of David Moshman Supporting Minor Appellees.

narrowly tailored to serve a compelling governmental interest." *Munson*, 467 U.S. at 965 n.13. The ban flies in the face of established doctrine: "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 801 (1988) (internal quotation marks and citation omitted).

IV. SECTION 318 VIOLATES THE MINORS' RIGHTS TO EQUAL PROTECTION.[49]

Section 318 also violates these Appellees' rights to equal protection guaranteed to them by the Fifth Amendment Due Process Clause. The ban on political contributions selects out those who are less than eighteen years of age. Section 318 then subjects those selected out to special disabilities with respect to their exercise of constitutional rights of expression and association. Put another way, a minor's exercise of fundamental First Amendment rights is differentially burdened, in an unjustifiable manner, because of age.

Because Section 318 burdens the exercise of fundamental rights in this way, it is subject to strict scrutiny. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting use of strict scrutiny for "classifications based on race or national origin and classifications affecting fundamental rights"). Of course, Section 318 fails even the more complaisant First Amendment analysis called for in *Buckley*. Consequently, because it cannot pass muster under the more rigorous standards discussed in the preceding sections, it fail constitutional analysis under strict scrutiny.

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[49] This separate ground for affirmance is fully supported by the record.

CONCLUSION

The judgment of the District Court – holding that Section 318 of the Bipartisan Campaign Reform Act unconstitutional – should be affirmed.

Respectfully submitted,

JAMES BOPP, JR.
RICHARD E. COLESON
THOMAS J. MARZEN
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
(812) 232-2434

Attorneys for Appellee Barrett Austin O'Brock

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
STUART J. ROTH
COLBY M. MAY
JOEL H. THORNTON
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue NE
Washington, DC 20002-5703
(202) 546-8890

Attorneys for Appellee Emily Echols, et al.

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FOR ARGUMENT

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11

No. 02-1674 et al.

IN THE

Supreme Court of the United States

SENATOR MITCH MCCONNELL ET AL.,

Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION ET AL.,

Appellees/Cross-Appellants.

On Appeal From The United States District Court For The District of Columbia

BRIEF FOR APPELLANTS/CROSS-APPELLEES SENATOR MITCH McCONNELL ET AL. (PAGE-PROOF VERSION)

FLOYD ABRAMS
SUSAN BUCKLEY
BRIAN MARKLEY
CAHILL GORDON &
REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

KENNETH W. STARR
Counsel of Record
EDWARD W. WARREN
KANNON K. SHANMUGAM
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

(*additional counsel on inside cover*)

July 8, 2003

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KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL
FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN &
FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

G. HUNTER BATES
FROST BROWN TODD LLC
400 West Market Street
32nd Floor
Louisville, KY 40202
(502) 589-5400

QUESTIONS PRESENTED

This brief will address the questions presented in No. 02-1674, *McConnell v. FEC*; No. 02-1676, *FEC v. McConnell*; and No. 02-1702, *McCain v. McConnell.*

The questions presented in No. 02-1674, *McConnell v. FEC*, are as follows:

1. Whether the district court erred by upholding portions of the "soft money" provision (section 101) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, because it constitutes an invalid exercise of Congress' power to regulate elections under Article I, Section 4, of the Constitution; violates the First Amendment or the equal protection component of the Fifth Amendment; or is unconstitutionally vague.

2. Whether the district court erred by upholding portions of the "electioneering communications" provisions (sections 203, 204, and 311) of BCRA, because they violate the First Amendment or the equal protection component of the Fifth Amendment, or are unconstitutionally vague.

3. Whether the district court erred by holding nonjusticiable challenges to, and upholding, portions of the "advance notice" provisions of BCRA (sections 201 and 212), because they violate the First Amendment.

4. Whether the district court erred by holding nonjusticiable challenges to, and upholding, the "coordination" provisions of BCRA (sections 202, 211, and 214), because they violate the First Amendment.

5. Whether the district court erred by holding nonjusticiable challenges to, and upholding, the "attack ad" provision of BCRA (section 305), because it violates the First Amendment.

The questions presented in No. 02-1676, *FEC v. McConnell*, are as follows:

1. Whether the limitations on political parties imposed by

Section 101 of BCRA are constitutional.

2. Whether the funding limitations and disclosure requirements imposed by Sections 201 and 203 of BCRA with respect to "electioneering communications" are constitutional.

3. Whether the limitations imposed by Section 213 of BCRA on coordinated expenditures by a political party committee are constitutional.

4. Whether the prohibition imposed by Section 318 of BCRA on contributions to federal candidates or political party committees made by minors is constitutional.

5. Whether the reporting and record-keeping requirements imposed on broadcast stations by Section 504 are constitutional.

The questions presented in No. 02-1702, *McCain v. McConnell*, are as follows:

1. Whether the three-judge district court erred in invalidating on First Amendment grounds the provision addressing the raising, directing, transferring, and use of funds by political parties, federal candidates, and federal officeholders (BCRA § 101).

2. Whether the three-judge district court erred in invalidating on First Amendment grounds the provisions addressing the use of funds from corporate and labor union general treasuries to finance broadcast advertisements that are intended or likely to influence federal elections, and disclosure requirements for all such broadcast advertisements (BCRA §§ 201, 203, 204).

3. Whether the three-judge district court erred in invalidating on First Amendment grounds the provision addressing the ability of political parties to make both "independent" and "coordinated" expenditures to support the campaigns of candidates they have nominated to seek federal office (BCRA § 213).

PARTIES TO THE PROCEEDINGS

This brief is filed on behalf of the following plaintiffs below, who are appellants in No. 02-1674 and cross-appellees in No. 02-1676 and No. 02-1702: Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; U.S. d/b/a Pro English; the National Association of Broadcasters; and Thomas E. McInerney.

The "federal defendants," who are appellees in No. 02-1674 and/or cross-appellants in No. 02-1676, are the Federal Election Commission (FEC) and David W. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their capacities as Commissioners of the FEC; John D. Ashcroft, in his capacity as Attorney General of the United States; the United States Department of Justice; the Federal Communications Commission; and the United States of America.

The "intervenor defendants," who are appellees in No. 02-1674 and cross-appellants in No. 02-1702, are Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

The following parties, many of whom are appellants in other consolidated cases, were also plaintiffs in the district court: Representative Mike Pence; Alabama Attorney General Bill Pryor; Libertarian National Committee, Inc.; Alabama Republican Executive Committee, as governing body for the Alabama Republican Party; Libertarian Party of Illinois, Inc.; DuPage Political Action Council, Inc.; Jefferson County Republican Executive Committee; American Civil Liberties Union; Associated Builders and Contractors, Inc.; Associated Builders and Contractors Political Action Committee; Christian Coalition of America, Inc.; Club for Growth, Inc.; Indiana

Family Institute, Inc.; National Right to Life Committee, Inc.; National Right to Life Educational Trust Fund; National Right to Life Political Action Committee; Martin Connors; Barret Austin O'Brock; Trevor M. Southerland; National Rifle Association of America; National Rifle Association Political Victory Fund; Emily Echols, a minor child, by and through her next friends Tim and Windy Echols; Hannah McDow, a minor child, by and through her next friends Tim and Donna McDow; Isaac McDow, a minor child, by and through his next friends Tim and Donna McDow; Jessica Mitchell, a minor child, by and through her next friends Chuck and Pam Mitchell; Daniel Solid, a minor child, by and through his next friends Kevin and Bonnie Solid; Zachary C. White, a minor child, by and through his next friends John and Cynthia White; Republican National Committee (RNC); Mike Duncan, as member and Treasurer of the RNC; Republican Party of Colorado; Republican Party of Ohio; Republican Party of New Mexico; Dallas County (Iowa) Republican County Central Committee; California Democratic Party; Art Torres; Yolo County Democratic Central Committee; California Republican Party; Shawn Steel; Timothy J. Morgan; Barbara Alby; Santa Cruz County Republican Central Committee; Douglas R. Boyd, Sr.; Victoria Jackson Gray Adams; Carrie Bolton; Cynthia Brown; Derek Cressman; Victoria Fitzgerald; Anurada Joshi; Peter Kostmayer; Nancy Russell; Kate Seely-Kirk; Rose Taylor; Stephanie L. Wilson; California Public Interest Research Group; Massachusetts Public Interest Research Group; New Jersey Public Interest Research Group; United States Public Interest Research Group; The Fannie Lou Hamer Project; Association of Community Organizers for Reform Now; Chamber of Commerce of the United States; National Association of Manufacturers; National Association of Wholesaler-Distributors; U.S. Chamber Political Action Committee; American Federation of Labor and Congress of Industrial Organizations; AFL-CIO Committee on Political Education Political Contributions Committee; Representative Ron Paul; Gun Owners of America, Inc.; Gun Owners of America Political Victory Fund; Real Campaign Reform.org; Citizens United; Citizens United Political Victory Fund; Michael Cloud; Carla Howell; Representative Bennie G. Thompson; and Representative Earl F. Hilliard.

STATEMENT PURSUANT TO RULE 29.6

None of the appellants has a parent corporation, and no publicly held company owns 10% or more of the stock of any of the appellants.

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INTRODUCTION

Far from merely closing loopholes, the Bipartisan Campaign Reform Act of 2002 (BCRA) wholly rewrites our Nation's campaign finance laws and works nothing less than a fundamental reordering of our political process. While BCRA's details are complex, the principles that it upsets are basic. First and foremost is our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). However contentious the debate about the outer reaches of the First Amendment, there can be no question but that political speech and association lies at its core. With its encroachments on the activities of actors at all levels of the political process, BCRA cannot be justified without abandoning this first principle of uninhibited, robust debate. Nor can it be defended under this Court's campaign finance jurisprudence. Even assuming that Congress sought to solve a genuine problem by enacting BCRA — and the law's defenders have not identified a single example of actual "corruption" motivating its enactment — BCRA constitutes a wildly overbroad remedy.

BCRA also undermines other bedrock constitutional principles. It contravenes the core principle that federal law governs the conduct of federal elections, and state law the conduct of state elections. Prior to BCRA's enactment, federal law solicitously accommodated the competing state interest in regulating campaign activities that affect both federal and state elections. BCRA, however, imposes a sweeping federal regulatory scheme that reaches even activities that *solely* affect state elections. Even the great federalizer, Alexander Hamilton, recognized that federal intervention into state election processes is so blatantly violative that it "require[s] no comment."

Equally disturbing, BCRA regulates different actors in the political process, and different types of speech, in disparate fashion, without advancing any legitimate justification for doing so. It disadvantages political parties in comparison with interest groups; television stations in comparison with newspapers; and so-called "attack ads" in comparison with other ads. These and other forms of differential regulation violate the basic principles of equality embodied in the First and Fifth Amendments.

Ultimately, the Constitution demands that this Court err on the side of protecting more speech, not less. As the Court noted almost two decades ago, "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages * * * can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) (*NCPAC*). That rule provides a sufficient basis for holding the challenged provisions of BCRA unconstitutional.

OPINIONS BELOW

The district court's opinions are reported at 251 F. Supp. 2d 176 and reprinted in the joint Supplemental Appendix to the jurisdictional statements ("Supp. App.") at 1sa-1382sa.

JURISDICTION

The district court entered judgment on May 2, 2003. Appellants filed their notice of appeal and jurisdictional statement on the same day. This Court noted probable jurisdiction in these cases on June 5, 2003. This Court has appellate jurisdiction pursuant to section 403(a)(3) of BCRA.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is reprinted in the Appendix to appellants' jurisdictional statement ("J.S. App.") at 7a-68a. Article I, Section 4, of the United States Constitution is reprinted at J.S. App. 4a. The First Amendment of the Constitution is reprinted at J.S. App. 5a. The Fifth Amendment of the Constitution is reprinted at J.S. App. 6a.

STATEMENT OF THE CASE

A. Background

The historical facts preceding the enactment of BCRA are largely undisputed, and are set out at great length in the opinions below. *See* Supp. App. 16sa-40sa (Kollar-Kotelly and Leon), 168sa-186sa (Henderson). We summarize only the essential facts here.

1. In 1971, Congress enacted the Federal Election Campaign Act (FECA), the first comprehensive regulatory scheme governing federal election campaigns. *See* Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455). As amended in 1974, *see* Pub. L. No. 93-443, 88 Stat. 1263, FECA had three principal components. FECA limited the amount of money that could be contributed "for the purpose of influencing [federal] elections" — money that would come to be known as "hard money." Individuals could contribute up to $1,000 per candidate, and "political committees" (including political action committees, or PACs) could contribute up to $5,000.[1] FECA also limited the amount of money that could be spent in federal elections, restricting expenditures by any person "relative to a clearly identified candidate" to $1,000. And FECA limited "coordinated expenditures": that is, expenditures made on behalf of, and in agreement with, a federal candidate. FECA generally treated coordinated expenditures as "contributions" subject to the applicable contribution limits.

2. a. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court

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[1] In 1976, Congress amended FECA to add further limits on the amounts that individuals could contribute to political committees and party committees, and the amounts that party committees could in turn contribute to candidates. *See* Pub. L. No. 94-283, 90 Stat. 475. BCRA contains provisions raising these contribution limits, which appellants are not challenging.

laid out the now-familiar framework for determining the constitutionality of campaign finance regulations. The Court recognized that both contributions and expenditures on behalf of political candidates implicate the First Amendment rights of free speech and association. *See id.* at 19-23. The *Buckley* Court also recognized that the government had a compelling interest in "the prevention of corruption and the appearance of corruption." *Id.* at 25. Although the Court did not explicitly define "corruption," it repeatedly referred to "quid pro quo" arrangements in which contributions or expenditures were made in exchange for some particular action. *Id.* at 26, 27, 45.

The *Buckley* Court upheld FECA's contribution limits, reasoning that such limits imposed lesser burdens on First Amendment rights — and were thus subject to a lower degree of scrutiny — than expenditure limits. *See id.* at 24-38. However, the Court struck down FECA's limits on independent expenditures. *See id.* at 39-59. Critically, before striking down the expenditure limits, the Court first narrowed those provisions to cover only expenditures for what has come to be known as "express advocacy": that is, advertising that "in express terms advocate[s] the election or defeat of a clearly identified candidate." *Id.* at 44. This narrowing construction excluded from FECA's reach so-called "issue advocacy": for instance, advertising that comments on positions taken by a clearly identified candidate, but does *not* expressly advocate the candidate's election or defeat. Even after narrowing these provisions, however, the Court struck them down on the ground that independent expenditures did not pose a sufficient threat of actual or apparent corruption. *See id.* at 45. In so doing, the Court expressed approval of FECA's treatment of coordinated expenditures as contributions. *See id.* at 47. The Court similarly narrowed a provision of FECA requiring the disclosure of certain expenditures, but ultimately upheld that provision. *See id.* at 74-82.

b. In the nearly three decades since *Buckley*, the Court has

remained faithful to *Buckley*'s dichotomous treatment of contributions and expenditures. It has consistently upheld federal limits on contributions, *see, e.g.*, *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), and coordinated expenditures, *see, e.g.*, *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*), but struck down federal limits on independent expenditures, *see, e.g.*, *NCPAC*, 470 U.S. at 480.

3. In the years following *Buckley*, the federal regulatory regime peacefully coexisted with the States' respective campaign finance regimes. Some States, such as Virginia, allowed unlimited contributions to, and expenditures by, state candidates and party committees; others, such as Vermont, imposed even more stringent limits than those imposed by federal law.

Questions quickly arose, however, as to who should regulate the financing of activities, such as voter registration, voter identification, and get-out-the-vote efforts, which had effects on *both* federal and state elections. In 1978, the FEC declared that state and local party committees could use a combination of federally regulated funds (so-called "hard money") and state-regulated funds (so-called "soft money") to fund those activities. *See* FEC Advisory Op. 1978-10. The FEC subsequently allowed national party committees to use a similar "allocation" of federally regulated and state-regulated funds. *See* FEC Advisory Op. 1979-17. Over the next two decades, the FEC extended the allocation regime to cover other activities, including administrative expenses, party-promoting (or "generic") campaign activities, and, perhaps most significantly, some so-called "issue advocacy." *See* FEC Advisory Op. 1995-25. During the 1990s, the raising and spending of state-regulated funds by political party committees, and the use of so-called "issue advocacy" by various groups, expanded significantly. By 2002, the major parties were raising a total of almost $500 million per election cycle in state-regulated funds. *See* Supp. App. 489sa (Kollar-Kotelly).

B. BCRA

BCRA is composed of a confusing, sometimes internally contradictory, patchwork of regulations, the most important of which are discussed below.

1. Title I of BCRA regulates the use of so-called "soft money": that is, funds that had previously been subject only to state regulation. Section 101 of BCRA bans national party committees from receiving or spending state-regulated funds for any purpose — even for activities that solely or primarily affect state and local elections. Section 101 also bans national party committees from soliciting state-regulated funds for, or transferring state-regulated funds to, any other entity, including state and local party committees.

In addition, section 101 bans state and local party committees from spending state-regulated funds for what BCRA euphemistically calls "federal election activity" — a category that includes voter registration, voter identification, get-out-the-vote activity, and party-promoting campaign activity whenever there is a federal election on the ballot, and advertising that refers to a federal candidate and "promotes," "supports," "attacks," or "opposes" the candidate. Because most States hold their state and local elections at the same time as federal elections, the practical effect of this provision is to ban state and local party committees from using state-regulated funds for covered activities even if those activities solely or primarily affect state and local elections.

Section 101 also severely restricts federal officeholders and candidates from raising state-regulated funds, and bans state and local candidates from spending state-regulated funds on advertising that refers to a federal candidate and "promotes," "supports," "attacks," or "opposes" the candidate.

2. Title II of BCRA is primarily directed toward the regulation of "electioneering communications," a new statutory term that embraces certain types of so-called "issue advocacy."

Sections 201 and 204 ban all corporations and unions, or entities using funds donated by corporations and unions, from making disbursements for "electioneering communications." Section 201 requires all persons who spend $10,000 on "electioneering communications" to make disclosures to the FEC regarding those disbursements. Section 203, in turn, defines an "electioneering communication" as any broadcast advertising carried within 30 days of a primary or 60 days of a general election which "refers to a clearly identified candidate for Federal office." Anticipating that this definition might be held unconstitutional, Congress included a "fallback" definition, which defines an "electioneering communication" as any broadcast advertising carried *at any time* which "promotes," "supports," "attacks," or "opposes" a federal candidate and "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

Title II also contains a number of provisions relating to disclosure and coordination. Sections 201 and 212 impose disclosure requirements on persons who merely enter into a contract to make disbursements for electioneering communications or other regulated expenditures, even before those outlays are actually made. Section 202 treats coordinated disbursements for electioneering communications, like coordinated expenditures, as contributions to the "supported" candidates. Section 214 broadens the definition of "coordination," repeals the FEC's existing regulations on coordination, and orders the FEC to promulgate regulations in support of the new statutory definition of coordination. Finally, section 213 bans political parties from making both independent and certain coordinated expenditures on behalf of a nominated candidate, and instead forces them to choose between one and the other.

3. Title III of BCRA includes various miscellaneous provisions. Section 318 bans minors from contributing federally regulated money in any amount to a federal candidate, and from contributing either federally regulated or state-

regulated money to a political party committee. Section 305 requires a federal candidate who wishes to take advantage of the lowest available rate for broadcast advertising either to certify that he or she will not refer to another candidate in any advertising, or to include a specified identification or statement in the ad. Belying Congress' claim that the ordinarily applicable limits for contributions and coordinated expenditures are necessary to combat actual or apparent corruption, sections 304, 316, and 319 effectively protect incumbents by raising those ordinarily applicable limits when candidates face opponents using personal funds in their campaigns. And section 311 establishes detailed identification requirements for the sponsors of express advocacy or electioneering communications.

4. Title V of BCRA contains section 504, which requires broadcasters to collect and disclose records of requests to purchase broadcast time for communications "relating to any political matter of national importance," even if those communications are never actually made.

C. The District Court's Decision

Conceding that BCRA raised "serious constitutional concerns," President Bush nevertheless signed BCRA into law on March 27, 2002. Eleven complaints were promptly filed in the United States District Court for the District of Columbia, challenging various aspects of the law. Pursuant to the judicial-review provisions in section 403 of BCRA, those cases were expedited and consolidated before a single three-judge panel (Henderson, Circuit Judge, and Kollar-Kotelly and Leon, District Judges). More than a year later, in a series of fractured opinions, the district court struck down some of the contested provisions of BCRA and upheld others.

1. The district court invalidated most of section 101, BCRA's "soft money" provision. *See* Supp. App. 397sa-460sa (Henderson), 887sa-1008sa (Kollar-Kotelly), 1084sa-1146sa (Leon). It struck down almost all of the restrictions on national party committees, with Judge Leon, in his controlling opinion for the court, rewriting the statute to ban national committees from spending state-regulated funds only for advertising that refers to a federal candidate and "promotes," "supports," "attacks," or "opposes" that candidate. The court also held unconstitutional the restrictions on state and local party committees, except insofar as the statute bans state and local committees from spending state-regulated funds for advertising referring to federal candidates. And the court struck down a provision banning party committees from soliciting funds for, or donating funds to, certain tax-exempt organizations or political committees. The court upheld the provisions limiting the ability of federal officeholders and candidates to raise state-regulated funds, and banning state and local candidates from spending state-regulated funds on advertising referring to federal candidates.

2. The district court also invalidated the core of BCRA's "electioneering communications" provisions, contained in sections 201, 203, 204, and 311. *See id.* at 106sa-128sa, 157sa-158sa (Kollar-Kotelly and Leon), 345sa-380sa (Henderson), 776sa-886sa (Kollar-Kotelly), 1146sa-1169sa (Leon). The district court agreed with plaintiffs that the "primary" and "fallback" definitions of "electioneering communications" were overbroad and vague, respectively. However, Judge Leon, in his controlling opinion for the court, again rewrote the statute in order to uphold it, severing the language in the "fallback" definition requiring regulated advertising to "be suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" and then upholding the "fallback" definition as broadened. The court upheld virtually the entirety of the disclosure provisions in sections 201 and 311.

3. The district court also invalidated the provision of section 201 requiring advance disclosure of contracts to make disbursements for "electioneering communications," even

before they are made. Over Judge Henderson's dissent, however, the court refused to reach plaintiffs' challenge to section 212, which requires similar advance disclosure of contracts to make independent expenditures, on the ground that the FEC's implementing regulations construe section 212 not to require such advance disclosure. *See id.* at 106sa-128sa, 130sa-134sa (Kollar-Kotelly and Leon), 380sa-384sa (Henderson). Also over Judge Henderson's dissent, the court rejected plaintiffs' challenges to the coordination provisions in sections 202 and 214, holding that an agreement is not constitutionally required as a predicate for a finding of coordination and that some of plaintiffs' challenges were nonjusticiable on standing and ripeness grounds. *See id.* at 128sa-130sa, 134sa-157sa (Kollar-Kotelly and Leon), 384sa-396sa (Henderson). And the court held that plaintiffs lacked standing to challenge section 305, the provision imposing restrictions on federal candidates who wish to take advantage of the lowest available rate for broadcast advertising. *See id.* at 8sa (*per curiam*), 467sa-472sa (Henderson), 1008sa (Kollar-Kotelly).

The district court unanimously invalidated three other provisions. The court concluded that section 213, which forces political parties to choose whether to make independent or certain coordinated expenditures on behalf of a nominated candidate, is unconstitutional because it severely burdens parties' First Amendment right to make independent expenditures. *See id. at* 396sa-397sa (Henderson), 886sa (Kollar-Kotelly), 1169sa-1176sa (Leon). It invalidated section 318, which bans minors from making contributions or donations of any amount to a federal candidate or political party committee. *See id.* at 460sa-467sa (Henderson), 1009sa-1011sa (Kollar-Kotelly), 1176sa-1181sa (Leon). And it struck down section 504, the provision requiring broadcasters to collect and disclose records of requests to purchase broadcast time, with a majority concluding that defendants had failed to identify any evidence that the provision served a cognizable governmental

interest. *See id.* at 371sa-384sa (Henderson), 1011sa (Kollar-Kotelly), 1181sa-1184sa (Leon).

SUMMARY OF ARGUMENT

A. BCRA's "soft money" provision violates the First Amendment, and can be invalidated on that basis alone. The provision severely burdens speech and associational rights, and should therefore be subject to strict scrutiny. Under any applicable level of scrutiny, however, it is invalid. The provision cannot implicate the governmental interest in preventing actual or apparent *quid pro quo* corruption, since it regulates only donations to and disbursements by political parties, rather than federal officeholders or candidates. The Court should reject outright the defendants' effort to defend the provision on the theory that it is needed to avoid the mere "possibility of the appearance of corruption," or "circumvention" of existing limits. Such unbridled justifications would sweep far beyond *Buckley* and allow the regulation of virtually *any* activity in the realm of campaign financing. As this Court noted almost a decade ago, the use of state-regulated funds for activities such as voter registration and get-out-the-vote efforts presents only the most attenuated opportunity for corruption, and, to the extent that any such opportunity exists, Congress could readily have enacted more narrowly tailored alternatives, such as a cap on the amount of state-regulated funds that could be given to national parties.

BCRA's "soft money" provision is unconstitutional for two additional reasons. First, the provision trenches on the prerogatives of the several States by exceeding Congress' power under the Elections Clause. That clause allows Congress to regulate the financing of *federal* campaigns, but not *state* campaigns. The provision overrides longstanding state regulatory mechanisms by limiting the activities of political parties, officeholders, and candidates, even if those activities affect *both* federal and state elections, or have *no* practical effect on federal elections at all. Second, the provision curtails speech by political parties but not identical speech by other entities engaged in the political process, in violation of the equality principle embodied in the First and Fifth Amendments. It will effect a massive transfer of funds from the political parties to narrowly focused interest groups, thereby detracting from the crucial role that parties have played in our political process.

B. BCRA's "electioneering communications" provisions also violate the First Amendment. Under this Court's landmark decision in *Buckley*, the government may regulate independent expenditures only for advertising that expressly advocates the election or defeat of a clearly identified candidate. To prevail, defendants must not only convince this Court to jettison *stare decisis* values and overrule *Buckley*, but also persuade the Court to promulgate a new rule prohibiting corporations and unions from engaging in core political speech about issues and candidates. Even if this Court were to agree with defendants in both respects, BCRA's "electioneering communications" provisions suffer from other constitutional infirmities, including overbreadth, vagueness, and underinclusiveness.

C. Finally, a number of BCRA's other provisions are likewise unconstitutional. BCRA's "advance notice" provisions require disclosures even before expenditures are made, absent any cognizable justification for doing so. The "coordination" provisions impermissibly broaden the definition of coordination, with the result that even mere discussions with a candidate or political party are sufficient to render an expenditure "coordinated" (and thereby subject to the limits applicable to contributions). The "attack ad" provision improperly conditions the availability of lower advertising rates on a candidate's agreement either that the candidate will not engage in "negative" advertising, or that the candidate will include certain content in his or her ad. The "forced choice" provision imposes a similarly unconstitutional condition, requiring political parties to choose whether to make independent or certain coordinated expenditures on behalf of a nominated candidate. The "minors" provision bans minors from making contributions to candidates or political parties, in stark contravention of their undoubted constitutional rights. And the "broadcaster records" provision imposes onerous recordkeeping and disclosure obligations on broadcasters — obligations that are both substantially overbroad and decidedly vague. All of these provisions, too, should be invalidated.

ARGUMENT

I. THE "SOFT MONEY" PROVISION OF BCRA IS UNCONSTITUTIONAL.

For many decades before BCRA's enactment, federal law governed the financing of federal election campaigns, and state law the financing of state campaigns. Where activities had effects on both federal and state elections — such as voter registration — political party committees were allowed to use a combination of federally regulated funds (so-called "hard money") and state-regulated funds (so-called "soft money") to pay for those activities. This dual regime reflected an assiduous regard for our federal system.

BCRA changes all that. For the first time, Congress has enacted legislation that dramatically restricts the funding of political activity on *both* the federal and state levels. Section 101 of BCRA imposes stringent and unprecedented restrictions on the raising and spending of state-regulated funds by political parties. And it severely burdens the activities of federal and state officeholders and candidates.

As we will now explain, this new provision restricts the rights of free speech and association in violation of the First Amendment. The district court correctly struck down most of section 101 on First Amendment grounds, though it erred by upholding the remainder. Equally fundamental, section 101 is unconstitutional on two additional grounds that the majority below largely did not reach. First, section 101 trenches on the prerogatives of the States by exceeding Congress' power to regulate federal elections under Article I, Section 4, of the Constitution. Second, section 101 impermissibly discriminates against speech by political parties in violation of the First and Fifth Amendments.

A. The "Soft Money" Provision Violates The First Amendment Rights Of Free Speech And Association.

In this section, we first demonstrate that section 101 burdens significant speech and associational rights, and should therefore be subject to strict scrutiny under this Court's settled jurisprudence. We then demonstrate that section 101 is not narrowly tailored to meet the government's compelling interest in preventing actual corruption or the appearance of corruption.

1. Section 101 affects the speech and associational rights of donors, political parties, and others in several pivotally important ways.

a. Like the contribution and expenditure limits at issue in *Buckley*, section 101 burdens the speech and associational rights of donors, who will no longer be able to give donations previously permitted by state law to national party committees, and of the parties themselves, which will no longer be able to spend state-regulated funds either at all (in the case of national party committees) or except for certain limited activities that do not qualify as "federal election activity" (in the case of state and local party committees). In *Buckley*, the Court noted (as to expenditures) that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. The Court noted (as to contributions) that contributions, like expenditures, have a speech component, though it suggested that "the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21. And the Court noted that limitations on contributions and expenditures implicated not just the right of free speech, but the right of free association as well. *See id.* at 22.

b. Section 101 burdens speech rights in additional ways not at issue in *Buckley*. For instance, it imposes restrictions not just on contributions and expenditures, but also on *solicitations*. This Court has repeatedly affirmed that a restriction on solicitations is the most direct form of restriction on speech. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 725 (1990); *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 788-89 (1988); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). That is unsurprising, for "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," *id.*, and "without solicitation the flow of such information and advocacy would likely cease," *id.*

Section 101 aggressively regulates the solicitation of both state-regulated and federally regulated funds. It bans national committees outright from soliciting state-regulated funds, *see* BCRA § 101(a) (adding new FECA § 323(a)(1)), and from soliciting a new category of federally regulated funds known as "Levin" funds, which can be used for a narrow subset of "federal election activity" known as "Levin" activities, *see id.* (adding new FECA § 323(b)(2)(C)(i)). It bans state and local committees from soliciting Levin federally regulated funds on behalf of, or jointly with, other state and local committees. *See id.* (adding new FECA § 323(b)(2)(B)(iv)). It bans all party committees from soliciting *any* type of funds for certain tax-exempt organizations or political committees. *See id.* (adding new FECA § 323(d)). Finally, it bans federal officeholders and candidates from soliciting state-regulated funds in connection with any state or local election on behalf of party committees or candidates unless those funds comply with the source-and-amount requirements of federal law, *see id.* (adding new FECA § 323(e)(1)(B)), and also bans them from soliciting Levin federally regulated funds, *see id.* (adding new FECA § 323(e)(1)(A)).[2] All of these restrictions deeply compromise the speech rights of the regulated actors.

c. In addition to speech rights, section 101 burdens associational rights in ways not implicated in *Buckley*. Specifically, by pervasively regulating the relationships among party committees, and between party committees and others, section 101 impermissibly interferes with the associational rights of political parties and their members. It is beyond question that "[t]he right to associate with the political party of one's choice is an integral part" of the First Amendment freedom of association. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). It is also well established that the right of association inheres not only in the members of a political party, but also in the party itself. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). So too, when the government attempts to regulate the internal structure of political parties, it infringes on the parties' associational rights. *See California Democratic Party v. Jones*, 530 U.S. 567, 573 (2000); *Eu*, 479 U.S. at 229, 230-31.

i. Section 101 interferes directly with the ability of different committees within a single political party to associate freely with each other. Most significantly, it bans national committees from transferring state-regulated funds to state and local committees, *see* BCRA § 101(a) (adding new FECA § 323(a)(1)); from soliciting Levin federally regulated funds for state and local committees, *see id.* (adding new FECA § 323(b)(2)(C)(i)); and from providing *any* funds to state and local committees for use in Levin activities, *see id.* (adding new FECA § 323(b)(2)(B)(iv)). It also bans state and local committees from soliciting Levin federally regulated funds on behalf of, or jointly with, other state and local committees, *see id.*, and from transferring Levin funds to those committees, *see id.* (adding new FECA § 323(b)(2)(C)(ii)). As numerous witnesses testified below, the net effect of these provisions is to strip from political parties much of their traditional power both to engage in coordinated fundraising and to allocate funds on the national, state, and local levels. *See, e.g.*, Supp. App. 304sa-306sa (Henderson), 1222sa-1223sa, 1239sa (Leon). The provisions will also force political parties to shift their fundraising activities from the national committees, which have developed comparative expertise in fundraising, *see, e.g., id.* at 1219sa, 1221sa-1222sa (Leon), to state and local committees.

ii. Section 101 also interferes with the ability of party committees to associate with others, including their own members. It severely restricts federal officeholders and candidates from participating in fundraising programs run by state and local committees. *See* BCRA § 101 (adding new FECA § 323(e)(1)). It bans party committees from soliciting funds for, or donating funds to, certain tax-exempt organizations and political committees. *See id.* (adding new FECA § 323(d)). Finally, to the extent that it treats certain federal officeholders or state and local party officials as "officers or agents" of the national committees, it bans those individuals from soliciting state-regulated funds or Levin federally regulated funds. *See id.* (adding new FECA §§ 323(a), 323(b)(2)(C)(i)). When considered as a whole, these associational burdens are both substantial and unprecedented.

2. Because of its severe burdens on free speech and association, section 101 should be subject to strict scrutiny.

It is well established that "exacting" or strict scrutiny is applied to limitations on independent expenditures, *see, e.g.*,

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[2] Section 101 also imposes complex restrictions on federal officeholders and candidates in connection with the solicitation of state-regulated funds for tax-exempt organizations. *See* BCRA § 101(a) (adding new FECA § 323(e)(4)).

Colorado II, 533 U.S. at 440-41; limitations on solicitations, *see, e.g.*, *Riley*, 487 U.S. at 795-96; and any other limitations that impose a severe burden on associational rights, *see, e.g.*, *California Democratic Party*, 530 U.S. at 582; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Eu*, 489 U.S. at 231. Strict scrutiny therefore unquestionably applies to all of the provisions of section 101 that were upheld (as modified) by the district court. *See* BCRA § 101(a) (adding new FECA §§ 323(a), 323(b)(1), 323(e), 323(f)); BCRA § 101(b) (adding new FECA § 301(20)(A)(iii)).

Defendants may well urge, as they did before the district court, that a lower degree of scrutiny is appropriate because section 101 also contains a limitation on contributions: namely, the subsection that bars donations of state-regulated funds to national party committees. *See* BCRA § 101(a) (adding new FECA § 323(a)(1)). To be sure, this Court has applied a lower level of scrutiny to limitations on contributions. *See, e.g.*, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But section 101 is far more than a contribution-limitation provision. Because section 101 was enacted as an integrated whole, this Court should treat section 101 accordingly, and subject its far-reaching requirements to strict scrutiny.[3] Even if the Court applies varying standards of review to different parts of section 101, however, it should still apply strict scrutiny to the subsection barring donations of state-regulated funds to national committees, for two reasons.

First, unlike the provisions of FECA at issue in *Buckley*, section 101 does not impose any new limits on the *amounts* of contributions to national committees: instead, it merely subjects funds used by national committees for a variety of previously unregulated purposes to the preexisting source-and-amount limitations of FECA, and requires that national committees raise and spend federally regulated, rather than state-regulated, funds for those activities. Because section 101 thereby effectively regulates the *uses* for which money is raised and spent, rather than imposing any new limits on the *amounts* of contributions or expenditures, *Buckley*'s dichotomy between contributions and expenditures is inapposite, and strict scrutiny is warranted.

Second, this Court has squarely concluded that limitations on the amount of contributions to *third parties*, unlike contributions to *candidates*, are subject to strict scrutiny. *See Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299 (1981). That rule makes eminent sense, because a limitation on the amount of contributions to third parties effectively limits the amount of expenditures by the third parties themselves (and, by extension, by the contributors who associate through those third parties). *See id.*; Supp. App. 398sa-409sa (Henderson). To be sure, this Court has seemingly applied a lower degree of scrutiny to limitations on contributions to third parties where those contributions could be used to circumvent limits on contributions directly to candidates. *See California Med. Ass'n v. FEC*, 453 U.S. 182, 198 (1981) (plurality opinion); *Buckley*, 424 U.S. at 38. Because donations of state-regulated funds cannot be used for express advocacy or other activities that solely support a candidate for federal office, however, such funds are not interchangeable with federally regulated funds contributed directly to candidates. The donation limit in section 101 will effectively limit the amount that national committees can spend on a variety of activities that only indirectly and partially assist a candidate for federal office, such as voter registration, voter identification, and get-out-the-vote efforts. It should therefore be subject to strict scrutiny.

3. Section 101 violates the First Amendment because it fails strict, or even intermediate, scrutiny. We begin by

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[3] *Cf. Nike, Inc. v. Kasky*, 539 U.S. ___, ___ (2003) (slip op., at 12-13) (Breyer, J., joined by O'Connor, J., dissenting) (applying heightened scrutiny to mixture of commercial and non-commercial speech).

identifying the governmental interests implicated by section 101, then consider whether section 101 is sufficiently tailored.

a. This Court held in *Buckley*, and has since reaffirmed, that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). "The hallmark of corruption," in turn, "is the financial *quid pro quo*: dollars for political favors." *Id.* at 497; *accord Buckley*, 424 U.S. at 26, 27, 45.

Section 101 cannot implicate the governmental interest in preventing actual or apparent corruption in the classic, *quid pro quo* sense, since a *political party* (unlike a current or future officeholder) cannot respond to a donation by taking some legislative action, but instead can act only through its officeholders. Unsurprisingly, defendants have failed, despite voluminous discovery, to identify a single instance of *quid pro quo* corruption attributable to the donation of state-regulated funds. *See* Supp. App. 325sa-328sa, 409sa-411sa, 425sa (Henderson), 1103sa-1111sa (Leon). Consequently, defendants contend that the donation of state-regulated funds can be corrupting because it allows donors to buy not some particular legislative action, but rather "access" to officeholders through their political parties. Defendants have suggested that this alleged purchasing of "access" gives rise not to actual corruption or the appearance of corruption, but rather to the "*possibility* of the appearance of corruption." Supp. App. 430sa, 433sa (Henderson) (emphasis added).

We recognize that language in some of this Court's most recent campaign finance opinions suggests that the government's interest in preventing corruption sweeps beyond preventing classic, *quid pro quo* corruption, to stemming the "broader threat from politicians too compliant with the wishes of large contributors," *Shrink Missouri*, 528 U.S. at 389, and barring "undue influence on an officeholder's judgment, and the appearance of such influence," *Colorado II*, 533 U.S. at 441. However broad these formulations may be, they do not reach as far as defendants' "access"-based interest. Defendants' "unexamined, anecdotal accounts" aside, *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001), there are no legislative findings, and certainly no valid statistical evidence, that money secures access to officeholders, *see* Supp. App. 328sa-332sa (Henderson), 1081sa (Kollar-Kotelly), 1263sa-1264sa (Leon). Even if there were sufficient evidence of such a link, however, defendants' "access"-based interest proves too much. Assuming that officeholders naturally provide greater access to their supporters, and specifically to their financial supporters (whether or not that includes the financial supporters of their political parties), than to their opponents, the only solution would be to take all money (whether federally regulated and state-regulated) out of politics altogether — which BCRA does not purport to do. In any event, this Court has squarely rejected such a broad equality-based rationale as a justification for campaign finance regulation. *See, e.g.*, *Buckley*, 424 U.S. at 48-49.

In the alternative, BCRA's defenders have contended that the government has an interest in imposing additional limits that, while themselves not justified by the anti-corruption rationale, are necessary to prevent circumvention of existing limits that *are* justified by the anti-corruption rationale.

To the extent this Court has invoked such a rationale, it has done so only in a limited context: namely, to uphold limits on contributions that could be used for the same purposes as direct contributions to federal candidates themselves. Thus, in *Buckley*, the Court upheld the $25,000 federal limit on aggregate contributions by an individual in a calendar year, on the ground that otherwise an individual could circumvent the $1,000 limit on contributions to a single candidate simply by contributing to that candidate's political party or sympathetic PACs. *See* 424 U.S. at 38. Similarly, in *California Medical*, the Court upheld the $5,000 federal limit on contributions to PACs, on the virtually identical rationale that otherwise an individual could circumvent the $1,000 limit on contributions to a single candidate and the $25,000 annual limit on aggregate contributions. *See* 453 U.S. at 198 (plurality opinion); *id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment). In its recent decision in *Beaumont*, the Court suggested that a similar rationale could be used to justify the ban on contributions by corporations. *See* 123 S. Ct. at 2207. Finally, in *Colorado II*, the Court, while frequently referring to "circumvention," upheld limits on coordinated expenditures by political parties on the basis of the longstanding rule, dating from *Buckley*, that expenditures coordinated with federal candidates are the functional equivalent of contributions to the candidates themselves. *See* 533 U.S. at 442-43. Pivotally, however, the Court has never embraced an anti-circumvention rationale to justify limitations on donations that are not interchangeable with direct contributions to *candidates*, much less limitations on independent expenditures (which, of course, are entitled to the fullest First Amendment protection). Indeed, the fifth-vote concurrence in *California Medical* expressly disclaimed application of the anti-circumvention rationale to independent expenditures. *See* 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment).

In reality, defendants' anti-circumvention rationale is no rationale at all. *Any* currently lawful use of money to affect the political process could be characterized as an attempt to "circumvent" currently existing prohibitions on other uses. If this Court were to uphold BCRA on the basis of the anti-circumvention rationale, defendants would likely justify future restrictions as necessary to prevent circumvention of BCRA, much as they have justified BCRA as necessary to prevent circumvention of existing law (and, indeed, have justified certain provisions of BCRA as necessary to prevent circumvention of *other* provisions of BCRA). This house of cards cannot stand. The Court should reject defendants' perverse attempt to fashion a limitless "prophylactic" rationale for *suppressing*, rather than *protecting*, core constitutional rights. *See NAACP v. Button*, 371 U.S. 415, 438 (1963).

b. The remaining question is whether section 101 is sufficiently tailored to the government's interest in preventing actual or apparent corruption. It is not.

i. At the outset, it is questionable whether section 101 is tailored to the government's interest in preventing corruption *at all*. To conclude that it is, the Court would have to indulge two critical assumptions.

First, the Court would have to assume that the donation of state-regulated funds to, or the spending of state-regulated funds by, a political party is just as corrupting of a candidate as a contribution directly to the candidate. To make such an assumption would work a major departure from existing law. In *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*Colorado I*), this Court held that Congress could not constitutionally limit independent expenditures of federally regulated funds by political parties. The plurality expressly rejected the argument that there are "any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction." *Id.* at 616. Indeed, the Court noted that expenditures by political parties were designed not only to get the party's candidates elected, but to promote the views of the party's members. *See id.* (plurality opinion); *id.* at 629 (Kennedy, J., concurring in part and dissenting in part); *id.* at 646 (Thomas, J., concurring in part and dissenting in part). Defendants advance no justification for treating the disbursement of state-regulated funds by political parties (or the donation of state-regulated funds to political parties for use in such disbursements) differently from expenditures of federally regulated funds by the same parties for purposes of First Amendment analysis.[4]

Second, the Court would have to assume that a donation of state-regulated funds to be used for activities that do not exclusively serve to get a candidate elected, but instead benefit candidates up and down the party ticket (such as party-promoting campaign activity), or the spending of state-regulated funds for such activities, is just as corrupting of a candidate as a contribution to be used for activities that exclusively do so (such as express advocacy). Again, this Court's decisions counsel against such an assumption. In *Colorado I*, the plurality expressly recognized that "FECA permits unregulated 'soft money' contributions to a party for certain activities." 518 U.S. at 616. Nevertheless, the plurality stated outright that "the opportunity for corruption posed by these greater opportunities for contributions is, *at best, attenuated*." *Id.* (emphasis added); *see also id.* at 647 (Thomas, J., concurring in part and dissenting in part) (noting that "there is little risk that an individual donor could use a party as a conduit for bribing candidates"). As a matter of common sense, because state-regulated funds by definition can be used only for activities that influence state elections (or in combination with federally regulated funds, for activities that influence *both* state and federal elections), a candidate will feel less indebted, *ceteris paribus*, to a donor for contributing state-regulated funds, which will affect his own election only indirectly and partially (if at all), than to another donor who contributes federally regulated funds, which can be used directly and entirely to support his

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[4] In upholding limits on *coordinated* expenditures by political parties, the Court did state that political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452. That makes our point. Since *Buckley*, the Court has treated coordinated expenditures as the functional equivalent of direct contributions to a candidate. *See id.* at 444. And the Court went on in *Colorado II* to emphasize that, in upholding limits on coordinated expenditures by political parties, it was treating political parties no differently from individuals or PACs, which are similarly limited. *See id.* at 455.

election. *See, e.g.*, Supp. App. 1105sa-1106sa (Leon).

ii. Even if the disbursement or donation of state-regulated funds could be corrupting in some circumstances, section 101 is substantially overbroad. If Congress were truly concerned with actual or apparent corruption, it could readily have enacted a more narrowly tailored alternative.

For instance, to the extent "large" donations of state-regulated funds are seen to be corrupting, *see Shrink Missouri*, 528 U.S. at 389, Congress could have imposed a cap on the amount of such donations. Indeed, the Hagel Amendment, which Congress considered and rejected, would have done just that. Specifically, it would have imposed a $60,000 aggregate limit on donations of federally regulated funds and state-regulated funds from any one donor to a national party committee. *See* 147 Cong. Rec. S2908 (daily ed. Mar. 26, 2001) (proposed amendment to S. 27, 107th Cong. (2001)). Instead, section 101 bans *any* donations of state-regulated funds to national committees, no matter how small, and further bans *disbursements* of state-regulated funds by national committees for any purpose (and by state and local committees for "federal election activity"). In addition, section 101 imposes a variety of restrictions with no evident connection to any concern about large donations, including (but not limited to) the ban on joint efforts by state and local committees to raise Levin funds; the ban on transfers of Levin funds between state and local committees; and the ban on solicitations by party committees for, or donations by party committees to, certain tax-exempt organizations and political committees.

Likewise, to the extent particular *uses* of state-regulated funds are seen as corrupting, Congress could have imposed narrower limits on the uses to which such funds could be put. Specifically, Congress could have limited the use of state-regulated funds only for those activities that arguably have a more direct effect on a federal candidate's election (such as advertising that refers to a federal candidate, assuming for the moment that such disbursements could constitutionally be regulated),[5] and not for those activities whose effect on a federal candidate's election is concededly more attenuated (such as party-promoting campaign activity). Instead, section 101 bans *all* uses of state-regulated funds by national committees, and restricts a number of uses of state-regulated funds by state and local committees which primarily or only affect state elections. And section 101 imposes a variety of restrictions on the transfer and solicitation of funds, which cannot be justified by any concern about the use of state-regulated funds for certain activities. This is overkill in the extreme. Given the availability of more narrowly tailored alternatives, section 101 violates the First Amendment.

B. The "Soft Money" Provision Constitutes An Invalid Exercise Of Congress' Power To Regulate Elections Under Article I, Section 4, Of The Constitution.

Because the district court struck down most of section 101 on First Amendment grounds, it had almost no occasion to reach plaintiffs' Elections Clause arguments, though concerns about section 101's regulation of state and local activities seemed to animate the district court's decision that most of section 101 was overbroad. *See, e.g.*, Supp. App. 433sa (Henderson) (noting that provisions regulating state and local party committees "apply wholesale to state and local party expenditures for state-focused election activities that barely affect federal elections"), 1101sa (Leon) (concluding that "the evidence, legal precedent, and common sense * * * do *not* support Congress' effort to regulate nonfederal funds used for nonfederal and mixed purposes"). Quite apart from First Amendment concerns, section 101 should fall in its entirety. Section 101 massively intrudes into a core area of state sovereignty — the ability of States to regulate their own elections. The Elections Clause authorizes Congress to regulate the financing of federal, not state, campaigns.

1. a. The Elections Clause states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. In *Buckley*, this Court assumed that the Elections Clause enabled Congress to regulate the financing of federal campaigns. *See* 424 U.S. at 13. But it added that none of the parties was challenging Congress' power to enact FECA. *See id.* at 13-14.

Whatever the merits of the Court's assumption in *Buckley* that the power to regulate the "Manner of *holding* Elections" entails the power to regulate the manner of *financing* election campaigns — which appellants, like the plaintiffs in *Buckley*, do not challenge — the text and history of the Elections Clause, and subsequent case law interpreting it, make clear that the Constitution does not empower Congress to regulate the financing of campaigns for *state* office.

b. The Elections Clause arose from a carefully crafted compromise between delegates to the Constitutional Convention who wanted the States to have plenary power over the election of federal officials, and delegates who wanted Congress to enjoy that power. *See Oregon v. Mitchell*, 400 U.S. 112, 119 n.2 (1970) (opinion of Black, J.); 2 Joseph Story,

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[5] In his controlling opinion, Judge Leon upheld provisions of section 101 that (1) restrict state and local party committees from making disbursements of state-regulated funds for certain advertising that refers to a federal candidate, *see* BCRA § 101(a) (adding new FECA § 323(b)(1)); BCRA § 101(b) (adding new FECA § 301(20)(A)(iii)), and (2) restrict state and local candidates from making disbursements of state-regulated funds for such advertising, *see* BCRA § 101(a) (adding new FECA § 323(f)(1)). Judge Leon also rewrote section 101 to add a similar restriction for national party committees. *See* Supp. App. 1111sa-1118sa. Whether as written by Congress or as rewritten by Judge Leon, however, all of these provisions violate the First Amendment for the simple reason that they impermissibly regulate expenditures for speech that does not constitute express advocacy. *See infra* Part II.

Commentaries on the Constitution of the United States 280-92 (1st ed. 1833). Under that compromise, States were given the power to enact regulations concerning federal elections, but Congress was given the power to override those regulations. The latter power was designed to counteract the "potential for States' abuse" of the former. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995). Indeed, the Framers were concerned that, if States enjoyed unlimited power over the election of federal officials, they might refuse to provide for their election at all. *See, e.g.*, The Federalist No. 59, at 363 (Clinton Rossiter ed. 1961) (Alexander Hamilton).

What is abundantly clear, however, is that the Framers left untouched the power of the States to regulate *state* elections. As Hamilton wrote in spirited defense of the Elections Clause:

> Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment; and, to an unbiased observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect to the pleasure of the State governments. An impartial view of the matter cannot fail to result in a conviction that each, as far as possible, ought to depend on itself for its own preservation.

Id.; *see also* 2 Story, *supra*, at 284-85 (paraphrasing Hamilton).

c. In a series of cases after the Civil War, the Court confirmed what is plain from the text and contemporary understanding of the Elections Clause: namely, that it does not confer upon Congress power to regulate state elections, much less to regulate campaign financing in state elections. In *Ex parte Siebold*, 100 U.S. 371 (1879), the Court considered the constitutionality of provisions of the Enforcement Act barring fraud by, or interference with, election officers in House elections. The Court noted that, while States often hold their elections at the same time as federal elections, Congress does not thereby acquire the power to regulate *state* elections in such cases; rather, Congress merely retains its power to regulate *federal* elections. *See id.* at 393; *Ex parte Yarborough*, 110 U.S. 651, 662 (1884). Indeed, the Court specifically added the disclaimer that, if election officers were to take actions that "ha[d] exclusive reference to the election of State or county officers," Congress would lack any authority to regulate those actions. *See Siebold*, 100 U.S. at 393. Likewise, in *United States v. Reese*, 92 U.S. 214 (1875), the Court held that the only possible source of congressional authority for Enforcement Act provisions regulating state elections was the Fifteenth Amendment, not the Elections Clause. *See id.* at 217-18. Finally, in *Blitz v. United States*, 153 U.S. 308 (1894), the Court ordered dismissal of an Enforcement Act indictment that failed to specify that the defendant impersonated another voter in voting *for a federal candidate*. The Court reasoned that "[v]oting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for representative in congress," and added that "with frauds of that character the national government has no concern." *Id.* at 314-15; *see also Ex parte Clarke*, 100 U.S. 399, 404 (1879) (upholding punishment of election official for violation "in reference to an election of a representative to Congress").

More recent cases reaffirm the foundational principle that the Elections Clause gives Congress no power over state elections. Most notably, in *Oregon v. Mitchell*, the Court considered the scope of the Elections Clause in determining whether Congress had the power to give 18-year-olds the right to vote in state, as well as federal, elections. In his controlling opinion concluding that Congress lacked that power, Justice Black emphasized that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." 400 U.S. at 124-25 (footnote omitted). Justice Black added that "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Id.* at 125. Finally, Justice Black noted that the States' power to regulate state elections is limited only by those constitutional amendments that operate directly on the States (such as the Civil War Amendments), "each of which has assumed that the States had general supervisory power over state elections." *Id.* at 125-26.

In a similar vein, other cases reaffirm the broad power of States to regulate their own elections. *See, e.g., Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *Pope v. Williams*, 193 U.S. 621, 632 (1904). Even those Justices who have consistently dissented in the Court's recent federalism cases have agreed that "[a] State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty." *California Democratic Party*, 530 U.S. at 590 (Stevens, J., joined by Ginsburg, J., dissenting).[6]

2. Section 101 of BCRA impermissibly infringes on the ability of States to regulate state elections in four ways.

a. Section 101 severely limits the involvement of national party committees in state and local elections. Those committees are prohibited outright from receiving or spending any state-regulated funds — even if they are to be used solely for state and local elections, and even if no federal elections are on the ballot (as in the States that hold "off-year" elections). *See* BCRA § 101(a) (adding new FECA § 323(a)(1)).

"National" party committees are known as such for good reason: their responsibilities extend beyond federal elections to state and even local elections as well. National party committees have given substantial amounts of state-regulated funds to, or spent state-regulated funds on behalf of, state and local candidates: for example, in the last two off-year election cycles, the RNC gave over $9.5 million to state and local candidates, and directly spent over $1 million on such candidates' behalf. *See* Supp. App. 1101sa n.31, 1214sa (Leon). National committees have also spent funds on grassroots activities in connection with state and local elections. *See, e.g., id.* at 536sa-537sa (Kollar-Kotelly). And in addition to spending money directly on state and local elections, national committees have transferred state-regulated funds to state and local committees for use in those elections. Those transfers have constituted a sizable portion of the budgets of state and local committees in recent years. *See, e.g., id.* at 520sa (Kollar-Kotelly). A substantial amount of that money was used solely for the purpose of influencing state and local elections: in the last two off-year election cycles, the RNC transferred over $10 million to state committees for use in those elections. *See id.* at 1101sa n.31, 1214sa (Leon).

Section 101 bans all of those activities, and indeed imposes additional restrictions on national committees. Section 101 prohibits national committees from soliciting state-regulated funds (or Levin federally regulated funds) for state and local committees. *See* BCRA § 101(a) (adding new FECA §§ 323(a)(1), 323(b)(2)(C)(i)). It bans national committees from transferring *any* funds to state and local committees to use for Levin activities, which include many activities that affect only state elections. *See* BCRA § 101(a) (adding new FECA § 323(b)(2)(B)(iv)). And it prohibits national committees, like

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[6] Indeed, the FEC itself conceded, at least prior to this litigation, that "[t]he Constitution grants each state the right to * * * establish its own rules for financing the nonfederal elections held within its borders." Federal Election Commission, *Twenty Year Report* 19 (1995).

state and local ones, from soliciting funds for, or donating funds to, certain tax-exempt organizations and political committees, even if those funds are to be used for state and local elections. *See* BCRA § 101(a) (adding new FECA § 323(d)).

In sum, section 101 leaves national party committees in the unique and ironic position of being able to use only federally regulated funds for any activity affecting state and local elections. It thereby displaces the prior regulatory regime, which more adequately accommodated the competing state regulatory interest by allowing national committees to use a combination of federally regulated and state-regulated funds for activities affecting both federal and state elections, and only state-regulated funds for activities affecting state elections.

b. Section 101 has similarly draconian effects on the activities of state and local party committees. Those committees are banned from spending state-regulated funds for "federal election activity." *See* BCRA § 101(a) (adding new FECA § 323(b)(1)); BCRA § 101(b) (adding new FECA § 301(20)-(24)). State and local committees must now pay for these activities solely out of ordinary federally regulated funds — or, to the extent that these activities qualify as Levin activities, out of a combination of ordinary federally regulated funds and Levin federally regulated funds. *See* BCRA § 101(a) (adding new FECA § 323(b)(2)(A)).

BCRA purports to regulate spending by state and local committees only when they engage in what the statute deceptively calls "federal election activity." This is mere wordplay. The fact that campaign activity occurs when a federal election is on the ballot does not remotely render the activity itself "federal." In most States, state and federal elections are held simultaneously. As to those States, many activities are defined as "federal election activity" even if they have effects on *both* federal and state elections (such as voter registration and voter identification); if they have *no* practical effect on federal elections at all (such as certain get-out-the-vote activity or party-promoting campaign activity); or if they are directed *only* toward state and local elections (such as any covered activity in a district in which the federal elections on the ballot are either actually or practically uncontested).[7]

By requiring state and local committees to pay for all of these activities exclusively with federally regulated funds,[8] section 101 effectively overrides the more generous laws of States, such as Missouri, that allow donations for such activities from corporations and unions (unlike federal law); States, such as Pennsylvania, that allow larger donations than federal law, or indeed in unlimited amounts; or States, such as Virginia, that allow both. *See, e.g.*, Supp. App. 424sa (Henderson). As a result, state and local committees will no longer be able to avail themselves of millions of dollars raised in full compliance with applicable state law. The California Democratic Party, for example, has historically received more than three-quarters of its donations of state-regulated funds from large donors, *see id.* at 1241sa (Leon) — donations that could not constitute ordinary or Levin federally regulated funds, and thus could no longer be put toward "federal election activity," if BCRA is upheld.

In sum, section 101 requires state and local party committees to use only federally regulated funds for many activities affecting state and local elections. It thus fails properly to accommodate the States' interest in regulating the involvement of state and local committees in their own elections.

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[7] In the 2002 elections in California, for example, there were no elections for the Presidency or the Senate, and only one of the 53 elections for the House of Representatives was closely contested. *See* Supp. App. 311sa (Henderson), 1228sa, 1229sa (Leon); *see generally id.* at 1106sa n.34 (Leon) (noting "practical reality that congressional races in many states are either noncompetitive[] or uncontested").

[8] Section 101(b) of BCRA (adding new FECA § 301(20)(B)) does allow state and local committees to use state-regulated funds for a few narrow categories of activities that affect state elections, including paying for bumper stickers and yard signs that identify only a state or local candidate.

c. In addition to political parties, section 101 imposes limits on the activities of federal officeholders and candidates in connection with state and local elections. Those individuals are banned from soliciting or directing state-regulated funds in connection with any state or local election unless those funds satisfy the source-and-amount requirements of federal law. *See* BCRA § 101(a) (adding new FECA § 323(e)(1)(B)). Further, they are banned from soliciting or directing Levin federally regulated funds for Levin activity, even if it affects state elections. *See id.* (adding new FECA §§ 323(b)(2)(C)(i), 323(e)(1)(A)). Although federal officeholders and candidates may speak at or attend fundraising events for state and local committees, *see id.* (adding new FECA § 323(e)(3)), they are otherwise greatly restricted in participating in fundraising programs for state and local committees and candidates.

The effects of this federal intrusion will be severe. State and local committees rely heavily on the participation of federal officials in their parties' integrated fundraising programs. *See, e.g.*, Supp. App. 1222sa-1223sa (Leon). For instance, federal officeholders and candidates will be prohibited from writing or calling donors to ask them to make donations otherwise permitted by state law to state and local committees and candidates, as Senator McConnell has frequently done in the past in his capacity as *de facto* leader of the Kentucky Republican Party. *See, e.g.*, 2 PCS/McC 1-4 (McConnell); MMc 0095. The involvement of federal officeholders and candidates in state and local elections, like that of national party committees, will therefore be greatly curtailed.[9]

d. Finally, section 101 intrudes even into the activities of state and local candidates. Those candidates are banned from spending state-regulated funds on any advocacy which "refers to" a clearly identified candidate for federal office and which "promotes," "supports," "attacks," or "opposes" a candidate for that office, regardless of how that advocacy is transmitted or when it occurs. *See* BCRA § 101(a) (adding new FECA § 323(f)(1)). For example, if a Democratic candidate for the California Legislature were to spend funds lawfully raised under state law on a print ad criticizing his opponent for supporting tax cuts, and linking his opponent's support of tax cuts to President Bush's, the state candidate could thereby violate BCRA — notwithstanding the fact that such an ad would primarily, perhaps exclusively, affect a state election. This is tantamount to an outright ban on such advocacy, since there is no such thing as "federally regulated funds" for state and local candidates. This restriction, like the other restrictions in section 101, fails properly to accommodate the competing state interest in regulating state and local elections, and should therefore be held invalid.

C. By Discriminating Against Political Parties, The "Soft Money" Provision Violates The First And Fifth Amendments.

Section 101 also fails constitutional muster because it limits speech by political parties but not identical speech by other entities. As this Court has observed, "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and *the speakers who may address a public issue.*" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (emphasis added; citation omitted). This requirement of neutrality among speakers is drawn not only from the equal protection component of the Fifth Amendment, but from the First Amendment itself. *See, e.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Discrimination among speakers is a species of impermissible underinclusiveness, insofar as the government is prohibiting regulable speech by some speakers but not others. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

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[9] Judge Henderson did address appellants' federalism claim as to the restrictions on federal officeholders and candidates, concluding that Congress does have the power to regulate the solicitation and transfer of non-federal funds "where a *federal candidate* is the one soliciting." Supp. App. 452sa n.174. The Elections Clause, however, gives Congress only the power to regulate *federal elections* — not plenary power to regulate the activities of federal officeholders or candidates even in exclusive connection with *state and local elections*.

Consonant with this fundamental principle, the Court, in its two most recent cases involving campaign finance and political parties, reaffirmed that nothing relating to the government's interest in preventing corruption justifies subjecting political parties to *worse* treatment than other entities. In *Colorado I*, in concluding that political parties (like other entities) could not be restricted in making independent expenditures, the plurality expressly rejected the argument that there are "any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction." 518 U.S. at 616. And in *Colorado II*, in concluding that political parties (like other entities) could be restricted in making coordinated expenditures, the Court reiterated that there is "no reason to see [political party] expenditures as more likely to serve or be seen as instruments of corruption than * * * expenditures by anyone else." 533 U.S. at 444.

It is indisputable that section 101 will place political party committees at a severe disadvantage compared to interest groups. Whereas national party committees are barred outright from raising state-regulated funds — or spending them on contributions to state or local candidates, voter registration, voter identification, get-out-the-vote efforts, party-promoting campaign activity, or even administrative expenses — interest groups will be able to continue to raise and spend non-federally regulated funds for all of these purposes. Moreover, whereas national party committees are barred outright from spending state-regulated funds on so-called "issue advocacy" (regardless of whether it refers to a federal candidate, or how and when it is disseminated), interest groups will continue to be able to raise and spend non-federally regulated funds for such advocacy,

subject to the restrictions contained in the "electioneering communications" provisions of BCRA, and unincorporated organizations (and qualified non-profit corporations, under the so-called "*MCFL*" exception) will be able to raise and spend non-federally regulated funds for such advocacy without restriction.[10] Similar disabilities will attach to state and local committees, which are barred from using state-regulated funds for many of the same purposes as national committees.

In the recently completed 2002 election cycle, the major parties collectively raised almost $500 million in state-regulated funds. *See* Supp. App. 489sa (Kollar-Kotelly). Unsurprisingly, interest groups have already been gearing up to fill the void and secure those funds themselves for use in many of the same activities previously funded by the political parties. *See, e.g.*,

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[10] In his controlling opinion below, Judge Leon seemingly recognized the equal protection problem, and attempted to cure it by rewriting the statute so as to impose similar restrictions on party committees under the "soft money" provisions as on interest groups under the "electioneering communications" provisions. *Compare* Supp. App. 1084sa-1142sa (rewriting section 101 to bar disbursements of state-regulated funds by party committees for a "public communication that refers to a clearly identified candidate for Federal office * * * and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office") *with id.* at 1159sa-1166sa (rewriting section 201 to bar disbursements of funds by corporations and unions for "any broadcast, cable, or satellite communication which promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office"). Even under Judge Leon's procrustean version of BCRA, however, political party committees would still be at a disadvantage relative to unincorporated organizations and qualified non-profit corporations.

Conversely, if this Court holds the "electioneering communications" provisions of BCRA entirely unconstitutional, thereby allowing *all* interest groups to engage in such communications without restriction, the inequities between party committees and interest groups in their use of non-federally regulated funds will only grow. Indeed, if this Court strikes down the "electioneering communications" provisions, it should strike down the "soft money" provision as well, since Congress would likely not have enacted the latter provision in the former provisions' absence. *See, e.g.*, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

id. at 415sa-416sa (Henderson). Indeed, interest groups have freely acknowledged that they expect their donations to increase as a result of section 101. *See, e.g., id.* at 324sa (Henderson).

By effectively diverting funds from the political parties to interest groups, section 101 will empower narrowly focused interest groups at the expense of the political parties, and thereby detract from the central and unifying role that parties have played in our political process from the earliest days of the Republic. "The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change." *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring); *see also Colorado I*, 518 U.S. at 618 (plurality opinion) (noting "important and legitimate role" political parties have played in American political process). By impermissibly disadvantaging political parties, section 101 violates fundamental principles of free speech and equal protection.

II. THE "ELECTIONEERING COMMUNICATIONS" PROVISIONS OF BCRA ARE UNCONSTITUTIONAL.

Sections 201, 203, 204, and 311 of BCRA impose draconian restrictions on the most vital speech in our representative democracy: speech about public issues and public officials. In a nation that so highly values and so passionately protects political discourse, it is difficult to conceive of a more constitutionally threatening sort of legislative intrusion than one that so stifles debate at the very core of the First Amendment.

The district court correctly struck down the core of these provisions, letting stand a truncated and plainly unconstitutional scrap of an already unconstitutional congressional offering. This Court should finish the job and strike the "electioneering communications" provisions in their entirety.

A. Under *Buckley* and *MCFL*, The Government May Regulate Only Speech That Constitutes "Express Advocacy."

1. We begin with first principles. Speech about politics, issues, and elections is entitled to the most solicitous protection of the First Amendment. Just last year, this Court observed:

> [T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges.

White, 536 U.S. at 781 (internal quotation omitted). But abridging the right to speak out on issues and candidates is precisely what BCRA's "electioneering communications" provisions do, and that is precisely why they cannot withstand scrutiny under the First Amendment.

2. There can be no doubt that BCRA's "electioneering communications" provisions are subject to strict scrutiny. Defendants have conceded this, and the Court's precedents leave no room for debate on the subject. *See, e.g., id.*; *Colorado II*, 533 U.S. at 440. It is also indisputable that the "electioneering communications" provisions seek to prohibit core political speech on the basis of its content. As such, they come to the Court bearing a presumption of unconstitutionality. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas. When First Amendment compliance is the point to be proved, the risk of nonpersuasion — operative in all trials — must rest with the Government, not with the

citizen.").

3. The Court's prior decisions in *Buckley* and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), make clear that the government may constitutionally regulate only independent expenditures for speech expressly advocating the election or defeat of a candidate, known as "express advocacy." The rule that a statute regulating expenditures for speech beyond express advocacy is unconstitutionally overbroad is well-established, and defendants' attempts to recharacterize the cases supporting that rule are unpersuasive.

a. In *Buckley*, the Court considered a provision of FECA that imposed a $1,000 limit on expenditures by any person "relative to a clearly identified candidate," and an attendant provision requiring disclosures of certain expenditures made "for the purpose of * * * influencing" federal elections. In both instances, the Court narrowed the provisions at issue to reach only expenditures made for "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office": that is, "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 & n.52, 80. The Court explained that it was narrowing these provisions both to cure vagueness in the statutory language and to eliminate constitutional overbreadth. *See, e.g., id.* at 80 (giving "expenditure" in disclosure provision same construction as "expenditure" in spending-limit provision, and construing it to reach only expenditures for express advocacy "[t]o insure that the reach of [the disclosure provision] is not impermissibly broad").

Notably, the *Buckley* Court drew the constitutional line at express advocacy even though it explicitly recognized the very "problem" that BCRA purports to address — namely, that it would sometimes be difficult to distinguish between speech advocating the election or defeat of candidates and other speech about issues and candidates:

> [T]he distinction between *discussion of issues and candidates* and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42 (emphasis added). The Court added that "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Id.* at 45. The Court nonetheless concluded that, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* The Court therefore recognized that, while the difficulty in drawing a clear line between express advocacy and other speech about issues and candidates was real, the danger of restricting core political speech by adopting a more expansive definition was more perilous.[11]

b. In *MCFL*, this Court considered a provision of FECA banning expenditures by corporations "in connection with" federal elections — the same provision that BCRA now amends to prohibit disbursements for "electioneering communications."

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[11] The Court ultimately struck down the FECA provision limiting expenditures on the ground that, even as narrowed, it failed to serve the governmental interest in preventing actual or apparent corruption, *see Buckley*, 424 U.S. at 47-48, 51, but upheld the provision requiring disclosures of expenditures, *see id.* at 81-82.

As with the provisions at issue in *Buckley*, the Court narrowed this provision to cover only expenditures for express advocacy. *See* 479 U.S. at 248-49. Critically, the Court did not narrow the provision on the ground that it was necessary to cure vagueness in the statutory language, but instead relied solely on the doctrine of constitutional overbreadth. *See id.* at 248. The Court reasoned that "*Buckley* adopted the 'express advocacy' requirement to distinguish *discussion of issues and candidates* from more pointed exhortations to vote for particular persons." *Id.* at 249 (emphasis added). The Court therefore accepted the corporation's argument that "the definition of an expenditure * * * necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates," *id.* at 248, though it proceeded to reject the further argument that the particular communication at issue did not constitute express advocacy, *see id.* at 249-50. The Court ultimately held that independent expenditures by qualified non-profit corporations (or so-called "*MCFL*" corporations), like independent expenditures by individuals, political parties, and political action committees, could not constitutionally be regulated. *See id.* at 263-65.

c. Congress also understood that *Buckley*'s express-advocacy test was constitutionally compelled. In revising FECA in the immediate aftermath of the Court's decision in *Buckley*, Congress amended the expenditure-disclosure provision at issue in *Buckley* to reach only express advocacy. In doing so, the Conference Committee Report observed that the amendment was necessary "to conform the independent expenditure reporting requirement * * * *to the requirements of the Constitution* set forth in *Buckley v. Valeo* with respect to the express advocacy of election or defeat of clearly identified candidates." H.R. Conf. Rep. No. 94-1507, at 40 (1976), *reprinted in* 1976 U.S.C.C.A.N. 946, 955 (emphasis added).

d. In the nearly three decades since this Court's decision in *Buckley*, courts and commentators alike have consistently

concluded that *Buckley*, and then *MCFL*, drew a constitutionally mandated line between speech that expressly advocates the election or defeat of a candidate and speech that does not. In a number of post-*Buckley* opinions rejecting the FEC's persistent efforts to expand the definition of express advocacy articulated by this Court, and therefore to do by regulation what BCRA now attempts to do by statute, the lower courts have consistently concluded that only express advocacy can constitutionally be regulated. *See, e.g.*, *Clifton v. FEC*, 114 F.3d 1309, 1312 (1st Cir. 1997) (noting that, "[i]n [*MCFL*], the Supreme Court not only narrowed section 441*b* by construction but also recognized a First Amendment right to issue advocacy"); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997) (observing that this Court has held that "express words of advocacy * * * are the constitutional minima") (internal quotation omitted); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991) (concluding that *Buckley* and *MCFL* ensured "the right to engage in issue-oriented political speech" by "limiting the scope of the FECA to express advocacy").[12] Even the Ninth Circuit, the sole court of appeals to sanction the FEC's efforts to broaden the express-advocacy standard, has agreed that the line between regulable express advocacy and non-regulable political speech is a constitutionally mandated one. *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2003), *FEC v. Furgatch*, 807 F.2d 857, 860 (9th Cir. 1987).

Similarly, the lower courts have invalidated a variety of state campaign finance laws, some containing starkly unambiguous statutory language, on the ground that they may not constitutionally restrict speech beyond express advocacy. *See, e.g.*, *Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir.) (agreeing with other circuits that, "under *Buckley* and

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[12] Lower-court cases supporting the proposition that the express-advocacy line is constitutionally compelled are too numerous to list here. *See* Supp. App. 354sa n.145 (Henderson) (listing a selection of cases).

MCFL, the government may regulate only those communications containing explicit words advocating the election or defeat of a particular candidate"), *cert. denied*, 123 S. Ct. 536 (2002); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000) (asserting that, in *MCFL*, "the Court clarified that express words of advocacy were not simply a helpful way to identify 'express advocacy,' but that the inclusion of such words was constitutionally required"); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000) (noting that state statute that explicitly extended disclosure requirement to expenditures for speech other than express advocacy is "a violation of the rule enunciated in *Buckley* and its progeny"). These repeated conclusions of lower courts cannot be wished away as mere "dicta," as Judge Kollar-Kotelly attempted to do, *see, e.g.*, Supp. App. 794sa, 797sa, 798sa, 799sa, but instead reflect the settled understanding, as one commentator has put it, that "the *Buckley* bottom line" is that "[e]xpenditures for speech that does not expressly advocate the election or defeat of a candidate — i.e., expenditures for issue advocacy — may neither be limited in amount nor subjected to disclosure requirements," Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 Va. L. Rev. 1761, 1769 (1999).

In and of itself, the *Buckley* "bottom line" dooms BCRA's "electioneering communications" provisions. The primary definition of "electioneering communications" in section 201, which covers advertising that merely "refers" to a clearly identified candidate for federal office, sweeps well beyond express advocacy, as it fails to require that the advertising contain "express words of advocacy of election or defeat." *Buckley*, 424 U.S. at 44 & n.52. The statute's fallback provision fares no better. That provision encompasses any communication that "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office

(*regardless of whether the communication expressly advocates a vote for or against a candidate*) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" (emphasis added). By its very terms, the fallback provision is at odds with *Buckley* and *MCFL*, thus requiring that it be stricken as well.[13]

B. The Holdings In *Buckley* And *MCFL* Apply Equally To Corporations And Unions.

In addition to contending that *Buckley* and *MCFL* did not draw a constitutional distinction between express advocacy and all other speech about issues and candidates, defendants have urged in the alternative that such a distinction does not apply to corporations and unions. The argument is unavailing.

1. Contrary to the government's suggestion, *see* Fed. Defts. J.S. 4 n.2, the past century of American history is not replete with examples of Congress passing constitutionally sound restrictions on the election-related speech of corporations and unions. To the contrary, the federal campaign finance laws did not even purport to reach expenditures until 1947, with the enactment of the Taft-Hartley amendments to the Federal Corrupt Practices Act. *See United States v. CIO*, 335 U.S. 106, 107 (1948). This Court did not address the constitutionality of federal expenditure limitations until its decision in *Buckley* almost three decades later. In three decisions prior to *Buckley*, the Court expressly declined to reach questions regarding the constitutionality of Taft-Hartley's expenditure restrictions. *See Pipefitters v. United States*, 407 U.S. 385, 400 (1972) (finding "decision of the constitutional issues premature" in light of dismissal of petitioners' convictions); *United States v. Automobile Workers*, 352 U.S. 567, 591-92 (1957) (refusing to "anticipate constitutional questions" because of decision to remand case for prosecution); *CIO*, 335 U.S. at 110, 124

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[13] The same is true for the modified fallback definition that the district court upheld as constitutional. *See* Supp. App. 1159sa-1166sa (Leon).

(dismissing indictment as beyond scope of statute and therefore "express[ing] no opinion * * * upon [statute's] constitutionality").[14] When the Court finally did consider the constitutionality of congressional expenditure restrictions, it struck them down on First Amendment grounds. *See Buckley*, 424 U.S. at 43-50.[15] In fact, every time this Court has addressed the constitutionality of a federal restriction on independent expenditures, it has either struck the challenged provision down, *see NCPAC*, 470 U.S. at 490-501; *Buckley*, 424 U.S. at 43-50, or significantly limited its scope through a narrowing construction, *see MCFL*, 479 U.S. at 248-49, 256-65. History therefore offers little support for BCRA's ban on "electioneering communications."

2. In *Buckley* and *MCFL* themselves, the Court insisted that only expenditures for express advocacy could be subject to regulation, without treating expenditures by corporations and unions differently. In *Buckley*, the expenditure provision at issue applied to individuals, groups, and corporations alike. *See* 424 U.S. at 23, 40 n.45 (quoting the statutory definition of

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[14] Aside from avoiding the constitutional questions raised by the federal restriction on campaign expenditures, these cases also revealed, through an exhaustive recitation of the legislative history, that the members of Congress who passed Taft-Hartley were not sure whether its expenditure limitation applied in a variety of circumstances, and had concerns about whether the Constitution would permit particular hypothetical applications of the law — such as to the corporate or union funding of radio broadcasts during a campaign that mentioned federal candidates. *See, e.g.*, *Automobile Workers*, 352 U.S. at 586-87 & n.1; *CIO*, 335 U.S. at 112. The historical ambiguity as to the scope of pre-FECA federal expenditure restrictions, considered together with the express advocacy limitation articulated in *Buckley* and *MCFL*, makes plain that the Court has never endorsed the type of regulations contemplated by BCRA's ban on "electioneering communications."

[15] It is noteworthy that, in striking down FECA's expenditure restrictions, the *Buckley* Court cited the dissent of Justice Douglas in *Automobile Workers*, in which Justice Douglas excoriated the majority for failing to strike down the Taft-Hartley expenditure restrictions on First Amendment grounds. *See Buckley*, 424 U.S. at 43 (citing *Automobile Workers*, 352 U.S. at 595-96 (Douglas, J., dissenting)).

"persons"). Indeed, two of the plaintiffs in *Buckley* were corporations, including the New York Civil Liberties Union. *See id.* at 8. The Court struck down the provision in its entirety, drawing no distinction between the individual and corporate plaintiffs.

In *MCFL*, the Court drew the same constitutional line in the specific context of speech by a corporation. *See* 479 U.S. at 241. The Court construed 2 U.S.C. § 441*b*, the provision of FECA banning all expenditures by corporations and unions "in connection with" federal elections, to reach only express advocacy. *See* 479 U.S. at 247-49. The Court did not limit its statutory construction to expenditures by qualified non-profit corporations, but instead held categorically, with respect to *all* corporations, that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441*b*." *Id.* at 249. In fact, it was only after the Court proffered its narrowing construction of section 441*b*, and concluded that the speech at issue *was* express advocacy, that the Court even drew a distinction between qualified non-profit corporations and other corporations, in resolving the ultimate issue of whether expenditures for express advocacy by the defendant non-profit corporation could be regulated. *See id.* at 256-65.

3. Just two years after *Buckley*, the Court made clear yet again that corporations may not be restricted from making expenditures for political advocacy. In *Bellotti*, the Court held unconstitutional a Massachusetts statute that banned corporate expenditures in connection with referenda unless they "materially affect[ed] any of the property, business or assets of the corporation." 435 U.S. at 767-68. Such speech, the Court concluded, was "at the heart of the First Amendment's protection" and "indispensable to decision making in a democracy," adding that "this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 776-77; *see also Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (noting that "[t]he identity of the speaker

is not decisive in determining whether speech is protected" and adding that "[c]orporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster") (internal quotation omitted). Similarly, in the recent case of *Nike, Inc. v. Kasky*, 539 U.S. ___ (2003), while there was disagreement as to whether the petition for writ of *certiorari* should have been dismissed as improvidently granted, there was no suggestion that non-commercial corporate speech relating to matters of public interest was without substantial First Amendment protection. *See id.* at ___ (slip op., at 10) (Stevens, J., joined by Ginsburg and Souter, JJ., concurring) ("Knowledgeable persons should be free to participate in * * * debate [about important public issues] without fear of unfair reprisal."); *id.* at ___ (slip op., at 12) (Breyer, J., joined by O'Connor, J., dissenting) ("[S]peech on matters of public concern needs 'breathing space' * * * in order to survive.").

4. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), is not, as the government suggests, *see* Fed. Defts. J.S. 24, to the contrary. In *Austin*, the Court held that a State could constitutionally restrict corporate independent expenditures for express advocacy. Nothing in *Austin*, however, even remotely hints that the Court intended to overrule *Buckley*, *MCFL*, and *Bellotti* so as to allow the government to regulate expenditures by corporations and unions for speech other than express advocacy. *Austin* itself involved a state statute modeled on the federal provision at issue in *MCFL*, *see id.* at 656 n.1, and an ad that urged voters, in large bold type, to "Elect Richard Bandstra" — an ad that plainly constituted express advocacy, *see id.* at 656; *id.* at 714 (appendix to opinion of Kennedy, J., dissenting). *Austin* held only that Michigan could regulate the Michigan Chamber of Commerce's expenditure for the express advocacy at issue, since the Chamber was not a qualified non-profit corporation under *MCFL*. *See id.* at 668-69. As Judge Henderson observed, "the Court's holding in *Austin* was limited to corporate expenditures on *express* advocacy." Supp. App. 356sa; *see also The Supreme Court, 1989 Term, Leading Cases*, 104 Harv. L. Rev. 209, 217 (1990) ("[T]he [*Austin*] Court preserved for corporations the right to speak on any issue so long as they do not expressly advocate the election or defeat of specific candidates.").

5. In a related vein, defendants have urged that corporations and unions may be required to engage in "electioneering communications" through PACs (or "segregated funds"), as BCRA permits. *See* Fed. Defts. J.S. 23-24; Intervenor Defts. J.S. 24-25. Leaving aside the fact that many corporations and unions may have no desire to establish PACs — a point vividly illustrated in the brief of the American Civil Liberties Union, *see* ACLU Br. 17 — requiring a corporation to speak exclusively through a PAC substantially burdens its right to speak, *see, e.g.*, *MCFL*, 479 U.S. at 252-56; *id.* at 266 (O'Connor, J., concurring). It is simply no answer to say that these entities can "speak" by having a PAC speak for them. PACs provide neither a constitutionally sufficient nor practically workable alternative to speech by plaintiffs themselves. If the speech at issue is fully protected by the First Amendment — and it is nothing less — plaintiffs are permitted to utter it in their own name, and to pay for it with their own funds, without fear of governmental interference.

C. Even If This Court Were To Abandon *Buckley* And *MCFL*, The "Electioneering Communications" Provisions Could Not Survive Scrutiny.

Given the determinations in *Buckley* and *MCFL*, the "electioneering communications" provisions can be sustained only if the Court were to overrule those cases. The Court should decline to do so. The express-advocacy standard is both narrow and unambiguous, and is narrowly tailored to advance the compelling governmental interest in preventing actual or apparent corruption. In contrast, BCRA's primary definition of "electioneering communications" is vastly overbroad. But even if this Court were to abandon *Buckley* and *MCFL* in favor of defendants' proffered standard, the "electioneering communications" provisions are so overbroad that they cannot be sustained under any theory consistent with the First Amendment.

1. Defendants' theory is that only speech that is "genuinely" about "issues" is constitutionally protected, while all other speech is subject to government regulation. This is, of course, precisely the opposite of what this Court concluded in *Buckley* and reaffirmed in *MCFL*: that only speech expressly advocating the election or defeat of a candidate is regulable, while all other speech about issues and candidates is not. Defendants' theory then proceeds to the dubious proposition that "most" speech that is "genuinely" about "issues" is not broadcast in close proximity to elections. Therefore, the syllogism marches on, by banning any reference to a federal candidate in any communication aired within 30 days of a primary or 60 days of a general election, BCRA will eliminate disfavored speech about issues and candidates — pejoratively referred to by defendants as "sham" issue ads — but not most "genuine" speech about issues. Defendants' theory is both legally and factually indefensible.

A review of actual advertisements aired in the 30- and 60-day periods before the 1998 and 2000 primary and general elections powerfully illustrates the sort of protected speech that would be criminalized by BCRA's regulation of "electioneering communications."[16] As would be expected (and as *Buckley* predicted, *see* 424 U.S. at 42), a vast majority of the ads covered by BCRA refer to incumbent officeholders who are running for re-election. One such ad, broadcast within 60 days of the 1998 general election in the district of Oregon

Congressman David Wu, urged him as follows:

> The people of America should be running our government. That's the way it was set up in the first place. The problem is the special interests and the paid lobbyists who control the Washington politicians. The answer is term limits. Term limits replace Washington insiders with new people who reflect community interests, not politics as usual. Molly Bordonaro has signed the pledge to limit her terms in Congress. David Wu refused. Call David Wu and tell him to sign the US Term Limits Pledge.

Br. App. 1a. The ad thus informed the viewers that Congressman Wu had failed to sign a term-limits pledge, and attempted to pressure him to do so. Though it may seem unthinkable that such core political speech could be the subject of criminal sanctions, Americans for Term Limits (the group that sponsored the ad) would be subject to such sanctions for airing the same ad today.

Another good example of what is lost under BCRA is an AFL-CIO ad opposing permanent most-favored-nation status for China. This ad, which ran, *inter alia*, in the district of Representative Ron Paul (a plaintiff in this case) within 30 days of his primary election, stated in its entirety:

> Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as 13 cents an hour, of a country that routinely violates trade rules flooding our markets, draining American jobs. Now Congress is set to scrap its annual review of China's record and reward China with a permanent trade deal. Tell Congressman Paul to vote "No" and keep China on probation until this label stands for fairness. Paid for by the AFL-CIO.

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[16] The ads discussed in this section are included in an appendix to this brief ("Br. App."), as are eight other ads discussed below. Also included with the brief is a CD-ROM containing 10 ads that were submitted to the district court and discussed at length in the briefs and at oral argument.

Br. App. 2a.[17] The AFL-CIO could be indicted in 2004 for running a similar ad.

Finally, the federal defendants have identified the following ad, aired in Michigan within 60 days of the 2000 general election, as an example of a so-called "sham" issue ad:

> WOMAN: My mom started this business and my brother and I worked hard to make it grow. One day we hope to own it but because of the law, we can never be sure.
>
> ANNOUNCER: Because of the death tax, people like Melanie are always at risk of losing family businesses. Debbie Stabenow voted twice against getting rid of the death tax.
>
> WOMAN: Everything we have worked for can be taken away in an instant and that's not fair.
>
> ANNOUNCER: Call Debbie Stabenow. Tell her our working families need a break. Paid for by the Michigan Chamber of Commerce.

Br. App. 3a. Remarkably, far from acknowledging that this ad is speech fully protected by the First Amendment, defendants have viewed it as a perfect example of speech that should be criminalized.

These ads — sometimes using pointed, critical, and antagonistic speech — all sought to lobby and pressure federal officeholders on issues of unquestioned importance to the groups that sponsor them. They are fully protected by *Buckley*, to say nothing of the core principle of *New York Times Co. v. Sullivan* that "uninhibited, robust, and wide-open speech" is protected by the First Amendment. 376 U.S. at 270.

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[17] The storyboard included in the appendix refers to Congresswoman Sue Myrick. The ad referring to Congressman Paul was materially identical. *See* 6 PCS/Mitchell decl., exh. 1, at 92.

2. To counter these and the many other examples of BCRA's overbreadth, defendants relied almost exclusively on two reports by the Brennan Center for Justice, counsel to the intervenor defendants in this case, entitled *Buying Time 1998: Television Advertising in the 1998 Congressional Elections* (Jonathan S. Krasno & Daniel E. Seltz, Brennan Center 2000), and *Buying Time 2000: Television Advertisements in the 2000 Federal Elections* (Craig B. Holman & Luke P. McLoughlin, Brennan Center 2001). The reports were cited repeatedly by Members of Congress during the debates on BCRA. *See, e.g.*, 147 Cong. Rec. S3045 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe); 148 Cong. Rec. S2117-18 (daily ed. Mar. 20, 2002) (statement of Sen. Jeffords); 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

The *Buying Time* reports surveyed ads aired during the 1998 and 2000 election cycles and concluded that the vast majority of ads that would have been banned by BCRA were "sham" issue ads, and thus speech that, in the authors' view, should not be entitled to First Amendment protection. The reports concluded that only a tiny fraction of so-called "genuine" issue ads — speech that defendants admit is entitled to full First Amendment protection — would have been covered by BCRA's primary definition of "electioneering communications."

Despite defendants' best efforts, however, the district court, after detailed and laborious consideration, *unanimously* rejected the conclusions of the *Buying Time* reports, finding that, if anything, the data demonstrated that BCRA would have criminalized a substantial amount of concededly protected speech in 1998 and 2000. Judge Henderson concluded that the *Buying Time* reports were "based on a flawed methodology and [are] therefore unreliable as evidence," Supp. App. 244sa,[18] but that, in any event, "the record as a whole suggests that BCRA would prohibit too much protected expression — anywhere from 11.38 per cent to 50.5 per cent of (what even the defendants characterize as) 'genuine' issue ads broadcast during the 60 days before an election in a typical election year," *id.* at 367sa n.149. Judge Leon concluded that "14.7 percent and 17 percent of the ads" that would have been prohibited by BCRA in 1998 and 2000, respectively, were "genuine" issue ads by the Brennan Center's own definition, and that such percentages represented "substantial overbreadth." *Id.* at 1157sa. Even Judge Kollar-Kotelly, who would have upheld the "electioneering communications" provisions, refused to accept either report's findings about BCRA's effect on so-called "genuine" issue ads, although she agreed that, as to the 2000 study, the evidence demonstrated that 17% of the speech that BCRA would have banned was "genuine" speech about issues. *See id.* at 857sa. This is overbreadth by any standard.

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[18] As Judge Henderson's opinion demonstrates, the *Buying Time* reports were entirely and irredeemably biased. Funding for the studies was solicited for the express purpose of furthering campaign finance "reform," *see* Supp. App. 239sa-240sa (Henderson); the academic who solicited the funding

The very premise of the *Buying Time* reports (and indeed, defendants' entire argument about BCRA's "electioneering communication" provisions) is itself fundamentally flawed. In insisting that BCRA will have only a modest effect on "genuine" issue advocacy, defendants and the *Buying Time* authors have sought to seize for themselves the role of determining — in a way wholly inconsistent with *Buckley* — what advocacy is "genuine." They have embraced the notion that only speech about a bill or an issue is "genuine" and is protected by the First Amendment, while speech about candidates is rarely, if ever, protected. This view, as we have observed, is flatly at odds both with this Court's decisions and with fundamental First Amendment principles.

The core conclusions of the *Buying Time* reports are derived solely from surveys filled out by college students, who were asked to determine whether the "purpose" of an ad was to "provide information about or urge action on a bill or issue," or, alternatively, to "generate support or opposition for a particular candidate." *See id.* at 241sa (Henderson), 1043sa (Kollar-Kotelly), 1329sa (Leon). If students determined that an ad generated support or opposition for a candidate, the ad was classified as a "sham" issue ad. If it provided information, the ad was deemed to be "genuine." The survey form provided no way for a student to conclude that an ad's "purpose" was to do both. *See* Holman dep. 43; Seltz dep. 187. Tellingly, when Professor Kenneth Goldstein, a defense expert and the principal researcher for the *Buying Time* reports, was asked if he would have designed the reports differently had he known that speech about both issues *and* candidates was constitutionally protected, he conceded that he would have. *See* Supp. App. 247sa (Henderson).

In any event, it is now clear that the reports' conclusions about BCRA's insignificant effect on so-called "genuine" issue ads are insupportable. The 1998 report, on which BCRA's congressional supporters relied, indicated that only 7% of "genuine" issue ads aired in 1998 would have been prohibited by BCRA. *See id.* at 242sa (Henderson), 857sa (Kollar-Kotelly), 1345sa (Leon). However, using a more accurate methodology that the Brennan Center itself later adopted, defendants' experts and the report's authors now concede that the underlying data demonstrates that 14.7% of the ads that would have been prohibited by BCRA were "genuine." *See id.* at 243sa (Henderson), 1157sa (Leon).

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agreed that the studies were "design[ed] and execute[d] * * * in a way that would help move the campaign reform ball forward," *id.* at 240sa (Henderson); data for the studies were acquired in order to "fuel a continuous and multi-faceted campaign to propel reform forward," *id.* at 241sa (Henderson); and the authors agreed with their sponsors that the studies would be abandoned in midstream, and the results never published, unless the results were helpful to the reform "cause," *see id.* at 239sa (Henderson). Such conduct was so plainly dishonorable that defendants' expert Dr. Arthur Lupia was forced to admit that it was not "consistent with scholarly behavior of honor and seriousness as member of a learned profession." Lupia dep. 17.

A closer look at the documents underlying the 1998 report demonstrates that BCRA would have prohibited even more so-called "genuine" issue ads. The report claimed that, of the 30 ads that would have been prohibited by BCRA, only two were coded as "genuine" issue ads. *See id.* at 242sa (Henderson), 1333sa (Leon). However, a review of the actual handwritten coding sheets filled out by Professor Goldstein's students shows that, in fact, at least 10 ads met BCRA's criteria and were coded as "genuine."

At some point before the 1998 report went to press, someone re-coded at least eight ads from "genuine" to "sham." *See* Br. App. 7a-15a; Supp. App. at 243sa (Henderson), 765sa-766sa (Kollar-Kotelly). The impact of this re-coding on the numbers is telling. If the eight re-coded ads had been counted as "genuine" issue ads, *Buying Time 1998* would have reported that *64%* of ads mentioning a candidate in the 60 days before the 1998 general election were coded by the students as "genuine." *See id.* at 243sa-244sa (Henderson), 1349sa (Leon). Employing a different methodology used in the report of defendants' expert Dr. Jonathan Krasno, plaintiffs' expert Dr. James Gibson concluded that no less (and likely more) than 50.5% of the ads featuring candidates within 60 days of the 1998 election were coded as "genuine." *See id.* at 244sa (Henderson), 1349sa-1350sa (Leon). This is surely overbreadth at a level rarely seen in any case.

For its part, *Buying Time 2000* also drastically underreports the number of "genuine" issue ads that would have met BCRA's criteria. Two of the three judges below, after close and careful review, concluded that if the data had been correctly analyzed, 17% of the ads that referred to candidates in the last 60 days of the 2000 campaign were "genuine" issue ads, the broadcast of which would have been criminal. *See id.* at 767sa (Kollar-Kotelly), 1157sa (Leon). Judge Henderson did not specifically address the 17% figure, finding that "neither study has any significant evidentiary weight" and that "even if I accepted the distinction [between 'genuine' and 'sham' issue ads], the record as a whole suggests that BCRA would prohibit too much protected expression." *Id.* at 367sa n.149.

D. The "Electioneering Communications" Provisions Are Overbroad Because They Regulate Speech By Qualified Non-Profit Corporations.

By its plain terms, section 204 of BCRA extends to *all* corporations and unions the ban on disbursements for "electioneering communications." BCRA therefore makes no accommodation for qualified non-profit corporations, or so-called "*MCFL*" corporations: that is, non-profit, ideological corporations that accept no more than *de minimis* funds from corporate sources. This Court has held that such corporations must be allowed to make expenditures even for express advocacy. *See MCFL*, 479 U.S. at 259, 264.

Judge Henderson would have struck down section 204 in its entirety. *See* Supp. App. 370sa. Judge Leon, in his controlling opinion, held section 204 to be unconstitutional insofar as it extends to *MCFL* corporations. *See id.* at 1166sa-1169sa. Defendants have conceded that BCRA's "electioneering communications" provisions cannot constitutionally be applied to *MCFL* corporations. *See* Fed. Defts. J.S. 24 n.8; Intervenor Defts. J.S. 14 n.16. In light of defendants' concessions, the Court should strike down section 204 as unconstitutionally overbroad.

E. The "Electioneering Communications" Provisions Are Vague And Underinclusive.

Finally, even if the Court accepts all of defendants' other arguments, BCRA's "electioneering communications" provisions are still unconstitutionally vague and underinclusive.

1. The "fallback" definition of "electioneering communications," which covers advertising that "promotes," "supports," "attacks," or "opposes" a federal candidate and is "suggestive of no plausible meaning other than an exhortation

to vote for or against a specific candidate," is as unconstitutional as the primary definition. First and foremost, the definition fails under — and indeed, flouts — *Buckley*, because it applies by its terms "regardless of whether the communication expressly advocates a vote for or against a candidate." This statutory provision, enacted notwithstanding the specific holding of *Buckley* to the contrary, once again puts political speakers "wholly at the mercy of the varied understanding of [their] hearers." *Buckley*, 424 U.S. at 43 (internal quotation omitted). Under the fallback definition, much as the Court warned in *Buckley*, speakers will be forced to "hedge and trim" their political speech to ensure that it is not perceived as promoting or attacking a candidate. *Id.* (internal quotation omitted).

Apart from its inconsistency with *Buckley*, the fallback definition is unconstitutional because it is so vague that people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *accord Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). And an "even greater degree of specificity" is required in the First Amendment context. *Buckley*, 424 U.S. at 77 (internal quotation omitted). As Craig Holman, chief author of *Buying Time 2000*, acknowledged in his deposition, any effort to determine the "purpose" of a political advertisement is by its nature not a "black and white issue," but is instead a "subjective judgment" that "can be reasonably debated." Holman dep. 72, 80. Indeed, defendants' own expert Professor Goldstein noted that the students involved in coding ads for the *Buying Time* studies disagreed 25% of the time as to whether a particular ad was intended to "generate support or opposition for a particular candidate" or not. *See* Goldstein dep. 182.

Discovery confirmed that reasonable and intelligent people often disagree about whether political ads meet the criteria of the fallback definition. When shown particular ads during their depositions in this case, the *Buying Time* authors, defendants' experts, and BCRA's sponsors routinely disagreed *with each other* as to whether a given ad was intended to promote, support, attack, or oppose a specific candidate. A criminal law that gives so little guidance as to its meaning cannot be sustained.

By way of example, an ad that ran within 60 days of the 1998 general election stated in part as follows: "Year after year the federal government takes a bigger piece of the pie. In fact in 1998 we'll pay more in federal taxes than at any time in American history except for World War II. And now with the budget surplus, in thirty years all the Washington politicians can talk about is getting their hands on more of your dough." The ad then asked viewers to "[c]all Harry Reid and John Ensign" and urge them to cut taxes. "Otherwise," the ad concluded, "there will be nothing left but the crumbs." Br. App. 4a. Luke McLoughlin, co-author of *Buying Time 2000*, opined that this ad was "genuine" because its "focus is on taxes." McLoughlin dep. 23. Senator McCain, however, testified that the ad "attacks both" candidates. McCain dep. 122. And Congressman Shays offered a third view, testifying that the ad supported "one person's position, but not the other" and that it was therefore "designed to influence the election." Shays dep. 111.

Another ad, sponsored by the Alliance for Quality Nursing Home Care broadcast within 60 days of the 2000 general election, referred to then-presidential candidate Al Gore. *See* Br. App. 5a. Senator Feingold was unsure whether the ad was pro-Gore or anti-Gore. *See* Feingold dep. 41. On the other hand, Senator McCain testified that the ad "implies that Al Gore was responsible for Medicare cuts, which is a pretty damning indictment." McCain dep. 139. But Representative Meehan concluded that that the ad "probably" was intended to promote Gore's candidacy, *see* Meehan dep. 124, and Representative Shays agreed, *see* Shays dep. 128.

A third example was this ad, aired with 60 days of the 2000 general election:

> GRADUATE: Dear high tech company, I'd like to send you my resume.
>
> ANNOUNCER: Dear Graduate, sorry, Congress is going to give your job to a foreign worker.
>
> GRADUATE: But I've just finished four hard years of technical studies.
>
> ANNOUNCER 1: Sorry, besides foreign workers will work for a lot less.
>
> ANNOUNCER 2: Is this any way to treat American workers? But based on her record, Congresswoman Northrup is likely to vote in favor of the Foreign Worker Bill. Call Congresswoman Northrup and tell her to save our best jobs for American workers. Ask her to vote no on the Foreign Worker Bill. This message paid for by the Coalition for the Future American Worker.

Br. App. 6a. Though the ad was treated in *Buying Time 2000* as a "genuine" issue ad (that is, one that does not "generate support or opposition for a particular candidate"), *see* Holman dep. 77-78, Senator McCain called the ad "exactly what I have in mind as a sham issue ad," McCain dep. 141.

With so much disagreement, it is plain that the fallback definition will inevitably lead candidates to "steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal quotation omitted). In the end, Senator McCain said it best when he rose on the Senate floor to oppose the inclusion of materially identical statutory-language:

> Boy, we better get out the dictionary because there is a great deal of ambiguity of words. * * * It says in the amendment: * * * [ads] can have no reasonable meaning other than to advocate the defeat of one or more clearly identified candidates. Who decides that? * * * Now you are asking a judge to look at every commercial, or you are asking the broadcast station to look at every commercial[,] and make some decision as to whether it is an attack ad or not. * * * I am not a lawyer, but I have been involved so long and so engaged in these issues that words do have meaning, and this amendment is very vague.

147 Cong. Rec. S3116 (daily ed. Mar. 29, 2001). The "fallback" definition in section 201 is unacceptably, and unconstitutionally, vague.[19]

2. Finally, by regulating only broadcast ads and not print ads or other forms of communication, both definitions of

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[19] The modified fallback definition that the district court upheld as constitutional, *see* Supp. App. 1159sa-1166sa (Leon), is not only vague, but also overbroad. As written by Congress, the fallback definition contained no temporal restrictions. Presumably, Congress determined that the 30- and 60-day limits of the primary definition were unnecessary in the fallback definition, because that definition would apply only to ads that are "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Shorn of that final clause, however, the fallback definition upheld by the district court now covers *all* ads that "promote, support, attack, or oppose a Federal candidate." In its rulemaking, the FEC itself recognized that virtually *any* ad that refers to a federal candidate "could well be understood" to meet those criteria. Electioneering Communications, 67 Fed. Reg. 65,190, 65,201 (Oct. 7, 2002).

Moreover, by striking the definition's one narrowing characteristic, the district court not only concocted a statutory provision that there is no reason to believe Congress would have enacted, but also did nothing to overcome the inherent vagueness of the terms "promote," "support," "attack," and "oppose." In fact, the language found to be unconstitutionally vague in *Buckley* (even after the Court's narrowing construction) bears a strong resemblance to the language in the fallback definition. *Compare Buckley*, 424 U.S. at 42 ("advocating the election or defeat of a candidate") (internal quotation omitted), *with* BCRA § 201(a) ("promot[ing] or support[ing] * * * or attack[ing] or oppos[ing] a candidate for [federal] office").

"electioneering communications" in section 201 are underinclusive and violate basic First Amendment principles. This Court has frequently struck down laws on the ground that they apply only to certain forms of media and not to others. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-05 (1979).

At the time of BCRA's enactment, members of Congress sought to justify the restriction on only broadcast ads by resorting to the "scarcity rationale": that is, the argument that activities by broadcasters may be regulated because broadcast stations operate on a limited spectrum provided by the government. *See, e.g.*, 144 Cong. Rec. S978 (daily ed. Feb. 25, 1998) (statement of Sen. Levin); 147 Cong. Rec. S2611 (daily ed. Mar. 21, 2001) (statement of Sen. Torricelli). Even assuming, however, that the "scarcity rationale" is applicable to cable and satellite broadcasting (or, for that matter, retains any vitality at all), that doctrine has never been applied to justify restrictions on broadcasters that would have the effect of *decreasing* speech, rather than *increasing* it. Indeed, the very justification for the "scarcity rationale" was to ensure the dissemination of voices that "would otherwise, by necessity, be barred from the airwaves." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969).

There is simply no justification for allowing Congress to regulate an ad only when it is read over the radio, but not when it is printed in a newspaper. *See* Supp. App. 365sa (Henderson). Because the "electioneering communications" provisions of BCRA discriminate against broadcast ads, they fail constitutional scrutiny on this ground as well.

III. OTHER PROVISIONS OF BCRA ARE UNCONSTITUTIONAL.

The district court correctly struck down a number of other provisions of BCRA, and incorrectly upheld others. We address each in turn.

A. The "Advance Notice" Provisions Are Unconstitutional.

The district court properly struck down one of BCRA's two "advance notice" provisions, but erred by holding plaintiffs' challenges to the other nonjusticiable. Section 201 of BCRA imposes disclosure requirements on persons who merely enter into a "contract to make" disbursements for electioneering communications, even before those disbursements are made, and even if they are ultimately not made. Section 212 imposes similar requirements on persons who "contract[] to make" independent expenditures over a certain amount, again even before those expenditures are made.

As the district court unanimously held, the "advance notice" provision of section 201 violates the First Amendment. Section 201 cannot be said to serve any of the governmental interests recognized in *Buckley* as potentially supporting disclosure requirements: namely, preventing actual or apparent corruption, informing the electorate as to the source of campaign spending, and assisting in the enforcement of contribution limits. *See* 424 U.S. at 66-68. As the district court recognized, those interests would be fully served by requiring disclosures after the underlying expenditures have actually been made. *See* Supp. App. 114sa (Kollar-Kotelly and Leon). Indeed, requiring advance disclosures could have a chilling effect on would-be speakers. This Court has held that similar preconditions on speech are repugnant to First Amendment values. *See, e.g.*, *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002) (striking down ordinance requiring permits for canvassers); *Thomas v. Collins*, 323 U.S. 516, 540 (1945) (invalidating registration requirement for labor organizers).[20]

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[20] In its rulemaking, the FEC itself freely acknowledged that mandating disclosure of expenditures before the relevant communications are aired could raise "constitutional issues." Electioneering Communications, 67 Fed. Reg. 51,137, 51,141 (Aug. 7, 2002).

The district court erred only by concluding that appellants' challenge to the analogous "advance notice" requirement in section 212 was unripe in light of the FEC's implementing regulation. *See* Supp. App. 130sa-134sa (Kollar-Kotelly and Leon). That regulation "construes" section 212 so as *not* to require advance disclosure. *See* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 452-53 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.10). As Judge Henderson suggested in dissent, *see* Supp. App. 383sa n.154, not only is section 212 not "easily susceptible" to such a saving construction, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975), but the construction advanced in the regulation is flatly contrary to the language of the statute itself. Section 212 expressly requires disclosures not just of independent expenditures themselves, but also of "contracts to make" such expenditures. The Court should accordingly conclude that appellants' challenge to the "advance notice" provision in section 212 is ripe, and that the provision is invalid for the same reasons as its counterpart in section 201.

B. The "Coordination" Provisions Are Unconstitutional.

The district court erred by rejecting appellants' challenges to BCRA's "coordination" provisions. The heart of those provisions is section 214, which broadens the definition of "coordination" to treat expenditures made in agreement or consultation with political party committees, like candidates, as coordinated, *see* BCRA § 214(a); repeals prior FEC regulations defining coordination, *see* BCRA § 214(b); and commands the FEC to promulgate new regulations that do "not require agreement or formal collaboration to establish coordination," BCRA § 214(c). Because those provisions allow an expenditure to be classified as "coordinated" (and thereby subject to the limits on contributions) even absent agreement between the spender and the candidate or party committee, they

violate the First Amendment.[21]

The district court erred by concluding that appellants' challenge to one subsection, section 214(c), was nonjusticiable. *See* Supp. App. 144sa-156sa (Kollar-Kotelly and Leon). Since appellants' contention is that agreement is *always* required before coordination can constitutionally be found, and since section 214(c) *commands* the FEC to promulgate a regulation that does *not* require agreement to establish coordination, *no* FEC regulation (including, as it turns out, the regulation subsequently promulgated) could pass constitutional muster. Appellants' challenge to section 214(c) is therefore appropriate for judicial resolution at this time, and appellants would suffer hardship absent review because of the risk that current activity could render future expenditures "coordinated." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).[22]

When considered as an integrated whole, section 214 violates the First Amendment. Although this Court has upheld the constitutionality of treating coordinated expenditures as contributions, *see Buckley*, 424 U.S. at 47, it has never defined the constitutional outer bounds of coordination, though it has suggested that coordination turns on whether expenditures are "potential alter egos for contributions" or "functionally true expenditures," *Colorado II*, 533 U.S. at 463, and made clear that coordination means "actual coordination as a matter of fact," *Colorado I*, 518 U.S. at 619 (plurality opinion). In other words, "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22.

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[21] Section 202 applies the BCRA's "coordination" provisions to disbursements for electioneering communications. If this Court strikes down the "electioneering communications" provisions of BCRA, it should strike down section 202 as well.

[22] Because of this risk, appellants plainly also have standing. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975).

Section 214 redefines coordination to sweep well beyond even implicit "wink and nod" agreements between the spender and the candidate or political party, *see, e.g.*, *Colorado II*, 533 U.S. at 442; *Colorado I*, 518 U.S. at 614 (plurality opinion), and include even mere discussions with a candidate or political party. Defining coordination so broadly, however, would chill political actors from engaging in constitutionally protected petitioning of officeholders, officials, and candidates. As a lower court noted in the decision that inspired the FEC regulations BCRA purports to overrule, "*considerable* coordination will convert an expressive expenditure into a contribution[,] [but] the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in *some* consultations or coordination with a federal candidate." *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91 (D.D.C. 1999) (emphases added).

As Judge Henderson noted in her dissent below, the net effect of BCRA's broadening of the definition of coordination will be to "tote the same impermissible restrictions [from other parts of BCRA] through the back door." Supp. App. 385sa. While the concept of coordination is readily defensible, BCRA's broadening of the definition of coordination is not. BCRA's "coordination" provisions should be invalidated.

C. The "Attack Ad" Provision Is Unconstitutional.

Section 305, entitled "Limitation on Availability of Lowest Unit Charge for Federal Candidates Attacking Opposition," is one of BCRA's most obviously unconstitutional provisions. It conditions the "lowest unit charge" (a lower advertising rate made available to candidates) upon a candidate's "written certification" that he or she will "not make any direct reference to another candidate for the same office" in the ad sought to be aired, or even in a different ad. Candidates can be exempted from these requirements, but only if they include specific disclosures in their ads — disclosures that are not required for ads that do not refer to (and therefore presumably "attack") opponents.[23]

The district court held that plaintiffs — including Senator McConnell — lacked standing to challenge section 305. *See* Supp. App. 467sa-472sa (Henderson). However, as the court acknowledged, Senator McConnell testified without contradiction that he intended to run campaign ads critical of his opponents in the future. *See id.* at 470sa. And he further testified that he had run such ads in his most recent campaign. *See* 2 PCS/McC 8 (McConnell). At a minimum, that is more than sufficient to meet this Court's relaxed requirements for standing in First Amendment challenges. *See, e.g.*, *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).[24]

On the merits, section 305 is a viewpoint-based regulation, subject to "most exacting" First Amendment scrutiny. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391

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[23] Under section 305, television ads referring to opponents qualify for the lowest unit charge only if they include an image of the candidate for four seconds and a printed statement identifying the candidate, indicating that the candidate approved the ad, and stating that the candidate's authorized committee paid for the ad. Radio ads referring to opponents qualify for the lowest unit charge only if they include a "personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast."

[24] The district court contended that relaxed First Amendment standing rules "are applicable only to claims of First Amendment *overbreadth*." Supp. App. 471sa (Henderson). But relaxed standing rules have often been applied in cases involving claims other than traditional overbreadth. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 445 n.5 (1972) (equal protection); *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965) (prior restraint). In any event, while a majority of the cases imposing relaxed standing requirements may involve claims of overbreadth, the basic rationale in all of these cases — that "the threat of enforcement * * * may deter or chill constitutionally protected speech," *Virginia v. Hicks*, 123 S. Ct. 2191, 2196 (2003) (internal quotation omitted) — is plainly applicable here.

(1992). Section 305 should be stricken because it imposes an unconstitutional condition (namely, the requirement that a candidate either engage in advertising that does not reference an opponent, or include governmentally required speech) on the receipt of a governmental benefit (the lowest unit charge). *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547-48 (2001); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-75 (1996); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

In addition, the defendants have failed to articulate any legitimate governmental interest to justify stricter regulation of ads that "attack" (or even mention) one's opponent.[25] Although the federal defendants have proffered several governmental interests purportedly served by section 305 — including that it "provides voters with important additional information to consider in evaluating" a candidate, Fed. Defts. D. Ct. Opening Br. 218; that it generally serves the purpose of preventing fraud and corruption, *see id.* at 216-17; and that it requires candidates to "own up to" their sponsorship of ads, Fed. Defts. D. Ct. Reply Br. 89 — at no time have defendants been able to link these purported objectives to the actual requirements of the statute. Because section 305 punishes "vehement, caustic, and sometimes unpleasantly sharp attacks on * * * public officials," *New York Times Co. v. Sullivan*, 376 U.S. at 270, without serving any legitimate government interest, it should be struck down.

D. The "Forced Choice" Provision Is Unconstitutional.

The district court unanimously, and correctly, struck down BCRA's "forced choice" provision. That provision, section 213, forces a political party to choose, once a candidate is

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[25] Even if the prevention of so-called "attack ads" were a permissible governmental objective, section 305 is unconstitutionally overbroad, because it would apply even to an ad that did no more than identify the opposing candidate. Defendants have not articulated, and cannot articulate, a governmental interest in regulating such ads.

nominated, whether to make independent expenditures on behalf of the candidate, or to make coordinated expenditures, subject to the statutory limits on coordinated expenditures applicable to political parties. For purposes of this provision, "all political committees established and maintained by a national political party * * * and all political committees established and maintained by a State political party" are treated as a single committee. Under section 213, therefore, if one committee of a political party chooses to make coordinated expenditures (subject to the relevant statutory limits) on behalf of a nominated candidate, all other committees of that party are barred from making independent expenditures, and vice versa.

As the district court noted, section 213 "flies in the face" of this Court's holding in *Colorado I*, and is therefore unconstitutional. Supp. App. 1170sa (Leon). In *Colorado I*, of course, the Court held that political party committees, like other entities, have an unfettered First Amendment right to engage in independent expenditures. *See* 518 U.S. at 614-19 (plurality opinion). Notably, in *Colorado I*, the party committee at issue not only was making independent expenditures, but had already effectively made the maximum permissible amount of coordinated expenditures as well. *See id.* at 612. The net effect of section 213 is to condition political parties' receipt of a "benefit" — specifically, the right to make a certain amount of coordinated expenditures, which is not constitutionally required, *see Colorado II*, 533 U.S. at 441-45[26] — on their agreeing to forgo their constitutional right to make independent expenditures. Such a rule severely burdens the political parties' constitutional rights, and indeed imposes an unconstitutional condition on them. *See, e.g.*, *Perry*, 408 U.S. at 597.

These constitutional problems are only exacerbated by the fact that section 213 treats all of the committees of a political party as a single committee. Section 213 therefore *compels* party committees to work together to decide whether to make independent or coordinated expenditures — and potentially leaves a party committee at the mercy of another committee over which it has no control (if, for instance, one county committee decides to make coordinated expenditures without consulting with another county committee). As Judge Henderson noted, this *compelled* association "is especially perverse in light of the fact that [BCRA] elsewhere severely *restricts* [party committees] from working together to raise certain kinds of funds and to decide how such funds should be used." Supp. App. 397sa; *see generally supra* Part I.A.1.c (discussing Title I provisions barring joint fundraising). Section 213's forced association, no less than Title I's forced disassociation, violates the First Amendment. *See, e.g., California Democratic Party*, 530 U.S. at 574-75.

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[26] The provisions of FECA regarding the public financing of presidential campaigns, by contrast, place conditions on the *receipt of public funds*.

Defendants have argued that section 213 is necessary because it is "tenuous" to claim that expenditures are truly independent when an entity is also making coordinated expenditures. *See, e.g.*, Intervenor Defts. J.S. 28. To the extent that is true, section 213 is woefully underbroad, since it continues to allow political parties to make simultaneous independent and coordinated expenditures (albeit subject to the lower limits applicable to individuals and PACs), and allows individuals and PACs to do so as well. Moreover, defendants' argument boils down to an argument that, where a political party makes *some* coordinated expenditures on behalf of a candidate, all *other* expenditures by that party should be presumed to be coordinated. This is little more than a variation on the contention that all expenditures should be presumed to be coordinated — a contention made by the FEC, and rejected by the Court, in *Colorado I. See* 518 U.S. at 619-23 (plurality opinion).

Like other provisions of BCRA, section 213 reflects Congress' disregard, even contempt, for this Court's campaign finance jurisprudence. It should be invalidated.

E. The "Minors" Provision Is Unconstitutional.

The district court also unanimously struck down section 318. That provision bans anyone under age 18 from contributing, in any amount, to a federal candidate, or giving federally regulated or state-regulated funds, in any amount, to a national, state, or local political party committee.

Section 318 is so plainly unconstitutional, it is difficult to know where to start. It is indisputable that minors, like adults, have First Amendment rights. *See, e.g., Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969). Although this Court has recognized that the government has broader authority to regulate minors than adults, it has done so primarily when the government is acting *in loco parentis* to safeguard children from harm. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986); *Bellotti v. Baird*, 443 U.S. 622, 634 (1979); *Ginsberg v. New York*, 390 U.S. 629, 637-38 (1968). Here, there can be no argument that section 318 is necessary to protect children: there is no evidence, for instance, that candidates or parties are somehow manipulating children into giving them money. For purposes of section 318, therefore, minors are fully protected by the First Amendment.

Because section 318 does not merely *limit* contributions by minors, but instead *bans* them altogether, it is subject to strict scrutiny. *See Buckley*, 424 U.S. at 21. Section 318 cannot survive that scrutiny, or indeed even the lower scrutiny applicable to limits on contributions. The only governmental interest on which defendants now rely is the supposedly compelling interest in preventing circumvention of contribution limits by parents who supposedly channel contributions through their children. *See* Fed. Defts. Opp. to Mot. of Echols Pltfs. to Aff. 4. As the district court noted, however, such channeling is already barred under preexisting law, *see* 2 U.S.C. § 441f, and defendants' evidence that channeling is nevertheless taking place is "remarkably thin." Supp. App. 463sa (Henderson); *accord id.* at 1011sa (Kollar-Kotelly). Moreover, to the extent that channeling is actually occurring, it could be regulated by a host of more narrowly tailored means, including (1) banning contributions by minors only when their parents have "maxed out" on their own contribution limits; (2) banning contributions by minors only when the contributed funds were given to the minors by others, not earned by the minors themselves; (3) requiring disclosure of the age of donors, so as to facilitate enforcement of the preexisting anti-channeling law; (4) imposing a cap on contributions by minors, or on contributions by a single family; (5) employing a rebuttable presumption regarding the voluntariness of contributions by minors, as the FEC itself proposed; and (6) barring contributions only by those children too young to be capable of making knowing and voluntary contributions. Presented with this tray full of scalpels, Congress opted for a machete instead.[27]

Section 318 also violates constitutional principles of equal protection, to the extent that it regulates speech by minors but not identical speech by other entities, and federalism, to the extent that it regulates even donations of state-regulated funds. Above all, however, the complete ban on contributions by minors in section 318 "reflects a profound congressional disregard for the First Amendment and settled jurisprudence thereunder." Supp. App. 467sa (Henderson). The district court's decision to strike down section 318 should be affirmed.

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[27] Defendants argue that the right of minors to make contributions should be limited because minors lack the right to vote, *see* Fed. Defts. Opp. to Mot. of Echols Pltfs. to Aff. 2-3; the right to serve on juries or bring lawsuits, *see id.* at 3 n.1; and the right to enter into binding contracts or alienate property, *see id.* at 3-4. The First Amendment, however, is not somehow coextensive with the Twenty-Sixth Amendment, and does not contain a hitherto-undiscovered limitation to individuals with otherwise plenary legal capacity. Moreover, while it is true that Congress has prohibited contributions by foreign nationals (who, like minors, lack the right to vote), *see id.* at 9 n.4, that restriction, unlike the restriction on contributions by minors, is justified by the ordinary governmental interest in preventing actual or apparent corruption.

F. The "Broadcaster Records" Provision Is Unconstitutional.

The district court unanimously determined that section 504 of BCRA is unconstitutional. That provision compels broadcasters to collect and publicly disclose detailed records related to (1) requests by candidates to broadcast any ads and (2) requests by private citizens and groups to broadcast ads related to "any political matter of national importance," including but not limited to communications relating to any "election to Federal office" or any "national legislative issue of public importance."[28] As the district court unanimously found, section 504 serves no legitimate governmental interest and thus violates the First Amendment. In the alternative, as the district court suggested, section 504 is unconstitutionally vague.

As a preliminary matter, Judge Henderson recognized that section 504 is unconstitutional on its face because, like sections 201 and 311, it requires disclosure of expenditures for speech that does not constitute express advocacy. *See* Supp. App. 377sa-378sa. Indeed, defendants have freely conceded that, in terms of covered subject matter, section 504 sweeps even more broadly than the "electioneering communications" disclosure provisions in section 201. *See* Fed. Defts. Opp. to Mot. of NAB to Aff. 7 n.1.

Even if this Court were to conclude that the government could require disclosures related to speech other than express advocacy, section 504 would still not survive exacting scrutiny. Defendants have identified an ever-changing list of purported governmental interests served by section 504, including that it provides "public access to important information about political broadcasts," Fed. Defts. D. Ct. Opening Br. 218; that it assists voters who have "difficulty identifying the true sponsors of issue ads," *id.*; and that it enables "the public to evaluate whether broadcasters are processing requests in an evenhanded fashion," Fed. Defts. J.S. 29. Yet defendants have never explained how such generalized interests satisfy the exacting scrutiny warranted by the First Amendment.

---

[28] These records must include the acceptance or rejection of requests for advertisements; the name of the person making the requests and other contact information; a list of the chief executive officers or members of the executive committee or board of directors of the entity making the request; the date and time on which the communication is aired; the rate charged; the class of time purchased; and the issue to which the communication "refers."

The district court found that defendants "provided *no evidence* that section 504 serves *any* of the government interests" that were deemed sufficient in *Buckley* to justify compelled disclosure of communications about federal candidates. Supp. App. 1182sa (Leon) (emphasis added); *accord id.* at 379sa (Henderson), 1011sa (Kollar-Kotelly). Moreover, the district court concluded that section 504's disclosure requirements for "noncandidate-focused" ads "are *even more* difficult to justify" and that "the defendants * * * provided *no* evidence" that interest groups posed a threat to justify the comprehensive disclosures mandated by section 504. *Id.* at 1183sa (Leon) (emphasis added); *accord id.* at 1011sa (Kollar-Kotelly).

Section 504 imposes a wealth of burdensome and invasive requirements upon broadcasters and political speakers alike. *See id.* at 1011sa (Kollar-Kotelly), 1184sa (Leon). In this regard, the provision is particularly intolerable under the First Amendment because it forces disclosure to the government of the identity and the message (even if it is never broadcast) of private individuals and groups engaged in advocacy about important, often controversial, social and political issues. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute * * * a restraint on freedom of association * * *.").

Finally, all three members of the district court correctly suggested that section 504 is void for vagueness because its application turns on the wholly ambiguous phrases "political matter of national importance" and "national legislative issue of public importance." Supp. App. 256sa (Henderson), 1011sa (Kollar-Kotelly), 1183sa n.141 (Leon). The inability of broadcasters to determine when the disclosure requirements of section 504 will apply is particularly troublesome because a violation of the provision will subject broadcasters to substantial fines or burdensome inquiries from the FCC. Such vagueness is plainly intolerable under both the First Amendment and the Due Process Clause of the Fifth Amendment. *See, e.g.*, *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967); *Connally*, 269 U.S. at 391.

Section 504 represents a broad and aimless infringement of the rights of broadcasters and political speakers alike. The district court's decision to strike down section 504 should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed in part and reversed in part, and the challenged provisions of BCRA declared unconstitutional.

Respectfully submitted,

Floyd Abrams
Susan Buckley
Brian Markley
Cahill Gordon &
Reindel LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

Attorneys for Senator Mitch McConnell and National Association of Broadcasters

Kathleen M. Sullivan
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

Attorney for Senator Mitch McConnell

Kenneth W. Starr
Counsel of Record
Edward W. Warren
Kannon K. Shanmugam
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Attorneys for Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

Jan Witold Baran
Thomas W. Kirby
Lee E. Goodman
Wiley, Rein &
Fielding LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Attorneys for Senator Mitch McConnell

Valle Simms Dutcher
L. Lynn Hogue
Southeastern Legal
Foundation, Inc.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

Attorneys for Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

July 8, 2003

G. Hunter Bates
Frost Brown Todd LLC
400 West Market Street
32nd Floor
Louisville, KY 40202
(502) 589-5400

Attorney for Senator Mitch McConnell and Thomas E. McInerney

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX

CMR

Ad Detector

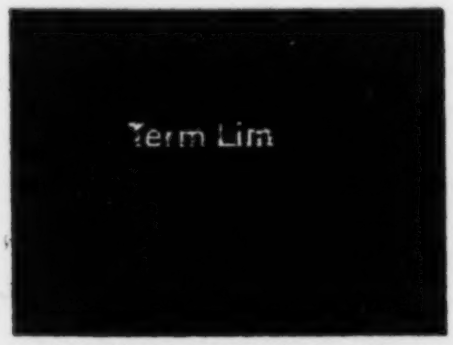
BRAND: AMERICANS/LIMITED TERMS+
TITLE: AFLT/Call WU
COMMERCIAL: AFLT/Call WU 1 of 1
LENGTH: 30
FRAMES: 8

CMAG REPORTS

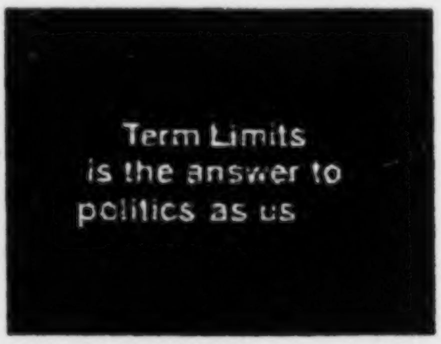
[Announcer]: The people of America should be running our government. That's the way it was set up in the first place.

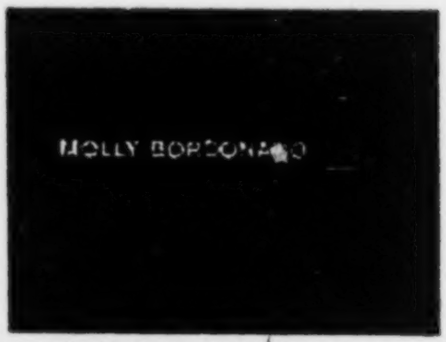
The problem is the special interests and the paid lobbyists who control

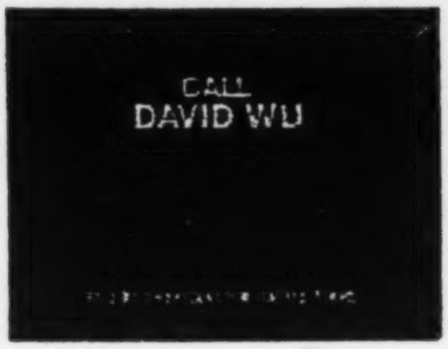
the Washington politicians. The answer is term limits. Term limits

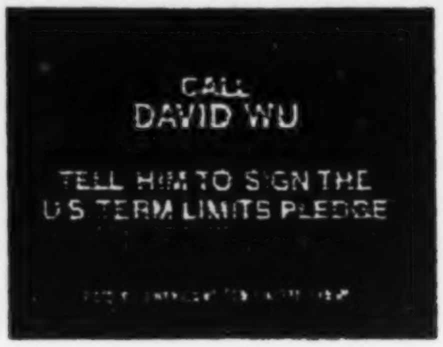


replace Washington insiders with new people who reflect community


Term Limits
is the answer to
politics as us
interests, not politics as usual. Molly Bordonaro has signed


MOLLY BORDONARO
the pledge to limit her terms in Congress. David Wu refused. Call David Wu


CALL
DAVID WU
and tell him to sign the US Term Limits Pledge.


CALL
DAVID WU
TELL HIM TO SIGN THE
US TERM LIMITS PLEDGE

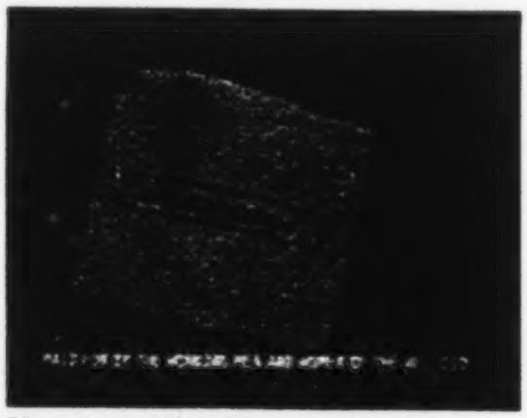
CMR

Ad Detector

BRAND: POL-UNKNOWN+
TITLE: AFL/Made In China Myrick
COMMERCIAL: AFL/Made In China Myrick 1 of 1
LENGTH: 30
FRAMES: 6

CMAG REPORTS

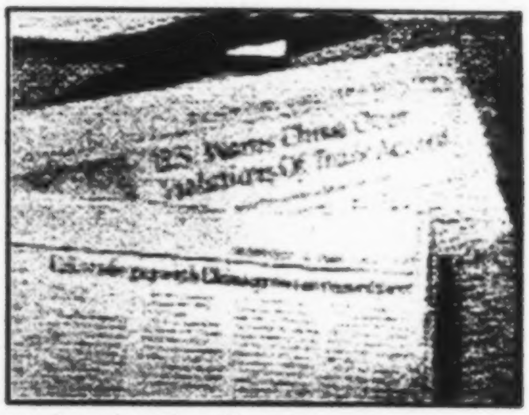
A0074-N3.E3B



[Announcer]: Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as

WAGES IN
CHINA
13¢

13 cents an hour, of a country that routinely violates



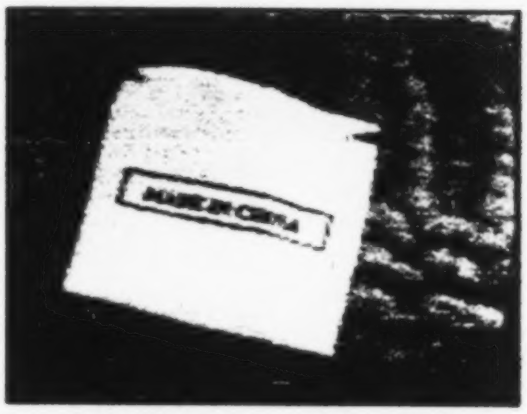
trade rules flooding our markets draining American jobs. Now Congress is set to scrap its annual review of China's record and

China, U.S. close to world trade agreement

reward China with a permanent trade deal. Tell Congresswoman Myrick

CALL CONGRESSWOMAN
MYRICK
704-362-1060

to vote "No" and keep China on probation until this label



stands for fairness. [DIS]: Paid for by the AFL-CIO.

CMR

Ad Detector

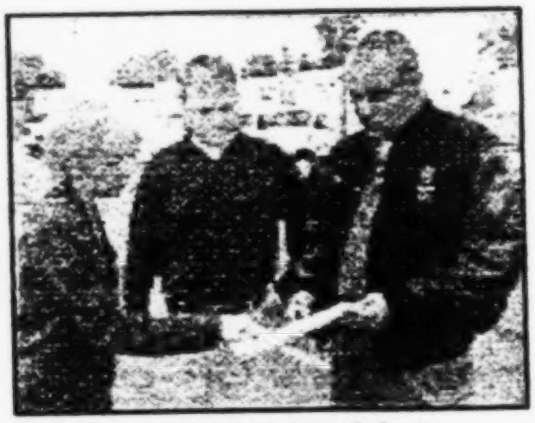
BRAND: POL-US SENATE+
TITLE: MI/COC Stabenow Death Tax
COMMERCIAL: MI/COC Stabenow Death Tax 1 of 1
LENGTH: 30
FRAMES: 8

CMAG REPORTS

A007OFWR.FSR

TWO MEN
AND A
TRUCK

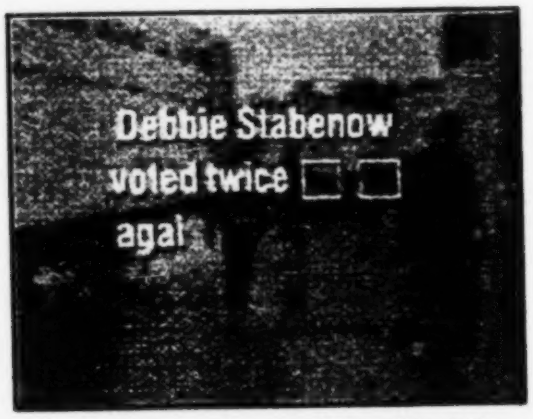
[Melanie]: "My mom started this business and my brother and I worked hard to make it grow.



One day we hope to own it but because of the law, we can

never be sure." [Announcer]: Because of the Death tax, people like Melanie

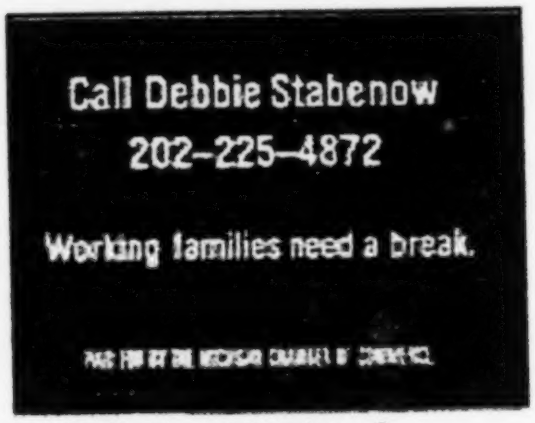
are always at risk of losing family businesses. Debbie Stabenow


Debbie Stabenow
voted twice
agai

voted twice against getting rid of the Death tax.

[Melanie]: "Everything we have worked for can be taken away in an instant and that's not fair."

[Announcer]: Call Debbie Stabenow.Tell her our working families need a break.


Call Debbie Stabenow
202-225-4872
Working families need a break.

[PFB Michigan Chamber of Commerce]

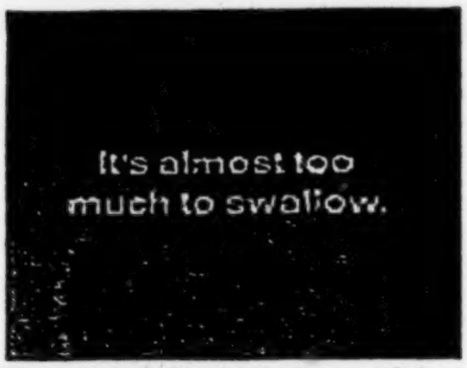
Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

CMR

Ad Detector

BRAND: DEMOCRATIC ST CNTRL CMT+
TITLE: CCS/No Matter Who Goes To DC
COMMERCIAL: CCS/No Matter Who Goes To DC 1 of 2 318
LENGTH: 30
FRAMES: 7

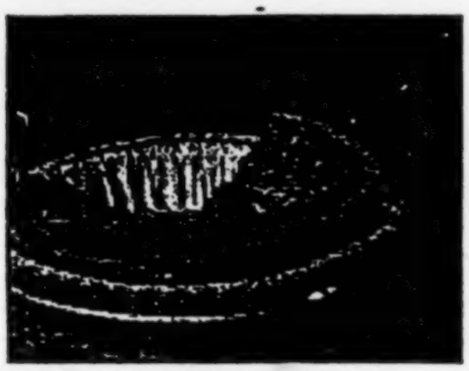
A005P3G0.ESB


It's almost too
much to swallow.

[Announcer] It's almost too much to swallow. Year after year the federal government takes a bigger piece of the pie.

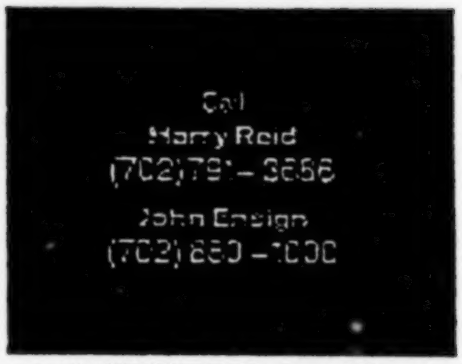
In fact in 1998 we'll pay more in federal taxes than at any time in American

history except for World War II. And now with the budget surplus,

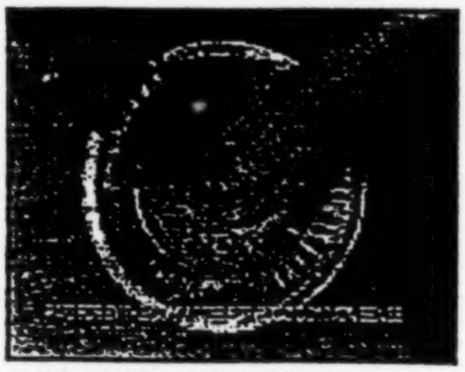


in thirty years all the Washington politicians can talk about is getting their hands

on more of your dough. Call Harry Reid and John Ensign tell them no matter who


Call
Harry Reid
(702)791-3656
John Ensign
(702)880-1000

goes to Washington you want them to cut your taxes. Otherwise they'll be



nothing left but the crumbs.

BRAND: ALLIANCE/QLTY NRSNG HMCR+
TITLE: AQNHC/Call Al Gore Restore Cuts
COMMERCIAL: AQNHC/Call Al Gore Restore Cuts 1 of 1
LENGTH: 30
FRAMES: 7

A007ESG..ESB

Nursing Homes in Financial Cri

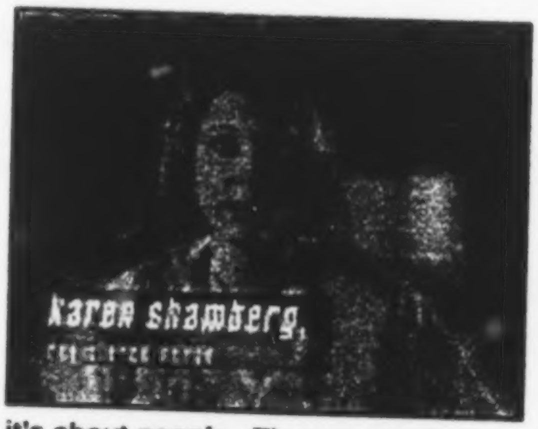
[Announcer]: Medicare cuts to nursing homes threaten quality care. This year the Clinton-Gore Administration is spending $3.5

clinton/gore
less

billion less than Congress provided for nursing home care. No wonder

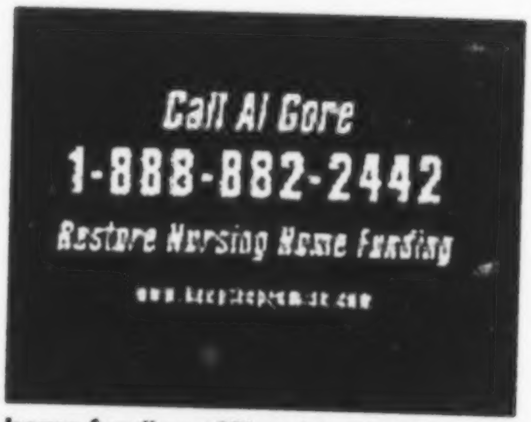
Care in Jeopardy

care for seniors is in jeopardy. [Shawberg]: "This isn't about politics,



it's about people. These cuts are hurting patient care. It's just wrong."

[Announcer]: Call. Tell Al Gore to fight to restore nursing



Call Al Gore
1-888-882-2442
Restore Nursing Home Funding

home funding. [Shawberg]: "Please Vice President Gore, restore the medicare cuts

and keep the promise."

CMR

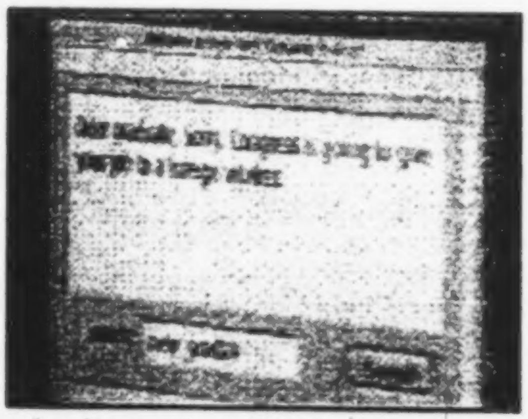
Ad Detector

BRAND: COALITION/FTR AMER WRKR+
TITLE: KY/CFAW Call Northrup
COMMERCIAL: KY/CFAW Call Northrup 1 of 1
LENGTH: 30
FRAMES: 7

CMAG REPORTS

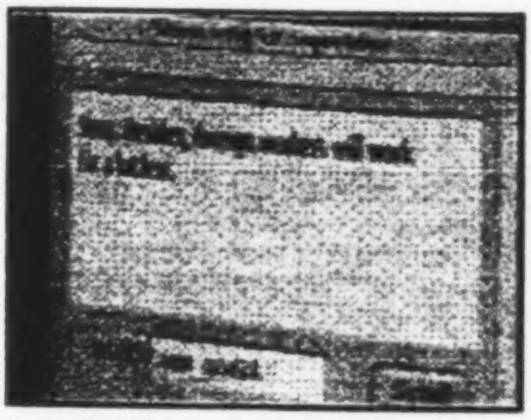
A007IIN.ESB

[Graduate]: "Dear high tech company, I'd like to send you my resume." [Announcer 1]: Dear Graduate, sorry, Congress is going to give your job to



a foreign worker. [Graduate]: "But I've just finished four hard years of technical studies."

[Announcer 1]: Sorry, besides foreign workers will work for a lot less. [Announcer 2]: Is this any way to



treat American workers? But based on her record, Congresswoman Northrup is likely to vote

in favor of the Foreign Worker Bill. Call Congresswoman Northrup and tell her to save

502-582-5129

our best jobs for American workers. Ask her to vote no on the Foreign Worker Bill.

COALITION FOR
THE FUTURE
AMERICAN WORKER

This message paid for by the Coalition for the Future American Worker.

Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

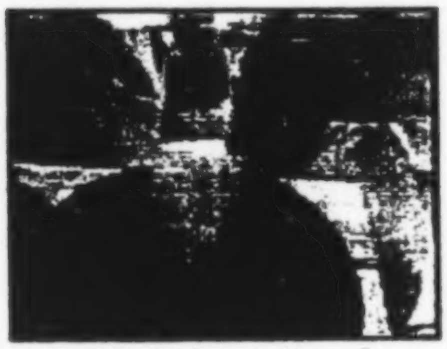
CMR

Ad Detector

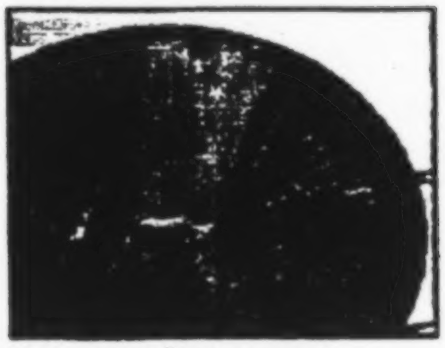
BRAND AMERICANS/LIMITED TERMS•
TITLE AFLT/Stand Up For Us
COMMERCIAL AFLT/Stand Up For Us 1 of 1
LENGTH 30
FRAMES 7

CMAG REPORTS

[Announcer]: They may go to Congress with a rigid resolve to represent the people back home. But after a few



terms in the boiling cauldron of corrupting influence of Washington, something



happens to a Congressman's commitment to stand up for us.

They begin to bend to the wishes and whims of the power brokers and special interests.

Yet despite claiming to support term limits, Merrill Cook resfuses

to sign the pledge to limit his own terms. Ask Cook before it's

too late not to become a career politician.

CMR

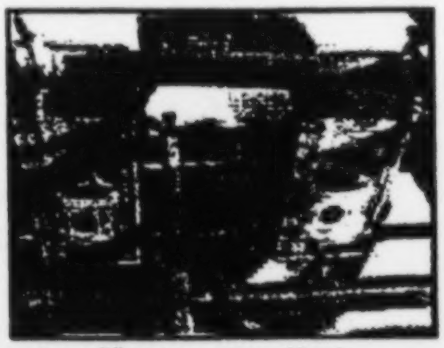
Ad Detector

BRAND: POL-CONGRESS+
TITLE: AFL/SS Trust Fund
COMMERCIAL: AFL/SS Trust Fund
LENGTH: 30
FRAMES: 8

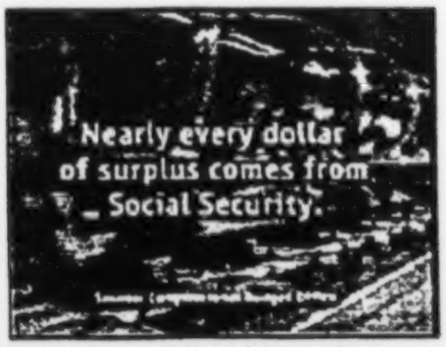
1 of 1

CMAG REPORTS

[Announcer] After years of deficits, the politicians in Washington say

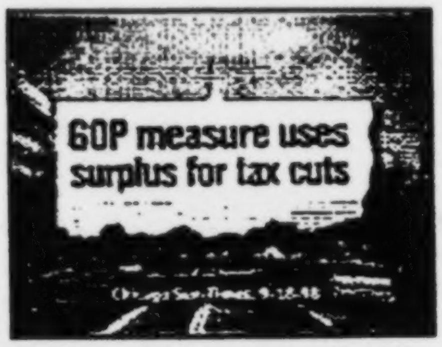


we're rolling in money. Here's something their not saying.


Nearly every dollar of surplus comes from Social Security.

Nearly every dollar of the budget surplus comes from Social Security.

Now the Republican Congress wants to spend the Social Security suplus on a 80 billion dollar


GOP measure uses surplus for tax cuts

election year tax cut. Even if there's talk about cutting Social Security

Plans would cut Social Security for future retirees.

for future retirees. Call Congresswoman Northup and tell her

Call
Congresswoman
Northup
1-800-378-1844

no on this scheme. Tell Northup to put Social Security first.

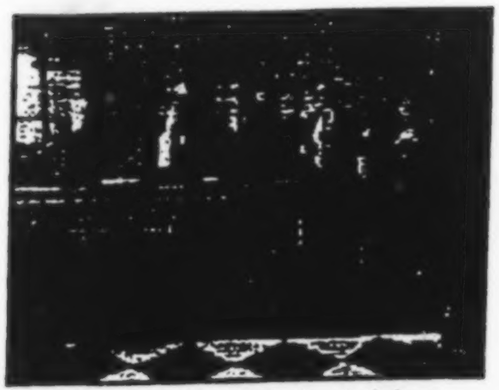
Put Social Security first.

Ad Detector

BRAND: AMERICAN ASSN/HEALTH PL+
TITLE: AAHP/Look Out For the Lawyers
COMMERCIAL: AAHP/Look Out For the Lawyers 1 of 1
LENGTH: 30
FRAMES: 6

2

A005L85Q.ESB



[Announcer]: Worried about rising healthcare costs? Then look out for the trial lawyers. They want Congress to pass new liability laws that could

Expensive
New Lawsuits

overwhelm the system with expensive new healthcare lawsuits. Lawsuits that could make trial lawyers richer.

2 Million
Could Lose
Health Coverage

That could make healthcare unaffordable for millions. Senator Lauch Faircloth

Senator Faircloth—
Fighting the
Trial Lawyers
New Laws

is fighting to stop the trial lawyers new laws. Call him today and tell him

Senator Faircloth—
Fighting the
Trial Lawyers
New Laws
Call Senator Faircloth
202 · 224 · 3154

to keep up his fight. Because if trial lawyers win,

working families lose.

CMR

Ad Detector

BRAND: AFL-CIO UNION+
TITLE: AFLCIO/Strengthen Surplus SS
COMMERCIAL: AFLCIO/Strengthen Surplus SS
LENGTH: 30
FRAMES: 7

1 of 1

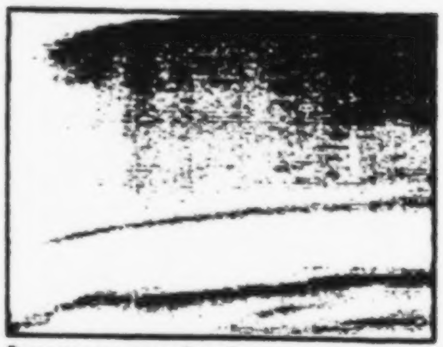
CMAG REPORTS

Shouldn't we save the
Social Security surplus?

[Announcer]: Shouldn't we save the Social Security surplus to strengthen Social Security? Most

Most Americans say yes.

Americans say yes. But Newt Gingrich said no and last month



Representative Pat Danner voted for the plan to spend the surplus on

GOP measure uses
surplus for tax cuts

an $80 billion election year tax cut instead of saving it all

to prevent cuts in Social Security for future retirees. Call

Call
Representative
Danner
1-800-378

Danner and tell her to vote no when the tax plan comes up again. Tell her this

resentative
anner
1-800-37 -1844

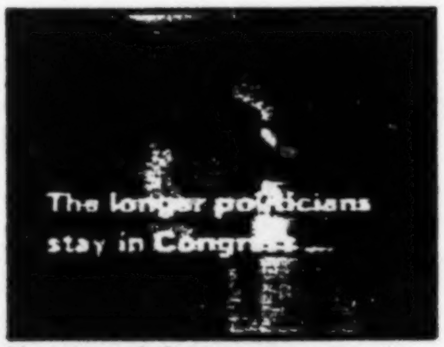
time put Social Security first.

CMR

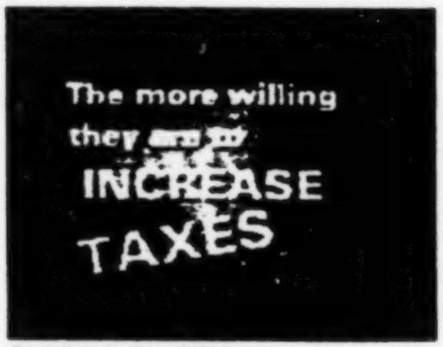
Ad Detector

BRAND: AMERICANS/LIMITED TERMS+
TITLE: AFTL/KY Lucas
COMMERCIAL: AFTL/KY Lucas 1 of 1
LENGTH: 30
FRAMES: 7

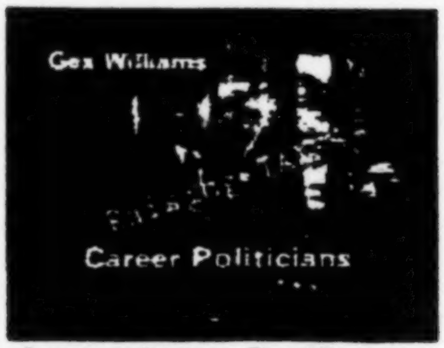
CMAG REPORTS


The longer politicians
stay in Congress ...

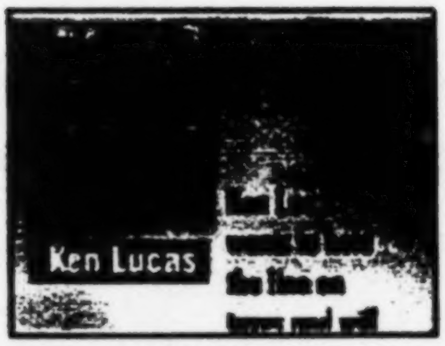
[Announcer] Studies show that the longer politicians stay in Congress the more willing they are to increase your taxes.


The more willing
they are to
INCREASE
TAXES

Candidate Gex Williams wants to follow the path


Gex Williams
Career Politicians

of career politicians. The difference. Ken Lucas



wants to hold the line on taxes and will limit his

Ken Lucas
limit his terms
in Congress

terms in Congress. Call Gex Williams and tell him

CALL GEX WILLIAMS

we don't need more taxes and spending. Tell him to sign the US Term Limits

We don't need more taxes
Sign the U.S. Term Limits Declaration
CALL GEX WILLIAMS

Declaration.

CMAG 00012

CMR

Ad Detector

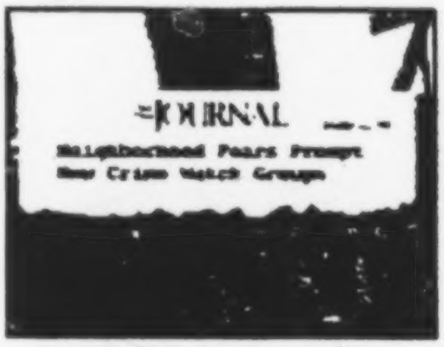
BRAND	POL UNKNOWN+	
TITLE	AFJS/Stabenow Tunred Her Back	
COMMERCIAL	AFJS/Stabenow Tunred Her Back	1 of 2
LENGTH	30	
FRAMES	7	

CMAG REPORTS

[Announcer]: Gang violence is on the rise, but not where you'd expect. Abductions at the Post Office, gang symbols painted on schools and City Hall.

Gangs are fleeing the bright lights of the big city to the street lights of our suburbs.

When Debbie Stabenow had a chance to do something about it, she turned her back on


JOURNAL
Neighborhood Fears Prompt New Crime Watch Groups

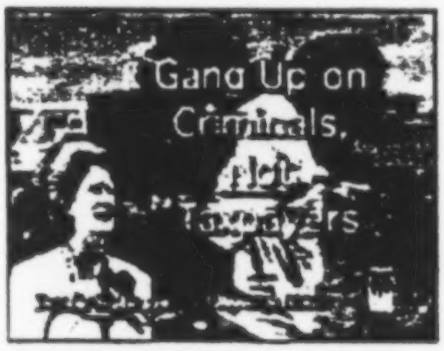
suburbs like Linden. Congresswoman Stabenow voted against a provision

Prosecuting Juvenile Criminals as Adults

that would have offered protection to small businesses and working families against gang

Prosecuting Juvenile Criminals as Adults

violence. Call Debbie Stabenow. Tell her to gang up on criminals, not


Gang Up on Criminals, not Taxpayers

the taxpayers

CMR

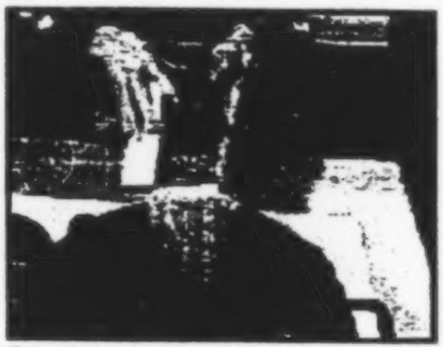
Ad Detector

BRAND: AMERICANS/LIMITED TERMS+
TITLE: AFTL/WI Tell Ryan
COMMERCIAL: AFTL/WI Tell Ryan 1 of 1
LENGTH: 30
FRAMES: 8

CMAG REPORTS

[illegible]

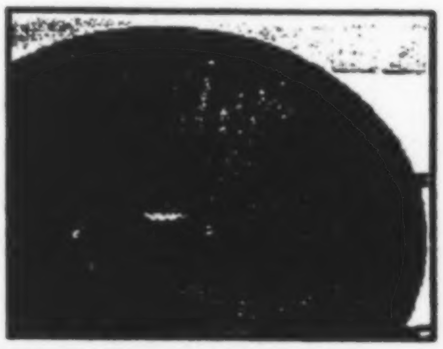
[Announcer]: They may go to Congress with a rigid resolve to represent the people back home.



But after a few terms in the corrupting influence of Washington

something happens to a Congressman's commitment to rigidly stand up for us.

They begin to bend to the wishes and whims of power brokers and



special interests. Yet despite claiming to support term limits, Paul Ryan

now refuses to sign the pledge to limit his own terms. Ask Ryan

before it's too late not to become a career politician.

CMR

Ad Detector

BRAND: NATIONAL PRO LIFE ALNC+
TITLE: WI/NPLA Feingold Kohl Abortion 60
COMMERCIAL: WI/NPLA Feingold Kohl Abortion 60 1 of 1
LENGTH: 60
FRAMES: 14

CMAG REPORTS

1411

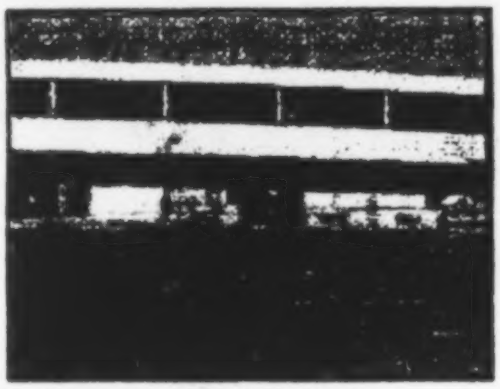
AC07SR21.ESB

NBC News Archives

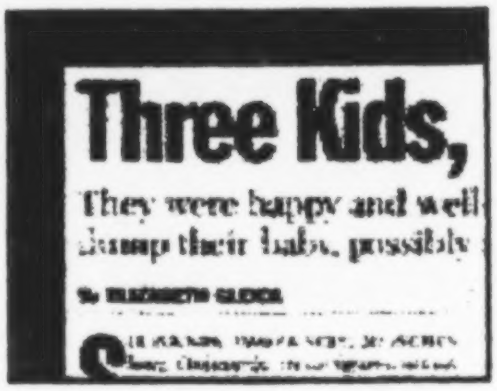
[Announcer]: America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed of

their newborn baby in a dumpster. Most Americans couldn't believe that

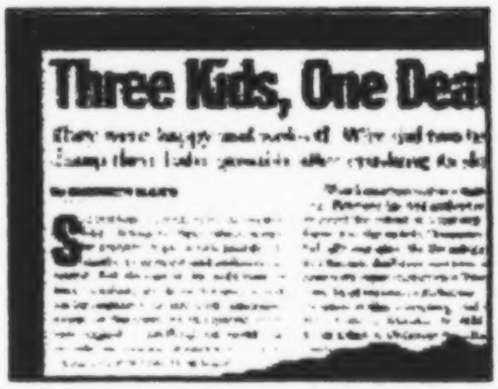
this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor



had been present that day in Delaware and delivered the infant, all but one inch from full


Three Kids,
They were happy and well
dump their baby, possibly

birth and then killed him it would have been perfectly legal.


Three Kids, One Dea

Instead of murder or manslaughter, it would have been called a partial-birth abortion.

PARTIAL-
BIRTH
ABORTION

Killing late in the third trimester, killing just inches away

PARTIAL-BIRTH ABORTIONS
KILL THOUSANDS EVERY YEAR

from full birth. Partial-birth abortion puts a violent death on thousands of babies

PARTIAL-BIRTH ABORTIONS
KILL THOUSANDS EVERY YEAR

every year. Your Senators, Russ Feingold and Herb Kohl

Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

CMR

Ad Detector

BRAND: NATIONAL PRO LIFE ALNC+
TITLE: WI/NPLA Feingold Kohl Abortion 60
COMMERCIAL: WI/NPLA Feingold Kohl Abortion 60 1 of 1
LENGTH: 60
FRAMES: 14

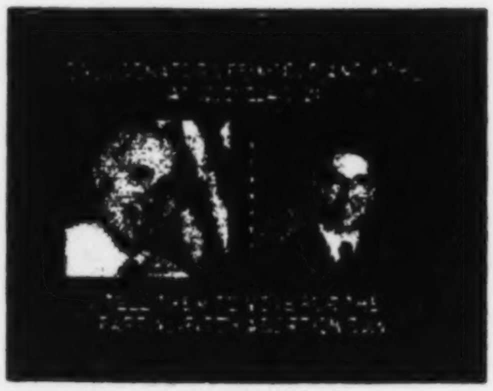
CMAG
REPORTS

AC07SR21.ESB

voted to continue this grizzly procedure. Contact Senators

Feingold and Kohl today and insist they change their vote and oppose

partial birth abortion. Their number in Washington is 202-224-3121.



[PFB: Members of the National Pro-Life Alliance]

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www.politicsontv.com

02-1674 (4)

(13) No. 02-1756 *et al.*

Supreme Court, U.S.
FILED
JUL 8 2003
CLERK

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

OPENING BRIEF OF THE "BUSINESS PLAINTIFFS" CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC.

Of counsel

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN AMUNDSON
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 637-3055

July 8, 2003

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
LEE E. GOODMAN
CALEB P. BURNS
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Appellants Chamber of Commerce of the United States, National Association of Manufacturers, Associated Builders and Contractors, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

105 pp

QUESTIONS PRESENTED

1. Whether the "coordination" provisions of the Bipartisan Campaign Reform Act ("BCRA") (§§ 202 and 214), violate the First Amendment rights of business corporations and those who wish to hear their speech and associate with them.

2. Whether the "electioneering communications" provisions of BCRA (§§ 201, 203, 204, and 311), violate the right of business corporations and those who wish to hear their independent speech and associate with them under the First Amendment.

PARTIES TO THE PROCEEDINGS

The Appellants here, Plaintiffs in two of the eleven cases consolidated in the district court, represent the interests of American business and business corporations. The Appellants are the Chamber of Commerce of the United States, the National Association of Manufacturers, and the Associated Builders and Contractors, Inc. They are referred to herein as the "Business Plaintiffs."

- The Chamber of Commerce of the United States ("Chamber") is the world's largest not-for-profit business federation. Founded in 1912, the Chamber represents over 3,000,000 businesses and business associations. The Chamber is a corporation, as are many of its members and supporters, and it is exempt from taxation under section 501(c)(6) of the Internal Revenue Code.
- The National Association of Manufacturers ("NAM") is the oldest and largest broad-based industrial trade association in the United States. Its membership comprises 14,000 companies and 350 member associations, meaning that NAM represents about 18 million individuals. Like many trade associations, NAM is incorporated and is exempt from taxation under section 501(c)(6).
- The Associated Builders and Contractors, Inc. ("ABC") represents more than 23,000 contractors and related firms in the construction industry, both unionized and non-unionized, who share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC is funded primarily by membership dues and is exempt from taxation under section 501(c)(6).*

The Appellees here, who collectively were Defendants in the district court, fall into two categories: the Government Defendants, comprising the Federal Election Commission, the Federal Communications Commission, and the United States of America; and the Intervenor Defendants, comprising Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords. They are referred to collectively herein as Defendants.

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement is included on page iii of the Business Plaintiffs' Jurisdictional Statement.

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* The Associated Builders and Contractors Political Action Committee (ABC PAC) and the U.S. Chamber Political Action Committee (U.S. Chamber PAC) are separate segregated funds of their respective organizations under 2 U.S.C. § 441b(b)(2)(C), and are political organizations under section 527(e)(1) of the Internal Revenue Code. They receive contributions from individuals as authorized by federal law and make contributions to or expenditures in support of federal candidates. Because of the associated burdens and risks, NAM does not have a PAC. The two business PACs are relying upon arguments by other allied parties at this stage of the briefing.

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The district court's opinions are reported at 251 F. Supp. 2d 176 (D.D.C. 2003), and may be found in the Supplemental Appendix to Jurisdictional Statements that has been filed with the Court. *See* Supp. App. 1sa-1382sa. The district court's Order staying the effect of its decision and the accompanying Memorandum Opinions are reported at 253 F. Supp. 2d 18 (D.D.C. 2003), and are reprinted in the Appendix to the Business Plaintiffs' Jurisdictional Statement ("J.S. App.") at J.S. App. 4a-20a.

JURISDICTION

The district court entered judgment on May 2, 2003. Appellants filed their timely notice of appeal on May 7, 2003. Appellants' notice of appeal is reprinted at J.S. App. 1a-2a. This Court noted probable jurisdiction on June 5, 2003. This Court has appellate jurisdiction pursuant to section 403(a)(3) of BCRA.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), is reprinted at J.S. App. 22a-85a. Sections 201, 202, 203, 204, and 311 of BCRA all are relevant to this brief, but the two provisions on which this brief focuses are the following:

Electioneering Communications

Section 201(a) of BCRA amends the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq.* ("FECA") by adding the following to 2 U.S.C. § 434 as part of subsection (f):

> (3) ELECTIONEERING COMMUNICATIONS. – For purposes of this subsection –
>
> [PRIMARY DEFINITION]
>
> (A) IN GENERAL. – (i) The term "electioneering communication" means any broadcast, cable, or satellite communication which –

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

[BACKUP DEFINITION]

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

Coordination

Section 214(a) of BCRA amended FECA, 2 U.S.C. § 441a(a)(7)(B), by inserting after existing clause (i) and before the former clause (ii) – redesignated as clause (iii) – the following new clause (ii):

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee; and

Section 214(b), (c), and (d) of BCRA provide as follows:

(b) REPEAL OF CURRENT REGULATIONS. – The regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees adopted by the Federal Election Commission and published in the Federal Register at page 76138 of volume 65, Federal Register, on December 6, 2000, are repealed as of the date by which the Commission is required to promulgate new regulations under subsection (c) (as described in section 402(c)(1)).

(c) REGULATIONS BY THE FEDERAL ELECTON COMMISSION. – The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall address –

(1) payments for the republication of campaign materials;

(2) payments for the use of a common vendor;

(3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and

(4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

(d) MEANING OF CONTRIBUTION OR EXPENDITURE FOR THE PURPOSES OF SECTION 316. – Section 316(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. § 441b(b)(2)) is amended by striking "shall include" and inserting "includes a contribution or expenditure, as those terms are defined in section 301, and also includes".

2. The First Amendment of the United States Constitution is reprinted at J.S. App. 21a.

INTRODUCTION

The success and vitality of American business, and of the corporations by which most of America's business is conducted, are central to the welfare and happiness of the American people, and to the security and stability of our nation. Corporations are primary employers, providing jobs, salaries, healthcare, retirement, and other benefits to most Americans; they produce much of our nation's goods and wealth; and their securities are central to retirement and investment plans.

Business corporations are profoundly affected by federal legislation, policy, and executive action on a wide range of issues, from tort reform to taxes, intellectual property to import controls, and employment standards to environmental protection. As a result, corporations are critically interested in the formulation and implementation of federal legislation and policy and in arguing that their knowledge and concerns are fully and effectively communicated to the public, federal legislators and other government officials, as well as to candidates and officials of the national political parties. At the same time, all Americans, including American voters and government officials, have a vital interest in hearing what corporations have to say on the key issues of the day.

The premise of the First Amendment is that we govern ourselves best when interested and informed parties are free to speak, associate, and petition, especially as to matters of legislation and public policy. This Court repeatedly has recognized the constitutional as well as the practical importance of corporate participation in the shaping of legislation and public policy. Although it has sustained some limits on express candidate advocacy, it has imposed a stringent standard of review, and has insisted that such limits be narrowly tailored and precisely defined, and has flatly rejected attempts to regulate corporate speech on matters of

public policy that does not expressly advocate the election or defeat of candidates.

BCRA threatens broad and vague new restrictions on the ability of corporations (and labor unions) to speak, associate, and petition the government. This brief focuses on two of BCRA's most damaging provisions.

First, BCRA seeks to expand the narrow and precise "express advocacy" standard, under which the First Amendment tolerates regulation of speech that explicitly advocates the election or defeat of clearly identified candidates. BCRA creates sweeping regulation of so-called "electioneering communications" that merely refer to a candidate or, alternatively, that may be thought to support or oppose a candidate. This new standard – intended to expand the "express advocacy" standard that this Court derived from the First Amendment – is applied throughout BCRA to impose disclosure, reporting, contribution and expenditure limits on individuals, unincorporated groups, corporations, political parties, and others. But it has particular effect on corporations and unions since the ban on their express advocacy is converted into a sweeping ban on a wide range of public speech. Incredibly, BCRA would forbid corporations to so much as mention President Bush, Vice President Cheney, or their Democratic rivals in broadcasts on the major television or radio stations in Washington, D.C., New York City, St. Louis, Chicago, and elsewhere during much of 2004!

Second, BCRA perverts the common sense "coordination" rule that agreeing with a candidate to finance specified speech in support of his or her campaign may constitute a forbidden contribution. By eliminating any requirement of agreement, BCRA imposes a vague coordination standard under which, on pain of criminal liability, corporations and others must choose between the types of routine communication and association with members of Congress and other allies by which federal legislation and policy is developed versus their core right to speak freely on legislative and policy issues.

The Business Plaintiffs who join in this brief – the Chamber, NAM, and ABC – are three of the major incorporated associations through which American business and business corporations communicate with Americans and American government officials and participate in the formulation of federal legislation and policy. For themselves and their members, and ultimately for the good of our democracy, the Business Plaintiffs urge the Court to adhere to the First Amendment limits it has set and to reject the coordination and electioneering communication provisions of BCRA.

STATEMENT OF THE CASE

The district court was deeply divided. Over Judge Henderson's strong dissent, Judges Leon and Kollar-Kotelly ruled that: (1) Neither of BCRA's alternative definitions of electioneering communication is valid, but the ambiguous Backup Definition could be made constitutional by severing a clause that narrows its scope, Per Curiam, Supp. App. 6sa; Leon, J., Supp. App. 1164sa-66sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa; and (2) BCRA's coordination standard is not void for lack of tailoring, and whether it is vague cannot be decided until after judicial review of the FEC's new coordination regulations before a single-judge district court, Per Curiam, Supp. App. 134sa-56sa. However, when the district court stayed its rulings pending this Court's decision, Judge Leon announced that the broadened Backup Definition does not provide enough "guidance" to be enforced. J.S. App. 19a.

The district court compiled only a paper record, receiving no live testimony. The three judges sharply disagreed as to the meaning of that record. In any event, in First Amendment cases, this Court makes an "independent examination of the whole record [to prevent] a forbidden intrusion on the field of free expression," as well as deciding all legal issues *de novo*. *Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). In these circumstances, and in light of this Court's Order of June 5, 2003, directing plaintiffs to submit opening briefs on all of their claims, regardless of how they fared in the district court, the Business Plaintiffs focus on the record below, citing the district court opinions where relevant.

BCRA'S "Coordination" and "Electioneering Communication" Provisions.

BCRA is a complex and lengthy statute that amends the equally complex FECA. This brief focuses on BCRA's "electioneering communication" and "coordination" provisions, quoted *supra* at 1-4, because they directly and substantially burden core First Amendment activities of corporations.

Electioneering Communication: *Buckley v. Valeo*, 424 U.S. 1 (1976), construed the First Amendment to prohibit campaign finance regulation that restricts independent speech that does not use explicit words to expressly advocate election or defeat of clearly identified candidates. This same "express advocacy" standard was employed across the board to set constitutional bounds to expenditure limits, reporting and disclosure requirements, and other burdens on individuals, groups, and corporations. *Id.* BCRA rejects *Buckley*'s "express advocacy" standard and instead introduces a new category of "electioneering communications." BCRA § 203. BCRA provides a Primary Definition of electioneering communication and a very different Backup Definition, which takes effect only if the Primary Definition is struck down.

Primary Definition: Under the Primary Definition, an electioneering communication is any broadcast, cable, or satellite communication that (a) "refers to a clearly identified [federal] candidate," (b) is made within 30 days before a nominating caucus, convention, or primary or 60 days before any general, special, or runoff election for the office the candidate seeks, and, in the case candidates for Congress, (c) is "targeted" in the sense that it "can be received by 50,000 or more persons" in the relevant district or State. BCRA § 201. The FEC's new regulations provide that communications referring to candidates for presidential and vice presidential nominations during state nominating events (e.g., a primary or convention) trigger a 30 day blackout period only in the involved state and only as to candidates seeking nomination by the involved party. 11 C.F.R. § 100.29(a)(2), (b)(3)(ii).

The FEC directed the Federal Communications Commission to create a database to answer the complex question of which broadcast, cable, and satellite signals can be received by 50,000 persons in particular jurisdictions. *See FCC Database on Electioneering Communications*, 67 Fed. Reg. 65,212, 65,215-16 (Oct. 23, 2002). This is necessary because electronic signals are not affected by political boundaries and often reach substantial audiences in multiple districts or states.

For example, major television stations in Washington, D.C., southern Maryland, and northern Virginia reach more than 50,000 persons in all three jurisdictions. *See, e.g.*, Warren Communications News, Television & Cable Fact Book (2002). Similarly, the principal New York City television stations reach more than 50,000 people in New Jersey, Pennsylvania, and Connecticut. *Id.*[1] Since radio and television broadcast signals often extend for a radius of 80 to 100 miles, there are many similar situations, ranging from large urban centers such as St. Louis, Missouri and East St. Louis, Illinois, or Chicago, Illinois and nearby Indiana communities, to population clusters such as Lake Charles and Sulfur, Louisiana which share radio and television coverage with Port Arthur and Beaumont, Texas, or Fargo, North Dakota and Morehead, Minnesota which lie on either side of the Red River. *Id.* And so on.

BCRA section 203 expands the former prohibition of express advocacy by corporations into a prohibition of electioneering communications. This means that in any given

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[1] The coverage of at least 50,000 people in each such state can be confirmed by summing the population of towns within the stations' grade "B" contour, e.g., Levittown and Easton, Pa.; Greenwich and Stamford, Conn.

state, BCRA's Primary Definition blacks out any corporate broadcast reference to the presidential candidates for *at least 120 days* during an election year: 30 days before the state primary or other nominating event; 30 days before the relevant national convention; and 60 days before the general election. For congressional candidates, the minimum period is 90 days since there is no national convention. But because broadcast, satellite, and cable signals often reach more than 50,000 persons in multiple jurisdictions, blackouts can be much longer.

The 2004 primary schedule is not complete, but if the 2000 dates were followed, the audience of major television and radio stations in the nation's capital could not receive corporate references to President Bush or Vice President Cheney for 157 days during 2004, and residents of New York City would be deprived of such speech for 176 days.[2] References to Democratic challengers also would be blacked out for 176 days in New York, but in D.C. the period would be 187 days.[3] Of these half-year blackout periods, 56 days of the New York City blackout, 37 days of the D.C. Republican blackout, and 60 days of the D.C. Democratic blackout would be due to primaries in adjacent jurisdictions.[4]

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[2] But for overlaps in some of the blackout periods, the blackout periods would be longer. With respect to New York City, the relevant primary dates are: N.Y. and Conn. 3/7; Pa. 4/4; and N.J. 6/6. With respect to D.C., the relevant primary dates are: Va. Rep. 2/29; Md. 3/7; and D.C. 5/2. The Republican National Convention started 7/31, and the general election was 11/7. These dates can be verified at the FEC's website, www.fec.gov. That site does not list minor party nominating dates. However, in a state such as New York where multiple minor parties also often nominate major party candidates, the blackout period actually could be 60 to 90 days longer than stated.

[3] This greater length is because Virginia's Republican primary overlaps with Maryland's primary, while Virginia's June 6 Democratic convention does not overlap any D.C. or Maryland event.

[4] The blackout would not merely affect residents of D.C. or New York, but would burden the entire audience of affected stations. For example,

Backup Definition: Alternatively, if the Primary Definition is "held to be constitutionally insufficient," then the Backup Definition defines electioneering communication as (a) any broadcast, cable, or satellite communication that "promotes or supports . . . or attacks or opposes" a candidate for federal office, (b) "regardless of whether the communication expressly advocates a vote for or against a candidate," so long as it (c) "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA § 201. The "suggestive of no plausible meaning" clause derives from *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), the only court of appeals decision to arguably relax *Buckley's* "express advocacy" standard.[5] In Senate debates,

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residents of Northern Virginia would suffer blackouts due to D.C. and Maryland nominating events. For the AM radio nighttime audience, the situation is much worse. Because AM radio waves bounce off of the ionosphere, which shifts after sunset, many local AM stations are required to sharply reduce power, or even to cease broadcasting, to clear the way for about fifty "clear channel" stations that use increased power and reflection from the ionosphere to serve wide regions – a range of approximately 750 miles in radius. *See* Audio Division, Federal Communications Commission, *Why AM Radio Stations Must Reduce Power, Change Operations, or Cease Operations at Night*, *at* http://www.fcc.gov/mb/audio/bickel/daytime.html (last visited July 1, 2003). Because these stations can be received in many states with different primary dates, their references to the president, vice president, and challengers may be banned for almost the entire election year. Listeners to subscription satellite radio, a newly emerging medium that reaches nationwide audiences and is required to use system-wide advertisements, face similar restrictions. *See* 2001 FCC LEXIS 4931, Para. 11 (Sept. 17, 2001).

[5] *Furgatch* overlooked this Court's then-recent decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 283 (1986) ("*MCFL*"). *Furgatch* was rejected by all other Courts of Appeals. *See Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 536 (2002); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Me. Right to Life*

the Backup Definition was frequently referred to as the "*Furgatch*" standard. 147 Cong. Rec. S2706, S2710, S2712-13 (daily ed. Mar. 22, 2001) (statements of Sen. Specter). The FEC declined to issue regulations dealing with the Backup Definition. *See Electioneering Communications*, 67 Fed. Reg. 65,190, 65,191 (Oct. 23, 2002) (Explanation and Justification). *See also* J.S. App. 19a (Leon, J.).

The Backup Definition applies at all times and in all states whether or not any election is pending there. It applies to speech that does not expressly advocate an electoral outcome. Because many members of the House of Representatives are nearly perpetual federal candidates, the Backup Definition would regulate corporate references to them year-round.

Coordination: Since *Buckley*, spending for speech that was sufficiently "coordinated" with a federal candidate or campaign was classified as a "contribution." *See Buckley*, 424 U.S. at 46-47; *see also* 2 U.S.C. § 441a(a)(7)(B); 11 C.F.R. § 100.23 (repealed by BCRA section 214). Corporations were forbidden to contribute to federal candidates, campaigns, and political parties on pain of civil and criminal penalties. 2 U.S.C. § 441b(a). Individuals were allowed to contribute only limited amounts. *Id.* § 441a(a). Thus, a charge that an issue ad was coordinated with a candidate translated into a charge of making an unlawful contribution. This contribution doctrine arguably applied only to speech that contained "express advocacy," though such a limitation was controversial at best. *See* Statement For

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Comm., Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996). *See also Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *see also Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction). In addition, the Ninth Circuit recently gave its *Furgatch* opinion a sharply narrow meaning. *See Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003).

the Record by Commissioner Bradley A. Smith in FEC MUR 4624 (Nov. 6, 2001), J.A. 1822, 1827-29.

As issue ads became more common, so did charges of coordination, and the meaning of coordination received more attention. By the late 1990's, constitutional precedent and FEC regulation required some element of agreement between speaker and candidate before otherwise permissible independent speech was converted into a forbidden contribution. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999); 11 C.F.R. § 100.23(c)(2)(iii) (repealed by BCRA section 214). BCRA section 214 rejects the constitutionally-based narrowing construction under which agreement was necessary, repeals the FEC regulations embodying the requirement of agreement, extends the coordination concept to political parties as well as candidates and campaigns, defines coordination as acting "in cooperation, consultation, or concert with, or at the request or suggestion of" a federal candidate, campaign, or party, and forbids construing this standard to require "agreement or formal collaboration."

The FEC has issued regulations implementing BCRA's coordination directives. *See Coordinated and Independent Expenditures*, 68 Fed. Reg. 421 (Jan. 3, 2003). They provide that "[a]greement or formal collaboration between the person paying for the communication and the candidate [or] political party" is not required to establish coordination. 11 C.F.R. § 109.21(e). "*Agreement* means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination." *Id.* Thus, speech is coordinated if it is "created, produced, or distributed at the *request* or *suggestion* of" or "after one or more *substantial discussions* about [it]" with, a candidate or political party or their agents, *even if there is no "mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination" between speaker and candidate or political party. Id.* §§ 109.21(d)(1)(i), 109.21(d)(3), 109.21(e) (emphasis added).[6]

Under the FEC regulations a broad range of speech may be deemed coordinated, including: (i) express advocacy, (ii) electioneering communications, and (iii) any "refer[ences] to a political party or to a clearly identified candidate for federal office" that is "directed to voters in the jurisdiction" where the candidate or the party's candidates are running, and is "publicly disseminated 120 days or fewer before" either a nominating event or election. *Id.* § 109.21(c).

The Process Of Developing National Legislation And Policy Requires Ongoing Close Contacts With Candidates And Party Officials.

Federal legislation and policy arises from the complex, ever shifting, and often long-term efforts of individual citizens or businesses, associations representing interested groups, federal legislators and their staffs, federal executive officers at all levels, and the national political parties. Ad hoc alliances are formed, compromises are hammered out, drafts and position statements are circulated, resources are pooled, the public is informed and persuaded, and, ultimately, legislation or policy is made. Huard Test. ¶¶ 3, 6, 7, J.A. 285-87; Josten Test. ¶ 4, J.A. 328; Monroe Test. ¶ 3, J.A. 592.

A prototypical example of the formulation of federal policy and legislation was the Thursday Group that met weekly in the offices of Congressman John Boehner in 1995 and 1996 to advance pro-business aspects of the "Contract with

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[6] To facilitate preparation of accurate voter guides, *see* 68 Fed. Reg. 421, 440 (Jan. 3, 2003), the FEC carved out a narrow "safe harbor" under which a "*response* to an *inquiry* about that candidate's or political party committee's positions on legislative or policy issues," standing alone, does not establish coordination. 11 C.F.R. § 109.21(f) (emphasis added). Reflecting its limited purpose, if the information is volunteered or arises from anything other than the specified type of inquiry, or if a response includes any "discussion of campaign plans, projects, activities, or needs," then the safe harbor does not apply. *Id.*

America." Henderson, J., Supp. App. 282sa-83sa. Congressman Boehner was the fourth-ranking Republican House member – the Republican Conference Chair, *ex officio* board member of the National Republican Congressional Committee (NRCC), and a candidate for re-election. Henderson, J., Supp. App. 283sa. Regular participants included the Chamber and NAM and other similar organizations, along with Congressman Boehner and his staff. Henderson, J., Supp. App. 282sa-83sa. Other members of Congress would be invited to explain relevant activities or insights. Huard Test. ¶ 7, J.A. 287. The focus was on legislative strategy and policy, but of course that involves identification and evaluation of friends, foes, options, strategies, public opinion and the like. Henderson, J., Supp. App. 283sa.

Another example is the participation of the Chamber in long-term efforts regarding prescription drug benefits and Medicare. District Judge Kollar-Kotelly opined that ads by the Chamber addressing the prescription drug benefit issue that ran in the fall of 2000 could not have a legislative purpose because "the prescription drug issue ... was not pending before Congress at the time the advertisement was aired." Kollar-Kotelly, J., Supp. App. 705sa. In fact, many conflicting proposals for comprehensive Medicare prescription drug coverage remained pending in Congress during the last half of the 2000 session.[7] When it became clear that a prescription drug benefit would not be enacted, involved legislators made clear that they would continue to press the issue.[8] And they did. Following the 2000 elections rival bills proposed by Senator Graham[9] and Senators Breaux and Frist[10] were debated but failed to pass, along with other reform plans.[11] In June, 2003, Medicare prescription drug benefit bills passed both the House and the Senate.[12]

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[7] *See, e.g.*, H.R. 4607, 106th Cong. (2000); S. 2753, 106th Cong. (2000); H.R. 4680, 106th Cong. (2000).

[8] *See* 146 Cong. Rec. S11521 (daily ed. Nov. 14, 2000); *see also* 146 Cong. Rec. H11754 (daily ed. Nov. 1, 2000); 146 Cong. Rec. H11803 (daily ed. Nov. 2, 2000).

[9] *See* S. 2625, 107th Cong. (2002).

[10] *See* S. 357, 107th Cong. (2001) and S. 358, 107th Cong. (2001).

The long-term prescription drug benefit struggle illustrates why the Business Plaintiffs and thousands of similar incorporated associations, as well as individual business corporations, must be in ongoing contact and communication with members of Congress, their staffs, other federal and national party officials, and with one another as they participate in the formulation of federal legislation and policy. Josten Test. ¶ 4, J.A. 328; Huard Test. ¶ 3, J.A. 285-86; Monroe Test. ¶ 3, J.A. 592. Unavoidably, this requires contact with candidates and representatives of political parties, often on the issues with which they are closely identified and that may become prominent in future elections. Huard Test. ¶ 7, J.A. 287.

In a democracy, many officials and others who play leading roles in legislation and policy formation also are candidates much of the time. Every member of the House of Representatives who wants to retain office must stand for reelection every two years. U.S. Const., art. I, § 2. Similarly, a third of the Senate must seek reelection every two years. *Id.* art. I, § 3; amend. XVII. Every four years there is a presidential election, *id.* art. II, § 1, in which the President and Vice President often run. Other presidential candidates typically include leading members of the House and Senate and other politically prominent Americans. Similarly, members of the House and Senate, particularly those in leadership positions, often hold positions with national and state political party committees. *See, e.g.*, McConnell Test. ¶¶ 2-8, J.A. 401-03. The same is true of the President and Vice President. Thus, the close contacts and communication with members of Congress and other leaders that are necessary to participation in formulating and implementing legislation and policy unavoidably involves close contacts and ongoing communications with candidates and political party leaders.

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[11] *See, e.g.*, H.R. 339, 107th Cong. (2001); H.R. 3626, 107th Cong. (2002); H.R. 3684, 107th Cong. (2002); S. Res. 269, 107th Cong. (2002); S. 2, 107th Cong. (2002).

[12] *See* H.R. 1, 108th Cong. (2003); S. 1, 108th Cong. (2003).

Legislative And Policy Development Requires Business Corporations To Communicate To The Public During Pre-Election Periods.

In addition to working closely with federal candidates and party officials, the Business Plaintiffs and similar incorporated associations and businesses, singly or in various groups or coalitions, regularly use television and radio advertisements to communicate with the American people about legislative and policy concerns. Henderson, J., Supp. App. 260sa-61sa. Such ads are broadcast year round, but are more common during election periods. Henderson, J., Supp. App. 234sa.

Judge Kollar-Kotelly suggested that "true" issue ads would not be run in the months leading up to elections, noting that broadcasters charge higher rates then and suggesting that candidate and other overtly electoral ads might prove distracting. Kollar-Kotelly, J., Supp. App. 757sa-58sa. However, as Judges Henderson and Leon observed, Americans tend to be most focused upon and receptive to discussions of public policy issues during the election period, and after elections there is a period of fatigue during which the public will pay little attention to such ads. Henderson, J., Supp. App. 236sa, 269sa; Leon, J., Supp. App. 1149sa. Public attention is even more focused in jurisdictions that are holding closely contested elections. Henderson, J., Supp. App. 266sa-67sa.

Furthermore, there often is a flurry of important legislative activity during the closing months of legislative sessions, which typically fall in the nomination and election period. Henderson, J., Supp. App. 263sa; Leon, J., Supp. App. 1148sa; *see also* United States House of Representatives and United States Senate Roll Call Votes for the 104th, 105th, 106th, and 107th Congresses, *at* http://clerk. house. gov/ histHigh/Congressional_ History/index.php (House) and http: //www.senate.gov/ pagelayout/legislative/ a_three_ sections_ with_teasers/votes.htm (last visited July 1, 2003) (Senate) (indicating 570 roll call votes taken within sixty days of the 1996, 1998, 2000, and 2002 November elections).

Issues of vital concern to business corporations arise during election periods. Major legislation often remains pending until the end of a session and, indeed, controversial legislation often is kept alive precisely to provide a campaign advantage. International and domestic crises that lead to seizure of steel mills, takeover of ports or transportation systems, enactment of draconian price or allocation controls, concessions relating to imports, exports, and assets and operations abroad, and so on are not excluded from election periods.

Effective issue ads often must refer to persons who happen to be candidates. Legislative and policy proposals often are publicly known by the names of leaders who are also candidates. Leon, J., Supp. App. 1150sa. For example, the Public Company Accounting Reform and Investor Protection Act was popularly known as "Sarbanes-Oxley." Representative Michael Oxley introduced Sarbanes-Oxley on February 14, 2002, and it was enacted on July 30, 2002. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended at 15 U.S.C. §§ 7201 *et seq.* (2002)). During the period leading up to the enactment of Sarbanes-Oxley, Representative Oxley was a candidate in the Ohio Republican Primary held on May 7, 2002. Indeed, the bills that became BCRA were popularly known as "McCain-Feingold" and "Shays-Meehan."

Americans often understand issues based on their relationship to prominent leaders who also may be candidates. Identifying a tax or budget proposal as one supported by Gore or Gingrich gives many Americans information that they consider important. Henderson, J., Supp. App. 263sa; Leon, J., Supp. App. 1150sa; *see also* 11 C.F.R. § 100.29(b)(2) (including the phrases "the President" and "your Congressman" as examples of references to federal officeholders that are regulated as electioneering communications). Referring to such names also can be persuasive. For example, identifying legislation as supported by Gore or Gingrich may lead members of the public to support or oppose it. Henderson, J., Supp. App. 263sa; Leon, J., Supp. App. 1150sa.

An important purpose of issue ads is to persuade candidates, who are existing or potential officeholders, that an issue is of importance to their constituents and, hence, merits their attention. Josten Test. ¶ 13, J.A. 331; Huard Test. ¶ 9, J.A. 287. Thus, many issue ads conclude by asking viewers to contact candidates and express support for or opposition to legislation or policy positions. Leon, J., Supp. App. 1372sa-77sa (examples of ads). In fact, viewers do call in response to these ads. Kollar-Kotelly, J., Supp. App. 671sa (quoting deposition testimony of Senator Feingold).

The record contains many examples of corporate broadcasts that refer to candidates in the course of discussing public issues without express advocacy. One widely discussed series of such ads was broadcast in 1996 by a group of pro-business associations known as The Coalition which included the Chamber and NAM. Henderson, J., Supp. App. 260sa-61sa. Another example discussed in the district court opinions is the series of ads that the Chamber supported during the 2000 election concerning whether Medicare should include a prescription drug benefit. This question is important to business corporations that provide health care coverage for employees and retirees. An example of these ads includes the following:

> [Announcer] Senator Robb supports a big-government prescription drug plan that could be costly for seniors. This plan requires seniors to pay up to $600 a year plus a 50/50 co-payment. In this big-government plan, seniors have a one time chance to sign up, otherwise they face penalties to join later. And who would decide which medicines are covered and which aren't? Tell Senator Robb to stop supporting a big-government prescription drug plan. [Paid for by: The U.S. Chamber of Commerce].

Josten Dep. Ex. 23 (cited by Kollar-Kotelly, J., Supp. App. 705sa). Similarly, ABC and NAM regularly run ads discussing issues and candidates. Monroe Test. ¶¶ 3, 7, 8, J.A. 592-94; Huard Test. ¶ 4, J.A. 286.

The Experience Of "The Coalition" Illustrates The Risk That A Broad "Coordination" Definition Poses To Corporate Involvement In Federal Legislation And Speech.

In 1996 while the Business Plaintiffs and others were active in the Thursday Group and similar alliances, the AFL-CIO announced that it intended to spend up to $35 million on advertising to defeat the Contract With America and win control of the House for the Democrats. Henderson, J., Supp. App. 260sa-61sa. Pro-business groups, including the Business Plaintiffs, immediately recognized that the business community would have to respond. Henderson, J., Supp. App. 260sa. Accordingly, five prominent business associations, including the Chamber and NAM, organized "The Coalition: Americans Working for Real Change." Henderson, J., Supp. App. 260sa-61sa. Ultimately about 30 associations and similar groups became public members; many others provided support on condition that they would not be publicly identified due to fear of retaliation from organized labor or government officials who might not approve of the ads. Henderson, J., Supp. App. 261sa-62sa.[13]

Members agreed that the purpose of The Coalition would be to raise funds from pro-business sources to create and broadcast responses to the AFL-CIO ads. Kollar-Kotelly, J.,

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[13] Judge Kollar-Kotelly erroneously found that The Coaltion was incorporated. Kollar-Kotelly, J., Supp. App. 817sa-18sa. Its money was largely corporate, however. The public members of The Coalition were identified on stationery and in press reports. *See, e.g.*, Richard W. Stevenson, *A Campaign to Build Influence*, N.Y. Times, Oct. 29, 1996, at A24.

Supp. App. 685sa-86sa (quoting deposition testimony of Bruce Josten). Because the AFL-CIO ads were run starting in 1995 and during the 1996 nomination and election period, the responding ads of The Coalition necessarily were to air during that same time.

Members of The Coalition also agreed that the ads were to be created and broadcast independently of any candidate or campaign, and that no participant in The Coalition was to discuss planned ads or broadcasts with any candidate or campaign or do anything else that might be thought to amount to "coordination" of the ads within the meaning of the federal election laws. Henderson, J., Supp. App. 282sa.

The Coalition raised and spent about $5 million in corporate funds to respond to the approximately $35 million spent by the AFL-CIO and its allies. Henderson, J., Supp. App. 260sa-61sa. Its ads endeavored to respond directly to the AFL-CIO's ads. Henderson, J., Supp. App. 260sa-61sa. The ads referred to candidates and issues, but did not expressly advocate the election or defeat of any candidate. Kollar-Kotelly, J., Supp. App. 685sa; Josten Test. ¶ 8, J.A. 329. They ran before the November election. Kollar-Kotelly, J., Supp. App. 685sa.

Despite The Coalition's care to avoid coordinating, the Democratic National Committee filed a complaint with the Federal Election Commission (FEC) charging that the ads had been coordinated and, as a result, the corporate funds spent on the ads constituted unlawful contributions. Henderson, J., Supp. App. 282sa-83sa. The DNC complaint offered no evidence of any element of agreement between The Coalition and any candidate or campaign. Instead, the charges of coordination were based primarily upon two things: *first*, founding members of The Coalition also were participants in the Thursday Group, which regularly met with Congressman Boehner, who himself was a candidate and who was an *ex officio* board member of the NRCC which was interested in assisting Republican candidates for election to the House; and

second, near the time The Coalition was being organized, Congressman Boehner was reported to have given a speech in which he stated that pro-business interests needed to respond to the AFL-CIO. Henderson, J., Supp. App. 283sa; Josten Test. ¶ 9, J.A. 329-30.

The FEC initiated Matter Under Review 4624 (MUR 4624) to investigate the DNC's complaint. Henderson, J., Supp. App. 283sa. At the very outset the FEC served highly intrusive and burdensome discovery demands on The Coalition's 28 Executive Committee members, Representative Boehner, his chief of staff Barry Jackson, Coalition consultants the Tarrance Group, National Media, Inc., Gannon, McCarthy and Mason, Ltd., American Viewpoint, Chuck Greener/Porter Novelli, Frank Luntz/Luntz Communications, and individual employees or principals of the consultants, the NRCC and the NRCC's Mario Cino and Ed Brookover, 37 candidate committees and their treasurers, and others. FEC General Counsel's Report at 4 (Apr. 23, 2001) ("General Counsel's Report") [DEV 53 Tab 6].[14]

The FEC's discovery requests required extensive document production, and answers to intrusive questions concerning contacts with Congressman Boehner and other candidates.[15]

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[14] Although most records relating to MUR 4624 are confidential under 2 U.S.C. § 437g(a)(12), the FEC's public file contains a General Counsel's Report (Apr. 23, 2001), a Statement for the Record by Commissioner Scott E. Thomas and Chairman Danny L. McDonald (Sept. 7, 2001), and a Statement for the Record by Commissioner Bradley A. Smith (Nov. 6, 2001). Henderson, J., Supp. App. 283sa. FEC General Counsel's Reports include uncorroborated information and testimony that is not subject to cross-examination. Respondents are denied access to the Reports before public release, to third party testimony, and to any third party documents.

[15] For example, item 64(a) to the Chamber demanded that it "identify all persons who were involved in any way ... in communications, conferences, meetings or discussions between the Coalition or any of its Management Committee members, and each of the following persons or entities between January 1, 1996 and December 31, 1996: (1) RNC; (2) Haley Barbour ... ; (3) NRCC; (4) Maria Cino ... ; (5) Edward

They also required the production of individuals for questioning under oath by FEC counsel. The full scope of the investigation is not known because it was conducted on a confidential *ex parte* basis. However, the D.C. Circuit recently gave some detail on the burden and intrusion suffered by the AFL-CIO during a parallel FEC investigation of coordination charges. *AFL-CIO v. FEC*, No. 02-5069, 2003 WL 21414308 (D.D.C. June 20, 2003).

Buckley had described the coordination concept as based on "prearrangement or coordination," 424 U.S. at 46-47, and *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 614, 621-22 (1996) ("*Colorado I*"), had indicated that a "general or particular understanding" was necessary to constitute coordination "for constitutional purposes." The FEC espoused a much broader view and the first full consideration of how the First Amendment limited the coordination concept occurred in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 89-90 (D.D.C. 1999). That opinion held that, because the coordination standard marks the dividing line between protected and unprotected corporate speech and tends to chill legislative contacts, the definition "ultimately is drawn by reference to the First Amendment," and must provide the "clearest possible guidance," while balancing the competing interests. *Id.* at 90-91. *Christian Coalition* rejected the FEC's unilateral "insider trading" theories, and formulated standards such as: a "corporation's expressive expenditure becomes an illegal contribution when the candidate … becomes a partner in the corporation's speech, though not necessarily an equal partner." *Id.* at 92.

Brookover … ; (6) The Republican Conference of the United States House of Representatives … ; (7) Congressman John Boehner or any of his staff … ; (8) Congressman Bill Paxon or any of his staff … ; (9) Any candidate for United States Representative in the 1996 elections." Item 64(b) demanded a detailed description and summary of each such meeting, and item 64(c) demanded all related documents. Many other members of The Coalition received similar demands. Massive discovery disputes resulted.

The FEC elected not to appeal and, instead, attempted to codify *Christian Coalition*'s constitutional ruling. As paraphrased by Judge Henderson:

> Before BCRA became effective, an expenditure for a communication was "coordinated" under 11 C.F.R. § 100.23(c)(2) if the communication was created, produced or distributed (1) "[a]t the request or suggestion of" the candidate or party; (2) after the candidate or party had "exercised control or decision-making authority" over the content or distribution of the communication; or (3) after "substantial discussion or negotiation" resulting in a "collaboration or agreement" between the creator, producer, distributor or payer of the communication and the candidate or party regarding the content or distribution of the communication.

Henderson, J., Supp. App. 388sa; *see also* 65 Fed. Reg. 76138 (Dec. 6, 2000) (codified at 11 C.F.R. § 100.23, though subsequently repealed pursuant to BCRA § 214(b)); *Christian Coalition*, 52 F. Supp. 2d at 91-92.

After those regulations were promulgated, the FEC's General Counsel recommended that MUR 4624 and similar MURs be dismissed because they rested on a theory of "loose coordination" that lacked any element of agreement and could not be squared with the law. General Counsel's Report at 2. The FEC voted to dismiss, with various Commissioners writing to explain their votes. The Statement for the Record by Commissioner Bradley A. Smith (Nov. 6, 2001) ("Smith Statement") observed:

> [D]espite the fact that the Commission has now found no violations in this case, I strongly suspect that the original complainant, the Democratic National Committee, considers its complaint to have been a success. The complaint undoubtedly forced their political opponents to spend hundreds of thousands, if not millions of dollars in

> legal fees, and to devote countless hours of staff, candidate, and executive time to responding to discovery and handling legal matters. Despite our finding that their activities were not coordinated and so did not violate the [FECA], I strongly suspect that the huge costs imposed by the investigation will discourage similar participation by these and other groups in the future.

Smith Statement at 2, J.A. 1824; *see also* Henderson, J., Supp. App. 284sa.

Commissioner Smith's observations about the use of FEC charges based on vague standards to hinder and deter political opponents parallel findings by the D.C. Circuit, which recently explained that FEC charges are regularly employed to harass and burden political opponents. "[P]olitical opponents . . . file charges against their competitors to serve the dual purpose of 'chilling' the expressive efforts of their competitor and learning their political strategy so that it can by exploited to the complainant's advantage." *AFL-CIO*, 2003 WL 21414308, at *9.

The General Counsel's Report expressed a series of judgments critical of the activities of The Coalition. The Business Plaintiffs to this day have not seen the body of information on which these statements rested and had no opportunity to see or to respond to the Report before the FEC acted. Henderson, J., Supp. App. 283sa. The post-dismissal response to the report has not been made public, despite Coalition members' requests. The Coalition members dispute vast portions of the Report. The FEC did not adopt the General Counsel's Report's judgments and most are in the nature of obiter dicta based on one-sided secret files. The General Counsel's Report is public, though the underlying data is not.

To The Extent A Speaker's Purpose Is Relevant And Can Be Discerned, The Coalition's Speech Was Not Exclusively Or Primarily Electoral, And Many Who Contributed To The Speech Had No Electoral Intent.

Defendants argued, and Judge Kollar-Kotelly found, that one purpose of the examples of broadcast corporate speech discussed above was influencing federal elections. Kollar-Kotelly, J., Supp. App. 820sa. Neither Defendants nor Judge Kollar-Kotelly discussed why motive matters in this context. They did not deny that the speech also had the purpose of discussing public issues and public figures. Nor did they discuss how to apply purpose tests when multiple persons or entities support speech for multiple purposes.

Persons involved in The Coalition who testified in this proceeding were unanimous that the institutional purpose of its ads was to respond to and correct misperceptions being created by the AFL-CIO's issue ads. Huard Test. ¶ 5, J.A. 286; Josten Test. ¶ 9, J.A. 329-30; Sandherr Test. at AGC 0004, J.A. 748. The Chamber's representative, Mr. Josten, was unequivocal that this was The Coalition's sole purpose, and no evidence from members of The Coalition contradicts that testimony. Kollar-Kotelly, J., Supp. App. 685sa-86sa (quoting Josten deposition testimony). Instead, Judge Kollar-Kotelly discussed evidence deemed to suggest that "*one purpose* of the advertising campaign was to influence the 1996 general election." Kollar-Kotelly, J., Supp. App. 686sa-89sa (emphasis added). This view was based on evidence that some vendors and some members displayed some electoral interest, as well as on the timing of the ads, a factor already discussed.

When The Coalition was first being organized, a prospective advertising firm submitted a proposal stating "Thank you for the opportunity to present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress." Kollar-

Kotelly, J., Supp. App. 686sa. So far as appears, this was uninformed speculation by an outsider before it was retained.

Outside consultants tested proposed Coalition ads for their effect on voter attitudes toward candidates. Kollar-Kotelly, J., Supp. App. 686sa-88sa. However, no one disputed that this was a logical way to assess the persuasiveness of the ads in countering the AFL-CIO ads.

A memorandum from outside polling groups entitled "Key Findings from Post-Election Surveys in OH-6, IA-4, WA-1, WA-5, WA-9, and KY-1" was provided to The Coalition after the election. Kollar-Kotelly, J., Supp. App. 688sa-89sa. It claimed that the number of Republicans elected showed that the ads had been persuasive.

After the election, some members of The Coalition suggested visiting Congressmen to take credit for the ads. Kollar-Kotelly, J., Supp. App. 712sa-13sa. However, other members opposed or had no interest in the visits, and only one apparently may have occurred. Huard Dep. at 86-87, 90, J.A. 899-901; Josten Dep. at 175-76, J.A. 920-21; General Counsel's Report at 34 (the FEC claimed to have found one person – an aide – who had been visited).

In sum, while some vendors and members had some electoral concerns, there was no basis for dismissing Mr. Josten's sworn testimony that the only purpose of The Coaltion as an entity was to respond to the AFL-CIO.

Business Plaintiff ABC also often broadcasts ads to educate people on issues of importance to it. Monroe Test. ¶ 8, J.A. 594. Many times these ads mention public officials and candidates during election periods. Monroe Test. ¶ 3, J.A. 592. ABC's members are from the construction industry and tend to have "a distinctive ethos: 'very strong patriotic red, white and blue God and country association.'" Kollar-Kotelly, J., Supp. App. 701sa (quoting deposition testimony of Edward Monroe). On one occasion, ABC broadcast an ad near an election that discussed a public official having pushed for the "strongest possible penalties for child molesters who attempt to lure children over the internet." Kollar-Kotelly, J., Supp. App. 700sa-01sa.

Because Mr. Monroe testified that child molestation was not a "particular concern" to ABC's membership, Judge Kollar-Kotelly incorrectly concluded that ABC must have selected the issue solely to affect an election. Kollar-Kotelly, J., Supp. App. 700sa-01sa. But, "particular" commonly means "distinctive," and Mr. Monroe's point, as he made clear, was that the concern was one that he believed ABC shared with many others. Kollar-Kotelly, J., Supp. App. 701sa. The fact that many people may share a common position about a particular issue does not diminish a particular person's or group's interest in the issue. According to Mr. Monroe's testimony, ABC members feel a very strong "God and country association," and are therefore likely to care about social issues like child molestation.

SUMMARY OF ARGUMENT

BCRA's electioneering communication and coordination provisions violate the First Amendment and are invalid.

Electioneering Communication: Congress cannot reverse this Court's constitutional holdings in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), that only express advocacy may be limited by campaign finance laws. Thus, BCRA's attempt to regulate all electioneering communications is flatly invalid. But if Congress could impose a new standard, the First Amendment would require it to be as narrowly tailored and clear as the express advocacy standard, and neither the Primary nor the Backup Definition of electioneering communication comes close.

The Primary Definition's prohibition of corporate and union broadcasts that merely mention a candidate during much of an election year facially restricts more speech than the First Amendment allows. Discussions of candidates and issues are inextricably intertwined. Candidates, many of whom are incumbent officials, must be mentioned to identify proposed bills, communicate their basic nature, and to persuade – e.g, a "Kennedy tax bill" or a "Gingrich budget proposal." Also, issue speech often asks the audience to communicate to named candidates – e.g., "tell candidate x to sign the term limit pledge." Indeed, Defendants' own data show that during the last two election cycles a substantial proportion of the political speech that the Primary Definition would have suppressed was "true" issue advocacy.

The Primary Definition's lack of tailoring is doubly impermissible because the minimum 90 to 120 day blackout period in each state and district is so lengthy, and the actual blackout periods are much longer in the many areas where major television and radio stations serve multiple jurisdictions with differing nominating dates, e.g., 187 days in the nation's capital, 176 days in New York City, etc. Forbidding corporations and unions to broadcast any reference to President Bush or his challenger for nearly half of 2004 in population centers nationwide is not a narrowly tailored response to the interests said to justify the new standard. Nor is there anything about the modest proportion of independent corporate and union speech during election periods that might justify such a serious First Amendment burden on both listeners and speakers.

The Backup Definition of electioneering communication is hopelessly vague and untailored. Speakers cannot be required, on pain of criminal penalty, to predict whether various audiences in changing circumstances will perceive broadcast communications (i) to "promote," "support," "oppose," or "attack" a candidate, and (ii) as "suggestive" of an exhortation to vote in a particular way. Nor can participants in public discourse be required to await advance FEC approval, under these vague standards, for each new broadcast statement – or for the same statement as circumstances change. This vagueness cannot be cured by a "broadening construction" under which the key narrowing clause is stricken, thus banning speech that is not even suggestive of an exhortation to vote.

Coordination: BCRA's coordination provisions are equally untailored and vague. No one questions that if a candidate is given sufficient influence and control, third party speech functions as a contribution and may be so classified to prevent circumvention of contribution limits. But because this doctrine converts highly protected independent speech into restricted or prohibited contributions, it is subject to strict scrutiny and must be narrowly tailored and clearly defined. BCRA's provisions are neither. They reject prior constitutional holdings that some element of agreement is necessary, and they permit coordination to be found on the basis of a political candidate's or party's unilateral request, suggestion, or substantive communication or discussion, even if there is no mutual agreement of any kind as to any element of the speech or its creation and dissemination. Far from curing the problem, the FEC's new coordination regulations simply confirm the overbreadth and vagueness.

The broad and vague coordination provisions have bite right now. The Business Plaintiffs and many similar entities work on an ongoing basis with members of Congress and other government and political party officials to develop and implement federal legislation and policy. Yet, the Business Plaintiffs must curtail those speech, association, and petitioning activities now to avoid providing an arguable basis for claims that later public speech has been coordinated and, hence, constitutes an unlawful contribution. This is a classic controversy that is ripe for resolution, particularly in light of the command of BCRA section 403(a) that constitutional challenges to the statute be decided as expeditiously as possible.

The electioneering communication and coordination provisions regulate a wide range of activity by individuals, associations, and corporations. They were not tailored to the specific characteristics of corporate speech, nor is there anything about corporate speech that would warrant the broad and vague restrictions they impose. Although *MCFL* and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), allow corporate express advocacy to be regulated, they authorize nothing further. A long line of this Court's holdings recognize the importance and highly protected status of corporate speech on matters of public policy that does not expressly advocate the election or defeat of a candidate.

ARGUMENT

I. LAWS THAT SIGNIFICANTLY BURDEN FIRST AMENDMENT POLITICAL ACTIVITIES OF CORPORATIONS MUST SATISFY STRICT SCRUTINY.

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or the press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances." U.S. Const. Amend. I. This strongly worded prohibition has its fullest and most urgent application to the political process. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (collecting authority).

Corporate speech on public issues is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940), and contributes "to the free flow of information," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Thus, strict scrutiny applies with full force to significant restrictions on First Amendment activities of corporations that are important to public policy formation. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 19 (1986); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657, 699-701 (1990) (unanimous as to standard of review). As these cases hold, the defenders of a law that burdens politically important corporate speech must prove that the specific restrictions imposed are "narrowly tailored" to a "compelling" government interest so that no less restrictive alternative will suffice. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-15, 827 (2000).

Contribution limits are an exception. Perceiving lesser "importance of the political activity at issue," where only *contributions* are restricted, this Court applies a less strict but still "rigorous" requirement that they be "closely drawn to match a sufficiently important interest." *FEC v. Beaumont*, 123 S. Ct. 2200, 2210 (2003) (collecting authority; internal quotation marks omitted); *Buckley*, 424 U.S. at 20-21, 29 (contribution limits receive "rigorous" review). That the lesser standard for contribution limits demands that the restrictions be "closely drawn" to serve an "important purpose" underscores how demanding full strict scrutiny is.

Beaumont recently upheld a limit on *contributions* by corporations, applying the "less[] demand[ing]" standard of review established in prior cases. 123 S. Ct. at 2210. However, *Beaumont* stressed that "the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech *or political association*," rather than on the corporate nature of the speaker. *Id.* (emphasis added). The same logic clearly extends to corporate involvement in petitioning the government.[16]

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[16] *See Christian Coalition*, 52 F. Supp. 2d at 91-92. Indeed, the *Noerr-Pennington* doctrine, which protects "the constitutionally protected right of petition," *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 399 (1978), has developed in cases involving corporations, and protects "groups" as well as individuals. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). *See* Aaron R. Gary, *First Amendment Petition Clause Immunity From Tort Suits*, 33 Idaho L. Rev. 67, 95 (1996) (collecting "innumerable" cases holding that *Noerr-Pennington* is grounded in the First Amendment's right to petition). *See Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc.* 508 U.S. 49, 60-62 (1993) (establishing stringent objective showing necessary to defeat *Noerr-Pennington*).

In addition to being narrowly tailored, campaign finance legislation that "imposes criminal penalties in an area permeated by First Amendment interests" also must possess a high degree of clarity to assure that highly protected activity is not sacrificed to provide a margin of safety. *Buckley*, 424 U.S. at 40-41, n.48 (collecting authority). The First Amendment demands a considerably "greater degree of specificity" than due process generally demands of criminal statutes, *id.* at 77 (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)), because its goals extend beyond providing fair notice to avoiding chill and loss of protected speech as speakers hedge and trim to avoid doubtful areas, and to minimizing government discretion that may be used to favor some speakers or views over others.[17]

The exceptional tailoring and clarity required of campaign finance statutes with criminal penalties is vividly illustrated by the "express advocacy" standard announced in *Buckley* and reaffirmed as to coporations in *MCFL*. In *Buckley* the Court of Appeals had narrowed an expenditure provision to regulate only speech "advocating the election or defeat of" a candidate. 424 U.S. at 42. But that standard required the speaker to predict what message others might perceive, with the result that FECA might chill "discussion of issues and candidates" that it could not regulate directly. *Id.* at 42-43. Both to cure vagueness and to achieve precise tailoring, this Court held that the "only" solution was an objective bright-line standard regulating only "communications that include explicit words of advocacy [that] in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 43-44. A decade later, *MCFL* ratified

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[17] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-99 (1982) (explaining that the minimum due process standard is that "person[s] of ordinary intelligence [have] a reasonable opportunity to know" what is forbidden, but that if a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply").

and followed that holding to limit a separate provision restricting the spending of corporate funds "in connection with any federal election" to express advocacy. 479 U.S. at 248-51.

Buckley recognized that its objective, narrow, and precise "express advocacy" standard gave the statute less scope than Congress desired and that "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." 424 U.S. at 45. Yet the First Amendment's twin imperatives of narrow tailoring and clarity had to be respected, even though one provision was rendered so ineffective that it lacked constitutional justification and was struck down. *Id.* at 45-51.

II. BCRA'S "ELECTIONEERING COMMUNICATION" PROVISIONS FAIL STRICT SCRUTINY.

The express advocacy standard for decades has marked the constitutional boundary between speech that campaign finance law may regulate and speech that it may not. BCRA introduces a new concept – "electioneering communication." Like the express advocacy standard, the new electioneering communication standard applies across the board to BCRA's provisions on disclosure, section 201; coordinated contributions, section 202; corporate and union speech, section 203; "targeted" communications, section 204; activities of foreign nationals, section 303; and sponsorship disclosure, section 311. The Business Plaintiffs challenge the application of this new concept to business corporations. This brief focuses on section 203 which forbids corporations to engage in electioneering communications, but the same flaws infect the use of "electioneering communication" in defining the types of speech that may be deemed coordinated communications under section 202.

A. The First Amendment Forbids Campaign Finance Regulation Of Independent Speech That Does Not Expressly Advocate.

Buckley limited two different provisions of FECA to express advocacy, one restricting independent expenditures by individuals, 424 U.S. at 39-43,[18] and one imposing reporting requirements, *id.* at 79-81. *MCFL* limited FECA's ban on independent corporate speech to express advocacy. 479 U.S. at 248-49. And the courts of appeals have applied the "express advocacy" standard to distinguish constitutional from unconstitutional restrictions under a range of state and federal campaign finance regulation.[19]

Recognizing that Congress cannot reverse this Court's construction of the First Amendment, defenders of BCRA have claimed that the express advocacy standard was simply one of many possible ways to clarify vague statutory language. However, *Buckley* was explicit that, in addition to achieving clarity, the express advocacy standard assured that FECA was "not impermissibly broad," 424 U.S. at 80, saying that it was the "only" way to protect issue advocacy, *id.* at 43. Likewise, *MCFL* stressed that the express advocacy standard was adopted "to avoid problems of overbreadth." 479 U.S. at 248.[20]

Alternatively, BCRA's defenders have asserted that the express advocacy standard was merely intended to preserve FECA against constitutional doubt and did not actually determine that a broader restriction would be invalid. Such an argument, of course, concedes that any regulation beyond express advocacy is constitutionally doubtful. But the argument fails because *Buckley* did not adopt the express advocacy standard to save FECA's restriction on independent expenditures. To the contrary, having narrowed that restriction to express advocacy, *Buckley* held that it did so little to achieve its purpose that it was unconstitutional. 424 U.S. at 45-51. If the First Amendment had permitted a broader standard that might have saved the provision, *Buckley* would have been obliged to adopt it.

The express advocacy limit has been respected in this Court's decisions concerning corporate speech. In *MCFL* the Court applied the "express advocacy" standard to narrow FECA's ban on corporate speech "in connection with" an election. 479 U.S. at 248-49.[21] Then, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 n.1 (1990), the Court upheld a state statute modeled on the FECA provision that *MCFL* had limited to express advocacy, holding that the state could forbid a corporate ad that expressly urged viewers to "Elect Richard Bandstra State Representative." 494 U.S. at 714.[22] However, when faced with restrictions on independent corporate political speech that did not expressly advocate a candidate vote – in *Bellotti*, *Consolidated Edison*, and *Pacific Gas & Electric* – this Court struck them down each time.

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[18] When the FECA was subsequently amended, Congress explained that its purpose was "to conform the independent expenditure reporting requirement ... to the requirements of the Constitution set forth in *Buckley v. Valeo*." H.R. Conf. Rep. No. 94-1507, at 38 (1976), *reprinted in* 1976 U.S.C.C.A.N. 946, 954.

[19] *See supra* note 5.

[20] These references to "overbreadth" deal with a lack of narrow tailoring under strict scrutiny, rather than to the type of overbreadth analysis that grants expanded standing in some First Amendment cases. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992) (distinguishing types of overbreadth); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-04 (1985) (same); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 965, 966 (1984) (under strict scrutiny, defendants must disprove overbreadth).

[21] *MCFL* recognized that PAC speech does not substitute for free corporate speech. 479 U.S. at 252-56, 266.

[22] *Austin* is in serious tension with the First Amendment's prohibition on government regulation of "speakers who may address a public issue." *Bellotti*, 435 U.S. at 784-85; *see also Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 194 (1999). This is doubly so since many may assume – however inaccurately – that corporations tend to favor particular viewpoints.

Because the electioneering communication provisions seek to legislatively reverse this Court's authoritative construction of the First Amendment, they are void and there is no need for extended analysis. But even if Congress theoretically could enact a substitute standard, that new standard would have to be as narrowly tailored and as clear as the express advocacy standard it seeks to expand. And on these grounds as well, the electioneering communication standard fails.

B. The Electioneering Communication Standard Is Not Narrowly Tailored.

Consistent with the highly protected nature of the rights that it regulated, the express advocacy standard was *precisely* tailored. Inevitably, all speech that used explicit words to expressly advocate the election or defeat of a clearly identified candidate was directly and unequivocally related to an election. The electioneering communication standard, by contrast, eschews any such direct and unequivocal link. Instead, it uses factors such as timing, media, geography, and reference to a candidate as criteria that are supposedly associated with the type of speech that properly may be regulated. Obviously, those who seek to abandon a precisely tailored standard and regulate speech on the basis of such indirect and inferential criteria bear a heavy burden of demonstrating narrow tailoring – and defendants cannot carry that burden here.

Proponents of BCRA claimed to have studies showing that, during the last two election cycles, most of the broadcast advertising that referred to candidates was sufficiently electoral that it should have been subject to regulation.[23] Both studies were shown to be deeply flawed. Henderson, J., Supp. App. 237sa-48sa. Moreover, despite their determined attempts to understate the amount of so-called "true" issue ads, the authors of the studies ultimately conceded that between 7% and 64% of the speech during the 60 days before the 1998 elections were not "sham" at all. Henderson, J., Supp. App. 242sa-44sa. *This Court has never sustained a statute that erroneously burdens such a proportion of core political speech.* In *Mills v. Alabama*, the Court struck down a one-day ban on speech which arguably would have affected "only" 1/365th of all speech. 384 U.S. 214 (1966).

More fundamentally, there have been and always will be periods of crisis and instability during which broadcast references to candidates will be critical. For example, presidents historically have seized basic industries, imposed wage and price controls, used armed federal employees as strike breakers, and entered into executive agreements with foreign countries concerning U.S. assets abroad. Nothing in nature excludes such periods from election years. Surely an industry whose assets are facing seizure by an incumbent president is entitled to independently broadcast its concerns to the American people without threat of criminal sanction. For that matter, an industry that faces confiscatory taxation under a bill or a campaign proposal being promoted by a member of Congress who is seeking re-election surely may independently tell the public why such taxation is a bad idea. Because the Primary Definition would prohibit such speech, it cannot satisfy First Amendment tailoring.

For the reasons above, the Primary Definition also would not be narrowly tailored even if its blackout periods only affected jurisdictions in which a nomination event or election was imminent. However, because electronic signals do not respect political boundaries, the blackouts extend much further. For example, in the coming election residents of the Nation's capital will find references to President/candidate Bush in certain ads excluded from their major television and radio stations not just during the 120 days attributable to D.C.

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[23] This judgment rests on the perceived subjective purposes of the speech, even though the motives of a speaker generally do not affect First Amendment protection. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988). Moreover, trying to assess the subjective purposes of an organization is highly problematic. *See Perry v. Bartlett*, 231 F.3d 155, 161-62 (4th Cir. 2000).

events, but also for a further 37 days because of primaries in Virginia and Maryland. *See supra* at 9. Similarly, residents of New York City will find such references excluded for 56 *additional* days by primaries in Pennsylvania, New Jersey, and Connecticut. *See supra* at 9. And similar consequences will follow wherever television and radio stations have audiences in more than one jurisdiction. For all of these reasons, the Primary Definition fails strict scrutiny and is void.

C. Corporate Speech Does Not Warrant The Overbreadth Of The Electioneering Communication Standard.

The electioneering communication standard controls a wide range of BCRA restrictions applicable to individuals, unincorporated organizations, and corporations. It was not specially tailored to regulate independent corporate issue speech. Nothing in the record shows that the criteria relied upon by the electioneering communication standard – e.g., timing, geography, media, and candidate reference – are any more reliable when applied to corporate speech than when applied to the speech of individuals or unincorporated associations. Nor is there any hint that corporate speech on important public issues needs less precision and clarity to avoid hedging, trimming, and chill.

BCRA's defenders have suggested that *Austin* supports applying a broad definition of electioneering communication to corporations. But *Austin* sustained a state statute that was directly modeled on a federal provision that this Court had narrowed to regulate only express advocacy, and the specific corporate speech at issue in *Austin* explicitly and unambiguously urged a vote for an identified candidate. 494 U.S. at 655 n.1, 714. Nothing in *Austin* suggests that regulation of corporate speech might properly extend beyond express advocacy, and certainly nothing there suggests the criteria used in the electioneering communication standard.

Nor does the record show that, under the express advocacy standard, independent corporate speech impairs the integrity of elections. Defendant's principal exhibit in support of BCRA is the Brennan Center's *Buying Time 2000*. *See* Craig B. Holman and Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (Brennan Center for Justice 2001) ("*Buying Time 2000*") [DEV 46]. Although that report has been shown to be heavily biased in favor of BCRA, Henderson, J., Supp. App. 238sa-41sa, it recognizes that independent organizations are a small minority voice on television during campaigns: "Over all elections combined in 2000, candidates were the principal sponsors of most political television ads, with party committees running second, and independent groups third." *Buying Time 2000* at 29, 40-41. In the 2000 presidential campaign, the estimate was candidates 51%, parties 41%, and independent organizations 8%. *Buying Time 2000* at 40-41. In Senate races, the figures were candidates 71%, parties 22%, and independent organizations 6%. *Id.* In House races, the figures were 61%, 22%, and 17%. *Id.* Similarly, the Government Defendants' expert, Prof. Goldstein, estimated that federal candidates funded 52% of the ads, parties 27%, and independent groups, 16%. Goldstein Am. Rep. at 8 [DEV 3 Tab 7]. Of the independent groups whose speech was estimated at 8%, 6%, 17%, and 16% of the total, only a portion were incorporated, but Defendants do not show how many.

The Brennan Center report also concludes that candidates and their political parties speak dramatically more than independent organizations in more hotly contested elections. *Buying Time 2000* at 87-97. Across all races the Brennan Center deemed "competitive" in 2000, the candidates themselves funded 70% of all television advertising. *Buying Time 2000* at 47. Their respective political parties funded 23% while independent organizations funded only 6.7%. *Id.* Anecdotally, Virginia U.S. Senate candidate George Allen's own ads accounted for 56% of all ads the Brennan Center deemed favorable to his campaign, while the Republican

Party's ads accounted for 43% and independent organization ads accounted for a mere 1%. *Buying Time 2000* at 87. His opponent, incumbent Senator Charles Robb, aired 39% of ads favorable to him, the Democratic Party aired 51%, and independent organization ads accounted for only 10%. *Id.*[24] Indeed, in the most competitive race in recent American history, the 2000 presidential race, the Brennan Center concludes only 8% of all expenditures on television ads were funded by independent organizations. *Buying Time 2000* at 39.

Only some of the independent spending reported above was by corporations, and only some of those were business corporations.[25] Defendants offer no evidence. But taking these figures as the best showing that Defendants possibly can make, two things are clear: (i) there is no evidence that the criteria which define the electioneering communication standard are tailored as applied to corporate speech; and (ii) there is no evidence of a compelling need to reduce the amount of corporate speech that refers to individuals who are candidates.

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[24] *Buying Time 2000* cited just one example of a congressional race (Cal.-49) in which a bare majority of the spending was by independent groups. *Buying Time 2000* at 95. However, the group spending was roughly balanced ($1.49 million versus $2.21 million), and the voters rejected the candidate that the group spending was said to have favored. *Id.* The real "distorting" spending comes from wealthy candidates using their personal fortunes, such as Ross Perot who spent $70 million on his 1992 presidential race, Steve Forbes who spent $48.6 million on his 2000 presidential campaign, and John Corzine who spent $63 million in the 2000 New Jersey Senate race. *See* Michael Cooper, *At $92.60 a Vote, Bloomberg Shatters An Election Record*, N.Y. Times, Dec. 4, 2001, at A1.

[25] Of course, *Austin* held that, where adequate grounds existed for forbidding corporate express advocacy, the legislature was not obliged to carve out non-business corporations for different regulation. 494 U.S. at 661-65.

D. The Untailored And Vague Backup Definition Cannot Be Saved By Broadening It To Burden Speech That Congress Intended To Leave Free.

BCRA's Backup Definition also seeks to regulate speech that does not contain express advocacy and, hence, it is fatally overbroad. Moreover, Defendants have offered no explanation as to why the Backup Definition is unlimited in time and constituency when the Primary Definition is limited in both respects. For this reason as well, the Backup Definition obviously is untailored and void.

Beyond that, all aspects of the definition are fatally vague. *Buckley* considered and expressly rejected as constitutionally inadequate a standard that regulated speech "advocating the election or defeat of" a candidate. 424 U.S. at 42. It held that requiring a speaker to predict the messages listeners might derive from the speech "blankets with uncertainty" and "compels the speaker to hedge and trim." *Thomas v. Collins*, 323 U.S. 516, 535 (1945), *quoted in Buckley*, 424 U.S. at 43. The "only" solution, the Court ruled, was a standard that turned on the objective presence within the speech of explicit words of express advocacy. *Buckley*, 424 U.S. at 43.

Yet, the Backup Definition requires a speaker to predict whether a communication will be perceived to "promote or support" or "attack or oppose" a candidate for federal office. BCRA § 201(a). What does that mean? Does the statement that "X supports the right to choose" praise, condemn, or make a neutral statement of fact? Does the answer vary depending on where the statement is broadcast? What role do changing circumstances play? Does the statement "X supported the invasion of Iraq" veer from praise to condemnation and back depending on how quickly the troops are advancing at any given moment? Can statements praising or condemning legislation or a policy position promote or attack the candidate? These are precisely the types of questions that *Buckley* holds a speaker cannot be required to consider.[26] Thus, this portion of the Backup Definition is unconstitutionally vague, as well as overbroad.

Congress sought to narrow the promote-support-attack-oppose standard by limiting it to speech that also "is suggestive of no plausible meaning other than an exhortation to vote." BCRA § 201. However, requiring a speaker to predict what plausible "suggestions" a listener may infer is just what *Buckley* forbids. Not surprisingly, therefore, all three district judges ruled that this aspect of the Backup Definition was void for vagueness. Henderson, J., Supp. App. 362sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa; Leon, J., Supp. App. 1164sa-65sa.

Judges Leon and Kollar-Kotelly initially thought that the vagueness of the Backup Definition could be cured by (i) severing the narrowing clause concerning what the speech suggests, (ii) retaining the clause dealing with supporting, promoting, attacking or opposing, and (iii) requiring corporations and unions to seek an advisory opinion for any speech that arguably veered from neutrality. Leon, J., Supp. App. 1164sa-66sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa. However, in his later opinion concerning a stay, Judge Leon recanted, stating that the support-promote-attack-oppose standard fails to give sufficient "guidance" in the absence of FEC regulations. J.S. App. 19a. The FEC expressly declined to adopt regulations construing the Backup Definition. *See* 67 Fed. Reg. 65190, 65191 (Oct. 23, 2002).

Judge Leon's recantation and the failure of any Defendant to support the proposed revision of the Backup Definition should dispose of the notion. But if further reasons were needed, they readily are available. The fundamental First Amendment vice of a vague statute is that it causes speakers to hedge and trim, thus suppressing speech that Congress has not actually forbidden. *Buckley*, 424 U.S. at 43. The clause that Judges Leon and Kollar-Kotelly propose to sever and discard *narrowed* the Backup Definition. Eliminating that clause thus expands the definition, flatly suppressing speech that the vague narrowing provision would have somewhat discouraged. Such a cure is worse than the disease. No doubt for this reason, this Court has never imposed such a "broadening construction" to cure First Amendment vagueness but, instead, has always imposed a *narrowing* construction, as in *Buckley*.

Moreover, the proposed severance defeats the primary intent of the Backup Definition. Congress intended for the severed clause to narrow the Backup Definition. Without the narrowing clause, the reference to any speech that supports, promotes, attacks or opposes a candidate is dramatically broader. Indeed, when the Backup Definition was proposed, the sponsor's stated rationale was that the final phrase – "suggestive of no plausible meaning other" than electoral advocacy – came from a court of appeals decision that purported to comply with this Court's constitutional ruling in *Buckley*, namely *FEC v. Furgatch*. During the debate, the Backup Definition repeatedly was described as adopting the *Furgatch* standard. 147 Cong. Rec. S2706, S2710, S2712-13 (daily ed. Mar. 22, 2001) (statements of Sen. Specter). Yet, Judges Leon and Kollar-Kotelly would throw out the language from *Furgatch* that Congress determined was as essential to the Backup Definition as the "promotes or supports" and "attacks or opposes" language. Severability is not proper where it serves to defeat legislative intent, *CFTC v. Schor*, 478 U.S. 833, 841 (1986), and this is doubly true where it burdens core protected speech.

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[26] The FEC noted that its authority to craft exceptions to the definition of electioneering communication, which was limited by BCRA to speech that does not "promote or support" or "attack or oppose," was "significantly limit[ed]" by the "difficulties involved in" defining such speech. *See* 67 Fed. Reg. 65190, 65196 (Oct. 23, 2002).

III. BCRA'S COORDINATION PROVISIONS FAIL STRICT SCRUTINY BECAUSE THEY ARE NEITHER NARROWLY TAILORED NOR CLEAR.

Coordination "turn[s] a protected expenditure for issue advocacy into an unprotected contribution." *Clifton v. FEC*, 927 F. Supp. 493, 500 (D. Me. 1996), *modified on other grounds*, 114 F.3d 1309 (1st Cir. 1997). Moreover, the conduct that constitutes coordination, and thus strips issue advocacy of its protection, itself is highly protected speech and association with members of Congress and other government and political party officials. Thus, strict scrutiny applies, and every judge to focus on the issue has agreed that the First Amendment:

> [D]emands a definition of coordination that provides the clearest possible guidance to candidates and constituents, while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and association.

Christian Coalition, 52 F. Supp. 2d at 91; (internal quotation marks omitted); Per Curiam, Supp. App. 143sa; Henderson, J., Supp. App. 386sa-87sa. The standard is every bit as demanding as the standard that led *Buckley* to insist on a narrow, objective, bright-line standard of express advocacy.

A. BCRA's Definition Of Coordination, Which Excludes Any Element Of Agreement, Is Not Narrowly Tailored.

The rationale for converting spending for coordinated speech into a contribution is that sufficient "prearrangement and coordination" with a candidate or political party can achieve the same effects as a direct contribution and, hence, invites circumvention of the contribution limits. *Buckley*, 424 U.S. at 46-47. But this rationale fails in the absence of a sufficient "general or particular understanding with a candidate" or party. *Colorado I*, 518 U.S. at 614. In the absence of the necessary agreement or understanding, "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22.

In 1999, *Christian Coalition* undertook a comprehensive analysis of the constitutional issues raised by the coordination concept and held that some substantial element of agreement was essential to the coordination concept in order to "giv[e] such expenditures sufficient contribution-like qualities to fall within the [FECA's] prohibition on contributions." 52 F. Supp. 2d at 91-92 (coordination requires that "the candidate and spender emerge as partners or joint venturers in the expressive expenditure").

BCRA section 214 repeals the FEC regulations that codified *Christian Coalition* (previously codified at 11 C.F.R. § 100.23(c)(2)(iii)) and provides that the broad statutory definition (discussed *infra*) cannot be construed to require any "agreement or formal collaboration." By specifying that only "formal" collaboration be excluded, but conspicuously applying no modifier to "agreement," BCRA plainly excluded any element of agreement, formal or informal.[27] If there were any doubt – and there is not – it would be removed by the FEC's contemporaneous coordination regulations, which define "agreement" to mean any "mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination." 11 C.F.R.

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[27] Judges Leon and Kollar-Kotelly suggested in a footnote that the maxim of *noscitur a sociis* justified reading the term "formal" as if it modified "agreement" as well as "collaboration." Per Curiam, Supp. App. 146sa. However, if that meaning had been intended, Congress would have referred to "formal collaboration or agreement." If a maxim were needed – and it is not – the decision to impose a limit on "collaboration" but not on "agreement" would involve *expressio unius est exclusio alterius*. 2A Norman J. Singer, *Sutherland Statutory Construction* §§ 47:23, 47:24, 47:33 (6th ed. 2001). Moreover, if BCRA sought only to exclude "formal agreement" from the standard, there would have been no need to repeal the FEC regulations, which did not require a formal agreement.

§ 109.21(e). Obviously, an agreement can be reached and manifested informally – a wink and a nod may do. But a wink standing alone will not.[28]

Because BCRA's coordination provisions eliminate any element of agreement, they restrict *independent* corporate speech. Hence, they are not narrowly tailored to their anti-circumvention purpose and fail strict scrutiny.

B. BCRA's Coordination Provisions Are Unconstitutionally Vague.

BCRA section 214 provides that speech is coordinated if it is made "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate or party, whether or not there is any "agreement or formal collaboration."[29] This language suggests a general concept or field of concern, but it certainly does not approach First Amendment clarity. Henderson, J., Supp. App. 384sa-96sa.

The new FEC coordination regulations do not solve the problem. They open by specifying that "whether or not," 11 C.F.R. § 109.21(d), there is any "mutual understanding or

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[28] *Christian Coalition* and the codifying FEC regulations stated without elaboration that speech occurring "at the request or suggestion" of a candidate is coordinated. 52 F. Supp. 2d at 91. Read in context, this language appears to have contemplated something similar to the formation of a "unilateral contract" which occurs when an offer is accepted by conduct. *Black's Law Dictionary* 326 (7th ed. 1999). However, BCRA's rejection of *any* element of agreement now converts the unilateral communication of a suggestion or request into a unilateral ban on subsequent speech of the type proposed, regardless of whether the speaker is accepting the proposal or acting for some other reason.

[29] By using the same language to define coordination with a party that existing provisions of FECA use to define coordination with a candidate or campaign, by repealing FEC regulations that narrowed the existing provisions by requiring an element of agreement, and by specifying that new regulations not require any element of agreement, section 214 operates as a whole to define the general concept of "coordination" under FECA as amended by BCRA. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (related statutory clauses must be understood as a whole).

meeting of the minds on all or any part of the material aspects of the communication or its dissemination," 11 C.F.R. § 109.21(e), is irrelevant. The statutory definition is said to be satisfied if the candidate or political party "request[s] or suggest[s]" or is "materially involved in decisions regarding" the communication, or if the communication "is created, produced, or distributed after one or more substantial discussions [that convey material] information about the candidate's or political party committee's campaign plans, projects, activities, or needs." *Id.* at 109.21(d).[30]

The Business Plaintiffs and many similar entities must attempt to apply these vague standards on a day-to-day or even hour-by-hour basis to avoid arguable coordination while, at the same time, they conduct ongoing communication and contact with members of Congress and other federal government and party officials about the same legislative and policy issues that those candidates or their opponents may stress during election campaigns.[31] Clearly the standards do not provide the type of precise guidance that the First Amendment demands, with the result that they are chilling communications and contacts with officials/candidates and will chill public communications about legislative and policy issues. Both ways, important First Amendment activity suffers.

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[30] The FEC's so-called "content" standard expands the coordination concept to apply to a wide range of speech, including express advocacy, electioneering communications, and speech during much of an election year that mentions a candidate. 11 C.F.R. § 109.21(c). The record shows that much issue advocacy, particularly around elections, mentions candidates. Thus, this regulatory standard does not alleviate either overbreadth or vagueness of the content standard. Indeed, to the extent that this is a backdoor regulation that reaches beyond express advocacy, it is untailored and void for the reasons discussed by FEC Commissioner Smith. Smith Statement at 3-5, J.A. 1825-30. The FEC's "safe harbor" is very narrow indeed, *supra* note 6, and does not protect typical legislative and policy contacts.

[31] It would be specious to suggest that the FEC somehow could solve this problem by issuing hour-to-hour advisory opinions as to whether specific circumstances might constitute coordination. In the fluid political realm, the material circumstances would have changed before the request for an opinion could be prepared, not to mention the 60 day FEC response period. 2 U.S.C. § 437f(a)(1). Also, because advisory opinion requests are made public for comment before being issued, 2 U.S.C. § 437f(d), such a process would be very intrusive into often confidential activity.

The threat from a vague coordination standard is real. As the D.C. Circuit recently recognized, political opponents are quick to file FEC complaints for tactical advantage, and the FEC's ability to screen out baseless attacks is impaired by imprecise legal standards. *AFL-CIO*, 2003 WL 21414308, at *9. And as the experience of The Coalition demonstrates, FEC investigations into alleged coordination can be exceptionally intrusive, burdensome, and expensive. Indeed, as Commissioner Smith aptly observed, the Democratic National Committee no doubt viewed its complaint against The Coalition as a success, since it crippled and ultimately killed a strong pro-business voice. Henderson, J., Supp. App. 284sa.

C. The Constitutional Challenge To BCRA's Coordination Provisions Can And Should Be Decided Now, As BCRA Itself Mandates.

Because First Amendment values are so important, courts strain to find that arguable First Amendment claims are justiciable. 13A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3532.3 (2d ed. 1984) (collecting cases). Moreover, BCRA section 403(a) mandates that constitutional challenges be resolved as expeditiously as possible. Strikingly, this provision for expedited judicial review was considered immediately after the section 214 coordination provisions and was enacted on the very same day. *See* 147 Cong. Rec. S3184, S3189, S3190, S3194 (daily ed. March 30, 2001). But even under ordinary standards, the Business Plaintiffs' narrow tailoring and vagueness challenges to BCRA are justiciable and ripe for review.

The basic constitutional requirement for exercise of the judicial power is a genuine case or controversy presented by a

plaintiff with standing. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Here the Business Plaintiffs are being forced to limit their present and ongoing communication and association with, and petitioning of, members of Congress and other candidates and party officials to preserve their future right to speak freely about issues and candidates, just as they have done in the past. They claim a First Amendment right to be free of this forced curtailment, and the Defendants contest that right. This is a classic case or controversy.

BCRA section 214 as a whole imposes an overbroad and vague standard of coordination. Striking down the section will eliminate the overbreadth and vagueness introduced by BCRA, providing substantial relief to the Business Plaintiffs. Also, striking down section 214(a)'s new ban on coordination with political parties will remove that burden, even if not fully eliminating all parallel issues presented by the coordination provisions of FECA. As a practical matter, this Court's opinion will guide construction of those provisions as well.

The Business Plaintiffs' challenge is to the statute itself. Failing to decide the challenge will subject the Business Plaintiffs and many other entities to ongoing injury to core First Amendment interests. And to the extent that the FEC is going to speak to the meaning of the statute, it has done so in its new coordination regulations.[32] Thus, this case is ripe. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).[33]

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[32] Ripeness turns on the regulatory situation at the time this Court rules. *Buckley*, 424 U.S. at 115-18; *Anderson v. Green*, 513 U.S. 557, 558-59 (1995) (per curiam).

[33] The Per Curiam Opinion's reliance on *Martin Tractor Co. v. FEC*, 627 F.2d 375 (D.C. Cir. 1980), is unfounded. Per Curiam, Supp. App. 150sa-55sa. There a corporation and its PAC challenged as vague a provision permitting them to "solicit" hourly employees only twice a year. 627 F.2d at 382. Plaintiffs alleged "that their behavior has thus far conformed to the statutory mandate [and] make no allegation of an intention imminent or otherwise to violate the statute, and the [FEC had]

Moreover, where Congress has directed swift action and a proper case or controversy exists, there is little room to refuse to proceed on prudential ripeness grounds. *See Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 328 (1999) ("Congress has eliminated any prudential concern").

Contrary to Judges Leon and Kollar-Kotelly, Per Curiam, Supp. App. 155sa-56sa, there is no lack of statutory jurisdiction here. Section 403(a) confers jurisdiction over any "action" that challenges the constitutionality of any provision of BCRA. The concept of "action" surely is broad enough to encompass a defense that the FEC's coordination regulations somehow cure the statute's lack of tailoring and vagueness. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The content of the regulations is known and, as is demonstrated above, they do not cure the problem.[34]

CONCLUSION

BCRA's electioneering communication and coordination provisions should be declared void under the First Amendment.

Respectfully submitted,

Of counsel

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN AMUNDSON
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 637-3055

JAN WITOLD BARAN,
Counsel of Record,
THOMAS W. KIRBY
LEE E. GOODMAN
CALEB P. BURNS
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Appellants Chamber of Commerce of the United States, National Association of Manufacturers, Associated Builders and Contractors, Inc.

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no cause to commence enforcement, nor even to threaten enforcement, of the challenged statutory provisions." *Id.* at 382-83. The court concluded that, because there was no "urgency of decision," *id.* at 388, and the FEC's advisory opinion process "offer[ed] a prompt means of resolving doubts with respect to the statute's reach," *id.* at 384, that could "be pursued at little risk to the rights asserted," *id.* at 386, the doctrine of ripeness counseled "against constitutional adjudication on a barren record." *Id.* at 385. Here, by contrast, the problem is urgent, the advisory process offers no meaningful assistance, and the case is before this Court on a full record and under a statutory mandate of prompt resolution.

[34] Judge Leon and Kollar-Kotelly profess that, because the regulations issued on December 18, 2002, two weeks after argument, "the Court does not know . . . to what extent the regulations have clarified the vagueness." Per Curiam, Supp. App. 151sa. If the district court needed further briefing on that issue, there was ample time between December 18 and the ruling on May 2, 2003, for the court to have called for it.

02-1674

(50) **No. 02-1740** 13

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In The
Supreme Court of the United States

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VICTORIA JACKSON GRAY ADAMS, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

◆

On Appeal From The United States District Court, District Of Columbia

◆

BRIEF OF APPELLANTS

◆

JOHN C. BONIFAZ
Counsel of Record
BONITA P. TENNERIELLO
LISA J. DANETZ
BRENDA WRIGHT
NATIONAL VOTING RIGHTS INSTITUTE
27 School Street
Suite 500
Boston, MA 02108
(617) 624-3900

DAVID A. WILSON
AVI SAMUEL GARBOW
HALE AND DORR LLP
1455 Pennsylvania Avenue, NW, 10th Floor
Washington, DC 20004
(202) 942-8400

Attorneys for Appellants

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the District Court erred in ruling that a challenge to the increased "hard money" contribution limits found in sections 304, 307 and 319 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, 97-100, 102-03, and 109-12 (codified as amended at 2 U.S.C. §§ 441a and 441a-1) is nonjusticiable due to lack of cognizable injury, even though the increases will confer preponderant electoral power on wealthy donors and will effectively exclude candidates and voters without access to networks of large donors from electoral participation, in violation of the equal protection guarantee incorporated by the due process clause of the Fifth Amendment to the United States Constitution.

LIST OF PARTIES

Actual parties to the proceedings in the United States District Court were:

(1) Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group, Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now, plaintiffs, appellants herein,

(2) The United States of America, defendant,

(3) The Federal Communications Commission, defendant,

(4) The Federal Election Commission, defendant,

(5) John Ashcroft, in his capacity as Attorney General of the United States, defendant,

(6) Sen. John McCain, Sen. Russell Feingold, Rep. Christopher Shays, Rep. Martin Meehan, Sen. Olympia Snowe, and Sen. James Jeffords, defendant-intervenors.

CORPORATE DISCLOSURE STATEMENT

None of the appellants has a parent corporation, and no publicly held company owns 10% or more of the stock of any of the appellants.

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OPINIONS BELOW

The opinions of the three-judge United States District Court for the District of Columbia are reprinted in the Supplemental Appendix to Jurisdictional Statements, Vols. I-V, filed by the appellants in McConnell et al. v. FEC et al., No. 02-1674, on behalf of all of the parties to the consolidated challenges to the Bipartisan Campaign Finance Reform Act of 2002, including the *Adams* appellants.

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JURISDICTION

The final judgment of the court below was entered on May 2, 2003. The *Adams* appellants, Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group, Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, Fannie Lou Hamer Project, and Association Of Community Organizers For Reform Now, filed their notice of appeal on May 5, 2003. *See* Appendix to Jurisdictional Statement ("J.S. App.") at 1a. The jurisdiction of this court is invoked under the Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 81, 113-114 (2002). This Court noted probable jurisdiction on June 5, 2003.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This constitutional challenge is brought pursuant to the due process clause of the Fifth Amendment to the U.S. Constitution, set forth at J.S. App. 3a. The challenged sections of the Bipartisan Campaign Finance Reform Act of 2002 are codified at 2 U.S.C. §§ 441a and 441a-1 and set forth beginning at J.S. App. 4a.

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STATEMENT OF THE CASE

This case arises out of an injury to the appellants' fundamental right to vote caused by the radical increases in the limits on individual campaign contributions in the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), §§ 304, 307 and 319, 116 Stat. 81, 97-100, 102-03, and 109-12 (codified as amended at 2 U.S.C. §§ 441a and 441a-1). These provisions raise the amount that an individual may contribute to a federal campaign from $1,000 per election to $2,000 per election. BCRA § 307. The individual contribution limit is further raised in races where a candidate faces an opponent who has spent over a threshold amount in personal funds. Under such circumstances, a candidate for Representative may receive individual contributions of up to $3,000 per election, and a Senate candidate may receive individual contributions of up to $12,000 per election. BCRA §§ 304 and 319.

The appellants are non-wealthy voters; organizations representing the interests of non-wealthy voters; and candidates lacking personal wealth and access to large networks of wealthy donors. They assert that the BCRA increases will enable the largest donors and candidates with vast networks of wealthy contributors to dominate the electoral process. Candidates who are not favored by the highest donors will no longer have any meaningful chance of success. Voters supporting those candidates will be denied the effective exercise of the franchise.

Thus, the BCRA hard money increases will deprive the appellants of the equal opportunity to participate in all integral aspects of the electoral process, in violation of the equal protection guarantee incorporated by the due process clause of the Fifth Amendment to the United States Constitution. Voluminous evidence supports the appellants' claim of electoral exclusion. The ruling of the three-judge district court, that the appellants lack standing because there is no cognizable injury fairly traceable to the BCRA, Per Curiam Opinion, Supplemental Appendix to Jurisdictional Statements ("J.S. Supp. App.") at 85sa; Opinion of Judge Henderson, J.S. Supp App. at 472sa-476sa, fails to take adequate account of this evidence and therefore fails to weigh adequately the constitutional values at stake in this case.

A. The predominance of the largest donors in the electoral process.

The appellants presented substantial, uncontroverted evidence that the challenged provisions would give grossly disproportionate weight in the electoral process to a small portion of the population able to contribute the maximum amount permitted. Combined with the real-world practice of bundling contributions, the hard money increases will heavily favor elite donors and candidates with access to such donors. Only a tiny minority of the voting-age population, 0.11 percent, gave maximum hard money contributions to federal candidates in the 2000 election cycle, yet these contributions constituted nearly half of all individual funds raised. *Adams* Exh. 1, Declaration and Expert Report of Derek Cressman ("Cressman Decl."), ¶¶ 4-5, J.S. App. 22a-23a. Major hard money donors are overwhelmingly white and male, and 81 percent have family incomes over $100,000. *See Adams* Exh. 2, Declaration and Expert Report of Prof. John Green, ¶ 3 ("Green Decl."), J.S. App. 31a. Among this group, those who say they will give more under increased limits are particularly wealthy, with 22 percent having family incomes over $500,000. *See Adams* Exh. 2B, Clyde Wilcox & John Green, et al., *Raising the Limits*, Public Perspective, May/June 2002, at 11, 13, J.S. App. 39a.

The challenged increases in BCRA will "result in increased giving by the elite pool of individual donors to federal campaigns," Green Decl. ¶ 4, and would allow this elite group to dominate the electoral process. Indeed, analysis of FEC data for the first quarter of 2003 shows that 57 percent of all funds already raised by 2004 presidential candidates have come from donations higher than $1,000. *See* Press Release, U.S. PIRG, "Presidential Candidates Getting More Money from Big Donors" (Apr. 16, 2003), *available at* http://www.pirg.org/democracy/democracy.asp?id2=9950. Expert witness Derek Cressman estimates that under the increased limits, the proportion of individual funds raised by federal candidates from donors giving under $200 will fall from 30 percent to 21-25 percent, while the percentage raised from donors giving the maximum amount allowed will increase from 46 percent to 55-63 percent. Cressman Decl., ¶ 14, J.S. App. 27a.

Candidates with networks of maximum donors are able to augment their fundraising advantage by encouraging these donors to bundle (*i.e.*, solicit or facilitate) maximum contributions from business associates, friends and family members. *Adams* Exh. 3, Declaration and Expert Report of Craig McDonald ("McDonald Decl."), ¶ 5, J.S. App. 47a. The BCRA hard money increases will multiply the amounts bundled by well-connected donors, giving these donors grossly disproportionate electoral power. *Id.*, ¶ 15. Candidates lacking networks of large donors will be effectively excluded from any meaningful participation in the process.

The Bush Pioneer program – the hard money bundling operation employed in the 2000 election cycle by the George W. Bush Presidential Exploratory Committee, Inc., and its successor organization, the George W. Bush For President Committee – exemplifies the disproportionate electoral influence that bundlers enjoy. Each Pioneer was responsible for gathering at least $100,000 in hard money contributions, and the 212 Pioneers channeled more than $22 million to the 2000 Bush presidential campaign. *Id.*, ¶ 13, J.S. App. 53a.

Under the BCRA increases, this small group could have potentially collected twice as much from the same number of donors. In fact, press accounts indicate that the Bush campaign for 2004 is asking a new group, called the "Rangers," to bundle at least $200,000 each.[1]

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[1] *See* Sharon Theimer, "Bush Volunteer Fund-Raising Group Formed," Associated Press, May 23, 2003, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A30660-2003May23.html; Richard A. Oppel Jr., "Bush's Heaviest Hitters to Be Called Rangers," N.Y. TIMES, May 24, 2003, at A12.

The Pioneer program also demonstrates that those who bundle contributions often do so with the aim of gaining enhanced access and influence with elected officials. The Pioneers – who were comprised largely of corporate executives and lobbyists, McDonald Declaration, ¶ 10, J.S. App. 50a-51a – were each assigned a tracking number so that the Bush Campaign could record the total amount of money raised by each individual. *Id.* ¶ 15; Deposition of John L. Oliver III, 30(b)(6) witness on behalf of Bush for President, Inc., 46, line 10 to 57, line 11, 106, lines 10-16. Joint Appendix ("Jt. App.") at 977-985.[2] *See also* May 27, 1999 letter from Bush Pioneer Thomas R. Kuhn, *Adams* Exh. 6, Jt. App. at 2116-2117. Each Pioneer, therefore, was "credited" with delivering at least $100,000 to the campaign, despite the nominal hard money limit of

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[2] The relevant text of this letter reads as follows: "As you know, a very important part of the campaign's outreach to the business community is the use of tracking numbers for contributions. Both Don Evans [the chair of the campaign] and Jack Oliver [the campaign's national finance director] have stressed the importance of having our industry incorporate the #1178 tracking number in your fundraising efforts. ***LISTING YOUR INDUSTRY'S CODE DOES NOT PREVENT YOU, ANY OF YOUR INDIVIDUAL SOLICITORS OR YOUR STATE FROM RECEIVING CREDIT FOR SOLICITING A CONTRIBUTION. IT DOES ENSURE THAT OUR INDUSTRY IS CREDITED, AND THAT YOUR PROGRESS IS LISTED AMONG THE OTHER BUSINESS/INDUSTRY SECTORS.*** *Adams* Exh. 6, Jt. App. at 2117 (emphasis in original). Kuhn sent a letter with similar language on May 26, 1999, to "Association Executives for Bush." *Adams* Exh. 6, Jt. App. at 2118-2119.

$1,000. As wealthy individuals such as the Pioneers are increasingly able to determine electoral outcomes under BCRA, they will also expand their ability to influence legislative outcomes. A wealth of evidence documents the disproportionate access and influence that maximum donors and bundlers enjoy in Congress.[3] "The increased individual contribution limits will exacerbate the disproportionate access and influence that the largest donors enjoy." Simon Decl., ¶ 10, J.S. App. 74a-75a.

B. The electoral exclusion of voters and candidates lacking personal wealth or access to large networks of wealthy donors.

Under the BCRA hard money limit increases, candidates without access to networks of wealthy donors will be effectively excluded from seeking political office, as the war chests of well-connected candidates grow and the financial bar rises far beyond the reach of those lacking such connections. The voices of candidates lacking access to large numbers of wealthy donors will be driven "beneath the level of notice," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000), and low- and moderate- income voters will lose their ability to have a meaningful impact on the electoral process.

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[3] *See Adams* Exh. 18, Declaration of Pat Williams, former Member of Congress from Montana ("Williams Decl."), ¶ 4, J.S. App. 77a ("There is no doubt in my mind that those giving the largest contributions expect preferential access and disproportionate influence"); *Adams* Exh. 17, Declaration of Paul Simon, former U.S. Senator from Illinois ("Simon Decl."), ¶ 4, J.S. App. 73a ("No member of Congress, not even the most scrupulous, is unaware of his or her largest contributors, and not even the most scrupulous members will ignore them."); Deposition of Representative Earl F. Hilliard, Sept. 5, 2002, 68, lines 18-20, 86, lines 9-15, 95, lines 9-11, Jt. App. at 890-893; Deposition of Representative Bennie G. Thompson, Sept. 19, 2002, 68, lines 16-22, Jt. App. at 1039. Fact witnesses for the defendants make the same point. *See Adams* Exh. 33, Declaration of Senator Dale Bumpers, former U.S. Senator from Arkansas, ¶ 14, J.S. App. 137a (discussing hard and soft money donors); Deposition of Arnold Hiatt, major hard money donor, Sept. 26, 2002, 102, lines 20-25, 104, lines 5-19, Jt. App. at 878. *See also* Stratmann Decl., ¶ 13-30, J.S. App. 60a-67a (documenting evidence that campaign contributions affect legislators' voting behavior).

Candidates with a financial advantage nearly always win elections; such candidates won congressional office 94 percent of the time in the 2000 general election, Cressman Decl. ¶ 2, J.S. App. 22a, and the same statistic held true in the 2002 Congressional election. *See* Press Release, Center for Responsive Politics, "Gender Gap, GOP Edge in Small Donations Could Loom Big in 2004 Elections" (June 27, 2003), *available at* http://www.opensecrets.org/pressreleases/donor demog.asp. These realities are confirmed by the candidate appellants and others who have previously run for federal office and are considering doing so again, but who testified that the BCRA increases would deter them from future candidacies because they lack access to large networks of maximum donors.[4] Senator Russell Feingold, a defendant-intervenor and a co-sponsor of BCRA, admitted that the hard money increases will likely further enable certain candidates to build up campaign war chests, "potentially discourag[ing] some people from running" for

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[4] *See Adams* Exh. 19, Declaration of Dr. Thomas A. Caiazzo ("Caiazzo Decl."), J.S. App. 79a; *Adams* Exh. 20, Declaration of Gail Crook, ("Crook Decl."), J.S. App. 83a; *Adams* Exh. 21, Declaration of Victor Morales ("Morales Decl."), J.S. App. 88a; *Adams* Exh. 22, Declaration of Cynthia Brown ("Brown Decl."), J.S. App. 93a; *Adams* Exh. 23, Declaration of Ted Glick ("Glick Decl."), J.S. App. 96a.

federal office. Deposition of Russell Feingold ("Feingold Deposition"), Sept. 9, 2002, 264, line 14 to 265, line 3, Jt. App. at 858.

Voters express themselves in the electoral process primarily through supporting the candidates of their choice. Thus when candidates lacking access to large donors are eliminated from competition, those who would support them are effectively deprived of the right to vote. As voter-appellant Carrie Bolton testified, under the BCRA increases supporting a candidate lacking large donors "would be like fighting a fire with a cup of water." *Adams* Exh. 25, Declaration of Carrie Bolton ("Bolton Decl."), ¶ 11, J.S. App. 105a-6a.

The voter-appellants have testified that they cannot afford to make large campaign contributions. Indeed, most Americans are unable to make contributions anywhere near the BCRA limit. A $2,000 contribution would represent nearly five percent of the median U.S. family income, which U.S. Census Bureau data puts at $42,228. *See* U.S. Census Bureau, INCOME 2001, *at* http://www.census.gov/hhes/income/income01/inctab1.html (last visited July 1, 2003). The $12,000 limit applicable in some races under the millionaire provisions would represent over 28 percent of median income.

Because the hard money increases will deprive the voter-appellants of the equal opportunity to elect the candidates of their choice, these appellants have testified that the increases will make their vote less meaningful.[5]

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[5] *See Adams* Exh. 24, Declaration of Victoria Jackson Gray Adams ("Adams Decl.") ¶ 5, J.S. App. 101a ("The largest donors get more attention, and when the ceiling is raised the voices of small

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As Bolton testified, "The increases in the hard money contribution limits make it no longer conceivable that I can access the political process. They undermine the meaning and value of my vote." Bolton Decl., ¶ 12, J.S. App. 106a. Representatives Earl F. Hilliard and Bennie Thompson testified that the increases will harm the ability of low- and moderate-income communities, and communities of color, to elect the representatives of their choice.[6]

C. The entrenchment of incumbents.

By aiding candidates favored by the wealthy, incumbent members of Congress dealt themselves a powerful advantage, for incumbents most often are the favorites of the wealthy. The uncontroverted evidence shows that BCRA's hard money increases will benefit incumbents, who enjoy greater access to large donors than do challenger candidates. *See Adams* Exh. 4, Declaration and Expert Report of Professor Thomas Stratmann ("Stratmann Decl."), ¶¶ 5-12, J.S. App. 57a-60a; Cressman Decl., ¶ 19. J.S. App. 29a. A leading co-sponsor of the BCRA, Defendant-Intervenor Senator Feingold, has admitted that the hard money increases will benefit incumbent candidates facing challengers without access to wealth. Feingold Deposition 260, lines 7-8, Jt. App. at 857.

Incumbents' advantages in raising maximum contributions are particularly pronounced. An analysis of Federal Election Commission data from the 2000 election cycle finds, "Senate incumbents in 2000 raised, on average, nearly three times as much as their challengers did from donors of $1,000 or more: $1.8 million v. $650,000. House incumbents in 2000 raised more than twice as much from donors of $1,000 or more as their challengers, on average: $178,000 v. $85,000." *Adams* Exh. 35, "Why the Battle over Hard Money Matters: Hard Facts on Hard Money," Public Campaign, J.S. App. 152a-153a. By raising the hard money limit, Congress has exacerbated the advantage incumbents already have over challengers to an intolerable degree.

D. The further exclusionary effects of the "millionaire" provisions.

The burdens on non-wealthy candidates described above will increase exponentially in races where a self-funded candidate triggers provisions allowing opponents to raise funds in increments of $3,000 per election in House races, and up to $12,000 per election in Senate races. *See* BCRA §§ 304, 319. The record demonstrates that when one candidate takes advantage of these "millionaire" provisions to multiply maximum contributions, a competing candidate whose supporters cannot make large donations will be buried in her opponents' cash. Candidates

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contributors and voters like myself will be lost."); *Adams* Exh. 30, Declaration of Chris Saffert, ¶ 18, J.S. App. 125a-126a ("The effect of the contribution limit increases will be to drown out the voices of people from low and moderate-income communities . . . "); *Adams* Exh. 26, Declaration of Daryl Irland ("Irland Decl."), J.S. App. 107a; *Adams* Exh. 27, Declaration of Anuradha Joshi ("Joshi Decl."), J.S. App. 110a; *Adams* Exh. 28, Declaration of Howard Lipoff ("Lipoff Decl."), J.S. App. 113a; *Adams* Exh. 29, Declaration of Nancy Russell ("Russell Decl."), J.S. App. 116a; *Adams* Exh. 31, Declaration of Kate Seely-Kirk ("Seely-Kirk Decl."), J.S. App. 127a; *Adams* Exh. 32, Declaration of Stephanie L. Wilson ("Wilson Decl."), J.S. App. 130a.

[6] *See* Thompson Deposition, 87, lines 9-12, Jt. App. at 1040 ("[B]y doubling the hard money contribution, you price low and moderate communities out of the market for electoral participation"); Hilliard Deposition, 103, lines 4-7, Jt. App. at 94.

who have in the past faced wealthy, self-funded opponents testified that the burden of simultaneously confronting a second campaign with vast infusions of cash from wealthy donors would make it impossible for them to compete.

For example, appellant Cynthia Brown, a candidate for the United States Senate from North Carolina in the 2002 Democratic Primary, testified that one of her opponents was a millionaire who "contributed enormous sums of money to his own campaign" while another opponent "raised large sums of money from wealthy contributors," Brown Decl., ¶ 5, J.S. App. 94a; that her own contributions averaged approximately $25, *id.* ¶ 4; and that she would consider running again for the U.S. Senate, but the BCRA millionaire provisions would "seriously discourage" her from participating. *Id.* ¶ 7, J.S. App. 94a-95a.[7] She stated:

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[7] Neither Ms. Brown nor any of the other candidates challenging various provisions of the BCRA in the consolidated litigation could have demonstrated complete certainty that they would compete in the 2004 elections, given that the lawsuits were filed during the 2002 elections. However, there is a clear likelihood that if Ms. Brown were to run for the Senate in North Carolina in 2004 she would be in a race where the millionaire amendment provisions apply. Incumbent Senator John Edwards spent $6.15 million of his own money to win election in 1998, *see* Center for Responsive Politics, JOHN R. EDWARDS: POLITICIAN PROFILE, *available at* http://www.opensecrets.org/1998os/index/N00002283.htm, and he will face re-election in 2004. North Carolina press accounts have already noted that the millionaire provision will likely be triggered even if Edwards does not run, since in that event Charlotte investment banker Erskine Bowles – who spent $6.8 million in his 2002 Senate bid – reportedly plans to enter the race. *See* Associated Press, *"Millionaire's Amendment" Could Help Burr in Senate Race*, June 24, 2003, *available at* http://newsobserver.com/nc24hour/ncnews/story/2643531p-2432009c.html; Jim Morrill, *Law May Level Political Funding Field*, Charlotte Observer, June 24, 2003, *available at* http:/www.charlotte.com/mld/observer/news/6156128.htm. Another entrant in the primary, U.S. Rep.

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> If I were to run for the U.S. Senate again from North Carolina, I would likely face again a millionaire opponent. Under the increases in the hard money contribution limits, my other opponents would be free to raise up to $12,000 per individual per election. The people I know can hardly afford to contribute twenty-five dollars, let alone $12,000. There is no way that any candidate like me can compete under these new conditions. These increases in the hard money contribution limits would effectively eliminate any future campaign I might hope to wage for the U.S. Senate.

Id., ¶¶ 8-9, J.S. App. 95a.[8] *See also* Glick Decl., ¶ 6, J.S. App. 98a ("It is impossible to participate facing that tremendous disparity in resources. I just do not run in the circles of people who can contribute $12,000.").

E. Proceedings in district court.

The *Adams* plaintiffs filed a lawsuit in the U.S. District Court for the District of Columbia on May 7, 2002. Count I alleged that the increases in the individual hard money contribution limits contained in BCRA Sec. 307 violate the equal protection guarantee incorporated by the due process clause of the Fifth Amendment to the U.S. Constitution. Count II alleged that the BCRA provisions

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Richard Burr, has reportedly begun fundraising and would take advantage of the higher contribution limits if the millionaire amendment were triggered. *See id.*

[8] Appellant Carrie Bolton, a North Carolina voter supporting Ms. Brown, also testified regarding her desire to support Ms. Brown in future elections. Bolton Decl., J.S. App. 103a-106a.

providing for further contribution increases in response to expenditures from personal funds (the "millionaire" provisions), BCRA §§ 304 and 319, similarly violate the Fifth Amendment.

The case was consolidated with ten other challenges to various provisions of the BCRA and assigned to a three-judge panel. A two-day trial based on recorded testimony was held on December 4 and 5, 2002. The defendants and defendant-intervenors presented no evidence counter to that presented by the *Adams* plaintiffs. Rather, they argued that the plaintiffs' injuries were insufficient to confer standing. *See* Defendants' Opening Brief ("Def. Br.") at 208-209. The three-judge District Court issued a final judgment on May 2, 2003 dismissing the claims as nonjusticiable. *See* Per Curiam Opinion, J.S. Supp. App. at 85sa; Opinion of Judge Henderson, J.S. Supp App. at 472sa-476sa.

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SUMMARY OF ARGUMENT

This Court has long held that "[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 & n.14 (1996) (*citing Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (invalidating, as a denial of equal protection, an annual $1.50 poll tax imposed by Virginia on all residents over 21); *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating Texas scheme under which candidates for local office had to pay fees as high as $8,900 to get on the ballot); *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating California statute requiring payment of a ballot-access fee fixed at a percentage of the salary for the office sought)).

The hard money increases in BCRA bar non-wealthy voters and candidates from exercising effectively this "basic right to participate in [the] political process[ ]." *M.L.B.*, 519 U.S. at 124. These increases exclude low- and moderate-income voters from effective exercise of the franchise as tangibly as did the mandatory candidate filing fees at issue in *Bullock* and *Lubin*. By raising contribution limits to levels at which only upper-income voters can afford to give, Congress has functionally guaranteed to that narrow segment of the electorate the power to determine which candidates are able to mount viable campaigns long before any ballots are cast. While non-wealthy voters may now be able to pull the lever on Election Day, BCRA's hard money increases prevent them from having "an equally effective voice." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (disparities in voting strength based on population of electoral district violate equal protection clause of Fourteenth Amendment). Similarly, the hard money increases prevent candidates lacking access to elite donor networks from competing meaningfully for federal office, "thereby tending to limit the field of candidates from which voters might choose." *Bullock*, 405 U.S. at 143. These increases "fall[ ] with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 144.

Congress may not raise contribution limits to a level which debases and dilutes the fundamental right to vote. By enabling elite donors to dominate the electoral process, Congress has created two distinct classes of voters: those who, as a result of the hard money increases, can employ vast networks of wealth in support of the candidates of their choice and those who cannot. The Constitution prohibits the State from unlawfully weighting a citizen's vote in this way. *See Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). *See also Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.").

In *Harper*, this Court stated that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper*, 383 U.S. at 665. By doubling the hard money contribution limit for all federal races and by multiplying it even further for races involving self-funded candidates, Congress has redrawn the lines in a manner which undermines the franchise. While Congress does not have the authority to enact a contribution limit which is "so radical in effect as to render political association ineffective," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000), neither does it have the authority to enact a contribution limit which allows elite donors to achieve a stranglehold over the electoral process, locking out the voices of ordinary voters.

There is no legitimate state interest that justifies the increased limits. The increases cannot be justified by inflation, as fundraising under the previous $1,000 limit far outpaced inflation, and defenders of the BCRA increases admitted that they had no difficulties fundraising under the previous limits. The record also demonstrates that the increased limits will decrease, rather than increase, electoral competition, because incumbents possess far more extensive networks of maximum donors.

Because the appellants have stated a legally cognizable injury that is fairly traceable to the challenged provisions, and will be redressed by invalidation of those provisions, their claims are fully justiciable. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The record discloses the imminent, particularized harm that the appellants will suffer from the increases. The electoral exclusion of which they complain is a direct result of the BCRA increases, and therefore fairly traceable to the enactment of those provisions. Because the appellants seek to preserve their ability to exercise effectively their basic right in the political process, rather than absolute equality in electoral influence, a return to the previous hard money limits will redress their injury.

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ARGUMENT

I. THE BCRA HARD MONEY CONTRIBUTION LIMIT INCREASES VIOLATE THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAW.

A. The marginalization of low- and moderate-income voters violates equal protection principles established in the Court's voting rights precedents.

Victoria Jackson Gray Adams has been an active advocate for voting rights for over forty years, and was a founder of the Mississippi Freedom Democratic Party, which challenged the seating of the state's all-white delegation to the 1964 Democratic Party national convention.

Adams Decl., ¶ 1, JS App. 100a. Yet despite her lifelong commitment to electoral democracy, she testified that the BCRA increases will "deprive me of full participation and discourage me from involvement with electoral politics." *Id.* ¶ 3, JS App. 101a. This is a sad irony, given that the asserted rationale behind the BCRA's overall reform of campaign finance includes "restoring Americans' faith in the electoral process and decreasing public cynicism about our system of government," along with preventing corruption and the appearance of corruption. *See Adams* Exh. 15, Intervenors' Responses to Contention Interrogatories, Responses to *McConnell* Interrogatory No. 1 and *Adams* Interrogatory No. 1., 2-5, Jt. App. at 1738. Far from serving these admirable goals, the BCRA hard money increases will accomplish the inverse, convincing low- and moderate-income citizens that their voices are meaningless compared with the few who are able to channel tens or hundreds of thousands of dollars to their favored candidates. The disparities between electoral "haves" and "have-nots" will deepen to a chasm, and those without wealth will be relegated to second-class citizenry, denied a "fundamental political right . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The Constitution must and does provide a remedy. This Court has long held that exclusion from the electoral process based on economic status violates equal protection principles,[*] *see Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax violates equal protection clause of Fourteenth Amendment); *Bullock v. Carter*, 405 U.S. 134 (1972) (candidate filing fees violate equal protection clause); *Lubin v. Panish*, 415 U.S. 709 (1974) (same), and that all citizens are entitled to an equally meaningful vote. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964) (disparities in voting strength based on population of electoral district violate equal protection clause of Fourteenth Amendment); *Davis v. Bandemer*, 478 U.S. 109 (1986) (dilution of voting strength is justiciable under the equal protection clause). The appellants seek to enforce the very rights guaranteed by these cases: an equal ability to participate in the electoral process regardless of economic status, and an equally meaningful vote.

Like the mandatory candidate filing fee, the hard money contribution increases preserve the right to vote but deprive the vote of meaning. The challenged statutes in *Bullock* and *Lubin* did not directly abridge the right to vote, but rather denied non-wealthy voters a meaningful vote, by preventing them from voting for the candidates of their choice. In striking such fees as a violation of the equal protection clause of the Fourteenth Amendment, the Court observed that candidates "lacking both personal wealth and affluent backers are in every practical sense" excluded from the electoral process by mandatory filing fees, and that "[t]he effect of this exclusionary mechanism on voters is neither incidental nor remote." *Bullock*, 405 U.S. at 143-144. *See also Lubin*, 415 U.S. at 716 (rights of excluded candidates are "intertwined with the rights of

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[*] The Fourteenth Amendment case law cited herein applies with equal force to a violation of equal protection committed through federal law. "The Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment." *Schweiker v. Wilson*, 450 U.S.

(Continued on following page)

221, 22 n.6 (1981); *see also National Black Police Association, Inc. v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983).

voters"); *Anderson v. Celebrezze*, 460 U.S. 780, 786-787 (1983) (striking early candidate filing deadline which unconstitutionally burdened rights of voters supporting independent candidate). The exclusion of voters and their preferred candidates was *de facto* rather than *de jure*; those lacking wealth were not literally but "in every *practical* sense" excluded from elections. *Bullock*, 405 U.S. at 143-144 (emphasis added).

Similarly, the apportionment cases recognize that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. *See also Baker v. Carr*, 369 U.S. 186 (1962) (vote dilution claim is justiciable); *Gray v. Sanders*, 372 U.S. 368 (1963) (violation of equal protection and due process clauses of Fourteenth Amendment, and of Seventeenth Amendment, to weight rural votes more heavily than urban votes); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (vote dilution violates Art. I, § 2); *Davis*, 478 U.S. 109 (dilution of voting strength of political group is justiciable under equal protection clause).

Reynolds held that state legislative apportionment must be based on population; the Alabama legislative apportionment that was held unconstitutional gave voters in some Senate districts up to 16 times more weight than others, and in some House districts the imbalance was about 41-to-1. 377 U.S. at 545. Approximately 25 percent of the population had the power to elect a majority of the state's Senate and House. *Id.* In holding these disparities a violation of the equal protection clause, the Court declared that each citizen is entitled to "an equally effective voice" in elections, as "[m]odern and viable state government needs, and the Constitution demands, no less." *Reynolds*, 377 U.S. at 565. The disparities in electoral power in this case are no less glaring. The appellants' expert witness Derek Cressman testified that with the hard money increases, maximum donors – who in recent elections have constituted just 0.11 percent of the voting age population – will provide between 55-65 percent of all individual funds to federal candidates. Cressman Decl., ¶¶ 4, 15, J.S. App. 22a-23a, 27a. Clearly, then, low- and moderate-income voters will not have an equally effective voice in elections.

The appellants do not contend that the Constitution requires absolute equality in electoral influence, and indeed disparities of electoral power have existed under the $1,000 pre-BCRA contribution limit. However, with the BCRA increases those disparities will rise to a level that denies the appellants "an equally effective voice," *Reynolds*, 377 U.S. at 565, in elections, and indeed will drive their voices "beneath the level of notice." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000). The fact that the appellants' injury is a matter of degree does not make it less of a constitutional violation, as is clear from the apportionment cases.[10] For example, *Reynolds* allowed that "some deviations from the equal-population principle are constitutionally permissible" if "based on legitimate considerations incident to the effectuation of a rational state policy." 377 U.S. at 579. But even when justified on that basis, deviation from one-person, one-vote cannot be "[c]arried too far," and "careful judicial scrutiny must be given . . . to the character as well as the degree of deviations from a strict population basis." *Reynolds*, 377 U.S. at 581. *See also Davis*, 478 U.S. at 133-34 (holding that a prima facie showing of discrimination in apportionment requires evidence that the challenged plan "has had or will have effects that are *sufficiently serious to require intervention by the federal courts*") (emphasis added).

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[10] *See also* Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 680-81 (1998) ("As in so many areas of the law, it is far easier to identify dramatically anticompetitive practices than it is to specify precisely what optimal competition would look like. This is particularly characteristic of much of the constitutional law of politics.") (citing *Gormillion v. Lightfoot*, 364 U.S. 339 (1960) (striking down the 28-sided gerrymander of Tuskeegee); *White v. Regester*, 412 U.S. 755 (1973) (identifying impermissible vote dilution); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (same); *Davis v. Bandemer*, 478 U.S. 109 (1986) (setting the standard for claims of unconstitutional partisan gerrymandering)).

There are many other contexts in which constitutional violations are a matter of degree. For example, in *Burson v. Freeman*, 504 U.S. 191 (1992), the Court upheld a 100-foot "campaign-free zone" around polling places while recognizing that larger zones might be unconstitutional. The Court viewed the relevant question to be "*how large* a restricted zone is permissible" while recognizing that "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden. . . . " *See id.* at 208, 210 (plurality). Similarly, the Supreme Court has found that the difference between 15 feet and 8 feet is constitutionally significant in determining whether buffer zones between protesters and persons entering medical clinics violate the First Amendment. *Compare Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) (holding 15-foot buffer zone unconstitutional), *with Hill v. Colorado*, 530 U.S. 703 (2000) (holding 8-foot buffer zone constitutional). By the same token, the difference between a contribution limit of $1000, on the one hand, and $2000 or as much as $12,000, on the other hand, *is* constitutionally significant.

B. The Court should act to preserve equal access to the electoral system through reasonable contribution limits.

Equal protection principles require that the Court act to preserve the franchise for all citizens, just as it did in the wealth discrimination cases, *see Harper*, 383 U.S. 663; *Bullock*, 405 U.S. 134; *Lubin*, 415 U.S. 709, and the one-person, one-vote cases. *See Baker*, 369 U.S. 186; *Gray*, 372 U.S. 368; *Wesberry*, 376 U.S. 1; *Reynolds*, 377 U.S. 533; *Davis*, 478 U.S. 109. When this Court enforced the one person, one vote standard in *Wesberry*, it recalled Madison's words:

> Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

376 U.S. at 18 (citing THE FEDERALIST, No. 57 (Cooke ed. 1961)). With the BCRA hard money increases, the rich will in every practical sense become the electors of federal officeholders, for no one lacking their favor will have a significant chance of success. In *Wesberry*, this Court famously observed, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classifications of people in a way that unnecessarily

abridges this right." 376 U.S. at 17-18. It is this vision of the Constitution that the Court must now act to protect, by striking down BCRA's doubling of hard-money contributions.

The Court's well-known admonishment in *Buckley v. Valeo*, 424 U.S. 1 (1976) that the voting rights cases do not support "abridging the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society," 424 U.S. at 49 n.55, does not bar relief in this case. The quoted statement was written in regard to the FECA's expenditure limitations which, on the record in *Buckley*, the Court held to be an unconstitutional restriction of speech. *Id.* at 51. The appellants in this case seek to maintain the very contribution limits that *Buckley* held entail "only a marginal restriction upon the contributor's ability to engage in free communication," 424 U.S. at 20, and do *not* substantially infringe the speech or associational rights of donors. *Id.* at 22; *see also Federal Election Commission v. Beaumont*, No. 02-403, 539 U.S. ___, slip op. at 14 (U.S. June 16, 2003) ("Going back to *Buckley v. Valeo*, 424 U.S. 1 (1976), restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."); *Shrink Missouri*, 528 U.S. at 386-88 (distinguishing between spending and contribution limits and upholding Missouri's contribution limits ranging from $250 to $1,000); *FEC v. Mass Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.").

The appellants here seek to "assure that citizens are accorded an equal right to vote for their representatives regardless of . . . wealth," *Buckley*, 424 U.S. 49 n. 55, a constitutional value that *Buckley* reaffirmed. *Id.* They do not seek to validate "governmentally imposed restrictions on political expression," as *Buckley* prohibited. *Id.* Far from stifling speech, contribution limits "aim to democratize the influence that money itself may bring to bear upon the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes." *Shrink Missouri*, 528 U.S. at 401 (Breyer, J., joined by Ginsburg, J., concurring), citing *Reynolds*, 377 U.S. at 565.[11] While *Buckley* did not find, on the record before it, that the promotion of equality justified the imposition of spending limits, 424 U.S. at 48-49, neither does that decision give constitutional license to a law that creates gaping inequalities.[12]

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[11] Further, in his *Shrink* concurrence Justice Breyer cautioned against reading *Buckley*'s disapproval of spending limits as a prohibition of any effort to promote electoral equality, particularly through contribution limits.

> [*Buckley*] said . . . that it rejected 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others.' But those words cannot be taken literally. The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many. . . . Regardless, as the result in *Buckley* made clear, the statement does not automatically invalidate a statute that seeks a fairer electoral debate through contribution limits, nor should it forbid the Court to take account of the competing constitutional interests just mentioned.

528 U.S. at 402 (Breyer, J., concurring) (internal citations omitted).

Justice Breyer has observed that contribution limits "protect the integrity of the electoral process – the means through which a free society democratically translates political speech into concrete action." *Shrink Missouri*, 528 U.S. at 401 (Breyer, J., joined by Ginsburg, J., concurring). The evisceration of contribution limits accomplishes the inverse, striking at the integrity of the electoral process. The dangers to democracy posed by the increased influence of wealth in elections are undeniable. *See, e.g.*, Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW U. L. REV. 1055, 1072-73 (1999) ("[W]ealth disparity introduces massive political inequality skewed to a predictable set of self-interested positions" and permits "wholly unjustifiable differences in political power to emerge. . . . The obvious inequalities introduced by massive wealth disparities cause many persons to lose faith in the system."); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412 (1986) (in an election campaign, the resources at the disposal of the rich "enable them to fill all available space for public discourse with their message"); Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, *in* IF BUCKLEY FELL 63, 78

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[12] Unlike *DeShaney v. Winnebago County Department of Services*, 489 U.S. 189 (1989) (state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause), this case does not involve the failure of the government to act. Rather, it involves the government's direct action in enabling wealthy donors to dominate the electoral process, debasing the vote of ordinary citizens.

(E. Joshua Rosenkranz ed., 1999) ("People cannot plausibly regard themselves as partners in an enterprise of self-government when they are effectively shut out from the political debate because they cannot afford a grotesquely high admission price."). The BCRA's hard money increases turn these dangers into accomplished fact.

C. No legitimate state interest justifies the BCRA hard money increases.

The harms wrought by the increased tide of hard money are not justified by any legitimate state interest. There is no factual basis for the purported rationale that because of inflation the increase is necessary to permit federal candidates to amass sufficient funds to campaign. Senator Mitch McConnell, a proponent of BCRA's hard money limit increases, admitted at his deposition that he raised millions of hard money dollars in each of his campaigns for the U.S. Senate under the pre-BCRA limits, and in each race – including the most recent re-election campaign in 1996 – he has "successfully competed." Deposition of Senator Mitch McConnell, Sept. 23, 2002, 12, line 8 to 19, line 16, Jt. App. at 953-958. Defendant-Intervenor Senator Feingold admitted, "I have never considered the prior thousand dollars limitation to be a barrier to my ability to run for office." Feingold Deposition, 243, lines 21-23, Jt. App. at 856. Candidates for federal office have been raising and spending more money than ever under the prior $1,000 limit.[13] Fundraising by candidates for

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[13] It is also worth noting that the Court, in *Shrink Missouri*, 528 U.S. 377, rejected the argument that a $1,000 contribution limit was so low as to inhibit campaigning in Missouri's statewide elections.

Congress increased by 425 percent from the 1977-78 cycle to the 1999-2000 cycle, and inflation accounted for less than half of that increase. Cressman Decl., ¶ 17, J.S. App. 28a. If increased spending under the prior $1,000 limit requires outreach to an expanded donor base, surely this is a benefit, and preferable to increased reliance on an ever-smaller group of elite donors. Senator Christopher Dodd rightly called BCRA's hard money increase a "cost-of-living adjustment for the less than 1 percent of the American public that can afford to write a $1,000 check." *Adams* Exh. 34, Jim Abrams, "Senate takes up rival to McCain-Feingold spending limits," Associated Press, 2, Jt. App. at 2123.

Neither is it credible that the hard-money increases will reduce the time that candidates spend fundraising. While candidates will be able to raise money in greater increments, this will only spur *more* fundraising, rather than less, and will push the campaign finance arms race to new heights. As Rep. Bennie Thompson testified, "I don't know any Member of Congress that says 'I've raised enough money for the campaign cycle. I'm going to stop'. . . . I think a Member will raise as much money as he or she can until that election is over."[14] Finally, the increased contribution limits will decrease, rather than

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[14] *See also* Simon Decl. ¶ 11, J.S. App. 75a ("The increased contribution limits will only increase the amount of time Senators and Representatives spend fundraising."); *Adams* Exh. 16, Declaration of Sam Gejdenson, former Member of Congress from Connecticut, ¶ 4, J.S. App. 70a; Hilliard Deposition, 88, lines 7-8, 90, lines 12-16, Jt. App. at 891-893; Cressman Decl., ¶ 18, J.S. App. 28a ("Increasing contribution limits will not reduce the time candidates spend raising money. Many states have no contribution limits at all, yet there is no evidence from those states that candidates spend any less time raising funds.").

increase, electoral competition, given that incumbents possess far more extensive networks of maximum donors. *See supra*, Statement of the Case, Section C.[15] Challengers generally do not enjoy the fundraising advantages that come with the power of incumbency. While there may, on occasion, be a challenger able to garner large amounts of maximum donations, the increases will overwhelmingly favor those already entrenched in office. *See* Stratmann Decl., ¶¶ 5-12, J.S. App. 57a-60a.

Rather than advance any legitimate state interest, the hard-money increases will undermine the very interests put forward by the defendants and intervenors in their defense of BCRA as a whole, including "preventing corruption and the appearance of corruption that results from unlimited financial contributions," "restoring Americans' faith in the electoral process and decreasing public cynicism about our system of government," and "preventing the adverse impact on candidates, parties, federal office holders and other participants in the political process from their participation in activities that create the appearance of corruption." *See Adams* Exh. 15, Intervenors' Responses to Contention Interrogatories, Responses to *McConnell* Interrogatory No. 1 and *Adams* Interrogatory No. 1, 2-5, Jt. App. at 1738. The evidence presented *supra* makes abundantly clear that hard money donors contribute to candidates "because people want access," Bumpers Decl.,

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[15] *See also* Williams Decl. ¶ 4, J.S. App. 77a ("[M]embers of committees with jurisdiction over matters of concern to wealthy interests attract large numbers of maximum contributions"); Bumpers Decl. ¶ 14, J.S. App. 137a (donors give because they want access to Members).

¶ 14, J.S. App. 137a, and that "[t]he increased individual contribution limits will exacerbate the disproportionate access and influence that the largest donors enjoy." Simon Decl., ¶ 10, J.S. App. 74a-75a. It is well established that large contributions can create the reality or perception of corruption. *See, e.g.*, *Buckley*, 424 U.S. at 26-28; *Shrink Missouri*, 528 U.S. 377; *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), *reh'g en banc denied*, 303 F.3d 752 (6th Cir. 2002), *cert. denied, City of Akron, Ohio v. Kilby*, 123 S.Ct. 968 (2003); *Daggett v. Commission on Governmental Ethics and Practices*, 205 F.3d 445 (1st Cir. 2000). The BCRA hard money increases will only increase this threat.[16]

II. THE APPELLANTS' CLAIMS ARE FULLY JUSTICIABLE.

Standing to litigate in federal court requires an "injury in fact" which is concrete and particularized, and actual or imminent, not conjectural or hypothetical; the injury must be fairly traceable to the challenged conduct; and it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The appellants have demonstrated that their claims meet these tests.

The appellants' injuries are legally cognizable, as established by case law outlawing electoral discrimination based on economic status, *see Bullock*, 405 U.S. at 143-44; *Lubin*, 415 U.S. at 716, and upholding the right to an equally meaningful vote, *see Reynolds*, 377 U.S. at 565; *Davis*, 478 U.S. 109, as discussed *supra* in Section I. The imminent effects of the BCRA hard money increases – the radically increased electoral power of the highest donors, and the corresponding diminishment in the electoral voice of low- and moderate-income citizens – is documented by the evidence described in the Statement of the Case, *supra*. This evidence includes expert testimony on the likely effects of increased limits on contribution patterns, *see* Cressman Decl., J.S. App. 21a; Green Decl., J.S. App. 30a; McDonald Decl., J.S. App. 45a; Stratmann Decl., J.S. App. 55a, and testimony from voters and candidates who have experience in federal elections, wish to participate in future federal elections, and will see their electoral voices greatly diminished under the increased limits. *See* Caiazzo Decl., J.S. App. 79a; Crook Decl., J.S. App. 83a; Morales Decl., J.S. App. 88a; Brown Decl., J.S. App. 93a; Glick Decl., J.S. App. 96a; Adams Decl., J.S. App. 100a; Bolton Decl., J.S. App. 103a; Irland Decl., J.S. App. 107a; Joshi Decl., J.S. App. 110a; Lipoff Decl., J.S. App. 113a; Russell Decl., J.S. App. 116a; Seely-Kirk Decl., J.S. App. 127a; Wilson Decl., J.S. App. 130a. The appellees did not challenge the validity of any of this evidence in proceedings below.

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[16] In addition to increasing the reality and perception of corruption defined as a donor's improper influence on policy outcomes, the BCRA will even more greatly increase corruption as it has been more broadly defined, as "money that causes officeholders to be more likely to respond to large donors than the needs of ordinary citizens." Burt Neuborne, The Values of Campaign Finance Reform 12 (Brennan Center for Justice 1998), *available at* http://www.brennancenter.org/resources/downloads/cfr2.pdf. As Prof. Neuborne points out, such corruption causes "the erosion of the capacity of a public official to make independent judgments free from financial pressures. A political system that subordinates the independence and free will of its officials to the need to raise money may be said to be corrupt in a structural sense. An even broader idea of corruption would include financial arrangements that put pressure on an officeholder to compromise her independence by taking political positions, not because she believes in them, but because they have financial consequences for her." *Id.*

In addition, the appellant candidates and their voter-supporters articulate an injury to their ability to compete in elections consistent with the competitive harm recognized in numerous cases. *See, e.g.*, *Int'l Assn. of Machinists v. FEC*, 678 F.2d 1092 (D.C. Cir. 1982) (voters have standing to challenge FECA provisions allowing corporations greater latitude in solicitation than unions, giving corporations an economic advantage in elections); *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26 (1st Cir. 1993) (hereinafter *Vote Choice*) (candidate not accepting public financing has standing to challenge statute raising contribution limit from $1,000 to $2,000 for candidates accepting public financing); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989) (candidate has standing to challenge tax-exempt status of debate-staging organization where she was deprived of opportunity to participate in debates and "palpably impaired" in her ability to compete "on an equal footing with other significant presidential candidates."); *Buchanan v. FEC*, 112 F.Supp.2d 58 (D.D.C. 2000) (candidate has standing to challenge exclusion from national debate under Federal Election Campaign Act). To deny cognizable injury from a candidate's loss of competitive advantage "would tend to diminish the import of depriving a serious candidate for public office of the opportunity to compete equally for votes in an election." *Fulani*, 882 F.2d at 626. The competitor standing doctrine has clear application in a case such as this one, where the appellants suffer an economic disadvantage in elections from the challenged provisions. *See Vote Choice*, 4 F.3d at 37; *Int'l Assn. of Machinists*, 678 F.2d at 51.

The appellants' injuries are fairly traceable to the BCRA hard money increases. As discussed in Section II, *supra*, by enacting the increases, Congress enabled elite donors to dominate the electoral process and effectively drown out the voices of low- and moderate-income citizens, directly causing the appellants' injuries. Rather than seek to remedy generalized inequalities, the appellants ask that specific legislation directly causing electoral exclusion based on economic status be declared unconstitutional.[17]

Finally, the injuries would clearly be redressed by a decision favorable to the appellants. An invalidation of the BCRA increases would return the hard money limits to the levels established by FECA before BCRA's enactment. "The elementary rule of statutory construction is without exception that a void act cannot operate to repeal a valid existing statute, and the law remains in full force and operation as if the repeal had never been attempted." *Conlon v. Adamski*, 77 F.2d 397, 399 (D.C. Cir. 1935). *See also Frost v. Corporation Comm'n*, 278 U.S. 515, 527 (1929) (amendment to an Oklahoma statute regulating the licensing of cotton gins held unconstitutional, leaving pre-existing statutory provisions in place); *Arkansas Lousiana Gas Company v. City of Texarkana*, 97 F.2d 179, 183 (8th Cir. 1938) (holding that pre-existing gas rates remained in effect upon a ruling that an amended rate schedule violated the Fourteenth Amendment; "A void legislative enactment does not operate to repeal a preexisting valid one."). The appellants' constitutional injuries will clearly be redressed by a return to the previous FECA limits, even though disparities of influence existed under the lower contribution limits as well. As discussed *supra* in Section I:A, a constitutional violation may arise when existing disparities rise to a level that causes injury of constitutional magnitude. *Reynolds*, 377 U.S. at 581; *Davis*, 478 U.S. at 133-34; *Burson*, 504 U.S. at 208; *and compare Schenck*, 519 U.S. 357, *with Hill*, 530 U.S. 703. The BCRA increases multiply the electoral power of the highest donors at the expense of the appellant voters and candidates, who now face insurmountable obstacles to the effective exercise of their basic rights in the political process.

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[17] This case is distinguishable from the cases upon which Judge Henderson relied in her concurring opinion below. *See* Opinion of Judge Henderson, J.S. Supp. App. at 473sa-474sa. Unlike *Ga. State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999), *NAACP, Los Angeles Branch v. Jones*, 131 F.3d 1317 (9th Cir. 1997), and *Albanese v. FEC*, 78 F.3d 66 (2d Cir. 1996), the appellants here do not seek a court order mandating the State's creation of a voluntary public financing system for candidates. Rather, the appellants merely seek an order invalidating legislative provisions which debase and dilute the fundamental right to vote.

◆

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court; declare that sections 304, 307, and 319 of BCRA, codified in 2 U.S.C. § 431 *et seq.*, violate the equal protection guarantee incorporated by the Due Process Clause of the Fifth Amendment to the United States Constitution; and remand the case to the district court with instructions to enter a permanent injunction restraining the appellees from enforcing or otherwise applying sections 304, 307, and 319 of BCRA and ordering the appellees to enforce the provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, that were amended by sections 304, 307, and 319 of BCRA as such provisions existed prior to the enactment of BCRA. In the alternative, the Court should reverse the district court's ruling of nonjusticiability and remand the case for consideration on the merits.

Respectfully submitted,

JOHN C. BONIFAZ
Counsel of Record
BONITA TENNERIELLO
LISA J. DANETZ
BRENDA WRIGHT
NATIONAL VOTING RIGHTS INSTITUTE
27 School Street
Suite 500
Boston, MA 02108
(617) 624-3900

DAVID A. WILSON
AVI SAMUEL GARBOW
HALE AND DORR LLP
1455 Pennsylvania Avenue, NW,
10th Floor
Washington, DC 20004
(202) 942-8400

Attorneys for Appellants

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IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

Joel M. Gora
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7926

Mark J. Lopez
(Counsel of Record)
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
125 Broad Street
New York, New York 10004
(212) 549-2608

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INTRODUCTION

This case presents a challenge to key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub.L. No. 107-155, 166 Stat. 81, which impose new and unprecedented restrictions on core political speech in the guise of revising this nation's campaign finance laws.

Despite its size and complexity, the BCRA was designed to achieve two principal goals. Title I prohibits the use of so-called soft money by political parties, even for traditional party building activities such as voter registration and get-out-the-vote drives. Title II makes it a crime for even nonprofit, nonpartisan, membership organizations like the ACLU to broadcast an ad that mentions the name of a federal candidate in the period preceding an election.

The district court correctly recognized that neither of these broad provisions could be reconciled with our constitutional traditions. It therefore declined to uphold the law that Congress had written. It nevertheless upheld a rewritten version of the law that continues to pose severe constitutional problems. Because the ACLU is not directly affected by the soft money ban, we will leave it to others to explain why the continued prohibition on the use of soft money for issue advocacy is unconstitutional. We do, however, have a very direct stake in the lower court's interpretation of Title II.

If that interpretation is upheld, it will now be a crime for the ACLU to broadcast an ad on radio or television advocating its views on a particular civil liberties dispute if the ad could be construed as attacking, supporting, promoting, or opposing a candidate for federal office. To place that dilemma in more concrete terms, President Bush has just announced his intention to run for a second term. There have also been press reports that the Administration may be seeking enhanced surveillance powers from

Congress as part of a new legislative initiative. If the ACLU chose to oppose these steps on civil liberties grounds in a broadcast ad that referred to the President, we would be risking criminal prosecution based on the lower court's decision in this case.

That result would dramatically transform the rules of political debate in this country and go far beyond anything this Court has ever permitted under the First Amendment. The ACLU urges this Court to reverse the district court and invalidate the challenged Title II provisions.

STATEMENT OF THE CASE

1. This litigation arises from plaintiffs' challenge to various provisions of the BCRA, including the soft money restrictions embodied in Title I and the issue advocacy restrictions embodied in Title II. As part of the *McConnell* complaint filed in the district court, the ACLU specifically alleged that its First Amendment right to speak out on issues of concern to the organization and its members was violated by the broad definition of "electioneering communications" set forth in the BCRA.

Prior to passage of the BCRA, all corporations, unions, associations, committees and individuals were free to engage in political speech without being subject to the Federal Election Campaign Act so long as their speech did not expressly advocate the election or defeat of a clearly identified candidate. *See Buckley v. Valeo*, 424 U.S. 1, 45 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). The BCRA dramatically expanded this regulatory regime by extending the ban on corporate and union expenditures to cover all "electioneering communications," regardless of whether they involve express advocacy. For those individuals and groups not covered by the broadcast ban, BCRA imposes substantial reporting and disclosure requirements.

Congress provided two definitions of the term "electioneering communications" in § 201. Under the primary definition, an "electioneering communication" means any broadcast, cable, or satellite communication that: (a) refers to a clearly identified candidate for federal office; (b) is made within 60 days of a general election or 30 days of a primary election; and (c) is targeted to the relevant audience (except in the case of the President or Vice-President where there is no targeting requirement). J.S. App. 4a.[1]

Congress also anticipated that the primary definition might not be sustained. It therefore provided a fallback definition that applies only if the primary definition is invalidated. In contrast to the primary definition, the fallback definition is not limited to the period preceding an election. Rather, it prohibits at any time of the year a broadcast, cable, or satellite communication that "promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." In addition, the communication must be "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." J.S. App. 5a.

Under § 201, any person or organization that spends more than $10,000 in a calendar year on "electioneering communications" is subject for the first time to detailed reporting and disclosure requirements.

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[1] Citations to "J.S.App." refer to the Appendix to the ACLU's Jurisdictional Statement in this case. Citations to the lower court opinion are denoted as Supp. App. and refer to the supplemental appendix filed by the McConnell plaintiffs in 02-1674 et al.

Under § 203(a), corporations and unions are barred from using their general treasury funds to engage in any "electioneering communications." However, this apparently absolute prohibition is modified by § 203(b), the so-called Snowe-Jeffords Amendment. Pursuant to Snowe-Jeffords, nonprofit corporations that qualify under § 501(c)(4) of the Internal Revenue Code, like the ACLU, are permitted to engage in "electioneering communications" if those communications are funded entirely by individual contributions and if the organization submits the detailed financial disclosure reports required by § 201, including the identity of any donors who contributed a total of $1,000 or more during a reporting period that can extend for nearly two year. J.S. App. 8a.[2]

As the last piece of this statutory puzzle, Congress adopted § 204 of the BCRA, known as the Wellstone Amendment, which revokes the exception that the Snowe-Jeffords Amendment ostensibly provides. J.S. App. 10a.[3] In short, the statute that emerged from Congress prohibits all unions and corporations - including nonprofit and nonpartisan corporations like the ACLU - from using their general funds to pay for any broadcast ad that names a clearly identified candidate within the 30/60 day window preceding federal elections.

Finally, in § 214 of the BCRA, Congress tightened the rules on coordinated expenditures (which are treated as contributions) by repealing the existing FEC regulations and then instructing the FEC to issue new regulations that do not require "agreement or formal collaboration," and that specifically address "payments for communications made . . . after substantial discussion about the communication with a candidate or political party." J.S. App. 11a.[4] Pursuant to § 202 of the BCRA, moreover, this reconception of the coordination rules applies not only to express advocacy but to all speech now embraced by the expanded definition of "electioneering communications."

2. By a 2-1 vote, in a nearly 1700 page decision, the district court struck down the primary definition of "electioneering communications" contained in § 201 of the BCRA as an overbroad restriction on constitutionally protected speech. The district court also struck down a critical portion of the fallback definition as unconstitutionally vague. The district court nonetheless concluded that the remaining portion of the fallback definition could stand on its own, and was neither vague nor overbroad.

As a result, the district court wound up sustaining a definition of "electioneering communications" that is broader in many ways than the definition it struck down as overbroad, that is vaguer in many ways than the definition it struck down as too vague, and that does not resemble the test for "electioneering communications" that Congress adopted as either its primary or its fallback definition.[5]

---

[2] The Snowe-Jeffords exception also applies to "political organizations" organized under § 527 of the Internal Revenue Code. BCRA § 203(c)(2).

[3] It is not clear why Congress did not simply repeal the Snowe-Jeffords Amendment when it adopted the Wellstone Amendment. The intent of the Wellstone Amendment is nonetheless plain. It states that the exemption authorized by the Snowe-Jeffords Amendment "shall not apply in the case of a targeted communication that is made by an organization described in" the Snowe-Jeffords Amendment. In other words, the Snowe-Jeffords Amendment is rendered a nullity because it no longer applies to the organizations it was meant to cover.

[4] The FEC published its new regulations on January 3, 2003. *See* 68 Fed. Reg. 421.

[5] The district court also ruled on numerous other provisions of the BCRA, which we do not address here because they are beyond the scope of the questions presented in the ACLU's jurisdictional statement. Those other rulings, however, have been presented to the Court in other jurisdictional statements filed by the numerous parties to this litigation.

Judge Leon's opinion was dispositive on the Title II questions. While recognizing that a prohibition on broadcast ads that refer to a clearly identified candidate within 30 days of a primary election or 60 days of a general election has the benefit of clarity, he concluded that it "sweeps so broadly that it captures too much First Amendment protected speech . . ." Supp. App. 1147sa. Quoting from a declaration submitted by Laura Murphy, director of the ACLU's Washington Office, Judge Leon noted that "[t]he 60 days before a general election and 30 days before a primary . . . are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all the controversial issues of the day. Much of this debate occurs against the backdrop of pending legislative action or executive branch initiatives." *Id.* at 1148sa. He further recognized that the electorate is often most attentive in the period preceding an election, Supp. App. 1149sa, and that the mere fact "that issue advertisements mention the name of a candidate . . . does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes." *Id.*

Having found the primary definition of "electioneering communications" to be unconstitutional, Judge Leon then turned his attention to the backup definition. He began his discussion by rejecting the claim that a prohibition on broadcasts ads that "promote," "support, "attack," or "oppose" a candidate for federal office is unconstitutionally vague. According to Judge Leon, a person of ordinary intelligence reading those words would understand what could or could not be said in a broadcast ad without running afoul of the criminal prohibitions of the BCRA. *Id.* at 1162sa – 1164sa.[6]

Congress, apparently, had more concerns about the scope and ambiguity of this fallback definition than Judge Leon. It therefore attached a limiting principle to its fallback definition of an "electioneering communication," stipulating that it would only apply to broadcast ads that were "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Paradoxically, Judge Leon was more troubled by this limiting language, which he found to be unconstitutionally vague and likely to produce a chilling effect on constitutionally protected speech. *Id.* at 1165sa – 1166sa. Unable to uphold the fallback definition as written, Judge Leon chose to sever the offending language, *id.*, leaving in place a definition of "electioneering communications" that Congress itself had felt constrained to narrow, and that lacks even the temporal limitations of the primary definition that he had previously declared unconstitutionally overbroad.

Judge Leon's approach to the fallback definition was reluctantly joined by Judge Kollar-Kotelly.[7] But Judge Leon joined with Judge Henderson in ruling that the Wellstone Amendment, § 204 of the BCRA, was unconstitutional as applied to nonprofit organizations that engage in issue advocacy and that meet the criteria set forth in *FEC v.*

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[6] Judge Leon reached this conclusion despite the fact that undisputed evidence in the record demonstrated that even the most avid advocates of the BCRA often disagreed on whether a particular ad should be characterized as a genuine issue ad or a so-called "sham ad." As Judge Kollar-Kotelly noted in her concurring opinion, "[t]he expert testimony in this case . . . illustrates how one person's genuine issue advertisement can be another's electioneering commercial." Supp. App. 786sa. Judge Leon's notion that the fallback definition does not apply to "neutral" ads, *Id.* at 1163sa, offers scant protection because of the ambiguity of the term and the unconstitutional requirement that advocacy groups refrain from advocating.

[7] Judge Kollar-Kotelly, argued that the primary definition is consistent with the First Amendment and reluctantly endorsed the fallback definition only to ensure that at least some portion of Title II was sustained. Supp. App. 885sa – 886sa. In Judge Henderson's view, both the primary and fallback definitions of "electioneering communications" are unconstitutional in their entirety. *Id.* at 345sa – 371sa.

Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)(MCFL). Supp. App. 1166sa. Corporations that qualify for the "MCFL" exception therefore retain the benefit of the Snowe-Jeffords Amendment under the district court's decision. As a result, they are free to engage in otherwise prohibited 'electioneering communications" if they comply with the strict and burdensome disclosure and reporting requirements of § 201, and if they pay for their "electioneering communications" entirely with individual contributions. *Id.* at 1167sa – 1168 sa. On the other hand, nonprofit corporations that do not qualify for an "MCFL" exception remain subject to the Wellstone Amendment, and thus are barred from engaging in "electioneering communications" unless they create a separate political action committee to speak for them. *Id.* at 1168sa.

Judges Kollar-Kotelly and Leon wrote a separate *per curiam* opinion upholding the disclosure requirements contained in § 201, which apply to any person, group, or organization that engages in "electioneering communications." *Id.* at 116sa – 128sa. Because the district court upheld the general broadcast ban, albeit subject to a rewritten definition of "electioneering communications," it did not consider whether the BCRA's disclosure provisions could be justified standing alone.

Lastly, in the same *per curiam* opinion, the district court upheld the extension of coordination rules, which were originally intended to distinguish between express advocacy that is independent of a candidate and express advocacy that is coordinated with a candidate and thus properly treated as a contribution, to all "electioneering communications." Accordingly, the district court found that § 202 of the BCRA is facially constitutional. *Id.* at 128sa – 130sa. Plaintiffs remaining challenges to § 214 and its expanded conception of coordination were largely dismissed as premature and nonjusticiable. *Id.* at 144sa – 157sa.

3. As construed by the district court, Title II of the BCRA will substantially abridge the First Amendment rights of the ACLU and the members it represents. With over 400,000 members nationwide today, the ACLU is perhaps the most well known civil liberties organization in the country. Its work amplifies the voices of all of its members, supporters and contributors.[8]

Since its founding in 1920, the ACLU has never taken a position in a partisan political election, never contributed a dollar to a political campaign or party, never formed a political action committee or "PAC" or affiliated with one, and has gone to great lengths to maintain its rigorously non-partisan stature. Being subject to the Federal Election Campaign Act (FECA) would be fundamentally inconsistent with the ACLU's mission and identity as a nonpartisan organization and would also have serious ramifications for the organization's members and contributors whose identities would have to be disclosed.

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[8] The ACLU is a nonprofit membership organization that has tax exempt status under 501(c)(4) of the Internal Revenue Code. Membership dues to the ACLU are not tax deductible. The basic membership fee is $35, though many members contribute more than that. There is also a reduced-fee membership available for students and other low-income individuals. Membership dues accounted for $9,393,948 of the $13,625,051 contributed to the organization by individuals in 2001. Only 212 individuals contributed more than $1,000. Although the ACLU does not maintain records on the corporate status of non-individual donors, such donors contributed less than $85,000 of the ACLU's total revenues in 2001, which represents less than 1% of the ACLU's budget. None of the contributions from businesses exceeded $500. Total annual contributions from labor organizations over the last 10 years have never exceeded $5,000. Total contributions from political parties over the same 10 year period were $330. In sum, contributions from non-individual donors represent an insignificant percentage of the ACLU's total annual funding. *See* Declaration of Anthony Romero, J.A. 720. Mr. Romero is the Executive Director of the ACLU.

Because it is a non-partisan organization that does not endorse or support candidates, *all* of the ACLU's advocacy is focused on issues. Yet, ever since the enactment of FECA approximately 30 years ago, the ACLU has been forced to resist efforts to stifle its own speech and the speech of other issue organizations through the overzealous application of overbroad campaign finance laws. For three decades, the ACLU has been at the forefront of the public debate over campaign finance (including our support of a program of full and fair public financing), and has been involved in most of the major litigation testing the constitutional limits of the effort to restrict political speech in the name of campaign finance reform.[9]

On an almost daily basis, the ACLU engages in public commentary on the actions of federal officials, many of whom will be standing for election. *See* Declaration of Laura Murphy, J.A. 609 - 613. Like other advocacy groups, the ACLU conveys its message through multiple media, including the internet, direct mail campaigns, membership drives, press releases, news conferences, public appearances, pamphlets and other publications that refer to, praise, criticize, describe or rate the conduct or actions of clearly identified public officials. ACLU communications referring to a candidate for elective office are not made for the purpose of influencing the election or defeat of that candidate. The timing of those communications is a function of the timing of debate over the legislation or issue under consideration. *See* Romero Declaration, J.A. 719.

The success of the ACLU is also dependent on broadcast media that report on the organization's activities on an almost streaming basis. The organization is at the front line of many controversial issues, and its views are often sought. But the ACLU cannot always rely on the news media to report its activities or to present its views accurately or completely. Because exclusive reliance on such "earned media" is not sufficient, the ACLU has turned to the use of paid media in an effort to ensure that the organization's views are heard in an accurate and balanced way. For example, the ACLU paid for a series of radio and newspaper ads directed at Speaker of the House Dennis Hastert during his March 2002 primary election. The ads had two purposes. First, they criticized the Speaker for failing to bring the Employment Non-Discrimination Act (ENDA) to the floor of the House of Representatives. At that point, ENDA was actively being considered in the Senate after the legislation had been stalled in the House for some time. The ACLU hoped the ad would be a catalyst to help bring the legislation up for a vote. In addition, the BCRA was then being debated in Congress. The radio and print ad campaign was intended to highlight the impact of Title II on groups like the ACLU, and to dramatize that the ACLU's radio spots would become criminal once Title II was enacted. As the ACLU pointed out at the time, the Hastert broadcast ads would have been illegal had the BCRA been in effect because they referred to Speaker Hastert and were aired in his district within 30 days of his primary election, even though he was running unopposed. *See* Murphy Declaration, J.A. 612.[10]

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[9] Most prominently, the ACLU was co-counsel in *Buckley*, and its New York affiliate appeared as a party. The ACLU, however, has participated in numerous other campaign finance cases, both before and after *Buckley*. *See United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir.1972); *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973)(three-judge court), *vacated as moot sub nom, Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975); *California Medical Association v. FEC*, 453 U.S. 182 (1981); *Brown v. Socialist Workers '74 Campaign Committee* 459 U.S. 87 (1982); *FEC v. National Conservative Political Action Committee* 470 U.S. 480 (1985); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Austin v. Michigan State Chamber of Commerce* 494 U.S. 652 (1990); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Colorado Republican Federal Campaign Committee v. FEC* 518 U.S. 604 (1996); *Nixon v. Shrink Missouri Government PAC* 528 U.S. 377 (2000); *FEC v. Colorado Republican Federal Campaign Committee* 533 U.S. 431 (2001).

Since passage of the BCRA, the ACLU has launched a media campaign to address the many civil liberties issues that have arisen in the past twenty months as the country struggles to maintain our tradition of freedom while responding effectively to the threats posed by international terrorism. *See* Murphy Declaration, J.A. 612. As part of this campaign, the ACLU is prepared to take out additional broadcast ads consistent with a broader media strategy. Romero Declaration, J.A. 721-722. Such media efforts - paid and earned, broadcast and print - are essential to creating a climate of opinion favorable to civil liberties. And because such communications typically concern legislative or executive policies, they frequently refer by name to current officeholders and candidates, including the President. *See* Murphy Declaration, J.A. 611. Title II's ban on "electioneering communications" would effectively mute much of this speech by the ACLU.

It is important to emphasize that whether measured by the 30/60-day rule struck down by the district court or the broader rule it upheld, election years are often periods of intense legislative activity, as the district court recognized. During the 2002 election cycle, for instance, legislation creating a new federal Department of Homeland Security was under consideration in the midst of the pre-election period. The ACLU took out full-page advertisements in *Congress Daily* and *CQ Monitor* on September 30, 2002, urging Congress to safeguard civil liberties in connection with its consideration of the "Gramm–Miller" and "Lieberman" versions of the Homeland Security legislation. A copy of the ad is attached to the Declaration of Laura Murphy. *See* J.A. 621. During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See* Chart summarizing "Bills of Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." J.A. 622-626.[11] Thus, it is not unusual for the ACLU's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election. Yet this is precisely when Title II most severely restricts the ACLU's use of broadcast ads.

The impact of Title II on the ACLU goes beyond the harm caused by the direct ban on broadcast communications. Even if the ban on "electioneering communications" violates the First Amendment, facially or as applied to the ACLU, § 201 of the BCRA still requires organizations like the ACLU to disclose the identity of their $1,000 donors as the price for taking out broadcast ads. Any such disclosure requirement not linked to candidate contributions or express advocacy would violate longstanding First Amendment rules designed to protect anonymous political speech and the right to associate with controversial political groups. Many ACLU members and donors request explicit assurances that their membership and contributions will remain confidential, and the ACLU has consistently defended their First Amendment right to anonymity. *See* Romero Declaration J.A. 720. While the lower court did not credit this evidence as sufficient to strike down the disclosure provision as applied, we submit that the very fact that the statute can be applied to the ACLU highlights its substantial overbreadth and the danger it poses to the organization's associational interests.

Finally, Title II will negatively affect the ACLU's legislative advocacy in other ways, as well. The organization's legislative efforts include many activities directly associated with lobbying. The ACLU regularly meets, speaks or corresponds with members of Congress and Executive Branch officials concerning proposed or pending legislation or executive action that may affect civil liberties. For instance, following September 11, 2001, the ACLU has had numerous direct contacts with members of both the House of Representatives and the Senate urging restraint in the rush to adopt legislation giving the Department of Justice and other federal agencies sweeping law enforcement powers curbing important civil liberties. The ACLU also routinely testifies before Congress, conducts staff briefings for Congress, and provides members with ACLU position papers. *See* Murphy Declaration, J.A. 608-609. By eliminating the link between express advocacy and coordination, §§ 202 and 214 of the BCRA have a chilling effect on these legislative activities even though the ACLU does not, and never has, coordinated its activities with elected officials for the purpose of influencing elections. *See* Murphy Declaration J.A. 610-611.

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[10] The text of the Hastert radio ad, which would be illegal under the BCRA, is attached as Exhibit A to this brief and was part of the record below, J.A. 615-617. The nearly identical text of the Hastert newspaper ad, which would be allowed under the BCRA, is attached to the Murphy Declaration. J.A. 619.

[11] Attached as Exhibit B to this brief.

SUMMARY OF ARGUMENT

1. Under any conception of the First Amendment, the ability of organizations like the ACLU to engage in public debate on critical issues of the day through any medium the organization deems appropriate, including broadcast ads, lies at the very core of constitutionally protected speech. In its zeal to close what they perceived to be loopholes in the current system of campaign financing, advocates of the BCRA attempted to address the problem of so-called "sham" issue ads by adopting a prophylactic rule that bars all broadcast ads by even nonprofit organizations in the period preceding an election if the ads simply mention the name of a federal candidate. The district court, to its credit, recognized that such prophylactic rules have no place

in our First Amendment jurisprudence. Unfortunately, the solution crafted by the district court is equally flawed because it rests on a definition of "electioneering communications" that is hopelessly vague, except insofar as it clearly prohibits advocacy groups like the ACLU from using broadcast ads to question the policy positions of public officials who also happen to be running for office. And, in an era of nearly perpetual campaigns, that means most public officials most of the time.

2. This Court has often stressed that campaign finance laws must be narrowly tailored to avoid "unnecessary abridgement of [First Amendment] freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25, 64 (1976). The precision required by *Buckley* is entirely missing from the restrictions on issue advocacy contained in Title II of the BCRA, and upheld by the district court. *Buckley* draws a First Amendment distinction between the permissible regulation of contributions and the impermissible regulation of expenditures. As a further safeguard against the stifling of political dissent, the Court also held that the government's regulation of expenditures must be limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate. . . ." *Id.* at 45. This "express advocacy" doctrine, which *Buckley* adopted to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. . . ." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), has played a critical role for more than two decades in protecting issue-oriented speech by providing a bright line between permissible and impermissible government regulation.

Under both the primary and fallback definition of "electioneering communications" contained in the BCRA, an ad by the ACLU criticizing a proposal put forward by President Bush or any of the announced Democratic candidates on civil liberties grounds is treated no differently than an ad by General Motors expressly advocating the election or defeat of a specific candidate. Both are equally prohibited despite the fact that the ACLU's funds are derived entirely from members and contributors rather than shareholders and customers, and we have never taken a partisan position in our eight-decade history.

Moreover, under the fallback definition of "electioneering communications" crafted by the district court, this prohibition applies throughout the entire election cycle once an individual files his or her candidacy papers. President Bush, for instance, has already filed his papers, as have several candidates for the Democratic nomination. Under the primary definition of "electioneering communications" adopted by Congress, the blackout period would perhaps be shorter but it would cover the period preceding a primary or general election when almost everyone agrees the public is most attentive. Neither prospect is consistent with "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The BCRA also discriminates between broadcast and other media in an awkward attempt to shape the debate over the qualifications of our elected officials. More specifically, § 203 directly restrains the free flow of information through the single most effective medium for reaching the widest possible audience. This type of line drawing cannot be justified by Congress's efforts to "level the playing field" or because of the power of broadcast advertising to influence the public. The fact that the ACLU remains free to speak through other media that Congress has deigned to permit highlights rather than resolves the constitutional problem. The distinction drawn by Congress between the print and

broadcast media has the purpose and effect of stifling core political speech.

The fact that the ACLU can continue to engage in whatever speech it wants by forming a PAC is part of the constitutional problem, not the solution. Unlike many other issue organizations, the ACLU does not have an affiliated PAC. There is a reason for that: the ACLU is not a partisan organization and does not choose to present itself as one. The ACLU cannot and should not be forced to restructure its organization or re-characterize its basic mission in order to engage in constitutionally protected speech. *See, e.g. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). Nor is it a sufficient answer to say that the ACLU may qualify as a "MCFL" organization and thus be entitled, at least in the district court's view, to an exemption from the general ban against corporate "electioneering communications." It is not clear that the ACLU will in fact qualify as a "MCFL" corporation so long as we continue to receive even a *de minimis* amount of contributions from sources other than individuals.[12] Moreover, the "MCFL" exception was crafted to permit ideological organizations to engage in express advocacy, not to impose a regime of disclosure and reporting requirements when such organizations engage in issue advocacy.

The decision below cannot fairly be described as an application of *Buckley* or even an extension of its core principles. To the contrary, it represents a return to the initial, imprecise efforts at regulating campaign speech and advocacy organizations that this Court emphatically rejected in *Buckley* and reaffirmed in *MCFL*. Both the BCRA and the decision below are fundamentally at odds with a central tenet of the Court's campaign finance jurisprudence: the imperative of protecting issue advocacy from campaign finance controls.

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[12] Under recently adopted FEC regulations, a § 501(c)(4) corporation that receives no funds whatsoever from corporate or union sources may be removed from the ban on broadcast communications. 11 CFR § 114.10 (2003). The ACLU does not appear to qualify for the exception, *see FEC v. National Rifle Association*, 254 F3d 173 (D.C. Cir. 2001) (denying MCFL status because of $7,000 in corporate contributions), because it accepts contributions from businesses and unions - although in *de minimis* amounts. *See* n.8, *supra*.

3. For similar reasons, the disclosure requirements of § 201 violate *Buckley* and the broader First Amendment principles it embodies. Those principles are designed to preserve associational privacy by limiting mandatory disclosure to circumstances where it truly serves an overriding need, at least in the expenditure context. As first articulated in *Buckley* and later reaffirmed in *MCFL*, the express advocacy test is a constitutionally compelled limit on the otherwise fatal reach of FECA's disclosure provisions. It marks the boundary where permissible campaign finance regulation ends and unregulated speech and association begin. Title II ignores this and other limitations and thereby undermines the First Amendment safeguards that this Court has so carefully erected.

4. Finally, §§ 202 and 214 of Title II significantly and unconstitutionally expand the rules prohibiting the "coordination" of campaign activity with candidates. First, § 202 extends the coordination rules beyond express advocacy to "electioneering communications." Second, § 214 eliminates any requirement of "agreement or formal collaboration." In tandem, these provisions create a significant chilling effect on the ACLU's traditional expressive activities because of FECA's ban on corporate campaign contributions, 2 U.S.C. § 441(b), which applies even to nonprofit advocacy organizations *See FEC v. Beaumont,* 123 S.Ct. 2200 (2003), and which encompasses coordinated expenditures.

ARGUMENT

I. SECTION 203 OF THE BCRA, WHICH PROHIBITS THE ACLU FROM BROADCASTING "ELECTIONEERING COMMUNICATIONS," VIOLATES THE FIRST AMENDMENT.

A. The BCRA's Definition Of "Electioneering Communications" Is Substantially Overbroad And Violates First Amendment Principles That Long Predate *Buckley*

Both the primary and the fallback definitions of "electioneering communication" set forth in the BCRA are irreconcilable with *Buckley*. But before discussing *Buckley*, it is important to note certain fundamental principles of First Amendment law that would require this Court to strike down the BCRA's overbroad ban on "electioneering communications" even if *Buckley* had never been decided.

First, "speech concerning public affairs is more than self-expression, it is the essence of self-government." *Connick v. Meyers,* 461 U.S. 138, 145 (1983)(quoting *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964)). Second, speech cannot be curtailed because of its proximity to an election. *Mills v. Alabama,* 384 U.S. 214 (1966). To the contrary, that is often the moment when political speech is most valuable. Third, freedom of speech necessarily "embrace[s] all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940). Fourth, neither the fact that the speech or criticism appears in a paid advertisement, *New York Times v. Sullivan*, 376 U.S. 254 (1964), nor the corporate status of the speaker, provides a justification for suppressing speech on matters of public concern. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison Co. v. New York Public Service Commission,* 447 U.S. 530 (1980). Fifth, the Constitution protects the right of individuals to amplify their voice through group association. *DeJonge v. Oregon,* 299 U.S. 353 (1937). Accordingly, the government must utilize "sensitive tools," *Speiser v. Randall,* 357 U.S. 513, 525 (1958), when it seeks to limit such associational activity, even if the association ultimately chooses to incorporate (like the ACLU) as a nonprofit entity.

The "sensitive tools" required by the First Amendment are missing from the BCRA. Instead, by broadly prohibiting all corporate entities from engaging in any "electioneering communications," without regard to whether the speech of the ACLU and other groups like it poses any genuine threat to the electoral process, Congress has chosen to legislate by labels. This Court can and should reject that approach. Contrary to the premise of the BCRA, the essential purpose of the First Amendment is "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times v. Sullivan,* 376 U.S. at 269.

As part of that constitutionally protected "interchange of ideas," comments by the ACLU and other groups "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials." *Id.* at 270. That is not a reason for suppressing the speech. To the contrary, it is evidence of "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Id.* In a participatory democracy, the First Amendment does not allow the government to substitute its judgment for the judgment of the people in evaluating conflicting arguments on matters of public concern by suppressing the flow of information essential to informed decisionmaking. *Bellotti,* 435 U.S. at 777. It is "'[t]he very purpose of the First Amendment. . . to foreclose public authority from assuming a guardianship of the public mind. . . .'" *Riley v. National Federation of the Blind,* 487 U.S. 781, 791 (1988) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945)(Jackson, J. concurring)).

The Hastert ad broadcast by the ACLU just prior to the BCRA's enactment into law dramatically illustrates the statute's constitutional shortcomings. As previously described, the ad called on Speaker Hastert to bring stalled legislation up for a floor vote on an issue important to the organization. Under the primary definition of an "electioneering communication," that ad would now be a crime because it was broadcast shortly before a primary election in which Speaker Hastert was running -- even though he faced no opposition, and even though the same ad could be (and was) printed in the newspapers. Under the fallback definition of an "electioneering communication," the blackout period would begin as soon as the Speaker qualified as a candidate under FECA. Once the blackout period began, the ACLU would face possible prosecution if the text of the ad were construed as a criticism of how the Speaker performed his official duties. This Court's cases simply do not allow the government to regulate speech that comments on the conduct of our elected officials.

Even before this Court decided *Buckley*, the ACLU successfully defended itself and others against the unconstitutional application of campaign finance laws to core political speech that was designed to address issues rather than influence elections. *See American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975); *Buckley v. Valeo*, 519 F.2d 821, 871 (D.C. Cir. 1975) (*en banc*); *In Re ACLU,* Dkt. MUR 1802 (Federal Election Commission, 1984). Indeed, the ACLU represented the defendants in the very first enforcement suit brought under the new Federal Election Campaign Act. The case involved a handful of dissenters who had published a two-page advertisement in The New York Times in May 1972 urging the impeachment of President Richard Nixon and praising the few members of Congress who had supported impeachment. *United States v. National Committee for Impeachment*, 469 F. 2d 1135 (2nd Cir. 1972). The United States filed suit claiming the advertisement was "for the purpose of influencing" the elections that year, thereby requiring the approval of all candidates that the ad might be construed as "on behalf of," and rendering the *ad hoc* group of ad sponsors a "political committee" subject to all of the law's new regulations and controls.

The government's position was soundly rejected by the courts. Drawing the now-settled distinction between issue advocacy and candidate advocacy, the Second Circuit ruled that it would be an "abhorrent" and "intolerable" consequence if FECA allowed the government to "regulat[e] the expression of opinion on fundamental issues of the day." *Id.* At 1142. Additionally, the court held that the Act could only be applied to groups under the control of candidates or those making contributions or expenditures "the major purpose of which is the nomination or election of candidates." *Id.* At 1141. Thus were the seeds of both the express advocacy and major purpose tests planted.

The *Committee for Impeachment* suit was followed by *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973). That case arose when the ACLU sponsored an advertisement shortly before the 1972 elections criticizing the Nixon Aministration's anti-busing policies and praising members of Congress who had disagreed with the President's position on busing. The court ruled that the portion of the Act which treated the ACLU advertisements as "on behalf of" the campaigns of members of Congress and "in derogation of" President Nixon's candidacy, "establishe[d] impermissible prior restraints, discourage[d] free and open discussion of matters of public concern and as such must be declared an unconstitutional means of effectuating legislative goals." *Id.* At 1051. Turning to

those portions of FECA that would have treated the ACLU as a "political committee," the *Jennings* court followed the lead of the Second Circuit and ruled that issue-oriented groups whose major purpose is not the election of candidates could not be covered by the Act:

> We are satisfied that by so constricting the reaches of Title III, the fears of constitutional infringements expressed by plaintiffs will be eliminated. They and other groups concerned with the open discourse of views on prominent national issues may, under both this ruling and that of the Second Circuit, comfortably continue to exercise these rights and feel secure that by so doing so their associational rights will not be encroached upon.

Id. at 1057.

These assurances, unfortunately, were short-lived. Only one year later, the 1974 amendments to FECA included a provision, 2 U.S.C. § 437a, requiring disclosure by issue-oriented groups in ways that *Jennings* and *Committee for Impeachment* had ruled impermissible.[13] That provision was challenged as part of the *Buckley* litigation. The District of Columbia Circuit, which upheld every other provision of the new law, unanimously struck down § 437a as an unconstitutional regulation of nonpartisan political speech. As the circuit court recognized, the broad statutory language of §437a prohibited even the discussion of campaign issues and candidate voting records, which are "vital and indispensable to a free society and an informed electorate." 519 F.2d. 821, 873 (D.C. Cir. 1975).[14] BCRA's disclosure provisions, discussed in Part II, *infra*, violate the same First Amendment principles identified in these lower court cases and later affirmed in *Buckley*, 424 U.S. 79-80, n. 106.

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[13] 2 U.S.C. §437a provided, in pertinent part:

> Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or had held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidates or to withhold votes from such candidate shall file reports with the Commission as if such person were a political committee.

This history is important both as context for the current dispute and to demonstrate how campaign finance laws have been applied against issue advocacy organizations in the past to stifle political speech that should never have aroused the government's concern. To be sure, there is some comfort in the fact that these prior efforts have been rebuffed by the courts, but "the value of a sword of Damocles is not that it drops, but that it hangs." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

The notion that the special context of an election justifies an abridgement of the right to speak out on disputed issues sets First Amendment jurisprudence on its head. *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002). The free exchange of ideas does not present a threat to our constitutional democracy, it is vital to preserving it. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982). "'[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges." *White*, 536 U.S. at 781 (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222-23 (1989)).

As the Court observed in *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966):

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[14] Section 437a was repealed a year later. Pub.L.No. 94-283, Title I § 105, 90 Stat. 481 (1976).

> Wherever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political process.

Applying that principle in *Mills*, the Court reversed the conviction of a newspaper editor who wrote an Election Day editorial criticizing the incumbent mayor in violation of state law, which prohibited any electioneering on Election Day. The Court found it "difficult to conceive of a more obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press. . . ." than a criminal statute that "silences the press at a time when it can be most effective." *Id.* at 219.

That observation is equally relevant here. Under the First Amendment, it is simply not the function of government to determine which issues should be discussed in a political campaign, when they should be discussed, and who should discuss them. *See Brown* 456 U.S. at 60. Nor is it the role of government to structure that debate by prohibiting broadcast ads because of their ability to reach the widest audience. *See* Point I C, *infra.*

B. The BCRA's Definition Of "Electioneering Communications" Is Directly At Odds With *Buckley* And It's Progeny

Title II of the BCRA is inconsistent with the fundamental First Amendment values discussed above and, for that reason, it is also inconsistent with *Buckley*.

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential for the identities of those who are elected will inevitably shape the course that we follow as a nation. . . . [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

424 U.S. at 14-15.

By holding that expenditure limits must be subject to strict scrutiny and that the government's ability to regulate political speech is limited to express advocacy, *Buckley* did not make new law. What *Buckley* held is that campaign finance legislation must be measured against traditional First Amendment standards precisely because it so directly affects vital questions of democratic self-governance. Measured against those standards, the BCRA's definition of "electioneering communications" cannot stand.

1. *Any Effort To Regulate Or Prohibit Independent Speech or Expenditures Must Be Subject To Strict Scrutiny*

Ever since *Buckley,* this Court's campaign finance jurisprudence has rested on a fundamental distinction between expenditure limits and contribution limits. 424 U.S. at 44-58. Expenditure limits are subject to strict scrutiny, contribution limits are not. Because the ban on "electioneering communications" contained in Title II of the BCRA is an expenditure limit, it cannot be upheld unless it is narrowly tailored to further a compelling state interest. In fact, the BCRA's overbroad definition of prohibited speech and prohibited speakers satisfies neither prong of the strict scrutiny test.

The distinction between contribution limits and expenditure limits articulated in *Buckley* is directly tied to this Court's perception of their impact on speech. On the one hand, "a limitation on the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction on the contributor's ability to engage in free communication." 424 U.S. at 20. On the other hand, "a restriction on the amount of money a person or a group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their explanation, and the size of the audience realized." *Id.* at 19.

By telling the ACLU what it can say in a broadcast ad and when it can say it, the ban on "electioneering communications" in Title II of the BCRA raises all of the concerns that this Court has identified with expenditure limits. The public is precluded from hearing the ACLU's message in the format that the ACLU seeks to deliver it, and the ACLU is precluded from pursuing a communications strategy that, in its view, will "effectively amplify[] the voice of [its] adherents." *Id.* at 22. As the facts of this case demonstrate, expenditure limits "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. It is not surprising, therefore, that expenditure limits have been regarded by the Court as presumptively unconstitutional.

In *Buckley* itself, the Court ruled that a $1,000 cap on expenditures "relative to a clearly identified candidate" could not be sustained because it "heavily burdens core First Amendment expression." In *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978), the Court invalidated a state law that barred corporations from making expenditures for the purpose of "influencing or affecting" a referendum after describing the prohibited speech as "indispensable to decisionmaking in a democracy." In *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985)(*NCPAC*), the Court ruled that a political action committee could not be barred from spending more than $1,000 to "further the election" of a publicly financed presidential candidate. Characterizing PACs as "mechanisms by which large numbers of individuals of modest means can join together in an organization," *id.* at 494, the Court noted that "the expenditures at issue in this case produce speech at the core of the First Amendment." *Id.* at 493. And, in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996)(*Colorado I*), the Court struck down an expenditure limit on the independent spending of political parties. Justice Breyer's plurality opinion in *Colorado I* reiterated the Court's well-established distinction between expenditure limits and contribution limits. He then observed: "The independent expression of a political party's views is 'core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." *Id.* at 616.

The Court's recent opinion in *FEC v. Beaumont*, ___ U.S. ___, 123 S.Ct. 2200 (2003), is entirely consistent with this approach. In ruling that a federal ban on corporate campaign contributions could be applied even to nonprofit entities (including *MCFL* groups), the Court stressed the distinction between contribution limits and expenditure limits. Indeed, the Court described it as "the basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions . . . ." *Id.* at 2210. In upholding the ban, the Court reiterated its concern that certain non-profit groups, like political parties and other organizations, could act as a conduit for large corporate contributions *Id.* at 2207. *See also Federal Election Commission v. Colorado Republican Campaign Committee*,

533 U.S. 431, 456 & n.5 (2001). In the context of a contribution limit, the perceived danger of corporate contributions to the political process was sufficient to justify the statute's prophylactic approach. Under the heightened scrutiny applicable to expenditure limits, however, Congress is not free to regulate so broadly. *See MCFL*, 479 U.S. at 260. *Beaumont* thus reaffirmed the holding in *MCFL* by adhearing to the constitutional distinction between permissible regulation of contributions and impermissible regulation of expenditures by non-profit corporations.

The BCRA not only ignores this distinction, which is sufficient to invalidate Title II restriction on "electioneering communications," but it also assumes without any basis that even nonprofit advocacy groups should be treated as a source of corruption in the electoral process unless every penny of their budget comes from individual contributions. For the ACLU and many other organizations like it, that assumption is entirely unfounded and highlights yet another facet of the statute's unconstitutional overbreadth.[15]

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[15] The lower court did not find, nor is there any basis to believe, that the ACLU is a shill or conduit for large corporate contributions. No single business entity gave the ACLU more than $500 in 2001. *See n. 8, supra.* Our records do not allow us to determine if a $250 contribution from "Bennington Pottery" or "Kathleen's Bake Shop" is a corporate contribution or not. In any event, that question has little relationship to any compelling state interest. The government claimed below that the ban on "electioneering communications" "carefully limits BCRA's reach to those ads sponsored by unions and corporations that present the greatest potential for distortion or corruption of the political process." Gov't Resp. Br. at 67. Where the ACLU is concerned there could not be a less apt description or a regulation wider of the mark. The ACLU simply does not present the type of problems that Congress purportedly sought to remedy by adoption of the BCRA. Conversely, the effort to apply the BCRA to the ACLU and similar groups is ample proof of the statute's constitutional overbreadth.

2. *The Express Advocacy Rule Announced In Buckley Is A Necessary Safeguard To Prevent The Suppression Of Constitutionally Protected Speech*

In addition to holding that expenditure limits are subject to strict scrutiny, the *Buckley* Court also ruled that any restrictions on political speech must be limited to express advocacy. The two doctrines are closely related. Put another way, an expenditure limit is not narrowly tailored if it does not include the express advocacy rule.

Title II of the BCRA clearly fails that test. Indeed, Congress made no effort to hide the fact that its definition of "electioneering communications" was designed to correct what it considered the flaws in the express advocacy rule announced by this Court in *Buckley*. Under the express advocacy rule, of course, only speech that expressly advocates the election or defeat of a particular candidate is subject to regulation through the campaign finance laws. Congress apparently viewed this as a loophole that needed to be closed. *Cf. City of Boerne v. Flores*, 521 U.S. 507 (1997)(Congress cannot rewrite constitutional rules through legislation).

During the course of this litigation, defendants and intervenors have additionally argued that the express advocacy rule was never intended to state a substantive rule of First Amendment law. They portray it instead as merely a response by the *Buckley* Court to the vagueness of FECA's original expenditure limits, which applied to any speech "relative to a clearly identified candidate." In their view, the BCRA has solved that problem in a different way by unambiguously banning any broadcast ad by a corporate sponsor (including the ACLU) that "refers to a clearly identified candidate" in the period preceding either a primary or general election.

Neither claim is persuasive. The express advocacy rule plays a far more central role in this Court's campaign finance jurisprudence than proponents of the BCRA have acknowledged. It defines the line between speech that can be regulated and speech that cannot. In drawing that line in *Buckley*, the Court understood that groups would always be able to devise "expenditures that skirted the restriction on express advocacy. . . . but nevertheless benefited the candidate's campaign." 424 U.S. at 46. Significantly, however, the *Buckley* Court also understood the converse proposition: that without a bright line between issue advocacy and express advocacy, speakers would inevitably "hedge and trim" their political message in an effort to avoid unreasonable government scrutiny. *Id.* at 23 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Accordingly, all speech which does not "in express terms advocate the election or defeat of a clearly identified candidate" is outside the scope of permissible regulation. "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views," *Buckley*, 424 U.S. at 45, and they are also free from reporting and disclosure requirements. *Id.* at 79-80. *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. at 238. As the Court recognized in *Buckley*, the First Amendment demands a bright line because political campaigns in the real world so rarely provide one. "Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Id.* at 42.

The primary definition of "electioneering communication" set forth in the BCRA is plainly inconsistent with the express advocacy rule. The fallback definition is equally flawed, even as written by Congress. Without the limiting language that Congress inserted and that the district court severed, the fallback definition has not only become less precise, it is functionally indistinguishable from FECA's original reference to speech "relative to a clearly identified candidate," which is what led the *Buckley* Court to develop the express advocacy rule in the first place. *Id.* at 39-59.

To be sure, the express advocacy rule was announced in *Buckley* in the context of a vagueness discussion. Vagueness, however, was never its only concern. When the Court reaffirmed the express advocacy rule in *MCFL,* it specifically noted that the rule had been crafted "in order to avoid problems of overbreadth." 479 U.S. at 248. The BCRA does not "avoid problems of overbreadth," it embraces them as essential to addressing the proliferation of so-called "sham" issue ads.[16] Unfortunately, in its eagerness to ban such ads, the BCRA also prohibits the ACLU from broadcasting a message urging the President to respect civil liberties in the war against terrorism. That is not a trade-off that the government gets to make, nor has this Court ever upheld such a far-reaching proscription of core political speech.

In the years since *Buckley*, the express advocacy doctrine has been an indispensable bulwark against overzealous efforts to regulate core political speech. From *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (*en banc*)(finding that Commission's enforcement suit against a tax protest group to be "totally meritless"), to *Clifton v. FEC*, 114 F.3d. 1309 (1st Cir. 1997) (invalidating FEC regulations on limiting voter guides), the government has suffered "a string of losses in cases between the FEC and issue advocacy groups over the meaning of the phrase 'issue advocacy' and the permissible scope of the FEC's regulatory authority over . . . political speech." *Federal Election Commission v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997)(authorizing an award of fees and costs against the Commission for bringing enforcement proceedings against an issue group in clear violation of this Court's "express advocacy" doctrine). *See also Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 2002); *Citizens for Responsible Government State PAC v. Davidson*, 236 F. 3d 1174, 1187 (10th Cir. 2000); *Iowa Right to Life Comm. Inc. v. Williams,* 187 F.3d. 963, 969 (8th Cir. 1999).

Those cases can and should stand as a cautionary tale. The purpose and effect of the express advocacy rule is to provide political speech with the "breathing space" required by the First Amendment. *NAACP v. Button,* 371 U.S. 415, 433 (1963). In that way, it functions much like the "actual malice" rule of *New York Times v. Sullivan,* 376 U.S. 254 (1964), or the "incitement" rule of *Brandenberg v. Ohio,* 395 U.S. 444 (1969). The Court recognized in *Sullivan* that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct. . . ." *Id.* at 273. The express advocacy rules creates an equivalent constitutional shield that is similarly designed to safeguard uninhibited public debate on issues of obvious public concern. By attempting to override the express advocacy rule, Title II eliminates that necessary constitutional safeguard.

3. *The BCRA's Overbroad Definition Of "Electioneering Communications" Undermines Any Asserted Compelling State Interest*

Beyond their disagreement with the express advocacy rule, proponents of the BCRA defend its restriction on "electioneering communications" on two principal grounds. First, they argue that the broadcast ban should be upheld because it only applies to unions and corporations that have traditionally been subject to greater regulation under the campaign finance laws. Second, they contend that objections to the broadcast ban are overblown because any group covered by the ban can avoid its proscription by creating a political action committee. Both arguments suffer from fatal oversimplification.

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[16] Defendants and intervenors heavily rely on a Brennan Center study to document the proliferation of so-called "sham" issue ads. The flaws in the Brennan Center study are discussed at length in other briefs and will not be repeated here.

This Court has applied the same framework for analyzing campaign finance restrictions on corporations and unions that it has applied to individuals and unincorporated entities. That is to say, the Court has differentiated between expenditure and contribution limits and then considered whether the challenged regulation can survive the appropriate standard of review. *MCFL* is the critical case on this issue. In *MCFL,* the Court held that nonprofit, ideological corporations could not be barred from engaging in express advocacy or required to establish a "separate segregated fund" and comply with burdensome reporting requirements. The government had argued there, as it has argued here, that all corporations could be held to a single standard. The Court disagreed. "The desirability of a broad prophylactic rule cannot justify treating alike business corporations and [nonprofit corporations] in the regulation of independent spending." *Id.* at 260. Instead, the Court carefully examined whether the general ban on corporate political spending made sense in the context of a nonprofit advocacy group like Massachusetts Citizens for Life.

The Court began that examination by noting that the traditional rationale for regulating corporate political activity is that a corporation's ability to amass wealth, and thus influence the political process, has little to do with popular support for its political positions. It then noted that the opposite is true for organizations like MCFL, which rely on the contributions of ideological supporters to fund their activities. Indeed, the Court explained, "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *Id.* at 261. Thus, the Court concluded, "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." *Id.* at 263.

The Court reached a different conclusion in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), but only because the Court confronted a very different set of facts. The state law in *Austin,* like the federal law in *MCFL,* prohibited corporations from engaging in independent campaign expenditures. However, unlike Massachusetts Citizens for Life, the Michigan Chamber of Commerce lacked many of the characteristics that the Court found dispositive in *MCFL.* Although organized as a non-profit corporation, more than three-quarters of its contributors were business corporations. *Id.* at 664. And because the Chamber engaged in many non-ideological activities of tangible benefit to its members, the Court found that even members who disagreed with its ideological positions would be reluctant to terminate their membership. For purposes of campaign finance regulation, it therefore resembled a business corporation, at least insofar as its financial resources did not necessarily reflect its political support.[17]

On the spectrum of incorporated entities, there is no doubt that the ACLU lies much closer to Massachusetts Citizens for Life than to the Michigan Chamber of Commerce, let alone General Motors. In contrast to the latter two corporations, the ACLU's financial resources directly reflect the ideological support of its members and contributors. In contrast to Massachusetts Citizens for Life, the ACLU has never advocated the election or defeat of a candidate for office. To quote the intervenors, "the ACLU can credibly claim that 'all of [its] advocacy is focused on issues.'" Intervenors' Response at I-75. Even more so than in *MCFL*, therefore, "the concerns underlying the regulation of corporate political activity are simply absent with regard to" the ACLU. 494 U.S. at 263. Yet, Title II of the BCRA treats all corporations alike, including the ACLU, based on precisely the sort of "broad prophylactic rule" that this Court rejected in *MCFL*.

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[17] The Court took an equally pragmatic approach in *FEC v. Beaumont,* 123 S.Ct. 2200. Rather than focus on the difference between nonprofit corporations and business corporations, which had been so pivotal in *MCFL,* the Court focused instead on the difference between contribution limits and expenditure limits. *See* p. 28, *supra.* In this case, of course, the ACLU is challenging an expenditure limit.

The district court was obviously constrained by *MCFL* and construed Title II to exclude qualified *MCFL* corporations. At the very least, this Court should affirm that holding. Outside the realm of express advocacy, however, even *MCFL* does not provide adequate protection for the constitutionally protected speech of groups like the ACLU. First, *MCFL* was intended to place a limit on the government's ability to regulate express advocacy and not to open the door for government regulation of issue advocacy. Second, the district court decision leaves it unclear, at best, whether the ACLU qualifies for an *MCFL* exemption.[18]

The lower Court's answer to this objection is that the ACLU can establish a PAC if it wants to speak. But, Congress cannot circumvent *Buckley* by requiring the ACLU to finance constitutionally protected speech through a segregated fund or PAC. While this requirement may be understandable in the context of contributions made by non-profit corporations to candidates, *see Beaumont,* it cannot be justified in the context of independent expenditures, *see* *MCFL,* much less those expenditures that do not purport to seek to influence elections. Political committees are regulated as such because their primary purpose is to influence federal elections. The ACLU and thousands of other organizations like it are not created for this purpose and should not be required to operate as if they were. If at some time it is determined that the ACLU has crossed the line and become an organization whose primary purpose is to influence federal elections, it would automatically be subject to the obligations and restrictions applicable to political committees. See *MCFL,* 479 U.S. at 262. That time has not come and there is no justification for extending FECA's coverage to the organization's speech.

The concept of a PAC is at odds with the ACLU's 83-year tradition of non-partisan advocacy of civil liberties; if imposed on the ACLU, it would convey a misleading image of political partisanship that does not accurately reflect the organization or how it operates. The government may not require that the ACLU recharacterize its mission or falsely represent it as a condition of exercising its First Amendment rights. *See, e.g. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

C. The Government Is Foreclosed From Limiting Radio And Television Access In An Effort To Level The Playing Field Or To Otherwise Influence The Debate Over The Qualifications Of Elected Officials

Under the BCRA, the same ad that can be printed in the newspaper cannot be read on the radio or broadcast on television without subjecting its sponsor to possible criminal prosecution. The only justification offered for this distinction is that Congress believed that radio and television are more powerful than print ads and can reach a wider audience. It is far from clear that this is always the case. For example, some newspapers reach a larger audience than some radio stations. In any event, the approach that Congress has taken is wrong on several grounds even if its factual assumptions are right.

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[18] Under prevailing law in the District of Columbia Circuit, *see FEC v. National Rifle Association,* 254 F.3d. 173 (D.C. Circuit 2001), and recently promulgated FEC regulations, *see* 11 CFR § 114.10, the ACLU does not qualify for an *MCFL* exemption because it has not returned the exceedingly modest amount of money that has been contributed to the organization in recent years from sources other than individuals. *See* n.12, *supra.*

First, when dealing with political speech, Congress cannot attempt to level the playing field by deciding that some speakers can no longer speak through the medium of their choice. *Buckley*, 424 U.S. at 48-49. Second, the exercise of constitutional rights cannot be "abridged on the plea that they may be exercised some other place." *Schad v. Mt. Ephraim*, 452 U.S. 61, 76-77 (1981). Third, Congress cannot discriminate among or between media in a way that "threatens to suppress the expression of particular ideas or viewpoints," *Leathers v. Medlock*, 499 U.S. 439, 447 (1990), or that operates "as effectively as a censor to check critical comment." *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983). All three principles reflect the First Amendment interest in neutrality, and all three principles are violated by the broadcast ban in Title II of the BCRA.

In *Buckley*, this Court squarely rejected the argument that expenditure limits could be justified by the government's interest in equalizing the relative ability of individuals and groups to influence the outcome of elections. The Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources," and "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Id. at 48-49 (internal citations omitted). *Mills v. Alabama,* 384 U.S. 214, and *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), are to the same effect in rejecting the idea that it is the government's role to introduce balance into the debate over the qualifications of our elected officials. Although the Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), upheld the Fairness Doctrine because of issues of scarcity unique to the broadcast industry, that justification has not been advanced in this case in support of the broadcast ban. In fact, just the opposite consideration is in play: Congress is seeking to constrict the flow of ideas, rather than enlarge it.

In addition, this Court's cases reject the idea that the BCRA's ban on broadcast ads passes constitutional muster because it allows for the ACLU to place the same ads in the print media. Rather, this Court has established that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (citing *Schneider v. State*, 308 U.S. 147, 163 (1938)). Contrary to the arguments made in this case, the government cannot foreclose a "distinct and traditionally important medium of expression," just because another one exists. *See City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994)(the availability of other forms of advertising did not justify restrictions on lawn signs); *see also Schneider*, 308 U.S. at 163; *Schad*, 452 U.S. at 76-77. Like streets, the broadcast media are "natural and proper places for the dissemination of information and opinion," *Schneider*, 308 U.S. at 163, and it is no answer under this Court's jurisprudence for Congress to claim that the BCRA is constitutional merely because the ACLU can express its ideas and opinions elsewhere.

Finally, in a separate line of cases that we believe is applicable here the Court has said that, when regulating the media, the government cannot discriminate against those speakers capable of reaching the largest audience for the purpose of suppressing speech. *See Grosjean v. American Press Co.*, 297 U.S. 233, 244-49 (1936) (invalidating a tax law that singled out large publications); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (striking down a tax scheme that penalized large publications); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (holding unconstitutional a tax exemption for certain magazines which resulted in a small number of large magazines paying the tax). We understand that these cases were brought by members of the media industry, but we believe that the overriding principle is the same when the effect of the line Congress has drawn is to "stifle the free exchange of ideas," *Leathers*, 499 U.S. at 453, by preventing speakers from having access to those media outlets. This principle resonates with the Court's long held belief that the First Amendment prevents "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens," *Grosjean*, 297 U.S. at 249-50.

The distinction between broadcast and print media that Congress approved in the BCRA suffers the same constitutional defect as the distinctions struck down in *Minneapolis Star* and *Arkansas Writer's Project*. Congress has intentionally drawn its line in order to censor the expressive activities of particular speakers, like the ACLU, by prohibiting them from reaching the largest audience possible. By reducing the size of the audience, the BCRA necessarily diminishes the force and impact of the speaker's message. Such an effort on the part of the government to regulate political discussion can only be seen as "operating as a censor to check critical comment," *Minneapolis Star*, 460 U.S. at 585, which impermissibly "stifl[es] the free exchange of ideas." *Leathers*, 499 U.S. at 453. The consequences of Congress's decision to target the broadcast

medium as a whole are thus indistinguishable from those arising from the government's decision to target particular newspapers in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers*, since each act embodies the dangers of censorship and threatens to distort the marketplace of ideas.

These First Amendment doctrines, whether viewed alone or together, highlight the unconstitutionality of the choice that Congress has made. The BCRA directly restrains the free flow of information by shutting down an entire medium. The uncontested evidence showing that the airwaves are the most effective and far-reaching medium of communication provides less, not more, justification for the restrictions. The fact that the ACLU can communicate its message in print ads cannot save the broadcast ban from its constitutional infirmity of stifling the free exchange of ideas.

II. THE DISCLOSURE AND REPORTING REQUIREMENTS OF SECTION 201 ARE UNCONSTITUTIONAL.

Under § 201, the ACLU has to report to the government in order to criticize the elected officials who run the government, assuming the ACLU is even entitled to run such broadcast ads under § 203. The reporting and disclosure requirements contained in Title II cross the line between constitutionally permissible disclosure rules and disclosure rules that place an unconstitutional burden on First Amendment speech. They thus go far beyond anything this Court upheld in *Buckley*.

In assessing the BCRA's disclosure rules, it is important to understand their practical import. As soon as the ACLU has disbursed more than $10,000 in a calendar year for any "electioneering communications," as defined by the BCRA, it must file a statement with the FEC. The statement must be filed within 24 hours and making further expenditures totaling more than $10,000 triggers additional reporting obligations. The mandatory disclosure requirements are simultaneously detailed and vague.[19] Of greatest concern, they require the ACLU to disclose the name and address of anyone who contributed more than $1,000 to the organization over a period that could be as long as 22 months.[20]

Both before and after *Buckley,* this Court has powerfully reaffirmed the importance of preserving the right to anonymous political speech and association, especially for those advocating unpopular causes. *NAACP v. Alabama,* 357 U.S. 449 (1958); *Talley v. California,* 362 U.S. 60 (1960), *McIntyre v. Ohio Elections Commission, supra.* In *Buckley* itself, the Court observed that compelled disclosure "can seriously infringe on privacy of association and belief

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[19] The statement, filed under penalty of perjury, must contain the following information. First, it must state "(A) the identification of the person making the disbursement, of any person sharing or exercising control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement." The ACLU is governed by an 83 member Board of Directors. Do they all have to be identified every time the ACLU runs an ad criticizing the President or a member of Congress? The disclosure statement must also contain "(C) the amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made." Thus, the ACLU would be required to identify all vendors and others involved in the preparation and presentation of each advertisement. In addition, the statement must identify "(D) the elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified." If the ACLU criticizes President Bush, a declared federal election candidate, does that "pertain" to any of the presidential primaries, the general election, either, or both?

[20] The ACLU must identify all of its $1,000 contributors unless it creates a segregated account to pay for "electioneering communications," in which case only $1,000 contributors to that fund need to be disclosed. In either event, the $1,000 threshold is an aggregate amount that is measured from the first day of the preceding calendar year to the disclosure date. Thus, an ad criticizing one of the presidential candidates in the week before the November 2004 election would have to consider all individual contributions made after January 1, 2003.

guaranteed by the First Amendment," 424 U.S. at 64. This Court was therefore careful in *Buckley* to weigh the necessity of any disclosure rules against the state's overriding interest in preventing corruption or the appearance of corruption in the electoral process. Using that scale, the *Buckley* Court upheld disclosure for political contributions, and for the expenditures of political candidates and committees. At the same time, the Court ruled that other political speech could only be subject to the government's disclosure rules if it amounted to express advocacy.

The government argued in *Buckley,* as it argues here, that "total disclosure" of all political expenditures is necessary "to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Id.* at 76. The Court was not unsympathetic to that concern. Nonetheless, applying strict scrutiny, the Court was unwilling to accept the free speech costs of imposing a disclosure requirement on speech that did not meet the express advocacy test. Under those circumstances, the Court wrote, "the relation of the information sought to the purposes of the Act may be too remote." *Id.* at 79-80.

The BCRA abandons this careful approach by disregarding the express advocacy rule and ignoring the narrow tailoring that *Buckley* requires. Insofar as the broadcast ban violates the First Amendment because it directly restricts speech that does not constitute express advocacy, the burdensome reporting and disclosure provisions that are triggered by the same unconstitutional definition of "electioneering communications" cannot stand. *Buckley,* 424 U.S. at 79-80. Having upheld a revised definition of "electioneering communications," the district court did not consider whether the disclosure provisions would survive if the direct ban were struck down.. Nevertheless, *Buckley* forecloses that possibility for the same reason that BCRA's direct restraint on speech is unconstitutional.

"When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest," even in the campaign finance context. *MCFL*, 479 U.S. at 256. The court below pointed to multi-million dollar election season advertising campaigns by certain organizations and individuals as justifying the BCRA's broad disclosure rules. But that concern fails as justification for a statute that can be triggered by running a few radio ads that mention federal elected officials during the course of an entire election calendar year, and that applies without regard for either the kinds of organizations involved or the need for public information about them.

Based on *Buckley* and *MCFL,* Congress could have drawn a more careful and narrow line. If the concern was the existence of groups or individuals whose "major purpose" is the funding and sponsoring of broadcast advertisements that might influence public opinion about specific federal candidates during the election season, the remedy could have been to require reporting and disclosure only of such groups. *See MCFL,* 479 U.S. at 262. Under such a targeted rule, the ACLU and countless other issue organizations across the political spectrum, for whom broadcasting advertising is collateral or incidental to their main advocacy activities, would have been spared the BCRA's intrusive regulatory regime. Congress chose not to do so.

Similarly, Congress could have focused its disclosure rules on business or capital corporations, which animated the first federal regulation in this area almost 100 years ago. Yet, even the effort to exempt nonprofit organizations from the broadcast ban was effectively repealed when the Snowe-Jeffords Amendment was supplanted by the Wellstone Amendment's insistence on universal coverage. By failing to act with the precision that the rights at stake require, Congress impermissibly imposed a "crudely crafted burden" on First Amendment rights. *United States v. National Treasury Employees Union*, 513 U.S. 454, 477 (1995).

Finally, even in the context of express advocacy, the *Buckley* Court recognized that there is a particularly grave risk of chilling political speech when the government insists on publicly disclosing an individual's association with controversial political organizations. 424 U.S. at 74. On that basis, the Court ruled in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), that campaign finance disclosure laws cannot be applied to controversial political parties, even those that engage in core campaign and electoral activities. This necessary safeguard is missing from Title II, as well.

Though the Court below discounted the record of harm from disclosure presented by the ACLU and other groups as not showing a sufficiently intense pattern of harassment and threats to warrant relief from the disclosure rules, this primarily facial challenge to the BCRA was not the proper occasion for a full-blown trial on harassment, as the court below recognized. But the record clearly shows that the ACLU and other groups have a firm reason to resist disclosure and protect the identity of their members and supporters.[21] Congress was oblivious to that interest in enacting § 201. Not only did it require disclosure of relatively modest expenditures, especially considering the broad reach of the statute, but it failed to provide for any "SWP exemption," or even any administrative procedure for raising such claims.

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[21] The ACLU submitted an uncontroverted affidavit by its Executive Director, Anthony Romero, stating that many of its members and contributors seek an explicit assurance that their anonymity will be preserved, and the ACLU has fought strenuously to do so throughout its history. Romero Declaration, J.A. 720. The district court criticized this showing as inadequate because it did not specify why the ACLU's members and contributors would want to preserve their anonymity. With due respect, we respectfully submit that the ACLU's defense of unpopular causes is well known and does not require extensive elaboration. Moreover, the connection between the ACLU's advocacy on controversial issues and the desire to preserve the privacy of its members and contributors has been recognized by other courts in

III. SECTIONS 202 AND 214, WHICH SIGNIFICANTLY EXPAND THE FECA'S RESTRICTIONS ON "COORDINATION," VIOLATE THE FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH, ASSOCIATION, AND PETITION.

Sections 202 and 214 of Title II significantly expand the rules prohibiting "coordination" of campaign activity with candidates. First, § 202 extends the coordination rules beyond express advocacy to "electioneering communications." Second, § 214 eliminates any requirement of "agreement or formal collaboration." In tandem, these provisions create a significant chilling effect on the ACLU's traditional expressive activities. The consequences are not insignificant because as a corporation the organization is governed by a separate provision of FECA that prohibits corporate contributions. 2 U.S.C. 441 (b).[22]

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analogous circumstances. *See, e.g., New York Civil Liberties Union v. Acito*, 459 F.Supp. 75 (S.D.N.Y. 1978); *ACLU v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1975).

[22] The district court upheld the coordination provisions of § 202 but ruled that plaintiffs' challenge to the coordination provisions of § 214 was largely nonjusticiable because the final implementation of § 214 was dependent on the promulgation of new coordination rules by the FEC. While that is true, it is also true that § 214 establishes a specific set of guidelines for the FEC to follow in implementing its new rules. Other parties, notably the Chamber of Commerce and the AFL-CIO, are addressing the coordination and related justiciability at greater length. This discussion has been kept brief to avoid repetition.

Rather than treat coordination as the absence of independence and the functional equivalent of candidate control or instigation, see *Buckley v. Valeo*, 424 U.S. at 47 & n.53, the BCRA broadly deems any "substantial discussion" about public communication between a candidate and an issue group as a basis for a finding of "coordination." Such "coordination" then taints later commentary by the issue group on the subjects discussed by treating it as a prohibited corporate contribution. The repeal of current FEC rules requiring agreement or formal collaboration directed by Title II casts the net further by eliminating a common sense understanding of what is required to satisfy the definition of coordination in this context.

The record shows how these new rules can chill and disrupt legislative and policy discussions by ACLU officials with Members of the Executive or Legislative branches. *See* Declaration of Laura Murphy, J.A. 609-611. Read literally, § 214 can effectively impose a year round prohibition on all communications made by a corporation like the ACLU where there has been "substantial discussion" about the communication with a candidate. This feature of the BCRA acts as a continuing prior restraint which bars the ACLU from engaging in core First Amendment speech for the lawmaker's entire term of office.

More generally, these coordination rules will impair the ability of the representatives of unions, corporations, non-profits and even citizen groups to interact in important ways with elected representatives for fear that the taint of coordination will silence the voices of those groups in the future. The First Amendment is designed to encourage and foster such face-to-face discussions of government and politics, *see Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), not to drive a wedge between the people and their elected representatives.

CONCLUSION

For the reasons above, the challenged provision of Title II of the BCRA should be declared unconstitutional.

Respectfully submitted,

Joel M. Gora
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201

JULY 8, 2003

Mark J. Lopez
Counsel of Record
Steven R. Shapiro
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION, INC.
125 Broad Street
New York, NY 10004
(212) 549-2500

Appendix A

Copy of Hastert radio ad paid for by the ACLU. The ad was broadcast on multiple Chicago and Aurora, Illinois radio stations the week of 5/15 – 3/17/02.

ACLU- Radio

60 Seconds
R201-x13 – ENDA Delays

Sound Effect: Long Tympani/ Drum Roll

Male Announcer – Master of Ceremonies (during sound effect): *And now…*

Sound Effect: Drum Roll Ends with Cymbal Crash
Sound Effect: 2 Seconds of Silence

Male Announcer: ……We're Waiting

Sound Effect: Long Tympani/ Drum Roll Starts Again
Sound Effect: Drum Roll Ends with Cymbal Crash
Sound Effect: 2 Seconds of Silence

Male Announcer: *Waiting for our Congressman,*(Sound Effect Music Up – Pop Goes the Weasal or Circus Music) *Dennis Hastert, to protect everyone from discrimination on the job.*

As speaker of the House, Representative Hastert has the power to stop the delays and bring the Employment Non-Discrimination Act – ENDA – up for a vote in Congress. It's about fairness. It's time to ensure equal rights for all who work, ***including lesbians and gay men,*** *and make sure that it's the quality of our work that counts, and nothing else.* (Music Out.)

Male Announcer: *So Congressman Hastert*

Sound Effect: Tympani/Drum Roll

Male Announcer – Master of Ceremonies (during sound effect): *What will it be?*

Sound Effect: Drum roll ends with Cymbal Crash

Male Announcer: *Protecting workers from discrimination, or more delays?*

Female Announcer: Take action now. Send Speaker Hastert a letter urging him to support fairness and bring ENDA to the floor by going to www.aclu.org/enda.

Male Announcer: Paid for by the American Civil Liberties Union.

Appendix B

106th Congress Congressional action during the 60 days prior to November general election on bills of interest to the ACLU.

106th Congress
Congressional Action
During the 60 Days Prior to November General Election
On Bills of Interest to the ACLU

Capital Punishment:

- "Sense of Congress" regarding the obligation of grantee states to ensure access to post-conviction DNA testing and competent counsel in capital cases (Amdt. 4345 to S. 3045): Introduced in the Senate on 10/26/2000.

Church State:

- Bill to protect religious groups in land-use disputes (S 2869) signed by the President on 9/22/2000; P.L. 106-274.
- Allows faith-based organizations to receive federal support for programs to help low income fathers get more involved in their families' lives (HR 4678): Passed House 9/7/2000.

Criminal Justice:

- Provide grants to states to process backing of DNA evidence (HR 4640): Passed House 10/2/2000.
- Pressure states into requiring HIV testing of rape suspects who have been formally charged, by threatening to withhold federal crime-fighting block grant money (HR 3088): Passed House 10/2/2000.
- Aimee's Law: cuts federal crime fighting money to states if convicted murderers & rapists did not serve stiff sentences and went on to commit offense in another state (part of HR 3244): Passed Senate 10/11/2000.

Gay and Lesbian Issues:

- Repeal federal charter of Boy Scouts, in reaction to Supreme Court decision that allows Boy Scouts to discriminate against homosexuals (HR 4892): Defeated in House 9/13/2000.
- Prohibit using local federal funds for needle exchange (amendment to HR 4942): Passed House 9/27/2000.
- Prohibit the use of Federal funds for the conduct or support of programs of HIV testing that fail to make every reasonable effort to inform the individuals of the results of the testing (HR 5615): Introduced in the House on 10/11/2000.

Hate Crimes:

- Expansion of federal hate crimes law (amendment to S 2549): House voted to instruct conferees to accept amendment 9/13/2000; conferees dropped language from bill 10/5/2000.

Immigration:

- Allow some immigrants who committed minor crimes long ago to apply to stay in US and not be deported; part of "Fix '96" (HR 5062): Passed House 9/19/2000.

Internet Filtering:

- Force schools and libraries to use technology protection measures to block access by children to web pornography (amendment to HR 4577): Conferees added this provision to the bill 10/23/2000.

Media & Violence:

- Require violent TV programming be limited to hours when children are not likely to be a substantial part of audience (S 876): Approved by Senate Commerce committee 9/20/2000.

Physician-Assisted Suicide:

- Overturns Oregon's law that permits physician-assisted suicide (amendment to HR 2614): Passed House 10/26/2000; Filibustered in Senate 10/27/2000.

Privacy:

- Restrictions on law enforcement use of electronic surveillance (HR 5018): Approved by House Judiciary subcommittee 9/14/2000; Mark-up by House Judiciary committee 9/20/2000.
- Creation of commission to study issue of privacy on the internet (HR 4049): Defeated in House 10/2/2000: failed to get 2/3's majority needed for passage under suspension of rules.
- Prohibit the appearance of Social Security account numbers on or through unopened mailings of checks (HR 3218): Passed House 10/18/2000; Passed Senate 10/25/2000.
- Enhance privacy protections for individuals, and to prevent fraudulent misuse of Social Security account numbers (HR 4857): House full committee mark up on 9/28/2000.

Reproductive Rights:

- Funding prohibition in DC Approp. (HR 4942; HR 5633): Passed both House and Senate on 11/14/2000.
- "Conscience clause" to employee-sponsored health plans coverage of contraceptives (amendment to HR 4942): Passed House 9/14/2000.
- Abortion restrictions on international family planning aid (HR 4811): Conference Committee appointed

10/19/2000; House debates conference report 10/25/2000.

- Define "human being;" seeks to protect humans born alive at any stage of pregnancy (HR 4292): Passed House 9/26/2000.
- Prevent abortion protestors convicted of violent crimes from seeking bankruptcy protection to avoid paying hefty legal penalties (amendment to S 3046): Senate voted to proceed with debate on 10/19/2000.
- Prohibit use of funds to distribute postcoital emergency contraception ("morning after pill" on elementary or secondary school premises (HR 4577, Labor/HHS Approp.): Rep. Coburn announces intention to offer motion to instruct House conferees on this amendment on 9/18/2000.

Secret Evidence:

- Makes it harder for INS to use secret evidence to deport immigrants or to deny them asylum (HR 2121): Approved by House Judiciary Committee 9/26/2000.

Terrorism:

- Provide clearer coverage over threats against former Presidents and members of their families (HR 3048): House disagreed with certain Senate amendments on 10/25/2000.

Trafficking and Victims:

- Combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions (HR 3244): Passed Senate 10/11/2000.

Violence Against Women:

- Reauthorization of VAWA ((HR 1248): Passed House 9/26/2000; Passed Senate as part of HR 3244 10/11/2000.

Voting Reform:

- Proposing a constitutional amendment to abolish the electoral college and to provide for the direct popular election (SJRes 56): Introduced in the Senate on 11/01/2000. Proposing a constitutional amendment to abolish the electoral college (HJRes 113): Introduced in the House on 10/12/2000.

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(52)

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Supreme Court, U.S.
FILED
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Nos. 02-1727, 02-1733, 02-1753

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN NATIONAL COMMITTEE, ET AL.,

Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE POLITICAL PARTIES

LANCE H. OLSON
DEBORAH B. CAPLAN
OLSON HAGEL & FISHBURN
555 Capitol Mall
Suite 1425
Sacramento, CA 95814
(916) 442-2952

BOBBY R. BURCHFIELD
Counsel of Record
THOMAS O. BARNETT
ROBERT K. KELNER
RICHARD W. SMITH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

(additional counsel on inside cover)

117pp

JOSEPH E. SANDLER
NEIL P. REIFF
JOHN HARDIN YOUNG
SANDLER, REIFF & YOUNG
50 E STREET, S.E.
SUITE 300
WASHINGTON, D.C. 20003
(202) 479-1111
Counsel for California Democratic Party Appellants

CHARLES H. BELL, JR.
BELL, MCANDREWS, HILTACHK & DAVIDIAN LLP
455 Capitol Mall
Suite 801
Sacramento, CA 95814
(916) 442-7757

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
Counsel for California Republican Party Appellants

THOMAS J. JOSEFIAK
CHARLES R. SPIES
REPUBLICAN NATIONAL COMMITTEE
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8500

BENJAMIN L. GINSBERG
ERIC A. KUWANA
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

MICHAEL A. CARVIN
JONES DAY REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for RNC Appellants

JAMES BOPP, JR.
RICHARD E. COLESON
THOMAS A. MARZEN
JAMES MADISON CENTER FOR FREE SPEECH
BOPP COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434
Counsel for Libertarian National Committee

QUESTIONS PRESENTED

1. Do the associational and financial restrictions imposed upon national, state, and local political parties by Title I of the Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155, 116 Stat. 81 ("BCRA"):

(a) infringe the rights of speech and association guaranteed by the First Amendment;

(b) exceed the powers granted Congress by Article I, Section 4 of the U.S. Constitution, violate principles of Federalism, and offend the Tenth Amendment; and

(c) abrogate the right of political party committees to equal protection of the law as guaranteed by the Due Process Clause of the Fifth Amendment.

2. Do the limitations imposed by Section 213 of BCRA on independent expenditures by a political party committee infringe the First Amendment?

3. Does the requirement in Section 214 of BCRA that the Federal Election Commission promulgate a definition of "coordination" that does not require proof of an "agreement" violate the First Amendment?

PARTIES TO THE PROCEEDING

Appellants and Cross-Appellees joining this brief were plaintiffs below in three of the consolidated cases: *Republican National Committee v. FEC*, No. 02-874; *California Democratic Party v. FEC*, No. 02-875; and *McConnell v. FEC*, No. 02-582. Appellants in No. 02-1727 (the "RNC Appellants") are the Republican National Committee ("RNC"); Robert Michael Duncan, former Treasurer, current General Counsel, and Member of the RNC; the Republican Party of Colorado; the Republican Party of New Mexico; the Republican Party of Ohio; and the Dallas County (Iowa) Republican County Central Committee. Appellants in No. 02-1753 (the "California Party Appellants") are the California Democratic Party ("CDP"); Art Torres, Chairman of the CDP; Yolo County Democratic Central Committee; California Republican Party ("CRP"); Shawn Steel, Chairman of the CRP; Timothy Morgan; Barbara Alby; Santa Cruz County Republican Central Committee; and Douglas Boyd, Jr. Appellant Libertarian National Committee, Inc. ("LNC") is one of the several appellants in No. 02-1733 and was a plaintiff below in *McConnell v. FEC*, No. 02-582. Collectively, the RNC Appellants, the California Party Appellants, and the LNC are referred to herein as the "Political Party Appellants."

The following were also plaintiffs in the actions indicated, all of which were consolidated below:[1]

McConnell v. FEC, No. 02-582: United States Senator Mitch McConnell, United States Representative Mike Pence and former Representative Bob Barr, Alabama Attorney General Bill Pryor, Alabama Republican Executive Committee (withdrawn), Libertarian Party of Illinois, Inc. (withdrawn), DuPage Political Action Council (withdrawn), Jefferson County Republican Executive Committee (withdrawn), American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, Center for Individual Freedom, Christian Coalition of America, Inc. (withdrawn), Club for Growth, Indiana Family Institute, National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, National Right to Work Committee, 60-Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. English d/b/a/ ProENGLISH, Martin Connors (withdrawn), Thomas McInerney, Barrett Austin O'Brock, Trevor Southerland.

National Rifle Ass'n v. FEC, No. 02-581: National Rifle Association of America ("NRA"), NRA Political Victory Fund.

Echols v. FEC, No. 02-633: Emily Echols, Hannah McDow, Jessica Mitchell, Daniel Solid, Zachary White, Reverend Patrick Mahoney.

Chamber of Commerce v. FEC, No. 02-751: Chamber of Commerce of the United States, U.S. Chamber Political Action Committee, National Association of Manufacturers, National Association of Wholesaler-Distributors (withdrawn).

National Ass'n of Broadcasters v. FEC, No. 02-753: National Association of Broadcasters.

AFL-CIO v. FEC, No. 02-754: AFL-CIO, AFL-CIO Committee on Political Education and Political Contributions.

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[1] As indicated, several plaintiffs withdrew before the three-judge court issued its decision.

Paul v. FEC, No. 02-781: United States Representative Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, Realcampaignreform.org, Citizens United, Citizens United Political Victory Fund, Michael Cloud, Clara Howell.

Adams v. FEC, No. 02-877: Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Peter Kostmayer, Nancy Russell, Kate Seely-Kirk, Rose Taylor, Stephanie Wilson, California Public Interest Research Group ("PIRG"), Massachusetts PIRG, New Jersey PIRG, United States PIRG, The Fannie Lou Hamer Project, Association of Community Organizers for Reform Now.

Thompson v. FEC, No. 02-881: United States Representatives Bennie Thompson and Earl Hilliard.

Appellee Federal Election Commission ("FEC") was a defendant below, together with the Federal Communications Commission; Attorney General of the United States John Ashcroft; the United States of America; and FEC Commissioners David Mason, Karl Sandstrom (since replaced by Ellen Weintraub), Danny McDonald, Bradley Smith, Scott Thomas, and Darryl Wold (since replaced by Michael Toner). Appellees United States Department of Justice ("DOJ"), United States Senators John McCain, Russell Feingold, Olympia Snowe, and James Jeffords, and United States Representatives Martin Meehan and Christopher Shays were defendant-intervenors below.

STATEMENT PURSUANT TO RULE 29.6

None of the appellants has a parent corporation, and no publicly held company owns ten percent or more of the stock of any of the appellants.

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INTRODUCTION

BCRA profoundly impairs the ability of political parties to participate in the electoral process at the local, state, and national level by, to cite just a few examples:

- Making it a felony for the Chairman of the RNC (or the Democratic National Committee) to send a fundraising letter on behalf of his party's Mississippi gubernatorial candidate in this November's off-year election – even though there are no federal candidates on the ballot this year, any donation would go to the candidate (not the party), and the donation is fully regulated by state (not federal) law;

- Prohibiting the California parties from donating even federally-regulated money to political action committees formed to support or oppose the current effort to recall California's Governor;

- Subjecting to pervasive federal regulation voter registration and get-out-the-vote ("GOTV") efforts by state and local political parties – even when those efforts name only state or local candidates or ballot measures – just because those efforts occur during a federal election year;

- Criminalizing the participation of national party personnel in Republican Victory Programs or Democratic Coordinated Campaigns – through which the national, state, and local parties have historically worked together to design, fund, and implement statewide voter mobilization programs – even during years when no federal elections are held.

Though touted as a statute that would "put the national parties entirely out of the soft money business," 148 Cong. Rec. H408 (2002) (stmt. of Rep. Shays), BCRA does more – much more – than limit the types of money local, state, and national parties may receive. Its numerous collateral restrictions fundamentally alter the way political parties function. The district court held, and the extensive record below proves, that the pervasive restrictions imposed by Title I of BCRA on political party speech and association violate the First Amendment. The court found *no* evidence of *quid pro quo* corruption resulting from donations of nonfederal funds to political parties, and insufficient evidence to prove that most of the activities regulated or prohibited by BCRA posed any threat of corruption to federal officeholders. Thus, BCRA's restrictions are not necessary to alleviate any material risk of corruption or even the "appearance of corruption" of federal candidates and officeholders, and they are neither "narrowly tailored" nor even "closely drawn." Indeed, the restrictions in BCRA's centerpiece national party "soft money ban" are categorical, with no exceptions, reflecting no drawing or tailoring at all.

Although the district court was not required to decide the issue, Congress also acted beyond the scope of its enumerated powers in Article I, Section 4, and ignored principles of federalism, by overriding the authority of the sovereign states to regulate their own elections.

Finally, although once more the district court did not decide it, Title I imposes far more draconian restrictions on political parties than on special interest groups, depriving parties of equal protection guaranteed by the First and the Fifth Amendments.

Campaign finance restrictions represent a "narrow exception" to treasured constitutional guarantees, not – as reform advocates would have it – the highest good. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-97 (1981). Although the Government seeks to justify BCRA as a broad new "prophylactic" regime innocently intended to plug loopholes, here "[w]e are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *FEC v. National Conservative Pol. Action Comm.*, 470 U.S. 480, 501 (1985) ("*NCPAC*").

OPINIONS BELOW

The opinions of the district court are reported at 251 F.Supp.2d 176 (D.D.C. 2003), and are reprinted in the Joint Supplemental Appendix to Jurisdictional Statements.

JURISDICTION

The decision below was entered on May 2, 2003, by a three-judge court convened pursuant to 28 U.S.C. § 2284 and Section 403(a)(1) of BCRA.[2] The RNC Appellants filed their Notice of Appeal on May 7, and their Jurisdictional Statement on May 27. The California Party Appellants filed their Notice of Appeal on May 12, and their Jurisdictional Statement on May 30. The LNC filed its Notice of Appeal on May 8, and its Jurisdictional Statement on May 28. The jurisdiction of this Court rests on 28 U.S.C. § 1253 and Section 403(a)(3) of BCRA. This Court noted probable jurisdiction on June 5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

BCRA is reprinted, along with pertinent parts of Article I, Section 4 of the United States Constitution, and the

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[2] BCRA adds new sections to the Federal Election Campaign Act ("FECA"), 2 U.S.C. §431 *et seq.* This brief refers either to sections of BCRA (*e.g.*, "Section 101(a)") or to the new FECA provisions (*e.g.*, "new Section 323(a)").

First, Fifth, and Tenth Amendments, in the RNC Appellants' Jurisdictional Statement at pp. 1-2 and App. 3a-76a.

STATEMENT OF THE CASE

A. The Statute. The "centerpiece" of BCRA is Section 101(a), which creates new Section 323 of FECA. 147 Cong. Rec. S2444 (March 19, 2001) (stmt. of Sen. Feingold). New Section **323(a)** categorically prohibits national party committees and their agents from "solicit[ing]," "receiv[ing]," "transfer[ring]," "direct[ing]," or "spend[ing]" any funds that are not subject to FECA's restrictions. This is the core of the ban on so-called "soft money," or more accurately "nonfederal money."[3] *There are no exceptions to new Section 323(a)'s blanket prohibition.*

New Section **323(b)** pertains to state and local political party committees. It subjects to full federal regulation all party building programs such as voter registration and GOTV that previously were "allocated" between federal and nonfederal accounts according to the percentage of federal and nonfederal candidates on the ballot.

In contrast to new Section 323(a)'s flat ban on national party involvement with nonfederal money, new Section 323(b) creates a maze of regulatory complexity. In general, new Section **323(b)(1)** prohibits state and local political parties from spending any state-regulated money for what the statute calls "Federal election activity." Federal election activity, in turn, is broadly defined by the Act to include: (i) all voter registration conducted within 120 days of a federal election, whether or not any registration activity refers to a federal candidate; (ii) voter identification, GOTV, and generic party-promotion activity conducted "in connection with" any election in which a federal candidate appears on the ballot, again whether or not the activity mentions a federal candidate; (iii) any "public communication" that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" a candidate for that office; and (iv) the full salary and benefits of any party employee who spends more than 25 percent of his or her time in connection with a federal election. *See* new §301(20)(A).

New Section **323(b)(2)** – commonly referred to as the "Levin Amendment" – carves out an exception to new Section 323(b)(1)'s general rule. New Section 323(b)(2) creates a new category of federally-regulated nonfederal money called "Levin money." State and local parties may use an FEC-specified percentage of Levin money mixed with federal money for voter registration, voter identification, and GOTV activities, *provided that* certain specified conditions are met: (i) the permitted activities may not refer to a clearly identified federal candidate; (ii) those activities may not involve any broadcast communication except those that refer solely to clearly identified state or local candidates; (iii) no single donor may donate more than $10,000 to a state or local party annually for those activities; and (iv) all money (federal and Levin money alike) spent on such activities must be "*homegrown*" – *i.e.*, raised by the state or local party that spends it – and may not be transferred from or even raised in conjunction with any national party committee, federal officeholder or candidate, or other state or local party. *See* new §§323(b)(2)(B), 323(b)(2)(C).

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[3] "Soft money" is an imprecise term, but in general is used to refer to funds that are regulated by *state* campaign finance statutes. "Hard money," by contrast, is regulated by FECA. Because, as the FEC itself has recognized, the "soft money" label is inherently misleading, this brief follows the FEC's and district court's lead by referring to "federal" and "nonfederal" (or, alternatively, "state-regulated") money. *See* 67 Fed. Reg. 49064, 49064-65 (July 29, 2002); *Per Curiam* 31sa n.9 (Kollar-Kotelly, Leon, JJ.); Henderson 182-183sa n.30.

New Section **323(c)** requires national, state, and local parties to use only federally-regulated money to raise any money that will be used on Federal election activities.

New Section **323(d)** prohibits any political party committee – national, state, or local – or its agents from "solicit[ing]" funds for or "mak[ing] or direct[ing]" any donations of federal or nonfederal money to either: (i) any tax-exempt Internal Revenue Code Section 501(c) organization that spends any money "in connection with an election for Federal office"; or (ii) any IRC Section 527 organization other than a party committee or a candidate committee.

New Section **323(e)** generally prohibits federal officeholders and candidates from soliciting, receiving, directing, or spending any nonfederal money. There are, however, several exceptions. These exceptions are quite telling. *First*, a federal officeholder or candidate (but *not* an agent of a national party committee) may solicit nonfederal money for state and local candidates from sources and in amounts that would be allowed by Federal law. *See* new §323(e)(1)(B). *Second*, a federal officeholder or candidate (but *not* an agent of a national party committee) may attend or speak at a fundraising event for a state or local political party. *See* new §323(e)(3). *Third*, a federal officeholder or candidate (but, again, *not* an agent of a national party committee) may solicit nonfederal funds on behalf of any tax-exempt Section 501 organization that spends money in connection with federal elections in either of two instances: (i) he or she may solicit *unlimited funds from any source* for a Section 501 organization (such as the NAACP or the National Rifle Association) whose "principal purpose" is *not* voter registration, voter identification, or GOTV activity, so long as the solicitation does not specify how the funds will be spent; and (ii) he or she may solicit up to $20,000 per individual per year *specifically for* voter registration, voter identification, or GOTV activity, *or* for an organization whose "principal purpose" *is* to conduct any or all of those activities. *See* new §323(e)(4).

Finally, new Section **323(f)** generally prohibits state officeholders or candidates from spending nonfederal money on any public communication, even in the course of a state campaign, that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" that candidate.

B. Proceedings Below. The day BCRA was signed, multiple plaintiffs filed actions in the U.S. District Court for the District of Columbia seeking declaratory and injunctive relief. A three-judge court consolidated the pending cases and determined that it would conduct a "paper trial," foregoing live testimony. It established an expedited schedule for discovery, submission of written testimony, out-of-court deposition-style cross-examination of witnesses, and expedited briefing. After two days of oral argument on December 5-6, the court issued its decision on May 2, 2003.

C. The Factual Record. From the extensive evidentiary record below, the following facts were found by at least two judges (unless otherwise indicated) and thus constitute the district court's findings:[4]

The Importance of Political Parties in American Democracy. As this Court has recently emphasized, "[t]he formation of national political parties was almost concurrent with the formation of the Republic itself." *California*

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[4] Findings of fact common to two or more judges comprise findings of the district court. *See Wright v. Rockefeller*, 376 U.S. 52, 56 (1964) (relying on findings of fact of majority of three-judge court, even though the three judges issued separate opinions). Such findings are entitled to deference by this Court unless deemed clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

Democratic Party v. Jones, 530 U.S. 567, 574 (2000). Parties play an "important and legitimate role . . . in American elections." *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("*Colorado I*"). "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together [in parties] in promoting among the electorate candidates who espouse their political views." *California Democratic Party*, 530 U.S. at 574.

As the district court found, based on the testimony of the RNC's senior political science expert, Dr. Sidney Milkis (James Hart Professor of Politics at the University of Virginia), its expert historian, Dr. Morton Keller (Emeritus Professor of American History at Brandeis University), and the Government's and Intervenors' own experts, political parties have played four vital roles in maintaining a stable constitutional order. *First*, "parties have coordinated and reconciled various national, state, and local entities within our federal system of government." Leon 1195sa; *see also* Henderson 292-93sa.

Second, "parties [have] encourag[ed] a 'democratic nationalism' by nominating and electing candidates and by engaging in discussions about public policy issues of national importance." Henderson 293sa; *see also* Leon 1195sa.

Third, "parties act as critical agents in developing *consensus* in the United States." Henderson 294sa (emphasis added); *see also* Leon 1196sa. Political parties are "the main coalition building institution[s] . . . by a good measure," Henderson 294sa (*quoting* defense expert Green CX 84); Leon 1196sa (same). "No other group could come close to political parties" in moderating extreme views. Henderson 294sa; *see also* Leon 1196sa (same).

Finally, and relatedly, political scientists "credit parties with . . . diluting the influence of organized interests." Henderson 293sa; *see also* Leon 1195sa. "[P]arties have been the most important institutions to cultivate a sense of community, of collective responsibility in a political culture principally dedicated to individualism, privacy, and rights." Henderson 294sa; *see also* Leon 1196sa.

The Use of Federal and Nonfederal Money by Political Parties. Political parties use money regulated by FECA ("federal money") to make contributions to federal candidates and for campaign expenditures that expressly advocate a particular federal candidate's election or defeat. *See* Henderson 295sa; Leon 1198sa. Before BCRA, parties used state-regulated ("nonfederal") money, *inter alia*, to make contributions to, and expenditures on behalf of, state and local candidates and ballot measure committees. *See* Henderson 297-99sa; Leon 1212-15sa.

Shortly after enactment of FECA, the FEC recognized that our federal system of government required that parties be free to raise and spend nonfederal money. *See* FEC Advisory Op. No. 1978-10 ("The costs allocable to non-Federal elections may be paid out of Party funds raised and expended pursuant to applicable [state] law."). Indeed, the FEC acknowledged that nonfederal, or "soft," money is a byproduct of our federal system:

> The origins of "soft money" lie in the United States' federal system of government. The Constitution grants each state the right to regulate certain activities within that state. In the area of campaign finance, each state may establish its own rules for financing the nonfederal elections held within its borders. As a result, committees that support both federal and nonfederal candidates frequently must adhere to two different sets of campaign finance rules – federal and state.

J.A. 1820-21, FEC, Twenty Year Report, Ch. 3, p. 4 (April 1995).

Certain party activities are neither exclusively federal nor exclusively nonfederal. In an effort to reconcile the competing federal and state regulatory interests, the FEC adopted "allocation regulations" to govern such "mixed" federal-state activities as full-ticket voter mobilization, communications with party supporters, certain advertising, and administrative overhead. *See* 11 C.F.R. § 106.5 (2002); Henderson 299sa; Leon 1218-19sa. Accordingly, for instance, FEC rules required the RNC and the DNC to fund these mixed activities with at least 65% federal money during presidential election years and 60% during other years. *See* Henderson 299-300sa; Leon 1218-19sa. Each national party maintained numerous nonfederal accounts tailored to these varying state laws. Because many states allow contributions from corporations and unions, and impose varying dollar limits (or no limits at all), the national party committees could accept unlimited individual, corporate, and union donations to certain of their nonfederal accounts. Before BCRA, national parties disclosed to the FEC all receipts and disbursements of nonfederal money. *See* 11 C.F.R. § 104.8(e) (2002). New Section 323(a) now requires national political parties to fund *all* of their local, state, federal, and mixed activities with 100% federally-regulated money. There are no exceptions.

Also before BCRA, state parties were required to allocate federal and nonfederal money to mixed activities, but did so based in part on the ratio of federal to state and local candidates on the ballot. *See* Henderson 309-10sa; Leon 1226sa. Because a typical ballot has many more state and local than federal candidates, state party allocation ratios frequently required a lower percentage of federal money than national party ratios. *See* Henderson 311sa; Leon 1227-28sa. State party activities relating to state and local candidates and initiatives were subject to neither the federal allocation regulations nor the federal reporting requirements. Title I of BCRA now subjects all of these state party "mixed" activities – as well as a substantial amount of activity directed toward state and local elections – to the federal regime.

The RNC and Its Activities. The RNC is governed by its members, who include the state party chairman, one committeeman, and one committeewoman drawn from each of the 50 states, D.C., and the territories. *See* Henderson 223-24sa; J.A. 1878-1926, RNC Ex. 1 ("The Rules of the Republican Party"); J.A. 291-92, Josefiak Decl. ¶15. The RNC is not a *federal* party; it is a *national* party. It participates extensively in state and local, as well as federal, elections. *See* Henderson 294-95sa; Leon 1197sa.

- The RNC's participation in state and local elections is perhaps most evident in odd-numbered years (*e.g.*, 2001, 2003), when no federal candidates appear on the ballot. Five states (Kentucky, Louisiana, Mississippi, New Jersey, and Virginia) hold all their elections for state and local office in odd-numbered years. Nearly every state holds at least some local elections in odd-numbered years,[5] including mayoral elections in major cities such as New York, Los Angeles, Houston, Minneapolis, and Indianapolis. *See* Henderson 298sa; Leon 1213sa.

As the district court unanimously found, in 2001, when there were no federal candidates on the ballot, the RNC spent more than $15.6 million of state-regulated money on state and local election activity, including contributions to state and local candidates, transfers to state parties, and direct spending. *See* Henderson 298sa; Kollar-Kotelly 536-37sa; Leon 1213sa. Over and above this direct spending, the RNC also devoted considerable "in-house" efforts to the Virginia and New Jersey gubernatorial and state legislative races in 2001, committing staff and other resources to those campaigns. *See* J.A. 301-04, Josefiak Decl. ¶45-55. The costs of these in-house resources were paid, under pre-BCRA law, as part of the RNC's administrative overhead with a "mix" of federal and nonfederal funds. *See id.* ¶31, J.A. 296.[6]

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[5] *See* U.S. Conf. Mayors, 2003 Mayoral Election Schedule, *available at* http://www.usmayors.org/uscm/elections/electioncitiesfall2003.pdf (visited on May 29, 2003) (46 states with mayoral elections in 2003).

Significantly, the district court found that the RNC engages in the same activities on behalf of state and local candidates even when federal candidates appear on the ballot. *See* Henderson 297sa; Leon 1212-13sa. In 2000, for instance, the RNC made approximately $5.6 million in direct contributions to state and local candidates. *See* Henderson 297sa; Leon 1212sa; J.A. 305, Josefiak Decl. ¶61. In federal election years, the bulk of the RNC's efforts are conducted in coordination with state parties and focus on full-ticket activities such as voter registration, voter identification, and GOTV efforts intended to aid all Republican candidates. Notably, even when federal races are not competitive in a state – as in Indiana in 2000 or California in 2002 – the RNC often devotes substantial resources to these programs. *See* Henderson 297sa; Leon 1212sa; J.A. 306, Josefiak Decl. ¶62; J.A. 695, Peschong Decl. ¶8.

BCRA's sponsors repeatedly testified that political party broadcast issue advertisements, which mentioned but did not expressly advocate the election or defeat of a federal candidate, and which were paid for with a mix of federal and nonfederal money, were the object of their concern. *See, e.g.*, J.A. 944, McCain Dep. 193 ("It's the broadcast television and radio ads that we believe are what is the problem."); J.A. 991-93, Shays Dep. 40-43; J.A. 975-76, Meehan Dep. 218-19; J.A. 1025-1026, Snowe Dep. 159-60; J.A. 916-17, Jeffords Dep. 83-85. Significantly, however, of the approximately $120 million in nonfederal money raised by the RNC in the 2000 cycle, *see* J.A. 336, Knopp Decl. ¶7, only $43.6 million (36%) was used for such advertisements, either directly or through state parties. *See* Henderson 300sa; J.A. 36, Banning Decl. ¶25. The remaining 64% of the RNC's nonfederal funds were used for administrative overhead (30%), J.A. 37, Banning Decl. ¶27, and other vital activities.

RNC Fundraising Activities. Contrary to popular misconception, the RNC historically raised 60% of its total funding in the form of small donations through direct mail, telephone banks, and Internet solicitations. *See* Henderson 307sa; Leon 1224sa; J.A. 335, 336-37, Knopp Decl. ¶¶5, 8. Of course, the RNC also had "major donor" programs, to raise both federal and nonfederal money, and both federal and nonfederal donors were invited to dinners and meetings at which federal officeholders and party officials spoke. *See* Henderson 307-08sa; Leon 1224-25sa; J.A. 753-54, Shea Decl. ¶14.

Also contrary to popular misconception, the RNC raised the bulk of its nonfederal money from individuals, not corporations. *See* Henderson 308sa; Leon 1225sa; J.A. 337, Knopp Decl. ¶9 (for 2000 cycle, $65 million nonfederal from individuals; $51 million from corporations). Indeed, every year from 1997 through 2001, the average corporate nonfederal donation ($2,226 in 2000) was significantly lower than the average individual donation ($10,410 in 2000). *See* Henderson 308sa; Leon 1225sa; J.A. 337, Knopp Decl. ¶9.

Finally, and again contrary to popular misconception, RNC reliance on federal officeholders for personal or telephonic solicitation of major donors was "exceedingly rare." Henderson 308sa; Leon 1245sa; J.A. 756-57, Shea Decl. ¶ 17.

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[6] Although there are no federal candidates on the ballot in November 2003, three states (Kentucky, Louisiana, and Mississippi) are holding elections for state-wide office, and dozens of others are electing local officials. BCRA prohibits the RNC from raising or spending any nonfederal money in these state and local elections.

RNC Financial Assistance To State Parties. The RNC has a "brand name," professional staff, nationwide presence, and economies of scale that state parties cannot replicate. *See* J.A. 765, Shea Decl. ¶41. Accordingly, the RNC made transfers to state and local parties of approximately $129 million ($35.8 million federal, $93.2 million nonfederal) during the 2000 cycle. *See* Henderson 302-03sa; Leon 1219sa.

The RNC also provided fundraising assistance to state and local parties to help them raise their own funds directly. For example, from January to October 2002, before BCRA took effect, RNC Chairman Marc Racicot made 82 trips to a total of 67 cities in 36 states; the RNC's Co-Chairman and Deputy Chairman were also well-traveled. The majority of these trips involved fundraising efforts on behalf of state and local parties and candidates. *See* Henderson 303-04sa; Leon 1220sa; J.A. 309, Josefiak Decl. ¶70. The RNC also conducted direct mail fundraising for state and local candidates. *See* Henderson 303sa; Leon 1220sa; J.A. 1926-28, 1929-30, RNC Exs. 232, 292 (examples of fundraising letters sent by RNC officers on behalf of gubernatorial and mayoral candidates). Since every dime raised and spent by state candidates is state-regulated money, these fundraising efforts for state and local candidates raised *non-federal money*, often in small denominations, that generally flowed directly to the state candidate or party, *not* to the RNC. *See* J.A. 300-301, Josefiak Decl. ¶44.

Activities of State and Local Parties. The CDP and CRP together represent over 12 million members.[7] Their activities are governed primarily by state law, which provides for the state parties themselves (governed by a State Central Committee), along with 58 County Central Committees for each party and a larger number of local Assembly District Committees.[8] *See generally* CAL. ELEC. CODE §§ 7050 *et seq*. Various provisions of state law as well as party bylaws provide for overlapping membership between the State Central Committees and County Central Committees, and these organizations also automatically include each party's state and national officeholders and candidates and the California members of each party's national committee (the DNC and RNC). *See* J.A. 115-16, Bowler Decl. ¶¶3-4; J.A. 600, Morgan Decl. ¶8.

Since 1974, California has extensively regulated campaign activities, including those of candidates and political parties. Like most states, it has made a deliberate policy choice about the regulation of contributions to its political parties for use in connection with its state and local elections.[9] Like federal law, California law provides for disclosure of campaign contributions and expenditures. Unlike federal law, California law allows contributions by both unions and corporations. *See* CAL. GOV. CODE § 81000 *et seq*.

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[7] Appellants in No. 02-1727 include the Republican Parties of Colorado, New Mexico, and Ohio and the Dallas County (Iowa) Republican County Central Committee.

[8] Appellants Yolo County Democratic Central Committee and Santa Cruz County Republican Central Committee are two of the County Central Committees.

[9] For example, New York chose to allow limited corporate contributions in connection with state elections. This and other related campaign finance "reforms" "represent[ed] the product of a successful, bi-partisan, Executive and Legislative effort to develop and distill an election law reform program that can and will substantially bolster voter confidence in the electoral process." 1974 N.Y. ST. LEGIS. ANN. 395. Likewise, Utah decided not to restrict corporate contributions at all, explicitly rejecting a proposal to "review federal laws on the financing of election campaigns to determine whether any of those laws and regulations could be used in (continued...)

California's campaign finance regime was significantly amended in November 2000, when "Proposition 34" was adopted by the state's voters. The new law imposes limits on contributions to candidates and offers certain benefits to candidates in exchange for voluntarily accepting spending limits.[10] *See* CAL. GOV. CODE § 85300 *et seq.* At the same time, however, the parties are allowed to raise and spend more money, not less, in connection with state and local elections. Limits for contributions to the parties for candidate-related expenditures are set at $26,600 per year. Contributions for non-candidate-specific expenditures (such as administrative expenses, generic party-building, voter registration, partisan GOTV and ballot measure activities) are unlimited. *See* CAL. GOV. CODE § 85303(c). As the district court found, Proposition 34 reflected a specific policy choice by the voters to allow unlimited contributions to the parties based on the view that "[p]olitical parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions." Henderson 310-11sa (*quoting* California Ballot Pamphlet); Leon 1227sa.

Utah," H.B. 328, 54th Gen. Assem. (UTAH 2001), and another "urging reform of Federal Campaign Finance Law" as embodied in the then-pending BCRA. *See* S. Res. 2, 52nd Gen. Assem. (UTAH 1998).

[10] California limits contributions by persons other than political parties and "small contributor committees" to $3,200 per election for state legislative candidates, $5,300 per election for statewide candidates, and $21,200 per election for gubernatorial candidates. *See* CAL. GOV. CODE §§ 85301-85303. (These numbers are slightly higher than in the briefs below because contribution limits are indexed for inflation. *Id.* § 83124.)

The district court found that while state parties play a role in federal elections, they do not exist primarily for that purpose. State and local parties exist primarily to participate in state and local elections, which substantially outnumber federal races, and state and local parties focus the majority of their resources on these elections. In particular, voter registration and GOTV activity such as direct mail, telephone banks, and door-to-door canvassing are all primarily directed at state and local elections. *See* Henderson 311-14sa; Leon 1227- 31sa.

The state and local parties currently organize and conduct most of the grass-roots campaign activities. Candidates generally have neither the money nor the infrastructure to conduct these activities; they typically use the media or mail because these methods are more cost-effective given the size of California's districts.[11] *See* J.A. 124-30, Bowler Decl. ¶20; J.A. 225, 234-35, Erwin Decl. ¶¶3, 8. State and local parties organize and support local party headquarters with paid staff to recruit, train, and coordinate volunteers during election season.

Significantly, the district court rejected the suggestion that state parties received most or all of their nonfederal funds from national party transfers for use on issue advertisements. It found that a substantial majority of the non-federal funds of CDP and CRP are the result of their own direct fundraising in conjunction with state and local candidates and activities. *See* Henderson 315-17sa; Leon 1239-40sa. Nonfederal funds raised directly by each of the California state parties in the past several cycles have ranged from approximately $10 million per cycle to $17 million per cycle. *See* Henderson 316-17sa; Leon 1241sa.

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[11] State Senate Districts (almost 850,000 persons) are larger than Congressional Districts (approximately 640,000 persons). *See* http://swdb.berkeley.edu./info/census2000/P001_by_2kDistrict.html. A State Assembly District contains approximately 423,000 persons. *See id.* In addition to 120 state legislators, Californians vote on eight statewide officers, as well as local and judicial officers and ballot measures. *See* J.A. 118, Bowler Decl. ¶8.

Moreover, although national parties have transferred money to state parties for use in issue advertisements, the evidence shows that many state parties spend the majority of their nonfederal money (including transfers from the national parties) on administrative overhead, grass-roots mobilization, and other party-building activities, and not on issue advertisements. *See* J.A. 1434-37, La Raja Decl. ¶22. If transfers are excluded, the percentage of nonfederal funds spent by the state and local parties on overhead and mobilization activities is even higher. *See* Leon 1121-22sa & n.58.[12]

The district court found that the state parties, unlike the national parties, have raised fairly consistent amounts of federal funds over the past several cycles, and that they are not likely to raise significantly more federal funds because the cost of doing so is extremely high. *See* Henderson 315sa, 317sa; Leon 1240-41sa.

In addition, although the state parties have raised far more nonfederal funds than federal funds, the Levin Amendment prohibits state parties from using most of their state-regulated money for state and local election activities

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[12] The Government and its experts have repeatedly made assertions about spending by state parties based on data concerning state party "allocation" accounts (which reflect, almost by definition, expenditures for largely "generic" or "mixed" activities, including issue advertising). These accounts do not, however, include the state parties' disbursements on purely state and local activities, such as mailings for state candidates. The Government's failure to include data on these purely state and local activities produces a distorted picture.

that fall within the definition of "Federal election activity." Over the past several cycles, contributions comprising 76%-86% of CDP's nonfederal revenue – $10-13 million per cycle – exceeded the $10,000 limit imposed by the Levin Amendment. *See* Henderson 316sa; Leon 1241sa; J.A. 144-52, Bowler Decl. Exh. A; J.A. 162-63, Bowler Reb. Decl. ¶4; *see also* J.A. 250-51, Erwin Decl. ¶15a (comparable figures for CRP are $12 million in Presidential cycles, and $3.5 million in non-Presidential cycles). Since BCRA imposes its strictures on all voter mobilization activity during federal election years, the effect is severe. Voter registration, generic party-building, and grassroots mobilization are likely to be reduced. *See* Henderson 321sa; Leon 1242-43sa.

Collaboration by local, state, and national parties on Republican "Victory Plans" and Democratic "Coordinated Campaigns." Relations among local, state, and national party organizations have strengthened in the past three decades, and have never been closer. This is generally healthy for American democracy. *See* Henderson 304sa; Leon 1221-22sa. This close working relationship is exemplified by Republican "Victory Plans" and Democratic "Coordinated Campaigns." As Senator McCain acknowledged, these "grass roots activities are the fundamentals of a democratic process." J.A. 943-44, McCain Dep. 192-93.

Before BCRA, at the outset of each election year, each state Republican party worked with the RNC to prepare and implement a written "Victory Plan" containing its strategy for identifying, contacting, and mobilizing voters for that election cycle. The plan included numerous components such as direct mailings, telephone banks, brochures, slate cards, yard signs, and rallies, and was funded with a mix of federal and nonfederal money. *See* Henderson 306sa; Leon 1223sa; J.A. 694, Peschong Decl. ¶4. The plan also set forth the budget for the programs, a strategy for raising the money, and an allocation of the financial burden among the local, state, and national parties. It often placed its greatest emphasis on state and local races. *See* Henderson 306sa; Leon 1223sa.

From the outset, RNC officials assisted the state party in drafting and implementing each plan. *See* Henderson 305-06sa; Leon 1222sa; J.A. 694-95, Peschong Decl. ¶¶5-7. In addition to the technical expertise the RNC brought to the Victory Plan process, the RNC provided funding for these programs – $42 million in 2000, 60% of which was nonfederal – and provided fundraising assistance to the state parties to help them raise their share. *See* Henderson 306sa; Leon 1223sa; J.A. 296, 306, Josefiak Decl. ¶¶31, 63. *None* of this money was used for issue advertising. *See* Henderson 306sa; Leon 1223sa. Similar activities were undertaken by local, state, and national Democratic party committees in their Coordinated Campaigns, *see* Henderson 305sa; Leon 1222sa, through which they "register[ed], identif[ied], and turn[ed] out voters on behalf of the entire Democratic ticket." J.A. 823-24, Stoltz Decl. ¶3.

The LNC and Its Activities. The Libertarian National Committee, Inc. ("LNC"), the governing body of the *Libertarian Party*® at the national level, is incorporated in the District of Columbia as a nonprofit corporation governed by IRC § 527. It advances the principle that all individuals have the right to exercise sole dominion over their lives and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose. *See* J.A. 181-82, Decl. of Dasbach, Crickenberger, and Dunbar of the LNC ("LNC Decl.") ¶4.[13]

The Libertarian Party is a membership organization with dues paid by all members, including minors. *See id.* ¶45, J.A. 199-200. Dues often are paid to affiliated state Libertarian parties, with a portion distributed to the LNC, so that those who pay dues may be members of both the state and national parties. The Libertarian Party permits one person to pay dues on behalf of another, in which case the dues are placed in state affiliate nonfederal money accounts. *See id.* ¶33, J.A. 195.

The LNC engages in a wide range of activities to increase acceptance of libertarian principles, many of which are unrelated to federal elections. It solicits, receives, and uses nonfederal money (as well as federal money) to advocate libertarian positions on public policy issues such as drug policy or taxation. *Id.* ¶¶15, 35, J.A. 187-88, 196. The LNC conducts issue advocacy campaigns and develops educational materials unrelated to election campaigns and without any express reference to Libertarian Party federal candidates. *See id.* ¶¶12, 35, J.A. 186, 196. The LNC also produces educational materials on libertarian issues for sale to the general public and to state and local Libertarian Parties and candidates. *See id.* ¶32, J.A. 194-95.

The LNC stages conventions of the Libertarian Party every other year, with nominating conventions during presidential election years and educational conventions during other election years. *See id.* ¶28, J.A. 192. Conventions held during non-presidential election years are devoted solely to discussion and advocacy of issues and internal LNC party matters; no candidates for public office are nominated or selected. *See id.* ¶29, J.A. 192-93. The LNC finances the conventions through attendance fees (including fees from minors) and, in significant part, through space rentals, advertising in convention programs, and sponsorships of the program and various events by individuals and corporations. *See id.* ¶29.

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[13] In addition to their specific objections to BCRA, the LNC and Libertarian Party oppose all federal campaign finance laws; the LNC does not seek, accept, or use any government funds for election campaigns. *See* LNC Decl. ¶4, J.A. 181-82.

The LNC also publishes a newspaper, the *Libertarian Party® News,* each month – regardless of whether an election is pending. The newspaper accepts advertising from for-profit and not-for-profit corporations and from state and local candidates. *See id.* ¶¶18-19, J.A. 189. As with the party dues structure, the newspaper accepts funds for subscriptions for one person on behalf of another. *See id.* ¶21, J.A. 189-90.

The LNC transfers nonfederal funds to affiliated state parties. *See id.* ¶¶15-16, J.A. 187-88. Only seven of the 51 state affiliates of the national Libertarian Party have registered as political committees with the FEC and are subject to FECA requirements. *See id.* ¶9, J.A. 184.

Even Libertarian Party federal campaigns are primarily focused on federal issue advocacy, because no Libertarian Party candidate has ever been elected to federal office. *See id.*, ¶10, J.A. 185. Knowing they have little prospect of winning, Libertarian Party federal candidates use their candidacies to educate the public on libertarian principles. *See id.* ¶11, J.A. 185-86. For the same reasons, the LNC supports its party candidates as a means to foster support for libertarian principles, not to elect candidates to federal office.

The LNC makes both independent and coordinated expenditures on behalf of candidates for state and federal office, and it transfers funds between national, state, and local party committees; it uses nonfederal money to finance its ballot access drives and to finance all of its national conventions; it solicits funds for and makes donations to IRC § 527 organizations; and it solicits funds for and makes donations to IRC § 501(c) organizations that make expenditures in connection with federal elections. *See id.* ¶¶16, 37, 39, J.A. 188, 196-97.

BCRA will wreak havoc on the structure and nonfederal political activity of the LNC and its affiliated state parties. BCRA prohibits the current LNC dues and newspaper subscription structure. Further, it requires the LNC to fund all activities with 100 percent federal dollars. At present, the LNC has three principal sources of nonfederal money: 1) list rental fees ($39,558 in 2001); 2) dues paid through state affiliates and forwarded from the state affiliates to the LNC ($75,239.77 in 2001); and 3) advertising in the *Libertarian Party® News* and elsewhere ($61,530.25 in 2001). *Id.* ¶9, J.A. 184. In 2002, only one individual contribution to the LNC exceeded the $20,000 FECA limit; during the past six years, no more than four donors to the LNC have exceeded this limit in any one year. *Id.*

The LNC is subject to all the same burdens imposed by BCRA as major parties. But the restraints that BCRA imposes on the far smaller LNC weigh even more heavily on its freedom to advocate issues and to associate with others toward a common purpose. The primary effect of BCRA on the LNC is thus to impede LNC issue advocacy and freedom of association with little or no potential to serve any interest in preventing actual or apparent corruption.

The Rise of Special Interest Groups. Throughout American history, single-issue interest groups have populated American politics. Parties seek to induce these groups into broader coalitions and thereby moderate their often extreme views. In the words of the Government's political science experts, "[p]arties with their necessary 'big tent' compete for the allegiances of multiple groups." Leon 1196sa (*quoting* Krasno & Sorauf Expert Report at 24).

In recent years, special interests have become increasingly well-funded and aggressive competitors of the political parties. Interest group broadcast issue advertising exploded, accounting for fully two-thirds of all such spending. *See* Henderson 230-31sa; Leon 1324-25sa.

Unlike political party issue advertising – which often responded to interest group advertising, was fully reported to the FEC, and was paid for with a mix of federal and nonfederal money – interest group issue advertising has been virtually unregulated. *See* J.A. 314, Josefiak Decl. ¶89. Even under BCRA, interest groups remain free to spend 100% nonfederal funds raised in any amount from any source – without *any* public disclosure – on broadcast issue advocacy so long as the spots are crafted to avoid Title II's definition of "electioneering communications."

Moreover, even before enactment of BCRA, many interest groups already were shifting their focus in the days and weeks preceding an election away from broadcast advertising toward "ground war" activities such as GOTV. *See* Henderson 322-23sa; Leon 1253-54sa; J.A. 697-98, Peschong Decl. ¶¶13-14. These activities are often subject to *no* regulation and *no* disclosure, even under BCRA.

As but one example, the district court unanimously found that during the closing weeks of the 2000 election campaign, the NAACP National Voter Fund spent roughly $10 million – $7 million of which came from one anonymous donor – on election-related activities, including registering 200,000 voters, putting 80 staff in the field, contacting 40,000 people in each of its target cities, operating a GOTV hotline, running newspaper print advertisements on issues, making seven direct mailings, funding affiliated groups, and calling over one million households. *See* Henderson 323sa; Kollar-Kotelly 645sa; Leon 1253-54sa; *see also* Henderson 323sa ($7.5 million GOTV efforts of NARAL); Kollar-Kotelly 645sa (same); Leon 1253-54sa (same). Thus, interest groups "engage in a wide array of political activities paralleling the activities of political parties." Henderson 322sa; *see also* Leon 1253sa.

The Government's experts agreed, and the district court found, that BCRA will encourage *more* interest group voter-mobilization activity, funded with undisclosed, unregulated money. *See* Henderson 323-24sa; Leon 1253sa; J.A. 861, Green CX 24; J.A. 928-29, Mann CX 164-65. Evidence in the record and, in Judge Henderson's words, "common sense," suggest that BCRA will merely shift nonfederal funds away from political parties to interest groups, which are free to operate below the radar of public scrutiny. *See* Henderson 415sa. NARAL president Kate Michelman, for instance, has said that donors seeking to "elect people who embody their values will be looking to groups like NARAL, which do serious political work and are seasoned operatives, to invest in. If they can't give to the parties . . . they are going to find other means." Henderson 324sa; Kollar-Kotelly 643sa; *see* J.A. 279, Gallagher Decl. ¶61; *see also* J.A. 1438-44, La Raja Decl. ¶24; J.A. 1601-02, Milkis Decl. ¶47; J.A. 928-29, Mann CX 164-65.

Already, media reports have confirmed these predictions. Indeed, as the *Washington Post* reported, "[w]hat appears certain, experts said, is that special interest groups – such as labor unions, abortion rights groups and the National Rifle Association – will use the cash they once sent to the political parties as soft money to air ads and organize voters directly."[14] BCRA does not truly ban "soft money"; it merely pushes it under the table.

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[14] *See* J.A. 1934-37, Thomas B. Edsall & David Von Drehle, *Republicans Have Huge Edge in Campaign Cash*, WASH. POST, Feb. 14, 2003, at A7. The *Washington Post* recently reported on a May 8, 2003, meeting of major interest groups planning to raise nonfederal money for use in funding a massive voter mobilization and issue advocacy campaign. "Most of the groups at the . . . meeting at Emily's List's offices in Washington have special committees . . . that are generally not restricted by McCain-Feingold. Most are competing for large contributions from many of the 'soft money' donors to the Democratic Party." J.A. 1938-41, Thomas B. Edsall, *Liberals Meeting to Set '04 Strategy; Labor, Rights Groups Focus on Getting Out the Vote to Help Democrats*, WASH. POST, May 25, 2003, at A6; *see also* J.A. 1942-45, Harold Meyerson, *Union* (continued...)

"Corruption" or the "Appearance of Corruption." Eminent historian Dr. Morton Keller of Brandeis testified without contradiction that – in view of an extensive federal, state, and local regulatory regime governing lobbying, gratuities, campaign contributions, and civil service patronage – "'[c]orruption or the appearance of corruption' . . . is less of a problem in American politics today than at any time in the past." J.A. 1261-62, 1267, Keller Decl. ¶55. Defense expert Dr. Frank Sorauf has observed, "the [campaign finance] reform agenda of the 1990s" – of which BCRA is a product – "is driven as much by populist demonologies as it is by the realities of contemporary political influence." Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 Colum. L. Rev. 1348, 1356 (1994). The record here amply bears this out.

Lack of evidence of *quid pro quo* corruption. Based on defendants' binding admissions, the district court found that there is *no* evidence "that any Member of Congress has ever changed his or her vote on any legislation in exchange for a donation of nonfederal funds to his or her political party." Leon 1254sa; *see also* Henderson 325sa; J.A. 1732, FEC Response to Requests for Admission ("RFA") Nos. 1, 2; J.A. 853-54, Feingold Dep. 132-33; J.A. 918-19, Jeffords Dep. 106-07. Moreover, defendants admitted that "[t]here is no probative evidence that national parties have attempted, through the use of nonfederal donations, to get federal officeholders to change their position on legislation." Leon 1261sa; *see also* Henderson 328sa; J.A. 1732, FEC Response

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Dos and Don'ts For the Democrats, WASH. POST, May 28, 2003, at A19 (describing "myriad so-called 527s – the tax code designation for organizations that are springing up now that campaign reform has banned the two parties from collecting soft money to fund voter registration and mobilization campaigns").

to RFA Nos. 23, 24; J.A. 1026-1030, Snowe Dep. 205-08, 231-32; J.A. 974-75, Meehan Dep. 171-72.

Likewise, defense statistical expert Dr. Green admitted there are *no statistically valid studies* showing a correlation between political donations and legislative voting behavior, *see* J.A. 861-64, Green CX 58-61, and the district court agreed. *See* Henderson 326sa, 327sa ("[n]o valid statistical evidence" nonfederal donations influence roll call votes, committee voting, amendments, or filibusters); *see also* Leon 1256sa (any statistical evidence that nonfederal donations resulted in *quid pro quo* corruption has been "so undermined by challenges to its validity that it has no probative value.").

"Access." The record provides no support for the claim that "access" to federal officeholders is *uniquely* granted to nonfederal donors as a result of their donations to political parties. *See* Henderson 330sa; Leon 1263-64sa; J.A. 864-67, Green CX 69-72, 95. Nor is there "probative evidence that federal officeholders are more likely to meet with nonfederal donors than with federal donors." Leon 1264sa; *see also* Henderson 330sa. As the FEC admitted, all six national party committees' fundraising events are open to federal *and* nonfederal donors alike. *See* Henderson 329sa; Leon 1263sa.

Moreover, the district court found that lobbying expenditures are more likely to produce "access" to a federal officeholder than political donations. *See* Henderson 331sa; Leon 1287sa. The amount spent on lobbying by party donors is often "geometrically larger" than their nonfederal donations to parties. Leon 1287sa; *see also* Henderson 332sa. For example, as the FEC admitted, the top five nonfederal donors to parties in 1997-98 donated $7.8 million in nonfederal funds but spent *$42 million* on federal lobbying during that same period. *See* Leon 1287sa; Henderson 332sa. Reported lobbying spending in Washington in just the *last six* *months* of 2002 was *$925.8 million*. *See* J.A. 1946-47, BNA, Money & Politics Report (June 24, 2003).

Public perception. As its "principal" evidence that nonfederal donations to political parties create the "appearance of corruption,"[15] the Government submitted a specially-commissioned but "poorly worded" public opinion poll by Richard Wirthlin and Mark Mellman. Henderson 334sa. The Wirthlin/Mellman poll asked respondents for their views of "*large*" or "*big*" contributions to parties, without defining those terms. The RNC's public opinion expert, Dr. Q. Whitfield Ayres, precisely replicated the Wirthlin/Mellman poll, substituting *BCRA's new contribution limits* for the words "big" or "large." Dr. Ayres' results almost exactly matched the Wirthlin/Mellman results. As Judge Henderson found, "[e]very conclusion that the Wirthlin-Mellman report reached about 'large' or 'big' contributions and contributors applies with equal force to the new . . . hard money limits in BCRA." *See* Henderson 336-37sa (*quoting* Ayres Reb. at 4-5).

Defendants' Anecdotal Evidence. Defendants can be expected to reiterate a torrent of anecdotes in an effort to show something so seriously flawed within the political system as to justify BCRA's extreme measures. These anecdotes are both legally insufficient and factually

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[15] Leon 1289-90sa. The record here shows that when people use the word "corruption," as often as not they are referring to things that are *unpleasant*: negative campaign ads, *see, e.g.*, J.A. 1041-45, Williams CX 21-22, 56-59; intense fundraising efforts, *see, e.g.*, J.A. 974, Meehan Dep. 128; high campaign costs generally, *see, e.g.*, J.A. 1038, Strother CX 38-39; the lack of disclosure and accountability on the part of special interest groups that run issue ads, *see, e.g.*, J.A. 1005-06, Shays CX 65; and even the FEC itself, *see* J.A. 930-32, McCain Dep. at 15-16, 89; *see also* Henderson 337sa. None of these conceptions of "corruption" is a valid basis for government regulation of political parties.

questionable.[16] For example, hearings convened by Senator Fred Thompson in the summer of 1997 focused on the raising of nonfederal funds during the 1996 campaign through "White House coffees," "Lincoln bedroom sleepovers," and donations from foreign sources, as well as the use of such money for issue advertising. Two corporations and 26 individuals were indicted under existing law as a result of that investigation, *see* J.A. 872-76, Green CX Ex. 12, and, in provisions not challenged in this case, BCRA tightens the restrictions on fundraising on federal property and on foreign donations, *see* new §§ 302, 303.

The district court's treatment of defendants' anecdotal evidence mirrored the conclusions of an "Adverse Report" on BCRA issued by the House Committee on Administration:

> No evidence has been produced to this Committee of a "corruption" problem stemming from soft money contributions to political parties. Even if there had been such a showing, H.R. 2356 does not even attempt to be a narrowly tailored remedy. If it were ever to become law, it would have precisely the opposite effect its proponents intend. Rather

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[16] As Judge Henderson observed, the evidence of actual or apparent corruption is "mostly anecdotal in nature." Henderson 409sa. Notwithstanding the "mountain of discovery," defendants below identified "not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees," *id.* 409-10sa, and no empirical evidence of the alleged corrupting effect of non-federal funds donated to parties. *Id.* 410-11sa. The evidence before Congress was no different. *See* 148 Cong. Rec. S2099 (Mar. 20, 2002) (stmt. of Sen. Dodd) ("I have never known of a particular Senator whom I thought cast a ballot because of a contribution."); 145 Cong. Rec. S12586 (Oct. 14, 1999) (stmt. of Sen. McCain) (responding to direct question, Sen. McCain fails to name any Senator who traded a vote for nonfederal funds). *See* Henderson 431sa (rejecting anecdotal accounts from legislative history) (relying on *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000)).

> than diminish the power of 'special interest' groups, it would actually make those groups even more powerful than they are today. Independent advocacy groups, unions and corporations would see their power and influence rise, while our national political parties would be debilitated. The result would be destabilization and factionalism, neither of which is in the best interest of our country.

H.R. Rep. No. 107-131(I), at 2 (2001); *see also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000) (under strict scrutiny, government "must present more than anecdote and supposition").

Effectiveness of BCRA in Addressing the Perceived Problem. Defense public opinion expert Dr. Robert Shapiro candidly admitted that he is aware of no public opinion evidence showing that BCRA will actually reduce the "appearance of corruption." Henderson 337sa; *see* J.A. 987-90, Shapiro CX 114-17. Likewise, defense expert Sorauf testified that "it's speculative" whether BCRA would remedy any perception of corruption. *See* Henderson 337-38sa (*quoting* Sorauf CX 191).

D. The Decision of the District Court. The district court concluded that virtually all the restrictions on political parties offend the First Amendment guarantees of free speech and association. Applying strict scrutiny, Judge Henderson concluded that neither new Section 323(a) nor 323(b) is narrowly tailored to serve a compelling interest of the federal government. *See* Henderson 398sa. Likewise, she found invalid new Section 323(d), prohibiting political parties from donating funds to certain tax-exempt organizations, *see id.* 449sa, and new Section 323(f), restricting state candidates' use of nonfederal funds for "public communications" that refer to a federal candidate, *see id.* 460sa. She found valid new Section 323(e), which restricts federal officeholders and candidates. *See id.* 460sa.

Judge Leon analyzed Title I under "intermediate scrutiny," but concluded that new Sections 323(a) and 323(b) were not "closely drawn" to achieve an important federal government objective. *See* Leon 1101-11sa, 1119-24sa. In an effort to salvage part of the statute, however, Judge Leon grafted new Section 323(b)'s definition of "federal election activity" onto new Section 323(a). *Id.* 1111-18sa. Then, he ruled that the definition of "federal election activity" was itself overbroad, but judicially limited that definition, for purposes of both new Sections 323(a) and 323(b), to a "public communication that refers to a clearly identified candidate for federal office and that promotes or supports . . . or attacks or opposes" a federal candidate. Leon 1111-18sa, 1119-24sa. Because it invalidated less of these sections than Judge Henderson's disposition, Judge Leon's disposition of new Sections 323(a) and 323(b) prevailed. Like Judge Henderson, Judge Leon voted to strike down new Section 323(d)'s restrictions on political party donations to tax-exempt organizations. *See id.* 1142-44sa. Judge Leon joined Judge Kollar-Kotelly in upholding the restrictions on state candidates in new Section 323(f). *See id.* 1146sa. He dissented from the panel's ruling to uphold the restrictions on federal candidates in new Section 323(e). *See id.* 1144-45sa.

Judge Kollar-Kotelly would have upheld Title I in its entirety, joining Judge Henderson with regard to new Section 323(e)'s restrictions on federal candidates and Judge Leon with regard to new Section 323(f)'s restrictions on state candidates. *See* Kollar-Kotelly 991sa, 993sa.

The court unanimously struck down on First Amendment grounds Section 213, which compels political parties to choose between independent or coordinated expenditures to support their candidates. *See* Henderson 384-85sa; Kollar-Kotelly 1011sa; Leon 1171-72sa.

Finally, over Judge Henderson's dissent, *see* Henderson 384-85sa, the court rejected plaintiffs' challenges to Section 214 (requiring an overbroad definition of "coordination"). *See Per Curiam* 134-57sa. The court unanimously held plaintiffs' challenge to Sections 304 and 319 (the "Millionaire's Provisions") to be nonjusticiable.[17] *See Per Curiam* 8sa; Henderson 475-76sa.

SUMMARY OF THE ARGUMENT

Although proponents of BCRA have described Title I as a simple effort to enforce longstanding prohibitions against the use of corporate and union money in federal campaigns, it is, in fact, much more than that. New Section 323(a) completely and without exception federalizes all aspects of national political party operations, even when those activities relate exclusively to state and local elections in years when no federal candidates appear on the ballot. It also severely restricts the ability of national party committees to associate with their state and local counterpart committees. Likewise, new Section 323(b) imposes pervasive federal dictates on how state and local parties spend money lawfully raised pursuant to state law, even when the spending primarily or even exclusively affects state and local elections. New Section 323(d) prohibits all political parties from donating even federally-regulated money to ideologically-aligned organizations; it even prohibits the CDP and CRP from supporting organizations spearheading the fight over recalling California's Governor at the March 2004 election. New Section 323(e) restricts the ability of federal

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[17] The Political Party Appellants are not pursuing a challenge to the Millionaire's Provisions at this time. The Government has shown remarkable intellectual flexibility in defending strict contribution limits and limits on coordinated party expenditures as essential bulwarks against corruption, only to abandon those restrictions in the interest of aiding financially-strapped candidates facing wealthy opponents.

officeholders to work with state and local parties and candidates. And new Section 323(f) restricts the ability of state and local candidates to tout their close association with popular federal officeholders. This phalanx of interwoven restrictions is already undermining the ability of political parties to fulfill their pivotal role in American democracy.

I. Far more restrictive than a mere contribution limit, Title I's pervasive restraints on political party activity are subject to the strictest scrutiny under the First Amendment. The record is devoid of any evidence of actual *quid pro quo* corruption, and the poorly-worded public opinion poll commissioned by the Government to show an appearance of corruption is not probative. Even if, however, the record contained sufficient evidence of apparent corruption to justify some legislative action, Title I is not narrowly tailored nor even closely drawn to address those concerns.

II. Like the statute it amends, BCRA was purportedly passed pursuant to the Federal Elections Clause, Article I, Section 4 of the Constitution. Title I exceeds this delegated authority by regulating activity that has no conceivable effect on a federal election, such as the RNC's participation in state and local elections held in off-years. Moreover, Title I shows disdain for the states as dual sovereigns by subjecting to full federal regulation even activities by state and local parties that affect only state and local elections.

III. In contrast to the phalanx of restrictions imposed on political parties, BCRA leaves special interest groups largely unfettered to engage in virtually all election-related activities. Even if BCRA's restrictions on corporate and union broadcast "electioneering communications" were to survive constitutional challenge, interest groups (but not political parties) would remain free from regulation to engage in broadcast communications not within the definition of "electioneering communication," as well as all forms of non-broadcast communication such as telephone banks, direct mail, and door-to-door canvassing. Interest groups have already begun raising the very money that national political parties may no longer accept, for use in the very activities that Title I extensively regulates when performed by political parties. In short, Title I's multitude of restrictions on political parties places parties at a severe disadvantage in relation to special interest groups.

ARGUMENT

I. BCRA's RESTRICTIONS ON POLITICAL PARTIES VIOLATE THE FIRST AMENDMENT.

Though defended in the lower court as a mere contribution limit or device to close loopholes, BCRA is much more. New Section 323(a) makes it a *felony* for the RNC's chairman to send a letter asking donors to give $25 to Mississippi gubernatorial candidate (and former RNC chairman) Haley Barbour for use in this November's off-year election. New Section 323(f)(1) prohibits Mr. Barbour from using his state-regulated campaign funds *this year* to send a mailing advocating state tax cuts and featuring President Bush, a declared candidate for reelection *next year*. During any even-numbered year, new Section 323(b)(2)(B)(iv) restricts the Yolo County Democratic Central Committee from collaborating with the CDP to spend funds raised pursuant to the Levin Amendment on a GOTV effort in a *mayoral election*. New Section 323(a) makes it a crime for the CRP to donate *even federal dollars* to a 501(c)(4) entity formed to support the current gubernatorial recall initiative. And new Section 323(a) subjects to criminal prosecution an RNC field representative who participates in a meeting to plan the fundraising, implementation, and spending for Louisiana's Victory Plan in *this year's* state elections. These restrictions, and the many others imposed by BCRA, on core rights of political speech and association simply cannot and should not survive First Amendment scrutiny.

Despite BCRA's severability clause, new Sections 323(a) and (b) are so closely tied together that, if one is invalid, both must fall.[18] Relying upon testimony by one of defendants' experts, Judge Henderson was "inclined to agree," Henderson 423sa (*quoting* Mann CX 110); she did not decide this question, however, because she held both new Sections 323(a) and (b) invalid.

A. The Many Restrictions on Association and Speech Imposed by New Section 323 Are Subject to Strict Scrutiny.

Unable to defend new Section 323 under strict scrutiny, defendants have vigorously argued for intermediate scrutiny under the mistaken view that BCRA falls neatly within the "contribution/expenditure" dichotomy set forth in *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*). As shown above, however, new Section 323 contains a multitude of nonfinancial restrictions on speech and association; it directly "burden[s]" the most basic associational activities of political parties at all levels, and thus is subject to strict scrutiny. *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 225 (1989).

First, strict scrutiny applies because new Section 323 severely restricts political party rights of association with their members and with their component parts. This Court has made clear that "the First Amendment protects 'the freedom to join together [in parties] in furtherance of common political beliefs. . . .'" *California Democratic*

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[18] The legislative history reflects the view of BCRA's sponsors that *both* new Sections 323(a) and (b) were necessary to achieve Congress's purpose. *See* 148 Cong. Rec. H408 Feb 13, 2002 (stmt. of Rep. Shays) ("The only effective way to address this problem of corruption is to ban entirely all raising and spending of soft money by the national parties."); *id.* ("[a]n effective effort to address state party soft money spending" is "absolutely essential to . . . solving the soft money problem.").

Party, 530 U.S. at 574 (*quoting Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214-15 (1986)). The Government violates a political party's right of association whenever it interferes "with an activity integral to the association in the sense that the association's protected purposes would be significantly frustrated were the activity disallowed." L. Tribe, *American Constitutional Law* § 12-26, at 1016 (2d ed. 1988); *see also Eu*, 489 U.S. at 224 (right of association means more than just "that an individual voter has the right to associate with the political party of her choice"); *Tashjian*, 479 U.S. at 215 (same).

Any law burdening political parties' right of free association is "unconstitutional unless it is narrowly tailored to serve a compelling state interest." *California Democratic Party*, 530 U.S. at 582; *see Eu*, 489 U.S. at 231 ("Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest."); *Tashjian*, 479 U.S. at 217 (rejecting state's claim that law restricting parties' associational rights "is a narrowly tailored regulation which advances the State's compelling interests").[19] Like the burdens imposed on political parties in *California Democratic Party*, *Eu*, and *Tashjian*, those in BCRA must be subjected to strict scrutiny and declared invalid.

Second, new Section 323 does not limit "contribut[ions] to a *candidate*," where the potential for apparent corruption is at its zenith and which this Court has

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[19] *See also Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) ("freedom of expressive association" could be overridden only by "'regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms'") (*quoting Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)); Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law*, §20.41, at 523 (3d ed. 1999).

"identified" as the "single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment." *Citizens Against Rent Control*, 454 U.S. at 296-97 (emphasis in original). Accordingly, this Court's decisions applying intermediate scrutiny to limits on contributions to candidates are not controlling.[20]

Instead, as Judge Henderson observed, Title I runs headlong into on-point precedent applying strict scrutiny to invalidate (i) limits on contributions to political associations (like the political parties here) that fund pure issue speech unrelated to federal campaigns, *see Citizens Against Rent Control*, 454 U.S. at 294, and (ii) restrictions on noncoordinated spending by political parties, *see Colorado I*, 518 U.S. at 608. It thus sweeps within its ambit a whole host of speech activity that the Government may not constitutionally restrict at all. *See* Henderson 419-20sa.[21]

In *Citizens Against Rent Control*, the Court applied strict scrutiny and struck down under the First Amendment a local ordinance that limited *contributions* to a political association that, in turn, engaged in pure issue speech. 454

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[20] *See Buckley*, 424 U.S. at 29; *see also Beaumont v. FEC*, 539 U.S. __, Slip Op. at 1 (2003) (upholding prohibition on contributions to candidates by non-profit advocacy organizations); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("*Colorado II*") (treating party coordinated expenditures as contributions to candidate); *Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 395 (2000) (upholding Missouri state law contribution limits); *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981) (plurality upholding contribution limits to political committees established to make contributions to candidates); *id.* at 203 (Blackmun, J. concurring) (casting decisive vote and noting that "a different result would follow if [the limitation] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates.").

[21] *Buckley* did not address limits on contributions to political parties, which Congress did not impose until after *Buckley* was decided.

U.S. at 296-99. Political parties spend money to support or oppose ballot initiatives, the *precise* activity at issue in *Citizens Against Rent Control*. 454 U.S. at 292. And the district court found that the RNC has recently participated in important public policy debates concerning, for instance, a balanced budget amendment, welfare reform, and education policy. *See* Henderson 293sa; Leon 1195sa.

Third, even if considered under the *Buckley* framework, new Section 323 would be subject to strict scrutiny because it directly limits spending. As this Court said in *Beaumont*, the level of scrutiny appropriate for "political financial restrictions" – and as shown, new Section 323 is much more than a "financial restriction" – "is based on the importance of the 'political activity at issue' to effective speech or political association." *Id.* Slip Op. at 14 (*quoting FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 259 (1986) ("*MCFL*")). The Court noted that *FEC v. National Right to Work Committee*, 459 U.S. 199 (1982), applied intermediate scrutiny because that committee was "organized to make contributions," whereas *MCFL* applied strict scrutiny "to invalidate the ban on an advocacy corporation's expenditures." *Beaumont*, Slip Op. at 15.

By acknowledging that the source restrictions in Section 441b were subject to strict scrutiny in *MCFL*, *Beaumont* rejected the simplistic notion that contribution limits must always be subject to intermediate scrutiny. Indeed, *MCFL* applied the highest level of scrutiny even though there was no restriction on the amount that the corporation could spend for independent express advocacy, but simply a requirement that all such political spending be done with dollars subject to FECA's restrictions. Although limiting the source of the funds was "not an absolute restriction on speech, it [was] a substantial one" that needed to be "justified by a compelling state interest" because, among other things, it "reduce[d] the sources of funding" available "to engage in core political speech." *MCFL*, 479 U.S. at 252, 255.

Similarly, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), applied strict scrutiny to a requirement that corporations do all political spending "through separate segregated funds" subject to FECA-like restrictions, because requiring corporations to spend only regulated monies on political activity "burden[s] expressive activity." *Id.* at 657-58. Here, requiring national political parties to engage in political spending exclusively with federal money is subject to strict scrutiny, particularly since, unlike the prohibited corporate funds in *Austin*, the money raised and spent by the RNC "reflects actual public support for the political ideas espoused by" the RNC. *Austin*, 494 U.S. at 660. Thus, new Section 323(a) is subject to strict scrutiny.

Just as clearly, new Section 323(b) places *no* restriction on the *raising* of nonfederal money; a state party may continue to raise as much state-regulated money as state law allows. Rather, new Section 323(b) limits only the *spending* of such lawfully-raised money and, accordingly, must be viewed as a pure expenditure limit subject to strict scrutiny. *Buckley*, 424 U.S. at 44-45; *see also Colorado I*, 518 U.S. at 609; *NCPAC*, 470 U.S. at 496.

Finally, the Government and Intervenors concede that Title II's limit on spending for "electioneering communications" is subject to strict scrutiny, and the district court unanimously agreed. *See* Henderson 363sa; Kollar-Kotelly 781sa; Leon 1147sa. It would be odd to subject new Section 323 to *lower* scrutiny when it imposes far more pervasive restrictions, including those on both raising *and* spending money, on political parties whose sole function is core political speech.

B. Section 323(a)'s Restrictions on National Party Committees Violate the First Amendment.

1. Section 323(a) Impermissibly Impedes the Ability of National Party Committees To Associate with State and Local Party Committees.

As a federation of state parties, the Republican Party "comprises several interacting, independent entities that work closely together on a daily basis" to promote Republican ideals, elect candidates who espouse those ideals, and govern according to those ideals at the local, state, and national levels. *See* J.A. 298-99, Josefiak Decl. ¶11. Senator McCain accurately testified, however, that new Section 323 erects a "firewall" between national and state party committees, J.A. 952, McCain Dep. 223, and thus strikes at the very heart of the parties' associational activities.[22]

A key example of the close working relationship among local, state, and national Republican Party committees and candidates is the creation, financing, and implementation of full-ticket "Victory Plans." *See supra* at 19-20. These voter mobilization plans are the essence of the democratic process. Yet, new Section 323(a) proscribes effective RNC participation in Victory Plans. RNC employees have historically been integrally involved in deciding how nonfederal funds will be "solicit[ed]," "receive[d]," and "spen[t]," for Victory Plans, in "transfer[ring]" both federal and nonfederal funds to state parties for these programs, and in "solicit[ing]" federal and nonfederal funds for them.[23] All of these activities by RNC personnel are now felonies if any nonfederal or Levin money is involved, even during years in which no federal offices appear on the ballot. *See* new §323(a). Moreover, new Section 323(b)(2)(B)(iv)'s "homegrown" requirement prohibits national party committees from providing state and local parties with *even federal money* for voter mobilization activities if those activities use any nonfederal or Levin money.

In short, *any* RNC participation in Victory Plans – merely sitting down at a table and participating in collective decisionmaking about how money will be solicited, received, and spent – is covered by new Section 323(a). To avoid felony prosecution, the Victory Plan must proceed without RNC involvement, or the entire program must be paid for with 100% federally-regulated money. State and local parties and candidates are punished simply for associating with the RNC. *See* J.A. 299-311, Josefiak Decl. ¶¶40, 77.

New Section 323(a) also forces RNC officers to discontinue their fundraising assistance to state and local parties and candidates. In the district court, the Government proposed two equally absurd solutions. *First*, the Government invoked FEC regulations allowing state party officials who are members of national party committees (but *not* national party officers or employees) to "wear multiple hats," 67 Fed. Reg. 49,083 (July 29, 2002), as support for the remarkable suggestion that RNC officials should simply raise nonfederal funds for state and local parties and candidates in their "*individual capacities*." Putting to the side whether any prudent person would engage in this sort of schizophrenia, it is not realistic to require RNC officers to pay for their fundraising trips with *personal funds*. Moreover, it is precisely the fact that the RNC chairman is acting *on behalf of the RNC* that makes those solicitations effective. Compelling the RNC chairman to disassociate from the RNC – even temporarily – is yet a further burden on First Amendment freedoms.

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[22] *See* J.A. 206-07, Duncan Decl. ¶7; J.A. 1410-12, La Raja Decl. ¶12.

[23] While the Government has sought refuge in the FEC's regulatory definition of "direct[ing]," the Intervenors have challenged that definition in court. *See Shays* v. *FEC*, Civ. No. 02-CV-1984 (D.D.C., filed Oct. 8, (continued…)

2002). In any event, the FEC regulations do nothing to narrow the bans on "solicit[ing," "receiv[ing]," "transfer[ring]," or "spend[ing]" nonfederal money.

Second, the Government and Intervenors propose that RNC officers simply solicit *federal money* for *state and local* candidates and parties. But state and local candidates register, raise, spend, and report their finances pursuant to *state* and *local* law; they do not, and cannot, even register with the FEC or raise federal funds. They raise and spend *nonfederal money*, which RNC officers cannot "solicit." Defendants' suggestion that state candidates accede to federal regulation merely confirms BCRA's utter disdain for the states as dual sovereigns. *See* Part II below.

New Section 323(a) also burdens the RNC's ability to communicate with its members and adherents. Before BCRA, the RNC relied in part on nonfederal funds to "communicate[] directly with its own members and adherents, a function that is vitally important to building the Party." J.A. 41-42, Banning Decl. ¶28(f); *see also* J.A. 1602-03, Milkis Decl. ¶48. Yet, whereas corporations and labor unions have a recognized right to use nonfederal funds to communicate with their officers, shareholders, and members on any subject (even to endorse a federal candidate), new Section 323(a) requires national parties to use exclusively federally-regulated funds for all communications with their members.[24]

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[24] *See* 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §114.3(a)(2); *see also United States v. CIO*, 335 U.S. 106, 120-21 (1948) (Court had "gravest doubt … as to constitutionality" of statute restricting corporations and unions from communicating with members on matters of public importance); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) ("The (continued…)

2. New Section 323(a) Unjustifiably Prohibits Solicitations.

New Section 323(a) also prohibits *pure speech*: Party officials are prohibited from uttering words of "solicit[ation]" for otherwise legal contributions. As but one example, it is perfectly legal for anyone else to say "contribute to the Jones for Governor campaign," but it is a *crime* for a national party official merely to utter *those exact words*. BCRA likewise categorically prohibits party committees from assisting each other in raising lawful Levin money, *see* new §323(b)(2)(B)(iv), and prohibits *all* political parties from soliciting donations on behalf of any tax-exempt organization that engages in Federal election activity, *see* new §323(d).

"Solicitation is a recognized form of speech protected by the First Amendment." *United States v. Kokinda*, 497 U.S. 720, 725 (1990). Indeed, this Court's "cases have long protected speech even though it is in the form of … a solicitation to pay or contribute money." *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977).

In *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 622 (1980), the Court struck down an ordinance banning door-to-door or on-street solicitations by charitable organizations not using at least 75% of their receipts for "charitable purposes." The Court accorded the solicitation full constitutional protection: "[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment." *Id.* at 632. Because there were less restrictive means of preventing fraud and protecting personal

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Supreme Court long ago … recognized an organization's … First Amendment right to communicate with its 'members.'").

privacy, the Court invalidated the anti-solicitation ordinance at issue. *See id.* at 637-39.[25]

Significantly, the Court in *Schaumburg* emphasized that solicitation "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, *political*, or social issues." *Id.* at 632 (emphasis added). "[W]ithout solicitation," the Court said, "the flow of such information and advocacy would likely cease." *Id.*

As the Court observed in *Schaumburg*, political solicitation is informational and ideological. *See* J.A. 342-43, Knopp Decl. ¶25. This Court has repeatedly stressed that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), and "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office," *Eu*, 489 U.S. at 223 (*quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Under no meaningful analysis could BCRA's solicitation restrictions be said to be narrowly tailored, or even closely drawn, to address any interest that the Government is entitled to pursue.

3. New Section 323(a) Is Grossly Overbroad.

As shown, because of the "heav[y]" and "severe" burdens it imposes on political party associational freedoms, new Section 323(a) is "unconstitutional unless it is narrowly tailored to serve a compelling state interest." *California Democratic Party*, 530 U.S. at 581-82. The First Amendment requires that "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion by Kennedy, J.).[26] It "must demonstrate that the recited harms are *real*, . . . and that the regulation *will in fact alleviate these harms in a direct and material way*." *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (emphasis added). *See also NCPAC*, 470 U.S. at 498 (invalidating independent expenditure limit where corruption "remain[ed] a hypothetical possibility and nothing more").

Here, lacking evidence of actual *quid pro quo* corruption, *see* p. 26 above, the Government grasps onto the slippery notion of "an appearance of corruption." Its "principal" evidence, Leon 1289sa, is a poorly-worded public opinion poll that proves only that the public views all "big" contributions – federal and nonfederal alike – with an equally jaundiced eye. Defendants' survey merely confirms that the appearance of corruption, like the now largely repudiated "appearance of impropriety" in legal ethics,[27] is far too

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[25] *See also Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984) (striking down Maryland ordinance similar to the one in *Schaumburg* as not "precisely tailored"); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 787, 789, 794 (1988) (striking down North Carolina statute prohibiting professional fundraisers from charging "unreasonable" fees).

[26] In *Colorado I*, six members of the Court expressly adopted for the campaign finance context Justice Kennedy's statement for the plurality in *Turner* that the government must show that speech regulations address a *real* harm. *See* 518 U.S. at 618 (O'Connor, Souter & Breyer, JJ.); *id.* at 647 (Rehnquist, C.J., Scalia & Thomas, JJ.) (concurring in the judgment and dissenting in part).

[27] *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility. Formal Op. 342 (1975) ("too vague to be useful"); Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 Minn. L. Rev. 243, 265 (1980) ("simply too dangerous and vague"); *Adoption of Erica*, 686 N.E.2d 967, 973 n.10 (Mass. 1997) ("standard that has been rejected by most courts").

elastic a standard by which to regulate core political speech and association.

Based on this less than persuasive record, BCRA presents a "wholesale restriction of clearly protected conduct." *NCPAC,* 470 U.S. at 501. New Section 323(a)'s flat ban on the solicitation, receipt, transfer, and disbursement of nonfederal money by national political parties is not "narrowly tailored" because *it is not "tailored" at all.* There are no exceptions.

It cannot be contended in good faith that *every* conceivable solicitation, receipt, transfer, or disbursement of nonfederal money by a national political party – even when the amounts are small, no federal candidate is involved, and no federal election is near – risks corrupting federal officeholders. Indeed, this Court has recognized – correctly, as this record shows – that the "opportunity for corruption" posed by "unregulated 'soft money' contributions to a party for certain activities, *such as electing candidates for state office or for voter registration and 'get out the vote' drives*" is "*at best, attenuated*." *Colorado I*, 518 U.S. at 616 (emphasis added). Even if *some* uses of nonfederal money carried a potential for corrupting federal officeholders, a statute that "indiscriminately lumps" together *all* uses of that money constitutes a "fatally overbroad response to [the perceived] evil." *NCPAC*, 470 U.S. at 498, 500. Congress simply may not outlaw protected First Amendment activity in an effort to suppress unprotected activity. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

BCRA itself proves that new Section 323(a) is neither narrowly tailored nor even closely drawn. New Section 323(e), which regulates the very federal candidates and officeholders at the heart of the concern with corruption, contains numerous exceptions, allowing federal officeholders to raise nonfederal money for state parties and candidates up to the analogous federal limit (new Section 323(e)(1)(B)), to speak at state and local party fundraising events (new Section 323(e)(3)), and even to raise money for politically-active nonprofit groups (*compare* new Sections 323(e)(4) *with* 323(d)).[28]

These provisions subjecting political parties to flat bans while permitting federal candidates and officeholders to engage in the same activities reveal an utter lack of tailoring, drawing, or even rationality in the Act's treatment of parties. Worse, these provisions flip the campaign-finance world on its head. It is, after all, the actual and perceived corruption of *candidates and officeholders* – not *political parties* – to which this Court has said campaign-finance laws may be properly addressed. So, why an outright ban on party activity and a Swiss-cheese approach to regulating the same activities when engaged in by candidates and officeholders? Asked, in effect, that very question in their depositions, BCRA co-sponsors Senators McCain and Feingold had no answer. *See* J.A. 944-52, McCain Dep. 205-15 ("I'll have to get back to you on that."); J.A. 854-55, Feingold Dep. 189 (unable to explain distinction "off the top of [his] head").

New Section 323(a) is also facially overbroad because it purports to limit national party "spend[ing]" that is not coordinated with any candidate's campaign. In *Colorado I*, the Court stressed that the "constitutionally significant fact" in assessing limits on party spending is "the lack of coordination between the candidate and the source of the expenditure," and held that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." 518 U.S. at 616-

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[28] Even though new Section 323(b) severely and unconstitutionally constrains state and local parties (see Part I.C. below), it at least superficially nods in the direction of tailoring by purporting to focus on over-broadly defined "Federal election activity."

17; *see also NCPAC*, 470 U.S. at 493; *California Medical Ass'n*, 453 U.S. at 203 (Blackmun, J., concurring). *Colorado II* reaffirmed the right of a political party to "spend money in support of a candidate *without legal limit* so long as it spends independently" and emphasized that "[a] party may spend independently *every cent it can raise* wherever it thinks its candidate will shine, on every subject and any viewpoint." 533 U.S. at 455 (emphasis added). Because new Section 323(a) limits the RNC's uncoordinated as well as its coordinated spending, it is invalid.

Even if new Section 323(a) were subjected to intermediate scrutiny, it would fail. *See* Leon 1111sa. The record shows that *only a third* of RNC nonfederal money was used for the supposed evil Congress wanted to address – candidate-specific issue advertisements (p. 13 above) – and that RNC reliance on federal officeholders to raise nonfederal money was "exceedingly rare" (pp. 13 above). Even assuming a legitimate interest in curtailing federal officeholder involvement in raising nonfederal money to be spent on candidate-specific issue advertising, Congress simply made no effort whatsoever to tailor, draw, or in any way narrow Section 323(a) to address that objective.

As Judge Henderson noted below, the Government and Intervenors have never claimed that new Section 323(a) is narrowly tailored. Instead, they have defended its indiscriminate reach as a necessary prophylaxis to avoid circumvention of contribution limits. As she correctly emphasized, however, "[b]road prophylactic rules in the area of free expression are suspect." Henderson at 418sa (*quoting NAACP v. Button*, 371 U.S. 415, 438 (1963)).

4. Title I Cannot Be Re-Written to Substitute New Section 301(20)(A)(iii) for New Section 323(a).

Having concluded that new Section 323(a) is not closely drawn to prevent actual or apparent corruption, Judge Leon, joined by Judge Kollar-Kotelly, nonetheless undertook to do the drawing himself, by replacing it with a ban on national parties' use of nonfederal funds for "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports . . . or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." New Section 301(20)(A)(iii).

The district court's approach oversteps judicial bounds. "The clarity and preciseness" of new Section 323(a) make it impossible to narrow "its indiscriminately cast and overly broad scope without substantial rewriting." *See Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *see also Reno v. ACLU*, 521 U.S. 844, 884 (1997) ("This Court will not rewrite a . . . law to conform it to constitutional requirements"). Indeed, Congress expressly considered and rejected a less restrictive alternative to the ban on national party use of nonfederal funds that was quite similar to the formulation of new Section 323(a) crafted by Judge Leon.[29]

Moreover, the district court rewrote new Section 323(a) to create a pure expenditure limit. The rewritten provision does not prevent any raising of nonfederal money by national, state, or local political parties, but instead prohibits them from spending nonfederal money for any "public communication" – print, broadcast, mail, telephone bank, or billboard – that "refers to" a federal candidate and "promotes," "supports," "attacks," or "opposes" that candidate. *See* new § 301(22) (defining "public communication"). This restriction fails strict scrutiny, because it is even broader than the vague and overbroad restrictions on special interest groups in Title II, which apply only to *broadcast* advertisements aired immediately before a Federal election so as to reach the *relevant electorate*.

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[29] The so-called "Ney Amendment" would have allowed national parties to spend nonfederal money for any activity except "federal election activities," defined to include only (i) issue advertising, using the *same* definition as new Section 301(20)(A)(iii) as enacted, and (ii) voter registration and GOTV, but *only* if they "mention[ed], depict[ed], or otherwise promote[d] a clearly identified Federal candidate." 148 Cong. Rec. H460 (2002). The House rejected the Ney Amendment by a vote of 248-181. *See* 148 Cong. Rec. H464 (2002).

C. Section 323(b)'s Restrictions on State and Local Party Committees Violate the First Amendment.

According to the Government, new Section 323(b) simply prevents state and local parties from using nonfederal money for activity that "affects" federal elections and thereby merely reaffirms the original intent of FECA. In fact, new Section 323(b) and, in particular, the definition of "Federal election activity," deliberately discards some of the key limitations of FECA in order to reach activities never contemplated by that Act. It is also an impermissible attempt to restrict party campaign spending at the state and local level by limiting both expenditures and the parties' ability to engage in collective campaign activity.

1. New Section 323(b) Impermissibly Regulates State and Local Party Activities That Have No Ability To Corrupt Federal Candidates.

As stated earlier, new Section 323(b) and the definition of "Federal election activity" do not impose limits on contributions. Rather, they operate broadly to limit spending unrelated to a federal candidate or, in some cases, unrelated to any candidate at all. "Federal election activity" under BCRA includes virtually all political activity conducted by state or local parties if the state conducts its state or local elections at the same time as federal elections, since it includes most voter registration, most activities focused on voter identification and turn-out (for any race or issue), and most generic party promotional activities.

With the exception of the "public communications" provision, BCRA does not require that the activity be directed at or even mention a federal candidate. There is no exemption for activities that are directly related to state or local candidates, or that mention only those candidates. Indeed, with respect to voter identification, GOTV, and generic activities, "Federal election activity" specifically *includes* "a public communication that refers *solely* to a clearly identified candidate for State or local office" if the activity is for voter registration, voter identification, or GOTV activity. *See* § 301(20)(A)(i), (ii) (emphasis added.)

By including activities based only on their proximity to a federal election, Congress has significantly expanded the scope of federal regulation into spending that has virtually no connection to federal elections. These activities are now, by definition, "federal" and can be funded only with federal money or a combination of federal money and Levin funds.

Under FECA, the touchstone for regulating either contributions or expenditures was that such activities were "for the purpose of influencing" a federal election. Although FECA regulated activities directed at federal candidates, activities directed at state and local elections were completely outside FECA and could be funded as permitted by state law. "Mixed" activities benefiting both federal and nonfederal candidates were "allocated" between federal and nonfederal funds. "Generic" activities such as issue advocacy or party promotional materials were also allocated. Under BCRA, all of these activities – federal, state, mixed, and generic – are swept within the rubric "Federal election activity."

To illustrate, Judge Henderson found that the following were "Federal election activities" under new Section 323(b):

- A generic mailer stating "Our Vote is our Voice. Keep Asian Pacific Families Moving Forward. Vote Democrat;"
- A telephone script featuring Jesse Jackson urging voters to defeat a school voucher *ballot initiative*;
- A mailer urging voters to vote for several *state* and *local* candidates.

See Henderson 436-437sa; J.A. 157, 1717, 1721, 3 PCS CDP/CRP App. 51, 177, 197, 208, 209. In *Colorado I*, the Court found that the opportunity for corruption posed by nonfederal contributions for activities such as "electing candidates for state office . . . voter registration, and 'get out the vote' drives" was, "at best, attenuated." *Colorado I*, 518 U.S. at 616. The district court similarly concluded that the Government's evidence failed to demonstrate any likelihood of corruption of federal candidates arising out of these activities. *See* Leon 1122-23sa; Henderson 438sa.

In fact, BCRA goes beyond even the activities discussed in *Colorado I* and regulates contributions for ballot measure expenditures. As the Court made clear in *Citizens Against Rent Control*, the justifications for limiting contributions to candidates simply do not apply in the context of contributions for non-candidate-related disbursements such as ballot measure activity, since the only justification for such limits is the "perception of undue influence of large contributors to a *candidate*." 454 U.S. at 297 (emphasis in original); *see also First Nat'l Bank of Boston v. Bellotti*, 435

U.S. 765 (1978). This same reasoning applies to disbursements for activities such as voter registration and generic GOTV, as well as expenditures made in support of state and local candidates.

Judge Leon and Judge Henderson both correctly focused on the potential for corruption posed by these activities, as opposed to simply whether there was any "effect" on the federal election. Both concluded that in order to present a threat of corruption sufficient to justify federal regulation, there must be a benefit or appearance of benefit to a federal candidate. Judge Leon (1122-35sa) concluded that the evidence failed to demonstrate any such effect or any public perception that funds used for such activities created the kind of "indebtedness" necessary for the appearance of corruption:

> The evidence . . . fails to demonstrate either the degree of effect such activities have on the federal candidate's re-election, or the existence of a public perception that donations used to fund such efforts create a sense of indebtedness between the federal candidate and those who make large donations to the party. . .
>
> Thus, in the absence of a substantial evidentiary showing to the contrary, it is "mere conjecture," *Shrink Missouri*, 528 U.S. at 392, by the defendants that an appearance of corruption arises from donations to state parties, or transfers from national parties, that are used for these generic or noncandidate-specific activities set forth in Sections 301(20)(A)(i) and (ii).

Judge Henderson agreed, stating that "Sections 301(20) and 323(b) . . . require state parties to spend federal funds on activities that will not plausibly corrupt any federal candidate." Henderson 434sa. Judge Henderson specifically discussed an advertisement against Proposition 209. The advertisement urged voters to reject an "anti-affirmative action" initiative, and included the following language (as part of a longer advertisement):

> ...Vote No on 209. Vote No on the Republican scheme to turn the clock back and shut down equal opportunity for all. On Tuesday, vote yes for our future and no on Prop. 209. Don't let the Republicans get away with it. Don't stay home. That's what they're counting on. Paid for by the California Democratic Party.[30]

Addressing Intervenors' argument that the spot had an effect on the contemporaneous federal election, Judge Henderson's response was clear and emphatic: "Their contention, even if correct, is irrelevant. The Congress cannot, consistent with First Amendment strict scrutiny, limit a political party's pooling of individual, corporate or union donations to pay for an ad *that so plainly has no corrupting effect, real or imagined, on any federal candidate or officeholder.*" Henderson at 436sa (emphasis added).[31] Based on the broad regulation of ballot measure activity, purely state election activity, and generic party activity, Judges Henderson and Leon agreed that new Section 323(b) was not narrowly tailored (Henderson 433sa) or closely drawn (Leon 1123-24sa) to prevent corruption or the appearance of corruption.

Although it is the only category of "Federal election activity" that actually requires the mention of a federal candidate, even the "public communications" section of the definition of "Federal election activity" is substantially overbroad. *See* new § 301(20)(A)(iii). That provision requires any public communication that refers to a clearly identified federal candidate and "promotes," "supports," "attacks" or "opposes" that candidate at any time to be paid with 100% federal funds, regardless of whether the communication "expressly advocates a vote for or against" that candidate. These terms are not defined either by the statute or the recent FEC regulations.

The constitutional infirmities of this provision are similar in many respects to those before the Court in the context of the "electioneering communication" provisions in Title II, and those arguments will not be repeated here except to make a few points relevant to the political parties.

First, the "public communications" provision of Title I applies at *any* time, not just in an election year, and includes communications in *all* media, including mail. If this provision is intended to curtail "sham issue ads" run in close proximity to federal elections (and, even assuming such advertisements constitutionally could be regulated), it is not at all tailored to "capture" those communications.

Second, political parties often engage in communications that feature federal candidates for a host of reasons relating to the activities of the party itself, and not to a particular election. The record contains numerous examples: a "welcome to the party" certificate for newly registered voters that featured well-known state and federal party officeholders; an invitation to an event featuring a federal candidate as a sponsor; a letter from a federal candidate supporting a ballot initiative sent out by the party to all members; and an endorsement of a local candidate for mayor by a federal officeholder. *See* 3 PCS CDP/CRP App. 319, 208, 209, 368, 369. Any of these could be said to "promote" the party's federal candidates in some sense, and yet requiring that they be funded with federal money will

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[30] Henderson 435sa.

[31] Nor could Congress do so, consistent even with intermediate scrutiny, because, as Judge Henderson points out, the advertisement carries with it "*no* corrupting effect" whatsoever. *Id.* (emphasis added).

severely limit the party's ability to communicate with its own members.[32]

Finally, if there is any question about the difficulty in interpreting the scope of this provision, it is surely answered by the very hypothetical used by Judge Leon: the "No Child Left Behind" advertisement that mentioned President George Bush. While appearing to Judge Leon clearly to be a "genuine" issue advertisement, Judge Kollar-Kotelly stated that it "raises questions." Leon 1106-08sa; Kollar-Kotelly 510sa. If the provisions prompt such disagreements within the judiciary, it is difficult to see how party committees can reasonably be expected to conform their conduct. Of course, this was exactly why *Buckley* required "express" words of advocacy, and this Court should require no less.

Nor are the numerous restrictions on the rights of the state and local political parties justified as a means for limiting "circumvention," as that concern was articulated in *Buckley* and *Colorado II.* As the district court properly found, the "circumvention" addressed in these cases was circumvention of the limits on contributions to candidates. If a contribution can be limited because it presents a threat of corruption to a federal candidate, but a much larger contribution can be made through a political party, it undermines the original limit. Or, as the Court held in *Colorado II*, since party coordinated spending was the "functional equivalent" of a direct candidate contribution, unlimited coordinated spending would "exacerbate the threat of corruption . . . that those contribution limits are aimed at reducing." *Colorado II*, 533 U.S. at 453.

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[32] This restriction is also likely to end party "slate mail," which lists all the party's candidates. Prior to BCRA, if one federal candidate and nine nonfederal candidates were featured equally, one-tenth of the cost of the piece had to be paid with federal funds. Now, the piece must be funded with 100% federal money, a prohibitive requirement.

With or without BCRA, the state parties cannot use *nonfederal* funds for either candidate contributions or coordinated party expenditures for federal candidates; in the absence of BCRA, those funds can be used only for generic or non-federal-candidate-specific expenditures. More precisely, they can be used only for the *nonfederal portion* of the cost of a generic activity, since all generic activities were allocated between federal and nonfederal accounts. Only expenditures for state and local election activity could be paid *completely* with nonfederal funds. Therefore, restrictions on those activities (or contributions to be used for those activities) cannot be justified by any need to avoid circumvention of the underlying federal contribution limits, because those activities are not the "functional equivalent" of direct contributions or coordinated expenditure.

The flaw in BCRA is its presumption that, because state and local parties may support federal candidates, all of their activities have that purpose. Although a state party may make expenditures on behalf of federal candidates, it does a great deal more than that. Its members make donations not merely, or even primarily, to support federal candidates, but to support the parties' state and local candidates, to participate (in California) in ballot measure advocacy, and to represent their views in the process of government. The federal government cannot, consistent with the First Amendment, limit expenditures for activities (or contributions to be used for those activities) other than those with a potential for corruption of federal candidates and officeholders. No decision of this Court allows the federal government to regulate contributions and expenditures unrelated to federal candidates in the way that BCRA attempts to do.

2. Section 323(b) Prevents the State and Local Parties from "Banding Together To Achieve a Common End."

The limits on spending imposed upon the state and local parties are exacerbated by provisions that prohibit those parties from "banding together to achieve a common end." *Citizens Against Rent Control*, 454 U.S. at 294. The parties are essentially denied the opportunity to engage *collectively* in effective advocacy, which the Court has viewed as "undeniably enhanced by group association." *Id.* at 295.

New Section 323(b) prohibits a state or local party from engaging in "Federal election activities" with Levin contributions that have been solicited, received, or directed through joint fundraising activities, or with *any funds* transferred, contributed, or provided by any national party committee or any other state or local party committee if Levin funds are being used. *See* new §§ 323(b)(2)(B), 323(b)(2)(B)(iv), 323(b)(2)(C).

In other words, BCRA not only prohibits the transfer or joint fundraising of *Levin* funds, it also prohibits the transfer of *federal* money between political party units if that money is to be used for "Federal election activity" funded in part with Levin money. The transfer ban is not limited to transfers from the national party committees; it applies with equal force to transfers between the state and local party committees. The result is that, during a federal election year, a state party may not transfer any money – federal, nonfederal, or Levin – to a local party for GOTV activities in a *state* election if any Levin money is used. Similarly, the joint fundraising restrictions make it illegal for two local party committees to conduct a joint fundraiser to raise *state-regulated* money for a voter registration drive.

Fundraising is inextricably intertwined with political activity. *Schaumberg*, 444 U.S. at 632. While there may be "some activities, legal if engaged in by one, yet illegal if performed in concert with others, [] political expression is not one of them." *Citizens Against Rent Control*, 454 U.S. at 296. In addition, if the state or local parties collectively decide that a particular race has special importance and want to channel their collective resources to that race – resources raised completely in compliance with state or federal law – there is no lawful basis for the government to interfere with that internal decision. In such cases, the parties should have the freedom that other organizations have to make basic decisions about where money is best spent. These decisions reflect the group's collective decision-making and priorities. As shown (Part I.A.), interference with this right to self-governance is subject to strict scrutiny. *California Democratic Party*, 530 U.S. at 582.

As shown (Part I.B.), new Section 323(b) also dramatically inhibits the participation of the state and local political parties in the Republican Victory Plans and Democratic Coordinated Campaigns. Restrictions described in the context of national parties are, of course, equally applicable to the state and local parties, which provide the grass-roots organizational resources.

In addition, many state and local party officers also serve in various capacities with their national party. *See* J.A. 115-16, Bowler Decl. ¶¶3-4; J.A. 600, Morgan Decl. ¶8. BCRA therefore creates the risk of criminal penalties for a state or local party officer who is responsible for raising nonfederal funds for the state party and who also serves as an officer of the party's national committee, because he or she may be accused of raising those funds as an "officer" or "agent" of the national committee. [33] At the least, these provisions are likely to inhibit full participation in campaign discussions by these persons, and discourage state and local officers from involvement in the national parties.

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[33] Although the FEC regulations give state party officers who serve on national party committees some comfort, the Intervenors have challenged those regulations. *Shays v. FEC, supra.*

The freedom to associate entails both ability to affiliate and ability to pool resources with like-minded persons in furtherance of common goals. Under BCRA, party committees are precluded from both affiliating (as a result of the restrictions on the national parties and federal officeholders in state campaign activity) and from pooling their resources with each other (as a result of the joint fundraising and transfer bans). These restrictions are direct impediments to the state and local parties working collectively to "conduct[] the party's campaigns," as provided by California law. More fundamentally, if the parties cannot effectively organize and speak on behalf of their membership, they will be precluded from "effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley,* 424 at 22.

Nor are the restrictions on association in new Section 323(b) narrowly tailored or, in fact, tailored at all. The ban on transfers of both federal and nonfederal money illustrates this point. New § 323(b)(2)(B)(iv). Federal money is, by definition, money raised in compliance with all of the federal limitations as to both source and amount. It is money that has been determined by Congress to be noncorrupting if used directly to support a candidate. It is inexplicable how a transfer of such money can be corrupting even though the initial contribution is not. The same is true for the transfer of Levin funds among the state and local parties. Transferring money already raised within certain limits to another party committee, for uses not directly related to federal candidates, cannot be corrupting. The prohibition is absolute; it is not tailored to address, for example, large transfers or transfers shown to have a particular potential for corruption. Judge Henderson concluded that even if the transfer provisions were aimed at national party funding for "issue ads" (and if such a problem could be constitutionally addressed, a question she answered in the negative), the provision was required to be more narrowly tailored. *See* Henderson 440sa.

Similarly, a joint effort with another party committee to raise Levin funds, where the funds to be raised are statutorily limited and are legally permissible as to both committees, cannot lead to either corruption or the appearance of corruption. Neither the Government nor the Intervenors have explained how joint fundraising among state and local parties raising state-regulated money for use in state elections could create the potential for corruption of federal candidates.

3. New Section 323(b) Prevents State and Local Political Parties from Amassing the Resources for Effective Advocacy.

Although *Buckley* upheld the contribution limits at issue in that case, the Court acknowledged that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. The Levin limits on the use of state-regulated money, coupled with the restrictions on normal associational activities, in fact create "a system of suppressed political advocacy" that offends the First Amendment. *Nixon*, 528 U.S. at 396.

The requirement that a particular expenditure be funded with federally-regulated money has significant consequences for the state and local parties. For example, CDP has raised approximately $4 million in federal money during each of the last several cycles. *See* Henderson 315sa; Leon at 1240sa. Administrative expenses have been approximately $5-6 million per cycle. *See* J.A. 117-18, Bowler Decl. ¶7. Pursuant to FEC regulations, a percentage of all administrative expenses must be paid with federal money.[34] A large percentage of CDP's federal money is, therefore, consumed by administrative expenses. This means that if additional state and local campaign activities are now deemed "federal election activity," existing federal money must be divided between administrative expenses and programmatic expenses.

Although both parties have made significant investments in federal fundraising, federal money is expensive to raise, the average contribution is quite low, and the more effective programs require a significant capital investment. *See* Henderson 315-18sa; Leon at 1240-42sa.[35]

In addition, the Levin Amendment will significantly restrict the usable amount of nonfederal funds available to the parties. This is the very money previously used to fund the lion's share of state parties' ballot measure advocacy. The evidence below demonstrated that 76-86% of the CDP's nonfederal funds raised over recent cycles would not comply with the Levin restrictions; for CRP, the figures are 47-69%.[36] *See* Henderson 316-18sa; Leon 1241-42sa. These findings stand in stark contrast to the finding in *Buckley* that only 5.1% of the money raised by Congressional candidates in that year was in amounts in excess of the $1,000 contribution limit. *Buckley*, 424 U.S. at 21 n.23.

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[34] The FEC regulations requiring state parties to allocate administrative expenses between federal and nonfederal accounts remain in effect, resulting in a need for federal funds beyond that required for "Federal election activity."

[35] For example, in the 2000 cycle, 43% of administrative costs had to be paid with federal money. Bowler Dec. ¶15.

[36] These numbers do not include the loss of transfers, which would reduce the amounts further.

The state and local parties therefore face the prospect of being required to fund a significantly increased percentage of their traditional campaign activities – state and local as well as federal – with either extremely limited federal money or with federally-regulated Levin money. The gap in projected revenues and the historical cost of the state parties' activities are illustrated in Bowler Decl., Ex. C, J.A. 154. *See also* Erwin Decl., Ex. 7 (CRP figures). This graph illustrates, based on historical revenue and expense figures, the projected federal and Levin revenues and CDP's expenses. The gap between the two would have been approximately $16 million (CDP) and $10.6 million (CRP) in the 1999-2000 election cycle.

There is no evidence in the record that Congress gave any meaningful consideration to the impact of BCRA, or new Section 323(b) in particular, upon the state and local parties. The effect of the $10,000 limit on nonfederal contributions is particularly harsh on parties in a state such as California, which has a large population. A State Senate District contains almost 850,000 persons. Because of term limits, California's state legislative and executive offices turn over regularly and the races are more competitive than most federal offices. *See* J.A. 116 Bowler Supp. Decl. ¶4. The cost of a statewide mailpiece can be approximately $260,000. *See* J.A. 132, Bowler Decl. ¶24; Henderson 313sa n.112. CDP's direct mail program in support of state and local candidates costs approximately $7-8 million per cycle. *See* J.A. 124-30, Bowler Decl. ¶20. As the Court has observed, "freedom of association is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective," and "[t]he value of the right to associate is illustrated by the cost of reaching the public." *Citizens Against Rent Control,* 454 U.S. at 296 & n.5 (internal citations omitted).

There is simply no way that the California state parties can withstand this impact (amounting to well over $10 million each) without serious impairment to their programmatic activities and their ability to communicate effectively with their 12 million members. The district court found that the need to use federal money for an increased range of expenditures unrelated to federal candidates, including many state and local election expenditures, and the inability to use the nonfederal money raised by the state parties, is likely to result in a reduction of voter registration activities, generic party-building, and grassroots mobilization. *See* Henderson 320-21sa; Leon 1242-43sa; *see also* J.A. 1434-37, La Raja Decl. ¶22; J.A. 1648-49, Snyder Decl. at 14-15. In addition, the transfer and fundraising restrictions make it impossible for the state and local parties to channel resources to races where they are most needed and/or where they can be used most effectively. The combination of spending limits and association limits will most surely lead to a loss of the "resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

D. New Section 323(a) Undermines the Speech and Associational Rights of Minor Parties.

The significant burdens that new Section 323(a) places on rights of political speech and association become especially irrational and crushing for political parties that primarily engage in issue advocacy and that lack the human and financial resources of the major parties. The LNC is both an example and a particular victim of new Section 323(a)'s effect on minor political parties. Most crucially, as applied to the LNC, new Section 323(a) obviously suppresses pure political speech and freedom of association in the name of suppressing campaign finance abuse.

Several examples of LNC nonfederal activity illustrate how new Section 323(a) restricts protected political activity unrelated to federal elections.

First, using nonfederal money, the LNC conducts numerous issue advocacy campaigns, including, for example, advertising campaigns advocating adoption of libertarian policy positions on government spending, drug control, welfare, gun ownership, and taxation. *See* J.A. 196, LNC Decl. ¶35 and the exhibits cited therein. The Libertarian Party also raises funds and advocates for its principles without any express reference to any Libertarian Party federal candidate when major party candidates do not address them. Thus, using nonfederal money, the Libertarian Party ran anti-drug war advertisements to lampoon advertisements being run by the federal government linking the drug war to anti-terrorism efforts. *Id.* ¶12 & Ex. E. New Section 323(a) forbids the LNC from using nonfederal money for these entirely issue-oriented purposes.

Second, every two years, the LNC stages conventions of the Libertarian Party; a nominating convention is held during presidential election years and a purely educational convention in off-presidential election years. *Id.* ¶¶28-31, J.A. 192-94. Non-presidential year election conventions are solely devoted to discussion and advocacy of issues and to internal party matters; the convention neither nominates nor selects candidates for public office. *Id.* ¶29, J.A. 192-93. Nevertheless new Section 323(a) effectively bans receipt of income from corporations for exhibit space rentals, advertising, and sponsorships that are used to finance these conventions. *Id.* ¶ 29. It also effectively forbids corporations from administering off-year conventions, since any costs of administration would amount to forbidden corporate in-kind contributions to the LNC. *Id.* ¶30, J.A. 193. New Section 323(a) also increases administrative costs by creating the need to distinguish between various sources of contributions. The cumulative effect is to significantly increase the cost to potential attendees and perhaps to render off-year conventions entirely infeasible. *Id.* And, in contrast to the major parties, the LNC receives no government funds for its conventions. *Id.*

Third, the LNC produces educational materials on libertarian issues for sale to the general public and to state and local Libertarian parties and candidates. *Id.* ¶ 32 & Exs. As a the result of BCRA, however, the LNC is forbidden to receive funds for this service from its own state and local parties and candidates as nonfederal money (or even as federal money because such a purchase would pose the risk that the state or local party or candidate would have to file with the FEC as a political committee engaging in federal activity.) *Id.* Not only does this represent a significant loss of revenue to the LNC, but it means that the consistency of the libertarian message may be compromised because state and local affiliates will have to develop materials independently or turn to non-party independent sources for those materials. *Id.*

Fourth, the LNC's monthly newspaper, the *Libertarian Party® News*, engages primarily in education and issue advocacy. *Id.* ¶¶18-19 & Exs., J.A. 189. But new Section 323(a) effectively forbids certain receipts arising from the paper's publication because they constitute nonfederal money. It also increases administrative costs for the *Libertarian Party® News*.

Under new Section 323(a), the LNC would be required to refuse advertising or subscriptions for its newspaper that it presently accepts from both for-profit and not-for-profit corporations (including any library organized as a corporation). *Id.* ¶19, J.A. 189. Moreover, new Section 323(a) would strongly discourage advertising by state or local candidates in the *Libertarian Party® News* since any such candidate would then be subject to FEC filing requirements, because their funds would be deemed to be expended for federal activities. *Id.* Finally, it would disrupt the subscription system by prohibiting one person from paying for a subscription on behalf of another. *Id.* ¶21, J.A. 189-90.

Finally, even Libertarian Party federal campaigns are primarily directed toward issue advocacy, rather than toward election of any particular candidate. *Id.* ¶¶10-13, J.A. 185-87. Libertarian Party candidates know that they have only a remote chance to win federal office, so they use their candidacies to educate the public on libertarian principles. *Id.* ¶11, J.A. 185-86.[37]

Simply put, the alleged corruption or appearance of corruption of federal officeholders that purportedly justifies new Section 323(a) does not apply to the Libertarian Party. No Libertarian Party candidate has ever won a race for federal office. *Id.* ¶10, J.A. 185.[38] Thus, no Libertarian Party candidate has ever been exposed to the occasion for actual or apparent corruption that new Section 323(a) allegedly protects against. Further, the supposed potential for widespread abuse of nonfederal money by national parties that motivated new Section 323(a) simply does not exist with regard to the LNC. The principal sources of LNC nonfederal money are mailing list rental fees, dues paid through state affiliates and forwarded to the LNC, and advertising in the *Libertarian Party® News* and elsewhere. *Id.* ¶9, J.A. 184. Very little of the nonfederal money received by LNC is from any corporate source (if funds from renting lists or advertising in the *Libertarian Party® News* are excluded) or from large individual contributions. *Id.* Even so, new Section 323(a) would deprive the LNC of these funds, although they cannot reasonably be deemed a threat of actual or apparent corruption Libertarian Party federal candidates.

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[37] Federal candidacies are important to the advancement of libertarian principles and the Libertarian Party because the issues that draw voters to the party are primarily federal and because federal candidates often achieve the crucial percentage necessary to achieve ballot status in future elections. LNC Decl. ¶14, J.A. 187. Ballot access is important because these campaigns provide an important means for the Libertarian Party to disseminate its views.

[38] In the 2000 general election, Libertarian Party U.S. Senate candidates averaged less than one percent (1%) of the vote; Libertarian Party U.S. House candidates averaged less than two percent (2%) of the vote. *Id.*

Likewise, without reasonable (much less a compelling) cause, new Section 323(a) deprives the LNC of nonfederal money from state affiliates and imposes significant administrative burdens on state affiliates. *Id.* ¶ 9, J.A. 184. It requires restructuring of the manner in which the LNC manages its membership, significantly increasing costs and diminishing possible income from rental of the membership list. *Id.* ¶¶24-25, J.A. 191. It places a significant and disproportionate administrative burden on the limited resources of the LNC. *Id.* ¶¶5-7, J.A. 182-83. New Section 323(a) restricts, and may even destroy, state party campaign and educational efforts and some state parties themselves. *Id.* ¶8, J.A. 183-84.

New Section 323(a) also effectively criminalizes the current structure of the national Libertarian Party as a membership organization that requires the regular payment of dues from members to the LNC. Dues are frequently paid to affiliated state Libertarian Parties, with a portion to be distributed to the national Libertarian Party, so that those who pay dues may be members of both the state and national parties. Further, dues often are paid by one person on behalf of another, then deposited in state affiliates' nonfederal money accounts. *Id.* ¶33, J.A. 195. Under new Section 323(a), however, these funds may not be transferred to the LNC, so that members who pay dues in such a manner must be denied membership in the national Libertarian Party.

To put the LNC's burden in perspective, the LNC is much smaller than the RNC or DNC. It has only eleven full-time employees, one half-time employee and three part-time student employees. *Id.* ¶5, J.A. 182. Only ten state

Libertarian parties have any paid employees, many of them only part-time, and they rely heavily on volunteer staff. *Id.* Because the requirements of FECA are constant, however, the new BCRA restrictions create a greater proportionate burden on the LNC. Moreover, especially because of its ban on nonfederal money, the BCRA will impede LNC's ability to publish its newspaper and educational materials, *id.* ¶¶18-23, 32, 35, J.A. 189, severely impede its ability to stage its educational off-presidential-year national convention (which does *not* nominate any candidates), *id.* ¶¶28-31, J.A. 192-93, and effectively criminalize its present membership structure. *Id.* ¶¶33-34, J.A. 195. In its effect on the LNC, new Section 323(a) is plainly not narrowly tailored to serve any compelling government interest.

E. Section 323(d)'s Prohibitions on Party Involvement With Other Organizations Violate the First Amendment.

New Section 323(d) prohibits any national, state, or local party committee from soliciting for, or donating to, any nonprofit, tax-exempt organization that makes any disbursements for "Federal election activity." New § 323(d)(1). The section also prohibits any party committee from contributing to any organization exempt from tax under IRC section 527 (other than party committees, candidate committees, or federally-registered political committees) regardless of whether that organization disburses any funds for "Federal election activity." New §323(d)(2).[39] These restrictions apply not only to the party committees at all levels, but also to any "officer or agent acting on behalf of" any party committee or entity.

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[39] Section 323(d) does not prohibit transfers among political party committees. *But see* new § 323(b)(2)(B)(iv). The FEC allows political party donations to Section 527 committees registered under state law, but only if those committees support only state and local candidates and do not engage in "Federal election activity." 11 C.F.R. § 300.51.

The prohibitions of new Section 323(d) outlaw a stunning array of normal coalition advocacy, as well as civic and associational activity by parties and their officers, employees, and volunteers. Because support for and opposition to ballot measures in California is conducted largely through ballot measure committees, which are organized as IRC § 501(c)(4) entities, *see* Henderson 444-45sa, the ability of the California state parties to give to and solicit funds for ballot measure committees has been critically important. Through such activity, the state parties express support for policies that reflect the party's values, positions, and common ideological goals. These activities are entitled to the highest degree of First Amendment protection. *See Citizens Against Rent Control,* 454 U.S. at 299 ("It is hard to imagine speech more eligible for First Amendment protection" than support of ballot-measure organizations). Because most ballot measure groups engage in some of the activities within BCRA's definition of "Federal election activity," such as GOTV, new Section 323(d) flatly bans the California state and local parties from contributing to or raising funds – even federally-regulated funds – for such groups.

New Section 323(d) also prohibits the parties from contributing to the local Democratic or Republican "Clubs." These clubs are the grass-roots organizations that typically conduct voter registration and walk precincts on or before election day – activities now defined as "Federal election activity." Contributions are prohibited to these organizations because they are organized under IRC section 527. *See* Henderson 449sa.

The ban on contributions to 527 organizations also affects the ability of the parties to participate in other state issues. In California, petitions are currently circulating to

recall the Governor. Many of the committees formed to support or oppose the recall are organized under IRC Section 527. Although the state parties are intensely interested in, and likely to be affected by, a potential recall election, there are serious questions about whether and, if so, when the state parties can contribute to, or solicit for, these committees. If the recall effort qualifies for the ballot, and a special election is set for March 2004 (an election which will include federal races), and these committees engage in GOTV activity within the definition of "Federal election activity," the national, state and local parties, as well as their officers and agents, will be completely prohibited from either contributing *any* money to, or soliciting *any* money for, the recall committees.

By making it a federal crime for party committees to donate to, or solicit for, organizations that share similar values and goals, new Section 323(d) severely burdens the freedom of association of the individual party officers, employees, and volunteers, and of the party committees themselves. As discussed above, solicitation activities by their very nature "'involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas and the advocacy of causes – that are within the protection of the First Amendment.'" *Illinois ex. rel. Madigan v. Telemarketing Associates, Inc.*, 123 S. Ct. 1829, 1836 (2003) (*quoting Riley*, 487 U.S. at 788-89). Such restrictions on solicitation of funds are unconstitutional when they are "not narrowly tailored to achieve the [government]'s asserted interest. . ." *Riley*, 487 U.S. at 788. Even apart from solicitation, the ban on contributions prevents the political parties from "affiliating" and "pooling resources" with like-minded organizations to further shared goals. An outright ban on such a showing of support cannot be squeezed within *Buckley's* allowance of contribution *limits*, especially since any funds that the parties might give have been lawfully raised.

New Section 323(d) cannot be defended as a means of avoiding circumvention by "satellite party organizations." *See* Kollar-Kotelly 987sa. This provision is neither "narrowly tailored," *Riley*, 487 U.S. at 788, nor even "closely drawn" to serve that purpose while avoiding "unnecessary abridgement" of the parties' First Amendment rights. *Buckley*, 424 U.S. at 25. *First*, the provision is not in any way limited to party support for "sham" organizations or satellite party organizations disguised as tax-exempt groups. Rather, it prohibits any solicitation or donation of contributions, by any party or party official, to well-established, clearly independent, nonprofit organizations engaging in "Federal election activity" as BCRA broadly defines it. It also prohibits donations to legitimate 501(c)(4) organizations that support or oppose ballot measures. Moreover, new Section 323(d) prohibits *all* donations, not just those that might be large enough to exert control over the recipient.[40]

Second, it prohibits party committees from contributing not only nonfederal money to nonprofit and nonfederal political organizations, but federally-regulated money as well. For example, new Section 323(d) prevents a local party committee from using even federal money to buy a table at the annual fundraising dinner of the local chapter of the NAACP, because the NAACP engages in nonpartisan voter registration ("Federal election activity").

Third, while new Section 323(d) prohibits donations to or solicitations for these tax-exempt groups by parties, new Section 323(e)(4)(A) allows federal candidates themselves to solicit contributions to nonprofit organizations, without

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[40] The vast majority of CDP donations to nonprofit organizations were under $1,000 and were made for ideological reasons (*e.g.*, $250 to the Haight Ashbury Food Program, $200 to Sojourner Women's Center). *See* J.A. 166-67, Bowler Reb. Decl. ¶9.

limitation, from any source, as long as the "principal purpose" of the organization is not to conduct voter registration or GOTV activities and as long as the solicitation is not for funds earmarked for those activities. Federal candidates are, of course, the very individuals who would be directly benefited (or potentially "corrupted") by the supposed circumvention of FECA's contributions limits.

F. By Limiting the Right of Political Parties To Make Independent Expenditures, Section 213 Violates the First Amendment.

The district court unanimously and correctly invalidated Section 213, which requires political parties to choose between making coordinated expenditures or independent expenditures for each of their candidates. *See Per Curiam* 7sa; Henderson 385sa, 396-97sa; Leon 1170-76sa; Kollar-Kotelly 886sa.

Section 213 is a bold attempt by Congress to overrule this Court's decision in *Colorado I*, which recognized the First Amendment right of political parties to make unlimited independent expenditures. Section 213 attacks this right by placing three interrelated restrictions on political parties' use of federal money.[41] (1) The "either/or" element provides that on or after the date a political party nominates a candidate for federal office, all committees of that political party must choose between independent and coordinated spending with respect to that candidate. They may no longer do both. (2) The "one committee" element provides that all political party committees—national, state, and local—are a single committee for purposes of these prohibitions. (3) The "first in time" element provides that the first committee of a political party at the federal, state, or local level to exercise one form of spending controls all other party committees' spending choices.[42]

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[41] Unlike new Section 323, which concerns "non-federal" money, Section 213 attempts to restrict the use of federal money.

As a clear limit on spending, Section 213 is subject to strict scrutiny. Leon 1171sa. Section 213 infringes the political parties' rights of speech and association in three significant ways.

First, it interferes with the political parties' right to make independent expenditures recognized by *Colorado I*, 518 U.S. at 616, by a method different in style but not effect from the prohibition invalidated in that case. Specifically, *Colorado I* rejected the FEC's conclusive presumption that a political party's expenditures were always coordinated expenditures, not independent expenditures. Section 213 simply recasts that conclusive presumption. If a political party makes *any* coordinated expenditure under Section 441a(d)(4), then *all* party independent expenditures are prohibited outright. The Government has proffered no justifiable interest – much less a compelling one – in restricting independent spending by political parties, and the district court found no justification in the legislative record. *See* Kollar-Kotelly 886sa; Leon 1174sa.

Defendants have asserted, as they have with respect to all of BCRA's prohibitions and restrictions upon political parties, that this constitutionally guaranteed right to make independent expenditures presents the opportunity for *circumvention* of candidate contribution limits. The Supreme Court rejected the same argument in *Colorado I*, concluding that political party funds used to make independent expenditures raised no serious corruption or circumvention problems. 518 U.S. at 617.

Second, Section 213 conditions the benefit of political party "coordinated expenditures" on behalf of their parties' nominees upon the parties' forbearance of their right to make independent expenditures. This forced choice is *both* a burden on the right to spend independently *and* an unconstitutional condition upon independent spending. *See Perry v. Sindermann*, 408 U.S. 593 (1972); *Elrod v. Burns*, 427 U.S. 347 (1976). The Government invoked *Buckley's* approval of public funding in exchange for spending limits to argue that forcing parties to choose between more generous coordinated expenditure limits available only to political parties and unlimited independent expenditures available to all political committees and individuals is permissible.

As the district court held, however, Section 213, offers no public funds. Henderson 397sa ; Leon 1173sa. It forces a choice between two *existing rights*: one statutory and the other constitutional. Moreover, no anti-corruption rationale has or could be advanced here, since all money at issue is *federally–regulated money* being spent *independently* of the candidates.

Third, Section 213 compels the forced association of party committees at all levels, to effect a collective speech restriction on independent spending by each. Such compelled association was rejected in *California Democratic Party*, 530 U.S. at 581-82. After *Colorado I*, but until BCRA Section 213, political party committees at the local, state, and federal levels could make unlimited independent expenditures and also limited "coordinated expenditures." The record shows, for example, that the RNC made coordinated expenditures at the same time the National Republican Senatorial Committee and the Republican Party of Michigan were making independent expenditures. J.A. 324, Josefiak Reb. Decl. ¶7. Thus, in another way, Section 213 eviscerates *Colorado I*.

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[42] Subdivision (C) of 2 U.S.C.A. § 441a(d)(4) also prohibits one party committee that has made "coordinated expenditures" from transferring federal dollars to another party committee to enable that committee to make independent expenditures.

The harsh, aggregate effect of this "three-in-one" rule on forced association can be demonstrated by two examples. With respect to *a single state*, one local or state Democratic party committee in California could bind the DNC, the CDP, and all local party committees in California to its decision to engage in independent expenditures or coordinated expenditures on behalf of that state's Senate or Congressional nominees. If a local party committee in Des Moines held a party during the Presidential Nominating Convention in 2004 and spent $100 to produce a banner reading "Re-Elect President Bush," then new Section 213 would prohibit the RNC from making any "coordinated expenditures" on behalf of President Bush in 2004.[43]

Therefore, in order for state or national party committees to protect their preferred spending alternative, these committees would be required to monitor and attempt to control the activities of local party committees. In view of the restrictions on party associational rights imposed by new Section 323 (*see* Part I above), this requirement may be impossible to fulfill, but is unconstitutional in any event.

G. By Mandating That "Coordinated Communications" Encompass Truly Independent Activity, Section 214 Violates the First Amendment.

Section 214 broadens the definition of when an expenditure is deemed to be "coordinated" with a candidate and therefore treated as an "in-kind" contribution under FECA. *See* Section 214(a). It repealed the FEC's existing regulatory definition of coordination, *see* Section 214(b), and

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[43] National party committees, but not state and local party committees, may make "coordinated expenditures" on behalf of candidates for President. Compare 2 U.S.C.A. §441a(d)(1) and 441a(d)(2); *see also* 11 CFR §109.32 (FEC Rulemaking re "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 444 (January 3, 2003)).

instructed the FEC to adopt a new definition of coordination that "shall not require agreement or formal collaboration to establish coordination." Section 214(c).

As Judge Henderson recognized, an expansive definition of "coordination" will necessarily impair the ability of speakers, and especially political parties, to make "independent expenditures." Henderson 386-87sa. In *Colorado I*, this Court refused to accept the FEC's longstanding presumption that all party spending is coordinated, since "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." 518 U.S. at 621-22. Rather, the Court looked for evidence of "actual coordination as a matter of fact." *Id.* at 619; *see also FEC v. Christian Coalition*, 52 F. Supp.2d 45, 91 (D.D.C. 1999) ("First Amendment clarity demands a definition of 'coordination' that provides the clearest possible guidance to candidates and constituents").

Because of their relationships with candidates, the Political Party Appellants are most directly injured by the broad definition of coordination required by Section 214 because it subjects *all* their expenditures in support of candidates to the coordinated party expenditure limit, even when the expenditures are truly independent "as a matter of fact." It also purports to make political parties (and derivatively, candidates) responsible for independent expenditures by persons or entities with whom the parties have little if any relationship.

Section 214 is just as offensive to the First Amendment as the "conclusive presumption" of coordination rejected by this Court in *Colorado I*, 518 U.S. at 619. With no express or implied "agreement," or even "formal collaboration," required to show coordination, political opponents are encouraged to file charges of coordination on the thinnest evidence. The consequences can be severe; any corporate political activity deemed "coordinated" with the party immediately becomes an illegal contribution to the party, and perhaps to the candidate, with severe penalties. *See* Section 312(a). Fear of these penalties will stifle the important efforts of parties to build coalitions – to "associate" – with ideologically-aligned groups.

The district court erroneously held that the RNC Appellants' constitutional challenge to Sections 214(b) and (c) are not justiciable on standing and ripeness grounds. As Judge Henderson correctly noted in dissent, however, that challenge is ripe for review because "[Section] 214 will violate the First Amendment no matter what the [FEC] does, for no regulation it promulgates may depart . . . from the provision['s] plain text." Henderson 394-95sa. Moreover, because constitutional challenges to BCRA must be brought before a three-judge court, *see* § 403(a), while challenges to regulations are heard by a single judge,[44] the court's ruling may effectively preclude review of Section 214's constitutionality. Thus, the Court should reach this issue, and declare Section 214 invalid in its entirety.

II. NEW SECTION 323'S RESTRICTIONS ON POLITICAL PARTIES EXCEED THE POWER OF CONGRESS UNDER THE FEDERAL ELECTIONS CLAUSE AND VIOLATE PRINCIPLES OF FEDERALISM.

It is now a federal crime for the Chairman of the RNC to send a fundraising letter on behalf of a *state* gubernatorial candidate or even a *local* mayoral candidate. The RNC is now precluded from raising and spending money in full compliance with state law even in off-year elections, unless it additionally complies with the extensive federal regulatory regime. And it is a federal crime for a *state* political party to use *state*-regulated money to telephone voters urging support for a *state* ballot initiative if it so happens that there is a federal candidate on the ballot. This federalization of the rules for participating in state political processes is unprecedented and directly contravenes the compromise struck by the Founders in Article I, Section 4 of the Constitution (the "Federal Elections Clause").

A. Congress May Not Regulate Purely or Predominantly State and Local Election Activity.

1. The Federal Elections Clause Limits Congressional Power To Regulate Nonfederal Election Activity.

Even though Congress did not specify a constitutional basis for enacting BCRA,[45] the Government has made a binding admission that Congress relied on no other enumerated constitutional power to support Title I.[46] The Federal Elections Clause states:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or

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[44] *See* 5 U.S.C. § 702 (providing for judicial review under Administrative Procedure Act).

[45] In *Buckley*, this Court treated FECA, which BCRA amends, as a product of Congress' power under the Federal Elections Clause. 424 U.S. at 13 & n.16.

[46] *See* J.A. 1800-01, United States' Resp. to RNC's 2d Set of Interrogs. to Defts. (Sept. 19, 2002) at 4 (claiming Commerce Clause basis *only* for BCRA §§305 and 504, which amend Federal Communications Act). This admission should end the matter. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (justification for government action "must be genuine, not hypothesized or invented *post hoc* in response to litigation"); *cf. United States v. Lopez*, 514 U.S. 549, 563 & n.4 (1995) (rejecting Congress' *post hoc* rationalization for its exercise of commerce power).

> alter such Regulations, except as to the Places of choosing Senators.

U.S. Const. Art. I § 4; *see also* S. Rep. No. 92-229, at 99 (1971).

The Clause "was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections." *Oregon v. Mitchell*, 400 U.S. 112, 119 n.2 (1970) (controlling opinion of Black, J.). The debate thus revolved around the question whether the Federal Government should have *any* role at all in regulating elections – even *federal* elections. As the Government's expert, Dr. Donald P. Green of Yale University, acknowledged, the allocation of control over elections was "maybe one of the most vigorously-debated aspects of the constitutional structure." J.A. 867-68, Green CX 142.

Even the most ardent nationalists among the Founders were particularly forceful in warning against federal encroachments into state elections. As Alexander Hamilton wrote in *Federalist* No. 59:

> Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle in this case would have required no comment.

Echoing Hamilton, Justice Joseph Story observed in dismissing a hypothetical federal power to regulate state elections that "[i]t would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments. It would be deemed so flagrant a violation of principle, as to require no comment." Joseph Story, 2 *Commentaries on the Constitution of the United States* 284-85 (1st ed. 1833). Notably, Dr. Green has candidly conceded both that (i) the Hamilton view correctly represents the original understanding of the Federal Elections Clause and (ii) BCRA "*goes a lot farther than Hamilton indicated in Federalist Number 59.*" J.A. 868-69, Green CX 148-49 (emphasis added).

Against this background, it is not surprising that this Court has consistently recognized that the Clause provides no authority to regulate state elections. For example, in *United States v. Reese*, 92 U.S. 214 (1875), which evaluated the constitutionality of the Enforcement Act of 1870, the Court dismissed the application of the Clause to a municipal election, noting that in view of the local character of the election at issue, "[t]he effect of art. 1, sect. 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration." *Id.* at 218. *Ex parte Siebold*, an Enforcement Act case involving ballot-box stuffing in connection with a federal election, similarly emphasized the limitation of the Clause to federal elections: "We do not mean to say . . . that for any acts of the officers of election, *having exclusive reference to the election of State or county officers*, they will be amenable to Federal jurisdiction." 100 U.S. 371, 393 (1871) (emphasis added).

To be sure, the Court has recognized that the Federal Elections Clause may permit some incidental regulation of state elections, but only as necessary effectively to regulate simultaneously-occurring federal elections. For example, *Siebold* noted that "[i]f for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations *in reference to the latter*." *Id.* (emphasis added). Thus, Congress may not regulate state elections under the Clause simply because they happen to occur at the same time as a federal election; rather, the Clause is broad enough only to allow federal regulation carefully tailored to apply *solely* to "*the latter.*"

The Court has repeatedly reiterated this principle. In *Blitz v. United States*, 153 U.S. 308 (1894), for instance, the Court dismissed an indictment for impersonating a voter because the indictment did not allege that the defendant had actually voted for Congress, as opposed to a state or local office. The Court there held that "[v]oting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for Representative in Congress," and that "[w]ith frauds of that character [*i.e.*, concerning elections for state office] *the national government has no concern.*" *Id.* at 314-15 (emphasis added).

More recently, in *Oregon v. Mitchell*, the Court struck down a provision of a federal law lowering to eighteen the voting age in *state and local elections*, while upholding a provision similarly lowering to eighteen the voting age in *federal elections*. In his controlling opinion, Justice Black emphasized that "[o]ur judgments . . . save for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them." 400 U.S. at 135. *See also Tashjian*, 479 U.S. at 217 ("[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places, and Manner of holding Elections for Senators and Representatives,' Art. I, §4, cl. 1, *which power is matched by state control over the election process for state offices*." (emphasis added)). Not a single Justice in *Oregon v. Mitchell* argued that the Clause empowered Congress to lower state voting ages. Accordingly, the Federal Elections Clause affirmatively precludes Congress from usurping the states' sovereign right to regulate their own elections.

2. Limitations on Our Federal Structure Require Congress To Respect the Electoral Processes of the States.

Even if (contrary to the Federal Elections Clause) Congress had the power to enact Title I's restrictions on state and local election activity, the statute's extensive intrusion into an area central to state sovereignty would contravene principles of federalism embodied in the Constitution, as well as the Tenth Amendment. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 156-57 (1992).

Under "Our Federalism," the states retain "a large residuum of sovereignty." *Alden v. Maine*, 527 U.S. 706, 748 (1999). That "[r]esidual state sovereignty was ... implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, ... which implication was rendered express by the Tenth Amendment[]." *Printz v. United States*, 521 U.S. 898, 919 (1997). In *Alden*, which principally addressed the scope of states' sovereign immunity under the Eleventh Amendment, this Court warned that:

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. *Congress must accord States the esteem due to them as joint participants in a federal system*, one beginning with the premise of sovereignty in both the central Government and the separate States.

Alden, 527 U.S. at 758 (emphasis added). Importantly here, *Alden* emphasized that federal encroachment is of particular concern where a state's sovereign powers of self-governance are at stake: "When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government. . . *A State is entitled to order the processes of its own governance*." *Id.* at 751-52 (emphasis added).

Similarly, in *Oregon v. Mitchell*, Justice Black's controlling opinion emphasized that "[n]o function is more essential to the separate and independent existence of the States and their governments" than the power to determine the qualifications of voters for state and local offices and – significantly here – "the nature of their own machinery for filling local public offices." 400 U.S. at 125; *see also California Democratic Party*, 530 U.S. at 590 (Stevens, J., joined by Ginsburg, J., dissenting) ("A state's power to determine how its officials are to be elected is a quintessential attribute of sovereignty.").[47]

Each of the 50 states has considered and enacted legislation governing the financing of campaigns for state and local office. BCRA superimposes federal restrictions on local, state, and national party participation in state elections. At worst, it overrides those state laws; at the very least it shows no "esteem" for the prerogatives of the states as dual sovereigns. *Alden*, 527 U.S. at 758.

3. Plaintiffs Have Standing To Challenge Title I As Exceeding Congress's Enumerated Powers and Violating Principles of Federalism.

The Political Party Appellants have challenged Title I primarily as an *ultra vires* regulation of state and local election activity with no basis in *any* enumerated power. The

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[47] Indeed, in enacting FECA in 1971, a more prudent Congress referred to "the powers reserved in this field to the States" – seemingly an acknowledgment of the Constitution's "reserv[ation] to the States," U.S. Const. amend. X, of the power to regulate their own elections. *See* S. Rep. No. 92-229, at 100.

Government correctly conceded in *Pierce County v. Guillen*, 123 S. Ct. 720 (2003), that the private party plaintiff in that case had standing because the plaintiff alleged "limitations on Congress's delegated powers."[48] The Court did not reach the question of standing, however. *Id.* at 732 n. 10.

Although the states surely are injured by Congress's *ultra vires* exercise of control over their own electoral processes, Congress has restricted the ability of political parties to participate in state and local elections in a variety of ways, *see infra* at 86-91, and subjected them to *criminal* sanctions, without any constitutional authority for doing so. It could hardly be the case that a person injured by a federal law that Congress was not constitutionally authorized to enact is without standing to resist enforcement of that law. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) (allowing private challenge to Violence Against Women Act as exceeding Congress' authority under the Commerce Clause); *Buckley*, 424 U.S. at 117-18 (private party plaintiffs suffered injury and had standing to challenge FECA provisions on ground that they violated Appointments Clause and separation-of-powers principles).

Moreover, this Court has made clear that "[t]he Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities." *New York*, 505 U.S. at 181. "To the contrary, the Constitution divides authority between federal and state governments *for the protection of individuals*." *Id.* (emphasis added). Congress's disruption of the federal-state balance in an area as sensitive as elections threatens the liberties of political parties and their supporters, not merely the sovereignty of the states, and both the political parties and the states have standing to seek redress.[49]

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[48] Brief of the United States at 25; *see also id.* (observing that "[t]his Court has adjudicated numerous cases in which federal statutes were challenged as lying beyond the reach of Congress's Commerce Clause power, even when the state where the regulated activity took place raised no objection to the statute.") (*citing United States v. Lopez*, 514 U.S. 549 (1995); *Perez v. United States*, 402 U.S. 146 (1971)).

B. New Section 323(a)'s Restrictions on National Party Committees Impermissibly Regulate Purely State and Local Activity.

All three judges of the district court found that during odd-numbered years when there are no federal candidates on the ballot, national parties engage in activities that do not affect federal elections *at all.* During the last two off-year elections, when there were no federal candidates on the ballot, the RNC spent approximately $21 million in nonfederal funds on state and local candidate support, transfers to state parties, and direct expenditures, not counting its commitment of such "overhead" as staff time and travel. *See* Kollar-Kotelly 535sa, 537sa; *see also* Henderson 298sa; Leon 1214sa; J.A. 37-38, Banning Decl. ¶28(a). Even in federal election years, the RNC also engages in extensive activity that affects *only* state and local elections, directly contributing, for example, $5.6 million to state and local candidates in 2000. *See* Henderson 297sa; Leon 1212sa; J.A. 305, Josefiak Decl. ¶61. And finally, a major portion of the RNC's budget during federal election years has historically gone toward Victory Plans, the full-ticket voter mobilization plans that affect far more state and local elections than federal elections. *See* pp. 19-20 above.

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[49] Judge Kollar-Kotelly cited this Court's *dicta* in *Tennessee Electric Power* v. *TVA*, 306 U.S. 118 (1939), for the proposition that only states have standing to bring Tenth Amendment claims, thus conflating the Elections Clause inquiry with the Tenth Amendment. *See* Kollar-Kotelly at 1001sa. *But see Steward Mach. Co.* v. *Davis*, 301 U.S. 548 (1937); *Pierce County*, 123 S.Ct. at 732 n.10 (private party standing under Tenth Amendment remains open question).

New Section 323(a) federalizes all these activities on pain of criminal sanctions. To participate at all in purely state election activity, such as this year's off-year elections, the RNC must comply fully with the federal regulatory regime, in addition to the state regulatory regime. This Court has never condoned federal regulation of purely state election activity, especially when there is not even a federal candidate on the ballot.

Moreover, new Section 323(a) totally federalizes all "mixed" election activities undertaken by the RNC. In contrast to the superseded allocation regulations, which required an allocation between federally-regulated and state-regulated money for such activities, new Section 323(a) shows no "esteem" whatsoever for the regulatory regimes of the dual sovereigns. It would, of course, be an affront to the federal government for a state to require the RNC to participate in a Senate election with purely state-regulated money simply because there are state candidates on the ballot. It is no less an affront to the state for new Section 323(a) to instruct the RNC to participate in gubernatorial elections with purely federally-regulated money even when there are *no* federal candidates on the ballot.

C. New Section 323(b) Impermissibly Regulates State and Local Political Activity.

In new Section 323(b), Congress attempted to assert its power under the Federal Elections Clause to regulate the financing of state and local elections – even to the point of regulating spending that does nothing more than expressly advocate the election or defeat of a state or local candidate.

Although the Government has sought to minimize the scope of the statute, the district court confirmed its effect on a broad range of state and local election activity. These activities include generic party appeals that mention no candidates, mail and doorhangers that mention only state or local candidates, and even ballot measure activity. Henderson 436-437sa. BCRA reaches not only activities directed at federal candidates, but also generic activities that refer to no candidates, and even activities in support of state or local candidates and ballot measures.

As the court below found, BCRA does not merely replace the previous administratively imposed allocation scheme with a new statutory allocation scheme. The previous allocation rules were limited to "generic" voter activities and allowed the costs of those activities to be allocated between federal and nonfederal funds. The allocation rules never purported to regulate pure state or local election activity. Those rules implicitly reflected the fact that the Act regulated only expenditures "for the purpose of influencing" a federal election, and supplied a methodology for apportioning expenditures that arguably had more than one purpose.[50] In contrast, "Sections 301(20) and 323(b) . . . abandon the rough balance struck by the allocation regulations. They require state parties to spend federal funds on activities that will not plausibly corrupt any federal candidate." Henderson 434sa. Or, as Judge Leon stated, "It is simply not enough to claim that just because the use of a donation has *some* effect on a federal election, it must be completely funded with federal funds." Leon 1123sa.

In fact, that is precisely what the Government and Intervenors have asserted. They have essentially abandoned the requirement that an expenditure be "for the purpose of influencing" a federal election or even that it be likely to corrupt a federal candidate, and have replaced these with a standard that allows federal regulation to be imposed unless

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[50] The fact that the parties lived within the allocation rules does not mean they concede that the federal government has authority to regulate all of those activities, as Judge Kollar-Kotelly has suggested. *See* Kollar-Kotelly 533-37sa. They have argued just the opposite.

it can be demonstrated that the activity has *no effect* on a federal election.

Thus, they have argued that because of voters' "partisan proclivities," activities in support of state candidates can be regulated; that since state redistricting decisions "affect" federal elections, party redistricting activities can be limited; that if state ballot measures have a "partisan" appeal, or are likely to mobilize voters along party lines, those activities can be federally regulated. Indeed, they have argued that even if a nonfederal contribution is used for nonfederal purposes that does *not* affect federal elections, it "frees up" federal money that might otherwise have to be used and thus influences federal elections.

Using the Government's logic, Congress could impose contribution limits directly upon state or local candidates, because their funds may be used to increase voter turnout, and increased turnout may "affect" a federal race.[51]

California law limits contributions to the parties for candidate-related expenditures to $26,600. Contributions for non-candidate-related expenditures are not limited. The $10,000 Levin contribution limit is *less than half* the limit that California has declared to be appropriate (and, presumably, noncorrupting) for contributions to the political parties for candidate-related uses. In fact, the voters made a specific finding that contributions to the parties have an "insulating" effect. *See* Henderson 310-11sa; Leon 1227sa. The fact that California has decided to allow unlimited contributions for other purposes is in part an acknowledgment of the constitutional limits in this area, but also reflects a specific policy decision that expenditures for those other purposes do not share the dangers associated with candidate-related expenditures.

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[51] Intervenors have, in fact, made this argument in their lawsuit challenging the recently adopted FEC regulations. *Shays v. FEC, supra.* Intervenors argue that the Levin limits on nonfederal contributions should apply to associations of state and local candidates for communications mentioning only state or local candidates if those communications are "Federal election activity."

It should be undisputed that California has "control over the election process for [its own] offices." *Tashjian*, 479 U.S. at 217. This authority was reserved to the states in the Constitution and "no subsequent amendment has taken [it] from them." *Mitchell*, *supra*, 400 U.S. at 135. BCRA deprives the states of that authority, and prohibits the parties from participating in state and local elections in the very ways authorized by the states.

The BCRA definition of "Federal election activity" simply does not take into account that the parties' activities may have a state or local, rather than a federal, focus. The court found as a matter of fact that the state parties' voter registration activities, direct mail, phone bank activities, and grassroots mobilizing activities were all typically driven more by state election activity than federal. Leon 1227-31sa; Henderson 311-14sa. BCRA fails to accommodate the state's interest in regulating its own elections or the parties' interest in being able to differentiate between "federal" election activity and "state" activity for purposes of ordering their conduct.[52] By imposing its own significant limitations on the use of funds lawfully raised under state law by state and local political parties for use in state and local elections, Congress has effectively invalidated the choices made by those state governments for the conduct of their own elections, and subjected the political parties to federal regulation which it has no authority to impose.

III. NEW SECTION 323 DISCRIMINATES AGAINST POLITICAL PARTIES IN RELATION TO SPECIAL INTEREST GROUPS ENGAGED IN IDENTICAL ACTIVITIES.

BCRA will not only weaken political parties in absolute terms; it will weaken them relative to special interest groups like the NRA, the Sierra Club, and NARAL. *See* J.A. 1617-18, Milkis Reb. Decl. ¶16. Although interest groups engage in many of the same activities as parties, *see supra* at 23; J.A. 870, Green CX 158 (NAACP GOTV plan "is not very different" from Missouri Republican Party Victory Plan), BCRA saddles parties alone with unique burdens. Specifically, it imposes broad-ranging restrictions on political parties, but then – inexplicably – leaves narrow special interest groups almost wholly free to raise and spend nonfederal funds without disclosing the bulk of their activities.[53]

A. Political Parties Are Guaranteed Equal Protection by Both the First and Fifth Amendments.

BCRA's disparate treatment of political parties is subject to strict constitutional scrutiny. Under the First Amendment, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). When the Government selectively imposes speech burdens – even if it does so on the basis of content-neutral criteria such as the size or income of the speaker – it poses the real danger of "distort[ing] the market for ideas" and thus runs a risk "similar to that from content-based regulation." *Leathers v. Medlock*, 499 U.S. 439, 448 (1991). As Justice O'Connor has emphasized, "[l]aws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 676 (1994) (concurring and dissenting opinion).

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[52] The Government's references to the *possible* "effects" that certain state and local election activities might have on a federal election is all the more troubling since Congress made no findings on such "effects." *See* Henderson 431sa.

[53] BCRA's disclosure provisions apply only to *broadcast advertising* that fits the definition of "electioneering communications," BCRA § 201(a), and do *not* apply to the GOTV activities on which interest groups spend much of their nonfederal money.

Even though "Congress ordinarily need not address a perceived problem all at once," when regulating speech, a "selective ban" simply "cannot be defended on the ground that partial prohibitions may effect partial relief." *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). Even if a *uniformly* imposed speech burden would be justified by sufficiently weighty government interests, selective or "underinclusive" regulations are invalid unless the government can *independently* justify differential treatment. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51-52 (1994); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 187-91 (1999); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 424-25 (1993).

There can be little doubt that BCRA singles political parties out. New Section 323 imposes a broad array of restrictions on parties, including but not limited to the "soft money ban." In contrast, corporations, unions, trade associations, and other interest groups not only avoid the collateral restrictions, but are largely unrestricted in raising and spending unlimited, unregulated, and undisclosed money from any source to pay for such activities as: voter registration; GOTV; phone banks, mail, and leafleting *at any time*; any broadcast advertising except for "electioneering communications;" and communications in any form on any subject – including endorsements of federal candidates – to their officers, shareholders, and members. *See* J.A. 697-98, Peschong Decl. ¶¶13-14; J.A. 1733-34, FEC Resp. to RFAs Nos. 101-108. Rather than using a scalpel to regulate specific uses of nonfederal money that it found particularly objectionable, Congress in BCRA used a meat cleaver on political parties while leaving special interest groups largely untouched.

Equal protection analysis under the Fifth Amendment leads to the same result. "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Austin*, 494 U.S. at 666.

Specifically in the campaign finance context, the Court has held that political parties may *not* be singled out for unfavorable treatment. In *Colorado I*, the Court observed that "[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." 518 U.S. at 618; *see also id.* at 616 ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." (emphasis added)). *See Eu*, 489 U.S. at 217 (noting oddity of rule under which, "[a]lthough the official governing bodies of political parties are barred from issuing endorsements, other groups are not").[54]

The Court did not retreat from this principle in *Colorado II*. The only question at issue in *Colorado II* was whether "a party is . . . in a different position from other political speakers," entitling it "to demand a generally *higher* standard of scrutiny" when it comes to coordinated expenditures. 533 U.S. at 445 (emphasis added). Answering that question in the negative, the Court created the opposite bookend for *Colorado I*: Parties are perhaps entitled to no greater protection than other actors (*Colorado II*), but they are certainly entitled to no less (*Colorado I*). Referring to *Colorado I*, the Court said there was "no justification for subjecting party election spending across the board to the kinds of limits previously invalidated when applied to individuals and nonparty groups." *Colorado II*, 533 U.S. at 444.

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[54] *See also Citizens Against Rent Control*, 454 U.S. at 296 ("any limit . . . on individuals wishing to band together to advance their views … , while placing none on individuals acting alone, is clearly a restraint on the right of association."); *cf. Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

Nor can these additional restrictions on political parties be salvaged on the ground that nonfederal spending by parties – as opposed to nonfederal spending by special interest groups – is *uniquely* likely to corrupt or appear to corrupt public servants. The Court in *Colorado I* has already rejected this very argument, stating it was "not aware of any special dangers of corruption associated with political parties that tip the constitutional balance" away from them and toward other political groups; rather, it said, the logic seemed to cut the other way. 518 U.S. at 616-17. The Court further observed, in language particularly relevant here, that the potential of "unregulated 'soft money' contributions to a party for certain activities such as electing candidates for state office or for voter registration and 'get out the vote' drives" to corrupt is "*at best, attenuated.*" *Id.* (emphasis added). Those conclusions are amply supported by the record evidence introduced here.

B. Section 323 Puts Political Parties at a Distinct Disadvantage in Relation to Special Interest Groups.

Title I plainly "classifies"; it does so on its face ("Soft Money *of Political Parties*"). Nor is it debatable that Title I "impinges" on the "right to engage in political expression."

The simple fact that political parties have preferred access to the ballot, or that FECA grants political parties certain advantages, cannot justify unique speech disabilities. Congress and the states have accorded parties these advantages because parties serve an important purpose in the American political system, not as an excuse to saddle them with other hardships. *Cf.* S. Rep. No. 93-689, 1974 U.S.C.C.A.N. 5587, 5593 ("[A] vigorous party system is vital to American politics ...."). This Court has never invoked, nor even mentioned, these advantages to uphold unique restrictions on political parties. *California Democratic Party*, 530 U.S. 567; *Eu*, 489 U.S. 214; *Tashjian*, 479 U.S. 208; *Colorado I*, 518 U.S. 604.

Nor is avoidance of the "appearance of corruption" created through the "access" provided to nonfederal donors sufficient to justify the unique restrictions on political parties.

First, to the extent the specter of special access is a problem at all as it relates to political parties, it is no more a problem among *nonfederal*-money donors (the subject of BCRA regulation) than among *federal*-money donors. Indeed, as the FEC has admitted, there is no evidence that officeholders are more likely to meet with nonfederal-money donors than with federal-money contributors. *See* Henderson 330sa; Leon 1264sa.

Moreover, BCRA's restrictions on political parties do not materially limit interest group "access." Apart from their extensive lobbying activities, it is undisputed that special interest groups "use federal officeholders to raise funds," and "host[] fundraisers much like those that parties conduct, featuring opportunities for wealthy donors and corporate executives to meet with federal officeholders." J.A. 1619, Milkis Reb. Decl. ¶19. Indeed, representatives of EMILY's List, NARAL, the League of Conservation Voters, and the Sierra Club, among others, have all candidly acknowledged that federal officeholders appear at group-sponsored fundraising events. *See* Henderson 335-36sa.

Notably, the FEC has admitted that "there is a potential for corruption or the appearance of corruption when non-political party organizations" (*e.g.*, interest groups) that pay for issue advocacy, voter registration, voter identification, and GOTV activity "with nonfederal money also lobby federal officeholders." J.A. 1734-35, FEC Resp. to RFAs Nos. 109-113.[55]

This substantial underinclusiveness indicates that "the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993); *see also City of Ladue*, 512 U.S. at 52 (exemptions to an otherwise legitimate regulation of speech "diminish the credibility of the government's rationale for restricting speech in the first place"); *Republican Party of Minnesota v. White*, 536 U.S. 765, 779-80 (2002) (Scalia, J., concurring).

Defendants' effort to justify BCRA's restrictions on political parties by asserting that the restrictions will prevent donors from using nonfederal donations to parties as "conduits" for circumventing direct contribution limits to candidates is fatally undermined by BCRA's exclusion of special interest groups *themselves* from the ban on spending nonfederal money. Applying a speech restriction to a potential indirect *conduit* (the party), while carving an exception for the principal *actor* (the donor) to take the same action *directly*, is even more "facial[ly] underinclusive" than the speech restrictions at issue in *Florida Star* that "raise[d] serious doubts about whether" the measure served the asserted purposes in that case. 491 U.S. at 540. Such an exemption, in fact, renders the statutory scheme wholly irrational as an effort to achieve its purported purpose.

Indeed, *Colorado II* demonstrates the facial invalidity of the speaker-based distinction drawn in BCRA. *Colorado II* did not suggest political party spending *per se* creates "undue influence on an officeholder's judgment" (let alone a likelihood of outright *quid pro quo*). *Colorado II*, 533 U.S. at 440-41; *accord Buckley*, 424 U.S. at 28 n.31. Rather, it held that a party's expenditures, when actually coordinated with a candidate's campaign, could be limited *only because the party was potentially acting as a "conduit" for donations by other political actors* – namely, special interests and PACs – who "do not pursue the same objectives in electoral politics that parties do" but, instead, "are most concerned with advancing their narrow interest[s]" and "seek to produce obligated office holders" through their contributions. 533 U.S. at 451-52 (internal quotation marks omitted). Thus, the Court held, because coordinated expenditures are the functional equivalents of "direct party contribution[s]" to candidates *and* because special interests could attempt to use those party contributions "to place candidates under obligation," Congress could limit parties' coordinated expenditures as a means of preventing potentially corrupting effects of special interest contributions. *Id.* at 452, 464-65.

BCRA, however, turns this reasoning on its head: It prohibits the unwitting party conduit from making noncorrupting disbursements of nonfederal money while simultaneously permitting – indeed encouraging – the special interests themselves to make the same disbursements (for GOTV, unregulated issue advocacy, and so forth). *Colorado*

---

[55] Defense expert Dr. Mann acknowledged that special interests engage in such activities as "electioneering communications" to "curry favor" with officeholders and gain "access." J.A. 1561-62, Mann Decl. 33-34; J.A. 927-28, Mann CX 148-49. Even if BCRA's limits on electioneering communications were upheld, Dr. Mann concedes, special interests would continue to "curry favor" through election-related activities, such as voter mobilization, paid for with completely unregulated and undisclosed nonfederal money. J.A. 927-28, Mann CX 148-49.

I, 518 U.S. at 617 ("[i]f anything, an independent [party] expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem *less* likely to corrupt than the same (or much larger) independent expenditure made *directly* by that donor.") (emphasis added).

Defendants' expert Dr. Paul Herrnson summed up well: Use by political parties of non-federal funds "does not create such strong policy-oriented IOU's between contributors and legislators as those created by narrowly-focused interest groups that spend soft money to help only a few candidates." J.A. 877, Herrnson Dep. at 208-09 (*quoted* in Henderson 415sa). The severe differential treatment imposed by Title I on political parties simply cannot be justified by a claim that parties are *more* likely then special interest groups to corrupt federal officeholders.

CONCLUSION

For the reasons set forth above, the Political Party Appellants urge the Court to hold BCRA Sections 101, 213, and 214 unconstitutional, invalid, and unenforceable.

Respectfully submitted,

LANCE H. OLSON
DEBORAH B. CAPLAN
OLSON HAGEL & FISHBURN
555 Capitol Mall
Suite 1425
Sacramento, CA 95814
(916) 442-2952
Counsel for California Party Appellants

JAMES BOPP, JR.
RICHARD E. COLESON
THOMAS A. MARZEN
JAMES MADISON CENTER
FOR FREE SPEECH
BOPP COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434
Counsel for Libertarian National Committee

BOBBY R. BURCHFIELD
Counsel of Record
THOMAS O. BARNETT
ROBERT K. KELNER
RICHARD W. SMITH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000
Counsel for RNC Appellants

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Supreme Court of the United States

AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

**On Appeal from the United States District Court
For the District of Columbia**

BRIEF OF AFL-CIO APPELLANTS/CROSS-APPELLEES

LARRY P. WEINBERG
1101 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 775-5900

Of Counsel

JONATHAN P. HIATT
LAURENCE E. GOLD
Counsel of Record
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5130

MICHAEL B. TRISTER
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 328-1666

*Counsel for Appellants/
Cross-Appellees*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

1. Whether the BCRA § 203 prohibitions of union and corporate spending for "electioneering communications," under the primary and backup definitions of that term, are narrowly tailored to serve a compelling governmental interest.

2. Whether the provisions prohibiting coordinated expenditures in BCRA §§ 202 and 214(a) are constitutional in light of the statute's mandate that no definition of "coordination" may require proof of "agreement or formal collaboration" and in light of BCRA's vagueness and overbreadth.

3. Whether BCRA's "advance disclosure" provisions are narrowly tailored to serve a compelling governmental interest.

PARTIES TO THE PROCEEDINGS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its federally registered political committee, AFL-CIO Committee on Political Education Political Contributions Committee (jointly the "AFL-CIO plaintiffs"), appear here as appellants in No. 02-1755 and as appellees in *Federal Election Comm'n v. McConnell*, No. 02-1676, and *McCain v. McConnell*, No. 02-1702. The appellees in No. 02-1755 and appellants in Nos. 02-1676 and 02-1702 are the Federal Election Commission, the Federal Communications Commission, the United States of America, Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords.

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OPINIONS BELOW

The district court's opinions dated May 1, 2003 are reported at 251 F. Supp. 2d 176 (D.D.C. 2003), and are reprinted in volumes I—IV of the Supplemental Appendix to Jurisdictional Statements ("S.A."). The district court's order dated May 19, 2003 staying its final judgment pending appeal and the related memorandum opinions are reported at 253 F. Supp. 2d 18 (D.D.C. 2003).

JURISDICTION

The district court entered judgment on May 2, 2003. The AFL-CIO plaintiffs filed their timely notice of appeal on May 7, 2003. J.S. App. 1a-2a. The jurisdiction of this Court is invoked under § 403(a) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, § 403(a)(3), 116 Stat. 113-114 (2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution is reprinted in pertinent part in the jurisdictional statement filed on behalf of the AFL-CIO plaintiffs at 2. BCRA is reprinted in full in the appendices to the jurisdictional statements in Nos. 02-1674, 02-1675, and 02-1676. Sections 201, 202, 203 and 214 of BCRA are reprinted at J.S. App. 4a-13a.

STATEMENT OF THE CASE

In accordance with the Court's order dated June 5, 2003, all of the issues raised by the AFL-CIO plaintiffs in the district court are addressed in this Opening Brief.

BCRA's Ban On Union and Corporate Electioneering Communications

BCRA §203, which prohibits corporate and union expenditures for broadcast advertisements through a primary and backup definition of covered electioneering communications, poses an immediate, direct and substantial threat to the AFL-CIO's historic role in advocating for progressive social legislation, influencing other government actions affecting workers and their families, and educating union members and the general public about these issues. The AFL-CIO spends millions of dollars annually for television, radio and cable advertisements on a wide variety of social and economic issues.[1] This program began in the wake of the 1994 national election, when the organization ran numerous radio and television ads to mobilize union households and the general public to oppose the new Republican-controlled Congress's attempts to enact the "Contract With America," including major cuts in federal funding for jobs, health and safety, housing, school lunches and the Medicare and Medicaid programs. Shea Dec. ¶¶ 20-27 (J.A. 781-85) and Exhs. 20-24, 27-28. Later, after President Clinton vetoed a draconian budget proposal adopted by the Congress and the federal government was forced to shut down, the AFL-CIO broadcast advertisements supporting the President's position and opposing the congressional budget cuts. Mitchell Dec., ¶¶ 30-32 (J.A. 440-41) and Exhs. 26-31; Shea Dec., ¶ 27 (J.A. 785) and Exh. 28. Virtually all of these ads urged viewers or listeners to call named Members of Congress to oppose the budget cuts. See Mitchell Dec., Exh. 1 (J.A. 464). Several of these ads would have been banned if BCRA § 203 had been in effect because they referred to President Clinton by name and were disseminated within 30 days of the Iowa presidential caucuses and the New Hampshire presidential primary election in which the President was a candidate. Mitchell Dec. ¶32 (J.A. 441) and Exh. 1 (J.A. 464).

The AFL-CIO broadcast program continued throughout 1996 in an effort to shape the federal legislative agenda and to establish pro-worker public policies, Mitchell Dec. ¶¶ 34-36 (J.A. 442-44) and Exhs. 33-46; Shea Dec. ¶¶ 30-34 (J.A. 786-88) and Exhs. 38-41, including a long-overdue increase in the federal minimum wage.[2] *Id.*, ¶¶ 30-36 (J.A. 786-89) and Exhs. 33-46, 38-41. Most of these ads named individual Members of Congress and urged voters or listeners to contact them with a particular policy message. Mitchell Dec., Exh. 1 (J.A. 464). A large number of these ads also would have been banned if BCRA § 203 had been in effect because they ran within 30 days of primary elections, held throughout the election year, in which the named Members of Congress were candidates. Mitchell Dec. ¶¶ 32, 34-40, 50, 57-59 (J.A. 441-46, 451-52, 455-57) and Exh. 1 (J.A. 464). In addition, one of the AFL-CIO's ads on the subject of federal funding for education, an issue which was then pending before Congress, []would have been banned by BCRA §203 because it ran within 60 days of the November 1996 general election and named a number of candidates for Congress. Mitchell Dec. ¶ 41 (J.A. 446-47) and Exh. 1 (J.A.464).

The AFL-CIO's broadcast advocacy program was active throughout the next three Congresses as well, addressing issues such as tax fairness, Social Security and retirement, Medicare funding and prescription drug coverage, health care, minimum wage and overtime standards, workplace health and safety, international trade, and education. See Mitchell Dec., Exhs. 1-22. These ads continued to refer to individual Members of Congress because this is a key element of an ad's potency and effectiveness. Mitchell Dec. ¶¶ 11-12 (J.A. 428-30). And, while most of the ads named Republicans,[3] this was because throughout this period

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[1] A comprehensive table summarizing the AFL-CIO's television and radio advertisements from 1995 through 2001, and videotapes and compact discs containing the actual ads themselves, are in the record. Mitchell Dec., Exhs. 1-22.

[2] Other AFL-CIO ads in 1996 addressed congressional efforts to reduce Medicare and Medicaid benefits, Mitchell Dec., ¶¶ 37-38 (J.A. 444-45) and Exhs. 47-56, a proposal to protect the retirement savings of working families, *id.*, ¶ 40 (J.A. 445-46) and Exhs. 57-58, and another struggle over the federal budget. *Id.*, ¶ 42 (J.A. 447-48) and Exhs. 59-61.

[3] In selecting the "targets" of its advertising, the AFL-CIO relied on substantive and tactical factors: the nature of the issue; the Member of Congress's voting record, committee assignments and legislative role; whether the Member's response to an ad would generate "free media"

Republicans in Congress aggressively pursued a host of policies and programs disfavored by the labor movement, and Congress was so polarized that few Republicans ended up voting "right" and few Democrats voted "wrong" by AFL-CIO policy standards. Mitchell Dec. ¶¶ 13, 30-44 (J.A. 430, 440-49); Mitchell Dep. 163; Mitchell Cross 12, 101, 127-28, 198; Shea Dec. ¶¶ 20-35, 38-39, 42, 55 (J.A. 781-89, 792, 797) and Exh. 18. On important legislative issues where Democrats' vote inclinations were suspect, including during election years, the AFL-CIO regularly targeted them as well.[4]

In striking down BCRA § 203's prohibition of union and corporate sponsorship of ads encompassed by the primary definition of electioneering communications, Judges Henderson and Leon both found that the prohibition would have a substantial effect on the AFL-CIO's legislative and policy program. Thus, Judge Henderson found that "BCRA's ban on corporate and labor disbursements for electioneering communications . . . will significantly interfere with the AFL-CIO's missions" of providing "an effective political voice to workers on public issues that affect their lives and to fight for an agenda at all levels of government for working families." S.A. 264sa. Judge Henderson also made detailed findings

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coverage influencing other Members; the presence among viewers or listeners of substantial numbers of union members; and whether a seriously contested election was likely or underway, due to the ensuing heightened public and policymaker attention and the incumbent candidate's sensitivity to public opinion. Mitchell Dec., ¶¶ 12, 14 (J.A. 429-31); Mitchell Dep. 17-20, 27-30, 165, 204-06, 209-12; Mitchell Cross 102, 198-200; Shea Dep. 52-53. Indeed, an effective way to influence an elected official's positions on issues is to make the official believe that embracing particular positions could win or lose him or her votes. Mitchell Cross 183, 189-90, 201; Shea Cross 14.

[4] See, *e.g.*, Mitchell Dec. Exh. 1 (J.A. 464): "Call" (July 1998, patient's bill of rights: 5 Democrats out of 16 Members named); "Barker" (September 1998, "fast track" trade policy: 2 of 8); "Trust" (April-May 2000, trade relations with China: 7 of 15); "Now" (October-November 2001, fast track: 17 of 25).

of fact regarding the AFL-CIO's television and radio advertisements, S.A. 264sa-75sa, including, *inter alia*, that numerous ads run by the AFL-CIO would be banned under BCRA, S.A. 268sa, and that they would be "significantly less effective" if they did not mention legislative events or had to be aired outside of the weeks immediately preceding primary and general federal elections. S.A. 269sa. Judge Leon cited one of the AFL-CIO's 1998 ads as "a classic example of a legislation-centered genuine issue advertisement," S.A.1150sa, and his findings of fact identify numerous other "genuine issue ads" run by the AFL-CIO that would have been prohibited under the primary definition of electioneering communications. S.A. 1370sa-1377sa.[5]

The majority's findings are supported by substantial evidence in the record. Had BCRA's prohibition on the use of union treasury funds to support "electioneering communications" been in effect between 1995 and 2001, it would have banned 18 flights of ads broadcast within 60 days of the 1996, 1998 and 2000 general elections in their entirety, with the exception of some versions of a 1998 ad that named Senators not then up for election.[6] And, the primary definition would have banned from one to 12 versions of an AFL-CIO ad in 18 of 34 flights aired within 30 days of various primaries and conventions.[7] The ads that would have been banned include:

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[5] Judge Leon also relied exclusively on AFL-CIO advertisements as examples of ads that, in some cases, would be protected under his revised backup definition of electioneering communications and, in other cases, would be prohibited under that definition because they are not "neutral as to a federal candidate," S.A. 1163sa, 1377sa-79sa, although Judge Leon failed to explain the basis for his conclusion that these ads are entitled to less protection under the First Amendment than are the ads he approved.

[6] See Mitchell Dec., Exh. 1 (J.A. 464): in 1996 "No Two Way," "Retire," "Kids," "Medicare," "Students," "Taxes," "Home"; in 1998: "Deny," "Spear," "Barker," "Save"; in 2000: "Help," "Teacher," "Job," "Who," "Sure," "Debate," "Work".

- Several different flights of ads in 1996 that called on the House to schedule a vote on the first minimum wage increase since 1991; at least ten Representatives targeted in these ads who voted in March not to bring the bill up, later voted in August in favor of final passage. Shea Dec. ¶¶ 30-34 (J.A. 786-88).
- "Barker," an AFL-CIO radio advertisement that was broadcast in eight congressional districts beginning September 21, 1998 after a vote on "fast-track" legislation was hastily scheduled for September 25. Mitchell Dec., ¶ 53 (J.A. 453-54); Shea Dec., ¶ 47 (J.A. 794).
- "Job," a television advertisement that was broadcast between September 13 and 25, 2000 and targeted 14 Representatives who had voted to prevent an important OSHA regulation from being implemented; President Clinton had threatened to veto the Labor-HHS budget bill if it retained the rider removing the regulation. Mitchell Dec., ¶ 61 (J.A. 457).
- "No Two Way," a radio and television advertisement focusing on an incipient budget fight in Congress that ran between September 5 and 17, 1996 in media markets serving approximately 35 congressional districts. Mitchell Dec., ¶ 41 (J.A. 446-47).
- "Deny," a radio and television advertisement broadcast that ran between September 10 and 23, 1998, shortly before the Senate was scheduled to vote on an HMO reform bill that the AFL-CIO considered weak. Mitchell Dec., ¶ 51 (J.A. 452-53). "Deny" targeted approximately 17 Senators whom the AFL-CIO and its allies believed could be persuaded to vote for a stronger version of the bill; 13 of these Senators were not candidates in the imminent 1998 election, but fou were. *Id.*

While some of the AFL-CIO's broadcast advocacy may in some cases indirectly influence election outcomes by addressing issues of interest to the electorate, S.A. 684sa-685sa, advancing specific electoral outcomes has never been the point of the AFL-CIO's broadcast advocacy. Mitchell Dec., ¶ 70 (J.A. 462-63). As the AFL-CIO's Director of Public Affairs testifed, these advertisements sought to "set the agenda for the legislative and political environment," put lawmakers "on notice that somebody is watching what they are doing," and make the AFL-CIO a "visible . . . champion[] for working families." Mitchell Dep. 18, 19; see also *id.* at 46-47.

BCRA's Coordination Provisions

BCRA's coordination provisions, like the statute's ban on corporate and union electioneering communications, will drastically limit the ability of the AFL-CIO and other unions to advocate the interests of workers and their families in connection with legislation and other government actions. It is critical for union representatives to be able to meet directly with Members of Congress and executive branch officials, including the President, Vice President and other senior White House officials. S.A. 285sa-286sa. Union representatives work with Congressional leaders and other legislators and executive branch officials to design and implement lobbying strategies aimed at passing or defeating specific legislation, including, as the record in this case amply demonstrates, grassroots lobbying efforts paid for by unions involving broadcast or other communications urging the public to take action. Union officers and members are also deeply involved in the operation of political party committees, particularly at the state and local levels where many union representatives serve on the parties' governing bodies and provide substantial volunteer services in support of party programs.

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[7] See Mitchell Dec., Exh. 1 (J.A. 464): in 1996: "Too Far" (banning 1 of 19 versions); "1991" (3 of 10); "Raise" (1 of 2); "People" (2 of 21); "Couple" (2 of 30); "Wither" (4 of 26); "5.15" (1 of 4); "Edith" (12 of 31); "Another" (6 of 26); and "No Two Way" (10 of 31; and the 60-day rule would have banned all 31). In 1998: "Call" (12 of 16) and "Soon" (1 of 3). In 2000: "Label" (2 of 14, including one Democrat); "Endure" (1 of 16, a Democrat); "Trust" (3 of 15, including one Democrat); "Sky" (1 of 12); "Protect" (2 of 14); and "Help" (3 of 12).

The majority below found that BCRA §214(a), was neither unconstitutionally vague nor overbroad.[8] S.A 135sa-143sa. With respect to vagueness, the majority held that "[i]t is . . . possible that many, perhaps all, of Plaintiffs' vagueness concerns have been remedied by the [FEC] regulations' contents." S.A.137sa. And, with respect to overbreadth, the majority held that the statute's failure to require the existence of an "agreement" as a predicate to the finding of coordination was not required by the Constitution as interpreted in this Court's prior decisions. S.A.138sa-143sa. The majority determined that BCRA § 202, which provides that "coordinated" electioneering communications shall be treated as contributions, was not unconstitutional for the same reasons as it upheld § 214(a). S.A. 130sa. Judge Henderson dissented, with respect to all of BCRA's coordination provisions, S.A. 384sa-396sa, finding that "[a]n association operating under a vague or overbroad definition of coordination faces serious risks each time it sponsors public communications either directly or through groups of like-minded organizations or individuals because any discussion with a legislator may later serve as the basis for an allegation

that an association has coordinated a particular communication's content with the legislator." S.A. 282sa. Specifically with respect to the AFL-CIO, she also found that "if the [organization] is prohibited from sponsoring broadcast ads because of its lobbying contacts with Members of Congress, it will be forced either to curtail its lobbying activities or to refrain from airing public communications during elections." S.A. 286sa. See *id.* at 281sa (finding that the ACLU's legislative activities would be covered by BCRA's coordination provisions "even though the ACLU does not engage in those activities for the purpose of influencing federal elections").

BCRA's Advance Disclosure Requirements

Two of BCRA's reporting provisions require that unions, corporations, individuals and other political actors must file reports with the FEC whenever they enter into a contract to make electioneering communications or independent expenditures, even though these communications have not yet aired. 2 U.S.C. § 434(f)(1)-(2); 2 U.S.C. §§ 434(g)(1)(A)-(B), 434(g)(2)(A)-(B). Judge Henderson found these advance disclosure requirements to be unconstitutional, S.A. 381sa-384sa, noting with respect to the AFL-CIO in particular that advance disclosure will interfere with and have a chilling effect on the organization's broadcast program by allowing its opponents to intensify their efforts to pressure stations into refusing to run AFL-CIO ads, S.A. 271sa, by forcing the organization to reveal its plans and strategies before they are finalized, *id.*, and by giving opponents the opportunity to prepare counter-messages. *Id.*

Although they upheld § 201(a)'s reporting requirement for electioneering communications in most respects, Judges Kollar-Kotelly and Leon also found that the statute's requirement of disclosure whenever a person has executed a contract to make a disbursement has the effect of "requiring disclosure of contracts to make electioneering communications prior to their public dissemination," S.A. 115sa, and therefore "lacks a

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[8] In their per curiam opinion, Judges Kollar-Kotelly and Leon also held that plaintiffs lacked standing to challenge BCRA § 214(c), S.A. 147sa-148sa, and, in a decision which paralleled their decision on BCRA §§ 202 and 214(a)(2), they alternatively ruled that plaintiffs' challenge to BCRA § 214(c) was not ripe for judicial review at this time because any vagueness in the statutory definition of coordination might be cured by the 2003 FEC regulations. S.A. 148sa-156sa. The majority also found that plaintiffs' challenge to BCRA §214(b), which repealed the December 2000 coordination regulations, was moot as a result of the promulgation of the January 2003 regulations. S.A.144sa. The Court need not address these decisions because, as we show, *infra*, the provisions of BCRA §§ 202 and 214(a)(2) clearly are ripe for decision and encompass all of the arguments made against §§ 214(b) and (c).

'relevant correlation' or 'substantial relation' . . . to a legitimate governmental interest." *Id.*, quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). With respect to §212's parallel advance disclosure requirement for independent expenditures, however, Judges Kollar-Kotelly and Leon found that plaintiffs' challenge was not ripe for review because of the FEC's promulgation of final regulations which, in their view, "provide Plaintiffs with the exact remedy they seek: the FEC will not require disclosure of independent express advocacy expenditures prior to their '[p]ublic disseminat[ion].'" S.A. 133sa.

SUMMARY OF ARGUMENT

1. BCRA's prohibition of union and corporate spending for a newly defined category of speech in the law, "electioneering communications," must be narrowly tailored to serve a compelling governmental interest. This prohibition applies where the First Amendment has its greatest and most urgent application, to speech concerning matters of public concern, including commentary on the activities of government officials, speech that inextricably intertwines discussion of issues, candidates and elections, and speech about the qualifications of candidates themselves. And, our jurisprudence establishes that the First Amendment's application to these matters is just as strong when the speaker is a union or a corporation. This Court has countenanced a governmental proscription only of express advocacy independent expenditures by a corporation, and solely because that spending was facilitated by the state-supported corporate form.

BCRA's primary definition of "electioneering communication" fails to adhere to the express advocacy line drawn by this Court since *Buckley*, and even if the government could ban other speech that is somehow connected with an election, the primary definition is overbroad. As applied to unions it substantially interferes with their core mission of advocating on behalf of all workers in the public sphere, and as applied to both unions and corporations it sweeps in a vast range of First Amendment protected speech whose connection with

elections is at most attenuated because its reliance on a candidate reference at certain places and times as a substitute for express advocacy fails accurately or narrowly to measure a range of speech that the government may regulate.

Each prong of BCRA's backup definition of "electioneering communication" is unconstitutionally vague. The phrase "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" depends on context for its meaning, its key words are undefined and imprecise, and its final phrase tracks a formulation that this Court held was overly vague in *Buckley*. The phrase "promotes or supports...or attacks or opposes a candidate" also depends on context and is undefined and imprecise, and the district court's construction of it rendered it unconstitutionally overbroad. Finally, the backup definition is non-severable, because Congress intended that either definition survive a constitutional challenge intact.

2. BCRA's definition of coordination must be narrowly and clearly drawn in order to avoid interfering with the freedom of speech, freedom of association, and the right to petition the government. BCRA § 214(a)(2)'s regulation of expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion" of a political party is vague and may reach a broad range of protected activities through which citizens interact with political parties. The majority's reliance on the fact that similar language appears in FECA's regulation of coordination with federal candidates was misplaced, since Congress has explicitly rejected the limiting construction given to that provision by the courts and the FEC, and four Justices have already found that FECA's language is overbroad.

The majority also erred in not reviewing the regulations issued by the FEC when it determined that those regulations might "possibly" cure any vagueness in the statutes. The district court had jurisdiction to consider the regulations, at least to the extent necessary to determine whether they saved the constitutionality of the statutes, and, even a cursory examination of the regulations would have shown that they are vague and overbroad in critical respects.

Finally, the majority erred in concluding that "agreement or formal collaboration," which BCRA prohibits from being a required element of "coordination," is not constitutionally required. This Court's prior decisions strongly suggest that proof of an "agreement" is required, and, as the FEC previously recognized, "agreement or formal collaboration" is necessary to prevent the coordination provisions from infringing upon significant protected activities involving candidates and parties.

3. BCRA's provision requiring advance disclosure of electioneering communications within 24 hours after an individual, corporation or union has contracted to make such communications but *before* they have aired will have a significant chilling effect on the right to speak on public issues by forcing speakers to disclose their plans and strategies before they are implemented, giving their opponents the opportunity to prepare counter-messages, and allowing opponents to induce broadcasters not to run the communications at all. The advance notice requirement is not narrowly tailored to serve a compelling governmental interest, because all of the interests which this Court has recognized are served by disclosure of political expenditures are fully served by after-the-fact disclosure, as the lower federal courts have uniformly concluded.

ARGUMENT

I. BCRA's PRIMARY DEFINITION OF "ELECTIONEERING COMMUNICATION" IS UNCONSTITUTIONALLY OVERBROAD

Section 201(a) of BCRA, codified at 2 U.S.C. § 434(f)(3)(A), defines a category of speech new to the law, "electioneering communication,"[9] and § 203, codified at 2 U.S.C. §§ 441b(b)(2) and (c), proscribes labor organizations and corporations from financing such a communication. Section 203 prohibits speech on the basis of its content—namely, a "refer[ence]" to a "candidate" for federal office. "The First Amendment's hostility to content-based regulations extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). For, it "place[s] the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others. . . . [T]he government is held to a very exacting and rarely satisfied standard when it disfavors the discussion of particular subjects. . . ." *Hill v. Colorado*, 530 U.S. 703, 735 (2000) (Souter, J., concurring). *See also Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) ("Our precedents apply . . . the most exacting

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[9] Section 434(f)(3)(A)(i) contains what is generally termed the "primary definition" of this term, and section 434(f)(3)(A)(ii) contains a "backup definition" that would apply instead if the primary definition is finally held to be unconstitutional. The primary definition includes a transmission element ("any broadcast, cable or satellite communication"); a content element ("refers to a clearly identified candidate for federal office"); a temporal element (within 60 days before "a general, special or runoff election," or within 30 days before "a primary or preference election" or nominating "convention or caucus" "for the office sought by the candidate") and an audience element ("can be received by 50,000 or more persons" in the relevant electoral jurisdiction). The term "clearly identified" means the candidate's "name," "photograph" or "drawing," and where "the identity of the candidate is apparent by unambiguous reference" otherwise. See 2 U.S.C. § 431(18). As elaborated by an FEC regulation, "the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressmen,' or 'the incumbent'", or "through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia'." See 11 C.F.R. § 100.29 (2002).

scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). Section 203 cannot bear that scrutiny.

A. Union and Corporate Speech About Matters of Public Concern Enjoys the Highest First Amendment Protection, and Restrictions Must Be Narrowly Tailored To Serve a Compelling Governmental Interest

Nearly 40 years ago this Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Thus, "[s]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (interior quotation marks omitted). *See also Thornhill v. Alabama*, 310 U.S. 88, 101-04 (1940). In *Sullivan* itself, the Court applied that principle to protect the right to criticize public officials through the medium of a paid newspaper advertisement, "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities." *Id.* at 266.

When this Court last reviewed a substantial rewriting of the Federal Election Campaign Act, it held that when speech on public issues dovetails with speech concerning elections, the First Amendment abides no limitation of the former. *See Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976). FECA then limited, to $1,000 a year, spending on independent expenditures—by all persons, including unions and corporations—for "advocating the election or defeat of a candidate." See *id.* at 39-40. The Court held that this phrase was unconstitutionally vague, because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in

practical application," as "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions," "candidates campaign on the basis of their positions on public issues," and "campaigns themselves generate issues of public interest." *Id.* at 42 (footnote omitted). And, "*'[d]iscussions of those issues, as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.'*" *Id.* at 42 n.50 (emphasis added), quoting *Buckley v. Valeo*, 519 F.2d 817, 875 (D.C. Cir. 1975).

Buckley's crucial insight concerning the inextricable connection between issues and elections, the futility of regulating public speech on the basis of perceived "intent" or "effect," and [t]he compelling public interest, guaranteed by the First Amendment, in persons making and receiving commentary on candidates *because* they are candidates, and on issues *because* they are pertinent to an ongoing election, are now deeply embedded in the law and our political culture. "[T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. '[D]ebate on the qualification of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges." *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002) (emphasis in original), quoting *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 222-23 (1989). *See also Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 686-87 (1989); *Buckley v. Valeo*, 424 U.S. at 14; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971) ("the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

This Court has also repeatedly affirmed that where the speaker on matters of public concern is a labor union, a corporation or some other organized group, no lesser or different First Amendment protection is at stake, for "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). In *Bellotti*, this Court invalided a criminal statute barring corporations from making contributions or expenditures in connection with ballot measures, because permitting such advocacy "afford[s] the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783 (footnote omitted). *See also Pacific Gas & Electric Co. v. Public Utilities Comm.*, 475 U.S. 1, 8-9 (1986) (state cannot require corporation to include statements of citizens group in its newsletter to customers); *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530 (1980) (state cannot preclude corporation from including with customer bills its own newsletter that discusses public policy matters).[10]

B. The Primary Definition Is Not Narrowly Tailored

This Court has just once endorsed a governmental proscription of candidate-related speech by an entity regulated by § 203, upholding, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a state's ban on the corpo-

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[10] Precisely because "speech on matters of public concern needs 'breathing space' . . . in order to survive," *Nike, Inc. v. Kasky*, 123 S.Ct. 2554, 2565 (2003), (Breyer, J., dissenting), *quoting New York Times Co. v. Sullivan*, 376 U.S. at 272, Justice Breyer recently stated that where a corporation's regulable "purely commercial" speech is "inextricably intertwined" with "non-commercial" (public issue-oriented) speech, it must not be subject to state "false advertising" and related "unfair competition" regulation because that would chill corporations from "issu[ing] significant communications relevant to public debate" and "thereby limit the supply of relevant information available to those, such as journalists, who seek to keep the public informed about important issues." *Id.* at 2565-68 (interim quotation marks omitted). *See also id.* at 2558-59 (Stevens J., concurring).

rate financing of independent express advocacy expenditures. In doing so, the Court "emphasize[d]" that its decision turned only on "the unique state-conferred corporate structure that facilitates the amassing of large treasuries" that "have little or no correlation to the public's support for the corporation's political ideas" and that, accordingly, renders corporate influence via independent expenditures "unfair[ ]" and regulable. *Id.* at 660.[11] *Austin* does not identify any other governmental interest that might be served by § 203, which only proscribes speech *other* than express advocacy, as the term "electioneering communication" does not include either an "expenditure" or an "independent expenditure" under FECA, see 2 U.S.C. § 434(f)(3)(B)(ii), which comprise the field of independent express advocacy speech. See 2 U.S.C. § 431(17); *FEC v. Massachusetts Citizens For Life, Inc.*, ("*MCFL*"), 479 U.S. 238, 248-49 (1986).

Even assuming that § 203's proscription of "electioneering communications" under the primary definition is aimed at serving the interests identified by the Court in *Austin*, it is not narrowly tailored to do so. First, insofar as the definition forecloses speech on matters of public concern that does not include express advocacy, *Buckley* and *MCFL* teach that, perforce, it is not narrowly tailored and is unconstitutional. We adopt the briefs of other plaintiffs on this point. Second, because § 203 necessarily reaches a wide variety of speech that is *not* election-related—whatever that means—or whose connection with an election is at most attenuated, it is not narrowly tailored because, as *Bellotti* demonstrates, a substantial amount of First Amendment-protected speech by corporations and unions is necessarily covered.

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[11] This Court has recognized no other rationale for regulating independent expenditures, and has repeatedly rejected the notion that they either implicate corruption or its appearance, or could serve as conduits to circumvent contribution limits. See *FEC v. Colorado Republican Federal Campaign Committee ("Colorado II")*, 533 U.S. 431, 440-41 (2001); *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 490-501 (1985); *Buckley v. Valeo*, 424 U.S. at 39-58.

The Government and BCRA's congressional proponents claim that § 203 captures only broadcast advertising that comprises the virtual equivalent of express advocacy because speech that "refers" to a candidate within 30 days of a primary or convention, or 60 days before a general election, either must seek the candidate's election or defeat or have that effect. For that proposition they rely almost exclusively upon the *Buying Time* reports of the Brennan Center, which purport to analyze some ads broadcast during the 60 days preceding the 1998 and 2000 general elections. Plaintiffs' opening brief in No. 02-1674, *McConnell v. FEC*, demonstrates how these reports are deeply flawed and unreliable, and we rely on that analysis here. But regardless of those reports' empirical worth, and even if this Court decides that Congress could proscribe some union and corporate non-express advocacy speech whose "intent" or "effect" is electoral, § 203 is unconstitutionally overbroad because it necessarily sweeps in too much speech that the First Amendment protects.

By its very terms § 201 encompasses a substantial scope of protected speech. Any kind of "refer[ence]" to a candidate is included, even one that neither names nor visually depicts a candidate so long as it refers to the candidate's governmental position or candidacy status, or makes some other "unambiguous reference" to the candidate. See 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. § 100.29 (2002). Nor does this reference have to have anything to do with the candidate's status *as* a candidate; any "reference" whatsoever to the individual that satisfies § 201(a)'s transmission, temporal and audience elements is proscribed, regardless of any other content or context. Indeed, that context may include the fact that the candidate is unopposed for reelection or faces only token opposition, rendering electoral considerations moot. And, we already know from the FEC's BCRA rulemaking that the

primary definition includes communications referring to the popular name of legislation that includes the name of a candidate; promoting a candidate's business; promoting a ballot initiative or referendum, even without a reference to a candidate; making public service announcements that include the candidate; and promoting local tourism with reference to the candidate. See Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200-03 (Oct. 23, 2002).

The potentially limitless variety of broadcast messages that § 203 precludes includes, for example, communications that, as the record demonstrates:

- Call upon a Member of Congress to support or oppose imminent legislation, or ask viewers or listeners to urge the Member to do so;
- Inform the public, or express an opinion, about a Member of Congress's votes, legislative proposals or performance otherwise;
- Respond directly to a Member who has criticized the organization or taken issue with its activities or policies; or
- Encourage candidates to commit that, if elected, they will support or oppose particular legislation or policies.

The prohibition will have an even more startling impact when the President is a candidate for reelection, a situation that, of course, now exists. Beginning 30 days before the first primary or caucus—for the 2004 election that date is December 14, 2003, see www.vote-smart.org/election_president_state_primary_dates—§ 203 will criminalize broadcast references to the President in a series of geographic blackouts that will continuously ripple throughout the Nation, blocking every broadcast outlet, wherever located, whose signal can reach 50,000 persons in an upcoming primary or caucus state, until June 8, 2004.[12] See *id*. This blackout will become national in scope on July 31, thirty days before the August 30 - September 2 Republican National Convention, see www.fec.gov/press/20030630convention, and it will then continue without interruption throughout the remaining 60 days until the November 2 election. Thus, from July 31, 2004 until the election, it will be a crime for a union, corporation or incorporated non-profit organization to pay to broadcast any "refer[ence]" to the President, by "name," "photograph," "drawing" or other "unambiguous" means, anywhere in the United States.

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[12] Additional 30-day blackout periods will transpire from July 18 until the August 17, 2004 Wyoming caucus, and from July 25 until the August

It is very much to the point in this case that "[u]nions have traditionally aligned themselves with a wide range of social, political and ideological viewpoints," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991), and they have always played a vital role in the public arena as advocates for both their members and all workers. *See generally Ellis v. Bhd. of Railway and Airline Clerks*, 466 U.S. 435, 446 (1984); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 227-32 (1977); *Pipefitters v. United States*, 407 U.S. 385, 402-32 (1972); *Machinists v. Street*, 367 U.S. 740, 767 (1961); *id.* at 798, 800-03, 812-16 (Frankfurter, J., dissenting); [13] *United States v. United Auto Workers*, 352 U.S. 567, 578-86 (1957); *United States v. CIO*, 335 U.S. 106, 115-21 (1948); *id.* at 143-46 (Rutledge, J., concurring).[14]

Thus, when unions engage in speech on matters of public concern, they "amplify[] the voice of their adherents." *Buckley*, 424 U.S. at 22. And, as we have shown the AFL-CIO's broadcast advocacy over a seven-year period has been a seamless year-in, year-out effort to shape the national issue agenda, encourage congressional action, engender public support for the labor movement's policy priorities, and influence debate during election periods to reflect worker concerns. This advocacy certainly might "affect," or be perceived to "affect," elections in the sense of influencing the electoral issue climate, forcing candidates to address union priority matters, informing the public and generating popular pressure on candidates to embrace particular policies. In turn, the labor movement's impact on public policy is only enhanced when electoral considerations motivate office-holders. But these are essential and inevitable aspects of "speech on matters of public concern."

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24 Alaska primary. See www.vote-smart.org/election_president_state_primary_dates.

[13] Of the AFL-CIO itself and its predecessor, the AFL, Justice Frankfurter wrote over 40 years ago:

> American labor's initial role in shaping legislation dates back 130 years. With the coming of the AFL in 1886, labor on a national scale was committed not to act as a class party but to maintain a program of political action in furtherance of its industrial standards. . . . When one runs down the detailed list of national and international problems on which the AFL-CIO speaks, [t]he notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment. And this Court accepts briefs as *amici* from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to and insulated from economic interests. It is not true for industry or finance. Nor is it true for labor.

Machinists v. Street, 367 U.S. at 812, 814-15 (Frankfurter, J., dissenting) (footnote omitted).

[14] In *Austin*, the Court determined that the ban on corporate independent expenditures, which did not apply to unincorporated labor organizations, was not fatally underinclusive for that reason because there are "crucial differences between unions and corporations," *id.* at 666, namely, unions do *not* partake of the "significant state-conferred advantages of the corporate structure," and while they "may be able to amass large treasuries" otherwise, "the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury." *Id.* at 665-66.

The overbreadth doctrine affords recourse against a law that "may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 123 S.Ct. 2191, 2196 (2003). Those who "abstain from protected speech" "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation... harm[ ] not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id.* For that reason, the First Amendment does not permit a prohibition of *all* candidate-referential speech merely because *some* of that speech could be viewed, and might even be intended, to have an electoral impact. "[T]he argument . . . that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2003). Section 203, however, is predicated on just such an assumed "resembl[ance]," and even identity, between express advocacy and references to candidates in particular times and places. As we have shown, § 203's reliance upon a candidate reference as a proxy for express advocacy widely misses that mark.

In *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947 (1984), the Court held that an anti-fraud statute prohibiting a charity from paying fundraising expenses in an amount more than 25% of the amount raised was unconstitutionally overbroad, because this condition restricted First Amendment-protected solicitations yet encompassed charities that legitimately incurred high costs because they engaged in that protected conduct. "The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Id.* at 965 (footnote omitted). So too here. Section 203's premise that *any* broadcast reference to a candidate, including, of course, an incumbent legislator, during certain times and to certain audiences, is an accurate measure of "electioneering" utterly fails to account for speakers who make such references in the course of First Amendment-protected non-electoral communications. *See also Erznoznik v. City of Jackson*, 422 U.S. 205 (1975); *United States v. National Treasury Employees Union*, 513 U.S. 454, 472-73 (1995); *United States v. Robel*, 389 U.S. 258, 262-66 (1967); *Thornhill v. Alabama*, 310 U.S. at 97-98. *Cf. Nike v. Kasky*, 123 S.Ct. at 2564-69 (Breyer, J., dissenting) (mixed commercial and public-issue speech cannot be subject to state false advertising laws.)

Finally, the overbreadth inquiry here cannot rise and fall on the limited experience of two 60-day periods,[15] irrespective of what the Brennan Center reports purported to conclude. The widespread use of paid broadcast advertising for non-public service messages is a relatively recent phenomenon, yet § 203 would ban a substantial amount of such advertising for all time in reliance upon only a fraction of even the experience to date. And, the novelty of these broadcasts lies only in their medium, not in their content, which falls well within the American tradition of freewheeling commentary on public affairs and public officials. Both experience, as the AFL-CIO and other plaintiffs have shown, and common sense advise that unions, corporations and other groups are likely to continue to broadcast a wide range of messages that include references to candidates, and that § 203 overbroadly restrains their ability to do so. *See generally Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 167 (2002); *City of Houston v. Hill*, 482 U.S. 451, 465-66 (1987); *Erznoznik v. City of Jacksonville*, 422 U.S. at 213; *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974). And, it is equally reasonable and pertinent to anticipate that Congress will take advantage of the broadcast silence imposed by § 203 to schedule particular legislation when those most affected are denied their preferred medium to respond swiftly and effectively. Section 203 both suppresses essential speech and facilitates official mischief and should be struck down.

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[15] Even defendants' studies did not review advertising proximate to primary elections, so there is no "empirical" evidence whatsoever regarding the 30-day ban. Yet "[f]ree discussion about candidates for public office is no less critical before a primary than before a general election." *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. at 223, especially in an era when redistricting has rendered party nominations for House seats tantamount to election in most districts. Nor do defendants' studies consider the 30-day period preceding national party conventions.

II. BCRA'S BACKUP DEFINITION OF "ELECTIONEERING COMMUNICATION" IS UNCONSTITUTIONALLY VAGUE, AND NEITHER OF ITS PRINCIPAL CLAUSES IS SEVERABLE

BCRA § 201(a) alternatively provides a backup definition of "electioneering communication," codified at 2 U.S.C. § 434(f)(3)(A)(ii), that is to apply in the event that the primary definition discussed above "is held to be constitutionally insufficient by final judicial decision. . . ." The backup definition includes any "broadcast, cable or satellite communication" that (1) "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)" "and" (2) "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Unlike the primary definition, the backup definition entails no temporal or audience restriction; it applies to *all broadcasts, any time, anywhere*. And, under FECA, "candidate[s]" include virtually all incumbent Representatives and Senators at all times, first-term Presidents and Vice Presidents during

substantial periods of time, and Vice Presidents whenever they run for President.[16]

Since the backup definition, like the primary definition, on its face eschews any limitation to express advocacy, Judge Henderson correctly concluded that the backup definition is unconstitutional. See S.A. 362sa. If this Court reaffirms its prior holdings that Congress may not proscribe corporations and unions from undertaking non-express advocacy communications to the general public on matters of public concern, then it must similarly strike down the backup definition. But, even if the Court finds that its earlier decisions on these matters are not controlling, the backup definition should be struck down as impermissibly vague and overbroad.

A. The Second Prong of the Backup Definition Is Unconstitutionally Vague

This Court has explained that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined," for "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (footnotes and citations omitted). Moreover, "adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal" is particularly important in a criminal statute, *Buckley*, 424 U.S. at 77, and "where First Amendment rights are involved, an even greater degree of specificity is required." *Id.* (interior quotation marks omitted). *See also Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982).

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[16] A person becomes a "candidate" within the meaning of FECA, for example, upon receiving contributions in excess of $5,000, 2 U.S.C. § 431(2)(A), a threshold routinely met by incumbent Members of Congress almost immediately after winning their most recent election. See also 11 C.F.R. § 100.3. As a practical matter, only a Member who has announced his or her retirement or has lost a nomination contest is not a "candidate."

Judge Leon, joined by Judge Kollar-Kotelly, see S.A. 885sa-86sa, correctly determined that the phrase "suggestive of no plausible meaning other than an exhortation to vote" was unconstitutionally vague because it "depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified." See S.A. 1164sa (footnote omitted). Additionally, the subsequent language "for or against a specific candidate," unlike the phrase "refers to a clearly identified candidate" in the primary definition, both is undefined and entails no requirement that the communication itself name or otherwise unambiguously refer to a candidate; instead, it admits the possibility that a viewer or listener, again solely as a subjective function of context, might independently conjure up the thought of a candidate.[17] Because this prong of the backup definition does not solely rely upon the text of a communication, a person's concern that a court might find that his speech is "suggestive" of only one "plausible"—express electoral advocacy—meaning, unacceptably "'puts the speaker wholly at the mercy of the varied understanding of his hearers,'" "'blankets with uncertainly whatever may be said,'" and "'compels the speaker to hedge and trim.'" *Buckley,* 424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945).

Moreover, BCRA defines neither of the key terms "suggestive" and "plausible", and their ordinary definitions palpably demonstrate their imprecision. The word "suggestive" means "[t]ending to suggest thoughts or ideas" or "[c]onveying a suggestion or hint." Webster II New College Dictionary (1999: Houghton Mifflin Co., Boston, MA) ("*Webster*"). The word "plausible" means "[s]eemingly or apparently valid, likely, or acceptable." *Id.* Plainly, both "suggestive" and "plausible" leave much to the subjective imagination. *Cf. Hynes v. Mayor of Oradell,* 425 U.S. 610, 622 (1976) (invalidating a municipal ordinance requiring persons to give advance notice of door-to-door canvassing for a "recognized charitable cause" or a "political . . . cause" because, *inter alia*, those terms are unconstitutionally vague). And, the final phrase "exhortation to vote for or against" is also undefined in the statute and is hardly distinguishable from the phrase "advocating the election or defeat," which, as noted earlier, *Buckley* held to be unconstitutionally vague.[18]

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[17] In *Buckley*, this Court approvingly equated to express advocacy the clarity of the statutory phrase "clearly identified" (then in FECA § 608(e)(2)), because it required "an explicit and unambiguous reference to the candidate . . . as part of the communication." 424 U.S. at 43 (footnote omitted). That observation strongly suggests that statutory terms defining prohibited communications that encompass less direct references to a candidate are unconstitutionally vague. If so, the backup definition plainly falls short, for it variously uses the formulation "candidate for that office" (and the phrase "that office" has no certain previous referent in the statute); "candidate," with no qualifier, which also appears in new 2 U.S.C. § 431(20)(A)(iii); and "specific candidate," a formulation not otherwise found in FECA, and which presumably differs, somehow, from both "candidate" and "refers to a clearly identified candidate". (The latter formulation, approved in *Buckley*, appears in both the primary definition, at 2 U.S.C. § 434(f)(3)(A)(1)(I), and in 2 U.S.C. § 431(20)(A)(iii).)

[18] A Lexis search reveals that each of these BCRA terms is either unique or virtually unique in the United States Code. Neither "exhortation" nor "exhort" appears at all. "Suggestive" appears but once, in the phrase "injuries suggestive of rape and sexual assault." See 42 U.S.C. § 3796gg. And "plausible" appears only in the phrases "plausible biological mechanism", see 38 U.S.C. §§ 1116 and 1117, and "plausible deniability." See 50 U.S.C. § 2301. None of these usages concerns the nature or meaning of language or communications.

B. The First Prong of the Backup Definition Is Unconstitutionally Vague

The key language of the first prong of the backup definition "promotes or supports a candidate . . . or attacks or opposes a candidate"—is also unconstitutionally vague. BCRA defines none of these terms, and they too have no precise meanings. Thus, "promote" can mean "contribute to the progress or growth of" or "attempt to sell or popularize by advertising." *Webster*. "Support" can mean "aid the cause of by approving, favoring or advocating." *Id.* "Attack" can mean "criticize strongly or in a hostile manner." *Id.* And, "oppose" can mean "be in conflict or contention with"; "be in disagreement with or resistant to"; "place in opposition or be in opposition to"; or "act or be in opposition to." *Id.*

Moreover, the "promote or support. . ." prong inherently invites the same examination of an ad's context that Judge Leon correctly found fatal to the "suggestive of no plausible meaning. . ." prong. Thus, the communication need not even refer to the candidate if its context might somehow remind the viewers or listeners about the candidate. Yet even, for example, an advertisement's request that viewers or listeners contact a *named* candidate might be considered "promoting" or "opposing" the candidate if viewers were called upon to ask the candidate to oppose legislation with which he or she is identified as a sponsor; the candidate's position on the matter at issue was both firmly held and widely known, so the "call" request in the ad reminded viewers of that position; or the bill or issue cited was central to an ongoing campaign, so raising it in the context of a "call" request underscored the issue to the candidate's benefit or detriment. Given these entirely ordinary scenarios, a would-be speaker could not be confident that even a "call" ad would pass muster.

Judge Leon, again joined by Judge Kollar-Kotelly, see S.A. 885sa-86sa, concluded below, however, that this prong is not unconstitutionally vague, declaring simply that "a person of ordinary intelligence would understand what is prohibited" because "one need only conclude, in effect, that the ad is *not* neutral as to both candidates for it to have satisfied the backup definition" (emphasis in original).[19] See S.A. 1163sa. But, what does "not neutral" mean? Judge Leon elaborated with an AFL-CIO advertisement entitled "No Two Way," which discussed a Representative in his or her legislative capacity and that, Judge Leon concluded, "was not neutral as to a federal candidate, as it attacks his or her position on the federal budget." See S.A. 1163sa. And, Judge Leon's examples of what he classified as permissible "[g]enuine [i]ssue [a]dvertisements" and impermissible "[c]andidate-[c]entered [i]ssue [a]dvertisements"—all of which are ads broadcast by the AFL-CIO—provide no clearer guidance. See S.A. 1165sa, 1372sa-79sa.

Whatever "not neutral" may mean, Judge Leon's construction plainly would preclude a union, business corporation, or incorporated non-profit group from broadcasting anything anywhere at any time that conveyed any of a substantial range of non-electorally referential opinions about the actions and qualities of any individual who is a "candidate"—including, as we have shown, virtually every incumbent Senator and Representative at virtually all times, and an incumbent President for a substantial period of time. In fact, from May 16, 2003, when President Bush legally became a candidate for reelection, see *Washington Post*, p. A1 (May 17, 2003), until May 19, when the district court stayed its May 2 decision below, it was a federal crime for a union, corporation or incorporated non-profit organization to broadcast anything that was "not neutral" about the President, irrespective of its subject matter or its urgency to a policy or legislative goal of the organization. Such overbreadth is an unacceptable cure for vagueness. *Cf. Buckley*, 424 U.S. at 44-47 (construing FECA §608(e)(1) to reach only express advocacy but then invalidating its limit on independent expenditures because it "severely restricts all independent advocacy despite its substantially diminished potential for abuse").

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[19] Nonetheless, Judge Leon's certitude on this point was apparently short-lived; on May 19, he declared that a stay of the court's May 2 judgment invalidating the primary definition was warranted because "the FEC's unfortunate failure to promulgate regulations for the backup definition, as it did for the primary definition, has sufficiently deprived the parties of guidance regarding the contours of the backup definition." Memorandum Opinion, at 3 (May 19, 2003) (Leon, J., dissenting in part and concurring in part) (footnote omitted).

Notably, in its BCRA rulemaking, the FEC declined to adopt numerous exceptions to the primary definition of "electioneering communication" because 2 U.S.C. §§ 434(f)(2)(B)(iv) bars a regulatory exception for any communication that "promotes," "supports," "attacks" or "opposes" a candidate, and the FEC concluded that virtually *any* reference to a candidate might be so considered. See Final Rule, "Electioneering Communications," 67 Fed. Reg. at 65200-03. And, in this same rulemaking, the defendant-intervenors urged the FEC not to include the "promotes or supports. . ." phrase in any exception because it was "subjective" and would "create[ ] uncertainty about whether a communication will be covered by the law." Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe and Senator James Jeffords, at 8, 6 (August 23, 2002). www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.[20] Certainly, if this phrase cannot provide sufficient clarity in an *exception* to the primary definition of "electioneering

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[20] In the same vein, principal BCRA sponsor and defendant-intervenor Senator McCain urged the defeat of an amendment to his bill proposed by Senator Bingaman that would have afforded a "clearly identified candidate" who was "attack[ed] or oppose[d]" by a person in any broadcast an opportunity, without charge, to respond on the same broadcast station, because, in part, "[i]t is very difficult to define what a negative ad is" that the amendment would cover. See 147 Cong. Rec. S3114 (daily ed., March 29, 2001).

communication," then it is unconstitutionally vague as an explicit *component* of the backup definition itself.

C. The Backup Definition Is Not Severable

Even if the majority below was correct that the first prong of the backup definition is sufficiently clear, its decision to save that prong by severing it from the second prong, which it acknowledged was unconstitutionally vague, see S.A. 1165sa (Leon, J.), was wrong for two reasons.

First, the legislative history[21] of BCRA makes evident that Congress's highly unusual enactment of a backup definition of a statutory term was the product of a legislative compromise intended to ensure that one of these particular formulations would survive constitutional challenge intact, and not that a mere fragment of either would remain. As introduced, the original Senate bill contained only what is now the primary definition of "electioneering communication." See S. 27, Section 201, 107th Cong., 1st Sess. (2001). Senator Specter initially offered an amendment to incorporate in that definition both the "promotes or supports. . ." clause as it now appears in the backup definition and the clause "when read as a whole, and in the context of external events, is unmistakable, unambiguous and suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." See Amendment No. 140, 147 Cong. Rec. S2700, S2704 (daily ed., March 22, 2001). Senator Specter explained that he drew the first clause from "language...existing in McCain-Feingold" (in what is now 2 U.S.C. § 431(20)(A)(iii)) and the second clause from *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), and that he offered the amendment because he feared that, without them, the definition in the bill was highly vulnerable to invalidation under *Buckley*. See 147 Cong. Rec. at S2706.

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[21] The question of severability requires "essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1995). Although BCRA contains a severability clause, Section 401, providing that if any "provision" or "amendment," or the "application" of either, to "any person or circumstance" is "held to be unconstitutional," the "remainder" of the act and its "application . . . to any person or circumstance, shall not be affected," a severability clause "'is an aid merely; not an inexorable command,'" *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 n.49 (1997), *quoting Dorchy v. Kansas*, 264 U.S. 286, 290 (1924), because "separation-of powers concerns" compel courts to steer clear of engaging in legislative conduct or rewriting laws. *Reno*, 521 U.S. at 884-85 and n.50. *See also United States v. Jackson*, 390 U.S. 570, 586 n.27 (1968).

In the ensuing debate, Senators Thompson, Biden and Snowe (one of the two co-authors of the primary definition) stressed the importance of maintaining a bright-line definition of "electioneering communication." *Id.* at S2708-12. Senator Specter responded by offering to convert his amendment from a modification of the definition to a separate, *alternative* definition: "to put in the 'or', the disjunctive instead of 'and', the conjunctive so that there is severability. And where one is decided to be inefficient [sic] to satisfy the vagueness standards of Buckley, the other might be sufficient—picking up on what [Senator Biden] said, having the safeguard." *Id.* at S2712. It was this alternative that was ultimately enacted as the backup definition. See *id.* at S3119-20, S3122-23.

Thus, the explicit legislative compromise was an either-or pairing of two palatable definitions of "electioneering communication"—the primary definition and the backup definition. The Court should refrain from severing either prong of the backup definition from the other if it finds either to be unlawful, for "drawing one or more lines between categories of speech covered by an overly broad statute . . . involves a . . . serious invasion of the legislative domain." *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995). *See also Reno v. American Civil Liberties Union*, 521 U.S. at 884-85.

Second, by severing the first prong after invalidating the second, the majority below adopted a definition of "electioneering communication" that, whatever its actual scope, is undeniably a significantly broader prohibition than *either* the full backup definition *or* the primary definition, and it simply cannot be concluded that Congress intended that result. *Cf. Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 525 (1929) (when an "excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand," because "to hold otherwise would be to extend the scope of the law...so as to embrace [circumstances] which the legislature passing the statute had, by its very terms, expressly excluded").

Accordingly, if this Court determines that either prong of the backup definition is unconstitutional, then the entire definition should be held non-severable and void.

III. BCRA'S COORDINATION PROVISIONS ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A. BCRA's Coordination Provisions Directly Regulate Protected Speech and Associational Activities.

All three judges below correctly recognized that BCRA's definition of coordination must be narrowly and clearly drawn in order to avoid interfering with First Amendment rights. S.A. 143sa (Per Curiam), 386sa-387sa (Henderson, J.). In holding that the FEC could not define coordination to include all expenditures by political party committees in support of their candidates, the Court recognized that the definition of coordination implicates both freedom of speech and freedom of association because it determines whether communications are fully protected as independent expenditures or are subject to the lesser degree of constitutional protection afforded to contributions. *See Colorado Republican Federal Campaign Comm. v. Federal Election Commission*, 518 U.S. 604, 615-16, 619-22 (1996) ("*Colorado I*"). Moreover, insofar as the definition of "coordination" depends on a speaker's contacts with his elected representatives and candidates, it implicates the fundamental right of citizens "to make their wishes known to their representatives." *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). *See also United States v. Harriss*, 347 U.S. 612, 635 (1954) (Jackson, J. dissenting). And, insofar as the definition of "coordination" depends on the contacts between a speaker and a political party, it implicates the equally fundamental right "to associate with the political party of one's choice." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). *See also Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. at 224; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

BCRA's coordination provisions not only implicate First Amendment rights by limiting freedom of speech, freedom of association and the right to petition the government, they also threaten these rights by intruding into highly sensitive private political activities which are at "'the very heart of the organism which the first amendment was intended to nurture and protect.'" *AFL-CIO v. Federal Election Commission*, F.3d 168, 179 (D.C. Cir. 2003), quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir.), *cert denied*, 454 U.S. 897 (1981). By definition, enforcement of coordination rules "'inevitably . . . involves an intrusive and constitutionally troubling investigation of the inner workings of political [actors].'" *Colorado II*, 533 U.S. at 471 n.3 (Thomas, J., dissenting, quoting with approval from Brief for American Civil Liberties Union, *et. al.* as *Amici Curiae* 18). See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (Frankfurter, J. concurring). As Judge Henderson put it in her dissenting opinion, "in the absence of a clear and narrow definition of coordination, an organization's ideological opponents need only assert that it is engaged in such activity to initiate a crippling litigation process that could prevent the organization from participating, legally, in lobbying or speech activities." S.A. 387sa.[22]

In the late 1990's, three lower courts attempted to limit the chilling effect of FEC's omnibus coordination investigations by narrowing the definition of coordinated political activities. See *Clifton v. Federal Election Commission*, 114 F. 3d 1309 (1st Cir. 1997), *cert denied*, 522 U.S. 1108 (1998); *Federal Election Commission v. Public Citizen, Inc.*, 64 F. Supp. 2d 1327 (N.D. Ga. 1999), *rev'd on other grounds*, 268 F.3d 1283 (11th Cir. 2001); *Federal Election Commission v. Christian Coalition, Inc.*, 52 F. Supp. 2d 45 (D.D.C. 1999). Responding to the direction given in these decisions, and noting that "[t]he statutory terms are not inherently clear, nor does the Act's legislative history provide much guidance," the FEC on December 6, 2000 issued regulations intended to "fill what is largely a vacuum in this area." Final Rule, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg. 76138, 76141 (Dec. 6, 2000), adopting 11 C.F.R. § 100.23 (2001). BCRA, however, reinstates the open-ended standards that were in effect prior to the courts' decisions and the 2000 regulations, once again raising serious impediments to the free speech and associational rights of all citizens.

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[22] The record amply supports Judge Henderson's conclusion regarding the "crippling" and intrusive impact of coordination investigations. In one leading coordination case brought against the Christian Coalition, the FEC conducted extensive discovery into the inner workings of the organization as well as private discussions between the leaders of the organization and numerous public officials. *See Federal Election Commission v. Christian Coalition, Inc.*, 52 F. Supp. 2d 45 (D.D.C. 1999). In another major enforcement case involving a coalition of business organizations, including the Chamber of Commerce and the National Association of Manufacturers, the Commission conducted a "disruptive, burdensome and expensive" investigation, S.A. 284sa, involving "four years of extensive discovery," S.A. 283sa, in order to determine whether lobbying meetings between business lobbyists and Congressional staff members were used to coordinate broadcast advertisements run during the 1996 election cycle. And, in a far-ranging, four-year investigation of the AFL-CIO's campaign and lobbying activities during the 1995-96 election cycle initiated by the organization's political opponents, the Commission's investigators sought evidence from more than 150 respondents and third-party witnesses, including the White House, the Clinton/Gore '96 Campaign, and 100 Members of Congress, and subpoenaed more than 50,000 pages of "extraordinarily sensitive political information [including] plans and strategies for winning elections, materials detailing political and associational activities, and personal information concerning hundreds of employees, volunteers and members of the Plaintiff organizations." *AFL-CIO v. Federal Election Commission*, 177 F. Supp. 2d 48, 51 (D.D.C. 2001), *aff'd*, 333 F.3d 168 (D.C.Cir. 2003).

B. BCRA's Provisions Regulating Coordinated Electioneering Communications And Expenditures Are Vague And Overbroad.

BCRA §214(a)(2) does not use the word "coordination" at all,[23] but provides instead that expenditures made by any person, other than a candidate or candidate's authorized committee, "in cooperation, consultation or concert with, or at the request or suggestion of" a political party committee shall be considered to be contributions made to such party. See 2 U.S.C. § 441a(a)(7)(B)(ii). This language offers no clear guidance to political actors and the agencies charged with enforcing the campaign finance laws. Does a political party "request or suggest" expenditures by third parties when a party official publicly identifies the party's principal

campaign themes and the states where the party hopes to prevail? Is the result different if the same message is delivered in a "private" strategy session, and, if so, how many party activists must be present before a meeting loses its private character? Has a union official acted "in cooperation . . . or concert with" a political party if he meets with the party's congressional leadership to plan strategy in support of the party's legislative agenda, including union expenditures in support of that agenda? If a trade association lobbyist participates in planning party activities during the early stages of a campaign season, will the use of information she has learned about the party's plans turn all of her group's subsequent independent expenditures into contributions because of improper "consultation"? These are only a few of the myriad unanswered questions raised by § 214(a)(2)'s expansive and unclear language, the uncertainty and breadth of which pose a substantial risk of deterring legitimate involvement of citizens in political parties.

The two judges below who voted to uphold §§ 202 and 214(a)(2) did not attempt to show that the statutory language is clear and narrowly drawn; indeed, the majority ignored the statutory language completely. Instead, the majority rejected plaintiffs' challenge to the scope of § 202 by reference to its analysis of § 214(a)(2), see S.A. 130sa, and it rejected the vagueness challenge to § 214(a)(2) in part on the dubious ground that the same language has long appeared in FECA's provision relating to coordination with candidates, 2 U.S.C. § 441a(a)(7)(B)(i).[24] S.A. 135sa-136sa, 137sa. The fact that statutory language is longstanding does not in itself mean that the language is clear or that it provides adequate guidance to those who must adhere to its mandate. See *Colorado II*, 533 U.S. at 472 (Thomas, J., dissenting) ("we have never before upheld a limitation on speech simply because speakers have coped with the limitation for 30 years"). The parallel language in FECA might be relevant *if* the FEC or the courts had rendered interpretations which narrowed the statute's scope and made its language more clear. However, the FEC itself recognized as late as 2000 that "[t]he statutory terms [of FECA's coordination provision] are not inherently clear," Final Rule, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg. at 76141, and the agency's effort to narrow the statutory language at that time has been repealed by BCRA § 214(b), itself. See Pub. L.107-155, § 214(b), 116 Stat.81, 94-95 (2002). While the majority in *Colorado II* did not address the question, the four dissenters stated clearly that FECA's definition of coordinated expenditures is unconstitutionally overbroad. See 533 U.S. at 467-468 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (2 U.S.C. § 441a(a)(7)(B)(i)

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[23] BCRA § 202 provides that if any person makes or contracts to make any disbursement for any electioneering communication and such disbursement is "coordinated with" a candidate or political party, the disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party. 2 U.S.C. § 441a(a)(7)(C). The Court need not consider whether § 202's bare reference to "coordination" is constitutionally adequate because the FEC regulations issued under BCRA apply the same standards for coordinated electioneering communications under § 202 as they apply to other coordinated communications under § 214(a)(2). See 11 C.F.R. § 109.21(c)(1).

[24] The majority below erroneously suggested that the Court approved the language of 2 U.S.C. § 441a(a)(7)(B)(i) in *Buckley v. Valeo*. S.A. 138sa-140sa. There, the Court located the coordination principle in FECA § 608(c)(2)(B), which then provided that expenditures "made by or on behalf of" any candidate were to be treated as expenditures of the candidate and contributions by the person or group making the expenditures, see 424 U.S. at 47 n.53, and further provided that expenditures are to be treated as "made by or on behalf of any candidate" if they are

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"*authorized or requested* by the candidate, an authorized committee of the candidate, or an agent of the candidate." 18 U.S.C. § 608(c)(2)(B), reprinted at 424 U.S. 191 (emphasis added). Whether or not the Court actually "upheld" this provision, as suggested by the majority below, see S.A. 139sa, is of no consequence here because the "authorized or requested" language of the 1974 statute is far more restrictive than the "in cooperation, consultation, or concert with" language adopted by Congress following *Buckley* and now repeated in BCRA § 214(a)(2). Similarly, the Court's interpretation of § 608(c)(2)(B), based on its legislative history, as "operat[ing] to treat all expenditures placed *in cooperation with or with the consent of* a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limits set forth in [FECA]," 424 U.S. at 47 n.53 (emphasis added), offers no support for the broader standard at issue here, which allows coordination to be found on the basis of mere "consultation" with a candidate or political party committee.

"covers a broad array of conduct, some of which is akin to an independent expenditure"); *id.* at 471 ("because of the ambiguity in the term 'coordinated expenditure,' the Party Expenditure Provision chills permissible speech as well").

C. The Majority Below Erroneously Relied On The "Possibility" of Corrective Regulations In Rejecting The Vagueness And Overbreadth Challenges to BCRA's Coordination Provisions

Rather than considering the language of §§ 202 and 214(a)(2), the majority below also rejected plaintiffs' vagueness challenges as not ripe for consideration because the issuance of final FEC regulations while the case was *sub judice* made it "possible that many, perhaps even all, of Plaintiffs' vagueness concerns have been remedied by the regulations' contents." S.A. 137sa. However, it is no answer to a claim that a statute is unconstitutionally vague and overbroad that an administrative regulation might "possibly" cure the constitutional defects as long as citizens may be subject to penalties under the statute. See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 371, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden."). This is the case here because the statute provides separate criminal penalties, enforceable by the Department of Justice, for knowing and willful violations of "the Act." *E.g.*, 2 U.S.C. § 437g(d). The only way that the FEC regulations defining coordination could cure the vagueness and overbreadth of the statute would be if the regulations provide a clear and narrowly drawn safe harbor for coordinated activities that prevents any possible criminal prosecution under the vague and overbroad statutory terms. While the majority relied on 2 U.S.C. § 438(e) for the proposition that "FECA also provides protection for those who act in good faith reliance on FEC regulations," S.A. 136sa n.88, that provision is only relevant to the extent that the coordination regulations in fact provide "protection" from criminal prosecutions under the statute, which cannot possibly be determined without reviewing the regulations themselves.[25]

In refusing to consider the FEC's coordination regulations issued in response to BCRA, the majority erroneously relied on BCRA § 403, which limits the jurisdiction of the three-judge court to constitutional challenges to BCRA. S.A. 138sa. For, it is well-established that a three-judge court has pendent jurisdiction to decide any other claim properly presented in a case even though the claim is one that standing alone would require only a single district judge. See *Philbrook v. Glodgett*, 421 U.S. 707, 712 (1975); *Hagans v. Lavine*, 415 U.S. 528, 543 (1974); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504 n. 5 (1972). Here, moreover, plaintiffs raised no claim against the FEC regulations, which became relevant, if at all, only as a defense to their constitutional claims against the statute. Even if the three-judge court lacked jurisdiction to invalidate the FEC regulations themselves, the court was not prohibited from considering whether the regulations cured the constitutional flaws in BCRA's coordination provisions. By relegating consideration of the regulations to a single-judge court in a separate action in which the constitutionality of BCRA's coordination provisions could not be addressed, the majority awkwardly bifurcated the coordination issues and ignored Congress' mandate that the courts should "expedite to the greatest possible extent the disposition of the action and

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[25] This is the approach followed by the majority below itself in considering the advance disclosure requirement set forth in BCRA § 201(a), where they found that the constitutional infirmity in the statute was not cured by the regulation and therefore held that the advance notice requirement in the statute should be struck down. S.A. 109sa-111sa and n.73. *Cf.* S.A. 132sa-133sa (refusing to address the constitutionality of BCRA § 212 because, in the majority's view, the FEC's regulation cured any infirmity in the statute).

appeal" in this case. Pub. L. 107-155, §403(a)(4), 116 Stat.114 (2002).

Finally, even a cursory examination would have demonstrated that the FEC regulations fail to narrow the statutes' coordination provisions sufficiently to save their constitutionality. For example, in defining the term "coordinated," the FEC regulations repeat *verbatim* the vague and overbroad language of BCRA § 214(a)(2), see 11 C.F.R. § 109.20(a); to the extent that this provision may be applicable,[26] it does nothing to clarify or narrow the statutory language. The regulations' definition of "coordinated communication" similarly repeats the vague statutory words "request or suggestion", 11 C.F.R. §109.21(d)(1)(i); and, the FEC explicitly refused to define the term further. See Final Rule, "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 431 (rejecting commenters' request for further definition of the term "suggest"). To the extent that the statute impermissibly permits a finding of coordination where a speaker merely informs a candidate or political party committee of its own independent plans, the regulation fails to cure this infirmity and actually reinforces it. See 11 C.F.R. § 109.21(d)(3) (providing that the regulations' conduct standards may be met by "substantial discussion"). Fourth, and most significantly, the FEC regulations do not protect contacts with legislators undertaken for a lobbying purpose.[27]

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[26] The relationship between the broadly worded definition of "coordinated" in 11 C.F.R. § 109.20 and the definition of "coordinated communication" in 11 C.F.R. § 109.21 is uncertain. The regulations appear to contemplate, however, that § 109.20(a) could be applied at least in some instances not covered by § 109.21. The majority in the district court did not consider the implications of § 109.20(a) to this case.

[27] 11 C.F.R. § 109.21(f), which provides a "safe harbor" for a candidate's or a party committee's responses to an inquiry about that candidate's or committee's positions on legislative or policy issues, does not protect the vast majority of legitimate contacts between outsiders and legislators and party committees on legislative and policy matters, as

For these reasons, it was critical for the majority below to consider the FEC's regulations in detail and its failure to do so was reversible error.

D. The Majority Erroneously Determined That "Agreement or Formal Collaboration" Is Not A Constitutionally Required Element of Coordination.

Although the majority below refused to consider the plaintiffs' overall vagueness and overbreadth challenges to BCRA §§ 202 and 214(a)(2) because of the possible impact of the FEC's coordination regulations, it did address whether the statutes are overbroad in light of BCRA § 214(c), which prohibits the agency from adopting any regulation requiring "agreement or formal collaboration" as an element of coordination.[28] S.A. 138sa-143sa. In ruling that "agreement or formal collaboration" is not a constitutionally required element of coordination, the majority incorrectly relied on this Court's decisions in *Buckley*, *Colorado I* and *Colorado II*,[29] which, while not deciding the question definitively,

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suggested by the majority below. S.A. 152sa. The FEC rejected several proposals to narrow the regulations in order to make certain that they do not prohibit contacts with legislators and committees on legislative and policy matters. See 68 Fed. Reg. at 441.

[28] This question was clearly ripe for decision since BCRA § 214(c) leaves the FEC with no discretion to ignore Congress's mandate. As required by Congress, the regulations issued by the FEC state that "[a]greement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent's authorized committee, a political party committee, or an agent of any of the foregoing, is not required for a communication to be a coordinated communication." 11 C.F.R. § 109.21(e). *See* also 11 C.F.R. § 109.21(d).

[29] Although the majority below also relied on the district court's decision in *Christian Coalition*, the opinion in that case offers no support for the conclusion that expenditures may be found to be coordinated without proof of "agreement or formal collaboration," for the court explicitly stated that "a spender should not be deemed to forfeit First

strongly suggest that the element of "agreement or formal collaboration" is essential to keeping the concept of coordination within constitutional bounds. Furthermore, without proof of "agreement or formal collaboration," the statutory provisions clearly reach a broad range of conduct, including mere consultation with a candidate or party, which is constitutionally protected.

In *Buckley*, the Court located the coordination principle in FECA § 608(c)(2)(B), the now-repealed provision which applied to any expenditure that was "authorized or requested" by a candidate, words that indicate that an element of agreement between the speaker and the candidate must be present. The Court's explanation for the coordination rule—that it is necessary "to prevent attempts to circumvent the Act['s contribution limits] through *prearranged* or coordinated expenditures amounting to disguised contributions," 424 U.S. at 47 (emphasis added)—also indicates that some form of agreement is necessary before an expenditure will subject a political speaker to civil and criminal penalties. Chief Justice Burger, concurring in part and dissenting in part, similarly emphasized the "authorized or requested" language of FECA § 608(c)(2)(B), although he noted that the Act "places intolerable pressure on the distinction between 'authorized' and 'unauthorized' expenditures on behalf of a candidate," *id.* at 252, and he expressed doubt "that the distinction can be maintained." *Id.* Justice White, in his separate opinion dissenting from the Court's invalidation of FECA's limits on independent expenditures, similarly made clear his understanding that coordinated expenditures under §608(c)(2)(B) were those made "at [a candidate's] request or with his approval or cooperation." *Id.* at 261.

Amendment protections for her own speech merely by having engaged in some *consultations* . . . with a federal candidate," see 52 F. Supp. 2d at 91 (emphasis added), and it stated that coordination only may be found to exist where "the candidate and spender emerge as *partners or joint venturers* in the expressive expenditure." See *id.* at 92 (emphasis added).

In *Colorado I*, the plurality opinion held that FECA's dollar limits on political party expenditures made "in connection with" the election campaign of a candidate for federal office, 2 U.S.C. § 441a(d)(3), could not be constitutionally applied to "an expenditure that the political party has made independently, without coordination with any candidate." 518 U.S. at 608. Since the case involved a challenge to FECA's party contribution limits as applied to specific expenditures by the Colorado Republican Party, *id.* at 613, the Court had no occasion to consider whether FECA's definition of coordinated expenditures was facially overbroad or vague.[30] See *id.* at 623-24. Moreover, with respect to the specific expenditures involved, there was little doubt that they were "independent" and not "coordinated" because no Republican candidate had been selected to run at the time of the party's expenditures criticizing the incumbent Democrat. *Id.* at 613-14. *See also Colorado II*, 533 U.S. at 439. In rejecting the FEC's reliance on "general descriptions of party practice . . . that do not refer to the advertising campaign at issue here or to its preparation," 518 U.S. at 614, the plurality indicated, however, that such general evidence could not cast significant doubt upon uncontroverted direct evidence that the campaign was developed by the party "independently and not pursuant to any general or particular *understanding* with a candidate." *Id.* (emphasis added). The Court's reference to "any general or particular understanding" is suggestive that

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[30] Justice Kennedy, joined by the Chief Justice and Justice Scalia, would have reached the constitutionality of FECA's limits on coordinated party expenditures, see 518 U.S. at 627, as would have Justice Thomas, joined by the Chief Justice and Justice Scalia. See *id.* at 631. Neither of these opinions addressed the facial invalidity of FECA's definition of coordination with candidates. Justice Thomas, however, warned of the dangers created by the coordinated expenditure rules which "leav[e] political parties in a state of uncertainty about the types of First Amendment expression in which they are free to engage." See *id.* at 634.

some form of "agreement" is constitutionally required before an expenditure may be treated as a "disguised contribution."

Finally, in *Colorado II*, the Court reached the question, left open in *Colorado I*, of whether FECA's party expenditure provision was "facially unconstitutional, and so...incapable of reaching party spending even when coordinated with a candidate." 533 U.S. at 440. Because the plaintiffs made no effort to distinguish between different kinds of coordinated expenditures, *id.* at 456 n.17, the majority opinion was not called upon to decide what kinds of conduct would constitute coordination if it upheld the statute. The Court did, however, cite with approval *Buckley*'s observation that "treating coordinated expenditures as contributions 'prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.'" 533 U.S. at 443, quoting 424 U.S. at 47.[31]

Because the majority erroneously regarded this Court's prior coordination decisions as controlling, it failed to consider plaintiffs' arguments that BCRA §§ 202 and 214(a)(2) would, without proof of "agreement or formal collaboration," reach a substantial number of legitimate and protected contacts between citizens and candidates or political parties.[32] Merely informing a candidate or party official about issues and urging them to take particular positions on these issues is core political speech. So is informing a candidate or party about a group's own activities taken on its behalf. *Federal Election Commission v. Christian Coalition Inc.*, 52 F. Supp. 2d at 92-95. And, citizens have a right to work in candidates' campaigns and for political parties, see *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. at 230-31, without having the information they may thereby obtain about the candidates' or parties' plans jeopardize their right to make independent expenditures in behalf of those candidates. Such conduct may be regulated without offending the First Amendment only where it presents the same danger of corruption as cash contributions, and that is only possible, as the Court's previous decisions reflect, where the candidate or party and the citizen have reached "agreement or formal collaboration."

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[31] As noted by the majority below, S.A. 142sa, the Court in *Colorado II* did state that the coordination rule could not be avoided by "wink and nod" arrangements. 533 U.S. at 442. This oblique and unexplained reference, however, hardly stands as authority for eliminating the requirement of "agreement or formal collaboration."

[32] The December 2000 FEC regulations specifically required that, in order to rise to the level of coordination, discussions with candidates or parties regarding certain aspects of a communication had to be "substantial" and result in "collaboration or agreement." See 11 C.F.R. § 100.23(c)(2)(iii) (2001), repealed by Pub. L. 107-155, § 214(b) (2002), 116 Stat. 81. In adopting the requirement of "collaboration or agreement" as a required element of coordination, the Commission stated that the purpose of the condition was to "establish a 'buffer zone' for protected

IV. BCRA'S ADVANCE DISCLOSURE REQUIREMENTS ARE NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST AND THEREFORE VIOLATE THE FIRST AMENDMENT.

"[C]ompelled disclosure [of political activities], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. at 64. The government's interests in mandating disclosure therefore "must survive exacting scrutiny," *id.* at 64, citing *NAACP v. Alabama*, 357 U.S. 449, 463 (1958); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963); *NAACP v. Button*, 371 U.S. 415, 438 (1963); and *Bates v. Little Rock*, 361 U.S. 516, 524 (1960), and must be narrowly tailored to serve important governmental interests.

In upholding FECA's requirement for after-the-fact reporting of independent expenditures in *Buckley*, the Court

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speech," see 65 Fed. Reg. at 76141, and that "this new rule is more protective of First Amendment rights than the standard it is replacing." *Id.*

recognized only three governmental interests sufficiently compelling to support mandatory disclosure and reporting of political expenditures: (1) providing the electorate with information as to where political campaign money comes from and how it is spent, 424 U.S. at 66; (2) deterring actual corruption and avoiding the appearance of corruption by exposing large contributions and expenditures to the light of publicity, *id.* at 67; and (3) gathering the data necessary to detect violations of the Act's contribution limitations. *Id.* at 68. BCRA's advance reporting requirements are not narrowly tailored because each of these governmental interests can be fully served by requiring persons making "electioneering communications" to disclose their expenditures within a reasonable period *after* the communications have been aired, not when they have merely contracted to make such expenditures. *Cf. Thomas v. Collins*, 323 U.S. at 540. In contrast, mandatory disclosure of expenditures for communications *before* they have run may, as Judge Henderson found, S.A. 271sa, chill speech by forcing speakers to disclose their plans and strategies before they are implemented, giving speakers' opponents an opportunity to prepare counter-messages, and allowing opponents the opportunity to induce broadcasters not to run the ads at all. In addition, as Judges Leon and Kollar-Kotelly found, advance notice may actually be counterproductive because "[i]nformation concerning contracts that have not been performed, and may never be performed, may lead to confusion and an unclear record upon which the public will evaluate forces operating in the political marketplace." S.A. 114sa.[33]

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[33] Defendant FEC itself has recognized that "until a person or entity actually airs an electioneering communication, it is impossible to know with certainty that the person or entity ever will air a communication that constitutes an electioneering communication under BCRA; accordingly, to require reporting beforehand could lead to speculative and even inaccurate reporting through no fault of the reporting person or entity." Notice of Proposed Rulemaking, "Electioneering Communications," 67

For these reasons, the lower federal courts uniformly have ruled that advance reporting of political expenditures is not narrowly tailored to serve a compelling governmental interest and should be struck down. See *Citizens For Responsible Government State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1197 (10th Cir. 2000); *Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078, 1091 (W.D. Wis. 2002); *Florida Right to Life, Inc. v. Mortham*, 1998 U.S. Dist. LEXIS 16694 at *30 (M.D.Fla. 1998). See also *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002 (9th Cir. 2003). Advance disclosure of electioneering communications similarly will chill the exercise of free speech by forcing groups such as the AFL-CIO to disclose ongoing and confidential political strategies and by giving their opponents the opportunity to interfere with the communications. S.A. 271sa (Henderson Findings 53g-i). The district court's decision invalidating section 201(a)'s advance reporting requirement should therefore be affirmed.

Fed. Reg. 51131, 51141 (Aug. 7, 2002). The Commission also noted that there could be "constitutional issues" with compelling disclosure of potential electioneering communications before they are finalized and aired, "particularly when such disclosure could force reporting entities to divulge confidential information, and could force them to report information, under the penalty of perjury, that later turns out to be misleading or inaccurate if the reporting entity does not subsequently air any electioneering communications." *Id.*

CONCLUSION

The decision of the district court concerning BCRA's prohibition against union and corporate spending for the primary definition should be affirmed; its decisions upholding the backup definition and BCRA's coordination provision should be reversed; and its decision striking down BCRA's advance disclosure provision should be affirmed.

Respectfully submitted,

LARRY P. WEINBERG
1101 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 775-5900

Of Counsel

JONATHAN P. HIATT
LAURENCE E. GOLD
Counsel of Record
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5130

MICHAEL B. TRISTER
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 328-1666

Counsel for Appellants/
Cross-Appellees

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In The
Supreme Court of the United States

NATIONAL RIGHT TO LIFE COMMITTEE, INC. *et al.*,
Plaintiffs-Appellants/Cross-Appellees,
v.
FEDERAL ELECTION COMMISSION *et al.*,
Appellees/Cross-Appellants

On Appeal from the United States District Court
for the District of Columbia

Brief of Plaintiffs-Appellants/Cross-Appellees National Right to Life Committee *et al.*

James Bopp, Jr., *Counsel of Record*
Richard E. Coleson
Thomas J. Marzen
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434

July 8, 2003

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Questions Presented

1. Whether the prohibition of § 101 of the Bipartisan Campaign Reform Act of 2002 (BCRA) on the solicitation, receipt, redirection, or use of "soft money" by any national political party for any communication that "promotes or supports . . . or attacks or opposes" a federal candidate, violates the First and Fifth Amendment and principles of federalism.

2. Whether the prohibition on federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending "soft money" contained in BCRA § 101 violates the First Amendment.

3. Whether the prohibition on state officeholders and candidates from soliciting, receiving, directing, transferring, or spending "soft money" in connection with an election for federal office in BCRA §101 violates the First Amendment.

4. Whether the backup "electioneering communication" definition at BCRA § 201, or its construction by the district court, violates the First Amendment.

5. Whether the requirements that "disbursements" and "expenditures" be reported as occurring when contracted for, rather than when made, BCRA §§ 201 and 212,[1] are justiciable and violate the First Amendment.

6. Whether the District Court injunction should extend to activities outside the District of Columbia.[1]

7. Whether BCRA § 403(b), permitting members of Congress to intervene, and the permitted intervention by Intervenor-Defendants without regard to whether they have Article III standing, violates the Constitution.

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[1] Question 5, as to § 212 only, and Question 6 are withdrawn.

Parties to the Proceedings

In the case of *McConnell, et al. v. FEC, et al.* (No. 02-582 in the district court), the following plaintiffs were represented by the James Madison Center for Free Speech ("JMC Plaintiffs"): U.S. Representative Mike Pence, Alabama Attorney General Bill Pryor, Libertarian National Committee, Inc. (LNC), Club for Growth, Inc. (CFG), Indiana Family Institute, Inc. (IFI), National Right to Life Committee, Inc. (NRLC), National Right to Life Educational Trust Fund (NRL Ed Fund), National Right to Life Political Action Committee (NRL PAC), Trevor M. Southerland,[2] and Barret Austin O'Brock .[3]

Plaintiffs below in the same action who were not represented by JMC were U.S. Senator Mitch McConnell, former U.S. Representative Bob Bar, American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, Center for Individual Freedom, National Right to Work Committee, 60 Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. English d/b/a/ ProENGLISH, Thomas McInerney.

Defendants and Intervenor-Defendants, were the Federal Election Commission (FEC), Federal Communication Commission (FCC), John D. Ashcroft, in his capacity as Attorney General of the United States, the United States Department of Justice; and the United States of America, U.S. Senator John McCain, U.S. Senator Russell Feingold, U.S. Representative Christopher Shays, U.S. Representative Martin Meehan, U.S. Senator Olympia Snowe, and U.S. Senator James Jeffords.

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[2] The Madison Center represented minors Southerland and O'Brock in their successful challenge to the ban on contributions by minors to candidates or political party committees. Mr. Southerland became 18 years of age on May 28, 2003.

[3] Withdrawn Plaintiffs below were Alabama Republican Executive Committee, Libertarian Party of Illinois, Inc., DuPage Political Action Council, Jefferson County Republican Executive Committee, Christian Coalition of America, Inc., and Martin Connors.

Corporate Disclosure Statement

As stated in the *Jurisdictional Statement*, none of the appellants has a parent corporation and no publicly held company owns ten percent or more of the stock of any of the appellants. Rule 29.6.

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Glossary

BCRA	Bipartisan Campaign Reform Act of 2002
CFG	Club for Growth
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
GOTV	get out the vote
JA	*Joint Appendix*
JDT	Joint Deposition Transcripts
JMC Plaintiffs	present plaintiffs-appellants/cross-appellees in trial court
JS	*Jurisdictional Statement*
JSA	*Jurisdictional Statement Appendix*
NRLC	National Right to Life Committee
NRL ETF	NRL Educational Trust Fund
NRL PAC	NRL Political Action Committee
NRLC Plaintiffs	present plaintiffs-appellants/cross-appellees in this brief
PCS	Plaintiffs' Consolidated Evidentiary Submission (cd)
SA	*Supplemental Appendix to Jurisdictional Statements*

Opinions Below

Lower opinions are at 251 F. Supp. 2d 176 and in the *Supplemental Appendix to Jurisdictional Statements* (SA).

Jurisdiction

Judgment issued May 1, 2003; appeal was noticed May 7. Jurisdiction is under 28 U.S.C. § 1253; BCRA § 403(a)(1).

Constitutional & Statutory Provisions

Relevant provisions are set out in the *Jurisdictional Statement* ("JS") and appendix pages cited. JS at 1-2.

Statement of the Case

Plaintiffs-appellants/cross-appellees represented by the James Madison Center for Free Speech (referred to below as "Madison Center" or "JMC" Plaintiffs) were part of a larger group below on the *McConnell v. FEC* (No. 02-582) complaint. They refer to themselves herein as the "NRLC Plaintiffs."

NRLC Plaintiffs are described in detail in the *Jurisdictional Statement*. They include nonprofit, ideological advocacy organizations, described in the *Per Curiam Opinion* as noted: National Right to Life Committee, Inc. (79sa), National Right to Life Educational Trust Fund (79a), Club for Growth, Inc. (79sa), and Indiana Family Institute. NRLC Plaintiffs include the Libertarian National Committee, Inc. (78sa); National Right to Life Political Action Committee (79sa); federal official and candidate Rep. Mike Pence; state official and candidate Alabama Attorney General William H. Pryor (78sa); and minor Barret Austin O'Brock (80sa).

NRLC Plaintiffs generally adopt the statement of the case of the McConnell Plaintiffs in No. 02-1674, but add the following unique information regarding the challenge to Intervenors' standing. Senators McCain and Feingold, Reps. Shays and Meehan, and Sens. Snowe and Jeffords (Intervenors) moved to intervene under Fed. R. Civ. P. 24(a)(1) and BCRA § 403(b). Docket #6. NRLC Plaintiffs objected that Intervenors lack mandatory Article III standing. Docket #14. The trial court granted intervention, holding that Intervenors have Article III standing if it is required. Docket #40.

Summary of the Argument

The ban on **"electioneering communication,"** § 201, is unconstitutional as to its primary, its backup, and (the district court's) truncated backup definitions. It violates this Court's binding, substantive decisions in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life* that the First Amendment requires that issue advocacy be protected from government regulation by a bright-line express advocacy test requiring explicit words advocating the election or defeat of a clearly identified candidate. The ban is not narrowly tailored to a compelling interest.

The **soft money bans** in Title I are unconstitutional as to political party committees, federal officials/candidates, and state officials. Libertarian National Committee joins the political parties' brief on the first subject. The ban on soft money fundraising by federal officials and candidates, such as Rep. Pence, for nonprofit ideological corporations, such as Indiana Family Institute, unconstitutionally burdens the rights of free expression and association without being narrowly tailored to a compelling interest. The ban on certain uses of soft money for state officials and candidates, such as Alabama Attorney General William Pryor, unconstitutionally burdens the rights of free expression and association, and hinders the conduct of official duties, without being narrowly tailored to a compelling interest.

BCRA's requirement of **advanced notice** of electioneering communications by treating contracts as communications unconstitutionally burdens free expression without furthering any compelling interest, as noted by the district court.

The trial court erred in **permitting Sen. McCain et al. to intervene** without individual Article III standing.

Argument[4]

I. The "Electioneering Communication" Ban Is Unconstitutional.

The argument over BCRA's electioneering communications ban, JSA 21a, 24a (BCRA §§ 201, 203), is over two views of issue advocacy. Defendants see issue advocacy as affecting elections and insist it should be banned. Plaintiffs see issue advocacy as essential to citizen participation in our democratic republic, guaranteed by the First Amendment, and therefore protected from abridgement – even if it affects elections.[5]

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[4] **Barrett O'Brock** joins the brief of plaintiffs Echols et al. opposing the minors' contributions ban. **Libertarian National Committee** joins the political parties' brief of Republican National Committee et al. In addition to specific notes of adoption here and elsewhere, **NRLC Plaintiffs** generally adopt all consistent briefing on their issues presented by other plaintiffs.

[5] Issue advocacy involves a wide variety of communications, including discussion of issues of public concern and potential legislation, grassroots lobbying for the passage of particular legislation, and praise and criticism of the actions of public official in office and the positions of candidates on issues. However, the "ultimate goal is to affect what the government does, and what Congress does by passing the types of issues [the group supports]." JDT *Deposition of David Keating* 64. This differs from candidate campaigns, whose "ultimate goal" is the election of a candidate. As a result, issue advocacy occurs throughout the year, year after year, often timed to coincide with potential legislative action. While issue advocacy is often done around elections and can certainly influence an election, it is often not done to influence *the outcome* of an election. "The media . . . the public . . . and the general political actors are [often] more attuned," JDT *id.* at 70, to issues at that time and, if an issue is raised in a campaign, it needs to be defended or "the media, the public, or other members of Congress [will] conclude that's a losing issue . . . for them politically [and] we'll never get anything adopted." JDT *id.* at 74. Thus, issue advocacy by advocacy groups has a fundamentally different purpose and effect than candidate

Judges Kollar-Kotelly and Leon used the first viewpoint, upholding the ban. Judge Henderson followed *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), holding that the Constitution mandates the second viewpoint and the ban should be stricken.

Judge Kollar-Kotelly argued that "*Buckley* and *MCFL* ... invoked the express advocacy test *only* as a means of statutory construction," SA 788sa, but acknowledged "the consensus among the judiciary that courts are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy.'" SA 796sa (quotation marks omitted). She dismissed this consensus, however, saying those other cases lacked "textual analysis" and were rife with "dicta." SA 794-99sa. Judge Henderson provided a cogent refutation. SA 345-384sa.

A. A textual analysis of *Buckley* and *MCFL* reveals that this Court, in adopting the express advocacy test, was concerned about protecting issue advocacy, not just vagueness.

1. The first provision *Buckley* considered, § 608(e)(1),[6] imposed spending limits on independent expenditures and was ultimately found unconstitutional. 424 U.S. at 51. Troubled by the vagueness of capping expenditures "*relative to* a clearly identified candidate," the Court first construed "relative to" with the provision's parallel phrase, "advocating the election or defeat of such a candidate." But the resulting phrase, "advocating the election or defeat of a clearly identified candidate," only "refocuse[d]" the vagueness problem in a way that "***only***" prefixing "*explicit words*," *id.* at 42-44 (emphasis added), or "*expressly*" could fix. *Id.* at 80 (emphasis added).[7]

What was the fatal defect this Court sought to avoid when it said that "*advocating*" was too vague absent the "expressly" modifier? The Court immediately answered this question: "[T]he distinction between *discussion of issues and candidates* and ***advocacy*** *of election or defeat of candidates* may often dissolve in practical application." *Id.* at 42 (emphasis added).

So the dichotomy *Buckley* established in its primary discussion of the express advocacy test was between (1) "discussion of issues and candidates," commonly known as issue advocacy, and (2) "advocacy of election or defeat of candidates," commonly known as express advocacy. This distinction is necessary because "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative issues and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Id.* at 42. In other words, issue advocacy that includes discussion of candidates and issues is essential to citizens' participation in our representative democracy.

This Court then quoted approvingly the Court of Appeals' recognition that issue advocacy would influence elections:

> "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to

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advertising.

[6] Section 608(e)(1) provided: "No person may make any expenditure *relative to* a clearly identified candidate during a calendar year which, when added to all other expenditures by such person during the year *advocating the election or defeat of such candidate*, exceeds $1,000." (emphasis added)

[7] The express advocacy test is not a "magic words" test, i.e., so long as the words used in *Buckley*'s footnote 52 are avoided, political speakers avoid regulation. *Id.* at 44 n.52. Footnote 52 creates an "express words of advocacy test": "This construction would restrict the application of § 608(e)(1) to communications containing *express words of advocacy* of election or defeat, *such as* 'vote for,' . . . ." *Id.* (emphasis added).

> influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections." [*Id.* at 43 n.50 (citation omitted).]

Issue advocacy, then, includes discussion of candidates and their positions, records, and conduct; it goes beyond mere "discussion" to "more positive efforts to influence public opinion on them." These constitutionally protected actions may "exert some influence on voting at elections," but they are protected nevertheless.

This Court went on in *Buckley* to flesh out the breadth of issue advocacy with a quote from *Thomas v. Collins*, 323 U.S. 516, 535 (1945), indicating that express advocacy cannot depend on intent or effect and that issue advocacy extends to "discussion, laudation, [and] general advocacy," so that only "solicitation" or "invitation" (i.e., "advocacy of election or defeat of candidates") can be regulable express advocacy:

> [W]hether words intended and designed to fall short of *invitation* [to vote for or against a candidate] would miss the mark is a question both of *intent* and of *effect*. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . [T]he supposedly clear-cut distinction between *discussion, laudation, general advocacy, and solicitation* puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for *free discussion*. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. [*Id.* at 43 (quotation marks and citation omitted) (emphasis added).]

So the "free discussion" that requires the "security" of this Court's express advocacy test is this broadly described issue advocacy. And the reason this Court was concerned with "vagueness" was not only that some language was ambiguous, but that the language substantively regulated this "free discussion." Thus, while the Court spoke of vagueness in these passages, there was an underlying overbreadth concern. The "[t]he constitutional deficiencies described in *Thomas v. Collins* [to be] avoided," *id.* at 43, were not fuzzy words, but the failure to protect "discussion, laudation, [and] general advocacy" (i.e., issue advocacy) from the regulation. "[A]void[ing]" these deficiencies meant avoiding the abridgment of issue advocacy, not avoiding a decision on whether there *were* any deficiencies, as Judge Kollar-Kotelly suggests. SA 789sa. Thus, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Buckley*, 424 U.S. at 45.

Further, since the express advocacy test was narrow and citizens remained free "to promote [a] candidate and his views" through issue advocacy, this Court fully recognized that it was permitting communications that would affect an election:

> It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign. [*Id.*][8]

But this Court was permitting such unfettered issue advocacy because it is vital to our representative democracy:

> Discussion of public issues and debate on the qualifications of candidates[, i.e., issue advocacy,] are integral to the operation

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[8] So studies purportedly showing that issue advertising affects elections are irrelevant. *Cf.* SA 353sa (Henderson). That effect was considered in *arriving at* the express advocacy test and cannot be used to overturn it.

> of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression ... "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." [*Id.* at 14 (citation omitted).]

Thus, "'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] *discussions of candidates*.'" *id.* (citation omitted) (emphasis added), including the right of citizens to band together to engage in issue advocacy.[9]

2. The second provision *Buckley* considered, § 434(e), "require[d] direct disclosure of what an individual or group contributes or spends [over $100]" "'for the purpose of . . . influencing' the nomination or election of candidates for federal office." *Buckley*, 424 U.S. at 75 (citation omitted). The Court said that "the ambiguity of this phrase . . . poses constitutional problems." *Id.* at 77. This Court noted that the vagueness present was of the same sort encountered in dealing with the independent expenditure cap: "[I]t shares the same potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. Therefore, the concern about the "ambiguity" was over whether the provision was overbroad for sweeping in protected issue advocacy – the same

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[9] *Buckley* recognized the constitutional right of people to associate in ideological corporations for issue advocacy:

> The constitutional right of association . . . stemmed from the Court's recognition that effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses the right to associate with the political party of one's choice. [*Id.* (internal quotation indicators and citations omitted).]

concern this Court had just addressed with respect to § 608(e)(1). As with the prior provision, this Court addressed the overbreath concern by applying the express advocacy test:

> To *insure* that the reach of § 434(e) is *not impermissibly broad*, we construe 'expenditure' for purposes of that section in the *same way we construed the terms of § 608(e)(1)* – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." [*Id.* at 80 (emphasis added).][10]

MCFL removes any doubt that this Court's "vagueness" concerns in *Buckley* were focused on protecting issue advocacy from overbroad legislation. *MCFL* said that the express advocacy test was imposed on the FECA "expenditure" definition "to avoid problems of overbreadth." 479 U.S. at 248 (citing *Buckley*, 424 U.S. at 80). The dichotomy affirmed in *MCFL* was between "'*discussion of issues and candidates* and *advocacy of election or defeat of candidates*,'" which it established in its introduction of the express advocacy test. *Id.* at 249 (quoting *Buckley*, 424 U.S. at 42) (emphasis added). Removing all doubt, the *MCFL* Court reiterated the dichotomy in other terms with identical meaning:

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[10] That this Court's intent was to protect issue advocacy here is further borne out by its plain statement that issue advocacy is not mere discussion: "As narrowed, § 434(e), like § 608(e)(1), *does not reach all partisan discussion* for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Buckley*, 424. U.S. at 80 (emphasis added). This last phrase, "advocate a particular election result" refers solely to that which may be constitutionally regulated under § 608(e)(1), which this Court had just said are expenditures "for communications that expressly advocate the election or defeat of a clearly identified candidate." Consequently "advocate a particular election result" can only mean "expressly advocate the election or defeat of a clearly identified candidate." Judge Kollar-Kotelly's effort to draw a false dichotomy between "issue discussion and advocacy of a political result" must therefore be rejected. SA 792-93sa.

"*Buckley* adopted the 'express advocacy' test to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id. MCFL* reiterated that the express advocacy test required express words of advocacy, such as those in *Buckley*'s footnote 52, which should remove all doubt that some other "express advocacy" test can be substituted.[11]

In sum, careful textual analysis of *Buckley* and *MCFL* reveals that this Court established the constitutionally-mandated principle that wherever legislation or regulation borders on issue advocacy – whether it is § 608(e)(1), § 434(e), or § 441b – issue advocacy must remain unfettered and protected by a bright-line test that requires explicit words expressly advocating the election or defeat of a clearly identified candidate.

Thus, Judge Kollar-Kotelly unsurprisingly discovered a "consensus among the judiciary that courts are bound by *Buckley* and *MCFL*, which strictly limit the meaning of express advocacy." SA 796sa (internal quotation marks omitted).[12] And perhaps the

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[11] *MCFL*'s discussion of the express advocacy in MCFL's newsletter does not expand the reach of the express advocacy test. The newsletter identified pro-life candidates and urged the reader to "vote pro-life." This Court said this "provides *in effect* an explicit directive" and the slightly less direct exhortation "does not change its *essential* nature." *Id.* at 249 (emphases added). But this does not establish a test looking to the "effect" or "essence" of a communication, only that if A=B and B=C, then A=C.

[12] Lower federal court cases recognizing constitutional protection for unfettered issue advocacy and the constitutional mandate for the express advocacy test include: *Me. Right To Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001) (*VSHL II*); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *N.C. Right To Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Va. Soc'y For Human Life v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *FEC v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1996) (*CAN I*); *FEC*

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v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997) (*CAN II*); *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Fla. Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming *Fla. Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. 1999)). *FEC v. Colo. Republican Fed. Campaign Comm.*, 839 F. Supp. 1448 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 604 (1996); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999); *FEC v. NOW*, 713 F. Supp. 428 (D.D.C. 1989); *FEC v. AFSCME*, 471 F. Supp. 315 (D.D.C. 1979); *Kansans for Life, Inc. v. Gaede*, 38 F. Supp. 2d 928 (D. Kan. 1999); *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *Planned Parenthood Affiliates of Mich. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998); *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich 1998); *N.C. Right to Life, Inc. v. Leake*, 108 F. Supp. 2d 498 (E.D.N.C. 2000); *Right To Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); *FEC v. Survival Educ. Fund*, No. 98 Civ. 0347, 1994 WL 9658, (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); *Oklahomans for Life v. Luton*, No. CIV-00-1163, slip. op. (W.D. Okla. May 25, 2001); *West Virginians For Life, Inc. v. Smith*, 919 F. Supp. 954 (S.D. W. Va. 1996). *But cf. Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078 (W.D. Wis. 2002); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300 (S.D. Ala. 2002).

State cases recognizing constitutional protection of unfettered issue advocacy include: *In Re Texas Association of Business*, (no number) (167th Judicial Dist. Ct. of Travis County, Texas) slip. op. at 1-4 (order denying motion to quash grand jury subpoenas and protective order), *appeal docketed*, No. 56,045-01, (Tex. Crim. 2003) (*Cf. Aides Shielded From Grand Jury Probe, U.S. Chamber Tells Texas Criminal Court*, Money & Politics Report, June 26, 2003); *Governor Gray Davis Committee v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534 (2002); *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000); *Wash. State Republican Party v. Wash. State Public Disclosure Comm'n*, 4 P.3d 808 (Wash. 2000); *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E. 2d 135 (Ind. 1999); *Elections Bd. v.*

textual analysis she found lacking in the myriad federal and state, trial and appellate, decisions was missing because courts seeking to follow this Court's holdings, not avoid them, found that simply reading *Buckley* and *MCFL* readily reveals that the Constitution and the needs of the republic mandate the express advocacy test to protect unfettered issue advocacy – as does the textual analysis here provided.

B. "Dicta," is the another means by which Judge Kollar-Kotelly sought to dismiss the acknowledged "consensus" of other courts, along with attempting to distinguish some cases. SA 796-99sa. One response to the alleged "dicta" in other federal courts is that it doesn't matter because the careful textual analysis set out above establishes what *this* Court said, and that holding governs. Another response notes the irony of Judge Kollar-Kotelly rejecting as "dicta" the judicial "consensus" while relying on two trial court opinions where discussion of the express advocacy test was so obviously obiter dictum.[13]

However, all federal appellate courts addressing the issue have concluded that *Buckley* established express advocacy as the constitutional standard for regulable political speech. "These courts rely primarily on *Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech and (2) the need to ensure that regulation does not impinge

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Wisconsin Mfr. & Commerce, 597 N.W.2d 721 (Wisc. 1999); *Klepper v. Christian Coalition*, 259 A.D.2d 926 (N.Y. App. Div. 1999); *Doe v. Mortham*, 708 So. 2d 929 (Fla. 1998); *Va. Soc'y for Human Life v. Caldwell*, 500 S.E.2d 814 (Va. 1998); *Conn. v. Proto*, 526 A.2d 1297 (Conn. 1987).

[13] *Wisconsin Realtors Ass'n*, 233 F.Supp.2d at 1085 (questioning in obiter dictum whether the express advocacy test is "*the* definitive test" but noting that issue advocacy is plainly protected from regulators); *Nat'l Fed'n of Republican Assemblies*, 218 F. Supp. 2d at 1325 (questioning in obiter dictum whether the express advocacy test is constitutionally mandated).

on protected issue advocacy." *Chamber of Commerce*, 288 F.3d at 193. *See*, e.g. *VSHL II*, 263 F.3d at 391-92 ("shift[ing] the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer ... is precisely what *Buckley* warned against and prohibited"); *Citizens for Responsible Gov't*, 236 F.3d at 1187, 1193-95 (statutes unconstitutional that cannot be construed to apply "only to expenditures for communications that contain explicit words advocating the election or defeat of a clearly identified candidate"); *Vermont Right to Life Comm.*, 221 F.3d at 386 (finding parties "in essential agreement that the disclosure provisions . . . and reporting provisions . . . *are necessarily unconstitutional* unless they apply only to [communications] 'that expressly advocate the election or defeat of a clearly identified candidate.'" (emphasis added) (quoting *Buckley*, 424 U.S. at 80)); *Iowa Right to Life Comm.*, 187 F.3d at 969-70 ("communication must contain express language of advocacy with an exhortation to elect or defeat a candidate," and "[t]he Supreme Court has made clear that a 'finding of "express advocacy" depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc.") (quoting *MCFL*, 479 U.S. at 249 (quoting *Buckley*, 424 U.S. at 44, n. 52))); *Brownsburg Area Patrons Affecting Change*, 137 F.3d at 506 ("[*Buckley*] recognized the important First Amendment interest in protecting political speech, including discussions surrounding elections and candidates.... Because of the vital importance of protecting such speech, the *Buckley* Court articulated what has come to be known as the 'express advocacy' test ...."); *Faucher*, 928 F.2d at 470 ("The Supreme Court, recognizing that such broad language ... creates the potential for first amendment violations, sought to avoid future conflict by explicitly limiting the statute's prohibition to "express advocacy.").

Even the Ninth Circuit in *Furgatch*, 807 F.2d at 857, recognized the binding nature of the express advocacy test, although in dicta it discussed the test in ways that seemed broader than the Supreme Court's articulation of the test.[14] Moreover, the Ninth Circuit has just affirmed that it fully embraces the *Buckley* formulation, by declaring that "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council*, 328 F.3d at 1097 (emphasis in original). This ruling eliminates any arguable federal circuit court support for dividing issue advocacy from express advocacy with a contextual approach, as do both of the BCRA "electioneering communication" definitions.[15]

The variety of laws, regulations, and fact patterns in which the express advocacy test has been applied demonstrates, not an opportunity for distinguishing, but rather the broad principle that in *whatever* situation government attempts to restrict speech on the border of issue advocacy, it must employ this Court's express advocacy test to avoid abridging free expression and association.[16]

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[14] *Cf. CAN II*, 110 F.3d at 1054 (*Furgatch*'s holding is: "where political communications . . . include an explicit directive to voters to take some [unclear] course of action, . . . 'context' . . . may be considered in determining whether the action urged is the election or defeat of a . . . candidate . . . .")

[15] Ironically, Judge Kollar-Kotelly repudiated *Furgatch*, the only opinion that formerly gave some support to the two contextual definitions of "electioneering communication" in BCRA. 795sa.

[16] Judge Kollar-Kotelly attempted to distinguish all the cases striking down FEC regulations on the basis of one quote from *VSHL II*, 263 F.3d at 392, which declared "that courts 'are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy.' If change is to come, *it must come from an imaginative Congress or from further review by the Supreme Court*.'" 796sa (quoting *VSHL II*, *supra*) (emphasis in opinion).

But the Fourth Circuit's statement was made in direct response to the FEC's claim that "'if the express advocacy requirement is read too narrowly, the prohibitions of 2 U.S.C. [§] 441b will require little more than careful

The more distinctions that are noted, the broader this principle grows.

C. Stare decisis requires this Court to follow its holdings in *Buckley* and *MCFL* that whenever government regulates on the border of issue advocacy it must protect issue advocacy from abridgment by employing the express advocacy test.

Neither holding has been "undermined by subsequent changes or development in the law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted). To the contrary, the express advocacy test has been woven into the web of cases that form the judicial "consensus" that Judge Kollar-Kotelly conceded. SA 796sa.[17] As noted, even the Ninth Circuit on May 8, 2003, noted the array of opinions criticizing its seeming failure to fully embrace this Court's express advocacy test and affirmed that it indeed utilizes the "explicit *words* of advocacy" test, just as everyone else. *California Pro-Life Council*, 328 F.3d at 1097

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diction and will do almost nothing to prevent millions of dollars from the general treasuries of unions and corporations from directly influencing federal elections, and from doing so without disclosing to the public the source of the influence.'" *VSHL II*, 263 F.3d at 392 (citation omitted). This is the same argument the FEC and other Defendants now make, but the Fourth Circuit rejected it by asserting that *Buckley* and *MCFL* are binding substantive law. That rejection does not support Judge Kollar-Kotelly's effort to distinguish this line of cases as being about agency authority instead of constitutional mandate.

[17] Furthermore, Congress has embraced the express advocacy test, 2 U.S.C. § 431(17) ("independent expenditure" definition), as have many states through their statutes. *See, e.g.*, Alaska Stat. §§ 15.13.400(6)(C)(4) and (6)(C)(7) (2003); Cal. Gov't Code § 82031 (2003); Del. Code Ann. tit.15, § 8002(10) (2002); Idaho Code § 67-6602(g) (2003); Iowa Code § 56.2(14) (2003); Kan. Stat. Ann. §§ 25-4143(g)(1)(B) and (h) (2002); Ky. Rev. Stat. Ann. § 121.015(12) (2002); Minn. Stat. § 10A.01(18) (2002); Miss. Code Ann. § 23-15-801(j) (2003); Nev. Rev. Stat. 294A.004 (2003); N.H. Rev. Stat. Ann. § 664:2(XI) (2002); Wis. Stat. § 11.01(16) (2002).

(emphasis in original).[18] As this Court said of the abortion right in *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992), this Court's express advocacy test has been relied upon and woven into the fabric of American law and the lives of numerous citizen groups.

The express advocacy test has not proven to be a "positive detriment[s] to coherence and consistency in the law" because its "conceptual underpinnings" have been weakened or because "later law has rendered it irreconcilable with competing legal doctrines or policies." *Patterson*, 491 U.S. at 173 (citations omitted). Rather, the courts have consistently followed this Court's holdings, creating a judicial "consensus" around the express advocacy test.

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[18] Unfettered issue advocacy enjoys international support, which this Court found weighty in In *Lawrence v. Garner*, 539 U.S. ___, 2003 WL 21467086 (2003) (reversing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (citing a 1981 European Court of Human Rights decision). The same court cited in *Lawrence* also decided in *Bowman v. United Kingdom*, 26 Eur. Ct. H.R.1, ¶ 48 (1986), that a London woman could not be charged with a campaign law violation for distributing 1.5 million copies of a voter guide telling voters where candidates stood on abortion (without expressly advocating anyone's election), even though it was a "single issue" guide that was assumed to be "distributed with a view to promoting the election of the candidate with the stand on abortion most acceptable to the [plaintiff]" and "might in fact have the tendency to influence certain voters in different directions," *id.* ¶ 46, because "freedom of expression constitutes one of the essential foundations of a democratic society, *id.* ¶ 45, and the government had failed to prove that such "'single issue' campaigning . . . would distract voters from the political platforms which are the basis of national party campaigns to such a degree as would hinder the electoral process," i.e., "'distort' election results." *Id.* ¶ 47. *See also Harper v. Canada*, 2002 ABCA 301 (2002) (declaring that a "polling day blackout" on "election advertising" is unconstitutional and striking "election advertising" definition, i.e., "tak[ing] a position on an issue with which a registered party or candidate is associated," *id.* ¶ 181, under the "minimal impairment" test because the definition "encroach[es] upon the freedom of expression of those who seek to voice public concerns which are inconsequential to partisan advocacy," *id.* ¶ 184).

Nor has the express advocacy test or its reasoning become "outdated after being 'tested by experience'" or "found to be inconsistent with the sense of justice or with the social welfare." *Id.* (citations omitted). As already noted, this Court foresaw that issue advocacy would affect elections, which is the subject of Defendants' studies, and already considered that fact in endorsing the express advocacy test, which it created to give issue advocacy necessary breathing room. This makes Defendants' studies irrelevant. And a "sense of justice" and the "social welfare" require that the very essence of our system of participatory government not be destroyed by incumbent politicians seeking to silence the amplified voice of the people about these politicians and their actions in office.

Stare decisis is "a cornerstone of our legal system," *Webster v. Reproductive Health Services,* 492 U.S. 490, 518 (1989), that promotes "the evenhanded, predictable, and consistent development of legal principles, reliance on judicial decisions, and the actual and perceived integrity of the judicial process," and it strongly counsels against reconsidering precedent. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 63 (1996) (quoting *Payne v. Tennessee,* 501 U.S. 808, 827 (1991)) (ellipses omitted).

Even in constitutional cases, stare decisis "carries such persuasive force" that this Court always requires "special justification" to depart from precedent. *Dickerson v. United States,* 530 U.S. 428, 443 (2000) (quoting *United States v. International Business Machines Corp.,* 517 U.S. 843, 856 (1996)). There is no "special justification" for overruling the express advocacy test of *Buckley* and *MCFL*. *Buckley* and *MCFL* were not "a solitary departure from established law," *Seminole Tribe,* 517 U.S. at 66; rather, they were a logical extension of established law. The express advocacy test has proven to be a workable and well-reasoned decision, *Payne,* 501 U.S. at 828-30, and created no confusion in the lower courts, except perhaps the court below. For those intent on following this Court's mandates about the dictates of the First Amendment and the needs of the republic, the express advocacy test is a bright line without confusion, and it has fulfilled its purpose – protecting issue advocacy from regulation. It should be retained, as the overwhelming number of federal and state courts have done in weaving a judicial "consensus."

D. The primary "electioneering communication" definition is therefore unconstitutional for flouting this Court's express advocacy test.[19] The primary "electioneering communication" definition provides for a 30/60-day blackout period when corporations and labor unions may not use general funds to broadcast communications that simply name a federal candidate. § 201(a)(i). Only Judge Kollar-Kotelly considered this constitutional. SA 12sa. Similar "name or likeness" provisions have been struck down by federal courts. *See, e.g., Perry v. Bartlett*, 231 F.3d 155, 159 (4th Cir. 2000); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376, 389-90 (2d Cir. 2000); *Right To Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998). These federal courts have consistently pointed to this Court's express advocacy test as controlling

The primary "electioneering communication" definition is also not narrowly tailored to a compelling interest. While this Court held that there is a compelling interest that permits regulating express

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[19] Judge Henderson rightly noted that "refers to" in the primary "electioneering communication" definition is also vague, SA 359sa, as Plaintiffs complained. Docket # 63 (McConnell Plaintiffs' *Second Amended Complaint* ¶ 50). Judge Kollar-Kotelly's defended "refer" by asserting that, while "refer" can mean "relate," "relate" can be defined as making "clear and specific mention." SA 802sa n.116. But the district court failed to so construe the primary definition, leaving it vague.

advocacy, it found no such interest for issue advocacy. *See Buckley*, 424 U.S. at 80. But the 30/60-day definition suppresses both issue advocacy and express advocacy within the gag periods, thereby failing both the compelling interest and narrow tailoring prongs of strict scrutiny. [20]

Judge Kollar-Kotelly tries to justify the ban[21] by claiming (1) that corporations and unions are actually *doing* issue advocacy (which this Court said the First Amendment and our system of government guaranteed that they could do), (2) that, when politicians are *grateful* for issue advocacy they find beneficial, this creates an appearance of corruption that must be stopped, and (3) that many of the issue ads that this Court said were protected by the First Amendment and our system of participatory government are run *near elections*. SA 804-23sa.

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[20] "Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 1404 (2002).

[21] As Judge Henderson rightly notes, SA 347sa n.142, this Court's decision in *MCFL* rejects the argument that the restriction on use of general funds is not truly a "ban" because it allows for advocacy with a segregated fund by noting that such a prohibition is a "substantial" restriction. 479 U.S. at 252. In any event, it is a total "ban" on the use of general funds, which are much easier for nonprofit ideological corporations to acquire than general funds. SA 347sa n.142, noting unrebutted evidence of the burden the PAC limitation would place on nonprofit organizations because of the inability to raise funds commensurate with the support of their members for the organizations' advocacy. Nor is this fact altered by this Court's decision in *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), which dealt with the unique issue of corporate contributions, not expenditures. *Beaumont* expressed concern about "war chests" and "conduits,"neither of which is applicable to expenditures (because independent expenditures are unlimited and do not flow to candidates), leaving only quid pro quo concerns, which do not apply to independent expenditures. *Buckley*, 424 U.S. at 47.

As to her first and third major points, since the textual analysis above establishes that corporations and labor unions are constitutionally entitled to discuss candidates and issues in ways that may affect elections, there can be no compelling interest in stopping them from doing a lot of it at election time, when people are especially attuned to things political and public issues (from which most promptly tune out immediately after the elections). SA 236sa (Henderson's alternative finding of fact, quoting RNC political operations director Terry Nelson and finding that "issue advocacy is not as effective in August of an election year as it is in October or early November").

Finally, Judge Kollar-Kotelly believes there is a compelling interest in regulating issue advocacy that might "earn the candidate's gratitude" because it might create the appearance of corruption. SA 854sa. Judge Leon agrees. SA 1135sa. However, gratitude is a natural and salutary human reaction to support or praise, and officials without gratitude to supporters has traditionally been considered to have a character flaw. Candidates are grateful for all forms of help or support, not just praise through issue advocacy. Gratitude is inherent in our system of representative government, so that the only way to eliminate the gratitude a politician ought to feel toward her supporters is to eliminate democracy itself.[22] And if

"gratitude" creates the appearance of corruption, Congress itself must be corrupt, because "logrolling" is a way of life.

The lower court believed this "gratitude" for issue advocacy would translate into "access," which it claims is inherently corrupt. *See, e.g.*, SA 1135sa (Leon). But if that were true, then lobbying would be inherently corrupting unless officials provide equal time for all views. And the standard political practice of charging for fundraising events, where one meets a candidate or public official, would also be viewed as inherently corrupting.[23] So the key is not whether politicians are grateful to supporters and therefore willing to meet and talk with them, but whether politicians would *only* meet with people after extracting campaign support. Candidates and public officials do the opposite, holding town hall meetings, visiting coffee shops, and meeting all the constituents possible, regardless of such support.

And people get to meet with candidates and public officials for many reasons. Celebrities from entertainment and sports, reporters and editorial boards of prominent newspapers, and influential community leaders can influence elections and get special access to elected officials as a result. What about campaign volunteers, political consultants and fundraisers for a campaign? They influence elections and get access to the candidate. If access itself is evil when granted to supporters by grateful politicians, then BCRA is unconstitutionally underinclusive, vitiating any asserted interest in preventing corruption. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (judicial candidate rules underinclusive).

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[22] The Framers already thought of "gratitude," and it cuts the wrong way for Defendants. A *Federalist* paper dealt with the charge that Members of Congress would "be most likely to aim at the ambitious sacrifice of the many to the aggrandizement of the few." *The Federalist* No. 57 (Alexander Hamilton or James Madison). But the author specifically listed "gratitude" as one of the reasons this would *not* happen. "[W]hat is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? . . . Duty, *gratitude*, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people." *Id.* (emphasis added). Thus, gratitude to the "great mass of the people," who support and put them in office, provides the natural checks and balances and is already built into "the genius of the whole system." *Id.*

[23] In *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197 (D. Col. 1999), the court noted that the "FEC highlights the various party-donor programs and the benefits and access to Members of Congress which a contributor gains by giving at various levels," *id.* at 1203, but noted that precedent did not support a claim that this is corruption:

> *Buckley* . . . recognized that money, in many cases, may grant access to a candidate. It did not, however, conclude that such access is akin to corruption or the appearance of corruption. The FEC seeks to broaden the definition of corruption to the point that it intersects with the very framework of representative government. Corruption cannot be defined so broadly."[*Id.* at 1209.]

E. The backup "electioneering communication" definition is unconstitutional – both as truncated by the district court at Judge Leon's insistence and as drafted, because it also violates this Court's express advocacy test – is vague, and it is not narrowly tailored to a compelling interest. Further Judge Leon's truncation definition is beyond judicial construction authority.

In a splintered decision, the district court decided that "'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate . . . or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." § 201(f)(3)(A)(ii).[24]

By amputating the last clause, the court made a vague definition vaguer, a broad definition broader. The last clause – "and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" – surely had the vagueness problems that Judge Leon identified. But it at least required that any "attacking or promoting" of candidates have something to do with elections, i.e., "an exhortation to vote" for or

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[24] The district court entered judgment "for Defendants with regard to [Section 203's] applicability to the backup definition of "electioneering communication" as defined in Section 201 of BCRA, in accordance with Judge Leon's Memorandum Opinion." SA 1382sa (Final Judgment); *see also* SA 12sa (Per Curiam). Judge Leon upheld the constitutionality of the definition of "electioneering communication" only without the final clause, which he held to be unconstitutionally vague. SA 1165-66sa.

against a candidate. However, amputating this qualifier leaves the definition with no language requiring that the candidate be "clearly identified" and with no language focusing the communication on voting in elections. The result is that a broadcast communication is banned by corporations or labor unions only if it attacks or promotes someone who happens to be "a candidate" (whether or not known to be so), and has nothing necessarily to do with any exhortation, voting, or even an election. This is confirmed by the parenthetical material of the definition, which proclaims that "promotes or supports" or "attacks or opposes" are not compassed by the limitations of either express advocacy or voting , i.e., "(regardless of whether the communication expressly advocates a vote for or against a candidate)."

As a result, the truncated backup definition is entirely governed by four unqualified, undefined verbs: *promote*, *support*, *attack*, and *oppose*. Dictionary definitions reveal the breathtaking scope of what is prohibited, as well as the vagueness inherent in choosing among possible meanings.

Judge Leon declared that the phrase he excised "depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified." SA 1164sa. The remaining four verbs depend on similar contextual, subjective vagaries for determination, but they have the further problem of having nothing to do with any election, election campaign, or exhortation to vote. The truncated backup definition speaks not of supporting or opposing a candidate's *election*, but only of supporting or opposing *a candidate*. Judge Leon declared that truncating the definition "assures that there will be no . . . effect on political discourse *unrelated* to federal elections," SA 1165sa (emphasis in original), but his truncated definition leaves nothing to *relate* the communication to any federal elections.

Judge Leon's view is that communicators only need to stick to "neutral" statements to avoid opposing or supporting a candidate. SA 1163sa. But what is "neutral" is subjective, too. Some would consider simply labeling a legislator (and a candidate) as "pro-life" or "pro-choice" to be supporting or opposing the candidate. Others would declare that supporting or opposing a human cloning bill amounts to supporting or opposing the candidate. To solve just such problems and to keep speakers from having to "hedge and trim," this Court created the "express advocacy" test as the "only" way to eliminate overbreadth and vagueness when legislating on the border of issue advocacy, *infra*, which the "electioneering communication" definition specifically disclaims.

Judge Leon also suggested that communicators could simply never use a candidate's name or they could get an FEC advisory opinion before communicating. SA 1166sa. This means that a citizen group could never broadcast a communication encouraging citizens to call Senator X to vote for or against a bill. The FEC could never issue advisory opinions fast enough to keep up with the fast-breaking, changing need for broadcasting grassroots lobbying communications during an active legislative session.[25] Such limitations impose enormous burdens on core political speech without constitutional warrant.[26]

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[25] Similarly, Judge Leon's use of the AFL-CIO advertisement entitled "No Two Way" as an example of a communication that is not "neutral" because it "attacks [a legislator's] position on the federal budget," reveals the incredible breadth of the concept of oppose/attack in the truncated backup definition. SA 1163sa.

[26] The statutory truncation was beyond the district court's authority. Don Simon of Common Cause, a principle drafter of BCRA, is quoted in a *USA Today* article entitled "Campaign finance hit by ruling" (May 4, 2003) as saying of the truncated definition" that "[w]e got more from the court than we ever could have gotten from Congress" and that "people haven't come to grips with . . . how sweeping it is." "'Unless it is evident that the

As originally enacted, the backup "electioneering communication" definition is also unconstitutional. Judge Kollar-Kotelly ardently defended the primary "electioneering communication" definition, then grudgingly joined Judge Leon's support for the backup definition to make a majority to uphold the ban. SA 885-86sa. Her argument for the primary definition encapsulates why the backup definition is unconstitutional: "The expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one person's genuine issue advertisement can be another's electioneering commercial." SA 768sa. She refused to consider whether "a series of advertisements" would be "unfairly captured" by BCRA, because this would "ask[] the Court to sit as the viewer and find that these advertisements were pure issue advocacy." SA 855sa (although she inconsistently decided elsewhere whether ads were "genuine" or not, SA 859sa). As justification, she said, "The *Buckley* Court warned against a statutory test that relied on the viewer and listener's interpretation of a political message. I have declined, therefore, to engage in this exercise." SA 855sa.

That is the exercise the backup definition calls for with its unconstitutional contextual approach. This Court mandated express words of advocacy, and nothing else suffices to protect the right of the people to participate in our system of government as guaranteed by the First Amendment.

Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Buckley*, 424 U.S. at 108-09 (quoting *Champlin Refining. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). Because the truncated definition is more expansive than the definition Congress enacted, it is certain that Congress would not have enacted the definition as truncated.

Real-life illustrations from Plaintiffs's experience demonstrate the sort of unconstitutional problems the backup definition imposes. During this litigation, National Right to Life Committee (NRLC) has been in the midst of congressional legislative battles to ban human cloning, to pass the federal Unborn Victims of Violence Act, and to pursue other legislative interests.[27] As part of these campaigns, NRLC planned to run broadcast advertisements in the Congressional districts of key Members of Congress, naming the members of Congress, many or all of whom are candidates, that could be viewed as attacking or promoting their positions on these legislative issues. The ads would be paid for with general corporate funds and would be similar to the AFL-CIO advertisement, "No Two Way," that Judge Leon found "not neutral." SA 1163sa. Consequently, these ads would be "electioneering communications" and NRLC would be prohibited from broadcasting them.

Nor does the truncated language solve the problem. If, contrary to *Buckley*, citizen groups are left to be judged by what others might think of their communications, how will they know when, where, and who will decide that a communication "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate"? "Suggest" means: "1. To offer for consideration or action .... 2. To bring or call to mind by logic or association; evoke .... 3. To make evident indirectly; intimate or imply .... 4. To serve as or provide a motive for; prompt or demand ...." *American Heritage Dict. Eng. Lang.* (4th Ed. 2000) <http://www.bartleby.com/61/98/S0869800. html> (visited June 27, 2003).[28]

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[27] *See, e.g.*, <http://www.capwiz.com/nrlc/issues/alert/?alertid =1366326&type=CO> (NRLC legislative action page urging contacts with legislators) (visited May 7, 2003).

[28] Synonyms of "suggest" are:

imply, hint, intimate, insinuate. These verbs mean to convey thoughts or ideas by indirection. Suggest refers to the calling of something to

Such imprecision "offers no security for free discussion ... blankets with uncertainty what may be said . . . and compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43 (quotation marks and citation omitted).

Similarly, Club for Growth, Inc. (CFG) broadcasted advertisements supporting President Bush's tax cut. One named candidate Sen. Tom Daschle and became the subject of a complaint by the Democratic Senatorial Campaign Committee to the FEC while the truncated backup "electioneering communication" definition was in place. Letter from Marc E. Elias, Counsel for DSCC, to Lawrence Norton, FEC General Counsel (May 13, 2003).[29] CFG believes its advertisement is "neutral" and lawful, bit the advertisement depicts a federal candidate and could be considered by someone (as happened with the DSCC complaint) as not "neutral" under Judge Leon's criterion for the truncated backup definition, or as opposing or attacking the candidate and "suggestive" to some audience of no other meaning than an exhortation to vote against Sen. Daschle.

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mind as the result of an association of ideas .... To imply is to suggest a thought or an idea by letting it be inferred from something else, such as a statement, that is more explicit . . . . Hint refers to an oblique or covert suggestion that often contains clues .... Intimate applies to indirect, subtle expression that often reflects discretion, tact, or reserve .... To insinuate is to suggest something, usually something unpleasant, in a covert, sly, and underhanded manner .... [*Id.*]

[29] The complaint letter gives the following text of the ad:

President Kennedy cut income taxes and the economy soared.
President Reagan cut taxes more and created fifteen million new jobs.
President Bush knows tax cuts create jobs, and that helps balance the budget.
But Senator Tom Daschle opposes the president.
South Dakota has lost thousands of jobs, and president Bush has a plan to help.
Tell Tom Daschle to support the Kennedy/ Reagan/ Bush tax policy that will bring jobs back to South Dakota. [*Id.* at 2].

BCRA's own advocacy groups, who pushed it through Congress, demonstrate the lack of a compelling interest in preventing corruption and the appearance of corruption for BCRA's "electioneering communication." These groups engaged in the same sort of activity as NRLC and other citizen groups, but insist that what they did was not corrupting.

Common Cause and Campaign for America promoted BCRA with the same style of issue advocacy NRLC used to oppose BCRA.[30] These "reformers" promoted BCRA by arguing that issue advocacy is corrupting, but under oath in depositions in this case they insisted that their activity was done with legitimate legislative purpose and was noncorrupting. This story is told for its irony and the proposition that assertions under oath are more credible – there is no corruption here.

NRLC has a long history of opposing the sort of campaign finance legislation that became BCRA. JA 636-645 (*Declaration of David N. O'Steen, Ph.D., Executive Director, National Right to Life Committee, Inc.*, (*NRLC Dec.*)). Since 1996, NRLC has scored congressional votes against BCRA-style campaign finance legislation along with votes against abortion, infanticide, assisted suicide, and euthanasia as votes aligned with NRLC's position. JA 88, 8 PCS/MC 509. In 1998, Dr. O'Steen and Douglas Johnson wrote to Sen. McCain, explaining their opposition to his campaign

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[30] The League of Women Voters of the United States (LWV) has similarly advocated for BCRA-style legislation and has run ads advocating it. For example, on October 2, 1997, the LWV issued a press release entitled "League Ads Target Maine for Key Campaign Finance Vote" and an ad transcript entitled "One Simple Message/Maine." 9 PCS/MC 1260, 1265 (*Affidavit of Lloyd Leonard on Behalf of League of Women Voters*). The press release explained that the radio ad targeted "Maine Senators Snowe and Collins [who were] regarded as key swing votes on the Lott amendment," which LWV wanted to defeat as a "'poison pill' amendment." *Id.*

finance legislation and refuting his assertion that such opposition was "ancillary" to NRLC's mission:

> [W]e emphatically disagree with your statement that these questions are "ancillary (if that)" to NRLC's main mission. In our view, if citizen groups' communications to the public had been restricted over the past 25 years in the ways that you have proposed in successive versions of your legislation, abortion would not be anything like the major *public policy* issue that it is today. Indeed, there are other nations which have elected legislatures, but in which elites of the political parties and news media have vastly more power to collectively exclude undesired issues from the political realm. Efforts to impose such false "consensus" have failed in this nation in large part because groups such as NRLC have been free to transmit to the public very specific information about specific politicians' positions and votes. [8 PCS/MS 487-91. (Letter from David O'Steen & Douglas Johnson to Sen. John McCain 5 (Feb. 17, 1998)).]

NRLC has aired advertisements in opposition to BCRA-style campaign finance legislation, and NRL-PAC has aired express-advocacy ads opposing candidates supporting such legislation. JA 640-644 (*NRLC Dec.* at ¶¶ 78-97 & referenced Exhibits).

In January 2000, Gov. Bush and Sen. McCain were seeking the Republican presidential nomination. NRLC used the occasion of national attention on these candidates to continue its long-term battle against BCRA-style legislation, just as Sen. McCain used his national attention to promote McCain-Feingold legislation.[31] On

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[31] NRL-PAC also opposed Sen. McCain on the ground that he had an inferior pro-life record to the other Republican candidates, declaring no endorsement for any of the other candidates because all had "good pro-life positions." JA 643 (*NRLC Dec.* ¶ 92 & Ex. B-33). Sen. McCain promptly turned the issue into a campaign-finance debate issuing a press release erroneously claiming that these *PAC* ads were paid for with "soft money"

January 10, 2000, New Hampshire Citizens for Life and NRLC issued a press release declaring that their PACs were "launch[ing a] new radio ad campaign highlighting John McCain's attacks on free speech about politicians" and urging voters to "[l]et John McCain know that freedom of speech about politicians is not a joke. Vote for somebody else." JA 643-44 (*NRLC Dec.* ¶ 95 & Ex. B-36). In the same press release, these two organizations announced that they were also doing another PAC ad entitled "You Have a Right to Remain . . . Silent" that focused on McCain-Feingold legislation that would ban mentioning a federal candidate in a broadcast communication for 60 days before an election, as became law in BCRA. *Id.* The press release clearly noted the distinction between the express advocacy the PACs were doing and the issue advocacy done in the non-PAC ads. *Id.*

NRLC believes its activities are non-corrupting:

> NRLC does not believe any of its activities corrupt or appear to corrupt any federal, state or local candidates or officeholders. NRLC and its members have various interests that are served through communications and other activities with its members and the general public, and these political activities are necessarily funded with money. Indeed, NRLC believes that its activities, rather than creating an appearance of corruption, instill in the general public a sense of confidence that avenues for pursuing legitimate common interests are available to all. [JA 660-61 (*NRLC Dec.* ¶ 200).]

Common Cause ("CC) has had "Campaign Finance Reform . . . at the heart of what [it] does since its inception" in 1970. JDT

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and that his "campaign finance proposals would eliminate this kind of money from politics." JA 643 (*NRLC Dec.* ¶ 93 & Ex. B-34). NRL-PAC promptly issued a press release rejecting McCain's claim that a PAC ad could be paid for with "soft money." JA 643 (*NRLC Dec.* 93 & Ex. B-34).

Deposition of Matt Keller (CC Legislative Director) 17-18 (*CC Dep.*). "While it has done no *broadcast* ads – so it did no "electioneering communication" – CC has engaged in activities that could be interpreted as opposing or promoting candidates around election time. These should clearly be "corruption" under Defendants' broad definition of "corruption," because favored candidates might feel "gratitude" for CC's communications promoting issues the politicians support and praising them for doing so. Yet CC insists, under oath, that its communications are noncorrupting.

As the 2000 New Hampshire primaries approached, CC "staged an event with Senator[s] McCain and . . . Bradley around the issue of Campaign Finance Reform generally" and a pledge to support BCRA-style legislation particularly. JDT *CC Dep.* 105. An op-ed, published on CC's website, extolled McCain and Bradley as the presidential candidates who understood the need for BCRA-style legislation and who had pledged to enact it. JDT *CC Dep.* Ex. 20. The "purpose was to raise the visibility of the issue of Campaign Finance Reform," not to influence a federal election. JDT *CC Dep.* 106. CC acknowledged that it was "possible" that the op-ed piece could influence the federal election, but declared, "that was not [its] intent." JDT *CC Dep.* 107. It disavowed any "intention to support . . . candidates," only "the issue," although it acknowledged that "[a] possible effect of the support of the issue could be interpreted as support of the candidate." *Id.*[32]

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[32] CC, in its own name or though its Americans4Reform.com project, also financed a number of "Town Hall Meetings" or "Town Hall Forums" in New Hampshire and other states to promote campaign finance legislation, at least one such event coinciding with primary election campaigns and several mentioning (and some having present) candidates for Congress in the upcoming election, but CC stated there was no intent to influence any election or promote or oppose candidates (although in some cases it admitted the activity might be so viewed). JDT *CC Dep.* 116- 117 & Exhibit 23, p.2 (N.H., Jan. 13, 2000); JDT *CC Dep.* 132-36 & Exhibit 30 (Ark., Jan. 29,

Within 30 days of a primary election and while Gov. Bush and Sen. McCain were presidential candidates, CC distributed nationwide a press release about Bush's campaign finance proposals subtitled "Proposal 'Fails Test of Reform.'" JDT *CC Dep.* Ex. 22. The document described Bush's proposal as "flawed," "fail[ing] the test of reform," "not even-handed," and "a hodge-podge of half-steps which would do nothing to further real reform." *Id.* "The purpose ... was to encourage Governor Bush to propose a ... package that was ... truly reform," said CC, and "it's possible that this could influence[] a federal election." JDT *CC Dep.* 111-12. The statement did not "promote[] or support[] a candidate for federal office," CC testified, although a voter could so interpret it, and "it's possible to read that as opposing or ... attacking the proposal put forth by then Governor Bush." JDT *CC Dep.* 113. But, declared CC, it was not an attack on Governor Bush himself. *Id.*

Within 30 days of a primary election, while Sen. Gore was a presidential candidate, CC also distributed nationwide a press release about Gore's campaign finance proposals subtitled "Gore Sets Forth Innovative Plan for Reform." JDT *CC Dep.* 113-15 & Ex. 23. The release described Gore's proposal as "sending a strong statement," "innovative and promising," and "seek[ing] to seriously address [campaign finance legislation]." "Gore is putting forth strong reform proposals in contrast to ... Bush," CC declared. JDT *CC Dep.* Ex. 23. "The purpose of the press release," declared CC, "was to highlight ... that ... yet another candidate ... was making ... Reform a primary issue in his campaign," not to influence the election, although it "could" affect the election." JDT *CC Dep.* 115. CC didn't think the release promoted or supported Gore. *Id.*[33]

2001); JDT *CC Dep.* 136-39 & Exhibit 31 (Ill., Feb. 12, 2001); JDT *CC Dep.* 139-42 & Exhibit 32 (Tenn., Sep. 7, 2001).

In March or April 2000, within 30 days of a primary in which Gov. Bush was a presidential candidate, CC distributed nationwide on its website an op-ed piece entitled "Bush's Campaign Finance Plan Too Weak." JDT *CC Dep.* 130-32 & Ex. 45. The plan derided Bush's plan as "keeping up with the Jones" and "rearranging the deck chairs on the Titanic," but CC affirmed no intent to influence the election (while acknowledging the communication would possibly do so) or attack or oppose candidate Bush (although it believed it could be so interpreted). JDT *CC Dep.* 131-32.[34]

On October 18, 2000, shortly before the general election, CC issued nationwide a press release announcing a "Reform Report Card" (grading members of congress on support for BCRA-style legislation) and listing signers of CC's "Public Integrity Pledge" (thereby promising to support CC's favored legislation). JDT *CC*

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[33] After the 2000 Democratic and Republican conventions and while Senators Gore and Lieberman were presidential and vice-presidential candidates, CC released nationwide a press release extolling their commitment to campaign finance legislation and describing Lieberman as "a consistent and effective champion of campaign finance reform." JDT *CC Dep.* 117-20 & Exhibit 24. There was no purpose to influence the election or promote the named candidates, said CC, but this would possibly happen. JDT *CC Dep.* 119-20.

[34] CC also engaged "50 [to] 70 volunteers who c[a]me in to [CC] every week," JDT *CC Dep.* 151, in making phonebank calls to get CC members to call legislators about pending legislation. JDT *CC Dep.* 151-52 & Exhibits 41-43. Calls were made employing one phonebank memo into Delaware, in March 1998, urging Rep. Mike Castle to oppose a certain amendment. JDT *CC Dep.* 152 & Exhibit 42. Rep. Castle was a candidate in the November 1998 general election. The declared purpose was opposing a "phony" bill and supporting a proper one, not influencing an election (but CC admitted it possibly do so). JDT *CC Dep.* 152.

Dep. 119-21 & Ex. 25 & 27.[35] The scorecard included an "honor roll" of legislators voting CC's way. JDT *CC Dep.* 127 & Ex. 27. CC affirmed the scorecard's purpose was informing people about how legislators voted, JDT *CC Dep.* 122, and "encourag[ing] ... Members of Congress to vote [right] in the next vote," JDT *CC Dep.* at122-23, not influencing elections or promoting candidates, but it could be so interpreted. JDT *CC Dep.* 122-125.

Could these activities affect federal elections? CC declared "they could ... impact ... how people vote." JDT *CC Dep.* 156. Could they be viewed "as either attacking or defending or promoting an individual candidacy?" *Id.* "Yes." *Id.* But were these communications corrupting? CC declared that it did not "believe that if a Member of Congress, as a result of [CC's] communications, supported Campaign Finance Reform or whatever [CC] w[as] advocating" that "that [would] give rise to an appearance of corruption." JDT *CC Dep.* 155.

Campaign for America's ("CFA") purpose is promoting BCRA-style legislation. JDT *Telephonic Deposition of Cheryl Perrin* (CFA Executive Director) 9 (*CFA Dep.*). CFA is funded primarily or solely by its founder, Jerome Kohlberg, Jr. JDT *CFA Dep.* 10. CFA has broadcast numerous ads promoting BCRA-style legislation that mentioned elected officials, some of whom were candidates in an upcoming election. *See, e.g.*, JDT *CFA Dep.* Ex. D (joint press release and radio ad scripts by CC and CFA).

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[35] CC communicated to the public on a "case-by-case basis" about who signed the integrity pledge, including communications about who signed and didn't vote as CC wanted. JDT *CC Dep.* 127. Such communications were issued around the time of votes of campaign finance legislation, which could coincide with election campaigns. JDT *CC Dep.* 128. The declared purpose of such tactics was not to influence elections or promote or attack candidates, but to "try to get somebody's vote." *Id.* CC acknowledged that such activity could influence elections and could be interpreted as promoting or opposing candidates. *Id.*

CFA published a "Legislative Report Card" giving "Thumbs Up" to advocates of BCRA-style legislation, including Senators McCain and Feingold. JDT *CFA Dep.* Ex.C. CFA didn't intend to influence an election and didn't believe the report could do so. JDT *CFA Dep.* 26. CFA has also broadcast grass-roots-lobbying radio ads mentioning federal legislators by name and encouraging listeners to call these legislators and vote for BCRA-style legislation or to pressure leaders, e.g., Sen. Lott, to hear CFA's favored legislation. *See, e.g.*, JDT *CFA Dep.* 28-31 & Ex. D (press release and text of ads). CFA said that its purpose was educating the public and seeking support for BCRA-style legislation, not influencing elections, that these ads could not affect federal elections, and that the ads did not attack or support any named candidate. JDT *CFA Dep.* 30. CFA declared that, if a legislator did what CFA urged in its ads, that there was no corruption because "[t]here would be no gain for that on either side." JDT *CFA Dep.* 59-60.

If all the above activity sounds like the busy marketplace of ideas in a vibrant democracy, that is because it is. Some of it fell within the BCRA blackout periods, but any of it could have, depending on when legislative action was occurring. Much of this vital political activity would be lost if BCRA were upheld. And the fact that both "reform" groups and Plaintiffs engage in the same sort of activity belies any claim that the public perceives corruption in these activities. Indeed "reform" groups themselves do not view such activity as corrupting.

II. "Soft Money" Bans Are Unconstitutional . . .

The Title I nonfederal money bans are unconstitutional as to national parties, federal officeholders and candidates, and state officeholders and candidates.

A. As to National Parties. Libertarian National Committee (LNC) joins the Republican National Committee et al., brief. The description of the unique way in which BCRA burdens the LNC and legal arguments are provided there and adopted here.

B. As to Federal Officeholders/ Candidates.

Rep. Mike Pence[36] wants to raise money for nonprofit corporations, including Indiana Family Institute (IFI).[37] But BCRA Title I adds § 323(e)(1)(A), JSA 13a, prohibiting federal candidates or officeholders from soliciting for, or directing nonfederal funds to, nonprofit organizations for "federal election activity" (voter registration within 120 days of an election) and voter identification, get-out-the-vote (GOTV) activity, activity supporting political parties, or making a communications that "refers to" a federal candidate and "promotes or supports ... or attacks or opposes" her).

Section 323(e)(4)(A) permits making "a general solicitation of funds" for nonprofit organizations "that does not specify how the funds will or should be spent," provided that the "principal purpose" of the organization is not engaging in "federal election activity."

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[36] Rep. Pence is a Member of Congress who associates with nonprofit ideological corporations to assist them in raising funds, as more fully described in the *Declaration of U.S. Representative Mike Pence* ("*Pence Dec.*"), JA 662-67. Rep. Pence alleged that the BCRA chills his ability to assist IFI and other nonprofit ideological corporations. JA 663 (*Pence Dec.* ¶ 6). He has assisted in raising funds for organizations including IFI and Vanderburgh County Right to Life and want to continue the relationship. JA 662-67 (*Pence Dec.* ¶¶ 5-22).

[37] IFI is a § 501(c)(3), MCFL-type corporation that advocates pro-family issues in the public policy arena, as more fully set out in the *Declaration of Curt Smith, President of Indiana Family Institute, Inc.* (*IFI Dec.*), JA 813-14 (*IFI Dec.* ¶¶ 3-7). IFI has a longtime relationship with Mike Pence before he was in Congress, which relationship has been used to help raise funds for IFI, and IFI wishes to have Rep. Pence continue to assist in raising funds for IFI without the restrictions of BCRA. JA 814-15 (*IFI Dec.* ¶¶ 8-11).

Section 323(e)(4)(B) provides that candidates may also make solicitations for "federal election activity,"except a communication that "refers to" a federal candidate and "promotes or supports ... or attacks or opposes" her, or for organizations whose principal purpose is to engage in such activity, provided the solicitation is made only to individuals[] and [] the amount solicited from any individual does not exceed $20,000."

The district court upheld this provision. SA 5sa (Per Curiam). Judge Henderson decided that the provision passed strict scrutiny because candidates raising large sums of non-federal money from corporations could create the appearance of corruption, SA 455sa, and "severing the most direct link between the federal candidate and the non-federal donor ... can serve to prevent the appearance of corruption where it is most acute." SA 457sa. She also decided that this may be the least restrictive means of preventing the use of soft money to buy influence over officials. SA 458sa.

Central to Rep. Pence's claim is the fact Rep. Pence has had a ten year relationship with IFI, both he and his wife have served on the IFI Board of Advisors, they have supported IFI financially, and he has been a featured guest and speaker at IFI fundraising events, because he believes in IFI's mission to focus on traditional family values. JA 662-63 (*Pence Dec.* ¶ 5). Rep. Pence and IFI want to continue the relationship they had before he became a Member of Congress, with Rep. Pence free to raise funds for IFI without restrictions. Because the relationship preexisted Rep. Pence's election to Congress in 2000 and Rep. Pence's present candidacy, JA 662 (*Pence Dec.* ¶ 2), there is no realistic concern that the public will perceive quid pro quo corruption in the fundraising relationship – even if he raised money for a pro-family or pro-life nonprofit corporation to register, identify, and mobilize voters.

But there is also a problem with what BCRA permits Rep. Pence to do. Fundraising events commonly include a presentation on the past or planned activities of the organization, either as an oral presentation (often with audio-visual enhancement) or in printed form to show what potential donors are supporting by their past and anticipated contributions. These activities often include (a) public communications (such as grassroots lobbying, issue advertising, and voter guides) that refer to a clearly identified candidate for federal office; (b) voter registration within 120 days of a federal election, voter identification, and GOTV activity. JA 664-65 (*Pence Dec.* ¶¶ 12-14).[38]

Rep. Pence's urging of support for such organizations may readily be considered by listeners to be a solicitation for funds that will be spent on the "federal election activities," described in oral or written presentations of past and planned activities of the group at the fundraising event, even if Rep. Pence expresses support for the group in general terms and does not specify how the funds will be spent. JA 665-66 (*Pence Dec.* ¶ 16). Further, it is unclear whether the "principal purpose" of an expressive association such as IFI or Vanderburgh County Right to Life is to engage in "federal election activity," because "principal purpose" is not defined by the BCRA. Must the activity be *a* principal purpose or *the* principal purpose? Does "principal purpose" means the same as "major purpose," the

term used by this Court in *MCFL*, 479 U.S. 238? JA 666 (*Pence Dec.* ¶ 17).

The requirement that "the amount solicited from any individual during any calendar year does not exceed $20,000" is by its terms a limitation on *solicitation*, not *contribution*, and unconstitutionally exposes Rep. Pence to liability for asking individuals for a $20,000 contribution when the individual has already been solicited for a contribution *of any amount* in that calendar year. This is exacerbated by the fact that Rep. Pence's solicitations are typically done to groups, where it is impossible to know who is in the audience and what solicitations have been made already to them. JA 667 (*Pence Dec.* ¶ 21).

No corruption or appearance of corruption exists in the activity described. This Court protects issue advocacy expenditures by citizen's groups and Congressmen have a legitimate interest in associating with such groups to advance the public issues common to them. Further, nonpartisan voter registration and GOTV activity furthers important civic goals. Since none of this activity is conducted in a partisan manner or advocates the election or defeat of any particular candidate, the connection between any prospect of quid pro quo corruption and the soliciting of funds for this activity is just too tenuous.

C. As to State Officeholders/Candidates. As a candidate for Alabama Attorney General, William H. Pryor Jr. has made many political communications and associations which are permitted by the laws of his state, but are restricted by BCRA. In violation of § 323(f) and § 301(20)(A)(iii), he has made public communications as a candidate and state official that refer to candidates for federal office and that promote, support, attack or oppose such candidates. JA 705-07 (*Declaration of William H. Pryor Jr., Attorney General of Alabama* (*Pryor Dec.*) ¶ 3, Ex. A-B). His references to candidates are made to compare his views to those of the federal candidate or because his official position effectively requires it. JA 707-08 (*Pryor Dec.* ¶¶ 4-6). He has also received contributions from state committees of national political parties and has spent state-regulated funds for voter registration within 120 days of a federal election, for voter identification and GOTV, and for generic campaign activities. JA 708-10 (*Pryor Dec.* ¶¶ 7-11).

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[38] Rep. Pence spoke at Vanderburgh County Right to Life's annual fundraising banquet, and VCRTL engages in a wide range of these activities with respect to federal, state, and local elections. IFI engages in some of these activities and has asserted its intent to continue doing so and to expand into doing more of these activities. JA 664-65 (*Pence Dec.* ¶¶ 9-11, 14). Some expressive associations also engage in independent expenditures in connection with federal candidates, with or without a connected political action committee ("PAC"), and some make contributions through their PACs to federal candidates. JA 665 (*Pence Dec.* ¶ 15).

Pryor's official duties often require him to discuss federal candidates in official press releases, congressional testimony, correspondence with public officials, and legal briefs. JA 705-08 (*Pryor Dec.* ¶¶ 3-5, Ex. C-O). "To fulfill my office as Attorney General effectively, I must often refer to federal candidates because they offer legal proposals which must be analyzed and would affect state law and policy and because they often become involved in legal controversies." JA 708 (*Pryor Dec.* ¶ 6).

By regulating the activities of candidates for state elective office, the BCRA is interfering with the ability of states to enact their own campaign finance schemes and has greatly complicating the burden of campaign finance laws on such candidates by subjecting them to two separate and often contradictory regulatory schemes. If the restrictions on "federal election activities" preempts state regulation, differences between state and federal approaches will be confusing and undermine the state's ability to design a logical and consistent scheme.[39] For example, Pryor's state of Alabama does not follow the federal approach of limiting the size of non-corporate contributions, but instead forbids them from being made while the Legislature is in session. Ala. Code § 17-22A-7(b)(2). If the federal law

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[39] State laws are pre-empted by (1) "express language in a congressional enactment," (2) "implication from the depth and breadth of a congressional scheme that occupies the legislative field," or (3) " implication because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

preempts Alabama law, an ad by Pryor urging voters to support him because he "helped President Bush fight the war on terror" would be subject to federal law limiting the size of contributions but not to Alabama's timing restriction, while an ad that does not mention a federal candidate could be paid for only by funds raised outside the legislative session, but from contributions of unlimited size. The impact could be even greater in states with similar but more restrictive laws. Hence, adding phrases like "I'm a Bush Republican" to their communications would enable Montana state legislative candidates to exchange their state's $100 per donor contribution limit with BCRA's limits of $2,000 or $5,000. Mont. Code Ann. § 13-37-216.

An even worse result would occur if these communications were subject to both state and federal restrictions. Pryor's communications showing him with President Bush would then be subject to the more restrictive aspects of both the federal and Alabama schemes. Montana candidates would need to ensure that their contributors had complied with federal limitations on contributions from political committees and individuals, but also raised outside of a legislative session, as required by Alabama law.

This impact would be especially acute in states providing public financing to candidates foregoing most private contributions. A Maine state representative candidate is barred from public funding for accepting more than $500 of private contributions. Me. Rev. Stat. Ann. tit. 21A § 1125(2)(C). A Maine state candidate wishing to spend $600 to tout his experience as a legislative staffer for Sen. Snowe, which now must be raised in accordance with federal law, would need to forego state financing to do so. If BCRA preempts state law, the candidate could raise unlimited private funds, subject to the much higher federal contribution limits, and still be eligible for public funding, if he spent the funds on ads mentioning Sen. Snowe

Besides being complicated and burdensome to state candidates, this subjection to federal regulation is also unfair in its impact on individual candidates. Consider the potential matchup in Indiana's 2004 gubernatorial election between Mitch Daniels, formerly President Bush's budget director, and Joe Andrews, former chairman of the Democratic National Committee.[40] Because President Bush is a candidate for re-election, Daniels would need to raise federal funds in order to discuss his work in the Bush administration or to tout an endorsement from his old boss. However, Andrews could freely use state-regulated funds to discuss his work with former President Clinton.

Restrictions based on the content of a candidate's speech violate this Court's maxim that it is the "people individually as citizens and candidates ... who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57. Restricting candidates' speech is especially troublesome because "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Republican Party of Minnesota*,536 U.S. at 781-82. In the rare instances when candidates are subjected to content-based restrictions, the government bears the burden to prove that the challenged regulation is "narrowly tailored, to serve ... a compelling state interest." *Id.* at 774-75. The government "must demonstrate that it does not 'unnecessarily circumscribe protected expression.'" *Id.* at 775 (citation omitted). When a plausible, less restrictive alternative is offered to a content-based speech restriction – such as the state regulatory schemes that already govern these communications – "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

In upholding these provisions, the district court, in Judge Leon's opinion, relied upon findings regarding the activities of state political parties supporting federal candidates to find that this statute was closely drawn to accomplish the federal purpose of "guarding against similar conversions of soft money donations to fund communications that are designed to accomplish the federal purpose of directly influencing a federal election." SA 1146sa. But the mere potential that these statements could be used to influence a federal election is insufficient justification. This Court has long recognized that "[c]andidates ... are intimately tied to public issues," *Buckley*, 424 U.S. at 42, and that the governments' regulatory interests extended only to spending that is "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. Despite this Court's warning that "the Government must present more than anecdote and supposition" to prove the necessity of such statutes, *Playboy*, 529 U.S. at 822, there is no support in logic or evidence for the premise that state candidates are likely to divert their scarce campaign resources to support federal candidacies rather than their own. State candidates invoke the name of federal candidates in order to *advance their own candidacies*, a point illustrated by Pryor's own flyers featuring pictures of him shaking hands with President Bush, citing his work on the President's prior campaign and transition team, and quoting praise for Pryor from the President and from Alabama's senators. 8 PCS/MC 36-45 (*Pryor Dec.* Ex. A & B).

Even more dubious are the restrictions on supposedly "federal election activity" by state officeholders – an application ignored by the district court. It is hard to imagine what federal interests could justify requiring state officials to fund official communications with private campaign contributions rather than with public funds authorized by their state legislature. As Pryor explained, "My official duties would be significantly impeded if I were unable to refer to federal candidates who sponsor or propose legislation or who are involved in litigation that might affect the people of Alabama." JA 707-08 (*Pryor Dec.* ¶ 5). Ironically, by requiring campaign donors to pay for communications normally funded by taxes, this provision enhances rather than reduces the role of money in politics.

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[40] Matthew Tully, *Daniels Dives In; Rival Bows Out*, Indianapolis Star, June 10, 2003, <http://www.indystar.com/print/articles /2/049677-9902-098.html>.

III. "Advance Notice" Is Unconstitutional.

BCRA provides two advance notice disclosure provisions, requiring that contracts be treated as actual expenditures. The district court found the challenge to § 212 not ripe because of FEC regulations requiring disclosure only after an independent expenditure has been made. SA 132sa (Per Curiam). NRLC Plaintiffs do not appeal this. Section 201(5), JSA 23a, also requires such advance notice for contracts to make electioneering communications, which the Court unanimously found unconstitutional. SA 12sa, 115sa (Per Curiam).

Advanced notice of a communication about a politician, by requiring the reporting of "contracts" for the communication, creates three separate, but substantial problems. First, the disclosure of donors subjects these donors to harassment.[41] Second, it is often

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[41] The district court upheld the requirement that $1,000 (and up) contributors for electioneering communications be reported, despite concerns about retaliation and harassment expressed by several plaintiffs. SA 124sa (Per Curiam) (citing "lack of specific evidence"). There was evidence in the record of harassment against NRLC and NRL PAC and interference with broadcast advertising arrangements when candidates become aware of such communications. JA 632 (*NRLC Dec.* ¶¶ 26-27, which is summarized *infra* at note 43).

Also, in *Arizona Right to Life PAC v. Bayless*, No. 00-CIV-0129-PHX-RGS, slip op. at 10 (D. Ariz. Aug. 28, 2000), *rev'd in part on other grounds*, 320 F.3d 1002 (9th Cir. 2003), the court in the process of granting permanent injunction against a requirement "that *individual* contributor's names and

unknown in advance whether the communication will actually be made and what the communication, or even the "contract" will cost.[42] Third, advance notice of a communications provide an opportunity for politicians to dissuade broadcasters and newspapers from carrying communications to which they object.[43]

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telephone numbers be included on the literature or advertisements of political committees who make independent expenditures," *id.* at 19 (emphasis in original), recounted the evidence submitted by one top contributor who had "received harassing phone calls – some threatening violence – during the 1998 political campaign as a result of the publication of his phone number." *Id.* at 10.

[42] Two examples from nonbroadcast advocacy illustrate the point. First, NRL PAC planned an independent expenditure on printed express advocacy pieces in support of U.S. Senate candidate John Ashcroft in the 2000 Missouri election. When Ashcroft's opponent died, NRLC did not think it seemly to release the brochures, electing to spend its money on other races. Both contracts and payments were made, but there was no communication, and it would have been inaccurate and misleading to have such "expenditures" reported as "independent expenditures." *See NRL PAC v. Connor*, 323 F.3d 684 (8th Cir. 2003) (recounting these facts).

Second, NRL PAC often arranges for telemarketing firms to make phone calls into targeted areas at election time. The general agreement is made well in advance of the election, but the agreement is only for a set range of expenditures (low and high ends) and the rate per call. At this point, the amount of money that will be available to spend is yet unknown, for it has not been raised yet, and the state or races are unknown. In fact the state or race may not be decided until the day before the phone calling begins, as last-minute polling indicates where there is a need. Thus, at the time of the agreement for telemarketing services, the total amount to be spent is yet unknown, as is the location of the calls.

[43] A concrete example occurred to NRL PAC in 1988 in Nevada. James Bopp, Jr. & Richard E. Coleson, *Comments on Proposed Rules at 11 C.F.R. Parts 100, 104, and 109 Regarding Independent Expenditure Reporting*, <http://www.fec.gov/pdf/nprm/ind_exp/ind_expcomments6-08-01.pdf> (visited July 1, 2003); *NRLC Dec.* (¶¶ 184-200), JA 658-61. It involves the case of *National Right to Life PAC v. Friends for Bryan* (No. CV-S-88-865-PMP-(RJJ)), a 1988 case brought in state court by NRL PAC against Nevada

Advance notice provides increased opportunity for such mischief, at the expense of First Amendment rights. If broadcasters can be intimidated into canceling advertisements that are already in process (as were NRL PAC's, note 42), it will be far easier for intimidation to prevail with the extra time advanced notice provides. Many broadcasters would be tempted to reject such communications, depriving citizen groups of free speech. The ability of Americans to participate in our democracy would be undermined.

IV. Intervenors Lack Article III Standing.

Senator John McCain, Sen. Russell Feingold, Rep. Christopher Shays, Rep. Martin Meehan, Sen. Olympia Snowe, and Sen. James Jeffords (Intervenors) intervened as Defendants in the District Court under Fed. R. Civ. P. 24(a)(1), invoking § 403(b) ("any member of the House of Representatives . . . or Senate shall have the right to intervene either in support or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment"). In granting intervention, the trial court decided the Intervenors have Article III standing whether or not such standing is required for intervention. Docket # 40 (order granting intervention

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Governor Richard Bryan's U.S. Senatorial campaign committee for tortuous interference with contractual relations resulting from cancelled broadcast arrangements for NRL PAC's independent expenditures due to harassing letters from Bryan's campaign. Other letters using the same boilerplate language were used in North Dakota and Nebraska and the source of this systematic campaign of intimidation was apparently an October 21, 1988, form letter prepared by Robert F. Bauer, Counsel to the Democratic Senatorial Campaign Committee. Similar letters were also sent to stations concerning ads by the American Medical Association PAC and the Auto Dealers and Drivers for Free Trade PAC. This evidence demonstrates what is usually invisible to the public – a widespread practice of well-planned, systematic intimidation attempts against broadcasters to gain political advantage.

5 (May 3, 2002)). However, Article III standing is required for intervention[44] and the Intervenors lack it.

The Intervenors must satisfy both constitutional and prudential requirements for standing. *See, e.g., National Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 1146 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Section 403(b), by permitting members of Congress to intervene, removes any prudential standing concerns. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress's decision to grant a particular plaintiff the right to challenge an act's constitutionality ... eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when the plaintiff brings suit"). However, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing." *Id.* Contrary to the District Court, Intervenors lack Article III standing.

First, they do not satisfy the requirement that one must suffer an "injury in fact," consisting of an "invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent." *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted). The Intervenors claimed injury here – "that they will be forced to raise money in a corrupt system *in the event the Act is struck down*" (Order at 8) (emphasis in original) – is neither concrete nor particularized.

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[44] Whether proposed Intervenors must have Article III standing in order to properly intervene is an issue of first impression, *Diamond v. Charles*, 476 U.S. 54, 68-69 and n. 21 (1986), and there is a conflict of circuits in this regard. *Compare Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996); *Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Building and Constr. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir.1994) *with United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir.1978); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir.1994); *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir.1991).

In *Raines*, 521 U.S. at 829, this Court held that individual Members of Congress lacked standing to challenge the constitutionality of the federal Line Item Veto Act, although the Act explicitly provided that any Member might bring suit against it, because the Members had alleged no cognizable injuries particular to themselves, and their claimed institutional injury was widely dispersed and abstract. The Intervenors claim here – that without the BCRA, they will have to raise funds in a supposedly corrupt system – lacks particularity and concreteness to an even greater degree than the claim of the *Raines* plaintiffs. A line item veto is at least known to diminish the specific weight of every legislative vote. This is surely a more concrete and particular injury than swimming in the same allegedly polluted fund-raising water as all other candidates must if BCRA is stricken. If the Raines plaintiffs lacked standing, the Intervenors lack it, too. If the Intervenors here have standing, then so do all legislators whenever any statute that affects them is brought into question before the courts, which would elide the entire meaning of the "case and controversy" requirement.[45]

Second, the Intervenors lack Article III standing because there is no causal connection between their "injury"and the conduct complained of. *Lujan*, 504 U.S. at 560-61. Their claimed injury would arise from the unregulated conduct of other parties. However, "[i]n those cases where a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (*or lack of regulation*) of someone else, it is substantially more difficult to establish injury in fact, for in such cases one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Common Cause v. FEC*, 108 F.3d 412, 417 (D.C. Cir. 1997) (quotations and citations omitted) (emphasis added).

However, "because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene ... must satisfy the same Article III standing requirements as original parties." *Building and Constr. Trades Dept., AFL-CIO*, 40 F.3d at 1282 (citations omitted). As the Eighth Circuit held:

> [A]n Article III case or controversy, once joined by intervenors who lack standing, is – put bluntly – no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party must have standing as well. The Supreme Court has made it very clear that "[those] who do not possess Art. III standing may not litigate as suitors in the courts of the United States." [*Mausolf*, 85 F.3d at 1300 (citation omitted)].

The Article III standing requirement cannot be mitigated by Congress. Congressional power to create standing is subject to the limitations of Article III. *See, e.g., Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 64 (1973). Article III's injury in fact requirement limits Congress' power to confer standing. *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring). "In no event ... may Congress abrogate the Art. III minima." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Thus,

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[45] In *Karcher v. May*, 484 U.S. 72, 78 (1987), this Court held that New Jersey legislators had standing to defend a statute that the state's Attorney General refused to defend, if they acted "in their official capacities as presiding officers on behalf of the . . . Legislature," but lost standing when acting as individual legislators. *Id.* In *INS v. Chadha*, 464 U.S. 919, 930, n.5 (1983), this Court held that Congress was a proper party to defend a one-House veto provision when a government agency refused to defend the provision and both Houses authorized the intervention of Congress to defend the provision. But Intervenors here have not intervened in any official capacity, only as individual legislators. And BCRA is actively and ably defended by the government.

Article III standing is required for intervention. Because Intervenors lack standing, the intervention grant must be reversed.

Conclusion

For the foregoing reasons, this Court should strike down Title I's bans on "soft money" use by political parties, federal officeholders and candidates, state officeholders and candidates, Title II's ban on "electioneering communications," and § 201(5)'s "advance notice" requirement as violating constitutional free expression and association guarantees. Also, this Court should hold that the grant of intervention to Sen. Mc Cain et al. was erroneous.

Respectfully submitted,

James Bopp, Jr., *Counsel of Record*
Richard E. Coleson
Thomas J. Marzen
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (fax: 812/235-3685)
Counsel for Plaintiffs-Appellants/
Cross-Appellees,

FOR ARGUMENT

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No. 02-1747

IN THE

Supreme Court of The United States

CONGRESSMAN RON PAUL, GUN OWNERS OF AMERICA, INC.,
GUN OWNERS OF AMERICA POLITICAL VICTORY FUND,
REALCAMPAIGNREFORM.ORG, CITIZENS UNITED,
CITIZENS UNITED POLITICAL VICTORY FUND,
MICHAEL CLOUD, AND CARLA HOWELL,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *ET AL.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS CONGRESSMAN RON PAUL, *ET AL.*

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Attorneys for Appellants
**Counsel of Record*

July 8, 2003

(Counsel continued on inside front cover)

187 p

RICHARD O. WOLF
MOORE & LEE, LLP
1750 Tysons Boulevard
Suite 1450
McLean, VA 22102
(703) 506-2050

GARY G. KREEP
U.S. JUSTICE FOUNDATION
Suite 1-C
2091 East Valley Parkway
Escondido, CA 92027
(760) 741-8086

PERRY B. THOMPSON
629 High Knob Road
Front Royal, VA 22630
(540) 305-0012

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred by dismissing appellants' freedom of the press challenge to various provisions of BCRA, and to provisions of FECA amended by BCRA, on the ground that, in the area of campaign finance regulation, the freedom of the press guarantee in the First Amendment to the United States Constitution contains no greater rights than those protected by the guarantees of free speech and association?

2. Whether the district court erred by upholding the statutory exemptions in BCRA enjoyed by the "institutional press" and other FEC-licensed press activities from the prohibitions against, and regulations of, electioneering communications and contribution limits governing appellants, on the ground that Congress may, regardless of the freedom of the press guarantee, grant greater rights to the "institutional press" than to the "general press," only the latter of which appellants are a part?

3. Whether the district court erred by holding that, regardless of the constitutional guarantee of the freedom of the press, the fall-back definition of electioneering communication in Title II of BCRA (as modified by the court) and the accompanying prohibitions and regulations are constitutional as applied to appellants as members of the "general press," even though the institutional press and other FEC-licensed press activities are exempted?

4. Whether the district court erred by holding that, regardless of the constitutional guarantee of the freedom of the press, those appellants who are federal officeholders and/or candidates for federal office must, as members of the "general press," submit to the Federal Election Commission's licensing power and editorial control as provided for in BCRA § 101(a) (new FECA § 323(e)), including limiting their ability to assist

candidates and causes they support, whereas members of the "institutional press" are exempt?

5. Whether the district court erred by holding that, regardless of the freedom of the press, those appellants who are candidates for election to state office, must, as members of the "general press," submit to the licensing power and editorial control of the Federal Election Commission as provided for in BCRA § 101(a) (new FECA § 323(f)), if they refer to a candidate for federal office and the Federal Election Commission determines this to constitute promotion or support, whereas members of the "institutional press" are exempt?

6. Whether the district court erred by holding that, regardless of the freedom of the press, appellant Congressman and candidates for federal office, being members only of the "general press," had no standing to challenge the constitutionality of BCRA § 307(a) limiting individual contributions to federal election campaigns, and mandating disclosure of contributor identities and donations, despite the impact of such limits upon the editorial function of their campaigns for federal office, and by dismissing appellant candidates' press challenge to such statutory limits and requirements?

PARTIES TO THE PROCEEDING

The appellants in this case, who were plaintiffs in Civil Action No. 02-CV-781 below before the district court, are: Congressman Ron Paul; Gun Owners of America, Inc.; Gun Owners of America Political Victory Fund; RealCampaignReform.org; Citizens United; Citizens United Political Victory Fund; Michael Cloud; and Carla Howell.

The appellees in this case, who were defendants or intervenor-defendants below, are: Federal Election Commission; the United States of America; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

This case was consolidated below with ten other civil actions challenging the constitutionality of certain BCRA provisions.

The names of plaintiffs in each of the consolidated cases are as follows:
National Rifle Ass'n v. FEC: National Rifle Association of America (NRA) and NRA Political Victory Fund;
McConnell v. FEC: U.S. Senator Mitch McConnell, former U.S. Representative Bob Barr, U.S. Representative Mike Pence, Alabama Attorney General William H. Pryor, Libertarian National Committee, Inc., American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, Center for Individual Freedom, Club for Growth, Inc., Indiana Family Institute, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, National Right to Work Committee, 60-Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. English d/b/a/ ProENGLISH, Thomas

McInerney, Barret Austin O'Brock, and Trevor M. Southerland;
Echols v. FEC: Emily Echols, Daniel Solid, Hannah McDow, Isaac McDow, Jessica Mitchell, Daniel Solid, and Zachary C. White;
Chamber of Commerce v. FEC: Chamber of Commerce of the United States, U.S. Chamber Political Action Committee, and National Association of Manufacturers (Plaintiff National Association of Wholesaler-Distributors withdrew);
National Ass'n of Broadcasters v. FEC: National Association of Broadcasters;
AFL-CIO v. FEC: AFL-CIO and AFL-CIO Committee on Political Education and Political Contributions;
Republican National Committee v. FEC: Republican National Committee (RNC), Mike Duncan, former Treasurer, current General Counsel, and Member of the RNC, Republican Party of Colorado, Republican Party of New Mexico, Republican Party of Ohio, and Dallas County (Iowa) Republican County Central Committee;
California Democratic Party v. FEC: California Democratic Party, Art Torres, Yolo County Democratic Central Committee, California Republican Party, Shawn Steel, Timothy J. Morgan, Barbara Alby, Santa Cruz County Republican Central Committee, and Douglas R. Boyd, Jr.;
Adams v. FEC: Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Peter Kostmayer, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group (PIRG), Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, the Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now; and
Thompson v. FEC: U.S. Representatives Bennie G. Thompson and Earl F. Hilliard.

The names of other defendants in the consolidated cases are as follows: Federal Communications Commission; John D. Ashcroft; in his capacity as Attorney General of the United States; United States Department of Justice; and David M. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their official capacities as Commissioners of the Federal Election Commission.

STATEMENT PURSUANT TO RULE 29.6

Appellant Gun Owners of America Political Victory Fund, a political committee, is a separate segregated fund of appellant Gun Owners of America, Inc., a nonprofit, nonstock corporation, and appellant Citizens United Political Victory Fund, a political committee, is a separate segregated fund of appellant Citizens United, a nonprofit, nonstock corporation. Otherwise, none of the appellants has a parent corporation. None of the appellants is a stock company, and no publicly held company owns 10 percent or more of the stock of any of the appellants.

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OPINIONS BELOW

The three-judge district court issued its judgment, along with four opinions which were filed on May 2, 2003: a *per curiam* opinion joined by two of the judges, and individual opinions by each of the three judges. The opinions are reported at 203 U.S. Dist. LEXIS 7816. Pursuant to this Court's Order of May 15, 2003, the appellants submitted jointly the district court's opinions, in the form of a Supplemental Appendix to the Jurisdictional Statement (hereinafter "Supp. App.").

JURISDICTION

The district court issued its opinions and judgment on May 2, 2003. Appellants timely filed their Notice of Appeal on May 7, 2003. This Court has appellate jurisdiction pursuant to § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 114. Appellants filed their Jurisdictional Statement on May 30, 2003, and this Court noted probable jurisdiction on June 5, 2003. Appellants' Notice of Appeal is reprinted at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 1a.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution is reprinted at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 5a.

Sections 434 and 441a of Title 2 of the United States Code (FECA prior to BCRA's amendments), are set forth at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 6a.

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), is reprinted at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 27a.

STATEMENT OF THE CASE

BCRA was signed into law on March 27, 2002. Eleven separate complaints were filed in the United States District Court for the District of Columbia challenging its constitutionality. The cases were consolidated by the three-judge panel assigned to hear them, and the parties were ordered to conduct discovery and submit their cases-in-chief, supporting briefs and opposition and reply briefs on an expedited basis over the course of approximately six months. The fully-submitted cases were argued before the court below on December 4-5, 2002. On May 2, 2003, the district court issued four separate opinions — a *per curiam* opinion and an opinion of each of the three judges on the panel — upholding certain BCRA provisions, striking down certain other BCRA provisions, and dismissing challenges to certain other BCRA provisions for nonjusticiability and lack of standing. *See* Supp. App.

The Paul Plaintiff appellants relied exclusively upon the freedom of the press in their arguments, rather than invoking the free speech and association guarantees relied on in Buckley v. Valeo, 424 U.S. 1 (1976), and by the other plaintiffs below.

To establish that FECA/BCRA violates their freedom of the press, the Paul Plaintiffs introduced substantial fact and expert testimony. These witnesses provided testimony and expert reports to establish that political campaigns and public interest advocacy involve traditional press activities and that FECA/BCRA interfere with these press activities in a number of significant ways. *See, e.g.*, Declarations of Congressman Ron Paul, Michael Cloud, and Carla Howell, and Reports of Paul Plaintiffs' Expert Witnesses James C. Miller III, Perry

Willis, and Walter J. Olson, in the Appendix hereto ("App.").[1] In particular, for example, the Paul Plaintiffs demonstrated that the FECA/BCRA licensing, reporting, and expenditure limitations, together with their contribution limits, have adversely affected Congressman Paul's federal election campaigns, as well as those of federal and state candidates Michael Cloud and Carla Howell, and will continue to do so. *See, e.g.*, Paul Decl. ¶¶ 16-18, App. 75a-76a, Cloud Decl. ¶¶ 6-30, App. 83a-95a, Howell Decl. ¶¶ 4-21, App. 96a-103a, Miller Rep. at 13-27, App. 21a-39a, Willis Rep. ¶¶ 7-11, App. 49a-56a, Olson Rep. ¶ 116, App. 68a-69a. The Paul Plaintiffs also established, *inter alia*, that FECA/BCRA inhibits both challengers to incumbent members of Congress and the growth of minor parties. *See, e.g.*, Cloud Decl. ¶¶ 7-13, App. 83a-88a, Howell Decl. ¶¶ 9-13, 20-21, App. 98a-100a, 103a, Miller Rep. at 8-13, App. 16a-23a, Willis Rep. ¶¶ 9-14, App. 52a-62a. Moreover, the Paul Plaintiffs demonstrated, *inter alia*, that, at least with regard to the passage of FECA, and that by the time BCRA was passed, the incumbent-protecting effect of this kind of regulation was discussed in Congress. *See, e.g.*, Statement of Sen. McConnell, 148 Cong. Rec. S3131-3132 (daily ed. Mar.

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[1] The Paul Plaintiffs demonstrated their functions as independent and effective "presses" — developing and implementing editorial policy, as well as researching, drafting, editing, publishing, and even withholding news stories, editorials, and commentaries on both public policy issues and federal election campaigns and candidates. The Paul Plaintiffs extensively publish through press releases, unpaid appearances on radio and television news, talk, and other shows, through paid political advertisements in newspapers and on radio and television, and through their own outlets — faxes, e-mail, web sites, direct mail, newsletters, bumper stickers, video and audio tapes, telephone calls, door-to-door campaigning, speeches, debates, and even a syndicated radio show. *E.g.*, Paul Decl. ¶¶ 13-15, App. 72a-74a; Willis Rep. ¶¶ 7, 8, App. 49a-52a; Lizardo Decl. ¶ 5, App. 78a; Bossie Decl. ¶¶ 3, 5; Pratt Decl. ¶¶ 3, 5, 9; Babka Decl. ¶¶ 4, 7, 9, Rec. No. 60.

29, 2001); Statement of Rep. Ney, 148 Cong. Rec. H348 (daily ed. Feb. 13, 2002).[2]

The evidence introduced by the Paul Plaintiffs was not challenged by the defendants, and apparently was accepted by the court below. There is no apparent factual dispute, and the Paul Plaintiffs' claims were rejected as a matter of law. Supp. App. at 99sa-105sa, 158sa-59sa, 460sa, 472sa-75sa and 1144sa-46sa. This case fundamentally concerns whether the constitutional guarantee of freedom of the press applies to the Paul Plaintiffs, and, if so, whether that guarantee precludes the challenged governmental restrictions, embodied in BCRA/FECA, of the Paul Plaintiffs' press activities.

SUMMARY OF ARGUMENT

The Paul Plaintiffs challenge the constitutionality of various provisions of the BCRA-amended FECA under the freedom of the press. Although it recognized the distinctiveness of the Paul Plaintiffs' challenge, the district court dismissed it, erroneously ruling that the freedom of the press imposes no limits upon campaign finance regulations different from those imposed by free speech and association. Deferring to congressional representations that the BCRA-amended FECA prevents "corruption and appearance of corruption," the court applied the strict scrutiny and intermediate scrutiny tests set forth in Buckley v. Valeo on the erroneous assumption that Buckley and its progeny precluded consideration of the Paul Plaintiffs' freedom of the press claims.

The record below unmistakably demonstrates that the BCRA-amended FECA increases the advantages that FECA granted to incumbents over challengers. Because campaign finance regulations implicate congressional self-interest, the normal rule of judicial deference to the constitutional judgment of Congress does not apply. Claims that such statutes have been enacted to prevent "corruption and appearance of corruption" remain undefined and constitutionally suspect. Insofar as Buckley has spawned the loose use of such terms, it ought to be overruled, or set aside, having failed to provide bright-line rules governing the marketplace of ideas related to federal elections.

The freedom of the press provides such bright-line rules. According to this Court's precedents, the freedom of the press: (1) bans congressional licensing of the publication and dissemination of ideas; (2) constrains Congress from imposing prior restraints upon such publication and dissemination except under the most extraordinary circumstances; (3) prohibits Congress from authorizing government officials to exercise the editorial function in such publication and dissemination; (4) forbids Congress from forcing the disclosure of the identities of publishers and disseminators; and (5) proscribes Congress from placing discriminatory economic burdens upon some such publishers and disseminators, and not others. Enforcing these freedom of the press constraints upon Congress is the only way to protect the people from government corruption, and it is not subject to any override by an asserted compelling government interest.

Subjecting the BCRA-amended FECA to analysis under the freedom of the press reveals that the Title II prohibitions and regulations of "electioneering communications" violate all five press standards. New FECA § 323(e) and § 323(f), created by Title I of BCRA, impose like unconstitutional restrictions. Section 323(e) imposes unconstitutional editorial control over federal officeholders and candidates; Section 323(f) imposes unconstitutional editorial control over state and local officeholders and candidates. Finally, the Paul Plaintiffs have standing to challenge the contribution limits imposed by BCRA-amended FECA § 307, which together with the individual and PAC contribution limitations of FECA § 441a and their companion disclosure requirements contained in FECA § 434, impose unconstitutional editorial control upon candidates and their campaigns. All should be struck down.

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[2] The Paul Plaintiffs' evidence below is set out in more detail in their Jurisdictional Statement to the Court, Jur. St. at 3-14.

ARGUMENT

I. THE CUSTOMARY DEFERENCE ACCORDED TO THE CONSTITUTIONAL JUDGMENT OF CONGRESS DOES NOT APPLY IN THIS CASE.

Ordinarily, this Court, when called upon to judge the constitutionality of an act of Congress, "accords great weight to the decisions of Congress," even in cases presenting First Amendment challenges. CBS v. Democratic National Committee, 412 U.S. 94, 102 (1973). *Accord* Rostker v. Goldberg, 453 U.S. 57, 64 (1981). Such deference to the constitutional judgment of Congress does not, however, apply in every case. For example, as explained by Justice Scalia in Morrison v. Olson, 487 U.S. 654 (1988), this Court did not invoke the "caution that we owe great deference to Congress' view that what it has done is constitutional" in assessing the constitutionality of the independent counsel law, because "where the issue pertains to separation of powers, and the political branches are ... in disagreement, neither can be presumed correct." Indeed "[a]s one of the **interested** and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt." *Id.* at 704-05 (Scalia, J., dissenting) (emphasis added).

This Court did not extend deference to the constitutional judgment of Congress in Powell v. McCormack, 395 U.S. 486 (1969), in a dispute over the extent of congressional power to exclude a person from Congress by the exercise of its power to "judge ... the qualifications of its own members," recognizing that Congress had an institutional **self-interest** in an expansive interpretation of such power, an interpretation that was, also, in direct conflict with "a fundamental principle of our representative democracy ... 'that the people should choose whom they please to govern them,'... [a] principle [that] is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Id.* at 541-47.

Similarly, Congress is an interested party with respect to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 116 Stat. 81 (2002), and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.* ("FECA"), that it amends. In both acts, Congress has crafted rules governing the process by which monies may be raised and spent to challenge Congressmen for **re-election**, a preeminent concern — if not **the preeminent concern** — of each member of Congress. As Chief Justice Burger observed in Buckley v. Valeo. 424 U.S. 1 (1976):

> I see grave risks in legislation, enacted by incumbents of major political parties, which distinctively disadvantages minor parties or independent candidates. This Court has, until today, been particularly cautious when dealing with **enactments that tend to perpetuate those who control legislative power**. *See* Reynolds v. Sims, 377 U.S. 533, 570 (1964).... [Buckley, 424 U.S. at 251 (Burger, C.J., concurring and dissenting) (emphasis added).]

Further, this Court ruled that a legislature's failure to consider the interests of minor parties creates a need for courts to do so. "[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decision making may warrant **more careful judicial scrutiny**." Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) (emphasis added). This rule should also be applied to acts of the United States Congress when the rights of minor party candidates are in question.[3]

A. BCRA/FECA Advantages Incumbents.

A campaign against an incumbent is not a fair fight. Incumbents enjoy a great advantage over challengers simply because their names are already well known and they have immediate access to the media due to their position. Other tangible benefits of incumbents had a total value between $1,823,086 and $3,144,999 in 1999 for each U.S. senator. Cloud Decl. ¶¶ 12-13, App. 85a-88a. *See also* Miller Rep. at 8-24, App. 16a-36a; Willis Rep. ¶¶ 10-13, App. 53a-61a; Buckley at 31. FECA/BCRA builds on these natural advantages of incumbency in numerous ways to the virtual destruction of a fair and open system of elections.

Economist, former Chairman of the Federal Trade Commission and Director of the Office of Management and Budget, James C. Miller III, Ph.D., who testified as an expert witness for the Paul Plaintiffs, has analyzed the manner in which political campaigns resemble commercial markets and incumbent politicians resemble monopolists. He found that any regulation which limits fundraising or spending harms challengers more than incumbents because challengers benefit more than incumbents from each dollar spent on their campaign. In economic terms, challengers receive a higher marginal utility for each dollar spent. Miller Rep. at 17, App. 27a. Because of the anti-competitive nature of fundraising/spending limits, the major effect of FECA has been to protect incumbents from challengers. *Id.* at 16, App. 25a. In commercial markets, monopoly leads to higher profits, higher prices, lower quality, and less innovation. When incumbents are able to enjoy monopolistic powers, the effects on citizens and voters are like the effects of monopoly on consumers. The range of options is limited, the overall quality of service is diminished, accountability suffers, officials more frequently respond to vested interests rather than the electorate at large, deliberations are less transparent, and citizens have less information about the candidates, their qualifications, and their positions. *Id.* at 7-8, App. 15a-16a. Even a candidate who faces no serious threat of electoral defeat may wish to avoid challenge simply to avoid the criticism that challengers generally use in their campaigns against incumbents. Finally, when one party is unable to achieve a true **monopoly**, the **second choice** of the would-be monopolist is to form a **duopoly** with one other party, thus enjoying nearly all of the benefits of monopoly, and simply sharing them with one other group. However, like commercial trusts, political candidates and parties have an incentive to break the agreement with their fellow conspirators. Thus, they **seek to enforce their anti-competitive agreements by law**. J. Miller, *Monopoly Politics* 40-42 (Hoover Inst. Stanford Univ.: 1999).

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[3] The political harm suffered by minor parties under FECA/BCRA are cogently demonstrated by the Willis Rep. ¶¶ 4-10, App. 44aa-55a; Miller Rep. at 8-27, App. 16a-39a; Cloud Decl. ¶¶ 6-30, App. 83a-95a; and Howell Decl. ¶¶ 4-21, App. 96a-103a. The need for this additional protection of minor parties is apparent when one considers their importance to our political system. "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." Williams v. Rhodes, 393 U.S. 23, 32 (1968). *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957). "All political ideas cannot and should not be channeled into the programs of our two major parties.... Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." *Id.* at 250-51.

Perry Willis, the former national director of the Libertarian National Committee and an experienced political consultant and fundraiser, also served as an expert witness for the Paul Plaintiffs. He testified that polls show a significant number of Americans hold political beliefs that are best described as "libertarian." Willis Rep. ¶ 4, App. 44a-46a. However, in spite of public support, the discriminatory effects of federal campaign laws on minor parties make it virtually impossible for libertarians to be viable candidates for federal office.[4] *Id.* ¶¶ 4-5, App. 44a-48a. Challengers, especially minor party challengers, must rely on fewer sources of contributions than incumbents because many potential donors refuse to donate to challengers given the ever present threat of retribution from the incumbent. To overcome this disadvantage, challengers must rely on larger contributions from strong supporters who share their philosophical convictions, which FECA/BCRA's contribution limitation makes impossible. Moreover, because of the limited amount of money which can be accepted from each contributor, challengers must pay the costs to locate and communicate with a greater number of potential donors, thus spending less communicating their message to the general public. Incumbents, however, can easily and inexpensively convince large numbers of donors to contribute to the

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[4] Additionally, the institutional media, which is exempted from FECA/BCRA, is uniformly biased against libertarian ideas. In an effort to counteract this bias, the primary aim of Libertarian campaigns is to serve as a press, educating the public about the policy options which are ignored by the mainstream press' focus on "conservative" versus "liberal" approaches. Willis Rep. ¶¶ 7-8, App. 49a-52a.

campaigns; thus, they are not harmed by contribution limits. *Id.* ¶¶ 9-12, App. 52a-58a. FECA/BCRA's reporting requirements also severely limit the ability of challengers, especially minor party challengers, to raise money because their greatest support comes from people who have philosophical or economic reasons to oppose the status quo. However, these are also people who tend to fear having the government learn of their efforts to change the status quo. Thus, many supporters of Libertarian campaigns donate $199 to avoid having their personal information reported. *Id.*, ¶ 13, App. 58a-61a.[5]

The anti-competitive provisions of FECA have been exponentially worsened by BCRA. For example, under BCRA, an American citizen can be sent to federal prison for five years for criticizing a member of Congress in the way that Congress has determined to be impermissible, and for a wide variety of other "offenses." FECA § 309(d)(1), Jur. St. App. at 69a. BCRA prohibits a member of Congress from signing a fundraising letter for a group that he or she supports to conduct issue advocacy or voter registration, and BCRA makes it virtually impossible for minor party candidates for federal and state office to run as a team to maximize their chance of gaining public attention and public support. FECA § 323(e) and (f), Jur. St. App. at 30a-33a. BCRA continues the FECA practice of severely limiting contributions by Americans to campaign committees, with an anemic, less-than-inflation increase in limitations, ensuring that effective challenges to incumbents will be virtually impossible. FECA § 315(a)(1), Jur. St. App. at 62a. BCRA continues and expands the FECA practice of compelling the disclosure of the identity of financial supporters so that incumbents may know the identity of those who would have the temerity to oppose them. 2 U.S.C. § 434(b)(3)(A), Jur. St. App. at 12a, and new FECA § 304(f), Jur. St. App. at 37a-41a. Few Americans can be expected to understand these restrictions or how they are to be applied to decisions made in the heat of an election campaign.[6]

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[5] Judge Buckley of the U.S. Court of Appeals for the District of Columbia observed in 2000: "the argument is essentially between political insiders and political outsiders, as exemplified by the ideologically disparate group that joined Sen. Eugene McCarthy and me in challenging the constitutionality of the Campaign Reform Act of 1974. What we had in common was a concern that its **restrictions on spending and giving would effectively squeeze independent voices and political reform movements out of the political process** by making it even more difficult than it already was to raise effective challenges to the political status quo. The legislation was, in fact, so notoriously one-sided in this respect that it became known as the **Incumbent Protection Act**." Cato Policy Report, March/April 2000, p. 1, Corruption, Campaign Finance, and Term Limits, http://www.cato.org/pubs/policy_report/v22n2/buckley.html (emphasis added).

In the face of the anti-competitive track record of FECA and the record below concerning BCRA, the time is right for this Court to entertain a broad challenge to the entire regulatory scheme for federal campaign finance.[7] Such a challenge is

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[6] BCRA makes FECA much more complex and difficult to work with. Even FEC employees often do not understand these restrictions. Paul Plaintiffs' expert witness Walter J. Olson, CPA, stated that, even though he is an experienced consultant in the area of campaign finance regulation, he frequently must call the FEC advice line. A number of times, the FEC information specialist he has spoken to has not been able to answer his questions. On occasion, FEC employees actually admit that they have no advice to give and Mr. Olson, as treasurer facing personal liability for FECA violations, must act at his own peril. Olson Rep. ¶ 8, App. 67a-68a.

[7] It is particularly important that the campaign finance reformers be checked now, because they have made it clear that even the restrictions in BCRA do not satisfy them. For example, before the House of Representatives had even voted on BCRA, Senator McCain declared "This new law does not resolve all of the problems of our campaign finance system — but it was a historic and **significant step** forward.... Those of us who believe deeply in these reforms will not falter in our efforts to ... **implement further reforms**

presented by the Paul Plaintiffs. Their challenge differs from the challenges of all others in this litigation in three ways: (1) the Paul Plaintiffs base their challenge on the press clause of the First Amendment rather than the speech and association clauses, or equal protection or due process; (2) the Paul Plaintiffs seek the re-examination and overturning of Buckley v. Valeo based on a real record, not just congressional self-serving promotionals upon which Buckley relied, although these plaintiffs believe that Buckley could simply be set aside; and (3) the Paul Plaintiffs challenge contribution limits and disclosure requirements not challenged by other parties and never before challenged on freedom of press grounds.

B. Claims of Corruption and the Appearance of Corruption Are Undefined and Mask a Constitutionally Illegitimate Purpose.

In this case, as in Buckley, the federal government and intervening members of Congress maintain that so-called reform is justified to combat "corruption and the appearance of corruption" in government, lest the people lose faith in their government officials and in their current system of government. *See* Defendants' Brief at 71-84 (Rec. No. 66). Rather than provide this Court with a precise definition of "corruption" and "appearance of corruption," they prefer to invoke those terms as "judicial mantras," hoping that by repetition this Court will simply accept the claims on the strength of this Court's normal practice of according deference to Congress. As pointed out

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in the future." McCain Declares Reform Crusade Continues, Press Release of John McCain, Nov. 14, 2001. His attitude is shared by his co-author of the Senate version of BCRA, Senator Feingold, who said, "[BCRA] is only a **first step** to cleaning up the system. There are **many provisions** we can consider **down the road**...." Statement of Sen. Feingold, 147 Cong. Rec. S2887 (daily ed. Mar. 26, 2001).

above, such deference should not be accorded Congress in this case because any presumption of constitutionality does not apply when Congress acts to protect itself and the current two-party system.

In Buckley, the Court was clear about what **it** meant by "corruption" — "large contributions ... given to secure political quid pro quo's from current and potential office holders." *Id.*, 424 U.S. 26. But this is not what BCRA's supporters meant by corruption. As FEC Commissioner Bradley Smith has written:

> What is meant by "corruption" in [the current "reform" debate] is not the common definition of the term, that is to say, personal enrichment of a legislator in exchange for a vote.... What reformers mean by "corruption" is that legislators react to the wishes of constituents; or what, in other circumstances, might be called "responsiveness." What makes this particular incidence of responsiveness "corrupt" is that the constituents involved have taken an active role in supporting the candidate's campaign for election.... In short, for at least some campaign regulation advocates, it appears that democracy itself is the problem. If individuals and groups are allowed to spend money campaigning, they might succeed in convincing voters to vote in certain ways; if they are allowed to lobby their representatives, they might persuade those representatives to support or oppose legislation. This "has really got to be changed." Democracy itself is corrupt. [B. Smith, *Unfree Speech* 52, 214 (Princeton Univ. Press: 2002).]

Although BCRA sponsors seek to define preventing the "appearance of corruption" as a compelling **governmental interest** justifying restrictions on the First Amendment rights of Americans, they are actually addressing a compelling **political interest** shared by all incumbents. When government is perceived as corrupt, it is the **incumbents**, not the challengers, who are at risk. Combating the "appearance of corruption," then, is a ruse designed by incumbents to justify limits on the freedoms of others to further their own interests.

Just two terms ago, this Court ruled that a state may not regulate the content of a campaign for elective judicial office without first defining specifically its goals. In Republican Party of Minn. v. White, 536 U.S. 765 (2002), this Court found that the claimed government interests of "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary" did not survive careful scrutiny. *Id.* at 773. Likewise here, the Government should not be allowed to claim an interest in preventing "corruption and the appearance of corruption" without defining those terms with the same precision as required in the White case. This is especially important here, where the government candidly admits that its overarching goal is to preserve the people's "confidence" in the present system of representative government. *See* Buckley, 424 U.S. at 27. In the past, governments have attempted to achieve that same goal through laws prohibiting seditious libel, contending that the current government must have the power to preserve its reputation with the people, lest the people lose confidence in their government. *See* Rex v. Tutchin, Howell's State Trials 1095 (1704) (sustaining seditious libel prosecution on the theory that "it is very necessary for all governments that the people should have a good opinion of it." *Id.* at 1128). However, if it is constitutionally illegitimate for the government to pursue a seditious libel prosecution in order to protect the government's reputation, as this Court ruled in New York Times v. Sullivan, 376 U.S. 254 (1964), then the government cannot protect the government's reputation by "preventive" measures such as those contained in BCRA/FECA, notwithstanding this Court's opinion in Buckley.

II. THE COURT BELOW ERRONEOUSLY DISMISSED THE PAUL PLAINTIFFS' CLAIMS UNDER THE FREEDOM OF THE PRESS.

Beginning with Buckley v. Valeo, and continuing through Federal Election Commission v. Beaumont, ___ U.S. ___, 123 S. Ct. 2200 (2003), this Court has never addressed a freedom of the press challenge to the Federal Election Campaign Act. For that reason alone, the *per curiam* opinion declined to determine the Paul Plaintiffs' challenges to BCRA under the freedom of the press. Supp. App. at 104sa. Additionally, the court below dismissed the Paul Plaintiffs' freedom of the press claims on the ground that the freedom of the press clause provides "no rights ... that are superior to or different than those under the other clauses of the First Amendment." *Id.* at 103sa-04sa. Thirdly, faulting the Paul Plaintiffs for failure "to provide the Court with a standard to apply" to their Press Clause claims,[8] the court below "appl[ied] the same scrutiny to all First

Amendment claims, whether presented under the Speech or Press Clauses." Supp. App. at 102sa-03sa, 105sa. Finally, the court rejected the Paul Plaintiffs' freedom of the press claims on the ground that "[i]f the Press Clause affords greater or different rights, it might force the courts to make a distinction between the 'institutional' and 'general' press," which could prove difficult, if not impossible, under the freedom of the press guarantee." *Id.* at 104sa, n.65. The court erred on all four points.

A. The Paul Plaintiffs' Freedom of the Press Claims Are Not Barred by Buckley and Its Progeny.

The court below worried that, if the Paul Plaintiffs' press claims were addressed on the merits, then "litigants could besiege the courts with a host of challenges to laws previously upheld by [this] Court ... merely by characterizing themselves in their complaints as members of the 'press' because their purpose is to disseminate information to the public." *Id.* at 104sa. To be sure, no plaintiff should be permitted to camouflage a free speech or association claim by wrapping it in freedom of the press clothing in order to escape the strictures of *stare decisis*. But that is not what the Paul Plaintiffs have done. Rather, on the basis of the unchallenged facts concerning their press activities — ranging from publication of public information to campaigning for public office — they have asserted that they are entitled to the discrete protections of the freedom of the press — including the prohibitions against government licensing, prior restraints, editorial control, forced identity disclosure and discriminatory economic burdens — all of which are different from either the "strict scrutiny" or "intermediate scrutiny" protections enjoyed by the free speech and association claimants who previously litigated Buckley and its progeny. *See e.g.*, Amended Complaint §§ 41-45, App. at 1a-4a; Paul Plaintiffs' Proposed Findings of Fact §§ 12-20, 23-

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[8] The *per curiam* opinion criticized the Paul Plaintiffs also for failing "to ... delineate the additional, substantive rights provided under the First Amendment Freedom of the Press Clause." Supp. App. at 101sa, n.61. This simply is not correct. In the briefing below by the Paul Plaintiffs, the "substantive rights" guaranteed by the freedom of the press were addressed thoroughly, given the 30-, 20-, and 10-page limitations on briefs imposed by the district court (Order of Oct. 15, 2002, Rec. No. 51) (reduced from the Paul Plaintiff's request of 45, 30, and 25 pages.) *See* Initial Brief at 8-12, Rec. No. 65, Opposition Brief at 10-11, Rec. No. 73, and Reply Brief at 1-6. The distinct judicial standard applied to violations of the press freedom are set forth in the several subparts of Section II.B, *infra*.

49, App. 109a-120a. *See also* itemization of record evidence on press claims in Statement of the Case, *supra*, at 3-4.

Lack of a prior challenge to campaign finance laws based upon the freedom of the press guarantee is no bar to raising such a challenge now. If "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence" (Walz v. Tax Comm. of New York, 397 U.S. 664, 678 (1970)), then surely the government does not acquire immunity from constitutional violations just because they have not been brought to the attention of the courts in previous litigation that stretches back only 27 years. Indeed, the fact that no one had previously raised a claim that campaign finance regulation "interferes with First Amendment freedoms" did not preclude this Court from addressing such a challenge in Buckley. *See* Buckley, 424 U.S. at 13-14. *See also* New York Times v. Sullivan, 376 U.S. 254, 268 (1964) (previous statements by the Court that the Constitution does not protect libelous publications is no bar to constitutional challenge to libel of government).

B. The Freedom of the Press Is Subject to a Different and Higher Standard of Review.

The court below concluded that the Paul Plaintiffs' press claims were no different from those previously litigated in Buckley and its progeny, because, as a matter of law, there are "no rights under the Press Clause that are superior to or different than those under the other clauses of the First Amendment." Supp. App. at 103sa-04sa. Thus, it reasoned, because "the Press Clause has largely been subsumed into the Speech Clause," the Paul Plaintiffs' claims are subject to "the same scrutiny" as other "First Amendment claims," whether they be free speech or association. *Id.* at 102sa, 104sa. To reach this conclusion, the court below disregarded a long line of this Court's precedents applying a higher and different standard of review to the freedom of the press.

The court below inferred from First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), that "in the context of an election law statute, as applied to a non-media corporation, the Supreme Court treated the Press and Speech Clauses as indistinct." Supp. App. at 103sa. This is a misreading of Bellotti. First, the bank plaintiff in Bellotti did not raise a freedom of the press claim, but limited its claims to violations of the freedoms of speech and association. Bellotti, 438 U.S. at 767, 771, 776-77, 780. Second, this Court **explicitly** characterized the bank's claim as one based upon the freedom of speech, without any reference whatsoever to any possible freedom of the press claim, and thus it applied the Buckley strict scrutiny test. *Id.* at 786-91. Third, although the Bellotti plurality referred to "press cases," this Court did not — contrary to the claim of the *per curiam* opinion below (Supp. App. at 103sa) — engage in a careful discussion of the freedom of the press, much less consider the bank's rights under the Press Clause to be indistinct from its claims under the Speech Clause. Rather, as Chief Justice Burger wrote in his concurring opinion, "[t]he meaning of the Press Clause, as a provision separate and apart from the Speech Clause, is implicated only indirectly by this case." Bellotti, 438 U.S. at 802.

No Licensing Standard. In his Bellotti concurrence, the Chief Justice proposed that the Press Clause, as distinguished from the Speech Clause, was designed to prohibit "official [government] restraints," such as "licensing, censors, indices of prohibited books, and prosecutions for seditious libel...." *Id.* at 795, 800. In particular, he noted that any effort to limit the reach of the Press Clause to "media corporations," as had been suggested by some, would run afoul of "the abhorred licensing system of Tudor and Stuart England — a system that the First Amendment was intended to ban in this country." *Id.* at 801. To support this proposition, the Chief Justice cited Lovell v. Griffin, 303 U.S. 444 (1938), which found unconstitutional a city ordinance requiring a person to obtain a permit **before** disseminating literature because it "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* at 451. And the Court so ruled in Lovell without subjecting the ordinance to strict or other scrutiny to determine if the city had a compelling interest to impose its licensing system.

In Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150 (2002), this Court assessed the constitutionality of a licensing system requiring a mayoral permit **before** engaging in "door-to-door ... religious proselytizing [and] anonymous political speech and the distribution of handbills." *Id.* at 153. Relying primarily upon its "World War II-era cases" (*id.* at 164), including Lovell (*id.* at 161), it placed special emphasis upon Schneider v. State, 308 U.S. 147, 164 (1939), quoting therefrom as follows:

> [P]amphlets have proved the most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press.... To require a **censorship through license** which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees. [Watchtower, 536 U.S. at 162 (emphasis added).]

The Watchtower Court then concluded that it was unnecessary to resolve the "standard of review ... assessing the constitutionality of this ordinance" — whether strict or intermediate or some lesser scrutiny — because "the breadth of speech affected by the ordinance and the **nature of the regulation**" offends "the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so," notwithstanding the government's claimed countervailing interests of preventing fraud and other crime, or protecting privacy. *Id.* at 164-166 (emphasis added). In essence, this Court in Watchtower concluded that the ordinary free speech or association standards of strict or intermediate scrutiny do not apply to a law "requiring a permit" to engage in "everyday public discourse," even if "the issuance of permits ... is a ministerial task that is performed promptly." *Id.* at 166. In so ruling, this Court recognized that, even if a government official has absolutely no discretion not to issue a permit, any "statute purporting to license the dissemination of ideas" is inherently "evil," and therefore, unconstitutional on its face. Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

Prior Restraint Standard. In addition to outlawing the licensing and censorship of publications and dissemination of ideas, the freedom of the press applies a more stringent standard than free speech to **previous** restraints upon publications. During their long tenures on this Court, Justices Black and Douglas concluded that **all** such restraints violated the freedom of the press. *See* New York Times Co. v. United States, 403 U.S. 713, 717, 720 (1971). Although their view never prevailed, the press doctrine of "no prior restraints" has laid down a much higher standard than the strict scrutiny standard applied to free speech and association. In Near v. Minnesota, 283 U.S. 697 (1931), Chief Justice Charles Evans Hughes observed that "the chief purpose of the guaranty [of the liberty of the press is] to prevent previous restraints upon publication." *Id.* at 713. While the Chief Justice acknowledged that "the protection even as to previous restraints is not absolutely unlimited," he maintained that "only in exceptional cases" could the government impose such a restraint. *Id.* at 716. In the 1971 Pentagon Papers case, this Court ruled that "'any system of prior restraints ... bear[s] a heavy presumption against its constitutionality.'" New York Times, 403 U.S. at 714 (internal cites omitted). To overcome this presumption, it was not enough for the government to show a "compelling state interest." Rather, as Justice Brennan noted in a separate opinion, "only government allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.* at 726-27. *See also id.* at 730-31.

No Government Editorial Control. Additionally, the freedom of the press posits editorial control in the people, not in the government. As Blackstone put it: "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." IV Blackstone's *Commentaries* at 151-52. Indeed, the very purpose of prohibiting the licensing of publications is to prevent government officials, executive, administrative, or judicial, from assuming the function of editors. *See* Near v. Minnesota, 283 U.S. at 711-17. As Justice Black put it in the Pentagon Papers case:

> In the First Amendment the Founding Fathers gave the free press the protection that it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose the deception in government. [New York Times, 403 U.S. at 717.]

Thus, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), a Florida right-to-reply statute was struck down as an unconstitutional intrusion upon the editorial function of newspaper, even though the statute, by requiring that a candidate for election to office have access to a monopoly news outlet to reply to charges against him, was designed to ensure a more fully informed electorate. *Id.* at 245, 258. This Court reasoned that, no matter how strong the interest of the state to counter the entrenched economic concentration of power in newspapers in order to "ensure that a wide variety of views reach the public," the freedom of the press guaranteed the private exercise of editorial discretion. *Id.* at 247-56. Thus, it is clear that the press guarantee of private editorial control is not subject to any overriding government interest, compelling or otherwise. *See id.* at 259-61 (White, J., concurring).

No Forced Identity Disclosure. Concomitant with the press guarantee of private editorial control is the right to publish and disseminate anonymously. As Justice Black opined in Talley v. California, 362 U.S. 60 (1960), the constitutional right to communicate anonymously is rooted, firstly, in the no licensing/no censorship principle of the freedom of the press, and only secondarily in the privacy protection afforded by the guarantee of free association. *See id.* at 62-65. While the anonymity protection of free association may be subject to overriding state interests, where applicable, the anonymity protection of the freedom of the press is not. *Compare id.* at 62-65 *with id.* at 66 (Harlan, J., concurring) and *id.* at 69 (Clark, J., dissenting).

In Buckley v. Valeo, plaintiffs challenged the forced disclosure of the identities of contributors (publishers) of campaign literature **solely** on the ground that such disclosure violated the privacy protection afforded by free association. 424 U.S. at 11. Therefore, this Court analyzed FECA's forced disclosure provisions under the strict scrutiny standard applicable to free association anonymity claims. *See id.* at 64-68. After Buckley, this Court has had the opportunity to review forced disclosure laws on four occasions. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995); Buckley v. Amer. Const. Law Found., 525 U.S. 599 (1999); and Watchtower v. Stratton, *supra*. In the Socialist Workers and American Constitutional Law Foundation cases, this Court applied the strict scrutiny test because the challenging parties had rested their anonymity claim upon freedom of association. Brown, 459 U.S. at 91-102; Amer. Const. Found., 525 U.S. at 200-05.

In McIntyre, however, an Ohio statute prohibiting the distribution of "anonymous campaign literature" was challenged as a violation of the freedom of speech. McIntyre, 514 U.S. at 336. In his majority opinion striking down the Ohio statute, Justice Stevens eschewed reliance on the privacy protection of free association, in favor of the free press principle of private editorial control, relying heavily upon Talley and Miami Herald. *Id.* at 341-45, 347-49. Although the majority claimed that it was applying "strict scrutiny" to the Ohio statute as in Buckley v. Valeo (*id.* at 347, 352-57), Justice

Scalia, in dissent, found the majority opinion's attempt "to distinguish Buckley unconvincing." *Id.* at 382-84 (Scalia, J., dissenting). Concurring with the majority, Justice Thomas discarded any attempt at strict scrutiny, finding the anonymity principle protected, without exception, in the freedom of the press. *Id.* at 359-71. *See also* Watchtower, 536 U.S. at 164.

No Discriminatory Economic Burdens. To confine the freedom of the press to freedom from licensing and censorship alone would be "too narrow a view of the liberty of the press." Grosjean v. American Press Co., Inc., 267 U.S. 233, 245-47 (1936). As the Grosjean Court observed, after the English monarchy gave up its licensing power to control the flow of information about the government, it turned to its taxing power to impose economic burdens upon "the publication of comments and criticisms objectionable to the Crown." *Id.* at 246. While the Parliament imposed stamp duties upon advertising revenue and printed publications "'avowedly for the purpose of repressing libels,'" in reality, "the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people with respect of their government affairs." *Id.* at 247 (internal cites omitted). Writing in opposition to the infamous Stamp Act of 1765, John Adams noted that the Act imposed "restraints and duties" upon the press to "strip us in a great measure of the means of knowledge." J. Adams, "A Dissertation of the Canon and Feudal Law," reprinted in J. Adams, *The Revolutionary Writings of John Adams* 21, 34 (Liberty Fund, Indianapolis: 2000). According to Adams, such taxes transferred the wealth of the people to the government in violation of the freedom of the press which was rooted in the "divine right" of the people "to know ... the characters and conduct of their rulers." *Id.* at 28.

Anytime the government imposes an economic burden upon publications, whether by tax or regulation, the costs of publication increase, and where such an economic burden is discriminatorily placed upon some, and not others, it is a violation of the freedom of the press. Grosjean, 297 U.S. at 240-41, 250-51; Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."); Miami Herald, 418 U.S. at 256. ("The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply exacted in terms of the cost in printing and composing time and materials...."). According to Grosjean and Miami Herald, the imposition of such a discriminatory economic burden is a *per se* violation of the freedom of the press.[9]

As Justice Frankfurter so forcefully put it:

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[9] Despite these press precedents, the court below concluded that Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), "settled" the question that, under the First Amendment, the government may impose discriminatory economic burdens on the "general press," as contrasted with the "'institutional' media," because "the [institutional] press' unique societal role ... provide[s] a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." Supp. App. at 103sa, n.64. Such a reading of Austin is wholly unwarranted. In Austin, this Court did not even address the discriminatory strictures of the freedom of the press, much less, contrary to the court below's claim, "settle" the question that the "media exemptions" contained in BCRA and FECA are justified by a "compelling" state interest. *Id.* The Austin plaintiff raised no freedom of the press claim, relying instead upon free speech and equal protection. Austin, 494 U.S. at 657-58. Thus, this Court applied the strict scrutiny test of Buckley and the Equal Protection Clause's compelling state interest test to the plaintiff's claims (*id.* at 658-66, 666-68), not this Court's distinctive rules governing freedom of the press.

> [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect **all persons** in their right to print what they will as well as to utter it. "[T]he liberty of the press is no greater and no less than the liberty of **every** subject of the Queen." *Regina v. Gray,* [1900] 2 *Q.B.* 36, 40, and in the United States, it is no greater than the liberty of **every** citizen of the Republic. [Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring, emphasis added).[10]]

C. The Freedom of the Press Is Not a Subset of the Freedom of Speech.

In disregard of the rich legacy of the distinct and higher standard of review applied to the freedom of the press, the *per curiam* opinion decided that the freedom of the press had been "'subsumed into the Speech Clause.'" Supp. App. at 102sa. In doing so, the court below violated the first principle of constitutional interpretation, which commands that:

> In expounding the Constitution of the United States [citation omitted], **every word** must have its due force, and appropriate meaning; for it is evident from the whole instrument, that **no word** was unnecessarily used, or needlessly added. [Wright v. United States, 302 U.S. 583, 588 (1938) (emphasis added).]

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[10] *Accord*, Lovell, 303 U.S. at 451-52; Bellotti, 435 U.S. at 781, n.17, 782, n.18, 790-91, n.30 (majority op.), and at 798-802 (Burger, C.J., concurring).

To rule that there is no real difference between the Speech and Press Clauses would not only undermine the integrity of the constitutional text, but would also rest upon a profound misreading of history of the two freedoms. Not only was the freedom of the press extended to the people a century before the freedom of speech,[11] but it was the freedom of the press, not the freedom of speech, that served as the American "palladium"[12] of liberty through the war for independence and into the late 18th century constitution-making. Thus, in the early state declarations of right, the freedom of the press was secured to the people,[13] but not the freedom of speech, the latter being secured only to the elected members of the state legislature assembled.[14] Whatever security the people enjoyed to speak freely came solely from the protection afforded by the freedom of the press.[15] Thus, according to this early history of the constitutional treatment of the freedoms of speech and of the press, free speech was subsumed under the freedom of the press, not the other way around.

Indeed, James Madison and other opponents of the Sedition Act of 1798 enlisted the freedom of the press to ban seditious libel prosecutions. *See, e.g.*, J. Madison, *Report on the Virginia Resolutions*, reprinted in 5 *The Founders' Constitution* 141, 142 (P. Kurland and R. Lerner, eds., Univ. Chicago: 1987). It was not until the 20th century that the ban on seditious libel was linked to the freedom of speech. *See* Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). Not until 45 years later did this Court rule that seditious libel laws violated "freedom of expression," and even then it expressly approved of Madison's claim that such laws violated the freedom of the press. *Compare* New York Times v. Sullivan, 376 U.S. at 269-72 *with id.* at 273-77. To rule, as the court below ruled, that the Press Clause has somehow been absorbed by the Speech Clause is, therefore, neither historically nor textually sound.

Nor is the view of the court below sound as a matter of constitutional policy. Although the licensing system banned by the freedom of the press extended to all publications, no matter what the subject, the central design was to prevent the publication and dissemination of information "raising a disaffection to His most Excellent Majesty and His Government,"[16] to the end of protecting the reputation of the current regime. T. Cooley, A Treatise on Constitutional Limitations 516 (5th ed. Little, Brown, Boston: 1883); *Sources* at 242-43. Not surprisingly, the leaders of the American independence movement realized the importance of the freedom of the press in ridding the colonies of the hated English licensing system. Thus, in the Continental Congress' 1774 appeal to the inhabitants of Quebec for support of the war for independence, they stressed the "importance" of the freedom of the press for "its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs." I *Journals of the Continental Congress,* reprinted in I *American Founding Era* 233-34. Indeed, nine years earlier, John Adams, writing against the Stamp Act, likewise praised the freedom of the press as essential to save the people from "tyrants," warning especially against those in government who attempt to "wheedle[] [you] out of your liberty by ... pretences of politeness, delicacy or decency." J. Adams, "A Dissertation on the Canon and Feudal Law," reprinted in J. Adams' *Revolutionary Writings* 28, 29.

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[11] By the end of the 17th century, the liberty of the press was a right of all Englishmen (IV Blackstone's *Commentaries* at 152, n.a.), whereas the freedom of speech was enjoyed only by members of Parliament assembled. *English Bill of Rights, Declaration 9* (Dec. 16, 1689), reprinted in *Sources of Our Liberties* 247 (Perry, ed., Rev. ed., American Bar Foundation, Chicago: 1978) (hereinafter "*Sources*").

[12] *See* P. Payson, *A Sermon* (Boston, 1778), reprinted in I *American Political Writing during the Founding Era ("American Founding Era") 1760-1805* 523, 530 (C. Hyneman and D. Lutz, eds., Liberty Press, Indianapolis: 1983).

[13] *See, e.g.*, Section 12, Constitution of Virginia (1776), reprinted in *Sources* at 312.

[14] *See, e.g.*, Articles XVI and XXI, Constitution of Massachusetts (1780), reprinted in *Sources* at 376,77.

[15] *See, e.g.*, Section XII of the 1776 Constitution of Pennsylvania, reprinted in *Sources* at 330.

[16] "An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Books and Pamphlets and for Regulating Printing and Printing Presses," reprinted in 5 *Founders' Const.* 112.

Even after a more representative form of government was established in America, James Madison invoked the freedom of the press against the Sedition Act of 1798, which he maintained was designed to "repress[] information and communication among the people" in relation to congressional and presidential elections:

> Let it be recollected ... that the right of electing members of the Government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust and on the **equal freedom,** consequently, of examining and discussing these merits and demerits of the candidates... [J. Madison, Report on Va. Resolutions, reprinted in 5 *Founders' Const.* 145, emphasis added.]

St. George Tucker echoed Madison's view, advising elected officials that, if they cannot stand the criticism that comes with elective office, they ought to retire, not impair "the absolute freedom of inquiry." Otherwise, the American government will be "instantly changed from a federal union of representative democracies, in which the people of the several states are sovereign ... to a consolidated oligarchy..., according to the prevailing caprice of the constituted authorities or of those who may usurp them." St. G. Tucker, "Of the Right of Conscience; and of the Freedom of Speech and of the Press," reprinted in St. G. Tucker, *Views of the Constitution of the United States with Selected Writings*, 371, 381 (Liberty Fund, Indianapolis: 1999). To prevent such a transformation, Tucker maintained, "the absolute freedom of the press" had been especially designed, being far more effectual to this task than the freedom of speech. *Id.* at 382.

This historic link between the freedom of the press and free elections has not been lost on this Court. In Mills v. Alabama, 384 U.S. 214 (1966), this Court struck down an Alabama corrupt practices law prohibiting the solicitation of a vote for or against a proposition on election day on the sole ground that it violated the freedom of the press, and without subjecting the law to strict or any other kind of scrutiny. *Id.* at 218-20. The Court affirmed that the absolute freedom of the press was essential to "the free discussion of governmental affairs [which] of course includes discussion of candidates" (*id.* at 218):

> Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies

> the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. [*Id.* at 219.]

It is the freedom of the press, then, not free speech and association, that America's founders declared to be "one of the great bulwarks [against] despotic governments." *See* Section 12, Virginia Constitution (1776), reprinted in *Sources* 312. Indeed, it was the "absolute" freedom of the press — unconstrained by government licensing, previous restraints, editorial control, forced disclosures, and discriminatory economic burdens, not contained by licensing, limitations, controls, disclosures, and burdens such as are imposed by BCRA/FECA — that was deliberately designed by America's founders to protect the people from government corruption.

III. BCRA TITLE II VIOLATES THE PAUL PLAINTIFFS' FREEDOM OF THE PRESS.

Coining a new term, "electioneering communications," Congress has, by BCRA Title II, extended the reach of FECA beyond communications that meet the formulaic test of "express advocacy" as defined in Buckley v. Valeo, 424 U.S. at 44, n.52. Claiming that federal candidates and their supporters were "evading" the law by "sham issue" advertising on radio and television, Congress enacted Title II, to place under FEC control "any broadcast, cable, or satellite communication which ... **refers** to a clearly identified candidate for Federal office," and which is broadcast within a specified period leading up to an election, or in the alternative — should this Court find the regulation unconstitutional — any such communication "which **promotes** or **supports** a candidate for [Federal] office, or **attacks or opposes** [such] a candidate." New FECA § 304(f)(3)(A)(i) and (ii), Jur. St. App. at 38a-39a (emphasis added). In a split decision, the court below found the primary definition of electioneering communication unconstitutional, but the "backup" definition constitutional. Supp. App. at 12sa (*Per curiam* op.). Had the court below applied the freedom of the press standard of review, it should have found the entire BCRA Title II regulatory scheme unconstitutional.

A. Title II Is an Unconstitutional Licensing System.

BCRA § 203(a) (Jur. St. App. at 42a-44a) purports to impose a broad and absolute ban on all corporate and labor union disbursements for "electioneering communications." In fact, it does not. Rather, by its definitions of "electioneering communications" including its statutory and regulatory exemptions thereto, Title II functions as a comprehensive licensing system permitting some corporate and labor union expenditures of funds that influence federal elections, while denying that same privilege to others, including plaintiffs Citizens United, Gun Owners of America, Inc., and RealCampaignReform.org.

As Judge Henderson pointed out in dissent below, BCRA Title II does not ban all communications that refer to a federal candidate within the statutory specified periods, nor all communications that either promote or support the election or defeat of a federal candidate. Supp. App. at 364sa. Indeed, as the FEC has expressly provided, Title II does not apply to "a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications." 11 C.F.R. § 100.29(c)(1). Second, as Judge Henderson also observed, Title II does not even apply to all such communications that are broadcast by radio and television. Supp. App. at 365sa-66sa.

Third, Title II does not apply to "a candidate debate or forum" approved by the FEC or "to any other communication exempted under such regulations as the [FEC] may promulgate" so long as such exemption is consistent with Title II. New FECA § 304(f)(3)(B)(iii) and (iv), Jur. St. App. at 40a. Fourth, according to the court below, some nonprofit and political advocacy corporations are exempted from Title II's ban on electioneering communications under FEC v. Massachusetts Citizens for Life (MCFL), 479 U.S. 238 (1986). *See* Supp. App. at 13sa, 368sa-70sa, and 1166sa-69sa (Leon Op.). Accordingly, the FEC has extended its regulations governing the MCFL exception to electioneering communications, by which the FEC exercises enormous discretionary power over whether a nonprofit corporation qualifies. 11 C.F.R. § 114.10.

By absolutely exempting some publications (11 C.F.R. § 100.29(c)(1) and (2)), qualifiedly excepting others (11 C.F.R. §§ 100.29(c), 114.10), and permitting still others so long as they meet the registration and reporting requirements of FECA/BCRA (11 C.F.R. § 104.20), Title II "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." Lovell, 303 U.S. at 451. By conferring special privileges upon some to publish and disseminate their ideas in ways not permitted to others,[17] Title II engages in the kind of discrimination that is "reminiscent of the abhorred licensing system of Tudor and Stuart England — a system the [freedom of the press] was intended to ban from this country." Bellotti, 435 U.S. at 801 (Burger, C.J., concurring).

B. Title II Is an Unconstitutional Prior Restraint.

Title II imposes a prior restraint not only upon those corporations and labor unions banned by § 203(a) (Jur. St. App. at 42a) from expending money for "electioneering communications," but upon those like the plaintiffs Gun Owners of America Political Victory Fund ("GOAPVF") and Citizens United Political Victory Fund ("CUPVF") who are permitted by Title II to engage in electioneering communications, but are not exempted from the onerous reporting, disclosure, and financial burdens imposed upon them as political committees. *See* new FECA § 304(f)(1) and (2), Jur. St. App. at 37a-38a.

There is no question that the ban on plaintiffs Gun Owners of America, Inc., Citizens United, and RealCampaignReform.org operates as a prior restraint. Not only does the statute, on its face, prohibit such organizations from making any expenditures towards certain press activities, which are now defined as electioneering communications, but, by 11 C.F.R. § 114.10(a) and (e), the FEC requires such organizations to "demonstrat[e] qualified nonprofit corporation status" under MCFL by certification to the FEC. And the FEC is empowered to seek a court injunction against them should they fail to meet the certification requirement, or otherwise to evade the ban on electioneering communications. *See* 2 U.S.C. § 437g(a)(6)(A).[18] Such an injunctive action would also be available to the FEC to enforce the reporting requirements of Title II, as applied to GOAPVF and CUPVF should either disburse funds "for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year." New FECA § 304(f)(1), Jur. St. App. at 37a. Indeed, such reports are due within 24 hours after the first and each subsequent aggregation of any excess over $10,000 during each calendar year. *See* Supp. App. at 66sa. While such reports need not be made "until after the advertisements have been publicly distributed" (*id.* at 108sa), there is no question that they are a significant factor in the making of any decision to "produce," much less "air," an electioneering communication as defined by Title II. As Judge Henderson observed in her dissent on this point, the reporting and disclosure requirements laid down in Title II are "intrusive," "inhibiting," and "cumbersome." *Id.* at 372sa-73sa, 375sa.

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[17] For example, any incorporated television or radio broadcasting outlet may publish without restriction a news story, editorial or commentary containing an electioneering communication, but plaintiffs Citizens United, Gun Owners of America, Inc., and RealCampaignReform.org may not broadcast any electioneering communication unless they fit within the MCFL exception set forth in 11 C.F.R.§ 114.10.

[18] Such restraints cannot be characterized as "time, place and manner" restrictions, as the *per curiam* opinion below maintained. Supp. App. at 107sa, n.69. The ban on electioneering communications by corporate entities, coupled with the administrative regulations requiring certification

As prior restraints, BCRA § 201's reporting and disclosure requirements (Jur. St. App. at 37a-38a) must be justified, if at all, by the kind of imminent and serious danger to the survival of the nation as was required in the publication of the Pentagon Papers. *See* New York Times v. United States, 403 U.S. at 714, 718, 725-27, 730. The government has made no such showing here, nor has it even attempted such a showing. *See* Supp. App. at 112sa-13sa, 823sa-30sa, 835sa-40sa.

C. Title II Unconstitutionally Establishes Government Editorial Control.

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meeting the MCFL exception, are designed "to prevent the dissemination of ideas or opinions thought dangerous or offensive" and, therefore, are well within the definition of "prior restraint." *See* Blue Canary Corp. v. City of Milwaukee, 251 F.3d 1121, 1123 (7th Cir. 2001).

In the political marketplace, the First Amendment, particularly the freedom of the press, demands a wide berth for speakers and their audience, writers and their readers. Not only must governments refrain from paternalistic suppression of truthful information, but they also cannot suppress ideas on the ground that they may be misleading, or even "false." *See* New York Times v. Sullivan, 376 U.S. at 271-73. Otherwise, the government would intrude upon the constitutional right of private editorial control of both the publisher and his reader, the speaker and his listener. *See* Martin v. City of Struthers, 319 U.S. 141, 141-44, 147-49 (1943). Thus, governments may not generally force a speaker or writer to disclose his or her identity as a deterrent against the dissemination of misleading, false, or even fraudulent ideas. *See, e.g.,* McIntyre v. Ohio Elections Comm., 514 U.S. 334, 349-53 (1995).

The court below, however, assumed the opposite. The *per curiam* opinion chided some plaintiffs for having run television and radio issue ads "while hiding under dubious and misleading names," claiming that the First Amendment's commitment to "uninhibited, robust, and wide-open" debate justified — indeed, compelled — government-enforced disclosure of speaker and publisher identities, lest such "organizations hide themselves from the scrutiny of the voting public." Supp. App. at 106sa. Such a paternalistic view of the role of government in the marketplace of political ideas, as Judge Henderson amply demonstrated, is totally foreign to the First Amendment. *Id.* at 346sa-47sa, 378sa-80sa. Indeed, forcing the disclosure of the names of the major publishers (the $1,000 contributors) and publishers is a direct abridgment of the editorial discretion guaranteed to the people by the freedom of the press. *See* McIntyre, 514 U.S. at 348.

But the forced disclosure of publisher identities is not the only unconstitutional intrusion that BCRA Title II makes upon the people's editorial prerogatives. By imposing its view on whether a political ad that "refers" to a clearly identified candidate for Federal office, or one that "supports" or "promotes" the election of a candidate or "attacks" or "opposes" such a candidate, is a "sham issue" ad, the government has robbed both the producer of the ad, and the viewer thereof, of their editorial powers secured by the freedom of the press. *See* Martin, 319 U.S. at 143-44. The freedom of the press secures to the people the right to make such editorial judgments for themselves. *See* Miami Herald, 418 U.S. at 247-54, 256, 258.

Additionally, Congress has conferred upon the FEC significant editorial judgment, through the issuance of advisory opinions, to determine whether an "issue ad" is a regulated "electioneering communication." According to Judge Leon, such editorial discretion "saves" the back-up definition from a constitutional challenge of vagueness. *See* Supp. App. at 1166sa. Judge Leon has overlooked, however, that the grant of such power is the very essence of censorship, wresting from the people the right to draw the line between "candidacy advocacy" and genuine issue advocacy. *See id.* at 1138sa-39sa.[19] The

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[19] The exercise of such editorial discretion by means of advisory opinions, under the threat of civil penalties and injunctive relief, would be even more pronounced under Title II's primary definition of "electioneering communications." As Judge Henderson observed, the statutory definition which turns on whether a communication "refers to a clearly identified candidate for Federal office" is open-ended. Supp. App. at 358sa-59sa. She is right. The FEC has already exercised its editorial powers, promulgating a regulation containing examples of what meets the statutory definition, which, unsurprisingly, is open-ended. *See* 11 C.F.R. § 100.29(b)(2). Under the Buckley regime, this Court put a tight rein on the FEC, requiring the "magic words" of express candidate advocacy. Under the new BCRA regime, the FEC is loosed as editor-at-large of political advertising related to federal election campaigns.

exercise of such editorial control is *per se* an unconstitutional abridgment of the freedom of the press. *See* Miami Herald, 418 U.S. at 258.

D. Title II Imposes Discriminatory Economic Burdens.

There is no question that Title II discriminates. The statute expressly exempts altogether "a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate." New FECA § 304(f)(3)(B)(i), Jur. St. App. at 39a. Thus, media corporations that own television and radio stations "need not make separably identifiable expenditures to communicate their views" on the issues; rather, "[t]hey accomplish the same objective each day within the framework of their usual protected communications." *See* Bellotti, 435 U.S. at 783, n.17. As Judge Henderson observed, BCRA exempts a "class of privileged speakers" from having to comply with the reporting and disclosure requirements of Title II. Supp. App. at 365sa-366sa.

Such discriminatory treatment is an unconstitutional violation of the Paul Plaintiffs' freedom of the press. The increased costs of compliance with the reporting and disclosure requirements of Title II are obvious. *See* MCFL, 479 U.S. at 254-55. Such costs operate like a "tax on knowledge," imposing economic burdens that adversely impact the quality and quantity of communications on the issues related to campaigns for election to federal office. *See* Cloud Decl. ¶¶ 7, 10, 14, App. 83a-85a, 89a. *See also* Willis Rep. ¶¶ 13c, 14, App. 60a-62a; Miller Rep. at 22-24, App. 33a-36a; Olson Rep. ¶ 116, App. 68a. By imposing these costs on some, and not on others, BCRA Title II crosses a fixed line of unconstitutionality. *See* Grosjean, 297 U.S. at 251.

IV. BCRA TITLE I, CREATING NEW FECA § 323(e) AND § 323(f) RESTRICTIONS, VIOLATES THE FREEDOM OF THE PRESS.

A. New FECA § 323(e) Imposes Unconstitutional Editorial Controls.

New FECA § 323(e) (Jur. St. App. 30a-32a.) singles out for special limitations the political activities of somewhat more than 1,100 Americans each biennium — federal office holders and their challengers — whether they act directly or through agents and organizations. Under BCRA, Congressman Paul, a federal office holder, could be sentenced for up to five years in federal prison if he were to knowingly and wilfully sign a letter for Gun Owners of America, Inc. soliciting funds to pay for radio ads criticizing identified Congressmen who voted against a bill sponsored by Congressman Paul.[20] Congressman Paul testified that such limits adversely impact his "ability as a federal office holder and candidate for election to federal office to help raise money for organizations that promote [his] positions on policy issues." Paul Decl. ¶ 16, App. 75a. If Congressman Paul is so restricted, then he is obviously handicapped in his ability to legislate. Also harmed is Gun Owners of America, Inc., which has used congressional signers for solicitation letters in the past, intends to do so in the future, and uses the funds for "issue advocacy" which BCRA classifies as "federal election activity." Pratt Decl. ¶ 10, Rec. No. 60. *See also* Bossie Decl. ¶ 9, Rec. No. 60, as to the activities of Citizens United, and Babka Decl. ¶¶ 7-9, Rec. No. 60, as to the activities of RealCampaignReform.org.

These restrictions are not limited to uses of funds which affect only federal elections, but rather extend to "any election." Section 323(e)(1)(B), Jur. St. App. at 31a. If BCRA had been in effect in 2002, Michael Cloud, the Libertarian candidate for U.S. Senate from Massachusetts, could have been fined up to $50,000 for a knowing and wilful solicitation of contributions to the campaign committees of his Libertarian colleagues who were candidates for statewide office in Virginia, where unlimited individual contributions are lawful for state races. Virginia State Board of Elections, *Campaign Finance in Virginia* (rev. July 2003), 18.

In an opinion by Judge Henderson, the court below dismissed the claims of the Paul Plaintiffs on the ground that such restrictions on federal officeholders "do ... not exert 'editorial control' on anyone's press activities." Supp. App. at 460sa, n.175. This is not correct. Although Judge Henderson has conceded that "solicitation" of funds to support the dissemination of ideas is constitutionally protected (Supp. App. at 459sa), she has failed to recognize that a "cap" on such solicitation, however "moderate," impairs the editorial function that the freedom of the press confers upon federal office holders and candidates. *See* Miami Herald, 418 U.S. at 254-58. Furthermore, she ignored § 323(e)(1)'s limit on "spend[ing] funds," notwithstanding this Court's affirmation in New York Times v. Sullivan that such expenditures are crucial to the free press guarantee of "'the widest possible dissemination of information from diverse and antagonistic sources.'" New York Times, 376 U.S. at 266.

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[20] How these rules actually operate could not be more confusing. The statute clearly permits some solicitations to be made for I.R.C. § 501(c) organizations, subject only to the requirement that the "solicitation does not specify how the funds will or should be spent." Section 323(e)(4), Jur. St. App. 32a. However, the FEC implemented rules that allow solicitations that are "not to obtain funds for activities in connection with an election," which could be read to require that the solicited funds not be used for activities in connection with an election rather than the statutory requirement that the solicitation not make reference to such an intended use. 11 C.F.R. § 300.65(a)(2).

It is difficult even to understand the Congressional purpose of such a limitation. According to Judge Henderson, "a federal candidate's solicitation of large donations from wealthy individuals, corporations, and labor organizations — whether or not the funds are used 'for the purpose of influencing' a federal election — can raise an appearance of corruption of the candidate." Judge Henderson relied on the defense testimony of two corporate CEO's who resent being asked for contributions, two senators who resent asking, and a witness who testified that the public perceived candidate fundraising to be corrupt. Supp. App. at 456sa-57sa. If testimony such as this is the basis for § 323(e), it undermines the very purpose of the freedom of the press. The free press guarantee posits editorial control and accountability in the people, not in the government. *See* Miami Herald, 418 U.S. at 254-58. Just because the senators and businessmen would rather that the government make their editorial decisions for them does not mean that they can enlist Congress to deny that press right to others.[21] To the contrary, the freedom of the press was designed to ban such paternalistic legislation to ensure that the people remained the censors of the government, not the other way around. *See* Arg. II, *supra*, at 30-32.

Actually, § 323(e) operates to protect incumbents by placing a discriminatory economic burden upon their challengers. By denying to challengers the freedom to solicit, it will make it more difficult for interest groups, such as Gun Owners of America, Inc. and Citizens United, to raise funds necessary to attack incumbents for how they have voted, and will encumber greatly minor party federal candidates like Michael Cloud to pool their resources with candidates of that same party seeking election to state office.

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[21] Indeed, the exclusive focus of § 323(e) appears to have been incumbents, not their challengers, yet the prohibitions apply equally to both. Never discussed in the legislative history, the record below, or any of the court opinions was how the BCRA ban on fundraising by challengers — who have neither power to pressure potential donors nor valuable access to buy — could be justified. Senator McCain's justification that this provision prevents "Federal officeholders from using their offices or positions of power to solicit money" as being analogous to "federal laws and ethical rules" simply does not apply to challengers. Statement of Sen. McCain, 148 Cong. Rec. S2138 (Mar. 20, 2002).

B. New FECA § 323(f) Imposes Unconstitutional Editorial Controls.

New FECA § 323(f) (Jur. St. App. at 32a) precludes state and local officeholders, or candidates therefor, from spending any funds except FECA/BCRA-regulated "funds" for a "public communication that refers to a clearly identified candidate for Federal office ... and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." Jur. St. App. at 32a-33a. According to 11 C.F.R. § 100.26, a "public communication," means "a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising [but not] communications over the Internet."[22]

According to Judges Kollar-Kotelly and Leon, § 323(f)'s restrictions on state and local officeholders and candidates are permissible as limits on "the use of soft money ... for the purpose of directly influencing a federal election." Supp. App.

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[22] The legislative record is devoid of any debate on this provision, except for a brief reference in the section-by-section analysis of BCRA entered into the Congressional Record by Sen. Feingold, 148 Cong. Rec. S1992 (Mar. 18, 2002).

1146sa, 993sa. If § 323(f) had been in effect for the last election cycle, plaintiff Carla Howell, the 2002 Libertarian candidate for Governor of Massachusetts, would likely have been financially precluded from promoting plaintiff Michael Cloud, the 2002 Libertarian candidate for U.S. Senate from Massachusetts, in her campaign literature or her media advertisements, or cooperative mailings supporting their joint candidacies. Cloud Decl. ¶ 20, App. 90a-91a; Howell Decl. ¶ 7, App. 97a-98a; Paul Decl. ¶ 16, App. 75a. Further, Ms. Howell could not reasonably have afforded to air an endorsement of her candidacy by a member of Congress (who was a candidate for federal office) with a supportive reference to any such congressman, even one from another state, even though his constituents would never see the communication. Amazingly, in a Presidential election year, Ms. Howell, for example, could not, for lack of funding necessary to comply with § 323(f) attack a President running for reelection as a big spender of the type that she would not be if elected.

A more comprehensive effort by Congress to ensconce the FEC as editor-in-chief of American election campaigns is difficult to imagine. By placing upon state and local officeholders and state and local candidates the onerous FECA contribution limits and reporting burdens, Congress has imposed an unconstitutional penalty upon such officeholders and candidates in their exercise of editorial discretion. *See* Miami Herald, 418 U.S. at 254-58. This burden falls especially hard upon minor party candidates, such as Mr. Cloud and Ms. Howell, because the pooling of scarce resources is essential if minor party state, local, and federal candidates are to get their message to the electorate. *See* Cloud Decl. ¶ 20, App. 90a.

V. THE FECA/BCRA CONTRIBUTION LIMITS AND DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL.

A. The Paul Plaintiffs Have Standing to Challenge the Constitutionality of BCRA § 307.

The district court held that the Paul Plaintiffs lacked standing to challenge the constitutionality of BCRA § 307. Supp. App. at 8sa. Judge Henderson opined that "no person who challenges either set of provisions" in BCRA increasing the FECA contribution limits "has standing to do so" (*id.* at 472sa), and specifically, that the "Paul plaintiffs lack standing to challenge BCRA's failure to index certain contribution limits for inflation," because the Paul Plaintiffs' evidence constituted "mere allegations." *Id.* at 475sa. This ruling is erroneous.

First, it mistakenly assumes that the Paul Plaintiffs' complaint was limited to the failure of BCRA to raise and index the contribution limits for PACs. 2 U.S.C. § 441a(a)(1)(C), Jur. St. App. at 19a. The Paul Plaintiffs' constitutional attack upon BCRA § 307 also contained the claim that the administration of the BCRA-amended FECA individual contribution limits violates the freedom of the press rights of candidates Ron Paul, Michael Cloud, and Carla Howell. *See* Paul Plaintiffs' Amended Complaint ¶¶ 11(b), 13(a)-(b), 16(a)-(b), 41, 43, 44, 53, and 57, App. 1a-4a, 6a. *See also* Paul Plaintiffs' Initial Brief at 27-30, Rec. No. 65; Opposition Brief at 15, Rec. No. 74; and Reply Brief at 7-10.

Second, the court below disregarded the more than ample evidence proffered by the Paul Plaintiffs in support of their claims. Addressing first their challenge to the contribution limits with respect to political committees, there is concrete evidence of injury in fact in the record. Both CUPVF's Michael Boos and GOAPVF's Lawrence Pratt represented that their respective political committees were injured by virtue of the FECA/BCRA $5,000 per-election maximum contribution the committees were permitted to make to federal candidates and committees. 2 U.S.C. § 441a(a)(2)(A), Jur. St. App. at 19a. Pratt Decl. ¶¶ 18-19, App. 105a-06a, Boos Decl. ¶¶ 13-14, App. 107a-08a. Those unrebutted declarations were supported by testimony that their respective committees likely would receive more contributions if the contribution limit had been raised/indexed for inflation, or simply did not exist at all. *See* Pratt Decl. ¶¶ 12, 18, App. 105a; Pratt Dep. at 22-25; Boos Decl. ¶ 14; Boos Dep. at 32-33, Rec. No. 60. The plaintiff committees' FEC reports, demonstrating a history of maximum contributions under FECA in certain years, supported the testimony that higher contributions would have been made if allowed. Pratt Decl. ¶¶ 18-19, App. 105a-06a, and Exhibit A (Rec. No. 60); Boos Decl. ¶¶ 13-14, App. 107a-08a, and Exhibit B (Rec. No. 60). These ongoing, active multicandidate political committees clearly were impacted adversely by FECA, which limited contributions to such PACs per calendar year, as well as by such PACs per candidate, per election, to $5,000, and by BCRA, which failed to raise such contribution limits or to index such contributions for inflation. Such fact-based testimony is clearly sufficient to meet the "injury in fact" requirement for standing. *See* Lujan v. National Wildlife Federation, 504 U.S. 555, 561-62 (1992).

As for the impact of BCRA § 307 upon the Paul Plaintiff candidates and their committees, Congressman Paul and Mr. Cloud both testified that their press activities were impaired by the BCRA/FECA individual and PAC contribution limits. *See* Paul Plaintiffs' Proposed Findings of Fact ¶¶ 12-13, 19-20, 37-39, 41-42 and 48-49, App. 109a-110a, and 113a-120a; Paul Decl. ¶¶ 12-16, App. 72a-75a; Lizardo Decl. ¶¶ 3-5, App. 77a-78a; Anonymous Witness No. 1 Decl. ¶¶ 3-5, App. 79a-80a; Cloud Decl. ¶¶ 13-15, App. 87a-89a. Without question, such evidence that the individual contribution limits adversely impact on the quantity and quality of their campaign communication meets the Lujan standing test.

In sum, the Paul Plaintiffs submitted unrebutted testimony that establishes, concretely and with particularity, the invasion of a legally protected interest, which is actual (under FECA) and imminent (under BCRA), there being no doubt about either a causal connection between those injuries and the limitations imposed by the statutes complained of or the fact that future injury will be redressed by a favorable decision.

B. The BCRA/FECA Contribution Limits and Disclosure Requirements Unconstitutionally Abridge the Paul Plaintiffs' Rights under the Freedom of the Press.

Heretofore, limits upon individual contributions have been sustained upon the factual assumption that "contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." Buckley, 424 U.S. at 29. Thus, constitutional orthodoxy holds that limits on contributions, constituting only a "marginal restriction ... upon free communication," are constitutional and to be measured solely by the First Amendment guarantees of free speech and free association. Buckley, 424 at 20-22. The evidence adduced by the Paul Plaintiffs, however, shatters both the factual and legal assumptions in Buckley, particularly when contribution limits are measured by the freedom of the press.

Unrebutted testimony has established that Congressman Paul has labored through several campaigns hampered by limits on individuals who desire to contribute beyond the maximum, cutting into the quantity and quality of his efforts to reach the public to support his candidacy and his position on the issues. Paul Decl. ¶¶ 14-15, App. 73a-74a; Elam Decl. ¶ 5, Rec. No.

60. In like manner, plaintiffs Cloud and Howell have been hampered in their recent campaigns for federal office. Cloud Decl. ¶ 15, App. 89a; Howell Decl. ¶ 15, App. 101a. In each of his races, plaintiff Paul has faced opposition from the "institutional press" in the major markets of his congressional district (Paul Decl. ¶ 13, App. 72a-73a) and plaintiffs Cloud and Howell have been virtually ignored by the press. Cloud Decl. ¶¶ 25-28, App. 92a-94a; Howell Decl. ¶ 8, App. 98a. *See also* Willis Rep. ¶ 5, App. 46a-48a. Under FECA the Paul Plaintiffs have been, and continue to be, subject to the contribution limits imposed by 2 U.S.C. § 441a(a). Yet, the institutional press is exempted from the BCRA/FECA contribution limits for expenditures for news stories, commentaries, and editorials attacking candidates, or supporting the opposition. 2 U.S.C. § 431(9)(B)(i). *See* Bellotti, 435 U.S. at 781, n.17.

Such disparate treatment of the "institutional press" and the Paul, Cloud, and Howell candidacies has resulted directly from the press exemption enjoyed by the former, first established by FECA (2 U.S.C. § 431(9)(B)(i)), and extended by BCRA Title II (new FECA § 304(f)(3)(B)(i), Jur. St. App. at 39a). By imposing economic burdens upon the Paul Plaintiffs, but not upon the institutional media, BCRA/FECA violates the freedom of the press which commands equal treatment of all forms of communicative activity:

> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals.... The press in its historic connotation comprehends **every sort of publication which affords a vehicle of information and opinion."** [Branzburg v. Hayes, 408 U.S. 665, 704 (1972), quoting Lovell v. Griffin (emphasis added).]

Additionally, the enforcement mechanism employed by FECA/BCRA to assure compliance with individual contribution limits intrude upon the editorial function of candidates and their campaign committees, requiring disclosure of the identities of their major "publishers," *i.e.*, their individual contributors of more than $200. *See* 2 U.S.C. §§ 434(b)(3), 431(13). Over 50 percent of Americans believe that politicians want disclosure requirements so they can see who is giving money to their challengers. By a two-to-one margin, Americans believe that incumbents use agencies to harass the supporters of challengers. J. Miller, *Monopoly Politics* 104-05.[23] As noted in Part II above, the protective shield of anonymity provided by the First Amendment is not limited to freedom of association. Indeed, since Buckley, this Court has applied the anonymity principle where the claim of "privacy" was clearly attenuated, demonstrating that forced disclosure of the identities of publishers, editors, and disseminators is based upon the freedom of the press, not just free association. *See, e.g.*, McIntyre, 514 U.S. at 341-44; Watchtower, 536 U.S. at 166-68.

In Watchtower, this Court noted that Talley and McIntyre stand for the proposition that the principle of anonymity applies to "persons who **support** causes," as well as to persons who engage in the actual communicative activity promoting such causes. Watchtower, 536 U.S. at 166 (emphasis added). Indeed, those who contribute money to enable the writers and editors, the circulators and the speakers are their "publishers." All alike are equally protected by the freedom of the press from forced disclosure of their identities. *See* McIntyre, 514 U.S. at 360-67 (Thomas, J., concurring). To allow the government, in the name of "corruption and the appearance of corruption," to sacrifice this time-honored principle of anonymity is to disregard the central purpose of the freedom of the press, as articulated by Sir William Blackstone: "Every freeman has an undoubted right to lay **what sentiments he [not the government] pleases before the public**: to forbid this, is to **destroy** the freedom of the press." IV W. Blackstone's *Commentaries* 151-52 (emphasis added).

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[23] Moreover, incumbents have an advantage in fundraising because they are in a position to intimidate prospective donors once their identities are disclosed. They "often remind major contributors that even if they lose, they will be around long enough to help them or hurt them." J. Miller, *Monopoly Politics* 79-80. As a result, some groups have a blanket policy of never contributing to non-incumbents in primaries and some PACs feel compelled to give money to candidates who hold views in direct opposition to their founding principles. *Id.*

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed, Buckley v. Valeo should be either overturned or set aside, freedom of the press be established as the governing constitutional principle for evaluation of campaign finance legislation, and the challenged sections of BCRA/FECA should be stricken.

Respectfully submitted,

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

RICHARD WOLF
MOORE & LEE, LLP
1750 Tysons Boulevard
Suite 1450
McLean, VA 22102
(703) 506-2050

PERRY B. THOMPSON
629 High Knob Road
Front Royal, VA 22630
(540) 305-0012

GARY G. KREEP
U.S.JUSTICE FOUNDATION
Suite 1-C
2091 E. Valley Parkway
Escondido, CA 92027
(760) 741-8086

Attorneys for Appellants
**Counsel of Record*
July 8, 2003

APPENDIX

CONGRESSMAN RON PAUL, *ET AL.*, v. FEDERAL ELECTION COMMISSION, *ET AL.*, NO. 02-CV-781

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.org, Citizens United, Citizens United Political Victory Fund, Michael Cloud, and Carla Howell bring this action against the defendants for declaratory and injunctive relief, alleging as follows:

NATURE OF THIS ACTION

1. This is an action for declaratory and injunctive relief with respect to certain provisions of the Bipartisan Campaign Reform Act of 2002, P. L. No. 107-155, as it amends the Federal Election Campaign Act, 2 U.S.C. Sections 431, *et seq.* ("BCRA/FECA"), as well as certain related provisions of the FECA, and against their enforcement by the Defendants on the grounds that these integrally related provisions deprive the Plaintiffs of the Freedom of the Press in violation of the First Amendment of the Constitution of the United States.

* * *

Plaintiffs' Activities in the Marketplace of Ideas Related to Federal Election Campaigns

41. As a past, current, and future candidate for election to federal office, Plaintiff Ron Paul has been, is currently, and will continue to be, injured by the afore-stated system of prior restraints and discriminatory regulations contained in FECA including: (a) registration with, periodic

reports to, and disclosures of the names, addresses and occupations of certain contributors to, the FEC; and (b) compliance with the contribution limits imposed upon individuals and other entities, even as raised and indexed by BCRA, and with the congressional mandate concerning coordinated expenditures, as provided for in the BCRA. Such prior restraints and regulations currently impose, and will continue to impose, discriminatory economic burdens and penalties upon Plaintiff Paul's communicative activity expressly advocating his election to federal office and promoting the policy positions that he takes as such a candidate, thereby preventing Plaintiff Paul, by threat of injunctive, and other restraining action, and by threat of civil and criminal penalties, as enhanced by BCRA, from engaging in the quality and quantity of political communications that he would choose in his editorial discretion, but for the licensing power, editorial control and discriminatory economic burdens and penalties placed upon him by the BCRA/FECA. Additionally, as a United States citizen, voter in and donor to federal election campaigns, and as to electioneering communications in relation to such campaigns, Plaintiff Paul is being discriminated against by licensing requirements, editorial controls and economic burdens and penalties not imposed upon broadcasting facilities, newspapers, magazines and other periodical publications not owned or controlled by any political party, political committee or candidate, and which are not subject to the power of the FEC to threaten injunctive, and other restraining, action and civil and criminal penalties.

42. Plaintiffs Gun Owners, RealReform, and Citizens United will be injured by the afore-stated system of prior restraints and discriminatory regulations under the BCRA/FECA. * * * Specifically, as to "electioneering communications," Plaintiffs Gun Owners, RealReform, and Citizens United will be discriminated against by licensing requirements, editorial controls, and economic burdens not imposed upon broadcasting facilities, newspapers, magazines and other periodical publications not owned or controlled by any political party, political committee or candidate, and which are not subject to the power of the FEC to threaten injunctive, or other restraining, action and civil and criminal penalties.

43. Plaintiffs GOA-PVF and CUPVF have been, currently are, and will continue to be, injured by the afore-stated system of prior restraints and discriminatory regulations under the BCRA/FECA, including: (a) registration with, reporting to and disclosure of the names, addresses and occupations of certain contributors, to the FEC; and (b) compliance with contribution limits imposed upon political committees independent of a candidate and a political party, having been neither raised nor indexed by BCRA. Such prior restraints and regulations currently impose, and will continue to impose, discriminatory economic burdens and penalties upon Plaintiffs GOA-PVF's and CUPVF's communicative activity expressly advocating or opposing the election of candidates to federal office.... * * *

44. As past, present and likely future candidates for federal office, Plaintiffs Michael Cloud and Carla Howell have been, currently are, and will continue to be, injured by the afore-stated system of prior restraints and discriminatory regulations contained in FECA including: (a) registration with, periodic reports to, and disclosures of the names, addresses and occupations of certain contributors to, the FEC; and (b) compliance with the contribution limits imposed upon individuals and other entities, even as raised and indexed by BCRA, and with the congressional mandate concerning coordinated expenditures, as provided for in the BCRA. Such prior restraints and regulations currently impose, and will continue to impose, discriminatory economic burdens and penalties upon Plaintiffs Cloud's and Howell's communicative activity expressly advocating election of each to federal office

and promoting the policy positions that each takes as such a candidate.... * * *

45. As candidates for state office in the future, and as members of the Massachusetts Libertarian Party, Plaintiffs Howell and Cloud will be injured by the editorial control and discriminatory economic burdens and penalties placed by the BCRA/FECA upon: (a) making public communications that refer to a clearly identified candidate for federal office, including communications that do not expressly advocate a vote for or against a candidates; (b) engaging in voter registration activities conducted within 120 days of a federal election; and (c) engaging in voter identification, get-out-the-vote, and generic campaign activities conducted in connection with an election in which a candidate for federal office is on the ballot.

CLAIMS FOR RELIEF

COUNT I

(Unconstitutional Prior Restraint and Editorial Control)

* * *

47. The BCRA/FECA, by distinguishing between political communications related to a campaign for election to a federal office and such communications not related to such an election, including, but not limited to, such distinctions as "express advocacy" and "issue advocacy," "electioneering communications" and non-electioneering communications, "federal election activity," and other than federal election activity, and requiring persons and entities engaged in political communications related to a campaigns for election to a federal office, whether such communication expressly advocates the election or defeat of a candidate for election to a federal office, promotes or supports, or attacks or opposes, such a candidate, or merely refers to such candidate, to comply with certain

registration and forced disclosure requirements and financial restrictions limiting such activity, has placed upon Plaintiffs an unconstitutional system of prior restraint, including licensing regulations, editorial controls, and discriminatory economic burdens and penalties based upon the subject matter content of speech.

* * *

COUNT II

(Unconstitutional Discriminatory Licensing System)

* * *

50. By exempting broadcasting stations, newspapers, magazines, and other periodicals owned by persons or entities who are not political parties, political committees, or candidates for election to federal office from the licensing system, editorial control and economic regulations administered by the FEC with respect to political communications related to campaigns for election to federal office * * * BCRA/FECA has placed upon Plaintiffs unconstitutional prior restraints, editorial control, and economic burdens through discriminatory registration requirements, reporting regulations, and disclosure requirements not placed upon such broadcasting facilities, media entities and persons.

* * *

COUNT III

(Unconstitutional Editorial Control of Electioneering Communications)

* * *

53. By exempting broadcasting stations, newspapers, magazines and other periodicals owned by persons or entities who are not political parties, political committees, and candidates for election to federal office from the disclosure, reporting and contribution limitations governing "electioneering communications," BCRA/FECA has placed upon Plaintiffs unconstitutional editorial control through discriminatory reporting regulations, disclosure requirements, and economic burdens and penalties, not placed upon such exempt entities and persons.

* * *

COUNT IV
(Unconstitutional Discriminatory Burden upon Plaintiffs GOA-PVF and CUPVF)

* * *

56. By enacting BCRA, Congress has raised the individual contribution limitation to candidates and their authorized campaign committees, and to political parties, and provided for automatic raises of such limits indexed to inflation, but has not raised the individual contribution limit to independent political committees, nor indexed the current limit to inflation.

57. By * * * failing to raise such limits and to index such limits with respect to political committees functioning independently from candidates, their authorized campaign committees, or political parties, the BCRA/FECA imposes a discriminatory economic burden and penalty upon GOA-PVF and CUPVF, both of which engage in activities expressly advocating the election or defeat of candidates for election to federal office independently from such candidates and their committees and such political parties.

* * *

COUNT V
(Unconstitutional Discriminatory Editorial Control of Political Party Candidates)

* * *

60. By imposing new rules defining "coordinated" campaign expenditures, and, further, by targeting political parties and their candidates designed to limit the impact of "soft money" in the conduct of campaigns for election to federal office, BCRA/FECA has placed significant discriminatory editorial control and economic burdens and penalties upon such political parties and their candidates.

61. By imposing new rules upon "federal election activity" limiting state and local political parties, and upon candidates for state office, BCRA/FECA has placed significant editorial control and economic burdens and penalties upon such parties and their candidates.

* * *

WHEREFORE, Plaintiffs respectfully pray that a three-judge court be convened and that said three-judge court hear this action, and upon such hearing:

1. Declare that the provisions of the BCRA and FECA, as challenged, violate the Plaintiffs' rights under the Freedom of the Press guarantee of the United States Constitution.

2. Permanently enjoin and restrain Defendants, their agents, and assistants from enforcing, executing, and otherwise applying the challenged provisions against

defendants and others in any and all respects in which the same may be found to violate the Freedom of the Press guarantee of the United States Constitution;

3. Award Plaintiffs costs and reasonable attorney's fees against Defendants; and

4. Grant and order such further relief as the Court may deem just and proper.

REPORT OF JAMES C. MILLER III[*]

Introduction

My name is James C. Miller III, and I am Chairman of CapAnalysis, an economic, financial, and regulatory consulting firm associated with the law firm Howrey Simon Arnold & White, with offices in Washington, DC, California (various locations), Houston, Chicago, London, and Brussels. I hold a Ph.D. in Economics from the University of Virginia (1969), a B.B.A. in Economics from the University of Georgia (1964), and am the author or co-author of over 100 articles in professional journals and nine books, the most recent of which is *Monopoly Politics*, published in 1999 by the Hoover Institution Press at Stanford University. (A copy of this book appears as Attachment A.) Before joining CapAnalysis, I held various academic and research posts and served in government, most recently as Director of the U.S. Office of Management and Budget and Member of President Reagan's Cabinet (1985-1988). Before that, I served as Chairman of the U.S. Federal Trade Commission (1981-1985), an agency which has a responsibility to enhance competition -- a matter of particular relevance here. In 1994 [*2] and again in 1996, I ran (unsuccessfully) for the U.S. Senate from Virginia. In 1998, I served as Treasurer of my wife's (Demaris H. Miller's) unsuccessful campaign for the U.S. House of Representatives to represent the 8th District of Virginia, and then again in 2000, I was involved in my wife's (unsuccessful) campaign for that same office.

A copy of my curriculum vitae appears as Attachment B. In the past four years, I have testified (in court) in only one case as an expert witness: Maritrans v. United States, #96-483C, U.S. Court of Federal Claims.

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[*] Pagination of this report as submitted to the District Court appears in brackets with an asterisk, *e.g.*, [*#].

Summary of Analysis and Conclusions

In this report, I address, first, the applicability of economic principles to the political marketplace. As I outline in *Monopoly Politics*, campaigns are a manifestation of the market for political representation. Just as in commercial markets, where sellers compete for consumers, in political markets, candidates compete for voters. The propensity of commercial enterprises to limit the ability of new entrants has its counterpart in political markets, where incumbents have a propensity to limit the ability of challengers to mount successful campaigns.

Second, I describe the benefits of incumbency – and the obverse, the obstacles faced by challengers. I describe not only the *natural* advantages such as having invested in advertising and other messages to become well known, but also, and more importantly, the *contrived* advantages of incumbency (and the obstacles imposed on challengers). These include the taxpayer-financed advantages of subsidized communications for incumbents (TV and radio studios, franked mail, *et cetera*) and the ways the office is abused to increase the chances of reelection, but, more importantly, the ways campaign rules are "rigged" to benefit incumbents and penalize challengers.

Third, I describe in more detail the steps a candidate has to undertake just to run for Federal office. I show that complying with current Federal election laws and the [*3] rules promulgated by the Federal Election Commission (FEC) impose a differentially heavy burden on challengers. I also show that the new Bipartisan Campaign Reform Act (BCRA) of 2002 further increases the advantage enjoyed by incumbents and heightens the discrimination faced by challengers. Finally, I show that the requirements are so burdensome that, in effect, they amount to a candidate's having to secure a "license" from the government in order to compete for political representation. Such requirements not only increase costs, especially for challengers, but limit candidates' and their supporters' freedom to control how they run their own campaigns.

Fourth, I describe how political markets would perform without the anti-competitive constraints presently incorporated in Federal campaign laws and regulations. I conclude that with their removal the market for political representation would be much more competitive and that voters would be better served, just as consumers are better served by competition in commercial markets.

I. Campaigns and the Market for Political Representation

Although most Americans spend little time considering the government's impact on their daily lives, the importance of decisions made in political markets rivals that of decisions made in the commercial sector. A quick look at the size of the Federal and state governments clearly indicates the magnitude of political decision-making. For fiscal year 2001, Federal expenditures topped $1,936 billion, while the 50 states spent nearly $1,293 billion. Combined, these two levels of government accounted for 32 percent of the nation's GDP ($10,082 billion).

Just how governments go about deciding what to spend and how to finance those expenditures has been the subject of intensive study.[1] One key outcome of the [*4] research is a recognition that elected officials respond to incentives just as producers and sellers in commercial markets. Elected officials compete for voters in elections, just as producers and sellers compete for consumers in the commercial marketplace. Accordingly, the type of analysis economists have applied routinely to assess the efficiency and effectiveness of commercial markets can also be used to assess efficiency and effectiveness of political markets. That this is possible becomes clearer when we recognize that in most relevant ways commercial and political markets are very much alike.

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[1] Much of this research comes out of the sub-discipline of economics and political science known as "public choice." For his contributions to the development of public choice, James M. Buchanan of George Mason University received the Nobel Prize for Economic Science in 1986.

In commercial markets, providers compete for consumers' dollars. In political markets, candidates compete for citizens' votes. In commercial markets, the ability of providers to step up to the plate, make offerings to the public, and *communicate* what they have to offer is of vital importance in assuring consumers of the most value for their money. In broad terms, markets are said to be efficient (and effective in serving consumers' wants) when competition is vigorous and sellers have ample opportunities to communicate their offerings.

In a similar manner, political candidates compete for the attention of citizens, soliciting their votes at the ballot box. Just as with commercial markets, political markets are efficient (and effective in responding to citizens' preferences) when candidates are able to step up to the plate, make offerings to the public, and *communicate* what they have to offer to prospective voters.[2]

There are differences between commercial markets and political markets, but they are not particularly material for the

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[2] For more on the similarities and differences between commercial markets and political markets, see *Monopoly Politics*, Chapters Two through Four.

analysis at hand. In the latter, the voters choose a single person to represent their interests. But choosing a representative in a political [*5] market is very much like choosing a retailer in a commercial market.[3] The retailer serves as the consumer's "agent" in picking a line of products or services from which to choose. Consumers typically do not survey all the goods or services offered for sale, but instead rely on stores such as Wal-Mart, Winn-Dixie, and their local insurance broker to search through the available product and service offerings and carry a select few. This makes the consumer's effort to find a good buy much simpler, but in doing so he or she puts a certain amount of trust in the judgment of the retailer chosen. If, however, the consumer finds over time that the retailer selects poor product or service lines, he or she will pick a better "agent."

In political markets, voters choose an agent to represent them in collective decision-making. Rather than survey all of the political issues facing Congress, inquire into the pros and cons of each, form an opinion, and then take part in a massive referendum on each and every one, voters choose representatives whose job it is to review all of these issues and make informed judgments. Just as in commercial markets, if citizens find that their agent does not serve them well, they will chose someone else -- that is, unless obstacles prevent or otherwise impede their ability to select the best person.

Political markets have equivalents to franchises in commercial markets. They are interest groups and, especially, political parties. In commercial markets consumers normally frequent those establishments that have earned their trust as agents. They gravitate towards these places because they have learned that a particular establishment consistently gives good advice, offers low prices, has outstanding service, or any number of other factors of importance. The reputation earned by [*6] establishments from meeting customers' expectations consistently can be leveraged through franchising. A consumer traveling far from home knows that the McDonald's on the road will serve the same menu, with the same quality, to which they are accustomed. This reliance on a firm's reputation to deliver value is the principal reason for franchises.

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[3] The following discussion replicates points made in Donald Wittman, "Why Democracies Produce Efficient Results," *Journal of Political Economy*, 1989, pp. 1395-424.

In political markets the equivalent to a commercial franchise is a political party, or to a lesser extent interest groups. Individuals faced with limited time and resources may choose to rely upon the label, Democrat or Republican. Or perhaps the citizen may take note of the opinions offered by the many interest groups such as the National Rifle Association, Greenpeace, labor unions, or the countless other organizations that take positions on political philosophy and/or policy issues. These groups do more than just inform voters: they also pressure the candidates to remain true to the principles they espouse. If a candidate (or elected official) diverges too far, the group may withdraw its support, just as Burger King might pull its franchise from stores that fail to perform.[4]

Incentives to innovate exist in both markets. Business firms spend considerable resources to develop new products and services -- to gain advantage over their competitors. In a similar manner, candidates (and their parties) put a great deal of effort and expense into making them more appealing to voters and gaining an advantage over their opponents. This can take the form of researching an issue, developing a unique solution, and communicating it to prospective voters. It can

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[4] Political parties withdraw their support of candidates – especially incumbents – very rarely.

also take the form of polling in an effort to probe and assess the opinions and wishes of the public. For both politicians and businesses, the most important development is irrelevant if nobody knows about it. The popular saying, "Build a better mousetrap and [*7] the world will beat a path to your door," is not quite accurate, as the world needs to be informed and sold on the new idea.

Would-be agents in both commercial and political markets solicit our support. In commercial markets, it is called advertising; in political markets, it is called campaigning. With respect to purpose there is really no difference between the two. In commercial markets producers promote their prices, qualities, and services, and sometimes even point out the inferior features of their competitors' offerings, while in political markets, candidates promote their agendas, their character, their histories on the issues, and on occasion suggest flaws in their opponents' character or the positions they take. In both cases the purpose is to inform about attributes that are expected to be decisive to the intended recipient.

As mentioned earlier, for commercial markets to be efficient and effective, they must be competitive. That is, providers must be free to make offerings and "compete" for business. That simple notion is what underlies the antirust laws and their enforcement. The reason is that, as Adam Smith observed over two centuries ago,

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.[5]

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[5] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (New York: Modern Library, 1937), p. 128.

Just as the ability to collude and exclude rivals in commercial markets leads to higher profits, higher prices, lower quality, and less innovation, collusive/exclusionary behavior in political markets makes life better for elected officials to the detriment of voters. Elected officials who are able to exclude, or even disadvantage, rivals have more power and influence, can more easily ignore their constituents, and can enjoy an easier lifestyle, facing less pressure to innovate, campaign, and engage in fundraising. [*8] The effects on citizens and voters, however, are like the effects of monopoly on consumers. The range of options is limited, the overall quality of service is diminished, accountability suffers, officials more frequently respond to vested interests rather than the electorate at large, deliberations are less transparent, and citizens have less information about the candidates, their qualifications, and their positions. In the same way that a monopolistic commercial market is inefficient and ineffective in serving consumers, a monopolistic political market is inefficient and ineffective in serving the interests of citizens.

The methods elected officials use to advantage themselves and to erect obstacles to challengers is covered in the next section. But it is important to focus on the fact that political agents have the same incentives to restrict competition as do business enterprises. Their legal liability, however, is far different. To limit anticompetitive practices in commercial markets, there are Federal and state antitrust laws, enforced by two Federal agencies, the Department of Justice and the Federal Trade Commission, numerous state Attorneys General, and the private antitrust bar. There is no corollary in political markets. Elected officials face no sanctions for anticompetitive activity. To be sure, there are Federal election laws, and the FEC, among other things, is responsible for monitoring campaign contributions and how they are spent. But as we shall see, these laws and the FEC impose far greater harm by protecting incumbents and disadvantaging challengers, than

any good they do in assuring the integrity of the electoral process.

II. Benefits Enjoyed by Incumbents and Obstacles Faced by Challengers

For competition in political markets to be vigorous there must be a reasonably level playing field -- one free of artificial advantages for one or more candidates versus others. This is not to suggest a need for rules to restrict natural advantages. Indeed, in [*9] an ideal system the natural advantages of the candidates would shine through, whether these are a more popular platform, superior organizational or communication skills, or even name recognition from previous accomplishments.[6] What does need to be restricted, and what hampers the efficiency and effectiveness of political markets, are contrived advantages for certain candidates. Without exception, contrived advantages are on the side of, and are orchestrated by, incumbents.

Aside from legitimate, natural advantages, there are two types of contrived advantages associated with incumbency. The first type is associated with abuse of the office for political gain – increasing the probability of reelection. The second is more pernicious – rigging the campaign rules to advantage incumbents and to place obstacles in the path of challengers. The first is explained in this section; the second is explained in the section that follows.

Members of Congress provide themselves with a full range of free services that are not available to their more cash-starved challengers. Members of Congress have free mail privileges (referred to as the frank),[7] telephone and Internet access,[8] and well-designed web pages.[9] Some people may be surprised at the magnitude of these free services. For example, in a recent election cycle, of the 20 largest spenders on the frank, 11 Members spent more on this privilege than their challengers spent on their [*10] entire campaigns.[10] And benefits such as frank do help. Albert Cover and Bruce Brumberg found that a control group receiving franked mail had a higher opinion of the incumbent than those who did not.[11] Members of Congress also derive a significant advantage through casework out of their district or state home offices. The increasing flow of indecipherable and ambiguous new laws (and ensuing regulations) increase the demand for casework services – which, of course, only incumbents can provide. Evidence of this can be found in the growth of House and Senate staff assigned to Members' district and state offices. From 1980 to 1997, the number of House staffers assigned to offices in the districts increased from 2,534 to 3,209, and for

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[6] The analogy in commercial markets should be evident: more desirable location and establishments, superior product/service line, more effective advertising, and better reputation.

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[7] There are modest restrictions on use of the frank. See *Monopoly Politics*, pp. 77-78.

[8] There are also modest restrictions on the use of these instruments for political purposes. See *Monopoly Politics*, p. 76.

[9] When governments join the "digital revolution," elected officials typically commandeer for themselves the up-front cost (web pages, e-mail, *et cetera*). See Cindy Crandall and Jeff Eisenach, *The Digital State*, 1998 (Washington: Progress & Freedom Foundation, 1998).

[10] National Taxpayers Union and Federal Election Commission. The point made about the incumbent's spending on franked mail versus challengers' campaign spending was noted in Steve Symms, "Campaign Finance Reform Gainers," *Washington Times*, August 13, 1997, p. A14.

[11] Albert D. Cover and Bruce s. Brumberg, "Baby Books and Ballots: The Impact of Congressional Mail on Constituent Opinion," *American Political Science Review*, 1982, pp. 347-59.

the Senate offices in the states, the number increased from 953 to 1,366. (The *proportion* of local-office staff vs. total staff increased as well: from 34 percent to 44 percent for the House and from 25 percent to 31 percent for the Senate.[12]) Academic research shows how beneficial constituent services are in garnering support and creating a positive image of the incumbent.[13] And [*11] it is apparent that this has not gone unnoticed by the incumbents themselves. For example, Morris Fiorina found that incumbents respond to close elections by increasing allocations to casework.[14]

Some might argue there is nothing wrong with such a response by the incumbent. They might suggest that the incumbent is only seeking to connect more closely with the voters, and that such a response is a sign of competition. To some extent this is true. Members of Congress have legitimate reasons to communicate with constituents and to help them on occasion. There are two problems, however. First, the evidence is stark that the system is abused for political gain. Second, this activity is funded by taxpayers, a source not available to challengers. In any event, the widespread abuse of these free services constitutes a contrived advantage that makes the playing field less even, the political market less competitive, and citizens less well served.

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[12] Norman S. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress, 1997-1998* (Washington, D.C.: Congressional Quarterly, 1998).

[13] Yiannakis found that constituent service is especially effective in attracting supporters of the incumbent's challenger. See Diana Evans Yiannakis, "The Grateful Electorate: Casework and Congressional Elections," *American Journal of Political Science*, 1981, pp. 568-80.

Serra and Cover found that constituent service creates a positive evaluation of the incumbent and has the most impact on constituents where only a small portion of them identify with the incumbent's party. See George Serra and Albert D. Cover, "The Electoral Consequences of Perquisite Use: The Casework Case," *Legislative Studies Quarterly*, 1992, pp. 233-46.

Serra and Moon found that voters respond to constituent service and implied that constituent service might be able to offset policy differences between the incumbent and his or her constituents. See George Serra and David Moon, "Casework, Issue Position, and Voting in Congressional Elections: A District Analysis," *Journal of Politics*, 1994, pp. 200-13.

[14] Morris Fiorina, "Some Problems in Studying the Effects of Resource Allocation on Congressional Elections," *American Journal of Political Science*, 1981, pp. 543-67.

Incumbents also have at their disposal the ability to send district- or state-specific spending back to their constituents. This practice, more commonly known as "pork spending," can play a large role in protecting incumbents from challenge. This is particularly true for more senior incumbents, who because of their tenure are more effective at bringing money back to their districts or states. Rational voters recognizing that the flow of pork is an increasing function of tenure will be more apt to return their Congressman for another term.[15] Research has found that incumbents are effective in taking advantage of these contrived advantages. Robert Stein and Kenneth Bickers found that vulnerable incumbents aggressively pursue pork spending,[16] and separately [*12] that the success of incumbents in bringing back agency grants influences a potential challenger's decision to run.[17] According to the organization Citizens Against Government Waste, this

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[15] Gerald W. Scully, "Congressional Tenure: Myth and Reality," *Public Policy*, 1995, pp. 203-19.

[16] Robert M. Stein and Kenneth N. Bickers, "Congressional Elections and the Pork Barrel," *Journal of Politics*, 1994, pp. 377-99.

[17] Kenneth N. Bickers and Robert M. Stein, "The Electoral Dynamics of the Federal Pork Barrel," *American Journal of Political Science*, 1996, pp. 1300-26.

tool, like so many others, has been growing over recent years, doubling from $6.6 billion to more then $13 billion over the five-year period 1993 to 1998.

As mentioned in the previous section, voters have an incentive to reelect more senior Members due to their effectiveness in delivering pork spending. This incentive also extends to the committee system, whereby Members jockey to obtain key positions on various committees that have oversight roles in important areas. Getting assigned to a powerful committee can enable an incumbent to gain additional contributions or support from voters who want to keep their representative in a position of power. For example, Bennett and Loucks found that being appointed to the House Banking Committee increases a Member's contributions from finance political action committees (PACs).[18] Additionally, Mark Crain and John Sullivan found that for Members belonging to the majority party, incumbents assigned to committees having significant control over industries under their jurisdiction significantly increased their vote margins between the 1988 and 1990 elections.[19] These empirical results, and the others like them,[20] are not [*13] surprising, given the tremendous

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[18] Randall W. Bennett and Christine Loucks, "Savings and Loan and Finance Industry PAC Contributions to Incumbent Members of the House Banking Committee," *Public Choice*, 1994, pp. 83-104.

[19] Mark W. Crain and John T. Sullivan, "Committee Characteristics and Re-election Margins: An Empirical Investigation of the U.S. House," *Public Choice*, 1997, pp. 271-85.

[20] For example, Loucks found an increase in PAC contributions from appointment to the Senate Banking Committee. Christine Loucks, "Finance Industry PAC Contributions to U.S. Senators, 1983-88," *Public Choice*, 1996, pp. 219-29.

Kroszner and Stratmann found that committee members get more money from PACs with an interest in their jurisdictions, and the contributions rise power exercised by those committees and by the members who serve on them.[21]

Another contrived advantage is the ability of incumbents to pressure donors for campaign contributions when there is little evidence of challenge, and to carry over these resources from election to election, continually growing their reserves in order to ward off any potential challenge. Janet Box-Steffensmeier found war chests particularly effective in deterring high-quality challengers.[22] This is not surprising, given that challengers must recognize the enormous resources stacked up against them. This benefit no doubt helps to explain why, for instance, after the 1996 election cycle incumbents' average cash on hand was over $175,000, and those

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with seniority. Randall S. Kroszner and Thomas Stratmann, "Interest Group Competition and the Organization of Congress: Theory and Evidence from Financial Services Political Action Committees," *American Economic Review*, 1998, pp. 1163-87.

Anagnoson found that during election years federal agencies speed up their approval of grants to the constituents of representatives who are on committees with authority over them. Theodore Anagnoson, "Federal Grant Agencies and Congressional Election Campaigns," *American Journal of Political Science*, 1982, pp. 547-61.

[21] Roberts found that the death of Senator Scoop Jackson (then a member of the Senate Armed Services Committee) depressed the prices of stocks of companies in Jackson's state and raised the prices of stocks in the home state of his successor. Brian E. Roberts, "A Dead Senator Tells No Lies: Seniority and the Distribution of Federal Benefits," *American Journal of Political Science*, 1990, pp. 31-58.

[22] Janet Box-Steffensmeir, "A Dynamic Analysis of the Role of War Chests in Campaign Strategy," *American Journal of Political Science*, 1996, pp. 352-71.

incumbents who won with more then 60 percent of the vote had cash on hand averaging more than $230,000.[23]

III. The Role of Federal Election Laws and FEC Rules in Limiting Competition

Of even greater importance and effect are the *contrived* advantages for incumbents created by the Federal campaign laws and regulations. It is important to bear in mind the asymmetry between commercial markets and political markets with respect to monopolization. In commercial markets, there is no organized forum for the [*14] exchange of information and discussion of ways to limit competition. Indeed, if there were such a forum, not to mention if the forum succeeded in orchestrating actions to limit competition, the participants would be liable for criminal prosecution under the Federal antitrust laws. On the other hand, in political markets, incumbents have the means as well as the incentive to limit competition. *They make the laws.* They not only have a legal forum in which to discuss ways of limiting competition, their actions to carry out policies to limit competition do not create for them legal liability of any sort. Although usually debated in high-sounding, public interest rhetoric, these laws (and subsequent enabling regulations) are understood to have great impact in limiting the ability of challengers to mount serious campaigns.[24]

A. Ways Federal campaign laws limit competition

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[23] Financial activities of house candidates, 1996, FEC (www.fedc.gov/1996/dates).

[24] It is really not necessary to prove motive here. It is the effect of the laws in limiting competition, whatever their official or secret rationale.

The ways Federal and state election and campaign-finance laws limit competition are varied. Only some of the major ones are addressed here.[25]

Perhaps recognizing the threat from third-party challengers, ballot access laws have been structured to reduce competition. Theodore Lowi concluded that state bans on "fusion tickets" (the nomination of the same candidate by more then one political party) have a simple objective -- to eliminate competition.[26] In a similar vein, Hamilton and Ladd found that ballot structure affects turnout (particularly for lesser-known candidates), party-line voting, and election results in partisan districts.[27]

[*15] Additionally, some states allow incumbents to have significant control in the primary process. For examples: in Virginia incumbents can demand a primary if they had been nominated that way the previous election cycle; Louisiana's open seat primary system, which favors incumbents, only saw one incumbent defeated in 22 years; and Connecticut requires a candidate for a party's nomination to receive at least 15 percent of the votes at the nominating convention to qualify for the primary. Also, incumbents work with their state legislatures and governors to formulate redistricting plans in such a way as to protect, and possibly improve, their chances for reelection. David Gopoian and Darrell West found that incumbents were more likely to gain, rather than lose, from

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[25] For a more thorough examination, see *Monopoly Politics*, esp. Chapter Five.

[26] Theodore J. Lowi, "A Ticket to Democracy," *New York Times*, December 28, 1996, p. A27.

[27] James T. Hamilton and Helen F. Ladd, "Biased Ballots?: The Impact of Ballot Structure on North Carolina Elections in 1992," *Public Choice*, 1996, pp. 259-80.

redistricting because legislatures tended to give incumbents of both parties a greater proportion of their party's voters.[28] Not surprisingly, additional research has found that if there is a bias in the redistricting process it tends to favor the state's dominant party.[29]

Passage of FECA in 1974 dramatically changed the landscape in which campaigns are funded and undertaken. The act created a tax-return check-off for funding presidential campaigns, placed limits on spending by presidential candidates who accept matching funds, and limited the amounts individuals could contribute to presidential and congressional campaigns. (The act also limited spending on congressional campaigns, but the U.S. Supreme Court later held this provision unconstitutional.[30])

[*16] In researching the academic literature in the process of writing of *Monopoly Politics*, I found overwhelming agreement among scholars that the major effect of the act has been to help incumbents further fend off challengers. (Although I have not followed the literature as intensely since 1999, I am aware of no further research that is of a contrary nature.) I also found evidence that the principal motivation for the act was self-interest. Peter Aranson and Melvin Hinich

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[28] David J. Gopoian and Darrell M. West, "Trading Security for Seats: Strategic Considerations in the Redistricting Process," *Journal of Politics*, 1984, pp. 1080-96.

[29] Gary King, "Representation through Legislature Redistricting: A Stochastic Model," *American Journal of Political Science*, 1989, pp. 787-824; Janet Campagna and Bernard Grofman, "Party Control and Partisan Bias in the 1980s Congressional Redistricting," *Journal of Politics*, 1990, pp. 1242-57; and Bruce E. Cain, "Assessing the Partisan Effects of Redistricting," *American Political Science Review*, 1985, pp. 320-33.

[30] See *Buckley v. Valeo*, 424 U.S. 1 (1976).

showed that the limits on contributions disproportionally constrain challengers more than incumbents and thereby benefit incumbents.[31] Abrams and Settle found that the Democrats' support of the 1974 bill was based on self-interest -- that in the absence of limits Gerald Ford would have won the 1976 presidential election.[32] As another example, Bender found that even in the bill-forming stage, when various spending limits were considered, Members' votes were highly correlated with forecasts of the effects such limits would have had on their chances for reelection.[33] And in *Buckley,* the Supreme Court, recognized that,

> Since an incumbent is subject to these limitations to the same degree as his opponent, the Act, on its face, appears to be evenhanded. The appearance of fairness, however, may not reflect political reality. Although some incumbents are defeated in every congressional election, it is axiomatic that an incumbent usually begins the race with significant advantages.[34]

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[31] Peter H. Aranson and Melvin J. Hinich, "Some Aspects of the Political Economy of Election Campaign Contribution Laws," *Public Choice,* 1979, pp. 435-61.

[32] Burton A. Abrams and Russell F. Settle, "The Economic Theory of Regulation and Public Financing of Presidential Elections," *Journal of Political Economy,* 1978, pp. 245-57.

[33] Bender, "An Analysis of Congressional Voting on Legislation Limiting Congressional Expenditures," *Journal of Political Economy,* 1968, pp. 1005-21.

[34] As quoted in Aranson and Hinich, "Some Aspects," p. 451.

To see how the 1974 act and subsequent restraints on contributions help incumbents, recall that a common theme in these reforms is that it makes raising money more difficult and spending it less effective. Research has shown that [*17] constraining both incumbent and challenger fundraising/spending harms challengers much more than incumbents. A slew of research has shown that the marginal gain in votes per dollar of spending is substantially greater for challengers.[35] That is, a dollar spent by a challenger will increase his or her vote (or vote margin) by more than a dollar spent by an incumbent will increase his or her vote (or vote margin). The principal reason is that challengers (and their platforms) are typically not as well known as the incumbents they are challenging. Also, since they typically spend far less on their campaigns than do incumbents, their expenditures are especially productive in getting name recognition and in communicating information about themselves and their platforms. On the other hand, incumbents usually have extensive name recognition already, and their positions on issues are fairly well know. In addition, they will have taken advantage of free press coverage and the many other perks of office discussed above. As Jeff Milyo observed:

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[35] See, for example, Aranson and Hinich, "Some Aspects"; Bruce Bender, "An Analysis of Congressional Voting," pp. 1005-21; Amihai Glazer, "On the Incentives to Establish and Play Political Rent-Seeking Games," *Public Choice*, 1993, pp. 139-48; Gary C. Jacobson, "Money and Votes Re-considered: Congressional Elections, 1972-1982," *Public Choice*, 1985, pp. 7-62, and "The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments," *American Journal of Political Science*, 1990, pp. 334-62; Christopher Kenny and Michael McBurnett, "A dynamic Model of the Effect of Campaign Spending on Congressional Vote Choice," *American Journal of Political Science*, 1992, pp. 923-37; John R. Lott, "Does Additional Campaign Spending Really Hurt Incumbents?: The Theoretical Importance of Past Investments in Political Brand Name," *Public Choice*, 1991, pp. 87-92; John L. Mikesell, "A Note on Senatorial Mass Mailing Expenditures and the Quest for Reelection," Public Choice, 1987, pp. 257-65; Dennis C. Mueller, *Public Choice II* (New York: Cambridge University Press, 1989), pp. 209-12; K. Filip Palda and Kristian S. Palda, "Ceilings on Campaign Spending: Hypothesis and Partial Test with Canadian Data," *Public Choice*, 1985, pp. 313-31; and Thomas J. Scott, "Do Incumbent Campaign Expenditures Matter?," *Journal of Politics*, 1989, pp. 965-76.

> The evidence...strongly suggests that marginal spending by incumbents has little impact on their electoral success. Even shocks to spending of $100,000 or more produce no discernible impact on incumbent vote shares.[36]

[*18] In sum, an incumbent knows that additional spending on his or her own campaign will be of marginal value in increasing votes (or vote margin), but that spending by an opponent will have a dramatic, threatening effect. Money for challengers is therefore absolutely essential if a race is to be competitive, and if the interest of citizens are to be served.. Challengers tend to be relatively unknown, and without significant resources it is nearly impossible for them to have any chance at success. Thus, it is in the interest of the incumbent to limit fundraising overall and to encumber the effectiveness of spending.

One indication of the effectiveness of limits on a challenger's ability to accumulate the resources necessary to wage a competitive campaign can be found in discussions around various proposals to reform the campaign finance laws. Consider the proposal in one of the early versions of the McCain-Feingold/Shays-Meehan bill to limit spending in House races to $600,000 per election cycle. According to Bradley Smith (now a Member of the FEC), in 1996, every incumbent who spent less then $500,000 won versus a meager

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[36] Jeff Milyo, "The Electoral Effects of Campaign Spending in House Elections," Citizens' Research Foundation, University of Southern California, June 1998, p. 27.

3 percent of challengers who spent that little. Yet challengers who spent between $500 thousand and $1 million won 40 percent of the time, and of the six who spent more then $1 million, five of them won. With respect to the proposal's variable limits for Senate races (from $1.50 million to $8.25 million per election cycle), in 1994 and 1996 every challenger who met the limit lost and every incumbent won.[37] It is not surprising, then, that incumbents do not like their odds against well-funded challengers and seek to limit their ability to raise such resources and to spend them effectively.

[*19] The act also advantages incumbents in another way not so generally recognized. By placing restrictions on the ability of *candidates* to communicate what they have to offer, the act increases the role and influence of the media, which are expressly exempted from FECA and BCRA with respect to news stories, commentaries, and editorials. Incumbents have a considerable advantage here: they have taxpayer-paid press spokesmen; they *make* news, and thus have more access to the media; and they have access to "inside information," which they communicate to, and curry favor with, the press. The reporting requirements also accentuate the role of the media in campaigns (and diminish the role of the candidates): in effect, this information is a subsidy to the media – giving it stories that it otherwise would not have been able to secure so easily.[38]

B. Bipartisan Campaign Reform Act of 2002

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[37] Bradley A. Smith, "Why Campaign Finance Reform Never Works," *Wall Street Journal*, March 19, 1997, p. A19.

[38] Under the act, a newspaper, for example, may make news-story, commentary, and editorial (in-kind) contributions to a candidate *unless* the newspaper is owned by the candidate. However, a supporter of the candidate may purchase a newspaper and run news stories, commentaries, and editorials on behalf of the candidate without restraint.

Earlier this year, Congress had an opportunity to address some of the anticompetitive features of FECA. On the whole, however, it made matters worse.

Title I of BCRA makes it more difficult for political parties to engage in educational activities that mention the names of candidates. While it has the laudable goal of limiting the influence of "special interest money," it also limits the ability of parties to support challengers. Again, anything that makes it more difficult for candidates to get out their messages reduces the competitiveness of the political marketplace.[39]

Section 213 of BCRA says that a political party may engage in independent expenditures on behalf of a candidate *or* contribute to the candidate's campaign – but [*20] not both. This change further limits the ability of challengers, especially, to acquire the requisite funds to mount a serious campaign.

Section 304 of the BCRA says, in effect, that contribution limits are warranted, but when a challenger appears on the horizon who is prepared to augment his or her campaign treasury out of his or her own pocket, the contribution limits are revised upward – but only for the opposing candidate(s). Furthermore, the candidate willing to provide full, or even partial, funding for his or her campaign must say so in advance, thus tipping off the competition to the campaign strategy. While technically the provisions contained in Section 304 would benefit a challenger facing a self-financing incumbent, the real import of the provision is to limit the ability of challengers to mount successful campaigns, since over the past years self-financing appears one of the few ways

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[39] Section 103 of Title I waives the relevant restraints when the money is to be used to construct buildings to house the political parties.

challengers have been successful in creating competitive races.[40]

Section 305 of the BCRA requires candidates advertising over the electronic (radio, TV) and print media to reserve a portion of the message for a complete identification of the candidate on whose behalf the advertisement is placed. Although the amount of time/space required may not seem all that intrusive, the restraint constitutes a significant diminution in the effectiveness of ads, given that they are usually quite short in duration or space. Also, there is the further encumbrance that the requirement makes the ads somewhat off-putting and therefore even less effective. Again, anything that makes the expenditure of funds (such as on advertisements) less effective gives further advantage to the incumbent.

Sections 312 and 314 of the BCRA impose more severe criminal penalties for violations of Federal election laws and require the U.S. Sentencing Commission to [*21] establish sentencing guidelines for such violations. While not taking issue with the notion of requiring compliance with *bona fide* law, it is notable that such increased penalties, combined with the lack of familiarity with the act's various provisions faced by most challengers, makes it even less likely that a challenger would venture to enter a political contest.[41]

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[40] See, for example, Larry J. Sabato and Glenn R. Simpson, "Money Talks, Voters Listen," *Wall Street Journal*, December 28, 1994, p. A12.

[41] Given the incredible complexity of the campaign laws, challengers justifiably would be fearful of even innocent mistakes. Consider, for example, the final regulations and associated explanation and justification the FEC promulgated in February 9, 1995 regulating all expenditures by principal campaign committees designed to prohibit personal use. These regulations run 14 pages, in the Federal Register, are far from clear, and convey the notion that it is really impossible to write a clear rule, and

In a most blatant "everyone is equal, but incumbents are more equal than others" provision, Section 403 of the Act gives incumbents, but not challengers, the right to intervene personally before the court in any challenge to the constitutionality of any and all provisions of the Act. So, if the constitutionality of a particular provision whose effect is to advantage incumbents and to place obstacles in the way of challengers is questioned, the incumbent will be heard, but the challenger will not.[42]

The only provision of the BCRA that would seem to address the overwhelming advantage enjoyed by incumbents and the obstacles faced by challengers is Section 307, which increases the individual contribution limit from $1,000 per election cycle to $2,000, increases the individual aggregate (Federal-election) limit from $20,000 to $25,000, and indexes both limits for inflation. Two things are notable about these changes, however. First, the uneven treatment given to other limits is curious: the PAC contribution limit is neither changed nor indexed, and the contribution limits for state [*22] parties are raised, but are not indexed for inflation. Second, the doubling of the individual contribution limit places it in *real* terms below the limit the Supreme Court found constitutional in *Buckley*; an adjustment for inflation alone (not to mention the higher cost and greater scope of most Federal campaigns

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therefore violations must be left to the judgment of the FEC. Given that penalties under BCRA for knowing or willful violations involving making, receiving, and reporting contributions or expenditures can run as high as $25,000 and imprisonment of up to five years, novice would-be challengers might opt never to run for office.

[42] Because of my experience in government, I am aware of the deference the courts afford Congress. But the instances with which I am aware go to broad policy issues. In this instances, the law is brazen its uneven treatment of those competing for the privilege of representing us: one set of rules for incumbents, another (less desirable) set for challengers.

today) would raise the limit to over $3,000.[43] The 25 percent increase in the aggregate limit doesn't even begin to adjust for inflation.

Thus, by further limiting the ability of contributors to fund campaigns, which in turn makes it more difficult for candidates to acquire requisite resources, BCRA comes down even harder on challengers and further increases the monopoly power found in the market for (Federal) political representation.

C. Federal election/campaign laws are equivalent to requiring a license

Dealing with the various Federal election and campaign laws and regulations has become so burdensome that in a real sense a citizen must obtain a *license* from the Federal government in order to run for public office. Consider that *before* a citizen may campaign for Federal office he or she must file certain forms, in certain ways, with the FEC and agree to abide by its rules and regulations.[44]

The candidate must have his or her campaign file an initial FEC report (directly with the FEC, in the case of a run for the House of Representatives, and with the Secretary of the Senate in the case of a run for the Senate) and send a copy to the relevant state agency. The candidate must set up a formal campaign committee, recruit a treasurer, and have that person make the filing and all subsequent reports to [*23] the FEC.[45] (The candidate files only FEC Form 2: Statement of Candidacy.) When I served as treasurer of my spouse's campaign for Congress in 1998, I received, after the initial filing, the following from the FEC: (a) a pamphlet on committee treasurers, (b) a copy of the FEC's latest newsletter, *The Record*, (c) a copy of FEC Disclosure Form 3: Report of Receipts and Disbursements for an Authorized Committee, together with instructions, (d) a list of state offices where copies of all reports must be filed, (e) a reprint of an article describing how to file disclosure reports electronically, (f) a copy of the reporting schedule for the year, (g) a notice about the FEC's fax line, (h) an announcement of upcoming FEC conferences (with no indication whether they are optional or compulsory), (i) a compendium of Federal election campaign laws, and (j) a copy of the latest issue of the *Code of Federal Regulations* dealing with Federal elections. The number of pages totaled 618, and the package weighed 1 pound, 12.5 ounces. And that's not the end. Whether responding to often-indecipherable questions from the FEC's staff about filings or guessing about appropriate (vs. inappropriate) language to use in answering their questions or questions on the various FEC forms, the candidate is reminded constantly that in order to run for office he or she has to secure *and maintain* a license from the Federal government.[46]

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[43] See *Monopoly Politics*, p. 116.

[44] Various matters trigger the requirement to file as a candidate, such as raising or spending over $5,000.

To see what maintaining this license is all about, consider that a mistake on a report, no matter how immaterial, can result in frustrating and time-consuming dealings with the FEC. As an example, consider the letter of inquiry I received following a midyear report submitted more than one full year

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[45] Moreover, according to the FEC, the treasurer has unlimited personal liability – surely an impediment, especially for challengers.

[46] See *Monopoly Politics*, pp. 96-100.

after I had lost a primary election for the U.S. Senate. In part it reads:

> [*24] Your report discloses a … loan from the candidate on Line 13(a) of the Detailed Summary Page. It appears that this loan was used to finance expenditures made directly by the candidate (pertinent portion attached). Please note that expenses advanced by the candidate or other committee staff members constitute debts rather than loans; and should be reported in the following manner: the advance should be itemized as a contribution on Schedule A and listed as a memo entry. If, however, the advance was paid in the same reporting period in which it was made, the filing of a Schedule A is not required. When the repayment is made, the transaction should be itemized on a Schedule B supporting Line 17. If the ultimate payee (vendor) requires itemization, it should be listed on Schedule B as a memo entry directly below the entry itemizing the repayment of the advance. Continuous reporting (on Schedule D) of all outstanding debts is required. Please amend your report, if necessary.

What is not clear from the letter is that the problem stemmed from a transcription error in my report to the FEC, indicating that a major deposit to the campaign account had been made the day *after* the campaign had written a major check to a vendor.

The learning curve and costs involved in dealing with such reporting requirements are substantial and amount to maintaining a license to run for Federal office.[47]

IV. Political Markets in the Absence of Federal Laws and Rules Limiting Competition

Those who have been most adamant about the need for *stricter* regulation of Federal election campaigns no doubt will respond to the criticisms leveled above by suggesting that the alternative -- the elimination of anticompetitive restraints -- would be far worse. That is not the case. As outlined briefly below, a regime where current anticompetitive restrictions were removed would be far more competitive, and elected officials would respond much more efficiently and effectively to citizens' preferences.

An important caveat: the regime posited does not contemplate the removal of any laws and implementing regulations affecting who is allowed to contribute, fraud, and other criminal acts. That is a whole separate issue. What *is* posited is the repeal of [*25] anticompetitive laws and the elimination of anticompetitive regulations. Under this regime, corporations and unions would still not be allowed to contribute directly, voter fraud would still be a crime, and so would buying votes, bribing elected officials, *et cetera*. Although there are variations on what might be characterized as a regime free (or relatively free) of anticompetitive restraints, the following discussion assumes the repeal of virtually all of FECA and BCRA. It also assumes the disestablishment of the FEC and the withdrawal of all its rules.[48]

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[47] It is worth noting that this license requirement gives incumbents another special advantage, for it says, in effect, that a challenger must give ample, and formal, notice to an incumbent that "I want your job."

How would political markets perform under such a regime? Much more efficiently and effectively than at present – and relatively free of the unsavory practices critics are likely to wave as the inevitable consequence of any freeing up of current legal and regulatory requirements.

First, three "macro" issues. It will be said that with no limits on contributions, total expenditures on Federal campaigns would be exorbitant. Judged by spending on the commercial-market analogue -- advertising -- this is very unlikely. In *Monopoly Politics*, I conservatively estimate that spending (of all types) on Federal campaigns per dollar of "sales" is only half of what is spent on advertising (per dollar of sales) in the commercial sector.[49] Lifting the lid on contributions would not likely result in more than a *doubling* of campaign spending. In any event, the greatest increase in expenditures would be on the part of challengers, and this would make the political market more efficient and more effective.

In addition, it will be argued that without limits on contributions some groups in society would have "undue influence" on elected officials. The question is one of [*26] degree. Undoubtedly, some contributors have "undue influence" now. Would the practice be more widespread in the regime posited? Interests could contribute more, but to some extent their contributions would cancel out, as others, with opposite interests, competed for favors. On the other hand,

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[48] These changes, of course, would not remove all forms of contrived advantages. See *Monopoly Politics*, esp. Chapter Six.

[49] See *Monopoly Politics*, pp. 117-8.

"interests" and others would have alternatives to "purchasing" influence with elected officials – supporting challengers. As we shall see below, this makes all the difference.

It will also be argued that a lack of limits on contributions would lead to general corruption in political contests. Yet the evidence on this issue suggests otherwise. The States of Virginia and Texas have no limits on contributions by individuals in statewide elections, and there appears to be no more corruption in these political markets than in states having strict limits on contributions.

Without limits on contributions and limits on the productivity of expenditures (such as the form and content of messages), political markets would be much, much more competitive. Challengers would find it much easier to accumulate the resources necessary to mount effective campaigns. (For one thing, in the absence of disclosure, a contributor wanting to support a challenger would not have to worry that the incumbent might find out and seek retribution.) In contrast, to a considerable extent, it really does not matter how much money incumbents acquire, for, as discussed above, the marginal product of incumbent spending (in terms of votes or vote share) tends to be inconsequential, whereas it tends to be quite positive for challengers. The old adage in politics, "It doesn't matter how much money your opponent raises; what matters is whether you can raise enough to be competitive," is operative here.

The absence of a requirement for candidates to obtain a Federal "license" before running for office (committee, treasurer, initial filing, periodic filings, responding to inquiries, *et cetera*) and the removal of threat of prosecution because of violations of [*27] laws with which few are familiar, would make it possible for more citizens to run for Federal office. Also, with more resources with which to make a run, candidates would be better able to communicate their agendas and their qualifications.

In a more competitive political market, elected officials would be more accountable. Without the assurance of so many contrived advantages in election contests, incumbents would no longer have so much "freedom" to ignore the wishes of citizens. They would have less room to maneuver and would be less responsive to "interest groups."

For those who believe transparency with respect to contributions is highly desirable, there would be a "market test" of that proposition. As did Governor George W. Bush when he ran for president, those seeking office might voluntarily publish their contributors (and amounts) on the Internet. This could be a ready source of differentiation between candidates and an important selling point. A candidate might publish on the Internet contributions not now required to be reported to the FEC. Candidates might also make other strategic decisions, such as refuse to accept funds from business, or labor, or other "interest" groups, if they thought such tactics would increase their chances for election.

The point is, a regime in which anticompetitive campaign laws and regulations were eliminated would not degenerate into "the law of the jungle." To the contrary, political markets would be more orderly, and far more responsive to the interests of the electorate.

REPORT OF PERRY WILLIS

1. My name is Perry Willis. I have spent the past 20 years working almost full time in direct professional involvement with state, local, and federal campaigns, and with state, local, and national Libertarian Party organizations. Because of my extensive practical experience with the real world effects of the federal campaign finance regulations, I have been asked to provide a report concerning those effects on challengers, and on Libertarian Party candidates in particular, both under the FECA and the BCRA. Actual experience with the real practical effects of campaign regulations has taught me a host of consequences of these laws that the scholarly studies in this area that I have read do not cover fully. I have agreed to provide this report and the cross-examine at no fee, only reimbursement for expenses. Below is a brief list of my professional experience followed by a summary of specific work activities as they relate to federal campaign regulation.

a. In 1980, I worked as a volunteer in San Diego, California for the Ronald Reagan for President campaign. When President Reagan failed to push proposals and veto legislation in keeping with his campaign promises, I became active in the Libertarian Party ("LP").

b. I managed Everett Hale's Libertarian for Congress campaign in 1982, and was involved with every aspect of a federal campaign at that level, from fundraising and campaign strategy and execution, to compliance with federal regulations.

c. In 1983, I served as Chair and Executive Director of the Libertarian Party of San Diego and was heavily involved in recruiting candidates for federal office.

d. In 1984, I served as Ballot Access Coordinator and Finance Director for David Bergland's Libertarian campaign for President, gaining extensive experience both with the difficulties of ballot access for minor parties in the United States, and the uneven effects of federal campaign finance regulation on minor party presidential campaigns.

e. During the first part of 1985, I served as Finance Director for the Libertarian Party of California.

f. For the latter half of 1985, through 1986, and into 1987, I served as the National Director of the Libertarian Party's Libertarian National Committee (LNC). As such, I was responsible for national party's overall strategy, including candidate recruitment and training, as well as fundraising, donor recruitment, and the staff work involved in complying with the federal campaign finance laws as they apply to national party committees.

g. In late 1987, I worked briefly for Congressman Ron Paul's Libertarian campaign for President.

h. In 1988, I worked as a consultant for Congressman Sam Steiger's Libertarian campaign for Governor of Arizona, and for an educational choice initiative in California.

i. In 1989 and 1990, I worked as a fundraising consultant for the Libertarian National Committee, and once again had to confront the difficulties minor parties face as a consequence of the federal campaign finance laws.

j. During the latter part of 1991 and the first part of 1992, I served as Chief of Staff (campaign manager) for Andre Marrou's Libertarian campaign for president. I was responsible for every aspect of the campaign's strategy and execution, including ballot access, media relations, candidate scheduling and travel, relations with state and local party organizations and candidates, volunteer coordination, fundraising via direct mail, telephone solicitation, campaign events, and personal meetings with donors, as well as FEC compliance.

k. For the remainder of 1992 and part of 1993, I served as the Chair of the Libertarian Party of Arizona and was once again involved with candidate recruitment and training for races at all level, including federal.

l. From late 1993 until late 1997, I served again as the National Director of the Libertarian National Committee, and was again responsible for the same broad range of activities as during my first period of duty as the Libertarian Party's top professional manager. During this time I was responsible for an unprecedented growth in national LP membership and revenue and oversaw the creation of the national LP's first software for filing automated FEC reports. Prior to this time all of the national LP's FEC reports had been prepared by hand.

m. After the LP's presidential nomination in 1996, Harry Browne's presidential campaign was run from my office with my close coordination as LNC National Director. As with the Marrou campaign in 1991/92, I was involved with every aspect of a national presidential campaign.

n. During 1997 and 1998, I served as a fundraising contractor for the LNC, and from late 1997 through the 2000 election I was also the campaign manager for Harry Browne's second Libertarian campaign for President. As with the Marrou campaign in 1991/92, I was again responsible for every aspect of the campaign's strategy and execution, including ballot access, media relations, candidate scheduling and travel, relations with state and local party organizations and candidates, volunteer coordination, fundraising via direct mail, telephone solicitation, campaign events, and personal meetings with donors, as well as FEC compliance.

o. At various times, in between paying political jobs, I have also served brief stretches as a member of the LNC.

2. The above work has given me extensive familiarity with campaign management and campaign fundraising, as well as party management and fundraising, including knowledge of donor motivations, campaign and party accounting, and database management, as well as campaign finance regulation and compliance at the local, state, and federal levels. I have designed multitudes of fundraising packages, including direct mail letters, major donor presentations, email appeals, online contribution pages, and all of the "lift pieces," inserts, and response forms that are normally associated with such packages. I also have extensive experience with the design of campaign and party databases and the forms and procedures required to comply with campaign finance regulations. I have overseen the development of both party and campaign finance reporting software, and served as a treasurer or assistant treasurer of federal campaigns. I have raised money by direct mail, over the phone, at events, and by personal meetings with

hundreds of donors. I have experienced first hand the effects that campaign finance laws have on the behavior of volunteers and donors, as well as professional campaign and party staff. My long and varied work experience has given me an understanding of the profound effect campaign finance regulations have on the operations of campaigns and party committees, as well as on the outcome of elections.

3. My political activity is motivated by my desire to effectively express my political values, and to seek representation for those values in the halls of government. I have been unable to accomplish this aim in significant part due to the limitations on political expression and association imposed by the federal campaign finance laws. As detailed herein, these laws serve the interests of incumbent politicians, as well as their allies in the established corporate news media. These laws restrict, trample, violate, and dramatically diminish my ability to speak, print, and broadcast my political preferences, and to freely associate with like-minded people for the same purpose.

4. With the exception of 1980, I have never voted for a candidate who has won political office (Ronald Reagan and other Republicans I voted for won in that year). Throughout all that time, I have considered myself to be virtually unrepresented in government. I am not alone in this regard.

Nearly all elected representatives are either self-professed liberals or conservatives, but not all Americans are liberals or conservatives. Indeed, numerous polls and surveys have demonstrated that there may be as many philosophical libertarians as there are philosophical liberals or conservatives in America.

For more than 20 years, the Libertarian Party has conducted surveys at fairs, trade shows, and flea markets across America. Depending on when and where these surveys were conducted, they have shown that somewhere between 12% and 33% of the populace hold views that can only be described as libertarian. Other surveys by polling organizations such as Gallup and Rasmussen Research have also shown a high degree of libertarian belief in the country. A Gallup poll in January 1996 found that 20% of Americans held libertarian beliefs, while 13% were liberal, 35% conservative, and 20% populist.[50] Other Gallup polls at other times have found libertarian beliefs in 19% and 22% of the populace. An extensive survey by Rasmussen Research, called Portrait of America, conducted on August 23, 2000, found the following breakdown in political beliefs among Americans: 32.1% centrist, 17.2% with views bordering on other categories, 16.3% libertarian, 12.8% liberal, and 7.2% conservative.[51] All of these surveys show a significant libertarian presence in society, and a wider range of belief systems among Americans than are represented in government. In particular, liberals and conservatives, in the form of Democrats and Republicans, seem to be significantly over-represented in government compared with Libertarians. In contrast, there is only one person in Congress who consistently espouses libertarian beliefs (Congressman Ron Paul), no Libertarian Party members in federal office at all, and precious few LP members in state and local office. This disparity, between the broad range of beliefs held by the public and the narrow range of beliefs held by elected office holders, is a strong indication that the distribution of political representation in America is artificially created, rather than the natural outcome of market forces.

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[50] http://www.lp.org/lpn/9606-Gallup.html

[51] http://www.lp.org/lpnews/0010/16percent.html

Some of this artificial distribution can be attributed to the United States' "winner-takes-all" voting system in conjunction with ballot access restrictions on new parties, and district gerrymandering that disenfranchises libertarian voters; however, none of these factors can explain other survey findings indicating that nearly all of America's philosophical libertarians are completely unaware of the Libertarian Party alternative to the Democrats and Republicans. I believe, and will more fully explain below, that the public's ignorance of the Libertarian Party alternative is largely due to the federal campaign finance laws and their counterparts at the state and local levels.

5. The absence of representation for philosophical libertarians in government is matched by a similar absence of libertarian ideas expressed by media businesses. The full range of widely-held political beliefs in America is not expressed by the established corporate news media. Instead, libertarians must endure the media's relentless parroting of the views of the politicians and parties already in power, as well as their promotion of Democratic and Republican office holders and party leaders, to the virtual exclusion of Libertarians and other minor parties and views.

The established corporate news media have rarely given any airing to libertarian ideas or candidates, and have never done so to a sufficient extent to have them properly evaluated by the American public. This has been true even when Libertarian Party candidates have been newsworthy in terms of the criteria the corporate news media apply to liberals and conservatives, Democrats and Republicans. I can provide at least two specific examples.

In 1992, my Libertarian Party candidate for president, Andre Marrou, defeated all of his Democratic and Republican rivals in the Dixville Notch voting that kicks off the New Hampshire primary Election Day. This victory was the lead news item all across the nation the following morning, but when voters called into TV networks wanting to learn more about Andre Marrou and the Libertarian Party they were repeatedly told that it would be a waste of time to do any additional reporting about Marrou and the LP. The networks argued that the Dixville Notch vote was clearly a fluke. NBC even said this on the air in response to one voter who called in, asking for more coverage of Marrou. Our campaign staff pointed out to the networks that Dixville Notch, because of its small population, had represented a rare opportunity for Libertarians to have their views heard by voters to the same extent as the Democrats and Republicans. Therefore, the Dixville Notch result was indicative of how other voters might respond to LP candidates if the media were to inform the public of who the Libertarians are and what they believe. The established corporate news media rejected this reasonable argument out-of-hand and provided no additional coverage at all.

A second example occurred in 2000. Pat Buchanan was running for president on the Reform Party ticket. He was a national figure who had previously enjoyed great success in Republican primaries. He accepted federal funding. He received extensive coverage from the established corporate news media, while his LP challenger in that year, Harry Browne, received almost none. But despite all of Buchanan's advantages, Buchanan and Browne were virtually tied in the polls throughout the 2000 campaign.[52] Our campaign argued to the media that Browne's equal showing, given his inferior public recognition, funding, and media coverage, would seem to indicate that Browne would find more favor with voters than Buchanan if Browne were to be provided with coverage equal to Buchanan's. This sensible argument was made in vain. The news media continued to give attention to the once and future Republican, Pat Buchanan, and to ignore Browne.

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[52] http://www.lp.org/press/archive.php?function=view&record=144

These examples are a strong indication that both election results and media coverage are largely artificial, and do not represent the true values, desires, and preferences of millions of American voters. This, too, is a consequence of the federal campaign finance laws, as I will discuss below.

6. If the established corporate news media will not cover libertarian ideas and Libertarian Party candidates, then Libertarians must undertake the burden of making themselves visible entirely through their own efforts. Unfortunately, the law does not permit us to communicate with the public in the same way that the established corporate news media can.

The established corporate news media retain an unrestricted right to raise unlimited amounts of money through a variety of means that are not legally available to political campaigns. The established corporate news media can also spend unlimited amounts giving free publicity to the political causes they favor, attacking those they oppose, and ignoring those they disdain. And they can do (and actually do) all of these things without any legal requirement to report to the government the source of every $200 they take in, or the recipients of their expenditures on expressions of political ideas and preferences. My preferred political ideas, candidates, parties, and campaigns do not enjoy equivalent rights of capital accumulation and expenditure, and are therefore unable to compete for the public's consideration or approval.

Libertarian campaigns are legally prohibited from operating as a press in the same way that the established corporate news media can, and therefore, cannot make up for the coverage the established corporate news media preferentially confer on our political opponents.

7. Throughout my years of effort, I have tried to live with, and to surmount, the legal obstacles imposed by the federal campaign finance laws. These laws burden my freedom of expression and association as I struggle to compete with media businesses that are exempt from corresponding sets of limits on their freedoms of expression and association.

It is important to understand that campaigns compete with media businesses to gain access to, and influence with, the American public. In particular, the first aim of the campaigns on which I have worked has always been to serve as a press, in every sense of that word, for the purpose of educating the public about libertarian ideas. But the established corporate news media have almost always communicated ideas that were mostly contrary to those my campaigns were trying to express. The competition between Libertarian campaigns and the established corporate news media is real and direct.

The second aim of the campaigns on which I have worked has been to win votes for my candidates. But the established corporate news media, both through acts of omission and commission, have always worked against my candidates. By omitting coverage of Libertarian candidates, the media have sent a message to the public that Libertarians are unworthy of consideration, and by giving extensive coverage to Democrats and Republicans, and by endorsing Democratic and Republican candidates, the media have been able to use their press to do what my press cannot do in the same way because of their broad exemption from campaign finance laws. Again, the competition between Libertarian campaigns and the established corporate news media is real and direct.

Campaigns and media businesses operate in a similar way. Both specialize in communicating with the public. Campaigns and media businesses also have similar capital requirements. Both must begin with sufficient venture capital to rent office space, buy equipment and supplies, pay staff salaries, and communicate with a broad audience, until such time as enough customers/contributors can be found to generate sufficient revenue to operate the business/campaign profitably. But campaigns and media businesses cannot accumulate capital in the same way.

Media businesses can borrow money to meet their capital needs, but campaigns are prohibited by the federal campaign finance regulations from borrowing money, except from banks, and even then only in narrowly constrained ways that make it difficult for minor party campaigns to take advantage of this source of capital. Minor party federal campaigns almost always lack sufficient assets to acquire secured bank loans.

Media businesses can also seek large investments from individuals, but campaigns are legally limited to relatively small contributions of $1,000 per election (and even the higher $2,000 limits under BCRA are totally insignificant compared with the amounts media businesses are legally allowed to raise).

All of these legal inequalities deprive the public of information that campaigns would otherwise provide, in opposition to the competing information provided by the established corporate news media. This distorts the political process.

8. It is a simple fact that the public cannot consider new political ideas, or the candidates who express them, unless they first become aware of them. This is a fundamental and inescapable truth. But, for ideas and candidates to become known, they must first compete for the time and attention of the public against all the other ideas and candidates clamoring to be heard. It must be understood that I am not talking about equality of outcome in this competition. I am talking about equality of opportunity, and more specifically still, of equality before the law. There can be no equality between campaigns and media businesses when the political expressions of campaigns are heavily regulated while the political expressions of media businesses are almost entirely exempt. The mere opportunity to become known by voters, quite apart from becoming accepted by them, is entirely a function of money. Money, and the various ways money can be accumulated, cannot be separated from speaking, printing, and broadcasting.

So how can we partisan Libertarians give our political preferences an equal opportunity to be heard? Should we be required to have some of our philosophical allies purchase a national television network, a national radio network, a national newspaper chain, and a weekly national news magazine, simply to be able to match the same level of expression that the established corporate news media already enjoy without legal impediment, or that our political opponents already achieve through their close relationship with the established corporate news media? But what if our philosophical allies are not willing or competent to capitalize and operate such media outlets? Is our freedom to speak, print and broadcast the way we want thereby foreclosed? The answer is yes under the current laws, because the comparative competence that partisan Libertarians do have, which is to use campaigns as a press to speak, print, and broadcast expressions of our political preferences, is legally limited by contribution limits and reporting requirements.

Does this then mean that our freedom to speak, print, and broadcast our political beliefs should be limited to nonprofit educational efforts relating only to public policy issues, because such expressions are largely free from the contribution limits and reporting requirements that so severely restrict political campaigns? Certainly our desire to express ourselves is not limited to those kinds of purposes. We also desire to express our preferences for and against candidates and parties in the same way that media businesses can.

I know that there are people with whom we would want to associate in ways that might counteract the similar expressions of our political opponents, and of the established corporate news media. But the ability of our campaigns to associate with others for the purpose of expressing political preferences in competition with media businesses cannot be achieved under the campaign finance laws.

9. The legal inequalities challengers face in their competition with media businesses are matched by similar legal inequalities between challengers and incumbents. These inequalities are many and varied, including the franking privilege, easier ballot access for major party candidates, and gerrymandered districts that protect incumbents. These legal advantages are bad enough, but they are compounded greatly by the advantages conferred upon incumbents by the campaign finance laws. The most obvious such advantage is the incumbent's greater access to sources of funds, as well as the more numerous methods of fundraising that are available to incumbents in comparison with challengers. Major parties also benefit because their Presidential nominating conventions are federally subsidized and candidates for President receive federal funds on a different basis than minor party candidates.

Challengers and minor party candidates rarely benefit from the special interest contribution bundling that funds incumbent candidates. Likewise, political action committees (PACs), which tend to organize around specialized interests, only rarely fund challengers against incumbents. The reasons for these disparities are simple and obvious. Challengers do not have the same power to help or harm special interests that incumbents have. And Libertarians are especially disadvantaged in that we are philosophically opposed to the expansive and activist state that is the source of special interest government favors. Libertarians have both a moral and constitutional objection to using government power to help or harm any commercial or other special interest, and cannot therefore promise policies that would be attractive to most special interest donors.

In my appeals to major donors for campaign contributions I have often been rejected because the donor was already contributing to incumbents who could help or harm the donor's interests. I have also applied for support from PACs, and been rejected because my candidate was not an incumbent. And no donor or organization has ever been willing to bundle contributions for my candidates. The only effective way to overcome these disparities in funding sources and fundraising methods between challengers and incumbents would be for the challengers to solicit larger contributions from the funding sources they do have, but the legal contribution limits make this impossible.

It is important to notice the parallels. The campaign finance laws not only disadvantage Libertarians and other challengers vis-à-vis the established corporate news media, but vis-à-vis incumbents as well. Worse still, these kinds of disadvantages not only apply to donors who are not seeking to gain special favors from government, they seem to particularly disadvantage those who contribute for purely philosophical reasons. I will discuss this problem in my next point.

10. During two decades of personal experience fundraising for campaigns, including innumerable discussions

with potential donors, I have learned that most potential contributors, and major donors in particular, share similar concerns about the potential results of their contributions. These concerns are expressed in the form of the questions most donors ask of campaigns: "Can you win?" "Will your message be heard?" "Will your message be remembered?" "What will be the lasting impact of my contribution?" Contribution limits and reporting requirements make it almost impossible for third party candidates and other challengers to give potential donors fully satisfying answers to these questions.

Our political system is "winner-takes-all." This reality leads most would-be donors to base their giving decisions on whether candidates can climb from zero support to a plurality or a majority. In addition, even challengers who are only seeking to educate the public, rather than unseat the incumbent, must still demonstrate to donors that their message can effectively compete not only with the incumbent's communications, but also those of the established corporate news media. It does little good to spend money on a message that will be drowned out by other communications, and/or forgotten for lack of sufficient repetition. By way of contrast:

a. An incumbent candidate must only demonstrate to a prospective donor that he or she can retain his or her previous plurality or majority. This is no hurdle at all. It is normally assumed that incumbents can retain the support that got them elected the first time. Re-election rates confirm this supposition.

b. Media businesses that express political ideas can accumulate resources merely by demonstrating the ability to earn a marginal profit on all of their expressions, both political and non-political. They are not burdened by the need to gain a plurality or majority market-share for their political expressions. A small market-share for political expressions can still be profitable, and/or other forms of communication such as sports and entertainment can even subsidize the media business's political expressions.

The same considerations do not hold true for challengers. Challengers have a much greater burden to demonstrate to potential donors that they can match both the communications of the incumbent, and the media. This usually means that the challenger will actually need more resources than the incumbent.

Worse still, the challenger is also going to have higher fundraising costs than the incumbent. Most challengers have to build donor lists from scratch, an expensive undertaking. It costs less for the incumbent to receive income from bundling and PACs, and to solicit repeat contributions from previous donors, than it does for a challenger to build his or her initial donor base. These considerations tend to hold true even when a challenger is running again after a first or second unsuccessful campaign. Prior electoral losses tend to instill skepticism in previous donors and increase the cost of earning new contributions from them. This also tends to hold true for candidates who are only running for educational purposes. Previous failures to saturate a market breed doubt that a second or third effort will do any better. Overcoming this doubt increases fundraising costs vis-à-vis what incumbents and the media pay to fund their communications.

11. It is very important to understand that contribution limits increase the marginal cost of each donation the challenger raises, more so than for incumbents who have broad and pre-existing sources of revenue. Contribution limits increase marginal fundraising costs by reducing the net effect of every appeal made to a donor who would have contributed

more than the legal limit, if not for the law. As an additional negative result, the increased costs created by contribution limits also increase the risk that the challenger's effort to compete with the communications of the incumbent and the media will fail. If a challenger does not raise the entire amount needed to be competitive, then the effective value of earlier contributions is largely negated. Potential donors tend to recognize this risk and reduce their contributions accordingly – often to zero. By contrast, donations larger than the limit, if the challenger could receive them, would lower the marginal cost of fundraising, shorten the time required to raise the needed amount, and thereby reduce the risk that the effort to gain communications parity would fail. This decreased cost and risk would cause potential donors to increase both their rate of giving and the size of their donations.

How can these difficulties be overcome? I know of only one way: the challenger needs to be able to raise larger amounts from his or her most stalwart supporters. This is impossible because it is illegal under the campaign contribution limits of both FECA and BCRA. The other potential option, of raising more contributions in smaller amounts, is subject to diminishing returns. The acquisition costs for each new contributor tend to rise higher and higher as the donor recruitment effort reaches more people who have fewer areas of agreement with the challenger. The sum spent on donor acquisition over time grows as a percentage of all funds raised. Worse still, earlier donors begin to object to the challenger spending their money simply to raise more money. This growing discontent on the part of earlier donors reduces fundraising efficiency still further by decreasing the number and size of additional gifts from previous donors. Valuable time is also lost as the effort to obtain sufficient small contributions progresses. While the incumbent and the media are busy communicating their messages to the public the challenger is spending time finding new donors.

12. None of the above factors has any appreciable impact on incumbents. Most significantly, the elimination of contribution limits would do little to increase meaningfully incumbents' communications with the electorate. Most of them are already able to saturate their districts with campaign communications. The marginal increases in funding that could come to incumbents with the end of contribution limits would have almost no effect on their ability to communicate with voters.

Former Clinton advisor Dick Morris demonstrated the truth of this in an article published on March 21, 2001 in *The Hill* (a weekly political newspaper). The article was titled, "You Don't Need Soft Money." In this article Morris pointed out that incumbents already spend more than enough to reach every voter as many times as necessary, and that raising more and spending more would not add anything significant to their campaigns. FEC Commissioner Bradley A. Smith has made a similar analysis in Chapter 4 of his book "Unfree Speech." Smith, like Morris, argues that increased funding would help challengers be more competitive, but would confer no additional advantage on incumbents. This is one of the dirty little secrets of campaign finance regulation that those who support such regulations never mention. Contribution limits hurt challengers and protect incumbents. Ending them would help challengers, but not hurt incumbents except insofar as voters could then better evaluate incumbents' views by comparing them to the views of challengers.

Donors either intuitively or explicitly understand most or all of the above factors. The increased risks and costs created by contribution limits lead many donors to forego contributions to challengers, even when they prefer the challenger to the incumbent. The investment seems pointless to the potential donor given the economic realities imposed by the contribution limits. This pernicious effect extends even to donors who can only afford to give amounts that are less than the maximum contribution limit. They know that their smaller contributions will be less effective if they are not also joined by donations that are larger than the legal limit. Smaller donors therefore tend to give less than they otherwise would in the absence of the contribution limits.

The truth is that, under the contribution limits, most challengers cannot raise enough money to win, or to be heard, or to be remembered, or to have any kind of lasting impact. Thus, many donors who agree with a challenger's message refuse to make contributions that they believe will achieve nothing, while others give reduced amounts merely out of sympathy for the quixotic quest. Still others fail to give out of fear, as I will discuss in my next point.

13. The most reliable sources of income for challengers are those citizens who either dissent from current government policies and/or those who have economic interests that are negatively affected by government activity. Both have incentives to not want their names to appear in the federal campaign finance reports challengers are forced to file.

Dissenters tend to have a greater fear of government power than do citizens who support incumbents. This fear is real even when it is poorly justified. The result tends to be that dissenters are less likely to contribute to challengers they would otherwise support, or that they contribute less than they otherwise would in order to fall below the reporting threshold. Donors have often told me that they would not contribute because they did not want to have their names reported. Many have also told me they were contributing $199 in order to avoid having their names and addresses appear in FEC reports.

Much the same holds true for potential donors who have business interests that are affected by government. Many of these donors, like the dissenters, fear the government as an institution, and are particularly concerned with the ability of incumbents to harm them through legislation and regulation. I know from many conversations with donors that this concern is real even when it is poorly justified. Many of these potential contributors do not want incumbents to know that they have given money to challengers. Thus, as with the dissenters, they sometimes fail to give at all, or they give less than the reporting threshold, even though they could easily afford to contribute more.

The reporting requirements also create three other problems.

a. Potential Libertarian donors tend to be especially concerned with privacy. Some are merely concerned about their own privacy. Others want to reduce the amount of information the government has about its citizens in general, feeling that such data can serve as the foundation for a police state. Libertarians with privacy concerns are confronted with having to lose part of their privacy if they want to make political contributions to Libertarian candidates who agree with their views on privacy. Many Libertarians resolve this conflict by not making political contributions, or by making donations that are lower than the amount that would trigger inclusion of their personal information in FEC reports. Once again, this distorts the political process.

b. As FEC Commissioner Bradley A. Smith discusses persuasively in Chapter 10 of his book "Unfree Speech," FECA reporting requirements also open political donors to potential intimidation by employers and union leaders.

c. The burdens of disclosure have a greater negative impact on challengers than incumbents. In addition to the fact that contributors to challengers face a greater risk of intimidation from incumbents, employers, and union leaders, there is also the problem that compliance costs represent a larger percentage of challengers' resources than is the case for incumbents. The burden is especially acute for third party presidential campaigns because the reporting requirements are slightly different than for other federal races. Reporting software for the more numerous House and Senate campaigns is readily available, but the market for reporting software for presidential campaigns is so small that it is not profitable for any commercial firm to create such software. This means that presidential campaigns have to design reporting software from scratch, at great expense and difficulty. For Harry Browne's presidential campaign in 2000, I had to employ a person who was expert in databases, programming, accounting, and FEC compliance. Developing all of these talents in one person was extremely expensive. This person was paid at a higher hourly rate than any other person on the campaign, including the campaign manager.

Given the above considerations, it is hard to understand why it is reasonable to compel the public disclosure of campaign receipts, disbursements, and contributor names, addresses, and amounts. This seems to be an excessive intrusion on established First Amendment protections of anonymous speech, given that a voluntary system could be used instead. Candidates could seek to attract votes from those who support disclosure by voluntarily reporting their campaign finances, and voters who believe in such disclosure could refuse to vote for any candidate who does not offer this information to the public. Likewise, those contributors who

want to remain anonymous could refuse to do donate to any candidate who voluntarily discloses contributor information. Those candidates who see a political value in disclosure could even enhance the value of their reports by offering independent audits, something that has not occurred under FECA. Instead of lobbying government to compel disclosure, public interest groups could lobby individual campaigns directly, and publicly criticize those that fail to disclose. This kind of voluntary approach is especially viable since the advent of the Internet. There is no reason for the legal intrusions on the First Amendment imposed by compulsory reporting when voluntary and market-driven alternatives are readily available. There is no compelling state interest in using government force, or the threat of such force, to make campaigns disclose information about contributors.

Unfortunately, the exterminating effect of the reporting requirements and contribution limits extend even to issues of candidate recruitment and volunteer participation, as I will discuss below.

14. The federal campaign finance laws constitute a barrier to entry and a prior restraint that effectively reduces the number of citizens who would otherwise run for public office. I have often failed to recruit people as candidates who would have been ideal for the job, not because they did not want to be candidates, but because:

a. They knew the campaign finance laws would make it impossible for them to raise enough money to do an effective job; and/or

b. They did not want to undergo the extreme burden of complying with the federal campaign finance laws. In addition, potential campaign Treasurers are especially intimidated by the personal liability they would assume

> for compliance mistakes, as well as the accompanying penalties that have become even more draconian under BCRA. The new BCRA penalties, which include potential 5-year prison sentences, have made federal campaign activity potentially ruinous to life, family, and career.

It must be understood that the campaign finance laws raise the cost of participating in the political process and thereby reduce both participation and voter choice. In the case of my own efforts, the result is fewer and often inferior candidates to express libertarian ideas to the public. But even those who do agree to participate, either as candidates or as campaign workers, are negatively affected in others ways, as I will discuss in my next point.

15. I have found that the federal campaign finance laws reduce volunteer participation, and cause dissention and a loss of enthusiasm on the part of candidates and campaign workers. These reductions in volunteer effort and enthusiasm are both direct and indirect.

The direct reductions involve volunteers who want to do things like conduct fundraising raffles, or print their own literature, or raise money to advertise presidential campaigns locally, but who cannot do so because of the regulatory red tape. Some of these volunteers are somewhat unsophisticated, and cannot comprehend that the difficulties are imposed by the government, and not because the campaign's managers lack creativity or a concern for volunteer desires. This misunderstanding creates discontent and diminished support for the campaign. Volunteer efforts work best when driven by emotional enthusiasm, but the regulatory burdens imposed by the campaign finance laws thwart creativity and spontaneity, and replace positive emotions with negative feelings. This has been a problem in every campaign on which I have worked.

Worse still, this problem does not apply only to the casual and unsophisticated volunteer. I have also had candidates who have had difficulty understanding why some of their great ideas could not be executed efficiently or at all under the law. Their frustration at our inability to engage in what they have regarded as common sense forms of free expression has often led to a decreased respect for the campaign's staff, and a decreased interest in those campaign activities that are permitted by the law. Even relatively sophisticated candidates and volunteers can misconstrue respect for the law with passivity, a lack of creativity, a "not invented here" mentality, and a desire to control.

There are also indirect negative impacts on volunteer efforts that are much the same as those that cause artificial reductions in financial support. There is less incentive for volunteer activity if the overall effort is constrained by artificially limited resources. Unsophisticated volunteers often find it impossible to understand why a campaign cannot raise more money, or receive more media attention, given that the incumbent is having no trouble doing so. This too leads to dissatisfaction and reduced efforts.

Another source of friction that results in the loss of both volunteer and financial support is that, because the federal campaign finance laws drive up the costs of fundraising, many supporters come to believe that challengers are wasteful of resources – spending too much money just to raise money. But this is a function of the laws and not the relative competence of the campaigns. It isn't reasonable to assume that all challengers are inefficient fundraisers, but all challengers do have fundraising costs that are much higher than those paid by incumbents.

16. In the past it was possible for some of the negative consequences of the federal campaign laws to be somewhat

ameliorated by soft money contributions to party committees in conjunction with coordinated expenditure provisions. But the corrective effect of so-called "soft money" was minor given that the strategic and tactical plans of campaigns and parties do not always coincide, and major donors do not always have the same interest in contributing to a party's "soft money" account that they would have in giving directly to a campaign.

It is important to understand that the primary purpose of most Libertarian campaigns at this stage of the LP's development is not to win elections, but to build the party itself. Most Libertarian Party campaigns seek to serve the same function as the media, a press if you will. They exist primarily to communicate ideas, and only secondarily to win votes. Unfortunately, the BCRA is designed to remove the largest potential source of funding for this kind of idea-oriented communication.

17. The campaign finance laws, and their impositions on the First Amendment, have been justified as necessary to prevent political corruption and the appearance thereof. But it is impossible for me to understand how the campaign finance laws are really directed at corruption. Anti-bribery and coercion laws make sense in this regard, but campaign finance restrictions do not. As long as the Constitution's express limitations on the power of government to confer special favors are ignored, there is no reasonable basis by which special interest contributions can be viewed as corrupt. They are merely the logical result of a constitutional regime that permits the government to favor some interests at the expense of others. It makes no sense to prohibit through the back door what we permit through the front door. Likewise, it is impossible to understand why politicians should be protected from the appearance that their actions are corrupt. Instead, they should have to defend their actions in a free and open public debate. The law should concern itself with discernable facts,

not debatable appearances. But instead, we have campaign finance laws that constrain a free and open debate about the real motives behind the actions of our elected officials. Ironically, these laws particularly impede the expression of another solution to the perceived problem of political corruption – the Libertarian solution.

To understand the Libertarian Party, it is important to realize that the libertarian program is based on the idea of limiting government, and thereby reducing or eliminating its ability to favor special interests over the general interest. We want to communicate to the public the idea that the real problem in government is not the abuse of power, but rather the power to abuse. We want to educate the American people about the Tenth Amendment. We want to inform citizens of our view that this amendment limits the federal government to only those powers and functions that are specifically enumerated in the Constitution. We want to argue that the federal government would have almost no power to favor some citizens over others if this amendment were strictly obeyed -- there would be few government favors to confer, there would be little power to abuse, and real opportunities for corruption would be vanishingly small.

We want to tell citizens that the real solution to perceived government corruption is not more restrictions on citizens, but more restrictions on government itself, and not through the creation of new laws, but through a new adherence to the supreme law of the land. And we want to argue that government power should never be expanded by means of the courts determining that the state has a compelling interest in wielding new power, but rather, that all increases in state power should only be accomplished when the American people themselves agree that such a need exists, and that the need really is so compelling that it warrants the remedy of a constitutional amendment.

But our ability to express these ideas is damaged by campaign finance laws that protect incumbent office holders from effective competition, withhold choices and information from the public, and ultimately serve to ensure that special interests will always have more power than the general interest. We, who have no desire to confer any special favors on anyone, are silenced by and for the benefit of those who do. We Libertarians believe that this is the real source of corruption in government.

If we Libertarians were permitted to compete freely in the political market place, and the voters still rejected our views and our candidates in an election, so be it. It could take us many years to learn how the voters really feel about our ideas, but if we are permitted to conduct free campaigns, at least we will know that we had a fair chance to be heard and to compete, which is all we seek.

REPORT OF WALTER J. OLSON

Subject Matter of Report

1. My name is Walter J. Olson, principal of Walter J. Olson & Associates, and I have been asked to prepare this report summarizing the operating, reporting, filing, and recordkeeping requirements imposed by the Federal Election Campaign Act of 1971, as amended, ("FECA") on committees registered with the Federal Election Commission ("FEC"), including separate segregated funds ("SSFs") and principal campaign committees of candidates for federal office, and the burdens of fulfilling the various requirements so that the overall regulatory scheme governing federal election campaigns that has now been extensively modified by the Bipartisan Campaign Reform Act of 2002 ("BCRA") can be more clearly understood.

* * *

8. In addition to conferences, the FEC tries to educate individuals, whose responsibility it is to comply with the Federal Election Campaign Act of 1971, as amended, and the FEC regulations on behalf of committees, by publishing informational materials (*e.g.*, the Campaign Guides), and by providing a toll-free telephone line to obtain answers to questions about federal campaign finance law, and making its publications and forms available on the FEC web site. Recently, the FEC has offered to respond within 10 business days to questions about its requirements submitted by e-mail. Even though I have worked in this area for years, I have had to call this FEC information line literally scores of times. Not always do the Information Specialists in the FEC's Information Division know the answers, and frequently must call back. Additionally, the Commission has issued more than 1,500 advisory opinions ("AOs") since 1975 (also now available on

the FEC web site), which are written responses to questions regarding the application of the federal campaign finance law to a specific, factual situation. However, in my experience, one does not need to work in this area very long to be confronted with a situation which has never been addressed precisely by the Commission. In such cases, the FEC staff generally suggests that the individual file an advisory opinion request ("AOR") with the Commission. The effort and costs involved in preparing and filing an acceptable AOR with the FEC, and the time that can be taken for a response, generally makes this procedure either not worth the trouble, or of no use as the response would be received too late to be acted upon. In other cases, I have been told that there is no advice available for me, and essentially I would have to act at my peril. * * * Also, Information Specialists in the FEC's Information Division have access to an index of advisory opinions which I do not believe is available to the public.

* * *

Conclusion

116. Over the course of my years in assisting individuals and organizations with federal election campaign filing and reporting matters, I have dealt with virtually all of the forms and requirements referenced above. In my experience, the burden and costs on such individuals and organizations have been significant. Despite my own extensive experience in working in this field, I find it necessary to research constantly — including calling the FEC for advice — questions that arise in the course of attempting to assist my clients. Compliance with the federal election requirements imposes a significant cost and time-consumption burden on individuals and organizations engaged in federal election activities, and exposes them to serious penalties for violation

of an extensive and complex set of operating, reporting, filing, and recordkeeping requirements.

DECLARATION OF CONGRESSMAN RON PAUL

Ron Paul, United States Representative from the 14th Congressional District of the State of Texas, a plaintiff in the above-captioned matter, declares pursuant to 28 U.S.C. Section 1746 as follows:

1. I am Ron Paul, the duly-elected United States Representative from the 14th Congressional District of the State of Texas. I have served the people of the 14th Congressional District in the capacity as a member of the United States House of Representatives for nearly six years, having been first elected to that position in November 1996 and twice re-elected, in November 1998 and November 2000. Currently, I am the Republican nominee standing for re-election as a Member of the United States House of Representatives from the recently-redistricted 14th Congressional District of the State of Texas.

2. In 1976, and then from 1978 to 1984, I served as an elected Member of the House of Representatives representing the people of the 22d Congressional District of the State of Texas. In 1984, I chose not to stand for re-election to my House seat. Instead, I sought the
Republican nomination for United States Senate from the State of Texas, which I did not win. Four years later, in 1988, I was the Libertarian Party candidate for President of the United States, an office which I did not win.

* * *

5. In 1995, prior to my entry into the race for United States Representative from the 14th Congressional District of the State of Texas, I was required by federal law, under pain of civil and criminal penalty and of the threat of the injunctive and contempt powers of the federal judiciary, to file with the Federal Election Commission ("FEC") an official FEC Form 2, namely, my Statement of Candidacy for the United States House of Representatives seat for the 14th Congressional District of Texas, designating therein my principal campaign committee and any other committee authorized to receive and expend funds on behalf of my candidacy.

* * *

9. As a candidate for election and for re-election as the United States Representative from the 14th Congressional District of the State of Texas, the treasurer of my principal campaign committee and I, as well as my committee's agents, have diligently made every effort to comply with all federal laws, rules and regulations of the Federal Election Campaign Act of 1971, as amended ("FECA"), including (a) all laws, rules and regulations governing the FEC licensing and registration of my candidacies and of my authorized campaign committees; (b) all laws, rules and regulations governing the filing with the FEC of periodic reports, open to the public, of receipts and disbursements of my authorized campaign committees; (c) all laws, rules and regulations limiting the amounts and sources of financial contributions to my campaigns; and (d) all laws, rules and regulations limiting the ways in which my campaigns can spend money.

10. During the period from December 1995 through July 2002, as required by law, the treasurer of my principal campaign committees has filed an aggregate total of 32 reports with the FEC, including year-end reports, quarterly reports, 12-day pre-primary election reports, 12-day pre-general election reports, and 3 0-day post-general election reports. * * *

11. In these reports, which are on file with the FEC and are public information, my authorized campaign committees, as required by federal law, have disclosed the identities, including name, address, occupation, and employer, of all individuals contributing more than $200 in the aggregate during a calendar year to my campaign committees and the identities, including name and address, of all payees receiving more than $200 in the aggregate during a calendar year regarding operating expenditures and certain other disbursements made by the committees in support of my campaigns for election and re-election to the 14th Congressional District House seat.

12. In these reports, the treasurer of my authorized committees, as required by federal law under pain of civil and criminal penalties and under the threat of the injunctive and contempt powers of the federal judiciary, has been required to comply with the source and contribution limits placed upon funds received to expressly advocate my election.

13. Prior to my entry into elective politics, and continuing to the present day, I have learned that most of the major newspapers, magazines, broadcast facilities, and other communication media promote government policies directly contrary to those that I hold. From the time that I reentered politics in 1995, campaigning for the Republican nomination for the 14th Congressional District seat which I now hold, and in each subsequent campaign for re-election, the newspapers in the major media markets in and around my District have always supported my campaign opponents and have consistently promoted big government policies contrary to those that I have devoted a lifetime to support. Consequently, I have been constrained to develop alternative means of communication outside of those available to me as a member of Congress, such as campaign newsletters, direct mail, e-mail, and the Internet, as well as radio and television advertisements designed to promote my candidacies for election and re-election and, in the process, to promote my policies of free market, sound money, independent sovereignty, and constitutionally-limited government. Because of the current campaign finance laws, however, I must advocate my candidacy and promote my ideas in relation to my candidacy under rules, regulations, and burdens backed up by the threat of civil and criminal penalties and judicial injunctive and contempt powers from which the institutional press — my major competition in the marketplace of ideas related to a federal election campaign — is exempt.

14. The combination of the licensing and reporting requirements, together with the contribution limits imposed upon me and my authorized committees by the FECA in order to promote my election to the United States House of Representatives from the 14th Congressional District of the State of Texas in 1996, 1998,2000, and 2002 has substantially interfered and adversely affect, and in the future will continue to interfere substantially and affect adversely, the communicative activities of myself, and my authorized campaign committee and my supporters during my campaigns, by reducing the quality and quantity of campaign communications designed (a) to promote my election and re-election, and (b) to inform and persuade the people of the 14th Congressional District regarding my positions on the public policy issues relevant to my campaign. I know and attest that, without such requirements and limits, the quality and quantity of such communicative activity would be improved and increased because my authorized campaign committee would then be able: (1) to raise more money from individuals and organizations which have advised me that they would give more money to my campaign but for the limits placed on them by FECA, even as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"); (2) to raise more money from individuals who have limited their giving to $200 or less to my

campaigns because of the public disclosure requirements of the FEC; (3) to expand the range of fundraising events; (4) to receive more assistance from volunteers; and (5) to redirect significant funds otherwise expended to comply with the FEC licensing, recordkeeping and reporting requirements. Such additional fundraising and expansion would enable me and my authorized campaign committee to support additional and higher-quality communications expressly advocating my election and my positions on the issues.

15. The combination of the contributions limitations and the licensing, reporting and expenditure requirements imposed by FECA upon me and my authorized campaign committees in order to promote my election and re-election to the United States House of Representatives from the 14th Congressional District of the State of Texas in the 1996, 1998, 2000, and 2002 election campaigns has substantially interfered with and adversely affected, and in the future will continue to interfere with substantially and affect adversely, my editorial control over the communicative activity promoting my election and re-election, and informing and persuading on the public policy issues related to my campaigns for election and re-election. Such requirements: (a) substantially limit my discretion to raise and expend funds in ways that I believe would more effectively advocate my election and re-election and my positions on public policy issues related to my campaigns for such election and re-election; (b) substantially limit my discretion in the staging of various kinds of campaign events, especially ones designed to raise funds to support my campaigns; (c) substantially limit my discretion to determine the substantive content and technical quality of my communications advocating my election and re-election and my positions on the public policy issues related to my campaigns; and (d) substantially displace my discretion to decide whether to identifl publicly the identities of the financial supporters of my campaigns.

16. The combination of the contribution limitations, soft money limits, campaign coordination policy, and electioneering communication rules and regulations under FECA, as amended by BCRA, that will be imposed upon me and my authorized committee after the November 2002 elections will place me and my authorized committee at further competitive disadvantage with exempt media advocacy, and will impose upon me and my authorized committee additional substantial and adverse interferences with my and my campaign committee's ability to expressly advocate my candidacy for election to federal office in the future and to inform and persuade the voting public on public policy issues related to my campaigns for election to federal office by: (a) adversely impacting on my ability as a federal office holder and candidate for election to federal office to help raise money for organizations that promote my positions on public policy issues; (b) deterring me from promoting my positions on policy issues lest it appear that such promotion is being coordinated with organizations that take like positions on such policy issues; (c) deterring, if not preventing, organizations that promote my positions on public policy issues from broadcasting those positions at the most critical stage of my election campaigns, but at the same time permitting certain exempt entities to promote positions on public policy issues contrary to my own during the same critical stage of my campaigns; and (d) deterring me from working closely with the state and local Republican parties during my campaigns for election to federal office.

17. The increased penalties under FECA, as amended by BCRA, coupled with the existing system of administrative investigations and fines, civil and criminal penalties, and threats of injunctive relief and the exercise of the contempt powers of the courts, will constrain me and my authorized campaign committees (a) with increasingly-burdensome filing and reporting requirements, (b) with an

increasingly-complex and confusing set of administrative rules, regulations and procedures, (c) with a likely prospect of an increase in costly and adverse administrative action by the FEC in response to complaints[53] filed by my political opponents and their supporters with respect to the new rules and regulations spawned by BCRA, and (d) with a greater threat of criminal liability for violation of the rules under the enhanced penalties of BCRA.

18. Overall, the federal licensing and regulatory system governing my campaigns for elective office has, in the past, operated as a prior restraint, having an intimidating effect upon my and my campaign committee's communicative activities promoting my candidacies for election to the 14th Congressional District House seat and my principles and policies to the people of the 14th Congressional District, and, as a consequence of the additional restrictions to be imposed upon me and my campaign committee by BCRA after the November 2002 election, will operate in the future as an even greater prior restraint with an even greater intimidating effect on such communicative activities, by adding more regulations, more forms and more restrictions, to an already overly-burdensome system that already is difficult to understand, necessitating the hiring of additional professional staff and the discontinuance of some lawful activities: just to stay out of trouble with the FEC that can so easily be stirred up by my political opponents.

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[53] For example, such complaints can be based merely on articles from newspapers that oppose my candidacy or my principles.

DECLARATION OF THOMAS LIZARDO

* * *

3. The recordkeeping requirements necessitated by the federally-imposed contribution limits and public disclosure rules have created such a serious conflict between the administration of the financial aspect of Ron Paul's campaigns and the conduct of such traditional campaign activities as celebrity rallies, money-raising auctions, and community barbeques, that the campaign committee has been forced to keep such events to a minimum. Additionally, when such events have been held, and attendees have come forward offering contributions to the campaign, many of them are "put off" by the campaign committee's requests for information about their names, addresses, occupations, and employers that is required by law for donors over $200 in the aggregate during a calendar year. Even after being instructed that it is the law, not the committee, that requires such information, some of these people have been upset with the campaign because of these requirements, and I believe that this has hurt both the campaign's fundraising efforts and the campaign's overall image.

4. In each of the election years in which I have served as a political consultant, I have noticed a number of individual donations in the amounts close to, but under, $200. On several occasions I have had opportunity to talk, in confidence, with individuals who have so limited their contributions, and I learned that for a variety of reasons they did not wish their gift to be made public. For example, on one such occasion, a contributor informed me that he did not want his gift disclosed for fear that his wife would find out. I believe that many donors would contribute substantially more than $200 if their contributions were not made public.

5. In each of the election years in which I have served as a political consultant, the Ron Paul campaign has experienced the following challenge and difficulty: because the main media outlets in the five major media markets in the 14th Congressional District opposed Ron Paul's candidacy, the Paul campaign had to develop alternative means — such as targeted telephone facsimiles, e-mail, radio spots, direct mail, and telephone calls — by which to communicate Ron Paul's message, principles and policies to the public. In contrast to the major media opposition which is exempt from FEC oversight and control, candidate Paul has been — and continues to be — required to raise funds, keep records, and make disclosures to the FEC. Such discriminatory treatment has placed Ron Paul at a competitive disadvantage to his political opponents who have enjoyed the support of the major media in the 14th Congressional District. I know that this competitive disadvantage would be lessened if Ron Paul, like such exempt media in the 14th Congressional District, could raise funds without FEC-imposed limits because a number of donors have indicated to me that they would give more money to the Paul campaigns if they could, and I am certain that such additional funds would enhance the quantity and quality of Ron Paul's campaign communications.

DECLARATION OF ANONYMOUS WITNESS NO. 1

* * *

3. Over the past decade I have contributed the maximum of $1,000 per election to many candidates for federal office, including Ron Paul, in multiple election cycles. For example, I have contributed $1,000 for the primary election and $1,000 in the general election in the same election cycle for Ron Paul in the 1990s. For example, I have made such contributions not only to help elect Ron Paul and others to federal office, but also to support Ron Paul's policy and educational efforts, and the policy and educational efforts of other candidates for federal office, both incumbents and challengers.

4. I have contributed the maximum of $5,000 per year to one federally-registered multi-candidate political committee in more than one year. I have made such contributions not only to the committee's efforts to support candidates, but also to support the policy positions that the committee was advancing through its support of such candidates.

5. I believe that limitations imposed by the Federal Election Campaign Act and the Bipartisan Campaign Reform Act (BCRA) on my right to contribute from my personal funds more than any specified amount to candidates for federal office unfairly and discriminatorily restrict my First Amendment rights and are unconstitutional. I contribute to others so that they can do that which I could not do myself, or do as well, and to supplement what I do myself. As a businessman, I do not have the time to promote aggressively the libertarian ideas and limited government policies to which I am deeply committed. Because of my personality and temperament, I firmly believe that I would not be as persuasive a spokesman for those ideas and policies to persons who are not close acquaintances or

people who are not like minded. Even if I had more available time and native ability, I want to support the efforts of many like-minded people to advance the cause of freedom. By giving money to others, especially candidates for election to federal office, I am deliberately choosing to associate with their efforts, with the common purpose of informing and persuading others to embrace ideas and policies based on the Constitution, and, if the persons I support are elected, furthering those ideas and policies by their actions as government officials.

DECLARATION OF MICHAEL CLOUD

Michael Cloud, a plaintiff in the above-referenced action, pursuant to 28 U.S.C. § 1746, declares the following:

INTRODUCTION

1. I am Michael Cloud. I am a plaintiff in this action in my capacity as an aggrieved citizen of the United States of America and the Commonwealth of Massachusetts. I am eligible to vote in all federal elections, including any election for the office of President , and I am a registered voter in the Commonwealth of Massachusetts. The federal election law wrongly limits my right to participate in elections both as a candidate and as a supporter of candidates by, among other things, restraining me from participating freely in the marketplace of ideas.

2. I am a plaintiff in this action because I am an aggrieved candidate for federal office, being the Libertarian Party's candidate for the United States Senate from the Commonwealth of Massachusetts in the 2002 election that will be held this November. I am the only challenger in this election facing an incumbent member of the Democrat Party, who enjoys not only the advantage of affiliation with his well-funded "major" party whose vast resources are not threatened by complying with federal election laws, but also the benefit of the selective attention of commercial media corporations. My campaign for federal office as the representative of the Libertarian Party is focused on promoting and educating the public about various policy issues and ideas, particularly the need to restore personal responsibility while reducing dependence upon the federal government. My campaign agenda is not merely to win office, but also, to promote the Libertarian Party's philosophy to the public so that others who share this philosophy can be elected to federal office and/or

inspired to work towards instituting Libertarian principles. The pernicious effects of the Federal Election Campaign Act of 1971 ("FECA"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA") (collectively "FECA/BCRA"), undermine my candidacy and impinge on my constitutional rights to communicate with the public about my ideas for a limited government that respects the sovereignty of the people. Instead of being able to speak my conscience and to maximize the limited resources at my disposal to get my message out to the public for debate and consideration, the FECA/BCRA dictates the content of what I must say to the public, how I must say it, and when I must say it.

* * *

4. I am a plaintiff in this action because my constitutional right to Freedom of the Press has been, is, and will continue to be, trampled and abridged by FECA/BCRA. * * * The FECA/BCRA steals the Freedom of Press from me and perverts it into a special privilege for the commercial media corporations. Having secured that special privilege, the commercial media corporations are then free, by action and omission, to promote the candidates of their choice and attack the candidates they dislike. Conversely, I risk imprisonment for up to five years if I knowingly violate certain of FECA/BCRA's provisions. (*See* FECA/BCRA, 2 U.S.C. Section 437g(d)). The FECA/BCRA achieves the ignominious distinction of being a law that grants special privileges to a group (*i.e.*, commercial media corporations) that are denied to individuals.

* * *

THE HARM INFLICTED BY THE FECA/BCRA

6. I have been a member of the Libertarian Party for 27 years, and have been active in federal and state elections both as a candidate and as an active supporter of candidates. During approximately the last 11 years, I have personally raised over $8 million for Libertarian candidates and the Libertarian Party. As noted above, I am presently the Libertarian Party's candidate for the United States Senate from the Commonwealth of Massachusetts. Previously, I ran as a Libertarian Party candidate for the United States Senate and the United States House of Representatives. I intend to participate in federal elections in the future as a candidate and/or as an active supporter of a candidate. I have accepted, do accept, and intend to continue to accept campaign contributions. In short, I have an abundance of first-hand experience in dealing with the "real world" impact that the FECA/BCRA causes and will cause to challenger candidates for federal office who, like me, represent a "third party."

7. As a "third party" challenger candidate, I face burdens and restrictions that the "major parties" and their candidates do not, and which make the time and cost burdens imposed by the FECA more regressive, onerous, and discriminatory. The time and costs spent complying with the FECA sap the limited resources available to get my ideas before the public in a campaign. Furthermore, I do not receive the media exposure accorded incumbents or candidates from the "major" parties.

8. The FECA/BCRA is the equivalent of a double-barreled shotgun blast aimed at third-party challenger candidates such as me who advocate change, because it codifies the advantages of incumbency and fosters a "government by media." Rather than creating a "level playing field" for candidates and encouraging free and open debate, the FECA/BCRA protects incumbents by restraining my right to engage in "electioneering communications" and "express

advocacy." The FECA/BCRA also empowers commercial media corporations with special privileges to express views about candidates and issues I cannot, and then immunizes the commercial media corporations from criminal prosecution for making statements about a candidate that could be a felony if my supporters uttered them.

9. To understand how truly harmful the FECA/BCRA is to me, a Libertarian candidate, it is necessary to appreciate how the FECA/BCRA severely exacerbates the difficulties that challengers such as me already face just to participate in a federal election. Some of these problems are addressed in the Report of Perry Willis, as an expert witness for the plaintiffs in this action. I have read, and I agree with, Mr. Willis' Report. As I discuss in this Declaration, my personal experience as a candidate for federal office and as an active supporter of other candidates for federal office (and state office) confirms Mr. Willis' conclusion that the federal campaign finance laws, despite their oft-stated good intentions, do not improve the electoral process, but instead, worsen it by further enhancing the advantages of incumbents and the unchecked power of the established corporate media to make or break the candidate as they see fit.

10. The FECA/BCRA is part of a legislative pattern that continually adds more of what economists refer to as "barriers to entry" for new candidates who seek federal office. Among the major barriers to entry that impact me and other third-party candidates for federal office, and will continue to do so, are (i) having the funds needed to get on the ballot for election, and (ii) having the funds needed to comply with the FECA/BCRA after getting on the ballot for election. Even without the cost of complying with the FECA/BCRA, a campaign for federal office is very expensive. I was co-organizer, fundraiser, and CEO for Libertarian Party candidate Carla Howell's campaign for the United States Senate in 2000.

It cost approximately $60,000 just to qualify her so that her name appeared on the ballot.

* * *

12. The pay and perquisites for a U.S. Senator are enormous. In truth, a challenger must overcome not just the campaign war chest of a U.S. Senator and his superior fund raising advantages; he or she must also overcome the benefits that an incumbent enjoys courtesy of the federal government, which is to say, courtesy of the taxpayer whose assistance is not voluntary, in that the taxpayer may oppose everything that the incumbent stands for. Here are some of the taxpayer subsidies to a U.S. Senator:

- Annual salary of $150,000 for most Senators (majority and minority leaders receive $166,700)
- Tax deduction for living expenses while away from home state
- Health insurance
- Life insurance
- Retirement system
- Administrative and clerical assistance allowance
- Legislative assistance allowance
- Telecommunications equipment and service for Washington, D.C. and home state
- Stationery and other office supplies as well as use of Senate

copying equipment

- Preparation of required official reports, acquisition of mailing lists to be used for official purposes, and the mailing, delivery, and transmittal of matters relating to official business

- Annual expenditure for mass mailings

- Official office expenses incurred for an office in home state other than equipment or furniture

- Expenditures for publications printed or recorded for auditory and visual use, including subscriptions and purchases of books and other publications, and fees to access computer databanks

- Travel expenses for Senator and employees while on official business

- Additional office equipment and related services for Washington, D.C. and home state

- Recording and photographic services and products obtained through the Senate recording and photographic studios

- Other official expenses as a Senator determines are necessary, such as conference fees, expenses for town meetings, and procurement of non-standard equipment, among other expenses

- Franked mail allotment

- Senate interns

- Paper, letterhead, and envelope allowance

- Public document envelope allowance

- Office space in states

- Mobile office space

- Furniture and furnishings in Washington, D.C. and home state offices

- Office equipment in Washington, D.C. and home state offices

According to the Congressional Research Service, in 1999, for U.S. Senators, (i) the administrative and clerical assistance allowance, (2) the legislative assistance allowance, and (3) the office expense allowance combined, ranged from **$1,823,086 to $3,144,999**. Over a six Senate year term, this amounts to between $11-19 million (approximately), without any time or cost whatsoever incurred for fund-raising. CRS Report for Congress, RL30064, Salaries and Allowances: The Congress, and "Salaries and Benefits of U.S. Congress Members," http://www.house.gov/rules/RL30064.pdf (page CRS-5); "Salaries and Benefits of U.S. Congress Members," http://usgovinfo.miningco.com/library/weekly/aa031200a.htm; and "Pay and Perquisites of Members of Congress" http://thecapitol.net/GAO/payandperqs.htm.

13. In my current campaign against Senator John F. Kerry, I face an incumbent who is in his third term, meaning that he is completing 18 years in office. In his last election in 1996, he spent over $10 million dollars to make himself even better known to the voters of Massachusetts. He receives extensive coverage from the Massachusetts, particularly

Boston, press. He is a favorite guest of many of the national television "news" shows which invite him on the air to give his views on domestic and foreign policy matters of all kinds. When pork barrel spending occurs in Massachusetts, it provides him with more opportunities for lavish press coverage. The cash value to his campaign of this media promotion is enormous.

* * *

Actually, I have little concern about how much money Senator Kerry has to spend. Senator Kerry's name identification and public presence in Massachusetts is so ubiquitous that I doubt it would be noticed if Senator Kerry had an additional $10 million to spend on his election. On the other hand, I care greatly about how much money I have to spend on my campaign to overcome the many advantages that Senator Kerry has before the election even begins. If I had only a fraction of that $10 million to spend on my election, I could reach the type of name identification and presence that would make my candidacy real to the voters of Massachusetts, and give them a real choice.

Senator Kerry can raise money from business PACs due to his Committee assignments, and I do not begrudge him this ability. But I do object when the federal laws that he helped write virtually ensure that he will not have serious campaign opposition for the rest of his life, due to the restrictions that they place on fund raising by challengers such as myself.

Since there is no Republican in this race, Senator Kerry may choose to save substantial money in his campaign, thereby having a war chest to carry over to the next election to cause any potential challenger to think twice before challenging him.

14. The financial and reporting burdens imposed by complying with the FECA strain my already limited resources to the breaking point. The FECA's financial and reporting burdens include (i) the burden to register an authorized campaign committee with the Federal Election Commission ("FEC") (*see* 2 U.S.C. Section 433); (ii) the burden to file periodic reports with the FEC of receipts and disbursements that are then subject to inspection by the public (*see* 2 U.S.C. Section 433); (iii) the burden to adhere to limitations on the amount of individual contributions (*see* 2 U.S.C. Sections 441a, 441d, 441f, and 441g); and (iv) the burden to report the names, addresses and occupations of contributors who give certain amounts (*see* 2 U.S.C. Section 434).

15. The FECA/BCRA denies me financial support from individuals who share my views, but who, for fear of having their support disclosed publicly or violating the FECA, cannot contribute as fully to my campaign as they would otherwise if their privacy could be protected. There are at least 46 contributors to my U.S. Senate campaign that have given the maximum amount permitted by the FECA and who would, but for the limits imposed by the FECA, contribute even more to my campaign. As a seasoned, professional political fundraiser, I estimate that these 46 contributors would donate between $350,000 and $700,000 in net, spendable funds.

16. There are also at least 261 contributors to my campaign who have contributed in amounts below that which triggers the FECA's mandatory contributor disclosure requirements (more than $200 in a calendar year per election), probably so that their anonymity can be maintained. The reasons for maintaining anonymity are sundry, and often range between genuine fear of injury from others to strong personal beliefs that disclosure is inappropriate. Some contributors do not want their identity disclosed because, as a matter of principle, they believe that the government has no right to

know who they support for a particular office. This creates a "catch 22" in that these contributors want to elect me because of my Libertarian commitment to protecting individual privacy, but to do that, they will have to surrender their privacy. As a seasoned political fundraiser, I estimate that these 261-plus individuals would contribute between $100,000 and $300,000. It is incongruous that our system demands that anonymity be maintained when we vote, so that each of us is free to vote for the candidate of our choice without fear of retribution, but affirmatively prohibits anonymity in the campaign process that culminates in the actual voting. I strongly believe that contributors to a campaign are entitled to the same anonymity as voters, not less.

17. Other contributors want their anonymity maintained because they fear reprisals by the government and/or the incumbent party or candidate. Their fear is justified. In 2001, for example, Richard Egan was being considered by President Bush for the appointment as the Ambassador to Ireland. Mr. Egan had previously donated $2,000 to Carla Howell during her campaign for the United States Senate against the incumbent, Edward Kennedy. Senator Kennedy cited to Mr. Egan's donation as a basis for questioning Mr. Egan's fitness to serve as ambassador.

* * *

20. In order to maximize my limited resources and take advantage of economies of scale, I have also worked with other Libertarian Party candidates for state and federal office. For example, Carla Howell is the Libertarian Party candidate for Governor of Massachusetts. We have mailed our respective campaign bumper stickers in one envelope and split the cost of the mailing. We have submitted our respective campaign literature for printing as two parts of one large job to get a more favorable large-scale price, with each of us bearing our share of the reduced cost. The BCRA's prohibitions on use of "soft money," including prohibiting state and local candidates from spending "soft money" on communications citing federal candidates, and its limitations on coordinated independent expenditures, may make these types of actions, which were borne out of the necessity for thrift, efficiency, and economy, a civil and criminal violation.

21. I want to be free of the mandatory licensing burdens imposed by the FECA/BCRA. I want to be able to campaign for federal office free from the burden of having to create and register an authorized campaign committee with the FEC. I want to be able to campaign for office free from the mandatory burden of filing periodic reports of receipts and disbursements with the FEC. In my current and likely future campaigns, I want to be free from the mandatory limitations upon individual financial contributions. I want to be free from the mandatory burden of having to report the names, addresses, occupations, and employers of donors to my campaign.

22. With such freedom, my resources would be less burdened and I would have a greater ability to get my ideas before the public and to compete more effectively against incumbents and major party opponents.

23. The "second barrel" of the FECA/BCRA "shotgun" is the special privileges and immunities it grants to institutional media. The assumption used to justify granting these special privileges and immunities is that such entities are non-partisan. My experience is that commercial media corporations, for example, are highly partisan and that to presume otherwise is an act of ignorance, folly, or both. The FECA/BCRA fosters a scheme of "government by media" by granting institutional media a special exemption from its provisions.

24. In the past, the media were overtly partisan. Parties operated their own newspapers, for example. Today, commercial media corporations might not be operated directly by the major parties, but they are still just as partisan.

25. I am personally familiar with the power of commercial media corporations to make or break a candidacy. The commercial media corporations do this directly by endorsing a particular candidate. But they have even more insidious ways of making or breaking candidates or campaigns. They choose what to report and what not to report. How to report it and how not to report it. When to report it and when not to report it. Or whether to report it at all. The power to edit is the power to editorialize. This is endorsement by other means.

For example, in my 2002 U.S. Senate campaign against three-term U.S. Senator John Kerry, I am Senator Kerry's only opponent. In the 14 months since I began my campaign for the U.S. Senate, WGBH-TV (PBS), WBZ-TV (CBS), WCVB-TV (ABC), and WHDH-TV (NBC) have refused to cover me or my campaign. Refused to send reporters. Refused to allow me to do in-studio interviews. And, on several occasions, these FCC-licensed television stations have announced during newscasts that Senator John Kerry is UNOPPOSED. Their news departments have treated our campaign workers rudely, refused to discuss the matter, and hung up the phone on us. Their 1984-style "Censorship by Media" has held down my name recognition, held back my campaign for U.S. Senate, driven down my donations from supporters, and suppressed coverage of me by other media, e.g., newspapers and radio stations. Then these television stations claim I have no public support and therefore I am not "newsworthy." It has been said "They break my legs and then tell me they don't cover cripples."

To add insult to injury, these television stations widely reported and eagerly covered a novice Republican who failed to collect the required 10,000 signatures to get on the ballot for U.S. Senate. Further, they covered an embarrassing attempt by another Republican candidate to become the Republican U.S. Senate nominee by trying to persuade 10,000 Republican primary voters to write his name in for U.S. Senate. This "write-in campaign" was done by a Republican who was already on the ballot for Massachusetts Secretary of State.

Republican failure, incompetence, and humiliation are newsworthy in the U.S. Senate race, but a Libertarian success is not. A candidate who has raised $8 million in the last 11 years for Libertarian campaigns is not newsworthy. A candidate who champions small government, individual liberty, and personal responsibility is consigned to Orwell's memory hole. Blacked out. Censored.

In 1997, Ed Rollins was criticized and condemned for suppressing African-American voter turnout for New Jersey Republican gubernatorial candidate Christine Todd Whitman. Mr. Rollins spread around a lot of "walking around money" to African-American preachers and community leaders in New Jersey so that they would discourage and oppose African-American voter turnout. Mr. Rollins' tactic apparently worked. Governor Whitman won re-election by fewer than 27,000 votes. In 2002, WGBH-TV (PBS), WBZ-TV (CBS), WCVB-TV (ABC), and WHDH-TV (NBC) are engaging in a de facto pattern of suppressing voter turnout that is as insidious and destructive to the voting process as the reported actions of Ed Rollins and former Governor Christine Todd Whitman described above.

26. The Libertarian Party is truly a party of ideas and political philosophy that, by choice and necessity, is uniquely integrated with its candidates for federal and state

office. The commercial media's refusal to cover Libertarian candidates is not a neutral act; it is tantamount to opposition.

27. For example, in Massachusetts, the *Boston Globe* strongly favors the Democratic Party. The *Boston Globe* has a long-standing record of endorsing almost exclusively Democratic Party candidates for federal office. By any reasonable definition, the *Boston Globe* is a partisan for the Democratic Party. Very liberal Republicans are acceptable if circumstances dictate. Further, the Boston Globe Group owns hundreds of newspapers in Massachusetts. Just as Wal-Mart headquarters dictates the policies of the Wal-Mart stores, the Boston Globe dictates the coverage and editorial policies of its chain of newspapers.

28. This partisanship is shown directly by its endorsements and commentaries about particular candidates and political parties. It is also manifested indirectly by the lack of attention that mass media outlets give to third party challenger candidates. The reality for my candidacy and of other Libertarians is that the *Boston Globe's* favoring of Democratic Party candidates means that my ideas receive virtually no public exposure in the *Boston Globe*. As a challenger candidate, I am subject to a virtual news blackout by the *Boston Globe*. I have no quarrel *per se* with the *Boston Globe's* right to endorse a particular candidate. I strenuously object, however, to the special privileges and immunities that the FECA/BCRA bestows upon the partisan commercial media corporate outlets such as the *Boston Globe*. The FECA/BCRA allows commercial media corporate outlets such as the *Boston Globe* to make "electioneering communications" under the fiction that its purported news stories, commentaries, and editorials are non-partisan.

29. As part of my candidacy for federal office, and in order to put my ideas and the Libertarian Party's philosophy before the public for its consideration, I frequently make reference to clearly-identified candidates for federal and state office, (*i.e.*, my opponents in the election), and I often criticize their positions and actions.

30. In addition, I frequently refer to other clearly-identified candidates for federal and state offices whose candidacies I support and those whose candidacies I oppose. I do not expressly advocate voting for or against such candidates; rather, I explain my support or opposition of the particular candidacy based on the candidate's actions and proposals. I fully intend to continue to express my opinions about the actions and positions of clearly-identified candidates for federal and state office in the future as part of my continuing efforts to have the public consider my ideas and the Libertarian Party's philosophy. As a plaintiff in this action, I want to be able to do so without fear of criminal prosecution.

31. I desire to campaign for federal office and to support the campaigns of others free from the editorial control and discriminatory burdens imposed by the FECA/BCRA. In sum, I desire to be free to communicate in an unrestricted manner with the public and to allow the public to judge the extent to which they want to support my candidacy and my ideas without concern that I will be committing a crime for speaking my conscience and, without compromising the privacy of those who support me.

* * *

DECLARATION OF CARLA HOWELL

Carla Howell, a plaintiff in the above-referenced action, declares the following, pursuant to 28 U.S.C. § 1746:

1. I am Carla Howell. I am an adult citizen of the United States of America and the Commonwealth of Massachusetts. I am a registered voter in the Commonwealth of Massachusetts, eligible to vote in all federal elections.

2. I am the Libertarian Party candidate for Governor of the Commonwealth of Massachusetts in the 2002 election that will be held this November. * * *

3. I was the Libertarian Party candidate for election to the United States Senate from the Commonwealth of Massachusetts in the 2000 election. Regardless of the outcome of the 2002 election for governor, I have every intention of remaining active in Massachusetts politics, and of running again for federal office.

4. I have been a member of the Libertarian Party for six years, and in addition to my candidacies for governor and senator, I am now, and have been, an active supporter of other Libertarian Party candidates. I intend to participate in federal and state elections in the future as a candidate and/or as an active supporter of a candidate. I have accepted, do accept, and intend to continue to accept, campaign contributions.

* * *

5. In 2000, as Libertarian Party candidate for election to the United States Senate from the Commonwealth of Massachusetts, I received funds from the national Libertarian Party that made it possible for me to get my name on the ballot. Additionally, I raised approximately $821,362 in funds, received 308,860 votes, and ran nearly even with my

Republican Party opponent. My United States Senate campaign was the #1 "third-party" senatorial campaign in America in 2000 according to measures set by *Campaigns and Elections Magazine*. In my campaign, we were hindered greatly by the onerous financial and time burdens attendant with demonstrating to the FEC our compliance with the FECA, and the law restricted my resources to run a campaign, and regulated my spending.

6. In 2002, as the Libertarian Party's candidate for the Governor of Massachusetts, my campaign's centerpiece is The Small Government Act to End the Income Tax ballot initiative that I and others succeeded in getting on the statewide Massachusetts ballot this November to abolish the state income tax. Just to get the state income tax initiative on the ballot, we had to obtain a total of at least 66,617 verified petition signatures from the citizens of Massachusetts. Recent polls show that about 40 percent of the public supports this initiative and that support is continuing to grow despite almost uniform opposition from the Republican and Democrat parties and the Massachusetts media.

7. In working with other Libertarian Party candidates for state and federal office in the past, I have learned how to maximize my limited resources and take advantage of economies of scale. In my 2000 campaign for the United States Senate, for example, I had to spend approximately $150,577 to pay for television ads and approximately $50,894 in radio ads. I must necessarily conserve my limited funds by various means, including coordinating my campaign efforts with those of other state and federal Libertarian Party candidates. For example, in the current election cycle Michael Cloud, the Libertarian Party candidate for United States Senator from Massachusetts, and I, the Libertarian Party candidate for governor, have mailed out our respective campaign bumper stickers in one envelope and

split the cost of the mailing. We have submitted our respective campaign literature for printing as one large job to get a more favorable large scale price, with each of us bearing our share of the reduced cost. It is my understanding that the BCRA limitations on use of "soft money" donations to political parties may interfere with, or even prohibit outright, such coordinated state and federal candidacy efforts, imposing significant civil and criminal penalties for violating the new rules on the use of soft money by state candidates in what the BCRA defines as federal election activity.

8. My campaign for governor does not receive the media exposure accorded the campaigns of the "major" parties. The commercial media, in Boston, Massachusetts in particular, are not disinterested, objective non-partisan voices of the common good, above the electoral process. Rather, they are active partisans that support their candidates and issues of choice by a variety of means, including favorable news articles about their preferred candidates, and either attacks in news articles, or refusal to provide coverage, about those they oppose. In addition to news stories, they use editorials and commentaries to advance their partisan objectives.

9. The FECA/BCRA is devastating to third-party challenger candidates such as me who advocate change, because it codifies the advantages of incumbency and fosters a "government by media." By exempting media from the FECA/BCRA licensing and regulatory restrictions, the commercial media corporations and other entities are endowed with special privileges to express views about candidates and issues, and are immunized from any threat of penalty or court action for having supported those views with funds unlimited by federal law.

10. To appreciate how perniciously the FECA/BCRA affects me, a Libertarian candidate, it is necessary to understand how the FECA/BCRA exacerbates the difficulties that challengers such as me already face just to participate in an election. I have read and agree with the Expert Witness Report of Perry Willis that was previously prepared in this action. It discusses some of the difficulties faced by challengers in general, and Libertarian party candidates in particular. My personal experience as a candidate for federal and state office, and as an active supporter of other candidates for federal office and state office, confirms Mr. Willis' conclusion that the federal campaign finance laws do not improve the electoral process. In fact, despite professed intentions of leveling the playing field, the FECA/BCRA worsens the electoral process by further enhancing the advantages of incumbents and the unchecked power of the established corporate media to make or break the candidate as they see fit, and to act as a cartel in control of election communications. (*See* Report of Perry Willis, ¶ 3).

11. For third-party candidates, such as me, commercial media blackouts and/or distortions are an all too-familiar experience. For example, in Massachusetts a cadre of commercial media corporations comprised of the *Boston Globe,* New England Cable News, and four television stations, WGBH, WCVB, WHDH, and WBZ, decided which gubernatorial candidates were invited to the Governor's Debates broadcast live on all major Boston area television stations. Despite the fact that I am the Libertarian Party nominee for governor, the leader of the successful effort to place The Small Government Act to End the Income Tax on the statewide ballot, and despite my strong showing in the 2000 campaign for the United States Senate, the news media has excluded me from participating in at least three debates so far.

12. The mass media decision to exclude me from participation in the debates demonstrates that the media have their own political bias and agenda which does not include

presenting to the public the ideas of Libertarian candidates....

* * *

13. In my 2000 campaign for the United States Senate, it cost approximately $60,000 just to qualify to get my name on the ballot. As a Libertarian challenger, I had to overcome a lack of name recognition in order to secure the minimum of 10,000 verified signatures to be qualified to appear on the ballot. Media exposure, of course, is the best way to get name recognition. In my experience, however, the partisanship of the commercial media corporations makes it very difficult for Libertarian candidates to get the needed exposure, let alone have their message presented in an unbiased way. At the same time, the partisanship of the commercial media corporations in Massachusetts makes it relatively very easy for candidates of the Green Party, a party that is the fraction the size of the Libertarian Party and which has a fraction of the track record for winning votes and supporters as the Libertarian candidates have, to get exposure and to have their message presented in a positive way. This has been demonstrated to such an extreme that it may well have caused the Green Party candidates to legally qualify for the November ballot where they would otherwise have failed. The special privileges and immunities that the FECA/BCRA grants to commercial media organizations serve to further burden and discourage Libertarian candidates from participating in the electoral process. Commercial media organizations already wield an enormous amount of power with regard to how, and even if, they cover a particular candidate. The FECA/BCRA assumes that the commercial media are fonts of impartiality and provides them with special privileges that are denied to me and other individuals. From my experience, I know that assumption is unfounded and prejudicial to my efforts as a candidate.

14. Even news reporting can be and has been used

by the commercial media to advance or hinder a particular candidate. For example, the *Boston Herald* obtained data about donors that I, as a United States Senatorial candidate, was required to disclose to the FEC, and then ran an article about out-of-state donors to my campaign. The Boston Herald "reported" that one (of thousands of such donors) claimed to have also donated funds to David Duke, a former Ku Klux Klan member. As a matter of personal conscience and as a member of the Libertarian Party, the Ku Klux Klan is anathema to me. The salient point, however, is that a purported "news" report based on public donor data was actually an effort to smear me by linking me to David Duke, in what was no doubt alleged to be a "news story" so that it would be exempt under the FEC's rules.

15. This type of misuse of public donor data underscores the harmful effect of the type of mandatory reporting and disclosure requirements in the FECA/BCRA. I am categorically opposed to compelling donor disclosures under the FECA/BCRA, not only because such information can be, and has been, misused, but also because it invades the privacy of the donor and discourages individuals from participating in campaigns. The FECA's mandatory disclosure donor requirements caused me to receive less financial support during my 2000 campaign for the United States Senate than I otherwise would have received. This resulted in me having less money to spend than I otherwise would have had. There were approximately 52 contributors to my campaign that gave the maximum amount permitted by the FECA. At least 30 of these donors were likely to have contributed even more to my campaign but for the limits imposed by the FECA.

16. Similarly, there were many contributors who shared my views, but who, for fear of having their support disclosed publicly or violating the FECA, did not contribute as fully to my campaign as they would otherwise if their privacy

could be protected. * * *

17. The FECA wrongly made, and continues to make, the surrender of privacy the price for providing political support beyond an arbitrary level. There is an inherent illogic in the way that the federal election laws deal with anonymity. When I vote, I am guaranteed anonymity. This enables me to vote my conscience without fear of retribution. Inexplicably, however, the FECA/BCRA expressly prohibits anonymity in the campaign process. It is my firm belief that contributors to a campaign are entitled to the same anonymity as voters, not less.

18. Other contributors to my campaign wanted their anonymity maintained because they feared reprisals by the entrenched major parties. A shocking example of this occurred last year, and involved Richard Egan, who now serves as the Ambassador to Ireland. Mr. Egan had previously donated $2,000 to my campaign for the United States Senate against the incumbent, Edward Kennedy. Incredibly — although perhaps not unexpectedly — during Senate consideration of his nomination, Senator Kennedy (D-MA) cited Mr. Egan's donation to my campaign as a basis for questioning Mr. Egan's fitness to serve as an ambassador. It is no wonder that persons supporting candidates think twice before giving money in a way that is revealed to the public.

19. Other donors restricted their donations to my campaign to maintain their anonymity so that the government would not know of their support for my Libertarian positions on issues such as taxation, so-called gun control, and legalization of drugs, where powerful government agencies like the IRS, BATF, and DEA, are perceived as taking a dim view of those who question their activities, and who have broad discretion to investigate their political adversaries, and the reputation of doing so.

20. Thus, the FECA/BCRA continues to add barriers to entry for new candidates for federal office. The financial and reporting burdens imposed by the FECA/BCRA strain my already limited resources to the breaking point.

* * *

21. The provisions in BCRA have, and will continue to have, a similarly debilitating impact on me and other third-party candidates. As stated in paragraph 5 above, I received funds from the national Libertarian Party during my 2000 campaign for the Senate that allowed me to get on the ballot. That financial assistance was crucial. Under the BCRA (*see* Section 101(a)), however, that type of assistance may be outlawed or practically impossible pursuant to the BCRA's prohibition against national party committees from soliciting, receiving, or directing "soft money."

* * *

23. I intend to continue to express my opinions about the actions and positions of clearly-identified candidates for federal office in the future as part of my continuing efforts to have the public consider my ideas and the Libertarian Party's philosophy. I want to be free of the mandatory licensing burdens imposed by the FECA/BCRA. I want to be free from the mandatory limitations upon individual financial contributions. I want to be free from the mandatory burden of having to report the names, addresses and occupations of donors to my campaign. I want to be free to campaign for federal office, and to support the campaigns of others, free from the editorial control and discriminatory burdens imposed by the FECA/BCRA. In sum, I want to be free to communicate in an unrestricted manner with the public and to allow the public to judge the extent to which they want to support my candidacy and my ideas without concern that I will be committing a crime for speaking my conscience, and without

compromising the privacy of those who support me.

DECLARATION OF LAWRENCE D. PRATT, ON BEHALF OF GUN OWNERS OF AMERICA, INC. AND GUN OWNERS OF AMERICA POLITICAL VICTORY FUND

* * *

18. Among GOAPVF's complaints in this litigation is the restriction on the maximum annual contribution — $5,000 — that it can receive from any one individual or other non-party political committee, which is also the maximum amount that GOAPVF can itself contribute to any candidate or candidate's committee per election. These restrictions have injured GOAPVF in the past — both with respect to amounts it could have received from individuals but for the restriction as well as with respect to amounts that it would have contributed to certain candidates but for the restriction — and they threaten to do so in the future as well unless they are removed. In addition to the fact that such restrictions arbitrarily limit GOAPVF's activities in supporting or opposing federal candidates, they unfairly discriminate against GOAPVF and other non-party political committees, whose annual contribution limits were not raised or indexed by BCRA, as opposed to the raising and indexing of contribution limits for individuals and party committees as set forth in Section 301 of the BCRA.

19. I believe that the contribution limits imposed by BCRA/FECA on political committees such as GOAPVF, including restricting the maximum contribution that may be donated to GOAPVF, as well as the maximum contribution that GOAPVF may make to the candidate(s) of its choice — which limits are not imposed upon the news media — are discriminatory and deprive GOAPVF of its rights under the First Amendment to the United States Constitution, including impeding GOAPVF from freely and effectively engaging in its

First Amendment activities relative to both express advocacy. As GOAPVF's FEC reports clearly reveal, for example, many individuals in the past have donated the maximum $5,000 contribution to GOAPVF, and I can attest that some of those contributors would have donated more to GOAPVF if they had not been restricted by the FECA as to how much they could have contributed. Similarly, as GOAPVF's FEC reports clearly reveal, in the past GOAPVF has donated the maximum $5,000 contribution to certain candidates, and I can attest that GOAPVF, in the past, would have contributed more than the $5,000 limit imposed by 2 U.S.C. Section 441a(a)(2) if such contribution limits did not exist, and I believe that GOAPVF would function more effectively if such contribution limits did not exist.

DECLARATION OF MICHAEL BOOS, ON BEHALF OF PLAINTIFFS CITIZENS UNITED AND CITIZENS UNITED POLITICAL VICTORY FUND

* * *

13. Among CUPVF's complaints in this litigation is the restriction on the maximum annual contribution — $5,000 — that it can receive from any one individual or other non-party political committee, which is also the maximum amount that CUPVF can itself contribute to any candidate or candidate's committee. These restrictions have injured CUPVF in the past — both with respect to amounts it could have received from individuals but for the restriction as well as with respect to amounts that it would have contributed to certain candidates but for the restriction — and they threaten to do so in the future as well unless they are removed. In addition to the fact that such restrictions arbitrarily limit CUPVF's activities in supporting or opposing federal candidates, they unfairly discriminate against CUPVF and other non-party political committees, whose annual contribution limits were not raised or indexed by BCRA, as opposed to the raising and indexing of contribution limits for individuals and party committees as set forth in section 301 of the BCRA.

14. I believe that the contribution limits imposed by BCRA/FECA on political committees such as CUPVF, including restricting the maximum contribution that may be donated to CUPVF, as well as the maximum contribution that CUPVF may make to the candidate(s) of its choice — which limits are not imposed upon the news media — are discriminatory and deprive CUPVF of its rights under the First Amendment to the U.S. Constitution, including impeding CUPVF from freely and effectively engaging in its First Amendment activities. I believe that individuals who in the

past donated the maximum $5,000 contribution to CUPVF would have donated more to CUPVF if they had not been restricted by the FECA as to how much they could have contributed. Similarly, as CUPVF's FEC reports clearly reveal, in the past CUPVF has donated the maximum $5,000 contribution to certain candidates, and I can attest that CUPVF, in the past, would have contributed more than the $5,000 limit imposed by 2 U.S.C. § 441a.(a)(2) if such contribution limits did not exist, and I believe that CUPVF would function more effectively if such contribution limits did not exist.

PROPOSED FINDINGS OF FACT OF PLAINTIFFS IN CIVIL ACTION NO. 02-CV-781

* * *

12. Congressman Paul, in addition to his own activities as a voter and contributor to other organizations and candidates, conducts a number of press activities as a candidate for federal office. Following the dictates of FECA, he has a FEC-registered campaign committee. He and his campaign committee issue campaign newsletters and communicate with the public by means of newsletters, direct mail, e-mail, targeted telephone facsimiles, telephone calls, and the Internet, as well as radio and television advertisements, to promote his candidacy for federal office and his policies of free market, sound money, independent sovereignty, and constitutionally-limited government. Paul Decl. ¶ 13; Lizardo Decl. ¶ 5. The FECA in the past and present, and the BCRA/FECA in the future, has interfered, does interfere, and will interfere with Congressman Paul's free press activities by reducing the quality and quantity of these communications. Paul Decl. ¶ 14; Lizardo Decl. ¶ 5; Elam Decl. ¶¶ 6-7. But for the BCRA/FECA, Congressman Paul would be able to raise more money from individuals and organizations for communicative activities, as well as expand the range of fundraising events, receive more assistance from volunteers, and redirect resources expended to comply with FEC licensing, record keeping, and reporting requirements. Paul Decl. ¶ 14; Elam Decl. ¶¶ 4-5, 7, 10; Anon. Wit. No. 1 Decl. ¶¶ 7-9; Anon. Wit. No. 2 Decl. ¶¶ 6-8. * * * Such restrictions, controls and prohibitions are part of the federal campaign regulatory system that operates as a prior restraint on Congressman Paul's campaigns for federal elective office and that has an intimidating effect on Congressman Paul's communicative, press activities in the political marketplace. Paul Decl. ¶¶ 15-18; Lizardo Decl. ¶¶ 5-6; Elam Decl. ¶¶ 10-11.

13. Plaintiffs Howell and Cloud also engage in press activities similar to those engaged in by Congressman Paul, both as citizens and voters, and as candidates for federal office.... * * * In fact, as 2002 state and federal Libertarian Party candidates, respectively, Ms. Howell and Mr. Cloud coordinated certain campaign activities with one another in the 2002 federal election cycle, which would be prohibited by BCRA's "soft money" rules. Howell Decl. ¶ 7; Cloud Decl. ¶ 20. The press campaign activities of both Ms. Howell and Mr. Cloud in the past have been restrained, economically challenged, and adversely impacted by the FECA laws limiting campaign contributions and requiring registration, reporting, and disclosure, which will be exacerbated under BCRA/FECA. Howell Decl. ¶¶ 7, 9, 15-22; Cloud Decl. ¶¶ 2, 4, 7-9, 14-17, 19-21. * * * Like Congressman Paul, Ms. Howell's and Mr. Cloud's press activities are impacted by the discriminatory effects of the FECA with respect to the institutional media, if not to a much higher degree because of the Massachusetts candidates' involvement with the Libertarian Party, which is a "third party." *Compare* Paul Decl. ¶¶ 13, 16 *with* Howell Decl. ¶¶ 8-12 *and* Cloud Decl. ¶¶ 7-9, 25-28. Additionally, a primary objective of Libertarian campaigns in general is to educate the public about small government and other aspects of Libertarian Philosophy. Willis Exp. Rep. ¶¶ 7-8. The existence of the Libertarian Party and any details of the Party's platform is almost universally ignored by the corporate mass media. Cloud Decl. ¶¶ 24-28; Howell Decl. ¶¶ 11-14, Willis Exp. Rep. ¶¶ 7-9.

14. GOA, RCR and CU, by their respective undertakings, engage in press activities. Each of them has as a principal function the dissemination of information concerning rights secured under the United States Constitution and other important legislative and policy issues. Pratt Decl. ¶ 3; Babka Decl. ¶ 3; Bossie Decl. ¶ 3. GOA and CU each spends significant funds for communications on such issues during periods, *inter alia*, just prior to federal primary and general federal elections, utilizing broadcast, cable, and satellite facilities. Pratt Decl. ¶ 3; Bossie Decl. ¶ 3. GOA and CU each also communicates with the public by means of mailed and telefaxed letters, messages and articles on its Internet web site, audio tapes, videotapes, and radio and television broadcasts to the public. Pratt Decl. ¶ 5; Bossie Decl. ¶ 5. The press activities of both GOA and CU include engaging in issue advocacy, including communications which will constitute "electioneering communications" as that term is defined by BCRA. The provisions of BCRA which restrict such communications will prevent GOA and CU from engaging in such press activities within 30 days of a primary federal election and 60 days of a general federal election. Pratt Decl. ¶¶ 7, 9; Bossie Decl. ¶ 7. RCR, which was formed in 2000, does not have the many years of press activities that GOA and CU have, but it regularly distributes educational communications by e-mail to a subscriber list of 15,000; it also has engaged in developing communications to the public by radio broadcast which would constitute "electioneering communications" as defined by BCRA. Babka Decl. ¶ 4. Future "electioneering communications" are planned utilizing various media, including radio broadcasting. Such communications would include "targeted communications" as defined by BCRA. Babka Decl. ¶ 7. * * *

15. * * * [T]he press activities of GOA, RCR, and CU are negatively impacted by BCRA/FECA with respect to their working relationships with federal officeholders. For example, both GOA and CU solicit funds through direct mail endorsed by Members of Congress who support the goals of those organizations. Pratt Decl. ¶ 10; Bossie Decl. ¶ 9. RCR has not yet reached that stage of its development, but would like to engage in such communications in the future. Babka Decl. ¶ 9. BCRA/FECA would effectively prohibit such communications, and thus would substantially interfere with

the press activities of GOA, RCR, and CU in this way as well. Even if these plaintiffs were able to engage in such communications in the future, by adopting separate funds that received no corporate contributions and using those funds exclusively to pay for electioneering communications, their press activities would be substantially burdened thereby, including the increased record keeping and reporting requirements with respect to electioneering communications under BCRA/FECA. Pratt Decl. ¶ 7; Bossie Decl. ¶ 5 (p. 5).

16. Plaintiffs GOA and CU, GOAPVF and CUPVF, as political committees, engage in press activities which are severely burdened and restricted by BCRA/FECA. Such burdens and restrictions include the discriminatory registration, reporting, and disclosure requirements mandated by those laws, as well as the discriminatory contribution limits upon political committees and donors to political committees. Pratt Decl. ¶¶ 13, 16-19; Boos Decl. ¶¶ 8, 11-14. *See* Olson Exp. Rep. ¶¶ 17-61. * * *

17. BCRA/FECA subjects the Paul Plaintiffs' press activities to a system of federal licensure. Plaintiffs Paul, Cloud, and Howell, who have been federal candidates, have been required to file a "statement of organization" (signed by a treasurer who assumes unlimited personal liability for legal compliance of the principal campaign committee) with the FEC (or the Secretary of the Senate regarding Senate candidates) before the individual or any committee established by the individual can expend more than $5,000 on "campaign activities," including publishing communications that expressly advocate the individual's election to federal office. Paul Decl. ¶ 14; Cloud Decl. ¶ 14. *See* Olson Exp. Rep. ¶¶ 16, 67, 73.

18. BCRA/FECA imposes economically burdensome regulations upon federal candidates and their committees. * * * For example, plaintiff Cloud estimated that his 2002 campaign for Senate would have received between $100,000 and $300,000 in additional contributions from at least 261 contributors who would have donated more, but did not do so because any contributions over $200 in the aggregate in a calendar year from an individual would have required that his or her identity be disclosed in filed reports. Cloud Decl. ¶¶ 14, 16. There is other substantial evidence that this reporting/disclosure requirement interferes with plaintiffs' press activities by restricting the funds that would otherwise be available for their federal candidacies. *E.g.*, Paul Decl. ¶ 14; Lizardo Decl. ¶¶ 3-4; Anon. Wit. No. 2 Decl. ¶ 8; Willis Exp. Rep. ¶ 13. This burden is discriminatory because it is not imposed on other elements of the press, such as the institutional media. Paul Decl. ¶ 13; Lizardo Decl. ¶ 5; Willis Exp. Rep. ¶ 6.

19. BCRA/FECA imposes additional economically burdensome regulations upon federal candidates and their committees. BCRA/FECA would limit contributions to candidate committees to $2,000 per election. Willis Exp. Rep. ¶ 7. This regulatory burden limits the funds available to federal candidates. Paul Decl. ¶ 14; Cloud Decl. ¶ 15; Willis Exp. Rep. ¶ 7. Plaintiff Cloud estimates that the limitation of $1,000 prior to BCRA cost his campaign committee between $350,000 and $700,000 in net contributions from at least 46 donors. Cloud Decl. ¶ 15. This discriminatory burden is not imposed on other elements of the press, such as the institutional media, which are permitted to editorialize, endorse, and report as they see fit. Paul Decl. ¶ 13; Willis Exp. Rep. ¶ 7; Lizardo Decl. ¶ 5. Such discrimination enhances the role and influence of institutional media corporations in the electoral process. Cloud Decl. ¶¶ 8-9; Miller Exp. Rep. at 19.

20. BCRA/FECA also imposes economically burdensome regulations upon Section 501(c)(4) organizations, including plaintiffs GOA, CU, and RCR, and the connected

separate segregated funds ("SSFs") of GOA and CU. * * * Pratt Decl. ¶¶ 12-13; Boos Decl. ¶¶ 4-5. *See* Olson Exp. Rep. ¶¶ 19, 22. No multicandidate SSF, including plaintiffs GOAPVF and CUPVF, may receive contributions in excess of $5,000 per year from an individual. Pratt Decl. ¶¶ 12, 18; Boos Decl. ¶ 13. GOAPVF, CUPVF, and other political committees supporting or opposing federal candidates also are required to file periodic reports with the FEC regarding their financial activities. Pratt Decl. ¶ 13; Boos Decl. ¶ 11; Olson Exp. Rep. ¶¶ 11, 17. GOAPVF, CUPVF, and other political committees registered with the FEC are further required to report the name, address, employer, and occupation of each contributor donating more than $200 in a calendar year. Pratt Decl. ¶ 17; Boos Decl. ¶ 13. This burden on plaintiffs' press activities is not imposed on other elements of the press, such as the institutional media, and is discriminatory. Pratt Decl. ¶ 19; Boos Decl. ¶ 14. The reporting burden can be 20 percent or more of an SSF's annual receipts. Boos Decl. ¶ 14.

* * *

23. Plaintiffs Paul, Cloud, and Howell, as candidates for federal and state office, have engaged in, and desire to continue to engage in, joint press activities between state and federal candidates. Paul Decl. ¶ 16; Cloud Decl. ¶ 20; Howell Decl. ¶ 7. As members of the Libertarian Party, plaintiffs Cloud and Howell have found it a necessity to run joint press activities as federal and state candidates, and to be able to refer to other candidates, both state and federal, in communicating their ideas and political philosophy during their campaigns. Cloud Decl. ¶¶ 20, 26, 29-30. Section 101(a) of Title I of BCRA places significant barriers in the way of continuing such cooperative press activities between federal and state candidates, and in doing so, substantially and adversely impacts on the power of plaintiffs Cloud, Howell, and Paul to exercise editorial control over their press activities in relation to their respective campaigns for federal and state office.

* * *

24. BCRA/FECA would subject the press activities of Plaintiffs to editorial control by effectively prohibiting plaintiffs GOA, RCR, and CU — organizations receiving corporate contributions — from engaging in "electioneering communications." These organizations have engaged in broadcasting communications in the past which would have or could have qualified as electioneering communications under BCRA, and desire to broadcast electioneering communications in the future. Pratt Decl. ¶¶ 7, 9; Bossie Decl. ¶ 7; Babka Decl. ¶¶ 4, 7, 9. * * *

25. The reporting requirements of BCRA/FECA are voluminous and extremely burdensome. Olson Exp. Rep. ¶¶ 7-15, 17-60, 116; Miller Exp. Rep. at 23; Pratt Decl. ¶¶ 13-16; Boos Decl. ¶¶ 7-11, Cloud Decl.¶ 14; Howell Decl. ¶ 20.

26. To the extent that GOA, RCR, and CU were permitted to make electioneering communications, they, like GOAPVF and CUPVF, would be required to comply with additional recordkeeping and reporting requirements if they spend $10,000 or more per year in "electioneering communications." Any significant broadcast television or radio activity will easily meet this threshold. Pratt Decl. ¶ 5.

* * *

37. BCRA/FECA subjects the press activities of the Paul Plaintiffs to editorial control by limiting the financial resources available to candidates. Federal candidates are now limited to contributions of $2,000 per election from individuals, reducing the quantity and quality of the press activities of candidates. Paul Decl. ¶¶ 14-15; Cloud Decl. ¶¶

21-22; Howell Decl. ¶¶ 15, 23; Lizardo Decl. ¶ 5; Elam Decl. ¶ 5; Miller Exp. Rep. at 15-17. Individuals would also continue to be prohibited from contributing as much as they desire to facilitate the spread of ideas and policies which they support. Anon. Wit. No. 1 Decl. ¶¶ 5, 8.

38. Limits on contributions disproportionately constrain challengers more than incumbents and thereby benefit incumbents, in part because the marginal gain in votes per dollar spent is substantially greater for challengers. Miller Exp. Rep. at 16-17; Willis Exp. Rep. ¶ 11. It is in the interest of incumbents to limit contributions, and therefore spending, because they already tend to be well known, while challengers must raise substantial sums of money simply to obtain basic name recognition. Miller Exp. Rep. at 16-18. Contribution limits increase the marginal cost of each donation received by candidates by reducing the net effect of every appeal made to each donor who might have contributed more in the absence of the legal limitation. This increase in fund raising costs has less effect on incumbents, who have broad-based pre-existing sources of financing. The spending increases that would likely follow an increase in, or elimination of, individual contribution limits would not increase the communicative activity of incumbents, because they are already able to saturate their districts with communications. Thus, contribution limits serve only to limit communications by challengers. Willis Exp. Rep. ¶¶ 10-12. With contribution limits in place, most challengers cannot raise enough money to win, to be remembered, to be heard, or even to have any kind of lasting impact. Willis Exp. Rep. ¶ 12.

39. Plaintiff Cloud received donations in the maximum amount allowed by FECA from 46 contributors in his recent Senate campaign. Cloud estimates that in the absence of BCRA/FECA's limits, these donors would have been willing to donate between $350,000 and $700,000. Cloud Decl. ¶ 15.

Plaintiff Howell received donations in the maximum amount allowed by FECA from 52 contributors. She estimates that at least 30 of these donors would have contributed more in the absence of limits. Howell Decl. ¶ 15. Experienced fundraisers regularly encounter donors who would be willing to donate amounts greater than $1,000, or $2,000, if there were no such limitations. Paul Decl. ¶ 14; Elam Decl. ¶ 5. Similarly, political action committees ("PAC") fundraisers often encounter individuals who would like to donate amounts greater than $5,000, but are unable to due to BCRA/FECA's limitations. Pratt Decl. ¶ 19.

* * *

41. BCRA/FECA also subjects the press activities of the Paul Plaintiffs to editorial control by limiting the financial resources available to candidates in another way. Federal candidates are limited to contributions of $5,000 per election from multicandidate SSFs, reducing the quantity and quality of political speech by candidates. Pratt Decl. ¶¶ 12, 18-19; Boos Decl. ¶14.

42. Additionally, BCRA/FECA would subject the press activities of the Paul Plaintiffs to editorial control by limiting the financial resources available to SSFs. Despite raising certain of the individual contribution limits in federal campaigns, SSFs remain limited to contributions of $5,000 per year from individuals, reducing the quantity and quality of political speech by plaintiffs GOAPVF and CUPVF, which are severely limited with respect to their ability to raise funds in support of their own press activities, as well as their speech for or against federal candidates. Pratt Decl. ¶¶ 18-19; Boos Decl. ¶¶ 5, 12; Howell Decl. ¶¶ 15, 23; Lizardo Decl. ¶ 5; Olson Exp. Rep. ¶ 39. Individuals would also continue to be prohibited from contributing as much as they desire to facilitate the spread of ideas and policies which they support. Anon. Wit. No. 1

Decl. ¶¶ 4, 9.

43. Reporting requirements reduce the funds contributed to campaigns because certain contributors, for various reasons, do not want to have their donations revealed to the public. Certain donors are concerned about retribution from incumbents for donations to challengers. Others, fear business or personal consequences of such revelations. Still others object on philosophical grounds to having personal information collected and published. Willis Exp. Rep. ¶¶ 13; Lizardo Decl. ¶¶ 3-4; Elam Decl.¶ 4, Anon. Wit. No. 1 Decl. ¶ 6; Anon. Wit. No. 2 Decl. ¶ 3; Cloud Decl. ¶¶ 16; Howell Decl. ¶¶ 15-16. There is little doubt that the fears of retribution or other adverse consequences are well-founded. This rational basis for fear of retribution from incumbents for donations to challengers' campaigns is illustrated by Senator Edward Kennedy's challenge to the confirmation of Richard Egan an Ambassador to Ireland, citing Mr. Egan's donation to the campaign of Carla Howell against Senator Kennedy as his basis for objection. Cloud Decl. ¶ 17; Howell Decl. ¶ 18. The estimated loss to plaintiff Cloud's senate campaign due to donors seeking to avoid having donations disclosed is between $100,000 and $300,000. Cloud Decl. ¶ 16.

44. In addition to limiting donations to candidates, the reporting requirements of BCRA/FECA discourage candidate entry into the political process. This is due to both the fact that these campaign finance laws make it virtually impossible to raise sufficient funds to compete and the extreme burden involved in complying with the reporting requirements, together with potential liability for even unintentional violations. Willis Exp. Rep. ¶¶ 14, 22.

45. Similar reporting requirements are not imposed on corporate mass media. Willis Exp. Rep. ¶ 9.

46. FECA, as amended by BCRA, clearly discriminates between distinct elements of the press as defined under the First Amendment. Institutional media corporations are exempt from funding limitations placed on candidates and candidate committees. Paul Decl. ¶ 16; Willis Exp. Rep. ¶¶ 6-7. These institutional media corporations remain intensely partisan and active participants in the electoral process. Paul Decl. ¶ 13; Howell Decl. ¶¶ 8-14; Cloud Decl. ¶¶ 23-28; Willis Exp. Rep. ¶ 5-7. BCRA/FECA's limitations on funding to candidates enhances the voice and influence of the institutional media corporations. Miller Exp. Rep. at 19. This discrimination also operates to benefit most incumbents. Willis Exp. Rep. ¶ 9, 10; Miller Exp. Rep. at 19.

47. FECA, as amended by BCRA, also clearly discriminates between distinct elements of the press in other ways. Institutional media corporations are exempt from reporting requirements placed on candidates and candidate committees. Paul Decl. ¶ 16; Willis Exp. Rep. ¶¶ 6, 8; Cloud Decl. ¶ 28. These institutional media corporations remain intensely partisan and active participants in the electoral process. Paul Decl. ¶ 13; Howell Decl. ¶¶ 8-14; Cloud Decl. ¶¶ 23-28; Willis Exp. Rep. ¶¶ 5-7. BCRA/FECA creates barriers to entry by non-incumbents into the electoral process. Cloud Decl. ¶ 10; Willis Exp. Rep. ¶ 14. For example, incumbents benefit from the contribution limitations. Cloud Decl. ¶¶ 10-13; Howell Decl. ¶¶ 4-7 and 15-20; Miller Exp. Rep. at 16-18. Incumbents also benefit from the discriminatory standards and impacts of the limitations on personal use of campaign funds. Howell Decl. ¶ 22; Olson Exp. Rep. ¶¶ 106-112.

48. Additionally, FECA, as amended by BCRA, discriminates between distinct elements of the press by limiting SSFs to contributions of $5,000 per year from individuals. This also reduces the quantity and quality of the press activities

of the Paul Plaintiffs. Pratt Decl. ¶¶ 16, 18-19; Boos Decl. ¶¶ 4-5, 12; Howell Decl. ¶ 23; Lizardo Decl. ¶ 5; Olson Exp. Rep. ¶ 39. BCRA has further discriminated against SSFs by its failure to increase the maximum level of legal contributions to SSFs, as contrasted with BCRA's increases to the maximum level of legal individual contributions to federal candidates, which are also indexed for inflation. Pratt Decl. ¶¶ 16, 18-19; Boos Decl. ¶¶ 11-14. Individuals, including the individual Paul Plaintiffs, would also continue to be prohibited from contributing as much as they desire to facilitate the spread of ideas and policies which they support. Anon. Wit. No. 1 Decl. ¶¶ 4, 9.

49. Unlike the other classes of political actors regulated by BCRA, BCRA/FECA does not index for inflation donations made by or to PACs. Thus, inflation will gradually reduce the significance of PACs vis-a-vis other BCRA/FECA-regulated political presses. Pratt Decl. ¶ 18; Boos Decl. ¶ 13.

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No. 02-1675

Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

NATIONAL RIFLE ASSOCIATION, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

◆

**On Appeal From The
United States District Court
For The District Of Columbia**

◆

BRIEF FOR APPELLANTS THE NATIONAL RIFLE ASSOCIATION, *ET AL.*

◆

CLETA MITCHELL
FOLEY & LARDNER
3000 K Street, N.W. Suite 500
Washington, D.C. 20007
(202) 295-4081

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HAMISH P.M. HUME
DEREK L. SHAFFER
COOPER & KIRK, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

BRIAN S. KOUKOUTCHOS
COOPER & KIRK, PLLC
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

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QUESTIONS PRESENTED

1. Whether Congress restricted corporate and union "electioneering communications" about candidates in Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA") in order to serve a compelling governmental purpose, as required by the First Amendment to the United States Constitution.

2. Whether Congress adopted the least restrictive means of regulating political speech by flatly prohibiting "electioneering communications" by both nonprofit 501(c)(4) corporations and for-profit corporations alike in Section 204 of BCRA, rather than permitting 501(c)(4) corporations to fund such communications exclusively with individual contributions, as was initially contemplated in Section 203(b).

3. Whether Congress adequately tailored the definitions of "electioneering communications" in Section 201 of BCRA to serve the anti-corruption purpose proffered in support of those definitions.

4. Whether Congress violated the Equal Protection guarantee of the Fifth Amendment by granting a special exemption in Section 201 of BCRA for political speech by corporations that own broadcast facilities, as opposed to all other corporations whose identical speech constitutes forbidden "electioneering communications."

PARTIES TO THE PROCEEDINGS

Appellants in this case, No. 02-1675, plaintiffs in the court below, are the National Rifle Association ("NRA") and the National Rifle Association Political Victory Fund ("PVF"), a Political Action Committee ("PAC") of the NRA.*

Appellees, defendants or intervenor-defendants below, are the Federal Election Commission and its Commissioners; the Federal Communications Commission; the United States of America; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

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* As stated in appellants' jurisdictional statement, neither appellant has a parent corporation, and no publicly held company owns 10% or more of the stock of either appellant.

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JURISDICTION

The District Court entered judgment on May 1, 2003. Appellants the National Rifle Association (the "NRA") and the NRA Political Victory Fund (the "PVF") filed their timely notice of appeal on May 5, 2003. This Court has appellate jurisdiction under § 403(a)(3) of BCRA.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First and Fifth Amendments to the United States Constitution, and relevant provisions of BCRA, are reproduced at App. 5a-6a and 20a-29a of the NRA's jurisdictional statement.

STATEMENT[1]

The NRA is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4). Its four million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms. S.A. 219 ¶2 (Henderson). "The NRA's frequent references to candidates for federal office and the programming it broadcasts throughout the election cycle – including the period immediately preceding primaries and

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[1] In order to avoid unnecessary duplication, this statement relies upon the brief filed by appellants in *McConnell v. FEC*, No. 02-1674, for a more detailed description of Title II of the Bipartisan Campaign Reform Act ("BCRA") and the procedural background of this litigation.

general elections – are essential to its political mission of educating the public about Second Amendment and related firearm issues." S.A. 256 (Henderson). In 2000, it paid for more speech on television – over 300,000 minutes – than all other issue advocacy groups and unions combined. *See* Joint Appendix ("J.A.") 367.[2]

The NRA's political speech furthers a variety of purposes: the NRA educates and informs its members and the public about specific legislative threats to Second Amendment rights, as well as broader political and cultural pressures on gun rights; the NRA also defends itself against attacks on its positions and reputation made by the media and by anti-NRA politicians; and the NRA recruits members and raises funds throughout the year. In almost all of this speech, the NRA refers to federal officeholders and candidates. S.A. 256 ¶51 (Henderson). And yet the vast bulk of its political speech that furthered these purposes in 2000 was not intended to influence a federal election. *See* J.A. 368, 380, 384-85.[3] The PVF is a political committee within the meaning of 2 U.S.C. § 431(4) and is a separate segregated fund of the NRA. The PVF runs ads that expressly advocate the defeat or election of a candidate.

The NRA funds its speech almost exclusively with dues and contributions from individual members. The organization does not accept business corporations as members and the contributions that it receives from such corporations are negligible (approximately $385,000 in 2000), especially in relation to its income from the dues and contributions of individual members (approximately $140 million in 2000). *See* S.A. 258-59 ¶51f (Henderson); J.A. 1963; J.A. 386. The average individual contribution to the NRA is $30. S.A. 89 ¶41 (Per Curiam); S.A. 258 ¶51f (Henderson). In short, the NRA is an organization comprised of ordinary Americans of moderate means who join their voices in a common effort to defend, promote, and enjoy a constitutional freedom that is precious to them.

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[2] The record in the District Court included two volumes of appendices and a supplemental appendix filed by the NRA, which are cited as they appear in the Joint Appendix or, alternatively, in the record below; various portions of the record below are cited as they can be found in Plaintiffs' Consolidated Submission ("PCS") or Deposition Transcripts Unified Filing. Attached hereto is an appendix of relevant legislative history referred to as "LH App."

[3] To be sure, in 2000 the NRA also aired approximately 30,000 minutes of speech designed to, among other things, inform the public of the grave threat that Vice President Gore's presidential candidacy posed to Americans' Second Amendment rights. *See* S.A. 234-35 ¶42a (Henderson); S.A. 695 ¶2.6.4.3 (Kollar-Kotelly); J.A. 383.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "[A] representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."

New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., joined by Douglas, J., concurring) (quoting 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (1803), 297 (editor's appendix)). If there is truth in this proposition, and this Court has reiterated it in many cases, then Title II of BCRA cannot stand, for it bans, on pain of criminal sanction, independent expenditures for broadcasting "opinions . . . upon the conduct of those who may advise or execute" public measures. It is, after all, references to candidates for federal office that the NRA and similar issue advocacy organizations are restricted by Title II from broadcasting during an election campaign.

Title II's purpose is to severely restrict the quantity and content of core political speech, a purpose that is "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976). This is irrefutably clear from the plain words of the statute itself; from the floor statements of legislators who supported the measure; from the sworn testimony of BCRA's main sponsors, who intervened in this litigation; from the law's clearly foreseeable effect of suppressing political speech; and even from the Intervenors' own brief below, which candidly blamed "the *amount* of general treasury funds at the disposal" of "interest groups" like the NRA for the "explosion" in recent years of issue ads – or "negative attack ads," in their vernacular. Intervenors' Opening Br. 104 (filed Nov. 6, 2002) (emphasis added). Indeed, the Government and the Intervenors (collectively "Defendants") went to great lengths to establish that this explosion in political speech was the predicate for, and specific target of, Title II. BCRA bans speech to precisely the extent that it succeeds in its goal of muffling this explosion.

This Court's decisions have consistently drawn an outcome-determinative distinction between legislative restrictions on independent political *expenditures* and on direct campaign *contributions*. Because independent expenditures, in contrast to campaign contributions, produce "core First Amendment expression" and pose little "danger[] of real or apparent corruption," *Buckley,* 424 U.S. at 48, 46, this Court has, with one exception, consistently struck down expenditure limits as failing to narrowly serve the compelling government interest of preventing corruption of the electoral process. Title II fares no better. To be sure, Defendants introduced in the District Court a mountain of evidence in support of their claim that the current campaign finance system is widely perceived to corrupt the political process. But that evidence relates almost entirely to the corrupting influence of unregulated "soft money" campaign contributions, which are addressed by Title I. The record contains no substantial evidence that the public regards political ads aired by advocacy groups as corrupting or in any way differentiates them from ads funded by PACs.

Nor can Title II find shelter in the only decision of this Court upholding an expenditure limit, *Austin v. Michigan State Chamber of Commerce,* 494 U.S. 652 (1990). Title II's

purpose, according to the Government, is merely "to ensure that [independent electioneering] spending 'reflect[s] actual public support for the political ideas espoused by corporations and unions, rather than their success in the economic marketplace, *Austin*, 494 U.S. at 660. . . . " Gov't Opp'n Br. 56 (filed Nov. 20, 2002). But *Austin* simply cannot be made to support a speech restriction that extends any further than is necessary to ensure that a nonprofit advocacy group's independent political spending bears a fair and reasonable "correlation to the public's support for the corporation's political ideas," 494 U.S. 660, as measured by the financial support of individual members rather than business corporations. The NRA, in contrast to trade or business associations, derives only a miniscule portion of its revenues from corporate contributions. It is funded almost exclusively by membership dues of approximately four million individuals of ordinary means, the vast bulk of whom cannot afford to make an additional donation to the NRA's PAC, the PVF, as is required under Title II in order to fund an electioneering communication. Thus, far from preventing the NRA's political voice from being unfairly inflated by funds derived from the economic marketplace, Title II reduces the NRA's political voice to a whisper when compared to its actual public support in the political marketplace. By channeling the NRA's political speech through its PAC, Title II artificially impedes the ability of ordinary Americans of modest means to participate effectively in our democracy. And *that* is the measure's avowed purpose; it cannot be intelligibly understood except as a naked effort to suppress political speech for its own sake.

But even if one looks past this dispositive refutation of the claim that Title II was designed to prevent *Austin*-type corruption of the electoral process, the measure nonetheless must fall, for there were less restrictive means available to Congress to ensure that the political voices of grassroots issue advocacy groups like the NRA were not unfairly inflated by contributions from business corporations. Indeed, Congress enacted a less restrictive alternative in Title II itself: the original "Snowe-Jeffords" version of Title II would have exempted electioneering communications by 501(c)(4) advocacy groups like the NRA, so long as they were "paid for exclusively by funds provided directly by individuals." BCRA § 203(b) (adding to U.S.C. § 441b(c)(2)). The so-called "Wellstone Amendment," however, negated the Snowe-Jeffords Provision, *see* § 204 (adding 2 U.S.C. § 441b(c)(6)), for the specific purpose of extending Title II to nonprofit issue advocacy organizations.

Senators McCain and Feingold and the other sponsors of BCRA *opposed* the Wellstone Amendment, not because they valued the political speech of the NRA and other grassroots advocacy groups that the amendment would stifle, but because they believed that the amendment would likely be struck down by this Court as unconstitutional. BCRA's opponents overwhelmingly supported the amendment, presumably for this very reason. BCRA's sponsors therefore insisted both that a severability clause be enacted and that the original Snowe-Jeffords language remain in the bill, so that invalidation of the Wellstone Amendment would not threaten Title II as a whole. If the Wellstone Amendment is upheld, it will mark the first time in our Nation's history that the Court has sanctioned a content-based restriction on core political speech funded by like-minded individuals.

Even if Title II did not suffer from the foregoing constitutional flaws, it is fatally overbroad for two independent reasons. First, BCRA regulates *speakers* that pose no threat of corruption. Simply put, there is no threat of corruption (or the appearance thereof) arising from like-minded individuals pooling their resources in a grassroots advocacy organization. Indeed, such collective action is the only way that citizens of ordinary means can have their voice heard in the mass media. Second, Title II sweeps within its restriction entire categories of speech that are wholly divorced from the measure's alleged target of speech intended to influence an election. An issue advocacy organization typically names federal officeholders and candidates for innumerable reasons, ranging from the need to educate the public about threats to the groups' beliefs, to defending itself against direct attacks launched by the politicians themselves. One could not have decried McCarthyism without mentioning McCarthy. And, as Judge Henderson found, when the NRA's speech is properly taken into account, more than a third of the broadcasts that Title II would have criminalized in the 2000 cycle were genuine issue ads unrelated to a federal election.

Finally, Title II carves out an exception for the electioneering communications of broadcast media companies. This media exception to Title II renders the measure unconstitutional in its entirety. This Court has consistently rejected the proposition that the institutional press has special First Amendment rights, and thus any speaker-based preference must be justified by a compelling governmental interest. Here, there is no such rationale. The factual predicates found in *Austin* to be sufficient to justify such a media exception simply no longer exist. With more Americans using the Internet than reading a daily newspaper, the broadcast media no longer play a "unique" role in "informing and educating" the public. 494 U.S. at 667. And with some of the world's largest multinational conglomerates now dominating the media industry, the notion that "media corporations differ significantly from other corporations" is plainly antiquated. *Id.* If grassroots advocacy organizations funded by their individual members truly pose a meaningful threat of an appearance of corruption, then surely so do the likes of Microsoft, Disney, General Electric, and AOL TimeWarner, each of which owns national television channels.

ARGUMENT

I. TITLE II'S PURPOSE IS TO STIFLE CORE POLITICAL SPEECH.

> *These groups often run ads that the candidates themselves disapprove of. Further, these ads are almost always negative attack ads and do little to further beneficial debate and a healthy political dialog. To be honest, they simply drive up an individual candidate's negative polling numbers*

> *and increase public cynicism for public service in general.*
>
> – Senator John McCain (LH App. 1a).

Thus did Senator McCain urge enactment of Title II's restriction on the rights of "these groups" to air advertisements critical of him during an election campaign. Title II creates a new crime and a new class of felons: corporations and unions that engage in "electioneering communications," which are defined as "[a]ny broadcast, cable, or satellite communication which ... refers to a clearly identified candidate for federal office ... 60 days before a general, special, or runoff election for the office sought by the candidate; or ... 30 days before a primary or preference election. . . . " BCRA § 201(a) (adding new FECA § 304(f)).[4] To be sure, Title II's restrictions on electoral speech are indifferent to whether the ads seek to bury Caesar or to praise him; they criminalize positive ads as well as negative. But the world has never seen, and never will see, a law *aimed at praise* of the lawmakers. And, in any event, sponsors and supporters of Title II in Congress made no bones about their target. One supporter after another openly echoed Senator McCain's complaint against "negative attack ads":[5]

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[4] Title II also includes a fallback definition of "electioneering communication," to take effect only if the primary definition is held "constitutionally insufficient." *Id.* The NRA has already explained in an emergency stay application to the Chief Justice that the truncated version of that fallback definition, as revised by Judge Leon and upheld by the District Court, is unconstitutional. The NRA therefore will not belabor those arguments here but, instead, incorporates them by reference. No matter its precise form, however, the fallback definition suffers from the same constitutional defects outlined herein with respect to the primary definition.

[5] Congress's purpose to stifle disfavored speech is further *inscribed upon the statute itself*, which grants "a free pass" to those electioneering communications that travel through newspaper and direct mail ads or are broadcast by media corporations, although such communications pose the *very same* corruption concerns now invoked by Defendants. *See*

(Continued on following page)

- Sen. McCain: "I hope that we will not allow our attention to be distracted from the real issues at hand – how to raise the tenor of the debate in our elections and give people real choices. No one benefits from negative ads. They don't aid our Nation's political dialog." (LH App. 3a).

- Senator Wellstone: "I think these issue advocacy ads are a nightmare. I think all of us should hate them. . . . We could get some of this poison politics off television." (LH App. 8a).

- Senator Jeffords: "[Issue ads] are obviously pointed at positions that are taken by you saying how horrible they are. . . . The opposition comes forth with this barrage [of ads] and you are totally helpless." (LH App. 5a).

- Senator Cantwell: "[Title II] is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves." (LH App. 9a).

- Senator Boxer: "We have an opportunity in the McCain-Feingold bill to stop [negative ads] and basically say, if you want to talk about an issue, that is fine, but you can't mention a candidate. . . . " (LH App. 13a).

- Senator Daschle: "The 'issue ads' are more attack-oriented and personal." (LH App. 14a). "I believe that negative advertising is the crack cocaine of politics." (LH App. 14a).[6]

S.A. 364-65 (Henderson). This underinclusiveness fatally "diminish[es] the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 45 (1994).

[6] This is a small but representative sample of the statements made in the Senate and the House reflecting Congress's overriding concern with stifling negative advertising that it deemed offensive, and, indeed, pernicious. A more complete list of such statements, including full citations to the relevant pages of the congressional record, is assembled in the legislative history appendix to this brief. *See* LH App. 1a-39a. It is also apparent from the legislative record that Congress was intent upon

(Continued on following page)

And in defending the measure as an intervenor to this case, Senator McCain confirmed that Congress specifically targeted speech critical of candidates for federal office: "The real world is that the overwhelming majority of ads that we see running today are attack ads that are called issue ads, which are direct, blatant attacks on the candidates. . . . We don't think that's right." J.A. 936.[7]

A. In targeting issue ads by corporations and unions, Title II is of a piece with the rest of BCRA, the overarching thrust of which is to "insulate[] legislators from effective electoral challenge." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 404 (2000) (Breyer, J., concurring). All agree that money plays a pivotal role in the American political system given the necessity and enormous expense of communicating political speech through the broadcast media, especially television. *See FEC v. NCPAC*, 470 U.S. 480, 494 (1985). In a transparent effort to protect their own incumbencies, BCRA's proponents sought to dry up every source of funds for such political speech except so-called "hard money" funds raised from individuals and PACs, the two sources of funds in which incumbents have a gigantic advantage over challengers. *See* NRA App. 119. And BCRA doubles the limits on individual contributions to candidates. As an additional measure of protection, Congress further leveraged the "media-related advantages of incumbency" by exempting media corporations from Title II's restrictions. *Shrink*, 528 U.S. at 404 (Breyer, J., concurring). *See* Appendix to Brief for Appellants Congressman Ron Paul, *et al.*, at 29a (filed July 8, 2003) (media exception confers "considerable advantage" upon incumbents by virtue of their access to "inside information" about the legislative process).

With this sharply skewed playing field in place, only two threats to incumbents remained. First, the threat of "outside interest groups" airing "negative attack ads" was quashed by Title II. Second, Congress responded to the threat of challenges from wealthy, self-funded candidates by raising the contribution limits for candidates who face such a challenge. Given that all of BCRA's provisions operate to the advantage of incumbents, the political class's age-old instinct for self-preservation is readily apparent. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (effects of a law are probative of statutory intent). This Court should not defer to Congress's (or more accurately the Justice Department's) asserted rationales where, as here, "that deference . . . risk[s] such constitutional evils as, say, permitting incumbents to insulate themselves against effective electoral challenge." *Shrink*, 528 U.S. at 402 (Breyer, J., concurring).

B. When viewed against the long and largely doleful history of governments among men, Title II's restraint on "electioneering communications" is entirely unremarkable – just another example of the "standard practice" of the governors "us[ing] the criminal law to insulate themselves from disagreement" by the governed. Anthony Lewis, Make No Law 52 (Random House, 1991). Even in our open democratic society, Title II's restraint on electoral speech is not without its chilling historical antecedents. The infamous Sedition Act of 1798, like Title II, was specifically

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repelling what it viewed as intrusion by outside groups, with their independent political ads, upon candidates' ability to control their own campaign agendas; according to Senator Boxer, for instance, the ads of outside groups "bring[] in other issues that the two candidates themselves do not even want to talk about." LH App. 40a; *see also id.* 40a-45a.

[7] The intervening defendants consistently echoed this theme in their sworn testimony. *See, e.g.*, J.A. 939-40; J.A. 914-15; J.A. 902; J.A. 906; J.A. 910; J.A. 972; J.A. 749.

aimed at stifling speech critical of the Government and its elected members.[8]

Proponents of the Sedition Act in the 5th Congress, like BCRA's supporters in the 107th, decried "malicious calumnies against Government," speech designed to "inflame ... constituents against the Government," publications "calculated to destroy . . . every ligament that unites ... man to society and to Government," and "representations [that] are outrages on the national authority, which ought not to be suffered." 11 PCS/NRA 111-13. Opponents of the Sedition Act in Congress, like opponents of BCRA, argued then, as we do now:

> This bill and its supporters suppose, in fact, that whoever dislikes the measures . . . of a temporary majority in Congress, and shall . . . express his disapprobation and his want of confidence in the men now in power, is seditious and is liable to punishment. . . . If you thus deprive the people of the means of obtaining information of their conduct, you in fact render their right of electing nugatory; and this bill must be considered only as a weapon used by a party now in power, in order to perpetuate their authority and preserve their present places.

11 PCS/NRA 114.[9]

The Sedition Act never reached this Court, but in *New York Times Co. v. Sullivan*, 376 U.S. at 276, the Court

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[8] *See* S.A. 259-60 ¶51g (Henderson); 11 PCS/NRA 109-10. The Act made it a crime, punishable by a $5000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States." 1 Stat. 596, *quoted in New York Times Co. v. Sullivan*, 376 U.S. at 273-74.

[9] Opponents of BCRA in Congress arrestingly made the same points. *See* LH App. 46a-51a.

unanimously acknowledged that the Act, "because of the restraint it imposed upon criticism of government and public officials," had been universally condemned "in the court of history" as a blatant infringement on the freedom of speech. If history's judgment on the Sedition Act is correct, then Title II's modern version of it must fall.

C. Nor can Title II's limitation on electoral speech be reconciled with this Court's holding in *New York Times Co. v. Sullivan*. At the heart of that case was a political advertisement run in the NEW YORK TIMES by an "interest group" – the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The ad was found to refer to an elected official and to falsely criticize his handling of civil rights protests in Montgomery, Alabama. The issue was whether the First Amendment "limit[s] a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.* at 256. Emphasizing that "[i]t is as much [the citizen's] duty to criticize as it is the official's duty to administer," *id.* at 283, the Court held that the First Amendment prohibits such an action unless the public official can show that the defamatory statement was made with actual malice. The *Sullivan* Court's reasoning is equally dispositive of Title II.

At the heart of the Court's unanimous ruling was its recognition that *political speech* is the lifeblood of our representative democracy and that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. That the political speech at issue was contained in a paid advertisement was irrelevant; the First Amendment protects "persons who do not themselves have access to publishing facilities" no less than it protects the press. *Id.* at 266. Nor did the advertisement's false and defamatory nature suffice to deprive it of First Amendment protection, for "erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.'" *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). And the *Sullivan* Court emphasized, over and over again, that speech concerning the conduct of public officials and candidates for public office is essential to the vitality of democracy itself. Quoting Mr. Madison's Report on the Virginia Resolutions denouncing the Sedition Act, the Court said this: "The value and efficacy of this right [to vote] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." *Id.* at 275 (citation omitted).[10]

In the record before this Court are hundreds, perhaps thousands, of the "negative attack ads" that Title II seeks to rid from the airwaves. To dispose of this case, it is enough to note simply that *every single one of them* would be protected by the First Amendment from a libel action brought by the attacked candidate. But Title II cuts even deeper into the heart of the First Amendment than did the defamation action invalidated in *Sullivan*. Title II goes beyond just rendering speech actionable in tort; it *criminalizes* speech outright and punishes the speaker with imprisonment. Title II goes beyond just reaching and restraining false speech; it reaches and penalizes *the truth*. Title II goes beyond just restraining political speech, it targets *electoral* speech about candidates for public office during the weeks before citizens go to the polls.

Thus, Title II's restrictions on electioneering communications violate the most fundamental postulates of the First Amendment. The same conclusion flows from this Court's campaign finance cases, as we demonstrate in detail below.

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[10] The Court has consistently held "that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo*, 424 U.S. at 50 (citing *Mills v. Alabama*, 384 U.S. 214 (1966), and *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)).

II. TITLE II'S RESTRICTIONS ON "ELECTIONEERING COMMUNICATIONS" CANNOT BE JUSTIFIED AS PREVENTING CORRUPTION.

A. Title II Was Not Designed To Prevent Corruption.

From *Buckley* in 1976 to *FEC v. Beaumont* earlier this Term, this Court has consistently emphasized the "'fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign.'" *Colorado Republican Fed. Campaign Comm. v. FEC,* 518 U.S. 604, 614-16 (1996) ("*Colorado Republican I*") (quoting *NCPAC*, 470 U.S. at 497-98); *see, e.g., FEC v. Beaumont,* 123 S. Ct. 2200, slip op. at 8 (June 16, 2003). Because of differences in both their expressive value and corrupting potential, "limits on political expenditures deserve closer scrutiny than restrictions on political contributions." *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-41 (2001) ("*Colorado Republican II*").

Emphasizing that political expenditures "produce speech at the core of the First Amendment," *NCPAC*, 470 U.S. at 493, and pose little threat of political corruption, this Court has "routinely struck down limitations on independent expenditures" under strict scrutiny. *Colorado Republican II*, 533 U.S. at 441. In contrast, campaign contribution limits have consistently been upheld under "relatively complaisant review" because "contributions lie closer to the edges than to the core of political expression," *Beaumont*, slip op. at 14, and they entail "a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption. . . . " *Id.* at 8.

Defendants are well aware that Title II is subject to strict scrutiny, so they attempt to cast Title II as designed to achieve the compelling government purpose of preventing actual or apparent political corruption. But the legislative record of Title II unequivocally establishes that Congress did not limit electioneering communications to protect officeholders from the corrupting influence of "sham" issue ads. To the contrary, as demonstrated above, *supra* at 7-11, Title II's supporters made clear that it was aimed at "negative attack ads" that have "demeaned and degraded all of us" and "do little to further the official debate."

To fill this void in the *legislative* record, Defendants attempted below to create a post-enactment *litigation* record, comprising solicited testimony from political consultants, lobbyists, and former politicians. But to sustain a content-based restriction on political speech, the Government must establish that *the purpose that actually animated enactment* of the measure is compelling and is narrowly served by the restriction. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 191 (1997).[11] Therefore, neither Defendants nor this Court can go beyond Title II's text and legislative history in the effort to discern and evaluate "the disease sought to be cured" by its limits on electioneering communications. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quotation and citation omitted). And Congress's avowed purpose – to stifle the airing of "negative attack ads" – is not even a legitimate, let alone a compelling, governmental purpose.[12]

But even if Defendants' anti-corruption rationales for Title II were not foreclosed as a matter of law, they fail as a matter of fact, as we demonstrate below.

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[11] The Government may defend a statute based upon a "conceivable" or "hypothetical" legislative purpose *only* when that statute is being reviewed under mere "rational basis" scrutiny. *See, e.g., Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002).

[12] If Defendants could extract *any* arguably legitimate purpose from the actual legislative record, that purpose would extend only so far as the *disclosure* requirements of Title II (as opposed to the prohibition on corporate speech), which are "the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68.

B. Gratitude For Political Support Is Not Corruption.

Defendants' concept of political corruption is far removed from the record of *"quid pro quo"* arrangements that concerned this Court in *Buckley*. *See* 424 U.S. at 26 & n.28. To Defendants, a politician who is, as they put it, "naturally grateful" to an organization that runs an issue ad in his favor is a politician on the take. But this is not "corruption" – this is the democratic process. Elected officials are indeed grateful for any support for their campaigns, whether it takes the form of the ballot of a single constituent, or the endorsement of an organization with millions of members, or the speech of supporters extolling the candidate's virtues or decrying the opponent's vices. And those who provide such support do indeed expect that, if the campaign is successful, the official will cast votes in a way that reflects the shared political ideals that inspired the support in the first place. This is called "democracy."

Defendants, however, see corruption in the natural functioning of our representative democracy, and if their concept of political corruption is allowed to take root in this Court's First Amendment jurisprudence, then no political activity is safe from congressional regulation.[13] One need not think long to grasp that if a candidate's natural gratitude to the NRA for helpful "electioneering communications" is corruption enough to justify silencing such political speech, then what is to stop the Government when it trains its sights on, say, the NRA's speech endorsing a candidate and urging its membership to rally behind him? This Court, therefore, has specifically rejected Defendants' notion of corruption. "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *NCPAC*, 470 U.S. at 498.

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[13] Defendants' novel and expansive theory of corruption *qua* gratitude was adopted by Judge Kollar-Kotelly, who opined that candidates are "as beholden to corporations . . . that spend money to help them through ad campaigns as they would be if the same entities wrote a check directly to the campaign." S.A. 838 (Kollar-Kotelly). That notion, which is bereft of evidence to support it, would obliterate this Court's consistent distinction between contributions and expenditures, leaving *any* independent expenditure – be it that of a PAC, an individual, or some other entity – fully subject to regulation because it can simply be equated, in the words of Judge Kollar-Kotelly, with a "check . . . to the campaign."

As previously noted, Defendants can offer nothing from Title II's *legislative* record demonstrating a link between "electioneering communications" and political corruption, so they attempted in the District Court to fill that void with a *litigation* record. To be sure, Defendants offered a massive evidentiary record in support of their claim of political corruption, but it relates almost exclusively to the corrupting influence of soft-money donations banned by Title I (thus confirming the fundamental distinction in the corrupting potential of contributions versus expenditures).[14] As Judge Henderson found: "None

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[14] The cavernous disparity in record evidence supporting Defendants' theory of corruption with respect to contributions regulated by Title I, as opposed to expenditures regulated by Title II, is manifest from the opinions below, particularly that of Judge Kollar-Kotelly. *Compare* S.A. 589 ¶1.75 (Kollar-Kotelly) ("The record is a *treasure trove* of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that *contributions* . . . are given with the expectation they will provide the donor with access to federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized.") (emphases added); S.A. 567 ¶1.63; S.A. 582 ¶1.73; S.A. 625 ¶1.82; S.A. 574 ¶1.70; S.A. 626 ¶1.83; S.A. 633-34 ¶1.83.5; S.A. 635-36 ¶1.84; *with* S.A. 718-19 ¶2.7.11 (Kollar-Kotelly) (finding no "direct examples of votes being exchanged for candidate-centered issue advocacy expenditures" but "that candidates and parties appreciate and encourage corporations . . . to deploy their large aggregations of wealth into the political process. If nothing else, I find that the record presents

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of the evidence the defendants have offered materially supports the proposition that corporate and labor disbursements for issue advocacy corrupt or appear to corrupt federal candidates." S.A. 274-75 ¶54b (Henderson). Indeed Defendants' token evidence relating to issue ads actually undermines their anti-corruption rationale, even under their "gratitude" theory of corruption. Media consultant Strother agreed that there is "nothing in any way corrupt or undemocratic about the enterprise . . . of airing these political broadcasts." J.A. 1031. And Senator Simpson, when asked whether advocacy groups should be entitled to run electioneering communications, stated that "[a]s long as people know who they are and what they're doing, yes, I think that's all right. Then you're into the First Amendment." J.A. 1013-14; *see also* J.A. 1021, Deposition Transcripts Unified Filing at Simpson Dep. 79. Indeed, he testified that it is "the essence of politics" to try to influence legislators. J.A. 1016-19. None of Defendants' declarants could testify to a single instance in which a candidate or office-holder had changed his or her vote in exchange for an advocacy group's speech,[15] nor could any even provide an example of a politician showing "gratitude" to an advocacy group.[16]

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an appearance of corruption stemming from the dependence of officeholders and parties on advertisements run by these outside groups."). Similarly, Judge Leon found specific evidence of an appearance of corruption to justify Title I but made no such findings regarding Title II. *See* S.A. 1289 ¶250 (Leon) ("The defendants have offered substantial evidence that the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of access to, and influence with, the officeholders . . . the donor enjoys thereafter."); S.A. 1289-95 ¶251-70 (Leon).

[15] *See* J.A. 846, 848-50; J.A. 1032; J.A. 1011-12.

[16] *See* J.A. 841-44; J.A. 1032-34. Indeed, lobbyist Andrews could not recall *any instance* of a politician expressing gratitude for issue ads that supported the politician or attacked an opponent. *See* J.A. 849-50. In the *only* concrete example of an issue group influencing a candidate, Strother related how a candidate decided to return money to an anti-gun group in order to avoid negative publicity from the NRA because

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C. Title II Cannot Be Justified As Preventing *Austin*-style Corruption.

Core political speech is protected by the First Amendment regardless whether a corporation is the speaker. *Buckley*, 424 U.S. at 45, 50, 187; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978); *FEC v. MCFL*, 479 U.S. 238, 259 (1986). Indeed, *MCFL* upheld a nonprofit voluntary membership corporation's First Amendment right to make unlimited independent expenditures to fund its political speech, including express advocacy. Only once, in *Austin*, has this Court upheld a restriction on independent expenditures for core political speech. The specific danger identified in *Austin*, corruption of the political process through the aggregation of wealth generated by business corporations, has no application to speech by nonprofit membership organizations that are devoted to the advancement of specific rights and ideas and are funded almost exclusively by the dues and donations of individual members. Title II of BCRA must therefore be struck down.

MCFL held that a voluntary membership organization committed to a political purpose does not lose its First Amendment rights simply by taking the corporate form:

> The resources in the treasury of a *business corporation* . . . are not an indication of popular support for the corporation's political ideas. . . .
>
> . . . .
>
> . . . Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed *to disseminate political ideas, not amass capital.* The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.

479 U.S. at 258-59 (emphasis added). In contrast, *Austin* upheld a law restricting expenditures on express advocacy by the Chamber of Commerce because 75% of its funding came from for-profit corporations; the Chamber therefore could (and did) serve as a conduit for using "resources amassed in the economic marketplace" "to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. The Court specifically observed that the Chamber's corporate wealth had *"little or no correlation* to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660 (emphasis added).

MCFL and *Austin* thus draw a line between advocacy organizations that fund their speech with individual dues and trade associations that fund their speech largely with contributions from business corporations. The former, unlike the latter, pose no danger of corrupting the political marketplace through wealth generated in the economic marketplace.

This analysis of *Austin* and *MCFL* is confirmed by the Court's decision last month in *FEC v. Beaumont*, No. 02-403, 123 S. Ct. 2200, slip op. (June 16, 2003), which held that a restriction on corporate campaign *contributions* could constitutionally be applied to nonprofit advocacy organizations as well as business corporations. Slip op. at 10. *Beaumont* reaffirmed that the *Austin* rationale for restricting expenditures was to prevent corporations from "'us[ing] resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.'" *Id.* at 6 (quoting *Austin*, 494 U.S. at 658-59) (internal citations omitted)). As demonstrated above, that problem is simply not presented by the NRA or similar nonprofit advocacy groups.

To be sure, *Beaumont* held that concerns about the corporate form of organization, even for a nonprofit advocacy organization funded by individual donations, were sufficient to sustain restrictions on campaign *contributions*

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the candidate was running in a pro-gun state and feared how "the voter would react if it was disclosed where the check came from." J.A. 1035-36. Thus, the "influence" was based upon the power of the *voter*, which is hardly improper in a democracy. *See also* J.A. 838, 850-51.

by such a corporation. *Id.* at 10-11. In other words, Congress may ban corporate campaign contributions in order to "bar[] corporate earnings from conversion into political 'war chests.'" *Id.* at 7. But, as the Court reaffirmed, contributions barely count as speech at all: "Going back to *Buckley v. Valeo*, restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment." *Id.* at 14 (citation omitted).

In contrast, independent political *expenditures* on campaign speech by nonprofit advocacy groups constitute "the core of political expression." *Id.* at 14. Independent political expenditures "do not pose that danger of corruption," and therefore the "'potential for unfair deployment of wealth for political purposes' f[alls] short of justifying a ban on expenditures" by such groups. *Id.* at 11. The rationales that sufficed to uphold restrictions on contributions in *Beaumont* cannot survive the strict scrutiny applicable to restrictions on expenditures for core political speech.[17] Indeed, that is why the First Amendment foreclosed Congress's attempt to regulate the independent expenditures of a corporate PAC in *NCPAC*. *See* 470 U.S. at 500-01.

The NRA is the archetypal issue advocacy group protected by the First Amendment. It "was formed to disseminate political ideas, not amass capital," and its members are "fully aware of its political purposes." *See* J.A. 1948-56; 11 PCS/NRA 137-56. The NRA's resources "are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *MCFL*, 479 U.S. at 259. The NRA and similar grassroots advocacy organizations do not do business in

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[17] *Beaumont* repeatedly reaffirmed this fundamental distinction between restrictions on contributions and expenditures. Slip op. at 4 & n.2, 8, 11, 14, 15. In particular, the Court distinguished the deference accorded legislative judgments about corruption "when Congress regulates campaign contributions" from the strict scrutiny applicable to expenditure restrictions. *Id.* at 8.

the "economic marketplace," nor derive "market profits," nor receive more than a negligible portion of their revenues from corporate contributions. In short, the NRA does not use "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Austin,* 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 259).[18] Title II's restriction on its independent electioneer expenditures is, therefore, unconstitutional.

D. Title II Cannot Be Justified As Protecting The Members Of Advocacy Groups From Misuse Of Their Donations.

In *Beaumont* the Court noted that the federal ban on campaign contributions by corporations also "protect[s] 'the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.'" Slip op. at 7 (quoting *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982)). Yet the Court assumed (correctly) that "advocacy corporations are generally different from traditional business corporations in the improbability that contributions they might make would end up supporting causes that some of their members would not approve." *Id.* at 12. Even if this legislative concern might carry some residual weight in the area of contributions, *see id.* at 12 n.5, which enjoy only marginal First Amendment protection, it is plainly insufficient to intrude on advocacy group *expenditures*, which are protected by strict scrutiny.

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[18] The NRA's *income* from sources other than individual contributions is *de minimis*. Although the NRA derives substantial *revenue* from advertising in its magazines and the sale of NRA memorabilia, it *loses* money on these activities. *See* J.A. 386-87. Additionally, the NRA generates rental income from leasing unused space in its building. Finally, the NRA receives negligible contributions from for-profit businesses. *See* J.A. 1963.

Nor is there any basis in this Court's jurisprudence for licensing the government to peer into the minds of the members of a grassroots issue advocacy group in order to ensure a perfect correspondence between their views and the group's political activities. Indeed, in *MCFL*, this Court recognized that a contribution to an advocacy group "necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor," and that a member "dissatisfied with how funds are used can simply stop contributing." 479 U.S. at 261. This Court offered the same reasoning with respect to contributors to a PAC: "[C]ontributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money." *NCPAC*, 470 U.S. at 495. And the same may be said with respect to the widely diverse membership of the political parties. *See Colorado Republican I*, 518 U.S. 604 (1996).[19]

E. Requiring The NRA To Speak Through Its PAC Will Artificially Deflate Its Voice.

Although Defendants have posited that electioneering communications are regulated by Title II because they beget the grievous public harm of official corruption, they also paradoxically maintain that Title II bans no electioneering communications at all because corporations and unions remain free to speak through their PACs. As a measure designed to prevent official corruption, of either the *quid pro quo* or the "gratitude" variety, Title II therefore makes no more sense than a bribery statute requiring corporations to pay for their bribes using funds from PACs. For that reason alone, "belief in the [statute's proffered anti-corruption] purpose [is] a challenge to the credulous." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) (quotation and citation omitted). Congress surely did not intend Title II to result in nothing more than an act of institutional ventriloquism, with organizations like the NRA simply throwing from the mouths of their PACs the very same "electioneering communications" that allegedly threaten to corrupt federal officeholders. Moreover, Defendants do not contend that a candidate is any less grateful for, and thus any less corrupted by, an issue ad aired with PAC money than an identical ad aired with an organization's general funds. And Defendants' own witnesses concede that the public's perception of ads is not affected in the slightest by whether they are purchased with general treasury funds or with PAC money.[20]

Title II's congressional supporters well understood that requiring the NRA to speak through its PAC will necessarily reduce the collective voice of its four million members to a whisper.[21] *See* S.A. 259 (Henderson) ("Political action committees cannot finance more than a small fraction of the electioneering communications that corporations and unions have been able to fund from their treasury funds."). A battery of regulatory and practical hurdles precludes groups such as the NRA from using their PACs to make independent expenditures commensurate with public support for their political ideas.[22] The NRA's PAC, the PVF, is strictly barred from soliciting beyond the NRA's membership for contributions, and no portion of an NRA member's membership fees may be allocated to PVF. *See* 11 C.F.R. § 114.7; 11 C.F.R. § 114.1. As Judge Henderson explained, "While NRA PVF raised $17.5 million during the 2000 election cycle, the NRA received over $300 million in contributions from individuals during the same period. The disparity stems from the inability of NRA members – most of whom are individuals of modest means – to pay the NRA's membership fee and then contribute beyond that amount to NRA PVF." S.A. 259 (Henderson) (internal citations omitted). Title II thus effectively deprives millions of ordinary individuals of their ability to join collectively in making "electioneering communications" to support and preserve their freedoms under the Second Amendment.

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[19] In any event, the record in this case confirms the strong support among NRA members for its speech: over 78 percent of the cost of airing its 30-minute broadcasts was paid for *by viewers* who signed up as new members. J.A. 1964. Under the FEC's regulations, the NRA's PAC would not be able to solicit funds in this manner from the general public.

[20] As Senator Simpson stated, drawing a distinction between the "appearance of corruption [depending upon] whether the ad is paid for by the NRA or whether it is paid for by the NRA's PAC" is like "dancing on the head of a pin," since "[t]here's no difference to the American public of who that is." J.A. 1022; *see also* J.A. 1023; J.A. 836; J.A. 1037.

[21] *See* LH App. 58a-62a (Sen. Wellstone) (referencing the NRA and Sierra Club as prototypical organizations whose ads should be restricted); LH App. 53a (Rep. Schakowsky) ("If my colleagues care about gun control, then campaign finance is their issue so that the NRA does not call the shots."); LH App. 52a (Rep. Pickering) (quoting Scott Harshberger, the President of Common Cause, who championed BCRA by saying: "'A vote for campaign finance reform is a vote against the second amendment gun lobby.'"); *see generally* LH App. 52a-57a.

Although some would justify restricting independent expenditures on political speech as necessary "to democratize the influence that money itself may bring to bear upon the electoral process," *Shrink*, 528 U.S. at 401 (Breyer, J., concurring with Ginsburg, J.), Title II stands that reasoning on its head. By requiring a group's political speech to be channeled through its PAC, Title II ensures that the voices of members of modest means will be silenced, closing the marketplace of political expression to all but the well-to-do.

For this reason, Title II works a similar inversion of the *Austin* Court's reasoning. Again, *Austin* upheld a limit on corporate independent expenditures as justified to prevent wealth generated in the economic marketplace from unfairly *inflating* the strength of the corporation's political voice beyond the "public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. The NRA's wealth, like that of typical advocacy groups, is attributable to its success in the political marketplace, not the economic marketplace, and its general treasury "accurately reflects members' support for the organization's political views." *Id.* at 666. By requiring the NRA's political speech to be channeled through the PVF, Title II *deflates* the strength of the organization's voice in the political marketplace vastly below its "contributors' support for the corporations' political views." *Id.* at 660-61. Thus, far from ensuring that "resources amassed in the economic marketplace [are not] used to provide an unfair advantage in the political marketplace," *MCFL*, 479 U.S. at 257, Title II ensures that resources amassed in the political marketplace cannot be put to use in the very place from whence they came.

Finally, most of the NRA's "electioneering communications" have nothing to do with getting candidates elected; instead, they serve to educate Americans about political developments that bear upon the Second Amendment, to defend the NRA against direct attacks by the media and politicians, and to generate membership and raise funds. *See supra* at 2; *infra* at 35-41. The exclusive mission of PVF, however, is "to influence the outcome of federal elections. That is the sole purpose for which donors contribute to the Political Victory Fund." J.A. 377. Indeed, PVF is the sole means through which NRA members can engage in "express advocacy" speech exhorting the public to "vote for" or "against" specific candidates – and PVF devotes its precious resources to funding precisely such speech. Forcing the PVF now to fund the NRA's "electioneering communications" would necessarily result in a tradeoff with the express advocacy it currently funds, further abridging core political speech at the heart of the First Amendment.

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[22] *See* J.A. 377-78; J.A. 702; J.A. 112-13; J.A. 333; J.A. 1008-09.

III. THE WELLSTONE AMENDMENT'S SUPPRESSION OF POLITICAL SPEECH FUNDED EXCLUSIVELY WITH INDIVIDUAL CONTRIBUTIONS IS UNCONSTITUTIONAL.

Even if one credits at face value Defendants' claim that the specter of *Austin*-type corruption extends to the independent electioneering expenditures of nonprofit advocacy groups, Title II must fall. Congress had before it a less restrictive means to ensure that the political voices of advocacy groups like the NRA were not unfairly inflated by corporate wealth generated in the economic marketplace.

As originally proposed by Senators Snowe and Jeffords, Section 203(b) of Title II would have exempted 501(c)(4) membership organizations from the ban on funding electioneering communications, so long as the organizations used funds that were derived solely from individual contributions and were maintained in an account segregated from any corporate contributions. Thus, Section 203(b) of Snowe-Jeffords was designed to ensure that such an advocacy organization's political message reflected its popular support in the political marketplace. Conversely, by banning electioneering expenditures of business corporations and their 501(c)(6) trade associations, the original Snowe-Jeffords proposal wholly eliminated the threat, identified in *Austin*, that such corporations might use wealth generated in the economic marketplace to unfairly distort the political arena with electioneering communications having "little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660-61. Snowe-Jeffords thus sought to steer a safe course between this Court's decisions in *MCFL*, on the one hand, and *Austin*, on the other.

The Wellstone Amendment, Section 204, effectively nullifies Section 203(b) of Snowe-Jeffords. Aimed specifically at the NRA, Sierra Club, and similar advocacy groups, *see* LH App. 58a-62a (Sen. Wellstone), the Wellstone Amendment was designed to prevent *individuals* from combining their voices with others of like mind "in organizations which serve to '[amplify] the voice of their adherents.'" *NCPAC*, 470 U.S. at 494 (quoting *Buckley*, 424 U.S. at 22 (alteration in original)).[23] The Wellstone Amendment thus runs directly contrary to this Court's consistent First Amendment teaching: "To say that [individuals'] collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Id.* at 495.

Fully grasping that the Wellstone Amendment was "susceptible to a constitutional challenge," LH App. 58a (Sen. Feingold), BCRA's sponsors opposed the measure. But opponents of BCRA rallied behind it (presumably for the same reason), and it was passed. To ensure that it would not doom Title II as a whole, however, BCRA's sponsors made sure that the Wellstone Amendment, in the District Court's words, could be "cleanly struck from the law."[24] As Senator Feingold explained:

> I voted against adding th[e Wellstone] amendment. I thought and still think that it makes

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[23] *See* LH App. 65a (Sen. Wellstone) ("individuals with all of this wealth" will "make their soft money contributions to these sham issue ads run by all of these . . . organizations, which under this loophole can operate with impunity" to run "poisonous ads"); LH App. 66a-67a (noting that only .002% of Americans donate more than $10,000 to candidates, and explaining, "I have an amendment that tries to make sure . . . this big money doesn't get" through).

[24] "The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability: hence, if the Court finds the inclusion of section 501(c)(4) organizations and section 527 within the ban on electioneering communications to be unconstitutional, the Wellstone Amendment can be cleanly struck from the law and the original Snowe-Jeffords exception for these groups will be restored." S.A. 65-66 (Per Curiam).

> Snowe-Jeffords more susceptible to a constitutional challenge, but it passed when many Senators who oppose the bill and the Snowe-Jeffords provision voted for it. In any event, the Wellstone amendment was written to be severable from the remainder of the Snowe-Jeffords provision. That gives even more significance to the vote we will have today on severability. But if we win that vote, Snowe-Jeffords will survive even if the Wellstone amendment is held to be unconstitutional.

LH App. 58a (Sen. Feingold).[25] The Wellstone Amendment, from its inception, was thus specifically designed to be a disposable part of Title II, destined for extinction upon completion of this Court's review.[26]

In the District Court, the Government – while taking pains to emphasize that the unconstitutionality of the Wellstone Amendment "provides no basis for striking down

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[25] *See also* LH App. 63a (Sen. Edwards) ("[T]he reason Senator Feingold and Senator McCain are opposing th[e Wellstone] amendment is the same reason that I oppose this amendment: It raises very serious constitutional problems"); LH App. 62a (Sen. Wellstone) ("I have drafted this amendment to be fully severable. In other words, no one can suggest that even if the court finds this amendment unconstitutional, it would drag down the rest of this bill or even jeopardize the other provisions of Snowe-Jeffords."); LH App. 58a-64a.

[26] Judge Henderson acknowledged the patent unconstitutionality of the Wellstone Amendment. *See* S.A. 368-70 (Henderson). Judge Kollar-Kotelly left the Wellstone Amendment undisturbed without purporting to analyze whether Section 203(b) of Snowe-Jeffords constituted a less restrictive alternative. *See* S.A. 869-71 (Kollar-Kotelly). Judge Leon likewise upheld the Wellstone Amendment; he thought it justified by the prospect that "for profit-corporations and unions [might] funnel their general treasury funds through nonprofit corporations in order to purchase electioneering communications." In doing so, he thus overlooked that this prospect is *wholly foreclosed* by Section 203(b) of Snowe-Jeffords, which restricts electioneering funding to *individual* contributions. S.A. 1168-69 (Leon).

BCRA's electioneering communications provisions *in toto*" – characterized the Amendment as intended to "prevent large soft-money donations from *individuals* (*i.e.*, those exceeding the hard money contributions to political parties) from being passed through nonprofit corporations to purchase electioneering ads." Gov't Reply Br. 58-59 (filed Nov. 27, 2002) (emphasis added). That simply reformulates the amendment's impermissible intent: the First Amendment flatly forbids Congress from regulating the political expenditures, as opposed to the contributions, of individuals, *Buckley* 424 U.S. at 48-49, and Congress can claim no valid interest in preventing circumvention of a nonexistent expenditure limit that it lacks power to create.[27]

Even if Congress *could* regulate individual expenditures in this fashion, the less restrictive (and thus constitutionally required) means of doing so would be to prevent 501(c)(4) corporations from funding "electioneering communications" with individual donations *in excess* of existing contribution limits – *not* to impose the Wellstone Amendment's flat prohibition. Had Congress taken this less restrictive approach, organizations like the NRA, whose average donation totals $30, could sustain their political voices without reliance upon "large soft-money donations from individuals" that supposedly justified the amendment.

Nor can Defendants save the Wellstone Amendment by recasting it as concerned with the "fungibility" of money, *i.e.*, the marginal prospect that nonprofit groups might otherwise use corporate contributions to offset their expenses, thereby freeing up individual contributions to fund "electioneering communications." That phenomenon is an independent feature of existing campaign finance law, as corporations remain free under BCRA to fund the administrative and operating expenses of their PACs out of general treasury funds. *See* 11 C.F.R. § 114.5(b). Moreover, this Court's teaching is simply that Congress may require a corporation's expenditures to bear a meaningful "correlation," *Austin*, 494 U.S. at 660, or to constitute a "rough barometer" of the public's support for its political views. *MCFL*, 479 U.S. at 258. Surely the original Snowe-Jeffords approach, by confining electioneering expenditures of nonprofit advocacy organizations to the amount of their individual contributions, fully implements that teaching. And the Wellstone Amendment, by preventing such organizations from engaging in "electioneering communications" for fear that a single corporate dollar might otherwise lend indirect assistance, just as surely flouts it.

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[27] Unlike PACs and political parties that may make *contributions* to candidates, the 501(c)(4) corporations regulated by the Wellstone Amendment are categorically prohibited from doing so. *See, e.g., FEC v. Beaumont*, 123 S. Ct. 2200, slip op. at 9-10 (June 16, 2003). Accordingly, the Government cannot defend the amendment as merely "a corollary of the basic individual contribution limitation" upheld in *Buckley*. 424 U.S. at 38; *see California Med. Ass'n v. FEC*, 453 U.S. 182, 198-99 (1981).

Finally, the Intervenors attempted below to justify the Wellstone Amendment on the ground that the "electioneering communications" of 501(c)(4) corporations might unduly diverge from the views of their individual donors. But there is nothing in the legislative record of Title II suggesting that Congress shared this concern. Nor is there evidence in the legislative record, or even in the litigation record developed in this case, that 501(c)(4) corporations tend to make independent expenditures at odds with the shared views of their donors. To the contrary, the realities of the political marketplace ensure that a *voluntary membership* organization dependent on member *donations* will rarely, if ever, stray significantly from the common ideals that bind the membership. *See NCPAC*, 470 U.S. at 495 ("[C]ontributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money."). Here, there is no doubt that the "electioneering communications" of the NRA enjoy the widespread support of its membership.[28]

In any event, as previously discussed, *supra* at 23-24, this Court has never suggested that a perfect correspondence between an advocacy organization's electioneering communications and the views of all of its members is a necessary predicate for First Amendment protection against regulation of the organization's political speech. *See MCFL*, 479 U.S. at 261 ("individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction" and "delegat[e] authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor").

IV. TITLE II IS FATALLY OVERBROAD.

Title II's prohibition on electioneering communications is fatally overbroad both because it silences *speakers* that pose no threat of the harms allegedly sought to be prevented and because it criminalizes *categories of speech* that are wholly divorced from the statute's purposes. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

Ashcroft struck down the Child Pornography Prevention Act as overbroad on the basis of *hypothesized* applications of the law. *See id.* at 258; *id.* at 273 (Rehnquist, C.J., dissenting). Here, by contrast, there is *compelling evidence*

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[28] Conversely, there is no indication that the independent political expenditures of either PACs or political parties, which remain free to fund "electioneering communications," accord with their donors' wishes any more consistently than do those of advocacy groups like the NRA.

that the NRA is a speaker whose conduct does not implicate the statute's purpose and whose speech falls outside the ambit of the restriction's purported rationale.

A. Title II Criminalizes the Speech of Organizations that Pose No Threat of Corrupting the Political Process.

By restricting the electioneering speech of grassroots advocacy organizations, Title II frustrates the central purpose of such entities: to allow "large numbers of individuals of modest means [to] join together in organizations which serve to '[amplify] the voice of their adherents.'" *NCPAC*, 470 U.S. at 494 (quoting *Buckley*, 424 U.S. at 22) (alteration in original). The aggregated contributions of the members of such an organization correspond with the members' support for its political ideas. The NRA's voice can be heard in the halls of Congress and state legislatures precisely because it is the *collective voice* of millions of Americans speaking in unison. That "is not a *corruption* of the democratic political process; it *is* the democratic political process." *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) (emphases in original). And if a group of individuals organized in the corporate form and united by their common devotion to the protection of their Second Amendment rights can be prosecuted for speaking the names of political candidates who pose a threat to those rights, then the First Amendment has become a "promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941).

Title II contains no exception for any nonmedia corporate entities. Indeed, even MCFL itself is barred from making electioneering expenditures.[29] This failure alone

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[29] Judge Kollar-Kotelly elided this defect by effectively reading an *MCFL* exemption into the statute, although no such exemption was "expressly provided for." S.A. 870 (Kollar-Kotelly). Judge Leon, in

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dooms the statute because there are numerous *MCFL* entities that engage in speech that will be criminalized. *See* S.A. 251 ¶45b (Henderson); 11 PCS/NRA 157-95; 11 PCS/NRA 196; J.A. 1957-58; J.A. 1959-61.[30]

B. Title II Criminalizes Speech That Is Not Intended To Influence Elections.

Title II's restriction on electioneering communications also fails the narrow tailoring standard because it unfairly criminalizes *numerous categories of speech* that are not intended to, and will not have the effect of, influencing federal elections. The NRA's extensive independent expenditures on television and radio broadcasting are designed to serve three principal purposes: (1) to educate the public

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contrast, held Title II "unconstitutional only in its application to *MCFL*, nonprofit corporations." S.A. 1169 (Leon). Both thereby erred in failing to analyze the statute, on its face, in accordance with its dispositive terms: The Wellstone Amendment specifically seeks to regulate nonprofit corporations' use of individual donations and to do so without qualification; and that express, unambiguous prescription by Congress is insusceptible to judicial modification short of outright invalidation. *See, e.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 220 (1998).

[30] Although the FEC's regulations provide relief for a limited subset of "qualified nonprofit corporations," its procrustean criteria create an exception so narrow that it conflicts with the Court's decisions in *MCFL* and *Austin* and, in any event, does not cure the overbreadth that infects this statute. 11 C.F.R. § 114.10(c). "The rigidity with which the FEC [implements] *MCFL* would impoverish political debate." *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 292 (2d Cir. 1995); *see Minnesota Citizens Concerned for Life ("MCCL") v. FEC*, 113 F.3d 129, 130-31 (8th Cir. 1997) (affirming that relevant FEC regulations "are constitutionally infirm . . . because they deny the *MCFL* exemption to a voluntary political association that conducts minor business activities or accepts insignificant corporate donations"); *MCCL v. FEC*, 936 F. Supp. 633, 643 (D. Minn. 1996), *aff'd*, 113 F.3d 129 (8th Cir. 1997) (further suggesting unconstitutionality of FEC requirements that organization's "only" purpose be promotion of political ideas and that members not obtain "any" benefit that might discourage disassociation).

about Second Amendment and related firearm issues, including pending legislative initiatives; (2) to defend itself against attacks aired by the broadcast media, including attacks by politicians opposed to the NRA's views on the Second Amendment and related issues; and (3) to recruit members and raise funds. When engaging in such speech, the NRA often makes references to public officials and candidates for federal office. *See* S.A. 256 ¶51 (Henderson). The vast majority of this speech is not intended to influence elections, *see* S.A. 858-59 (Kollar-Kotelly), and BCRA's criminalization of this speech demonstrates the statute's dramatic overbreadth.

1. Broadcasts that urge viewers and listeners to oppose or support pending legislation do not implicate the concerns that allegedly animate Title II. Just as this Court has recognized that speech pertaining to referenda does not raise a substantial concern about corruption, so too speech urging the passage or defeat of pending legislation does not carry any threat of corrupting the political process. *See Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.") (internal citation omitted). Even BCRA's sponsors proposed to the FEC a regulatory exception to allow "entities concerned about legislation to run true issue ads with a legislative objective and a request to contact an elected official during the 30 or 60 day windows." *See* J.A. 1967-68. Senator Jeffords has acknowledged that "there's nothing wrong with" a membership organization running an ad urging Senators to vote on legislation affecting its members. *See* 11 PCS/NRA 88. But, of course, the Wellstone Amendment and the FEC regulations now criminalize such speech.

For example, the NRA ran a series of TV ads criticizing the so-called Brady Bill and urging viewers to call their congressional representatives in support of an alternative legislative proposal. *See* J.A. 2005; 12 PCS/NRA A (video). These ads fall within even the Intervenors' conception of a "true issue ad," though BCRA now criminalizes them. Likewise, in 1994 the NRA ran a series of broadcast ads in opposition to President Clinton's Crime Bill. The broadcasts urged viewers to "Call your congressman" to oppose passage of the bill. *See* J.A. 2006-09; 12 PCS/NRA A (video). All of these messages were quintessential political speech that was not intended to influence an election, regardless of when the ads might have been broadcast. The references to federal officeholders were necessary to urge Second Amendment supporters to pressure their representatives to defend this freedom.

The NRA also airs general educational programming to offset the mainstream media's biased coverage of news relating to Second Amendment rights. In response to a virtual blackout on coverage of issues important to the NRA and its members, the NRA in 2000 ran a series of in-depth, half-hour broadcasts modeled on TV news magazines such as *60 Minutes*. *See* J.A. 366-67; S.A. 256-58 ¶51 (Henderson). The topics included: gun registration and confiscation in England, Australia, and Canada; the impact of the Clinton administration's failure to pursue vigorous prosecution of existing gun laws; the identities and hypocrisy of the sponsors of the "Million Mom March"; and an analysis of Vice President Gore's position on the Second Amendment. *See* J.A. 367-70; J.A. 379-83; S.A. 751-52 ¶2.11.4.4 & n.103 (Kollar-Kotelly). These broadcasts ran over 11,000 times at an expense of more than $13 million, and were aired both on national cable channels and in targeted markets in virtually every state in the Union. *See* J.A. 367; J.A. 1965.

One such NRA broadcast covered the mounting efforts to restrict private ownership of firearms in California. *See* J.A. 2010-33; 12 PCS/NRA D (video). During the 30-minute program, a poster bearing a likeness of President Clinton and the words "TWO YEARS LEFT TO GET YOUR GUNS" appeared while the reporter stated that California's legislation banning semi-automatic weapons was "[t]he first in the country and the model use[d for] the 1994 Clinton-Gore assault weapons ban." J.A. 2011. This single reference to Mr. Gore would have sufficed to trigger BCRA's criminal penalties for each of the more than 800 airings that occurred in California alone between August 29, 2000 and November 5, 2000. *See* J.A. 1966. None of these airings was intended to influence a federal election. J.A. 368. Indeed, in California the outcome of the 2000 presidential election was never in serious doubt, and the NRA would not have wasted its scarce resources on such a contest if influencing the election had been its objective.[31]

2. As Judge Henderson found, "the NRA's frequent references to candidates for federal office in the programming it broadcasts throughout the election cycle . . . enable the NRA to respond directly and effectively to frequent criticism by politicians and the media." S.A. 256-57 ¶51 (Henderson). For example, on March 2, 2000, President Clinton appeared on NBC's Today Show. During the 15-minute interview, he pointedly criticized the NRA and made several erroneous statements, including that the NRA is "against anything that requires anybody to do anything as a member of society that helps to make it safer." *See* J.A. 2034-45; 12 PCS/NRA C (video), S.A. 258 (Henderson).

In order to get its side of the story out, the NRA developed and aired a series of thirteen 30- and 60-second ads featuring the organization's President, Charlton Heston. *See* 12 PCS/NRA 914-16; 12 PCS/NRA B (video). Critical to framing an effective response was the NRA's

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[31] The NRA also aired a broadcast in 2000 entitled "It Can't Happen Here." *See* J.A. 2046-69; 12 PCS/NRA E (video). This program was substantially similar to the "California" program and was run throughout the United States from August through October of 2000. *See* 11 PCS/NRA 217-20. Although Vice President Gore's image on the cover of the NRA's magazine appeared three times on the screen during this 30-minute broadcast and a single reference was made to the Clinton-Gore administration, this program was not intended to influence a federal election in any way. *See* J.A. 2047, 2052-53, 2060, 2068; J.A. 368; S.A. 257 ¶51b (Henderson).

ability to refute specific statements made by President Clinton and to refer to him by name. *See* S.A. 258 (Henderson). The NRA designed the ad campaign to elevate the controversy to such a degree that NRA representatives would be invited onto national media outlets and would thus gain a forum to defend the NRA before a national audience. J.A. 417-19; S.A. 258-59 (Henderson). The media strategy succeeded, and NRA representatives were invited to appear on several nationwide news shows. Without access to paid media and without the ability to refer to President Clinton by name, the NRA would not have been able to gain access to the national television audience that had heard President Clinton's statements. *See* S.A. 258-59 (Henderson); J.A. 416-21. Although the NRA's ads would not have been prohibited by Title II because President Clinton was not running for reelection, they illustrate the critical role that paid programming plays in allowing the NRA to defend itself.

Some politicians also use their campaign ads to attack the NRA by name. There are dozens of recent examples of such ads. *See* Storyboards of Ads Attacking NRA (Supplemental Submission on CD); 11 PCS/NRA 223-25, J.A. 1961-81, 11 PCS/NRA 233-44.[32] But BCRA would limit the NRA's ability to defend itself by responding directly to its attackers through the same medium.

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[32] Just this past election cycle, for example, Mark Shriver, a candidate in the Democratic primary for the 8th congressional district in Maryland, and his opponent, Chris Van Hollen, attacked the NRA in a series of TV ads. *See* J.A. 1969-76. The most egregious attack was run by Mr. Shriver:

> I . . . defeated a piece of legislation backed by the NRA that would have allowed convicted felons to own handguns. That's bad public policy. We shouldn't allow people who are convicted of domestic violence to own a handgun. . . . I welcome the fight from the NRA. Nothing would give me more pleasure than defeating the NRA.

J.A. 1969-70.

The NRA's paid broadcasts also allow it to defend against and rebut biased media reporting. *See* J.A. 378-79. The media's coverage of the Million Mom March is illustrative. In the spring of 2000, the sponsors of that event worked closely with the Clinton White House and were able to gain enormous exposure (through free national media coverage) for their attacks on the NRA. *See* J.A. 379-80. In response, the NRA aired a 30-minute paid program that examined the forces and influences behind the Million Mom March. *See id.*; *see also* J.A. 2070-85; 12 PCS/NRA F (video). The program criticized celebrities and politicians (such as Senator Feinstein) for advocating confiscation of handguns from ordinary citizens while ensuring that they (or their personal bodyguards) retain their guns. *See* J.A. 2071-73. The program also included a short statement from Senator Orrin Hatch criticizing anti-gun celebrities. *See* J.A. 2072-73, 12 PCS/NRA 939; S.A. 257 ¶51c (Henderson). Additionally, during a solicitation for new members, the program showed a cover of the NRA's magazine FIRST FREEDOM reading "Clinton to the Gore" and depicting President Clinton morphing into Vice President Gore. J.A. 2077, 2084, 12 PCS/NRA 942. The program also stated that "President Clinton, Hillary [Clinton, then a candidate for the Senate], [and] Schumer" were at the Million Mom March "for their own political gain," J.A. 2076; and another segment chastised the "Clinton-Gore White House" for having "turned its back on real justice" by allowing the number of federal firearm prosecutions to drop by 44 percent between 1992 and 1998. J.A. 2083.

This news magazine was broadcast throughout the country from July to November 2000. For two months prior to the 2000 election, all of the airings nationwide would have been prohibited under BCRA because of two references to the "Clinton/Gore" administration's record on prosecution of federal firearms laws and the depiction of a magazine cover. The program aired dozens of times in California in the 60 days prior to Senator Feinstein's reelection. *See* S.A. 257 ¶51c (Henderson); 11 PCS/NRA 245-48. It also aired in New York in the 30 days prior to Senator Clinton's primary race for the Democratic nomination for Senate, 11 PCS/NRA 249, 251, and in Utah in the 60 days prior to Senator Hatch's reelection. Supp. App./NRA 973. But in defending itself against the attacks launched at the Million Mom March, the NRA had no intention of influencing a federal election. *See* J.A. 380. Indeed, Senator Clinton's primary election and Senators Hatch's and Feinstein's general elections were not competitive, and the ad ran heavily in states that Mr. Gore had no chance of winning.

3. The NRA also broadcasts programs that are designed to increase its membership and to raise funds. An integral part of such speech is identifying the threats posed to Second Amendment rights by anti-gun politicians. In making fundraising appeals, the NRA has repeatedly referred to Senators Schumer, Feinstein, and Clinton, as well as to President Clinton and Vice President Gore, and criticized their positions on Second Amendment rights. *See, e.g.*, J.A. 1950-56, 11 PCS/NRA 137-56. These fundraising activities are not designed to influence federal elections. Rather, they are targeted at communities that the NRA believes are concerned about preserving the Second Amendment and already have very negative impressions of the federal officeholders named in the fundraising appeals.[33]

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[33] For example, the NRA aired a "Tribute" to Charlton Heston throughout the country from June through September 2000. J.A. 384. The program contained several references to then-Vice President Gore. J.A. 2088, 2095; *see* S.A. 752 n.104 (Kollar-Kotelly). Despite these limited references, the program was not intended to influence the outcome of a federal election. J.A. 384-85. Indeed, when the ad was run within the 60 days prior to the election, it aired in markets such as Dallas, Texas, and Los Angeles, California, where the outcome of the presidential election was not in doubt. 11 PCS/NRA 252, 253. Additionally, during the appeals for new members, Senator Feinstein's name was briefly mentioned in text at the bottom of the screen in a ticker format. J.A. 2091 ("National gun registration plan from Sen. Dianne Feinstein – Campaign Centers on Gun Photo ID's."). Again, although this program ran in September of 2000 in California, it was not intended to influence Senator Feinstein's reelection contest, which was not competitive. *See* J.A. 384-85. Similarly, the NRA in 1999 aired

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4. As the foregoing reflects, in the year 2000 alone, the NRA aired issue advocacy on hundreds, if not thousands, of occasions when it had no intent to influence a federal election but nonetheless would face criminal penalties under BCRA. Title II, accordingly, must fall, for the criminalization of "a large amount of speech" that is protected under the First Amendment demonstrates that the statute is fatally overbroad. *Reno v. ACLU*, 521 U.S. 844, 874 (1997). And even if the Court rests its overbreadth analysis on the *percentage* of "innocent" political speech that is prohibited by Title II, the NRA's speech alone demonstrates the palpable flaws in the *Buying Time 2000* study relied upon by Congress and Defendants to justify the speech restriction.

By design, the study excluded all of the 330,000 minutes of the NRA's speech that took the form of half-hour news magazines, for the study considered only ads that lasted less than two minutes on television. Indeed, the amount of NRA speech neglected by the study is, in terms of total airtime, more than twice that which its authors considered. *See* J.A. 1171-73 (interest groups ran 133,335 political ads in 2000). As explained above, most of the NRA's infomercials, including those that referenced candidates, were devoted solely to issue advocacy and were not intended to influence an election. When the documented airings of the NRA's broadcast are added to the proper numerator and denominators identified in the McConnell Plaintiffs' brief, Title II is shown to be at least 34 percent overbroad and thus plainly constitutionally invalid. *See* S.A. 257-58 ¶51d (Henderson).[34]

"Banned In Canada," which warned viewers that "powerful people like Senator Charles Schumer, the most anti-gun politician in history, have a very different future in mind for you"; no election was looming at the time, and Senator Schumer himself was not up for election until 2004. *See* Supp. App./NRA 987, 999.

[34] *Both* Judges Kollar-Kotelly and Leon inexplicably stated that the NRA had not established how its news magazines would have affected

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Title II will also have a chilling effect because it creates a practical nightmare for national issue advocacy groups that wish to continue to engage in political discourse without running afoul of the statute's criminal sanctions. In 2004, such groups will have to censor their broadcasts in no fewer than 1,505 markets at varying times.[35] And there will be thousands of candidates whose names must be cleansed from broadcasts reaching the relevant markets. *See* 11 PCS/NRA 118-19 (indicating that there were 2,100 candidates for the House and Senate in 1998). In attempting to comply with Title II, the NRA must first identify the precise time that each primary occurs for all political parties in each state, and the names of each and every candidate for federal office. The resulting database will have to be constantly updated to reflect candidates dropping in and out of all the races. The NRA will then have to cross-check its speech for any reference to any candidate within the proscribed markets and times. Even the Defendants' own experts concede that "[t]he hodgepodge of different primary dates makes it difficult" to identify speech that is covered by Title II. *See* J.A. 1343.[36]

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the results of *Buying Time*. S.A. 1072-73 (Kollar-Kotelly); S.A. 1355-56 (Leon). But the details of the calculation upon which Judge Henderson relied were set forth in the NRA's Reply Br. below at 24-25 & n.21 (citing J.A. 1966, Supp. App./NRA 1005-49).

[35] In 2004, there will be as many as 870 primaries for the House of Representatives (a Republican and Democratic primary for each House race), 66 primaries for Senate races, 100 primaries for the Republican and Democratic nominations for the presidency, 435 general elections for the House, 33 Senate general elections, and one general presidential election. These calculations exclude, of course, the primaries for third party candidates and thus represent a conservative estimate of the number of races that will trigger BCRA's requirements.

[36] It will be especially onerous for the NRA to purge references to candidates for federal office from its 30-minute news magazines. Much of this programming is devoted to unscripted interviews with ordinary citizens. The NRA will have to transcribe these interviews so that it can compile the names of all those who are referenced during the program.

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V. TITLE II UNCONSTITUTIONALLY DISCRIMINATES IN FAVOR OF MEDIA CORPORATIONS.

Title II's restriction of "electioneering communications" does not extend to any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast station." BCRA §201(a). During the period when all other corporations are muzzled, media companies may air as many of *their own* electioneering communications as they wish. Unlike other corporations, they can endorse candidates for election and name candidates while editorializing on particular issues. But Title II's media exception does more than give the broadcast companies a special license to discuss candidates for federal office.

By banning advocacy groups from buying their own advertising time, Title II puts those broadcasters in the position of being able to grant (or deny) speech licenses to advocacy groups whose only remaining hope for air time is to be chosen by a broadcaster for inclusion on one of its programs. This reinforces the station owners' "unfettered power . . . to communicate only their own views on public issues, . . . and to permit on the air only those with whom they agree[ ]." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969); *see also FCC v. League of Women Voters*, 468 U.S. 364, 398 (1984). An eighteenth century British colonial censor armed only with the Stamp Act would salivate at the prospect of wielding the speech-licensing power that Title II confers on the broadcast media.

The public debate in the weeks preceding an election will now be heavily skewed by Title II to those viewpoints that the broadcast media, as super-gatekeepers, judge to be worthy of consideration. During future elections, the NRA will be limited to its PAC funds in broadcasting any communication that even refers to a candidate; by contrast, General Electric, for example, will be free to broadcast criticism or praise of candidates at will. Indeed, a multinational conglomerate that happens to own a TV network and cable channels, Rupert Murdoch's News Corporation, can use its general treasury funds to produce a weekly hour-long program ("American Candidate") that effectively launches its very own political candidate, *see* J.A. 1982-86, 11 PCS/NRA 346-47, while the NRA – funded by millions of regular Americans with annual dues of $30 each – would commit a federal crime if it purchased a 30-second commercial spot during that program that so much as *referred* to that candidate.

This is unconstitutional. This Court has rejected the proposition that "communication by corporate members of the institutional press is entitled to greater protection than the same communication by [non-media companies]." *Bellotti*, 435 U.S. at 783 n.18; *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985). The First Amendment does not enshrine the press, *for its own sake*, as a favored institution *apart* from the public. There is no favored Fourth Estate here, any more than there is a First Estate (the clergy) or a Second Estate (the aristocracy). The rights of the media are *derivative of the rights of the people*. The press is protected only because it "serves . . . as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

Additionally, some of the interviews contain references to officeholders, such as the attorney general of a particular state, without including his name. *See, e.g.*, J.A. 2050 ("And when gun owners call ATF directly or the California Attorney General's Office, they can't get a straight answer from them either."). The NRA will have to identify each unnamed officeholder given that Title II covers references to specific offices. *See* 11 C.F.R. § 100.29(b)(2). Many of the NRA's programs include footage of protests against anti-gun measures, so the NRA will have to scan and transcribe the text of all the placards carried by the protesters to ensure that none contains the name of a candidate or references a specific office. And the NRA will face the task of making sure that the candidates themselves do not appear in these protests or any of its news footage. Once all of these names have been compiled, then the NRA must then match them against the database of candidates for federal office. The complexity of this process will severely chill the NRA's speech.

The Equal Protection Clause prohibits the Government from discriminating between classes of speakers without a compelling governmental purpose. *See Austin*, 494 U.S. at 667. In *Austin*, this Court confirmed that a law exempting media companies from a regulation of political speech triggers strict scrutiny, but concluded that there was a compelling governmental purpose for this discrimination: the "unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Id.* at 667 (quoting *Bellotti*, 435 U.S. at 781). The Court found that "media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public." *Id.*

Austin cannot save Title II's media exception because the uncontested evidence in the record demonstrates that *Austin*'s factual predicates no longer exist. The creation and proliferation of the Internet has permanently transformed "the collection of information and its dissemination to the public," and the absorption of media companies into multinational conglomerates negates any notion that media companies are either "unique" or immune from the corruption-related concerns that are claimed to be the driving force behind BCRA.

Under strict scrutiny, the Government may not simply "posit" the existence of a compelling governmental interest, but must "demonstrate" that interest through the presentation of substantial evidence. *Turner*, 520 U.S. at 191; *see United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816-19 (2000). And this Court has recently recognized that the existence of the extraordinary facts needed to satisfy strict scrutiny at one time does not necessarily mean that those facts will continue to exist to justify a similar law in the future. *See generally Grutter v. Bollinger*, No. 02-241, slip op. at 31 (U.S. June 23, 2003). Given that 13 years have passed since the *Austin* Court upheld a state law favoring the political speech of media companies over that of nonmedia companies, the NRA's challenge to Title II's media exemption obligated the Government to present *evidence* demonstrating why that discrimination satisfies strict scrutiny.

Despite this burden, the Government presented *no evidence* to the trial court that might justify Title II's discrimination in favor of media companies, choosing instead to rely solely upon *Austin*. The majority below followed suit. *See* S.A. 883-84 (Kollar-Kotelly). But while it rejected the NRA's argument, the District Court did not (and could not) reject the *uncontested* facts that persuaded Judge Henderson that "[t]he media industry is no longer 'unique' in the way that it was 10 or 15 years ago." S.A. 273 ¶54(a)(5) (Henderson). Neither Judge Kollar-Kotelly nor Judge Leon found any facts that contradict Judge Henderson's core factual finding.[37]

When the factual record in *Austin* closed in 1986, the internet was essentially nonexistent. Now, as Judge Henderson found, "[m]ore than 168 million Americans, or 60 percent of the general public, use the internet," meaning that "[m]ore Americans use the internet than read a daily newspaper." S.A. 272-73 ¶54(a)(3)(A) (Henderson). Judge Henderson also found that as "a source of news and information, the internet rivals and is displacing the broadcast media," that the "rapid growth in internet usage is one of the reasons for the dramatic decline in broadcast news program viewing," and that "[n]umerous websites provide an alternative source of daily news and challenge the market dominance previously enjoyed by the traditional media." S.A. 274 ¶54(a)(3)(B) (Henderson). In particular, "[t]he internet has also become an increasingly popular source of political news during election periods." *Id.*

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[37] Judge Kollar-Kotelly rejected the contention that Internet advertisements are "comparable to those broadcast over TV and radio in terms of their public reach and impact," S.A. 739-41 ¶¶2.10.3, 2.10.4 (Kollar-Kotelly), because Internet viewers "make a choice to go to the website and download or watch the program, while advertisements on television and radio are aired throughout programming without any viewer choice." S.A. 739-40 ¶2.10.3.1 (Kollar-Kotelly). Judge Henderson certainly did not find this distinction relevant, *see* S.A. 272-73 ¶54a(3) (Henderson), nor did Judge Leon endorse it. More importantly, neither Judge Kollar-Kotelly nor Judge Leon rejected any of the specific facts related to the proliferation of Internet usage found by Judge Henderson, and therefore did not (and could not) reject the proposition that the Internet has dramatically changed the "collection of information and its dissemination" since the time *Austin* was decided.

Based upon the undisputed evidence, Judge Henderson concluded that "[o]ver the past decade the role of the traditional media in informing and educating the public has been profoundly altered by the emergence of the internet," to the point of negating the factual premise of *Austin* that traditional broadcast companies play a "unique role" in disseminating information and offering a forum for debate. S.A. 272-73 ¶54(a)(5)(A) (Henderson). Neither Judge Leon nor Judge Kollar-Kotelly rejected these critical facts.

Judge Henderson also found a second changed circumstance. While *Austin* relied on the assumption that media corporations were different because "their resources are devoted to the collection of information and its dissemination to the public," 494 U.S. at 667, Judge Henderson found that "many media entities have been subsumed within larger corporate conglomerates and have devoted their resources to bottom-line profits."[38] Why should the speech rights of such corporate behemoths as General Electric and Disney be greater than the rights of nonprofit, grassroots advocacy organizations like the NRA? Surely a multi-billion dollar multinational conglomerate is not vaulted into a "unique role" in our society the moment it decides to absorb a television station into its panoply of diverse business assets. Title II thus stands for the perverse proposition that it is wrong to use corporate money to pay for a discrete amount of broadcast time to air electioneering communications, *unless* the amount of money used is so enormously large that it purchases an *entire station's worth* of broadcast time.

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[38] As Judge Henderson noted, "CBS has been acquired twice in the past decade, first by Westinghouse and then by Viacom, and is now a subsidiary of a conglomerate that runs oil companies, farms, theme parks, and mining companies." Likewise, ABC is now part of the Walt Disney Corporation, NBC is owned by General Electric, and Fox Television is part of Rupert Murdoch's global News Corporation empire, which owns transportation companies and sports teams." S.A. 274 ¶54a(5)(B) (Henderson). Additionally, AOL TimeWarner owns CNN, and Microsoft is a co-owner of MSNBC.

Neither the Government nor the majority below explain why nonmedia companies that can afford to purchase broadcast facilities should be entitled to greater speech rights than other nonmedia companies. Instead, Judge Kollar-Kotelly tried to finesse "the NRA's entire line of argument" with the assertion that "the media exception only applies to the 'facilities of any broadcasting *station*,' . . . not the facilities of any broadcasting *company*." S.A. 883 (Kollar-Kotelly). Yes, it is true that Title II exempts news stories, commentaries, and editorials distributed through the facilities of any "broadcast *station*," but that obviously means that Title II exempts news stories, commentaries, and editorials broadcast by the *company* that *owns* that broadcast station.

Judge Henderson specifically found, on the basis of the NRA's substantial, uncontested, and uncontradicted evidence, that "[m]edia subsidiaries in some circumstances have been pressured by their non-media parent corporations to advance the interests of the parent or of the affiliated non-media businesses." Not surprisingly, therefore, "[s]ome media companies have refused to cover stories that might compromise the interests of the parent or of the affiliated entities." S.A. 274 ¶54a(5)(C) (Henderson).[39]

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[39] Indeed, BCRA's supporters, including the late Senator Wellstone, have argued that one can no longer rely on the media to fulfill their traditional function of "hold[ing] concentrated power – whether public or private power – accountable to the people." 12 PCS/NRA 628.

In sum, the uncontested evidence before the trial court confirms that "Big Media" has become part of "Big Business." There is no longer any qualitative distinction between the two that can justify (1) immunizing broadcast corporations from the same corruption concerns that Title II ostensibly attributes to all other corporations, or (2) giving, say, General Electric a special license to comment on federal elections, while muzzling advocacy groups whose defining corporate purpose is not profit but the dissemination of ideas.

CONCLUSION

For the foregoing reasons, this Court should enjoin Title II's prohibition on electioneering communications or, alternatively, the Wellstone Amendment.

Respectfully submitted,

CLETA MITCHELL
FOLEY & LARDNER
3000 K Street, N.W. Suite 500
Washington, D.C. 20007
(202) 295-4081

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HAMISH P.M. HUME
DEREK L. SHAFFER
COOPER & KIRK, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

BRIAN S. KOUKOUTCHOS
COOPER & KIRK, PLLC
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

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I. CONGRESSIONAL STATEMENTS CONCERNING CONTROLLING THE QUANTITY AND QUALITY OF POLITICAL SPEECH

A. SENATE STATEMENTS

Statement of Sen. McCAIN:

"What the modified bill seeks to do is establish a so called bright line test 60 days out from an election. *Any independent expenditures that fall within that 60-day window could not use a candidate's name or his or her likeness.* During this 60-day period, ads could run that advocate any number of issues. Pro-life ads, pro-choice ads, anti-labor ads, pro-wilderness ads, pro-Republican party or Democratic party ads all could be aired without restriction. *However, ads mentioning candidates themselves could not be aired.*

This accomplishes much. First, if soft money is banned to the political parties, such money will inevitably flow to independent campaign organizations. ***These groups often run ads that the candidates themselves disapprove of. Further, these ads are almost always negative attack ads and do little to further beneficial debate and a healthy political dialog.*** *To be honest, they simply drive up an individual candidate's negative polling numbers and increase public cynicism for public service in general."*

143 CONG. REC. S10,105 (Sept. 29, 1997).*

*** All emphases throughout this appendix have been added.**

Statement of Sen. McCAIN:

"I am sure we can make a judgment on a lot of ads we have seen and the same ads the Senator and I find disgusting and distasteful and should be rejected. But at the same time, I don't know how we can say, OK, if this station doesn't run my ads, I am going to go to a judge and have the judge make them run my ads. It just is something that would be very difficult.

I would love to work with the Senator from New Mexico. He has been a steadfast stalwart for campaign finance reform. I would love to work with him to try to achieve this goal. Frankly, after going around and around on this issue, identifying who paid for the ad, full disclosure and, frankly, not allowing corporations and unions to contribute to paying for these things in the last 60, 90 days, which is part of our legislation, is about the only constitutional way that we thought we could address the issue.

I thank the Senator from New Mexico. *He is addressing an issue that has demeaned and degraded all of us because* ***people don't think very much of you when they see the kinds of attack ads that are broadcast on a routine basis.***

As the Senator pointed out, ***they are dramatically on the increase. I will tell you what. You cut off the soft money, you are going to see a lot less of that. Prohibit unions and corporations, and you will see a lot less of that.*** If you demand full disclosure for those who pay for those ads, you are going to see a lot less of that because people who can remain anonymous or organizations that can remain anonymous are obviously much more likely to be a lot looser with the facts than those whose names and identity have to be fully disclosed to the people once a certain level of investment is made."

147 CONG. REC. S3116 (Mar. 29, 2001).

Statement of Sen. McCAIN:

"I hope that we will not allow our attention to be distracted from ***the real issues at hand how to raise the tenor of the debate in our elections and give people real choices. No one benefits from negative ads. They don't aid our Nation's political dialog.*** Again, if someone chooses to run negative ads, this bill will not restrict their right to do so. But we should not just throw up our hands and say, 'Who cares?' *We should seek,* within the protections of the Constitution, *to encourage a healthy political debate."*

143 CONG. REC. S10,106 (Sept. 29, 1997).

Statement of Sen. McCAIN:

"That is, so we are changing both. I say to my friend, I am changing both the definition of 'independent expenditure' and the definition of 'express advocacy.' We are doing so because there is clearly a huge problem in American politics today, which I am sure the Senator from Kentucky appreciates. There are no longer independent campaigns.

There is nowhere in any dictionary in the world the word 'independent' that would fit these campaigns. They are part of campaigns. ***To my dismay, and I am sure to every Member of this body, they are negative. And they are negative to the degree where all of our approval ratings sink to an all time low.***

. . . .

If the Senator from Kentucky believes that these are truly independent campaigns, set up and run and funded by individuals who just want to see their particular issues, whether it be pro-life or pro-choice or workers' right to strike or any of the others, then fine.

But it is beyond me to believe that the Senator from Kentucky could have, having seen these ads he is very deeply involved in the political process that they are independent. They are not. They are appendices of the political campaigns. ***The tragedy of it is, 98 percent of them are attack ads,*** *as the Senator well knows.*"

143 CONG. REC. S10,132 (Sept. 29, 1997).

Statement of Sen. JEFFORDS:

"Mr. President, I understand what my good friend from Kentucky is saying, but I remind everyone what the real issue is, and that is elections. *We are talking about a system which has developed over the past couple of years which has seriously imposed upon us unfairness as far as* ***candidates*** *are concerned who* ***find themselves faced with ads, and other areas of expression, to change the election.*** Why would they spend $135 million to $200 million unless it was successful?

Let us get a real-life situation of what we are talking about. I have been in the election process for many, many years, and *I know from my own analysis* – and I think it probably is carried forward everywhere – *that the critical time in an election to make a change in people's minds is the last couple of weeks.*

Basically, I find that probably of the electorate, only about 50 percent care enough about elections to even go. That is the average across the country. Of that 50 percent,

probably half of them will make up their minds during the last 2 weeks.

So you are out and have a well-planned campaign and everything is coming down to the end. You can go and find out what your opponent has to spend, and you can try to be ready to match that. ***And then whammo, out of the blue comes all these ads that are supposedly issue ads, but they are obviously pointed at positions that are taken by you saying how horrible they are. So these are within the Snowe-Jeffords amendment.***

What can you do about it? You cannot do anything. You cannot even find out who is running them, unless you are lucky and have an inside source in the TV and radio stations to tell you who it is. You cannot find out. There is no disclosure.

The most important part of our amendment is just plain disclosure. If it is far enough in advance, 30 days before a primary and 60 days before a general election, at least you have time to get ready for it. If you know you are going to get all these ads coming, then you can reorder your priorities of spending. You can say, "Oh, my God, we have all this coming," and you never know until it is all over. *You are gone. You lose the election and you didn't know.* ***The opposition comes forth with this barrage and you are totally helpless.***"

144 CONG. REC. S917 (Feb. 24, 1998).

Statement of Sen. JEFFORDS:

"Mr. President, I am disturbed at the DeWine attempt to solve a problem that is not there. ***I*** *was one of those back in my last election – not the last but the one before that –*

who was exposed to this kind of advertising, who has ***had to face seeing ads on television which totally distort the facts and say terrible things.*** *You watch a 20-percent lead keep going down* and you do not know who is putting them on. You know what they are saying is totally inaccurate, but you have no way to refute it, other than to try to get people convinced that nobody knows who put it there, who is behind it.

The constitutionality of our provisions is common sense. How can you say that something which merely asks the person who put out the ad to let everybody know who they are is unconstitutional? How in the world can you say that it is unconstitutional to require somebody to disclose who they are and what they are?

That is all we are doing in Snowe-Jeffords.

The Wellstone amendment does make things a little more confusing in that regard."

147 Cong. Rec. S3071 (Mar. 29, 2001).

Statement of Sen. SNOWE:

"That is correct – our amendment is not intended to convey any criticism of the FEC. *The Buckley magic words test* is a very narrow one, and *has proven completely ineffective in stopping phony issue ads* ***that attack candidates.*** *My amendment offers a new approach to this problem, by creating a new category of 'electronic ads' that name candidates in broadcasts close in time to an election.*"

144 Cong. Rec. S979 (Feb. 25, 1998).

Statement of Sen. SNOWE:

"Any successful campaign finance reform bill must address the realities of elections as we approach the new millennium. One of those realities is the so called issue advocacy or voter education ads. We have all seen these ads: threatening music over provocative images blatantly designed to influence voters to vote against a candidate. But because these ads don't specifically say "vote against candidate X" there is currently no limit on how much can be spent on them, and no accountability.

It is obvious to anyone the purpose of these ads; to skirt current campaign finance laws that require that ads designed to influence Federal elections be paid for with hard money, and disclosed to, and regulated by, the Federal Election Commission. Under my bill, *the law would be changed in such a way to include these types of ads under hard money limits and disclosure requirements.* ***This would help limit the attack ads*** and give the public the information they need about who is paying for these ads and how much they are spending. An informed electorate is the key to any democratic system of government, and my bill will give people the information they need to make up their own minds."

143 Cong. Rec. S8581 (July 31, 1997).

Statement of Sen. WELLSTONE:

"The last criterion is political equality. Everybody ought to have an equal opportunity to participate in the process. That means the values and preferences of citizens, not just those who get our attention through the large contributions, should be considered in the debate. One

person, one vote; no more, no less; one person, same influence. Each person counts as one, no more than one. That is the standard. That is what it is all about. *That precious principle, that precious standard of representative democracy, is being violated.*

. . . .

Finally, I have to say this because I forgot to mention this earlier. ***This is the part of the McCain-Feingold legislation that I think is perhaps most important. I remember the 1996 election. I think these issue advocacy ads are a nightmare. I think all of us should hate them.*** *I very much would like to apply this to independent expenditures as well.* I want to be clear about it. But in Minnesota, it was a barrage of these phony issue advocacy ads, where they do not tell you to vote for or against; ***they just bash you*** and then they say: Call Senator So-and-so.

They are soft money contributions with no limits on how much money is raised, no limits on how the money is raised. It could be in $100,000 contributions, $200,000 contributions, and make no mistake about it, this is in both parties. These big soft money contributors have a tremendous amount of access and way too much influence in both parties.

So with one stroke, it would be a wonderful marriage. We could get some of this poison politics off television. We could get some of these phony ads off television. We could build more accountability, and we would make both political parties, I think, more accountable to the public."

145 CONG. REC. S12,606-07 (Oct. 14, 1999).

Statement of Sen. WELLSTONE:

"The point is, if you are concerned about poison politics, leave this loophole open, let these interest groups run these sham ads. Overwhelmingly they are negative, they can be vicious, they are poison politics."

147 CONG. REC. S2846 (Mar. 26, 2001).

Statement of Sen. WELLSTONE:

"If you want to try to get as much of the big money out of politics as possible, you have to support this amendment. ***If you hate bitter, personal, poison politics, you have to support this amendment.*** Because, before the Presiding Officer came in, I was saying that *the Brennan Center said that 70 percent of the money spent by these sham ads by these groups and organizations is personal, negative, and going after people's character.* I am glad to say that only about 20 percent of the candidates' ads do that."

147 CONG. REC. S2849 (Mar. 26, 2001).

Statement of Sen. CANTWELL:

"This bill is about slowing the ad war. It is about calling sham issue ads what they really are. ***It is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves.*** *Ninety-eight million dollars worth of these ads ran in the 2000 election by narrowly focused special interest groups* based out of Washington, DC. This legislation will change that and again focus these debates more on the public agenda. This bill also stops the unlimited flow of corporate contributions, or soft money, *that contributed to the volume of ad wars in the 2000 election."*

148 CONG. REC. S2117 (Mar. 20, 2002).

Statement of Sen. CANTWELL:

"*The Seattle Post Intelligencer noted earlier this week that campaign ads 'rained down on – or bludgeoned, according to some – viewers throughout the late summer and fall.* And this wasn't an intermittent, drip torture kind of rain that Seattle residents know so well. *It was a deluge, a constant unavoidable torrent, stretching across three solid months.'*

With this constant torrent of negative advertising, it is no wonder that voting among 18 to 24 year olds has dropped from 50% to only 32% *– a much steeper decline than overall turnout.*

Part of the reason for this disaffection with voting and with politics is undoubtedly due to negative attack advertising."

147 CONG. REC. S2698 (Mar. 22, 2001).

Statement of Sen. BOXER:

"Another good thing about McCain-Feingold: Those vicious attacks that have come from large soft money contributions will not be able to come 60 days before your election. *That is a big plus because that is what* ***we find – that candidates at the end simply cannot respond to this barrage of activity.***

So I feel personally grateful, going into an election cycle, that in 2004 candidates will not have this burden to raise hundreds of thousands of dollars from one source in soft money. That will not be allowed. I think that is good for the candidate. I think that is good for the country, it is good for the legislative process. ***We will not be hit by these last-minute ads with unregulated soft money at the end, to which we will be unable to respond."***

148 CONG. REC. S2101 (Mar. 20, 2002).

Statement of Sen. BOXER:

"I have to tell you, when I think about speech, I think about both sides of it. *If you have an independently wealthy billionaire running against you in a State like California, and he writes checks every day and bashes you on television every day and bashes the other opponents that he is running against every day, I believe we should ask, what about the free speech rights of the opponents?* What about the speech of the other people that are drowned out because of money? ***If you equate money and speech, it seems to me you are saying someone who is wealthy has more speech rights than someone who is not.***

This is not the American way. *We are all created equal.* That is the basis of who we are as a nation. I really hope that we can get past this notion that money is speech and that we will move forward with a comprehensive bill.

My one disappointment with the substitute pending before the Senate, is that it is not as comprehensive as the first version of the McCain-Feingold bill. However, I respect the judgment of the Senators that it would be best at this time to zero in on two horrible abuses of the system.

One abuse is the soft money abuse, which means unregulated dollars of any amount that flow into political parties. We have seen the hearings that are going on by this U.S. Senate and over in the House. If anything, we come away with this: Let's put an end to soft money. We could point fingers all day this politician, that politician, where the calls were made, who made them but I guarantee that gets us nowhere. The issue is the system. There will be enough examples around from both parties. This is not the problem.

So if we get exercised about these hearings and I have seen colleagues here who are very exercised about them they should go over to John McCain and Russ Feingold and tell them they are on their side. There ought to be some controls on the soft money contribution, and those controls are now pending before the Senate. *The second area of abuse tackled by the McCain-Feingold bill is the so called issues advocacy advertisements. This is where you take an organization with endless sums of money to put into an attack ad against the candidate they don't like.*

Under current law, individuals can only give $1,000 in the primary and $1,000 in the general to the candidate, but issues advocacy has grown into huge loophole. *These so called issues ads are not regulated at all and mention candidates by name.* ***They directly attack candidates***

without any accountability. It is brutal. I have seen them. I have seen them from both sides.

I can tell you, it is totally unfair and totally unregulated ***and vicious.*** *It is vicious.* ***We have an opportunity in the McCain-Feingold bill to stop that and basically say, if you want to talk about an issue, that is fine, but you can't mention a candidate.*** If this is truly issue advocacy, you can't mention a candidate a few weeks before the election.

If you want to talk about an issue day and night, talk about the issue, whether it is choice, the environment, health care, gun control talk about it. *But* ***once you attack a candidate, that is not an issue ad. This is what the Feingold McCain will go after***."

143 Cong. Rec. S10,208-09 (Sept. 30, 1997).

Statement of Sen. BOXER:

"Second, the McCain-Feingold amendment bans ***attack advertising*** *disguised as 'issue ads' by corporations and unions within 60 days of an election."*

144 Cong. Rec. S10,168 (Sept. 10, 1998).

Statement of Sen. DASCHLE:

"We also have a serious problem with regard to the ads themselves and all that comes from spending this money. It is the amount of money, the perception of to whom we are indebted, but *now we also have a problem* *with the* ***virulent advertising*** *that comes from it.* ***I believe that negative advertising is the crack cocaine of politics.*** We are hooked on it because it works. We are hooked on it because we win elections using it. There is no accountability, no reporting; it is publicly not tied to any candidates. *And I expect that in 1998 we are going to see a meltdown of the process, because* ***we are going to see more virulent ads*** *than we have ever seen in our lifetimes.* ***The crack cocaine of politics will be at work again.***

Negative ads from anonymous sources push candidates to the margins. ***Candidates become bit players in their own races.*** *How many times have I heard candidates actually say, 'I couldn't keep track of who was on my side. I'd watch television and I'd hear my name used pro and con, and I didn't have anything to do with those ads. I am sitting like a man at a tennis match, watching both sides play it out.'* And the debate now is defined by who has the most money; that is how it is defined."

144 CONG. REC. 868 (Feb. 24, 1998).

Statement of Sen. DASCHLE:

"A 1997 study by the respected Annenberg Public Policy Center at the University of Pennsylvania found that phony 'issue ads' are nearly identical to campaign ads – with two exceptions. *The 'issue ads' are more* ***attack-oriented and personal.*** And, it is harder to identify the sponsor. ***These ads epitomize the negative campaigning*** – without any accountability – ***the public so dislikes.***"

145 CONG. REC. S12,660 (Oct. 15, 1999).

Statement of Sen. KENNEDY:

"In recent years, the amount of money spent in Presidential campaigns has doubled every 4 years. Senate and House races now cost millions of dollars. ***Election campaigns have become more and more negative, with misleading TV spots that traffic in halftruths or outright falsehoods.*** And corrupting and corroding it all are the massive abusers of the current loophole ridden campaign financing laws."

143 CONG. REC. S10,271 (Oct. 1, 1997).

Statement of Sen. LIEBERMAN:

"The Annenberg study further found that *more than 40 percent of the 1996 ads* ***plainly attacked candidates,*** *not issues.* One of the witnesses before our committee said last week that *by his review of the ads, the* ***issue ads were actually more negative to candidates*** *than the candidate ads were.* Some ads don't bother with issues at all."

143 CONG. REC. S10,141 (Sept. 9, 1997).

Statement of Sen. DURBIN:

"On the Saturday night before the election last November, bone weary, I pulled into my apartment in Chicago, and I was going to relax a little bit. It was in the closing days of the campaign. So I slumped down in a chair, grabbed the remote control to listen to Saturday night Live. Somewhere between the news and Saturday Night Live, ***up pops four television commercials, one***

after the other, and every one of them blasting me. What a treat that was to sit in the chair and get pummeled by four different commercials.

The most unique thing was that not a single one was paid for by my opponent, the Republican Party in Illinois, or the National Republican Party. *They were paid for by committees and organizations that most people never heard of.* These are organizations which mushroom up during campaigns, take some high sounding name, collect millions of dollars, undisclosed and unreported, and run ads, the most negative ads on television, against politicians. That is an outrage. It is an outrage that I have to account for every dollar I raise and spend and I have to identify the television commercials that I put on, either comparing my record with my opponent or speaking about something I believe in, and these groups can literally run roughshod over the system, spending millions of dollars without any accountability.

McCain-Feingold addresses that. Thank God it does. *If we don't put an end to this outrage, most of these other reforms are meaningless. To eliminate soft money and to allow special interest groups, whether on the business or labor side, to continue to spend money unfettered in issue advocacy and the like is outrageous.* The McCain-Feingold legislation is an idea whose time has come."

143 CONG. REC. S10,124 (Sept. 29, 1997).

Statement of Sen. DURBIN:

"People are sick of our advertising. ***It is too negative. It is too nasty. These drive-by shooting ads that we have, 30-second ads by issue groups you never heard***

of, at the last minute of a campaign, and candidates, myself included, spending a lot of time groveling and begging for money, that does not help the process. ***It does not help our image.*** It does not encourage people to get involved.

What McCain-Feingold is about is not just changing the law but changing the attitude of the public toward the political campaigns. And unless and until that happens, we face a very serious problem in this country. What McCain-Feingold goes after in eliminating soft money is something that has to happen. Soft money is what is left after all of the restrictions on hard money have been applied.

For those who are not well versed in the language of politics and campaigns, 'soft money' can be corporate money, it can be money that is given by a person that exceeds any kind of limitation. It can be money that is used indirectly to help a campaign. And that sort of expenditure has just mushroomed.

I am glad that the legislation of Senator Feingold and Senator McCain is going to ban soft money. *I also think it is critically important they do something about these issues ads."*

144 CONG. REC. S879 (Feb. 24, 1998).

Statement of Sen. DURBIN:

"There is not only something wrong with *the advertising*, it *has become* ***so negative, so nasty, so dirty, that people are disgusted with it.*** There is something wrong with the products. Candidates for the House and Senate are losing their reputation or seeing their integrity maligned because we spend so much time grubbing for money. People believe that we are captives of special interest groups. And because they are sick of the style of campaign and because they have little or no confidence in those of us who wage the campaigns, they stay home."

143 CONG. REC. S10,123 (Sept. 29, 1997).

Statement of Sen. DURBIN:

"There is another element, too – the advertising that we put on television during the course of the campaign. A lot of people are turned off by it. Most campaigns hire sophisticated people to make those ads. They hire pollsters who go out and take legitimate samples of American opinion – samples within a given State – and convert those samples into messages; 30-second messages that go up on television. Some of the messages are positive. *Some are negative.* ***It is the negative ones that unfortunately give us the bad name and lead a lot of people to say that this process itself is so fundamentally flawed."***

144 CONG. REC. S10,060 (Sept. 9, 1998).

Statement of Sen. DORGAN:

"And guess what? What kind of advertising was this? *Eighty-one percent of it was* ***negative advertising****; 81 percent negative advertising.* ***That is the air pollution in***

this country that we ought to worry about. We ought to do something about it."

143 CONG. REC. S10,097 (Sept. 26, 1997).

Statement of Sen. DORGAN:

"Finally, campaign finance reform is also part of what our caucus is committed to doing. There are a lot of discussions about what pieces will work and what pieces will not work with respect to campaign finance reform. I want to describe one little piece that I think is important. ***The most significant kind of air pollution in America today is the 30-second political ad that does nothing but tear down someone's opponent. It is a 30-second slash and burn, cut and run ad that contributes nothing to our country.*** The first amendment gives everybody the right to do that. We won't change that. But there is a little thing we can change. We can, by Federal law, say that every television station is required to offer the lowest rates on the rate card during political advertising during a certain period. I propose that we change that law to say that low rate is only available to candidates who run advertisements that are at least 1 minute in length. Let's require people to say something significant in one in which the candidate himself or herself is in the advertisement 75 percent of that 1 minute."

144 CONG. REC. S702 (Feb. 12, 1998).

Statement of Sen. DORGAN:

"This overly narrow definition of what constitutes express advocacy *has created a giant loophole for* ***attack***

ads. Simply by avoiding the magic words I mentioned above, *corporations, unions, and other special interest groups can pay for brutal attack ads*. Anyone who has seen some of these ads can tell they're intended to influence the outcome of Federal elections. And because they can be paid for with soft money, groups can raise money for them without limits, buy them in the millions of dollars, and never have to disclose what they're doing to the FEC."

143 CONG. REC. S8933 (Sept. 8, 1997).

Statement of Sen. DORGAN:

"And what about the issue ads which Senator Durbin mentioned as well? *These issue ads – are they ads that contribute to this political process? Eighty-one percent of them are negative. They represent the slash, burn and tear faction of the political system*. Get money, get it in large chunks from secret sources and put some issue ads on someplace and try to tear somebody down."

144 CONG. REC. S880 (Feb. 24, 1998).

Statement of Sen. DORGAN:

"I would like to just mention two additional items before I close. ***One of the concerns I have about our political system is so much of the advertising is negative.*** There is nothing you can do about that; I understand that. We cannot prohibit this kind of advertisement. We can say, if you are going to put this kind of advertisement on the air, you have to play by the rules and get hard money and disclose the donors. There is nothing

wrong with that. But we cannot prohibit any advertisement. *So much of it now is negative and so much of it is a 30-second little political explosion that goes on across our country where candidates are not even hardly named, at least with respect to the person's campaign, in financing the 30-second ad. It is a nameless, faceless, little bomb directed to destroy, tar or feather some other candidate.*"

143 CONG. REC. S10,138 (Sept. 29, 1997).

Statement of Sen. DORGAN:

"Mr. President, *I rise today to discuss legislation I am introducing to address a significant air pollution problem we have in this country*.

No, I'm not talking about smog, or acid rain, or the ozone layer, ***I'm talking about broadcast air pollution. And by that I mean the 30- second, slash-and-burn, hit-and-run political ad that does nothing but cut down an opponent.***

Can you think of any other business in this country that sells its wares only by tearing down the opposition? Do airlines ask you to consider their services because their competitors' mechanics are unreliable, and try to conjure up images of plane crashes to get you to switch carriers? Do car manufacturers sell their products by raising dark, misleading doubts about the safety of their competitors' autos? Does McDonald's run ads raising the threat of E-coli bacteria in Burger King's hamburgers?

Of course not, but that's precisely the way we compete in politics against each other.

It is a pretty sad state of affairs when the American people get a more informative and dignified discussion about the soda they drink or the fast food restaurant they prefer than they do in the debate about what choices to make for our country's future. It is time to do something about it.

We cannot and should not attempt to limit speech. But there is something we can do to provide the right incentives. Under current law, television stations are required to offer the lowest unit rate to political candidates for television advertising within 45 days of a primary election, and within 60 days of a general election."

The legislation I am proposing today would change that law to provide that the low rate must be made available only to candidates who run ads that are at least one minute in length, in which the candidate appears at least 75 percent of the time."

144 Cong. Rec. S1076 (Feb. 26, 1998).

Statement of Sen. COLLINS:

"The situation with bogus issue ads is not better. That practice undermines the two major objectives of our election laws, namely, placing limits on contributions and disclosing the identity of those making the contributions. Without such disclosure, we lose accountability. *A recent study found that as accountability in political communications declines, levels of misinformation and deceit rise.* ***Thus, it is no surprise that bogus issue ads almost always carry a negative message, something which all in this body purport to decry.*** *The question is –* ***are we willing to do something about it?"***

144 Cong. Rec. S875 (Feb. 24, 1998).

Statement of Sen. COLLINS:

"I want to respond, also, to the comments made by the Senator from Connecticut and the Senator from Michigan and thank them for their support of the Wyden-Collins proposal. *Senator Dodd and Senator Feingold also raised a very important point, and that is,* ***the deluge of negative attack ads discourages people from voting and really turns off the American public.*** This is exacerbated by the fact that a lot of times it is not evident who is sponsoring these ads, who is behind these charges and allegations that are hurled particularly in the final days of the campaign.

I believe the Snowe-Jeffords amendment will help in that regard and that the amendment Senator Wyden and I are sponsoring today will make very clear that when a candidate launches a negative ad attacking his opponent, that candidate will have to take responsibility for that ad."

147 Cong. Rec. S2695 (Mar. 22, 2001).

Statement of Sen. CLELAND:

"I look back at the 1976 decision by the Supreme Court which, in effect, equated the ability to spend money with free speech. In the campaign finance hearings a couple of years ago, I asked the simple question: If you do not have any money in this country, does that mean you do not have any speech? Of course not. ***The problem is we***

have equated money with speech and the ability to get on the air with 30- and 60-second spots which make us want to throw up.

I share the concern of the distinguished Senator from Alabama, Mr. Sessions, about these negative attack ads that come from out of State and seem to originate from God knows where. They come in and assassinate someone's character. That is not the country for which Senator McCain and I fought. That is not the kind of democracy we intend to serve. *That is one reason why I have bonded with him in such a close way: to support cleaning up this incredible process.*"

145 CONG. REC. S12,612 (Oct. 14, 1999).

Statement of Sen. REED:

"This would curtail what has become an explosion throughout our American political system. *Phony issue advertisements are unconstrained, cropping up suddenly, without attribution,* ***to strike at candidates.***"

144 CONG. REC. S884 (Feb. 24, 1998).

Statement of Sen. DODD:

"*If you look at campaign advertising,* ***the attacks we wage against each other****, the personal degradation we attach to and associate with our political competitors, what has happened is,* ***we have so devalued public service and the public life of elected office that the public has become understandably disgusted with the condition of politics in America****.* We have no one to

blame for that but ourselves. *In no small measure that has occurred because of the rising amount of dollars that are spent being convinced by political consultants that the best way to win office is not to convince anyone of the merits of your argument but if you can convince people that your opponent is somehow unworthy of even consideration for the office*, let alone that his ideas or her ideas may lack substance, then you can win a seat in the Congress of the United States.

Thus we see, as we did last year, where, of the 200 million eligible voters in America, only 50 percent voted; 100 million Americans cast their ballots for the Presidency of the United States, a decision that was made by a handful of votes in one State, and 100 million of our fellow citizens did not even show up on election day, where a tiny fraction, had they shown up in one State, would have resulted in a different outcome than what occurred as a result of the recounts and so forth that occurred in the State of Florida.

I suspect that a good portion of that 100 million didn't show up because they forgot or because they had something better to do that day.

I suspect a substantial portion didn't show up because they are disgusted with the process; *they are sick and tired of coming into September and October after an election year and* ***you can't turn on a single bit of programming without some mudslinging going on, attacking of one another, blistering one another****. Whether it is through our own ads,* ***or the ads of outside groups just trying to destroy the reputations of people seeking public life***, I suspect that has more to do with the declining numbers of people checking off on the 1040 forms, the resource to support Presidential public financing.

One of the reasons why McCain-Feingold deserves support, in my view, is because there is some hope that this will put the brakes on, slow this down enough *so we don't have an unending exponential growth of dollars pouring into the coffers of candidates and groups out there year in and year out, destroying not only the candidates, but the public's confidence in a political system* that has contributed greatly to this great Nation over 200 years."

147 Cong. Rec. S2943 (Mar. 27, 2001).

Statement of Sen. DODD:

"Mr. President, let me thank our colleague from New Mexico for proposing this amendment. All of us here, and those who pay any attention at all to politics in this country and are confronted with this, as most Americans are, if you look at this chart by the Senator from New Mexico, ***particularly in that August, September, October period of an election year, it is hard not to be confronted with the assault*** – that is the only way to describe this – *of ads on television from one end of the country to the next, on every imaginable radio station, television station, now cable stations* – ***this bombardment that occurs.***

What the Senator from New Mexico has graphically demonstrated with his chart is that *the overwhelming majority of these ads are* ***the so-called attack ads. Usually, they are very vicious***, designed to not promote

one's ideas nor one's vision, one's agenda – if they are elected to Congress or the Senate or the Presidency or some other office – but merely to try to convince the rest of us why you ought to be against someone; not why you ought to be for me but why you ought to be against my opponent.

The least enlightening part of a campaign is the proliferation of these ads. They do nothing, in my view, to contribute to the education, the awareness of the American people. ***We have seen an explosion of them over the past few years.*** I suspect this has probably been in the last 6 or 7 years, with the explosion of soft money ***that the McCain-Feingold bill seeks to shut down.***"

147 Cong. Rec. S3113 (Mar. 29, 2001).

Statement of Sen. MURRAY:

"Given the problems in the system, I developed a set of principles for reform that have guided my decisions throughout this debate. My principles for reform are: *First, there should be less money in politics. Second,* ***I want to make sure that average voters aren't drowned-out by special interests or the wealthy***. Third, we must demand far more disclosure from those who work to influence elections. When voters see an ad on TV or get a flyer in the mail, they should know who paid for it. There must be disclosure for telephone calls and voter guides. Citizens have a right to know who's trying to influence them. ***We've seen a disturbing increase in the number of issue ads, which are often negative attack***

ads. Too often, voters have no idea who's bankrolling these ads."

147 CONG. REC. S3236 (Apr. 2, 2001).

Statement of Sen. BINGAMIN:

"It should come as no surprise to any of us that more and more *Americans are repulsed by these anonymous assaults* and the sheer volume of money pouring into our election system. As a consequence, they are distancing themselves from the political process. That is the greatest tragedy of all. Americans are so turned off by our political system that they don't even vote on election day. When they do vote, often it is not the sense of voting for the better of two candidates; it is a perception that they are voting for the lesser of two evils on the ballot.

With a tidal wave of campaign cash flowing into our political system, ***the torrent of negative advertising*** *on the airways*, and the lack of meaningful disclosure or accountability, ***it is becoming increasingly difficult, almost impossible, for the American people to feel good about any candidate***, or their participation in the democratic process."

144 CONG. REC. S10,081 (Sept. 9, 1998).

Statement of Sen. WYDEN:

"Mr. President, I come to the floor this morning with Senator Collins of Maine to offer a bipartisan amendment

that we believe will help slow the explosive growth of negative political commercials that are corroding the faith of individuals in the political process. I also thank my colleague from New Mexico, Senator Bingaman, and Congressman Greg Walden of Oregon on the House side, who has also been extremely interested in this issue over the years.

Negative commercials are clearly fueling citizens' cynicism about politics. Those negative commercials are depressing voter participation and, in my view, they are demeaning all who are involved in the political process."

147 CONG. REC. S2692 (Mar. 22, 2001).

Statement of Sen. BAUCUS:

"The problem we're really facing is how grey the campaign finance laws have become. McCain-Feingold, as amended, would make them black and white. Just take issue advocacy advertising as an example. In the last couple campaigns, the lines have been blurred between express advocacy, which requires federal disclosures, and issue advocacy.

We can all recall advertisements in our own state that just barely skirted the lines. In Montana, the unregulated soft money ads started early. *Close to a year before the election,* ***groups started attacking candidates with mud-slinging ads.*** Groups with benign sounding names that hid their partisan bent. Ads that attacked candidates, and even told people where to call, but somehow fell under the 'issue advocacy' definition, and were exempt from campaign finance laws."

147 CONG. REC. S3239 (Apr. 2, 2001).

Statement of Sen. JOHNSON:

"I personally have just been through one of the longest and, frankly, one of the most expensive per voter Senate campaigns in the history of America. My opponent and I spent a total of $24 for every vote cast. And, if one were to include the money spent by the national party organizations and the various independent groups, total spending would rise to around $29 per vote. All of this money produced one of the longest political campaigns the Nation has ever seen. My opponent began running campaign commercials 17 months from the election, *then 13 months before the election an attack ad campaign, one that I had to respond to*, although I was not yet even formally an announced candidate in the race.

That is the kind of campaign negative vitriolic, longwinded, longstanding that did nothing to improve the confidence of the American public in our political process, and did nothing to restore confidence that in fact the system reflects their values and their ideals and their values. *It was simply a system awash in too much money.*"

143 CONG. REC. S10,395 (Oct. 6, 1997).

Statement of Sen. LEVIN:

"If we do not do it, ***if we do not put a stop to the money chase and the attack ads that are overwhelming the system and disgusting the American people, we will let down our constituents.***"

143 Cong. Rec. S10,127 (Sept. 29, 1997).

Statement of Sen. COCHRAN:

"We all see the ads. ***We are overwhelmed by the total number of television ads*** *and other mailings that are sent out during a political campaign these days in House races, in Senate races, and even the Presidential election this past year. Voters have to be confused.* Who is running the ads? It says "The Good Government Committee," but who is that? Or it says something else that sounds really good, as though they are on the side of right and justice and right thinking. So they put the ad up that suggests or insinuates that one or the other of the candidates isn't on the right track, either on one subject or just generally speaking, it isn't good for the State or the district or the country, or suggests that there may be something in the background of the candidate that is suspicious, that needs to be looked at very carefully. ***The insinuation, the misleading tone, the negative aspect of political campaigns is fueled by the huge amounts,*** the juggernaut, an almost imperceptible amount of influence being brought to bear on these campaigns by who knows what source, who knows who is behind the spending."

147 CONG. REC. S2444 (Mar. 19, 2001).

Statement of Sen. MIKULSKI:

"*The McCain-Feingold bill does several things.* It bans soft money raised by national parties and by candidates for Federal office. *It ends issue ads,* ***which are really attack ads*** *under the guise of 'issues.'* I want to close the loophole which allows groups to skirt the current election law – and this bill does just that. Finally, it clarifies what election activities non-profits can do on behalf of our candidates for Federal office."

147 CONG. REC. S2691 (Mar. 22, 2001).

Statement of Sen. BRYAN:

"The McCain-Feingold proposal addresses two important issues that could begin to turn our campaign system around. ***The legislation proposes*** to ban soft money contributions to our national political parties and ***to curb the use of attack advertisements*** *hidden behind so-called 'issue advocacy' campaigns.*"

144 CONG. REC. S1038 (Feb. 26, 1998).

B. HOUSE STATEMENTS

Statement of Rep. SHAYS:

"*The other thing is that we want to deal with the sham issue ads.* ***The sham issue ads are those campaign ads that basically almost tanked the gentleman from Arizona.*** We would ban those sham issue ads. We would not see corporate money being used, we would not see union dues money because it would be illegal, because once it is a campaign ad, they cannot do those ads. They can do it through PAC contributions, but not through members' dues, and they cannot use corporate money."

144 CONG. REC. H5480 (July 14, 1998).

Statement of Rep. ALLEN:

"If one is a TV viewer and they like endless streams of deceptive anonymous issue ads in election years, oppose reform; but if one prefers honest and less frequent ads, support Shays-Meehan."

145 CONG. REC. H8182 (Sept. 14, 1999).

Statement of Rep. HOEFFEL:

"Mr. Chairman, I thank the gentleman for yielding me this time, and I rise in opposition to the Ney substitute, because it is clearly designed to send campaign reform to conference where it will die. I rise in full support of the Shays-Meehan underlying bill.

It is time that we get soft money out of Federal elections. *It is time that we control the sham issue ads.* In fact, Mr.

Chairman, it is time for a lot more reform. This is only one good step forward into cleaning up our Federal elections.

We should consider other steps that would limit the corrupting influence of private money on public campaigns. We should consider a measure of public financing for congressional elections, as we do for Presidential elections. ***We should consider ways to raise the discourse and stop the negative ads***, and do other things to clean up our system and restore a sense to the democratic process that it belongs to the people, not the big donors, and restore a sense that it matters what we say in campaigns and what people do in campaigns."

148 CONG. REC. H389 (Feb. 13, 2002).

Statement of Rep. BAIRD:

"Let me share with my colleagues an example actually from our recent experience. We had a very expensive campaign, I will admit it, *because **we were getting attacked heavily, one of the number-one targets** in the whole country*. But we also had a grassroots campaign. That is what we need to have more of. We had 1,100 volunteers in the field on the day of the election, 1,100 people going around the district working telephones, saying why they cared so much about that election. I know my good friend from Illinois had a similar organization. That is politics at its best. *Politics at its best is people working in the field for people they believe. Politics at its worst is when people pay telephone solicitors to call with smear campaigns.* ***Politics at its worst are last-minute $100,000, $200,000 and $300,000 TV attack ads.***

What I am hoping we can do is inspire the young people who come watch us each day and watch us on TV and who are in our schools today to be a part of politics at its best. This bill will help reduce the impact of politics at its worst and maybe inspire people to do more."

145 CONG. REC. H1311 (Mar. 16, 1999).

Statement of Rep. CAPPS:

"*Last year, as was mentioned,* ***I endured four grueling elections and watched as wave after wave of attack ads flooded my district under the guise of informing voters.*** *These ads distorted both my record and the record of my opponent.*

The Shays-Meehan bill effectively ends the misuse of issue advertising. It does so by requiring all ads which clearly urge the support or defeat of a candidate in a Federal election to be treated like what they are, political ads.

Let us restore the public's trust in our political system. We need to pass the Shays-Meehan bill and send it to the Senate today."

145 CONG. REC. H8190 (Sept. 14, 1999).

Statement of Rep. BONIOR:

"Mr. Speaker, *every 2 years* ***America's airwaves are flooded with political attack ads. These negative ads leave voters feeling cynical, disenchanted, and with little faith in politicians or in the political process.***

These attack ads are also the main reason why we spend so much time fund-raising, defending ourselves against vicious 30-second spots, ***often now funded by outside groups,*** and have become more and more costly every single year and every single election. Free TV time for credible candidates could drastically lower the cost of campaigns and eliminate the need for excessive fund-raising.

The broadcasters and the radio folks and the TV folks and the cable folks, they do not own those airwaves. They belong to the American people, not the media corporations."

144 CONG. REC. H3726 (May 21, 1998).

Statement of Rep. BONIOR:

"Although some have proposed spending even more on campaigns on this side of the aisle, the American people think just the opposite. Nine out of ten believe too much money is being spent on political campaigns today. *So we need* to fix the system, to get the money down, to set limits, ***to stop negative advertising,*** *and to get Americans voting again."*

143 CONG. REC. H3111 (May 21, 1997).

Statement of Rep. BARRETT:

"I think that the Shays-Meehan proposal takes away some of the cynicism that is out there because it lets people understand that we do not want unregulated soft money coming into this system. ***We do not want drive-by shootings that are basically what some of these 30-second commercials are.*** What we want is we want integrity in the system. And I think that this is a very serious and a very meritorious attempt to bring some integrity back to the system."

144 CONG. REC. H4796 (June 18, 1998).

Statement of Rep. ESHOO:

"We should be having a real debate on real reform, the Shays-Meehan bill. It bans the unregulated, unlimited donations to political parties known as soft money; it establishes exacting disclosure requirements; and it ***limits the fund-raising of independent groups who run those infamous TV attack ads."***

144 CONG. REC. H1735 (Mar. 30, 1998).

Statement of Rep. ROUKEMA:

"They look at the way this system works – the explosion of soft money, fat cats buying access. White House coffees, the Vice-President dialing for dollars, foreign contributions. Members and Senators spending every waking moment raising cash, ***attack ad upon attack ad piled on top of attack ad."***

145 CONG. REC. H8196 (Sept. 14, 1999).

Statement of Rep. WU:

"The Shays-Meehan bill does this: It bans soft money raised by national parties and by candidates for Federal office. It ends issue ads, ***which are really attack ads*** *under the guise of 'issues.'* And, it clarifies what election activities non-profits can do on behalf of our candidates for Federal office."

148 CONG. REC. H354 (Feb. 13, 2002).

Statement of Rep. ISRAEL:

"*When we stop the special interests*, when people have as much of a voice in this House as the special interests do by ***flooding our airwaves with*** *unregulated soft money,* ***negative attack ads****, that is when people will be put first.* When people, regular people, working people have as much influence in this House as the special interests who flood campaign treasuries with unregulated soft money special interests contributions, that is when we will put people first. Maybe that is when we will get a prescription drug benefit."

148 CONG. REC. H271 (Feb. 12, 2002).

Statement of Rep. EDWARDS:

"Free speech is a fundamental right, but in a democracy, *the strength of a citizen's voice should depend upon the quality of one's ideas, not the quantity of one's bank account.*

Let us unite once again in defense of our democracy. Let us affirm the great American ideal that this should truly be the people's House, *where the voice of every citizen is heard, not just a privileged few.*"

148 CONG. REC. H374 (Feb. 13, 2002).

II. CONGRESSIONAL STATEMENTS CONCERNING PRESERVING CANDIDATES' CONTROL OVER CAMPAIGNS

A. SENATE STATEMENTS

Statement of Sen. BOXER:

"We need to ensure that these issue ads become a thing of the past. What a phony deal that is. That is as much an ad as the ad I put on for myself. How is this for an issue ad? 'Senator X has just cast a vote against a particular bill. It is a disaster for our country. Call Senator X and tell her she is wrong.' That is an issue ad? No. *That is a personal attack*.

'Senator Y has supported a bill that is going to hurt our country's economy. Call Senator Y. Here are the three reasons he is wrong on that,' and you mention the Senator's name over and over. By the way, you can even show the Senator's face.

That is not an issue ad. *That is a direct attack ad*. Was it done against my opponent? Yes, it was. Was it done against me? Yes, it was. It is uncontrolled. ***It brings in other issues that the two candidates themselves do not even want to talk about. It unbalances the whole debate in the campaign.*** It has to be a thing of the past."

145 Cong. Rec. S12,608-09 (Oct. 14, 1999).

Statement of Sen. BOXER:

"This isn't just a hypothetical: *In my own state, outside special interest groups regularly spend millions of dollars attacking California congressional candidates,* ***often leaving those candidates mere spectators in their own election campaigns.***

The amendment prohibits corporations and unions from buying these stealth attack ads, and anyone else – individuals and nonprofit organizations – has to disclose what they are doing."

144 Cong. Rec. S10,169 (Sept. 10, 1998).

Statement of Sen. DASCHLE:

"*Negative ads from anonymous sources push candidates to the margins.* ***Candidates become bit players in their own races.*** *How many times have I heard candidates actually say, 'I couldn't keep track of who was on my side. I'd watch television and I'd hear my name used pro and con, and I didn't have anything to do with those ads. I am sitting like a man at a tennis match, watching both sides play it out.'* And the debate now is defined by who has the most money; that is how it is defined."

144 Cong. Rec. S868 (Feb. 24, 1998).

Statement of Sen. LIEBERMAN:

"*We run the risk here, Mr. President,* ***of the candidates becoming bit players*** *in a contest that occurs at a higher level between dueling interest groups spending millions of dollars running issue ads with soft money.*"

143 Cong. Rec. S10,141 (Sept. 29, 1997).

Statement of Sen. GLENN:

"The legislation that we have had before us over the past few days takes key steps to correct the two worst problems, the proliferation of huge amounts of soft money and the explosion of calculated issue advertising which exists outside the reach of existing laws simply because it avoids a key term such as 'vote for' or 'defeat.' ***But the proliferation of issue advocacy candidates are becoming footnotes in their own campaigns*** *struggling to conduct substantive debates* on issues of local importance against the din of millions of dollars of issue advertising by national interest groups."

144 CONG. REC. S1047 (Feb. 26, 1998).

Statement of Sen. MURRAY:

"It reaches the point where ***you almost cannot hear the voices of the candidates*** *or the people anymore, only the voices of the dueling special interests.* We do not know who pays for these ads, where they get their money, or what they stand to gain if their candidate wins. Yet they have found ways to have a huge influence over the election process."

144 CONG. REC. S10,167 (Sept. 10, 1998).

B. HOUSE STATEMENTS

Statement of Rep. WAMP:

"The two things we should focus on is banning soft money, which any thinking person is for, it is way out of hand; and, secondly, trying to hold accountable *these outside groups that come in in the last few days of a campaign and assassinate people with unlimited, unregulated, now huge sums of money dumped from nowhere in campaigns.* ***Pretty soon we as candidates will not even be able to control the message in our own campaigns.***"

144 CONG. REC. H4787 (June 18, 1998).

Statement of Rep. MALONEY:

"I think that all of us have been attacked by these so-called independent groups in our campaigns. ***What is very troubling, in many cases I believe these independent groups are spending more money than the candidates themselves.*** But I am all for free speech. We all support free speech. Just let the American public know who is paying for it. Is that too much to ask? But the real point is that we have before us a very carefully crafted bill that has what I call the fragile flower of consensus. We have a majority of Members in this Congress that support Shays-Meehan. We can pass it and enact it into law. We can consider other important amendments in the commission bill. That is what we should be doing tonight."

144 CONG. REC. H6801 (July 30, 1998).

Statement of Rep. CAPPS:

"I want to even become more personal with my own experience. In a hard-fought race in the 22nd District of California, my opponent and I both faced this new phenomenon in our current campaign situation. I am speaking now about $300,000 ads that were used to support me. And I opposed those ads because they were issue ads that did direct voters to vote for me but did not do so under current laws, which, in the right way, regulate the way campaigns should be run.

In other words, they did so under this giant loophole which we have allowed and these laws, these issues and the people behind them which are not disclosed, the amount of money that they can contribute is not limited, the source of their funds are not disclosed, and these ads are not accountable. ***They directly influence the way campaigns are handled.***

It even became common knowledge in my race in the special election in California in March that eventually these issue people said, ***candidates themselves will be incidental in congressional races,*** *that they are looking for these people who espouse particular issues, particular ideas about issues, who want to have a platform and they see the congressional campaign as a very good platform on which to run their issues."*

144 CONG. REC. H4870 (June 19, 1998).

Statement of Rep. BORSKI:

"During the 1996 elections, the television and radio airwaves were flooded with these sham issue ads – many of

which were negative attack ads. Americans who see or here [sic] these ads have no idea who pays for them because no disclosure is required. *They drown out the voice of the average American citizen,* ***and even sometimes of the candidates themselves.*** Without reform, we can certain [sic] expect a huge increase in these sham issue ads."

145 CONG. REC. E1888 (Sept. 15, 1999).

III. CONGRESSIONAL STATEMENTS CONCERNING OPPOSITION TO TITLE II

Statement of Sen. DEWINE:

"Our amendment is very simple. It is a motion to strike title II, the Wellstone-Snowe-Jeffords provision from the underlying McCain-Feingold bill.

Mr. President, this amendment is necessary because *title II draws an arbitrary and capricious and unconstitutional line – a line that abridges the first amendment rights of U.S. citizens.* Under title II, citizens groups – and I emphasize that this is currently in the bill and unless our amendment is adopted, it will stay in the bill – American citizens would be prohibited from discussing on television or radio a candidate's voting records and positions within 60 days before a general election or 30 days before a primary.

That is right, Mr. President, and Members of the Senate. ***It would be illegal for citizens of this country, at the most crucial time, when free speech matters the most, when political speech matters the most – that is, right before an election – this Congress would be saying,*** *and the 'thought police' would be saying, the 'political speech police' would be saying that you cannot mention a candidate's name; you cannot criticize that candidate by name.*

It silences the voices of the people. It silences them at a time when it is most important for those voices to be heard. It restricts citizens' ability to use the broadcast media to hold incumbents accountable for their voting records. It says essentially that the only people who have a right to the most effective form of political speech, ***the only people allowed to use television or radio to freely express an opinion or to take a stand on an issue when it counts, when it is within days of an election, are the candidates themselves and the news media. But under the way the bill is written now, not the people – just candidates and the news media.*** Everyone else would be silenced by this unconstitutional, arbitrary line.

Let's suppose for a minute that title II stays in the bill and it becomes law. Under this scenario, if you are a candidate running for Federal office and it is 60 days before the election, yes, you can go on the radio or the local television station and broadcast your message. If you are lucky enough to be Dan Rather, Tom Brokaw, or Peter Jennings, or the person who anchors the 6 o'clock news or 7 o'clock news in Dayton, OH; or in Steubenville, OH; or in Cleveland, you can also talk about the issues and candidates, and you can talk about them together. *You can talk about the candidate's voting record.*

But if you don't fall into either one of these two categories – ***if you are part of a citizens group wanting to enter the political debate and engage in meaningful discourse, using the most wide-sweeping medium for reaching the people which is TV, under this provision you cannot do that. You simply cannot enter the debate using television or radio as a mode of communication.***

Title II of this bill makes that illegal. *So if you would go in to buy an ad and say you want to criticize where the ad mentions the name of a candidate who is up for election within that 60-day period, the local broadcaster would* *have to turn to you and say, no, he cannot accept that*. It is illegal because the U.S. Congress has said it is illegal.

Title II would make it illegal for citizens groups to take to the airwaves and even mention a political candidate by name. It would make it illegal to state something as simple as to tell the voters whether or not a candidate voted yes or no on an issue. *It basically just throws the rights of citizens groups out of the political ring. It throws them right out of the ring. I believe that is wrong and I think it is also unconstitutional.*

It represents a direct violation of the people's right to free political speech, the right guaranteed to us by the first amendment of the Bill of Rights in the Constitution of the United States of America.

The language in this bill picks the time when political speech is the most important and restricts who can use that political speech, and who can engage in that political speech."

147 Cong. Rec. S3024 (Mar. 28, 2001).

Statement of Sen. SANTORUM:

"Assuming this is all held to be constitutional – and I agree with my colleague from Kentucky, I have grave doubts whether that will be the case, but assuming it will all be held constitutional, this will do several things.

No. 1, I got to the Senate and the House of Representatives as a challenger. I came out of nowhere in almost both those situations. I did it the hard way. I had support basically from only one special interest group: the Republican Party. That was it.

In my first race for Congress, I was outspent 3 1/2 to 1. I think I got $10,000 in PAC contributions. I was a nobody. I was a guy who was knocking on doors. The Republican Party said: We will help him a little bit; we will get the folks organized to help out. And they gave me a little money. Guys like me are going to have a lot harder time getting to the Senate or the House of Representatives. None of the special interest groups was fighting for me because they did not think I had a chance. They are going to be the ones to hold the power now.

Political parties are not going to have the resources to support challengers. I heard this comment among my colleagues over and over – it is this frustration level, and I do not mean to point fingers and I will not, but ***I hear this frustrating comment from my colleagues who support this bill: I am sick and tired of all these people playing around in my election. I am tired of all these outside groups running ads in my election.***

Well, excuse me. Excuse me. Gee, ***I did not realize when I ran for office that this was my election. You see, I thought this was an election for the Senate or, before that, for the Congress. I certainly did not believe I had ownership of this election.*** *But I will tell you, in private meetings, over and over I hear this comment: I am sick and tired of all these people, all these speeches – speeches meaning ads – all these folks attacking me in my election; I want control back over my election.*

'My election.' If you do not think this is an incumbent protection plan, I guarantee you have not

been listening. This is all about protecting incumbents. Do my colleagues think we are going to pass something which helps folks who run against us? *How many folks are going to say: I like being here, but I want to give the guy who takes me on a better shot at me? I can guarantee if my colleagues read this bill, there is no way they can see that.*

All you bothersome people out there in America who believe you have some right to participate in my election, it keeps you at home. *You just stay home. Leave me alone 60 days before my election so I can do what I want to do and tell the people what I want to tell them.*

That is the first thing this does – it shuts you up because – you know what? – you are an annoyance. ***You guys go out there and say things I do not like, I do not agree with, and it may not be true, so we are just going to shut you up. That is the first thing this bill does."***

148 CONG. REC. S2132-33 (Mar. 20, 2002).

Statement of Rep. DELAY:

"This bill does not contain real reform. Instead, *this bill strips citizens of their political rights and unconstitutionally attempts to regulate political speech.*

The primary protection of our first amendment is the right of average citizens to get together and to freely and fully criticize their government. Political speech is the key to political freedom, and *Shays-Meehan would radically weaken our first amendment right by inappropriately and*

unwisely constraining the right to political speech. Shays-Meehan denies Americans, denies American citizens their fundamental right to criticize politicians for 2 months before the election.

Now, we all know that the last days before an election are a very crucial period of political dialogue. That is when voters are really paying attention, and that is the precise reason that this incumbent protection scheme that is in the bill will suppress political speech 60 days before Election Day. Shays-Meehan strengthens incumbents and makes it far harder for their constituents to hold them accountable.

This is a sham. ***It shuts down the system, Mr. Chairman. It shuts down political speech. It shuts down the opportunity to participate in elections. In a country the size of the United States, an individual citizen has very little chance of joining the political debate without banding together with others, so by blocking citizens' groups from participating in days leading up to an election, Shays-Meehan removes a very vital tool that citizens can use to hold elected officials accountable.***

This is Swiss cheese. It is full of holes. It does not do what the authors want. It is like a fine wine that does not get better with age, it just rots."

148 CONG. REC. H342 (Feb. 13, 2002)

IV. CONGRESSIONAL STATEMENTS CONCERNING THE NEED TO RESTRICT *NRA*'S SPEECH

Statement of Rep. PICKERING:

"*Let me use the words of those who advocate this reform to tell what this legislation is all about.* They are very clear about their purposes.

Scott Harshberger, the president of the Washington D.C.-based Common Cause, says, '*We need to make the connection with every person who cares about gun control that* ***there is a need for campaign finance reform because that is how you are going to break their power.***'

He goes on to say, '*The equation,' he says, 'is a simple one.* ***A vote for campaign finance reform is a vote against the second amendment gun lobby.***' *It says, 'This is one of those times when there is a very direct connection.' They say, 'A vote for campaign finance reform is a vote for policies about guns.'*

It is very clear that their intent here is to gut and to defeat those who want to advocate and defend the second amendment. ***A vote here is to take away the rights of those on the first amendment, the freedom of speech, to help defeat those who want to defend the second amendment.***

This is about the second amendment. The whole underlying text of the legislation of this section is unconstitutional. I am convinced it will be struck down. *But we need to make sure that people know what is really going on right here. This is an attempt by their own words to defeat those who want to defend and protect the second amendment.* If one stands for the second amendment, if one

believes in the first amendment, then I urge my colleagues to support this amendment."

148 Cong. Rec. H424 (Feb. 13, 2002).

Statement of Rep. SCHAKOWSKY:

"Americans know that special interest money unduly influences elections and policy. ***If my colleagues care about gun control, then campaign finance reform is their issue so that the NRA does not call all the shots.*** If health care is my colleagues' issue, campaign finance reform is for them so they can be heard over the HMOs and insurance companies.

Ordinary people are wondering what the heck we are doing here. I urge the Speaker and my colleagues to do something to debate campaign finance reform now. Let us do it next week and get this bill on the floor to debate it."

145 Cong. Rec. H3174 (May 14, 1999).

Statement of Rep. MEEHAN:

"Madam Speaker, there is no doubt about it, money talks on Capitol Hill. And *for the Republican leadership, no money talks louder than gun money.*

The National Rifle Association has been the largest political donor to Members of Congress throughout the decade. In fact, the NRA soft money contributions to the Republican Party grew exponentially when the Republicans took over the House in 1994.

So it should come as a surprise to absolutely no one that the Republican leadership turned to the NRA to write their so-called 'gun Control' legislation, a proposal that is rife with loopholes.

The truth of the matter is that big money talks louder than kids' lives on Capitol Hill. Enormous soft money contributions have blinded the Republican leadership to 13 children who die every day in America in gun-related violence.

Let us stop the madness. *Let us start saving our children's lives by passing real gun control legislation, and let us pass campaign finance reform to cut the ties between gun money and Congress once and for all."*

145 CONG. REC. H4029 (June 10, 1999).

Statement of Rep. MEEHAN:

"Mr. Chairman, this has been a long evening. But then again, this has been a long wait. I have been in the Congress now for 6 years trying to find some way to get campaign finance reform passed. And I remember when I first got here, sort of a brash young freshman legislator and I got together with another member from Oklahoma. He is a great Member, had a lot of experience, Mike Synar.

Mike had a lot of courage and he was smart. And he sat down with me and he said, 'If you want to work on campaign finance reform, boy, let me give you some tips. The first thing you have to do is you have to work with Republicans. Because if we, as Democrats,' and we were the majority party then, 'if we, as Democrats, propose our bill, it is not going to have credibility. We have got to get

Republicans on board. So the first thing you need to do is find a group of Republicans who are interested in truly passing campaign finance reform.'

And that is what we did. Every year that I have fought for campaign finance reform, I have worked with Republicans so that we could level the playing field equally among Democrats and Republicans.

The other thing that Mike Synar said was, 'You know what? My experience is that independent expenditures are the thing that are going to kill American politics because congressional elections are not going to be about the people who live back home anymore.'

*Mike Synar knew something about independent expenditures, **because the National Rifle Association and other groups spent millions over the years trying to defeat him.** So he said, 'Whenever you come up with a bipartisan bill, you got to make sure that you deal with independent expenditures.'"*

144 CONG. REC. H4821-22 (June 18, 1998).

Statement of Rep. SHAYS:

*"For example, **the NRA, the National Rifle Association, may campaign against someone,** never bringing up the issue that they really oppose them on, that person supported the assault weapon ban, **and making it sound like that candidate is bad for other reasons.*** We want the NRA to just be up front and say it is their ad, and we want them to have to abide by all the rules that anyone else has to disclose where they get their money,

and raise their money under the requirements of the campaign law.

You will have pro-choice groups and pro-life groups that want to do the same thing. *And you have pro-assault weapon ban groups as well as the NRA that opposes the assault weapon ban.* So it is going to apply to everyone, and it should."

144 CONG. REC. H4044 (June 3, 1998).

Statement of Sen. FRIST:

"The fundamental problem we talked about all last week, money in politics – is it corrupt, is it bad, is it evil? I say no, that is not the problem. *I come back to what the problem is – the candidate, the challenger, the incumbent does not have the voice they had historically.*

Let me show three charts. They will be basically the same format. It is pretty simple. There are seven funnels that money, resources, can be channeled through in campaign financing. I label the chart 'Who Spends the Money?' I will have these seven funnels on the next three charts.

First, I have Joe Smith, the individual candidate who is out there campaigning. I said his, or her, voice over time has been diminished. Why? Because you have all of these other funnels – the issue groups: ***We talked about the Sierra Club, the NRA, the hundreds of issue groups that are out there right now spending and overwhelming the voice of the individual candidate."***

147 CONG. REC. S2931 (Mar. 27, 2001).

Statement of Sen. REID:

"I repeat, Mr. President, what I have said on this floor before. My friend and colleague, the other Senator from the State of Nevada, and I were involved in a bitterly contested race in 1998, a race in which we both spent about 4 million of hard dollars, campaign dollars. We spent $8 million between us. Then our State parties spent another $6 million each, or $12 million between them, on issue ads. That is $20 million total. These State party issue ads were all negative against my opponent and all negative against me. I do not think they did anything to better the body politic. They certainly did nothing to better people's feelings about who I think were two good people running for office.

That was not the end of it. ***Then we had independent expenditures coming in: the National Rifle Association, the League of Conservation Voters****. They would have ads running against me; people who believed in me would have ads running against my opponent.* I have no idea how much money these outside groups spent, but probably another $2 million to $3 million."

147 CONG. REC. S2851 (Mar. 26, 2001).

V. CONGRESSIONAL STATEMENTS CONCERNING SEVERABILITY OF WELLSTONE AMENDMENT IN LIGHT OF CONSTITUTIONAL CONCERNS

Statement of Sen. FEINGOLD:

"I have discussed here the original Snowe-Jeffords provision. The Wellstone amendment, in effect, broadens that provision to cover ads run by corporations and unions. ***I voted against adding that amendment. I thought and still think that it makes Snowe-Jeffords more susceptible to a constitutional challenge, but it passed when many Senators who oppose the bill and the Snowe-Jeffords provision voted for it.*** *In any event, the Wellstone amendment was written to be severable from the remainder of the Snowe-Jeffords provision.* ***That gives even more significance to the vote we will have today on severability. But if we win that vote, Snowe-Jeffords will survive even if the Wellstone amendment is held to be unconstitutional."***

147 CONG. REC. S3073 (Mar. 29, 2001).

Statement of Sen. WELLSTONE:

"Snowe-Jeffords forces disclosure of all ads that fall under this definition, but under this bill, only corporations and unions may not spend funds from their treasury or soft money for this purpose. If a corporation or union wishes to run electioneering communications, they must use a PAC with contributions regulated by Federal law to do so. *The point is, they have to do it with hard money. The point is,* ***every other group and organization, pick and choose – it can be the NRA, it can be the Christian right, it can be the Sierra Club,*** *it can be other organizations on the left, other organizations on the right, organizations representing every other kind of interest imaginable –* ***they can continue to use soft money and pour it into these sham ads.***

Why are we not applying this prohibition to them? Why are we creating this huge loophole? Do we want to pass a piece of legislation which is just like Jell-O? Push here, no, it doesn't go do parties and now it all goes into the sham issue ads.

We will not be doing right for people in the country if we pass a bill that *does not get, really, very much* ***big money out of politics*** *but just changes the way it is spent.* Maybe it will even be less accountable.

Here is the exemption in this bill for certain organizations: 501(c)(4) groups and 527 groups – ***this exemption means that Sierra Club, National Rifle Association, Club for Growth, or Republicans for Clean Air would be able to run whatever ads they want using soft money to finance them.*** *They would, for the first time, have to disclose how much they are spending, but there is no bar to such groups running sham ads under this bill.*

Fine. They can disclose how much they are spending. Three weeks before election, they pour in an unlimited amount of money with **poison politics** *attacking Republicans, I say to the Chair, or Democrats, or independents. Why do we want to have this loophole?*

I want to see this soft money prohibition and this ***big money out***. I do not want to see us have this loophole in this piece of legislation which may mean that we passed a piece of legislation that has shifted all of this big money in the worst possible direction. I think this is a mistake. *Already these interest groups are spending over $100 million on sham ads to influence our elections.* ***Over 70 percent of them are bitterly personally negative.***

So these groups already play a major role in our elections, and I predict, *if we do not close this loophole now with this amendment, we will be back here* in 2 years or 4 years, or I hope and pray people do not – maybe it will not be for another 20 or 30 years – trying to do what I am *trying to do today.* ***The reason will be that the center of power*** – please listen to this – *in Federal elections will move much closer to these unaccountable groups because they will be able to pump millions and millions of dollars in soft money into these sham ads.* That is where this money is going to go.

We will see what the other arguments on the floor are. I can anticipate some of them, and I will continue to make mine brief. But I say to the Presiding Officer, I do not know how many votes this amendment will get. I really do not know. But I will tell you this. My wife's family are from Appalachia – Harlan County, and Letcher County in Kentucky – the Isons. They talk about poor cities. When I am 80 years old, I at least am going to be able to tell my grandchildren – I am sorry, I have grandchildren now – my great grandchildren, great, great, great grandchildren, I hope and pray – that *I laid down this amendment, I tried to close this loophole, I tried to do something that for sure would get more of the big money out of politics.*

I do not know what the vote will be, but I know I am here, and I know I have to be a reformer, and I know I have to make this bill better. I have to lay down this marker just as I tried to do last week in an amendment

that should have passed. I cannot believe that colleagues, authors of this bill, did not support it. I cannot believe that during the vote I had people telling me: I don't want my State legislature or people in my State telling me how to finance my campaign – as if it were our campaign. I could not believe it.

I say to the Presiding Officer, I could not believe Republicans, who always argue for States rights, voted against the proposition that every State ought to decide whether or not they wanted on a voluntary basis to apply some system of voluntary or partial public financing. Talk about encouraging grassroots politics. People in the country say: We can get at it in Arizona. They already have. You have clean money, clean elections. We can get at it in Minnesota, in Nevada. We don't know if we can ever be effective in D.C. toward public financing, but we can do it right here, we don't have to take expensive air trips to D.C. And it is defeated. Now I am trying to plug this loophole, and tomorrow or the next day we are heading towards raising spending limits.

Let me be clear, this amendment does not say any special interest group cannot run an ad. A lot of interests are special. That is fine. They are special to the people they represent, and sometimes they are special to the public interest, depending on your point of view. It only says these groups and organizations need to comply with the same rules as unions and corporations. Groups covered by my amendment can set up PACs, they can solicit contributions, and they can run all the ads they want. All this amendment says is they cannot use their regular treasury money. They can't use the soft money contributions to run these ads.

This is an amendment about fairness. *It is an amendment about leveling the playing field.*

I know some of my colleagues may come to the floor and oppose this amendment because, while they believe as a matter of policy this amendment is the right thing to do, *they fear the Court may find that covering these special interest groups under the Snowe-Jeffords electioneering communication provision is unconstitutional. And, in all honesty, this is probably a question upon which reasonable reformers can disagree.* But it is a debate worth having. I think this provision can withstand constitutional scrutiny, but it is probably not a slam-dunk.

Still, in a moment I want to talk about why I think the courts will uphold this amendment. But before I do – this has to be in the summary of this amendment tomorrow, before people vote – I want to make one important point. ***I have drafted this amendment to be fully severable.*** *I have drafted this amendment to be fully severable.* ***In other words, no one can suggest that even if the courts find this amendment unconstitutional, it would drag down the rest of this bill or even jeopardize the other provisions of Snowe-Jeffords.***

This creates a totally new section under title II of this bill. Under the worst case scenario, ***if the Supreme Court rules that groups covered by my amendment cannot be constitutionally barred from using treasury funds for these sham issue ads, then the rest of the legislation will be completely unaffected.*** The rest of the legislation will be completely unaffected. And we are going to have a debate on severability anyway."

147 CONG. REC. S2847 (Mar. 26, 2001).

Statement of Sen. EDWARDS:

"What has been done with Snowe-Jeffords is a very careful effort to make sure the constitutional requirements of Buckley v. Valeo have been met. In fact, they have been met. It is not vague; it establishes a very clear bright-line test so we don't have a vagueness constitutional problem. We also don't have a problem of substantial overbreadth because all of the empirical evidence shows 99 percent of ads that meet the test are, in fact, election campaign ads and constitute electioneering.

Snowe-Jeffords has been very carefully crafted. It is narrow. It specifically meets the requirements of Buckley v. Valeo, the constitutional requirement.

The problem with what Senator Wellstone is attempting to do is there is a U.S. Supreme Court case, the FEC v. The Massachusetts Citizens for Life, that is directly on point, saying that these 501(c)(4)s have a limited constitutional right to engage in electioneering to do campaign ads. There are some limits, but unfortunately if you lump them in with unions and for-profit corporations, you create a very serious constitutional problem because the U.S. Supreme Court has already specifically addressed that issue.

So the reason Senator Feingold and Senator McCain are opposing this amendment is the same reason that I oppose this amendment: It raises very serious constitutional problems. *The U.S. Supreme Court, in fact, in 1984 specifically ruled on this question.*

What we urge the Members of the Senate to do is not support this amendment, to vote for tabling. Those people who are in favor of real and meaningful campaign finance *reform we hope will support Snowe-Jeffords, support McCain-Feingold, and vote to table the Wellstone amendment."*

147 CONG. REC. S2883 (Mar. 26, 2001).

Statement of Sen. SCHUMER:

"I will close by reemphasizing what the Senators from Arizona and Wisconsin have so often and eloquently said in the course of this debate. I plead with my colleagues, we cannot let the perfect be the enemy of the good. On this side of the aisle, *I say to my colleagues, even if you are unhappy with the delicate balance of 501(c)(4) organizations,* ***even if you realize they may not be limited once the courts get hold of this, don't throw out the baby with the bath water.*** The good in this bill is more than just good, it is great. It is a landmark achievement, the first serious reform in a generation. And we should strive to preserve it, not kick the can across the street to the Supreme Court."

147 CONG. REC. S3103 (Mar. 29, 2001).

VI. CONGRESSIONAL STATEMENTS CONCERNING THE DESIGN OF WELLSTONE AMENDMENT TO CURB *INDIVIDUAL* EXPENDITURES

Statement of Sen. WELLSTONE:

"I am going to say it one more time. I don't know whether this amendment will pass. I do not know whether it will get one vote. But I tell you this: I am going to be able to say later on that I at least tried to get this reform amendment passed. This is a huge loophole. In the Shays-Meehan bill, they plugged the loophole. In the original Feingold bill, they plugged the loophole.

I will say it again. How can you say to corporations and to labor that they can't run these sham issue ads in the 60-day period before elections and the 30-day period before primaries but at the same time not apply that prohibition to every other group and organization, whatever cause they represent?

And, No. 2, don't you realize that what everybody is going to do is set up another one of these groups and organizations? Then you will have a proliferation of influence groups and organizations. And ***individuals with all of this wealth*** and organizations that want to make these huge soft money contributions ***will make their soft money contributions to these sham issue ads run by all of these groups and organizations,*** *which under this loophole can operate with impunity.*

We are going to take soft money out of parties and we are going to put it into the sham issue ads. Frankly, I don't want my colleague from Kentucky to count me as an ally. If I am going to be the subject of these kinds of poisonous ads, I would rather point my finger at the Republicans. Or if I were a Republican, I would rather point my finger at the Democrats. Or I would rather point my finger at the opposing candidates. I wouldn't want to be put in a position of not knowing exactly who these different groups and organizations were with all of this soft money pouring into these poisonous ads in the last 3 weeks before the election. That is the loophole that we have.

I am not telling you that some of these groups and organizations, right, left, and center, are going to necessarily like this. But I am telling you, if you want to be consistent, that we have to support this amendment. If we don't want a huge loophole that is going to create maybe just as much soft money in politics as now, you have to support this amendment."

147 CONG. REC. S2848 (Mar. 26, 2001).

Statement of Sen. WELLSTONE:

"Mr. President, this is a book. I don't agree with all of its analyses. It has a catchy title and was written by Jim Hightower. The title is, 'If The Gods Had Meant Us To Vote, They'd Have Given Us Candidates.'

The reason I mention this book is there is this one graphic that is interesting: The percentage of the American people who donate money to national political candidates. Ninety-six percent of the American people donate zero dollars. The percentage who donate up to $200 is 4 percent. The percentage who donate $200 to $1,000 is .09 percent. And the percentage who donate $1,000 to $10,000 is .05 percent. ***The percentage who donate from $10,000 to $100,000*** – and he points out in his book that you need a magnifying glass for this one – ***is .002 percent.***

The percentage who donated $100,000 or more – you need a Hubble telescope, he says, for this one – is .0001 percent.

I use this graph from my friend Jim Hightower's book for two reasons. First of all, ***I have an amendment that tries to make sure a lot of this big money doesn't get*** – it is like Jell-O, you push it here, it shifts. It shifts from the party into the sham issue ads, not to the corporation, not to labor, but to every other group and organization. There will be a proliferation of it. This amendment plugs that loophole.

The Shays-Meehan bill basically has the same approach. This was originally part of the Feingold-McCain bill. I made it clear this provision is 100-percent severable. This is a separate provision. In any case, we will have a debate on severability. I have made it clear it is hard to make the argument that when a majority vote, you can't make the argument that to vote for this reform would bring the bill down.

I think we voted for other reforms that have a better chance of bringing down the bill. But it doesn't make sense. You say the majority voted for this amendment; now they are going to vote against the bill that has this amendment.

The other point I want to make is with this graph, what we are doing here is voting down reform amendments, such as the amendment last week that would have allowed States to light a candle and move forward with some voluntary system of partial or public financing, or maybe vote down this amendment, which would be a terrible mistake.

We are going to revisit this. This is going to be the loophole, I promise you. Let's do the job now, while we can. At the same time, they want to raise the hard money limits. Now we are supposed to feel better that we have gotten rid of a lot of soft money. That is what is significant about this effort by Senators McCain and Feingold. That is a significance that cannot be denied. But the problem is, it may shift to the sham issue ad. The other problem is, since 80 percent of the money spent in 2000 was hard money, PAC money included, you are going to raise the hard money limits.

It is crystal clear what people are talking about with one another. Why are we going to do that? ***Why are we going to bring yet more big money into politics and make people running for office more dependent on the top 1 percent of the population?*** How did that get to be a reform? And then I hear Senators say, well, the point is, if you go from 1 to 3 or 2 to 6, we will have to spend only one-third of the time.

Permit me to be skeptical. Everybody will be involved in this obscene money chase. They will be just chasing $3,000 contributions and $6,000 contributions. Somehow, people in Minnesota are going to be more reassured that we are putting more emphasis on the people who can afford to make $3,000 or $6,000, or maybe it will go from 1 to 2, or 2 to 4, and we are doing something that gives people more confidence in a political process that is more dependent upon the *people who have the big bucks*."

147 CONG. REC. S2850 (Mar. 26, 2001).

121D

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FOR ARGUMENT

12

Supreme Court, U.S.
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In the Supreme Court of the United States

MITCH MCCONNELL, UNITED STATES SENATOR,
ET AL., APPELLANTS/CROSS-APPELLEES

v.

FEDERAL ELECTION COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR THE FEDERAL ELECTION COMMISSION, ET AL. (PAGE PROOF VERSION)

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

MALCOLM L. STEWART
GREGORY G. GARRE
Assistants to the Solicitor General

DOUGLAS N. LETTER
JAMES J. GILLIGAN
MICHAEL S. RAAB
DANA J. MARTIN
TERRY M. HENRY
RUPA BHATTACHARYYA
ANDREA GACKI
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

STEPHEN E. HERSHKOWITZ
DAVID KOLKER
Assistant General Counsels
Federal Election Commission
Washington, D.C. 20463

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QUESTIONS PRESENTED

In 2002, the President signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, which amends the Federal Election Campaign Act (FECA), 2 U.S.C. 431 *et seq.* BCRA is designed to address various well-documented abuses associated with the financing of federal election campaigns. The questions presented are as follows:

1. Whether new FECA § 323(a) (added by BCRA § 101), which prohibits national political parties from soliciting or receiving funds except in compliance with FECA's disclosure requirements and source-and-amount contribution restrictions, is constitutional.

2. Whether new FECA § 323(b) (added by BCRA § 101), which generally requires that funds spent by state parties on four specified categories of "Federal election activity" must be raised in compliance with FECA's disclosure requirements and source-and-amount contribution restrictions, is constitutional.

3. Whether new FECA § 323(d) (added by BCRA § 101), which prohibits national and state political parties from soliciting funds for certain tax-exempt organizations, or making donations to such organizations, is constitutional.

4. Whether new FECA § 323(e) (added by BCRA § 101), which prohibits federal office-holders and candidates from soliciting funds for federal or state electoral campaigns except in compliance with FECA's source-and-amount contribution restrictions, is constitutional.

5. Whether new FECA § 323(f) (added by BCRA § 101), which provides that funds used by state candidates and office-holders for communications that promote or attack a federal candidate must be raised in compliance with FECA's

disclosure requirements and source-and-amount contribution restrictions, is constitutional.

6. Whether BCRA § 213, which requires political parties under certain circumstances to choose between making independent or coordinated expenditures in support of their federal candidates, is constitutional.

7. Whether the source-of-funding limitation and disclosure requirements pertaining to "electioneering communications," imposed by BCRA §§ 201-203 and 311, are constitutional.

8. Whether the district court correctly dismissed plaintiffs' challenges to BCRA § 214(a)-(c), which states that expenditures coordinated with a political party shall be treated as contributions to the party (§ 214(a)); directs the Federal Election Commission to promulgate new regulations governing "coordinated communications" (§ 214(b)); and provides that those regulations "shall not require agreement or formal collaboration to establish coordination" (§ 214(c)).

9. Whether the district court correctly dismissed plaintiffs' challenge to BCRA § 307, which increases from $1000 to $2000 the per-election limit on an individual's contributions to a federal candidate.

10. Whether the district court correctly dismissed plaintiffs' challenge to BCRA §§ 304 and 319, which establish increased contribution limits in certain circumstances when a candidate faces an opponent who expends substantial personal funds, beyond a statutory threshold amount, on his own campaign.

11. Whether the district court correctly dismissed plaintiffs' challenge to BCRA § 305, which imposes certain conditions on a federal candidate's entitlement to the "lowest unit charge" for broadcast advertising.

12. Whether the reporting and record-keeping requirements imposed on broadcast stations by BCRA § 504 are constitutional.

13. Whether BCRA § 318, which prohibits minors from making contributions to federal candidates or political party committees, is constitutional.

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In the Supreme Court of the United States

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MITCH MCCONNELL, UNITED STATES SENATOR,
ET AL., APPELLANTS/CROSS-APPELLEES

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL ELECTION COMMISSION, ET AL.[1]

OPINION BELOW

The opinion of the district court (Supp. App. 1sa-1382sa) is reported at 251 F. Supp. 2d 176.

JURISDICTION

The judgment of the district court was entered on May 2, 2003. This Court noted probable jurisdiction on June 5, 2003. The jurisdiction of this Court rests on the Bipartisan

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[1] This brief is filed on behalf of the Federal Election Commission (FEC) and David M. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their capacities as Commissioners of the FEC; John Ashcroft, in his capacity as Attorney General of the United States; the United States Department of Justice; the Federal Communications Commission; and the United States of America. Those parties are appellants in *Federal Election Commission* v. *Mitch McConnell, United States Senator*, No. 02-1676.

Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 4, Clause 1 of the United States Constitution is reproduced at 02-1676 J.S. App. 10a.

2. The First Amendment to the United States Constitution is reproduced at 02-1676 J.S. App. 11a.

3. The Fifth Amendment to the United States Constitution is reproduced at 02-1676 J.S. App. 12a.

4. The Tenth Amendment to the United States Constitution is reproduced at 02-1676 J.S. App. 13a.

5. The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, is reproduced at 02-1676 J.S. App. 14a-86a.

STATEMENT

These consolidated cases arise out of pre-enforcement facial constitutional challenges to various provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. A three-judge panel of the District Court for the District of Columbia sustained several of the challenged BCRA provisions, held that other provisions violate the First Amendment, and found that certain of the constitutional challenges are not justiciable in the present suits.

1. "[T]he history of federal campaign finance regulation, having its origins in the Administration of President Theodore Roosevelt, is a long-standing and recurring problem that has challenged our government for nearly half of the life of our Republic." Supp. App. 16sa (per curiam). This Court has previously canvassed the history of such regulation and has repeatedly recognized Congress's authority to protect the integrity of federal elections and prevent corruption of federal office-holders. See, *e.g.*, *FEC* v. *Beaumont*, 123 S. Ct. 2200 (2003); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197 (1982) (*NRWC*); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972); *United States* v. *Automobile Workers*, 352 U.S. 567 (1957) (*UAW*); *United States* v. *CIO*, 335 U.S. 106, 113 (1948). As the district court explained, Supp. App. 15sa-40sa (per curiam), the development of federal campaign-finance regulation has followed a pattern of congressional action to address particular electoral abuses; attempts to circumvent the limitations established by Congress; and renewed legislative action to respond to the efforts at circumvention and "plug [an] existing loophole." *UAW*, 352 U.S. at 582. After years of deliberation and debate, Congress enacted BCRA to adjust the existing statutory scheme in light of "burgeoning problems with federal campaign finance laws" experienced in the prior decade. Supp. App. 40sa (per curiam).

2. BCRA amends the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.* The Federal Election Commission (FEC) is empowered to administer and enforce FECA's provisions. See generally 2 U.S.C. 437c(b)(1), 437d(a), 437g. Two central features of the pre-BCRA statutory regime are of particular significance here. First, federal law has long prohibited the use of corporate and labor union general treasury funds for contributions or expenditures in connection with federal elections, while allowing such contributions or expenditures to be made through separate segregated accounts. 2 U.S.C. 441b. Second, for more than 25 years, FECA has limited the amounts of money that individuals and unincorporated associations may contribute to federal candidates, political parties, and independent political committees. 2 U.S.C. 441a.

a. *Prohibited sources of federal campaign spending*: The cornerstone of federal campaign-finance regulation is the longstanding prohibition against the use of corporate general treasury funds for contributions and expenditures in connection with federal elections. See 2 U.S.C. 441b; see generally *Beaumont*, 123 S. Ct. at 2205-2206 (summarizing historical development of relevant legislation); see also pp. 74-76, *infra*. In 1907, Congress first prohibited any corporation from making a "money contribution" in connection with a federal election. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-865. Congress has since extended that ban to cover "expenditures" as well as "contributions," and to subject labor unions as well as corporations to the prohibition on federal campaign spending. See *UAW*, 352 U.S. at 582-583.

Corporations and unions are permitted to establish and administer separate segregated accounts (commonly called political action committees or "PACs") for the purpose of making political contributions and expenditures, using funds collected from stockholders, members, or certain other personnel and relatives. See 2 U.S.C. 441b(b)(2)(A)-(C); *Pipefitters*, 407 U.S. at 409-410; *Beaumont*, 123 S. Ct. at 2203, 2211. Money so acquired can be contributed by the PAC to federal candidates (subject to FECA's contribution limits) or used to pay for independent campaign-related spending. See Supp. App. 62sa-63sa (per curiam).

This Court has squarely held that Congress and the state legislatures may prohibit the use of corporate and union general treasury funds for election-related contributions and expenditures, and may require instead that corporations and unions finance their election-related spending with money contributed specifically for that purpose. In *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), this Court considered and rejected a First Amendment challenge to a Michigan statute, modeled on 2 U.S.C. 441b, that "prohibit[ed] corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office." *Id.* at 654. The Court held that corporations may be barred from using treasury funds to make independent expenditures for the purpose of influencing electoral results, at least so long as they retain the option of establishing separate segregated accounts to finance such communications. *Id.* at 657-661.

In *Beaumont*, this Court reaffirmed the validity of 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for federal campaign contributions. 123 S. Ct. at 2205-2211. The Court observed that any constitutional challenge to that ban "goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections.'" *Id.* at 2205 (quoting *UAW*, 352 U.S. at 585). The Court explained that the ban on corporate treasury contributions serves (1) to prevent actual or apparent corruption of federal office-holders, (2) to protect the interests of individuals who have paid money to a corporation or union for non-political purposes, and (3) to prevent circumvention of other contribution limits. *Id.* at 2206-2207.

b. *Amount limitations on federal campaign contributions from permitted sources*: FECA was intended to reduce "the actuality and appearance of corruption" resulting from the "opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 26-27. As amended in 1974, FECA prohibited individuals from contributing more than $1000 per election to any candidate for federal office, or more than $25,000 per year to all federal candidates and political committees (including political parties) combined. 18 U.S.C. 608(b)(1) and (3) (Supp. IV 1970). In *Buckley*, this Court upheld those contribution limits against a First Amendment challenge. 424 U.S. at 12-38.

The *Buckley* Court explained that

> [t]he Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.

424 U.S. at 28. The Court found "no indication" that the FECA limits would prevent effective electoral advocacy, explaining that "[t]he overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons." *Id.* at 21-22. The Court also upheld the $25,000 annual ceiling on an individual's aggregate contributions to all federal candidates and political committees, characterizing it as a "quite modest restraint upon protected political activity" that "serves to prevent evasion of" FECA's $1000 limit on individual contributions to candidates. *Id.* at 38.[2]

In *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court reaffirmed the holding in *Buckley* that reasonable limits on contributions to political candidates do not violate the First Amendment. The Court observed that contribution limits reflect "a concern not confined to bribery

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[2] At the time *Buckley* was decided, FECA did not impose a specific ceiling on an individual's contributions to a political committee, including a national or state party committee. Thus, the only practical limitation on the amount that an individual could contribute to such entities was the $25,000 annual aggregate limit on an individual's overall contributions. Limits on individual contributions to national parties and to other political committees were added to FECA in 1976. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, Tit. I, § 112(2), 90 Stat. 486-487; see p. 7, *infra*.

of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 389. In rejecting the contention that the challenged contribution limits were too low, the Court framed the applicable test as "whether the contribution limitation [i]s so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* at 397.

3. *Developments leading to enactment of BCRA:* Before BCRA was enacted, application of FECA's source-and-amount restrictions to a donation received by a national or state political party committee turned on the uses to which the relevant funds were put. As amended in 1976 (see note 2, *supra*), FECA imposed a $20,000 limit on an individual's "contributions" to a national political party committee, and a $5000 limit on individual "contributions" to other political committees, including state party committees. See 2 U.S.C. 441a(a)(1)(B) and (C) (1976).[3] Those limits remained in effect until the enactment of BCRA. The term "contribution" was (and is) defined to mean a gift or similar transfer made "for the purpose of influencing any election for Federal office." 2

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[3] The term "political party" is defined to mean "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16). FECA imposes generally applicable limits on the amount that one "political committee" as defined in the Act may contribute to a federal candidate or to another "political committee." See 2 U.S.C. 441a(a)(1) and (2). The Act provides, however, that "[t]he limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." 2 U.S.C. 441a(a)(4). Party committees remain free under BCRA to transfer funds amongst themselves without being subject to the limits that otherwise apply to contributions made by one political committee to another.

U.S.C. 431(8)(A)(i). FECA also prohibited the use of corporate or union general treasury funds for contributions in connection with any federal election. 2 U.S.C. 441b; see pp. 3-5, *supra*. Party activities intended to influence federal elections were thus required to be financed with funds, known as "hard" or "federal" money, that had been raised in compliance with FECA's disclosure requirements and source-and-amount contribution limits.

Political parties were also permitted, however, to raise additional funds, known as "soft" or "nonfederal" money, and to spend those funds for activities intended to influence state or local elections. Because donations used for such purposes did not fall within the FECA definition of a "contribution," they could lawfully be made outside the framework of the FECA source-and-amount limits. The "soft money" given to national and state parties included donations of corporate or labor union general treasury funds, as well as individual donations in amounts well above the applicable FECA contribution limits.[4]

Application of the FECA contribution limits to funds used for various "party-building" activities (*e.g.*, get-out-the-vote drives, or generic party advertising), which influence the outcome of *both* federal and state elections, proved to be difficult. "Since early in its history, the Commission has struggled with the fact that many party functions have an impact on both federal and non-federal elections." 63 Fed. Reg. 37,723 (1998). In a series of advisory opinions, informational letters, and formal rulemakings, the FEC has addressed the use of soft money to fund such activities. See *id.* at 37,723-37,724 (summarizing history of FEC regulatory efforts); Supp. App. 29sa-34sa (per curiam) (same).

The FEC initially appeared to take inconsistent positions on the question whether party activities having a likely effect on both federal and state elections could be financed in part with funds (*e.g.*, corporate donations) raised outside the framework of FECA's source-and-amount limits. See Supp. App. 29sa-30sa (per curiam). Regulations promulgated in 1976 clarified the Commission's views. Those rules authorized any political committee to establish separate federal and non-federal accounts, and to allocate its administrative expenses between the accounts. 11 C.F.R. 102.6(a)(2) and 106.1(e) (1977); see Supp. App. 30sa (per curiam). Advisory opinions issued in 1978 and 1979 allowed state and national party committees to accept corporate and union treasury funds for deposit in a non-federal account, and permitted the parties to allocate the costs of voter registration and get-out-the-vote activities between the federal and non-federal accounts in the same manner as administrative expenses. *Ibid.* Thus, "by the middle of 1979, the FEC permitted national and state party committees to solicit and accept donations outside of FECA's source and amount limitations * * * provided that these monies were placed in separate accounts from the federal funds." *Id.* at 30sa-31sa. From that time until the enactment of BCRA, moreover, the FEC's consistent view was that the costs of activities that influence both federal and state elections could be allocated between a party committee's hard- and soft-money accounts.

In 1990, the FEC promulgated regulations that required various party expenses to be funded in part with hard money, and that established formulas to be used in allocating those expenses. See 55 Fed. Reg. at 26,058 (announcing final rules).[5] Those regulations, which remained substantially unchanged until the Commission's promulgation of new rules to implement BCRA, applied to party committees' "[a]dministrative expenses" (11 C.F.R. 106.5(a)(2)(i) (2002)) and to their expenses for, *inter alia*, "[g]eneric voter drives," which included "voter identification, voter registration, and get-out-the-vote drives." 11 C.F.R. 106.5(a)(2)(iv) (2002). National party committees were required to allocate at least 65% of those expenses to federal accounts during presidential election years, and at least 60% in non-presidential election years. 11 C.F.R. 106.5(b) and (c) (2002). For state and local parties, the allocation was determined by the proportion of federal offices to all offices on the state's general election ballot. See 11 C.F.R. 106.5(d) (2002).

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[4] **Thus, under the pre-BCRA regime, an individual who wished to donate $100,000 to a national party committee would have been permitted to contribute up to the $20,000 FECA limit in "hard" or "federal" money contributions (which could lawfully be used to influence federal elections), and could have designated an additional $80,000 for deposit in a "soft money" account (which could not legally be used for federal-election purposes).**

4. *The provisions of BCRA:* "In the area of campaign finance regulation, congressional action has been largely incremental and responsive to the most prevalent abuses or evasions of existing law at particular points in time." Supp. App. 481sa (Kollar-Kotelly); see *id.* at 15sa-40sa (per curiam) (reviewing Congress's incremental approach to campaign-finance regulation); *NRWC*, 459 U.S. at 209 (discussing Congress's "cautious," "step by step" approach). BCRA is the product of more than six years of intensive congressional study and debate. See Supp. App. 40sa-47sa (per curiam). In crafting the statute, Congress sought principally to address (1) the potential for corruption of federal office-

holders that is created by soft-money donations to political parties; and (2) the growing use of corporate and union general treasury funds for communications that are designed to influence, or are likely to have the effect of influencing, the outcome of federal candidate elections.

a. In recent years, soft-money donations to political parties have increased dramatically. See Supp. App. 34sa-35sa, 38sa (per curiam) (national parties' soft-money spending increased from $80 million in 1992 to $272 million in 1996 and $498 million in 2000). In addition to funding an allocable share of administrative and generic party-building expenses, as specifically contemplated by FEC regulations, soft money has been used to purchase advertisements that have featured federal candidates but have not expressly advocated a particular electoral result. See *id.* at 35sa-36sa. The parties have paid for such advertisements "with a mix of federal and nonfederal funds as permitted by FEC allocation rules." *Id.* at 36sa. Under the pre-BCRA regime, national party funds were often transferred to state parties for use in such activities because FEC regulations established more favorable allocation formulas (i.e., permitted greater use of soft money) for state than for national party committees. See *ibid.*[6] In addition, large-scale soft-money donors frequently sought and were granted special access to federal office-holders, with the attendant potential to influence legislation, through arrangements brokered by the political parties. See Supp. App. 567sa-626sa (Kollar-Kotelly); pp. 37-41, *infra.*

Congress enacted Title I of BCRA to prevent the real or apparent corruption of federal office-holders that may result from political parties' solicitation and receipt of donations made either (i) from sources (principally corporate and union general treasury funds) that have historically been barred from making contributions in connection with federal elections, or (ii) in amounts that exceed the FECA limits on contributions by other donors. BCRA § 101(a) adds a new FECA § 323, which consists of several interrelated provisions designed to ensure "that national parties, federal officeholders and federal candidates use only funds permitted in federal elections to influence federal elections, and that state parties stop serving as vehicles for channeling soft money into federal races to help federal candidates." 147 Cong. Rec. S3251 (daily ed. Apr. 2, 2001) (statement of Sen. Thompson).[7]

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[5] In *Common Cause* v. *FEC*, 692 F. Supp. 1391, 1394-1396 (D.D.C. 1987), the district court accepted in principle the FEC's determination that the costs of party activities affecting both state and federal elections could be allocated between hard-and soft-money accounts, but held that the Commission had failed to provide sufficient guidance regarding the proper method(s) of allocation. See 55 Fed. Reg. at 26,058. The 1990 regulations were intended to "provide committees with significantly more guidance on how they are to allocate their administrative expenses and costs for combined federal and non-federal activities." *Id.* at 26,059; see Supp. App. 33sa (per curiam).

[6] The record evidence in this case indicates, and two members of the district court panel specifically found, that national party officials characteristically have insisted on retaining control of the content of advertisements that were financed with money transferred from national to state party committees. See Supp. App. 522sa-523sa, 524sa-525sa (Kollar-Kotelly); *id.* at 1234sa (Leon).

New FECA § 323(a)(1) provides that "[a] national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA]."[8] That provision

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[7] Although Title I of BCRA restricts the ability of political parties to obtain donations from prohibited sources or in amounts that exceed the FECA contribution limits, the limits themselves have been increased by other BCRA provisions. Individuals are now permitted to contribute up to $25,000 per year to any national political party committee, $10,000 per year to any state party committee, and $2000 per election to any federal candidate. See BCRA §§ 102(3), 307(a)(1) and (2). The overall annual limit is now $37,500 per election cycle for contributions to candidates and $57,500 for other contributions (of which not more than $37,500 may be attributable to contributions to political committees that are not national party committees). See BCRA § 307(b). Most of the current contribution limits are indexed for inflation. See BCRA § 307(d); Supp. App. 472sa (Henderson).

[8] Currently operating under the auspices of the two major political parties are a total of six national committees: the Republican National Committee, the National Republican Senatorial Committee, the National

imposes no limits on how the national party committees may spend their money. Rather, it is directed solely at the *acquisition* of funds: its purpose and effect is to require that all money solicited and received by national parties will be treated as "contributions" subject to the longstanding disclosure requirements and source-and-amount restrictions imposed by FECA.

New FECA § 323(b) addresses the acquisition by state and local party committees of funds they use to affect federal elections. New FECA § 323(b)(1) provides as a general rule that any disbursements made by a state, district, or local committee of a political party for "Federal election activity" must "be made from funds subject to the limitations, prohibitions, and reporting requirements of [FECA]." The term "Federal election activity" is defined to include (i) voter registration activity within the 120 days before a federal election; (ii) voter drives and generic campaign activities "conducted in connection with an election in which a candidate for Federal office appears on the ballot"; (iii) any "public communication that refers to a clearly identified candidate for federal office * * * and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office"; and (iv) all services provided by any employee who devotes more than 25% of his compensated time in any month to activities in connection with federal elections. See BCRA § 101(b) (adding FECA § 301(20)(A)(i)-(iv)). New FECA § 323(b)(2)—known as the "Levin Amendment"—establishes exceptions to that general rule, authorizing state-level party committees to use soft money in limited amounts, raised under certain restrictions, to fund

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Republican Congressional Committee, the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee. See J.S. Supp. App. 544sa (Kollar-Kotelly); *id.* at 1186sa (Leon). Of those six committees, only the Republican National Committee is a party to the instant cases.

an allocated portion of the costs of specified activities that affect both federal and state elections. See Supp. App. 56sa (per curiam). BCRA imposes no limit on the amount of money that a state party committee may spend on "Federal election activity"; it simply requires the party committee to comply with FECA's source-and-amount restrictions in raising funds used for such activities.

New FECA § 323(d) prohibits political party committees from soliciting any funds for, or making or directing any donations to, certain organizations described in Sections 501(c) and 527 of the Internal Revenue Code. See Supp. App. 57sa-58sa (per curiam). New FECA § 323(e)(1) provides that federal candidates and officeholders may solicit funds in connection with any federal or non-federal election only if the amount solicited is "not in excess of" the applicable FECA/BCRA contribution limit and the solicitation is "not from sources prohibited by the Act." See Supp. App. 58sa (per curiam). Finally, new FECA § 323(f) prohibits any state or local office-holder, or any candidate for such office, from spending soft money for a public communication that promotes or attacks a candidate for federal office. See Supp. App. 59sa (per curiam).

b. Title II of BCRA addresses the escalating use of union and corporate treasury funds for broadcast advertising that is likely to influence the outcome of federal elections, yet escaped federal regulation under the prior legal regime. Federal law has long prohibited corporations and labor unions from spending general treasury funds to influence federal elections. See 2 U.S.C. 441b; pp. 3-5, *supra*. This Court, however, has construed 2 U.S.C. 441b's restrictions on corporate and union independent campaign expenditures to apply only to communications that "expressly advocate" the election or defeat of an identified federal candidate. *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238,

248-249 (1986) (*MCFL*).[9] With respect to persons other than political committees, the Court has interpreted FECA's requirements for disclosure of independent political expenditures (2 U.S.C. 434(c)) in a similar manner. See note 9, *supra*. In recent years and with increasing frequency, corporations and unions have spent hundreds of millions of dollars in general treasury funds to pay for so-called "issue advocacy" campaigns, disseminating advertisements that praise or denounce a candidate for federal office but do not use terms that explicitly urge his election or defeat. See Supp. App. 38sa-39sa (per curiam). Because those advertisements do not include words of express advocacy, the corporate or union disbursements used to finance them have entirely escaped regulation under FECA.

Subtitle A of Title II of BCRA reflects Congress's effort to identify, through precise and easily administrable standards, an important category of advertisements, "electioneering communications," that can be expected to influence federal elections, whether or not they contain "express advocacy." New FECA § 304(f)(3) (added by BCRA § 201(a)) defines the term "electioneering communication" to mean (i) a television or radio communication that (ii) "refers to a clearly identified candidate for Federal office"; (iii) is made within the 60 days before the federal general election, or the 30 days before the federal primary election, in which the identified candidate is running; and (iv) is "targeted to the relevant electorate" (meaning that it can be received by at least 50,000 persons in the State or district where the election is to be held). See Supp. App. 59sa-60sa (per curiam).[10]

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[9] The Court in *MCFL* based that holding on *Buckley*'s similar construction of other FECA provisions pertaining to independent campaign expenditures. See 479 U.S. at 248-249; p. 79, *infra*. Neither the validity nor the proper construction of 2 U.S.C. 441b was at issue in *Buckley*.

BCRA § 203(a) amends FECA § 316(b)(2) (2 U.S.C. 441b(b)(2)) to provide that corporate and labor union general treasury funds, whose use for express advocacy has long been forbidden, likewise may not be used to finance "electioneering communications" as defined in BCRA. See Supp. App. 61sa (per curiam). "The prohibition on electioneering communications only applies to the general treasury funds of national banks, corporations, and labor unions, or any other person using funds donated by these entities." *Id.* at 62sa. Because BCRA does not alter the pre-existing FECA provisions that allow corporations and labor unions to use funds from separate segregated accounts (or PACs) for the purpose of influencing federal elections, such funds may lawfully be used to sponsor electioneering communications. See 2 U.S.C. 441b(b)(2)(C) and (4); Supp. App. 62sa (per curiam).

New FECA § 304(f)(1)-(2) (added by BCRA § 201(a)) requires that any person who spends more than $10,000 on electioneering communications in a calendar year must file statements with the FEC that identify, *inter alia*, the persons making the disbursements, those to whom the disbursements were made, and the persons who contributed $1000 or more to the persons making the disbursement. New FECA § 304(f)(5) provides that "[f]or purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement."

BCRA also includes provisions updating FECA's regulation of coordinated expenditures. BCRA § 202 amends FECA § 315(a)(7) to provide that any disbursement for an electioneering communication that is coordinated with a candidate or political party shall be treated as a contribution to the candidate or party. BCRA § 214(a) states that "expenditures" made in coordination with political party committees will be treated as contributions to the party. BCRA §§ 202 and 214(a) parallel pre-existing FECA provisions under which campaign spending in coordination with a candidate is treated as a contribution to the candidate. See 2 U.S.C. 441a(a)(7)(B)(i); see also *Buckley*, 424 U.S. at 46 (noting that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act"); Supp. App. 70sa (per curiam); *id.* at 385sa-386sa (Henderson). BCRA § 214(b) repeals FEC regulations promulgated in December 2000 that address coordinated communications financed by persons other than candidates or parties, and BCRA § 214(c) directs the FEC to promulgate new rules on the subject that "shall not require agreement or formal collaboration to establish coordination."

c. Title II of BCRA also addresses campaign expenditures made by political parties in support of their candidates. Although expenditures coordinated with federal candidates are subject as a general rule to FECA's contribution limits, FECA allows political party committees to make coordinated expenditures in amounts much greater than the limits that apply to other donors. Thus, while other multi-candidate political committees can contribute no more than $5000 per election to a candidate, see 2 U.S.C. 441a(a)(2)(A), party committees are permitted to make contributions in the form of coordinated expenditures that far exceed that amount, see 2 U.S.C. 441a(d); *Colorado II*, 533 U.S. at 455; *Colorado*

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[10] BCRA also includes a backup definition of the term "electioneering communication," to be used in the event that the primary definition is held to be unconstitutional. Under the backup definition, "the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA § 201(a) (adding FECA § 304(f)(3)(A)(ii)); see Supp. App. 61sa (per curiam); compare 11 C.F.R. 100.22(b).

Republican Fed. Campaign Comm. v. *FEC*, 518 U.S. 604, 610-611 (1996) (opinion of Breyer, J.) (*Colorado I*).[11] Under this Court's decision in *Colorado I*, political party committees also have a First Amendment right to make unlimited independent expenditures to support the party's candidates. See *id.* at 608, 618 (opinion of Breyer, J.); *id.* at 629-631 (opinion of Kennedy, J.); *id.* at 648 (opinion of Thomas, J.).

BCRA § 213 alters the range of spending options available to a party committee, while preserving the party's statutory prerogative of making coordinated expenditures well in excess of the contribution limits that apply to other donors. After a party has nominated a candidate for a particular federal election, Section 213 requires the party either (1) to forgo independent expenditures in support of that candidate, while remaining free to invoke the increased coordinated-expenditure limits applicable to political parties under 2 U.S.C. 441a(d); or (2) to abide by the $5000 limit on contributions and coordinated expenditures applicable to all other multicandidate political committees, while retaining the right to make unlimited independent expenditures in support of that candidate. For purposes of Section 213, all national and state committees of a particular political party "shall be considered to be a single political committee." BCRA § 213(2) (adding FECA § 315(d)(4)(B)).

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[11] The national committee of a political party may make coordinated expenditures of up to 2 cents multiplied by the voting age population of the United States in support of a Presidential candidate. See 2 U.S.C. 441a(d)(2); 11 C.F.R. 109.32(a). The national committee and a state party committee may each make coordinated expenditures of up to the greater of $20,000 or 2 cents multiplied by the voting age population of a State in support of the State's candidate for Senator, and up to $10,000 in support of a candidate for Representative. See 2 U.S.C. 441a(d)(3); 11 C.F.R. 109.32(b). National and state party committees are permitted to assign their authority to make coordinated expenditures to another political party committee. 11 C.F.R. 109.33(a); *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) (*DSCC*). The statutory limits are adjusted each year for inflation. 2 U.S.C. 441a(c); 11 C.F.R. 109.32(b)(3). In the year 2000, the limits on those additional coordinated expenditures ranged from $33,780 to $67,560 for House of Representative races, and from $67,560 to $1.6 million for Senate races. See *Colorado II*, 533 U.S. at 439 n.3. The FEC interprets 2 U.S.C. 441a to permit national and state political parties to make direct contributions to a candidate of up to $5000 (the limit applicable to contributions by political committees generally under 2 U.S.C. 441a(a)) in addition to the coordinated expenditures authorized by 2 U.S.C. 441a(d). See, *e.g.*, 11 C.F.R. 109.32(a)(3) and (b)(4); *Colorado II*, 533 U.S. at 455 n.16.

d. BCRA §§ 304 and 319 are known collectively as the "millionaire provisions." Those provisions allow a congressional candidate to accept contributions in excess of the generally applicable FECA limits under specified circumstances when his opponent expends substantial personal funds on the opponent's own campaign. See BCRA § 304(a)(2) (Senate); BCRA § 319(a) (House of Representatives); Supp. App. 211sa-212sa, 475sa-476sa (Henderson).

e. BCRA § 311 imposes additional requirements concerning the identification of sponsors of election-related advertisements, and makes the sponsorship-identification requirements applicable to "electioneering communications" as defined in BCRA § 201. See Supp. App. 157sa-158sa (per curiam).

f. BCRA § 318 prohibits individuals who are less than 18 years old from making contributions to federal candidates or to political party committees. See Supp. App. 74sa-75sa (per curiam).

g. BCRA §§ 305 and 504 amend Section 315 of the Communications Act of 1934, 47 U.S.C. 315. The Communications Act requires stations to sell broadcast time to a candidate at the "lowest unit charge" during the 45-day period before a federal primary election or the 60-day period before a federal general election. 47 U.S.C. 315(b)(1). Under BCRA § 305, a candidate is entitled to the "lowest unit charge" only if he satisfies one of two requirements. First, the candidate may certify in writing that neither he nor any authorized committee will make any "direct reference to another candidate for the same office" during the broadcast advertisement. BCRA § 305(a)(3) (adding 47 U.S.C. 315(b)(2)(A)). Alternatively, the candidate can retain his entitlement to the lowest unit charge without making such a promise if he identifies himself in a specified manner at the end of the advertisement and states that he approves of the broadcast. BCRA § 305(a)(3) (adding 47 U.S.C. 315(b)(2)(C) and (D)); see Supp. App. 73sa (per curiam).

BCRA § 504 requires a broadcast station to maintain and make publicly available a complete record of requests to purchase broadcast time "made by or on behalf of a legally qualified candidate for public office" or to broadcast a "message relating to any political matter of national importance," including "a legally qualified candidate," "any election to Federal office," or "a national legislative issue of public importance." BCRA § 504 (adding 47 U.S.C. 315(e)(1)). The record created by the licensee must include "the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person." BCRA § 504 (adding 47 U.S.C. 315(e)(2)).

h. BCRA § 401 is a severability provision stating that the invalidation of any BCRA provision, or of any application of the statute, shall not affect the validity of the remainder of the Act. BCRA § 403(a) provides that suits challenging the constitutionality of the Act will be heard by a three-judge district court in the District of Columbia, and that the final decision in any such suit will be reviewable by appeal to this Court. BCRA § 403(b) authorizes any Member of Congress to intervene in any suit in which the constitutionality of the Act is called into question, and BCRA § 403(c) authorizes Members of Congress to file suit to challenge the constitutionality of the Act.

5. Pursuant to BCRA § 403(a), a variety of individuals, party committees, interest groups, and others filed 11 separate lawsuits, alleging that BCRA on its face violates the First, Fifth, and Tenth Amendments to the Constitution. The FEC, the individual FEC Commissioners, the Federal Communications Commission (FCC), the Department of Justice, and the Attorney General were named as defendants. The United States intervened as a defendant to defend the constitutionality of BCRA. The principal sponsors of BCRA also were granted leave to intervene as defendants pursuant to BCRA § 403(b). After expedited discovery and briefing, the three-judge district court upheld some provisions of the statute; invalidated other BCRA provisions and enjoined their enforcement and application; and found that some of the constitutional challenges were not justiciable in these suits. See Supp. App. 4sa-15sa (per curiam) (summarizing the district court's disposition of the various constitutional challenges); 02-1676 J.S. 16-20 (same).

SUMMARY OF ARGUMENT

A. Title I and Section 213 of BCRA are constitutional.

1. Both in campaign-finance legislation and in a broad range of other laws, Congress has limited the flow of money to federal officers in order to safeguard the integrity of government operations. Because federal elected officeholders are inextricably linked to their political parties, Congress reasonably concluded that large donations to party committees pose a threat of corruption similar to that created by large donations to candidates.

2. Title I's effort to close the soft-money loophole by subjecting all donations to national parties to source-and-amount limitations is consistent with the First Amendment. Limits on contributions are subject to relatively relaxed

constitutional scrutiny. Congress's concern that such donations could result in actual or apparent corruption of office-holders is reasonable on its face. It is also supported by abundant record evidence that describes a systemic exchange of large soft-money donations for access to federal office-holders, through arrangements brokered by the parties. In light of the national parties' demonstrated ability to raise large sums of *hard* money, there is no meaningful danger that the soft-money ban will prevent effective advocacy.

3. Congress validly required that state party committees comply with applicable federal limits when the state parties finance "Federal election activity" as defined in BCRA. Because each category of "Federal election activity" involves conduct that by its nature will affect federal elections, large donations used for such activities substantially assist federal candidates and thus directly implicate the federal government's interest in preventing actual or apparent corruption. The fact that such activities will often affect state elections as well does not diminish the federal interest involved. The financing of such activities has long been subject to federal regulation; BCRA simply (and validly) requires that *all* (rather than an allocable portion) of their costs be paid with hard money.

4. Title I's solicitation restrictions validly serve to prevent party committees and federal office-holders and candidates from using surrogate recipients as a means to circumvent other FECA/BCRA contribution limits. Both in the campaign-finance context and elsewhere, restrictions on an entity's freedom to solicit payments to a third party are frequently used to prevent circumvention of limits on that entity's ability to receive such payments directly.

5. Title I validly prohibits state candidates from spending soft money for a communication that "promotes" or "attacks" a clearly identified federal candidate. That ban helps to prevent circumvention of the FECA/BCRA contribution limits, and it does not impose any onerous burden on state candidates and office-holders.

6. BCRA § 213 validly requires political parties, with respect to each nominated federal candidate, to forgo either independent expenditures in support of that candidate or the increased coordinated expenditures that parties alone are allowed to make. Congress might constitutionally have compelled the parties to utilize the second alternative, thereby subjecting them to the same legal regime that applies to all other political committees. Congress's decision to give political parties an additional option creates no constitutional infirmity.

B. The electioneering-communications provisions of Title II of BCRA are constitutional.

1. This Court has repeatedly affirmed Congress's judgment that the unique legal and economic attributes of corporations and labor unions warrant regulation of political spending by corporations and unions that would not be permitted as to individuals or unincorporated groups. Because corporations and unions may amass wealth that does not necessarily reflect the popularity of their political views, federal law (2 U.S.C. 441b) has long prohibited them from using general treasury funds to make contributions or independent expenditures in connection with federal elections, and instead requires them to engage in such political activity through a separate segregated fund.

Section 441b's general prohibition on the direct funding of corporate and union political activity is of well-established constitutional validity and has been interpreted by this Court to apply to the financing of advertisements that contain express advocacy—*e.g.*, "Vote for Smith." Title II of BCRA adjusts that longstanding prohibition to apply it to the corporate or union funding of candidate-centered advertisements—defined as "electioneering communications"

(BCRA § 201)—which have escaped regulation because they avoid express advocacy, but nonetheless clearly identify candidates and in all likelihood have the same influence on federal candidate elections as advertisements containing express advocacy. In the past eight years, corporations and unions have poured hundreds of millions of dollars in general treasury funds into federal candidate elections in the form of such "electioneering communications."

2. Title II's source-of-funding limitation on "electioneering communications" is narrowly tailored to serve several compelling government interests. BCRA's primary definition of "electioneering communications" is not only clear and objective, but is supported by empirical evidence showing that advertisements that clearly identify federal candidates and are broadcast shortly before an election to the candidate's own electorate are highly likely to influence electoral outcomes. The objective factors identified by Congress in BCRA § 201 will pose little or no obstacle to entities that are interested in financing "genuine" issue advertisements, but are carefully calibrated to capture so-called "sham" issue advertisements. Preventing the influx of general treasury funds to finance electioneering communications directly advances compelling government interests in eliminating real and apparent corruption in connection with federal elections, as well as in preventing circumvention of the longstanding federal policy embodied in 2 U.S.C. 441b.

3. Neither plaintiffs nor the district court has identified any reason to invalidate Title II's electioneering-communications provisions. In particular, plaintiffs' reliance on the overbreadth doctrine is fundamentally misplaced. The conclusion that Title II meets the narrow-tailoring requirement of strict scrutiny forecloses any finding that the statute is unconstitutionally overbroad. Moreover, because Title II of BCRA does not ban any speech whatsoever, but instead merely places a restriction on the manner in which corporations or unions may *finance* certain speech, the Act does not create the sort of "chill" that this Court has held sufficient to call for the extraordinary step of invalidating a statute on its face. In any event, plaintiffs' attempt to manufacture overbreadth from a few anecdotal examples that they have culled from the massive record in this case does not begin to establish the sort of *substantial* overbreadth required by this Court's precedents. To the contrary, the best examples plaintiffs themselves could find only confirm the wisdom of the objective factors identified in BCRA § 201.

4. Title II's disclosure requirements with respect to electioneering communications are valid. This Court has upheld FECA's disclosure requirements concerning campaign expenditures, recognizing that such provisions prevent real or apparent corruption by exposing significant campaign spending to the light of day and assist the electorate in making predictions about candidates' future performance in office. The disclosure provisions of Title II simply update the similar requirements under FECA that have long applied to the funding of express advocacy.

5. The district court correctly dismissed plaintiffs' challenges to BCRA § 214(a)-(c). BCRA § 214(a) validly applies the same standard that has long governed spending coordinated with federal candidates to spending undertaken in cooperation with political parties. BCRA § 214(b) and (c) imposes no substantive obligation on plaintiffs, but simply directs the FEC to promulgate regulations that are themselves subject to judicial review. In and of itself, BCRA § 214(b) and (c) causes plaintiffs no injury, and it therefore is not subject to challenge in this lawsuit.

C. Plaintiffs' challenges to Titles III and V of BCRA should be rejected.

1. Plaintiffs lack standing to challenge BCRA §§ 304, 307, and 319, which increase the applicable limits on individual

contributions to federal candidates. Plaintiffs themselves are entitled to give and receive contributions in the increased amounts. The competitive injury they claim is much too speculative to support standing and is not fairly traceable to BCRA or to any action of the defendant. In any event, plaintiffs' equal protection claim lacks merit: Congress was under no constitutional obligation to enact contribution limits at all, and it has broad latitude to define and adjust the applicable ceilings.

2. Plaintiffs also lack standing to challenge BCRA § 305, which establishes specific sponsorship-identification requirements for broadcast advertisements that directly refer to an opposing candidate, if the sponsoring candidate asserts his statutory entitlement to the "lowest unit charge" for broadcast time. Because the "lowest unit charge" is available only during specific periods immediately preceding an election, and Senator McConnell's current term does not expire until the year 2008, BCRA § 305 has no actual or imminent impact on any plaintiff's communicative activities. In any event, BCRA § 305 is constitutional. The FCC has long required that the sponsor of *every* broadcast advertisement be identified in the advertisement itself. BCRA § 305 simply provides for identification of the relevant sponsor in an especially clear and unmistakable manner.

3. BCRA § 504, which requires broadcast stations to maintain and keep publicly available records of requests to purchase broadcast time for certain categories of political advertising, is constitutional. BCRA § 504 largely codifies longstanding and unchallenged regulatory requirements imposed by the FCC.

4. BCRA § 318's prohibition on contributions by minors to federal candidates and political parties is a constitutionally valid means of preventing circumvention of the FECA/BCRA contribution limits by adults who might otherwise use minors as surrogate contributors.

ARGUMENT

Contrary to plaintiffs' characterizations, BCRA represents a refinement of pre-existing campaign-finance rules. It is an effort to prevent circumvention of the established statutory scheme, rather than a repudiation of the prior legal regime. In particular, BCRA brings two of the most notorious efforts to circumvent pre-existing law—unregulated soft-money donations to political parties and unregulated election-related advertisements paid for out of corporate and union treasuries—within the regulatory regime and makes related adjustments to the law's disclosure requirements and source-and-amount limitations. Congress has the undoubted power and responsibility to safeguard the integrity of federal elections and to prevent actual or apparent corruption of federal office-holders. Its past efforts to achieve those objectives include a variety of restrictions, previously upheld by this Court, on the financing of federal electoral campaigns. As with other anti-corruption and conflict-of-interest rules whose validity is unquestioned here, Congress in enacting prior campaign-finance laws has sought to prevent monied—and especially corporate—interests from exercising undue influence on the judgment of federal office-holders and on the outcome of federal elections.

As central participants in the federal campaign system, Members of Congress are particularly well-positioned to assess both the inadequacies of existing campaign-finance legislation and the likely efficacy and practicality of alternative proposed solutions. In drafting and enacting BCRA, Congress remained faithful to the core principles that have underlain prior campaign-finance laws, while adapting the statutory regime in light of newly emerging threats to the integrity of federal elections and office-holders. That "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, * * * warrants considerable deference" from this Court. *NRWC*, 459 U.S. at 209 (internal quotation marks omitted). And the adjustments challenged in these cases comport with the principles established by this Court's campaign-finance jurisprudence. The challenged provisions of BCRA should be sustained.

1. TITLE I AND SECTION 213 OF BCRA ARE CONSTITUTIONAL

A. The Restrictions On Political Party Fundraising Imposed By Title I Are Consistent With Other Anti-Corruption And Conflict-Of-Interest Provisions Designed To Protect The Integrity Of Federal Office-Holders And Employees

1. "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized." *NRWC*, 459 U.S. at 210. As the Court held in *Buckley*, see 424 U.S. at 26-29, limits on contributions to candidates for elective office are a constitutionally permissible means of pursuing that objective. To address "the broader threat from politicians too compliant with the wishes of large contributors," *Shrink Missouri*, 528 U.S. at 389, Congress may prohibit donors from transmitting, and candidates from accepting, infusions of money above a statutory threshold.

Limits on campaign contributions, however, are simply one means by which Congress has addressed the danger that federal officers, in performing their governmental duties, might be tempted to favor their financial benefactors or otherwise to advance their own pecuniary interests at the expense of the public good. Federal law also contains "an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 409 (1999). Thus, a federal official is subject to criminal penalties if he solicits or accepts a bribe or illegal gratuity, see 18 U.S.C. 201(b) and (c), *Sun-Diamond*, 526 U.S. at 404; participates in his official capacity in a matter in which he has a personal financial interest, see 18 U.S.C. 208, *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 548-549 (1961) (discussing predecessor statute); or receives a supplementation of salary from any source outside the United States government, see 18 U.S.C. 209, *Crandon* v. *United States*, 494 U.S. 152, 158-166 (1990). Officers and employees within all three Branches of government are barred, subject to limited exceptions, from soliciting or accepting anything of value from any person "whose interests may be substantially affected by the performance or nonperformance of the individual's official duties." 5 U.S.C. 7353(a)(2). Executive Branch employees are further barred, again subject to limited exceptions, from soliciting or accepting any gift "[g]iven because of the employee's official position." 5 C.F.R. 2635.202(a)(2).

As the Court explained in *Crandon*, such restrictions serve to prevent actual and apparent corruption of the federal workforce and to ensure that federal officers and employees bear undivided loyalty to their public employer:

> First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers.

Crandon, 494 U.S. at 165. The anti-corruption rationale for limits on contributions to candidates for public office, accepted by this Court in *Buckley* and its progeny, thus closely resembles the long-accepted bases for more sweeping restrictions on the receipt by public officials of payments and gifts from persons outside the government. See *Shrink Missouri*, 528 U.S. at 390.

Thus, while the Federal Elections Clause (U.S. Const. Art. I, § 4, Cl. 1) provides a fully sufficient constitutional basis for the statutory provisions at issue in this case, cf. *Buckley*, 424 U.S. at 13, it is not the only source of Congress's power to act in this sphere. Congress possesses in addition a more general power to superintend and protect the integrity of the federal work force. As Justice Black explained, "inherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause." *Oregon* v. *Mitchell*, 400 U.S. 112, 124 n.7 (1970) (opinion of Black, J.). Congress has undoubted authority, for example, to prohibit the payment of bribes even to *unelected* federal officers and employees.

The extensive network of laws described above also makes clear that the FECA/BCRA limits on federal campaign contributions do not represent an exception to some general rule that persons outside the government are free to use transfers of money to express approval of official conduct or to associate with public officers. No one (to our knowledge) contends that 18 U.S.C. 201(c)(1)(A), which prohibits the transfer of anything of value to a federal official "for or because of any official act," unconstitutionally impairs the expressive or associational rights of either the donor or the donee. Outside the context of electoral campaign contributions, it is uncontroversial that persons who wish to register their approval of official actions must employ modes of expression other than the transfer of money to federal personnel. The existing FECA/BCRA regime thus is not a unique constraint on the use of money in support of political objectives, but instead represents a pragmatic effort to achieve the same objectives that underlie federal anti-corruption and conflict-of-interest laws, while allowing federal candidates to obtain the funds needed to wage vigorous electoral campaigns.

Although FECA restricts the amounts that an individual or association may contribute to a candidate for federal office, the applicable contribution limits far exceed the (essentially *de minimis*) value of the gifts that federal officials are otherwise permitted to receive. Compare, *e.g.*, BCRA § 307(a)(1) (individual may contribute up to $2000 per election to federal candidate's campaign) with Senate Rule 35.1(a)(2) and (c)(4), S. Doc. 107-1, at 58-59 (2002) (Senator may not accept gifts from a single source worth $100 or more during a calendar year if gifts are given because of the Senator's official position). With respect to candidates, therefore, there is no "soft money"—all contributions are subject to FECA's source-and-amount restrictions. Moreover, in order to reduce the corruptive potential of campaign contributions, federal law prohibits the diversion of such funds to the candidate's personal use. See BCRA § 301 (amending FECA § 313(b)(1)). By allowing donors to give money specifically earmarked for campaign-related purposes, in amounts that are limited but that may substantially exceed the value of gifts that could permissibly be made on account of the individual's official status, Congress has sought to minimize the risk of actual or apparent corruption while ensuring that candidates for elective office are able to "amass the resources necessary for effective advocacy." *Shrink Missouri*, 528 U.S. at 397 (brackets and internal quotation marks omitted) (quoting *Buckley*, 424 U.S. at 21).

2. Federal limits on contributions to political party committees reflect a similar balancing of interests. Just as an elected official might be tempted to favor the interests of

persons who have given (or might be expected to give) large sums to his own campaign, he might also be tempted to favor the interests of donors who have made substantial contributions to his political party, especially when direct contributions to candidates are capped.[12] In part that is true because party committees frequently seek to influence particular federal elections, and the parties' spending decisions are often responsive to the wishes of large-scale donors. As this Court recognized in *Colorado II*, parties frequently "act as agents for spending on behalf of those who seek to produce obligated officeholders," 533 U.S. at 452, when "[d]onors give to the party with the tacit understanding that the favored candidate will benefit," *id.* at 458. When a federal officeholder has cause to believe that a contribution to the party has been or will be used for spending that directly furthers his own electoral prospects, he is particularly likely to regard it as functionally comparable to a contribution to his own campaign.

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[12] Contrary to the McConnell plaintiffs' contention (Br. 23), the validity of the challenged BCRA provisions does not depend on the premise that a donation to a party committee "is just as corrupting of a candidate as a contribution directly to the candidate." BCRA clearly does not equate the two types of donations, since it allows contributions to national and state party committees in amounts much larger than the applicable limits on contributions to candidates. Compare BCRA §§ 102(3), 307(a)(2) (annual limit of $10,000 on contributions to state party committee and $25,000 on contributions to national party committee) with BCRA § 307(a)(1) (limit of $2000 per election on contributions to federal candidate). BCRA *does* reflect a congressional judgment that donations to parties in amounts above the statutory thresholds may ultimately skew the judgment of federal office-holders in essentially the same way as exorbitant contributions to candidates. Once the validity of *some* cap on donations to party committees is accepted, Congress has considerable latitude to determine appropriate dollar limits, see *Buckley*, 424 U.S. at 30, at least so long as the limits do not deprive the parties of the resources needed for effective advocacy, see *Shrink Missouri*, 528 U.S. at 397; pp. 43-44, *infra*.

Even when that sort of direct and specific benefit is absent, however, a Member of Congress can be expected to feel a natural temptation to favor those persons who have helped the "team," especially when those persons have also made contributions to the individual "team member" up to the legal limits. A variety of factors contribute to the close identification between candidate and party. A candidate for federal office typically runs on a party ticket and is customarily identified by party affiliation. Indeed, under FECA, the distinguishing feature of a "political party" is that it "nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16).

The close connection between the party and its member legislators extends beyond the electoral process. "Once elected to legislative office, public officials enter an environment in which political parties-in-government control the resources crucial to subsequent electoral success and legislative power." D. Green Expert Report 7. Each House of Congress is organized along party lines, and an individual Member's stature and responsibilities will vary dramatically depending on whether his party is in the majority or in the minority. See, *e.g.*, *id.* at 8 ("Power within each committee and subcommittee [of Congress] is distributed according to political party, with the majority party enjoying special procedural prerogatives and staffing resources."). Party officials both inside and outside Congress will naturally seek to cultivate an attitude that each party member has an important stake in the success of the larger organization. A Member's prospects of obtaining reelection may be significantly affected by the willingness of party leaders to offer their support, as well as by public perceptions of the party with which the Member is associated. See *id.* at 9; Krasno & Sorauf Expert Report 23. It was thus wholly reasonable for

Congress to conclude that a Member of Congress is likely to look favorably upon his party's large-scale benefactors, and that substantial contributions to the party will therefore create risks of "undue influence on an officeholder's judgment, and the appearance of such influence," *Colorado II*, 533 U.S. at 441, similar to those posed by a sizeable contribution to the candidate himself.[13]

B. The Provisions Of Title I And Section 213 Of BCRA Are Consistent With The First Amendment

1. **The ban on receipt of soft money by national party committees complies with the First Amendment**: New FECA § 323(a)(1) (added by BCRA § 101(a)) prohibits any national committee of a political party from receiving funds that are not subject to the FECA contribution limits. The effect of that provision is to close loopholes in the regulation of donations to political parties by barring national party committees from receiving any donations whatever of corporate and union general treasury funds, and by limiting individual donations to the national committees to an annual maximum of $25,000 (see note 7, *supra*). Those restrictions

easily satisfy the relatively relaxed standard of review applicable to contribution limits.

a. New FECA § 323(a)(1) places no restrictions either on the total amount of money that a national committee may spend, or on the uses to which lawfully-acquired funds may be put. It functions solely as a source-and-amount limit analogous to (though much larger than) the limits that FECA imposes on contributions to federal candidates and to non-party political committees. Since this Court's decision in *Buckley*, "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *Beaumont*, 123 S. Ct. at 2210.

In *Buckley* itself, this Court upheld FECA's $25,000 annual limit on an individual's aggregate contributions to all federal candidates and political committees, including national parties, characterizing that provision as a "quite modest restraint upon protected political activity" and as "no more than a corollary of the basic individual contribution limitation." 424 U.S. at 38. The Court did not suggest that limits on contributions to parties or other political committees are subject to more searching review than limits on contributions to candidates. As the Court in *Beaumont* explained, contribution limits are subject to a relaxed standard of review because, "[w]hile contributions may result in political expression if spent by a candidate or an association, the transformation of contributions into political debate involves speech by someone other than the contributor." 123 S. Ct. at 2210 (ellipsis omitted) (quoting *Buckley*, 424 U.S. at 21). That observation is as applicable to contributions to party committees as to contributions to candidates—indeed, the Court's reference to "contributions * * * spent by a candidate or an association" (*ibid.*) unambiguously encompasses both categories of contributions.

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[13] Other federal anti-corruption and conflict-of-interest laws operate on the premise that payments made to a surrogate may have the same corruptive effect as payments made directly to a federal official. Thus, 18 U.S.C. 201, which proscribes the payment and receipt of bribes and illegal gratuities, encompasses payments made to a third party designated by the relevant federal official, so long as the requisite connection between the payment and official action is present. See 18 U.S.C. 201(b)(1)-(4). Federal ethics regulations likewise provide that the "gift[s]" subject to the regulatory restrictions include gifts "[g]iven to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee." 5 C.F.R. 2635.203(f)(2). Senate Rule 35.1(b)(2)(A) is to the same effect. The evident premise of all those prohibitions is that a federal officer or employee will feel a natural affinity of interests with an organization with which he is closely affiliated, whether or not he has a personal financial stake in the organization's success.

Similarly, the Court in *Buckley*, in distinguishing between contribution and expenditure limits for purposes of First Amendment analysis, referred repeatedly to limits on contributions to candidates *or* political associations. See 424 U.S. at 20-22. And unlike the expenditure caps struck down in *Buckley*, see *id.* at 39-58—which limited the total amounts that candidates and others could spend on electoral activity, without regard to the size of the increments in which the relevant funds were raised—the effect of the national party soft-money ban "is merely to require [national party committees] to raise funds from a greater number of persons." *Id.* at 22. There is consequently no basis for plaintiffs' suggestions that new FECA § 323(a)(1)'s ban on soft-money donations to national party committees is subject to strict scrutiny.

b. The closing of the soft-money loophole is reasonably designed to prevent actual and apparent corruption of federal office-holders and is therefore consistent with the First Amendment. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. The premise on which new FECA § 323(a)(1)'s soft-money prohibition is based—i.e., that a federal office-holder may be tempted to favor the interests of those who have donated large sums of money to an organization of which the office-holder is an integral part, and that will have a significant impact on his efforts to win reelection—is "neither novel nor implausible." *Ibid.* In upholding FECA's $25,000 annual ceiling on an individual's aggregate contributions, the *Buckley* Court observed that, absent such a limit, a donor could circumvent the $1000 cap on contributions to a federal candidate by making "huge contributions to the candidate's political party." 424 U.S. at 38. And, in light of the close connections between federal office-holders and the parties with which they are affiliated, and the degree to which the candidate's fortunes are intertwined with those of the larger party organization, the concern that some federal office-holders may be unduly protective of the interests of their parties' large-scale donors is an entirely plausible one. See pp. 31-34, *supra*.

Presumably for these reasons, plaintiffs do not take issue with the basic pre-existing $20,000 limit on contributions to national parties (increased to $25,000 by BCRA § 307(a)(2)), but only challenge its extension to all donations made to national parties, regardless of their ostensible purpose. The premise of the underlying contribution limit, however, is that large contributions to the parties may ultimately influence the official conduct of party members within the government. Once the validity of that premise is conceded, Congress is entitled to considerable deference in deciding whether donations ostensibly made for non-federal purposes should be exempted from the limits, or whether those donations also create an unacceptable risk of actual or apparent corruption of office-holders.

c. The reasonableness of Congress's judgment regarding the potential corruptive effects of soft-money donations to the national parties is confirmed by the record in this case. Cf. *Colorado II*, 533 U.S. at 458 ("What a realist would expect to occur has occurred."). Judge Kollar-Kotelly aptly described that record as "a treasure trove of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that contributions, especially large nonfederal donations, are given with the expectation they will provide the donor with access to influence federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized." Supp. App. 589sa. Former Senator Warren Rudman testified that "[l]arge soft money contributions in fact distort the legislative process" because "[t]hey affect whom Senators and House members see, whom they spend their time with, what input they get, and—make no mistake about it—this money affects outcomes as well." *Id.* at 595sa. One lobbyist testified that "[t]he amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients infuse into the political system." *Id.* at 594sa. A corporate CEO who had previously worked for many years as a political fundraiser and consultant (see *id.* at 550sa) testified that "many members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game." *Id.* at 598sa; see *id.* at 1265sa-1284sa (Leon) (discussing evidence of links between soft-money donations and increased access to federal office-holders).

Perhaps the most telling evidence that donors view large soft-money donations as a means to affect the legislative process is the fact that in both 1996 and 2000, well over half of the 50 largest soft-money donors gave money to *both* of the major political parties. See Supp. App. 619sa-623sa (Kollar-Kotelly); *id.* at 1284sa-1286sa (Leon); see also *Colorado II*, 533 U.S. at 451 (noting that "many PACs naturally express their narrow interests by contributing to both parties during the same electoral cycle"). That pattern of giving belies an ideological motivation and is explicable instead as an effort to obtain influence within the legislative process. As former Senator Dale Bumpers testified, "[g]iving soft money to both parties, the Republicans and the Democrats, makes no sense at all unless the donor feels that he or she is buying access." Supp. App. 621sa (Kollar-Kotelly); see D. Green Expert Report 26 (stating, with respect to corporations that have made large soft-money donations to both of the major parties, that "it strains credulity to think that their evenhanded distribution of shareholders' money to both parties grows out of their desire to foster democratic discourse").

The examples described above are simply illustrative. A voluminous body of record evidence in this case describes donors' use of large soft-money donations to obtain access to federal office-holders and thereby attempt to affect legislative outcomes.[14] That evidence is exhaustively catalogued in Judge Kollar-Kotelly's opinion (see Supp. App. 567sa-626sa) and dwarfs the evidence of corruption that the Court in *Buckley* (see 424 U.S. at 27 & n.28) and *Shrink Missouri* (see 528 U.S. at 393-394) found sufficient in upholding the contribution limits at issue in those cases.[15]

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[14] The record also contains abundant evidence that large soft-money donations to political parties have created an appearance of corruption in the eyes of the electorate. See Supp. App. 626sa-636sa (Kollar-Kotelly); *id.* at 1289sa-1296sa (Leon). This Court has made clear that the interest in preventing the appearance of corruption, and thereby fostering public confidence in the operations of the government, is a constitutionally sufficient basis for limits on campaign contributions. See *Shrink Missouri*, 528 U.S. at 390, 393-394; *Buckley*, 424 U.S. at 27, 30. The Court has recognized the importance of that interest in other contexts as well. The Court has explained, for example, that conflict-of-interest laws governing federal personnel are "directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *Mississippi Valley Co.*, 364 U.S. at 562; see *Crandon*, 494 U.S. at 164-165 (identifying public perception of corruption as one of the harms caused by private supplementation of government worker's salary); cf. *Civil Serv. Comm'n* v. *Letter Carriers*, 413 U.S. 548, 565 (1973) (explaining, with regard to Hatch Act restrictions on Executive Branch employees' political activities, that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent").

[15] As the RNC plaintiffs observe (Br. 26), the record does not identify specific instances in which a soft-money donation has demonstrably caused a Member of Congress to alter his vote on a pending legislative proposal. This Court's decisions make clear, however, that the validity of a contribution limit does not depend on evidence of that character. This Court in *Buckley*, citing the opinion of the court of appeals in that case, referred to

The record makes clear not only that donors and federal office-holders perceive a connection between large soft-money donations and influence upon the legislative process, but that the national party committees actively seek to foster that perception. The RNC's own documents "show that the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors." Supp. App. 608sa (Kollar-Kotelly); accord *id.* at 1271sa (Leon). The RNC plaintiffs assert (Br. 13) that "RNC reliance on federal officeholders for personal or telephonic solicitation of major donors was 'exceedingly rare.'" Even if federal office-holders seldom undertake the actual solicitation of funds on behalf of the RNC, but see Supp. App. 554sa-555sa (Kollar-Kotelly), the RNC encourages office-holders to meet with the party's large soft-money

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"the deeply disturbing examples surfacing after the 1972 election" as persuasive evidence "that the problem [of corruption] is not an illusory one." 424 U.S. at 27 (citing *Buckley* v. *Valeo*, 519 F.2d 821, 839-840 & nn.36-38 (D.C. Cir. 1975)). The cited portion of the court of appeals' opinion, however, identifies no instance in which a political contribution had been proved to affect the outcome of a Presidential or legislative decision. Rather, the court of appeals described instances in which large contributions (1) were made "in order to gain a meeting with White House officials on [milk] price supports," *Id.* at 839 n.36; (2) "were motivated by the perception that this was necessary as a 'calling card, something that would get us in the door and make our point of view heard,'" *id.* at 839 n.37; or (3) were triggered by a "widespread understanding that such contributions were a means of obtaining the recognition needed to be actively considered" for ambassadorial appointments, *id.* at 840 n.38. Indeed, the court of appeals in *Buckley* stated that it was "not material," for purposes of the constitutional analysis, "whether the President's decision [to increase the price supports] was in fact, or was represented to be, conditioned upon or 'linked' to" the contributions at issue. *Id.* at 839 n.36. This Court's treatment of those examples as an adequate factual predicate for the constitutionality of the FECA contribution limits amply demonstrates that a systemic exchange of large soft-money donations for access to federal office-holders may properly be regarded as a form of corruption.

donors, see *id.* at 603sa-607sa, and it utilizes the prospect of access to office-holders in order to attract soft-money donations, see *id.* at 608sa-609sa. The RNC's use of other individuals to convey the explicit request for funds does not meaningfully reduce the corruptive potential of the larger process by which soft-money donations are obtained. There has never been a requirement that the quid and the quo must both occur in the same telephone call. In addition, Congress in drafting appropriate prophylactic legislation was entitled to guard against the possibility that the RNC might begin to employ on a more systematic basis the same fundraising techniques that other national party committees have utilized.[16]

d. In crafting new FECA § 323(a), Congress chose to close the loophole that allowed unlimited soft-money donations to national party committees for the financing of activities ostensibly intended solely to influence state elections. The decision to regulate all donations to the national parties reflects Congress's judgment that "[b]ecause the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process." 148 Cong. Rec. H409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays). Congress concluded that "[t]he only effective way to address this problem of corruption is to ban entirely all raising and spending of soft money by the national parties." *Ibid.* In light of Congress's greater familiarity with the nature of party fundraising and its effects on the legislative process, that determination is entitled to substantial judicial deference. It is also supported by extensive record evidence demonstrating that large soft-money donors to the national party committees have been promised and granted access to the parties' federal office-holders, notwithstanding the fact that soft money is (by definition) not permitted to be used in order to influence federal elections. See pp. 37-41, *supra.*

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[16] None of the four congressional campaign committees (CCCs) is a party to these cases. See note 8, *supra*. Unlike the Republican and Democratic National Committees, each of the CCCs is headed by a sitting Member of Congress. See Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 651 (2000) ("Members of Congress constitute and control the CCCs that play the leading role in providing party money and campaign services to congressional candidates."); Krasno & Sorauf Expert Report 9-10. The CCCs regularly call upon Members of Congress to solicit donations. See Supp. App. 548sa-554sa (Kollar-Kotelly). With respect to those committees, it is particularly clear that "no wall between the national parties and the national government exists." Krasno & Sorauf Expert Report 10. The four CCCs raised a total of $212 million in soft money during the 2000 election cycle. *Id.* at 9.

It is wholly understandable, moreover, that an elected federal official will tend to look favorably on his party's large donors, even when a particular donation is earmarked for activities directed solely at state elections. Because money is fungible, a donation that defrays the costs of state electoral advocacy will free up funds for other activities that may directly and tangibly affect federal elections. Cf. *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001).[17] Because the

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[17] In *California Medical Ass'n* v. *FEC*, 453 U.S. 182 (1981), this Court applied a similar analysis in holding that FECA's $5000 annual limit on contributions to a political committee is constitutional even as applied to contributions earmarked for administrative support of the political committee itself. The California Medical Association (CMA)—the putative donor in that case—argued that contributions so earmarked "lack any potential for corrupting the political process." *Id.* at 199 n.19 (plurality opinion). In rejecting that contention, the plurality explained that "if an individual or association was permitted to fund the entire operation of a political committee, all moneys solicited by that committee could be converted into contributions [to candidates], the use of which might well be dictated by the committee's main supporter." *Ibid.*; see *id.* at 203

decennial redrawing of congressional district lines is typically performed by state legislatures, a party's congressional candidates can expect to benefit if the party obtains a legislative majority within the State. See Supp. App. 531sa-533sa (Kollar-Kotelly); D. Green Expert Report 11-12. A Presidential candidate's likelihood of winning a State's electoral votes may be increased if the State's Governor is a member of the candidate's own political party. And even where such tangible links are not apparent, federal and state candidates within a single party are co-participants in a common enterprise and are encouraged by party leaders to regard each other as such.

Thus, whether or not a particular donation earmarked for state elections has a foreseeable spillover effect on any federal race, a federal office-holder's close identification with his political party may cause him to regard a large-scale party benefactor as an ally of his own. See pp. 31-34, *supra.* That potential is magnified when the soft-money donor has already made hard-money contributions to the candidate and party up to the legal limit. Although soft-money donations may have less tangible benefits to a federal candidate or office-holder because of legal restrictions on how the money may be spent, soft money nevertheless benefits such persons by assisting the organization of which they are integral members. And, in any event, the process by which the funds are raised, in which access to federal office-holders has been systematically exchanged for large soft-money donations, creates a substantial risk of actual or apparent corruption, regardless of how the funds are ultimately spent. See pp. 37-41, *supra.*

(Blackmun, J., concurring in part and concurring in the judgment) (agreeing that statutory limit should be sustained under an anti-circumvention rationale).

e. The closing of the soft-money loophole cannot plausibly be expected to prevent the national parties from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; see *Shrink Missouri*, 528 U.S. at 397. In the 2000 election cycle, the national parties raised $741 million in *hard money* alone. Supp. App. 491sa-492sa (Kollar-Kotelly). That is some $210 million *more* than the national parties' combined hard- and soft-money receipts as recently as the 1992 election cycle. *Ibid.* The national parties will likely raise even larger sums of hard money under BCRA, both because the limit on individual contributions to national party committees has been increased from $20,000 to $25,000 per year, see BCRA § 307(a)(2), and because the national parties can adapt to the soft-money ban by "rais[ing] funds from a greater number of persons," *Buckley*, 424 U.S. at 22.[18]

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[18] The RNC plaintiffs also argue (Br. 64-69) that new FECA § 323(a) violates the First Amendment as applied to minor parties such as plaintiff Libertarian National Committee (LNC). The principal thrust of their constitutional argument is that the LNC uses federal campaigns as fora for issue advocacy, rather than as serious efforts to achieve the election of candidates, and that soft-money donations to the LNC pose no realistic threat of corrupting federal office-holders because "[n]o Libertarian Party candidate has ever won a race for federal office." RNC Br. 67. Having chosen to accept the advantages that flow from official recognition of its candidates on the ballot, however, as well as the various forms of preferential treatment that the FECA/BCRA regime gives to party committees (see p. 71, *infra*), the LNC has no constitutional entitlement to an exemption from the restrictions that apply to other political parties. Plaintiffs' argument logically suggests that the individuals whom it nominates for federal office should also receive a constitutional exemption from the FECA/BCRA limits on contributions to candidates, a proposition that has no support in this Court's precedents. Indeed, this Court in *Buckley* specifically declined to create a blanket exception for minor parties from the FECA limits on contributions to federal candidates, or from the Act's disclosure requirements. See 424 U.S. at 33-35, 72-74.

2. **The restrictions on state parties' use of soft money for "Federal election activity" are reasonable and consistent with the First Amendment:** With respect to state political party committees, Congress employed a somewhat different approach. Congress did not place a federal limit on all donations to the state parties. Rather, BCRA applies the federal source-and-amount restrictions and disclosure requirements (subject to the narrow exception provided by the Levin Amendment, see pp. 49-51, *infra*) only to the funds used for four specified categories of "Federal election activity." See FECA § 323(b)(1) (added by BCRA § 101(a)). That term is defined to include (i) "voter registration activity" within the 120 days before a federal election; (ii) "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot"; (iii) any "public communication that refers to a clearly identified candidate for Federal office * * * and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office"; and (iv) all services provided by any employee who devotes more than 25% of his compensated time in any month to activities in connection with federal elections. BCRA § 101(b) (adding FECA § 301(20)(A)(i)-(iv)). The requirement that such activities be financed entirely with money raised in compliance with the FECA/BCRA contribution limits is consistent with the First Amendment.

a. Contrary to the RNC plaintiffs' contention (Br. 39), the restrictions imposed by new FECA § 323(b) are properly treated as limits on contributions rather than on expenditures, even though the applicability of those restrictions turns on the use to which the relevant funds are ultimately put. Unlike the expenditure caps that were struck down in *Buckley*, new FECA § 323(b) does not limit the total amount of money that either the donor or the party may spend, either on political advocacy generally or on "Federal election activity" in particular. Compare *Buckley*, 424 U.S. at 39 (explaining that FECA's prior "expenditure ceilings impose direct and substantial restraints on the quantity of political speech"). Rather, like the contribution limits that the *Buckley* Court sustained, the effect of new FECA § 323(b) "is merely to require * * * [party] committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Id.* at 22. Indeed, Congress placed distinct restrictions on disbursements for "Federal election activity" not in order to impose some overall limit on state party spending, but solely to allow spending for non-federal purposes to remain free from federal regulation. The RNC plaintiffs' argument would have the perverse effect of subjecting Congress's limited regulation of contributions used for defined activities to more demanding constitutional scrutiny than an absolute cap on donations for any purpose.

b. Each category of "Federal election activity" as defined in the Act involves conduct that by its nature will influence federal elections. Disbursements for such activities—particularly disbursements for the activities described in new FECA § 301(20)(A)(i), (ii), and (iv)—will often influence state elections as well. But the potential impact on state elections does not diminish the federal interest in preventing actual or apparent corruption of federal office-holders. If a state party's voter-registration and get-out-the-vote activities in connection with an even-year election are successful, the party's federal candidate(s) will inevitably benefit; and the extent of that benefit does not depend on the number of state offices that are contested at the same election. See D. Green Expert Report 14 (available evidence "shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices."). Because federal candidates are likely to regard large donations used to finance "Federal election activity" within their States or districts as substantially assisting their own campaigns, such donations directly implicate the concern that the donor may exercise "undue influence on an officeholder's judgment, and the appearance of such influence." *Colorado II*, 533 U.S. at 441.

Each category of "Federal election activity," moreover, has historically been subject to federal regulation and required to be financed in part with hard money under the FEC's allocation rules. See pp. 8-10, *supra*. The prior allocation regime reflected the FEC's recognition that such activities can be expected to influence federal elections. Plaintiffs' attack on new FECA § 323(b) logically implies that either (1) the prior allocation rules were themselves unconstitutional, or (2) the activities described in new FECA § 301(20)(A)(i)-(iv) have a sufficient impact on federal elections to justify a requirement that *part* of their costs be paid with hard money, but do not have a sufficient impact to support a requirement that *all* of their costs be so financed.

Neither of those theories is persuasive. The evidence in this case amply supports Congress's determination that "Federal election activity" as defined in the Act can be expected to have a significant impact on federal elections. See Supp. App. 516sa-531sa (Kollar-Kotelly). If such activities could be financed entirely with *unlimited* soft-money donations, the party's spending could therefore have the effect of creating indebted federal office-holders, and the other limits on contributions could be effectively circumvented. And once the propriety of *some* restriction on the funding of "Federal election activity" is accepted, "a court has no scalpel to probe" (*Buckley*, 424 U.S. at 30) whether 100% or some lesser portion of the costs of such activities should be required to be financed with hard money. Based on its Members' extensive experience under the Commission's former allocation rules, Congress determined that greater constraints on state parties' use of soft money were needed to preserve the integrity of federal elections and federal office-holders. The Constitution does not prevent Congress from acting upon that judgment.

The RNC plaintiffs appear to argue that the FEC's prior allocation rules were invalid, and that a party committee has a First Amendment right to receive unlimited contributions for any political activity that does not expressly advocate the election or defeat of a federal candidate. See RNC Br. 54-55, 88 n.50.[19] The Court in *Buckley* declined, however, to impose an "express advocacy" test for organizations "the major purpose of which is the nomination or election of a candidate," because the expenditures of such organizations "are, by definition, campaign related." 424 U.S. at 79; see *id.* at 79-80. Unlike some interest groups, which may have as their primary function issue advocacy rather than the election of candidates, "parties are primarily and continuously concerned with acquiring power through electoral victory. Parties never engage in public communication without regard to its electoral consequences." D. Green Expert Report 17 n.19. There is consequently no need to distinguish between political party disbursements that are directed at candidate elections and those that are not. Rather, the relevant distinction is between disbursements that are directed, in whole or in part, at *federal* elections, and those that are directed at state and/or local elections only (and even that line addresses only who should regulate; it does

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[19] The McConnell plaintiffs state (Br. 13) that the FEC's prior allocation rules "reflected an assiduous regard for our federal system." Like the RNC plaintiffs, however, they contend (*id.* at 26 n.5) that Congress lacks power to "regulate expenditures for speech that does not constitute express advocacy."

not demarcate activities that the First Amendment places beyond regulation). Disbursements for "Federal election activity" as defined in BCRA can reliably be assumed to fall within the former category.

c. Consistent with both the First Amendment and principles of federalism, Congress might have categorically required state party committees to finance all "Federal election activity" entirely with funds contributed subject to the FECA/BCRA source-and-amount restrictions and disclosure requirements. Congress chose, however, to establish an exception to that general rule, in order to accommodate the interests of state parties in raising and spending additional funds to influence state elections. Under the "Levin Amendment" (new FECA § 323(b)(2)), state and local party committees may use soft money to finance an allocable share of the costs of certain categories of "Federal election activity," provided that the following conditions are met:

> First, the permitted activities may not refer to a clearly identified federal candidate. Second, those activities may not involve any broadcast communication except one that refers solely to a clearly identified state or local candidate. Third, no single donor may donate more than $10,000 to a state or local party annually for those activities. Finally, all money (federal and Levin money alike) spent on such activities must be "homegrown"—i.e., raised solely by the spending state or local party.

Supp. App. 56sa (per curiam). Without those limitations on the Levin Amendment option, Congress might well have declined to create any exception to the rule that state parties' "Federal election activity" must be financed exclusively with money raised in compliance with the generally applicable federal source-and-amount restrictions. And state parties may avoid the restrictions on the use of Levin

Amendment funds simply by spending hard money to finance the activities described in new FECA § 301(20)(A).

The RNC plaintiffs focus in particular (see Br. 58-61) on the requirement that "homegrown" funds be used, which they characterize as a "ban" on transfers of funds between different units of a political party. RNC Br. 58. That claim is misconceived. The Levin Amendment does not restrict the freedom of party committees to transfer lawfully-acquired funds among themselves. BCRA simply requires that, *if* a state or local party committee seeks to use funds raised outside of FECA's source-and-amount restrictions to defray part of the costs of "Federal election activity," *that activity* must be financed entirely with "homegrown" money. That modest condition on the Levin Amendment option—an option that Congress was not obliged to create, and one that no state or local party committee is required to utilize—creates no meaningful constitutional problem.

Although state and local party committees in raising Levin Amendment funds are not subject to all of FECA's source-and-amount restrictions,[20] the $10,000 limit on Levin Amendment donations reflects Congress's conclusion that the activities in question affect federal elections and that unrestricted donations would therefore threaten actual or apparent corruption of federal office-holders. Absent the requirement that funds used for Levin Amendment activities be "homegrown," a donor could contribute $10,000 to each of several committees participating in the same joint activity, effectively subverting the $10,000 per-donor cap on Levin Amendment donations. And if national party committees could provide the hard money to be spent in allocation with a state or local party's Levin funds, the

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[20] Most significantly, Levin Amendment funds may include corporate and union treasury donations, subject to the $10,000 maximum, to the extent that state law permits. See 11 C.F.R. 300.31(c).

national parties "could gain influence over how the account is spent, including the money raised by the less restrictive Levin provisions." D. Green Expert Report 18; cf. note 6, *supra* (explaining that, before the enactment of BCRA, national parties frequently transferred soft money to state parties with instructions as to the manner in which those funds should be used). The national parties would thus effectively regain the ability to direct soft money to activities that will affect federal elections—precisely the abuse that new FECA § 323(a) was designed to prevent.

3. **Title I's solicitation restrictions reinforce Title I's contribution limits and comply with the First Amendment:** Plaintiffs also challenge three distinct restrictions imposed by BCRA § 101(a) on the solicitation of funds by political party officials and by federal office-holders and candidates. First, new FECA § 323(a) prohibits any national political party committee from soliciting soft-money donations to any recipient. Second, new FECA § 323(d) prohibits any national or state party committee from soliciting donations to certain organizations that are exempt from tax under Section 501(c) or Section 527 of the Internal Revenue Code. Third, new FECA § 323(e)(1) generally prohibits federal office-holders and candidates from soliciting donations in connection with either federal or state elections unless those donations comply with FECA's source-and-amount restrictions. Those provisions are valid anti-circumvention measures that are fully consistent with the First Amendment.

a. The McConnell plaintiffs contend that the challenged solicitation restrictions are subject to strict scrutiny. McConnell Br. 17-18 (citing *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 795-796 (1988)). They are mistaken. In *Riley*, the Court applied strict scrutiny only in reviewing a state-law provision that directly regulated the *content* of the fundraiser's message, by compelling disclosure of information concerning the percentage of gross receipts that were actually passed on to charities. *Riley*, 487 U.S. at 786, 795. The Court explained that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Id.* at 795. The provisions at issue here, by contrast, are directed not at the content of the fundraising appeal, but at the identity of the fundraiser. They are in the nature of conflict-of-interest regulations and serve to prevent individuals who have acquired power or influence in one capacity from utilizing it in service of another entity, in circumstances where corruption of federal office-holders may result. Though such restrictions are not immune from First Amendment challenge, this Court's decisions do not suggest that they are subject to strict scrutiny.

To the contrary, this Court has subjected solicitation restrictions designed to reinforce and prevent the circumvention of the FECA contribution limits to the same complaisant scrutiny applied to the contribution limits themselves. In *NRWC*, this Court held that a nonprofit corporation could constitutionally be prohibited from soliciting contributions to its federal PAC from individuals who were not its actual "members." See 459 U.S. at 201-211. The Court did not apply strict scrutiny, but instead emphasized the need for deference to congressional judgments in this area, stating that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 210; see also *Beaumont*, 123 S. Ct. at 2207-2209 (noting the close interrelationship between the solicitation restrictions at issue in *NRWC* and the underlying contribution limits expressly upheld in *Beaumont*). A similarly deferential review is appropriate here.

b. New FECA § 323(a)'s ban on soft-money solicitations by national political party committees is based on the reasonable premise that, if a large donation to the national party has sufficient corruptive potential to justify a ban, a similar donation to an associated entity (*e.g.*, a state party committee or candidate for state office) designated by the national party may create a comparable threat of corruption.[21] That risk is particularly acute in light of the close connections between national and state party committees and candidates within the party, which increase the danger that a large soft-money donation solicited by a national party committee will be perceived—by the donor, the national party, and federal office-holders—as the functional equivalent of a donation to the national party committee itself. Congress properly acted to prevent the use of such solicitations as a means of circumventing the statutory ban on donations of soft money directly to the national parties.

Insofar as new FECA § 323(a) prohibits a national party committee from soliciting for others donations that the committee itself could not lawfully receive, it is in no way anomalous. To the contrary, similar prohibitions are a characteristic feature of federal anti-corruption and conflict-of-interest laws. See, *e.g.*, 5 C.F.R. 2635.203(f)(2) (providing that regulatory restrictions on gifts to federal employees encompass gifts "[g]iven to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee"); note 13,

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[21] We do not understand plaintiffs to challenge new FECA § 323(a)'s ban on soft-money solicitations by national party committees insofar as that ban applies to solicitations for the national party itself. New FECA § 323(a) categorically prohibits national party committees from *receiving* soft-money donations, and neither the party nor its officials can claim any First Amendment right to propose an illegal transfer of funds. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-389 (1973). Rather, we understand plaintiffs to challenge BCRA's solicitation restrictions only as they apply to potential donations (*e.g.*, soft-money donations to state party committees or to state candidates) that are not in themselves illegal.

supra. As those provisions demonstrate, when person A is (for whatever reason) barred from giving money to person B, a natural corollary of that prohibition is to bar B from requesting that A give money to a third party (person C) of B's choosing. That ancillary prohibition raises no meaningful First Amendment concerns, even when a payment from A to C is not unlawful in and of itself.[22]

c. Congress acted constitutionally in barring national and state party committees, and their officials acting on behalf of the parties, from soliciting donations for certain tax-exempt organizations that engage in political activity.[23] New FECA

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[22] The RNC plaintiffs assert (Br. 43) that "it is perfectly legal for anyone else to say 'contribute to the Jones for Governor campaign,' but it is a *crime* for a national party official merely to utter *those exact words*." That assertion overstates the practical effect of new FECA § 323(a)'s ban on soft-money solicitation by the national parties. First, that ban applies to national party officials only when they act "on behalf of such a national committee." A national party official therefore remains free to solicit soft money for a state party or state candidate if he acts in a different capacity (*e.g.*, as a state party official, or simply as an individual). See 67 Fed. Reg. 49,083 (2002). Second, a candidate for state office (like anyone else) is free to establish a federal PAC, which can accept contributions subject to FECA's disclosure requirements and source-and-amount limits. Money contributed to that PAC can be used (insofar as federal law is concerned) to finance the state candidate's campaign. Even when acting on behalf of the RNC, a national party official could legally solicit hard-money contributions to that PAC. Third, it is not "perfectly legal for anyone else to say 'contribute to the Jones for Governor campaign.'" To the contrary, federal law validly prohibits a variety of persons from soliciting funds for state electoral campaigns. See, *e.g.*, 5 U.S.C. 7323(a) (federal Executive Branch employees; see pp. 57-58, *infra*); 26 U.S.C. 501(c)(3) (designated nonprofit organizations); *Blount* v. *SEC*, 61 F.3d 938, 947 (D.C. Cir. 1995) (municipal securities professionals, with respect to the campaigns of state officials from whom they obtain or solicit business). Finally, the RNC plaintiffs' argument highlights the restrictions placed on political parties by new FECA § 323(a) while ignoring the special advantages that parties receive—precisely the analytical approach that this Court rejected in *California Med. Ass'n*. See 453 U.S. at 200-201; p. 71, *infra*.

[23] New FECA § 323(d) prohibits the parties from soliciting donations to a Section 501(c) organization "that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)," or to any Section 527 organization "other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office."

§ 323(d) serves to prevent circumvention of the limits on contributions to the parties through the use of nonprofit organizations as surrogate recipients of funds.[24] The national party committees have in the past persuaded "donors to donate nonfederal money to certain interest groups that then use such funds for broadcast issue advertisements and other activities that influence federal elections." Supp. App. 636sa (Kollar-Kotelly); see *id.* at 636sa-642sa; *id.* at 1247sa-1253sa (Leon).

Those donations, if solicited by party committees, will likely be regarded (by donors, party officials, and federal office-holders alike) as benefitting the party itself and its federal candidates; yet they are not subject to FECA's disclosure requirements and source-and-amount restrictions. The tighter restrictions on donations to other likely surrogates, such as the state parties, will only increase the temptation to pursue such arrangements. In the absence of new FECA § 323(d), "the national parties could easily circumvent the new regulatory regime by creating satellite party organizations in the guise of tax-exempt organizations, which would be free to collect donations of unlimited size." D. Green Expert Report 18; cf. *Colorado II*, 533 U.S. at 457 (explaining that substantial record evidence in that case "demonstrates how candidates, donors, and parties test the limits of the current law").[25]

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[24] In addition to prohibiting national and state parties from *soliciting* donations from other persons to the designated tax-exempt organizations, new FECA § 323(d) also provides that the parties themselves shall not "make or direct any donations to" those organizations. The government's expert explained that "[t]he parties' motive for transferring funds to tax-exempt organizations that are engaged in electoral activity is to gain control of these organizations, because doing so gives parties control over the soft money that tax-exempt organizations are free to raise." D. Green Expert Report 17. The ban on party donations to those organizations prevents the parties from leveraging their own assets in that manner. *Id.* at 17-18. And by forcing the party committees to engage in political advocacy in their own names, rather than through surrogates whose links to the parties may not be widely known, the prohibition on party donations to tax-exempt entities assists the public in evaluating communications for which the party is ultimately responsible. Party committees remain free to donate lawfully acquired funds to PACs, which are subject to the disclosure requirements and source-and-amount restrictions imposed by FECA. *Id.* at 18; see new FECA § 323(d)(2) (solicitation ban is inapplicable to any Section 527 organization that is a "political committee"). And, as with the ban on party solicitations for the designated Section 501 and Section 527 organizations, the ban on direct donations may be regarded as simply a reasonable condition on Congress's decision to confer tax-exempt status upon the relevant organization. See note 25, *infra*.

d. New FECA § 323(e)'s restrictions on soft-money solicitations by federal candidates and office-holders are also constitutional. New FECA § 323(e) reflects Congress's reasonable concern that large donations made to other candidates or political committees at the behest of a federal candidate or office-holder may create the same kind of risks of actual or apparent corruption as are posed by large donations to a federal candidate's own campaign. To the extent that it is unclear whether a federal candidate would

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[25] New FECA § 323(d) might also be conceived (and sustained) as a reasonable condition imposed by Congress on its decision to grant the relevant Section 501(c) or Section 527 organization an exemption from federal tax. "[T]ax exemptions * * * are a form of subsidy that is administered through the tax system." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544 (1983). Although Congress's authority to grant and withhold tax exemptions is subject to constitutional limits, see *id.* at 545, "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes," *id.* at 547. New FECA § 323(d) reflects Congress's determination that certain organizations that have requested and received a tax subsidy should not also receive a particular type of fundraising assistance that could potentially be used to circumvent the campaign-finance laws. Especially under the relaxed standard applicable to legislative judgments in this field, that condition on the organization's tax-exempt status easily survives First Amendment review.

view a donation to a particular recipient favorably, that uncertainty is eliminated by the solicitation itself. As one corporate CEO and former political consultant testified, "[m]ost soft money donors don't ask and don't care why" money solicited by a Member of Congress is being directed to a particular recipient; "[w]hat matters is that the donor has done what the Member asked." Supp. App. 550sa-551sa (Kollar-Kotelly). By permitting solicitations for both federal and state elections, subject to FECA's source-and-amount limits, BCRA addresses the threat of actual or perceived corruption while allowing federal office-holders and candidates to play a meaningful role in party fundraising efforts.

Insofar as it subjects federal office-holders and candidates to legal constraints stricter than those imposed upon the general public, new FECA § 323(e) breaks no new ground. This Court has recognized that "the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Connick* v. *Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968)).[26] Subject to narrow exceptions not relevant here, the Hatch Act has long prohibited the solicitation of political contributions by federal Executive Branch employees. See 5 U.S.C. 7323(a)(2); see also *Letter Carriers*, *supra*; *Public Workers* v. *Mitchell*, 330 U.S. 75 (1947).[27]

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[26] Although new FECA § 323(d) encompasses candidates for federal office who are not (yet) office-holders, its application to such persons serves the same anti-corruption purpose as its application to persons actually holding federal office. If a candidate incurs political debts during the course of a campaign, and subsequently wins election, those debts may be repaid after the candidate takes office. Cf. 18 U.S.C. 201 (federal bribery and anti-gratuity law applies to any "person who has been selected to be a public official" as well as to any "public official").

[27] At the time of this Court's decisions in *Letter Carriers* and *Mitchell*, the Hatch Act more broadly prohibited Executive Branch employees from

Restrictions on the participation of public employees in political fundraising serve in part to insulate the employees themselves from untoward pressure to engage in political activities. See *Letter Carriers*, 413 U.S. at 566. Those restrictions also serve, however, to ensure (i) that public employees are not affected (or perceived to be affected) in the performance of their duties by the fact that persons with business before the government have contributed to a political campaign or have declined to do so, cf. *id.* at 564-565, and (ii) that persons from whom contributions are requested will not feel coerced to contribute by reason of the solicitor's official status. New FECA § 323(e) is a reasonably tailored effort to achieve the same objectives.[28]

4. **New FECA § 323(f)'s restrictions on state candidates and office-holders are valid anti-circumvention measures**: New FECA § 323(f) prohibits state candidates and office-holders from spending soft money "for a communication

described in [new FECA] section 301(20)(A)(iii)"—*i.e.*, for a communication that "refers to a clearly identified candidate for Federal office * * * and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." BCRA § 101(b) (new FECA § 301(20)(A)(iii)). As Judge Leon correctly explained, that provision "simply guard[s] against * * * conversions of soft money donations to fund communications that are designed to accomplish the federal purpose of directly influencing a federal election." Supp. App. 1146sa; see *id.* at 993sa (Kollar-Kotelly) (endorsing Judge Leon's analysis).

Plaintiffs' attack on new FECA § 323(f) rests largely on overstatements of that provision's practical effects. Thus, the NRLC plaintiffs appear to construe new FECA § 323(f) to encompass virtually every reference a state candidate or office-holder might make to an identified candidate for federal office, even when the evident purpose of the communication is to fulfill a state officer's official duties unrelated to any election, or to further a state candidate's own electoral prospects, rather than to influence a federal election. See NRLC Br. 39-43. As Senator Feingold explained, however, new FECA § 323(f) does not prohibit "spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose the Federal candidate." 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002). The McConnell plaintiffs contend (Br. 35) that new FECA § 323(f) "is tantamount to an outright ban" on the issuance by state candidates and office-holders of the communications described in new FECA § 301(20)(A)(iii). Contrary to those plaintiffs' suggestion (Br. 35), however, nothing in federal law prevents a state candidate or office-holder from establishing a political committee, which can receive contributions

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taking an "active part in political management or in political campaigns." See *Letter Carriers*, 413 U.S. at 550; *Mitchell*, 330 U.S. at 78 & n.2. Congress has since relaxed the Hatch Act's restrictions. Under current law, the ban on active participation in political campaigns applies only to a relatively narrow group of Executive Branch employees. See 5 U.S.C. 7323(a), (b)(2) and (3). The ban on participation in political fundraising, however, remains generally applicable. See 5 U.S.C. 7323(a)(2).

[28] Restrictions on a federal candidate's freedom to solicit lawful contributions in connection with his *own* electoral race would raise substantial constitutional questions that are not implicated by the restrictions imposed upon Executive Branch employees by 5 U.S.C. 7323(a)(2). With respect to *other* elections, however, and particularly elections for state office, it is not apparent why a Member of Congress should have a greater First Amendment right to engage in political fundraising than does an Executive Branch employee. Indeed, this Court's decision in *United States* v. *NTEU*, 513 U.S. 454, 472-473 (1995), suggests that Congress may have *greater* power to restrict the off-duty financial activities of the highest-ranking federal officials than to impose similar restrictions on the federal rank-and-file, since high-ranking officials will likely be better positioned to reward past favors through the use of their governmental power.

subject to FECA's source-and-amount restrictions. Funds contributed to such a political committee can be used to finance any communication for which new FECA § 323(f) requires the use of hard money.

5. **BCRA § 213's provisions governing independent and coordinated expenditures by party committees comply with the First Amendment:** Under 2 U.S.C. 441a(d), political party committees are permitted to support their candidates for federal office with coordinated expenditures that far exceed the contribution limits to which other donors are subject. See pp. 17-18 & note 11, *supra*. Once a political party has nominated a candidate for a particular federal election, BCRA § 213 requires the party either (1) to forgo independent expenditures in support of that candidate, in which case it may invoke the increased coordinated-expenditure limits applicable to political parties; or (2) to abide by the $5000 limit on contributions and coordinated expenditures that applies to political committees generally, in which case it may make unlimited independent expenditures in support of that candidate.[29] Plaintiffs' First Amendment

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[29] The RNC plaintiffs suggest (Br. 73) that if a party committee makes independent expenditures in support of a nominated candidate, the party is thereafter barred from *any* coordinated spending with respect to that candidate. That is incorrect. BCRA § 213(2) adds a new FECA § 315(d)(4)(A)(i), which is codified at 2 U.S.C. 441a(d)(4)(A)(i), and provides that, after making an independent expenditure with respect to a nominated candidate, the party may not make "any coordinated expenditure *under this subsection* with respect to the candidate during the election cycle." BCRA § 213(2) (emphasis added). "[T]his subsection" refers to 2 U.S.C. 441a(d). Thus, BCRA § 213 requires the party to choose between independent expenditures and the *increased* coordinated expenditures that 2 U.S.C. 441a(d) allows party committees to make. But whichever option the party chooses, it may make direct contributions, or contributions in the form of coordinated expenditures, up to the $5000 limit that applies to political committees generally under 2 U.S.C. 441a(a)(2)(A), and it may invoke the much larger limit on national party contributions to Senate candidates established by 2 U.S.C. 441a(h).

challenges (McConnell Br. 68-70; RNC Br. 73-76) to that provision lack merit.

a. Although a party committee has a First Amendment right to make unlimited independent expenditures in support of the party's candidates, see p. 18, *supra*, it has no greater *constitutional* right to make coordinated expenditures than does any other political committee. See *Colorado II*, 533 U.S. at 455 (a political party "is in the same position as some individuals and PACs, as to whom coordinated spending limits have already been held valid"); McConnell Br. 69 (acknowledging that 2 U.S.C. 441a(d) "is not constitutionally required"). Consistent with the Constitution, Congress might have subjected party committees to the $5000 limit on coordinated spending that applies to every other multicandidate political committee, while leaving the parties free to engage in unrestricted independent spending. Under BCRA § 213, any political party remains free to choose that option with respect to any federal election. Congress's decision to provide party committees an *additional* spending option creates no constitutional infirmity.

b. Plaintiffs contend that BCRA § 213 is invalid because it "forces a choice between two *existing rights*: one statutory and the other constitutional." RNC Br. 75. But Congress may and often does condition the availability of a statutory benefit on a private party's willingness to forgo conduct in which it would otherwise have a constitutional right to engage. In *Buckley*, for example, the Court held that Congress, in establishing a program of public financing for Presidential election campaigns (see 424 U.S. at 85-109), "may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." *Id.* at 57 n.65. The Court upheld that condition on public funding, notwithstanding its determination that FECA's freestanding limits on campaign spending by candidates for federal office violated the First Amendment. See *id.* at 54-

58. The Court explained that, "[j]ust as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *Id.* at 57 n.65.

BCRA § 213 does not, as the RNC plaintiffs suggest (Br. 74), reflect a "conclusive presumption" that all party spending in connection with a federal election is coordinated with the party's nominee. To the contrary, the text of BCRA § 213 expressly contemplates the prospect that a party committee can make independent expenditures in support of its candidate even after a nominee is selected. Congress reasonably determined, however, that the higher coordinated-expenditure ceilings provided in 2 U.S.C. 441a(d) should be reserved for those situations in which the relevant political party concludes (for whatever reason) that independent spending in support of a particular candidate is infeasible or politically disadvantageous.

The balance struck by Congress accords both with the original rationale for the higher party coordinated-spending limits and with this Court's decision in *Colorado I*. In 1976, when it reenacted the predecessor to 2 U.S.C. 441a(d) after this Court's decision in *Buckley*, Congress viewed party spending in support of the party's candidate as necessarily coordinated. The Conference Report accompanying the 1976 FECA amendments explained that the increased spending limits for party committees "allow[] the political parties to make contributions in kind by spending money * * * to aid the individual candidates who represent the party," and it expressed the view that, "but for this subsection, these expenditures would be covered by the contribution limitations stated in [2 U.S.C. 441a(a)(1) and (a)(2)]." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976); see *DSCC*, 454 U.S. at 28 n.1 (noting FEC's position that "[p]arty committees are considered incapable of making 'independent' expenditures

in connection with the campaigns of their party's candidates").

Thus, 2 U.S.C. 441a(d) was premised on Congress's understanding that the parties' higher level of coordinated spending would counterbalance their inability to make the unlimited independent expenditures that other political committees are allowed to make. There was never an intent to allow parties to enjoy the best of both worlds—unlimited independent expenditures and unique opportunities for substantial coordination. In enacting BCRA § 213, Congress sought to continue to provide parties with an option that reflects their distinct character and relationship to federal candidates, while acknowledging that party committees are *capable* of making independent expenditures like other political committees, and leaving them free to pursue those expenditures as an alternative to the unique opportunities for coordination allowed to parties under 2 U.S.C. 441a(d). BCRA § 213 also helps to prevent political parties from circumventing the FECA limits on their coordinated spending through the use of expenditures that are ostensibly independent but in fact rest on understandings with the party's nominee. Although BCRA § 213 does not wholly bar a party from simultaneously making independent and coordinated expenditures in support of the same federal candidate (see note 29, *supra*), it reduces the potential for abuse that such an arrangement may create.[30]

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[30] In *Colorado I*, a majority of this Court agreed that, where a party committee's expenditures are in fact independent of any candidate, the First Amendment precludes Congress from imposing any limit on the amount of money that the committee may spend. The Justices in the majority appeared to disagree, however, as to the practical feasibility of such independent expenditures. Compare 518 U.S. at 613-614 (opinion of Breyer, J.) (reviewing the record evidence and accepting the party's representation that the expenditure in question was independent of any candidate) with *id.* at 630 (opinion of Kennedy, J.) (stating that "it would be impractical and imprudent, to say the least, for a party to support its

c. For purposes of BCRA § 213, all political committees "established and maintained" by the national and state committees of a particular political party "shall be considered to be a single political committee." BCRA § 213(2) (adding FECA § 315(d)(4)(B)). That provision serves an obvious anti-circumvention purpose and does not intrude upon the parties' First Amendment rights. There is no merit to plaintiffs' claim (RNC Br. 75; McConnell Br. 70) that BCRA § 213 imposes upon the parties any form of "compelled" or "forced" association. Rather, the provision simply attaches new legal consequences to an existing *voluntary* association between different committees of the same political party.[31] A party remains free to establish any internal structure or procedures it deems necessary to ensure that the appropriate official makes the decision between independent and

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own candidates without some form of 'cooperation' or 'consultation'"). Moreover, because the expenditures at issue in *Colorado I* took place before the party's nominee had been selected, see *id.* at 612, 613-614 (opinion of Breyer, J.), the Court did not confront the practical feasibility of independent party expenditures during the post-nomination period—the only period to which BCRA § 213 applies. BCRA § 213 allows each political party, with respect to each election for federal office, to determine for itself whether independent expenditures in support of its candidate would be practical and commensurate with its interests. The First Amendment does not preclude Congress from allowing a political party to make that judgment, and then holding the party to its choice.

[31] A state party committee is already aggregated with its "subordinate committee[s]" for purposes of the coordinated spending limits set out in 2 U.S.C. 441a(d)(3). FECA has also long provided that contributions made by PACs established or controlled by any "parent, subsidiary, branch, division, department, or local unit" of a particular corporation or union "shall be considered to have been made by a single political committee." 2 U.S.C. 441a(a)(5). There is consequently nothing anomalous about a rule under which the political expenditures of one entity will affect the spending options of its affiliates.

coordinated spending with respect to each of its federal candidates.[32]

C. Title I Does Not Intrude Upon The Authority Of The States To Regulate Their Own Elections

Plaintiffs contend (see RNC Br. 78-91; McConnell Br. 26-35) that Title I violates principles of federalism by impairing the States' authority to regulate their own elections. That claim lacks merit.

1. Title I does not affect the duties, qualifications, or compensation of state officers. It does not regulate the time, place, or manner of voting, or the qualifications of voters. Title I imposes *no* requirements or prohibitions on the States themselves; it simply regulates financial transactions between private parties, and it does so in order to safeguard the integrity of *federal* elections and office-holders. None of the precedents on which plaintiffs rely remotely suggests that provisions of that character contravene principles of federalism. To the contrary, this Court, in describing the limits on congressional power imposed by the Tenth Amendment and related federalism principles, has consistently distinguished between laws that operate on the States *qua* States and those that operate directly on the citizenry. See, *e.g.*, *New York* v. *United States*, 505 U.S. 144, 166 (1992) ("In providing for a stronger central government, * * * the

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[32] Plaintiffs' reliance (RNC Br. 75; McConnell Br. 70) on *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000), is misplaced. In striking down a state law requiring that party primaries be open to non-members, the Court in that case noted that the challenged law "force[d] [political parties] to adulterate their candidate-selection process * * * by opening it up to persons *wholly unaffiliated with the party*." *Id.* at 581 (emphasis added). A law that allows *non-members* to play a potentially decisive role in the selection of the party's nominee is not remotely comparable to BCRA § 213, which simply holds a national or state party accountable for the actions of those subordinate committees that it has "established and maintained."

Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

2. More broadly, insofar as plaintiffs seek to invoke the principle that the national government is one of limited powers, see, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), their federalism arguments add nothing of substance to their First Amendment claims. Congress in enacting BCRA sought to protect the integrity of federal elections and to prevent corruption of federal office-holders. Plaintiffs do not dispute that those are legitimate federal objectives and that Congress possesses constitutional authority to enact laws reasonably calculated to achieve them. If the means chosen by Congress are sufficiently reasonable and tailored so as to overcome plaintiffs' First Amendment objections (see pp. 34-65, *supra*), there is no basis for challenging Title I under the principles announced in *Lopez* and *Morrison*.

3. Plaintiffs in effect posit a third federalism-related limitation on congressional authority: that congressional regulation of private conduct, even if reasonably necessary to the achievement of a valid federal objective, may be held invalid if it displaces state policy choices on a subject of particular importance to the State. That theory is flatly inconsistent with established constitutional doctrine. If Title I is an otherwise valid means of preserving the integrity of *federal* elections and preventing corruption of *federal* office-holders, the fact that it prohibits some financial transactions that the relevant State would permit, and may thus incidentally affect the way in which state electoral campaigns are financed, cannot create any constitutional infirmity. That conclusion follows both from decisions of this Court specifically addressing the regulation of federal elections, and from the Supremacy Clause itself.

a. In *Ex parte Siebold*, 100 U.S. 371 (1879), this Court upheld a federal statute that authorized federal prosecution of a state election judge, based on the judge's breach of state-law duties in connection with an election at which both federal and state offices were contested. The Court observed that Congress's power over federal elections "is paramount, and may be exercised at any time, and to any extent which [Congress] deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith." *Id.* at 392. The Court further explained that "[i]f for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter." *Id.* at 393. In *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884), the Court reiterated that congressional authority to prevent corruption of a federal election is not "annulled because an election for State officers is held at the same time and place."

Indeed, FECA currently prohibits a variety of potential donors from making contributions to state as well as federal candidates. See 2 U.S.C. 441b (national banks and federally-chartered corporations); 2 U.S.C. 441c(a) (federal contractors); 2 U.S.C. 441e (foreign nationals); see also 18 U.S.C. 607 (as amended by BCRA § 302) (restricting fundraising on federal property in connection with both state and federal elections); *Blount*, 61 F.3d at 941-949 (upholding federal rule that restricts the ability of municipal securities professionals to contribute and solicit contributions to the campaigns of elected state officials with whom they do business).[33] Although Congress does not possess any freestanding authority to superintend state electoral processes, no principle of federalism bars Congress from *directly* regulating the financing of state electoral campaigns where such regulation is justified by a legitimate federal interest and is an otherwise appropriate exercise of one of Congress's Article I powers. There is consequently no basis for plaintiffs' contention that BCRA's *indirect* effects on the financing of state electoral campaigns render it an invalid means of safeguarding federal elections and preventing actual and apparent corruption of federal office-holders.

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[33] In *McCormick* v. *United States*, 500 U.S. 257 (1991), this Court considered the application to campaign contributions of the Hobbs Act, 18 U.S.C. 1951, an exercise of congressional authority under the Commerce Clause that makes it a federal crime to obstruct, delay, or affect interstate commerce by means of robbery or extortion. Although the Court rejected the application of the Hobbs Act to the facts before it, see 500 U.S. at 269-273, the Court held that the Act *does* prohibit a state elected official from

b. When an Act of Congress operates upon private parties rather than upon the States themselves, and when the law is reasonably designed to achieve a legitimate federal objective, its validity does not depend upon any balancing of state and federal interests. Indeed, even when Congress takes the more intrusive step of *preempting* state law, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U.S. 663, 666 (1962); see *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982) (relying on *Free* and explaining that the legal principles generally governing federal preemption of state law "are not inapplicable here simply because real property law is a matter of special concern to the States"). The challenged provisions of Title I do not even preempt state law, in the sense of precluding the States from enforcing their own restrictions on the financing of electoral campaigns. Rather, Title I (in common with a vast range of federal legislation) simply prohibits private conduct that some States have chosen to allow. Plaintiffs' contention that an Act of Congress may be declared invalid by reason of its asserted conflict with state policy choices turns the Supremacy Clause on its head. Cf. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990) (referring to "the truism that States may not pre-empt federal law").

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accepting campaign contributions "if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," *id.* at 273.

D. Title I Does Not Intrude Impermissibly Upon The Ability Of Political Party Committees To Associate And Interact With Each Other

Plaintiffs repeatedly contend (*e.g.*, RNC Br. 40; McConnell Br. 14, 16, 17) that various provisions of Title I unconstitutionally impede party committees from associating with each other in collaborative endeavors. That claim lacks merit. This Court's decisions make clear that the internal affairs of political parties are not altogether immune from reasonable government regulation, and BCRA places very modest restrictions on the freedom of political party committees to associate with each other through financial transactions.

1. This Court has rejected "the proposition that party affairs are public affairs, free of First Amendment protections." *California Democratic Party*, 530 U.S. at 573. The Court has recognized, however, that when a political party assumes an official role in the State's electoral machinery (as when the party's nominee is guaranteed a place on the ballot), it is typically subject to greater constraints than a political organization acting in a purely private capacity. The Court has "considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Id.* at 572 (quoting *American Party of Tex.* v. *White*, 415 U.S. 767, 781 (1974)).

2. Plaintiffs' characterizations of BCRA's effects on party committees' collaborative activities are substantially

overstated. Notwithstanding the McConnell plaintiffs' characterization of Title I as "pervasively regulating the relationships among party committees" (McConnell Br. 16), Title I does not restrict the ability of national and state party committees to coordinate strategy or to confer on spending priorities. It does not limit the amount of money that national party committees may disburse to state and local party committees: any and all funds lawfully acquired by a national party committee may legally be transferred to the party's state and local committees (although the Levin Amendment places some restrictions on the circumstances in which such transferred funds may be used, see pp. 49-51, *supra*). Title I also does not alter pre-existing provisions of federal law that facilitate cooperation between different committees of the same political party. See 2 U.S.C. 441a(a)(4) (FECA contribution limits "do not apply to transfers between and among political committees which are national, State, district, or local committees * * * of the same political party"); 11 C.F.R. 109.33(a) (authorizing national and state party committees to assign their authority to make coordinated expenditures to another political party committee).

E. Title I Does Not Violate The Political Parties' Rights Under The Equal Protection Component Of The Fifth Amendment Due Process Clause

The RNC (Br. 91-98) and McConnell (Br. 35-38) plaintiffs contend that BCRA's restrictions on national and state political party committees unconstitutionally discriminate against the parties and in favor of non-party interest groups. That claim lacks merit. Congress may legitimately determine that different types of organizations "require different forms of regulation in order to protect the integrity of the electoral process." *California Med. Ass'n*, 453 U.S. at 201. The FECA/BCRA regime affords political parties substantial advantages that are not available to other advocacy groups, while restricting the party fundraising practices that pose the greatest risk of actual or apparent corruption.

1. As the Court recognized in *Colorado II*, in many respects, FECA and BCRA treat political parties more favorably than other political committees. See 533 U.S. at 455. Both national and state party committees are permitted to receive contributions from individuals that substantially exceed the FECA limits on contributions to non-party political committees. See note 7, *supra*. Party committees are also permitted to make contributions to federal candidates, in the form of coordinated expenditures, in amounts much greater than the contribution limits that apply to other donors. See 2 U.S.C. 441a(d); *Colorado II*, 533 U.S. at 455 ("[A] party is better off [than individuals and PACs], for a party has the special privilege the others do not enjoy, of making coordinated expenditures up to the limit of" Section 441a(d)); note 11, *supra*. Committees of the same political party may transfer funds to each other without regard to the limits that otherwise govern contributions from one political committee to another. See 2 U.S.C. 441a(a)(4); p. 70, *supra*. Congress has also given national party committees a multimillion-dollar federal subsidy for their quadrennial conventions, see 26 U.S.C. 9008, a benefit that is not available to other entities. Those substantial advantages sharply undercut plaintiffs' equal protection claim. Compare *California Med. Ass'n*, 453 U.S. at 200-201.

2. In addition to the special privileges they enjoy, the parties' distinct role in electoral and governmental processes demands distinct treatment. "Political parties play a distinctive and in many ways privileged role. Other entities are not entitled to organize the slate of candidates presented to voters. Other entities do not organize legislative caucuses, assign committee chairs and members, or elect legislative leadership." D. Green Expert Report 8. A particular

Member of Congress may also be a member of the NRA or the Sierra Club, but his name does not appear on the election ballot as the nominee of such an organization, and his status and privileges within the legislature are not tied to the fortunes of any non-party advocacy group. See pp. 33-34, *supra*. The particular closeness of political parties to their office-holder members creates a heightened risk that a federal candidate will regard a large donation to the party as a direct benefit to himself, and may therefore be tempted to give undue weight to the interests of the donor. A majority of Congress, whose Members possess unique expertise in matters of this character, concluded that large soft-money donors to the parties had in fact acquired unwarranted influence over the legislative process and ultimately over legislative outcomes. That judgment is entitled to substantial deference, and it is supported by copious evidence showing that parties have offered and provided donors unique access to federal office-holders as a reward for large soft-money donations. See pp. 37-41, *supra*.

II. THE ELECTIONEERING-COMMUNICATIONS PROVISIONS OF TITLE II OF BCRA ARE CONSTITUTIONAL

The electioneering-communications provisions of Title II of BCRA are addressed to the second major problem that has developed in connection with federal elections over the past decade: the "spectacular rise" (Supp. App. 655sa (Kollar-Kotelly)) in candidate-centered issue advertisements that are paid for with general treasury funds amassed by corporations and unions and that are designed to influence federal candidate elections or likely to have that effect. The direct funding of such advertisements has escaped regulation under 2 U.S.C. 441b's longstanding prohibition on the use of a corporation's or union's treasury funds in connection with federal elections simply because the advertisements do not

contain express advocacy (*e.g.*, Vote for Jones), even though the advertisements are just as likely to influence federal candidate elections as advertisements that contain express advocacy. BCRA adjusts Section 441b to apply it to the funding of such candidate-centered issue advertisements—defined in BCRA § 201 as "electioneering communications." The district court invalidated BCRA § 201's primary definition of "electioneering communications," and BCRA § 203's source-of-funding limitation on the use of general treasury funds to finance such communications. Those rulings should be reversed.

A. BCRA's Electioneering-Communications Provisions Are A Natural Evolutionary Step In Congress's Longstanding Regulation Of Corporate And Union Electoral Spending

In analyzing challenges to campaign-finance laws, this Court is sensitive to the "historical prologue" of the provisions at issue. *FEC* v. *Beaumont*, 123 S. Ct. 2200, 2207 (2003); see *id.* at 2205-2207, 2210-2211 n.9; see also *United States* v. *Automobile Workers*, 352 U.S. 567, 570 (1957) (*UAW*) ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."). BCRA's electioneering-communications provisions are a natural and incremental outgrowth of the hallmark of federal campaign-finance regulation during the twentieth century: Congress's effort to curb the unique threat that treasury funds accumulated by corporations and labor unions with the help of their form present to the integrity of the federal electoral process.

1. *For Almost A Century, Congress Has Cautiously Regulated The Manner In Which Federal Political Activity May Be Financed By Corporations And Labor Unions*

a. As this Court emphasized in *Beaumont*, "[s]ince 1907, there has been continual congressional attention to corporate political activity." 123 S. Ct. at 2205; see *id.* at 2205-2207 & n.3; see also *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208-209 (1982) (*NRWC*); Supp. App. 15sa-38sa (per curiam); *id.* at 481sa-482sa (Kollar-Kotelly). That attention is a product of the unique "dangers posed by [corporations and labor unions] to the electoral process." *NRWC*, 459 U.S. at 209; see *Beaumont*, 123 S. Ct. at 2206; *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257-259 (1986) (*MCFL*); *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 500-501 (1985) (*NCPAC*); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981); *UAW*, 352 U.S. at 570-571. Indeed, federal campaign-finance regulation itself was borne of "a 'popular feeling' in the late 19th century 'that aggregated capital unduly influenced politics, an influence not stopping short of corruption.'" *Beaumont*, 123 S. Ct. at 2205 (quoting *UAW*, 352 U.S. at 570). And the concern that —if left unregulated—"corporate earnings" will be "conver[ted] into political 'war chests,'" *id.* at 2206, remains to this day one of the central fixtures of this Court's campaign-finance jurisprudence.

In particular the Court has stressed that the "state-created advantages" of the corporate form afford corporations "an unfair advantage in the political marketplace." *Austin*, 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 257). As the Court reiterated in *Beaumont*:

> State law grants corporations special advantages—such as limited liability, perpetual life, and the favorable treatment of the accumulation and distribution of assets —that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

123 S. Ct. at 2206 (quoting *Austin*, 494 U.S. at 658-659). "[T]he political advantage of corporations is unfair," the Court has explained, because "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas," but rather "reflect * * * the economically motivated decisions of investors and customers." *Austin*, 494 U.S. at 659; see *Beaumont*, 123 S. Ct. at 2206.[34]

The Court has recognized that labor organizations enjoy a similar advantage in terms of their capacity to influence federal elections with "aggregated wealth" that does not necessarily reflect the popularity of their political ideas. *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 416 (1972); see *NRWC*, 459 U.S. at 207-208; *UAW*, 352 U.S. at 585; *United States* v. *CIO*, 335 U.S. 106, 113 (1948).

b. Over the past 95 years, Congress has engaged in "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step," "to account for the particular legal and economic attributes of corporations and labor unions," *NRWC*, 459 U.S. at 209 (internal quotation marks omitted), and respond to the efforts of "candidates, donors, and parties [to] test the limits of the current law," *Beaumont*, 123 S. Ct. at 2207. Initially, in 1907, Congress made it unlawful for "any corporation whatever" to make "a money contribution" in connection with a federal election. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864. Then, over the next 40 years, Congress expanded the original prohibition on *money* contributions to include "*anything* of value," Federal Corrupt Practices Act of 1925, ch. 368, § 302(d), 43 Stat. 1071 (emphasis added); extended the coverage of the prohibition from corporations to labor unions, War Labor Disputes Act, ch. 144, § 9, 57 Stat. 167; and extended the prohibition on direct corporate and union contributions to include "expenditure[s]," Labor-Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 159; see also Supp. App. 22sa-23sa (per curiam) (discussing legislative history of Act).

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[34] Nonprofit corporations that qualify under Section 501(c)(4) of the Internal Revenue Code also receive a valuable subsidy in the form of an exemption from federal income taxation. See *Taxation with Representation*, 461 U.S. at 544; see also *Beaumont*, 123 S. Ct. at 2209 (noting the "powerful" political influence of "corporations that qualify for favorable tax treatment under § 501(c)(4)").

2 U.S.C. 441b, which Congress enacted in 1971, is "merely a refinement of this gradual development of the federal election statute." *NRWC*, 459 U.S. at 209. As discussed, that provision prohibits corporations and labor unions from making any contributions or expenditures in connection with federal elections, but permits such entities to participate in the federal electoral process through a separate segregated fund. See *id.* at 201; *Beaumont*, 123 S. Ct. at 2203-2204; 2 U.S.C. 441b(b)(2)(C); see also p. 4, *supra*.

c. As this Court recounted in *Beaumont*, the Court's "cases on campaign-finance regulation represent respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'" 123 S. Ct. at 2207 (quoting *NRWC*, 459 U.S. at 209-210). In *Beaumont*, the Court rejected a challenge brought by a nonprofit advocacy corporation to Section 441b's prohibition on contributions. 123 S. Ct. at 2203. In doing so, the Court emphasized that "[a]ny attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections,' which we have canvassed a number of times before." *Id.* at 2205 (quoting *AUW*, 352 U.S. at 585); see also *NRWC*, 459 U.S. at 209-211.

In *MCFL*, this Court held that Section 441b's prohibition on *independent expenditures* could not constitutionally be applied to a nonprofit corporation with three "essential" features: (i) "it was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (ii) it "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (iii) it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." 479 U.S. at 263-264. In so holding, the Court explained that corporations with those key features do not pose a sufficient "danger of corruption," in the context of regulating political expenditures, to justify the "regulation of corporate political activity" that the Court has upheld as to contributions. *Id.* at 259; see *id.* at 257-260.

In *Austin*, by contrast, the Court upheld the application of a state law limit on corporate independent expenditures—modeled on 2 U.S.C. 441b—to a nonprofit corporation that did not share the essential features of the corporation in *MCFL*. 494 U.S. at 654-655 & n.1. Although the Court recognized that *Buckley* had held unconstitutional a limitation on the independent election expenditures of *individuals*, see 424 U.S. at 47, the Court concluded that the equation was different in the case of *corporations*, given "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. Indeed, the Court held that the source-of-funding limitation on independent expenditures by corporations at issue in *Austin* passed strict scrutiny. *Id.* at 658-661.

Together, *Austin* and *MCFL* make clear that the Constitution permits source-of-funding limits on corporate expenditures in connection with candidate elections with respect to corporations that do not share the "crucial features" of the nonprofit corporation in *MCFL*. *Austin*, 494 U.S. at 662. Indeed, Justice Brennan—who authored the opinion for the Court in *MCFL*—joined the Court's decision in *Austin* and wrote a separate concurrence emphasizing that *MCFL* is limited to the unique type of nonprofit corporation in that case. See *id.* at 669-675.

Thus, even in the context of "independent campaign expenditures" entitled to the highest protection, *Austin*, 494 U.S. at 657, this Court's precedents establish that government has broad leeway to protect the federal electoral process from the potential corruption associated with the use of general treasury funds by corporations and labor organizations. In addition, the Court's decisions further recognize that Congress may require non-*MCFL* corporations and unions to take the relatively simple but nonetheless critical regulatory step of establishing and making independent election expenditures through a separate segregated fund, which also allows for disclosure without compromising the associational interests of the broader corporate entity.

2. *BCRA's Electioneering-Communications Provisions Were Enacted To Plug A Loophole In Existing Law That Has Been Exploited By Corporations And Unions*

The political marketplace has always shown extraordinary resilience in adapting to—and finding ways around—federal campaign-finance limits. As the record in this case amply demonstrates, Title II of BCRA was enacted in response to that same driving force. See Supp. App. 40sa (per curiam); see *id.* at 651sa (Kollar-Kotelly); *id.* at 1308sa (Leon); see also *Beaumont*, 123 S. Ct. at 2207 ("[E]xperience demonstrates how candidates, donors, and parties test the limits of the current law.") (internal quotation marks omitted).

a. FECA's general definition of "expenditure" includes the provision of "anything of value * * * for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). In *MCFL*, the Court construed 2 U.S.C. 441b so "that an expenditure must constitute 'express advocacy' in order to be subject to [its] prohibition." 479 U.S. at 249. The Court based that "construction" on a passage in *Buckley*, where the Court, in construing a different provision of FECA, "adopted the 'express advocacy' requirement to distinguish [for purposes of that provision] discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Ibid.* The *Buckley* construction read the relevant provision to apply "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' defeat,' 'reject.'" 424 U.S. at 44 n.52. Those phrases have been referred to as *Buckley*'s "magic words," because, under *MCFL*, 479 U.S. at 248-249, corporate- or union-funded communications that contain those words are subject to Section 441b's limitation.[35]

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[35] The FEC has promulgated a regulation that defines "express advocacy" in more flexible terms. 11 C.F.R. 100.22(b). Some lower courts have concluded that that regulation is invalid, reasoning that *MCFL* "engrafted *Buckley*'s 'explicit words of advocacy' limitation onto § 441b(a)," and that the lower courts are "bound by" that statutory construction. *Virginia Society for Human Life* v. *FEC*, 263 F.3d 379, 391-392 (4th Cir. 2001). At the same time, however, in response to the FEC's "powerful" argument concerning the need to construe the express-advocacy test in a manner that prevents circumvention of its requirements, the court of appeals in *Virginia Society* emphasized that neither this Court nor Congress was bound by *MCFL*'s construction of 2 U.S.C. 441b(a). *Ibid.* In Title II of BCRA, Congress took matters into its own hands.

b. In the wake of *MCFL*, corporations and labor unions began to circumvent the express-advocacy requirement and pour hundreds of millions of dollars in general treasury funds into candidate-centered advertisements that avoided words of express advocacy but were just as likely if not more likely to influence the outcome of federal candidate elections as advertisements that contained express advocacy. Significantly, although plaintiffs wage a multi-faceted attack on the solution that Congress devised, they do not deny the powerful forces that led to its enactment.

i. "Approximately ten years after *MCFL*, during the 1996 election cycle, corporations and labor unions began aggressively to use general treasury funds to pay for 'issue advocacy' campaigns that avoided express advocacy but were designed to influence federal elections." Supp. App. 652sa (Kollar-Kotelly); see *id.* at 652sa-658sa (detailing "spectacular rise in candidate-centered issue advertising"); *id.* at 1306sa-1308sa (Leon) (same); see also *id.* at 39sa (per curiam) (noting "widespread" use of such issue advocacy).

For example, the evidence shows an escalating cycle of activity. During the 1995-1996 election cycle, about $135 to $150 million was spent by organizations on multiple broadcasts of about 100 separate issue advertisements; during the 1997-1998 election cycle, about $250 to $340 million was spent by 77 organizations on broadcasts of 423 separate issue advertisements; and during the 1999-2000 cycle, more than $500 million was spent by 130 groups on 1100 separate issue advertisements. See Supp. App. 655sa (Kollar-Kotelly); *id.* at 806sa-807sa; *id.* at 1306sa (Leon). Plaintiffs' "own expert readily concede[d] that the number of organizations sponsoring issue advertisements has 'exploded' over the past three election cycles." *Id.* at 807sa (citing La Raja testimony).

That trend is not happenstance. It is "uncontroverted that * * * by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits." Supp. App. 657sa-658sa (Kollar-Kotelly); see *id.* at 664sa-668sa (explaining why "express advocacy" is an "ineffective criteri[on] for distinguishing between genuine issue advertisements and advertisements that do not use express advocacy but are designed to influence a federal election"); see *id.* at 1299sa-1306sa (Leon).

As Judge Kollar-Kotelly explained, "[t]he record persuasively demonstrates that corporations and unions routinely seek to influence the outcome of federal elections with general treasury funds by running broadcast advertisements that skirt the prohibition contained in section 441b by simply avoiding *Buckley*'s 'magic words' of express advocacy." Supp. App. 778sa; see *id.* at 814sa-821sa (discussing evidence). Judge Leon similarly observed that, "Congress concluded, and the record more than adequately demonstrates, that in the twenty-eight years since *Buckley*, corporations, unions, and interest groups, have increasingly affected federal elections by funding out of their general treasuries uncoordinated 'issue ads' that either they, or a political party, ran in the months leading up to an election" and that "avoid regulation as express advocacy." *Id.* at 1160sa (record citations omitted); see *id.* at 1315sa-1325sa (discussing evidence); *id.* at 106sa (per curiam).

A side by side comparison of two advertisements that were broadcast in 2000 by the NRA—whose Executive Vice President acknowledged that the NRA "spent what it took to defeat Al Gore" in 2000, Supp. App. 694sa (Kollar-Kotelly) (quoting LaPierre testimony)—illustrates the ease with which Section 441b was circumvented by corporations and unions. One advertisement was paid for by the NRA's PAC and the other by the NRA's general treasury. Both advertisements clearly identify Al Gore, are nearly identical in their content, and would in all likelihood have the same influence on the Presidential election in the districts in which the advertisements were run. The only significant difference between the advertisements is that the tag line at the end of the advertisement paid for by the PAC says "Vote George W. Bush for President." *Id.* at 695sa-696sa (comparison).[36]

ii. The express-advocacy test is not only easy to circumvent, but it does not accurately identify communications designed to affect candidate elections. Even when they are overtly designed for electioneering, "the overwhelming majority of modern campaign advertisements do not use words of express advocacy, whether they are financed by candidates, political parties, or other organizations." Supp. App. 658sa (Kollar-Kotelly); see *id.* at 1296sa (Leon) ("The record convincingly demonstrates that the overwhelming majority of modern political advertisements do not use words of express advocacy."). Indeed, "[t]he uncontroverted testimony of political consultants demonstrates that it is neither common nor effective to use the 'magic words' of express advocacy in campaign advertisements." *Id.* at 659sa (Kollar-Kotelly); see also *id.* at 659sa-664sa (discussing evidence); *id.* at 808sa-809sa.

As one political consultant explained, "[i]n the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.'" Supp. App. 809sa (Kollar-Kotelly) (quoting Bailey testimony). The record confirms that observation by showing that even candidates—who have no financial or regulatory incentive to do so—typically avoid express advocacy. "The unrebutted expert testimony demonstrates that only 11.4 percent of advertisements purchased by federal candidates that aired during the 2000 election cycle would qualify as electioneering under the 'magic words' test." *Id.* at 808sa (Kollar-Kotelly). Present and former office-holders and candidates likewise confirmed that the express-advocacy test, as one Senator put it, "has no real bearing in today's world of campaign ads." *Id.* at 665sa (quoting 147 Cong. Rec. S3036 (daily ed. Mar. 28, 2001) (statement of Sen. McCain)); see *id.* at 665sa-668sa, 813sa-814sa.

Accordingly, prior to BCRA, federal law (2 U.S.C. 441b) prohibited corporations and unions from using their general treasury funds to pay for electioneering advertisements that contained express advocacy, but left them free to spend their treasuries on electioneering advertisements that are considered by candidates and political consultants to be if anything *more* effective in influencing elections because they do *not* contain express advocacy. As discussed above, corporations and unions not only have taken note of that loophole, but they have in each of the past few federal election cycles funneled increasing amounts of their general treasury funds into federal elections *through* that loophole.

iii. The record establishes that federal office-holders and candidates are aware of and feel indebted to corporations and unions that finance electioneering advertisements on their behalf or against their opponents. See Supp. App. 836sa-837sa (Kollar-Kotelly). For example, the evidence shows that "Members of Congress seek to have corporations and unions run these advertisements on their behalf"; "corporations and labor unions target[] particular federal candidates or their opponents" for electioneering advertisements; and "candidates are very appreciative of the additional electioneering support provided on their behalf from the general treasuries of corporations and labor unions." *Id.* at

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[36] Numerous other examples are contained in the record and underscore the efforts of many of the plaintiffs in this case to circumvent the express-advocacy test. See Supp. App. 678sa-685sa, 693sa-697sa (Kollar-Kotelly) (discussing, *inter alia*, AFL-CIO's and NRA's use of issue advertisements to engage in electioneering). In addition, defendants filed a video presentation in the district court that contains examples of advertisements run in connection with recent elections and demonstrates how advertisements that do not trigger the express-advocacy test may nonetheless have virtually the same effect on an election.

837sa-838sa; see also *id.* at 708sa-719sa (discussing evidence). Former officer-holders and candidates confirmed that they "are very aware of who ran advertisements on their behalf and feel indebted to those who spend money to help get them elected." *Id.* at 711sa.[37]

Equally problematic is the specter of corruption associated with such advertisements. "[A] large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these [entities]." Supp. App. 837sa (Kollar-Kotelly); see *id.* at 713sa-714sa (discussing record).

c. Congress responded to those phenomena by enacting Title II of BCRA. See Supp. App. 482sa-483sa & n.1 (Kollar-Kotelly) (legislative history of BCRA); *id.* at 674sa-675sa. As discussed above, Title II adjusted the longstanding prohibition on the use of corporate and union general treasury funds in connection with a federal election to cover "electioneering communications," as defined in BCRA § 201, that in all likelihood, based on the presence of certain objective factors, will affect the outcome of federal elections, even if they do not contain particular words of express advocacy. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. 441b(b)(2). BCRA left in place the FECA provisions that permit a corporation and labor union to establish a separate segregated fund, which in turn may make contributions and independent expenditures and, in particular, pay for "electioneering communications." Congress also updated the disclosure requirements for entities that make electioneering communications and individuals or entities that contribute to such entities, so

that the electorate will know what interests are funding which candidates and will be able to make more informed predictions about future performance. See Part II.D, *infra.*

B. BCRA's Source Limitation On Electioneering Communications Is Narrowly Tailored To Advance Public Interests That This Court Has Repeatedly Recognized As Compelling

This Court has held that "independent campaign expenditures constitute 'political expression'" entitled to the highest constitutional protection. *Austin*, 494 U.S. at 657. In reviewing plaintiffs' challenge to the constitutionality of BCRA's electioneering-communications provisions, the Court must therefore decide whether those provisions are narrowly tailored to advance a compelling government interest. See *id.* at 658-661. This Court's prior precedents bear strongly on that determination.

The Court has repeatedly recognized that by limiting electioneering activity to a separate segregated fund, the campaign-finance laws by no means impose a "complete ban" on such activity. *Beaumont*, 123 S. Ct. at 2211; see *Austin*, 494 U.S. at 660. Moreover, *Austin* and *MCFL*, discussed *supra*, establish that the existing prohibition in Section 441b on the *direct* funding of corporate and union independent expenditures in connection with federal elections—including for express advocacy—passes strict scrutiny for non-*MCFL* corporations. Congress's adjustment of Section 441b to cover corporate or union disbursements for "electioneering communications" that meet BCRA's primary definition—political activity entitled to no more protection under the First Amendment than the expenditures long regulated by that provision—passes strict scrutiny too. Indeed, the record compiled in this case supporting Congress's judgment with respect to the need for that limitation dwarfs the showing that this Court found sufficient in upholding the source limitation on expenditures in *Austin*. See 494 U.S. at 660.

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[37] See also Defs.' D. Ct. Opening Br. 41-42, 45 (discussing evidence showing that certain organizations sought credit from Members of Congress for broadcasting election-related advertisements).

1. *BCRA's Electioneering-Communications Provisions Advance Several Compelling Government Interests*

a. The Court has long recognized that the interest in protecting federal elections from real or apparent corruption is "of the highest importance." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 788-789 (1978); see *id.* at 788 n.26 ("The importance of the governmental interest in preventing [corruption] has never been doubted."); *NCPAC*, 470 U.S. at 496-497 ("preventing corruption or the appearance of corruption are * * * compelling government interests"); *Buckley*, 424 U.S. at 27. Such corruption "directly implicate[s] the 'integrity of our electoral process,'" *NRWC*, 459 U.S. at 208 (quoting *UAW*, 352 U.S. at 570), and thus strikes at the foundation of American democracy.

BCRA's source-of-funding limitation on electioneering communications protects against the same "type of corruption" that this Court identified in *Austin—i.e.*, "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660; see *ibid.* ("[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures"). In addition, the government has a related but equally important interest in "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208; see *Austin*, 494 U.S. at 660; *Beaumont*, 123 S. Ct. at 2206.

In *Austin*, this Court held that a State's effort to address those forms of corruption supplied "a sufficiently compelling rationale to support its restriction on independent expenditures by corporations," emphasizing that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." 494 U.S. at 660. BCRA's source limitation on the financing of electioneering communications directly advances the same "compelling" interest identified in *Austin* by requiring corporations and unions to finance electioneering communications through a separate segregated fund that consists of contributions from individuals who choose to fund such political activity, as opposed to general treasury funds that are accumulated as a result of the benefits of the corporate form and may or may not correlate with public support for the corporation's or union's political activity. See *id.* at 660-661.

The NRA argues (Br. 20) that "[t]he specific danger identified in *Austin* * * * has no application to speech by nonprofit membership organizations that are devoted to the advancement of specific rights and ideas and are funded almost exclusively by the dues and donations of individual members." That argument, however, is fully answered by this Court's decision to exempt *MCFL* corporations, but only *MCFL* corporations, from Section 441b's corporate expenditure restrictions. In *Austin*, this Court rejected the argument that the rationale of *MCFL* should be extended to nonprofit corporations that do not share MCFL's "crucial features," let alone to traditional for-profit corporations. 494 U.S. at 662.

In another case, the NRA successfully contended that it qualified as an *MCFL* corporation in certain years, while the FEC took a different view. See *FEC* v. *National Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001). This wide-ranging case is hardly a proper vehicle for the Court to resolve that entity-specific issue. Suffice it to say that if the NRA can demonstrate that it is an *MCFL* corporation, then its concerns about applicability of *Austin*'s distortion rationale to it will be addressed. But, in any event, especially in light of the potential availability of *MCFL*'s safe harbor, those concerns provide no basis for invalidating BCRA's electioneering-communication provisions on their face.[38]

b. The Court has stressed that the government also has a compelling interest in insulating federal elections from the type of corruption arising from the real or apparent creation of political debts. See *NRWC*, 459 U.S. at 207-208. The Court has repeatedly recognized that that interest is directly served by Section 441b's limitation on corporate and union campaign *contributions*. See *Beaumont*, 123 S. Ct. at 2207; *NRWC*, 459 U.S. at 207. In *NCPAC*, the Court held that the danger of such real or apparent quid pro quo corruption was not sufficient to justify a limit on independent expenditures that applied, *inter alia*, to unincorporated groups and to PACs not connected to a corporation. See 470 U.S. at 496, 500-501; see *id.* at 496 (recognizing that Court did not "need to reach * * * the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office"). In *Austin*, however, this Court specifically recognized "that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by *corporations* to influence candidate elections." 494 U.S. at 659 (emphasis added); see *Bellotti*, 435 U.S. at 788 n.26.

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[38] The NRA itself agreed in the district court to "stay any as-applied challenge [it] had against BCRA under *MCFL* until the Supreme Court resolved the merits of Plaintiffs' challenge to BCRA." Supp. App. 833sa (Kollar-Kotelly). Any nonprofit corporation, especially the NRA in light of its agreement, that believes it is entitled to exemption under *MCFL* should be required to litigate that claim on an as-applied basis in a different case if the FEC disputes the issue. See *id.* at 871sa.

Although the Court did not need to reach the issue in *Austin*, see 494 U.S. at 659-660, and it need not do so here in light of the fact that Title II of BCRA directly advances the government's compelling interest in eliminating the specific type of corruption identified and relied on in *Austin*, the record in this case nonetheless demonstrates a sufficient risk of real or apparent quid pro quo corruption to justify Congress's judgment that corporations and unions should be prevented from using general treasury funds to finance "electioneering communications." See Supp. App. 835sa (Kollar-Kotelly) ("The record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting."); *id.* at 708sa-718sa, 835sa-838sa; *id.* at 1161sa-1162sa & n.117 (Leon) (reaching same conclusion); pp. 83-84, *supra*.

NRA states that "gratitude for political support is not corruption." NRA Br. 17 (heading); see *id.* at 17-19. But gratitude for political support in the form of *contributions* directly from a corporate or union treasury has long been viewed as corruption, as has gratitude for political support in other forms. See Part I.A, *supra*. The record in this case confirms Congress's judgment that further adjustment of Section 441b was needed to eliminate the fact or expectation of a candidate's political indebtedness stemming from the use of corporate and union treasury funds to broadcast electioneering communications clearly targeted to support a particular candidate or attack his opponent. Even the appearance of such corruption is sufficient to justify Congress's enactment of Title II, regardless of whether federal officeholders who have benefitted from those advertisements in fact have responded with political favors.

c. Finally, the government has a compelling interest in preventing the circumvention of existing statutory limits.

See *Beaumont*, 123 S. Ct. at 2207; *Colorado II*, 533 U.S. at 457; *California Med. Ass'n*, 453 U.S. at 198-199. As discussed above, despite the longstanding federal policy against the use of corporate and union general treasury funds to influence federal elections, corporations and unions have poured hundreds of millions of dollars into federal elections since at least 1996 in the form of broadcast advertisements that do not trigger *Buckley*'s express-advocacy requirement but nonetheless have essentially the same influence on elections as advertisements whose direct funding would be proscribed by Section 441b if they contained the requisite words of express advocacy. See pp. 80-82, *supra*.

Congress's compelling interest in preventing the evasion of existing limits is all the more compelling when, as here, the record demonstrates that those limits are practically illusory and other political actors have demonstrated that the preexisting limits no longer accurately delimit core electioneering expenditures. In light of the hundreds of millions of dollars spent by corporations and unions on advertisements virtually indistinguishable from electioneering advertisements funded by *candidates themselves*, see pp. 82-83, *supra*, Congress clearly needed to update the limits on corporate and union expenditures to prevent the evasion of the longstanding policy embodied in Section 441b.

2. *BCRA's Electioneering-Communications Provisions Are Narrowly Tailored To Advance A Compelling Government Interest*

BCRA's source-of-funding limitation on "electioneering communications," as defined in BCRA § 201, is narrowly tailored to achieve the compelling government interests discussed above. Indeed, here, as in *Austin*, that source limitation on expenditures is carefully "targeted" to eliminate the particular threats of corruption and circumvention to which the limitation is aimed, and yet still allows corporations and

unions "to express their political views" in the form of electioneering communications through a separate segregated fund. 494 U.S. at 660. Any contrary conclusion would impose an unattainable legislative burden on Congress in seeking to close the enormous loophole discussed above, see pp. 80-82, *supra*, the existence of which is not even controverted by plaintiffs.

a. BCRA's primary definition of "electioneering communications" (§ 201) is clear and objective. An advertisement falls within the definition only if it satisfies four criteria. First, it must be distributed by broadcast, cable, or satellite —*i.e.*, television or radio. Second, it must refer to "a clearly identified candidate for Federal office." Third, it must be distributed within 60 days before a general election or 30 days before a primary election. Fourth, it must be "targeted" to the identified candidate's electorate, *i.e.*, the advertisement must reach at least 50,000 voters in the relevant district or State in an election for the House of Representatives or the Senate. See BCRA § 201(a); FECA § 304(f)(3)(A).[39]

In defining the "electioneering communications" subject to BCRA's source limitation Congress thus established a bright-line, readily administrable test that avoids the pitfalls that this Court identified in *Buckley*. See 424 U.S. at 42-43 (discussing the problems in attempting to distinguish between advertisements based on subjective and manipulable inquiries such as the intent of speakers or understanding of listeners). The remarkable clarity of that definition is exemplified by the fact that, notwithstanding the numerous challenges raised in this litigation, none of the plaintiffs has seriously argued that the primary definition of electioneering communications is in any way vague. See Supp. App. 800sa (Kollar-Kotelly); *id.* at 801sa-803sa.

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[39] In addition, Congress further narrowed the definition of "electioneering communications" by explicitly exempting certain additional communications, including those appearing within a news story or editorial. See BCRA § 201(a); FECA § 304(f)(3)(B); see also Supp. App. 841sa-843sa (Kollar-Kotelly).

As explained below, in challenging the primary definition of "electioneering communications," plaintiffs attempt to show that the definition captures at least some so-called "genuine" issue advertisements that—even though they clearly identify a federal candidate and are broadcast in the time frame and place in which they are most likely to influence a candidate's election—purportedly are not designed to influence electoral outcomes. That challenge fails, for the reasons explained below. At the outset, however, it is significant to note that because of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly not interested in airing electioneering communications may easily avoid the source limitation on such communications by simply not referring to a candidate for federal office, running the advertisement outside the 30- or 60-day window, or running the advertisement outside the candidate's district. The clarity with which Congress defined "electioneering communications" therefore itself has considerable constitutional virtue from the standpoint of entities interested in communicating only about genuine issues, and not in influencing the election of particular candidates.

b. Congress—whose Members are the central participants in the scheme regulated by BCRA—is uniquely positioned to identify the factors that separate communications that are intended to influence the outcome of their elections and communications that are simply intended to promote debate on particular issues. BCRA's objective factors are each carefully calibrated to prevent corporations and unions from circumventing Section 441b's source prohibition on election-related expenditures by using general treasury funds to broadcast advertisements that do not trigger the express-advocacy test but nonetheless will in all likelihood have the effect of influencing federal candidate elections. While "genuine" issue advocacy can readily be accomplished in a manner that does not trigger Title II of BCRA, BCRA § 201's definition makes it very difficult for "sham" issue advocacy to circumvent Title II.

i. BCRA § 201's definition of "electioneering communications" is limited to advertisements distributed by broadcast, cable, or satellite (*i.e.*, television and radio). The record demonstrates that those media are the most common media in which advertisements seeking to influence elections have been distributed by corporations and unions because those media reach the largest audience and are considered to be the most effective means of communicating an electioneering message. See Supp. App. 736sa-743sa (Kollar-Kotelly). As one political communications consultant testified, "among the various media outlets 'for conveying [the NRA's] message, the most powerful is the use of "paid broadcast media," which simply refers to paid media that is broadcast over network, cable, or satellite television, or over radio.'" *Id.* at 739sa (McQueen testimony).

ii. The definition applies only to advertisements that refer to "a clearly identified candidate for Federal office." Not surprisingly, the unrebutted evidence shows that "most advertisements designed to influence federal elections refer to a federal candidate." Supp. App. 847sa & n.129 (Kollar-Kotelly); see *id.* at 719sa-725sa, 845sa-846sa. Federal officeholders confirmed that fact. *Id.* at 668sa. Conversely, the uncontroverted evidence also shows that it is not necessary to refer to "specific candidates for federal office in order to create effective [issue] ads.'" *Id.* at 846sa (Bailey testimony). Furthermore, an advertisement that clearly refers to a candidate for federal office, as opposed to one that simply discusses an issue (without referring to a candidate), creates a greater risk of an appearance of corruption because the public is more likely to perceive that a candidate will become indebted to a corporation or union that buys advertising that clearly identifies him or his opponent.

iii. The timing requirement is also directly tied to Congress's objective of capturing advertisements that are likely to influence the outcome of federal elections. The record "overwhelmingly demonstrate[s] the appropriateness of BCRA's sixty and thirty day benchmarks," and confirms with remarkable clarity the common-sense conclusion "that issue advertisements aimed at influencing federal elections are aired in the period right before an election." Supp. App. 725sa-728sa, 847sa-848sa (Kollar-Kotelly) (discussing evidence); see *id.* at 851sa ("The sixty and thirty-day figures are not arbitrary numbers selected by Congress, but appropriate time periods tied to empirically verifiable data.").

iv. The definition of "electioneering communications" is further tailored by focusing only on advertisements that are targeted to the relevant electorate of the candidate identified in the advertisement. In particular, with respect to advertisements run in connection with elections for the House of Representative and the Senate, an advertisement that mentions a candidate and is run in the period before the election does not constitute an "electioneering communication" unless 50,000 or more individuals in the candidate's district or State may receive the communication. See BCRA § 201(a); FECA § 304(f)(3)(C); 2 U.S.C. 434(f)(3)(C). That criterion, too, is significant because, as Judge Kollar-Kotelly explained, "[b]roadcast advertisements that target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude." Supp. App. 854sa.

c. In short, BCRA's primary definition of "electioneering communications" targets advertisements that are run in the most effective communications media for reaching voters (broadcast); are clearly associated with a particular federal candidate (by identifying a candidate or his opponent); and

are run during the period and in the place where they are most likely to be perceived by voters and candidates as relating to an upcoming candidate election (shortly before the election and in the candidate's own district). So, for example, the NRA can freely finance anywhere and anytime broadcast advertisements trumpeting the Second Amendment that do not refer to a particular candidate; it can freely complain about a particular Senator's crusade against gun rights without limitation in election cycles in which he does not stand for reelection and in 49 States even when he does run; and if it wants to complain about the Senator to his voters in the critical days before his election in a broadcast advertisement, it still may do so—it simply must act through a separate segregated fund.[40]

Zeroing in on advertisements that meet BCRA § 201's criteria directly advances each of the compelling government interests discussed above. First, it prevents corporations from deploying funds amassed with the benefit of the corporate form to broadcast advertisements that are designed to or will influence candidate elections, but yet do not necessarily correlate with public support for the corporation's political ideas. Second, it eliminates the danger—demonstrated by the record in this case—that candidates who benefit from advertisements that clearly identify them or their opponents and that are run at the most critical junctures of their campaigns will become indebted to the corporations and unions that pay for those advertisements, or that the public will perceive such indebtedness. Third, it prevents corporations and unions from circumventing the federal policy embodied in Section 441b by funding advertisements that do not contain express advocacy but yet are virtually indistinguishable from most *candidate*-funded advertisements and thus presumably are designed to have the same influence on the election of candidates.

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[40] In addition, the NRA may run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund.

Because BCRA's source limitation on "electioneering communications" (BCRA § 201) is narrowly tailored to advance a compelling government interest, it is constitutional. In at least two important respects, that conclusion follows directly from this Court's precedents. First, this Court has held that a general prohibition on the use of a corporation's general treasury funds to make political expenditures survives strict scrutiny. The expenditures at issue in this case are entitled to no greater protection than the expenditures at issue in *Austin*, and the record demonstrating the need to limit those expenditures is much stronger here than in *Austin*. Second, this Court has recognized that Section 441b may be applied to corporate and union spending on advertisements that are intended to influence federal elections if they expressly advocate for or against a candidate. BCRA § 201's definition of "electioneering communications" is carefully calculated to regulate candidate-centered advertisements that are likely to have the same effect on the outcome of federal candidate elections but just avoid the magic words.

C. Plaintiffs' Challenges To BCRA's Source-Of-Funding Limitation Should Be Rejected

Neither plaintiffs nor the district court has provided any reason for this Court to reach a different conclusion in reviewing BCRA's source-of-funding limitation on electioneering communications.

1. *BCRA's Source-Of-Funding Limitation On Electioneering Communications Does Not "Ban" Any Speech Whatever*

a. In attacking Title II, plaintiffs greatly exaggerate its effect, going so far as to argue that BCRA's source limitation on the *funding* of electioneering communications actually "bans" speech. NRA Br. 3; ACLU Br. 2-3; see also McConnell Br. 38 ("draconian restrictions"); Business Pls. Br. 5 ("sweeping ban"). As the district court recognized, that argument is refuted by this Court's decisions. See Supp. App. 62sa (per curiam). As this Court reiterated in June, Section 441b—which Congress amended in enacting Title II of BCRA—does not "ban" any speech, but instead merely limits the manner in which a corporation or labor union may *finance* certain speech. See *Beaumont*, 123 S. Ct. at 2211 ("NCRL is simply wrong in characterizing § 441b as a complete ban."); accord *Austin*, 494 U.S. at 660; *NRWC*, 459 U.S. at 201; *MCFL*, 479 U.S. at 255; *Pipefitters*, 407 U.S. at 416-418. Thus, to be clear, corporations and labor unions are "free to fund as many [electioneering communications covered by BCRA § 201] as they desire from their separate segregated fund." Supp. App. 792sa n.113 (Kollar-Kotelly).[41]

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[41] The Business Plaintiffs proclaim (Br. 5) that, "[i]ncredibly, BCRA would forbid corporations to so much as mention President Bush, Vice President Cheney, or their Democratic rivals in broadcasts on the major television or radio stations in Washington, D.C., New York City, St. Louis, Chicago, and elsewhere during much of 2004!" In fact, the Business Plaintiffs may air all the electioneering communications that they would like during 2004 or any other election cycle by simply establishing a separate segregated fund and financing the communications with money from that fund as opposed to their general treasuries. In addition, the FEC has promulgated a regulation providing that the geographic and time limits of BCRA § 201 apply separately leading up to presidential primaries in each individual State. 11 C.F.R. 100.29(b)(3)(ii). And of course, under FECA, the Business Plaintiffs have for decades been required to fund advertisements that expressly advocate for a candidate through a PAC.

As this Court recognized in *Beaumont*, 123 S. Ct. at 2203, although it must register and disclose its activities, such a separate segregated fund, or PAC, "may be wholly controlled by the sponsoring corporation, whose employees and stockholders or members generally may be solicited for contributions." 123 S. Ct. at 2203-2204; see *NRWC*, 459 U.S. at 200 n.4, 201. Moreover, far from simply requiring "an act of institutional ventriloquism," NRA Br. 25, "[t]he PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure without jeopardizing the associational rights of advocacy organizations' members." *Beaumont*, 123 S. Ct. at 2211 (citations omitted); see also *California Med. Ass'n*, 453 U.S. at 196.[42]

b. The NRA argues (Br. 25) that requiring it "to speak through its PAC will necessarily reduce the collective voice of its four million members to a whisper." But the NRA is free to solicit funds from its members, see 2 U.S.C. 441b(b)(4)(C); this Court has recognized that nonprofit advocacy organizations such as the NRA are quite adept in amassing such funds, see *Beaumont*, 123 S. Ct. at 2209-2210 & n.6; and, indeed, in 2000, the NRA's separate segregated fund spent almost $17 million to influence federal elections. See <<http://www.fec.gov/press/053101pacfund/tables/pacdis00.htm.>>; see also *NCPAC*, 470 U.S. at 493 (discussing influence of other nonprofit PACS). Nor, as plaintiffs suggest, can the costs of establishing a separate

segregated fund be overstated, as not just the NRA but every nonprofit corporation whose challenge this Court has reviewed, including MCFL, has established such a fund.

Moreover, organizations such as the NRA should not be allowed to have it both ways. If they are really so pervasively political that the establishment of a separate segregated fund would be superfluous, then contributions to an expressly political fund will not dry up and reduce their voice to a "whisper." NRA Br. 25. To the extent that the members of an organization such as the NRA decline to contribute money to a separate fund devoted to electioneering activities, that only underscores that some members may look to the organization for non-political benefits and thus highlights the concern—which the Court reiterated in *Beaumont*—that some corporations may seek to exploit the advantages of the corporate form and amass wealth for the purpose of exerting political influence that is "quite possibly at odds with the sentiments of some shareholders or members." 123 S. Ct. at 2211.

c. In addition to the option of acting through a separate segregated fund, individuals who are affiliated with corporations or labor unions remain free to use their own funds for electioneering communications. Cf. *Beaumont*, 123 S. Ct. at 2210 n.8 ("A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information."). The "First Amendment speech and association interests" of corporations and labor unions "are derived largely from those of their members and of the public in receiving information." *Ibid.* (citing *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-459 (1958), and *Bellotti*, 435 U.S. at 777). The First Amendment interests of corporations and labor unions to finance electioneering communications from funds amassed in their general coffers are thus necessarily limited by the fact that the individuals who own and operate those entities are free to fund and otherwise engage in such speech without restriction.

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[42] What is more, corporations that meet the requirements of the exception established by this Court in *MCFL* (see 479 U.S. at 263-264) may engage in *unlimited* independent spending in connection with federal elections—including with respect to making electioneering communications—without even having to form and operate through a separate segregated fund. See p. 77, *supra*.

In a similar vein, this Court has observed that, "[i]n return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals." *NCPAC*, 470 U.S. at 495. The Court in this case should reject plaintiffs' demands that they are in effect entitled under the Constitution to the best of both worlds—the special advantages of the corporate form, *plus* the freedom to finance electioneering communications without having to take the minimal—but for the sake of preventing corruption vital—step of doing so through a separate segregated fund.

d. Finally, the separate segregated fund option reinforces the narrow tailoring of BCRA's limitations on funding "electioneering communications" in yet another dimension. To the extent that corporate or union funds are spent on electioneering communications, there is a legitimate interest in public disclosure of the individuals who are behind that electioneering activity. Requiring disclosure of a corporation's—and especially a nonprofit organization's—membership list, however, risks associational freedoms. Accordingly, as this Court in *Beaumont* recognized, the use of separate segregated funds furthers associational freedoms by allowing for disclosure of the funding sources of political activity without necessitating disclosure of an organization's underlying membership. See 123 S. Ct. at 2211. Indeed, many nonprofit corporations would presumably voluntarily adopt an arrangement similar to the separate segregated fund to protect their members' associational interests. That fact only underscores that the costs of a segregated-fund option are minimal and the option to operate through such a fund is a uniquely tailored response to the challenges of regulating corporate and union electioneering.

2. ***Neither* Buckley *Nor* MCFL *Adopted The Express-Advocacy Test As An Absolute Limit On Congress's Authority***

Plaintiffs suggest that *Buckley* and *MCFL* erected an inalterable First Amendment rule "that the government may constitutionally regulate only independent expenditures for speech expressly advocating the election or defeat of a candidate, known as 'express advocacy.'" McConnell Br. 40; see *id.* at 12, 40-45; ACLU Br. 25-33. The district court properly rejected that argument. See Supp. App. 782sa, 788sa-799sa (Kollar-Kotelly); *id.* at 1147sa (Leon).

Certainly nothing in *Buckley* imposes such a categorical constitutional restraint on Congress's "well-established" authority to regulate federal elections. 424 U.S. at 13. In adopting an express-advocacy requirement, the Court in *Buckley* was not expounding on such first principles; it was resolving plaintiffs' argument that the former 18 U.S.C. 608(e)(1)'s use of the phrase "relative to" was "unconstitutionally vague." 424 U.S. at 40-41.

In the key passage of the opinion, the Court explained that "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." *Buckley*, 424 U.S. at 41. After concluding from the statutory context that "the phrase 'relative to' a candidate [should] be read to mean 'advocating the election or defeat of' a candidate," the Court observed that the distinction drawn by the statute "between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42. Therefore, "in order to preserve the provision against invalidation on vagueness grounds," the Court held that "§ 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44 (emphasis added). In an accompanying footnote, the Court further opined that "[t]his construction would restrict application of § 608(e)(1) to communications containing [certain specified] express words of advocacy." *Id.* at 44 n.52.

MCFL confirms that reading of *Buckley*. In that case, the Court was required to construe the meaning of Section 441b's "definition of an expenditure," and in particular "the phrase 'to any candidate . . . in connection with any election.'" 479 U.S. at 248. Relying on *Buckley*, the plaintiff argued that that definition "necessarily incorporate[d] the requirement that a communication 'expressly advocate' the election of candidates." *Ibid.* The Court agreed with the plaintiff that Section 441b's definition of expenditure "require[d] a similar *construction*" as the similar phrase at issue in *Buckley*. *Id.* at 249 (emphasis added). But here again, in adopting that "construction," the Court in no way laid down the express-advocacy requirement as an absolute constitutional barrier on how far Congress may go in regulating such expenditures when, as in BCRA, it chooses to do so in more specific terms.

When the Court adopts a saving construction of a statute that is amenable to such a construction, the Court by no means forecloses Congress from devising a different or more carefully targeted legislative solution to a problem. Cf. *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 374 (1971) (plurality). Indeed, the whole point of the avoidance cannon is that it *avoids* the need to fix the constitutional line definitively in circumstances in which Congress may not have intended to implicate a constitutional question. If Congress later clarifies its intent, then, and only then, is the constitutional issue ripe for adjudication. That is particularly true when, as here, Congress revisits an area to devise a solution to a problem that has developed in the decades since this Court adopted a saving construction of a different statutory provision in a prior case.

At the same time, it would be bizarre to conclude that the Constitution permits Congress to prohibit the use of corporate or union general treasury funds for electioneering advertisements, but that the *only* standard that it can constitutionally use (express advocacy) is one that misses the vast majority (88.6 percent) of advertisements that candidates themselves use for electioneering. See pp. 82-83, *supra*. That uncontroverted evidence strongly indicates that express advocacy is not an accurate proxy for identifying advertisements that are designed to influence elections or will have that effect, much less a standard that—as plaintiffs argue—is constitutionally enshrined. More to the point, nothing in *Buckley* or *MCFL* consigns Congress—or this Court—to such an impractical and inflexible constitutional rule.

3. *The Primary Definition Of "Electioneering Communications" Is Not Overbroad*

Plaintiffs argue that BCRA's primary definition of "electioneering communications" is unconstitutionally overbroad. See McConnell Br. 50; NRA Br. 33. But to the extent that the doctrine of overbreadth applies at all in the circumstances here, plaintiffs have not met the heavy burden necessary to justify facial invalidation of Title II.

a. "[O]verbreadth is an exception to [the] normal rule regarding the standards for facial challenges," which the Court has provided "out of concern that the threat of enforcement may deter or 'chill' constitutionally protected speech." *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2196 (2003); see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611 (1973). While, when properly applied, the overbreadth doctrine ensures First Amendment breathing room, the Court has stressed that its application also imposes "substantial societal costs." *Hicks*, 123 S. Ct. at 2197. For example, overbreadth challenges may "block[] application of a law to constitutionally unprotected speech," *ibid.*, and considering a statute's hypothetical application to situations before they even arise can lead to "unnecessary pronouncement on constitutional issues," *United States* v. *Raines*, 362 U.S. 17, 22 (1960).[43]

The Court accordingly has emphasized that "the overbreadth doctrine * * * is, manifestly, strong medicine," which "has been employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613; see *Hicks*, 123 S. Ct. at 2196-2197; see *Ashcroft* v. *ACLU*, 535 U.S. 564, 584 (2002) (plurality); *Hill* v. *Colorado*, 530 U.S. 703, 731 (2000); *New York* v. *Ferber*, 458 U.S. 747, 769 (1982). Overbreadth challenges may succeed only on a showing that the law's overbreadth is "'*substantial*,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Hicks*, 123 S. Ct. at 2197 (quoting *Broadrick*, 413 U.S. at 613) (emphasis added); see *Ferber*, 458 U.S. at 771. In addition, "[t]he overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from actual fact, that [such] substantial overbreadth exists." *Hicks*, 123 S. Ct. at 2198 (internal quotation marks omitted).

While the overbreadth doctrine is rarely invoked to begin with, this case is a particularly unusual candidate for its "strong medicine." In the typical overbreadth case, a statute clearly prohibits a category of *unprotected* speech and the concern is that that bar will chill *protected* speech. As discussed above, however, Title II of BCRA does not ban any speech; it simply limits the manner in which certain political activity may be *funded* by corporations and unions. See pp. 97-98, *supra*; *Hill*, 530 U.S. at 731 (rejecting overbreadth argument because, *inter alia*, the statute at issue "simply does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements"). Similarly, any alleged "chill" created by BCRA is much more remote than in the usual overbreadth case. Title II does not silence any speakers—or speech—but instead simply requires those who desire to engage in certain speech to finance it through a separate fund. Accordingly, plaintiffs' reliance on the overbreadth doctrine is fundamentally misplaced at the outset.

b. In any event, plaintiffs have not come close to meeting the heavy burden necessary to invalidate a statute for overbreadth. At most, plaintiffs—who have not submitted any empirical studies of their own in this case and instead have relied primarily on anecdotal evidence, Supp. App. 762sa (Kollar-Kotelly)—have shown that BCRA's definition of "electioneering communications" may apply to "genuine" issue advertisements in a few "marginal applications." *Ferber*, 458 U.S. at 770 n. 25 (citation omitted). Plaintiffs have not, however, shown that the definition is substantially overbroad—either in an "absolute sense," or "relative to the scope of the law's plainly legitimate applications." *Hicks*, 123 S. Ct. at 2197. Therefore, their overbreadth claim fails.

That conclusion follows naturally, if not necessarily, from the fact that, as explained above, BCRA's primary definition of "electioneering communications" is narrowly tailored to advance several different compelling government interests. See *Broadrick*, 413 U.S. at 611-612 (overbreadth doctrine is a "corollary" to the rule that a law that burdens protected expression must be "narrowly drawn" to address "compelling societal needs"). The fact that the narrow-tailoring requirement has been met should eliminate any basis for invalidating the statute on its face under the guise of "overbreadth." To the extent that the definition is not

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[43] The hypothetical threat of criminal prosecution for violation of BCRA's source limit—to which plaintiffs repeatedly refer—is highly remote. Criminal prosecutions for violation of the prohibition on independent expenditures under Section 441b are unusual and require proof of a "knowing and willful" violation of the Act. 2 U.S.C. 437g(a)(5)(C). Plaintiffs have not cited any cases involving criminal prosecutions arising from corporate or union expenditures since the FEC was given civil enforcement authority over such provisions. See 2 U.S.C. 437d, 437g.

perfectly tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis, where a court would at least have the benefit of adjudicating the applicability of Title II to a concrete controversy.

c. The centerpiece of plaintiffs' overbreadth challenge is a post hoc analysis of a few advertisements that were broadcast before BCRA was enacted. See McConnell Br. 50-52; AFL-CIO Br. 6; NRA Br. 36. That analysis, however, depends on plaintiffs' own post hoc account of the *purpose* behind those advertisements. As discussed above, BCRA establishes clear criteria to guide organizations that truly seek to broadcast issue advertisements that are not disguised attempts to influence the election of federal candidates. The only basis for invalidating the statute on its face for overbreadth would be to conclude that in a substantial number of instances, organizations that seek to air legitimate issue advertisements would be unable to do so without triggering BCRA's definition and, further, that having to choose between airing such communications and funding them through a PAC somehow would impose an unconstitutional chill on such speech. That conclusion is entirely implausible. To avoid BCRA, an organization need only refrain from identifying a federal candidate in an issue advertisement or avoid the narrow window before the candidate's election or advertising in the candidate's district. Moreover, as discussed, this Court has recognized that the separate segregated fund imposes only minimal—and permissible—burdens for non-*MCFL* corporations.

In any event, even accepting plaintiffs' post hoc analysis, the *few* examples that they have culled from *hundreds* of political advertisements in the record spanning four different election cycles, see Krasno & Sorauf Expert Report App. (Spreadsheet: 2000 Formula), do not begin to establish the requisite cloak of *substantial* overbreadth. Moreover, when

these advertisements are examined within their electoral context, as is essential to understanding their underlying objectives, Supp. App. 732sa-733sa (Kollar-Kotelly); *id.* at 1311sa-1312sa (Leon), it is clear that even the most favorable examples that plaintiffs' lawyers could locate fail to advance their overbreadth claim. Even if plaintiffs' account of the advertisements' alleged *purpose* were taken at face value, it would not alter the fact that—based on the presence of the objective factors identified in BCRA § 201—the advertisements were just as likely to influence the outcome of the candidate elections in connection with which they were run as advertisements containing express advocacy.

For example, "Stabenow Death Tax," sponsored by the Michigan Chamber of Commerce, criticized then-Senate candidate Debbie Stabenow for her past votes against repeal of the estate tax. McConnell Br. 52, App. 3a. The advertisement ran from September 20, 2000, until a week before election day, Goldstein Expert Report Exh. L (2000 database), in one of the most closely contested Senate races of the year. Cook Political Report 85 (Oct. 25, 2000) (Cook Report). It is implausible to suggest that the advertisement was not likely or designed to influence the election.

Similarly, "Job," AFL-CIO Br. 6, ran from September 14 to October 6, 2000, in the districts of a dozen or so Members of Congress whose races were considered competitive by the political handicappers—nine were labeled as "toss-ups." Mitchell Decl., Exhs. 1, 101-102; Cook Report 42-43. The advertisements criticized the targeted legislators for already having voted in June 2000 "to block federal safety standards that would help protect workers," and culminated in a plea to voters to tell the candidates that "[their] politics cause[] pain." Mitchell Decl., Exh. 141.

"No Two Way" criticized Representatives for voting *in 1995* "with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy," Mitchell Decl., Exh. 59, yet ran *in September 1996*, Mitchell Decl., Exhs. 1, 43-47, at the height of the AFL-CIO's advertising campaign to unseat the Republican majority in the House of Representatives. See Supp. App. 678sa-685sa (Kotelly); *id.* at 1316sa-1320sa (Leon). Given that those broadcasts ran long after-the-fact and at the height of hotly contested elections whose outcome might determine control of Congress but not the outcome of the particular legislative issues addressed, it is unimaginable that the advertisements were not intended to or did not have the effect of influencing candidate elections.

The NRA's claim that its "infomercials" were not likely to influence candidate elections does not square with the record. Indeed, the NRA's Executive Vice President, Wayne La Pierre, declared that the NRA had "no more important political objective" in 2000 than defeating Al Gore, and that it "spent what it took" to achieve that objective. LaPierre Dep. 84, 98; see also *id.* at 55, 85-86, 93-96, 101-113; Supp. App. 693sa-697sa (Kollar-Kotelly); *id.* at 1324sa (Leon). That objective is plain, for example, in "Tribute," NRA Br. 41 n.33, in which former NRA President Charlton Heston declares that the NRA's return "spells very serious trouble for a man named Gore," and defines the NRA's mission as "winning in November." NRA App. 946-947; see Supp. App. 752sa n.104 (Kollar-Kotelly).[44]

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[44] The remaining broadcasts cited by the NRA include the March 2000 advertisements it ran in answer to televised remarks by President Clinton. Those advertisements would not have been regulated under BCRA because, as the NRA concedes, President Clinton was not a candidate for office in 2000. NRA Br. 38-39; see Supp. App. 748sa (Kollar-Kotelly). The NRA also refers to its 1994 advertisements urging viewers to "Call your congressman" to oppose President Clinton's crime bill, and those criticizing the Brady Bill (Br. 36-37), but offers no evidence that these advertisements were broadcast within BCRA's 30-or 60-day window. LaPierre Decl. ¶ 21; NRA App. 885-888; see Supp. App. 748sa (Kollar-Kotelly). Likewise, "Banned in Canada" ran in 1999, when "no election was looming," NRA Br. 41-42 n.33, so it, too, would not have been

At the same time, a closer examination of the allegedly "genuine" issue advertisements touted by plaintiffs simply underscores the wisdom of the objective criteria selected by Congress for defining the "electioneering communications" subject to BCRA. As Judge Kollar-Kotelly explained, although plaintiffs "rely on their own self-serving testimony and self-selected advertisements they claim are pure issue advertisements, * * * BCRA's primary definition of electioneering communications presents an empirical test that ignores this type of self-serving *ex post facto* rationalization by focusing on purely objective criteria." Supp. App. 745sa. That is the test that Congress—whose Members are the veterans of federal campaigns and thus are well aware of what constitutes electioneering—determined was best.[45]

d. Plaintiffs erroneously assert that "defendants relied almost exclusively on two reports by the Brennan Center for Justice," the *Buying Time* studies. McConnell Br. 53-54. Although plaintiffs focus their attacks on *Buying Time* studies, in fact the reports represent only a portion of the evidence that was placed in the record to show that BCRA's primary definition of "electioneering communications" is carefully targeted to capture issue advertisements that are likely to influence the outcome of federal candidate elections. Moreover, the *Buying Time* reports contain both (i) objective findings on matters such as when and where certain advertisements were run in connection with recent federal

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subject to regulation under BCRA's primary definition of "electioneering communications."

[45] Underscoring the lengths to which plaintiffs have gone to try to create an impression of overbreadth, the ACLU (Br. 11) cites the only electioneering communication that it has *ever* sponsored, which, the district court found, "was clearly designed simply to provide the corporation standing to challenge BCRA." Supp. App. 748sa-751sa (Kollar-Kotelly); see *id.* at 1368sa-1369sa (Leon).

elections, and (ii) a subjective analysis of the "genuine" or "electioneering" *purpose* of certain advertisements.

As Judge Kollar-Kotelly explained, "much, if not all, of the objective findings in the *Buying Time* reports have not been undermined by Plaintiffs' expert." Supp. App. 856sa. For example, plaintiffs did not challenge the objective conclusions in the *Buying Time* studies that use of the express advocacy terminology or reference to a candidate outside the 60-day period before a general election is rare; that interest group advertisements that identify candidates are concentrated toward the end of the election campaign; or that such advertisements are overwhelmingly run in a small number of competitive districts. See *ibid.*; Defs.' D. Ct. Reply Br. 69-71 (summarizing undisputed record facts).[46]

Rather, plaintiffs' criticism of the *Buying Time* studies has focused on the *subjective* aspect of the reports, which sought to determine whether the purpose of advertisements was to influence federal elections. That aspect of the *Buying Time* studies is less telling than the objective findings on which Congress based in part the criteria specified in BCRA § 201 because, as discussed, such an analysis does not answer the more important question of whether, or to what extent, BCRA's definition of electioneering communications will impermissibly chill protected expression on a *prospective* basis. See Supp. App. 858sa (Kollar-Kotelly) (The "subjective nature of the effort of trying to capture mental impressions

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[46] Plaintiffs contend that the district court "*unanimously* rejected the conclusions of the *Buying Time* reports." McConnell Br. 53 (emphasis in original). In fact, however, Judge Kollar-Kotelly specifically emphasized that plaintiffs had not controverted the "objective findings in the *Buying Time* reports." Supp. App. 856sa. Judge Leon also accepted many of the studies' objective findings, see *id.* at 1356sa-1359sa (discussing Goldstein Expert Report, which was based on essentially the same database as *Buying Time* studies), and found that even the subjective analysis of "the *Buying Time* studies are entitled to some evidentiary weight." *Id.* at 1154sa; see *id.* at 1339sa-1340sa.

of viewers" illustrates "why BCRA's framers have used objective criteria to 'electioneering communication.'").

In any event, the subjective analysis in the *Buying Time* reports ultimately bolsters the conclusion that BCRA's definition is not substantially overbroad. Indeed, using the 1998 formula, analysis of the data underlying the *Buying Time* reports leads to the conclusion that only 6.1 percent of genuine issue advertisements that aired in 1998 would have been captured post hoc by BCRA § 201, and 3.14 percent of genuine issue advertisements that aired in 2000. See Supp. App. 1056sa-1057sa (Kollar-Kotelly).

The 1998 formula measures overbreadth in the "absolute sense," *Hicks*, 123 S. Ct. at 2197, in that it compares the number of genuine issue advertisements broadcast that meet BCRA's definition (numerator) with the number of *all* genuine issue advertisements aired in a calendar year (denominator). The 2000 formula used in the *Buying Time* studies uses the same numerator but compares it with the number of all aired advertisements *captured by BCRA's definition.* Because the denominator in the 2000 formula combines both genuine issue *and* electioneering advertisements run within 60 days of a general election, it results in a calculation that may vary significantly depending on the volume of electioneering advertisements in a calendar year. See Krasno & Sorauf Expert Report App. & Spreadsheets; Goldstein Expert Report 25 (Tbl. 7).

Plaintiffs assert that "defendants' experts and the [*Buying Time*]'s authors now concede that the underlying data [for the 1998 report] demonstrates that 14.7% of the ads that would have been prohibited by BCRA were 'genuine.'" McConnell Br. 55. That figure, however, is based on the 2000 formula, which measures the percentage of advertisements regulated by BCRA that are genuine, as opposed to the more absolute comparison undertaken by the 1998 formula. Using the 1998 formula, the 14.7 percent figure drops to around six or seven percent of all genuine issue advertisements aired in the year 1998. A definition that captures only six or seven percent of the genuine issue advertisements broadcast in 1998 is not substantially overbroad.[47]

e. Plaintiffs argue that Title II is overbroad because it does not expressly exempt "'*MCFL*' corporations." McConnell Br. 57; see NRA Br. 34-36 & n.29. BCRA § 204 (the Wellstone Amendment) applies the source limitation on electioneering communications to nonprofit organizations established under Section 501(c)(4) and Section 527(e)(1) of the Internal Revenue Code. See BCRA §§ 203, 204; Supp.

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[47] Plaintiffs argue that "if the data [in the 2000 report] had been correctly analyzed, 17% of the ads that referred to candidates in the last 60 days of the 2000 campaign were 'genuine' issues ads." McConnell Br. 56. That figure, however, was calculated by one of defendants' experts at a deposition based on an *erroneous* premise—that five of the six advertisements in the year 2000 database which had been coded by the authors of the *Buying Time* reports as "electioneering" should have been recoded "genuine" (even though they had been originally coded "electioneering" by students). When the figure is calculated with the five advertisements properly coded as "electioneering" rather than "genuine," the overbreadth figure is properly reduced to around two to three percent. See Goldstein Cross-Exam. 144-145, 151-152, 160; Goldstein Rebuttal Report 16. Moreover, as Judge Kollar-Kotelly explained, even "accept[ing] the 17 percent figure as a valid metric for determining overbreadth," it would not render the definition "substantially overbroad." Supp. App. 859sa-860sa. Rather, "any such impact of BCRA is substantially counterbalanced by the record in this case and the objective empirical determinants related to these advertisements." *Id.* at 860sa.

Plaintiffs also argue that, in the 1998 report, certain advertisements were improperly recoded by the authors as "electioneering," and that if those advertisements had not been recoded, the 1998 report would have concluded (using the 2000 formula) that "64% of ads mentioning a candidate in the 60 days before the 1998 general election were coded by students as 'genuine.'" McConnell Br. 56. The advertisements at issue, however, were recoded to account for the fact that the students had given internally inconsistent responses with respect to the advertisements; even plaintiffs' own expert concluded that he would have recoded the advertisements under those circumstances. See Gibson Cross Tr. 120-121; Defs.' D. Ct. Reply Br. 74-76.

App. 65sa (per curiam). Although BCRA § 204 does not expressly address *MCFL* corporations, the "well-settled prsumption" is "that Congress understands the state of existing law when it legislates." *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988). Nor in light of the Court's treatment of statutes that similarly lacked a specific exception for nonprofits in *MCFL* and *Austin* would Congress have perceived any necessity in expressly carving out "*MCFL* corporations." In addition, the FEC's regulations implementing BCRA, just like its pre-BCRA regulations implementing 2 U.S.C. 441b, specifically exempt *MCFL*-type corporations from Title II's source limitation. See 11 C.F.R. 114.10.

The district court concluded that BCRA § 204 would be unconstitutional as applied to nonprofit corporations that meet the criteria specified in *MCFL*. See *MCFL*, 479 U.S. at 264; Supp. App. 865sa-872sa & n.139 (Kollar-Kotelly); *id.* at 1166sa-1169sa (Leon). The government has not challenged that ruling. 02-1676 J.S. 24 n.8. The NRA (Br. 21-22) and ACLU (Br. 34-37)—both of which elect to receive corporate contributions, see NRA Br. 3; ACLU Br. 17 n.12—urge the Court to *expand* the *MCFL* exception to cover *any* Section 501(c)(4) corporation, not just those that meet the criteria specified in *MCFL*. That argument is out of place in this case and, in any event, should be rejected. See Supp. App. 871sa (Kollar-Kotelly); p. 88 & note 38, *supra*. Indeed, as this Court recognized in *Beaumont*, nonprofit corporations that "qualify for favorable tax treatment under § 501(c)(4)," including the NRA, are among "the Nation's politically powerful organizations." 123 S. Ct. at 2209.

f. Lastly, it is significant that, although plaintiffs go to extraordinary lengths in attempting to show that BCRA's definition of "electioneering communications" is imperfect at its margins, they have never proposed a better test for identifying such communications other than claiming that it is necessary to adhere to the express-advocacy test. As discussed, the uncontroverted evidence shows that the express advocacy test is a grossly inaccurate proxy for identifying electioneering communications. Indeed, nearly 90% of the advertisements that federal candidates themselves aired in 2000 did not contain express advocacy, though presumably *all* of them were designed to influence their own election. See pp. 82-83, *supra*. The overbreadth doctrine provides no basis for invalidating Congress's definition of "electioneering communications" in BCRA and limiting federal regulation of the source-of-funding for electioneering advertisements to the blunt proxy of the express-advocacy test.

4. *The Primary Definition Of "Electioneering Communications" Is Not Too Narrow*

a. Plaintiffs argue that the definition of electioneering communications is fatally *under*inclusive because it applies (FECA § 304(f)(3)(A)(i), 2 U.S.C. 434(f)(3)(A)(i)) only to advertisements run in broadcast media and not to advertisements run in other media, such as print. See McConnell Br. 61-62; ACLU Br. 37-41. That argument should be rejected. Congress's decision in BCRA to take the more limited step of focusing only on broadcast advertisements does not render the Act unconstitutional. See *MCFL*, 479 U.S. at 258 n.11 (Congress may proceed in the area of campaign finance in a "cautious advance, step by step."); *Buckley*, 424 U.S. at 105 ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). Moreover, as a general matter, broadcast media have historically been subjected to much greater federal regulation than print media.

Two considerations in particular support Congress's decision to take a more limited approach here. First, "[t]he uncontroverted testimony of experts and political consultants is that broadcast advertising is the most effective form of communicating an electioneering message." Supp. App.

879sa (Kollar-Kotelly); see *id.* at 876sa. Second, broadcast time is more expensive than space in other media. Indeed, the increased cost of airing advertisements on television and radio is one of the principal causes of the escalating costs of the modern political campaign for federal office. As a result, broadcast advertisements are much more likely than other types of advertisements to cause the fact or appearance of the "corrosive and distorting effects [that] immense aggregations of wealth" can inflict on the electoral process. *Austin*, 494 U.S. at 660; see also 145 Cong. Rec. S511 (daily ed. Jan. 19, 1999) (statement of Sen. Snowe) (broadcast advertisements "constitute the most blatant form of [unregulated] electioneering").[48]

b. The NRA likewise argues that the definition of "electioneering communications" is impermissibly narrow because it excludes "communication[s] appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast station." BCRA § 201(a). In *Austin*, however, the Court expressly rejected a challenge to a state law modeled on 2 U.S.C. 441b that contained the same type of media exception from the restriction on corporate independent expenditures. 494 U.S. at 655 n.1, 666-668. As the Court explained, "[a] valid distinction * * * exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *Id.* at 668. And, the Court held, the "press' unique societal role * * *

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[48] The newspaper-tax cases relied upon by the ACLU are inapposite. See ACLU Br. 40-41 (citing, *e.g.*, *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Rev.*, 460 U.S. 575 (1983)). BCRA does not impose any tax on any media outlet and therefore does not implicate any of the special concerns involving "taxation of the press." *Minnesota Star*, 460 U.S. at 585. Moreover, unlike the selective treatment involved in *Minnesota Star*, see *id.* at 593, there is ample justification for Congress's decision to focus on broadcast media as opposed to other media in enacting BCRA.

provide[s] a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." *Ibid.* Nothing has changed either in this Court's case law or in the role of the media since *Austin* that would warrant revisiting much less overturning that holding of *Austin.* See Supp. App. 883sa-884sa (Kollar-Kotelly).

5. *BCRA's Fallback Definition Of "Electioneering Communications" Is Valid*

Plaintiffs attack BCRA's fallback definition of "electioneering communications" on the ground that it is unconstitutionally vague. See McConnell Br. 57-61; AFL-CIO Br. 24- 33. Judge Leon—who wrote the controlling decision on the issue for the district court—held that the fallback definition of "electioneering communications" is constitutional except for its final clause, which further specifies that a covered communication must be "suggestive of no plausible meaning other than an exhortation to vote." BCRA § 201(a) (adding FECA § 304(f)(3)(A)(ii)); see Supp. App. 1159sa-1166sa (Leon); *id.* at 885sa-886sa (Kollar-Kotelly). But Judge Leon concluded that the final clause "can be excised" and upheld the backup definition as so modified. *Id.* at 1165sa. If the Court concludes that the primary definition of "electioneering communications" is invalid, it should uphold BCRA's backup definition in its entirety.

"[T]he vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (internal quotation marks omitted); see *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). But by no means does the mere possibility of imprecision render a law unconstitutionally vague. As this Court has observed, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language," and "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" *Id.* at 110 & n.15; see also *United States* v. *Powell*, 423 U.S. 87, 93-94 (1975); *NRWC*, 459 U.S. at 211. The Court is especially reluctant to invalidate a law for vagueness when, as here, the vagueness challenge is made to a law *on its face.* See *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 580, 588-590 (1998); *Hill*, 530 U.S. at 733.

Nothing about the final clause of the definition is unconstitutionally vague. Indeed, that clause is designed to *protect* corporate and union speakers, and to *narrow* the reach of BCRA's restrictions on corporate and union expenditures, by reducing BCRA § 203's potential applicability to communications that are not in fact intended to affect federal elections. To the extent that there is any ambiguity in that last sentence, it is only a question of how much otherwise regulable electioneering speech Congress has voluntarily *forgone* addressing in an effort to avoid any conceivable chilling effect. Any degree of uncertainty in a standard designed to protect speech—like whatever uncertainty might remain about the exact contours of *New York Times* v. *Sullivan*'s "actual malice" standard—is not the kind of vagueness that should condemn a statute. Cf. *Schenck* v. *Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 383-384 (1997) (rejecting First Amendment challenge to sidewalk-counselor exception to cease-and-desist order restricting certain demonstrations; "the entire exception for sidewalk counselors was an effort to enhance petitioners' speech rights, and the 'cease and desist' limitation must be assessed in that light") (citations omitted).

Judge Leon reasoned that "[w]hether an ad is suggestive of no plausible meaning other than an exhortation to vote depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified." Supp. App. 1164sa. The context in which the advertisement is broadcast is indeed important. But that does not mean that a corporation or labor union preparing to broadcast such an advertisement would have any difficulty in determining—based on its understanding of the context in which its own advertisement will be aired—whether that communication is reasonably capable of no other meaning than an exhortation to vote for or against a specific candidate. See *FEC* v. *Furgatch*, 807 F.2d 857, 864 (9th Cir.) (construing FECA's express-advocacy test to apply to communications that do not contain *Buckley*'s magic words, but are "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate"), cert. denied, 484 U.S. 850 (1987).[49]

As Judge Leon himself concluded, plaintiffs' vagueness challenge to the other terms of the backup definition similarly lacks merit. See Supp. App. 1163sa-1164sa. In considering that challenge, Judge Leon properly refused to follow the deposition testimony cited by plaintiffs (see McConnell Br. 58-60) based on their own pop quiz of certain witnesses, during which plaintiffs refused to answer the witnesses' requests to supply them with additional information concerning the context in which the advertisement was

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[49] Although BCRA's backup definition does not incorporate the specific, objective criteria included in BCRA's primary definition of "electioneering communications," it is nonetheless akin to other First Amendment standards that omit such express criteria and instead use an objective "reasonable person" or "ordinary observer" standard. See *Ashcroft* v. *ACLU*, 535 U.S. at 246; *County of Allegheny* v. *ACLU*, 492 U.S. 573, 599-600 (1989); see also *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655 (2002) (a reasonable observer must be deemed to be aware of the "history and context" of the program at issue); *Greenbelt Coop. Publ'g Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970). Moreover, the traditional vagueness inquiry itself must be undertaken from the standpoint of a reasonable person—presumed to be aware of the world around him.

aired (which a corporation or union determining whether an advertisement is covered by the backup definition would have). See Defs.' D. Ct. Opp. Br. 95 & n.103 (citing depositions). Disagreement over whether a particular advertisement falls within the backup definition suggests only that a communication may be susceptible to more than one interpretation, not that the statute's *definition* is unconstitutionally vague. The backup definition itself makes clear that if a communication is susceptible to more than one reasonable interpretation, it is not covered.

D. BCRA's Disclosure Requirements With Respect To Electioneering Communications Are Valid

BCRA § 201 amends FECA § 304 (2 U.S.C. 434) to require any person who makes a disbursement for the direct costs of producing or airing "electioneering communications" in an aggregate of more than $10,000 in a calendar year to disclosure certain information to the FEC. See Supp. App. 66sa-67sa (per curiam). That provision simply updates the requirements that have long applied to express advocacy, and were upheld in *Buckley*, to reflect BCRA's adjustment of Section 441b to apply to "electioneering communications." In fact, BCRA's disclosure provisions are *less* intrusive than the disclosure requirements for independent expenditures that have long applied under 2 U.S.C. 434(c). Whereas that provision requires groups making independent expenditures to identify each of their donors contributing over $200 and to file disclosure reports for expenditures exceeding $250, 2 U.S.C. 434(c)(2)(C), BCRA's new requirements apply only to each of their donors contributing over $1000 and do not require disclosure at all until $10,000 has been spent. FECA § 304(f)(2)(E) (2 U.S.C. 434(f)(2)(E)).

The district court sustained BCRA § 201's disclosure provisions in principal part, see Supp. App. 106sa-128sa (per curiam), emphasizing that "[t]he factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public," *id.* at 106sa; see also *id.* at 675sa-677sa (Kollar-Kotelly). That ruling is unassailable.

This Court has recognized that disclosure laws in the campaign-finance context serve several compelling interests. First, laws requiring disclosures concerning the sources of financial support "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Buckley*, 424 U.S. at 67. Second, "[d]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Ibid.* Third, "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of [campaign finance laws]." *Id.* at 67-68. BCRA's disclosure requirements directly advance each of those interests.

The ACLU argues (Br. 41-46) that BCRA § 201's disclosure provisions impermissibly chill speech and violate its "right to anonymous political speech and association." *Id.* at 42 (citing, *e.g.*, *NAACP* v. *Alabama ex rel Patterson*, 357 U.S. 449 (1958)). In *Buckley*, however, this Court rejected a similar challenge to FECA's disclosure provisions, holding that electioneering "disclosure requirements, as a general matter, serve substantial government interests" and "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." See 424 U.S. at 68; see *id.* at 66-68 (discussing the important government interests served by FECA's recordkeeping and disclosure requirements). As the district court found, BCRA's disclosure requirements directly advance the same interests given the number of organizations that have

financed electioneering communications but sought to conceal their identities through the use of misleading or nondescript pseudonyms. See Supp. App. 118sa (per curiam); see also *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 298 (1982) ("[W]hen individuals and corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source.").

In *Buckley*, this Court also held "that *NAACP* v. *Alabama* is inapposite where * * * any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative." 424 U.S. at 70. Instead, the Court held, to implicate the concerns identified in that case, the plaintiffs must establish "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties." *Id.* at 74; see *ibid.* ("The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself."). In this facial challenge, as in *Buckley*'s, plaintiffs have failed to meet that evidentiary burden. Indeed, as the district court explained, "the ACLU has presented the Court with no facts that place it in the same category of threatened associations such as the NAACP." Supp. App. 122sa (per curiam).

The district court concluded that BCRA § 201 is invalid insofar as it requires disclosure of executed contracts for electioneering communications that have not yet been publicly distributed. See Supp. App. 107sa-116sa (per curiam); see 2 U.S.C. 434(f)(5) (added by BCRA § 201) ("For purposes of this subsection, a person shall be treated as having made the disbursement if the person has executed a contract to make a disbursement."). That holding is erroneous. Because the time and location of the actual broadcast is an element of BCRA's definition of electioneering communication, the

FEC has interpreted the provision at issue not to require disclosure until after "the date on which a communication is publicly distributed." 67 Fed. Reg. 64,555, 64,656 (2002). But even assuming that new FECA § 304(f)(5) might sometimes have the effect of requiring that contracts be disclosed before public distribution of an electioneering communication, that requirement would neither prevent any person from speaking nor require disclosure of the specific content of any advertisement. Indeed, under the pre-BCRA regime the definition of "expenditure" included a "written contract, promise, or agreement to make an expenditure." 2 U.S.C. 431(9)(A)(ii); see 11 C.F.R. 104.11(b).[50]

E. The District Court Correctly Dismissed Plaintiffs' Challenges To BCRA § 214(a)-(c)

Federal law has long provided that expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of," a federal candidate will be treated as contributions to the candidate's campaign. 2 U.S.C. 441a(a)(7)(B)(i); see p. 17, *supra*. In December 2000, the FEC revised its regulations defining the circumstances under which election-related expenditures will be treated as "coordinated" with a candidate or party committee. See 65 Fed. Reg. 76,138 (2000); 11 C.F.R. 100.23 (2002). Evidently concluding that the FEC had redefined the concept of coordination in an unduly narrow way, see 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain), Congress directed the agency to reconsider the matter. BCRA § 214(b) repeals the Commission's December 2000 coordination regulations, and BCRA § 214(c) requires the FEC to promulgate new regulations that "shall not require agreement or formal collaboration to establish coordination." In addition, BCRA § 214(a)(2) amends FECA § 315(a)(7)(B) to provide that expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of," a political party committee shall be considered contributions to that committee.

Plaintiffs challenged BCRA § 214, contending that it is unconstitutionally vague and that it reflects an unduly broad understanding of "coordination." In December 2002, while plaintiffs' claims were pending in the district court, the FEC promulgated new coordination rules in accordance with the statutory directive. See 68 Fed. Reg. 421 (2003). The district court rejected plaintiffs' challenge to BCRA § 214(a) and held that their challenge to BCRA § 214(b) and (c) is not justiciable in this facial challenge. See Supp. App. 134sa-156sa (per curiam); but see *id.* at 386sa-396sa (Henderson, dissenting). Those holdings are correct.

1. The text of BCRA § 214(a)(2) tracks the preexisting language of 2 U.S.C. 441a(a)(7)(B)(ii). As the district court observed, "this same definition has been applied to expenditures coordinated with political candidates for over 25 years and was recently found by [this] Court to apply to political party expenditures." Supp. App. 135sa-136sa (per curiam) (citing *Colorado II*, 533 U.S. at 467). "Plaintiffs have provided no explanation as to why the application of this coordination formula to the context of political parties chills political speech any more than when applied to expenditures coordinated with political candidates." *Id.* at 137sa. And by directing the FEC to promulgate new regulations addressing the subject of coordination, subject to judicial review if

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[50] BCRA § 311 amends FECA § 318 to impose additional requirements concerning the identification of sponsors of election-related advertisements, and to make the sponsorship-identification requirements applicable to "electioneering communications." Like the other disclosure requirements that BCRA imposes with respect to electioneering communications, BCRA § 311 furthers the government's interest in ensuring an informed electorate. Plaintiffs' challenge to BCRA § 311 is premised entirely on their contention that *Buckley* precludes Congress from imposing restrictions on speech that is not express advocacy. See McConnell Br. 38-45; Bus. Pls. Br. 32-33; Supp. App. 157sa-158sa (per curiam). That argument lacks merit for the reasons stated at pp. 101-104, *supra*.

necessary (see p. 124, *infra*), BCRA § 214(c) provides a mechanism for alleviating any uncertainty that regulated entities may feel regarding the scope of BCRA § 214(a). See Supp. App. 137sa-138sa (per curiam). Plaintiffs' vagueness challenge therefore lacks merit.

2. BCRA § 214(b) and (c) does not define the standard for determining when an expenditure is "coordinated" with a candidate or party, nor does it otherwise alter the plaintiffs' legal rights or obligations. Rather, the Act directs the expert agency to address the question of coordination in the first instance. Any impairment of plaintiffs' ability to engage in campaign-related activity is attributable to the FEC rules adopted in response to the statutory directive, not to BCRA § 214(b) and (c) on its face. The FEC has now promulgated the required regulations, which are subject to judicial review under the Administrative Procedure Act (APA). If plaintiffs believe that the rules promulgated by the FEC in December 2002 define coordination in an unconstitutionally broad (or otherwise improper) manner, their proper recourse is to file suit under the APA to challenge those regulations. In and of itself, however, BCRA § 214(b) and (c) causes plaintiffs no injury, and it therefore is not subject to challenge in this lawsuit.[51]

3. Plaintiffs contend that "agreement is *always* required before coordination can constitutionally be found," and that any FEC regulation that is consistent with BCRA § 214(b) and (c) would therefore necessarily violate the First Amendment. McConnell Br. 65; see RNC Br. 78. FECA has long provided, however, that expenditures made "at the request or suggestion of" a candidate will be treated as contributions to that candidate. 2 U.S.C. 441a(a)(7)(B)(i). This Court has recognized that coordinated spending "covers a spectrum of activity," *Colorado II*, 533 U.S. at 445, including "wink or nod" arrangements, *id.* at 442. And while plaintiffs contend that BCRA § 214(b) and (c) effectively compels the FEC to promulgate coordination rules that violate the First Amendment, they have not filed suit to challenge the regulations that the Commission has actually adopted.[52]

III. PLAINTIFFS' CHALLENGES TO TITLES III AND V OF BCRA SHOULD BE REJECTED

A. The District Court Correctly Dismissed Plaintiffs' Challenges To The Increased Individual Contribution Limits In BCRA § 307

1. To establish Article III standing, a plaintiff must demonstrate an actual or imminent injury that is fairly traceable to the defendant's challenged conduct and is likely to be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The district court correctly held that the Adams plaintiffs lack standing to challenge BCRA § 307(a)(1), which increases from $1000 to $2000 the per-election limit on individual contributions to

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[51] As the district court observed, any plaintiff in an APA action challenging the FEC's coordination regulations could "seek a stay from the FEC or a court to prevent the application of the rule pending review." Supp. App. 156sa n.99 (per curiam) (citing 5 U.S.C. 705). There is consequently no basis for the McConnell plaintiffs' suggestion (Br. 65) that immediate review by this Court of their abstract constitutional challenge to BCRA § 214(b) and (c) is necessary in order to avoid hardship to regulated entities.

[52] Plaintiffs' reliance (McConnell Br. 65) on *Abbott Labs.* v. *Gardner*, 387 U.S. 136 (1967), is misplaced. *Abbott Labs.* holds that an agency regulation may appropriately be made the subject of a judicial challenge, even before the rule has been applied to a discrete set of facts, if the regulation "is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (citing *Abbott Labs.*). *Abbott Labs.* does not suggest, however, that a plaintiff may bring a facial challenge to a statutory provision that imposes no substantive obligation upon any private party, but simply requires the promulgation of rules by an Executive Branch agency.

federal candidates. See Supp. App. 472sa-475sa (Henderson); *id.* at 1008sa (Kollar-Kotelly).[53]

The Adams plaintiffs include both voters and potential federal candidates. See Adams Br. 2. BCRA § 307 allows those plaintiffs to make and receive *larger* contributions than were previously lawful. Plaintiffs' contention (Br. 2-3) that other donors and candidates will derive a greater practical benefit from the increase is far too speculative to establish actual or imminent injury. And even if plaintiffs had adequately alleged a likelihood of "actual or imminent" injury, their harm would not be "fairly traceable" to BCRA or to any action of the defendants. See Supp. App. 474sa (Henderson).

2. In any event, plaintiffs' equal protection claim lacks merit. Because plaintiffs themselves can now make and receive contributions up to the new $2000 limit, BCRA § 307 does not deny them any right or privilege that it confers on others. Plaintiffs' claim logically presumes that limits on individual contributions to federal candidates are constitutionally compelled—a proposition clearly belied by the absence of any such restrictions until 1974. And, having concluded that a contribution limit is appropriate, Congress has considerable discretion to choose and adjust the applicable

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[53] Unlike the Adams plaintiffs, the Paul plaintiffs contend (Br. 46) that Congress should have *increased* the contribution limit applicable to political committees other than political parties, and that it should have indexed that limit for inflation. This Court lacks jurisdiction over that claim because it is in substance a challenge to the pre-existing FECA limit on contributions to non-party political committees, not to any provision of BCRA (which left that contribution limit unchanged). Challenges to the constitutionality of FECA are subject to direct review before an appropriate en banc court of appeals, see 2 U.S.C. 437h, not in the three-judge district court convened pursuant to BCRA § 403(a). In any event, Congress has broad authority to conclude that different types of organizations "may require different forms of regulation in order to protect the integrity of the electoral process," *California Med. Ass'n*, 453 U.S. at 201; see pp. 70-72, *supra*, and it did not exceed that authority here.

ceiling. Indeed, the Court in *Buckley* specifically noted that "a court has no scalpel to probe" whether a "$2000" or "$1000" cap would be preferable. 424 U.S. at 30.

B. The District Court Correctly Dismissed Plaintiffs' Challenge To The "Millionaire Provisions" Of BCRA §§ 304 And 319

1. The Adams plaintiffs also challenge BCRA §§ 304 and 319 (collectively referred to as the "millionaire provisions"), which allow congressional candidates to accept contributions that exceed the generally applicable FECA/BCRA limits in certain circumstances when the candidate faces an opponent who expends substantial personal funds on his own campaign. See BCRA § 304(a)(2) (Senate); BCRA § 319(a) (House of Representatives). Plaintiffs contend (Adams Br. 11-12) that non-wealthy candidates "whose supporters cannot make large donations" will be unable to compete on even terms in any future election in which their opponents include *both* a self-funded candidate *and* another candidate who receives contributions in excess of the general $2000 limit by invoking the "millionaire" provisions. The district court correctly held that plaintiffs lack standing to challenge BCRA §§ 304 and 319. See Supp. App. 475sa-477sa (Henderson); *id.* at 1008sa (Kollar-Kotelly).

Plaintiffs' claim of injury resulting from BCRA §§ 304 and 319 is even more speculative than their claim with respect to BCRA § 307. It is wholly uncertain whether any plaintiff will be a candidate in any election affected by the millionaire provisions. See Supp. App. 476sa (Henderson). And even if one of the plaintiffs becomes a candidate in such a race, the immediate consequence of BCRA §§ 304 and 319 (like that of BCRA § 307) would be to *increase* the amount of the money that could be contributed to his campaign. Plaintiffs' claim of harm depends not only on the uncertain prospect that a plaintiff candidate will face a self-funded opponent in an upcoming federal election, but also on speculative predictions that a *third* candidate in the same race will qualify for and benefit significantly from the increased contribution limits provided by BCRA §§ 304 and 319, and that plaintiffs themselves will be unable to derive a comparable benefit. Even in that circumstance, any competitive electoral disadvantage that plaintiffs might suffer would not be attributable to BCRA or to the defendants. See p. 126, *supra*.

2. In any event, the millionaire provisions do not deprive plaintiffs of their right to equal protection of the laws. In any election where a self-funded opponent's expenditures trigger the higher contribution limits provided by BCRA §§ 304 and 319, plaintiffs themselves will have the same opportunity as any other donors and candidates to make and receive contributions in the increased amounts. The possibility that other donors and candidates will derive a greater practical advantage from the increased limits is insufficient to establish an equal protection violation. See p. 126, *supra*.

C. The District Court Correctly Dismissed Plaintiffs' Challenge To BCRA § 305

Under BCRA § 305, a candidate for federal office may invoke his statutory entitlement (see p. 19, *supra*) to the "lowest unit charge" for broadcast advertising only if he either (a) promises that his advertisements will "not make any direct reference to another candidate for the same office," or (b) makes clear, in any advertisement that does include a direct reference to an opposing candidate, that the sponsoring candidate has approved the broadcast. If the sponsoring candidate chooses option (b), BCRA § 305 prescribes the form in which he must state his approval of the advertisement. For television broadcasts, the advertisement must include "a clearly identifiable photographic or similar image of the candidate," and "a clearly readable printed statement" expressing the candidate's approval.

BCRA § 305(a)(3) (adding 47 U.S.C. 315(b)(2)(C)(i) and (ii)). For radio advertisements, the broadcast must include "a personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast." BCRA § 305(a)(3) (adding 47 U.S.C. 315(b)(2)(D)). The district court correctly held that plaintiffs lack standing to challenge BCRA § 305. See Supp. App. 467sa-472sa (Henderson); *id.* at 1008sa (Kollar-Kotelly). In any event, plaintiffs' challenge lacks merit.

1. Plaintiffs' claim of injury resulting from BCRA § 305 rests entirely on the affidavit of Senator McConnell. Senator McConnell testified that in prior campaigns, he has run advertisements "that made contrasts between me and my opponent." McConnell Aff. para. 12. He further testified that he would run similar advertisements in future campaigns because he considers it "important for Kentucky voters to have as much information as possible about the qualifications of those who choose to run for the office of United States Senator." *Ibid.*; see McConnell Br. 67.

Senator McConnell's current term does not expire until the year 2008. Because a candidate for federal office is entitled to the "lowest unit charge" for broadcast advertising only during specific periods directly preceding an election, see 47 U.S.C. 315(b)(1), BCRA § 305 has no immediate impact on any communicative activities in which Senator McConnell might wish to engage. Rather, "the earliest date he could feel the effect of [BCRA § 305] is 45 days before the Republican primary election in 2008." Supp. App. 470sa (Henderson). The length of time before Senator McConnell could be tangibly affected by the challenged provision, and the inevitable uncertainty regarding the type of advertisements he will wish to run if he indeed stands for reelection in 2008, precludes him from establishing that his alleged injury is "*certainly* impending." *Defenders of Wildlife*, 504 U.S. at

565 n.2. And neither Senator McConnell's affidavit nor plaintiffs' brief explains how his ability to inform Kentucky voters "about the qualifications of those who choose to run for the office of United States Senator" (McConnell Aff. para. 12) would be compromised if he were to state his approval of the relevant broadcasts in the manner specified by BCRA § 305—a course of action that would allow him to refer directly to opposing candidates while retaining his entitlement to the "lowest unit charge."

2. BCRA § 305 does not violate the First Amendment. Contrary to plaintiffs' contention (McConnell Br. 68), BCRA § 305 does not discriminate on the basis of viewpoint. Rather, it applies by its terms to all radio and television broadcasts that make a "direct reference" to a candidate's opponent, regardless of the party affiliation of either candidate or the message that the sponsoring candidate seeks to convey. BCRA § 305 is not invalid simply because it may induce candidates to include in their advertisements a statement of personal approval that they would not otherwise make. An FCC regulation that long predates BCRA requires that the sponsor of *every* broadcast advertisement must be identified within the advertisement itself. See 47 C.F.R. 73.1212 (2002). Although BCRA § 305 imposes additional requirements regarding the *manner* in which the sponsorship-identification information must be conveyed, plaintiffs do not explain why that greater specificity should alter the constitutional analysis. Indeed, BCRA § 305 is in one significant respect *less* burdensome than the pre-existing FCC rule, since it applies only if the candidate invokes his statutory entitlement to the "lowest unit charge."

BCRA § 305 reflects Congress's determination that, if a candidate for federal office seeks the "lowest unit charge" for a broadcast advertisement that includes a direct reference to his opponent, the candidate should identify himself as the sponsor in a particularly clear and unmistakable manner.[54] See 147 Cong. Rec. S2693 (daily ed. Mar. 22, 2001) (statement of Sen. Collins). Federal candidates have no First Amendment right to utilize the broadcast media anonymously, let alone to do so at a particularly favorable rate. They likewise have no constitutional right to avoid a mode of sponsorship-identification that is especially likely to achieve its intended objective.

D. The Disclosure Requirements In BCRA § 504 Are Constitutional

BCRA § 504 requires a broadcast station to maintain and make publicly available a complete record of requests to purchase broadcast time to "communicate[] a message relating to any political matter of national importance, including * * * a national legislative issue of public importance." BCRA § 504 (adding 47 U.S.C. 315(e)(1)(B)). Plaintiffs' First Amendment challenge to that provision (McConnell Br. 73-75) lacks merit.[55]

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[54] The analogous FCC rule, in addition to requiring generally that the sponsor of broadcast advertising be identified within the advertisement itself, see 47 C.F.R. 73.1212(a)(1) and (2) (2002), imposes more specific sponsorship-identification requirements with respect to candidate advertising. See 47 C.F.R. 73.1212(a)(2)(ii) (2002) ("In the case of any television political advertisement concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds."). Thus, the fact that BCRA § 305's more specific sponsorship-identification requirement is triggered by the content (but not the viewpoint) of the pertinent advertisement reflects no departure from the established principles governing broadcast communications.

[55] BCRA §§ 305 and 504 impose distinct types of sponsorship-identification requirements, though the two provisions serve closely related purposes. BCRA § 305 requires, as a prerequisite for entitlement to the "lowest unit charge," that the sponsor of certain broadcast advertisements must be identified in a specified manner *in the advertisement itself.* BCRA § 504 applies to a broader class of advertisements and requires that additional information be submitted to the broadcast licensee and made

1. Plaintiffs contend (McConnell Br. 73) that the First Amendment bars Congress from imposing disclosure requirements for speech that does not expressly advocate the election or defeat of a candidate for public office. That argument is foreclosed by this Court's precedents. See *Bellotti*, 435 U.S. at 792 n.32 (State may require disclosure of sponsor of corporate advertisement regarding referendum proposal); *Buckley* v. *Am. Constitutional Law Found.*, 525 U.S. 182, 202-203 (1999) (State may require disclosure of the names of ballot initiative petition sponsors and the amounts paid to gather support for the initiatives).

2. As explained in the government's brief in opposition to the motion for summary affirmance on this issue filed by plaintiff National Association of Broadcasters (NAB), longstanding FCC regulations impose disclosure requirements with respect to the sponsorship of broadcast matter "involving the discussion of a controversial issue of public importance." 47 C.F.R. 73.1212(d) and (e) (2002); see 47 C.F.R. 76.1701(d) (2002) (same standard used in disclosure regulation governing cablecasting). By enabling viewers and listeners to identify the persons actually responsible for communications aimed at a mass audience, those regulations assist the public in evaluating the message transmitted. See *Bellotti*, 435 U.S. at 792 n.32 ("Identification of the source of advertising may be required * * * so that the people will be able to evaluate the arguments to which they are being subjected.").

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publicly available upon request. Both provisions have close analogues in longstanding FCC regulatory requirements. See 47 C.F.R. 73.1212(a), (d) and (e) (2002); p. 130, *supra*; p. 132, *infra*. Plaintiffs' mode of attack on BCRA §§ 305 and 504—characterizing those provisions as unprecedented assaults on the First Amendment, while simply ignoring their established historical antecedents—is symptomatic of plaintiffs' approach to the entire case.

The range of information required to be disclosed under BCRA § 504 is comparable to the disclosures mandated by pre-existing FCC rules. Compare 47 U.S.C. 315(e)(2)(G) (added by BCRA § 504), with 47 C.F.R. 73.1212(e) and 76.1701(d) (2002). Plaintiffs do not attempt to show that BCRA § 504's requirements are more onerous than the FCC's longstanding rules, nor do they contend that the pre-existing agency regulations are themselves unconstitutional. See generally 02-1676 Gov't Br. in Opp. to Mot. of NAB for Summ. Aff. 4-9. Because BCRA § 504 is essentially a codification of established and unchallenged regulatory requirements, plaintiffs' First Amendment claim should be rejected.

3. Plaintiffs' vagueness argument (McConnell Br. 74-75) also lacks merit. Broadcasters have evidently achieved a workable understanding of FCC disclosure requirements that apply to broadcast matter "involving the discussion of a controversial issue of public importance." 47 C.F.R. 73.1212(d) and (e) (2002); 47 C.F.R. 76.1701(d) (2002). Plaintiffs offer no reason to believe that the BCRA terms "political matter of national importance" and "national legislative issue of public importance" will be more difficult to comprehend. See generally 02-1676 Gov't Br. in Opp. to Mot. of NAB for Summ. Aff. 2-4.

E. BCRA § 318, Which Prohibits Any Minor From Making A Contribution To A Federal Candidate Or Political Party, Is Constitutional

1. This Court's decision in *Beaumont* forecloses the Echols plaintiffs' argument (Br. 34 n.38) that BCRA § 318 is subject to strict scrutiny. In *Beaumont*, a nonprofit corporation "argue[d] that application of the ban on its contributions should be subject to a strict level of scrutiny, on the ground that [2 U.S.C.] § 441b does not merely limit [corporate] contributions, but bans them on the basis of their source."

Beaumont, 123 S. Ct. at 2210. The Court rejected that contention, explaining that "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment." *Ibid.*; see p. 35, *supra*. The Court further observed that "the difference between a [contribution] ban and a limit" is properly considered "when applying scrutiny at the level selected, not in selecting the standard of review itself." *Id.* at 2211. Similarly here, the fact that BCRA § 318 bans rather than limits contributions by minors to federal candidates and political parties is relevant to the First Amendment analysis, but it provides no basis for applying strict scrutiny.

2. BCRA § 318 is a valid means of preventing circumvention of the FECA/BCRA contribution limits by adults who might otherwise use minors as surrogate contributors. Minors have historically been barred from voting, from entering into binding contracts, and from disposing of property. BCRA § 318 therefore does not meaningfully burden any right that minors have traditionally been understood to possess. Congress surely has power to identify *some* minimum age for making political contributions, and it reasonably chose the age at which individuals acquire a host of other political, civil, and property rights. BCRA § 318 will have no meaningful impact on the ability of candidates and parties to acquire the resources needed for their own advocacy—the principal constitutional value implicated by contribution limits. And because BCRA § 318 bars only transfers of money to federal candidates and political parties, it leaves minors free to volunteer for federal campaigns and to engage in a variety of other political activities. See generally 02-1676 Gov't Br. in Opp. to Mot. of Echols, et al., for Summ. Aff. 2-9.

CONCLUSION

The Court should sustain the constitutionality of BCRA and should affirm in part and reverse in part the judgment of the district court.

Respectfully submitted.

LAWRENCE H. NORTON
General Counsel
RICHARD B. BADER
Associate General Counsel
STEPHEN E. HERSHKOWITZ
DAVID KOLKER
Assistant General Counsels
Federal Election Commission

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
MALCOLM L. STEWART
GREGORY G. GARRE
Assistants to the Solicitor General
DOUGLAS N. LETTER
JAMES J. GILLIGAN
MICHAEL S. RAAB
DANA J. MARTIN
TERRY M. HENRY
RUPA BHATTACHARYYA
ANDREA GACKI
Attorneys

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IN THE
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MITCH MCCONNELL, UNITED STATES SENATOR, *et al.*,
Appellants/Cross-Appellees,
v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees/Cross-Appellants.

AND CONSOLIDATED CASES

**ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR INTERVENOR-DEFENDANTS SENATOR JOHN McCAIN, SENATOR RUSSELL FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, SENATOR OLYMPIA SNOWE, AND SENATOR JAMES JEFFORDS

ROGER M. WITTEN
WILMER, CUTLER &
PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Additional counsel listed on inside cover

160 pp

BEST AVAILABLE COPY

BURT NEUBORNE
FREDERICK A.O. SCHWARZ, JR.
BRENNAN CENTER FOR
JUSTICE
161 Avenue of the Americas,
12th Floor
New York, NY 10013

CHARLES G. CURTIS, JR.
DAVID J. HARTH
MICHELLE M. UMBERGER
HELLER EHRMAN WHITE &
MCAULIFFE LLP
One East Main Street
Suite 201
Madison, WI 53703

BRADLEY S. PHILLIPS
MUNGER, TOLLES &
OLSON LLP
355 South Grand Ave.
35th Floor
Los Angeles, CA 90071

E. JOSHUA ROSENKRANZ
HELLER EHRMAN WHITE &
MCAULIFFE LLP
120 West 45th Street
New York, NY 10036

ALAN B. MORRISON
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, N.W.
Washington, D.C. 20009

ERIC J. MOGILNICKI
MICHAEL D. LEFFEL
A. KRISAN PATTERSON
JENNIFER L. MUELLER
STACY E. BECK
JERROD C. PATTERSON
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

FRED WERTHEIMER
ALEXANDRA EDSALL
DEMOCRACY 21
1825 Eye Street, N.W.
Suite 400
Washington, D.C. 20006

TREVOR POTTER
GLEN M. SHOR
CAMPAIGN LEGAL CENTER
1101 Connecticut Ave., N.W.
Suite 330
Washington, D.C. 20036

QUESTIONS PRESENTED

The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is designed to protect the integrity of the federal election process, to guard against the corruption and appearance of corruption of federal officials and candidates for federal office, and to prevent a recurrence of the massive circumvention of longstanding regulations of campaign finance in the Federal Election Campaign Act (FECA) that occurred before enactment of BCRA.

In light of the fact that the Solicitor General will comprehensively address the various plaintiffs' constitutional objections to BCRA, the intervenor-defendants will address only the following questions in this brief:

1. Whether Title I of BCRA—which prohibits national political parties, federal officeholders, candidates for federal office, and officers of national political parties from soliciting and using "soft money" (donations from prohibited sources such as corporations and labor unions or in amounts exceeding statutory contribution limits), and which restricts state and local political parties, state candidates, and state officials from using unlimited "soft money" for "federal election activity"—is constitutional.

2. Whether Title II-A of BCRA—which prohibits the use of funds from corporate and labor union general treasuries for "electioneering communications," and which imposes disclosure requirements with respect to "electioneering communications"—is constitutional.

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INTRODUCTION

More than a century ago, Elihu Root decried massive donations to political parties and candidates as

> a constantly growing evil in our political affairs, which has . . . done more to shake the confidence of the plain people of small means in our political institutions[] than any other practice which has ever obtained since the foundation of our government. And I believe that the time has come when something ought to be done to put a check upon the giving of $50,000 or $100,000 by a great corporation toward political purposes, upon the understanding that a debt is created from a political party to it; a debt to be recognized and repaid with the votes of representatives in the legislature and in Congress, or by the actions of administrative or executive officers who have been elected in a measure through the use of the money so contributed.[1]

The concerns about the vitality of our democratic system that lie at the heart of this case are thus "neither novel nor unfamiliar." SA 479(K).[2] Congress and the States have long wrestled with the problem that "aggregated capital [can] unduly influence[] politics, an influence not stopping short of corruption." *FEC* v. *Beaumont*, 123 S. Ct. 2200, 2205 (2003). To protect democracy, they have limited the size of campaign contributions; mandated public disclosure of contributions and expenditures; and required corporations and unions to use only funds voluntarily raised from individuals to make campaign-related contributions and expenditures. This Court has sustained many such measures. *See id.*; *FEC* v. *Colorado Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Burroughs* v. *United States*, 290 U.S. 534 (1934).

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[1] Elihu Root, Political Contributions By Corporations (Sept. 3, 1894), in *Addresses on Government and Citizenship* 143-44 (R. Bacon & J. Scott eds., 1916).

[2] Citations to "SA" refer to the district court's opinions reprinted in the supplemental appendix to the jurisdictional statements. We use the judges' initials (H, L, K) to refer to their individual opinions, and "PC" for the per curiam opinion. "DEV" refers to the defendants' exhibit volumes in the court below, and "IER" to the intervenors' excerpts of record.

In the 1970s, after the public learned that its government officials had granted favors, positions, and preferential access to campaign donors, Congress acted to restore integrity to a system that had suffered a dramatic loss of public confidence. Congress did not attempt to remove private money from politics. But it did seek to ensure that federal officials would not be induced to heed the wishes of $100,000 donors, donors would not feel compelled to make massive contributions as insurance against official retaliation, corporations and unions would not use their war chests to advance the election of federal candidates in the hope of gaining influence with them, and citizens would not lose faith in their representatives out of concern that they were more responsive to the large moneyed interests that had assisted their election than to their constituents—or the public interest.

Yet history teaches that political actors and those who control aggregations of wealth are always "test[ing] the limits of the current law," *Beaumont*, 123 S. Ct. at 2207, and a generation later, Congress recognized that its work was on the brink of collapse. Although the Federal Election Campaign Act (FECA) worked well for a time, its effectiveness was undermined when the Federal Election Commission (FEC) created significant loopholes, which players of the political money game relentlessly exploited. By the 2000 elections, political actors had ceased to observe anything like a prohibition against contributions or expenditures from corporations or unions, or against contributions in excess of statutory limits, for the purpose of influencing federal elections. The Bipartisan Campaign Reform Act (BCRA) is Congress's attempt to restore FECA to working order.

The plaintiffs' position is that FECA, having fallen (or, more accurately, having been pushed), must, like Humpty Dumpty, remain forever smashed. They argue that the Constitution permits only rules that would be ineffectual to counteract either the reality or the perception of a system in which donors give massive assistance to political parties on the understanding that they create—as Elihu Root stated—"a debt to be recognized and repaid." In their view, Congress, this Court, and the public must accept a political system in which an overwhelming majority of Americans believe that Members of Congress disproportionately heed the views of large donors to political parties—even if those views do not coincide with what most constituents want, or what a Member thinks is best for the country. *See* SA 626-28(K), 1289-92(L); Mellman/Wirthlin Rep. 6-9 (JA 1564-69).

As this Court has observed, "[l]eave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000). Nothing in BCRA casts the least doubt on "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). But BCRA serves public interests every bit as profound: "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society." *United States* v. *UAW*, 352 U.S. 567, 570 (1957).

STATEMENT

1. *The Problem Congress Faced.* FECA carried forward provisions, first enacted between 1907 and 1947, prohibiting corporations and unions from using their general treasury funds to make contributions or expenditures in connection with federal election campaigns. FECA permitted corporations and unions to establish separate segregated funds (PACs), to solicit voluntary contributions to those PACs from related individuals, and to use the PAC funds in federal campaigns. It limited other campaign contributions

and expenditures, required expanded disclosure of both, and established the FEC to enforce the law.

In *Buckley* v. *Valeo*, this Court generally upheld FECA's limits on contributions to candidates and political committees, 424 U.S. at 23-38; struck down its limits on expenditures, *id.* at 39-51; and upheld its disclosure requirements, *id.* at 60-84. In sustaining disclosure of expenditures by persons other than candidates or political committees (such as political parties), the Court construed the term "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80. As examples, the Court pointed to words of "express ... advocacy" such as "vote for" or "vote against." *Id.* at 80 n.108 & 44 n.52.

a. *Soft Money.* Two years after *Buckley*, the FEC embraced a legal fiction under which political parties effectively became able to use funds raised directly from corporations and unions and from individuals in amounts exceeding FECA's contribution limits ("soft money") for activities affecting federal elections. Under this loophole, political parties could use a combination of "hard" (FECA-compliant) and soft money for mixed-purpose activities that influenced both federal and state elections. FEC Adv. Op. 1978-10. This fiction allowed political parties to raise and use unlimited soft money to influence federal elections.[3]

National-party soft money spending grew from $19 million in 1980 to $80 million in 1992, by which time a significant

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[3] Plaintiffs object to the term "soft money." Congress, however, used that term to refer to funds that are not subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. § 441i ("Soft money of political parties"). Members of this Court have used the term the same way. *Colorado Repub. Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.) (*Colorado I*); *Shrink Mo.*, 528 U.S. at 398 (Stevens, J., concurring). Plaintiffs prefer terms such as "state" or "state-regulated" money, but those locutions are premised on the very fiction that BCRA was enacted to address—that the hundreds of millions of dollars donated to parties' "non-federal" accounts were not used to influence federal elections. *See* pp. 17-19, 25-26.

share was being spent to influence federal elections. SA 32-35(PC); Mann Rep. 15-17 (JA 1548-51). The trend accelerated in the 1996 elections, when the national parties ran so-called "issue" ads prominently featuring presidential candidates, but funded in large part with soft money on the theory that they used no words "expressly advocating" any candidate's election. SA 35-37 & nn.14-15(PC), 494-95(K), 1191(L). By the 2000 election cycle, their soft money activity reached $498 million—42% of their total spending. SA 38(PC).

The FEC's rules permitted state parties to use a greater percentage of soft money than national parties in funding mixed-purpose activities. The parties gained leverage by raising soft money at the national level, but transferring it to state parties to fund activities—including "issue" ads—that influenced federal elections. SA 33-37(PC), 517-19(K), 1231-34(L). In 1996 the national parties transferred to state parties $115 million in soft money—two thirds of state-party soft money expenditures. By 2000, the amount rose to $280 million—more than half the soft money the national parties raised. SA 490-91(K), 1188-89(L).

To raise a half-billion dollars, the national parties turned to large donors. In the 2000 election cycle, 60% of their soft money came from just 800 donors—including 435 unions, corporations, and other organizations, and 365 individuals—each contributing at least $120,000. SA 287(H), 1189(L). These developments struck at the fundamental principle, sustained by this Court, that the threat of actual or apparent corruption can be minimized by regulating the source and amount of contributions made to influence federal elections.

b. *"Issue" Advocacy.* Like the parties, corporations, unions, and others began sponsoring advertisements that supported or opposed federal candidates but avoided words of "express advocacy." Following the lead of the AFL-CIO, corporations, unions, and interest groups spent millions of dollars in 1996 from their treasury funds and dues (not PAC funds) to pay for broadcast ads directed at specific federal candidates and aired in their districts in the final weeks before their elections. SA 38-40(PC), 678-99(K), 1316-17(L).

The record "unequivocally establishes" that despite the absence of "magic words," such ads "not only [were] crafted for the specific purpose of directly affecting federal elections, but [were] very successful in doing just that." SA 1161(L); *see* SA 810-21(K). Like soft money donations to parties, candidate-focused "issue" ads undermined core aspects of the campaign finance regime upheld in *Buckley*. They allowed corporations and unions to intervene in federal elections using general treasury funds rather than PAC funds, and enabled groups and individuals to make campaign expenditures without meeting FECA's disclosure requirements. SA 39(PC), 657-58(K), 1306-08(L).

2. *Congress's Response*. BCRA responds to these wholesale evasions in a direct but tailored way. The details of BCRA are covered elsewhere. We note, however, that plaintiffs' attacks on BCRA studiously ignore its core function of restoring public confidence in federal officials and elections by closing the soft money and "issue" ad loopholes. Instead, they imagine obscure applications of BCRA, and then suggest those applications lie at the heart of the law; they stretch to find the most draconian possible interpretation of the law, only then to complain of its harsh effect; and most significantly, they repeatedly mischaracterize the law's provisions, and thus attack something that does not exist.

For example, the political parties highlight their four most compelling examples of BCRA's supposed excesses on the first page of their brief. None is addressed to BCRA's core provisions, and each is premised on a misstatement of the law. First, the parties assert it is a crime under BCRA for "the Chairman of the RNC . . . to send a fundraising letter on behalf of his party's . . . gubernatorial candidate in [an] off-year election." But the FEC and Justice Department have made clear that national-party officials may solicit hard money on behalf of any candidate—federal, state, or local—and their parties also remain free to contribute

hard money to federal, state, and local candidates.[4] Second, they assert that California state parties may not donate even hard money to PACs formed to support or oppose the current effort to recall the Governor. In fact, the relevant restriction has no application to the recall election, which the State of California has scheduled for October 7, 2003, five months away from any federal election.[5] Third, they assert that BCRA subjects to "pervasive federal regulation voter registration and get-out-the-vote . . . efforts by state and local parties." Actually, BCRA does not regulate—much less "pervasive[ly]" regulate—these activities, but merely addresses the size and source of contributions used to finance them, when they are conducted in connection with federal elections.[6] Most bewilderingly, plaintiffs assert that BCRA makes it a crime for the national parties to work with their state counterparts "to design, fund, and implement statewide voter mobilization programs." In truth, BCRA does not prevent national and state parties from coordinating their activities for such efforts, so long as the national parties do not *solicit* soft money or *control* its expenditure.[7]

Plaintiffs' characterizations of BCRA's new definition of "electioneering communications" are equally flawed. They persistently contend (*e.g.*, McConnell Br. 39) that the electioneering communications provisions "seek to prohibit core political speech." These provisions ban no speech. Corporations and unions remain free to run federal campaign ads, as long as they pay for the ads from PAC funds voluntarily contributed by individuals for that purpose.

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[4] 2 U.S.C. § 441i(a)(1), (2) (national parties and their officers prohibited from soliciting funds that are not "subject to the limitations, prohibitions, and reporting requirements of this Act"); *see* pp. 36-37.

[5] 11 C.F.R. 300.37(a)(3)(iv) (state parties may transfer funds to state political committees supporting only state or local candidates and not engaging in federal election activity); *see* p. 38 n.29.

[6] 2 U.S.C. § 441i(b)(1) (amounts expended for federal election activity "shall be made subject to the limitations, prohibitions, and reporting requirements of this Act"); *see* pp. 27-28.

[7] 2 U.S.C. § 441i(a)(1) (national party may not "solicit, receive, or direct to another person . . . or spend" soft money).

Most fundamentally, plaintiffs mischaracterize BCRA as representing an epochal change in the law. In truth, BCRA merely strives to restore the efficacy of longstanding federal campaign finance laws, and to put an end to the evasion that has made a mockery of the law and left the public to believe that democracy is for sale.

SUMMARY OF ARGUMENT

BCRA's aim is to restore public faith in federal officeholders and elections by closing the soft money and "issue" ad loopholes that had, in recent years, eviscerated the federal campaign finance laws. Prior to enactment of BCRA, corporations, unions, individuals, and political parties routinely evaded long-established contribution limits and source restrictions. Hundreds of millions of dollars of contributions were used to influence federal elections without complying with federal standards. Similarly, by running campaign ads that avoided words of "express advocacy," corporations and unions routinely evaded federal restrictions on the use of their general treasury funds to influence federal elections, injecting many millions of dollars more of unregulated money into federal elections. BCRA responded to the collapse of the FECA regime in a considered and measured way. The law should be sustained in its entirety.

I. Title I restores efficacy to the FECA structure of source prohibitions, amount limits, and disclosure requirements for contributions used to influence federal elections. It does so by banning soft money contributions to national political parties, regardless of how the money is used, and restricting state parties' use of soft money for specified "federal election activity." It imposes no spending limits on anyone, but rather addresses the risk that large political contributions will foster actual or apparent corruption of federal officeholders. Upholding Title I thus requires no more than reaffirming the principle of *Buckley* v. *Valeo* that Congress may limit contributions in a real and effective manner.

The Members of Congress who enacted BCRA correctly concluded, based on a substantial record and their own experiences, that the corrupting potential of soft money donated to national parties stems from the way in which it is raised, and from the close relationship between national parties and federal officeholders and candidates. Rather than insulating their officeholders from this corrupting potential, national parties acted as the conduit for that corruption, bringing soft money donors and officeholders together and urging officeholders to raise soft money and to entertain the policy wishes of the donors. Congress recognized that this system generated enormous damage to public confidence in our democratic system and public officials, and enabled candidates to engage in massive circumvention of FECA's limits on sources and amounts of contributions.

Congress knew that national parties had used state affiliates to deploy soft money for activities affecting federal elections. It understood that any effective reform measure had to address state-party use of soft money in federal elections, lest the problem immediately regenerate at the state party level. Congress delineated four categories of activities undertaken by state parties with the largest impacts on federal elections and determined they should be paid for with FECA-compliant money. Congress may protect the integrity of federal elections and officeholders in this manner, particularly since BCRA leaves state parties otherwise free to spend whatever money they may raise under state law. The balance of Title I guards against corruption and avoidance of the soft money restrictions by other well-tried devices known to Congress.

II. Title II addresses the problem of candidate-focused "issue" ads. It bans no speech. It only restricts the source of the funds used for those ads and requires disclosure in certain circumstances.

Before BCRA, unions, corporations, and others routinely created ads to support or oppose specific candidates, while avoiding "magic words" of "express advocacy." They hired campaign consultants and pollsters to refine electioneering messages in these ads, and made clear in their own statements what they were doing. These ads shared characteristics with parties' and candidates' ads that confirm their electioneering nature: they named specific candidates; they were concentrated in the last weeks before an election; and they were targeted to close races in a partisan way. The sponsors of these ads fundamentally undermined FECA's source and disclosure rules for independent campaign expenditures—in reality, they conducted electioneering with unlimited corporate and union treasury funds, and without disclosing the sources of the funds. Their techniques also created opportunities for corruption in the exchange of "issue" ad campaign support for political favors.

Title II responds narrowly and objectively to these problems by defining a new category of "electioneering communications" with specific reference to the demonstrated dimensions of the problem. Imposing source and disclosure rules on such ads serves the same compelling interests that sustain those rules as applied to "express advocacy": preventing the distortions that arise when corporate and union treasuries become political "war chests"; providing information to the voting public; and preventing circumvention of other rules. Title II also serves the compelling First Amendment interest in using clear, objective statutory lines in this sensitive area. And it imposes only modest burdens—disclosure rules, and the requirement that corporations and unions fund some ads during the immediate pre-election period with PAC funds.

Buckley did not codify "express advocacy" as a constitutional test; it held only that a statutory line defining independent campaign spending should be clear, and directed at advocacy relating to the campaigns of particular federal candidates. Title II satisfies those precepts. Nor is Title II overbroad. It imposes only limited burdens of a sort this Court has already recognized may, in appropriate circumstances, be imposed even on political speech entitled to stringent protection under the First Amendment. That Title II applies only to limited categories of speech during the period just before elections is a virtue, not a tailoring flaw. Plaintiffs' attack on a small portion of the empirical evidence

supporting Title II is misguided and irrelevant, and their examples of past ads supposedly demonstrating overbreadth offer them little support. Additional arguments raised by ideological nonprofit organizations do not support either the facial invalidation of any part of Title II or a blanket exemption.[8]

ARGUMENT

I. TITLE I OF BCRA IS CONSTITUTIONAL

A. Soft Money Has Undermined Democratic Institutions And Public Confidence In Government

Since the Tillman Act of 1907, which prohibited corporate campaign contributions, Congress has endeavored to prevent the corruption and appearance of corruption of federal elected officials by reducing their dependence on large campaign contributions. Congress's concerns, as relevant now as they were in the time of Theodore Roosevelt, are that public officials will be particularly attentive to the interests of those who make large contributions to candidates and their political parties, and that citizens will perceive such official responsiveness to large donors as characteristic of a degraded system that does not deserve public confidence. Whether or not officeholders in fact yield to the temptation to assist large donors, "the opportunity for abuse inherent in the process of raising large monetary contributions" is plain. *Buckley*, 424 U.S. at 30.

The 1990s made clear that the temptation facing politicians to assist large donors is not limited to helping those who have contributed directly to their own campaigns. The political fortunes of officeholders and candidates are intertwined with the fortunes of their parties. Green Rep. 7-10 (JA 1195-1200). The Members of Congress who enacted BCRA learned through personal experience that officeholders also have a powerful incentive to assist those who have contributed generously to their closest allies—their national and state political parties.

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[8] The NRLC plaintiffs argue (Br. 45-49) that intervenor-defendants lack Article III standing to defend the constitutionality of BCRA. The Court should reject that contention for the reasons set forth in the district court's order of May 3, 2002. NRLC Reply Br. App. 4a-6a.

1. The Soft Money System In Operation

The political parties argue that Title I responds to a phantom—that the spectacle of 93 entities contributing $100,000 or more in soft money to *both* major national political parties in the 2000 election cycle alone does not even raise an appearance of corruption.[9] Although this Court has recognized that little evidence is required to support the self-evident proposition that "large contributions" pose a threat of actual or apparent corruption, *see Shrink Mo.*, 528 U.S. at 391, the record overwhelmingly establishes the reasonableness of Congress's conclusion that soft money had fundamentally undermined public confidence in our democratic system and elected officials. That evidence includes testimony from current and former Members of Congress, current and former party officials, and experts, as well as many thousands of pages of documents, press reports, and studies chronicling how those exploiting the soft money loophole made a mockery of federal campaign finance laws and their goal of minimizing actual or apparent corruption of federal officeholders.

There was no mystery in the way the soft money system worked. As Members of Congress who voted to end that system knew from personal experience, political parties routinely offered donors more extensive and more personal access to federal officeholders in exchange for larger donations. Often the parties explicitly offered donors opportunities to exchange views with officeholders on matters of policy in return for large contributions. On other occasions, the parties offered donors the opportunity to introduce themselves to officeholders for later follow-up. The most notorious examples may be the "White House coffees" with President Clinton that the DNC facilitated for particularly generous contributors, but instances of such preferential access were numerous, if generally occurring in more prosaic settings. S. Rep. No. 105-167, at 191-224 (1998) (Thompson Comm. Rep.); SA 603-15(K), 1268-76(L).

Party officials commonly offered to pass on the concerns of generous donors to appropriate persons on Capitol Hill, and asked Members to meet with donors to hear their proposals on pending issues. In that way, party officials directly linked donors' generosity to Members' willingness to entertain their positions. SA 603-07(K), 1269-71(L). And as former Senator Warren Rudman recounted (Rudman Dec. ¶ 7 (JA 742)), the ensuing conversations between Members and donors were "not idle chit-chats about the philosophy of democracy":

> Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so you should do this to help us." No one needs to say it—it is perfectly understood by all participants in every such meeting.

Plaintiffs argue that there is no proof of a direct connection between large donations and floor votes on specific legislation. That can hardly be the test for actual corruption, and in any event, the evidence is to the contrary. Senator Feingold testified, for example, that a fellow Democrat (and member of the Senate leadership) urged him to end a filibuster of a pending bill because it contained a provision sought by Federal Express, which had made a $100,000 soft money contribution to their party. Feingold Dep. 62. Former Senator Paul Simon similarly recounted that members of his party caucus knew who was "buttering our bread" and acted accordingly. Simon Dec. ¶¶ 13-18 (JA 805-07). The legislative record, as well as testimony in this case by Members of Congress, connected soft money to Congress's failure to enact generic drug legislation, tort reform, tobacco-control measures, and new accounting rules for stock options. Feingold Dep. 62; McCain Dec. ¶¶ 8-11 (JA 392-94); Meehan Dep. 11-14; Shays Dep. 63-65, 228.

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[9] Common Cause, *You Get What You Pay For* (2000) (analysis of FEC reports showing 93 donors gave $100,000 or more to both Democrats and Republicans between January 1, 1999 and June 30, 2000), DEV 31, Tab 52.

As former Senator Alan Simpson explained (Simpson Dec. ¶ 10 (JA 811)):

> Too often, Members' first thought is not what is right or what they will believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from trial lawyers to Democrats stopped tort reform.

There are also many ways other than floor votes, less open to public scrutiny, in which Members influence the legislative process—especially through control of the legislative calendar—and soft money often had its effect long before the votes were cast. McCain Dec. ¶ 5 (JA 390-91); Simon Dec. ¶¶ 13-14 (JA 805). Experts confirmed that, even if only a small proportion of actual votes are directly influenced, contributions may have "a significant impact on legislative outcomes." Green Rep. 24-25 (JA 1218-20); *see* Bok Rep. 3-5.

Donors understood that soft money was "essential for developing relationships with Members of Congress, which in turn lead[s] to access, which in turn lead[s] to influence over policy." SA 589(K); *see* SA 1265, 1277-81(L). A prominent lobbyist explained that, under the soft money system, traditional lobbying activities are "alone insufficient to be effective . . . . To have true political clout, the giving and raising of campaign money for candidates and political parties is often critically important." Andrews Dec. ¶ 5 (JA 2); SA 589-95(K).

Donors therefore viewed soft money contributions as a necessary investment toward favorable policy outcomes. As observed in one representative internal document from a Fortune 100 company, soft money donations were a "key to [the company's] increased role and ability to get [its] views heard by the right policy makers on a timely basis; in other words, a smart investment." SA 599(K), 1280(L). An executive of another large company explained the need to contribute $1.4 million by noting that both parties believed soft money was "critical to their success in coming elections" and were "especially sensitive to which companies contribute soft money, and which don't." SA 618(K); *see* 1284(L). Many other documents in the record are to the same effect; corporate employees justified soft money donations because they would "strengthen our relationship" with a Member, "get our relationship" with a Member "off to a good start," or "establish[] goodwill." SA 587-88(K); *see* SA 1280-81(L).

The most striking evidence on this point is that many corporations made massive soft money donations to *both* major political parties. *See* Mann Rep. tbls. 5-6 (App. 52a-55a). Donors who felt "increased pressure from party and congressional leaders" and who knew that "direct competitors and potential competitors are weighing in with big soft money donations" wanted to ensure that they had access to "both sides of the aisle." SA 618(K), 1284-85(L). Indeed, the soft money system evolved to the point that donors feared retaliation unless they made contributions to both parties. Greenwald Dec. ¶ 9 (JA 282-83); Hassenfeld Dec. ¶ 23; SA 584, 599(K). The parties promoted this fear; when they learned a donor had given to the other side, they would "get a message" to the donor asking, "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" SA 619-23(K), 1284-86(L); Randlett Dec. ¶ 12 (JA 715). As former Senator Dale Bumpers stated, massive donations turned into a coercive kind of "insurance." Bumpers Dec. ¶ 14 (JA 174-75).

Soft money also gave rise to a widespread perception of corruption. A study conducted by two leading experts in public opinion (one Democrat, one Republican) found that 71% of the public believed Members of Congress sometimes voted the way large donors to their parties wanted, even when that was not what people in their districts wanted or what Members thought best for the country. Similarly, 84% believed that Members of Congress would be more likely to listen to those who gave money to their political party in response to their solicitations for large donations, and 68% believed that big donors sometimes blocked official decisions that could have improved the everyday lives of the public. Mellman/Wirthlin Rep. 7-9 (JA 1566-69). A 2000 survey of leading corporate executives likewise found that 74% believed businesses were pressured to make large political donations; half stated that businesses feared adverse legislative consequences if they turned down requests from high-ranking party officials and their surrogates; and 75% believed their donations gave them an advantage in shaping legislation. When asked why corporate America contributed to political campaigns, the surveyed executives' most frequent answer was "to avoid adverse legislative consequences" (31%), followed by "to buy access to influence the legislative process" (23%). Kolb Dec. ¶ 9 & Ex. 6 (JA 349); SA 574(K).

But the testimony of the true experts about public opinion—Members of Congress—is the most remarkable. Both in the legislative debates on BCRA and in sworn testimony in this case, Members reported that their constituents had become "as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations." Simpson Dec. ¶ 14 (JA 812); *see* SA 630-33(K), 1278, 1294-95(L) (quoting numerous Members of Congress). Members themselves described the soft money system as corrupting. Senators Boren, Brock, Bumpers, Feingold, Jeffords, McCain, Rudman, Simon, Simpson, Snowe and Wirth, and Representatives Meehan and Shays, among others, detailed the baneful effects of soft money on the working of our government.[10] Former Senator Rudman described large soft money contributions as "inherently, endemically, and hopelessly corrupting," and stated, "You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty." Rudman Dec. ¶ 10 (JA 743). Given that senior elected officials perceived the political system in which they operated as "dirty," it is scarcely surprising that the public overwhelmingly agreed, or that Congress saw that BCRA was needed to restore public confidence.

2. Circumvention Of FECA And The Use Of Soft Money To Influence Federal Elections

Not only does the judicial and legislative record amply demonstrate that the raising of soft money—regardless of how that money was ultimately used—gave rise to both actual and apparent corruption, it also shows how the soft money system eviscerated FECA's core restrictions on the size and source of contributions to influence federal elections. This Court has long recognized the danger of circumvention of contribution restrictions, noting only a few months ago that "experience demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." *Beaumont*, 123 S. Ct. at 2207. In light of that experience, the Court has consistently given effect to Congress's judgment that these limits must be reinforced by related restrictions. *See Buckley*, 424 U.S. at 38; *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 197-99 (1981) (plurality) (*CalMed*); *id.* at 203 (Blackmun, J., concurring in part and in the judgment).

The Court and Congress have found a particularly serious danger of circumvention in the prospect that a donor might effectively "contribute massive amounts of money to a particular candidate through ... huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38. The soft money system was exactly that form of circumvention. Although the parties and many donors were aware that outright earmarking of donations for the benefit of particular candidates would run afoul of FECA, they engaged in every activity short of express direction to ensure that federal candidates could receive the benefit of soft money. There was scarcely any pretense that soft money would not be used to assist in electing the parties' federal candidates, including in many cases the candidates who actually solicited the funds.

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[10] *See also* DEV 32, Tab 70 (chart of statements in the Congressional Record by Sen. Feingold identifying ways in which soft money donors had apparently secured influence over legislation).

Indeed, soft money was largely *not* used for so-called "party building" functions, but rather was directed to activities related to the election of the parties' candidates. SA 495-501(K), 1198-1212(L). Lawmakers commonly asked donors who had reached their federal contribution limits to make soft money donations to national and state parties "solely in order to assist federal campaigns," including their own.[11] Parties kept close track of soft money raised by lawmakers, and "the amount of money a Member of Congress raise[d] for the national political party committees often affect[ed] the amount the committees g[a]ve to assist the Member's campaign." SA 555(K). Donors often requested that their soft money contributions be credited to particular candidates, and the parties obliged. It was of little significance to the donor whether funds were "hard" or "soft," as long as it was understood that the funds were to benefit particular parties and candidates. SA 558-61(K), 1198-1202, 1245-46(L); *see* SA 561-62(K), 1246-47(L) ("joint fundraising committees" established by parties and candidates). Just as the Court noted in *Colorado II* regarding hard money, so too with soft money: "[w]hat a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit." 533 U.S. at 458.

The importance of soft money in influencing federal elections was confirmed by current and former party officials and the RNC's own soft money expert. Former RNC Chair Brock acknowledged that "the parties by and large use [soft] money to help elect federal candidates." Brock Dec. ¶ 6 (JA 170). The RNC's soft money expert has similarly explained that "[n]ational parties allocate soft money to state organizations primarily with the intent to help federal

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[11] Randlett Dec. ¶ 9 (JA 714); *see* SA 550-53, 565-66, 1237-38(L) (Members asked donors to contribute to state parties "to help that officeholder or other federal candidates").

candidates in close races," and that soft money "permits candidates, contributors, and parties to circumvent federal laws limiting campaign contributions."[12] In short, as congressional investigative reports on abuses in the 1996 federal elections found, "permitting [soft money] donations to political parties eviscerated FECA's longstanding ability to prevent corporate and labor union treasury funds from influencing federal elections." SA 37(PC).

B. The Soft Money Restrictions Properly Respond To The Dangers Of Unlimited Contributions

1. The Court Should Defer To Congress's Judgments Underlying Soft Money Restrictions

Title I reflects Congress's determination that FECA's regulatory structure had been undermined to the point of collapse by the parties' burrowing at its vulnerable points. Members of Congress understood from personal and institutional experience how the soft money system functioned and what was needed to save FECA. This experience is particularly relevant in three respects, for "[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Shrink Mo.*, 528 U.S. at 402 (Breyer, J., concurring).

First, Congress's experience establishes a strong basis for its judgment that officeholders and candidates understand that their political fortunes are intimately connected to their political parties. Members of Congress knew that, as federal officeholders, they cannot be expected to ignore their party's need for money or the expressed wishes of their party, including the wish that Members heed the concerns of large donors. Plaintiffs propose a theoretical construct in which parties shield their officeholders from the corrupting potential of large donations to the party. The

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[12] La Raja Cross, Ex. 3 at 74; La Raja, *Sources and Uses of Soft Money*, in *A User's Guide to Campaign Reform* 83, 105 (G. Lubenow ed., 2001); SA 519-20(K), 1206, 1234, 1237(L).

Members who enacted BCRA knew otherwise. At the same time, given the close bonds between Members and their parties, it cannot be seriously maintained that Congress enacted BCRA to destroy the party system.

Second, Members knew from personal experience that donations for certain campaign activities, although purportedly not used to influence federal elections, were intended to and did in fact do so. The indisputable record was that, through the 1990s, parties had used soft money for generic campaign advertising, voter registration drives, get-out-the-vote (GOTV) activity, and "issue" ads mentioning federal candidates, with the intent to affect federal elections.[13] Although the FEC treated these donations as though they were not used to influence federal elections, Congress saw through this loophole and closed it.

Third, Title I includes anti-circumvention provisions that rest on Congress's judgment about how political actors will inevitably test the limits of the law—a judgment informed by an extensive factual record demonstrating how they had behaved in the past. In the First Amendment context, as elsewhere, this Court has deferred to Congress's predictive judgment about the need for regulation. *See Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 195-96 (1997). The case for deference is yet stronger here, where the law reflects how Members of Congress expect *they* (and their parties) would act in the future.

2. Only Limited Judicial Scrutiny Is Applicable To The Soft Money Provisions Of Title I

It is "settled" that regulations designed to buttress contribution restrictions need only be "closely drawn" to match the "sufficiently important" government interests in combating corruption and the appearance of corruption. *Colorado II*, 533 U.S. at 456. Plaintiffs nonetheless contend that Title I is a restraint on speech and association that requires strict scrutiny. This assertion is meritless.

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[13] *E.g.* Fowler Dec. ¶ 17 (JA 264); 148 Cong. Rec. H409 (Feb. 13, 2002) (Rep. Shays); SA 525-26(K).

After *Buckley*, it cannot be seriously contended that Title I's reinforcement of the FECA structure abridges any *contributor's* right of free speech. *Buckley* establishes that reasonable contribution restrictions work no impermissible restriction on the donor's right to speak, for "the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S. at 21. Nor does Title I restrain anyone from engaging in "direct political expression" on his or her own rather than (or in addition to) through parties and candidates. *Id.* at 22.

Title I also does not burden a *political party's* free speech rights in any constitutionally problematic way. Although plaintiffs devote much effort to arguing that Title I acts as a limit on campaign spending, it in fact leaves political parties free to spend as much money as they wish on federal or state election activity, be it for advertising, GOTV activity, or voter registration drives.[14] Title I regulates only the sources and amounts of funds that the parties may raise and use for federal election activities. Like the contribution limits in FECA to which they are tied, the soft money restrictions merely require parties "to raise funds from a greater number of persons," and do not "reduce the total amount of money potentially available to promote political expression." *See Buckley*, 424 U.S. at 22; *id.* at 29 (FECA contribution limits "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues").

That some of BCRA's provisions are necessarily framed in terms of mirror-image restrictions on "solicitations" rather than "contributions" does not occasion strict scrutiny. These solicitation provisions merely ensure that the contribution restrictions are not readily evaded, as they were in the past, and thus operate functionally as a reinforcement of the contribution limits. *Cf. Colorado II*, 533 U.S. at 438 (noting that FECA employs a "functional," not formal, understanding of contributions). The Court has previously sustained a provision of FECA that limits corporations and unions to soliciting contributions for their segregated PAC funds from certain persons, without suggesting that the statute's focus on solicitations was important (and indeed FECA does not separately prohibit contributions from other individuals). *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 206-11 (1982) (*NRWC*). Nor did the Court apply strict scrutiny to that solicitation restriction in *NRWC*. *See Beaumont*, 123 S. Ct. at 2211 (discussing *NRWC* on this point). Rather, the Court upheld the solicitation restriction as a legitimate "prophylactic measure[]." *NRWC*, 459 U.S. at 210.[15]

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[14] BCRA separately limits coordinated expenditures by national parties on behalf of their nominees to federal office, if they also make independent expenditures for the same nominees during the general election. 2 U.S.C. § 441a(d). That provision is discussed by the Solicitor General.

Nor does BCRA impermissibly burden any right of association. BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and fundraising goals with one another. The parties invoke a purported unlimited right to pass funds among one another, but no decision of this Court suggests this right has the elevated constitutional status that plaintiffs claim. *See Beaumont*, 123 S. Ct. at 2210 (restrictions on contributions subject to "relatively complaisant review"). In any event, nothing in BCRA prevents national and state parties from transferring unlimited amounts of hard money among one another. *See* 2 U.S.C. § 441a(a)(4).

Title I also does not abridge any party's right to associate with its donors. Contributions to candidates and political committees "lie closer to the edges than to the core of political expression." *Beaumont*, 123 S. Ct. at 2210. Any associational right of political parties to solicit donations is surely no more weighty than the right of would-be contributors to make them. Indeed, unlike donors, who make a "symbolic expression of support" to a party by making a contribution, *Buckley*, 424 U.S. at 21, a political party generally does not signal support for, or even a desire to be associated with, its donors when it solicits funds—especially when the donors give to *both* parties (as was often true with soft money).

3. The National-Party Soft Money Ban

BCRA provides that a national committee of a political party may not solicit, receive, direct to another person, or spend funds that are not subject to the source prohibitions and amount restrictions of FECA. 2 U.S.C. § 441i(a)(1). This across-the-board prohibition against the national parties' use of soft money is based on the judgment of Members of Congress, drawn from personal experience, that national political parties had acted as conduits of influence between party donors and the federal candidates and officeholders with whom the parties were connected, and that in consequence national parties had to be removed from the soft money business altogether. That judgment is amply supported by the legislative and judicial record.

a. Contrary to plaintiffs' contention, under the soft money system, political parties did not insulate their officeholders from importuning contributors or sanitize the effect of large contributions. Quite the reverse: the parties frequently encouraged their officeholders to be attentive to their soft money donors' positions on matters of policy, and brought their donors and officeholders together to meet privately. SA 603-15(K), 1269-76(L). Federal officeholders and candidates were routinely informed of the identities of large donors to their parties. In many cases, Members of Congress personally solicited large soft money donations; in other cases, the parties distributed lists of potential and actual donors to officeholders. SA 579-82(K), 1258-61(L). Donors also often informed officeholders that they had made contributions to their party. "[F]or a Member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves." SA 581(K); *see* SA 1258(L).

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[15] Plaintiffs invoke *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290 (1981), in support of strict scrutiny, but nowhere in that decision did the Court state that it was applying strict scrutiny. *See id.* at 299 (challenged contribution limit "does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights"); *id.* at 301 (Marshall, J., concurring) ("the Court is following our consistent position that this type of governmental action is subjected to less rigorous scrutiny than a direct restriction on expenditures"); *id.* at 302 (Blackmun & O'Connor, JJ., concurring in the judgment) (appropriate level of scrutiny requires only "a sufficiently important governmental interest" and "means 'closely drawn to avoid unnecessary abridgment' of First Amendment freedoms"; quoting *Buckley*). Moreover, that case involved a restriction on donations to groups promoting ballot measures, which the Court distinguished from *Buckley* on the ground that ballot measure groups had no nexus to corruption or appearance of corruption of officeholders or candidates. 454 U.S. at 296-97. The record in *this* case demonstrates that political parties have a close connection to officeholders and candidates, which enables them to serve as highly efficient conduits of corruption.

Indeed, in the soft money context, it is futile to look for any meaningful separation between federal officeholders and their national parties. *All* the members of four of the six major national-party committees (DCCC, DSCC, NRCC, and NRSC) are federal officeholders. The DSCC and NRSC also established "joint fundraising committees" with the official campaigns of federal candidates, effectively enabling candidates to raise both hard and soft money simultaneously, in their own names and for their own races. SA 561-62(K), 1246-47(L); Krasno/Sorauf Rep. 13 (JA 1286).

The other major national committees—the DNC and RNC—are also tightly connected to their parties' federal officeholders. As former RNC Chair Haley Barbour stated, during presidential election years they make election of the President their "highest priority." SA 1197(L); *see* SA 545(K) (national committees assume "subsidiary role" to presidential candidate's campaign committee). The DNC's "issue" ad campaign on behalf of President Clinton in 1996 forcefully bears that out, but that episode is merely illustrative of the point that the central function of the major national-party committees is to promote the election of the parties' federal candidates. Any elected official also benefits considerably from a donor's generosity to his or her party, for an official's power depends greatly on whether that party is in the majority or minority, and whether it controls another branch of the government or legislative chamber. Parties and their federal officeholders and candidates are thus connected by powerful bonds, and Congress recognized that elected officials are likely to be attentive to the concerns of generous donors to their parties.

b. Although Judge Leon accepted the basic premise of Title I—that *raising* unlimited soft money from corporations, unions, and wealthy individuals creates the potential for corruption and appearance of corruption, SA 1132-35—he mistakenly concluded that the validity of the national soft money ban turns on how the soft money is *spent*. Judge Leon believed that the interests of preventing corruption and appearance of corruption do not sustain BCRA in the absence of "any perceived, or actual, benefit to a federal candidate." SA 1103. He therefore concluded that, while Congress could prohibit national parties from using soft money to finance "public communications" that promote or attack clearly identified federal candidates, it could not ban the use of soft money for activities that do not "directly" affect federal elections, including disbursements for voter registration and GOTV activities undertaken within days of a federal election. SA 1119.

Even on its own terms, Judge Leon's theoretical demarcation between activities that do and do not provide a "perceived" or "actual" benefit to federal candidates does not support the line he drew. Congress reasonably determined that many activities undertaken by both national and state parties with soft money beyond "public communications"—including *all* the activities that Congress defined as "[f]ederal election activity," such as generic campaign activity and GOTV (even when it makes no express reference to a federal candidate)—actually benefit candidates in federal elections. Indeed, contrary to the picture drawn by the plaintiffs, soft money was generally not used for "party building" activity several steps removed from election campaigns, but was used in just these ways to affect federal elections. Green Rep. 14 n.17 (JA 1205).[16]

But Judge Leon's approach is also misguided in a more fundamental respect: it fails to apprehend that, for national parties, the potential for corruption comes from *raising* soft money and the close connections between the party and its federal officeholders and candidates, regardless of how the national party spends that money. Title I does not rest on any notion that voter registration or GOTV activity is suspect; national parties may continue to spend unlimited hard money on such activities, or may transfer unlimited hard money to state and local parties if they prefer. Rather, Title I is predicated on Congress's well-supported recognition that, absent regulation to the contrary, corporations, unions, and individuals who want to obtain favors from federal officials will make large donations to be used by those officials and their parties as they perceive to be most advantageous to their political fortunes. And because of the close bonds between federal officeholders and their parties, unlimited donations threaten to corrupt federal officeholders even when they are made, not to assist the officeholders directly, but to help their political allies in the party. "[W]hether they like it or not, [parties] act as agents for spending on be-

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[16] Representatives of all four major congressional campaign committees acknowledged, for example, that their committees targeted GOTV efforts paid for with soft money in states where there were close federal races, and that those efforts did affect federal elections. SA 525(K). The parties also told donors that their soft money would be used for GOTV efforts to help the parties' candidates in federal elections. SA 526(K). Similarly, the parties used soft money to conduct voter registration efforts that assisted federal as well as state and local candidates. SA 529-30(K). Expert testimony confirmed that, when a political party conducts GOTV and voter registration efforts, as well as generic advertising, the effect on the federal election is not "indirect," even when those activities do not expressly mention the federal candidate. In that situation, the parties expect and intend that efforts to mobilize voters "will produce a harvest of votes for [that party's] candidates for both state and federal offices." Green Rep. 14 (JA 1205-06); SA 527-29(K).

half of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452.[17]

c. Plaintiffs suggest there is no danger of corruption or appearance of corruption if national parties raise soft money only for the purpose of spending those funds on state races (or transferring those funds to state parties for use in state races). This argument suffers from the same flaw as Judge Leon's analysis: it fails to apprehend that the risk of corruption stems from the *raising* of the money. Moreover, in the past, the FEC allowed national parties to raise and use soft money purportedly for non-federal activity, but in fact that soft money was routinely used for activities affecting federal elections. Congress is not required to repeat that mistake.

Nor does the Constitution require Congress to permit an earmarking regime under which national parties could accept unlimited donations for some purposes, but not others. Just as Congress may bar a group that receives only a small part of its funds from corporations from making any campaign contributions, and need not consider whether any of the group's funding is earmarked for campaign purposes, *Beaumont*, 123 S. Ct. 2210 & n.7, Congress acted within its discretion in concluding that the only effective means to prevent the national parties from continuing to circumvent the law is an across-the-board rule against soft money. Indeed, given the fungibilty of money, if national parties could accept unlimited contributions purportedly for state purposes alone, donors could easily evade FECA's restrictions by making large soft money contributions to national parties simply to free up hard money for the party to use for federal candidates, who could then owe a debt of gratitude to the soft money donors.

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[17] Plaintiffs have stressed that Justice Breyer's lead opinion in *Colorado I* stated that "[w]e are not aware of any special dangers of corruption associated with political parties." 518 U.S. at 616. The issue here, however, is not whether political parties *themselves* commonly seek to corrupt their own candidates and officeholders with *lawfully* raised money, as had been argued in *Colorado I*. Rather, the point in this case is that political parties can serve as effective instruments of corruption by *others*—a point the Court strongly endorsed in *Colorado II*, 533 U.S. at 452.

In any event, the supposed impairment of the national parties' ability to assist their state affiliates is minimal. Even though national parties may not themselves spend soft money on state elections, they may spend unlimited hard money on state races, and may consult with state parties about how the state party might spend its own soft money on purely state races (as long as the national party does not control the use of the soft money, 441i(a)(1)). Thus, although plaintiffs characterize BCRA as driving a wedge between national and state parties, that is simply not the case.

4. The State-Party Soft Money Restrictions

a. Whereas BCRA precludes national parties from raising and spending soft money at all, Title I restricts state parties from using soft money only for specific "[f]ederal election activity." 2 U.S.C. § 441i(b)(1).[18] This restriction reflects Congress's determination—amply supported by the legislative and judicial record—that state parties had been pervasively used as conduits for soft money in federal elections.[19] Even leading opponents of campaign finance reform

recognized that "a prohibition of soft money donations to national-party committees alone would be wholly ineffective."[20]

State parties played a central role in the soft money system. Indeed, state parties became the preferred conduits of soft money funds in federal elections, because FEC allocation regulations permitted them to spend a greater percentage of soft money on supposedly non-federal activity (such as GOTV, voter registration, and "issue" ads) than could be done if the national party spent the money. SA 516-22(K), 1231-38(L); Magleby Rep. 37 (JA 1510). For that reason, in the 2000 election cycle alone, the national parties transferred $280 million in soft money to the state parties. SA 490-91(K), 1188-89(L).

State parties told their soft money donors that their generosity had "delivered Ohio for President George W. Bush," *see* RNC OH 0410155 (IER, Tab 10), enabled the California Democratic Party to "increase the number of Californian Democrats in . . . Congress" and "deliver[ed] California's 54 electoral votes for President Bill Clinton[]," SA 526(K). National parties and federal candidates also routinely directed donors to contribute soft money to state parties for deployment in federal elections. Many state parties were effectively reduced to "offshore banks" for national parties, useful principally to inject soft money into federal elections in compliance with the national parties' directions—a phenomenon well documented by the Thompson Committee that investigated abuses in the 1996 elections (and discussed in the amicus brief for former Senator Thompson, at 24-26).[21]

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[18] "Federal election activity" includes voter registration activity during the 120-day period before a federal election, GOTV, voter identification, and generic campaign activity conducted "in connection with" an election in which a federal candidate is on the ballot, and "public communications" that promote or attack a "clearly identified candidate for Federal office." 2 U.S.C. § 431(20)(A). The definition excludes a broad range of state party activity. For example, Title I does not reach state party GOTV activity for elections with only state races on the ballot, state party contributions to state candidates, or "public communications" at any time that refer only to state and local candidates (other than GOTV and voter registration), because they are not "[f]ederal election activity."

[19] Plaintiffs strain to find fault in the fact that the state party provision is framed in terms of activities on which state parties *spend* money. But Congress obviously framed § 441i(b)(1) in terms of funds "expended or disbursed for Federal election activity" to make clear that BCRA does *not* prohibit state parties from raising or using soft money, so long as state parties use such funds only for state or local election purposes. Section 441i(b)(1) is thus functionally identical to a limit on soft money contributions to state parties for federal election purposes. *Cf. Colorado II*, 533 U.S. at 438.

[20] *The Constitution and Campaign Reform: Hearings on S. 522 Before the Sen. Comm. on Rules and Admin.*, 106th Cong., 2d Sess. 301 (2000) (statement of Bobby R. Burchfield, Partner, Covington & Burling).

[21] Green Rebuttal Rep. 10 (JA 1239); Thompson Comm. Rep. 4467-68 (state parties acted as conduits to pay for DNC issue ads); *id.* at 8300 (minority views) (RNC memo described buying ads through state parties as "simply a book keeping hassle"); SA 522-25(K), 1234(L) (national parties

The record also shows that massive soft money donations to state parties gave rise to the familiar risks of actual and apparent corruption. For example, Carl Lindner, chair of Chiquita Brands and a longtime Republican donor, gave more than $500,000 to *Democratic* state parties only hours after the Clinton administration asked the World Trade Organization to examine European Union trade barriers against Chiquita bananas.[22] The Thompson Committee found that, in exchange for $300,000 in soft money given to Democratic state parties and candidates and the DNC, the DNC assisted Roger Tamraz in his effort to win backing for an oil pipeline in the Caucasus by arranging meetings with government officials and with President Clinton—against the recommendation of National Security Council staff. Thompson Comm. Rep. 43-44, 2907-31; *id.* at 7519 (minority views). That Committee also found that Native American tribes that operated casinos gave significant soft money contributions to national and state Democratic committees after the DNC Chair contacted Clinton White House officials about those tribes' opposition to the casino application of a rival tribe, and the Department of the Interior denied that casino application (overturning a contrary staff recommendation). Thompson Comm. Rep. 44-46, 3167-94.

b. Plaintiffs implausibly suggest there is no danger of corruption or appearance of corruption when a corporation or union makes a $100,000 donation to a state party to engage in federal election activity supporting a federal candidate, and argue that Congress was not justified in bringing state parties within the prohibition of use of soft money in federal elections. But there is no reason to believe that a federal officeholder would be less willing to heed the wishes of a donor that generously funded activities assisting his election merely because the funds happened to be deployed

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retained control over soft money after it was transferred to state parties); La Raja Cross, Ex. 3 at 49 (state parties became "branch organizations" implementing "strategic decisions of party professionals in Washington").

[22] McCain Dec., Ex. I (Weisskopf, *The Busy Back Door Men*, Time, Mar. 31, 1997, at 40 [INT 001289-90]).

through a state party. If, as plaintiffs suggest, Congress is constitutionally barred from regulating state parties that engage in federal election activity, then in the future, soft money donors will simply write their checks to state parties for use in federal election activity and make their generosity known to federal candidates. Thus it was essential for Congress to bring state parties' federal election activity within the soft money restrictions, as opponents of the ban recognized. Congress's constitutional authority to protect the integrity of federal elections is not diminished merely because the threat comes through state-party activity that indisputably affects federal elections.[23]

Congress has also limited the effect of the soft money restrictions on state parties. First, BCRA's definition of "[f]ederal election activity" in § 431(20)(A) excludes a broad range of state election activity, thus ensuring that the restrictions do not intrude too far into state-party activity (*see* p. 28 n.18). Second, Congress has allowed state parties to make some use of soft money even in federal elections. Just as, before BCRA, the FEC allowed state parties to use a combination of soft and hard money for activities that could affect both federal and state elections, the Levin Amendment, 2 U.S.C. § 441i(b)(2), authorizes a new kind of allocation formula permitting use of combinations of limited soft and hard money in federal elections. This authorization, however, is subject to provisos designed to prevent a resurgence of the pre-BCRA system in which state parties were used as conduits of unlimited soft money into federal elections.[24]

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[23] Indeed, if Congress has no constitutional authority to regulate soft money used by state parties in connection with federal elections, then it is difficult to see how the FECA regime before BCRA could have been constitutional. Even then, both national and state parties that conducted GOTV, voter registration, and generic campaign activity in connection with an election in which a federal candidate was on the ballot were required to allocate their disbursements for such activity between hard and soft money, under the rationale that both federal and state interests were implicated by elections featuring both federal and state races. 11 C.F.R. §§ 106.1, 106.5 (2001).

When States opt to hold state elections simultaneously with federal elections, Title I incidentally restricts state parties from using soft money for some activities that affect state races. That does not establish, however, that Title I *regulates* the state elections or otherwise exceeds Congress's Article I powers. Once Congress has balanced the competing policy considerations and has determined that the use of soft money in "[f]ederal election activity" so affects the integrity of federal elections as to warrant the exercise of its Article I powers, the courts have no warrant to reweigh the federal regulations against any incidental effect on the funding of state campaign activity. The necessary and proper scope of laws to ensure the integrity of federal elections "are matters for congressional determination alone." *Burroughs* v. *United States*, 290 U.S. 534, 547-48 (1934). Thus, as the Court held more than a century ago, "[i]f for its own convenience a State sees fit to elect state and county officers at the same time and in conjunction with the election of [federal officials], Congress will not be thereby deprived

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[24] Although plaintiffs have sought to portray the Levin Amendment as an onerous restriction on state parties, in fact it accommodates state parties by creating an exception to BCRA's restrictions on their use of soft money for federal election activity. Like the provision upheld in *Buckley* that allowed individuals to contribute more to political committees than to candidates, the Levin Amendment thus "enhances the opportunity . . . to participate in the election process." 424 U.S. at 35.

Under the Levin Amendment, a state or local party committee may use combinations of hard money and soft money (including money obtained from corporations and unions), under allocation formulas established by the FEC, for certain kinds of federal election activity, such as voter registration and GOTV activity that does not refer to a clearly identified candidate for federal office. "Levin funds" (soft money used in the allocation) must be raised locally—*i.e.*, by the state or local committee that makes the disbursements, and not solicited by or received from another party committee or a federal officeholder; a donor may not contribute more than $10,000 per year in Levin funds to any particular party committee; and Levin funds may not be used for any activity referring to a clearly identified federal candidate. 2 U.S.C. § 441i(b)(2)(B), (C).

of the right to make regulations in reference to the latter." *Ex parte Siebold*, 100 U.S. 371, 393 (1879). Nor does Title I intrude on state sovereignty in any manner implicating the Tenth Amendment or other structural features of the Constitution. Unlike statutes this Court has found to contravene principles of state sovereignty, BCRA does not require the States to do or not do anything.[25]

c. As with the national-party ban, Judge Leon concluded that the restrictions on state-party use of soft money could be validly applied only to those activities that, in his view, "directly" benefit candidates for federal office. SA 1118-42. Again, Judge Leon's reasoning is flawed. Congress determined, based on its experience, that GOTV, voter registration, and generic campaign activity conducted in connection with or close proximity to federal elections often are intended to and in fact do influence the outcome of such elections. Congress was therefore justified in acting to protect the integrity of federal elections by restricting state parties' use of soft money for federal election activity.

The parties point to an advertisement run by the California Democratic Party opposing Proposition 209 as an example of the purportedly excessive coverage of Title I. The parties do not dispute that such advertisements could well affect the outcome of a federal election, but they nonetheless contend that such advertisements cannot create a risk of corruption or appearance of corruption of a federal candidate. But Congress recognized that a donor can secure undue influence with a federal candidate by making a massive donation to a state party, intending that the state party then use those funds for "[f]ederal election activity" (such as GOTV activity or generic party advertising) in connection with that candidate's election. It is not significant whether (for example) the state party's GOTV activity funded with that soft money highlights a ballot initiative or a gubernatorial race; either form of GOTV activity affects a federal election on the same ballot—as the press understood in the context of Proposition 209.[26] The risks of corruption and appearance of corruption inhere in both, and stem from the fact that the donor can make it known to the federal candidate that his election was assisted by the donor's generosity.

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[25] *Cf. Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

The parties contend (Br. 54-56) that even that part of the soft-money restrictions that Judge Leon would have left intact, which prohibits parties from using soft money for any "public communication" referring to a clearly identified candidate for federal office (§ 431(20)(A)(iii)), is unconstitutional because it applies even when parties do not engage in "express advocacy" for or against a candidate, and thus could intrude on pure issue advocacy. That argument is meritless. This Court made clear in *Buckley* that political parties exist for the purpose of engaging in campaign activity, and so there is no need to differentiate between their campaigns and other activity. In *Buckley*, the Court construed a provision limiting independent expenditures by *individuals and interest groups* to cover only express advocacy. 424 U.S. at 40-42. But when the Court considered a separate provision requiring reporting and disclosure by *political committees* (including political parties) making campaign-related expenditures, the Court noted that the term "political committees" in that context reached only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," not groups "engaged purely in issue discussion." *Id.* at 79. The Court explained that "[e]xpenditures of candidates and of 'political committees' so construed ... are, by definition, campaign related." *Id. Buckley* thus establishes that, because political parties are presumed to engage in campaign activity, regulation of their financing does not intrude on pure issue advocacy.

5. Related Anti-Corruption And Anti-Circumvention Provisions

Congress enacted further measures in Title I to ensure that political actors do not continue established means of circumventing FECA's hard money restrictions. Plaintiffs devote a significant portion of their briefing to challenging these measures. The pattern in their briefs is to urge the broadest imaginable construction of each provision, posit its application to a remotely conceivable situation, and then contend that that application would be unconstitutional, and so the entirety of Title I must fall. The irony in this position is striking: one can imagine the reaction of one of the political party plaintiffs if the FEC advanced such expansive readings of the statute in an enforcement action against it—in contrast to this case, where it serves the parties' goals to make Title I seem draconian. And of course, the duty of the courts is to save the law, not to adopt constructions that might imperil it. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979).

Plaintiffs are essentially attempting to convert a pre-enforcement facial challenge to BCRA into an as-applied challenge to factual scenarios that may never arise. Even under the relatively generous standards of First Amendment doctrine, statutes are not to be invalidated based on "hypothetical application to situations not before the Court." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 743 (1978); *see Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985). Rather, to prevail in their facial challenge, plaintiffs must demonstrate "a substantial risk that application of the provision will lead to the suppression of speech." *NEA* v. *Finley*, 524 U.S. 569, 580 (1998); *see City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (stressing that a statute is not facially invalid merely because "one can conceive of some impermissible applications"). Plaintiffs have not made that showing.

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[26] Press reports indicated that the state parties' political activity over Proposition 209 was closely connected to their efforts to affect the 1996 presidential election, which was on the same ballot. "[P]olitical partisans promoted [Proposition 209 and similar measures] as a way of getting 'their' voters to the polls," and "the California Republican Party subsumed backing of [Proposition 209] into a get-out-the-vote drive for Bob Dole." Stall & Morain, *Prop. 209 Wins, Bars Affirmative Action Initiatives*, L.A. Times, Nov. 6, 1996, at A1; *see* Wooster, *California Fights The Race Wars*, Am. Enter. 54 (2000). The ad in question decried Proposition 209 as a "Republican Scheme," urged voters not to "let the Republicans get away with it," and exhorted voters to go to the polls. Feingold Dep., Ex. 15.

a. *Solicitations By Federal Candidates.* BCRA added 2 U.S.C. § 441i(e), which imposes fundraising restrictions on federal candidates (including federal officeholders). Section 441i(e)(1)(A) prohibits federal candidates from raising, transferring, or spending soft money (whether for a national or a state party or otherwise) in connection with a federal election. Section 441i(e)(1)(B) then extends to non-federal elections the requirement that federal candidates solicit only funds subject to FECA's rules on sources and amounts. Thus, a federal candidate may raise money for others to use in federal and state races as long as the funds raised would not contravene the federal contribution limits or the prohibitions on contributions by corporations and unions.[27]

These provisions are aimed at the core problems of corruption and appearance of corruption that underlie FECA in general and the party contribution limits of Title I in particular. Large donations made at the request of federal candidates and officeholders create the risk that the donor will acquire (or appear to acquire) undue influence as a result of

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[27] Congress further narrowed these quite reasonable restrictions with three exceptions that accommodate competing policy considerations. Section 441i(e)(2) makes the general rule against solicitation of soft money inapplicable if the money is to be used only for a state race in which the federal officeholder is running. Under § 441i(e)(3), a federal candidate may "attend, speak, or be a featured guest at a fundraising event for a State, district or local committee of a political party." Under § 441i(e)(4)(A), federal candidates may solicit unlimited funds for organizations that are tax exempt under IRC § 501(c)—even groups that engage in some "federal election activity," so long as that is not their principal purpose—if the solicitation does not specify how the funds will be spent. Under § 441i(e)(4)(B), candidates may explicitly solicit funds for use by IRC § 501(c) groups for voter registration or GOTV activity, or for 501(c) groups principally organized to engage in such activity, if the solicitation is made only to individuals and the amount solicited from any individual does not exceed $20,000 in a calendar year. These closely drawn measures serve the valid goal of eliminating the appearance of corruption of federal candidates through contributions that are excessive or from impermissible sources, while avoiding overreaching into state political activity.

the requester's gratitude. Indeed, when soft money was solicited, links were often drawn between massive donations and pending legislation—as demonstrated by national-party documents in the record, including "call sheets" prepared for fundraising calls, which emphasized legislative and regulatory matters of interest to solicitation targets. *See* IER, Tabs 1.A., 1.E., 3. These risks are also present when a federal officeholder asks a corporation or union to donate $100,000 to a state party or candidate. A federal officeholder cannot be expected to ignore the fact that a donor has made a substantial contribution at his request to a political ally.

b. *Solicitations By National-Party Officers.* Plaintiffs spill much ink over § 441i(a)(2), which extends the national-party soft money solicitation ban to the national parties' officers. This provision recognizes that political parties, like all artificial entities, necessarily act through their officers and agents. It thus ensures that a national party may not circumvent the basic soft money solicitation ban by claiming that the fundraising was done by its officers, not itself.

The parties strain to manufacture a constitutional flaw in this provision by arguing that it broadly prohibits national-party officers from soliciting even *hard* money for state candidates, even in a year in which no federal candidate is on the ballot (*see* Br. 1). This construction is, to say the least, not compelled by the language of § 441i(a), which bars national-party officers from soliciting only funds that are not "subject to the limitations, prohibitions, and reporting requirements of this Act"—much as § 441i(e) applies to bar solicitation of soft money by federal officeholders. Although some of the intervenors gave differing responses in their depositions when asked about the reach of § 441i(a)(2),[28] the Justice Department and the FEC, which are responsible for enforcing the campaign finance laws, have made clear § 441(a)(2) does *not* prevent the national parties or their officers from soliciting hard money for state parties or candidates. Gov't D.Ct. Opp. Br. 25-26, 38 n.37; Gov't D.Ct. Reply Br. 30 n.34. Nor does the provision limit the amount of hard money a national party may raise and contribute to state candidates. It is quite revealing that the very first example of the supposed excesses of BCRA contained in the political parties' brief relies on a reading of the law that has been rejected by those responsible for enforcing it.

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[28] *Compare* Feingold Dep. 166-67 (appearance of corruption when party officer is "in a position to seek unlimited contributions") *and* Meehan Dep. 236 (party officer may not "ask[ ] for unlimited amounts of money for a local election"), *with* Shays Dep. 237-40 (solicitation ban more restrictive for party officers than federal officeholders).

c. *Solicitations For And Transfers To Tax-Exempt Groups.* Section 441i(d) prevents political parties and their officers and agents from soliciting money for, or directing money to, certain organizations that are tax-exempt under § 501(c) and § 527 of the Internal Revenue Code. In the case of § 501(c) organizations, the prohibition applies only if the organization makes expenditures in connection with federal elections, including "[f]ederal election activity" as defined in § 431(20). Section 527 groups by definition are involved in election activities, and § 441i(d) forbids party fundraising for them only if they do not qualify as candidate committees or "political committees."[29]

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[29] Plaintiffs contend that § 441i(d) prevents state parties from donating funds to state groups formed to support or oppose the impending California gubernatorial recall election. In fact, § 441i(d) has no such application. California has scheduled the election for Oct. 7, 2003, which is not simultaneous with or near any federal election. Any activity undertaken by such § 527 groups concerning the recall therefore would not constitute "[f]ederal election activity," and § 441i(d) would accordingly not apply. *See* 11 C.F.R. § 300.37(a)(3)(iv). But even if California chose to hold the recall election with or near a federal election, § 441i(d) would impose only minimal burdens. To support or oppose the recall, state parties could themselves use soft money for many activities (including ad campaigns directed at the recall), Levin funds on other activities, and hard money on any remaining activities. State parties could also donate funds to § 527 groups formed to support or oppose the recall, provided those groups do not engage in "[f]ederal election activity" or are subject to FECA's reporting requirements. In short, all § 441i(d) prevents state parties from doing is funding federal election activity in a manner that evades FECA's contribution limits and reporting requirements.

Section 441i(d) prevents circumvention of FECA's disclosure requirements by ensuring that national and state parties do not direct or transfer hard or soft money to outside groups that are not subject to those disclosure rules, for use in federal election activities. In the past, Congress had witnessed exactly such evasions.[30] It also prevents circumvention of the requirement that state parties use only hard money and Levin funds for federal election activities. Absent § 441i(d), state parties could sidestep that requirement by soliciting soft money for, or directing or transferring soft money to, tax-exempt groups that undertake voter mobilization campaigns concentrated on core party voters.

d. *Public Communications About Federal Candidates By State Candidates And Officeholders.* Finally, § 441i(f) deals with the very narrow situation in which a candidate for state office or state officeholder makes a "public communication" that refers to a clearly identified candidate for federal office and either promotes or opposes that candidate.[31] In that instance, hard money must be used to finance the communication, for the obvious reason that it relates directly to a federal election. This provision is analogous to the state-party hard money requirement for "public communications" of this type. It also serves to close a potential loophole: without it, state parties could shift soft money to their closely allied state candidates and officeholders to use for "public communications" promoting or attacking federal candidates.

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[30] 144 Cong. Rec. S1048 (Feb. 26, 1998) (Sen. Glenn), S977 (Feb. 25, 1998) (Sen. Levin), S898 (Feb. 24, 1998) (Sen. Ford); Thompson Comm. Rep. 4013; *id.* at 4568, 5974-81 (minority views).

[31] The restriction in § 441i(f) presumably does not apply when a state officeholder makes a communication in his public capacity with public funds. Section 441i(f)(2) also provides an exception if the federal candidate or officeholder referred to is also a candidate for state office and the communication refers to such person in connection with the state election in which he or she is participating.

C. Political Parties Will Remain Vibrant

Although the First Amendment affords protection to the right to "amass[] the resources necessary for effective advocacy," that right is not infringed by contribution limits unless they are "so radical in effect as to render political association ineffective . . . and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397; *see Buckley*, 424 U.S. at 21-22. Plaintiffs have not made even a colorable showing that the soft money restrictions will impair the ability of political parties to engage in effective advocacy, or to assist their candidates in doing so. Their Chicken Little assertions about the impending demise of political parties are implausible and contrary to experience.

As former DNC Chair Donald Fowler (who was also a state party chair) and former RNC Chair William Brock stated, restricting soft money is likely to strengthen both national and state parties—by encouraging them to reinvigorate their support among numerous smaller contributors and volunteers, rather than rely on a few donors who are willing to write massive checks but who are often more interested in promoting particular federal candidates than in the party's long-term health. *See* Fowler Dec. ¶¶ 12, 17 (JA 262, 264); Brock Dec. ¶¶ 6-7 (JA 170-71). Former Senator Brock explained (JA 170):

> The reliance of the major national parties on soft money donations does not in fact strengthen the parties, it weakens them. The focus on raising and spending soft money to affect federal elections divorces both the national and state parties from their roots. The money by and large is not used for "party building." To the contrary, the parties by and large use the money to help elect federal candidates . . . . Far from reinvigorating the parties, soft money has simply strengthened certain candidates and a few large donors, while distracting parties from traditional and important grassroots work.

Moreover, political parties are highly flexible organizations that have successfully adapted to previous regulations and can adapt to new ones. La Raja Cross, Ex. 3 at 37, 148; Green Rep. 5-6, 30 (JA 1193-95, 1226). In many States, political parties have long been subject to restrictions far more stringent than those imposed by federal law, yet state parties have thrived. *Id.* at 33-34 (JA 1229-32).

Nor will the soft money restrictions starve the parties of funds needed for effective campaigning. Soft money represented a small percentage of the national parties' resources before the mid-1990s, yet they performed robustly. SA 32-35(PC); Mann Rep. 18 (JA 1551), tbl. 2 (App. 51a); *id.* at chart 1; Brock Dec. ¶ 7 (JA 170-71); Fowler Dec. ¶ 12 (JA 262). The parties have also been very successful at increasing their hard money receipts. The national parties almost doubled their hard money between the 1992 elections and the 2000 elections, and raised $741 million in hard money in the 2000 election cycle. Green Rep. 30 (JA 1226). State parties' hard money receipts rose from $111.2 million in 1991-92 to $309.6 million in 2000. Biersack Dec. tbl. 11.

The parties will continue to have access to enormous financial resources. BCRA expands their access to hard money: it increases the amount an individual may contribute to any national-party committee by 25%, to $25,000 per year, and to any state party committee by 100%, to $10,000 per year. 2 U.S.C. § 441a(a)(1)(B), (D). There is no reason to doubt the parties will take advantage of these increased limits and step up their efforts to raise hard money from a broader array of individuals, instead of the narrow group of corporations, unions, and large donors that provided soft money in the past. Green Rebuttal Rep. 5-6 (JA 1193-95). As Mark Twain might have said, then, plaintiffs' reports of the death of the political parties are greatly exaggerated.[32]

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[32] Indeed, information from FEC disclosure reports from the first half of 2003 confirms that the six major national-party committees raised more hard money ($160 million) in those six months than they raised in *combined hard and soft money* ($138 million) in the first six months of the last presidential election cycle (January-June 1999). This hard money take in 2003 is *double* the $80 million in hard money that the parties raised in the first half of 1999. If the parties continue to double their hard money

II. TITLE II OF BCRA IS CONSTITUTIONAL

Unlike political parties, whose expenditures "are, by definition, campaign related," *Buckley*, 424 U.S. at 79, corporations, unions, and other interest groups sponsor both communications that *are* related to federal election campaigns, and others that are *not*. As to the former, Congress may impose both disclosure rules and requirements that corporations and unions use only money voluntarily contributed by individuals for political use. *Id.* at 74-75; *Austin*, 494 U.S. at 668-69. For many years, the "express advocacy" test that *Buckley* fashioned to identify which communications were campaign-related worked reasonably well. Despite isolated instances of circumvention, it was generally understood that ads praising or criticizing federal candidates were required to honor FECA's disclosure and source restrictions.

Beginning in 1995, however, that understanding completely changed. A trickle of marginal abuses became a tidal wave of circumvention. "Express advocacy" as a standard for electioneering became worse than irrelevant: it became an object of public derision. Here, for example, is the chair of the NRA's PAC, speaking in 1997 SA 673-74(K):

> Today, there is erected a legal . . . wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it.

Title II of BCRA seeks to re-clothe the emperor by supplying an effective, objective standard for whether an ad is campaign-related. Under Title II, an ad is subject to disclosure and source requirements if it is broadcast, mentions a candidate, is geographically targeted to the candidate's electorate, and is run in the 60 days before a federal general election or the 30 days before a primary. That bright-line test is the product of objective data and experience, which confirm the common-sense reality that in these carefully limited circumstances, ads naming a candidate are very likely intended to convey—and almost certainly will convey—an electioneering message.

Plaintiffs contend that any test other than "express advocacy" is invalid on its face. The Court should evaluate that contention in the light of the overwhelming evidence that in recent years interest groups, prominently including several of the plaintiffs, utterly buried the test they now come to praise. Nothing in the Constitution required Congress to resign itself to the open evasion of FECA's source and disclosure rules. In Title II, it made another "'cautious advance'" in the long history of "careful legislative adjustment of the federal electoral laws" to reflect ongoing experience. *NRWC*, 459 U.S. at 209. It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not "unnecessarily circumscrib[e] protected expression." *Brown* v. *Hartlage*, 456 U.S. 45, 54 (1982).

Plaintiffs' rhetoric notwithstanding, nothing in Title II "bans" any speech. For individuals it requires only disclosure, and only when expenditures for campaign ads exceed $10,000 per year. Corporations and unions remain entirely free to run any ad at any time—even in the targeted circumstances addressed by Title II, so long as they use funds raised by their PACs. As the Court recently reiterated, it is "simply wrong" to characterize that limitation as a "complete ban." *Beaumont*, 123 S. Ct. at 2211. The Court has upheld just such modest burdens on independent campaign expenditures as narrowly tailored to serve compelling public interests in informing the electorate and preventing corruption of the electoral process. It should similarly reject plaintiffs' facial challenge to reforms carefully designed to make FECA's source and disclosure rules effective once again.

A. Plaintiffs Aggressively Exploited The "Express Advocacy" Test To Circumvent Longstanding Source And Disclosure Rules

The record shows that beginning in earnest with the 1996 election, corporations and unions found that under the "express advocacy" test they could easily design broadcast

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take, they will raise $1.5 billion in hard money during the 2004 cycle. *See* http://www.opensecrets.org/parties/index.asp.

campaign ads that focused on candidates and swayed elections, while avoiding FECA's source and disclosure rules.[33]

1. The Ads Themselves

The most direct evidence is the ads themselves. The district court quoted the following ad, run by the AFL-CIO during the 60 days before the 1996 election in the district of a targeted Republican Congressman, as just one example of the type of "issue" ads run by unions and corporations:

> [Narrator] What's important to America's families? [Middle-aged man] "My pension is very important because it will provide a significant amount of my income when I retire." [Narrator] And where do the candidates stand? Congressman Steve Stockman voted to make it easier for corporations to raid employee pension funds. Nick Lampson opposes that plan. He supports new safeguards to protect employee pension funds. When it comes to your pension, there is a difference. Call and find out.

SA 38-39(PC). There is no doubt this was a campaign ad, specifically intended to influence votes in the upcoming election. Yet because it did not actually say "Vote for Lampson," the AFL could pay for it with general treasury funds, and make no disclosures under FECA.

Here are a few more examples. Each avoids the "magic words" of "express advocacy," and each could be said to address some "issue"—yet each was also clearly intended to influence a federal election:

- An ad run by "Citizens for Reform" during the 1996 Montana congressional race involving candidate Bill Yellowtail: "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." Thompson Comm. Rep. 6304-05 (minority views).
- An ad run on the eve of the 2000 presidential election, alleging that Myanmar used "slave labor to assist the building of an oil pipeline by American company Haliburton" under Dick Cheney's leadership. The tag-line: "[W]e just can't trust Dick Cheney a heartbeat away from the presidency."[34]
- An Americans for Job Security ad, run close to the 2000 election in Washington State, criticizing Senate candidate Maria Cantwell's legislative voting record on taxes from 1993, even though she was not in office in 2000, and could not vote on any issue unless elected to the Senate. The tag-line: "Can we afford politicians like Maria Cantwell?" App. 2a.

There are many, many more. We have included "storyboards" for some others in an Appendix to this brief (at 1a-10a). In addition, Volume 48 of the defendants' exhibits below contains audio and video copies of some ads, and storyboards for virtually every distinct television ad sponsored by an interest group in 1998 and 2000 that referred to a federal candidate and ran within 60 days of the general election. By way of comparison, it also includes examples of the very different ads that do *not* mention candidates, and of the very similar ads run *by* candidates. This volume by itself demonstrates the problem Congress faced.

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[33] The history and nature of the "issue" ad problem, the need for reform, and related evidence are discussed in the opinions below at SA 38-40, 92-99, 106-128(PC); 651-770, 776-886(K); 1146-1159, 1296-1379(L). The expert discussions of Kenneth Goldstein, Jonathan Krasno and Frank Sorauf (testifying jointly), and David Magleby are excerpted at JA 1150, 1272, 1476, and may be found in the record at DEV 1, Tabs 2 and 7, and DEV 4, Tab 8.

[34] App. 1a. Data about ads from 1998 and 2000 are generally derived from the "CMAG database." *See* Goldstein Rep. 5-8 (JA 1157-61).

2. "Issue" Ads Were Designed To Influence Federal Elections

This case might have a different cast if plaintiffs could credibly claim that the candidate-centered ads they ran before BCRA, and that would now be covered by Title II, were designed only to spread their views on public issues—with perhaps some dim awareness that they "[might] in some cases indirectly influence election outcomes by addressing issues of interest to the electorate." AFL Br. 7. Instead, the record demonstrates that plaintiffs and other sponsors of candidate-specific "issue" ads designed, tested, and ran them with an unmistakable electioneering purpose. *See* SA 678-99(K), SA 1315-26(L).

a. *Consultants And Pollsters.* The seasoned professionals that sponsors hired for their "issue" ad campaigns understood the mission: Devising hard-hitting *electioneering* messages that would sway the conduct of *voters* in federal elections. For example, as part of the AFL's pioneering "issue" ad campaign in 1996, which involved a series of ads criticizing Republican incumbents for having cast votes contrary to the AFL's positions, a firm called "Campaign Consulting" assessed potential political advertising agencies. SA 680(K). It assured the union

REDACTED

Mitchell Dep., Ex. 6 (JA 2169). In evaluating "political media consultants," the same advisor noted that

REDACTED

Mitchell Dep., Ex. 7 (JA 2166); SA 680(K).

Business interests

REDACTED

Josten Dep. 20-21. They formed "The Coalition: Americans Working for Real Change" to respond in kind. SA 685-86(K); *see* 1320-23(L). The consultant who landed the job of assisting The Coalition opened his proposal, "Thank you for the opportunity to present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress." SA 686(K), 1321(L). Similarly, in August 2000 the NRA's media consultant produced a memo entitled "NRA National Election Media Recommendations," listing, as the first objective, "influence outcome of presidential election and ... key congressional seats in 10 'battle ground' states." SA 693(K), 1324(L).

Sponsors' polling tells the same story. Before running its 1996 "electronic voter guides," the AFL evaluated possible ads comparing an incumbent (identified as a Republican) and a challenger (identified as a Democrat).

REDACTED

Mitchell Dep., Ex. 9 (JA 2176).

REDACTED

Id. (JA 2176).

REDACTED

Mitchell Dep., Ex. 10 (JA 2178); *see* SA 679(K). Likewise, The Coalition surveyed "voter attitudes nationwide," measuring reactions to "the AFL-CIO's claims."[35] A survey of "swing voters" showed that test "response ads" moved "25% of participants ... closer to voting for a Republican candidate."[36]

b. *Sponsors' Statements.* Ad sponsors' own statements confirm that influencing voters was a prominent goal of their candidate-centered "issue" ads. In 1996, the AFL-CIO did not hide its objectives. As the press reported:

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[35] Huard Dep., Ex. 2, at TC513 (JA 2153); *see id.* at TC514 (JA 2154) ("Most voters view the AFL-CIO as first and foremost a political entity . . . ."); *id.* at TC538 (JA 2158)

REDACTED

[36] SA 687(K); Huard Dep., Ex. 4, at AV139 (JA 2127) (purpose of research is "[f]inding a message for" an "outside voice" to "come to the[] defense" of Republicans "under attack by AFL-CIO advertising," to "even [the] playing field during the 1996 election"); *see* Huard Dep. 37-38, 103, Ex. 6B (JA 2159-60), REDACTED Ex. 18 (JA 2131-32).

> [U]nion leaders . . . said they believe they have a legitimate chance to reverse the Republican majority in the House. . . . AFL-CIO President John Sweeney, who presented the election plans to a closed-door meeting of the federation's ruling executive council, said unions would spend $35 million in the election campaign.[37]

Much of that $35 million was spent on broadcast "issue" advertising. SA 681-82(K). After the election, the AFL's political director reiterated that one of its "major [campaign] goals" in running the ads had been "to try to help defeat some of those members of Congress and replace them with some members who would be more friendly to working people."[38] AFL President Sweeney boasted that by spending "our money on an independent, *issue-based television*, direct mail, and door-knocking campaign, rather than donating it to any political party," the AFL had "defeated 17 of the ugliest Americans ever to serve in the United States House of Representatives." Mitchell Dep., Ex. 12 (emphasis added).

Similarly, the NRA's Executive Vice President agreed that defeating Al Gore was the "overriding NRA objective" in 2000. LaPierre Dep. 55-56; *see id.* at 237-42. An NRA fundraising letter declares: "If the NRA had remained silent during the final 60 days of the last election, Al Gore would be president today." NRA02586 [DEV 120]. And another explains that the "millions" the NRA "spent . . . to defeat Al Gore . . . got our message out, drove our supporters

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[37] Mitchell Dep., Ex. 5 (Swoboda, *AFL-CIO to Target 75 House Districts*, Wash. Post, Jan 25, 1996, at A16); *see also, e.g.*, Gugliotta, *Interest Groups' Spending Had Varied Success*, Wash. Post., Nov. 7, 1996, at A28 ("'Incumbents with anti-working family records were defeated in 19 congressional districts where the labor movement ran aggressive ground and/or ad campaigns around working family issues,' said AFL-CIO President John Sweeney. 'Working families are back as a political force.'").

[38] Talk of the Nation (NPR radio broadcast, Nov. 27, 1996) (quoting AFL's political director, Steven Rosenthal); D. Beck et al., *Issue Advocacy Advertising During the 1996 Campaign* 11-13 (Annenberg Pub. Pol'y Ctr. 1997).

to the polls, and changed history." LaPierre Dep., Ex. 3 (JA 924); *see* LaPierre Dep. 100 (indicating that spending referred to included money for "infomercials and spot ads, both on television and radio"); SA 693-97(K) (discussing evidence that NRA used "issue" ads to influence 2000 election).

A major Democratic contributor also testified:

> I have been approached by interest groups, such as NARAL and the League of Conservation Voters, with appeals for large donations to be used for broadcast advertisements that will help federal candidates whom the groups know I support. Groups like these know of my interest in the Senate, and they can be opportunistic in saying things like, "We think we can get Bill Bradbury elected in Oregon," or in talking about how they're going to go in and really help Debbie Stabenow.

Buttenwieser Dec. ¶ 19. Another recounted how "[t]he [Democratic] party recommended that I donate to certain groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL. The assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential election." Kirsch Dec. ¶ 10.

c. *Naming Candidates*. Certain common features of candidate-centered "issue" ads also demonstrate that they are intended—and overwhelmingly likely—to convey an electioneering message. They also help explain the choices Congress made when it framed Title II. Most obviously, such ads "almost always refer to specific candidates." SA 1312(L); *see id.* at 719(K). This is significant in part because, particularly in conjunction with other factors such as timing and targeting, it ties each ad directly to an upcoming election. Moreover, as veteran campaign consultants testified, "there is usually no reason to mention a candidate's name unless the point is to influence an election." SA 1312(L); Strother Dec. ¶ 7 (JA 2148); *see* Bailey Dec. ¶ 9 (JA 26). Rather, if the aim were only to address an issue, "invoking [candidates] might unnecessarily politicize the underlying message ... and undermine [an ad's] effectiveness." Krasno/Sorauf Rep. 63 (JA 1345).

A related feature of many candidate-centered ads was a tag-line exhorting the viewer or listener to call and "thank" the named candidate, or "ask" or "tell" the candidate something. Campaign professionals know that, in context, these exhortations are equivalent to urging a vote for or against the named candidate. Beckett Dec. ¶ 8; Pennington Dec. ¶ 10 (JA 672-73); Lamson Dec. ¶ 6. As a senior NRA political operative put it, discussing an ad that urged viewers to call and "thank [a Congressman] for fighting crime":

> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did.... [T]hree months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them.

SA 674(K); *see* Josten Dep. 230; G. Shea Dep. 46.

d. *Timing*. "Issue" ads naming candidates were heavily concentrated in the final weeks before an election. SA 725-28(K). The appendix to this brief includes (p. 11a) a graph from Judge Kollar-Kotelly's opinion vividly illustrating how ads mentioning federal candidates spiked in the weeks immediately before the 2000 election. The data confirm that 78% of interest group ads mentioning a federal candidate—and 85% of ads mentioning a presidential candidate—were aired within 60 days of the general election. Goldstein Rep. 19 tbl. 4 (JA 1169-71). In contrast, group ads that did *not* mention candidates were distributed fairly evenly throughout the year. *Id.* at 3 (JA 1155). Equally tellingly, candidate-specific ads *stopped*—cold—on Election Day. *Id.*

As an election nears, interest groups substitute ads that mention a candidate for ads that do not. SA 721-26(K). From January 1, 2000, through September 4, 2000, for example, a pharmaceutical industry-funded group called Citizens for Better Medicare (CBM) aired 23,867 television ads, without once mentioning a candidate. SA 690, 722(K). Between September 4 and the election, it ran 10,876 candidate-specific spots. SA 721(K). A similar pattern appears in the advertising of other groups, including the Chamber of Commerce, Planned Parenthood, EMILY's List, the Business Roundtable, and the League of Conservation Voters. SA 722-25(K).

Former consultant Douglas Bailey sums up: "In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections. From a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election." SA 720(K); *see* Bailey Dec. ¶ 12 (JA 27); Pennington Dec. ¶ 10 (JA 672-73); Goldstein Rep. 33 (JA 1186-87).

e. *Targeting*. Interest groups that ran candidate-specific ads close to elections also targeted candidates in close contests—and almost invariably in a partisan manner. SA 728-31(K). The AFL-CIO, for example, targeted its "legislative issue ads" in part based on whether they could have a "big impact" in "marginal district[s]"—that is, districts where races were likely to be close.[39]

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Huard Dep., Ex. 7; *id.* at 45-46 (JA 2172-73).

REDACTED

Josten Dep. 269, 298 & Ex. 25. The NRA "target[ed] states ... where they intended to hopefully have an impact on the election." LaPierre Dep. 24-25; *see id.* Ex. 3 ("critical swing states") (JA 923).

The AFL's 1996 campaign targeted 32 freshman Republicans, SA 681(K), aiming to "reclaim the Congress from the extremists that snatched control in 1994."[40] The AFL's ad campaigns also generally targeted candidates to whom it assigned the lowest lifetime voting "scores" on its issues. *Compare* G. Shea Cross, Ex. 2 (ratings), *with* Mitchell Dec., Ex. 1 (targeting).

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[39] Mitchell Dep. 17-20. The AFL's ads targeting then-Governor Bush ran in the nine states rated as "toss-ups" that had the most electoral votes at stake. CMAG Database; Cook & Co. Political Analysis, *The Cook Political Report 2000: The Race for the White House* (2000) [DEV 38 Tab 17].

[40] Mitchell Dep., Ex. 11. *See, e.g.*, Mitchell Cross 174, 178-79, 182 (no Democrat targeted in a broadcast ad in the 60-day period in 2000 or 1996).

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Monroe Cross 13-15.

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Monroe Cross 25, 26. A group intent on changing legislators' minds would not likely choose the hardest targets—nor focus its ads on candidates' *past* votes.

3. "Issue" Ads Concealed Sponsorship

The use of "issue" ads allowed sponsors to avoid FECA's disclosure requirements. *See* SA 91-99(PC) (summarizing evidence), 675-77(K), 1308(L). One prominent example is the Bill Yellowtail ad quoted above (p. 43-44), which was part of a campaign focused on various congressional races, mounted by a group calling itself "Citizens for Reform." Thompson Comm. Rep. 6305 (minority views). Recently organized as a nonprofit corporation, the group had "no . . . offices, staff [or] telephones," and it never disclosed under FECA the identity of its principals, what it spent on electioneering ads, or the sources of funds. *Id.* at 6301-05.

Similarly, CBM spent $65 million on television advertising in 1999 and 2000. SA 655(K), 1307(L). It held itself out as "a broad-based, bipartisan group representing the interests of patients, seniors, pharmaceutical research companies, doctors, caregivers, hospitals, employers, health care experts and many others concerned with . . . our Medicare system."[41] But its fundraising was conducted by the Pharmaceutical Research and Manufacturers of America, and almost all its funds for the 2000 elections came from corporate interests. SA 690-91(K), 1323(L). Yet before BCRA, no disclosure was required so long as CBM's ads did not use the "magic words."

There are many other examples of identities, relationships, and interests masked from voters by ad sponsors using names such as "American Family Voices," "Voters for Campaign Truth," or "American Seniors, Inc." Krasno/Sorauf Rep. 71-72 (JA 1355-56); *see also, e.g.*, SA 97-99(PC) ("Republicans for Clean Air"), 643-44(K), 1252-53(L); Magleby Rep. 18-19 (JA 1484-85). Where ads named candidates, in their districts, just before elections, that practice deprived voters of just the sort of information that disclosure provisions are intended to provide. *See Buckley*, 424 U.S. at 66-68, 81-82.

4. Widespread Circumvention Destroyed The Efficacy Of The "Express Advocacy" Test

The development, long after *Buckley*, of candidate-centered "issue" ads quickly destroyed the efficacy of the "express advocacy" test as a means of identifying independent campaign expenditures. It is now clear that words of express advocacy are not necessary, or even necessarily desirable, to frame a campaign message. SA 658-64(K), 1296-99(L). Indeed, candidates, whose advertising is *all* electioneering, hardly ever use such words in their own ads, any more than companies tell consumers to "buy" their products. SA 1033(K), 1160 n.114(L). The *absence* of "express advocacy" thus indicates nothing about whether an ad is intended to or does convey an electioneering message. SA 664-75(K), 1299-1306(L). That is why the AFL's political director could comment, during the 1996 campaign, "If somebody handed me a magic wand and said there is no election law, I would do exactly what I am doing now." Clymer, *System Governing Election Spending Found in Shambles*, N.Y. Times, June 16, 1996, at A1 (quoting Steven Rosenthal). And it is why by early 1997 the Chair of the NRA's PAC could characterize the legal standard separating "issue advocacy and political advocacy" as "a line in the sand drawn on a windy day." SA 673-74(K), 1305(L).

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[41] Citizens for Better Medicare, Who We Are, *available at* http://web.archive.org/web/20000815061032/www.bettermedicare.org/who (archiving the CBM website as of Aug. 15, 2000).

Not surprisingly, groups' use of electioneering "issue" ads began "to rival, and in some cases outpace, advertising by federal candidates," Krasno/Sorauf Rep. 51 (JA 1331), and political parties themselves, Magleby Rep. 20 (JA 1487). One study of 17 competitive congressional races in 2000 found that interest-group spending on candidate-specific ads amounted to as much as two-thirds of what candidates themselves spent on radio and television ads. Magleby Rep. 22 (JA 1491). In the 60 days before the 2000 election, in eight battleground States, groups aired more than half as many ads about presidential candidates as did the candidates themselves. Goldstein Rep. 12 (JA 1164). And groups ran 20 "issue" ads naming candidates for every such ad run by their PACs. SA 656(K). In sum, as Judges Leon and Kollar-Kotelly concluded, widespread manipulation of the "express advocacy" test thoroughly sapped the force of the type of source and disclosure rules for independent expenditures that this Court approved in *Buckley* and *Austin*. SA 657-58(K), 1296-1302(L).

5. The Potential For Corruption

This Court has recognized that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978). Although the Court has previously found it unnecessary to rely on that specific type of corruption in order to uphold source restrictions on corporate expenditures, *see Austin*, 494 U.S. at 659-60, the record here shows just such a threat. *See* SA 708-19, 835-40(K), 1161-62(L).

"[T]he people who admit to running these ads will later remind Members of how the ads helped get them elected." Simpson Dec. ¶ 13 (JA 812). Indeed, any reminder may be superfluous:

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Huard Dep. 92.

From the candidates' point of view, "[a]n important element running through modern campaign plans is consideration of

what role political parties and interest groups are going to play in your campaign." Pennington Dec. ¶ 4 (JA 669). In 1996, for example,

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Josten Dep. 19-21.

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Josten Dep. 270; *see* SA 711-13(K).

Independent ad campaigns can thus be used to seek access and influence in much the same way as contributions. Candidates "pay very close attention to the political advertisements broadcast in their districts," and "keep track of who is helping them."[42] Former legislators confirm that "members realize how effective these ads are, and they may well express their gratitude to the individuals and groups who run them."[43] Lobbyist Wright Andrews, who advises a broad array of corporations and other groups, describes candidate-specific "issue" ads as simply "[a]nother practice used to secure influence in Washington." Andrews Dec. ¶ 17 (JA 6). In his well-informed view, "[a]n effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party." *Id.*

Thus, candidates can be as beholden to corporations or unions for an ad campaign as for a check. Yet before BCRA, expenditures on ads, unlike direct contributions, could be made with treasury funds, and without public disclosure. That situation "create[d] enormous opportunities . . . for favors to be exchanged between issue advocates and public officials." Krasno/Sorauf Rep. 74 (JA 1357). And whether or not any actual exchange takes place, the appearance of corruption can be just the same. SA 713(K) (80% of poll respondents believed that a Member of Congress would likely give "special consideration" to the views of an individual, group, corporation, or union that spent $50,000 on broadcast political ads benefiting the Member).

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[42] SA 709(K); Strother Dec. ¶ 13 (JA 2150); *see* Magleby Rep. 15; Pennington Dec. ¶ 8 (JA 671-72) ("In addition to trying to elect candidates, these groups are often trying to create appreciation or even obligation on the part of successful candidates."); Beckett Dec. ¶ 16 ("Of course candidates often appreciate the help that these interest groups can provide, such as running attack ads for which the candidate has no responsibility."); Chapin Dec. ¶ 16 ("Federal candidates appreciate interest group electioneering ads . . . that benefit their campaigns, just as they appreciate large donations that help their campaigns."); Bloom Dec. ¶ 17 (JA 54-55); Lamson Dec. ¶ 19.

[43] Simpson Dec. ¶ 13 (JA 811-12); *see* Bumpers Dec. ¶ 27 ("Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.") (JA 178).

B. Title II Is Narrowly Tailored To Serve Compelling Public Interests

Confronted with the collapse of the "express advocacy" test as an effective regulatory dividing line, Congress had a choice. It could accept that source and disclosure rules had been rendered a dead letter—despite this Court's decisions upholding the constitutionality of such rules when applied to campaign spending. It could create a new statutory definition of "campaign" spending that depended on some finding of electoral intent or effect—but that would surely be attacked as too vague and subjective in application. Or it could rely on available data, and its Members' experience, to frame an objective definition that would address the problem, without imposing even the modest burden of source and disclosure rules on any more speech than was necessary to restore the effectiveness of longstanding rules.

Title II responds narrowly and objectively to the circumvention problem. It does not "ban" any speech, and neither its disclosure rules nor its requirement that corporations and unions use their PAC funds imposes any great burden. Its definition of "electioneering communications" is limited to broadcast ads, because that is where abuse was most prevalent. It is further limited to candidate-specific ads that are targeted to the candidate's electorate, because those are the ads sponsors used in their electioneering campaigns. And it is still further limited to ads run in the final weeks before an election, because the objective empirical

evidence makes clear that, so limited, it will reach the vast majority of candidate-specific issue ads, at the time when they are almost certain to convey an electioneering message—while imposing even its modest burdens only during the carefully circumscribed period when they are most clearly necessary to serve compelling public interests.

This careful, experience-based adjustment of the definition of which advertising expenditures are campaign-related serves precisely the same interests that the Court has recognized in sustaining source and disclosure rules as applied to "express advocacy." Source restrictions prevent the conversion of organizational treasuries into political "war chests" that could be used to incur political debts from legislators. *Beaumont*, 123 S. Ct. at 2206.[44] They protect the individuals "'who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates whom they may oppose.'" *Id.* And they address the "corrosive and distorting effects" on elections that could otherwise arise when corporations and unions amass "aggregations of wealth" that may have "little or no correlation to [individuals'] support for the [organization's] political ideas." *Austin*, 494 U.S. at 660. Rules that permit campaign spending only from PAC funds are "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." *Id.*; *see also Beaumont*, 123 S. Ct. at 2211.[45]

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[44] *Beaumont* dealt with a limitation on contributions, but its discussion of the interests served by source restrictions draws on cases involving expenditures (including *Austin*), and those interests are largely the same in both situations. *See* 123 S. Ct. at 2206-07.

[45] Plaintiffs argue (McConnell Br. 47) that under *Bellotti*, which involved corporate spending on an issue referendum, these interests do not support source rules for "political advocacy." Apart from distinctions between Title II and the law at issue in *Bellotti* which had, for instance, no temporal limitation, applied to all media, and did not provide for PAC spending, *see* 435 U.S. at 767-68 & n.2, that argument begs the question at issue here: How Congress may *identify* expenditures that relate to *candidate* elections. *See id.* at 788 n.26 ("[O]ur consideration of a corpora-

Disclosure rules, for their part, "shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures." *Buckley*, 424 U.S. at 81. Knowing who is spending money to support or oppose candidates "allows voters to place each candidate in the political spectrum more precisely," "alert[s] the voter to the interests to which a candidate is most likely to be responsive" while in office, and "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large . . . expenditures to the light of publicity." *Id.* at 66. Disclosure thus provides "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82; *see also, e.g.*, *Bellotti*, 435 U.S. at 792 n.32. And both source restrictions and disclosure serve the interest in preventing circumvention of other campaign finance rules. *Beaumont*, 123 S. Ct. at 2207; *Buckley*, 424 U.S. at 67-68.[46]

Source and disclosure rules serve these interests not only when an ad is run with the express or principal *purpose* of affecting an election, but also when it is likely to have such an *effect*. The record shows how Title II addresses widespread, conscious circumvention, involving ads run with unmistakable electioneering intent. Plaintiffs, however, focus on potential applications of BCRA's objective definition at its margins, where intent might be difficult to discern, or in a

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tion's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for public election to office").

[46] Title II's rules help prevent circumvention of Title I, which prohibits the raising of soft money that parties spent in part on campaign "issue" ads. That reform would be undermined if corporations or unions could substitute their own ad spending for party contributions, or if parties could divert contributions to nominally independent groups that would design and run such ads. *See* 145 Cong. Rec. S12,661-62 (Oct. 15, 1999) (Sen. Feinstein) ("Instead of giving soft money to political parties, the same dollars [could] be turned into 'independent' ads."); *see also* Thompson Comm. Rep. 5927 (minority views) (RNC contributions to non-profit groups), 5967, 5974-79 (RNC cooperation with such groups).

few cases might even be absent. It is therefore important to recognize that an ad's likely electoral effect is as salient as its sponsor's subjective motives in determining whether the burdens imposed by source and disclosure rules are constitutionally proportionate to the public benefits they provide. *See* Center for Gov'tl Studies Br. 13-15, 26-28.

It is also important to recognize that Title II's standards for defining which ads will be treated as campaign-related squarely serve a compelling interest in using clear and objective lines to frame any rule that affects speech. It was, after all, principally a concern for clarity that first led this Court to adopt the "express advocacy" test as a gloss on FECA's language. *Buckley*, 424 U.S. at 40-44, 79-80; *see* pp. 60-62. Twenty years later, that test proved too open to manipulation to remain effective. In responding, Congress heeded the Court's admonitions concerning vagueness. Plaintiffs have conspicuously failed to suggest any way in which Congress could better have reconciled the twin compelling goals of adequate coverage and necessary clarity.[47]

Finally, the nicety with which legal requirements must be tailored depends in part on the magnitude of the burdens they impose. *See, e.g.*, *Beaumont*, 123 S. Ct. at 2211 ("the difference between a ban and a limit" on speech is to be considered "when applying scrutiny at the level selected"); *Buckley*, 424 U.S. at 68 (in determining whether disclosure requirements are justified by the interests they serve, "we must look to the extent of the burden that they place on individual rights"). The burdens imposed by source and disclosure rules are modest—as this Court has recognized. *See Beaumont*, 123 S. Ct. at 2211 ("the PAC option allows corporate political participation without the temptation to use corporate funds for political influence"); *Austin*, 494 U.S. at 660-61; *Buckley*, 424 U.S. at 68, 82 (disclosure is "minimally restrictive"). Particularly in light of that circumstance, Title

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[47] *See* Foley, *"Narrow Tailoring" Is Not the Opposite of "Overbreadth,"* 2 Elec. L. J. (forthcoming Oct. 2003), *available at* http://www.liebertpub.com/ELJ/Foley1.pdf (temporary pp. 7-12).

II's requirements are narrowly tailored to serve their compelling public goals.[48]

C. *Buckley* Did Not Establish "Express Advocacy" As A Constitutional Straitjacket

Plaintiffs argue that however ineffective the "express advocacy" test may have become, *Buckley* established it as a constitutional limit. The district court properly rejected that argument. SA 783-799(K), 1147(L). *Buckley* adopted a practical, limiting construction of particular statutory language that was impermissibly vague—not a constitutional standard that would foreclose Congress from redrawing the statutory lines as necessary to reflect experience and to make them effective.

Buckley explained that a provision imposing an absolute cap on independent campaign expenditures "'relative to' a candidate fail[ed] to clearly mark the boundary between permissible and impermissible speech." 424 U.S. at 41. Similarly, a provision for disclosure of independent expenditures made "for the purpose ... of influencing" nominations or elections raised "serious problems of vagueness," because it "could be interpreted to reach groups engaged *purely* in

issue discussion," as well as those whose speech also involved "advocacy of a political result." *Id.* at 76, 79 (emphasis added). In each instance, the Court addressed the vagueness problem by construing the statutory language to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted); *see id.* at 44 & n.52.

In adopting the "express advocacy" construction, *Buckley* never purported to render all "issue" speech immune from source or disclosure rules. Even campaign speech that uses "express advocacy" typically also conveys issue messages—and, conversely, the Court recognized that electoral advocacy could be effective without being "express." 424 U.S. at 45 (noting that "express advocacy" test could permit circumvention of expenditure caps). Thus, the principal virtue of the "express advocacy" test was its clarity, not any perfect differentiation between campaign speech and pure "issue" speech.[49] Title II shares that same cardinal virtue—and does a much *better* job of identifying campaign speech, in light of extensive experience with the realities of the political marketplace. Such periodic statutory repair is a normal process—and the natural province of legislatures, not of courts. *See Beaumont*, 123 S. Ct. at 2205-06; *NRWC*, 459 U.S. at 209-10. It would make no sense to read any of this

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[48] Appending a supposedly "representative" sample of legislative history, the NRA argues at length that Congress's purpose in enacting Title II was not, as in Title I, to prevent corruption and circumvention, but to protect incumbents from public attack. That is incorrect. As reflected in the excerpts from the legislative history collected in the appendix to this brief (at 12a-27a), Congress enacted Title II to serve the very purposes that underlie the preexisting independent expenditure provisions: bringing campaign spending of the "issue" ad variety within the scope of longstanding source and disclosure rules. *See, e.g.*, App. 14a (Sen. Snowe: "The record ... will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws."); *id.* (Sen. McCain: "This bill would simply subject soft money-funded campaign ads that masquerade as issue discussion to the same laws that have long governed campaign ads."). As Senator Thompson's amicus brief confirms (26-28), his Committee's path-marking investigation resulted in similar conclusions. *See* App. 22a-26a.

[49] As plaintiffs point out (McConnell Br. 40, 42), both *Buckley* and the Court's later opinion in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which extended the "express advocacy" construction to the provision that imposes source restrictions on corporate and union campaign expenditures, linked the problem of statutory vagueness with that of overbreadth. That is hardly surprising. *See* p. 63. *MCFL*'s decision to adopt a parallel construction of two statutory provisions is equally unremarkable—particularly given Congress's own adoption of the "express advocacy" standard, after *Buckley*, in FECA's definition of "independent expenditure." *See* 2 U.S.C. § 431(17). Nothing in *Buckley* or *MCFL* suggests that any different congressional approach to defining campaign-related spending is automatically invalid.

Court's cases in a way that would disable Congress from acting on the lessons of experience.[50]

To the contrary, *Buckley* is more a roadmap than a constitutional stop sign. Two general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not "dissolve in practical application," 424 U.S. at 42; and they should be "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate," *id.* at 80; *see id.* at 76-82. Those are precisely the precepts to which Congress adhered in framing Title II.

D. Facial Invalidation Of Title II Would Be Especially Inappropriate

Plaintiffs contend that Title II is "overbroad under the First Amendment, and cannot be applied to [them]—or anyone else." *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2196 (2003). They attack Congress's use of an objective definition of "electioneering communications," pointing to a few marginal examples of ads that would fall within the definition, yet might have no electioneering purpose or likely effect.

Such a challenge cannot succeed unless *plaintiffs* carry "the burden of demonstrating, 'from the text of [the law] and from actual fact,'" that Title II, "*taken as a whole*, is substantially overbroad judged in relation to its plainly legitimate sweep." *Hicks*, 123 S. Ct. at 2198. They must show that the "substantial social costs *created* by the overbreadth doctrine," when it results in the facial invalidation of a law that would have many valid applications, are outweighed by any potential "chilling effect" on speech in circumstances that might support an as-applied challenge. *Id.* at 2196-97;

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[50] *Buckley* did not discuss independent expenditure provisions as applied to corporations or unions. In light of the long history of special treatment of these entities in campaign finance law, it surely makes no sense to read *Buckley*, or the simple adoption of a parallel construction in *MCFL*, to preclude Congress from taking further action to address the sort of massive corporate and union expenditures on campaign advertising that began in earnest ten years after *MCFL*.

see Broadrick v. *Oklahoma*, 413 U.S. 601, 614-15 (1973). "Facial invalidation 'is, manifestly, strong medicine,'" to be used "'sparingly and only as a last resort.'" *NEA* v. *Finley*, 524 U.S. at 580.

That cautious approach is particularly appropriate here. Plaintiffs argue as though source and disclosure rules may be applied only to conduct or to "unprotected" speech, and the question is whether Title II might stray beyond that line. *See* McConnell Br. 50. That approach is fundamentally misconceived. "Discussion of public issues," while surely protected speech, cannot be any *more* protected than speech, including "express advocacy," that relates directly to "'the conduct of campaigns for political office.'" *Buckley*, 424 U.S. at 14-15. Yet this Court has already made clear that it is consistent with the First Amendment for Congress to impose source and disclosure rules on independent campaign speech—in part because such rules involve no censorship, but only the source and transparency of campaign funding.

At the margins, Congress's new, objective definition of campaign-related speech might result in source and disclosure rules applying in a few situations in which the public interests they serve are not strongly implicated. But the manifestly compelling need for clear line-drawing in this sensitive area counsels deference to Congress's placement of the line—especially where, as here, its application never *prohibits* any speech, and imposes only limited burdens that are acceptable even as applied to fully protected speech.[51] In these special circumstances, the cost of facially invalidating rules of a sort this Court has previously held to be justified would be particularly high, while the benefits to be gleaned in terms of speech protection would be unusually low.

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[51] *See, e.g.*, *Burson* v. *Freeman*, 504 U.S. 191, 208-10 (1992) (upholding, under strict scrutiny, a *ban* on campaign-related speech within 100 feet of polling places); *Storer* v. *Brown*, 415 U.S. 724, 736 (1974) (recognizing "compelling" interest in bright-line one-year disaffiliation rule for candidates seeking to switch party sponsorship for ballot access).

Similarly, Title II poses little risk of the sort of chilling effect that can justify the facial invalidation of an overbroad law. *See Hicks, supra.* That effect is of most concern when a law is vague. *See, e.g., Village of Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.6 (1982) ("[T]he vagueness of a law affects overbreadth analysis."). Here, Title II was specifically designed to *avoid* vagueness. *Cf. Broadrick*, 413 U.S. at 607. Moreover, at most, the law requires only that groups like the Chamber of Commerce, the AFL, and the NRA pay for some ads using PAC funds, rather than treasury funds. These corporate and union plaintiffs, which have or can easily establish PACs, are not likely to be chilled in their speech, or to be unable to assert their rights if and when there is a realistic threat that the Act may be applied to them in some unconstitutional way. In these circumstances, awaiting as-applied challenges, arising in specific factual contexts, is by far the wiser course.

1. Plaintiffs Have Not Demonstrated Substantial Overbreadth

In addressing plaintiffs' overbreadth challenges, we address first arguments of more general applicability, and then those involving the special situation of ideological nonprofit corporations such as the NRA and ACLU (*see* pp. 73-75).

a. *The Period Just Before Elections.* One conspicuous virtue of Title II is its narrow, evidence-based focus on the final weeks leading up to a specific federal election, involving the specific candidate named in a covered ad. *See* pp. 49-51, 56. Remarkably, plaintiffs attempt to use that important aspect of narrow tailoring as evidence of overbreadth. They argue that Title II would restrict their ability to address legislative issues that might arise in the period just before elections. Yet, any ad that triggers Title II is very likely to have some actual *effect* on an election, whatever its intent. In any event, BCRA does not stop anyone from speaking during the covered period. Sponsors may run even candidate-specific ads, targeted at the relevant electorate, so long as they disclose their sponsorship and funding, and use no corporate or union treasury funds. They can also craft ads addressing

legislative issues in ways that do not trigger Title II—avoiding candidate references, or using non-broadcast media, or avoiding the districts of mentioned candidates in the final weeks before their elections.[52]

It might be possible to describe a small category of ads that are facially covered by Title II, but have no likely electioneering intent or effect—for instance because they refer only to pending legislative issues, and refer to candidates only by saying, generically, "Call your Congressman." BCRA expressly authorizes the FEC to adopt regulatory exemptions if it is satisfied that they can be framed in a way that meets statutory criteria and does not open paths for abuse. 2 U.S.C. § 434(f)(3)(B)(iv). Indeed, as the NRA points out (Br. 36), the intervenor-defendants suggested to the FEC a narrow exemption of the sort just noted. The FEC determined, however, that the proposed exemption would leave room to design ads that nonetheless promoted or opposed candidates. 67 Fed. Reg. 65,201-02. No plaintiff appealed that decision. In any event, even without an exemption, plaintiffs cannot show that the burden of complying with Title II will be disproportionate to the compelling interests it serves in anything like enough cases to justify striking the law on its face.

Plaintiffs also argue that the public is most receptive to issue advocacy just before elections. If they mean that election time is ideal for public policy discussions wholly divorced from the electoral context, their argument is both implausible and contrary to the testimony of an expert and two experienced practitioners. *See* pp. 50. A period when airtime is particularly expensive and the airwaves are crowded with campaign ads is generally *not* the best time to address the public with issue messages that in fact have nothing to do with elections. If instead plaintiffs mean that broadcasting ads discussing issues *and referring to a candidate*, targeted to the candidate's electorate, at the time that voters are deciding whom to elect, best allows them to "influenc[e] the electoral issue climate" and "generat[e] popular pressure on candidates," because especially at that moment "electoral considerations motivate officeholders" (and their challengers), *see* AFL Br. 21, then they are simply restating the rationale for Title II.

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[52] The NRA argues (Br. 44-50) that the statutory exemption for broadcast news and editorials is unconstitutional, because the world has changed so much in 13 years that this Court should revisit its rejection of that argument in *Austin*, 494 U.S. at 666-68. If and when Congress concludes that corporations are abusing their ownership of media outlets to interfere in federal elections using their treasury funds, it may consider whether it is necessary to adopt some statutory adjustment. Nothing in the NRA's submissions concerning the growth of the internet or changes in corporate ownership calls into serious question the unique role of the institutional press, or the permissibility of a media exemption as a matter of constitutional law. Indeed, an important purpose of that exemption is to avoid the sort of overbreadth concerns that plaintiffs otherwise voice.

b. *The Empirical Evidence.* Congress knew from Members' own experience that the vast majority of ads BCRA covers have an electioneering purpose or effect. It also considered empirical evidence, including studies by the Annenberg Public Policy Center (which plaintiffs have never contested), SA 652-57(K); Professor Magelby's study "Dictum Without Data," *see* 147 Cong. Rec. S252-53 (Apr. 2, 2001) (Sen. Thompson); and the CMAG database of political advertising, in the form of the 1998 and 2000 *Buying Time* studies much discussed below, *see* SA 1031-73(K), 1327-56(L), 238-48(H). Apart from an *ad hominem* attack (McConnell Br. 53 n.18), plaintiffs do not dispute that the CMAG data represent the most comprehensive body of research on political television advertising ever conducted.[53]

Indeed, plaintiffs do not challenge the vast majority of the findings based on the CMAG data—including the central findings, summarized above and in the opinions below, that: the extent of political advertising by interest groups grew

explosively during and after the 1996 election cycle; candidates and political parties, whose electioneering purposes are undisputed, do not use "express advocacy" in their ads; candidate-centered "issue" ads run by interest groups are overwhelmingly concentrated in the final weeks before elections; groups target such ads at close campaign races and in a partisan manner inconsistent with protestations that they mean to address *only* "issues"; and these patterns are different for ads that do *not* name candidates. *See, e.g.*, pp. 49-53; SA 678-708(K), 1315-26(L). These unchallenged findings, based entirely on objective data, refute plaintiffs' wishful assertion that the defense of Title II "relie[s] almost exclusively" on the single aspect of the empirical evidence that they attack. McConnell Br. 53.

Plaintiffs focus on one question in each *Buying Time* study, in which student coders were shown ads (out of the context in which they ran) and asked whether, in their view, "the purpose" of each ad reviewed was to provide information about or urge action on an issue, or to generate support for or opposition to a candidate. *Buying Time 1998* at 193 (Q. 6); *Buying Time 2000* at 99 (Q. 11). Responses to that question allowed researchers to estimate the percentage of issue-focused ads aired by interest groups over the whole year that BCRA would have covered, and the percentage of all interest group ads covered by BCRA that were classed by the student respondents as issue-focused rather than campaign-focused. The first test explores how much issue-focused speech over the course of an election year BCRA leaves completely unaffected, while the second seeks to get at how effective BCRA is in covering what it intends to cover. Defendants' expert witnesses estimated that of all airings of issue-focused ads by interest groups in the two election years studied, only 6.1% in 1998 and 3.1% in 2000 would have been treated as "electioneering communications." The estimated proportion of ads BCRA would have covered that were coded as issue-focused was 2.3% in 2000; 14.7% in 1998 (when there was no presidential election); and 3% for the two years combined. Krasno/Sorauf Rep., App. at

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[53] With regard to plaintiffs' personal aspersions, we note only that Judge Leon, after carefully reviewing the matter, concluded that any interest the *Buying Time* authors had in campaign finance reform did not "skew[] the results" of their research, and that any "flaws and shortcomings . . . do not detract from the studies' credibility and reliability." SA 1335; *see also* League of Women Voters Br. 18-29.

C (for 1998), 60 n.143; Goldstein Rep. 25 (for 2000) (JA 1383, 1342, 1179).

Although both plaintiffs and the opinions below discuss these particular figures at some length (*see, e.g.*, McConnell Br. 53-57), only four essential points need be made. First, experts defend the disputed subjective component of the empirical evidence as one instructive measure strongly suggesting that Title II "does a good job hitting what it is aiming at . . . and missing what it is not." Krasno/Sorauf Rep. 60-61 (JA 1343). Nonetheless, given all the *objective* evidence defining the problem of candidate-centered "issue" ads and demonstrating the tailoring of Congress's response, the subjective evidence is in no way essential. Indeed, the dispute over it supports Congress's decision to adopt an entirely objective definition of what constitutes "electioneering."

Second, Judge Leon based his overbreadth analysis in part on the misunderstanding that defendants' expert Dr. Goldstein "testified on cross examination that he had reevaluated the results of the [2000] study . . . and concluded that, in fact, 17 percent" of ad airings that would have been covered by BCRA in 2000 "were genuine issue advocacy." SA 1157(L); *see* SA 767(K). As the amicus brief filed by the League of Women Voters demonstrates (24-25), it simply misreads the record to attribute to Dr. Goldstein a figure generated by plaintiffs, and only through an implausible recoding of the underlying data.[54]

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[54] Briefly, the 2000 study included seven similar CBM ads. Student respondents originally coded six of them as campaign-focused and one as issue-focused. *See* Goldstein Rebuttal Rep. 16-17; Goldstein Cross 159, 216. During cross-examination, Dr. Goldstein explained that although all the ads should have been classified as electioneering, his report adopted the conservative approach of honoring the original, anomalous coding of the seventh ad. *See* Goldstein Cross 127, 159, 217-20. Plaintiffs' counsel demonstrated that if one instead treated all seven as "issue" ads, one could mathematically generate the 17% figure. *Id.* at 160-69. Dr. Goldstein never suggested that, given the actual original coding of the ads, that approach would make any sense. *See id.* at 216-20 (confirming he had "[no] doubt at all that these ads should be classified as electioneering").

Third, plaintiffs, who bear the burden of proving that Title II is so overbroad that it should be struck down on its face, produced no empirical evidence of their own. *See* SA 764, 856(K). Nor have they challenged *any* of the objective evidence put forward in support of Title II.

Fourth, and most important, whatever their real or imagined flaws, the subjective research results cannot demonstrate the *in*validity of Title II. They are based on questions that asked respondents to identify "the purpose" of each ad. Respondents were not allowed to answer "both." Yet, as both sides have emphasized, many if not most campaign ads—including ads run by candidates, and ads that use "express advocacy"—*also* discuss issues. Source and disclosure rules serve their purposes so long as *one* material purpose *or effect* of an ad is to influence a federal election. Thus, if the survey results presented by defendants' experts correctly identify the percentage of ads whose *principal* focus was electioneering, then they are strong evidence of extremely narrow tailoring. But even if some or all of plaintiffs' criticisms are correct, then whatever recomputation is justified would identify only a larger percentage of ads whose *principal* focus was on issues. Because ads with that focus might nonetheless have influencing elections as another material purpose or effect, such results would neither support plaintiffs' claim of overbreadth, nor undercut any of the record's other evidence of proper tailoring.

c. *Plaintiffs' Examples.* Finally, plaintiffs offer a few examples—presumably the best they could find—of ads they claim "powerfully illustrate[]" the overbreadth of Title II. McConnell Br. 50. Their examples are, indeed, telling.

One ad featured by the McConnell plaintiffs (Br. 51, 1a) complains about "Washington politicians," advocates term limits, points out that one candidate has "signed the pledge to limit her terms" but that the other "refused," and ends by urging viewers to "[c]all David Wu and tell him to sign" the pledge. What really "seem[s] unthinkable" (Br. 51) about this ad is that plaintiffs would seriously suggest that when broadcast in Wu's district, just before an election, it might have had no electioneering purpose or effect. *See* p. 49 (discussing use of "call" or "tell" tag-lines).

The McConnell plaintiffs also feature (Br. 52, 3a) an ad run by the Michigan Chamber of Commerce naming Senate challenger Debbie Stabenow. The ad aired between September 20 and five days before the 2000 election. It says families risk losing their businesses "[b]ecause of the Death tax"; criticizes Stabenow for "vot[ing] twice against getting rid of the Death tax"; and asks viewers to "Call Debbie Stabenow" and "[t]ell her our working families need a break." It highlights past votes in the House, not an upcoming vote. A Chamber official acknowledged that voters "would negatively perceive" Stabenow in light of such ads, and that the reason for running them was that "she was in that time . . . a candidate for public office and we felt that the people of . . . Michigan needed" the ad as "necessary information" for their "decision-making process." LaBrant Dep. 34-35, 37. The "decision" in question was what Senator to elect.

We certainly agree with plaintiffs that this ad, and the others like it that are attached to the McConnell plaintiffs' brief, are "speech fully protected by the First Amendment." McConnell Br. 52. They also serve quite well to illustrate just the sort of obviously *campaign-focused* ads that interest groups were airing before BCRA—without complying with the FECA provisions meant to preclude groups like the Chamber of Commerce from using *treasury* funds to run *campaign* ads, and without disclosing to the public just who was funding the *campaign* activities of groups with names like "Coalition for the Future American Worker" (Br. 6a) or "Americans for Job Security" (Br. 12a).

There are a few examples of spot ads that may have been designed and run without any material electioneering purpose, despite naming candidates, reaching a targeted electorate, and running close to an election.[55] The AFL, for

instance, ran two "cookie cutter" ads that targeted numerous Members of Congress, only some of whom were candidates. One urged opposition to granting China permanent most-favored-nation status. *See* McConnell Br. 51, 2a. Another alleged denial of benefits by HMOs, and criticized "Republicans in Washington" for "pushing an empty HMO proposal that won't stop these abuses." AFL Br. 6 ("Deny") (included in DEV 48, Tab 3 as "HMO Said No"). When targeted at incumbents not then running for reelection, these ads would not have been covered by BCRA. (The China ad, for example, would have triggered Title II in only two of fourteen market locations in which it ran. *See* Mitchell Dec., Ex. 1 at 92-93.) Where the target *was* a candidate, there is every reason to assume that the ads *did* have an electoral effect—and quite possibly some electoral purpose as well.

Plaintiffs make much of any uncertainty concerning actual electoral intent or effect in such marginal cases. Similarly, in their discussion of Title II's back-up definition (Br. 59-61), the McConnell plaintiffs argue that reasonable people could disagree about whether some ads "support or oppose" a candidate. Avoiding subjective judgments in individual cases is, of course, one principal reason Congress chose to enact an *objective* primary definition to define the coverage of Title II—a choice that honors this Court's emphasis on avoiding vagueness in regulations that touch on speech. But if one attempts such judgments, then as the AFL itself emphasizes (Br. 18), evaluation of the likely intent or effect of a particular ad requires consideration of the full context surrounding its use.[56] Accordingly, a court would need to have a more complete and focused picture of all relevant circumstances before concluding that applying source and disclosure rules to a particular ad like any of those cited by plaintiffs would be constitutionally invalid.

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[55] The ACLU submits (Br. 10-11) one example of an ad that it claims falls in this category. As Judge Kollar-Kotelly explained, this is the only ad in the ACLU's history that satisfied Title II's criteria—and the ACLU *manufactured* it just so it could be a plaintiff in this case. SA 748-51.

[56] The ad "AAHP/Look Out for the Lawyers" (McConnell Br. 9a), for example, praises then-incumbent Senator Lauch Faircloth for "fighting to stop the trial lawyers," who "want[ed] Congress to pass new liability laws" that would "make trial lawyers richer" but "make healthcare unaffordable for millions." As Judge Kollar-Kotelly explains, in context, that ad clearly conveyed an electioneering message supporting Faircloth against his opponent, prominent trial lawyer John Edwards. SA 733-34.

As this discussion underscores, Congress could have achieved greater precision of the sort plaintiffs profess to seek only by using a flexible statutory standard—one inevitably tied to more subjective factors, such as those that plaintiffs criticize in attacking the back-up definition. In effect, plaintiffs seek to create a legal dead zone in which Congress cannot, as a practical matter, avoid either facial overbreadth or facial vagueness. The Court should not tolerate that cynical contention. It would be an odd Constitution that theoretically allowed Congress to impose source and disclosure rules on independent campaign spending, but restricted it to means that have proven wholly ineffective.

Finally, the NRA refers to some of its 30-minute "infomercial" ads, in which some references to candidates might be deemed incidental. *See* Br. 37-43. (Among plaintiffs, only the NRA runs such ads. In a 30- or 60-second ad, *no* image or word is "incidental.") Understandably, it does not focus on any of its unabashedly partisan infomercials, such as the one that led with Charlton Heston's observation that "[t]his election could come down to battleground states," and continued with repeated references to Al Gore. *See* McQueen Dep. 113-30 (JA 960-70) (text of ad). Nor does it dwell on ads such as the two spots set out side-by-side at SA 695-96(K), one funded from the NRA's treasury and the other by its PAC. The difference? The PAC ad ends with "Vote George W. Bush for President," while the "issue" ad makes do with Charlton Heston observing—just before the 2000 election—that "the day of reckoning is at hand." *See also* SA 697(K). Whatever Title II's impact on the exceedingly small universe of 30-minute ads with truly incidental candidate references run just before elections, it cannot support a claim that Title II is facially invalid as to all ads to which it applies.[57]

2. Title II Properly Reaches Nonprofit Corporations Unless They Qualify For An As-Applied Exemption under *MCFL*

The NRA and the ACLU argue that nonprofit, ideological corporations should not be treated like other corporations for purposes of campaign finance regulation. That argument is incorrect as a general matter, and this litigation is not the place for as-applied challenges by these plaintiffs.

To begin with, neither organization demonstrates that compliance with Title II would impose any great burden. The NRA claims that BCRA would reduce its members' "collective voice" to a "whisper" (Br. 25), but there is no reason that should be so—if, in fact, the members do support the group's *electoral* speech. Nothing prevents the NRA from reducing its membership dues by some amount, and asking its four million members to contribute that amount to its Political Victory Fund. In any event, during the 2000 election cycle, the PVF's own fundraising was already so successful that it used its own funds to pay for administrative expenses that could legally have been paid with NRA treasury funds. Adkins Cross 41-43. The ACLU, meanwhile, complains principally (Br. 17) that it does not want to set up a segregated fund to comply with BCRA, because it "is not a partisan organization and does not choose to present itself as one." It never explains why there is any "presentation" issue. FECA does not require that segregated funds adopt a partisan name, make political contributions, or engage in partisan conduct. No one need misunderstand the purposes of the "ACLU Election-Period Non-Partisan Legislative Advocacy Fund."

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[57] The NRA also argues (Br. 38-41) that it uses broadcast advertising to respond to public attacks and raise funds. It does not demonstrate that these efforts would be materially impeded by complying with Title II, or explain why such ads would not raise source and disclosure concerns if they name candidates and run in their districts just before elections.

In contrast to these imagined burdens, the risks posed by an "issue" advocacy exemption for nonprofits are very real. This Court has expressly recognized that the basic reasons for limiting corporate and union campaign spending to segregated funds apply to ideological nonprofits—specifically including the NRA. *Beaumont*, 123 S. Ct. at 2209-10. Such organizations, "like their for-profit counterparts, benefit from significant 'state-created advantages,'" and their fundraising and political prowess "show that 'political "war chests"' may be amassed simply from member contributions." *Id.* at 2209 & n.6. If exempt from source and disclosure rules, they could quickly become easy-to-use, hard-to-police conduits for unlimited campaign spending by unions and for-profit corporations. *Id.* at 2209-10; *Austin*, 494 U.S. at 664; *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (*MCFL*) (nonprofits could "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace"). And individuals who support a nonprofit's basic mission—or join because membership provides various benefits—do not necessarily want their funds to be used to support or oppose candidates. *See Beaumont*, 123 S. Ct. at 2209 n.5. BCRA's coverage of nonprofits is not only reasonable, but indispensable.

As the NRA emphasizes (Br. 28-33), BCRA contains superseded provisions that would have required simply that nonprofit corporations pay for electioneering communications only out of funds contributed by individuals. *See* 2 U.S.C. §§ 434(f)(2)(E)-(F), 441b(c)(2), *superseded by* 2 U.S.C. § 441b(c)(6). That approach would have been significantly more complicated to administer and enforce—and significantly less effective. Money is fungible, so corporate or union contributions could be used to fund *all* the organization's non-campaign activities, freeing individual contributions for electioneering communications. *See Beaumont*, 123 S. Ct. at 2210 n.7 (rejecting argument that "earmarking" rules adequately addressed conduit problem in contribution context).

As to any argument that specific organizations should not be subject to Title II, *MCFL* already establishes that restrictions on the use of treasury funds cannot be applied to certain nonprofits. *MCFL* and the FEC's regulations establish the basic criteria for exemption—including that the corporation engage in no "business activities," not be "established by a business corporation or a labor union," and have "a policy not to accept contributions from such entities." 479 U.S. at 264; *see* 11 C.F.R. § 114.10(c), (d) (recognizing that Title II is subject to the same as-applied exemption under *MCFL*). Later decisions reaffirm, however, both that *MCFL*'s requirements are to be strictly construed, and that FECA's requirements may properly be applied to most "nonprofit ideological corporations." *See Austin*, 494 U.S. at 661-65; *Beaumont*, 123 S. Ct. at 2204, 2207-11.

These requirements suggest that neither the NRA nor the ACLU is entitled to a constitutional exemption, because each accepts corporate funding.[58] More fundamentally, given *MCFL* and *Austin*, BCRA's electioneering communications provisions may not be challenged on their face on the ground that *some* nonprofit corporations might be entitled to an as-applied exemption. After all, *MCFL*, which *upheld* such a challenge, did not therefore invalidate the application of FECA's source restrictions to all corporations. A corporation that believes it falls within *MCFL*, or that the *MCFL* exemption should be expanded, may pursue that claim on an as-applied basis, before the FEC and then in the courts. Whatever the merits of such arguments, they are out of place in this case.

CONCLUSION

BCRA should be sustained in its entirety.

Respectfully submitted,

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[58] Each argues that its corporate funding is comparatively modest—which suggests that neither would be terribly burdened by forgoing corporate donations to qualify for an exemption. *See* SA 834 n.123(K). But the absolute amounts involved—$85,000 for the ACLU (Br. 9 n.8, 17), and $385,000 for the NRA (Br. 3)—are not trivial, and could quickly increase if the organizations became conduits for corporate or labor electioneering.

ROGER M. WITTEN
WILMER, CUTLER &
PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

AUGUST 2003

CMR

Ad Detector

BRAND: GORE FOR PRESIDENT+
TITLE: NA/Cheney Myanmar
COMMERCIAL: NA/Cheney Myanmar 1 of 1
LENGTH: 30
FRAMES: 7

CMAG REPORTS

[Announcer]: On October 27th, The Wall Street Journal reported that a brutal military regime

in Myanmar, formerly known as Burma, forced men, women, and children

into slave labor to assist the building of an oil pipeline by American company

Haliburton. The president of Haliburton at the time, Dick Cheney. The

question is: Did Dick Cheney really know nothing or did he know and

did nothing? Either way, we just can't trust Dick Cheney

a heartbeat away from the presidency.

Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

BEST AVAILABLE COPY

CMR

Ad Detector

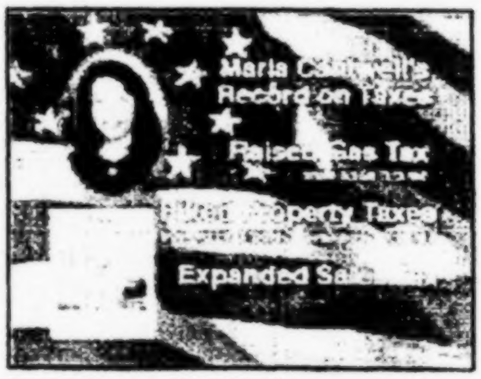
TITLE: WA/AJS Judge Cantwell By Her Record
COMMERCIAL: WA/AJS Judge Cantwell By Her Record 1 of 1
LENGTH: 30
FRAMES: 7

CMAG REPORTS

[Announcer]: You can judge a person by her past performance. Look at Maria Cantwell's record.

Maria Cantwell's Record on Taxes

Cantwell voted to raise the gas tax, hike property taxes, and expand


Maria Cantwell's Record on Taxes
Raised Gas Tax
Property Taxes
Expanded Sa

the sales tax. Cantwell even voted to raise tax rates on

Maria Cantwell's Record on Taxes
70%

Social Security by 70%. [Cantwell]: "I'm actually proud of my

1993 vote because I think that that vote was the right decision." [Announcer]: Maria Cantwell

voted to raise fees and taxes over fifty times. So she must be very

Call Maria Cantwell
206-674-2700
Tell her to stop raising taxes on
Washington's working families!

proud indeed. Can we afford politicians like Maria Cantwell? [PFF Americans for Job Security]

Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

CMR

Ad Detector

BRAND: GORE FOR PRESIDENT
TITLE: AFLCIO/Bush Debates PBR
COMMERCIAL: AFLCIO/Bush Debates PBR 1 of 1
LENGTH: 30
FRAMES: 7

CMAG REPORTS

[Inglis]: " When Governor Bush said during the debate that he brought people together to

pass the patient's bill of rights, he knew in his heart that

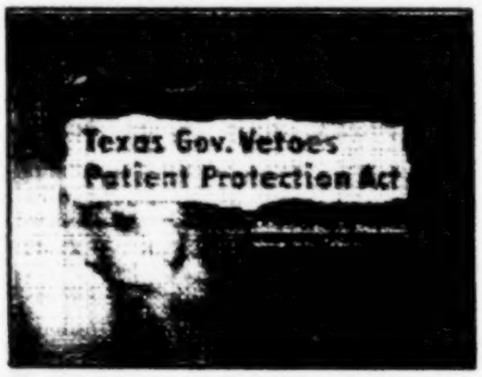
Toni Inglis, R.N.
Austin, Texas

that was absolutely false. Nurses

worked long and hard to pass this legislation and hold

the HMOs accountable for denying medical care to people. He fought

it every step of the way. His constituency was



the insurance companies. That's why he vetoed it." [PFB: The Working Men and Women of the AFL-CIO]

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703-683-7110
www.politicsontv.com

CMR

Ad Detector

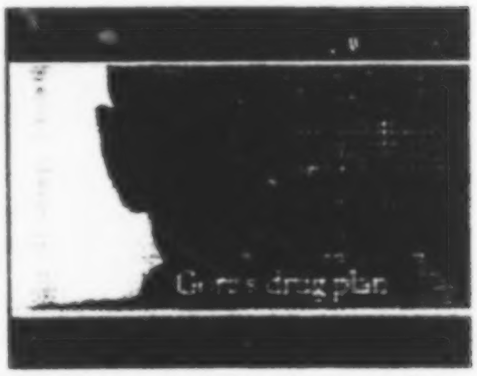
BRAND: BUSH FOR PRESIDENT+
TITLE: AJS/Bush Think Hard Rx
COMMERCIAL: AJS/Bush Think Hard Rx 1 of 1
LENGTH: 30
FRAMES: 8

CMAG REPORTS

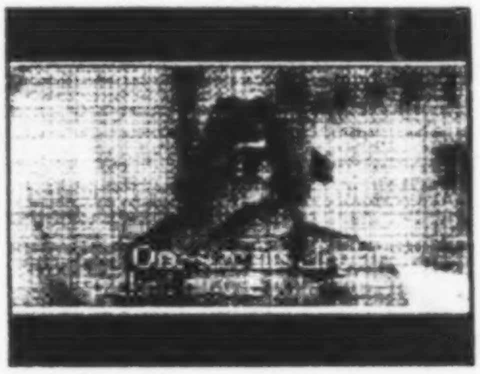
[illegible]

[Announcer]: Think hard about what your healthcare and prescription drugs would be like under Al Gore. One in four seniors

could lose their good private coverage. Just one chance to join Gore's


Gore's drug plan

drug plan or be left out forever. A one size fits all plan


One-size-fits-all drug plan

picked by the government where bureaucrats would end up deciding what medicines

you can get. And you'd pay up to $600 a year more straight out of

your Social Security check for the privillege. So think hard America.

think hard America

[PFB: Americans for Job Security]

think hard America

Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

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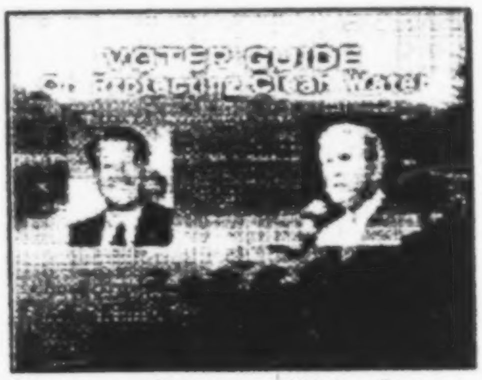
CMR

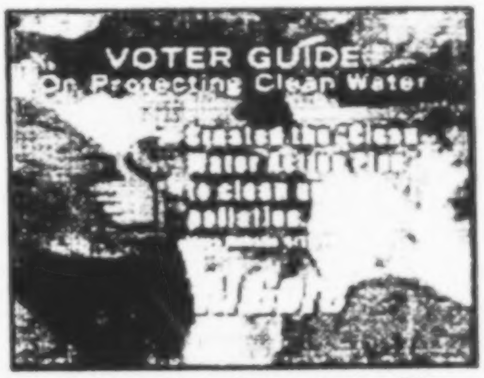
Ad Detector

BRAND: SIERRA CLUB+
TITLE: SIERRA/OR Bush Gore Worlds Apart
COMMERCIAL: SIERRA/OR Bush Gore Worlds Apart 1 of 1
LENGTH: 30
FRAMES: 8

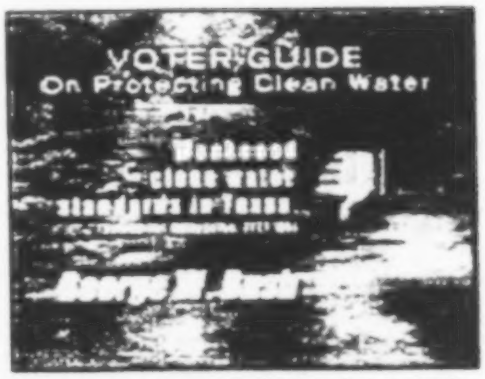
CMAG REPORTS


VOTER GUIDE
On Protecting Clean Water

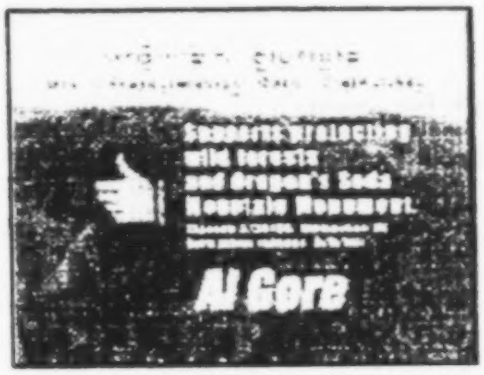
[Announcer]: Two candidates for President are world's apart when it comes to protecting Oregon's environment. Al Gore


VOTER GUIDE
On Protecting Clean Water
Created the Clean Water Action Plan to clean up pollution.
Al Gore

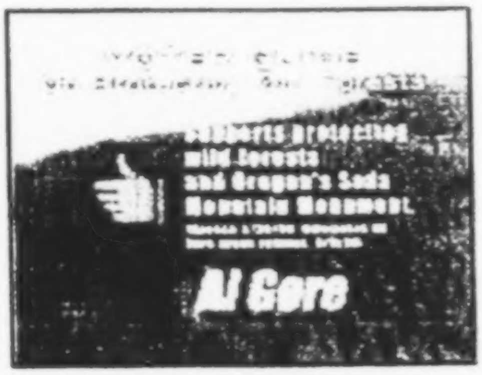
created the Clean Water Action Plan to clean up pollution. George Bush weakened


VOTER GUIDE
On Protecting Clean Water
Weakened clean water standards in Texas.
George W. Bush

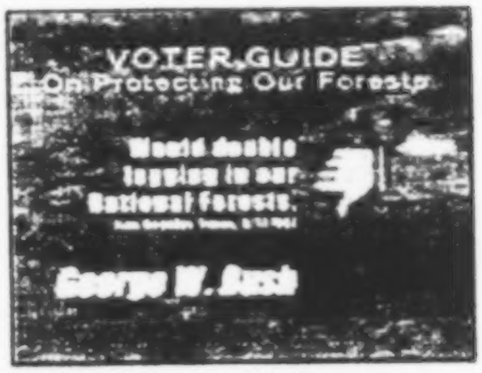
clean water standards for rivers and lakes in Texas. Al Gore


Supports protecting wild forests and Oregon's Soda Mountain Monument.
Al Gore

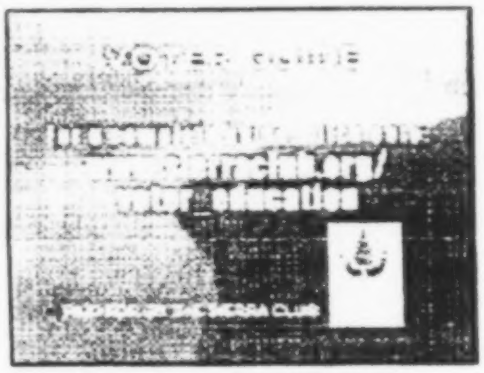
supports protecting wild forests and Oregon's Soda Mountain Monument.


Supports protecting wild forests and Oregon's Soda Mountain Monument.
Al Gore

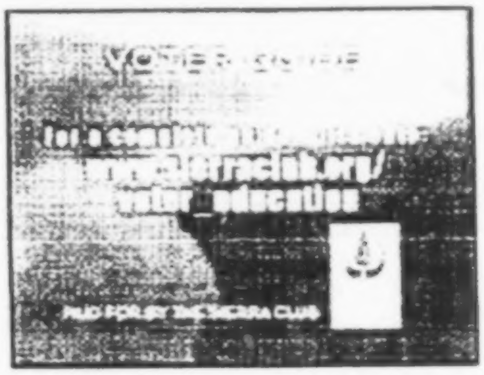
George Bush would double logging in our national forests.


VOTER GUIDE
On Protecting Our Forests
Would double logging in our National Forests.
George W. Bush

Still think there's no difference between Al Gore and George Bush? Click on the Sierra Club's


VOTER GUIDE
www.sierraclub.org/voter_education
PAID FOR BY THE SIERRA CLUB

complete voter guide. [PFB: The Sierra Club]


VOTER GUIDE
www.sierraclub.org/voter_education
PAID FOR BY THE SIERRA CLUB

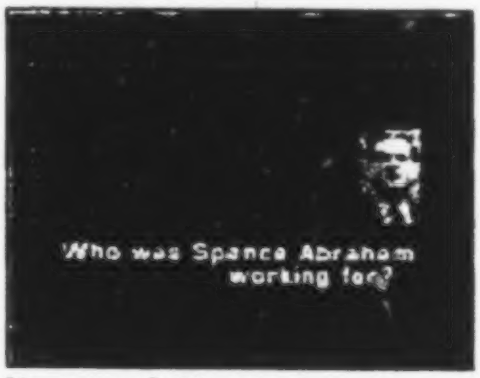
Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

CMR

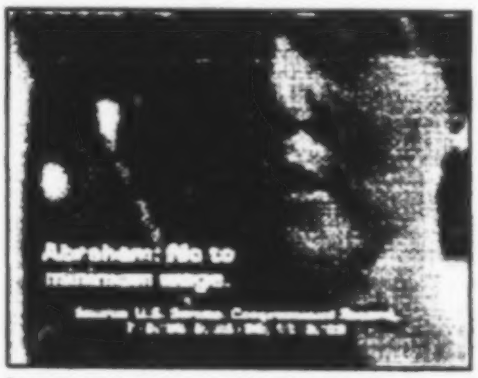
Ad Detector

BRAND: AFL-CIO UNION+
TITLE: AFLCIO/MI Who is Abraham Working For
COMMERCIAL: AFLCIO/MI Who is Abraham Working For 1 of 1
LENGTH: 30
FRAMES: 7

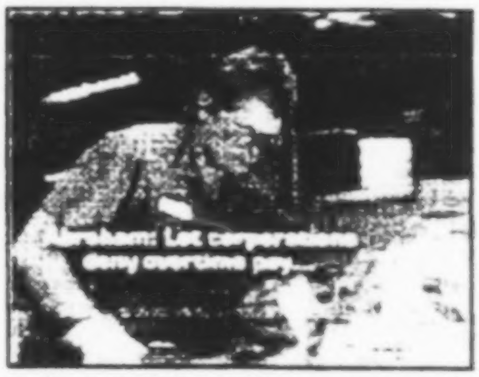
CMAG REPORTS


Who was Spence Abraham working for?

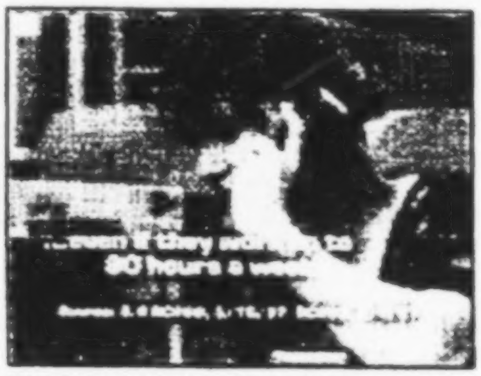
[Announcer]: Who was Spence Abraham working for when he voted three times against the minimum wage


Abraham: No to minimum wage.

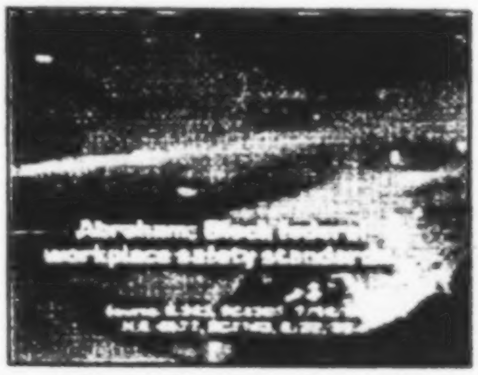
increase with no strings attached? When he voted to allow corporations


Abraham: Let corporations deny overtime pay...

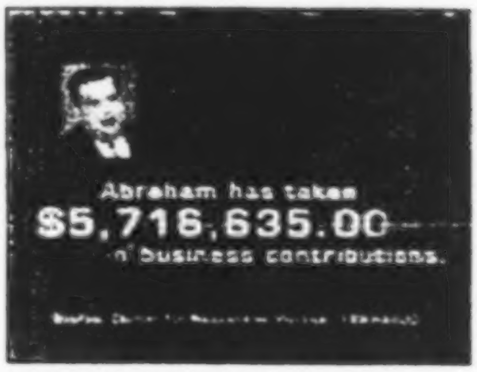
to deny workers overtime pay even if they work up to 80 hours a week?


...even if they work up to
80 hours a week

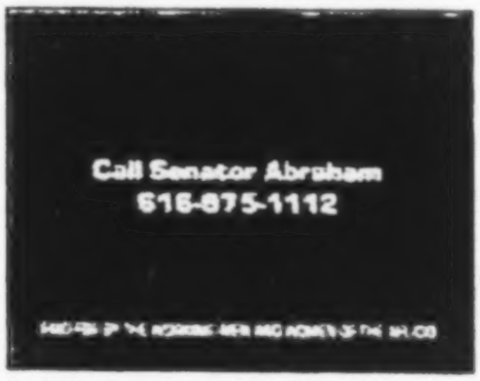
When he voted to block federal safety standards aimed


Abraham: Block federal workplace safety standards

at protecting workers on the job? Was Abraham working for you or


Abraham has taken
$5,716,635.00
in business contributions.

his friends in big business. Tell Spence Abraham when he votes against our wages and our safety, he's not working


Call Senator Abraham
616-875-1112

for Michigan's working families.
[PFB: Working Men and Women of the AFL-CIO]

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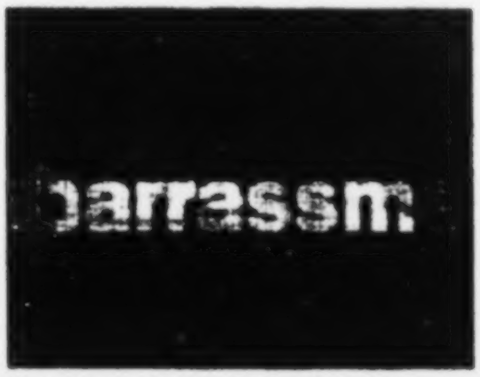
703-683-7110
www.politicsontv.com

CMR

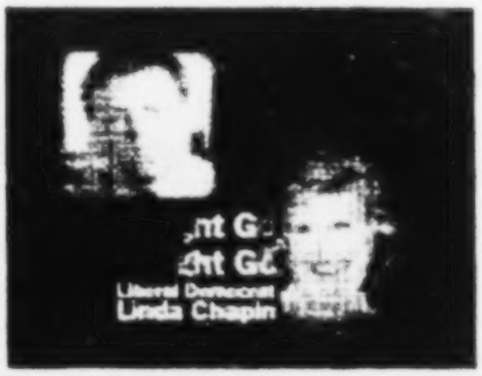
Ad Detector

CMAG REPORTS

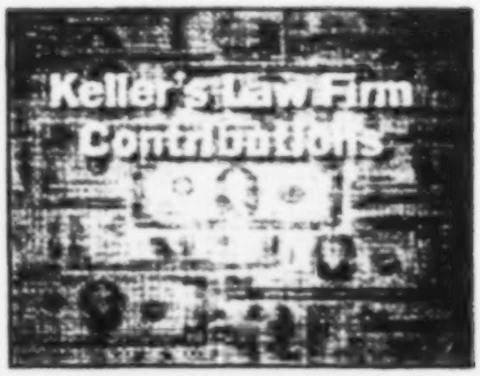
BRAND: POL-CONGRESS+
TITLE: FL/RLC Keller An Embarrassment
COMMERCIAL: FL/RLC Keller An Embarrassment 1 of 1
LENGTH: 30
FRAMES: 7



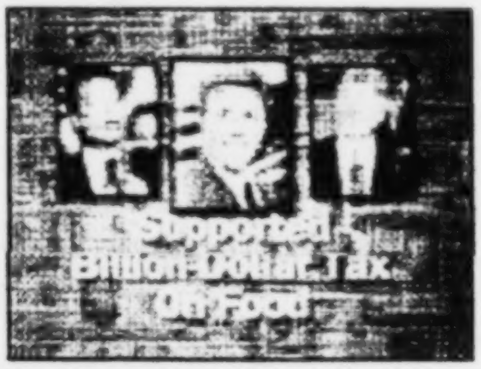
[Announcer]: Ric Keller has become an embarrassment. He claims to be a conservative but got caught getting help from liberal Democrat Linda


Liberal Democrat
Linda Chapin

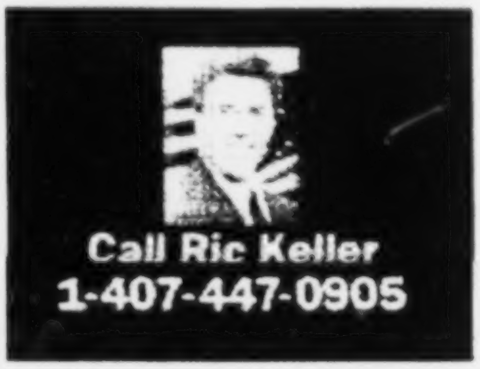
Chapin, and Keller's law firm coughed up campaign contributions for


Keller's Law Firm
Contributions

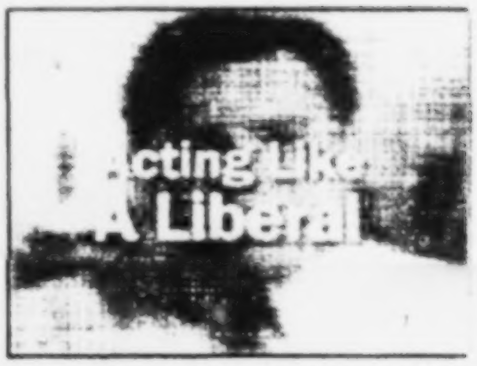
liberal Democrat Buddy McKay. Ric Keller even supported


Supported
Billion-Dollar Tax
On Food

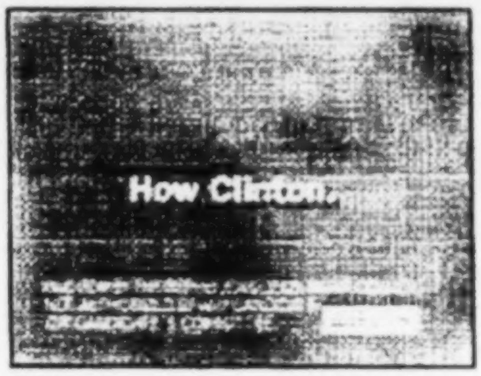
the Clinton-Gore billion dollar tax on food. Ric Keller, who


Call Ric Keller
1-407-447-0905

proclaims to be a conservative but gets caught acting like a liberal.


Acting Like
A Liberal

How embarrassing. How wrong How Clinton.


How Clinton.

(PFB: Republican Leadership Council)

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CMR

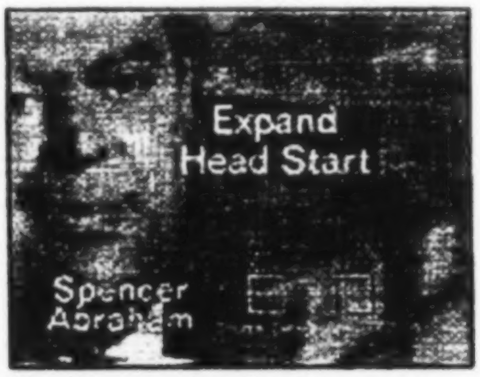
Ad Detector

BRAND: POL-US SENATE+
TITLE: MI/MIWV Abraham Failed MI Children
COMMERCIAL: MI/MIWV Abraham Failed MI Children 1 of 1
LENGTH: 30
FRAMES: 8

CMAG REPORTS

Spencer
Abraham

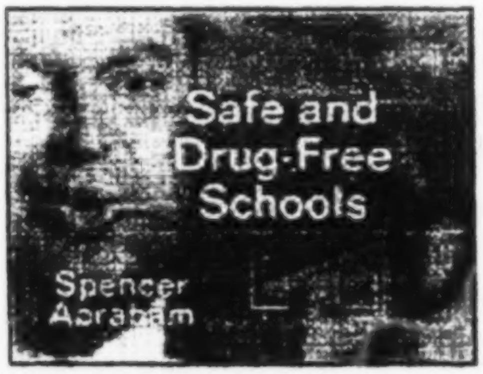
[Announcer1]: When it comes to education, Spencer Abraham has failed Michigan's children. [Announcer2]: Expand Head Start:


Expand
Head Start
Spencer
Abraham

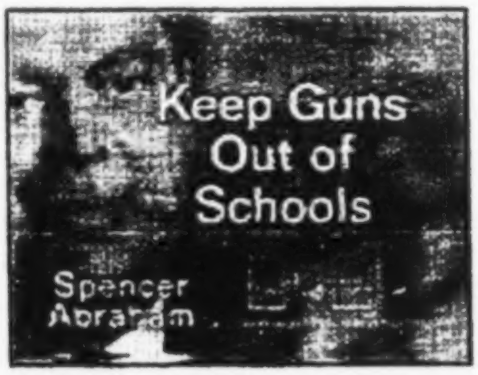
Abraham voted against it. [Announcer1]: Hire new teachers to reduce class size:

100,000
New Teachers
Spencer
Abraham

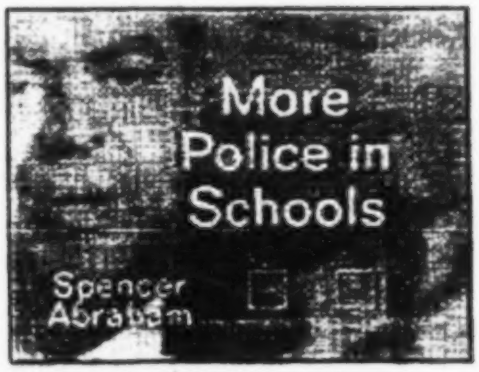
Abraham voted no. [Announcer2]: Safer and drug-free schools: Abraham voted to eliminate


Safe and
Drug-Free
Schools
Spencer
Abraham

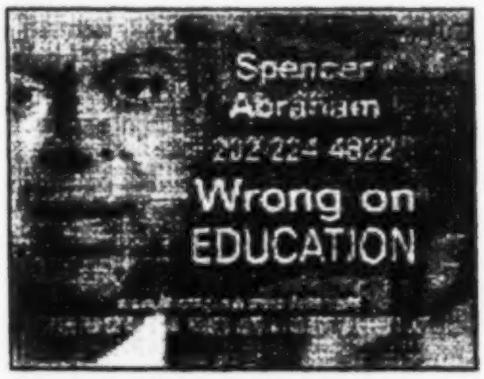
a program that protects kids. [Announcer1]: A law against guns in school:


Keep Guns
Out of
Schools
Spencer
Abraham

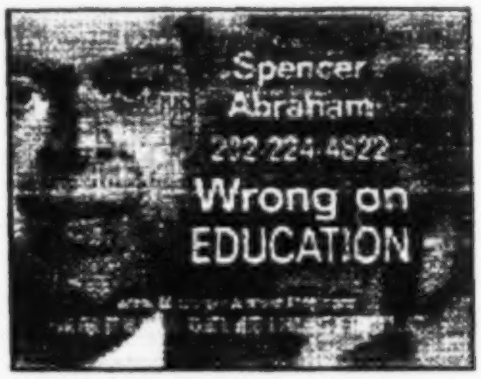
Abraham actually opposed it. [Announcer2]: Put more police in local schools:


More
Police in
Schools
Spencer
Abraham

Once again Abraham voted no. [Announcer1]: Tell Spencer Abraham his record on education is


Spencer
Abraham
202-224-4822
Wrong on
EDUCATION

wrong for Michigan families.


Spencer
Abraham
202-224-4822
Wrong on
EDUCATION

[PFB: Michigan Women Voters. A Project of Emily's List]

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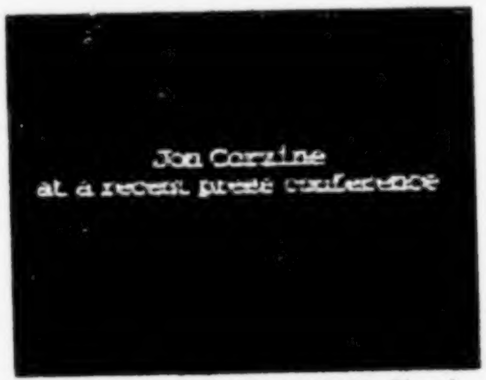
CMR

Ad Detector

BRAND: CITIZENS/BETTER AMERICA+
TITLE: NJ/CBA Corzine Didn't Vote in 1998
COMMERCIAL: NJ/CBA Corzine Didn't Vote in 1998 1 of 1
LENGTH: 30
FRAMES: 8

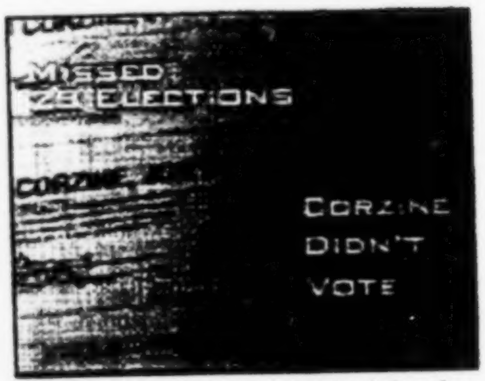
CMAG REPORTS


Jon Corzine
at a recent press conference

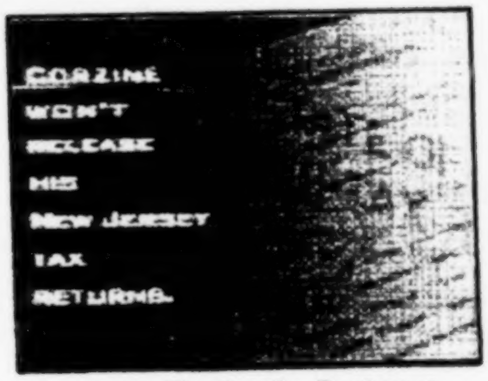
[Corzine]: " I did vote in 1998. Check the record."

in 1998
Check the record."

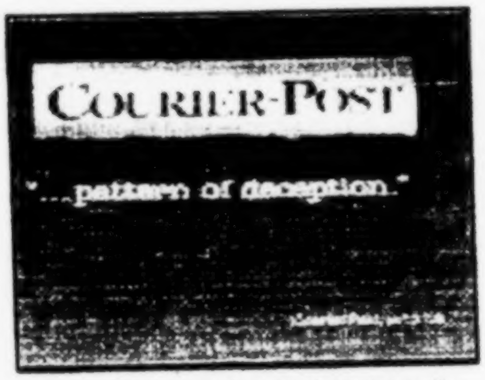
[Announcer]: We did check and he didnt' vote and Corzine missed voting


MISSED
ELECTIONS
CORZINE
DIDN'T
VOTE

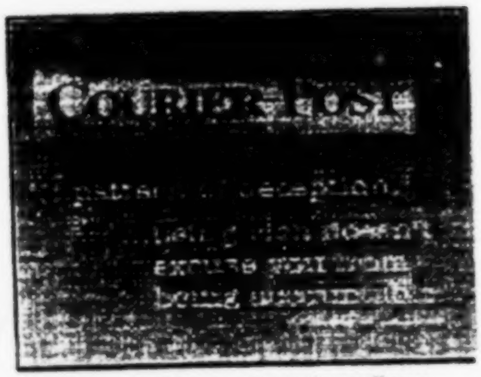
in 23 other elections too. And Corzine won't release his New Jersey


CORZINE
WON'T
RELEASE
HIS
NEW JERSEY
TAX
RETURNS.

tax returns. The Courier-Post says, "..it's all part of a pattern

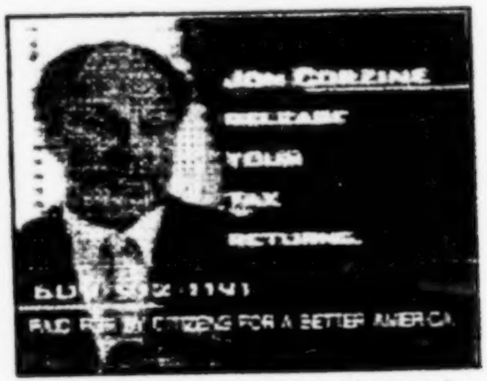

COURIER-POST
"...pattern of deception."

of deception and being rich doesn't excuse him from being accountable."


COURIER-POST
excuse you from
being accountable

The Star Ledger calls it "needless secrecy." We agree.

Jon Corzine: Release your tax returns and always tell the truth.


JON CORZINE
RELEASE
YOUR
TAX
RETURNS.
PAID FOR BY CITIZENS FOR A BETTER AMERICA

[PFB: Citizens for a Better America]

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www.politicsontv.com

10a

CMR

Ad Detector

BRAND: POL-CONGRESS+
TITLE: MI/MICA Bonior Let Criminals Free
COMMERCIAL: MI/MICA Bonior Let Criminals Free 1 of 1
LENGTH: 30
FRAMES: 7

1043

A005OV7H.ESB

October 1993

[Announcer]: The Daily reports criminals are being set free into our neighborhoods. In May, Congressman

Congressman
David Bonior

David Bonior voted to allow judges to let violent criminals out of jail.

Congressman
David Bonior
violent criminals
out of jail early

Rapists, drug dealers, and even muderers. But that's not all. Bonior'

Bonior's record
on drugs
is even worse.

record on drugs is even worse. Bonior voted to reduce the penalties

Congressman
David Bonior

for crack cocaine. And in April, David Bonior voted to use your tax dollars

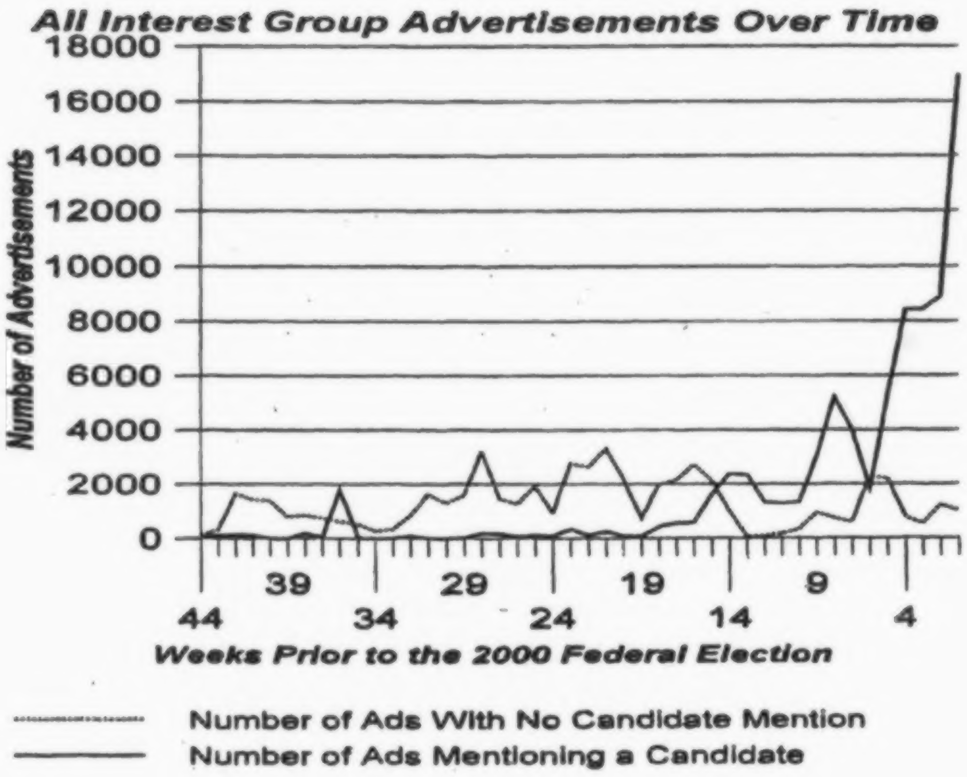
Congressman
David Bonior

to give free needles to illegal drug users. Call Bonior.

Tell Bonior he's wrong...

Tell him he's wrong. Dangerous
ninals belong in jail.

APPENDIX B



Reprinted from SA 848 (Kollar-Kotelly)

APPENDIX C

LEGISLATIVE HISTORY EXCERPTS

Statements by Congressional Sponsors

Statement of Sen. Snowe: "We also must close off the use of corporate and union treasury money used to fund ads influencing Federal elections.... What we are talking about are broadcast advertisements that are influencing our Federal elections and, in virtually every instance, are designed to influence our Federal elections. Every focus group and every study group that has been conducted over the last few years proves this, and I'll detail those studies later. And yet, no disclosure is required and there are none of the funding source prohibitions that for decades have been placed on other forms of campaigning. Why is this so? Because they don't contain the so-called 'magic words' like 'vote for candidate x' or 'vote against candidate x' that make a communication what is called 'express advocacy,' and therefore, subject to Federal law requiring disclosure and requiring that the ad be paid for with hard money.... It's time we closed this loophole. It's time to remove the cloak of anonymity. Otherwise, we are saying that it really doesn't matter to the election process. That we should not know who is behind these types of commercials that are run 60 days before the election, 30 days before a primary, whose donors contribute more than $1,000. We ought to have disclosure on these ads where there currently is no disclosure. And that's what the Snowe-Jeffords provision in this bill does, in simple, straightforward and unambiguous terms.... [I]t prohibits the use of union or corporate treasury money to pay for these ads, in keeping with longstanding provisions of law. Corporations have been banned from direct involvement in campaigns since the Tillman Act of 1907. Unions were first addressed in the Smith-Connally Act of 1943 and the prohibition was finally made permanent in 1947 with the Taft-Hartley Act. And these laws have stood because the Court has recognized—as recently as 1990 as this quote from Justice Marshall in the Austin versus Michigan Chamber of Commerce decision shows—'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form, and that have little or no correlation to the public's support for the corporation's political ideas.'" 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002).

Statement of Sen. Jeffords: "I am especially proud of the provisions in this legislation that reform the law concerning broadcast advertisements near an election that escape even minimal disclosure by not using the 'magic words.' These electioneering communications are cleverly and clearly seen by the electorate to be trying to influence their vote, but the true nature of the sponsors and funding for these advertisements remain cloaked in the veil of secrecy. The American public deserves to know who is trying to influence their vote, and the Snowe-Jeffords provisions will provide them this necessary information." 148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002).

Statement of Sen. McCain: "Federal election law has long barred unions and corporations from making expenditures in connection with federal elections. However, by sponsoring their own putative 'issue ads,' they circumvent this law. The Snowe-Jeffords electioneering communications provision will help restore the original intent of the law: to keep a tidal wave of union and corporate money out of Federal elections.... [Parties and outside groups] evade campaign finance laws prohibiting the use of soft money on campaign ads by studiously avoiding the use of the so-called 'magic words' of 'vote for' or 'vote against' in such ads. But these soft money-funded ads are nonetheless patently campaign ads. Indeed, 97 percent of the electioneering ads reviewed as part of the Brennan Center's 'Buying Time 2000' study did not use 'magic words.'... The sham issue ad subterfuge—permitting outside groups to spend supposedly prohibited soft money on campaign ads without disclosing even a dime of that spending—will continue unless Congress draws a more accurate line between campaign ads and issue ads. Clearly, even a casual observer would concede that 'magic words' is a dramatically underinclusive test for determining what constitutes a campaign ad. This bill would simply subject soft money-funded campaign ads that masquerade as issue discussion to the same laws that have long governed campaign ads." 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002).

Statement of Sen. Feingold: "I believe [Snowe-Jeffords] is an extremely valuable addition to the bill. It is the second big loophole in the system. No. 1 is the soft money loophole. No. 2 is the phony issue ads. Snowe-Jeffords gets at the heart of the issue ad loophole. Right now wealthy interests are abusing this loophole at a record pace. They are flouting the spirit of the law, there is no question about it. They advocate for the election or defeat of a candidate, even though they don't say those 'magic words,' such as 'vote for,' 'vote against,' 'elect' or 'defeat.' These ads might side-step the law, Mr. President, but they certainly don't fool the public." 147 Cong. Rec. S3070 (daily ed. Mar. 29, 2001).

Statement of Sen. Snowe: "At the same time we address the soft money issue, I also think it is critical that we address the ever burgeoning segment of electioneering popularly known as sham issue advertising. We do so in a way carefully constructed as to pass constitutional muster. I am speaking of advertisements influencing the Federal elections in this country but [that] get off scot-free when it comes to any degree of disclosure or any degree of prohibitions normally associated with campaigning. Let there be no mistake. The record I intend to outline will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws." 147 Cong. Rec. S2455 (daily ed. Mar. 19, 2001).

Statement of Sen. Feingold: "Mr. President, this bill also includes the amendment dealing with abuses of 'issue advocacy' . . . . The Snowe-Jeffords amendment is a balanced approach to the 'phony issue ad' problem that prohibits corporations and unions from purchasing television and radio advertisements within the last 2 months of a campaign if those ads refer to a clearly identified candidate. It is designed to prevent corporate and union treasury money, which has been banned from federal elections since early in this century, from making its way back into the elections in the form of advertisements that pretend to be about issues, but instead are about elections. Advocacy groups, on the other hand, are permitted to purchase what the bill calls 'electioneering communications,' as long as they disclose their expenditures and the major donors to the effort and take steps to prevent the use of corporate and union treasury money for the ads. Mr. President, we worked long and hard to perfect this amendment last year, to make sure that it is constitutional, and that it will be effective in combating what has become a very serious subterfuge engaged in by entities that plainly want to influence elections but don't want to abide by the election laws. It is a crucial piece of the campaign finance reform puzzle, and we are proud to have the support of Senators Snowe and Jeffords for our effort and to include their proposal in our bill." 145 Cong. Rec. S423 (daily ed. Jan. 19, 1999).

Statement of Sen. Feingold: "We firmly believe that [the Snowe-Jeffords amendment] will withstand constitutional scrutiny because corporations and unions have for a very long time been barred from spending money directly on Federal elections. The Senator from Kentucky suggested we lack case law for these propositions, but the Supreme Court upheld the ban on corporate spending in the *Austin* v. *Michigan Chamber of Commerce* case. Mr. President, it is noted that a Michigan regulation that prohibited corporations from making independent expenditures from treasury funds prevented 'corruption in the public arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' According to the Court, the Michigan regulation 'ensured that the expenditures reflect actual public support for the political ideas espoused by the corporations.'" 144 Cong. Rec. S984 (daily ed. Feb. 25, 1998) (italics added).

Statement of Sen. Jeffords: "Corporations have been banned from electioneering since 1907; unions, since 1947. As the Supreme Court pointed out in *United States* v. *UAW*, Congress banned corporate and union contributions in order to 'avoid the deleterious influences on Federal elections resulting from the use of money by those who exercise control over large aggregations of capital.' Our amendment would ban corporations and unions from using General Treasury funds to fund electioneering communications in the last 60 days of the general election and the last 30 days before a primary." 144 Cong. Rec. S974 (daily ed. Feb. 25, 1998).

Statements by Other Members of Congress

Statement of Rep. Serrano: "The influence of money in American politics is a problem as old as the Nation. It is discouraging to remember that the broken campaign finance system that Shays-Meehan would replace was itself once seen as a reform, designed to limit undue influence by large unregulated and undisclosed campaign contributions, but that big money soon found its way around the reforms through soft money and 'independent' advertising. . . . Campaign advertisements masquerading as issue advocacy must be regulated. Shays-Meehan will require that broadcast communications that mention a Federal candidate must be paid for with hard money—which includes corporate and union PAC funds—within 60 days of a general or 30 days of a primary election." 148 Cong. Rec. H347 (daily ed. Feb. 13, 2002).

Statement of Rep. Cardin: "The bill would close two large loopholes in the law that contribute to the corruption of our political system. One loophole is so-called 'soft money' contributions, which are unregulated and unlimited contributions from wealthy special interest groups. Another major loophole deals with 'independent' issue advertisements, which allow special interests to seek to influence the outcome of an election campaign by spending large sums of money on advertising campaigns. Currently, these ads which are clearly aimed at influencing an election can be worded in a way that they are deemed issue advocacy and are not subject to campaign spending limits or disclosure requirements." 148 Cong. Rec. H387 (daily ed. Feb. 13, 2002).

Statement of Rep. Kleczka: "An equally troubling aspect of today's campaign system is the number of issue advertisements broadcast on the television and radio. Although these ads technically adhere to federal campaign regulations, they violate the spirit of the law." 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002).

Statement of Rep. Nadler: "[Y]ou said that of course incumbent politicians, many of them, some of them don't want to be criticized, so therefore there is an attempt to restrict the speech. . . . But isn't it the case that really this has nothing to do with criticism? This bill is not saying you can't criticize the Congressman, or whatever; the bill is saying if you want to criticize the Congressman, one, do it with hard money and subject to the other—basically with hard money disclosure; and two, by implication, be honest about it . . . . Isn't the issue really not that you can't criticize, but that if you want to criticize you can't do it with multimillion-dollar contributions?" *Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 151, 1st Sess. (2001).

Statement of Sen. Edwards: "We now know empirically in the case of the 2000 election, 99 percent of those ads covered by Snowe-Jeffords are campaign ads and not issue ads. They are sham issue ads. They are a fraud under the campaign election laws that exist in this country. Snowe-Jeffords is trying to eliminate that fraud, eliminate that sham." 147 Cong. Rec. S3040 (daily ed. Mar. 28, 2001).

Statement of Sen. Edwards: "In fact, [sham issue ads] are more than a masquerade, they are a sham, they are a fraud on the American people, and they are nothing but a means to avoid the legitimate election laws of this country.... The Court has already held that what we are doing in these sham issue ads and with soft money is a compelling State interest because of the need to avoid corruption or, more importantly, in this case, the appearance of corruption." 147 Cong. Rec. S2636 (daily ed. Mar. 21, 2001).

Statement of Sen. Dodd: "The McCain-Feingold legislation ... does address two of the most pressing deficiencies in our system of campaign finance: Undisclosed soft money contributions, and sham issue ads.... This special interest speech—paid for with unlimited, undisclosed soft money—creates, at a minimum, the appearance of undue influence, if not an implied quid pro quo by the contributor." 147 Cong. Rec. S2435-36 (daily ed. Mar. 19, 2001).

Statement of Sen. Dodd: "[A] majority in the Congress and a majority of the American people firmly believe that massive amounts of unregulated money pouring into political campaigns is corrupting our system of elections in this country. That perception threatens to undermine the very authority of government and will erode, in my view, the confidence in our system of democracy.... Nowhere is this potential for cynicism greater than in the use of electioneering messages masquerading as 'sham issue' ads." *The Constitution and Campaign Reform: Hearings before the Comm. on Rules and Admin.* 106th Cong. 636, 2d Sess. (2000).

Statement of Sen. Kennedy: "The House reforms also ended other serious abuses in campaign financing. It ends the sham of the so-called issue ads loophole, which permits special interests to spend big money on campaign advertising obviously designed to support a candidate, as long as the ads do not specifically call for the candidate's election. The House bill treats these ads as the campaign ads they really are, and rightly subjects them to regulation under the campaign finance laws." 145 Cong. Rec. S12741 (daily ed. Oct. 18, 1999).

Statement of Sen. Feinstein: "Banning soft money without addressing issue advocacy will simply redirect the flow of undisclosed money in campaigns. Instead of giving soft money to political parties, the same dollars will be turned into 'independent' ads. The issues of soft money ban and independent advertisements go hand in hand one can not be addressed without the other.... This campaign loophole [regarding issue advocacy] allows unions, corporations, and wealthy individuals to influence elections without being subject to disclosure or expenditure restrictions." 145 Cong. Rec. S12661-62 (daily ed. Oct. 15, 1999).

Statement of Rep. Borski: "Soft money is used to finance the second loophole in campaign finance law; sham issue advertisements. This loophole allows special interests to spend huge sums of money on campaign ads advocating either the defeat or election of a candidate. As long as these ads do not use the magic words 'vote for' or 'vote against' they are deemed 'issue advocacy' under current law and therefore not subject to campaign spending limits or disclosure requirements. In an effort to ban campaign advertisements that masquerade [a]s 'issue advocacy,' Shays-Meehan tightens the definition of 'express advocacy' communications. Under the bill, any ad that is clearly designed to influence an election is deemed 'express advocacy' and must therefore abide by federal contribution and expenditure limits and disclosure requirements." 145 Cong. Rec. H1888 (daily ed. Sept. 15, 1999).

Statement of Rep. Blunt: "Mr. Chairman, the Meehan-Shays substitute bans soft money, and then what we also do is we recognize that the sham issue ads are truly campaign ads, and that is the key point. They are not sham in the sense that they do not have a right to speak, but they are not issue ads, they are campaign ads, and we call them such. One of our provisions is obviously already in existing law. Vote for or vote against; it makes it a campaign ad. And people get around the sham issue ads by not saying vote for or vote against, but they might as well based on what they say." 144 Cong. Rec. H6802 (daily ed. July 30, 1998).

Statement of Sen. Glenn: "Together, the soft-money and issue-advocacy loopholes have eviscerated the contribution limits and disclosure requirements in federal election laws and caused a loss of public confidence in the integrity of our campaign finance system. By inviting corruption of the electoral process, they threaten our democracy. If these and other systemic problems are not solved, the abuses witnessed by the American people in 1996 will be repeated in future election cycles.... The McCain-Feingold legislation that we are considering here today goes a long way to address these abuses. [The bill] brings 'issue advertising' funded by corporate and union interests within the campaign finance system." 144 Cong. Rec. S1048-49 (daily ed. Feb. 26, 1998).

Statement of Sen. Glenn: "The [Thompson Government Affairs] Committee's investigation also showed that the legal distinction between 'issue ads' and 'candidate ads' has proved to be largely meaningless. The result has been that millions of dollars, which otherwise would have been kept out of the election process, were infused into campaigns obliquely, surreptitiously, and possibly at times illegally." 144 Cong. Rec. S1048 (daily ed. Feb. 26, 1998).

Statement of Sen. Bryan: "Independent expenditure ads are one of the very reasons the campaign system is out of control. We all know that these ads are really intended to defeat a candidate and are often coordinated with the opposition campaign. Simply put, these ads are not genuinely independent nor are they strictly concerned with issue advocacy." 144 Cong. Rec. S1038-39 (daily ed. Feb. 26, 1998).

Statement of Sen. Kerry: "The ads which are the targets of this legislation are ads paid for with union and corporate soft money, and which clearly identify candidates and are aired close to the election, despite the phony claim that they are 'issue ads.' If we were simply to ban soft money contributions to the parties, the soft money expenditures made by Labor and corporations would increase exponentially . . . ." 144 Cong. Rec. S1039-40 (daily ed. Feb. 26, 1998).

Statement of Sen. Glenn: "It is beyond question that raising soft money and broadcasting issue ads are not, in themselves, unlawful. The evidence suggests that much of what the parties and candidates did during the 1996 elections was within the letter of the law. But no one can seriously argue that it is consistent with the spirit of the campaign finance laws for parties to accept contributions of hundreds of thousands—even millions—of dollars, or for corporations, unions and others to air candidate attack ads without being required to meet any of the federal election law requirements for contribution limits and public disclosure." 144 Cong. Rec. S1048 (daily ed. Feb. 26, 1998).

Statement of Sen. Lieberman: "Soft money, issue ads, which are clearly ads for or against candidates have been used to evade those clearly constitutional restrictions on contributions to political campaigns.... The current ability of parties and outside groups to disguise candidate-focused electioneering ads as issue ads undermines these longstanding and important Federal elections policies." 144 Cong. Rec. S993 (daily ed. Feb. 25, 1998).

Statement of Sen. Dorgan: "A political ad [from outside interest groups], paid for with soft money from a political Swiss bank account. It's like a Swiss bank account because it is from a secret source, designed to be used to create attack ads, to be used at election time to influence Federal elections, something that, frankly, is supposed to be prohibited by law. But this has now become the legalized form of cheating. In fact, we are not even sure it is legal, but it is being done all across this country and it is being done with big chunks of secret money. In fact, one secret donor put up, I'm told, $700,000 to spend on so-called issue ads to influence federal campaigns. We don't even know for certain the identity of that person. And that soft money, that big chunk of money prohibited from ever affecting Federal races was used in this kind of advertising to directly try and influence Federal campaigns." 144 Cong. Rec. S881 (daily ed. Feb. 24, 1998).

Statement of Sen. Dorgan: "[Running sham issue ads] was done, by the way, with a legal form of cheating made possible by today's campaign finance law and current court decisions permitting issue ads, not so thinly disguised, to be waged in unlimited quantity using unlimited corporate money, unlimited individual money and undisclosed so that no one, no one in this country, will discover where the money came from. That is what is wrong with this current system." 144 Cong. Rec. S805 (daily ed. Feb. 23, 1998).

Statement of Sen. Collins: "Mr. President, the situation I have described [regarding "issue" ads run by the AFL-CIO] has led to the biggest sham in American politics. Nobody in Maine believed that the AFL[-]CIO's negative ads were for any purpose other than the defeat of a candidate. Ads of that nature make an absolute mockery out of the prohibition against unions and corporations spending money on Federal elections. The 'express advocacy' provision in McCain-Feingold is designed to do away with this sham." 143 Cong. Rec. S10125 (daily ed. Sept. 29, 1997).

Statement of Rep. Johnson: "The Hutchinson bill fails to address one of the most serious loopholes in our campaign finance system, the so-called sham issue ads. In recent elections we have watched special interest money exploit this loophole by pouring millions of dollars into campaign ads in elections all over the country.... Shays-Meehan clamps down on this loophole by requiring these outside groups to play by the same rules as everyone else." 144 Cong. Rec. H7325 (daily ed. Aug. 6, 1997).

Congressional Reports

"The Shays-Meehan bill also would provide a reasonable solution to the problem of unlimited and disclosed advertising

that fails to qualify as 'express advocacy' under federal election law, even though it is clearly designed to influence the outcome of an election.... Both political parties, as well as a wide range of interest groups and entities whose origin and purpose remain largely a mystery, have exploited issue advocacy in recent elections to run ads that clearly are designed to advocate the election or defeat of specific federal candidates, but evade federal election regulations by avoiding the 'magic words.'" *Bipartisan Campaign Reform Act of 2001: Committee on House Administration; Adverse Report*, H.R. Rep. No. 107-131, pt. 1, at 50 (2001).

"The evidence collected by this Committee showed clearly that there were really two campaigns conducted during the 1995/96 cycle. There was an 'overt' campaign and a 'covert' campaign.... In the 'overt' campaign, all contributors—whether they were individual donors or political action committees—revealed their names, their occupations, and the size of their donations to the Federal Election Commission. All donors to specific candidates were subject to strict limits on how much they could give.... In the 'covert' campaign, the rules were utterly different. In this parallel campaign, there was no disclosure and there were no limits on how much money would be distributed. *Tax-exempt 'issue advocacy' groups and other conduits were systematically used to circumvent the federal campaign finance laws....* Although the secret donors in the covert campaign were invisible, they had a powerful impact. These anonymous contributors poured millions of dollars into House, Senate, and presidential campaigns. In many cases, the secret donors financed massive advertising blitzes in the closing weeks of the campaign—boosting certain candidates and undermining their opponents. There is every reason to believe that these de facto campaign contributions determined the outcome of some of the close races.... *The secret flows of money used to pay for these attack campaigns severely undermine our campaign finance laws and corrupt the electoral process.*" Thompson Rep. at 5983-84 (minority views) (emphasis added).

"Corporations, unions and other independent groups are legally permitted to participate in federal election activity if they comply with federal requirements for contribution limits and disclosure. The complaint with these groups in the 1996 election cycle is that they sought to affect election outcomes, while evading the contribution limits and disclosure requirements that apply to other entities engaged in campaign activities. It is this evasion of the law, and the resulting erosion of public confidence in the federal campaign finance system, that has made the election activities of independent groups such a serious concern." Thompson Rep. at 5928 (minority views).

"One of the striking differences between the 1996 elections and prior elections was the prominent role played by so-called 'independent groups' that were not registered with the Federal Election Commission as political organizations. Typically, these groups ran campaign ads under the guise of 'issue advocacy.' By operating in that fashion, they were able to circumvent federal restrictions on campaign financing.... A significant number of nonprofit organizations that claimed to be nonpartisan played an active role in the 1996 elections, spending millions of dollars on behalf of political parties or specific candidates. These groups were not registered with the Federal Election Commission as political organizations and most of them claimed to be 'social welfare' or charitable organizations, registered with the Internal Revenue Service as either 501(c)(4) or 501(c)(3) tax-exempt entities." Thomp. Rep. at 5967 (minority views).

"Issue advocacy is the second most significant loophole. As long as ads avoid using 'express advocacy' terms like 'elect' and 'defeat,' the advertisers have been able to argue successfully that they are not running campaign ads—even if the ads are obviously intended to benefit special candidates. When an ad falls into the 'issue advocacy' category, the campaign finance laws do not apply: Virtually anyone can contribute money to independent groups to pay for such ads, there are no limits on how much money a donor can give, and there is no disclosure of the donor's identity. Thus, many organizations that run 'issue ads' are not required to or do not register with the Federal Election Commission as political organizations, despite running television ads attacking candidates, conducting mail and telephone operations targeting voters, and spending millions of dollars on activities which affect election outcomes." Thompson Rep. at 5968 (minority views).

"In fact, the Committee has found that millions of dollars channeled to 'independent' groups were used on behalf of Republican candidates during the weeks leading up to the November 1996 election. Americans for Tax Reform—the largest recipient of RNC funds—received $4.6 million, as noted above. ATR used this money to conduct a massive 'issue advocacy' campaign aimed at helping the Republicans.... By operating through surrogates like ATR, the RNC was able to circumvent federal campaign finance laws. When a political party broadcasts issue ads, it is required to pay for them with a combination of hard dollars and soft dollars. If an outside group runs such ads, there are no such restrictions—even if the funding comes from the RNC. Thus, the RNC was able to use 100 percent soft money to pay for ads by outside groups. By channeling money to outside groups and having them run issue ads, the RNC was able to conserve precious hard dollars and circumvent federal restrictions on how soft money can be spent." Thomp. Rep. at 5978-79 (minority views).

"Several Republican donors contributed money to nonprofit organizations that ran purported 'issue ads' aimed at helping specific Republican candidates win election in 1996. These nonprofits were typically put forth as 'grassroots' organizations but several were, in fact, established for the main—or sole—purpose of running political ads under the guise of issue advocacy.... Triad managed two tax-exempt organizations[:] Citizens for Reform and Citizens for the Republic Education Fund.... [B]oth entities were shell companies with no offices, no employees, and no members. They were established in the spring of 1996 for the sole purpose of running attack ads—under the guise of 'issue advocacy'—to help

Republican candidates win election to Congress.... In fact, there is overwhelming evidence that these so-called 'issue ads' were but one tool in a carefully orchestrated campaign to spend money on behalf of specific Republican candidates without adhering to federal election laws." Thomp. Rep. at 5981-82 (minority views).

"The issue advocacy loophole was also exploited by Triad Management Services, a for-profit company that claims to be in the business of providing advice to conservative donors in exchange for fees. In fact, Triad was funded by a handful of wealthy Republican donors who used it as a mechanism to support the election of conservative Republican candidates.... Triad channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.'... By operating this way, Triad and its financial backers avoided the disclosure and campaign contribution limits of the federal election laws." Thomp. Comm. Rep. at 4569 (minority views).

Congressional Testimony

"In the [1996] election cycle, so-called issue advocacy became one of the most prominent and controversial weapons in the federal campaigns. It provided an easy way for individuals, political committees, corporations, and unions to spend money to influence elections without any regulatory control. Its impact cannot be exaggerated. To anyone interested in campaign finance reform, issue advocacy is the 800-pound gorilla. Without taming it, campaign finance reform, no matter how thoroughly it addresses public funding, soft money, PAC spending, or any other perceived problems, will come to naught. Issue advocacy represents a huge, gaping loophole of last resort." Thomp. Comm. Rep. at 7521 (minority views) (hearing testimony of Prof. Daniel Ortiz).

"The second loophole that destroys the effectiveness of current campaign finance rules allows individuals and groups to participate vigorously in elections debate, while pretending to be interested only in educating the electorate on a particular issue.... Unless the sham 'issue advocacy' loophole is firmly closed, wealthy contributors who cannot give money directly to a candidate, because they are corporations or unions or individuals who have hit a maximum, will simply recycle the funds as sham 'issue advocacy' carefully orchestrated to help a candidate, but skirting regulation." *The Constitution and Campaign Reform: Hearings before the Comm. on Rules and Admin.* 106th Cong. 28, 2d Sess. (2000) (statement of Deborah Goldberg, Deputy Director, Democracy Program, Brennan Center for Justice at NYU School of Law).

"This matter raises a question of fundamental importance to the continued viability of the Federal Election Campaign Act (FECA), as well as to the broader goal of regulating money in the political process: whether the Congress will permit the creation of a loophole in the FECA through which unlimited, unregulated and undisclosed money can flow into federal campaigns, thereby subverting the FECA's purpose of protecting the integrity of the electoral process from corruption and the appearance of corruption—interests which the Supreme Court found to serve compelling public purposes in *Buckley* v. *Valeo*, 424 U.S. 1 (1976).... The mechanism of this subversion is electioneering for candidates that takes place in the form of so-called 'issue advocacy.'" *The First Amendment and Restrictions on Issue Advocacy: Hearings Before the House Subcomm. on the Constitution*, 105th Cong. 140-41, 2d Sess. (1998) (statement of Donald J. Simon, Executive Vice President and General Counsel, Common Cause).

"These are not speculative or hypothetical fears—such evasion occurred in the 1996 elections, involving tens of millions of dollars spent outside the scope of the FECA, simply because the ads were carefully crafted to avoid the use of 'magic words.'... Bluntly speaking, this spending [by parties and outside groups] represented a means of massive cheating on the federal campaign finance laws." *The First Amendment and Restrictions on Issue Advocacy: Hearings*

Before the House Subcomm. on the Constitution 105th Cong. 143, 2d Sess. (1998) (statement of Donald J. Simon, Executive Vice President and General Counsel, Common Cause).

APPENDIX D

TITLE 2. THE CONGRESS

CHAPTER 14. FEDERAL ELECTION CAMPAIGNS

Selected BCRA Amendments

Material added by BCRA in bold

§ 431. Definitions

* * * *

(20) Federal election activity.

(A) In general. The term "Federal election activity" means—

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(B) Excluded activity. The term "Federal election activity" does not include an amount expended or disbursed by a State, district, or local committee of a political party for—

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention; and

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

* * * *

§ 434. Reporting requirements

* * * *

(e) Political committees

(1) National and congressional political committees

The national committee of a political party, any national congressional campaign committee of a political party, and any subordinate committee of either, shall report all receipts and disbursements during the reporting period.

(2) Other political committees to which section 323 applies

(A) In general

In addition to any other reporting requirements applicable under this Act, a political committee (not described in paragraph (1)) to which section 441i(b)(1) of this title applies shall report all receipts and disbursements made for activities described in section 431(20)(A) of this title, unless the aggregate amount of such receipts and disbursements during the calendar year is less than $5,000.

(B) Specific disclosure by State and local parties of certain non-Federal amounts permitted to be spent on Federal election activity

Each report by a political committee under subparagraph (A) of receipts and disbursements made for activities described in section 431(20)(A) of this title shall include a disclosure of all receipts and disbursements described in section 441i(b)(2)(A) and (B) of this title.

(3) Itemization

If a political committee has receipts or disbursements to which this subsection applies from or to any person aggregating in excess of $200 for any calendar year, the political committee shall separately itemize its reporting for such person in the same manner as required in paragraphs (3)(A), (5), and (6) of subsection (b) of this section.

(4) Reporting periods

Reports required to be filed under this subsection shall be filed for the same time periods required for political committees under subsection (a)(4)(B) of this section.

(f) Disclosure of electioneering communications

(1) Statement required

Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) Electioneering communication

For purposes of this subsection—

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which–

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions

The term "electioneering communication" does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 431(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) Disclosure date

For purposes of this subsection, the term "disclosure date" means—

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse

For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements

Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with Internal Revenue Code

Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986.

(g) Time for reporting certain expenditures

(1) Expenditures aggregating $1,000

(A) Initial report

A person (including a political committee) that makes or contracts to make independent expenditures aggregating $1,000 or more after the 20th day, but more than 24 hours, before the date of an election shall file a report describing the expenditures within 24 hours.

(B) Additional reports

After a person files a report under subparagraph (A), the person shall file an additional report within 24 hours after each time the person makes or contracts to make independent expenditures aggregating an additional

$1,000 with respect to the same election as that to which the initial report relates.

(2) Expenditures aggregating $10,000

(A) Initial report

A person (including a political committee) that makes or contracts to make independent expenditures aggregating $10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.

(B) Additional reports

After a person files a report under subparagraph (A), the person shall file an additional report within 48 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $10,000 with respect to the same election as that to which the initial report relates.

(3) Place of filing; contents

A report under this subsection—

(A) shall be filed with the Commission; and

(B) shall contain the information required by subsection (b)(6)(B)(iii) of this section, including the name of each candidate whom an expenditure is intended to support or oppose.

(4) Time of filing for expenditures aggregating $1,000

Notwithstanding subsection (a)(5) of this section, the time at which the statement under paragraph (1) is received by the Commission or any other recipient to whom the notification is required to be sent shall be considered the time of filing of the statement with the recipient.

* * * *

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions~~:~~

~~(1) No~~**(1) Except as provided in subsection (i) of this section and section 441a-1 of this title, no** person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $ ~~1,000~~ **2,000;**

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $ ~~20,000~~ **25,000;**

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or

~~(C) to any other political committee in any calendar year which, in the aggregate, exceed $ 5,000.~~

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $ 5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $ 15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $ 5,000.

~~(3) No individual shall~~**(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may** make contributions aggregating more than ~~$ 25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the~~

~~calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.~~ —

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

* * * *

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

——~~(ii~~(iii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign

committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) if—

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 434(f)(3) of this title); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

——~~(C)~~(D) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

* * * *

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office~~.~~

* * * *

(4) Independent versus coordinated expenditures by party

(A) In general

On or after the date on which a political party nominates a candidate, no committee of the political party may make—

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at

any time after it makes any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

(B) Application

For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) Transfers

A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate.

* * * *

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section ~~12(h) of the Public Utility Holding Company Act *(15 U.S.C. 79l*(h)),~~ **79l(h) of Title 15**, the term "contribution or expenditure" ~~shall include~~ **includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes** any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business)

to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section **or for any applicable electioneering communication**, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

*   *   *   *

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 434(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of Title 26) made under section 434(f)(2)(E) or (F) of this title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8). For purposes of the preceding sentence, the term "provided directly by individuals" does not include funds the source of which is an entity described in subsection (a) of this section.

(3) Special operating rules

(A) Definition under paragraph (1)

An electioneering communication shall be treated as made by an entity described in subsection (a) of this section if an entity described in subsection (a) of this section directly or indirectly disburses any amount for any of the costs of the communication.

(B) Exception under paragraph (2)

A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) of this section shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 434(f)(2)(E) of this title.

(4) Definitions and rules

For purposes of this subsection—

(A) the term "section 501(c)(4) organization" means—

(i) an organization described in section 501(c)(4) of Title 26 and exempt from taxation under section 501(a) of such title; or

(ii) an organization which has submitted an application to the Internal Revenue Service for determination of its status as an organization described in clause (i); and

(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(5) Coordination with Internal Revenue Code

Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of Title 26 to carry out any activity which is prohibited under such title.

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term "targeted communication" means an electioneering communication (as defined in section 434(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(C) Definition

For purposes of this paragraph, a communication is "targeted to the relevant electorate" if it meets the requirements described in section 434(f)(3)(C) of this title.

§ 441i. ~~[Repealed]~~ Soft money of political parties

(a) National committees

(1) In general

A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability

The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

(b) State, district, and local committees

(1) In general

Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability

(A) In general

Notwithstanding clause (i) or (ii) of section 431(20)(A) of this title, and subject to subparagraph (B), paragraph (1) shall not apply to any amount expended or disbursed by a State, district, or local committee of a political party for an activity described in either such clause to the extent the amounts expended or disbursed for such activity are allocated (under regulations prescribed by the Commission) among amounts—

(i) which consist solely of contributions subject to the limitations, prohibitions, and reporting requirements of this Act (other than amounts described in subparagraph (B)(iii)); and

(ii) other amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection).

(B) Conditions

Subparagraph (A) shall only apply if—

(i) the activity does not refer to a clearly identified candidate for Federal office;

(ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;

(iii) the amounts expended or disbursed which are described in subparagraph (A)(ii) are paid from amounts which are donated in accordance with State law and which meet the requirements of subparagraph (C), except that no person (including any person established, financed, maintained, or controlled by such person) may donate more than $10,000 to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and

(iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from—

(I) any other State, local, or district committee of any State party,

(II) the national committee of a political party (including a national congressional campaign committee of a political party),

(III) any officer or agent acting on behalf of any committee described in subclause (I) or (II), or

(IV) any entity directly or indirectly established, financed, maintained, or controlled by any committee described in subclause (I) or (II).

(C) Prohibiting involvement of National parties, Federal candidates and officeholders, and State parties acting jointly

Notwithstanding subsection (e) of this section (other than subsection (e)(3) of this section), amounts specifically authorized to be spent under subparagraph (B)(iii) meet the requirements of this subparagraph only if the amounts–

(i) are not solicited, received, directed, transferred, or spent by or in the name of any person described in subsection (a) or (e) of this section; and

(ii) are not solicited, received, or directed through fundraising activities conducted jointly by 2 or more State, local, or district committees of any political party or their agents, or by a State, local, or district committee of a political party on behalf of the State, local, or district committee of a political party or its agent in one or more other States.

(c) Fundraising costs

An amount spent by a person described in subsection (a) or (b) of this section to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(d) Tax-exempt organizations

A national, State, district, or local committee of a political party (including a national congressional campaign committee of a political party), an entity that is directly or indirectly established, financed, maintained, or controlled by any such national, State, district, or local committee or its agent, and an officer or agent acting on behalf of any such party committee or entity, shall not solicit any funds for, or make or direct any donations to—

(1) an organization that is described in section 501(c) of Title 26 and exempt from taxation under section 501(a)

of such title (or has submitted an application for determination of tax exempt status under such section) and that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); or

(2) an organization described in section 527 of such title (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(e) Federal candidates

(1) In general

A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not—

(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or

(B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—

(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of section 441a(a) of this title; and

(ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

(2) State law

Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a State or local office solely in connection with such election for State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.

(3) Fundraising events

Notwithstanding paragraph (1) or subsection (b)(2)(C) of this section, a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.

(4) Permitting certain solicitations

(A) General solicitations

Notwithstanding any other provision of this subsection, an individual described in paragraph (1) may make a general solicitation of funds on behalf of any organization that is described in section 501(c) of Title 26 and exempt from taxation under section 501(a) of such title (or has submitted an application for determination of tax exempt status under such section) (other than an entity whose principal purpose is to conduct activities described in clauses (i) and (ii) of section 431(20)(A) of this title) where such solicitation does not specify how the funds will or should be spent.

(B) Certain specific solicitations

In addition to the general solicitations permitted under subparagraph (A), an individual described in paragraph (1) may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 431(20)(A) of this title, or for an entity whose principal purpose is to conduct such activities, if—

(i) the solicitation is made only to individuals; and

(ii) the amount solicited from any individual during any calendar year does not exceed $20,000.

(f) State candidates

(1) In general

A candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication described in section 431(20)(A)(iii) of this title unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Exception for certain communications

Paragraph (1) shall not apply to an individual described in such paragraph if the communication involved is in connection with an election for such State or local office and refers only to such individual or to any other candidate for the State or local office held or sought by such individual, or both.

APPENDIX E

Table 2.
National Political Party Spending, 1976-2000 ($ Millions)

	Democrats			Republicans			Overall Spending			
Election	Federal (Hard)	Nonfederal (Soft)	Total	Federal (Hard)	Nonfederal (Soft)	Total	Federal (Hard)	Nonfederal (Soft) $	Nonfederal (Soft) %	Total
1976	19.4	--	19.4	40.1	--	40.1	59.5	--	0	59.5
1980	35.0	4.0	39.0	161.8	15.1	176.9	196.8	19.1	8	215.9
1984	97.4	6.0	103.4	300.8	15.6	316.4	398.2	21.6	5	419.8
1988	121.9	23.0	144.9	257.0	22.0	279.0	378.9	45.0	11	423.9
1992	171.9	32.9	204.8	256.1	47.5	303.6	428.0	80.4	16	508.4
1994	137.8	50.4	188.2	234.7	48.4	283.1	372.5	98.8	21	471.3
1996	214.3	121.8	336.1	408.5	149.7	558.2	622.8	271.5	30	894.3
1998	155.3	93.0	248.3	275.9	127.7	403.6	431.2	220.7	34	651.9
2000	265.8	244.9	510.7	427.0	252.8	679.8	692.8	497.7	42	1190.5

Sources: Anthony Corrado. *Campaign Finance Reform*. New York: Century Foundation Press, 2000, p. 70; Federal Election Commission, "FEC Reports Increase in Party Fundraising for 2000," May 15, 2001. Figures for 1976 and for nonfederal spending between 1980 and 1988 are estimates. All other figures are provided by the Federal Election Commission.

AmB

Total to Reps($)

% to Reps

% from Affiliated Individuals

Total ($)

Total to Dems($)

% to Dems

% from Treasury

Organization

Table 5.
Top 50 Soft Money Donors in 1996

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
New York Republican State Committee	3,287,175	0	3,287,175	0	100	100	0
Philip Morris	3,019,414	496,518	2,522,896	16	84	100	0
Joseph E Seagram & Sons	2,050,583	1,373,438	677,145	67	33	50	50
RJR Nabisco	1,442,931	254,756	1,188,175	18	82	100	0
California Republican Party	1,350,000	0	1,350,000	0	100	100	0
Walt Disney Co	1,347,000	1,043,050	303,950	77	23	99	1
Atlantic Richfield	1,262,031	486,372	775,659	39	61	100	0
Federal Express Corp	1,157,044	592,625	564,419	51	49	98	2
Communications Workers of America	1,150,300	1,150,300	0	100	0	100	0
MCI Telecommunications	1,005,963	646,600	359,363	64	36	99	1
AT&T	1,000,024	447,184	552,840	45	55	99	1
American Federation of St/Cnty/Munic Employees	958,462	958,462	0	100	0	100	0
Republican Party of Florida	934,746	0	934,746	0	100	100	0
News Corp	869,700	75,000	794,700	9	91	69	31
Association of Trial Lawyers of America	803,400	606,300	197,100	75	25	100	0
MacAndrews & Forbes	779,649	639,649	140,000	82	18	94	6
Anheuser-Busch	773,057	401,107	371,950	52	48	100	0
Time Warner	761,250	365,250	396,000	48	52	83	17
Lazard Freres & Co	759,956	595,106	164,850	78	22	0	100
Eli Lilly & Co	746,835	239,850	506,985	32	68	100	0
United Food & Commercial Workers Union	733,771	733,771	0	100	0	100	0
American Airlines	711,450	398,349	313,101	56	44	100	0
Chevron Corp	708,184	176,050	532,134	25	75	100	0
DreamWorks SKG	702,400	702,400	0	100	0	0	100
Archer-Daniels-Midland Co	701,000	295,000	406,000	42	58	91	9
Michigan Republican State Committee	699,133	0	699,133	0	100	100	0
Enron Corp	687,445	142,400	545,045	21	79	59	41
Goldman Sachs	666,075	472,500	193,575	71	29	5	95
Textron Inc	654,227	274,700	379,527	42	58	100	0
NYNEX Corp	652,802	240,347	412,455	37	63	100	0
American Financial Group	645,250	115,000	530,250	18	82	77	23
Brown & Williamson Tobacco	642,500	7,500	635,000	1	99	100	0
Laborers Union	634,588	627,088	7,500	99	1	100	0
Loral Space & Communications	632,500	601,500	31,000	95	5	0	100
Integrated Health Services	609,270	574,000	35,270	94	6	83	17
Northwest Airlines	608,900	352,400	256,500	58	42	70	30
American Defense Institute	600,000	0	600,000	0	100	100	0
UST Inc	595,592	68,862	526,730	12	88	97	3
Entergy Corp	592,371	295,000	297,371	50	50	98	2

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Organization

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Sprint Corp	585,732	409,609	176,123	70	30	100	0
Blue Cross/Blue Shield	578,793	139,635	439,158	24	76	99	1
PaineWebber	567,366	155,700	411,666	27	73	93	7
Freddie Mac	558,250	287,500	270,750	52	48	100	0
WMX Technologies	556,500	187,200	369,300	34	66	100	0
BankAmerica	554,329	192,939	361,390	35	65	100	0
Bristol-Myers Squibb	552,400	114,500	437,900	21	79	88	12
Tobacco Institute	537,357	106,044	431,313	20	80	100	0
Travelers Group	535,410	200,349	335,061	37	63	80	20
Service Employees International Union	532,880	531,630	1,250	100	0	100	0
Milberg, Weiss et al	530,000	530,000	0	100	0	28	72

Source: Based on an analysis provided by the Center for Responsive Politics on September 19, 2002. "Totals" include funds donated from organization treasuries and funds given by individuals affiliated with the organization.

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Table 6.
Top 50 Soft Money Donors in 2000

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
American Fedn of St/Cnty/Munic Employees	5,949,000	5,949,000	0	100	0	100	0
AT&T	4,398,920	1,776,269	2,622,651	40	60	95	5
Service Employees International Union	4,288,096	4,257,696	30,400	99	1	100	0
Carpenters & Joiners Union	2,873,500	2,873,500	0	100	0	100	0
Freddie Mac	2,398,250	1,025,000	1,373,250	43	57	100	0
Philip Morris	2,383,453	296,641	2,086,812	12	88	100	0
Communications Workers of America	2,355,000	2,355,000	0	100	0	100	0
Microsoft Corp	2,317,226	966,792	1,318,384	43	57	75	25
United Food & Commercial Workers Union	2,146,450	2,146,450	0	100	0	100	0
Global Crossing	2,083,195	1,161,652	921,543	56	44	40	60
SBC Communications	1,862,228	876,621	985,607	47	53	100	0
Intl Brotherhood of Electrical Workers	1,780,000	1,780,000	0	100	0	100	0
Bristol-Myers Squibb	1,740,951	213,250	1,527,701	12	88	85	15
Enron Corp	1,671,555	532,565	1,138,990	32	68	70	30
American Federation of Teachers	1,668,000	1,668,000	0	100	0	100	0
MGM Mirage	1,563,086	713,086	850,000	46	54	100	0
Pfizer Inc	1,558,817	160,000	1,398,817	10	90	99	1
Citigroup Inc	1,509,010	763,806	745,204	51	49	86	14
Saban Entertainment	1,496,000	1,496,000	0	100	0	21	79
National Rifle Association	1,489,222	0	1,489,222	0	100	100	0
Verizon Communications	1,473,451	573,800	899,651	39	61	99	1
Williams & Bailey	1,365,000	1,365,000	0	100	0	42	58
FedEx Corp	1,327,600	475,478	852,122	36	64	100	0
Loral Spacecom	1,291,800	1,291,250	550	100	0	0	100
American Financial Group	1,280,000	620,000	660,000	48	52	12	88
Sheet Metal Workers Union	1,255,854	1,255,854	0	100	0	100	0
Buttenwieser & Associates	1,252,500	1,252,500	0	100	0	0	100
MBNA Corp	1,235,905	200,000	1,035,905	16	84	60	40
Ness, Motley et al	1,230,500	1,230,500	0	100	0	100	0
Vyyo Inc	1,207,500	1,207,500	0	100	0	0	100
Angelos Law Offices/Baltimore Orioles	1,197,900	1,172,900	25,000	98	2	22	78
Fannie Mae	1,188,650	610,800	577,850	51	49	96	4
Credit Suisse First Boston	1,185,450	443,000	742,450	37	63	36	64
Vivendi Universal	1,172,238	640,219	532,019	55	45	60	40
Lockheed Martin	1,152,350	457,500	694,850	40	60	100	0
Amway/Alticor Inc	1,138,500	0	1,138,500	0	100	32	68
Goldman Sachs	1,133,350	757,250	376,100	67	33	5	95
Slim-Fast Foods/Thompson Medical	1,113,000	1,093,000	20,000	98	2	2	98

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same info in these black boxes as on
Page 52a AMB

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Blue Cross/Blue Shield	1,104,415	236,250	868,165	21	79	100	0
Limited Inc	1,080,100	300,000	780,100	28	72	88	12
United Parcel Service	1,072,871	195,662	877,209	18	82	100	0
America Online	1,061,205	452,750	608,455	43	57	35	65
Milstein Properties	1,044,515	1,044,515	0	100	0	0	100
UST Inc	1,041,570	53,000	988,570	5	95	99	1
American International Group	1,036,760	554,010	482,750	53	47	100	0
Association of Trial Lawyers of America	980,200	974,850	5,350	99	1	100	0
Anheuser-Busch	968,281	413,256	555,025	43	57	100	0
Metabolife	963,000	558,000	405,000	58	42	100	0
AFLAC Inc	961,325	453,000	508,325	47	53	100	0
GlaxoSmithKline	955,695	80,900	874,795	8	92	99	1

Source: Based on an analysis provided by the Center for Responsive Politics on September 19, 2002. "Totals" include funds donated from organization treasuries and funds given by individuals affiliated with the organization.

(6)

Supreme Court, U.S.
FILED
JUN 30 2003
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No. 02-1674

IN THE

Supreme Court of the United States

MITCH McCONNELL, SENATOR, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF THE APPELLANTS

JOHN C. ARMOR
Counsel of Record
"KettleRock"
Box 243
Highlands, NC 28741
(828) 526-3149

Of Counsel:

PETER FERRARA
Executive Director, ACRU
1232 Pine Hill Road
McLean, VA 22101
(703) 917-4247

Attorneys for the Amicus Curiae

181559

COUNSEL PRESS
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INTEREST OF AMICUS[*]

The American Civil Rights Union (ACRU) was established in 1998 as a Section 501(c)(3) educational and legal charity dedicated to basic constitutional issues. Its purpose, as stated on its Internet webpage, is to advance civil rights because "Civil rights are the fundamental liberties that all Americans should enjoy as a matter of basic morality, as well as constitutional protection."

The Policy Board of the ACRU consists of: Hon. Robert B. Carleson, Chairman; Hon. Edwin Meese, III; Judge Robert Bork; Hon. Linda Chavez (Emerita); Mr. Joseph Perkins; Hon. William Bradford Reynolds; Professor James Q. Wilson; Ambassador Curtin Winsor, Jr.; Dean J. Clayburn LaForce; Professor Walter Williams; and the Hon. Ken Tomlinson (Emeritus).

The interest of the ACRU in this case is primarily the First Amendment rights of both individuals and private organizations, which are affected by the Bipartisan Campaign Reform Act.

This case represents the most extensive change in, and the most extensive judicial review of, the conduct and funding of federal elections since the bulk of the existing law was written in 1974 and reviewed in 1976 by this Court in the longest and most complex decision in its history. There are two basic reasons for ACRU's interest in this case: First, it concerns largely the First Amendment, and most of the briefs filed by the ACRU in all courts have been on basic First Amendment issues. Second, the ACRU is especially interested in the freedoms of association and of speech and press of private organizations both secular and religious. The ability of such groups and their members to participate as they deem appropriate in the political process is affected by BCRA in critical ways.

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[*] This *amicus curiae* brief filed in support of the Appellants was funded solely by the ACRU and is authored entirely by counsel for the ACRU.

SUMMARY OF ARGUMENT

The Court entered an unusual Order in this case, saying that the parties "are to address the questions presented in the jurisdictional statements. . . ." and there are eleven such statements presenting a plethora of issues. Therefore it is incumbent on the American Civil Rights Union to make clear the few issues that it will address.

The first issue that ACRU will address concerns the various provisions that ban certain types of electronic advertising by certain organizations. In the view of ACRU, these provisions are the most obvious and noxious affronts to the First Amendment of the Constitution and should be specially addressed in the remedies that this Court applies.

The second ACRU issue deals with the provisions of BCRA which bar certain types of fund raising and communications — especially the tradition of forming tickets combining candidates for office at several levels — which has been part of American politics longer than the Constitution itself has been in effect. Such provisions, in the view of the ACRU, violate the First Amendment rights of those organizations and their members or adherents. They also violate the Tenth Amendment rights of the states and the citizens thereof.

The third issue that ACRU will address is the differing levels of permissible contributions to federal candidates. Section 305 sets limits of $2,000 in both primary and general elections, for a total of $4,000 for all congressional candidates. But Section 304 sets limits of up to "6 times the applicable limit" for senatorial candidates only, depending on how much self-financing the opposing candidate provides for his/her own campaign. That multiplies the maximum limit for personal contributions for senatorial candidates to $12,000 in both the primary and the general elections, for a total of $24,000.

For the reasons stated below, these differences are themselves a violation of the Fifth Amendment, and the lowest of these limits should be struck as unconstitutional. Because of the urgency of the impending election of 2004 for which fund raising is well underway, this too should be dealt with specially in the remedies the Court applies.

The final issue is the question of remedy, should this Court find as many, or even more, of the provisions of BCRA unconstitutional as did the special, three-judge District Court. If so, the ACRU argues that the Swiss cheese remnant of the law would not have been passed by Congress in that form, and that therefore the entire law should be declared unconstitutional.

ARGUMENT

I. Are the prohibitions of certain types of media advertising by organizations other than political parties themselves, a violation of the First Amendment?

This argument concerns the bans on electronic media advertising, which appear two places in BCRA. One of those provisions, Section 203, was upheld in part by the lower court. The other, Section 201, concerned advertising by organizations of private citizens, thirty days before a federal primary election and sixty days before a federal general election. This ban was unanimously ruled unconstitutional by the trial court.

Most of the nations of the world, including England from which the United States borrowed the bulk of its laws, are unitary governments. The United States is, instead, a federal government. State political parties here, unlike local party groups in most nations, are not merely appendages of the national political parties. State parties (and their local affiliates) have separate interests, and separate First Amendment rights. This Court recognized such distinctions in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

Even clearer than those are the independent political and First Amendment interests of the 25,000 national organizations that have offices in Washington, D.C., to represent the joint interests of groups ranging from actuaries to zoologists. In addition to the organizations that are national, there are statewide organizations of many interests and occupations, ranging from farmers to bankers to motorists — all interests, all professions.

Some of those organizations choose to be apolitical. But many have a direct interest in decisions that can or will be made by Congress, and wish to express their support for the positions taken by some incumbents (and challengers), or opposition to those positions. It is self-evident that the expressions of such group opinions are most effective in the final weeks before an election, which is the precise period in which Congress sought to make such broadcast advertising

illegal unless such organizations placed themselves under the jurisdiction and control of the Federal Election Commission. All candidates for all offices demonstrate the fact that advertising close to any election is the most effective, by their choices to run most of their own ads at such times.

Why did a majority of both Houses of Congress choose to restrict the speech of these many and diverse voices of the American people close to the elections? Congress said why it was doing that, in the floor debates leading up to the passage of BCRA.

The following statements are taken from the floor debates immediately prior to final passage in each House, with the House of Representatives first, on 13 February, 2002. From Rep. Steny Hoyer, D-Md. (*Congressional Record*, 107th Congress, p. H340), "This legislation, in short, will ban so-called soft money contributions to the national political parties and prohibit soft money from being used for sham issue ads by third-party groups that most of us would agree are nothing more than campaign ads." From Rep. Christopher Shays, R-NY (*id.*, p. H342), "We limit no speech. We just say you cannot do it with corporate treasury money, union dues money, or unlimited money from individuals." From Rep. Jose Serrano, D-NY (*id.*, p. H347), "Campaign advertisements masquerading as issue advocacy must be regulated. Shays-Meehan will require that broadcast communications that mention a Federal candidate must be paid for with hard money — which includes corporate and union PAC funds — within 60 days of a general or 30 days of a primary election."

The Senate quotes are all from 20 March, 2002. From Senator Barbara Boxer, D-Calif. (*Congressional Record*, 107th Congress, p. S2101),

> Another good thing about McCain-Feingold: Those vicious attacks that have come from large soft money contributions will not be able to come 60 days before your election. That is a big plus because that is what we find — that candidates at the end simply cannot respond to this barrage of activity.

From Senator Paul Wellstone, D-Minn. (*id.*, p. S2097),

> If we had less of this money going to the parties but more of it going to all kinds of independent groups and organizations — "Americans For This" and "Americans For That" — that could raise $200,000, $300,000, $400,000, $500,000 at a crack and put it into these sham issue ads, I do not think we would be any better off.

From Senator Phil Gramm, R-Texas (*id.*, p. S2102),

> When did God decree freedom of speech existed only if one owns a newspaper or a television station or if they are a commentator? What about people who work for a living and who want to be heard? How can we write a law that treats the New York Stock Exchange differently from the New York Times? What this bill provides is unequal speech, privileged speech. So I am opposed to this bill because it is patently unconstitutional.

There is no doubt that most Members of Congress consider the presence of such independent voices in the process of federal elections to be an impediment to them and their parties in presenting their chosen messages as they run for reelection. Proponents of BCRA were consistent on that. But that reality offers zero justification for Congress to adopt this provision for the joint convenience of its Members. The First Amendment contains no exception clause, "Congress shall make no law respecting . . . freedom of speech (unless a majority of Members consider it really, really important) . . ."

This Court has recognized that the citizens' freedoms under the First Amendment are the most basic guarantees in the Constitution, because the preservation of all other rights depends on those. *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

Thomas Jefferson described the essence of press freedom better than anyone else when he wrote, "Were it left to me to have a government without newspapers, or newspapers without government, I would not hesitate for a moment to prefer the latter." (Letter to Col. Edward Carrington, 16 January, 1787. M.E. 6:57.) His point was that with freedom of the press, the errors or even the absence of government could be corrected; but without a free press, the errors of government would accumulate to general, national failure. What was the nature of the press whose freedom the Framers sought to assure through the First Amendment?

> [The Editor] hopes, by a constent and strict adherence to the freedom of the press, and a vigilant attention to the interests of his fellow-citizens, to gain their esteem, and receive an ample

> recompense for his labours. This paper shall (as far as possible) contain everything that shall offer which may be of service to the public: at the same time it will be constantly shut against everything of a scurrilous, or that may hurt the feeling of innocense. . . .

(Opening editorial, S. Arnett, Editor, *New Brunswick Gazette*, 5 October, 1786. Library of Congress, Periodical Collection, microfilms of early American newspapers.) [All spelling and punctuation are per the originals, except replacing the old-style "f" with "s."]

Later in the same issue, the *Gazette* printed this: "Why, Sir, Lawyers are a CONSEQUENCE and not a CAUSE of public evils. They grow out of laziness, dilatoriness in payment of debts, breaches of contract, and other vices of the people, just as mushrooms grow out of dunghills after a shower." [Emphasis in the original.] (*Ibid.*)

> If ever there was a devoted tool to a faction, the editor of the New York Minerva may safely be said to be one. If ever a man prostituted the little sense that he had, to serve the purposes of a monarchic and aristocratic junto, Noah Websters, Esq., must be the man.

(*Aurora General Advertiser*, 2 December, 1796. *Ibid.*)

> All those laws, which have disgraced probity, and stained national character, originated with men whose debts made them desperate, and disqualified them for any office of Government. . . . Will not Government and the most perfect constitution be considered a farce, when mean, low and worthless personage, who should act as candle-snuffers, strut o'er the public stage as Judges, Members, Representatives and Governors?

(*New York Daily Advertiser*, quoted in *Brunswick Gazette*, 4 September, 1787. *Ibid.*)

"To the Antifederal Junto in Philadelphia — With great regard, and sincere wishes for your success in everything that tends to anarchy, distress, poverty and tyranny, I am your friend and humble servant. Daniel Shays, Franklin State." (*Brunswick Gazette*, 2 October, 1787. *Ibid.*)

"If ever a nation was debauched by a man, the American nation has been debauched by Washington . . . the masque of patriotism may be worn to conceal the foulest designs against the liberties of the people." (*Aurora General Advertiser*, 23 December, 1796. *Ibid.*) This newspaper was located in New York state, which was a hotbed of Anti-Federalist sentiment. As atypical as this comment might appear to modern minds, the *Advertiser* was speaking both to and for its readers with this statement.

The ACRU asks this Court to examine the fractious, partisan and harsh press that existed when the First Amendment was demanded by the states, drafted by Congress, and ultimately ratified. Often the papers were founded by individuals for the precise purpose of supporting their favored political positions and candidates. That tradition continued for more than a century, which is why some of the nation's oldest surviving papers contain the word "Democrat" in their names.

All of the complaints that Members of Congress expressed about advertising by independent groups today, would have applied with even greater force to those newspapers. Additional proof of the highly partisan nature of the "press," for whose protection the First Amendment was drafted, is available. Several hundred issues of early American newspapers survive in the microfilm collection of the Library of Congress. Almost all were "broadsheets," printed on both sides of a sheet then folded to create a four-page newspaper. For a fast reader, reading them all is a single day's task.

The early American newspapers wore their politics on their sleeves, rather than up their sleeves. There could hardly be a better proof that these two provisions of BCRA are unconstitutional than that the kinds of public communications the Framers sought to protect in drafting and ratifying the First Amendment are the same kinds that Congress sought to stifle through BCRA.

The last time that Congress sought to silence critical voices in the press was the Sedition Act of 1798 (known as part of the collective "Alien and Sedition Laws"). The Federalists passed this Act, which provided even for jailing publishers who criticized the government (note that BCRA also provides for criminal penalties). This Court lacked the institutional strength to strike those laws down at the time. After the Democrat-Republican candidate, Thomas Jefferson, came into office as President in 1801, he pardoned and released the imprisoned newspaper editors, most of them supporters of his Party, concluding that the law was unconstitutional.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), at pps. 274-276, the Court finally stated that the Alien and Sedition Laws were clearly unconstitutional for seeking to silence independent voices of and for the people. In reviewing the history of those laws, the Court wrote, "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."

As for the nature of the public discourse that the First Amendment protects, the *Sullivan* Court (at p. 268) cited with approval Judge Learned Hand's conclusion, "The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues that through any kind of authoritative selection. To many, that is, and always will be, folly, but we have staked upon it our all."

The ACRU submits that exactly the same conclusion should be reached concerning the attempts to silence certain types of speech in the electronic press today. And it should be noted that most of the proponents of BCRA spoke about its advertising bans applying only to the broadcast media, but assumed such restraints could not be applied to the print media.

The proponents are right about the print media. As this Court recognized in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), a right of reply could not be imposed on any print media, as it then did apply to the broadcast media. Since most Americans now get the bulk of their political information from broadcast media rather than print media, the ACRU hopes and trusts that this Court in this case will not give second-class citizenship to the First Amendment rights of the broadcast media. As the *Sullivan* Court noted at the outset of its analysis (p. 265), the First Amendment protects "the freedom of communicating information and disseminating opinion." [Citation omitted.] Defining "the press" by its public purpose as just described leaves no room for a lesser protection for those who would "publish" ads in broadcast media, rather than in print.

Also, corporate entities that wish to speak on public issues have First Amendment protection. *See First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978). In addition, those who publish paid advertisements even without political content have First Amendment protection. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748. So it should follow as a matter of course that the organizations that would broadcast advertisements concerning positions taken by Members of Congress should also have full First Amendment rights against the restrictive provisions of BCRA.

II. Are the restrictions on certain types of materials and spending by state political parties and state candidates a violation of both the First Amendment rights of those groups and candidates, and of the Tenth Amendment?

Cooperative efforts to support local, state and national candidates at the same time have a history in the United States older than the Constitution. The first political machine that developed such joint efforts was the Tammany Society in New York, founded in 1786, which Aaron Burr shortly turned into Tammany Hall, a dominant political power in the state and nation.

Such efforts involve creating tickets and raising and spending money for the tickets. Under Section 101, such funding and spending by state and local parties is inhibited. This Section also prevents federally-regulated money from being combined for materials that show federal candidates at the top of a ticket including state and local officials. The only possible basis for such a restriction is a presumption is that ticket materials constitute "gifts" to federal candidates' campaigns. This presumption is dead wrong, as can be seen from public records.

Election results are public records, of which this Court or any other court can take judicial notice. With a consistency above 99%, election results in every state and every congressional district in every even-numbered year in the 20th century show the same pattern. In every district, the top of the ballot — a federal candidate — receives the largest number of total votes. The bottom of the ballot, the local candidates, receives the lowest number of votes. Generally, the lower any race appears on the ballot, the lower number of total votes are cast in that race.

There are two sound reasons for this pattern. Federal candidates receive more "free ink," meaning press coverage of them and their positions without charge. State and local candidates cannot make up for the lesser amount of free ink by purchasing paid advertisements because they raise less money, both in gross dollars and in dollars per voter, than do the federal candidates.

The public record therefore shows that the "gift" from the inclusion on a ticket runs in the opposite direction. It is the state representative and the local sheriff who gain if a congressional or senatorial candidate agrees to put his or her name at the top of a ticket, not the other way around. And there is no legitimate, or even arguable, justification for Congress telling a candidate for Congress that he cannot benefit state or local candidates by joining a ticket with them.

There is a First Amendment issue here, because the association of citizens, or candidates, or both together is how this Court interpreted the meaning of "freedom of association" under that amendment. *See Lubin v. Panish*, 415 U.S. 709 (1974).

Lastly, to the extent that the Tenth Amendment has any legal validity after *Garcia v. San Antonio Transit District*, 469 U.S. 528 (1985), it also militates against BCRA's attempt to bar joint funding of federal-state combined tickets. The Tenth Amendment's reservation of powers to the states and the citizens thereof, at minimum must apply to the central legislative decisions within each state about how election campaigns for its state and local officials should be funded and run.

Each state has established its own election laws concerning corruption, lobbying, public and private funding and campaigning. No two states have identical patterns, and none of them exactly match the federal provisions. Under a federal system of government, this diversity is to be expected.

For all these reasons, the American Civil Rights Union submits that all the provisions of BCRA which reach inside the states and seek to control state candidates and parties in their fund raising, campaigning, and campaign materials should be struck as beyond the power of Congress to enact.

III. Do the Bipartisan Campaign Reform Act's (BCRA) three different levels of permissible contributions to federal candidates necessarily contradict each other under the Fifth Amendment, and if so, which of those levels should be ruled constitutional?

As this Court made abundantly clear in *Buckley*, *supra* at p. 25, the legitimate purpose of federal election campaign laws is "the prevention of corruption and the appearance of corruption." This Court accepted in 1976 that Congress could, under that standard, adopt private contribution limits of $1,000 per election, or a total of $2,000 for a primary and general election.

When this limit remained unchanged for many years, a challenge was brought that inflation had diminished the value of the dollar and the limit should be judicially raised to keep pace with inflation. That argument failed, as did a similar case on the issue which sought to raise judicial salaries to keep pace with inflation. The most recent, detailed discussion of this subject appears in *Spencer Williams*, *et al.*, *v. United States*, U.S. Federal Circuit, Case No. 99-1572. That court, following a clear precedent from this Court, concluded that courts have no power to allow for inflation unless Congress has acted finally by law. (Note that BCRA, for the first time, provides an inflation index for individual gift limits.)

In BCRA, Congress has made three decisions about the levels of private giving which do not involve "corruption or the appearance of corruption." In Section 305 it sets the level generally at $2,000 per election or $4,000 total. In Section 304 it sets that level for senatorial candidates only, at $12,000, or $24,000 total, depending on the fund-raising actions of the opponent. A similar provision for House candidates appears in Section 319, allowing their maximum individual contributions to rise to $6,000 per election, and $12,000 total.

What is the difference between these three provisions, the general flat rates and the two sets of rising rates? The up to $6,000 senatorial limit applies to candidates "... if the opposition personal funds amount is over — (i) 2 times the threshold amount, but not over 4 times that amount — (I) the increased limit shall be 3 times the applicable limit; ..." The threshold amounts are defined state by state, and the personal funds account is defined by how much money one's opponent contributes to his/her own campaign from personally controlled sources. If the opponent exceeds "4 times that amount," the candidate's limit rises to the maximum $12,000 per election. The House rate is similar, but jumps only once to $6,000.

But what are candidates who spend their own money in their own campaigns doing? According to this Court in *Buckley*, *supra* at p. 53,

> The primary governmental interest served by the Act — the prevention of actual and apparent corruption of the political process — does not support the limitation on the candidate's expenditure of his own personal funds. ... Indeed, the use of personal funds reduces the candidate's dependence on outside contributions, and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.

After rejecting the rationale of "equalizing the relative financial resources of candidates competing for elective office," the *Buckley* Court concluded, "Second, and more fundamentally, the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that § 608(a)'s restriction on a candidate's personal expenditures is unconstitutional."

There is a practical question here, also. It is equally impossible for a candidate to bribe himself as it is for him to tickle himself. It cannot happen. So the justification for the limit on self-financing falls.

In BCRA, Congress is attempting to give a special fund raising benefit to candidates whose opponents are highly self-financed. But since the *Buckley* Court has said that self-financing is a constitutional right, the special benefit for opponents of such candidates becomes a violation of the Fifth Amendment. The Constitution bars the government from acting against a citizen for exercising his or her constitutional rights. *See Perry v. Sinderman*, 408 U.S. 593 (1972), which concerned a college professor whose contract was not renewed because he made statements of which the administrators strongly disapproved. As the *Perry* Court wrote,

> [E]ven though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially his interest in freedom of speech.

408 U.S., at 597 (quoting *Speiser v. Randall*, 357 U.S. 513 (1958)). The *Perry* case involved state action and was decided

under the Fourteenth Amendment. The instant case concerns federal action, and the Fifth Amendment applies. The guarantee of "due process of law" is identical in these two amendments. Also, in elective politics there is no difference between a government denial of a benefit (as in *Perry*) and the granting of such a benefit to one's opponent (in BCRA). What aids your opponent necessarily harms you.

So far, it would seem that the $12,000 limit per election should be struck, leaving only the $2,000 limit. But what has Congress necessarily said by passing the $12,000 limit in the first place? It has reached a legislative judgment that $12,000 is the dividing line between "the appearance of corruption" and the lack thereof.

Consider this Court's decision in *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173 (1979). That case concerned a special election to replace the late Mayor Daley, who had died in office. Under Illinois law, 35,947 signatures had to be filed to put a third party or independent candidate on the ballot for that election in Chicago. However, the law also provided that only 25,000 signatures were required to place such a candidate on the ballot in the entire state of Illinois for President, or for any statewide office.

In all its ballot access cases including *Socialist Workers Party*, this Court has consistently held that each legislature can establish a minimum level of community support that a third party or independent candidate must demonstrate by petitions to earn a place on the ballot. The Court noted that Illinois had set a 25,000-signature minimum statewide. Therefore a higher limit solely within the confines of Chicago was necessarily too high, and the Court struck it.

The same logic applies in the instant case, except that limits on individual donations to federal candidates are maximums rather than minimums. Congress has demonstrated its legislative judgment in Section 304, that $12,000 per election is the total limit to avoid the "appearance of corruption." Therefore, any lower limit set elsewhere in BCRA must be unconstitutionally low. (Occasional resort to the real world is appropriate — in 2002 all winning senatorial candidates exceeded or vastly exceeded $1 million in campaign spending, and the average of winning House candidates was more than $900,000. So the BCRA general limit of $2,000 per election is infinitesimal by comparison, and the $12,000 is still quite small.)

The ACRU therefore submits that this Court should strike the $2,000 general limit and leave the $12,000 limit standing. This conclusion makes practical sense as well as comporting with this Court's logic in *Socialist Workers Party*, *supra*. Given the inflation since 1974, when the $1,000 total limit on individual contributions to a candidate was first set, $6,000 (the House limit) in 2003 represents about the same spending power in constant dollars, and given the much higher cost of senatorial campaigns, $12,000 (the Senate limit) should also stand.

IV. Are so many parts of BCRA unconstitutional that the entire law should be declared unconstitutional? If so, how should the remedy be fashioned?

This Court is aware of the seven-year, tortured history of the passage of BCRA. The entire legislative history of the failure of many efforts to adopt such a law, and finally the passage of BCRA, is before the Court. Especially instructive is the back and forth bargaining that occurred both within the Senate and the House of Representatives, and between the leaders and Members of those Houses, in the final four months before the ultimate passage of this law.

"Horse trading" in the passage of legislation is a process older than the United States itself. It was seen in the Colonial legislatures, such as the General Court in Massachusetts and the Assembly in Virginia, that seized a measure of independence from their Royal Governors who in theory had an absolute veto. In all legislatures, horse trading means the same thing. When any complex legislation is on the table, and does not at the beginning claim a substantial majority, bargaining occurs between those who support the legislation and those on the fence. Until final passage of any such piece of legislation, the horse trading involves the inclusion of various provisions, or the exclusion of others, with the purpose of assembling a majority.

This Court explicitly recognized this process in *Buckley v. Valeo*, *supra*, at p. 108: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." [Citation omitted.] There, the Court used the severability clause on Subtitle H, but declared that the make-up and appointment of the Federal Election Commission was unconstitutional across the board. So the *Buckley* Court left the remnants of Subtitle H standing, but ruled that the Commission could no longer exercise executive branch powers of any kind and gave Congress a month to reconstitute the Commission.

The logic behind both of the *Buckley* Court's conclusions is clear. In any law which contains a severability clause, Congress has recognized in advance that some provisions may not survive constitutional scrutiny, but the other parts of the law should remain. However, as this Court recognized in *Buckley* and cases there cited, beyond a certain point the Court has struck such an important part of a law that the remainder might never have been passed by Congress in that form.

In that circumstance, the Court should do what Circuit Judge Henderson concluded in the District Court panel. So much of the law may be struck that this Court should not attempt to rewrite the law as if it were the legislature, but instead should place that task back in the hands of Congress.

A special circumstance applies to this Court's review now, as it did in *Buckley* in 1976. For major offices such as President and Senator, fund raising is well underway, and for House candidates it is not far behind. The *Buckley* Court concluded that the Federal Election Commission itself had to be declared unconstitutional, but it took the rare step of staying its final Order to that effect for thirty days, to give the legislative branch the opportunity to rewrite the law in accord with the conclusions reached by this Court. As the *Buckley* Court said, at p. 143, "This limited stay will afford

Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, . . ."

And given that opportunity in 1976, Congress did rewrite the law in accord with the Court's findings under the First Amendment (and the separation of powers, which was also a critical issue in *Buckley*). In 2003, with a national election just around the corner — and already begun from the standpoint of fund raising and position-taking by candidates and national and state parties — this Court should afford Congress a similar opportunity to rewrite BCRA.

CONCLUSION

For the reasons above stated, and similar reasons that applied when this Court decided *Buckley*, the American Civil Rights Union submits that the Court should determine that too many of the original provisions of BCRA are unconstitutional for the balance of the law to remain standing, even considering its severability clause. For the same reasons, then as now, the ACRU submits that the Court should not simply strike BCRA immediately, but should stay its hand and its final Order for a limited period, perhaps more than the thirty days allowed in *Buckley*, to permit Congress to rewrite the law in accord with this Court's decision.

The broadcast media, especially television, are the principal means of communication in American elections today. The broadcast advertising bans are the most obviously unconstitutional provisions in BCRA. And broadcast advertising on issues and positions has already begun, looking forward to the elections of 2004. For these reasons, ACRU submits that notwithstanding the thirty-day delay for Congress to reenact a corrected BCRA, this Court should make its Order striking the broadcast advertising provisions effective immediately.

Fund raising for federal candidates has already well begun. All such fund raising will accelerate, as it always does, in the final months before the year of the election.

Therefore, with respect to the question of $2,000 or $12,000 limits on individual contributions per election, the ACRU suggests that the Court make its Order on this effective immediately as well. For the benefit not just of hundreds of candidates for federal office, but of hundreds of thousands of citizens who wish to support such candidates, the ACRU urges the Court to strike the lower limit and leave the higher ones standing, now.

This Court has taken unprecedented steps to convene on 8 September and hear this case on an accelerated basis. This Court recognizes, as it did in 1976, the critical First Amendment impact of laws that reshape the conduct of federal elections. Therefore, the ACRU urges the Court to speak thoroughly and clearly to Congress about the provisions of BCRA which are unconstitutional, and those which pass constitutional muster, so the rewriting of BCRA by Congress will become a solid and sustainable pattern for the conduct of the 2004 elections and, it is hoped, many elections to come.

Respectfully submitted,

John C. Armor
Counsel of Record
"KettleRock"
Box 243
Highlands, NC 28741
(828) 526-3149

Of Counsel:

Peter Ferrara
Executive Director, ACRU
1232 Pine Hill Road
McLean, VA 22101
(703) 917-4247

Attorneys for the Amicus Curiae

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No. 02-1676 and consolidated cases

IN THE
Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *et al.*
Appellants

vs.

SENATOR MITCH MCCONNELL, *et al.*
Appellees.

On Appeal from the United States
District Court for the District of Columbia

Brief of Amicus Curiae
Professor David Moshman
Supporting Appellees

Kevin H. Theriot
P.O. Box 1090
Dacula, GA 30019
7 Lumpkin Street
Lawrenceville, GA 30046
(770) 995-9144
(770) 995-0910

Attorney for Amicus Curiae

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INTEREST OF AMICUS[1]

David Moshman is a Professor of Educational Psychology at the University of Nebraska-Lincoln. He obtained his Ph.D., in Developmental Psychology from Rutgers University in 1977, M.S., in Developmental Psychology from Rutgers University in 1975, and B.A. in Psychology from Lehigh University in 1971.

Professor Moshman's expertise centers on the development of reasoning, rationality, morality, and identity in adolescence and early adulthood. This includes (a) logical and scientific reasoning; (b) the rational basis for morality and identity; and (c) the role of intellectual freedom in development and education. He has been regularly teaching a course on cognitive development since 1977 and a course on adolescent development since 1985. Dr. Moshman is serving or has served on the editorial boards of seven journals including Child Development, Journal of Research on Adolescence, Journal of Adult Development, and Developmental Review, and presently serves as Book Review Editor for the Journal of Applied Developmental Psychology and as Associate Editor of Educational Psychology Review.

Recent publications related to adolescent development authored by Dr. Moshman include:

1. David Moshman, *Cognitive development beyond childhood.* In W. Damon (Series Ed.) & D. Kuhn & R. Siegler (Vol. Eds.), Handbook of child psychology: Vol. 2. Cognition, perception and language (5th ed., pp. 947-978) (1998).

2. David Moshman, *Adolescent psychological development: Rationality, morality, and identity* (1999).

3. David Moshman, *Developmental change in adulthood.* In J. Demick & C. Andreoletti (Eds.), *Handbook of adult development* (pp. 43-61) (2003).

In 1990, Professor Moshman filed an amicus curiae brief with this Court in *Bd. of Education, Westside Community Schools v. Mergens,* 496 U.S. 226 (1990).

The present case, in part, considers the constitutionality of Section 318 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (enacted at 2 USC §441k (2003)), which prohibits minors from contributing to the committees of political parties and to candidates for federal office. This provision clearly restricts the freedom of minors to support political causes and candidates, which is of particular concern to Professor Moshman because of his interest and expertise in the intellectual and moral development of adolescents.

SUMMARY OF ARGUMENT

BCRA eliminates all opportunity for minors to exercise their free speech rights to support federal political candidates or their parties by making contributions to them. Section 318 of BCRA states:

> An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution to a committee of a political

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[1] The Department of Justice has consented to the filing of this brief as indicated in the copy of their letter being filed *instanter.* All other represented parties have filed written consents to the filing of amicus with the Court. Pursuant to Rule 37.6, amicus discloses that no counsel for any party in this case authored this brief in whole or in part and that monetary contribution to the preparation of this brief was received from the non-profit group, Justice Advocates.

party.

Title III, § 318, H.R. 2356, 107th Cong. (2002) (enacted at 2 USC §441k (2003)). This provision completely ignores the similarities between adolescents[2] and college aged adults, and the profound differences between adolescents and elementary aged children, in their ability to understand civic issues.

Research indicates that most adolescents are just as capable as most college aged individuals of comprehending abstract political issues such as civil rights. Moreover, encouraging adolescents to analyze current societal issues and make their voices heard in the political arena on matters of interest to them is a vital part of their educational process. When the government flatly prohibits adolescents from speaking in the form of making contributions, it greatly diminishes the ability of parents and educators to instruct these young people on how to be contributing citizens in our democratic society. The best method of teaching, especially young people, is to give the students direction and then encourage them to try it themselves. Section 318 makes it difficult, if not impossible, to teach adolescents how to swim in the process of political contributions, because it prevents them from getting in the pool.

ARGUMENT

Our society and this Court have recognized that an important method of expressing one's support of a candidate for office, or political party, is to contribute funds to them. *Buckley v. Valeo,* 424 U.S. 1, 14 (1976). The United States Government has taken this right away from all minors, including adolescents, based solely on the interest of prohibiting their

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[2] In this brief, the term "adolescents" generally refers to children ages 12 through 17.

parents from circumventing ceilings on amounts given by donating in the names of their minor children. No interest in protecting children has ever been asserted in this case as a rationale for prohibiting political contributions of minors. In fact, research indicates that adolescents can and should participate in the process of supporting political causes and candidates in order to learn about our democratic system of government.

I. ADOLESCENTS ARE CAPABLE OF MAKING INDEPENDENT CHOICES REGARDING SUPPORT OF POLITICAL CAUSES AND CANDIDATES.

By enacting Section 318, Congress has made a distinction between most college students, and adolescents who are in high school.[3] But studies in this area indicate that adolescents are capable of understanding and making rational judgments regarding their civic duties and liberties as citizens.

> "Sophisticated conceptions of civil liberties ...emerge by early adolescence and are used to evaluate social events." . . .To the extent that understanding of intellectual freedom involves an ability to make abstract judgments independent of content, the results support the view that the nature of intellectual freedom is understandable by early adolescence.

David Moshman, *Adolescent Reasoning and Adolescent Rights,* 36 Human Development 27, 32-33 (1993) ("Adolescent Reasoning") (quoting C.C. Helwig, *Continuity and*

---

[3] **It is worth noting, however, that many college students are seventeen years of age when they begin their secondary education. Even though they can attend college, often times hundreds of miles away from home, they cannot make political contributions because they are under eighteen.**

Discontinuity in Moral Judgment, Paper presented at the annual meeting of the Jean Piaget Society (1991)). Adolescents have the ability to learn about political issues, formulate opinions regarding these issues, and express these opinions to their peers as well as society as a whole.

In this regard, even adolescents ages 12 and 13 are more like college students than like students in elementary school. "[S]tudies showed that with brief instruction, involving definition of validity, examples, and/or feedback, seventh graders were comparable to college students in their ability to distinguish the validity of arguments from the truth or falsity of their content, whereas fourth graders did not profit from such instruction." *Adolescent Reasoning* at 33.

There may be occasions when adolescents need to be protected from physical and psychological harm as they are developing, and should not be treated the same as adults. For instance, this Court has upheld restrictions on minors' access to obscene material, *see Ginsberg v. New York,* 390 U.S. 629, 637-38 (1968), and to abortion, *see Bellotti v. Baird,* 443 U.S. 622, 634 (1979). However, there is no similar possible harm to adolescents in allowing them to express themselves and associate with, for instance, an individual running for senate, by giving them a donation.

> One might, for example, argue for a more stringent criterion of maturity with respect to freedom to engage in potentially harmful overt behaviors (such as use of guns, cars, or legal drugs) than with respect to expression of beliefs (such as advocacy of gun control or drug use). Ideas can be dangerous, of course, but the dangers of expression, compared to those of overt action, are likely to be long-term, speculative, and reversible through discussion.

Adolescent Reasoning at 36.

The government has prohibited adolescents from expressing their support for, and associating with, political causes and candidates by giving money. There is no evidence that adolescents are incapable of properly wielding this freedom, or that allowing such expression will cause them any harm. On the contrary, as indicated below, it will help them learn how to be a contributing member of our democratic society.

II. PROHIBITING ADOLESCENTS FROM MAKING CAMPAIGN CONTRIBUTIONS HAS AN ADVERSE EFFECT ON EDUCATING YOUNG PEOPLE IN THE POLITICAL PROCESS.

Some of the justifications this Court has recognized as a basis for restricting the rights of minors are a child's "inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing." *Bellotti v. Baird,* 443 U.S. 622, 634 (1979). However, Section 318 actually inhibits an adolescent's ability to learn how to make critical decisions, and infringes upon the parental role in child rearing.

"[C]urrent theory and research suggest that, if there is ever a time when the opportunity to generate, explore, and discuss ideas freely is especially critical to one's development, it is adolescence." *Adolescent Reasoning* at 34. Becoming involved in the campaign process is an excellent opportunity for adolescents to learn by analyzing the different positions of candidates and parties, then developing and expressing their own views on these positions.

It is widely agreed that learning and

> development are positively related to the opportunity to interact freely with peers, to consider multiple points of view, to formulate and express one's own ideas, to reflect on one's own thinking, and to work at resolving cognitive contradictions and social conflicts. ...Students should have broad access to information and ideas and should be actively encouraged to formulate, express, and discuss their views.

Adolescent Reasoning at 35. *See also* David Moshman, Adolescent Psychological Development: Rationality, Morality, and Identity 113 (1999) ("Adolescent Psychological Development") ("one would expect the construction of rationality to be facilitated by social environments in which individuals have free access to information and ideas and are encouraged to formulate, express, discuss, and justify ideas of their own.")

Most parents want their adolescent to learn the importance of independent thinking and political expression. Section 318 completely eliminates parents' ability to teach their children through hands on experience how to express their political views by donating money. Research indicates that "[g]overnmental restrictions on adolescents, then, merit critical scrutiny because they are likely to interfere not only with adolescent autonomy but with family relations and cultural practices." *Adolescent Reasoning* at 37. *See also id.* at 38 ("the sorts of restrictions on adolescents most likely to be justifiable are restrictions by parents on their own children's overt behavior. ...[T]he sorts of restrictions least likely to be justifiable are restrictions by governmental agents on adolescents' beliefs, expression, and access to information and ideas.")

Teaching adolescents how to become informed, contributing participants in the political process not only benefits them, but is vital to the health and future of our democratic society. As noted by a distinguished philosopher of education, Israel Scheffler,

> [t]he function of education in democracy is rather to liberate the mind, strengthen its critical powers, inform it with knowledge and the capacity for independent inquiry, engage its human sympathies, and illuminate its moral and practical choices. This function is, further, not to be limited to any given subclass of members, but to be extended, in so far as possible, to all citizens, since all are called upon to take part in the processes of debate, criticism, choice, and co-operative effort upon which the common social structure depends.

Adolescent Psychological Development at 112.

Simply put, learning how to express oneself in the political arena by contributing funds to candidates and parties is an important lesson to be learned as an adolescent. By eliminating the crucial teaching tool of hands on experience, the government has tied the hands of parents and educators attempting to accomplish this task.

CONCLUSION

The foregoing research and analysis demonstrate adolescents are mature enough to properly exercise the freedom to make the political contributions that BCRA prohibits. Moreover, the prohibition on campaign contributions adversely affects adolescents by eliminating an important learning tool during a critical time for educating young people in the political process.

Therefore, the judgment below holding Section 318 of BCRA unconstitutional should be affirmed.

Respectfully submitted,

Kevin H. Theriot
P.O. Box 1090
Dacula, Georgia 30019
7 Lumpkin Street
Lawrenceville, Georgia 30046
(770) 995-9144
(770) 995-0910

Attorney for Amicus Curiae

Supreme Court, U.S.
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No. 02-1674

IN THE

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MITCH MCCONNELL *et al.*,
Appellants,
v.
FEDERAL ELECTION COMMISSION *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE HONORABLE J. DENNIS HASTERT, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANTS

J. RANDOLPH EVANS *
STEFAN C. PASSANTINO
SETH F. KIRBY
ARNALL GOLDEN GREGORY LLP
2800 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3450
(404) 873-8500

Counsel for J. Dennis Hastert, Speaker of the United States House of Representatives

* Counsel of Record

July 8, 2003

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BRIEF OF THE HONORABLE J. DENNIS HASTERT, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANTS

J. Dennis Hastert, Representative of the 14th Congressional District of Illinois and Speaker of the United States House of Representatives (hereinafter referred to as "the Speaker" or "Speaker Hastert"), submits and files this brief with the consent of the parties.[1]

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[1] All parties have filed blanket consent forms with the Clerk of Court. *Amicus* states that no party to this case authored any portion of this brief and counsel for the Speaker received no monetary contribution toward the preparation of this brief from any person or entity other than the Speaker and the Republican National Committee.

INTEREST OF AMICUS

Speaker Hastert has served as Speaker of the United States House of Representatives since the 106th Congress. As such, Congress passed the Bipartisan Campaign Reform Act of 2002[2] (hereinafter referred to as the "BCRA") during his tenure. It is with an appreciation of the gravity of this action that the Speaker submits this *amicus curiae* brief in support of the appellants' constitutional challenge to the BCRA.

In its review of this case, the United States District Court for the District of Columbia found significant portions of Title I of the BCRA to be constitutional. (Memorandum Opinion, D. D.C. May 1, 2003). Specifically, the District Court upheld those portions of Title I which prohibit federal candidates from having any involvement in the solicitation of "soft money". *Id.* These provisions directly impact the ability of Members of Congress to participate in the political process. Yet, despite devoting over 1,600 cumulative pages to its analysis of the constitutionality of the BCRA, the lower court's opinion provides precious little, if any, substantive analysis of the degree to which the new law curtails the constitutional rights of Members of Congress. For this reason, Speaker Hastert has a direct interest, both in his own capacity, and on behalf of other Members of Congress, in ensuring that those portions of the BCRA most affecting the Members receive the constitutional scrutiny which, heretofore, has been lacking.

The Speaker occupies a unique position in American government. His position allows him to set the agenda of the House of Representatives, assign Members to House Committees, and, like other Members of the House, actively participate in the legislative process. Speaker Hastert is also a member of the Republican Party, and by virtue of his position in Congress, serves as *de facto* head of the Republican Party when his party does not control the White House. Speaker Hastert's role in American government, however, is neither limited to federal office nor national politics. The Speaker is also a politically active citizen of the State of Illinois and an active member and leader in the Illinois Republican Party. In each of these roles, provisions of the BCRA directly and impermissibly harm the Speaker.

The Speaker is elected from, and by, the Members of the majority party in the United States House of Representatives. The Speaker actively campaigns for Republican Members throughout the nation. Furthermore, as a citizen with a commitment to a political ideology, Speaker Hastert has a vested personal interest in ensuring that his views are represented at all levels of government. Consequently, Speaker Hastert has actively participated in state and local elections, particularly in his home State of Illinois. Although the BCRA does not directly impact the Speaker's legislative role, it does seek to curtail the Speaker's ability to participate meaningfully in the political process, thereby altering the role of the Speaker in American government. Furthermore, it prevents the Speaker, and other Members of Congress, from participating fully in state and local government elections or civic organizations.

In the purported interest of eliminating an "appearance" of impropriety in the manner in which citizens and organizations participate in the political process, the BCRA imposes unwarranted and unconstitutional barriers between federal candidates, their parties, and the individuals they hope to serve. The BCRA infringes upon the rights of the Speaker and other Members of Congress without achieving, or even helping to achieve, its purported goals. Consequently, the Speaker is compelled to support a judicial declaration striking down Title I of the BCRA as unconstitutional.

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[2] Pub. L. No. 107-155, 116 Stat. 81.

SUMMARY OF ARGUMENT

The stated purpose of the BCRA is to preserve the confidence the American people have in their Federal government by eliminating the purported appearance of corruption supposedly created by excessive political contributions to elected officials. The BCRA fails to achieve this purpose while simultaneously doing significant harm to the political process. The BCRA directly prevents the Speaker, and other Members of Congress, from participating *fully* in state political activities to the extent permitted by their state's laws and prevents them from actively participating in many types of local civic and business organizations. As drafted and interpreted by the District Court, by mere qualification for federal office, the BCRA restricts the Speaker's (and any other federal candidate's) speech and participation in activities that are totally permissible for other citizens. In essence, the BCRA operates as a forfeiture of civic rights provided by states to their citizens with regard to state and local political activities by doing nothing more than qualifying for federal office.

Subsequent to the District Court's holding, Title I of the BCRA also prohibits all federal candidates and office holders from soliciting or directing money in excess of the BCRA limits to be used in non-federal elections *even if permitted by the state where the candidate is seeking office*. This prohibition prevents the Speaker, and other federal candidates and officeholders, from full participation in the fundraising campaigns of state and local candidates *even where the state regulating the fundraising would authorize more*. Indeed, as drafted and approved by the District Court, the BCRA prohibits a federal candidate from even *talking* about soft money under some circumstances. The Speaker, as a citizen of the State of Illinois, is denied the same rights and privileges as other citizens of the State under the BCRA solely because he is a federal officeholder. This burden lacks rational basis and consequently violates the Fifth and Tenth Amendments.

If the Speaker, or any Member, seeks to fully participate in state political activities or in other organizations that do not wish to be restricted by the BCRA's "soft money" ban, those Members are arguably obligated to limit, if not eliminate, their involvement with their party's national committee. In reality, this is not an option for many Members who must remain actively involved in their national party committee to satisfy political obligations. The mere fact that the BCRA presents this choice to Members reveals the unconstitutional burden imposed by the new law upon the Members' constitutionally protected freedom of association with their national parties and congressional campaign committees.

Finally, absent the District Court's holdings, the BCRA's infringement upon the Speaker's ability to participate in state political activities and with other organizations contains an outright ban on the receipt or expenditure of "soft money" by national committees of political parties. This ban extends not only to the national political party committees themselves, but to their agents and any entities they control. The Speaker's role in the National Republican Congressional Committee almost certainly renders him an agent of a national committee of a political party under the BCRA. Therefore, under this law, as drafted, any organization that allows, or arguably allows, or tacitly permits, the Speaker to take an active role in its governance or fundraising activities could be subjected to the same "soft money" ban imposed on the national party committees. Any organization not wanting to incur the fundraising and expenditure limitations placed on the national committees by the BCRA will be forced to exclude the Speaker from active participation, limiting him instead to "honorary" positions or as their "special guest" at events. These intrusive and unnecessary restrictions will chill the ability of the Speaker, and all Members of Congress, to freely associate.

THE ROLE OF THE SPEAKER IN AMERICAN POLITICS

The position of the Speaker combines several roles: the institutional role of presiding officer and administrative head of the House of Representatives, the partisan role of leader of the majority party in the House, and the representative role of an elected Member of the House. As the "elect of the elect", the Speaker has perhaps the most visible job in Congress.

Although the Constitution mentions the Office of the Speaker, it is silent as to his duties. The Speaker possesses substantial powers under House rules. Among his duties are: calling the House to order (Rule I, clause 1); preserving order and decorum within the chamber and in the galleries (Rule I, clause 2); recognizing Members to speak and make motions (Rule XVII); deciding points of order (Rule I, clause 5); presenting the pending business to the House for vote (Rule I, clause 6); appointing select and conference committees (Rule I, clause 2); and referring measures to committee(s) (Rule XII, clause 2). The Speaker frequently is authorized by statute to appoint Members to various boards and commissions, and it is typically the Speaker who is the formal recipient of reports or other communications from the President, government agencies, boards, and commissions.

Although it is not prescribed in any formal way, the elevated profile of the Office of the Speaker often means he must take a leading role in negotiations with the Senate or President. Under both Republican and Democratic majorities, Speakers have played similar roles as leaders of their parties; both within the party conference or caucus and on the House floor. Within the Republican Party conference, Speaker Hastert acts as the chairman of the party's Steering Committee and thus plays a major part in the committee assignment process. In addition, the Speaker is empowered to make nominations directly for the Republican Conference's consideration for membership (including chairs) on the Rules Committee and the House Administration Committee, as well as the chair and one Member (to serve as the second ranking Republican) on the Budget Committee. House Republican Conference rules also provide for the Speaker to serve on the National Republican Congressional Committee ("NRCC").

Beyond the formalities of the Speaker's official duties, every Speaker is called upon to exercise his personal prestige, and his powers of persuasion and bargaining, to enunciate and advance his party's vision and legislative agenda nationally. The Speaker also works to retain majority control of the House. To accomplish these objectives, modern Speakers engage in a variety of activities, not just in Congress and their party conference, but on the national stage as well. This is primarily accomplished by helping to set party policy and legislative agenda, publicizing those policies and achievements and assisting party members who are seeking election to the United States House of Representatives.

While the Speaker does not serve the NRCC in an official capacity, Speaker Hastert serves the NRCC as its titular head and as a member, *ex officio*, of its Executive Committee. In addition, and particularly when the Republican Party does not control the White House, the Speaker maintains a close working relationship with the Republican National Committee. In these roles, the Speaker is deeply involved in the development and implementation of Republican strategy in the House of Representatives and across the nation. Speaker Hastert further assists with the implementation of Republican strategy through fundraising activities and by acting as a party spokesman and communicator of the party message.

Moreover, Speaker Hastert's activities as Speaker extend well beyond his role with the United States House of Representatives and national party politics. After sixteen years of teaching and coaching at Yorkville High School in Illinois, Speaker Hastert served in the Illinois House of Representatives for six years before being elected to the United States House of Representatives in 1986. Entirely separate and apart from his duties as Speaker, Speaker Hastert remains active in Illinois politics to this day. Speaker Hastert has campaigned and raised funds for local candidates to the Illinois House of Representatives, county Republican parties, as well as local and municipal elected officials throughout the state. Speaker Hastert has appeared for, and supported, numerous candidates for local and statewide office and plays an active role in the identification and recruitment of promising candidates for state and local office.

Speaker Hastert's considerable activities for state candidates include participation in fundraising events and the lending of his name to local solicitations for campaign contributions. Even in non-federal election years, Speaker Hastert is an active participant in Illinois politics and in the formation of the Republican message in Illinois.[3] As an Illinois citizen who has never abandoned his primary residence in that state, Speaker Hastert shares the same personal interest in the local candidates and municipal issues as any other state resident. As is the right and privilege of any Illinois citizen, Speaker Hastert participates actively in the political debate, fundraising, and election process crucial to those issues.

Speaker Hastert is also politically active in numerous states other than Illinois. In the past election cycle, Speaker Hastert appeared in forty-nine of the fifty states of the Union in support of local candidates for federal office. The Speaker does not limit his activities in other states to candidates for federal office, however. At virtually every appearance in the

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[3] *e.g.* In the State of Illinois, elections for township and local offices are held in non-federal election years. 10 ILL. COMP. STAT. 5/2A-1.2(c).

United States, individuals and organizations, from the highest echelons of the Republican Party to the smallest and most local of grass-root associations, approach Speaker Hastert and solicit his advice and counsel regarding issues of political strategy and legislation.

The Speaker respectfully submits that these activities are a necessary and laudable element of American politics. Few, if any, would argue that these activities represent anything less than quintessential participation in representational democracy in its purest form. Yet, under the BCRA scheme, however well intentioned, the Speaker's participation in these activities is severely, and unconstitutionally, curtailed.

ARGUMENT

I. THE BCRA VIOLATES THE CONSTITUTION BY IMPERMISSIBLY RESTRICTING THE SPEAKER'S ABILITY TO PARTICIPATE IN STATE AND LOCAL POLITICAL ACTIVITIES.

Absent the District Court's ruling, the BCRA painted with a broad brush, banning national committees of political parties from soliciting, receiving, or directing any funds that are not subject to the restrictions imposed by the Federal Election Campaign Act of 1971[4] (hereinafter referred to as "FECA"), as amended by the BCRA. BCRA § 101(a) (adding new FECA § 323(a)(1)). This restriction explicitly included the national congressional campaign committees of a political party in the "soft money" ban. *Id.* The District Court found these broad restrictions to be unconstitutional.

Not only did the ban apply to party national committees and national congressional campaign committees, it also applied to "any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee." BCRA § 101(a) (adding new FECA § 323(a)(2)).

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[4] 2 U.S.C. § 431 *et. seq.*

The BCRA does not define the term "agent", but instead leaves the term open to interpretation by the Federal Election Commission ("FEC"). Recent FEC regulations implementing the BCRA define "agent" as any person who has actual authority, either expressed or implied, to perform certain activities on behalf of their principle. 11 C.F.R. § 300.2(b) (2002). This regulation reads as follows:

> (b) Agent. For the purposes of part 300 of chapter I, agent means any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the specified persons:
>
> (1) In the case of a national committee of a political party:
>
> (i) To solicit, direct, or receive any contribution, donation, or transfer of funds; or,
>
> (ii) To solicit any funds for, or make or direct any donations to, an organization that is described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a) (or has submitted an application for determination of tax exempt status under 26 U.S.C. 501(a)), or an organization described in 26 U.S.C. 527 (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office). . . .

Id.

Given the Speaker's duties for, and responsibilities to, the National Republican Congressional Committee, the Speaker's position would appear to place him squarely within the definition of an "agent" of the Committee as defined by the BCRA and federal regulation. Consequently, the BCRA as

drafted will undoubtedly be applied to him as an agent of a national party and therefore subject him to all limitations the BCRA imposes on national parties.

The Speaker is also a "federal candidate" under the terms of the BCRA. As such, he is subject to specific BCRA prohibitions against soliciting, receiving, directing, transferring, or spending soft money in connection with a federal election. BCRA § 101(a) (adding new FECA § 323(e)(1)(A)). Furthermore, as a "federal candidate," the Speaker is prohibited from soliciting, receiving, directing, transferring, or spending funds in connection with state and local elections unless such funds are subject to the source and amount restrictions of the FECA. BCRA § 101(a) (adding new FECA § 323(e)(1)(B)).

A. The Speaker Will be Prohibited from Taking Any Significant Role in the Activities of His State Party or the Campaign Committees of State Candidates.

As applied by the District Court, the BCRA operates to supersede a state's laws governing its own state citizens in connection with a state election if the person is a federal officeholder or candidate. As held by the District Court, federal candidates and officers lose their rights as afforded under the home state's laws for home state elections. Instead of having the same rights and privileges afforded to every other citizen of the State of Illinois in connection with an Illinois election, under the BCRA as interpreted by the District Court, Speaker Hastert would have those rights *except* where the BCRA limits them. The sole basis for this difference is not that his conduct impacts a federal election (as it would not). Instead, the sole basis for distinction is that he is a federal officeholder.

Absent the modifications by the District Court, if state parties or candidates wish to engage in "federal election activities", they may do so, but only if they finance that activity exclusively with funds raised subject to BCRA restrictions. BCRA § 101(a) (adding new FECA §§ 323(b) & 323(f)). Thus, while a state party or candidate may solicit campaign contributions without limitation under the applicable law of their home state, they are now prohibited from using that money to engage in "federal election activities" as defined by the BCRA.

As an initial matter, it is clear that these intrusions into the ability of a state to regulate its own political process violate the Constitution. Traditionally, the Elections Clause of the Constitution has been relied upon to give Congress the authority to regulate the financing of federal elections. *See Buckley v. Valeo*, 424 U.S. 1 (1976). However, the Elections Clause does not allow Congress to intrude upon the way a state governs its own political affairs. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. No one would argue that the states have ceded their power to control their own electoral process to the federal government. *See Oregon v. Mitchell*, 400 U.S. 114, 125 (1970) ("No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices."). How then can it be permissible for a law such as the BCRA to place limits on the way that state citizens participate in state elections?

The "federal election activity" definition provided by the BCRA is so broad that it limits the way state parties and state candidates may pay for purely state activities. These restrictions on state parties and state candidates violate the Tenth Amendment and should be declared unconstitutional. Moreover, even if this Court were to conclude that these provisions do not violate the Tenth Amendment, they remain unconstitutional restrictions on First Amendment rights of free speech and freedom of association and Fifth Amendment principles of equal protection.

While implicating serious states' rights issues, the BCRA has even greater personal impact on the Speaker. By imposing arbitrary limitations in a broad manner, the BCRA chills the Speaker's ability to associate with local individuals and groups without rational basis. For example, after careful consideration, the citizens of the State of Illinois, through their legislature, have elected to place fewer restrictions on the financing of local campaigns than those imposed by federal election law. *See* 10 ILL. COMP. STAT. 5/1-1 *et seq.* While Illinois law requires parties and candidates to disclose campaign contributions, it does not place restrictions on either the source or amount of those contributions. *Id.* As noted above, however, the Speaker and other federal candidates forfeit their freedoms afforded by state law under the BCRA. Citizen Hastert could raise funds in excess of the BCRA limits for an Illinois candidate for state or local office under Illinois law. Under the BCRA, Speaker Hastert may not. As others can raise money, it is not the amount of the contribution that can serve as the justification for the restriction. Instead, to support the distinction, the record below would have to show that funds raised by federal officeholders for state elections were somehow *more* corrupting than funds raised by non-federal officeholders. There is no evidence in the record to support this position.

The chill on participation at the state and local level is notable. Local candidates or entities cannot risk being limited from raising funds on unequal terms with their competitors. Accordingly, local Illinois parties, groups and candidates will likely avoid any activities or associations which could even arguably lead to the imposition of these fundraising restrictions upon them. For local Illinois parties and groups, the uncertainty concerning the Speaker's status as a federal candidate and agent of a political party, and the risks of severe additional regulations borne by groups and individuals who associate with the Speaker, now serve as the basis to blockade the Speaker from those he seeks to serve without rational basis or constitutional authority.

In the absence of the rulings by the District Court, the ramifications would be even greater. The Speaker is the leader of the National Republican Congressional Campaign Committee and is therefore, arguably, an "agent" of that Committee under the BCRA scheme. If the Speaker were to take any role of significance with the Illinois Republican Party, his home state's party, or with the campaign committee of a state candidate, under the BCRA's definitions and scheme, the organization could arguably be deemed to be "directly or indirectly established, financed, maintained, or controlled by" an agent of the National Republican Congressional Committee. BCRA § 101(a) (adding new FECA § 323(a)(2)). If so, then that state organization could automatically become subject to the source and amount restrictions imposed by the BCRA, thereby forfeiting its ability to raise unlimited funds as allowed by Illinois law. The specter of this possible result from mere association with the Speaker will undoubtedly have a chilling effect on the Speaker's involvement with the Illinois Republican Party and with candidates for Illinois State and local government as well as other state and local political parties and candidates.

Moreover, the BCRA does not define or limit the phrase "directly or indirectly established, financed, maintained, or controlled". *Id.* Indeed, the language of the phrase implies that it should be construed as broadly as possible in an apparent attempt to close a perceived loophole in the law before it develops. The FEC has promulgated rules in an attempt to clarify the phrase. 11 C.F.R. § 300.2(c)(2002). This FEC regulation defines political parties, federal candidates, and the agents thereof as "sponsors" and then sets forth ten factors to be considered in determining whether a sponsor "controls" an entity. *Id.* Those factors include whether the sponsor has the ability to participate in the governance of the entity; whether the sponsor has the ability to "hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity"; and whether a sponsor has common or overlapping officers, members, or employees. *Id.*

Unfortunately, these factors do not serve to limit the potential reach of the language employed by the BCRA. In the case of Speaker Hastert, almost any role that he assumes with the Illinois Republican Party or any local party or campaign could potentially subject that state party to full BCRA restrictions as if it were a national political party. For instance, under the BCRA, the Speaker could not assume a role as an officer or director of the state party because, under the scheme adopted by the BCRA, such a position would permit him to participate in the governance of the entity and potentially give him the ability to hire, appoint, demote, or otherwise control the employees of the state party. He may not even be allowed to serve on minor committees within the state party if such service would place him in charge of employees of the state party. Finally, and perhaps most egregiously, the BCRA scheme as adopted may prevent the Speaker even from being a member of the state party because his membership could be used to show that the Illinois Republican Party had overlapping members with the National Republican Congressional Committee.

One would hope that Speaker Hastert's mere membership in the Illinois Republican Party would not result in the party being considered "directly or indirectly established, maintained, financed, or controlled" by a national party. However, the BCRA creates uncertainty regarding the Speaker's continued active involvement in the Illinois Republican Party. This scenario illustrates the chilling effect that the BCRA has on the Speaker's ability to associate with state political entities and their willingness to associate with the Speaker.

Although this analysis only focuses on the Speaker's roles in the state party, it applies with equal effect to his role in district or local parties and to his role in campaign committees of state candidates. Of course, the BCRA does not explicitly state that the Speaker may not associate with state political entities. Doing so would be a blatant abrogation of the Speaker's constitutional right to associate with like-minded individuals, which is precisely the type of association protected by the First Amendment. *See, e.g., Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). No court would uphold such a prohibition because it is extreme and serves no legitimate purpose, much less a compelling government interest. Instead, the BCRA attempts to cloak its assault on freedom of association by tacitly allowing the Speaker to associate as he sees fit, but imposing draconian limitations on entities in which he actively participates.

In confirming the right of freedom of association, this Court has observed, "the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Although the freedom of association is an individual right, the freedom also extends to political parties. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000). Thus, associations are free to organize and govern themselves as they choose, and the government has no right to interfere with such decisions. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 230 (1989); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 ("[P]olitical parties' government, structure, and activities enjoy constitutional protection."). Here, the BCRA has the effect of preventing the Speaker from associating with the Illinois Republican Party by imposing severe restrictions on the party if the Speaker assumes any role of significance. In fact, the BCRA may result in such restrictions on the party if the Speaker simply retains his membership in that organization. This is a significant burden on the Speaker's individual rights and on the rights of the party.

It is thus apparent that the BCRA significantly impairs the Speaker's First Amendment right of freedom of association. For such an imposition to survive constitutional scrutiny, it must be narrowly tailored to achieve a compelling governmental interest. *See Eu*, 489 U.S. at 231-33 (applying strict scrutiny to a California law that controlled the way a state party was organized). The only governmental interest validly at issue here is the reduction of actual or apparent corruption in the federal government. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (accepting the prevention of actual or apparent corruption in the political process as the only valid basis for the FECA); *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985). In *Buckley*, this Court recognized that large contributions given directly to a candidate could create the appearance of corruption, indicating that the candidate would vote a particular way in exchange for the contribution. *Id.* at 27. Although it is just as likely that such a contribution could be given to the candidate because he already shares similar views as the donor, the Court reasoned that the government's interest in preventing the appearance of corruption was sufficient to warrant limitations on campaign contributions. *Id.* at 29.

The BCRA's infringement on the Speaker's freedom of association cannot satisfy strict scrutiny because it will not achieve, nor even help to achieve, the government's interest in reducing corruption or the appearance of corruption. The Speaker's involvement in his state party in no way implies improper conduct. Much to the contrary, his active involvement in state politics indicates that he is concerned about the citizens and government of his home state. No logical argument can be advanced that restricting the Speaker from participating in state political activity will cause the American people to have more trust in the federal government. These provisions plainly fail to satisfy any interest of the federal government and therefore must be struck down as unconstitutional.

B. The BCRA Unconstitutionally Discriminates Against the Speaker and Other Members of Congress by Preventing Them From Raising Money For State Candidates as Permitted by State Law.

The BCRA prohibits any federal candidate, including the Speaker, from raising or spending any money in connection with a state or local election that is not subject to the source and amount restrictions of the FECA. BCRA § 101(a) (adding new FECA § 323(e)(1)(B)). Consequently, notwithstanding the fact that Illinois law permits any individual to raise an unlimited amount of money from individuals, corporations, and labor unions on behalf of a candidate for state office, the Speaker's ability to raise money for state candidates in his home state will be restricted by the BCRA. *See* 10 ILL. COMP. STAT. 5/1-1 *et seq.* Under some circumstances, a federal candidate's very *speech* can constitute a BCRA violation in clear contradiction of the First Amendment.

The sole basis for these restrictions is the federal candidate's status as a federal office holder. Because the BCRA will cause the Speaker to be treated differently than other citizens of his state, it violates Fifth Amendment principles of equal protection. This prohibition also violates Tenth Amendment principles of federalism because it intrudes upon the way a state conducts its electoral process. The State of Illinois has determined that it is best to allow its citizens to donate and solicit financial support for candidates in unlimited amounts and from unlimited sources. *Id.* The BCRA steps in and artificially limits the rights of certain citizens of the State of Illinois, namely Speaker Hastert, and any other federal candidate who is an Illinois citizen.

A state is free to conduct its election activity as it sees fit. *Oregon*, 400 U.S. at 125. Only narrowly tailored infringements to this right necessary to meet compelling government interests are permissible under the Constitution. *Eu*, 489 U.S. at 225. Once again, the BCRA falls well short of that mark. Limiting the Speaker's ability to raise and spend money to help elect candidates in Illinois does not directly relate to his duties as a United States Representative from Illinois. It is true that Speaker Hastert's role in national politics affords him an enhanced ability to raise money for state candidates. But it is also true that such money goes to the state candidate, not to the Speaker. As such, the alleged appearance of impropriety the BCRA purports to prevent becomes tenuous at best. The money received by the state candidate is of no benefit to the Speaker, other than to help ensure that his views are represented in state government. That ideological benefit is far too attenuated to give the appearance of the *quid pro quo* vote buying feared in *Buckley*.

The natural counter-argument to this position is that the Speaker's efforts to help get state candidates elected garner him political support in his own campaign activities. However, that is not the conduct the BCRA purports to curtail. The BCRA will still allow federal candidates to speak or be featured guests at fundraising events for state, district, and local political parties. BCRA § 101(a) (adding new FECA § Sec. 323 (e)(3)). Surely such appearances would engender the support of those in attendance. Since that activity is permitted by the BCRA, this counter-argument to the Speaker's position must fail.

Recently, in an apparent attempt to diminish the impact of Title I on a federal candidate's ability to raise money for state and local candidates, the Federal Election Commission issued an Advisory Opinion that extends the "featured guest" safe harbor mentioned above to other non-federal fundraising events. FEC Advisory Opinion No. 2003-3. However, the Advisory Opinion does not make Title I any less objectionable. It allows members to speak at non-federal fundraisers as long as they avoid "asking" for money, or in the alternative, if they choose to make any solicitations, they must affirmatively disclose that they are not asking for any donations that would violate the FECA. Requiring federal candidates to make magical incantations in order to solicit funds for a state candidate is an unconstitutional burden on their freedom of speech.

The Advisory Opinion also provides that in the event a federal candidate is mentioned in any advertisement containing a solicitation of funds for a state or local candidate, the advertisement must contain a written explanation that "limit[s] the solicitation to funds that comply with the amount limitations and source prohibitions of the [FECA]." FEC Advisory Opinion No. 2003-3, p. 7. Thus, in any state which allows candidates to raise funds in excess of the limitations imposed by the FECA or from sources prohibited by the FECA, state and local candidates will be forced to exclude any mention of a federal candidate from their fundraising solicitations. Otherwise, the state or local candidate will be unable to take full advantage of their state's campaign finance laws. The Advisory Opinion and its administratively created requirements do not remedy the constitutional infirmities of the BCRA.

The simple truth is that the supporters and drafters of the BCRA view money as a great evil from which political candidates must be sanitized. Even if the fear that money corrupts politicians were somehow valid, which this Court has repeatedly recognized it is not, limiting the Speaker's ability to raise money for state candidates is of no value to that end. *See, e.g., Buckley*, 424 U.S. at 19-22 (upholding the FECA's contribution limits but recognizing that political speech requires money). Therefore, the BCRA's overwhelming intrusion into the Speaker's participation in state politics fails to meet any compelling governmental interest. As a consequence, these provisions of the BCRA are unconstitutional.

C. The BCRA as Adopted Unconstitutionally Limits the Speaker's Ability to Participate in Other State and Local Organizations.

Because the BCRA as adopted arguably defines the Speaker as an agent of the National Republican Congressional Committee, the Speaker must refrain from participating in any organization that does not wish to be subject to the restrictions imposed by the BCRA. It is easy to discern the types of organizations that would not wish to become subject to the soft money ban imposed on political parties. Churches, civic leagues, business leagues, conservation leagues, and social welfare organizations all prefer to preserve their ability to raise large contributions from individuals and corporations. While the BCRA does allow the Speaker to raise money for these types of organizations, it does not contain a provision specifically authorizing him to be a member of these groups, much less assume a leadership role in the groups without arguably imposing the restrictions of the BCRA upon them. BCRA § 101(a) (adding new FECA § 323(e)(4)).

This severe and unwarranted potential intrusion is a concern of any federal candidate, but much more so for the Speaker due to his role in the National Republican Congressional Committee. If his role in an organization leads to a determination that it is controlled by the National Republican Congressional Committee, then federal law will prohibit the organization from soliciting donations beyond BCRA restrictions. Imagine a church not being able to accept a donation from a parishioner because it exceeds the limitation on donations to a political party, or being prohibited from receiving any contribution from a local business because corporate contributions are not allowed by the FECA. Such a result is absurd, but entirely possible under the BCRA, as adopted, if the Speaker assumes a leadership role at the church. Similar fates could befall civic leagues or conservation societies if they allow the Speaker to participate meaningfully in their organizations. This is true even if the organization has no political objectives whatsoever. To avoid any possibility of such an outcome, the Speaker must exclude himself from such positions, which, quite obviously, violates his right and the right of the organization to freely associate.

What benefit is derived from this incursion? It is difficult, if not impossible, to determine how preventing the Speaker from assuming a leadership role in his church or in a civic league will engender more confidence in the federal government from American citizens. Indeed, the average citizen, perhaps even the average legislator, would not realize that the BCRA creates such restrictions. Consequently, they cannot engender confidence in the government. Nevertheless, these restrictions clearly exist under the BCRA and demonstrate that the Act is over-inclusive. This violates First Amendment guarantees of freedom of association and Fifth Amendment guarantees of equal protection. Thus, for yet another reason, this Court should declare Title I of the BCRA unconstitutional.

II. THE BCRA AS ADOPTED VIOLATES THE CONSTITUTION BY IMPERMISSIBLY RESTRICTING THE SPEAKER'S ROLE IN HIS NATIONAL PARTY

If the constitutional violations highlighted above are allowed to occur, they will render one inescapable result: For the Speaker to participate in his state government, raise campaign funds for state candidates according to state law, and participate in other non-political organizations, he must relinquish his role as the leader of the National Republican Congressional Committee. Otherwise, he must give up cherished fundamental constitutional rights. This is a Hobbsian choice that the Speaker should not be forced to make.

At the beginning of each session of Congress, the Speaker of the House is elected from, and by, its Members. Ballots are cast until an individual Member receives a majority of the votes cast. As a consequence of this process, the Speaker is always a member of the majority party. To be elected Speaker of the House, a Member must demonstrate the capacity to be a leader among leaders, and, naturally, the Member must show a strong allegiance to his party. Members choose a Speaker for many reasons, including his or her perceived ability to maintain the cohesiveness of the party during the legislative process and to ensure that their party maintains its majority.

The importance of maintaining control of the House to a political party cannot be overstated. To achieve its political agenda, each party strives to gain and maintain a majority in the House of Representatives. This allows the majority party to elect a Speaker, who, in turn, controls the legislative agenda and exerts considerable influence on committee appointments. These powers allow the party, through the Speaker, to focus on enacting legislation that is consistent with the ideological goals of the party.

The very purpose of the National Republican Congressional Committee is to maintain Republican control of the House. The Speaker must assume a leadership role with the NRCC in order to achieve the goals of his office. The NRCC provides the Speaker with the information and resources that are essential to maintaining control and achieving the Republican Party's legislative agenda. It monitors congressional races throughout the United States and helps the Speaker target districts in which Republicans may gain or lose Congressional seats. It helps to unify the political message that Members are presenting to their constituents, and it provides assistance to congressional candidates during their campaigns.

As adopted, the BCRA will force the Speaker to make a choice: He may continue to serve as the *de facto* leader of the NRCC or he may terminate this role and engage in more significant participation with state political and non-political organizations. In reality, this is not a choice. If the Speaker wishes to retain his position, he must elect to continue his role in the NRCC. Failure to do so would render him unable to assist other Members effectively in their bids for reelection. Furthermore, his ability to assist fellow Members in presenting a unified message and to maintain cohesiveness within his party would be hampered.

Nevertheless, the BCRA clearly punishes the Speaker for electing to associate with the NRCC. To assume his traditional role as a leader of his party, he must sacrifice his individual liberties. This burden on his association with his party is constitutionally impermissible and should not be countenanced by this Court. It should also be recognized that this is a significant attack on the way the NRCC chooses to organize and select its leadership, which, on its own, violates the Constitution. *See California Democratic Party*, 530 U.S. at 573; *Tashjian*, 479 U.S. at 224 ("The Party's determination of the boundaries of its own association, and the structure which best allows it to pursue its political goals, is protected by the Constitution."). Such prohibitions against political participation advance no legitimate ends and can only erode the confidence the American people have in their political process. By pursuing such prohibitions, the BCRA serves only to cause irreparable damage to the very confidences it seeks to preserve.

CONCLUSION

For Members of Congress, the BCRA imposes a forfeiture of constitutional rights simply by virtue of one's being a federal officeholder. The Speaker challenges the restrictions imposed, whether as signed into law or as interpreted by the District Court, on what Members can do for others, not on the limits to what Members can do for themselves. There are no challenges to the new BCRA limits for Congressional campaigns. However, the Speaker challenges the restrictions that tend to isolate Members from their parties and, most significantly, from their home states. It is a political process. Members do not stop being citizens of their home state by virtue of deciding to run for federal office. The BCRA ignores this fact and, as a result, it imposes unconstitutional restrictions unrelated to its purpose to the harm and detriment of Members' fundamental constitutional liberties.

For these reasons, J. Dennis Hastert, Speaker of the United States House of Representatives, respectfully asks the Court to declare Title I of the Bipartisan Campaign Reform Act of 2002 unconstitutional.

Respectfully submitted,

J. RANDOLPH EVANS *
STEFAN C. PASSANTINO
SETH F. KIRBY
ARNALL GOLDEN GREGORY LLP
2800 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3450
(404) 873-8500

Counsel for J. Dennis Hastert,
Speaker of the United States
House of Representatives

* Counsel of Record

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MITCH MCCONNELL, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE AND THE INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANTS

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant cases are of central interest to Cato and the Center because they present issues at the very heart of the First Amendment and offer a once-in-a-generation opportunity to reexamine comprehensively of the Constitution's treatment of core political speech.

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between freedom of speech and government mandates, and thus touches the very core of IJ's mission and ideals.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

STATEMENT

The First Amendment framework for government regulation of election-related political speech and association has been anchored for the last generation by this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). That decision declared a compelling, though vaguely defined, government interest in preventing the corruption or the appearance of corruption of elected officials. *Buckley* also carved out various exceptions to the strict scrutiny ordinarily applied to restrictions on core political speech and association. Campaign contributions to candidates were given less protection than independent expenditures for speech in support of a candidate. So-called "express advocacy" of the election or defeat of a candidate was given less protection than other election-related political speech. And corporations and labor unions were given less protection than given to other groups for their political speech and association.

The lines defining such exceptions to strict scrutiny, however, were never particularly stable or principled, and thus have given rise to considerable litigation attempting to expand or contract First Amendment protection for election-related speech and association. The result has been a system that neither allows predictable and coherent regulation nor provides reliable protection to core First Amendment activities.

Indeed, the badly fractured opinion of the district court in these cases stands as a stark illustration of the inconsistencies and confusion that *Buckley*'s unprincipled lines have wrought. Of the three judges seeking faithfully to apply *Buckley* and its progeny, one found cause to sustain virtually all of the challenged provisions of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"). Another found cause to invalidate virtually all such provisions. And the third straddled the fence, picking and choosing various provisions and even separate phrases to sustain or reject. While appellants can discuss the particular inconsistencies of reasoning within the fragmented opinions below, the larger point is that such fragmentation is, and will be, the inevitable result of a line of cases based upon conflicting principles that can be selectively used in support of almost any potential result.

SUMMARY OF ARGUMENT

1. *Buckley* v. *Valeo* erred by recharacterizing the most elemental aspects of representative democracy as "corrupt" and by creating unprincipled exceptions to the First Amendment protection of core political speech and association. It and its progeny should be overruled and replaced with a more consistently speech-protective jurisprudence. This Court should begin by recognizing that the value of political speech and expressive association in getting a candidate elected is not an *improper* source of influence over such candidate. That politicians will be responsive to those who support them and who, through core political speech, help persuade others to do so, is not corruption; it is democracy at its most basic. That different speakers will speak more or less according to their means and inclination, and will be more or less persuasive to the public according to a myriad of factors, likewise is not corruption. It is the freedom of speech at its most basic. Genuine corruption of elected officials involves the exchange of official conduct for some *personal* gain. The exchange of political speech or association in return for lawful official conduct if elected is *representation*. While combating genuine corruption is indeed a compelling interest, combating political influence mediated through speech and expressive association is not. The essential mechanics of democracy and free speech, whatever their pros and cons, cannot be categorized, *ipse dixit*, as corrupt under our present Constitution.

And just as attacking misconceived notions of corruption is not itself a compelling interest, neither is the attempt to eliminate an erroneous public "perception" that such ~~democ~~ratic and free-speech fundamentals are somehow corrupt. If the public misperceives a corruption of our constitutional system, more speech to explain the Constitution, not judicial abandonment of that Constitution, is the proper response. And if the public nonetheless continues to view our constitutional system as fostering "corrupt" practices, then the only permissible response is to change the Constitution itself by the means provided therein, not by judicial fiat based upon the mere appearance or perception of non-existent corruption.

2. Replacing the *Buckley* regime with a more coherent and workable jurisprudence also requires eliminating the various unprincipled exceptions to full First Amendment protection for core political speech and association. *Buckley* set up a series of false dichotomies between contributions and expenditures, between "express" advocacy and other forms of political advocacy, and between corporate and union speech and speech by other associations. Under a proper conception of corruption as involving official action exchanged for personal gain, not merely political support, those dichotomies collapse. Campaign contributions are just another form of expressive association, can be used only to support expressive activities, not for personal gain, and thus any influence they may generate is not corrupt. Express advocacy of the election or defeat of a candidate is indistinguishable from all other political advocacy and carries absolutely no risk of corruption properly understood. And political speech and association by corporations and labor unions pose no unique threat of corruption. The restrictions on speech and association by such entities are based on the constitutionally improper notion that speech by the economically or socially powerful can and must be restricted in order to give others a greater relative voice.

3. A return to core First Amendment principles would also require reversal of *Buckley*'s too-casual willingness to force disclosure of the identities of private citizens making expenditures or contributions for political speech either directly or in association with other such speakers. Anonymous political speech and associational privacy are powerful guarantors of the exercise of free speech, and forced disclosure is an equally powerful tool to suppress the speech of unpopular speakers or those who would support unpopular views. Any legitimate concern with making political influence over government officials more transparent to the voting public can be accommodated by requiring the *candidates* to disclose all contributions received, including whether such contributions were made anonymously. The public itself then can decide whether to be skeptical of candidates accepting or rejecting such anonymous support and vote accordingly. Likewise with anonymous political speech itself, or associations preserving the privacy of their members or supporters, the public can judge accordingly such speech and association, and the candidates supported or opposed thereby. Public knowledge of the fact of anonymity thus obviates the need to violate such anonymity and protects speakers who might otherwise be silenced through forced disclosure.

4. Replacing *Buckley* with a more speech-protective regime consistent with the First Amendment would promptly resolve most of the specific challenges to the BCRA at issue in these appeals. The BCRA provisions restricting soft-money, electioneering communications, campaign contributions, and coordinated expenditures, requiring myriad forms of disclosure, and discriminating between well-funded and poorly-funded speakers, all would fail strict scrutiny. Absent *Buckley*'s flawed conception of corruption, none of those provisions narrowly serve compelling interests.

ARGUMENT

The fundamental flaws of *Buckley* v. *Valeo* cast a pall over any attempt to formulate a coherent jurisprudence regarding election-related speech and association. Both time and analysis have demonstrated that various aspects of *Buckley* are unworkable and indefensible. The current cases present this Court with a vital opportunity to return to core First Amendment principles and either eliminate or at least minimize the contradictions in *Buckley* and its progeny.

I. THE GOVERNMENT INTEREST IN PREVENTING CORRUPTION IS ILL-DEFINED AND OVER-INCLUSIVE.

Much of the difficulty in recent campaign finance jurisprudence stems from a flawed conception of the government interests at stake. The primary government interests asserted in support of campaign speech restrictions are the prevention of "corruption and the appearance of corruption" of elected officials. *See Buckley*, 424 U.S. at 25; *see also*, *FEC* v. *Beaumont*, -- U.S. --, 123 S. Ct. 2200, 2206 (2003) ("ban [on corporate contributions] was and is intended to 'preven[t] corruption or the appearance of corruption'") (citation omitted); *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 388-389 (2000) (discussing corruption interest). But as with the asserted interest in judicial impartiality in *Republican Party of Minnesota* v. *White*, advocates of campaign speech restrictions are "rather vague" about what they mean by corruption and yet "[c]larity on this point is essential before we can decide whether" preventing corruption is "indeed a compelling state interest, and, if so, whether the [restriction at issue] is narrowly tailored to achieve it." 536 U.S. 765, 775 (2002).

A. Influence Over Elected Officials Mediated through Speech, Expressive Association, and Voting Is the Essence of Democracy and Is Not Corrupt.

Buckley focused on a government interest in preventing "the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25. This Court's recent decision in *Beaumont* similarly explained that "corruption" is to be "'understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence.'" *Beaumont*, -- U.S. at --, 123 S. Ct. at 2207 (citation omitted). The asserted interest in preventing "corruption," however, fails to differentiate between proper and improper influence on government officials. Without a principled basis for drawing such a distinction, the label "corruption" simply devolves into a generic epithet addressed at any political influence that is contrary to the often unspoken preferences of the person applying the label.

The basis for a distinction between proper and improper influence over elected officials necessarily starts with the recognition that democracy in general, and elections in particular, are, by definition, an exchange between candidates and the citizens that elect them. Every candidate for office necessarily says to voters: "Give me your vote, give me a job as your representative, and I will give you something in return." Different candidates offer different things in exchange for being given their jobs. Some promise to lower taxes, some to provide more social services; some promise to fight for abortion rights, others to fight against abortion; some promise to bring more public works to their jurisdiction, others to reduce "pork" in politics. And every voter says to the candidates in turn: "Give me the policies and laws that I desire and I will give you my vote for a job as my elected representative. Deny me the official actions I desire and I will vote you out on your ear." The exchange of elective office for desired official conduct, and the influence over government officials that such an exchange necessarily creates, are the essence of representative democracy and neither the exchange nor the influence can be characterized as improper without indicting our democratic system as a whole.[2]

Our constitutional democracy also relies on the core premise, endorsed through the First Amendment, that politicians and the public will be influenced not merely by periodic voting alone, but also by the political speech of competing interest groups and individuals. The influence exerted through the exchange of supportive political speech for desired official action is an inherent and desirable element of a democracy that relies upon speech and elections, rather than force, to change its laws and leaders.[3] To indict the exchange of political support for official action would brand virtually *all* behavior by elected officials as corrupt and would condemn the Constitution itself.

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[2] Even where the exchange of elective office support for desired public policy is expressed in terms of an explicit *quid pro quo* – vote for me and I promise to do X; we will vote for you if you promise to do X – there still is nothing *improper* about that exchange. In fact, the exchange is precisely what we want and expect it to be. Voters are entitled to vote for candidates responsive to their desires, and candidates are entitled to respond to those desires through lawful official action.

In contrast to the fundamental democratic exchange of electoral support for desired official conduct, genuine corruption is limited to the exchange of official action for some private advantage. Bribery is the archetype of such corruption: "I'll give you cash for your *personal* benefit if you vote for an upcoming bill." But the element of private gain inherent in the concept of corruption does not and cannot include whatever personal satisfaction and benefit come from being elected to public office. And if the benefit of actually being elected cannot be deemed corrupting, neither can the potential electoral benefit from speech or association in support of a candidate be deemed corrupting. While such speech, like votes themselves, may well be exchanged for official action, such exchanges are the essence of representative democracy and may not be redefined, *ipse dixit*, as "corrupt."

The suggestion that corruption can be found in the substantial magnitude of some political influence, rather than in its mere existence, is equally unavailing. Characterizing the influence of expressive activities as "coercive" or "undue" is merely an epithet, not an explanation of how it differs from the substantial influence associated with other forms of political support or with the need to remain in favor with voters. Many things have an influence – indeed, even a coercive influence – on candidates' positions and actions, yet few would be considered improper.[4] The mere size or force of influence thus is not the measure of whether such influence is corrupt.

While corruption cannot be found in the mere existence or magnitude of political influence, the notion of "undue" influence might be meant to suggest influence out of proportion to the person or group wielding it. Any indictment of "disproportional" influence, however, begs the question of how much influence any given person or group *should* have in some idealized construction of the world. While each person has only one *vote*, and hence has limited influence in that sense, we have never imagined that the *speech* of each person or group should be equally influential or that the views of politicians should be based solely on broad opinion polls.

Speech having unequal influence on the public, and hence unequal value to candidates, comes in many shapes – speech by the media, speech by celebrities, speech by religious leaders, and speech by the economically successful. Whether through differences in access, quantity, or credibility, the impact of speech necessarily will vary.[5] But the falsely egalitarian notion that the speech of persons and groups *ought* to have influence in proportion to the voting strength of the speakers, and the assumption that speech in fact will have influence solely in relation to its quantity, represent fundamental misunderstandings of the principles and predicates of the First Amendment.

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[3] Just as with votes, speech is routinely exchanged for the promise and performance of official conduct. A newspaper that says it will only endorse a candidate who pledges to vote for/against abortion rights, a citizens' group that says it will endorse a candidate that pledges not to raise taxes, and a candidate that promises to increase law enforcement in exchange for the endorsement of a respected anti-crime advocate, all are engaged in the same exchange embodied in the election process itself.

[4] Public opinion is an obvious example of something that might "coercively" influence a candidate – at least any candidate that takes seriously his or her role as a representative of constituents and who has any interest in being elected or re-elected. Vehement public opposition to a particular policy would exert a tremendously coercive influence on candidates considering such a policy. Yet that influence could not be deemed corrupt.

[5] And if an elected official is more responsive to those constituents that have a greater impact in persuading the public to vote for him or her, that is not corruption – that is simply politics. Disparities in influence are the inevitable consequence of differences in wealth, intelligence, popularity, motivation, and a hundred other factors. Such disparities might be addressed through means such as education, economic opportunity, and the like, but they can never be eliminated in a free society.

The *freedom* of speech means that the quantity and substance of speech *ought* to be determined by private choices, not government control. And the First Amendment assumes that, so long as government stays out of the way, the eventual influence of speech will turn on its substance, not its quantity or initial popularity, and that more speech is superior to restricted speech. Through such assumptions the First Amendment places its trust in the public, not government, to sort it all out in the end. As classically explained by Judge Learned Hand, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

Even if disparities in actual or apparent influence are troubling, the government may not attempt to equalize the political strength of different elements in society by restricting the voice of some to enhance the voice of others. *Buckley*, 424 U.S. at 48-49. The First Amendment uniquely and especially condones political influence mediated through speech and forbids government manipulation of that aspect of the political process. However imperfect or worrisome a system built on such influence may be, it is the system the Constitution established, it is better than the alternatives, and it may not simply be redefined as "corrupt" in order to avoid the First Amendment.

The exchange of political speech and association for desired official action embodies representative government. To have a coherent definition of corruption, the concept must be limited to official action exchanged for some *private* advantage, not simply for the very public advantage of getting elected. Any alleged interest based on contrary assumptions is not compelling, is not substantial, and is not even valid.

B. Eliminating the Mere Appearance of Corruption Is Not a Compelling Government Interest.

Absent a demonstrable interest in preventing actual corruption, campaign-related restrictions often are alleged to serve the interest of avoiding a public perception of unproven corruption – the mere "appearance of corruption," *Buckley*, 424 U.S. at 27 – that might shake confidence in our democratic institutions. But mere public suspicions or misperceptions that the operation of free speech is somehow corrupt are no bases for ignoring the constitutional scheme. Rather, the proper answer to such misperceptions is either more speech, the election of candidates voluntarily practicing the public's notion of virtue, or, ultimately, a constitutional amendment if the existing system cannot hold the public's confidence. In no event are public misperceptions a justification for distorting constitutional provisions set out precisely to resist even the strongly held desires of a temporal majority.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. *Barnette,* 319 U.S. 624, 638 (1943).

Maintaining the public's esteem may be desirable for a government deserving of such esteem, but it is not a sufficient basis for avoiding constitutional requirements. The government surely could not forbid speech accusing elected officials of corruption because they kow-tow to political polls or favor the interests of their home states, regardless whether such criticism caused the public to *believe* – rightly or wrongly – that elected officials were corrupt.[6]

If the danger from exposing or imagining a corrupt government is so great, then there should be ample incentive for more speech to counter such danger. And if more speech is insufficient to mitigate the public's contempt and distrust for the government, and to restore its confidence in our constitutional system, then presumably there will be sufficient support and motivation for a constitutional amendment.

II. ALL AVENUES OF POLITICAL EXPRESSION AND EXPRESSIVE ASSOCIATION SHOULD RECEIVE FULL FIRST AMENDMENT PROTECTION.

It is a cornerstone of the First Amendment that restrictions on political speech and association are subject to strict judicial scrutiny. Yet *Buckley* and its progeny apply a lower level of scrutiny to restrictions on campaign contributions, on express advocacy of a candidate's election or defeat, and on corporate or union speech than to restrictions on other election-related speech and association. *Beaumont*, -- U.S. at --, 123 S. Ct. at 2210; *Nixon,* 528 U.S. at 386-388; *Buckley*, 424 U.S. at 25. Such differential scrutiny is based on non-existent or irrelevant distinctions between contributions and expenditures and on misperceptions regarding what constitutes corrupt influence. A return to First Amendment fundamentals would apply strict scrutiny to all restrictions on political speech and association, including restrictions on campaign contributions, express advocacy, and corporate or union speech.

A. The False Dichotomy between Contributions and Expenditures.

The BCRA carries forward the prior regime of restricting campaign contributions, albeit with some modification in the amounts, a prohibition on contributions by minors, and some exceptions for candidates with well-financed opponents. *See, e.g.*, BCRA §§ 304, 307, 316, 318 & 319. And many of the BCRA's more onerous expenditure restrictions are defended, at least in part, as means of preventing circumvention of existing contribution limits and depend upon the supposed validity of such limits. The validity of contribution limits in general both is implicated by the challenges to the "minor" and "millionaire" provisions, and is "fairly embraced within the question[s]" presented regarding the BCRA's expenditure and disclosure provisions. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

As *Buckley* at least initially recognized, both contributions and expenditures "operate in an area of the most fundamental First Amendment activities," in which the "First Amendment affords the broadest protection" for individual expression and the "fundamental" right to associate. 424 U.S. at 14, 25. *Buckley* also correctly recognized that the ability to expend money for speech and to associate and pool money for group speech were fully protected by the First Amendment. *Id.* at 15-19. As with many rights, exercising the right to speak almost always costs money, especially if the speaker intends to reach a large audience. The right to speak thus necessarily encompasses the right to pay for speech or the distribution of speech, just as the right to counsel encompasses the right to hire a lawyer and the right to free exercise of religion includes the right to contribute to a church. In each of those cases the expenditure or contribution is protected not because "money is speech" or "money is a lawyer," or "money is religion," but rather because such targeted use of money is part of the *exercise* of the right to speak, to counsel, or to free exercise of religion.

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[6] The weight given to the appearance of corruption in *United States Civil Service Commission* v. *National Association of Letter Carriers* involved partisan conduct by non-elected civil service employees charged with *administering* the law, 413 U.S. 548, 564-65 (1973), and cannot credibly be translated to the behavior of *elected* officials who *make* the law, who are necessarily political, and who can and should favor the positions of their political supporters. Concerns over undue favoritism or unequal burdens are properly addressed by the Equal Protection and Takings Clauses, as well as by the next election cycle.

Buckley's diluted scrutiny for contribution restrictions was based on the claims that contributions involve only symbolic speech by the contributor, that any further expression is contingent on "speech by someone other than the contributor," and that the burden imposed by contribution restrictions are marginal. 424 U.S. at 21-22. Those assertions, however, are both wrong and irrelevant to the applicable level of scrutiny.

More than Symbolic Speech. The claim that contributions involve only the "undifferentiated symbolic act of contributing," unrelated to the amount of the contribution, 424 U.S. at 21, is simply incorrect. Even *Buckley* itself later acknowledged that "[m]aking a contribution * * * enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22. Just as with contributors to other advocacy groups, campaign contributors form part of an expressive association organized around a favored candidate who is both an object of the collective speech as well as a unifying spokesperson or coordinator for such speech.

Contributors thus "speak" not only through the symbolic act of contributing, but also through the speech funded by the contribution.[7] Such speech will indeed vary in both scope

and reach according to the amount of contributions. And even if *Buckley*'s characterization of contributions as only undifferentiated symbolic speech were accurate, contributions to candidates would be no different from contributions to other speakers or groups and thus deserve no less protection.

Contributions Earmarked for Collective Speech. As for *Buckley*'s disparagement of the contingent and once-removed nature of the speech that results from contributions, 424 U.S. at 21, such criticism is again wrong and irrelevant to the standard of scrutiny. Unlike gifts or bribes, campaign contributions can be spent *only* to support campaign-related expression, BCRA § 313, and hence implicate purported government interests only when they *are* spent to support such expression. Because contributions only have value to a candidate when used to support political speech, both sides of the First Amendment balance turn on the same contingency, rendering that contingency irrelevant. And while the candidate may do the literal speaking that results from contributions, it is emphatically *not* true that such speech is *only* that of the candidate, rather than the speech of both the candidate and the contributors combined. That someone other than the multiple contributors utters the final words neither diminishes the expressive interest of the contributors nor distinguishes contributions from other expenditures for speech.

First Amendment Offense Not Marginal. *Buckley*'s third asserted distinction is that contribution restrictions have only a marginal impact on political expression. 424 U.S. at 21-22. But that attempted distinction is no more tenable than the previous two. The size of the First Amendment burden imposed by contribution limits is not as slight as *Buckley* suggests and, in any event, it is the character, not the magnitude, of a speech restriction that dictates the standard of scrutiny applied. Even a trifling speech tax discriminatorily imposed on messages critical of the government would be subject to strict scrutiny regardless of the size of the burden on such speech.

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[7] *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958) (association "is but the medium through which its individual members seek to make more effective the expression of their own views"); *see also*, *Buckley*, 424 U.S. at 22 (role of associations is to "effectively amplify[] the voice of their adherents"); *Nixon*, 528 U.S. at 415 (Thomas, J., dissenting) ("a contribution, by amplifying the voice of the candidate, helps to ensure the dissemination of the messages that the contributor wishes to convey").

Contrary to *Buckley*'s suggestion, a contribution limit is not merely an "indirect[]" burden on campaign speech, "making it relatively more difficult for candidates to raise large amounts of money." 424 U.S. at 26 n. 27. There is nothing *indirect* in conditioning the amount of a candidate's expression on his ability "to raise funds from a greater number of persons," and there is nothing *indirect* in "compel[ling] people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Id.* at 21-22. Rather, allowing speakers to raise and pool money only by bits and pieces, and doing so precisely *because* such money will be used for political speech, quite directly offends the First Amendment and burdens speech and association.[8]

Whether direct or indirect, however, the burden also is substantial, particularly where the aggregation of large amounts of money is essential for access to "expensive modes of communication" such as television, radio, and other mass media, which are "indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 19. Requiring a gardener to water a garden with a thimble rather than a pitcher plainly would burden the production of flowers, and so too with contribution limits and the production of speech. Contribution limits necessarily increase the time and expense a candidate must devote to raising money to support speech and divert such time and expense from the campaign speech itself. And they increase the burden on contributors as well, who must search for less effective means of combining in support of a shared message and are likely to find numerous alternative avenues of expressive association foreclosed as well.

Contributions Are Not Corrupting. The flawed dichotomy between contributions and expenditures regarding the standard of review is compounded by the flawed claim of a greater threat of corruption from contributions. But *neither* expenditures nor contributions threaten corruption as properly understood. The *only* function of campaign contributions or expenditures is to generate political speech and the *only* value to a candidate stems from the prospect that the resulting speech will persuade voters and help the candidate get elected. If a candidate were to receive contributions for some *personal* use such as buying jewels or fancy cars, that would indeed be corruption.[9] But contributions that assist the candidate in getting elected through the entirely proper mechanism of generating political speech are no different than endorsements or votes. Because the assistance is ultimately channeled through the protected medium of political speech, it cannot be deemed corrupt.

In the end, the speech and association interests are fundamentally identical for expenditures and contributions that can be used only to support speech and the jurisprudential line separating them is incoherent. Both should be afforded the "fullest and most urgent application" of the First Amendment, *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971), and restrictions on either should be subject to no less than the full force of strict scrutiny. Indeed, content-based restrictions on such core political speech and association should be *per se* invalid under the First Amendment, with no further inquiry or balancing required. *Republican Party of Minnesota*, 536 U.S. at 793 (Kennedy, J., concurring).

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[8] That the burden is imposed because the money is targeted for speech is what distinguishes contribution restrictions from general income taxes or similar financial burdens that have only an incidental effect on speech and thus fall within the analysis of *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). But a restriction specifically on raising money for speech and imposed precisely because such money will be spent on speech – *i.e.*, because of its communicative impact – fails the *O'Brien* test. *Id.* at 382.

[9] The fundamental line between corrupt and non-corrupt payments to candidates is reflected in BCRA § 313, which provides that a "contribution or donation described in subsection (a) shall not be converted by any person to personal use." Concern that contributions will be converted to personal use notwithstanding § 313 can be handled by audit procedures to enforce that prohibition.

B. The False Dichotomy between "Express Advocacy" For or Against Candidates and Other Forms of Political Speech.

One manifestation of the incoherence of the distinction between expenditures and contributions was its immediate abandonment regarding express advocacy of the election or defeat of a candidate. Such advocacy, of course, is pure political speech, and "is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Buckley*, 424 U.S. at 48.[10]

Yet despite this Court's apparent recognition of express advocacy's undiluted First Amendment status, *Buckley* ultimately denied such election advocacy full protection because it was thought to be functionally equivalent to a contribution, would be valued similarly by a candidate, and thus could be restricted in some instances as a means of preventing circumvention of the contribution limits. 424 U.S. at 43-44 & n. 52. And it is precisely that distorted view of political speech as a means of circumventing contribution limits that has driven the BCRA's further restrictions on express advocacy and on the broader category of electioneering communications.

Perhaps if *Buckley* had reasoned in the opposite direction, the First Amendment principles at stake would have been clearer. Advocacy of the election or defeat of a candidate – whether express, implied, or otherwise – is a quintessential example of political speech and should be entirely immune from regulation. While a candidate likely will value and appreciate supportive political speech, especially if it is effective in persuading others to support the candidate, that is true of all political speech. Valuing such support and being responsive to those who advocate effectively for your election is at the heart of being an elected official. From there the recognition of strong similarities between express advocacy for a candidate and contributions to that candidate's campaign fund – the very purpose of which is to generate express advocacy for the candidate – is cause to fully protect contributions, not to create a bigger hole in the First Amendment.

To instead use contribution limits to bootstrap still further restrictions on speech that might influence candidates causes the unprincipled exception to swallow the First Amendment rule. Effective political speech and association used to influence government are not means of *circumventing* restrictions on supposedly improper influence. Rather, they are the constitutionally favored alternatives for achieving desired ends *without* force, bribery, or other improper means. And even if there is some salient difference in the influence generated by express, as compared to all other, advocacy, that difference should be evaluated under normal strict scrutiny by asking whether the interest in suppressing speech-mediated influence is compelling and the remedy narrowly tailored.[11]

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[10] But for that basic protection, it could be made a crime for an individual – not merely a corporation or labor union – to take out a small newspaper advertisement that read "Vote for Harry Browne." *See Buckley*, 424 U.S. at 40.

[11] Coordinated expenditures are another example of direct speech and direct association being grouped with and scrutinized as contributions despite the complete absence of the alleged distinguishing features of contributions. Any greater influence such expenditures might have does not lower the First Amendment bar, but at most increases the governmental interest to be weighed within the existing parameters of strict scrutiny.

C. The False Dichotomy between Different Forms of Collective Associations.

Another of *Buckley*'s unfortunate legacies is the inconsistent treatment of multiple forms of collective speech. While *Buckley* and later cases applied strict scrutiny to restrictions on speech by private associations in general, this Court has given less First Amendment protection to such private associations as corporations and labor unions. *See FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-53, 256-60 (1986) ("*MCFL*").

This Court's recent *Beaumont* decision surveyed the various reasons that have been used to restrict corporations and labor unions to a greater extent than individuals or other types of expressive associations. The justifications for restricting corporate and union speech included the supposed "special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and * * * to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace"; the interest in preventing such wealth from being "converted into political 'war chests' which could be used to incur political debts from legislators"; the supposed protection of "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed"; and preventing the use of corporations "as conduits for circumvention of [valid] contribution limits" by corporate owners or employees. *Beaumont*, -- U.S. at --, 123 S. Ct. at 2206-07 (citations and quotation marks omitted).

Those arguments are not persuasive justifications for reduced scrutiny of restrictions on political speech by business corporations and labor unions. Those entities are vital associations based on the shared interests of their members – assuming voluntary purchase of stock by shareholders or payment of membership dues by workers. That those interests

are largely economic does nothing to diminish their constitutional status. Political advocacy and speech driven by economic perspectives are likely universal and, in any event, are no different than speech motivated by less worldly concerns. *Cf. NAACP* v. *Alabama*, 357 U.S. at 460 ("it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters").

Claiming that corporations possess an "unfair" advantage because they have characteristics that allow them to accumulate significant capital is no more and no less than a complaint that they are wealthy and that it is somehow wrong to use wealth to support political speech. The notion that corporations can achieve their wealth through special advantages hardly distinguishes them from other expressive associations, all of which can adopt the corporate form if they so choose. Furthermore, the very characteristics that help corporations raise money – the liquidity of reasonably priced shares of stock and the limited financial risks of stock ownership – also facilitate widespread and voluntary association of all types of citizens through the medium of a corporation. In any event, we do not examine individual speakers to see if their personal resources were obtained through some special advantage – perhaps ownership of corporate stock – and thus the cause of corporate wealth seems irrelevant to whether such wealth can be deployed for political speech.[12] Calling such wealth a

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[12] Laws and regulations targeted at the non-expressive conduct of corporations or labor unions that impose incidental burdens on expression would be evaluated under the familiar *O'Brien* test for such mixed-effect laws. Of course, in these cases, the *O'Brien* test is inapplicable because the BCRA is specifically aimed at the expressive consequences of contributions and expenditures *for* speech, rather than at any conduct itself. *See Buckley*, 424 U.S. at 17 ("Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve 'suppressing communication.'").

"war chest" to be used in return for political favors adds nothing to the analysis and fails to differentiate the wholly non-corrupt political debts incurred in return for all other forms of political speech, association, and support. *See supra* Part I.

Insofar as the perceived unfairness of corporate wealth being used for contributions or expenditures is premised on the notion that corporations can generate speech and influence out of proportion to the strength or support behind their ideas and hence beyond the amount of speech and influence they *ought* to have, that is the same criticism leveled against all large contributions, regardless of source, and begs the same question of what is the "proper" amount of speech and influence. Once again, the notion that the wealthy have too great a voice is not only inadequate as a justification for lesser scrutiny of corporate speech restrictions, it is a reason itself to invalidate such restrictions. Though failing in its application, *Buckley* at least correctly recognized that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 579 (1995).

The notion that corporate and union speech is somehow not a valid reflection of the interests of the shareholders or members, *MCFL*, 479 U.S. at 258, 260, simply ignores that such agency issues are inherent to all associations and do not diminish the speech interests involved so long as association is voluntary. All shareholders and members are free to remain affiliated or not, and do so knowing that the entities are authorized to speak in furtherance of the collective economic interests that they represent. That individuals may have other interests that conflict with their economic interests in a corporation or union – and hence conflict with a corporation's or union's speech – simply puts them to the choice of which interests are more important to them and whether to continue or terminate their association. That same choice is presented by all forms of association.

The related disparagement of corporations or labor unions as being "special," rather than ordinary, interests – with the implication that those interests are somehow less valid – also flies in the face of free-association principles. Whatever the unifying ideas or interests that motivate a particular association's expression, the government simply has no power to regulate speech on the basis of its satisfaction or dissatisfaction with those ideas or motives. The law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

Furthermore, the supposedly narrow motives and interests of different groups not only fail to diminish the constitutional protection for their expressive activities, it is actually a central and important assumption of the Framers and a key aspect of the checks and balances of our Constitution. Those checks and balances are designed to promote a multiplicity of competing factions in order to block domination by any single faction. Indeed, Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45 (Rossiter & Kesler eds. 1999). Madison correctly recognized that "the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*." *Id.* at 48 (emphasis in original). The solution is not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Any supposed concern with "special" interests thus misunderstands the entire problem of faction as it concerned the Founders. Far from being compelling, a desire to decrease special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52.

Finally, claiming that corporations will act as conduits to avoid individual contribution limits begs the question of the validity of such limits and is a problem easily solved by treating corporations the same as individuals and applying the *same* contribution limits.

In the end, all voluntary associations, whatever their primary motivating concerns and actual or potential wealth, collectivize and amplify the speech of their associates. Corporations and labor unions are no exception. Their expressive activity should be protected equally by the First Amendment.

III. ANONYMITY AND ASSOCIATIONAL PRIVACY REMAIN IMPORTANT GUARANTORS OF FREE POLITICAL SPEECH.

Buckley's casual approval of numerous disclosure requirements for speakers and contributors is inconsistent with the recognition of the right to engage in anonymous speech and associational privacy as essential aspects of the freedom of speech and association. The BCRA's numerous disclosure requirements build upon *Buckley*'s error and severely curtail the possibility of anonymous political speech and association in the election context.

Forcing speakers to reveal their identities both compels and restricts speech – they are compelled to say more than they would choose on their own, and they may be deterred from speaking at all if, by revealing their identities, they may expose themselves to various forms of harassment or retaliation for their views. Because of such concerns, the First Amendment protects the rights of individuals to engage in anonymous speech. *See Watchtower Bible and Tract Society of New York* v. *Village of Stratton*, 536 U.S. 150, 166-67 (2002); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334

(1995). Similar concerns underlay First Amendment protection of the right to associational privacy. As this Court has observed,

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association [as other types of burdens] * * *. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

NAACP v. *Alabama*, 357 U.S. at 462.

Notwithstanding the protection afforded anonymous speech and associational privacy, *Buckley* upheld various disclosure requirements on the grounds that contribution disclosures (1) provide a means of gathering data essential to detecting violations of the contribution limits themselves; (2) deter actual corruption and avoid the appearance of corruption by publicizing large contributions and expenditures and thus discouraging their use for seeking political favor; and (3) provide information to the electorate regarding who supports a candidate and thus supposedly reveal something about the candidate's views and about the interests to which he might be responsive. 424 U.S. at 66-68.

Those justifications fail to offer an adequate basis for depriving speakers and contributors of their rights to anonymity and associational privacy. First, the interest in enforcing contribution limits might well be a valid concern if, but only if, such limits are themselves valid restrictions on speech. *Cf. Buckley*, 424 U.S. at 75-76 (discussing disclosure related to invalid expenditure limits). That condition is doubtful given proper First Amendment scrutiny, *supra* Part II(A), and a correct understanding of the quite narrow government interest in preventing corruption. And even if contribution limits continue to be upheld, enforcement concerns are more than adequately addressed by record-keeping and limited disclosure to enforcement authorities themselves. Further disclosure to the public substantially adds to the speech burden without appreciably aiding enforcement of contribution limits.

Second, the alleged interest in deterring corruption and the appearance of corruption is particularly inapt if contribution limits themselves are upheld. The restrictions are so low as to eliminate even the speculative suggestion that the underlying contributions would influence a candidate. In any event, even absent such limits, large contributions and expenditures for speech simply *are not corrupt*, regardless of whether they are given in exchange for political favor. *See supra* Part I.

Third, the information value provided by disclosure is not an adequate basis for government restriction or compulsion of speech and association. Insofar as disclosure is meant to provide information about the contributors or expenders themselves, control over such information is squarely part of First Amendment freedoms. *McIntyre*, 514 U.S. at 342 ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."). And insofar as it is meant to provide information about a candidate, that benefit is far too attenuated to impose First Amendment burdens on third parties making contributions or expenditures. To obtain information about candidates, it is the candidates themselves who should be required to disclose contributions, and if a contribution is made anonymously, that fact can be disclosed without further requiring identification of the donor.[13] A candidate accepting substantial anonymous donations may well be suspect, but the public can judge that for themselves and vote accordingly.

IV. APPLICATION OF GENERAL PRINCIPLES TO SPECIFIC SECTIONS OF THE BCRA.

The previous sections provide an alternative framework for evaluating restrictions on campaign-related speech and association that is more faithful to the First Amendment. All such restrictions should be evaluated under strict scrutiny, and the compelling interest in combating corruption should be carefully cabined to preventing the offer or acceptance of private gain for official action, and should exclude exchanges of political support mediated through speech or association. Under such an approach, essentially all of the BCRA violates the First Amendment. Almost none of those provisions serve an interest in combating genuine corruption, they would not survive true strict scrutiny, and in most instances the provisions are affirmatively antithetical to the core premises of the Constitution and the First Amendment.

For convenience, however, *Amici* will point out several of the more troubling BCRA provisions on appeal that would be invalidated under the proposed framework's renewed commitment to core First Amendment principles.

BCRA Title I: ***Soft-Money Prohibitions.*** Because political parties are private expressive associations entitled to full First Amendment protection, the restrictions in BCRA § 101 on their collection and expenditure of funds earmarked for political speech must be subject to strict scrutiny. Those restrictions would fail such scrutiny because the government's interest is virtually non-existent.

Disclosure Requirements. The requirement that political committees disclose the identities of contributors, BCRA

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[13] If the contributor revealed his or her identity to the candidate, but asked for that information to be withheld, then disclosure of that circumstance too could be required without disclosing the contributor's identity. Of course, a candidate who disclosed having agreed to conceal from the public the identity of a known donor quite likely would lose the trust of numerous voters if the donation truly appears corrupt. Concerns regarding such contributions are thus self-correcting at the ballot box.

§ 103(a), impairs fundamental First Amendment rights of anonymity and associational privacy without adequate government interest or justification. With contribution limits in place, disclosure serves virtually no purpose. And even without contribution limits, any legitimate interest in revealing a candidate's sources of support is adequately served by disclosing the fact of anonymous contributions without disclosing the identities of the contributors.

BCRA Title II: ***Restrictions on Electioneering Communications.*** Disclosure and segregated funding requirements triggered by electioneering communications, BCRA §§ 201(a), 211, 212, also impair the rights to anonymity, associational privacy, and expressive association in general. That the restrictions are triggered by the content and presumed communicative impact of the speech renders them subject to strict scrutiny. Because electioneering communications are not corrupt, restrictions triggered by such communications serve no legitimate, much less compelling, purpose.

Coordinated Expenditures. Restrictions on broadly defined coordinated expenditures, BCRA §§ 202, 213 & 214, involve direct restrictions on speech and association subject to full strict scrutiny. Coordinated speech is not corrupt and restrictions thereon cannot survive First Amendment scrutiny.

Restrictions on Corporate and Union Funding of Speech. Prohibiting business corporations and labor unions from engaging in express advocacy and other electioneering communications, BCRA § 203, and forbidding other associations from using corporate or labor donations for electioneering communications, BCRA § 201(a), squarely suppress the expression of voluntary associations and are subject to strict scrutiny. The interests alleged for suppressing corporate and labor speech are not compelling and in some instances are patently offensive under the First Amendment.

BCRA Title III: ***Contribution Limits.*** The contribution limits contained in BCRA § 307, though higher than previous limits, nonetheless must be evaluated under, and would fail, full strict scrutiny. Because campaign contributions cannot be converted to personal use, BCRA § 313, they have no connection to any genuine corruption and the limits thereon further no compelling government interests.

Wealthy or Popular Opponent Exceptions. The heightened contribution and political party spending limits for *opponents* of wealthy or popular candidates, BCRA §§ 304, 316 & 319, must be judged under, and would fail, strict scrutiny. The higher limits will most often apply to poorer or less popular candidates, who are actually *more* vulnerable to the supposedly corrupting influence of larger contributions. Wealthy or popular opponents – still constrained by the lower limits – are *less* vulnerable to such influences.[14] The self-evident purpose of such differential limits – equalizing the speech of differently funded candidates – is not even valid, much less compelling. *Buckley*, 424 U.S. at 48-49. Furthermore, the differential contribution limits demonstrate either that the standard $2,000 contribution limit is unrelated to any interest in fighting corruption or that such interest is insufficiently important to be pursued consistently. *See Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 186-87 (1999) (substantiality of interest in doubt when it is "offset, and sometimes outweighed, by countervailing policy considerations," where policy was "decidedly equivocal" towards interest, and where Congress was unwilling "to adopt a single national policy that consistently endorses" the interest). Sections 304, 316, and 319 thus undermine numerous other provisions of the BCRA.

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[14] *Compare Buckley*, 424 U.S. at 26 ("a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign"), *with id.* at 52 ("the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed").

* * * * *

Eliminating the errors and inconsistencies of *Buckley* and applying a consistent First Amendment framework to these and other challenged provisions of the BCRA will facilitate the sound resolution of these current and future cases. Political influence mediated through speech and association is not corrupt, and all forms of political speech and association are entitled to undiluted First Amendment protection.

CONCLUSION

For the foregoing reasons, the decision of United States District Court for the District of Columbia should be reversed insofar as it upholds the BCRA and affirmed insofar as it strikes down the BCRA as contrary to the First Amendment.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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In The

Supreme Court of the United States

◆

MITCH McCONNELL, SENATOR, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

◆

On Appeal From The United States District Court For The District Of Columbia

◆

BRIEF OF RODNEY A. SMITH AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

◆

CLARK BENSEN
3112 Cave Court
Lake Ridge, Virginia 22192
(703) 690-4066
(*Counsel of Record*)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Rodney A. Smith is a marketing and fundraising consultant. He has been National Finance Director for the National Republican Congressional Committee, Treasurer and Finance Director of the National Republican Senatorial Committee, and Comptroller and Finance Director of the Republican National Committee. He has been involved in fundraising efforts for many campaigns including more than 50 statewide efforts. In 1996, he received the "Pollie Award" from the American Association of Political Consultants as the "Most Valuable Player in a Campaign," the only finance professional ever given this award.

In addition to his practical experience as a political fundraiser, he is also a scholar. For seven years he served on the faculty of the University of Maryland School of Business and has recently completed a book-length manuscript on campaign finance restrictions and their unintended consequences.

This brief is based in large measure on exhaustive research he amassed in preparation for the writing of his definitive study, soon to be published, titled, "The Sunset of Citizen Sovereignty in America."

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[1] All parties in this matter have consented to the filing of this Amicus Curiae Brief, as evidenced by letters of consent lodged with the Clerk. This brief was not authorized, in whole or in part, by any counsel for a party. No person or entity, other than the amicus curiae, made monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The history of campaign finance reveals an early reluctance on the part of the nation's political leaders to interfere in the operations of federal elections. Their instincts were sound, particularly in relation to political parties, which were originally organized and controlled by the people rather than by government. In the first decade of the 20th century, the U.S. Congress began to commandeer the electoral process and to dictate to political parties the way in which they could collect and spend campaign funds. These regulatory efforts were instituted to rein in the undue influence of high-dollar contributors and to eliminate the "appearance" of corruption. The Supreme Court has perennially supported Congress in these efforts, mistakenly assuming that restrictive legislation would actually accomplish these ends.

This brief argues that the unintended consequences of federal control have been (1) a further heightening of the role big money plays in elections and (2) even greater advantages for rich candidates, and further empowerment of incumbents, who as the result of this regulation are all but unbeatable.

Part 1
Political Fundraising

America's competitive, two-party political process is at the crossroads. Its life-blood, political fundraising, is under siege. Marketing, technological, legislative and market changes have emerged almost simultaneously to undermine political fundraising and exponentially increase its complexity and cost. Under the best of circumstances, political fundraising is a hard sell. These ever-increasing

restrictions are making it infinitely more difficult to raise regulated so-called "hard" dollars.

Without an adequate, continuous supply of money, our political process, the best in history, will fall apart – a victim of well-intended campaign restrictions that have substantially shut down the political debate they were intended to foster.

The single most devastating blow to hit political fundraising is the financial stranglehold imposed by the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which has only been made worse by the passage of the Bipartisan Campaign Reform Act.

While campaign finance reform has mandated changes in political fundraising, none of the finance reform laws provide a funding mechanism, other than scarce "regulated dollars" (money raised in compliance with federal regulations) to pay for the development of systems needed to operate any new form of fundraising. To draw an analogy with the commercial world, what campaign finance reform has done to political fundraising is similar to what would happen if a law were passed outlawing high-priced jewelry and Tiffany's had to immediately become a "Wal-Mart" without the benefit of any of the elaborate support systems that enable Wal-Mart to effectively and efficiently function.

The Current Political Fundraising Market

According to the Federal Election Commission ("FEC"), the population of the United States in April 2000 was 281,421,906, of which 209,128,094 represent the voting age population. In November 2000, 101,452,285 people voted for the two major party Presidential candidates (or 48.5% of the eligible voters).

FEC data shows that during the 1999-2000 Presidential election cycle, barely 1% of Americans gave a campaign contribution to a federal candidate, political party committee or Political Action Committee.

The Donor Matrix (*see* Appendix Chart A) shows a breakdown of the people nationwide who made a political donation during the 1999-2000 Election Cycle.

Chart A shows that approximately 3.5 million Americans made a political contribution at the federal level during the 1999-2000 election cycle. This figure represents only 1.2% of the total U.S. population and 1.7% of the total voting age population. Eighty percent of these donors, or roughly 2.7 million people, gave less than $200. These smaller contributions are the most time-consuming and expensive to raise. In terms of $200+ donors, there is roughly one donor (Republican, Democrat or Independent) for every 350 people, or one donor out of every 200 households in the average congressional district. What this all means from the point of view of fundraising is that trying to raise significant amounts of money in any given congressional district for a political party or candidate is difficult and not unlike trying to find a large number of needles in the proverbial haystack.

It is important to note that according to a survey conducted by McLaughlin and Associates back in 2000, these estimated 3.5 million donors represent a reasonable guess of the entire known universe of known political donors in America. These people supply *all* the individual donor money for *all* the committees and candidates – including Republicans, Democrats, and Independents across the country. That means this small group supplies *all* the individual donor money for Presidential Candidates, Senatorial Candidates, and House Candidates; for *all* state and local candidates, for *all* national, state and local party committees, and for *all* federal reporting political action committees.

The Changing Political Fundraising Market

When the Supreme Court made its landmark ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), the dominant political fundraising audience in America was the "Patriot Generation," consisting of people born before 1925. The year 1925 is important because it is the last year an individual could have been born and suffered through the depression and been old enough to fight in World War II, both of which were life-altering experiences.

Think what America was like prior to 1925. No television, no Internet, few phones, some cars, and lots of small towns. Children raised during this time were generally taught to believe that their role as citizens was to make society better. They joined groups like the Boy and Girl Scouts; they respected authority, leadership and civic-mindedness. Growing up in a national "small town" culture, gave them a sense of civic duty and patriotism. As they aged, they volunteered and donated money because it was part of their inner image.

Over 60 million Americans born prior to 1925 were alive in 1976. As children, this pre-1925 generation looked at such things as Sears & Roebuck and Montgomery Ward catalogs for entertainment as well as for shopping. They grew up with mass communication conducted via letters, newspapers, magazines, billboards, and catalogues. They were accustomed to doing things through the mail. When the political contribution limits first went into effect in 1976, this generation was largely an untapped source of political giving. Thus, direct mail appeals to the Patriot Generation audience became an important source of new money and helped offset some of the sting imposed by the new financial restrictions. Subsequent to the *Buckley v. Valeo* decision this Patriot Generation audience became the broad-base financial backbone for most political organizations. Prior to that decision most political support was received via a smaller number of larger contributions, which was and still is the least expensive way to quickly raise substantial sums of money.

Now at the dawn of a new century most of the Patriot Generation has disappeared. As a consequence, that source of reliable revenue for political organizations is also substantially gone. Most of the political financial support being generated right now is coming from the Depression/World War II generation (i.e., people born between 1926 and 1945). In terms of psycho-graphics, this "Transition Generation" contains a mixture of characteristics from both the Patriot Generation and the later Baby Boomer Generation (1946-1964).

The parents of the Transition Generation drilled the lessons of the Great Depression into the heads of their children. Thus, the people born between 1926-1945 tend to be organization-loyal and value-oriented. They resemble their parents in that they tend to give generously to charity. The problem with this Transition Generation in terms of fundraising is its size; it only represents about 12% of the adult market. So as a source of political funding, their potential is limited.

The most important fundraising market today is the huge "Baby Boomer Generation" (70 million) whose propensity for giving to political organizations and candidates is still largely unknown. Equally troubling is the fact that the marketing techniques and tools to entice "boomers" to make political contributions are also largely undeveloped.

"Boomers" tend to be self-centered. They were told life is a voyage of self-discovery and that they could do anything they wanted. They are the only generation that ended a war (Vietnam) and brought down a president (Nixon). They grew up watching lots of television and using the telephone extensively. They tend to buy first, pay later, use credit cards and like monthly payment plans. They accept the phone and TV as methods of transacting business. In short, the psycho-graphic profile of the Baby Boomer Generation is far different from the psycho-graphic from that of their Patriot Generation elders.

The Changing Techniques of Marketing

What this shift in psycho-graphic profiles from the Patriot Generation to the Baby Boomer Generation means, in terms of broad-based political fundraising, is that the old fundraising paradigm of mass marketing, including mass media, mass mail, and even mass telemarketing, is slowly giving way to a radically new marketing paradigm specifically targeted at Baby Boomers and the younger emerging markets.

These new marketing techniques are best explained simply as "one-to-one" marketing. Instead of raising money via mass mailings to a single homogeneous group like the Patriot Generation, we are heading toward a time when to be successful at mass marketing fundraising, political organizations will have to be able to generate customized, individualized appeals. Books like *The One to One Future* and *Enterprise One to One* by Don Peppers & Martha Rogers; *The Next Economy* by Elliott Ettenberg and *Defining Markets Defining Moments* by Geoffrey E. Meredith & Charles D. Schewe all discuss various aspects of this emerging reality. An example of the marketing change now taking place in politics is the decline in money being raised from the Patriot Generation via direct mail and the increase in money being raised from the Transition Generation and the leading edge of the Baby Boomer Generation via telemarketing.

To meet the new marketing demands and emerging marketing paradigm, political organizations and candidates will have to be able to access communication systems that provide the ability to interact with people on the issues that are important to each individual via the medium preferred by the person. However, campaign finance laws block the access to financial resources and cooperative business relationships necessary to effectively develop such sophisticated marketing systems. Therefore every political organization's ability to compete in the evolving new fundraising world is seriously hampered.

Modes of Fundraising

There are four ways to ask an individual for money: (1) send them a letter (Direct Mail); (2) phone calls (Telemarketing); (3) face to face (Finance Committee); and (4) send them an email (Internet). It should be noted that as the volume of people contacted increases via the implementation of one or more of these modes of fundraising, the nature of the fundraising effort changes.

Volume Changes Form

As the size of something increases, the more its form tends to change. For example, the various functions that occur within a typical congressional campaign often look substantially the same as these same functions occurring within a Presidential campaign. But they are not always the same thing. At some point, the sheer volume of the number of units involved in a particular function will force a change in its form.

A simple example of this dynamic is the function of processing contributions. Every campaign has to process checks. Yet a clerk processing two thousand checks over the course of a congressional campaign has a far different kind of check processing system than the check processing system for a Presidential campaign that receives several hundred thousand checks over the same time period. This principle of "volume changing form" impacts every aspect of fundraising, particularly as political fundraising scrambles to offset the loss of large contributions.

The Volume Chart (*see* Appendix Chart B) illustrates that as the volume of contributions received increases and the average contribution declines, the cost of generating the additional contributions also increases. This is a mathematical certainty. As a consequence to make up for lost revenue resulting from the imposition of contribution limits, the volume of smaller contributions must increase as the average contribution amount declines. This dynamic results in unavoidable higher fundraising cost.

In fact, there is an inverse functional relationship between fundraising cost and average contribution. The higher the average contribution, the lower fundraising costs will be as a percentage of gross receipts. The reverse is also true. The lower the average contribution, the higher the fundraising cost will be.

Chart C shows four different ways to raise one million dollars. *See* Appendix Chart C.

Each of the examples in Chart C has its own special fundraising challenge. For instance, compare Example 1 with Example 4: Attempting to get $1 million from one person is a radically different fundraising challenge than attempting to get $10 from 100,000 people. Spending $5 to get a $1 million contribution is nothing. But spending $5 per contribution to raise $1 million from 100,000 donors seems expensive. Yet nothing has changed but the volume and the average contribution. The human effort, the cost, the mode of fundraising used, the support systems needed, the time involved – all these things are different for each and every example shown.

Donor Acquisition

The cost dynamic of fundraising is further complicated because every fundraising organization must also spend money "acquiring" new donors. This process is commonly referred to as "prospecting." The goal in prospecting is to attempt to break even, which means the first contribution received from each new donor is used to fund the entire cost of an organization's growth. However, breaking even at prospecting is a difficult objective to realize. In fact, it is often an impossible goal to achieve. In such situations an organization's growth must be partially funded out of general operating funds.

The fact that money must be consumed to acquire new donors exacerbates the cost dynamics of fundraising. Unfortunately few people understand this aspect of fundraising, which invariably leads to the misperception of "high fundraising cost."

Given that the active donor audience for most political organizations is relatively fixed, there are only two ways a fundraising operation can grow. One is by increasing the average contribution. The other is by prospecting for more donors. Since the mandated contribution limits imposed by campaign finance reform severely limit every political organization's ability to increase its average contribution amount, the only alternative available to candidates and political organizations that want and/or need to generate additional revenue is by acquiring more donors.

Chart D is similar to Chart C, in that it demonstrates four ways to raise one million dollars. *See* Appendix Chart D. However, Chart D also incorporates an assumed $10 acquisition cost per donor in addition to the assumed $5 per donor fundraising cost.

Example 1 shows a $15 or .0015% cost to raise $1 million dollars. Dirt-cheap! But when the exact same cost dynamics of $5 per gift and $10 for acquisition is applied to 100,000 donors the total fundraising cost of $1.5 million, or 150%, seems outrageous. Yet none of the costs elements have changed. What changed is the average contribution and the volume of gifts.

The reason for the huge variance between Example 1 and Example 4 is the unavoidable functional relationship between cost, volume and the average contribution. As volume and the average contribution amount change, so does the cost and the form of the fundraising challenge. As these examples clearly demonstrate, the aggregate fundraising cost as a percentage of gross receipts increases as volume increases and the average contribution drops.

What campaign finance reform has done by imposing contribution limits on candidates and political organizations is to mandate a lower average contribution amount, necessitating the need to significantly increase volume in order to make up the lost revenue. Thus, the imposed financial restrictions and limits have increased every political organization's fundraising costs.

It might be argued that the increase in the allowable "hard dollar" contribution amounts included in the Bipartisan Campaign Reform Act has mitigated the harsh reality of this mathematical dynamic. However, in terms of real purchasing power these increases in the contribution limits are deceptive. The FEC is estimating that the inflation factor in 2004 will be 446% in terms of adjusting for 1976 dollars, which is when the limits were first imposed. When the old individual contribution limit of $1,000 is adjusted into 1976 dollars it is only worth $225 in terms of purchasing power in 2004. As a consequence, the new individual contribution limit of $2,000 is really only worth $450 in terms of 1976 dollars. Thus, the new contribution limits incorporated in the most recent campaign reform law are not really increases because they do not make up for the loss in purchasing power due to inflation.

Unfortunately, few people in or out of politics have an understanding of the mathematical realities of fundraising. Moreover, this general lack of understanding may well mean that the next great misperception to plague political fundraising will be "the perception of the corruption of high fundraising costs."

Part 2

As a direct consequence of restrictions on campaign contributions, Congress, with the endorsement of the judiciary, has made politics, like polo, a game for the rich – the court mandated "patrician class." People of modest income (the court mandated "plebeian class") are consigned to the sidelines while the Financial Elite (*see* Appendix Chart E) support candidates or set up political advocacy programs outside the established two-party system.

Sometimes the Financial Elite become candidates themselves, maximizing their chance of victory by spending as much of their own money as is needed. In recent elections, some candidates have spent literally tens of millions of dollars of their private funds. In fact, one political committee of a major party is actively seeking candidates who are multimillionaires and can "pay their own way."

What the Congress set out to do was to get big money out of politics. Instead, they have devised a system that makes it virtually impossible for citizens without personal wealth to compete successfully for federal office. The only spending constraint on the financial elite is the magnitude of their fortune and the amount they choose to commit to politics.

While wealthy candidates can and do accept outside financial help, this does not mean they need it. In fact it is not uncommon for them to lend their campaigns a substantial sum of money and then, after winning the election, raise the money needed to repay their loans.

Candidates without personal wealth cannot do this. To compete successfully, non-wealthy candidates need all the outside financial support they can get – and in the past, this necessary help has come from political parties, the Great Equalizers in elective politics.

Consider just one problem the not-so-rich encounter. While running for public office, few can work full time. In fact, employers could face charges of making an illegal corporate contribution if they kept a federal candidate on their payroll. Candidates without wealth often have a hard enough time paying their personal expenses – the mortgage, family groceries, credit card bills, *etc.* – while running for public office. Most do not have extra funds available to contribute or lend to their campaign. Thus, without a substantial amount of outside financial aid, these candidates are almost always defeated before they begin.

Chart F displays a schematic diagram of America's financial elite – Billionaires, Centimillionaires, Decamillionaires and simple, ordinary Millionaires. *See* Appendix Chart F.

An estimate of the funds controlled by the "super-rich" is roughly $10 Trillion (*see* Appendix Chart G) – a staggering sum of money. To get some sense of the magnitude of this wealth, consider this fact – as of June 2003 our national debt was $7.4 Trillion, *less* than the combined wealth of the super-rich. It should be emphasized that the figures in Chart G are only a best-guess estimate based on available information. But even if these estimates are 50% off, the amount of money controlled by the Financial Elite is still daunting. If only a quarter of one percent of this money were ever spent on politics during any given election cycle, it would dwarf the total sum of all other sources of political funding. Chart G makes the problem abundantly clear.

The fact that this amount of money is controlled by a relatively small group of people has marginalized middle-income and lower-income candidates and has prevented political parties from making up the difference. The whole electoral process is weakened by the creation of an unpredictable, autonomous financial force outside the established order. That this will have a devastating effect on our competitive two-party political process is almost a certainty. In addition, giving this kind of advantage to the rich increases the possibility that someone who obtains significant wealth through white-collar crime, drug trafficking, mob connections or terrorist activities could use those dollars to become a powerful political figure in America.

Candidate Contributions

The financial information shown in the charts is compelling evidence that the winning of House and Senate races is substantially (though not exclusively) the prerogative of the financial elite. On occasion, non-wealthy candidates do win elections for federal office. But a careful review of the bottom section of Chart H (Senate Challengers Defeating Senate Incumbents) shows how vulnerable incumbents without wealth are when a member of the financial elite decides to challenge them. *See* Appendix Chart H.

This evidence should be disturbing to those who advocate heightened government control of elections in order to curtail the impact of money. Indeed, the increase of high-dollar influence *coincides* with the increase of restrictions. The more Congress fiddles with the process, the more they empower the very people they are trying to bridle. The correlation is uncanny.

In setting up the voluminous amount of election and financial data for analysis (collected respectively from the Clerk of the House and the Federal Election Commission), the following five-tiered system was established to rank the competitiveness of campaigns:

Rank	Title	Descriptions
5	No Contest	Campaigns won by 15% or more
4	Not Competitive	Campaigns won (10%-14.99%)
3	Semi-Competitive	Campaigns won (5%-9.99%)
2	Competitive	Campaigns won (2.5%-4.99%)
1	Extremely Competitive	Campaigns won (0-2.49%)

Utilizing this competitive ranking system, Charts H, I, and J show the average contribution amounts for winners and losers for the period 1992-2000.[2]

In reviewing the charts that follow, note that in order to win the seat of an incumbent, the challenger must be not merely a millionaire – but often a multi-millionaire.

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[2] *See* Appendix Chart H for Senate races; Appendix Chart I for House races; Appendix Chart J for open seats.

These charts illustrate the startling degree to which money has influenced the outcome of political campaigns. In his book *Monopoly Politics*, James C. Miller states that 332 seats are locked up for one party or the other. This estimate is reinforced by the fact that during the period 1992-2000 95% of the House incumbents were re-elected. So the power of incumbency and the priority access of incumbents to regulate "hard money," have made members of the House of Representatives all but immune to defeat.

Fundraising Ratios – House

Chart K is a detailed summary by source of all the money raised by *House* candidates for the period 1992-2000. *See* Appendix Chart K. It is also the chart used to calculate the fundraising ratios between incumbents and challengers. These ratios highlight the financial advantage wealthy House candidates enjoy.

House Incumbents Re-elected

- The total average dollars raised by the 1821 Incumbents was $655,044 to Challengers' $190,012 or a *3.5 to 1* advantage.
- The average Individual money raised by Incumbents is $345,978 to Challengers' $111,129 or a *3.1 to 1* advantage.
- The average PAC fundraising by Incumbents is $298,523 to Challengers' $36,506, or an *8.2 to 1* advantage.
- The average personal money spent by Challengers over Incumbents was $42,377 to $10,543 or a *4 to 1* advantage.

House Incumbents Defeated

- The total average dollars raised by the 86 Incumbents defeated was $1,022,462 to the winning Challengers' $638,223, or a *1.6 to 1* advantage. Note: Incumbent raising more money than the average winning Challenger suggests the presence of additional money being spent by an outside force – either a political party committee(s) and/or a special interest group(s).
- The average Individual money raised by Incumbents is $553,244 to Challengers' $333,713, or a *1.7 to 1* advantage.
- The average PAC fundraising by Incumbents is $443,258 to Challengers' $194,354, or a *2.3 to 1* advantage.
- The average personal money spent by Challengers over Incumbents was $110,156 to $24,960 or a *4.4 to 1* advantage.

House Open Seats

- The total average dollars raised by winners was $764,753 to losers' $502,183, or a *1.5 to 1* advantage.
- The average Individual money raised by winners was $422,063 to losers' $251,196, or a *1.7 to 1* advantage.
- The average PAC fundraising by winners was $226,410 to losers' $128,934, or a *1.8 to 1* advantage.
- The average personal money spent by losers over winners was $122,053 to $116,280, or a *1.1 to 1* advantage.

House Incumbents Defeating Incumbents

- The total average dollars raised by the winning Incumbents was $792,539 to the losers' $794,336, or *1 to 1*.
- The average Individual money raised by Incumbent winners is $458,472, to losers' $375,147, or a *1.2 to 1* advantage.
- The average PAC fundraising by Incumbent winners was $405,889 to losers' $296,880, or a *1.4 to 1* advantage.
- The average personal money spent by winning Incumbents over losers was $37,187 to $13,300, or a *2.8 to 1* advantage.

Fundraising Ratios – Senate

Chart L is a consolidated summary by source of all the money raised by Senate candidates for the period 1992-2000. *See* Appendix Chart L. It is also the chart used to calculate the fundraising ratios between Incumbents and Challengers shown. These ratios highlight the financial advantage wealthy Senate candidates enjoy.

Senate Incumbents Re-elected

- The total average dollars raised by the 114 Incumbents was $3,645,716 to Challengers' $1,954,314, or *1.9 to 1* advantage.
- The average Individual money raised by Incumbents is $2,372,222 to Challengers' $1,246,913, or a *1.9 to 1* advantage.

- The average PAC fundraising by Incumbents is $1,033,111 to Challengers' $177,723, or a *5.8 to 1* advantage.
- The average personal money spent by losing Challengers over Incumbents was $529,678 to $240,383, or a *2.2 to 1* advantage.

Senate Incumbents Defeated

- The total average dollars raised by the 16 Senate Challengers defeating Incumbents was $7,648,320 to Incumbents' $6,603,849, or a *1.2 to 1* advantage.
- The average Individual money raised by Incumbents is $4,802,136 to Challengers $3,840,384 or a *1.3 to 1* advantage.
- The average PAC fundraising by Incumbents is $1,653,568 to Challengers' $665,568, or a *2.5 to 1* advantage.
- The average personal money spent by Challengers over Incumbents was $3,142,368 to $148,145, or a *21.2 to 1* advantage.

Senate Open Seats

- The total average dollars raised by winners was $5,907,596 to the losers' $3,610,001, or a *1.6 to 1* advantage.
- The average Individual money raised by winners was $3,056,486 to the losers' $2,615,166, or a *1.2 to 1* advantage.
- The average PAC fundraising by winners was $921,385 to the losers' $534,394, or a *1.7 to 1* advantage.

- The average personal money spent by winners over losers was $1,929,725 to $460,441, or a *4.2 to 1* advantage.

National Party Committees

Chart M shows the total "Hard" and "Soft" money raised by the three Republican and three Democrat national party committees combined for the 2001-02 Election Cycle. *See* Appendix Chart M. "Soft money" represented approximately 43% of the net money raised by Republicans and 57% of the net money raised by Democrats. The passage of the Bipartisan Campaign Reform Act has stripped away all this "soft" money (roughly $250 million) from each political party.

The Fundraising Matrix (*see* Appendix Chart N) shows within various giving ranges the approximate number of new donors each party would have to find in order to make up for the loss in "soft" dollars mandated by law. When these numbers are compared to the figures shown in Chart A: Donor Matrix, it becomes crystal clear that it is a practical impossibility for either party to recruit enough new donors to make up for the loss of "soft" dollars. Both political parties would literally have to double their existing donor bases. Absent the occurrence of some cataclysmic event, doubling the size of either party's donor base is simply impossible.

In fact, the heightened level of fundraising competition that is certain to occur within each party as a result of the loss of "soft dollar" revenue is more likely to shrink rather than expand either party's existing donor base. Why? Because the increased intensity in inter-party competition for dollars within both political parties is more likely to turn-off proven donors faster than new donors can be recruited. In other words, over the long run, in an attempt to recover the lost "soft dollar" revenue, it is almost certain that the internal fight for dollars will result in "smothering by over solicitation" a large number of the "geese" that have traditionally supplied the "golden eggs," supporting the activities of both parties.

As already noted, the fundraising market for both political parties is simply too small and the new restrictions too severe for all the candidates and party committees to prosper under the new law. Over time, both parties are likely to shrink in size and influence – and shrink significantly. Many reformists have worried that some loophole might be discovered that would undermine their handiwork. To the contrary, the wolves of "reform" did their work well. There are no escape hatches or loopholes. And contrary to popular belief, this is not good news for America.

Part 3

The charts in this section graphically demonstrate that the restrictions imposed by Congress have been counterproductive, empowering the rich and reducing the competitiveness of the political arena. These unintended consequences of *Buckley v. Valeo* are thus contrary to the spirit of the Preamble of the Constitution which begins with the words, "We the people," meaning, "we the sovereigns" not "we the subjects." To the Framers, sovereignty meant the right of citizens to govern themselves free from the interference of some oppressive central authority. As stated by James Monroe, "*The introduction, like a preamble to a law, is the Key of the Constitution. Whenever federal power is exercised, contrary of the spirit breathed by this introduction, it will be unconstitutionally exercised, and ought to be resisted by the people.*" If in politics money is speech, then the question looms large: How can government, in a free society, abridge its collection and disbursement without, at the same time, destroying the rights of citizens to govern themselves?

House Re-election Results

Chart O shows the election rates for House Incumbents and Challengers for the whole country, the old confederacy (eleven southern states), and the balance of the country without the south. *See* Appendix Chart O. Given that the old confederacy emerged from the civil war as a rock-solid single party geographic area, and that this single party affiliation did not seriously begin to change until the latter part of the twentieth century, Charts O(1), P(1) and Q(1) exclude the old confederacy. *See* Appendix Chart O(1); Appendix Chart P; Appendix Chart P(1); Appendix Chart Q; and Appendix Chart Q(1).

It is important to note that the Court's *Buckley v. Valeo* decision also had a repressive impact on elections in the south, but given the long time domination of a single party in this area, the impact is not as seemingly dramatic. As a consequence, the results for the south are shown separately. This separation makes it easier to clearly reveal the devastating impact of the Supreme Court's *Buckley v. Valeo* decision on the rest of the country.

The impact of the High Court decision on House races, for the period 1976–2000, is to push the *re-election rate* for House Incumbents to 95.4% and slash the chances of a Challenger candidate defeating an Incumbent by 60.7%

(*see* Appendix Chart O(1)).Over this same time period, the *margin of victory* for House Incumbents also substantially changed as follows: the number of extremely competitive House races dropped by 42.9%; the number of competitive races dropped by 47.1%; the number of semi-competitive races dropped by 39.8%; the not competitive races dropped by 39.3% and the no-contest races (those with a winning margin of 15% or more) shot-up by a remarkable 25.4%.

Buckley v. Valeo's Impact on Senate Re-election Results

The impact of the Supreme Court's *Buckley v. Valeo* decision on Senate elections is very much the same as on House elections. *See* Appendix Chart S; Appendix Chart S(1); Appendix Chart T; and Appendix Chart T(1). The Senate Incumbent *re-election* percentage increased by 13.3%, while the percentage of Challengers winning dropped by 37.4%.

Like House Incumbents, Senate Incumbent's *margin of victory* in the no-contest category (those won by a margin of 15% or more) shot-up by 32%. During the same time period, extremely competitive Senate races dropped by 18.8%; the number of competitive Senate races dropped by 20.5%; the number of semi-competitive Senate races dropped by 32.5%; the number of non-competitive Senate races dropped by 12.7%.

Clearly, the Supreme Court's *Buckley v. Valeo* decision has had a devastating impact on both Senate and House elections and the Bipartisan Campaign Reform Act will only make things worse. This prediction is supported by a June 27, 2003 news release put out by The Center for

Responsive Politics which found that 94% of winning congressional candidates out-spent their losing opponents. Only four House challengers defeated incumbents in 2002.

Election Comparison – President, Senate, House

Charts U(1) and U(2) provide detailed analysis of the Non-Competitive and Competitive Categories shown in Chart U. *See* Appendix Chart U; Appendix Chart U(1); Appendix Chart U(2). Charts U(1) and U(2) emphasize the striking difference in the competitiveness of Presidential races and Senate and House races. In the Non-Competitive Category (races won by a margin of 10% or more) 36.9% of Senate races are won by a wider margin than the Presidential contest. In the House, the margin is an incredible 70.4% greater.

In the Competitive Category (races where the victory margin is between 0-4.9%) there are 19.8% fewer competitive Senate races than Presidential races and 60.3% fewer competitive House races.

What is a Reasonable Amount of Campaign Funding?

In July of 1758 running as a challenger candidate, George Washington spent about $195 to win election to the Virginia House of Burgesses. The voting results were as illustrated in Chart V. *See* Appendix Chart V.

In his first successful election to office, George Washington spent roughly $0.25 per vote cast. This $0.25 adjusted for inflation in 2000 dollars (for an exact calculation *see* S. Morgan Friedman www.westegg.com) is worth approximately $2.40. Using George Washington's actions as the frame of reference, the following is an analysis of all the actual federal elections spending in the 1999-2000 election cycle compared to what would have been spent if General Washington's spending standard adjusted for inflation had been followed. *See* Appendix Chart W.

Adjusting George Washington's spending for inflation and using this adjusted figure as the standard of measurement, the total spent by all candidates and party committees at the federal level during the 1999-2000 election cycle is only 65% of what the Father of our country would have spent, and back in 1758, Washington did not have to pay for the high cost of mass media.

CONCLUSION

Political party organizations are a natural offshoot of democracy – an essential concomitant. They were devised not only to promote certain ideas and interests, but also to curtail the influence of unbridled wealth functioning autonomously. A political party is no more than a group of like-minded people who combine their resources to elect people to public office. When allowed to operate without restriction, they can match or even exceed the investment of a single rich person or small group of wealthy individuals, who otherwise might be able to buy an election – for themselves or for candidates who support their interests.

In the kind of democracy defined at the Philadelphia convention, the rich were not supposed to dominate government in the way the aristocracy had dominated it in colonial times. Even the English House of Commons was filled with wealthy country squires who promoted their own interests until a two-party system began to provide the means for less wealthy commoners to enter the political arena in support of other agendas.

We owe much to our two-party political process. It has protected America from the curse of multi-party, coalition government and from plutocracy. Our competitive two-party political process is *one of the fundamental strengths of American democracy*. This Court should recognize that the restriction of the Bipartisan Campaign Reform Act and the Federal Election Campaign Act will bring our political parties to the brink of ruin through limiting their First Amendment association rights.

Respectfully submitted,

CLARK BENSEN
3112 Cave Court
Lake Ridge, Virginia 22192
(703) 690-4066
(Counsel of Record)

APPENDIX*

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* *Data used to create Appendix Charts*: Since 1920, the Clerk of the House of Representatives has collected and published the official vote counts for federal elections from the official sources among the various states and territories.

Since 1976, the Federal Election Commission ("FEC") has received financial reports containing all receipts and disbursements as required by the Federal Election Campaign Act. The FEC information collected since 1992 is in an electronic format that is downloadable from the Internet.

Utilizing the public information available from the Clerk of the House since 1920 and the FEC since 1992, two electronically formatted and uniquely categorized databases were created – one for General Election Voting Data and one for Campaign Financial Information. All charts and graphs in this Brief are the products of these compiled, electronically formatted and uniquely categorized databases. Copyright registrations for both databases have been submitted to the U.S. Patent & Trademark Office and are currently pending.

Chart A: Donor Matrix
Total Number of Political Donors Nationwide
1999 - 2000 Election Cycle

Category	Giving Range	Total Number of Donors	Average Per Congressional District		
			435 Districts	600,000 Population	350,000 Households
A	$1,000 +	339,526	780	0.1%	0.2%
B	$200 - $999	439,214	1,010	0.2%	0.3%
Subtotal	$200 +	778,740	1,790	0.3%	0.5%
C	Under $200	2.7 Million	6,200	1%	2%
TOTAL	All	3.5 Million[1&2]	8,000	1.3%	2.5%

Source: Federal Election Commission
Based on dividing estimated average contribution into gross receipts

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[1] In a 2000 post-election survey conducted by McLaughlin and Associates, the base Republican vote for the 2000 Presidential Election was 38%, or roughly 40 million. The base Democrat vote for the 2000 Presidential Election was 41%, or roughly 43 million. This survey also identified known Republican donors to be approximately 5% of the Republican base (or about 2 million) and the known Democratic donors to be approximately 3% of the Democrat base (or about 1.5 million for a combined Republican/Democrat Donor base of approximately 3.5 million.)

[2] This number excludes people participating in the voluntary presidential check-off box on individual tax returns administered by the Internal Revenue Service.

Chart B: Volume Chart
Fundraising Cost versus Average Contribution
Inverse Functional Relationship

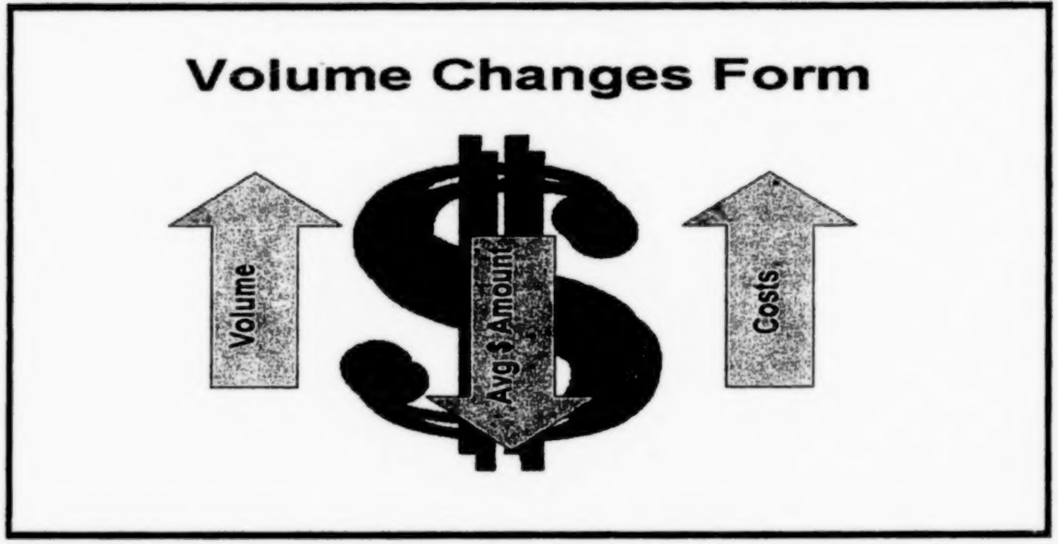

Volume Changes Form
Volume
Avg $ Amount
Costs

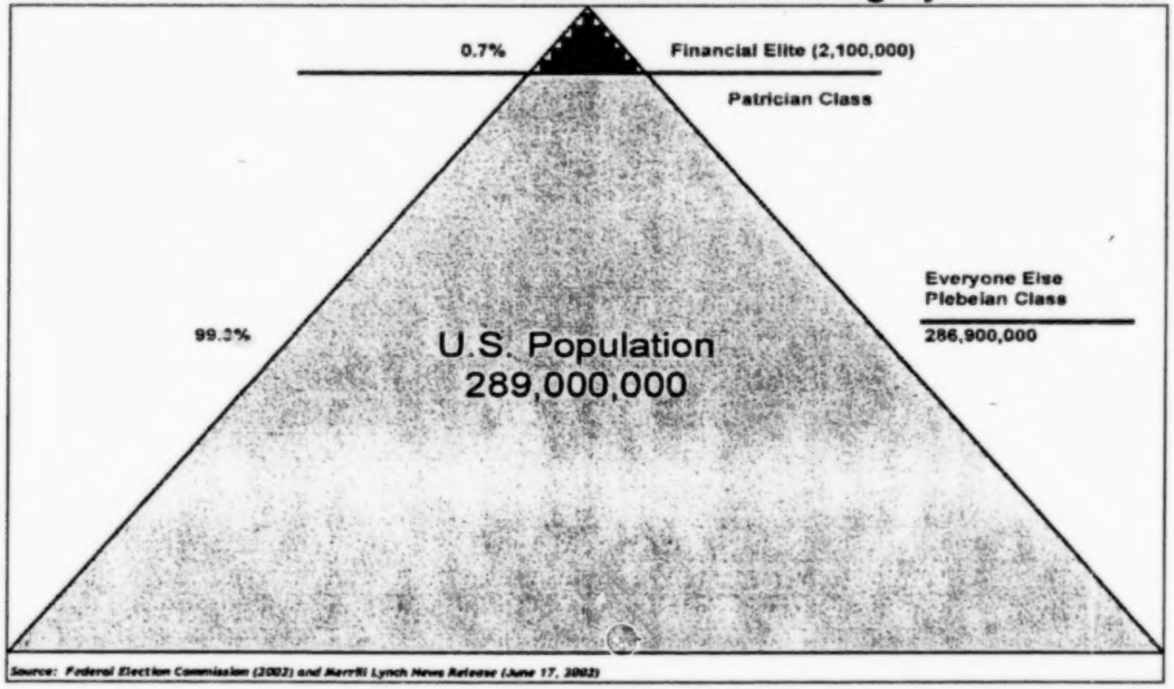
Chart C: Raising $1 Million
Assumed Cost Per Gift = $5
Alternative Examples

Example	Number of Donors	Average Gift	Total Amount Raised	Cost Per Gift	Total Cost	Cost %
1	1	$1 Million	$1,000,000	$5	$5	.0005%
2	1,000	$1,000	$1,000,000	$5	$5,000	.5%
3	10,000	$100	$1,000,000	$5	$50,000	5%
4	100,000	$10	$1,000,000	$5	$500,000	50%

Chart D: Raising $1 Million
Assumed Cost Per Gift = $5 and Assumed Acquisition Cost Per Donor = $10
Alternative Examples

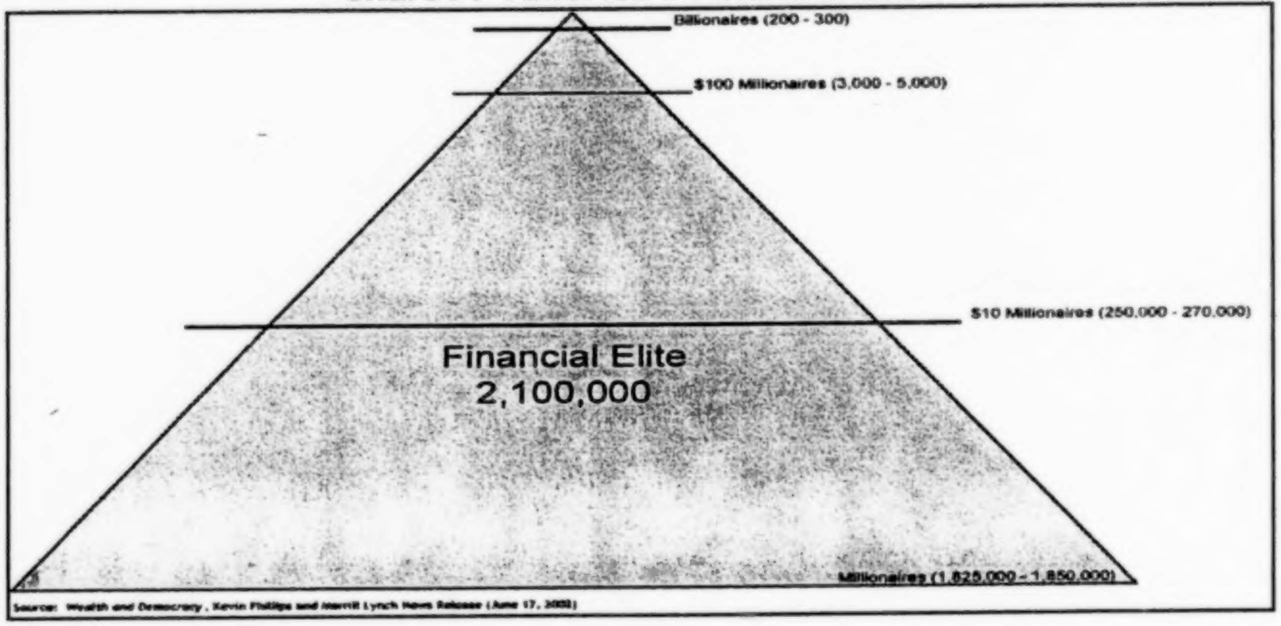
Example	Number of Donors	Average Gift	Total Amount Raised	Cost Per Gift	Total Gift Cost	Acquisition Cost Per Donor	Total Donor Acquisition Cost	Combined Total Cost	Cost %
1	1	$1 Million	$1 Million	$5	$5	$10	$10	$15	.0015%
2	1,000	$1,000	$1 Million	$5	$5,000	$10	$10,000	$15,000	1.5%
3	10,000	$100	$1 Million	$5	$50,000	$10	$100,000	$150,000	15%
4	100,000	$10	$1 Million	$5	$500,000	$10	$1,000,000	$1,500,000	150%

Chart E
Supreme Court's
Mandated Version of Citizen Sovereignty



Source: Federal Election Commission (2002) and Merrill Lynch News Release (June 17, 2002)

Chart F: America's Financial Elite



Source: Wealth and Democracy, Kevin Phillips and Merrill Lynch News Release (June 17, 2002)

Chart G

The Financial Elite in America

The Wealthiest Individuals in America and the Money they Control

	Est. Number	*Range of Wealth (per Individual)*	*Est. Average*	*Range of Wealth (for Group)*
Billionaires	200 - 300	$ 1 billion - $ 50 billion	$ 3.25 billion	$ 650 billion - $ 975 billion
Centimillionaires	3,000 - 5,000	$ 100 million - $ 999 million	$ 250 million	$ 750 billion - $ 1.25 trillion
Decamillionaires	250,000 - 270,000	$ 10 million - $ 99 million	$ 20 million	$ 5 trillion - $ 5.4 trillion
Millionaires	1.8 - 2.0 million	$ 1 million - $ 9.9 million	$ 1.5 million	$ 2.7 trillion - $ 3 trillion
	2.0 - 2.28 million			$ 9.1 trillion - $ 10.6 trillion

⇩

$ 10 trillion

Potential Annual Minimal Political Involvement of U.S. Financial Elite:

Percent	*Amount*
¼ of 1%	$ 25 billion
½ of 1%	$ 50 billion
1%	$ 100 billion

Source: *Wealth and Democracy*, Kevin Phillips and Merrill Lynch News Release (June 17, 2002)

(c) Rodney A. Smith, 2003

Chart H

U.S. Senate Races

Candidate Contributions

1992-2000

Incumbents Defeating Challengers

Competitiveness Category	Number of Races	Average Winner Contribution	Average Loser Contribution
5. No Contest (15%+)	77	$213,919	$158,549
4. Not Competitive (10% - 14.99%)	9	$19,500	$145,751
3. Semi-Competitive (5% - 9.99%)	17	$208,371	$1,018,442
2. Competitive (2.5% - 4.99%)	7	$128,571	$84,829
1. Extremely Competitive (0 - 2.49%)	4	$1,578,513	$7,146,217
Cumulative Average	**114**	**$240,383**	**$529,678**

Challengers Defeating Incumbents

Competitiveness Category	Number of Races	Average Winner Contribution	Average Loser Contribution
5. No Contest (15%+)	1	$77,695	-
4. Not Competitive (10% - 14.99%)	2	$3,132,500	$4,662
3. Semi-Competitive (5% - 9.99%)	3	$3,928,081	-
2. Competitive (2.5% - 4.99%)	5	$4,309,403	$471,800
1. Extremely Competitive (0 - 2.49%)	5	$2,120,787	$400
Cumulative Average	**16**	**$3,142,368**	**$148,145**

Data compiled from the Federal Election Commission and the Clerk of the House

Chart I

U.S. House Races

Candidate Contributions

1992-2000

Incumbents Defeating Challengers

Competitiveness Category	Number of Races	Average Winner Contribution	Average Loser Contribution
5. No Contest (15%+)	1,528	$9,211	$28,120
4. Not Competitive (10% - 14.99%)	128	$13,116	$98,134
3. Semi-Competitive (5% - 9.99%)	95	$24,766	$138,337
2. Competitive (2.5% - 4.99%)	34	$16,679	$53,915
1. Extremely Competitive (0 - 2.49%)	36	$14,627	$117,026
Cumulative Average	**1,821**	**$10,543**	**$42,377**

Challengers Defeating Incumbents

Competitiveness Category	Number of Races	Average Winner Contribution	Average Loser Contribution
5. No Contest (15%+)	5	$29,378	$24,880
4. Not Competitive (10% - 14.99%)	11	$58,865	$23,848
3. Semi-Competitive (5% - 9.99%)	30	$105,587	$20,180
2. Competitive (2.5% - 4.99%)	20	$99,040	$34,874
1. Extremely Competitive (0 - 2.49%)	20	$176,531	$27,150
Cumulative Average	**86**	**$110,156**	**$25,960**

Data compiled from the Federal Election Commission and the Clerk of the House

Chart J

Open Seat Races

Candidate Contributions

1992-2000

Senate Open Seats

Competitiveness Category	Number of Races	Average Winner Contribution	Average Loser Contribution
5. No Contest (15%+)	14	$250,124	$445,901
4. Not Competitive (10% - 14.99%)	11	$1,196,115	$79,848
3. Semi-Competitive (5% - 9.99%)	7	$12,001	$372,027
2. Competitive (2.5% - 4.99%)	6	$10,661,319	$395,097
1. Extremely Competitive (0 - 2.49%)	4	$84,380	$1,810,707
Cumulative Average	**42**	**$1,929,725**	**$460,441**

House Open Seats

Competitiveness Category	Number of Races	Average Winner Contribution	Average Loser Contribution
5. No Contest (15%+)	127	$123,610	$59,827
4. Not Competitive (10% - 14.99%)	36	$63,666	$165,171
3. Semi-Competitive (5% - 9.99%)	48	$164,775	$167,154
2. Competitive (2.5% - 4.99%)	33	$70,846	$252,303
1. Extremely Competitive (0 - 2.49%)	19	$123,374	$109,582
Cumulative Average	**263**	**$116,280**	**$122,053**

Data compiled from the Federal Election Commission and the Clerk of the House

Chart K (House Fundraising Ratios)

Chart K

U.S. House Candidates

Summary of Source of Income
1992 - 2000

		Number of Candidates	Candidate Contribution	PACs Party	Individuals	Total
1)	**Incumbernts Re-elected**					
	Incumbents - Totals	1821*	$19,199,503	$543,610,103	$630,025,068	$1,192,834,674
	Average Per Incumbent	-	$10,543	$298,523	$345,978	$655,044
	% By Category	-	2%	46%	52%	100%
	Losing Challengers - Totals	1649*	$69,880,370	$60,197,655	$183,252,028	$313,330,053
	Average Per Challenger		$42,377	$36,506	$111,129	$190,012
	% By Category		22%	19%	59%	100%
2)	**Incumbents Defeated**					
	Defeated Incumbents - Total	86	$2,232,600	$38,120,153	$47,578,969	$87,931,722
	Average Per Incumbent	-	$25,960	$443,258	$553,244	$1,022,462
	% By Category	-	3%	43%	54%	100%
	Winning Challengers - Totals	86	$9,473,431	$16,714,462	$45,996,770	$72,184,663
	Average Per Challenger	-	$110,156	$194,354	$534,846	$839,356
	% By Category	-	13%	23%	64%	100%
3)	**Open Seats**					
	Winners - Total	263*	$30,581,724	$59,545,823	$111,002,569	$201,130,116
	Average Per Winner	-	$116,280	$226,410	$422,063	$764,753
	% By Category		15%	30%	55%	100%
	Losers - Total	261*	$31,855,946	$33,651,684	$65,562,032	$131,069,662
	Average Per Loser	-	$122,053	$128,934	$251,196	$502,183
	% By Category	-	24%	26%	50%	100%
4)	**Incumbents - Incumbents**					
	Incumbent winner-Totals	5	$185,934	$1,484,400	$2,292,360	$3,962,694
	Average Per Winner	-	$37,187	$296,880	$458,472	$792,539
	% By Category	-	5%	37%	58%	100%
	Incumbent Loser- Totals	5	$66,500	$2,029,443	$1,875,734	$3,971,677
	Average Per Loser	-	$13,300	$405,889	$375,147	$794,336
	% By Category		2%	51%	47%	100%

Data compiled from the Federal Election Commission and the Clerk of the House

***Note:** There were 174 races (172 incumbent seats and 2 open seats) in which the winner had no financial opposition. All candidates who raise and spend $5,000 or more are required to file financial disclosure reports with the FEC*

Data compiled from the Federal Election Commission and the Clerk of the House

Chart L (Senate)

Chart L

U.S. Senate Candidates

Summary of Source of Income

1992 - 2000

	Number of Candidates	Candidate Contribution Loans	PACs Party	Individuals	Total
1) Incumbernts Re-elected					
Incumbents - Totals	114*	$27,403,627	$117,774,602	$270,547,254	$415,725,483
Average Per Incumbent	-	$240,383	$1,033,111	$2,372,222	$3,646,715
% By Category	-	7%	28%	65%	100%
Losing Challengers - Totals	113*	$59,853,652	$20,082,703	$140,901,153	$220,837,508
Average Per Challenger		$529,678	$177,723	$1,246,913	$1,954,314
% By Category		27%	9%	64%	100%
2) Incumbents Defeated					
Defeated Incumbents - Total	16	$2,370,323	$26,457,080	$76,834,169	$105,661,572
Average Per Incumbent	-	$148,145	$1,653,568	$4,802,136	$6,603,849
% By Category	-	2%	25%	73%	100%
Winning Challengers - Totals	16	$50,277,886	$10,649,091	$61,446,146	$122,373,123
Average Per Challenger	-	$3,142,368	$665,568	$3,840,384	$7,648,320
% By Category	-	41%	9%	50%	100%
3) Open Seats					
Winners - Total	42	$81,048,447	$38,698,178	$128,372,414	$248,119,039
Average Per Winner	-	$1,929,725	$921,385	$3,056,486	$5,907,596
% By Category	-	33%	15%	52%	100%
Losers - Total	42	$19,338,536	$22,444,531	$109,836,960	$151,620,027
Average Per Loser	-	$460,441	$534,394	$2,615,166	$3,610,001
% By Category	-	13%	15%	72%	100%

Data compiled from the Federal Election Commission and the Clerk of the House

* **Note:** *(D) John Breaux (LA) ran unoppossed in his 1992 Senate Campaign.*

Chart M: National Party Committees

Republican National Committees
Total Gross[1] & Estimated[2] Net Receipts
2001 - 2002 Election Cycle

	HARD MONEY[3]			SOFT MONEY[4]			COMBINED TOTAL		
	Gross Hard Money Receipts	Estimated[2] Fundraising Cost – 25%	Estimated Hard Money Net	Gross Soft Money Receipts	Estimated[2] Fundraising Cost – 10%	Estimated Soft Money Net	Total Gross Receipts	Estimated[2] Fundraising Cost	Estimated Combined Net
3 Republican National Committees – Combined	$402,065,392	$100,000,000	$302,065,392	$250,032,620	$25,000,000	$225,032,020	$652,098,012	$125,000,000	$527,098,002
% of Combined Total	62%	–	57%	38%	–	43%	100%	–	100%

source: Federal Election Commission, October 24, 2002

Democrat National Committees
Total Gross[1] & Estimated[2] Net Receipts
2001 - 2002 Election Cycle

	HARD MONEY[3]			SOFT MONEY[4]			COMBINED TOTAL		
	Gross Hard Money Receipts	Estimated[2] Fundraising Cost – 25%	Estimated Hard Money Net	Gross Soft Money Receipts	Estimated[2] Fundraising Cost – 10%	Estimated Soft Money Net	Total Gross Receipts	Estimated[2] Fundraising Cost	Estimated Combined Net
3 Democrat National Committees – Combined	$220,244,544	$55,000,000	$165,244,544	$245,850,711	$24,000,000	$221,850,711	$466,095,255	$79,000,000	$387,095,255
% of Combined Total	47%	–	43%	53%	–	57%	100%	–	100%

source: Federal Election Commission, October 24, 2002

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[1] Gross Receipts provided by the Federal Election Commission, October 24, 2002.

[2] Estimated fundraising costs are percentage estimates based upon the author's experience.

[3] Hard Money – Money given by political parties which *is* subject to the contribution limits of the Federal Elections Campaign Law.

[4] Soft Money – Money given by political parties which *is not* subject to the contribution limits of the Federal Elections Campaign Law.

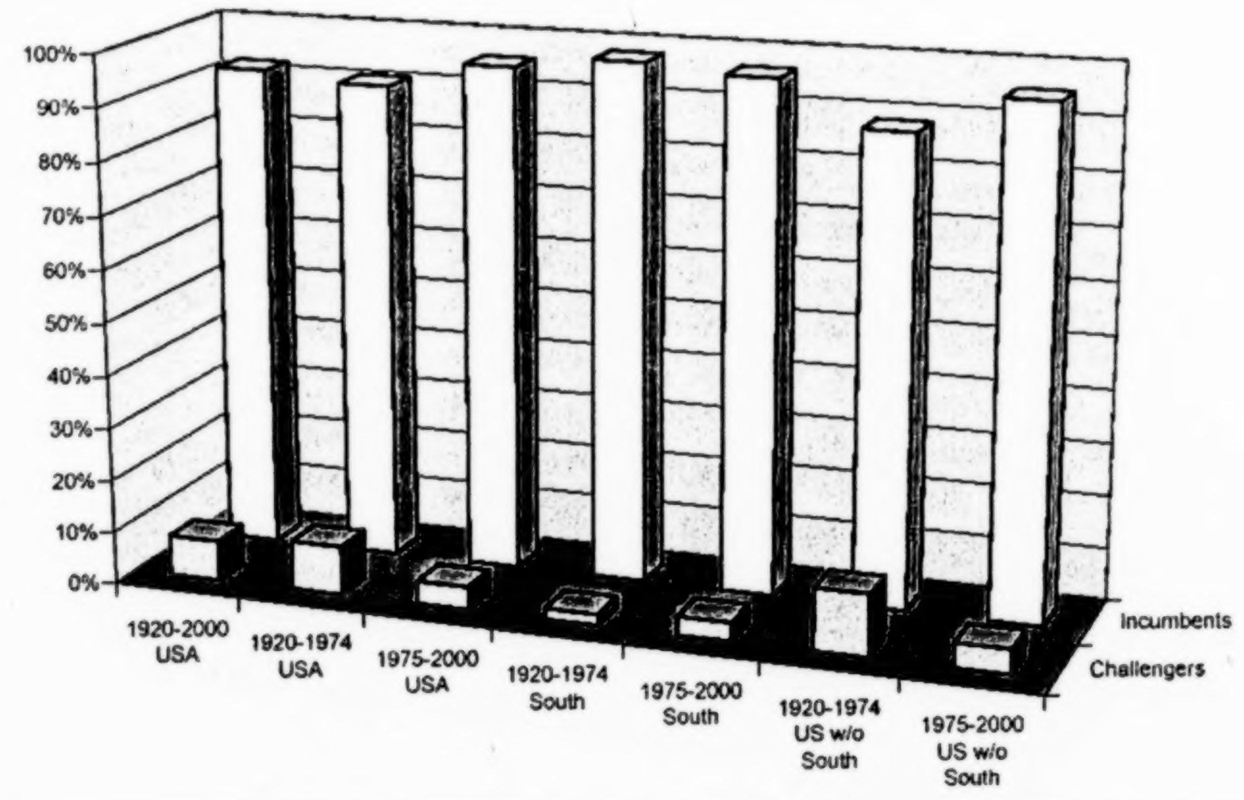
Chart N: Fundraising Matrix
New Additional Donor Base Needed

Contributions Needed to Raise $250 Million
Republican or Democrat National Party Committees

Example	Giving Range	Average Contribution	Number of Contributors	Gross Dollars
1	$10,000	$15,000	16,700	$250 Million
2	$1,000 – $9,999	$2,500	100,000	$250 Million
3	$200 – $999	$500	500,000	$250 Million
4	Under $200	$100	2.5 Million	$250 Million

Chart O: House Victory Percentages

House Elections - Incumbents v Challengers



	1920-2000 USA	1920-1974 USA	1975-2000 USA	1920-1974 South	1975-2000 South	1920-1974 US w/o South	1975-2000 US w/o South
Challengers	7.8%	9.4%	4.3%	2.0%	3.5%	11.7%	4.6%
Incumbents	92.2%	90.6%	95.7%	98.0%	96.5%	88.3%	95.4%

Data compiled from the Clerk of the House

(c) Rodney A. Smith, 2003

Chart O(1)

House Victory Percentages – US w/o South

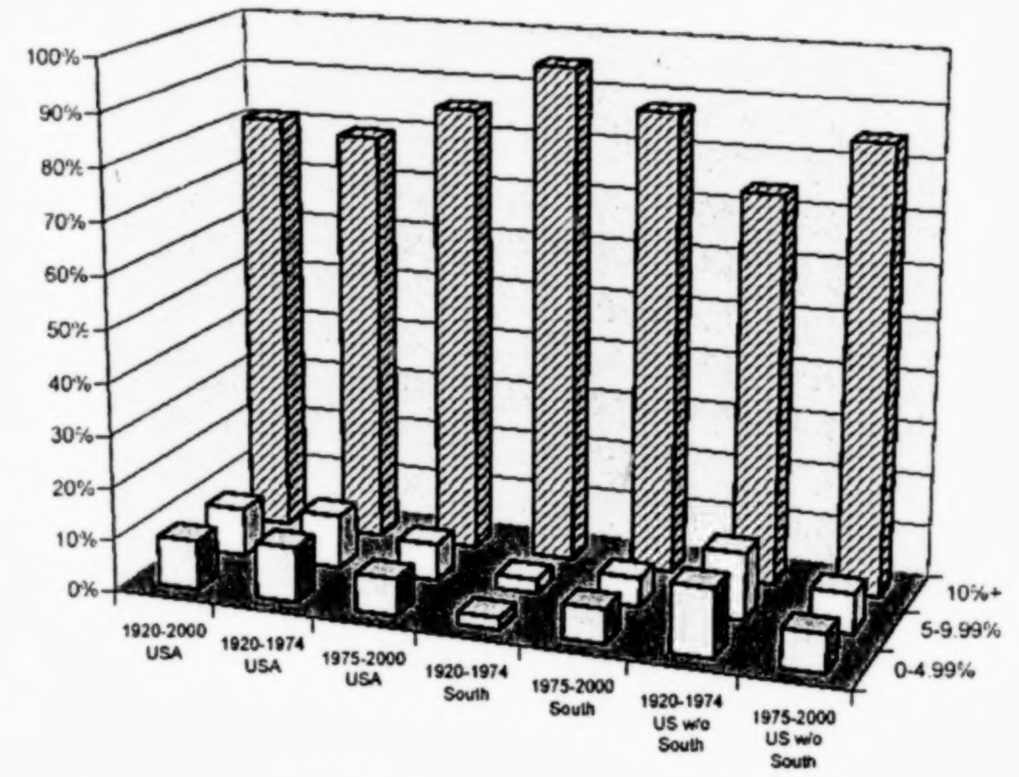
Buckley v. Valeo's impact on House Re-election rates

	1920-1974	1975-2000	Change	% Increase or <Decrease>
Challengers	11.7%	4.6%	<7.1>	<60.7%>
Incumbents	88.3%	95.4%	7.1	8%

Data compiled from the Clerk of the House

Chart P

House Elections - Margin of Victory



	1920-2000 USA	1920-1974 USA	1975-2000 USA	1920-1974 South	1975-2000 South	1920-1974 US w/o South	1975-2000 US w/o South
0-4.99%	9.4%	10.5%	7.1%	2.3%	6.6%	13.1%	7.3%
5-9.99%	9.3%	10.3%	7.1%	2.6%	5.5%	12.8%	7.7%
10%+	81.3%	79.2%	85.8%	95.1%	87.9%	74.1%	85.0%

Data compiled from the Clerk of the House

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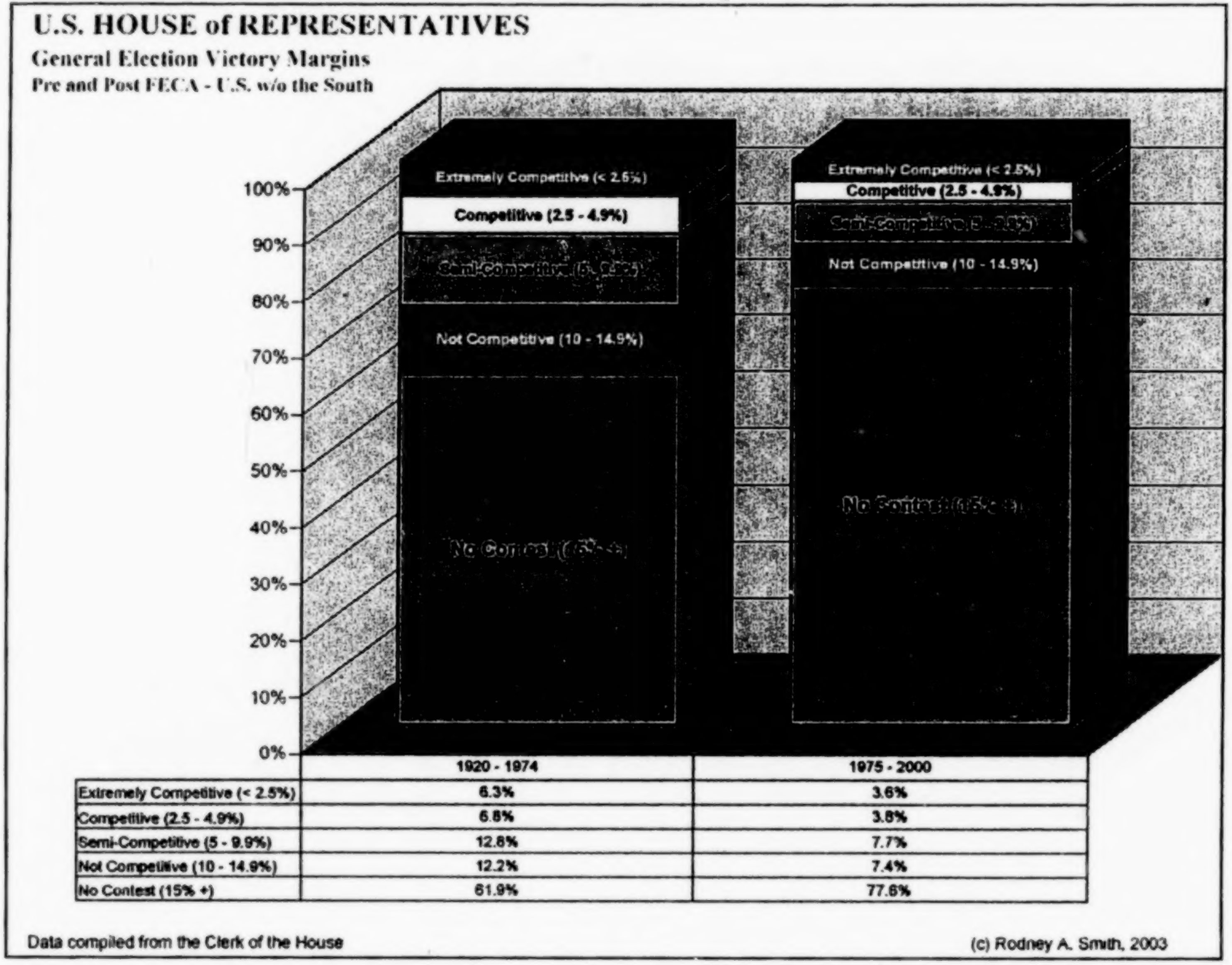
Chart P(1)
House Margin of Victory – US w/o South
Buckley v. Valeo's Impact on House Re-election rates

	1920-1974	1975-2000	Change	% Increase or <Decrease>
0-4.99%	13.1%	7.3%	<5.8>	<44.3%>
5-9.99%	12.8%	7.7%	<5.1>	<39.8%>
10%+	74.1%	85%	10.9	14.7%

Data Compiled from the Clerk of the House

Chart Q



	1920 - 1974	1975 - 2000
Extremely Competitive (< 2.5%)	6.3%	3.6%
Competitive (2.5 - 4.9%)	6.8%	3.8%
Semi-Competitive (5 - 9.9%)	12.8%	7.7%
Not Competitive (10 - 14.9%)	12.2%	7.4%
No Contest (15% +)	61.9%	77.6%

Data compiled from the Clerk of the House

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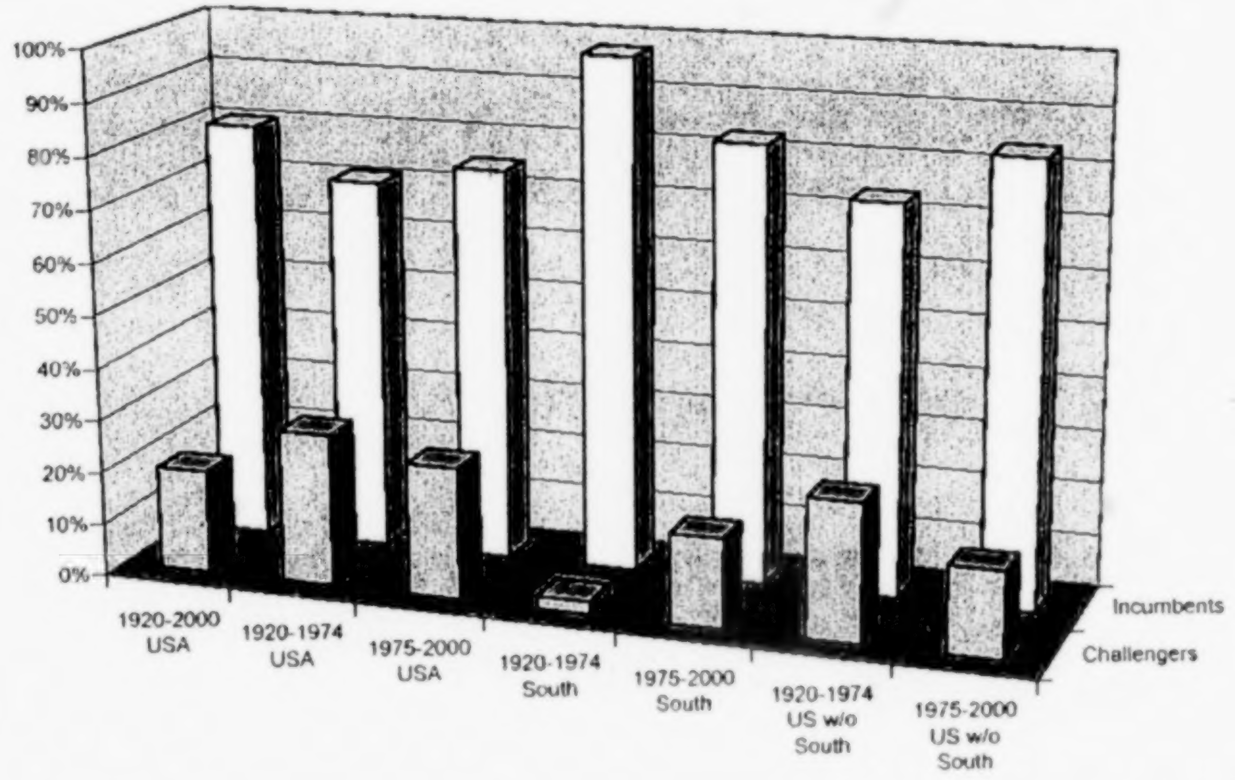
Chart Q(1)
House Change in Margin of Victory by Competitive Categories

	1920-1974	1975-2000	Change	% Increase or <Decrease>
Extremely Competitive (2.5%)	6.3%	3.6%	<2.7>	<42.9%>
Competitive (2.5% - 4.9%)	6.8%	3.6%	<3.2>	<47.1%>
Semi-Competitive (5% - 9.9%)	12.8%	7.7%	<5.1>	<39.8%>
Not Competitive (10% - 14.9%)	12.2%	7.4%	<4.8>	<39.3%>
No Contest (15%+)	61.9%	77.6%	15.7	25.4%

Data compiled from the Clerk of the House

Chart R: Senate Victory Percentages

Senate Elections - Incumbents v Challengers



	1920-2000 USA	1920-1974 USA	1975-2000 USA	1920-1974 South	1975-2000 South	1920-1974 US w/o South	1975-2000 US w/o South
Challengers	19.6%	29.0%	25.1%	2.3%	17.1%	26.2%	16.4%
Incumbents	80.4%	71.0%	74.9%	97.7%	82.9%	73.8%	83.6%

Data compiled from the Clerk of the House

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Chart R(1)

Senate Victory Percentages – US w/o South

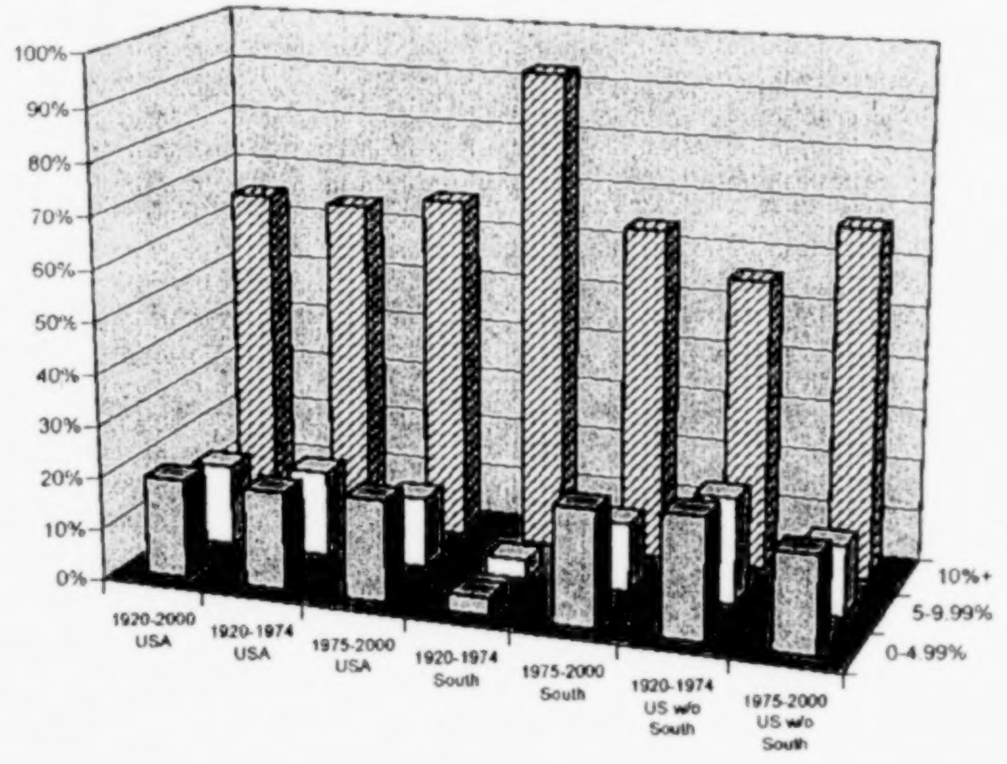
Buckley v. Valeo's Impact on Senate Re-election rates

	1920-1974	1975-2000	Change	% Increase or <Decrease>
Challengers	26.2%	16.4%	<9.8>	<37.4%>
Incumbents	73.8%	83.6%	9.8	13.3%

Data compiled from the Clerk of the House

Chart S

Senate Elections - Margin of Victory



	1920-2000 USA	1920-1974 USA	1975-2000 USA	1920-1974 South	1975-2000 South	1920-1974 US w/o South	1975-2000 US w/o South
0-4.99%	19.1%	18.9%	19.6%	3.4%	22.4%	23.5%	18.8%
5-9.99%	15.7%	16.6%	13.6%	3.8%	13.3%	20.3%	13.7%
10%+	65.2%	64.5%	66.8%	92.8%	64.3%	56.2%	67.5%

Data compiled from the Clerk of the House

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Chart S(1)

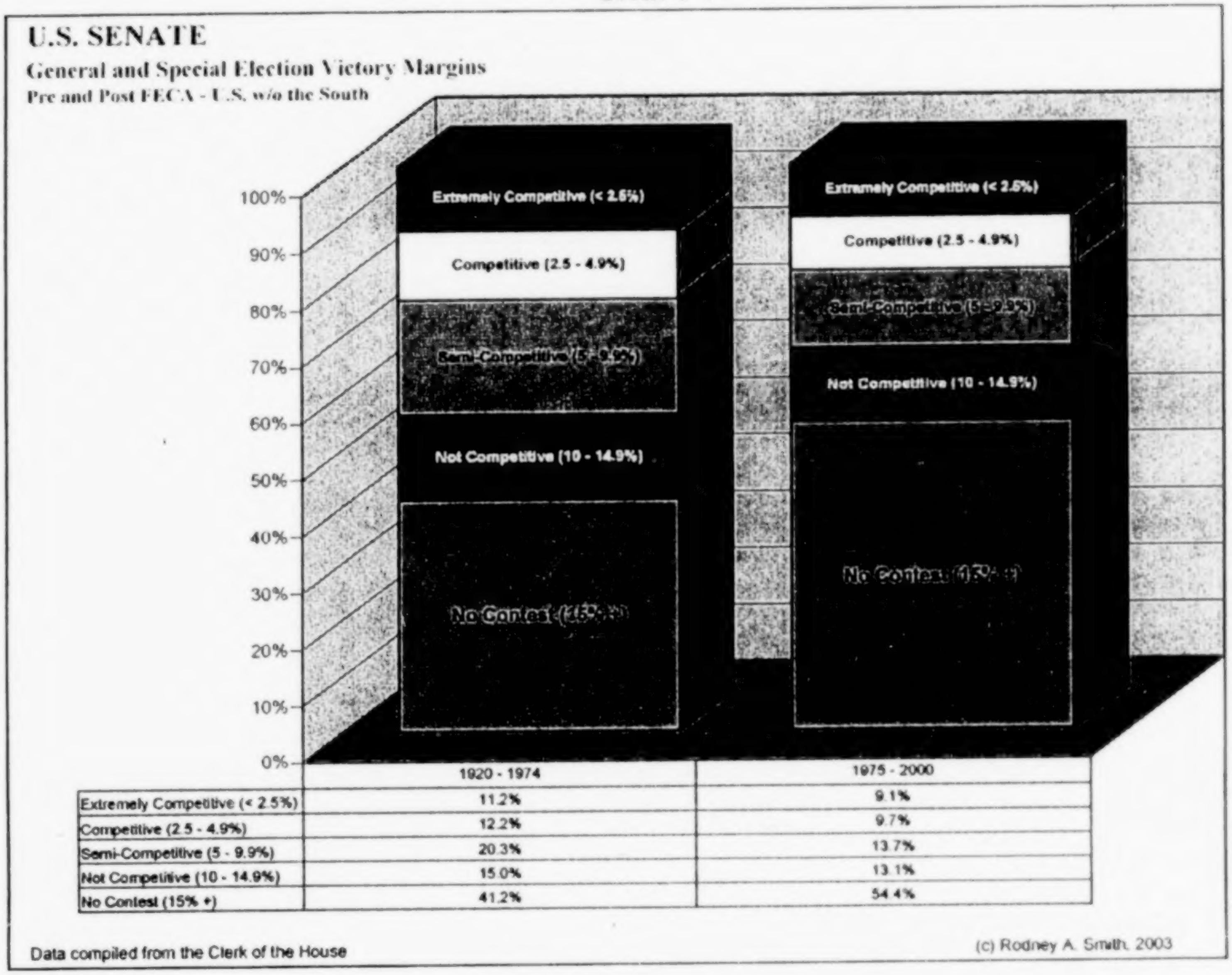
Senate Margin of Victory – US w/o South

Buckley v. Valeo's Impact on Senate Re-election rates

	1920-1974	1975-2000	CHANGE	% Increase or <Decrease>
0-4.99%	23.5%	18.8%	<4.7>	<20%>
5-9.99%	20.3%	13.7%	<6.6>	<32.5%>
10%+	56.2%	67.5%	11.3	20.1%

Data Compiled from the Clerk of the House

Chart T



	1920 - 1974	1975 - 2000
Extremely Competitive (< 2.5%)	11.2%	9.1%
Competitive (2.5 - 4.9%)	12.2%	9.7%
Semi-Competitive (5 - 9.9%)	20.3%	13.7%
Not Competitive (10 - 14.9%)	15.0%	13.1%
No Contest (15% +)	41.2%	54.4%

Data compiled from the Clerk of the House

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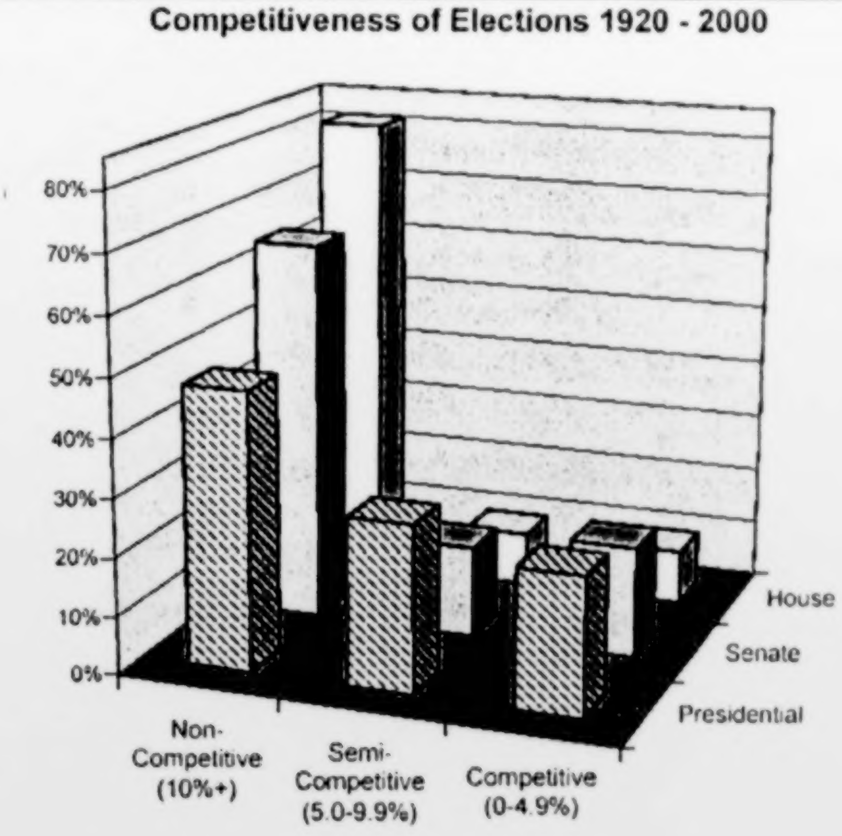
Chart T(1)
Senate Change in Margin of Victory by Competitive Categories

	1920-1974	1975-2000	Change	% Increase or <Decrease>
Extremely Competitive (2.5%)	11.2%	9.1%	<2.1>	<18.8%>
Competitive (2.5% - 4.9%)	12.2%	9.7%	<2.5>	<20.5%>
Semi-Competitive (5% - 9.9%)	20.3%	13.7%	<6.6>	<32.5%>
Not Competitive (10% - 14.9%)	15.0%	13.1%	<1.9>	<12.7%>
No Contest (15%+)	41.2%	54.4%	13.2	32.0%

Data compiled from the Clerk of the House

Election Comparison - President, Senate, House

Chart U
Comparison: President, Senate & House Races



	Non-Competitive (10%+)	Semi-Competitive (5.0-9.9%)	Competitive (0-4.9%)
Presidential	47.7%	28.6%	23.7%
Senate	65.3%	15.7%	19.0%
House	81.3%	9.3%	9.4%

Data Compiled from Clerk of the House

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Chart U(1)
Comparison: President, Senate & House Races
Non-Competitive Category (10%+) Only

	NON-COMPETITIVE (10%+)		Difference	% Change Increase <Decrease>
	Congressional	Presidential		
Senate	65.3%	47.7%	17.6	36.9%
House	81.3%	47.7%	33.6	70.4%

Data Compiled from Clerk of the House

Chart U(2)
Comparison: President, Senate & House Races
Competitive Category (0-4.9%) Only

	COMPETITIVE (0-4.9%)		Difference	% Change Increase <Decrease>
	Congressional	Presidential		
Senate	19.0%	23.7%	<4.7>	<19.8%>
House	9.4%	23.7%	<14.3>	<60.3%>

Data Compiled from Clerk of the House

Chart V
Election to the Virginia House of Burgesses
July 1758

Candidate	Votes Received	%
Colonel George Washington	310	39%
Colonel Thomas Bryan Martin	240	30%
Hugh West	199	25%
Thomas Swearingen	45	6%
TOTAL VOTE	**794**	**100%**

Source: Barton, R.T. "The First Election of Washington to the House of Burgesses" (http://www.ls.net/~newriver/va/lelectgw.htm)

Chart W
Comparative Analysis Adjusted for Inflation
G. Washington's Spending 1758 to Actual Spending 2000

Category	Number of Votes	$ Spent Per Vote	Candidate Factor*	Projected Spending Using G.Washington's Standard	Actual General Election Spending	%
Presidential	105,405,100	$2.40	2	$505,945,000	$135,000,000	27%
Congressional	97,228,616	$2.40	2	$466,695,000	$368,600,000	79%
Senate	79,315,481	$2.40	2	$380,715,000	$244,800,000	64%
Subtotal	281,949,197	–	–	$1,353,355,000	$733,400,000	55%
Party	281,949,197	$2.40	2	$1,353,355,000	$1,018,193,000	75%
Total	–	–	–	$2,706,710,000	$1,751,593,000	65%

Data compiled from the Federal Election Commission

*Assume one candidate per major party

Supreme Court, U.S.
FILED
JUL 8 2003
OFFICE OF THE CLERK

No. 02-1674

In The
Supreme Court of the United States

◆

MITCH MCCONNELL, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

◆

**On Appeal From The United States District Court
For The District Of Columbia**

◆

BRIEF *AMICI CURIAE* OF THE STATES OF VIRGINIA, NORTH DAKOTA, IDAHO, INDIANA, KANSAS, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH IN SUPPORT OF APPELLANTS

◆

CRAIG ENGLE
(*Counsel of Record*)
ARENT FOX KINTNER PLOTKIN
& KAHN, PLLC
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
(202) 857-6000
(202) 775-5791

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Jerry Kilgore, Attorney General
of the Commonwealth of Virginia;
Wayne Stenehjem, Attorney General
of the State of North Dakota;
Lawrence Wasden, Attorney General
of the State of Idaho;
Steve Carter, Attorney General of the
State of Indiana;
Phill Kline, Attorney General of the
State of Kansas;
Jon Bruning, Attorney General of the
State of Nebraska;
Jim Petro, Attorney General of the
State of Ohio;
Henry McMaster, Attorney General
of the State of South Carolina;
Larry Long, Attorney General of the
State of South Dakota;
Mark Shurtleff, Attorney General
of the State of Utah

QUESTION PRESENTED

Do the restrictions imposed upon state and local parties and elections by Title I of the Bipartisan Campaign Reform Act of 2002 ("BCRA") violate Article I, Section 4 of the U.S. Constitution, the Tenth Amendment, and principles of federalism?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici are States which through our Attorneys General argue BCRA is an unconstitutional intrusion upon state sovereignty. While the Federal Elections Clause, U.S. Const. art. I, § 4, cl. 1, gives the Federal Government broad authority to regulate federal elections, it provides no authority for Congress to regulate state election activity. When BCRA took effect, many state campaign finance laws were overridden. This is even true for amicus Commonwealth of Virginia, which is conducting its state elections *this* November in a non-federal election year.

Filing this brief is necessary because the lower panel neglected the Plaintiffs' threshold Elections Clause and Tenth Amendment arguments. Basing their decisions primarily on the First Amendment, Judges Leon and Henderson did not confront Plaintiffs' federalism claims. Judge Kollar-Kotelly avoided the issue by finding none of the Plaintiffs had standing to raise the argument.[2]

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[1] This brief was not written in whole or in part by counsel for a party. The preparation of this brief was funded by the State Government Leadership Foundation, a 501(c)(4) organization whose membership includes present and former elected state officials of the amici States.

[2] With respect to §§ 301(20)(A)(i), (ii), and (iv), Judge Leon admitted it is a "considerable issue" whether the Elections Clause can be fairly read to allow Congress to regulate state party matters. Leon at 1119sa-1120sa. But he also skipped the federalism challenges to Section 301(20)(A)(iii) without explanation. Leon at 1126sa, n.63. Opinions for *McConnell v. Federal Election Comm'n*, No. 02-582, 2003 U.S. Dist. LEXIS 7834 (D.D.C. May 1, 2003), reprinted in Joint Supplemental Appendix to Jurisdictional Statements, cited herein as [Name of Judge] at 1-1400sa.

Amici are well-informed to bring to the Court's attention the overreach of BCRA and its federalization of state and local campaign finance law. States have responsibility for conducting state elections and have adopted their own campaign finance rules reflecting the different choices of our citizenries. As always, amici are vigilant in ensuring the Federal Government does not exceed its limited Constitutional authority; we submit this brief to defend our unique interest.

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AUTHORITY TO FILE

This brief is presented on behalf of amici States by their Attorneys General pursuant to Court Rule 37.4.

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SUMMARY OF ARGUMENT

Our Federal government is one of limited powers. The judiciary, a branch with tenure and authority independent of direct electoral control, must often keep Congress' political zest from running beyond its actual legislative power. One limitation on Congress is a result of the war our forefathers fought over the abuses of sovereignty. Their victory created the constitutional principle of federalism to protect the people and the States from being overrun by a national government, as the colonies were.

Title I of BCRA violates that principle. The offense occurs in the most fundamental area of a democratic system: a State's ability to have its own rules on how its own government will be chosen. Congress' transgression occurs by trumping state campaign finance laws and is similar to its prior over-reaching in *Oregon v. Mitchell*, 400 U.S. 112 (1970). This Court is called to prevent this violation by applying the Tenth Amendment or the Elections Clause in Article 1 of the U.S. Constitution.

Congress has asked this Court to vouchsafe its fears of corruption. It has even presented alternative statutes to the Court to help them find a political majority on how to clean up the system. This Court can avoid that thicket by finding state sovereignty – an idea older than contribution limits or the appearance of corruption – has been trespassed by Congressional over-regulation. Simply put, whatever problems Congress thinks it has with its elections cannot lawfully be solved by federalizing the rules Governors, state legislators and even some candidates for mayor must follow to get elected.

When Congress overruled the financing laws our constituents chose for electing their own state governments, it also took from them the power to shape what their state leaders do and how they will be held accountable. Do not take our word for it: Congressionally-elected campaign finance reformers insist that contributions, and not ideas, determine politics and legislative results. If they are right, then the Constitution must be invoked to prevent Congress from determining state politics and legislative results by reforming state campaign finance laws. And if they are wrong, then this entire artifice is in doubt.

Either way, Congress does not have the authority to overrule our campaign laws and their lack of deftness in doing so shows how fortunate it is they do not have that right.

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ARGUMENT

This case combines two of the most lively debates in American history: campaign finance reform in the 107th Congress and the proper allocation of power among dual sovereigns in the Constitutional Convention. To reconcile these two, this Court must understand what non-federal ("soft") money really is and does, and how the new campaign finance reform law conflicts with the Framers' cherished federalism.

Political parties raise and spend non-federal money in two different places and ways. First is money raised (typically by national party committees, federal officeholders and candidates) and spent outside the contribution and expenditure definitions of federal election law. This money is kept by the national parties in a few large accounts in Washington and finances the national parties' administrative expenses, redistricting work, and a share of its federal candidate-related issue ads and voter contact expenses.[3]

Second is money raised (by just about anyone) and spent in specific compliance with the limits and definitions of a state's own election law. State parties raise this money and keep it in their own state accounts for making contributions to state candidates and to pay for voter contact expenses. National parties also raise this money to make state-regulated contributions to state candidates and transfers to state parties.

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[3] Leon at 1214sa-1215sa (facts #60-64); Kollar-Kotelly at 533sa (fact #1.35).

BCRA regulates both. We are not challenging Congress' wisdom or ability to regulate federal money for the very reason Congress should not be allowed to regulate non-federal money; we each lack the power to regulate the other.

This Court has said Congress, not the States, has the authority to regulate federal campaign finance. *Buckley v. Valeo,* 424 U.S. 1, 13 (1976) (noting Congress' power to regulate federal elections is well-established). In fact, the Federal Election Campaign Act specifically preempts the States from regulating federal campaign finance.[4]

It follows that States have similar authority to regulate state campaign finance. To be sure, this Court recently sustained two state campaign finance laws not because they were compatible with Congress' rules (in fact, they were not) but because each State advanced its own interest well enough to pass First Amendment muster. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660, 666 (1990) ("[Michigan] has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations . . . [and] Michigan's decision to exclude unincorporated labor unions from the [prohibition] is therefore justified by the crucial differences between unions and corporations."); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 382 (2000) ("We hold *Buckley* to be authority for comparable state regulation, which need not be pegged to *Buckley's* dollars.").

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[4] *See* 2 U.S.C. § 453 (1976) (amended 2002) (federal election laws "supersede and preempt any provision of State law with respect to election to Federal office"). According to the Conference Committee report on the 1974 Amendments to the Act, federal law controls with respect to campaign expenditure-related criminal sanctions; the sources of campaign funds used in federal races; reporting and disclosure of political contributions to, and expenditures by, federal candidates and political committees; and the conduct of federal campaigns – but does not affect the States' rights as to other election related conduct such as voter fraud; ballot theft; the manner of qualifying as a candidate; or the dates and places of elections. H.R. Rep. No. 93-1438, at 69, 100-101 (1974).

Although Congress may have an irresistible interest in our campaign finance practices, the Constitution's Elections Clause or the Tenth Amendment means Congressional authority stops where ours begins. Amici agree Elections Clause case law requires the States to yield or share many federal election functions with Congress, but decisions on who can contribute, what kind and amount of money can be used, and how candidates and parties can spend that money in state elections is a State's alone. This traditional and essential state power does not disappear because Congress has authority over federal elections, which are often held on the same day as state elections.

To be clear, we do not seek redress just for ourselves as political entities, but for the protection of our citizens who derive liberty from the diffusion of power. *Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999) (quoting *New York v. United States*, 505 U.S. 144, 182-83 (1992) (O'Conner, J., for the Court) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

Accordingly, amici will prove BCRA is an "ultra vires" Congressional action, see *Printz v. United States*, 521 U.S.

898, 923 (1997), by (**I**) discussing the threshold question[5] of Constitutional federalism and state elections, and (**II**) showing how Title I of BCRA takes power from the States.

I. THE CONSTITUTION LEAVES THE MANNER OF CONDUCTING STATE ELECTIONS TO THE STATES

The Elections Clause states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1.

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[5] Amici respectfully suggest the Court order the constitutional analysis in this case as was done in *Gillespie*, 185 F.3d 693: initially asking if the advocate can make a Tenth Amendment challenge; if yes, then deciding if that challenge is successful; if no, then proceeding to other claims such as Second or Fifth Amendment challenges. *See also New York*, 505 U.S. 144 (Tenth Amendment inquiry, then Guarantee Clause and Severability analysis); *Printz*, 521 U.S. 898 (Tenth Amendment inquiry, then Necessary and Proper Clause analysis); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (noting state's Tenth Amendment right to regulate its judiciary, then finding no Congressional intent under the Commerce Clause to change that, then finding no violation of the Equal Protection Clause); *Cf. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (relying on *National League of Cities v. Usery*, 426 U.S. 833 (1976), looking at the Commerce Clause first, then the Tenth Amendment, then Just Compensation and Due Process Clauses of the Fifth Amendment).

That sentence is traditionally cited as the source of Congressional authority to regulate campaign finance. *Buckley*, 424 U.S. at 13. This Court has unanimously called this clause a "default provision; it invests the States with responsibility for the mechanics of *congressional* elections . . . so far as Congress declines to preempt [them]." *Foster v. Love,* 522 U.S. 67, 68 (1997) (internal citation omitted) (emphasis added). *See also, Storer v. Brown*, 415 U.S. 724, 729-30 (1974); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972).

This clause has not, however, given Congress default power to regulate *state* elections. *See, e.g., Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 217 (1986) (the Constitution allows for "state control over the election process for state offices"); *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) ("[S]tates have a major role to play in structuring and monitoring the election process. . . . "). This sentiment appears in majority opinions and dissents alike. *Jones*, 530 U.S. at 590 ("A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty.") (Stevens, J. joined by Ginsberg, J., dissenting).

The best analyses of the limited reach of the Elections Clause are made in *Oregon v. Mitchell*, 400 U.S. at 117-126 (controlling opinion of Black, J.); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995); 2 Joseph Story, *Commentaries on the Constitution of the United States* 280-92 (1st ed. 1833); and *The Federalist No.* 59 (Alexander Hamilton). From each of those varied settings and centuries, one principle endures: the States, and not the federal government, have authority under the Elections Clause or the Tenth Amendment[6] to regulate their own elections and perquisites for filling local public office.

This principle is supported by five points: (1) the founders' purpose in enumerating an election power for Congress was not to give it power to regulate state elections; (2) this Court's jurisprudence affirms States have broad regulatory rights over conducting state elections; (3) campaign finance laws are a fundamental manner of conducting an election; (4) a State does not yield its power because state and federal elections are often held on the same day; (5) arguments against the state interest are unpersuasive.

(1) The Founders Did Not Intend To Give Congress Power To Regulate State Elections

The Constitutional Convention debates make clear the Framers' Election Clause compromise was not intended to give Congress plenary power over federal and state elections, but rather to prevent States from over-regulating federal elections. *See* 2 Joseph Story, *Commentaries on the Constitution of the United States* 280-92, 284 (1st ed. 1833) (The concept of federal power regulating state elections is "so flagrant a violation of principle, as to require no comment."); *U.S. Term Limits*, 514 U.S. at 808-09 ("[T]he

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[6] The question whether Congress has the affirmative power to regulate in a certain area is the "mirror image[ ]" of the question whether states have the reserved power to regulate in that area under the Tenth Amendment. *See, e.g., New York v. United States,* 505 U.S. at 156. If the Tenth Amendment is not a tautology, amici would view this case as a Congressional over-extension of a delegated power, rather than a pure Tenth Amendment inquiry, because the Constitution metes out election powers rather than being completely silent on the subject.

Framers' overriding concern was the potential for States' abuse of the power to set the 'Times, Places and Manner' of elections."); *The Federalist No.* 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that giving state governments exclusive power to regulate federal elections would leave the existence of the Union at the mercy of the States).

(2) States Have Broad Regulatory Rights Over Conducting State Elections

This Court's history is replete with endorsements of state power over state elections. *See, e.g., Sugarman*, 413 U.S. at 647 (State's power to regulate elections inheres in the State "the basic conception of a political community") (internal quotation omitted); *Pope v. Williams*, 193 U.S. 621, 632 (1904) ("[T]he privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution."); *Blitz v. United States*, 153 U.S. 308, 314-15 (1894) (The national government has "no concern" regarding certain fraud in the election of state offices.).

In *Oregon v. Mitchell*, 400 U.S. 112, this Court upheld a new voting age statute only as applied to federal, but not state, elections. Justice Black wrote:

> [n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and *the nature of their own machinery for filling local public offices*.

Mitchell, 400 U.S. at 125 (emphasis added). Justice Black made an additional and compelling point in *Mitchell*: a State's plenary power over state elections is limited only by U.S. Constitutional Amendments, "each of which has assumed that the States had general supervisory power over state elections." *See id.* at 125-26.

(3) Campaign Finance Laws Are A Fundamental Manner Of Conducting An Election

There should be no doubt that state and federal campaign finance laws are a "traditional and essential function" of a democratically elected government. *See Pennsylvania Dep't of Corrections v. Yesky*, 524 U.S. 206, 209 (1998). Just as in determining the qualifications for state office holders, amici contend the manner of holding an election is a "decision of the most fundamental sort for a sovereign" and "at the heart of representative government." *Gregory*, 501 U.S. 452, 460, 463 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)); *accord City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 565 n.17 (1994) (Souter, J., dissenting). Regulating the manner of an election is "comprehensive" authority including the power to impose "numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Foster*, 522 U.S. at 72 n.2 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

The Federal government's manner of regulating campaign finance is one traditional aspect of conducting a federal election. *Federal Election Comm'n v. Beaumont*, No. 02-403, 2003 U.S. LEXIS 4595, at *14 (U.S. June 16, 2003) (noting that since 1907, there has been a century of

Congressional attention to corporate political contributions). For Congress, enacting campaign finance laws is an essential government function too. Supporters contend the whole branch may fall victim to the appearance of corruption without new, stricter rules. If this Court agrees, then each State also faces this fundamental issue – *but for itself.*[7] *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system).

(4) A State Does Not Yield Its Power Because State And Federal Elections Are Held On The Same Day

The date of holding an election does not change a State's rights. Surely, when a State holds its elections simultaneously with the Federal government, Congress does not lose its power to regulate federal elections. But this does not mean Congress somehow gains the power to regulate state elections held on the same day.[8] *See Ex parte*

Siebold, 100 U.S. 371, 393 (1879) (acts relating exclusively to the election of state and county officers are not amenable to Federal jurisdiction); *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 143 (1947) (The United States "has no power to regulate[] local political activities as such."); *United States v. Reese*, 92 U.S. 214, 218 (1875) (noting with regard to the Elections Clause and municipal races, "the effect of art. 1, sect. 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration.").

The date of a state and federal election is a critical point because BCRA's hook for federalizing state fundraising rules is that nearly all elections for federal and statewide office are held on the same day.[9] Moving state elections to a different day or year to avoid BCRA's claw should not be suggested. As is, state elections are not violating anyone's constitutional rights. Nor are amici challenging Congress' exercise of its constitutional power over itself. We are just defending the exercise of our own. Saying that States can exercise their rights some other time does not sound as though we have "residuary and inviolable sovereignty" but more like we are Congress' prefecture. *The Federalist, No.* 39, at 245 (James Madison) (Clinton Rossiter ed., 1961); *Printz*, 521 U.S. at 919.[10]

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[7] Congress' purpose in enacting campaign finance reform (to orient Members away from donors and towards constituents) is precisely the reason Congress cannot regulate contributions to our state candidates and parties. *See Jones*, 530 U.S. at 580-81. Altering election laws for the purpose of changing candidates' views or whom they must "curry favor with" to get elected or reelected unconstitutionally occurs at the expense of a party's ability to perform the basic function of choosing their own leaders. *Id.* (citing *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). This is especially true when the goal is the "election of problem solvers *who are less beholden to party officials*." *Id.* (emphasis in original).

[8] "Federal Election Day" under 2 U.S.C. §§ 1 and 7, means "the Tuesday after the first Monday in November in an even numbered year." *Foster*, 522 U.S. at 68.

[9] *See* BCRA, Pub. L. No. 107-155, tit. I, sec. 101, §§ 301(20)(A)(i), (ii), 116 Stat. 81, 85-86. Leon at 1213sa (fact #58); Kollar-Kotelly at 536sa (fact #1.39.1.2); Henderson at 298sa (fact #72c(2)(A)).

[10] States may wish to hold their elections simultaneously with those for the Federal government not just for convenience but for the reason Congress wanted a uniform federal election day: to remedy the evil arising from elections at different times that can distort the voting process and influence later voting. *Foster*, 522 U.S. at 73 (quoting *Ex*

(Continued on following page)

(5) Arguments Against The State Interest Are Unpersuasive

Although several States may write in favor of BCRA, the Constitutional power of Congress cannot be expanded by the "consent" of the governmental unit whose domain has been narrowed. *New York*, 505 U.S. at 182. Further, amici find the arguments of our sister states to be unconvincing. Below, they wrote: "because the Act is *designed* to regulate federal election activity, it does not intrude on purely local matters." Brief of Amici Curiae States of Iowa et al. at 13, *McConnell v. Federal Election Comm'n*, 2003 U.S. Dist. LEXIS 7834 (D.D.C. May 1, 2003) (No. 02-582) (emphasis added). With all due respect, that sounds more like an *ipse dixit* than a reasoned explanation, especially when those states also admit "some impact on those state elections and campaigns is inevitable." *Id.* at 11. That impact is not excusable just because BCRA was not *intended* to regulate state elections activity. *See Foster*, 522 U.S. at 73 (Resolving a conflict between state and federal election laws "does not depend on discerning the intent behind the federal statute."). Instead, it shows how positively well-integrated state and federal political activities are even with a dual set of governments.[11] And to the extent our sister states' arguments are policy-driven[12] we concede they have won that argument in the branch where it was properly fought. Today's question is whether that victory was constitutional.

BCRA's defenders may also claim it intrudes no more on state sovereignty than some other provisions of FECA, namely 2 U.S.C. § 441b forbidding "any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to *any* political office" (emphasis added) and 2 U.S.C. § 441e forbidding foreign nationals from making contributions "in connection with a Federal, State or local election."[13]

These provisions enjoy a stronger pedigree than BCRA. Sections 441b and e each find support in well-recognized Congressional powers other than the Elections Clause. With respect to § 441b, Congress has long held the ability to charter and regulate national banks. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). Inherent in the grant of corporate life is the ability of the sovereign (in this case Congress, not a State) to constrain such institutions in the way its grantor sees fit. Section 441e is part of the Federal government's plenary power over immigration and foreign affairs rather than a specific

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parte Yarbrough, 110 U.S. 651, 661 (1884)); *Busbee v. Smith*, 549 F. Supp. 494, 524 (D.D.C. 1982) (recounting the purposes of § 7), *aff'd*, 459 U.S. 1166 (1983).

[11] Leon at 1221sa-1222sa (facts #90-92); Kolar-Kotelly at 525sa (fact #1.28); Henderson at 297sa (fact #71c).

[12] Policy arguments made below such as BCRA "is attacking the causes of cynicism," and "is an urgently needed national solution to a national problem," or BCRA will "counter the negative influence of fundraising" are all debatable, but not before the Court. Brief of Amici Curiae States of Iowa et al. at 3, 5, 8, *McConnell v. Federal Election Comm'n*, 2003 U.S. Dist. LEXIS 7834 (D.D.C. May 1, 2003) (No. 02-582).

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[13] The FEC has previously interpreted "any political office" as applying to federal, state and local elections. *See United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999). The Court has never had occasion to rule whether this FEC interpretation, § 441b or § 441e can withstand Tenth Amendment scrutiny. Amici note BCRA expanded 441e, but that change is not at issue in this case.

attempt to regulate elections. The predecessors to §§ 441b and e also predate any effort on the part of the Federal government to systematically regulate campaign contributions.[14]

This Court should note dual sovereignty is more than a barrier against a tide toward nationalism. It also allows healthy competition *among* the States. Amici know each State's individual success is based on enacting unique legislation in a variety of areas such as tax, employment law, and even the rules for financing state and local campaigns. Beyond being democracy's laboratory, a State may feel a contribution restriction (or lack thereof) may induce better candidates to run for governor who in turn, may have better chances of enticing new businesses or winning federal appropriations. Given that 68 of today's 100 U.S. Senators were previously elected to some state office,[15] our own state campaign finance laws must have been a fair proving ground for federal office.

We agree state sovereign interests are more properly protected by "procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia*, 469 U.S. at 552. To amici it is obvious that federalism protects our sovereign interests in deciding who can contribute to those wishing to run our governments, what support they can give, and how that money can be spent.

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[14] 2 U.S.C. § 441b was originally part of the Tillman Act, ch. 420, 34 Stat. 864 (1907). 2 U.S.C. § 441e was originally enacted as 18 U.S.C. § 613 (1966), an amendment to the 1938 Foreign Agent Registration Act, 18 U.S.C. § 219.

[15] *See* 29 *Congressional Yellow Book* (Ericka J. Claflin ed., Leadership Directories, Inc. Summer 2003).

II. TITLE I OF BCRA TAKES A MANNER OF CONDUCTING STATE ELECTIONS AWAY FROM THE STATES

Title I of BCRA imposes new, nationally uniform rules that change the way amici have chosen to finance our election campaigns. Amici admit BCRA does not entirely replace state campaign laws,[16] but it does cross the line from federal into state territory by directly regulating state contributions, the voter contact work of state parties and even the commercials state candidates can run.

To prove this charge, amici will demonstrate: (1) the States have adopted a wide variety of campaign finance laws, (2) BCRA imposes federal rules on state activity, and (3) applying these rules fundamentally changes State choices on financing State election activity.

(1) States Have Adopted A Wide Variety Of Campaign Finance Laws

There are far more elections for state and local offices than federal offices.[17] To accommodate this, each of the 50 states, the four United States territories, and the District of Columbia has adopted its own unique campaign finance laws. *See* Federal Election Commission, *Campaign Finance Law 2000: Chart 2A: Contribution and Solicitation Limitations* ("FEC Chart 2A") *at* http://www.fec.gov/pages/cfl00chart2A.htm (last modified June 6, 2000). In many instances, these laws date to the late 19th century and have undergone a long and deliberative process of continual development and revision. *See, e.g.*, "Act to Prevent Corrupt Practices in Elections and to Provide for Publicity of Elections Expenses," Mass. Acts (1892); "Act to Promote the Purity of Elections," Cal. Stat. (1893).

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[16] Alleging a new election law's burden is not severe because "it does not limit the parties from engaging fully in *other* traditional party behavior, such as . . . conducting campaigns" is beside the point. *Jones*, 530 U.S. at 581 (emphasis in original). This Court has consistently refused to overlook an unconstitutional restriction simply because it leaves other constitutionally protected activity unimpaired. *See id.*

[17] Leon at 1223sa, 1227sa-1228sa (facts #97, 114); Kollar-Kotelly at 540sa (fact #1.43.2.3).

According to the Federal Election Commission's most recent summary of state campaign finance laws, twenty-nine States permit and twenty-one States prohibit corporations from contributing treasury funds to state and local candidates' campaigns. *See* FEC Chart 2A. Of those States permitting corporate contributions, some allow unlimited contributions to be made, while others place limits. Many States also allow unlimited contributions of labor union treasury funds. In Michigan, unincorporated labor unions can make unlimited expenditures, but corporations may not. *See* Mich. Comp. Laws § 169.254 (2003). In Utah, the case is just the opposite. *See* Utah Code Ann. § 20A-11-1403 (Supp. 2002).

Some States allow individuals to make unlimited contributions to state candidates, political action committees ("PACs") and party committees. *See, e.g.*, Henderson at 290sa-291sa (fact #68b). Other States put a variety of limits on these gifts. Many States allow national, state and local political parties to spend unlimited sums on contributions to (or expenditures on behalf of) state candidates. Many states also allow unlimited transfers from the national party committees to the state parties to finance state-related voter contact work.[18] Some States regulate the expenditure of these amounts.

Other peculiarities of state campaign finance laws include restrictions on contributions by certain regulated industries, prohibitions on contributions by lobbyists while the legislature is in session, regulations governing the operation of PACs, and provisions for public financing of state and local elections. *See* FEC Chart 2A. State election laws even vary the dates and years for holding state and local elections.[19]

Regardless, States are continually adjusting their campaign finance laws to reflect new priorities, enforcement concerns and changed conditions.[20] In many cases these changes are made by state legislatures and city councils. In some cases they are enacted directly by citizens through ballot initiatives and referenda. *See, e.g.*, California Proposition 34, *Campaign Contributions and Spending. Limits. Disclosure.* (2000); Leon at 1227sa (fact

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[18] Leon at 1239sa (facts #152-54); Kollar-Kotelly at 539sa (fact #1.43.2.1); Henderson at 297sa (fact #71c).

[19] Leon at 1213sa (fact #58); Kollar-Kotelly at 536sa (fact #1.39.1.2); Henderson at 298sa (fact #71c(2)(A)).

[20] Even as this brief was being written, it was reported that four states changed their state elections laws. *North Carolina State Board Finds Municipalities Barred From Making Contributions*, 2003 Money & Politics Rep. (BNA) (July 2, 2003); *Massachusetts Governor Lets Stand Repeal of Public Campaign Financing*, 2003 Money & Politics Rep. (BNA) (July 1, 2003); *Murkowski Signs Bill Loosening Limits on Contributions and Lobbyists in Alaska*, 2003 Money & Politics Rep. (BNA) (July 1, 2003); *South Carolina Governor Signs Bill To Beef Up Campaign Finance Rules*, 2003 Money & Politics Rep. (BNA) (June 30, 2003).

#111); Henderson at 310sa (fact #72); *Shrink Missouri*, 528 U.S. at 382.

(2) BCRA Imposes Federal Rules On State Activity

Before BRCA, federal election law could be easily summarized: contributions by individuals, PACs and parties were limited; contributions by corporations and labor unions were prohibited; and generic or mixed party activities[21] either did not count as a contribution or had to be paid with an allocation of federal and state-regulated money.[22] Leon at 1215sa (fact #65). But in any event, state activity by state candidates and parties was left alone.

Title I of BCRA changes that. The Title contains more than thirty new provisions and definitions which must be patiently read to appreciate their invasion of state sovereignty. Of particular concern to amici are the following

provisions which are unfortunately dense but fairly phrased as follows:

> § 323(a) NATIONAL POLITICAL PARTY COMMITTEES
>
> National political party committees may not solicit, receive, contribute, transfer or spend any funds not in accordance with Federal law.
>
> § 323(b)(1) STATE AND LOCAL POLITICAL PARTY COMMITTEES
>
> Any amount that is expended or disbursed for "Federal election activity" by a state or local committee of a political party shall be from funds subject to the limitations, prohibitions, and reporting requirements of Federal law.
>
> § 301(20)(A) THE TERM 'FEDERAL ELECTION ACTIVITY' MEANS
>
> (i) Voter registration activity for 120 days before a regularly scheduled Federal election;
>
> (ii) Voter identification, get-out-the-vote activity, or generic campaign activity conducted in an election where a candidate for federal office appears on the ballot (regardless of whether state candidates also appear on the ballot);
>
> (iii) A public communication that promotes, supports, attacks, or opposes a federal candidate for that office (regardless of whether the communication contains express advocacy or also refers to a state candidate); or

---

[21] Mixed expenses include the necessary (if not praiseworthy) efforts of political parties to identify voters, register them, and get them out to vote. Leon at 1195sa (fact #23); Kolar-Kotelly at 529sa (fact #1.31); Henderson at 292sa-294sa (facts #70-71); *Jones*, 530 U.S. at 587 ("Encouraging citizens to vote is a legitimate, indeed essential, state objective.") (Kennedy, J., concurring). Generic exhortations to "Vote Republican" require some accounting to ensure the party uses a mix of state and federal dollars to finance them. When the parties pay for communications such as "Vote for Congressman Smith" or "Defeat Attorney General Jones" they fully use federal or state funds and may be subject to contribution and some expenditure limits. *See Federal Election Comm'n v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*).

[22] *See, e.g.*, 2 U.S.C. §§ 441a(a)(1), 441a(a)(2), 441a(d), 441a(h), 441b(a), 431(8)(B)(ix), (x), (xi); 11 C.F.R. §§ 102.5, 106.

(iv) The cost of personnel who spend more than twenty-five percent of their compensated time on federal election activity.[23]

§ 323(b)(2) "LEVIN EXCEPTION" TO BCRA's APPLICABILITY TO STATE PARTIES

A state or local committee of a political party may use an FEC-approved allocation of extra funds for certain political party expenses provided that:

(i) The activity does not refer to a clearly identified federal candidate;

(ii) It is not for the cost of a broadcast communication (except if it just refers to a candidate for State office);

(iii) The extra money is from sources approved by State law, but no person may donate more than $10,000 for these expenses;

(iv) The amounts expended are raised by the state party itself and not from funds provided by the national political party or their officers, agents or related entities.

§ 323(f) STATE CANDIDATES

A candidate for state office or individual holding state office cannot make a broadcast communication described in (20)(A)(iii) (above) which positively or negatively refers to a federal candidate unless he or she uses federal funds.

BCRA, Pub. L. No. 107-155, tit. I, sec. 101, §§ 323(b)(1), 323(b)(2), 301(20)(A), 323(f), 116 Stat. 81, 82-86 (codified at 2 U.S.C. §§ 441i, 431 (2003)).

From this glimpse, the Court can see these sections create quite a regulatory back-and-forth; there are three general rules, an exception, and then conditions on the exception. The first rule prohibits national parties from raising and transferring state-approved money to its state parties, and further prohibits them from making state-approved contributions to state candidates – *even if state law specifically permits it.*

The second rule prohibits state parties from spending state money on an incredibly misnamed set of "federal election activities." *See* Henderson at 318sa (fact #76). These so-called "federal" activities include: voter contact and generic party promotion conducted for an election with federal candidates *even if the activity does not mention a federal candidate*; and the not-so-bright line rule on prohibiting public communications that promote, support, attack or oppose someone who is a federal candidate *even without reference to an election.* BCRA, tit. I, sec. 101, § 301(20)(A).

The exception allows state parties to raise some extra money to be used for a share of routine voter contact work, *but* on the condition the money cannot be used to refer to a federal candidate, cannot exceed $10,000 per person regardless if state law permits more, and cannot be raised with the help of the national committee as done in the past. BCRA, tit. I, sec. 101, § 323(b)(2).

The last rule is of particular alarm to amici's state officials. BCRA requires any broadcast communication by state candidates or officeholders that may also promote, support, attack or oppose an individual candidate for federal office be paid with federally-regulated, and not state, campaign funds. BCRA, tit. I, sec. 101, § 323(f).

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[23] "Federal election activity" does not include (i) communications solely about state candidates, (ii) contributions to state candidates, (iii) state conventions, or (iv) buttons, bumper stickers and signs depicting state candidates only. *See* BCRA, tit. 1, sec. 101, § 301(20)(B).

(3) BCRA Fundamentally Changes State Choices On Financing State Election Activity

Applying BCRA to state activity makes for some treacherous ground. One misstep and a state party volunteer or candidate for city council could face a federal prison sentence.[24] That is true because most here-to-fore state party voter contact work is now "federal election activity." Henderson at 318sa (fact #76). This change means long-standing, uncontroversial state activities previously paid for with state money must now be paid for with federally-regulated funds. On its face, that is reason enough to invalidate Title I of BCRA. But applying BCRA produces irrational results that gives even more reason for it to be stopped at the state line. Examples:

Applying 323(a), the Republican National Committee may not raise money specifically allowable under the laws of Virginia, Kentucky, New Jersey, Louisiana or Mississippi and contribute that money to a state candidate in a manner approved by state law for elections occurring *this* November – even though there are no federal candidates on those ballots.[25]

Applying 323(a), the Republican National Committee can no longer work side-by-side with its fifty-five state-level parties to raise money for them in a manner approved by their state's law – even if the state party contributes every cent raised to state candidates.[26]

Applying 323(a)(1), Republican National Committee Co-Chairman Ann Wagner cannot organize and hold a series of state-regulated fundraisers for a nationwide slate of state and local female candidates in an effort to support the party platform of boosting diversity in government – even if the contributions go directly from the donors to the deserving candidates.[27]

Applying 301(20)(A)(ii), a state party may not use exclusively state funds to launch a get-out-the-vote drive because its incumbent governor is in a hotly contested election if a Congressional candidate is also on the ballot – even if that Congressman is running unopposed or is in an uncompetitive race.[28]

---

[24] BCRA, tit. III, sec. 312, 315 (codified at 2 U.S.C. §§ 437g).

[25] The evidence below shows the Republican National Committee spent over $15.6 million of state-regulated money on direct contributions to state and local candidates and other state party activities in 2001 – when there were no federal candidates on the ballot. Henderson at 298sa (fact #71c(2)(B)); Koller-Kotelly at 536-37sa (fact #1.39.1.2); Leon at 1213sa (fact #59).

(Continued on following page)

[26] The evidence below shows the Republican National Committee spent $5.6 million of state-regulated money on direct contributions to state and local candidates in 2000. Henderson at 297sa (fact #72c(1)(A)); Leon at 1212sa (fact #55).

[27] This result runs contrary to Justice Kennedy's observation: "Our constitutional tradition is one in which our political parties and their candidates make common cause.... There is a practical identity of interests between parties and their candidates during an election." *Jones*, 530 U.S. at 584.

[28] *See* Leon at 1212sa-1213sa (fact #56) regarding the RNC financial assistance to California in 2002 and Indiana in 2000.

Applying 301(20)(A)(i), a state party is now prohibited from using state funds for voter registration efforts for a state primary election held as early as July before a general election – even if there are only state candidates on the primary ballot.[29]

Applying 301(20)(A)(ii), a state party is now prohibited from using any state money for a message stating "Vote Republican to Protect Your Water Rights" if a federal candidate is on the election ballot. The party's candidate for Water Commissioner, however, could use entirely state money for that very same message.

Applying 301(20)(A)(ii), a state party now faces a 365 day prohibition against using state funds for routine state voter contact work in an election year – even if it is not directed at a federal race or does not mention a federal candidate.[30]

Applying 301(20)(A)(ii), the state parties in the five states that have chosen to hold elections for state officers in odd-numbered years can no longer receive state-law-approved transfers of money from the national parties – even if the money will only be spent on the state races.

Applying 323(b)(2) (the "Levin exception"), a state party can only raise certain money to pay its share of mixed state and federal voter contact work but no more than $10,000 can come from any one source – even if state law permits higher amounts.[31]

Applying 323(f) and the not-so-bright-line regulation of 301(20)(A)(iii), amici's office holders – whether in the context of their re-election campaigns or not – can no longer use state-regulated campaign funds for messages that refer to a federal candidate in a way that promotes or attacks that person for that office. Henderson at 292sa (fact #69).

This 323(f) prohibition deserves additional comment. Below, Judge Leon sustained this prohibition against state candidates and officeholders from making 301(20)(A)(iii) communications with state funds because it is "consistent with [his] preceding discussion of the constitutionality of Section 301(20)(A)(iii)" as imposed on political parties. Leon at 1146sa. To the extent this Court is reviewing his rationale, the judge is merging two very different things and is overlooking an extra element in 323(f).

---

[29] The Court's jurisprudence allows easy condemnation of BCRA's financial interference with state primaries. *See Jones*, 530 U.S. at 575 (citing *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989)) ("[O]ur cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer . . . .") (internal quotations omitted).

[30] Prior federal law could not reach this sort of non-federal activity that "spilled over" into Congressional races or created "reverse coat tails." *Federal Election Comm'n v. GOPAC, Inc.*, 917 F. Supp. 851, 862, 865, 866 (D.D.C. 1996) (explaining while it is "theoretically possible" to isolate and trace the indirect impact GOPAC's non-federal activity had on Congressional elections, such activity is not federally regulable because GOPAC's activity did not directly support federal candidates).

[31] The evidence below shows this will substantially interfere, for example, with the California Democratic Party's state law-approved fundraising practices. *See* Leon at 1241sa (fact #161).

First, Judge Leon sustains the not-so-bright line of 301(20)(A)(iii) because the record reflects Congressmen know whose money is being given to the political parties for issue ads favorable to their re-election, which raises an appearance of corruption. Leon at 1130sa, 1134sa-1135sa. Second, political parties are unique and sophisticated: they are constantly in the business of electing their own, they merit special regulation and can avoid the bad words if they *really* want to advocate on an issue. Leon at 1139sa.

That may or may not be true, but 323(f) applies BCRA's speech prohibition to people, not party committees. They are people who may be running for the state legislature and think a campaign advertisement saying they are supporting the President's re-election will improve their own chances for getting elected. Instead, it will improve their chances for jail.[32]

More important, 323(f) also applies to individuals simply "holding" state or local office. BCRA, tit. I, sec. 101, § 323(f). Judge Leon overlooks the statute's extra prohibition on state office holders, *as officeholders*, regardless of whether they are seeking re-election or retiring. Congress cannot possibly have this power over our state office holders or prove even a minimal federal nexus for such a grant. "[S]imply because Congress may conclude a particular activity substantially affects [a Congressional power] does not necessarily make it so." *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (*quoting Hodel*, 452 U.S. at 311 (Rhenquist, J., concurring)). Rather, it is a judicial question that can only be resolved by this Court. *Id.* (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

---

[32] It is possible the federal interest here is that a federal candidate could steer non-federal donors to a state candidate who agrees to run Trojan Horse ads really advocating the federal candidate's election. That fact is nowhere to be found in the approximately 1,400 pages below and should be dismissed, as this Court once aptly said, as "mere conjecture." *Shrink Missouri*, 528 U.S. at 392.

BCRA is clumsy. BCRA is unreasonable. BCRA has commanderred state laws, state constitutions and state ballot initiatives upsetting "the usual constitutional battle of federal and state powers." *Gregory*, 501 U.S. at 460. The considered legal opinion of amici is BCRA creates real, concrete examples of federal interference with the States' prerogatives on how its governments will be chosen. This cannot be reconciled with the Constitution.

CONCLUSION

Federal money is admittedly a federal issue. State money is a state issue. State campaign finance laws are an integral part of state governance and this Court should not be surprised amici are here zealously guarding against this federal encroachment. *See, e.g., Alden v. Maine*, 527 U.S. 706, 748, 751-52, 758 (1999); *Printz*, 521 U.S. at 919-20.

Regardless of how this Court evaluates the merits of Congress' approach, the *first* question is whether Congress can have any approach that includes our state laws. After striking those sections that violate our sovereignty, we encourage the Court to *then* evaluate the justifications for the remainder.

The superfluity of Congress' approach to campaign finance reform may be the temporary tenor of the times. Fortunately, the judiciary can see beyond that. And while amici must frequently heed the desires of the federal government, this particular law is more deserving of fear than respect.

Title I of BCRA should be invalidated.

Respectfully submitted,

CRAIG ENGLE
(Counsel of Record)
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
(202) 857-6000
(202) 775-5791

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In The

Supreme Court of the United States

◆

VICTORIA JACKSON GRAY ADAMS, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

◆

On Appeal To The United States
District Court, District Of Columbia

◆

BRIEF AMICUS CURIAE OF PUBLIC CAMPAIGN IN SUPPORT OF APPELLANTS

◆

GREGORY LUKE
Counsel of Record
14622 Ventura Blvd., #735
Sherman Oaks, CA 91403
(818) 486-4233

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS*[1]

Public Campaign is a non-profit, non-partisan educational organization with separate corporate branches established under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code. As the premier national organization supporting legislation to establish the public financing of elections, Public Campaign promotes reforms that aim to dramatically reduce the role and influence of money in America's elections. Public Campaign rigorously monitors the effects of fundraising and campaign contributions on the legitimacy of our representative bodies and produces educational materials describing the actual operation of Clean Money campaign funding systems already adopted in four of the fifty states. The raised "hard money" contribution limits at issue in this case directly undermine the mission of Public Campaign, and the rights of its members, by augmenting the influence of that minuscule portion of the electorate wealthy enough to constrict electoral competition through massive campaign contributions.

Amicus respectfully urges the Court to reverse that portion of the decision that dismissed the claims lodged by the *Adams* Appellants on justiciability grounds and to declare unconstitutional the increased "hard money" limits adopted by Congress in sections 304, 307, and 319 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 97-100, 102-103, and 109-112 (codified as amended at 2 U.S.C. §§ 441a and 441a-1).

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[1] Pursuant to Rule 37.6, *Amicus* hereby certifies that no counsel for a party to this action authored this brief in whole or in part and further certifies that no person or entity other than *amicus*, its members, and its counsel have made any financial contribution to the preparation or submission of this brief. All parties have submitted to the Clerk of the Court "blanket" consents to the filing of *amicus curiae* briefs.

SUMMARY

This appeal raises an issue of epochal concern for the survival of our republic: what substance is left to representative democracy when aggregations of wealth drawn from a tiny number of citizens bar non-wealthy voters from meaningful participation in elections? Despite the overwhelming evidence of electoral lockup proffered by the *Adams* Appellants, the district court below refused to acknowledge jurisdiction over their complaint and face the implication of the facts they presented. That decision conflicts with four decades of precedent from this Court affirming the duty of the Judiciary to protect all citizens' effective exercise of the franchise. It also conflicts with the unmistakable intent of the Framers that the Constitution should effect elections open to all classes of society, regardless of their economic status. This Court now faces a simple choice: address the mounting sea of evidence that indicates how debased our democracy has become, or enforce the will of entrenched incumbents and that scant minority of citizens wealthy enough to sustain a bipartisan electoral lockup through large campaign contributions.

In order to pass legislation designed to close a longstanding loophole in the campaign finance laws that had allowed corporations and wealthy individuals to channel vast sums of what was known as "soft money" into federal elections, Congressional opponents of reform insisted upon doubling the "hard money" limits that had served as the primary bulwark against the corruption of our electoral system since the passage of the Federal Election Campaign Act of 1974.[2] Given the spiraling costs of effective

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[2] "Quite simply, the increase in the hard money limits was the price to be paid to gain sufficient support from our Republican colleagues for banning soft money and reining in so-called sham issue ads." 147 CONG. REC. S3833 (daily ed. April 24, 2001) (statement of Sen. Dodd). "But for the willingness of Senators . . . to find common ground

(Continued on following page)

campaign communication, access to substantial wealth has become a prerequisite to meaningful electoral competition. Because fundraising almost always determines electoral outcomes, any serious aspirant for office must amass campaign funds on the same order of magnitude as his or her opponents. Lack of access to wealth thus makes effective political competition impossible. By doubling the amount of money that wealthy citizens may pour into campaigns, Congress raised the entry barrier for non-wealthy voters and candidates who wish to participate in self-government to insuperable new heights.

Non-wealthy voters and candidates brought the instant case to vindicate the political rights of the vast majority of Americans who cannot contribute campaign funds anywhere near the levels contemplated by the BCRA.[3] The district court below summarily held that it had no jurisdiction to rule on the matter. In reaching this conclusion, the district court radically mischaracterized the nature of the *Adams* Appellants' complaint, incorrectly stating that they seek "equal influence" in elections. Instead, they assert an equal protection right to a "meaningful opportunity" to compete, a concept of self-evident significance in the scholarly literature and jurisprudence regarding the regulation of free and open economic markets. Flouting the proper procedural duty for jurisdictional

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on the issue of increasing hard money limits, I fear our efforts would have proved as futile as they have in the past." 147 CONG. REC. S3258 (daily ed. April 2, 2001) (statement of Sen. McCain).

[3] "It is unfortunate that the Senate voted to raise the hard money contribution limits. Nearly 80 percent of the money in our elections is hard money, more and more of which is being raised in checks of $1000. During the last election, only 4 out of every 10,000 Americans made a contribution greater than $200. Only 232,000 Americans gave contributions of $1000 or more to federal candidates – one ninth of one percent of the voting age population." 147 CONG. REC. S3256 (daily ed. April 2, 2001) (statement of Sen. Wellstone).

dismissals, the district court also improperly relied on its own factual conclusion that the *Adams* Appellants raise no issue of ballot access. Given the breadth of evidence demonstrating that lack of wealth does effectively restrict access to ballot – evidence which the district court was required to take as true – this factual determination was clear error. This Court's precedents also make clear that the right of suffrage can be unconstitutionally debased and diluted even when no one is denied the right to cast a vote and no direct barrier has been placed on the ballot.

Because this Court reviews the legal decision below *de novo, see e.g., Shaw v. Reno*, 509 U.S. 630, 638 (1993), attention must at last be given to the facts adduced by the *Adams* Appellants, which accurately reflect the experience and learning of *Amicus* during its extensive research into American politics. During the debate over passage of the BCRA, numerous Senators decried the raised "hard money" limits, lamenting how few citizens stood to benefit from them and specifically condemning their anti-democratic and discriminatory implications for the future.[4]

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[4] *See, e.g.*, "The thrust of McCain-Feingold was to minimize the influence of the special interests. It has now become maximized. . . . the thrust of McCain-Feingold was to eliminate the obscenity of the outrageous amounts of money that it takes in politics to be elected. The final bill now doubles this obscenity." 147 CONG. REC. S3240 (daily ed. April 2, 2001) (statement of Sen. Hollings); "One-quarter of 1 percent of the population contributes $200 or more, one-ninth of 1 percent of the population contributes $1,000 or more. So I do not really see the benefit of injecting yet more money into politics, literally turning some of the hard money into soft money. . . . I don't see how politics that becomes more dependent on big contributors, heavy hitters, people who have more money and can afford to make these contributions, is better politics." 147 CONG. REC. S3022 (daily ed. March 28, 2001) (statement of Sen. Wellstone); "We ought to be looking for ways to reduce the amount of money in politics. . . . It is running the risk of moving our very system of democracy into deep trouble. There is no issue more important than this one. The other issues we will have come before us are significant, but this goes right to the heart of who we are as a people,

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These observations, bolstered as they are by stark statistics of an electoral system dominated by the wealthy and distrusted by the public, cannot go unheeded. "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390 (2000).

The district court's dismissal is also at odds with the Framers' intent to create a lasting government of the People. Recognizing that corruption inheres to unchecked power, the Framers intended that Congress, by expressing the voice of the "entire body of the People", would serve as the last line of defense against all manner of tyranny. The authors of the Federalist Papers repeatedly argued that the representation of diverse interests in Congress would prevent government from devolving into an oligarchy of the "wealthy and well-born". The People adopted the Constitution in reliance on this promise of representation. Because representation of the diverse interests of the People is a fundamental, explicit premise of our Constitutional order, it must have been the Framers' intent that our Constitution should establish open and free elections based upon the cornerstone principle of political equality. Because our constitutional order leaves the judiciary as the only branch of government capable of breaking a lockup of the electoral marketplace, the *Adams* Appellants must have a legally protected interest in the meaningful exercise of the franchise.

The extensive jurisprudence regarding the regulation necessary to sustain open and fair competition in economic

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who can run for public office, who can get elected to public office. Our failure to do something about it places, as I said the other day, our democracy, in my view, in peril." 147 CONG. REC. S2918 (daily ed. March 26, 2001) (statement of Sen. Dodd).

markets provides this Court an analytical framework for recognizing the bipartisan electoral lockup effectuated by the BCRA. Self-interested contestants in the electoral marketplace will follow incentives not only to game the system for temporary gain, but also to design rules of participation that perpetuate their market power. Because the judiciary must protect the function of electoral marketplace at least as vigilantly as it protects economic markets, courts cannot ignore evidence of entrenched financial power that squelches competition and creates barriers to entry. The extensive evidence of bipartisan electoral lockup should compel this Court to apply a hard-nosed, skeptical review of the effects of the raised hard money limits in the BCRA.

ARGUMENT

I. BY CONCLUDING THAT THE *ADAMS* APPELLANTS RAISED NO JUSTICIABLE CLAIM, THE DISTRICT COURT BELOW ABDICATED ITS FUNDAMENTAL DUTY TO SAFEGUARD THE POLITICAL PROCESS FROM ANTI-DEMOCRATIC LOCKUP.

A. The decision below is plainly at odds with this Court's precedents holding that voters and candidates have standing to seek redress for their exclusion from electoral participation on the basis of wealth.

"No right is more precious in a free country than having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Beginning with the apportionment and filing fee cases of the 1960's and 1970's, this Court recognized that the right to vote necessarily comprises far more than an entrance pass to a voting booth and a theoretical chance to place one's name on a ballot. *See Baker v. Carr*, 369 U.S. 186 (1962); *Gray v.*

Sanders, 372 U.S. 368 (1963); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974); *Davis v. Bandemer*, 478 U.S. 123 (1986). Precisely because voting is *the* fundamental act of self-government, upon which the entire conceit of our Constitutional order depends, this Court has long fulfilled its unique institutional duty to scrutinize the regulations of state and federal legislative bodies for impediments to the *effective* exercise of the franchise throughout all stages of the electoral process. *See, e.g.*, *Reynolds*, 377 U.S. at 565 (in the context of apportionment, the Constitution "requires" that each citizen have "an equally effective voice"); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (ballot access restrictions burden "the right of qualified voters . . . to cast their votes effectively"); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (noting the "right of qualified voters . . . to cast their votes effectively"); *Norman v. Reed*, 502 U.S. 279 (1992); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality) (recognizing compelling interest in preserving integrity of the electoral process); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J. concurring) ("the Constitution often permits restrictions on the speech of some in order to prevent the few from drowning out the many . . . [and] limiting the political rights of some so as to make effective the political rights of the entire electorate") (citing *Storer v. Brown*, 415 U.S. 724, 736 (1974)).[5]

Even when legislators have imposed no direct restraint on casting a ballot or appearing on a ballot, this

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[5] Courts have also recognized the value of "protecting access to the political arena". *Landell v. Sorrell*, 118 F. Supp. 2d 459, 483 (D. Vt. 2000) (quoting *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 649-50 (1996) (Stevens, J., concurring)).

Court has recognized that the right to vote may be so substantially degraded by an electoral regulatory framework, or by the actions of officials surrounding the election, as to lose all practical meaning. *See, e.g., Bush v. Gore,* 531 U.S. 98, 105 (2000) ("The right of suffrage can be denied by a debasement or dilution of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise") (citing *Reynolds v. Sims,* 377 U.S. at 555); *Baker, supra.* Even when barriers to meaningful exercise of the franchise were erected by private, non-state actors, this Court has interceded to protect the rights of all citizens to participate in all integral aspects of the electoral process. *See Terry v. Adams,* 345 U.S. 461 (1953) (plurality). And when the impediment to effective exercise of the franchise has been financial, the Court has unequivocally championed the rights of all persons, regardless of their economic status, to participate meaningfully in self-government. *See Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966); *Bullock, supra*; *Lubin, supra; Morse v. Republican Party of Virginia,* 517 U.S. 186 (1996). In all these cases touching on the substantive meaning of the right to vote, detailed attention to actual electoral circumstances was necessary to maintain the significance of suffrage and to preserve our claim to representative democracy.

Offering overwhelming evidence of the anti-competitive effects of wealth in our elections, the *Adams* Appellants allege that the BCRA cements an entry barrier to the electoral marketplace and squelches the political rights of non-wealthy citizens. In a cursory few sentences, the district court below dismissed the *Adams* plaintiffs' claims as non-justiciable, concluding that they "have not suffered an invasion of a *legally protected* interest" and that, even if they had suffered such an injury, "it would not be 'fairly . . . trace[able]' to BCRA". *McConnell v. FEC,* No. 02-582, May 19, 2003, Slip Op. at 340 (D.D.C.) (Henderson, J.) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)) (emphasis in original). By concluding that non-wealthy voters and candidates have no "legally protected interest" to some basic modicum of meaningful political participation, the district court below ignored four decades of precedent, cited above, that have given substance to the 'right to vote'. *Id.,* Slip Op. at 340. As set forth more fully in section B, *infra,* this holding flies in the face of the Framers' clear intent that all citizens should participate in elections under terms of political equality. The decision also ignores the court's duty to credit the plaintiff's allegations of fact when weighing a jurisdictional dismissal.

For dismissals under Rule 12(b)(1), "the complaint will be construed broadly and liberally . . . with all uncontroverted factual allegations being accepted as true". 13 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FED. PRAC. & PROCEDURE, § 1350 (2d ed. 1990 & Supp.); *see also Lujan,* 497 U.S. at 889 (courts presume that general allegations embrace necessary specific facts); *Allen v. Wright,* 468 U.S. 737, 751-52 (1982) ("the standing inquiry requires careful judicial examination of a complainant's allegations"); *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *American Fed'n of Gov't Employees v. Cohen,* 171 F.3d 460, 465 (7th Cir. 1999) (to dismiss for lack of standing "[a]ll material allegations of the complaint are accepted as true and construed in the light most favorable to the pleader"). By summarily concluding that the *Adams* Appellants had failed to "carry [their pleading] burden", the district court utterly failed to follow this procedural duty. *McConnell,* Slip Op. at 340. The district court did not identify any specific deficiency in the *Adams* Appellants' factual allegations. Nor did it make any reference to any facts at all. Instead, the district court radically mischaracterized the *Adams* Appellants' complaint as one alleging a "right to equal influence in the overall electoral process" and improperly interposed its own factual conclusions regarding the *Adams* Appellants' access to the ballot. *Id.* ("none of the *Adams* plaintiffs has been . . . stripped of his right to vote or of access to the ballot."). Each of these errors independently justifies reversal.

Radical mischaracterization of a complaint is plain and obvious error – in effect, the destruction of a paper tiger. The district court simply avoided the gravamen of the *Adams* Appellants' claims by citing four decisions from the Courts of Appeal, in which those courts also refused to address any facts demonstrating the effective exclusion of non-wealthy voters and candidates from the electoral process. *See id.* (citing *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999) ("*Cox*"); *NAACP v. Jones*, 131 F.3d 1317 (9th Cir. 1997), *cert. denied*, 525 U.S. 813 (1998) ("*Jones*"); *Albanese v. Federal Election Comm'n*, 78 F.3d 66 (2d Cir. 1996) ("*Albanese*"); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998)). In the three "wealth primary" cases – *Cox, Jones*, and *Albanese* – the voter and candidate plaintiffs did *not* claim a 'right to equal influence' but rather a right to 'meaningful participation' in the electoral process. Though the concepts of 'equal influence' and 'meaningful participation' are as radically distinct as the notions of 'equality of opportunity' and 'equality of outcome', the Courts of Appeal in two of those cases all relied on such mischaracterization as a rationale for dismissal. *See Cox*, 183 F.3d at 1263 (mischaracterizing claim as "right to equal influence in the overall electoral process"); *NAACP v. Jones*, 131 F.3d at 1323-24 (mischaracterizing claim as "right . . . to have equal influence in the election process" and "right of voters to contribute to successful campaign").[6] Because those decisions founder on a plain confusion of the rights asserted, their authority as precedents is suspect.

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[6] The *Cox* court also relied on the suspect passage in *Buckley* which claimed that "[t]he concept that government may restrict the speech of some in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). As Justice Breyer observed, "those words cannot be taken literally". *Nixon v. Shrink*, 528 U.S. at 402 (Breyer, J. concurring).

Albanese and *Kruse* also fail to support the dismissal below. In *Albanese*, the Court of Appeals "substantially" adopted the opinion of the district court, which found the plaintiffs' theory "intriguing" but felt "bound to apply" a legal analysis that deemed the candidate's injury too "conjectural". *See Albanese*, 78 F.3d at 68-69; *Albanese v. Federal Elections Comm'n*, 884 F. Supp. 685, 691 n. 8 and 692-93 (E.D.N.Y. 1995) ("Albanese opted not to participate in the election process; he was not prevented from doing so"). The court found the notion that plaintiffs suffer injury because they "have less access or influence than a hypothesized wealthy contributor . . . abstract and remote." *Id.*, at 692. This conclusion, drawn against both common sense and the allegations of plaintiffs, simply does not bear up under scrutiny. *See generally* LARRY MAKINSON, SPEAKING FREELY: WASHINGTON INSIDERS TALK ABOUT MONEY IN POLITICS (2d ed. 2003) (retired Congresspeople admit large contributors' disproportionate access and influence). Similarly, in *Kruse*, a panel majority refused to consider evidence proffered by the City of Cincinnati to justify its campaign spending limits because it concluded such limits were *per se* unconstitutional under *Buckley*. Like the other cases cited by the district court, these decisions simply represent refusals to address any evidence of the debasement of the franchise. Such refusal conflicts with both the rules of procedure and the duty of the Judicial Power to protect functional political equality. *See* § B, *infra*.

In asserting that no *Adams* plaintiff could "conceivably" be "stripped of his right to vote or of access to the ballot" by operation of the BCRA, the district court also erred by impermissibly folding its own factual conclusion regarding ballot access into a legal statement that is plainly at odds with this Court's own precedent. *McConnell*, Slip Op. at 340. This Court's decisions regarding ballot access, vote dilution, and filing fees establish that the right to vote may indeed be abridged even when no one is prevented from casting a ballot. *See, e.g., Reynolds v.*

Sims; Baker v. Carr; Bullock v. Carter; *Morse v. Republican Party of Virginia; Bush v. Gore, supra.* Whether or not the *Adams* Appellants have meaningful access to the ballot is a complex question that may not be determined in the absence of actual fact-finding. It was clear, reversible error for the district court to prejudge this factual question.

The district court also erroneously concluded that any injury suffered by the *Adams* Appellants would not be fairly traceable to the BCRA. Slip Op. at 340. This conclusion defies common sense and conflicts with other decisions that have confirmed the standing of parties whose competitive chances were injured by electoral regulatory regimes. *See, e.g., Vote Choice v. DiStefano*, 4 F.3d 26, 36 (1st Cir. 1993); *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621, 626 (2d Cir. 1989); *International Ass'n of Machinists v. Federal Election Comm'n*, 678 F.2d 1092, 1099 (D.C. Cir. 1982); *see also Becker v. Federal Election Comm'n*, 230 F.3d 381, 388 (1st Cir. 2000) ("one who challenges a governmental action may not be denied standing merely because his challenge in a sense stems from his own choosing"). Congress dealt incumbent members and their financial patrons a loaded hand in the BCRA. This legislation will directly cause the costs of electoral competition to skyrocket, thereby extinguishing the opportunity for non-wealthy voters to place persons who might represent them on the ballot. *Compare Terry v. Adams*, 345 U.S. at 481 (private citizens cannot constitutionally deprive a discrete minority of their right to participate in "any 'part of the machinery for choosing [elected] officials'" even when the state does not control such private conduct) (Clark, J., concurring)); *Bullock v. Carter*, 405 U.S at 143 (a financial burden creating "barriers to candidate access to the ballot . . . tend[s] to limit the field of candidates from which voters might chose").[7] The exclusion of non-wealthy voters from meaningful electoral competition is traceable to the BCRA and the flood of electoral spending it threatens to release.

This Court has stressed the importance of evaluating the operation campaign finance regulations in light of "actual political conditions". *See, e.g., Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 443-462 (2001) ("*Colorado Republican*"). Precisely because "the right of suffrage can be denied" through complex schemes of debasement or dilution, *Bush v. Gore, supra*, courts must perform a thorough review of all the relevant facts with a common-sense sensitivity to actual political conditions that give rise to the controversy at issue. *See, e.g., Bullock*, 405 U.S. at 143-44 (finding it "essential to examine in a realistic light the extent and nature of [the] impact" of filing fees on voters and concluding that "[w]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status"). The district court utterly failed to review the facts with the requisite scrutiny.

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[7] The traceability conclusion below appears analytically indistinguishable from the discredited premise that reliance of free markets constitutes government neutrality. This notion, dating to *Lochner v. New York*, 198 U.S. 45 (1905), has been supplanted by the understanding that existing distributions of wealth can result as much from government decisions not to act as from regulation. *See* MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW; 1870-1960 (1992); *see also* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 Col. L. Rev. 1390, 1397 (1994). The BCRA structures the 'free market' distribution of resources available to wealthy candidates, and by extension, imposes a competitive burden on those candidates whose constituents have no substantial wealth.

Those facts, a portion of which are reproduced in the Adams Appellants' Appendices to their Jurisdictional Statement before this Court, paint a clear picture of electoral lockout. To claim that they fail to allege a concrete injury to the right to vote, one would have to believe that a non-wealthy candidate could amass funds from her non-wealthy constituents sufficient to mount a competitive campaign against a well-funded opponent. The facts adduced by the *Adams* Appellants show that such a scenario is delusional. The BCRA's raised contribution limits will establish an electoral system where wealthy donors effectively pre-select all the candidates who will appear on ballots.

The decision below thus stands in troubling contrast to the judiciary's long-standing willingness to protect the rights of wealthy citizens and corporations to spend vast sums directly, and indirectly, on political speech. *Buckley* and its progeny announce a quite familiar hierarchy of judicial scrutiny for electoral spending, according some uses of money more protection than others based upon the "importance of the 'political activity at issue' to effective speech or political association." *Federal Election Comm'n v. Beaumont*, 539 U.S. __, 71 U.S.L.W. 4451, 4455 (2003) (citing *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 259 (1986); *Colorado Republican*, 533 U.S. at 440-42; and *Nixon v. Shrink*, 528 U.S. at 386-88). When the Courts have the authority and duty to strike down congressional attempts to regulate political spending because those regulations make political association ineffective for those who can spend, must they not also have the authority and duty to review congressional regulations that render "effective speech and political association" all but impossible for those who cannot? Indeed, it is difficult to ascribe any substantive meaning at all to the concept of "*effective* speech or political association" if that right is not shared by all, because the contrary proposition – that the right to effective speech is only enjoyed by those citizens wealthy enough to exercise it – so plainly undermines the purpose of the Constitution. *See* § B, *infra*. By closing the courthouse door before even the most cursory consideration of the *Adams* Appellants' factual allegations, the decision below inescapably leads to the conclusion that the judiciary will only defend the 'effective speech and political association' of voters and candidates who have access to money.[8] This Court must not allow this implication to stand. Because the district court's cursory conclusion that non-wealthy plaintiffs have no legally protected interest in meaningful political participation directly refutes this Court's long-standing determination to protect the meaning of the franchise, it must be reversed.

B. The decision below is plainly at odds with the Framers' intent that the Constitution establish elections based upon political equality, their disavowal of any property qualifications on the right to vote or hold office, and their expectation that the Judicial Power would address all cases arising under the Constitution and laws of the United States.

The proposition that non-wealthy citizens have no "legally protected interest" in the meaningful exercise of the franchise is manifestly contradicted by evidence of the Framers' contrary intention. Defending the proposed Constitution from all manner of objection, the authors of the Federalist Papers turned time and time again to the will of the People, expressed through their representatives in Congress, as the ultimate line of defense against corruption of the proposed government. Most importantly, the Framers insisted that, in order to perform its Constitutional function in a system of checks and balances, the voice of the People must be the voice of the "entire body of the People" and not just some favored class. THE FEDERALIST NO. 63 (Alexander Hamilton or James Madison). In defense of the republican form of representative democracy, James Madison stressed that "[i]t is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic." THE FEDERALIST NO. 39 (James Madison) (emphasis in original).[9] This "essential" policy *requires* that all citizens have a meaningful and equal opportunity to seek representation in government; without functional political equality, republican government is logically impossible.[10]

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[8] Incumbents in Congress confirm that fundraising is indispensable to mounting an *effective* campaign and recognize its deleterious effects on the body politic: "The influence of special interests and the enormous amount of money required to effectively run a modern political campaign have created a rift between the Congress and the American people." 147 CONG. REC. S3239 (daily ed. April 2, 2001) (statement of Sen. Nelson).

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[9] *See also* THE FEDERALIST NO. 57 (Alexander Hamilton or James Madison) ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States."); *see also* JAMES MADISON, 14 THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland *et al.* eds., 1983) ("establishing political equality among all" is the primary remedy to political evils).

[10] *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 625 (1982) (Political equality is the "cornerstone of American democracy"); JOHN RAWLS, A THEORY OF JUSTICE, 11-19, 205-07, 221-28 (1971) ("fair opportunity to take part in and to influence the political process" is a precondition of constitutional democracy); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 10-11, 23 (1948) (some regulation of political speech in the name of political equality is

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Accordingly, the Framers' repeated insistence that Congress would represent the voice of the People indicates their clear intent that the Constitution establish and guarantee an electoral system founded on functional political equality. *Accord Gray v. Sanders*, 372 U.S. at 380-81 (noting "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments").

Much of the Federalists' defense of the proposed order was devoted to reassuring doubters that the new government could not devolve into oligarchy nor revert to monarchy. THE FEDERALIST NO. 57 (Alexander Hamilton or James Madison) ("The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation"). The Framers' repeated assurance that our government would represent the entire body of the people was more than a rhetorical ploy; it was instead the logical linchpin of their arguments in support of the legitimacy of the proposed Union. Though convinced "that the federal Senate [would] never be able to transform itself, by gradual usurpations, into an independent and aristocratic body", the Framers' believed "that if such a revolution should ever happen from causes which the foresight of man cannot guard against, the House of Representatives, with the people on their side, will at all times be able to bring back the Constitution to its primitive form and principles. Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the

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necessary for the intelligent deliberation that self-government requires).

legislature the affections and support of the entire body of the people themselves." THE FEDERALIST NO. 63 (Alexander Hamilton or James Madison). If, on the contrary, through 'causes the which the foresight of man cannot guard against,' the 'entire body of the people' are not in fact represented in Congress, the major pillar in the Framers' logic, and thus the legitimacy of our experiment in self-government, collapses.

Broad and equal political rights were deemed necessary to cure the inevitable evils of "faction" and "the superior force of an interested and overbearing majority". *See, generally,* THE FEDERALIST NO. 10 (James Madison). More importantly, the Framers explicitly and repeatedly identified *diversity of interest* as an essential curative and prophylactic force in republican self-government. "There is sufficient diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the Union, to occasion a material diversity of disposition in their representatives towards the different ranks and conditions in society. . . . The House of Representatives being to be elected immediately by the people, the Senate by the State legislatures, the President by electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors." THE FEDERALIST NO. 60 (Alexander Hamilton). *See also* THE FEDERALIST NO. 10 (James Madison) ("Does [the advantage of the republican form] consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority?").[11] By arguing that the security of individual rights is dependent upon representation in government of a multiplicity of interests, the Framers expressed an unmistakable intent that elections be functionally open to all.

The Framers also generally warned that aggregations of wealth pose a serious threat to the proper function of elections in republican government. Not only did the Federalist authors inveigh against "the intrigues of the ambitious . . . the bribes of the rich" and "the vicious arts by which elections are too often carried", they also recognized that "the most common and durable source of factions has been the various and unequal distribution of property." THE FEDERALIST NO. 10 (James Madison). To fend off the charge that the new government would only serve the interests of the wealthy, the Federalist authors specifically relied on the fact that the Constitution would not countenance any property qualifications on the right to vote or hold office:

> The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the TIMES, the PLACES, the MANNER of elections. The

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[11] *See also* THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) ("Different interests necessarily exist in different classes of citizens. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.")

> qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature.

THE FEDERALIST NO. 60 (Alexander Hamilton).[12] The Framers believed that a Constitution which ensured the opportunity for representation to citizens of all classes was necessary to withstand the evils of faction, forestall the tyranny of a powerful majority, and prevent the reversion to oligarchy. Elections free from property qualifications were a necessary, explicit premise of this belief.

While the promoters of our Constitution claimed that the diversity of the People represented in our elections would prevent government from falling under the sway of the "wealthy and well-born", uniform and overwhelming evidence now shows that this diversity no longer obtains. *See* Jamin B. Raskin & John C Bonifaz, *The Wealth Primary: Campaign Fundraising and The Constitution*, Ch. § 3 (visited July 2, 2003) <http://www.opensecrets.org/pubs/law_wp/wealth06.htm> ("millionaires are over-represented in the House by a factor of more than 3,000 percent and in the Senate by a factor of more than 5,000 percent"); JOHN GREEN, PAUL HERRNSON, LINDA POWELL & CLYDE WILCOX, JOYCE FOUNDATION OF CHICAGO, INDIVIDUAL CONGRESSIONAL CAMPAIGN CONTRIBUTORS: WEALTHY, CONSERVATIVE – AND REFORM MINDED (1998) (95% of those who make large contributions are white; 81% are male; 81% report incomes over $100,000). The Framers' faith in the enduring diversity of our representative bodies now

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[12] While elsewhere, in defense of the federal power of taxation, Hamilton conceded the impossibility of having every possible "occupation" and class directly represented by one of its members, he nonetheless argued that a power of taxation could present no opportunity for abuse when each of the various classes of society were represented in Congress by some "natural representatives" who shared and would guard that class's interests. *See, generally,* THE FEDERALIST NO. 35 (Alexander Hamilton).

rings hollow when measured against the debased nature of present electoral competition.

The authors of the Federalist Papers did not specifically anticipate how access to substantial wealth would itself become a functional prerequisite to meaningful electoral participation.[13] One may fairly conclude that such an idea was simply inconceivable – a conclusion buttressed by the specific denials in the Federalist Papers that such a "property qualification" could ever be imposed, given the clearly enumerated powers bestowed on the legislature in the regulation of elections. THE FEDERALIST NO. 52 (Alexander Hamilton or James Madison) ("Under these reasonable [qualifications of holding elective office set forth in the Constitution], the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."); THE FEDERALIST NO. 57 (Alexander Hamilton or James Madison) ("Were the objection to be read by one who had not seen the mode prescribed by the Constitution for the choice of representatives, he could suppose nothing less than that some unreasonable qualification of property was annexed to the right of suffrage; or that the right of eligibility was limited to persons of particular families or fortunes . . ."). In the present circumstance, when a flood of electoral spending bars non-wealthy citizens from meaningful entry into politics, persons whose political rights have been debased in this manner, like voters subject to an unconstitutional gerrymander, can not rely on the curative power of future elections to vindicate their rights. Incumbent legislators, who are by definition masters of the fundraising system, undeniably benefit from the raised BCRA limits, which facilitate a lockup of the electoral process. *See* section II, *infra*; *see also* Daniel R. Ortiz, *Federalism, Reapportionment and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & POL. 653, 675 (1988).[14]

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[13] The electoral schemes explicitly mentioned by the Federalist authors as having potential to debase the franchise were essentially geographic, in the nature of the gerrymander and of strategic placement of polling places. *See, generally,* THE FEDERALIST NO. 60 and THE FEDERALIST NO. 61.

Non-wealthy citizens thus have no recourse but to the judiciary to seek vindication of their Constitutional right to meaningful electoral participation. Given the self-evident futility of seeking relief from a wealth-based barrier to entry at the ballot box,[15] it is essential that this Court acknowledge its duty to defend the Constitutional order contemplated by the Framers and exercise jurisdiction over the controversy raised by the *Adams* Appellants. Such judicial review of unconstitutional legislation is both proper and necessary. U.S. CONST., Art. III, § 2; *Marbury v. Madison*, 1 Cranch 137 (1803); *Reynolds v. Sims*, 377 U.S. at 566 ("a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.").[16]

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[14] That the raised limits may also benefit some newcomers does not mitigate the exclusionary effects of augmented electoral spending; successful newcomers, of necessity, will arise only from the ranks of those well-connected to established avenues of fundraising and to the few, wealthy citizens who have the capacity to be big-time donors.

[15] "Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in . . . and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system. Obviously our elected representatives are the last persons we should trust with identification of either of these situations." JOHN HART ELY, DEMOCRACY AND DISTRUST 102-03 (1980); *see also* THE FEDERALIST NO. 81.

* * *

The Founders intended that our nation be a democracy in which an voter's right to participate was not gauged to his or her wealth. When the spiraling costs of electoral participation have made meaningful competition impossible for a substantial portion of the citizenry, the Court must conclude that an *essential* element of the design of the nation has been abandoned. That the People adopted our Constitution in reliance on the Framers' repeated assurance that the "electors [of the federal representatives would] be the great body of the people of the United States" is beyond cavil. THE FEDERALIST NO. 57 (Alexander Hamilton or James Madison). The raised contribution limits of BCRA put this fundamental guarantee of political equality under full assault. Those limits establish an effective lockup of the electoral process, favoring incumbents and the champions of that small portion of the electorate capable of contributing vast sums of money. The judiciary stands alone as the institutional actor empowered to preserve the central premise of political equality in our Constitutional order. For this reason, this Court cannot refuse to examine the facts proffered by the *Adams* Appellants, which reflect a fundamental threat to our republican form of government. The decision of the district court below regarding the justiciability of the *Adams* Appellants' claims must be reversed.

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[16] "[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions. . . . No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union . . ." THE FEDERALIST NO. 80 (Alexander Hamilton).

II. BY RAISING THE HARD MONEY CONTRIBUTION LIMITS IN THE BCRA, CONGRESS INSTITUTED AN UNCONSTITUTIONAL ENTRY BARRIER TO THE ELECTORAL MARKETPLACE.

By doubling the hard money limits and indexing them to inflation, Congress dismantled a necessary prophylactic against domination of the electoral marketplace by a minuscule number of the country's citizens. Because electoral competition now primarily involves financial struggle for the voting public's attention, it is proper for the Courts to analyze electoral competition by reference to the case law and scholarly literature describing the malfunction of economic markets. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). As discussed above, a rights-based approach that focuses only on wealthy citizens' rights to "effective speech and political association" ignores a systemic malfunction in the electoral marketplace that strips our democracy of its legitimacy. Through BCRA's raised and ever-rising limits, Congress has facilitated the creation of massive political war chests, drawn from a small and select portion of the electorate. These war chests raise the cost of challenge to insuperable heights and erect a barrier to entry to the political marketplace, denying non-wealthy voters and candidates a meaningful opportunity to compete in the electoral arena.

Noting "the increasingly sophisticated ways, over the course of the twentieth century, that the two dominant parties managed to manipulate and capture the ground rules of political competition so as to freeze out serious challengers" and "lock up political institutions to forestall competition," commentators have rightly urged "the institution best positioned to destabilize these lockups, the United States Supreme Court, to develop a theoretical

framework that would enable effective judicial performance of this role." Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process,* 50 STANFORD L. REV. 643, 644 (1998). Professors Issacharoff and Pildes recommend that courts "assess . . . reforms intensively to ensure they do not further entrench bipartisan political lockups." *Id.*, at 689; *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 537 (1997). "[W]hen interpreting the various constitutional provisions that protect self-government . . . the Court should construe those provisions against a background conception of democracy that recognizes the importance of competitive political markets to ensuring appropriately responsive representation. As part of that inquiry, the Court ought to focus on whether the process remains sufficiently open to challenge and reform, or whether the costs of mobilizing effective challenge have been raised so high as to leave the system insufficiently responsive." Issacharoff & Pildes, *supra*, at 673.

The elementary principles of antitrust law, which describe anticompetitive behavior and barriers to market entry, provide apt guidance in this inquiry. *See* PHILIP E. AREEDA, Herbert Hovenkamp & John L. Solow, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, Volume IIA, ¶ 420 (1995) ("Entry Barriers Generally"). Antitrust policy abhors "exclusionary", "anti-competitive", and "predatory" practices that allow cartels and monopolists to keep potential competitors from entering the marketplace at all. The raised contribution limits in BCRA represent such an anti-competitive barrier because they perpetuate the entrenched power of Congressional incumbents and their patrons.[17] Congress' self-dealing in the BCRA represents a form of "horizontal agreement" among putative competitors to exacerbate dependence on big-money contributions, giving big contributors more exclusive access to elected representatives. Such horizontal agreements "are antitrust's most 'suspect' classification, and as a class provoke harder looks than any other arrangement." PHILIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 19.03 (2002). Because the political marketplace is more susceptible to lockup than a purely economic model – there is no price mechanism to restrain exclusionary market power – this Court should subject the BCRA's raised limits to the strictest scrutiny.

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[17] "Entry is especially likely to be deterred if it is a[n] . . . expensive process requiring specialized assets that would have little salvage value in the event of failure." Areeda, Hovencamp & Solow, at ¶ 420, n.6.

Conduct that impairs rivals or raises their costs to create or facilitate the exercise of anticompetitive market power violates the antitrust laws and inflicts antitrust injury on an aggrieved competitor. *See, e.g., Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992); *Premier Elec. Constr. Co. v. NECA*, 814 F.2d 358, 368 (7th Cir. 1987) (Easterbrook, J.); Thomas Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L. J. 209 (1986). Similarly, in the context of mergers and cartels, "conduct that impairs a competitor's ability to act as a constraint on the market power of the merging firms is conduct that harms both the competitor and consumers – the precise sort of conduct that gives rise to antitrust injury in the sense contemplated by *Brunswick* [429 U.S. 477 (1977)] and *Cargill* [479 U.S. 104 (1986)]." Jonathan M. Jacobsen & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 ANTITRUST L. J. 2 (1998). The BCRA's raised limits inflict such anti-competitive injuries.

Understanding the operation of wealth as an electoral barrier does not, however, require resort to the arcana of game theory or microeconomics. The *Adams* Appellants' factual presentation makes the futility of mounting a campaign against a well-funded opponent obvious. To establish the operation of wealth as an entry barrier, the *Adams* Appellants need not prove an absolute, invariable correlation between spending and electoral success. Rather, they need only show that BCRA makes substantial fundraising a pre-requisite to meaningful competition.[18] Because the BCRA makes it substantially more difficult for a non-wealthy candidate to raise funds on the same order of magnitude as his or her opponent, that candidate stands no realistic chance of having his or her voice heard by the voting public. As one non-wealthy voter put it, "[i]t would be like fighting a fire with a cup of water." *Adams* Jurisdictional Statement, App. D, Exh. 25, Decl. of Carrie Bolton, ¶ 11.

To remedy legislation like the BCRA that produces a plainly unconstitutional electoral barrier, it is not necessary for the Court to devise an exact formula of how to achieve fully competitive elections. "As in so many areas of the law, it is far easier to identify dramatically anticompetitive practices than it is to specify precisely what optimal competition would look like. This is particularly characteristic of much of the constitutional law of politics. Without identifying an ideal theory of proper municipal boundary-line drawing, the Court was able to strike down grossly impermissible forms of manipulating such boundaries. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Without a full theory of equal voting power, the Court was able to identify impermissible vote dilution. *See White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). Without a worked-out vision of appropriate partisan factors in redistricting, the Court was able to hold partisan gerrymandering unconstitutional. *See Davis*

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[18] That rare winning candidates spent marginally less than their opponents has no bearing at all on the fact that accumulated wealth bars the non-wealthy from meaningful competition, because *those rare winning candidates who spent less still raised and spent substantial sums of money*.

v. Bandemer, 478 U.S. 109 (1986). So too here: Without a complete theory of optimal partisan political competition, the courts can do a far better job of recognizing grossly anticompetitive practices." Issacharoff & Pildes, *supra*, at 680-81.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59 (1990), this Court recognized that vast aggregations of wealth, amassed without relation to popular support for a particular idea, threaten to dominate and pervert the political process. The *Austin* Court "squarely acknowledged . . . that inequalities of private economic power tend to reproduce themselves in the political sphere and displace legitimate democratic governance." Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1285 (1993). While the *Austin* decision focused on the dangers of economic power amassed through the corporate form, unless one assumes that wealthy citizens achieved their wealth through popular support for their political ideas, there is no principled reason to conclude that non-corporate aggregations of wealth do not produce the same distorting and exclusionary effects on politics. Recently, in the context of advocacy corporations, this Court acknowledged that "political war chests may be amassed simply from [the aggregation of individual] members' contributions." *Beaumont*, 71 U.S.L.W. at 4455 (Slip Op. at 13, n. 6) (citation and internal quotation marks omitted). No matter their source, such war chests render politics a futile enterprise for citizens who do not have the support of wealthy donors. Congress' decision to facilitate the formation of these war chests by a minute portion of the electoral must be seen as an unconstitutional effort to undermine electoral competition and entrench a class of well-connected incumbents:

> By raising the hard money limits, the Senate voted to increase the amount of special interest money in politics and entrench candidates' dependence on a narrow, political, elite made up of wealthy individuals. That is not reform. The Senate also adopted an amendment to allow candidates facing self-financing opponents to raise even more big money. Again, this is a step backward and is blatant incumbent protection.

147 CONG. REC. S3256 (daily ed. April 2, 2001) (statement of Sen. Wellstone). By doubling the amount of money that wealthy individuals can directly spend on their preferred slate of candidates, the BCRA unmistakably favors incumbents and well-connected candidates. By raising the costs of challenge to insuperable heights, political insiders are thus able to lock up the "market for control". *See* Issacharoff & Pildes, *supra*, at 664-65.

The anticompetitive effects of massive fundraising injure both the excluded voters and the electoral system as a whole. "[D]emocracy is damaged when some groups of citizens have no or sharply diminished opportunity to appeal for their convictions because they lack the funds to compete with rich and powerful donors. People cannot plausibly regard themselves as partners in an enterprise of self-government when they are effectively shut out from the political debate because they cannot afford a grotesquely high admission price." Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 78 (E. Joshua Rosencranz, ed. 1999). This Court must give effect to the Constitution's guarantee of political equality by ensuring a truly competitive electoral marketplace. Were the Court to ignore legislative rules that entrench the power of money in politics, it would close off the only avenue of redress for the vast majority of non-wealthy citizens and effectuate a tyranny of a minority wholly inimical to the Constitution. *Amicus* respectfully urges this Court to fulfill the duty of its oath and office by facing the overwhelming evidence of electoral malfunction.

CONCLUSION

For the foregoing reasons, the Court should find that the raised hard-money contribution limits set forth in sections 304, 307, and 319 of the BCRA violate the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

GREGORY LUKE
14622 Ventura Blvd., #735
Sherman Oaks, CA 91403
(818) 486-4233

Counsel to Amicus Curiae

(10)

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SENATOR MITCH MCCONNELL, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

◆

On Appeal From The United States District Court For The District Of Columbia

◆

BRIEF AMICUS CURIAE OF THE CENTER FOR GOVERNMENTAL STUDIES IN SUPPORT OF THE APPELLEES

◆

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RICHARD L. HASEN
Counsel of Record
919 South Albany Street
Los Angeles, California 90015
(213) 736-1466

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF THE *AMICUS CURIAE*

With the consent of the parties, the Center for Governmental Studies submits this brief *amicus curiae* in support of the Defendants. The letters of consent have been filed with the Clerk of the Court.[1]

The mission of the Center for Governmental Studies (CGS) is to use research, advocacy, technology, and education to improve the fairness of governmental policies and processes, empower the underserved to participate more effectively in their communities, improve communication between voters and candidates for office, and help implement effective public policy reforms.

Although CGS supports many aspects of the Bipartisan Campaign Reform Act, this brief limits its discussion to support the position that BCRA's "electioneering communications" provisions are constitutional. CGS is particularly interested in this aspect of the case because it drafts model campaign finance laws, including disclosure laws covering electioneering communications, that are considered and adopted by states and local jurisdictions. In recent years, the question of "issue ads" has increased in importance as interest groups attempt to find ways to skirt state and local campaign finance laws.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The purpose of this brief *amicus curiae* is to alert the Court to the serious possibility that a decision by this Court regarding one aspect of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), may well impair the ability of federal, state, and local governments to enforce comprehensive campaign finance disclosure and other laws. What is at stake in this Court's resolution of the dispute over the "electioneering communications" provisions of BCRA is nothing less than the ability of all levels of government to enforce *effective* campaign finance laws (1) requiring *disclosure* of the identity of political actors engaging in election-related activities and of the amounts and sources of money for those activities and (2) regulating the mechanics of *corporate and union* involvement in the political process.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

In the last decade or so, this country has witnessed a sea change in the means by which campaigns for office are conducted. Corporations, unions, and individuals increasingly have skirted many disclosure requirements and other applicable campaign finance laws by eschewing the use of express words of advocacy, such as those contained in footnote 52 of *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). Thus, by ending an advertisement with something like "Call Smith and tell her she's soft on crime" rather than with "Vote Against Smith," political actors have escaped the reach of most campaign finance laws.

One well-publicized example occurred during the 2000 Republican Party primary in New York, where a previously unknown organization, "Republicans for Clean Air," sponsored television advertisements without using words of express advocacy criticizing Senator John McCain, a primary opponent of then-Governor George W. Bush. *See* Richard Perez-Pena, *Air of Mystery Clouds Shot at McCain*, N.Y. Times, Mar. 3, 2000, at A15. The source of the advertisements remained a mystery until a supporter of Mr. Bush, Sam Wyly, volunteered that he had run the advertisements in the hopes of influencing the outcome of the primary. *See* Richard W. Stevenson & Richard Perez-Pena, *The 2000 Campaign: The Tactics; Wealthy Texan Says He Bought Anti-McCain Ads*, N.Y. Times, Mar. 4, 2000, at A1; Joint Supplemental Appendix to Jurisdictional Statements ("Supp. App.") at 97sa-98sa (per curiam opinion).

Congress chose to address the problem of unregulated electioneering communications by using a bright-line "electioneering communications" definition in BCRA section 201, bringing within the ambit of federal campaign finance laws those advertisements run within a short period before the election, featuring the name or likeness of a candidate for office, broadcast on television, radio, satellite or cable stations, and targeted to the relevant electorate. State governments have begun using similar bright-line approaches.

If this Court strikes down BCRA's bright-line test as applied to the statute's disclosure provisions, no government body in the United States will be able to engage in *effective* campaign finance regulation. Corporations, unions, and others will have the opportunity to escape disclosure laws by eschewing express words of advocacy. Inadequate disclosure in turn will (1) deny voters adequate information about the sources of funding so helpful in making decisions about whom to vote for; (2) raise the risks of corruption and the appearance of corruption; and (3) interfere with other campaign finance programs, such as voluntary public financing programs.

A decision striking down the law could have other, perhaps unintended, effects on state and local laws as well. For example, North Carolina's recently enacted public financing program for candidates for judicial office includes a "trigger" provision releasing additional public financing upon the filing of reports indicating that a certain amount of independent expenditures have been made in support of or in opposition to a judicial candidate. *See* N.C. Gen. Stat. § 163-278.67 (2003). Such triggers cannot work if those supporting or opposing judicial candidates can avoid filing reports of their expenditures.

In addition, at least twenty-five states and the District of Columbia have laws requiring the disclosure of information on expenditures on grassroots lobbying. *See infra* note 10. These laws could be called into question by a ruling by this Court striking down the electioneering communications provisions of BCRA.

Moreover, the ease with which corporations and unions may eschew words of express advocacy means that any efforts by state or local governments to limit or prohibit excessive corporate and union influence over the political process will be doomed to fail as well. Thus, laws that have been in place for many decades aimed at preventing corruption of the electoral process and protecting shareholders and union members – laws that this Court effectively sanctioned in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) – will become dead letters.

Congress's decision to bring within the ambit of federal campaign finance disclosure laws and corporate and union segregated fund requirements those broadcast advertisements covered by the "electioneering communications" provisions of BCRA certainly passes constitutional muster. The rationales supporting the disclosure and segregated fund requirements apply equally whether or not the advertisements contain express advocacy.

Plaintiffs' main constitutional argument against the electioneering communications provision is that it is substantially overbroad because it reaches too many "issue advertisements" that are, in plaintiffs' view, constitutionally immune from regulation under this Court's opinion in *Buckley*. Plaintiffs are mistaken. The fact that BCRA's bright-line test might, in some applications, apply to instances of "genuine" issue advocacy that are not principally intended to influence candidate elections does not render the statute overbroad even in those applications, much less substantially overbroad. Whether or not intended to influence a federal election, an advertisement that specifically refers to a federal candidate and is broadcast soon before the candidate's election – which are advertisements BCRA reaches – will likely in fact influence the election. Congress has the power to require disclosure of such advertisements and limit the source of corporate and union expenditures for such advertisements to segregated funds.

ARGUMENT

I.

THIS COURT SHOULD AFFIRM THAT LEGISLATIVE BODIES MAY ENACT NARROWLY TAILORED DISCLOSURE LAWS GOVERNING COMMUNICATIONS THAT INFLUENCE ELECTIONS. STRIKING DOWN BCRA'S NARROWLY TAILORED DISCLOSURE PROVISIONS WOULD JEOPARDIZE VIRTUALLY ALL EFFECTIVE CAMPAIGN FINANCE LAWS.

A. This Court Has Recognized the Compelling Interests Served by Narrowly Tailored Disclosure Laws.

In *Buckley*, 424 U.S. at 60-84, this Court upheld the broad reporting requirements of the Federal Election Campaign Act ("FECA"). Under *Buckley*, "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But . . . there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Id.* at 66 (citation omitted).

The Court held that three compelling governmental interests justified reporting requirements:

(1) Disclosure provides the electorate with important information. The sources of financial support "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office," and a public "armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* at 67.

(2) "Disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* Disclosure of independent expenditures permits the legislature to reach "'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Id.* at 76.

(3) "Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of . . . contribution limits. . . . " *Id.* at 67-68.

Buckley's approach to reporting requirements is notable for its deference to legislative judgments. The plaintiffs had challenged FECA's requirements that political committees maintain records with the name and address of those who make annual contributions in excess of $10 and report the name, address, occupation, and employer of those who contribute, in the aggregate, more than $100 annually. *See id.* at 63. The Court agreed that these thresholds were "indeed low," but concluded that "we cannot require Congress to establish that it has chosen the highest reasonable threshold." *Id.* at 83. To the contrary, it held that drawing the line was "best left in the context of this complex legislation to congressional discretion." *Id.*

The *Buckley* Court also rejected an overbreadth challenge based on the applicability of the requirements to minor as well as major political parties. The plaintiffs claimed that the First Amendment rights of minor parties were seriously burdened by the requirement that they disclose contributors, because their supporters were more susceptible to harassment. But the Court refused to carve out a blanket exemption for minor parties. *See id.* at 68-74. While rejecting the facial constitutional challenge, *Buckley* recognized that the federal reporting requirements would be unconstitutional as applied to those minor parties that could establish a reasonable probability of harassment. The Socialist Workers Party made the requisite showing in *Brown v. Socialist Workers '74 Campaign Committee*, and the Court recognized that party's right to an exemption. *See* 459 U.S. 87, 102 (1982).

Two years after *Buckley*, this Court briefly reaffirmed the voters' compelling interest in electoral information, this time in ballot measure elections. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), involved a Massachusetts criminal statute that prohibited banking and business corporations from making contributions or expenditures to influence the vote on ballot measure initiatives, unless the initiatives materially affected corporate assets, property, or business. The Court invalidated the ban against giving and spending money on First Amendment grounds but found required *disclosure* of those activities to be different, recognizing that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32 (citations omitted); *cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 n.4, 298-99 (1981) (noting that the government's interest in identifying the sources of support for and opposition to ballot measures could be met by an existing law requiring pre-election publication of a contributor list).

Although this Court has divided in recent years in cases raising the constitutionality of certain campaign finance contribution limitations, *see, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), it has consistently and unanimously upheld the ability of the government to require the filing of reports disclosing information about contributions and expenditures in candidate and ballot measure campaigns.

Of course, support for contribution limits necessarily includes support for adequate disclosure laws to allow enforcement of those limits. But even Justices who have expressed skepticism of the constitutionality of contribution limitations have pointed to disclosure as a more narrowly tailored alternative to contribution limits. *See, e.g., Shrink Mo.*, 528 U.S. at 430 (Thomas J., dissenting) ("States are free to enact laws that . . . require the disclosure of large contributions. . . .").

In one of the most recent campaign finance cases, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*"), there was substantial agreement among the Justices on the propriety of Colorado's law mandating the filing of reports disclosing the names of initiative sponsors and the amounts spent gathering support for their initiatives. *See id.* at 202-03; *see also id.* at 214 (Thomas, J., concurring); *id.* at 224 (O'Connor, J., joined by Breyer, J., concurring in the judgment in part and dissenting in part); *id.* at 233 (Rehnquist, C.J., dissenting).[2]

B. In Recent Years, Corporations, Unions, and Individuals Have Been Able to Avoid Disclosure on a Massive Scale in Candidate Campaigns, and Thereby Thwart Effective Campaign Finance Disclosure Laws, by Eschewing Express Words of Advocacy.

Consider two hypothetical broadcast advertisements intended to convince voters to vote against candidate Smith run in close proximity to the election. They are identical except one advertisement ends with the words "Vote against Smith," while the other ends with "Call Smith and tell her she is soft on crime." The compelling interests in disclosure previously identified by the Court – providing voters with valuable information, deterring actual and apparent corruption, and enforcing other campaign finance laws – are the same in the two cases. Yet in recent years only the first advertisement has been subject to disclosure laws. The second advertisement could be funded by millions of dollars from corporations, unions, or individuals, and no one would ever know the source of funding unless the information was voluntarily disclosed.

The disparate treatment of these otherwise identical advertisements stems from this Court's discussion in *Buckley* of the FECA disclosure provisions. Section 434(e) of the FECA required "'[e]very person . . . who makes contributions or expenditures' . . . 'for the purpose of . . . influencing' the nomination or election of candidates for federal office" to disclose the source of such contributions and expenditures. *Buckley*, 424 U.S. at 77. This Court viewed the statute, as well as section 608(e), imposing limits on spending "relative to a clearly identified candidate [in federal elections]," *see id.* at 41, as presenting problems of unconstitutional *vagueness* as applied to persons other than political committees: people engaged in political speech might not know if the statutes covered their conduct. *Id.* at 42-44, 76-78.

To save both statutes from unconstitutional vagueness, the Court construed the term "expenditures" as reaching only "communications that in express terms advocate the election or defeat of a clearly identified candidate." *Id.* at 44; *see also id.* at 80. In footnote 52, *id.* at 44, the Court explained that such express advocacy required explicit words "of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'" So construed, the Court upheld the disclosure requirements, *see id.* at 80-81, though it struck down the spending limits as violating the First Amendment in the absence of any compelling government interest, *see id.* at 48-49.[3]

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[2] The Court, by contrast, has divided on the propriety of disclosure laws involving individual leafletters and others engaged in one-to-one communications about ballot measures. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *ACLF*, 525 U.S. at 199 (striking down requirement that initiative petition circulators wear an identification badge); *id.* at 203 (striking down requirement that initiative proponents list on reports the identity of paid circulators and their income from circulation). *But see Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150, 167 (2002) (noting that state "may well be justified" in requiring the disclosure of the identity of those involved in ballot measure campaigns to protect "the special state interest in protecting the integrity of a ballot-initiative process"). This body of law involving disclosure in one-to-one communications is not at issue in this case, which involves disclosure of large-scale political activity in reports filed with the government, required to be filed only if expenditures reach a specified monetary threshold.

[3] Notably, the Court applied this narrowing construction only with respect to independent expenditures by individuals and groups *other than* candidates and political committees. By contrast, and because of their particular importance in election campaigns, political committees (*i.e.*, organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate, *see Buckley*, 424 U.S. at 79), were (and are) required to file regular reports of all of their receipts and disbursements, *including those pertaining to issue advocacy not directly related to election campaigns*. *See FEC v. Akins*, 524 U.S. 11,

(Continued on following page)

This Court in *Buckley* certainly recognized that its interpretation to avoid vagueness could allow for evasion of the FECA rules, *see id.* at 45, but neither the Court nor anyone else could have foreseen *the extent* of the evasions that would follow. Indeed, it was not until the 1990s that so-called "sham issue advocacy" (advertising influencing – and typically intended to influence – the outcome of elections but eschewing words of express advocacy) became a major feature of campaigns. Studies uncontradicted in the lower court have shown that approximately $135 to $150 million was spent on advertising referring to candidates for federal office but lacking words of express advocacy in the 1995-96 election cycle. That number rose to between $230 million and $341 million during the 1997-98 period and over $500 million in the 2000 election cycle. Supp. App. 230sa-231sa (Henderson), 806sa-807sa (Kollar-Kotelly), 1306sa (Leon). Indeed, the uncontradicted evidence further showed that express words of advocacy are not necessary for effective campaign speech: only four to 11.4 percent of advertising funded by *candidates* includes express words of advocacy. Supp. App. 229sa (Henderson), 659sa (Kollar-Kotelly); *see also* 1296sa-1297sa (Leon).

In response to the rise of electioneering communications lacking words of express advocacy, the Federal Election Commission ("FEC") crafted a regulation stating that an advertisement would be considered express advocacy when, among other requirements, "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates." 11 C.F.R. § 100.22(b)(2) (2000). Most courts considering the constitutionality of "intent-based" tests such as the FEC regulation have held that they are impermissibly vague under *Buckley*. *See, e.g., FEC v. Christian Action Network*, 110 F.3d 1049, 1055-57 (4th Cir. 1997) (collecting cases disagreeing with FEC's regulation of express advocacy through an intent-based test). *See also, e.g., Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 731 (Wis. 1999); *Chamber of Commerce v. Moore*, 288 F.3d 187, 196-98 (5th Cir. 2002).

14-15 (1998). The reason for this broader requirement, the Court explained in *Buckley*, 424 U.S. at 79, is that the activities of candidates and of "political committees" "can be assumed to fall within the core area sought to be addressed by Congress" and "are, by definition, campaign related."

C. This Court Should Recognize BCRA's Bright-Line "Electioneering Communications" Provision as a Narrowly Tailored Means of Enforcing Effective Disclosure Laws.

1. The district court failed to distinguish between use of the bright-line test for the disclosure requirement and for the segregated fund requirement.

To avoid the fate of intent-based tests in the lower courts, BCRA uses a newer means to require *effective* disclosure without raising the problem of unconstitutional vagueness. Section 201 of the law requires the filing of disclosure reports for those who spend at least $10,000 per year on "electioneering communications." It then defines electioneering communications as "any broadcast, cable, or satellite communication which – (I) refers to a clearly identified candidate for Federal office; (II) is made within [60 days of a general, special or runoff election or 30 days before a primary or preference election]; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."[4] This bright-line test is the primary definition of electioneering communications in BCRA. A backup definition, to be used only in the event the primary definition fails constitutional muster, is a test that turns on "objective" intent, i.e., what a reasonable person would necessarily perceive as the purpose of the communication. *See id.*

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[4] The law defines "targeted to the relevant electorate" as capable of reaching 50,000 or more individuals in the relevant congressional district or state that the candidate for the House or Senate is seeking to represent. *See* BCRA § 201.

Plaintiffs' main constitutional argument against the primary definition in section 201 is that it is substantially overbroad because it reaches too many "issue advertisements" that are, in plaintiffs' view, constitutionally immune from all regulation, including but not limited to disclosure requirements. Two of the judges below, Judges Henderson and Leon, agreed with plaintiffs, while Judge Kollar-Kotelly rejected the overbreadth challenge. Supp. App. 864sa-865sa (Kollar-Kotelly). Judge Leon, joined by Judge Kollar-Kotelly, approved the definition under the backup provision,[5] as modified by Judge Leon to account for a vagueness problem he found in the definition. Supp. App. 1159sa-1166sa (Leon); *see also* Supp. App. 885sa-886sa (Kollar-Kotelly).[6]

The lower court judges' discussion of the overbreadth concerns with the primary definition unfortunately sheds

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[5] These judges struck down one disclosure rule, BCRA § 201(a)(5), "which equates contracts to make disbursements with actual disbursements requiring disclosure of contracts to make electioneering communications prior to their public dissemination," as lacking a "relevant correlation" or a "substantial relation" to a legitimate governmental interest. Supp. App. 115sa (per curiam). We do not address the constitutionality of that specific provision in this brief.

[6] Judge Henderson also would have held the law "underinclusive" because it does not apply to print, direct mail, or internet advertisements, Supp. App. 364sa-366sa (Henderson). The other two lower court judges correctly rejected Judge Henderson's conclusion on this issue. Supp. App. 873sa-880sa (Kollar-Kotelly), 1159sa (Leon). This Court has recognized that in the context of alleged discrimination in campaign regulations, Congress "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Buckley*, 424 U.S. at 105; *see also FEC v. Mass. Citizens for Life*, 479 U.S. 238, 258-59 n.11 (1986) ("*MCFL*"). Judge Kollar-Kotelly emphasized that broadcast ads are more "potent" and "effective," Supp. App. 876sa, 878sa-879sa (Kollar-Kotelly), and Congress acted reasonably in tackling first advertisements in the media presenting the most pressing need for disclosure. Indeed, by not covering print and the Internet, Congress has made the statute much *less* onerous than it would otherwise be.

little light on the constitutionality of BCRA's *disclosure* provisions. In considering the constitutionality of the primary definition, the judges focused on how the bright-line test would extend the requirement that corporations and unions use segregated funds for election-related activities, *see* BCRA § 203, discussed in Part II *infra*. The lower court judges then simply applied their discussion of overbreadth in the segregated funds context to the disclosure context, without carefully distinguishing between the two. *See* Supp. App. 367sa n.149 (Henderson) (definition "would prohibit too much protected expression"); Supp. App. 1152sa (Leon) (definition "limit[s] and chill[s]" protected speech).

This case, however, does not concern the abstract constitutionality of a definition, but the constitutionality of specific substantive provisions of title II of BCRA – in particular, the disclosure requirements of section 201 and the segregated fund requirement of section 203. Each of those substantive provisions must be separately analyzed on their own terms, with due regard paid to the distinct requirements and justifications for each. Overbreadth concerns that are pertinent to one provision are not necessarily germane to another provision.

The disclosure rules in section 201 do not suffer from the concerns that troubled the lower court. They prohibit *no* political expression, and this Court's recognition of an as-applied exemption to disclosure requirements in the *Socialist Workers* case cures any concern over chilling speech. Moreover, and as we now show, as to disclosure it is not clear that there is *any* overbreadth, much less *substantial* overbreadth, created by section 201's primary definition.

2. The bright-line test as applied to disclosure regulations is not overbroad at all because virtually all issue ads covered by the test will influence federal elections.

The judges below debated the extent to which the evidence showed that the bright-line test would regulate too much protected speech. It is true that the substantial overbreadth test includes an empirical component requiring consideration of the relative frequencies of valid versus unconstitutional applications of the law. *See Virginia v. Hicks*, 123 S. Ct. 2191, 2197 (2003) (under the overbreadth doctrine, the Court has "insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also *relative to the scope of the law's plainly legitimate applications* ... before applying the 'strong medicine' of overbreadth invalidation") (emphasis added); *Massachusetts v. Oakes*, 491 U.S. 576, 589-90 (1989) (Scalia, J., concurring); *see also id.* at 598-99 (Brennan, J., concurring); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (the question is whether the overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"). *See generally* Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 Minn. L. Rev. 1773, 1781-89 (2001) (discussing the relevance of empirical evidence to the Court's substantial overbreadth doctrine). But answering the empirical question requires first *identifying* unconstitutional applications of the law. Regarding disclosure, there are very few, if any, such unconstitutional applications.

The lower court judges all agreed – and we do not dispute – that the bright-line test would require disclosure by some political actors who run advertisements that are not, in fact, *intended* to influence the outcome of a federal election. Indeed, there was considerable debate over the validity of two studies conducted by the Brennan Center for Justice aimed at measuring the extent of such "genuine" issue advocacy compared to issue advocacy that is in fact intended to influence the outcome of federal elections. *Compare* Supp. App. 762sa (Kollar-Kotelly) *with* Supp. App. 1154sa (Leon) *and* Supp. App. 367sa n.149 (Henderson). The two judges who gave the Brennan Center studies at least some evidentiary weight disagreed over whether the studies showed that section 201's bright-line test covered too much "genuine" issue advocacy. *Compare* Supp. App. 858sa-860sa (Kollar-Kotelly) *with* Supp. App. 1157sa (Leon).

At least with respect to disclosure, these arguments miss the mark completely. Unlike the FECA disclosure provision discussed in *Buckley*, the disclosure provisions of BCRA are not dependent upon, and do not correspond to, the actual or perceived *intent* of the parties responsible for the expenditures. Rather, underlying the BCRA provisions is the government's recognition that "genuine" issue advertisements, when broadcast in the circumstances described in BCRA's "primary" definition, will almost invariably *influence the outcome of elections*, even if they were not specifically intended to do so. An advertisement about pending legislation, mentioning a candidate, targeted to the relevant electorate, and run immediately before the election (*see* Supp. App. 1147sa-1148sa (Leon)), even if not intended to influence the election, is at least intended to affect some *legislative action*. And, in so doing, the advertisement almost always influences a federal election, thereby triggering the concerns underlying BCRA's disclosure requirements.

By adopting the bright-line test in section 201, Congress demonstrated that its concern is with respect to advertisements that likely *will, in fact*, influence federal elections, rather than with advertisements that are intended, in whole or in part, to have such effect. Thus, the primary definition is precisely tailored to the congressional objectives, and there is *no* overbreadth.

3. Issue advocacy is not constitutionally favored over election-related speech.

Many of the plaintiffs appear to assume that "genuine" speech concerning legislative matters (or concerning political debates distinct from specific electoral decisions) are either entitled to greater First Amendment protection than "express" campaign-related speech, or are categorically immune under the First Amendment from any regulation, including disclosure requirements. But this assumption is fundamentally mistaken in both respects.

"Express" election-related speech – such as "Vote for Jones" – is, of course, political expression "'at the core of our electoral process and of the First Amendment freedoms,'" *Buckley*, 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Accordingly, such "express advocacy" is entitled to no lesser protection than speech concerning "issues."

Moreover, *issue*-related speech may be subject to carefully tailored disclosure requirements. For instance, the lobbying of legislators is the quintessential form of "genuine" issue advocacy. This Court has long recognized the constitutionality of laws requiring disclosure of expenditures for lobbying government officials. *See United States v. Harriss*, 347 U.S. 612 (1954). Disclosure is permissible to prevent corruption and its appearance, as well as to serve important informational purposes. In *Harriss*, the Court upheld the Federal Regulation of Lobbying Act, noting that through the Act Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit as for a similar purpose in passing the Federal Corrupt Practices Act – to maintain the integrity of a basic governmental process." *Id.* at 625-26.

Indeed, this Court has recognized the informational interest *alone* as sufficient to justify disclosure in large-scale political activity. In *Bellotti* and *ACLF*, this Court approved of laws allowing the government to require disclosure of financial information in *ballot measure* campaigns where the possibility of candidate corruption is absent. And in *Buckley* itself, the Court approved of disclosure requirements as to *all* of a candidate's or political committee's disbursements, including those pertaining to issue advocacy not directly related to election campaigns. *See supra* note 3.

Plaintiffs' argument that "genuine" issue advocacy is constitutionally immune from disclosure regulation therefore is untenable. In support of that argument, plaintiffs rely almost entirely on a few stray words in *Buckley*. In discussing why the definition of "expenditure" needed to be construed narrowly for disclosure purposes in order to avoid vagueness concerns, this Court stated that "[t]o insure that the reach of § 434(e) is not impermissibly *broad*, we construe 'expenditure' for purposes of that section in the same way as we construed the term of § 608(e) – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80 (footnote omitted and emphasis added). Read in context, it is apparent that the Court adopted the narrowing construction largely, if not entirely, in order to cure a concern over *vagueness*, not overbreadth: the discussion appeared in a section of the opinion entitled "Vagueness Problems," *id.* at 76, and the discussion of the constitutional problems with section 608(e), referenced in the discussion of section 434(e), clearly stated that the Court adopted its narrowing construction "to preserve the provision against invalidation *on vagueness grounds*." *Id.* at 44 (emphasis added).

To the extent the Court was addressing a problem of "overbreadth," it appears to have been suggesting *not* that a broader definition of "expenditure" would reach speech *constitutionally immune from regulation*, but instead that, as applied to speech not expressly election-related, "the relation of the information sought *to the purposes of the Act* may be too remote." *Id.* at 80 (emphasis added).

Significantly, those purposes are quite different than BCRA's. Under the express terms of FECA, Congress was concerned only with "the use of money or other objects of value '*for the purpose* of . . . influencing' the nomination or election of any person to federal office.'" *Id.* at 63 (emphasis added); *id.* at 77. Because Congress's objectives in FECA were aimed only at speech *intended* to influence federal elections, any applications of the statute to speech that was *not* so intended would have been "overbroad" *relative to the purposes of the Act itself.*

By contrast, as we explained above, under BCRA Congress has not limited its concern, or the aim of its regulation, to speech *intended* to influence federal elections: instead, it has carefully crafted a statute to address only candidate-specific speech *likely* to influence such elections – and thus to bring within the scope of the Act a more comprehensive array of the speech that does, in fact, implicate the concerns underlying the disclosure (and segregated fund) requirements. If *Buckley* were understood as holding that application of disclosure requirements to speech other than "express" advocacy is unconstitutional *regardless* of the legislature's objectives, such a holding would have been flatly inconsistent with the Court's holding in *Harriss*, and with the Court's subsequent discussions in, *e.g.*, *Bellotti*, *Citizens Against Rent Control*, and *ACLF*, in each of which the Court signaled its approval of the idea of disclosure requirements for "genuine" issue-related speech where such requirements are appropriately tailored to an important state interest, such as assisting voters to "evaluate the arguments to which they are being subjected," *Bellotti*, 424 U.S. at 792 n.32, and (in contexts where such speech may also affect officeholder conduct) to prevent "the appearance of corruption," *McIntyre*, 514 U.S. at 356 n.20 (describing *Harriss*). Indeed, such a holding would have been inconsistent with *Buckley*'s own approval of the broad disclosure requirements imposed on "political committees" with respect to *all* of their disbursements. *See supra* note 3.

Of course, in this case the Court need not identify the precise circumstances under which disclosure requirements may be imposed with respect to "pure" issue advocacy unrelated to candidate elections, such as was discussed in cases such as *Harriss*, *Bellotti*, and *ACLF*. BCRA does not attempt to reach lobbying speech, ballot-initiative speech, or any other speech that is unlikely directly to affect candidate elections. BCRA is, instead, aimed at speech that is likely to affect *candidate* elections, and thus is supported by additional compelling and powerful state interests that are not typically present in the context of, *e.g.*, ballot referenda. The fact that BCRA's bright-line test might, in some applications, apply to instances of "genuine" issue advocacy that are not principally intended to influence candidate elections does not render the statute overbroad even in those applications, much less substantially overbroad, because Congress has the power to require disclosure of basic financial information about the funding of broadcast advertisements that will likely

influence federal elections (regardless of intent) using a clear, non-vague statute.

4. Even if there is some overbreadth, it is not substantial.

Even if this Court disagrees with this analysis and would hold that it is impermissible for Congress to require any disclosure of expenditures for funding "genuine" issue advocacy, it should still uphold section 201's disclosure provisions because the provisions are not *substantially* overbroad. As this Court recently noted in *Virginia v. Hicks*, 123 S. Ct. at 2197, "there are substantial costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech."

To be sure, the parties and judges below vigorously debated the amount of "genuine" issue advocacy that would be covered by the bright-line test. But even if as much as 17% of the unique advertisements subject to disclosure are genuine issue advertisements (i.e., intended *solely* to influence matters other than elections) – as Judge Leon concluded was possible, Supp. App. 1157sa (Leon)[7] – the law is not substantially overbroad. In evaluating overbreadth, this Court should consider not only the empirical evidence regarding *the extent* of valid versus invalid applications of the law, but also *qualitative factors*, such as the state's strong interest in legislation of this kind, legislative inability to craft a more narrowly tailored law and the extent of the burden of the law in its invalid applications. *See* Hasen,

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[7] The 17% figure depended upon the "'most conservative' estimate" of the studies' director, Dr. Ken Goldstein. Supp. App. 1360sa-1361sa (Leon), and in fact the actual percentage may be much lower. *See* Supp. App. 1361sa (Leon) (Dr. Goldstein would have coded five of the six advertisements initially coded as genuine advertisements as electioneering advertisements). Judge Kollar-Kotelly, contrary to the McConnell plaintiffs' misstatement, McConnell Br. at 54, emphatically did not "agree[]" with the 17% figure. Supp. App. 859sa-860sa (Kollar-Kotelly).

supra, at 1799-1804; Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 894 (1991).

Here, Congress had a strong reason to act. The meteoric rise of electioneering communications lacking words of express advocacy (up to half a billion dollars in the 2000 election cycle) has threatened to undermine disclosure rules central to any *effective* set of campaign finance laws.

In addition, Congress could not craft a more narrowly tailored law. In order to avoid constitutional vagueness, Congress used a bright-line test under which anyone with "[a] copy of the proposed advertisement and a calendar" may "make a conclusive advance determination that the ad is subject to regulation." Supp. App. 803sa (Kollar-Kotelly) (emphasis omitted). It is hard to imagine a less vague test or one that could solve the problem of sham issue advocacy more directly. *See* Edward B. Foley, *"Narrow Tailoring" Is Not the Opposite of "Overbreadth": Defending BCRA's Definition of "Electioneering Communications,"* 2 Election L.J. (forthcoming Oct. 2003), *available at* http://www.liebertpub.com/elj/Foley1.pdf.

Finally, the First Amendment burden is slight. Political actors who must file disclosure reports under BCRA for advertisements captured by the bright-line test may well be already filing such reports for their election-related activities that fund advertisements including words of express advocacy. Importantly, the disclosure rules *do not prevent any speech*, and anyone facing the threat of harassment from disclosure may always seek an as-applied exemption from disclosure under *Socialist Workers*. The rules will not chill any significant political activity.

D. If This Court Fails to Uphold BCRA's Bright-Line "Electioneering Communications" Provision, All Effective State and Local Campaign Finance Disclosure Laws and Public Financing Laws Are in Jeopardy.

As noted in Part I.B., above, state attempts to use intent-based tests to require disclosure of expenditures

funding issue advertisements that influence state elections have fared poorly in lower courts. In response, states have begun enacting bright-line tests similar to section 201 to ensure *effective* state campaign finance disclosure laws.[8] A decision by this Court striking down BCRA's bright-line test would do more than call into question these nascent efforts by states to write effective disclosure laws, however. The law would also doom efforts to provide effective voluntary public financing of campaigns, including *judicial* campaigns.

North Carolina's recently enacted public financing program for judicial candidates includes a "trigger" provision releasing additional public financing upon the filing of reports indicating a certain amount of independent expenditures in support of or in opposition to a judicial candidate. *See* N.C. Gen. Stat. § 163-278.67. Such triggers cannot work if those supporting or opposing candidates can avoid filing the reports of their expenditures simply by eschewing words of express advocacy. Other state and local laws have similar triggers for their public financing programs.[9]

In addition to these laws, twenty-five states and the District of Columbia have laws that require disclosure of expenditures funding grassroots lobbying.[10] These laws too

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[8] *See, e.g.*, Cal. Gov't Code § 85310 (West Supp. 2003); Conn. Gen. Stat. § 9-333c(a)(2) (2003); Vt. Stat. Ann. tit. 17 § 2883 (2002); Wis. Stat. § 11.12(6) (2002); *id.* § 11.01(16)(a).

[9] *See, e.g.*, Ariz. Rev. Stat. § 16-952 (2003); Me. Rev. Stat. Ann. tit. 21-A, § 1125(9) (2002); Austin, Tex., City Code § 2-9-12 (2003); L.A., Cal. Municipal Code § 49.7.14 (2003).

[10] *See* Alaska Stat. §§ 24.45.011, .051 (2002); Ark. Code Ann. §§ 21-8-402, -601 (Michie 2003); Cal. Gov't Code § 82045(e) (West. Supp. 2003); Colo. Rev. Stat. §§ 24-6-301, -302 (2002); Conn. Gen. Stat. §§ 1-91(k), -94, -96 (2003); D.C. Code Ann. § 1-1105.01 (2003); Ga. Code Ann. §§ 21-5-70, -71, -73 (2003); Haw. Rev. Stat. §§ 97-1 to -3 (2003); Idaho Code §§ 67-6602, -6617, -6619 (Michie 2003); Ind. Code Ann. §§ 2-7-1-9, -2-1, -3-3 (Michie 2003); Kan. Stat. Ann. §§ 46-225, -268 (2002); Md. Code Ann., State Gov't §§ 15-701, -704 (2003); Mich. Comp. Laws §§ 4-415, -418 (2003); Minn. Stat. Ann. §§ 10A.01, .03, .04 (2002); Miss. Code Ann. §§ 5-8-3, -9 (West 2003); Mont. Code. Ann. § 5-7-102 (2002); Neb. Rev. Stat. § 49-1433 (2002); Nev.

(Continued on following page)

could be subject to challenge should this Court strike down the electioneering provisions of BCRA on grounds that the government may not require disclosure of expenditures likely to influence government action.

II.

THIS COURT SHOULD AFFIRM THE CONSTITUTIONALITY OF NARROWLY TAILORED LAWS REQUIRING CORPORATIONS AND UNIONS TO USE A SEGREGATED FUND FOR COMMUNICATIONS THAT INFLUENCE ELECTIONS.

A. This Court Has Recognized the Compelling Interests Served by Limits on Excessive Corporate and Union Involvement in the Electoral Process.

Since 1947, federal law has required corporations and unions to establish and administer segregated accounts for the purpose of making political contributions and expenditures using funds collected from stockholders, members, executive and administrative personnel, and their families. See 2 U.S.C.A. § 441b (West 1997 & Supp. 2003). Section 203 of BCRA extends that segregated fund requirement to "electioneering communications" defined in section 201. Section 203 is consistent with a long tradition of congressional and state attempts to limit undue corporate and union involvement in elections, and is constitutional.

In *FEC v. Beaumont*, 123 S. Ct. at 2205-08, this Court set forth a detailed "historical prologue" tracing a "century

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Rev. Stat. § 218.912 (2002); N.M. Stat. Ann. §§ 2-11-2, -6 (Michie 2002); N.Y. Legis. Law §§ 1-c, -j (McKinney 2003); Or. Rev. Stat. §§ 171.725, .745 (2001); 65 Pa. Cons. Stat. §§ 1303, 1305 (2002); Vt. Stat. Ann. tit. 2, §§ 261, 264 (2003); Va. Code Ann. §§ 2.2-419, -426 (Michie 2003); Wash. Rev. Code § 42.17.200 (2003); W. Va. Code § 6B-3-5 (2003).

of congressional efforts to curb corporations' potential 'deleterious influences on federal elections.'" *Id.* at 2205 (quoting *United States v. Auto. Workers*, 352 U.S. 567, 585 (1957)). The Court explained that federal law in this area began with the 1907 Tillman Act, followed by "periodic amendment . . . meant to strengthen the original, core prohibition on direct corporate contributions." *Id.* at 2206. While not mentioned in *Beaumont*, state efforts to limit excessive corporate involvement in the electoral process date back even further, to 1891.[11]

This Court has consistently supported special rules for corporation and labor union involvement in candidate elections. *Id.* at 2200 (upholding federal corporate contribution limitations applied to nonprofit ideological corporations); *Austin*, 494 U.S. at 669 (upholding Michigan requirement that corporations spend money on state candidate elections only through a segregated fund); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982) ("*NRWC*") (upholding federal requirement that corporations without shareholders restrict solicitations for segregated PACs to "members" of corporation).

This Court has recognized four interests that justify limits on corporate and union contributions and expenditures, three of which are relevant to BCRA § 203.[12]

(1) *Preventing Corruption and the Appearance of Corruption.* This Court has long recognized that "substantial aggregations of wealth amassed by the special advantages

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[11] *See* Ky. Const. § 150; Act of June 2, 1891, ch. 4538, §§ 1-2, 1891 Fla. Laws 72, 72; Act of Apr. 19, 1905, ch. 291, § 1, 1905 Minn. Laws 436, 436; Act of Apr. 3, 1897, ch. 19, § 1, 1897 Neb. Laws 185, 185; Act of Apr. 6, 1911, ch. 109, § 1, 1911 N.H. Laws 113, 113; Act of Feb. 5, 1907, ch. 121, 1907 N.C. Sess. Laws 134; Act of May 29, 1908, ch. 31, art. 1, art. VII, § 9, 1907-1908 Okla. Sess. Laws 316, 348; Act of Apr. 5, 1897, ch. 18, § 1, 1897 Tenn. Pub. Acts 143, 143; Act of June 21, 1905, ch. 492, § 1, 1905 Wis. Laws 869, 869; Act of Feb. 17, 1911, ch. 41, § 10, 1911 Wyo. Sess. Laws 50, 53.

[12] The fourth interest is preventing circumvention of valid contribution limits, *see Beaumont*, 123 S. Ct. at 2207.

which go with the corporate form" may become "converted into political war chests which could be used to incur political debts from legislators." *Beaumont*, 123 S. Ct. at 2206 (quoting *NRWC*, 459 U.S. at 207, internal quotations omitted). No doubt, these "war chests" raise the possibility of corruption and the appearance of corruption as to campaign *contributions* by corporations and unions. In *Bellotti*, 435 U.S. at 788 n.26, this Court explicitly recognized that such war chests raise the same dangers as to *expenditures* as well: "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[13]

(2) *Preventing the Corrosive Effect of Corporate Wealth on Politics*. In *Austin*, this Court held that a limit on corporate expenditures was justified by "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" but that result from "unique state-conferred" benefits. *Austin*, 494 U.S. at 660.

(3) *Shareholder and Union Member Protection*. In *NRWC*, 459 U.S. at 208, this Court recognized that the segregated fund requirement protects individuals "who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *See also Beaumont*, 123 S. Ct. at 2206; *United States v. Congress of Indus. Org.*, 335 U.S. 106, 113 (1948).

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[13] In the later *Austin* case, this Court did not determine whether or not this interest justified the segregated fund requirement for corporate expenditures on express advocacy. *See Austin*, 494 U.S. at 659 ("*Regardless of whether* this danger of 'financial *quid pro quo*' corruption . . . may be sufficient to justify a restriction on independent expenditures . . . ") (emphasis added).

B. In Recent Years, Corporations and Unions Have Been Able to Skirt the Limits on Involvement in the Electoral Process by Eschewing Express Words of Advocacy.

As explained in Part I.B, interpretations of the Court's *Buckley* opinion have allowed corporations and unions to skirt limits on their involvement in the electoral process by eschewing words of express advocacy. Corporations and unions have made millions of dollars of "soft money" contributions to political parties to fund election advertisements that avoid words of express advocacy. *See, e.g.*, Supp. App. 1284sa (Leon). They also have spent millions more on independent expenditures lacking such words. Supp. App. 1316sa-1317sa (Leon). The result is a gutting of the longstanding segregated fund requirement of 2 U.S.C.A. § 441b.

C. This Court Should Recognize BCRA's Bright-Line "Electioneering Communications" Provision as a Narrowly Tailored Means of Limiting Corporate and Union Involvement in the Electoral Process.

Congress sought to deal with the evisceration of the controls on corporate and union involvement in the political process by extending the segregated fund requirement to electioneering communications as defined under the bright-line test of BCRA section 201. The government's interests in limiting corporate or union contributions and expenditures apply equally whether or not an advertisement that is intended or likely to influence the outcome of elections includes words such as "Vote for Jones." The provision merely insures that the existing federal segregated fund requirement is *effective*.

The connection between corruption – and the appearance of corruption – and corporate and union *contributions* to fund issue advertisements is obvious: large contributions can create political debts for legislators. In addition, the evidence presented below shows that corporate and union war chests also raise the possibility of corruption and the appearance of corruption as to *independent expenditures*. Judge Kollar-Kotelly detailed how federal candidates and political parties "know and appreciate who runs candidate-centered issue advertisements in their races." Supp. App. 708sa-719sa (Kollar-Kotelly) (capitalization altered). No other judges made contrary findings.

BCRA's legislative change is simply the most recent of what this Court recognized are "periodic amendment[s] [to congressional laws regulating corporate political activity] . . . meant to strengthen the original core prohibition on direct corporate contributions." *Beaumont*, 123 S. Ct. at 2206. As this Court has done in its other recent campaign finance cases, it should show "respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'" *Id.* at 2207 (quoting *NRWC,* 459 U.S. at 209-10).

Two of the lower court judges in this case rejected application of the bright-line test to the segregated fund limitation on corporate and union involvement in the electoral process on the ground that it "would prohibit too much protected expression." Supp. App. 367sa n.149 (Henderson); *see also* Supp. App. 1152sa (Leon).

This analysis misses the mark. As this Court explained in *Beaumont,* 123 S. Ct. at 2211, the segregated fund requirement should not be "characteriz[ed] . . . as a complete ban. . . . [T]he section 'permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of [PACs].'"

Nor is the law substantially overbroad. As explained in Part I.C., *supra*, "genuine" issue advertisements that must be funded through segregated funds under the new law, even if not intended to influence the outcome of elections, are intended to influence government decisions and in fact will almost inevitably – however intended – *influence the outcome of elections* if made under the circumstances described in BCRA's bright-line definition. The AFL-CIO acknowledges this point in its brief. AFL-CIO Br. at 21 (AFL-CIO broadcast advocacy "certainly might 'affect,' or be perceived to 'affect,' elections in the sense of influencing the electoral issue climate, forcing candidates to address union priority matters, informing the public and generating popular pressure on candidates to embrace particular policies. In turn, the labor movement's impact on public policy is only enhanced when electoral considerations motivate office-holders").

Three of the same interests that this Court has recognized for limiting corporate and union attempts to influence elections through express advocacy apply as well to the government's interest in limiting excessive corporate and labor influence over the outcome of elections, whatever the *intention* of the corporations and unions paying for the advertisements.

Large amounts of corporate and union spending referring to a candidate for federal office and broadcast *around the time of elections* raise at least the appearance of corruption in voters' minds, not to mention the threat of actual corruption. The concern is neither novel nor implausible. *Cf. Shrink Mo.*, 528 U.S. at 391.

In addition, limiting the corrosive effect on elections of immense aggregations of wealth that are accumulated as a result of unique state-conferred privileges and benefits – an interest this Court found sufficiently compelling to justify a segregated fund requirement in *Austin* – applies equally whether or not a corporation or labor union *intends* to influence an election so long as large spending *is likely to have that effect*. Nor does that corrosive effect depend upon the presence of "express advocacy."

Importantly, plaintiffs in this case have not challenged the holding in *Austin* that the "corrosive effect" of immense aggregations of wealth through the corporate form justifies regulating corporate express advocacy.[14] *Cf. Beaumont*, 123 S. Ct. at 2212 (Kennedy, J., concurring) (declining to reconsider distinction between contributions and expenditures because the issue was not presented for review). The question then should be simply whether the same "corrosive effect" rationale for limits on corporate express advocacy applies as well to corporate and union advertisements lacking words of express advocacy but likely to influence the outcome of elections. It certainly does apply in that context, and plaintiffs offer no arguments to the contrary.[15] *See* Foley, *supra*, 2 Election L.J. (temporary pages 12-15).

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[14] The closest the plaintiffs come in their opening briefs to challenging *Austin* is the discussion of the media exemption in the National Rifle Association Br. at 47-48. The NRA does *not* attack *Austin*'s central holding on the corrosive effects of corporate wealth, but rather raises an equal protection attack based on BCRA's exemption of media corporations from the electioneering communications regulations.

Similarly, the government's interest in corporate shareholder and union feeholder protection applies equally whether or not an advertisement funded with shareholder or union member funds contains words of express advocacy. *Cf. Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521-22 (1991) (plurality opinion) (state may not compel its employees to subsidize legislative lobbying or other political union activities, including "discussion[s] of governmental affairs," outside the limited context of contract ratification or implementation).

Even if this Court were to hold that the government may not require unions and corporations to pay for broadcast advertisements through a segregated fund when the corporation or union does not *intend* to influence the outcome of elections and uses no words of express advocacy, the law is not substantially overbroad. The vast majority of candidate-specific issue advertisements that are broadcast to the relevant electorate in the period immediately before the election are intended to influence the outcome of federal elections. *See* Supp. App. 1315sa-1325sa (Leon); Supp. App. 678sa-708sa (Kollar-Kotelly). In addition, as noted in Part I.C., in evaluating overbreadth, this Court should consider not only the empirical evidence regarding *the extent* of valid versus

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[15] *MCFL* is not to the contrary. In *MCFL*, this Court referred to the overbreadth language in *Buckley*, characterizing its construction of the express advocacy provision in *Buckley* as a means to "avoid problems of overbreadth." *MCFL*, 479 U.S. at 248. As explained above, *Buckley* found overbreadth in the context of the FECA's purposes. In contrast, in this case there is no overbreadth in the context of BCRA's purpose to control excessive corporate and union influence over the electoral process, whatever the intention of the corporate or union advertisers.

invalid applications of the law, but also *qualitative factors*, such as the state's strong interest in legislation of this kind, legislative inability to craft a more narrowly tailored law, and the extent of the burden of the law in its invalid applications.

Here, the government has a strong and longstanding interest in regulating corporate and union involvement in the electoral process; the government has no ability to craft a more narrowly tailored law that will materially address what this Court in *Austin* identified as the government's compelling interests; and the law requires only the use of a segregated fund – no speech is banned. The burden is particularly slight in the case of corporate activities. As this Court recently noted in the context of a corporate contribution ban, "[a] ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information." *Beaumont*, 123 S. Ct. at 2210 n.8. The same may be said of the segregated fund requirement: it leaves individual members of corporations free to make their own contributions or expenditures (including to the segregated fund), and deprives the public of little or no material information.[16]

D. If This Court Fails to Uphold BCRA's Bright-Line "Electioneering Communications" Provision, State and Local Government Will Be Unable to Enact *Effective* Laws Limiting Corporate and Union Involvement in the Political Process.

At least fourteen states impose segregated fund requirements on corporations, unions, or both types of entities.[17] A number of cities have similar requirements.[18] If this Court fails to uphold BCRA's bright-line electioneering provision to the segregated fund requirements on the federal level, these states and municipalities will not be able to craft *effective* laws limiting corporate or union involvement in the political process. The laws will become a dead letter, thereby undoing historical practice going back many decades.

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[16] The ACLU, NRA, and NRLC all argue that the *Austin* rationale should not apply to these organizations because they are ideological corporations. Those arguments are best addressed by the Court in the context of considering the proper scope of the *MCFL* exception to the law. They are not a reason to strike down the segregated fund requirement as applied to for-profit corporations such as General Motors or Exxon-Mobil or unions such as those comprising the AFL-CIO.

CONCLUSION

For the foregoing reasons, we urge this Court to affirm the constitutionality of the electioneering provisions of sections 201 and 203 of the BCRA.

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Respectfully submitted,

RICHARD L. HASEN
Counsel of Record
919 South Albany Street
Los Angeles, California 90015
(213) 736-1466

Attorney for Amicus Curiae

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[17] Ariz. Rev. Stat. §§ 16-919, 920 (2003); Conn. Gen. Stat. § 9-333o, p (2003); Mich. Comp. Laws §§ 169.254, 169.255 (2003); Mont. Code Ann. § 13-35-227 (2002); N.Y. Elec. Law § 14-116 (McKinney 2003); N.C. Gen. Stat. § 163-278.19 (2002); Ohio Rev. Code Ann. §§ 3599.03, 3517.082 (West 2002); Okla. Stat. tit. 21, § 187.2 (2003); 25 Pa. Cons. Stat. § 3253 (West 2003); R.I. Gen. Laws §§ 17-25-10.1(h), -15 (2002); S.D. Codified Laws § 12-25-2 (Michie 2002); Tex. Elec. Code Ann. §§ 253.094, .100 (2003); W. Va. Code § 3-8-8 (2003); Wis. Stat. § 11.38 (2002).

[18] For example, a number of California cities have such requirements. *See* Berkeley, Cal., Municipal Code § 2.12.440 (2003); Chula Vista, Cal., Municipal Code § 2.52.060 (2001); Coronado, Cal., Municipal Code § 1.84.40 (2003); Poway, Cal., Municipal Code § 2.28.030(B)(1) (2002); San Diego, Cal., Municipal Code § 27.2947 (2003); San Diego County, Cal., Municipal Code tit. 3, div. 2, ch. 9, § 32.924 (2002); Santee, Cal., Municipal Code § 2.40.070 (2002); Scotts Valley, Cal., Municipal Code § 2.60.040 (2003).

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IN THE SUPREME COURT OF THE UNITED STATES

SENATOR MITCH MCCONNELL ET AL.,
Appellants/Cross-Appellees,
v.
FEDERAL ELECTION COMMISSION ET AL.,
Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF POLITICAL SCIENTISTS NORMAN J. ORNSTEIN, PH.D., ET AL. AS AMICI CURIAE SUPPORTING THE CONSTITUTIONALITY OF TITLE 1 OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

TERESA W. ROSEBOROUGH
Counsel of Record
JUDITH A. O'BRIEN
ANDREW W. BROY
SHANNON L. KIMBALL
Sutherland Asbill & Brennan LLP
999 Peachtree Street
Atlanta, Georgia 30303
(404) 853-8000

Counsel for Amici Curiae

August 5, 2003

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The NES Guide to Public Opinion and Electoral Behavior, The National Election Studies, Table 2a.3, *available at* http://www.umich.edu/~nes/nesguid/toptable/tab2a_3.htm 12-13

Center for Responsive Politics, National Party Totals, *available at* http://www.opensecrets.org/parties/demhard.asp 21

Nos. 02-1674, 02-1727, 02-1733, 02-1753

IN THE SUPREME COURT OF THE UNITED STATES

SENATOR MITCH MCCONNELL, ET AL.,

Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INTEREST OF AMICI CURIAE[1]

As political scientists who have studied and written extensively on political parties in the United States, we have a particularly strong appreciation for the vital role political parties play in our democratic system of governance. The view that parties are crucial to the American political system is widely shared in our field. "[I]t is no exaggeration to say that there is an emerging consensus among professional political scientists that party is the most fundamental of all democratic institutions."[2]

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[1] The names and academic affiliations of the political scientists filing as *Amici* are set forth in Appendix A. All parties have consented to the filing of this brief. No counsel for a party authored this brief, and no one other than the named *amici* and their counsel made a monetary contribution to its preparation and submission.

We strongly disagree with the position taken by the Political Party Appellants ("Political Parties") in this case. They argue that the Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155, 116 Stat. 81 ("BCRA"), by eliminating soft money, will destroy or severely weaken political parties. Political scientists have a substantial interest in the health of political parties, just as party officials do. But, unlike many party officials, who are heavily invested in the status quo or who have an ideological aversion to campaign finance reform, we are able to examine the abuses of the former system objectively and draw reasoned conclusions. We also can call upon a wealth of knowledge gained from an extensive body of highly respected research on political parties and the party system. Our studies and experience lead us to conclude that BCRA will strengthen, not weaken, political parties.

Under the previous campaign finance regime, political parties were diverted from their core functions by the allure of so-called "soft money." Ordinary party supporters were largely ignored while national party leaders, working closely with influential officeholders, solicited large contributions of soft money from corporations, unions, and wealthy individuals. Opportunities for access to government insiders were often promised in return.

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[2] Testimony before the Senate Comm. on Rules and Admin., 106th Cong. 1 (Apr. 5, 2000) (statement of Michael C. Munger, Chairman-Designate, Department of Political Science, Duke University).

Starting with the 1996 election cycle, large amounts of soft money were used to pay for so-called "issue ads" that attacked specific candidates in targeted races. Far from educating voters on important issues, these ads were virtually indistinguishable from candidates' campaign ads. Indeed, the ads barely mentioned the name of the political party at all. Taking advantage of federal allocation formulas, national parties learned to stretch their soft dollars by funneling funds through various state and local party accounts in what amounted to a money-laundering operation.

SUMMARY OF ARGUMENT

Soft money and candidate-specific issue ads dramatically altered how political parties operated. National parties relied increasingly on a small number of very large contributions – some in the multi-million dollar range – from corporations, unions, and wealthy individuals. According to a study by the nonpartisan Center for Responsive Politics, two-thirds of all soft money contributed to the 2000 presidential campaign (nearly $300 million) came from a mere 800 donors.[3] This unhealthy dependence on a small number of very large donors raised serious concerns that these donors would exert undue influence on the officeholders who benefited from their contributions.

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[3] Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* 78 (2001) (Brennan Center for Justice, N.Y.U.L. Sch.).

Although political parties have been part of the American political system for over two centuries, and although the soft-money phenomenon dates back little more than twenty years, the Political Parties flatly assert that the loss of soft money will leave them without sufficient resources to fulfill their critical functions. Indeed, they claim that BCRA, which has been in effect for less than a year, already has "undermin[ed] the ability of political parties to fulfill their pivotal role in American democracy." (Brief of the Political Parties at 32 (hereinafter "Pol. Par. Br.")). Happily, the facts refute these dire predictions. In the first six months of 2003, after BCRA had gone into effect, the six national party committees raised more "hard money" ($160 million) than they raised in hard and soft money *combined* in the comparable period in the last presidential election cycle ($138 million).

BCRA represents a necessary and appropriate response to the abuses resulting from widespread circumvention of federal campaign finance laws. BCRA does not impose an expenditure limit and does not add *any* limits on the amount of money that can be spent by political parties. Instead, it requires that party funds be raised in compliance with a federal statutory and regulatory regime aimed at preserving the integrity of federal elections. BCRA §§ 323(a), 323(b). Contrary to the Political Parties' assertions, BCRA does not prevent parties from pooling resources or otherwise associating with each other. Nor does BCRA impermissibly intrude upon state control of local elections.

Nobody has more of a stake in a vibrant party system than the members of Congress and the President of the United States. It simply is not reasonable to think that the 300 Representatives and Senators who voted for BCRA, and the President who signed it into law, would support a measure that threatened to impair the effectiveness of the political parties.[4] To the contrary, in enacting BCRA, Congress sought to eliminate the potentially corrupting influence of soft money and to liberate political parties from an unhealthy dependence on a small number of large donors. Once parties no longer function as the mere conduits of unregulated and potentially corrupting soft money, public confidence in the political system will be restored. Grassroots initiatives of the kind for which political parties are best known will be reinvigorated. Individual voters will once again be the central actors in our political system.

While it is true that the soft money regime required coordination among the national and state political parties to avoid the limitations imposed by the federal election laws existing at that time, this brotherhood of circumvention is hardly the type of associational interest protected by the Constitution. The First Amendment right of association has never been interpreted to include the right of an *entity*, like a political party, to associate with other entities for the purpose of evading regulatory constraints aimed at reducing invidious political corruption.

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[4] *See generally Georgia* v. *Ashcroft*, 539 U.S. __, 123 S. Ct. 2498 (June 26, 2003) (giving significant weight to the nearly uniform support shown by the minority legislators most directly affected by a legislative redistricting plan submitted by the State of Georgia for approval under the Voting Rights Act and observing that the minority legislators were in the best position to know how the redistricting plan would affect them). Members of Congress are directly affected by, and have special knowledge of and experience with, campaign finance regulation. Just as the Court accorded great weight to the minority legislators in *Georgia* v. *Ashcroft*, the Court should defer to the view of a majority of the members of Congress who voted for BCRA.

Moreover, nothing in BCRA will impair the ability of the national and state parties to work together just as effectively as they did under prior law to build common platforms, facilitate get out the vote efforts, build party membership, hold party conventions, field candidates for election at all levels of government, develop party strategies, and fashion enduring internal party structures. Indeed, the elimination of soft money will promote more party-strengthening activities at all levels of the party system.

ARGUMENT

I. Political Parties Are An Enduring and Indispensable Part of the American Political System.

America may have been conceptualized as a "government of and by the people," but, as V.O. Key, Jr., one of the most prominent political scientists of the twentieth century, observed: "[T]he machinery of popular government [did not] come into existence overnight. By a tortuous process party systems came into being to implement democratic ideas."[5]

Political parties began to emerge soon after the Republic was formed. Their development was not without controversy. James Madison, for example, expressed concern that political parties would degenerate into competing factions, dividing and destabilizing the new nation.[6] "While [the founders] were loath to endorse the concept of political parties—because [parties as we know them] had yet to be devised—they did perceive the need to organize those who shared their views in order to succeed with this new form of government they had established. In their efforts to make our democracy work, they invented the political institution that suited their needs [the modern political party.]"[7]

Eventually Madison satisfied himself that our Constitution contained sufficient safeguards to control the potentially dangerous consequences of political factions. Not long after Alexander Hamilton put together a voting majority that would later become the Federalists, Madison joined with Jefferson in organizing an opposing party. Thus, by the Third Congress, federal officeholders "were divided into two recognizable, broad, intersectional alliances" that contained "many of the elements we identify with political parties today."[8]

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[5] V.O. Key, Jr., *Politics, Parties, and Pressure Groups 2000-01* (New York: Crowell, 1964).

[6] The Federalist No. 10 (James Madison).

[7] L. Sandy Maisel, *Parties and Elections in America: The Electoral Process* 33 (3d ed., Rowman & Littlefield, 2001).

From their beginning, parties served an important role in our political system. Parties link individuals with their government, represent and integrate the interests of party members, and control and direct government.[9] Parties mobilize the electorate and streamline voters' electoral choices.[10] In short, parties serve as the medium through which average citizens find their place in our democratic system of government.[11] Parties also serve as a forum for aggregating public policy preferences and diluting the influence of organized special interests.[12] In this manner, parties facilitate the solidification of political

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[8] John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* 82 (1995); *see generally id.* at 79-82. The two-party system has exerted the control Madison anticipated. Through political parties, competing groups coordinate policy positions and aggregate influence under a single umbrella, thereby facilitating majority-building and the growth of political power. The process by which groups come together under the umbrella of political parties enlarges and refines public discourse and creates the stability Madison and others deemed necessary to successful democratic government.

[9] William J. Keefe & Mark J. Hetherington, *Parties, Politics, and Public Policy in America* 2-3 (9th ed. 2003). *See also* Maisel, *supra* note 7, at ch. 3.

[10] William J. Keefe, Parties, Politics, and Public Policy in America 33 (7th ed. 1994); Aldrich, *supra* note 8, at 288.

[11] Daniel M. Shea, *Transforming Democracy* 9-10 (1995).

[12] *Inside the Campaign Finance Battle* 30 (Anthony Corrado et al. eds., 2003).

power and the stabilization of our democratic government.[13]

On a more practical level, parties provide important services to the electorate. They develop party leadership, recruit and groom candidates, assist with voter registration, attract party members through grassroots political outreach and other means, and get voters to the polls.[14] Parties formulate policy and craft party platforms, providing party members with a coherent political view to serve as a guidepost in their political activities.[15] Moreover, stiff competition between the political positions of the major parties "produces public policy more in keeping with the preferences of the electorate."[16] Good party leadership understands the importance of building party loyalty. Indeed, "[f]ew factors are of greater importance for our national elections than the lasting attachments of tens of millions of Americans to one of the parties."[17]

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[13] Marjorie Randon Hershey & Paul Allen Beck, *Party Politics in America* 11 (10th ed. 2003).

[14] Corrado, *supra* note 12, at 30.

[15] Hershey & Beck, *supra* note 13, at 12-13. Political scientist Clinton Rossiter provides two historical examples of how parties shaped and informed important public debate. He cites the role of the Republican Party, through President Lincoln, in educating the nation about the nature and implications of slavery, and the role of the Democratic Party, through President Franklin Roosevelt, in seeking to educate the public about the relationship of private enterprise and public authority. *See* Clinton Rossiter, *Parties and Politics in America* 48 (1960).

[16] Keefe & Hetherington, *supra* note 9, at 55 & n.31 (citing Charles Barrilleaux, "Party Strength, Party Change and Policy-Making in the American States," *Party Politics* vol. 6, no. 1, at 61-73 (2000)).

Political scientists are not against party fundraising. In fact, to the extent that fundraising is a means of strengthening the electorate's attachment to political parties, we fully support party fundraising activities. But fundraising is a means to an end. The end is making sure that the parties can engage and mobilize voters, select and elect candidates, promote the parties' viewpoints, and facilitate governance. If we evaluate fundraising efforts in recent election cycles based on whether they served these purposes, the pre-BCRA regime would have to be judged an abject failure. During the same period that corporations and unions were contributing huge sums of soft money to political parties, the number of individual Americans who reported contributing to election campaigns declined by nearly 50 percent.[18] In 1976, 16 percent of Americans stated that they contributed to a campaign; in 2000, only 9 percent of Americans did so.[19]

II. Soft Money Has Done More to Harm Political Parties Than to Help.

Contrary to the Political Parties' assertions, the elimination of soft money will not diminish the ability of political parties to carry out their crucial democratic functions. Indeed, the preponderance of the research in this area affirms that soft money did not strengthen, and indeed harmed, political parties.

As one scholar has noted: "[S]oft money doesn't really make the parties strong; it makes the people who bring soft money to the party strong."[20] Over the past twenty years, hard and soft money contributions have accelerated at a dizzying rate. The increases in soft money contributions have been particularly staggering, growing from a mere $20 million in 1980 to nearly $500 million in 2000.[21] If soft money had the party-building powers that critics of BCRA attribute to it, one would expect to see impressive gains over the past ten to twenty years in such indicia of party strength as electoral competition,[22] party identification, and voter turnout. Quite the opposite is true.

In the soft money era, electoral competition actually *decreased*. In 1976 and 1978, the last two elections before parties began their pursuit of soft money, House incumbents won reelection in 95.8 percent and 93.7 percent, respectively, of their races. In both 1998 and 2000, two of the last elections conducted under the soft-money system, House incumbents won 97.8 percent of their races.[23] For Senate incumbents, the reelection rates in 1976 and 1978 were 64 percent and 60 percent, respectively; these rose to 89.7 percent and 79.3 percent, respectively, in 1998 and 2000.[24] As these figures indicate, soft money increases have done nothing to counter or reduce the advantages of incumbency. And in the 2002 midterm congressional elections, when soft money was surging at high tide, only four House incumbents were defeated by challengers, the smallest number in U.S. history.

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[17] Angus Campbell et al., *The American Voter* 121 (New York: Wiley, 1960).

[18] Warren E. Miller & The National Election Studies, American National Election Studies, Cum. Data File, 1948-2000.

[19] *Id.*

[20] Corrado, *supra* note 12, at 53 (citing statement by Robin Kolodny, *CFI "Cyber-Forum": How Would McCain-Feingold Affect the Parties?*).

[21] Corrado, *supra* note 12, at 27.

[22] Statistical Abstract of the United States, Table No. 381 (U.S. Census Bureau, 2002).

[23] *Id.*

Soft money has also done nothing to reverse the downward trend in voter turnout figures since 1968.[25] In 1996, only 48.9% of the voting-age population cast ballots in the presidential election, the lowest rate ever recorded.[26] Thus, despite the millions of dollars of soft money raised by the parties in the 1980s and 1990s, there is absolutely *no* evidence that this money had any positive impact on voter turnout.[27]

Similarly, survey data show no appreciable increase in the strength of party identification. Based on the seven-point scale developed by the National Election Studies (NES), which has been the academic measure of partisanship for fifty years, the strength of party attachments did not materially increase in the past decade.[28] Individuals who identified themselves as strong Democrats or Republicans accounted for about 29 percent of respondents in 1992 and 31 percent in

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[24] *Id.*

[25] Statistical Abstract of the United States, Table 395.

[26] *Id.*

[27] *Id.*

[28] The NES Guide to Public Opinion and Electoral Behavior, *The National Election Studies*, Table 2a.3.

2000. These figures are typical of the results for the past five decades.[29]

These declines in traditional measures of party strength are a reflection of the fact that soft money was not used to support party-building activities.[30] In the 2000 campaign, only eight cents of every soft-money dollar spent by the state parties went to voter education, phone banks, voter registration, get-out-the-vote drives, and other traditional party-building activities.[31] Moreover, when money was made available to state and local organizations for voter mobilization efforts, it was used primarily for direct mail and telephone banks. Very little was used to fund direct personal contact with voters, despite research showing that face-to-face campaigning is far more effective than phone banks and direct mail in stimulating voter turnout.[32]

Much more of the soft money raised by national parties and transferred to state parties was devoted to television advertisements touting federal candidates. These advertisements rarely mentioned parties by name, except for a perfunctory acknowledgement that the advertisement was "Paid for by the [Democratic or Republican] National Committee." Candidates, on the other hand, were identified by name in virtually all of the ads, and opponents were mentioned by name in a high percentage of ads. Thus, soft money became the mechanism by which parties conducted candidate-centered advertising campaigns which, ironically, had the effect of weakening the link between parties and candidates in the public mind.

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[29] *Id.*

[30] Corrado, *supra* note 12, at 109.

[31] *Id.* at 32 & n.36; Press Release, "New Study Finds That Parties' Voter Mobilization Efforts Are Not Dependent on Soft Money" (July 3, 2001) (Brennan Center for Justice, N.Y.U.L. Sch.).

[32] *See* Corrado, *supra* note 12, at 111; *see also* Alan Gerber & Donald Green, *The Effects of Canvassing, Direct Mail, and Telephone Contact on Voter Turnout: A Field Experiment* 653-63, American Political Science Review, vol. 94 (2000); Donald Green, Alan S. Gerber & David Nickerson, *Getting Out the Youth Vote in Local Elections: Results from Six Door-to-Door Canvassing Experiments* (May 2002).

The preponderance of the evidence from recent research suggests that the exponential growth in soft money has also compromised political parties' ability to fulfill their traditional role in the American political process. The soft-money regime brought elected officials and large private donors together. High-ranking elected officials were often involved in raising large amounts of soft money.[33] These officials then dominated the national party committees, exerting a determinative influence in deciding how these resources would be allocated in presidential and congressional elections. In this race toward national party prominence, any semblance of state party independence was lost. Instead, national parties used state parties primarily as vehicles for advancing federal election campaign objectives, thereby turning political parties into money launderers for individual candidates.[34]

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[33] *See* Corrado, *supra* note 12, at 28-29.

[34] A study examining elections in twelve states concluded that state parties were conduits for special interest money, a practice that often had a dramatic and adverse impact upon state party and legislative caucus leaders, competitiveness of races, the strength of incumbency, and the shaping of policy. David Schultz, *Money, Politics and Campaign Finance Reform Law in the States*, (Durham, NC: Carolina Academic Press, 2002).

Put simply, the vast increases in soft money fundraising over the past twenty years have had no positive effect on traditional measures of party strength and have, in fact, coincided with an electoral era marked by measurable and significant decreases in electoral competition, party identification, and voter turnout. This research indicates that soft money, if anything, has had a corrosive effect on party strength, local party affiliation, and party loyalty among voters. The national parties chose to spend far more money promoting federal candidates – largely by sponsoring issue ads – than investing in party-building activities at any level. There is no reason to believe that these priorities would change if BCRA's soft money ban were to be held unconstitutional.

III. BCRA Will Not Have the Dire Consequences for Political Parties That Opponents of BCRA Predict.

The Political Parties' doomsday predictions for the fate of political parties under BCRA is both fanciful and inconsistent with the historical development of campaign finance regulation. Modern campaign finance reform began in earnest in the wake of the Watergate scandal.[35] Since that time, various regulatory regimes have been enacted, but experience

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[35] Norman J. Ornstein, Thomas E. Mann & Michael J. Malbin, *Vital Statistics on Congress 2001-2002*, at 12-13 (2002).

"demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 457 (2001) (hereinafter "Colorado Republican II").

BCRA is the culmination of Congressional efforts to impose reasonable contribution limits on political parties. BCRA's restrictions on soft money contributions, coupled with its increases in hard money contribution limits, will not work any real hardship on political parties, which have proven themselves remarkably resilient when raising funds to further their political aims. Instead, limits on soft money contributions will restore balance to parties' fundraising efforts, which in recent years have come to be dominated by wealthy donors who seek to buy access along with their contributions.

Specifically, the Political Parties assert that Title I will harm political parties in several ways: (1) by limiting the amount of money political parties can spend; (2) by frustrating fundraising efforts; (3) by disrupting essential party functions; and (4) by intruding upon state and local affairs. This parade of horribles vastly distorts the text of BCRA and mischaracterizes BCRA's likely effect. Moreover, these contentions completely ignore provisions in BCRA that strike a balance between the interests of political parties, on the one hand, and the competing need to protect the integrity of federal elections and federal policy decisions, on the other.

A. BCRA Does Not Impose Any Limits on Spending.

Despite the Political Parties' assertions to the contrary (Pol. Par. Br. at 39), BCRA does not impose *any* limit on the amount of money parties can spend. Instead, BCRA simply requires national political parties to use funds that are legal under federal law. BCRA §§ 323(a), 323(b). Similarly, BCRA requires state political parties, when they choose to spend money on activities that affect federal elections, to use funds that are legal under federal law. BCRA § 323(a), 323(b)(2)(c). BCRA's focus is on the *kind* of money that can be used for activities that affect federal elections, not on *how much* money political parties can spend. This is not a spending limit any more than were the contribution limits upheld in *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

BCRA is a mechanism to assure that when national and state parties spend money that affects federal elections, they only spend money raised in compliance with federal law. BCRA accomplishes this objective in a manner that is well within the powers accorded to Congress under the Constitution. BCRA has the additional effect of preventing party circumvention of federal law, a laudatory goal cited in a long line of Supreme Court campaign finance cases. *See, e.g., Colorado Republican II*, 533 U.S. at 456 &

n.18; *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 664 (1990).

Indeed, Congress has the power to regulate campaign contributions precisely because of the unique threats such contributions pose to the integrity of federal elections. As the Court has long recognized, campaign contributions carry with them a risk of corruption and the perception that access to and influence over federal officials are for sale to the highest bidder. *See Buckley*, 424 U.S. at 26-28 (noting that campaign contribution limits are needed to counter both the appearance and the reality of corruption); *Colorado Republican II*, 533 U.S. at 440-41 ("[L]imits on contributions are more clearly justified by a link to political corruption than limits on other kinds of . . . political spending are (corruption being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence") (citation omitted); *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) (recognizing the need to "preven[t] corruption or the appearance of corruption").

B. BCRA Will Not Frustrate Party Fundraising Efforts.

The new restrictions imposed on soft money will not impair the parties' ability to raise funds sufficient to conduct and coordinate their campaigns, as the Political Parties contend. Indeed, numerous provisions in BCRA show that Congress took the financial interests of political parties into account in crafting the new regulatory scheme. As a result of the sensitivity shown by Congress, parties may find that their ability to raise funds has been enhanced by BCRA.

First, BCRA actually *raises* the limits on hard money contributions that individuals may make. Under BCRA, the amount individuals may contribute in hard money doubles, from $1,000 per candidate per election to $2,000 per candidate per election. BCRA § 307(a)(1). Likewise, the amount individuals may contribute to national party committees and state or local party committees also increases. In the case of national party committees, individuals may now contribute $25,000 per year, up from $20,000 pre-BCRA. BCRA § 307(a)(2). In the case of state or local party committees, individuals may now contribute $10,000 per year, an increase of $5,000 over previous limits. Moreover, the aggregate limit on individual contributions under BCRA is now $95,000 per two-year election cycle, almost twice the $25,000 per year formerly allowed. BCRA §§ 307(b)(3)(A), 307(b)(3)(B). Of this $95,000, only $37,500 may be contributed to candidates over a two-year election cycle, leaving $57,500 reserved for contributions to the political parties or other political committees.

BCRA also eliminates a provision of the earlier law that set up a painful either/or competition between parties and their candidates. Under the previous law, individuals could contribute $25,000 per year overall, with up to $20,000 of that amount going to national parties—but if an individual gave, say $15,000 to candidates, he could contribute only $10,000 to parties.

As these figures illustrate, BCRA will allow political parties to raise considerably more hard money, which can in turn be used for any purpose the parties choose, including direct advocacy on behalf of a specific candidate.

Second, the Levin Amendment allows state and local parties to use limited soft money, as long as such money is legitimately used for grassroots activities like voter registration and get-out-the-vote (GOTV) campaigns. Under the Levin Amendment, state and local parties may raise up to $10,000 per contributor per year to fund voter registration and GOTV drives. BCRA § 323(b)(2)(B)(iii). As the floor debate on the Levin Amendment attests, Congress crafted the Amendment to allow state parties to conduct voter mobilization activities consistent with state law, while also protecting the federal election process from soft money abuses (often occurring through state parties).[36] In fact, the Levin Amendment was inserted into the campaign finance reform bill in response to criticism that the bill did not give state and local parties the leeway needed to raise money for grassroots voter activities.

Thus, the Political Parties are simply wrong when they complain that, in enacting BCRA, Congress failed to give "any meaningful consideration to the

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[36] *See, e.g.*, 147 Cong. Rec. S3125 (daily ed. Mar. 29, 2001) (statement of Sen. Levin) ("This amendment is aimed at restoring the appropriate use by parties of non-Federal funds which are obtained by those parties in compliance with their own State laws in [voter registration and GOTV activities].").

impact of BCRA" on state and local parties. (Pol. Par. Br. at 63).[37] The Levin Amendment is a measured approach that addresses state parties' legitimate concerns about raising money for local voter mobilization activities while recognizing the danger inherent under the previous regime, in which state parties were used as tools to circumvent federal fundraising regulations.

Third, evidence to date indicates that parties are having no difficulty raising increasing amounts of hard money to compensate for the restrictions on soft money imposed by BCRA. The national parties have raised more hard money in the first six months of the current year – $160 million during the period January 1 to June 30, 2003 – than the national parties raised in combined *hard and soft money* in the six-month period at the comparable stage of the last presidential election cycle – $138 million from January 1 to June 30, 1999.[38]

Just as they have done in the past (and are currently doing under BCRA), the parties will adapt to the new regulations and will continue to raise money in amounts that eclipse earlier fundraising levels. Indeed, if the current year is any indication, political parties will emerge from the hold of soft money with more funds to use on party-building and campaign activities, and federal politicians will be liberated from the burden of raising soft money to finance campaigns in the small number of targeted races.

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[37] *See also infra* note 42 (citing numerous portions of congressional debate specifically referencing BCRA's effect on state and local party committees).

[38] Center for Responsive Politics, National Party Totals.

To project that parties will suffer a loss of revenue equal to the soft money previously taken in is to assume that parties will do nothing to recoup these losses, which is absurd. Parties will take advantage of the higher contribution levels for hard money and will broaden their donor base. The dramatic increase in hard-money fundraising in the past decade leaves little doubt that this can be achieved.[39]

Banning soft money in federal elections, far from weakening parties, will make them stronger. To attract the new donors and supporters that they will need, parties will be forced to engage in more personal contact with voters, develop policy positions and party platforms that will inspire new members, make greater use of volunteer services, and reduce the reliance on purchased services.[40]

Finally, even if BCRA were to have some negative effect on party fundraising, the positive trade-off would be the restoration of balance to the campaign fundraising process. Under the pre-BCRA regime, political candidates were held hostage by an unremitting pressure to keep up with opponents whose campaigns benefited from the expenditure of huge amounts of soft money. BCRA amounts to a "nonproliferation treaty," helping to curb the campaign fundraising "arms race." If BCRA is left standing, it

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[39] Corrado, *supra* note 12, at 108.
[40] *Id.* at 110.

will prove a successful deterrent to soft money abuses and restore integrity to the political process.

C. BCRA Imposes No Unconstitutional Restraint on the Associational Rights of National and State Parties.

Political parties enjoy numerous First Amendment protections, but the right to engage in collaborative action to circumvent legitimate regulation of campaign funds that affect federal elections is not among them. To hold BCRA unconstitutional because it bans organizational collaborations intended to evade federal campaign laws would represent an unprecedented extension of the First Amendment's scope. This Court has never held that the right to freedom of association encompasses the right of distinct *organizations* to associate with each other as organizations. To the contrary, the Court's opinions reflect that what is protected is the right of an organization's *members* to associate with each other and to act collectively. Even were it otherwise, the limited restriction BCRA imposes on what is, in effect, joint political money laundering is not sufficiently burdensome to outweigh significant governmental interests in protecting the integrity and fairness of the election process and in advancing public confidence in that process.[41] *Cf. Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351 (1997) (Minnesota's refusal to allow party to nominate candidate already selected by another party impaired, but not unconstitutionally, the party's freedom of association).

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[41] The Republican National Committee has no more right to associate with a state entity for the purpose of political money laundering than Exxon has to associate with Texaco to advance a price fixing scheme.

Moreover, the Political Parties greatly exaggerate BCRA's effect on the ability of state and national party committees to work together. (Pol. Par. Br. at 34, 40, 59, 60.) Contrary to what the Political Parties imply about cooperative activities, such as "coordinated campaigns" and "victory plans," BCRA does not preclude state and national party committees "from both affiliating . . . and from pooling their resources with each other." (*Id.* at 60). State and national party committees are free to work together, without any limitation whatsoever, in soliciting and spending money raised in compliance with federal law ("federal funds"). State and national parties may also engage in joint campaign strategy discussions and other coordinated activities in connection with the spending of Levin Amendment money, as long as the national party is not involved in soliciting the Levin money and does not control how the Levin funds are spent. National party officials may also raise federal funds for state parties and state candidates. Moreover, state parties may work jointly with one another in raising, transferring and spending nonfederal funds for activities that do not constitute federal election activity.

National, state, and local parties may still work together to build common platforms, to facilitate get out the vote efforts, and to fashion internal party structures and strategies. State and national parties may still coordinate their activities and engage in joint projects for the welfare of the party or the candidates they support. BCRA does not prevent the joint expression of views by national and state parties, the joint selection of candidates, or the joint pursuit of common political ends. Nor does BCRA affect the ability to recruit and field successful candidates at all political levels, engage in issue advocacy, or hold party conventions. Indeed, by placing a greater premium on diffuse fundraising efforts, BCRA creates tremendous incentives for increased cooperation between state and national parties. These incentives will result in *stronger* local parties, which will no longer serve merely at the behest of their national affiliates.

In short, BCRA leaves plenty of room for association and discourse among political parties at all levels. Of course, the Political Parties' speech and association argument is not really about the First Amendment at all. As the carefully selected examples in their brief make clear (Pol. Par. Br. at 34, 40, 59, 60), what they are really challenging is the power of Congress to extend its legislative reach to activities at the state or local level that affect federal elections. This Court has already held that Congressional power extends that far. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976).

D. BCRA Does Not Intrude Unconstitutionally Upon State and Local Affairs.

The Political Parties argue that BCRA's definition of "Federal election activity," 2 U.S.C. § 431

(20), is too broad and impermissibly intrudes upon areas properly subject only to state and local regulation. (Pol. Par. Br. at 51.) This argument does not square with the relevant statutory language or this Court's election law precedents. Congress has long applied federal campaign finance rules to state party funds that are spent on activities affecting federal elections.

BCRA's definition of "Federal election activity" does not interfere with "virtually all political activity conducted by state or local parties," even when state elections are held at the same time as federal elections, as the Political Parties claim. (Pol. Par. Br. at 51.) BCRA does not limit the ability of state and local parties to engage in activities that affect only state or local elections, even in federal election years. State parties are free to use unlimited amounts of their nonfederal funds to make contributions to state and local candidates; to run campaign ads in support of state and local candidates (as long as the communications are not otherwise voter mobilization activities); to hold state or local party conventions; and to distribute grassroots campaign materials that name only state or local candidates. *See* 2 U.S.C. § 431(20)(B)(i)-(iv). State and local parties may also spend nonfederal funds for other activities, for example, voter registration activities prior to 120 days before a federal election, services of staff who devote less than 25 percent of their time to federal activities, and all party administrative costs.

The Levin Amendment, discussed above, shows that Congress was sensitive to party resource concerns.

The Political Parties seek to minimize the significance of the Levin Amendment, denying that it provides clear evidence that Congress did in fact give "meaningful consideration to the impact of BCRA" upon state and local parties. (Pol. Par. Br. at 63.) However, the floor debate on the Amendment and other debate show that Congress carefully considered BCRA's impact on state parties.[42] The Levin Amendment is structured to increase state party resources for voter mobilization activities, while avoiding the soft-money abuses of the past. The language in the Levin Amendment that requires states to raise their own Levin funds and not to use funds transferred from other party committees is an example of Congress' determination to avoid such abuses. *See* BCRA § 323(b)(2)(B)(iv). Contrary to the Political Parties' portrayal of this language (Pol. Par.

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[42] *See, e.g.*, 148 Cong. Rec. S2155 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd); 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain); 148 Cong. Rec. S2112 (daily ed. Mar. 20, 2002) (statement of Sen. Schumer); 148 Cong. Rec. H445 (daily ed. Feb. 13, 2002) (statement of Rep. Levin); 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002) (statement of Rep. Kleczka); 148 Cong. Rec. H409-410 (daily ed. Feb. 13, 2002) (statement of Rep. Shays); 148 Cong. Rec. H354 (daily ed. Feb. 13, 2002) (statement of Rep. Bentsen); 148 Cong. Rec. H349 (daily ed. Feb. 13, 2002) (statement of Rep. Dingell); 148 Cong. Rec. H348 (daily ed. Feb. 13, 2002) (statement of Rep. Costello); 148 Cong. Rec. H347 (daily ed. Feb. 13, 2002) (statement of Rep. Serrano); 147 Cong Rec. S3247 (daily ed. Apr. 2, 2001) (statement of Sen. Levin); 147 Cong. Rec. S3125-26 (daily ed. Mar. 29, 2001) (statement of Sen. Clinton); 147 Cong. Rec. S3125 (daily ed. Mar. 29, 2001) (statement of Sen. Ensign); 147 Cong. Rec. S3124-25 (daily ed. Mar. 29, 2001) (statement of Sen. Levin); 147 Cong. Rec. S2940-41 (daily ed. Mar. 27, 2001) (statement of Sen. Feingold); 147 Cong. Rec. S2928 (daily ed. Mar. 27, 2001) (statement of Sen. Schumer).

Br. at 34), it does *not* prohibit collaboration among state, county, and local party committees in connection with the spending of Levin funds.

The requirement that parties spend a mixture of federal and nonfederal funds on voter mobilization activities that affect both federal and state elections is nothing new, as the Political Parties acknowledge. (Pol. Par. Br. at 10.) Allocation rules are an important means of balancing the federal government's interest in protecting the integrity of federal elections and the states' interest in setting their own campaign finance rules for state elections. However, the old allocation rules had provided a gaping loophole for soft money and were badly in need of revision. BCRA now requires that state parties fund voter mobilization activities with federal funds if a federal candidate is named, or with a combination of federal money and Levin money in other circumstances.

IV. Political Parties Will Flourish Under BCRA.

Through BCRA, Congress has laid the foundation for a renewed emphasis on individual participation in political parties. The soft money ban does not prevent parties from raising money; it simply requires them to raise money, up to the more lenient hard money contribution limits, from a greater number of individual contributors. Parties will quickly discover how to maximize contributions in ways that are consistent with the changes in the law. This will almost certainly entail a greater reliance on grassroots activities and less emphasis on candidate-specific issue ads, a development that would actually strengthen parties.

BCRA will also result in increased electoral competitiveness. The explosion of party-funded television ads has sharply increased broadcast costs, to the particular disadvantage of challengers. Not only do high advertising costs make it difficult for challengers to gain the necessary name recognition that it takes to wage a successful challenge, but the abundance of ads makes it difficult for challengers to get their message across to viewers. BCRA helps correct this imbalance by restricting the soft money formerly used to finance such ads.

BCRA promises a new age of strength for political parties. With the soft money loophole firmly closed, unregulated financial donations from corporations, unions, and wealthy donors will no longer be allowed to taint the political process with the suggestion of impropriety. Instead, candidates and parties will return to their traditional focus on party-building. This renewed focus will make the parties more receptive to the needs of individual voters and do much to restore confidence in the integrity of the American political system.

CONCLUSION

For the foregoing reasons, the Court should sustain Title I of BCRA.

Respectfully submitted,

TERESA W. ROSEBOROUGH
Counsel of Record
JUDITH A. O'BRIEN
ANDREW W. BROY
SHANNON L. KIMBALL
Sutherland Asbill & Brennan LLP
999 Peachtree Street
Atlanta, Georgia 30303
(404) 853-8000 phone
(404) 853-8806 fax

Counsel for Amici Curiae

August 5, 2003

APPENDIX A

Norman J. Ornstein, Resident Scholar, The American Enterprise Institute for Public Policy Research

Paul Allen Beck, Professor and Chair, Department of Political Science, Ohio State University

Janet M. Box-Steffensmeier, Vernal Riffe Professor of Political Science, Ohio State University

Diana Dwyre, Assistant Professor of Political Science, California State University Chico

Leon D. Epstein, Hilldale Professor of Political Science, University of Wisconsin, Madison

Paul S. Herrnson, Director, Center for American Politics and Citizenship, University of Maryland

Ruth S. Jones ,Vice Provost for Academic Programs, Office of the Executive Vice President and Provost, Arizona State University

Ira Katznelson, Ruggles Professor of Political Science and History, Columbia University

Robin Kolodny, Associate Professor of Political Science, Temple University

L. Sandy Maisel, William R. Kenan, Jr. Professor of Government, Colby College

Mark Rozell, Professor of Politics, The Catholic University of America

David Schultz, Professor, Hamline University, Graduate School of Public Administration and Management

Clyde Wilcox, Professor of Political Science, Georgetown University

Raymond E. Wolfinger, Heller Professor of Political Science, University of California Berkeley

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Supreme Court of the United States

SENATOR MITCH McCONNELL, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF COMMUNITY ORGANIZATIONS DEDICATED TO DEFENDING THE CIVIL RIGHTS OF RACIAL MINORITIES, AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES

MARTIN R. GLICK
Counsel of Record
CLARA J. SHIN
AMY L. BOMSE
HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABKIN
A PROFESSIONAL CORPORATION
Three Embarcadero Center
Seventh Floor
San Francisco, CA 94111-4024
(415) 434-1600

Attorneys for the Amici Curiae

182237

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

This brief is filed on behalf of the following community organizations dedicated to defending the civil rights of racial minorities:

Allen Temple Baptist Church
American GI Forum
El Concilio of San Mateo County
First AME Church, Los Angeles
Greater Phoenix Urban League
Hermandad Mexicana Nacional
Hmong American Political Association
Latin Business Association
Latino Issues Forum
Mexican American Political Association
Mission Language & Vocational School
National Black Business Council, Inc.
National Council of Asian American Business Associations
National Federation of Filipino American Associations
Oakland Citizens Committee for Urban Renewal
San Francisco Black Chamber of Commerce
Southeast Asian Community Center
The California Black Chamber of Commerce
The Chicano Federation of San Diego County, Inc.
The East Los Angeles Community Union
The Greenlining Institute

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

In an ideal world, men and women of perfect virtue, vision and diversity are elected to public office. They enact laws and approve policies for the greater good, unaffected by the special interests and persistent urgings of their most generous contributors. They steadfastly refuse to compromise beliefs, analyses or principles for reelection, their next targeted higher public office, or their own ultimate financial well-being. And, campaigns for office in that ideal world wouldn't cost tens or hundreds of millions of dollars of privately raised funds.

Few issues engender as much fire and energy as "campaign finance reform." And that's because in the real world it really matters. It matters to incumbents, to their potential challengers, to vested interests and to citizens, including the communities of color sponsoring this brief, who have been effectively shut out of meaningful participation in our political process. It matters because the massive amount of money contributed to finance campaigns in America has an undeniable and monumental impact on who gets elected,[2] who gets access to and heard by those who are elected, and on the ultimate decisions about health care, wages, taxes, quality of schools, public benefits, affirmative action, neighborhood safety, the environment and equal justice.

---

[1] Pursuant to Supreme Court Rule 37.3(a), *Amici* filed this brief with the written consent of all parties. Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission.

[2] Despite the fact that racial minorities are approximately 30% of the United States population, there are currently no Black or Latino United States Senators and only approximately 16% of United States Representatives are people of color.

The corruptive and pervasive role of soft money political contributions is outlined in many publications and studies and in the legislative history; these are in the record and need no repetition here. Between January 1995 and December 2002, the Republican and Democratic parties raised nearly 1.3 *billion* dollars in soft money. Soft money constituted 41% of all funds expended by the two parties in the 2000 election cycle. The vast majority of money came from big business interests. Congress and the President have intervened. They took a first step in enacting the Bipartisan Campaign Reform Act of 2002 ("BCRA" or "Act"). While no one, sponsors or opponents, suggests that the Act solves all problems, *Amici* are convinced that its restrictions on soft money must be preserved.[3]

Amici are organizations dedicated to improving the quality of life for low-income and Asian-American/Pacific Island, Black, and Latino communities. *Amici* represent communities of color with the highest levels of poverty, environmental pollutants, infant mortality and crime, as well as the lowest levels of employment, educational achievement and home ownership. While *Amici* represent diverse constituencies, including community-based organizations of color, faith-based organizations, minority business chambers and community development corporations, they are united by a civil rights issue affecting each of their communities: campaign finance reform.

Amici are committed to eradicating the soft money system that displaced the American promise of "one person, one vote" with the corrosive reality of a "pay to play" scheme. *Amici* are deeply interested in ensuring that communities of color can participate fully in the political process. *Amici* believe that the soft money reform in BCRA is an important, indeed critical, change, that will help open the process for presentation of their issues to an audience of elected officials who will be responsive to their concerns.

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[3] While hard money contributions to candidates, parties and political action committees are subject to prescribed limits, and corporations and unions are barred from such contributions, under the pre-BCRA campaign finance regime, there was *no limit* on soft money contributions to national party committees.

ARGUMENT

I.

CAMPAIGN FINANCING IS A CIVIL RIGHTS ISSUE.

In 1965, Congress enacted the Voting Rights Act in response to "an upsurge of public indignation against the systemic exclusion of Negroes." H.R. Rep. No. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437, 2440. Prior to passage of the Act, Congress conducted lengthy hearings in which it heard from a wide variety of concerned officials and individuals. In its General Statement in support of the Act, a group of Republican Congressmen commented, "[t]he problem to which this legislation is directed is no abstract matter to those whose rights must be assured. The right to vote is of particular importance and value to minority groups in general but to our Negro citizens in particular who suffer deprivations of rights other than access to the ballot." *Id.* at 2465-66 (General Statement of Republican Views).

Even as it enacted major reform, Congress predicted that given the tenacity of racial discrimination, new forms of voter discrimination would replace the existing ones:

> As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely it will be in the form of fraud, intimidation and corruption. . . .
>
> It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt practices. (*Id.* at 2471)

The corruption predicted in 1965, of course, was of the more virulent variety than exists today—ballot stuffing and coercion of voters. But, there are other types of unfair influence that now beset our political system and shut out those most in need of representation. Today, it is the power of moneyed interests that dominates the agenda of the nation's leaders and undermines representative democracy. Forty years after it passed the Voting Rights Act, Congress again responded to "an upsurge of public indignation," and enacted the Bipartisan Campaign Reform Act of 2002.

As demonstrated by *Amici* below, the campaign finance system has excluded the least affluent citizens, many of whom are racial minorities. The pre-Act campaign finance regime, with its emphasis on unrestricted funds, has profoundly unbalanced our electoral system and deprived minorities of an effective voice in the direction of their country. As this Court has most recently affirmed in the analogous context of affirmative action, it is only by recognizing and addressing the persisting symptoms of past racial discrimination that our Nation can realize "the dream of one Nation, indivisible." *Grutter v. Bollinger*, 156 L. Ed. 2d 304, 2003 U.S. LEXIS 4800, at **44 (June 23, 2003).

In *Grutter*, this Court recognized a university's compelling need to intervene and to correct the effects of discrimination at the level of college and graduate school admissions because such institutions are the gateways to leadership. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at **45. Having held that the Constitution is no bar to affirmative action in university admissions, this Court now has an opportunity to clear an even greater hurdle to fair representation by upholding the right of the Legislative and Executive Branches to pass tailored campaign finance reforms to the process for selecting and electing our future leaders.

II.

RACIAL MINORITIES ARE UNIQUELY DISADVANTAGED BY THE PRE-BCRA CAMPAIGN FINANCE SYSTEM.

A. Racial Minorities Are Unable To Participate Meaningfully In Campaign Financing.

Public Campaign, a nonpartisan public interest organization, studied campaign contributions made during the 1995-96 federal election cycle with respect to race.[4] That published study entitled, *The Color of Money*, correlated United States Census data and zip code data from federal campaign reports and concluded that "people of color, in general, are politically disenfranchised." PUBLIC CAMPAIGN, THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE (1998).[5] Findings include:

1. The 26 zip codes that provided the most money had a population of just under 700,000. That group contributed about $67 million dollars. That was *about the same amount* as contributed by *all* 2,492 zip codes in which people of color comprise 50% or more of the population—$66 million. The combined population of the 2,492 zip codes is *over 41 million persons* or 60 times greater than the population in the other 26 zip codes.

2. The average contribution from the 100 top-giving zip codes was 210 times higher than the average amount from the 100 zip codes with the highest percentage of minorities: $1.5 million compared to $7,000. The participation rate was 100 times greater in the 100 top-giving zip codes—three of 100 citizens contributed compared to three of 10,000 in the largely minority zip codes.

3. There are 483 zip codes in the United States in which people of color comprise 90% or more of the population. The average contribution in those zip codes was $.59 per person. This contrasts with the average of $65 per person in the 100 highest-giving zip code areas.

A study by professors and doctoral students at the University of Maryland, the University of Akron and Georgetown University surveyed a random sample of donors reported to the Federal Election Commission ("FEC") as having given at least $200. John Green et al., *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded*, JOYCE FOUNDATION (1998).[6] The study also identified an additional list of "most active donors"—donors who gave money to at least eight candidates and/or gave at least $8,000. John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 Public Perspective 29 (2000).[7] The researchers concluded that "donors to House and Senate candidates are disproportionately drawn from advantaged social and economic groups." *Id.* at 30. Nearly 80% of donors had incomes of over $100,000 and over 80% were college graduates. Among the most active donors, over half had incomes of over $500,000 and only four percent had incomes of less than $100,000. However, the single most common characteristic among donors—regardless of whether they were regular donors or the most active—was race: 99% of the donors were white. *Id.*

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[4] Public Campaign's National Advisory Board includes officials from both parties and from bipartisan lobbying groups, including among others: Mary Dent Crisp, former Co-Chair, Republican National Committee; Steve Grossman, former National Chairman, Democratic National Committee; Carolyn Jefferson Jenkins, President, League of Women Voters of the United States; James Abourezk, former United States Senator (D-SD); Thomas Eagleton, former United States Senator (D-MO); Robert Stafford, former United States Senator (R-VT); William Proxmire, former United States Senator (D-WI); and Paul Simon, former United States Senator (D-IL).

[5] *Available at* www.colorofmoney.org. (For the convenience of the Court, we include the websites of the studies and articles cited herein that are available online.)

[6] *Available at* www.opensecrets.org/pubs.

It is lack of money, not lack of interest, that creates the disparity in political contributions. Minorities simply have less wealth and less income than Whites. In 1998, the median net worth was $9,200 for Latino households, $15,000 for Black households, and $95,610 for White households. Census Information Center, National Council of La Raza, *Hispanic Savings and Individual Development Accounts (IDAs) Fact Sheet* at 1 (Nov. 2000)[8] (based on findings by the Federal Reserve).[9] In 2001, the median household income for White non-Hispanic households was $46,305, for Black households

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[7] *Available at* www.georgetown.edu/faculty/wilcoxc/joyce.htm.

[8] *Available at* www.nclr.org/policy/econ.html.

[9] These numbers are consistent with data compiled by the United States Census Bureau. In 1995, the median net worth was $49,030 for Whites, $7,073 for Blacks, and $7,255 for Latinos. U.S. Census Bureau, Household Net Worth and Asset Ownership: 1995, at xv (2001).

$29,470, and for Hispanic households $33,565; in other words, the median income for a Black or Latino household was about one-third lower than the median income for a White household. U.S. Census Bureau, Table HINC-03. People in Households—Households, by Total Money Income in 2001: Age, Race, and Hispanic Origin of Householder (2002).[10]

In a landmark study, the "Citizen Participation Study" by Sidney Verba, Kay Lehman Schlozman and Henry Brady, the authors conducted a scientific large-scale, two-stage survey of the voluntary activity of the American public (political, charitable and religious). The first stage was a random telephone survey of 15,000, including 1,400 African-American and 894 Latino respondents. This stage was followed by in-person interviews of 2,517 of the original 15,000, with a weighted sample including 477 African-Americans and 370 Latinos. Henry E. Brady et al., *Race, Ethnicity, and Political Participation in* Classifying by Race 354, 355-56 (Paul E. Peterson ed., 1995). They concluded, "[t]he results are unambiguous: the major determinant of giving money is having money." Henry E. Brady et al., *Beyond SES: A Resource Model of Political Participation*, 89 Am. Pol. Sci. Rev. 271, 283 (1995). They also concluded that African-Americans readily participate in other political activities where available time and ability to do so are much more important determinants than wealth. Henry E. Brady et al., *Race, Ethnicity, and Political Participation in* Classifying by Race, *supra*, at 361-62. The study's conclusions are also borne out by comparing recent voting rates with rates of monetary contribution. While people of color gave about one percent of political contributions, they voted at approximately the same rate as Whites. In the November 2000 elections, for example, 53.5% of Blacks reported voting and 56.4% of Whites reported voting. U.S. CENSUS BUREAU, TABLE 2. REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE, FOR THE UNITED STATES: NOVEMBER 2000 (2002).[11]

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[10] *Available at* www.census.gov/hhes/www/income.html

B. Soft Money Largely Forecloses Political Access To Racial Minorities.

In the days leading up to the Bipartisan Campaign Reform Act taking effect on November 6, 2002, the national political parties were tallying up a record-breaking amount of soft money raised—almost half a billion dollars. COMMON CAUSE, *The Soft Money Finale!* (Apr. 7, 2003).[12] The influence of soft money has become pervasive in political fundraising and parties have become increasingly dependent on it. In the 1992 election cycle, the two parties expended $86.1 million in soft money. BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, *The Purposes and Beneficiaries of Party "Soft Money"*: Summary of Key Findings at Figure One (2001).[13] This amount roughly tripled in the 1996 election cycle to $264 million, and then climbed to nearly $490 million in the 2000 election cycle. *Id.* According to FEC statistics, soft money constituted 17% of all campaign funds expended in 1992 by the Republican and Democratic parties, 30% in 1996 and 41% in 2000. *See* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, *supra*, at Figure One.

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[11] *Available at* www.census.gov/population/www/socdemo/voting.html.

[12] *Available at* www.commoncause.org/publications.

[13] *Available at* www.brennancenter.org/resources/downloads/purposes_beneficiaries070301.pdf

The rise of soft money in American elections has tended to concentrate influence among the biggest donors. In the 2000 election cycle, nearly two-thirds of soft money—about $296 million—came from just 800 donors. David Rogers, *"Soft Money" Study Shows Concentration Of Donations by Wealthy Contributors*, WALL ST. J., Mar. 16, 2001, at A16. Business interests and very wealthy individuals are the biggest soft money donors, accounting for nearly all of the growth since 1994.[14] COMMON CAUSE, SOFT MONEY LAUNDROMAT (2003).[15] Groups seeking to promote a social agenda, on the other hand, such as civil rights or environmental protection, are not major contributors of party soft money. Reports filed with the FEC demonstrate that between the 1994 and 1998 election cycles, the top industry soft money donors who increased their donations were insurance (298%), tobacco (255%), transportation (255%), telecommunications (233%), pharmaceuticals (207%), real estate (185%), and securities and investments (134%). COMMON CAUSE, *Wag The Dollar* (1998).[16] During the 2002 election cycle, the pharmaceutical industry further increased its soft money donations by 29.8% from the 2000 cycle, while banks and lenders increased their soft money donations by 18.5%. COMMON CAUSE, *THE SOFT MONEY FINALE!*, *supra*.

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[14] "People of color are also less likely to control business interests, which accounted for $208 million (eighty-one percent) of the 'soft money' contributions made in 1999 and the first half of 2000. As of the mid-1990s, minorities represented only three percent of senior managers of Fortune 1000 companies and only four percent of directors serving on corporate boards. Indeed, prior to 1999, no African American had ever served as a chief executive officer of a Fortune 500 Company." Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987, 1011 (2002) (footnotes omitted).

[15] *Available at* www.commoncause.org/laundromat/stat/top50.htm.

[16] *Available at* www.commoncause.org/publications/wagthedollar.htm.

Soft money donors use money to influence legislation. The first 18 months of the 1998 election cycle is instructive. The insurance, securities and investments, and oil and gas industries were the top industry soft money contributors to the Republican national party committees while lawyers and lobbyists, securities and investments, and labor unions were the top industry soft money donors to Democratic national party committees. COMMON CAUSE, *Wag the Dollar*, *supra*. During this same time period, Congress was debating legislation pertaining to oil royalties, bankruptcy reform, financial services reform, patient rights, and computers and antitrust. *Id.*

Communities of color are well aware that they are financially out-leveraged in the political process. According to a study conducted by the Greenlining Institute, while voters of all backgrounds believe that elected officials are beholden to large donors, people of color in particular perceive that low-income people are effectively shut out of politics and unable to influence legislative decisionmaking. THE GREENLINING INSTITUTE, CAMPAIGN FINANCE AS A CIVIL RIGHTS ISSUE: FINDINGS FROM EIGHT FOCUS GROUPS CONDUCTED AMONG CALIFORNIA VOTERS IN MARCH 2002 (2002) *on file with* The Greenlining Institute. This same study shows that African-American voters believe that money in politics is used to directly exclude their community from having any meaningful power in the political system.[17] The state has a

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[17] Lake Snell Perry & Associates conducted eight focus groups stratified by race and gender at three sites. Each group was comprised of eight to ten registered voters aged 20-65.

compelling interest in preventing this appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office: "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial corporations." *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (*per curiam*).

This compelling governmental interest in assuring the electoral system's legitimacy and protecting it from the appearance and reality of corruption is a "constitutionally sufficient justification" for governmental action—namely financial contribution limits—that may have the effect of curtailing First Amendment rights. *Id.* at 29 ("the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms"); *see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 386-88 (2000) (holding that state limit on contributions to state political candidates was sufficiently tailored to prevent corruption and appearance of corruption, as required to survive First Amendment scrutiny); *California Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182 (1981) (holding that limits on contributions to multi-candidate political committees do not infringe upon a contributor's First Amendment rights). "Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982); *see Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) (noting the Court's "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized").[18]

C. The Current Campaign Finance Regime Deprives Racial Minorities Of Adequate Representation.

The soft money system provides an avenue for access that is closed to the non-affluent and to nearly all communities of color. It also precludes essentially anyone other than the wealthy elite or with connections to the wealthy elite from running successfully for office. In this way too the pre-BCRA campaign finance regime harms racial minorities.

Minorities are significantly underrepresented in elected positions. In the current United States Senate, of the 100 Senators, there are only three people of color (3%), and there are no Latino or Black Senators. Mildred L. Amer, Congressional Research Service, Membership of the 108th Congress: A Profile, CRS Rep. No. RS21379, at 5 (May 8, 2003).[19] Historically, since Post Reconstruction, only two African-Americans (Mildred L. Amer, Congressional Research Service, Black Members of the United States Congress: 1789-2001, CRS Rep. No. RL30378, at 35 (2001))[20]; three Latinos; three American Indians; and five Asian-American/Pacific Islanders have served in the United States Senate.[21] In the United States House of Representatives, 71 of 440 Members (16%) are people of color: there are two American Indian Members, five Asian-American/Pacific Islander Members (including one Delegate), 25 Latino Members (including one Delegate), and 39 Black Members (including two Delegates). Mildred L. Amer, Congressional Research Service, Membership of the 108th Congress: A Profile, *supra*, at 1, 5. Yet, people of color comprise approximately 31% of the population. *See* U.S. Census Bureau, Projections of the Total Resident Population by 5-Year Age Groups, Race, and Hispanic Origin with Special Age Categories: Middle Series, 2001 to 2005 (2000).[22]

Soft money contributions help to perpetuate this disparity. The money generated by these unregulated donations is distributed to incumbents first. Declaration of Senator John McCain in Support of Defendants in *McConnell v. FEC* in the U.S. District Court for the District of Columbia, dated October 4, 2002, ¶22. Today, almost nine out of ten congressional incumbents seeking reelection are successful. Jamin B. Raskin & John Bonifaz, The Wealth Primary: Campaign Fundraising and the Constitution 19 (1994).

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[18] *Amici* are, of course, well aware that Congress increased the limits on regulated direct donations to soften the ban on soft money contributions. No doubt extremely wealthy donors will continue to contribute directly in greater numbers than the less affluent. Nonetheless, direct donations are *limited* and, because they are not filtered through national political parties, they attach to particular candidates. The ban on unregulated and unlimited individual and corporate soft money donations is a major step forward in representative democracy; and the balancing Congress and the President achieved to make this important step is squarely within their discretion.

[19] *Available at* www.senate.gov/reference/resources/pdf/RS21379.pdf

[20] *Available at* www.senate.gov/reference/resources/pdf/RL30378.pdf.

[21] *Available at* www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm.

[22] *Available at* www.census.gov/population/www/projections/natsum.html.

With soft money contributions, incumbents are able to bankroll their campaigns. The more a candidate spends, the more likely she will win. In 1996, for example, 92% of the House races and 88% of the Senate races were won by the candidate who ran the most expensive campaign. PUBLIC CAMPAIGN, THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE, *supra*, Executive Summary.

CONCLUSION

Over 100 years ago, this Court recognized that the right to full and fair representation in a democracy is a fundamental right because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The current campaign finance regime has undermined the meaning of equal voting rights by elevating the interests of contributors over average citizens. Major leaders of both parties and the President successfully engineered a difficult but major step in the right direction with the Bipartisan Campaign Reform Act. *Amici* believe that the Act moves forward aggressively to provide an opportunity for much greater participation by communities of color in the election process. It is well within Congress' and the President's power to regulate elections and prevent corruption or the appearance of corruption. We urge that it be sustained.

Respectfully submitted,

MARTIN R. GLICK
Counsel of Record
CLARA J. SHIN
AMY L. BOMSE
HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABKIN
A PROFESSIONAL CORPORATION
Three Embarcadero Center
Seventh Floor
San Francisco, CA 94111-4024
(415) 434-1600

Attorneys for the Amici Curiae

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IN THE

Supreme Court of the United States

MITCH McCONNELL, SENATOR, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE COMMITTEE FOR ECONOMIC DEVELOPMENT, WARREN E. BUFFETT, EDWARD A. KANGAS, JEROME KOHLBERG, PAUL VOLCKER, AND SIXTEEN OTHER BUSINESS LEADERS IN SUPPORT OF APPELLEES

STEVEN ALAN REISS
Counsel of Record
R. BRUCE RICH
JOSH A. KREVITT
JONATHAN BLOOM
CLAIRE E. GOLDSTEIN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Attorneys for Amici Curiae

182238

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION AND INTEREST OF THE AMICI[1]

This brief *amici curiae* in support of the Appellees is submitted on behalf of the Committee for Economic Development (CED), a nonprofit, nonpartisan, and nonpolitical research and policy organization comprised of approximately 250 business leaders and educators, and a number of individual business leaders who support CED's position on campaign finance reform: Robert L. Bernstein, Warren E. Buffett, William K. Coblentz, Harry L. Freeman, Ronald Grzywinski, Edward A. Kangas, Thomas J. Klutznick, Jerome Kohlberg, Arjay Miller, Thomas S. Murphy, Steffen E. Palko, Raymond Plank, Sanford R. Robertson, Richard Rosenberg, George Rupp, Donald Stone, Robert D. Stuart, Jr., Dr. P. Roy Vagelos, A. C. Viebranz, and Paul Volcker.[2] CED's trustees set CED's research agenda, develop policy recommendations, and speak out for their adoption. CED has long been an outspoken voice in favor of campaign finance reform – particularly the need to prohibit unregulated soft money – and argued vigorously for passage of the reforms contained in the Bipartisan Campaign Reform Act of 2002 (BCRA).[3]

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[1] Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no persons or entities other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief. A copy of the letter of consent from the Solicitor General is being filed herewith.

[2] The affiliations of the individual *amici* are listed in the Appendix to this brief.

[3] As set forth more fully in a 1999 report developed by a group of business, academic, and political leaders, CED, after careful study,

(Cont'd)

Amici urge the Court to sustain BCRA's soft money restraints. By prohibiting national parties from raising, receiving, or spending funds that are not subject to the limitations imposed by the Federal Election Campaign Act (FECA), Pub. L. No. 93-443, 88 Stat. 1263 (1974), BCRA closes the soft money loophole through which corporations and other large contributors have been goaded into evading FECA's hard money limits, a phenomenon that has damaged both the democratic process and the business environment.

With this filing, the *amici* seek to highlight the extent to which prominent business leaders – those perceived to benefit the most from the access and influence purchased with soft money – do not wish to continue funding an unrestrained campaign finance "arms race." To the contrary, the *amici* are deeply troubled by the distortion of both the political process and of the free-market system that have resulted from the forced acquiescence of business in what effectively has become a corrupt soft money shakedown. There can be little doubt that the current soft money system promotes both the perception and reality of rampant influence peddling by both major parties and that it has given rise to the widespread belief that Congress routinely acts for the benefit of large corporate contributors, rather than on the merits of issues presented. At the same time, the taint engendered by the flood of unregulated corporate soft money harms public confidence in business, as the public perceives large corporations to have secured unfair advantages and to have purchased disproportionate influence on the outcome of elections and on the operation of government. Businesses are also harmed directly to the extent that politically motivated policy decisions introduce an element of arbitrariness into the functioning of the market.

Corporate soft money contributions are a far cry from the issue-focused corporate speech that this Court held to be constitutionally protected in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Corporate soft money typically is neither acquired nor given for ideological reasons. As the *amici* are all too aware, and as the factual record in these cases convincingly documents, businesses typically make soft money contributions for one of two reasons: (i) to secure tangible benefits in the form of access to and influence over legislators; or (ii) to maintain access and avoid retribution in the form of adverse governmental action on issues that directly affect solicited businesses. Put differently, these contributions – often made in response to high-pressure solicitation by Members of Congress, party leaders, and others – are motivated by stark political pragmatism, not by ideological support for either party or their candidates. Because the stakes are potentially so high for solicited businesses, the reality is that soft money payments are "voluntary" only in the narrowest sense of that term. In truth, they are commonly made out of fear of the consequences of refusing to give – or refusing to give enough. That corporate soft money is calculated and functional, rather than expressive or ideological, in nature is exemplified by the propensity of companies to give to both parties in order to best protect their interests.

(Cont'd)

concluded that the soft money system had become dysfunctional and corrupt in a manner that tarnished solicitor and contributor alike and, more broadly, impaired the health of our democracy. *See* Committee for Economic Development, ***Investing in the People's Business: A Business Proposal for Campaign Finance Reform*** (1999) (the "CED Report") (Exh. 1 to the Declaration of Charles E. M. Kolb ("Kolb. Decl.")). By 2001, this report had been endorsed by over 300 executives.

Amici fervently believe that BCRA's soft money ban sensibly advances the compelling government interest in protecting the political process against actual or perceived corruption without abridging expressive and associational rights protected by the First Amendment. Since its landmark ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court repeatedly has recognized the eradication of actual and apparent corruption in connection with campaign financing as a compelling government interest. BCRA's soft money ban is an urgently needed means of advancing this interest. Accordingly, the "deference to legislative choice" that this Court has consistently afforded Congress' efforts to restrict the influence of corporate money on federal elections is fully warranted here, as the soft money system is demonstrably "a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages." *Federal Election Comm'n v. Beaumont*, 123 S. Ct. 2200, 2207 (2003).

Section I explains the reasons businesses feel compelled to contribute soft money to the national parties and the detrimental impact of soft money on public perception of the role of business in the political process and on the integrity of the political process itself.

Section II demonstrates that restricting soft money contributions does not meaningfully impair political speech, as corporate soft money is not political expression, but an instrument with which to secure or maintain commercial advantage. As such, soft money has, at best, an attenuated relationship to the speech and associational rights protected by the First Amendment.

ARGUMENT

I. SOFT MONEY CONTRIBUTIONS ARE EXTRACTED FROM CORPORATIONS FEARFUL OF THE ADVERSE CONSEQUENCES OF NOT GIVING

CED's trustees and the individual *amici*, who are past and present chairmen, presidents, and senior executives of major American corporations and university presidents, have direct experience with being solicited by party leaders and elected officials for ever-increasing corporate soft money contributions. As such, they have "developed a particularized understanding of how the soft money fundraising system works and how it impacts the integrity of our elected officials, the integrity of American business, and more generally the health of our democracy." Declaration of Gerald Greenwald at ¶ 5 ("Greenwald Decl.").[4]

As set forth in the Greenwald Declaration, and as echoed by numerous other declarants, businesses generally make soft money contributions for one of two reasons: (i) to secure preferred access to and influence over legislators and other government officials and/or (ii) to maintain this relationship and avoid being disadvantaged as against competitors that contribute. *See* Greenwald Decl. at ¶¶ 9-10; *see also* Declaration of Alan G. Hassenfeld, Chairman and Chief Executive Officer of Hasbro, Inc. ("Hassenfeld Decl.") at ¶ 15; Declaration of Senator Warren Rudman, former

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[4] Gerald Greenwald, Chairman Emeritus of United Airlines, serves on the Board of Trustees of CED. *See* Greenwald Decl. at 1. From 1994 through his retirement in 2000, Mr. Greenwald served as Chairman and CEO of United Airlines. Prior to that, he was Vice-Chairman of the Chrysler Corporation and worked at the Ford Motor Company.

U.S. Senator (R-N.H.) ("Rudman Decl.") at ¶ 5. It is, in fact, precisely because large soft money contributors understand that such contributions secure or at least maintain preferred access that many companies give substantial contributions to both the Democratic and Republican parties – a telling fact that exposes the cynically pragmatic, rather than ideological, nature of soft money contributions.

A. Corporate Soft Money Contributions Are Made to Secure Preferred Access to and Influence over Government Officials

A full appreciation of the importance of removing soft money from the political process requires an understanding of the opportunistic nature of corporate soft money contributions. The massive evidentiary record in these cases amply supports the *amici*'s view of soft money solicitation and contribution as a fundamentally commercial process in which businesses feel compelled to participate.[5] *See* Declaration of Wright H. Andrews, attorney and lobbyist ("Andrews Decl.") at ¶ 8 ("Sophisticated political donors . . . are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return."); Declaration of Wade Randlett, Chief Executive Officer of Dashboard Technology, an internet technology consulting firm ("Randlett Decl.") at ¶ 5 ("[M]any soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal office holders who can protect or advance specific interests through policy action or inaction."); Declaration of Robert W. Hickmott, former Democratic party official and fundraiser, at Exh. A ¶ 46 ("The majority of those who contribute to political parties do so for business reasons, to gain access to influential Members of Congress and to get to know new Members."); *McConnell*, 251 F. Supp. 2d at 481 (opinion of Kollar-Kotelly, J.) ("the evidence presented in this case convincingly demonstrates that large contributions, particularly [soft money contributions], provide donors access to federal lawmakers which is a critical ingredient for influencing legislation"); *id.* at 489-500, 511.

The success of the two major parties in soliciting soft money is directly attributable to the magnitude of the commercial interests corporations perceive to be advanced by contributing in response to such solicitations. The record leaves no doubt that although soft money checks are written to political parties, soft money contributors know that those checks "open the doors to the offices of individual and important Members of Congress and the Administration" and give contributors a chance to argue for their position and against alternative positions on a particular government policy. Greenwald Decl. at ¶ 12. As Mr. Greenwald explains:

> That access runs the gamut from attendance at events where [contributors] have opportunities to present points of view informally to lawmakers

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[5] Over the past several election cycles, as the range of activities funded with soft money has increased, party organizations have engaged in more aggressive efforts to raise soft money, seeking larger amounts from contributors and pursuing new contributors, especially among members of the business community. *See* CED Report at 27. The *per curiam* decision below notes that during the 1998 midterm elections, the national parties spent $221 million in soft money, or 34% of their total spending. During the 2000 elections, the corresponding figures were $498 million and 42%. *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d 176, 200-01 (D.D.C. 2003) (per curiam).

> to direct, private meetings in an official's office to discuss pending legislation or a government regulation that affects the company or union.

Id. at ¶ 10. *See also* Declaration of Robert Rozen, a Washington lobbyist ("Rozen Decl.") at ¶ 12 ("That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money. . . .").

Members of Congress have acknowledged the crude "access for sale" character that the soft money system has acquired. For instance, Senator Carl Levin (D-Mich.) has stated:

> The parties advertise access. It's blatant. Both parties do it. Openly. Invitation after invitation sells access for large contributions. From 1996: For a $50,000 contribution or for raising $100,000 a contributors gets: Two events with the President. Two events with the Vice President . . . Monthly policy briefings with key administration officials and members of Congress. . . . One invitation in 1997 to a Senatorial Campaign Committee event promised that large contributors would be offered "plenty of opportunities to share [their] personal ideas and vision with" some of the top leaders and senators.

147 Cong. Rec. S3248 (Apr. 2, 2001). *See also* Declaration of Representative Christopher Shays (R-Conn.) ("Shays Decl.") at ¶ 9 ("Soft money donations, particularly corporate and union donations, buy access and thereby make it easier for large donors to get their points across to influential

Members of Congress."); Declaration of Senator Dale Bumpers, former U.S. Senator (D-Ark.) at ¶ 18 ("I doubt there is a politician on Capitol Hill who would deny that soft money donations get people access.").

The national parties exploit (i) the access they can provide to federal officeholders and (ii) the direct influence of federal officeholders and candidates on the interests of potential contributors to solicit large sums of soft money. National party leaders often ask executive branch officials and congressional leaders to appear at soft money fundraisers, attend weekend retreats with large soft money donors, participate in party-sponsored policy briefings, and play a role in other events. *See* CED Report at 27; Declaration of Peter L. Buttenwieser, a major Democratic donor, at ¶¶ 22, 25.

Solicitations from party officials are no different in kind or effect from those by elected officials. Companies know that party officials "inform elected officials about who has given significant amounts; and party officials often promise access to elected officials" to those who give large soft money contributions. Greenwald Decl. at ¶ 11. That access, in turn, permits donors to influence legislation that affects their businesses. As former United Airlines CEO and CED Trustee Greenwald bluntly states: "[B]usiness leaders believe – based on experience and with good reason – that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties." *Id.* at ¶ 12.[6]

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[6] In an op-ed in *The New York Times*, *amicus* Warren Buffett recounted a fund-raising Senator once jokingly telling him, "Warren, contribute $10 million and you can get the colors of the American flag changed." Warren E. Buffett, *The Billionaire's Buyout Plan*, N.Y. Times, Sept. 10, 2000, at A17.

It is no accident that the largest soft money contributors tend to be companies in industries that are heavily regulated by the federal government or those whose profits can be dramatically affected by government policy. These contributors are solicited by Members of Congress who sit on committees that consider matters directly affecting the financial health or operations of the companies being solicited. *See* Greenwald Decl. at ¶ 8; CED Report at 25. Representative Shays notes that "the large soft money contributions most [M]embers of Congress raise to meet their committee chairmanship or ranking member obligations come from the corporations and unions who are regulated by those very committees." Shays Decl. at ¶ 10.[7] This is a manifestly unhealthy state of affairs.

The blatantly opportunistic nature of the soft money system was documented in a poll conducted by the Tarrance Group for CED. The poll found that seventy-five percent of business leaders believe that political contributions give them an advantage in the shaping of legislation, while another twenty-three percent consider soft money a currency to be used "to buy access to influence the legislative process." Press Release, CED, Senior Business Executives Back Campaign Finance Reform (Oct. 18, 2000).

B. Soft Money Contributions Are Made to Avert Perceived Retribution

The malign and corrupting nature of the soft money system is demonstrated by the fact that corporate executives have felt coerced into giving ever-escalating soft money contributions with ever-increasing frequency by subtle threats of retribution that accompany soft money solicitations. As Mr. Greenwald has noted, for many business executives "experience has taught that the consequences of failing to contribute (or failing to contribute enough) may be very negative." Greenwald Decl. at ¶ 9. *See also* Hassenfeld Decl. at ¶ 23 (noting perception by some companies that "because their activities are so closely linked with federal government actions, they must participate in the soft money system in order to succeed").

Corporations believe that elected officials and party leaders may shun or disfavor them if they do not "adequately" contribute and that "competing interests who do contribute generously will have an advantage in gaining access to and influencing key Congressional leaders on matters of importance to the company." Greenwald Decl. at ¶ 9. For example, the Tarrance Group poll of 300 senior executives of companies that had annual revenues of approximately $500 million or more, conducted for CED in the fall of 2000, found that half of business executives feared adverse legislative consequences to their companies or their industries if they turned down requests for campaign contributions from high-ranking political leaders and/or political operatives, and seventy-four percent of the executives polled felt that pressure is placed on business leaders to make large political contributions. *See* Press Release, CED, *supra*.

Members of Congress are well aware of the leverage they exert over solicited businesses. In this regard, Senator Rudman testified:

> By and large, the business world . . . gives money to political parties . . . [because] they believe that if they decline solicitations for such contributions, elected and appointed officials will ignore their

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[7] *See also* Declaration of Senator John McCain (R-Ariz.) at ¶¶ 8-10 (giving examples of the influence of corporate soft money contributions on bills affecting the contributors' businesses).

> views or, worse, that competing business interests who do make large contributions to the party in question will have an advantage in influencing legislation or other government decisions.

Rudman Decl. at ¶ 5.

This perceived threat of retribution underpinning the political parties' soft money solicitations was, ironically, underscored by the brazen reaction of the chairman of one of the political party committees to the issuance of the CED Report in 1999. When the CED Report was issued on March 18, 1999, Senator Mitch McConnell (R-Ky.), Chairman of the National Republican Senatorial Committee (NRSC) and a plaintiff in these actions, sent letters to various CED trustees declaring his "concern that a serious error [that CED prominently identifies you as a backer of its legislative plan] has occurred, which may cause some embarrassment to you if it is not immediately corrected." Kolb Decl. at ¶ 6 and Exh. 2 thereto. After CED replied to Senator McConnell, setting forth the basis for the report's conclusions, the NRSC chairman sent follow-up letters to various CED trustees expressing his astonishment and "great concern" that these well-known business leaders would concur with CED's position on campaign finance reform. *Id.* at ¶ 8. Senator McConnell added a personalized handwritten note urging the corporate executive CED trustees to withdraw publicly from CED. *Id.* and Exh. 4 thereto. As Mr. Kolb states in his declaration: "Several of these executives, who worked for companies that had significant issues pending before Congress at the time, considered the letters a thinly-veiled attempt to intimidate them with the implied message: Resign

and keep quiet, or don't count on doing business with Congress." *Id.*[8]

This type of threat is an integral aspect of soft money solicitation. A well-publicized article quotes a lobbyist for a Fortune 500 company as saying that the reason his company contributed soft money was "[b]asically, protection. . . . If you decline to give, you're taking a risk of legislative retribution. . . . Companies are scared that on some critical issue, they'll get hosed." Burt Solomon, *Forever Unclean*, The Nat'l J., Mar. 18, 2000, at 858.

The pervasive practice of giving soft money to both sides of the aisle exposes the fundamentally self-protective motives that drive corporate soft money contributions. According to data released by the FEC on June 9, 2003, 120 donors made soft money contributions totaling $500,000 or more in the 2001-2002 election cycle. More than sixty percent of those donors contributed to both Democratic and Republican national party committees. During that same period, a total of 185 donors gave soft money contributions of $50,000 or more to both Democrats and Republicans. *See* The Center for Responsive Politics, Soft Money to National Parties, *at* http://www.opensecrets.org/softmoney/softtop.asp (last visited July 21, 2003). In 1996, forty of the top fifty soft money contributors gave to both major parties, while in 2000 thirty-five did. *McConnell*, 251 F. Supp. 2d at 509 (opinion of Kollar-Kotelly, J.).

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[8] *Amicus* Edward A. Kangas, former chairman of the global board of directors of Deloitte Touche Tohmatsu and the campaign finance reform co-chairman of CED, noted in a newspaper editorial: "The threat may be veiled, but the message is clear: failing to donate could hurt your company." Edward A. Kangas, *Soft Money and Hard Bargains*, N.Y. Times, Oct. 22, 1999, at A27.

Judge Kollar-Kotelly, in her opinion below, noted the evidence that this practice "is a result of donors' desire to have special access to lawmakers from both parties, and also out of concern that if the contributor gives to only one political party, the other will perceive an imbalance and punish the donor." *McConnell*, 251 F. Supp. 2d at 509 (opinion of Kollar-Kotelly, J.). *See also*, *e.g.*, *id.* at 678-80 (noting that giving to both parties is motivated by fear of giving to a party that subsequently loses control of Congress); Randlett Decl. at ¶¶ 11, 12 ("Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective. . . . If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give."); Declaration of Charles M. Geschke, co-founder and Chairman of the Board of Adobe Systems, Inc., at ¶ 10 (donors who give large amounts of soft money to both parties "may feel that influence with one party is not sufficient to achieve their financial or policy goals, especially now that power in Congress is pretty evenly balanced"). This practice of contributing simultaneously to both parties belies any claim that contributions are ideologically, as opposed to pragmatically, driven.

The fundamentally corrupt nature of this system led industry leaders like General Motors and AlliedSignal publicly to declare that they would no longer make soft money contributions to the political parties, and dozens of corporate executives similarly recognized the dangers to our system of government created by soft money solicitation. *See* CED Report at 33-34. But these voluntary efforts, however laudable and courageous, cannot solve the problem of soft money. For every large corporation that may be willing to draw the line, there exist dozens of others, perhaps more vulnerable, that will continue to "give large soft money contributions to political parties – sometimes to both political parties – because they are afraid to unilaterally disarm." Greenwald Decl. at ¶ 12.

The access afforded by soft money contributions is a competitive, as well as a political, reality. How many corporations will have the fortitude not to ante up at the soft money table knowing that their competitors are still in the game? The solution, Congress reasonably determined, is to end the game.

C. Actual and Perceived Corruption Engendered by Soft Money Contributions Has Eroded Confidence in Business and Government

The perversion of the soft money system into a widely acknowledged "pay to play" shakedown scheme by both major parties understandably has eroded public confidence in the integrity of business, and it has greatly contributed to the cynicism and skepticism with which the public views the involvement of business in the political process. As CED stated in its 1999 Report: "Given the size and source of most soft money contributions, the public cannot help but believe that these donors enjoy special influence and receive special favors." CED Report at 27. *See also* Andrews Decl. at ¶ 20 ("[M]illions of Americans are convinced that lobbyists and the interests we represent are unprincipled 'sleaze balls' who, in effect, use great sums of money to bribe a corrupt Congress.").

It is clear that the public perception that policy decisions are warped by a sense of obligation to the donors of large unregulated contributions has harmed the public trust in the integrity of its government. As Senator McCain has observed:

> In 1961, 76% of Americans said yes to the question, "Do you trust your government to do the right

> thing?" This year, only 19% of Americans still believed that. Many events have occurred in the last 30 years to fuel their distrust. Assassinations, Vietnam, Watergate, and many subsequent public scandals have squandered the public's faith in us, and have led more and more Americans from even taking responsibility for our election. But surely frequent campaign finance scandals and their real or assumed connection to misfeasance by public officials are a major part of the problem.

147 Cong. Rec. S2434 (Mar. 19, 2001). *See also* Declaration of Alan K. Simpson, former U.S. Senator (R-Wyo.), at ¶ 14 ("Both during and after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations."); Declaration of Senator David Boren, former U.S. Senator (D-Okla.) and President of the University of Oklahoma, at ¶ 11 ("American's (sic) trust of government and political parties has fallen precipitously over the years. I . . . ask [my] students why they think this is the case. Almost unanimously, they respond that our government has been 'purchased' by special interests.").

A plethora of polls and studies demonstrates the extent of the damage wrought by the incessant solicitation and contribution of soft money to the public's perception of the integrity of the political process. As the CED Report stated in 1999 – before the business scandals of the last two years: "The vast majority of citizens feel that money threatens the basic fairness and integrity of our political system. . . . Fully two-thirds of the public think that their own representative in Congress would listen to the views of outsiders who made large political contributions before a constituent's views." *Id.* at 1 (internal quotations omitted).

The CED Report's summary of the dismaying downward spiral of public perception of the political process is consistent with a recent non-partisan poll conducted by Democratic pollster Mark Mellman and Republican pollster Richard Wirthin. The principal finding of their study was that the American public believes that the views of large contributors to parties "improperly influence policy and are given undue weight in determining policy outcomes." *See* Mark Mellman and Richard Wirthin, Research of Findings of a Telephone Study Among 1300 Adult Americans (Sept. 23, 2002). The poll found that eight in ten Americans believe that, at least sometimes, members of Congress vote based on the wishes of big contributors to their political parties. Nearly half of those polled said this happens often. In addition, the poll found that more than three in four Americans believe that big contributors to political parties have at least some impact on decisions made by the federal government, and more than half of those polled think that big contributors have a great deal of impact. *See id.*[9]

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[9] Similar results were found in a poll conducted by *The New York Times* and CBS News in April 1997. Seventy-five percent of Americans said "yes" to the question "In general, do many public officials make or change policy decisions as a result of money they receive from major contributors." Only 14 percent answered "no." *See* Francis X. Clines, *Most Doubt a Resolve to Change Campaign Financing, Poll Finds*, N.Y. Times, Apr. 8, 1997, at Al; *see also* Press Release, Public Campaign, New National Survey Shows Robust Support for "Clean Money" (Apr. 3, 2000).

Members of Congress have voiced the concerns of the American public about the corrupting influence of large contributions on the political system. In 1999, for example, Senator Russ Feingold (D-Wisc.) highlighted the extent to which soft money has perverted the legislative process:

> The appearance of corruption is rampant in our system, and it touches virtually every issue that comes before us. . . . [T]oday, when we weigh the pros and cons of legislation, many people think we also weigh the size of the contributions we got from interests on both sides of the issues. And when those contributions can be a million dollars, or even more, it seems obvious to most people that we would reward our biggest donors.

147 Cong. Rec. S2446 (Mar. 19, 2001).[10]

This distrust and cynicism also threatens to have a deep and longstanding impact on the public's trust in the integrity of corporate management and on the economy. As the authors of the CED Report state:

> As business leaders, we are also concerned about the effects of the campaign finance system on the economy and business. Americans identify "special interest" principally with corporations. A vibrant economy and well functioning business system will not remain viable in an environment of real or perceived corruption, which will corrode confidence in government and business. If public policy decisions are made – or appear to be made – on the basis of political contributions, not only will policy be suspect, but its uncertain and arbitrary character will make business planning less effective and the economy less productive. In addition, the pressures on business to contribute to campaigns because their competitors do so will increase. We wish to compete in the marketplace, not in the political arena.[11]

CED Report at 1. CED Trustee Greenwald amplified these concerns:

> It goes without saying that maintaining governmental integrity is critically important to our democracy and our citizens' faith in their government. It is also important for American[s] to have faith in the integrity of their business institutions and labor unions as well. The recent spate of deplorable corporate scandals has broadly demoralized America and this is having widespread and adverse political and economic

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[10] Similarly, Representative Lloyd Doggett (D-Tex.) observed:

> [T]he corrupting influence of money on public policy is evident in [the] House every day. It is evident not only as a principal concern that arises here on vote after vote, significantly influenced by who gave how much, to whom, when, but it is also particularly evident in the silence on critical issues of public policy, on what is never discussed.

147 Cong. Rec. H3966 (Jul. 12, 2001).

[11] *See also* Press Release, Campaign for America, Testimony of Cheryl Perrin, Executive Director, Campaign for America, House Administration Committee (Jul. 22, 1999) ("[W]hile it is naïve to think that the government won't play a role in shaping the market, the soft money system encourages companies to allow the government to intervene in the market in an arbitrary and unfair way.").

> consequences. It is not good for America when American citizens believe their business leaders are corrupt, and one element of that regrettably widespread perception is the appearance that business buys government decisions by making large political contributions.

Greenwald Decl. at ¶ 14.

At this time of widespread shaken confidence in American corporations, restricting soft money is necessary to help restore public confidence in the integrity of business and government. It is also necessary to restore the fairness of the marketplace. As Wade Randlett, CEO of Dashboard Technology, testified:

> The raising and spending of soft money in recent election cycles has distorted the federal political system and the commercial marketplace. . . . [M]uch of the business community believes that the federal campaign financing system is broken and needs to be fixed. People in business look for a reasonable, rational system and a level playing field. The current soft money-oriented system does not meet that standard.

Randlett Decl. ¶ 14.

II. BCRA'S PROHIBITION ON SOFT MONEY SOLICITATION AND CONTRIBUTION DOES NOT SIGNIFICANTLY ABRIDGE FIRST AMENDMENT RIGHTS

A. Corporate Soft Money Does Not Reflect the Ideas of Its Contributors

This Court has held that limitations on political contributions by individuals entail "only a marginal restriction upon the contributor's ability to engage in free communication" because "a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). Corporate soft money has even less communicative value and, hence, less of a claim to constitutional protection because, unlike political contributions by individuals, it is motivated principally by pragmatic commercial concerns.

As demonstrated in Section I, corporate soft money contributions typically do not represent an expression of the contributor's identification with a political party or its platform but are nothing more than an attempt to advance or protect commercial interests. They are investments, not expressions of ideological support. *See*, *e.g.*, Declaration of Steven T. Kirsch, founder and Chief Executive Officer of Propel Software Corporation, at ¶ 14 ("Major donors perceive that they are getting a business benefit through their special access, and that it is a good investment for them.").

The fact that corporate soft money contributions are made for commercial purposes – by entities that do not, after all, vote – weakens any argument that such contributions implicate core First Amendment values. Moreover, to the extent that corporate soft money is given to protect against unfavorable treatment, it does not even constitute a voluntary expression of support; rather, it is merely, in essence, a coerced pay-off to avoid retribution. As Representative Christopher Shays explained, a soft money contribution is "really like protection money. . . . It guarantees you a place at the table. They know you are a friend and you don't hurt friends, but in order to be a friend, you've had to buy that protection."[12] *See also* Randlett Decl. at ¶ 14 ("[M]any members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game. They are caught in an arms race that is accelerating, but that many feel they cannot afford to leave or speak out against.").

Although soft money contributions are not compelled by law in a manner that would warrant literal application of the compelled speech doctrine, to the extent that soft money does have communicative value or subsidizes political speech, the coercive nature of the soft money system warrants analogizing soft money to constitutionally disfavored forms of coerced expression, such as compelled dues payments. *See, e.g., Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36 (1977) (First Amendment requires that labor union expenditures to express political views not germane to its duties as collective-bargaining representative not be financed by employees "coerced into doing so against their will"); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) ("[T]he State constitutionally may not compel its employees to subsidize legislative lobbying or other political union

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[12] Jonathan D. Salant, *Businesses Tire of Soft Money Contributions*, Associated Press, Nov. 23, 1999.

activities outside the limited context of contract ratifications or implementation."). *See also United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (mandated support for speech "is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity"). The compelled-speech doctrine offers a useful analogy that underscores the low level of constitutional protection to be accorded to soft money contributions made in response to coercive solicitation.

The disassociation of soft money from political expression is starkly illustrated by the fact, noted above, that many soft money contributors "express their narrow interests by contributing to both parties during the same electoral cycle, *and sometimes even directly to two competing candidates in the same election.*" *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 451-52 (2001) (emphasis added) (citing FEC disclosure reports documenting that many large corporations give to both parties). Those who give soft money to both parties do so not to express support for political ideas but "because they want to make sure they have access regardless of who's in the White House, filling the Senate seat, or representing the Congressional District." Declaration of Arnold Hiatt, former President and Chief Executive Officer of the Stride Rite Corporation, at ¶ 12.

Finally, the nexus to political expression is weakened further still in those instances where soft money contributors give to the political party committees without knowledge of how the contribution will be used, for whom it will be used, or what message it will be used to promote. *See* Rozen Decl.

at ¶ 12 ("From [the contributor's] perspective, what account the money goes into or how it's used is not important."); *see also* Hassenfeld Decl. at ¶ 15 ("Donors know that if they give $100,000 in soft money to the Republicans or $100,000 to the Democrats, that will entitle them to some type of access. They are not concerned with how that money is used.").

B. Corporate Soft Money Contributions Distort the Marketplace of Ideas

Corporate soft money contributions do not contribute to the "marketplace of ideas" protected by the First Amendment. Instead, they reflect wealth amassed in the marketplace, not the ideas of investors and employees, who have no control over contributions made to political parties from the corporation's general treasury funds. More troubling, as Senator Rudman testified, is that "large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done." Rudman Decl. at ¶ 9.

This Court has held that the "unique legal and economic characteristics of corporations" and "special advantages" granted by state law "not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) (quoting *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986)). "This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas." *Massachusetts Citizens for Life*, 479 U.S. at 257.

The size of the treasury amassed by a corporation does not reflect popular support for the corporation's political ideas. Rather, it reflects "the economically motivated decisions of investors and customers." *Massachusetts Citizens for Life*, 479 U.S. at 258. These resources may be used to make a corporation a formidable political presence "even though the power of the corporation may be no reflection of the power of its ideas." *Id.*

Indeed, these resources may make the corporation a political presence that runs counter to the ideas of its investors and employees, just as a union may engage in political activity that some members may not support. Courts have voiced concern for individuals who have paid money into a corporation for purposes other than the support of candidates from having that money "used to support political candidates to whom they may be opposed." *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207-08 (1982).

> [Stockholders and union members] contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends. Furthermore, because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union.

Massachusetts Citizens for Life, 479 U.S. at 260; *see also Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 416 (1972) (citing concerns about the voluntariness of contributions and protecting the minority stockholder or union Member as reasons underlying congressional regulation of contributions made in connection with federal elections).

As far back as 1907, Congress, in regulating political contributions by corporations, was motivated by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 113 (1948). Accordingly, restricting the use of corporate funds in elections prevents corporations from, in effect, being pressured into allocating for purposes for which they were not intended general treasury funds which may not have been given by investors in the first place had they known how they would be used.

C. A Ban on Soft Money Does Not Offend the First Amendment Right of Association

The First Amendment protects political association as well as political speech. *Buckley*, 424 U.S. at 15; *see also NAACP v. Alabama*, 357 U.S. 449, 460 (1958). "[F]reedom to associate with others for the common advancement of political beliefs and ideas" is protected by the First Amendment. *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973). The right to associate with the political party of one's choice "is an integral part of this basic constitutional freedom." *Id.* at 57.

In *Buckley*, however, the Court held that even a significant interference with associational rights could be outweighed by a campaign finance restriction closely drawn to advance a sufficiently important government interest. 424 U.S. at 25. Because the associational rights implicated by BCRA's soft money ban are (like the free speech rights implicated) weak at best, they are easily outweighed by the important public interests advanced by BCRA's soft money restraints.

First, as discussed above, corporate soft money contributions typically are not expressions of support for the ideological platform of a political party. Second, even where that is not the case, because contributors have no way of knowing where and for what their soft money is being used – and often do not care – the contributions are not linked in any meaningful way to any specific political ideas. Accordingly, even to the extent such contributions may express support for the platform (or elements of the platform) of the party to which they are given, they do not further the values secured by the right of association, namely the "pool[ing] of resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22. Rather, they represent, at bottom, commercially motivated payments.

Third, despite no longer being able to contribute soft money, donors still will be able to associate with and demonstrate public support for a political party and a political party's ideological platform in traditional and far more meaningful ways. *See, e.g.*, *Buckley*, 424 U.S. at 22 ("[FECA's] contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates"). Corporate executives still can – and certainly will – continue to contribute to political parties as individuals.

Given the limited degree, if any, to which soft money evinces a contributor's genuine interest in associating with a political party for ideological reasons and the multitude of other avenues of more meaningful association with a political party and its platform, a restraint on soft money will have only minimal, if any, impact upon the associational rights protected by the First Amendment.

CONCLUSION

The coercive soft money system that BCRA eliminates has corrupted solicitor and contributor alike. It has engendered understandable public cynicism regarding both business and government. It has interfered arbitrarily in the functioning of the economy. Business leaders increasingly wish to be freed from the grip of a system in which they fear the adverse consequences of refusing to fill the coffers of the major parties. The coerced and, at bottom, wholly commercial nature of corporate soft money contributions distinguishes them from political speech, as well as from the type of ideological association protected by the First Amendment. Given the compelling government interest in eliminating both actual and perceived corruption from the political process, BCRA's ban on soft money in federal elections should be sustained.

Respectfully submitted,

STEVEN ALAN REISS
Counsel of Record
R. BRUCE RICH
JOSH A. KREVITT
JONATHAN BLOOM
CLAIRE E. GOLDSTEIN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Attorneys for Amici Curiae Committee for Economic Development, Robert L. Bernstein, Warren E. Buffett, William K. Coblentz, Harry L. Freeman, Ronald Grzywinski, Edward A. Kangas, Thomas J. Klutznick, Jerome Kohlberg, Arjay Miller, Thomas S. Murphy, Steffen E. Palko, Raymond Plank, Sanford R. Robertson, Richard Rosenberg, George Rupp, Donald Stone, Robert D. Stuart, Jr., Dr. P. Roy Vagelos, A. C. Viebranz, and Paul Volcker

APPENDIX — THE INDIVIDUAL *AMICI*

Robert L. Bernstein
Former Chairman/President
Random House, Inc.

Warren E. Buffett
Chairman & CEO
Berkshire Hathaway Inc.

William K. Coblentz
Attorney at Law
Coblentz, Path, Duffy & Bass

Harry L. Freeman
Chair
The Mark Twain Institute

Ronald Grzywinski
Chairman
Shorebank Corporation

Edward A. Kangas
Chairman and CEO (retired)
Deloitte Touche Tohmatsu

Thomas J. Klutznick
Chairman
Thomas J. Klutznick Company

Jerome Kohlberg
Chairman
Kisco Management Corporation

Arjay Miller
Dean Emeritus, Graduate School of Business,
Stanford University
Former President, Ford Motor Company

Thomas S. Murphy
Chairman & CEO (retired)
Capital Cities/ABC, Inc.

Steffen E. Palko
President
XTO Energy Inc.

Raymond Plank
Chairman/Founder
Apache Corporation

Sanford R. Robertson
President
S.R. Robertson & Company, LLC

Richard Rosenberg
Chairman & CEO (retired)
Bank of America, N.A.

George Rupp
President
The International Rescue Committee

Donald Stone
Former Chairman & CEO
Merrill Lynch Specialists, Inc.

Robert D. Stuart, Jr.
Chairman Emeritus
The Quaker Oats Company

Dr. P. Roy Vagelos
Chairman & CEO (retired)
Merck & Co., Inc.

A. C. Viebranz
Former Sr. V. President
GTE Corporation

Paul Volcker
Former Chairman
The Federal Reserve

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MITCH MCCONNELL, *et al.*,
Appellants,
v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the
United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* REPRESENTATIVES CASTLE AND PRICE, AND REPRESENTATIVES ALLEN, ANDREWS, BAIRD, BASS, BOEHLERT, CARDIN, ESHOO, FRANK, GILCHREST, GREENWOOD, HOLT, HOUGHTON, NANCY L. JOHNSON, LEACH, JOHN LEWIS, KENNETH LUCAS, MALONEY, PETRI, PLATTS, RAMSTAD, SCHIFF, SIMMONS, AND TOM UDALL IN SUPPORT OF APPELLEES

Charles Tiefer
Professor, University of Baltimore
School of Law
1420 North Charles Street
Baltimore, MD 21201
(301) 951-4239

Jonathan W. Cuneo
Cuneo Waldman & Gilbert, LLP
317 Massachusetts Ave., N.E.
Washington, D.C. 20002
(202) 789-3960

Richard Briffault
(Counsel of Record)
Joseph P. Chamberlain
Professor of Legislation
Columbia University
School of Law
435 West 116th Street
New York, N.Y. 10027
(212) 854-2638

Counsel for Amici Curiae

August 5, 2003

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INTEREST OF *AMICI CURIAE*[1]

Representative David Price and Representative Michael Castle supported consistently the reform proposal enacted ultimately as the Bipartisan Campaign Reform Act of 2002. They have worked together, across party lines, as especially thoughtful architects of BCRA. Each brought special insight to this issue, based upon an individual background of deeper study of this subject: Representative Price, as a professor of political science and author of respected technical works on the subject; Representative Castle, as a state governor involved in the interrelated state and federal systems of democracy and governance.

Their particular interest is to inform the Court from the specially enriched understanding that thoughtful Members of Congress, as expert participants themselves in the electoral process, brought to the problem of constructing reforms of the campaign finance system. Their particular depth of interest caused them to select representation by the principal counsel filing this brief, Professor Richard Briffault of Columbia Law School, author of numerous scholarly articles and presentations on the recent legislative and judicial legal developments in this subject. They have been joined in this brief by other Representatives who associate themselves with the goal of a bipartisan presentation reflecting the special insights on this subject of Members of Congress who brought deep expertise, as well as bipartisan devotion to democracy-strengthening reform, to the enactment of the BCRA. They are:

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation of submission of this brief.

Representatives Allen (D-ME), Andrews (D-NJ), Baird (D-WA), Bass (R-NH), Boehlert (R-NY), Cardin (D-MD), Eshoo (D-CA), Frank (D-MA), Gilchrest (R-MD), Greenwood (R-PA), Holt (D-NJ), Houghton (R-NY), Nancy L. Johnson (R-CT), Leach (R-IA), John Lewis (D-GA), Kenneth R. Lucas (D-KY), Maloney (D-NY), Petri (R-WI), Platts (R-PA), Ramstad (R-MN), Schiff (D-CA), Simmons (R-CT), and Tom Udall (D-NM).

SUMMARY OF ARGUMENT

The Bipartisan Campaign Reform Act of 2002 (BCRA) is the product of a careful bipartisan Congressional effort to repair the cracks that emerged in the federal campaign finance system since this Court upheld the principal provisions of the Federal Election Campaign Act (FECA) in *Buckley v Valeo*, 424 U.S. 1 (1976), more than a quarter-century ago.

In *Buckley* and other cases this Court has specifically upheld Congress's authority in the critical areas that BCRA targets. Congress has responded to new campaign finance schemes – particularly soft money and so-called issue advocacy – unanticipated when FECA was enacted. As elected officials, members of Congress have a powerful, first-hand awareness of the subtle details and changing nature of electoral campaigns; of the impact of campaign practices on government integrity and on public confidence; and of how the fundamental provisions of campaign finance law have the potential to be evaded.

BCRA's provisions regulating political party soft money and electioneering communications are clear, closely-drawn, narrowly-tailored rules that draw on Congress's special familiarity with political campaigns and the impact of campaign finance practices on governance.

ARGUMENT

I. AS THE SUPREME COURT HAS RECOGNIZED, CONGRESS HAS SPECIAL EXPERTISE IN THE CAMPAIGN FINANCE REGULATION NEEDED TO PROMOTE DEMOCRACY

Elections are the heart and soul of American democracy. For almost one hundred years Congress has repeatedly responded to public concerns that particular campaign finance practices jeopardize the integrity of the electoral process and public confidence in government. Three principles have become central components of federal campaign finance law upheld by this Court, in recognition that, rather than infringe on the First Amendment, they promote the First Amendment values of fair political discourse, voluntary participation in political life, and voter education.

The first principle is the complete exclusion of corporate and union treasury funds from federal elections, *see Federal Election Commission v. Beaumont*, 123 S.Ct. 2200, 2205 & n. 3(2003)(*citing* numerous authorities).[2] A second major principle, with a pedigree going to 1910, is disclosure, both of contributions and of independent expenditures to support or oppose federal candidates. The Court has repeatedly upheld disclosure as vital to the prevention of corruption and the promotion of the informed electorate so crucial to an effective democracy. *Buckley v. Valeo*, 424 U.S. 1, 61-62 & n.71 (1976).

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[2] This is, among other things, "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by contributions." *Federal Election Commission v. National Right to Work Committee (NRWC)*, 459 U.S. 197, 207 (1982); *see United States v. Automobile Workers*, 352 U.S. 567, 570 (1957)(union treasuries). *See also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652,658-59 (1990); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 495 (1985); *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 258 (1986).

The third major principle of federal campaign finance regulation – restrictions on the dollar amounts of contributions – became law with the enactment of the Federal Election Campaign Act (FECA) Amendments of 1974, responding to the Watergate scandals that marked the financing of the 1972 presidential election. *Buckley v. Valeo, supra*, 424 U.S. at 28.[3] As this Court has recognized,[4] very large contributions undermine public confidence in democracy itself.

As candidates for office, members of Congress have first-hand experience with campaign finance - the need for money to pay for staff, transportation, research, and advertising; the nitty-gritty of fundraising dinners, personal solicitations, and other practices for obtaining money; and the funding interactions with individual donors, interest groups, and political parties. *See, e.g., Colorado Republican II, supra*, 533 U.S. at 452 ("We have long recognized Congress's concern with this reality of political life").

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[3] As *Buckley* emphasized, a ban on raw vote-buying would "deal with only the most blatant and specific attempts of those with money to influence government action." *Id.* at 28. Rather, very large contributions raise "the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389 (2000).

[4] As the Court recently explained, democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *Shrink Missouri, supra*, 528 U.S. at 390, *citing and quoting United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961). *See Buckley, supra*, 424 U.S. at 27 ("the appearance of corruption"); *id.*, *citing and quoting Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565 (1973)("the appearance of improper influence").

Members of Congress also have close familiarity with the impact of campaign laws on campaign practices. Members know the administrative costs of compliance and the burdens that contribution limitations can place on fundraising, the shortcomings of election law administration, and the development of campaign finance techniques that can avoid legal restrictions. They learn first-hand whether and how campaign finance regulations actually work in practice. Justice Breyer recently observed, Congress has "significantly greater institutional expertise," *Nixon v. Shrink Missouri PAC, supra*, 528 U.S. at 402 (Breyer, J., concurring) than the Court in assessing campaign practices and their impact on public integrity and the electoral process.

So, too, as law-makers responsible for our Nation's governance, members of Congress have direct experience with the potential impact of campaign finance practices on governance – on the role that contributions can potentially play in affecting which interests secure how much access to public officials, which interests either wield or appear to wield extra influence on legislative and agency decision-making, and the impacts of these on the day-to-day operations of government.

From regular and close contact with constituents, members of Congress become keenly aware of public concerns about the campaign finance system and the extent to which certain campaign finance practices undermine public confidence in government. Reform leaders and supporters within Congress must, and do, focus overwhelmingly upon the need to restore that public confidence.

This Court has recognized Congress's institutional expertise over campaign finance in three ways. First, the Court has looked to Congress's determination that certain campaign finance practices so threaten electoral or government integrity or public confidence in government that regulation is warranted. *See, e.g., Beaumont, supra*, 123 S. Ct. at 2205-07. *See also Nixon v Shrink Missouri, supra*, 528 U.S. at 403 (Breyer, J., concurring)("the legislature understands the problem – the threat to electoral integrity, the need for democratization – better than do we"). Second, when the Court determines that a particular regulatory technique is a constitutionally appropriate means of addressing a threat that a campaign finance practice poses to democracy, the Court has deferred to Congress with respect to the scope of such regulation. *Beaumont, supra*, 123 S.Ct. at 2208.[5] Finally, the Court has sustained laws that Congress has determined are necessary to prevent circumvention or evasion of the core requirements of campaign finance regulation, from *Automobile Workers, supra*, 352 U.S. at 582, to, most recently, *Beaumont*.[6]

To be sure, Congress does not and should not enjoy *carte blanche* with respect to campaign finance laws that implicate the First Amendment, *Buckley, supra*, 424 U.S. at 14-23, 64-68. Rather, campaign finance law ought to reflect an evolving partnership between Congress and the Court. Congress has the primary responsibility for surveying the political landscape, determining which campaign finance practices threaten democratic values and developing a legislative response. Judicial review assures that any resulting restrictions on electoral activity are politically neutral, adequately justified, narrowly-drawn, and consistent with the needs of a free and fair democratic electoral system.

II. BCRA'S RESTRICTIONS ON SOFT MONEY CONTRIBUTIONS TO THE POLITICAL PARTIES ARE A CONSTITUTIONAL MEANS OF RESTORING FECA'S LIMITATIONS AND PROHIBITIONS

BCRA's restrictions on soft money affect only contributions, so the more deferential standard of review that this Court has applied to contribution restrictions ought to apply. *MCFL, supra*, 479 U.S. at 259-60. A contribution restriction will be upheld if it is "'closely drawn' to match a 'sufficiently important interest.'" *Nixon, supra*, 528 U.S. at 387-88, *quoting Buckley, supra*, 424 U.S. at 25.

A. CONGRESS FOUND THAT UNRESTRICTED SOFT MONEY DONATIONS HAVE THE DELETERIOUS EFFECTS ON THE POLITICAL PROCESS AND PUBLIC TRUST IN GOVERNMENT THAT PREVIOUSLY NECESSITATED REGULATING HARD MONEY DONATIONS

Soft money contributions to the political parties emerged as a factor in federal elections only after the enactment of FECA's restrictions on direct contributions to federal candidates and to the parties. Some soft money activity can be found in the late 1970s and 1980s, *see Richard Briffault, The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 628-29 (2000). But, soft money exploded in federal elections in the 1990s. Over the course of that decade, soft money grew from roughly 17% of national party money in the 1991-92 election cycle to nearly 40% of national party money – or nearly $500 million – in the 1999-2000 election cycle. *See McConnell v. Federal Election Commission*, 251 F. Supp.2d 176 (D.D.C. 2003) at 331 (opinion of Henderson, J.); *id.* at 439-41 (opinion of Kollar-Kotelly, J.).

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[5] *See Buckley*, 424 U.S. at 30 (quoting the Court of Appeals that "a court has no scalpel to probe, whether, say, a $2,000 [contribution] ceiling might not serve as well as $1,000."). Similarly, the disclosure threshold "is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion." *Id.* at 83. The Court also upheld limits on smaller corporations by declining to " second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC, supra*, 459 U.S. at 210.

[6] The anti-circumvention purpose was crucial in *Buckley*, 424 U.S. at 35-36, 38; in *California Medical Association v. Federal Election Commission (CalMed)*, 453 U.S. 182, 197-98 (1981); in *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado Republican II)*, 533 U.S. 431, 456 (2001)("all Members of the Court agree that circumvention is a valid theory of corruption"), and *id.* at 457 n.19; and in *Beaumont, supra*, 123 S.Ct. at 2207 (warning against "circumvention of [valid] contribution limits.")(*citing and quoting Colorado Republican II*).

Soft money has enjoyed such exponential growth precisely because it enables big donors, parties, and candidates to avoid FECA's contribution source prohibitions and dollar limitations. Although FECA capped individual contributions to the national committees of the political parties at $20,000, in 1999-2000 there were 800 donors who each gave $120,000 or more to the national party committees, including hundreds of corporations and unions – even though FECA completely bars corporate and union treasury funds from federal elections. *See id.* at 331 (opinion of Henderson, J.). The top 50 soft money donors each gave between $955,695 and $5,949,000. *See id.*[7]

Members of Congress have found that huge soft money donations have potentially serious effects on our government's

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[7] Senator Thompson, who chaired the Senate's investigation into illegal and improper activities in the 1996 federal election campaigns, concluded that, compared to "a short time ago," now, "those raising the money would consider themselves foolish if they spent too much time on raising those hard dollars when they can pick up the phone to these big outfits and raise many times that. You are not a player anymore unless you have $20,000, $30,000, $40,000, $50,000, or $100,000. . . ." 148 Cong. Rec. S2110 (Mar. 20, 2002). As Rep. Shays explained, soft money includes "the very kinds of contributions that the federal laws intended to exclude – namely donations from corporations, unions, as well as large individual contributions. Soft money is not just a loophole, it is the loophole that ate the law."148 Cong. Rec. H353 (Feb. 13, 2002); *accord*, 148 Cong. Rec. S2114-2115 (Mar. 20, 2002)(Sen. Levin)("the soft money loophole . . .allows parties to raise unlimited amounts of money from individuals as well as corporations and unions. . . . The loophole has destroyed the law. There are no effective limits"); 148 Cong. Rec. S2111 (Mar. 20, 2002)(Senator Schumer)(soft money "makes a mockery" of FECA's bans and dollar limits).

integrity.[8] As Senator Thompson explained in condemning the rise of very large soft money donations, "[i]t is not good to have legislators or Presidents too dependent on people for whom they are supposed to be making laws that affect their lives. When the very people who have legislation before you are coming to you with greater and greater amounts of money for your political campaign, that creates a conflict of interest." 148 Cong. Rec. S2110 (Mar. 20, 2002).[9] Even beyond any direct impact on government decision-making, members of Congress[10] found that the explosion of soft money has had a devastating impact on public confidence in government.[11]

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[8] According to Representative Miller, "[b]ecause of large, unregulated contributions, known as 'soft money,' special interests and corporations often get special representation by elected officials, special representation that is often in conflict with the larger public interest." 148 Cong. Rec. H351 (Feb. 13, 2002). According to Rep. DeGette, "[m]any took advantage of the soft money loophole to gain inordinate access to our country's leaders and lowered our nation's political parties to little more than middlemen for moving soft money for corporations and wealthy individuals." 148 Cong. Rec. H354 (Feb. 13, 2002). As Rep. Wu found, soft money "is nothing more than a backdoor way to avoid the contribution limits that are now placed on candidates. Soft money is influencing our process almost as much as direct contributions to candidates do. . . . And let's face it, special interest groups that contribute large sums of this soft money have an influence on the political process." 148 Cong. Rec. H354 (Feb. 13, 2002).

[9] As Senator Feingold stated on the floor of the Senate, "these days, major legislation almost never comes to this floor without interests, often on both sides, that have made major soft money contributions to the political parties." 148 Cong. Rec. S2104 (Mar. 20, 2002). According to Rep. Morella, "soft money has been at the heart of every political or corporate scandal over the past decade." 148 Cong. Rec. H344 (Feb. 13, 2002).

[10] According to Rep. Kind, "though the opponents of reform say the public does not care about this issue, the residents of Wisconsin's Third District tell me otherwise. They see where our system is headed and demand reform from Congress." 148 H. 351 (Feb. 13, 2002). According to Rep. Shays, "there is much evidence – and our own experience with our constituents confirms – that one of the major reasons citizens increasingly

Indeed, precisely because these donations are "soft" -- that is, outside the scope of federal regulation -- they particularly damage public opinion. Many soft money donations are dramatically larger than permitted hard money contributions. Many very large donations come from corporations and unions in defiance of the ban on their participation in federal elections. From soft money, voters receive the troubling message that big money is simply too

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fail to vote is their perception that their vote makes no difference because of the role of money in politics and the influence of special interest groups." 148 Cong. Rec. H353 (Feb. 13, 2002). Rep. Maloney agreed, based on a survey of her Long Island constituents, that "their disenchantment with the current system results in fewer Americans exercising their right to vote." 148 Cong. Rec. H348 (Feb. 13, 2002). Representative Dingell found that "unregulated soft money . . . taints us all individually and collectively works to increase the public's cynicism and destroy faith in Congress." 148 Cong. Rec. H349 (Feb. 13, 2002). See also 148 Cong. Rec. H354 (Feb. 13, 2002) (statement of Rep. Wu that soft money contributes to a "culture of cynicism"); id. at H355 (statement of Rep. Udall that soft money creates "the perception that the national government is for sale to the highest bidder").

[11] Senator Lieberman explained the consequences of "a system that often leaves the average person disempowered, disinterested, and disengaged from a political process where the average person's annual income, in many cases, mostly doesn't even approach the cost of a ticket to our political parties' most elite fundraising events. This causes the average people, the majority, to continually question why their leaders are taking the actions they take. It causes those of us in public life to work, too often, under a cloud of suspicion, with our citizenry wondering whose interests are served." 148 Cong. Rec. S2137 (Mar. 20, 2002). As Senator McCain put it, "any voter with a healthy understanding of the flaws of human nature and who notices the vast amounts of money solicited and received by politicians cannot help but believe that we are unduly influenced by our benefactors' generosity. . . . [C]ampaign contributions from a single source that run into the hundreds of thousands or millions of dollars are not healthy to a democracy." 147 Cong. Rec. S2434 (Mar. 19, 2001).

powerful to be ignored. Effective controls on soft money would perform the extremely valuable function of directly redressing public distrust of our political system.

B. CONGRESS FOUND THAT UNRESTRICTED SOFT MONEY DONATIONS THREATEN GOVERNMENT INTEGRITY AND PUBLIC CONFIDENCE BECAUSE SOFT MONEY AFFECTS FEDERAL ELECTIONS AND FEDERAL OFFICEHOLDERS

The theory for the exemption of soft money from regulation is that the activities funded by soft money either do not affect federal elections or support a mix of federal elections and nonfederal activities. But, as Congress found, soft money does in fact have a direct impact on federal elections and the federal government. As the Court found in *Colorado Republican II*, parties, "whether they like it or not, . . . act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452.[12]

Donors can use "parties as conduits," *id.*, for soft money gifts as easily as for hard money contributions. Indeed, soft money is typically used in ways that directly benefit candidates' campaigns. The single greatest use of soft money is on communications that support or oppose a clearly identified candidate for federal office but which avoid the technical words of express advocacy. *See* Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Election* 31, 74 (2001). Party ads that support a candidate or oppose her opponent clearly benefit that candidate. Candidates are likely to know about such ads, and to be grateful to the sources who provided the funding for them. As the Court observed in *Colorado Republican II*, this is how "the power of money actually works in the political structure." 533 U.S. at 450.

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[12] Parties can be and are used as "the instruments of some contributors whose object is not to support the party's message . . . but rather to support a specific candidate for the sake of a position on one narrow issue or even to support any candidate who will be obliged to the contributors." *Colorado Republican II*, 533 U.S. at 452.

Similarly, the use of soft money for drives to mobilize voter support, and payment of party workers, in connection with elections where federal candidates appear on the ballot operates to benefit federal candidates and render these individuals grateful for the specific donors' funding. Given Congress's first-hand experience "with this reality of political life," *id.* at 452 n. 14, it reasonably concluded that soft-money-funded party activities that aid federal candidates are as great a potential source of undue influence as other items that FECA requires to be funded with hard money: party contributions to candidates, coordinated expenditures with candidates, and independent express advocacy expenditures in support of candidates.

Moreover, Members of Congress know, only too well, the mechanics of officeholder soft money fund-raising. Party fund-raising practices establish close links between officeholders and potential donors to the parties and, indirectly, to those officeholders. As Representative Shays explained, "even though the money often goes to the parties, it's the candidates themselves and their surrogates who . . . not only solicit the funds themselves, they meet with big donors who have important issues pending before the government; and sometimes, the soft money candidates raise for their political parties is often directed back to their own campaigns." 148 Cong. Rec. H352 (Feb. 13, 2002). Federal officials become directly involved in soliciting contributions for the party committees' soft money accounts. Major donors are rewarded with special access to leaders of the executive branch, members of the Congressional leadership, and committee chairs and ranking members. Many members of Congress, in turn, are

active in soliciting and obtaining large soft money contributions, in order to enhance their status in Congress and stake their claim to leadership of their parties. *See Colorado Republican II, supra*, 533 U.S. at 460 n.23.

Moreover, the national party committees soliciting and receiving soft money are closely connected to Congress.[13] Given the web of relations linking major donors, party committees, and elected officials, only the prohibition on national parties soliciting or accepting soft money can keep oversized individual, corporate, and union contributions out of federal campaigns, and away from federal officeholders and from party committees composed of or tightly linked to federal officeholders.

Further, the ban on state and local parties soliciting, receiving or using soft money for defined federal election activities is essential to prevent circumvention of the ban on national party soft money.[14] Drawing on Members' first-hand awareness of how the national parties use the state parties to support federal candidates, they reasonably concluded that some regulation of the state and local parties was necessary to prevent circumvention of the soft money ban.[15] From their own in-depth experience, they drew this definition narrowly to capture the federal election activities of state and local parties, without reaching state and local party programs that do not affect federal elections. They established BCRA's soft money restrictions as essential loophole-closing devices to restore the campaign finance structure created by FECA and sustained in *Buckley*.

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[13] The four congressional campaign committees – that is, the Democratic and Republican House and Senate campaign committees – are composed of members of Congress. Almost invariably, the president dominates his party's national committee, and the opposing party's presidential nominee comes to dominate his party's national committee. As a result, large donations to the national party committees effectively function as donations to the leadership of Congress and the president.

[14] As Senator McCain explained, the limit on state and local party federal election activities "addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties, which then use those funds for Federal election activity." 148 Cong. Rec. S2138 (Mar. 20, 2002). As Sen. McCain noted from the 1996 campaign finance investigation reports, "the coffers of Federal and State political parties are intertwined. In 1996, the State parties spent money they received from the national parties on advertisements considered key to the Presidential candidate's election . . . . The bottom line is, whatever the technical niceties, soft money is being spent by State parties to support Federal campaigns. In fact, much of the soft money spent in the 2000

C. CONGRESS DETERMINED THAT BCRA IS LIKELY TO STRENGTHEN, NOT WEAKEN, THE POLITICAL PARTIES

Critics of BCRA have asserted that the soft money restrictions will hurt the political parties. But, that is entirely mistaken. BCRA places no new limits on the amount of money that parties can give to candidates or to spend on expenditures coordinated with candidates. It places no limits on party independent expenditures. Nor does it place any limitations on party voter registration or voter mobilization, or party spending on generic party activities. All BCRA requires is that these activities be funded by hard money, that is, by contributions that comply with federal dollar limitations and source prohibitions.

Virtually all Members of Congress affiliate with one of

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elections to support Federal campaigns was spent by State parties." 148 Cong. Rec. S2138 (Mar. 20, 2002).

[15] They tied the statutory definition of federal election activities to communications that expressly mention federal candidates, expenditures for voter registration and mobilization in connection with an election in which a federal candidate is on the ballot, and the salaries of state and local party officials who spend 25% or more of their time on federal campaigns.

the two major parties, run for election on party lines, participate in party caucuses in Congress, and serve as leading members of their state and national parties. As political leaders dedicated to making the party system of our democratic republic viable, they are the last group in the nation who would enact legislation to harm their own parties. In fact, Congress in 1979 exempted hard-money-funded party-building activity from FECA's party spending limitations, *see* David E. Price, *Bringing Back the Parties* 252 (1984)(by a principal *amicus* for this brief). Indeed, both Republicans and Democrats in Congress expressed confidently and vigorously the expectation that BCRA's soft-money reform will strengthen, not weaken, the parties by directing the parties to rely more on grass-roots donors rather than wealthy special interests.[16]

When the pre-BCRA law allowed the parties to be reduced to mere conduits for the flow of big soft-money contributions for the benefit of candidates, that law demeaned, not strengthened, the role of the parties. When parties merely serve as instruments for candidates raising soft money which the same candidates or their operatives, in turn, direct to be used for specific ads, this hollows out the functioning of parties, marginalizing the parties' vital traditional functions.[17]

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[16] As Senator McCain has explained, "the massive influx of soft money" "has turned State and local parties into mere pass-through accounts for the national parties and for large, direct contributions from corporations, unions and wealthy individuals. If anything, the bill will return the State and local parties to the grassroots and encourage them to broaden their bases and reach out to average voters." 148 Cong. Rec. S2139 (Mar. 20, 2002). *Accord*, 148 Cong. Rec. S2112 (Mar. 20, 2002) (Sen. Schumer)("Campaign finance will strengthen our grassroots political system by breaking the parties' reliance on a handful of very wealthy contributors and forcing them to build a wider base of small donors and grassroots supporters").

BCRA does little to impair the ability of parties to fund their activities. Despite the growing role of soft money, parties still rely primarily on hard money, and hard money contributions climbed sharply in the 1990s, from $445 million in 1991-92 to $741 million in 1999-2000. 251 F. Supp.2d at 441 (opinion of Kollar-Kotelly, J.). BCRA will make it easier for parties to raise hard money contributions.[18]

And, BCRA even contains section 323(b)(2), known as the Levin Amendment, allowing specific state and local party activities to be paid with a mix of hard and soft funds. Section 323 allows restricted soft money use for some voter registration, get-out-the-vote, voter identification, and generic party activities in elections with federal candidates on the

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[17] On the floor of the House, Rep. Wamp, drawing on his experience chairing the local Republican Party in Chattanooga, Tennessee, urged enactment of BCRA because "Both of our political parties will be better served by weaning ourselves from soft money and returning to the people, returning to the foot power, returning to the grassroots. Writing big checks is actually the easy way out for people that want to participate in this process, [while] [t]he harder way is to involve the people." 148 Cong. Rec. H463 (Feb. 13, 2002). By contrast, as for the advertising purchased with big soft-money contributions, "We rarely see ads saying, this is what our party stands for. Join our party. Be a part of our platform. Get involved. We mostly see ads that are degrading and divisive." *Id.*

[18] BCRA § 307 raises the maximum individual contribution to the political party national committees from $20,000 to $25,000, and BCRA § 102 raises the hard money cap as to the state party committees from $5,000 to $10,000. Even more dramatically, BCRA raises, and rearranges, the aggregate cap on individual contributions, encouraging donors to give the full authorized amount to the parties without that cutting into their ability to contribute to candidates. That is, section 307(b) establishes sub-aggregate caps so that an individual's donations to parties do not reduce the actual limit on what he can donate to candidates, i.e., the caps do not cause candidate donations to compete with, or "crowd out," party donations.

ballot, subject to careful controls that avoid the abuses of unrestricted soft money. Taken together with the increase in the limits on individual hard money donations and the Levin Amendment, Congressional restricting of soft money merely passing through the parties does not weaken the parties; it restores their traditional role.

III. BCRA'S DEFINITION OF ELECTIONEERING COMMUNICATIONS IS A CLEAR, OBJECTIVE AND NARROWLY-DRAWN TEST THAT IS ESSENTIAL TO PREVENT THE WIDESPREAD AND BLATANT EVASION OF THE LONGSTANDING BAN ON THE USE OF CORPORATE AND UNION TREASURY FUNDS AND OF DISCLOSURE REQUIREMENTS

A. CONGRESS ADOPTED THE NEW DEFINITION OF ELECTIONEERING COMMUNICATIONS IN RESPONSE TO OVERWHELMING EVIDENCE OF WIDESPREAD AND BLATANT EVASION OF FECA

Section 201 of BCRA amends the FECA by adding, inter alia, a new subsection 304(f)(3) which creates a new statutory term – "electioneering communication" - with two key applications. First, it promotes disclosure.[19] Second, it bolsters the longstanding prohibition on the use of corporate and union treasury funds in federal elections by applying that ban to electioneering communications. See BCRA § 203, amending 2 U.S.C. § 441b(b)(2). As a result, a corporation or union may use its separate, segregated fund to pay for electioneering communications, but may not use treasury funds to pay for such communications.

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[19] BCRA requires that any person spending more than $10,000 in electioneering communications comply with FECA's reporting and disclosure requirements for independent expenditures. See BCRA, § 201, 2 U.S.C. § 434(f)(1).

This amendment is a direct response to one of the greatest loopholes to emerge in the structure of federal campaign finance law – the rise of so-called issue advocacy advertising. Issue advocacy consists of electoral communications that effectively advocate or oppose the cause of a candidate but stop short of literally calling for the election or defeat of a candidate. The most common tactic for political advertisers is to include some language calling on the viewer to respond to the ad by doing something other than voting, such as calling the sponsor for more information or calling the candidate criticized to complain about her views. *See* Richard Briffault, *Issue Advocacy; Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751, 1759-60 (1999).[20]

The genesis of such technically evasive fund-intensive activity – what Justice Kennedy has accurately labeled as "covert speech," *see Nixon v. Shrink Missouri PAC, supra*, 528 U.S. at 406 – is this Court's decision in *Buckley* construing FECA's provision requiring the disclosure of the sources of funds for independent expenditures.[21] In footnote, the Court referred to "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' "Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *See id.* at 80 n. 108, *cross-referencing id.* at 44 n. 52. These have come to be referred to as the "magic words" of express advocacy.

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[20] "By combining sharp criticism of a candidate with an exhortation to call the sponsor or the candidate criticized," *id.* at 1760, the sponsors of these ads can effectively participate financially in federal elections while avoiding federal campaign finance disclosure. *See also McConnell v. FEC, supra*, 251 F. Supp.2d at 304 (opinion of Henderson, J.); *id.* at 800 (opinion of Leon, J.).

[21] The Court construed the disclosure requirement "to reach only funds for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.

After *Buckley* and *MCFL*,[22] only expenditures that contain words of express advocacy would be subject to federal disclosure requirements or the prohibition on the use of corporate or union treasury funds. Other campaign advertising has been labeled issue advocacy – even though many so-called issue ads contain no discussion of issues at all, but instead focus on the characters or personalities of the candidates for imminent election. At the time *Buckley* was decided, Congress and the Court had little experience in evaluating campaign advertising, or with campaign ads masquerading as issue discussions. Even when *MCFL* was decided a decade later, issue ads were relatively rare.

All that changed in the 1990s. "Beginning in 1996 corporations, unions, and interest groups . . . began large-scale use of their treasury funds to sponsor issue advertisements." *McConnell v. FEC, supra*, 251 F. Supp.2d at 305 (opinion of Henderson, J.). In the 1996 election cycle a total of approximately $135 million to $150 million was spent on issue advocacy advertising. By the 1999-2000 election cycle that figure had risen to more than $500 million. *Id.* at 304. *See also id.* at 527 (opinion of Kollar-Kotelly, J.); *id.* at 879 (opinion of Leon, J.). Corporate and union treasury funds, otherwise barred from federal elections, financed much of this. *See id.* at 304-05 (opinion of Henderson, J.); *id.* at 526-29 (opinion of Kollar-Kotelly, J.); *id.* at 879-80 (opinion of Leon, J.).

In addition to enabling corporations and unions to flout the ban on their use of treasury funds in federal elections, the rise of issue advocacy has frustrated Congress's efforts, approved by this Court, *Bellotti, supra*, 435 U.S. at 792 n. 32, to inform voters concerning the sources of campaign ads. The court below found that "politicians and general strategists" as well as the voters "have difficulty determining the source of these commercials." *Id.* at 229 (per curiam).[23] Indeed, two of *plaintiffs'* experts agreed that issue advocacy frustrates the goal of an informed electorate.[24] The rise of unregulated issue advocacy denies the voters vital information and renders them less capable of casting effective and intelligent ballots.

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[22] In *MCFL*, the Court held that the ban on corporate and union independent expenditures in federal elections must also be interpreted to apply only to express advocacy. *See* 479 U.S. at 249.

B. Congress Found That Buckley's Express Advocacy Test Fails to Distinguish Between Campaign-Related Communications and True Issue Speech and Must Be Replaced if Disclosure Requirements and the Ban on the Use of Corporate and Union Treasury Funds Are to Be Meaningful

As Senator Jeffords, a principal author of the electioneering communication provision, told to the Senate, "the 'magic words' standard created by the Supreme Court in

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[23] Without a disclosure requirement, how are voters to know that Citizens for Better Medicare – which spent $65 million in the 2000 election, a full 13% of all issue advocacy that year, *id.* at 304 (opinion of Henderson, J.) – is "an arm of the Pharmaceutical Research and Manufacturers Association"? *Id.* at 232 (per curiam, *quoting* Annenberg Public Policy Center Report). Similarly, how were voters to know that the "Republicans for Clean Air" who spent $2 million on ads praising one candidate and attacking his opponent during the 2000 Republican primaries were actually "two brothers, both of whom were strong financial supporters of then Governor Bush and one of whom was an authorized fundraiser for the Bush presidential campaign"? *Id.* at 232 (per curiam)(quotation omitted).

[24] *Id.* at 231 (finding that according to plaintiffs' expert Professor Sidney Milkis the names of issue advocacy advertising sponsors "did little to tell viewers who the sponsors of these messages were; indeed, in some cases they were misleading"); *id.* at 233 (finding that plaintiffs' expert Professor Raymond LaRaja "agrees that the candidate-centered issue advocacy of the Republicans for Clean Air highlights the fact that this technique can be used to influence federal elections without complying with FECA's disclosure provisions.").

1976 has been made useless by the political realities of modern political advertising. Even in candidate advertisements," he noted, "only 10 percent of the advertisements use the 'magic words.' Parties' and groups' use of the magic words is even smaller, with as few as 2 percent of their ads using the magic words." 148 Cong. Rec. S2117 (Mar. 20, 2002).[25] In the 2000 election, a half-billion dollars was spent on federal election campaign advertising that, because of the express advocacy/magic words test, was exempt from disclosure requirements or the ban on the use of corporate and union treasury funds. As each member [26] of the three-judge court below agreed, the express advocacy/magic words test fails utterly to distinguish between campaign-related communications and non-campaign-related communications.[27]

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[25] His principal co-sponsor, Senator Olympia Snowe explained that issue advertisements "constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws." 147 Cong. Rec. S2455 (Mar. 19, 2001).

[26] *See* 251 F. Supp.2d at 303 (opinion of Henderson, J.) ("Few candidate or party advertisements use words of express advocacy. In the 1998 election cycle only four percent of ads sponsored by candidates used words of express advocacy. In 2000 only 11.4 per cent of ads sponsored by candidates and only 2.2 percent of ads sponsored by political parties used words of express advocacy."); *id.* at 529 (opinion of Kollar-Kotelly, J.) ("it is neither common nor effective to use the 'magic words' of express advocacy in campaign advertisements"); *id.* at 532 ("Present and former officeholders and candidates likewise provide uncontroverted testimony that 'magic words' do not distinguish pure issue advertisements from candidate-centered issue advertisements'); *id.* at 874 (opinion of Leon, J.) ("The record convincingly demonstrates that the overwhelming majority of modern political advertisements do not use words of express advocacy, whether they are financed by candidates, political parties, or other organizations. As a result of this development, Congress found that FECA, . . . as defined by *Buckley*, was no longer relevant to modern political advertisement.")

Most candidly, the former chair of plaintiff NRA Political Victory Fund stated in a speech that the distinction between express advocacy and issue advocacy: "is built of the same sturdy material as the emperor's new clothes": "Everyone sees it. No one believes it. It is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." She added that when the NRA praised Congressman Hostettler for his position on gun laws and asked people to call a telephone number to thank him for his position, " Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did." 251 F. Supp.2d at 536-37 (opinion of Kollar-Kotelly, J.) (*quoting* Tanya K. Metaksa); *id.* at 878-79 (opinion of Leon, J.) (*quoting* same statement). Absent a new definition of campaign-related communications, FECA's well-justified disclosure requirements and the ban on the use of corporate and union treasury funds will be completely nullified.

C. Congress's Definition of Electioneering Communications is Clear, Objective and Narrowly-Drawn to Achieve the Goals of Assuring the Disclosure of Those Communications Most Likely to Have an Impact on a Federal Election and of Excluding Corporate and Union War Chests from Federal Elections

BCRA's definition of electioneering communication consists of a four-part test that looks to the medium, content, timing, and geographical placement of the advertisement. Congress used its expertise to develop a test both clear and objective, and narrowly-tailored to the Act's goals of voter information and enforcement of the ban on corporate and union treasury participation in federal elections.

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[27] Indeed, as both Republican and Democratic media consultants testified, "it is rarely advisable to use such clumsy words as 'vote for' or 'vote against." *Id.* at 874-75 (*quoting* Republican political consultant Douglas L. Bailey). *Accord, id.* at 875 (*quoting* Democratic political media consultant Raymond Strother).

First, the test is clear, unlike the vague definition of "expenditure" in FECA that gave rise to *Buckley*'s express advocacy construction. It is quite straightforward to determine that an ad is broadcast, refers to a clearly identified candidate for federal office, is aired in the district or state in which a candidate for the House or Senate is running, and is aired during the immediate pre-election period. Second, the test is objective, requiring no open-ended probing of the subjective intentions of the sponsor or the subjective perceptions of viewers. Third, the test is narrowly drawn to focus only on those advertisements, like expensive broadcast ads,[28] most likely to have an impact on an election, and thus to justify the disclosure requirement and the application of the ban on corporate and union treasury funds.[29]

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[28] The media prong of the definition – regulating only broadcast, cable, and satellite communications – targets only those messages that Congress determined were most likely to have an impact on voters' electoral decision-making, and fits with BCRA's provision setting the dollar threshold for disclosure concerning electioneering communications at $10,000, *see* BCRA § 201(a), adding new subsection (f)(1) to FECA § 304, 2 U.S.C. § 434(e). This portion of the definition spares from disclosure the low-cost, grass-roots types of individual participation focused upon by the Court's decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

[29] The targeting requirement limits regulation to only those ads that are aired to a candidate's electoral constituency, thus, eliminating all ads that can have no effect on voting decisions. And, the requirement that an ad refer to a clearly identified candidate for federal office eliminates all ads that make no references to candidates. Although issue discussions in such

Finally, the bright-line temporal test narrows the scope of regulation to targeted broadcast messages that clearly refer to candidates and that are funded to air only in the period immediately preceding the candidate's election. Experienced Members of Congress knew from their own in-depth electoral activity the particular likelihood that such broadcast messages will impact on the voters' upcoming electoral decision.[30] Thus, the temporal test not only narrows the scope of regulation but is also crucial to the determination that the affected costly broadcast advertising is, in fact, electioneering.

To be sure, the exact temporal line for the imminent pre-election period is debatable. But, this is precisely the sort of question, like the dollar threshold for disclosure or the dollar ceiling on contributions, for which this Court deems deference to Congress appropriate. See *Buckley, supra,* 424 U.S. at 30, 83. Moreover, Congress adopted the 60 day/30 day test from a fine model: its self-imposed rules governing its own franked mass communications with the public.[31] Congress's judgment

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ads could have an indirect effect on voting decisions, in many cases the impact is likely to be attenuated, so Congress appropriately excluded such ads from regulation. Conversely, ads that do refer to candidates, even if they also discuss issues, very likely affect a voter's consideration of whether or not to vote for that candidate in the imminent election.

[30] The temporal test draws on the widely-shared view in both the political science, and practical political, communities that during the days and weeks immediately preceding election day, highly funded advertising focuses increasingly on the election.

[31] Long before BCRA, Congress concluded that, in the immediate pre-election period, it should preclude its own members from using their franking privilege on mass mailings. Moreover, BCRA's definition of the pre-election period is actually narrower and less burdensome than the restrictions Congress has imposed on its own franking. Because Members imposed this ban solely on themselves one-sidedly and not on non-officeholding candidates who have no frank, the 60 day/30 day line from

concerning the temporal scope of the immediate pre-election period is also amply supported by the extensive evidence in the record [32] indicating a dramatic shift in the nature of high-cost political advertising in the defined pre-election period.

With the temporal test, the statutory definition of electioneering communication is clearly and narrowly tailored to the compelling governmental interests of providing for effective disclosure of the sources of funding of communications likely to have an impact on federal elections, and of assuring that corporate and union treasury funds are not used to pay for communications likely to have an effect on federal elections. Corporations and unions that wish to broadcast communications concerning political issues, even during the pre-election period, are free to do so, provided they either skip clear references to the federal candidates imminently on the ballot, or use funds voluntarily contributed by individuals to separate segregated funds expressly for that purpose. Avoiding the use of candidates' names poses no difficulty for effective advocacy that is truly about issues.[33]

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that context carries a uniquely potent imprimatur of objective Congressional in-depth expertise about elections and expensive mass communications. And, under 39 U.S.C. § 3210(a)(6), the ban on the use of the Congressional frank for mass mailings begins to run 90 days before both a primary and a general election for House members, and 60 days before both a primary or a general election for Senators when they are standing for election.

[32] Most interest group advertising outside the pre-election period does not refer to federal candidates or officeholders, whereas nearly all political advertising that actually mentions federal candidates or officeholders is aired in the defined pre-election period. *See* 251 F. Supp.2d at 305 (opinion of Henderson, J.); *id.* at 563 (opinion of Kollar-Kotelly, J.); *id.* at 889 (opinion of Leon, J.).

[33] Republican political consultant Douglas Bailey, who has extensive experience in developing both electioneering issue ads and true issue ads, testified that with respect to true issue ads "it was never necessary for us to reference specific candidates for federal office in order

IV. BCRA'S "STAND BY YOUR AD" PROVISION, SECTION 311, IS NARROWLY TAILORED TO SERVE VITAL PUBLIC INTERESTS IN EFFECTIVE DISCLOSURE OF BROADCAST CAMPAIGN ADVERTISING

Section 311 of the BCRA, the "Stand By Your Ad" provision, makes a specific set of improvements on the FECA's existing disclosure provision for candidate-funded advertisement expenditures, 2 U.S.C. § 441d. Its key subpart simply improves the traditionally-required candidate self-identification of sponsorship by having him broadcast this in a format that is effective – namely, with brief use of his own image and voice. This should not be considered constitutionally controversial. In the district court, the challengers only questioned section 311 as to one particular aspect, namely, its inserting a cross-reference to BCRA's new term "electioneering communications" as to the scope of its application, the issue previously discussed in this brief.[34] The challengers contested another provision about disclosures, section 305, having to do with negative advertising; however, that section is not connected in any way to section 311, and the challenges made to that section simply cannot be made to the completely content-neutral section 311. This brief provides a fuller treatment of section 311 primarily because Rep. David Price, one of the two principal amici Members of the House of Representatives filing this brief, was the chief sponsor seeing section 311 through from introduction to passage, making this brief a superior vehicle for explicating this valuable provision.[35]

A. SECTION 311 MAKES TRADITIONAL DISCLOSURES FOR CANDIDATE-FINANCED BROADCAST ADS MORE EFFECTIVELY

The consistent legal tradition of disclosure of candidate broadcast advertising's sponsorship goes back in general to the Communications Act's origins in 1927 and 1934, as refined in 1944 regulations and a 1960 statutory amendment. *Loveday v. Federal Communications Commission*, 707 F.2d 1443, 1449-57 (D.C. Cir. 1983)(reciting history of FCC political advertising disclosure requirement). Separately, disclosure requirements for candidate (and independent) advertising expenditures in various media also developed as part of the campaign finance disclosure requirements, *Buckley v. Valeo*, 424 U.S. at 61-64.[36]

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to create effective ads." 251 F. Supp.2d at 561 (quoted in opinion of Kollar-Kotelly, J.); *id.* at 884 (quoted in opinion of Leon, J.). Similarly, Democratic consultant Raymond Strother testified that the many true issue ads he had made in his career "did not mention any candidates by name. Indeed, there is usually no reason to mention a candidate's name unless the point is to influence an election." *See id.* at 882 (quoted in opinion of Leon, J.) *id.* at 561 (partially quoted in opinion of Kollar-Kotelly, J.).

[34] Section 311 extended the disclosure obligations to "an electioneering communication (as defined in section 434(f)(3) of this title." 2 U.S.C. sec. 441d(a). This does not require addressing by this section of the brief (rather, the previous section of the brief about, overall, the issues of electioneering communications, should be considered as addressing that issue as applied to this section as well).

[35] Rep. Price originally introduced his "Stand by Your Ad" bill in 1997, and it was included in the contemporary version of the campaign finance reform bill when this came to the House floor in 1998. See 144 Cong. Rec. H3777-78 (May 22, 1998)(Rep. Price). It was reintroduced and/or included in reform bills in subsequent Congresses. 145 Cong. Rec. E26 (Jan. 7, 1999)(Rep. Price) and H8255-56 (daily ed. Sept. 14, 1999)(Rep. Price); 147 Cong. Rec. E5 (Jan. 31, 2001)(Rep. Horn); 148 Cong. Rec. H426 (Feb. 11, 2002)(Rep. Price). By contrast, Section 305 was developed by Senate sponsors. This is noted simply to clarify that the two provisions are separate and that this brief, filed by bipartisan Representatives, is a vehicle for discussing the House-originated, not Senate-originated, provision. Parenthetically, the district court did not rule on the challenge to section 305, finding it was not yet ripe.

[36] Ultimately, the FEC and the FCC coordinated the broadcast campaign advertising disclosure requirements in 1978. *KVUE v. Moore*, 709 F.2d 922, 933-34 (5th Cir. 1983), *aff'd*, 464 U.S. 1092 (1984). So, unlike the context of *McIntyre v. Ohio Elections Commission*, *supra*, the case of an anonymous leafletter opposing a local-ballot school tax levy, no

So, as amended by section 311, section 441d(a) requires that "Whenever a political committee makes a disbursement for the purpose of financing" any ad through specified media, "if paid for and authorized by a candidate . . . [it] shall clearly state that the communication has been paid for by such . . ." Section 441d's constitutionality[37] has never been seriously questioned. However, section 441d[38] operated with a notable flaw: the format for identification was the "matchbook-sized" or "postage stamp-sized" picture, which simply failed at communicating to the electorate. So, the "Stand By Your Ad" provision first and foremost makes the candidate broadcast an effectively visible and audible self-identification.[39]

B. SECTION 311'S KEY SUBPART LETS CANDIDATES CHOOSE THEIR OWN PLACEMENT AND FORMAT FOR DISCLOSURES

Several aspects of this "Stand By Your Ad" provision warrant notice as obviating various kinds of constitutional questions. Like the pre-BCRA version of section 441d, the "Stand by Your Ad" provision is triggered entirely by the candidate's financing, absolutely without anything to do with advertising content. And, the "Stand by Your Ad" provision was written to be separate from, and not embroiled in, the issues regarding the main provisions of the BCRA.[40]

Furthermore, section 311 raises no concern about infringing candidates' stylistic freedom with respect to their advertising content. It does not oblige candidate advertising[41] to speak about issues, to use a "talking heads" format, or to take any particular tone. Like a self-identifying photograph on a passport or a driver's license, the candidate's image identifies him with something neither disparaging nor opprobrious, just his decision to sponsor advertising.

Compared to the key subpart of "Stand By Your Ad" concerning self-identification in candidate-sponsored broadcast advertising, the rest of the provision is complementary in nature. The pre-BCRA § 441d applied to independently sponsored broadcast advertising, requiring an independently sponsored advertisement to disclose that it was not authorized by a candidate. As interpreted by the FEC, Section 311 merely makes this disclosure more effective by using "a representative of the political committee or other person [paying for the ad]," 2 U.S.C. § 441d(d)(2), for their choice of either a brief visual

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tradition of anonymity has ever applied to broadcast candidate-sponsored campaign advertising.

[37] *See, e.g., McIntyre,* at 354 n.18 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected")(citing *Buckley*); *KVUE v. Moore, supra*, 709 F.2d at 937 (a "sponsorship identification requirement . . . . does not violate the first amendment").

[38] 47 C.F.R. § 73.1212 (disclosure need only be "four percent" as high as screen); Kathleen Hall Jamieson, Dirty Politics: Deception, Distraction, and Democracy 227 (1992)(ad had "a matchbook-sized picture of [the candidate] . . . . to meet the FCC-stipulated condition for a lower purchase rate for ad time."); 148 Cong. Rec. H426 (Feb. 11, 2002)(Rep. Price)("postage stamp-sized picture").

[39] Section 311 requires a television ad statement "the candidate has approved" the ad "shall be conveyed by—(I) [a] . . . view of the candidate . . ., or (II) the candidate in voice-over, accompanied by a clea[r] . . . image . . .; and (ii) . . . in writing . . . [for] 4 seconds." 2 U.S.C. § 441d(d)(1)(B).

[40] As originally introduced (see the legislative history previously cited), "Stand by Your Ad" was a free-standing bill. Its origins and purpose thus kept it apart from the debates over the main provisions.

[41] When the candidate self-identifies as having authorized his advertisement, he has a free and unfettered choice whether this is completely integrated into the rest of the advertisement, such as by a candidate who speaks or acts various parts of his advertising message and includes this disclosure in what he says, or is completely separated at the end, where the written statement about authorization is placed.

image or a voice-over.[42] This means that those receiving the ad see or hear, by contrast[43] with the candidates pictured or heard in candidate-sponsored advertisements, that this is not candidate-sponsored. Overall, section 311 is a valuable provision that, like the rest of BCRA, solves problems in the effectiveness of the prior campaign finance laws.

V. CONCLUSION

For these reasons, amici ask the Court to uphold BCRA as constitutional.

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[42] The FEC has promulgated regulations about the image and the voice-over in independent advertisements. "Unlike the requirements for television communications authorized by candidates, the audio statement required for television communications that are not authorized by candidates can be accomplished through voice-over *without any requirement of a photograph* or similar representation of the speaker." 67 Fed. Reg. 76967 (Dec. 13, 2002)(emphasis added). So the independent advertiser need not even supply any visual image at all, just voice-over disclosure.

[43] Those paying for an independent advertisement have freedom in choosing their "representative" for the brief disclosure image or voice-over. And, they have absolutely no obligation whatsoever to identify, visually or otherwise, a candidate they support. The district court's per curiam opinion (slip op. at 169 & n.101) insightfully questioned the challengers' inaccurate suggestion that "political ads [must] contain information identifying the candidate supported by the communication." The independent advertiser simply notes the absence of authorization by "any candidate" (pursuant to section 441d(a)(3)), doing so either by having their representative viewed as this is said, or having that representative say this in voice-over.

Respectfully submitted,

Charles Tiefer
Professor, University of
Baltimore School of Law
1420 North Charles Street
Baltimore, MD 21201
(301) 951-4239

Jonathan W. Cuneo
Cuneo Waldman & Gilbert
317 Massachusetts Ave. N.E.
Washington, D.C. 20002
(202) 789-3960

Richard Briffault
(Counsel of Record)
Joseph P. Chamberlain
Professor of Legislation
Columbia University
School of Law
435 West 116th Street
New York, N.Y. 10027
(212) 854-2638

Counsel for Amici Curiae
August 5, 2003

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Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

◆

On Appeal From The United States District Court For The District Of Columbia

◆

BRIEF OF THE STATES OF IOWA, VERMONT, CONNECTICUT, ARIZONA, COLORADO, ILLINOIS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MAINE, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW YORK, OKLAHOMA, RHODE ISLAND, WASHINGTON, WISCONSIN, AND THE COMMONWEALTH OF PUERTO RICO AND THE U.S. VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF APPELLEES

◆

THOMAS J. MILLER
Iowa Attorney General
THOMAS ANDREWS
Assistant Attorney General
Hoover Bldg., 2nd Floor
Des Moines, IA 50319
(515) 281-8373

WILLIAM H. SORRELL
Vermont Attorney General
*BRIDGET C. ASAY
Assistant Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3181

RICHARD BLUMENTHAL
Connecticut Attorney General
55 Elm Street
Hartford, CT 06141
(860) 808-5318

**Counsel of Record*

[Additional Counsel Listed on Inside Cover]

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OR CALL COLLECT (402) 342-2831

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TERRY GODDARD
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007

KEN SALAZAR
Attorney General of Colorado
1525 Sherman Street,
7th Floor
Denver, CO 80203

ALBERT B. CHANDLER, III
Attorney General of
Kentucky
Capitol Building, Suite 118
700 Capitol Avenue
Frankfort, KY 40601

RICHARD P. IEYOUB
Attorney General of
Louisiana
One American Place
301 Main Street, Suite 600
P.O. Box 94005
Baton Rouge, LA 70804

THOMAS F. REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

G. STEVEN ROWE
Attorney General of Maine
State House, Station 6
Augusta, ME 04333

MIKE HATCH
Attorney General of
Minnesota
State Capitol, Suite 102
St. Paul, MN 55155

MIKE MOORE
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205

JEREMIAH (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General of Montana
215 N. Sanders
P.O. Box 201401
Helena, MT 59620

ELIOT SPITZER
Attorney General of
New York
120 Broadway, 25th Floor
New York, NY 10271

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Blvd., Suite 112
Oklahoma City, OK 73105

PATRICK LYNCH
Attorney General of Rhode
Island
150 S. Main Street
Providence, RI 02903

CHRISTINE O. GREGOIRE
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504

PEGGY LAUTENSCHLAGER
Attorney General of
Wisconsin
17 W. Main Street
P.O. Box 7857
Madison, WI 53707

ANABELLE RODRÍGUEZ
Secretary of Justice
Commonwealth of
Puerto Rico
P.O. Box 9020192
San Juan, P.R. 00902

IVER A. STRIDIRON
Attorney General
United States Virgin Islands
Department of Justice
48B-50C Kronprindsens
Gade
GERS Bldg., 2nd Floor
St. Thomas, VI 00802

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INTEREST OF THE AMICI CURIAE

The Amici States[*] bring two unique interests to this litigation. First, the States as sovereigns have an abiding interest in the constitutional principles that govern the regulation of elections and campaign finance. Amici bear substantial responsibility for conducting and policing elections. The very legitimacy of state governments is implicated when citizens lose faith in their elections and elected officials. To combat this, virtually every State in the Union has pursued different types of campaign finance reform in a continuing effort to ensure the integrity of our democratic processes. Just as *Buckley v. Valeo,* 424 U.S. 1 (1976), has framed the debate on campaign finance legislation at both the state and federal level for the last quarter-century, the decision in this case will also have a profound impact on both state and federal election law for many years to come.

Second, as dual sovereigns and partners in our federal system, the Amici have a keen interest in protecting the proper division of power between the federal and state governments. The plaintiffs in this litigation contend that Congress has overstepped its bounds in the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA" or "the Act"). Yet, at the same time that plaintiffs complain about federal legislation encroaching on the States, they ask this Court to adopt a restrictive interpretation of the First Amendment that would call into question both state and federal campaign finance laws. The Amici States disagree strongly with the federalism arguments advanced by the plaintiffs in this case. The potential threat to state authority in this context comes not from Congress but from plaintiffs' theory of the First Amendment, which, if adopted, would greatly limit the ability of the States to enact meaningful campaign finance reforms.

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[*] Joined by the Commonwealth of Puerto Rico and the U.S. Virgin Islands.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted BCRA, it recognized that significant campaign finance reform was essential to the health of our national democracy. Although the plaintiffs posit that the Act's key provisions violate the First Amendment and exceed Congress's authority, they are mistaken. BCRA is a constitutional exercise of Congress's power to regulate federal elections and ensure the integrity of federal officeholders.

The Amici States are particularly troubled by the plaintiffs'[1] effort to derail Congress's crucial reform effort by invocation of "federalism." The Amici have a special expertise in the area of federalism, and they pay close attention to the constitutional division of authority between the federal and state governments. In the view of Amici, the plaintiffs' federalism arguments are wholly unsupportable.

Congress has broad authority to regulate activities that bear a reasonable relationship to federal elections. The Court has long recognized the power delegated to Congress, *see* U.S. Const. art. I, § 4, to prescribe regulations for federal elections and to protect the integrity of federal officeholders. BCRA is tailored to reach those campaign activities that are subject to federal regulation – and to reach no further.

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[1] In this context, "plaintiffs" refers to appellants/cross-appellees "Senator Mitch McConnell et al.," and the "political parties." The briefs filed by these two sets of plaintiffs devote substantial space to arguing that certain elements of BCRA exceed Congress's authority, violate the Tenth Amendment, or otherwise run afoul of principles of federalism. *See* Br. for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 26-35; Br. of Political Parties at 78-91.

Congress has not exceeded its delegated constitutional authority and has not regulated purely local matters or intruded on the sovereignty of the States.

Eliminating the corrupting influence of soft money in federal elections does not intrude on state power but, to the contrary, benefits both the States and their citizens. The States and their citizens rely on the integrity and fidelity of federal office holders. Just as importantly, state and local governments suffer from the disaffection and alienation caused by the perception that, in politics, "money talks." Even more than the federal government, state and local governments depend upon an active, engaged citizenry to share in the work of governing. By addressing the causes of alienation and cynicism, BCRA will foster participation and political discourse at both the state and federal level.

The combination of First Amendment and federalism arguments advanced by the plaintiffs is troubling for another reason. Because the States share with Congress the responsibility for ensuring the integrity of elections, the Court's decision in this case will not only decide the fate of BCRA. It will also govern the actions of state legislators across the nation as they pursue efforts to regulate and reform the financing of elections. Although plaintiffs assert allegiance to principles of federalism, they do not truly seek to preserve the authority of the States to legislate in this area. Rather, they seek a constitutional ruling from this Court that would limit state campaign finance laws and preclude state innovation and experimentation. This Court should not adopt such a restrictive view of the First Amendment. The political branches at the state and federal level should be

afforded the latitude they need to protect the integrity of their respective electoral processes.

ARGUMENT

I. BCRA Is A Constitutional Exercise Of Congress's Authority To Regulate Federal Elections And Federal Officeholders.

In our federalist system of government, the federal and state governments share the authority to govern. As a result, the States retain substantial sovereign powers. *See, e.g., Printz v. United States*, 521 U.S. 898, 918-19 (1997) (Constitution establishes a system of dual sovereignty, in which the States retain a "'residuary and inviolable sovereignty'") (quoting *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)). As intended by the Founders, *see, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991), the States guard those powers against encroachment by the federal government. But not *all* powers of governance have been – or should be – reserved to the States. The Constitution rightly assigns certain powers to Congress, including the power to regulate federal elections and protect the integrity of federal officeholders. *See* U.S. Const. art. I, § 4; *Burroughs v. United States*, 290 U.S. 534, 545 (1934). BCRA falls comfortably within this authority granted to Congress.

The "federalism" challenges to portions of the Act, raised by plaintiffs and some of their amici, are misplaced. First, plaintiffs' cramped view of Congress's authority is inconsistent with this Court's precedents. Congress may regulate activities that bear a reasonable relationship to federal elections and may pass legislation designed to protect the integrity of federal officeholders. The power of Congress in this area is not automatically limited by the unavoidable impact such regulations may have on state and local elections. Second, BCRA does not exceed the authority granted to Congress. Each of the challenged provisions of the Act regulates activities related to federal elections and federal officeholders. Finally, BCRA does not "federalize" the conduct or the financing of state elections. Congress carefully tailored BCRA to reach activities that are related to federal elections and officeholders while leaving intact the sovereign authority that States exercise over state and local elections.

A. Congress has the power to regulate matters related to federal elections and to ensure the integrity of federal officeholders.

As the necessary starting point for the analysis of the power of Congress to enact BCRA, the Court must first establish the scope of federal authority in this area. Much of this work has already been done, however. The Court's precedents establish that Congress has broad authority to regulate matters relating to federal elections, as well as activities that pose a risk of corrupting or appearing to corrupt federal candidates and officeholders.

It is not surprising that by the time of *Buckley v. Valeo* the Court described the power of Congress to regulate federal elections as "well-established." 424 U.S. 1, 13 (1976). Well over one hundred years ago, the Court acknowledged that Congress has "a general supervisory power over the whole subject" of federal elections. *Ex parte Siebold*, 100 U.S. 371, 387 (1879). Congress unquestionably may provide a "complete code for [federal] elections," including "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). The power of Congress in this area is not circumscribed or narrow; rather, "[t]he power of Congress . . . is paramount, and may be exercised at any time, and to any extent which it deems expedient." *Siebold*, 100 U.S. at 392.

Numerous decisions of the Court confirm that this "paramount" authority of Congress includes the power to ensure the integrity of federal elections and officeholders and to legislate against the potentially corrupting influence of money in politics. The reasoning of the Court in *Ex parte Yarbrough*, 110 U.S. 651, 657-58 (1884), still has force today: "If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption." Similarly, in *Burroughs v. United States*, the Court found no doubt that Congress had the power "to pass appropriate legislation to safeguard [a presidential] election from the improper use of money." 290 U.S. at 545. To say otherwise would "deny to the nation in a vital particular the power of self-protection." *Id.*; *see also Buckley v. Valeo*, 424 U.S. at 257(acknowledging the authority of Congress to "protect the elective processes against the 'two great natural and historical enemies of all republics, open violence and insidious corruption'") (White, J., concurring in part and dissenting in part) (quoting *Yarbrough*, 110 U.S. at 658).

The plaintiffs largely disregard the substantial body of case law supporting the authority of Congress to regulate federal elections. Indeed, they fail to acknowledge or articulate any standard for measuring the extent of Congress's authority to regulate federal elections. Instead, plaintiffs merely assert that Congress lacks the power to regulate state elections. *See* Br. of Political Parties at 79, 81-82; Br. for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 27-30. In so doing, plaintiffs ask and answer the wrong question. The issue posed in this case is not whether Congress may regulate state elections, but whether Congress may regulate federal elections and officeholders in a manner that may affect some state and local campaign activity.

Once properly posed, to paraphrase Justice Miller, the 'question answers itself.' *Cf. Yarbrough*, 110 U.S. at 662. Given the concurrent timing of federal and state elections in most jurisdictions, it would be impossible for Congress to act *without* having some impact on state elections.[2] In *Siebold*, the Court acknowledged as much, declaring that a State's decision to hold concurrent elections does not deprive Congress "of the right to make regulations in reference to [federal elections]." 100 U.S. at 393. The Court suggested that the power of Congress might not extend to matters "having *exclusive* reference to the election of State or county officers," *id.* (emphasis added), thus implicitly recognizing that Congress does have primary authority over matters of shared federal and state interest. In *Yarbrough*, the Court once again rejected the argument that a concurrent state election in any way diminishes the authority of Congress to regulate the federal election. 110 U.S. at 661-62. Neither *Siebold* nor *Yarbrough*, nor any of the Court's precedents, support the proposition that Congress must refrain from regulating matters related to federal elections and officeholders whenever those regulations could also impact state and local campaign activities.

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[2] The impact of federal regulations on state and local campaign activity is longstanding. Prior to BCRA, federal law required the political parties to allocate their spending for many campaign activities between federal and nonfederal dollars. *See* 11 C.F.R. § 106.5 (2002).

That is not to say that the power of Congress to regulate elections is so unfettered that it could swallow up the concomitant authority of States. In other areas, the Court has been hesitant to adopt expansive views of Congressional authority that would effectively remove "any limitation on federal power." *United States v. Lopez*, 514 U.S. 549, 564 (1995); *see also United States v. Morrison*, 529 U.S. 598 (2000). BCRA does not raise this concern, however, because it does not depend upon an expansive interpretation of federal power. As argued below, the Act reaches only those activities that are related to federal elections and officeholders, and it does not intrude on state sovereignty. BCRA thus respects the "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18.

B. BCRA is an appropriate exercise of Congress's authority to regulate federal elections.

Once the scope of Congress's authority to regulate federal elections and protect the integrity of federal officeholders is understood, plaintiffs' federalism arguments are easily dismissed. Plaintiffs suggest that BCRA regulates matters unconnected to federal elections and undermines the authority of States to regulate state and local elections. They consistently overstate the impact on state elections while minimizing the clear basis for federal authority over the regulated activities. The few specifics they cite illustrate the weakness of their arguments.

The national party "soft money" ban. Title I of BCRA prohibits the national parties from raising and spending any nonfederal money. BCRA, tit. I, sec. 101(a), § 323(a), 116 Stat. at 82. Plaintiffs complain that Congress exceeded its authority under the Elections Clause by prohibiting national parties from raising or spending soft money for nonfederal purposes, such as supporting candidates for state and local offices. The record in this case, however, demonstrates the significant federal interest in curtailing the ability of the national parties to raise and spend soft money. Close ties exist between the national party committees and the elected federal officials who run the committees and raise significant sums of soft money on their behalf. *See, e.g.*, Kollar-Kotelly, 548sa-562sa; Leon, 1243sa-1247sa. The record illustrates the manner in which soft money donations to the national parties gain access for donors to federal candidates and officeholders. *See, e.g.*, Leon, 1265sa-1271sa (lobbyists, former Members of Congress, business leaders, and donors believe that soft money donations to the parties increase access to officeholders); *id.* 1271sa-1276sa (party donation programs show that increased access corresponds with larger donations); Kollar-Kotelly, 567sa (evidence shows that large contributions provide donors access to federal lawmakers). The public, not surprisingly, believes that large donors to the parties have a major impact on the decisions of elected federal officials. Leon, 1291sa.

These concerns do not go away merely because the national party committees are nominally raising money for nonfederal activities. Money is fungible. If the party committees are able to raise and use soft money for some "nonfederal" purposes, they will have more hard money available to transfer to or spend in support of federal candidates and officeholders. For this reason, a soft money contribution to a national party committee–although earmarked for a nonfederal purpose–may nonetheless confer a benefit on federal candidates and officeholders. The ban on national parties raising and spending soft money prevents donors from circumventing contribution limits in this way. *Cf. Buckley v. Valeo*, 424 U.S. at 38 (upholding $25,000 limit on total contributions during an election cycle "to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party"). This provision of BCRA thus protects the integrity of federal officeholders and elections.

The soft money ban on federal candidates and officeholders. Title I similarly prevents federal candidates and officeholders from raising or spending soft money in connection with any election, state or federal. BCRA, tit. I, sec. 101(a), § 323(e), 116 Stat. at 84. Although federal officeholders remain free to solicit funds on behalf of state and local candidates, any sums raised must comply with federal contribution limits. Here, the federal interest is crystal clear.[3] Past

experience shows that allowing federal officeholders to raise soft money leads to the appearance of corruption, because the donors gain, or appear to gain, increased access to federal officials. The purpose for which the soft money is raised does not matter. If a federal officeholder solicits soft money contributions, both potential donors and the public must reasonably assume that the contributions will benefit that officeholder in some way. *See* Kollar-Kotelly, 566sa (federal officeholders value donations to state political parties "almost as much as donations made directly to their campaigns"). The benefit to the federal officeholder is sufficient to lead to a risk of corruption or the appearance of corruption.

Restrictions on the use of soft money to fund "federal election activity" conducted by state and local parties. In addition to prohibiting the national parties and federal candidates and officeholders from raising or spending soft money, Title I restricts the use of soft money by state and local parties – but only to the extent that the money is used for "federal election activity." BCRA, tit. I, sec. 101(a), § 323(b), 116 Stat. at 82-83.[4] Federal election activities include communications that support or attack federal candidates as well as voter registration activity within

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[3] Judge Henderson addressed this issue below and held that Congress has the power to regulate the solicitation and transfer of nonfederal funds by federal candidates and officeholders. Henderson, 452sa n.174.

[4] State and local parties and candidates may either use federal money for these purposes, or a mix of federal dollars and nonfederal dollars raised pursuant to the "Levin Amendment," BCRA, tit. I, sec. 101(a), § 323(b)(2), 116 Stat. at 83. The Levin Amendment loosens the soft money restrictions somewhat for voter registration, voter identification, and get out the vote activities.

120 days of a federal election, and voter identification, get out the vote, and party promotion activities conducted in connection with a federal election. BCRA, tit. I, sec. 101(b), § 301(20)(a), 116 Stat. at 85-86. Notably, although plaintiffs challenge these restrictions, they do not dispute that these activities are related to federal elections.[5]

In fact, all of these activities significantly affect federal elections and are subject to federal regulation. When parties register voters, and find ways to help voters reach the polls, the voters cast ballots for federal candidates. When voters are influenced in the weeks before a federal election by signs and campaign ads that urge them to "Vote Democratic" or "Vote Republican," they are influenced to vote for federal candidates. Congress previously attempted to regulate this kind of activity by allowing state parties to use a mix of federal and nonfederal money, but that approach proved to be a loophole through which substantial amounts of soft money were used to influence the outcome of federal elections. *See* Kollar-Kotelly, 493sa-501sa ("issue" advocacy); *id.* 525sa-527sa (get out the vote activity); *id.* 529-531sa (voter registration); *id.* 542sa ("national parties found a huge loophole through which to circumvent the federal campaign finance regime"). BCRA closes the loophole.

Communications by state candidates that support or oppose candidates for federal office. Under BCRA, a candidate for state office must use federal funds for communications that refer to a clearly identified candidate for federal office and promote, support, attack, or oppose the candidate for that office. BCRA, tit. I, sec. 101(a), § 323(f)(1), 116 Stat. at 85. In other words, if a state candidate wants to advocate for or against a federal candidate for office, the state candidate must use federal funds, just as the federal candidate would. Without this restriction, donors could easily evade the soft money limits by contributing to state candidates, who would use the money to support not only their own campaigns but also the campaigns of like-minded federal candidates.[6] The connection with federal elections is clear and direct, and thus Congress has authority to regulate in this manner.

Although plaintiffs challenge these elements of BCRA on federalism grounds, they nonetheless acknowledge that campaigns for federal and state elections are closely intermeshed. *See, e.g.*, Br. of Political Parties at 19-20 (describing Republican "Victory Plans" and Democratic "Coordinated Campaigns"). Taken in context, plaintiffs' complaint that Congress failed to respect the boundary between federal and state election activities cannot stand. As is evident, parties, candidates, and the voters respect no clear dividing line between such elections. When the political parties and candidates purposefully coordinate their efforts in federal and state elections, Congress can hardly be faulted for regulating federal elections in a manner that may impact some state and local activities. The overlap is neither avoidable nor unconstitutional.

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[5] The political party plaintiffs appear to argue that the Elections Clause gives Congress authority to regulate only those expenditures made "for the purpose of influencing" the outcome of a federal election. *See* Br. of Political Parties at 88. They cite no support for this proposition, however, and there is no logical reason that Congress's power should be defined by the purpose of an activity or expenditure, rather than by its effect. The McConnell plaintiffs complain about this provision because sometimes the federal elections in a particular jurisdiction are "actually or practically uncontested." Br. for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 33. They fail to explain why the power of Congress to regulate categories of election activity should turn on the election dynamics cf a particular jurisdiction in a given year.

[6] Plaintiffs further argue that federal candidates should be permitted to solicit soft money to be donated to state candidates, who could then use the funds to influence both the federal and state elections.

C. BCRA, which regulates the financial transactions of private parties, does not impermissibly intrude on state sovereignty.

As important as what BCRA does is what BCRA does not do: it does not directly regulate the States in any way. The Act leaves untouched such matters as the timing of state elections, the structure of state government, the qualifications of state officeholders and voters, and the terms and duties of state officials. The degree of hyperbole found in the plaintiffs' briefs, and in the brief of the Amici States of Virginia, et al., might suggest otherwise. But, contrary to the assertion of these amici States supporting the plaintiffs, BCRA does not affect "a State's ability to have its own rules on how its own government will be chosen," nor does it "trump[] state campaign finance laws." Br. of Amici Curiae Virginia et al. at 2. Instead, the Act regulates the financial transactions of private parties.

A brief comparison of BCRA with the cases cited by plaintiffs and their amici promptly illustrates that BCRA stops far short of intruding on state sovereignty. In *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), the Court struck a federal statute that set a minimum voting age for state elections. In *Gregory v. Ashcroft*, 501 U.S. at 463-64, the Court similarly expressed doubt about the power of Congress to interfere with the "authority of the people of the States to determine the qualifications of their most important government officials." BCRA does not override any such state laws. Nor does it affect the conduct of voters in state elections. *Cf. Blitz v. United States*, 153 U.S. 308, 313-15 (1894). Other cases are even farther afield. BCRA does not regulate the workings of state government at all, so it certainly does not "commandeer" state officials or state legislatures, *see Printz*, 521 U.S. at 925 or abrogate state sovereign immunity, *see Alden v. Maine*, 527 U.S. 706, 712 (1999).

Also inapposite are the supposed examples of Congressional overreaching described by the plaintiffs. The political parties emphasize that the "Chairman of the [Republican National Committee]" cannot "send a fundraising letter on behalf of a *state* gubernatorial candidate or even a *local* mayoral candidate." Br. of Political Parties at 78. The McConnell plaintiffs cite this example of "severe" federal intrusion: federal officeholders, like Senator McConnell "will be prohibited from writing or calling donors to ask them to make donations . . . to state and local committees and candidates." Br. of Appellants/Cross-Appellees Senator Mitch McConnell et al. at 34. What plaintiffs describe are simply restrictions on the solicitation of money by certain private parties, not intrusions on the authority of States to regulate their own elections.

BCRA's restrictions on soft money regulate the financial transactions of private parties, not States. Congress created a set of rules to govern the financing of federal elections, not state elections. Admittedly, the two areas overlap, in large part because many States thus far have chosen to hold their elections simultaneously with federal elections.[7] The power of Congress to regulate in this area, however, is not lessened by any incidental and unavoidable effect those regulations may have on state elections.

II. BCRA Serves The Interests Of The States And Their Citizens By Restoring Integrity To The National Political Process And Promoting Political Participation and Discourse.

Although Congress passed BCRA to reform the federal election process, the Act serves a goal that is vitally important to the States. It seeks to restore integrity to, and confidence in, the national political process of which all Americans are a part. As this Court has repeatedly recognized, "[d]emocracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000) [hereinafter "*Shrink Missouri*"] (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)). By eliminating the flow of soft money through the political parties, and preventing corporations and unions from spending unlimited sums on sham "issue ads," BCRA is designed to remedy the "disaffection [and] distrust [that] has now spread to the entire political discourse." *Shrink Missouri*, 528 U.S. at 408 (Kennedy, J., dissenting). The States, like the federal government, must grapple with this national loss of

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[7] States maintain the full authority as sovereigns to hold their elections at different times from federal elections.

faith in our democratic institutions. BCRA directly benefits the States and their citizens by (1) restoring faith in, and therefore participation in, the democratic process; and (2) ensuring that elected federal officials represent their constituents with loyalty and integrity.

Americans' confidence in their elected officials has been deeply shaken by the influence of money, real or apparent, on the outcomes of elections, access to government, and political decision-making. The record below contains substantial evidence that "the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of access to, and influence on, the officeholders of that party that the donor enjoys thereafter." Kollar-Kotelly, 626sa; Leon, 1289sa. Among the data before the court was a poll conducted by two prominent pollsters, Mark Mellman and Richard Wirthlin, *see* Leon, 1290sa, which found that "[a] significant majority of Americans believe that those who make large contributions to political parties have a major impact on the decisions made by federally elected officials." Kollar-Kotelly, 627sa; Leon, 1291sa. The poll further found that *seventy-one percent* of Americans "think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or *even if it's not what they think is best for the country*." Kollar-Kotelly, 628sa; Leon, 1292sa (emphasis added).

It is crucial to the States that their citizens have faith in the democratic process. When the electorate perceives that federal elections or officeholders are corrupt, this perception taints the electorate's view of more than just the federal government. Such a sentiment leads to cynicism, alienation and a pervasive loss of faith in all levels of government – federal, state and local. State and local governments, which depend on their citizens to serve on local boards and committees, run for municipal offices, volunteer for emergency services and participate in the obligations of democratic society, suffer sharply from such cynicism. As this Court has warned, "[l]eave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."*Shrink Missouri*, 528 U.S. at 390; *see also United States v. Int'l Union UAW-CIO*, 352 U.S. 567, 575 (1957) (noting that ban on corporate contributions not only preserves the integrity of the electoral process but also "sustain[s] the active, alert responsibility of the individual citizen in a democracy").

The States also have a keen interest in the integrity and loyalty of federal officeholders elected to represent the interests of their citizens. The record documents the ways in which soft money has distorted the federal political process and has given large donors disproportionate access to federal officeholders. Curtailing the solicitation and spending of soft money will reduce the pressure on federal officeholders to respond to the interests of donors and allow these public officials to focus their time and attention on the needs of their constituents.

Removing the influence of "big money" not only promotes accountability, it invigorates political debate at the state and local level. Freeing the political parties of the race to raise and spend huge amounts of soft money in each federal election cycle will enable them to refocus their efforts on political organizing at the state and local level, thereby giving ordinary Americans more opportunity to debate issues, meet candidates and participate in our national political process. BCRA is crucial to achieving this result.

III. The Ability Of The States To Protect The Confidence Of Their Citizenry In Their Own Elected State Officials Should Not Be Hobbled By The First Amendment Proscriptions Sought By Plaintiffs.

The Court should reject plaintiffs' view of the First Amendment, not only to uphold BCRA, but to preserve the ability of the States to enact and enforce their own campaign finance reforms. The plaintiffs view virtually every significant aspect of BCRA as facially invalid. If adopted, plaintiffs' constitutional vision would forever deny to the States the ability to enact broad categories of legislation,[8] thereby transforming the First Amendment into an imposed set of "judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion).

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[8] As an example, the McConnell plaintiffs argue that restrictions on contributions to political parties cannot be justified by the governmental interest in avoiding corruption or the appearance of corruption. Br. for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 20. Both the McConnell and political party plaintiffs argue that limits on contributions to political parties must withstand strict scrutiny. *Id.* at 17; Br. of Political Parties at 35-36. These views call into question not only section 101 of BCRA but also efforts by States to limit contributions to political parties.

The States seek to protect their ability to experiment with campaign finance reforms, because the States have a compelling interest in addressing the shared belief of many citizens that they have lost any meaningful voice in their own government. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("it is important to protect the integrity of the marketplace of political ideas"). A core attribute and function of the sovereignty of the Amici is the policing of their own elections.

This case implicates the continuing validity, and the future vitality, of myriad State campaign finance reforms and innovations that address corruption or the appearance of corruption in State elections. *See generally* 33 Council of State Governments, *The Book of the States* 174-232 (2000) (detailing campaign finance reform legislation passed by the States); http://www.fec.gov/pages/cfllaw2000.htm (visited July 30, 2003) (charting the current array of campaign finance legislation by the States). This Court should not effectively silence the medley of responses being played out in Statehouses across this nation. Instead, the Court should adopt a vision of the First Amendment that protects core freedoms while allowing the States to continue serving as "laboratories of democracy":

> [A] single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).[9]

Rather than enhancing state sovereignty, the plaintiffs seek to preclude the States from experimenting with meaningful campaign finance reform. As Judge Kollar-Kotelly recognized, the plaintiffs advance a view of the First Amendment that does not appear to "accept any restrictions whatsoever," even the contribution limits established as constitutional in *Buckley*. Kollar-Kotelly, 1008sa. The plaintiffs seek not to reform, but to repeal, this entire area of the law, cutting a wide constitutional swath that would eradicate a century of efforts to deal with the erosion of the public's faith in our institutions of democracy. If plaintiffs' view of the law prevails, "[t]he clock will be turned back to close to 100 years of incremental and balanced campaign finance regulation." Kollar-Kotelly, 1012sa-1013sa; *see also*

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[9] As Senator John Bankhead noted long ago:

> "We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose of paying the expenses of campaigners sent out into the country to spread propaganda, both true and untrue."

United States v. Int'l Union UAW-CIO, 352 U.S. at 577-78 (1957) (quoting 86 Cong.Rec. 2720).

Leon, 1083sa, 1101sa (noting that various of the positions urged by plaintiffs, if adopted, would be an "affront" to the existing regulatory system and "would make a mockery of existing Supreme Court precedent").

The plaintiffs' invocation of "federalism" in this case is nothing more than a political fig leaf. Plaintiffs seek to obscure the fact that their First Amendment arguments, if adopted, would foreclose meaningful state innovation across the political landscape of campaign finance law. Plaintiffs truly seek to restrict, not to preserve, state authority. Their arguments should be rejected.

CONCLUSION

For the foregoing reasons, the Court should uphold the constitutionality of the Bipartisan Campaign Reform Act.

Respectfully submitted,

THOMAS J. MILLER
Iowa Attorney General
THOMAS ANDREWS
Assistant Attorney General

RICHARD BLUMENTHAL
Connecticut Attorney General

WILLIAM H. SORRELL
Vermont Attorney General
*BRIDGET C. ASAY
Assistant Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3181

Counsel for Amici States
* *Counsel of Record*

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SENATOR MITCH MCCONNELL, *et al.*,
Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees/Cross-Appellants.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF COMMON CAUSE AND AARP AS *AMICI CURIAE* IN SUPPORT OF THE CONSTITUTIONALITY OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

Of Counsel:

DANIEL B. KOHRMAN
AARP FOUNDATION
LITIGATION
MICHAEL SCHUSTER
AARP
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

DONALD J. SIMON *
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY LLP
1425 K Street NW, Suite 600
Washington, DC 20005
(202) 682-0240

Counsel for Amici Curiae
Common Cause and AARP

August 5, 2003

* Counsel of Record

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INTEREST OF THE AMICI CURIAE [1]

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 200,000 members and supporters nationwide. Common Cause has had a longstanding concern with the growing problem of soft money in the federal political process, and has publicly advocated for congressional action to ban soft money in order to restore integrity to the electoral system. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (BCRA).

AARP is a nonprofit membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP is nonpartisan and does not support or oppose any candidate for public office. Nor does it contribute money to political candidates' campaigns or to political parties. Older Americans have made clear their interest in promoting and protecting the integrity of our nation's electoral processes. Because of the significance of campaign finance reform to its members, AARP was active in supporting enactment of the BCRA, including through grassroots efforts across the nation.

SUMMARY OF ARGUMENT

BCRA serves compelling governmental interests not only in "preventing corruption and the appearance of it that flows from munificent campaign contributions," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000), but also in closing the enormous loopholes in the law that have been used for "circumvention of [valid] contribution limits," *FEC v. Beaumont,* 123 S. Ct. 2200, 2207 (2003), quoting *FEC v.*

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[1] Letters of consent to the filing of this brief from all parties have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae,* made a monetary contribution to the preparation or submission of this brief.

Colorado Republican Federal Campaign Comm., 533 U.S. 431, 456 (2001) (*Colorado Republican II*).

The soft money system[2]--addressed by Title I of BCRA--grew over time into nothing less than a massive scheme for circumventing the contribution limits and source prohibitions of the federal campaign finance laws--measures that, over the last hundred years, have been enacted by Congress and sustained by this Court as necessary to preserve "the willingness of voters to take part in democratic governance." *Shrink Missouri,* 528 U.S. at 390.

Soft money was not created by Congress. Rather, it was a loophole opened in the law by the Federal Election Commission in 1978, through administrative interpretations that allowed first, state parties, and then national parties, to raise and spend funds not subject to federal contribution limits and source prohibitions for voter activities--such as voter registration and get-out-the-vote drives--that clearly affected federal elections.

The soft money system changed character and scale in 1988 when it became an integrated part of that year's presidential campaign. Both presidential candidates, working closely with their national party committees, organized $100,000 donor clubs, and incorporated the raising and spending of soft money into their presidential campaign strategies. This new organizing focus doubled the amount of soft money raised, and injected it directly into the presidential campaign in a major fashion.

The soft money system changed yet again in the 1996 election, this time even more catastrophically, when it mutated from paying for just the "ground" war of grassroots voter activities to also paying for the "air" war of multimillion dollar television campaigns that promoted the presidential candidates. An unprecedented quarter of a billion dollars of soft money was raised by the national parties, much of it by the presidential candidates themselves. Tens of millions of dollars of soft money was channeled through state party accounts to pay for candidate-specific broadcast ads controlled by the presidential campaigns, in what amounted to a sophisticated scheme for evasion of the law. In so doing, the presidential candidates also dodged the spending limits they had agreed to as a condition of their receipt of public funds, thus undermining key aspects of the presidential public financing system as well.

During the 1990's, the soft money system spread also to the congressional level where, in an innovation that emerged by the end of the decade, "joint fundraising committees" were developed as vehicles for congressional candidates to raise soft money in their own names, and then funnel those funds through party accounts to be spent on candidate-specific ads promoting their congressional campaigns.

By 2002, the last election conducted prior to the effective date of BCRA, the soft money system had grown to *half a billion dollars*–all of it from sources or in amounts that may not be contributed or spent to influence federal elections. Soft money became not just a loophole in the law, but a systemic circumvention so massive as to virtually overwhelm the law.

The enactment of BCRA was a necessary congressional response to this evisceration of the federal election laws, not just as a step to address the corruption and appearance of corruption caused by soft money, but also as an anti-circumvention measure intended to repair and restore laws that this Court has deemed "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley v. Valeo,* 424 U.S. 1, 27 (1976), quoting *Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548, 565 (1973).[3]

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[2] Soft money, simply put, is money that does not comply with the contribution limits, source prohibitions and reporting requirements of federal law.

ARGUMENT

I. Introduction

In 1997, in the midst of a major congressional investigation of the campaign finance abuses that occurred during the 1996 presidential election, Democratic National Committee (DNC) fundraiser Johnny Chung was quoted as saying, "The White House is like a subway: You have to put in coins to open the gates."[4]

Chung was in a position to know. According to the final report of the investigation conducted by the Senate Governmental Affairs Committee ("Thompson Committee"), Chung made soft money donations totaling $366,000 to the DNC from August 1994 through August, 1996.[5] And in the two year period ending in February, 1996, Chung obtained access to the White House *on 49 occasions*–"access that he used . . . to further his interests with foreign business clients . . . ."[6] Further, according to the Thompson Committee,

> There can be no question that Chung's contributions to the DNC helped give him this access to the President and the First Lady. So close was the nexus between Chung's donations and his visits, in fact, that White House officials actually collected money from him in the First Lady's office in exchange for allowing him to bring a delegation of his clients to White House events.[7]

Johnny Chung's analogy of the White House to little more than a coin-operated gateway for the sale of access and influence is a fitting epitaph for the debasing effect of soft money on the American political process.

An equally dispiriting picture was painted by Roger Tamraz, another DNC donor who figured prominently in the Thompson Committee investigation. Described by the Committee as "an unrepentant access-purchaser," *id.* at 2907, Tamraz donated a total of $300,000 of soft money to the DNC and various state party committees or campaigns between July 1995 and March 1996, all at the DNC's request. *Id.* at 2913-14. In apparent exchange for these donations, Tamraz sought, and received, access to an array of DNC and government officials in an effort to win U.S. backing for an oil pipeline project he was promoting in central Asia.[8] DNC chairman Don Fowler personally interceded with officials at the Central Intelligence Agency and the National Security Council in an effort to help Tamraz, *id.* at 2917-18, who attended six events with President Clinton from September 1995 through June 1996. *Id.* at 2920. Tamraz spoke on several occasions with the President, who directed his chief of staff, Mack McLarty, "to follow up" on Tamraz's requests. *Id.* at 2920, 2929. McLarty did so in numerous ways,

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[3] Although this brief focuses on the circumvention of the campaign finance laws caused by soft money, and addressed by Title I of BCRA, the *amici* also strongly support the other provisions of BCRA, including Title II, which responds to the equally serious problem of sham "issue" advocacy that has been used as a means for corporations and labor unions to circumvent, on a massive scale, the longstanding prohibition on the spending of corporate and labor treasury funds "in connection with" federal elections. 2 U.S.C. § 441b.

[4] Marc Lacey, *House Subpoenas Torrance Businessman*, L.A. Times, Nov. 8, 1997, at A12, *quoted in Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, Final Report of the Committee on Governmental Affairs, S. Rep. No. 105-167, 105th Cong., 2d Sess. (1998) ("Thompson Committee Report") at 783.

[5] Thompson Committee Report, *supra* note 4, at 783, 795.

[6] *Id.* at 783. The Report notes that in a newsletter to his company's shareholders, Chung "boasted of his political clout, claiming that he had 'built up connections to easily arrange visitations to the White House and meetings with the President.'" *Id.* at 785.

[7] *Id.* at 783.

[8] When asked at the hearings if "one of the reasons" he gave this money was to get access to government officials, Tamraz replied, "Senator, I'm going even further. It's the only reason--to get access. . . ." *Id.* at 2913, n.46.

enlisting officials from the Department of Energy in the effort to promote Tamraz's mission. *Id.* at 2925-28.

Although Tamraz clearly succeeded in buying access to the highest levels of government in exchange for his $300,000 of donations, he did not ultimately succeed in his goal of obtaining government support for his project. But his own conclusion was not that money fails to buy policy, but rather that he had not given *enough* money. He told the Thompson Committee, "I think next time, I'll give 600,000 [dollars]." *Id.* at 2930.

The Thompson Committee investigation followed months of front-page headlines about a wide range of scandals arising out of the fundraising practices of the 1996 campaign. These scandals included:

- The "sale" of White House access to major donors through "coffees," overnight stays in the Lincoln Bedroom and other presidential events. *Id.* at 191-499.
- The funneling of funds into U.S. elections from foreign nationals to influence U.S. policy through political contributions. *Id.* at 2499-2517.
- The influence that political donations may have had on federal review of Indian casino operations. *Id.* at 3165-3547.
- The use of non-profit groups as "fronts" for funneling party soft money into federal campaigns. *Id.* at 5974-81 (Minority Rpt.).

Although diverse stories, these scandals of the 1996 campaign are unified by a common thread–soft money.

Protections against the pernicious influence on federal elections of corporate and union donations, and of unlimited individual contributions, had been put in place by Congress over time since the beginning of the last century. These laws were enacted precisely in order to prevent the same reality and appearance of corruption and influence-peddling that were graphically on display in the 1996 campaign. But by that campaign, the rise of soft money as a means to circumvent the federal campaign finance laws had become so dominant that the longstanding regulatory regime had all but collapsed. The result, as stated by the Thompson Committee, was that the President and his aides "left themselves open to strong suspicion that they were selling not only access to high ranking officials, but policy as well." *Id.* at 3.

II. This Court Has Long Recognized that Anti-Circumvention Measures Serve a Compelling Purpose in Ensuring that the Campaign Finance Laws Are Effective.

Last Term, in *Beaumont*, this Court once again recognized the important role played by anti-circumvention measures in protecting the integrity of the campaign finance laws. In upholding a ban on corporation contributions, the Court said that "[q]uite aside from war-chest corruption and the interests of contributors and owners," the restriction on corporations was separately justified because it "hedges against their use as conduits for 'circumvention of [valid] contribution limits.'" 123 S. Ct. at 2207, quoting *Colorado Republican II,* 533 U.S. at 456. As the Court noted in *Colorado Republican II,* "all Members of the Court agree that circumvention is a valid theory of corruption. . . ." 533 U.S. at 457.

Precisely because "substantial evidence demonstrates how candidates, donors and parties test the limits of the current law," *id.*, anti-circumvention measures are necessary. While corporations were the vehicle threatening circumvention in *Beaumont,* it was the political parties that posed the same danger in *Colorado Republican II.* There, the Court upheld limits on party coordinated expenditures in order to prevent the use of parties "as conduits for contributions meant to place candidates under obligation," *id.* at 452, and to forestall their "exploitation as channels for circumventing contribution and coordinated spending limits. . . . ," *id.* at 455.

Similarly, in *California Medical Ass'n. v. FEC,* 453 U.S. 182, 197-98 (1981), the Court upheld the limit on contributions to multi-candidate political committees, 2 U.S.C.

§ 441a(a)(1)(C), in order "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*." And in *Buckley*, the Court sustained the aggregate annual limit on contributions by an individual, because it "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through...huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38.

BCRA is, at bottom, an anti-circumvention measure. By 1996, the growth of soft money had caused, in the words of the Thompson Committee, "the erosion of safeguards in U.S. election law designed to guard against political corruption . . . ."[9] BCRA was enacted precisely to close the soft money loophole, to repair this erosion, and to prevent the continued evasion of current law.

III. Over the Last 25 Years, the Soft Money System Has Evolved into a Massive Scheme for Political Parties, Federal Candidates and Campaign Donors to Circumvent the Federal Campaign Finance Laws.

The enactment of the Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 (FECA), was a milestone in the effort to limit the deleterious influence of large campaign contributions on the federal political process. Based on evidence of serious improprieties resulting from the flow of campaign contributions in the 1972 presidential election, and the concomitant public concerns arising out of the Watergate investigation,[10] Congress enacted FECA in order to, *inter alia*, limit the amount of money that donors could give to federal candidates,[11] and to political committees, including party committees.[12] These contribution limits were upheld in *Buckley* because they serve a compelling governmental interest in dealing "with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed." 424 U.S. at 28.

So too, FECA re-codified the longstanding prohibition on contributions and expenditures by corporations and labor organizations in connection with federal elections.[13] "The overriding concern behind the enactment" of this prohibition "was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982), quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n. 26 (1978); *see also Beaumont*, 123 S. Ct. at 2206. These provisions also seek "to eliminate the distortion caused by corporate spending" in the political process, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1989), and to protect shareholders and union members from having their funds "used to support political candidates to whom they may be opposed," *Nat'l Right to Work*, 459 U.S. at 208.

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[9] Thompson Committee Report, *supra* note 4, at 33.

[10] The Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. (1974).

[11] 2 U.S.C. § 441a(a)(1)(A) (limit of $1,000 per election). This amount was increased by BCRA to $2,000 per election. *See* BCRA § 307(a)(1).

[12] 2 U.S.C. § 441a(a)(3) (2002) (aggregate individual limit of $25,000 per year to all candidates and committees). This limit was increased by BCRA to $95,000 per two-year election cycle. *See* BCRA § 307(b). In the 1976 FECA Amendments, contributions to national party committees were made subject to a limit of $20,000 per year, 2 U.S.C. § 441a(a)(1)(B), an amount now increased by BCRA to $25,000 per year. BCRA § 307(a)(2).

[13] 2 U.S.C. § 441b. For a history of this prohibition, *see generally FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208-09 (1982).

Shortly after the enactment of the 1974 FECA Amendments, the soft money system developed as a means to evade these contribution limits and source prohibitions.

Over the last 25 years, and until the effective date of BCRA, soft money donations have consisted of the unlimited sums--in some cases considerably more than $1 million from a single donor--given to the national or state political parties by corporations, labor organizations and wealthy individuals, and then spent by the parties, in conjunction with their federal candidates, on activities that were intended to influence, and that had the effect of influencing, federal elections.[14]

The soft money system, which began in 1978, just four years after passage of the FECA, developed slowly at first, but then grew with escalating velocity. By the 1996 presidential election cycle, the soft money system had become little more than a massive scheme for circumventing the federal election laws.

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[14] For instance, the American Federation of State, County and Municipal Employees (AFSCME) gave $7.4 million in the period January 1, 2001 through November 5, 2002, virtually all of it to the Democratic Party. The Pharmaceutical Research & Manufacturers of America (PhRMA) in the same period gave $3.4 million, virtually all to the Republican Party. The two major parties together collected a total of $470 million in soft money in that period. *See* Common Cause, *The Soft Money Finale!*, Follow the Dollar Report (April 7, 2003), *available at* http://www.commoncause.org/publications/april03/040703.htm.

The most cynical form of soft money comes from "double givers"--those who make large contributions to *both* parties in the same election cycle. In the 2002 cycle, there were 37 donors who gave $250,000 or more to both political parties. These included AT&T, which gave $1.5 million to the Democrats, and $1.7 million to the Republicans; the Philip Morris Companies, which gave $625,000 to the Democrats and $2.2 million to the Republicans, and Microsoft, which gave $2.7 million to the Democratic party committees and $852,000 to the Republican committees. *Id.*

A. Phase One: 1978-1988--The creation of the soft money system based on the fiction that soft money does not affect federal elections.

The soft money system was founded on a regulatory fiction promulgated by the Federal Election Commission–that spending by the political parties on "mixed" activities such as voter registration or get-out-the-vote drives which, by their nature, affect federal, as well as non-federal, elections, can be parsed into those separate components, and that the non-federal portion can be funded by soft money without those funds affecting federal elections.

This conclusion was first set out by the FEC in a 1978 advisory opinion that reversed a position the Commission had taken just two years earlier. In the earlier opinion, the FEC had held that state parties had to pay for "mixed" voter activities using solely hard money, *i.e.*, monies raised under the federal law rules, because those activities affected federal elections, even in part.[15]

But in its 1978 advisory opinion, the FEC opened the door to soft money in federal elections by reversing itself and holding that such mixed activities could be financed with a combination of federal and non-federal funds.[16] The Commission left it up to the discretion of the parties to decide on the proper mixture of such funds, requiring only that the allocation be made on a "reasonable basis."[17] This ruling allowed state parties to spend soft money on activities that would affect federal elections.[18]

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[15] Response to FEC Advisory Opinion Request 1976-72 (Oct. 6, 1976); *see also* Response to FEC Advisory Opinion Request 1976-83 (Oct. 12, 1976).

[16] *See* FEC Advisory Opinion 1978-10 (August 29, 1978).

[17] *See* 11 C.F.R. § 106.1(e) (1978) (permitting allocation to be made "in proportion to the amount of funds expended on federal and nonfederal elections, or on another reasonable basis").

[18] This included not only get-out-the-vote and voter registration drives, but also "generic" party activities, such as ads that say "Vote Republican."

Not surprisingly, the national parties soon followed suit. In 1979, the FEC opined that the national parties, as well, could open non-federal accounts to raise soft money, and that the same allocation principles would apply to national party expenditures.[19]

In November 1984, Common Cause petitioned the FEC to institute a rulemaking to reverse these administrative interpretations, arguing that soft money was being used in a wholesale manner to influence federal elections.[20] After a two-year consideration of the petition, the Commission denied the request.[21] Common Cause then sued the FEC for abuse of discretion.

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[19] *See* FEC Advisory Opinion 1979-17 (July 16, 1979). In 1979, Congress amended the FECA to encourage state parties to spend money on grassroots activities such as voter registration and get-out-the-vote drives. *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. Contrary to the belief of some, these Amendments did *not* authorize the soft money system. Although the 1979 Amendments provided that money spent by state parties on certain grassroots activities was exempt from the definition of "expenditure," and thus exempt from the overall limit on party spending in 2 U.S.C. § 441a(d), the law expressly stated that the money spent for these activities is subject to federal contribution limits and source prohibitions. 2 U.S.C. § 431(9)(B)(viii), (ix) (exempting certain voter activities from the definition of "expenditure" provided "such payments are made from contributions subject to the limitations and prohibitions of this Act"). Thus, the importance of the 1979 amendments was to provide greater room for state parties to spend money on grassroots voter activities, but *not* to authorize that spending be done with non-federal funds. *See* Thompson Committee Report, *supra* note 4, at 4463-4.

[20] *See* FEC Rulemaking Petition: Notice of Availability, 50 Fed. Reg. 477 (Jan. 4, 1985) (citing Letter of November 5, 1984 from Fred Wertheimer, President of Common Cause, to Lee Ann Elliott, chair, Federal Election Commission).

[21] FEC Rulemaking Petition: Notice of Disposition, 51 Fed. Reg. 15,915 (April 29, 1986), *quoted in Common Cause v. FEC*, 692 F. Supp. 1391, 1393 (D.D.C. 1987).

The district court ordered the FEC to issue new regulations, finding that the agency had acted contrary to law by allowing the parties too much discretion in determining the mixture of hard and soft money to spend on mixed activities.[22] After a year passed without action by the Commission, the court again ordered the agency to act, noting that "it is undisputed that there is a public perception of widespread abuse, suggesting that the consequences of the regulatory failure identified a year ago are at least as unsettling now as then."[23] Finally, three years later, in 1991, the FEC promulgated new regulations on soft money, but in effect only codified the existing soft money system by establishing specific percentages for the allocation of hard and soft money in different scenarios.[24] In addition, the regulations, for the first time, required the national parties to disclose their soft money.[25]

B. Phase Two: 1988-1996--The integration of soft money into the presidential campaigns.

While the FEC was engaged in its protracted rulemaking process, the use of soft money in federal campaigns underwent dramatic change in the 1988 presidential campaign. The nascent soft money system had operated at a comparatively modest level in prior election cycles, with both national parties raising and spending a total of about $20 million in non-federal funds in each of the 1980 and 1984 campaigns.[26] In 1988, however, this amount doubled--to a total of $45 million.[27]

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[22] 692 F. Supp. at 1396. In fact, the court noted that the Commission might reasonably conclude "that *no* method of allocation will effectuate the Congressional goal" that only hard money be spent on activities influencing federal elections. *Id.* (emphasis in original).

[23] *Common Cause v. FEC*, 692 F. Supp. 1397, 1399 (D.D.C. 1988).

[24] *See* Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26,058 (June 26, 1990) (codified at 11 C.F.R. § 106.5 (1991)) (establishing several methods and formulae for allocation that depend on whether the spending is by a national or state party committee, whether the spending is in a presidential or non-presidential election year, and whether the activity being funded is party administrative costs, generic voter drives, or fundraising).

[25] *Id.; see also* 11 C.F.R. § 104.8(e)(2002).

Soft money in the 1988 cycle for the first time became an integrated part of the major party presidential campaigns, organized and directed by the top strategists and fundraisers of those campaigns. Democratic nominee Governor Michael Dukakis and Republican nominee Vice President George Bush, in conjunction with their national parties, systematically solicited individuals for six figure contributions to their respective political parties--amounts far in excess of federal contribution limits.[28]

The spiral of soft money fundraising began with the Dukakis campaign which, led by its treasurer and chief fundraiser Robert Farmer, initiated a program to solicit $100,000 contributions from wealthy individual donors.[29] At

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[26] Expert Report of Thomas E. Mann, available in the record at DEV (Defendants' Evidentiary Volume) 1, Tab 1, at Table 1, *National Political Party Spending, 1976-2000.*

[27] *Id.*

[28] *See* Charles Babcock, *$100,000 Donations Plentiful Despite Post-Watergate Restrictions*, Wash. Post, Sept. 22, 1988, at A27 ("Spurred by competition between presidential fundraisers, the number of $100,000 donors in this election year has already surpassed that in the 1972 Watergate era, when alleged abuses triggered reform in federal election financing."); Brooks Jackson, *Democrats' Coffers Fill Up as Fat Cats Seek Bigger Role in Party*, Wall St. J., July 19, 1988, at 60 ("Fat cats are back, more numerous and playing a bigger role in Democratic politics . . . . More than 200 people have become Democratic Party 'trustees' by agreeing to give $100,000 for the fall campaign, or to raise such an amount from others.").

[29] Brooks Jackson, *GOP Is Aiming New Fund Drive at Big Donors*, Wall St. J., Aug. 17, 198, at 44 ("The see-sawing spending war was touched off weeks ago by Michael Dukakis's chief fundraiser, Robert Farmer . . . Mr. Farmer stunned the political community by announcing his intention to raise a total of $50 million in party funds, including much soft money, to be spent in addition to the $36 million in public funds to be spent directly by the Dukakis campaign."). *See also* Charles Babcock,

first, the Bush campaign attacked the Dukakis soft money operation as, according to deputy campaign manager Richard Bond, "illegal on its face."[30] Shortly thereafter, however, when it failed to stop the Dukakis soft money effort, the Bush campaign moved to match, and then out-raise it.[31] The Bush "Team 100" fundraising campaign of $100,000 soft money donors was headed by Robert Mosbacher, who had been serving as the chief fundraiser for the Bush presidential campaign.[32]

Thus, the chief fundraiser for each presidential candidate headed each party's soft money fundraising drive. According to *The Wall Street Journal,* 267 individuals and corporations made contributions of up to $100,000 to the Bush effort, while a top Dukakis fundraiser said "his $100,000 club numbered 130 individuals."[33] Ultimately, each presidential campaign raised more than $20 million in soft money.[34]

Fund-Raisers Gear Up for Fall Race, Wash. Post, June 27, 1988, at A1; Thomas Edsall, *'Victory Fund' Raises Millions for Party*, Wash. Post, July 19, 1988, at A21 (Edsall, *Victory Fund*).

[30] Thomas Edsall, *GOP Plans Big-Donor Drive*, Wash. Post, Aug. 16, 1988, at A1 (Edsall, *Big Donor Drive*). *See also* Brooks Jackson, *Broken Promise: Why the Federal Election Commission Failed* 52 (1990) (Jackson, *Broken Promise*).

[31] Richard Berke, *Big Money's Election Year Comeback*, N.Y. Times, Aug. 7, 1988, at E5 ("'The Democrats are saying that they're going for the big money,' said Robert A. Mosbacher, Jr., finance chairman of the Bush campaign. 'And I don't think there's much we can do about it but match them.'"); Thomas Edsall, *Soft Money Competition: GOP Seeking $50 Million from Big Donors*, Wash. Post, Aug. 16, 1988, at A1 (Edsall, *Soft Money*) ("For the GOP, the decision to go with Team 88 represents a major policy change. As recently as three weeks ago, top officials of Vice President Bush's campaign described the almost identical Democratic program as blatantly illegal. . . . According to Mosbacher, 'We intend to match the Democrats plus $1.'").

[32] Edsall, *Soft Money, supra* note 31.

[33] Brooks Jackson, *Bush, Dukakis Presidential Campaigns Each Spent More than $100 Million*, Wall St. J., Dec. 11, 1988.

[34] Jackson, *Broken Promise, supra* note 30, at 54.

The 1988 presidential campaigns were involved not only in raising soft money but in spending it as well. A spokesperson for the RNC soft money effort said "the decision on how to spend Team 88 money will be made primarily by key officials of the Bush campaign, including Lee Atwater, the campaign manager and [Richard] Bond [the deputy campaign manager] . . . [T]he basic criterion in picking states to benefit from the fund will be the closeness of the presidential race."[35]

Soft money was used in the 1988 election to perform vital "ground war" functions for the presidential campaigns--such as get-out-the-vote and other field operations.[36] In Illinois, for example, *The New York Times* reported that the Dukakis campaign had only five paid staff members. But it shared office space with Campaign '88, a "state party" operation organized by the DNC and employing 115 workers across the state, paid for with a budget of $2 million in soft money.[37] Peter Kelly, chairman of the California Democratic Party, told the *Times* that the "whole theory behind" the 1988 soft money effort was to raise enough money to help Dukakis win the state.[38] In short, the 1988 presidential campaigns were structured as two parallel operations--an official campaign receiving public funds and subject to a spending limit, and an

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[35] Edsall, *Big Donor Drive*, *supra* note 30.

[36] T. Edsall, *Victory Fund*, *supra* note 29 ("The money raised by the Victory Fund and Victory 88 will be used to finance what is known as the 'ground war' of the campaign: get-out-the-vote drives, voter registration, direct mail and voter list development. To the degree a soft money campaign is successful, it permits the presidential campaign to spend a high percentage of the $46.1 million in federal money each nominee receives on the 'air war'--television advertising and moving the candidates around the country.").

[37] Richard Berke, *In Election Spending, Watch Ceiling and Use a Loophole*, N.Y. Times, Oct. 3, 1988, at A23.

[38] Richard Berke, *Contributors Help Dukakis by Avoiding Limits He Set*, N.Y. Times, Oct. 31, 1988, at B5.

unofficial campaign raising and spending unlimited amounts of soft money.[39]

C. Phase Three: 1996-2002--The expansion of the soft money system from the "ground war" to the "air war."

If the 1988 campaign saw soft money being used to pay for presidential "ground war" activities, the 1996 campaign saw soft money spent to finance presidential "air war" efforts as well. Beginning in late 1995, President Clinton's reelection campaign used millions of dollars of soft money to fund so called "issue" ads run through the DNC or Democratic state parties. In reality, those ads were nothing more than candidate-specific campaign ads promoting the President's re-election effort. By early 1996, the presidential campaign of Senator Robert Dole followed suit.

The explosive growth of soft money in the 1996 cycle--from a total of $80 million in 1992 (itself a near-doubling from the amount in the 1988 cycle) to *more than triple that amount,* over $271 million, in 1996[40]--was fueled by the collision of the soft money loophole with the sham "issue" ad loophole, in a "perfect storm" that effectively destroyed the barriers between hard money and soft money spending in federal elections.[41] In short, the political parties, working in close conjunction with their presidential candidates, started to spend soft money to pay for the broadcast of candidate-specific campaign ads that simply avoided the use of express advocacy phrases like "vote for" or "vote against."

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[39] This dichotomy illustrates another major harm caused by the soft money system--the subversion of not only the contribution limits and source prohibitions of federal law, but the spending limits of the public financing system as well. Under 26 U.S.C. § 9003(b), a major party nominee who receives public funds is prohibited from raising or spending any additional funds for his or her general election campaign. But since 1988, while party nominees have made a binding commitment to limit their general election spending to the amount of the public grant, they have then solicited soft money donations to their political parties and controlled the spending of that money through their parties to advance their campaigns. The spending limit on which the grant of public funds is conditioned has become largely meaningless. Thus, the injection of soft money into the middle of presidential campaigns has dramatically undermined key purposes of the presidential public financing law--"to reduce the deleterious influence of large contributions on our political process . . . and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91.

[40] Mann Expert Report, *supra* note 26, at Table 1.

There was no foundation in law for this development. In *Buckley,* this Court made clear that the "express advocacy" test was intended to address a problem of vagueness encountered in regulating the political activities of "an individual other than a candidate or a group other than a political committee," *Buckley,* 424 U.S. at 79. Thus, the "express advocacy" test was *not* meant to apply to spending by candidates and political parties, whose expenditures, this Court said, do not present comparable issues of vagueness because their activities "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*[42]

Nonetheless, in late 1995, the DNC, working under the direction and control of the Clinton re-election campaign, began to use soft money to fund an aggressive nationwide program of TV ads promoting President Clinton and his

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[41] Sebastian Junger, *The Perfect Storm* (1997).

[42] The DNC claimed that its new use of soft money was permitted under FEC Advisory Opinion 1995-25 (Aug. 24, 1995), which held that "legislative advocacy media advertisements" run by a national party committee could be funded with an allocated mixture of hard and soft money. But this claim was wrong: the Commission's opinion was explicitly based on the condition that the ads would not refer to a federal candidate, or if they did so at all, would not contain any "electioneering message." *See* FEC Advisory Opinion 1995-25, n.1.

policies, or criticizing Senator Dole.[43] These ads were written, edited, produced, directed and targeted by Clinton campaign officials, and the President himself was personally involved in the effort.[44] The ads were run in key "battleground" states for the 1996 presidential election.[45]

By early 1996, Republican nominee Senator Robert Dole and the RNC began running a similar TV ad campaign, using soft money to promote Dole's candidacy.[46] That effort was coordinated by the Dole campaign.[47]

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[43] A typical Clinton/DNC soft money ad was called "Finish," and promoted President Clinton while criticizing Senator Dole:

> Head Start. Student loans. Toxic cleanup. Extra police. Anti-drug programs. Dole, Gingrich wanted them cut. Now they're safe. Protected in the '96 budget--because the President stood firm. Dole, Gingrich? Deadlock. Gridlock. Shutdowns. The president's plan? Finish the job, balance the budget. Reform welfare. Cut taxes. Protect Medicare. President Clinton says get it done. Meet our challenges.

See Thompson Committee Report, *supra* note 4, at 4478. See also *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*: Hearings Before the Senate Committee on Governmental Affairs, 105th Cong., S. Hrg. No. 105-300 Part VIII (1997) ("Thompson Committee Hearings") 277-317 at 301 (letter from Ann McBride, President of Common Cause, to Attorney General Janet Reno (October 9, 1996) ("Common Cause Letter") at 25).

[44] *See* Thompson Committee Report, *supra* note 4, at 107-129.

[45] The evidence discussing the efforts by the Clinton and Dole campaigns to promote their candidates using ads run through their respective political parties and paid for with soft money is extensively discussed in the letter of October 9, 1996 sent by Common Cause to the Department of Justice seeking an investigation of these practices as violations of the campaign finance laws. *See* Common Cause Letter, *supra* note 43.

[46] *Id.* A typical Dole/RNC soft money ad was called "Stripes," and criticized President Clinton:

> Bill Clinton, he's really something. He's now trying to avoid a sexual harassment lawsuit claiming he is on active military duty. Active duty? Newspapers report that Mr. Clinton claims as commander in chief he is covered under the Soldiers and Sailors Relief Act of 1940, which grants automatic delays in lawsuits

The two presidential campaigns and their parties ultimately spent more than $60 million during the 1996 election on ads, funded in substantial part with soft money, that praised their candidate or criticized the opposing candidate by name. Much of this money was solicited by the presidential candidates or their campaign fundraisers, and donated to the national party committees, which then transferred a mixture of hard and soft money funds to particular state parties. The state parties immediately transferred the same funds back to the Washington, DC-based media consultants for the presidential campaigns, who then placed the ads in the name of the state party.[48]

This flow of funds highlights the integral role in the soft money system played by the state parties, which acted as little more than conduits for injecting soft money into the

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> against military personnel until their active duty is over. Active duty? Bill Clinton, he's really something.

Common Cause Letter, *supra* note 43, at 36.

[47] *See* Thompson Committee Report, *supra* note 4, at 8294-8305 (Minority Rpt.).

[48] To trace just two of several hundred similar transactions documented in the evidence compiled by Common Cause, the DNC on November 17, 1995 transferred $81,070 in soft money to the California Democratic Party, and on November 21, 1995 transferred $39,930 in hard money. On November 22, 1995, the California Democratic Party transferred $81,070 in soft money and $39,930 in hard money to Squier, Knapp, Ochs Communications, a media consultant for the Clinton presidential committee, to pay for a broadcast ad aired in the name of the state party. Similarly, on June 24, 1996, the RNC transferred $780,870 in soft money to the California Republican State Party, and on June 25, 1996, it transferred $384,608 in hard money. On June 25, 1996, the California state party sent $780,870 in soft money and $384,608 in hard money to Multi-Media Services Corp., a media buyer in Alexandria, Virginia that made the media buys for the Dole campaign and was headed by the chief pollster for Dole. *See* Common Cause, *The Money Trail: The Democrats* (1996) and *The Money Trail: The Republicans* (1996), in the record at DEV 36, Tab 9 and Tab 10; *see also* Thompson Committee Report, *supra* note 4, at 4467.

presidential campaigns. Most of the soft money deployed in the 1996 campaign by the national parties was routed through the state parties and then paid out to the media consultants for the presidential campaigns. This was done in order to maximize the amount of soft money that could be used to fund the ads.[49]

But substantial amounts of soft money also were donated directly to the state parties at the behest of national party officials, thus bypassing the national party accounts in order to avoid federal reporting requirements.[50] Thus, for instance, at the same time that "Vice President Gore was attacking the Republican National Committee as 'just about a wholly owned subsidiary of the tobacco industry,' DNC fundraisers asked R.J. Reynolds Tobacco Co. to make campaign contributions through state Democratic parties."[51]

And there are many other examples. Roger Tamraz, for instance, made most of his contributions directly to Democratic state parties, at the direction of DNC officials, including $100,000 to the Virginia state party and $25,000 to the Louisiana state party.[52] Another controversial DNC fundraiser, John Huang, solicited $482,500 in soft money that was given directly to Democratic state parties in 1996.[53] Carl Lindner, chairman of Chiquita Brands and a longtime Republican donor, "quietly gave $415,000 to about two dozen Democratic state parties . . . in April 1996, only hours after the [Clinton] administration formally challenged European Union trade sanctions against Central American bananas grown by Chiquita."[54]

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[49] FEC allocation regulations more leniently regulated state parties, and allowed them to spend a greater proportion of soft money on an ad, than could the national party in airing the same ad. *Compare* 11 C.F.R. § 106.5(b) (2002) (allocation of expenses between federal and non-federal activities by national party committees) *with id.* at § 106.5(d) (2002) (allocation by state and local party committees).

[50] *See* Charles Babcock, *DNC Diverted Controversial Donations*, Wash. Post, April 13, 1997, at A1 ("Democratic National Committee officials channeled millions of dollars in campaign donations to state Democratic parties last year, effectively hiding big contributions from tobacco, gambling and other special interests . . . Because the money was not deposited in the accounts of the national party, the identities of the donors did not appear on the DNC's federal disclosure reports.").

[51] *Id.*

[52] *See* Thompson Committee Report, *supra* note 4, at 2913-14.

In October, 1996, Common Cause filed a complaint with the Justice Department that urged the appointment of an independent counsel to conduct a criminal investigation into the "knowing and willful" violation of the federal election laws arising from the use of soft money by both parties and both presidential campaigns in the 1996 election.[55] A parallel complaint was filed with the FEC, calling on the agency to pursue civil violations of the law.

After a two year criminal investigation, the Attorney General ultimately closed the Justice Department's inquiry without taking action,[56] and referred the matter for civil

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[53] *See* Ira Chinoy, *DNC Donors Also Gave to State Groups*, Wash. Post, Jan. 26, 1997, at A1.

[54] George Archibald, *Banana Baron Peeled off Half a Mil; White House Paid Back in WTO Fight*, Wash. Times, Aug. 25, 1997, at A1. According to *Time*, "DNC officials instructed Lindner to give directly to state party coffers, which are subject to far less public scrutiny than federal election accounts." Michael Weisskopf, *The Busy Back Door Men*, Time, March 31, 1997, at 40.

[55] *See* Common Cause Letter, *supra* note 43.

[56] Notification to the Court Pursuant to 28 U.S.C. § 592(b) of the Results of Preliminary Investigation *filed in In re William Jefferson Clinton* (D.C. Cir. Dec. 7, 1998) (Independent Counsel Division). The Attorney General did not conclude that the soft money advertising was lawful, but only that the campaigns acted pursuant to advice of counsel, and therefore lacked the requisite specific intent to commit a criminal violation of the law. *Id.* at 8.

enforcement to the FEC which also--contrary to the advice of its staff--failed to act.[57]

In the absence of *any* law enforcement action, the abuses of 1996 became the established practices of subsequent campaigns. Both presidential candidates in the 2000 election cycle raised soft money, which was funneled through national party accounts to state party accounts and then used to fund so-called "issue" ads promoting their campaigns.[58]

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[57] *See* Statement of Reasons of Comm. Scott E. Thomas in *In the Matter of Dole for President, Inc. et al.*, MURs 4553 and 4671 (FEC May 25, 2000) at 2-5, *available at* http://www.fec.gov/members/thomas/Thomasstatement05.htm (recounting procedural history of the FEC's consideration of the audit and enforcement actions involving the 1996 presidential campaign spending). On most of the series of votes about whether to proceed with the enforcement actions, the Commission deadlocked by a vote of 3-3, thus resulting in the closure of the matters. *Id.*

[58] *See e.g.*, Howard Kurtz, *DNC Issue Spot Touts Gore's Medicare Plan*, Wash. Post, June 8, 2000, at A4:

> The Democratic National Committee unveiled its first issue ad designed to boost Vice President Gore's campaign yesterday, featuring Gore calling for expanded Medicare benefits to shield the elderly from "ridiculously high prices for prescription medicines."
>
> While Democratic National Chairman Joe Andrew ... described the commercial as a "party-building" spot, it never mentions the Democratic Party. Instead, the 30 second ad spotlights Gore and a Web site touting "the Gore Plan," and is produced by Gore's media consultants, including Carter Eskew and Robert Shrum. . . .
>
> The ad is financed in part by controversial "soft money" donations to the party that are supposed to be used to generate support for the party and not to explicitly promote a specific candidate.

See also Peter Marks, *Some Soft Money to Pay for Gore Ad Blitz*, N.Y. Times, June 7, 2000, at A28. The RNC shortly followed suit, running similar ads praising its nominee, George Bush. *See* Howard Kurtz, *GOP Launches Its First Salvo in 'Issue' Ad War*, Wash. Post, June 11, 2000, at A4.

Common Cause (joined by Democracy 21) again filed complaints with the Department of Justice and the FEC arguing that this use of soft money was illegal. Neil A. Lewis, *The 2000 Campaign: The Donations; 2*

During the 1990's, soft money also migrated from the presidential to the congressional level, where it was raised by congressional candidates and used, first, for grassroots activities and then, for broadcast ads to promote congressional candidates.

There is no clearer illustration of this point than in the growth of soft money raised by the congressional campaign committees of both parties. These committees are national party entities that consist *in their entirety* of sitting Members of Congress in both Houses, and that have the purpose of electing candidates of each party to the House and Senate.[59]

Notwithstanding this exclusively federal campaign function, all four congressional committees have raised and spent huge sums of soft money, exposing the myth that soft money is used only for non-federal purposes. In the 2002 election cycle, for instance, the DCCC raised $53.7 million in soft money, more than *three times* what it had raised in the 1998 cycle. The NRCC similarly tripled its 1998 soft money total, to $60.7 million in the 2002 cycle. The two Senate campaign committees did even better. The DSCC raised a total of $85.9 million in soft money in 2002, over four times what it raised in 1998. The NRSC increased its soft money from $23.2 million to $54.1 million.[60] With regard to the soft money practices of the party congressional campaign committees, the Thompson Committee Minority Report noted:

> Like the national party committees, the parties' national senatorial and congressional campaign committees raise and spend soft money in ways that render prohibitions on corporate and union contributions virtually meaningless. Senatorial and congressional campaign committees are intended, as their names imply, to help elect United States Senators and Representatives. . . . The amounts of soft money raised [in 1996] by the House and Senate committees increased dramatically over previous years, demonstrating the greater importance of soft money in the last election cycle.[61]

But the apotheosis of the soft money infiltration into congressional campaigns came with the development of congressional "joint fundraising committees"--which were in essence nothing more than dedicated soft money accounts for specific congressional candidates. These joint committees, used by more than 20 Senate campaigns in 2000, were typically formed between the candidate's campaign committee and the senatorial campaign committee of the candidate's national party. A Senate candidate typically solicited both soft and hard money for his or her designated joint committee. The hard money contributions would be disbursed to the

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Groups Ask Justice Dept. To Investigate Parties' Ads, N.Y. Times, July 28, 2000, at A16. Both complaints were ultimately dismissed without action.

[59] The Democratic Congressional Campaign Committee (DCCC), for instance, describes itself as "the only national party committee whose principal mission is to elect Democrats to the House of Representatives." *See* DCCC website at http://www.dccc.org/about/. Similarly, the Democratic Senatorial Campaign Committee (DSCC) describes itself as "the national committee of the Democratic Party formed to elect Democratic members of the United States Senate." *See* DSCC website at http://www.dscc.org/information/about/. To the same effect, the National Republican Senatorial Committee (NRSC) says on its website, "It is our sole responsibility to make sure that Republican Senate candidates are elected to the United States Senate." *See* NRSC.org website at http://www.nrsc.org/nrscweb/aboutus/. The National Republican Congressional Committee (NRCC) describes itself as "governed by its chairman, U.S. Rep. Tom Reynolds (NY-26), and an executive committee composed of Republican members of the U.S. House of Representatives." *See* NRCC website at http://nrcc.org/nrcccontents/issuesagenda/overview.shtml.

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[60] *See* Common Cause, "National Parties Raise Record $470.6 Million In Soft Money During The 2001-2002 Election Cycle Before New Law Takes Effect" (Jan. 6, 2003), *available at* http://www.commoncause.org/news/default.cfm?ArtID=83.

[61] Thompson Committee Report, *supra* note 4, at 7518 (Minority Rpt.). The report also states: "Experts agree that soft money into the House and Senate campaign committees stretches to the limit the credibility of the argument that the money is being used only for party building and not to elect federal candidates." *Id.* at 7527, n. 27.

candidate's authorized campaign committee, and the soft money would be sent to the party senatorial committee, which would place the money in party soft money accounts. The party committee would then typically transfer the soft money to the state party of the Senate candidate who raised the money, which would then spend it for candidate-specific "issue ads" and other voter activities to support the Senate candidate.[62] In effect, these joint fundraising committees allowed Senate candidates to raise soft money in their own name and for their own campaigns. All pretense of doing anything else was dropped.[63]

The growing use of soft money in congressional races in the 2000 cycle, combined with its continuing use in the presidential campaign, resulted yet again in the near doubling of the soft money raised, from $271 million in 1996 to $498 million in 2000.[64] The soft money system had now mushroomed into a loophole of nearly half a billion dollars.

IV. Congress Crafted BCRA's Soft Money Ban To Ensure That It Would End the Circumvention of the Campaign Finance Laws.

Congress wrote Title I of BCRA in light of this history of how the soft money system actually evolved, and how it actually worked. Practical experience shows that the provisions of Title I are each necessary to close the soft money loophole. Three points in particular are crucial.

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[62] *See* John M. Broder, *Democrats Able to Circumvent Donation Limit*, N.Y. Times, Dec. 22, 1999, at A1.

[63] In April 2000, Common Cause and Democracy 21 filed a complaint with the FEC, alleging that these joint fundraising committees were illegal. The FEC ultimately dismissed the complaint without action. *See* Statement of Reasons of Comm. Scott E. Thomas in *In the Matter of Ashcroft Victory Committee et al.*, MUR 4994 (FEC Dec. 19, 2001) *available at* http://www.fec.gov/members/thomas/thomasstatement41.html.

[64] Mann Expert Report, *supra* note 26, at Table 1.

A. The total ban on national party soft money is necessary.

Experience shows, as this Court has recognized, that parties act as agents "on behalf of those who seek to produce obligated officeholders." *Colorado Republican II*, 533 U.S. at 452. The relationship between national parties and federal officeholders is so inextricably intertwined--as noted above, four of the six national party committees are in fact nothing more than associations of federal officeholders--that to serve anti-corruption purposes effectively, a soft money ban must preclude the national parties from raising or spending any soft money, for any purpose. Otherwise, national party officials will continue, as they have, to broker access to and influence with federal officeholders for those who donate large amounts of soft money to the national parties, even if the parties spend that money for purportedly non-federal purposes. Likewise, national party officials will continue, as they have, to direct donors like Roger Tamraz or Carl Lindner to make large contributions directly to state parties or candidates in a corrupt relationship that exchanges money for access to, or benefits from, federal officeholders. With regard to the national parties, Congress correctly recognized that the nub of the issue is how the money is *raised,* not how it is *spent.*

B. The ban on state party soft money for "Federal election activities" is necessary.

The history of the soft money system recounted above demonstrates why Congress was correct to extend Title I of BCRA to the state parties, which have been integral participants in the funneling of soft money into federal elections. The state parties have been the willing vehicles through which national parties and federal candidates have operated--to transfer, direct and spend soft money funds for federal electoral purposes. Indeed, as the flow of funds in the 1996 campaign shows, the state parties have been used as eager conduits to "game" the allocation rules *specifically in order to maximize* the amount of soft money that could be spent. If

Congress had failed to take account of the role of the state parties in this history, and had banned soft money only for national party committees, the entire soft money system would simply have shifted to the state party level and re-created itself there.

But this history also shows that the objections to BCRA by the Political Party Appellants are based on little more than hyperbole. BCRA is not the radical new regulatory regime they describe. State parties have *for decades* operated under federal rules that, *inter alia*, require them to use exclusively hard money for ads that expressly advocate the election of federal candidates, and to limit their contributions to, or spending in coordination with, federal candidates.[65]

Moreover, since 1978, the state parties had operated under a federal allocation system that required them to use hard money to pay at least part of the costs of voter mobilization activities that affected federal elections (even if these activities also affected state and local elections)--a federal regulatory regime that Congress ultimately found was inadequate to protect compelling federal interests.

Thus, BCRA does not suddenly impose federal rules on state parties where none had existed before. Instead, it simply defines, by statute, certain state party activities that Congress correctly deemed to affect federal elections, and substitutes one allocation system for another: instead of funding these activities with a mixture of hard money and soft money, the parties are now to fund them with a mixture of hard money and limited soft money funds raised pursuant to the Levin Amendment.[66] If a state party wishes to avoid the conditions placed on the use of Levin funds, it is free to spend entirely hard money for these activities. The state party has the choice. And by the same token, Congress has left wholly unregulated by federal law a wide range of state party activities that are directed solely to state and local elections.[67]

C. The coverage of "voter mobilization" activities is necessary.

Prior to the 1996 campaign, the soft money system operated *exclusively* through party spending on voter mobilization activities such as voter registration and GOTV drives, and generic campaign ads. That kind of spending--as the vivid experience of the 1988 presidential campaign shows--was how the soft money system worked. If Congress had failed to cover these activities in BCRA, the reform law would do little more than codify the pre-1996 soft money system, which was already a system awash in "Team 100" type donors who were solicited by the presidential campaigns for donations then spent on the "ground war" to affect federal elections.

This history alone refutes the district court's conclusion that such voter mobilization activities do not directly or sufficiently affect federal elections. Common sense also counsels that when state parties spend money to register their core voters and get them to the polling booth where they will cast votes on ballots that contain federal candidates, such spending will necessarily and substantially benefit federal candidates and affect those federal elections. Even if the party's "message" in turning out voters is a generic one that promotes the party without mentioning any candidates, or is one directed solely to state and local races, there is no doubt that the voters who are brought to the polls then cast their ballots in federal races as well. That *impact*, and the history of circumvention which is the defining characteristic of the soft money system, amply justify Congress' judgment to include such spending within the definition of "Federal election activity."[68]

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[65] 2 U.S.C. § 441a(a)(2)(A) (contribution limit); 2 U.S.C. § 441a(d) (coordinated spending limit).

[66] 2 U.S.C. § 441i(b)(2) (added by BCRA § 101(a)) (Levin Amendment). The Levin Amendment illustrates the particular care that Congress took in balancing the need to protect federal interests in preventing corruption, against its concern that state parties continue to have adequate resources to engage in grassroots voter drive activities. Not only did Congress double the individual contribution limit on hard money donations to state parties, BCRA § 102 (codified at 2 U.S.C. § 441a(a)(1)(D)), but in the Levin Amendment, it also provided state parties with an option to raise funds under more liberal rules for certain voter mobilization activities, in order to ameliorate the impact of BCRA on state parties.

[67] BCRA itself expressly excludes from the definition of "Federal election activity" essential state party functions such as making contribuions to state and local candidates, all "public communications" (such as party-funded campaign ads) referring to state or local candidates if the communications are not otherwise "Federal election activity," the costs of state and local conventions, and the costs of grassroots campaign materials that name only state or local candidates. 2 U.S.C. § 431(20)(B)(i)-(iv). In addition, any other state party spending that is not within the definition of "Federal election activity," 2 U.S.C. § 431(20)(A), is also excepted, such as voter registration drives prior to 120 days before a federal election, or party administrative costs.

CONCLUSION

The Court should sustain the constitutionality of BCRA as a measure necessary to address the dangers of corruption and the appearance of corruption caused by the rise of soft money in American campaigns, and as a necessary anti-circumvention measure to close the soft money loophole.

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[68] The Party Appellants erroneously equate a loss of soft money funding for their voter mobilization activities with a limit (or even, ban) on the activities themselves. Nothing could be further from the truth. Although the Party Appellants repeatedly refer to Title I as a "spending limit," *e.g.*, Br. at 48, 50, or even, a "pure expenditure limit," *id.* at 39, that is a clear mischaracterization. The state parties are free to engage in as much voter mobilization activity as they wish, and to spend as much as they want on such activities, so long as they use hard money, or funds otherwise permitted by the Levin Amendment. This is no "spending limit." *See Buckley*, 424 U.S. at 21-22 (contribution limits upheld because their effect "is merely to require candidates and political committees to raise funds from a greater number of persons . . .").

Respectfully submitted,

Of Counsel:

DANIEL B. KOHRMAN
AARP FOUNDATION
LITIGATION
MICHAEL SCHUSTER
AARP
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

August 5, 2003

DONALD J. SIMON *
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY LLP
1425 K Street NW, Suite 600
Washington, DC 20005
(202) 682-0240

Counsel for Amici Curiae
Common Cause and AARP

* Counsel of Record

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IN THE

Supreme Court of the United States

SENATOR MITCH MCCONNELL, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

On Appeal from the United States
District Court For The District of Columbia

BRIEF OF *AMICI CURIAE* THE INTERFAITH ALLIANCE FOUNDATION; THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST; THE UNION OF AMERICAN HEBREW CONGREGATIONS; THE UNITARIAN UNIVERSALIST ASSOCIATION; NETWORK, A NATIONAL CATHOLIC SOCIAL JUSTICE LOBBY; AND THE CENTRAL CONFERENCE OF AMERICAN RABBIS IN SUPPORT OF APPELLEES

EVAN A. DAVIS
Counsel of Record
ANIL KALHAN
KATHERINE MOONEY
Cleary, Gottlieb, Steen & Hamilton
One Liberty Plaza
New York, New York 10006
212-225-2000

August 5, 2003

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[*]

The Interfaith Alliance Foundation (the "Foundation"), serving in partnership with The Interfaith Alliance, is a non-partisan, educational institution that provides training, education, research, and other support to a growing network of clergy and people of faith from more than 65 different religious traditions. Through public education and advocacy of reform measures, the Foundation strives to promote a fair and balanced campaign finance system in which ordinary citizens, including people of faith, participate meaningfully in civic and political life. The Foundation is deeply interested in the outcome of this litigation because the weakening of campaign finance reform stands to impede numerous people of faith and good will from engaging in national political activity.

The General Synod of the United Church of Christ, a representative body of the 1.3 million members of the United Church of Christ, has a deep and compelling interest in protecting civic life as expressed through the electoral system and the voting process in the United States. In a 1997 Resolution entitled "Campaign Finance Reform," the General Synod addressed the threat to our democratic process by "the present system of financing campaigns for public office . . . that allows for the appearance of improper influence in the legislative process by large contributors and correspondingly discourages participation by persons of lesser means." The 1997 General Synod of the United Church of Christ also resolved to "support legislation which seeks more equitable campaign financing."

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[*] *Amici curiae* state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of this Court.

In addition, counsel for *amici curiae* acknowledge with appreciation the invaluable assistance with the research and writing of this brief provided by Joseph Landau, Sanjay Mody, and Stephen M. Rich, associates at Cleary, Gottlieb, Steen & Hamilton who have not yet been admitted to the bar, and Michael Kavey, a summer associate at Cleary, Gottlieb, Steen & Hamilton who is a member of the class of 2004 at Yale Law School.

The Union of American Hebrew Congregations ("UAHC") is the central body of the Reform Jewish Movement in North America, composed of 900 Reform congregations encompassing some 1.5 million Reform Jews. Campaign finance reform is not an esoteric technical issue of election regulations, but one that goes to the essence of the ethical and moral fiber of our nation. The millions of dollars that flow into federal elections have created a major problem that threatens the integrity of our democratic process. In 1984, the UAHC recognized that "Congress must legislate an end to this financial influence race." The UAHC supports the Bipartisan Campaign Reform Act as a vital step toward creating a vibrant and participatory American democracy where financial means does not determine a citizen's political influence.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States and elsewhere. The Association democratically adopts resolutions consistent with its fundamental principles and purposes and has taken positions supporting campaign finance reform, including a resolution in 2000

calling for campaign finance reform at the state and federal levels.

NETWORK, A National Catholic Social Justice Lobby ("NETWORK") of more than 12,000 individual and organizational members, lobbies, educates, and organizes to promote federal legislation creating social and economic opportunity. Since 1971, NETWORK has worked to create a just, democratic society in which all members have a part in the decision-making process. The campaign finance system has seriously jeopardized the trust of citizens, the health of our democracy, and the ability of all citizens to participate effectively in the political process. The undue influence of money in campaigns diminishes the voting power of ordinary citizens, and especially those who are poor.

The Central Conference of American Rabbis ("CCAR") is the organized Rabbinate of Reform Judaism, composed of 1,800 Reform rabbis. The Jewish tradition speaks clearly and unhesitatingly to the critical importance of appointing leaders according to their merit and fostering the ability of leaders to act independently for the public good, unfettered by the demands of the wealthy. Jewish texts and common sense teach that a democracy only can function properly when elected officials are equally accountable, and equally responsive, to all citizens, without regard to those citizens' abilities to make large campaign contributions. The existing campaign finance system benefits the extraordinarily wealthy, reduces voter access to elected officials, erodes moral standards in government agencies and institutions, and breeds distrust and alienation. In 1997, the CCAR resolved to "[s]upport the general principles outlined in the Bipartisan Campaign Finance Reform Act of 1997," and the CCAR continues to support the version of that act that was enacted into law in 2002.

SUMMARY OF ARGUMENT

Amici curiae urge the Court to uphold the constitutionality of the Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), vital legislation that will help restore public confidence in the political system and enable ordinary citizens to participate meaningfully in the democratic process. Faith-based organizations like *amici*, as well as their constituents and members, share in a proud tradition of conscientious political participation and public service that will be impaired without a strong and effective system of campaign finance regulation. Fostering responsible and moral governance requires elected officials who focus on the needs of their constituents, not sources of funding. Respect for individual dignity requires that all citizens have confidence that their direct political participation—the giving of their hearts and minds, not just their dollars—can positively affect how our nation is governed. The integrity and vitality of our democracy require that ordinary citizens, including people of faith, are allowed a meaningful voice in the political process.

1. Widespread distrust of elected officials and decreased voter turnout in the years leading up to BCRA's enactment demonstrated that our democratic process was badly in need of reform. Opinion polls have revealed a broad public perception of corruption and a general sentiment among voters that they cannot make a difference in the political system as it has been operating. The failings of the pre-BCRA system have been of particular concern to communities of faith, since honesty, fairness, and integrity are universal religious values. Indeed, as of 2001, 60% of people of faith believed that the pre-BCRA campaign finance system needed either a "complete overhaul" or "major changes," while only 10% believed that the system was acceptable in its existing state. Only 10% of people of faith believed they had the ability to make a major difference in the political system, while an overwhelming 61% believed that they personally lacked the ability to make much of a difference in the political process at all. With this in mind, religious leaders from a broad and diverse array of faith traditions have been outspoken in favor of reform.

2. As the Supreme Court has consistently recognized, the government has a compelling interest in building public trust in the political process and encouraging active citizen participation. Ordinary citizens are likely to lose confidence in the electoral process if they lack faith that their votes and voices "count" equally in the eyes of elected officials and the law. To advance these compelling interests, it is crucial that Congress be able to regulate political campaigns not only to eliminate *quid pro quo* corruption, but also to minimize the perception of undue influence and the notion that individual citizens are incapable of making a difference. The very foundations of democracy are threatened when ordinary citizens believe their voices will be drowned out by special interests.

3. BCRA directly address these interests and concerns. With provisions that rein in "soft money" contributions, tighten the regulation of "issue ads" that appear immedi-

ately before elections, and expand disclosure requirements, the newly enacted reforms closely target those elements of the preexisting campaign finance system that have contributed most to the perception among individual citizens that their votes and voices "count" less than those of financially powerful interest groups. Empirical data shows that people of faith believe that the reforms embodied in BCRA will improve the integrity of our political system.

ARGUMENT

I. LARGE SEGMENTS OF THE PUBLIC, INCLUDING SIGNIFICANT NUMBERS OF PEOPLE OF FAITH, LACKED CONFIDENCE IN THE PRE-BCRA POLITICAL PROCESS AND CAMPAIGN FINANCE SYSTEM

Amici represent people of faith from more than 65 different religious traditions. They are concerned with the morality of government, the potential for corruption among our leaders, and the disillusionment and alienation that prevail among the electorate on the issue of campaign finance. Honesty, fairness for all, and integrity—the very principles that BCRA seeks to return to our nation's political system—are also three universal religious values that have informed some of the highest traditions of political participation and public service in our nation's history. A government that claims to represent the public interest but fails to reflect these values can have no moral legitimacy in the eyes of Americans of faith and will fail to inspire its citizens to participate actively and conscientiously in public affairs.

The ineffectiveness of the campaign finance system in place before enactment of the BCRA contributed significantly to this disaffection among people of faith and other citizens. The perception that many elected officials had become beholden to particular interests that use large "soft money" contributions, so-called "issue ads," and coordinated expenditures to evade existing campaign finance regulations diminished public trust in the integrity and effectiveness of those regulations and led ordinary citizens to lose confidence in their ability to participate effectively in the political process.

A. The Pre-BCRA System Gave Rise to a Widespread Perception of Corruption

The pre-BCRA campaign finance system produced a widespread perception that financially powerful interests exercised undue, even corrupting influence on the electoral system and government officials. Statements from a broad range of religious leaders confirm a widespread public perception that unregulated "soft money" contributions do not differ significantly in their impact from outright *quid pro quo* corruption. One ecumenical Protestant group has stated that the pre-BCRA system created "an environment where public officials [were] beholden to contributors in ways that border on bribery." Protestants for the Common Good, *Why Should Christians Care About Campaign Finance Reform?* (2000), *at* http://www.thecommongood.org/campaign_finance.html. The Methodist Church has decried the "pouring of tens of millions of dollars into political campaigns to buy special influence with legislators" as "a national scandal." Interfaith Alliance Foundation, *Study Paper: Campaign Finance Reform* 13 (2002), *available at* http://www.interfaithalliance.org/Files/getFile.cfm?id=4645. The Religious Action Center of Reform Judaism has criticized "the pernicious influence of money in our electoral system, which often allows moneyed interests to dominate the political debate," adding that "[w]e cannot accept an electoral system that structurally and systematically favors the richest among us." Press Release, Religious Action Center of Reform Judaism, Reform Jewish Leader Welcomes House Breakthrough on Campaign Finance Reform (Jan. 24, 2002), *at* http://www.rac.org/news/012402.html.

The sense of urgency surrounding this issue is further demonstrated by collective reform efforts undertaken by religious groups. In connection with their efforts to reform the campaign finance system, more than 250 leaders from a diverse array of religious organizations took the unusual step of constituting an issue-based coalition, Religious Leaders for Campaign Finance Reform ("RLCFR"). In 2001, this broad coalition issued a joint letter to Congress urging passage of meaningful reform measures and warning that "the current campaign finance system . . . gives the appearance that political access and favors are for sale to the highest bidder." Letter from Religious Leaders for Campaign Finance Reform, to the United States Senate (Mar. 16, 2001), *at* http://www.ncccusa.org/news/01news25a.html. The religious leaders who signed the letter represented Catholics, Presbyterians, Methodists, Baptists, Evangelical Lutherans, Episcopalians, Greek Orthodox Christians, Quakers, Jews, and others. Signatories included the national leaders of 17 mainstream religious groups, ranging from the National Baptist Convention to the Union of American Hebrew

Congregations.[1] The RLCFR had previously written a letter to Congress in 1997 lamenting that the "present system gives at least the appearance that the President, Senators and Representatives are willing to sell their values and votes, as well as the integrity of their offices, for the sake of campaign contributions." Letter from the Religious Leaders for Campaign Finance Reform, to Congress (Feb. 13, 1997), *available at* http://www.wfn.org/1997/02/msg00149.html (hereinafter "1997 RLCFR Letter").

Concerns about corruption and support for campaign finance reform have not, of course, been limited to the leaders of faith-based organizations. Lay people of faith—from across the political spectrum, *see infra* n.2—also have perceived an urgent need to cleanse the campaign finance system of corruption and undue influence.

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[1] The religious leaders who signed the letter included the Presiding Bishop of the Evangelical Lutheran Church in America, the General Secretary of the National Council of the Churches of Christ in the USA, the General Secretary of the Reformed Church in America, the Presiding Bishop and Primate of the Episcopal Church in the United States, the General Minister and President of the Christian Church (Disciples of Christ) in the United States and Canada, the Minister General of the Franciscan Friars of the Atonement, the General Secretary of American Friends Service Committee, the Executive Director of the Church of the Brethren General Board, the Primate of the Antiochian Orthodox Christian Archdiocese of North America, the President of the Moravian Church in America (Southern Province), the President of the National Baptist Convention, the Diocesan Bishop of the Mar Thoma Church, the President of the United Church of Christ, the President of the Union of American Hebrew Congregations, and ecumenical officers from the Greek Orthodox Archdiocese of America, the Council of Bishops of the United Methodist Church, and the Christian Methodist Episcopal Church.

According to a 2001 Gallup Organization public opinion study of clergy and people of faith, commissioned by *amicus curiae* The Interfaith Alliance Foundation, a solid majority (60%) of people of faith believe that the pre-BCRA campaign finance system needed either a "complete overhaul" or "major changes," while only 10% believe that the system was fine as it was. The Gallup Organization, *Campaign Finance Reform: Opinions of People of Faith and the Clergy* 7 (Aug. 2001) (hereinafter "Gallup Poll"), *available at* http://www.callforreform.org/gallup.pdf.[2] More than 85% of people of faith say that campaign finance reform, in comparison to other key political issues like education and taxes, is either very important (54%) or somewhat important (32%). *Id.* Given these numbers, it is hardly surprising that religious leaders from such a broad variety of faiths have actively and visibly taken public stances on this issue and have

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[2] The Gallup Organization interviewed a nationally representative sample of 1,202 people of faith and a nationally representative sample of 303 clergy. "People of faith" were those who indicated that (1) they attended religious service at least once a month, or that (2) religion was "very important" to them. The samples were weighted by age, race, gender, education, and geographical region, in accordance with previous Gallup surveys that had used the same screening questions. Gallup Poll at 4.

The samples also represented a broad range of political ideologies. Among people of faith sampled, 41% described themselves politically as either "very conservative" or "somewhat conservative," 36% described themselves as "moderate," and 19% described themselves as either "very liberal" or "somewhat liberal." *Id.* at 6. Among clergy sampled, 54% described themselves politically as either "very conservative" or "conservative," 21% described themselves as "moderate," and 13% described themselves as either "very liberal" or "liberal." *Id.* at 6.

strongly supported reform of the nation's campaign finance laws.[3]

The views of people of faith are in accord with the overwhelming support for reform among the American people, a decisive majority of which lacked confidence in the pre-BCRA campaign finance system. One major poll showed that two-thirds of Americans believed that campaign finance laws either required "major changes" or needed to be "completely overhauled." Carl M. Cannon, *A Rough Ride for Reform*, Nat'l Journal, Jan. 29, 2000, *at* 320. More than 70% of the public believed members of Congress sometimes vote based on the desires of large contributors to their political parties, even when doing so is not in the country's best interest and when it is not what their constituents support. Defendant-Intervenors' Excerpts of Reply Brief (Redacted Version for Public Distribution) at I-6, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003). Almost 80% of the public believed "big party contributions" have either a "great deal of impact" (55%) or "some impact" (23%) on decisions made by the federal government. Only 6% believed such contributions do not have much or any impact. Press Release, The Reform Institute for Campaign and Election Issues, On the Docket: Campaign Finance and the Courts (Sept. 24, 2002), *at* http://www.reforminstitute.org/cgi-data/article/files/39.shtml.

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[3] For example, 52% of clergy support a ban on soft money donations, while 31% oppose such a ban. Sixty-four percent prefer strict limits on contributions in addition to disclosure requirements over disclosure requirements alone. Gallup Poll at 10, 13.

B. The Pre-BCRA Campaign Finance System Created a Widespread Perception That Ordinary Citizens Cannot Meaningfully Participate in the Political Process

With a campaign finance system widely viewed as broken and corrupt, it is hardly surprising that average citizens tend to feel they cannot make a significant difference by participating in political life. Only 10% of people of faith believe they can make a major difference in the political system as it has been operating. Gallup Poll at 9. By contrast, 61% feel that they personally can make little or no difference. *Id.* While the legitimacy of our democratic government is premised on the existence of broad and active political participation, citizens who feel politically powerless can hardly be expected to vote in high numbers or otherwise actively engage themselves in the political process. As noted by the RLCFR, "[i]f citizens feel their efforts are futile in the face of economic and other forces that overwhelm them, hope for the democratic process is destroyed." 1997 RLCFR Letter. Indeed, this Court itself has observed that the perception that "large donors call the tune" can "jeopardize the willingness of voters to take part in democratic governance. Democracy works 'only if the people have faith in those who govern.'" *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) (internal citation omitted).

The Gallup Poll statistics call into question any notion that Americans of faith are indifferent to reform or otherwise fear it will impede their political participation. For example, 58% of people of faith believe campaign finance reform will give the average citizen a greater voice in the political process, while only 11% believe that it will give the average citizen less of a voice. Gallup Poll at 16. Fifty-seven percent of people of faith believe campaigns will become more competitive with campaign finance reform, while only 16% believe they will be less competitive. *Id.* These statistics demonstrate that people of faith do not agree with the claims made by opponents of reform—including some religious special interest groups—that campaign regulations somehow stifle debate or inhibit political expression. Indeed, the overwhelming majority of people of faith (78%) expressly reject the notion that campaign finance reform would interfere with their right to free speech. *Id.* at 18.

II. THE GOVERNMENT HAS A COMPELLING INTEREST IN BUILDING PUBLIC CONFIDENCE IN THE POLITICAL PROCESS AND ENCOURAGING CITIZEN PARTICIPATION

It is clear, therefore, that the pre-BCRA system fostered serious doubts among people of faith and other citizens about their ability to participate effectively in the nation's democratic processes. By enacting BCRA, in the exercise of its constitutional power to regulate federal elections, Congress squarely sought to address this troubling condition. This Court has long recognized that "preserv[ing] . . . the individual citizen's confidence in government" and "'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance" that Congress may legitimately seek to advance when regulating federal elections. *First Nat'l*

Bank of Boston v. Bellotti, 435 U.S. 765, 788-89 (1978); *see Shrink Mo. Gov't PAC*, 528 U.S. at 401 (Breyer, J., concurring) (recognizing that campaign finance system may be regulated in order to advance compelling government interests in "build[ing] public confidence in [the electoral] process and broaden[ing] the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes"); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) ("Congress could legitimately conclude that the avoidance of the appearance of improper influence" is "critical" in order to maintain "'confidence in the system of representative Government'" (quoting *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973))); *United States v. Int'l Union UAW-CIO*, 352 U.S. 567, 590 (1957) (recognizing compelling government interest "to protect the political process from undue influence of large aggregations of capital and *to promote individual responsibility for democratic government*" (emphasis added)).

In legislating to advance this compelling interest, Congress legitimately concluded that because an individual citizen's "right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" itself, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), ordinary citizens are likely to lose confidence in the electoral process if they lack faith that their votes and voices "count" equally in the eyes of elected officials and the law. *See Shrink Mo. Gov't PAC*, 528 U.S. at 390 (recognizing compelling interest in preventing "the cynical assumption that large donors call the tune" from "jeopardiz[ing] the willingness of voters to take part in democratic governance"); *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The right to vote is protected in more than the initial allocation of the franchise."); *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."); *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) ("No right is more precious in a free country than that of *having a voice* in the election of those who make the laws under which, as good citizens, we must live." (emphasis added)). Because "viable" representative government demands "[f]ull and effective participation by all citizens" in the political process, Congress legitimately may regulate the campaign finance system to ensure that citizens remain sufficiently confident that they have "equally effective voice[s]" in the electoral process to maintain participation at the levels necessary to sustain democratic government. *Reynolds*, 377 U.S. at 565; *see FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (Congress may legitimately regulate campaign finance system in order to curb "undue influence on an officeholder's judgment, and the appearance of such influence"); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (recognizing compelling government interest in restricting ability of corporations to use state-created advantages "to obtain 'an unfair advantage in the political marketplace'" (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986))).

In *Buckley*, this Court sustained provisions of the Federal Election Campaign Act[4] ("FECA") that, *inter alia*, (1) set forth limits on political contributions and (2) mandated disclosure and reporting of the sources of such contributions, on the ground that each furthered the government's compelling interest in cultivating public confidence in the electoral process. The Court expressly rejected the petitioners' argument that bribery laws and narrowly drawn disclosure requirements constituted a sufficient alternative to contribution limits, observing that criminal penalties "deal with only the most blatant and specific attempts of those with money to influence governmental action" and that disclosure requirements were only a "partial measure" in combating electoral corruption. *Buckley*, 424 U.S. at 28.[5] Thus, the Court concluded that political contribution limits substantially advanced Congress's compelling interest in building public confidence in the electoral process by minimizing both the opportunity for undue influence and the perception of such influence in the eyes of the public. *Id.* at 26-29.

The Court also recognized three categories of compelling governmental interests furthered by FECA's disclosure requirements. First, disclosure "aid[s] the voters

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[4] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[5] In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990), the Court expanded this rationale to capture the regulation of campaign expenditures, because "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."

in evaluating those who seek federal office," allowing "voters to place each candidate in the political spectrum more precisely" and "alert[ing] the voter to the interests to which a candidate is most likely to be responsive and thus facilitat[ing] predictions of future performance in office." *Id.* at 66-67. Second, the *Buckley* Court echoed Justice Brandeis in concluding that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67 (citing L. Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933)). Third, the Court concluded that "disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations." *Id.* at 68. Advancement of each of these interests in turn bolsters public confidence in the electoral system. For example, greater transparency regarding the sponsorship of candidate-specific advertisements mitigates the suspicion and confusion caused by advertisements funded by pseudonymous organizations with vague or unclear connections to the candidates themselves. Disclosure requirements hinder advocacy groups' efforts to disguise their alliances or manufacture impressions of broad, grassroots support using corporate dollars. By deterring interest groups from engaging in such deception and mandating greater accountability for campaign-related speech, disclosure requirements decrease voter alienation and increase public confidence in our political system.

Two terms after *Buckley*, the Court reaffirmed that the preservation of "the individual citizen's confidence in government" is a public concern "of the highest importance." *Bellotti*, 435 U.S. at 789. For that reason, the

Court cautioned that where evidence demonstrates that "undue influence" by financially powerful interests tends to "destroy the confidence of the people in the democratic process and the integrity of government" by "drown[ing] out other points of view . . . [and] thereby denigrating rather than serving First Amendment interests," such arguments merit careful consideration. *Id.* In addition, the *Bellotti* Court powerfully reiterated the interest in disclosure announced in *Buckley*, stating that in "judging and evaluating the relative merits of conflicting arguments," the electorate "may consider . . . the source and credibility of the advocate," and that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 791-92.

Since that time, the Court has made clear that for Congress to advance its compelling interests of ensuring public confidence in the electoral process and facilitating meaningful citizen participation, it must be able to prevent circumvention of the mechanisms it has chosen to promote those interests in the first instance. *See FEC v. Beaumont*, 123 S. Ct. 2200, 2207 (2003) ("[R]ecent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for circumvention of [valid] contribution limits.") (internal quotation omitted) (alteration in original); *Colo. Repub. Fed. Campaign Comm.*, 533 U.S. at 456 (noting that "all members of the Court agree" that preventing circumvention of regulation is an "important government interest") (internal quotation omitted); *Austin*, 494 U.S. at 664 (refusing to grant non-profit corporations an exemption from expenditure limits in part because such an exemption would allow for-profit corporations to circumvent those limits); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-98, 199 (1981) (finding that Congress could place limits on contributions to political committees as a means of "prevent[ing] circumvention of the very limitations on contributions [to candidates] that [the] Court upheld in *Buckley*"); *Buckley*, 424 U.S at 47 ("[C]ontribution ceilings . . . prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions.").

For example, the Court has recognized that groups exercising undue influence may forsake blatant *quid pro quo* arrangements and instead use more sophisticated tactics of influence peddling and misdirection to secure their particular objectives. *Austin*, 494 U.S. at 659-60 (finding that Michigan's regulation of independent expenditures fulfilled a compelling interest in ameliorating "the corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form . . . that have little or no correlation to the public's support for the corporation's political ideas," regardless of whether Michigan had also demonstrated a viable threat of "'financial *quid pro quo*' corruption" (citations omitted)); *see also Buckley*, 424 U.S. at 28 (rejecting argument that Congress is limited to "partial measure[s]" that "deal with only the most blatant and specific attempts . . . to influence governmental action" when it legislates to ensure integrity of the political process). Drawing upon *Buckley*, the Court also has paid close attention to attempts to circumvent existing campaign finance regulations through the use of "the 'special characteristics of the corporate structure'" in a manner that "threaten[s] the integrity of the political process," and accordingly has endorsed "the public interest in 'restrict[ing] the influence of political war chests funneled through the corporate form.'" *Beaumont*, 123 S. Ct. at 2206 (alteration in original) (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500-01 (1985)); *see also Austin*, 494 U.S. at 659 ("[S]tate-created advantages . . . permit [corporations] to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." (internal quotation marks and citation omitted)).

Unless congressional action to close the obvious loopholes in its chosen scheme of campaign finance regulation is sustained, public cynicism and alienation from the political process will increase even further as a result of the disconnect between what the law facially purports to regulate and the reality of powerful individuals and institutions circumventing its provisions. As demonstrated by the district court record and reinforced by the evidence presented by *amici* in this brief, *see supra* Point I, that is precisely what has happened in the years since *Buckley* and *Bellotti* were decided.

In enacting BCRA, Congress explicitly sought, in the exercise of its constitutional power to regulate federal elections, to "restor[e] Americans' faith in the electoral process and [to] decreas[e] public cynicism about our system of government." Brief of Appellants at 18, *Adams v. FEC*, *prob. juris. noted*, 123 S. Ct. 2270 (2003) (No. 02-1740-ATX) (internal quotation marks and citations omitted). In this context, Congress's legislative judgment that BCRA is necessary (1) to preserve the integrity and effectiveness of its overall scheme of campaign finance regulation, and (2) to build confidence among ordinary citizens in the integrity of that scheme and their own abilities to participate meaningfully in public life, is entitled to deference. *Cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (noting that "the predictive judgments of Congress" should not be ignored "'simply because [appellants] cas[t] [their] claims under the umbrella of the First Amendment,'" since "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here" (alteration in original and citations omitted)).

III. BCRA ADVANCES THE GOVERNMENT'S COMPELLING INTERESTS IN IMPROVING PUBLIC CONFIDENCE IN THE POLITICAL SYSTEM AND FACILITATING CITIZEN PARTICIPATION

The district court record contains volumes of evidence documenting the use of large, unregulated soft money donations by financially powerful interests to secure undue influence over federal elections and elected officials. These large soft money contributions foster corruption and the appearance of corruption, undermining public confidence in the integrity of our political system. People of faith share the general public's concern about soft money and support campaign finance reform that includes stricter contribution limits. Of those surveyed in the 2001 Gallup Poll, 71% of people of faith and 64% of clergy favor strict limits on contributions in addition to full disclosure about campaign contributions. Gallup Poll at 13. Moreover, a plurality (40%) of people of faith and a majority (52%) of clergy support a ban on soft money. *Id.* at 10.

People of faith believe that tighter restrictions on contributions and stricter disclosure requirements would strengthen the integrity of our political system and the ability of average citizens to participate meaningfully in the political process. For example, when asked their views about the effects of imposing stricter limits on contributions and stricter disclosure requirements,

- 62% of people of faith and 63% of clergy responded that such reforms would make the American political system work better;
- 59% of both people of faith and clergy surveyed believe such reforms would result in more ethical and honest conduct by members of Congress; and
- 58% of people of faith and 56% of clergy responded that such reforms would give the average citizen a stronger voice in the political process.

Id. at 15-16.

BCRA's provisions directly address the most significant loopholes used to circumvent Congress's existing campaign finance regulations. Title I of BCRA addresses real and perceived corruption by closing the "soft money" loophole that had made FECA's restrictions virtually irrelevant in the eyes of the public. Its provisions require that all money raised by national political parties be "hard money" raised from sources and in amounts regulated by FECA, and applies the same restriction to state political parties to the extent their activities influence

federal elections.[6] BCRA § 101, amending FECA § 323, 2 U.S.C. § 441i. By closing off the most significant avenue for large contributors to exert undue influence on the federal political system, the soft money restrictions in Title I will bolster the confidence of the American people, including people of faith, in the political system. Ordinary citizens will be less likely to believe that the influence of big donors renders their own participation in the political system meaningless and thus will be encouraged to participate. Reducing the perception of corruption and disenfranchisement among ordinary citizens will thus improve the vitality and strength of our democracy.

Title II of BCRA closes two major loopholes that previously allowed widespread circumvention of the source restrictions and disclosure rules of FECA: sham "issue ads" and coordinated expenditures. Corporations, unions, and other interest groups—like political parties—have in recent years spent significant amounts on advertisements purporting to address issues rather than expressly advocate the election or defeat of a candidate for public office. Although these expenditures generally had both the intent and effect of influencing federal elections, they fell outside FECA's definition of "independent expenditures" and thus outside its source restrictions and disclosure rules, because they did not "expressly advocat[e] the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17) (defining "independent expenditure"); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 245-49 (1986).

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[6] In the so-called "Levin Amendment," BCRA does allow state and local parties to spend limited soft money donations, in combination with hard money, on voter registration and mobilization activities that do not mention federal candidates. BCRA § 101(a), amending FECA § 323(b)(2), 2 U.S.C. § 441i(b)(2). The Levin Amendment enhances the resources at the disposal of state and local parties to pursue voter turnout efforts, while avoiding the abuses that accompanied the use of unlimited soft money to finance these activities.

The provisions of Title II close this loophole by extending those source limitations and disclosure rules to "electioneering communications," defined in the first instance to include broadcast advertisements that refer to a clearly identified candidate for federal office and are targeted at that candidate's electorate within 60 days prior to a federal general election or 30 days before a federal primary election. Congress also provided a "back-up" definition that would become effective if the original definition were held unconstitutional, as the district court concluded in this case. *McConnell v. FEC*, 251 F. Supp. 2d 176, 184-85 (D.D.C. 2003). Under the backup definition, an electioneering communication is defined as "any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA § 201(a), amending FECA § 304, 2 U.S.C. § 434(f)(3)(A)(ii). Corporations and unions may not use their treasury funds to run advertisements that qualify as "electioneering communications," and any individual or group spending more than $10,000 per year on such advertisements must file a report with the Federal Election Commission ("FEC") disclosing the identity of the sponsor of each advertisement and other information. BCRA § 201(a), amending

FECA § 304, 2 U.S.C. § 434(f)(1)-(2). Unions and corporations remain free to fund electioneering communications through sponsored political action committees.

In order to prevent circumvention through unregulated coordinated expenditures, Title II also adjusts what expenditures in support of a candidate are to be considered "coordinated" and thus subject to FECA. As this Court recognized in *Buckley*, expenditures coordinated with candidates may be regulated in order to prevent circumvention of contribution limits. *Buckley*, 424 U.S. at 47. The Court distinguished between expenditures "made totally independently of the candidate and his campaign" and those made "in cooperation with or with the consent of a candidate, his agents or an authorized committee of the candidate." *Id.* at 47 & n.53. Since *Buckley*, the Court has reaffirmed the proposition that unrestricted expenditures on behalf of a candidate that are coordinated with that candidate or her agents pose the same danger to the integrity and perceived integrity of the electoral system as unrestricted direct contributions. *E.g.*, *Colo. Repub. Fed. Campaign Comm.*, 533 U.S. at 464 (noting that there exists "no significant functional difference between a party's coordinated expenditure and a party's direct contribution"). Section 214 of Title II repeals the narrow definition of "coordination" adopted by the FEC and directs it to issue new regulations. Congress provided that these new regulations "shall not require agreement or formal collaboration to establish coordination."[7] BCRA § 214(c), 2 U.S.C. § 441a note. Section 214 also expands the definition of coordinated expenditures to designate independent expenditures made in coordination with a national, state, or local committee of a political party as contributions to such a committee. BCRA § 214(a), amending FECA § 315(a)(7)(B), 2 U.S.C. § 441a(a)(7)(B). Section 213 requires political parties to choose between making coordinated expenditures in support of a candidate under 2 U.S.C. § 441a(d) or making "independent" expenditures in support of the candidate. BCRA § 213, amending FECA § 315(d), 2 U.S.C. § 441a(d).

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[7] The FEC issued regulations pursuant to this directive on January 3, 2003. Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003).

Title II's independent expenditure provisions prevent circumvention of FECA's existing source and contribution limits and disclosure requirements, which this Court has long recognized advance the government's compelling interest in preventing the appearance and reality of corruption in the electoral system. *See, e.g.*, *Buckley*, 424 U.S. at 25-27, 66-68. Unless the significant loopholes relating to sham issue ads and coordinated expenditures are closed, congressional regulation of candidate financing will be largely ineffectual. Large contributors will retain undue influence, and public perceptions of corruption and disenfranchisement will persist.

In addition to closing loopholes related to contribution limits, BCRA includes several new disclosure requirements that the plaintiffs challenge as unconstitutional. With respect to electioneering communications, section 201 of BCRA mandates disclosure regarding disbursements funding electioneering communications that total more than $10,000 in a year. The required disclosure includes the identity of the person making the disbursement, principal place of business if not an individual, and

the names and addresses of persons who have donated $1,000 or more to the disbursing fund. BCRA § 201(a), amending FECA § 304, 2 U.S.C. § 434(f)(2). With respect to independent expenditures, section 212 of BCRA requires reports regarding expenditures or contracts to make independent expenditures that total $1,000 or more after the twentieth day prior to a federal election. BCRA § 212, amending FECA § 304, 2 U.S.C. § 434(g).

Finally, BCRA requires the clear identification within an advertisement of the sponsors of any electioneering communication. Section 311 amends FECA to provide that electioneering communications must either clearly identify the candidate or political committee that authorized the advertisement or, if not authorized by a candidate or her committee, "clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." BCRA § 311(1), amending FECA § 318(a)(3), 2 U.S.C. § 441d(a)(3).

These expanded disclosure requirements advance several compelling government interests related to building voter confidence and protecting the integrity of our electoral system.[8] Sections 201 and 212 help prevent circumvention of Title II's restrictions on coordinated expenditures by providing information concerning the sources of funding for electioneering communications in support of a candidate. Similarly, section 311's requirement that an advertisement's sponsors be clearly identified also enhances the ability of voters to evaluate the information presented to them and the candidates. Such identification and source information enables the public, the media, and regulatory authorities to investigate connections between candidates and their financial supporters—connections that are of interest to the public both during the election, when contribution limits might be triggered, as well as after the election, when the public would be alerted to the potential for corruption. The disclosure requirements also serve as a deterrent to illegal conduct and facilitate enforcement of campaign finance and anti-corruption laws.

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[8] The Court's decisions in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), and *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999), are not to the contrary. Those decisions concerned state regulations of voter initiatives and referenda, and neither state government produced evidence that it had acted on the basis of a substantial correlation between disclosure and the eradication of electoral fraud and informational distortion. Indeed, the majority in *McIntyre* reiterated the Court's earlier statements that in "candidate

In addition, BCRA's expanded disclosure requirements advance informational interests, long recognized by this Court, in helping voters to evaluate candidates and predict their future conduct once in office. Voters are better positioned to ascertain a candidate's place within the political spectrum and the interests to which the candidate is likely to respond later if they are informed about the identities of groups and individuals providing financial support to that candidate. *Buckley*, 424 U.S. at 66-67.

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elections" the government can pursue its compelling interest in decreasing corruption and that "[d]isclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office." 514 U.S. at 356. As Justice Ginsburg's concurring opinion observed, "[i]n for a calf is not always in for a cow," and the Court's decision that a single pamphleteer commenting on a school tax levy up for consideration by local referendum did not have to disclose herself as author "d[id] not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity." *Id.* at 358.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that (1) BCRA advances the government's compelling interests in building public confidence in the ability of ordinary citizens to participate meaningfully in the political process, encouraging active citizen participation, eliminating corruption and its appearance, and minimizing the perception of undue influence in the political process, and (2) the Court accordingly should uphold BCRA in all respects as a constitutional exercise of Congress's power to regulate federal elections.

Respectfully submitted,

EVAN A. DAVIS
Counsel of Record
ANIL KALHAN
KATHERINE MOONEY
Cleary, Gottlieb, Steen & Hamilton
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for Amici Curiae

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Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the
United States District Court
for the District of Columbia

BRIEF OF *AMICUS CURIAE* THE CENTER FOR RESPONSIVE POLITICS IN SUPPORT OF APPELLEES

LAWRENCE M. NOBLE *
PAUL SANFORD
1101 14th St. NW Suite 1030
Washington, D.C. 20005
(202) 857-0044

Counsel for *Amicus Curiae*

* Counsel of Record

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BRIEF OF *AMICUS CURIAE* THE CENTER FOR RESPONSIVE POLITICS IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS* [1]

The Center for Responsive Politics ("CRP" or "The Center") is a non-partisan, non-profit 501(c)(3) research organization that has systematically tracked the patterns in U.S. federal elections since the late 1980s. The Center was founded in 1983 by two U.S. Senators—Republican Hugh Scott of Pennsylvania and Democrat Frank Church of Idaho.

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[1] This brief is filed with the consent of all parties. *Amicus* certifies that no counsel for a party authored this brief in whole or in part, nor has any person nor entity, other than *Amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief.

Its purpose is to track the flow of money to federal candidates and political parties, analyze money's impact on public policy, and make this information available to the public. The Center's funding comes primarily from foundations, and it accepts no contributions from for-profit corporations or labor unions.

Nearly from its inception, the Center has played a unique role in the world of money and politics, converting the raw data collected by the Federal Election Commission (FEC) from federal candidates, parties and political action committees, and creating from it easy-to-understand profiles of candidates, industries, and the money that flows to Congress. CRP's data is widely used and respected by news organizations, the academic community, and by political professionals from all points in the ideological spectrum.

This *amicus* brief is presented as an informational resource to the Court to show the impact, growth and patterns of so-called "soft money" giving. It contains an analysis of campaign contributions based on data compiled from reports filed by political party soft money committees with the Federal Election Commission, and an analysis of the sources of those contributions by industry, organization and individual donor.

The source material for that analysis was the actual FEC database of nearly 224,000 itemized contributions over $200 given by individuals, corporations and other organizations during the 12 years when soft money contributions were required to be disclosed by the national party committees.[2] That period ran from January 1, 1991 through Election Day 2002. As such, this brief is intended to provide a factual framework to the arguments made by the defendants in this case.

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[2] An explanation of the Center's methodology in categorizing contribution data by industry is contained in the Appendix.

SUMMARY OF ARGUMENT

The ability of the parties to seek unlimited soft money contributions, exempt from the limitations imposed on hard money giving, led both the Democratic and Republican parties to rely ever more heavily on these large donations to fund their operations and election-related activities. Though it was originally claimed to be used exclusively for "non-federal" party building purposes, soft money was increasingly used by the parties to directly influence the outcome of federal elections. In fact, the giving patterns and trends unequivocally support the conclusion that these soft money contributions were being given to influence federal elections.

The giving patterns among organizational donors reveal a politically pragmatic approach, with most organizations delivering money to both sides during the same election cycle. This suggests organizational contributions have been used not as a reflection of a consistent political philosophy, but as a way to attain influence with political leaders from both parties.

The parties' reliance on these large donations created the appearance, at the very least, that these donations bought access to government officials and unduly influenced important governmental policy decisions. This is an outcome this Court, in *Buckley v. Valeo*, 424 U.S. 1 (1976) held was within Congress' authority to regulate when it upheld the contribution limits imposed by Congress in the Federal Election Campaign Act of 1971. The Bipartisan Campaign Reform Act of 2002 ("BCRA") merely cuts the connection between the ever-increasing flow of soft money and the national party committees and federal officeholders and candidates.

ARGUMENT

I. ESCALATION OF "SOFT MONEY" FUNDRAISING

Though the FEC first allowed "soft money" contributions to the political parties in the late 1970s, the extent of their effect on national party finances remained hidden from public view until 1991. That was when an FEC rule [3] requiring full disclosure of the contributions became effective.

Once it became visible, the extent of soft money's increasingly important role in party fundraising became fully apparent. At the same time, the dollars collected in the parties' soft money accounts began to accelerate sharply. In the 1992 election cycle, the Democratic and Republican national party committees (including the Democratic and Republican National Committees and both parties' House and Senate fundraising committees) raised a combined total of $86.1 million. By the 2000 cycle the total rose to nearly half a billion dollars, a level that was matched in the most recent cycle, even though there was no presidential election held. The following charts illustrate the trends behind those summary numbers in several ways.

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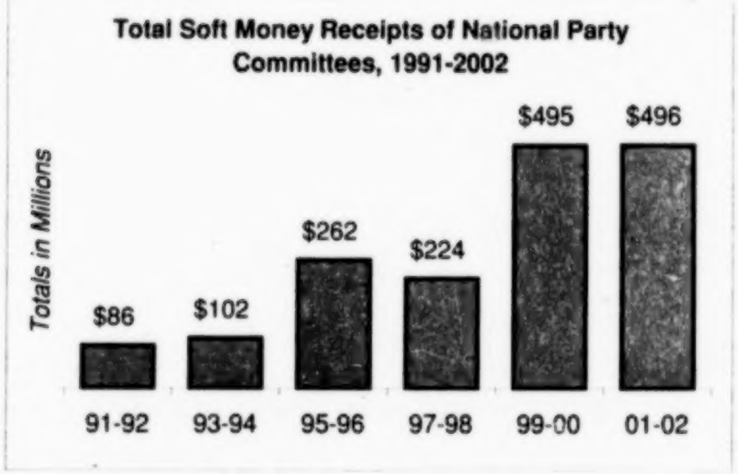
[3] 11 CFR § 104.8(e) (1991).



Source: Federal Election Commission [4]

Historically, the biggest leaps in soft money fundraising have occurred in election cycles when presidential campaigns took place. From 1994 to 1996 the amount of soft money raised by the parties more than doubled, as illustrated in the chart above. It doubled again in 2000. During mid-term election cycles, the fundraising levels remained close to where they had been in the previous presidential election cycle. Even in mid-term cycles, however, the pace of soft money fundraising doubled every four years.

The trend of contribution spikes during presidential election cycles is even more pronounced when the soft money that went to the Democratic and Republican National Committees is isolated as shown in the chart below. The chart does not include money that went to the parties' congressional campaign committees.

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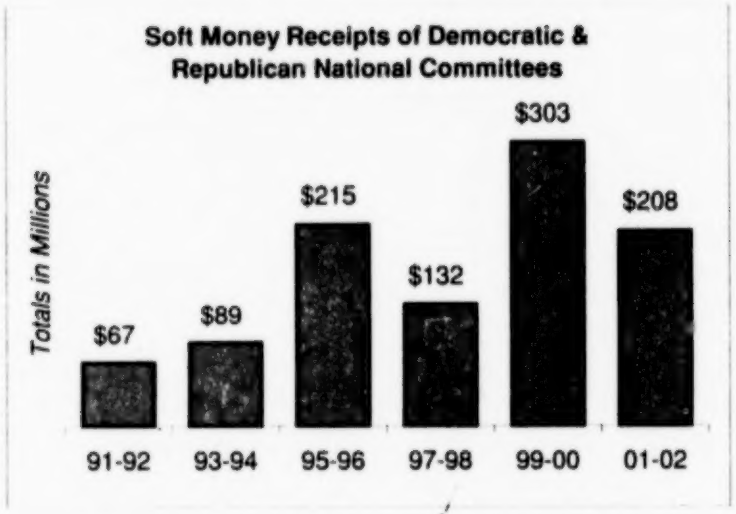
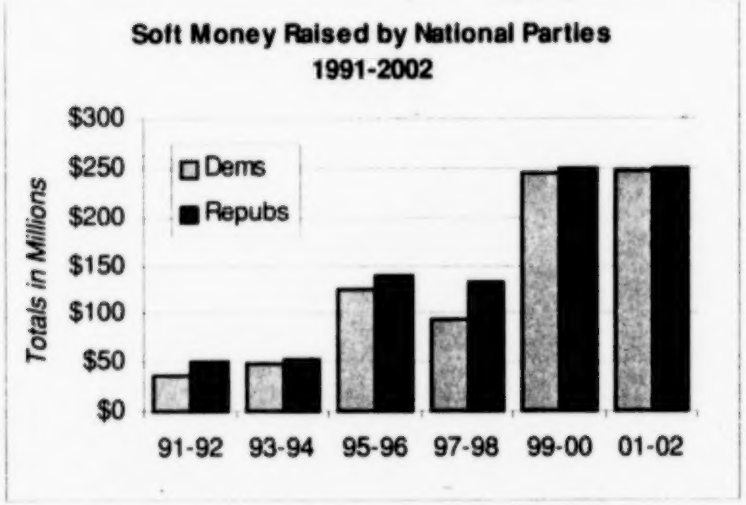
[4] *Party Committees Raise More than $1 Billion in 2001-2002*, FEC Press Release, March 20, 2003.


Soft Money Receipts of Democratic & Republican National Committees

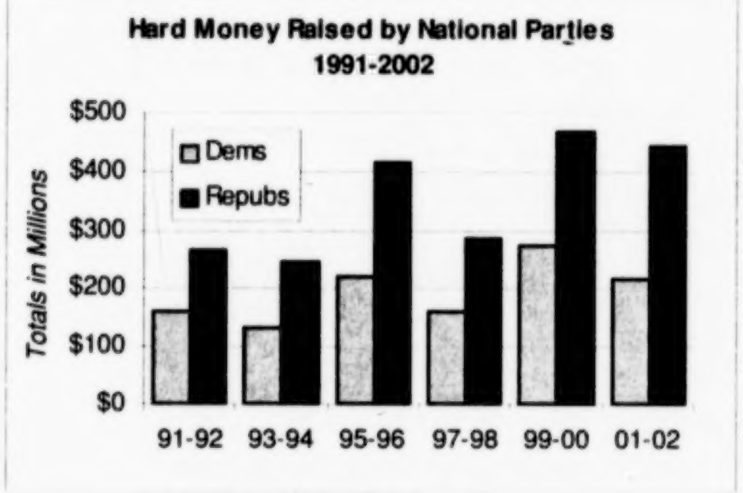
Source: Federal Election Commission

Notably, both parties were able to raise roughly equal amounts of soft money during the period such contributions were legal and disclosed. The chart below shows the breakdown by party.


Soft Money Raised by National Parties 1991-2002

Source: Federal Election Commission

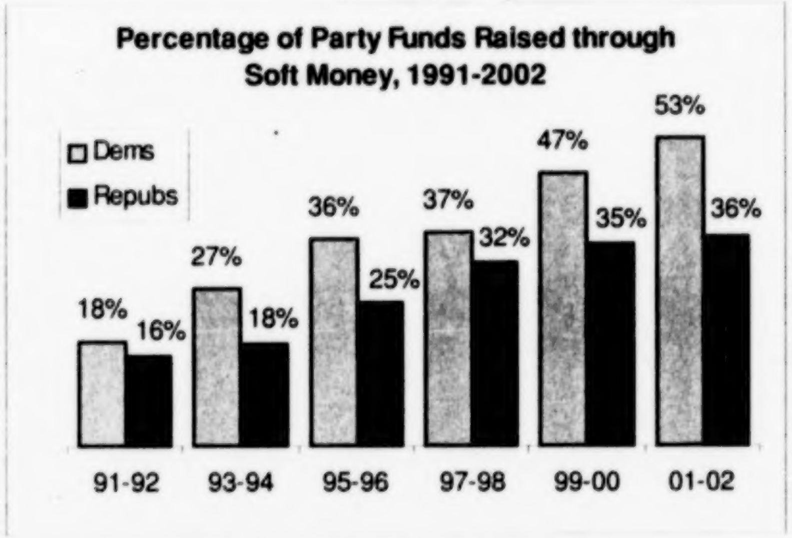
This relative parity in soft money fundraising sharply contrasts with the disparity between the parties in raising hard money. Republicans have long held the advantage in those contributions, as is clear in the following chart. In the most recent election cycle, for example, the Democratic federal party committees raised just $217 million in hard money contributions, less than half the $442 million raised by the Republicans.


Hard Money Raised by National Parties 1991-2002

Source: Federal Election Commission

Raising money quickly is more easily accomplished if the donors write big checks rather than small ones. As competition between the parties grew ever more contentious throughout the 1990s and the beginning of the new century, party fundraisers grew ever more reliant on collecting six-figure (or larger) donations through their soft money committees. This was especially true of the Democratic Party, which for years had lagged far behind the Republicans in its ability to raise hard money contributions.

The chart below shows each party's reliance on soft money during the past six election cycles. The figures include only funds collected by the Democratic and Republican National Committees, and each party's two congressional committees.



Source: Federal Election Commission

The Democrats' heavy reliance on soft money to fill the party's coffers did act as a counterbalance to the longstanding Republican advantage in collecting contributions from small donors. This trend was never so obvious as in the 2001-2002 cycle, when the party collected an unprecedented spate of large contributions from a relative handful of wealthy individual donors. Some 22 individuals gave soft money donations of $1 million or more in the 2002 election cycle – more than twice as many as had given in all previous election cycles. Of those 22 donors, 17 gave exclusively to the Democrats.

TOTAL	NAME	CITY	DEMS	REPUBS
$9,280,000	Saban, Haim	Los Angeles, CA	100 %	0 %
$7,390,000	Echaner, Fred	Chicago, IL	100 %	0 %
$6,700,000	Bing, Stephen L.	Los Angeles, CA	100 %	0 %
$3,288,786	Kirsch, Steven T.	Los Altos Hills, CA	100 %	0 %
$2,255,250	Schwartz, Bernard L.	New York, NY	100 %	0 %
$2,021,000	Corzine, Jon S.	Summit, NJ	100 %	0 %
$1,930,000	Simon, Bren & Melvin	Carmel, IN	100 %	0 %
$1,835,000	Angelos, Peter G.	Baltimore, MD	100 %	0 %

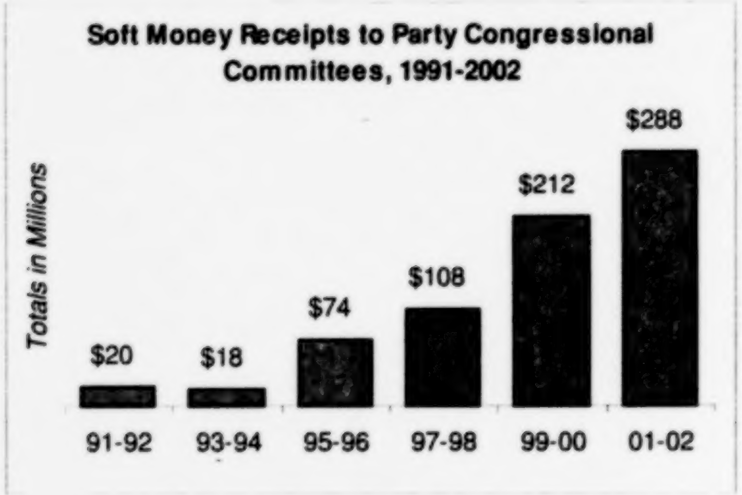
TOTAL	NAME	CITY	DEMS	REPUBS
$1,815,000	O'Quinn, John M.	Houston, TX	100 %	0 %
$1,500,000	Arnall, Dawn & Roland E.	Orange, CA	33 %	67 %
$1,450,000	Abraham, S. Daniel	West Palm Beach, FL	100 %	0 %
$1,295,000	Lindner, Carl H.	Cincinnati, OH	10 %	90 %
$1,205,000	Kushner, Charles	Florham Park, NJ	100 %	0 %
$1,180,000	Sussman, S. Donald & Laurie	Greenwich, CT	96 %	4 %
$1,053,000	Gund, Louise L.	Berkeley, CA	100 %	0 %
$1,040,000	Hindery, Leo J.	Sunnyvale, CA	100 %	0 %
$1,035,000	Johnson, Robert L.	Washington, DC	100 %	0 %
$1,020,000	Wasserman, Casey	Los Angeles, CA	100 %	0 %
$1,000,000	Alles, Malini	Los Altos Hills, CA	100 %	0 %
$1,000,000	Farmer, Richard T.	Cincinnati, OH	0 %	100 %
$1,000,000	Fulton, Stanley E.	Las Vegas, NV	0 %	100 %
$1,000,000	Willis, Ernest M.	Arlington, VA	100 %	0 %

Overall, these giving patterns—with their direct correlation to federal elections—demonstrate that the soft money now banned by BCRA was being sought in connection with, and to influence, federal elections. As shown below, this connection is even more stark when contributions to the parties' Senate and House fundraising committees are analyzed.

II. "Non-Federal" in Name Only

The cyclical nature of the fundraising by the RNC and DNC reflects the connection between soft money and presidential races. Soft money receipts increased during each presidential cycle, stayed about the same for the next midterm election, and then increased again for the next presidential election. While this is strong evidence of the connection between soft money and federal elections, one element of the parties' soft money fundraising was not subject to the cyclical patterns that affected contributions to the Democratic and Republican National Committees, but followed a very different trajectory of its own. That exception is well worth noting, for it even more clearly illustrates a crucial distinction between the theory of soft money and actual practice.

The exception is in soft money collected by the political parties' four congressional fundraising committees – the Democratic Congressional Campaign Committee (DCCC), the Democratic Senatorial Campaign Committee (DSCC), the National Republican Congressional Committee (NRCC) and the National Republican Senatorial Committee (NRSC). Fundraising for these groups has been going in one direction only: up. The chart below shows their combined soft money revenues between 1991 and 2002.



Source: Federal Election Commission

By their own admission, these campaign committees have an unambiguous purpose: to elect members of their own party to the U.S. House of Representatives and the U.S. Senate. The committees' own Web sites state this explicitly.

Democratic Congressional Campaign Committee:

> The Democratic Congressional Campaign Committee works to promote issues of importance to the Democratic Party and is the only national party committee whose principal mission is to elect Democrats to the House of Representatives.[5]

Democratic Senatorial Campaign Committee:

> The Democratic Senatorial Campaign Committee (DSCC) is the national committee of the Democratic Party formed to elect Democratic members of the United States Senate.[6]

National Republican Congressional Committee:

> The NRCC is a political committee devoted to increasing the 229-member Republican majority in the U.S. House of Representatives.[7]

National Republican Senatorial Committee:

> It is our sole responsibility to make sure that Republican Senate candidates are elected to the United States Senate.[8]

These four committees exist to elect members of Congress from their respective parties. Despite the fact that "soft money" was supposed to be used for non-federal party-building activities[9], these committees formed soft money committees of their own and raised unlimited contributions. From 1991-2002, these four committees have collected a combined $1.014 billion dollars in soft money contributions.[10] The money came from an array of corporations, trade associations, individuals and interest groups with business before Congress—interests that clearly saw benefits in linking their Capitol Hill lobbying efforts with large contributions.

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[5] Mission statement of the Democratic Congressional Campaign Committee <http://www.dccc.org/about/>.

[6] Mission statement of the Democratic Senatorial Campaign Committee <http://www.dscc.org/information/about/>.

[7] Mission statement of the National Republican Congressional Committee <http://www.nrcc.org/nrcccontents/issuesagenda/overview.shtml>.

[8] Mission statement of the National Republican Senatorial Committee <http://www.nrsc.org/nrscweb/aboutus/>.

These congressional committees have not been the only ones setting up soft money committees to affect federal elections. In recent election cycles, even *candidates* for federal office have gotten into the soft money business, establishing joint fundraising committees to raise hard money for their own campaigns and, at the same time, soft money for their party to spend on their behalf. The practice first attracted widespread attention in the early stages of Hillary Rodham Clinton's 2000 U.S. Senate campaign in New York.[11]

Mrs. Clinton's "New York Senate 2000" committee was established to collect soft money contributions for both the New York Democratic Party and the Democratic Senatorial Campaign Committee (DSCC), while proceeds to her "New York Democratic Victory 2000 Non-Federal" committee were to benefit the Democratic National Committee.[12]

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[9] *See* FEC Advisory Op. No. 1979-17 *and* 11 C.F.R. §§ 102.5, 106.5 (2002).

[10] *See* FEC Press Release, *supra* note 4.

[11] *See* John M. Broder, *Democrats Able to Circumvent Contribution Limit*, New York Times, December 22, 1999, at A1; *see also* Susan B. Glasser, *Clinton Taps Big Donors for Special N.Y. Account; 'Soft Money' Builds Party's Senate Fund*, Washington Post, January 4, 2000, at A1.

[12] *See* Robert Zausner, *Loophole Helps Clinton Exceed Donation Limit*, Philadelphia Inquirer, June 15, 2000, at A28.

An article in the Bureau of National Affairs' *Money & Politics Report* of December 6, 1999 explained how the arrangement worked:

> Perhaps not coincidentally, the DSCC transferred $100,000 to the New York State Democratic Party for TV 'issue ads' promoting Hillary Clinton. The ads, which began airing in November, were paid for with unregulated soft money and did not explicitly call for a vote for Clinton. However, they were criticized by Republicans, who suggested they broke campaign finance laws because they were improperly coordinated with the Clinton campaign.[13]

While the committee was careful not to explicitly guarantee that the money raised would directly benefit the First Lady's Senate campaign—but would be spread by the DSCC to other Senate races—donors were undoubtedly aware that Mrs. Clinton would be very grateful for their contributions, and the bigger the better. Indeed, news reports emerged in early 2000 about a $300,000 contribution received by New York Senate 2000 that appeared to be aimed at lobbying Mrs. Clinton's husband, the President.[14]

The contributions were given by two women from Westport, Connecticut—Francine Goldstein and Sandra Wagenfeld—who had an abiding interest in a decision by the European Commission whether to allow older jets equipped with "hush kits" to land at European airports. Ms. Goldstein owned the company that manufactured the kits, and President Clinton reportedly met with the president of the European Commission to urge him to permit the landing of airplanes equipped with those kits.[15] This scenario raises at least the appearance that the two donors' real intention was to lobby the administration to revise its trade policy with the European Commission in a way that would financially benefit them.

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[13] Kenneth P. Doyle, *Fund-Raising Unit Linked to Mrs. Clinton Provided $200,000 in Soft Money to DSCC*, BNA's Money & Politics Report (December 6, 1999) <http://pubs.bna.com/>.

[14] *See* Sheila Kaplan, Gary Cohen, *Of Perks and the Purse*, U.S. News & World Report, January 24, 2000, at 21.

When Mrs. Clinton's opponent at the time, New York City Mayor Rudy Giuliani, learned of the new soft money "joint fundraising" committee, his initial reaction was to lambaste it as a perversion of the campaign finance laws. Later, his opinion changed and he set up a similar committee of his own.[16] In all, at least 10 Democratic and Republican Senate candidates collected contributions through soft money joint fundraising committees in 2000, as did 11 more in the 2002 campaign.[17] Other Senate candidates accomplished

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[15] *Id.*

[16] *See* Giuliani Victory Committee letter to FEC Reports Analysis Division, May 3, 2000 ("The Giuliani Victory Committee is the joint fundraising representative of which the Friends of Giuliani Exploratory Committee and the National Republican Senatorial Committee are the only joint fundraising participants").

[17] In 2000, joint fundraising soft money committees were established by the campaigns of Republicans John Ashcroft in Missouri (Ashcroft Victory Committee), Conrad Burns in Montana (Burns Victory Committee), Rudy Giuliani in New York (Giuliani Victory Committee), Slade Gorton in Washington (Gorton Victory Committee), Rod Grams in Minnesota (Grams Victory Committee), Orrin Hatch in Utah (Hatch Victory Committee), and Rick Santorum in Pennsylvania (Santorum Victory Committee). In the 2002 campaign, they were set up by Republicans Lamar Alexander in Tennessee (Alexander Victory Committee), Ron Coleman in Minnesota (Coleman Victory Committee), Elizabeth Dole in North Carolina (Dole Victory Committee), Tim Hutchinson in Arkansas (Hutchinson Victory Committee), Mitch McConnell in Kentucky (McConnell Victory Committee), Bob Smith in New Hampshire (Bob Smith Victory Committee), Gordon Smith in Oregon (Gordon Smith Victory Committee), Ted Stevens in Alaska (Stevens Victory Committee), and George Voinovich in Ohio (Voinovich Victory Committee). Additional committees in other states were also established, but did not report collecting any funds.

the same effect by establishing so-called "527 committees" that reported only to the Internal Revenue Service, not to the FEC.[18]

As with the Clinton campaign, there was little pretense among the other committees that these donations would be supporting the parties generally. Rather, the candidates made it quite clear that they were grateful for the donations--which were dozens of times larger than the $2,000 maximum that could legally be donated in hard money directly to their campaigns.[19] The Democratic candidates generally named their committees after the state they were running in, setting up eight of them in 2000 and no fewer than 19 in 2002.[20] Many Republican candidates took an even bolder approach, naming their soft money committees—as with the Santorum Victory Fund in Pennsylvania—directly after the candidates themselves.[21]

Were the donors under the impression that their soft money contributions would be used to support specific Senate races, rather than the party generally? CRP posed this question to Peter Buttenwieser, a major Democratic donor who invested heavily in several of those committees, including Michigan Senate 2000, a soft money committee set up for Debbie Stabenow's campaign to defeat Republican incumbent Spencer Abraham. Buttenwieser's response was published in *Speaking Freely: Washington Insiders Talk About Money in Politics.*

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[18] *See* Mike Soraghan, *'Soft' Cash Dominates Senate Race*, Denver Post, September 30, 2002, at A1.

[19] *See* Broder, *supra* note 11.

[20] Democratic Senate candidates setting up so-called 527 fundraising committees in 2000 included Mel Carnahan in Missouri, Hillary Clinton in New York, Dianne Feinstein in California, Ron Klink in Pennsylvania, Zell Miller in Georgia, Bill Nelson in Florida, Debbie Stabenow in Michigan and Bob Weygand in Rhode Island. In 2002 committees were set up to benefit the Democratic Senate candidates in Arkansas, Colorado, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maine, Michigan, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee and Texas.

[21] *See* note 17 *supra.*

> *CRP: When you give $100,000 to that joint fundraising committee, is it your expectation that money's going to be used to elect her in that state?*
>
> Oh yeah, I know exactly what it's going to do. I literally know what it's going to do. I mean, I'm sitting there with the professionals in a room, and I don't know exactly what the ad's going to look like, but I know what the ad's going to try to do. So it's a fairly educated well-informed understanding.
>
> Now, if I send some money to [North Carolina Senate candidate] Erskine Bowles for that, and [Arkansas Senate candidate Mark] Pryor for that and [Colorado Senate candidate] Tom Strickland for that, I don't know, 'cause I'm not in it very well. But when it comes to [New Hampshire Senate candidate Jean] Shaheen, I know. When it comes to [Maine Senate candidate] Chellie Pingree, I very much know, and when it comes to Mrs. Carnahan, I very much know . . .[22]

What becomes apparent by examining the contributions themselves—even without talking with the donors—is that soft money contributions over the years became an increasingly important means of delivering huge contributions, many times over the legal limit, to benefit specific federal candidates.

III. INDUSTRY TRENDS IN SOFT MONEY GIVING

Not only did the national political party committees and federal candidates solicit soft money for federal elections, but

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[22] LARRY MAKINSON, SPEAKING FREELY: WASHINGTON INSIDERS TALK ABOUT MONEY IN POLITICS 134-135 (2003).

the giving patterns of the donors make it clear that the money was being contributed to influence federal elections. Four industries—tobacco, pharmaceuticals, casinos/gambling and telecommunications services & equipment—gave more than half their campaign dollars from 1991-2002 in soft money. All four combined their soft money giving with intense lobbying efforts aimed at influencing federal government decisions in Washington. Together, they provide a revealing glimpse of the patterns and motivations typical of major soft money donors.

A. TOBACCO

For the tobacco industry, the big switch to soft money came in 1996, a time when the Clinton administration was making public its support of Food and Drug Administration proposals to regulate nicotine as a drug and restrict the marketing of cigarettes to minors.[23] The industry's contributions—both hard and soft—peaked in 1996, declined somewhat in 1998 and have held steady since that time.

The dominant giver was Philip Morris, the largest tobacco company in the world and the second-biggest soft money donor of all, behind only the American Federation of State, County and Municipal Employees. In all, the firm delivered more than $12.3 million in soft money donations between 1991 and 2002, 83 percent of it to Republican Party committees.[24] During the same period, RJR Nabisco, the number two tobacco giant, gave more than $4 million in soft money contributions, nearly 80 percent to Republicans. UST Inc, which specializes in smokeless tobacco, also gave slightly more than $4 million, with 88 percent going to the

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[23] *See* Peter H. Stone, *Some Hard Facts About Soft Money*, National Journal, March 23, 1996, at 672.

[24] All the industry and corporate figures cited in this section were calculated by CRP from the FEC soft money database.

GOP. Loews Corp., whose diversified interests also include hotels, gave just over $2.5 million, with 56 percent to the Republicans. Brown & Williamson Tobacco gave slightly under $2.5 million, with 98 percent of its dollars delivered to the Republican Party. In this case, the industry clearly aligned itself, both politically and financially, with the Republican Party, which was seen as more sympathetic to the tobacco companies' issues. Its lopsided giving left Democrats free to criticize the Republicans for their alignment with the tobacco industry, something many candidates did in their campaigning.[25]

Overall, tobacco industry contributions—both hard and soft combined—peaked in 1996 at $10.6 million. From that year until soft money ended in 2002 with the enactment of BCRA, more than 60 percent of tobacco's contributions were given in soft money to the parties, rather than in hard money contributions to candidates. Indeed, as political contributions from tobacco companies came to be considered a political liability for many federal candidates and office-holders, the firms' strategy of giving to the parties may have made practical political sense.[26]

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[25] *See* Mark H. Rodeffer, *Dems Hit Coleman on Campaign Cash*, NationalJournal.com (October 24, 2002) <http://nationaljournal.com/members/adspotlight/2002/10/1024mnsen1.htm>; *see also* Meg Kinnard, *Richardson Goes After Otter's Politics*, NationalJournal.com (September 19, 2002) <http://nationaljournal.com/members/adspotlight/2002/09/0919brid1.htm>.

[26] *See* Stone, *supra* note 23.

SOFT MONEY CONTRIBUTIONS FROM THE TOBACCO INDUSTRY, 1991-2002

ELECTION CYCLE	TOTAL	TO DEMS	TO REPUBS
1992	$2,807,955	33%	67%
1994	$2,518,893	14%	86%
1996	$6,904,687	15%	85%
1998	$5,481,042	15%	85%
2000	$5,318,039	11%	89%
2002	$6,010,173	19%	81%

OVERALL TOBACCO INDUSTRY GIVING, 1991-2002

ELECTION CYCLE	TOTAL	SOFT MONEY	HARD MONEY	TO DEMS	TO REPUBS
1992	$5,876,978	48%	52%	44%	56%
1994	$5,314,238	47%	53%	33%	67%
1996	$10,580,141	65%	35%	19%	81%
1998	$8,614,588	64%	36%	21%	79%
2000	$8,610,638	62%	38%	16%	83%
2002	$8,929,509	65%	35%	22%	78%

B. PHARMACEUTICALS/HEALTH PRODUCTS

Like Big Tobacco, the pharmaceutical industry is consolidated into a relative handful of giant corporations that are the dominant political players. Unlike tobacco, its contributions are still on the rise. Drug companies stepped into soft money with a relatively modest $2.3 million in the 1992 election cycle, ranking 10th in soft money giving among all industries. By the end of the 2002 election cycle, the industry had moved up to 5th place and boosted its soft money contributions to more than $18.2 million.

The top soft money contributors in the industry were Pfizer Inc., with $4.5 million in contributions (86 percent to

Republicans); Bristol-Myers Squibb, $4.2 million (84 percent to Republicans); Pharmaceutical Research & Manufacturers of America, the industry's trade association, which gave just under $3.9 million (96 percent to Republicans), Eli Lilly & Co, giving just over $3 million (75 percent to Republicans), Schering-Plough, $2.3 million (85 percent to the GOP), and Pharmacia, $2.2 million (84 percent to the GOP). The industry also includes manufacturers of non-prescription health supplements—a segment that retains a very strong interest in keeping federal regulators out of its business.[27] The top donor among that group was S. Daniel Abraham, who founded Slim-Fast Foods and Thompson Medical. Abraham and his company gave just under $2.4 million, with 93 percent going to Democrats. Metabolife International, giving all its money through the company itself, donated $1.7 million (60 percent to Democrats).

In all, 14 companies from the Pharmaceutical and Health Products industry gave $1 million or more in soft money during the 12 years such contributions were disclosed. As the charts below show, drug firms' soft money giving increased dramatically as issues of concern to the industry came before Congress.

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[27] *OpenSecrets.org* (visited July 30, 2003) <http://www.opensecrets.org/industries/background.asp?Ind=H4600>; *see also* Louis Jacobson, Shawn Zeller, *K Street for August 4, 2001*, National Journal, August 4, 2001, *and* Jeffrey Goldberg, *Next Target: Nicotine*, New York Times, August 4, 1996, at Section 6, Page 23.

SOFT MONEY CONTRIBUTIONS FROM THE PHARMACEUTICAL INDUSTRY, 1991-2002

Election Cycle	Total	To Dems	To Repubs
1992	$2,324,878	36%	64%
1994	$2,170,257	32%	68%
1996	$6,755,563	34%	66%
1998	$6,233,781	34%	66%
2000	$15,462,572	31%	69%
2002	$18,206,604	18%	82%

OVERALL PHARMACEUTICAL INDUSTRY GIVING, 1991-2002

Election Cycle	Total	Soft Money	Hard Money	To Dems	To Repubs
1992	$7,936,489	29%	71%	43%	57%
1994	$7,565,883	29%	71%	44%	56%
1996	$13,665,104	49%	51%	34%	66%
1998	$12,886,669	48%	52%	35%	65%
2000	$26,660,336	58%	42%	31%	69%
2002	$26,941,139	63%	37%	24%	75%

C. CASINOS & GAMBLING

Over the past 20 years, the casino and gambling industry has undergone a revolution in the United States. A generation ago, if someone wanted to legally bet in a casino he or she had two choices: Las Vegas or Atlantic City. Today, casinos operated by major corporations and by Indian tribes stretch from coast to coast.

Most of the government decisions responsible for that revolution were made by state and local governments, and the full extent of political contributions made to those officials over the years has never been tallied. Even though the federal government has generally kept its hands off the gaming industry—with the exception of the Bureau of Indian Affairs, which certifies tribes entitled to open casinos – millions of dollars have flowed to members of Congress and the national political parties from gaming interests. More than half that money—over $26 million between 1991 and 2002 – was given in soft money contributions to the Democratic and Republican parties. Overall, the industry's largesse has been fairly evenly split between the parties, though a noticeable contrast can be seen between the corporate casinos—whose $18 million has gone two-to-one to Republicans—versus Indian casinos—whose $8 million has favored Democrats by a three-to-one margin.

SOFT MONEY CONTRIBUTIONS FROM THE GAMING INDUSTRY, 1991-2002

ELECTION CYCLE	TOTAL	TO DEMS	TO REPUBS
1992	$468,768	63%	37%
1994	$1,492,469	45%	55%
1996	$4,111,041	56%	44%
1998	$4,155,350	35%	65%
2000	$7,670,413	55%	45%
2002	$8,544,926	39%	61%

Like tobacco, and in recent years like the pharmaceutical industry, direct political contributions from the gaming industry to congressional and presidential candidates may sometimes cause political problems for the recipients if those industries are unpopular with voters.[28] That may be one

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[28] *See* Ryan Connors, *Ferguson Hits Kennedy for Gambling Ties*, NationalJournal.com (March 29, 2002) <http://nationaljournal.com/members/adspotlight/2002/03/0329cfri1.htm>; *see also* Anonymous, *Beasley Slams Politician Hodges*, NationalJournal.com (Oct. 19, 1998) <http://nationaljournal.com/members/adspotlight/1998/10/1008db1.htm> *and* Timothy Boone, *Accept Money, Make Excuses*, Biloxi Sun Herald, July 20, 2003, at D3.

reason the gaming industry has invested so heavily in soft money, which goes to the parties instead. The industry's tendency to give ample funds to both parties illustrates one of the fundamental verities about political contributions: by giving generously to both Democrats and Republicans, specific donors—or an entire industry—can often neutralize potential opposition, or at least ensure that their particular issue does not become a lightning rod seized by one party to attack the other.

OVERALL GAMING INDUSTRY GIVING, 1991-2002

ELECTION CYCLE	TOTAL	SOFT MONEY	HARD MONEY	TO DEMS	TO REPUBS
1992	$1,540,219	30%	70%	67%	33%
1994	$2,984,249	50%	50%	53%	47%
1996	$7,048,532	58%	42%	53%	47%
1998	$6,694,488	62%	38%	40%	60%
2000	$12,426,660	62%	38%	55%	45%
2002	$14,270,088	56%	44%	52%	48%

Six gaming industry donors gave $1 million or more between 1991 and 2002, led by MGM Mirage, which gave just over $3 million (62 percent to Republicans). Other top donors included the Mandalay Resort Group ($1.8 million, 85 percent to Republicans); International Game Technology ($1.8 million, 65 percent to Republicans); the Mashantucket Pequot Tribe ($1.3 million, 63 percent to Democrats; Las Vegas casino executive Stanley Fulton ($1.2 million, 100 percent to Republicans); and Harrah's Entertainment, $1.1 million, 58 percent to Democrats.)

D. TELECOMMUNICATIONS SERVICES & EQUIPMENT

In contrast to the other industries above whose soft money contributions came mainly from large corporations, the Telecommunications Services and Equipment industry's biggest donor was not a company, but an individual: Bernard

Schwartz, head of Loral Space & Communications. Schwartz delivered more than $5.3 million in soft money between 1991 and 2002, virtually all of it to the Democratic Party. His firm is currently restructuring under Chapter 11, as is the second-leading contributor on the list, Global Crossing.[29]

The political benefits Schwartz's contributions produced for his company erupted into a scandal in 1998 that prompted a congressional investigation.[30] At issue was a waiver granted by the Clinton administration for the transfer of sensitive satellite technology to the Chinese government—technology that could be used not only for commercial purposes, but for military purposes as well. The State Department had initially denied permission for the transfer on the grounds of national security. In February 1998, however, President Clinton overruled that decision, transferring responsibility to the Commerce Department, which then approved a waiver for Loral. Schwartz was the single biggest contributor to the Democratic Party in the 1996 election cycle, with more than $600,000 in soft money contributions. He gave another million dollars in the 1998 cycle, nearly $1.3 million in the 2000 cycle, and over $2.2 million in 2001-2002. The incident remains a powerful example of the nexus between large political donations and significant government decisions that may directly benefit a donor.

Global Crossing offers another illustrative case study. The firm's plans to build undersea fiber-optic cables connecting the U.S. to Japan hit a snag in 1999 when a consortium of rivals—AT&T, MCI and Sprint—sought permission from the

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[29] *See* J. Lynn Lunsford, Andy Pasztor, Anne Marie Squeo, *Space Woes Zap Loral, Boeing*, Wall Street Journal, July 16, 2003; *and* Dennis K. Berman, Yochi J. Dreazen, *Global Crossing Deal May Hit Snag*, Wall Street Journal, July 9, 2003.

[30] *See* John Mintz, *China Aid Hurt U.S. Security, Panel Says*, Washington Post, December 31, 1998, at A1.

Federal Communications Commission to build one of their own.[31] Out of nowhere, Global Crossing emerged as a political powerhouse in Washington, thanks to a multi-million-dollar lobbying effort and $2 million in soft money contributions during the 1999-2000 election cycle. The money was split almost evenly between the two parties (Democrats got 52 percent), and it came both from the corporation and from three of its top executives: co-chairmen Gary Winnick and Lodwrick Cook and CEO Leo Hindery. The company disappeared from the political radar screen almost as quickly as it arose, filing for bankruptcy not long after Enron did and facing investigations for accounting irregularities.

SOFT MONEY CONTRIBUTIONS FROM THE TELECOM SERVICES/EQUIPMENT INDUSTRY, 1991-2002

ELECTION CYCLE	TOTAL	TO DEMS	TO REPUBS
1992	$440,566	30%	70%
1994	$591,203	50%	50%
1996	$2,588,990	71%	29%
1998	$2,638,887	65%	35%
2000	$11,269,594	63%	37%
2002	$8,413,392	57%	43%

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[31] *See U.S.-Japan Undersea Cable Project Focus of Probe*, Bloomberg News, *available in* Los Angeles Times, July 1, 1999, at C3; *see also AT&T Plan for Japan Cable Clears Hurdle*, Bloomberg News, *available in* New York Times, July 10, 1999, at C3.

OVERALL TELECOM SERVICES/EQUIPMENT INDUSTRY GIVING, 1991-2002

ELECTION CYCLE	TOTAL	SOFT MONEY	HARD MONEY	TO DEMS	TO REPUBS
1992	$1,708,705	26%	74%	46%	54%
1994	$1,759,179	31%	69%	54%	46%
1996	$4,862,638	53%	47%	56%	43%
1998	$5,199,605	51%	49%	53%	46%
2000	$18,220,484	62%	38%	56%	44%
2002	$12,853,876	65%	35%	54%	46%

E. THE ROLE OF ORGANIZED LABOR

While most business groups have long supported the Republican Party in their campaign contributions, labor unions have for generations been a mainstay of financial support for the Democratic Party. They, too, were quick to adapt to the new regime of soft money contributions, as was obvious when the source of that money was first disclosed in the 1991-92 election cycle. In that cycle and the five to follow, unions delivered a total of just under $95 million. Ninety-eight percent of it went to the Democrats.

SOFT MONEY CONTRIBUTIONS FROM ORGANIZED LABOR, 1991-2002

ELECTION CYCLE	TOTAL	TO DEMS	TO REPUBS
1992	$4,319,238	99%	1%
1994	$4,417,358	99%	1%
1996	$9,546,686	98%	2%
1998	$10,322,136	97%	3%
2000	$30,418,895	99%	1%
2002	$35,867,806	99%	1%

While the bulk of union dollars continue to flow to Democratic candidates in hard money through political action committees, the proportion of labor dollars delivered in soft money continued to rise with each new election cycle while soft money was legal—growing from just 8 percent of all labor money in 1992 to more than one dollar in every three in both the 2000 and 2002 cycles.

OVERALL LABOR GIVING, 1991-2002

ELECTION CYCLE	TOTAL	SOFT MONEY	HARD MONEY	TO DEMS	TO REPUBS
1992	$53,341,208	8%	92%	94%	5%
1994	$51,044,388	9%	91%	96%	4%
1996	$64,949,299	15%	85%	93%	6%
1998	$60,859,967	17%	83%	92%	8%
2000	$90,152,281	34%	66%	94%	6%
2002	$96,529,105	37%	63%	93%	7%

Even considering that the largest unions have millions of members nationwide, their impact as soft money donors is impressive. AFSCME, the American Federation of State, County and Municipal Employees, was the single biggest donor of soft money from 1991-2002, with more than $15.7 million in contributions, all to the Democrats. Six other unions ranked in the top 20: the Service Employees International Union ($11.3 million); Communications Workers of America ($9.2 million); the Carpenters & Joiners Union ($7.1 million); the American Federation of Teachers ($6.9 million); the United Food & Commercial Workers Union ($5.5 million); and the National Education Association ($4.8 million). Virtually all the money went to Democratic Party committees; the most bipartisan among them was the NEA, which gave 7 percent of its soft money to the Republicans.

CONCLUSION

As the above analysis demonstrates, soft money contributions at the national level are directly related to federal election campaigns and the policy agendas of individuals, industries and groups. Those agendas, like the soft money contributions, are focused on decisions made by members of congress and the occupant of the White House. Contrary to the claim of some, these large soft money contributions are not primarily focused on state and local races or party building. These contributions are "non-federal" only in the sense that, prior to the BCRA, the FEC had declared them so. For all other intents and purposes, the donors and the recipients were linked in a soft money strategy that was aimed at helping elect Federal candidates to further a national agenda of the donors.

Respectfully submitted,

LAWRENCE M. NOBLE *
PAUL SANFORD
1101 14th St. NW Suite 1030
Washington, D.C. 20005
(202) 857-0044

Counsel for *Amicus Curiae*

* Counsel of Record

August 5, 2003

APPENDIX

METHODOLOGY

For this *amicus* brief the Center reviewed nearly 224,000 itemized soft money contributions made to political party committees between January 1, 1991 and November 7, 2002—the entire lifespan of disclosed soft money contributions to the national parties. This includes all contributions above $200 made by individuals, corporations, or other organizations. Wherever possible, the contributions were then coded by industry/interest group. For organizations, this classification was based on the company or association's primary business interest, or in the case of ideological groups, the political issues it promotes. For individuals, the code was based on the donor's occupation/employer, as reported by the recipient committee based on the disclosure by the donor.

The codes used for business groups follow the general guidelines of the Standard Industrial Classification (SIC) codes initially designed by the Office of Management and Budget, and later replaced by the North American Industry Classification System (NAICS), developed jointly by the U.S., Canada and Mexico. These groupings were adjusted as needed to make them more applicable to common political demarcations, such as jurisdictional divisions in the structure of congressional committees. For labor and ideological groups, the Center derived its own classification system.

The system is hierarchical, divided into 13 broad sectors. Ten of these sectors reflect the world of business (such as defense, transportation, and health care). Labor has its own sector, as does the broad spectrum of ideological and single-interest groups.

At the more detailed level, the codes are broken down into more than 80 "industries"—for example air transport, insurance, and health professionals. Finally, the most detailed "category" level covers more than 400 specific groupings, from sugar growers to chiropractors, and from teachers unions to supporters of Israel.

The Center has been using this coding system since 1988, updating it when needed as new industries and interest groups emerge. Over the years, the system has made possible a broad analysis of the billions of dollars of hard and soft money donations given to federal candidates and political parties.

Using the classification system, the Center compiles contribution profiles for every member of Congress and every candidate for federal office who collects political contributions. A vast amount of this information is available at no cost on the Center's Web site at http://www.opensecrets.org.

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No. 02-1674 & Consolidated Cases

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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MITCH MCCONNELL, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES IN SUPPORT OF APPELLEES

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
1730 M Street, N.W.
Suite 1000
Washington, DC 20036
(202) 229-1965

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Rd.
Charlottesville, VA 22903
(434) 924-3127

Counsel for *Amicus Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE*[1]

The League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy. The League is organized in more than a thousand communities in every state and has more than 125,000 members and supporters nationwide. The League was organized in 1919 as an outgrowth of the 72-year struggle to win voting rights for women in the United States.

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[1] The Department of Justice has consented to the filing of this brief in a letter which accompanies this filing. All other parties have filed written consents to the filing of *amicus* briefs with the Court. No counsel for any party authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or counsel made any monetary contribution to its preparation or submission.

One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, that protects individual liberties established by the Constitution, and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades. The League thus has a strong and direct interest in this case.

SUMMARY OF ARGUMENT

In late October of 1996, the following television advertisement ran repeatedly in Arkansas:

> Senate candidate Winston Bryant's budget as Attorney General increased seventy-one percent. Bryant has taken taxpayer funded junkets to the Virgin Islands, Alaska, and Arizona. And spent about $100,000 on new furniture. Unfortunately, as the state's top law enforcement official, he's never opposed the parole of any convicted murderers. And almost 4,000 Arkansas prisoners have been sent back to prison for crimes committed while they were out on parole. Winston Bryant: government waste, political junkets, soft on crime.

Deborah Beck, *et. al.*, Annenberg Public Policy Center, *Issue Advocacy During the 1996 Campaign* 24 (1997). Winston Bryant was running for an open seat in the United States Senate. The tax-exempt organization that sponsored the ad, Citizens for the Republic Education Fund, spent more than $300,000 on a last-minute television blitz of Little Rock and Jonesboro. Bryant lost. *Id.* Such advertisements come as little surprise, of course. They are a powerful part of many campaign strategies.

What is surprising is that until the enactment of the Bipartisan Campaign Reform Act (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002), such advertisements were not treated as electioneering speech under federal law. Despite their appearance on the eve of the election, their unmistakable mention of a particular federal candidate, their targeting of the candidate's electorate, and their appearance on television, the courts would have treated such ads as "issue" advocacy. By avoiding the use of "magic words"—express terms like "vote for," "elect," "support," "vote against," "defeat," and "reject"—they fell outside of coverage. Even if they were designed to promote a particular candidate, continuously featured that candidate, swayed voters to the candidate's favor, and did not even mention a traditional issue, they were treated as simple "issue" ads.

"Issue" advocacy thus became a peculiar term of legal art. It indicated nothing about what an advertisement said or concerned. It signified only that a few particular words were missing. An ad could educate on a burning social issue or shamelessly shill for a candidate. But whatever its content, so long as no magic words appeared, it was completely immune from the sort of reasonable source and disclosure rules that have long applied to campaign advocacy.

By making the absence of a few particular words all that mattered, the "magic words" approach undermined two of the longest-standing and most central architectural features of American campaign finance regulation: the disclosure of political spending and the bar against direct corporate and union spending to influence federal elections. By omitting a few particular words, individuals and entities could spend unlimited amounts to campaign for federal candidates without ever having to disclose their activities. In the Bryant blitz, for example, the citizens of Arkansas did not know the tax-exempt sponsor's identity, let alone the individuals or corporations or unions that may have funded the tax-exempt's political activities. *See, e.g.*, Leslie Wayne, *A Back Door for the Conservative Donor*, N.Y. Times, May 22 1997 at B10. Only after much research by the press did the identity of the tax-exempt itself become clear. No research, however, was able to uncover the identity of any individuals, corporations, or unions that may have donated money to the tax-exempt for these particular advertisements. As this Court has repeatedly observed: "Publicity is justly commended as the remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933)). But the absence of "magic words" bars all disclosure.

Without "magic words," moreover, corporations and unions could have used the tax-exempt as a conduit to run this ad throughout the campaign season, or, indeed, have paid for it themselves. So long as they did not use "magic words" nothing stopped them from spending whatever they wanted to advocate the election or defeat of particular federal candidates. The addition of two words—"vote against"—at the end of the Bryant ad would have made all the difference. The "magic words" test would certainly have prevented a corporation or union from funding that. But that is of little concern to the corporate or union sponsor. If anything, using such words makes ads less effective.

Understanding this history—indeed, documenting it in a detailed factual record—Congress enacted BCRA, which sought to return campaign finance regulation to steadier footing. By applying an objective test which looked at whether a clearly identified federal candidate was mentioned, the medium, the targeting, and the timing of the communication, BCRA aimed to reach "issue" ads that looked the same as–and presumably were as effective as–the ads that candidates ran on their own behalf. This represented modest change. It merely sought to subject to longstanding disclosure and source requirements those advertisements that looked like the campaign ads candidates themselves run. Such a small and sensible step would prevent circumvention of this country's basic safeguards against corruption and the appearance of corruption.

A majority of judges on the district court found that several empirical studies supported this modest step. Of these studies, Plaintiffs challenge two: the *Buying Time* studies. These particular studies surveyed political television advertising from the 1998 and 2000 election cycles and concluded that very few issue ads would have been mistakenly caught by BCRA's primary definition of "electioneering communication." After carefully considering Plaintiffs' general claims that the *Buying Time* studies were biased and untrustworthy, a majority of the judges properly rejected those claims. Plaintiffs' more detailed methodological claims also fail. They complain first that some of the data underlying the *Buying Time* studies was improperly recoded. The recoding they complain of, however, was approved by their own expert and nothing suggests that the recoding they themselves propose and on which they base many of their own numbers more accurately reflects the actual judgments of the original coders, let alone the content of the ads themselves. The contrary, in fact, is more likely true. Their second complaint goes to the choice of metric employed by one of the studies. Although they assert it is unhelpful to overbreadth analysis, the opposite is the case. It strongly demonstrates the care and caution Congress took in entering this sensitive area.

ARGUMENT

I. BCRA'S REGULATION OF ELECTIONEERING COMMUNICATIONS, UNLIKE REGULATION UNDER THE PRIOR "MAGIC WORDS" TEST, PREVENTS CORRUPTION AND THE APPEARANCE OF CORRUPTION WITHOUT IMPERMISSIBLY BURDENING SPEECH.

A. Disclosing Election Spending and Stopping Corporations and Unions from Spending from Their General Treasuries to Influence Federal Elections Represent Two Central Safeguards Against Corruption and the Appearance of Corruption in Federal Elections.

Congress first required the disclosure of certain campaign contributions in 1910, and has since expanded this requirement to a much wider range of campaign spending.[2] This Court has recognized that such disclosure serves three important interests that underpin the "free functioning of our national institutions." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (quoting *Communist Party v. Control Board*, 367 U.S. 1, 97 (1961)). First, disclosure provides voters with information about where money comes from and how it is spent. Such information helps voters better evaluate candidates and determine where they stand. *Id.* at 66-67. Second, disclosure prevents actual corruption and the appearance of corruption. By giving voters information about the ties of elected officials to their financial supporters, it deters contributions made with an eye to special favors and, should any be made, allows voters more easily to detect them. *Id.* at 67. Third, disclosure is "an essential means of

gathering the data necessary to detect violations of . . . contribution limitations," *id.* at 68, which are independently necessary to prevent corruption. In short, disclosure represents one of the most important means of securing the public legitimacy of our political institutions because it provides voters important political information, because it directly deters corruption, and because it allows for the enforcement of independent safeguards, like contribution limits.

Source requirements preventing business corporations and unions from spending money from their general treasuries to influence federal elections are even longer-standing. Since 1907, Congress has carefully regulated corporate political activity. In that year, Congress passed the Tillman Act, which made it "unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office." Act of Jan. 26, 1907, ch. 420 34 Stat. 864. Over the years, this rule was extended to cover both contributions and independent expenditures by both business corporations and unions. *See, e.g., United States v. Auto. Workers*, 352 U.S. 567, 570-84 (1957) (recounting history). From the beginning, the law has focused on the "special characteristics of the corporate structure that threaten the integrity of the political process." *FEC v. Beaumont*, 123 S.Ct. 2200, 2206 (2003) (internal citations and quotation marks omitted). Because "[s]tate law grants corporations special advantages . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments . . . corporations . . . [can] use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." *Id.* (internal citations and quotation marks omitted). As this Court has long recognized, "barring corporate earnings from conversion into political war chests . . . prevent[s] corruption or the appearance of corruption," *id.* (internal citations and quotation marks omitted), the importance of which "has never been doubted," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978). Barring corporate contributions and expenditures also helps prevent the use of corporations "as conduits for circumvention of valid contribution limits." *Beaumont*, 123 S.Ct. at 2207 (internal citations, brackets, and quotation marks omitted). Together the disclosure and source requirements barring corporate and union spending to influence federal elections are two of the primary bulwarks against corruption.

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[2] *See e.g.*, Act of June 25th, 1910, ch. 392, 36 Stat. 822; Federal Corrupt Practices Act, 1925, ch. 368, tit. 3, 43 Stat. 1053, 1070-79; Federal Election Campaign Act of 1971 (FECA), Pub L. No. 92-225, 86 Stat. 3.

B. Identifying Advertisements Designed to Influence Federal Elections Through "Magic Words" Undermines These Two Central Safeguards Against Corruption.

In *Buckley*, this Court considered the statutory meaning of "expenditures . . . advocating the election or defeat of [a clearly identified] candidate." 434 U.S. at 41-51. In order to avoid possible void-for-vagueness difficulties (in the case of spenders other than candidates and political committees, including political parties), this Court "limited [the term] to communications that include explicit words of advocacy of election or defeat of a candidate," *id.* at 43, and in a footnote "restrict[ed its] application . . . to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. Nowhere did this Court indicate that such "magic words" were constitutionally required for Congress ever to impose disclosure and source requirements. Rather, this Court narrowly held that given the uncertain reach of this particular term, it had to be given more objective contours. Otherwise, speakers would not know ahead of time what they could and could not say. They would always be at the mercy of their audience, for no matter how carefully they crafted their speech to avoid advocacy, their audience could interpret it differently. *Id.* at 42-44. The lesson of *Buckley*, in other words, is not that the First Amendment requires the use of "magic words," but rather that covered spending must be defined objectively—just as BCRA's primary definition of "electioneering communications" does. Definitions that rely largely on subjective audience understanding or speaker intent are constitutionally problematic.

After carefully surveying the landscape of political advertising, Congress found that the "magic words" test did not work.[3] First, few modern campaign ads use any "magic words." Uncontroverted evidence before the district court[4] showed that only 11.4 percent of the 433,811 advertisements aired by candidates during the 2000 federal election met the express advocacy test laid down in *Buckley*. Supp. App. at 659sa, 763sa-764sa (Kollar-Kotelly, J.). Second, candidates and political consultants have found it very easy to evade magic words in their advertising. In 1996, for example, the Republican National Committee ("RNC") ran the following ad, called "The Story," on television before the election:

Audio of Bob Dole:	We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in.
Voice Over:	Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his

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[3] *See, e.g.*, 148 Cong. Rec. S2116 (daily ed. March 20, 2002) (statement of Sen. Levin) ("magic words . . . are not a complete test of what constitutes electioneering ads"); *id.* at S2117 (statement of Sen. Jeffords) ("the 'magic words' standard . . . has been made useless"); *id.* at S2141 (statement of Sen. McCain) ("even a casual observer would concede that 'magic words' is a dramatically underinclusive test").

[4] The filing of a Joint Appendix in this case has been deferred. Citations to the original record are made where necessary pursuant to this Court's Rule 26.4(b). The opinions of the district court are reprinted in the Joint Supplemental Appendix to Jurisdictional Statements, cited herein as Supp. App. at 1sa-1382sa.

country called . . . he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.

Audio of Bob Dole: I went around looking for a miracle that would make me whole again.

Voice Over: The doctors said he'd never walk again. But after 39 months, he proved them wrong.

Audio of Elizabeth Dole: He persevered, he never gave up. He fought his way back from total paralysis.

Voice Over: Like many Americans, his life experience and values were as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.

Voice of Bob Dole: It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.

Senate Comm. on Governmental Affairs, *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns,* S. Rep. No. 105-177, at 4014 (1998). "The Story" focused entirely on the personality traits and affect of Bob Dole, not on any issues. Although the RNC's political director thought that it "need[ed] to be run," he worried that "[m]aking this spot pass the issue advocacy test may take some doing." *Id.* at 4015. He need not have worried. As Bob Dole himself explained to Ted Koppel when asked why such an ad would be considered "generic," i.e., issue advocacy, "It doesn't say 'Bob Dole for president.' . . . [I]t talks about the Bob Dole story. It also talks about issues. It never mentions the word that I'm—it never says

that I'm running for president, though I hope that it's fairly obvious, since I'm the only one in the picture!" *Id.* at 4154. The audience laughed. The absence of four little words made all the difference.

Third, "magic words" make advertisements, if anything, less effective. The uncontroverted testimony of political consultants in the district court was that "magic words" were clumsy and weakened political advertisements. Republican political consultant Douglas L. Bailey, for example, testified that "[i]n the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.' . . . . All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat." Supp. App. at 660sa (Kollar-Kotelly, J.). Likewise, Democratic political consultant Raymond Strother testified that

> media consultants prefer putting across electioneering messages without using words such as 'vote for.' Good media consultants never tell people to vote for Senator X; rather you make your case and let the voters come to their own conclusions. In my experience, it actually proves less effective to instruct viewers what you want them to do.

Id. at 662sa. In this respect, political advertising is just like commercial advertising. As two experts pointed out,

> the practices of political advertisers are not dissimilar from those of commercial advertisers. Car ads rarely exhort viewers to "buy" a Chevrolet, nor do soft drink ads urge people to "drink" their product. . . . This atmospheric approach to commercial advertising—where the product is presented in various tableaus—has become increasingly popular. It serves the general strategy of advertisers to present viewers with a variety of reasons to choose their product, hoping that they will latch onto one. Too heavy-handed an approach might

> interfere with this process by raising viewers' defenses. Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls.

Id. at 663-64sa (quoting Krasno and Soraf Expert Report at 54). Like any good advertiser, those advertising candidates avoid "magic words" because they want to make their pitch as effective as possible.

The "magic words" test, then, ironically identifies as campaign advertising those ineffective ads that candidates themselves seldom use. It classifies as pure issue advocacy, by contrast, exactly the kinds of effective campaign advertising the candidates themselves *do* use. It gets the real world backwards. In a sense, the "magic words" test works only to protect political advertisers from making stupid decisions. Because it compels disclosure of and keeps corporations and unions from using treasury funds to engage in the least effective forms of candidate advocacy, it encourages more effective forms. Can that be the purpose of the First Amendment?

By classifying nearly all campaign advocacy by independent spenders as issue advocacy, the "magic words" test clearly undermines ordinary disclosure requirements, which give voters important information and prevent corruption. In three 2000 Republican primaries, for example, an organization called "Republicans for Clean Air" sponsored ads praising then-Governor Bush and criticizing Senator McCain. After the first of these primaries, reporters discovered that "Republicans for Clean Air" consisted of two brothers, Charles and Sam Wyly, who were long-term friends of Governor Bush. One was, in fact, an authorized fundraiser for the Bush campaign. According to the press, the Wylys spent $2.5 million on the ads. When their identities were uncovered in a later primary, much bad publicity ensued and the Bush campaign felt compelled to distance itself from them. In short, the "magic words" test allowed this major advertising campaign to be conducted in secrecy and the eventual public reaction shows how greatly the identity of the sponsors mattered to voters. *See* Supp. App. at 97-99sa (per curiam).

As political consultant Raymond Strother stated,

> one of the biggest problems that a candidate's media consultant now faces is the lack of disclosure associated with third parties running these ads. A few years ago, Jill Docking ran for the United States Senate against Sam Brownback in Kansas. . . . In the last two weeks of a very tight election, an unidentifiable group came in and poured a million dollars into the race. They ran [ads] throughout Kansas telling voters that Jill wasn't a Christian, and all we could find was a fax machine. We had no idea where the money came from. I have had similar experiences in other races as well. Without knowing who is funding the groups that run these ads, we are often unable to correct the distortions.

Id. at 93sa-94sa. Without disclosure, voters cannot evaluate candidates by seeing who supports them, cannot easily recognize corruption in any special favors given to the funders of these ads, and cannot tell whether the spending effectively represents a circumvention of the contribution limitations.

Similarly, the "magic words" test allows corporations and unions to evade the prohibitions against spending directly from their general treasuries to influence federal elections. By carefully avoiding "magic words," for example, the National Rifle Association ("NRA"), a § 501(c)(4) tax-exempt entity, successfully evaded the campaign finance law's source requirements. It sponsored much advertising to influence the 2000 federal elections. Executive Vice President of the NRA, Wayne LaPierre, stated in a fundraising letter that he "spent what it took [in 2000] to defeat Al Gore, which amounted to millions more than we had on hand." Supp. App. at 693sa-694sa (Kollar-Kotelly, J.). He later testified that "[w]e took some money out of the reserves to cover the deficit . . . . [The Gore advertising] was probably ... the main contributing factor." *Id.* The NRA ran several different Gore ads—some funded out of its general treasury funds and some funded by the NRA Political Victory Fund, its affiliated political action committee. The small differences between some of the ads run by the NRA and those run by its PAC show what little difference there is between advertisements that do and do not use "magic words." The ads were virtually identical. The ones paid for from the corporation's general treasury simply omitted a few express terms:

NRA PAC Advertisement	NRA Direct (Non-PAC) Advertisement
HESTON:	HESTON: Other issues may come and go, but no issue is as important as our freedom. And the day of reckoning is at hand.
Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own *any* firearm? No handgun, no rifle, no shotgun.	Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own *any* firearm? No handgun, no rifle, no shotgun.
And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges handpicked by Al Gore if he wins this election.	And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges handpicked by Al Gore if he wins this election.
Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Dianne Feinstein do to your gun rights?	Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Dianne Feinstein do to your gun rights?
And what *you* think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.	And what *you* think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.
When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights.	When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights.
Please, vote freedom first. Vote George W. Bush for President.	
ANNCR: Paid for by the NRA Political Victory Fund and not authorized by any candidate or candidate's committee.	**ANNCR: Paid for by the National Rifle Association.**

Id. at 695sa-696sa. (differences between ads bolded). NRA Executive Vice President Wayne LaPierce described the two scripts as "exactly the same" because, he admitted, the reference to "the day of reckoning . . . at hand" in the NRA ad was to the day of the 2000 election. *Id.* at 697sa.

Uncontroverted testimony in the district court showed, moreover, that candidates track these advertisements and who funds them. Lobbyist Wright Andrews testified that

> [s]ophisticated political donors—particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups—are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. . . . [Issue ads] are noticed by the elected officials on whose behalf, or against whom, [they] are run. An effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party that is used for political purposes in his or her district or state.

Id. at 709sa-710sa. So helpful are these ads, in fact, that politicians who benefit from this type of corporate and union general treasury fund spending often raise money for these organizations. *Id.* at 712sa. Congressman Ric Keller, for example, for whose 2000 campaign the Club for Growth had funded advertising, signed a Club for Growth fundraising letter which stated: "The Club for Growth selected my race as one of its top priorities. . . . . *Since the Club targets the most competitive races in the country, your membership in the Club will help Republicans keep control of Congress.*" *Id.* (emphasis in original).

Although the number of entities funding these advertisements has grown, only a handful account for most of the influence. In the 1999-2000 election cycle, for example, the Republican and Democratic parties accounted for 31 percent of this spending; Citizens for Better Medicare, 13 percent; the Coalition to Protect America's Health Care, 6 percent; the U.S. Chamber of Commerce, 5 percent; AFL-CIO, 4 percent; NRA, 4 percent; and U.S. Term Limits, 4 percent. *Id.* at 655sa. Just the six leading nonparty entities accounted for 36 percent of the spending—more than the parties themselves (31 percent) and more than all other organizations combined (33 percent). Two of these six entities, in fact, represented the same type of special interest. Far from being "a grass-roots generated group of citizens," Citizens for Better Medicare was "an arm of the Pharmaceutical Research and Manufacturers Association" and the Coalition to Protect America's Health Care worked under the umbrella of the American Hospital Association, Erika Falk, Annenberg Public Policy Center, *Legislative Issue Advertising in the 107th Congress* 62, 64 (2003) (internal citations omitted). As these figures show, far from broadening the spectrum of political debate, the ability to spend from general treasury funds constricts it. It concentrates the threat of corruption.

The "magic words" test, then, has undermined two of the central protections against corruption and the appearance of corruption—the disclosure of campaign spending and the bar against funding electioneering activity from general union and corporate treasuries—that FECA was intended to support. The test paradoxically allows corporations and unions to use their treasuries to fund *only* the kinds of advertisements that candidates now usually employ to promote their own candidacy—those without "magic words." And it discourages *only* the kinds of advertisements that candidates themselves now seldom use because they think them ineffective—those with "magic words." The test, in short, allows corporate earnings and union dues to be easily converted into political "war chests," the influence of which is often invisible to voters.

II. THE *BUYING TIME* STUDIES ON WHICH A MAJORITY OF THE DISTRICT COURT RELIED IN UPHOLDING SEVERAL OF BCRA'S CENTRAL PROVISIONS ARE RELIABLE AND STRONGLY SUPPORT BCRA'S PRIMARY DEFINITION OF ELECTIONEERING COMMUNICTATIONS.

A. A Majority of the District Court Clearly Rejected the Plaintiffs' Attacks on the *Buying Time* Studies.

Plaintiffs rest much of their attack on BCRA's handling of "electioneering communications" on the supposed unreliability of parts of two particular reports. These reports, the *Buying Time* studies, surveyed television ads from the 1998 and 2000 election cycles and concluded that very few issue ads would be affected by BCRA's primary definition. BCRA's primary definition would, in the view of these studies, leave the vast majority of actual issue ads untouched. The 1998 study, for example, concluded, in part, that only 7% percent of all issue ads televised that year met BCRA's primary definition. Jonathan S. Krasno & Daniel E. Seltz, Brennan Center for Justice, *Buying Time: Television Advertising in the 1998 Congressional Elections*, 109 (2000); *see also* Supp. App. at 1348sa n.213 (Leon, J.) (noting that Dr. Krasno's current estimate is 6.1%).

Plaintiffs understandably attack these studies because they stand so powerfully against them. Among other things, Plaintiffs claim that "the district court, after detailed and laborious consideration, unanimously rejected the conclusions of the *Buying Time* reports," McConnell Br. at 53, that "the *Buying Time* reports were entirely and irredeemably biased," *id.* at 53 n.18, and that "the reports' conclusions about BCRA's insignificant effect on so-called 'genuine' issue ads are insupportable," *id.* at 55. Nothing could be further from the truth.

In their individual opinions, two of the three judges on the district court strongly rejected Plaintiffs' broad-brushed attacks. As Judge Leon put it, "I find that although the *Buying Time* studies contain some flaws and shortcomings, ... those shortcomings do not detract from the studies' credibility and reliability." Supp. App. at 1335sa. Judge Kollar-Kotelly went even further. She described Plaintiffs' expert's attempts to discredit the studies as "a piñata party: if one hits the piñata enough, it will eventually crack apart." *Id.* at 764sa. In the Plaintiffs' case, however, the expert clearly failed to crack the piñata. Like Judge Leon, Judge Kollar-Kotelly extensively relied on the studies' central findings. She also thought the Plaintiffs' failure to do any independent studies or even to try to replicate the study they criticized highly significant:

> Although some of [the piñata] "hits" have merit, . . . neither Plaintiffs nor Dr. Gibson[, their expert,] have attempted to conduct their own similar study, or even replicate a discrete portion of the *Buying Time* studies, despite the fact that the underlying materials were provided to them by Defendants. Presenting the Court with contradictory results from such a study would have been far more persuasive than the recalculations of incorrect versions of the *Buying Time* data sets and the often conjectural and speculative criticism proffered by Plaintiffs and Dr. Gibson.

Id. In fact, the Plaintiffs' complete failure to offer their own studies puts them in an awkward position. Although they continually attack the *Buying Time* reports, they find themselves having to rely extensively on the underlying data—quarrelling with it in some places, changing it in others, but all the time using it to support their own arguments on overbreadth. *See, e.g.*, McConnell Br. at 56 (massaging data to argue that "64% of ads mentioning a candidate in the 60 days before the 1998 general election were coded . . . as genuine"). Their own extensive reliance on the studies undermines their broadside attacks.

A majority of the judges on the district court also strongly rejected any claim of bias. Judge Leon, for example, found that "while . . . the primary purpose of the *Buying Time* studies was to further campaign finance reform, I do not find that this fact has skewed the results of the study." Supp. App. at 1335sa. Judge Kollar-Kotelly was even more forceful. "I would not," she found, "discount the [*Buying Time*] studies because they were approached with a particular result in mind. The testimony shows that policy perspectives and effective scientific research are not mutually exclusive." *Id.* at 764sa. And, as to the particular actions which Dr. Gibson pointed to as evidence of bias—the "cleaning" of data and recoding—Judge Kollar-Kotelly correctly noted that "[t]he 'cleaning' of the data that Dr. Gibson finds suspicious appears . . . to be a necessary function for databases of the size produced for the *Buying Time* reports and not a function of bias. Fixing miscodings and resolving the 'cookie cutter' issues required such actions." *Id.* at 764sa-765sa. Judges Leon and Kollar-Kotelly both noted, moreover, that one of Dr. Gibson's major complaints with the studies, his inability to reproduce their conclusions from the underlying data sets, resulted from his own use of the wrong data set. *Id.* at 1336sa (Leon, J.) ("[W]hile Dr. Gibson maintains that his inability to replicate the *Buying Time* . . . results 'undermines . . . any confidence one should place in the findings,' his inability seems attributable to his using the incorrect data set."); *id.* at 765sa (Kollar-Kotelly. J.) ("confusion . . . as to the correct database to use to analyze the studies' findings decreases the utility of Dr. Gibson's Expert Report") (internal citations omitted). Judge Kollar-Kotelly, in fact, found that this confusion also "undermines the notion that the *Buying Time* authors manipulated the data in order to achieve their desired results." *Id.* at 765sa. The charge of bias is simply empty of merit.

As a majority of judges pointed out, moreover, even if the Plaintiffs' attacks were all credible, they would leave many of the conclusions of the *Buying Time* studies untouched. *See* Supp. App. at 1333sa-1334sa (Leon, J.); *id.* at 765sa (Kollar-Kotelly, J.). First, as Dr. Gibson himself admitted, "Entirely objective characteristics of the ads . . . present few threats to reliability." Gibson Expert Report at 11. These include such central findings as (1) that "magic words" are rarely used in political advertising, (2) that group-sponsored ads that mention candidates tend to be concentrated before an election, and (3) that advertisements sponsored by parties and interest groups comprise a significant and increasing portion of political advertising broadcast in federal races. Supp. App. at 1333sa-1334sa (Leon, J.).

Second, Plaintiffs failed to challenge the validity of other authoritative studies, particularly the Annenberg studies, which support the central findings of the *Buying Time* reports. *Id.* at 763sa (Kollar-Kotelly, J.) ("The Annenberg studies . . . have not been challenged by anyone."). Even if Plaintiffs did manage to discount the *Buying Time* studies, these others would support many of the same conclusions. In particular, the Annenberg studies concluded that in the 1999-2000 election cycle, candidate campaign ads virtually dominated all types of issue ads in the last two months of the election:

> The type of issue ad that dominated depended greatly on how close we were to the general election. . . . Though candidate-centered issue ads always made up a majority of issue ads, as the election approached, the percent [of] candidate-centered spots increased and the percent of legislative and image ads decreased, such that *by the last two months before the election almost all televised issue spots made a case for or against a candidate.*

Annenberg Public Policy Center, *Issue Advertising in the 1999-2000 Election Cycle* 14 (2001), *quoted and emphasis added in* Supp. App. at 654sa (Kollar-Kotelly, J.). The

Annenberg studies, in fact, produced a bottom line for the 2000 election remarkably close to the one the *Buying Time* reports produced for the 1998 election: "Fully 94% of issue ads aired in after August[, 2000] made a case for or against a candidate. Just 3.1% were legislative [issue] ads, and 2.3% were general image ads." *Id., quoted in* Supp. App. at 726sa (Kollar-Kotelly, J.).

The findings of the uncontroverted Annenberg studies not only bolster the conclusions of the *Buying Time* reports, but also underscore the perversity of the "magic words" test. Among the conclusions of the Annenberg studies were (1) the amount of money spent on "issue advocacy" is rising rapidly; (2) instead of creating the number of voices *Buckley v. Valeo* had hoped, issue advocacy allow[s] groups such as the parties, business and labor to use soft money or general treasury "war chests" to gain a louder voice; (3) the distinction between issue advocacy and express advocacy is a fiction; and (4) "issue" advocacy, as practiced in recent elections, masks the identity of some key players and so deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility. *Id.* at 2, *quoted in* Supp. App. at 657sa (Kollar-Kotelly, J.). In addition, the unrebutted findings of Dr. Goldstein about the 2000 election showed that (1) interest group advertising that mentioned candidates was highly concentrated in battleground states; (2) no more than 12% of candidate-sponsored advertisements in 2000 used "magic words"; and (3) interest group advertisements that identified a candidate in 2000 tended to be broadcast within the final 60 days of the election campaign, whereas those that did not identify a candidate were spread more evenly throughout the year. *See* Supp. App. 763sa-764sa (Kollar-Kotelly, J.). The authoritative studies Plaintiffs did not challenge, then, support BCRA's overall approach to electioneering communications just as strongly as do the studies they do attack. Even Judge Henderson, who criticized the *Buying Time* studies, relied on these other studies in her opinion. *See* Supp. App. at 230sa-231sa, 233sa.

B. Plaintiffs Are Wrong in Claiming that the Authors of the *Buying Time* Studies Improperly Recoded Data.

In the district court, Plaintiffs made one central challenge to the integrity of the 1998 *Buying Time* study. They claimed that the authors had improperly recoded data to recharacterize eight "genuine" issue ads as campaign ads. They still do. *See* McConnell Br. at 56. Judge Leon, however, who of the three judges considered the *Buying Time* studies most closely, found no problem here. *See* Supp. App. at 1344sa. He rightly saw that "the changes [made] in the database reflect the gradual filling in of missing data and the discovery of internal contradictions." *Id.* What happened was that the original coders who had reviewed these eight ads had filled out their coding sheets in a way that was internally contradictory. Plaintiffs' expert Dr. Gibson acknowledged as much. Gibson dep. at 116-21. Since it was impossible from the original coding sheets to tell how the coders would have properly classified these ads, they were recoded. Dr. Gibson agreed that that was the proper course. In fact, when asked what he would have done under the circumstances, he answered directly "I probably would have fired [the coder] and had the cases re-coded," *id.* at 121, which—apart from the firing—is what the authors of the 1998 study did. When asked to review several of these internally contradictory coding sheets along with the ads they coded, Dr. Gibson himself indicated that it was "highly probable" that the original coders intended to categorize the ads as campaign advertising, not as issue ads. *Id.* at 112. Dr. Gibson, then, unlike the Plaintiffs themselves, did not believe that these eight ads should be counted as issue ads, an assumption upon which one of the most dramatic and misleading arguments of the Plaintiffs rest: "that 64% of ads mentioning a candidate in the 60 days before the 1998 general election were coded by the students as 'genuine.'" McConnell Br. at 56. That number cannot stand in the face of the record and Plaintiffs' own expert's testimony.

Plaintiffs also attack the coding of the data underlying the *Buying Time 2000* study. They incorrectly claim that 17%, not 2.3%, of the television ads appearing within 60 days of the general election were actual issue ads. To get there, they must recode six of seven basically identical ads that were widely broadcast in the 2000 campaign. This is improper. In his expert report analyzing the *Buying Time 2000* study's methodology and use of data, Defendants' expert Professor Goldstein explained that one of these seven ads was originally coded by the students as an issue ad and the remaining six essentially identical ads were coded by them as campaign ads. *See* Goldstein Rebuttal Report at 16-17. Although the original *Buying Time 2000* investigators had then recoded the one ad to match the six others, Professor Goldstein had followed the original inconsistent coding in his analysis. But the Plaintiffs argued in district court that the six should be made to conform to the one. *See* Pls.' D. Ct. Reply Br. at 37. The Defendants and Intervenors, on the other hand, believed it more sensible to reclassify the one outlier rather than the large majority of advertisements. They did not object, however, to Dr. Goldstein's adhering to the original inconsistent coding, the approach that led to the figure of 2.3%. Although in deposition Plaintiffs pressed Professor Goldstein to reclassify the majority of ads, he agreed only that under the Plaintiffs' version of "the most conservative estimate" the six should be made to conform to the outlier.[5]

He nowhere stated that recoding six ads to conform to one would better reflect the ads' content or his own "conservative estimate." He merely confirmed that under "the most conservative estimate" any doubt—no matter how small—would place the ads in the genuine issue category. And it is this "most conservative estimate" that produces the figure of 17%. Supp. App. at 1353sa-1354sa, 1361sa (Leon, J.).

If anything, controversies over recoding reflect bias in the Plaintiffs' challenges to the *Buying Time* studies, not in the studies themselves. At one point in his report Dr. Gibson relied on a modified version of the 2000 database in which 30 ads had been selected for recoding from campaign ads to issue ads by Plaintiffs' counsel. *See* Gibson Expert Report 62-63. Based on that recoding, Plaintiffs argued that the actual number of issue ads BCRA's primary definition would have covered "would have increased by . . . 23%." Pls.' Omnibus Op. Br. (McConnell Pls.) at 69 n.34. But Dr. Gibson himself never understood why those ads should be recoded. He received no explanation from counsel and he could not see any reason himself.[6] Indeed, Dr. Gibson never even looked at the storyboards for the recoded ads. *Id.* at 181. He simply followed the directions of counsel.

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[5] Professor Goldstein's deposition testimony proceeded as follows:

> Q: [I]f you believe [the six ads] are virtually indistinguishable [from the one other], then wouldn't it have been fairer to include them in your analysis, your quote 'conservative analysis' in undertaking to prepare your expert report?
>
> A: In retrospect, knowing that these [six] ads were originally coded as genuine issue ads [—a counterfactual assumption—] they should have been included in *the most conservative estimate* . . . . Having said that, . . . I don't know what they were originally coded as.

Goldstein dep. at 160 (emphasis added).

[6] His deposition testimony makes this clear:

> Q: Now, you refer . . . to this mysterious group of 30 ads and [your report] says, "[t]his list was provided to me by counsel." What I wan[t] to know is how were these ads selected by counsel for you?
>
> A: I don't know.
>
> * * *

C. The *Buying Time* Studies Strongly Support BCRA's Primary Definition of Electioneering Communications.

Because of a slight change of focus, the 1998 and 2000 *Buying Time* studies employ somewhat different measures to quantify BCRA's fit. The studies compare a single number, the numerator, to two other numbers, the different denominators. The common numerator consists of the number of pure issue ads mischaracterized as campaign advocacy under BCRA's primary definition of electioneering communications. The 1998 study compares this numerator to the overall number of issue ads televised in that year and thus offers up a ratio of how many "false positives" using BCRA's primary definition would create. For example, if BCRA's primary definition mistakenly tagged four issue ads as campaign ads out of 100 issue ads televised that year, the measure would produce 4/100 or four percent. For 1998, this measure produces a result of 6.1% false positives, Supp. App. at 1348sa n.213 (Leon, J.); for 2000, it produces a result of 3.1%, *id.* at 1360sa. These numbers are uncontested by Plaintiffs, who rest their arguments on the other measure.

The 2000 study takes a somewhat different approach. It compares this same numerator to the total number of ads covered by BCRA's primary definition. This approach provides a measure of the proportion of ads BCRA's primary definition classifies as campaign ads that are actually pure issue ads. It measures not "false positives" but rather the inaccuracy of BCRA's primary definition just within the relatively small universe of ads it tags. Although both measures use the same numerator—the number of issue ads mischaracterized as campaign advocacy by BCRA's primary definition—they employ quite different denominators and thus lead to different results.[7]

Contrary to Plaintiffs, this denominator issue is no "problem" at all. These two different measures answer two

---

Q: [Were] these ads ... selected to illustrate that changing the . . . coding on relatively few ads can produce a relatively large swing in the percentages?

A: Yes. . . . .

Q: I take it you didn't make any determination that these 30 ads should have been coded as genuine issue ads; is that correct?

A: That's correct.

Q: Do you know now (sic) the Plaintiffs' lawyers went about selecting the ads . . .?

A: No, I don't.

Q: Did you have any understanding of the way in which the 30 ads were selected?

A: No.

Gibson dep. at 179-81.

[7] For 1998, the Defendants and Judge Leon believe that this second measure produces a result of 14.7%, while Plaintiffs, because they would recode eight campaign widely televised ads as issue ads for this year, believe it would produce a result of 64%. *Compare* Supp. App. at 1157sa *with* McConnell Br. at 56. As discussed earlier, however, their argument is specious. *Supra* at 23-24. When asked to review several of these ads and their internally contradictory coding sheets, Dr. Gibson, Plaintiffs' own expert, indicated that it was "highly probable" that the coder intended to categorize the ads as candidate campaign advertising. Gibson dep. at 112.

For 2000, the Defendants believe this same measure produces a result of 2.3%, while Plaintiffs and Judge Leon believe it produces a result of 17%. Supp App. at 1157sa. As discussed earlier, however, this higher figure takes seven essentially-identical ads, six of which the original coders characterized as campaign advocacy and one of which they characterized as issue advocacy, and characterizes all seven as issue advocacy. *Supra* at 24-25. At best the 17% figure can serve only as an upper limit. Accepting the original inconsistent coding, which itself errs on the side of caution, produces the figure Defendants tendered: 2.3%. The more reasonable approach of reclassifying the one outlier to conform to the other six ads would, of course, produce a still lower figure.

different questions about BCRA's effect. The original, 1998 measure compares the number of issue ads covered by BCRA to all issue ads televised in that year and so measures the impact of BCRA on issue advertising generally. The later measure compares the number of issue ads covered by BCRA to all ads covered by BCRA and so measures the inaccuracy of the primary definition *within the restricted domain of those ads it captures*. Unlike the first measure, it says nothing at all about the accuracy of the primary definition in the total domain of political advertising.

Of these two measures, only the first bears on what proportion of total issue advocacy is mistakenly caught by BCRA's primary definition. On any view, that is a very small number—6.1 percent for 1998 and 3.1 percent for 2000. This ratio, however, actually *over*states the impact of BCRA on issue ads for several reasons. First, the coders were given a stark all-or-nothing choice—the ads had to be classified simply as issue or candidate ads, not some mixture of both. Hybrid ads touting or attacking candidates on particular issues could thus have been coded as pure issue ads even if a major purpose was electioneering. Second, the coders had no context for the ads. An ad that appears on its surface to be about issues can assume a quite different role in the context of an actual election. An ad attacking trial lawyers, for example, might not have coded as a candidate ad even if in a particular race that ad had been aimed at one candidate prominently identified with that profession. Third, the study did not consider print ads and mass mailings, which BCRA's primary definition excludes from coverage. Had they been included in the overall analysis, however, the proportion of issue advocacy covered by BCRA's primary definition would have fallen greatly. The same number of televised issue ads would have been coded as falling under BCRA's primary definition, of course, but they would have been among the much larger universe of televised, print, and mass mailing issue ads. For these reasons, then, the already low figures

that the 1998 measure produces for mischaracterized issue advocacy are upper limits. The actual numbers would be much lower. As the *Buying Time* studies show, BCRA's primary definition in no way impermissibly burdens speech.

CONCLUSION

For the foregoing reasons, this Court should uphold BCRA's primary definition of electioneering communications.

Respectfully submitted,

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
1730 M Street, N.W.
Suite 1000
Washington, DC 20036
(202) 229–1965

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Rd.
Charlottesville, VA 22903
(434) 924–3127

Counsel for *Amicus Curiae*

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Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees/Cross-Appellants.

On appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* INTERNATIONAL EXPERTS IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
YUL J. KWON
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

THOMAS D. GRANT
LAUTERPACHT RESEARCH
CENTRE FOR INTERNATIONAL LAW
5 Cranmer Road
Cambridge CB3 9BL
United Kingdom
011 44 1223 691 664

* Counsel of Record

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INTEREST OF *AMICI CURIAE* [1]

Amici, who include recognized authorities on campaign finance laws within their respective countries, are legal academics, political scientists, and present and former officials and advisors (acting in their individual capacities) of national electoral commissions from around the world ("International Experts"):

Thomas D. Grant (Fellow, Lauterpacht Research Centre for International Law, and Senior Research Fellow, Wolfson College, Cambridge University);

Verena Blechinger-Talcott (Assistant Professor, Department of Government, Hamilton College, New York, and former Deputy Director, German Institute for Japanese Studies, Tokyo);

Manuel Lucas Durán (Profesor Titular de Derecho Financiero y Tributario Vicedecano de la Facultad de Derecho, Universidad de Alcalá, Madrid, Spain);

Zsolt Enyedi (Assistant Professor, Political Science Department, Central European University, Budapest, Hungary);

Keith Ewing (Professor of Public Law, King's College, London);

Colin Feasby (attorney, Osler, Hoskin & Harcourt LLP, Calgary, Alberta, Canada);

Stefano Grassi (Chaired Professor of Constitutional Law, University of Florence, Faculty of Law);

Andrew Geddis (Lecturer, Faculty of Law, University of Otago, Dunedin, New Zealand);

Omer Farul Genckaya (Department of Political Science and Public Administration, Bilkent University, Ankara, Turkey);

---

[1] Pursuant to Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part. No persons other than *amici* or their counsel made a monetary contribution to the preparation of this brief.

Ellie Greenwood (Senior Registrar, UK Electoral Commission);

Gábor Juhász (doctor of laws and editor, political-economic weekly HVG, Budapest, Hungary);

Prof. Dr. Bart Maddens (Department of Political Science, Catholic University of Leuven, Belgium);

Prof. Dr. iur. Martin Morlok (Chair of Public Law, Sociology of Law, and Legal Theory, Director, Institute for German and European Law of Political Parties (PRUF), Heinrich-Heine-Universität, Düsseldorf, Germany);

Víctor M. Navarrete Villarreal (Advisor to the President of the Tribunal, Tribunal Superior de Justicia del Distrito Federal, Mexico City);

Graeme Orr (Lecturer in Law, Griffith University, Brisbane, Australia);

Federico Ortino (Lecturer, European Union Law, University of Siena, Italy);

Eugenia Perona (social scientist and private consultant, Buenos Aires, Argentina);

DDr. Hubert Sickinger (Faculty, Universität Wien/Institut für Konfliktforschung, Austria);

Surat Singh (constitutional lawyer, Bar of the Supreme Court of India, New Delhi);

Daniel Smilov (Adjunct Professor, Department of Legal Studies, Central European University, Budapest, Hungary);

Thilo Streit (Assistant Lecturer, PRUF, Heinrich-Heine-Universität, Düsseldorf, Germany); and

Daniel Treisman (Assistant Professor of Political Science, University of California at Los Angeles).

The substantial interest of *amici* in this case arises from their citizenship in nations forming a community of shared democratic values, and the unavoidable impact of legal developments in the United States upon representative democracy worldwide. *Amici* collectively possess a formidable breadth of theoretical knowledge and practical experience in the field of campaign financing, and are uniquely qualified to assist the Court by situating the Bipartisan Campaign Reform Act of 2002[2] ("BCRA") within the broader international legal landscape.

PRELIMINARY STATEMENT

This brief examines campaign finance laws in foreign countries to inform the Court with respect to two central issues: (1) the constitutionality of BCRA's limitations on paid political advertising by third parties; and (2) the constitutionality of BCRA's prohibitions on "soft money." The information presented here was contributed by *amici*, and supplemented by data from a variety of publicly available sources, including a survey of foreign campaign finance regimes conducted by the Library of Congress on behalf of Congress in 2000.[3]

SUMMARY OF ARGUMENT

The United States is not alone in struggling with the problem of how to curtail inappropriate financial influence in electoral politics. Every major democracy recognizes that money can distort politics, and each restricts campaigning to mitigate corruption in the electoral system. A comparative understanding of such efforts may aid this Court's review of Congress's efforts to close loopholes in the American campaign finance regime. Considering parallel efforts by other countries around the world is consistent with the Court's established practice of drawing on foreign experiences to address issues of common constitutional concern.

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[2] Pub. L. 107-155, 116 Stat. 81 (2002)

[3] In 2000, the Library of Congress surveyed eighteen countries—Argentina, Australia, Canada, the Czech Republic, France, Greece, India, Iran, Israel, Italy, Japan, Mexico, the Netherlands, the Russian Federation, Singapore, Taiwan, Turkey, and the United Kingdom. The results of that survey are provided in both a "Comparative Summary and Analysis," *see* Law Library of Congress, *Campaign Financing in Various Foreign Countries, Comparative Summary and Analysis* (Document No. 2002-14013) (2002) ("*LOC Comparative Summary*"), and reports on individual countries.

Two pillars of BCRA are its limitations on third-party paid political advertising by unions and corporations, and its restrictions on so-called "soft money." With respect to paid political advertising, the United States has adopted a far more lenient regime than its peers. Most democracies, including all of the other members of the Group of Seven (G-7) nations, strictly limit or even prohibit the broadcast of paid political advertisements. An analysis of judicial opinions in other countries, moreover, suggests that the United States' isolated posture does not follow ineluctably from the American commitment to freedom of speech. To the contrary, other democracies with deeply ingrained traditions of free speech analogous to the First Amendment have recognized that preserving the integrity of the political process requires some restrictions on paid political advertising.

With respect to the American soft money problem, there is no direct analogue overseas. Nevertheless, it is instructive to consider this problem within the larger context of how other nations control the flow of money into political campaigns. Most major democracies, again including all of the other G-7 nations, have far more restrictive regulatory regimes than the United States. As a general rule, other countries have chosen to implement either public financing of elections, or strict limits on campaign expenditures, or both. The United States has, of course, taken the more permissive approach of merely limiting federal campaign contributions. While *amici* take no issue with that basic approach, we would urge the Court—in considering whether to uphold congressional efforts to plug the gaping soft money loophole—to be cognizant of the fact that the United States occupies an extreme end of the spectrum in regulating the flow of money in electoral politics. Upholding BCRA's limits on soft money would only

incrementally nudge the American system of campaign financing away from the fringe of international practice.

I. THE COURT SHOULD CONSIDER MEASURES TAKEN BY OTHER COUNTRIES TO LIMIT THE INFLUENCE OF MONEY IN ELECTORAL POLITICS.

The problem of how to limit "deleterious influences on federal elections"[4] arising from the political activities of corporations and other sources of aggregated wealth is not unique to the United States. In reviewing the constitutionality of BCRA, this Court should consider other countries' treatment of the issues underlying the statute.

A. Members Of The Court Increasingly Recognize The Value Of Considering The Work Of Foreign Decision-Makers.

The value of looking beyond our national boundaries on matters of common constitutional concern has been increasingly recognized and affirmed by members of the Court. Chief Justice Rehnquist spoke forcefully to this issue over a decade ago:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. . . . But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.[5]

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[4] *FEC v. Beaumont*, 123 S.Ct. 2200, 2205 (2003) (quoting *United States v. Automobile Workers*, 352 U.S. 567, 585 (1957)).

[5] William H. Rehnquist, "Constitutional Courts—Comparative Remarks" (1989) (reprinted in *Germany and its Basic Law: Past, Present and Future—a German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993)).

Chief Justice Rehnquist's statement has been echoed and elaborated by other Justices. In 1999, Justice Ginsberg gave a lecture in which she stated the importance of comparative analysis in constitutional interpretation:

> Experience in one nation or region may inspire or inform other nations or regions . . . . In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.[6]

Last year, Justice O'Connor similarly urged attention to the work of foreign decision-makers and the opportunities they afford the Court to learn from their well-considered opinions:

> [C]onclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. . . . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.[7]

More recently, Justice Breyer correctly observed that the process of examining "our Constitution and how it fits into the governing documents of other nations . . . will be a challenge for the next generation."[8] Such comments by sitting Justices signal an appropriate interest on the part of this Court in expanding the universe of data upon which its deliberations rely.

Significantly, however, applying foreign law and experience to calibrate American constitutional norms is hardly a new practice. To the contrary, "this Court has long con-

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[6] Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 281-82 (1999).

[7] Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

[8] *This Week with George Stephanopoulos* (ABC television broadcast, July 6, 2003).

sidered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."[9] Starting with the celebrated case of *The Paquete Habana*, in which the Court declared that "international law is a part of our law,"[10] the Court has regularly referenced decisions in kindred democracies to illuminate its understanding of shared democratic values and universal human standards.[11] Most recently, in *Lawrence v. Texas*,[12] the Court directly relied on the conclusions of the European Court of

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[9] *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari).

[10] 175 U.S. 677, 700 (1900).

[11] *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 710, 718 n.16, 785-87 (1997) (Rehnquist, C.J.) (declaring that "in almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide" and citing the Canadian Supreme Court, the British House of Lords Select Committee, New Zealand's Parliament, the Australian Senate, and the Colombian Constitutional Court); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J.) (stating that the execution of juveniles violates norms shared "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community"); *id.* at 868 n.4 (Scalia, J., dissenting) (noting that the "practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident"); *Miranda v. Arizona*, 384 U.S. 436, 488-89, 521-22 (1966) (comparing U.S. practice with that in India, Sri Lanka, and Scotland); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (delimiting notion of privacy in the home by looking to "common understanding throughout the English-speaking world"); *Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring) ("The safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples . . . .").

[12] 123 S.Ct. 2472 (2003).

Human Rights and other foreign nations in overturning its prior holding in *Bowers v. Hardwick*.[13]

B. This Court's Opinions Have Examined Foreign Law And Practices When Dealing With Complex Issues In Campaign And Election Law.

Justices of this Court have frequently looked overseas to benefit from the real world lessons of foreign democracies in the specific context of campaign and election law.[14] For example, in *Wright v. Rockefeller*, the dissent by Justices Douglas and Goldberg examined a system for apportioning electoral districts used in Lebanon, Cyprus, and British India in order better to evaluate a similar system that had been implemented in Manhattan.[15] In *McIntyre v. Ohio Elections Commission*, Justice Scalia, joined by Chief Justice Rehnquist, dissented from an opinion striking down an Ohio statute that prohibited the distribution of anonymous campaign literature. Pointing to a number of foreign democracies that banned anonymous campaigning, Justice Scalia sharply criticized the majority's decision to ignore "the real-life experience of elected politicians" from "around the country and around the world."[16]

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[13] *See id.* at 2475, 2481, 2483 (overturning *Bowers*, 478 U.S. 186 (1986).

[14] *See, e.g., Holder v. Hall*, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring) (mentioning the voting systems of Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe in assessing race-consciousness in the U.S. voting system); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (finding the Court's First Amendment jurisprudence consistent with the decisions of the European Court of Human Rights and the Canadian Supreme Court).

[15] 376 U.S. 52, 63-66 (1964) (Douglas, J., dissenting).

[16] 514 U.S. 334, 381-82 (1995) (Scalia, J., dissenting) ("[R]elevant to our decision is whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections . . . . Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning. How is it, one must wonder, that all of these elected

Particularly relevant here is *Burson v. Freeman*, upholding the constitutionality of a Tennessee statute that prohibited both the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place.[17] The Court observed that "[s]everal other countries were attempting to work out satisfactory solutions to these same [election process] problems," [18] and embarked upon a detailed examination of the Australian electoral system, which had previously been adopted in England and Belgium.[19] The Court found it compelling that "all 50 States, *together with numerous other Western democracies*, settled on the same solution;" it therefore concluded that "this widespread and time-tested consensus [among the states and foreign countries] demonstrates that some restricted zone is necessary."[20] *Burson* confirms Justice Breyer's observation that the experiences of other countries may "cast an empirical light on the consequences of different solutions to a common legal problem," [21] and represents persuasive authority for looking to the international community in evaluating BCRA.

II. PREVAILING INTERNATIONAL NORMS SUPPORT BCRA'S RESTRICTIONS ON THE USE OF CORPORATE AND LABOR UNION TREASURY FUNDS FOR ELECTIONEERING COMMUNICATIONS.

Nearly every democracy acknowledges that significant restrictions on advertising are necessary to preserve the

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legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly [?]").

[17] 504 U.S. 191 (1992).

[18] *Id.* at 202.

[19] *See id.* at 202-205.

[20] *Id.* at 206 (emphasis added).

[21] *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

integrity of the political process.[22] When measured against those restrictions adopted in other countries, BCRA's sixty and thirty-day constraints on corporate and labor union advertising[23] are clearly located toward the extreme end of permissiveness. Most major democracies have implemented far stronger solutions—including categorical prohibitions on paid political advertisements—to prevent well-funded entities from dominating broadcast media during elections.

A. Other Democracies Restrict Paid Political Advertising Far More Aggressively Than BCRA.

Plaintiffs-Appellants in this case state that "unfettered issue advocacy enjoys international support."[24] If, in making this assertion, Plaintiffs-Appellants suggest that other countries do not generally impose restrictions on paid political advertising, they are simply wrong.[25] The substantial majority of

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[22] In the United States, justifications for campaign finance reform have focused primarily on the "actuality and potential for corruption absent regulation." *Buckley v. Valeo*, 424 U.S. 1, 28 (1976). Notably, while other countries certainly recognize that interest, the need to "level the playing field"—so that a diversity of groups may express themselves and so that a single dominant group does not curtail the rights of others to political expression by overwhelming the most important channels of mass communication—also enjoys widespread recognition as a legitimate goal of an electoral system. *See, e.g.*, International Institute for Democracy and Electoral Assistance (IDEA) and the Office of Democratic Institutions and Human Rights of the OSCE, *International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections* 65-66 (2002) ("[T]here should be a level playing field among the parties or candidates"); *see also* Council of Europe Recommendation No. (99)15 ("on measures concerning media coverage of election campaigns").

[23] *See* Pub. L. 107-155 (H.R. 2356, 107th Cong.) §§ 201, 203.

[24] Brief of Plaintiffs-Appellants/Cross-Appellees National Right to Life Committee et al., at 15 n.18.

[25] An alternative reading of Plaintiffs-Appellants' proclamation is that other countries do not restrict the advertisement of *issue-oriented* (and

developed nations, including all the other G-7 democracies—the United Kingdom, France, Canada, Germany, Italy, and Japan—impose burdens on paid political advertising that are much more restrictive than those mandated under BCRA. Some countries directly fetter paid political advertising by third parties, while others impose ceilings on third-party spending that indirectly but substantially curtail the ability of third parties to broadcast political advertisements.

1. *Direct Controls on Political Broadcasting During Election Periods Are Widespread Among Established Democracies.*

Even with the adoption of BCRA, the United States possesses by far the most permissive regime regulating paid political advertising within the G-7. In the United Kingdom, the Broadcasting Act of 1990 prohibits *all* paid political advertising in broadcast media—whether funded by candidates, political parties, or third parties.[26] Similarly, France proscribes *all* paid political advertising on television during the three months preceding an election.[27] Germany also imposes a general ban on paid political advertisement in broadcast media,[28] with one exception. During the six weeks leading up to a national or European Union election, public stations are required to provide free airtime to the political

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non-election-related) political messages. Whether this claim is true or not, it is irrelevant to the case at hand. There is no question here as to whether BCRA may proscribe the use of such funds for true issue-oriented advertisements, because the statute does not attempt to limit such advertisements by unions and corporations. The degree to which other countries support issue-oriented, non-election-related advocacy therefore does not speak to the question before the Court.

[26] *See* Broadcasting Act, 1990, ch. 42, §§ 8(2)(a) and 92(2)(a).

[27] *See* C. élect. art. L. 52-1.

[28] *See* §§ 7, 42 *Rundfunkstaatsvertrag (RStV)*; § 11 cl. 1 *ZDF-Staatsvertrag für das Zweites Deutsches Fernsehen*.

parties.[29] National private stations may offer advertising time to the political parties during this period as well, but may charge no more than cost, which naturally discourages widespread paid advertising.[30] In Japan, political advertising is heavily regulated. Candidates cannot purchase television or radio airtime, although they are allowed to advertise free of charge during the campaign period on either the Japan Broadcasting Corporation (NHK) or at government expense on any privately owned radio or television station.[31] Political parties (and other qualified political groups) may purchase advertising time, but they may only broadcast advertisements emphasizing policy positions without reference to specific candidates.[32] Canada requires radio and television networks to provide free advertising time to registered parties.[33] Third parties are not prohibited from purchasing airtime in broadcast media, but they must conform to strict spending limits which, as a practical matter, foreclose meaningful third-party broadcast advertising.[34] Italy altogether prohibits

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[29] *See id.*

[30] *See* §§ 7, 42 *RStV*. For all advertising, whether on public or private channels, the "principle of gradated equality of chances"—a balancing and fairness rule—obtains. § 5 cl. 1 *Parteiengesetz*.

[31] *See* Notice No. 165 of the Ministry of Home Affairs, Nov. 29, 1994, as amended by Notice No. 150, July 12, 1996; Law No. 100, art. 150, Apr. 15, 1950, as last amended by Law No. 54, May 8, 1998 (Japanese Election Law (Kôshoku Senkyohô—"JEL")). JEL arts. 150, 150.1, 150.2 and JEL Enforcement Order arts. 111.4, 111.6 provide for five advertisements of five and a half minutes each, plus a one-time advertisement presenting a candidate's biography.

[32] *See, e.g.*, JEL arts. 139-200; JEL Enforcement Order arts. 108-128.

[33] *See* 2000 S.C., ch. 9, § 345.

[34] Third-party advertising expenditures are capped at $150,000 during a general election, of which no more than $3,000 can be used in any one electoral district. *See id.* § 350.

paid political advertising in the national media while strictly regulating political advertisements in other media channels.[35]

Outside the G-7, limitations on paid political advertising during election periods are equally widespread. Sweden allows no paid advertising on its broadcast television channels and mandates impartiality in political reporting.[36] In Austria, paid political advertising is not permitted on the public network.[37] Israel has legislated a complex and restrictive regime governing political broadcasts, sustained under challenge before the High Court.[38] New Zealand limits political broadcasts on television and radio to state-funded timeslots near election day, and Australia imposes a complete ban on radio and television campaigning, including issue advocacy, for the three days prior to election day.[39] In Belgium, the limitation extends to *three months* before election day and encompasses virtually all paid media and all political matter.[40] Broadcast and electioneering limitations of shorter duration are also in place in Russia and Hungary,[41] as well as Grenada, Dominica, St. Vincent and the Grenadines, and Nepal.[42] Other countries that severely limit paid political advertising in broadcast media include Brazil,[43] the Czech

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[35] *See* Law No. 28 of February 28, 2000 (statute on equal access to media during election period and on political broadcasting); Italian Communications Authority Decision No. 200/00/CSP of June 22, 2000 (implementing Law No. 28 of February 28, 2000); and House of Parliament Scrutiny Committee on Public Broadcasting (RAI) Decision of December 18, 2002 (implementing Law No. 28 of February 28, 2000). Local private broadcasters, if they so elect, may allocate airtime to parties free of charge, but only on an equal access basis and not in exeess of two advertisements per day per party. Local private broadcasters may also sell time for political advertisements, but they may not charge more than 50% of the normal commercial rate or sell more time than they have voluntarily allocated for free broadcasting. *See also* P. Barile, E. Cheli & S. Grassi, *Istituzioni di diritto pubblico*, Padova, CEDAM, 103- 104, 295-296 (2002).

[36] *See* Law on Radio and Television, S.F.S. 1996:844.

[37] *See Bundesgesetz über den Österreichischen Rundfunk* (as amended, *Bundesgesetzblatt*, I No. 83/2001), §§ 13 (1), 14-17 (enumerating exhaustive list of permitted advertising subjects).

[38] *See* High Court of Justice Cases Nos. 869/92 and 931/92 (1992) (M. Shamgar, Pres.): "But in the said periods before elections, there is a limitation on election propaganda that is broadcast on the radio or television . . . . This limitation is . . . an unavoidable necessity."

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[39] *See* Broadcasting Act, 1989 §§ 69, 70 (N.Z.); Broadcasting Services Act, 1992 (Cth), Sch. 2, Part 2, cl. 3A (Austl.); Special Broadcasting Services Act 1991 (Cth) § 70(c) (Austl.). In *Australian Capital Television v. Commonwealth*, 177 C.L.R. 106 (1992), the High Court of Australia struck down an omnibus ban on the broadcast of political advertising on the ground that it unconstitutionally limited political expression. However, the court left intact a three-day blackout period. Justices Brennan, Deane, and Toohey volunteered positive views on the constitutionality of the three-day blackout period. *See id.* at 159, 175. No challenges have been made to the blackout period since this decision.

[40] The limitation extends to paid billboards, telephone campaigns, and television, radio, and cinema. *See* Loi du 4 juillet 1989 relative à la limitation et au contrôle des dépenses électorales engagées pour les élections des Chambres fédérales, ainsi qu'au financement et à la comptabilité ouverte des parties politiques, art. 5.

[41] *See* Federal Law No. 19 F-3, On Election of the President of the Russian Federation, art. 50, point 3; Federal Law No. 175-F3, On Elections of Deputies of the State Duma of the Federal Assembly of the Russian Federation, art. 58, point 3 (Russ.); Act C of 1997 on Electoral Procedure ¶¶ 40-41, § (2) (Hung.).

[42] These jurisdictions ban all or most forms of electioneering on polling day, or on polling day and the day before. *See* Electoral Law, 1958, ch. 160, §§ 63(1), (3) (Gren.); House of Assembly (Elections) Act, ch. 2:01, §§ 52, 54 (Dominica); Representation of the People Act, Electoral Law, 1982; § 41 (St. Vincent and the Grenadines); Election Code of Conduct, 2053 (1996) § A, ¶ 5 (Nepal).

[43] *See* Lei No. 9.504, que estabelece normas paras as eleições, arts. 26, 44 (1997).

Republic, Denmark, Ireland, Malta, Malaysia, Norway,[44] Portugal, Senegal, Seychelles, Singapore, Slovakia, Sri Lanka, Switzerland,[45] and Turkey.[46] In the Americas as a whole—with the exception of the United States, of course—election period restrictions on paid advertising are essentially ubiquitous.[47]

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[44] In Norway, an advertisement paid for by the National Norwegian Union of Nurses was found to violate the advertising prohibition. *See* European Platform of Regulatory Authorities, *Working Group 2: Political Advertising*, Background Paper EPRA/2002/09, at 6-7, *available at* http://www.epra.org/content/english/index2.html.

[45] *See* Federal Law Concerning Radio and Television of 21 June 1991, § 4, art. 18, ¶ 5 ("La propagande religieuse ou politique est prohibée").

[46] *See* Michael Pinto-Duschinsky, *Financing Politics: A Global View*, 13 J. Democracy 69, 76-77 tbl.2 (2002); European Platform of Regulatory Authorities, *supra* note 44, at 1. Turkey prohibits all political broadcasting for seven days before elections. *See* Const., art. 32 (as amended by Law No. 4756, May 21, 2002) (Turk.).

[47] *See* Ley 25.610, Reforma Código Nacional Electoral, art. 3 (2002) (Arg.) (32-day ban on broadcasts with "the purpose of promoting the acquisition of votes by candidates for public office"); Ley Electoral de 1984, con reformas, incluyendo la Ley No. 2232 (2001), art. 120 (Bol.) (election day ban); Lei No. 4.737 Código Eleitoral de 1965, atualizado com as modificações da Lei 9504/97, art. 250 (Braz.) (2-day ban); Ley Orgánica Constitucional No. 18.700/88, sobre votaciones populares y escrutinios, actualizada a octubre de 2001, art. 30(6) (Chile) ("electoral propaganda" broadcasts allowed only from the 30th to the 3rd day before election); Ley No. 1536, Código Electoral, actualizado con las reformas de 1996, art. 79 (Costa Rica) (ban for day before election and month of December); Ley Electoral y de Partidos Políticos de 1985, art. 223(c) & Decreto 1-90 del Tribunal Supremo Electoral, 1990, art. 38 (Guat.) (36-hour ban); Ley electoral y de las Organizaciones Políticas del 19.05.1981, actualizada hasta DL No. 180-92, art. 74 (Hond.) (5-day ban on attack ads); Código Federal de Instituciones y Procedimientos Electorales de 1994, con reformas de 1996 ("COFIPE"), art. 190(2) (Mex.) (3-day ban); Ley Electoral de Nicaragua de 2000, art. 97 (Nicar.) (3-day ban); Ley No. 834/96 de 1996, Código Electoral Paraguayo, art. 290 (Para.) (political advertising allowed only for 60 days leading up to 2-day ban); Ley No. 26859/97, Ley Orgánica de Elecciones de 1997, art. 190 (Peru) (24-hour

2. *Indirect Limitations on Third-Party Political Advertising Through Spending Limits Are Also Widespread Among Democracies.*

While direct constraints on the use of broadcast media for political advertising are common, many countries also impose general ceilings on third-party spending that indirectly but effectively serve the same purpose. As noted earlier, Canada places a $3,000 limit on spending by third parties within each electoral district. This functions *de facto* as a near-complete ban on paid television advertising by third parties.[48] Italy, Japan, Mexico, and Costa Rica take a more extreme position—they simply bar independent expenditures altogether. An automatic and far-reaching ban on third-party advertising obviously follows in these countries from their prohibitions.[49] In still other jurisdictions, spending by third parties counts against the spending limits of the candidates they support, making it difficult for wealthy third parties to flood broadcast media with paid advertisements. The laws of New Zealand, Belgium, and Nepal are examples of this approach.[50]

Israel has been particularly proactive in recognizing that any effort to mitigate corruption or imbalance is undone if the regulatory ambit fails to reach independent expenditures. Israeli law regulates "election propaganda," and the High Court of Justice took pains to define the term broadly.[51] Widespread evasion of the intent behind campaign finance rules led State Comptroller and former Supreme Court Justice Eliezer Goldberg to emphasize in an official report after the 2000 Knesset elections that "extra-party propaganda" constitutes prohibited contributions under article 8 of the Financing Law.[52]

BCRA, of course, does not come close to imposing the far-reaching limitations on independent expenditures that are so common to the rest of the world. It is exponentially more selective, restricting *specific* entities (corporations and unions) from using *specific* funds (treasury funds) for *specific* activities (paid advertising) during *specific* time periods (thirty or sixty days prior to an election). Before the passage of BCRA, one scholar noted that although "[a]ccess to political television advertising is . . . a matter dealt with in

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ban); Ley Orgánica de Sufragio y Participación Política, art. 209 (1997) (Venez.) (48 hours before start of elections, "all electoral publicity will cease").

[48] *See supra* note 34 and accompanying text.

[49] In Costa Rica, to undertake political-electoral publicity in any form, a person must be designated by a political party to the Supreme Tribunal of Elections. *See* Ley No. 1536, art. 85(d). Mexican law provides: "The contracting of advertising in radio and television, either in favor or against any party or candidate, by means of third persons, will not be allowed in any case." COFIPE, art. 48(13). Italian broadcasters may air paid political advertisements only if they clearly identify the political party paying for them—by direct implication, a ban on selling political airtime to independent individuals or groups. *See, supra* note 35. Under Japanese law, only groups and persons specifically permitted by statute to do so may engage in electioneering activities (*i.e.*, political parties, qualified political groups, and candidates). *See* JEL, art. 151.5.

[50] *See* Electoral Act, 1993 §§ 210, 214B, 221 (N.Z.); Loi du 4 juillet 1989, art. 4, § 2 (Belg.); Election Code of Conduct, 2053 § B, ¶ 5 (1996) (Nepal). Notably, India does regulate campaign spending by candidates but *not* third parties; as a result, its Supreme Court has observed that the restrictions on candidates are "mere eye wash and no practical check on election expenses" as needed "to attain a meaningful democracy." *Godakh Yashwantrao Kankarro v. E.V. alias Balasaheb Vikhe Patil*, 1994 A.I.R. (S.C.) 678.

[51] *See* Case No. 869/92 (defining "electoral propaganda" as "[a] broadcast that contains direct preaching for parties or lists of candidates; an attack on a rival party or list; and also, any broadcast, whose dominant effect is propaganda-wise").

[52] *See Report on the Results of the Audit of the Party Groups for the Period of Elections for the Fifteenth Knesset* ¶¶ 7-8 (1997).

virtually all regulatory frameworks of campaigns[,] the *United States* is truly exceptional."[53] While BCRA's targeted limitations on paid advertising by corporations and unions during election periods represent very modest steps by international standards, they move the United States incrementally towards the mainstream of democracies that regulate third-party political advertising to safeguard the integrity of their electoral systems.

B. Other Democracies Have Found That Restrictions On Paid Political Advertising Are Compatible With Free Speech.

The United States is not the only jurisdiction whose courts have addressed restrictions on third-party paid political advertising within the framework of a constitutionally enshrined right to freedom of expression. Both Canada and many European nations enjoy a well-developed free speech jurisprudence, and courts in both places have asked whether free speech can accommodate restrictions on third-party political advertising. An analysis of Canadian and European judicial opinions yields a qualified answer in the affirmative.

1. *The Canadian Supreme Court Has Indicated That Restrictions on Paid Political Advertising by Third Parties Can Survive Constitutional Scrutiny.*

In Canada, rights to freedom of expression and freedom of association are protected under the Canadian Charter of Rights and Freedoms.[54] The Charter reflects a commitment to these freedoms similar in scope and vigor to that of the

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[53] Fritz Plasser and Gunda Plasser, *Global Political Campaigning: A Worldwide Analysis of Campaign Professionals and Their Practices* 205, 216 (2002) (emphasis in original).

[54] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982*, ch. 11, §§ 2(b) and 2(d) (declaring as "fundamental" the "freedom of thought, belief, opinion and expression" and the "freedom of association").

U.S. Constitution. In the words of the Canadian Supreme Court:

> [This] Court has consistently and frequently held that freedom of expression is of crucial importance in a democratic society. . . . "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized."[55]

Clearly, freedom of expression is deeply embedded in Canadian jurisprudence.

The seminal Canadian Supreme Court decision applying constitutional scrutiny to restrictions on paid political advertising by third parties is *Libman v. Quebec (A.G.)*.[56] In *Libman*, the court considered a constitutional challenge to Quebec's Referendum Act, which required groups wishing to participate in a referendum campaign to either join or affiliate with a national committee formed for the purpose of supporting one of the referendum options.[57] The Act also provided for the financing of national committees and allowed them and their affiliated groups to incur expenses (up to prescribed limits) for the purpose of promoting or opposing a referendum option. Groups that did not join or affiliate with a national committee, however, were permitted to incur only minor expenses, and were essentially banned from all paid advertising.[58] The appellant in *Libman* argued that this limitation unconstitutionally infringed his right to freedom of expression under the Charter.

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[55] *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569, 151 D.L.R. (4th) 385, ¶ 28 (quoting *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, 1336).

[56] *Id.*

[57] *See* Referendum Act, R.S.Q., ch. C-64.1, §§ 402, 403, 404, 406, ¶¶ 3, 413, 414, 416, 417 of Appendix 2 (as cited in *Libman*, 3 S.C.R. 569).

The Canadian Supreme Court recognized the need for such restrictions and agreed with them in principle:

> Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. Nor would it be much better served by a system that undermined the confidence of citizens in the referendum process.[59]

Nevertheless, the court reluctantly concluded that the Referendum Act's near-total ban on third-party spending by "individuals and groups who can neither join the national committees nor participate in the affiliation system" went too far.[60]

Significantly, however, in addition to evaluating the Referendum Act itself, the *Libman* court went out of its way to address a separate federal statute, the Canada Elections Act.[61] Like the Referendum Act, the Canada Elections Act imposed strict limits on third-party spending, but in a manner that *did* allow for limited paid political advertising. Specifically, the Act allowed third parties to spend up to $1,000 on political "advertising expenses," defined to include all costs incurred "for the production, publication, broadcast and distribution of any advertising for the purpose of promoting or opposing" a party or candidate during an election.[62] The statute also

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[58] *See Libman*, 3 S.C.R. ¶ 12 (setting forth strictly limited permissible expenses).

[59] *Id.* ¶ 84.

[60] *Id.* ¶ 77.

[61] R.S.C., 1985, ch. E-2.

[62] *Id.* § 259.

designated certain "blackout" periods during which all persons were enjoined from election advertising.[63]

By the time the Canadian Supreme Court took up *Libman*, the Canada Elections Act's $1,000 limit on third-party advertising expenditures had been held unconstitutional by the Alberta Court of Appeal in *Somerville v. Canada*[64] Because the Canadian government decided not to appeal the lower court judgment in *Somerville*, however, the Canadian Supreme Court could not review the lower court decision directly. As a result, it took the highly unusual step in *Libman* of expressing its clear disapproval of a ruling not before it:

> In *Somerville v. Canada (Attorney General)*, the Alberta Court of Appeal declared [the Canada Election Act's restrictions on third party advertising] to be unconstitutional. With respect, we have already mentioned that we cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion regarding the legitimacy of the objective of the provisions.[65]

The court explained:

> We agree . . . with the analysis of the Lortie Commission[66] . . . regarding the need to limit spending both

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[63] *See Somerville v. Canada* (A.G.) (1996), 136 D.L.R. (4th) 205, ¶ 6 (summarizing the black-out provisions codified as subsection 213(1) of the Canada Elections Act, R.S.C., 1985, ch. E-2). The black-out periods prohibited election advertising "for approximately the first 18 of 47 days of a federal election campaign. This is followed by a period of 28 days when advertising is permitted, up until the day prior to polling day, after which it is again prohibited." *Id.* ¶ 58.

[64] *See id.*

[65] *Id.* ¶ 79.

[66] The Royal Commission on Electoral Reform and Party Financing chaired by Pierre Lortie ("Lortie Commission") was appointed to analyze the role of money in the Canadian electoral process in response to concerns about the levels and sources of expenditures during the 1988 federal election. Many of the Lortie Commission's recommendations were adopted in the new Canada Elections Act, 2000 S.C., ch. 9.

> by the principal parties (the national committees in the case of a referendum) and by independent individuals and groups in order to preserve the fairness of elections and, in the present case, referendums.[67]

The court further suggested that the Canada Elections Act's limits on third-party advertising were tailored narrowly enough to pass constitutional muster, in contrast to the Referendum Act's more severe restrictions on third-party spending.[68]

Libman's potential contribution to this Court's analysis lies in its explicit recognition that campaign finance laws implicate multiple constitutional values, and that arriving at a sensible solution requires a careful balancing of those interests. In the context of third-party expenditures, this necessarily entails moderating the otherwise broad right to free speech in order to preserve the integrity of the democratic process. Of course, *Libman*'s premise is not foreign to this Court's deliberations. Rather, this Court has implicitly adopted a nuanced balancing framework in many of its own cases. As Justice Breyer noted during a discussion on contribution limits:

> [T]his is a case where constitutionally protected interests lie on both sides of the legal equation . . . . In such circumstances—where a law significantly implicates competing constitutionally protected interests in complex ways—the Court has ... balanced interests. And in practice, that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others. . . This approach is that taken in fact by *Buckley*

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[67] *Libman*, 3 S.C.R. ¶ 55-56.

[68] *Id.* ¶ 77 ("In our view, there are alternative solutions far better than [the Referendum Act's near-complete ban on unaffiliated third party spending]. . . . The Lortie Commission's recommendation on third party expenses [which was incorporated into the Canada Elections Act as the $1,000 spending limit] is one possible solution.").

> for contributions, and is found generally where competing constitutional interests are implicated, such as privacy, First Amendment interests of listeners or viewers, and the integrity of the electoral process.[69]

The Court should apply that approach in the present case, recognizing that the fundamental constitutional value of preserving the integrity of the democratic process justifies BCRA's modest imposition on speech.

In sum, *Libman* is a well-considered effort by the Canadian Supreme Court to accommodate third-party spending restrictions within constitutional parameters. It stands not only for the proposition that constitutionally protected free speech can tolerate restrictions on third-party political activities, but that such restrictions are integral to a robust democratic polity. In reviewing BCRA's restrictions on paid political advertising, this Court should take into account the Canadian Supreme Court's thoughtful analysis of a shared constitutional concern.[70]

2. *The European Court of Human Rights Has Indicated That Restrictions on Paid Political Advertising by Third Parties Are Compatible with the Right to Free Speech.*

In forty-four European countries, the right to freedom of expression is guaranteed under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").[71] The Conven-

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[69] *Nixon*, 528 U.S. at 400, 402-403 (2000) (Breyer, J., concurring) (internal citations omitted).

[70] The Canadian Supreme Court on June 27, 2003 cited *Libman* approvingly for its holdings on fairness in the electoral process. *See Figueroa v. Canada (A.G.)*, 2003 S.C.C. 37, ¶¶ 49, 51.

[71] 312 U.N.T.S. 222 (1950) (hereinafter "Convention"). The key provisions of Article 10 provide:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart

tion was the first document that gave "specific legal content to human rights in an international agreement, and combined this with the establishment of machinery for supervision and enforcement."[72] Violations of rights guaranteed under the Convention are adjudicated by the European Court of Human Rights (ECHR), which was established under the Convention. As in the United States and Canada, the right to free speech is considered by the ECHR to be of paramount importance: "According to the Court's case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment."[73] "The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy."[74]

> information and ideas without interference by public authority and regardless of frontiers.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such . . . restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others . . . .

[72] Ian Brownlie, *Basic Documents in Human Rights* 338 (1971).

[73] *Unabhängige Initiative Informationsvielfalt v. Austria*, [2002] E.C.H.R. 28525/95, ¶ 34; *see also Wierzbicki v. Poland*, [2002] E.C.H.R. 24541/94, ¶ 31 (referring to "principles established in the case-law of the Convention organs concerning freedom of expression, which constituted one of the essential foundations of a democratic society"); *Surek and another v. Turkey*, (1999) 7 B.H.R.C. 339, ¶ 45 ("The court reiterates the fundamental principles under its judgments relating to art 10. . . . Freedom of expression constitutes one of the essential foundations of a democratic society."); *Fressoz and Roire v. France*, (1999) 5 B.H.R.C. 654, ¶ 45 (same).

[74] Özgür Gündem *v. Turkey*, [2000] E.C.H.R. 23144/93, ¶ 43 ("Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. . . . Such are the demands of the pluralism, tolerance and broadmindedness without which there is no "democratic society." *Id.* at ¶ 57).

Limitations on third-party spending were addressed by the ECHR in *Bowman v. United Kingdom*.[75] Bowman, a political activist, challenged a British statute that prohibited unauthorized third parties from spending more than five pounds ("GBP")—less than $10—during the period before an election to convey information "with a view to promoting or procuring the election or defeat of a candidate."[76]

Plaintiffs-Appellants in their brief cite *Bowman* to support their assertion that "unfettered issue advocacy enjoys international support."[77] Purporting to quote directly from *Bowman*, Plaintiffs-Appellants summarize the ECHR's opinion as follows:

> [The ECHR decided] that a London woman could not be charged with a campaign law violation for distributing 1.5 million copies of a voter guide . . . even though it was . . . "distributed with a view to promoting the election of the candidate with the stand on abortion most acceptable to the [plaintiff]" and "might in fact have the tendency to influence certain voters in different directions," because "freedom of expression constitutes one of the essential foundations of a democratic society, [sic] and the government had failed to prove that such "'single' issue campaigning . . . would distract voters [or] "'distort' election results."[78]

But that is *not* what the ECHR said in *Bowman*. In fact, these statements were never made by the ECHR at all. Plaintiffs-Appellants miscite and misattribute these quotes, which actually come from a report made by a now-defunct investigative body that referred the case to the ECHR for adjudication.[79] What the ECHR *actually* said in *Bowman* was the following:

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[75] [1998] E.C.H.R. 24839/94, (1998) 4 B.H.R.C. 25.

[76] *Id.* ¶ 13 (quoting subsections 75(1) and (5) of the Representation of the People Act of 1983: "No expenses shall, with a view to promoting or procuring the election of a candidate . . . at an election, be incurred by any person other than the candidate, his election agent and persons authorized in writing by the election agent.").

[77] Brief of Plaintiffs-Appellants/Cross-Appellees National Right to Life Committee et al., at 15 n.18.

[78] *Id.*

> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system . . . . Nonetheless, in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature."[80]

The ECHR ultimately did strike down the British statute, but on grounds similar to those articulated in *Libman*—that the spending limit of 5 GBP "operated, for all practical purposes, as a total barrier to Mrs. Bowman's publishing information with a view to influencing the [election]."[81]

Like *Libman*, *Bowman* is widely understood to affirm the principle that countervailing constitutional interests must be balanced in reviewing campaign finance limitations, and that such balancing *permits* restrictions short of a complete ban.[82] The United Kingdom, for example, has interpreted the ECHR's decision as allowing reformulated statutory restrictions on paid third-party expression; the Parliament recently enacted a comprehensive election reform bill that

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[79] *See* European Commission of Human Rights, Bowman Against the United Kingdom, Application No. 24839/94, Report of the Commission (adopted Sept. 12, 1996).

[80] *Bowman*, [1998] E.C.H.R. 24839/94, ¶¶ 42-43.

[81] *Id.* ¶ 47.

[82] The High Court of Justice of Israel also has endorsed a balancing approach. *See* Cases Nos. 869/92 and 931/92 (*Nissim Zvili v. Chairman of the Ctrl. Elections Com., Ass'n for Human Rights v. Dir. Gen'l of the Broadcasting Service*) (Aharon Barak, J.) ("The solution is to be found in an appropriate balance among the contradictory purposes.").

modestly raises expenditure limits for third parties to meet the *Bowman* standard.[83]

III. NEARLY ALL MAJOR DEMOCRACIES IMPOSE RESTRICTIONS ON THE FLOW OF MONEY THAT ARE FAR MORE ONEROUS THAN BCRA'S RESTRICTIONS ON SOFT MONEY.

There is no obvious analogue to the American soft money problem overseas, for the problem relates to unique aspects of the relationship in the United States between federal and state political parties and between federal and state fundraising rules. As explained in detail in the record developed at the district court level, soft money relates to the unregulated raising, transfer, and expenditure of nonfederal funds to influence federal elections. Most other countries simply do not have a dual system of government that provides opportunities for funneling money from one level to the other in contravention of the spirit and purpose of the campaign finance laws.

The soft money problem, however, is one manifestation of a larger problem common to many democracies: how to prevent the massive influx of unregulated money into campaigns from undermining the democratic process. Significantly, most foreign countries address that issue with a range of regulations far more proscriptive than the closing of the soft money loophole contemplated by BCRA.

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[83] *See* Political Parties, Elections, and Referendums Act (PPERA), 2000, ch. 41, § 131(3). PPERA amends a "permitted sum" exception to § 75(1) of RPA 1983, so as to elevate that sum from 5 GBP to 500 GBP, plus one half pence for each elector in the district, for independent expenditures supporting an individual candidate for Parliament. The limit applies both to an individual making such an independent expenditure and to groups of individuals acting as part of a "concerted plan of action." Part VI, § 94(5) of PPERA imposes a separate limit on spending money "supporting or opposing registered political parties or parties that put forward particular policies or unnamed candidates who hold particular views or advocate particular policies." The limit on such third-party expenditures is 10,000 GBP for England and 5,000 GBP each for Scotland, Wales, and Northern Ireland. *See also* Committee on Standards in Public Life, Fifth Report at 10.59 (1998) (proposing how to implement *Bowman* standards).

First, as discussed above, nearly every major industrialized country has far-reaching restrictions or bans on paid advertising. Since advertising is an enormous component of campaign expenditures, such laws dramatically reduce incentives for introducing unregulated funds into the campaign process.

Moreover, most countries furnish public funds for campaigns, further reducing the incentive for candidates and parties to find fundraising loopholes. The G-7 nations generally provide public funds to parties and candidates for most or all national elections. Indeed, in the Library of Congress survey, *every* country except India, Iran, and Singapore had a system of direct public funding.[84] In a separate survey of sixty countries—including many less-developed countries with little regulatory infrastructure—fully 70% were found to provide some form of direct public funding.[85] The United States is thus again the exception to the rule insofar as, apart from presidential campaigns, it does not provide public funds for parties or candidates.

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[84] *See LOC Comparative Summary*, *supra* note 3, at 4. Most calculate the amount of support using a flat-rate formula, while a minority base their calculation on a certain percentage of qualified expenditures. The countries using flat-rate formulas are: Argentina, Australia, the Czech Republic, France (with regard to parties), Israel, Italy, Japan, Mexico, the Netherlands, Taiwan, and Turkey, and the United Kingdom. The countries using a percentage of qualified expenditures are: Canada, Greece, and France (with regard to candidates). *See id.* at 4-5.

[85] *See* Michael Pinto-Duschinsky, *Handbook on Funding of Parties and Election Campaigns* (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), forthcoming 2003) (overview *available at* http://www.europexxi.kiev.ua/english/program/conference/007.html).

Finally, unlike the United States, most other major democracies limit campaign expenditures. By controlling campaign funding through the more aggressive means of expenditure limits rather than—or in addition to—contribution limits, other countries minimize incentives to pursue ways of overcoming contribution limits. Among the other Group of Seven nations, all with the exception of Germany establish ceilings on campaign expenditures. Canada places expenditure limits on candidates and political parties (based on the number of eligible voters) as well as on third parties.[86] Italy establishes limits on expenditures by candidates based on the number of citizens in a district, and for parties based on the number of eligible voters.[87] The United Kingdom imposes separate limitations for candidates, parties, and third parties for different types of expenditures.[88] In France, the law sets a general ceiling on campaign expenditures for candidates and also imposes special limitations on different types of expenditures to promote fairness and prevent runaway election costs.[89] Japan imposes spending limits for candidates according to a complex formula based on the number of registered voters and the number of seats in a district.[90] France, Italy, and Japan also impose a second layer of control by imposing contribution limits on top of expenditure limits.[91]

Widening the circle beyond the G-7 nations, the Library of Congress found in its comparative survey of campaign finance laws in eighteen countries that expenditure limits are maintained by a substantial majority of those surveyed.[92] The expenditure ceilings are either set amounts, as in Greece, Israel, and Russia, or based on the number of voters or constituencies, as in Canada, India, France, Japan, Taiwan, and the United Kingdom.[93]

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[86] *See* 2000 S.C., ch. 9, § 441.

[87] *See* Law No. 515/1993, art. 7.

[88] *See* PPERA §85.

[89] *See* Law Library of Congress, *France: Campaign Financing of National Elections* (Document No. 2000-9042) at 6 (2000).

[90] *See* Law No. 100, art. 194, Apr. 15, 1950, as last amended by Law No. 54, May 8, 1998 (JEL); art. 194 JEL, arts. 126, 127 of JEL Enforcement Order.

[91] *See LOC Comparative Summary*, *supra* note 3, at 3.

Amici do not recount these facts to urge this Court to disavow *Buckley v. Valeo* and uphold expenditure limits. *Amici* recognize that the United States' exceptionally permissive system is motivated by the laudable desire to protect First Amendment values and to promote political discourse and participation. Rather, *amici* seek to illustrate that the United States is located toward one extreme of the democratic continuum with respect to how it regulates money in its electoral system.[94] Against this backdrop, it is clear that BCRA's modest efforts to stem the flow of soft money that continues to erode the democratic process are both permissible and desirable. BCRA is a badly needed step that will begin to pull campaign finance in the United States back from the fringe of international practice.

CONCLUSION

For the foregoing reasons, the provisions of the Bipartisan Campaign Reform Act of 2002 relating to third-party political advertising and soft money should be affirmed.

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[92] *See id.* at 4.

[93] *See id.*

[94] The United States is also located at one extreme in terms of voter participation—it ranked 140 out of 163 countries in voter turnout during the 1990s, behind Tanzania, Madagascar, Jamaica, Cameroon, and Chad, and just ahead of Botswana, Kenya, Haiti, Mauritania, Ivory Coast, and Pakistan. *See* International Institute for Democracy and Electoral Assistance (IDEA) Voter Turnout Website, *at* http://www.idea.int/vt/survey/voter_turnout_pop1.cfm.

Respectfully submitted,

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
YUL J. KWON
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

THOMAS D. GRANT
LAUTERPACHT RESEARCH
CENTRE FOR INTERNATIONAL LAW
5 Cranmer Road
Cambridge CB3 9BL
United Kingdom
011 44 1223 691 664

* Counsel of Record
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Supreme Court of the United States

SENATOR MITCH MCCONNELL ET AL.,
Appellants/Cross-Appellees,

—v.—

FEDERAL ELECTION COMMISSION ET AL.,
Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE*, FORMER LEADERS OF THE AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF APPELLEES/CROSS-APPELLANTS FEDERAL ELECTION COMMISSION, *ET AL.*

ERIC M. LIEBERMAN
ROGER BEARDEN
GREGORY SILBERT
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman, P.C.
740 Broadway, 5th Floor
New York, New York 10003-9518
(212) 254-1111

NORMAN DORSEN
Counsel of Record
Stokes Professor of Law
New York University School of Law
40 Washington Square South
New York, New York 10012
(212) 998-6233

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INTEREST OF AMICI CURIAE[1] AND STATEMENT OF POSITION

Amici constitute persons who have served as ACLU President, ACLU Executive Director, ACLU National Legal Director, and ACLU National Legislative Director. Norman Dorsen served as ACLU General Counsel from 1969-1976 and as President of the ACLU from 1976-1991. John Pemberton served as Executive Director of the ACLU from 1962-1970 and Aryeh Neier served as Executive Director from 1970-1978. john powell served as National Legal Director from 1987-1993. John Shattuck served as National Legislative Director of the ACLU from 1976-1984 and Morton Halperin as National Legislative Director from 1984-1992.[2] *Amici* have devoted much of their professional lives to the ACLU and, in particular, to the protection of free speech. They are proud of their ACLU service, and they continue to support the ACLU's matchless efforts to preserve the Bill of Rights. They believe, however, that the opposition of the current leadership of the ACLU to campaign finance reform in general, and the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. 107-155, 116 Stat. 81, in particular, is misplaced. *Amici* submit this brief to elucidate their publicly-stated view that the electioneering provisions of BCRA, Sections 201-204, are facially constitutional.[3]

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

[2] Burt Neuborne, who served as National Legal Director from 1982-1986 and who joined with *amici* in a statement supporting the legislation, represents the intervenor-defendants/appellees Senator John McCain *et al.* in defense of the constitutionality of the Bipartisan Campaign Reform Act and is therefore ineligible to appear on this brief. Charles Morgan, Jr., who served as National Legislative Director from 1972-1976, signed a letter to Congress with the other *amici* publicly supporting the constitutionality of the BCRA, but he is currently ill and unable to consent to appear on this brief. Bruce Ennis, who preceded Burt Neuborne as National Legal Director and who joined in the statement in support of the legislation, died prior to the commencement of this litigation.

SUMMARY OF ARGUMENT

The electioneering provisions of BCRA, Sections 201-204, address the growing evasion of existing campaign finance regulations through the use of broadcast advertisements designed to influence federal elections, yet not subject to the disclosure requirements or the funding source prohibitions that for decades have been placed on other forms of electioneering activity. These advertisements avoid words expressly advocating the election or defeat of a particular candidate, while leaving no doubt to the listener that a particular candidate's election or defeat is preferred.

To bring these advertisements within the existing campaign finance regulations, Congress adopted a definition of electioneering communication, carefully limited to broadcast, cable, or satellite communications referring to a clearly identified candidate for federal office, made within 60 days of a general election or 30 days of primary election, and targeted to the relevant electorate. Congress then imposed the same funding and disclosure requirements on these communications that for decades have applied to other electioneering communications.

Appellants' facial challenge, while conceding the numerous constitutional applications of the electioneering communications provisions, nevertheless asserts that the definition of electioneering communication adopted by Congress was overbroad in that it may reach, in certain instances, issue advocacy unconnected with a pending election. Further, appellants argue that the fall-back definition of electioneering communication adopted by Congress, limiting the term to broadcast, cable, or satellite communications promoting, supporting, attacking, or opposing a candidate for office and suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate, is unconstitutionally vague and therefore must be stricken on its face.

Appellants' challenge fails for at least four reasons. *First*, petitioners wrongly invoke the overbreadth doctrine to challenge the primary definition of electioneering communication. The Court has held that it will not invoke the "strong medicine" of overbreadth facial invalidation unless a law is substantially overbroad and only upon due consideration of the costs exacted by facial invalidation. Given that the overwhelming majority of the applications of BCRA are constitutional and that appellants have multiple avenues available for as-applied relief, appellants' facial challenge cannot stand.

Second, appellants' facial vagueness challenge to the back-up definition fails for similar reasons. A law may be stricken as facially vague only where it lacks an operative core of prohibited conduct. There can be no doubt as to the core application of the fall-back definition of electioneering communication. Whether the definition may be vague in application to particular circumstances must be reserved for an appropriate as-applied challenge.

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[3] *Amici* support the constitutionality of the soft money provisions of BCRA, Sections 101-103, which is fully and adequately defended in other briefs before the Court.

Third, the application of existing funding and disclosure requirements to electioneering communications as defined by BCRA is clearly constitutional under the Court's precedents. The Court has long upheld restrictions on corporate and labor union funding of electioneering communications, and has similarly held that disclosure requirements serve important First Amendment interests in informing the public about the sources of support for candidates for public office. The extension of these funding restrictions and disclosure requirements to electioneering communications as defined by BCRA is perfectly consistent with the Court's campaign finance jurisprudence.

Last, the contention that the Court's limiting construction in *Buckley v. Valeo*, 424 US 1 (1976), forever constrains Congress to regulate only words expressly advocating the election or defeat of a candidate misreads the Court's decision in *Buckley*. Moreover, given the ease with which electoral communications may avoid words of express advocacy, a holding that these magic words form a constitutional ceiling beyond which no campaign finance law may reach would leave Congress unable to create any effective system of campaign finance regulation. Nothing in the First Amendment or the Court's precedents requires such a result.

ARGUMENT

I. Appellants' Facial Challenge to BCRA Must Be Rejected Because BCRA's Scope is Precisely and Narrowly Tailored and Cannot Be Deemed "Substantially Overbroad"

Congress adopted alternative definitions of the term "electioneering communication" in the BCRA. The primary definition provides that an electioneering communication is a "broadcast, cable, or satellite communication" which— (1) "refers to a clearly identified candidate for Federal office;" (2) is made within 60 days of a general election or 30 days of primary election; and (3) in elections other than for president or vice-president, "is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i). The fall-back definition, applicable if the primary definition "is held to be constitutionally insufficient by final judicial decision," defines "electioneering communication" as a "broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." 2 U.S.C. § 434(f)(3)(A)(ii).

Appellants assert a facial challenge to both the primary and fall-back definitions of "electioneering communication." Appellants argue, first, that the primary definition, although precise and unambiguous, unconstitutionally imposes funding and disclosure restrictions on certain communications that may appear on the broadcast media in an electoral district during the period immediately preceding a federal election and use a candidate's name or likeness, but that are, nevertheless, unconnected with the forthcoming election. The possibility that the funding of such so-called "pure issue" communications might be restricted by BCRA, appellants argue, requires the invalidation of the primary definition on its face, even as applied to the vast majority of cases in which petitioners concede enforcement would not violate the First Amendment.

Turning to the fall-back definition, appellants contend that a definition of electioneering communication limited to speech that praises or criticizes a given candidate and that may not be plausibly understood as anything other than an exhortation to vote for or against the candidate, is unconstitutionally vague on its face. Appellants argue that since speakers cannot know with absolute certainty whether a given communication praising or criticizing a candidate for federal office can reasonably be construed as anything but a request for electoral support, speakers may self-censor and untrustworthy administrators will be vested with undue discretion to apply the statute in a viewpoint discriminatory manner.

Appellants' facial challenge to BCRA's two definitions of electioneering communications cannot stand. This Court has recognized that despite its important role as a protector of free expression, the First Amendment facial overbreadth doctrine exacts societal costs by striking down otherwise valid laws based on a judicial prediction that a law might be applied in an unconstitutional manner. Accordingly, the Court has limited facial overbreadth challenges to settings where plaintiffs can show that the feared unconstitutional applications of the law are "substantial" relative to those instances where it may be constitutionally applied. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Virginia v. Hicks*, ___U.S.___, 123 S. Ct. 1291 (2003). Similarly, the Court has refused to impose the costs of facial overbreadth review in settings where affected speakers can effectively seek as-applied protection of First Amendment rights. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). Since Congress's primary definition of electioneering communication is clearly constitutional in the vast bulk of its applications, and since appellants in this action, among the most powerful speakers in this country, may effectively seek as-applied relief from any allegedly unconstitutional application, the Court should reject

appellants' efforts to use facial review strategically in an effort to bring down the entire edifice of campaign finance regulation.

Appellants' facial vagueness challenge to Congress's fall-back definition of electioneering communication should likewise be rejected. Under settled law, a facial vagueness challenge may be raised only when a statute is so vague that it lacks an "operative core." *Smith v. Goguen*, 415 U.S. 566 (1974). It is impossible to argue persuasively that the back-up definition of electioneering communication lacks an "operative core." Indeed, in the vast majority of possible applications, the fall-back definition is perfectly clear. A reasonable person can understand whether a broadcast advertisement praises or criticizes a given candidate and whether the advertisement may plausibly be understood as anything other than an exhortation to vote for or against the candidate. Any purported vagueness in the fall-back definition at the margins may effectively be dealt with through an as-applied request for declaratory relief from the Federal Election Commission, or, if necessary, an Article III court. *Steffel v. Thompson*, 415 U.S. 452 (1974).

A. The Primary Definition of Electioneering Communications Is Facially Valid

This Court has traditionally required that persons seeking judicial review of the constitutionality of government action proceed on an "as-applied" basis, seeking relief against a credible and otherwise ripe threat to enforce a statute or regulation against the litigant's behavior. *See Yazoo & Mississippi Valley R.R. v. Jackson Vinegar*, 226 U.S. 217 (1912); *United States v. Raines*, 362 U.S. 17 (1960); *Warth v. Seldin*, 422 U.S. 490 (1975). Although an important exception to this principle has been recognized in the First Amendment context, the Court has consistently required plaintiffs to demonstrate "substantial overbreadth" before resorting to the "strong medicine" of facial invalidation. *Broadrick*, 413 U.S. at 613; *see Houston v. Hill*, 482 U.S. 451, 458 (1987) ("Only a statute that is substantially overbroad may be invalidated on its face"). The Court has, therefore, rejected efforts to posit hypothetical future harms in limited circumstances as a basis for facial invalidation. *See, e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"); *New York v. Ferber*, 458 U.S. 747, 771 (1982) ("[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications..."); *United States v. Salerno*, 481 U.S. 739, 745 (1987).[4]

In the campaign finance context, this Court has effectively protected the First Amendment rights of participants in the electoral process through as-applied review and narrow construction. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (as-applied challenge holding that ban on corporate treasury expenditures on behalf of a federal candidate could not constitutionally be applied to a small, nonprofit advocacy group that received no financial support from capital corporations); *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982) (creating as-applied exception to Ohio campaign contribution disclosure rules for contributions to the Socialist Workers

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[4] Notably, plaintiffs-appellants Mitch McConnell, *et al.*, in their discussion of the purported overbreadth of the primary definition of electioneering communication, do not cite to a *single one* of the Court's overbreadth cases. *See* McConnell Br. at 49-57.

Party based upon evidence that disclosure would subject party members to threats, harassment, and reprisals); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (recognizing as-applied exception to efforts to limit the independent expenditures of a political party). Indeed, in *Buckley* itself, the Court recognized that the definition of "electioneering communication" in FECA was too broad. Instead of invalidating the entire scheme on its face, however, the *Buckley* Court posited a narrowing construction designed to avoid conflict with the First Amendment. *Buckley*, 424 U.S. at 42; *Cf. Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding Oklahoma's "Little Hatch Act," regulating political activities of government employees, in facial challenge because the protected speech at risk was not sufficiently "substantial" when compared with the sweep of unprotected activity lawfully regulated by the statute).

As the Court recently noted in *Virginia v. Hicks*, ____U.S. ____, 123 S.Ct. 1291, 1296-97 (2003), before applying the "strong medicine" of facial overbreadth invalidation, the Court has weighed the benefits of facial invalidation of a statute against the societal costs of blocking a statute in its numerous constitutional applications. "[T]here are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech." *Id.* at 1297 (emphasis in original). Thus, "[t]o ensure that these costs do not swallow the social benefits of declaring a law 'overbroad,'" the Court has "insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation." *Id.* (citing *Broadrick*, 413 U.S. at 613).

Due consideration of both the costs and benefits of resorting to the "strong medicine" of facial invalidation requires rejection of petitioners' facial challenge to BCRA's primary definition of electioneering communications. In the first place, resort to facial review is not necessary to protect a vulnerable speaker. Appellants in this action are among the nation's most powerful and wealthy speakers who are more than able to protect their First Amendment rights in as-applied challenges. *See Renne v. Geary*, 501 U.S. 312, 323-324 (1991) (facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case); *Board of Trustees, State Univ. of New York v. Fox*, 492 U.S. 469, 484-85 (1989); *Brockett*, 472 U.S at 504.

The primary definition of electioneering communication is restricted to the funding of large-scale expenditures for broadcast advertisements using the name or likeness of a candidate in a period immediately preceding a federal election. Since vulnerable speakers who might be unable to raise as-applied challenges or to seek administrative guidance are highly unlikely to be affected by such a narrow law, BCRA simply does not raise concerns that would be present in settings involving vulnerable speakers who are unlikely to be in a position to preserve their First Amendment rights in more traditional as-applied proceedings. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972).

Moreover, the risk to protected speech posed by the primary definition of electioneering communication is minimal. Contrary to appellants' hyperbole, Congress has not banned any speech in adopting the primary definition of electioneering communication. Rather, Congress has prohibited the use of corporate and labor union treasury money to fund broadcast advertisements within 60 days of a general election and 30 days of a primary election in which the candidate's name or likeness is used and provided that other entities must disclose the source of the funds for these advertisements. In the overwhelming majority of settings, such a regulation aimed at reinforcing long-standing restrictions on the use of corporate and labor treasury funds in federal election campaigns and assuring disclosure of the sources of federal campaign funding raises no significant First Amendment issues. *Buckley*, 424 U.S. at 66-68 (upholding disclosure); *FEC v. Beaumont*, ___ U.S. ___, 123 S.Ct. 2200, 2211 (2003) (upholding ban on corporate treasury funds in federal elections).

Further, even in those relatively few instances in which the application of the primary definition may touch upon "pure issue advocacy," arguably beyond the scope of campaign finance regulation, appellants may simply establish a separate segregated fund with which to conduct such communications, funded in accordance with the same rules that apply to other electioneering communications. Such a minor administrative inconvenience hardly requires the strong medicine of facial overbreadth review. *See Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

Finally, appellants wishing to avoid the administrative inconvenience of establishing a PAC can avoid the statute's reach entirely by simply omitting the candidate's name or likeness in the period immediately preceding a federal election.

In the district court, considerable attention was dedicated to calculating the percentage of "true issue advocacy" communications that would be captured by the primary definition of electioneering communications as a means of ascertaining whether the primary definition was substantially overbroad. For this purpose, defendants submitted the *Buying Time* studies of advertisements airing in the 1998 and 2000 elections to which BCRA's primary definition would apply and argued that only a small percentage of these advertisements reflected "true issue advocacy," arguably beyond the purview of campaign finance legislation. Plaintiffs, for their part, submitted no independent evidence of the purported overbreadth of the primary definition, but rather relied upon their own analysis of defendants' studies which, they said, showed that approximately 50% of the advertisements airing in 1998 that would fall within BCRA's coverage and 17% of the advertisements in the 2000 election were "true issue advocacy." *See* Supp. App. at 244sa, 1349sa-1350sa; McConnell Br. at 56.

The three judges in the court below reached widely divergent conclusions as to the sweep of the primary definition. *See* Supp. App. at 1157sa (Judge Leon); *id.* at 857sa (Judge Kollar-Kotelly); *id.* at 244sa, 367sa n.149 (Judge Henderson). These widely differing analyses confirm the wisdom of an overbreadth analysis that looks to the costs and benefits of facial review, rather than a mechanical and unwieldy effort to estimate the percentage of communications that fall on one side or another of a constitutional line. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 894 (1991) (rejecting empirical approach to overbreadth doctrine as requiring "uncabined judicial speculation in areas that are, at best, on the outer fringes of the courts' practical competence"). In fact, while the *Buying Time* studies contained the best available social science data and were of great assistance to Congress in seeking to predict the future, no study – especially a study that asks college students to discern the purpose of a political advertisement completely divorced from context - can provide a court with a precise percentage of hypothetical future speech that will raise significant First Amendment concerns. Only experience can provide that data and only as-applied review can respond appropriately to such data. Accordingly, appellants' effort to invalidate BCRA before any body of experience can develop should be rejected.

B. The Fall-back Definition of "Electioneering Communication" Is Facially Valid

Appellants' facial vagueness challenge to Congress's back up definition is equally unavailing. Appellants argue that the fall-back definition of "electioneering communication" limiting coverage to those communications that (1) praise or criticize a candidate for federal office and (2) cannot be plausibly construed as anything other than an exhortation to vote for or against the candidate, introduces an element of subjective uncertainty into the statutory scheme and therefore must be stricken on its face.

The Court will strike a statute for facial vagueness only in extremely narrow circumstances where the statute lacks an "operative core" of prohibited behavior. *See Smith v. Goguen*, 415 U.S. 566 (1974); *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 965-966 (1984) *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999). In such a situation, the statute is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Smith*, 415 U.S. at 578 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)); *see Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (California statute requiring persons who loiter or wander on the streets to provide "credible and reliable" identification "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification"); *Smith*, 415 U.S. at 578 (Massachusetts statute prohibiting "publicly treat[ing] contemptuously the flag of the United States" specifies "no standard of conduct" and therefore facially vague); *City of Chicago*, 527 U.S. at 59-60 (striking on facial vagueness grounds Chicago anti-loitering ordinance prohibiting individuals from "remain[ing] in any one place with no apparent purpose"); *Cf. Spence v. Washington*, 418 U.S. 405, 414 n.9 (1974).

The fall-back definition of electioneering communications is not facially vague under such a test. In the vast majority of cases, application of the fall-back definition raises no difficult issues of statutory construction and neither prospective speakers nor regulators can have any doubt as to the statute's applicability. The statute thus has a "core of easily identifiable and constitutionally proscribable conduct," *Munson*, 467 U.S. at 965-966. If, as appellants allege, certain circumstances may arise in which the scope of the prohibition is unclear, an appropriate as applied challenge may be brought before both the FEC and an Article III Court to determine the applicability of the statute.

II. EXPRESS ADVOCACY IS NOT A CONSTITUTIONAL CEILING

Appellants contend that BCRA's primary and fall-back definitions of "electioneering communication" violate a putative constitutional requirement that campaign finance restrictions be limited to speech that expressly advocates the election or defeat of a candidate by using magic words such as "vote for" or "vote against" the candidate.[5] The magic words version of an express advocacy limitation is not an irreducible constitutional ceiling, restricting any conceivable regulation of independent expenditures. Rather, the Court resorted to a magic words approach to express advocacy as a narrowing construction to avoid constitutional issues raised by certain provisions of FECA, namely that the provisions did not clearly demarcate what conduct was prohibited and might have regulated speech too far afield from the election campaign of a specific candidate for federal office. Neither of these vulnerabilities is present in the electioneering communication provisions of BCRA.

The Court in *Buckley* twice construed a provision of FECA to apply only to expenditures used to fund communications that use magic words to expressly advocate the election or defeat of a candidate. Each time, the Court used magic word/express advocacy as a saving construction of statutory language that would otherwise be unconstitutionally vague or reach communications not clearly related to the campaign of a particular federal candidate. Neither in *Buckley* nor thereafter has the Court suggested that a campaign finance regulation without these infirmities must be limited to a magic word version of express advocacy.

The *Buckley* Court first discussed express advocacy in the context of FECA's $1,000 ceiling on expenditures "relative to a clearly identified candidate." "The use of so indefinite a phrase as 'relative to' a candidate," the Court explained, "fails to clearly mark the boundary between permissible and impermissible speech . . . ." *Buckley*, 424 U.S. at 41. In the Court's view, the vagueness problem was not overcome by the court of appeals' reading of the statutory term "relative to a . . . candidate" to mean "advocating a candidate's election or defeat." The problem with that interpretation, the Court explained, is that a speaker could never be certain whether any particular political communication would be deemed electoral advocacy—and thus within the statute's reach—or mere "issue advocacy." "For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42. The Court therefore adopted a more precise interpretation of the statutory language than the one put forward by the Court of Appeals: "[I]n order to preserve the provision against invalidation on vagueness grounds, [the expenditure ceiling] must be construed to apply only to expenditures for communications that in *express terms* advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 43 (emphasis added).

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[5] The contention that the Court's limiting construction in *Buckley* creates a constitutional ceiling beyond which no permissible regulation of electioneering communications may regulate is the sole issue properly before the Court in facial challenge to the electioneering provisions of BCRA. If, as appellants contend, *Buckley*'s magic words of express advocacy forever constrain Congress from fixing a definition of electioneering communications beyond these magic words, then BCRA's regulation of electioneering communications beyond express advocacy would be unconstitutional in all its applications and therefore be subject to facial challenge. However, as shown below, nothing in the Court's precedents sustains appellants' contention.

In contrast, BCRA leaves no doubt whether any particular expenditure will be deemed to have been made for an "electioneering communication." Four criteria must be satisfied to come within the statute's reach: There must be (1) a broadcast, cable or satellite communication; (2) which refers to a clearly identified candidate for federal office; (3) is made within 60 days before the election for the office sought by the candidate (or 30 days before the primary or caucus); and (4) is targeted to the relevant electorate, unless the office sought is President or Vice-President. 2 U.S.C. § 434(f)(3)(A)(i).

Whether an expenditure satisfies each of these criteria may easily be determined, and a speaker need only negative any one of them to avoid application of the statute. Consequently, no one could plausibly claim to have been deprived of "'fair warning'" as to what conduct the statute regulates. *Buckley*, 424 U.S. at 41 n.48 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). Nor is any speaker compelled to "'hedge and trim,'" or refrain even from unregulated speech because the boundaries of the statute's coverage are not clearly marked. *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). In short, BCRA regulates with "narrow specificity," just as the First Amendment requires. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

The *Buckley* Court returned to express advocacy when construing FECA's disclosure requirements for expenditures made by persons other than candidates and groups other than political committees. "To insure that the reach of [the disclosure provision] is not impermissibly broad, we construe 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 80 (internal footnote omitted).

Unlike FECA, in the vast majority of applications, BCRA is directed at "spending that is unambiguously related to the campaign of a particular federal candidate." As noted, the primary definition requires that a subject communication must refer to a clearly identified candidate, must be made within a short period preceding an election or vote for nomination, and must be targeted to the relevant electorate. Taken together, these requirements ensure that the overwhelming majority of communications subject to BCRA are communications intended to be and received as messages in support or opposition to a candidate.

Notably, two of these three requirements in the primary definition of electioneering communications were lacking in FECA's provisions regulating expenditures. Although FECA limited its reach to expenditures that were "relative to a clearly identified candidate," or "for the purpose of influencing" an election, it did not restrict its coverage to a narrow time frame preceding an election or vote for nomination. Nor did FECA limit its scope to communications that, where appropriate, are targeted to the relevant electorate. These additional statutory criteria sharpen the focus of the BCRA's electioneering communication provisions as compared with FECA's regulation of expenditures. Virtually any information about a candidate worth sharing and distributed to the relevant electorate soon before an election will be received by listeners as potentially pertinent to voting decisions. BCRA thus restricts its reach to communications that will inevitably be understood as supporting or opposing a candidate's election. Consequently, under the plain language of BCRA—but not under the plain language of FECA—only communications unambiguously related to a particular candidate's campaign will be covered by the statute.[6] Applying the Court's analysis in *Buckley*, then, no magic words/express advocacy limitation nor any other narrowing construction is needed to make the BCRA's "electioneering communication" provision consistent with the First Amendment.

Appellants' argument that the First Amendment requires all regulations of campaign finance expenditures to be limited to a magic words approach to express advocacy rests on a misreading of *Buckley*. Appellants contend that the use of magic words as a form of express advocacy demarcates the boundary between "electoral advocacy," which may permissibly be regulated, and "issue advocacy," which, on appellants' theory, may not be. As the *Buckley* Court plainly recognized, however, the very distinction between electoral advocacy and issue advocacy is frequently a false dichotomy. *See id.* at 42 ("[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application").

Moreover, as the Court observed when invalidating FECA's expenditure ceiling: "[I]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Buckley*, 424 U.S. at 45.

In this light, the net result of the magic words/express advocacy limitation urged by appellants is not the drawing of a line between regulable and non-regulable speech. Rather, appellants ask the Court to hold that the Constitution prohibits effective regulation of expenditures for any form of advocacy, whether for issues or elections. For any campaign finance regulation limited by a magic words approach to express advocacy will, in practice, function as a purely voluntary regime. As the record below amply demonstrates, it is a simple matter to express support or opposition for a candidate's election without invoking talismanic phrases such as "vote for" or "vote against" which, on petitioners' view, are the only suitable means of identifying communications subject to regulation.

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[6] As noted in Point I, above, to the degree to which BCRA applies to broadcast advertisements referring to clearly identified federal candidates and appearing shortly before an election, but which nevertheless are unrelated to the upcoming election, an appropriate as-applied challenge may be raised.

Consequently, the elevation of a magic words approach express advocacy from a narrowing construction of a poorly drafted statute into an irreducible constitutional ceiling, as petitioners propose, would forever prevent Congress from advancing the substantial interests served by disclosure requirements for independent expenditures—interests which, according to this Court, themselves "furthe[r] First Amendment values by opening the basic processes of our federal election system to public view." *Buckley*, 424 U.S. at 82.

Likewise, the transformation of a magic words approach to express advocacy into a constitutional ceiling would forever free corporations to use corporate treasury funds for independent expenditures to support or oppose candidates for Federal office—notwithstanding the Court's holding that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quoting *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 500-01 (1985)). If appellants' theory of express advocacy is correct, the Constitution leaves Congress no practicable means of remedying "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660; *see Beaumont*, 123 S.Ct. at

2206-07. Nothing in *Buckley* or the Court's campaign finance jurisprudence dictates that result.

III. DISCLOSURE REQUIREMENTS AND PROHIBITIONS ON CORPORATE AND LABOR UNION FUNDING OF ELECTIONEERING COMMUNICATIONS SERVE IMPORTANT FIRST AMENDMENT INTERESTS

As argued in Point I, above, this Court should not entertain appellants' facial overbreadth and vagueness challenges to either the primary or fall-back definitions of "electioneering communication." Assuming the Court chooses to address the merits of these arguments, the Court should uphold the electioneering provisions of BCRA.

The Court has long held that fundamental First Amendment principles support reasonable disclosure and funding requirements for electoral communications. First, the Court has repeatedly held that disclosure requirements enhance, rather than retard, First Amendment interests. As the Court has recognized, the marketplace of ideas that the First Amendment guarantees is ill-served by a regime of shadowy, untraceable expenditures for electioneering communications by groups that disguise their true sources of support. Second, the Court has repeatedly recognized that the marketplace of ideas suffers when corporations and labor unions are able to monopolize electoral communications through the state-conferred advantages that permit them to amass large quantities of capital unrelated to the support for their political positions.

The electioneering provisions of BCRA, Sections 201-204, build directly upon these long-standing pillars of the Court's campaign finance jurisprudence. First, in line with long-upheld restrictions on corporate and labor union electioneering activities, BCRA prohibits corporate and labor union funding of broadcast communications which clearly identify a candidate within 60 days of a general election or 30 days of a primary election and are targeted to the candidate's electorate. Second, BCRA requires entities or individuals who spend more than $10,000 in a calendar year on such broadcast communications to disclose the sources of funding for these communications. These provisions are fully consistent with the First Amendment principles long recognized by this Court.

A. BCRA's Disclosure Requirements Are Constitutional

Section 201 of BCRA requires every person who makes disbursements in excess of $10,000 per year for electioneering communications to file with the FEC a statement containing the person's identity and principal place of business; the amount of each disbursement over $200 and the identity of the recipient of the disbursement; the elections and candidates to which the electioneering communications pertain; and the names and addresses of contributors who contributed $10,000 or more to the person or separate segregated fund making the disbursement. 2 U.S.C. § 434 (f)(1), (2).

The Court has previously recognized that the governmental interests advanced by disclosure requirements are especially likely to outweigh any potential inhibition of First Amendment activity where, as here, "the 'free functioning of our national institutions' is involved." *Buckley*, 424 U.S. at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). The Court has further noted that "disclosure requirements . . . in most applications appear to be the least restrictive means of curbing the evils of campaign

ignorance and corruption that Congress found to exist." *Buckley*, 424 U.S. at 68. "'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'" *Id.* at 67 (quoting L. Brandeis, *Other People's Money* at 62 (National Home Library Foundation ed. 1933)).

Applying these principles in *Buckley*, the Court upheld disclosure requirements substantially similar to those at issue here. As in *Buckley*, the disclosures mandated by BCRA advance at least three governmental interests. First, BCRA's disclosure provisions assist voters by publicizing a candidate's sources of financial support, thereby identifying the interests to which the candidate is likely to be responsive if elected. *See Buckley*, 424 U.S. at 66-67. "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. "Third, and not least significant," disclosure facilitates enforcement of contribution limitations. *Id.* at 67-68.

BCRA's disclosure requirements raise none of the vagueness concerns that prompted the *Buckley* Court to adopt a narrowing construction of FECA's disclosure provision for expenditures by parties other than candidates or political committees. FECA defined "expenditure" to mean the use of money or valuable assets "for the purpose of . . . influencing" a federal nomination or election. *Id.* at 77; FECA §§ 431(e), (f). "It [wa]s the ambiguity of this phrase that pose[d] constitutional problems." *Buckley*, 424 U.S. at 77. To avoid those problems, the Court interpreted "for the purpose of . . . influencing" an election to mean using magic words for the purpose of expressly advocating a candidate's election or defeat, for purposes of section 434(e)'s disclosure requirements for persons other than candidates or political committees. *Id.* at 80.

As discussed above, section 201's definition of "electioneering communication" is not similarly ambiguous in its reach. The statute leaves virtually no doubt whether particular conduct will trigger disclosure obligations. The precision of the legislation not only provides adequate notice to persons contemplating future expenditures, it also defines a safe harbor for pure issue advocacy. Those wishing to engage in issue advocacy free from regulation may do so easily by avoiding any one of the statutory criteria.

Section 201 likewise does not require disclosure of information too remote from the government's objectives to sustain the legislation. *Cf. Buckley*, 424 U.S. at 80-81. Virtually any "electioneering communication" within the meaning of section 201 will relate to the campaign of a specific candidate and will therefore properly be the target of the government's anti-corruption and informational interests advanced by disclosure.

The weighty First Amendment values served by disclosure would forever be compromised if the Court were to treat the magic words approach to express advocacy as a constitutional ceiling on the regulation of independent expenditures. As with section 434(e) of FECA, section 201 "is responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act." *Id.* at 76 (internal footnote omitted). As the Court predicted when discussing express advocacy in the context of FECA's expenditure caps, *see id.* at 45, the express advocacy limitation made it a simple matter to circumvent pre-BCRA regulation of expenditures while engaging in full-blown electoral advocacy. Section 201 is well-drawn because it provides ample breathing room for discussion of issues while targeting communications overwhelmingly likely to be understood as supporting or opposing a particular candidate's election.

To the extent BCRA's disclosure requirements may unduly burden any particular group, adequate protection is available through as-applied challenges. The *Buckley* Court spelled out clearly the evidentiary requirement necessary to prevail in such a challenge, and called for "flexibility in the proof of injury" from disclosure. *See Buckley*, 424 U.S. at 74. Applying those standards, the Court subsequently found Ohio's disclosure requirement unconstitutional as applied to the Socialist Workers Party of Ohio. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 102 (1982). As the Court observed in *Buckley*, it "cannot assume that courts will be insensitive to similar showings when made in future cases." *Buckley*, 424 U.S. at 74.

B. BCRA's Restriction of Corporation and Labor Union Funding of Electioneering Communications Is Constitutional

Federal law has long prohibited the use of corporate and labor treasury funds for federal election activities and required that any corporate or labor expenditures on these activities be made from separate, segregated funds. Congress first prohibited corporate contributions to candidates for election to federal offices in the Tillman Act of 1907, 34 Stat. 864 (1907). Congress extended the prohibition on corporate contributions to labor unions and prohibited corporate and union expenditures in connection with federal elections in the Taft-Hartley Act, 61 Stat. 136 (1947); *Beaumont*, 123 S.Ct. at 2205-06; *FEC v. National Right to Work Committee*, 459 U.S. 197, 208

(1982); *Pipefitters Local Union No. 562 v. U.S.*, 407 U.S. 385, 402 (1972); *United States v. United Auto Workers* ("*UAW*"), 352 U.S. 567, 585 (1957). These long-standing prohibitions were incorporated into FECA, adopted following Watergate, and have long been upheld.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court examined provisions of Michigan's campaign finance law, which, like FECA, prohibited corporate contributions or expenditures in connection with an election. The Court reasoned that, given the special advantages conferred on corporations under state law, they can accumulate large quantities of capital which "have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. *Austin* upheld the prohibition on corporate contributions and expenditures to guard against "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" and to "ensure[] that expenditures reflect actual public support for the political ideas espoused by corporations." *Id.*; *see FEC v. National Right to Work Committee*, 459 U.S. 197, 207 (1982) ("[S]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators").

The reasoning of *Austin* was reaffirmed in the Court's recent decision in *FEC v. Beaumont*, ___ U.S. ___,123 S.Ct. 2200 (2003). In upholding the prohibition on corporate contributions as applied to nonprofit advocacy groups, the Court noted that "as in 1907, the law focuses on the 'special characteristics of the corporate structure' that threaten the integrity of the political process." *Beaumont*, 123 S.Ct. at 2207 (quoting *National Right to Work*,

459 U.S. at 209). The Court reaffirmed "the public interest in 'restrict[ing] the influence of political war chests funneled through the corporate form.'" *Id.* (quoting *National Conservative Political Action Comm.*, 470 U.S. at 496-497); *see UAW*, 352 U.S. at 585 (examining extensive history of prohibition of labor union contributions and expenditures in federal elections).

Building upon the long-standing prohibition on corporate and labor union expenditures for electioneering activities, BCRA expands the definition of electioneering activities to include broadcast advertisements made within 60 days of a general election or 30 days of a primary election, referring specifically to an identified candidate for federal office within the jurisdiction in which the candidate seeks office. Congress reasonably could conclude that these communications present the same distortive effects as those expressly advocating the election or defeat of a candidate. Moreover, such communications may still be funded through a corporation or labor union's separately segregated fund.

C. The Exception for MCFL Corporations Is Preserved by BCRA

In *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), the Court held unconstitutional the application of FECA's independent expenditure limitations to nonprofit advocacy corporations which receive no corporate or labor union funding. As set forth in the Court's opinion, three "essential" characteristics of Massachusetts Citizens for Life made it constitutionally impermissible to apply FECA to it. First, MCFL was "formed for the express purpose of promoting political ideas, and cannot engage in business activities." *MCFL*, 479 U.S. at 264. Second, it had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings." *Id.* Third, MCFL "was not established by a business corporation or a labor union" and had a "policy not to accept contributions from such entities." *Id.* This policy of refusing business corporation or labor union contributions "prevent[ed] such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id; see also Austin, supra*, at 664 (noting that a nonprofit corporation is capable of "serv[ing] as a conduit for corporate political spending").

Amici acknowledge that Section 204, known as the Wellstone Amendment, would appear to make BCRA applicable to *MCFL*-type corporations. As a constitutional rule, however, *MCFL* cannot be repealed by legislative enactment. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). The FEC's implementing regulations confirm this understanding of BCRA. *See* Electioneering Com-munications, 67 Fed. Reg. 65190, 65203-04 (October 24, 2002), <available at http://www.fec.gov/pdf/nprm/electioneering_comm/fr67n205p65189.pdf>. Thus, under BCRA, corporations that meet the three requirements set forth in *MCFL* continue to be exempt from the disclosure requirements and expenditure limitations of FECA.

Nonprofit advocacy corporations that continue to receive corporate and/or labor union contributions are therefore faced with a choice under BCRA. They can either refuse to accept such contributions, thereby exempting themselves from BCRA's disclosure rules and expenditure limitations, or accept such contributions, subjecting themselves to BCRA with its requirement that electioneering communications be funded through a segregated fund. Given the compelling interest in preventing nonprofit corporations from being used as conduits for prohibited corporate and labor union electioneering activities, the application of BCRA to nonprofit corporations that choose to receive corporate and labor union contributions is clearly constitutional, especially since the option of establishing a PAC leaves open a full range of communicative options.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the electioneering provisions of BCRA, Sections 201-204, are constitutional.

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August 5, 2003

Respectfully submitted,

Norman Dorsen
Counsel of Record
Stokes Professor of Law
New York University
School of Law
40 Washington Square
South
New York, NY 10012
(212) 998-6233

Eric M. Lieberman
Roger Bearden
Gregory Silbert
Rabinowitz, Boudin,
Standard, Krinsky &
Lieberman, P.C.
740 Broadway, 5th Floor
New York, NY 10003-9518
(212) 254-1111

Attorneys for Amici Curiae
Former Leaders of the American Civil Liberties Union

1674 (37) 1675 (26) 1676 (28) 1702 (23)

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IN THE

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MITCH MCCONNELL, UNITED STATES SENATOR, ET AL.,
Appellants / Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION, ET AL.,
Appellees / Cross-Appellants.

On Appeals and Cross-Appeals from the United States District Court for the District of Columbia

BRIEF OF THE HONORABLE FRED THOMPSON AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus Curiae

August 5, 2003

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QUESTION PRESENTED

Amicus will address the following question:

Whether the evidence of overwhelming abuses in the raising and spending of soft money in the 1996 presidential election, which were uncovered by a Senate Governmental Affairs investigation in 1997 and 1998 and debated in the context of passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, shows that Congress had ample justification to enact BCRA Titles I and II to prevent corruption, the appearance of corruption, and widespread circumvention of the existing federal campaign finance laws.

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INTEREST OF *AMICUS CURIAE*[1]

Senator Fred Thompson, a Republican from Tennessee, served in the United States Senate from 1994 to 2003. From 1997 to 2001, he chaired the Senate Governmental Affairs Committee, which investigated numerous abuses of the campaign finance laws during the 1996 presidential campaign. That special investigation culminated in a six-volume report spanning nearly 10,000 pages (including numerous exhibits) that became a substantial basis for Congress's enactment of the campaign finance reforms now before this Court. *See Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167 (1998) ("Report").

Senator Thompson also co-sponsored the Senate bill Congress enacted as the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, just as he had co-sponsored the original campaign finance reform legislation introduced by Senators John McCain and Russell Feingold in 1995. Accordingly, Senator Thompson has a strong interest in the BCRA reforms being upheld as constitutional. This *amicus* brief seeks to show that the Report's findings on campaign finance abuses in the 1996 election provided Congress with an overwhelming factual basis for concluding that the BCRA reforms are necessary to plug the "[u]nanticipated loopholes discovered in the federal campaign finance laws since they were developed in the 1970s." Report at 4499. Those loopholes allowed for "campaign finance law manipulation and corruption" that needed to be redressed to restore confidence and integrity in our electoral system. *Id.*[2]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this *amicus* brief.

[2] Rather than advance constitutional and other legal arguments similar to those that the government and others will make, which *amicus* adopts, this brief seeks to show that Congress had more than

STATEMENT

1. The Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431 *et seq.*, was enacted to reduce the "actuality and appearance of corruption" created by the "opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam). FECA set limits on how much an individual may contribute to a candidate's campaign or a national political party committee for the purpose of influencing a federal election.[3] It also continued longstanding prohibitions on the use of a corporation's or labor union's treasury funds to influence federal elections. *See* 2 U.S.C. § 441b (2000). The purpose behind those restrictions was to ensure that contributors could not exercise or be perceived as exercising undue sway over a candidate by making massive contributions.

As contrasted with that "hard money," as funds subject to those limits came to be called, political parties also raised "soft money," supposedly for general party-building purposes or state elections (but, as explained below, in actuality to influence federal elections). Soft money was not subject to the same regulatory limits and prohibitions as hard money, and consequently was limited in its use to influence a federal election. *See* JSSA 30sa-32sa (per curiam) (discussing FEC allocations permitting party activities that influence federal elections to be funded with a mix of hard and soft money) (citing, *inter alia*, FEC Adv. Op. 1978-10). Over time, however, clever politicians and their tacticians devised ways to use unlimited soft money in the party's coffers to influence federal campaigns.

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ample factual support for enacting the BCRA, as evidence gleaned in the Report demonstrates.

[3] Prior to enactment of the BCRA, those limits were: $20,000 per calendar year for an individual contribution to a national political party committee; $5,000 per calendar year to any other political committee; and $1,000 per election for a candidate seeking federal office. *See* 2 U.S.C. § 441a(a)(1) (2000).

2. The 1996 presidential election campaign brought into stark relief the breakdown of the system established under FECA and upheld as constitutional by this Court in *Buckley*. The soft-money fundraising and spending in that election rendered all but meaningless the source and contribution limits that Congress had established in the 1970s in FECA. In 1996, the national parties' total soft-money spending reached $272 million, or 30% of total spending, up from $80 million, or 16% of total spending, in 1992. *See* JSSA 34sa-35sa (per curiam).[4]

Once soft money was placed in party coffers, the parties then used it for purposes that exploited loopholes in how such funds could be spent. In 1996, the parties aired thousands of thinly disguised "issue advertisements" on television and radio that in reality were intended to, and did, influence federal elections. The theory of the legality of this practice was that the ads stopped just shy of using so-called "magic words" of express advocacy, such as "Vote for Clinton" or "Reject Dole," which would have required the ads to be funded with regulated hard money. *See* JSSA 778sa (Kollar-Kotelly). Non-party interest groups such as unions and nonprofits also got into the act by running similar sham issue ads, which often were orchestrated by or coordinated with a political party.

As the 1996 campaign proceeded, public attention focused on White House coffees and overnights, large contributions to parties by persons interested in affecting national policy, and an unprecedented television blitz of advertisements that touted the leading candidates for president.[5] In early 1997, in response to this rapid increase in soft-money fundraising and spending, the Senate Committee on Governmental Affairs commenced a special investigation to determine whether those activities were legal under FECA or, if technically legal, were abusive evasions of the campaign finance laws. Relevant here, the investigation focused on:

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[4] These staggering figures have only gotten larger with time. JSSA 38sa (per curiam) (noting that national party soft-money spending rose to $498 million, or 42% of total spending in the 2000 elections).

[5] *See, e.g.*, Alison Mitchell, *Building a Bulging War Chest: How Clinton Financed His Run*, N.Y. Times, Dec. 27, 1996; Michael Weisskopf & Charles R. Babcock, *Donors Pay and Stay at White House; Lincoln Bedroom a Special Treat*, Wash. Post, Dec. 15, 1996; Michael

> The independence of the presidential campaigns from the political activities pursued for their benefit by outside individuals or groups;
>
> Unregulated ("soft") money and its effect on the American political system;
>
> Promises and/or the granting of special access in return for political contributions or favors;
>
> The effect of independent expenditures (whether by corporations, labor unions, or otherwise) upon our current campaign finance system, and the question as to whether such expenditures are truly independent; [and]
>
> Contributions to and expenditures by entities for the benefit or in the interest of public officials.

Report at 11-12.[6] The committee issued 427 subpoenas, reviewed more than 1.5 million responsive documents, took 200 depositions, conducted more than 200 witness interviews, and held 32 days of hearings where it took testimony from 72 witnesses. *Id.* at 15.

The committee's Report, released in March 1998, was approved by a vote of eight to seven, split along party lines. *See id.* at 23; *id* at 1-4555. The minority committee members published their own findings and recommendations, which will be cited herein as the "Minority Report." *See* Minority Report at 4557-9575. Due to a politically charged atmosphere, the majority Republican committee members focused more on abuses by Democrats, while the minority focused more on abuses by Republicans.[7] Both majority and minority fully agreed, however, that "[t]he Committee investigation has built an undeniable case for campaign finance reform" by showing that "[t]he soft money loophole . . . led to a meltdown of the campaign finance system that was designed to keep corporate, union and large individual contributions from influencing the electoral process." *Id.* at 4562, 7515; *see also* Report at 4459 ("[T]he federal campaign finance system virtually collapsed."); Additional Views of Senator Collins at 4535 ("[T]he hearings provided overwhelming evidence that the twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble.").[8]

SUMMARY OF ARGUMENT

Congress had a compelling interest in enacting the BCRA reforms. The rapidly increasing practices of raising and spending soft money (with a significant focus on sham "issue ads" that unquestionably influence federal elections) fully justify the BCRA reforms. "[S]oft money spending by political party committees eviscerates the ability of the FECA to limit the funds contributed by individuals, corporations, or unions for the defeat or benefit of specific candidates." Report at 4468. The evisceration of the original limits set by FECA through soft-money contributions has "caused a loss of public confidence in the integrity of our campaign finance system. By inviting

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Isikoff & Mark Hosenball, *Soft Money, Easy Access*, Newsweek, Oct. 21, 1996.

[6] The committee also investigated other issues such as illegal foreign contributions and conflicts of interest of federal officials. Report at 11. Although those issues are not directly relevant to the matters before this Court, they do illustrate the carelessness of the political parties in their relentless pursuit of soft money.

[7] The majority and minority members also differed at times on whether certain of the abuses were actual violations of pre-BCRA law.

[8] Although as Chair *amicus* did not vote in favor of the Minority Report, the combined findings of both reports provide a devastating look at the fundraising practices of both parties. For that reason, this brief cites and discusses the findings of both the majority and the minority.

corruption of the electoral process," the raising of such massive sums of soft money from large donors "threaten[s] our democracy." Minority Report at 4565.

Many of the proponents of the BCRA cited the findings of the Report and advanced its legislative proposals. Understanding the basis for the committee's Report, therefore, serves as a critical factual predicate to Congress's enactment of the BCRA.

ARGUMENT

I. PERVASIVE SOFT-MONEY FUNDRAISING LED TO A WIDESPREAD PUBLIC PERCEPTION THAT THE CAMPAIGN FINANCE SYSTEM WAS CORRUPT

After Republicans won control of both houses of Congress in the 1994 mid-term elections, President Clinton's 1996 re-election campaign developed a virtually unslakable "thirst for money" in the drive to keep the White House. Report at 23. Unable to raise sufficient amounts of hard money under FECA's contribution limits, the Democrats turned to soft-money contributions given, not to the Clinton/Gore campaign, but rather to the Democratic National Committee ("DNC") and state Democratic parties. As the Report details, the Republicans naturally followed suit. Those soft-money contributions, in turn, funded issue ads and other activities designed by both parties to influence the 1996 presidential election.

A. Both Parties Traded Access To Candidates And Senior Government Officials For Large Soft-Money Contributions

The pursuit of large contributions of soft money led to a "willingness to sell access to senior government officials." Report at 65. Candidates urged potential donors to contribute soft money to federal and state party committees (or to interest groups working to elect the candidate). In exchange, donors expected and often received unprecedented access to federal officeholders. Soft-money contributions – unlimited in amount – were thus far more successful at gaining access for contributors to politicians than hard-money contributions, which FECA limited to $1,000 per person. *See* 2 U.S.C. § 441a(a)(1), (6) (2000).

As the following examples gleaned from the Report establish, public officials used their offices to raise massive contributions from donors, who in turn sought and received access to those officials to advance their own interests. Such a process gave rise, at a minimum, to a powerful perception of corruption.

1. *White House Coffees, Overnights, and Other Fundraising Events by Democrats.* The Report concluded that President Clinton used the White House on hundreds of occasions to reward contributors and to provide access for donors who gave massive amounts of money to the DNC. *See* Report at 41 ("Perhaps nothing illustrates this merchandising of the Presidency better than the DNC's White House 'coffees' – fundraising events at which major donors were provided access to the President in exchange for their campaign contributions."). In January 1995, Terrance McAuliffe, then-DNC Finance Chairman and soon-to-become National Finance Chairman for Clinton/Gore '96, drafted a memorandum suggesting White House coffees, overnights, golf games, and morning jogs as ways to give major donors "'quality time'" "'to discuss issues and exchange ideas with the President.'" *Id.* at 194. The President responded, "'yes, pursue [these events] and promptly – and get other names at 100,000 [dollars] or more; 50,000 [dollars] or more.'" *Id.* at 195.

> Between January 11, 1995 and August 23, 1996, the White House hosted 103 coffees. Most lasted at least an hour, and the President attended the vast majority of them. Approximately 60 of these were DNC-sponsored coffees, 92 percent of the guests at which were major Democratic Party contributors. These guests made contributions during the 1996 election cycle of $26.4 million, an average contribu-

> tion of over $54,000 per person, with one-third of their total donations, some $7.7 million, given within a month of the donor's attendance at a White House coffee.

Id. at 41; *see also id.* at 196 ("in keeping with the DNC's plan to cultivate 'top top' contributors, at least 12 individuals contributed at least $100,000 on or around the dates of the coffees they attended") (footnote omitted).[9]

Many donors also stayed overnight at the White House, "often in the historic Lincoln Bedroom." Minority Report at 7956. These overnight guests, "178 individuals – from 114 different families – contributed a total of more than $5 million to the DNC . . . during the 1996 election cycle[,] . . . an average contribution per family of over $44,000." Report at 199 (footnote omitted). As the evidence discussed further below demonstrates, many donors hoped to get the administration's assistance to further their private business interests, and some apparently succeeded.

The President and Vice President also placed many phone calls soliciting soft-money donations for the DNC. *See id.* at 501-12. Such telemarketing by our highest elected officials at best "amounted to unsavory and unseemly activity that lessens the dignity of these offices." *Id.* at 521. It also "would defy reality not to recognize that the recipients of such calls, many of whom had business interests, would find it difficult to turn down requests for funds from persons who exercise such vast power." *Id.*

2. *Republican Soft-Money Fundraising Efforts.* The Minority Report catalogued Republican use of access to the White House and senior government officials for fundraising for the Republican National Committee ("RNC"). "Tablebuyers" purchasing 10 seats at the 1992 President's Dinner were "entitled to attend a 'Private Reception

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[9] Coffees were a highly efficient way to raise money. The DNC's overhead costs were "negligible," while direct mail overhead ran at 42%. Report at 196 & n.29.

hosted by President and Mrs. Bush at The White House' or a 'Reception hosted by The President's Cabinet.'" *Id.* at 5418 (noting that tablebuyers could also attend a "'Luncheon hosted by Vice President and Mrs. Quayle'" and a "'Senate-House Leadership Breakfast hosted by Senator Bob Dole and Congressman Bob Michel'"). Tablebuyers could also "'request a Member of the House of Representatives to complete the table of ten,'" and the purchase of a second table gained the "'option to request one Senator or one Senior Administration Official.'" *Id.* at 5418-19; *see also id.* at 5419 (explaining that fundraisers would receive similar benefits, and warning: "'Note: Attendance at all events is limited. Benefits based on receipts.'").

Promotional materials for the RNC's two principal donor programs, Team 100 and the Republican Eagles, promised that members "would receive special access to high-ranking Republican elected officials, including governors, senators, and representatives." *Id.* at 7968. Team 100 membership requires an initial contribution of $100,000, and $25,000 for each of the next three years; Republican Eagle membership requires contributions of $15,000 annually. *Id.* One fundraising letter to a prospective Team 100 member represented that, after Ed Lupberger, CEO of Entergy, joined Team 100, Haley Barbour, then-Chairman of the RNC, "'escort[ed] him on four appointments that turned out to be very significant in the legislation affecting public utility holding companies. In fact, it made Ed a hero in his industry.'" *Id.* at 7971. And a memorandum from an RNC aide to the Team 100 chairman reported that the RNC sought to get a "'hot'" prospect "'an appointment with [Representative] Dick Armey, so we can get his other $50,000.'" *Id.* at 8036.[10]

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[10] "[A] 1995 Eagles brochure contains photographs of Eagles members meeting with former President George Bush, former Vice President Dan Quayle, Governor Pete Wilson, Senators Connie Mack and Kay Bailey Hutchison, and Mayor Rudolph Giuliani." Minority Report at 7969. The brochure states: "'Each Year Eagles receive invitations

From May to August 1996, presidential candidate Robert Dole attended "at least 25 RNC soft-money fundraisers." *Id.* at 8301. A 1997 fundraising letter by then-Senate Majority Leader Trent Lott, sent on behalf of the National Republican Senatorial Committee, promised contributors "'plenty of opportunities to share [their] personal ideas and vision with some of our top Republican leaders, senators, and panel members.' Failure to contribute meant that 'you could lose a unique chance to be included in current legislative policy debates – debates that will affect your family and your business for many years to come.'" *Id.* at 7974 (alteration in original); *see also id.* at 7968-78 (more examples of special access for large RNC donors).[11]

3. *The Roger Tamraz Contributions.* "One of the most egregious examples of access being provided in exchange for political contributions concerns businessman Roger Tamraz," *id.* at 4574, one of "a number of alarmingly unsavory characters" who gained access to President Clinton, Report at 41. Tamraz, an international businessman, was wanted by French police and faced an Interpol arrest warrant for embezzlement in Lebanon. *Id.* at 43.

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to four national meetings. At least two of these meetings take place in Washington, D.C., and feature strategy and issue committee sessions with prominent elected Party leaders from the U.S. Senate and House on such topics as the budget and tax reform, international trade and regulatory reform, health care and foreign policy. Other participants have included Republican Presidents (*at the White House*), Governors and former Administration officials.'" *Id.*

[11] A 1993 letter urging contributors to join the Republican Senate Council stated that a "'standard'" membership ($5,000 yearly) "'entitles you to monthly meetings while the Senate is in session[,] . . . generally consist[ing] of discussion on current pending legislation with the ranking Republican on the pertinent committee addressing the membership. The Policy Board level [$15,000 yearly] is entitled to all the standard membership benefits in addition to quarterly dining with this smaller group and the Republican Senators. The meetings serve as a virtual one-on-one as the Senators may outnumber the Policy Board members.'" Minority Report at 8033.

Tamraz sought U.S. government backing for an oil pipeline project in the Caucasus and was willing to invest significant sums of money to get it. When officials at the National Security Council ("NSC") determined that his schemes were untenable and harmful to U.S. foreign policy interests, Tamraz began making huge contributions, donating a total of $300,000 to the DNC and several state democratic parties, and promising more. *See id.* at 2910-14. The allocation of those donations came at then-DNC National Chairman Don "Fowler's direction." *Id.* at 2913; *see also id.* at 2914 ("Buoyed by their success in winning such large sums from Tamraz, DNC Finance Director Richard Sullivan recounted, 'all of us were continually asking him for money through the course of the year' – perhaps 'every six weeks' during 1996."). When asked at the committee hearings whether access to the President for promotion of his pipeline was a reason for the donations, Tamraz candidly replied: "'Senator, I'm going even further. It's the only reason – to get access.'" *Id.* at 2913 n.46; *see also id.* at 2915 ("'[I]f they kicked me from the door, I will come through the window.'").

Despite warnings by DNC staff regarding Tamraz's background and NSC staff concerns that he should be denied access to senior government officials, *see id.* at 2911-13, "Tamraz was able to attend events with President Clinton on no fewer than six occasions from September 1995 through June 1996," *id.* at 2920.[12] After one conversation, the President asked Thomas McLarty, Counselor to the President, to look into the pipeline. Through McLarty's influence, Energy Department officials tried to use Tamraz's sizeable donations to change the NSC's opposition to dealing with Tamraz. *See id.* at 2921-29.

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[12] These events were "(1) a reception for the DNC's Business Leadership Forum on September 11, 1995; (2) a DNC dinner on September 15, 1995; (3) a DNC Chairman's holiday reception on December 13, 1995; (4) a DNC Trustee's dinner on March 27, 1996; (5) a Presidential coffee on April 1, 1996; and (6) a buffet dinner and private screening of the film *Independence Day* on June 22, 1996." Report at 2920.

Although Tamraz was ultimately unsuccessful in persuading the government to support his pipeline, he "did succeed in subverting the policy of the U.S. Government," as established by the interagency Caspian energy working group, "to deny him access to high-level U.S. officials. Despite the working group's firm position against such access, Tamraz found access to the President of the United States to be available for a price through Donald Fowler and the DNC." *Id.* at 2930. More ominously, Tamraz used his vast contributions to "enlist[] senior [U.S.] officials in his attempt to change the working group's policy on Caspian energy issues." *Id.* Though ultimately thwarted in receiving full government support for his oil pipeline project, Tamraz was unrepentant. As he told the committee, "'I think next time, I'll give [$]600,000.'" *Id.*[13]

Although the most publicized incidents involving Tamraz concerned soft money given to the DNC, he also "openly bought access from both political parties." Minority Report at 8095. "In February 1997, Tamraz received letters from Republican Senators Trent Lott and Mitch McConnell inviting him to become a member of the Senatorial Inner Circle. . . . Senator McConnell['s] . . . letter stated that for a contribution to the Republican Party, Tamraz could discuss high-level policy issues at exclusive dinners with the Senate leadership." *Id.* at 8113 (noting, however, that Tamraz's subsequent contribution was returned). "When asked why he had contributed this time, Tamraz responded, 'you set the rules, and we are following the rules. . . . [T]his is politics as usual. What is new?'" *Id.* (alterations in original).

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[13] Ironically, "Tamraz seems to have come closer to purchasing policy concessions in the [U.S.] than he did in the unstable and corrupt new democracy of post-communist Russia," where he reportedly made an unsuccessful offer of $100 million to Boris Yeltsin's re-election campaign in exchange for endorsement of his pipeline. Report at 2930-31.

As the Tamraz saga additionally demonstrates, donors often give to both parties in order to ensure access. "In 1996, for example, corporations such as RJR Nabisco, AT&T, and Walt Disney were among the top contributors to both parties. In the words of Common Cause President Ann McBride, '[S]oft money is not about ideology. . . . It is about making sure "whoever wins, my special interest has a place at the table". . . . It is about gaining access and influence.'" *Id.* at 7517 (alterations in original). The cynicism of the Tamraz affair was perhaps best illustrated by the fact that he did not even bother to vote. Tamraz "believed himself to possess 'more than a vote' by virtue of his campaign contributions." Report at 2909.[14]

4. *Michael Kojima's Fundraising and Contributions.* Because he contributed $500,000 to the 1992 President's Dinner, Michael Kojima and his wife were placed "at the head table with President and Mrs. Bush." Minority Report at 7372. In addition, the Republican Presidential Roundtable (a Republican fundraising organization) wrote letters on Kojima's behalf to obtain meetings for him with U.S. embassy and foreign officials, to facilitate Kojima's pursuit of private business interests. *See id.* at 5416-17. In sum, "[i]n a two-year period, due to his contributor status, Kojima met President Bush on five occasions, including at an Oval Office reception; met with Vice President Quayle twice; met Cabinet members at an intimate lunch; and met multiple times with U.S. ambassadors and senior embassy personnel." *Id.* at 5428.

5. *Charlie Trie.* Charlie Trie was a former Little Rock restaurateur who contributed and raised substantial sums of money to benefit the DNC to gain access to the Clinton

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[14] "In theory, every voter is equal; the reality is that some voters, to borrow George Orwell's phrase, are 'more equal than others.' No one can deny that individuals who contribute substantial sums of money to candidates are likely to have more access to elected officials. And most of us think greater access brings greater influence." Minority Report at 4563.

White House and senior Administration officials for himself and his associates. *See* Report at 2524, 2527 ("Trie . . . managed to contribute a total of $220,000 to the DNC between 1994 and 1996," and he "made a commitment to the DNC to raise $350,000" in 1996 alone). Trie visited the White House "at least twenty-two times" from 1993 to 1996, and his Macau-based business associate, Ng Lap Seng (who actually funded Trie's contributions), visited the White House 10 times between 1994 and 1996. *Id.* at 2531-32. "Trie['s] contributions and fundraising made him a DNC Managing Trustee and member of the DNC's National Finance Board of Directors, and afforded him VIP treatment at DNC events." *Id.* at 2532 (footnotes omitted).

In addition, the committee concluded that "Trie's contributions and fundraising purchased his otherwise unwarranted appointment in 1996 to the Commission on U.S.-Pacific Trade and Investment Policy." *Id.* at 2519. Despite a disqualifying financial interest in the affairs of the commission (due to Trie's Asian business interests), and despite the fact that all slots on the commission were filled, Trie received the appointment. "In order to accommodate the White House's interest in the inclusion of Trie . . ., the President issued [an] Executive Order . . . expanding the membership of the Commission." *Id.* at 2534. The paperwork on Trie's disqualifying financial interest "simply 'fell through the cracks.'" *Id.* at 2535.[15]

6. *Johnny Chung.* Major DNC soft-money donor Johnny Chung likewise enjoyed repeated access to the White House. His "DNC contributions helped Chung obtain access to the White House at least 49 times between February 1994 and February 1996 – access that he used . . . to further his interests with foreign business clients . . . . So close was the nexus between Chung's donations and his visits, in fact, that White House officials actually collected money from him in the First Lady's office in exchange for allowing him to bring a delegation of his clients to White House events." *Id.* at 783 (footnote omitted). In Chung's own colorful and candid view, he was granted access because the "'White House is like a subway: You have to put in coins to open the gates.'" *Id.*

7. *Native American Fundraising and Access.* Native American groups found that the same principle – fundraising money for political access – operated to them as well. "It is clear that access to the DNC resulted in increased access to administration officials for tribes. And the way to get access to the DNC was to make political contributions. . . . The tribes with greater resources had many more doors opened to them." *Id.* at 3080.

For instance, the Mashantucket Pequots, owners of one of the world's largest casinos, were "assured . . . special attention from the DNC" by virtue of their "generosity to the Democratic party." *Id.* at 3075. In a briefing memorandum for a meeting between then-DNC head Don Fowler and the Pequot chairman, "Fowler was encouraged by DNC staff to ask the Pequots to contribute 'at least' $250,000 to the DNC. The memo notes that an issue of special significance for the Pequots was a provision in the 1995 budget bill that proposed a 35% tax on Indian gaming revenues. Inasmuch as the Foxwoods Resort casino [owned by the Pequot tribe] has yearly revenues of approximately $1 billion, such a tax would have had a huge impact on the tribe. The provision was removed, and, according to the memo, Fowler 'played an active role in expressing' tribal opposition regarding the tax to the Administration and Congress. The memo exhorts Fowler to 'take credit' for that and other pro-tribal achievements." *Id.* (footnotes omitted); *see also id.* at 3076-80 ("finance officials at the DNC and Clinton Gore were [regularly] targeting various Indian tribes for contributions").

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[15] Trie also arranged admission to a White House coffee for a Chinese arms dealer and advisor to the Chinese government. *See* Report at 2714 ("The President subsequently admitted his meeting with Wang Jun was highly improper."). The Committee found generally that the White House's vetting process "was essentially nonexistent." *Id.* at 753. Due to the soft money quest, "too many unsavory individuals were allowed entrance to the White House and access to President Clinton." *Id.* For example, major DNC donor Ted Sioeng, "a foreign national with suspiciously close ties to the Chinese government, sat at the head table with the President or Vice President at several fundraisers." *Id.* at 41; *see also id.* at 963-80.

In another instance of donor access that "confirms the public's worst suspicions about how things seem to work in Washington," three impoverished bands of Wisconsin Indian tribes applied to open a casino in Hudson, Wisconsin. *Id.* at 3167; *see id.* at 3167-94. The Bureau of Indian Affairs' area office initially approved their application in November 1994 over the objections of the wealthy, neighboring tribes whose nearby gambling casinos would face competition from the applicants. "At the same time the area office decision was sent to Washington for final approval, on a separate track began a full-tilt lobbying effort *against* the decision, which involved the DNC and the White House." *Id.* at 3167.

The Report found "strong circumstantial evidence that the Interior Department's decision to deny the Hudson application was caused in large part by improper political considerations, including the promise of political contributions from opposition tribes. At a minimum, it is clear that the opposition tribes and their lobbyists activated the DNC and, to some extent, the White House, to take action on their behalf. Financial support – both past and future – was crucial to this effort." *Id.* at 3168. "According to FEC records, in the four months following the Department's denial of the Hudson application, the opposition tribes contributed $53,000 to the DNC and the [Democratic Senatorial Campaign Committee ("DSCC")]; they donated an additional $230,000 to the DNC and the DSCC during 1996, and gave more than $50,000 in additional money to the Minnesota Democratic Party." *Id.* at 45.[16]

The taint of wrongdoing in that episode was so strong that an independent counsel was appointed to investigate. *See Final Report of Independent Counsel In Re: Bruce Edward Babbitt* (Aug. 22, 2000). Although the independent counsel found insufficient evidence to bring a criminal bribery prosecution, its scathing conclusion about soft-money fundraising bears remembering, as it pertains directly to the types of concerns the *Buckley* Court invoked to uphold the constitutionality of FECA: "From a criminal justice perspective, as long as large sums of money outside of the regulatory authority of the campaign finance laws – i.e., 'soft money' – may be given to political parties, the possibility of attempted corruption of official actions will loom large, public confidence in the integrity of governmental decision-making will be undermined and federal prosecutors will too often be required to give extraordinary scrutiny to what should be ordinary administrative agency actions." *Id.* at 422.

B. Soft-Money Fundraising Distracts Elected Officials From Their Public Duties

The Report documented examples of how soft-money fundraising has diverted the attention of key elected officials from their public responsibilities. In a 10-month period before the 1996 election, for example, President Clinton attended more than 230 fundraising events, raising $119,000,000. *See* Report at 43.

> According to Presidential campaign advisor Dick Morris, President Clinton "would say 'I haven't slept in three days; every time I turn around they want me to be at a fund-raiser . . . I cannot think, I cannot do anything. Every minute of my time is spent at these

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[16] The Minority Report contended that the denial "was based upon legitimate concerns," Minority Report at 8390, although it agreed that such incidents do create a strong appearance of impropriety, *see id.* at 8368 ("One of the most discouraging aspects of the present campaign finance system is that even public policy decisions undertaken in the utmost good-faith can take on an appearance of impropriety in the context of a system where so many of the individuals or entities likely to be affected by government actions are able to make the kind of large campaign contributions presently permitted by our system.").

> fundraisers.'" This frenzied pursuit of campaign contributions raises obvious and disturbing questions. Can any President who spends this much time raising money focus adequately upon affairs of state? Is it even possible for such a President to *distinguish* between fundraising and policymaking?

Id. (alteration in original); *see also id.* at 42 ("As Vice President Gore himself noted, 'we can raise the [necessary] money . . . ONLY IF – the President and I actually do the events, the calls, the coffees, etc.'") (alterations in original).

Former Vice President Walter Mondale testified that "'[i]t is the most degrading and humiliating thing that can happen to a public officer to have to spend a substantial chunk of his or her time pleading for money in this kind of way. . . . That is one of the most powerful arguments for repeal of the soft money loophole.'" Minority Report at 7520 (alteration in original). "In some ways, the most troubling result of the White House's and DNC's ceaseless quest for campaign funding is the great amount of time the President and the Vice President themselves actually spent raising money." Report at 42. "The bottom line is this: were it not for the lure of soft money and the relentless pressure to raise it, our nation's highest officials would have not been placed into the inappropriate situations in which the Committee too often found them. The President and the Vice-President, for example, never would have felt the need even to consider personally phoning supporters for donations, and we likely never would have seen the White House and Capitol Hill conscripted into serving the fundraising goals of the DNC, the RNC, and the two major presidential campaigns." Additional Views of Senator Lieberman at 9538.

Such frenzied pursuit of soft money fatally undermines public confidence in our political system, as examples from both parties illustrate. As one White House coffee attendee commented, "'the White House coffee was an improper "shakedown" for money . . . in the presence of the President.'" Report at 214. Another donor found the Vice President's telephone "sales pitch . . . 'revolting,'" and still another felt the call he received had "'elements of a shakedown.'" *Id.* at 501-02. In March 1995, the National Policy Forum (a think-tank established by the RNC, *see* Report at 16) held a conference on telecommunications at which then-Senate Majority Leader Robert Dole and other Republicans spoke. *See* Minority Report at 4664. One newspaper reported: "'[E]ven though the [requested] $25,000 payment is not mandatory to attend, company representatives professed surprise at the size of the contribution request. "It's pretty astounding," said one invitee. "If this doesn't have 'payment for acces[s]' (to top GOP lawmakers) written all over it, I don't know what does."'" *Id.* (first alteration in original).[17]

II. CONGRESS HAD A COMPELLING INTEREST IN REGULATING USE OF SOFT MONEY TO FUND SHAM "ISSUE ADS"

The way soft money is spent is just as problematic as the way it is raised. During the 1996 election campaign, both the DNC and the RNC (along with corporations, unions, and other interest groups) found a gaping loophole through which they ran so-called "issue advertisements" designed to influence federal elections.[18] Under FECA, soft money cannot be used expressly to advocate the election or defeat of a clearly identifiable federal candidate, but rather may be used only for more generic party-building activities. *See supra at* p.2.

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[17] Although candidates arguably would have to spend more time raising hard dollars if unlimited soft money could no longer influence federal elections, lower limits are less likely to place a candidate in the position of asking for massive contributions from individuals and therefore giving the appearance of being beholden to them. The BCRA's hard-money limits of $2,000 per person to a candidate and $25,000 to a national party address that concern. *See* BCRA § 307(a), 2 U.S.C. § 441a(a)(1).

[18] *See* JSSA 39sa (per curiam) ("It does not appear that prior to 1996, the practice of using issue advertising to influence federal elections was a widespread practice.").

A significant development of party-building, however, was through "issue ads," television advertisements that do not expressly advocate the election or defeat of a specific candidate. Report at 4465. Parties learned over time that a cleverly worded ad can technically meet this standard by portraying candidates in a positive or negative light "in the context of issues." *Id.* at 4478.

By the 1996 presidential campaign, "[t]he vast majority of issue ads identified specific candidates and functioned as campaign ads. . . . [Those ads] were effectively indistinguishable from candidate ads." Minority Report at 7515. Both the national parties and corporate, union, and other interest groups ran numerous such issue ads funded substantially[19] or completely with unregulated soft money. These sham ads, highly problematic in their own right because they were used to influence federal elections and not restricted to generic party-building uses, were made worse by the fact that they were often coordinated with – indeed, controlled by – the 1996 presidential campaign from which they purportedly were independent.

A. The National Parties Used Massive Amounts Of Soft Money To Fund Sham "Issue Ads"

In the 1996 election, the DNC spent approximately $44 million in soft money on issue ads, and the RNC spent approximately $24 million. *See* Report at 4482; Minority Report at 8294. At the committee hearings, Harold Ickes, President Clinton's Deputy White House Chief of Staff, responded to a question asking whether the average person would understand the DNC and RNC issue ads as suggesting a vote for Clinton or Dole: "'I would certainly

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[19] Under FECA, federal law permitted issue ads run by a national party in an election year to be paid for with 35% soft money, and the rest with hard money. *See* JSSA 33sa-34sa (per curiam).

hope so. If not, we ought to fire the ad agencies.'" Minority Report at 8286.

The President knew he was using DNC soft money to fund issue ads in the service of his re-election campaign. He told a group of major contributors to the DNC:

> "[W]e even gave up one or two of our fundraisers at the end of the year to try to get more money to the Democratic Party rather than my campaigns. My original strategy had been to raise all the money for my campaign this year, so I could spend all my [time] next year being president, running for president, and raising money for the Senate and House Committee and for the Democratic Party.
>
> And then we realized that we could run these ads through the Democratic Party, which meant that we could raise money in twenty and fifty and hundred thousand dollar lots, and we didn't have to do it all in thousand dollars. And run down – you know what I can spend which is limited by law. So that's what we've done. But I have to tell you I'm very grateful to you. *The contributions you have made in this have made a huge difference.*"

Report at 62 (emphasis added; alteration in original).

The Dole campaign adopted a similar strategy. "[T]here can be little doubt that the RNC's issue ads were intended to influence the outcome of a federal election . . . . One of those issue ads, entitled 'The Story,' was nothing more than a biography of Bob Dole." *Id.* at 4014.[20] Indeed, an internal RNC memorandum concluded that "'[m]aking this spot pass the issue advocacy test may take some doing.'" *Id.* at 4015; *see also id.* at 4014-15 (discussing another RNC issue ad that "focused on personality traits [of Bill Clinton] rather than public issues"); Minority Report at 8301 (quoting Dole campaign manager as saying, "'[w]e went out in April and May and raised $25 million for the party, of which about $17, $18, or $19 million was put into party building ads, which were Bob Dole in nature'").

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[20] "The Story" stated as follows (Report at 4014) (alteration in original):

"Audio of Bob Dole: We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in.

Voice Over: Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility.

While being interviewed by Ted Koppel of ABC, Dole candidly admitted that, although his campaign did not have enough money to pay for advertising, the RNC would be running "generic" ads on his behalf (Report at 4153-54):

> "Q You said generic spending, and then it says 'Bob Dole for president', is that considered generic spending?
>
> SEN. DOLE: It doesn't say 'Bob Dole for president.' It has my – it talks about the Bob Dole story. It also talks about issues. It never mentions the word that I'm – it never says that I'm running for president, though I hope that it's fairly obvious, since I'm the only one in the picture! (Laughter)."

So when his country called . . . he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.

Audio of Bob Dole: I went around looking for a miracle that would make me whole again.

Voice Over: The doctors said he'd never walk again. But after 39 months, he proved them wrong.

Audio of Elizabeth Dole: He persevered, he never gave up. He fought his way back from total paralysis.

Voice Over: Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.

Voice of Bob Dole: It all comes down to values. What you believe in. What you sacrifice for. And what you stand for."

B. The National Parties Coordinated Sham "Issue Ads" With Their Presidential Candidate's Campaign

In the 1996 campaign, the White House "operated the [DNC] party apparatus as a slush-fund for the President's re-election campaign." Report at 23. The Clinton campaign and the DNC engaged in "unprecedented" coordination "over the content, placement, and production of advertisements. . . . By the end of the campaign, any distinctions remaining between the White House, the DNC, and Clinton/Gore had been obliterated." *Id.* at 107.

The soft money the President and Vice President had been so instrumental in raising for the DNC was used to fund DNC issue ads over which "the President himself exercised total control." *Id.* at 34. According to Dick Morris, President Clinton's campaign advisor, "the President 'was as involved [in the DNC and Clinton/Gore '96 media campaign] as any of his media consultants were,' '[e]very line of every ad came under his informed, critical, and often meddlesome gaze,' such that '[t]he ads [for both the DNC and Clinton/Gore '96] became . . . the work of the President himself.'" *Id.* at 122 (alterations in original); *see also id.* at 123-25 (detailing close involvement of Vice President Gore and other White House officials). The coordination even "extended to the exact day the media team chose to run a DNC advertisement versus a Clinton/Gore '96 advertisement," *id.* at 118, and both the DNC and Clinton/Gore '96 "employed all the same consultants, pollsters, and media producers," *id.* at 34. One meeting agenda candidly stated: "'[u]se DNC to pay for it, we [the joint White House, DNC and Clinton/Gore media team] control production.'" *Id.* at 118-19 (alterations in original).

Although such close coordination was arguably illegal under FECA, the Attorney General declined to appoint an independent counsel. She opined that "'FECA does not prohibit the coordination of fundraising or expenditures between a party and its candidate for office.'" *Id.* at 4528.

The Attorney General's opinion and the perception created by these fundraising scandals thus made clear that Congress had to close this enormous loophole. *See* Minority Report at 8290 ("By permitting such coordinated efforts to raise soft money and spend it on political activities that advance the interests of presidential campaigns, the federal election laws create a tremendous loophole to both contribution limits and spending limits.").

The committee's investigation also showed that, to a lesser degree, the Dole campaign and RNC coordinated ads; indeed, their media campaigns came under common control. The Minority Report concluded that Senator Dole's "campaign manager, chief fundraiser, media consultant, and pollster controlled the RNC's media campaign." *Id.* at 8297; *see also id.* at 8302 ("[F]ormer Dole staffers who were on the RNC payroll ran every aspect of the bankrupt Dole for President campaign, from planning campaign events for Dole to raising money for a multi-million-dollar ad campaign designed to boost the senator's candidacy."). Moreover, the RNC's issue ads were typically run (like the DNC ads) only in "battleground" states "where Clinton and Dole were close in the polls." *Id.* at 8299 ("[T]he criterion used by the RNC and the Dole campaign for deciding where to run issue ads was whether the ads would help Senator Dole win electoral votes.").

C. Both Parties Shifted Soft Money From National To State Party Coffers To Fund More Sham "Issue Ads"

Pre-BCRA law permitted issue ads run by a national party in an election year to be paid for with 35% soft money. *See* JSSA 33sa-34sa (per curiam). Because FEC regulations permitted state and local parties to fund issue ads with more than 35% soft money, *see id.* at 34sa-36sa & nn.14-15, national party committees often transferred soft money to them. "Substantial amounts of such transfers are made to state and local political parties for 'generic voter activities' that in fact ultimately benefit federal

candidates because the funds for all practical purposes remain under the control of the national committees. The use of such soft money thus allows more corporate, union treasury, and large contributions from wealthy individuals into the system." Report at 4466.

The size of such transfers is truly massive. In 1996, the Democratic committees transferred as much as $64 million in soft money to state parties, nearly nine times more than in 1992. *See id.* at 4467; Minority Report at 7520. The Republican committees transferred $50 million in soft money to state parties, or almost 10 times more than in 1992. *See* Minority Report at 7520. The transfers did not generally entail any loss of control over how the transferred soft money was spent. As one RNC memorandum explains (*id.* at 8300):

> "Some have voiced concern that buying through the state parties could result in a loss of control on our part. There is absolutely no reason to be concerned about this. As was demonstrated in our efforts recently in the [California] and [Oregon] special elections, our field staff is fully able to insure that state parties make good on any arrangement we make with them. This is simply a book keeping hassle, but not in anyway [*sic*] a reason not to proceed."

State parties thus "acted as mere conduits, exercising no independent judgment over the ads." *Id.*; *see also* Report at 4468 ("the state entities operated as little more than a pass-through for the DNC to pay for the production and broadcasting of ads by the [same] firm" that produced DNC and Clinton/Gore '96 ads).[21] Indeed, the communications director for the Florida Democratic Party commented with regard to ads run under the state party's name: "'Those aren't ours; those are the DNC's.'" *Id.*

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[21] This mechanism was also used in elections at other levels. The DNC, for example, accepted a $230,000 soft-money contribution and shortly thereafter transferred $215,000 to the Kentucky Democratic Party, "which in turn paid for an advertising blitz that closely paralleled the themes that [the donor's] favored candidate used in campaigning for the U.S. Senate." Report at 4467; *see also id.* at 4467-68 & n.32 (detailing incident where "the DNC saved $122,810 in hard

D. Non-Party Groups Used Massive Amounts Of Soft Money To Fund Sham "Issue Ads"

The loophole identified and exploited by the national parties was likewise used by a wide array of advocacy groups to influence the 1996 election. Such groups spent an estimated $55-70 million on political advocacy campaigns, or "roughly one-seventh of the 400 million dollars expended on political advertising during the 1996 elections by parties, candidates and others." Report at 3993. A substantial (though indeterminate) portion of those funds was spent on issue ads meant to influence federal elections, yet, like the ads run by the national parties, avoided using magic words of express advocacy (and thus arguably avoided being deemed in-kind contributions subject to hard-money limits). *Id.*

In addition, those expenditures were often coordinated to varying degrees with the 1996 presidential campaigns or the national parties. For example, "White House aides and the AFL-CIO carefully reviewed each other's advertisements and coordinated their timing and placement." *Id.* at 49; *see also id.* at 3997 ("Evidence . . . indicates [that AFL-CIO] programs were conceived, designed and implemented to defeat Republican Members of Congress during the 1996 federal elections."); *id.* at 3997-4006.[22]

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dollars by using the Michigan Democratic Party as a conduit to pay for . . . advertisements" produced by the DNC's own media consultant).

[22] "[I]n August 1995 [Deputy White House Chief of Staff Harold] Ickes organized and chaired a White House meeting in the Roosevelt Room between representatives of the DNC and Clinton/Gore '96 media team and approximately seven representatives of various labor unions. . . . [B]oth the union representatives and the DNC and Clinton/Gore '96 media team displayed advertisements each had run or were considering running. [Clinton presidential campaign advisor Dick]

The minority found that a conservative group, The Coalition: Americans Working for Real Change, "was formed to counter-balance issue ads run by the AFL-CIO. To do so, it reportedly spent at least $4.5 million, supported 23 Republican incumbents, and criticized the voting records of four Democrats in tight races. The Coalition's ads also contained nearly identical language to that used in ads broadcast by the National Republican Congressional Coalition ("NRCC"), a division of the RNC. In addition, the Coalition's ads were run at the same time as the NRCC's ads and in districts where the Republican incumbent's seat was vulnerable." Minority Report at 8944 (footnotes omitted).

The minority further found that "[t]he issue advocacy loophole was also exploited by Triad Management Services, . . . [which] channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.' By operating this way, Triad and its financial backers avoided the disclosure and campaign contribution limits of the federal election laws." *Id.* at 4569. For example, under the guidance of Triad, another nonprofit named Citizens for Reform with no previous record and "no . . . offices, staff, or even telephones," *id.* at 6301, spent $2 million to run television ads on congressional races from Kansas to Texas.[23]

Morris testified that . . . 'It was a full briefing of us by them on their media plans.'" Report at 128 (footnote omitted).

[23] The following ad, for example, aired during the final weeks of the Montana congressional race between Bill Yellowtail and Rick Hill:

> "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."

III. THE BCRA ADDRESSES THE SOFT-MONEY AND ISSUE ADVERTISEMENT ABUSES DOCUMENTED IN THE REPORT

The major problems documented in the Report are addressed in and fully support the BCRA. The Report detailed potential reforms, including banning soft money at the national and state party levels and restricting sham issue advocacy by nonparty groups. *See* Report at 4468-70, 4480-81, 4485-86, 4491-94; *id.* at 4492 ("A ban on the raising of soft money by national party committees effectively deals with the use of union and corporate general treasury funds in the federal political process only if it" requires funding of candidate-specific ads with hard money, such as that contributed to a political action committee.). The Minority Report likewise recommended that Congress both "[e]liminate [s]oft [m]oney . . . contributions to political parties from individuals, corporations and unions" and enact "reforms addressing candidate advertisements masquerading as issue ads." Minority Report at 9394.

The BCRA addresses both problems. Title I regulates the uses by political parties of soft money, whereas Title II attempts to prohibit labor union and corporate treasury funds "from being used to run issue advertisements that have an ostensible federal electioneering purpose." JSSA 47sa. *See* BCRA §§ 101-103 (Title I), 201-214 (Title II).

The legislative history shows that Congress relied substantially on the Report in passing the BCRA.[24] Senator Feingold recounted that, "in the wake of the Thompson investigation, we reluctantly concluded that we needed to first focus our efforts on closing the biggest loopholes in the system: the soft money and the phony issue ads." 148 Cong. Rec. S2104 (Mar. 20, 2002).

Senator Lieberman likewise described his "new sense of commitment in 1997, when the Governmental Affairs Committee conducted its year-long investigation into campaign finance abuses in the 1996 Federal elections. With the passage of time, the shock of that investigation's revelations have started to fade. But it is critical that we remember them because they represent precisely what is most wrong with the system we plan to change and

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Minority Report at 6305 (alteration in original); *see also* Report at 4007. Although the group was credited with helping Hill beat Yellowtail, it never disclosed how much it spent or the sources of its funds. *See* Robert P. Meier, Comment, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds*, 147 U. Pa. L. Rev. 971, 990 n.117 (1999).

[24] The BCRA "legislative process took over six years of study and reflection by Congress." JSSA 482sa (Kollar-Kotelly); *see id.* at 482sa n.1 (citing numerous campaign finance reform bills introduced over the last six years). Although the Senate and House bills ultimately enacted as the BCRA were not accompanied by explanatory committee reports, members of Congress frequently invoked the Thompson Committee Report in floor debates as support for the legislation. *See, e.g.*, 147 Cong. Rec. S3251 (Apr. 2, 2001) (Sen. Thompson) ("The Final Report of the Senate Governmental Affairs Committee's year-long Special Investigation documents numerous examples of actual and apparent corruption resulting from the solicitation and contribution of soft money. . . . The McCain-Feingold bill will restore a campaign finance system that has been completely thwarted by loopholes created in the late 1970s."); *id.* at S3138 (Mar. 29, 2001) (Sen. Levin) ("The 1997 Senate investigation collected ample evidence of campaign abuses, the most significant of which revolved around the soft money loophole. Soft money contributions of hundreds of thousands, even millions, of dollars, were shown to have undermined the contribution limits in Federal law and created the appearance of corruption in the public's eye. The Republican and Democratic national political parties that solicit and spend this money use explicit offers of access to the most powerful, elected officials."); *id.* at S2463 (Mar. 19, 2001) (Sen. Levin) (explaining how hearings of the committee exposed how politicians had "trashed the limits on contributions that exist in the law" and stating desire that, "[h]opefully, McCain-Feingold is going to restore those limits"); 148 Cong. Rec. S2133-34 (Mar. 20, 2002) (Sen. Collins) ("The problem with soft money was painfully evident during the 1997 hearings . . . . We heard from individual after individual who testified about giving hundreds of thousands of dollars in order to buy access."); *id.* at S2138-41 (Sen. McCain) ("The Senate Governmental Affairs Committee investigation found flagrant abuses by both Presidential campaigns in the 1996 elections.").

precisely what helped to begin in full force the effort that is about to reach a successful conclusion." *Id.* at S2137.

In the wake of the campaign finance meltdown in the 1996 elections, a Gallup poll showed that 59% of Americans believed elections were "generally for sale to the candidate who can raise the most money," half thought the President "was willing to change government policy in exchange for donations," and 77% considered national leaders to be "mostly influenced by the pressure they receive on issues from major campaign contributors." The Gallup Organization, *Americans Not Holding Their Breath on Campaign Finance Reform* (Oct. 11, 1997). A paltry 19% believed elected officials were influenced by what is in the best interests of the country. *Id.* As the court below recognized, more recent polls show these perceptions linger unabated. *See* JSSA 628sa (Kollar-Kotelly), 1292sa (Leon).

The investigation by the Senate Governmental Affairs Committee in 1997 and 1998 established a documentary and testimonial record that proved crucial in convincing legislators of the need to close the loopholes in FECA that had so badly distorted our electoral system and "to restore the campaign finance system to what was intended prior to the appearance and exploitation of the soft money loophole." 147 Cong. Rec. S3251 (Apr. 2, 2001) (Sen. Thompson). That record exposed the worst of our system: meetings and sleepovers in the White House for specially chosen contributors of high-dollar soft money, the alteration in policy to meet the demands of donors, and the use of soft money for advocacy purposes at an unprecedented scale. In seeking to return the system to what it had been under FECA before those loopholes were discovered, Congress had a more than ample evidentiary record and a constitutionally proper mandate under *Buckley* to enact the BCRA.

CONCLUSION

Amicus respectfully urges this Court to uphold the constitutionality of BCRA Titles I and II.

Respectfully submitted,

DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus Curiae

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Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

◆

On Appeal From The United States District Court For The District Of Columbia

◆

BRIEF OF *AMICI CURIAE* THE CALIFORNIA STUDENT PUBLIC INTEREST RESEARCH GROUP, INC., THE MASSACHUSETTS STUDENT PUBLIC INTEREST RESEARCH GROUP, THE PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., U.S. PIRG, FANNIE LOU HAMER PROJECT, THE ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, AND PUBLIC CAMPAIGN IN SUPPORT OF APPELLEES

◆

BONITA TENNERIELLO
Counsel of Record
JOHN C. BONIFAZ
BRENDA WRIGHT
LISA J. DANETZ
NATIONAL VOTING RIGHTS
INSTITUTE
27 School Street
Suite 500
Boston, MA 02108
(617) 624-3900

DAVID A. WILSON
HALE AND DORR LLP
1455 Pennsylvania Avenue, NW,
10th Floor
Washington, DC 20004
(202) 942-8400

Attorneys for Amici

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTERESTS OF *AMICI*[1]

Amici California Student Public Interest Research Group, Inc. (CALPIRG), Massachusetts Student Public Interest Research Group (MASSPIRG), and Public Interest Research Group of New Jersey, Inc. (NJPIRG Student Chapters) are state-based, non-profit, non-partisan organizations that conduct research, advocacy, and public education campaigns on a host of public interest issues including public health, environmental and consumer protection, higher education and good government. These PIRGs are directed by college students who lack the means to make large political contributions. Many state PIRGs have supported policies similar to Bipartisan Campaign Reform Act of 2002 (BCRA) Title I soft money provisions at the state level, and the outcome of this lawsuit will affect the ability of state PIRGs to support such policies in the future.

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[1] Pursuant to Rule 37.6, *amici* hereby certify that no counsel for a party in the actions involving Title I of the BCRA, *McConnell v. FEC*, No. 02-1674; *Republican Nat'l Comm. v. FEC*, No. 02-1727; *Cal. Democratic Party v. FEC*, No. 02-1753; *Paul v. FEC*, No. 02-1747; *National Right to Life Committee v. FEC*, No. 02-1733; *FEC v. McConnell*, No. 02-1676; *McCain v. McConnell*, No. 02-1702, authored this brief in whole or in part. *Amici* CALPIRG, MASSPIRG, NJPIRG, USPIRG, FLHP and ACORN are appellants in *Adams v. FEC*, No. 02-1740, which involves only increases in individual contributions to candidates contained in Title III of the BCRA and not any provisions of Title I. *Amici* further certify that no person other than *amici*, their members and their counsel have made any financial contribution to the preparation or submission of this brief. Consents to briefs *amicus curiae* from all parties have been filed with the Clerk of the Court.

Amicus U.S. PIRG is the national advocacy office of twenty-seven state PIRGs. U.S. PIRG supports political reform to make government accountable to ordinary citizens, believing that meaningful campaign finance reform is necessary to promote the public interest in government by the people.

Amicus Fannie Lou Hamer Project (FLHP), named after the legendary civil rights worker from Mississippi, is a non-profit organization that fights for political equality for low- and moderate-income communities of color across the country. The project seeks to address inequities in the campaign finance system which limit civic and political participation based on socioeconomic status and which result in a disparate impact on communities of color.

Amicus Association of Community Organizations for Reform Now (ACORN) is the nation's largest community organization of low and moderate-income families, with over 150,000 member families organized into 700 neighborhood chapters in 51 cities across the country. ACORN's effort to advance the interests of low and moderate-income families is severely undermined by a system in which vast sums of money are required to engage in political participation.

Amicus Public Campaign is a non-profit, non-partisan educational organization with separate corporate branches established under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code. Public Campaign promotes reforms that aim to dramatically reduce the role and influence of money in U.S. elections, in particular the public financing of election campaigns, and monitors the influence of fundraising and campaign contributions on representative bodies.

All of the *amici* share a concern over the growing, corrosive influence of unregulated soft money contributions in national politics, and therefore share an interest in preserving the regulations of political party contributions and expenditures in Title I of BCRA.[2]

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SUMMARY

The record demonstrates that a few wealthy individuals and corporations capable of making massive nonfederal political party donations ("soft money" gifts) have exercised grossly disproportionate electoral influence. To permit this trend to continue to grow would, in practical terms, destroy the underpinnings of democratic governance. Denied an effective voice, ordinary citizens have no incentive to participate in – or even believe in – electoral politics.

The soft money regulations in BCRA's Title I[3] are unquestionably justified by the government's interest in combating the reality or appearance of corruption, as the Defendants and Intervenors have comprehensively documented in the proceedings below. In addition, however, this litigation presents the Court with an opportunity to affirm that equality of access to the electoral system serves core values that are implicit in the First Amendment.

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[2] While *amici* support the "electioneering" provisions contained in Title II of BCRA, this brief focuses solely on Title I.

[3] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101, 116 Stat. 82; BCRA § 102, 116 Stat. 86; BCRA § 103, 116 Stat. 87.

Equality concerns are deeply embedded in this court's First Amendment jurisprudence.[4] These values protect the speech and association of all members of the public, in order to preserve the "public participation and open discussion that the First Amendment itself presupposes." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., joined by Ginsburg, J., concurring). When considering regulation of corporate expenditures, the Court has recognized the need to "protect the integrity of the marketplace of political ideas" by denying "resources amassed in the economic marketplace" the ability to gain an "unfair advantage in the political marketplace." *FEC v. Mass. Citizens for Life* (*"MCFL"*), 479 U.S. 238, 257 (1986). In approving federal individual contribution limits, Justice Breyer has observed that contribution limits "aim to democratize the influence that money itself may bring to bear upon the electoral process." *Shrink Mo.*, 528 U.S. at 401 (Breyer, J., joined by Ginsburg, J., concurring) (citing *Reynolds*, 377 U.S. at 565, for the proposition that "in the context of apportionment, the Constitution 'demands' that each citizen have 'an equally effective voice'").

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[4] This Court's election law decisions based on the equal protection clause have also consistently affirmed the importance of equal participation in politics. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (poll tax violates equal protection clause of Fourteenth Amendment); *Bullock v. Carter*, 405 U.S. 134 (1972) (mandatory candidate filing fees violate equal protection clause of Fourteenth Amendment); *Lubin v. Panish*, 415 U.S. 709 (1974) (mandatory candidate filing fees violate equal protection clause of Fourteenth Amendment); *Reynolds v. Sims*, 377 U.S. 533 (1964) (disparities in voting strength based on population of electoral district violate equal protection clause of Fourteenth Amendment); *Davis v. Bandemer*, 478 U.S. 109 (1986) (dilution of voting strength is justiciable under the equal protection clause).

Massive, unregulated soft money donations have indeed distorted the "marketplace of political ideas." The record demonstrates that soft money is primarily aimed at influencing federal elections, and is appropriately brought within the regulatory framework of the Federal Elections Campaign Act (FECA), 2 U.S.C. § 431 *et seq.* Soft money donations have enabled a class of corporate and individual super-donors to circumvent hard money regulations and wield electoral clout that ordinary citizens cannot dream of having. A victory for the asserted speech rights of this tiny fraction of our citizenry would be a defeat for the democratic values at the core of the First Amendment.

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ARGUMENT

I. UNREGULATED SOFT MONEY CONTRIBUTIONS HAVE CONFERRED DISPROPORTIONATE ELECTORAL POWER ON THE LARGEST DONORS AND DISCOURAGED BROAD POLITICAL PARTICIPATION.

The rise of nonfederal political party donations, or soft money, brought a radically increased concentration of electoral power in the hands of an elite group of donors. As the record demonstrates, a small number of wealthy corporations and individuals have provided the lion's share of the soft money flowing to parties.[5] These massive

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[5] The $498 million in soft money raised in the 2000 elections constituted 42 percent of the spending by the national political parties, and a full 60 percent of this large sum came from only 800 corporate and individual donors, each giving $120,000 or more. *See* Opinion of Judge Kollar-Kotelly ("Kollar-Kotelly Op.") at 489-91sa (citing Mann

(Continued on following page)

contributions purchased electoral influence, as much of the soft money was used to benefit federal candidates, either deployed through state organizations for the benefit of federal candidates or spent by the parties on "issue advocacy" which in effect was targeted at federal races.[6]

Soft money contributions, like the "hard money" donations regulated by FECA, 2 U.S.C. § 441a, reflect the major parties' "capacity to concentrate power to elect." *FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colo. Republican II*"), 533 U.S. 431, 455 (2001). With soft money, as with hard, "donors give to the party with the tacit understanding that the favored candidate will benefit." *Id.* at 458.[7] Large soft money donors, in addition to

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Expert Report at 21-25); Opinion of Judge Leon ("Leon Op.") at 1189sa (citing Mann Expert Report at 24-25). The top 50 soft money donors in 2000 – 35 of which were corporations – each contributed between $955,695 and $5,949,000. *See* Leon Op. at 1189sa (citing Mann Expert Report at Table 6). All citations to the district court opinions are to the Supplemental Appendix to Jurisdictional Statements, Vols. I-V, filed by the appellants in *McConnell v. FEC*, No. 02-1674, on behalf of all of the parties to the consolidated challenges to the Bipartisan Campaign Finance Reform Act of 2002.

[6] *See* Kollar-Kotelly Op. at 566sa (finding that candidates value nonfederal donations "almost as much as donations made directly to their campaigns and . . . these donations assist federal candidates' campaigns. Furthermore, the evidence makes clear that the national parties also direct nonfederal donations to their state party affiliates for the purpose of affecting federal elections"); Leon Op. at 1202 ("The national parties spend a large proportion of their nonfederal money on so-called 'issue advertisements' that are really designed to help elect specific federal candidates").

[7] *See* Kollar-Kotelly Op. at 558-562 (discussing finding that "Nonfederal Funds are Given with Intent to Assist Specific Members of Congress; Political Parties Keep Track of Contributions Members of Congress Raise"); Leon Op. at 1198sa-1202sa (reviewing evidence in support of finding that "[n]onfederal money is often given to national

(Continued on following page)

gaining the ability to influence electoral outcomes disproportionate to the strength of their ideas, also gain an unearned hold on the political parties. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 666 (2000) ("When party leaders can raise huge sums at White House coffees or Speakers' Club retreats, they necessarily become more sensitive to the interests of their big donors, and less attentive to their less well-heeled, rank-and-file supporters").

Thus, soft money has been a back channel for the wealthy not only to instill a sense of obligation in federal candidates, as the defendants and intervenors maintain, but also to greatly amplify their electoral influence. Congress rightly considered the corrosive effect carried by such concentration of electoral power in the hands of these few donors. As Representative Shays described the legislation he co-sponsored, it was "about making sure that rich individuals cannot buy elections . . . ." 148 CONG. REC. H263 (daily ed. Feb. 12, 2002). Representative Clements observed, "In America we have a substantial number of people who do not vote in elections, who do not participate in elections. Why? Because of the influence of big money." 148 CONG. REC. H240 (daily ed. Feb. 12, 2002). *See also, e.g.,* 148 CONG. REC. S2160 (daily ed. Mar. 20, 2002) (Sen. Feingold); 148 CONG. REC. H235 (daily ed. Feb. 12, 2002) (Rep. Frank); 148 CONG. REC. H270 (daily ed. Feb. 12, 2002) (Rep. Lucas); 148 CONG. REC. H272 (daily ed. Feb.

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parties with the understanding that it will be used to assist the campaigns of particular federal candidates, and, indeed, it is often used for that purpose").

12, 2002) (Rep. Moore); 148 CONG. REC. H350 (daily ed. Feb. 13, 2002) (Rep. Nadler).

The ability of a small number of individuals and corporations to channel vast sums of money into elections diminishes the electoral influence of ordinary citizens to such an extent that many perceive their participation to be meaningless. "There is in this country a widely held belief that special interests and the very wealthiest campaign contributors have way too much influence in our political system. This belief discourages citizen participation in our democracy." 148 CONG. REC. H272 (daily ed. Feb. 12, 2002) (Rep. Moore). In other words, the effect of soft money has been to "render political association ineffective." *Shrink Mo.*, 528 U.S. at 397. The resulting disparities strike at the foundation of democracy. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

II. THE FIRST AMENDMENT PROTECTS THE RIGHT OF ALL CITIZENS TO MEANINGFUL POLITICAL PARTICIPATION.

A. The First Amendment Recognizes Broad Political Participation as a Vital Government Interest.

Equality concerns are firmly embedded in this Court's First Amendment jurisprudence. In the compaign finance context, this Court has on several occasions affirmed that the state may act to "protect the integrity of the marketplace of political ideas" by denying "resources amassed in the economic marketplace" the ability to gain an "unfair advantage in the political marketplace." *FEC v. Mass. Citizens for Life* ("*MCFL*"), 479 U.S. 238, 257 (1986) (ban

on corporate expenditure invalid as applied to non-profit corporation); *see also Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 257 (1986) (upholding ban on campaign spending from corporate treasury); *FEC v. Nat'l Right to Work Comm.* ("*NRWC*"), 459 U.S. 197, 207-08 (1982) (upholding ban on corporate solicitation of non-members). For this reason, the Court has permitted stricter regulation of contributions and spending by labor unions as well as corporations, *see U.S. v. UAW*, 352 U.S. 567 (1957), and much of soft money indeed has come from corporate and union treasuries.[8]

While the Court has cited concern over the "special advantages which go with the corporate form of organization," *NRWC*, 459 U.S. at 207, the threat recognized by these cases is a broader one: "the potential for unfair deployment of wealth for political purposes." *MCFL*, 479 U.S. at 259. If corporate money can purchase results which "have little or no correlation to the public's support for the corporation's political ideas," *Austin*, 494 U.S. at 660, the same can surely be said of large accumulations of personal wealth.[9] These decisions recognize that the electoral influence of large war chests threatens to dampen the will of ordinary citizens to engage in politics.

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[8] Of the 800 largest soft money donors in 2000, each giving over $120,000, 435 – or 54 percent – were corporations, unions and other organizations, and 365 were individuals. Mann Expert Report at 24.

[9] The statement in *MCFL* that "[r]elative availability of funds is after all a rough barometer of public support," 479 U.S. at 258, clearly has greater validity when each public supporter is able to contribute roughly similar amounts, and has far less validity when a few members of the public can tip the scales toward their own opinion, as with large soft money gifts.

"Speaking broadly, what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." *UAW*, 352 U.S. at 570. As this Court said in approving of the federal ban on labor union contributions and expenditures, "[I]ts aim was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Id.* at 575.

Thus the First Amendment actively protects the broad and diverse expression needed for meaningful public debate, in concert with the constitutional equal protection guarantee. "The First Amendment's constitutional role is not simply one of protecting the individual's 'negative' freedom from government restraint. The Amendment in context also forms a necessary part of a constitutional system designed to sustain that democratic self-government." Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002). As Justice Brennan similarly observed:

> [T]he First Amendment embodies more than a commitment to free expression and communicative exchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of government. Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the antecedent assumption that valuable public debate – as well as other civic behavior – must be informed.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

The gaping inequalities created by the soft money regime limit the range of public debate in a manner antithetical to these First Amendment values. *See Shrink Mo.*, 528 U.S. at 401 (Breyer, J., joined by Ginsburg, J., concurring) (contribution limits "encourag[e] the public participation and open discussion that the First Amendment itself presupposes"); *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189-90 (1997) (recognizing "important governmental interest" in "promoting the widespread dissemination of information from a multiplicity of sources"). *See also* Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 Nw. U. L. Rev. 1055, 1072-73 (1999) ("[W]ealth disparity introduces massive political inequality skewed to a predictable set of self-interested positions" and permits "wholly unjustifiable differences in political power to emerge . . . . The obvious inequalities introduced by massive wealth disparities cause many persons to lose faith in the system"); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1412 (1986) (in an election campaign, the resources at the disposal of the rich "enable them to fill all available space for public discourse with their message"); J. Skelley Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 636 (1982) ("To invoke the first amendment, not to protect diversity, but to prevent society from defending itself against the stifling influence of money in politics is to betray the historical development and philosophical underpinnings of the first amendment"); Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, *in* If Buckley Fell 63, 78-79 (E. Joshua Rosenkranz ed., 1999) ("People cannot plausibly regard themselves as partners in an enterprise of self-government when they are effectively shut out from the political debate because they cannot afford a grotesquely high admission price").

B. *Buckley v. Valeo* Does Not Bar the Promotion of Equality as a Government Interest Justifying Regulation.

Buckley v. Valeo does not foreclose equality of political participation as a First Amendment value. *Buckley*'s disapproval of measures that "restrict the speech of some elements of our society in order to enhance the relative voice of others," *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), cannot, as Justice Breyer has observed, "be taken literally." *Shrink Mo.*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring). For, as Justice Breyer noted, the Constitution "often permits restrictions on the speech of some in order to prevent a few from drowning out the many." *Id.* In addition to the examples provided by Justice Breyer (including the rules of congressional debate and ballot access laws, *id.*), this Court has on numerous occasions upheld regulations that limit or dilute the intensity of one voice, or a few voices, to keep them from overwhelming the speech of others. *See Turner Broad. Sys.*, 520 U.S. 180 (upholding Cable Act "must carry" provision against cable operators' First Amendment claim); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-88 (1980) (state law allowing pamphleteers in private shopping mall did not infringe disagreeing mall owner's First Amendment rights); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969) (upholding FCC rebuttal requirements for broadcast personal attacks and political editorials). Even the above-cited passage of *Buckley* acknowledges that the First Amendment was "designed to 'secure the widest possible dissemination of information from diverse and antagonistic

sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 49 (citations omitted).

In addition, this passage of *Buckley*, with its warning against "restrict[ing] speech of some elements of our society," 424 U.S. at 48, was directed at FECA's spending limits; in contrast, contribution limits such as the political party regulations at issue in Title I of BCRA,[10] entail "only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20-21; *see also FEC v. Beaumont*, 539 U.S. ___, 123 S. Ct. 2200, 2210 (2003) ("Going back to *Buckley v. Valeo*, 424 U.S. 1 (1976), restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression"); *Colo. Republican II,* 533 U.S. at 440, 456 (applying more deferential standard of review to political party coordinated expenditures, which may be regulated as contributions); *Shrink Mo.*, 528 U.S. at 386-88 (lesser scrutiny applied to contribution limits than expenditure limits).

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[10] While the soft money ban acts as a complete prohibition on contributions to national parties from corporate treasuries, rather than a limit, corporations remain free to contribute hard money from segregated accounts. And it is already settled that corporations may be barred from making campaign independent expenditures from their treasuries, *Austin*, 494 U.S. 652, which entails a greater restriction than a contribution ban. *See* Richard Hasen, *The Constitutionality of a Soft Money Ban after Colorado Republican II*, 1 ELECTION L. J. 195, 200-202 (2002).

Neither is the speech of the political parties unconstitutionally burdened, as there can be no showing that FECA's limits on hard money contributions to parties – raised, for individuals from $20,000 to $25,000, *see* BCRA § 307(a)(2), 116 Stat. 102 – are so low as to impede the parties' ability to "amas[s] the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21 or "so radical in effect as to render political association ineffective, drive the [parties'] voice below the level of notice and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397. Judge Kollar-Kotelly noted that as soft money donations rose during the 1990s "hard money contributions rose markedly as well, from $445 million to $741 million." Kollar-Kotelly Op. at 491sa, quoting Green Expert Report at 30.

In fact, the government interest in combating corruption and the perception of corruption, which *Buckley* and subsequent cases have held justifies contribution limits, *see Buckley*, 424 U.S. at 20; *Shrink Mo.*, 528 U.S. at 386-88; *Colo. Republican II*, 533 U.S. at 440; *Beaumont*, 123 S. Ct. at 2207, is in practice intertwined with considerations of political equality. Commentators have noted that the concern about corruption is inexplicable without reference to the larger goal of equality. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370-75 (1994). The influence of large contributions on policy is troubling largely, if not primarily, because citizens do not have an equal ability to make them; if all citizens had equal financial resources and thus an equal ability to purchase political influence through contributions, political contributions would become an accurate proxy for political support.

In the debate over BCRA, many members of Congress gave voice to the notion that corruption exists in the unequal ability of all citizens to have a say in the working of government. For example, Sen. Lieberman said: "When the price of entry to our democracy's discussion starts to approach the average American's annual salary, something is terribly wrong. When we have a two-tiered system of access and influence – one for the average volunteer and one for the big contributor – something is terribly wrong."

147 CONG. REC. S2531 (daily ed. Mar. 19, 2001) (Sen. Lieberman). Senator Dodd similarly voiced his belief that:

> no democracy can thrive – if indeed survive – if it is awash in massive quantities of money; money that threatens to drown out the voices of the average voter of average means; money that creates the appearance that a wealthy few have a disproportionate say over public policy.

147 CONG. REC. S2435 (daily ed. Mar. 19, 2001) (Sen. Dodd). *See also, e.g.,* 147 CONG. REC. S2449 (daily ed. Mar. 19, 2001) (Sen. Collins); 148 CONG. REC. H350 (daily ed. Feb. 13, 2002) (Rep. Nadler); 148 CONG. REC. H342 (daily ed. Feb. 13, 2002) (Rep. Lewis).

This linkage between corruption and inequality underlies the Court's post-*Buckley* rulings on corporate campaign finance regulations, which aim "to ensure that substantial aggregations of wealth . . . should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by these contributions." *NRWC*, 459 U.S. at 207; *see also Austin*, 494 U.S. at 659-60; *and see* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1285 (1993) (with *Austin* the court "squarely acknowledged – for the first time in constitutional discourse – that inequalities of private economic power tend to reproduce themselves in the political sphere and displace legitimate democratic governance").

* * *

The First Amendment must stand in aid of, rather than opposed to, principles of political equality at the heart of this nation's identity. The challenge to the BCRA soft money ban poses the question famously asked and answered by James Madison: "Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people . . . ." FEDERALIST NO. 57, at 385 (J. Madison) (J. Cooke ed., 1961). In banning unlimited soft money gifts, Congress sought to preserve the public's faith in, and engagement with, the electoral process. It would be the saddest of ironies if the First Amendment's guarantee of freedom of speech were interpreted to bar such an effort.

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CONCLUSION

For the foregoing reasons, the Court should uphold the regulations contained in Title I of the Biparitisan Campaign Finance Reform Act of 2002 in their entirety.

Respectfully submitted,

BONITA TENNERIELLO
JOHN C. BONIFAZ
BRENDA WRIGHT
LISA J. DANETZ
NATIONAL VOTING RIGHTS
INSTITUTE
27 School Street
Suite 500
Boston, MA 02108
(617) 624-3900

DAVID A. WILSON
HALE AND DORR LLP
1455 Pennsylvania Avenue, NW,
10th Floor
Washington, DC 20004
(202) 942-8400

Attorneys for Amici

(20)

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In The
Supreme Court of the United States

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MITCH MCCONNELL,
UNITED STATES SENATOR, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

◆

On Appeal From
The United States District Court,
District Of Columbia

◆

BRIEF OF *AMICI CURIAE* BIPARTISAN FORMER MEMBERS OF THE UNITED STATES CONGRESS IN SUPPORT OF APPELLEES

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RANDY L. DRYER
Counsel of Record
J. MICHAEL BAILEY
H. DOUGLAS OWENS
PARSONS BEHLE & LATIMER
201 South Main Street
Suite 1800
Salt Lake City, UT 84145-0898
(801) 532-1234

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI*

Amici are former members of the U.S. Senate and U.S. House of Representatives (the "Former Members").[1] They are deeply interested in the Bipartisan Campaign Reform Act ("BCRA") and in this litigation because its outcome will shape the environment for federal elections for decades to come and have a profound impact on citizens' confidence in the integrity of federal elections and of the officials who are elected. This Court's decision will either bolster a nascent hope for meaningful campaign reform or cause a return to the pre-BCRA days of cynicism and disillusionment. The Former Members have devoted many years, for some most of their lives, to making representative government work in practice, including the real and gritty business of running for office. They hold a unique position among interested parties in that they (a) have studied and crafted federal campaign finance law, (b) have lived with its consequences as federal candidates, fund-raisers and officeholders, and (c) are free to criticize the fund-raising system they no longer rely on to remain in office. In those roles the Former Members have seen, firsthand, the growing influence and appearance of influence of big money and special interests on elections and the legislative process. They are also acutely aware of the resulting sense of disenfranchisement felt by so many citizens. Based on their experience and their exceptional knowledge of the system, the Former Members attest to the need to "clean up" the financing of federal campaigns and by so doing to restore the voters' confidence in the process. They believe the principles enacted by BCRA advance these worthy objectives.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

The Former Members who have joined in this brief are an impressive and diverse bipartisan group whose service in Congress and experience in federal elections spans the modern campaign era. The Former Members are identified in the Appendix. Collectively, they represent more than 500 years of elected public service at the federal level. They come from both sides of the political aisle with constituencies from all walks of life: young and old, poor and wealthy, urban and rural, educated and uneducated.

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SUMMARY OF ARGUMENT

Amici submit this brief to convince this Court of the profound necessity to sustain the reforms enacted by the Bipartisan Campaign Reform Act ("BCRA"). The Former Members are on intimate terms with the practical realities of campaign finance law. They know the effects of soft money on elections, and they know its effects on the legislative process. While serving in Congress, they witnessed the conflict between the ideal of representative government, where a representative's duty and exercise of judgment is owed to constituents and to the broader public interest, and the reality of raising the enormous sums of money needed for the next election. They hope that their experience will demonstrate to the Court the compelling need for reform. They believe that the benefits of BCRA in serving the values of a democratic republic do not come at the expense of free speech or vigorous electioneering. Indeed, BCRA will expand the number of voices participating in elections. BCRA will move elections closer to the ideal of a contest of ideas among all interests and away from recent trends of elections as contests only among moneyed interests. BCRA will help check a growing cynicism in the electorate and foster greater participation in campaigns at the grass roots level and in voting itself.

The Former Members wish to underscore that the campaign finance system that existed before BCRA corrupted and undermined the legislative process in that it often altered legislative outcomes by elevating moneyed interests at the expense of the broader public interest. Members of Congress are induced to offer their time and attention to donors, and in particular to large donors. Regrettably, but undeniably, it is a fact of political life that members of Congress are often more attentive to those who donate money to them or to their political party than to those who do not. Large donations are the lifeblood of any campaign. Money leads to preferential access, and access means influence. Through such "access," large donors are able to influence legislation to their advantage, often to the detriment of the overall public interest. Members of Congress quickly learn that if they do not provide time and attention to large donors, and if they do not act to influence or acquiesce in legislative decisions favoring such large donors, then they and their party are likely to be at a serious disadvantage. As former Senator Paul Simon bluntly stated, "When people have donated $50,000 or $100,000, they are going to want their pound of flesh after the election." Declaration of Senator Paul Simon ("Simon Decl.")[2] ¶ 15. The expectation is unwritten, but is often honored nonetheless.

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[2] This and the other declarations cited herein from former and current members of Congress are in the record and were cited in the opinions below. *See, e.g.*, Memorandum Opinion of Judge Kollar-Kotelly (D.D.C. May 19, 2003), *reprinted in* Appellants' June 2003 Supplemental

(Continued on following page)

Foes of BCRA claim that all is well so long as there is no *quid pro quo* between the donor and the officeholder. The reality is that serious, if incremental, corruption occurs without any explicit *quid pro quo* agreement. The *quid* is given with the expectation that the *quo* is, or soon will be, on its way. Those expectations are rewarded often and amply enough to keep everyone playing the game. Even where the expectation is not fulfilled, the perception remains among others in Congress and in the public at large that money "opened the door" or "greased the wheels" of government.

The Former Members want to emphasize that most of their colleagues serving then and now are upright and honest men and women who are doing their best to serve the public. Cases of personal venality and individual corruption are quite rare. Nonetheless, the corrosive effect of the money chase on the institution of Congress overall and the public's perception of it are not in dispute.

BCRA does not end all campaign donations, of course, so it does not remove all temptation to favor donors. But BCRA will effectively end the single worst temptation – the unlimited soft money donations that function with essentially the same effect and influence as direct campaign donations.

If unchecked by BCRA, donors will continue to use soft money loopholes to avoid the key provisions of pre-BCRA law, including the requirements to disclose the identity of donors, limit the amount of donations, and prohibit donations from corporations and unions. In reality, BCRA does little more than reimpose the limits on campaign finance practices that this Court has previously found to be constitutional.

These soft money loopholes are primarily exploited by means of the so-called "issue" advertisement. Issue advertisements purport not to advocate the election of a particular candidate; that is a fiction believed nowhere, but relied on everywhere to skirt the prior law. Virtually every member of Congress has either benefited from or been pilloried by an issue advertisement. Because candidates for federal office ultimately learn the source or sources of funding for most of these advertisements, large soft money donations funding them present a serious potential for undue influence.

The Former Members are very familiar with negative attitudes held by the public toward government in general and toward big-money politics in particular. This public cynicism is based on a perception that a citizen without great wealth cannot effectively participate in government. Such cynicism is supported by an observation of pre-BCRA campaign and legislative practices. The belief that "money talks," and that *only* "big money" talks effectively, corrodes the foundation of American democracy by conveying to average non-wealthy citizens a sense that their participation does not matter. The Former Members believe that upholding BCRA will do much to expand the depth, breadth and authenticity of political speech occurring in an election, and rather than curtail speech will encourage every citizen, regardless of wealth, to take part in his or her government.

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Appendix to Jurisdictional Statements, Vol. II. The declarations can also be found at www.campaignlegalcenter.org.

ARGUMENT

The growing use of the soft money loophole in the Federal Election Campaign Act (FECA), Pub. L. No. 93-443, 88 Stat. 1263, 2 U.S.C. § 431 *et seq.* (1974), can be chronicled with numbers and statistics. For the 1992 elections, the two major parties raised $86 million in soft money. This amount roughly tripled for the 1996 elections and then nearly doubled again to $495 million in the 2000 election cycle. Memorandum Opinion of Judge Kollar-Kotelly (D.D.C. May 19, 2003), *reprinted in* Appellants' June 2003 Supplemental Appendix to Jurisdictional Statements Vol. II (hereinafter "Kollar-Kotelly Op.") at 489sa. Soft money accounted for 42 percent of the spending by the national political parties in the 2000 presidential election. Kollar-Kotelly Op. at 491sa *citing* Expert Report of Thomas Mann at 24-25. Yet this exponential growth only begins to tell the story. *Amici* here witnessed firsthand the harm caused by exploitation of the loopholes closed by BCRA, including distortions in policy-making favoring large donors and the demoralization of the electorate.

Our republican form of government depends upon the essential trust of the people – trust in their elected representatives to serve the public interest and the common weal. The Former Members believe that BCRA is necessary to combat the dry rot eating at that element of trust and at republican government itself. They believe that BCRA will help restore integrity to the federal electoral process, mend the damaged trust with the electorate, and improve and expand political discourse in this country. The Court should take notice of and credit their firsthand observations concerning the practices BCRA is designed to correct and the overwhelming need for the reforms BCRA makes. Similarly, the Court should give deference to the Congress

that enacted BCRA in that campaign finance reform is squarely within its area of special expertise.[3]

I. BCRA WILL HELP RESTORE INTEGRITY TO NATIONAL POLITICS BY ENDING LARGE SOFT MONEY DONATIONS.

A. The National Parties Expect Members of Congress to Raise Soft Money, and Members are Rewarded or Penalized Accordingly.

BCRA was passed in part to reform the manner in which members of Congress ("Members") raise money for their respective political parties. Under the prevailing pre-BCRA regime, Members were expected to raise significant amounts of soft money for their party committees, were given incentives to do so, and could face sanctions if they did not. The party committees usually asked Members to solicit additional contributions from persons who had already donated the maximum possible amount to the Member's election campaign. The party committees kept track of how much each Member raised, and this governed in large part how much money the party was willing to spend on that Member's election campaign. Members were asked to make the calls to raise the money because donors preferred to give with the knowledge of a Member, thus gaining favor in the Member's sight. Donors often gave to a party committee with the understanding that the funds would go on the "tally" or be credited to the "account" of a particular candidate and be used to help with his or her campaign. Party committee officials regularly informed Members of large donations and who made them.

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[3] *See FEC v. Beaumont*, 123 S. Ct. 2200, 2207 (2003) ("[D]eference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages."); *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments. . . . "); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) ("[C]areful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference. . . . ").

Most donors were well aware that Members could take direct credit for their donations to the parties, and would specifically inform the Member when they made a party donation. An experience typical for the Former Members is that of Senator David Boren: "Like other Senators, I was expected to 'sell a table' and attend these [fund-raising dinners], and, from time to time, I did. Sometimes, lobbyists called me or other Senators, offered to buy a 'table' for the corporation they represent and then offered to 'make sure the donation goes on your tally.'" Declaration of Senator David Boren ("Boren Decl.") ¶ 5. Senator Dale Bumpers recounts: "The last time I ran, I remember that the DSCC [Democratic Senatorial Campaign Committee] promised to give every candidate a minimal amount of money regardless of whether he or she did any fundraising for the DSCC. To get more than the minimum, however, you had to raise money for the DSCC. For example, if I had helped the DSCC raise the maximum amount it could legally expend on my behalf, I certainly would have expected the maximum to come back to me." Declaration of Senator Dale Bumpers ("Bumpers Decl.") ¶ 11. The Former Members have had similar experiences.

Conversely, Members who did not raise soft money often were penalized. The party committees withheld donations to candidates who did not raise money for the party. "I . . . tried to minimize the time I spent raising 'soft money' for the Democratic Party, and as a result, I received almost no money from the Democratic Party for my campaigns. At the time, the DSCC and other national party organizations kept records or 'tallies' of how much soft money a Senator had raised for the party. The DSCC then gave little money to the campaigns of those Senators who had not raised adequate party funds." Boren Decl. ¶ 4. This experience is similar to that of the Former Members in both parties, who also saw particular soft money expectations levied by leadership on colleagues who held seats on the most powerful committees. There is an inseverable link between the national political parties, their congressional fund-raising committees and federal candidates. Large contributions to national parties and their committees pose the same risk of corruption or appearance of corruption as large contributions by individuals directly to candidates themselves. The latter have been banned by Congress and upheld by this Court for decades.[4] BCRA merely prevents individuals and others from doing indirectly what they cannot do directly.

Soft money is used less and less for traditional, grassroots, party-building activities, and more and more for electioneering. This should be expected because it is axiomatic that the primary function of political parties is to get their candidates elected. Moreover, this Court has recognized that expenditures of candidates and of political committees "are, by definition, campaign related." *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). As Senator Bumpers stated: "Political parties' primary interest is in supporting and electing their candidates. The parties are money raisers, and they spend the money they raise to assist their candidates in campaigns." Bumpers Decl. ¶ 4. As set forth below, this campaign spending typically takes the form of so-called "issue" advertising.

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[4] *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Beaumont*, 123 S. Ct. 2200 (2003).

B. Soft Money Donations Unavoidably Corrupt the Legislative Process.

In establishing a democratic republic, the Founders intended elected officeholders to cast their votes and make other decisions based on some combination of their own judgment, the preferences and expectations of their constituents, and a regard for the larger public interest. This ideal is undermined by current practices relating to soft money.

Because soft money donations are so large compared to hard money donations, the soft money donations heavily influence Members in the legislative process. And because legislative leaders are especially interested in and informed about these donations, the effect on key leadership decisions, such as taking party positions and scheduling bills for consideration, are particularly susceptible to undue influence.

Of course, it would be against the law for an explicit *quid pro quo* to exist between Member and donor. But the relationship need not be an explicit one to effectively corrupt the legislative process. As this Court observed in its recent decision in *FEC v. Beaumont*, 123 S. Ct. 2200, 2207 (2003), "corruption" is to be "understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence."

1. Large Donors Enjoy Disproportionate Access to Members of Congress.

In the pre-BCRA system, many Members granted greater "access" to large soft money donors and raised money from donors for whom they made favorable legislative decisions. In turn, donors gave financial support to Members perceived to be sympathetic and willing to further the donors' legislative agenda. Whatever the cause and effect relationship in a given instance, the cumulative effect and appearance are suspect.

It is only natural that a busy member of Congress with ten minutes to spare will spend those minutes returning the call of a large soft money donor before or instead of the call of other constituents. Money equals access which equals influence. Former Senator Paul Simon's testimony filed with the court below is illustrative of the views of the Former Members:

> Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions. When you increase the amount that people are allowed to give, or let people give without limit to the parties, you increase the danger of unfair access.

Simon Decl. ¶ 16.

Party committee officials often promised large donors access to Members in return for contributions. Perceiving that their political survival depended on it, Members and their staffs easily recalled who their party's large donors were and usually were eager to grant requests for attention.

> No matter how busy a politician may be during the day, he or she will always make time to see

> donors who gave large amounts of money. Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.

Declaration of Senator Alan K. Simpson ("Simpson Decl.") ¶ 9.

The congressional community is not large. Members know which lobbyists represent large donors. Large donors and Members attend conferences, briefings, retreats, golf outings and dinners together on a frequent basis. Each group needs what the other has. It is natural that Members should feel beholden to the donors. Donors and their representatives communicate openly with Members about financial matters, notifying them when large donations to the party have been made, sometimes even preferring to hand the checks directly to the Members. Members and donors often do not discuss matters pending in Congress at the same time that donations are discussed. This formality helps to insulate the transaction from becoming a *quid pro quo.* But even at fund-raising events it is not uncommon for the donor to mention a desire to see the Member at some subsequent time about a matter of interest. Though most donations are made without specific intention of asking for something in return, donors are aware that their donation will afford them access when they need it.

The Former Members stress that it was exceedingly rare for a Member to make a particular legislative decision because of a particular past or expected donation. The system was much more subtle and incremental than that. Even as the vast majority of individual Members have never "sold" a vote, it is just as true that the influence of campaign donations is so pervasive that it acts as an invisible hand to guide and nudge outcomes in ways that causation is always "plausibly deniable."

The larger the donation, the greater the access. "Sometimes, the party asked us to solicit soft money for attendance at events that included access to the president; other times major donors were given access to certain lawmakers. The more money one donates, the higher-level players he or she has access to." Simpson Decl. ¶ 4.

The Former Members are convinced that the reason most large donors give to political parties is because the donors believe they will receive special access to and influence over government officials, even as most also feel their cause is legitimate or even altruistic. Donors also believe, with ample justification, that if they do not make large donations when requested by Members, those officials will pay less attention to their views and positions or even favor those with opposing views. Because Members need donations to survive politically, and because donors need the access their donations obtain for them, and because an opposing party or competing donor is usually ready to fill any vacuum in the system, neither the Members nor the donors can afford to "unilaterally disarm" by opting out of the fund-raising "arms race." In order to reform the system, it takes legislation like BCRA to level the playing field for all involved.

2. Large Donors Exercise Disproportionate Influence on the Legislative Process.

The Former Members believe that the pre-BCRA system distorted and corrupted the legislative process in ways ranging from the subtle to the blatant. As noted, Members make time to meet with large donors or their representatives. Such meetings "are not idle chit-chats about the philosophy of democracy," as Senator Warren Rudman describes them.

> In these meetings, these special interests, often accompanied by lobbyists, press elected officials – Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party – to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so you should do this to help us." No one needs to say it – it is perfectly understood by all participants in every such meeting.

Declaration of Senator Warren Rudman ("Rudman Decl.") ¶ 7. The Former Members can attest to the accuracy of Senator Rudman's description. The access afforded to large donors to, at a minimum, make their case, gives them a substantial advantage. A large donor is much more likely than others to be successful in inducing legislative decisions that benefit the donor.

The Former Members have witnessed specific examples of legislation affected by the influence of large money donors. Senator Simon recounts one such incident:

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next-to-last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last two-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties.
>
> I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, "I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread." I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.

Simon Decl. ¶¶ 13-14.[5]

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[5] Senator John McCain, one of BCRA's sponsors, describes another:

> In June 1998, it was widely reported that during the Senate's consideration of a bill entitled the National Tobacco Policy and Youth Smoking Reduction Act (S. 1415), U.S. Senator Mitch McConnell, then head of the National Republican Senatorial Committee, talked at a Republican Senators' policy lunch about political advertising by major tobacco manufacturers. In a complaint it filed on June 29, 1998 with the Federal Election Commission, the Campaign for Tobacco-Free Kids characterized Senator McConnell's communications as follows: "Based upon reports that have been widely published in the news media, only hours before Republican Senators were due to vote for or against cloture on S. 1415, Senator Mitch McConnell informed his colleagues in a closed door meeting that if they voted to kill the tobacco bill, the major tobacco manufacturers were promising to mount a television ad campaign to support those who voted against the bill." [citation omitted] I was present at the meeting and this is an accurate report of what Senator

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The examples from both parties are abundant. Current Senator John McCain recounts how, while a bill was pending to get generic drugs to market faster, the Republican senatorial and congressional campaign committees held a gala dinner that raised nearly $30 million in mostly soft money, a substantial portion of which came from pharmaceutical companies. McCain Decl. ¶ 11. He also witnessed the "hijack[ing]" of telecommunications deregulation legislation that ended up "filled with internal inconsistencies designed to appease . . . competing donors rather than to serve the public interest," and he saw the demise of an important amendment to the Sarbanes-Oxley corporate governance bill based on the opposition of large donors to the parties. McCain Decl. ¶¶ 9-10.

Warren Rudman describes how "[s]ome large donors will ask for help with personal causes, such as immigration matters, tax reform, or political appointments. Others attend meetings with elected officials in order to voice their company or industry's concerns with particular legislation and to affect the outcome of the legislation." Rudman Decl. ¶ 8. He concludes that "[e]lected officials may not intend to be affected by such access, but the fact is that they receive a disproportionate amount of input and advice from larger, more wealthy contributors. This can skew their judgment." *Id.*

The Former Members can recount witnessing instances when favors for soft money donors were dispensed in a number of ways, including tactical parliamentary

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McConnell said. This episode graphically indicates that corporate soft money is widely used to influence legislative votes.

Declaration of Senator John McCain ("McCain Decl.") ¶ 8.

maneuvers such as the offering of amendments, mobilization of support or opposition, and speeding or delaying action. The Former Members join with Senator David Boren when he says "I know from my first-hand experience and from my interactions with other Senators that they did feel beholden to large donors." Boren Decl. ¶ 8. Such feelings are openly acknowledged in moments of candor:

> I remember specific instances when Senators' votes were affected by the fear of losing future donations. One time, Senator Bob Dole and I were seeking votes on an important national issue. More than once, we heard a Senator tell us, 'I realize it's an issue of great importance, but if I vote for that I won't get any more money. I want to be here for another term. You do want me back here next year, don't you?' These senators know that it's a bad idea to poison the well that nourishes the system.

Simpson Decl. ¶ 11.

Of course, special interests are not limited to making soft money donations, and critics of reform might protest that soft money is no more corrupting than hard money. The Former Members simply state to the contrary that soft money carries more risk for the simple reason that the donations are so much larger. Hard money donations are limited in size. Soft money donations are in effect unlimited. These large, soft money donations, both past and anticipated, are more prominent in the minds of the Members. The Members know, in deciding on a vote or parliamentary tactic, that a lot of money can ride on what they are about to do. They do not necessarily change their minds for that reason, but there is an insidious effect on the psychology of the institution. Quite humanly, Members may hope for an easier time fund-raising in the next election cycle, or they may fear a more difficult effort. They know that "[w]hen people have donated $50,000 or $100,000, they are going to want their pound of flesh after the election." Simon Decl. ¶ 15. The recipients of such donations know that the piper must be paid, or at least respected: " . . . many Members of this body pause at least once to ask themselves how a vote will affect their contributions when they should be asking solely how it will affect this great Nation." 148 Cong. Rec. H373 (2002) (Statement of Rep. Baird). Again, these effects are magnified in the case of critical decisions by leadership.

Members often seek out positions on powerful committees, such as the Senate's Finance Committee or the House's Ways and Means, in part because it is easier to raise money from those positions. Most of this money is raised from donors who have matters of interest pending before these committees. The party committees and leaders in turn expect the Members on these powerful legislative committees to raise more soft money for the party committees.

The overwhelming principle motivating donors is the need to obtain access and influence. This is particularly clear in light of the frequent practice of making large donations to both parties. Forty of the 50 top soft money donors in 1996 donated to both parties, as did 35 of the top donors in 2000. Kollar-Kotelly Op. at 619sa-620sa *citing* Expert Report of Thomas Mann tbls. 5-6). This seemingly contradictory behavior is in fact easily explained by the need donors feel for access on both sides of the aisle and by a fear, based on experience, that they will be ignored or even punished by one party if they give only to the other. Many donors are left feeling "shaken down" for their money.

Remaining in office is a form of personal benefit to a Member of Congress. Members enjoy financial and other emoluments and privileges and a status not available to most citizens. These benefits are hard earned and deserved. Indeed, many Members make tremendous personal financial and other sacrifices in order to serve the public. Nonetheless, most Members desire to continue in elected office. Their desire requires reelection, and their reelection campaigns depend on raising huge sums of money. The money necessary to deter or defeat opponents and win reelection increasingly comes from large donors and political parties, often in the form of soft money.

Pre-BCRA practices involving soft money exploited loopholes in the previous election law, and turned that law on its head. Indeed, BCRA's sponsor said that BCRA's purpose is "to enforce the 1907 law banning corporate treasury money, the 1947 [law] banning union dues money, and enforce the 1974 law banning unlimited sums of money." 148 Cong. Rec. H346 (2002) (Statement of Rep. Shays). BCRA is designed to restore force and effect to these earlier statutes, which have already been upheld by this Court.

The Former Members urge the Court to consider their experience. The current system of political fund-raising is badly in need of repair. The process of donation to Members, followed by access and favor granted by Members, followed by further donation to Members, is inherently corrupting at the institutional level even though the participants are well intentioned and do nothing legally wrong. This cycle reinforces itself when donors tend to ignore Members who do not provide access and favors, and Members tend not to provide access and favors to those who do not donate. The circle is complete without the necessity of a *quid pro quo*. *Quid* regularly followed by *quo* is amply sufficient. BCRA removes the most powerful force in this cycle – soft money.

C. Soft Money Donations Unavoidably Corrupt the Electoral Process.

Beyond the distortions to the legislative process, soft money is also deleterious to the electoral process under the pre-BCRA system. It is soft money that fuels the abuses associated with "issue advertisements" and "coordinated expenditures." An issue advertisement simply masks the otherwise illicit infusion of soft money into congressional elections through a charade-like and formalistic compliance with the law. Issue advertisements studiously avoid a "direct" pitch to the public to vote one way or another, instead making that pitch indirectly (but still effectively) by urging support or opposition to a particular issue and then tying that support or opposition to a particular candidate with statements such as "tell him [the opponent] to quit doing that." Most issue advertisements run in the periods immediately prior to elections, so it is apparent they are not intended to provoke debate on the issues of the day, as their name might suggest. Voters get the very obvious message that they should vote for or against Congressman X. It is the Former Members' experience and belief that the so-called "express advocacy" test to determine whether a campaign advertisement comes within the scope of FECA is so easily avoided as to render meaningless the ban on companies and unions using treasury funds to pay for advertisements designed to influence federal elections.

By law, advertisements paid for with soft money must be sponsored and funded by outside organizations or the parties themselves. Additionally, the sponsors of the advertisements must avoid explicit coordination of their

advertisements with the campaign in question. Otherwise, the cost of the advertisements is considered to be an in-kind contribution to the campaign, which may be illegal if funded by soft money. Explicit coordination with the campaign is unnecessary because election consultants who have no formal ties to campaigns are perfectly capable of analyzing what message will be useful to elect or defeat a particular candidate. Candidates rarely take action to stop issue advertisements they perceive as helpful.

The coordination between the candidate and the sponsor can take other indirect forms, such as when the consultants producing the advertisements work for other candidates for federal office in the same areas where the advertisements run. Consultants or staffers sometimes move freely from a job working for a candidate to one working for the sponsoring advocacy group and vice versa. Political parties can also be the conduit for information between campaigns and advocacy groups. Sometimes political parties loan persons to assist campaigns with their media. These persons may also serve unwittingly as a conduit between a political party and the campaign. With such overlaps, polling data and other research and advice often are shared. While these relationships and behaviors effectively coordinate soft money expenditures with the campaign, the "independent" expenditures are not counted as campaign contributions under FEC decisions that narrowly and unrealistically define coordination as "substantial discussion" about the coordinated communication. *See, e.g., FEC v. The Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999).

There is ample evidence that political parties, party committees and candidates for office manipulate this soft money loophole to their advantage. Candidates or others associated with them sometimes circumvent limits applicable to donations to campaigns by suggesting that donors contribute to the interest groups that run the issue advertisements. Members are frequently favorably disposed towards such donors just as they would be to other soft money donors.

Specific examples of the circumvention of pre-BCRA election law abound. "The national Democratic party managed to finance two-thirds of its pro-Clinton 'issue ad' television blitz by taking advantage of the more favorable allocation methods available to state parties. They simply transferred the requisite mix of hard and soft dollars to party committees in the states they targeted and had the state committees place the ads." Mann Expert Report at 22, *quoted in* Kollar-Kotelly Op. at 494sa. Republicans engage in the same types of conduct:

> [The group "Republicans for Clean Air"] sponsored ads praising then-Governor George W. Bush and criticizing Senator John McCain before the 2000 Republican presidential primaries in three states. Eventually, after the first of these primaries (South Carolina's) reporters uncovered that Republicans for Clean Air consisted of two brothers, Charles and Sam Wyly, long-time friends and supporters of Governor Bush. Charles Wyly, in fact, was an authorized fundraiser for the Bush campaign. . . . [I]t is impossible to imagine officials of the Bush campaign were in the dark about Republicans for Clean Air. According to press estimates, the Wylys spent $25 million on their ads for Governor Bush. [internal footnote omitted] We find it inconceivable that an expenditure of that magnitude could remain unknown to the small circle of financial leaders close to both the Bush campaign and the Wylys (including Charles Wyly himself) or the even smaller circle of Republican media consultants.

Jonathan S. Krasno & Frank Sorauf, *Issue Advocacy and the Integrity of the Political Process, in* INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 189, 194-95 (Anthony Corrado et al. eds., 2003).[6]

It is apparent to the Former Members that soft money is not being used by the parties for state and local elections or for other party-building activities, as FECA contemplates. The national parties raise soft money and work through state parties to influence federal elections. Party-sponsored soft money advertisements increasingly have become explicit electioneering. Parties and their committees are almost never mentioned in the advertisements for which they pay. In 2000, for example, 92% of the advertisements paid for by the parties did not even identify the name of the party. None encouraged voters to register with the party or to volunteer in support of the party. Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000* at 64 (2001), *quoted in* Kollar-Kotelly Op. at 507sa. But 99 percent of such ads in 2000 mention candidates, 51 percent name the opposing candidate, 17 percent name the party's candidate, and 32 percent name both candidates. Jonathan S. Krasno & Frank Sorauf, *Why Soft Money Has Not Strengthened Parties, in* INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 49, 51 (Anthony Corrado et al. eds., 2003).

The soft money exception has swallowed the rule. Such blatant disregard of campaign contribution limits by the combination of soft money and issue advertisements should not be permitted. It can best be corrected by upholding BCRA.

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[6] Jonathan Krasno is a Visiting Fellow at Yale University's Institute for Social and Policy Studies. Frank Sorauf is a Regents' Emeritus Professor of Political Science at the University of Minnesota. Both filed expert testimony for the Appellees in the Court proceedings below.

Generally, the public needs to know the true source of an advertisement in order to fairly assess it and assign a degree of credibility. Another problem with issue advertisements not paid for by party committees is that they frequently are paid for with money filtered through nominal "committees" that do not disclose in any meaningful way how or by whom they are funded. While pre-BCRA law requires the sponsor to identify itself at the end of the advertisement, such identification can be the name of an entity created to conceal the identity of the true sponsor. The lack of full disclosure of receipts and expenditures for issue advertisements undermines the candor and financial transparency that should be present in elections. The secrecy creates opportunity for corruption, since the public does not know who is paying for advertisements that benefit a candidate.

Disclosure was one of the primary objectives of FECA, and was seen by this Court as a substantial guard against corruption. As this Court has held, "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Buckley*, 424 U.S. at 67. Without BCRA, the disclosure requirements of FECA can be evaded. BCRA will restore it to efficacy.

II. BCRA WILL HELP RESTORE OUR CITIZENS' FAITH IN DEMOCRACY.

A. BCRA Mitigates the Appearance of Corruption.

This Court has repeatedly held that the public perception of the probity of elected representatives is an important and sufficient governmental interest.[7] BCRA was passed, in part, not only to address actual corruption, but to address the appearance of corruption, an issue this Court has previously noted as being of grave concern to our democracy. In *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 390 (2000), the Court warned that the " . . . cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." BCRA was Congress's response both to the wholesale evasion over time of the principles underlying the FECA and to the growing appearance of corruption and its corrosive effect.

As the district court noted, in the 2000 election cycle almost a half billion dollars in soft money was contributed to the national parties by corporations, unions and wealthy individuals. Memorandum Opinion of Judge

---

[7] This Court has stated that legislation may be justified by a government's interest in preventing the appearance of corruption in addition to actual corruption. *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (affirming the "importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption"); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

Richard J. Leon (D.D.C. May 1, 2003), *reprinted in* Appellants' June 2003 Supplemental Appendix to Jurisdictional Statements Vol. IV at 1189sa; Kollar-Kotelly Op. at 491sa. Although these funds were ostensibly not made for the purpose of influencing the outcome of federal elections, the Former Members' experience demonstrates that the public believes the opposite – and for good reason. The Federal campaign law prior to the enactment of BCRA had become so riddled with loopholes, and large contributors had become so adept at exploiting these loopholes, that the safeguards against corruption and the appearance of corruption were rendered meaningless.

The pervasive public cynicism about the electoral process is directly linked to the perception that a citizen without great wealth cannot effectively participate in government. Too many citizens believe that "money talks" and that only "big money" talks with any effectiveness. This belief leaves non-wealthy citizens with a sense that their participation does not matter and so corrodes the foundation of participatory democracy. The health of republican government will be strengthened when a major corrupting influence, one that is obvious to the average voter, is curtailed. Nearly three-quarters of voters believe that their congressional representatives sometimes decide how to vote on an issue based on what their party's big donors want. Mark Mellman & Richard Wirthlin, *Public Views on Party Soft Money, in* INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 267 (Corrado, Mann & Potter eds., 2003). Campaign laws and practices which, without BCRA, seem to the public to be designed to discourage voter participation and diminish public confidence in government and in the electoral process are a shame. BCRA will help end that shame. The Former Members believe that this Court's affirmation of BCRA and BCRA's underlying principles will do much to restore the faith of the citizenry in our democratic processes by mitigating the appearance of corruption.

B. BCRA Enhances Political Participation and Discourse.

BCRA will strengthen the electoral process by fostering a greater role in that process for the individual voter and small contributor, a role that prior legislation sought to protect, but which soft money practices have trampled. BCRA's opponents assert that it will impinge free speech. To the contrary, the Act will expand the speech opportunities for the vast majority of "ordinary" citizens in the electoral process.

The Constitution establishes a system where the Members of Congress represent the people of a particular state or district. Soft money practices effectively undermine and distort that system, affording soft money donors influence that eclipses that of the average voter and average donor. Their voices are lost when Members grant disproportionate access and other attention to soft money donors. Senator Simon has expressed the Former Members' views in this regard:

> In a very real sense, we are going through the old fight between Thomas Jefferson and Alexander Hamilton: should propertied interests have preference in what goes on in government? And our answer, with our present system of financing campaigns, is yes, people with money are going to be given greater influence, because their names are going to be recognized. They are going to have greater access than those who did not contribute. The soft money system is the most egregious part of the abuse of political contributions resulting in preferred access.

Simon Decl. ¶ 17.

The voices of the average voter and the average small donor are drowned out when a flood of soft money, from undisclosed sources, pours into a race. Those citizens see and understand what is going on, and they are discouraged from participating and even from voting. As money tends to compromise the elected, it also serves to disenfranchise the electors. Any true competition of ideas has little chance when faced with the financial conglomerate of special interests. Such distortions have been curbed in the past with this Court's approval, and the Former Members respectfully urge the Court to uphold BCRA, which was Congress' long-fought effort to eliminate the worst abuses in the campaign finance system.

BCRA will go far to counter the dismay with which people react to the big money politics of the recent past. The Former Members have remained active in public affairs in many different ways and continue to have extensive opportunity to listen to the public on matters of concern. They continue to encounter the palpable cynicism about government in general and soft money politics in particular they experienced while in office. One of the issues most frequently mentioned is campaign finance and soft money. The public is angry and frustrated with government officials who often appear to be for rent. The public is convinced that Members and other federal officials are beholden to special interests who bankroll campaigns through unlimited soft money donations. They believe that these interests have far too much sway over their representatives, and they believe their own votes, their own participation in grassroots activities, and their own small donations do not count for much. These beliefs generate the apathy, indifference and low voter turnout that cut at the very root of American democracy. Representative democracy is seriously damaged when so many citizens believe they have no meaningful opportunity to participate in government because they lack the financial resources to compete with rich and powerful donors.

BCRA stands for the proposition that the national government is not for sale to the highest bidder, and it welcomes and encourages the participation of the average citizen. Without that participation, the American political system is in peril. Senator John Glenn, once a candidate for this country's highest office, framed the issue clearly:

> I hope that when the courts review this law, they consider what the future of this country is going to be. In this case, the courts will be dealing with an issue that is going to be a key part of whether this country continues to look at itself as a country that represents every citizen's interests equally, or whether we go back toward that oligarchy from which we escaped in 1776. Yet the great thing about this country is that there is no such thing as an average citizen. Under the Constitution, every citizen should be considered equal and supreme. If we get away from that, we get away from what makes this country great.

Declaration of Senator John Glenn ¶ 7.

CONCLUSION

BCRA's reforms were designed principally to restore the integrity of the Federal Election Campaign Act, to address the fundamental concerns expressed in *Buckley v. Valeo* regarding corruption and the appearance of corruption, and to stop the massive use of soft money to circumvent the constitutionally approved limitations on campaign contributions. This Court should give effect to

BCRA's objectives and affirm and reverse the decision of the Court below accordingly.

Respectfully submitted,

RANDY L. DRYER
Counsel of Record
J. MICHAEL BAILEY
H. DOUGLAS OWENS
PARSONS BEHLE & LATIMER
201 South Main Street
Suite 1800
Salt Lake City, UT 84145-0898
(801) 532-1234

August 5, 2003

APPENDIX

The Former Members who have joined in this brief are an impressive and diverse bipartisan group whose service in Congress and experience in federal elections spans the modern campaign era. Collectively, they represent more than 500 years of elected public service at the federal level. They come from both sides of the political aisle with constituencies from all walks of life: young and old, poor and wealthy, urban and rural, educated and uneducated. They are listed below:

Representative John B. Anderson served as a Republican U.S. Representative from Illinois from 1961 to 1981. He was a candidate for President of the United States in 1980.

Representative Michael D. Barnes served as a Democratic U.S. Representative from Maryland from 1979 to 1987.

Representative Thomas M. Barrett served as a Democratic U.S. Representative from Wisconsin from 1993 to 2003.

Representative Anthony Beilenson served as a Democratic U.S. Representative from California from 1977 to 1997.

Representative James H. Bilbry served as a Democratic U.S. Representative from Nevada from 1987 to 1995.

Representative Robert A. Borski served as a Democratic U.S. Representative from Pennsylvania from 1983 to 2003.

Senator Leslie L. Byrne is currently a Virginia State Senator. She served as a Democratic U.S. Representative from Virginia from 1993 to 1995.

Representative Bob Carr served as a Democratic U.S. Representative from Michigan from 1975 to 1981 and 1983 to 1995.

Representative William F. Clinger served as a Republican U.S. Representative from Pennsylvania from 1979 to 1997.

Representative Barber B. Conable, Jr. served as a Republican U.S. Representative from New York from 1965 to 1985.

Representative Sam Coppersmith served as a Democratic U.S. Representative from Arizona from 1993 to 1995.

Representative William J. Coyne served as a Democratic U.S. Representative from Pennsylvania from 1981 to 2003.

Representative Thomas J. Downey served as a Democratic U.S. Representative from New York from 1975 to 1993.

Senator Thomas F. Eagleton served as a Democratic U.S. Senator from Missouri from 1968 to 1987.

Representative Don Edwards served as a Democratic U.S. Representative from California from 1963 to 1995.

Representative Ben Erdreich served as a Democratic U.S. Representative from Alabama from 1983 to 1993.

Representative Peter Hoagland served as a Democratic U.S. Representative from Nebraska from 1989 to 1995.

Representative Elizabeth Holtzman served as a Democratic U.S. Representative from New York from 1973 to 1981.

Representative James P. Johnson served as a Republican U.S. Representative from Colorado from 1973 to 1981.

Representative Robert Kastenmeier served as a Democratic U.S. Representative from Wisconsin from 1959 to 1991.

Representative John J. LaFalce served as a Democratic U.S. Representative from New York from 1975 to 2003.

Representative Elliott H. Levitas served as a Democratic U.S. Representative from Georgia from 1975 to 1985.

Representative Bill Luther served as a Democratic U.S. Representative from Minnesota from 1995 to 2003.

Representative James Maloney served as a Democratic U.S. Representative from Connecticut from 1997 to 2003.

Representative Marc Lincoln. Marks served as a Republican U.S. Representative from Pennsylvania from 1977 to 1983.

Representative Abner J. Mikva served as a Democratic U.S. Representative from Illinois from 1969 to 1973, September 1975 to 1979.

Vice President Walter F. Mondale served as Vice President of the United States from 1977 to 1981. He served as a Democratic U.S. Senator from Minnesota from 1964 to 1976. He was a candidate for President of the United States in 1984.

Representative Jim Moody served as a Democratic U.S. Representative from Wisconsin from 1983 to 1993.

Representative Constance A. Morella served as a Republican U.S. Representative from Maryland from 1987 to 2003.

Senator Charles H. Percy served as a Republican U.S. Senator from Illinois from 1967 to 1985.

Representative John Edward Porter served as a Republican U.S. Representative from Illinois from 1980 to 2001.

Representative Glenn Poshard served as a Democratic U.S. Representative from Illinois from 1989 to 1999.

Senator David Pryor served as a Democratic U.S. Senator from Arkansas from 1979 to 1997. He served as a Democratic U.S. Representative from Arkansas from 1966 to 1973.

Representative Patricia Schroeder served as a Democratic U.S. Representative from Colorado from 1973 to 1997.

Representative Karen Shepherd served as a Democratic U.S. Representative from Utah from 1993 to 1995.

Representative David E. Skaggs served as a Democratic U.S. Representative from Colorado from 1987 to 1999.

Representative Peter Smith served as a Republican U.S. Representative from Vermont from 1989 to 1991.

Senator Adlai E. Stevenson, III served as a Democratic U.S. Senator from Illinois from 1970 to 1981.

Representative Richard Swett served as a Democratic U.S. Representative from New Hampshire from 1991 to 1995.

Representative Jill Long Thompson served as a Democratic U.S. Representative from Indiana from 1989 to 1995.

Governor Lowell Weicker served as an Independent Governor for the State of Connecticut from 1991 to 1995. He served as a Republican U.S. Senator from Connecticut from 1971 to 1989. He served as a Republican U.S. Representative from Connecticut from 1969 to 1971.

Representative Howard E. Wolpe served as a Democratic U.S. Representative from Michigan from 1979 to 1993.

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v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

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FLOYD ABRAMS
SUSAN BUCKLEY
BRIAN MARKLEY
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

KENNETH W. STARR
Counsel of Record
EDWARD W. WARREN
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

(*additional counsel on inside cover*)

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
Frost Brown Todd LLC
400 West Market Street, Suite 3200
Louisville, KY 40202-3363
(502) 568-0222

Counsel in No. 02-1674

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[HIGHLY CONFIDENTIAL – COUNSEL ONLY]

DECLARATION OF WRIGHT H. ANDREWS

[DEV Vol. 6, Tab 1]

1. My name is Wright H. Andrews, Jr. I am an attorney and lobbyist at the Washington, D.C. firm of Butera & Andrews, specializing in government relations and federal legislative representations. I have been an active lobbyist before Congress since 1975. Prior to that time, I served as Chief Legislative Assistant to then United States Senator Sam Nunn (D-GA). Prior to forming Butera & Andrews, I worked in the government relations practice at the Washington office of the law firm of Sutherland, Asbill & Brennan. During my career, I have represented clients from throughout the nation and abroad, and they have included major corporations, trade associations, coalitions, and state governmental entities. I have worked with clients on a broad array of issues including environmental matters, federal taxation, banking, financial services, housing, and many others. I have served two terms as President of the American League of Lobbyists, and *Washingtonian* magazine named me as of "Washington's Top 50 Lobbyists." All matters attested to in this declaration are based on my personal beliefs and knowledge or information that I have acquired during the course of my lobbying career.

2. In the years I have been in this business, I have seen our federal campaign finance [2] system and its effect on the legislative process change dramatically -- and not for the better. Federal lobbyists, the interests we represent, and legislators increasingly operate in a legislative environment that is far too dominated by the campaign finance process, and its excesses are like a cancer eating away at our democratic system.

3. I am not an ivory-tower liberal, nor do I naively believe we can or should seek to end the influence of all money on politics. I have engaged in many activities most reformers abhor, including: (1) making thousands of dollars

in personal political contributions over the years, (2) raising thousands of dollars, including "soft money," for candidates and for both political parties, and (3) counseling clients on how to use their money and "issue ads" legally to influence the legislative and political process. I readily admit that I will continue, and perhaps even expand, my own campaign finance activities -- just as will many of my colleagues -- unless the rules are changed. But in this declaration, I will attempt to begin to illustrate how certain of these practices undermine the democratic process, and at the very least, create in the minds of many citizens the appearance of corruption or improper influence.

4. Broadly described, lobbying is the attempt to influence or sway a public official toward a desired action. Government officials are continuously making public policy decisions that affect the vital interests of individuals, corporations, labor organizations, religious groups, charitable institutions and other interests. In order to make informed policy judgments, public officials need to receive factual information from, and know the views of, affected interests. Interests have a legitimate and constitutionally protected right to advocate their views to public officials and lobbyists help provide information and convey their clients' positions. In doing so they perform an important service and play an integral role in our nation's democratic process.

5. In my experience, however, this type of basic involvement in the legislative process is alone insufficient to be effective in many instances in lobbying endeavors. To have true political clout, the giving and raising of campaign money for candidates and political parties is often critically important. Most federal elected officials have extremely expensive reelection campaigns. The costs of most federal campaigns today is especially high due to the expense of [3] broadcast media advertising, and officials know that they are often likely to face serious reelection risks unless they can raise large sums of money to pay for competitive levels of advertising.

6. It is overly simplistic and inaccurate to say that legislative outcomes are generally "purchased" by campaign contributions or expenditures. But there can be no doubt that political contributions serve at least two important political goals: securing access and building relationships.

7. Large donations often may help gain access to key decision makers, and may help ensure that the positions of a lobbyist's client are at least considered. Those who are able to provide the largest sums of money are often more likely to have more consideration given to their views. Not only does it help provide a foot in the door into a federal elected official's office and a chance to make the donor's pitch, but also it naturally may tend to foster a more sympathetic hearing.

8. Sophisticated political donors – particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups – are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. Sophisticated donors do not show up one day with a contribution, hoping for a favorable vote the next day. Instead, they build longer term relationships. The donor seeks to convey to the member that he or she is a friend and a supporter who can be trusted to help the federal elected official when he or she is needed. Presumably, most federal elected officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.

9. The donor's hope is that when it comes time for the federal elected official to make political decisions, he or she will help those who have supported them if possible. Of course, a candidate for whom one has raised money will not always act as the contributor wants; however, that candidate-turned-elected-official may exercise political discretion in favor of those [4] who have "helped" them often enough to

make the political support worthwhile from the donor's perspective.

10. Together, access and relationships help provide meaningful influence. Academics might refer to this as the "norm of reciprocity." Overly zealous reformers might call it "cozy backroom dealing." But the simple truth is that it is human nature for people to try if possible to help the people who help them; and in politics, help often involves money and exercising political discretion.

11. In Washington, D.C., tens of thousands of men and women now are professional lobbyists and represent virtually every type of interest. Most are honest, hard working and ethical. Many are largely focused on monitoring developments, and they may have little or no direct participation in the campaign finance process. Others are much more active in advocating positions, and many of them are likely to be more involved in campaign finance activities. Many of these lobbyists operate in a relatively narrow circle. They work discreet issues that are handled in specific committees, and they naturally target most of their campaign contribution activities on key members of these relevant committees. But, even for the later group, giving or raising political money, albeit important, typically is but one of numerous activities that they use to gain political influence.

12. The amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients infuse into the political system. Some lobbyists help raise large "soft money" donations and/or host many fundraising events for key legislators. Some simply represent a single client with very deep pockets and can easily reach into large corporate or union funds for "soft money" donations or other allowable expenditures that may influence legislative actions. Those who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly, the lobbyists with the most political clout.

13. Often, corporate clients seek their lobbyists' advice concerning how their money is best spent, whether it be by contributing their PAC's hard money directly to candidates, [5] donating soft money to the political parties, or funding independent expenditures such as broadcast "issue ads." Although the answer for each client will depend upon various circumstances, including the goals that client is working to achieve, unregulated expenditures – whether soft money donations to the parties or issue ad campaigns – can sometimes generate far more influence than direct campaign contributions.

14. For example, a properly channeled $100,000 corporate soft money donation to the national Republican or Democratic congressional campaign committees can get the corporate donor more benefit than several smaller hard dollar contributions by that corporation's PAC. Although the donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly other senior officials, are likely to remember the donation and to recognize that such big donors' interests merit careful consideration. Of course, parties with legislative interests also may give "soft money" to benefit a less senior federal elected official. The official may benefit by having the money go, for example, to his or her state party to be used for election related activity that will nonetheless help the officeholder in his or her campaign. Or, the donation might help fulfill fundraising commitments that the officeholder has made to his or her party or party committee. The official is likely to remember the helpful larger donation and donor.

15. From the perspective of many lobbyists' clients, a large soft money donation funded by the corporate treasury is relatively easy. By contrast, it usually takes a great deal of effort for the corporation to raise $100,000 in "hard money" in smaller, legally limited individual increments.

16. Today, many lobbyists often host a number of fundraisers. This phenomenon started with a few prominent lobbyists, but in recent years it has become very widespread within [6] the lobbying community. Whereas the political parties periodically organize "gala" events in large ballrooms filled with hundreds of donors, lobbyists now often prefer attending smaller events hosted by other lobbyists, with only ten or fifteen people participating, all sitting at a dinner or breakfast table with the invited guest elected official. This type event allows lobbyists a better opportunity to build more personal relationships and to exchange views.

17. Another practice used to secure influence in Washington is for an interest group to run so called "issue ads." "Issue ads" run in close proximity to elections may influence the outcome of the election. Moreover, such ads may influence the elected official who is seeking reelection to come out in support of or opposition to particular legislation due to the response local voters have to the ads. These ads are noticed by the elected officials on whose behalf, or against whom, these ads are run. An effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party that is used for political purposes in his or her district or state. These ads often have the effect of showing an elected official that a lobbyist's particular issue can have consequences at the ballot box. Given how useful "issue ads" can be in creating political clout with candidates, it is laughable to have a system that prohibits corporations and labor unions from giving even a penny to a candidate, but allows them to funnel millions into positive or negative advertising campaigns that may influence election outcomes and that many candidates are likely to be influenced by.

18. In contrast to large soft money donations and the funding of "issue ads," single, individual "hard money" contributions of $250, $500, or even $1,000, made directly to candidates' campaign funds typically have relatively little impact on the legislative process. Because candidates for Congress regularly raise hundreds of thousands, if not millions, of dollars each election cycle, relatively small individual donations lack the same potential for truly corrupting influence. Even at double or triple current levels, each hard money contribution is a tiny drop in a very large bucket. Putting limits on soft money is likely to create more pressure to give larger individual contributions, but at least those contributions will be capped and will have [7] to come from individuals' own pocketbooks rather than being drawn with ease out of a corporate or union treasury.

19. Overall, today's levels of political contributions and expenditures are undercutting the integrity of our legislative process. There is an ever-increasing and seemingly insatiable bipartisan demand for more contributions, both "hard" and "soft" dollars. The Federal Election Commission has reported that overall Senate and House candidates raised a record $908.3 million during the 1999-2000 election cycle, up 37 percent from the 1997-1998 cycle. The Republican and Democratic parties also raised at least $1.2 billion in hard and soft money, double what they raised in the prior cycle. These numbers are more than statistics reported by a federal bureaucracy. I see the effect of these numbers on a day-to-day basis as elected officials are forced to keep up with the money chase. Today, most legislators have to spend a great deal of time that should be devoted to their legislative duties seeking campaign contributions.

20. Ironically, congressional lobbyists in general are better, more professional, more ethical and represent more diverse interests than in the past. Our elected officials today also are generally honest, hard-working and well-meaning.

But millions of Americans are convinced that lobbyists and the interests we represent are unprincipled "sleaze balls" who, in effect, use great sums of money to bribe a corrupt Congress.

21. Many citizens believe that using money to try to influence decisions is inherently wrong, unethical and unfair. While recognizing citizen's concerns, I disagree; I find little problem with political interests seeking to influence elected officials through legally limited personal contributions and expenditures at moderate levels, provided this is publicly disclosed and not done on a quid-pro-quo basis.

22. Some lobbyists continue to support the present campaign finance system for a variety of reasons, including in some cases because their own abilities to influence decisions, and their economic livelihoods, are far more dependent on using political contributions and expenditures than on the merits of their causes. But some, like me, believe that the restraints on campaign finance contained in the Bipartisan Campaign Reform Act are both allowable, and [8] necessary.

23. Campaign-related contributions and expenditures at today's excessive levels, however, increasingly have a disproportionate influence on certain legislative actions. Unlimited "soft" money donations and "issue ad" spending in particular are making a joke of contribution limits and are allowing some of the wealthiest interests far too much power and influence. The prevailing system, which permitted unlimited soft money contributions, and which was legally permissible until the latest federal campaign law reforms, has provided the opportunity for a small number of very wealthy individuals, corporations, and labor unions to gain what I consider undue access and political influence.

DECLARATION OF Q. WHITFIELD AYRES

1. My name is Q. Whitfield Ayres. I am the President of Ayres, McHenry & Associates, Inc., a national public opinion and public affairs research firm in Roswell, Georgia.

I. QUALIFICATIONS

2. I hold a Ph.D. and a Masters degree in political science from The University of North Carolina at Chapel Hill. I also hold a Bachelor's degree in political science from Davidson College in Davidson, North Carolina. I have taught and published widely on political science, public policy, and public opinion. My academic background is summarized in my resume, attached as Exhibit A, along with a list of publications during the past ten years.

3. I have extensive professional experience in the field of public opinion research and analysis. Eleven years ago I founded my own public opinion research firm, which I continue to run. The firm has provided polling for Georgia Senator Paul Coverdell's upset of Wyche Fowler in 1992 and Tennessee Senator Bill Frist's upset of Jim Sasser in 1994. Other political clients include U.S. Senators Jeff Sessions of Alabama and Strom Thurmond of South Carolina, former South Carolina Governors Carroll Campbell and David Beasley, and the 1996 [*2] Lamar Alexander for President campaign. The Republican National Committee selected the company to conduct its major post-election national survey after the 2000 Presidential election. I have conducted numerous national and statewide polls on public opinion and public policy, as well as moderated focus groups on particular issues. Other aspects of my professional experience, including five years as Senior Executive Assistant for Budget and Policy for Governor Campbell, are summarized in my resume. See Exhibit A. I am being compensated for my

services in connection with this case at the rate of $200 per hour.

II. OPINIONS, REASONS, AND DATA RELIED UPON

4. I have been asked to render an expert opinion on whether the Bipartisan Campaign Reform Act of 2002 (BCRA) will reduce the appearance of corruption in American politics.

5. In reaching my opinion, I have assumed that "corruption" means a "quid pro quo: dollars for political favors," FEC v. National Conservative Political Action Comm., 470 U.S. 480, 497 (1985), although surveys that include the words "corrupt" or "corruption" in their questions rarely define the term at all, let alone as the Supreme Court has.

6. I have reviewed data on campaign finance from the Roper Center for Public Opinion Research, one of the most widely respected repositories for publicly-available public opinion data, the Poll Track database compiled by National Journal, an extensive on-line repository of data published in The Hotline, as well as historical data available from The Gallup Organization, the Pew Research Center at Princeton University, and the NBC/Wall Street Journal polls. The data do not support the contention that the BCRA will reduce the appearance of corruption in American politics. I have reached that conclusion for several reasons.

7. In American democracy, public opinion sets the range of acceptable policy alternatives that policy makers can consider, much like a stream bed controls the width and [*3] direction of a stream. Within the range of acceptable alternatives, or within the banks of the stream, elites and public officials determine the particular policy. See V.O. Key, Jr., Public Opinion and American Democracy, 1967.

a. On a few issues, the range of acceptable policy alternatives—the width of the stream—is very narrow. On these issues public opinion is deep and well informed. The essence of the public's view is: "I have heard a lot about it, I've thought about it, and I've reached a pretty firm conclusion about it." Examples of these issues are abortion in a strongly religious conservative district, the impeachment debate surrounding President Clinton, and whether the U.S. should respond militarily to the terrorist attacks on September 11, 2001.

b. On the vast majority of issues, the range of acceptable policy alternatives is very wide. On these issues public opinion is shallow and poorly informed. The essence of the public's view is: "I really don't know what you are talking about, but if you'll ask me a question, I'll give you an answer so I won't seem ignorant." When pollsters ask questions on this type of issue, they are more likely to create rather than measure public opinion. Examples of these types of issues are American foreign policy toward Uzbekistan, the role of the International Monetary Fund in Central America, and changes in campaign finance regulations.

8. Substantial evidence supports the contention that public opinion about campaign finance regulations is shallow and poorly informed.

a. The public is not aware of campaign finance regulations, such as the distinction between hard and soft money. Nor has the public identified a particular campaign practice, such as issue advertisements, or a particular campaign finance practice, such as paying for issue advertisements partly with soft money, as a source of corruption. Indeed, the public is not even aware of practices that are currently illegal: only 4 percent know, for example, that [*4] corporations are not allowed to contribute directly to presidential and congressional candidates' campaigns. See Money and Politics Survey, Princeton Survey Research

Associates, April, 1997. According to that Princeton study that is largely sympathetic to campaign finance reform, "Most Americans know little or nothing about the details of campaign finance. . . Less than one percent of respondents chose the right answer to all five (campaign finance regulation) questions." See Money and Politics Survey, Princeton Survey Research Associates, April, 1997.

9. Consequently, any effort to demonstrate that public opinion regarding corruption in the political process will be altered by changes in campaign finance regulations is inherently suspect. If the public knows nothing about campaign finance regulations as they currently exist, then changing those regulations through the BCRA cannot possibly affect the public's view of corruption in the political system. While public opinion data can be generated on the changes—just as they can on any issue—those data will be so dependent on the information provided and the wording of the question that the result is far more likely to create public opinion than to measure it.

10. As opposed to public opinion about campaign finance laws and regulations, the public does have more stable views about the important issues facing the country, and campaign finance consistently falls at or near the bottom of the list. Indeed, a concerted effort must be made to find a national public policy issue that the American public cares less about than campaign finance reform.

a. For example, in January of 2002, near the height of the BCRA debate, an ABC News/Washington Post survey found that only 40 percent of Americans placed "reforming election campaign finance laws" as a high or highest priority for President Bush and Congress. That placed campaign finance reform dead last on the list, behind "handling the U.S. [*5] campaign against terrorism" (90 percent a high or highest priority), "improving the economy" (89 percent), "improving education and the schools" (83

percent), "protecting Social Security" (80 percent), "handling national defense and the military budget" (79 percent), "improving the health care system" (78 percent), "keeping the federal budget balanced" (69 percent), "helping the elderly pay for prescription drugs" (68 percent), and "protecting the environment" (59 percent). Not only does campaign finance reform rank tenth out of ten issues tested, it ranked a distant tenth. The gap between the ninth and tenth issues—19 percentage points between the environment and campaign finance—was greater than the gap between any other two consecutive issues. See ABC News/Washington Post Survey, January 24-27, 2002.

b. That low priority for campaign finance reform has been consistent over time. In 1997 one national survey showed that not one single respondent out of 1,017 named campaign finance reform as the problem they are most concerned about. See Tarrance Group Survey, May 27-29, 1997.

11. Because campaign finance regulations are such a low priority in the public mind, previous changes in campaign finance laws appear to have had no impact whatsoever on trust in government.

a. The "trust in government" question tracked by the University of Michigan Survey Research Center and now asked by the Gallup Organization is the longest running, identically-worded measure of governmental trust in America, with data going back 44 years. As shown in Exhibit B, trust in government was headed down as the first Federal Election Campaign Act (FECA) was passed in 1971, and continued down after its enactment. Trust plunged during the Watergate scandal of 1973-74, and the FECA Amendments passed in 1974 did nothing to arrest the slide. It was not until Ronald Reagan's election in 1980 that trust began [*6] to improve. Trust began to decline again during the early 1990s, and reached its nadir in 1994 when disgust with Congress led to a sea change in party control. Then trust began to climb again during the remainder of the 1990s and the first two years of the new century, during the period of increasing criticism of PACs and soft money that led to passage of BCRA. Indeed, trust in government rose before passage of BCRA to its highest level in three decades. If governmental trust were affected by campaign finance regulations, trust would not have increased at precisely the time when the spotlight was focused on campaign finance but Congress seemed unable to pass reform legislation. Trust in government appears to be completely unaffected by campaign finance regulations, but rather driven by other factors that Americans actually care about, like the state of the economy and the war against terrorism.

12. Despite the upward trend in trust in government, a majority of Americans remain dissatisfied with their government, but concern about the role of money in politics is not the primary source of that dissatisfaction.

a. A 1997 Pew Research Center survey probed the source of Americans' dissatisfaction with their government. At that time, 40 percent were satisfied and 57 percent dissatisfied with their government. When those who were dissatisfied were asked for their reasons, 48 percent of respondents mentioned some aspect of poor governmental performance like gridlock or politicians not keeping promises, 21 percent said some aspect of the budget such as wastefulness or high taxes. Only 9 percent mentioned some aspect of sleaze, the politics of the system itself, or a tendency toward corruption. See Pew Research Center, 1997. Since the specific issue of campaign finance is some subset of this latter category, it is clear that campaign financing is at best a minor reason for dissatisfaction with the way government works.

[*7] 13. Just as past campaign finance reform efforts had no effect on trust in government, the BCRA is unlikely to reduce the appearance of the corruption in American politics, because few people are aware of the BCRA and, once informed, do not believe it will work.

a. After the U.S. Senate first passed the BCRA in 2001, the Pew Research Center asked Americans "Do you happen to know whether the Senate passed the McCain-Feingold campaign finance reform bill, or did they vote it down?" Only 21 percent said the Senate passed the bill, 15 percent thought the Senate voted it down, and fully two-thirds—64 percent—admitted that they did not know. See Pew Research Center, April 18-22, 2001. In other words, only one out of five adult Americans could even guess the correct answer shortly after the first Senate passage of BCRA.

b. After being informed of the law, from three-fifths to two-thirds of Americans do not believe it will have the intended result. For the past four years, the Gallup Organization has asked: "Some people say major changes to the laws governing campaign finance could succeed in reducing the power of special interests in Washington. Other people say no matter what new laws are passed, special interests will always find a way to maintain their power in Washington. Which comes closer to your view?" In March of 1998, Americans said special interests would maintain their power by a margin of 63 to 31 percent. By October of 2000 that margin had grown to 64 to 28 percent. And by February of 2002, shortly before the BCRA became law, the margin had grown to 67 to 28 percent. See Gallup Poll, March 20-22, 1998, October 6-9, 2000, February 8-10, 2002. In other words, overwhelming majorities of Americans think the BCRA will have no effect on the power of special interests in American government. Given this level of cynicism about the role of special interests, changing campaign [*8] finance regulations through BCRA will not reduce the perception of undue influence by special interests on American politics.

14. In summary, the BCRA will not reduce the appearance of corruption in American politics because:

a. Americans know virtually nothing about campaign finance regulations, such as the distinction between hard and soft money, so their opinions about those regulations are shallow and poorly informed.

b. Americans care so little about campaign finance regulations that they continually place campaign finance reform at the bottom of their list of governmental priorities.

c. Past efforts at campaign finance reform have had no effect on Americans' trust in their government.

d. Americans are dissatisfied with their government, but concern about the role of money in campaigns is at best a minor reason for that dissatisfaction.

e. Overwhelming majorities of Americans do not believe BCRA will reduce the influence of special interests on their government.

I hereby declare under penalty of perjury that the foregoing is true and correct.

s/
Q. Whitfield Ayres

Executed on September 23, 2002

[EXHIBITS OMITTED]

REBUTTAL DECLARATION OF Q. WHITFIELD AYRES

1. I am submitting this rebuttal statement in response to the expert reports of Richard Wirthlin, Mark Mellman, Robert Shapiro, Jonathan Krasno, Frank Sorauf, Donald Green, Thomas Mann, and Derek Bok.

WIRTHLIN-MELLMAN

2. Richard Wirthlin and Mark Mellman conducted a national survey of American adults to assess public opinion about large contributions to political parties. Their principal finding is that the public "believes the views of large contributors to parties improperly influence policy and are given undue weight in determining policy outcomes." This survey drives home the point in my original declaration that the Bipartisan Campaign Reform Act will not reduce the appearance of corruption in American politics.

3. On October 1-3, 2002, our firm conducted a follow-up survey to the Wirthlin-Mellman survey that replicated the methodology in their survey. See Exhibit A. We tested the perception of the new hard money limits for contributions to [*2] political parties included in the BCRA. In addition, we re-asked several of the key questions from the Wirthin-Mellman survey, substituting the new hard money limits for contributions to political parties included in the BCRA for the phrase "big contributors" or "large contributors," the phrasing used in the Wirthlin-Mellman survey. We found that:

a. Americans overwhelmingly believe that the BCRA annual contribution limit to political parties of $25,000 per person is viewed as a "large" contribution. 66 percent think that an individual who gave $25,000 to a political party in one year would be making a large contribution, 22 percent think they would be making a medium contribution, and only 10 percent think they would be making a small contribution.

b. Americans overwhelmingly believe that the BCRA contribution limit to political parties of $50,000 per person over a two-year election cycle is viewed as a "large" contribution. 70 percent think that an individual who gave $50,000 to a political party during a two-year election cycle would be making a large contribution, 21 percent think they would be making a medium contribution, and only 7 percent think they would be making a small contribution.

c. Americans overwhelmingly believe that the BCRA annual contribution limit to political parties of $50,000 for a married couple is viewed as a "large" contribution. 79 percent think that a married couple who gave $50,000 to a political party in one year would be making a large contribution, 15 percent think they would be making a medium contribution, and only 4 percent think they would be making a small contribution.

[*3] d. Americans overwhelmingly believe that the BCRA contribution limit to political parties of $100,000 for a married couple over a two-year election cycle is viewed as a "large" contribution. 88 percent think that a married couple who gave $100,000 to a political party during a two-year election cycle would be making a large contribution, 9 percent think they would be making a medium contribution, and only 2 percent think they would be making a small contribution.

e. Not surprisingly, given the view of most Americans that contributions to political parties allowed under the BCRA are "large," re-asking the Wirthlin-Mellman questions with the BCRA limits yields almost exactly the same conclusions as found in the Wirthlin-Mellman survey.

i. The Wirthlin-Mellman survey found that 71 percent of Americans think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their districts want. Our survey found that 71 percent of Americans think that members of Congress sometimes decide how to vote on an issue based on what people who give 25,000 dollars per year to their political party want, even if it's not what most people in their districts want.

ii. The Wirthlin-Mellman survey found that 71 percent of Americans think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what they think is best for the country. Our survey found that 71 percent of Americans think that members of Congress sometimes decide how to vote on an issue based on what people [*4] who give 25,000 dollars per year to their political party want, even if it's not what they think is best for the country.

iii. The Wirthlin-Mellman survey asked "If an individual, issue group, corporation, or labor union donated $50,000 or more to the political party of a Member of Congress, how likely would a Member of Congress be to give the contributor's opinion special consideration because of the contribution?" They found that 81 percent thought it likely that the Member of Congress would give special consideration to that opinion—41 percent very likely and 41 percent somewhat likely. We asked "If an individual donated 25,000 dollars to the political party of a Member of Congress, how likely would a Member of Congress be to give the contributor's opinion special consideration because of the contribution?" We found that 81 percent thought it likely that the Member of Congress would give special consideration to that opinion—41 percent very likely and 40 percent somewhat likely.

f. In other words, every conclusion that the Wirthlin-Mellman report reached about "large" or "big" contributions and contributors applies with equal force to the new, hard money limits in the BCRA. Wirthlin and Mellman note in their report that "in public opinion research, it is uncommon to have 70 percent or more of the public see an issue the same way. When they do, it indicates an unusually strong agreement on that issue." I agree. The American public shares an unusually strong agreement that the contribution limits to political parties adopted in the BCRA are large contributions, and they view those large contributions in precisely the ways the Wirthlin-Mellman survey so effectively discerned. Consequently their survey reinforces the **[*5]** conclusion that the BCRA will not reduce the appearance of corruption in American politics.

OTHER EXPERT REPORTS

4. Other expert witnesses have produced impressive reviews of public attitudes toward the current campaign finance system. They demonstrate effectively that the public has a skeptical, indeed cynical, view about the role of money in politics. They address a number of questions regarding public perception about various reform proposals. But they offer no persuasive evidence on the critical public opinion question in this case: "Will the Bipartisan Campaign Reform Act, as written, reduce the appearance of corruption in American politics?"

a. These experts point to surveys that purport to demonstrate popular support for specific campaign finance reforms. For example, Robert Shapiro points to majority support for a ban on soft money contributions to political parties (See Shapiro Declaration, p. 13). But, as demonstrated in my original declaration, the public has no clue about the distinction between "soft" and "hard" money contributions. And, as demonstrated in our survey discussed above, the public views the BCRA "hard" money contribution limits to political parties as large contributions, with presumably all the nefarious effects attributed to any large contribution. What is driving these public perceptions is not "soft money" versus "hard money," or "regulated money" versus "unregulated money," but money itself. But the BCRA actually raises the hard money contribution limits to individual candidates, and sets hard money contribution limits to political parties at a level that the public overwhelmingly views as "large." Therefore the BCRA, as written, will not reduce the appearance of corruption in American politics.

[*6] b. These experts argue that the public thinks campaign finance reform will improve the political system. But the evidence offered to support that proposition is a classic case of survey research creating rather than measuring public opinion, as explained in my original declaration.

i. For example, Jonathan Krasno and Frank Sorauf point to an agree/disagree question: "I have more optimism about government since campaign finance reform passed Congress and will be implemented in November," with 50 percent agreeing and 31 percent disagreeing. But the survey organization that produced that result also showed that only one out of five respondents even knew the Senate had passed BCRA (See Pew Research Center, April 18-22, 2001), so the question had to educate the respondents about passage of the Act before it could "measure" their opinion on the subject about which they had just been educated. Moreover, the word "reform" has such a positive connotation in American politics that "reform" of anything—environmental laws, health care, the Internal Revenue Service—is likely to generate a supportive response.

ii. The Krasno-Sorauf report also cites a Gallup question: "In general, if new campaign finance reform legislation were passed, do you think it would make our democratic form of government work much better than it does now, just a little better, about the same, just a little worse, or much worse than it does now?" 22 percent said much better, 37 percent a little better, and 32 percent the same. But the same survey organization produced directly contradictory findings, cited in my original declaration, that only about one-fourth of Americans thought "major changes to the laws governing campaign finance could succeed in reducing the power of special [*7] interests in Washington," while about two-thirds thought that "no matter what new laws are passed, special interests will always find a way to maintain their power in Washington." See Gallup Poll, March 20-22, 1998, October 6-9, 2000, February 8-10, 2002. These shifting results with different question wording are typical of a shallow and poorly informed public opinion discussed in my original declaration.

c. These experts decry the cynical attitude of the American public toward the American political system, and there is little question that a deep vein of cynicism exists. But it is worth noting that this level of cynicism has not raised "corruption in government" high on the list of American concerns, nor has it undermined the legitimacy of the government in the eyes of most Americans.

i. A Richard Wirthlin survey taken April 5-8, 2002, asked about "the single most important problem facing the United States today." "Government corruption" was mentioned by only 1 percent of the respondents. See Wirthlin Worldwide, April 5-8, 2002.

ii. The Senior Editor of the Gallup survey argued in January of this year: "(T)he lack of public trust in government in this country was never shown to be inimical to the functioning of democracy. Indeed, the levels of trust found by polls appear to be more an artifact of question wording than a real, substantive measure of how much Americans support their government. Since the allegedly low levels of trust of the past 17 years or so did not appear to hurt democracy, there is little reason to believe that higher levels will now help. . . (W)hatever its varied levels over the years, trust has never fallen so low as to threaten the legitimacy of the governmental [*8] system." See David W. Moore, "Just One Question," Public Perspective, January/February, 2002 (attached hereto as Exhibit B).

CONCLUSION

5. Only rarely do the expert reports focus precisely and sharply on the one truly important public opinion question in this case: "Will the BCRA reduce the appearance of corruption in American politics?" When they do provide data to inform that question, such as in the Wirthlin-Mellman survey, they reinforce the fundamental conclusion from my original declaration: the Bipartisan Campaign Reform Act will not reduce the appearance of corruption in American politics.

I declare under penalty of perjury that the foregoing is true and correct.

s/
Q. Whitfield Ayres

Executed on October 7, 2002

[EXHIBITS OMITTED]

DECLARATION OF DOUGLAS L. BAILEY

[DEV Vol 6, Tab 2]

1. My name is Douglas L. Bailey. In 1968, I founded Bailey, Deardourff & Associates, which was among the first national political consulting firms, working for Republican candidates for Governor, Congress, Senate, and President. Our clients included Gerald Ford's Presidential Campaign, and over fifty successful campaigns for Governor or the United States Senate in 17 states.

2. As campaign consultant, my job was to plan the campaign and then create broadcast advertisements that would shape its outcome. In 2000, John Deardourff and I were each among the first eight recipients of the American University - Campaign Management Institute's "Outstanding Contribution to Campaign Consulting" Award given to the consultants who have best represented the ideals of the profession and shown concern for the consequences of campaigns on public attitudes about our democratic process. In this declaration, I will describe what I believe are widely understood in the industry as basic rules of crafting effective political advertisements.

3. In the modern world of 30 second political advertisements, it is rarely advisable [2] to use such clumsy words as "vote for" or "vote against." If I am designing an ad and want the conclusion to be the number "20," I would use the ad to count from 1 to 19. I would lead the viewer to think "20," but I would never say it. All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat. This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians.

4. Contrary to what many people would like to believe, it is well known among campaign consultants that the "swing voters" who regularly determine the outcome of elections usually vote on candidate personalities, rather than issues.

Regardless of the substantive topic of any particular ad, one of the single most important message that a political ad can convey is the underlying sentiment that a candidate has values similar to or different than the target viewers of the ad. A campaign commercial is most effective if the candidate is perceived as likeable to the citizens relaxing in their living rooms, and if the viewers feel comfortable that the candidate shares their values. Often, the substantive issue is merely the vehicle used to demonstrate personal qualities.

5. The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as "vote for" is at best a historical anachronism. When I first entered this business, and up through the mid-1980s, we were regularly able to purchase five minute slots of air time. In a five minute spot, I could introduce a candidate, bring the viewer to a comfort level with the candidate, cover a few different substantive issues, and at the end, have the candidate make a direct appeal for a vote. In this by-gone era, it made sense for a candidate to appeal directly for votes using words such as "vote for," "support," or "cast your ballot" on the basis of a more full or substantive story told in a five minute time period. By contrast, in a 30 second ad, there is not enough time to make a positive direct sale.

6. In the era of the 30 second ad, it is a mistake to view any particular electioneering [3] advertisement as a campaign in and of itself. Over time, a campaign defines a candidate through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these "feels" to make up a campaign. Thirty second campaign ads, therefore, must be viewed collectively. It is impossible for the political ad consultant to truly close a positive sale until after he has had time to build the candidate's image through a series of 30 second spots.

7. Even if an electioneering ad aired in August, September, or October used words such as "vote for," "support," or "cast your ballot," it would do little good. People's minds may change from day to day about how they intend to vote, or more likely, they aren't significantly focused on whom to vote for until the days immediately prior to the election. Thus, the only real sale date is on election day in November. In the months leading up to that "sale date," the most important positive thing an ad can do is to create a general impression of a candidate that the voters will internalize over time, and that will hopefully sink in by election day.

8. Even if the goal of an early-September electioneering ad were to make a direct pitch for a vote, it would be nearly impossible to do it effectively. It is amazing how short thirty seconds really is when you are trying to craft a political ad. There is barely enough time to effectively convey a single theme. If you change course in the final five seconds of an ad, you may undo everything that you have attempted to accomplish in the previous 25 seconds. Therefore, it is uncommon that you would see a political advertisement on television that says "Candidate X is tough on crime" and then breaks that flow and switches to the entirely separate point of "Please vote for Candidate X."

9. In addition to the work we did for candidates at Bailey, Deardourff, we also did political ads for political parties and issue groups. When we were creating true issue ads (e.g., for ballot initiatives or more general issues such as handgun control), and when we were creating true party building ads, it was never necessary for us to reference specific candidates for federal [4] office in order to create effective ads. For instance, we created a serious of ads opposing a gambling referendum in Florida which made no reference to any candidates. We were successful in conveying our message, and the referendum failed two to one.

10. For instance, in 1982 we were hired by the National Republican Congressional Committee to counteract the effects of the declining economy that usually result in the President's party losing numerous Congressional seats during the mid-term election. We designed a series of ads that were generally called the "Stay the Course" campaign. These ads emphasized that Republicans had only just begun enacting an economic agenda that would turn the economy around, and that the country needed to give it more time to work. This ad campaign was credited with helping Republicans keep more seats than would normally have been expected. We set the tone for the entire election season without ever mentioning specific candidates.

11. Similarly, issue organizations can design true issue ads without ever mentioning specific candidates for federal office. In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections. From a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election. This is true not only in the 60 days immediately prior to an election, but probably also in the 90 or 120 days beforehand.

12. When I had a client who wanted to run a true issue ad to change or bolster public attitudes on an issue, I would recommend, if possible, avoiding the time period when the airwaves are saturated with electioneering ads. Such pure issue ads would likely get drowned out by the din of election related ads. Moreover, any ads that mention specific candidates that are aired during the height of an election season are almost certain to be perceived by the public as electioneering.

13. Few political advertisements go onto television without being subject to rigorous [5] polling, word testing, and focus groups. This is big business and a lot of money goes into pre- and post-development analysis. The political

parties and issue groups that run so-called "issue ads" in the fall of an even-numbered year know exactly what they are doing. I certainly don't think that it is inappropriate for these organizations to sponsor broadcast ads that talk about issues and include positive or negative comments about particular candidates, I just wouldn't call them "issue ads." They are designed to influence elections and should be recognized as such.

14. These so-called "issue ads" are a phenomenon of the last 12 to 15 years. The serious explosion of these ads took place prior to 1996, and with that year's campaign by the Democratic National Committee. Since that time, political advertising has become a no-holds-barred war. When I consulted on dozens of campaigns in the 1970s and 1980s, we operated under essentially the same set of rules that governed in 1996, but many of today's practices would have been considered dangerous and wrong then, both politically and legally. In the post-Watergate era, we were worried about not only obeying the rules, but also assuring that our clients were seen as trying to clean up the image of the political process. But due to a lack of enforcement and a willingness on the part of some to win at all costs, these concerns appear to have dissipated.

15. Burned out by the nonstop madness of campaign life, in 1987 I became Founder and Publisher of the *Hotline*, which is a bipartisan daily briefing on American politics that "covers the coverage" of campaigns, candidates and issues from TV, radio, and 400 daily papers across the country. The *Hotline*'s audience includes The White House, nearly every office on Capitol Hill, the campaign consultant industry, the interest groups, the political parties, the national TV networks, and more than 60 daily newspapers. I sold my interest in the *Hotline* to National Journal Inc. in 1996, but remain as a part-time consultant.

16. Currently, I am President and co-Founder (with Mike McCurry, former Press Secretary to President Clinton) of Freedom's Answer, a non-partisan, non-profit project of

Youth-e-Vote, a 501 (c) (3) organization. Freedom's Answer is the largest non-partisan get-out [6] -the-vote drive ever organized in this country. Starting this September 11th, Freedom's Answer volunteers have begun registering new voters, getting pledges to vote from family, friends, and neighbors, and making sure they actually turnout to vote on election day. While every American can take part in Freedom's Answer, the "ground troops" for the campaign are high school students in the Youth Voter Corps. A record-setting vote this November will show the world that the September 11th attacks only strengthened our nation's commitment to stand together for freedom. Which candidate or party wins is less important than that freedoms wins. And freedom wins when all who can vote do vote.

17. Ideally, there would be no need to organize such a massive effort in order to encourage people to exercise their right to vote. Declining voter participation rates are well documented: in the 2000 Presidential race, barely half of all eligible voters bothered to show up at the polls. The sad truth is that people now need to be convinced that they can have a meaningful effect on the political process. Although I cannot purport to be able to precisely attribute any particular percentage of the decline in voter turnout to any particular factor, I have had a front row seat during the last four decades of national political campaigns. I have no doubt that the rise in the quantity and importance of soft money has shifted power away from local networks of citizens to the big contributors and the campaign consultants who orchestrate massive national media campaigns, and to the national media itself. A ban on soft money, together with efforts such as Freedom's Answer, can hopefully restore our nation's faith in democracy.

DECLARATION OF JAY C. BANNING

I, Jay C. Banning, do declare and state as follows:

1. My name is Jay C. Banning. I am currently Director of Administration and Chief Financial Officer of the Republican National Committee ("RNC"). I have served in those capacities since 1983, and I have been employed by the RNC in those and other capacities for twenty-six years. My curriculum vitae, which contains a more detailed description of my professional background, is attached hereto. See RNC Exhibit No. 2292, attached hereto as Attachment 1. Except where otherwise indicated, this declaration is based upon my personal knowledge.

[*2] 2. The various RNC exhibits attached to this declaration are to the best of my knowledge true and correct copies of records prepared and kept by the RNC in the course of its regularly conducted business activities.

3. My responsibilities as Director of Administration of the RNC include overall management of the RNC's facilities, human resources, and security. As Chief Financial Officer of the RNC, my responsibilities include managing the RNC's budget, overseeing its finance and accounting personnel, maintaining the RNC's books and records, overseeing the RNC's annual audit, signing all contracts, paying all bills, serving as assistant treasurer for the Republican National Conventions and for the various RNC non-federal accounts registered with state authorities under state law, and generally managing the RNC's finances.

I. History of the RNC's Non-Federal Accounts.

4. By the time I arrived at the RNC in 1976, the Federal Election Campaign Act ("FECA") was already in effect. The United States Supreme Court had recently ruled on its constitutionality, on January 30, 1976. After a period of legal analysis and adjustment, the RNC concluded that its historical ability to raise and spend money for state and local election activity, pursuant to state law, was not affected by FECA.

5. The first non-federal account opened by the RNC after enactment of the FECA was the "Committee to Preserve the National Republican Center" -- the so-called "building fund" account -- which was opened by the RNC on or before June 10, 1977. Non-federal funds raised for the building fund account are raised from corporations, labor unions, trade associations, and individuals. The Internal Revenue Service form assigning a taxpayer identification number to this account is attached hereto. See RNC Exhibit No. 1799, attached hereto as Attachment 2. In 1978, the building fund was used to purchase the RNC's current headquarters facility at 310 First Street, S.E., Washington, D.C. In 1991, the RNC used the [*3] building fund to finance the purchase of a warehouse for records storage. All of the RNC's national operations are housed in the headquarters building, including activities supporting federal, state, and local elections, as well as the RNC's general research, policy analysis, and communications operations. Building fund money is not used for campaign activities or to influence federal elections.

6. Beginning in early 1978, the RNC opened several non-federal accounts reserved for funds raised in compliance with state campaign finance laws. These were each designated as Republican National State Elections Committee accounts ("RNSEC," pronounced "rehn-seck").

7. It is my understanding that state campaign finance laws vary widely from state to state. It is also my understanding, however, that it is possible to group the states into several categories that share common regulatory characteristics. The RNC assigned a separate RNSEC account

to each such category and raises funds for each account in compliance with the laws of the states within that category.

8. On or before March 7, 1978, the RNC established the "RNSEC-Corporate" account. See RNC Exhibit Nos. 1797, attached hereto as Attachment 3 (IRS taxpayer identification number notice). The "RNSEC-Corporate" account collects corporate funds, which may be used to make contributions in the numerous states that permit corporate contributions in connection with state and local elections.

9. Some of the states that allow corporate contributions have specific limitations on the sources of the corporate contributions, however. For example, certain of those states do not allow corporate contributions by insurance companies or public utilities. The "RNSEC-Limited Corporate" account, also established on or before March 7, 1978, is used to raise corporate funds that do not originate with any of those sources that are prohibited under the laws of certain states. See RNC Exhibit No. 1798, attached hereto as Attachment 4 (IRS taxpayer identification number **[*4]** notice). Amounts contained in the RNSEC-Limited Corporate account are used to pay for non-federal activities in those states.

10. The "RNSEC-Operating" account, also established on or before March 7, 1978, holds only individual donations. See RNC Exhibit No. 1796, attached hereto as Attachment 5. Funds in the RNSEC-Operating account may be used both in states that prohibit corporate funds and in many other states.

11. The RNC also established RNSEC state-specific accounts, which are used in connection with states whose campaign finance laws have peculiarities that would prevent the RNC from using RNSEC-Corporate, RNSEC-Limited Corporate, or RNSEC-Operating account funds for

disbursements in those states. The RNC raises funds for these state-specific accounts pursuant to applicable state law.

12. The RNC established a state-specific account for Michigan on or before May 23, 1978. See RNC Exhibit No. 1795, attached hereto as Attachment 6 (IRS taxpayer identification number notice).

13. The RNC established a state-specific account for Vermont on or before July 5, 1978. See RNC Exhibit No. 1794, attached hereto as Attachment 7 (IRS taxpayer identification number notice). This account was later closed, in response to changes in state law.

14. The RNC established a state-specific account for Florida on or before March 21, 1980. See RNC Exhibit No. 1791, attached hereto as Attachment 8 (IRS taxpayer identification number notice). This account was later closed, in response to changes in state law.

15. The RNC established a state-specific account for Wisconsin on or before March 21,1 980. See RNC Exhibit No. 1793, attached hereto as Attachment 9 (IRS taxpayer identification number notice). This account was later closed, in response to changes in state law.

[*5] 16. Additional state-specific accounts have been opened by the RNC over the years, in response to changes in state laws. In 1994, the RNSEC-Merchant account was opened to facilitate credit card donations to other RNSEC accounts. The RNSEC-Administrative account was opened in 1998 to accept donations from certain entities whose donations to political parties may not legally be used for campaign-related purposes, whether federal or non-federal. RNSEC-Administrative account funds are used solely to pay the non-federal share of the RNC's administrative overhead expenses.

17. The following is a complete list of the twelve RNSEC accounts currently maintained by the RNC:

- RNSEC-Corporate
- RNSEC-Limited Corporate
- RNSEC-Operating
- RNSEC Administrative
- RNSEC Merchant
- Michigan
- California
- New York
- Massachusetts
- North Carolina
- Rhode Island
- Missouri

18. The RNSEC accounts are registered as "political committees" or as "political party committees" in many of the states, pursuant to applicable state campaign finance laws. In other states, the RNSEC accounts are not required to be registered, but disbursements from the [*6] RNSEC accounts in connection with state and local elections within those states are reported by the RNC to the relevant state election agencies, as required by state law.

19. The RNC currently employs three staff members, under my supervision, who do nothing but prepare disclosure reports for the RNSEC accounts. Those reports are

regularly filed with the relevant state election agencies and are generally made available by the states for public review. I personally sign RNC disclosure reports filed in 30 states. In addition, I am personally listed as treasurer, deputy treasurer, or assistant treasurer for the RNC's state accounts in 30 states.

20. The RNC also maintains the Republican Governors Association's ("RGA") "Conference Account," which is used by the RGA primarily to hold funds raised from municipal securities dealers. Because the rules governing licensed municipal securities dealers may prevent them from contributing funds to federal, state, or local candidates, funds donated to the RGA Conference Account are not used in connection with any elections and are used instead to support associational activities of the RGA such as meetings, conferences, and noncampaign-related travel by RGA members and staff

21. All funds raised by the RNC are reported to the Federal Election Commission, and may also be reported to one or more state election agencies, pursuant to applicable state law. All receipts from a single person aggregating to more than $200 in a calendar year are itemized in reports filed monthly with the Federal Election Commission, The itemized reports provide information regarding the source of the donation, address of the donor, amount of the donation, date of the donation, and in the case of individual donors, the occupation and name of the employer. I am aware of no other type of organization that publicly reports its receipts in this much detail and this often.

[*7] 22. All funds disbursed by the RNC are reported to the Federal Election Commission, and may also be reported to one or more state election agencies, pursuant to applicable state law. This includes all disbursements to state and local political party committees. All disbursements to the same person aggregating to over $200 per calendar year are

itemized in reports filed monthly with the Federal Election Commission. I am aware of no other type of organization that publicly reports its disbursements in this much detail and this often.

II. How the RNC Spends Non-Federal Funds.

23. The RNC spends non-federal funds, subject to applicable state law, on a very wide range of activities that are not in connection with federal elections.

24. It is well-known that for many years the RNC has produced and aired television, radio, and print advertising promoting the Party's message on many issues, without expressly advocating the election or defeat of clearly identified federal candidates. Examples of such "issue advertisements" sponsored by the RNC in recent years are attached with this declaration. See RNC Exhibit No. 1760, attached hereto as Attachment 10 (1994 *TV Guide* print advertisement regarding Contract with America).

25. Under current Federal Election Commission regulations, the RNC is required to pay for issue advertisements using no more than 35 percent non-federal funds and no less than 65 percent federal funds during presidential election years. During non-presidential election years, the RNC is required to pay for issue advertisements with no more than 40 percent non-federal funds and no less than 60 percent federal funds. See 11 C.F.R. § 106.5. During the 2000 election cycle, the RNC provided, either directly or through state parties, $43.6 million of non-federal funds and $27.6 million of federal funds for issue advertising.

26. It is far less well known that the RNC also pays for a range of other vital party-building and associational activities in whole or in part with non-federal funds.

27. Many of the costs associated with these activities are reflected in the RNC's "administrative overhead" expenses, which under current law are paid for using a mix of federal and non-federal funds. Administrative overhead includes the operating costs of RNC facilities, such as utility bills and maintenance, fundraising costs, and routine expenses for travel and supplies. Administrative overhead also includes the salaries of RNC employees. During the 2000 election cycle, the RNC spent $35.6 million of non-federal funds and $52.9 million of federal funds on administrative overhead.

28. Examples of party-building and associational activities paid for in whole or in part with non-federal funds include, but are not limited to, the following:

(a) **Direct support for state and local candidates.** The RNC provides direct support for state and local candidates, as does the RGA. All RGA disbursements are reported by the RNC to the Federal Election Commission on the RNSEC disclosure reports. The RNC also sometimes provides direct support for state and local referenda and ballot initiative campaigns. Such direct support takes the form of contributions to state and local candidates and other political committees, as well as disbursements for advertising or other materials advocating the election or defeat of state and local candidates or support or opposition to referenda and ballot initiatives. The RNC's support for state and local candidates includes direct support for state and local candidates in the five states that currently hold their state and local elections during odd-numbered years, when there are ordinarily no federal candidates on the ballot. These five states are Kentucky, Louisiana, Mississippi, New Jersey, and Virginia. Many states hold municipal elections during odd-numbered years, and special elections for state office sometimes occur during odd-numbered years even in states that hold their regularly scheduled elections in even numbered federal election years.

The following chart demonstrates the scale of RNSEC support, using 100 percent non-federal funds, for state and local election activity during the most recent two odd-numbered election years, 1999 and 2001.

RNSEC DISBURSEMENTS FOR STATE AND LOCAL ELECTION ACTIVITY IN ODD-YEAR ELECTIONS

	Transfers to State Party	Contributions to State and Local Candidates	Direct Spending	Total
1999				
Kentucky	$75,050			$75,050
Louisiana	$2,000	$172,282		$174,282
Mississippi	$732,500	$614,850		$1,347,350
New Jersey	$26,400			$26,400
Virginia	$402,280	$258,000		$660,280
Other state elections	$2,731,680	$636,350		$3,368,030
Mayoral elections		$5,500		$5,500
TOTAL (All state and local elections combined)	$3,969,910	$1,686,982		$5,656,892
2001				
Kentucky				
Louisiana	$15,500	$5,000		$20,500
Mississippi	$42,500			$42,500
New Jersey	$72,000	$3,040,304	$1,167,000	$4,279,304
Virginia	$1,817,682	$4,040,715		$5,858,397
Other state elections	$4,347,342	$1,063,311		$5,410,653
Mayoral elections		$50,000		$50,000
TOTAL (All state and local elections combined)	$6,295,024	$8,199,330.18	$1,167,000	$15,661,354.18

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(b) **State and local government affairs.** The RNC supports the associational activities of Republican state and local officials. For example, the RNC sponsors gatherings of [*10] Republican governors, lieutenant governors, state attorneys general, secretaries of state, and mayors. See RNC Exhibit No. 0435, attached hereto as Attachment 11 (Feb. 3, 2001, memorandum describing functions and activities of "Republican Lieutenant Governors Association"). The purpose of these gatherings is to allow Republican state and local officials to exchange information and ideas regarding legislative accomplishments and initiatives and to discuss among themselves major issues facing states, localities, and the Republican Party. The RNC, through its full-time Director of Government Affairs, also arranges and pays for meetings between Republican state and local officials and Congressional or Executive Branch officials, in order to highlight the accomplishments of Republican officials at the state and local level. During the 2000 election cycle, the RNC spent $199,000 of non-federal funds and $333,500 of federal funds on state and local government affairs.

(c) **Political training and support.** The RNC conducts training seminars on a range of practical skills and topics, including "grass roots" organization and mobilization techniques, fundraising, campaign management, and campaign finance legal compliance. These training seminars are attended by Republican candidates, activists, and campaign staff, including many who are principally involved in the campaigns of state and local candidates, as well as state and local party officials. As an example, instructional materials produced by the RNC for RNC-run seminars on fundraising for "state legislative and local campaigns" are attached hereto. See RNC Exhibit No. 1612, attached hereto as Attachment 12. Typical attendees for such seminars include campaign managers for state and local candidates. See RNC Exhibit No. 2165, attached hereto as Attachment 13 (application to attend RNC fundraising seminar by Cynthia

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Wilcox, campaign manager for Boise, Idaho mayoral campaign). During 2000 election cycle, the RNC conducted 117 so-called "nuts and bolts" seminars, providing training on grass roots organization and "get-out-the-vote" activities. See RNC Exhibit No. 0387, attached hereto as [*11] Attachment 14 (example of "nuts and bolts" training materials). In addition, the RNC conducted 3 Campaign Management College seminars, teaching campaign management strategies and skills, and a Campaign Finance College seminar, focusing on fundraising techniques. Attendees included activists, candidates, and campaign staff from the federal, state, and local level. At least 10,000 people participated in RNC-sponsored training seminars nationwide during the 2000 election cycle. Examples of Republican governors who participated in the RNC's training programs during the 2000 election cycle are Governors Jeb Bush (Florida), Mike Huckaby (Arkansas), George Ryan (Illinois), Frank Keating (Oklahoma), Bob Taft (Ohio), and John Engler (Michigan). The RNC currently employs four full-time staff engaged in overseeing political training and support in its Political Education and Training Department. During the 2000 election cycle, the RNC spent $391,000 of non-federal funds and $671,000 of federal funds on political training and support.

(d) **Research.** The RNC currently employs 41 researchers who generate a large volume of original research and analysis on public policy issues, media coverage of the Republican Party, legislative initiatives and accomplishments of Republican officeholders, state and local elections, and federal elections. This research is distributed to RNC officers and staff, RNC national committeemen and committeewomen, Republican state party chairmen, Republican officeholders at the federal, state, and local levels, RNC donors and adherents, the media, and the general public. The RNC uses this research to help refine the Party's message and positions on major issues and to disseminate the same widely within and without the Party. See RNC Exhibit No. 0045, attached hereto as Attachment 15 (example of RNC research brief on public

policy issue). During the 2000 election cycle, the RNC spent $1,322,000 of non-federal funds and $2,298,600 of federal funds on research.

[*12] (e) **Support for allied groups and minority outreach.** The Republican Party benefits from the activism and organizational capacity of numerous allied groups, including College Republicans, Young Republicans, and Republicans Abroad. These organizations operate independently of the RNC, but the RNC uses non-federal funds to provide them with financial support. These allied groups recruit members, register voters, and propagate the message of the Republican Party. The RNC supports allied organizations that work to expand minority membership in, and support for, the Republican Party. These organizations include the Hispanic Assembly, the National Federation of Republican Women, and the National Black Republican Council. The RNC also develops and disseminates materials aimed at national, state, and local party staff to build minority outreach efforts. See RNC Exhibit No. 2239, attached hereto as Attachment 16 (RNC manual on outreach to Hispanics); RNC Exhibit No. 0275, attached hereto as Attachment 17 (RNC strategic plans for minority outreach efforts). In addition, the RNC produces and distributes promotional materials directed to potential minority supporters. One example is a Spanish-language video produced by the RNC this year in order to deliver the Republican message to Hispanics. The tape features appearances by Hispanic leaders in the Republican Party, such as HUD Secretary Mel Martinez. During the 2000 election cycle, the RNC spent $1,211,000 of non-federal funds and $2,163,000 of federal funds on support for allied groups and minority outreach.

(f) **Communications.** The RNC's Communications Department, which currently employs 3 1 persons, disseminates public information about the Republican Party and responds to inquiries from the public and the media. A presentation prepared by the Communications Department describing its mission and functions is attached hereto. See RNC Exhibit No. 2169, attached hereto as Attachment 18. The RNC's public communications efforts are vital to propagating the Party's message and clarifying its positions on major public policy issues. For **[*13]** example, the Communications Department has often articulated the Party's opposition to legislative efforts to restrict the Party's free speech and associational rights or to federalize campaign finance law. The Communications Department also produces publications articulating the Party's message and reporting on Party-related news, which it circulates to the media and the general public. The RNC also communicates directly with its own members and adherents, a function that is vitally important to building the Party. While the RNC's rules treat as "members" only the 165 voting members of the RNC, the RNC informally treats many thousands of supporters as members for associational and communicative purposes. The RNC communicates with these members through a members-only limited access area of its web site, as well as through the U.S. mail and through electronic mail. Although it is my understanding that membership organizations are allowed to communicate with their members on any subject (including expressly advocating the election or defeat of federal candidates) using unregulated money from any source, the RNC currently must pay for communications with its members with a mix of federally regulated and state-regulated funds. Under the BCRA, the RNC will be required to pay for these communications with members and adherents using 100 percent non-federal funds. During the 2000 election cycle, the RNC spent $2,499,000 of non-federal funds and $4,254,000 of federal funds on communications.

(g) **RNC annual meetings and conferences.** The RNC conducts three annual meetings that draw Party officials from across the nation. These meetings are attended by state party chairmen and executive directors, national committeemen and committeewomen, and various other Republican activists. In addition to the quadrennial

Republican National Convention, these meetings represent the main fora for the exchange of views, debate of issues, and formulation of Party rules and policy within the Republican Party. During the 2000 election **[*14]** cycle, the RNC spent $455,000 of non-federal funds and $775,000 of federal funds on RNC annual meetings and conferences.

(h) **RNC membership in associations and international organizations.** The RNC is a member of various associations and international organizations, such as the International Democratic Union, the American Democratic Union, and the Pacific Democratic Union. The RNC pays its membership dues in these organizations using 100% non-federal funds. During the 2000 election cycle, the RNC spent $163,900 of non-federal funds on membership dues.

(i) **Redistricting.** The RNC plays a major role in coordinating the Party's approach to redistricting of electoral districts by state legislatures, and in financing legal challenges associated with redistricting. Redistricting involves re-drawing the lines for both state legislative districts and Congressional districts. During the 2000 election cycle, the RNC spent $574,000 of non-federal funds and $306,000 of federal funds on redistricting. During 2002, the RNC expects to spend $4.1 million on redistricting, approximately 70 percent of which will be paid for with non-federal funds.

III. Transfers to State Parties.

29. In addition to spending non-federal funds directly, the RNC also transfers large amounts of non-federal funds to state party committees. During the 2000 election cycle, the RNC transferred $88.2 million of non-federal funds to state party committees.

30. Many of the Republican state party committees are heavily dependent on these transfers to cover the cost of their operations. Among the state parties that will be hardest

hit by the loss of these transfers under the BCRA are the Republican Parties of Arkansas, Maine, North Carolina, Oregon, and Wisconsin.

31. RNC transfers of non-federal funds to the state parties play a critical role in subsidizing the activities of the state parties. The state parties depend on these funds to pay for [*15] everything from their own administrative overhead to voter mobilization, grass roots organizing, and media. By transferring non-federal funds to the state parties, the RNC is able to help sustain strong state party organizations, even in states that have limited in-state donor bases. These transfers ensure that funds are distributed to state party organizations that would otherwise have difficulty raising substantial funds on their own.

IV. Effect of the BCRA on RNC Operations.

32. The RNC currently employs 378 individuals. Based on current projections, the RNC expects that the ban on raising and spending non-federal funds by national political party committees will require the RNC to lay off approximately 150 employees, accounting for approximately 40 percent of the RNC's total workforce.

33. It is too soon to say how reductions in personnel and operational spending will be distributed across the RNC's many activities that are financed in whole or in part with non-federal funds.

34. While the BCRA permits the RNC to raise and spend funds subject to federal source and amount limitations, the RNC will not be able to replace non-federal funds with federal funds. The RNC has historically lacked sufficient federal funds to meet the needs of its federal candidates. For example, during the 1993-1994, 1995-1996, 1997-1998, and 1999-2000 election cycles, the RNC did not provide every eligible House and Senate candidate with the maximum

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permissible contributions and coordinated expenditures. Indeed, the RNC's federal accounts ended up in debt at the end of the 1993-94, 1995-96, and 1997-98 election cycles. If the RNC had had more federal funds available, it would have contributed more money to more federal candidates. Devoting additional resources to raising federal funds will not make up for lost non-federal funds because the RNC already maximizes its investment in prospecting for [*16] additional donors of federal funds. Further prospecting would result in diminishing marginal returns.

35. Based on my 26 years of experience working with RNC financial issues, it is clear to me that the BCRA will severely restrict the ability of the RNC to:

(a) communicate with its adherents;

(b) provide direct financial support to state and local candidates;

(c) provide direct financial support to state and local political parties;

(d) work closely with state and local parties and candidates, especially if these parties and candidates are continuing to raise and spend non-federally regulated funds; and

(e) disseminate the Party's message on important issues to a broad national audience.

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I declare under penalty of perjury that the foregoing is true and correct.

s/
Jay C. Banning

Executed on October 4, 2002

[EXHIBITS OMITTED]

DECLARATION OF ELAINE BLOOM

[DEV 6, Tab 7]

1. My name is Elaine Bloom.

2. I am currently engaged in consulting, public speaking, and community activities. In 2001, I was a candidate for Mayor of Miami Beach, Florida. In 2000, I was the Democratic candidate in the general election to represent Florida's 22nd Congressional district, running against the incumbent Republican Clay Shaw, who had served in Congress for nearly 20 years. In this election, Congressman Shaw was declared the winner by a margin of approximately 500 votes out of over 200,000 cast. Prior to this 2000 race, I served as a member of the Florida House of Representatives for over 18 years, from 1974 to 1978 (representing Northeast Dade County) and from 1986-2000 (representing Miami Beach and Miami). I was Speaker Pro-Tempore of the Florida House from 1992 to 1994, and during my time there I also served as chair of several legislative committees, including the Health Care Committee, the Joint Legislative Management Committee, the Joint Legislative Auditing Committee, and the Tourism and Cultural Affairs Committee. During my years in the Florida House, I focused on many issues, including health care, [2] authoring a number of bills to extend health insurance coverage and to make health care coverage available to more people. From 1993 to 2000, I served on the board of Andrx Corporation, a manufacturer of affordable generic drugs based in Fort Lauderdale, Florida. From 1990 to 1999, I served as Florida development director for Bar-Ilan University, which is based in Israel. From 1981 to 1985, I was Vice-President of the South Florida Broadcasting Company. From the late 1970's to the mid-1980's, I was a government relations consultant for several organizations, including the Florida Association of Jewish Federations, the Florida United Way and the United Protestant Appeal. I have also served on the boards of numerous Florida

organizations, including the Greater Miami Chamber of Commerce, the Florida International University Foundation, the Florida Philharmonic, the New World Symphony and the University of Miami Law School Visiting Committee.

3. National, state and local party committees all played important roles in the 2000 campaign to represent Florida's 22nd Congressional district. On the Democratic side, the Democratic Congressional Campaign Committee ("DCCC") provided some staff and other resources to support my campaign. In addition, the national, state and local Democratic parties participated in the "coordinated campaign," whose goal was to help get out the vote for Democratic campaigns at all levels, including the Presidential campaign of then-Vice President Al Gore and Senator Joe Lieberman, Bill Nelson's United States Senate campaign, and my campaign. Parts of the counties of Dade, Broward and Palm Beach comprised Florida's 22nd Congressional district when I ran in 2000 (note: the 22nd is different today), and the Democratic parties of all three of these counties played roles in the coordinated campaign. As I recall, I helped to raise some federal funds ("hard money") and non-federal funds ("soft money") for all of these parties as part of the coordinated campaign. The coordinated campaign did get-out-the-vote, voter registration, and absentee ballot activities. Florida was a targeted state for the 2000 Presidential race, and so the [3] coordinated campaign was a major effort driven primarily by the Presidential campaign. On the Republican side, the Florida Republican Party and the National Republican Congressional Committee ("NRCC") did a good deal of direct mail in support of Mr. Shaw's campaign, much of it attacking me, in my view unfairly and untruthfully. The congressional campaign committees of both major national parties also ran broadcast ads through their state parties in support of the Congressional candidates in Florida's 22nd district, as will be discussed below.

4. Interest groups were an important factor in the 2000 Congressional election in Florida's 22nd District. There was a lot of television and direct mail supporting Mr. Shaw's campaign by Citizens for Better Medicare, a group that I understand was funded mainly by the Pharmaceutical Research and Manufacturers of America, Inc. ("PhRMA"), which represents major corporations in the pharmaceutical industry. Other interest groups also ran many ads on television and radio in support of both major candidates, as will be discussed below.

5. In my experience in campaigns for federal, state and local office, including my involvement in the television advertising we ran in my race for Congress, no particular words of advocacy are needed for an ad to influence the outcome of an election. Many so-called "issue ads" are run in order to affect election results.

6. Television and radio advertising by political parties and interest groups had a tremendous influence on the outcome of the 2000 Congressional election in Florida's 22nd District. I do not believe there had never been a congressional race at any time, anywhere in Florida, with anywhere near what was spent on television by the campaigns, the parties, and interest groups. Although I did not have much time to watch television toward the end of the race, my campaign taped ads, showed them to me and made sure I was aware of what was going on. The AFL-CIO and the Florida Democratic Party ran many television "issue ads" in support of my campaign towards the end of the race, and these surely influenced the outcome to my benefit. However, based on my [4] observations, broadcast "issue ads" run in the last few weeks of the campaign by groups representing business interests, particularly the PhRMA group Citizens for Better Medicare, and by the Republican Party were deciding factors in this extremely close race, particularly because, in my view, they were mean-spirited attack ads. We did extensive polling in the race, including daily tracking polls over the final few weeks. As I recall, this polling indicated

that the ads run in the last few weeks by these interest groups and the NRCC (through the Florida Republican Party) caused my numbers to decline substantially, from well over 50% to essentially a dead heat at the end. Of course, my campaign was not the only entity with access to tracking polls in this race. In my view, the extraordinarily intense ad spending toward the end of the race by these groups indicates that they had information that I was likely to win. Long time incumbents like Mr. Shaw rarely receive that kind of attention unless they are in danger of losing. The groups rushed to defend Mr. Shaw, who had been their ally for many years in Congress and who served on the important House Ways and Means Committee. The major pharmaceutical companies PhRMA represents felt they had much to lose if the 107th Congress passed a Democratic version of a Medicare prescription drug bill, and Citizens for Better Medicare spent massively nationwide for ads in support of people like Mr. Shaw who they felt would work to prevent that. I also feel that, given my background on health care issues, the pharmaceutical industry would have been especially displeased to see me in Congress.

7. The role that so-called "issue ads" run by political parties and interest groups played in the 2000 race in Florida's 22nd Congressional district was also a subject of public and private discussion between my campaign and Mr. Shaw's campaign. As I recall, there were two significant interactions between our campaigns about it. The first, in September 2000, occurred when Mr. Shaw held a press conference and announced that he had sent a letter to me offering for both of us to disavow party or independent entity "issue ads." As I recall, he had the letter delivered at least [5] one day after he went to the press with it. At that point, the AFL-CIO had done some ads in the Palm Beach media market critical of Shaw's positions, but no group had yet come forward in support of him or in opposition to me. Further, the DCCC, through the State Party, had just begun television advertising.

8. When the press called me for a response to Mr. Shaw's letter, I said that if Mr. Shaw was serious about campaign finance reform, he should go back to Washington and get the Shays- Meehan legislation to the floor of the House and help to pass it. I also said I had no control over the ads that the AFL-CIO or the DCCC were running. I rejected his offer because I understood that he was attempting to end the election before it really got underway. He was the incumbent; he had much higher name ID; he was approaching $1 million in PAC money, and he and I both knew he was ahead in the polls. I said at the time that he had the opportunity to change the law by voting for Shays-Meehan and he failed to do so. When Senator John McCain came to Palm Beach to campaign for Shaw, I made the same points. I was not going to live by the rules he had voted against.

9. In October, there was a televised debate between Mr. Shaw and me, and the issue came up again. In the debate, Mr. Shaw said he thought soft money ads improperly swayed elections. Immediately after the debate, I challenged him to agree to end all negative ads by himself and by groups supporting him. I said, "I will agree not to mention your name in my ads and ask those supporting me to do the same, if you will agree to do likewise." Mr. Shaw did not accept my offer.

10. The Florida Democratic Party ran so-called "issue ads" directed at influencing the outcome of the 2000 election in Florida's 22nd Congressional district. Storyboards representing four of these ads, which I understand were run on television in the two months prior to the general election, are attached as Exhibit 1 to this Declaration. I understand that these storyboards and all others attached to this Declaration were provided by the Brennan Center for Justice, which had [6] obtained them by arrangement with the Campaign Media Analysis Group ("CMAG"). My understanding is that these ads were actually DCCC ads run through the Florida Democratic Party to get the better hard

money-soft money allocation rate. Obviously, I did not know anything about the content of these ads or how frequently they would run until after they began running. As I recall, Mr. Shaw publicly objected to the ads attached at Exhibit 1 at 1 and 4, arguing that although they said he had voted with Republican leaders nearly 90% of the time, in fact the correct number was only 86% or 87%. As I recall, the ad attached at Exhibit 1 at 4 was run extensively in September 2000, and I believe it may have been a factor in Mr. Shaw's request that we call off the soft money ads at around that time. These Florida Democratic Party ads were clearly run for the purpose of electing me.

11. The Florida Republican Party also ran broadcast ads directed at influencing the outcome of the 2000 election in Florida's 22nd Congressional district. Storyboards representing two of these ads, which were run on television very heavily in the two months prior to the general election, are attached as Exhibit 2 to this Declaration. My understanding is that, as on the Democratic side, these ads were actually NRCC ads run through the Florida Republican Party. I believe that the attack ad attached at Exhibit 2 at 1 ("FL/FLGOP Bloom Cheating Seniors"), which was run just before the general election, had a particularly strong effect on the outcome. As I recall, the Florida Republican Party also ran a significant number of "issue ads" against me on radio prior to the election. All of these ads were clearly intended to help defeat me in the election.

12. The AFL-CIO ran television ads directed at influencing the outcome of the 2000 election in Florida's 22nd Congressional district. Storyboards representing three of these ads, which were run on television prior to the general election, are attached as Exhibit 3 to this Declaration. Television ads by the AFL-CIO, as I recall particularly ads on repetitive motion injuries like the one attached at Exhibit 3 at 1 ("AFLCIO/Call Clay Shaw"), were a key factor in Mr. Shaw's request in [7] September 2000 that we call off the groups running soft money ads. The storyboard attached at

Exhibit 3 at 3 ("AFLCIO/Sherwood Sided With Drug Industry") actually names a candidate other than Mr. Shaw, and I understand this is because it is a "cookie cutter" ad run in more than one race, which the CMAG technology records the same way after the first time it sees the ad. In other words, when this ad ran in the 22nd district, it named Mr. Shaw instead of Mr. Sherwood. As Mr. Shaw suggested, these ads were intended to affect the election results in my favor, and I think they did have that effect.

13. The Florida Women's Vote project of EMILY's List also ran ads directed at influencing the outcome of the 2000 election in Florida's 22nd Congressional district. A storyboard representing one of these ads, which I understand was run on television fairly heavily in the two months prior to the general election, is attached as Exhibit 4 to this Declaration. This ad ("FL/FLWV Shaw Says He Fights for Seniors") was run to increase the number of people voting for me in the election, and I think it had that effect.

14. Citizens for Better Medicare ran a massive number of broadcast "issue ads" directed at influencing the outcome of the 2000 election in Florida's 22nd Congressional district. Storyboards representing five of these ads, which were run on television in the two months prior to the general election, are attached as Exhibit 5 to this Declaration. As I recall, Citizens for Better Medicare also ran a large number of "issue ads" against me on the radio in the final weeks of the campaign. The television ads were all focused on promoting Mr. Shaw by praising his record and position on the prescription drug benefit. Obviously this was an important issue in Congress in the years surrounding this election, and one in which the large drug companies PhRMA represents had a great interest, but the timing, placement and content of these ads show that their primary purpose was to insure that Mr. Shaw remained in Congress, so he could vote their way on the issue. The average age of residents in Florida's 22nd Congressional district is one of the highest in the nation, [8] so these ads had a big impact on the viewers. As explained

above, my campaign's tracking polls indicated that these Citizens for Better Medicare ads affected the election outcome in Mr. Shaw's favor. Older people, even Democrats, were confused. My response ads, saying that the ads attacking me were not true, could not match the frequency of the PhRMA ads or the Republican Party ads.

15. The Business Roundtable also ran ads directed at influencing the outcome of the 2000 election in Florida's 22nd Congressional district. A storyboard representing a television ad the group ran frequently on television for Mr. Shaw in the final weeks of the general election is attached as Exhibit 6 to this Declaration. The storyboard for this ad ("BRT/Shaw From The Start"), the script of which actually names a different candidate because it is apparently a "cookie cutter" ad, features shots of babies. The ad mentions education and jobs in a general way, but it is meaningless except as an attempt to persuade voters that the candidate in question was generally on the side of children. It was intended to help elect Mr. Shaw.

16. The United States Chamber of Commerce also ran so-called "issue ads" directed at influencing the outcome of the 2000 election in Florida's 22nd Congressional district. A storyboard representing a television ad that I understand the group ran on television against me in the final weeks of the general election is attached as Exhibit 7 to this Declaration. The storyboard for this ad ("KY/COC Jordan Scaring Seniors Rx"), which names a different candidate because it is apparently a "cookie cutter" ad, criticizes the candidate for her position on the prescription drug benefit. I believe this was not a huge ad buy, but running the ad would still allow the Chamber to let Mr. Shaw know that they had done something to help him survive the serious challenge he faced.

17. I appreciated the ads described above that were run by political parties and interest groups to assist my 2000 Congressional campaign, even though I had no advance knowledge [9] of what they would say or where they would

air. I understood them to be lawful and in compliance with FEC rules.

18. I support the restrictions in the new McCain-Feingold legislation on the use of soft money to affect federal elections through donations to parties and so-called "issue ads." In fact, I have worked for the passage of comparable state legislation here in Florida. Mr. Shaw, despite the help he received from Senator McCain, voted against the Shays-Meehan bill in 2002.

19. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

[BLOOM EXHIBIT 3-1]

CMR Ad Detector – CMAG Reports

BRAND: POL-CONGRESS+

TITLE: AFLCIO/Call Clay Shaw

COMMERCIAL: AFLCIO/Call Clay Shaw

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]

[Man]: " When you are lifting 70,000 lbs of castings a day and you do this for 24 years, you are going to hurt yourself. I had surgery on both hands.

[BLOOM EXHIBIT 3-1]

[2 of 7]

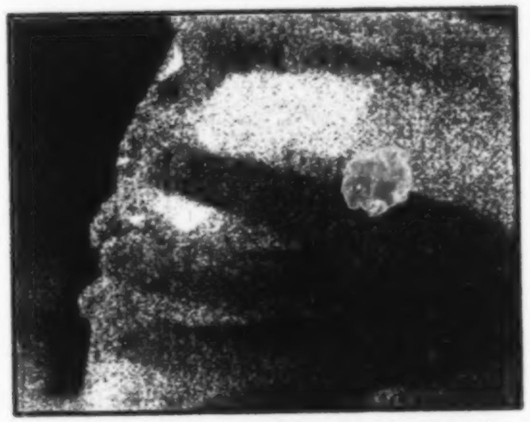
I will be in pain for the rest of my life." [Announcer]: Every year, tens of thousands of Americans

[3 of 7]

suffer permanent and crippling repetitive motion injuries on the job.

[BLOOM EXHIBIT 3-1]

[4 of 7]



Yet, Congressman Clay Shaw voted to block federal safety standards

[5 of 7]

that would help protect workers from this risk. Tell Shaw his politics

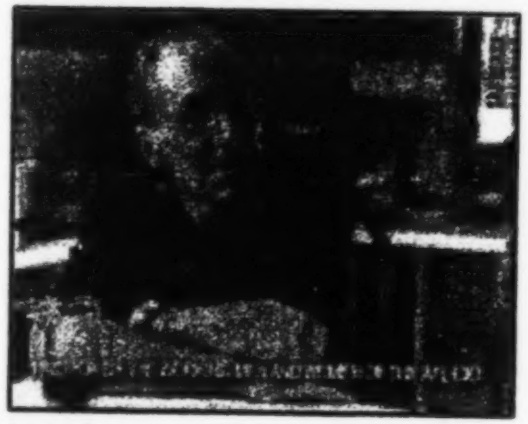
[BLOOM EXHIBIT 3-1]

[6 of 7]

Call Congressman Shaw
561.032.3007

causes pain. [Man]: " We're all human beings. We need to help eachother so this stuff doesn't happen

[7 of 7]



to us."

[BLOOM EXHIBIT 3-2]

CMR Ad Detector – CMAG Reports

BRAND: AFL-CIO UNION+

TITLE: AFLCIO/Call Clay Shaw

COMMERCIAL: AFLCIO/Call Clay Shaw

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]

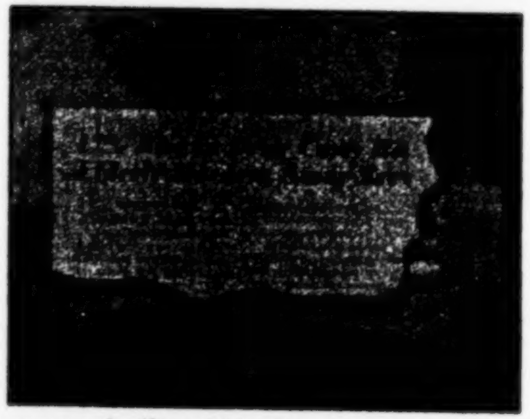
[Woman]: " When I think about getting older, it's not dying I worry about. It's living and

[BLOOM EXHIBIT 3-2]

[2 of 7]

being burried under a pile of medical bills that I can't pay for." [Announcer]: Prescription drug costs

[3 of 7]



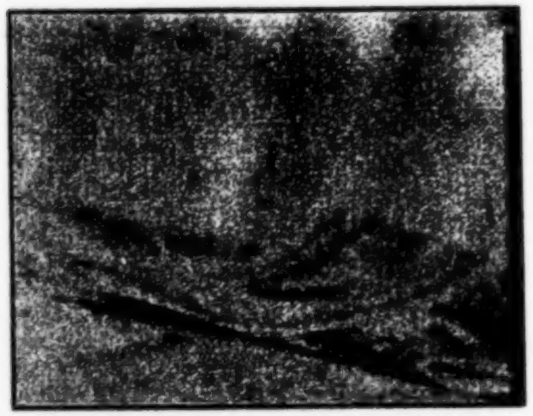
are exploding. Yet, Congressman Clay Shaw voted against guaranteeing

[BLOOM EXHIBIT 3-2]

[4 of 7]

seniors prescription benefits under medicare and back to a private

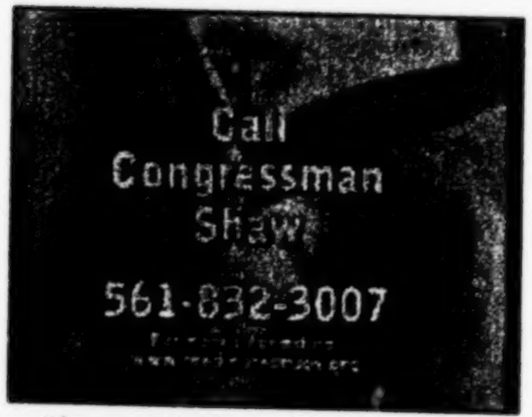
[5 of 7]



insurance plan that will leave millions without coverage. Call Shaw. Tell him to quit

[BLOOM EXHIBIT 3-2]

[6 of 7]



putting special interests ahead of working families. [Woman]: " With the cost of

[7 of 7]

these drugs. It's very very scarey."

[BLOOM EXHIBIT 3-3]

CMR Ad Detector – CMAG Reports

BRAND: POL-UNKNOWN ST&LCL OFC+

TITLE: AFLCIO/Sherwood Sided With Drug Industry

COMMERCIAL: AFLCIO/Sherwood Sided With Drug Industry 1 of 1

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]

Michael Weisman, R.Ph
Pharmacist

[Weisman]: " The citizens today can't afford the medication. They come in and I know that they're skipping the medication so they can

[BLOOM EXHIBIT 3-3]

[2 of 7]

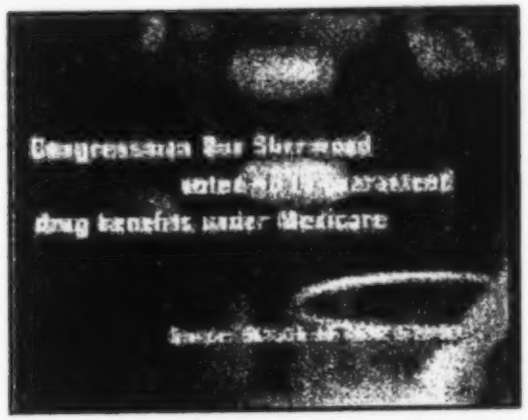
pay for their food. With the rising cost of medication today, it could wipe out

[3 of 7]

anybody at any time." [Announcer]: Yet, Congressman Don Sherwood sided

[BLOOM EXHIBIT 3-3]

[4 of 7]


Congressman Don Sherwood
voted NO to guaranteed
drug benefits under Medicare

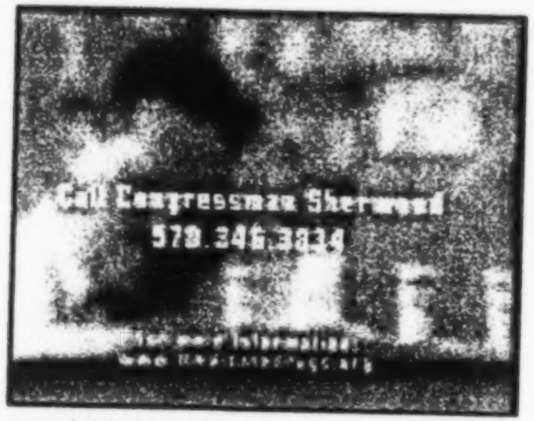
with the drug industry. He voted no to guaranteed medicare prescription benefits

[5 of 7]

that would protect seniors from runaway prices. Tell Sherwood. Quit putting

[BLOOM EXHIBIT 3-3]

[6 of 7]


Call Congressman Sherwood
570.346.3834
For more information:

special interests ahead of working families. [Weisman]: " Watching people walk away without

[7 of 7]

For more information:

the medication they need takes a little out of me every day."

[BLOOM EXHIBIT 4-1]

CMR Ad Detector – CMAG Reports

BRAND: POL-CONGRESS+

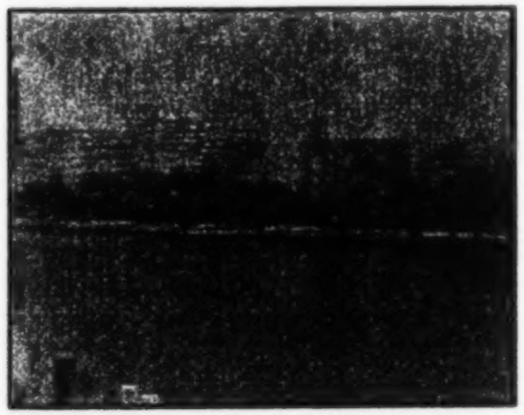
TITLE: FL/FLWV Shaw Says He Fights For Seniors

COMMERCIAL: FL/FLWV Shaw Says He Fights For Seniors 1 of 1

LENGTH: 30

FRAMES: 8

[Frame 1 of 8]



[Announcer]: In Florida, he says he fights for seniors, but Clay Shaw's Washington

[BLOOM EXHIBIT 4-1]

[2 of 8]

CLAY
SHAW'S
REAL
RECORD

record tells another story. In Washington, Clay Shaw was

[3 of 8]

CLAY
SHAW'S
REAL
RECORD

the architect of legislation to privatize Social Security and invest your

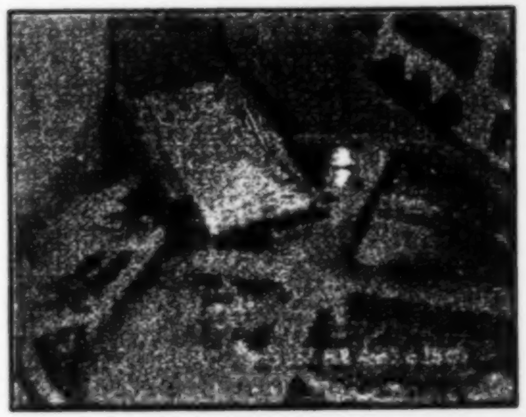
[BLOOM EXHIBIT 4-1]

[4 of 8]

Shaw: Privatize
dangerous

guaranteed savings in dangerous stock market schemes, and

[5 of 8]



Clay Shaw voted to subsidize pharmaceutical and insurance companies, instead of providing

[BLOOM EXHIBIT4-1]

[6 of 8]

the guaranteed, affordable prescription drug coverage that seniors

[7 of 8]

should have. Here's how to learn more about Clay Shaw's Washington record.

[BLOOM EXHIBIT4-1]

[8 of 8]

www.FloridaWomenVote.com
or call Clay Shaw at 202 225-3026

[PFB: Florida Women Voters. A project of Emily's List]

[BLOOM EXHIBIT 5-1]

CMR Ad Detector – CMAG Reports

BRAND: CITIZENS/BETTER MEDICARE+

TITLE: CBM/FL Shaw Knows Rx Is Important

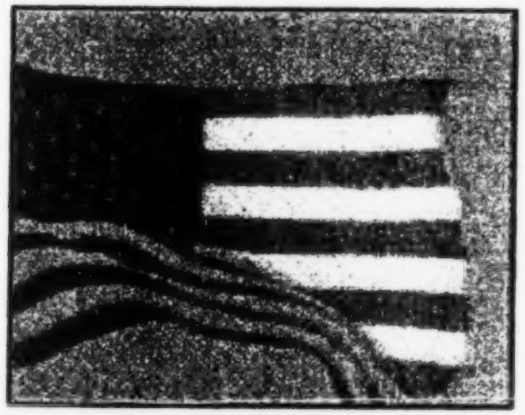
COMMERCIAL: CBM/FL Shaw Knows Rx Is Important

1 of 1

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]



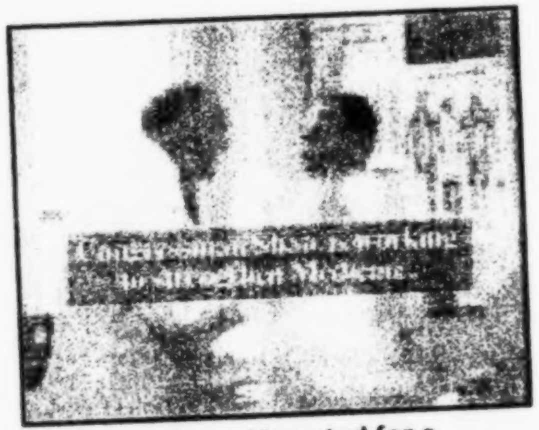
[Announcer]: Congressman Clay Shaw knows how important medicines are to seniors'

[BLOOM EXHIBIT 5-1]

[2 of 7]

health. That's why he's been working to strengthen and improve Medicare for

[3 of 7]


Congressman Shaw is working
to strengthen Medicare

Florida seniors. He voted for a prescription drug plan that's

[BLOOM EXHIBIT 5-1]

[4 of 7]

affordable, reliable, and that offers seniors real choice when it

[5 of 7]

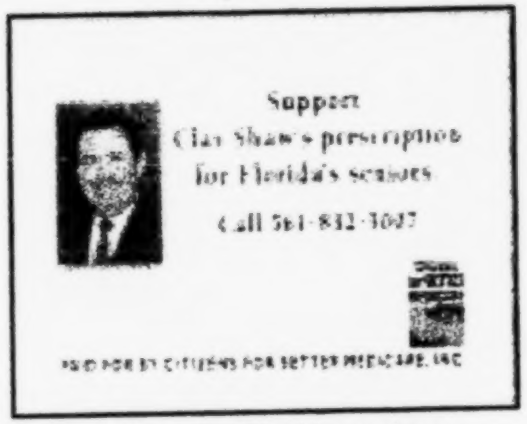
comes to their prescription medicine coverage. That's what seniors want

[BLOOM EXHIBIT5-1]

[6 of 7]

and that's what Congressman Clay Shaw wants for seniors too. Support Clay Shaw's

[7 of 7]


Support
Clay Shaw's prescription
for Florida's seniors
Call 561-832-3037
PAID FOR BY CITIZENS FOR BETTER MEDICARE, INC

prescriptions for Florida seniors. [PFB: Citzens for Better Medicare]

[BLOOM EXHIBIT 5-2]

CMR Ad Detector – CMAG Reports

BRAND: CITIZENS/BETTER MEDICARE+

TITLE: CBM/PA Sherwood If You Don't Have Health

COMMERCIAL: CBM/ PA Sherwood If You Don't Have Health 1 of 1

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]

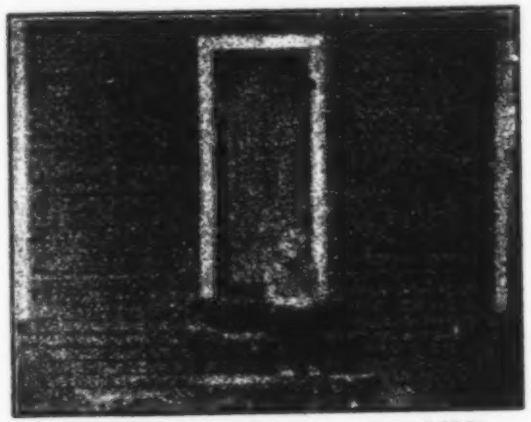
[Woman1]: "If you don't have health, you can't enjoy anything else. I paint, I write and I have my

[BLOOM EXHIBIT 5-2]

[2 of 7]

family. And I'm pretty stable with my cancer.

[3 of 7]



I would be struggling very hard if it weren't for

[BLOOM EXHIBIT 5-2]

[4 of 7]

medicines." [Announcer]: Congressman Don Sherwood is working to strengthen

[5 of 7]

Don Sherwood

Medicare and provide a prescription drug benefit so all seniors can

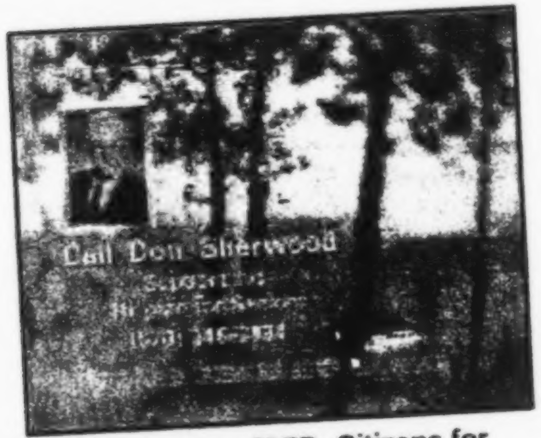
[BLOOM EXHIBIT5-2]

[6 of 7]

Don Sherwood

get the medicines they need. Support Don Sherwood's prescription drug

[7 of 7]



plan for seniors. [PFB: Citizens for Better Medicare]

[BLOOM EXHIBIT 5-3]

CMR Ad Detector – CMAG Reports

BRAND: CITIZENS/BETTER MEDICARE+

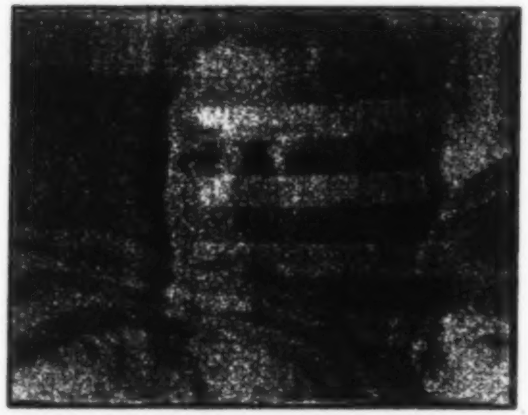
TITLE: FL/CBM Clay Shaw

COMMERCIAL: FL/CBM Clay Shaw 1 of 1

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]



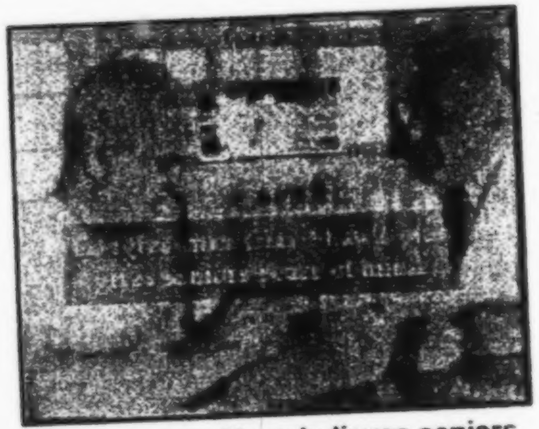
[Announcer]: Congressman Shaw believes Florida seniors deserve the best health care so he is fighting to improve

[BLOOM EXHIBIT 5-3]

[2 of 7]

Medicare with an affordable prescription drug plan that gives seniors peace of mind.

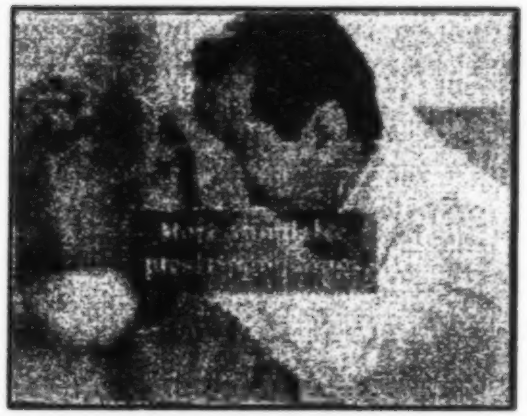
[3 of 7]



Congressman Shaw believes seniors should have real choices because he

[BLOOM EXHIBIT 5-3]

[4 of 7]



recognizes that every senior has different health care needs. Real choice.

[5 of 7]

Choice. Quality. Affordability.
The right plan

Quality. Affordability. Congressman Shaw has the right plan

[BLOOM EXHIBIT5-3]

[6 of 7]

to bring Florida's seniors peace of mind. Support Clay Shaw's

[7 of 7]

Support
Clay Shaw's prescription
for Florida's seniors.
Call 561-832-3407

prescription for Florida's seniors.

[BLOOM EXHIBIT 5-4]

CMR Ad Detector – CMAG Reports

BRAND: POL-CONGRESS+

TITLE: FL/CBM Foley Cancer Rx

COMMERCIAL: FL/CBM Foley Cancer Rx 1 of 1

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]

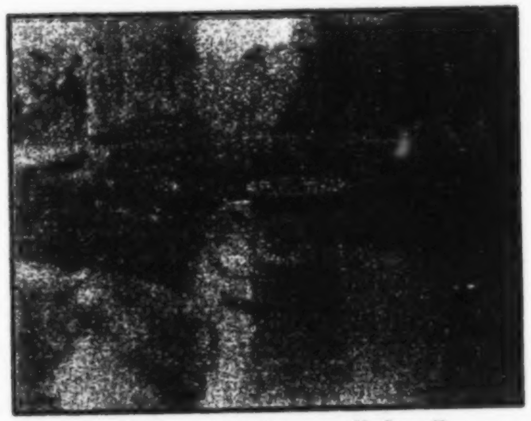
[Woman]: "People who have cancer are looking for miracles. At this point it is my

[BLOOM EXHIBIT 5-4]

[2 of 7]

faith and support from my family and my friends.

[3 of 7]



And then there is the medicine." [Announcer]: Congressman Mark Foley is working

[BLOOM EXHIBIT 5-4]

[4 of 7]

to add a prescription drug benefit to Medicare. And to make sure medicines are

[5 of 7]

available for every senior who needs them. Call Congressman Mark

[BLOOM EXHIBIT5-4]

[6 of 7]

Call Mark Foley
Support his Rx plan for Seniors
(561) 627-6192

Foley. [Woman]: "Without the medicine I would not

[7 of 7]

Call Mark Foley
Support his Rx plan for Seniors
(561) 627-6192

be where I am." [PFB Friends of Bill Redmond]

[BLOOM EXHIBIT 5-5]

CMR Ad Detector – CMAG Reports

BRAND: POL-CONGRESS+

TITLE: FL/CBM Shaw I Want Rx Plan

COMMERCIAL: FL/CBM Shaw I Want Rx Plan 1 of 1

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]

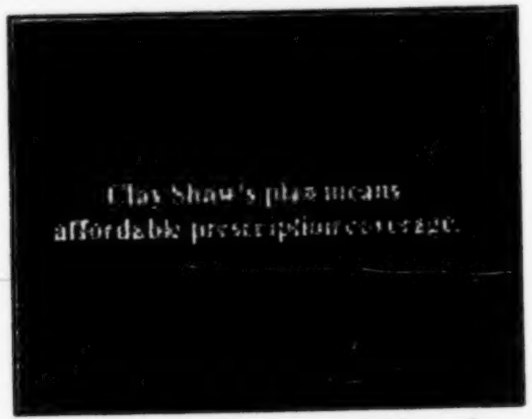
[Man1]: "I want the medicines I need."

[BLOOM EXHIBIT 5-5]

[2 of 7]

[Woman]: "I want a prescription plan that gives me real choice."

[3 of 7]



Clay Shaw's plan means affordable prescription coverage.

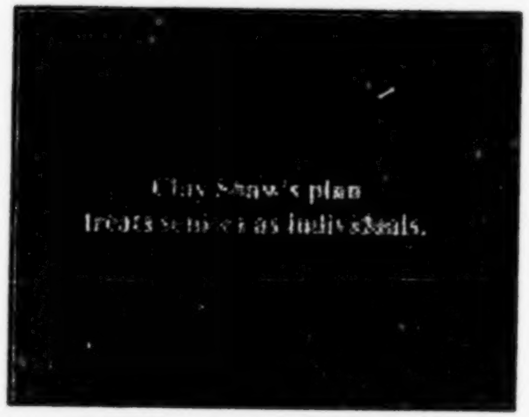
[Man2]: "We want a prescription plan that treats us as

[BLOOM EXHIBIT 5-5]

[4 of 7]

individuals."

[5 of 7]



Clay Shaw's plan treats seniors as individuals.

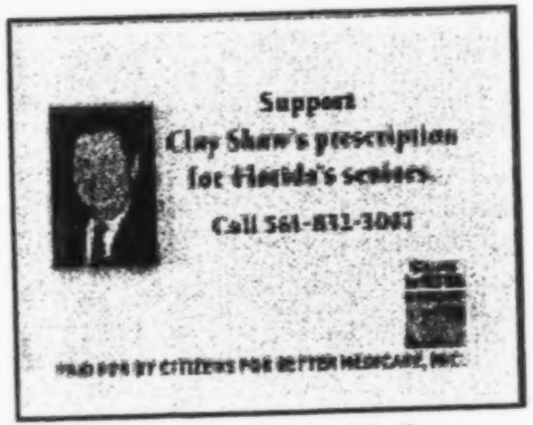
[Announcer]: Florida seniors want a Medicare prescription plan that gives them choice,

[BLOOM EXHIBIT5-5]

[6 of 7]

quality, and affordability. And that's what Congressman Clay Shaw wants for seniors too.

[7 of 7]



Support
Clay Shaw's prescription
for Florida's seniors.
Call 561-831-3047
PAID FOR BY CITIZENS FOR BETTER MEDICARE, INC.

[PFB: Citizens for Better Medicare, Inc]

[BLOOM EXHIBIT 6-1]

CMR Ad Detector – CMAG Reports

BRAND: BUSINESS ROUNDTABLE ORG+

TITLE: BRT/Shaw From the Start

COMMERCIAL: BRT/Shaw From the Start 1 of 1

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]

[Announcer]: From the start, everybody needs a helping hand and it's up to all of us to make sure they get it. Our children are our future.

[BLOOM EXHIBIT 6-1]

[2 of 7]

And their future should include the very best education possible.

[3 of 7]

A meaningful job and an America opening foreign

[BLOOM EXHIBIT 6-1]

[4 of 7]

markets around the globe, spreading peace and prosperity.

[5 of 7]

That's what Congressman David Minge has been fighting for.

[BLOOM EXHIBIT6-1]

[6 of 7]

Call him and thank him for fighting for us and them.

[7 of 7]

[PFB: Business Round Table]

[BLOOM EXHIBIT 7-1]

CMR Ad Detector – CMAG Reports

BRAND: US CHAMBER OF COMMERCE+

TITLE: KY/COC Jordan Scaring Seniors Rx

COMMERCIAL: KY/COC Jordan Scaring Seniors Rx

1 of 1

LENGTH: 30

FRAMES: 8

[Frame 1 of 8]

[Man]: "I heard Eleanor Jordan supports this White House prescription drug plan for seniors.

[BLOOM EXHIBIT 7-1]

[2 of 8]

What happens to the good prescrption drug plan that I already have through my company

[3 of 8]

retirement? They say I could lose it, and be left with

[BLOOM EXHIBIT 7-1]

[4 of 8]

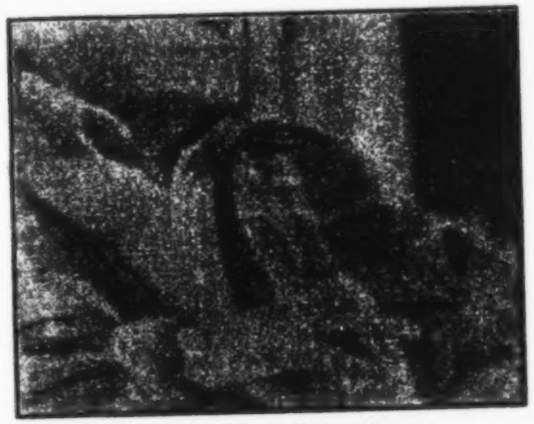
this government plan that may cost more and have fewer benefits.

[5 of 8]

And whose gonna run this big government plan. Will some bureaucrat be tellling

[BLOOM EXHIBIT 7-1]

[6 of 8]



me what kind of medicine I can have?" [Announcer]: Tell Eleanor Jordan

[7 of 8]

Scaring Seniors!

to stop scaring seniors. Stop supporting the White House prescription drug plan. [PFB U.S. Chamber of Commerce]

[BLOOM EXHIBIT 7-1]

[8 of 8]

Scaring Seniors!
the White House
Prescription Drug Plan

Declaration of Michael Boos

* * *

[4]

7. As pointed out by Walter J. Olson, one of the plaintiffs' expert witnesses in this action (Declaration of Walter J. Olson, ¶¶ 7-15, 17-60, 116), and as further confirmed in paragraph 8 of this Declaration below, these FEC filing and reporting requirements with respect to SSFs are quite burdensome, and I can confirm that these burdens have been, and continue to be, extraordinary, unduly harmful burdens for CUPVF.

8. As evidence of the licensing scheme established and perpetuated by the FECA/BCRA, prior to engaging in any "federal election" activities, and as a government-imposed condition for engaging in such activities, CUPVF was required to file with the FEC its initial Statement of Organization referenced above. In addition, CUPVF has been required by the government to maintain its records in such a way that it is able to prepare and file with the FEC a number of reports in each year of its existence, as well as to spend the time, effort, [5] and money to actually prepare and file those reports. The filing and reporting requirements, which I have undertaken and supervised on behalf of CUPVF, include--together with numerous other FECA-mandated requirements and restrictions--the following:

- CUPVF was required to include in its name the full name of its connected organization. (11 CFR 100.6(a) and 102.14(c).)
- CUPVF was required to appoint a treasurer of the SSF before accepting contributions or makes expenditures. (11 CFR 102.7(a) and (b).)
- The treasurer of CUPVF was required to prepare and file the initial FEC form 1 (Statement of Organization) for the CUPVF, which includes the following information (11 CFR 102.2):
  - (i) name and address of the SSF;
  - (ii) electronic mail address if such an address exists and if the committee is required to file electronically;
  - (iii) Internet address of the committee's official web site, if such a web site exists;
  - (iv) name and address of the connected organization;
  - (v) type of connected organization;
  - (vi) name and address of the custodian of records;
  - (vii) name and address of the treasurer; and
  - (viii) name and mailing address of banks or other depositories.

- The initial FEC Form 1 was filed with the FEC, as required. (11 CFR 105.4)
- A copy of the FEC Form 1 for CUPVF was filed, as required, with the designated State officer of Virginia. (11 CFR 108.1.)
- After the original, executed FEC Form 1 was filed with the FEC, the FEC assigned an Identification Number (C00295527) to CUPVF. (11 CFR 102.2(c).)
- CUPVF was required to prepare and file an amendment to its registration statement (FEC Form 1) with the FEC within 10 days after there [sic] any change or correction to the information contained in the registration statement, which it did on July 27, 1999, to reflect a new address and depository. (11 CFR 102.2(a)(2).)
- CUPVF was required to designate as its campaign depository or depositories only state banks, federally charted depository institutions (including national [6]

banks), or depositories insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration. (11 CFR 103.2.)

- CUPVF has been required to maintain at least one checking account or transaction account at one of its depositories. (11 CFR 103.2.)
- CUPVF has had to engage and retain a treasurer responsible for ensuring that all receipts are deposited in a designated depository account identified in CUPVF's registration statement within 10 days of receipt, or are returned to the contributor without being deposited within 10 days of receipt. (11 CFR 103.3(a).)
- CUPVF has been prohibited from receiving contributions or making expenditures when there is a vacancy in the office of treasurer if the committee does not have an assistant treasurer. (11 CFR 102.7.)
- CUPVF has been required to make all disbursements by check or similar draft drawn on accounts established at its designated depository or depositories, except for expenditures of $100 or less made from a petty cash fund maintained pursuant to 11 CFR 102.11. (11 CFR 102.10.)
- CUPVF has been required to maintain a treasurer responsible for ensuring that excessive contributions are not deposited in an account depository of CUPVF (11 CFR 103.3(b).)
- Before qualifying as a multicandidate committee, CUPVF was permitted to make contributions only up to $1,000 per election to a candidate for federal office, including a candidate for the office of Representative, Senator, or President of the United States. (2 U.S.C. § 441a(a).)
- After qualifying as a multicandidate committee *(i.e.*, when it (i) received contributions from more than 50 persons, (ii) had been registered with the FEC for at least six months, and (iii) had made contributions to at least five federal candidates), CUPVF's treasurer filed a completed, executed FEC Form 1M (Notification of Multicandidate Status) with the FEC. (2 U.S.C. § 441a(a) and 11 CFR 100.5(e)(3) and 102.2(a)(3).)

- After qualifying as a multicandidate committee and filing its FEC Form 1M with the FEC, CUPVF was prohibited from giving more than $5,000 per election to a candidate for federal office (2 U.S.C. § 441a(a) and 11 CFR 110.2(b).) It is my understanding that the BCRA did not increase that limit, as it did for individual contributors.

[7]

- As a qualified multicandidate committee, CUPVF has been required to give each recipient federal candidate or campaign committee written notification that CUPVF has qualified as a multicandidate committee when it has made a contribution to such federal candidate or campaign committee. (11 CFR 110.2(a)(2).)
- CUPVF has been limited in soliciting contributions to CUPVF at any time from Citizens United's restricted class, which includes (i) its noncorporate members (such as individuals or partnerships), (ii) its executive and administrative personnel, and (iii) the families of both groups. (11 CFR 114.7.)
- CUPVF has been able to solicit contributions to the SSF no more than twice a year from employees of Citizens United who are nonexecutive and nonadministrative personnel and their families. (11 CFR 114.6.)
- CUPVF has been able to accept contributions of no more than $5,000 in the aggregate per calendar year from a contributor. (11 CFR 110.1(d).)

- If any contribution received by CUPVF exceeded the limit, the treasurer was required to return or refund the excessive amount unless the following procedure were followed within 60 days of receipt of the excessive contribution by the treasurer: the excessive amount of the contribution may be retained by the SSF, if, within 60 days of receipt by the treasurer, (i) the excessive amount was reattributed to another individual, such as a joint account holder, by obtaining signed written authorizations from each person making the contribution pursuant to 11 CFR 110.1(k)(3), and (ii) the treasurer informs the individual making the contribution that he or she may request the return of the excessive portion of the contribution if it is not intended to be a joint contribution. (11 CFR 110.1(k)(3).)
- CUPVF may not accept contributions made from the general treasury funds of corporations, labor organizations, or national banks. (11 CFR 114.2(a) and 114.2(b).)
- CUPVF may not accept contributions made by federal government contractors. (11 CFR 115.)
- CUPVF may not accept contributions by foreign nationals as defined in 11 CFR 110.4(a)(4). (11 CFR 110.4(a).)
- CUPVF may not accept contributions made by one person in the name of another. (11 CFR 110.4(b).)

[8]

- CUPVF may accept neither cash contributions of more than $100, nor anonymous cash contributions of more than $50. (11 CFR 110.4(c)(1), 110.4(c)(2) and 110.4(c)(3).)
- The treasurer of CUPVF is responsible for making his best efforts in determining the legality of a contribution. (11 CFR 103.3(b)(1).)

- An SSF registered with the FEC, such as CUPVF, must file periodic FEC Form 3X reports with the FEC until it has terminated its registration and reporting obligations by filing a termination report. (11 CFR 104.5(c).)
- As an SSF registered with the FEC, CUPVF must file FEC Form 3X reports on either a quarterly or monthly schedule. During a nonelection year, in which there are no regularly scheduled federal elections, a quarterly filer is required to file two semiannual FEC Form 3X reports: (i) a mid-year report (January 1 through June 30); and (ii) a year-end report (July 1 through December 31). During an election year, an SSF which is a quarterly filer is required to file the following FEC Form 3X reports (11 CFR 104.5(c)):
  - (i) April 15 Quarterly;
  - (ii) July 15 Quarterly;
  - (iii) October 15 Quarterly;
  - (iv) 12-Day Pre-General (if appropriate);
  - (v) 30-Day Post-General;
  - (vi) January 31 Year End; and
  - (vii) 12-Day Pre-Election (*e.g.*, primary, runoff) reports (if appropriate).
- As a monthly filer, CUPVF has been, and is, required to file the following FEC Form 3X reports each year (11 CFR 104.5(c)):
  - (i) February 20 Monthly;
  - (ii) March 20 Monthly;
  - (iii) April 20 Monthly;
  - (iv) May 20 Monthly;
  - (v) June 20 Monthly;
  - (vi) July 20 Monthly;
  - (vii) August 20 Monthly;
  - (viii) September 20 Monthly;
  - (ix) October 20 Monthly;

(x) 12-Day Pre-General (election years only, if appropriate);
(xi) 30-Day Post-General (election years only);
(xii) November 20 Monthly (nonelection years only);
(xiii) December 20 Monthly (nonelection years only);
(xiv) January 31 Year End.

[9]

- As an SSF which is a multicandidate committee, CUPVF has been required to indicate that it has qualified as a multicandidate committee on the summary page of each FEC Form 3X (Report of Receipts and Disbursements) report filed with the FEC.
- When CUPVF files its FEC 3X reports with the FEC, it is required to simultaneously file copies of the summary page, detailed summary page and the appropriate Schedule B (Itemized Disbursements) pages of the FEC Form 3X report with the designated State officer of the State in which CUPVF supported or opposed federal candidates during the reporting period, unless that State has received a waiver from the requirement to maintain copies of FEC statements and reports. (11 CFR 108.1.)
- An SSF may change its filing schedule (*e.g.*, monthly to quarterly) only once per calendar year. (11 CFR 104.5(c).)
- As an SSF, CUPVF must file a 24-hour report, signed by the treasurer under penalty of perjury, when it makes independent expenditures aggregating $1,000 or more after the 20th day but more than 24 hours before the day of an election. The notice must be received by the FEC within 24 hours after the expenditure is made. The notice must include all the information required on the Schedule E (Itemized Independent Expenditures) of FEC Form 3X, including CUPVF's name and FEC Identification Number. Each independent expenditure which, by itself or when added to other independent expenditures made to the same payee during the same calendar year, exceeds $200 must be itemized, including the following information (11 CFR 104.3(b)(3)(vii)(B), 104.4(b) and 104.5(g)):
  (i) name and address of the payee;
  (ii) date of expenditure;
  (iii) amount of expenditure;
  (iv) purpose of expenditure;
  (v) name of the federal candidate who is supported or opposed; and
  (vi) office sought by the federal candidate.

- An SSF may file a termination report at any time, provided that (i) it no longer intends to receive contributions to make expenditures, and (ii) it does not have any outstanding debts or obligations. (11 CFR 102.3)
- As an SSF, CUPVF is required to file hard copy reports and other documents, such as FEC Form 3X and amendments to FEC Form 1, with the FEC, unless it receives contributions or makes expenditures in excess of $50,000 in a calendar year, or has "reason to expect to exceed" $50,000 in contributions or expenditures in a calendar year. (11 CFR 104.18(a).)

[10]

- Beginning with the reporting periods that start on or after January 1, 2001, CUPVF is required to file reports, such as FEC Form 3X and amendments to FEC Form 1, electronically with the FEC, if its combined total contributions or combined total expenditures exceed, or "have reason to expect to exceed," $50,000 in a calendar year. An SSF that is not required to file electronically may choose to file its reports in an electronic format. (11 CFR 104.18)

- CUPVF's treasurer is required to keep copies of each registration statement (FEC Form 1), FEC Form 3X report and other documents (*e.g*, 24-hour report of independent expenditures) for three years after they are filed. (11 CFR 102.9(c) and 104.14(b).)
- CUPVF's treasurer is required to keep records and accounts of all contributions received by or on behalf of CUPVF, and of all disbursements made by or on behalf of CUPVF, for three years after the report to which such records and accounts relate is filed. (11 CFR 102.9)
- CUPVF's treasurer is required to ensure that the contribution records identify each contribution: (i) of more than $50 by amount, date of receipt, and donor's name and address; and (ii) of more than $200 by amount, date of receipt, and donor's name, address, occupation, and employer (11 CFR 102.9(a).)
- According to the FEC, CUPVF's treasurer is personally responsible for carrying out the following (11 CFR 103.3 and 104.14(d)):
  (i) filing complete and accurate reports and statements with the FEC on time;
  (ii) signing all reports and statements filed with FEC;
  (iii) depositing receipts in the committee's designated bank within 10 days;
  (iv) authorizing expenditures or appointing an agent (either orally or in writing) to authorize expenditures;
  (v) monitoring contributions to ensure compliance with the law's limits and prohibitions; and
  (vi) keeping the required records of receipts and disbursements.

These and other FEC-related requirements are extremely burdensome -- I estimate that normal FEC-related functions, such as complying with the FEC filing and reporting requirements, alone have required at least three hours of my time per month, year round, and this does not include the time necessary for CUPVF's treasurer to review and sign the reports, nor does it [11] include the time of Citizens United's or CUPVF's bookkeepers or any other individual. Nor does it include the time involved in less regular FEC-related matters, including my own continuing study of FEC requirements, or counseling Citizens United and CUPVF with respect to election law matters, or FEC proceedings such as Matters Under Review ("MURS"), which are discussed in the following paragraph.

9. In the past six years, CUPVF and its treasurer have been involved as respondents in several MURS, even where no complaint alleged illegal activity of CUPVF or its treasurer, and CUPVF and its treasurer were called upon to justify conduct that I believe any reasonable person would deem legal and in compliance with FEC regulations and the law. Defending CUPVF (and CUPVF's treasurer) in these MURS--all of which were dismissed (without apology) against CUPVF and its treasurer--was time-consuming and expensive. Furthermore, during the course of these MURS, I became aware of a number of policies and/or practices of the FEC in conducting its MURS, including the following:

- The FEC does not permit either respondents or counsel for respondents in MURS to appear before the FEC at any stage of the proceeding.
- The FEC General Counsel's office presents its own views as well as the views of respondents in MURS to the FEC in closed hearings which the respondent, respondent's counsel and the public may not attend.
- When the deposition of a respondent in a MUR is taken by the FEC, the FEC policy is to require the respondent to sign the deposition at the offices of the FEC, or at the offices of a reporting company, and in neither case is the respondent allowed to take with

him a copy of the deposition, or to copy the deposition.

- The FEC will not permit a respondent to take possession of a copy of his own deposition even if the respondent is the only respondent and he waives his right to confidentiality under FECA.

[12] It has been my experience, on behalf of Citizens United and CUPVF, that the policies and procedures of the FEC, including those in MURS as set forth above, has worked to the tremendous, unfair disadvantage of the citizenry, including CUPVF and its treasurer, and has resulted consistently in an extremely unnecessary waste of time, effort, and expense, in litigating MURS against the FEC. The MURS referenced above involving CUPVF and its treasurer consumed, conservatively, more than 100 hours of time of CUPVF and its staff, and cost CUPVF or Citizens United many thousands of dollars in attorney's fees. These are but examples of the tremendous burden felt by organizations and individuals involved in the morass of needless, counter-productive, and I believe unconstitutional regulation spawned by the FECA, and now the FECA as amended by the BCRA.

10. The FECA/BCRA regulatory scheme is daunting, from a compliance standpoint. Without constant vigilance and careful recordkeeping and bookkeeping, for example, it would not be difficult to run afoul of the recordkeeping and reporting requirements in any given year, particularly during active periods, such as just prior to an election. As Citizens United's FEC reports indicate (see paragraph 7, below, and Exhibit B hereto), its gross contributions have not exceeded $50,000 per year, and they are normally substantially less (*e.g*, $36,970 in 2000, $41,489.25 in 1999, $16,633 in 1998). Yet I would estimate the actual cost of maintaining and operating CUPVF with respect to FEC compliance matters at between $5,000 to $12,000 per year. Again, this is relative to regular compliance matters, and does not include extraordinary matters such as MURs. For the activities of an SSF that raises and expends substantially less than $50,000 for year, the FECA requirements and FEC regulations [13] implementing them, costing a small SSF like CUPVF up to twenty percent or more of its yearly receipts, are unconscionably and unconstitutionally burdensome and overbearing.

11. The burdens and restrictions imposed upon CUPVF by the FECA/BCRA, which Citizens United and Citizens United Political Victory Fund contend are unconstitutional, include the following: as a political committee CUPVF is required to comply with statutorily-imposed licensing regulations, editorial control, and discriminatory economic burdens, to wit: (i) registration with the FEC as a political committee, as required by 2 U.S.C. Section 433, in order to be permitted to engage in any communicative activity expressly advocating the election or defeat of a candidate for federal office; (ii) the filing of periodic reports, open to the public, of receipts and disbursements, as required by 2 U.S.C. Section 434, in order to be permitted to continue to engage in such communicative activity; and (iii) compliance with limits upon individual financial contributions, as specified by 2 U.S.C. Sections 441a, 441d, 441f, and 441g, and reporting to the FEC the names, addresses, employers, and occupations of contributors, as required by 2 U.S.C. 434, in order to convey CUPVF's candidate preferences in a federal election. These are substantial burdens, in terms of time and effort expended, out-of-pocket expense and employee salaries, and distraction from the substantive activities of CUPVF (as well as Citizens United itself), that greatly interfere with the free exercise of the First Amendment rights of Citizens United and CUPVF, and inhibit the ability of CUPVF to carry out its activities with respect to federal elections.

* * *

[3 PCS CDP 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No.: 02-CV-0582 (CKK, KLH, RJL)
CALIFORNIA DEMOCRATIC PARTY, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No.: 02-CV-0875 (CKK, KLH, RJL) CONSOLIDATED ACTIONS

[CORRECTED] DECLARATION OF KATHLEEN BOWLER

I, KATHLEEN BOWLER, hereby swear and depose as follows, based on my own personal knowledge:

1. I am the Executive Director of the California Democratic Party ("CDP" or "Party"). This is the highest staff-level position in the Party. As Executive Director, I am the [3 PCS CDP 2] chief administrative officer and I run the day-to-day operations of the Party under the supervision of elected State Party Chair, Art Torres. I have served as Executive Director since 1995. Before that, I worked on and off for the party in various capacities beginning in 1980. I have previously been a Co-Chair of the CDP Rules Committee, and have worked with the Party's mail program extensively over the years. I am familiar with the Party's income and expenditures, and the reporting requirements imposed by both California law and Federal law. I am also familiar with the Party's voter registration programs, its Get-Out-The-Vote (GOTV) activities, its generic party-building activities, and its public communications (including its mail program).

2. CDP is an unincorporated association of approximately seven million members who have joined together to advance common political beliefs. To advance those beliefs, CDP performs many functions, among them providing financial and material support to federal, state and local candidates, recruiting and training those candidates, taking positions on public issues (including state and local ballot measures) and publicizing those positions, engaging in voter registration, get-out-the-vote and generic party-building activities, and maintaining an administrative staff and administrative structure to support these goals and activities and to comply with extensive state and federal regulation. CDP is financially supported by contributions from its members and other supporters. At its core, CDP is made up of persons who share certain political views and seek to join together to express those views through active participation in the political process.

STRUCTURE AND ORGANIZATION OF CDP

3. CDP is the duly authorized and officially recognized Democratic Party of the State of California. Its organization, operations and functions are set out in California Elections [3 PCS CDP 3] Code Sections 7050 *et seq*. The Party is required by these provisions to govern itself through a Democratic State Central Committee (DSCC). The DSCC is made up of about 2,710 members, about 849 of whom are

elected by the 58 county central committees. Other members serve as a result of their status as State or Federal elected officials, appointees of these officials, nominees of the Party, and members of the Democratic National Committee from California, as well as elected representatives of 80 Assembly District Committees (subunits of the Party). The DSCC meets as a whole once a year in the Party's annual convention. During the rest of the year the Party governs itself through an Executive Board. The Executive Board has about 315 members and meets two to three times a year. Many State and Federal elected officials as well as all members of the Democratic National Committee from California are members of the Executive Committee.

4. The California Elections Code also provides for the Democratic County Central Committees. Members of the County Central Committees are elected at each statewide primary election. All members of the Party serving as State Senators, members of the State Assembly, members of Congress, or the Party's nominees for those offices serve as ex-officio members of their County Central Committee. On a more local level, the CDP By-laws provide for Assembly District Committees ("AD Committees"). These committees elect delegates to the State Central Committee and are the district-level organizational blocks of the Party. Both the County Central Committees and AD Committees are primarily involved in local voter registration, get-out-the-vote or similar grass-roots activities, and act as liaisons with the campaign organizations of Democratic candidates in that area. [3 PCS CDP 4]

5. CDP is integrally related to the Democratic National Committee (DNC), which is the governing body of the Democratic Party of the United States. Under its Charter, the DNC is made up principally of the State Chair and highest ranking officer of the opposite gender from each recognized

state Democratic Party, and of 200 additional members apportioned to, and selected by, the state parties, based on a formula taking into account population and Democratic voting strength. Thus, CDP's Chair and Vice Chair are members of the DNC by virtue of their state party offices; and CDP has elected twenty other persons to represent CDP on the DNC. In addition, the chairman of the CDP Art Torres, has been elected by the DNC, on the recommendation of the DNC chair, to serve on the DNC Executive Committee. The DNC often works with CDP in planning and implementation of strategy and operations to elect Democrats to all levels of office and in the dissemination of the Democratic Party's message. Members of the DNC representing the CDP attend regular meetings of the DNC, as well as training sessions, regional caucuses and numerous other meetings and events.

6. CDP has a core staff of approximately 24 people during non-election years. Those employees are divided into six divisions: Accounting, Administrative, Finance (which includes fundraising), Party Services (which includes our conventions and Executive Board meetings), Political/ Communications, and Research. The Party maintains year-round offices in two locations: Sacramento and Los Angeles. The cost of maintaining the offices and staff, apart from the costs of specific activities, is substantial. It includes not only staff costs, but also related expenses such as health and pension benefits, and workers compensation, as well as rent, utilities, legal fees, general liability insurance, printing, office equipment and similar overhead expenses. Many of these expenses are not directly related to election activity and are typical of [3 PCS CDP 5] any large membership organization. Like other organizations, we hold conferences and meetings, distribute literature that describes the Party's goals and principles, respond to member inquiries, and issue press releases.

7. CDP's regular and ongoing operating expenses,

including fundraising expenses, between 1997 and 2000 ranged between $2.1 million and $3 million. These figures do not include convention costs, which have typically been several hundred thousand dollars annually. As explained further below, these costs cannot be reduced without significantly impairing the Party's ability to perform its core functions.

CDP'S PROGRAMMATIC ACTIVITIES

8. In addition to ongoing overhead and administrative costs, CDP makes expenditures for a range of activities in furtherance of its ideological goals. I will discuss some of these activities in more detail below but, in general, we support the Party's candidates at the national, State and local level; we support or oppose ballot measures at the State or local level that reflect the Party's ideology; we engage in extensive voter registration activities, GOTV activities, and generic party-building communications. We also recruit and train candidates, and provide communications, services and activities for our membership (such as party literature, press releases, and convention activities). The most significant part of CDP's activities, both in terms of time and money, is its support of State and local candidates, and activities such as voter registration and GOTV, that are essential to the election of those candidates.

9. CDP maintains a Federal committee that is registered with the Federal Election Commission ("FEC"). It is required to comply with the Federal contribution limits and reporting requirements, and it has a Federal account which is limited to contributions received within the [3 PCS CDP 6] Federal limits ($5,000 per contributor per year). In accordance with Federal law, this account does not include any contributions from corporations or labor unions.

10. I have reviewed the Federal contribution figures

since 1995. The amount of Federal money raised through contributions has been relatively constant. For example, we raised $4,316,528 in the 1995-96 cycle; $4,076,870 in the 1997-98 cycle; $4,837,967 in the 1999-00 cycle; and $3,455,887 in the 2001-02 cycle (as of June 30). These are Federal contributions raised directly by CDP; these figures do not include any transfers from other party committees or candidates. Exhibit A illustrates Federal contributions during these cycles. These numbers reflect a substantial effort over the years to raise Federal money; even with increased efforts, I believe it would be exceedingly difficult to raise substantially more Federal money.

11. CDP is also registered as a political committee in accordance with California law, and is required to comply with California law as well as Federal law with respect to its campaign activities. Its non-Federal campaign activities are subject to direct regulation by the Fair Political Practices Commission, and it regularly files reports of all its receipts and expenditures with the California Secretary of State. California law was changed significantly by the adoption of Proposition 34, a comprehensive campaign finance measure, in November, 2000. Under Prop. 34, contributions to candidates by individuals, committees or entities other than political parties are limited: $3,000 to state legislators, $5,000 to statewide candidates other than Governor, and $20,000 to Governor. ("Small contributor" committees may give slightly more.) Contributions by political parties to candidates are not limited, although they count toward the voluntary spending limits, if a candidate has accepted such limits. Expenditures made by a political party on behalf of a candidate are also unlimited, but they do not count toward the spending limits. As [3 PCS CDP 7] a practical matter, this means that if the Party sends out a mailer endorsing a candidate that costs $2,500 that amount does not count against the candidate's limits, but if the Party gives a $2,500 contribution to the same candidate, it will count

against those limits. Contributions to political parties for the purpose of making contributions to state candidates are limited to $25,000 per year per contributor; contributions for other purposes (such as administrative and overhead costs, voter registration, generic GOTV and support of ballot measures) are not limited. Contributions to the political parties are not limited as to the source (i.e., corporations and unions may contribute).

12. Consistent with its State and local focus, CDP has always raised more non-Federal money than Federal money. These amounts have also been relatively constant over the past four cycles. In the 1995-96 cycle, we raised $12,991,251; in the 1997-98 cycle, we raised $15,957,831, in the 1999-00 cycle, we raised $15,617,002; for the 2001-02 cycle, we have raised $13,928,496 through June 30. I would expect the final figures for this cycle to be somewhat higher than 1999-00. Again, this is money raised directly by CDP; these figures do not include any transfers from other party committees. This is money that we have used to fund our State and local activities. Exhibit A also illustrates non-Federal income over these cycles.

13. In the past, the Party has placed contributions that meet the Federal limits as to amount and source into its Federal account. Other contributions, representing a substantial majority of the Party's income, have been placed in its non-Federal accounts. The Federal account pays for direct contributions to Federal candidates, as well as expenditures coordinated with a Federal candidate as permitted by federal law. It would also be used for independent expenditures in support of a Federal candidate (although I am only aware of one such [3 PCS CDP 8] expenditure since 1995). The non-Federal accounts would be used for direct contributions to State or local candidates, as well as coordinated or independent expenditures made on their behalf. There are 120 legislative officers, 8 statewide elected officers, and 4 members of the State Board of Equalization (elected by district). In addition, there are elections for judicial office and local office, and ballot measures at both the State and local level.

14. One of the Party's most significant non-Federal expenses is its direct mail program in support of its endorsed non-Federal candidates and ballot measures. CDP typically spends $7-8 million per cycle in non-Federal funds on its mail program in support of its non-Federal candidates. Obviously, the majority of our non-Federal contributions (approximately ($13-16 million per cycle) goes into this program.

15. The costs of certain activities, which have been construed by the FEC since about 1990 as having an effect on both Federal and non-Federal elections, are "allocated" between our Federal account and our non-Federal account. Allocation is required for administrative expenses (e.g., rent, utilities, salaries), generic voter identification, partisan voter registration and GOTV activities that are not candidate-specific, fundraising expenses, and communications on behalf of both Federal and non-Federal candidates (such as a mailer that mentions both). This allocation is done in accordance with the FEC's regulations; the precise allocation formula depends on the nature of the activity. For example, administrative expenses and generic party activities have been allocated based on the "ballot composition" formula, which calculates the ratio of Federal offices and non-Federal offices expected to be on the general election ballot in that cycle. For example, in the 1999-2000 cycle, which included a Presidential race, administrative expenses were required to be allocated 43% Federal - 57% Non-Federal. In this cycle, where the only [3 PCS CDP 9] Federal office on the ballot is the Congressional race, administrative expenses are required to be allocated 12.5% Federal/87.5% Non-Federal. Public communications are allocated using a "time and space" formula. For example, the

costs of a mailer that endorses one Federal candidate and nine non-Federal candidates equally would have be paid one-tenth from the Federal account and nine-tenths from the non-Federal account. Fundraising expenses are allocated on a "funds raised" basis. For example, if a fundraising dinner raises $100,000, and $40,000 is deposited into the Federal account and $60,000 into the Non-federal account, then the dinner expenses are paid 40% with Federal dollars and 60% Non-federal. While I do not always agree with the FEC's characterization of a particular activity as having an effect on a Federal election, the allocation system has been a fair and understandable method of dealing with activities that may have some effect on a Federal election, even if somewhat remote and indirect. It also recognizes the reality that most states combine Federal and non-Federal elections, and that certain expenditures may effect both.

16. Over the years, CDP has received transfers of both Federal and non-Federal money from the Democratic National Committee (DNC), the Democratic Congressional Campaign Committee (DCCC), and the Democratic Senatorial Campaign Committee (DSCC). The majority of these transfers were for issue advocacy, although money has also been transferred for voter registration, get-out-the-vote activities, and even administrative expenses. We are able to raise a substantial amount of money for our non-Federal activities and do not rely on national party transfers for those purposes. Some transfers were not for particular expenses, but were "trades" between CDP and the DNC that reflected our different needs in a particular election cycle. For example, in 2000, we had some additional Federal money at the end of the [3 PCS CDP 10] year, and the 2001-2002 cycle was going to require a lower percentage of Federal money for allocated expenditures. The DNC needed Federal money, but had additional non-Federal money. So, we traded. This is legal and was fully reported on our State and Federal campaign reports.

17. The FEC has determined that issue advocacy is a form of generic party activity and must be allocated between Federal and non-Federal money. The allocation ratio for the state parties has been somewhat more favorable than the ratio for national parties. For example, in 2000, CDP's Federal portion was 43% while the national parties' was at least 65%. Since Federal money is harder to raise and is less available, transferring money to CDP for issue ads allowed CDP to run ads which it otherwise might not have been able to afford, and allowed the ad to be run with a lower percentage of Federal money. CDP also benefitted by having its name on the ad (which gave the Party increased visibility for all of its races), and the ads typically featured themes that were popular "Democratic" themes and were designed to motivate voters around those issues (e.g., health care, Social Security). It is important to note that this was all done legally and only after FEC had indicated that this was permissible. It is also my view that the "transfer" issue is something of a "red herring" in that it could have been addressed by the FEC or Congress on a very direct basis and cannot be used as a justification for imposing a number of other restrictions on the political parties that have nothing to do with the problems supposedly created by these transfers. [3 PCS CDP11]

THE BCRA'S UNREASONABLY BROAD DEFINITION OF "FEDERAL ELECTION ACTIVITY"

18. I have reviewed the provisions of the Bipartisan Campaign Reform Act (BCRA). The BCRA creates a new term -- "federal election activity" -- and requires that any activities falling within the scope of that term must be paid for either completely with Federal contributions, or with a combination of Federal contributions and a new form of Federally regulated money -- "Levin amendment" contributions. Levin contributions are not limited by Federal law as to source (i.e., they may include corporate or union

contributions if permitted under State law), but they are subject to the Federal limits as to amount. Under the BCRA, both Federal contributions and Levin contributions will be limited to $10,000. This means that State parties such as California will now be required to have at least three accounts: a Federal account, a Federally limited Levin account and the State's non-Federal accounts. (For example, in California, the Party must maintain separate accounts for candidate-related contributions and expenditures, and for non-candidate-related contributions and expenditures.) The first two of these accounts are Federally limited, and only those two accounts may be used to fund "federal election activities" after the BCRA goes into effect.

19. Based upon the past patterns of non-Federal contributions to CDP, it is clear that between 76% and 86% of CDP's non-Federal contribution income has been from contributions in excess of the $10,000 Levin limit. Imposing the Levin limit during the last four cycles would have resulted in the following reductions of CDP's non-Federal income: 1995-96 income would have been reduced from $12,991,251 to $3,166,918 (a 76% reduction); 1997-98 income would have been reduced from $15,957,831 to $3,839,818 (a 76% reduction); 1999-00 income would [3 PCS CDP 12] have been reduced from $15,617,002 to $2,141,138 (an 86% reduction); and 2001-02 income would have been reduced from $13,928,496 to $2,489,162 (through June 30, 2002) (an 82% reduction -- although it will be somewhat smaller at the close of the cycle). Although CDP may continue to accept the higher contributions under California law, the usefulness of those contributions is limited because any income from such contributions may not be used under the BCRA for any activity considered "federal election activity." Exhibit A illustrates the impact of the Levin limits on CDP's non-Federal income during these cycles.

20. Under the new definition of "federal election activity," virtually all of CDP's activities in support of its State and local candidates, as well as most of its "generic" party-building activity, will be considered "federal election activity" even though those activities have only a remote or indirect effect on any Federal election or, in some cases, no effect at all. As a result, non-Federal money cannot be used at all for these activities. This has the following consequences for our activities:

a. **Voter registration activities.** The BCRA makes all voter registration activities within 120 days of any election including a Federal office "federal election activity." This includes primary elections. This means that in an election year, virtually all voter registration activity must be paid with Federal money, or a combination of Federal and Levin money. The view that this activity is for the purpose of "influencing" a Federal election misunderstands that nature of party registration activity. Although we have in the past allocated the costs of voter registration between Federal and non-Federal money as required by the FEC regulations, it is often the case that voter registration activities are primarily driven by the desire to affect State and local races. For example, this is a non-Presidential year with no U.S. Senate [3 PCS CDP 13] races on the ballot in California. Because of recent redistricting, there is only one closely contested Congressional race – the 18th CD located in the Modesto area. Nonetheless, CDP has been actively involved in voter registration activities throughout the State. Similarly, the two largest urban areas of the State – Los Angeles and San Francisco – rarely experience competitive Federal races, but CDP regularly funds substantial voter registration activities in both of those areas.

In addition, the BCRA ignores the fact that political parties are, in large part, membership organizations and voter registration is the way in which the parties add to their membership. For this reason, CDP engages in a range of activities throughout the election cycle, although it is inevitable that interest is most focused as an election approaches. During the past year, CDP participated in registering over 300,000 Democratic registrants. CDP makes direct expenditures for voter registration by producing voter registration materials and literature that is distributed to local groups and by sponsoring a program which encourages local Democratic Clubs and Assembly District Committees to conduct voter registration drives and pays them according to the number of new registrations. CDP also conducts voter registration activities in connection with new citizen ceremonies throughout the State. Finally, CDP contributes substantially to voter registration programs either run by or allied with the State legislative leadership. CDP's expenditures on voter registration were approximately $145,000 in the 1995-96 cycle; $300,000 in the 1997-98 cycle; $100,000 in the 1999-00 cycle; and $185,000 for the cycle January 1, 2001, through June 30, 2002. All of these expenditures were allocated between Federal money and non-Federal money according to the ratio for that cycle. It is worth noting that the cycle with the highest expenditures (1997-98) was the cycle with the lowest Federal/non- [3 PCS CDP 14] Federal ratio, i.e., it had the fewest number of Federal races on the ballot, but all the statewide elected offices were on the ballot. Since registration is essential to voting, CDP's registration efforts serve a double purpose – they add to its membership, but they also add voters to the voter rolls, an important function and one which will otherwise have to be funded by the State of California or other civic organizations not restricted by BCRA. If voter registration activities have to compete with candidate-support activities for Federally limited contributions under the BCRA, it is very likely that CDP's voter registration activities will be significantly reduced or eliminated.

b. **GOTV activities.** The BCRA defines "federal election activity" to include "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot." Since California holds its State elections at the same time as Federal elections, this means that virtually all activity in support of State candidates will be "federal election activity" regardless of the relative importance of the Federal offices on the ballot. For example:

- State candidate mail. Even if the mail only identifies a State candidate, if it also encourages persons to vote, it is GOTV activity and must be paid with Federally limited funds. This mail often gives both the election date and the person's polling place -- both GOTV criteria under the FEC's regulations. Some mail also contrasts the Democratic position on an issue with that of the Republicans. Under the BCRA, this could be considered "generic party activity." Examples of our State mail are attached as Exhibits D and E. CDP typically spends approximately $7 - $8 million in non-Federal funds on its mail program in support of State [3 PCS CDP 15] candidates – mail that does not include Federal candidates. As stated above, there are 120 members of the Legislature, eight statewide elected officials and numerous judicial elections, ballot measures and local races. In 2000, CDP produced and sent out over 350 different mail pieces for its State and local candidates and ballot measures. Although this mail does not reference Federal candidates or any Federal races, non-Federal money can no longer be used for this State mail after the BCRA goes into effect.
- Mail in support of or opposition to ballot measures. The same restrictions apply; if the mail urges voters to vote, it is considered

"federal election activity" under the BCRA. It does not matter that no Federal candidate is mentioned. The San Francisco general ballot for the November, 2002 contains 7 statewide measures and 20 local measures. The local party committee cannot send out any "GOTV" mail concerning any of these measures unless paid for completely with Federally limited funds.

- Apart from the mail, much of the Party's direct voter GOTV activity is done by "telephone banks" and door-to-door canvassing in which voters are urged to vote. In the past, this activity has been paid with non-Federal money if only State candidates were endorsed. If the message carried was a "generic" message supporting all Democratic candidates, the cost was allocated between Federal and non-Federal money. However, a significant percentage of paid phone banking (perhaps 40-50%) is done in connection with a specific State or local race and refers only to the State or local candidate. After the BCRA goes into effect, all [3 PCS CDP 16] phone bank and canvassing GOTV activity will have to be paid with federally limited money, even if it only mentions a State candidate and does not mention a Federal candidate. Not a single non-federal dollar could be used. An example of a purely State phone script is attached as Exhibit F. An example of a generic phone script is attached as Exhibit G.

- Slate cards/doorhangers. These are cards or mail pieces listing all the party's endorsed candidates urging voters to vote on election day, and providing information such as the date of the election and the polling place. They are usually tailored for distribution in a particular local area, and State and local races dominate numerically over the Federal races. Examples of local slate mail and a local doorhanger are attached as Exhibits H and I. Like grass-roots activities, they have been allocated between Federal and non-Federal money according to the over-all space occupied by the Federal candidates. Under BCRA, these are considered GOTV activity, and non-Federal money can no longer be used.

c. **Generic party activity**. The BCRA defines generic activity as any activity that promotes a party and does not promote a Federal or non-Federal candidate. It is difficult to imagine many party activities that could not be characterized as "promoting" the party. All generic activity must be paid with Federally limited funds. In the past, the costs of these activities would have been allocated between Federal money and non-Federal money. For example, CDP routinely sends a postcard to new registered Democratic voters explaining the principles of the Party and urging them to actively support the Party. An example is attached as [3 PCS CDP 17] Exhibit J. After the BCRA, non-Federal funds cannot be used to print or mail the postcard. Other examples of generic material are attached as Exhibits K and L.

d. **Public communications.** Under the BCRA, public communications are communications that refer to a clearly identified Federal candidate and that "promote or support" a Federal candidate. In the past, CDP has done mail and radio advertisements on behalf of State candidates showing that they are endorsed by a Federal candidate. In the past, these could be paid with non-Federal money as long as the Federal candidate's election was not referenced or advocated. To the extent that these types of public communications can be construed to "promote or support" the endorsing Federal candidate they will now have to be paid completely with Federal money.

e. **Broadcast Communications**. If any of the above activities (i.e., voter registration, GOTV or generic party-building messages) use a "broadcast" medium, they must be paid only with Federal money. Even Levin money cannot be used. Examples of messages that cannot be broadcast with any non-Federal funds are attached as Exhibits M, N, and O.

THE ADVERSE IMPACT OF BCRA

21. I have reviewed CDP's expenditures since 1995. Although it is difficult to say precisely which activities conducted in the past would be "federal election activities" under the BCRA, I believe that certain categories of activities would be included in the new BCRA definition. In determining which activities would be "federal election activities," I have excluded virtually all of the Party's administrative costs, although some of those costs would certainly fall within the definition – particularly certain staff salaries which might reach the 25% "influencing federal elections" threshold of the BCRA. Administrative costs, although not [3 PCS CDP 18] "federal election activities," are required to be allocated, that is, paid in part with Federal money. In calculating the Federal portion of administrative costs, I have used the new allocation formula issued by the FEC rather than the formula that was in effect for that particular cycle. I have also excluded past activities that would be prohibited under the BCRA – for example, I have excluded transfers to other party committees, and contributions to 501(c) organizations and 527 organizations.

22. Even after excluding transfers from other parties and contributions to other organizations, it is clear that the vast

majority of CDP's historical activities in support of its candidates and measures and/or to build the Party's membership base and promote its ideology may be classified as "federal election activity." This means that those activities can no longer be funded from the non-Federal money we raise in accordance with California law -- they will have to be funded either completely with Federal funds or a combination of Federal funds and Levin limit funds. Exhibit B illustrates both administrative or overhead expenses that will have to be funded in part with Federal money plus the new category of "federal election activity" that will have to be funded with Federally limited money. Exhibit C compares the new income levels under BCRA with historical expenses that the BCRA will require to be paid with Federally limited funds.

23. It is clear that if available income is reduced by almost two-thirds, CDP will clearly not be able to continue funding its historical level of expenditures and its activities will have to be curtailed dramatically. If you include national party transfers for activities other than issue ads, the impact is even more pronounced. Not only will administrative costs have to be reduced, but certain administrative costs are actually likely to increase: accounting (because of [3 PCS CDP 19] BCRA's additional reporting requirements) and fundraising. In addition, since only Federal money can be used to raise either Federal or Levin dollars, any increase in fundraising efforts will come at a direct cost to CDP's programmatic and candidate-support activities. All of CDP's programmatic activities will essentially be competing against each other (and against administrative costs) for limited Federal/Levin dollars. As a practical matter, candidate support and GOTV activities will remain the Party's priority. Voter registration, generic party-building activity and grass-roots organizing activities will be reduced or largely eliminated while the remaining GOTV activity will be dramatically reduced, both in terms of the number of candidates supported and the level of support

available for a given candidate. It is clear that it is the non-Federal expenditures that will suffer most dramatically rather than the Federal expenditures.

24. The cost of communicating with voters in California is substantial. It is a geographically large state, with a very large population, and several expensive media markets. The cost of television is higher for the Party than it is for candidates. If the national parties are prohibited from transferring money to assist with ads, it is unlikely that CDP will be able to afford to do them, although we would like to be able to do them to the same extent as other organizations and without additional limitations on the type of money used. Even if the Party limits its communications to mail, in order to compete for attention effectively the mail must have a visual impact and there must be repeated contact. In my experience, an organization cannot reach voters effectively by mail unless it sends at least 12-15 pieces in relatively close proximity in terms of time. The average cost of a CDP mail piece has been approximately $.25 - .35 (postage alone is at least $.10 per piece); the average number of mail pieces for a State Senate [3 PCS CDP 20] district is 150,000; the average number for a State Assembly district is 90,000. A statewide mail piece, such as a vote-by-mail piece, costs approximately $260,000. A sample Vote By Mail piece is attached as Exhibit P. None of these pieces mention Federal candidates, yet all of these costs will have to be paid with Federally limited funds. If CDP's income is limited by the BCRA by the percentages indicated above, CDP will clearly not only not be able to do any television or radio advertisements, its mail program will be reduced below the level of effective communication of its message.

25. In addition, GOTV efforts other than the mail program will suffer. A ground campaign is very expensive to run. Although CDP recruits volunteers, a significant number of persons must also be paid. I estimate that in the coming election, approximately 50% of the GOTV work will have to be done by paid staff. Candidates cannot, for the most part, afford to conduct this kind of campaign; they use the media or mails because these methods are more effective for the money spent. Nor do candidates have the infrastructure set up to conduct this kind of campaign. The parties, through their local organizations, conduct the only real ground campaign. We anticipate supporting at least 30 local offices for the upcoming election. The vast majority of these offices will have paid staff doing at least some training, recruiting, coordinating, etc. If the parties cannot conduct or support these activities, either from lack of available funds or restrictions imposed on coordinating party activities at more than one level, these activities are likely to simply disappear over time. [3 PCS CDP 21]

EFFECTS OF BCRA ON FUNDRAISING AND ASSOCIATIONAL ACTIVITIES

26. The broad definition of "federal election activity" and the limits on raising money that can be used to fund those activities will be exacerbated by several other provisions of the BCRA. First, the BCRA prohibits national party officers or agents from raising Levin money, as well as non-Federal funds. It also prevents the use of such funds if they have been raised by other Party officials, such as County Central Committee officers. CDP and DNC's by-laws provide that the Chair and Vice-Chair of CDP are members of the Democratic National Committee by virtue of their office. Similarly, County Central Committee Chairs are members of CDP's Executive Committee. Members of the DNC in California, as well as County Central Committee officers, are also often active in Party activities at the State level, and the DNC includes a number of State, Federal, local officials and even a CDP staff person. The political parties are designed to have a great deal of "overlap" in their membership and leadership. The provisions of the BCRA, particularly the

criminal provisions, will make it difficult, if not impossible, for persons to engage in activities on more than one level (local, state, national) if those activities or communications can subject them to investigation or prosecution for assisting another party committee in raising what are essentially Federally regulated funds.

27. A second way in which the BCRA will exacerbate the problems caused by its "federalization" of State activities is that it prohibits Federal candidates and officeholders from assisting the State or local party committees in raising Levin funds or non-Federal funds. CDP's candidates at all levels are its standard-bearers. They are the face of the Party to the party membership as well as the public at large. The Federal candidates and officeholders are often [3 PCS CDP 22] better known than State or local candidates, particularly in a state like California with term limits for State Legislators. Members of the Party and, especially, persons actively engaged in supporting the Party, enjoy meeting the candidates – including Federal candidates – and hearing them discuss issues in a particular campaign or in the news. The BCRA, by allowing Federal candidates and officeholders to "appear" at fundraising events but prohibiting them from any involvement in fundraising, will put them at risk with respect to participating in such events and is likely to cause them to minimize these events or avoid them altogether. Many organizations engaged in fundraising use "celebrities" or similarly well-known spokespersons to stimulate enthusiasm and excitement over the organization's programs. Parties are not significantly different in this regard, and the prohibition on Levin fundraising and non-Federal fundraising by Federal candidates or officeholders unreasonably deprives the parties of the assistance of some of their most successful and popular representatives.

28. The BCRA restricts transfers of Federal money between party committees if that money is to be used in conjunction with Levin money for "federal election activities." This makes no sense. Federal money is, by definition, raised in compliance with all of the Federal limitations as to both source and amount. CDP can use its own Federal money for "federal election activities," but cannot use any Federal money transferred from another party committee. The only apparent explanation for these restrictions is a desire to inhibit intra-party coordination and further inhibit the development of strong parties. Since Federal money is difficult to raise and, under the BCRA, will have to be used in large measure for even non-Federal electoral activity, it is unlikely that such funds would be transferred unless one party committee had "surplus" funds and another party committee needed such funds, as in the case of a closely [3 PCS CDP 23] contested seat. In these cases, the parties should have the freedom that other organizations have to make basic organizational decisions about where money is best spent. Even though Levin funds are not subject to all the Federal restrictions (although subject to significant restriction), the same is true as to the transfer of Levin funds among the State and local parties. Transferring money already raised within certain limits cannot be said to be circumventing such limits. The limits on transfers and the ban on joint fundraising activities between party committees make it clear that the real intent of the Levin limit is to limit over-all spending and weaken the parties by reducing their participation in the election process.

29. Fundamentally, the BCRA attempts to separate and isolate each level of the party. Currently, the parties at all levels are bound together not only by ideology, but also in the common enterprise of electing candidates up and down the ticket. In various ways, the parties attempt to coordinate their efforts, reach out to their core constituencies and allocate their collective resources to achieve both electoral goals and ideological goals. In the electoral context, the Democrats have had the "coordinated campaign," which has been an effort to

bring all the elements of the party together to maximize their resources and the likelihood of electoral success. The coordinated campaign involves representatives of the national, State and local parties, as well as constituent groups that have historically provided strong grass-roots support, coming together to discuss the very real and practical problems of winning campaigns. If these persons have to worry about whether their discussions amount to "soliciting," "receiving," "directing," or "spending" non-Federal money, and whether their communications subject them to criminal prosecution, it will be virtually impossible to engage in the kind of collective planning and decision-making that is part and parcel of election campaigns. Moreover, these [3 PCS CDP 24] restrictions are not imposed on other groups participating in the political process – only on the political parties.

30. CDP has also made certain expenditures that are directly related to its State and local electoral activities that will be prohibited by the BCRA. For example, contributions to organizations described in IRS Code Section 501(c) are prohibited if they engage in federal election activity, including voter registration and GOTV. Most committees that are organized to support or oppose ballot measures in California are organized as 501(c)(4) committees; it is my understanding that this has been required by the IRS. Virtually all of these committees engage in some activity that would be characterized as GOTV. The ban on contributions means not only that CDP cannot contribute directly to a particular ballot measure committee; it also cannot make "in-kind" contributions to such a committee. The CDP by-laws give the Party the authority to endorse on ballot measures; CDP commonly communicates its endorsement by including it in mail pieces that contain a combination of candidate and ballot measure endorsements. Each of these constitutes an "in-kind" contribution to the benefitted committee unless done completely independently of the committee. This ban on contributions to ballot measure committees, whether direct or in-kind, means that CDP will be prohibited from involvement in many of the most significant State controversies – issues such as affirmative action, education of immigrant children, welfare reform, restrictions on union membership, and term limits, all of which have been the subject of ballot measures in recent years.

31. The BCRA also prohibits any contributions to organizations described in IRS Code section 527, without regard to their activity. I understand Section 527 organizations are commonly thought of as PACs, but the term also includes political parties, clubs, other groups [3 PCS CDP 25] engaged in partisan activities and candidate controlled committees. CDP has also contributed to 527 organizations, particularly its Assembly District Committees, and Democratic clubs. These contributions are made to assist these local committees with very basic administrative and organizational costs, as well as for voter registration activities. Although these committees have traditionally engaged in grass-roots GOTV activity, they are not engaged in direct activities in connection with Federal elections; in fact, they are strongly discouraged by CDP from engaging in Federal electoral activities. Ironically, the BCRA apparently excepts Federal political action committees from this prohibition, but does not except purely "local" political action committees, which engage only in the kind of "grass-roots" activity that the BCRA purports to advance. Other 527 organizations funded by CDP in the past are the voter registration programs conducted by the Party's leadership in the State Senate and Assembly. The BCRA not only prohibits the Party from contributing to the voter registration programs of its own state leaders, it apparently requires any association of State Legislators who wish to do voter registration to register as a Federal committee and pay for these activities with only Federally limited money.

OTHER STRUCTURAL PROBLEMS CREATED BY

BCRA

32. The BCRA severely limits the abilities of State and local parties in one other way – it prohibits a party committee from making an independent expenditure in support of or opposition to a Federal candidate if any other national, State or local party committee anywhere in the country has made a coordinated expenditure and, conversely, it prohibits a party committee from making a coordinated expenditure in support of or opposition to a Federal candidate if any other national, State or local party committee anywhere in the country has made an independent expenditure. As a practical matter, I do not have any way of knowing what party committees [3 PCS CDP 26] have made such expenditures without examining the reports of each and every party committee in the country and, even then, because of the lag time between the close of a reporting period and the actual filing date for that period, I might not be aware of a particular coordinated or independent activity that has taken place. As a matter of law, I understand that CDP is entitled to make independent expenditures so long as those expenditures are truly independent and are not coordinated with the candidate. Although CDP can ensure that its independent activities have not been coordinated with a candidate, it has no control over (and usually no knowledge of) the activities of other party committees. Even within California, CDP has no control over (and usually no knowledge of) the activities of the County Central Committees. These Committees function independently of CDP.

33. The BCRA will also significantly increase CDP's costs of complying with Federal law. CDP has six full-time employees responsible for record-keeping and preparation of the reports required by State and Federal law. In an election year we file quarterly and pre-election and post-election reports with the FEC. The BCRA will require monthly reporting if we

maintain a Levin account. In non-election years, the number of reports would increase from two to fourteen. In addition, the limitations on Levin money (apart from the amount) will require additional verification efforts. I anticipate that CDP will have to hire at least one additional staff person just to meet the additional BCRA verification and reporting requirements. Ironically, this means that CDP's significantly reduced income will have to be spent at least in part on compliance costs and increased fundraising costs that will be required by the new law. [3 PCS CDP 27]

CONFLICT WITH STATE LAW

34. The basic principles of the BCRA are at odds with Proposition 34, the California campaign finance law enacted by a vote of the people in November, 2000. As stated above, that law combines limits on contributions to candidates with voluntary spending limits. However, the law was specifically designed to allow the political parties to play a greater role in State and local elections and to provide an "insulating" effect between large contributors and candidates. Because the role of the parties in California was viewed as basically a positive one, the limits for contributions to the parties for candidate expenditures were set relatively high ($25,000) and are unlimited for expenditures such as administrative expenses, generic party-building, voter registration and GOTV expenses and ballot measure expenditures. Contributions and expenditures by the Party on behalf of its State candidates are not limited, reflecting the view that these expenditures are not harmful. Finally, the spending limits for candidates were specifically set with the intent that political party expenditures would augment the candidate's expenditures and would not count against the candidates' voluntary expenditure limits. In other words, the parties can support its candidates by mail, etc. without such expenditures counting against the spending limits. The point was to

encourage the parties to actively support their candidates and thereby reduce the candidates' need to raise large campaign treasuries while at the same time allowing the parties and the candidates to cooperate in effectively communicating the candidates' (and the parties') message. The BCRA will adversely affect the Party's support for all of its candidates, but particularly its State and local candidates. If all Party communications and GOTV activity for State and local candidates becomes "federalized" and can only be financed [3 PCS CDP 28] with Federally limited money, the Party will simply be unable to afford these activities and it will not be able to provide the kind of organizational support for its State and local candidates envisioned by Prop. 34. Although non-Federal money can be contributed directly to State and candidates, such contributions will count against the spending limits and therefore the over-all resources available to the State candidates will be significantly reduced.

ADDITIONAL ISSUES

35. I understand that various "experts" have asserted either that the parties will simply be forced to raise more Federal money (assisted by the new, higher limits) or, to the extent they experience a drop in actual income, will be forced to go back to volunteers and increased grass-roots efforts. Both of these assertions are wrong. Over the last 20 years, the Party has tried a number of different approaches to raise money within the Federal limits. The most successful program has been our telemarketing program. In recent years, our telemarketing program has raised between $800,000 and $2 million. The average contribution is $27.00. The main drawback with this program is that it is very expensive to run. On the average, it costs approximately $.40 - $.50 for every dollar raised. We have also conducted direct a joint fundraising direct mail campaign with the DNC. This will be prohibited under the BCRA; if CDP wished to continue it, they

would have to incur the increased costs of doing it "in-house." In reviewing our Federal contributions since 1995, I consider it significant that the number of contributions made at the $5,000 level (i.e., the number of persons giving the current maximum) was very small, usually accounting for less than 5% of the total. The total amount from those contributions has ranged between $170,000 (1999-00) to $355,000 (1995-96). Since the number of contributions at the $5,000 level is so small, I do not believe that doubling the limit from [3 PCS CDP 29] $5,000 to $10,000 will result in a substantial increase in the amount of Federal money contributed.

36. The notion that the parties can simply return to the "good old days" of volunteers and grass-roots organizing is also wrong. On a very basic level, the political parties are competing for the attention of potential voters with a deluge of competing messages from all media sources – television, radio, mail, news, and the Internet. We are also competing for volunteer time at a time when discretionary time is at a minimum and more women are employed outside the home. The size of the Senate and Assembly districts are such that they are simply too large to rely primarily on volunteers. Although our local offices still use, and try to recruit, volunteers, an increasing amount of GOTV work is done by paid staff. I expect that in this election at least 50% of the GOTV work will have to be done by paid employees. That is why candidates cannot afford it. Many activities such as the distribution of lawn signs and buttons are valuable to maintain a presence in the community, generate enthusiasm, and create a sense of identification and participation. However, these things alone do not have the necessary impact to reach, educate and persuade a large number of voters. Given the sophisticated and professionally packaged messages that voters are subjected to everyday, the only way to "break through" for their attention is to provide similarly sophisticated and professionally packaged communications on behalf of the parties. Similarly, even

though volunteer and grass-roots activities remain an important part of the parties' strategies, even those activities must be supervised and coordinated by paid staff if they are to be effective.

37. In addition, in my view, the BCRA poses one additional very real risk for the parties – that they will become marginalized in the political process. People become active in the [3 PCS CDP 30] political parties, and make contributions to the parties, because the parties play a central role in defining the issues and articulating those issues through their candidates. Although many interest groups are also involved with the parties, the force and role of these groups is moderated in the "give and take" of party politics so that nō particular group monopolizes the parties or the selection of candidates. If the issues are instead defined by those interest groups (including the narrower ideological factions within the parties which are free to set themselves up as independent organizations not subject to the restrictions of the BCRA), and those groups set the agenda for elections, both the candidates and the public will be likely to focus on those groups as they seek to influence the outcome of a particular election. The parties will become under-financed, ineffective bystanders as other groups drive both issues and candidates.

38. I am the custodian of the records for the documents that have been designated as potential trial exhibits, and/or attached to various discovery requests, including our Requests For Admission, and thereby provided to the defendants and/or intervenors in this case and disclosed pursuant to the Court's discovery orders. I have been informed that these documents may be used at trial. They are true and correct copies of documents that have been created and maintained in the ordinary course of the California Democratic Party's business operations.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct. Executed this 14 day of October 2002, at Sacramento, California.

/s/

KATHLEEN BOWLER

GROSS INCOME
CA DEMOCRATIC PARTY
Data Compiled from FPPC and FEC Campaign Reports

1995 NON-FEDERAL

Percentage		Amount	GROSS INCOME
40%		$1,095,462.94	Receipts - $10,000 or less (within Levin limits)
30%		$1,054,130.45	Non-Levin Receipts
30%		$865,051.74	DNC/DCCC/DSCC Transfers (prohibited under BCRA)
	60%	$1,919,182.19	*Non-Levin Receipts and prohibited Receipts under BCRA*
100%		$3,014,645.13	TOTAL 1995 NON-FEDERAL

1995 FEDERAL

Percentage		Amount	GROSS INCOME
76%		$ 1,449,356.17	Receipts Less than $5,000
7.7%		$ 140,000.00	$5000 Receipts
0.3%		$ 5,286.00	Candidates/State Party Transfers
16%		$ 314,892.00	DNC/DCCC/DSCC Transfers
	16.30%	$320,178.00	*Prohibited receipts under BCRA for federal election activities*
100%		$ 1,909,534.17	TOTAL 1995 FEDERAL

[Bowler Dec. Ex. A; 3 PCS CDP 34]

GROSS INCOME
CA DEMOCRATIC PARTY
Data Compiled from FPPC and FEC Campaign Reports

1996 NON-FEDERAL

Percentage		Amount	GROSS INCOME
12%		$2,073,955.41	Receipts - $10,000 or less (within Levin limits)
51%		$8,770,202.32	Non-Levin Receipts
37%		$6,387,639.85	DNC/DCCC/DSCC Transfers (prohibited under BCRA)
	88%	$15,157,842.17	*Non-Levin Receipts and prohibited Receipts under BCRA*
100%		$17,231,797.58	TOTAL 1996 NON-FEDERAL

1996 FEDERAL

Percentage		Amount	GROSS INCOME
44%		$ 2,512,171.80	Receipts Less than $5,000
4%		$ 215,000.00	$5000 Receipts
3%		$ 141,120.00	Candidates/State Party Transfers
49%		$ 2,748,899.07	DNC/DCCC/DSCC Transfers
	52%	$2,890,019.07	*Prohibited receipts under BCRA for federal election activities*
100%		$ 5,617,190.87	TOTAL 1996 FEDERAL

[Bowler Dec. Ex. A; 3 PCS CDP 35]

GROSS INCOME
CA DEMOCRATIC PARTY
Data Compiled from FPPC and FEC Campaign Reports

1997 NON-FEDERAL

Percentage		Amount	GROSS INCOME
100%		$440,277.09	Receipts - $10,000 or less (within Levin limits)
		$0.00	Non-Levin Receipts
		$0.00	DNC/DCCC/DSCC Transfers (prohibited under BCRA)
		$0.00	*Non-Levin Receipts and prohibited Receipts under BCRA*
100%		$440,277.09	TOTAL 1997 NON-FEDERAL

1997 FEDERAL

Percentage		Amount	GROSS INCOME
95.0%		$ 1,471,209.33	Receipts Less than $5,000
4.7%		$ 70,000.00	$5000 Receipts
0.1%		$ 1,126.00	Candidates/State Party Transfers
0.2%		$ 2,500.00	DNC/DCCC/DSCC Transfers
	0.30%	$3,626.00	*Prohibited receipts under BCRA for federal election activities*
100%		$ 1,544,835.33	TOTAL 1[illegible]7 FEDERAL

[Bowler Dec. Ex. A; 3 PCS CDP 36]

GROSS INCOME
CA DEMOCRATIC PARTY
Data Compiled from FPPC and FEC Campaign Reports

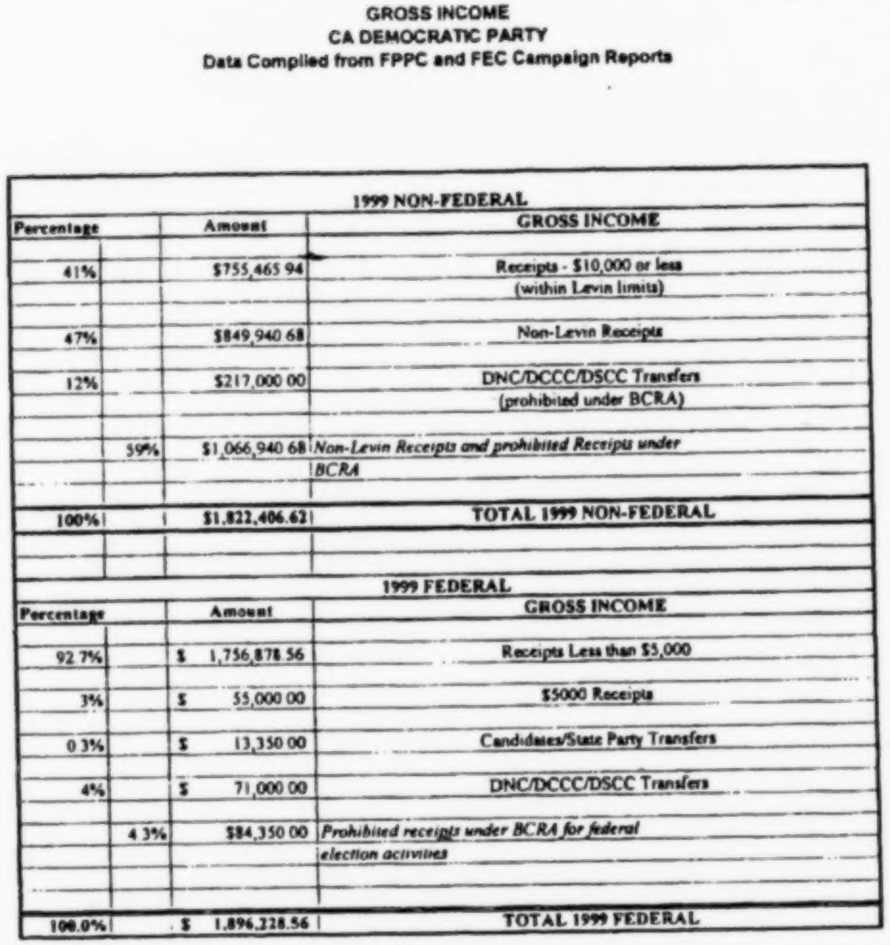
1998 NON-FEDERAL

Percentage		Amount	GROSS INCOME
19%		$3,399,541.20	Receipts - $10,000 or less (within Levin limits)
65%		$12,118,012.50	Non-Levin Receipts
16%		$2,896,435.00	DNC/DCCC/DSCC Transfers (prohibited under BCRA)
	81%	$15,014,447.50	*Non-Levin Receipts and prohibited Receipts under BCRA*
100%		$18,413,988.70	TOTAL 1998 NON-FEDERAL

1998 FEDERAL

Percentage		Amount	GROSS INCOME
36%		$ 2,390,660.33	Receipts Less than $5,000
2%		$ 145,000.00	$5000 Receipts
9%		$ 566,899.00	Candidates/State Party Transfers
53%		$ 3,484,170.00	DNC/DCCC/DSCC Transfers
	62%	$ 4,051,069.00	*Prohibited receipts under BCRA for federal election activities*
100%		$ 6,586,729.33	TOTAL 1998 FEDERAL

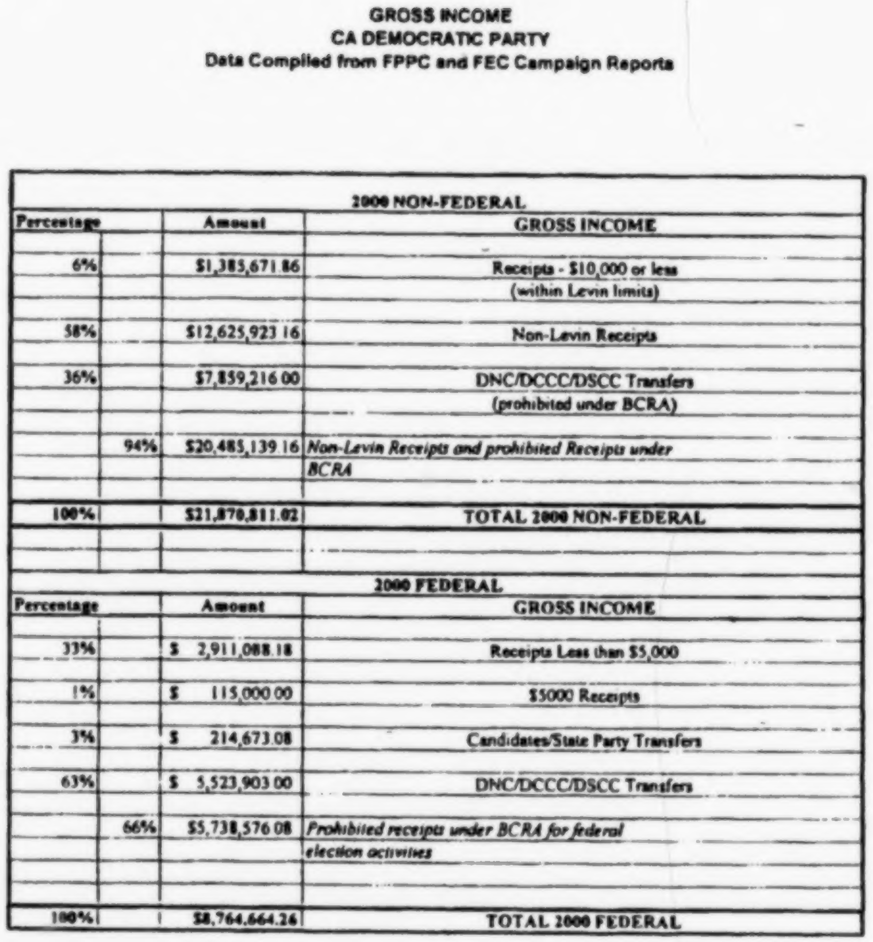
[Bowler Dec. Ex. A; 3 PCS CDP 37]



GROSS INCOME
CA DEMOCRATIC PARTY
Data Compiled from FPPC and FEC Campaign Reports

Percentage		Amount	GROSS INCOME
			1999 NON-FEDERAL
41%		$755,465.94	Receipts - $10,000 or less (within Levin limits)
47%		$849,940.68	Non-Levin Receipts
12%		$217,000.00	DNC/DCCC/DSCC Transfers (prohibited under BCRA)
	59%	$1,066,940.68	*Non-Levin Receipts and prohibited Receipts under BCRA*
100%		**$1,822,406.62**	**TOTAL 1999 NON-FEDERAL**
			1999 FEDERAL
Percentage		**Amount**	**GROSS INCOME**
92.7%		$ 1,756,878.56	Receipts Less than $5,000
3%		$ 55,000.00	$5000 Receipts
0.3%		$ 13,350.00	Candidates/State Party Transfers
4%		$ 71,000.00	DNC/DCCC/DSCC Transfers
	4.3%	$84,350.00	*Prohibited receipts under BCRA for federal election activities*
100.0%		**$ 1,896,228.56**	**TOTAL 1999 FEDERAL**

[Bowler Dec. Ex. A; 3 PCS CDP 38]



GROSS INCOME
CA DEMOCRATIC PARTY
Data Compiled from FPPC and FEC Campaign Reports

Percentage		Amount	GROSS INCOME
			2000 NON-FEDERAL
6%		$1,385,671.86	Receipts - $10,000 or less (within Levin limits)
58%		$12,625,923.16	Non-Levin Receipts
36%		$7,859,216.00	DNC/DCCC/DSCC Transfers (prohibited under BCRA)
	94%	$20,485,139.16	*Non-Levin Receipts and prohibited Receipts under BCRA*
100%		**$21,870,811.02**	**TOTAL 2000 NON-FEDERAL**
			2000 FEDERAL
Percentage		**Amount**	**GROSS INCOME**
33%		$ 2,911,088.18	Receipts Less than $5,000
1%		$ 115,000.00	$5000 Receipts
3%		$ 214,673.08	Candidates/State Party Transfers
63%		$ 5,523,903.00	DNC/DCCC/DSCC Transfers
	66%	$5,738,576.08	*Prohibited receipts under BCRA for federal election activities*
100%		**$8,764,664.26**	**TOTAL 2000 FEDERAL**

[Bowler Dec. Ex. A; 3 PCS CDP 39]

GROSS INCOME
CA DEMOCRATIC PARTY
Data Compiled from FPPC and FEC Campaign Reports

2001 NON-FEDERAL			
Percentage		Amount	GROSS INCOME
16%		$1,677,960.08	Receipts - $10,000 or less (within Levin limits)
81%		$8,488,548.04	Non-Levin Receipts
3%		$313,153.85	DNC/DCCC/DSCC Transfers (prohibited under BCRA)
	84%	$8,801,701.89	*Non-Levin Receipts and prohibited Receipts under BCRA*
100%		$10,479,661.97	TOTAL 2001 NON-FEDERAL
2001 FEDERAL			
Percentage		Amount	GROSS INCOME
95%		$ 2,100,313.45	Receipts Less than $5,000
2%		$ 50,000.00	$5000 Receipts
1%		$ 6,637.50	Candidates/State Party Transfers
2%		$ 46,240.28	DNC/DCCC/DSCC Transfers
	3%	$52,877.78	*Prohibited receipts under BCRA for federal election activities*
100%		$2,203,191.23	TOTAL 2001 FEDERAL

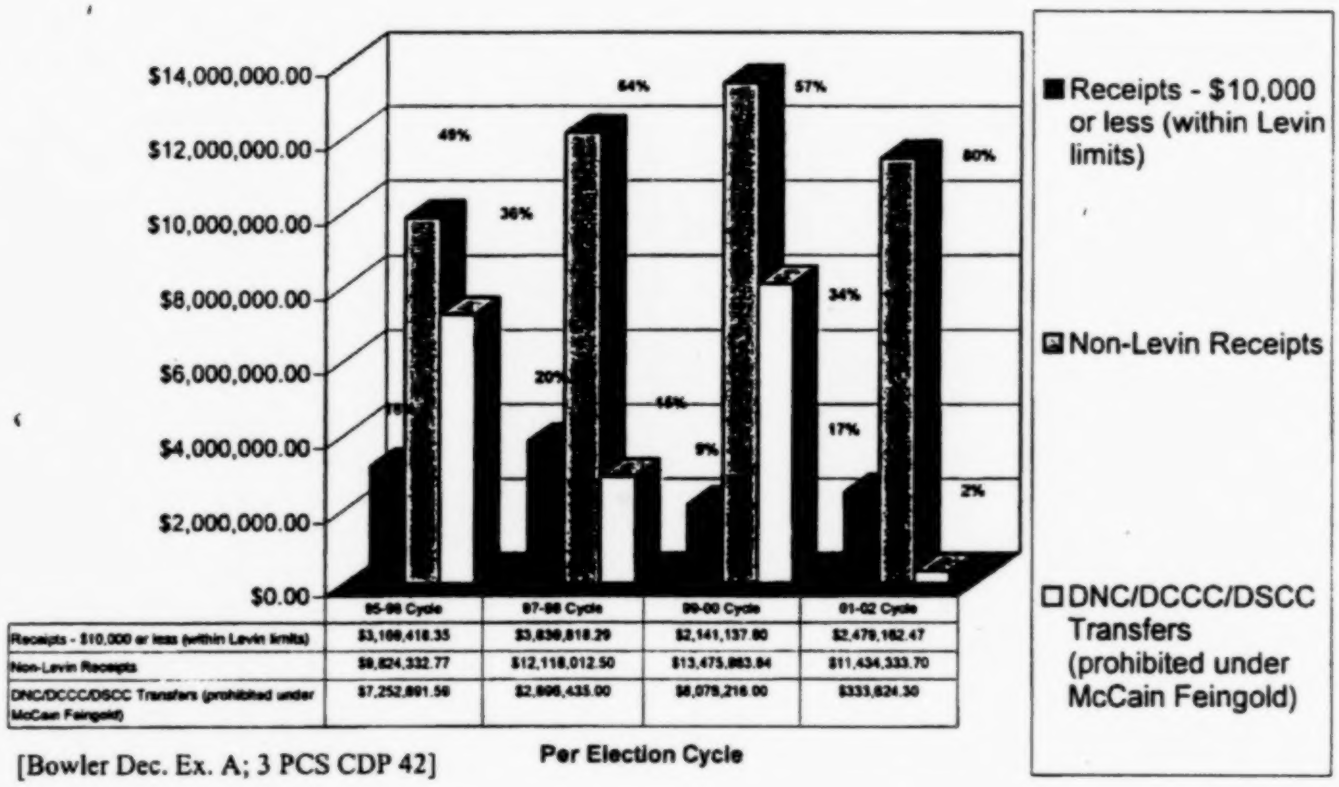
[Bowler Dec. Ex. A; 3 PCS CDP 40]

GROSS INCOME
CA DEMOCRATIC PARTY
Data Compiled from FPPC and FEC Campaign Reports

1/1/02 - 6/30/02 NON-FEDERAL			
Percentage		Amount	GROSS INCOME
21%		$801,202.39	Receipts - $10,000 or less (within Levin limits)
78%		$2,945,785.66	Non-Levin Receipts
1%		$20,470.45	DNC/DCCC/DSCC Transfers (prohibited under BCRA)
	79%	$2,966,256.11	*Non-Levin Receipts and prohibited Receipts under BCRA*
100%		$3,767,458.50	TOTAL 1/1/02 - 6/30/02 NON-FEDERAL
1/1/02 - 6/30/02 FEDERAL			
Percentage		Amount	GROSS INCOME
98.8%		$ 1,295,573.22	Receipts Less than $5,000
0.8%		$ 10,000.00	$5000 Receipts
0.4%		$ 4,900.00	Candidates/State Party Transfers
		$ -	DNC/DCCC/DSCC Transfers
100%		$1,310,473.22	TOTAL 1/1/02 - 6/30/02 FEDERAL

[Bowler Dec. Ex. A; 3 PCS CDP 41]

CDP NON-FEDERAL GROSS INCOME



	95-96 Cycle	97-98 Cycle	99-00 Cycle	01-02 Cycle
Receipts - $10,000 or less (within Levin limits)	$3,109,416.35	$3,830,818.29	$2,141,137.80	$2,479,162.47
Non-Levin Receipts	$9,824,332.77	$12,118,012.50	$13,475,883.84	$11,434,333.70
DNC/DCCC/DSCC Transfers (prohibited under McCain Feingold)	$7,252,891.58	$2,898,435.00	$8,079,216.00	$333,824.30

[Bowler Dec. Ex. A; 3 PCS CDP 42]

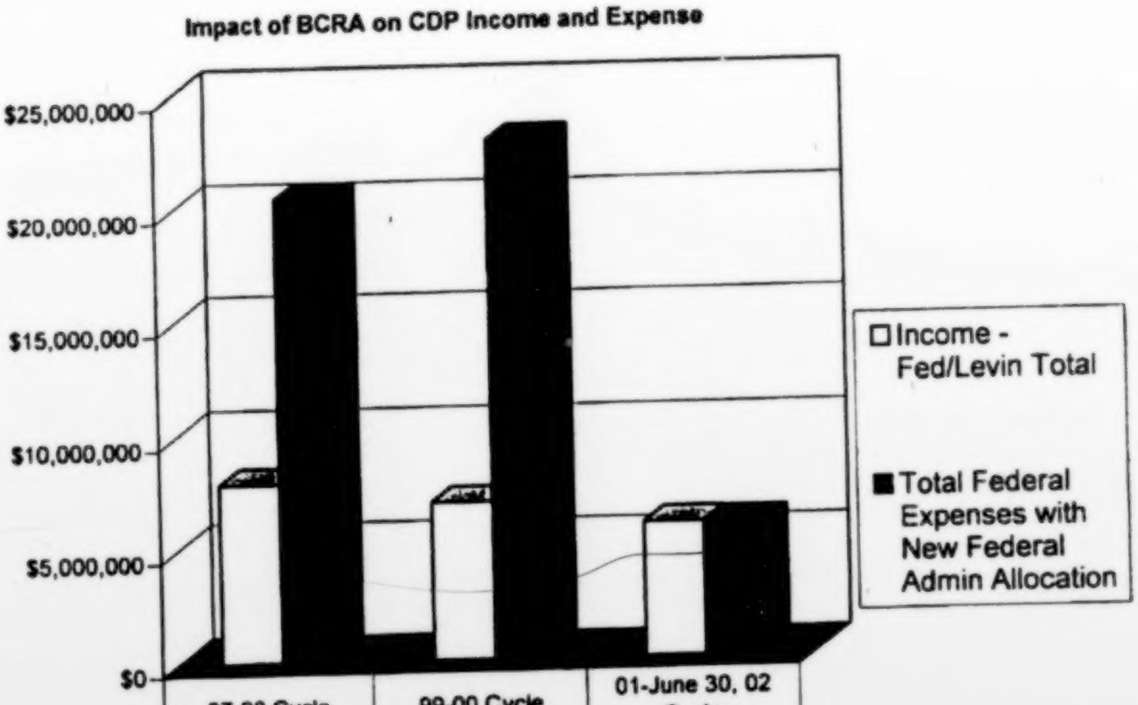
CALIFORNIA DEMOCRATIC PARTY
EXPENSE STATEMENT

For the 2-Year Election Cycles

	1997-1998	1999-2000	2001-June 2002
EXPENSES ALLOCATED BETWEEN FEDERAL AND NONFEDERAL MONEY			
Administrative Overhead	867,399	422,200	765,985
Political Reporting/Legal Services	427,875	619,612	561,251
Operations Expenses	770,140	972,961	724,007
Finance and Finance Events	617,921	742,403	389,245
Party Services Overhead	225,352	258,274	215,025
Communications/Political Operations	209,961	185,452	473,753
Research	184,616	233,036	286,558
Legal fees/Litigation	288,773	342,697	51,774
TOTAL OPERATING EXPENSES	3,392,037	3,776,635	3,467,597
BCRA Fed Allocation	21%	36%	15%
BCRA Fed Amount	712,328	1,359,588	520,140
Net Operating Expenses (Minus the Required BCRA Fed Amt)	2,679,709	2,417,046	2,947,457
EXPENSES THAT REQUIRE EITHER FEDERAL MONEY, OR FEDERAL AND LEVIN MONEY (FEA)			
Telemarketing	1,487,922	1,310,346	1,687,513
Issue Media	2,434,852	7,927,249	0
Independent Exp's/Inkinds - Candidates	7,564,862	7,180,599	2,455,860
Non-Fed Operating/Overhead Expenses	70,996	480,895	821,038
Coordinated Campaign - Generic	4,948,744	3,574,185	383,466
Contributions - Federal Candidates-IE's, 441AD's,Inkinds,Direct	3,242,411	1,098,621	33,501
TOTAL :	19,749,787	21,549,696	5,381,378
BCRA Fed Allocation Amount (from Above)	712,328	1,359,588	520,140
TOTAL WITH THE BCRA Fed Allocation	20,462,115	22,909,284	5,901,518
NONFEDERAL EXPENSES			
Direct Contributions - State Candidates	299,150	22,490	6,644
Conventions	449,443	1,191,199	820,742
TOTAL:	748,593	1,213,689	827,386
PROHIBITED EXPENSES			
Transfers to State/National Parties	1,171,110	1,270,000	591,800
Local Parties	22,883	11,050	17,491
Direct and Inkinds to Ballot Measures (if FEA)	221,156	803,277	3,348,848
527 Committees	283,650	184,082	260,065
TOTAL:	1,698,798	2,268,409	4,218,203
TOTAL EXPENDITURES:	25,589,215	28,808,428	13,894,565

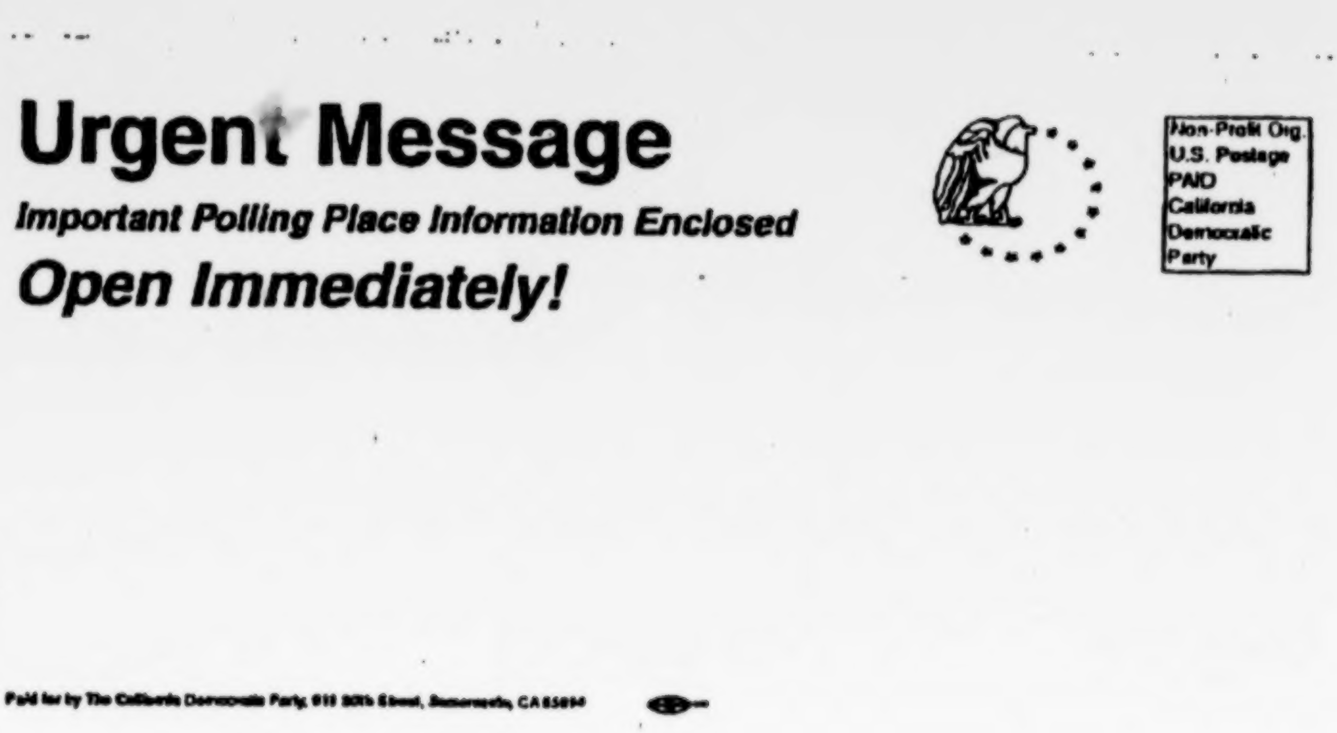
[Bowler Dec. Ex. B; 3 PCS CDP 44]

Impact of BCRA on CDP Income and Expense



	97-98 Cycle	99-00 Cycle	01-June 30, 02 Cycle
Income - Fed/Levin Total	$7,916,688	$6,979,105	$5,935,049
Total Federal Expenses with New Federal Admin Allocation	$20,462,115	$22,909,284	$5,901,518

[Bowler Dec. Ex. C; 3 PCS CDP 46]



Non-Profit Org.
U.S. Postage
PAID
California
Democratic
Party

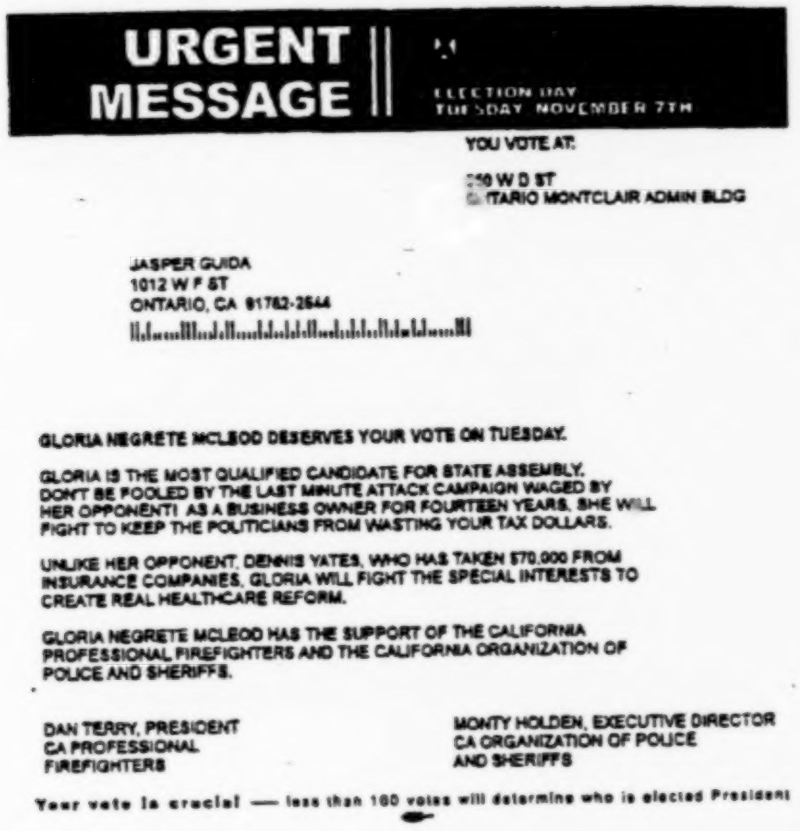
Urgent Message

Important Polling Place Information Enclosed

Open Immediately!

Paid for by The California Democratic Party, [illegible]

[Bowler Dec. Ex. D; 3 PCS CDP 48]



URGENT
MESSAGE

ELECTION DAY
TUESDAY NOVEMBER 7TH

YOU VOTE AT:

[illegible]50 W D ST
ONTARIO MONTCLAIR ADMIN BLDG

JASPER GUIDA
1012 W F ST
ONTARIO, CA 91762-2644

GLORIA NEGRETE MCLEOD DESERVES YOUR VOTE ON TUESDAY.

GLORIA IS THE MOST QUALIFIED CANDIDATE FOR STATE ASSEMBLY. DON'T BE FOOLED BY THE LAST MINUTE ATTACK CAMPAIGN WAGED BY HER OPPONENT! AS A BUSINESS OWNER FOR FOURTEEN YEARS, SHE WILL FIGHT TO KEEP THE POLITICIANS FROM WASTING YOUR TAX DOLLARS.

UNLIKE HER OPPONENT, DENNIS YATES, WHO HAS TAKEN $70,000 FROM INSURANCE COMPANIES, GLORIA WILL FIGHT THE SPECIAL INTERESTS TO CREATE REAL HEALTHCARE REFORM.

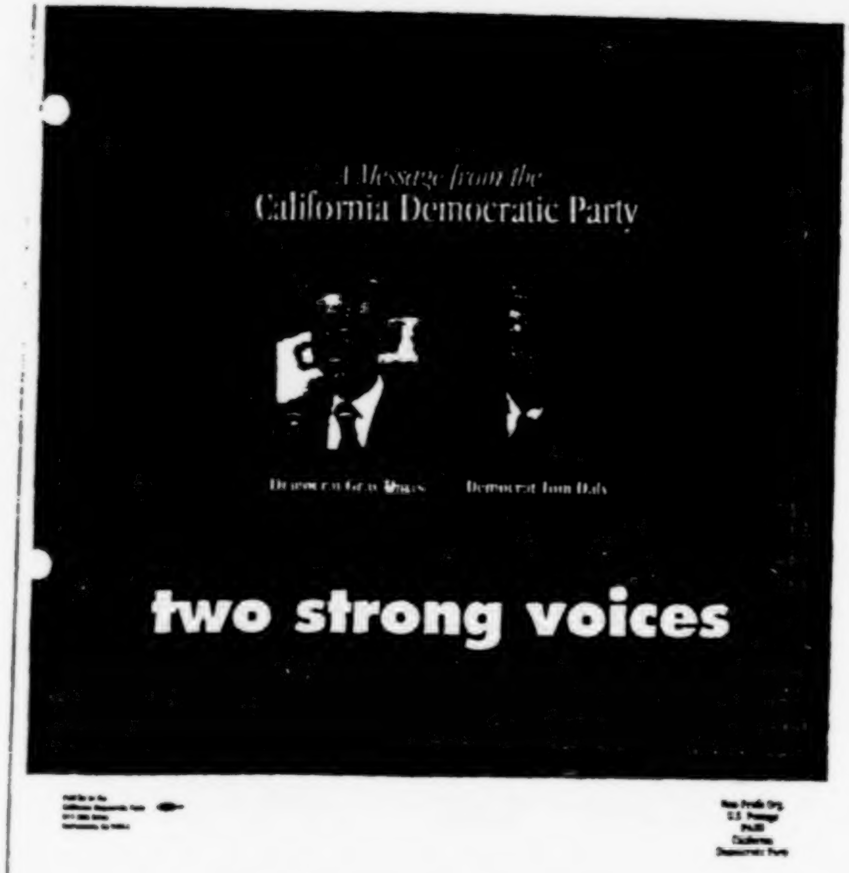
GLORIA NEGRETE MCLEOD HAS THE SUPPORT OF THE CALIFORNIA PROFESSIONAL FIREFIGHTERS AND THE CALIFORNIA ORGANIZATION OF POLICE AND SHERIFFS.

DAN TERRY, PRESIDENT
CA PROFESSIONAL
FIREFIGHTERS

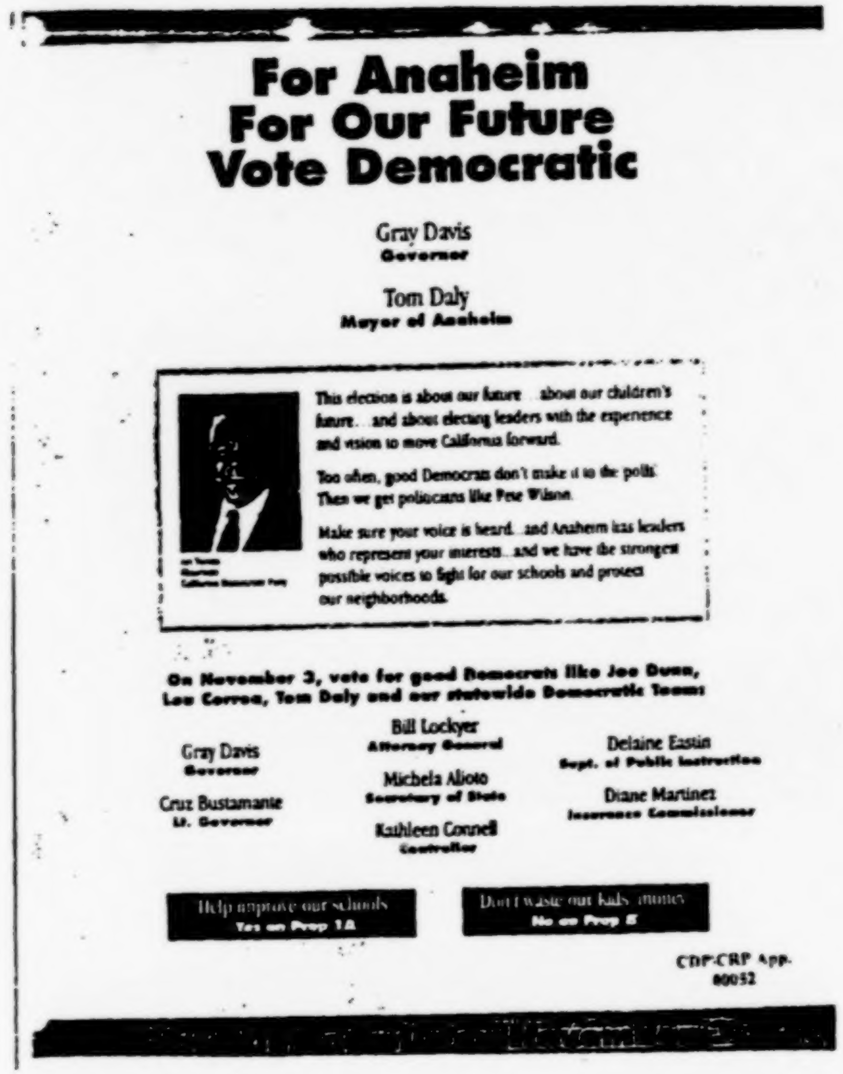
MONTY HOLDEN, EXECUTIVE DIRECTOR
CA ORGANIZATION OF POLICE
AND SHERIFFS

Your vote is crucial — less than 100 votes will determine who is elected President

[Bowler Dec. Ex. D; 3 PCS CDP 49]



[Bowler Dec. Ex. E; 3 PCS CDP 51]



For Anaheim
For Our Future
Vote Democratic

Gray Davis
Governor

Tom Daly
Mayor of Anaheim

This election is about our future . . . about our children's future . . . and about electing leaders with the experience and vision to move California forward.

Too often, good Democrats don't make it to the polls. Then we get politicans like Pete Wilson.

Make sure your voice is heard . . . and Anaheim has leaders who represent your interests . . . and we have the strongest possible voices to fight for our schools and protect our neighborhoods.

On November 3, vote for good Democrats like Joe Dunn, Lou Correa, Tom Daly and our statewide Democratic Team:

Gray Davis
Governor

Cruz Bustamante
Lt. Governor

Bill Lockyer
Attorney General

Michela Alioto
Secretary of State

Kathleen Connell
Controller

Delaine Eastin
Supt. of Public Instruction

Diane Martinez
Insurance Commissioner

Help improve our schools
Yes on Prop 1A

Don't waste our kids' money
No on Prop 8

CDP-CRP App-
00052

[Bowler Dec. Ex. E; 3 PCS CDP 52]

Pete Wilson's Republicans have no shame.

First the attacked us with Proposition 187, which denies immigrants their rights and opportunities.

Then they attacked us with more propositions, which deny our children access to schools and universities.

Pete Wilson's Republicans have supported laws, which would deny citizenship to children born in this country, and increases to supplemental social security for senior citizens.

Now they have a hand-fun of sellouts that are trying to convince us to vote for Pete Wilson's Republican Party's candidates.

They will not deceive us.

We know that the Democratic Party has fought for our rights.

Superintendent for Public Schools Delaine Eastin is better for our children.

Gray Davis, candidate for Governor, is better for our state.

Cruz Bustamente, candidate for Lieutenant Governor, is better for our community.

Down with sellouts.

Down with Pete Wilson.

Vote for Delaine Eastin, Gray Davis, and Cruz Bustamente.

Paid for by the California Democratic Party.

[Bowler Dec. Ex. O; 3 CPS CDP 76]

[3 PCS CDP 85]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No.: 02-CV-0582 (CKK, KLH, RJL)
CALIFORNIA DEMOCRATIC PARTY, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No.: 02-CV-0875 (CKK, KLH, RJL) CONSOLIDATED ACTIONS

REBUTTAL DECLARATION OF KATHLEEN BOWLER

1. My name is Kathleen Bowler. I am the Executive Director of the California Democratic Party (CDP). I have been Executive Director since 1995, but I have been actively involved with CDP since 1980. A number of statements made in various "expert" reports submitted in this matter are either factually inaccurate, or are misleading because they omit critical information. I would like to take this opportunity to respond to those statements. [3 PCS CDP 86]

2. There appears to be a fundamental misunderstanding about the term "soft money" and how that

term is used throughout both the "expert" reports and the fact declarations. It is true that "soft money" is money derived from sources that do not meet the requirements of Federal law, either as to amount or source. In that sense, all money that has traditionally and historically been raised by the state parties that is either from sources prohibited under Federal law, or in amounts that exceed the Federal limits, is "soft money." Notwithstanding this, money was raised by the state parties for state election purposes long before the FECA came into effect, and has continued since the FECA has been in effect. In California, since 1974, that money has been required to be fully disclosed with audits and public reporting of all income and expenditures. By continually referring to "soft money" as meaning non-Federal money raised by the national parties, the "experts" conveniently forget that "soft money" also includes a substantial amount of money that has been raised by state and local parties, and subject to direct state (and, in some cases, local) regulation.

3. The "expert" reports (particularly those of Green, Mann, Magleby, and Krasno & Souraf) also refer to "soft money" as money transferred by the national parties to the state parties primarily for issue advertising. The percentage of "soft money" falling into this category would vary from state to state, as well as by election cycle, but for the California Democratic Party it is not a significant percentage of our total income. For example, in the 95-96 cycle, transferred soft money was approximately $7 million out of total income of $27.7 million; in 97-98, it was approximately $2.8 million out of total income of $27 million; in 99-00, it was approximately $8 million out of total income of $34.2 million; and, as of June 30, 2002, in this cycle it has been only $330,000 of approximately $17.7 million in income. In fact, if you limit the discussion to transfers specifically for issue ads, these transfer numbers would be even lower because money was, in fact, transferred for other activities or, in some cases, was

unrestricted. To discuss "soft money" [3 PCS CDP 3] as if it is only the amounts transferred from the national parties, and to exclude the substantial amounts of state money raised by state parties on their own, both before and since the adoption of FECA, is extremely misleading. In addition, focusing only on the transferred money (and the loss of those transfers) in examining the impact of the BCRA, and excluding an examination of the effects BCRA on the states' own fundraising, results in a significant distortion of those effects.

4. CDP has long raised money in accordance with California state law for use in California elections. The money raised and the expenditures made are primarily for state and local election activity. As I stated in my Declaration, CDP has significant overhead and administrative costs that exist irrespective of Federal elections. These expenses run in the neighborhood of several million of dollars per year. We also have significant voter registration and get-out-the-vote activities that take place irrespective of Federal elections. These activities, particularly our direct mail program in support of state and local candidates *that do not mention federal candidates* cost approximately $7-8 million per cycle, and can run higher depending on the number of statewide offices and targeted legislative races on the ballot. In addition, since the adoption of Proposition 34 and a new campaign finance regime, party spending for candidates does not count against their voluntary spending limits; this is already creating pressures for increased State party spending to offset the lower campaign spending. Finally, unlike the Federal system, California has term limits which creates a constant turnover of seats, and a large number of competitive races in which to participate. In addition to candidate support, CDP also spends significant amounts of state (i.e., "soft") money on state and local ballot measures. All of these expenses existed before the issue advocacy transfers began in 1996, and all were paid for with

money raised by the state party for its state activities. The "experts" have stated that the BCRA will simply return the parties to the "pre-soft money world" (Magleby, 55-56); that soft money is not being used exclusively or primarily for state and local election activity (Mann, 26); that it is a [3 PCS CDP 88] "lie" that money is being used for purposes other than influencing federal elections (Mann, 35); or that the "substantial transfers" of soft money to states make them "virtual agents" of the national party committees (Krasno & Souraf, 38). None of these statements are true. I can only assume that these individuals are either completely unaware of the historical and ongoing state party activity in a state like California, or that, in their exclusive focus on soft money transfers from the national committees, they have completely lost sight of the state parties' fundraising and expenditure experiences before those transfers began.

5. This failure to take into account the state parties' activities appears to be compounded by their lack of understanding about the scope and effects of the BCRA. They all apparently understand that it will stop the transfers of "soft money" for "issue ads," but they do not understand that it will also limit the raising of state money by state parties by imposing the same dollar limits on those contributions as are imposed on Federal contributions in direct contradiction to state campaign finance law. The effect of the Levin amendment limits in California will be to eliminate approximately $10-13 million in contributions per cycle. *This is not money transferred by the national party; this is money raised by contributions in accordance with State law, and which would otherwise be available for state election activities.* The "experts" appear to believe that state party contributions are only limited for "Federal" election activities. Again, they do not understand the scope of the BCRA, and therefore, their statements are wrong. Under BCRA, virtually all election activity – Federal, state or local – will be "Federal" because the

BCRA defines it that way. All of CDP's mail for its State candidates will be considered "GOTV" activity (and therefore "Federal"); virtually all voter registration activity will now be "Federal;" all generic party-building activity will be "Federal;" and any broadcast communications (e.g., a radio ad in support of a ballot measure) will be "Federal." In fact, we have identified direct contributions to state candidates and convention expenses as the *only* two areas in which state [3 PCS CDP 89] money may clearly and safely be spent after the BCRA goes into effect.

6. The net result is that the BCRA defines virtually all state and local party election-related activity as "Federal" and then imposes the Federal limits on state party contributions without regard to the costs of running state campaigns, particularly in a state like California. When Krasno & Souraf state that the BCRA would restore the parties' ties to the local electorate and free them from the "dole" and intervention and control by national parties (which they term "tough love," at 40), they are woefully inaccurate. CDP's income and expenditures for state and local activities -- completely apart from any national transfers -- is substantial, and would continue at approximately the same level even if the national party transfers were discontinued. However, *the BCRA does not merely discontinue the transfers for issue ads*; *it goes much further and limits income available for state and local activities.* (On this note, Krasno & Souraf appear to understate the amount spent by state parties on voter mobilization (or GOTV) activities (at 44, fns. 103, 104). In attempting to quantify this activity, they apparently coded certain expenditures as GOTV, but only included other expenditures if they took place in the last two weeks before the election. A substantial amount of GOTV work takes place outside that period, and therefore, their numbers would significantly underestimate the money currently being spent on these activities.) Moreover, the BCRA creates several structural barriers that will inhibit state/local coordination rather than enhance it. Under the BCRA, state and local party committees may not engage in joint fundraising efforts; they may not transfer funds between themselves; they may not use their most well-known and popular representatives (the candidates and officeholders) to raise money; and, they may not make contributions to 527 organizations which, at least in California, include most of the local Democratic clubs and District-level party organizations.

7. Although the "experts" appear to be stating that the state parties will still have enough money to adequately function at the state and local level (which is not true), they also [3 PCS CDP 90] appear to believe that any revenue shortfall is of no consequence because it will simply "force" the parties to use more volunteers and invest more in local "grass-roots" operations. This is also wrong. We already make substantial efforts to recruit volunteers. We send out several mailings each cycle to recruit volunteers, and we also rely heavily on the local Democratic Clubs and Assembly District (AD) Committees to recruit and coordinate volunteers. We open or support approximately 30 field offices each election cycle. Although we rely heavily on volunteers, we simply cannot get enough volunteers for all the times and tasks that need to be performed. Green is wrong when he claims (with no factual support) that party professionals have little incentive to court political activists (Green, 31). In fact, *we prefer* to use them because they are more enthusiastic and more passionate when they communicate the party's message. He is also wrong when he suggests that the money the state parties spend on other activities implies that grass-roots activity is not important, or that the parties elevate fundraising over other activities (Green, 31). Many of our expenses are directly related to our need to comply with complex Federal and State regulation. Six of our staff persons do only accounting and reporting work. We have three employees engaged in full-time fundraising and contract

out some fundraising work. Again, we do this not because we choose to, but because the laws require us to raise funds in very specific ways, and because contribution limits in general require that you contact a broad base of people to raise the necessary funds within the limits. Indeed, the BCRA itself will require expanded fundraising efforts at a substantial cost to the parties -- costs that will be paid in terms of reduced programmatic activities. Finally, although Green claims that our expenses for mobilization efforts are low (Green, 46-47), it may be partly low because we are relatively successful in recruiting volunteers; if he quantified all of our existing volunteer time, these expenses would be significantly higher.

8. Green characterizes the parties as arguing that voter mobilization activities are [3 PCS CDP 91] "beyond scope of federal authority" because those activities do not directly involve federal candidates (Green, 14). This is inaccurate. We currently allocate all of those activities -- from administrative overhead to voter registration to GOTV activities, including communications -- between Federal and non-Federal accounts. The only activities that we do not allocate are those activities that are specific to State and local candidates. We pay for those activities, not with money transferred from national parties, but from the state (i.e., "soft") money we raise ourselves. Green states that only a small fraction of "soft" money is spent on voter mobilization. Although he is correct if he is referring *only* to soft money transferred to CDP, he is incorrect if he is referrring to CDP's over-all expenditures for mobilization or GOTV efforts. All of our generic GOTV/mobilization efforts that have a mixed State/Federal message are paid for on an allocated basis, which involves millions of dollars of both Federal money and non-Federal money.

9. Green also makes the inexplicable statement that a party's motives for transferring money to tax-exempt organizations is to gain control of these organizations (Green, 17). CDP makes contributions or donations to a number of nonprofit organizations. These contributions (or donations) are quite modest and are done for ideological reasons (e.g., $250 to the Haight Ashbury Food Program; $200 to Sojourner's Women's Center). The vast majority are under $1,000. We make these donations to support the organization, or a particular program of the organization; it is ludicrous to suggest that we are trying to control these organizations. Green is also apparently unaware that ballot measure committees in California are organized as 501(c)(4) organizations, and that the BCRA will prohibit CDP from contributing to these committees either directly, or indirectly with in-kind contributions. Since these organizations exist only for one election, there would be no reason to try to "control" them. Finally, the BCRA also prohibits contributions to 527 organizations. Most of the programs in California that do partisan voter registration, including CDP's Assembly District Committees and the local Democratic Clubs, are organized as 527 [3 PCS CDP 92] organizations. This means (as stated above) that contrary to strengthening the State/local connections of the parties, it is one further way in which the BCRA weakens those connections.

10. Table 1 of Green's report shows a $5,000 limit on contributions to parties in California. This is incorrect. California currently imposes a $25,000 limit on contributions to be used for candidate-related expenses, and places no limit on contributions to be used for non-candidate-related purposes such as administrative expenses, voter registration, generic GOTV, and ballot measures expenditures. Green may be referring to a previous law, Proposition 208, that was adopted in 1996, but was enjoined approximately one year later on constitutional grounds by the U.S. District Court. CDP's experience under Proposition 208, which imposed somewhat lower limits on the parties than the BCRA/Levin amendment, may be informative. Contrary to the opinions of all the

"experts" here, the parties did not "adapt." CDP's income was reduced to under $500,000 for that year. We significantly reduced staffing levels, and had little money for any programmatic activities. Luckily, this occurred in a non-election year, so it did not directly impact the election the following year, but I have no doubt that had it been in effect, all of CDP's activities -- voter registration, GOTV, generic party-building and, of course, its candidate support would have suffered dramatically.

11. Finally, Green speculates that "[i]f recent trends in campaign spending should be halted or even reversed by BCRA, it is unlikely that either democracy or the parties themselves will suffer dire consequences" as they allege (Green, 35). I find Mr. Green's comments unreassuring. First, there is nothing in the BCRA that "halts" or "reverses" campaign spending (unless one concedes that the Levin limit is simply a thinly veiled attempt to impose a spending limit). As the experts acknowledge, other interest groups are ready, willing and able to increase their voter mobilization and candidate-related efforts. While I do not object to them doing so, it is my belief that both democracy and the political parties will suffer dramatically from any campaign [3 PCS CDP 93] finance regime which overtly seeks to reduce the level of party participation in the process of electing candidates.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October 7, 2002

/s/
KATHLEEN BOWLER

DECLARATION OF SENATOR WILLIAM E. BROCK

[DEV 6, Tab 9]

The affiant, having been duly sworn, deposes and says:

1. My name is William E. Brock.

2. From 1963 until 1971, I served as United States Representative from Tennessee. From 1971 until 1977, I served as a United States Senator from the State of Tennessee. From 1977 until 1981, I served as Chairman of the Republican National Committee. From 1985 until 1987, I served as Secretary of Labor under President Ronald Reagan. Although I have not been in public office since 1987, I have continued to be a participant in national politics and I am a close first-hand observer of subject.

3. In 1994, for example, I ran for the Senate in Maryland. One conclusion drawn this experience was that the enormous growth of so-called "soft money" in the past decade had allowed both parties to substitute those funds for the more arduous task of grass-roots organizing, thereby inflating costs and devaluing personal participation. Political parties, the essential "connection" between citizens and their government, were weakened. In effect the [2] parties increasingly became conduits for single interest influence rather than for the development of broadly based representative government.

4. On April 29, 1998, a publication called "The Hill" published an article I wrote concerning the deleterious effects of soft money on our democracy and on political parties in particular (Attachment A). The article accurately reflected my views at the time, which were based on first-hand experience. The article continues to reflect my views based on my experience, and I incorporate the views expressed by the article in this Declaration.

5. Large contributions -- of $50,000, of $100,000, of $250,000 -- made to political parties by corporations, labor

unions, and wealthy individuals have an enormously negative impact in at least the following ways:

a. These contributions compromise our elected officials. When elected officials solicit these contributions from interests who almost always have matters pending before the Congress, these elected officials become at least psychologically beholden to those who contribute. It is inevitable and unavoidable. The contributors, for their part, feel they have a "call" on these officials. Corporations, unions, and wealthy individuals give these large amounts of money to political parties so they can improve their access to and influence over elected party members. Elected officials who raise soft money know this.

b. The appearance of corruption corrosive and is undermining our democracy.

6. The reliance of the major parties on large soft money donations does not in fact strengthen the parties, it weakens them. The focus on raising and spending soft money to affect federal elections divorces both the national and state parties from their roots. The money by and large is not used for "party building." To the contrary, the parties by and large use the money to help elect federal candidates -- in the Presidential campaigns and in close Senate and House [3] elections. Far from reinvigorating the parties, soft money has simply strengthened certain candidates and a few large donors, while distracting parties from traditional and important grassroots work.

7. I warmly agree with those who say that political parties perform extremely important functions in our democracy. Based on my experience, however, I disagree with those who say soft money is necessary to build parties. Parties ably performed their unique functions in our political system before they became awash in soft money. And they can again perform those functions -- indeed, they can perform them better and with more integrity -- without reliance on soft money. The parties can and do raise large

amounts of hard money, i.e., money that complies with federal requirements.

8. It does no good to close the soft money loophole at the national level, but then allow state and local parties to use money from corporations, unions, and wealthy individuals in ways that affect federal elections. State and local parties use soft money to help elect federal candidates both by organizing voter registration and get-out-the-vote drives that help candidates at all levels of the ticket and by using soft and hard money to run "issue ads" that affect federal elections. Therefore, for soft money reforms to be truly effective, it is vitally important to require the use of hard money at the state level to pay for activities that affect federal elections.

9. As noted, I have been a candidate in seven federal campaigns and, as Chairman of the RNC, I was deeply involved in many federal election campaigns. I am therefore fully familiar with the basics and the nuances of campaign advertising in such campaigns. Citizens are bombarded by campaign ads funded with soft money, but are told that these are not related to the candidates' campaigns. This conduct breeds an unhealthy cynicism in the electorate, which [4] generally harms our democracy and which specifically undermines the credibility of the major political parties.

10. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DECLARATION OF SENATOR DALE BUMPERS

[DEV 6, Tab 10]

Background

1. My name is Dale Bumpers.

2. I served two terms as Governor of Arkansas, from 1971 to 1975. After my service as Governor, I served as a Member of the United States Senate, representing the State of Arkansas, from 1975 to 1999. After I retired from the Senate, I spent one year directing the Center for Defense Information, a nonprofit think-tank based in Washington, D.C. I have also taught classes at the University of Arkansas and other schools.

3. Currently I practice law in Washington, D.C., at Arent Fox Kintner Plotkin & Kahn, PLLC, where I provide strategic counsel and advice to corporations, trade associations, and nonprofit organizations on a broad range of international and government relations issues. [2]

The Role of Political Parties

4. Political parties' primary interest is in supporting and electing their candidates. The parties are money raisers, and they spend the money they raise to assist their candidates in campaigns. Party committees focus their resources on competitive races. Unlike some other groups that are active in the political process, party committees keep information on the opposing party so they can tell their candidates about things like their opponents' legislative votes and public statements, and thereby help them win elections.

5. Political parties do not have economic interests beyond their broad view that the public generally prospers more as a result of the election of that party's candidates.

6. I have never been contacted by the party about any issue, and have never been lobbied by the party to take a certain position on an issue or matter before Congress. In my view, the party is not the leader on policy issues, and it is

not very issue-oriented. It is the Members who provide leadership on policy issues, and the party is a follower that promotes those policies in order to elect its candidates. I am not aware that the party has any interest in the outcome of public policy debates that is separate from its interest in supporting and electing its candidates.

7. Parties expect Members to raise money for the party. At weekly caucus meetings, for example, party leaders pressured Members to raise funds. Party leaders would also recognize Members who helped raise significant amounts of money. This money is normally raised from those who are involved in donating to Democratic or Republican causes in the home states of these Members. [3]

Members of Congress and Soft Money Fundraising

8. In my experience, it is a common practice for Members of Congress to be involved in raising both hard and soft dollars for the national party committees, at the parties' request. I have raised hard money for the Democratic Senatorial Campaign Committee ("DSCC") and have attended any number of fundraising functions for both the Democratic National Committee ("DNC") and the DSCC. While I have not raised soft money for the Party, occasionally the Party had asked me whether certain people I knew would be willing to make large soft money donations.

9. Parties expect Members to call some of the big donors in their home states and, for example, suggest sending the DNC a donation of $15,000 for a table at a DNC dinner. These are often donors who have previously contributed to the Member's campaign, and some of them may be "maxed out" donors who have already contributed the maximum allowable amount of hard dollars to that campaign.

10. When a Member raises money for the party, there is a sense on the part of the Member that he or she is helping his or her own campaign by virtue of raising that money. When Members raise funds for the DNC, it helps the DNC

perform its function of keeping tabs on statements, policies, and votes of opposition party members and groups.

11. Members who raise money for the DSCC expect some of that money to come directly back to them. Part of this unwritten but not unspoken rule is that if you do not raise a certain amount of money for the DSCC, you are not going to get any back. The DSCC does not give a candidate the maximum allowed unless he or she has raised at least a certain amount for the DSCC. The last time I ran, I remember that the DSCC [4] promised to give every candidate a minimal amount of money regardless of whether he or she did any fundraising for the DSCC. To get more than the minimum, however, you had to raise money for the DSCC. For example, if I had helped the DSCC raise the maximum amount it could legally expend on my behalf, I certainly would have expected the maximum to come back to me.

12. For Members there would not be any real difference if the funds they solicited were for themselves or for the DNC or DSCC, or if they were hard or soft money donations. Members and donors understand that donations to the party committees help Members.

Soft Money Donors

13. People give money to the DNC, DSCC, and the state parties for the same reasons that they give to individual Members. Some feel that they are ingratiating themselves with the Member who is soliciting the donation. Others contribute out of friendship with the Member who is soliciting the donation, or because they are true believers who simply want to support Democratic causes. People will only give money to the parties when they are solicited by a Member they respect, like, or know out of friendship, and I do not think they normally expect to have any say as to how the donation will be spent.

14. Although some donors give to Members and parties simply because they support a particular party or Member, the lion's share of money is given because people want access. If someone gives money to a party out of friendship with a Member, that donor may never ask for anything in return. However, although many people give money with no present intention of asking for anything in return, they know that if they ever need access they can probably get it. Donations can thus serve as a type of insurance. [5]

15. Giving soft money to both parties, the Republicans and the Democrats, makes no sense at all unless the donor feels that he or she is buying access. The business community makes such donations quite often.

16. I believe that, in many instances, there is an expectation of reciprocation where donations to the party are made. Donors also often give large soft money donations when legislation that affects them is being considered in Congress. For example, when the Senate considered the Patients' Bill of Rights, the insurance companies began loading up the Republican Party with soft money.

17. Likewise, I do not think the tobacco industry gives the Republican Party a million and a half or two million dollars because they expect them to take a very objective view on tobacco issues. I think the tobacco industry got what they expected when, after they had given scads of money to both the Republican National Committee and the National Republican Senatorial Committee, a majority of Republicans killed the tobacco bill. You can just look at a series of events: the money is given to the Republicans, the party begins to take a stand, Members of the party start filibustering any efforts by Democrats to bring up the bill. It was the best investment that the tobacco industry ever made. Those things are not written out or spoken, that is just the way it happens.

Effects of Soft Money Donations

18. I doubt there is a politician on Capitol Hill who would deny that soft money donations get people access. The unwritten law in the Congress is that those who have

consistently been good party members and good donors can get access. They can get their phone calls returned. I have heard that some Members even keep lists of big donors in their offices. [6]

19. I think a lot of politicians have a little filter in their ears when a legislative vote comes up. They quite often run that vote through their memory filter and determine how the vote will affect jobs in their state, and how it will affect the supply of donations, in terms of who is likely to be offended and who is likely to be helped by the vote. That is just human nature, and there is nothing illegal about it.

20. I think it would be naive in the extreme to suggest that, for example, someone who gave $20,000 to the DSCC at the solicitation of a Member would not get his or her phone call returned, or have access to the Member who solicited the donation. And you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party. If someone in Arkansas gave $50,000 to the DNC, for example, I would certainly know that. Likewise, if someone gives $100,000 to the Presidential inauguration committee, that is something politicians and party officials keep in their memory bank.

21. Soft money gives big corporations and the very wealthy an inordinate advantage over others in the legislative process. If these corporations or individuals have given $100,000 to either or both parties, their chances of securing a change in legislation in Congress is exponentially increased. Often donors seek legislative changes so that they or their business can reap large financial gains.

22. The effect of soft money on the legislative process is sometimes obvious, as with the tobacco legislation or the Patients' Bill of Rights. Other times, however, there are more subtle ways to affect legislation that do not receive media attention. For example, Members may choose to filibuster a bill which would adversely affect an industry that

[7] has given large soft money donations to their party, or a committee chairman may similarly stall a bill.

23. Constituents do not distinguish between money that candidates raise for their own campaigns and money they raise for the party committees.

The Burdens of Fundraising on Members of Congress

24. The rise in soft money giving has increased the burden placed on Members to spend time raising funds. The great majority of Members find it anathema to spend such an inordinate amount of their time trying to raise money. But with the rise of self-funded millionaires running for election to Congress, Members do not have a choice but to spend more and more time raising funds.

25. The burdens of fundraising are sometimes a reason that Members choose to retire. For example, I remember when Tom Eagleton made a speech on the Senate floor announcing that he would not be running for reelection. I went up to him afterwards and said, "Tom, why are you doing this? You're a great Senator and we need you." He responded by saying that he was tired of going around with his tin cup out. I, too, detested fundraising, and that was one reason I decided not to seek reelection.

Issue Advertisements

26. Soft money also finds its way into our system through so-called "issue advertisements" sponsored by outside organizations that mostly air right before an election. Organizations can run effective issue ads that benefit a candidate without coordinating with that candidate. They have experienced professionals analyze a race and reinforce what a candidate is saying. These ads influence the outcome of elections by simply stating "tell him [the opponent] to quit doing this." The "magic words" test is [8] completely inadequate; viewers get the message to vote against someone, even though the ad may never explicitly say "vote against him."

27. Members or parties sometimes suggest that corporations or individuals make donations to interest groups that run "issue ads." Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups. In fact, Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.

28. Politicians especially love when a negative "issue ad" airs against their opponents. If these politicians did not feel that the issue ads were helping them, they would call the people sponsoring them and tell them to stop, or they would hold a press conference and angrily denounce the ads. But that rarely, if ever, happens.

29. One of the most insidious things about soft money "issue ads" is that the ordinary viewer doesn't have a clue as to who paid for the ad. I first noticed this problem in 1996, when I saw several issue ads before it ever dawned on me that those ads were not being paid for by the candidate. What caused my curiosity to be piqued was the ending tag [9] lines on those ads: "Call so and so and tell him to quit doing so and so." At first I just assumed that the ads were paid for by the opposing candidates' campaign funds, though I did think it was very strange that the opposing candidates' names were never mentioned. In those ads, everything is honed in on the candidate the ad is trying to defeat. At that time, I did not know that they were soft money spots. Of course it didn't take long for me to inquire and figure out that they were. However, my view is that 95 to 98 percent of the constituents today who watch ads produced by soft money think nothing of the tag line saying to call someone and never realize those are soft money ads. These ads are clearly election-related.

30. I considered soft money-funded issue advertising in 1996, and I consider it now, to be the most insidious thing going on in politics. Soft money spent on issue ads is a way to circumvent the campaign contribution limits. A thousand dollars is the most a candidate can take from an individual, but you can take a gazillion in soft money and run those kinds of ads, which make a mockery of the campaign finance laws. In this respect, the current system is rotten to the core, and in my opinion, it is awful for the body politic.

Lobbyists and Political Donations

31. As a government relations consultant, I have seen firsthand how campaign finance money affects the legislative process. My clients expect me to advise them on what is likely to happen in Congress and especially what actions they should take when legislation that affects them is at a critical stage. Having spent 24 years in the Senate, I often know exactly what Congress is going to do and why. Oftentimes, campaign finance money is the reason why certain legislation either passes or dies.

32. Like other governmental relations consultants, I will occasionally discuss political donations with my clients. Sometimes I advise my clients to make donations; other times, my clients approach me about political giving. I tell my clients that they should contribute to the Members who can do the most good for them, such as the Chairman or Ranking Member of a committee that has jurisdiction over issues affecting them.

33. From time to time, I will also recommend to clients that they participate in a political fundraiser. Lobbyists often receive invitations for fundraising events to pass on to their clients. In fact, I receive an average of five fundraising invitations per day from [10] Members or parties. Both Members and the parties pressure lobbyists and their clients to attend these events and make donations.

34. Although I am loathe to perpetuate what I see as a corrupt process, I still encourage my clients to attend fundraisers and make donations. The truth is that you cannot be a player in Washington unless you immerse yourself in the current system.

Conclusion

35. I do not accept the specious claim that free speech rights will be infringed by the new McCain-Feingold law. I am a staunch defender of the Bill of Rights, and I fully support the new law.

36. Our current campaign finance system is crass, unholy, and destructive of democracy. People are dreaming if they think a democracy can survive when elected officials and the bills they consider are beholden to big donors. Currently, you can't find a better method of ensuring government help from time-to-time than to make significant soft money donations. The vast majority of citizens do not have the resources to donate soft money, and they are entitled to as much consideration as those that do. James Madison would be whirling in his grave if he saw how corrupt our system has become.

37. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

[1 (9 PCS/MC 890)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, *et al.*,)
Plaintiffs,) Case No. 02-0582
v.) (CKK, KLH, RJL)
) *All consolidated*
Federal Election Commission, *et. al.*,) *cases.*
Defendants.)

Declaration of Stephen L. Dasbach, Ronald Crickenberger, and Dominick Dunbar of the Libertarian National Committee

The Declarants declare the following on personal knowledge:

1. Stephen L. Dasbach is a U.S. citizen and resident of Virginia. He is Senior Advisor, former Executive (National) Director, and former Chair of the Libertarian National Committee ("LNC"), and he hereby testifies on personal knowledge regarding all paragraphs of this Declaration.

2. Ronald Crickenberger is a U.S. citizen and resident of Virginia. He is Political Director and former National Director of the LNC, and he hereby testifies on personal knowledge regarding all the paragraphs of this Declaration, except paragraphs 9, 17, 21, 23, and 40.

3. Dominick Dunbar is a U.S. citizen and resident of Virginia. He is Operations Director and former National Director of the LNC, and he hereby testifies on personal knowledge regarding all the paragraphs of this Declaration.

4. The Libertarian National Committee, Inc., is the governing body of the Libertarian [2 (9 PCS/MC 891)] Party® at the national level. The LNC is incorporated in the District of Colum-

bia as a nonprofit corporation, and it is governed by I.R.C. § 527. The LNC seeks to represent the principle that all individuals have the right to exercise sole dominion over their lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose. *See* Exhibit B, which we hereby verify is a true and correct copy of the "Libertarian National Committee: Policy Manual" (Dec. 20, 2001 (1939-69; Exhibit M, which we hereby verify is a true and correct copy of Libertarian National Committee Corporation Certificate, Articles of Incorporation, and Annual Report (1992-2002); Exhibit L, which we hereby verify as a true and correct copy of Libertarian National Committee tax forms (1983-91). Declarants also adopt and verify as true and correct all documents available at www.lp.org, including, without limitation: bylaws, platform, policy manual, convention schedules, issues statements, press releases, membership forms, and convention programs (1996, 1998, 2000) and all documents relating to the LNC available at www.fec.gov. Notwithstanding its specific objections to the "Bipartisan Campaign Reform Act of 2002" ("BCRA"), the LNC and Libertarian Party® oppose all federal campaign finance laws, and reserve the right to mount a broad challenge to the constitutionality of these laws in the future.

5. The impact of the BCRA on the LNC is significantly greater than on the Democratic National Committee ("DNC") or Republican National Committee ("RNC"). The Libertarian Party is, of course, much smaller than either of the major parties. The LNC has only eleven full-time employees; it has one half-time employee and three part-time student employees. Only ten state Libertarian parties have any paid employees, many of them only part-time. In size and administrative sophistication, the LNC is similar to a typical state affiliate of the RNC or DNC.

6. The basic administrative burden imposed by Federal Election Campaign Act of 1971 [3 (9 PCS/MC 892)] ("FECA") requirements remains constant on political parties, regardless of size, so that the LNC must almost certainly expend a relatively higher percentage of its resources on compliance with FECA than the RNC or DNC – a situation that will be exacerbated by the further extension of FECA requirements imposed by the BCRA.

7. Further, the LNC has less relative expertise and sophistication and a greater likelihood that it will commit errors in administering the requirements of FCA because LNC's small staff cannot specialize to the degree that is possible for the RNC or DNC. The BCRA thus would only magnify the relative administrative inefficiency of the LNC, resulting in an even greater competitive advantage for the RNC and DNC. For example, the LNC's current office manager, Dominick Dunbar, acts as Assistant Treasurer, preparing all FEC reports. In addition, he performs the following administrative functions: As Controller, he personally reconciles the balance sheet, oversees payables and receivables, and manages cash flow; as Office Manager, he manages the administrative staff of two; as Human Resource manager, he prepares payroll, and administers 401(k), health insurance and benefit plans; as Network administrator, he maintains and upgrades a 13 station network; as Database administrator, he prepares lists for in-house mailings and phone campaigns and updates to the rental list, and oversees contract programmers for system debugging and enhancements; as Customer Service Manager, he manages and trains two customer service reps; as Telemarketing Manager, he manages two part-time telemarketers.

8. Because the majority of state Libertarian parties operate with volunteer staffs, and lack full-time or professional staffs, they rely on the LNC for assistance in meeting FECA requirements.

Because BCRA will involve greater regulation of state parties under FECA, it will thus create an even greater administrative burden on the LNC. To the extent that the LNC will be unable to meet state party needs, the BCRA would effectively result in destruction of state [4 (9 PCS/MC 893)] party campaign efforts and some state parties themselves.

9. During the 1999-2000 FEC reporting cycle, only 10-15% of LNC funds were placed in its "soft money" account, a far lower percentage than for the RNC or DNC, which place more than half their funds in "soft money" accounts. At present, the LNC has three principle sources of soft money: 1) list rental fees ($39,558 in 2001), 2) dues paid through state affiliates and forwarded from the state affiliates to the LNC ($75,239.77 in 2001), and 3) advertising in the *Libertarian Party® News* and elsewhere ($61.630.25 in 2001). According to the FEC's website, only seven (7) of the 51 state affiliates of the national Libertarian Party have registered as political committees with the FEC, subject to FECA requirements. Hence, under BCRA, any of the other 44 affiliates that desire to collect and send to LNC $1,000 or more per year (or engage in federal campaign activities that would be aggregated with payments to LNC in order to total $1,000 per year) would be required for the first time to register as political committees with the FEC, subject to FECA requirements. Very little of the soft money received by LNC is from any corporate source (if funds from renting lists or advertising in the *Libertarian Party® News* are discounted) or from large individual contributions. In 2002, for example, only one individual contribution exceeded $20,000. During the past six years, no more than four donors to the LNC have aceeded this limit in any one year. Thus, the supposed potential for widespread abuse of soft money by national parties that motivated the BCRA simply does not exist or arise with regard to the LNC.

10. Although it would be subject the BCRA, no federal officeholder has been a candidate of the Libertarian Party, and no candidate of the Libertarian Party has ever won a race for federal office. Thus, no Libertarian Party candidate has ever been exposed to the occasion for corruption that the BCRA is supposed to protect against. The most that any Libertarian candidate for the U.S. Senate has garnered is 12% of the vote; the most that any Libertarian [5 (9 PCS/MC 894)] candidate for the U.S. House has garnered is 38% of the vote in a two-way race. In the 2000 general election, Libertarian Party U.S. Senate candidates averaged less than one (1%) percent of the vote, and Libertarian Party U.S. House candidates averaged less than two percent (2%) of the vote. Yet, often, the Libertarian Party candidate offers needed opposition to a Republican or Democratic Party candidate. For example, in the 2002 general election, four U.S. Senate races are being contested by only one major party candidate (no Democrat in Kansas, Mississippi and Virginia; no Republican in Massachusetts). A Libertarian is on the ballot in Kansas and Massachusetts.

11. Unlike federal candidates of the Republican or Democratic Parties, Libertarian Party federal candidates know that they have only a remote chance to win federal office, and they use their candidacies for running educational/issue advocacy campaigns that concentrate on advancing libertarian principles. *See* the following Exhibits attached hereto, which we hereby verify to be true and correct copies: Exhibit C ("Libertarian Political Action: Techniques for Effective Campaigning") (1970) (only cover page numbered); Exhibit D ("Libertarian Party 2000 Issue Briefing Booklet") (1971) (only cover page numbered). Federal candidacies are important to the advancement of libertarian principles and the Libertarian Party because the issues that draw voters to the party are primarily federal. *See* the following Exhibits, which we hereby verify to true and correct copies: Exhibit V ("Nolan for Congress - 'Prisoners' and 'Cancer'" ad scripts)

(2045); Exhibit NN (Libertarian Party radio ads in .wma format on two 3.5 diskettes) (2143-44). For example, the Libertarian Party's presidential campaigns very effectively garner publicity for libertarian principles, and recruits to the Party, even though these campaigns have only a remote chance of winning the election. *See* the following Exhibits [6 (9PCS/MC 895)] attached hereto, which we hereby verify to be true and correct copies: Exhibit QQ (VHS tape of Libertarian Party Browne for President TV ads) (2174); Exhibit JJ ("Campaign Update: Our last chance to smash the media 'Browne Out'!") (2123-30).

12. Libertarian Party candidates also address issues that Republican and Democratic candidates tend to avoid as controversial. On the whole, Libertarian candidates place much more emphasis on issues and political philosophy, while Republican and Democratic candidates stress personal image, qualifications, name recognition, and electibility. The Libertarian Party will also raise issues related to its principles without any express reference to any Libertarian Party federal candidate when major party candidates are not addressing these issues. Thus, earlier this year, using soft money, the Libertarian Party ran anti-drug war advertisements in *USA Today* and the *Washington Times* to lampoon advertisements being run by the federal government in an attempt to link the drug-war to anti-terrorism efforts. *See* Exhibit E ("U.S. Drug Czar John Walters" ad) (1972), which we hereby verify as a true and correct copy. Similarly, using soft money, the Libertarian Party holds bi-annual national conventions. Off-Presidential election year national conventions are focused on issue advocacy, educational issues and the elction of Libertarian Party officers. They have nothing to do with the nomination of federal candidates.

13. The impact of the BCRA on the Libertarian Party thus severely hamstrings the Party's issue advocacy activities that are its focus, without serving the interest in preventing corruption or the appearance of corruption that the BCRA purports to serve. Since the LNC does not seek, accept, or use any federal funds to conduct its campaigns, and since the effect of the administrative burdens imposed by the BCRA are disproportionately far greater for smaller political parties, the effect of the BCRA is to dramatically affect the ability of the Libertarian Party to compete with the major parties. [7 (9PCS/MC 896)]

14. Libertarian Party federal candidate campaigns are focused on fostering party growth and at gaining ballot access. In most states, a certain percentage of the vote must be achieved to attain or retain ballot presence. Often this milestone is achieved by one of the Libertarian Party's federal candidates. It is often crucial that federal candidates achieve this percentage since, otherwise, in the great majority of states there is an immense monetary cost involved in petitioning for thousands, tens of thousands, or hundreds of thousands of voter signatures in order to regain ballot status. If funds and volunteer efforts are diverted to regaining ballot status, then the loss of those funds and volunteer efforts severely diminishes the opportunity to use the resulting campaign to advance libertarian principles. It also severely diminishes the ability to elect candidates to non-federal offices. Again, the focus is not on election of federal candidates, but in assuring that there will be an effective electoral forum in which federal candidates might advocate libertarian principles. At the state level, the Libertarian Party has been effective in electing non-federal candidates (more than 300 elected Libertarians currently serve), but this success would be threatened by the additional regulation.

15. In sum, the LNC and Libertarian Party have in the past and intend in the future to solicit, receive, and use soft money and hard money to advocate issues, and as a means to this end support Libertarian Party candidates in campaigns for federal and state elective office. The LNC has in the past and intends in the

future to solicit, receive, and use soft money funds to finance issue advocacy communications. The LNC has in the past and intends in the future to transfer soft money funds to state-affiliated parties that have in the past and intend in the future to receive such funds. The BCRA burdens or obstructs all of these activities, causing significant harm to the Party's issue and express advocacy efforts.

16. Similarly, the LNC has in the past and intends in the future to communicate with [8 (9 PCS/MC 897)] candidates for federal office and with federal officeholders and to spend soft money for issue advocacy communications regarding issues supported by such candidates and officeholders. As it has in the past and intends in the future, the LNC has made and intends to make both independent and coordinated expenditures on behalf of candidates for state and federal office after the party's candidates are nominated and to transfer funds between national, state, and local party committees. The LNC has in the past and intends in the future to use "soft money" to finance its ballot access drives and to finance all of its national conventions, which are held every other year. As it has in the past and intends in the future, the LNC solicits funds for and makes donations to IRC § 527 organizations. It intends in the future to solicit funds for and make donations to IRC § 501(c) organizations that make expenditures and disbursements in connection with federal elections. Again, the BCRA burdens or obstructs all of these activities, causing significant harm to the Party's issue and express advocacy efforts.

17. Special burdens are placed on the LNC and Libertarian Party by the BCRA's ban on soft money contributions to national parties without addressing any abuse that receipt of soft money supposedly occasions for the LNC. The LNC presently uses soft money accounts to avoid the burdensome costs incurred in administering "hard money" funds subject to FECA requirements. Rather than discriminating among funds received for certain activities, the LNC simply places all funds received for these

activities in its soft money fund. The BCRA would dramatically increase administrative costs by requiring the LNC to discriminate among the funds to determine which funds the LNC would accept. It would deny the LNC funds by requiring it to refuse contributions it determines it cannot accept.

Libertarian Party® News

18. The LNC publishes a monthly newspaper, the *Libertarian Party® News. See* [9 (9 PCS/MC 898)] Exhibits P-1 to P-6, which we hereby verify are true and correct copies of the *Libertarian Party® News* for various months (2024-29) (only cover pages numbered). The effect of the BCRA would be to forbid certain receipts arising from the paper's publication because they are soft money and to increase administrative costs for the *Libertarian® Party News* across-the-board.

19. The LNC presently accepts advertising. See Exhibit O, which we hereby verify is a true and correct copy of samples of *Libertarian Party News* ad invoices (2009-23). Under BCRA, however, it would be required to refuse advertising that it presently accepts from both for-profit and not-for-profit corporations. Administrative costs would be increased by requiring the LNC to investigate whether certain advertisements are paid for by corporations or not. Moreover, the BCRA would strongly discourage advertising by state or local candidates in the *Libertarian Party® News* since any such candidate would then be subject to FEC filing requirements, because their funds would be deemed to be expended for federal activities..

20. Similarly, the BCRA would forbid the *Libertarian Party® News* to accept any subscription from any for-profit or not-for-profit corporation library.

21. The cumulative effect of the BCRA is to significantly increase the costs of administering subscriptions and advertising income for the *Libertarian Party® News* by requiring careful scrutiny of the source of advertising and subscription funds.

Further, it would require two transactions in the LNC's current membership database system instead of one for subscriptions paid for by one person for the benefit of another: The person who paid for the subscription would have to be separately listed with credit for a contribution, while the subscription provided would have to accounted for elsewhere in the record in the name of the person who receives the subscription. Further, it would require two transactions in the LNC's current [10 (9 PCS/MC 899)] accounting and database systems instead of one for advertising income received: The advertising payment received would have to be entered into the business accounting system, and also accounted for elsewhere in the membership database as a contribution in the name of the person who makes the advertising payment for aggregation purposes. Currently, the *Libertarian Party News* accounting system is not integrated at all with the contribution database used for FEC hard money reporting. Ultimately, this would require a substantial customized rewriting of the software used by the LNC for its bookkeeping and database systems.

22. Another effect of the BCRA would be significant loss of revenue from potential corporate subscribers and advertisers to the *Libertarian Party® News*, as well as from potential non-federal campaign committee advertisers that might be required to comply with burdensome FEC filing requirements should they advertise.

23. The punitive burden imposed by the BCRA on the LNC would not be relieved by treating subscription and advertising funds as hard money. Similar administrative costs would still be incurred by requiring accounting for receipts to avoid exceeding individual and aggregate cumulative limits imposed on hard money contributions by the FECA. For example, the LNC would have to account for and total payments received from a person, whether from advertising or from free-will donations, in order to

determine whether that person had exceeded contribution limits. Individual and aggregate limits would also restrict the amount of advertising, subscription, and other hard money contributions that any individual might make to the LNC, thus resulting in potential loss of revenue to the LNC.

Mailing List Rental

24. The LNC presently rents its membership list through a corporate broker to both individual and corporate third-parties. *See* Exhibit H ("Order Clearance Request"re Libertarian [11 (9 PCS/MC 900)] Party list rental (1976)); Exhibit I ("Revision: 08/26/99" re mailing for Libertarian Party (1977)); Exhibit J (Libertarian Party List Rentals receivable reports (1978-80)); Exhibit K (Aug. 6, 1984, letter from Theodore Troy to Libertarian Natl. Comm. re "Bulk Mail Information" as a "qualified political committee" (1981-82)), which we hereby verify are true and correct copies of these documents. Any funds generated are placed in the soft money account. The effect of the BCRA would be to forbid certain receipts arising from mailing list rental because they are soft money and to increase administrative costs for list rental across-the-board.

25. Because the BCRA forbids the LNC to accept corporate funds, it could not continue to use a corporate list broker. The corporate broker would collect list rental funds from third-party renters, then pay the LNC with its own corporate funds for use of the list, thus violating the BCRA. The LNC must then attempt to secure the services of a probably less efficient and less competitive list broker that is either an individual or a sole proprietorship in order to avoid receiving a payment from a corporate broker for use of the LNC's list. Due to the individual hard money contribution limits, the LNC would have to hire multiple list brokers, or forgo a substantial amount of income.

26. The alternative of in-house list brokering would be costly and highly inefficient due to lack of sufficient staff and expertise.

The LNC does not have the resources or expertise to "seed" the list with fictitious names in connection with each use, then track the "seeds" in order to assure that the list is not re-used without payment. This and other security services are provided by an independent professional list broker. The LNC is at a serious competitive disadvantage in relation to the RNC and DNC in this regard, because the major political parties might well have the resources to do in-house brokering and secure administration of their lists.

27. Regardless of the character of the list broker used by the LNC, significant [12 (9 PCS/MC 901)] administrative costs and loss of revenue would be incurred because the BCRA forbids receipt of funds from any corporate entity that might rent the list, whether for-profit or not-for-profit corporations, including 501(c)(3) and 501(c)(4) corporations. The LNC's mailing list is often rented by nonprofit corporations, such as the Advocates for Self-Government, Inc., the Reason Foundation, or the National Taxpayers Union Foundation, whose philosophies are attractive to libertarians. Similarly, BCRA forbids receipt of funds for rental of the LNC's list by one person or entity on behalf of another. Moreover, non-federal campaign committees will be strongly discouraged from renting the LNC list because they might then be required to become FEC filing committees because their rental fees would be deemed expenditures for federal activity.

National Conventions

28. The LNC stages bi-annual conventions of the Libertarian Party, with a nominating convention during presidential election years and an educational convention on off-years. The BCRA would prohibit certain funds to be received during off-year conventions and seriously alter the nature of the Libertarian Party's nominating convention.

29. Libertarian Party conventions held in years when there are no federal presidential elections are solely devoted to discussion and advocacy of issues; no candidates for public office are nominated for or selected to run as Libertarian Party candidates at these conventions. They are financed by attendance fees and, in significant part, by exhibit space rentals, advertising in the convention program, and sponsorships of the program and various events by individuals and corporations. *See* Exhibits OO and PP, which we hereby verify to be true and correct copies of the 2000 Libertarian National Convention booklet (2145-72) and 2002 Libertarian National Convention booklet (2173) (only cover page numbered), respectively. But because the BCRA bans receipt of soft money, it bans receipt of income from corporations for exhibit space rentals, [13 (9 PCS/MC 902)] advertising, and sponsorships. The effect is thus to increase fee costs to attendees, thus limiting attendance and perhaps rendering any off-year convention practically unfeasible -- although off-year conventions are intended not as occasions for express advocacy of any federal candidate, but as occasions for issue advocacy, election of LNC officers, platform and bylaws development, and other internal party matters..

30. The BCRA would also forbid any corporation from administering off-year conventions since any receipts arising from administration would amount to forbidden corporate disbursements to the LNC. Increased administrative costs would be incurred during the course of any such convention by the need to distinguish between various sources of contributions. Moreover, there would be significant loss of revenue because there could be no receipts from corporate sponsors or advertisers or from minors. Finally, the LNC suffers a disproportionate disadvantage in such regard because, unlike the major parties, no government funds are provided to LNC for the Libertarian Party's national conventions.

31. For conventions during presidential election years, the BCRA in effect requires administration through a host committee

in order to take advantage of special rules established by the FECA and BCRA to facilitate funding presidential nominating conventions. This changes present Libertarian Party practice, in which conventions are managed by the LNC, and it would require significant loss of potential control of the convention by the national party and significant administrative costs by requiring careful development of contractual relationships. See Exhibit N (Sample National Libertarian Party contract) (2003-08), which we hereby verify to be a true and correct copy.

Material Sales

32. The LNC produces educational materials on libertarian issues for sale to the general [14 (9 PCS/MC 903)] public and to state and local Libertarian Parties and candidates. *See* the following Exhibits, which we hereby verify to be true and correct copies: Exhibit F ("Libertarian Party Outreach Materials for Sale (1973-74); Exhibit LL ("Here's the information you requested..." envelope of documents re Libertarian Party for persons requesting information (2141) (contents not numbered); Exhibit MM ("I Want to Join the Libertarian Party" membership card) (2142); Exhibit Q ("How to use the Self-Government Compass") (2039); Exhibit R ("World's Smallest Political Quiz") (2040); Exhibit S (LNP bumper stickers) (2041-42); Exhibit G ("America's Libertarian Heritage: The Politics of Freedom" by David Bergland) (1975) (only cover page numbered). However, as the result of BCRA, the LNC would be forbidden to receive funds for this service from its own state and local parties and candidates as soft money or as hard money for this service in large amounts because such a large purchase would pose the risk that the state or local party or candidate would have to file with the FEC as a political committee engaging in federal activity. Not only does this represent a significant loss of revenue to the LNC, but it means that the consistency of the libertarian message may be compromised because state and local affiliates will develop materials independently or turn to non-party independent sources for those materials. At the same time, independent development would result in unnecessary duplication of efforts, increase the cost of those materials to users, and destroy the economies of scale in having the LNC produce and provide those materials. Spinning-off production of educational materials to independent profit-making enterprises would involve loss of control of message, as well as trademark and branding. This would significantly increase the cost of the LNC's advocacy of issues.

Membership

33. The national Libertarian Party is a membership organization that requires the regular [15 (9 PCS/MC 904)] payment of dues from members to the LNC. Dues are frequently paid to state-affiliated Libertarian Parties, with a portion to be distributed to the national Libertarian Party, so that those who pay dues may be members of both the state and national parties. Dues are often paid by one person on behalf of another, as a wife might pay for a husband, and are often paid with delays in forwarding them to the LNC. In these circumstances, the funds are appropriately deposited in state affiliates' soft money accounts. Under the BCRA, however, these funds may not be transferred to the LNC, so that members who pay dues in such a manner must be denied membership in the national Libertarian Party. Thus, the BCRA effectively criminalizes the current structure of the national Libertarian Party as a membership organization.

34. Receipt of membership dues as hard money would pose the danger to state affiliates that might become subject to FEC filing requirements as a result of transfer of funds to the LNC. that would be deemed expenditures for federal activity. It would also subject state affiliates to significant administrative burdens although they lack paid or professional staff to assume those burdens.

Contributions for Issue Advocacy

35. Using soft money, the LNC presently conducts numerous issue advocacy campaigns unrelated to any federal candidacy. *See* the following Exhibits, which we verify to be true and correct copies: Exhibit X ("Which political party is 100% pro-gun rights?") (2047-48); Exhibit Y ("Special Report: An Inside Look at the Libertarian Party") (2049-68); Exhibit Z ("Libertarian Solutions: How Libertarians would address some of the most significant political & social problems facing the United States" (2069-2100); Exhibit AA ("Why Libertarians Support Equal Rights for America's Gun Owners") (2101-02); Exhibit BB ("What Happened to Your Family Budget?") (2103-04); Exhibit CC ("Making Your Neighborhood Safe Again") (2105-06); [16 (9 PCS/MC 905)] Exhibit DD ("Towards a More Sensible Drug Policy") (2107-08); Exhibit EE ("Ending the Welfare State") (2109-10); Exhibit FF ("Working to Cut Your Taxes") (2111-12); Exhibit GG ("Is This the New Political Party You've Been Waiting For?") (2113-14); Exhibit HH ("Million Dollar Bill" (on verso "The U.S. Government Spends $1,000,000 Every Five Seconds!") (2115-16); Exhibit T ("The U.S. Government Spends $1,000,000 Every Five Seconds!" ad) (2043); Exhibit U ("This is your breakfast") (2044) ; Exhibit W ("Promises" ad script) (2046).

36. As the result of the BCRA, however, soft money could not be received for this essential purpose of the Libertarian Party, severely hampering its issue advocacy activities that have nothing to do with federal candidacies.

Contributions for Ballot Access

37. Soft money is also presently used by the LNC for ballot access campaigns that do not solely involve candidacies for federal office, but also implicates state and local candidacies. Access to the ballot is essential for efficient advocacy of libertarian principles and advocacy of its views on issues. See Exhibit

KK ("Robbed! How the Republicans CHEATED us out of ballot status in Illinois") (2131-40), which we hereby verify to be a true and correct copy. The prohibition of the BCRA on receipt of soft money would thus severely hamper the LNC's activities in this regard.

National Office Building

38. The RNC and DNC used soft money to purchase national office buildings. The LNC likewise intends to purchase or build a national office building, but would be forbidden by the BCRA to use soft money to do so, thus severely hampering its ability to secure a national office building.

Contributions for Non-Federal Campaigns

[17 (9 PCS/MC 906)]

39. The LNC presently receives and uses soft money contributions for use on non-federal campaigns, but would be forbidden to do so under BCRA. *See* Exhibit II ("Campaign Update: Help us run more TV ads for you local candidates!") (2117-22). As a consequence, the ability of the LNC to assist in such campaigns would be seriously compromised, thus compromising the ability of state and local Libertarian Party candidates to launch effective campaigns.

Accounting/Database Costs

40. The requirements of the BCRA would require the LNC to modify, at considerable expense, its existing membership database. For the example, current software focuses on whose membership in the party or *Libertarian Party News* subscription is being extended. It does not track the person who made the contribution, in cases where one person made the contribution or subscriptions payment on benefit of another. The software must be modified to change this focus on who is a member of the party, not who contributed money for membership. New software would have to be developed to change this focus. Considerably more staff time would have to be devoted to the new tasks

that the BCRA would create in administration of the new program. Any such software would have to be custom written, at great cost, in order to comply with FECA requirements. Because there are only a handful of national party committees, of which the LNC is one, software for such national committees is not commercially available "off-the-shelf."

Effect on Libertarian Party Infrastructure

41. As noted above, the LNC has very few compensated employees, and the state Libertarian Parties, taken as a whole, have even fewer compensated employees. As a consequence, a large percentage (very likely much larger than with the Republican or [18 (9 PCS/MC 907)] Democratic Parties) of the Libertarian Party's infrastructure (e.g., "professional" party personnel, administrative functions, ballot access petitioning expertise, and FECA compliance expertise) is operated by the LNC.

42. The LNC is the primary funder of last resort for ballot access drives, and is generally regarded as responsible to ensure the Libertarian Party presidential ticket gains ballot access nationwide. Because of prohibitive ballot access laws, many state Libertarian Parties do not have the resources to gain ballot access in their states, without assistance from the LNC. For example, North Carolina requires an enormous number (currently 58,842) valid signatures of registered voters to place the Libertarian Party on the ballot every four years (assuming the Party fails to retain ballot status by polling 10% of the vote). Every four years, the LNC routinely funds a portion of the North Carolina Libertarian Party's ballot access drive, as the North Carolina Libertarian Party is unable to handle it alone. Further burdening the resources of the LNC will materially and adversely affect the ability of many state Libertarian Parties to obtain and retain ballot access for both their federal and non-federal candidates.

43. The LNC is a primary recruiter of contributors and members of state Libertarian Parties. It has significantly more expertise in direct mail fundraising, and the economies of scale to engage in direct mail fundraising nationally. In addition to sharing the proceeds of membership dues raised via that direct mail fundraising with 45 state Libertarian Party affiliates as part of the LNC's unified membership program, the LNC shares with all state Libertarian Party affiliates the names and contact information derived from its direct mail and other activities. Further burdening the resources of the LNC will materially and adversely affect its ability to assist state Libertarian Parties in this way, and membership it will greatly impede recruitment by the state Libertarian Parties. [19 (9 PCS/MC 908)]

44. As noted above, only a handful of state Libertarian Parties are registered as political committees with the FEC. Hence, virtually all of the FECA compliance expertise of the Libertarian Party is concentrated in a few employees or contractors of the LNC. Under the BCRA many more state Libertarian Parties will be required to file as political committees with the FEC, though none of them have the expertise to deal with the FECA or BCRA. The net effect of this is that they will look to the LNC to provide that expertise, thus diverting LNC resources from issue advocacy and candidate support, to providing FECA and BCRA consulting services.

Prohibition of Contributions by Minors

45. The national Libertarian Party presently has many, but an indeterminate number of, minor members. *See* Exhibit A, which we hereby verify is a true and correct copy of "Combined Current Member Analysis" (1938). Dues must be paid as a condition for membership in the national Libertarian Party. However, minors are forbidden by the BCRA to contribute their membership dues as "hard money" to the LNC; persons are forbidden to contribute their dues as "soft money" to the LNC; any dues contributed as "soft money" to state-affiliated parties cannot be transferred to the LNC under the BCRA. As a consequence, the

BCRA effectively forbids minors from being members of the national Libertarian Party. This would force the LNC to discriminate on the basis of age, which is completely contrary to libertarian beliefs and principles.

46. Because many of the Libertarian Party's state affiliate party committees have a unified membership structure that requires state members to also contribute to the LNC and become national Libertarian Party members, and because only a state or national member may be elected as a Libertarian Party National Convention Delegate, the BCRA would effectively [20 (9 PCS/MC 909)] prohibit minors from serving as Convention Delegates, though many have done so in the past. For example, at the 1993 Libertarian National Convention, Natalie Lloyd, an Ohio delegate who was then a minor, attended and ran for national chair of the Libertarian Party, receiving many, though not a majority, of votes. Trevor Southerland, a Georgia delegate who is a minor, attended the 2002 Libertarian National Convention, and participated by voting on changes to the Libertarian Party's national platform and bylaws.

47. Because the LNC does not receive federal funding for its national conventions like the Republican and Democratic Parties, it must charge attendees for the cost of their participation. In the past, many minors have attended Libertarian Party national conventions and have paid the LNC to do so. As a consequence, BCRA effectively forbids minors from attending Libertarian Party national conventions, because minors are prohibited from contributing funds to the LNC to defray the costs of their participation at the conventions.

48. Some state party affiliates require state party members to be members of the national party in order to participate as officers or board members in the state or local party. Thus, BCRA's effective prohibition on minors being members of the national Libertarian Party precludes their participation in these state or local parties as offices or board members.

49. The rationales that support the BCRA's ban on minors' contributions have no application to the Libertarian Party. There are no known cases in which minors have been used as conduits to enable others to exceed limits on contributions made to the LNC. None of LNC's large contributors are minors. [21 (9 PCS/MC 910)]

VERIFICATION OF DECLARATION

I verify that the paragraphs I testify to in the foregoing Declaration of Stephen L. Dasbach, Ronald Crickenberger, and Dominick Dunbar of the National Libertarian Committee in *McConnell, et al. v. FEC, et al.*, Case No. 02-0582 (CKK, KLH, RJL) (consolidated action) is true and correct.
Executed this 2nd Day of October, 2002

/s/ Stephen L. Dasbach
Stephen L. Dasbach
Senior Advisor
Former Executive Director (1998-2002)
Former National Chairman (1993-1998)
Libertarian National Committee

[22 (9 PCS/MC 911)]

VERIFICATION OF DECLARATION

I verify that the paragraph I testify to in the foregoing Declaration of Stephen L. Dasbach, Ronald Crickenberger, and Dominick Dunbar of the National Libertarian Committee in McConnell, et al. v. FEC, et al., Case No. 02-0582 (CKK, KLH, RJL) (consolidated action) is true and correct.
Executed this 2nd day of October, 2002

/s/ Ronald Crickenberger
Ronald Crickenberger

Political Director
Libertarian National Committee

[23 (9PCS/MC 912)]

VERIFICATION OF DECLARATION

I verify that the paragraphs I testify to in the foregoing Declaration of Stephen L. Dasbach, Ronald Crickenberger, and Dominick Dunbar of the National Libertarian Committee in *McConnell, et al. v. FEC, et al.*, Case No. 02-0582 (CKK, KLH, RJL) (consolidated action) is true and correct.

Executed this 2nd Day of October, 2002

/s/ Domick Dunbar
Dominick Dunbar
Operations Director
Libertarian National Committee

DECLARATION OF ROBERT MICHAEL DUNCAN

I, Robert Michael Duncan, hereby swear and depose as follows, based on my own personal knowledge:

1. I am a Member of the Republican National Committee ("RNC") from the State of Kentucky. At the time the RNC's Complaint in this case was filed, I served as Treasurer of the RNC, but as of July 2002 have become its General Counsel. I submit this Declaration to discuss: (a) my personal involvement in Republican Party activities at the local, state, regional, and national levels; and (b) my understanding of the likely impact of the Bipartisan Campaign Reform Act ("BCRA") on my personal political activities, the RNC, and the Republican Party of Kentucky.

[*2] Education and Political Background

2. I am a 1971 graduate of Cumberland College and a 1974 graduate of the University of Kentucky College of Law. I have also attended executive education programs at Harvard University, the University of Wisconsin, and the University of Kentucky. My full educational background is provided in my biographical statement, which is RNC Exhibit 2250, attached as Attachment 1 hereto.

3. I have an extensive background in Republican Party politics at the local, state, and regional levels, spanning the last thirty years. A comprehensive listing of my positions with local, state, and regional Republican Party organizations is included in my biographical statement. By way of illustration, my background includes the following:

(a) At the local level, I was Chairman of the Martin County (Kentucky) Republican Party from 1976-80. At various times I have also served as precinct chairman of the Upper Inez Precinct.

(b) At the state level, I was Chairman of the Republican Party of Kentucky in 1995. For various periods since 1971, I have also been a member of the State Central Committee and the Executive Committee. I was Finance Chairman in 1992, and I have been Chairman of the Budget Committee since 1996. I was a Delegate from the State of Kentucky at the Republican National Conventions held in 1972, 1976, 1992, 1996, and 2000. Shortly after my graduation from law school, from 1975-76, I also was Chairman of the Kentucky Young Republicans Federation.

(c) At the regional level, I was Chairman of the Region III College Republicans National Association from 1971-72. In 2000, I was Chairman of the Southern [*3] Republican Leadership Conference. I have also served as Vice-Chairman of the Southern Region of the RNC.

4. I also have substantial Republican Party experience at the national level, particularly through my positions with the RNC. By way of explanation, the RNC is composed of 165 voting Members, including: (a) the state and territorial Chairman or Chairwoman from each of the 50 states, the District of Columbia, and the four Territories of the United States (Guam, the U.S. Virgin Islands, Puerto Rico, and American Samoa); and (b) a National Committeeman and Committeewoman from each of these 55 entities. RNC membership is explained in detail in the Rules of the Republican Party, which were most recently adopted at the 2000 Republican National Convention on July 31, 2000. These Rules are RNC Exhibit 1, and are attached as Attachment 2 hereto.

5. I have been a Member of the RNC since 1992, when I became the National Committeeman from the State of Kentucky. As noted above, I am also General Counsel of the RNC, an office I assumed in July 2002. I previously was Treasurer of the RNC, an office I held from January 2001 to July 2002. I am, concurrently, a member of the RNC's Executive and Rules Committees. Over the past decade, I have served on the RNC Chairman's Executive Council and the RNC Committee on Arrangements, and as Chairman of the RNC Committee on Contests. Further, I have held several positions on the committees responsible for various aspects of the Republican National Conventions held in 1972, 1976, 1992, 1996, and 2000. A full list of my RNC positions is provided in my biographical statement.

6. Like most of the RNC's Members, I have worked my way up through the ranks from the local and state levels to the national level of the Republican Party. I still remain involved in party activities at the local and state levels. Most significantly, I regularly participate [*4] in fundraising activity for the Republican Party of Kentucky and candidates for statewide elected office.

a. I was a Silver Sponsor of a fundraising reception held on August 27, 2002, to support the re-election of Kentucky State Senator Julie Rose Denton. In addition to State Senator Denton, the featured guest at this reception was United States Congressman Ernie Fletcher. The invitation to this event, showing my participation, is RNC Exhibit 235, attached hereto as Attachment 3.

b. I was a Host, in my capacities as RNC National Committeeman from Kentucky and Treasurer of the RNC, of a fundraising dinner held on July 29, 2002, to support Kentucky Victory 2002 and the Republican Party of Kentucky. The dinner honored United States Senator Mitch McConnell and Congresswoman Anne Northrup, with a special appearance by former New York City Mayor Rudolph Giuliani. A full 80% of the proceeds from this dinner went to the Republican Party of Kentucky for its use in various local, state, and federal Victory programs. The invitation to this event, showing my participation, is RNC Exhibit 233, attached hereto as Attachment 4.

c. I was also a Host, in my capacity as RNC National Committeeman from Kentucky, of a fundraising dinner held on June 16, 2000, to support Kentucky Victory 2000 and the Republican Party of Kentucky. The dinner was in honor of then-Governor George W. Bush. All of the proceeds from the dinner went to the Republican Party of Kentucky for use in its various local, state, and federal Victory programs. The invitation to this event, showing my participation, is RNC Exhibit 859, attached hereto as Attachment 5.

d. I was on the Dinner Committee of a fundraising event held on July 24, 1996, to support Victory '96 and the Republican Party of Kentucky. The dinner was in honor [*5] of former President George Bush. All of the proceeds from the dinner went to the Republican Party of Kentucky for use in its various local, state, and federal Victory programs. The invitation to this event, showing my participation, is RNC Exhibit 1617, attached hereto as Attachment 6.

e. I was also on the Dinner Committee of a fundraising event held on October 13, 1995, to support the Republican Party of Kentucky. The event was a salute to former President George Bush. All of the proceeds from this event went to the Republican Party of Kentucky. The invitation to this event, showing my participation, is RNC Exhibit 1734, attached hereto as Attachment 7.

7. In my experience at all levels of Republican Party activity, it is very important for the local, state, and national arms of the RNC to work closely together in all aspects of the political process. Coordinated efforts among the party's branches produces the best results and prevents duplication of effort and inadvertent conflicts among efforts. The involvement of high-ranking RNC officials in local and state-level party activities is vital as well. As a National Committeeman, and as General Counsel and formerly Treasurer of the RNC, for example, I have substantial and continuous responsibilities within the RNC, but I also remain active in Kentucky state and local politics.

a. In addition to the fundraising activities described above, at the state level I have also provided general campaign assistance and advice to Kentucky gubernatorial candidates Louie Nunn in 1979, Robert Gable in 1975, and Larry Hopkins in 1991.

b. At the federal level, I was Chairman of Bush for President, Central States, from 1999-2000. I was also Chairman of Bunning for Senate in 1998, Chairman of Kentucky Bankers for Bush in 1988 and 1992, Chairman of the Seventh Congressional District for Reagan in 1980 and 1984, and Chairman of Young Kentuckians for Nixon-Nunn in 1972.

[*6] A more complete list of my campaign activities at all levels is included in my biographical statement.

Impact of the BCRA

8. The BCRA, among other provisions, will prohibit political parties or their "agents" from soliciting, raising, spending, or contributing funds that do not fit within the requirements of the Federal Election Campaign Act. This aspect of the BCRA will directly impact my personal political activities and the activities of the RNC and the Republican Party of Kentucky.

9. As described above in paragraph 6, I am substantially involved in fundraising activities on behalf of the Republican Party of Kentucky and candidates for state office in Kentucky. I engage in these activities both in my personal capacity and in my official capacity as RNC National Committeeman from the State of Kentucky. The funds I help raise on behalf of the Republican Party of Kentucky and

candidates for state office in Kentucky are, to a large extent, regulated by state rather than federal law. For this reason, the BCRA may directly restrict my personal political and fundraising activity because it may be a crime for me to assist the Republican Party of Kentucky or state and local candidates in raising non-federally regulated money. Indeed, even if my status as an officer or "agent" of the Republican Party is not clearly resolved by the BCRA implementing regulations, I may well refrain from participating in state-level fundraising activity to prevent the possibility of an enforcement action intended to prompt clarification of the BCRA by a federal court or the FEC.

10. The BCRA will adversely affect the Republican Party of Kentucky. The State of Kentucky is predominantly Democratic, with 60% of voters registered as Democrats and 33% registered as Republicans. Kentucky's current Governor, Paul Patton, is a Democrat, and [*7] was first elected Governor in 1995. The state has not had a Republican Governor since Louie Nunn left office in 1971. Although the State Senate is almost evenly split between Democrats and Republicans, Democrats have a nearly 2-1 margin over Republicans in the State House of Representatives, where Democrats occupy 66 seats and Republicans occupy only 34 seats. Because Democrats comprise the vast majority of registered voters and state-level elected officials, the Republican Party of Kentucky in the past [illegible] had difficulty in raising sufficient funds and active members to maintain its necessary operations. Senator McConnell has been instrumental in building the state party through his heavy involvement in organizational and fundraising activities. Because he is a federal officeholder, the BCRA will prohibit or severely restrict Senator McConnell's participation in these activities.

11. The Republican Party of Kentucky relies on financial assistance from the RNC and other national Republican Party committees. For example, the Republican

Party of Kentucky in 2000 had total revenues of approximately $7.35 million. Of this total, roughly $4.5 million -- around 60% -- consisted of transfers from the RNC's Republican National State Elections Committee ("RNSEC"), the National Republican Senatorial Committee, and the National Republican Congressional Committee. More significantly, in 2000 the Republican Party of Kentucky had total non-federal revenues of approximately $4.1 million, of which roughly $3.98 million -- over 90% -- consisted of transfers from these same national party committees. And, as shown above, much of the money raised by the Republican Party of Kentucky was raised in ways that will be prohibited by the BCRA, particularly those funds raised with the assistance of the RNC or federal officeholders or candidates.

12. Obviously, the BCRA's prohibitions on the expenditure or raising of non-federal money by national political party committees will have a serious financial impact on the [*8] Republican Party of Kentucky. The activities most likely to suffer directly from this loss of funding are "get out the vote" efforts, generic party-building activities, and sponsorship of issue advertisements, which are mostly supported by the transfers of non-federal money from the national party committees. The Republican Party of Kentucky will also suffer as a result of the BCRA's prohibition on federal officeholder involvement in state-level fundraising activity. The success of state-level fundraising efforts in Kentucky often turns on precisely this soon-to-be-illegal activity and many federal officeholders, including Senator McConnell, participate in state party fundraising efforts that the BCRA would ban. Further, the RNC currently shares lists of fundraising prospects with the Republican Party of Kentucky, and this arrangement likely would be banned by the BCRA as well.

13. Beyond its impacts on my personal political activity and the Republican Party of Kentucky, the BCRA will also undermine the essential relationship between local, state,

and national arms of the RNC. For example, the BCRA will restrict joint fundraising activities between the RNC and state parties, but such activities are very important to state parties. The RNC has a very impressive and professional fundraising program which, when engaged in joint fundraising activity, greatly increases the amount of money raised by and on behalf of state parties. The BCRA's elimination of joint fundraising will have a severe impact on state parties because they simply cannot fill the void that will be left by the removal of the RNC from the process. My experience with the RNC and the Republican Party of Kentucky demonstrates to me that state parties generally: (a) are not able to attract full-time fundraising staff with experience equal to that of the RNC's fundraising employees; (b) have a lower profile than the RNC; and (c) thus have more difficulty raising funds, both in-state and out-of-state, than the **[*9]** RNC does even when it is raising funds specifically for use in connection with Kentucky state-level elections.

14. The BCRA will also prohibit the RNC from donating funds to the Republican Party of Kentucky that it ultimately uses to support state and local candidates for office. For example, just this year, RNC transfers of non-federal money allowed the Republican Party of Kentucky to provide $75,000 to support a Republican candidate for Mayor of the City of Lexington which, without the RNC's transfers, the state party would have had great difficulty providing. In 2000, the RNC provided the state party with $125,000 in connection with State Senate elections and $75,000 for a special Senate race in 2001.

15. Moreover, as a general matter, RNC transfers are particularly important in Kentucky, which holds statewide elections in odd-numbered years that do not coincide with the federal elections that occur in even-numbered years. The absence of federal elections that coincide with Kentucky's "off-year" elections causes them to attract less attention from voters, and thus diminishes the state party's ability to raise funds for the purpose of supporting state-level candidates. Even though these "off-year" elections do not coincide with federal races, the BCRA would nonetheless prohibit the RNC's donation of non-federal money to the Republican Party of Kentucky and to state-level candidates in Kentucky.

16. The various RNC exhibits attached to this declaration are to the best of my knowledge true and correct copies of records kept by the RNC in the course of its regularly conducted business activities. The invitations to fundraising events are true and correct copies of documents in my personal possession.

[*10] I declare under penalty of perjury that the foregoing is true and correct.

s/

Robert Michael Duncan

October 3, 2002

[EXHIBITS OMITTED]

[caption omitted]

DECLARATION OF EMILY ECHOLS

I, Emily Echols, hereby declare under penalty of perjury of the State of Georgia:

1. I am a citizen of the United States and a resident of the State of Georgia.

2. I am a minor, 13 years of age, and was born on December 25, 1988.

3. Although I am not an adult, I understand that it is important to speak truthfully about the facts that I know, and admit honestly when I do not know something; I understand that not telling the truth in this statement would be a wrongful thing, and that I have the duty under the law to tell the truth.

4. Although I am not an adult, I understand the difference between facts and fantasy, and that my duty in making this statement is to testify to facts, and to avoid making up things that I cannot remember or do not know.

[end of page 1]

5. My parents are Tim and Windy Echols.

6. I am their oldest child, and I have six brothers and sisters.

7. We live in Commerce, Georgia.

8. I have attended Christian Schools, including Athens Christian, but this coming year I am returning to home-schooling. I will be starting into the ninth grade this year.

9. In addition to my studies at home and in Christian school about civics, government and history, I have learned about legislation and politics, by attending training programs sponsored by Teen Pact.

10. Teen Pact is an organization that my dad started to teach Christian students about the work of legislators and lawmakers, and about the basic operation of

the political process in our country and our states:

1. Teen Pact teaches kids about state legislation and political activities.

2. We listen to speakers, study materials, and have activities that allow us to look close up at legislative and political activities on the state level.

3. Also, we interviewed lobbyists at the legislature, and we heard from some legislators, and had the opportunity to ask them questions.

4. Participating in the Teen Pact programs has given me an understanding of how state legislatures work, including the process in the legislature and the outside activities of lobbyists and others who influence legislation.

5. I have become interested in government, politics and legislation, and the training at Teen Pact has increased my interest in these subjects, as well as my understanding.

[end of page 2]

6. In addition, I have gained experience in basic web page design and maintenance by designing the Teen Pact web site on the Internet.

7. I also learned about the process of writing legislation in Teen Pact, and had several opportunities to craft legislative proposals.

11. As a result of my learning about legislation, government and politics, I have been involved in helping certain candidates for election in their campaigns.

12. For example, I have worked on Mike Bailey's [interlinear correction: Beatty's] campaign. I worked at his headquarters making campaign signs, stamping and folding envelopes, and doing other needed work.

13. I have also worked at a polling place on election day to support candidates of my choosing.

14. The candidates that I have supported by volunteering, and by other activities, are ones that I have

chosen after careful thought and research.

15. I am a Christian.

16. By that, I mean that I have accepted the gift of salvation that comes through Jesus Christ and His death on the cross.

17. My family and I attend Grove Level Baptist Church.

18. As a Christian I would like to spread the faith inside the legislative process, and hope that the result of that will be to affect our country, change its direction, and hopefully, cause it to end legalized abortion.

19. I also believe, as a principal of my faith, that it is important for persons who are
[end of page 3]
followers of Christ to be involved in politics and in governing our Nation.

20. Because of my Christian faith, I will only support a candidate that is pro-life.

21. Also, I think that our government has gotten too big, and that too many people have gotten used to relying on it, so I can only support candidates that agree with me about reducing the size of government.

22. Becoming a state senator or representative one day is a goal that I have, but not for a very long time. Meanwhile, I enjoy going to the Capitol so that I can meet with the senators and representatives, and occasionally lobbying directed at a legislative aide.

23. As I understand the new campaign reform law, after November 5, 2002, until I reach my eighteenth birthday, I will not be allowed to give my money to candidates for elective federal office, including candidates for the Presidency, for the Senate and for the House.

24. In addition, as I understand it, after November 5, 2002, until I reach my eighteenth birthday, I will not be allowed to give money to any committees of political parties.

25. Being barred from supporting candidates who share my beliefs, opinions, and views, deprives me of the ability that I currently have to give money to such candidates, and takes away a means I have of expressing two different things: my support for the candidate, and my association with the candidate toward common goals.

26. As things stand now, when I attend a campaign rally or event, I am free to be able to donate money if a collection is being taken up for the candidate; but once the new law takes effect, I will lose that right.

27. Although I am young, I do have my own money, that is under my direction and control.
[end of page 4]

28. I earn money several different ways:

1. I do ironing for my family, and earn twenty-five cents per item of clothing;
2. I also earn money by cleaning houses.
3. I also earn money by setting up and operating a snack stand at different Teen Pact events;
4. I also earn money by teaching horse riding; I give lessons during the week, and in the summertime, I ran a week-long day camp for girls up to age 13.

29. The first thing I do with money I have earned is to pay my tithe to the church.

30. I also use the money I earn to pay for all expenses related to keeping and caring for my horse.

31. I also am able, from time to time, to deposit some money into my savings account.

32. Nevertheless, I usually have a small amount of cash on hand that I can use as I wish, and would be able to make a donation to a candidate that fits my requirements for office because of his beliefs and opinions.

33. My parents have encouraged me to save money, and also to give the tithe of my earnings to God, but

they have never forced me to spend my money in one way or another.

34. Because of my interest in government, legislation, and politics, and because of my Christian faith, I plan and intend to continue seeking out candidates for federal elective office who represent my views and beliefs on important questions like the right to life of children before birth, and on the size of our government, and other issues.

[end of page 5]

35. When I find such candidates, I plan and intend to make donations to them.

36. If I wanted to do so, I could spend it in many ways; but when the new law goes into effect, one way I will not be free to spend my own money is to support federal candidates with whom I agree.

[subscription and signature omitted]

[caption omitted]

DECLARATION OF TIM ECHOLS

I, Tim Echols, hereby declare under penalty of perjury of the State of Georgia:

1. I am a citizen of the United States and a resident of the State of Georgia.

2. I am above the age of 18, and I am competent to testify to the truth of the matters asserted in this Declaration.

3. I am married to Windy Echols.

4. We are the parents of seven children.

5. Our oldest child is a daughter, Emily Echols.

6. Emily is 13 years old.

7. She was born on December 24, 1988, in Georgia.

8. As a family we have provided for Emily's education through both private,

[end of page 1]

Christian schools and through home schooling, rather than by sending her out to a local public school.

9. In addition, we have arranged for her to receive education and training related to citizen participation in the government process by having her attend and participate in Teen Pact.

10. Teen Pact is a a non-profit ministry that I founded in 1993 after working several years with Campus Crusade for Christ.

11. We are members of Grove Level Baptist Church.

12. I have been ordained as a minister of the gospel.

13. As a ministry, Teen Pact has adopted a Statement of Faith, expressing our enduring understanding of the essential truths of our Christian faith. Our statement of faith acknowledges that we believe:

a. The Scriptures, both Old and New Testaments, to be the inspired Word of God, without error in the original writings, the complete revelation of His will for the salvation of men and the Divine and final authority for Christian faith and practice;
b. In one God, Creator of all things, infinitely perfect and eternally existing in three persons—Father, Son, and Holy Spirit;
c. That Jesus Christ is true God and true man, having been conceived of the Holy Spirit and born of a virgin, Mary. He died on the cross as a sacrifice for our sins according to the Scriptures. Furthermore, He arose bodily from the dead, ascended into heaven, and now sits at the right hand of God the Father. He is now our High Priest and Advocate;
d. That the ministry of the Holy Spirit which glorifies Jesus Christ, by
[end of page 2]
convicting of sin, regenerating the believing sinner, indwelling, guiding, instructing and empowering the believer for Godly living and service;
e. That man was created in the image of God but fell into sin and is therefore lost and only through regeneration by the Holy Spirit can salvation and spiritual life be obtained;
f. That the shed blood of Jesus Christ and His resurrection provide the only ground for justification and salvation for all who believe, and only those who receive Jesus Christ are born of the Holy Spirit, and thus become children of God;
g. That water baptism and the Lord's supper are ordinances to be observed by the Church during this present age. They are, however, not to be regarded as means of salvation;
h. That the true Church is composed of all such persons who through saving faith in Jesus Christ have been regenerated by the Holy Spirit and are united together in the body of Christ of which He is the Head;

i. In the personal and second coming of our Lord Jesus Christ; and,
j. In the bodily resurrection of the dead, of the believer to everlasting blessedness and joy with the Lord, of the unbeliever to judgment and everlasting conscious punishment.
14. Teen Pact is a nonprofit organization that provides instruction on the legislative and political process; it accomplishes its educational purposes by hosting young people in their state capitals for a four day period of intensive training and activities:
a. At TeenPact our major objective is to break down the intimidation that many have about involvement in our civil government. Surprisingly to some, public servants are
[end of page 3]
available and desirous to meet citizens - regardless of age - who live within their district. We want students to see that the future of our country is dependent upon their involvement.
b. One of the ways that we pursue this objective is by making the unfamiliar and challenging less threatening and manageable. We have found that you cannot go into a Legislature anywhere in the country and not be inundated with paper: bills, amendments, disclosures, rosters, code sections, committee reports. Even for adults, they all seem so confusing at first. By exposing them to these documents and explaining the role they serve in the process of law-making, Teen Pact students leave the Capitol with a better idea of the importance of each document and how they can use them as citizens for the rest of their lives.
c. Another approach we use in Teen Pact is to help our students learn the basics of parliamentary procedure and debate. We explain procedure and debate, and more importantly, we provide our students the fun and educational opportunity to put their learning into practice. Students write their own bills and work to see them passed

by the TeenPact Legislature during the week that they spend participating in the program.

d. Of course, working with a legislature requires knowing where it is, and where the offices of legislators are, and where committee and caucus rooms and hearing rooms are. So we also help our students learn their way around the State Capitol. Amazingly, just feeling comfortable with the surroundings and knowing your way around does a lot to help our students feel like this is their Capitol and a place they want to come back to.

e. Bearing in mind that we are a ministry, the week our students spend in their State capitols deliberately includes regular devotional times and Bible study. Students
[end of page 4]
begin each morning with music as they sing hymns and familiar choruses. TeenPact Student Staff lead their peers through a devotional on great political leaders found throughout to Bible.

f. During the State Capitol session, our TeenPact students have the opportunity to hear presentations by important and influential people in their state, and also to interact with them personally. Many of these political leaders enjoy spending time with our students and often share candid insights that inspire students to aspire for positions of leadership. One of the goals of our ministry is that every student will meet and encourage their legislators.

15. As a result of her participation in Teen Pact's activities, Emily understands parliamentary procedure and the election process.

16. In addition to Teen Pact, our home schooling program has provided Emily with information about the government and its operation.

17. As a family, we consider citizen involvement in government, legislative processes and politics to be an important duty.

18. As a family we have assisted with campaign

activities of candidates whose positions on important issues is consistent with our understanding of sound, Biblically based morality and governance.

19. Emily is very interested in politics, to the extent of volunteering to support campaigns of candidates.

20. I am aware that legal limits on the amount of money that I can give to a candidate for federal office have been enacted by Congress.

21. I am also aware that federal law prohibits me from giving money to a candidate
[end of page 5]
for federal office in the name of another, even in the name of one of my children.

22. I have never used my daughter's name, or any other person's, in making a political donation, in order to avoid limits that the law places on my ability to support candidates of whom I approve.

23. Emily is a bright and engaging young lady, and also quite responsible and entrepreneurial; she has demonstrated her responsibility and entrepreneurial inclination by starting a business offering horse riding lessons, and a week long summer day camp focused on horse riding instruction.

24. Emily's business has produced an income for her, and she has funds from that business that she has placed in a savings account, and some funds that she keeps on hand to use for various things.

25. Emily controls the money she has earned, paying her tithes to the Lord, using some proceeds for the feeding and care of her horse and mule, and depositing some into savings.

26. Emily is quite responsible. She began her business to afford the expenses related to having a horse. She has used monies she earned in the business to care for her horse.

[subscription and signature omitted]

[3 PCS CDP 382]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH
McCONNELL, *et al*,
Plaintiffs,
v.
FEDERAL ELECTION
COMMISSION, *et al*.
Defendants.

Civil Action No.:
02-CV-0582
(CKK, KLH, RJL)

CALIFORNIA DEMOCRATIC
PARTY, *et al*,
Plaintiffs,
v.
FEDERAL ELECTION
COMMISSION, *et al*.
Defendants.

Civil Action No.:
02-CV-0875
(CKK, KLH, RJL)

CONSOLIDATED
ACTIONS

AFFIDAVIT OF RYAN ERWIN

I, RYAN ERWIN, swear and depose as follows, upon personal knowledge:

1. I am the Chief Operating Officer of the California Republican Party ("CRP" or "Party"). This is the highest staff-level position in the Party. As Chief Operating Officer, I am the chief administrative officer and I run the day-to-day operations of the Party under the supervision of the Operations Committee of the CRP's Board of Directors. I have served as Chief Operating Officer since 2001. I was previously Executive Director of the Nevada Republican Party, serving in that capacity from 1999 to 2001. I am familiar with the Party's income and expenditures, and the process of reporting required

under both California law and Federal law. I am familiar with its past activities and expenditures by review of its files and from discussions with staff and other persons knowledgeable about these matters. I have a basic understanding of the CRP, its relations with the Republican National Committee and the national party organizations, and its relations with Republican County Central Committees ("subordinate party committees"), its Victory Program, and its fundraising programs and projects, from my Nevada as well as my more recent California experiences. I am also familiar with the Party's voter registration programs, its Get-Out-The-Vote (GOTV) activities, its generic party-building activities, and its public communications (including its mail programs).

I am the custodian of the records of the documents that have been produced in discovery to defendants in this case and disclosed by the CRP on September 6, 2002, as amended on September 12, 2002 pursuant to the Court's scheduling and discovery order, identified as Exhibits 1-8, pursuant to the court's discovery Order. I have been informed by counsel that these documents may be used at trial. They are true and correct copies of documents that are created and maintained in the ordinary course of the CRP's business operations or are documents [3 PCS CDP 384] that have been produced in connection with the prosecution of this litigation by CRP.

2. CRP's Administrative Organizational Structure:

CRP has a core staff of 12 people during non-election years. Those employees are divided into, a Political Department, a Communications department, and a finance department. Administered by a Chief Operating Officer. This number increases substantially during even-numbered election years, to approximately 25 full-time persons. The Party maintains offices in two locations: Sacramento and Burbank, in the Los Angeles area. The cost of maintaining the offices and staff is substantial. Such cost includes not only staff wages and salary, but also related expenses such as health benefits,

workers compensation and disability insurance. Overhead includes among other things, rent, utilities, insurance, and legal fees.

3. CRP's Core Political Functions:

In addition to ongoing CRP's overhead and administrative costs, CRP makes expenditures for a range of activities in furtherance of its ideological principles and goals. In general, CRP supports the Republican Party's candidates at the national, State and local level. CRP actively supports or opposes ballot measures at the State or local level that reflect the Party's ideology. CRP provides training and support of grass roots organization and mobilization activities of fifty-eight county Republican Central Committee organizations. CRP engages in extensive voter registration activities, GOTV activities, and generic party-building activities and communications. CRP recruits and trains candidates for local, state and federal elective offices. CRP conducts bi-annual convention meetings to mobilize Party activists at the state level and conducts a variety of workshops, training sessions and informational meetings on a regional basis, in cooperation with its County Republican Central Committees. CRP provides communications, services and activities for our membership (such as party literature, press [3 PCS CDP 385] releases, and talking points distributed to Party activists throughout California on issues to support grass roots letter writing campaigns). The most significant part of CRP's activities, both in terms of time and money, is its support of State and local candidates, and activities such as voter registration and GOTV, that are essential to the election of those candidates.

4. CRP's Conduct of Victory (Coordinated) Campaigns: CRP conducts a coordinated campaign, which has been designated as its Victory Campaign in each election cycle since 1980 (e.g., Victory 2000.) This campaign model has been used in Presidential election cycles and non-Presidential election

cycles where the "top of the ticket" is its Gubernatorial candidate.

The coordinated campaign is first formulated in the off-election year, prior to the nomination of any Gubernatorial or Presidential nominee. The CRP's Victory coordinated campaign plan is developed by the CRP's Chief Operating Officer and Political Director, in conjunction with representatives of State Legislative campaign leaders who serve on the CRP's Board of Directors. When the CRP has had an incumbent Governor at the top of the ticket or top of the organization, such as [3 PCS CDP 396] from 1982 through 1998, the incumbent Governor or his representative would be involved integrally in the development of the Victory Plan. Similarly, CRP's Chief Operating Officer and Political Director discuss the proposed Victory Plan and coordinate informally with the Republican National Committee's Regional Representative and with the appropriate representatives of the National Republican Senatorial Committee ("NRSC") and the National Republican Congressional Committee ("NRCC"). CRP facilitates this coordination and communication, not only to ensure that RNC, or NRSC and NRCC, at the national level can assess the California situation for purposes of its coordinated national campaign strategy but also to lay a foundation for RNC support for specific programs, such as voter registration, voter identification, and other top-of-the-ticket assistance. The coordinated Victory Plan is implemented after the nomination of a Gubernatorial candidate or Presidential nominee at the Republican National Convention, with full involvement of the CRP political staff, the State Legislative leadership, members of the Republican Congressional delegation from California, and representatives of the top-of-the-ticket campaigns.

The CRP's Victory Program is an umbrella under which volunteers are recruited to the CRP's election GOTV program utilizing the obvious attraction of the leadership and full-coordination of the entire program with the Republican "top-of-the-ticket" candidates, such as the Republican Gubernatorial or Presidential nominees.

5. CRP's Support for Candidates at the Local, State and National Levels:

CRP recruits, trains and assists persons to seek elective offices at the local, state and national levels. Under California law, local offices are non-partisan. (Article II, Section 3.5, California Constitution; California Elections Code § 8002.) CRP has currently identified over 5,000 local officeholders (members of City Councils, County Boards of Supervisors, school, water, utility, fire and other local districts) who are registered Republicans. Although such offices are not "partisan," CRP views such officeholders as part of the "bench" of potential candidates for future partisan elective offices, and CRP occasionally formally endorses candidates for such non-partisan offices and seeks to encourage and promote capable candidates to seek partisan elective offices.

For example, CRP spent nearly $500,000 in the 2001 City of Los Angeles mayoral primary election in an effort to elect Republican Steve Soboroff as Mayor of Los Angeles, and smaller amounts to elect several members of the City Council and City Controller. (See Exhibit *5,* Items B 1-B 8, incorporated by this reference herein.) In 2002, CRP spent nearly $15,000 in [3 PCS CDP 387] the 2002 City of Long Beach mayoral primary and runoff elections in an effort to elect Republican Norm Ryan as Mayor of Long Beach (See Exhibit *5,* Items Al - A2 , incorporated by this reference herein.)

A number of Republican County Central Committees, including the San Diego County Republican Central Committee, also actively support the election of candidates for local elective offices. In 2001, the San Diego County Republican Central Committee actively supported the election of Dick Murphy as Mayor of the City of San Diego, and in 2002 is supporting nearly one hundred candidates for local elective offices.

The State of California nominates candidates for partisan elective offices (including State Constitutional and legislative offices, State Board of Equalization, U.S. Senate, and U.S. House of Representatives by the direct primary election process. (California Elections Code § 337.) California's partisan primary election is a "partially closed primary." (California Elections Code §§ 13102(a), (b); see also, *California Democratic Party, California Republican Party, et al. v. Jones,* 530 U.S. 567 (2000) [Complaint, ¶ 5].)

CRP does not participate in "contested" partisan primary elections that nominate Republican candidates for such partisan elective offices. (Bylaws, Article III, Sections 3.02; but see *Eu v. San Francisco County Democratic Central Committee, et al.*, 489 U.S. 214 (1989).) However, CRP may support candidates in uncontested primary elections for partisan elective offices, and occasionally does so. CRP generally supports all Republican nominees for such offices at general elections.

CRP's principal focus is to elect its nominees to State Constitutional offices, (including Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer, Controller, insurance Commissioner), and for State Legislature (forty State Senators, eighty State Assembly [3 PCS CDP 388] members.)

CRP spends substantial amounts in direct support of candidates for state legislative offices. CRP supports the election of challenger candidates for State Senate and State Assembly each election cycle. Typically, CRP will support from five to fifteen challenger candidates seeking election to "open seats" (in which no incumbent seeks re-election) or in seats held by Democrat incumbents during each election cycle. CRP also supports its incumbent candidates who face challenges in marginal or competitive districts. CRP supports such candidates by direct monetary contributions to their campaigns, but more importantly by mailing of endorsement mail pieces directly to registered Republican voters and often to identified potential supporters who are independent or registered as declining to state a partisan affiliation. CRP also includes such candidates

on "slate lists" sent to Republican voter households as part of its GOTV efforts. CRP spent approximately $2 million on such direct candidate support of state legislative candidates in the 1999-2000 election cycle, and similar amounts in the 1997-1998 and the 1995-1996 election cycles. CRP may send approximately five to twenty mailings on behalf of each candidate for office to voters during the election. The cost per mailing may range from $10,000 to $30,000 per mailing.

Support of candidates for such offices is the primary role of the CRP, because these officials and their appointive members directly comprise approximately forty-five (45%) percent of the membership of the CRP's state central committee. Moreover, CRP seeks to elect Republicans to the Governorship and State Legislative offices, because Republican state elected officials support and promote policies favored by the Republican electorate and also because the Governor and State Legislature decide the decennial redistricting of state and federal offices.

Exhibit 5, Items Cl-C6, incorporated by reference herein contains a partial set of mailings on behalf of [3 PCS CDP 389] Republican candidates/nominees for State Legislative offices.

Under current California law, enacted by California voters as Proposition 34 in 2000, candidates for state elective offices are subject to contribution limits on contributions from contributors of $3,000 per election for candidates for State Legislative offices, $5,000 for candidates for State Constitutional offices other than Governor, and $20,000 per election for candidates for Governor. (California Government Code ° 85301.) The latter two limits are not in effect for the November 2000 elections, but will apply to subsequent elections for such offices. Candidates for such offices also are subject to voluntary expenditure limits. (California Government Code § 85400 et seq.)

However, CRP and local Republican County Central Committees may accept contributions of up to $25,000 per contributor per calendar year for the purpose of making unlimited direct contributions to such candidates (California Government Code § 85303(b)), and for sending "member communications" to registered Republican voters that endorse candidates for state elective offices (California Government Code §§ 85303(b), 85312) and for "issue advocacy" communications that do not "expressly advocate" the election of such candidates but that are coordinated with those candidates (California Government Code § 85310). These expenditures do not count against these candidates' voluntary expenditure ceilings. (California Government Code ° 85400(c).) Thus, under Proposition 34, CRP and Republican County Central Committees can play, and currently are playing, a more significant role in the support of Republican nominees for State Constitutional and State Legislative offices than other participants in the election process for such candidates.

Proposition 34 also permits CRP and local Republican County Central Committees to accept unlimited contributions for administration, overhead, voter registration, get-out-the-vote, [3 PCS CDP 390] voter identification, and independent expenditure activities as well as "issue advocacy" communications not coordinated with candidates for elective state offices, and finally, for activity in support of candidates for local elective offices. (California Government Code § 85303(c).)

Political parties will play an even more significant part in the future when the contribution limits for candidates for State Constitutional offices are fully effective.

CRP also supports candidates for federal office, including its nominees for U.S. Senate and U.S. House of Representatives. CRP has no candidates for U.S. Senate at the November 2002 election, and had one candidate for U.S. Senate on the 1998 ballot and one on the 2000 ballot. CRP supports the election of challenger candidates for such offices each election cycle. Because the 1980 redistricting and the 2000 redistricting of Congressional districts resulted in few marginal or "competitive" districts, typically, CRP has supported no more than one or two challenger candidates seeking election to "open seats" (in which no incumbent seeks re-election) or in seats held by Democrat incumbents during each election cycle.

CRP also supports its incumbent Congressional officeholders who face challenges in marginal or competitive districts. CRP supports both challenger and incumbent candidates by direct monetary contributions to their campaigns, which are limited to $5,000 per election. CRP also provides "coordinated expenditures" in support of such candidates on occasion. (2 USCA § 441a(d)(3); see also *Colorado Republican Federal Committee v. Federal Election Commission* ("Colorado 11") 533 U.S. 431(2001).) CRP provided "coordinated expenditure" support or "volunteer party mail" on behalf of incumbent Congressmen Brian Bilbray, Steve Kuykendall, and Steve Horn, and in support of challenger candidates Rick Rodriguez and Jim Cuneen, in 2000. CRP provided "coordinated expenditure" support of Matt Fong, CRP's nominee for U.S. [3 PCS CDP 391] Senate in the 1998 election in the amount of S 2,189,000, which included the amount of delegated support by the Republican National Committee. (2 USCA ° 441a(d)(3); 11 CFR § 109.2(d).)

CRP also provides "volunteer party mail," mail produced, sorted, and stamped by party volunteers. (2 USCA 43 l(B)(9) (viii).) Such volunteer party mail endorsing Republican nominees or opposing their Democrat opponents is sent directly to registered Republican voters and often to identified potential supporters who are independent or registered as declining to state a partisan affiliation.

CRP budgeted and spent approximately $ 1,400,000 on federal "coordinated expenditure" mailings or broadcast advertising and "volunteer party mailings" in the 1999-2000 election cycle; approximately $ 650,000, in the 1997-1998 election cycle.

CRP also may participate in "independent expenditures" on behalf of its candidates for federal offices (*Colorado Republican Federal Campaign Committee v. Federal Election*

Commission ("Colorado 1") 518 U.S. 604 (1996.) While CRP may do so under Colorado I, to date CRP has not actually engaged in such independent expenditures on behalf of Republican candidates. However, in each election since the Colorado I decision, CRP has considered this option in making decisions about the manner in which it will support such federal candidates, and believes the use of such independent expenditures may be appropriate in certain circumstances. It is my understanding that the chief reason in the past for not using "independent expenditures" has been the relative unavailability of federal dollars to do so.

CRP also includes such candidates on its "slate card listings" sent to Republican households as part of its GOTV efforts. Such mailings are considered "exempt activities" under F.E.C.A. (2USCA § 431(a)(B)(iv).) [3 PCS CDP 392]

6. CRP's Support of Issues Through "Issue Advocacy" Messages:

CRP has engaged in "issue advocacy" activity in order to educate Republicans and the public generally of its positions on a variety of issues. Many "issue ads" disseminated in the 1996 and 2000 election cycles identify candidates for federal offices. These messages are the best way to crystallize attention on issues and principles on which the Party stands, because the public does not read party platforms or consider issue positions in a vacuum. Candidates' positions on issues are cues to the Party's position on issues for the public, and helps not only to educate the public but to mobilize the public toward association with the Party.

CRP participated in national issue advocacy programs in 1996 and 2000 which featured Bob Dole and George W. Bush and presented their positions on issues such as education, taxes, national defense, and Social Security, with particular attention given to the Hispanic population in California. Through such activity, CRP reached out to the Hispanic community, in order to attract new adherents to the Republican

ideas and principles.

CRP in the 2002 election cycle for state and local elective offices is using "issue advocacy" messages also to focus public attention on the Party's position on issues such as energy policy, the budget, taxes, and education, and how the Republican positions and ideas contrast with those of the Democrat Party.

7. CRP's Support of Ballot Measures at the State and Local Levels:

California's Constitution provides for popular initiative and referendum at the State and local levels. (Art. II, Sections 8 and 10, Art. IV, Section 5, California Constitution.) California has been at the forefront of the popular initiative process, in which the People enact amendments to California's Constitution and statutes, and enact bond funding for revenue bonds for public capital improvements, and at the local level to County and City charters and general ordinances. [3 PCS CDP 393]

Proposition 13, the 1978 Howard Jarvis - Paul Gann property tax relief measure, is probably the best-known example of such popular legislating.

CRP endorses or opposes statewide ballot measures and occasionally local ballot measures during each election cycle. At its recent convention in September 2002, CRP's state central committee endorsed or opposed seven statewide measures on subjects as diverse as court consolidation, parks and school bond funding, afterschool program activities funding, and election day voter registration law changes, and one local measure in the County of Los Angeles on the subject of local bond funding. In 2000, CRP endorsed or opposed nearly a dozen statewide measures on subjects as diverse as juvenile crime, marriage, Indian gaming compacts, insurance reforms, bond measure approval requirements, school vouchers, campaign finance reform, and penalties for murder and car jackings.

CRP regularly includes ballot measure endorsements on its slate mailings. Exhibits 3, Items A-F, incorporated by reference herein, includes sample CRP "slate card listings" of candidate and ballot measure endorsements during the 1995-1996, 1997-1998 and 1999-2000 election cycles.

California law does not limit the source or amount of such contributions, and such activity is protected under the federal constitution. (California Government Code ° 85303(c); see also Hardie v. Eu (1976) 18 Cal.3d 371; Citizens Against Rent Controlv. City of Berkeley, 454 U.S. 290 (1981); First National Bankof Boston v. Bellotti, 435 U.S. 765 (1979).) CRP's expenditures on behalf of such ballot measures typically are coordinated with the proponents or opponents of such measures, and thus constitute "non-monetary contributions" to the committees formed to support or oppose such measures. Such committees are typically non-profit, tax exempt organizations exempt under section 501(c)(4) of the Internal Revenue Code and [3 PCS CDP 394] corresponding state tax law. Section 323(d)(l)of the FECA, as enacted by section 101of BCRA, prohibits CRP and Republican County Central Committee organizations, from contributing to section 50 1(c) organizations such as these ballot measure committees, if these organizations engage in "federal election activity." It is my understanding that such organizations typically engage in such activity by urging California voters to vote at consolidated state partisan primary and general elections that are federal elections.

Thus, CRP and Republican County Central Committees engaging in such ballot measure endorsement activity would be prohibited from using funds explicitly permitted by California law and from spending funds effectively to support such ballot issues.

8. CRP's Training and Support of County Grass Roots and Mobilization Activities:

CRP as the state central committee is part of a pyramid of Republican volunteer and activist activity, with the Republican County Central Committees in fifty eight California

counties at the base of the pyramid. At the county level, the Central Committee organizations, volunteer Republican organizations such as the Republican Womens' Federation, and others, operate local headquarters at election time, make volunteer phone calls, walk precincts, and conduct much of the grass roots, on-the-ground operations to contact and mobilize Republican voters.

CRP has provided training of Republican County Central Committee members and party activists at its conventions, at special regional training sessions conducted in election and off- election years, and through a variety of manuals and guides. Exhibit 4, Items A - X, entitled "CRP County Support Program Materials," incorporated by reference herein, are samples of CRP-produced and distributed training manuals covering subjects such as organizing a headquarters operation, a telephone center, organizing a county fair booth to distribute generic [3 PCS CDP 395] party materials, campaign collateral materials such as buttons, bumper strips and yard signs, organizing a fundraising program, compliance with campaign laws including FECA and the California Political Reform Act and the like.

Neither the Republican County Central Committees nor the local Republican volunteer clubs or activist groups has the financial wherewithal or expertise available to prepare such materials or provide experienced volunteer trainers as does the CRP. I understand that the Republican National Committee also has provided assistance of a similar kind to Republican County Central Committee organizations on a nationwide basis.

9. CRP's Voter Registration Activities:

CRP for many election cycles has provided and paid for partisan voter registration, through its Operation Bounty program in which Republican County Central Committees, Republican volunteer organizations and Republican candidates for state and federal office may participate, and through supplementary paid voter registration drives. Most of these participating groups and organizations are Internal Revenue Code section 527 organizations, transfers of CRP funds to which may be prohibited by section 323(d)(2) of FECA, as enacted by section 101 of BCRA.

CRP has registered over 350,000 Republican voters through such volunteer and paid voter registration programs in each election cycle except the 1997-1998 election cycle since 1983. (Exhibit 7, Chart 9, incorporated by reference herein, quantifies the results of these CRP voter registration programs.) In the 1995-1996 election cycle, CRP's Republican voter registration programs realized 367,935 Republican registrations, in 1997-1998, they realized 160,384 Republican registrations, in the 1999-2000 election cycle, 450,864 Republican registrations, and in the 2001-2002 election cycle, already they have realized over 300,000 [3 PCS CDP 396] Republican registrations. This voter registration activity exceeds the entire registered voter populations of some states.

Voter registration drives also provide opportunities to attract new registrants to participate in CRP and Republican County Central Committee activities and to solidify the voters' affiliation with the Republican Party and its candidates for elective state and federal offices.

The overwhelming amount of this activity is "generic" voter registration activity urging potential registrants to "Register Republican."

10. CRP's GOTV Activities:

CRP conducts extensive Get-Out-the-Vote activities to mobilize Republican voters through a variety of methods and materials, in coordination with Republican County Central Committee organizations, Republican volunteer clubs and candidates. Such GOTV activities are local in nature.

Exhibit 7, Chart 10, entitled "Get Out the Vote Activity by County by Election Cycle, 1993-2000," incorporated by this reference herein, is a summary of the CRP's GOTV activity that was coordinated with the Republican County Central Committees during election cycles since 1993.

a. *GOTV Telephone Calls:* CRP provides financial assistance to Republican County Central Committees to establish local headquarters with telephone bank capability to make GOTV phone calls not only to mobilize volunteers to walk and phone on election day but also to make direct calls to voters to urge them to vote, as well as to offer assistance in getting to the polls if necessary. CRP also has established telephone centers that make calls on a regional and statewide basis for such purposes. [3 PCS CDP 397]

This GOTV phone call activity has been stable, rising somewhat over the years as telephoning has supplemented and to some extent supplanted door-to-door efforts due to demographics and the difficulties of accessing doors in gated neigiaborhoods, restricted entry apartment houses, condominiums and rural areas.

In the 1993-1994 election cycle, a Gubernatorial election with two U.S. Senate races on the ballot, CRP made over 1.3 million GOTV phone calls to Republican households with more than one registered Republican voter resided. In the 1995-1996 election cycle, a Presidential election cycle, CRP made nearly 1.8 million GOTV phone calls. In the 1997-1998 Gubernatorial election cycle with one U.S. Senate race on the ballot, CRP made 2.15 million GOTV calls. In the 1999-2000 Presidential election cycle, CRP made 2.5 million GOTV calls.

b. *GOTV Mail:* CRP has employed GOTV mail programs, including its absentee ballot application mailings, sometimes including a "slate card list" of candidates for local, state and federal offices and ballot measure endorsements. Exhibit 3, Items B-F, include samples of such absentee ballot GOTV mailings.

> In the 1993-1994 election cycle, CRP sent approximately 2.3 million absentee ballot/slate mailings to Republican households of two or more registered Republican voters.
>
> In the 1995-1996 election cycle, CRP sent

approximately 2.25 million absentee ballot/slate mailings to such Republican households.

In the 1997-1998 election cycle, CRP sent approximately 2.5 million absentee ballot/slatemailings to such Republican households.

In the 1999-2000 election cycle, CRP sent approximately 5.2 million absentee ballot/slate mailings, in that case twice as many mailings as previously sent, to Republican households.

c. *GOTVDoorhangers and Persuasion Mail:* [3 PCS CDP 398]

Part of door-to-door GOTV campaigns is the "doorhanger slate" which is a piece distributed by walkers, both volunteer and paid, who go door-to-door and hang such cards on front doors in targeted precincts. The GOTV doorhangers supplement and reinforce CRP's and Republican County Central Committees' GOTV program directed to mobilizing Republican voters to go to the polls. The GOTV walk pieces are candidate collateral materials, and primarily are targeted toward "top of the ticket" (Gubernatorial and Presidential candidate) advocacy messages, in the latter case, exempt "collateral materials."

In the 1993-1994 election cycle, CRP paid for and Republican County Central Committees distributed approximately 1.5 million doorhangers and 2.3 million persuasion or advocacy walk pieces.

In the 1995-1996 election cycle, CRP paid for and Republican County Central Committees distributed approximately 1 .7 million doorhangers and 2.1 million advocacy walk pieces.

In the 1997-1998 election cycle, CRP paid for and Republican County Central Committees distributed approximately 1.3 million doorhangers and 7 million advocacy walk pieces.

In the 1999-2000 election cycle, CRP paid for and Republican County Central Committees distributed approximately 1.4 million GOTV doorhangers and 7 million advocacy walk pieces.

11. CRP's Generic Party Building Activities:

CRP engages in a variety of generic "party building" activities. CRP mails to newly- registered voters urging them to affiliate with the Republican Party because the Republican Party shares their values of family, faith. neighborhood and nation. CRP disseminates generic [3 PCS CDP 399] "Register Republican" and "Join the Republican Party" messages at county fairs -- which are important public gatherings in the fifty-eight counties of California -- as well as at ethnic fairs, new citizen "swearing in" ceremonies, and in ethnic and minority newspapers and periodicals.

Generic message communication affords the Republican Party an opportunity to identify with California's growing minority and ethnic population. Generic message communication fosters associational rights. CRP has established a "Party Base Building" Subcommittee of its Board of Directors, and has initiated ethnic conferences in connection with Party conventions, in order to attract more ethnic minority members into the Party. Bylaws, Art. II, Section 2.05.04(F). Plaintiff and Party Chairman Shawn Steel's "Blue Badge" project also focuses on communicating with ethnic minority groups the CRP's efforts to increase Party state central committee membership for such groups.

12. CRP's Fundraising Programs and Activities:

CRP has employed a wide variety of fundraising techniques and methods to raise "hard" federal dollars as well as permissible non-federal dollars.

a. *Direct Mail Fundraising*

It is my understanding that CRP was an early pioneer in the late 1970s and early 1980s of small dollar direct mail fundraising programs. These direct mail fundraising programs commenced with the development of a "donor file" through test mailings and roll-out mailings to registered Republican voters, and persons on lists and files rented from third party groups or obtained from direct mail vendors.

CRP's direct mail "donor file" mailing programs include a regular annual "Membership Renewal" mailing to known donors, usually sent under the name and signature of the Party's Chairman, with appropriate follow-up mailings to such donors. They also include special, [3 PCS CDP 400] topical mailings that feature the Party's Chairman, or another prominent Republican signer (such as a President or Presidential candidate, a Governor, a former high level official, such as former President Reagan).

Other, topical special mailings, and emergency appeals as the election draws nearer and voters, and donors, focus on an election, are sent to the donor file. A donor file may be mailed as often as eight times in a year.

To maintain a direct mail fundraising "donor list," the CRP must continually spend money "prospecting," that is, seeking new donors through the rental and mailing to new lists of potential donors that are the property of direct mail vendors, third parties, or vendors of third parties. Prospecting, or "list maintenance" and development, is expensive, and often loses money. Nevertheless, they are essential to keep the file current and productive.

Direct mailings largely raise permissible federal dollars, with an average return of between $20 and $40 per donor. These mailings occasionally realize corporate or other donations permissible under California law but not under federal law. Thus, CRP's donor solicitation disclaimers contain appropriate information advising the potential donor that permissible federal "hard dollar" contributions will be placed in the Party's federal account, and that corporate and other permissible contributions will be placed in the Party's non-federal account.

CRP's direct mail fundraising program returns are set forth in Exhibit 7, Chart 11, entitled "Major Funding Sources by Year, 1985-2001." The data shows that direct mail returns reached a high in 1986 of over $2 million and has declined to under $1 million since 1997. I understand this decline is consistent with the historic decline trend in political direct mail fundraising returns. [3 PCS CDP 401]

b. *Telemarketing*

CRP's telemarketing program began in the early 1990s, as reflected in Exhibit 7, Chart 11. The trend of returns from such fundraising has grown, as telemarketing first supplemented and to some extent supplanted direct mail fundraising.

CRP's telemarketing program also is directed at small "hard dollar" fundraising primarily for its federal account. Similar to direct mail fundraising, the average telemarketing donation is a federal "hard dollar" donation of between $20 and $40.

Also like direct mail, telemarketing prospecting to maintain and develop a "donor file" is expensive and often unproductive.

c. *Major Donor Programs*

CRP has developed a variety of multi-level major donor fundraising programs over the last three decades.

The CRP's "Golden Circle" fundraising program was introduced and spearheaded by John Wayne and former President Ronald Reagan while he was Governor of California. The "Golden Circle" program sought contributions of $1,000 initially, and that donor level was raised in the mid-1990s to $1,500 for individuals and $2,500 for business entities.

The CRP's "Golden Bear" Program and the "Team California" Program developed in the late 1980s. The "Golden Bear" Program was a California - initiated program, which sought donations from individuals and businesses at the $10,000 level. The "Team California" Program developed as an adjunct to the RNC's "Team 100," Program. The initial "Team

California" Program sought contributions of $25,000 from California donors to the RNC's "Team 100." This coordinated fundraising activity arose out of a practical concern shared by RNC and CRP that California has traditionally been an important source of fundraising for national political [3 PCS CDP 402] parties; that California was a "net" fundraising source for national dollars; and that California's major Republican donors had a particular interest in supporting the political viability of the CRP program, because of the importance of maintaining control of the California Governorship and Legislature, its role in the determination of national Presidential elections, and their general interest in California state and local elections.

The "Team California" Program reached its zenith in returns in 1990, a Gubernatorial not a Presidential election year, and in 1992, a Presidential election year in which the George H.W. Bush- Dan Quayle Presidential election campaign largely withdrew from actively contesting for California's electoral votes in August, 1992.

d. *Event Fundraising*

CRP relied upon "top-of-the-ticket" annual fundraising dinners featuring either an incumbent President, such as California's President Ronald Reagan, or an incumbent Governor, such as former Governors George Deukmejian and Pete Wilson. The allure of such fundraising events was the "star attraction" of featuring and honoring the top-of-the-ticket candidate or officeholder.

CRP's event fundraising also has relied upon occasional visits of federal candidates, such as former Speaker of the House of Representatives, Newt Gingrich, or "surrogates" such as members of the President's cabinet or a Presidential spouse or Presidential candidate spouse, such as Elizabeth Dole. Because of the large number of members of the California Republican Congressional Delegation, between 20 and 28 members over the years, I understand that such federal officials appear at the Party's convention events or as adjunct guests at fundraising events featuring the top-of-the-ticket individuals. However, members of the California Republican Congressional delegation less often are invited to be featured fundraising attractions at CRP's headline fundraising events. More frequently, such federal officials appear as fundraising attractions for Republican County Central Committees' annual or special fundraising events.

These events are generally medium level "hard dollar" federal fundraising events, and not large non-federal dollar events.

13. CRP's Expenditures Affected by BCRA:

CRP raises and spends millions of dollars each election cycle in support of its principles and goals, including its administrative and overhead costs, voter registration and GOTV activities, grass roots activities in support of local Republican County Central Committee volunteer organization, ballot measures, candidates for state and local offices, and candidates for federal offices.

A. Total Dollars Raised and Spent -- Exhibit 7, Chart 1; Campaign Finance Reports:

In the 1993-1994 election cycle, a non-Presidential election at which the Gubernatorial and major State Constitutional offices and two U.S. Senate races also were on the ballot, CRP raised $15,129,602 and spent $15, 244,312. (See Exhibit 7, Chart 1 incorporated by reference herein.) Of the amounts raised, $ 10,065,539 was for its non-federal account and $5,064,063 for its federal account. (CRP State Campaign Finance Reports, on file with the California Secretary of State; CRP Federal Campaign Finance Reports, on file with the Federal Election Commission (<http://herndon1 .sdrdc.com/cgi-bin/fecimg/?COO 140590>,)

In the 1995-1996 election cycle, a Presidential election in which no U.S. Senate races were on the ballot, CRP raised $23,833,790 and spent 23,326,244. (Id.) Of the amounts raised, $15,156,863 was for its non-federal account and $ 8,676,927 for its federal account. (CRP State Campaign Finance Reports, on file with the California Secretary of State; CRP Federal [3 PCS CDP 404] Campaign Finance Reports, on file with the Federal Election Commission (<http://herndon1 .sdrdc.com/cgi-bin/fecimg/?COO 140590>,)

In the 1997-1998 election cycle, at which the Gubernatorial and major State Constitutional offices and one U.S. Senate race also were on the ballot, and during part of the cycle (most of calendar year 1997), a restrictive state campaign finance measure was in effect that substantially suppressed non-federal fundraising, CRP raised $ 18,926,126 and spent $19,453,582. (Id.) Of the amounts raised, $ 11,661,806 was for its non-federal account and $ 7,264,320 for its federal account. (CRP State Campaign Finance Reports, on file with the California Secretary of State; CRP Federal Campaign Finance eports, on file with the Federal Election Commission (<http ://herndon1.sdrdc.com/cgi-bin/fecimg/?COO 140590>.)

In the 1999-2000 election cycle, a Presidential election in which one U.S. Senate race was on the ballot, CR? raised $35,658,711 and spent 534,658,7 11 (Id.) Of the amounts raised, $17,180,588 was for its non-federal account and $ 18,478,123 for its federal account. (CRP State Campaign Finance Reports, on file with the California Secretary of State; CRP Federal Campaign Finance Reports, on file with the Federal Election Commission (<http://herndon1.sdrdc.com/cgi-bin/fecimg/?C00 140590>.)

B. BCRA Effects on Raising of State-Permitted Campaign Funds -- Exhibit 7 Charts 5, 6A, 6B and 8:

In the 1995-1996 election cycle, a Presidential election in which no U.S. Senate races were on the ballot, CRP raised $2,520,000 from donors of $10,000 or more in non-federal funds per calendar year, consisting largely of corporate and business entity funds permissible under California state-law for use in connection with state and local elections, and permitted by federal law for use in joint federal]non-federal allocated activities. These funds were raised from 76 [3 PCS CDP 405]

separate donors. (Exhibit 7, Chart 5, incorporated by this reference herein.) These funds constituted 10.57% of total funds raised by CRP and 16.6 % of non-federal funds raised by CRP in that election cycle. Of these funds, $1,760,000 or 69.1%, would have been unavailable had CRP been limited to raising funds subject to the "Levin" limits of section 323(b)(2)(iii)of FECA, as enacted by section 101, of BCRA. (See Exhibit 7, Charts 6B and 8, incorporated by reference herein.) Only $760,000 of such donors' contributions of $10,000 or more to CRP's state campaign committee would have been available for use in that cycle had CRP been limited to raising funds subject to the "Levin" limits. [3 PCS CDP 406]

In the 1997-1998 election cycle, at which the Gubernatorial and major State Constitutional offices and one U.S. Senate race also were on the ballot, and during part of the cycle (most of calendar year 1997), a restrictive state campaign finance measure was in effect that substantially suppressed non-federal fundraising, CRP raised CRP raised $1,325,000 from donors of $10,000 or more in non-federal funds per calendar year, consisting largely of corporate and business entity funds permissible under California state law for use in connection with state and local elections, and permitted by federal law for use in joint federal/non-federal allocated activities. These funds were raised from 70 separate donors. (See Exhibit 7, Chart 5, incorporated by this reference herein.) These funds constituted 7.00% of total funds raised by CRP and 11.36 % of non-federal funds raised by CRP in that election cycle. Of these funds, $625,000 or 47.2%, would have been unavailable had CRP been limited to raising funds subject to the "Levin" limits of section 323(b)(2)(iii)0fFECA, as enacted by section 101, of BCRA, (Exhibits 6B and 8, incorporated by reference herein.) Only $700,000 of such donors' contributions of$10,000 or more to CRP's state campaign committee would have been available for use in that cycle had CRP been limited to raising funds subject to the "Levin" limits.

In the 1999-2000 election cycle, a Presidential election in which one U.S. Senate race was on the ballot, CRP raised CRP raised $5,397,400 from donors of $10,000 or more in non-federal funds per calendar year, consisting largely of corporate and business entity funds permissible under California state law for use in connection with state and local elections, and permitted by federal law for use in joint federallnon-federal allocated activities. These funds were raised from 166 separate donors. (See Exhibit 7, Chart 5, incorporated by this reference herein.) These funds constituted 15.14% of total funds raised by CRP and 31.41 % of non- federal funds raised by CRP in that election cycle. Of these funds, $3,737,000 or 69.2%, would have been unavailable had CRP been limited to raising funds subject to the "Levin" limits of section 323(b)(2)(iii)0fFECA, as enacted by section 101, of BCRA. (See Exhibits 7, Charts 6B and 8, incorporated by reference herein.) Only $1,660,000 of such donors' contributions of $10,000 or more to CRP's state campaign committee would have been available for use in that cycle had CRP been limited to raising funds subject to the "Levin" limits.

C. BCRA Effects on National Party Transfers Exhibit 7, Charts 2, 3, 7 and 8:

Exhibit 7, Charts 2, 3, 7 and 8 identify the CRP's receipt of funds transferred from the federal and non-federal accounts of the national party committees (RNC, RNSC, and NRCC) during the election cycles since 1991.

Chart 2, entitled "National Party Transfers by Election Cycle, 1991-2000," identifies the dollar amounts of non-federal and federal dollars transferred by cycle.

In the 1991-1992 cycle, $533,750 in total, consisting of $50,000 in federal and $483,750 in non-federal funds, were transferred to CRP. In the 1995-1996 cycle, $11,548,431 was transferred, of which $9,032,399 was non-federal funds and $2,516,032 in federal funds.

In the 1997-1998 cycle, of the $3,274,606 total, $2,545,573 were federal funds, and [3 PCS CDP 407] $729,035 were non-federal funds. The highest total, $12, 957,872 in the

1999-2000 cycle, was composed of $6,132,373 in federal and $6,825,499 in non-federal funds.

The percentages of such funds to CRP's total election cycle funding has varied from 48.4% of total funds in the 1995-1996 election cycle to 17.3% in the 1997-1998 cycle and 36.3% in the 1999-2000 cycle, with a decade average of 29.4%.

Chart 7, entitled "Bi-Partisan Campaign Reform Act Costs by Election Cycle, 1995-2000," is an attempt to provide an estimate of the impact of BCRA on large-dollar receipts, including (a) the elimination of all national party transfers, as prohibited by BCRA; (b) the reduction of permissible non-federal funds which had been unlimited prior to BCRA with the brief exception of the 1997 calendar year in which CRP was subject to now-invalidated contribution limits of $5,000 per year for state and local election purposes, to the $10,000 per year "Levin" amounts; and (c) the hypothetical doubling of federal donations from maximum donors, who could give $5,000 per year prior to BCRA and would be permitted to increase their donations. Chart 7 demonstrates that in the "best case" circumstances that had all maximum federal donors doubled their federal contributions to $10,000, CRP would have suffered a net loss of $13,018,000 in the 1995-1996 election cycle, of $3,759, 608 in the 1997-1998 election cycle and of $10,634,872 in the 1999-2000 election cycle. Chart 8 quantifies this loss as a percentage of CRP's total revenues for that election cycle as follows: a 54.6% loss for the 1995-1996 election cycle; a 19.9% loss for the 1997-1998 election cycle and a 30.3% loss for the 1999-2000 election cycle.

14. Effect of BCRA on CRP Programs and Activities:

Under the new definition of "federal election activity," virtually all of CRP's activities in support of its State and local candidates, as well as most of its "generic" party-building activity, [3 PCS CDP 408] will be considered "federal election activity" even though those activities have only a remote or indirect effect on any federal election or, in some cases, no effect at all. As a result, non-federal money cannot be used at all for these activities. This has the following consequences for CRP's activities:

a. *Voter registration activities.* The BCRA makes all voter registration activities within 120 days of any election including a federal office "federal election activity." This includes primary elections. This means that in an election year, virtually all voter registration activity must be paid with federal money, or a combination of federal and "Levin" money. The view that this activity is for the purpose of "influencing" a Federal election misunderstands that nature of party registration activity. Although CRP has allocated the costs of voter registration between federal and non-federal money because required to do so by the FEC, it is oflen the case that voter registration activities are primarily driven by the desire to affect State and local races.

For example, this is a non-Presidential year with no U.S. Senate races on the ballot. However, CRP has registered more than 300,000 Republican voters.

b. *GOTV activities.* The BCRA defines "federal election activity" to include "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot." This means that virtually all activity in support of State candidates will be "federal election activity" regardless of the relative importance of the Federal offices on the ballot.

c. *State candidate mail.* Even if the mail only identifies a State candidate, if it also encourages persons to vote, it is GOTV activity and must be paid with federally limited funds. This mail typically gives both the election date and the person's polling place -- both GOTV criteria under the FEC's regulations. CRP typically spends between $2- 4 million in non-federal funds [3 PCS CDP 409] on its mail program in support of State candidates -- mail that does not include federal candidates. Non-federal money can no longer be used for this

State mail after the BCRA goes into effect.

d. *Mail in support of or opposition to ballot measures.* The same restrictions apply if the mail urges voters to vote. It does not matter that no Federal candidate is mentioned.

e. *Party GOTV "telephone banks."* In the past, this activity has been paid with non-federal money if only State candidates were endorsed. If both State and federal candidates were endorsed, the cost was allocated between federal and non-federal money. After the BCRA goes into effect, all phone bank GOTV activity will have to be paid with federally - limited money, even if it only mentions State candidates and does not mention a federal candidate.

f. *Grass-roots campaign activities* such as buttons, bumper stickers and yard signs that mention a federal candidate are "federal election activity." In the past, the costs of these items have been allocated between federal and non-federal money. After the BCRA, they must be paid with federally - limited funds, even though the cost of these items are not considered "contributions" under the FECA. Many of the experts believe that the BCRA will result in the parties engaging in more grass-roots activities; if these items have to be financed with extremely limited federal money, and have to compete with other party expenses, in my view as discussed more fully below, the likely result will be less, rather than more, grass-roots activity.

g. *GOTV Slate cards/doorhangers.* These are cards or mail pieces listing all the party's endorsed candidates. They are usually tailored for distribution in a particular local area, and State and local races dominate numerically over the federal races. Like grass roots activities, the expenses of such slate cards/doorhangers have been allocated between federal and non-federal money according to the over-all space occupied by the federal candidates. If these [3 PCS CDP 410] are considered GOTV activity, non-federal money can no longer be used.

h. *Public communications that refer to a clearly* *identified Federal candidate* if they "promote or support" a federal candidate. In the past, CRP has produced mail, television, and radio advertisements on behalf of State candidates containing endorsements by a federal candidate. In the past, these could be paid with non-federal money as long as the federal candidate's election was not referenced. It is my understanding that such endorsement communications will now have to be paid completely with federal money.

i. *Generic party activity.* The BCRA defines "generic activity" as any activity that promotes a party and does not promote a federal or non-federal candidate. It is difficult to imagine many party activities that could not be characterized as "promoting" the party. Although the FEC has limited this provision to even - numbered years, all "generic activity" in those years must be paid with federally- limited funds. In the past, the costs of these activities would have been allocated between federal money and non-federal money. For example, if CRP sends a mailing to new citizens and newly- registered Republican voters explaining the principles of the Party and urging them to actively support the Party, in an even numbered year, non-federal funds cannot be used to print or mail this mailing.

15. BCRA Effects on CRP Fundraising Activities:

I have reviewed CRP's past fundraising activities since 1995. While there is some uncertainty about just what roles national party officials, federal candidates and officeholders may play in fundraising activities, and if fully prohibited from directly or indirectly soliciting non-federal or "Levin" funds for CRP whether CRP could find comparably- effective persons to substitute in the fundraising roles played by such persons, my views of the potential impacts of BCRA on CRP's fundraising activities are as follows: [3 PCS CDP 411]

a. Cutoff of National Party Transfers to CRP: The elimination of national party transfers together with cutoff of non-federal funds together will reduce CRP's available budget

by nearly 40% in Presidential election cycles and 20% in non Presidential election cycles. With an average spending of nearly $30 million in Presidential election cycles and $17.5 million in non-Presidential election cycles in the 1993-2000 period, this would result in a reduction of from $30 million to $18 million available for Presidential election cycles, and from $17.5 to 14.0 million in non-Presidential election cycles. With CRP administration and fundraising costs averaging about $4.5-5.0 million per election cycle, the amounts available for voter registration, get-out-the-vote and direct candidate support activities for local, state and federal candidates and ballot measures would be reduced from an average of about $25 million to about $13 million in Presidential election cycles and from about $12.5 million to about $ 9.0 million in non-Presidential election cycles.

b. Impact on Overall CRP Spending and Effective Campaigning: The dollar impact of this diminution in funds available for CRP political projects, including direct support of State and local candidates and other activities such as voter registration, get-out the-vote, and local political party support operations, will be dramatic. This reduction would be approximately 48% in Presidential election cycles and 28% in non-Presidential election cycles. This impact may well be exacerbated by the fact that much of this activity may require federal "hard" dollars, and not "Levin" funds, or may not be available to transfer to local Republican County Central Committees or candidates due to other disqualifying factors such as (1) the prohibition on transfers to [3 PCS CDP 412] an Internal Revenue Code Section 527 organization; (2) the prohibition on coordinated fundraising activities by state and local political party committees.

c. Eliminating National Party Transfers Will Affect Substantially More CRP Activity than RNC - Funded "Issue Advocacy": By prohibiting national political parties from raising any "soft" or non-federal dollars, and also prohibiting the transfer of non-federal dollars to state and local party committees, BCRA clearly eliminated the national political parties' opportunities to provide funding of "issue advocacy" by State political parties such as the CRP. However, these prohibitions, combined with BCRA's redefinition of "federal election activity" to encroach upon activities for which state and local parties had used permissible State funds for the non-federal allocable portion of voter registration, voter identification and get-out-the-vote, and BCRA's imposition of "Levin"fund limits on such State- permissible money, affect far more than State political parties' "issue advocacy" activities. In my view, CRP will suffer an diminution of its ability to fund purely state and local candidate advocacy activities, and will require CRP to make substantial spending reallocations. This in my view will likely will result in CRP spending quite a bit less money on grass roots support, communications concerning issues of state and local interest to its members at the local grass roots levels, and will hamper the very activities the Defendants'/Intervenors' experts suggest as the "magic bullet" to mitigate BCRA's impacts on political parties' ability to campaign effectively.

d. Potential Increase In Amount of Federal Contributions Due to Doubling of Annual Contribution Limit to $10,000: The potential to double maximum federal contributions of donors who have a history of making contributions to CRP of the [3 PCS CDP 413] maximum $5,000 per year will be reduced by the prohibition on using "top-of-the-ticket" attractions such as a Presidential candidate or high level federal official orcandidate to help raise such funds, and by the perceived diminution in the Party's potential effectiveness. Moreover, the increase in amounts that may be contributed directly to federal candidates may cause donors to shift their contributions from the party to candidates. The potential effect on CRP of the increase in a donor's aggregate contributions from $25,000 per calendar year to $95,000 per election cycle, with segmented "sub- limitations" on a donor's aggregate contributions to state and local political parties, is

uncertain.

e. *Prohibition on CRP Chairman 's "Levin" and Non-federal Dollar Fundraising:* CRP's inability to use its Chairman, who has been a principal fundraiser for the CRP and whose fundraising responsibilities are set forth in the CRP's bylaws, will have a certain, adverse impact not only on "Levin" and non-federal dollar fundraising, but also on federal dollar fundraising. CRP's Chairman is a member of the RNC and thus is prohibited from soliciting non-federal funds under section section 323(a)(2) and 323(b)(2)(D) of the FECA as amended by section 101 of BCRA. This prohibition will have its most dramatic effect on CRP's raising of "hard" federal dollars through its direct mail program because this program also raises some "soft" non-federal funds. BCRA's prohibition, with criminal penalties as well as enhanced fines for violation of this prohibition, will require CRP to steer wide of protected activity and avoid the use of the CRP Chairman for even such predominantly federal dollar fundraising.

f. *Prohibition of Fundraising for State and Local Party Committees by Federal* [3 PCS CDP 414] *Candidates and Officials:* CRP's and Republican County Central Committees' reliance upon federal officials and candidates to raise state-permissible money to assist in both local and state campaign activity will have a significant but uncertain effect upon its fundraising capability

g. *Impact on CRP 's Major Donor Fundraising Programs:* CRP's newer large dollar Major Donor fundraising programs, in particular the Team California Program, will be substantially and adversely affected by BCRA's prohibition on "top-of-the-ticket" star power of Presidential, high level federal officials and members of Congress to participate in these programs. These same large dollar Major Donor fundraising programs will be affected by the "Levin" limits in almost as substantial a way. (See Exhibit 8, Charts 4, 5, 6A, 6B, 7 and 11.)

h. *Direct Mail and Telemarketing Programs:* CRP has extensive direct mail and telemarketing fundraising programs that will need to be funded from federal and "Levin" dollar sources. While I have stated in deposition that CRP can "work harder" to increase such fundraising, working harder also entails spending more money to develop and maintain such programs. The diminution of available funds will also adversely affect CRP's ability to increase these programs, because prospecting costs to develop and maintain active direct mail and telemarketing donor files are expensive.

i. *No Adequate Substitutes for Loss of Such Fundraising Program:*. Defendants/Intervenors' experts have suggested that door-to-door canvassing for fundraising may be able to supplant the loss of funds described above. However, the costs of organizing, recruiting, supervising and administering such a program at the [3 PCS CDP 415] local level will be substantial. Because BCRA also compartmentalizes and cuts off relationships between the state and local party committees, CRP's ability to assist Republican County Central Committees to develop such programs, or to recruit and utilize local personnel for such programs administered at the state level by CRP, is doubtful. Finally, grass roots volunteers would be diverted from other tasks, such as voter registration and campaigning to organize and manage such a proposed door-to-door canvass program. Finally, door-to-door canvassing in an urban/suburban State like California is frustrated by the prevalence of gated neighborhoods, restricted entry apartment houses, condominiums and rural areas.

16. Other BCRA Effects:

I have reviewed BCRA's other provisions as well. Again, while some of the provisions of BCRA are uncertain, and their application may depend on interpretation by the courts and the Federal Election Commission, my view is that a number of the provisions of BCRA also will have a very substantial impact on CRP's ability to raise funds to support its activities, and will

substantially impair its ability not only to campaign effectively in support of its candidates, but also to speak on ballot issues and other issues, to associate and to foster association among Republicans at the local, state and federal levels. In particular, the cutting off of relationships between the national, state and local parties will have a very detrimental impact on the grass roots organizational capabilities of the Republican Party.

a. *Prohibition on State's National Committee Members' Fundraising for CRP:* RNC officials including our Chairman and National Committee members will no longer be able to raise non-federal money for CRP.

b. *Prohibition on State's National Committee Members Fundraising for Republican* [3 PCS CDP 416] *County Central Committees:* RNC officials including our Chairman and National Committee members will no longer be able to raise non-federal money for Republican County Central Committees.

c. *Prohibition on Federal Candidates and Officeholders' Fundraising for CRP and Republican County Central Committees:* Federal candidates and members of Congress officials including our Chairman and National Committee members will no longer be able to raise non-federal money for CRP or Republican County Central Committees.

d. *Diminution of Political Party Speech With Respect to Ballot Issues and Other Issues:* CRP will no longer be able to support ballot measures and in particular state and local initiative, bonds, and referenda, because organizations formed to support such measures under California law are organized as tax exempt organizations under Section 501(c)(4) of the Internal Revenue Code. CRP will be unable to make contributions of money or "in- kind" to such organizations, which are considered "contributions" under California law and BCRA. Such ballot measure committees are organized as 501c4 organizations, and often engage in what would be considered "federal election activity" including voter registration and get-out-the-vote and CRP's endorsement spending would be an "in-kind" contribution prohibited by section 323(d)(l) of FECA.

e. *Prohibition of Transfers of Non-Federal Funds from CRP to Republican County Central Committees:* CRP will no longer be able to provide substantial county support activities that help open party headquarters and phone banks during election periods, both under the prohibition of section 323(d)(2) of FEC as enacted by section [3 PCS CDP 417] 101 of BCRA, because such committees are organized under Section 527 of the Internal Revenue Code, and to a more limited extent, such CRP fund transfers will require federal or "Levin" funds and not funds that are permissible under California Government Code Section 85303(c) for these purposes.

f. *Substantial Interference with Grass Roots Voter Registration Activities of CRP 's Operation Bounty:* CRP will be unable to operate its Operation Bounty program in which Republican County Central Committees, Republican volunteer clubs, and state and local candidates are the primary participants. All of these organizations are tax exempt Section 527 Internal Revenue Code organizations, including state and local candidates whose committees also are section 527 IRS organizations.

g. Shifting of Voter Registration from Grass Roots Volunteers to Paid Professionals Will Discourage Grass Roots Participation in Party: Rather than rely upon these grassroots volunteer organizations that are Section 527 tax exempt organizations, CRP will be forced to rely more upon paid professional vendor operations, which will further discourage the grass roots volunteers, and frustrate their involvement in other party mobilization tasks.

h. *"Either/Or" Requirements of Section 44]a(d) (4) for Coordinated Expenditures and Independent Expenditures:* Because CRP would be prohibited from engaging in "coordinated expenditures" on behalf of a federal candidate if any local Republican County Central Committee made a single dollar of "independent expenditures" on behalf of such candidate, and vice versa, Republican County Central Committees would be prohibited from making "independent

expenditures" such as putting a slate listing in a newspaper without coordinating that activity with the federal candidate, if [3 PCS CDP 418] CRP had made "coordinated expenditures" on behalf of the candidate. Because BCRA attempts to cut off coordination between the state and local parties in fundraising, and also restricts the interaction that they have traditionally had with respect to voter registration, phone bank and fundraising/transfer activity, their ability to communicate about such "coordinated expenditures"/"independent expenditures" activity also will diminish. CRP will need to spend resources to monitor such local activity in order to protect its ability to do "coordinated expenditures" on behalf of a federal candidate. Moreover, one, small last minute "independent expenditure" on behalf of a federal candidate by a Republican County Central Committee could make illegal previous, and more substantial, "coordinated expenditure" activity by the CRP.

i. *Fundamental Interference With California Law Promoting State and Local Campaign Contributions to and Expenditures by Political Parties:* BCRA conflicts with Proposition 34, and will directly affect CRP's and RCCC's ability to accept contributions for state and local campaign activity specifically identified in Prop 34 to include voter registration and get-out-the-vote and other non-direct candidate support activities including communications with CRP's members, who are registered Republican voters (Gay. Code 85312). BCRA will interfere with CRP's and Republican County Central Committee's conduct of state and local election activity and associational rights.

j. *Third Party Supplanting of Role of Political Parties:* Parties like CRP and Republican County Central Committees will be supplanted by other third party groups, including 501(c)(4) groups that may engage in voter registration and even advocacy with respect to federal and non-federal candidates without BCRA [3 PCS CDP 419] Restrictions.

The foregoing is true and correct Executed under penalty of perjury under the laws of the United States this 4th day of October, 2002, at Burbank, California.

/S/
RYAN M. ERWIN

DECLARATION OF DONALD FOWLER

[DEV 6, Tab 13]

The Affiant, being duly sworn, deposes and says:

1. My name is Donald L. Fowler. I reside in Columbia, South Carolina.

2. From 1971 until 1980, I served as Chairman of the South Carolina Democratic Party. From January 1995 until January 1997 I served as Chairman of the Democratic National Committee. Other positions that I have held with the Democratic Party are enumerated in Attachment A.

3. During the time that I served as chairman of the DNC, the DNC and its sister organizations, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee, raised large amounts of "soft money," but even so the Republican Party raised more of this category of political money during this same period than we did.

4. One of my principal responsibilities as Chair of the DNC was to raise money. Other DNC officers participated in this effort as did a number of Executive [2] Department and Congressional officials, including President Bill Clinton and Vice President Albert Gore, Jr. We raised soft money in amounts ranging from $5,000 to at least $400,000 from individuals, corporations, and labor unions. Hard money or federal money (the terms were used interchangeably) was raised in many small contributions of less than $100 up to a limit of $20,000.

5. During the summer of 1995 when the DNC was reviewing its fund raising policies, I recommended that we restrict contributions to the DNC to $2,000 or less for both hard and soft money. This recommendation was not adopted. Even so, I continued to be of the opinion that limiting contributions from individuals, corporations, unions and other entities to modest sums is good, essential, appropriate

public policy. Based on more than three decades of study, research, teaching, and fund raising at the local, state and national levels, my strong opinion is still that contributions to parties and campaigns should be limited to modest sums. This policy should apply to the Democratic and Republican committees and campaigns involving federal candidates.

6. This position is based on both logic and experience. Many contributors of large sums of money – both Republicans and Democrats – gain access to party and governmental officials that they otherwise would not have. With this access, contributors are able to make their cases to people who make public policy and take official governmental action. Those who contribute small amounts of money do not have this advantage and thus are unable to influence government with the same effectiveness. This money-based advantage exists not only in politics, but also in churches, universities, the United Way, the United States [3] Chamber of Commerce, and the National Organization of Women. This easy access based solely on money creates a favored class, the members of which have much greater opportunity to make their case for their issues and their interests. Logically and factually this tilts the American political system toward the rich and away from average citizens.

7. One should understand that this system has been legal – but critically flawed. Making it illegal is good policy that will improve the fundamental fairness of the American political system, one of the principal goals of McCain-Feingold.

8. Party and government officials participate in raising large contributions from interests that have matters pending before Executive agencies, the Congress, and other government agencies. Party officials, who are not themselves elected officials, offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities – White House and congressional meetings – to press their views on matters pending before the government. This process undermines our democratic processes and creates a lack of confidence in its fairness on the part of average citizens.

9. I do not fault party officials for playing this role so long as it is legal. Indeed, I believe that party officials have a responsibility to provide linkage between party members, the people and their government. Party officials should do this for small and large contributors and those who do not contribute at all. As long as the system permits big money contributors, however, they will inevitably have a disproportionate advantage. I recognize this as a fact. The solution is to change the party and campaign finance system to eliminate, or at least reduce, the extra [4] influence of contributors of large sums of money. I do believe and insist, however, that party officials have a duty and responsibility to provide linkage between the people and the government.

10. During my tenure as DNC chair there is no evidence that any one of our contributors of large sums of money received a quid pro quo, i.e., a substantive governmental benefit. But the mere fact that larger contributors have an advantage in making their case is sufficient reason to adopt new policies and procedures.

11. One much publicized case of large contributions and alleged political influence involved the Hudson Indian Casino. During the 1990's, Indian tribes in Wisconsin sought permission from the Department of the Interior to establish a casino in Hudson, Wisconsin. Certain Minnesota tribes opposed this application because they had pre-existing facilities where gambling took place. Some individuals in these tribes were supporters of the Democratic Party. At the request of an old friend whom I admired and respected, I met with some of the leaders of the Minnesota tribes who opposed the casino. They presented their views on the casino application to me. Thereafter, I informed White House officials of the meeting and asked them to review the matter

– without recommending any course of action. While I did not know it at the time, I later learned that representatives of both sides in this issue had contacted almost every member of the Wisconsin and Minnesota Congressional delegations as well as Administration officials. During the 1995-1996 election cycle, the Minnesota tribes contributed substantial sums of money to various Democratic Party committees. [5]

12. Soft money does not necessarily strengthen political parties. Both major parties use aggressive techniques in raising large sums of money because they feel that they are locked in an "arms race" with each other. Neither believes it can afford to fall behind the other, for fear of being outspent and losing key federal and state elections. This intense focus on raising larger and larger amounts from relatively few special interest sources does not make for stronger or better parties. This is particularly true for Democrats, because we are the party of average Americans, while most wealthy individuals and special interest groups tend to favor Republican politicians. Raising more money in smaller amounts from a larger number of people would certainly strengthen the Democratic Party by providing us with a stronger base of active citizens.

12. National parties can perform their important functions without large soft or hard money contributors. Large soft money contributions are a relatively recent phenomenon, yet the parties were vibrant, functional and effective prior to the advent of gross soft money contributions. They can continue to be effective without soft money.

13. The increased hard money limits in the Bipartisan Campaign Reform Act (BCRA) will permit both parties to raise sufficient money to support their operations and candidates. The argument that the BCRA "defunds" the parties and thereby cripples them is incorrect. Nothing in this legislation damages the operational integrity of the parties if the legislation survives in its entirety. Should the provisions limiting independent issue ads within sixty days

of a general election and thirty days of a primary be struck, it would reduce the role and significance of [6] political parties while accentuating the importance of special interest groups that sponsor such ads. If the courts should strike this provision, the role of special interest groups would be greatly enhanced and the role of parties would be significantly diminished. Court approval of the entire BCRA would clearly be in the interest of political parties and the political system in general.

14. This is particularly true in light of the fact that national, state and local party committees raised $741,000,000 in the 1999-2000 election cycle. With the increased limits for individual and PAC contributions applicable to post-2002 elections, this will increase substantially and parties and candidates will have sufficient money to make their cases to the people.

15. Except in very limited circumstances the use of soft money by state parties for activities that affect federal elections should be severely restricted. National parties in the past transferred hard and soft money to state parties with key *federal* elections, so that the state parties could use the money in legal ways that inevitably affected the federal elections. In the 1996 election cycle, the DNC transferred money to Democratic state parties in states where key elections were close. State parties which received these funds paid for the spots that ran in their states with this money using media firms that produced them and handled the media buys. These firms were composed of media and campaign advisors who were under joint contract to the DNC and the Clinton Re-election Campaign, a perfectly legal arrangement. With appropriate consultation with the DNC and others, these media and campaign advisors designed and wrote the advertisements with a combination [7] of soft and hard money. They were placed in strategic markets using a combination of hard and soft money.

16. There is nothing inherently wrong or bad about state and national party cooperation of this type. Indeed that is what parties are supposed to do. If there is a difficulty with this arrangement, it is because there is so much money involved which must be raised in large amounts thus giving those who contribute these large amounts the same advantages described in the paragraphs above.

17. As noted, I served as Chairman of the South Carolina Democratic Party. Based on that experience, I know first-hand that various activities such as get-out-the-vote campaigns, voter identification efforts, voter registration drives, and advertisements that mention federal as well as state candidates have the effect of promoting candidates for federal office as well as candidates for state office. Soft money mixed with hard money gives parties expanded capabilities. Eliminating soft money, however, does not mean that these joint efforts will have to be eliminated. They will have to be done more efficiently with lower overall expenditures with the assistance of local, grassroots volunteers.

18. In conclusion, contributions of large sums of money to parties and campaigns undermine the integrity of the political process, create inequities in the system, and produce a privileged class of political actors. Sound public policy dictates that these large contributions be eliminated from the American political system.

19. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DECLARATION OF MARY JANE GALLAGHER

I, Mary Jane Gallagher, do depose and state as follows:

1. I am the currently the Executive Vice President of the National Abortion and Reproductive Rights Action League ("NARAL"), a District of Columbia nonprofit corporation recognized as tax exempt under section 501(c)(4) of the Internal Revenue Code of 1986, as amended (the "Code"). NARAL does not include any affiliates or any separately organized entity.

2. I have served in this position since June 2002. My primary responsibilities include interdepartmental coordination, budget oversight and implementation of NARAL's strategic plan.

3. NARAL has designated me pursuant to Federal Rule of Civil Procedure 30(b)(6) to respond in the form of a declaration to the requests for documents and notice of [*2] deposition served upon NARAL by the Republican National Committee ("RNC") on June 19, 2002 as part of its challenge to the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). In addition to providing this declaration, NARAL also produced documents to the RNC on July 23, August 1, August 2, and August 27. All of the documents produced by NARAL, as well as those NARAL documents that are exhibits to this declaration, are, to the best of my knowledge at this time, accurate and authentic copies of original documents either created by NARAL or maintained by NARAL in the regular course of business. Those documents that are pages printed from NARAL's internet website are also accurate and authentic copies of those pages, as they appear in electronic form on NARAL's website.

4. NARAL's position is that neither NARAL-PAC nor NARAL Foundation is covered by the subpoena received by NARAL. Although I am not an officer or director

of NARAL-PAC, I believe that the following information about NARAL-PAC is correct to the best of my knowledge at this time based upon my general knowledge of NARAL-PAC's operations.

Background

5. For over thirty years, NARAL has been the political arm of the pro-choice movement and an advocate of reproductive freedom and choice. NARAL works within the political and legislative systems to advocate for comprehensive reproductive health policies and to secure reproductive choice for all Americans. NARAL's mission is to develop and sustain a constituency that uses the political process to guarantee every woman the right to make her own decisions regarding the full range of reproductive choices, including preventing an unintended pregnancy, bearing healthy children, and choosing legal abortion. NARAL defends the right to choose and works to make abortion less necessary. Attached as Exhibit A to this declaration are **[*3]** copies of NARAL's Annual Reports for 1999-2000 and 2000-2001, both of which discuss NARAL's mission and objectives.

6. NARAL accomplishes many of its objectives by mobilizing its grassroots system to build broad-based support for the right to safe, legal abortion.

7. NARAL, NARAL-PAC, and NARAL Foundation are three separate organizations that work within the legal requirements limiting their respective activities to achieve similar pro-choice objectives.

8. NARAL works through the political and legislative systems to advocate for comprehensive reproductive health policies and to secure reproductive choice for all Americans. Using sophisticated political strategies, grassroots organizing, and lobbying efforts, NARAL has fought and won numerous pro-choice victories in its 30-year history.

9. NARAL-PAC, a multicandidate committee registered with the Federal Election Commission ("FEC") and connected with NARAL, is a force behind the election of many pro-choice candidates. NARAL-PAC mounts multi-faceted campaigns, including paid advertising and get-out-the-vote efforts to elect pro-choice candidates. One of NARAL-PAC's strengths is its ability to mobilize volunteers into an effective get-out-the-vote force in the final weeks of a campaign. In addition to these get-out-the-vote efforts, NARAL-PAC provides financial contributions and its political advice and services also provide an edge to pro-choice candidates across the country.

10. The NARAL Foundation, a District of Columbia nonprofit corporation recognized as tax-exempt under section 501(c)(3) of the Code, was founded in 1977 to perform **[*4]** in-depth research and legal work, publish substantive policy reports, mount public education campaigns, and provide leadership training for grassroots activists across the nation.

11. NARAL is also affiliated with numerous state affiliates throughout the country that share the same mission as NARAL. The affiliates focus their activities at the state and local levels. NARAL currently has affiliates in twenty-six states: California, Colorado, Connecticut, Florida, Georgia, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Virginia ("Affiliate In Formation"), Washington, Wisconsin, and Wyoming. Many of these affiliates maintain and operate their own websites and some of them work in close concert with the national organization in order to increase their ability to protect choice.

12. As Kate Michelman, president of NARAL, said on "Democracy Now!" on July 1, 2002, NARAL is a "business" engaged in political advocacy in competition with the Republican Party. NARAL's business is advocacy. In fact, according to Fortune Magazine, NARAL has become one of the top 10 advocacy groups in America.

NARAL Membership

13. NARAL currently has nearly 145,000 members throughout the country. These members pay at least $10.00 in annual dues.

14. NARAL's members have certain rights, including receiving communications from NARAL regarding issues affecting a woman's right to choose or reproductive freedoms, the right to vote on candidates for NARAL's Board of Directors, and the [*5] right to attend the annual meeting. Attached as Exhibit B are examples of materials sent to NARAL members.

NARAL's Fundraising & Expenses

15. In addition to the funding it receives through membership dues, NARAL also solicits and receives donations from the general public, Code section 527 organizations, and contributors at events. NARAL does not and is not required to track whether it receives donations from persons outside of the United States. However, NARAL believes that the majority, if not all, of its donors are residents of the United States. Support and revenue for NARAL and NARAL-PAC for 1999, 2000, and 2001 are summarized in the following chart:

	1999	**2000**			**2001**		
	Total	NARAL	NARAL-PAC	Total	NARAL	NARAL-PAC	Total
Membership Dues, Contributions and Bequests	5,066,999	5,831,100	444,207	6,275,307	13,105,721	1,361,585	14,467,306
Investment Income	58,052	48,869	8,371	57,240	81,443	24,752	106,195
Lobbying Service Income	236,667	264,612	N/A	264,612	654,411	N/A	654,411
Other	129	6,353	N/A	6,353	528,828	N/A	528,828
Totals	**$5,361,847**	**$6,150,934**	**$452,578**	**$6,603,512**	**$14,370,403**	**$1,386,337**	**$15,756,740**

16. NARAL solicits membership dues and donations using a variety of methods, including telephone solicitations, direct mailings, the Internet, fundraising events, and personal visits. Attached as Exhibit C are examples of solicitations sent by NARAL.

17. All of NARAL's activities are paid for through the donations that it receives and from income on NARAL investments.

[*6] 18. Individuals that contribute more than $1,000 to NARAL become members of NARAL's Justice Blackmun Society. This group of donors is further broken down into categories based on the amount of contributions given. The following chart lists each category, the amount required to become a member of each category, and the number of members in each category during the time period between April 1, 2000 and March 31, 2001:

Donor Category	**Required Contribution**	**Number of Members**
Life Trustees	$100,000 and up	19
Grand Trustees	$50,000 - $99,999	12
Trustees	$25,000 - $49,999	26
Patrons	$10,000 - $24,999	89
Benefactors	$5,000 - $9,999	128
Sponsors	$2,500 - $4,999	161
Members	$1,000 - $2,499	538

A list of the members in each category who allowed their names to be disclosed is included in the annual reports attached to this declaration as Exhibit A.

19. Although NARAL publishes the names of many of its donors in its annual report, NARAL is not required to do so under any federal law. In fact, many of NARAL's donors choose to remain anonymous. NARAL respects the rights of its donors to remain anonymous and does not publicly reveal the names of these donors unless the donor allows NARAL to do so. NARAL believes that the identities of donors who wish to remain anonymous are confidential. Moreover, NARAL believes that the names of its donors are constitutionally and legally protected from public disclosure.

20. Federal officeholders and candidates occasionally participate in NARAL's fundraising efforts. This participation includes signing direct mail materials, attending fundraising events, endorsing other NARAL activities and writing or signing a newsletter or [*7] annual report feature story. Attached as Exhibit D are examples of fundraising letters signed by federal officeholders or candidates on behalf of NARAL.

21. The following chart represents the amount spent by NARAL and NARAL-PAC on various functions during 1999, 2000, and 2001.

	1999	**2000**	**2001**
Political	1,149,843	1,013,468	7,336,828
Communications	346,638	630,911	825,835
Legal and Policy Research	155,682	210,659	218,249
Government Relations	298,597	344,296	450,235
Political Action Committee	827,546	283,858	1,289,268
Public and Member Education	954,294	1,368,917	1,402,192
Management and General	565,381	682,413	749,130
Fundraising	1,521,491	1,853,679	2,951,622
Total	**$5,819,472**	**$6,388,201**	**$15,223,359**

22. All of NARAL's operational expenses (rent, salaries, etc.) are paid for using donations to or investments or other income of NARAL.

NARAL's Involvement in Elections

23. For more than 30 years in every major election, NARAL has educated, organized and mobilized pro-choice voters across the country to elect pro-choice candidates. NARAL's objectives include helping to secure a pro-choice majority in the U.S. House of Representatives and Senate. To date, NARAL has been effective in advancing this objective. In fact, during the 2000 elections, NARAL was active in 110 races across the nation, winning 83 of them. Attached as Exhibit E is a copy of NARAL, Choice, and Women: Driving Forces in the 2000 Elections, a NARAL publication summarizing NARAL's impact on the 2000 elections.

[*8] 24. As indicated in NARAL's 2000-2001 Annual Report, NARAL's influence during the 2000 elections was "historic and, in many cases, decisive." In addition to defining choice as a central issue in the election, NARAL spent approximately $7.5 million and mobilized 2.1 million pro-choice voters during the 2000 elections. NARAL "made

3.4 million phone calls to pro-choice voters, mailed 4.6 million pieces of election mail to pro-choice households, educated voters and the media online, and organized thousands of volunteers to conduct phone banks, distribute literature, walk door-to-door and perform Election Day activities." Attached as Exhibit F are examples of the direct mailings and get-out-the-vote material used during the 2000 elections, and press releases discussing NARAL's efforts.

25. NARAL's voter turnout campaign was one of the largest in the country among organizations of its kind. As indicated in NARAL's 2000-2001 Annual Report, with "several important outcomes that could be traced directly to NARAL's involvement," "NARAL was one of the nation's most influential organizations in the 2000 elections."

26. NARAL started its Choice 2000 Campaign nearly two years before Election Day when, as stated in NARAL, Choice, and Women: Driving Forces in the 2000 Elections, NARAL set the following goals: "electing a pro-choice president and pro-choice Members of Congress, and elevating the right to legal abortion and reproductive rights as defining issues in the 2000 election."

27. Recognizing the presidential primary season as a critical time to educate voters on the candidates' views, NARAL's campaign began with the Iowa primary in mid-June 1999. As stated in NARAL, Choice, and Women: Driving Forces in the 2000 Elections, "NARAL developed and implemented an extensive Iowa media strategy, including press **[*9]** briefings and editorial board meetings, broadcast television and radio ads, and roadside billboards . . .."

28. In late-June 1999, NARAL launched several Internet banner ads criticizing George W. Bush's record on abortion issues. These ads ran for a full month on the websites of California's major newspaper outlets. NARAL also held activist visibility events outside all seven of George W. Bush's Los Angeles events. These visibility events generated press coverage throughout California.

29. NARAL's activities increased toward the end of the 2000 presidential campaign. In October 2000, after carefully scrutinizing the poll numbers and gathering intelligence on the ground, NARAL concluded that Ralph Nader had gained sufficient support in seven states to allow George W. Bush to win those states. As indicated in the 2000-2001 NARAL Annual Report and NARAL, Choice, and Women: Driving Forces in the 2000 Elections, "[w]ithin 24 hours, NARAL launched a full-scale operation," including television advertisements costing approximately $1.5 million, rallies, and press conferences, all of which were intended to inform voters in those states about the dangers caused by Ralph Nader's candidacy. Ralph Nader's support plummeted, and Al Gore won all seven of the targeted states. Attached as Exhibit G are NARAL press releases relating to this effort.

30. NARAL engaged in independent expenditures during the 2000 election cycle. Although NARAL made independent expenditures on behalf of numerous candidates throughout the country, a significant portion of its independent expenditures were made for the purpose of supporting Al Gore's presidential candidacy. In fact, as indicated on NARAL's FEC reports from October 1, 2000 through November 7, 2000, NARAL spent approximately $3.8 **[*10]** million on independent expenditures supporting Al Gore. The bulk of this money was spent on media, direct mailings and phone banks expressly advocating the election of Al Gore.

31. NARAL made no independent expenditures in 1999. NARAL spent a total of approximately $6,103,475 in 2000 and approximately $200,554 in 2001 on independent expenditures.

32. NARAL has engaged in similar efforts in the past and intends to continue to do so in the future to the extent allowed by applicable law.

33. An example of one of NARAL-PAC's recent activities is the Pennsylvania Democratic gubernatorial primary in 2002 between Ed Rendell and Bob Casey.

34. As indicated on NARAL's website, "[t]he [2002] Pennsylvania Democratic gubernatorial primary provided NARAL-PAC with a unique opportunity to highlight the saliency of the choice issue and its ability to move voters while flexing its political muscle at the beginning of the 2002 mid-term elections."

35. Along with Pennsylvania's Campaign for Choice, the political arm of NARAL's Pennsylvania affiliate, NARAL-PAC engaged in "an extensive effort to raise awareness about the choice issue" and the importance of nominating Ed Rendell as the Democratic gubernatorial candidate. Attached as Exhibit H is NARAL-PAC's statement endorsing Ed Rendell.

36. NARAL-PAC also conducted an aggressive get-out-the-vote effort in the final weeks of the campaign. In fact, as indicated on NARAL's website, "over 20 staff from [*11] NARAL affiliates across the country [flew] in to join Pennsylvania staff and supporters, creating a virtual [get-out-the-vote] army." This "army" targeted neighborhoods throughout the Philadelphia area, where it distributed literature and get-out-the-vote material to residents and persuaded them to vote for Ed Rendell.

37. NARAL-PAC's get-out-the-vote initiative was extensive: over 75 in-state and out-of-state staff volunteers; 35,000 pieces of literature distributed in Philadelphia neighborhoods; 12,000 volunteer get-out-the-vote phone calls placed to NARAL members and donors; more than 50,000 get-out-the-vote phone calls to Democratic voters; 82,000 pieces of get-out-the-vote mail sent to Pennsylvanians; and get-out-the-vote television advertisements aired during the final seven days on cable channels in the Pittsburgh and Philadelphia markets. Attached as Exhibit I are examples of get-out-the-vote materials distributed, copies of the scripts of advertisements, and NARAL press releases describing the effort.

38. By educating, persuading, and mobilizing over 82,000 voters – nearly 6% of the primary voter turnout and 16% of Ed Rendell's total votes – NARAL-PAC proved to be a force in the campaign. NARAL-PAC spent more than $180,000 on in-kind contributions to Rendell's primary campaign. Considering that polls prior to NARAL-PAC's get-out-the-vote efforts showed Bob Casey with a lead among women voters, as indicated on NARAL's website, NARAL-PAC's efforts helped show that "communicating the threat to a woman's right to choose moves voters and has a significant impact in close races."

39. NARAL-PAC has engaged in similar efforts in the past and intends to continue to do so in the future to the extent allowed by applicable law.

[*12] 40. NARAL frequently endorses candidates in federal and state elections throughout the country. NARAL frequently issues press releases announcing its endorsements, sends direct mail advocating the election of its endorsed candidates, engages in grassroots activities designed to benefit its endorsed candidates, and runs television, radio, and print advertisements expressly advocating the election of its endorsed candidates. Attached as Exhibit J are examples of NARAL's statements endorsing candidates, press releases announcing the endorsements, and scripts from advertisements supporting these efforts.

Contributions to Candidates and Committees

41. NARAL-PAC frequently makes contributions to federal candidates and expenditures designed to influence federal elections.

42. The total contributions from NARAL-PAC to federal candidates during recent years, as indicated on forms filed with the FEC, are as follows: approximately $89,260 during 1999; approximately $419,208 during 2000; and approximately $275,922 through August 31, 2002. The vast majority of contributions during each election cycle have been to Democratic candidates.

43. NARAL-PAC's total receipts during recent years, as indicated on forms filed with the FEC, are as follows: approximately $1,408,126 during 2000; and approximately $730,553 through August 31, 2002. NARAL-PAC may only solicit contributions from NARAL members.

44. The total amount spent by NARAL-PAC during recent years, as indicated on forms filed with the FEC, are as follows: approximately $1,363,581 during 2000; and approximately $578,195 through August 31, 2002.

[*13] 45. NARAL-PAC does not generally make contributions to the federal accounts of political party committees. NARAL-PAC made no such contributions during 2000 and approximately $15,000.00 during 2001.

NARAL's Communications With Its Members and the General Public

46. NARAL communicates with its members on a regular basis through direct mailings, telephone calls, and occasional other events. Examples of NARAL's communications with its members are attached as Exhibit B.

47. NARAL also communicates with the general public through a variety of methods, including through NARAL's website, earned media, and the use of issue advertisements.

48. Although certain advertisements refer to clearly identified candidates, these advertisements do not expressly advocate their election or defeat. NARAL's issue advertisements focus on issues of importance to NARAL's members. NARAL engages in issue advocacy principally through direct mail and telephone calls, as well as on television and radio, and in public print media.

[*14] NARAL's Legislative Activities

49. NARAL's Government Relations Department employs 2 full-time professional lobbyists. In addition, several other NARAL employees also spend some amount of their time lobbying. Attached as Exhibit K are copies of NARAL's recent Lobbying Disclosure Act forms.

50. NARAL's lobbyists regularly telephone, write, and meet with members of Congress (and their staff) on issues of importance to NARAL's members. NARAL by and large lobbies pro- and "mixed-choice" members of the House and Senate and also contacts members of the Executive Branch. NARAL also occasionally engages in lobbying at the state level.

51. NARAL coordinates its lobbying activities with other organizations that share NARAL's interests. For example, NARAL has on occasion coordinated its efforts with Planned Parenthood to lobby on issues relating to reproductive rights.

52. NARAL spent less than $160,000 in each of years 2000 and 2001 on direct lobbying-related activities.

53. NARAL also encourages its members and supporters to contact and meet with federal, state and local officeholders to discuss issues of importance to them. For example, as part of NARAL's effort to defeat the nomination of John Ashcroft for Attorney General, NARAL encouraged its members and supporters to contact their Senators in opposition to his nomination. NARAL placed a link on its website through which more than 40,000 people were able to contact their Senator's office. NARAL's efforts generated more than 320,000 contacts to **[*15]** Senators' offices. Attached as Exhibit L is a NARAL press release relating to NARAL's efforts to defeat John Ashcroft's nomination.

54. NARAL's legislative efforts also include the publication of Congressional Record on Choice, an annual "report card" on every member of the House and Senate. This publication rates each Senator and Representative based on the votes he or she makes that are consistent with NARAL's position on certain key issues. Attached as Exhibit M is a copy of NARAL's 2000 Congressional Record on Choice.

NARAL's Other Advocacy Activity

55. NARAL also engages in other advocacy activity. This includes, among other activities, supporting and opposing ballot initiatives and referenda, polling, and transferring funds to other organizations.

56. NARAL occasionally becomes involved in efforts to support or oppose state ballot initiatives. For example, in 2000, NARAL worked to defeat a Maine ballot initiative that would have prohibited a variety of abortion procedures used throughout pregnancy. NARAL efforts included staffing 885 hours of get-out-the-vote phoning, contacting 18,000 pro-choice voters twice each, and conducting visibility events on Election Day. See NARAL's 1999-2000 Annual Report, attached as Exhibit A.

57. In 2000, NARAL was also involved in a ballot initiative in Colorado. NARAL opposed Colorado Amendment 25, which would have imposed additional requirements on women who seek to obtain an abortion. NARAL provided direct financial support to the Protect Families Protect Choice Campaign, an organization which conducted the in-state **[*16]** campaign to defeat the initiative, and included a "vote no on 25" message in more than 215,000 pieces of mail sent to nearly 43,000 pro-choice identified Colorado voters.

58. From time-to-time, NARAL conducts public opinion polling on issues of importance to NARAL's members. On occasion, NARAL releases the results of these polls to the public.

59. Occasionally, NARAL donates funds to other organizations. For example, NARAL has donated to the NAACP.

60. NARAL has approved personal or vacation leave, as well as leave without pay, for employees providing assistance and advice to candidates during the last few weeks of their campaigns.

61. While NARAL cannot predict how the BCRA will affect donor behavior, NARAL believes that some donors who previously made contributions to the political parties but are limited in doing so by the BCRA may consider, and may actually make, donations to non-party organizations, such as NARAL. Kate Michelman, the president of NARAL, was quoted in the Washington Post on June 23, 2002 as saying that soft money donors seeking to "elect people who embody their values will be looking to groups like NARAL, which do serious political work and are seasoned operatives, to invest in. If they [donors] can't give to the parties … they are going to find other means."

62. NARAL does not believe that any of its activities corrupt or appear to corrupt any federal candidate or federal officeholder.

63. I declare under penalty of perjury that the foregoing is true and correct. Executed on September 27, 2002.

s/
Mary Jane Gallagher

[EXHIBITS OMITTED]

DECLARATION OF GERALD GREENWALD

[DEV 6, Tab 16]

1. My name is Gerald Greenwald.

2. I currently serve as Chairman Emeritus of United Airlines, the largest employee-majority-owned company in the United States. From 1994 through my retirement in 2000, I served as the Chairman and CEO of United. Prior to that, I was vice-chairman at Chrysler Corporation and worked at Ford Motor Company.

3. I also serve on the Board of Trustees of the Committee for Economic Development (CED), a nonpartisan organization of business and education leaders dedicated to policy research on major economic and social issues. CED is a trustee-directed organization; trustees alone set CED's research agenda, develop policy recommendations, and speak out for their adoption. A list of the Trustees is attached.[2]

4. CED has been an outspoken voice for the need for campaign finance reform and lobbied vigorously for passage of the Bipartisan Campaign Reform Act (BCRA). In April 2000, CED President Charles Kolb testified before the U.S. Senate Committee on Rules & Administration on the issue. CED representatives were regularly featured in editorials, articles and news reports about campaign finance reform. Many Members of Congress, including reform leaders Senators John McCain and Russell Feingold, used CED's work as evidence of the need to pass meaningful campaign finance reform legislation.

5. As noted, CED's Trustees are chairmen, presidents, and senior executives of major American corporations and university presidents. These business leaders have direct experience with campaign fundraising over the last fifteen years. They and their companies have been solicited by elected officials and party leaders for ever-increasing amounts of soft money corporate contributions to political parties (as well as for hard money contributions from corporate employees and the corporation's PAC if it has

one). These business leaders have accordingly had occasion to consider the pros and cons of contributing or declining to contribute. Based on this experience, CED's Trustees individually and as a group have developed a particularized understanding of how the soft money fundraising system works and how it impacts the integrity of our elected officials, the integrity of American business, and more generally the health of our democracy.

6. My clear conclusion, which I know is shared by CED Trustees generally, is that soft money fundraising by elected officials and party-officials and large soft [3] money contributions by corporations corrupt the solicitors and the givers alike, and certainly create an appearance among the electorate generally that American business buys influence and legislation.

7. When I talk with leaders of large labor unions, I have found that they share the concerns of the CED Trustees about the corrosive effect of large soft money contributions on the system.

8. The fact is that the people who raise large soft money contributions from business corporations and labor unions are often sitting Members of Congress who will have to consider matters that will affect the financial health or operations of the organizations being solicited. Often the Members who solicit large corporate contributions sit on committees that directly affect the corporation's business. Similarly, these Members' actions affect issues of interest to labor unions. Congress as a body and through these Congressional committees regularly considers matters that importantly affect both business and labor in regulated and unregulated industries—from tax legislation to trade legislation to industry deregulation to environmental legislation, to list just a few examples.

9. When sitting Members solicit large corporate and union contributions, the leaders of these organizations feel intense pressure to contribute, because experience has taught

that the consequences of failing to contribute (or failing to contribute enough) may be very negative. Business and labor leaders believe, based on their experience, that disappointed Members, and their party colleagues, may shun or disfavor them because they have not contributed. Equally, these leaders fear that if they refuse to contribute (enough), competing interests who do contribute [4] generously will have an advantage in gaining access to and influencing key Congressional leaders on matters of importance to the company or union.

10. The other side of the coin is that labor and business leaders are regularly advised that—and their experience directly confirms that—organizations that make large soft money donations to political parties in fact do get preferred access to government officials. That access runs the gamut from attendance at events where they have opportunities to present points of view informally to lawmakers to direct, private meetings in an official's office to discuss pending legislation or a government regulation that affects the company or union.

11. If an organization is solicited by a party official rather than an elected official, the effect is the same. Companies and unions know that party officials inform elected officials about who has given significant amounts; and party officials often promise access to elected officials to those who agree to contribute large amounts of corporate or union money.

12. In sum, most unions and corporations give large soft money contributions to political parties—sometimes to both political parties—because they are afraid to unilaterally disarm. They do not want their competitors alone to enjoy the benefits that come with large soft money donations: namely, access and influence in Washington. Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the opportunity to

argue for their corporation's or union's position on a particular statute, regulation, or other governmental action. Labor and [5] business leaders believe—based on experience and with good reason—that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties.

13. In these ways, the soft money loophole over the past two decades has created a deeply cynical environment of real and perceived corruption that traps American government, business, and labor unions.

14. This debilitating and demoralizing environment damages government and business alike. It goes without saying that maintaining governmental integrity is critically important to our democracy and our citizens' faith in their government. It is also important for American to have faith in the integrity of their business institutions and labor unions as well. The recent spate of deplorable corporate scandals has broadly demoralized America and this is having widespread and adverse political and economic consequences. It is not good for America when American citizens believe their business leaders are corrupt, and one element of that regrettably widespread perception is the appearance that business buys government decisions by making large political contributions.

15. Public policy decisions should be made and should appear to all to be made on the basis of the public interest—not on which corporation or labor union can give the most money to the political party in power. Even the appearance of this type of corruption weakens public confidence in governmental as well as business and labor institutions. [6]

16. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 02-582 (CKK, KLH, RJL)
Consolidated Actions

SENATOR MITCH McCONNELL, et at.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants.

DIRECT TRIAL TESTIMONY OF PAUL R. HUARD

1. My name is Paul R. Huard. I am Senior Vice President for Finance and Administration of the National Association of Manufacturers, often referred to as NAM. From 1993 to 1999, I was NAM's Senior Vice President for Public Policy and Communications – an elegant term for chief lobbyist. For about 13 years before that, I was NAM's senior tax lobbyist.

2. NAM is the oldest and largest broad-based industrial trade association in the United States. Its membership comprises 14,000 companies and 350 member associations, meaning that NAM represents about 18 million individuals. Like many trade associations, NAM is incorporated. It is exempt from taxation under Section 501(c)(6) of the Internal Revenue Code.

3. To advance the interests of its members, NAM must regularly consult with Members of Congress, officers of the

Executive Branch, and others, including political party officials and current or likely candidates for election to Federal office. At the same time, NAM must consult and work with a wide variety of other politically active organizations. The groups we work with may range from other business associations to national labor organizations to citizen groups organized around specific policy views or objectives, depending on the issue.

4. On occasion NAM has run broadcast issue ads by itself and in its own name. For example, on two occasions in the late 1990's we ran ads advocating support of the President's tax proposals. In at least some of those ads we referred to the proposal as being that of the President and that was an important element of our message.

5. More commonly, however, NAM supports coalitions or similar groups that have formed around an issue or group of issues and that create and broadcast advertisements as part of their legislative or policy strategy. We may well support such groups with our own funds, and we

also may contact our members to urge them to support group efforts. To give one example among many, in 1996 NAM participated in a group of business associations known as The Coalition that was formed to broadcast ads to respond to the AFL-CIO's planned $35 million dollar issue ad campaign. We urged our members to provide support, and they contributed about $2 million to The Coalition.

6. Our partners in legislative efforts can vary widely depending on the issue. For example, our coalitions have worked with unions on issue ads on job-related issues such as drilling for oil in the Arctic National Wildlife Refuge or various EPA regulations that restrict coal mining. Similarly,

through the Alliance for Worker Retirement Security, we have worked with various associations of senior Americans.

7. NAM does not support issue ads as an end in itself. They are used to support some legislative or policy agenda. The effort to pass or defeat legislation also necessarily involves working closely with Members of Congress and their staffs, as well as with political parties and others who take positions on legislation and political policy. To give one example from among many, during 1996 NAM participated in the Thursday Group which was organized by Congressman Boehner to advance the legislative components of The Contract With America. That group brought together various associations who supported that legislative agenda and provided a forum for information exchange and planning. Congressman Boehner also brought in key members to discuss their areas of responsibility and interest.

8. Members of Congress are, in our democracy, elected to office. In selecting legislative and policy initiatives to support or oppose, they naturally must be concerned with the likely views of their constituents.

9. Thus, an important element of a legislative or policy agenda may be developing or demonstrating public support for or opposition to ideas or proposals. In some cases it may be necessary to pursue a nationwide shift in public attitude. In other cases, what is needed is education targeted to a few key districts or states. In some cases, the need is not to create a public position but to convince Members of Congress that such a position already exists. NAM has supported issue ads with all of these purposes.

10. NAM has run issue ads at times when no election was impending. In broad terms, however, Americans tend to have greater interest in political matters as an election approaches. At the same time, elected officials are most attuned to the views of their constituents in the pre-election period. Thus, for many purposes, the pre-election season is a critical time for issue ads. Conversely, after an election

public interest in public policy matters fades, perhaps due to fatigue. Then, few issue ads are run soon after an election.

11. The timing of other issue ads is driven by external events. For example, issue ads supporting a particular tax bill may well be needed as the bill approaches a vote. If it happens that primaries or elections are imminent, that does not diminish the need to be able to speak out right then.

12. There are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by

DECLARATION OF THOMAS JOSEFIAK

I, Thomas Josefiak, hereby swear and depose as follows, based on my own personal knowledge:

1. I am currently the Chief Counsel of the Republican National Committee ("RNC").

2. The various RNC exhibits attached to this declaration are to the best of my knowledge true and correct copies of records prepared and kept by the RNC in the course of its regularly conducted business activities.

[*2]

Background

3. I attended college at Fairfield University and graduated in 1969. I then attended Georgetown University Law School and received a law degree in 1974. I am currently admitted to practice law in Texas.

4. My legal career has been focused heavily on the practice of federal and state election law, and I have developed substantial expertise in election law issues.

5. I first joined the Republican National Committee Counsel's Office in February 1992. As Chief Counsel, I am primarily responsible for the day-to-day legal operations of the RNC, including ensuring that all activities of the RNC, its officers, and its employees comply with applicable federal and state election laws.

6. In 1985, President Ronald Reagan appointed me to a six-year term as Commissioner on the Federal Election Commission ("FEC"). I served as the Chairman of the FEC in 1988, during the 1988 presidential election, and as Vice Chairman and Chairman of the Finance Committee in 1987.

7. From 1981 to 1985, prior to serving as an FEC Commissioner, I was Special Deputy to the Secretary of the United States Senate, in which position I represented the Secretary as a full-time, Ex-Officio Commissioner of the FEC.

8. From 1977 to 1980, I served as Counsel to the National Republican Congressional Committee, and served on the staff of Rep. Silvio Conte.

9. During the period from 1977 to 1979, I served at various times as Special Counsel to the Minority of the Committee on House Administration, where I assisted Republican members in proposing and amending election law legislation. During my tenure as a committee staff member, Congress passed the 1979 amendments to the Federal Election Campaign Act.

[*3] 10. The information contained in this declaration is based on the personal, non-privileged observations I have made while serving in the various positions I have described above; my review of the RNC's FEC reports, the documents which the RNC produced in connection with this litigation, and the RNC's designated exhibits; and the interviews I personally conducted with Jay Banning, Janice Knopp, Beverly Shea, Ann McCord, and others during my preparation to be the RNC's designated witness under Rule 30(b)(6). By submitting this declaration, I do not waive and do not intend to waive any attorney-client, work product, or any other privileges that may otherwise be available to my current or former employers, including the FEC and RNC.

Structure of the Republican Party

11. The Republican Party comprises several interacting, independent entities that work together on a daily basis to promote Republican ideals at the local, state, and federal levels, help elect candidates who espouse these ideals at all levels, and govern after elections according to these ideals.

12. Established in the early 1850's, the Republican Party has grown to become one of the two major political parties in the United States. Throughout its history, tens of millions of Americans who believe in the Republican Party's ideals, and support the Republican Party's candidates at all levels of government, have affiliated themselves with the Republican Party.

13. One of the most visible parts of the Republican Party is the RNC. The RNC is an unincorporated political association created and governed by The Rules of the Republican Party ("Rules"), as adopted on July 31, 2000 by the Republican National Convention in Philadelphia, Pennsylvania. See RNC Exhibit 1, attached as Attachment A hereto. The RNC [*4] will be governed by these rules until the 2004 Republican National Convention. The Rules are reviewed, revised, and adopted at each quadrennial convention.

14. The RNC has held a national convention every 4 years since 1856. The purpose of these conventions is to adopt party rules; discuss, debate and adopt a platform of policy issues; nominate presidential and vice presidential candidates; rally Republican supporters; and promote the Republican message. A copy of the Republican Platform, as adopted on August 31, 2000 by the delegates to the 2000 Republican National Convention is RNC Exhibit 862, attached as Attachment B hereto.

15. The RNC is a federation of state and territorial Republican parties and currently has 165 members. As indicated in the Rules, the RNC's membership consists of one national committeeman and one national committeewoman from each of the 50 states, the District of Columbia, Puerto

Rico, the U.S. Virgin Islands, Guam, and American Samoa. The state and territorial Party chairmen also serve as members of the RNC.

16. The RNC's officers, consisting of a chairman and co-chairman, eight vice chairmen, and a secretary, treasurer, and other officers that the RNC may deem necessary, are elected by the 165 members of the RNC. Accordingly, each state has an equal say in choosing the leadership of the RNC.

17. The Chief Counsel position, in which I currently serve, is appointed by the chairman of the RNC.

18. Although the numbers vary at different points in the election cycle, the RNC currently employs 378 individuals. In addition, the RNC relies on thousands of dedicated volunteers for assistance with important party building activities across the country and relies on the generous contributions of millions of Americans each year. The average amount of these [*5] contributions is relatively small. Between 1993 and 2002, the average donation to the RNC was approximately $57.00.

19. The RNC's national focus should not be misunderstood as a federal focus. Rather, given the RNC's state-based structure, it is not surprising that the RNC actually focuses many of its resources on purely state and local election activity. This frequently involves devoting significant resources to grassroots activities, some of which exclusively benefit state and local candidates.

20. Although the national structure of the Republican Party starts with the RNC, each state has its own Republican State Committee with a Chairman and staff. The RNC works hand-in-hand with these state committees, each of which is a private political association operating under its own bylaws and direction. Although primarily focused on the promotion of Republican issues at the state and local levels and the election of state and local Republican candidates, these state committees also work closely with the RNC, the National Republican Senatorial Committee, and the National Republican Congressional Committee to help elect candidates for federal office.

21. In addition to the RNC and state parties, the Republican Party also includes numerous local party committees. For example, the Dallas County (Iowa) Republican County Central Committee, a co-plaintiff in this litigation, is independent of the RNC and Iowa Republican Party. This committee, which is actively involved in supporting candidates for office in Iowa and promoting its issue agenda, is not treated as a "political committee" under the FECA because it does not raise or spend $1,000 per cycle on activities influencing federal elections. See 11 C.F.R. 100.5.

[*6] Goals of the Republican Party

22. The Republican Party has a long and rich history advocating some core principles: a smaller federal government, lower taxes, individual freedom, and a strong national defense. The RNC achieves these principles through three primary means: (1) promoting an issue agenda advocating Republican positions on issues of local, state, regional, national and international importance; (2) electing candidates who espouse these views to local, state and national offices; and (3) governing in accord with these views. Although these efforts sometimes overlap, they also frequently occur independently of one another. Accordingly, as discussed in greater detail below, the RNC often seeks to promote Republican positions on important issues, even in contexts outside of elections.

23. In accomplishing its objectives, the RNC pays for its activities in a manner consistent with the FEC's allocation regulations. Since the FEC has long recognized that the RNC is heavily involved in activities at the federal and state levels, the RNC has historically paid for its overhead using an allocation, or "split," between federal and nonfederal funds: activities that are purely federal are paid for with 100% federal funds; activities that are purely state or local are paid for with 100% nonfederal funds; and activities that relate to both federal and state elections are paid for with a combination of federal and nonfederal funds. The split between federal and nonfederal funds varies depending on whether it is a presidential election year. During non-presidential election years, the RNC is required to pay for these expenses with no less than 60% federal funds. This percentage increases to 65% during presidential election years. Accordingly, even though the vast majority of the candidates on the ballot in any given year are for state and local offices, the RNC must pay at least 60% of its expenses using federal funds, according to the FEC regulations currently in effect.

[*7]Coordination Between the RNC and State Parties on Electoral Issues

24. Throughout its history, the RNC has worked closely with state and local parties on electoral activity. This coordination occurs regardless of whether any federal candidates appear on the ballot.

RNC's Victory Program

25. Nothing better exemplifies the close working relationship between the various components of the Republican Party than the Victory Plans and Programs that are crafted and implemented every year on a collaborative basis.

26. During the past several election cycles, the RNC, in close collaboration with the state parties, has engaged in an effort known as the "Victory Program," a state-by-state full-ticket effort involving voter registration, voter identification, get-out-the-vote, generic advertising, and other grassroots activities undertaken by state parties with the active assistance and involvement of the RNC. By providing its expertise, guidance, partial funding, and fundraising ability, the RNC, in collaboration with the various state Republican parties, has successfully used this program to stimulate grassroots activism and increase voter turnout throughout the country. These Victory Programs contain local, state, and federal components and are designed to benefit candidates at all three levels.

27. The state Republican parties' Victory Programs during the 2000 election cycle were generally called "Victory 2000." Working hand-in-hand, the RNC and state parties used Victory 2000 as a highly effective tool for promoting grassroots activity and increasing voter turnout.

28. Victory 2000 was the result of extensive and continuous collaboration between the RNC and the state parties. Recognizing that each state has unique needs and that a **[*8]** Victory Program that works well in one state may not work well in another, the RNC assisted the state parties in developing and implementing programs tailored to the particular needs of each state.

29. This collaborative effort began when the RNC asked the various state parties to develop a Victory Plan consisting of a combination of the grassroots and get-out-the-vote activities that each believed would be the most effective for their particular state. Over the course of several months, each state party then developed a Victory Plan for addressing voter registration, voter identification, absent ballot initiatives, direct mail programs, and other grassroots activities. The

RNC's field personnel were often consulted by the state parties at this stage of the planning process.

30. Next, the RNC conducted regional meetings where representatives from the RNC met individually with each state party to review and discuss their Victory Plans. During these meetings, the RNC listened to the needs of the state parties, provided advice where appropriate, and helped revise each of the states' proposals. For example, a memorandum from the RNC to the political director of the North Carolina Republican Party providing feedback and suggestions on North Carolina's Victory 2000 Plan is RNC Exhibit 918, attached as Attachment C hereto. By working closely together, the end result was a Victory Program for each state that was designed to benefit candidates at all levels of the ticket.

31. The funding for Victory 2000 was shared between the RNC and the state parties. After developing an appropriate Victory Plan, the RNC and state parties worked together to develop a budget and set fundraising goals. These fundraising goals varied significantly depending on the state. For example, in a limited number of states, particularly those that raise large amounts of nonfederal money, the state party was able to pay for a **[*9]** significant portion of the program. In contrast, other states that do not raise as much nonfederal funds could not commit to raising the funds needed to pay for the program. Because the RNC believed these programs were important, it committed to sharing the funding with the state parties. In total, the RNC transferred approximately $42 million strictly for grassroots and get-out-the-vote activities to supplement the state parties' fundraising. This $42 million does not include broadcast issue advertising. Because of the FEC's state allocation formulas, approximately 60% of this total was nonfederal money.

32. In the end, by working closely together, sharing their expertise, and sharing the costs, the RNC and state parties were able to design, fund, and implement Victory Programs containing extensive grassroots and get-out-the-vote initiatives that were unique to the needs of each state and designed to benefit candidates at all levels of the ticket.

33. Although generally similar in scope, the Victory Plan for each state varied depending on the needs and characteristics of the state. Three examples of these plans are those implemented in California, Missouri, and New Mexico.

34. The California Victory 2000 Plan was "designed to assist all Republican candidates on the November 7, 2000 ballot." A copy of this plan is RNC Exhibit 762, attached as Attachment D hereto. This plan was developed, funded and implemented through close collaboration between the RNC and the California Republican Party. The Plan states that it was "designed to utilize the core pillars of modern direct voter contact: voter registration, absentee ballots, get-out-the-vote, non-allocable mail and voter file development and access." Each of these programs, as well as several others that were part of the California Victory 2000 Plan, are described in detail in Attachment D.

[*10] 35. The total expected operating budget for the California Victory 2000 Plan was $23,735,100. The RNC contributed approximately $8.3 million of this total for certain of the state party's activities as allowed by law. Of this amount, approximately $2.5 million was federal money and approximately $5.8 million was nonfederal money. The allocation between federal and nonfederal money was determined based on the percentage of federal candidates on the ballot, among other factors.

36. The Missouri Victory 2000 Campaign Plan was designed to accomplish three fundamental objectives: (1) "To

maximize GOP turnout in base Republican areas that will produce winning margins sufficient to produce state-wide Republican victories for president, governor and U.S. Senate"; (2) "To identify, persuade and turn out voters in key 'swing' precincts where voters choose candidates regardless of partisan labels"; and (3) "To fully integrate, for the first time ever, all aspects of successful grassroots activity by capturing the output of volunteer efforts in [the Missouri Republican Party's] database along with the output of paid services." A copy of the Missouri Victory Plan is RNC Exhibit 770, attached as Attachment E hereto. As indicated in the Missouri Victory 2000 Campaign Plan, the Missouri Republican Party, working together with the RNC, sought to accomplish these objectives through a combination of voter identification and voter registration activities, absentee ballot initiatives, direct mail (including slate mail and issue advocacy mail), get-out-the-vote activities, collateral materials (including bumper stickers, label stickers, and yard signs), and direct and in-kind support for the candidates.

37. The RNC contributed approximately $5.7 million to the Missouri Victory 2000 Program for certain of those programs as allowed by law. Of this amount, approximately $1.5 million was federal money and approximately $4.2 million was nonfederal money.

[*11] 38. The New Mexico Victory 2000 Plan was also the product of significant collaboration between the RNC and the New Mexico Republican Party. A draft of this plan is RNC Exhibit 2306, attached as Attachment F hereto. This plan consisted of voter registration and voter identification activities, an absentee ballot initiative, and get-out-the-vote mailings and telephone calls.

39. The RNC contributed approximately $1.5 million to the New Mexico Victory 2000 Program for certain of the state's programs as allowed by law. Of the total amount, approximately $500,000 was federal money and approximately $1.0 million was nonfederal money.

40. As discussed above, the activities included in the Victory Programs have historically been paid for using a combination of federal and nonfederal funds, with the percentage of each type of funds based on the ballot composition in each state and other factors. Under the BCRA, however, state parties will be forced to pay for these activities in federal election years with federal money or a combination of federal and "Levin money," all of which must be raised by the state party. If the RNC participates in the program by raising, transferring, spending or directing money, the entire program must be paid for with 100% federal money; and no Levin money. Thus, there is a strong disincentive for state parties to work with national parties on these important activities.

Electoral Activity When No Federal Candidates Appear on the Ballot

41. The close working relationship between the RNC and state and local parties with regard to state and local electoral activity is most apparent during odd-numbered years when several states and major cities hold elections with only state and local candidates on the ballot. These states include Kentucky, Louisiana, Mississippi, New Jersey, and Virginia. **[*12]** Among the major cities that hold mayoral elections during odd-numbered years are Los Angeles, New York City, Minneapolis, Indianapolis, and Houston. Absent a special election for a vacant federal office, no federal candidates appear on the ballots in these cities and states during the odd-numbered years. Yet, the RNC frequently devotes significant resources to these elections.

42. Using nonfederal funds raised consistent with applicable state law, the RNC, through the Republican

National State Elections Committee ("RNSEC"), frequently makes direct donations to state and local candidates, pays for the nonfederal share of the party committee's administrative and overhead costs, and pays for the nonfederal share of party building activities such as voter registration and get-out-the-vote efforts. Due to variations among the various states' election laws, RNSEC currently maintains 12 separate accounts for state and local election activity to assure compliance with each state's laws. These accounts are described in the Declaration of Jay Banning.

43. By providing money for rent, electricity, and other operating and administrative costs, the RNSEC's assistance is essential in literally keeping several of the state parties operating. In fact, without this assistance, I believe that some state parties would not be able to function at more than a nominal level.

44. The RNC also provides significant fundraising assistance to state and local candidates, as well as to the state and local parties. These efforts frequently include fundraising letters sent by RNC officers on behalf of state and local candidates. For example, in October 2001, Jack Oliver, the Deputy Chairman of the RNC, sent a fundraising letter on behalf of Brett Schundler's campaign for Governor of New Jersey. See RNC Exhibit 292, attached as Attachment G hereto. The RNC's officers also send fundraising letters on behalf of state and local parties. For example, in August 1993, Haley Barbour, then the chairman of the RNC, sent **[*13]** a fundraising letter on behalf of the New Jersey Republican Party. See RNC Exhibit 1766, attached as Attachment H hereto. Chairman Barbour sent a similar letter on behalf of George Allen's candidacy for Governor of Virginia in 1993. See RNC Exhibit 1762, attached as Attachment I hereto. The RNC generally does not receive or handle the money received in response to these solicitations; nor is the RNC necessarily informed about who contributes. It

is inconceivable to me that anyone could believe these direct mail fundraising solicitations for state and local candidates corrupt, or appear to corrupt, any federal (or state or local) officeholder. Yet, such solicitations will be a crime under the BCRA.

45. As permitted under state law, the RNC also assists state and local candidates through direct contributions. For example, during the Virginia 2001 elections, pursuant to Virginia state law, the RNC made approximately $4.0 million in contributions through RNSEC to state and local candidates. This total included, among others, direct contributions to the Early for Governor Campaign, the Katzen for Lieutenant Governor Campaign, and the Kilgore for Attorney General Campaign. The RNC also transferred approximately $1.8 million to the Republican Party of Virginia. The RNC's total spending in the 2001 Virginia elections was approximately $5.8 million.

46. The RNC, through RNSEC, made similar contributions during the New Jersey elections in 2001. This included approximately $451,200 in direct contributions to state and local candidates (including the Schundler for Governor Campaign) and transfers of approximately $72,000 to the Republican State Central Committee. The RNC also spent approximately $1,167,000 on independent expenditures and made approximately $2,489,104 in in-kind contributions. The RNC's total spending in the 2001 New Jersey elections was approximately $4.2 million.

[*14] 47. The RNC's involvement in the 2001 Virginia and New Jersey elections, however, extended far beyond direct contributions. In fact, the RNC played a significant role in organizing and supporting grassroots activities that were designed to increase Republican and unaffiliated voter participation in both states.

48. In New Jersey, for example, the RNC devoted significant resources to a grassroots program that included a strong absentee ballot initiative, voter identification program, get-out-the-vote mailings, get-out-the-vote telephone banks, and field programs. In addition to providing funding for these activities, the RNC, working closely with the New Jersey Republican Party, also was actively involved in developing and implementing these programs.

49. To achieve its goal of maximizing voter participation, the RNC funded a significant absentee ballot initiative during the 2001 New Jersey elections. This effort began in early October with a mailing to almost one million householders containing two absentee ballot applications and a slate card of the entire Republican ticket. These applications were pre-filled out and personalized for each election district. A copy of this mailing is RNC Exhibit 2291, attached as Attachment J hereto. Coinciding with the delivery of this first mailing, approximately 340,000 automated telephone calls were made to answering machines. The message left on the voters' answering machines notified them that an absentee ballot application had been sent and urged them to "take the time to make sure [their] vote is counted." A copy of the proposed script for these automated telephone calls is RNC Exhibit 533, attached as Attachment K hereto. The third component of the absentee ballot initiative consisted of an oversized postcard mailing sent to almost one million householders. This postcard, which was personalized and sent one week after the first mailing, reminded voters that they could participate in the general election by mail and urged them to return their absentee ballot [*15] applications. A copy of this mailing is RNC Exhibit 2289, attached as Attachment L hereto. In total, the RNC spent more than $523,000 on this absentee ballot initiative.

50. The RNC also funded get-out-the-vote efforts designed to maximize turnout among the Republican base and unaffiliated voters. These efforts included two direct mailings (one sent to approximately 800,000 householders and the other to approximately 555,000 householders), three telephone calls (one of which occurred on election day), and door hangers that were delivered door-to-door by volunteers organized by the county Republican organizations. In total, the RNC spent approximately $500,000 on these get-out-the-vote efforts. A copy of one of these direct mailings is RNC Exhibit 534 and attached as Attachment M hereto.

51. The RNC's efforts in New Jersey during 2001 also included persuasion programs designed to reach out to key swing voters. These programs consisted of three separate direct mailings containing issue advocacy messages and follow-up telephone calls that were designed to reinforce the message delivered by the mailings. A copy of one of these mailings is RNC Exhibit 234, attached as Attachment N hereto.

52. The RNC's persuasion efforts during the 2001 New Jersey elections also included spending approximately $1.0 million on television advertising that touted the "GOP Tax Cutting Team."

53. In total, through RNSEC, the RNC spent approximately $1.6 million (excluding RNC salaries and overhead) on all of these efforts during the New Jersey 2001 election for the sole purpose of benefiting state and local candidates and promoting the Republican Party's issue agenda.

54. The RNC engaged in similar grassroots and get-out-the-vote efforts in Virginia during 2001. As in New Jersey, even though no federal candidates appeared on the [*16] November ballot (a special election occurred in June 2001 for a vacant congressional seat), the RNC believed it

could play an important role in Virginia by boosting grassroots activity and voter turnout throughout the state.

55. The RNC's grassroots and get-out-the-vote efforts in Virginia were extensive. For example, the RNC paid for polling for the Early campaign, made approximately 2,300,000 get-out-the-vote phone calls, sent approximately 1,950,000 get-out-the-vote mailings and 2,857,000 persuasion mail pieces, spent approximately $80,000 on radio advertisements, and placed numerous full-time staffers in the field (reaching a total of between 45 and 50 during the final days of the campaign) to assist the grassroots and get-out-the-vote efforts. Again, because no federal candidates appeared on the November 2001 ballot, this effort was designed entirely to benefit state and local candidates and promote the Republican Party's issue agenda.

56. In addition to New Jersey and Virginia, the RNC was also involved in elections in Louisiana and Mississippi during 2001. Through RNSEC, the RNC spent over $10 million in these four states even though no federal candidates appeared on the ballot in any of these states (other than the Virginia June 2001 special election).

57. Sometimes, states have special elections for state and local offices in odd-numbered years. This recently occurred in South Carolina, when by virtue of a retirement, an important state Senate seat was on the special election ballot in 2001. Pursuant to requests from the South Carolina Senate Republican Caucus, the RNC committed $35,000 of nonfederal funds to this election. If federal funds are required for these situations, the RNC may be much less favorably disposed to provide assistance to the candidates, and some states may prohibit use of federal funds for state election activities.

58. As indicated above, the RNC also frequently provides assistance to state and local parties in key mayoral races, even when no federal candidates appear on the ballot. This includes providing support for Republican mayoral candidates, either directly or through state Republican party organizations, in such cities as Los Angeles, Houston, Indianapolis, and Minneapolis, among others.

59. The RNC's activities during most odd-year elections in Kentucky, California, Mississippi, New York, New Jersey, and Virginia, and in the odd-year mayoral races, are critically important to the mission of the Republican Party, but have no effect on federal elections.

Electoral Activity When Federal Candidates Appear on the Ballot

60. Although the RNC's activities relating exclusively to state and local elections are most apparent in the 5 states and numerous localities with odd-year elections, the RNC engages in the very same activities during even-numbered years when federal candidates do appear on the same ballot. These elections are sometimes referred to as "mixed" elections. The RNC, of course, is actively involved in all these elections at the local, state, and national levels.

61. Some of the RNC's activity during these mixed elections continues to involve purely state and local activity. This activity includes making direct donations to state and local candidates, making direct donations to state parties for purely state and local activities, and providing fundraising assistance to state and local candidates and parties. For example, during 2000, the RNC (through RNSEC) donated approximately $5.6 million of nonfederal money to state and local candidates. In 2000, the RNC also transferred approximately $123.9 million to state and local parties, of which approximately $88.2 million was nonfederal funds.

62. In fact, even though federal, state, and local candidates appear together on the ballot, the RNC's deployment of resources is sometimes dictated by the state and local levels rather than the federal level. This is demonstrated by the fact that the RNC sometimes devotes significant resources towards states with competitive gubernatorial races even though the races for federal offices are less competitive. For example, during 2000, most observers believed (correctly, as it turned out) that Indiana was a safe state for George W. Bush. This state also lacked a competitive Senate race (Senator Lugar easily won reelection). Nevertheless, the RNC committed significant resources to the state in hopes of influencing the gubernatorial race. Similarly, California has a competitive gubernatorial race this year, but no Senate race. Even without a Senate race, the RNC has been heavily involved in the state to support the gubernatorial candidacy of Bill Simon.

RNC Involvement in State Party Fundraising

63. The RNC provides assistance with state party fundraising in two important ways: (1) transferring money directly to the state parties; and (2) assisting the state parties with various programs and efforts that allow them to raise money on their own.

64. The RNC transfers both federal and nonfederal money directly to the state parties for a variety of purposes. As discussed above, this includes nonfederal funds to assist in the implementation of a state party's Victory Program, as well as to assist with state and local races. The RNC also frequently transfers nonfederal money to the state parties. Many of the state parties are heavily dependent on these transfers to cover the costs of their operations, as discussed in the Declaration of Jay Banning. Many state parties do not have, and are unlikely to develop, the fundraising capability to

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replace these transfers, as discussed in the Declaration of Beverly Shea.

[*19] 65. The RNC also goes to great lengths to assist the state parties in raising money on their own. Among the methods frequently used are donor list exchanges, fundraising events, facilitating contributions from interested donors to particular state parties, supporting fundraising activities through letters or appearances by RNC personnel, and providing matching incentives.

66. Donor lists are an important asset to any organization that seeks to raise money, because they enable the organization to direct its solicitations to those individuals who either have a history of making contributions or who have indicated a desire to do so. Over the years, the RNC and state parties have separately developed comprehensive donor lists. Accordingly, by exchanging these lists, the RNC and state parties are able to increase their prospective donor pools, thereby increasing their ability to raise money.

67. The RNC and state parties also frequently plan separate fundraising events in the same city, commonly referred to as "tiered fundraising events." As explained in the Declaration of Beverly Shea, "tiered" fundraising events typically involve two or three separate events occurring on a single date at locations in the same vicinity or city. Typical tiered events will consist of a large low-dollar event for federal donors to candidates in the first tier, a middle-tier "photo op" event with larger donors, and often a separate top-tier dinner for the event Host Committee. The proceeds of the large first-tier event typically go to a candidate for state office, the proceeds of the middle-tier "photo op" go to the state party, and the proceeds of the top-tier dinner go to the RNC. So-called "tiered" fundraising events such as these serve to benefit state parties because they are able to increase their fundraising success through direct association with the RNC.

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In fact, without the RNC holding an event in the same city and on the same date as the state party event, it would likely be logistically and financially impossible for the state party to [*20] convince major-drawing surrogates to be the featured guest at their own event. Further, the RNC has a highly professional and experienced fundraising staff, which many state parties do not. Indeed, some state parties have no fundraising employees at all. Therefore, state parties necessarily benefit from the involvement of RNC personnel in tiered fundraising activities, both because RNC fundraising staffers are highly competent and because their involvement supplements the efforts of state party personnel.

68. It is also not uncommon for the RNC to put interested donors in touch with various state parties. This often occurs when a donor has reached his or her federal dollar limits to the RNC, but wishes to make additional contributions to state parties. When this happens, the RNC will often suggest that the donor make contributions to certain state parties that are most in need of funds at that time.

69. As explained above, RNC personnel frequently sign fundraising letters on behalf of state parties. An example of one of these letters is RNC Exhibit 1769, attached as Attachment O hereto. In addition to signing fundraising letters, RNC officers, including Chairman Marc Racicot, Co-Chairwoman Ann Wagner, and Deputy Chairman Jack Oliver, spend a significant amount of their time attending fundraisers across the country that benefit state and local parties and candidates. For example, Ann Wagner and Jack Oliver attended a fundraiser on behalf of the Missouri Republican Party in October 2001. A copy of the invitation to this event is RNC Exhibit 297, attached as Attachment P hereto. In September 2001, Ann Wagner was also the keynote speaker at a Shelby County Republican Women's Club fundraising dinner in Memphis, Tennessee. A thank you letter sent to Chairwoman Wagner is RNC Exhibit 301, attached as Attachment Q hereto.

[*21] 70. Since becoming Chairman in January 2002, Governor Racicot has made 82 trips in which he visited a total of 67 cities in 36 states. Similarly, since January 2001, Ann Wagner and Jack Oliver have traveled to 31 and 33 states, respectively, in their capacities as RNC officers. The majority of these trips have had significant fundraising components to them.

71. Finally, the RNC has implemented matching incentive programs designed to benefit state and local parties and candidates. For example, during 2000, the RNC created the State Legislative Campaign Fund. The goal of this program was to improve the Republican's chances of regaining control of the state legislatures.

72. As part of the State Legislative Campaign Fund, the RNC approached 15 states and offered to match a percentage of the funds raised by the state party. By adding its credibility and fundraising expertise to this effort, the RNC was able to raise between $3.0 and $4.0 million for this program. All of this money benefited state candidates.

RNC Involvement in Redistricting

73. The RNC also has provided redistricting staff to the state parties. Although redistricting has an impact on federal elections, its impact on state and local elections is much more immediate and significant. In fact, as indicated in a letter from David Wilkins, the Speaker of the House in South Carolina, the RNC's assistance "has proven to be invaluable to the South Carolina Republican Party's efforts to expand [its] influence in state government." A copy of this letter is RNC Exhibit 2435, attached as Attachment R hereto.

74. The RNC's redistricting efforts also include litigating challenges to various redistricting plans throughout the country. During the 2000 election cycle, the RNC spent approximately $880,000 on redistricting efforts, including redistricting litigation. A substantial portion of this was nonfederal money, as allowed under current law. During 2002, **[*22]** the RNC has budgeted more than $3.0 million on redistricting litigation. Overall, the RNC spends more on state legislative redistricting than on congressional redistricting.

Impact of the BCRA on the RNC's Ability to Assist and Interrelate With State Parties

75. The BCRA will have a significant -- and highly detrimental -- impact on the RNC's ability to associate with and assist the state parties. The unfortunate result will be less interaction between the RNC and state parties, less sharing of expertise and resources, and significantly less resources devoted to core grassroots and get-out-the-vote activities that are crucial to increasing voter turnout.

76. As an initial matter, because the BCRA prohibits the RNC from raising, spending, or directing nonfederal money, the RNC may be banned from any state and local activities in certain states that prohibit the use of federal money in state and local election activity. In Connecticut, for example, state law requires national political parties to form a state-regulated political committee, and then raise money directly into that committee, in accordance with state law. Transfers of federally-regulated money into such a Connecticut-regulated political committee to benefit state and local candidates are prohibited by state law. Since the BCRA prohibits the RNC and other national political parties from raising non-federally-regulated funds, without a significant change in state or federal law, national parties may be precluded from participating in Connecticut state and local campaigns. Similar issues may be presented in Massachusetts, North Carolina, and perhaps other states.

77. Moreover, in those states where the RNC can still spend money, any involvement by the RNC or its officers, staff, members, or any its "agents" in drafting and implementing Victory Plans might constitute "spending" or "directing" nonfederal funds (including Levin funds), and thus result in the "federalization" of the entire program. Therefore, **[*23]** state parties will face the prospect of being punished for simply associating with the RNC: these state parties will be forced to use 100% federal money to pay for programs they could otherwise pay for with a combination of federal and Levin money. Indeed, given the difficulty state parties face in raising large amounts of federal dollars, most states will be forced to significantly reduce -- or perhaps eliminate -- their grassroots and get-out-the-vote activities. Even with the increased federal contribution limits for state parties, competition for federal contributions within the $37,500 aggregate limit will make it extremely difficult for state parties to raise federal funds. As a result, these important activities will be left to unregulated outside interest groups, many of whom do not disclose any information about their donors.

78. This "federalization" may occur even in odd-numbered years when no federal candidates appear on the ballot. Thus, should the RNC's officers, members, or agents seek to assist a state party during an odd-numbered year when only state and local candidates appear on the ballot by advising the state party on how to allocate funds for these activities, the state party might be forced to pay for all of these programs with federal dollars. In effect, by punishing the state parties for associating with the RNC, the BCRA severely burdens the ability of the RNC and state parties to work together during even odd-year elections.

79. Moreover, the BCRA actually places greater limits on the RNC's ability to help state and local parties and candidates than it does with respect to federal candidates and officeholders. After all, the RNC cannot even raise nonfederal money up to the federal limit for these state and local parties and candidates. By contrast, the BCRA created two exceptions that allow federal officeholders to raise nonfederal money for the state and local candidates and parties, but neither exception applies to the national parties or their agents.

[*24] 80. The problem that this creates is particularly acute with respect to the various state party chairmen who also serve in executive roles at the RNC. For example, Ann Wagner, the Co-chairman of the RNC, is also the Chairwoman of the Missouri Republican Party. The BCRA makes it a crime for Ms. Wagner to solicit funds on behalf of the Missouri Republican Party, or for that matter any other state or local party or candidate.

81. The RNC is very concerned about the financial viability of several state parties that depend on the RNC for a large portion of their funding. The BCRA's prohibitions on the RNC's fundraising assistance to states, and RNC transfers of nonfederal funds, will have a debilitating effect on such parties as the Republican Party of Arkansas. Just this year, the RNC made a nonfederal transfer to the Arkansas party just to allow it to pay its current bills.

The RNC's Relationship With Other Republican Associations

82. The RNC works closely with several other organizations on a daily basis for the purpose of electing Republican candidates to state and local offices and promoting the Republican agenda. Among others, these organizations include the Republican Governors Association ("RGA"), the Republican Attorneys General Association ("RAGA"), and the National Republican Legislators Association ("NRLA"). The BCRA will prohibit the RNC from working with these organizations.

83. Since its founding in 1963, the RGA has served as the official public policy and political organization of the Republican governors and governors-elect of the United States. In this role, the RGA has worked closely with the RNC to elect Republican gubernatorial candidates. Two examples of this close working relationship were the Virginia and New Jersey 2001 gubernatorial races, where the RNC and RGA joined efforts to support the candidacies of Mark Earley and Bret Schundler. Although the Republican gubernatorial candidates in these **[*25]** states were ultimately unsuccessful, the combined effort of the RNC and RGA played an important role in assisting other Republican candidates on the ballot.

84. The RAGA is modeled after the RGA and serves similar purposes: (1) assisting in the election and reelection of Republican candidates for the office of attorney general; and (2) facilitating communications among the Republican attorneys general, RGA, RNC, state and local parties, and other Republican elected officials. Since RAGA's establishment in 1999, the RNC has worked closely with the RAGA to accomplish its objectives. A memorandum providing an overview of the RAGA is RNC Exhibit 978, attached as Attachment S hereto.

85. The NRLA currently represents more than 3,500 Republican state legislators across the country and, with the RNC's support and assistance, has become an important part of the Republican Party.

86. The BCRA will have a significant impact on the RNC's ability to work and interact with Republican organizations such as the RGA, RAGA, and NRLA. The BCRA not only prohibits the RNC from helping these groups

raise state-regulated money, but also, by prohibiting the RNC from soliciting, receiving, or directing nonfederal money to any such entity, the BCRA effectively precludes the RNC's involvement with these organizations.

RNC Issue Advocacy

87. The Republican Platform, established by the delegates at each quadrennial convention, describes the positions the Republican Party espouses on many of the critical issues facing the Nation. In remarkable detail, the Platform outlines the Party's goals for local, state, and federal legislative and regulatory policy. Although individual Republican candidates [*26] sometimes disagree with the Party's platform on particular issues, the Platform nevertheless remains the Party's guiding statement.

88. The RNC devotes substantial resources annually to advocating its positions on these issues. This includes significant efforts to communicate with RNC members and the general public through a variety of means, including direct mail, press releases, e-mail, and broadcast advertisements.

89. The RNC airs many public communications that expressly advocate the election or defeat of clearly identified federal candidates and pays for all of these "express advocacy" communications with 100% federal money. The RNC also airs other public communications that do not expressly advocate the election of defeat of any clearly identified federal candidates. These "issue advertisements" are, by FEC precedent, funded with a split of federal and non-federal money. Although not required by law, as a matter of policy, the broadcast issue advocacy efforts undertaken by the RNC do not mention any election; in all or virtually all instances, they also avoid referring to any individual as a candidate.

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90. Proponents of the BCRA have suggested that the primary use of nonfederal funds by national party committees is for so-called "electioneering" broadcast advertisements, by which they mean candidate-specific broadcast advertising aired within 60 days of a general and 30 days of a primary election, but which does not expressly advocate the election or defeat of a clearly identified federal candidate. This suggestion is inaccurate for two reasons. First, in recent election cycles, less than half of the RNC's nonfederal funds have been used for broadcast issue advocacy efforts; therefore, only a relatively small subset has constituted "electioneering" broadcast advertisements as that term is used in the BCRA. Second, although the RNC does, like interest groups, air broadcast issue advertisements that mention federal [*27] candidates close to elections, it also engages in non-candidate issue advocacy and party building communications. And it should not be overlooked that, unlike interest groups, the RNC is required under current law to pay for all of its issue advertising with a significant portion of federal money.

91. There are instances in which the RNC pays for broadcast issue advertising for the exclusive purpose of influencing the legislative and policy debate.

(a) One area in which the RNC was particularly active with broadcast issue advertisements was the debate over a constitutional amendment that would have required the federal government to have a balanced budget ("Balanced Budget Amendment"). In February 1995, the RNC determined that it could make an important difference in this debate. The RNC's goal was to garner additional support for the amendment, an issue of great importance to many Republicans throughout the country. Accordingly, and even though the closest federal election was over 20 months away, the RNC decided to fund a major broadcast advertising campaign. The RNC ran these advertisements to encourage

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particular Senators to support the amendment, regardless of whether those Senators were up for reelection 20 months later. For example, one key Senator who expressed opposition to the amendment, but who was considered persuadable, was New Mexico's Jeff Bingaman. As described in a letter Senator Bingaman sent to the RNC on March 3, 1995, the RNC funded advertisements in New Mexico in early 1995 specifically to call attention to this issue. See RNC Exhibit 1711, attached as Attachment T hereto. Given that Senator Bingaman had been reelected to the Senate in 1994 and would not be up for reelection for another 5 years, the RNC's decision to run advertisements in New Mexico was clearly designed to promote the Republican Party's stance on this issue and to influence the public debate.

[*28] (b) The RNC continued to run broadcast issue advocacy -- including additional 30-second spots and a feature-length GOP-TV program described in greater detail below -- throughout 1995 and the beginning of 1996 for the purpose of communicating its views on the balanced budget issue. A copy of one of these advertisements is RNC Exhibit 2438, attached as Attachment U hereto.

(c) In fact, in May 1996, the RNC produced and aired one of the most memorable and effective broadcast advertisements in its history, again in the context of the continuing public debate on the balanced budget. The purpose of this advertisement was to communicate the Republican Party's position that the federal government must control its reckless appetite for deficit spending. This particular advertisement featured President Clinton, and included numerous clips of him stating a different number of years in which he would balance the budget. The advertisement explained, "Talk is cheap. Double talk is expensive. Tell Mr. Clinton to support the Balanced Budget Amendment." A copy of this advertisement is RNC Exhibit 2439, attached as Attachment V hereto. Eventually, President Clinton signed a balanced budget resolution.

(d) Later in the summer of 1996, when the legislative agenda and accompanying public debate turned to welfare reform, the RNC again effectively communicated its views through broadcast issue advertising for the purpose of putting pressure on President Clinton to sign welfare reform legislation. Beginning in late May 1996, the RNC aired advertisements comparing President Clinton's rhetoric on welfare reform with his record on welfare reform. A copy of this advertisement is RNC Exhibit 2440, attached as Attachment W hereto. The advertising campaign was successful and culminated in President Clinton finally signing a welfare reform bill into law after he vetoed the bill twice. The RNC would like to **[*29]** believe that its issue advocacy campaign played a role in President Clinton's decision to ultimately sign this legislation into law.

(e) In addition to its efforts to influence the legislative debate, the RNC also seeks to educate the public about the positions for which the Republican Party stands. The balanced budget amendment advertisements are examples of these efforts. Another example is the advertising campaign the RNC is currently running nationwide in support of the Republican education agenda. The RNC is currently airing a 60-second radio spot entitled "Leave No Child Behind." The script of this advertisement is RNC Exhibit 2428, attached as Attachment X hereto. This advertisement, which features a man and a woman discussing education issues, concludes with the following exchange:

Male:	Republicans are working for better, safer schools...
Female:	... so no child is left behind.
Male:	That's right ... Republicans.

The advertisement mentions President Bush's name for the purpose of identifying the precise proposal supported by the Republican Party ("President Bush's No Child Left Behind Law"), but mentions no federal candidate currently facing reelection. It concludes with a request that listeners call a toll-free number to learn more about Republican education reform.

92. Many of the RNC's broadcast issue advertisements are run in response to, or in anticipation of, "attack" advertisements paid for by special interest groups using unregulated and undisclosed funds. The RNC's ability to respond to these advertisements is critical in ensuring a full and accurate debate on the issues. In 1998, for example, the RNC funded a portion of a multi-million dollar issue advocacy campaign announced by the NRCC called "Operation Breakout." The express purpose and intent of Operation Breakout was to **[*30]** respond to an anticipated blitz of labor union and other interest group broadcast issue advertisements attacking Republican Congressional candidates.

93. Many of the RNC's broadcast issue advocacy efforts are primarily directed to media markets in which the RNC believes the public is most attuned to the particular issues the RNC intends to address with each advertisement. Often, these broadcast issue advocacy efforts are directed to media markets in which a competitive federal election campaign is ongoing. In those specific instances, the RNC believes that the public is closely following the issues which divide the candidates, and that advertising promoting certain of the messages espoused by the Republican Party will receive more attention and discussion than they might during times when no election is pending.

94. The RNC also communicates its message through GOP-TV, which is essentially the RNC's television studio. As part of GOP-TV, the RNC produces feature-length video programming that it subsequently airs on cable television nationwide. Many of the GOP-TV programs are designed as simulated news broadcasts: a GOP-TV anchor interviews officeholders, RNC staff, and members of the public -- often several of whom are admittedly not Republicans -- about various important issues and the Republican Party's proposals for addressing them. One relatively recent program addressed education and tax reform. See RNC Exhibit 334B, attached as Attachment Y hereto.

95. Party building is another important goal of GOP-TV, and an important mission of the GOP-TV effort is to define the Republican Party as a "big-tent" party that is especially eager to recruit women and minorities who traditionally may not have identified with the Party. One recent GOP-TV program featured prominent Republican leaders J.C. Watts, Elaine Chao, and Ileana Ros-Lehtinen in an effort to reach out to minority communities that do **[*31]** not traditionally associate themselves with the Republican Party. See RNC Exhibit 1910, attached as Attachment Z. Another particularly effective production highlighted the role of Republican women in the current Administration, again with the message that the Republican Party welcomes the participation and leadership of women. See RNC Exhibit 334A, attached as Attachment AA.

96. The GOP-TV program is funded in part with non-federal dollars and is an integral part of the RNC's party building and education campaigns that could not be effectively undertaken without the use of such funds.

97. Many of the issue advocacy and party building programs I have described are duplicated on the RNC's state-of-the-art website, located at www.rnc.org. Paid for in part with non-federal funds, the website provides access to press releases, GOP-TV videos, talking points, biographies of selected Republican leaders, and many other features designed

to disseminate the Party's views to the world and to allow a broader understanding of those views.

98. The RNC also engages in significant non-broadcast communications with the public. For example, the RNC ran an advertisements in Reader's Digest magazine in 1994 to promote the Contract with America. A copy of this advertisement is RNC Exhibit 1760, attached as Attachment BB hereto.

99. The RNC's non-broadcast communications also include, among others, the magazine Rising Tide, which is distributed to anyone who contributes at least $25 per year to the RNC. Rising Tide is designed to provide readers with a more in-depth education about the Republican issue agenda than is possible in the more traditional 30-second television advertisements. A copy of Rising Tide is RNC Exhibit 977, attached as Attachment CC hereto. The RNC also communicates its message through its eChampions program, which allows anyone **[*32]** who is interested to sign up on the RNC's website to receive frequent e-mails from the RNC. One e-mail program, called "The Weekly Team Leader," provides timely updates about issues of importance to RNC members. Examples of recent The Weekly Team Leader e-mails are RNC Exhibits 2425 & 2426, attached as Attachments DD & EE.

100. Finally, in addition to the RNC efforts to educate its members and the public, the RNC also seeks to educate Republican officeholders at all levels of government. For example, the RNC recently committed substantial resources to educate Republican officeholders about the expected effects of the BCRA. As part of these efforts, the RNC advocated against the passage of this legislation. I understand that allegations have been made that the Republican Party had threatened to cut-off contributions to Republicans who voted in favor of this legislation. No such threat was made to the best of my knowledge. It is a fact that, at this very moment, the Republican party committees have committed to provide the maximum amount of coordinated expenditures in certain House races in which a Republican who voted for the BCRA is facing stiff competition. Coordinated spending is being allocated today, as it always has been, based on the competitiveness of the races, not on the basis of this or any other legislative votes.

101. The RNC believes its ability to communicate to its members and the public -- whether though broadcast issue advertisements or any of the other discussed above -- is an important part of its mission. By prohibiting the raising and spending of nonfederal funds, the BCRA will significantly reduce the amount of resources available for issue advocacy. As a result, the BCRA will result in less advocacy about issues of importance to the public.

[*33] I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

s/
Thomas Josefiak

Executed on October 4, 2002

[EXHIBITS OMITTED]

REBUTTAL DECLARATION OF THOMAS JOSEFIAK

I, Thomas Josefiak, hereby swear and depose as follows, based on my own personal knowledge:

1. I am submitting this declaration in rebuttal to the witness statements served by the Department of Justice, Federal Election Commission, and Defendant-Intervenors (collectively, "Defendants").

The BCRA's Coordinated Spending Provisions

2. Senator McCain makes the assertion that "[t]he idea that a party could make both 'coordinated' and 'independent' expenditures once the party has nominated a candidate, is not sensible." Declaration of Senator John McCain ¶ 23. Although this appears to **[*2]** be Senator McCain's justification for the BCRA's coordinated spending provisions, this assertion is both unsupported and untrue. Senator McCain also fails to acknowledge the virtually unworkable situation created by the BCRA's requirement that political party committees choose between coordinating their political activities with their federal candidates and engaging in independent expenditures in support of their federal candidates.

3. As a practical matter, the BCRA requires all political party committees to make a collective choice between independent expenditures and coordinated expenditures, a choice to which all of the committees of a party will be irrevocably bound. In addition to being impractical, I also believe this requirement is an attempt by the supporters of the BCRA to take away the political parties' right to engage in unlimited independent expenditures.

4. Based on my experience, I believe that it will be extraordinarily difficult, if not impossible, for a national party to police every party entity -- including "all political committees established and maintained by" a national or state political party -- to make sure that none of them have made or are about to make a coordinated or independent expenditure. For example, if the RNC decides to make a coordinated expenditure with respect to a candidate, the RNC must somehow first confirm that no other political committee has or is about to make an independent expenditure with respect to the same candidate. Also, by expanding the definition of "coordination" so as to require something less than agreement or formal collaboration, the BCRA may even make it so that the very act of policing by the national parties could itself preclude independent expenditures.

5. Such a result places the political parties in an untenable position: the BCRA essentially requires the political parties to forego future coordinated expenditures as the "price" for engaging in independent expenditures. Accordingly, the BCRA may have the result **[*3]** of effectively precluding the RNC from engaging in this form of constitutionally-protected political activity. At a minimum, the expanded definition of coordination will further hinder the ability of the RNC to work closely with the subordinate parties and candidates.

6. Although I do not believe it is possible for the RNC to know of every example of other Republican Party committees making independent expenditures when the RNC has made or is making coordinated expenditures, two examples come to mind. First, in 1996, following the Supreme Court's ruling in Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996), that political parties have a constitutionally protected right to make unlimited independent expenditures, the National Republican Senatorial Committee ("NRSC") made independent expenditures on behalf of several candidates for the United States Senate, while the RNC was simultaneously making

coordinated expenditures on behalf of those same candidates. In total, the NRSC made approximately $10.5 million in independent expenditures in 17 states where the RNC was making coordinated expenditures: Alabama, Arkansas, Colorado, Georgia, Iowa, Kansas, Louisiana, Maine, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Rhode Island, South Dakota, and Wyoming. The RNC made more than $4.3 million of coordinated expenditures in these states. As part of its efforts, the NRSC took extraordinary measures to assure no coordination, including moving the staff working on the independent expenditures out of the NRSC's office building.

7. Second, it is my understanding that the Republican Party of Michigan has made independent expenditures on behalf of federal candidates with some regularity, including during periods when other Republican party committees were making coordinated expenditures. For example, during 2000, the Republican Party of Michigan made approximately $191,000 in [*4] independent expenditures and the RNC made approximately $998,000 in coordinated expenditures in Michigan.

The BCRA's Millionaire's Provision

8. Similarly, the Defendants' witnesses also fail to address the difficulty imposed upon the political parties by the so-called "Millionaire's Provision," which increases contribution limits, and eliminates any limits on party coordinated expenditures, for the campaigns of candidates for the Senate or House whenever they confront opponents who devote specified amounts of personal wealth to their own campaigns.

9. Under the Millionaire's Provision, the RNC will be put in the position of providing different levels of funding for Republican candidates depending on whether or not the Republican candidates or their opponents decide to commit $150,000 of their personal funds to the campaign. In some situations, the RNC will be unable to make unlimited coordinated expenditures on behalf of candidates who legally use their own resources to support their campaigns, while their opponents can receive unlimited coordinated spending by their political parties. In other situations, the RNC will be able to spend unlimited amounts in coordination with some of its candidates who are running against wealthy opponents who devote more than $150,000 of their personal resources to their campaigns, but will be prohibited from spending unlimited amounts in coordination with other candidates are not running against wealthy opponents. Therefore, the RNC's ability to provide funding to a Republican candidate will, in some cases, be dictated more by the decisions of the Republican candidate's opponent than by the RNC.

10. I believe that the Millionaire's Provision also serves to demonstrate that the true congressional interest in imposing the coordinated expenditure limit is to limit spending, [*5] not to prevent corruption. After all, at least with regards to the Millionaire's Provision, Congress appears to not be concerned that allowing larger contributions and greater funding from the political parties to candidates will corrupt those candidates.

Viability of State Parties

11. Several of the Defendants' witnesses suggest that parties will be strengthened by the BCRA. These witnesses fail to recognize, however, that the BCRA's various restrictions on national party transfers of nonfederal money to state parties, fundraising assistance by national parties and federal officeholders to state parties, and limitations by way of the Levin Amendment on the amount of state-regulated money state parties may accept from contributors will severely harm the state parties, and jeopardize the viability of

several. For example, in the 2000 election cycle, the Republican Party of Wisconsin received 64% of its funding by way of transfers from the RNC; the Republican Party of Oregon received 77% of its funding by way of transfers from the RNC.

RNC Financial Support of Members Who Voted For the BCRA

12. In Senator McCain's affidavit, he states: "At times, when Members seek to support legislation their congressional leaders oppose, they are threatened with the prospect that their leaders will withhold soft money being spent on their behalf." Declaration of Senator John McCain ¶ 7. As previously indicated, I am aware of no instance in which a Member has been so threatened. Moreover, the objective facts demonstrate that campaign funding is not withheld from Members of Congress or Senators, even in situations, like the BCRA, when Members vote contrary to the suggestions of the party. In fact, the RNC has or will soon spend the maximum amount of coordinated expenditures on behalf of Congresspersons Bass, Capito, Johnson, Leach, Morella, and Simmons, and also on behalf of Congressmen Thune, Ganske, and [*6] Graham, who are running for the Senate. Each of these Members voted in favor of the BCRA. It is my understanding that the NRCC has already made substantial direct contributions to many of these candidates as well. Senator Collins, who voted for the BCRA, is also receiving coordinated expenditures.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

s/
Thomas Josefiak

Executed on October 7, 2002

Josefiak Reb. Decl. 5-6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 02-582 (CKK, KLH, RJL)
Consolidated Actions

SENATOR MITCH McCONNELL, et at.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants.

DIRECT TRIAL TESTIMONY OF R. BRUCE JOSTEN

1. My name is R. Bruce Josten. I am Executive Vice President for Government Affairs of the Chamber of Commerce of the United States ("Chamber"), a position I have held since 1994. I have been with the Chamber since 1974.

2. My position gives me supervisory responsibility for the government affairs activities of the Chamber. I also participate directly in those activities. Our mission is to represent the American business community before the federal legislative and executive branches of government.

3. The Chamber is the world's largest not-for-profit business federation. Founded in 1912, the Chamber represents over 3,000,000 businesses and business associations. The Chamber is a corporation, as are many of its members and contributors. It is exempt from taxation under Section 501(c)(6) of the Internal Revenue Code.

4. To advance the interests of its members, the Chamber must and does regularly consult with Members of Congress, officers of the Executive Branch, and others, including political party officials and current or likely candidates for election to Federal office. At the same time, the Chamber must consult and work with a wide variety of other politically active organizations. Depending on the issue, the groups we work with may range from other business associations to national labor organizations to citizen groups organized around specific policy views or objectives.

5. In building and maintaining support for the Chamber's legislative and policy agenda, we need to be able to communicate our views to the public. To that end, the Chamber regularly produces and purchases television, radio, cable, and other public communications on matters of interest to the public. Sometimes the Chamber sponsors these communications directly in its own name. For example, in 1999 the Chamber ran ads relating to Y2K, and the Chamber's president, Tom Donohue, has delivered a series of radio talks entitled "Speaking of Business." Sometimes the Chamber contributes to groups or coalitions of like minded organizations and persons that take responsibility for preparing and airing the communications. For example, in March, 2000, the Chamber helped support ads by American Business for Legal Immigration and in December, 2001, the Chamber supported ads by People for Common Sense Courts that urged Senator Daschle to schedule a Senate vote on Eugene Scalia's nomination as Solicitor of Labor.

6. Not surprisingly, since these communications are intended to advance the Chamber's objectives, they may well address issues that the Chamber has discussed with the persons and groups with which it regularly cooperates,

including Members of Congress and representatives of political parties, as well as various cooperating organizations of all types.

7. Because we are a democracy, many of the Members of Congress with whom we work are or soon will be candidates for reelection. Members of the House, of course, run every two years. One third of the Senate runs each two years. Also, there are periodic special elections. As one would expect, the policy views and political activities of such candidates often are the subject of public discussion during such campaigns.

8. The Chamber and many other groups with which it cooperates with respect to legislative and public policy were the subject of a complaint filed with the Federal Election Commission. It alleged that so-called issue advertisements (advertisements that did not expressly advocate the election or defeat of a candidate) that the Chamber helped sponsor in 1996 through a group known as "The Coalition" were coordinated with federal candidates, campaigns, or political committees and, hence, were subject to federal campaign finance regulation and an improper use of corporate funds. In fact, the Chamber and the Coalition had gone to great lengths to assure that no coordination occurred, but nevertheless they were subjected to years of intrusive, burdensome, and very expensive proceedings before the FEC dismissed the complaint. In my judgment that experience discouraged many participants in The Coalition from further similar efforts and public communication.

9. The events underlying the complaint against the Coalition, as reported in the press, illustrate the types of contacts that groups such as the Chamber necessarily have with candidates or persons associated with candidates. The charges of coordination were based on several things, all of which are entirely innocent and necessary. First, Congressman Boehner reportedly gave speeches saying that the business community should mount some response to the

$35 million dollar anti-business advertising campaign that the AFL-CIO had announced. Although the need to respond to the AFL-CIO was obvious to us all, those reported speeches were said to amount to suggestions that we run ads. Second, the Chamber and other active members of The Coalition also were participants in something called the Thursday Group that Congressman Boehner had organized to promote the pro-business legislative aspects of The Contract With America. The overlap in membership between the two groups and the contact with Congressman Boehner was said to indicate coordination, though in fact no ads were discussed with the Thursday Group until after they had run, and then only briefly. Third, it was alleged that some of our vendors who assisted in planning, developing, and placing our advertisements also were doing work for one or more candidates. This overlap was said to show coordination.

10. As the experience of The Coalition demonstrates, it is essential to have a clear, objective, bright-line test for coordination. Otherwise, groups like the Chamber face serious risks every time they support public communications, either directly or through groups of like-minded organizations or individuals. The risks arise in several ways. First, statements by candidates or their agents may be characterized as suggesting the speech. Second, discussions of issues with legislators may be deemed to coordinate message content. Third, meetings with legislators whose policy views are consistent with the communications may lead to inferences of coordination. Fourth, hiring vendors whose skill also makes them attractive to candidates or campaigns may be claimed to suggest coordination. And so on.

11. The Chamber could not avoid the risks posed by a vague or overbroad coordination standard by limiting the

contacts that its representatives have with legislators and political parties. So long as the Chamber is to work with other groups, as it did in The Coalition and as it often does, it runs the risk that activities by others will be claimed to convert the entire effort into coordinated speech. At minimum, the coordination standard must be both clear enough and narrow enough that the Chamber can have reasonable confidence that the representatives of groups with which the Chamber works can both understand the standard and reasonably be expected to comply with it. A coordination standard that required an actual agreement with a candidate or campaign as to the content or placement of issue advertising would work, although even such a standard will cause some chill.

12. For obvious reasons, Members of Congress often seek to attach their names to legislation that they sponsor. These designations become how the legislation is known in public discourse. A recent and obvious example is the recent campaign finance legislation, which in various permutations was known as McCain/Feingold or Shays/Meehan.

13. An important reason to run issue ads in the home district or state of Members of Congress can be to get the Members' attention, make them think about how their constituents are likely to feel about his legislative and policy positions, and either encourage or discourage those activities. To achieve those objectives, it often is important for an issue ad to use a Member's name. Moreover, because both Members and the public are most focused on political issues at election time, it is important for such ads to be run near the election.

14. Legislative efforts can extend for many years. At times during such an effort it may be very important to run public advertising at the time that a committee or chamber of Congress is about to vote. But issue ads also may play a longer-range purpose, building for the future. It may be important, however, for such long-range ads to take

advantage of recent events. For example, if a presidential or prominent legislative candidate, says or does something that may be persuasive on a legislative issue, it may be important to use that event or statement in a prompt issue ad, even though no vote is impending.

15. The Chamber and similar groups cannot afford to be tied up in campaign finance enforcement proceedings. Such proceedings use up resources intended for other purposes and the mere threat of such proceedings discourages donor support. For those reasons, as well as because we want to obey the law and certainly do not want to risk punishment for an inadvertent error, it is critical to us to have a clear standard for identifying the type of campaign speech that is subject to federal limitation and regulation. The express advocacy standard – whether an ad

Affidavit of David Keating

* * *

[11 (8 PCS/ MC 200)]

53. CFG does not believe it can effectively fund its issue advocacy by funding it through its political action committee rather than through its § 527 general treasury fund for several reasons: (1) minors cannot contribute to its political action committee; (2) contributions to its political action committee are limited under the BCRA and FECA; (3) corporate contributions to its political action committee are prohibited; (4) CFG's administrative burden would be increased because it would have to track more contributions, complete more paperwork, work harder to raise funds; and (5) less funds would be available for its issue advocacy.

* * *

DECLARATION OF JANICE L. KNOPP

I, Janice L. Knopp, hereby swear and depose as follows, based on my own personal knowledge:

1. I am the Deputy Director of Finance/Marketing Director for the Republican National Committee ("RNC"). I submit this Declaration to discuss: (a) the RNC's use of direct marketing in fundraising; (b) limits on the RNC's ability to raise federal funds through direct marketing; (c) the motivations of RNC donors; (d) fundraising assistance provided by the RNC to state parties; and (e) the inability of state parties to replicate the RNC's fundraising assistance under the Bipartisan Campaign Reform Act ("BCRA"). I base this Declaration on my own personal experience as a direct marketing fundraiser for the RNC. As **[*2]** used herein, "direct marketing" refers to the RNC's solicitation of funds through large volume targeted mail and telephone contacts, typically involving more than 100 identical solicitations, and solicitations via electronic commerce (e.g., the RNC's internet website). See 11 C.F.R. § 110.11(a)(3).

Fundraising and Marketing Background

2. I have nineteen years of experience in professional political party fundraising, which is summarized by my resume and biographical statement. See RNC Exhibits 17 & 2252A, combined and attached as Attachment 1 hereto. From 1997 to the present, I have served as Deputy Director of Finance/Marketing Director for the RNC. From 1993 through 1996, I served as Director of Marketing for the RNC. In those positions, I designed, tested, prepared, directed, and reviewed hundreds of direct mail campaigns and scores of telemarketing campaigns. I estimate that, since I began working for the RNC in 1993, I have been responsible for a direct mail operation that has mailed approximately 630 million solicitation letters. I also estimate that the direct mail and telemarketing operations I supervise have raised over $520 million for the RNC since 1993.

3. Before joining the RNC, I spent ten years as a direct marketing and fundraising professional for Odell, Roper & Simms, a direct marketing consulting firm. My clients at Odell, Roper & Simms included national and state political organizations, federal and state candidates, national and local non-profit organizations, and trade associations.

4. In addition to my professional experience, I have received formal training in direct marketing. I minored in marketing at West Virginia University and I have attended numerous seminars on direct marketing. I have also appeared as a lecturer at George Washington University's graduate course on campaign management, consulted with many state **[*3]** Republican parties and candidates on their direct marketing operations, and spoken on direct marketing to trade associations, including international conferences for the Association of Fundraising Professionals.

Direct Marketing Fundraising by the RNC

5. My personal experience demonstrates to me that, contrary to common perception, the RNC does not raise the bulk of its money through major donations. To the contrary, the RNC relies on small contributions raised through direct marketing to obtain the majority of its funds. During the nine years that I have been at the RNC, for example, on average 60% of the total funds raised each year by the RNC were raised through direct marketing. See RNC Exhibit 2429, attached as Attachment 2 hereto. In the year 2001, this figure was over 68%. Id. During these same nine years, the average donation to the RNC was about $57. See RNC Exhibit 2430, attached as Attachment 3 hereto. The average direct marketing contribution in 2000 was $43.40.

6. As explained in more detail below, the RNC receives many small donations of non-federal funds. These donations come in a variety of ways:

a. as checks written on small business accounts in response to direct mail solicitations;

b. as checks from individuals designated for the Republican National State Elections Committee ("RNSEC"), to assist the RNC in its efforts on behalf of state parties and candidates; in some instances, the RNC has sent direct mail solicitations specifically seeking to raise funds for the RNSEC accounts, see RNC Exhibit 2431, attached as Attachment 4 hereto; and

[*4] c. as checks from individuals who have reached the limit on the contribution of federal funds, either to the RNC or in the aggregate; any additional donations from such "maxed out" individuals, however large or small, by law must be designated as non-federal.

7. During the 2000 election cycle, approximately 98% of the money raised by the RNC's direct marketing was federal funds. The remaining 2% was non-federal, consisting primarily of some individual donations and checks written on small business corporate checking accounts in response to direct marketing solicitations. These non-federal donations were deposited into one of the RNC's non-federal accounts. In the 2000 election cycle, the non-federal funds raised through direct marketing totaled $3,352,171, comprising 2.8% of all non-federal funds raised by the RNC for the cycle.

8. As noted above, the RNC engages in several different types of direct marketing, particularly through mail, phone, and internet solicitations. These different methods of direct marketing are responsible for widely differing amounts of contributions. In calendar year 2000, for example, the RNC's direct mail efforts raised a total of $89,237,400, of which $87,106,973 was federal and $2,130,427 was non-federal. The RNC's telephone solicitations in 2000 raised $16,623,300, of which $16,070,769 was federal and $552,531 was non-federal. The RNC's internet website, and other forms of electronic commerce, in calendar year 2000 were responsible for raising $1,927,128, of which $1,908,069 was federal and $19,059 was non-federal.

9. Contrary to common perception, the RNC does not raise the bulk of its non-federal money through corporate contributions. In the 2000 election cycle, for example, the RNC raised $65 million in non-federal money from individuals, but only $51 million from [*5] corporations. See RNC Exhibit 7, attached as Attachment 5 hereto. Overall corporate donations of non-federal money were larger than individual donations in several other recent years, but not by great margins, and certainly not to the extent popularly imagined. Moreover, in every year from 1997-2001, the average corporate donation of non-federal money was significantly lower than the average individual donation. In calendar year 2000, for example, the average corporate donation of non-federal money was $2,226, whereas the average individual donation of non-federal money was $10,410. Corporate donations as a percentage of the RNC's total fundraising, including both federal and non-federal donations, have been declining, and currently stand at 13% for the 2002 cycle. See Attachment 5 hereto.

Limits on the RNC's Ability to Raise Federal Funds Through Direct Marketing

10. I understand that the suggestion has been made that once the BCRA becomes effective, the RNC can simply raise more federal money to replace the non-federal money upon which it has previously relied. I strongly disagree with the suggestion that the RNC can increase its federal fundraising to a degree even remotely necessary to replace the non-federal money lost due to the BCRA. The total amount of

federal funds that the RNC can raise through direct marketing is limited by economic and political constraints. This is true for several reasons.

11. A limited number of likely donors in the population. In my experience, whether a potential donor is likely to give to the RNC depends not so much on the persuasive power of the party's direct mail or telephone solicitations but on economic and demographic factors such as: (a) disposable income; (b) age; (c) propensity to give to charitable and/or political causes; and (d) ideological compatibility with the RNC. Most fundraisers with whom I am acquainted agree that the size of the potential Republican donor market for candidates and [*6] party committees is only four to five million individuals. A survey conducted by John McLaughlin & Associates in 2001, however, determined that in calendar year 2000 the "known" Republican donor market consisted of only 2.1 million individuals. See RNC Exhibit 2432, attached as Attachment 6 hereto. My personal experience demonstrates to me that the "known" market is substantially smaller for party committees, as many donors prefer to contribute directly to candidates. In the 2000 election cycle the RNC received donations from 1,030,666 separate donors, indicating to me that the RNC is very close to maximizing the money raised from its fundraising base.

12. The cost of direct mail and telemarketing. The RNC divides direct marketing operations into two categories: (a) prospecting for new donors, and (b) "house file" solicitations of previous donors. Both methods are costly.

13. It is essential for the RNC to invest in growing its donor list. In any given year, the RNC loses approximately 10% of its donors due to attrition (i.e., death, incapacitation, or inability to continue support). The RNC must find 80,000 to 100,000 new donors each year simply to stay even.

14. The political landscape drives the cost of finding new donors. For example, in 1997, following a presidential campaign loss, the RNC spent $2.2 million to get 120,000 new donors. In contrast, following President Bush's victory, in 2001 the RNC spent $816,000 to get 220,000 new donors -- and this differential is despite the fact that after the events of September 11, 2001, the RNC suspended its prospecting operations for roughly one month and reduced them for the remainder of the calendar year.

15. Success in maintaining and building its donor file is also dependent on the amount of money the RNC has available to invest. In my personal experience, prospecting for [*7] new donors costs more money than it raises, at least in the short term. During calendar year 1999, for example, the RNC mailed 19,910,307 packages prospecting for new donors and enjoyed a response rate of only 1.14%. The total amount grossed through these mailings was $6,292,600, with an average donation of $26.93. The average cost of these prospecting mailings was 38.5 cents in direct costs plus 1.5 cents in back-end costs. The average amount grossed per piece was only 31 cents. Thus, the RNC "lost" 7.5 cents on each prospecting direct mail solicitation -- a total loss on prospecting of $1,382,204. See RNC Exhibit 2433, attached as Attachment 7 hereto.

16. The RNC therefore prospects for new donors through direct marketing as an "investment" to supplement the party's donor base and to replace donors who die or cease giving. The investment begins to justify the costs, however, only if a new donor gives repeatedly. Because prospecting for new donors actually loses money in the short term, there is a limit to how much prospecting a party can do. Moreover, the average returns fall as the RNC begins prospecting farther and farther from its natural base of likely donors.

17. Though not as expensive as prospecting for new donors, direct mail and telemarketing solicitations of the

RNC's "house file" of previous donors is also expensive. During the 1999-2000 election cycle, for example, the RNC mailed 80,494,349 packages to its "house file" of previous donors and enjoyed a response rate of 2.95%. The total amount grossed through these mailings was $98,094,017, with an average donation of $40.39. The average cost of a direct mail piece to a previous donor was 39 cents. The average amount grossed by such direct mail pieces was only $1.22 per piece. Thus, the RNC netted, on average, only 83 cents on each "house file" direct mail solicitation. See Attachment 7 hereto.

[*8] 18. Telemarketing is even more expensive. During the 1999-2000 election cycle, the RNC placed over 11 million telephone calls (completing over 2.5 million) soliciting contributions from its existing donor file. These calls cost, on average, approximately 45 cents for every $1.00 raised.

19. There is a limit to the number of mail and telephone solicitations that the RNC can profitably direct to its previous donors. If the RNC makes too many solicitations, it risks alienating its donor base and limiting its capacity to raise money in the future. Also, at a certain point each additional solicitation produces a smaller and smaller average gross return. Further, if the RNC's small donor base were to believe -- as the reformers contend -- that the RNC is "selling out" to large donors, then the RNC would run the risk of losing many small donors. It is clear to me that our small donors do not believe that our large donors have bought control of the Republican Party.

20. The cost of raising funds through direct marketing has risen substantially since I have been at the RNC. Since I joined the RNC in 1993, non-profit postage rates have risen 30% and first class postage has risen 28%. The postage increase on June 30, 2000, for example, will add approximately $1.1 million to $1.4 million to the cost of the RNC's direct marketing program over the course of a year.

Additional postage increases that will inevitably occur in the future will drive costs even higher.

21. Overall, in recent years, specifically 1997 through 2000, it has cost the RNC 47.8 cents to raise each dollar of federal money, and 18.4 cents to raise each dollar of non-federal money.

22. Competition from other charitable and political organizations. The amount of federal funds that the RNC can raise is also limited by competition from other [*9] charitable and political organizations. In some cases, these organizations compete directly for the same segment of the population that constitutes the RNC's likely donor population. There are numerous religious, social, and political organizations that solicit donations from the very people who most closely fit the RNC's likely donor profile. Also, some of the organizations with which the RNC, and political parties generally, compete are 501(c)(3) organizations, which have a considerable competitive advantage because contributions to them are tax-deductible. See RNC Exhibits 1754, 1672, 1409, 1364, and 1295, attached as Attachments 8-12 hereto (collecting newspaper articles about the increased competition for charitable donations). In addition, fundraising competition from charitable organizations has increased noticeably since the events of September 11, 2001, which spurred increased levels of support for the Red Cross and terrorism-related victim support groups.

23. In my personal opinion, it seems that competition forf ederal funds will intensify after the effective date of the BCRA, in view of the BCRA's prohibition on political party solicitation or use of non-federal funds. More activity at the local, state, and federal level will be paid for only with federal funds. Moreover, because of restrictions within the BCRA on transfers of funds among party committees for certain purposes, the BCRA will increase the competition between the RNC, the NRCC, and NRSC on the

one hand, and state and local parties on the other, for small donations.

24. The party's political successes and failures. The capacity of the RNC to raise money is also constrained, particularly in the shorter term, by the Republican Party's political successes and failures. The RNC's ability to raise federal funds typically falls after Republican Party candidates suffer setbacks at the polls. For example, after the November 1998 elections, the RNC's rate of return on direct marketing fell dramatically. Similarly, the RNC's [*10] rate of return on direct marketing fell in April 1995 after the balanced budget constitutional amendment failed to pass Congress. By contrast, the RNC's rate of return on direct marketing rose after the November 1994 elections and also rose during the early days of the 104th Congress when Congress passed a number of bills collectively known as the "Contract with America." The RNC's rate of return on mailings to donors dropped 37% in 1997 over the previous 1996 presidential election year's results. In contrast, the RNC's rate of return on direct marketing rose after the election of President George W. Bush in November 2000.

Motivations of Donors to the RNC

25. In my personal experience conducting direct marketing for the RNC, I have observed that what motivates donors to give money to the RNC is a belief that the Republican Party holds and advances a political philosophy that they support. People who do not share the Republican Party's ideology are unlikely to respond to the RNC's direct marketing. Further, the return rate on the RNC's direct marketing correlates in the shorter term with the Republican Party's electoral and policy successes and failures. Perhaps most importantly, of the scores of direct marketing messages that I test, use, and review each year, those that perform best are those that emphasize the Republican Party's core political philosophy of lower taxes and less government and the RNC's

important role in federal and state elections. In short, the RNC's fundraising success depends on its appeal to persons desiring to associate with its governing philosophy.

26. My personal experience demonstrates that the conclusions expressed above are not limited to small donors. I have observed that the same factors that motivate the RNC's smallest donors also motivate the RNC's major donors. For example, the amount of money raised by the RNC's telemarketing operation and the RNC's Team 100 major donor [*11] program has been roughly equal in many years since 1993. This correlation suggests that large and small donors are influenced by the same factors. Based on my personal experience, these factors, principally, are: (a) the health of the economy and the amount of disposable income donors have; (b) whether donors perceive the RNC to be successfully advancing a political philosophy that they share; and (c) the type of year in which fundraising is conducted, namely odd years (when there are fewer elections) versus even years (when most local, state, and federal elections are held).

Inability of State Parties to Replicate the RNC's Fundraising Role

27. The BCRA's ban on political party use of non-federal money will have a profoundly detrimental effect on state parties, because they will be unable to maintain their funding levels without RNC assistance. Generally, the RNC assists state and local parties financially by direct transfers to these parties of both federal and non-federal money, assistance in raising federal and non-federal money, and by direct financial assistance of non-federal money to state and local candidates. It is important to understand that the transfers from the RNC to the state parties are net dollars, after the RNC has incurred and paid the costs of fundraising. For the state parties to replace these non-federal transfers with federal money, they must raise not only the amount of the transfers, but also the amount of fundraising costs incurred to raise the

amounts transferred. As noted above, it costs the RNC 47.8 cents to raise every dollar of federal funds; even if, as I and other fundraising experts consider highly unlikely, the state parties are just as efficient as the RNC in raising federal funds, they will need to raise $1.48 for every $1.00 now transferred to them just to stay in the same place. It is inconceivable to me that they can make up this shortfall. My reasons follow.

[*12] 28. After the BCRA becomes effective, the RNC will have no non-federal resources to transfer to the state parties. Accordingly, it is clear that the state parties will need to shoulder a much larger proportion of their own fundraising. Moreover, it will be a crime for the RNC to help state parties raise non-federal money, and the RNC will have an urgent need for its federal money. Further, I understand that the state parties will have a greater demand for federal money, since the BCRA severely limits their ability to raise and spend non-federal money.

29. It is unlikely that many state parties will be able to meet the funding challenges created by the BCRA's restrictions on the RNC. Simply put, the fundraising capacity of the RNC is significantly greater than that of state political parties, and it cannot be matched by them. I draw this conclusion for several reasons:

a. First, as the official national Republican Party committee, the RNC has a "brand name" and prestige that the state parties, by definition, do not. Prospective donors are much more likely to have heard of the RNC, to consider it accountable and credible, to understand its role in the political process, and to trust that its activities are aligned with the national Republican Party agenda. Further, several state Republican Party organizations are largely inactive, and thus are unable to present compelling reasons for donors to support them.

b. Second, the RNC has a large direct marketing and fundraising staff, consisting at any given time of 40-45 employees, all of whom are full-time professionals with substantial experience in the field. State parties, in contrast, generally lack professional fundraising staff. Because it is a well-known national party committee, the RNC also tends to attract the most talented and dedicated marketing and fundraising employees and consultants. It is more difficult for state parties to do so.

[*13] c. Third, the size and scope of the RNC's direct marketing and fundraising operations enable it to achieve economies of scale that state parties simply cannot match. For example, the RNC's cost per mail piece in a nationwide fundraising campaign is substantially lower than the cost per mail piece of a statewide campaign conducted by a state party, because the volume of mailings is so different. The RNC, therefore, can conduct direct market fundraising more cost-effectively than state parties can.

d. Fourth, as a national organization, the RNC is able to "go where the money is" with much greater ease and ability than a state party. For example, under current law, the RNC can hold a fundraiser in New York, then re-distribute that money internally to support a candidate running for state office in Mississippi. The Republican Party of Mississippi, in contrast, is much less likely to have fundraising success in New York. The BCRA would largely eliminate the RNC's ability to deploy its fundraising resources at the state level. The ability of the RNC to raise funds nationwide is demonstrated by the attached charts that sort the RNC's federal and non-federal contributions by state for calendar year 2000 and year-to-date for 2002 (as of June 28). See RNC Exhibits 2259 and 65, attached as Attachments 13-14 hereto. Both charts show that the RNC raised federal and non-federal money from all 50 states. Id. Again, because the BCRA would prohibit the RNC from raising or transferring any non-federal money, or from assisting states in their fundraising efforts, state parties would lose the tremendous benefit of the RNC's fundraising prowess.

e. Finally, as noted above, my experience has demonstrated to me that donors have fairly firm limits on the amount of money they are willing and able to contribute to political parties. This is a fact of the marketplace that will not change merely because of the BCRA. Because the RNC is so much more prominent than state parties are, my **[*14]** experience suggests that party donors are -- and will continue to be -- inclined to allocate more of their contributions to the RNC than to state parties.

30. I understand that the reformers here argue that the BCRA will actually help the state parties by reducing competition for funds between state and national parties. This suggestion is ill-informed and incorrect, and I know no professional fundraisers who believe it. To begin with, while the BCRA prohibits national parties from raising, spending, or directing non-federal money, state parties could theoretically benefit from this prohibition only if their ability to raise and spend non-federal money currently raised by national parties were unaffected. But I understand that the BCRA severely restricts the ability of state parties to raise and spend non-federal money. Accordingly, the BCRA will intensify the competition between state and national parties for federal money, which will be even more valuable under the BCRA than it is today. State parties may deflect some small percentage of federal money from national parties, but not enough to make up the shortfall. For the reasons set forth above, the national parties will likely retain their greater ability to raise non-federal money -- even though they will fall far short of replacing the non-federal money raised now with federal money -- and state parties will clearly suffer in this competition.

31. The various RNC exhibits attached to this declaration are to the best of my knowledge true and correct

copies of records kept by the RNC in the course of its regularly conducted business activities.

I hereby declare under penalty of perjury that the foregoing is true and correct.

s/

October 3, 2002 Janice L. Knopp

[EXHIBITS OMITTED]

THE TERRANCE GROUP

Research for Decisions in Politics and Public Affairs

Executive Summary

October 11, 2000

To: **Committee for Economic Development**

From: **William Stewart**

Subject: **Key Findings from a Survey of Corporate America about Campaign Finance**

These key findings are drawn from telephone interviews with N=300 'corporate executives' employed by major U.S. corporations. The margin of error associated with a sample of this type is ± 5.8% at the 95% confidence level. Responses were gathered from September 12 to October 10, 2000.

A decisive majority (79%) of Corporate America feels that the campaign finance system is broken and should be reformed.

- This sentiment stands at 75% among those executives whose companies are soft money donors, and 82% among those whose companies do not make soft money contributions. In fact, this figure exceeds 70% among every major demographic subgroup.

There are several reasons that help explain why a majority of executives feel the campaign finance system is broken.

51% *agree that many business executives fear adverse legislative consequences to themselves or their industry if they turn down requests for campaign contributions from high-ranking political leaders and/or political operatives.*

66% *agree that the burdens of fundraising have reduced competition in congressional campaigns and diminished the number of qualified candidates for federal elections*

75% *agree that business leaders believe that political contributions give them an advantage in the shaping of legislation.*

79% *agree that the current campaign finance system has spawned an arms race for cash that continues to get more-and-more out of control.*

- The bottom line is that executives are more likely to believe that Corporate America contributes to political campaigns because it wants something in return (73%) as opposed to the betterment of the political process and discourse (17%).
- Moreover, in response to a separate question, the plurality of executives indicates that the foremost reason why Corporate America contributes to political campaigns is "to avoid adverse legislative consequences" (31%). The next most frequently cited response is "to buy access to influence the legislative process" (23%). These responses are followed by "to promote a certain ideological position" and "to support the electoral process" (22% and 12%, respectively).
- A slim majority (55%) of corporate executives would characterize the amount of money being solicited from American business leaders and corporate treasuries by political candidates and parties as either "excessive" or "high, but not excessive." Thirty-one percent (31%) feels the amount of money being solicited is "moderate," and just 6% would say it is "low."
- These issues are troubling to many executives because they ultimately affect corporate reputations. Seven-in-ten (71%) executives indicate that stories and other reports of big dollar political contributions cause everyday, average Americans to have a less favorable impression of Corporate America.

The net impact of these perceptions is that Corporate America is generally supportive of many different campaign finance reform proposals.

53% *support a publicly financed matching system for small-dollar contributions below $200.*

60% *support a ban on all soft money contributions from corporations, labor unions, and individuals.*

65% *support increasing the limit on individual contributions.*

66% *support voluntary spending limits for federal campaigns.*

- When asked what the individual contribution limit should be, no single response garners a clear plurality. For example, seven percent (7%) feel it should be less than $1,000, 20% feel it should be $1,000 exactly, 16% feel it should be $3,000, 28% feel it should be $5,000, 21% feel it should be $10,000 or more, and another eight percent (8%) have no opinion.
- That said, among those executives who are supportive of an increase in the individual contribution limit, 42% believe the limit should be $5,000.
- These reform proposals generally transcend partisan lines by capturing over 50% support among Republicans, Democrats, and Independents. The exception is the proposed publicly financed matching system, which stands with 45% support among Republican executives as compared to 73% among Democrat executives.

Executives generally see eye-to-eye on issues pertaining to campaign finance regardless of whether or not their company has made a soft money contribution.

- The issue that draws the greatest margin between these two groups is whether or not political contributions give business leaders an advantage in the shaping of legislation. Fully 80% of executives from companies that have not made soft money contributions feel that political contributions give donors a legislative advantage, while only 67% of executives whose companies make soft money contributions would agree with this sentiment.

- On the issue of whether or not soft money contributions from corporations, labor unions, and individuals should be banned, 62% of executives from companies that have not made soft money contributions would support this initiative. Comparatively, support drops only five percentage points among executives whose companies make soft money contributions (57%).
- On the issue of why corporations give soft money contributions, 76% of executives from companies that have not made soft money contributions feel that contributions are made in order to buy access to influence the legislative process. Even among executives whose companies make soft money contributions, 70% would concur with this viewpoint.

This survey also reveals some interesting findings about the demographic composition of Corporate America.

- Forty-two percent (42%) of the executives interviewed for this survey are employed by companies that made a soft money contribution during the 1998 and/or 2000 campaign cycle.
- Eighty-six percent (86%) of the executives interviewed for this survey have personally made a contribution to a political candidate or party.
- Eighty-nine percent (89%) of the executives interviewed for this survey are male.
- Fifty-nine percent (59%) of the executives interviewed for this survey consider themselves Republican, 22% consider themselves Independent, and 19% consider themselves Democrat.
- Forty-one percent (41%) of the executives interviewed

for this survey entered the workforce in the 1960's or earlier, 40% entered the workforce in the 1970's, and 19% entered the workforce in the 1980's or later.

- All of the executives interviewed for this survey were vice presidents or higher within their respective corporations, with 19% being executive officers (e.g. CEO, CFO, COO, et cetera).

CAMPAIGN FINANCE: A Survey of Corporate America

THE TARRANCE GROUP
Study Number: 8417
Field Dates: September 12 - October 10, 2000
Sample: N=300 Senior Business Executives throughout the United States

Hello, I'm __________of The Tarrance Group, a national public affairs research firm. May I please speak with **[NAME ON THE SAMPLE SHEET]**?

IF NAME ON THE SHEET IS NOT AVAILABLE, ASK:

Is there a time when I might be able to speak with [NAME] either later today or tomorrow?

(Schedule a callback and make a notation on the sample sheet) ________________________

IF NAME ON SHEET IS AVAILABLE, ASK:

Hello, I'm _________of The Tarrance Group, a national public affairs research firm. We recently sent you a letter asking for your participation in our national survey of senior business executives regarding campaign finance. This survey will take approximately 9 minutes of your time, **and I want to assure you that your responses are completely confidential and will be used for summary analysis only**. May we begin the survey now?

IF "YES", CONTINUE ONTO Q1

IF "NO, THIS IS NOT A CONVENIENT TIME", ASK:

Is there a better time I might call you back either later today or tomorrow?
(Schedule a callback and make a notation on the sample sheet) ________________________

IF "NO, I DO NOT WANT TO PARTICIPATE AT ALL", SAY:

Thank you for your time.

Thinking about why American businesses contribute to political parties and their candidates...

1. Which of the following comes closest to your own opinion about why Corporate America contributes to political campaigns? Would you say it is... **(ROTATE)**
   - To promote a certain ideological position
   - To support the electoral process as part of its civic duty
   - To buy access to influence the legislative process
   - To avoid adverse legislative consequences

To promote a certain ideological position	21.7%
To support the electoral process	12.0%
To buy access to influence the legislative process	22.7%
To avoid adverse legislative consequences	31.0%
NONE OF THE ABOVE **(DNR)**	2.3%
OTHER **(Specify) (DNR)**	8.3%
UNSURE / REFUSED **(DNR)**	2.0%

As you may be aware, the current campaign finance laws prohibit corporations and trade unions from directly contributing to political campaigns. However, they are allowed to make unlimited contributions to political committees, like the Republican National Committee and the Democrat National Committee. These types of contributions are often called "soft money" contributions.

2. Thinking about this information, which one of the following statements comes closest to your own opinion? **(READ AND ROTATE)**

   (Some people / Other people) say that... American corporations give large "soft money" contributions out of a sense of civic duty.

   (Other people / Some people) say that... American corporations give large "soft money" contributions to buy access in order to influence the legislative process.

Again, which viewpoint comes closest to your own?

Contribute out of a sense of civic duty	17.3%
Contribute to influence the legislative process	73.3%
NEITHER **(DNR)**	5.3%
BOTH **(DNR)**	3.0%
UNSURE/REFUSED **(DNR)**	1.0%

Still thinking about the role of Corporate America in this process...

3. How much pressure is placed on American business leaders to make large political contributions?

A lot	20.3%
Some	53.7%
Not very much	20.3%
None whatsoever	3.3%
OTHER **(Specify) (DNR)**	0.0%
UNSURE / REFUSED **(DNR)**	2.3%

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4. Generally speaking, do you feel the level of pressure being placed on American business leaders to make large political contributions has increased, decreased, or stayed about the same since the last presidential election in 1996?

IF "INCREASED" / DECREASED", ASK:

And, do you feel it has (increased / decreased) a lot or just somewhat?

Increased / a lot	12.3%
Increased / somewhat	26.0%
Stayed about the same	55.3%
Decreased / somewhat	1.3%
Decreased / a lot	0.3%
UNSURE / REFUSED **(DNR)**	4.7%

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5. And, how would you describe the amount of money being solicited from American business leaders and their corporate treasuries by political candidates and parties? Is it... **(ROTATE)**

Excessive	22.3%
High, but not excessive	33.0%
Moderate	30.7%
Low	6.3%
UNSURE/REFUSED **(DNR)**	7.7%

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6. To what extent do you think American business leaders are concerned that their contributions are being used to fund negative political ads? Would you say they are... **(ROTATE)**

Extremely concerned	7.3%
Somewhat concerned	40.0%
Not too concerned	37.7%
Not concerned whatsoever	12.7%
UNSURE/REFUSED **(DNR)**	2.3%

Thinking for a moment about the recent political conventions...

There were several stories in the news about the amount of corporate spending at these events, including stories about groups of donors who had contributed in excess of $250,000.

7. When everyday, average Americans see these stories and other reports of big-dollar political contributions, do you think it has an impact on the impression they have of **Corporate America**? Specifically, do you think they have a more favorable impression of Corporate America, a less favorable impression of Corporate America, or doesn't it make any difference at all?

IF A CHOICE IS MADE, ASK:

And, do you feel strongly about that?

More favorable/strongly	0.7%
More favorable/somewhat	1.3%
UNSURE/REFUSED **(DNR)**	1.7%

NO DIFFERENCE **(DNR)**	25.3%
Less favorable/somewhat	37.7%
Less favorable/strongly	33.3%

Now, I am going to read you a series of statements that some people have made regarding our campaign finance system. For each one, please tell me whether you agree or disagree with the statement. Here is the first one...

(RANDOMIZE LIST)

IF A CHOICE IS MADE, ASK: *And, do you feel strongly about that?*

8. The burdens of fundraising have reduced competition in congressional campaigns and diminished the number of qualified candidates for federal elections.

AGREE		UNSURE	DISAGREE	
Strng	Smwhat	REFUSED (DNR)	Smwht	Strng
41.0%	24.7%	4.3%	21.7%	8.3%

9. Many business executives fear adverse legislative consequences to themselves or their industry if they turn down requests for campaign contributions from high-ranking political leaders and/or political operatives.

AGREE		UNSURE	DISAGREE	
Strng	Smwhat	REFUSED (DNR)	Smwht	Strng
17.3%	33.3%	3.3%	29.3%	16.7%

10. Generally speaking, business leaders believe that political contributions give them an advantage in the shaping of legislation.

AGREE	UNSURE	DISAGREE	AGREE	UNSURE
25.3%	49.3%	2.7%	15.0%	7.7%

11. The current campaign finance system has spawned an arms race for cash that continues to get more-and-more out of control.

AGREE	UNSURE	DISAGREE	AGREE	UNSURE
43.3%	35.3%	1.7%	14.7%	5.0%

12. The interests of everyday, average Americans are ignored because campaigns have become too dominated by large corporations.

AGREE	UNSURE	DISAGREE	AGREE	UNSURE
16.0%	15..0%	2.0%	24.3%	42.7%

(END RANDOMIZATION)

Generally speaking...

13. To what extent are you concerned about a decline in voter participation in the electoral process?

Extremely	21.0%
Very	32.0%
Somewhat	35.0%
Not at all	11.7%
UNSURE / REFUSED **(DNR)**	0.3%

Now, thinking about the campaign finance system overall.

14. Do you believe that the current campaign finance system is broken and should be reformed?

Yes	78.7%

No	18.0%
UNSURE / REFUSED **(DNR)**	3.3%

As you may or may not know, the individual contribution limit of $1,000 per candidate was established in 1974 by the *Campaign Finance Reform Act* and has not been adjusted since then...

15. Knowing this information, would you support or oppose increasing the limit on individual contributions?

IF A CHOICE IS MADE, ASK:

And, do you feel strongly about that?

Support/strongly	39.7%
Support/somewhat	25.7%
UNSURE/REFUSED **(DNR)**	6.7%
Oppose/somewhat	11.7%
Oppose/strongly	16.3%

Still thinking about the limits on individual contributions to political candidates -

16. What do you think should be the individual contribution limit to political candidates? **(READ LIST)**

Less than $1,000	7.0%
$1,000	20.3%
$3,000	16.0%
$5,000	28.0%
$10,000	10.7%
More than $10,000	10.0%
UNSURE/REFUSED **(DNR)**	8.0%

There have been many solutions offered to amend our federal campaign finance system. Please listen as I read you some of the proposals, and for each one, tell me whether you support or oppose the idea. Here's the first one...

IF A CHOICE IS MADE, ASK: *And, do you feel strongly about that?*

17. A publicly financed matching system for small-dollar contributions below $200 to encourage broader electoral participation and reduce the reliance on large contributions

SUPPORT		UNSURE/	OPPOSE	
Strng	Smwhat	REFUSED (DNR)	Smwht	Strng
23.7%	29.0%	4.7%	16.0%	26.7%

18. Voluntary spending limits for federal campaigns.

SUPPORT	UNSURE/	OPPOSE	SUPPORT	UNSURE/
Strng	Smwhat	REFUSED (DNR)	Strng	Smwhat
35.0%	30.7%	5.0%	14.7%	14.7%

19. Keeping in mind that "soft money" refers to unlimited, and largely unregulated political contributions to political committees. Would you support or oppose a ban on all unlimited "soft money" contributions from corporations, labor unions, and individuals.

SUPPORT	UNSURE/	OPPOSE	SUPPORT	UNSURE/
Strng	Smwhat	REFUSED (DNR)	Strng	Smwhat
42.0%	18.0%	2.3%	18.7%	19.0%

Just a few final questions for statistical purposes only...

20. Have you ever personally made a contribution to a political candidate or party?

Yes	85.7%
No	13.7%
REFUSED **(DNR)**	0.3%
UNSURE **(DNR)**	0.3%

21. In what year did you enter the workforce? **(RECORD EXACT YEAR)**

1960s or earlier	41.0%
1970s	40.3%
1980s or later	18.7%

22. Generally speaking, do you think of yourself as a Republican, a Democrat, an Independent, or something else?

IF REPUBLICAN OR DEMOCRAT ASK:

Would you call yourself a strong or not very strong(Republican/Democrat)?

Republican/strong	35.7%
Republican/not strong	19.3%
Lean Republican	3.7%
Independent	18.7%

IF INDEPENDENT OR ANYTHING ELSE, ASK:

Do you think of yourself as closer to the Republican or Democrat Party?

Lean Democrat	2.0%
Democrat/not strong	8.0%
Democrat/strong	8.7%
NO PREFERENCE **(DNR)**	1.0%
OTHER **(DNR)**	1.3%
UNSURE/REFUSED**(DNR)**	1.3%
NOT REGISTERED TO VOTE **(DNR)**	0.3%

Thank you very much for participating in this survey. We appreciate your time.

D1. RECORD GENDER BY OBSERVATION:

Male	88.7%
Female	11.3%

D2. RECORD JOB TITLE / POSITION FROM SAMPLE SHEET:

Executive Officer (e.g. CEO, CFO, etc.)	19.0%
VP of Government Affairs / Public Affairs	18.0%
Other Corporate Executive	63.0%

D3. RECORD COMPANY SOFT MONEY CONTRIBUTION RECORD FROM 1997 TO 2000:

Soft money donor	42.0%
Non-donor	58.0%

[1 (11 PCS/ NRA 1)]

DECLARATION OF WAYNE LAPIERRE

1. I am the Executive Vice President of the National Rifle Association (the "NRA"). As such, I have ultimate responsibility for the operations of the NRA. I have held this position since 1991. For the five years prior to my appointment to this position, I was the Executive Director of the NRA's Institute for Legislative Action. At the same time, I was the Chairman of the NRA's Political Action Committee, the Political Victory Fund.

2. The primary purpose of the NRA is to preserve and protect the Second Amendment's guarantee that individuals shall have the right to "keep and bear arms." *See* Exhibit 1 (NRA 01469-01527). Additionally, the NRA promotes public firearm safety, trains law enforcement agencies in the use of firearms, sponsors shooting competitions, and advances hunter safety. *Id.* Indeed, the NRA has spent over $20 million on gun safety in the last ten years.

3. The NRA's exercise of its free speech rights is critical to the fulfillment of its mission. The Second Amendment and the NRA are at the center of a culture war. In recent years, liberal politicians and their friends and allies in the media industry have sought to change [2 (11 PCS/ NRA 2)] American culture, particularly concerning the individual right to own and use firearms. They have tried to demonize the NRA and denigrate the Nation's heritage of hunting and of responsible gun ownership. This campaign has been based on crude and inaccurate stereotypes and outright lies about the NRA and its positions. In response to such attacks, the NRA has joined this battle. If the Republic's first freedom--the right to keep and bear arms--is to be preserved, the NRA must defend our common cultural heritage, including the important role that responsible gun ownership has played in the lives of countless Americans since the Nation's founding.

4. The Bipartisan Campaign Finance Reform Act ("BCRA") effectively cedes the entire battlefield in this cultural war to the broadcast media corporations and the politicians. It allows federal candidates and the big media conglomerates to say whatever they want about the NRA in the months before an election and shields them from any effective response by prohibiting the NRA from uttering the name of its attackers. Working in tandem, anti-gun politicians and their friends in the media can attack the NRA, and the NRA will have to stand by silent, unable to respond directly to its attackers. The law thus stacks the deck in favor of huge for-profit media corporations, such as Disney, General Electric, Viacom, and AOL/Time Warner and their political allies. These media conglomerates can give as much free airtime to their political allies as they like. They can also tout anti-gun politicians in news stories to their hearts' content. The value of such free airtime is enormous. And no matter how unfairly the NRA is attacked by politicians working through the media, the NRA will be unable to respond directly to its attackers.

5. Access to paid broadcasting media has been critical to defending the integrity of the NRA's reputation. Anti-gun politicians frequently engage in unprovoked attacks on the NRA in an effort to generate political support. Such attacks are typically based on distortions about the NRA's positions. In mounting these challenges to the NRA, politicians have far more access [3 (11 PCS/ NRA 3)] to free airtime than do the NRA and other similar organizations. When the NRA is permitted to speak on the national media, it rarely has a chance to get the full side of its story out. Thus, the ability to buy airtime is essential for the NRA to respond to such attacks, whenever they occur.

6. The NRA's access to paid media serves two other critical functions. First, television and radio are critical media for educating the public about Second Amendment issues. The mainstream media is dominated by anti-gun interests and simply does not report on many legislative pro-

posals and other significant events that impact the interests of America's 80 million gun owners.

7. Second, the NRA's television and radio advertising is essential to the NRA's efforts to hold politicians accountable on legislative and public policy issues related to the Second Amendment. Increasingly, when election time comes around, some anti-gun politicians pretend to be in favor of the Second Amendment when it serves their interests. The NRA's advertising seeks to identify the inconsistencies between these politicians' rhetoric and their actual records in public office. In the paragraphs below, I detail the ways in which the NRA's television and radio advertising and programs have furthered each of these important interests.

I. The NRA's Television Broadcasts Educate The Public

8. Educating the public about issues relating to gun ownership plays a critical role in preserving Second Amendment rights. A well-informed citizenry is the best defense against infringement of the protections found in the Bill of Rights. If citizens are not informed about the wide variety of threats to Second Amendment rights, they will not be in a position to act effectively to mobilize and make their opposition to such policies known.

9. The national media has willfully ignored important news stories that bear on individuals' right to keep and bear arms. There are numerous examples at home and abroad of im[4 (11 PCS/ NRA 4)]portant developments relating to the registration and confiscation of guns that have gone virtually unreported by the media conglomerates that control the television industry in this country. In response to this blackout on coverage of issues of importance to the NRA and its members, the NRA decided to embark on an extensive series of in-depth reports on issues of importance to gun owners. We modeled our broadcasts on the type of in-depth coverage provided by television news magazines such as 60 Minutes. We used a 30-minute format that permitted detailed and thorough treatment of the topics that we covered. The same reporter, Ginny Simone, conducted all of the interviews for these programs. Ms. Simone is a former television anchor and reporter who is now an employee of the Mercury Group, a well-respected media company based in Alexandria.

10. In the year 2000, the NRA developed and ran several such 30-minute educational broadcasts. The NRA's programs ran over 11,000 times during the course of 2000. *See* Exhibit 2 (NRA-ACK 03301-03304). The broadcasts were aired both on national cable channels and in targeted markets in virtually every state in the Union. *See id.* It cost the NRA over $13 million to pay for these broadcasts. *See id.*

11. Each of the programs had several segments. As detailed below, the segments addressed a variety of important topics touching upon both national and international trends that threaten gun ownership rights. Time and again, viewers of these programs have told me that before seeing our programs they had no idea about the issues we covered in these broadcasts. Viewers across the country have repeatedly expressed their gratitude that the NRA brought this information to their attention. Clearly, these ads have served an important purpose in educating and informing viewers.
[5 (11 PCS/ NRA 5)]

12. One of the NRA's 30-minute television programs that aired in 2000 was entitled "California." *See* Exhibit 3 (NRA-ACK 00005). This program covered the increasing efforts to restrict private ownership of firearms in California. The program described the inception of gun control legislation in California in 1989 and its dramatic expansion in subsequent years. The broadcasts included the specific attacks against NRA by the sponsors of the legislation at the time of its passage by the California legislature. The program showed interviews with gun owners in California discussing their concern that their rights were being increasingly restricted. Numerous interviewees described confusion, even on the part of experts and authorities, regarding what is and is

not legal under the new laws. One competitive target shooter explained that she risked criminal prosecution in California simply because the customized firearm she competed with technically qualified as an assault weapon. And the news commentary reported that though convicted felons cannot be forced to register a firearm because doing so violates their Fifth Amendment rights against self-incrimination under the Supreme Court's decision in *Haines v. United States*, law-abiding citizens can and are being forced to do precisely that.

13. During the entirety of the 30-minute program, there was only one fleeting reference to a federal candidate for office. Specifically, during a short segment urging viewers to join the NRA and describing the benefits of membership, a cover of an issue of the NRA's magazine "First Freedom" depicting Vice President Gore, then a presidential candidate, flashed on the screen for several seconds.

14. The program detailing California's restrictions on gun ownership ran over 800 times in California from August 29, 2000 through November 5, 2000. *See* Exhibit 2. None of these airings were intended to influence a federal election. Indeed, California was not in play in [6 (11 PCS/ NRA 6)] the 2000 presidential election. Vice President Gore was widely, and correctly, viewed as a certain winner in California.

15. During 2000, the NRA also aired a broadcast entitled "It Can't Happen Here." *See* Exhibit 4. NRA-ACK 00012. This program was substantially similar to the "California" program, with only minor variations. This show was run throughout the United States from August through October of 2000. *See* Exhibit 5 (NRA-ACK 06539, 06323, 07557, 12110). Although Vice President Gore's image on the cover of the NRA's magazine appears on the screen for a few seconds during this 30 minute broadcast, this broadcast was not intended to influence a federal election in any way.

16. In 2000, the NRA also paid to televise a program entitled "The Truth About Prosecution(s)," Exhibit 6 (NRA-ACK 00004), that ran for nearly 30 minutes and specifically responded to various proposals and comments of President Clinton relating to private ownership of firearms and Second Amendment rights. This broadcast was aired on numerous occasions in various markets around the country from June through October 2000. See Exhibit 7 (NRA-ACK 07838, 07909, 06372). In the first segment, Charlton Heston recited various assertions by President Clinton about how he has promoted gun safety while the NRA has opposed it. Mr. Heston responded to each one with facts and statistics showing that prosecutions declined under Clinton's administration and that the supposed effectiveness of the Brady Bill that President Clinton trumpets was belied by the lack of actual arrests and prosecutions. In addition, Charlton Heston corrected President Clinton's repeated misrepresentations that Congress "can't act" "because of the heat the NRA has put on them," that the NRA is against anything that would make society safer even as 13 children die each day from gun accidents, and that the reason other countries have lower rates of gun-related deaths is "because they don't have an NRA." These [7 (11 PCS/ NRA 7)] were outrageous and grotesque distortions of the NRA's record that nonetheless received extensive media coverage and threatened to carry great weight with the American public. On behalf of its members, the NRA was obliged to respond to such comments on a similar scale.

17. It is absolutely paramount to the NRA's mission that it respond to such charges by broadcasting its own speech directed at the charges and the source from which they came; and the NRA used this first segment of its broadcast to do precisely that.

18. The second segment centered on extensive, unscripted, on-the-scene interviews with American citizens. In it, the reporter visited low-income projects in the inner-cities that are ravaged by high rates of violent crime and in which law-abiding residents are deprived by firearms restrictions of the ability to protect themselves. Those interviewed complained that only they--the law abiding citizens--are de-

prived of firearms, while gangs and criminals have ready access to them. The report also explained that HUD (Housing & Urban Development) was preparing to sue the gun industry even as Attorney General Janet Reno failed to undertake prosecutions that would enforce federal firearms laws that are on the books. The third segment then reprises the first segment. The overriding purpose of this broadcast was to defend the NRA and to respond to the allegations made by President Clinton.

19. After the 2000 election, the NRA continued to run 30 minute programs designed to educate the public. In 2001, the NRA paid to televise the "NRA Report on the UN," Exhibit 8 (NRA-ACK 00009), that ran for nearly 30 minutes on numerous occasions and in various markets throughout the country. This broadcast highlighted the conflict between the international effort to restrict private ownership of firearms, spearheaded by the United Nations, and the cherished right of Americans to keep and bear arms. I opened the show by talking about the great generation of Americans who saved the world for freedom in World War II and the prospect that the next generation of Americans may be called upon to do the same thing. This segment then discussed the importance and potential of [8 (11 PCS/ NRA 8)] the next generation of American children and the importance of raising them correctly and showing them the meaning of freedom. The next segment described how the United Nations is moving far beyond its initial charter and formulating all-encompassing global standards that threaten to replace those contained in the Bill of Rights. Interviewees from the Philippines and Mexico recounted their experiences growing up under oppressive regimes that deprived them of the firearms with which they might protect themselves. Reports from around the world demonstrate that firearm bans in Australia, England and other countries have backfired, with crime escalating but governments refusing to admit it. Congressman Bob Barr then commented that the greatest threat posed by the UN is that it will undermine the freedoms we

treasure. Bob Barr added that the NRA can play an important role as a nongovernmental observer in monitoring what the UN is doing. In the final segment, I explained that the international movement to ban guns has reached our shores, taking root in California. I warned that the UN may soon try to impose this global policy upon us.

20. In 2001, the NRA also paid to televise a program that surveyed efforts abroad to restrict firearms and warned of the prospect that those efforts might reach American shores. *See* Exhibit 9 (NRA-ACK 00019). The first segment covered the imposition of firearm restrictions in South Africa and the complaints of law-abiding firearm owners who have had their rights curtailed in the face of civil disorder and high crime against which they can no longer defend themselves. The second segment covered the imposition of firearm restrictions in Canada and complaints of firearm owners along the lines of those in South Africa, echoing warnings to Americans that they should vigilantly defend their rights lest they suffer the same fate. The third segment covered the massive government buy-back of guns in Australia and the complaints and [9 (11 PCS/ NRA 9)] warnings of firearm owners there. Without our paid programming, these important stories would not have been covered.

21. The NRA has also run advertisements to educate the public about pending legislation. Often such commercials will mention the name of a federal officeholder. For example, in 1994, the NRA ran a series of more than ten, thirty-second advertisements, Exhibit 10 (NRA-ACK 0003), featuring Charlton Heston responding to President Bill Clinton's assertions in favor of proposed legislation, a so-called "Crime Bill," that he was supporting. In each of these advertisements, Charlton Heston would say that, "what Bill Clinton's not telling you about the Crime Bill should be a crime." Charlton Heston pointed out that Bill Clinton was misrepresenting crucial aspects of the Crime Bill and corrected various misrepresentations in different advertisements, explaining that it would hire twice as many new social workers as

new police officers, spend nine-billion dollars on social welfare programs, release drug dealers serving mandatory sentences, and protect the privacy of violent sexual predators who are released.

22. The NRA has also made extensive use of radio broadcasts to address legislative policy issues. In early 2000, for example, the NRA paid for a series of radio spots noting that the Clinton-Gore administration had finally acknowledged the need to increase prosecutions for existing gun laws. *See* Exhibit 11 (NRA 03664). The ads emphasized that this long overdue change in policy provided no justification for enacting more gun laws. Although these ads made reference to the "Clinton-Gore" administration and were run in the 30 days prior to Democratic primaries, they were not intended to influence the Democratic presidential primaries, given that the NRA was indifferent to outcome of the election contest between Al Gore and Bill Bradley.

[10 (11 PCS/ NRA 10)]

II. Defending The NRA Against Political Attacks

23. The NRA's paid programming on television and radio also serves a vital function in permitting the NRA to defend itself against political attacks. In recent years, many politicians have repeatedly leveled false and malicious accusations against the NRA. In the face of such assaults, the NRA has no choice but to defend itself. To the extent the attacks are aired on television and radio, it is critical that the NRA has access to paid political programming promptly to get its message out to the same audience that heard the charges made against the NRA.

24. In responding to politically motivated attacks by candidates, the NRA is at a distinct disadvantage to its attackers. Incumbent politicians, and even candidates for office, have far more access to free national media than does the NRA. President Clinton and Vice President Gore took full advantage of their ability to go on national television to launch such attacks. Although the NRA does the best it can to defend itself, the NRA simply does not have the financial resources necessary to respond adequately through national television advertising campaigns. The large media companies have a tremendous financial advantage over the NRA and can spend far more than the NRA to promote their candidates and their issues. Additionally, given the media's general bias against the NRA and its positions, the NRA does not have a fair and adequate opportunity to get its side of the story out even when the NRA is afforded an opportunity to respond on television.

25. The most prominent recent example of this phenomenon occurred in the year 2000. During the course of that year, it became apparent that President Clinton and Vice President Gore had embarked upon a political strategy to demonize the NRA and try to poison the culture against the interests of gun owners. They hoped that these efforts would lead to further restrictions on gun ownership. In furtherance of this objective, President Clinton made ample [11 (11 PCS/ NRA 11)] use of his access to free national media time. An example illustrates both the types of attacks leveled at the NRA by politicians and the critical role that the NRA's ability to buy airtime played in permitting the NRA to get its side of the story out to the public.

26. On March 2, 2000, President Clinton went on NBC's Today Show ostensibly to address a recent tragic shooting in Flint, Michigan. The incident involved a child living in a crackhouse who found a stolen gun there and who then used it on a classmate. The Today Show deviated from its normal format by skipping the news and interviewing President Clinton for 15 minutes. *See* Exhibit 12 (NRA-ACK 17894). Although the interview began with a series of comments about the case in Flint, Michigan, the President quickly turned his attention to the NRA. He made several false statements during this interview. For example, he claimed that "the NRA is against anything that requires anybody to do anything as a member of society that helps to

make us safer." In short, President Clinton endeavored to lay the blame for the types of incidents that occurred in Flint on the NRA and its defense of Second Amendment rights. At no time was the President subjected to any questioning by Today Show host Katie Couric that would have exposed the false nature of his attacks on the NRA.

27. President Clinton's appearance on the Today Show amounted to a political mugging of the NRA. Although I was granted a short responsive interview on the Today Show, I was not given equal time, and I was subjected to hostile questioning throughout the interview. Based on my experience over the years, NBC's treatment of the NRA is typical of that of other television networks and other major media companies.

28. In order to get our side of the story out, the NRA had to develop a media strategy that centered upon a series of paid television advertisements that responded to President Clinton's outrageous misrepresentations about the NRA. To that end, I worked with Angus [12 (11 PCS/ NRA 12)] McQueen of Ackerman McQueen to produce and air a series of 13 commercials featuring Charlton Heston. *See* Exhibit 13 (NRA-ACK 00002). In these spots, Mr. Heston both defended the NRA's position on safety issues and questioned President Clinton's truthfulness.

29. The NRA did not have the funds necessary to launch a nationwide advertising campaign that would reach the same audience that heard President Clinton's interview and his false accusations against the NRA. Accordingly, we sought to develop an ad campaign that would elevate the controversy between the NRA and President Clinton to such a degree that I would be invited onto national media outlets and would thus be able to defend the NRA before a national audience. Critical to the strategy was our ability to reference the specific misrepresentations made by President Clinton and to refer to him by name. Our media campaign succeeded, and I was ultimately invited to appear on several nationwide news shows during which I was able to respond at least in part to the President's assault on the NRA. Without access to paid media and without the ability to refer to President Clinton by name, the NRA would not have been able to gain access to the national television audience that had heard President Clinton's gross misstatements.

30. Another example of a media ambush on the NRA was the ABC News Special entitled "The Gun Fight" that ran on the eve of the 2000 general election. *See* Exhibit 14 (NRA-ACK 17893). Much of the show focused on the NRA's treatment of Bart Stupak, a member of Congress who represents rural Michigan. The show's host, Peter Jennings, portrayed Mr. Stupak as a stalwart defender of gun rights. The thrust of the piece was that the NRA had unfairly targeted Stupak for defeat because of one vote he had cast. Stupak was allowed to paint himself as a victim furthered by misrepresenting the positions he had taken. The NRA was not given an [13 (11 PCS/ NRA 13)] opportunity to clarify Stupak's actual positions. The end result was a "news" story that unfairly cast the NRA in an unfavorable light.

31. Politicians also use their campaign funds to attack the NRA. There are dozens of recent examples of such ads. *See* Exhibit 15 (service by facsimile). A recent example from the current election cycle illustrates the type of attacks to which the NRA is constantly subjected. Mark Shriver was a candidate in the Democratic primary for the 8th congressional district in Maryland. Both he and his opponent, Chris Van Hollen, attacked the NRA in a series of television commercials. *See* Exhibit 16 and 17 (service by facsimile). The most egregious of these assaults that I witnessed was contained in the following attack ad paid for by Shriver:

> Mark Shriver: I stood up on the floor of the House of Delegates this year and defeated a piece of legislation backed by the NRA that would have allowed convicted felons to own handguns. That's bad public policy. We shouldn't allow people who are convicted of

> domestic violence to own a handgun. We need trigger locks on our handguns, we need to eliminate the gun show loophole, we need to make gun licensing the law of the land. So I welcome the fight from the NRA because nothing would give me more pleasure than defeating the NRA.

Exhibit 16 (service by facsimile).

32. This is a gross misstatement given that the NRA does not support allowing convicted felons to carry firearms. The NRA should be able to defend itself against such falsehoods by responding directly to the attacker. And yet, given that the ad was aired during the 30 days prior to the Democratic primary, the Bipartisan Campaign Finance Reform Act ("BCRA"), if it were in effect, would have criminalized any response from the NRA in which Mr. Shriver was referred to by name.

33. Another example of this sort of attack is an ad that was run by Betty McCollum, a candidate for the House of Representatives from Minnesota. She ran the following ad in October 2000:

[14 (11 PCS/ NRA 14)

> Betty McCollum: I have an 8-year old friend. He told his mom and Dad he's afraid of guns, guns in school. This is wrong. Gun safety is plain, common sense. We need trigger locks, criminal background checks for every gun purchased and tougher penalties for anyone who sells a handgun to a minor. If it's a choice between catering to the NRA or protecting our children, that's an easy choice. In Congress, I'll fight for what matters to you because it matters to my family too.

See Exhibit 18 (service by facsimile). This ad attacks the NRA by creating the false impression that the NRA is not concerned with gun safety or the safety of children. Nothing could be further from the truth. And under the new law, as I understand it, the NRA will not be able to respond to the attacker by name. A representative sample of other similar attack ads against the NRA is attached as Exhibit 15.

34. For several reasons, it is utterly irrelevant that the Political Victory Fund can theoretically respond to such attacks on the NRA. First and foremost, the NRA and the Political Victory Fund are distinct entities. The attacks are aimed at the NRA itself and do not even mention the Political Victory Fund. Second, as a political action committee, the Victory Fund expends its funds to influence the outcome of federal elections. That is the purpose for which donors contribute to the Political Victory Fund. Given that the NRA and the Political Victory Fund were indifferent as to which candidate won the Democratic primary in Maryland's 8th congressional district, there is no basis for requiring the Political Victory Fund to spend dollars on ads referring to candidates on whom it is indifferent. When the NRA is merely defending its reputation, there is no justification for forcing it to spend dollars raised by the PAC. Third, candidates have two distinct advantages in this battle: (1) their access to friendly media coverage and (2) ability to draw upon their personal wealth to attack the NRA. Given this access to unregulated sums of money and air time, there is no justification for creating an unlevel playing field in which the NRA is effectively gagged and the Victory Fund is handcuffed by contribution limitations, while [15 (11 PCS/ NRA 15)] candidates can mount a major television campaign with a personal single check or a phone call to a media executive.

35. The NRA's PAC also has far more limited resources than the NRA itself. Many NRA members simply

cannot afford to make a contribution to the Political Victory Fund. The NRA's members are overwhelmingly comprised of ordinary middle class Americans. Through the years, innumerable members have told me that they would like to do more to help further the NRA's political agenda, but they simply cannot afford to give anything more than their membership dues of $25 a year. For many of these individuals, they must make sacrifices just to pay their annual dues. If these members are not permitted to pool their resources in the form of annual membership dues, they will effectively be excluded from the political dialogue that takes place on the Nation's airwaves. Thus, if only the NRA's PAC is permitted to speak in the weeks leading up to elections, those citizens with the fewest resources will be silenced and shut out of our democratic process.

III. Defending The NRA Against Media Attacks

36. In recent years, the media has increasingly worked with anti-gun advocates to smear the NRA. This entrenched hostility to the NRA is part of a broad, systemic bias against conservative causes that pervades the major media companies and their coverage of the news. This liberal bias distorts what is supposed to be objective news reporting by the major network broadcasters, as well as by the print media, by slanting the presentation of all news stories to portray conservatives as wrong-headed or extreme, while portraying a liberal perspective as moderate, reasonable, and mainstream.

37. This widespread prevalence of this liberal bias has recently been exposed in dramatic fashion by the publication of a book entitled *Bias: A CBS Insider Exposes How The Media* [16 (11 PCS/ NRA 16)] *Distort The News*, by Bernard Goldberg, who worked as a reporter for CBS News for twenty-six years. *See* Exhibit 19 (NRA-MDEE 0556-0831). This book chronicles in detail the extent of the liberal bias in the major media, the effect this bias has on the way in which news is portrayed and hence upon the way in which the world is perceived by the viewing public, and the way in which the media insiders work towards keeping the fact of their bias hidden from the general public.

38. Another good source for describing the existence of liberal media bias is the Media Research Center. For example, this center published a Special Report on January 5, 2000, entitled "Outgunned: How The Network News Media Are Spinning The Gun Control Debate." This report, and its Executive Summary, have also been produced in this litigation, *see* Exhibit 20 (NRA 09730-09745). In this Special Report, the Media Research Center explains how a study of morning and evening news stories on ABC, NBC, CBS, and CNN over a two year period between 1997 and 1999 revealed the following: (1) 357 stories advocated more gun control, whereas only 36 opposed further gun control; (2) evening news shows favored gun control *eight times* more often than they opposed gun control; (3) morning news shows favored gun control *thirteen times* more often than they opposed gun control; (4) anti-gun soundbites appeared more than twice as frequently as pro-gun soundbites; (5) news programs were twice as likely to feature pro-gun control activists as guests than pro-gun rights activists; (6) themes that are considered pro-gun – such as the decline in federal gun prosecutions under the Clinton Administration, or the positive use of guns in self-defense – were barely covered in the 653 stories sampled.

39. An example of the collaboration between anti-gun politicians and the media can be seen in the coverage given to the Million Mom March, which occurred in the spring of 2000. The sponsors of that event worked closely with the Clinton White House and were able to gain enormous exposure through their access to free national media. Organizers of the Million Mom [17 (11 PCS/ NRA 17)] March repeatedly attacked the NRA. In response to this assault, the NRA produced and aired a program that examined the forces and influences behind the Million Mom March.

This broadcast was entitled "MMM/ Prosecution." Exhibit 21 (NRA ACK 00007).

40. The program criticized the Clinton Administration for pursuing new gun control measures rather than prosecuting criminal violations of laws already on the books. The program ran for nearly 30 minutes and aired on numerous occasions in various markets around the country. Charlton Heston introduced the first segment, which described various celebrities and politicians who want to confiscate the guns of ordinary citizens while ensuring that their personal bodyguards retain them. This first segment contrasted Rosie O'Donnell's insistence at the Million Mom March that "only police should have guns," with her bodyguard's application for a permit to carry a concealed handgun, and similarly contrasted Senator Dianne Feinstein's stance against carrying handguns with a permit she once held to carry a handgun for personal protection. The second segment cited a study by Syracuse University showing that federal firearm prosecutions had drastically declined by 44% between 1992 and 1998, and reported on crimes that resulted from failure to prosecute. The third segment then repeated the initial segment. The program contains limited reference to candidates for federal office. Specifically, the first segment says that "President Clinton, Hillary [then a candidate for the Senate], and Schumer" were all out there at the Million Mom March "for their own political gain," and the second segment chastises the "Clinton/Gore White House" for having "turned its back on real justice." The overarching purpose of this program was to generate new membership and support for the NRA and to ensure that its message was heard in response to prominent media campaigns against it. The program was not intended to influence a federal election.

[18 (11 PCS/ NRA 18)]

IV. Holding Politicians Accountable

41. The NRA also runs paid television and radio broadcasts to hold politicians accountable for their actions. Such broadcasts are the only way the NRA can inform the public about the discrepancies between candidates' words and their actions. Given that the general public's attention on important public policy issues is at its zenith during the weeks leading up to an election, the NRA's efforts to hold anti-gun politicians accountable for their actions is critically important during this period.

42. An example of the NRA's efforts to hold politicians accountable for their actions is the NRA's 30-minute broadcast detailing Al Gore's position on the Second Amendment. The Clinton-Gore Administration had been bashing the NRA throughout the entire year. This was part of their apparent political strategy to demonize and marginalize the NRA. It didn't work. And so Vice President Gore tried to flip-flop and portray himself as a pro-Second Amendment candidate just prior to the beginning of his general election campaign. In a statement published by the New York Times on August 10, 2000, one of Al Gore's top campaign spokesmen, Douglas Hattaway, stated that "we support Second Amendment rights and want to protect those rights for law-abiding gun owners and sportsmen, while promoting common-sense policy to keep guns away from kids and criminals." *See* Exhibit 22 (NRA 11330-11331). Remarkably, less than two weeks after making this statement, on August 22, 2000, the top constitutional lawyer in the Clinton-Gore Administration, Solicitor General Seth Waxman, unequivocally stated that it was the administration's position that individuals do not possess a Second Amendment right to keep and bear arms. Specifically, General Waxman's letter stated: " 'it must be considered as settled that there is no personal constitutional right, under the Second Amendment, to own or to use a gun.' " *See* Exhibit 23 (NRA-PVF 00468). Nevertheless, the Gore campaign continued to por[19 (11 PCS/ NRA 19)]tray their candidate as a proponent of the Second Amendment. When the NRA questioned this conten-

tion, the Gore campaign's operatives attacked the NRA's credibility. The Gore campaign's allies in the unions distributed leaflets denouncing the NRA and claiming that the NRA was distorting Gore's record. As the NRA did not have access to union membership rolls, the only way to defend ourselves against this attack was to buy airtime.

43. The NRA could not allow Al Gore to engage in such blatant hypocrisy. If he and his top lawyers thought that the Second Amendment was a dead letter, then the American people had a right to know about it. And none of the major media outlets were reporting this story. In the face of this reality, NRA produced a 30-minute broadcast that brought this information to light. *See* Exhibit 24 (NRA-ACK 00010).

44. In the broadcast, Ginny Simone, the reporter on all the broadcasts referenced earlier, traveled into areas with a heavy union presence and interviewed citizens, union members and their families. The interviews were neither scripted nor pre-arranged. The citizens in the broadcast expressed their candid belief that George Bush will protect their firearm rights whereas Al Gore will not, and many cited that issue as their central concern for the 2000 presidential election. In an intervening segment, I quoted from the Clinton Administration's position in the *Emerson* case, in which the then-Solicitor General stated the Administration's position that "the Second Amendment does not extend an individual right to keep and bear arms." And I explained that if Al Gore were to win the election and have the opportunity to appoint Supreme Court Justices such as "Hillary Clinton, Chuck Schumer, and Dianne Feinstein" who agree with his Justice Department officials regarding the scope of the Second Amendment, that would foreclose firearm owners from invoking any right under the Second Amendment. Charlton Heston then explains the importance of this issue to the upcoming election and urges voters to consider their [20 (11 PCS/ NRA 20)] freedoms in casting their vote. In the next segment, Charlton Heston quotes extensively from statements Al Gore has made about firearm restrictions and his desire to impose new licensing requirements, explaining the problems and pitfalls associated with these approaches.

45. This program was designed to achieve many different purposes, including to respond to the union attacks on the NRA, galvanize the NRA's existing membership, attract new members, encourage donations, influence the presidential election in favor of George W. Bush, and present important information to the American public. It was spurred in large part by the representation of Al Gore's campaign that he intended to protect gun owners and their right to bear arms, and was designed to debunk that notion with accurate, documented information, and the candid perceptions of ordinary citizens focused upon the issue.

46. Although this program was aired in many battleground states, we also aired the program in California, Nebraska, and Montana where the outcome of the presidential election was not in question. *See* Exhibit 2. These airings plainly demonstrate that this broadcast was not solely an election ad, but rather spoke to a more fundamental point: the Second Amendment was under attack from a politician masquerading as a friend of this fundamental constitutional right.

47. We also ran portions of the full program as 30 second paid advertisements. Some of these "spots" were run with the tag line "Vote for George W. Bush." These ads were paid for by the Political Victory Fund. Ads that did not conclude with an exhortation to vote for or against a candidate were paid for by the NRA's Institute for Legislative Action, which is part of the NRA and is not a political action committee.

48. During the two decades that I have worked at the NRA, I am unaware of any coordination between the NRA and candidates for federal office with respect to television or radio advertising.

[21 (11 PCS/ NRA 21)]

V. Membership Drives

49. The NRA also broadcasts programs that are designed to increase its membership. In 2000, the NRA paid to air another 30-minute broadcast that was a tribute to the NRA's President, Charlton Heston. The program focused on his life and political involvement, touting him as a role model and inspiration to all Americans. *See* Exhibit 25 (NRA ACK 00006). The program described his patriotism and devotion to public life, especially his longstanding involvement with the NRA and advocacy of Second Amendment rights. It was aired on numerous occasions in various markets around the country. The first segment shows film footage of Charlton Heston and explains that, as President of the NRA, he now makes enormous personal sacrifices and subjects himself to withering attacks in trying to promote the NRA's views in hostile academic and media forums. The second segment consisted of unedited footage from Charlton Heston's acceptance speech upon being elected as NRA President for a third term. The third segment then repeats the initial segment.

50. During the short membership appeals that preceded and followed each segment, the program urged viewers to join the NRA and described the benefits of membership. For several seconds, the screen flashed an issue of the NRA's magazine "First Freedom" with Al Gore clearly depicted on the cover. In addition, the first segment, in praising Charlton Heston's personal courage, says that he has proven his willingness to debunk the hypocrisy and lies of the Clinton/Gore Administration. Finally, the second segment, consisting entirely of Charlton Heston's unedited acceptance speech, includes his passing comments that increasing sentiment against gun control "spells very big trouble for a man called Gore," and his closing remark, while holding a musket over his head, "from my cold, dead hands, Mr. Gore." This program was aired at numerous times throughout the country. The overarching purpose behind the program was to [22 (11 PCS/ NRA 22)] generate new members

and donations for the NRA. The program was not intended to influence the outcome of a federal election.

VI. Publications and Direct Mail

51. The NRA also communicates with its members and certain s segments of the general public through its publications and direct mail. NRA regularly publishes six magazines. Members may select to receive one of three of these magazines, America's First Freedom, American Rifleman, American Hunter, as a benefit of membership. American Rifleman is the oldest of the NRA publications and has been published by NRA for 117 years. It had an audited average monthly paid circulation for the six month period between January 1, 2002 and June 30, 2002 of more than 1.5 million copies. American Hunter is in its 30th year of monthly publication by NRA and had an audited average monthly paid circulation for the six month period between January 1, 2002 and June 30, 2002 of more than 1.1 million copies.

52. America's First Freedom is NRA's monthly news magazine devoted to news about legislation, public policy, and political activities related to the Second Amendment and the use and enjoyment of firearms by law abiding citizens. NRA began publishing America's First Freedom in 2000, and as of June 30, 2002, it had an audited average paid circulation for the six month period preceding that date of 635,580.

53. The other NRA magazines are Shooting Illustrated, Shooting Sports USA, and InSIGHTS. Shooting Sports USA and Shooting Sports Illustrated are published monthly and sold to subscribers and/or are available for purchase on public newsstands. InSIGHTS magazine is a benefit of membership to NRA junior members.
[23 (11 PCS/ NRA 23)]

54. The NRA also engages in extensive direct mailing campaigns. In 2000, the NRA spent approximately

$19 million to publish and distribute its magazines and approximately $29 million on direct mail.

55. The NRA's print media serve the same purposes as its television and radio broadcasts: educating the public, opining on the wisdom of specific acts of legislation, defending the NRA against attacks by politicians and the media, raising membership and contributions, and influencing federal elections. As with its broadcast programming, the NRA's print communications frequently refer to candidates for federal office by name throughout the year, including in the 30 days prior to a primary and the 60 days prior to a general election.

VII. The NRA Funds Itself From Individual Contributions

56. The NRA is a voluntary membership organization. NRA members join because of our organization's commitment to preserving Second Amendment rights. In 2000, the NRA had more than 4 million members. Annual membership dues, ranging from $25-$35 per year, make up the vast majority of our funding. In the year 2000, for example, we received over $100 million in individual membership dues. We received approximately another $40 million in additional contributions from individuals. The average contribution from individuals amounted to $30 per year. Thus, the NRA's financial strength is derived from the pooling of resources of millions of ordinary working folks who seek to preserve their right to keep and bear arms.

57. The NRA receives only a negligible amount of contributions from corporations. In the year 2001, the NRA received less than $300,000 in corporate contributions.

58. Revenues received from other NRA activities do not serve as a source of funds for the NRA's television and radio broadcasts. Specifically, the revenues derived from magazine advertising are not sufficient to cover the cost of producing these magazines. Likewise, sales of NRA memorabilia are not used for producing or airing of television or radio advertising because the revenue from the sale of [24 (11 PCS/ NRA 24)] NRA memorabilia does not even cover the cost of producing and distributing these items.

59. The revenue that the NRA receives from credit card affinity programs and insurance programs that are available to NRA members reflect the members' desire to support the activities of the NRA. Members are clearly aware that when they sign up for an NRA credit card or insurance through an NRA-sponsored provider that the NRA will receive financial remuneration. Thus, these modest revenues are therefore the functional equivalent of contributions from individuals.

60. The NRA's net revenues available for political speech overwhelmingly are derived from individual contributions. Corporate contributions account for less than 1 percent of funds available for broadcast programming. Even assuming that revenues from affinity programs and subtenants are corporate contributions, over 94% of the funds available to the NRA for broadcasting speech are derived from individual contributions.

61. Starting in 2003, the NRA will put in place measures to ensure that all of the funds expended on television and radio broadcasts are derived *entirely* and exclusively from contributions from individual members. We will ensure that all funds derived from corporations will be segregated from contributions from individuals. Thus, we will pay for our television and broadcast programming exclusively out of funds provided from individual members.

VIII. BCRA's Disclosure Requirements Threaten the Privacy Interests of NRA Members

62. The disclosure requirements in BCRA will invade the privacy interests of all affected NRA members. Through the years, hundreds, if not thousands, of NRA members have told me that they do not wish to disclose their contributions to the NRA. With all the hostile [25 (11 PCS/

NRA 25)] criticism that has been leveled at the NRA and all the misinformation that has been disseminated by the media about the NRA in recent years, it is natural that people would fear repercussions either at work or in their community from such disclosure. The people that have voiced these fears to me come from all walks of life. They include a lawyer who worked at the Department of Justice during the Clinton years, a Secret Service agent, teachers, police officers, and workers in Hollywood. Based on my conversations with members through the years, I firmly believe that there is a large segment of the NRA membership and the public at large who share these privacy concerns. If, as a result of BCRA, members are forced to disclose their identities, I firmly believe that many will not make contributions that trigger such disclosure.

63. In the course of this litigation, the NRA and I were contacted by the lawyers at Cooper & Kirk and asked if we could produce copies of the NRA and VICTORY FUND's Bylaws and of the NRA's Certificate of Incorporation. I can testify to the fact that true and complete copies of these Bylaws and Certificate of Incorporation have been produced to the lawyers at Cooper & Kirk. I understand that these copies were also produced to the defendants in this litigation, and have been marked with the Bates range NRA 1469-1527, and NRA 2926-2977 are Exhibits 1 and 26, respectively.

64. In the course of this litigation, I have reviewed a copy of an article that ran in *The New York Times* on August 10, 2002, entitled "The 2000 Campaign: The Ad Campaign," which I first read when it ran during the 2000 election cycle. I can testify that the lawyers and Cooper & Kirk have provided me with a true and correct copy of this article; and it is my understanding that an identical copy has been produced to the defendants in this litigation, marked with the Bates range NRA 11330-11331.

* * *

DECLARATION OF SENATOR JOHN MCCAIN

[DEV 8, Tab 29]

The affiant, having been duly sworn, deposes and says:

1. My name is John McCain. I have spent most of my adult life in public service and many years holding elected office. From 1958 through 1982, I served in the U.S. Navy. In 1982, I was elected to the U.S. House of Representatives. I served two terms in the House before being elected to the Senate in 1986. During my four years as a Congressman, sixteen years as a U.S. Senator, and as a presidential candidate in the 2000 presidential election, I have had extensive opportunities to observe the electoral process and the way political campaigns are financed. During my 20 years as a Member of Congress, I have seen our campaign finance system change substantially and have seen the harmful effects that these changes have had on the American public's opinion of lawmakers. Today, as a result of this system, all of us are tainted by the appearance of corruption. The same was not the case 20 years ago.[2]

2. Almost 100 years ago—in 1907—the United States Congress, under the leadership of President Theodore Roosevelt, enacted a law banning corporations from contributing funds to political campaigns. In 1947, Congress also banned unions from making these donations. In 1974, Congress limited individual contributions to candidates and parties. The Supreme Court has upheld the constitutionality of each of these contribution restrictions. In spite of these laws, however, we have been operating under a campaign finance system where federal candidates and elected officials solicit unlimited soft money contributions from unions, corporations and individuals, and these funds are spent in ways that directly influence the outcome of federal elections. In addition to making such contributions to political parties, corporations and unions are spending their money on sham

issue ads that pretend to address issues but in fact have the purpose and effect of influencing federal elections.

3. A large number of highly respected former elected officials agree that the current system of campaign finance is in need of repair and should be fixed now, starting with a ban on soft money. Former presidents George H.W. Bush, Jimmy Carter and Gerald Ford have each called for such a ban, and presidents Carter and Ford have argued that "the honor of public service is being tarnished by a system of campaign funding that has made many Americans lose faith in the concept of public service . . . ." *See* Attachment A. Senator Barry Goldwater, a man known for his independence and integrity, argued for more stringent reforms than the ones enacted by the Reform Act. Also in my own party, former Senate Majority Leader Howard Baker, former Senate Majority Whip Alan Simpson, former Senator and Republican National Committee Chairman Bill Brock, and former Minority House Leader Bob Michael all have advocated a soft money ban.

4. The growth of the soft money loophole has been staggering. In the 1992 election cycle, the two parties raised $86 million in soft money. This amount roughly tripled in the 1996 [3] election cycle and nearly doubled again in the 2000 election cycle, climbing to a staggering $495 million. I have heard opponents of reform argue that this flood of soft money does not corrupt or even appear to corrupt politicians or the political process. They argue that soft money contributions are made to political parties, not to candidates, and thus any exchange of favors for contributions is unlikely. My experience in the Senate tells me that this view does not correspond to today's realities.

5. Opponents of reform frequently ask reform proponents to cite examples of "quid pro quo" corruption. I believe, based on my experience, that elected officials do act in particular ways in order to assist large soft money donors and that this skews and shapes the legislative process. As Representative Eric Fingerhut has noted: "The public will often look for the grand-slam example of the influence of these interests. But rarely will you find it. But you can find a million singles . . . regulatory change, banking committee legislation (to cite a committee that I served on) . . . . Think of the committee and you can think of the interest group or the company that will have an interest. . . ." Martin Schram, *Speaking Freely*, at 93. This statement accurately reflects my experience.

6. At a minimum, large soft money donations purchase an opportunity for the donors to make their case to elected officials, including the President and Congressional leaders, in a way average citizens cannot. Many legislators have been in situations where they would rather fit in an appointment with a soft money contributor than risk losing his or her donation to the party. Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money. Members of Congress interact with donors at frequent fundraising dinners, weekend retreats, cocktail parties, and briefing sessions that are held exclusively for large donors to the party. Donors or their lobbyists often inform a particular Senator that they have made a large donation. When, as a result of a Member's [4] solicitation, someone makes a significant soft money donation, and then the donor calls the Member a month later and wants to meet, it's very difficult to say no, and few of us do say no.

7. The parties encourage Members of Congress to raise large amounts of soft money to benefit their own and others' re-election. At one recent caucus meeting, a Member of Congress was praised for raising $1.3 million dollars for the party. James Greenwood, a Republican Congressman from Pennsylvania, recently told the *New York Times* that House leaders consider soft money fundraising prowess in assigning chairmanships and other sought-after jobs. He stated, "I cringe at the notion that the would-be chairs of these committees are engaging in a mad dash to gather as much soft money as possible, then thinking about the potential

obligations incurred by asking for and receiving these six-plus-figure contributions from the very entities being regulated by these committees." *See* Attachment B. I share Mr. Greenwood's concerns. Congressional leaders also use soft money to enforce party discipline and loyalty to their views. At times, when Members seek to support legislation their congressional leaders oppose, they are threatened with the prospect that their leaders will withhold soft money being spent on their behalf.

8. In June 1998, it was widely reported that during the Senate's consideration of a bill entitled the National Tobacco Policy and Youth Smoking Reduction Act (S. 1415), U.S. Senator Mitch McConnell, then head of the National Republican Senatorial Committee, talked at a Republican Senators' policy lunch about political advertising by major tobacco manufacturers. In a complaint it filed on June 29, 1998 with the Federal Election Commission, the Campaign for Tobacco-Free Kids characterized Senator McConnell's communications as follows: "Based upon reports that have been widely published in the news media, only hours before Republican Senators were due to vote for or against cloture on S. 1415, Senator Mitch McConnell informed his colleagues in a closed door meeting that if they voted to kill the tobacco bill, the major [5] tobacco manufacturers were promising to mount a television ad campaign to support those who voted against the bill." (Tobacco-Free Kids complaint and accompanying press release are available at http://www.commondreams.org/pressreleases/June98/062998c.htm). I was present at the meeting and this is an accurate report of what Senator McConnell said. This episode graphically indicates that corporate soft money is widely used to influence legislative votes.

9. Several years ago, Congress passed legislation purportedly deregulating the telecommunications industry in order to encourage competition and lower costs to the consumers. The Senate Commerce Committee, on which I serve, held hearings on the issue. Every industry that would be affected was heard from, and while their interests varied, they had two things in common: first, they hoped to gain entry into their competitors' business while keeping competitors out of theirs; and second, they were generous donors to members of the committee and to the political parties, having given tens of millions of hard and soft money contributions during the time the bill was being developed. During consideration of the bill in the Committee, on the Senate floor, and in the Conference Committee, Members of Congress who were involved in crafting the legislation were inundated with requests for meetings by soft money contributors -- and many Members met with these contributors. While the halls and offices of Congress were overrun with representatives of telecommunications interests that had contributed soft money, the public interest had few lobbyists and no campaign contributions to protect it. The legislation that was finally adopted by Congress reflected the effects of soft money contributions on the political process. The process was essentially hijacked by large soft money contributors and their lobbyists. The legislation, which dealt with issues of interest to big money donors, was poorly conceived and filled with internal inconsistencies designed to appease these competing donors rather than to serve the public interest. Regardless of whether the [6] interested donors received a "quid pro quo" for their donation, the entire process was skewed by these large contributions and there was clearly an appearance of improper influence.

10. The recent debate over the expensing of stock options provides another example. When the Senate recently considered the Sarbanes-Oxley corporate governance bill, I attempted to modify the bill to require companies to account for stock options by expensing them on their income statements -- a proposal that has considerable support among preeminent economists and businessmen including Alan Greenspan and Warren Buffett. High tech executives who have donated generously to both the Democratic and Republican parties in recent years opposed the expensing

proposal and it was reported that it was they who succeeded in defeating it. According to newspaper accounts, Silicon Valley venture capitalist John Doerr, who has given $619,000 to the Democratic Party since 1999, spoke by phone to the Senate Democratic leadership and urged them to oppose my stock options proposal. The Senate Democratic leadership then used a parliamentary procedural device to block a vote on it. Again, the legislative process was, or at least appeared to be, adversely and unfairly influenced by large soft money contributions, demonstrating that large contributors often influence or are perceived to influence not only what goes into a bill, but also what stays out.

11. In yet another example from this year, a bill recently passed by the Senate to get generic drugs to market faster has stalled in the House, reportedly because of pressure exercised by the White House and the Republican House leadership. According to the Congressional Budget Office, the bill could save consumers about $60 billion over the next ten years. Not surprisingly, the pharmaceutical industry -- which opposes the bill -- has reportedly vastly increased its campaign contributions in order to stall the legislation's passage. While the bill was pending, the NRSC and NRCC held a large gala fundraiser to raise almost $30 million in largely soft money contributions, a substantial portion from pharmaceutical companies. According to [7] newspaper reports, among the largest contributors to the gala were GlaxoSmithKline PLC ($250,000), PhRMA ($250,000), Pfizer ($100,000), Eli Lilly & Co. ($50,000), Bayer AG ($50,000) and Merck & Co. ($50,000). While their large and timely contributions do not prove a "quid pro quo," once again the appearance that large soft money contributors have disproportionate influence is overwhelming.

12. Even my colleague Senator McConnell has recently complained about the influence that union contributions to Democratic candidates and officeholders have on policy outcomes. On October 1, 2002, Senator McConnell argued that "the homeland security bill is being held up because some labor unions want to put their special interests ahead of the collective interests of the Nation's security." He then asked:

> "So why are our colleagues on the other side advancing the labor union's agenda? Well, let's take a look at this chart. Four of the five major public sector unions who are publicly pushing for the Lieberman bill have showered over 93 percent of their campaign contributions to Democrats. The fifth contributed 87 percent. Here are the top contributors supporting the Lieberman bill: American Federation of State, County, and Municipal Employees contributed 99 percent of their funds to Democrats; American Federation of Teachers, 99 percent; International Association of Fire Fighters, 87 percent; American Federation of Government Employees, 93 percent; and National Treasury Employees Union, 94 percent." *See* Attachment C.

Senator McConnell's statements imply that contributions do influence policy or lead to the appearance of improper influence. Even if Senator McConnell's statements pertain only to hard money contributions, if relatively smaller hard money donations actually or apparently influence policy, the immense soft money donations that the Reform Act bans are even more likely to actually or apparently influence legislative outcomes.

13. Soft money from corporations, unions, and wealthy individuals is also used to evade the law when political parties run sham issue ads using soft money. The Thompson Committee found rampant abuses by both campaigns in the 1996 elections. Both presidential candidates [8] raised soft money that was spent by their parties on sham issue ads to support their presidential campaigns. Both presidential

campaigns openly assisted their party committees in creating ads that were designed to support their candidates. During the 1999-2000 election cycle, these abuses continued and included congressional races.

14. In 1996, I promoted Senator Bob Dole's bid for President. I communicated with Senator Dole about his campaign, including the political advertisements he was running and those the Republican Party was running on his behalf.

15. One example of an "issue advertisement" the RNC financed in 1996 with soft money is a Bob Dole commercial entitled "The Story," which movingly depicts Senator Dole's recovery from life-threatening wounds he sustained in World War II. On ABC News, Senator Dole described how the RNC was able to disguise the ad as issue advocacy that can be paid for with soft money: the ad "never mentions the word that I'm -- it never says that I'm running for president, though I hope it's fairly obvious, since I'm the only one in the picture!" *See* Attachment D. As a man of integrity, Senator Dole had a hard time not stating the obvious. His comments demonstrate how the parties circumvent federal contribution and spending limits by running candidate ads under the guise of "issue advocacy."

16. Likewise, in 1996, the AFL-CIO reportedly spent $35 million on an "issue ad" campaign designed to restore a Democratic majority in the House. It ran ads in 44 Republican districts, spending an average of $250,000 to $300,000 on media in the districts of the 32 House Republicans it targeted. According to a *New York Times* article, Steve Rosenthal, political director of the AFL-CIO, provided a frank assessment of how ineffective campaign finance laws have become when he discussed these ads with the *New York Times* and said: "If somebody handed me a magic wand and said there is no election law, I would do exactly what I am doing now.'" *See* Attachment E. The National Republican Congressional Committee filed a complaint [9] with the Federal Election Commission about

this AFL-CIO initiative, arguing that "the AFL-CIO is using a huge general treasury to unfairly influence the outcome of elections" by starting a "massive TV advertising campaign." The complaint explains that while the AFL-CIO ads did not specifically use the "magic words" such as "vote for" or "defeat," "any informed American clearly knows that the purpose of these ads is "expressly advocating" defeat of the Republican who is the subject of the ad." *See* Attachment F. I agree with what the NRCC then said. What the Republican party committee is now saying is completely inconsistent with that and regrettably very wrong and misguided. This too shows the corrupting effect of soft money -- once the NRCC (as well as the other Republican and Democratic national party committees) became more and more dependent on soft money, they appeared willing to say or do almost anything.

17. Additionally, according to a complaint filed by the Kentucky Republican Party, the Kentucky Democratic Party allegedly spent $300,000 in a last-minute, soft-money television advertising campaign in late 1990 to assist Democratic Senate candidate Harvey Sloane, whose campaign had nearly exhausted its financial resources. The Kentucky Republican Party complaint states that a "tape of the ads themselves demonstrate conclusively that the purpose of this activity is to influence a federal election" in assisting Mr. Sloane against his opponent, Senator Mitch McConnell. Again, I agree with the position the Kentucky Republican Party then took. Senator McConnell knew of the complaint, telling a reporter that it was "going to be a landmark case," and expressing his "concern[] that soft money, which in the past has been more prevalent in presidential elections, is 'seeping into Congressional races.'" *See* Attachment G.

18. During my 1998 Senate reelection campaign, the tobacco industry ran supposed "issue ads." These ads purported to address comprehensive tobacco legislation, an issue of national significance. In fact, however, they appear to have been run to influence my 1998 [10] reelection campaign in Arizona, and a rumored Presidential campaign

by me in 2000, as they were shown only in Arizona, Iowa and New Hampshire; that is, my home state, and the first two states to be contested in the Republican presidential primary.

19. Federal election law bars unions and corporations from making direct contributions to candidates and from making expenditures for communications that influence federal elections. However, by sponsoring their own putative "issue ads," they circumvent this law. The electioneering communications provision would restore the original intent of the law: to keep a tidal wave of union and corporate money out of federal elections.

20. Opponents of reform argue that the parties are being treated unfairly and will be irreparably damaged by the Reform Act. I personally believe that the parties were stronger and more vibrant when I first ran for Congress in 1982, when they relied on barbeques and volunteers as a way to get ordinary citizens involved in the political process. Due to the 1990s' wave of soft money, the parties now rely in significant part on paid consultants and TV ads instead of volunteers and activists, all with little success in strengthening parties. In Arizona, each of the major parties lost over 2% of their registered voters in the last election alone. Only the number of voters registered independent has risen, from 11% ten years ago, to more than 20% today. *See* Attachment. H. Additionally, it is difficult for me to understand why voter activities cannot be financed with the immense amounts of hard money the political parties raise. In the 2000 election cycle, the two major parties nationally raised almost $750 million in hard money. To date, in the 2002 election cycle, the parties have already raised 12% more hard money than they had at the same point in 2000. In my view, the Reform Act will cause the parties to be more responsive to their grass roots than they have been in recent times.

21. Soft money is often raised directly by federal candidates and officeholders, and the largest amounts are often raised by the President, Vice President and Congressional party [11] leaders. National party officials also often raise these funds, in large part by promising and providing donors access to federal officeholders and candidates. Soft money contributions are also given directly by donors to state parties to be used to influence federal elections. *See* Attachment I. An appearance of impropriety arises when soft money donors seek, and party officials and federal officeholders and candidates provide, access to federal officeholders and candidates for these large donors. Given the control that federal officials exercise over national party committees, and the close ties between those committees and federal officials, the risk of corruption or its appearance from large contributions to those national party committees exists regardless of who raises the money or what it is used for. Similarly, given the close ties between state parties on the one hand and national parties and federal officials on the other hand, soft money contributions to state parties that are spent on federal election activities create a risk and appearance of corruption. By banning soft money for national parties, and also for national party officials acting on behalf of their parties, the new law provides a clean break approach for the national parties that have been a core part of the soft money problem. Under the law, national party officials are not covered by the ban if they are not acting on behalf of their national parties.

22. While opponents of this bill sometimes argue that soft money helps challengers, in my experience that is not the case. The parties generally focus their soft money spending first on taking care of the parties' current officeholders and on the candidates running for open seats and after that on the challengers running against incumbents.

23. The entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected. At that point in time, political parties and their candidates generally communicate and coordinate on a regular basis on a variety of topics such

as fundraising, strategy, opposition research, polling data, advertisements and message, and voter [12] mobilization. The idea that a party could make both "coordinated" and "independent" expenditures once the party has nominated a candidate, is not sensible.

24. While the relationship between candidates and political parties is uniquely intertwined, there have also been situations where federal candidates and political parties coordinate with outside groups. This coordination can occur in many ways -- sometimes directly, but often indirectly. For example, political consultants who produce sham issue ads on behalf of labor unions or business groups also can work for federal candidates for office in the same districts where the issue ads are run. These consultants can function as conduits of information between advocacy groups, the parties, and federal candidates -- sharing polling data, opposition research and message advice among all three. In addition, staff from advocacy groups may sometimes leave to join campaigns of candidates for federal office, providing yet another back channel of information between the advocacy groups and candidates. Finally, the political parties may also funnel information from candidates to advocacy groups as the Democratic Party did for labor unions and Democratic candidates in the 1996 and 2000 cycles, and the Republican Party did for business groups and Republican candidates in the 1996 and 2000 cycles. *See* Attachment J.[13]

25. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

[1(2 PCS/McC 001)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL,)
et al.,)
)
Plaintiffs,)
) Civ. No. 02-0582
v.) (CKK, KLH, RLL)
)
FEDERAL ELECTION) CONSOLIDATED
COMMISSION, et al.,) ACTIONS
)
Defendants.)

AFFIDAVIT OF SENATOR MITCH MCCONNELL

MITCH MCCONNELL, being first duly sworn, deposes and says:

1. I am the senior United States Senator from the Commonwealth of Kentucky and a member of the Republican Party. I attest to the truth and accuracy of the matters set forth in this affidavit on the basis of my own personal knowledge.

2. I have been active in the Republican Party at the local, state, and national level throughout my adult life.

3. At the local level, I was a member of the Executive Committee of the Jefferson County Republican [2(2 PCS/McC 002)] candidates for the Greater Louisville Council (newly-merged, city-county government of Jefferson County, Kentucky).

4. At the state level, I have served since 1985 as a member of the State Central Committee of the Republican Party of Kentucky. During this time, I have actively engaged in activities whose design and effect have been to strengthen the Republican Party of Kentucky at the state and local level. In 1999, I played an integral role in persuading state Senators Daniel Seum and Robert Leeper to switch from the Democratic Party to the Republican Party, which gave Republicans control of the Kentucky Senate for the first time in history.

5. I routinely participate in events to help state and local Republican candidates and state and local Republican party committees. For example, I participated in an election strategy conference call with state Senator Leeper on July 5, 2002; headlined a state party fundraiser to benefit state Senate candidates on August 15, 2002; participated in a fundraiser for a state Senate candidate on August 20, 2002; and attended a rally for the Republican candidate for judge-executive in Butler County, Kentucky, on September 28. This coming weekend, I will attend a breakfast for the Republican Party of Jessamine County, Kentucky (Oct. 5), and headline a fundraiser for Republican state House candidates (Oct 6).

6. My commitment to the Republican Party at the state and local level is longstanding and well-recognized. At a statewide Kentucky Republican Party dinner on Feb. 16, 2002, I was described as "the architect of the modern-day Republican Party" and honored by the naming of the Kentucky Republican Party headquarters as "The Mitch McConnell Building." I attended the 1980, 1984, 1988, 1992, 1996 and 2000 Republican National Conventions as a voting delegate. [3(2 PCS/McC 003)]

7. I was elected to the United States Senate from Kentucky in 1984, and reelected in 1990 and 1996. I am currently a candidate for reelection in November 2002.

8. I am the former chairman and current ranking member of the Senate Committee on Rules and Administration, which has jurisdiction over federal election law. Since my election to the Senate, I have been a member of the National Republican Senatorial Committee ("NRSC"), which promotes issues and supports the campaigns of Republican candidates on the federal, state, and local level. I chaired the NRSC during the 1998 and 2000 election cycles. During my tenure as NRSC chairman, I was involved in raising money for funds not subject to the restrictions and prohibitions of federal law. These funds were used for the purpose of voter registration, voter identification, get-out-the-vote activities, issue advocacy, building funds, and national support for state and local candidates. For example, during my tenure as NRSC Chairman, I directed nonfederal NRSC contributions to dozens of state and local candidates in compliance with the regulations and reporting requirements of state law, including: the Virginia Republican gubernatorial candidate, Jim Gilmore, in 1997; the California Republican gubernatorial candidate, Dan Lungren, in 1998; and the Republican candidate for mayor of Warwick, Rhode Island, Scott Avedisian, in 2000.

9. In my capacities as federal officeholder, candidate, fundraiser, and party member, I am, and will continue to be, injured by the Bipartisan Campaign Reform Act of 2002 ("BCRA").

10. The BCRA will substantially impair my activities (and the activities of those construed to be my agents) with respect to national political parties, state and local political parties, and state and local candidates. [4(2 PCS/McC 004)]

a. As a federal officeholder, I will no longer be able to raise money not subject to the BCRA's restrictions (so-called "soft money") for the purpose of voter registration, voter identification, get-out-the-vote activities, issue advocacy, building funds, and national support for state and local candidates. As set forth above, I have been involved substantially in raising money for each of these activities in the past, and would do so in the future, but for the BCRA.

b. As a member of the Republican Party, the National Republican Senatorial Committee, and the State Central Committee of the Republican Party of Kentucky, I could be considered an agent of the Republican National Committee and thus be banned from raising any money for state and local political parties or state and local candidates under the BCRA. Moreover, had the BCRA been in effect during my four years as Chairman of the NRSC, I would have been federally prohibited from raising any money for state and local parties or state and local candidates. As set forth above, I have been involved substantially in raising money for state and local political parties and state and local candidates in the past, and would do so in the future, but for the BCRA.

c. The BCRA prohibits federal officeholders from raising any so-called Levin funds for state and local parties to support, among other things, grassroots activity, such as voter registration within 120 days before the day of either the primary or general election and get-out-the vote efforts. I have been involved substantially in raising money not subject to the restrictions, prohibitions and reporting requirements of federal law for the purpose of supporting activities such as voter registration within 120 days before the day of either the

[8(2 PCS/McC 008)] "lowest unit rate" for the dissemination of these messages to viewers in Kentucky solely as a result of their content. Because I believe it is important for Kentucky voters to have as much information as possible about the qualifications of those who choose to run for the office of United States Senator, I intend to run similar ads in campaigns in the future and will be subject to the BCRA's discriminatory penalty for doing so.

13. During my 18 years in the United States Senate, I have met with thousands upon thousands of Americans with whom I have shaken hands, posed for photographs, answered questions, and discussed legislative issues. The overwhelming majority of these meetings were with people who are not contributors to the Republican Party at the national, state or local level. In fact, I typically am unaware of the contribution history of individuals with whom I meet. Additionally, meetings with soft money contributors to the Republican Party are not only fewer, but also typically larger and less conducive to a discussion of legislative issues than most of my meetings in a given week.

14. During my 18 years in the United States Senate, I have never witnessed any colleague who changed his vote or took any official action as a result of a federal contribution or a nonfederal donation to a political party at the national, state or local level.

/s/
MITCH McCONNELL
UNITED STATES SENATOR

[caption omitted]

DECLARATION OF DONNA MCDOW

I, Donna McDow, hereby declare under penalty of perjury of the State of Alabama:

1. I am a citizen of the United States and a resident of the State of Alabama.

2. I am above the age of 18, and I am competent to testify to the truth of the matters asserted in this Declaration.

3. I am married to Tim McDow, and we are the parents of Hannah and Isaac.

4. Hannah is sixteen years old, and was born on January 23, 1986.

5. Isaac is fourteen years old, and was born on March 16, 1988.

6. As a family we have chosen to provide for Hannah's and Isaac's education at home, rather than by sending them out to a local public or other school.

[end of page 1]

7. As a family, we consider citizen involvement in government, legislative processes and politics to be an important duty.

8. All of our children have attended and/or participated in the activities of Teen Pact, beginning with our oldest daughter, who, although she has not participated as a student, has served as a chaperone.

9. In addition to attending Teen Pact functions, I have served as a "staff mom" to help out with chaperoning and transportation and other support activities.

10. Hannah and Isaac have been involved in campaign work to support candidates that shared our values, beliefs and opinions.

11. I am aware that legal limits on the amount of money that I can give to a candidate for federal office have been enacted by Congress.

12. I am also aware that federal law prohibits me from giving money to a candidate for federal office in the name of another, even in the name of one of my children.

13. I have never used my children's names, or any other person's, in making a political donation, in order to avoid limits that the law places on my ability to support candidates of whom I approve.

14. Both Hannah and Isaac have money that is under their own direction and control, that they have earned, or received as a gift.

15. Hannah and Isaac control their money, and choose whether and how to spend it.

[end of page 2]

16. Of course, they do consult with their dad and me about how they spend money, and we have given them guidance as we thought appropriate.

[subscription and signature omitted]

[caption omitted]

DECLARATION OF HANNAH MCDOW

I, Hannah McDow, hereby declare under penalty of perjury of the State of Alabama:

1. I am a citizen of the United States and a resident of the State of Alabama.

2. I am a minor, 16 years of age, and was born on January 23, 1986.

3. Although I am not an adult, I understand that it is important to speak truthfully about the facts that I know, and admit honestly when I do not know something; I understand that not telling the truth in this statement would be a wrongful thing, and that I have the duty under the law to tell the truth.

4. Although I am not an adult, I understand the difference between facts and fantasy, and that my duty in making this statement is to testify to facts, and to avoid making up things that I cannot remember or do not know.

[end of page 1]

5. My parents are Tim and Donna McDow.

6. I am their third child.

7. We live in Shelby County, Alabama.

8. I am home-schooled, and this year I will be starting into the eleventh grade.

9. In addition to my home-school studies at home about civics, government and history, I have learned about legislation and politics, by attending training programs sponsored by Teen Pact.

10. Teen Pact is an organization that teaches Christian students about the work of legislators and lawmakers, and about the basic operation of the political process in our country and our states:

a. Teen Pact teaches kids about state legislation and political activities.

b. We listen to speakers, study materials, and have activities that allow us to look close up at legislative and political activities on the state level.

c. Also, we interviewed lobbyists at the legislature, and we heard from some legislators, and had the opportunity to ask them questions.

d. Participating in the Teen Pact programs has given me an understanding of how state legislatures work, including the process in the legislature and the outside activities of lobbyists and others who influence legislation.

e. In addition to attending the Teen Pact program in Alabama, I have also served on the staff of the program both in Alabama and in other States, and have participated in other Teen Pact programs.

[end of page 2]

f. I have become interested in government, politics and legislation, and the training at Teen Pact has increased my interest in these subjects, as well as my understanding.

11. As a result of my learning about legislation, government and politics, I have been involved in helping certain candidates for election in their campaigns.

12. I have volunteered with a campaign and assisted a candidate by assembling yard signs for distribution by his campaign.

13. I have also traveled out of state to help candidates by doing door-to-door campaigning in support of their candidacies.

14. I am a Christian.

15. By that, I mean that I have accepted the gift of salvation that comes through Jesus Christ and His death on the cross.

16. As a Christian I would like to spread the faith inside the legislative process, and hope that the result of that will be to affect our country, change its direction, and hopefully,

cause it to end legalized abortion.

17. Even more important than what I think, I know that the Bible teaches us to be good stewards of all the things that have been entrusted to us by God; from that teaching in the Bible I believe that we have the responsibility to be involved in the political process and the campaign process in order to make sure that we are being faithful stewards of God's gifts to us.

18. I also believe, as a principal of my faith, that it is important for persons who are followers of Christ to be involved in politics and in governing our Nation.

19. I actively research and study the candidates for election to various offices of

[end of page 3]

interest to me, asking questions of others and studying information I obtain from their campaigns and on the Internet.

20. As I understand the new campaign reform law, after November 5, 2002, until I reach my eighteenth birthday, I will not be allowed to give my money to candidates for elective federal office, including candidates for the Presidency, for the Senate and for the House.

21. In addition, as I understand it, after November 5, 2002, until I reach my eighteenth birthday, I will not be allowed to give money to any committees of political parties.

22. Being barred from supporting candidates who share my beliefs, opinions, and views, deprives me of the ability that I currently have to give money to such candidates, and takes away a means I have of expressing two different things: my support for the candidate, and my association with the candidate toward common goals.

23. As things stand now, I am free to donate money to a candidate of my choosing, and in doing so, I am able to express my support for that candidate, and my affiliation

with his or her beliefs, opinions and views.

24. Although I am young, I do have my own money, that is under my direction and control.

25. I work as a secretary in the office at our church, and have income regularly from that job.

26. I have a savings account, but I also have a checking account and I use that to spend the money I earn as I choose.

27. I plan and intend to give money to candidates for federal office and committees of political parties, as I find those candidates and committees that I can support consistent with my

[end of page 4]

faith in Christ.

28. My parents have never forced me to spend my money in one way or another, except responsibly. If I wanted to do so, I could spend it in many ways; but when the new law goes into effect, one way I will not be free to spend my own money is to support federal candidates with whom I agree.

[subscription and signature omitted]

[caption omitted]

DECLARATION OF ISAAC MCDOW

I, Isaac McDow, hereby declare under penalty of perjury of the State of Alabama:

1. I am a citizen of the United States and a resident of the State of Alabama.

2. I am a minor, 14 years of age, and was born on March 16, 1988.

3. Although I am not an adult, I understand that it is important to speak truthfully about the facts that I know, and admit honestly when I do not know something; I understand that not telling the truth in this statement would be a wrongful thing, and that I have the duty under the law to tell the truth.

4. Although I am not an adult, I understand the difference between facts and fantasy, and that my duty in making this statement is to testify to facts, and to avoid making up things that I cannot remember or do not know.

[end of page 1]

5. My parents are Tim and Donna McDow.

6. I am their fourth child.

7. We live in Shelby County, Alabama.

8. I am home-schooled, and this year I will be starting into the ninth grade.

9. In addition to my home-school studies about civics, government and history, I have learned about legislation and politics, by attending training programs sponsored by Teen Pact.

10. Teen Pact is an organization that teaches Christian students about the work of legislators and lawmakers, and about the basic operation of the political process in our country and our states:

a. Teen Pact teaches kids about state legislation and political activities.

b. We listen to speakers, study materials, and have activities that allow us to look close up at legislative and political activities on the state level.

c. Also, we interviewed lobbyists at the legislature, and we heard from some legislators, and had the opportunity to ask them questions.

d. Participating in the Teen Pact programs has given me an understanding of how state legislatures work, including the process in the legislature and the outside activities of lobbyists and others who influence legislation.

e. I have become interested in government, politics and legislation, and the training at Teen Pact has increased my interest in these subjects, as well as my understanding.

11. As a result of my learning about legislation, government and politics, I have been

[end of page 2]

involved in helping certain candidates for election in their campaigns.

12. I am a Christian.

13. By that, I mean that I have accepted the gift of salvation that comes through Jesus Christ and His death on the cross.

14. As a Christian I would like to spread the faith inside the legislative process, and hope that the result of that will be to affect our country, change its direction, and hopefully, cause it to end legalized abortion.

15. I also believe, as a principal of my faith, that it is important for persons who are followers of Christ to be involved in politics and in governing our Nation.

16. Even more important than what I think, I know that the Bible teaches us to be good stewards of all the things that have been entrusted to us by God; from that teaching in the Bible I believe that we have the responsibility to be involved in the political process and the campaign process in order to make sure that we are being faithful

stewards of God's gifts to us.

17. I actively research and study the candidates for election to various offices of interest to me, asking questions of others and studying information I obtain from their campaigns and on the Internet.

18. As I understand the new campaign reform law, after November 5, 2002, until I reach my eighteenth birthday, I will not be allowed to give my money to candidates for elective federal office, including candidates for the Presidency, for the Senate and for the House.

19. In addition, as I understand it, after November 5, 2002, until I reach my eighteenth birthday, I will not be allowed to give money to any committees of political parties.

20. Being barred from supporting candidates who share my beliefs, opinions, and

[end of page 3]

views, deprives me of the ability that I currently have to give money to such candidates, and takes away a means I have of expressing two different things: my support for the candidate, and my association with the candidate toward common goals.

21. Being denied the ability to give money to federal candidates and the committees of political parties interferes with my free choice to spend my own money as I choose, and with my decision to associate myself with a candidate or a party because of his or her or its beliefs, opinions, and views.

22. As things stand now, I am free to donate money to a candidate of my choosing, and in doing so, I am able to express my support for that candidate, and my affiliation with his or her beliefs, opinions and views.

23. Although I am young, I do have my own money, that is under my direction and control.

24. I earn money several different ways:

a. I earn money for cutting the lawn.

b. I make small Christmas crafts and sell them.

25. When I earn money, I put it into my savings account, and I draw it out when I need it.

26. I plan and intend to give money to candidates for federal office and committees of political parties, as I find those candidates and committees that I can support consistent with my faith in Christ.

27. My parents have never forced me to spend my money in one way or another, except responsibly. If I wanted to do so, I could spend it in many ways; but when the new law

[end of page 4]

goes into effect, one way I will not be free to spend my own money is to support federal candidates with whom I agree.

[subscription and signature omitted]

Declaration of Angus McQueen

* * *

[9 (11 PCS/ NRA 116)]

25. A recent example of an NRA communications effort helps to illustrate the fundamental importance to the NRA of being able to utilize paid broadcast media that references elected officials and other public figures who may hold office in the future:

(a) In early 2000, a 6-year old boy in Flint, Michigan, managed to obtain his father's stolen gun and take it to school. There, he fired the gun and killed a 6-year old classmate. In response to this tragic event, as had happened in the wake of especially horrific examples of gun violence in the years immediately preceding this incident, there was a great deal of media attention brought to bear upon the 'causes' of incidences such as this one and the media's ongoing suggestion that to prevent such instances requires more government restrictions on gun ownership and use by law-abiding citizens – policies which NRA believes to be anathema to the Second Amendment, as well as the NRA's position on these issues.

(b) At the height of this media attention, then-president Clinton appeared on NBC's Today Show, where he was interviewed by the very popular Today Show hostess, Katie Couric. Ms. Couric spoke with the President during a segment that lasted for 14 minutes, 40 seconds. Her questioning of the President was empathetic and friendly. Specifically, prompted by Ms. Couric's leading questions, the President expressed his sadness at the tragic event, and then explained how there had been a significant drop in gun deaths during his tenure. After taking

credit for this drop in gun deaths, the President, at Ms. Couric's invitation, described the additional anti-gun measures he would seek to have enacted by Congress and the federal government, including specifically mandatory child-safety trigger locks. Mr. Clinton then blamed the NRA – by name -- for its opposition to these and other measures, casting NRA in an extremely negative light by [10 (11 PCS/ NRA 36)] characterizing it as having a "stranglehold on Congress." Toward the end of the segment, the President made the comment that "The NRA is against anything that requires anybody to do anything as a member of society that helps to make us safer."

(c) Absent a response from the NRA, such a media appearance by the President of the United States could have devastating consequences. Whatever the popularity ratings or party affiliation of the particular individual inhabiting the office at any particular time, the office of President of the United States always wields a certain moral authority. To have the President directly criticize your organization as part of the problem that has lead to something as tragic as the death of a 6-year old boy obviously creates a huge challenge to the organization – and could well have catastrophic consequences in terms of the political and legislative climate for opposing a presidential initiative in Congress. Moreover, for the President to be cast in a very favorable light by an extremely popular and well-known television interviewer whose tenor with the President suggests an obvious empathy and agreement with his position on the issue of gun regulation substantially compounds this problem for the NRA, its members and the Second Amendment rights of law-abiding American citizens. In short, the NRA's public image, its legitimacy and its moral credibility -- and ultimately its ability to further its core mission of promoting and protecting Second Amendment rights, was placed at substantial risk by the Clinton Today Show appearance. Moreover, I believe that this was exactly what Clinton and the national media intended to accomplish in order to achieve their political, cultural and legislative goals.

(d) Ackerman McQueen was substantially involved in developing NRA's strategy for responding to the Couric/Clinton Today Show segment. To put the magni[11 (11 PCS/ NRA 37)]tude of the problem into perspective, the President's appearance on the Today Show lasted a total of 14 minutes, 40 seconds. As explained below, the only practical means of responding to President Clinton's attack was to launch a direct counter-offensive that specifically challenged the President *by name*, and that would thereby attract the attention of the national media.

(e) First, of course, came an effort on the part of the NRA to directly rebut the President's comments through an appearance on the Today Show itself. Thus, on March 3, 2000, Wayne LaPierre appeared on the show and was questioned by Ms. Couric for five minutes, fifty-five seconds. During this appearance, Ms. Couric asked a number of pointed questions that obviously reflected a hostile and very skeptical attitude towards the NRA and its objectives. Once again, a national television audience saw the NRA through the lens of its opponents, rather than the image it would seek to present of itself. Thus, the brevity of his appearance and the tone adopted by Ms. Couric toward Mr. LaPierre and the NRA combined to dilute the significance of his appearance to a perfunctory airing of 'the other side' of the government's argument, far less than an adequate rejoinder to President Clinton's attacks on the NRA.

(f) Accordingly, with Ackerman McQueen's help and advice, the NRA developed a

strategy for maximizing the effectiveness of its public response to President Clinton's nationally televised attack on the NRA and on gun rights. Lacking the resources necessary for a sustained nationally televised broadcast media buy, the NRA decided to focus a targeted broadcast media effort that responded directly to the misrepresentations set forth in President Clinton's appearance, and that would be run almost exclusively in the Washington D.C. area. The reason for focusing the effort geographically [12 (11 PCS/ NRA 38)] on Washington D.C. was to garner the maximum possible amount of attention from the national political media and from national political figures, essentially all of whom are based in Washington.

(g) Thus, the NRA asked Charlton Heston, a most effective spokesman for the NRA and a very credible person among the American people, to appear in a series of paid messages in which he directly challenged the President for having made statements that Clinton *knew* to be false. Specifically, on one of these broadcasts, Mr. Heston quoted the precise words President Clinton uttered on the Today Show – "The NRA is against anything that requires anybody to do anything as a member of society that helps to make us safer" – and then proceeded to prove the manifest falseness of this statement by recounting all of the safety initiatives undertaken or supported by the NRA. Finally, Mr. Heston ended the broadcast with a specific confrontation of the President, saying, "Mr. President, when you say something that's wrong, that's a mistake; but when you know it's wrong, that's *a lie*."

(h) In total, the NRA ran 13 similar paid broadcast messages in which Mr. Heston directly confronted President Clinton with similarly pointed challenges. These messages were run repeatedly in the Washington area in an effort to elicit the maximum media and political interest possible by those broadcast outlets who accept advertising by the NRA (as noted below, some stations refuse *all* advertising sponsored and paid for by NRA, regardless of the content), thereby maximizing the effectiveness of the resources NRA devoted to these broadcasts.

(i) The strategy paid off. After the broadcasts had an opportunity to attract media attention, the press took up the story on its own and pursued it. Thus, a strategy of [13 (11 PCS/ NRA 39)] paid broadcast media led to "free media" that sought to provide at least a slightly more balanced approach to the NRA and its positions on child safety locks, enforcement of gun laws, and gun rights in general. First, ABC news reporter and talk show host Sam Donaldson was given a one-on-one interview with President Clinton, in which he directly confronted the President with the Heston messages and with the NRA response to his misleading statements. Next, Wayne LaPierre was invited onto the ABC news show "This Week," where he was interviewed by Cokie Roberts and Sam Donaldson. As a result of comments he made on This Week, Mr. LaPierre was subsequently interviewed on "Meet The Press" by Tim Russert.

(j) Thus, by carefully constructing a strategy for confronting the President's accusations head-on through a paid media blitz directed solely at the political and media classes located in Washington D.C., the NRA succeeded in achieving a national forum where it was given an opportunity to tell its side of the story in a full response to the President's Today Show accusations. Had the NRA not directly confronted President Clinton by referring to him *specifically by name* in the Heston television broadcasts, but instead merely run broadcasts setting forth its record on the issue of safety locks, it is my firm professional opinion that it would never have achieved anything approaching success and certainly nothing like the media attention that was achieved through this strategic use of paid television advertising.

(k) The media campaign used by the NRA to respond to the Clinton Today Show segment cost a total of $718,094.20. (*see* Bates NRA-ACK 18001-18024). Had the NRA not been able to utilize this strategy, but had it instead been confined to simply airing national advertisements that spoke to the issue of child safety locks in general, with[14 (11 PCS/ NRA 40)]out mentioning any federal official by name, it would have been considerably more expensive, and would certainly not have achieved anywhere near the same result in terms of public profile for and attention to its message.

26. It is my understanding that under the new campaign finance legislation – the Bipartisan Campaign Reform Act ("BCRA") – the NRA could be prohibited from undertaking the type of media campaign illustrated by the Heston broadcasts. Specifically, if President Clinton had been up for reelection in 2000 (or, conversely, had the media campaign occurred in 1996), then the Heston broadcasts would in many if not all instances have occurred within 30 days of a primary election in which President Clinton was a candidate. Since these broadcasts specifically referred to him by name, they would be criminalized under BCRA. Likewise, if the Today Show incident had occurred close to the November general election, the NRA would have been barred from responding to it through such a media campaign.

27. Based on my understanding of BCRA's prohibitions of these types of media campaigns, I believe it will have a seriously harmful impact on the ability of the NRA, as well as all other similar groups, to respond effectively to public attacks that are leveled against them and their beliefs by politicians and political candidates, especially if they are based on misleading or simply inaccurate factual assertions.

BCRA's prohibitions will therefore harm both issue advocacy groups and the public's ability to learn the truth about the issues and the citizens' groups which advocate those issues and beliefs.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al.,
Plaintiffs,
v.
FEDERAL ELECTION COMMISSION, et al.,
Defendants.

Civ. No. 02-582 (CKK, KLH, RJL)

All consolidated cases.

COUNSEL ONLY

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al.,
Plaintiffs,
v.
FEDERAL ELECTION COMMISSION, et al.,
Defendants.

DECLARATION OF DENISE MITCHELL

Introduction

1. I am the Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney. I was appointed to this position on November 1, 1995, shortly after Mr. Sweeney was elected President of the AFL-CIO. Prior to assuming this position, I had worked with Mr. Sweeney in a similar role for a number of years when he was President of the

Service Employees International Union and I had assisted in his campaign for election to the position of AFL-CIO President. I have worked in marketing and media relations for unions and other non-profit [2] organizations on working family issues for more than 20 years.

2. As the Special Assistant to the President for Public Affairs, I have the primary responsibility for overseeing all public relations activities of the AFL-CIO including all AFL-CIO use of broadcast and print media. I am responsible for making the operational decisions as to both the substance and the method of communication of the AFL-CIO's message to union members and to the general public. I make the strategic and logistical decisions regarding our media buys, and, within policy guidelines, I also make the editorial decisions regarding the contents of our communications.

3. In seeking to become AFL-CIO President, Mr. Sweeney had campaigned on a platform of providing "a New Voice for American Workers." The underlying thrust of this promise was, and remains, to make public policy accountable to the needs and interests of working families, and to increase workers' participation in legislation and politics by focusing on the issues central to their lives. To that end, the AFL-CIO under Mr. Sweeney's leadership has committed to providing our members timely and accessible information about legislative developments that affect their lives. This has not been limited to developments related to labor law or unions in a narrow sense, but has included a broad range of policies that affect the interests of working men and women, such as Medicare, education, health care and the federal minimum wage. Another goal of the AFL-CIO's public affairs program, particularly as it relates to elections for public office, has been to direct public debate away from so-called "wedge" issues, such as abortion and gun control, to pocketbook issues of universal importance to working families. In this Declaration I will describe in detail how the AFL-CIO carried out these complementary goals through its broadcast advertising program starting in late 1995 and continuing through 2001. I will also provide information about the amount spent by the AFL- [3] CIO in its advertising program, and I will describe in some detail how decisions have been made about the content or placement of the AFL-CIO ads.

Compilation of AFL-CIO Advertising

4. The Public Affairs Department of the AFL-CIO does not have a single record of all of its broadcast advertisements since 1995. In response to the discovery requests in this litigation, my staff gathered all of the tapes of our ads available in my office and the list attached as Exhibit 1 to this Declaration was compiled. A few of the advertisements on this list may not have run, and a small number of ads that were run may not be reflected because the tapes are not still in our files. With these caveats, I believe that Exhibit 1 is a substantially accurate list of the ads run by the AFL-CIO between 1995 and 2001. The "broadcast dates" listed on Exhibit 1 were derived from a variety of records, including buy books, memoranda, press releases and other documents in my files. I believe that all such documents have been produced in discovery and designated as trial exhibits.

5. In a number of places in this Declaration, I will identify instances in which the AFL-CIO's radio, television and cable advertisements were run within 30 days of a primary election in which the public officials named in

the advertisement were running. This information was compiled using the dates for primary elections as reported in publications of the Federal Election Commission. I understand that these dates were applicable only to the Democratic and Republican parties and, possibly, to minor parties who held their primaries on the same date. We were unable to obtain information regarding the dates on which party conventions or caucuses were held for the selection of nominees of minor parties, so this Declaration does not attempt to report whether advertisements were run within 30 days of those events.

6. Although the records in the Public Affairs Department include sufficient [4] information to determine when most advertisements ran and, in some cases, the stations on which they ran, we do not have records from which it can be determined whether any specific advertisement could be received by 50,000 or more persons within the state or congressional district in which the primary election was held. To the best of my knowledge, such information is not publicly available at the present time. However, because our goal was to reach as many persons as possible within each state or congressional district, I believe that many, if not all, of the advertisements described in this Declaration were likely to be able to be received by 50,000 or more persons.

7. In the following section of this Declaration, I refer to and attach the written scripts for many of the AFL-CIO advertisements since these are easier to access than the tapes of the actual advertisements. I have attached a representative example of the script referred to, rather than the identical scripts for advertisements run in other locations at approximately the same time.

8. Copies of the tapes and compact discs of the advertisements broadcast by the AFL-CIO and retained in our files are also attached to this Declaration as Exhibits 2-22 (AFL-CIO 16696-16756, 17181-17182, 18935-18943). These are chronological compilations created from many separate tapes in our files. These compilations do not precisely reflect Exhibit 1 because Exhibit 1 is drawn from more sources. And, it is possible that a few of the ads on these tapes were never broadcast.

Decision-making as to the Content and Placement of the AFL-CIO's Broadcast Advertising

9. As a general matter, I keep the officers of the AFL-CIO and other senior staff informed about the overall direction of our broadcast program, but the officers do not generally [5] become involved in the day-to-day decision-making, such as the subjects on which advertisements will be run and in what media markets. Within the senior staff, the persons who have been most involved in helping me with respect to the content and placement of broadcast advertisements have been the Legislative Director (Peggy Taylor until January 2001, Bill Samuel since then) and the Assistant to the President for Governmental Affairs (Gerald Shea). As discussed in greater detail below, the AFL-CIO's Political Director (Steven Rosenthal) had little involvement in these decisions during 2000, and virtually none in previous years.

10. In both election and non-election years, my goal in selecting the issues to be addressed in the AFL-CIO's broadcast advertising has been to focus attention on a series of national policy issues of importance to working families. I

have been guided in selecting these issues by input from the Executive Council of the AFL-CIO, which regularly discusses and focuses on a legislative and policy agenda for the organization, the AFL-CIO's ongoing lobbying program, polling and other opinion research, conducted primarily by the Washington, D.C. firm of Peter Hart Associates, and the views of affiliated unions. Most of the issues addressed in our advertisements, such as budget priorities, tax fairness, Medicare, and health care, recur in virtually every session of Congress; others, such as fast-track trade legislation or the trade status of China, may be current for a period of years and then become inactive for awhile.

11. In my experience, from our first flights of television and radio advertisements in late 1995 until the present, virtually all of the AFL-CIO's advertisements in non-election years as well as election years, have identified Senators and Representatives by name. This practice started at least as early as April 1995, before I arrived at the AFL-CIO, and is the result of our strong belief that Members of Congress and Senators must be held accountable for how they vote on issues of importance to union members and working families; based on my experience, [6] advertisements on policy and legislative issues have far less impact when they do not mention a policymaker by name. The express or implied urging of viewers or listeners to contact the policymaker regarding the issue is also especially effective by showing them how they can personally impact the issue debate in question. The only exception to this policy has been for advertisements run on national cable networks, such as CNN, where we cannot name specific candidates because a single advertisement is aired throughout the country, and an occasional generic ad in the Washington, D.C. broadcast market. While these ads add resonance to an

issue debate and emphasize the AFL-CIO's role as a working families advocate, they have little legislative impact and we rarely use them. With certain exceptions, we have tried to run the same or very similar advertisements in a group of media markets at the same time, with only the name of the policymaker being changed in each media market. This is largely the result of financial considerations; it is much less expensive to produce a single ad and run it in a number of markets at the same time than to produce different advertisements for each market. In addition, by running a flight of identical advertisements we are able to ensure a unified issue advocacy message and generate attention in the media for what we are doing, thereby influencing citizens and policymakers in markets where we cannot afford to run an advertisement. To the best of my recollection, during the period from 1995 to the present, we have never run different advertisements at the same time for Representatives or Senators who were not running for re-election than for those who were candidates in an upcoming primary or general election. Thus, as discussed below, on a number of occasions we have run broadcast advertisements naming Representatives or Senators who coincidentally were candidates in a primary or a general election to be held within 30 or 60 days, respectively, while running the identical ad naming a larger number of Representatives or Senators who were not up for re-election in that year.

12. [7] Because of our limited financial resources to support the public affairs program, we have tended, with certain exceptions, to run more advertisements naming Representatives than Senators. This is primarily because it is generally far more expensive to purchase sufficient time on television and radio to have an impact on Senators, who serve a statewide constituency, than Representatives whose

congressional districts are usually smaller. Moreover, we believe that ads targeting Representatives may have a spill-over impact on Senators from the same state. We also have been forced by our limited resources to run our flights of advertisements in a small number of media markets relative to the total number of Representatives or Senators. In selecting the specific targets for our broadcast advertisements, we have relied on a number of factors relating to the particular issue being addressed. How a Representative or Senator has voted with respect to previous identical or similar legislation and whether he or she is currently undecided have been, over the years, among the most important factors. Whether a Representative or Senator is on a relevant Committee or has some other prominent role with respect to a particular piece of legislation is sometimes a critical factor. Other factors may also become important in particular cases, such as whether we anticipate that a Representative or Senator will be especially vocal in responding to our advertisements, thereby helping us gain so-called "free media" for our issue and letting other Representatives or Senators whom we have not targeted know of our position and how important it is to workers.

13. It is certainly true that the AFL-CIO's advertisements have targeted more Republican legislators than Democrats, although many Democrats have been targeted on specific issues. There are a number of reasons for this, the most important being that throughout all of this period both Houses of Congress were controlled by the Republican Party and, for most of this period, the Republican leadership in Congress, led by Speaker Newt Gingrich, has actively [8] pursued an overwhelming partisan legislative agenda seeking to remove or limit many of the pro-worker protections and benefits achieved in prior years.

14. Finally, two other related factors have played an important role in the AFL-CIO's selection of markets for our broadcast advertising. In order to focus our limited resources on Representatives or Senators who were regarded as being susceptible to the AFL-CIO's point of view on particular issues, we have often aired our advertisements in states or congressional districts with large numbers of union members, because it is in these areas that our ability to activate our membership and change a Member of Congress's position is likely to be the greatest. We have similarly tended to focus on locations where elections for the House and Senate are likely to be close because our experience has shown, and the advice we have received has indicated, that the public and policymakers are far more likely to pay attention to our message where elections are competitive and the advertising could influence public perceptions of their official conduct and policy commitments than where one candidate is regarded as a shoo-in for election.

15. In early 1996, my understanding of the legal environment was that there was significant doubt as to whether or not I could discuss any of my decisions regarding the content and placement of the AFL-CIO's broadcast advertisements with any candidate, candidate committee, or party official; AFL-CIO activities that were "coordinated" with candidates or parties could be treated as unlawful contributions to them. I also understood that there was a considerable degree of uncertainty concerning what contacts with a candidate or party official might be treated as improper "coordination." At roughly the same time, I was asked by our lawyers to assist in preparing the AFL-CIO's response to complaints filed with the Federal Election Commission by various Republican Party committees

alleging that the AFL-CIO had [9] illegally coordinated our broadcast communications with various Democratic candidates, the White House and the Democratic Party.

16. Throughout my tenure I have studiously avoided discussing the content or placement of the AFL-CIO's radio and television advertisements with any candidate for federal office or any person whom I know or have reason to believe may be working for such a candidate. I have also avoided discussing the advertisements with any political party official. I have made this policy known to my staff in the Public Affairs Department and often reminded them of it. I can only recall a few instances over the years in which I was approached by a candidate or someone acting on behalf of a candidate and urged to run broadcast ad in the candidate's state or congressional district. In each instance I informed the candidate or other individual that I could not discuss the AFL-CIO's broadcast advertising with him or her and ended the conversation, and I did not respond to the request by running advertisements as requested. Indeed, it is likely that if such a request was made I would have avoided doing so in order to avoid any possible legal claim against the AFL-CIO.

17. In contrast to the Public Affairs Department, I am aware that the AFL-CIO's Political Department regularly communicates with candidates for federal office, their campaigns, and party officials. Because we understood the law to be very uncertain on the matter, in order to avoid any charge that the AFL-CIO was using the staff of the Political Department to coordinate our advertising program with candidates and party officials, beginning in 1996 an internal "Chinese wall" was constructed to keep the Political Department isolated from my decisions regarding the placement and content of our broadcast advertising. Thus, although I met with our Political Director, Steven Rosenthal, from time to time on a variety of organizational matters, I avoided discussing the content or placement of our advertisements with him.

18. [10] Mr. Rosenthal similarly did not provide me with polling and similar information that could reveal the specific plans of the Political Department in connection with the election. I was reminded at my deposition that in July 1986 Mr. Rosenthal sent me a list of states grouped according to how close the presidential election looked. I requested that list so I would know where other advertising was likeliest to be heavy in the Fall, so we could plan our own ad buys. Otherwise, to the extent that I needed information about political races, I usually relied on general circulation publications, including the Rothenberg Report.

19. The "wall" of separation between the Public Affairs and Political departments remained in effect throughout the 1996 and 1998 federal elections cycles. In 2000, we came to understand that the definition of impermissible "coordination" had been clarified to some extent in a recent judicial decision involving the Christian Coalition and in regulations issued by the Federal Election Commission. As a result, I understood that, while we still could not coordinate specific broadcast advertisements with candidates or party officials, it was no longer necessary to maintain a rigid "wall" between the Public Affairs and Political departments. In reality, however, the relationship between the two departments had become well-established with respect to the content and placement of broadcast advertising and the Political Department continued to have very little involvement in these decisions.

20. When I joined the AFL-CIO in November, 1995, the AFL-CIO was using a single media consulting firm, Greer, Margolis, Mitchell, Burns & Associates' to create and produce its television and radio advertisements and to purchase time for running these advertisements. I continued to use Greer, Margolis for these purposes for the broadcast ads that we ran at the end of 1995 and into the Spring of 1996. Some time in 1996, however, I decided that we should make a change in the way we were handling our communications program, particularly insofar as [11] we were using the same firm that developed and produced the advertisements as the media buyer for the advertisements. After interviewing a number of firms, in June 1996 we switched to three other firms to develop and produce our advertisements, Axelrod and Associates, Shrum, Donilon & Devine, and Sol Shorr & Associates. We also began using Media Strategies and Research, Inc., a Colorado-based media buyer, for all of our broadcast advertising. During my deposition in this litigation on September 18, 2002, I was shown several communications relating to my selection of our new media consultants and media. Although some of those documents include references to electoral goals of AFL-CIO broadcast media, that is not how I described our goals to prospective consultants, and the memo from Media Strategies and Research predates by five months our decision to hire the firm.

21. In helping to respond to the Republican Party FEC charges against the AFL-CIO concerning our 1996 broadcast advertisements, I learned that Greer, Margolis may have done a small amount of work for the Democratic National Committee and the Democratic Senatorial Campaign Committee, although my recollection is that the work for the DNC only involved the production of a tape on a

trip taken by President Clinton to Ireland and the work for the DSCC occurred after we stopped using the firm. However, I never discussed Greer, Margolis' activities on behalf of the DNC or the DSCC with the firm and was not even aware of it until well after the 1996 election. Well after the election, I similarly learned as a result of the FEC investigation that Media Strategies and Research had acted as a media buyer for a small number of candidates at the same time as it was acting as the AFL-CIO's media buyer. I was not aware of MS&R's work on behalf of those candidates at the time, and I am certain that MS&R never discussed the candidates' plans or needs with me or my staff. Finally, I became aware for the first time during the FEC investigation that our public opinion consultants, Peter Hart Research Associates, had [12] worked for a Member of Congress in whose district the AFL-CIO had run broadcast ads, although I was not sure of this fact during the election.

22. The AFL-CIO has also declined as a matter of policy to desist from broadcast issue advocacy where candidates have called on groups not to engage in it while they are campaigning. This is because we make an independent judgment as to whether it is necessary or advisable for the AFL-CIO to run broadcasts, and we scrupulously avoid collaboration with officeholders in their capacities as candidates concerning our broadcast efforts, including whether or not to broadcast at all. Two recent examples occurred in 2000. During the New York U.S. Senate race, Democrat Hillary Rodham Clinton and her opponent Republican Rick Lazio publicly discussed an agreement to call on all groups and organizations to forego advertising about either of them. As attached Exhibit 23 (AFL-CIO 20130) demonstrates, the AFL-CIO publicly rejected abiding by such a request, although we had no plans

(and did not) engage in any such broadcasts. Another such request was made by the campaign of Susan Davis (D) for Congress in California. Again, we declined to comply, and in fact broadcast an ad in July referring to her opponent, incumbent Brian Bilbray (R), concerning prescription drug coverage under Medicare.

23. Since 1996, AFL-CIO issue advertising has prompted numerous efforts by the three national Republican Party committees to dissuade broadcast stations -- usually with threats of litigation -- from continuing to broadcast the ads. In no instance has any of these party committees ever contacted the AFL-CIC about the matter; instead, their practice has been to send letters to the stations demanding that they pull our ads. Numerous stations have complied with these demands, with or without seeking our response or even informing us that they have done so. Others have forwarded the letters to us for a response, and then in light of our response [13] usually continued or resumed airing our ads. Attached as Exhibit 24 are Republican Party committee letters and press releases, AFL-CIO responsive letters, and related correspondence from 1996, 1997 and 1999 reflecting these disputes. (AFL-CIO 17188-91, 17865-67, 17152-56, 17125-30, 19976, 17138-39, 17157-58, 17145-47, 17143-44, 20299-302, 17131-33, 18918-32.) Attached Exhibit 25 indicates, for example, that, at one point during July 1996, 12 stations were refusing to carry AFL-CIO ads for reasons other than an overall station policy against "third party" advertising, six stations had pulled ads they had been running, and one was threatening to do so. (AFL-CIO 17159-80).

24. From my experience, if, contrary to the Bipartisan Campaign Reform Act (BCRA), the AFL-CIO

were able to continue broadcasting advertisements that refer to officeholders who are candidates, or non-incumbent candidates, during the 30- and 60-day periods before primaries and general elections, but the AFL-CIO were required by the BCRA to file detailed public reports with the FEC about the potential content of future advertising once the AFL-CIO contracted for or spent $10,000 in expenditures to do so, four consequences would surely follow:

a. First, this obligation of advance disclosure would chill and deter the AFL-CIO from initiating some broadcast plans because we would lose the leverage and impact that ordinarily follows from conveying our message at a way and time of our choosing.

b. Second, the AFL-CIO would be forced to disclose ongoing and changing broadcast message strategies and ideas that it might never carry out -- for reasons unrelated to that disclosure -- and publicize our internal decision-making processes that we believe should remain, and needs to remain, confidential.

c. Third, officeholders, candidates, party committees and others who oppose [14] AFL-CIO policies would seek to pressure broadcast stations into refusing to carry contemplated advertising in advance of the broadcasts, and establish a pattern of preemptive attacks to silence us.

d. Fourth, our opponents would be likely to arrange to broadcast counter-messages simultaneously or even before ours are broadcast.

25. I also understand that the BCRA would require broadcasters immediately to disclose to the public a

great deal of information about any "request" -- even if rejected -- by the AFL-CIO to purchase broadcast time for any message concerning a "political matter of national importance," including a "legally qualified candidate," "any election to Federal office," or "a national legislative issue of public importance." This publicly disclosed information would include the date and time of the requested broadcast; the candidate, election or issue the broadcast would refer to; the identity of the AFL-CIO representative making the request; and a list of the AFL-CIO's chief executive officers or Executive Council members.

26. I do not know the scope of the "matters" and "issues" that the BCRA would require broadcasters to disclose, but assuming that much or all AFL-CIO broadcast advertising of the kind that has run since 1995 would be covered, from my experience these requirements would be both chilling and burdensome. The AFL-CIO, usually through MS&R, regularly contacts broadcast stations in order to arrange for advertisements to air. If every such request triggered public disclosure of the intended date, time and subject matter of the ad, the AFL-CIO would be deterred and hampered in its public issue advocacy efforts for each of the four reasons I have described above with respect to filing advance disclosure reports with the FEC regarding "electioneering communications." And, the broadcaster disclosure requirements are even broader than the "electioneering communications" disclosure requirements, because they cover [15] ads that do not mention candidates or any individual, and because they include disclosure of the exact date and time of an intended broadcast. These disclosures would-reveal a great deal about ongoing and preliminary AFL-CIO plans and decision-making by providing a road map of when and where we might broadcast

issue advertising -- again, regardless of what we finally decide, including a decision not to broadcast anything.

27. The AFL-CIO has expended substantial resources for broadcast issue advertising. The direct costs, comprised of third-party payments, and excluding staff time and other overhead, for 1997-2001 are as follows:

1997: $3,757,193
1998: $8,392,148
1999: $3,065,187
2000: $17,890,425
2001: $3,490,469

The usual costs of production and air time are such that the $10,000 reporting threshold in the BCRA would be met for virtually any AFL-CIO broadcast.

28. The AFL-CIO also sometimes purchases newspaper advertising for its issue advocacy. We have usually done so in newspapers with high readership among Members of Congress and their staffs, such as Roll Call and the Washington Post. When we are seeking to influence and mobilize public opinion, however, we almost always have used broadcast advertising because it is far more cost-effective; most people get their news and information from broadcast sources; newspaper readership is tilted toward higher-income readers, and we try to reach working and middle-class families; and broadcasts simply have a more potent effect, including the ability to generate additional "free media," reporting about the advertisements [16] themselves. Also, newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human,

personal impact of legislative issues -- a key part of our strategy and effectiveness.

29. The AFL-CIO has not undertaken to use direct mail or telephone banks to reach the general public. These means by definition are not mass, publicized communications, so there could not trigger the same amplification through "free media;" and, these costly and labor-intensive means, requiring massive lists and technological investments, could not offer the same efficiencies and impact as broadcast.

The AFL-CIO's Broadcast Advertising: 1995 to 2001

30. In the Fall of 1995, President Clinton and the Republican Congress, led by Speaker Gingrich, became embroiled in a battle over the FY 1996 federal budget. The AFL-CIO undertook a series of grassroots lobbying activities in an effort to mobilize workers and the public in support of the President's position. As part of this grassroots effort, the AFL-CIO sponsored a flight of television and radio advertisements called "Families" and "Fair" that ran in media markets serving approximately 23 Congressional Districts between December 5 and 11, 1995. The script for "Families" is attached as Exhibit 26 (AFL-CIO 7173). A memorandum to me from our media consultant documenting the broadcast dates for these ads is attached as Exhibit 27 (AFL-CIO 1253-1254). The television version of the advertisement discussed the proposed cuts to Medicare, college loans and other programs in the Republican budget plan and concluded by urging viewers to contact their representatives in opposition to that proposal: "Now it's up to us to get involved and speak out. Let's tell Congressman XXX: this time don't vote for the wealthy special interests. This time vote for America's working families." The Members of Congress selected as targets of the "Families" and "Fair" advertisements had all voted in favor of [17] the Republican budget plan.

31. When the budget impasse continued into January 1996, the AFL-CIO sponsored another flight of television and radio advertisements entitled "Too Far" and "Why" that ran between January 17 and 23, 1996 in media markets serving approximately 18 Congressional Districts. A copy of the scripts are attached as Exhibits 28 (AFL-CIO 7174) and 29 (AFL-CIO 7172) and additional materials produced by my office related to these advertisements are attached as Exhibit 30 (AFL-CIO 1255-1256). The television version of this advertisement discussed the government shutdown, the Republican budget cuts, and concluded: "Let's tell Congressman XXX to stop the political games and stand up for working families for a change."

32. In addition to the television version of "Too Far," a generic version of the advertisement also ran on CNN between January 17 and 23, 1996 as a so-called national buy, meaning that the time for this advertisement was purchased nationally, rather than through local cable outlets, and it was seen throughout the country. The cable version of "Too Far" did not mention the name of a specific Member of Congress, as did the television version, but it did mention President Clinton and Rep. Gingrich by name and included their likenesses. A copy of the script is attached as Exhibit 31 (AFL-CIO 7178). Within 30 days after "Too Far" ran on CNN, President Clinton's name appeared on the primary ballots in Iowa (February 12, 1996) and New Hampshire (February 20, 1996), both of which elections he won easily without serious opposition.

33. During my deposition in this case I was asked a number of questions concerning a news article dated January 25, 1996. Attached as Exhibit 32 (AFL-CIO 19757-19769) is a transcript of the press conference described in that news article.

34. As set forth in the Declaration of Gerald Shea, during April 1996 the AFL-CIO [18] undertook a major lobbying campaign to increase the federal minimum wage from $4.25 to $5.15. As part of this effort, the AFL-CIO sponsored a flight of paid television advertisements entitled "1991" that ran between April 9 and 15, 1996. A copy of the script is attached as Exhibit 33 (AFL-CIO 6948), and additional materials produced by my office related to these advertisements are attached as Exhibit 34 (AFL-CIO 006971, 19945). The advertisements emphasized the need to increase the minimum wage and urged viewers to call their representatives in Congress and tell them to vote for the increase. "1991" ran in approximately 19 media markets serving congressional districts of Representatives who had voted against bringing up the minimum wage increase at the end of March. A radio version of "1991" was run in approximately nine markets. At least three of the Representatives named in the television and radio advertisements run by the AFL-CIO during April 1996 coincidentally were candidates in a primary election within 30 days after the advertisements ran. These individuals are identified on Exhibit 1.

35. During the first week in May 1996, the AFL-CIO sponsored another flight of radio advertisements targeted at Representatives who had voted not to bring the minimum wage increase up for a vote. Entitled "Raise" and "Votes," these advertisements ran in markets serving approximately 29 congressional districts. A copy of the scripts are attached as Exhibits 35-36 (AFL-CIO 6995-6996) and additional materials produced by my office related to these advertisements are attached as Exhibit 37 (AFL-CIO 6992-6994). Between May 20 and 23, 1996, after the House leadership indicated that it would allow the minimum wage increase to be brought up for a vote, the AFL-CIO sponsored another flight of television and radio advertisements entitled "People" and "No" in markets serving 27 congressional districts. Copies of the scripts are attached as Exhibits 38 (AFL-CIO 7050) and 39 (AFL-CIO 7023), and [19] additional materials produced by my office related to these advertisements are attached as Exhibits 40 (AFL-CIO 19946) and 41 (AFL-CIO 7024-29). At least three of the Members of Congress named in these television and radio advertisements run by the AFL-CIO during May 1996 coincidentally were candidates in a primary election within 30 days after the advertisements ran. These individuals are also identified on Exhibit 1.

36. Between July 5 and 8, shortly before the minimum wage bill was due to be voted on in the Senate, the AFL-CIO ran radio ads entitled "Minimum Wage" targeting the Republican Senators in Maine, Vermont and South Dakota. A copy of the script is attached as Exhibit 42 (AFL-CIO 6935) and additional materials produced by my office related to these advertisements are attached as Exhibit 43 (AFL-CIO 6936-6937). In order to keep pressure on Republicans in the House to vote in favor of the final version of the minimum wage bill after it returned from the Senate, between June 27 and July 7, the AFL-CIO ran a television advertisement entitled "$5.15" in media markets serving approximately 14 congressional districts. A copy of the

script is attached as Exhibit 44 (AFL-CIO 7125) and additional materials produced by my office related to these advertisements are attached as Exhibits 45 (AFL-CIO 7116-7117) and 46 (AFL-CIO 7148). The advertisement informed viewers that their Representative had voted against the minimum wage in May "even though 93 other Republicans voted for the bill," and urged them to call the Member named in the advertisements and "Tell him[her] it is time to start rewarding work. Tell him its time to raise the minimum wage." The Members who were targeted in those ads had voted against final passage of the House bill in May; we discontinued our advertisements regarding a number of Members who had previously been targeted but who had voted for the House bill. At least one of the Members of Congress named in the television and radio advertisements run by the AFL-CIO during July 1996 coincidentally was a candidate in a [20] primary election within 30 days after the advertisements ran, although I was not aware of this at the time.

37. Between June 27 and August 4, 1996, the AFL-CIO sponsored flights of substantially similar television and radio advertisements entitled "Couple," "Lady," "Peace," and "Wither." Copies of the scripts are attached as Exhibits 47 (AFL-CIO 17642), 48 (AFL-CIO 7166), 49 (AFL-CIO 7170), and 50 (AFL-CIO 17676) and additional materials produced by my office related to these advertisements are attached as Exhibits 51 (AFL-CIO 17694-17696) and 52 (AFL-CIO 17705-17706). These advertisements were all intended to defeat the continuing efforts of the Republican Congress to reduce Medicare/Medicaid benefits as part of the FY 1997 federal budget legislation. For example, "Couple" reminded listeners and viewers about the cuts in the Medicare program adopted by the Republican Congress in November 1995,

stated that "Congress is preparing to vote again on drastic cuts in Medicare," and urged viewers and listeners to call the Representative who was named in the advertisements and "tell him not to destroy Medicare. Tell him this time we're watching." "Peace," which was run only on radio, urged listeners to call the named Member of Congress and "Tell him to keep his hands off Medicare." "Wither" focused on adverse comments about Medicare by Speaker Gingrich.

38. Between August 28 and September 4, 1996, the AFL-CIO sponsored another flight of advertisements entitled "Another" in response to a series of advertisements run by business interest groups that called into question the AFL-CIO's Medicare ads by claiming that the Republican budget would increase, rather than decrease, Medicare benefits. A copy of the script for this ad is attached as Exhibit 53 (AFL-CIO 19368) and additional materials produced by my office related to these advertisements are attached as Exhibits 54 (AFL-CIO 7126-7127), 55 (AFL-CIO 19987-19988), and 56 (17782-17783). The tag line to "Another" urged viewers [21] to tell the named Member "we know the truth about his vote [in 1995] to cut our Medicare benefits. Another vote is coming. This time we'll be watching."

39. At least 12 of the Members of Congress named in the Medicare television and radio advertisements run by the AFL-CIO during July and August, 1996 coincidentally were candidates in a primary election within 30 days after the advertisements ran. These individuals are identified on Exhibit 1.

40. As part of the AFL-CIO's continuing legislative program, in August 1996, the AFL-CIO sponsored

a television and radio advertisement entitled "Edith," which was intended to gain support for legislation to protect the retirement savings of working families by applying the same protections to 401(k) plans as already applied to traditional defined benefit plans. A copy of the script for this advertisement is attached as Exhibit 57 (AFL-CIO 7082) to this Declaration, and additional materials produced by my office related to these advertisements are attached as Exhibit 58 (AFL-CIO 17912-17928). The advertisement was broadcast in congressional districts whose Representatives had all supported legislation as part of the "Contract with America" that would have made it easier for corporations to raid their pension plans without informing workers. The advertisement featured an employee of a company that had raided its 40(k) plan assets before it went broke, and urged viewers and listeners to call a named Member of Congress and "tell [him] to put the law on our side." At least 11 of the Representatives named in the Medicare television and radio advertisements run by the AFL-CIO during July and August, 1996 coincidentally were candidates in a primary election within 30 days after the advertisements ran. These individuals are identified on Exhibit 1.

41. Between September 5 and 17, 1996, the AFL-CIO sponsored a flight of radio and television advertisements entitled "No Two Way," which focused on the upcoming budget fight [22] over education programs. A copy of the script is attached as Exhibit 59 (AFL-CIO 17933) and additional materials produced by my office related to these advertisements are attached as Exhibits 60 (AFL-CIO 17929-17931) and 61 (AFL-CIO 17934-17936). The advertisement ran in media markets serving approximately 35 congressional districts. The advertisement informed viewers that the named Representative had voted with Newt Gingrich to cut the

college loan program in October, 1995 and that "Congress will vote again on the budget." It ended by asking viewers and listeners to "Tell [Cong. X] "don't write off our children's future.... Tell him his priorities are all wrong." The ad also included an 800 number to be used in contacting the named Representative. At least eight of the named Representatives in Medicare television and radio advertisements run by the AFL-CIO during September 1996 coincidentally were candidates in a primary election within 30 days after the advertisements ran. These individuals are identified on Exhibit 1. Furthermore, although these advertisements were broadcast in direct response to pending legislation, all of the "No Two Way" advertisements were run on television or radio stations on one or more occasions within 60 days of the general election held on November 5, 1996. The Members targeted by these advertisements are identified in Exhibit 1.

42. The second session of the 104th Congress adjourned October 3, 1996. After that date, therefore, the AFL-CIO discontinued its television and radio broadcast program aimed at immediately pending legislative issues. However, beginning in late September and continuing until the November election, the AFL-CIO ran what we called "electronic voter guides" comparing the positions of congressional candidates on a number of important issues. These ads were entitled "Kids," "Retire," "Medicare," "Taxes," and "Homes." Copies of the scripts are attached as Exhibits 62 (AFL-CIO 7193), 63 (AFL-CIO 7204), 64 (AFL-CIO 7190), 65 (AFL-CIO 7200), 66 (AFL-CIO 7226), 67 (AFL-CIO 7194), and 68 (AFL-CIO 7208) and additional [23] materials produced by my office related to these advertisements are attached as Exhibits 69 (AFL-CIO 7197-7198), 70 (AFL-CIO 7205-7206), 71 (7191), 72 (7201-7202),

73 (7188), 74 (7195-7196) and 75 (7209-7210). The purposes of these voter guides were to continue the AFL-CIO's efforts to inject working family issues into the congressional elections by educating the public about the candidates' positions on these issues, and to maintain pressure on candidates to take pro-worker positions with respect to these issues during their campaigns, in order to achieve more favorable treatment by them when the issues arose again in the next Congress. The issues we selected to highlight in the voter guides had been addressed in issue advertisements sponsored by the AFL-CIO during the previous year - Medicare, education, tax fairness and pension protection - and were issues that annually are addressed in Congress.

43. Each of the AFL-CIO's electronic voter guides included an 800 number through which viewers and listeners could request additional written information about the positions taken by the candidates running for Congress in their districts. A copy of the written information provided is attached as Exhibit 76 (4923-4925). The electronic voter guides, as well as the written materials sent to respondents, were prepared by the Public Affairs Department from public sources, including the Congressional Record, web sites, news stories, etc. We did not contact any candidate to obtain the information about their records, or otherwise discuss the content of the guides with any candidates, party officials or their agents. And, the issues selected and research for the electronic voter guides were determined without input from the AFL-CIO's Political Department.

44. All of the electronic voter guides run by the AFL-CIO in 1996 were broadcast on television or radio during the 60 days prior to the general election on November

6. The candidates whose records were compared in these guides are identified in Exhibit 1.

45. [24] Throughout 1997, the first session of the 105th Congress, the AFL-CIO continued to sponsor television and radio advertisements on legislative issues of importance to working families. The advertisement entitled "Values" ran on television between April 1 and 7, 1997. A copy of the script is attached as Exhibit 77 (AFL-CIO 18881) and additional materials produced by my office related to this advertisement are attached as Exhibits 78 (AFL-CIO 18904-18905) and 79 (AFL-CIO 20008). A similar advertisement, entitled "Choice," was run on radio during the same period. The advertisements were intended to raise questions about America's priorities by asking why Congress neglects crumbling schools in need of repair, yet at the same time gives tax subsidies that actually reward companies for sending jobs overseas. The advertisements urged listeners and viewers to contact both Republican and Democratic Representatives through their local office telephone number and "tell him [her] to protect our kids, not special interests. Let's make the right choice for working families."

46. Between May 10 and 14, 1997, the AFL-CIO sponsored a flight of radio advertisements entitled "Gut" targeting both Democratic and Republican Senators from nine states who, based on their previous voting records, our Legislative Department regarded as possible supporters of a pending proposal that would have allowed employers to require their employees to work over 40 hours a week without paying them overtime. Each advertisement urged listeners to contact the named Senator through an 800 line and "tell him[her] to do the right thing for [state]'s working families by voting no."

47. Between June 18 and 24, 1997, the AFL-CIO ran a radio ad entitled "Everybody" and a television ad entitled "Fairness" opposing a Republican proposal to exclude welfare recipients from the protections of the Fair Labor Standards Act. A copy of the television script is attached as Exhibit 80 (AFL-CIO 6686) and additional materials produced by my office related [25] to these advertisements are attached as Exhibits 81 (AFL-CIO 6687-6689) and 82 (AFL-CIO 6690). The advertisements mentioned certain Representatives by name and urged viewers to "Call Congressman XXX at 1-800-765-4400. Tell him [her] to fight for fairness. One minimum wage for everybody."

48. In June 1997, prior to a vote in the House of Representatives on competing Republican and Democratic tax proposals, the AFL-CIO sponsored a number of television and radio advertisements urging support for President Clinton's tax proposal and opposition to the Republican plan. These advertisements, entitled "Paycheck" and "Breaks," targeted Republicans and Democrats. Following passage of H.R. 2014 in the House, in early July the AFL-CIO ran another flight of radio and television ads entitled "Wrong" and "Bad Vote" in the congressional districts of 23 Members who had voted in favor of the Republican-supported bill. Copies of the scripts are attached as Exhibits 83 (AFL-CIO 20179), 84 (AFL-CIO 20178), 85 (AFL-CIO, 18910), and 86 (18911), and additional materials produced by my office related to these advertisements are attached as Exhibits 87 (AFL-CIO 18906-18909), 88 (AFL-CIO 18916-18917) and 89 (AFL-CIO 20021-20022). These advertisements criticized the named Members for their votes and urged them to support the White House proposal when the issue returned for consideration.

49. Throughout September and into October, 1997, when President Clinton asked Congress for so-called "fast-track" trade authority, the AFL-CIO aired television and radio advertisements entitled "Rush" and "Get It Right" in opposition to the President's proposal. Copies of the scripts are attached as Exhibits 90 (AFL-CIO 6518) and 91 (AFL-CIO 6511) and additional materials produced by my office related to these advertisements are attached as Exhibits 92 (AFL-CIO 6635) and 93 (AFL-CIO 20027). The ads, which targeted approximately [26] 23 Members of Congress who had previously voted in favor of a similar proposal, mentioned the Representatives by name and urged listeners or viewers to "Tell Congressman XXX] to no vote on Fast Track so he can fight for trade deals that work for us," or "Call Congressman X at 1-800 .... and tell him to stop fast track."

50. Between July 15 and 23, 1998, the AFL-CIO sponsored several flights of television and radio advertisements designed to generate support for HMO reform legislation (H.R. 3605) that had been introduced earlier in the year and was about to come to a vote in the House. Two ads, "Pass" (radio) and "Support" (television), targeted 12 Republicans and nine Democrats. Copies of these scripts are attached as Exhibits 94 (AFL-CIO 6876) and 95 AFL-CIO (6730), and additional materials produced by my office related to these advertisements are attached as Exhibits 96 (AFL-CIO 6878-6880) and 97 (AFL-CIO 6736-6738). The television ad informed the public that "Fortunately, our Representative, [name] supports the Patient Bill of Rights," and urged listeners to "Call and thank him at 1-800 ..... and ask him to make sure Congress passes this law for working

families." Other ads run during this period, entitled "Call," "Failed," "Liable," "Soon" and "Basic," targeted Representatives and Senators, including one Democrat, who had not yet endorsed H.R. 3605 but who our Legislative Department believed could be persuaded to support the bill. Copies of these scripts are attached as Exhibits 98 (AFL-CIO 6586), 99 (AFL-CIO 20173), 100 (AFL-CIO 6919), 101 (AFL-CIO 20174), and 102 (AFL-CIO 20176), and additional materials produced by my office related to these advertisements are attached as Exhibits 103 (AFL-CIO 17023-17031) and 104 (AFL-CIO 20045-20046). As reported in Exhibit 1, at least one Representative (Tanner, D-TN) and one Senator (Bond, R-MO) named in the advertisements coincidently were candidates in primary elections within 30 days after the advertisements ran.

51. [27] In September 1998, the Republican leadership in the Senate scheduled a vote on S. 2330, an extremely inadequate Patient's Bill of Rights bill that was opposed by the AFL-CIO. In response, the AFL-CIO sponsored a flight of advertisements entitled "Deny" that was intended to generate opposition to the bill. A copy of the script is attached as Exhibit 105 (AFL-CIO 6911), and additional materials produced by my office related to these advertisements are attached as Exhibits 106 (AFL-CIO 20050-20051) and 107 (AFL-CIO 20049). The advertisement, which ran on both television and radio between September 10 and 23, 1998, targeted approximately 17 Senators who the Coalition believed could be persuaded to support the stronger bill supported by the AFL-CIO and its coalition partners. Thirteen of these Senators were not candidates in the general election to be held on November 3, 1998. However, as shown on Exhibit 1, the remaining four Senators targeted by name in the "Deny" advertisements

were candidates in the November 3, 1998 election.

52. During September 1998, Congress also considered a Republican proposal to use the Social Security Trust Fund to pay for tax cuts. The proposal was included in the Taxpayer Relief Act ("TRA"), which was scheduled for a vote in the House on September 26, 1998. In response, the AFL-CIO ran flights of radio and television advertisements entitled "Spearmint" and "Spear," which focused on the Republican tax proposal. Copies of the scripts are attached as Exhibits 108 (AFL-CIO 19369) and 109 (AFL-CIO 20172), and additional materials produced by my office related to these advertisements are attached as Exhibits 110 (AFL-CIO 2055-2056), 111 (AFL-CIO 19484-19506) and 112 (AFL-CIO 19481-19483). The ads ran between September 22 and 25 in approximately 15 congressional districts. After the TRA passed the House and was being considered in the Senate, we ran another flight of ads on this subject entitled "Save" (television) and "Block" (radio), which were intended to influence House [28] Members in the event that the bill returned for another vote in the Senate. Copies of these scripts are attached as Exhibits 113 (AFL-CIO 19370) and 114 (AFL-CIO 20297), and additional materials produced by my office related to these advertisements are attached as Exhibit 115 (AFL-CIO 20060-20061). These ads ran between October 2 and 9, 1998 in approximately 20 congressional districts. As shown in Exhibit 1, all of the Members targeted in both flights of TRA ads were candidates in the general election held on November 3, 1998.

53. When another vote on pending "fast-track" trade legislation was hastily scheduled in the House of Representatives for September 25, 1998, the AFL-CIO ran a

flight of radio advertisements entitled "Barker" between September 21 and 25 in eight congressional districts urging listeners to call their Representative and "tell him to vote no on Fast Track. Tell him we're still paying attention. And Fast Track is still a bad idea." A copy of the script for this advertisement is attached as Exhibit 116 (AFL-CIO 6476). The names of the individual Members named in these advertisements, all of which ran within 60 days of the general election on November 3, 1998, are shown on Exhibit 1.

54. The primary focus of the AFL-CIO's broadcast advertising in 1999 was the Patient's Bill of Rights (PBR), which had been stalled in the Senate at the end of 1998. As the Senate again took up the PBR proposals in July, the AFL-CIO ran a flight of advertisements entitled "Side"(television) and "Charge" (radio) that compared the Democratic proposal with the weaker Republican proposal that ultimately passed in the Senate on July 19, 1999. Copies of the scripts for these ads are attached as Exhibits 117 (AFL-CIO 6389) and 118 (AFL-CIO 16724), and additional materials produced by my office related to these advertisements are attached as Exhibit 119 (AFL-CIO 20073). The ads targeted 10 Republican Senators whose votes were regarded as crucial in the upcoming vote. Later in the year, when PBR was brought up in the [29] House, the AFL-CIO ran another flight of ads in support of a bipartisan bill introduced by Reps. Norwood (R-GA) and Dingell (D-MI). Those ads, entitled "Watch" (radio) and "Decide" (television), ran for four days immediately before the House vote on October 7, 1999, and targeted approximately 15 Members of Congress. A copy of the radio script is attached as Exhibit 120 (AFL-CIO 6381), and additional materials produced by my office related to these advertisements are attached as Exhibits 121 (AFL-CIO 20079), 122 (AFL-CIO 6387), and 123 (19831).

55. In July 1999, the AFL-CIO ran television and radio advertisements entitled "Voice" and "Secure." Copies of the scripts are attached as Exhibits 124 (AFL-CIO 6379) and 125 (AFL-CIO 20182), and additional materials produced by my office related to these advertisements are attached as Exhibit 126 (AFL-CIO 20078). These ads targeted approximately 15 Representatives who had voted for a $792 billion tax cut on July 22, 1999 and focused on the need to shore up programs such as Medicare.

56. In November and December, 1999, the AFL-CIO ran a number of ads in the Seattle area at the time of the meetings of the World Trade Organization to focus attention on the goals of the union demonstrators.

57. In the months of February through June, 2000, the AFL-CIO ran several flights of ads entitled "Label," "Trust," "Endure," and "Stand" in opposition to President Clinton's proposal to provide permanent normal trade relations to China. Copies of these scripts are attached as Exhibits 127 (AFL-CIO 16671), 128 (AFL-CIO 6359), 129 (AFL-CIO 6355), and 130 (20175), and additional materials produced by my office related to these advertisements are attached as Exhibits 131 (AFL-CIO 6356-6358), 132 (AFL-CIO 16658-16670), 133 (AFL-CIO 6362), 134 (AFL-CIO 6237-6244), 135 (6371-6376) and 136 (20103-20104). As shown on [30] Exhibit 1, China advertisements naming five Representatives coincidentally were run within 30 days of primary elections held in the congressional districts served by those Members.

58. In late June to early July, 2000, the AFL-CIO

paid for a flight of radio advertisements entitled "Block" aimed at pressuring the Senate to approve the Norwood-Dingell version of the Patient's Bill of Rights, rather than the weaker version approved by the Senate in 1999. A copy of the script for this advertisement is attached as Exhibit 137 (AFL-CIO 16727). "Block" targeted seven Republican Senators who had consistently voted not to allow a vote on this legislation. The advertisement urged listeners to "call Senator XXX. Tell him to stop covering for the insurance industry and pass a real patient protection law. Tell him we're waiting." In August and September, with the bill still stalled in conference, we ran several flights of television advertisements entitled "Help" targeting Republican Representatives who had voted against the Patient's Bill of Rights when it passed the House in October, 1999, urging viewers to contact each of these Members and 'tell him he's on the wrong side." A copy of the script for this advertisement is attached as Exhibit 138 (AFL-CIO 6161). One of the flights of "Help" ran between August 18 and September 6, 2000; three Members targeted in this flight coincidentally were involved in primary elections within 30 days after the ads ran in media markets serving their congressional districts, as shown on Exhibit 1. Additional flights of "Help," targeting seven different Members, ran between September 7 and 15, September 25 and October 1, and October 9 and 16, all within 60 days of the general election to be held on November 7, 2000. The Members named in these advertisements are listed in Exhibit 1.

59. During July and August, 2000, the AFL-CIO ran television advertisements entitled "Sky" and "Protect" naming approximately twelve different Representatives who had voted at the end of June to pass prescription drug legislation that failed to guarantee drug benefits [31] under

Medicare. Copies of the scripts are attached as Exhibits 139 (AFL-CIO 6030) and 140 (AFL-CIO 6029). Four of these flights ran within 30 days of a primary election involving the Member named in the advertisement, as set forth in Exhibit 1.

60. During my deposition in this case on September 18, 2002, I was shown an AFL-CIO advertisement on the subject of prescription drugs naming Rep. Don Sherwood (R-PA). Although it was not identified as such in the exhibit shown to me, I believe that the advertisement was one of the flight of ads entitled "Sky." The records show that the advertisement was run between July 18 and 24 and August 2 and 8, 2000.

61. Between September 13 and 25, 2000, the AFL-CIO ran television advertisements entitled "Job" naming 14 Members of Congress who had voted to prevent an important OSHA regulation intended to prevent repetitive motion injuries from being implemented. President Clinton had threatened to veto the Labor-HHS budget bill if it retained the rider removing the regulation and the House Republican leadership agreed to a compromise and then backed out in October 2000. A copy of the script is attached as Exhibit 141 (AFL-CIO 16971), and additional materials produced by my office related to these advertisements are attached as Exhibits 142 (AFL-CIO 16972-16977) and 143 (AFL-CIO 16970). As shown on Exhibit 1, all of these advertisements ran on television within 60 days of the general election to be held on November 7, 2000.

62. During the 2000 Presidential campaign, after then-Governor Bush announced his proposal to privatize Social Security, which the AFL-CIO strongly opposes, the

AFL-CIO ran advertisements labeled "Teacher" addressing the proposal. A copy of the script is attached as Exhibit 144 (AFL-CIO 6143), and additional materials produced by my office related to these advertisements are attached as Exhibits 145 (AFL-CIO 6144-6146) and 146 (AFL-CIO 20113). [32] The AFL-CIO also ran a flight of ads labeled "Debate" following Governor Bush's erroneous claim during one of the debates that he had brought people together to pass a Patient's Bill of Rights in Texas. A copy of the script is attached as Exhibit 147 (AFL-CIO 6010).

63. In 2000, in order to educate the voters in Michigan concerning the positions of Senator Spencer Abraham (R-MI), a candidate for re-election, and to influence the positions he took in the campaign, the AFL-CIO ran an ad entitled "Who" highlighting his positions on minimum wage, overtime pay and workplace safety standards. The advertisement ran from October 16 to 22, 2000. A copy of the script is attached as Exhibit 148 (AFL-CIO 20177).

64. Table 10 in Volume 1 of the Appendix to the Expert Report of Kenneth L. Goldstein purports to report the number of airings of AFL-CIO advertisements (television and cable) in specific congressional districts in 2000. I am not able to verify the number of airings reported without additional information about the specific ads reported by Prof. Goldstein because, as set forth in Table 15, the titles of the ads he reported on are different from the titles in our records. However, I have reason to doubt the accuracy and completeness of the information in Table 10. First, Table 10 indicates AFL-CIO advertisements in five Congressional Districts for which our records show no airings during 2000: FL-23, MI-04, MN-06, PA-4 and SC-01. Second, our records also show AFL-CIO ads as having run during 2000 in a large number of districts not listed in Table 10: CA-20, CA-27, CA-36, CO-1, FL-02, FL-05, FL-15, IN-05, IN-08, KY-01, MA-05, MA-07, ME-01, ME-01, MI-07, MN-01, MO-07, NY-09, NY-29, NM-02, NC-01, NC-09, OH-16, PA-05, PA-11, PA-15, TX-14, TX-16, WI-03 and WI-04. While, as I have previously indicated, our records of when and where AFL-CIO advertisements were run are not perfect, the number of these discrepancies is substantial.

65. Table 11 in Volume 1 of the Appendix to Prof. Goldstein's Expert Report also [33] reports that the AFL-CIO ran ads referring to only one Senate candidate in 2000. Table 14 identifies this as an advertisement mentioning Spencer Abraham that ran between October 16 and 22, 2000. However, our records indicate other 2000 ads that mentioned the name of a candidate for Senate including John Ashcroft (R-MO) and Rod Grams (R-MN). Also, this does not include several radio ads naming Senate candidates, which I understand were not available in Prof. Goldstein's data base.

66. Table 17D in Volume 1 of the Appendix to Prof. Goldstein's Expert Report purports to report the number of airings of all of the advertisements run by the AFL-CIO in 2000 according to the week the ads aired. As noted previously, I am not able to verify the airings reported without further information regarding the advertisements included. However, several observations about Table 17D are still possible:

a. Table 17D reports a number of airings (508) during the week ending February 28, 2000 and indicates that these ads did not mention a candidate by name. Our records indicate that the ad "Label" ran on television during this period in 11 Congressional Districts and three states and that a Representative or Senator was mentioned by name in each ad. To my knowledge, all but one of these Representatives or Senators (Senator Kerry (D) of Massachusetts) were candidates for re-election in the November 2000 general election, and at least one of the Representatives mentioned in a "Label" advertisement was a candidate in a primary election within 30 days after the ad was run.

b. Table 17D also reports airings of AFL-CIO ads in the weeks ending April 10 (101), April 17 (294), April 24 (168), and May 1 (197) and identifies each of these ads as "no candidate mentioned." Our records indicate that one or both of the advertisements entitled "Endure" and "Trust" ran on television during these periods in 16 congressional districts and that [34] most, if not all, of these ads mentioned by name a Representative who was a candidate in the general election.

c. Table 17D shows no AFL-CIO ads as having been aired in the weeks ending May 8, May 15, May 22, May 29, June 5, June 12, June 19, June 26, July 3, and July 17. Our records show that the ads entitled "Endure" and "Trust" ran on television from May 11 to May 17, 2000. In addition, the ads entitled "Stand" and "Block" ran on radio from June 2 to June 8 or June 29 to July 6, respectively. Each of these advertisements mentioned a candidate by name.

67. In 2001, shortly before President Bush's tax plan was to be considered in the Senate, the AFL-CIO provided financial and production support to a flight of radio advertisements run by the Fair Taxes for All Coalition. These advertisements, entitled "Bank," ran in approximately

six states urging individual Senators "to fight for a tax cut, but one that makes sense - a tax cut for working families that won't break the bank." A copy of the script is attached as Exhibit 149 (AFL-CIO 20186) to this Declaration, and additional materials produced by my office related to these advertisements are attached as Exhibits 150 (AFL-CIO 20144) and 151 (AFL-CIO 18803-18807). The Senators targeted by these advertisements were all Democrats because the Coalition believed they would be key swing votes.

68. In November 2001, the AFL-CIO ran television advertisements entitled "Afford" targeting 17 Republican and Democratic Senators whose votes were regarded as crucial in passing an economic stimulus bill supported by organized labor. The advertisement urged viewers to call their Senator at a particular 800 number and stated, "The U.S. House just passed billions in tax rebates for big corporations ... while leaving laid off workers to struggle. Now it's up to Senator X to change the plan." A copy of the script for this advertisement is attached [35] as Exhibit 152 (AFL-CIO 18810). After the Senate voted on November 14, 2001 not to bring up the AFL-CIO supported package, the AFL-CIO ran television advertisements entitled "Call" in two states criticizing the Senators for their votes and urging them to change his/her position. A copy of the script for this advertisement is attached as Exhibit 153 (AFL-CIO 20183).

69. After President Bush announced his intention to seek fast track trade authority of the kind opposed by the AFL-CIO in previous years and with a vote pending in the House, the AFL-CIO ran a flight of television advertisements entitled "Track," which urged 21 named Representatives "to vote no on fast track so he can fight for trade deals that work

for us." A copy of the script for this advertisement is attached as Exhibit 154 (18802), and additional materials produced by my office related to these advertisements are attached as Exhibits 155 (AFL-CIO 20162-20165). These ads ran between July 25-29, 2001 and named Members who were viewed as potential "no" votes on fast track legislation. In the fall of 2001, when the Republican leadership brought its fast-track legislation back up for a vote in the House, the AFL-CIO sponsored additional flights of television advertisements entitled "Now" that ran October 21-November 7 and December 2-5. A copy of the script for this advertisement is attached as Exhibit 156 (20203), and additional materials produced by my office related to these advertisements are attached as Exhibits 157 (AFL-CIO 20168) and 158 (AFL-CIO 20170). The ads ran in media markets serving 24 congressional districts served by Representatives who were specifically named in these ads. Sixteen of the Members named were Democrats. The advertisement urged the viewers to "call Congressman X and Tell Congressman X to vote no on Fast Track."

Conclusion

70. [36] In conclusion, I would like to make a comment about the potential effect of the BCRA's prohibition on "electioneering communications." During the debates on the BCRA, I saw numerous statements from supporters of the bill about the need to regulate "so-called" or "sham" issue ads, by which I understood them to mean that all or most issue advertisements by the AFL-CIO and other groups were intended solely or in reality to influence the outcome of federal elections. I realize that AFL-CIO advertising could affect how citizens vote. If our advertisements succeed in educating the public about working families issues, and influence the actions, votes, positions and policy commitments of legislators and candidates, they may in some cases have an indirect effect on election outcomes, just as virtually every legislative and other activity undertaken by the AFL-CIO on behalf of workers that is conveyed to the public may have such an effect. This, however, has never been the point of our broadcast advertising program, within or outside the 30- and 60-day periods. As permitted under the law, the AFL-CIO runs an aggressive political action program through its Political Department that seeks to register union members and their families to vote and encourages them to vote for candidates endorsed by the labor movement. This partisan program focuses on grassroots mobilization activities that have proven over the years to be highly effective. These efforts rely on issues and partisan messages that, based on experience, tend to motivate union households and working families to vote. They do not necessarily focus on the same broad, national policy issues featured in our pubic advertising program because the broader issues do not necessarily resonate with voters in the same way. To the extent that the BCRA will prohibit the AFL-CIO from carrying out the kinds of programs described in this Declaration in the future, it is the public in general and working families in particular who will suffer the consequences.

[37] I declare under the penalty of perjury that the foregoing is true and correct.
Executed this 4th day of October, 2002.

/s/
Denise Mitchell

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

JOINT APPENDIX

VOLUME II (Pages 465 to 952)

FLOYD ABRAMS	KENNETH W. STARR
SUSAN BUCKLEY	*Counsel of Record*
BRIAN MARKLEY	EDWARD W. WARREN
CAHILL GORDON &	KANNON K. SHANMUGAM
REINDEL LLP	KIRKLAND & ELLIS
80 Pine Street	655 Fifteenth Street, N.W.
New York, NY 10005	Washington, DC 20005
(212) 701-3000	(202) 879-5000

(*additional counsel on inside cover*)

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
Frost Brown Todd LLC
400 West Market Street, Suite 3200
Louisville, KY 40202-3363
(502) 568-0222

Counsel in No. 02-1674

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EDITOR'S NOTE

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"Cuts"	Generic		☐	Budget Priorities; Health & Safety	"Stand with us—we're the men and women of the AFL-CIO, leading th fight for America's working families." *"Call your Representatives – [800-number]"*	4/10/95-4/23/95		1996	☐	☐
"A Thousand Cuts"	Generic		☐	Budget Priorities; Health & Safety	"Stand with us—we're the men and women of the AFL-CIO, leading th fight for America's working families" *[800-number]*	4/10/95-4/23/95		1996	☐	☐
"Cuts"	AR-04	Jay Dickey	☐	Budget Priorities; Health & Safety	"Stand with us—we're the men and women of the AFL-CIO, leading th fight for America's working families." *"Call Rep. Jay Dickey – [800-number]"*	4/10/95-4/23/95	1996	1996	☐	☐
"Cuts"	KY-01	Edward Whitfield	☐	Budget Priorities; Health & Safety	"Stand with us—we're the men and women of the AFL-CIO, leading th fight for America's working families." *"Call Rep. Edward Whitfield – [800-number]"*	4/10/95-4/23/95	1996	1996	☐	☐
"Cuts"	PA-05	Bill Clinger	☐	Budget Priorities; Health & Safety	"Stand with us—we're the men and women of the AFL-CIO, leading th fight for America's working families." *"Call Rep. Bill Clinger – [800-number]"*	4/10/95-4/23/95	1996	1996	☐	☐
"Cuts"	OH-10 OH-19	Steve Latourette & Martin Hoke	☐	Budget Priorities; Health & Safety	"Stand with us—we're the men and women of the AFL-CIO, leading th fight for America's working families." *"Call Rep. Steven Latourette and Rep. Martin Hoke – [800-number]"*	4/10/95-4/23/95	1996	1996	☐	☐
"Cuts"	NC-04	Fred Heineman	☐	Budget Priorities; Health & Safety	"Stand with us—we're the men and women of the AFL-CIO, leading th fight for America's working families." *"Call Rep. Fred Heineman – [800-number]"*	4/10/95-4/23/95	1996	1996	☐	☐
"Cuts"	PA-21 PA-05	Phil English & Bill Clinger	☐	Budget Priorities; Health & Safety	"Stand with us—we're the men and women of the AFL-CIO, leading th fight for America's working families." *"Call Rep. Phil English and Rep. Bill Clinger – [800-number]"*	4/10/95-4/23/95	1996	1996	☐	☐
"Sparkler"	TX-09	Steve Stockman	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families." *"Call Rep. Stockman – [800-number]"*	7/95	1996	1996	☐	☐

MITCHELL EXHIBIT 1

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"Sparkler"	Generic		☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Congress – [800-number]"*	7/96		1996	☐	☐
"Sparkler"	IL-18	Ray LaHood	☒	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	IN-08	John Hostettler	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Hostettler – [800-number]"*	7/96	1996	1996	☐	☐
"Sparkler"	TN-03	Zach Wamp	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Wamp – [800-number]"*	7/96	1996	1996	☐	☐
"Sparkler"	CA-01	Frank Riggs	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Riggs – [800-number]"*	7/96	1996	1996	☐	☐
"Sparkler"	WY-AL	Barbara Cubin	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Cubin – [800-number]"*	7/96	1996	1996	☐	☐

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"Sparkler"	GA-07	Bob Barr & John Linder	☒	Budget Priorities; Medicare Funding; Education Funding; Health & Safety; Tax Fairness	"Call 1-800..., Tell Congressmen Bob Barr and John Linder to keep alive the promise of America."	7/96	1996	1996	☐	☐
"Sparkler"	OK-02	Tom Coburn	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Coburn – [800-number]"*	7/96	1996	1996	☐	☐
"Sparkler"	MA-06	Peter Torkildsen	☒	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	Generic ([illegible])		☒	Budget Priorities; Medicare Funding; Education Funding; Health & Safety; Tax Fairness	"Call [800-number] tell Congress to stand up for America's working families"	7/96	1996	1996	☐	☐
"Sparkler"	IL-05	Michael Flanagan	☒	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families	7/96	1996	1996	☐	☐
"Sparkler"	CT-05	Gary Franks	☒	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	NC-04	Fred Heineman	☒	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐

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"Sparkler"	NY-27	Bill Paxon	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	OH-06	Frank Cremeans	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	OR-05	Jim Bunn	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	
"Sparkler"	PA-13	Jon Fox	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	WA-01 WA-09	Rick White & Randy Tate	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	NV-01	John Ensign	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Grain"	WI-01	Mark Neumann	☐	Health & Safety	"Tell Republican Congressman Neumann to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Neumann – [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐

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"Stand"	AR-04	Rep. Jay Dickey *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Dickey to stop attacking America's working families" *"Call Rep. Dickey [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Grain"	AR-04	Rep. Jay Dickey	☐	Health & Safety	"Tell Republican Congressman Dickey to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Dickey – [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Grain"	KY-01	Rep. Edward Whitfield	☐	Health & Safety	"Tell Republican Congressman Whitfield to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Whitfield – [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Grain"	TN-03 TN-04	Rep. Zach Wamp & Van Hilleary	☐	Health & Safety	"Tell Republican Congressmen Wamp and Hilleary to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Wamp and Hilleary – [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Grain"	OH-06	Frank Cremeans	☐	Health & Safety	"Tell Republican Congressman Cremeans to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Cremeans – [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Stand"	UT-02	Rep. Enid Greene Waldholtz *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congresswoman Waldholtz to stop attacking America's working families" *"Call Rep. Waldholtz [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Grain"	UT-02	Rep. Enid Greene Waldholtz	☐	Health & Safety	"Tell Republican Congresswoman Waldholtz to stop cutting health an safety so other families don't lose their loved ones." *"Call Rep. Waldholtz – [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Stand"	WI-01	Mark Neumann *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Neumann to stop attacking America's working families" *"Call Rep. Neumann [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐

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"Stand"	PA-21	Rep. Phil English *Newt Gingrich*	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Tell Congressman English to stop attacking America's working families" *"Call Rep. English [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	OK-02	Tom Coburn	☐	Health & Safety	"Tell Republican Congressman Coburn to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Coburn – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	TX-14	Greg Laughlin *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Laughlin to stop attacking America's working families" *"Call Rep. Laughlin [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	TX-14	Greg Laughlin	☐	Health & Safety	"Tell Republican Congressman Laughlin to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Laughlin – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	IN-08	John Hostettler	☐	Health & Safety	"Tell Republican Congressman Hostettler to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Hostettler – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	IN-08	John Hostettler *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Hostettler to stop attacking America's working families" *"Call Rep. Hostettler [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	ID-01	Helen Chenoweth	☐	Health & Safety	"Tell Republican Congresswoman Chenoweth to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Chenoweth – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	ID-01	Helen Chenoweth *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congresswoman Chenoweth to stop attacking America's workin families" *"Call Rep. Chenoweth [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐

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"Grain"	TX-09	Steve Stockman	☐	Health & Safety	"Tell Republican Congressman Stockman to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Stockman – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	TX-09	Steve Stockman *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Stockman to stop attacking America's working families" *"Call Rep. Stockman [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	OH-12	John Kasich	☐	Health & Safety	"Tell Republican Congressman Kasich to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Kasich – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	OH-12	John Kasich *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Kasich to stop attacking America's working families" *"Call Rep. Kasich [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	OH-19 OH-10	Steve LaTourette & Martin Hoke	☐	Health & Safety	"Tell Republican Congressmen LaTourette and Hoke to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. LaTourette and Hoke – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	CA-22	Andrea Seastrand *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congresswoman Seastrand to stop attacking America's working families" *"Call Rep. Seastrand [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	NV-01	John Ensign *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Ensign to stop attacking America's working families" *"Call Rep. Seastrand [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	OK-02	Tom Coburn *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Coburn to stop attacking America's working families" *"Call Rep. Coburn [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐

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"Grain"	MI-08	Dick Chrysler	☐	Health & Safety	"Tell Republican Congressman Chrysler to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Chrysler – [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Stand"	MI-08	Dick Chrysler *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Chrysler to stop attacking America's working families" *"Call Rep. Chrysler [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Grain"	OR-05	Jim Bunn	☐	Health & Safety	"Tell Republican Congressman Bunn to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Bunn – [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Stand"	OR-05	Jim Bunn *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Bunn to stop attacking America's working families" *"Call Rep. Bunn [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Stand"	KY-01	Rep. Edward Whitfield *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Whitfield to stop attacking America's working families" *"Call Rep. Whitfield [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Stand"	OH-06	Frank Cremeans *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Cremeans to stop attacking America's working families" *"Call Rep. Cremeans [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Stand"	OH-19 OH-10	Steve LaTourette & Martin Hoke *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressmen LaTourette and Hoke to stop attacking America's working families" *"Call Rep. LaTourette and Hoke [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐
"Grain"	IA-04	Greg Ganske	☐	Health & Safety	"Tell Republican Congressman Ganske to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Ganske – [800-number]"*	8/21/96-9/4/96	1996	1996	☐	☐

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"Sparkler"	Generic		☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families *"Call Congress – [800-number]"*	7/96		1996	☐	☐
"Sparkler"	IL-18	Ray LaHood	☒	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	IN-08	John Hostettler	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Hostettler – [800-number]"*	7/96	1996	1996	☐	☐
"Sparkler"	TN-03	Zach Wamp	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Wamp – [800-number]"*	7/96	1996	1996	☐	☐
"Sparkler"	CA-01	Frank Riggs	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Riggs – [800-number]"*	7/96	1996	1996	☐	☐
"Sparkler"	WY-AL	Barbara Cubin	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Cubin – [800-number]"*	7/96	1996	1996	☐	☐

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"Sparkler"	GA-07	Bob Barr & John Linder	☑	Budget Priorities; Medicare Funding; Education Funding; Health & Safety; Tax Fairness	"Call 1-800..., Tell Congressmen Bob Barr and John Linder to keep alive the promise of America."	7/96	1996	1996	☐	☐
"Sparkler"	OK-02	Tom Coburn	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families. *"Call Rep. Coburn – [800-number]"*	7/96	1996	1996	☐	☐
"Sparkler"	MA-06	Peter Torkildsen	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	Generic (Hightower)		☑	Budget Priorities; Medicare Funding; Education Funding; Health & Safety; Tax Fairness	"Call [800-number] tell Congress to stand up for America's working families"	7/96	1996	1996	☐	☐
"Sparkler"	IL-05	Michael Flanagan	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families	7/96	1996	1996	☐	☐
"Sparkler"	CT-05	Gary Franks	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	NC-04	Fred Heineman	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐

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"Sparkler"	NY-27	Bill Paxon	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/95	1996	1996	☐	☐
"Sparkler"	OH-06	Frank Cremeans	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	OR-05	Jim Bunn	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	PA-13	John Fox	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/95	1996	1996	☐	☐
"Sparkler"	WA-01 WA-09	Rick White & Randy Tate	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Sparkler"	NV-01	John Ensign	☑	Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Ask Congress to make America the land of opportunity again, to keep the American Dream alive, to stand up for America's working families.	7/96	1996	1996	☐	☐
"Grain"	WI-01	Mark Neumann	☐	Health & Safety	"Tell Republican Congressman Neumann to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Neumann – [800-number]"*	5/21/96-6/4/96	1996	1996	☐	☐

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"Stand"	AR-04	Rep. Jay Dickey *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Dickey to stop attacking America's working families" *"Call Rep. Dickey [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	AR-04	Rep. Jay Dickey	☐	Health & Safety	"Tell Republican Congressman Dickey to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Dickey – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	KY-01	Rep. Edward Whitfield	☐	Health & Safety	"Tell Republican Congressman Whitfield to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Whitfield – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	TN-03 TN-04	Rep. Zach Wamp & Van Hilleary	☐	Health & Safety	"Tell Republican Congressman Wamp and Hilleary to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Wamp and Hilleary – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	OH-08	Frank Cremeans	☐	Health & Safety	"Tell Republican Congressman Cremeans to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Cremeans – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	UT-02	Rep. Enid Greene Waldholtz *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congresswoman Waldholtz to stop attacking America's working families" *"Call Rep. Waldholtz [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	UT-02	Rep. Enid Greene Waldholtz	☐	Health & Safety	"Tell Republican Congresswoman Waldholtz to stop cutting health an safety so other families don't lose their loved ones." *"Call Rep. Waldholtz – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	WI-01	Mark Neumann *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Neumann to stop attacking America's working families" *"Call Rep. Neumann [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐

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"Stand"	PA-21	Rep. Phil English *Newt Gingrich*	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Tell Congressman English to stop attacking America's working families" *"Call Rep. English [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	OK-02	Tom Coburn	☐	Health & Safety	"Tell Republican Congressman Coburn to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Coburn – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	TX-14	Greg Laughlin *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Laughlin to stop attacking America's working families" *"Call Rep. Laughlin [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	TX-14	Greg Laughlin	☐	Health & Safety	"Tell Republican Congressman Laughlin to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Laughlin – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	IN-08	John Hostettler	☐	Health & Safety	"Tell Republican Congressman Hostettler to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Hostettler – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	IN-08	John Hostettler *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Hostettler to stop attacking America's working families" *"Call Rep. Hostettler [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	ID-01	Helen Chenoweth	☐	Health & Safety	"Tell Republican Congresswoman Chenoweth to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Chenoweth – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	ID-01	Helen Chenoweth *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congresswoman Chenoweth to stop attacking America's workin families" *"Call Rep. Chenoweth [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐

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"Grain"	TX-09	Steve Stockman	☐	Health & Safety	"Tell Republican Congressman Stockman to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Stockman – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	TX-09	Steve Stockman *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Stockman to stop attacking America's working families" *"Call Rep. Stockman [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	OH-12	John Kasich	☐	Health & Safety	"Tell Republican Congressman Kasich to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Kasich – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	OH-12	John Kasich *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Kasich to stop attacking America's working families" *"Call Rep. Kasich [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	OH-10 OH-19	Steve LaTourette & Martin Hoke	☐	Health & Safety	"Tell Republican Congressman LaTourette and Hoke to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. LaTourette and Hoke – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	CA-22	Andrea Seastrand *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congresswoman Seastrand to stop attacking America's working families" *"Call Rep. Seastrand [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	NV-01	John Ensign *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Ensign to stop attacking America's working families" *"Call Rep. Seastrand [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	OK-02	Tom Coburn *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Coburn to stop attacking America's working families" *"Call Rep. Coburn [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐

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"Grain"	MI-08	Dick Chrysler	☐	Health & Safety	"Tell Republican Congressman Chrysler to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Chrysler – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	MI-08	Dick Chrysler *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Chrysler to stop attacking America's working families" *"Call Rep. Chrysler [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	OR-05	Jim Bunn	☐	Health & Safety	"Tell Republican Congressman Bunn to stop cutting health and safet so other families don't lose their loved ones." *"Call Rep. Bunn – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	OR-05	Jim Bunn *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Bunn to stop attacking America's working families *"Call Rep. Bunn [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	KY-01	Rep. Edward Whitfield *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Whitfield to stop attacking America's working families" *"Call Rep. Whitfield [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	OH-03	Frank Cremeans *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Cremeans to stop attacking America's working families" *"Call Rep. Cremeans [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	OH-10 OH-19	Steve LaTourette & Martin Hoke *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman LaTourette and Hoke to stop attacking America's working families" *"Call Rep. LaTourette and Hoke [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	IA-04	Greg Ganske	☐	Health & Safety	"Tell Republican Congressman Ganske to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Ganske – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐

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"Stand"	IA-04	Greg Ganske *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Ganske to stop attacking America's working families" *"Call Rep. Ganske [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	NV-01	John Ensign	☐	Health & Safety	"Tell Republican Congressman Ensign to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. Ensign – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	CA-22	Andrea Seastrand	☐	Health & Safety	"Tell Republican Congresswoman Seastrand to stop cutting health an safety so other families don't lose their loved ones." *"Call Rep. Seastrand – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	WA-01 WA-09	Rick White & Randy Tate	☐	Health & Safety	"Tell Republican Congressmen White and Tate to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. White and Tate – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	WA-01 WA-09	Rick White & Randy Tate *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressmen White and Tate to stop attacking America's working families." *"Call Rep. White and Tate [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Grain"	PA-21	Rep. Phil English	☐	Health & Safety	"Tell Republican Congressman English to stop cutting health and safety so other families don't lose their loved ones." *"Call Rep. English – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	TN-03 TN-04	Rep. Zach Wamp & Van Hilleary *Newt Gingrich*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressmen Wamp and Hilleary to stop attacking America's working families" *"Call Rep. Wamp and Hilleary [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Stand"	Generic	*Newt Gingrich*	☐	Budget Priorities; Education Funding; Medicare Funding; Health & Safety; Tax Fairness	"Tell your Congressman to stop attacking America's working families. *"Call your Representative [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐

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"Grain"	Generic		☐	Health & Safety	"Tell your Congressman to stop cutting health and safety so other families don't lose their loved ones." *"Call your Representative – [800-number]"*	8/21/95-9/4/95	1996	1996	☐	☐
"Ron Hayes"	GA-07	Bob Barr	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Republican Bob Barr to stop pandering to big business and the rich. Call [800-number] and stand up for America's working families."	Not available	1996	1996	☐	☐
"Patrick"		Generic	☐	Health & Safety; Medicare Funding; Education Funding	"Tell the Republicans to stop cutting health and safety and to stop cutting medicare and college loans. Call [800-number] and stand up for America's families."	Not available	1996	1996	☐	☐
"Choice"		Generic	☐	Budget Priorities; Medicare Funding; Education Funding; Health & Safety; Tax Fairness	"Get informed. Get involved. Stand up for what's right." *"Call Congress – [800-number]"*	Not available	1996	1996	☐	☐
"Parent"		Generic	☐	Budget Priorities; Medicare Funding; Education Funding; Health & Safety; Tax Fairness	"Get informed, get involved, and stand up for our families." *"Call Congress – [800-number]"*	Not available	1996	1996	☐	☐
"Medicare"	Generic		☐		"Get informed, get involved, and stand up for what's right." *"Call Congress – [800-number]"*	10/95		1996	☐	☐
"Medicare"	LA-03	Tauzin	☑	Medicare Funding	"Get informed, get involved, and stand up for our families."	10/95	1996	1996	☐	☐
"Medicare"	Camp	Camp	☑	Medicare Funding	"Get informed, get involved, and stand up for our families."	10/95	1996	1996	☐	☐
"Medicare"	NY-17 NJ-07 NY-04	Susan Molinari, Bob Franks, & Frisa	☑	Medicare Funding	"Get informed, get involved, and stand up for our families."	10/95	1996	1996	☐	☐

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"Medicare"	IL-11	Jerry Weller	☑	Medicare Funding	"Get informed, get involved, and stand up for our families."	10/95	1996	1996	☐	☐
"Medicare"	CT-05 CT-06	Nancy Johnson & Gary Franks	☑	Medicare Funding	"Get informed, get involved, and stand up for our families."	10/95	1996	1996	☐	☐
"Families"	KY-01	Edward Whitfield, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Whitfield: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Whitfield -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	OR-05	Jim Bunn, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Bunn: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Bunn -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	OH-06	Frank Cremeans, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Cremeans: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Cremeans -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	NV-01	John Ensign, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Ensign: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Ensign -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	MI-08	Dick Chrysler, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Chrysler: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Chrysler -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐

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"Families"	ME-01	James Longley, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Longley: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Longley -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	IN-08	John Hostettler, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Hostettler: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Hostettler -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	CA-22	Andrea Seastrand, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congresswoman Seastrand: this time don't vote for the wealthy speci interests. This time vote for America's working families." *"Call Rep. Seastrand -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	ID-01	Helen Chenoweth, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congresswoman Chenoweth: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Chenoweth -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	CA-01	Frank Riggs, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Riggs: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Riggs -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	NC-04	Fred Heineman, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Heineman: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Heineman -- [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐

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"Families"	WA-01 WA-09	Rick White, Randy Tate, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressmen White and Tate: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. White and Tate – [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	IA-04	Greg Ganske, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Ganske: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Ganske – [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	AR-04	Jay Dickey, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Dickey: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Jay Dickey – [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	TX-09	Steve Stockman, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Stockman: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Stockman – [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	TN-04	Van Hilleary, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congressman Hilleary: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Hilleary – [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Families"	Generic	Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell our Congressman: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call your Representative – [800-number]"*	12/5/95-12/11/95		1996	☐	☐

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"Families"	ID-01	Helen Chenoweth, Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, Al Gore, Dole*	☐	Budget Priorities; Medicare Funding; Education Funding; Tax Fairness	"Now it's up to us. We need to get involved and speak out. Let's tell Congresswoman Chenoweth: this time don't vote for the wealthy special interests. This time vote for America's working families." *"Call Rep. Chenoweth – [800-number]"*	12/5/95-12/11/95	1996	1996	☐	☐
"Fair"	TX-14	Greg Laughlin	☒	Budget Priorities	"Send Congressman Greg Laughlin a message."	12/1/95-12/12/95	1996	1996	☐	☐
"Fair"	OH-12	John Kasich	☒	Budget Priorities	"Send Congressman John Kasich a message."	12/1/95-12/12/95	1996	1996	☐	☐
"Fair"	MI-08	Dick Chrysler	☒	Budget Priorities	"Send Congressman Dick Chrysler a message."	12/1/95-12/12/95	1996	1996	☐	☐
"Fair"	IA-04	Greg Ganske	☒	Budget Priorities	"Send Congressman Greg Ganske a message."	12/1/95-12/12/95	1996	1996	☐	☐
"Fair"	NJ-08	Bill Martini	☒	Budget Priorities	"Send Congressman Bill Martini a message."	12/1/95-12/12/95	1996	1996	☐	☐
"Too Far"	WI-01	Mark Neumann & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Neumann to stop the political games and stand up for working families for a change." *"Call Neumann – [800-number]"*	1/17/96-1/23/96	9/10/96	11/5/96	☐	☐
"Too Far"	ID-01	Helen Chenoweth & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congresswoman Chenoweth to stop the political games an stand up for working families for a change." *"Call Chenoweth – [800-number]"*	1/17/96-1/23/96	5/28/96	11/5/96	☐	☐
"Too Far"	CA-22	Andrea Seastrand & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Seastrand to stop the political games and stand up for working families for a change." *"Call Seastrand – [800-number]"*	1/17/96-1/23/96	3/26/96	11/5/96	☐	☐

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"Too Far"	TX-14	Greg Laughlin & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Laughlin to stop the political games and stan up for working families for a change." *"Call Laughlin – [800-number]"*	1/17/96-1/23/96	3/12/96	11/5/96	☐	☐
"Too Far"	WA-01 WA-09	Rick White, Randy Tate, & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressmen White and Tate to stop the political games a stand up for working families for a change." *"Call White and Tate – [800-number]"*	1/17/96-1/23/96	9/17/96	11/5/96	☐	☐
"Too Far"	PA-21	Phil English & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman English to stop the political games and stand up for working families for a change." *"Call English – [800-number]"*	1/17/96-1/23/96	4/23/96	11/5/96	☐	☐
"Too Far"	OR-05	Jim Bunn & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Bunn to stop the political games and stand u for working families fol a change." *"Call Bunn – [800-number]"*	1/17/96-1/23/96	5/21/96	11/5/96	☐	☐
"Too Far"	IA-04	Greg Ganske & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Ganske to stop the political games and stand up for working families for a change." *"Call Ganske – [800-number]"*	1/17/96-1/23/96	6/4/96	11/5/96	☐	☐
"Too Far"	AR-04	Jay Dickey & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Let's tell Congressman Dickey to stop the political games and stand up for working families for a change." *"Call Jay Dickey – [800-number]"*	1/17/96-1/23/96	5/21/96	11/5/96	☐	☐
"Too Far"	ME-01	James Longley & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Longley to stop the political games and stand up for working families for a change." *"Call Longley – [800-number]"*	1/17/96-1/23/96	9/17/96	11/5/96	☐	☐

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"Too Far"	OH-12	John Kasich & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Kasich to stop the political games and stand up for working families for a change." *"Call Kasich – [800-number]"*	1/17/96-1/23/96	3/19/96	11/5/96	☐	☐
"Too Far"	OH-06	Frank Cremeans & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Cremeans to stop the political games and stand up for working families for a change." *"Call Cremeans – [800-number]"*	1/17/96-1/23/96	3/19/96	11/5/96	☐	☐
"Too Far"	OH-01	Steve Chabot & Newt Gingric	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Chabot to stop the political games and stand up for working families for a change." *"Call Chabot – [800-number]"*	1/17/96-1/23/96	3/19/96	11/5/96	☐	☐
"Too Far"	NV-01	John Ensign & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Ensign to stop the political games and stand up for working families for a change." *"Call Ensign – [800-number]"*	1/17/96-1/23/96	9/3/96	11/5/96	☐	☐
"Too Far"	NC-04	Fred Heineman & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Heineman to stop the political games and stand up for working families for a change." *"Call Heineman – [800-number]"*	1/17/96-1/23/96	5/7/96	11/5/96	☐	☐
"Too Far"	MI-08	Dick Chrysler & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Chrysler to stop the political games and stan up for working families for a change." *"Call Chrysler – [800-number]"*	1/17/96-1/23/96	8/6/96	11/5/96	☐	☐
"Too Far"	CA-01	Frank Riggs & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Riggs to stop the political games and stand u for working families for a change." *"Call Riggs – [800-number]"*	1/17/96-1/23/96	3/26/96	11/5/96	☐	☐

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"Too Far"	KY-01	Edward Whitfield & Newt Gingrich *Newt Gingrich*	☐	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Tax Fairness	"Let's tell Congressman Whitfield to stop the political games and stand up for working families for a change." *"Call Whitfield – [800-number]"*	1/17/96-1/23/96	5/28/96	11/5/96	☐	☐
"Too Far"	Generic	Newt Gingrich, Bill Clinton *Newt Gingrich, Bill Clinton, & Al Gore*	☐	Budget Priorities; Education Funding; Medicare Funding; Tax Fairness	"Let's tell the Republicans to stop the political games and stand up for working families for a change" *"Call Congress – [800-number]"*	1/17/96-1/23/96	2/12/96 2/20/96	11/5/96	☑	☐
"Why"	CA-49	Brian Bilbray & Newt Gingrich	☑	Budget Priorities; Medicare Funding; Medicaid; Education Funding; Health & Safety	"Call [800-number] Tell Congressman Bob Bilbray to say no to the Gingrich budget and to stand up for America's working families for a change. Call [800-number]"	1/17/96-1/23/96	3/26/96	11/5/96	☐	☐
"Minimum Wage" (approximate date)	WI-01	Mark Neumann *Mark Neumann*	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Neumann: raise the minimum wage." *"Call Rep. Neumann, Raise the Minimum Wage. [800-number]"*	Not available	9/10/96	11/5/96	☐	☐
"1991"	AR-04	Jay Dickey	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness.	"Let's tell Congressman Dickey: Raise the minimum wage and start voting for America's working families" *"Call Rep. Dickey-Raise minimum wage [800-number]"*	4/9/96-4/15/96	5/21/96	11/5/96	☐	☐
"1991"	MS-03	Sonny Montgomery	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Montgomery: Raise the minimum wage and start voting for America's working families." *"Call Rep. Montgomery-Raise minimum wage [800-number]"*	4/9/96-4/15/96	3/12/96	11/5/96	☐	☐
"1991"	NC-04	Fred Heineman	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Heineman: Raise the minimum wage and start voting for America's working families." *"Call Rep. Heineman-Raise minimum wage [800-number]"*	4/9/96-4/15/96	5/7/96	11/5/96	☑	☐

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"1991"	OH-06	Frank Cremeans	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Cremeans: Raise the minimum wage and start voting for America's working families." *"Call Rep. Cremeans-Raise minimum wage [800-number]"*	4/9/96-4/15/96	3/19/96	11/5/96	☐	☐
"1991"	IN-08	John Hostettler	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Hostettler: Raise the minimum wage and start voting for America's working families." *"Call Rep. Hostettler-Raise minimum wage [800-number]"*	4/9/96-4/15/96	5/7/96	11/5/96	☑	☐
"1991"	NE-02	Jon Christensen	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Christensen: Raise the minimum wage and start voting for America's working families." *"Call Rep. Christensen-Raise minimum wage [800-number]"*	4/9/96-4/15/96	5/14/96	11/5/96	☑	☐
"1991"	OR-05	Jim Bunn	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Bunn: Raise the minimum wage and start voting for America's working families." *"Call Rep. Bunn-Raise minimum wage [800-number]"*	4/9/96-4/15/96	5/21/96	11/5/96	☐	☐
"1991"	MI-08	Dick Chrysler	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Chrysler: Raise the minimum wage and start voting for America's working families." *"Call Rep. Chrysler-Raise minimum wage [800-number]"*	4/9/96-4/15/96	8/6/96	11/5/96	☐	☐
"1991"	KY-01	Edward Whitfield	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Whitfield: Raise the minimum wage and start voting for America's working families." *"Call Rep. Whitfield-Raise minimum wage [800-number]"*	4/9/96-4/15/96	5/28/96	11/5/96	☐	☐
"1991"	CA-22	Andrea Seastrand	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congresswoman Seastrand: Raise the minimum wage and start voting for America's working families." *"Call Rep. Seastrand-Raise minimum wage [800-number]"*	4/9/96-4/15/96	3/26/96	11/5/96	☐	☐

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"Minimum Wage"	OH-10	Martin Hoke	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Hoke: Raise the minimum wage and start voting for America's working families."	4/9/96-4/15/96	3/19/96	11/5/96	☐	☐
"1991"	OH-01	Steve Chabot	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Chabot: Raise the minimum wage and start voting for America's working families." *"Call Rep. Chabot-Raise minimum wage [800-number]"*	4/9/96-4/15/96	3/19/96	11/5/96	☐	☐
"Minimum Wage"	OH-19	Steve Latourette	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Latourette: Raise the minimum wage and sta voting for America's working families."	4/9/96-4/15/96	3/19/96	11/5/96	☐	☐
"1991"	KS-04	Todd Tiahrt	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Tiahrt: Raise the minimum wage and start voting for America's working families." *"Call Rep. Tiahrt-Raise minimum wage [800-number]"*	4/9/96-4/15/96	8/6/96	11/5/96	☐	☐
"1991"	IA-04	Greg Ganske	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Ganske: Raise the minimum wage and start voting for America's working families." *"Call Rep. Ganske-Raise minimum wage [800-number]"*	4/9/96-4/15/96	6/4/96	11/5/96	☐	☐
"1991"	TX-14	Greg Laughlin	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Laughlin: Raise the minimum wage and start voting for America's working families." *"Call Rep. Laughlin-Raise minimum wage [800-number]"*	4/9/96-4/15/96	3/12/96	11/5/96	☐	☐
"1991"	WA-01 WA-09	Rick White & Randy Tate	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressmen White & Tate: Raise the minimum wage and start voting for America's working families." *"Call Rep. White & Tate-Raise minimum wage [800-number]"*	4/9/96-4/15/96	9/17/96	11/5/96	☐	☐

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"1991"	WI-01	Mark Neumann	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Neumann: Raise the minimum wage and start voting for America's working families." *"Call Rep. Neumann-Raise minimum wage [800-number]"*	4/9/96-4/15/96	9/10/96	11/5/96	☐	☐
"1991"	ME-01	James Longley	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Longley: Raise the minimum wage and start voting for America's working families." *"Call Rep. Longley-Raise minimum wage [800-number]"*	4/9/96-4/15/96	9/17/96	11/5/96	☐	☐
"1991"	NY-25 NY-23	Jim Walsh & Sherwood Boehlert	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressmen Walsh & Boehlert: Raise the minimum wage and start voting for America's working families." *"Call Rep. Walsh & Boehlert-Raise minimum wage [800-number]"*	4/9/96-4/15/96	9/10/96	11/5/96	☐	☐
"1991"	NV-01	John Ensign	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Let's tell Congressman Ensign: Raise the minimum wage and start voting for America's working families." *"Call Rep. John Ensign-Raise minimum wage [800-number]"*	4/9/96-4/15/96	9/3/96	11/5/96	☐	☐
"Four"	CT-05	Gary Franks	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Call [800-number] Let's tell Congressman Franks raise the minimum wage. [800-number] tell Congressman Franks to start voting for America's working families. Now that would be a change"	4/9/96-4/15/96	9/10/96	11/5/96	☐	☐
"Four"	Generic	Generic	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Call [800-number] Let's tell Congressman Generic raise the minimum wage. [800-number] tell Congressman Generic to start voting for America's working families. Now that would be a change"	4/9/96-4/15/96		11/5/96	☐	☐
"Four"	MA-03	Peter Blute	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Call [800-number] Let's tell Congressman Blute raise the minimum wage. [800-number] tell Congressman Blute to start voting for America's working families. Now that would be a change"	4/9/96-4/15/96	9/17/96	11/5/96	☐	☐

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Title	District	Named in normal type *Pictured in italic type*	Radio?	Issue(s) Discussed	Audio in normal type *Video in italic type*	Broadcast	Primary	General Election	30 Days of Primary?	60 Days of General Election?
"Four"	OH-10 OH-19	Hoke & Steve LaTourette	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Call [800-number] Let's tell Congressmen Hoke and LaTourette raise the minimum wage. [800-number] tell Congressmen Hoke and LaTourette to start voting for America's working families. Now that would be a change"	4/8/98-4/15/98	3/10/98	11/3/98	☐	☐
"Four"	IL-11 IL-05	Michael Flanagan & Jerry Weller	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Call [800-number] Let's tell Congressmen Flanagan and Weller raise the minimum wage. [800-number] tell Congressmen Flanagan and Weller to start voting for America's working families. Now that would be a change"	4/8/98-4/15/98	3/18/98	11/3/98	☐	☐
"Four"	MD-2	Robert Ehrlich	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Call [800-number] Let's tell Congressman Ehrlich raise the minimum wage. [800-number] tell Congressman Ehrlich to start voting for America's working families. Now that would be a change"	4/8/98-4/15/98	3/5/98	11/3/98	☐	☐
"Four"	CT-04	Chris Shays	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Call [800-number] Let's tell Congressman Shays raise the minimum wage. [800-number] tell Congressman Shays to start voting for America's working families. Now that would be a change"	4/8/98-4/15/98	9/10/98	11/3/98	☐	☐
"Raise"	CT-05	Gary Franks	☑	Minimum Wage	"It's time working people got a raise. Call [800-number] Tell Congressman Gary Franks. Stop the games. Stop the gimmicks and raise the minimum wage. [800-number] Tell Congressman Franks, it's time to start voting for America's working families."	5/1/98-5/5/98 (approximately)	9/10/98	11/3/98	☐	☐
"Minimum Wage" (approximate date)	CT-05	Gary Franks	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Call [800-number] Let's tell Congressman Franks raise the minimum wage. [800-number] tell Congressman Franks to start voting for America's working families. Now that would be a change"	Not available	9/10/98	11/3/98	☐	☐
"Minimum Wage" (approximate date)	WA-05	George Nethercutt	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Nethercutt: raise the minimum wage."	Not available	9/17/98	11/3/98	☐	☐
		George Nethercutt			*"Call Rep. Nethercutt. Raise the Minimum Wage. [800-number]"*					

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"No"	PA-13	Jon Fox	☑	Minimum Wage	"If you think that's wrong, call [800-number] Tell Congressman Fox to stop the political games and raise the minimum wage. [800-number] Tell Congressman Fox it's time to start voting for America's working families for a change."	5/20/98-5/23/98	4/23/98	11/3/98	☐	☐
"No"	OH-10	Martin Hoke	☑	Minimum Wage	"If you think that's wrong, call [800-number] Tell Congressman Hoke to stop the political games and raise the minimum wage. [800-number] Tell Congressman Hoke it's time to start voting for America' working families for a change."	5/20/98-5/23/98	3/10/98	11/3/98	☐	☐
"No"	IL-11 IL-05	Michael Flanagan & Jerry Weller	☑	Minimum Wage	"If you think that's wrong, call [800-number] Tell Congressmen Flanagan and Weller to stop the political games and raise the minimu wage. [800-number] Tell Congressman Flanagan it's time to start voting for America's working families for a change."	5/20/98-5/23/98	3/18/98	11/3/98	☐	☐
"No"	CT-05	Gary Franks	☑	Minimum Wage	"If you think that's wrong, call [800-number] Tell Congressman Frank to stop the political games and raise the minimum wage. [800-number] Tell Congressman Franks it's time to start voting for America's working families for a change."	5/20/98-5/23/98	9/10/98	11/3/98	☐	☐
"No"	WI-01	Mark Neumann	☑	Minimum Wage	"If you think that's wrong, call [800-number] Tell Congressman Neumann to stop the political games and raise the minimum wage. [800-number] Tell Congressman Neumann it's time to start voting for America's working families for a change."	5/20/98-5/23/98	9/10/98	11/3/98	☐	☐
"Raise"	IN-08	John Hostettler	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"It's time working people got a raise. Call [800-number] Tell Congressman John Hostettler. Stop the games. Stop the gimmicks and raise the minimum wage. [800-#] Tell Congressman Hostettler, it's time to start voting for America's working families."	5/1/98-5/5/98 (approximately)	5/7/98	11/3/98	☑	☐
"Minimum Wage" (approximate date)	CT-04	Chris Shays	☑	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Call [800-number] Let's tell Congressman Shays raise the minimum wage. [800-number] tell Congressman Shays to start voting for America's working families. Now that would be a change"	Not available	9/10/98	11/3/98	☐	☐

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"People"	NC-02 NC-04	David Funderburk & Fred Heineman *David Funderburk & Fred Heineman*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Funderburk and Heineman: raise the minimum wage" *"Call Rep. Funderburk and Heineman – [800-number]"*	5/20/96-6/23/96	5/7/96	11/5/96	☐	☐
"People"	IN-08	John Hostettler *John Hostettler*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Hostettler: raise the minimum wage" *"Call Rep. Hostettler – [800-number]"*	5/20/96-6/23/96	5/7/96	11/5/96	☐	☐
"People"	IA-04	Greg Ganske *Greg Ganske*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Ganske: raise the minimum wage" *"Call Rep. Ganske – [800-number]"*	5/20/96-6/23/96	6/4/96	11/5/96	☐	☐
"People"	KS-04	Todd Tiahrt *Todd Tiahrt*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Tiahrt: raise the minimum wage" *"Call Rep. Tiahrt – [800-number]"*	5/20/96-6/23/96	8/6/96	11/5/96	☐	☐
"People"	KY-01	Edward Whitfield *Edward Whitfield*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Whitfield: raise the minimum wage" *"Call Rep. Whitfield – [800-number]"*	5/20/96-6/23/96	5/28/96	11/5/96	☑	☐
"People"	ME-01	James Longley *James Longley*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Longley: raise the minimum wage" *"Call Rep. Longley – [800-number]"*	5/20/96-6/23/96	9/17/96	11/5/96	☐	☐
"People"	NE-02	Jon Christensen *John Christensen*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Christensen: raise the minimum wage" *"Call Rep. Christensen – [800-number]"*	5/20/96-6/23/96	5/14/96	11/5/96	☐	☐

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"People"	OH-01	Steve Chabot *Steve Chabot*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Chabot: raise the minimum wage" *"Call Rep. Chabot – [800-number]"*	5/20/96-6/23/96	3/19/96	11/5/96	☐	☐
"People"	OR-05	Jim Bunn *Jim Bunn*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Bunn: raise the minimum wage" *"Call Rep. Bunn – [800-number]"*	5/20/96-6/23/96	5/21/96	11/5/96	☑	☐
"People"	WA-01 WA-09	Rick White & Randy Tate *Rick White & Randy Tate*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman White and Tate: raise the minimum wage" *"Call Rep. White and Tate – [800-number]"*	5/20/96-6/23/96	9/17/96	11/5/96	☐	☐
"People"	WA-04	Doc Hastings *Doc Hastings*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Hastings: raise the minimum wage" *"Call Rep. Hastings – [800-number]"*	5/20/96-6/23/96	9/17/96	11/5/96	☐	☐
"People"	TN-04	Van Hilleary *Van Hilleary*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Hilleary: raise the minimum wage" *"Call Rep. Hilleary – [800-number]"*	5/20/96-6/23/96	8/1/96	11/5/96	☐	☐
"People"	MI-08	Dick Chrysler *Dick Chrysler*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Chrysler: raise the minimum wage" *"Call Rep. Chrysler – [800-number]"*	5/20/96-6/23/96	8/6/96	11/5/96	☐	☐
"People"	WA-05	George Nethercutt *George Nethercutt*	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Nethercutt: raise the minimum wage" *"Call Rep. Nethercutt – [800-number]"*	5/20/96-6/23/96	9/17/96	11/5/96	☐	☐

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"People"	CA-01	Frank Riggs	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Riggs: raise the minimum wage"	5/20/96-5/23/96	3/26/96	11/5/96	☐	☐
		Frank Riggs			*"Call Rep. Riggs – [800-number]"*					
"People"	OH-06	Frank Cremeans	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Cremeans: raise the minimum wage"	5/20/96-5/23/96	3/19/96	11/5/96	☐	☐
		Frank Cremeans			*"Call Rep. Cremeans – [800-number]"*					
"People"	CA-22	Andrea Seastrand	☐	Minimum Wage; Medicare Funding; Education Funding; Tax Fairness	"Tell Congresswoman Seastrand: raise the minimum wage"	5/20/96-5/23/96	3/26/96	11/5/96	☐	☐
		Andrea Seastrand			*"Call Rep. Andrea Seastrand – [800-number]"*					
"People"	GA-08	Sax Chambliss	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Chambliss: raise the minimum wage"	5/20/96-5/23/96	7/9/96	11/5/96	☐	☐
		Sax Chambliss			*"Call Rep. Chambliss – [800-number]"*					
"People"	GA-10	Charlie Norwood	☐	Health & Safety; Medicare Funding; Education Funding; Tax Fairness	"Tell Congressman Norwood: raise the minimum wage"	5/20/96-5/23/96	7/9/96	11/5/96	☐	☐
		Charlie Norwood			*"Call Rep. Norwood – [800-number]"*					
"Couple"	CT-06	Gary Franks & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Gary Franks and tell him not to destroy Medicare. Tell him, this time, we're watching."	7/10/96-7/19/96	9/10/96	11/5/96	☐	☐
		Gary Franks & Newt Gingrich			*"Tell Congressman Franks not to destroy Medicare. Call [800-number]."*					
"Couple"	NV-01	John Ensign & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call John Ensign and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/16/96	9/3/96	11/5/96	☐	☐
		John Ensign & Newt Gingrich			*"Tell Congressman Ensign not to destroy Medicare. Call [800-number]."*					

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"Couple"	NY-25	Jim Walsh & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Jim Walsh and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/16/96	9/10/96	11/5/96	☐	☐
		Jim Walsh & Newt Gingrich			*"Tell Congressman Walsh not to destroy Medicare. Call [800-number]."*					
"Couple"	OH-06	Frank Cremeans & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Frank Cremeans and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/16/96	3/19/96	11/5/96	☐	☐
		Frank Cremeans & Newt Gingrich			*"Tell Congressman Cremeans not to destroy Medicare. Call [800-number]."*					
"Couple"	OH-10	Martin Hoke & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Martin Hoke and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/16/96	3/19/96	11/5/96	☐	☐
		Martin Hoke & Newt Gingrich			*"Tell Congressman Hoke not to destroy Medicare. Call [800-number]."*					
"Couple"	OK-02	Tom Coburn & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Tom Coburn and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/16/96	8/27/96	11/5/96	☐	☐
		Tom Coburn & Newt Gingrich			*"Tell Congressman Coburn not to destroy Medicare. Call [800-number]."*					
"Couple"	OR-05	Jim Bunn & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Jim Bunn and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/16/96	5/21/96	11/5/96	☐	☐
		Jim Bunn & Newt Gingrich			*"Tell Congressman Bunn not to destroy Medicare. Call [800-number]."*					
"Couple"	TX-09	Steve Stockman & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Steve Stockman and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/16/96	3/12/96	11/5/96	☐	☐
		Steve Stockman & Newt Gingrich			*"Tell Congressman Stockman not to destroy Medicare. Call [800-number]."*					
"Couple"	GA-08	Sax Chambliss & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Sax Chambliss and tell him not to destroy Medicare. Tell him, this time, we're watching."	7/10/96-7/19/96	7/9/96	11/5/96	☐	☐
		Sax Chambliss & Newt Gingrich			*"Tell Congressman Chambliss not to destroy Medicare. Call [800-number]."*					

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"Couple"	CA-22	Andrea Seastrand & Newt Gingrich *Andrea Seastrand & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Andrea Seastrand and tell her not to destroy Medicare. Tell her, this time, we're watching." *"Tell Congresswoman Seastrand not to destroy Medicare. Call [800-number]."*	7/10/98-7/19/98	3/10/98	11/3/98	☐	☐
"Couple"	KS-04	Todd Tiahrt & Newt Gingrich *Todd Tiahrt & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Todd Tiahrt and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Tiahrt not to destroy Medicare. Call [800-number].*	7/10/98-7/19/98	8/4/98	11/3/98	☑	☐
"Couple"	GA-10	Charlie Norwood & Newt Gingrich *Charlie Norwood & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Charlie Norwood and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Norwood not to destroy Medicare. Call [800-number]."*	7/10/98-7/19/98	7/9/98	11/3/98	☐	☐
"Couple"	NE-02	Jon Christensen & Newt Gingrich *John Christensen & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Jon Christensen and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Christensen not to destroy Medicare. Call [800-number]."*	7/10/98-7/19/98	5/14/98	11/3/98	☐	☐
"Couple"	IN-08	John Hostettler & Newt Gingrich *John Hostettler & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call John Hostettler and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Hostettler not to destroy Medicare. Call [800-number]."*	7/10/98-7/19/98; 7/11/98-7/19/98	5/7/98	11/3/98	☐	☐
"Couple"	OH-01	Steve Chabot & Newt Gingric *Steve Chabot & Newt Gingric*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Steve Chabot and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Chabot not to destroy Medicare. Call [800-number]."*	7/10/98-7/19/98	3/10/98	11/3/98	☐	☐
"Couple"	MI-08	Dick Chrysler & Newt Gingrich *Dick Chrysler & Newt Gingric*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Dick Chrysler and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Chrysler not to destroy Medicare. Call [800-number]."*	6/27/98-7/20/98; 7/11/98-7/19/98	8/4/98	11/3/98	☑	☐

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"Couple"	WI-01	Mark Neumann & Newt Gingrich *Mark Neumann & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Mark Neumann and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Neumann not to destroy Medicare. Call [800-number]."*	6/27/98-7/20/98	9/8/98	11/3/98	☐	☐
"Whither"	NY-25	Jim Walsh & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." "Call Congressman Walsh – [800-number]"	7/20/98-8/4/98	9/10/98	11/3/98	☐	☐
"Whither"	WA-04	Doc Hastings & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." "Call Congressman Hastings – [800-number]"	7/20/98-8/4/98	9/15/98	11/3/98	☐	☐
"Whither"	WA-01 WA-09	Rick White, Randy Tate, & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." "Call Congressmen White and Tate – [800-number]"	7/20/98-8/4/98	9/15/98	11/3/98	☐	☐
"Whither"	TX-09	Steve Stockman & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." "Call Congressman Stockman – [800-number]"	7/20/98-8/4/98	3/10/98	11/3/98	☐	☐
"Whither"	AZ-06	J. D. Hayworth & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." "Call Congressman Hayworth – [800-number]"	7/20/98-8/4/98	9/8/98	11/3/98	☐	☐
"Whither"	OR-05	Jim Bunn & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." "Call Congressman Bunn – [800-number]"	7/20/98-8/4/98	5/19/98	11/3/98	☐	☐
"Whither"	OK-02	Tom Coburn & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." "Call Congressman Coburn – [800-number]"	7/20/98-8/4/98	8/25/98	11/3/98	☑	☐
"Whither"	WA-05	George Nethercutt & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." "Call Congressman Nethercutt – [800-number]"	7/20/98-8/4/98	9/15/98	11/3/98	☐	☐
"Whither"	NV-01	John Ensign & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." "Call Congressman Ensign – [800-number]"	7/20/98-8/4/98	9/1/98	11/3/98	☑	☐

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"Whither"	NC-02 NC-04	David Funderburk, Fred Heineman, & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressmen Funderburk and Heineman – [800-number]"*	7/20/96-8/4/96	5/7/96	11/5/96	☐	☐
"Couple"	ME-01	James Longley & Newt Gingrich *James Longley & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call James Longley and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Longley not to destroy Medicare. Call [800-number]."*	5/27/96-7/20/96; 7/11/96-7/19/96	6/11/96	11/5/96	☐	☐
"Couple"	WA-04	Doc Hastings & Newt Gingrich *Doc Hastings & Newt Gingric*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Doc Hastings and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Hastings not to destroy Medicare. Call [800-number]."*	7/10/96-7/19/96	9/17/96	11/5/96	☐	☐
"Whither"	NE-01	Jon Christensen & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Christensen – [800-number]"*	7/20/96-8/4/96	5/14/96	11/5/96	☐	☐
"Couple"	AZ-06	J. D. Hayworth & Newt Gingrich *J. D. Hayworth & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call J.D. Hayworth and tell him not to destroy Medicare. Tell him, thi time, we're watching." *"Tell Congressman Hayworth not to destroy Medicare. Call [800-number]."*	5/27/96-7/20/96; 7/11[illegible]19/96	9/10/96	11/5/96	☐	☐
"Lady"	KY-01	Edward Whitfield & Newt Gingrich *Edward Whitfield & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Edward Whitfield and tell him not to destroy Medicare. Tell him this time we're watching" viz: *"Tell Congressman Whitfield not to destroy Medicare. Call [800-number]"*	5/27/96-7/20/96; 7/11/96-7/19/96	5/28/96	11/5/96	☐	☐
"Lady"	IA-04	Greg Ganske & Newt Gingrich *Greg Ganske & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Ganske and tell him not to destroy Medicare. Tell him this time we're watching." *"Tell Congressman Ganske not to destroy Medicare. Call [800-number]"*	5/27/96-7/20/96; 7/11/96-7/19/96	6/4/96	11/5/96	☐	☐
"Couple"	CA-01	Frank Riggs & Newt Gingrich *Frank Riggs & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Frank Riggs and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Riggs not to destroy Medicare. Call [800-number]."*	5/27/96-7/20/96; 7/11/96-7/19/96	3/26/96	11/5/96	☐	☐

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"Couple"	WA-05	George Nethercutt & Newt Gingrich *George Nethercutt & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call George Nethercutt and tell him not to destroy Medicare. Tell him this time, we're watching." *"Tell Congressman Nethercutt not to destroy Medicare. Call [800-number]."*	5/27/96-7/20/96; 7/11/96-7/19/96	9/17/96	11/5/96	☐	☐
"Couple"	MA-03	Peter Blute & Newt Gingrich *Peter Blute & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Peter Blute and tell him not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressman Blute not to destroy Medicare. Call [800-number].*	5/27/96-7/20/96; 7/11/96-7/19/96	9/17/96	11/5/96	☐	☐
"Whither"	OH-10 OH-19	Martin Hoke, Steve LaTourette & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressmen Hoke and LaTourette – [800-number]"*	7/20/96-8/4/96	3/19/96	11/5/96	☐	☐
"Whither"	ID-01	Helen Chenoweth & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congresswoman Chenoweth – [800-number]"*	7/20/96-8/4/96	5/28/96	11/5/96	☐	☐
"Whither"	CA-01	Frank Riggs & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Riggs – [800-number]"*	7/20/96-8/4/96	3/26/96	11/5/96	☐	☐
"Lady"	ID-01	Helen Chenoweth & Newt Gingrich *Helen Chenoweth & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Helen Chenoweth and tell her not to destroy Medicare. Tell her this time we're watching" viz: *"Tell Congresswoman Chenoweth not to destroy Medicare. Call [800-number]"*	5/27/96-7/20/96; 7/11/96-7/19/96	5/28/96	11/5/96	☐	☐
"Whither"	CA-22	Andrea Seastrand & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congresswoman Seastrand – [800-number]"*	7/20/96-8/4/96	3/26/96	11/5/96	☐	☐
"Whither"	IA-04	Greg Ganske & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Ganske – [800-number]"*	7/20/96-8/4/96	6/4/96	11/5/96	☐	☐
"Whither"	IN-08	John Hostettler & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Hostettler – [800-number]"*	7/20/96-8/4/96; 7/26/96-8/4/96	5/7/96	11/5/96	☐	☐

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"Whither"	KS-04	Todd Tiahrt & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Tiahrt – [800-number]"*	7/20/96-8/4/96	8/6/96	11/5/96	☒	☐
"Whither"	MI-08	Dick Chrysler & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Chrysler – [800-number]"*	7/20/96-8/4/96	8/6/96	11/5/96	☒	☐
"Whither"	CT-05	Gary Franks & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Franks – [800-number]"*	7/20/96-8/4/96	9/10/96	11/5/96	☐	☐
"Couple"	NC-02 NC-04	David Funderburk & Fred Heineman & Newt Gingrich *David Funderburk, Fred Heineman, & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare Call David Funderburk and Fred Heineman and tell them not to destroy Medicare. Tell him, this time, we're watching." *"Tell Congressmen Funderburk and Heineman not to destroy Medicare. Call [800-number]."*	7/10/96-7/19/96	5/7/96	11/5/96	☐	☐
"Whither"	KY-01	Edward Whitfield & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Whitfield – [800-number]"*	7/20/96-8/4/96	5/28/96	11/5/96	☐	☐
"Whither"	ME-01	James Longley & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Longley – [800-number]"*	7/20/96-8/4/96	6/11/96	11/5/96	☐	☐
"Whither"	MA-03	Peter Blute & Newt Gingrich *Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now comes another vote. They're after Medicare again." *"Call Congressman Blute – [800-number]"*	7/20/96-8/4/96	9/17/96	11/5/96	☐	☐
"Couple"	WA-01 WA-09	Rick White & Randy Tate & Newt Gingrich *Rick White, Randy Tate, & Newt Gingrich*	☐	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare Call Rick White and Randy Tate and tell them not to destroy Medicare Tell him, this time, we're watching." *"Tell Congressmen White and Tate not to destroy Medicare. Call [800-number]."*	7/10/96-7/19/96	9/17/96	11/5/96	☐	☐
"Peace"	MA-03 MA-06	Peter Blute, Peter Torkildsen & Newt Gingrich	☒	Medicare Funding	"So call Congressmen Blute and Torkildsen. Tell them to keep their hands off medicare"	7/20/96-8/4/96	9/17/96	11/5/96	☐	☐

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"$5.15"	CA-22	Andrea Seastrand *Andrea Seastrand, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congresswoman Seastrand. Tell her it is time to start rewarding work. Tell her it's time to raise the minimum wage." *"Call Congresswoman Seastrand – [800-number]"*	6/20/96-7/8/96	3/26/96	11/5/96	☐	☐
"Couple"	MA-06	Peter Torkildsen & Newt Gingrich	☒	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare Call XXX Torkildsen and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/19/96	9/17/96	11/5/96	☐	☐
"Couple"	PA-13	John Fox & Newt Gingrich	☒	Medicare Funding; Tax Fairness	"Now Congress is preparing to vote again on drastic cuts in Medicare Call XXX Fox and tell him not to destroy Medicare. Tell him, this time we're watching."	6/27/96-7/20/96; 7/11/96-7/19/96	4/23/96	11/5/96	☐	☐
"$5.15"	OH-01	Steve Chabot *Steve Chabot, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Chabot. Tell him it is time to start rewarding wor Tell him it's time to raise the minimum wage." *"Call Congressman Chabot – [800-number]"*	6/20/96-7/8/96	3/19/96	11/5/96	☐	☐
"$5.15"	WA-01	Rick White *Rick White, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman White. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman White – [800-number]"*	6/20/96-7/8/96	9/17/96	11/5/96	☐	☐
"$5.15"	NE-02	Jon Christensen *John Christensen, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Christensen. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Christensen – [800-number]"*	6/20/96-7/8/96	5/14/96	11/5/96	☐	☐
"$5.15"	WA-04	Doc Hastings *Doc Hastings, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Hastings. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Hastings – [800-number]"*	6/20/96-7/8/96	9/17/96	11/5/96	☐	☐
"Peace"	PA-13	John Fox & Newt Gingrich	☒	Medicare Funding	"So call Congressman Fox. Tell him to keep his hands off medicare"	7/20/96-8/4/96	4/23/96	11/5/96	☐	☐

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"$5.15"	NC-04	Fred Heineman *Fred Heineman, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Heineman. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Heineman – [800-number]"*	6/29/96-7/8/96	5/7/96	11/5/96	☐	☐
"$5.15"	IN-08	John Hostettler *John Hostettler, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Hostettler. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Hostettler – [800-number]"*	6/29/96-7/8/96	5/7/96	11/5/96	☐	☐
"$5.15"	WA-09	Randy Tate *Randy Tate, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Tate. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Tate – [800-number]"*	6/29/96-7/8/96	9/17/96	11/5/96	☐	☐
"Peace"	MA-03	Peter Blute & Newt Gingrich	☒	Medicare Funding	"So call Congressman Blute. Tell him to keep his hands off medicare"	7/20/96-8/4/96	9/17/96	11/5/96	☐	☐
"$5.15"	NC-02	David Funderburk *David Funderburk, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Funderburk. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Funderburk – [800-number]"*	6/29/96-7/8/96	5/7/96	11/5/96	☐	☐
"Peace"	CA-01	Frank Riggs & Newt Gingrich	☒	Medicare Funding	"So call Congressman Riggs. Tell him to keep his hands off medicar	7/20/96-8/4/96	3/26/96	11/5/96	☐	☐
"$5.15"	CT-06	Gary Franks *Gary Franks, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Franks. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Franks – [800-number]"*	6/29/96-7/8/96	9/10/96	11/5/96	☐	☐
"Couple"	MA-03	Peter Blute & Newt Gingrich	☒		"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Peter Blute and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/18/96	9/17/96	11/5/96	☐	☐

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"$5.15"	NC-04	Fred Heineman *Fred Heineman, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Heineman. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Heineman – [800-number]"*	6/29/96-7/8/96	5/7/96	11/5/96	☐	☐
"$5.15"	IN-08	John Hostettler *John Hostettler, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Hostettler. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Hostettler – [800-number]"*	6/29/96-7/8/96	5/7/96	11/5/96	☐	☐
"$5.15"	WA-09	Randy Tate *Randy Tate, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Tate. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Tate – [800-number]"*	6/29/96-7/8/96	9/17/96	11/5/96	☐	☐
"Peace"	MA-03	Peter Blute & Newt Gingrich	☒	Medicare Funding	"So call Congressman Blute. Tell him to keep his hands off medicare	7/20/96-8/4/96	9/17/96	11/5/96	☐	☐
"$5.15"	NC-02	David Funderburk *David Funderburk, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Funderburk. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Funderburk – [800-number]"*	6/29/96-7/8/96	5/7/96	11/5/96	☐	☐
"Peace"	CA-01	Frank Riggs & Newt Gingrich	☒	Medicare Funding	"So call Congressman Riggs. Tell him to keep his hands off medicar	7/20/96-8/4/96	3/26/96	11/5/96	☐	☐
"$5.15"	CT-06	Gary Franks *Gary Franks, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Franks. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Franks – [800-number]"*	6/29/96-7/8/96	9/10/96	11/5/96	☐	☐
"Couple"	MA-03	Peter Blute & Newt Gingrich	☒		"Now Congress is preparing to vote again on drastic cuts in Medicare. Call Peter Blute and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/18/96	9/17/96	11/5/96	☐	☐

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"Lady"	IA-04	Greg Ganske & Newt Gingrich	☑		"Now Congress is preparing to vote again on drastic cuts in Medicare Call Greg Ganske and tell him not to destroy Medicare. Tell him this time we're watching."	6/27/96-7/20/96; 7/11/96-7/19/96	6/4/96	11/5/96	☐	☐
"Couple"	CA-01	Frank Riggs & Newt Gingrich	☑		"Now Congress is preparing to vote again on drastic cuts in Medicare Call Frank Riggs and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/19/96	3/26/96	11/5/96	☐	☐
"Lady"	KY-01	Edward Whitfield & Newt Gingrich	☑		"Now Congress is preparing to vote again on drastic cuts in Medicare Call Edward Whitfield and tell him not to destroy Medicare. Tell him this time we're watching."	6/27/96-7/20/96; 7/11/96-7/19/96	5/28/96	11/5/96	☐	☐
"Couple"	TX-08	Steve Stockman & Newt Gingrich	☑		"Now Congress is preparing to vote again on drastic cuts in Medicare Call Steve Stockman and tell him not to destroy Medicare. Tell him, this time, we're watching."	6/27/96-7/20/96; 7/11/96-7/19/96	3/12/96	11/5/96	☐	☐
"$5.15"	KS-04	Todd Tiahrt *Todd Tiahrt, footage of dozens of members of Congress*	☐	Minimum Wage	"Call Congressman Tiahrt. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage." *"Call Congressman Tiahrt – [800-number]"*	6/29/96-7/8/96	8/6/96	11/5/96	☑	☐
"$5.15"	IN-08	John Hostettler	☑		"Call Congressman Hostettler. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage."	6/29/96-7/8/96	5/7/96	11/5/96	☐	☐
"$5.15"	NC-02	David Funderburk	☑		"Call Congressman Funderburk. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage."	6/29/96-7/8/96	5/7/96	11/5/96	☐	☐
"$5.15"	NC-04	Fred Heineman	☑		"Call Congressman Heineman. Tell him it is time to start rewarding work. Tell him it's time to raise the minimum wage."	6/29/96-7/8/96	5/7/96	11/5/96	☐	☐
"Minimum Wage"	SD-Sen	Larry Pressler	☑		"Our Senator, Larry Pressler, is undecided about the minimum wage, so call him at [800-number]. Tell him to raise the minimum wage. No exceptions. No excuses. [800-number]"	7/5/96-7/8/96	6/4/96	11/5/96	☐	☐

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"Minimum Wage"	ME-Sen	Olympia Snowe & Bill Cohen	☑		"Both of our Senators, Olympia Snowe and Bill Cohen, are undecided about the minimum wage, so call them at [800-number]. Tell them to raise the minimum wage. No exceptions. No excuses. [800-number]"	7/5/96-7/8/96	6/11/96	11/5/96	☐	☐
"Minimum Wage"	VT-Sen	Jim Jeffords	☑		"Our Senator, Jim Jeffords, is undecided about the minimum wage, s call him at [800-number]. Tell him to raise the minimum wage. No exceptions. No excuses. [800-number]"	7/5/96-7/8/96	9/10/96	11/5/96	☐	☐
"Couple"	IN-08	John Hostettler & Newt Gingrich	☑		"Now Congress is preparing to vote again on drastic cuts in Medicare Call John Hostettler and tell him not to destroy Medicare. Tell him, th time, we're watching."	7/10/96-7/19/96; 7/11/96-7/19/96	5/7/96	11/5/96	☐	☐
"Couple"	NC-02 NC-04	David Funderburk & Fred Heineman & Newt Gingrich	☑		"Now Congress is preparing to vote again on drastic cuts in Medicare Call David Funderburk and Fred Heineman and tell them not to destr Medicare. Tell them, this time, we're watching."	7/10/96-7/19/96	5/7/96	11/5/96	☐	☐
"Couple"	GA-10	Charlie Norwood & Newt Gingrich	☑		"Now Congress is preparing to vote again on drastic cuts in Medicare Call Charlie Norwood and tell him not to destroy Medicare. Tell him, this time, we're watching."	7/10/96-7/19/96	7/9/96	11/5/96	☐	☐
"Couple"	GA-08	Sax Chambliss & Newt Gingrich	☑		"Now Congress is preparing to vote again on drastic cuts in Medicare Call Sax Chambliss and tell him not to destroy Medicare. Tell him, thi time, we're watching."	7/10/96-7/19/96	7/9/96	11/5/96	☐	☐
"Whither"	IN-08	John Hostettler & Newt Gingrich	☑		"Now comes another vote. They're after Medicare again."	7/22/96-8/4/96; 7/26/96-8/4/96	5/7/96	11/5/96	☐	☐
"Whither"	KY-01	Edward Whitfield & Newt Gingrich	☑		"Now comes another vote. They're after Medicare again."	7/26/96-8/4/96	5/28/96	11/5/96	☐	☐
"Whither"	NC-02 NC-04	David Funderburk, Fred Heineman, & Newt Gingrich	☑		"Now comes another vote. They're after Medicare again."	7/22/96-8/4/96	5/7/96	11/5/96	☐	☐

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"Whither"	AZ-06	J. D. Hayworth & Newt Gingrich	☑		"Now comes another vote. They're after Medicare again."	7/20/98-8/4/98	9/10/98	11/5/98	☐	☐
"Edith"	PA-13	John Fox	☐		"Tell Fox to put the law on our side." *"Call Congressman Fox [800-number]"*	8/7/98-8/20/98	5/21/98	11/5/98	☐	☐
"Edith"	PA-13	John Fox	☑	Pension Security	"Tell Fox to pu the law on our side."	8/7/98-8/20/98	5/21/98	11/5/98	☐	☐
"Raiders"	MA-06	Peter Torkildsen & Newt Gingrich	☑	Pension Security	"So call Congressman Torkildsen. This time tell Torkildsen to put the law on our side, not the pension raiders"	8/7/98-8/20/98	9/17/98	11/5/98	☑	☐
"Edith"	WA-01	Rick White	☐	Pension Security	"Tell White to put the law on our side." *"Call Congressman White [800-number]"*	8/7/98-8/20/98	9/17/98	11/5/98	☑	☐
"Edith"	NY-25	Jim Walsh	☐	Pension Security	"Tell Walsh to put the law on our side." *"Call Congressman Walsh [800-number]"*	8/7/98-8/20/98	9/10/98	11/5/98	☑	☐
"Edith"	KY-01	Ed Whitfield	☐	Pension Security	"Tell Whitfield to put the law on our side." *"Call Congressman Whitfield [800-number]"*	8/7/98-8/20/98	5/28/98	11/5/98	☐	☐
"Edith"	MN-01	Gil Gutknecht	☐	Pension Security	"Tell Gutknecht to put the law on our side." *"Call Congressman Gutknecht [800-number]"*	8/7/98-8/20/98	9/10/98	11/5/98	☑	☐
"Edith"	IA-04	Greg Ganske	☐	Pension Security	"Tell Ganske to put the law on our side." *"Call Congressman Ganske [800-number]"*	8/7/98-8/20/98	6/4/98	11/5/98	☐	☐
"Edith"	NV-01	John Ensign	☐	Pension Security	"Tell Ensign to put the law on our side." *"Call Congressman Ensign [800-number]"*	8/7/98-8/20/98	9/3/98	11/5/98	☑	☐
"Edith"	OH-06	Frank Cremeans	☐	Pension Security	"Tell-Cremeans to put the law on our side." *"Call Congressman Cremeans [800-number]"*	8/7/98-8/20/98	3/19/98	11/5/98	☐	☐
"Edith"	OK-02	Tom Coburn	☐	Pension Security	"Tell Coburn to put the law on our side." *"Call Congressman Coburn [800-number]"*	8/7/98-8/20/98	8/27/98	11/5/98	☑	☐

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		Officeholder/Candidate			Call to Action	Dates			Broadcast within...	
Title	*District*	Named in normal type *Pictured in italic type*	*Radio?*	*Issue(s) Discussed*	Audio in normal type *Video in italic type*	*Broadcast*	*Primary*	*General Election*	*30 Days of Primary?*	*60 Days of General Election?*
"Edith"	MI-08	Dick Chrysler	☐	Pension Security/Pension Security/Pension Security	"Tell Chrysler to put the law on our side." *"Call Congressman Chrysler [800-number]"*	8/7/98-8/20/98	8/6/98	11/5/98	☐	☐
"Edith"	CT-05	Gary Franks	☐	Pension Security	"Tell Franks to put the law on our side." *"Call Congressman Franks [800-number]"*	8/7/98-8/20/98	9/10/98	11/5/98	☑	☐
"Edith"	WA-04	Doc Hastings	☐	Pension Security	"Tell Hastings to put the law on our side." *"Call Congressman Hastings [800-number]"*	8/7/98-8/20/98	9/17/98	11/5/98	☑	☐
"Edith"	AZ-06	J. D. Hayworth	☐	Pension Security	"Tell Hayworth to put the law on our side." *"Call Congressman Hayworth [800-number]"*	8/7/98-8/20/98	9/10/98	11/5/98	☑	☐
"Edith"	KS-04	Todd Tiahrt	☐	Pension Security	"Tell Tiahrt to put the law on our side." *"Call Congressman Tiahrt [800-number]"*	8/7/98-8/20/98	8/6/98	11/5/98	☐	☐
"Edith"	TX-09	Steve Stockman	☐	Pension Security	"Tell Stockman to put the law on our side." *"Call Congressman Stockman [800-number]"*	8/7/98-8/20/98	3/12/98	11/5/98	☐	☐
"Edith"	CA-22	Andrea Seastrand	☐	Pension Security	"Tell Seastrand to put the law on our side." *"Call Congresswoman Seastrand [800-number]"*	8/7/98-8/20/98	3/26/98	11/5/98	☐	☐
"Edith"	CA-01	Frank Riggs	☐	Pension Security	"Tell Riggs to put the law on our side." *"Call Congressman Riggs [800-number]"*	8/7/98-8/20/98	3/26/98	11/5/98	☐	☐
"Edith"	WA-05	George Nethercutt	☐	Pension Security	"Tell Nethercutt to put the law on our side." *"Call Congressman Nethercutt [800-number]"*	8/7/98-8/20/98	9/17/98	11/5/98	☑	☐
"Edith"	GA-10	Charlie Norwood	☐	Pension Security	"Tell Norwood to put the law on our side." *"Call Congressman Norwood [800-number]"*	8/7/98-8/20/98	7/9/98	11/5/98	☐	☐
"Edith"	NC-04	Fred Heineman	☐	Pension Security	"Tell Heineman to put the law on our side." *"Call Congressman Heineman [800-number]"*	8/7/98-8/20/98	5/7/98	11/5/98	☐	☐
"Edith"	ME-01	James Longley	☐	Pension Security	"Tell Longley to put the law on our side." *"Call Congressman Longley [800-number]"*	8/7/98-8/20/98	6/11/98	11/5/98	☐	☐

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"Edith"	OH-10	Martin Hoke	☐	Pension Security	"Tell Hoke to put the law on our side." *"Call Congressman Hoke [800-number]"*	8/7/96-8/20/96	3/19/96	11/5/96	☐	☐
"Edith"	IN-08	John Hostettler	☐	Pension Security	"Tell Hostettler to put the law on our side." *"Call Congressman Hostettler [800-number]"*	8/7/96-8/20/96	5/7/96	11/5/96	☐	☐
"Edith"	WA-09	Randy Tate	☐	Pension Security	"Tell Tate to put the law on our side." *"Call Congressman Tate [800-number]"*	8/7/96-8/20/96	9/17/96	11/5/96	☒	☐
"Edith"	NE-02	Jon Christensen	☐	Pension Security	"Tell Christensen to put the law on our side." *"Call Congressman Christensen [800-number]"*	8/7/96-8/20/96	5/14/96	11/5/96	☐	☐
"Edith"	OH-01	Steve Chabot	☐	Pension Security	"Tell Chabot to put the law on our side." *"Call Congressman Chabot [800-number]"*	8/7/96-8/20/96	3/19/96	11/5/96	☐	☐
"Edith"	ID-01	Helen Chenoweth	☐	Pension Security	"Tell Chenoweth to put the law on our side." *"Call Congresswoman Chenoweth [800-number]"*	8/7/96-8/20/96	5/28/96	11/5/96	☐	☐
"Edith"	GA-08	Sax Chambliss	☐	Pension Security	"Tell Chambliss to put the law on our side." *"Call Congressman Chambliss [800-number]"*	8/7/96-8/20/96	7/9/96	11/5/96	☐	☐
"Edith"	OR-05	Jim Bunn	☐	Pension Security	"Tell Bunn to put the law on our side." *"Call Congressman Bunn [800-number]"*	8/7/96-8/20/96	5/21/96	11/5/96	☐	☐
"Edith"	NH-02	Charles Bass	☐	Pension Security	"Tell Bass to put the law on our side." *"Call Congressman Bass [800-number]"*	8/7/96-8/20/96	9/10/96	11/5/96	☒	☐
"Edith"	NC-02	David Funderburk	☐	Pension Security	"Tell Funderburk to put the law on our side." *"Call Congressman Funderburk [800-number]"*	8/7/96-8/20/96	5/7/96	11/5/96	☐	☐
"Edith"	PA-13	John Fox	☒		"Tell Fox to put the law on our side."	8/7/96-8/20/96	4/23/96	11/5/96	☐	☐
"Raiders"	PA-13	John Fox	☒	Pension Security	"So call Congressman Fox. This time, tell Fox to put the law on our side, not the pension raiders."	8/7/96-8/20/96	4/23/96	11/5/96	☐	☐

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"Raiders"	IL-05	Michael Flanagan	☒	Pension Security	"So call Congressman Flanagan. This time tell Flanagan to put the la on our side, not the pension raiders"	8/7/96-8/20/96	3/19/96	11/5/96	☐	☐
"Raiders"	MA-06	Peter Torkildsen	☒	Pension Security	"So call Congressman Torkildsen. This time tell Torkildsen to put the law on our side, not the pension raiders"	8/7/96-8/20/96	9/17/96	11/5/96	☐	☐
"Edith"	CA-01	Frank Riggs	☒		"Tell Riggs to put the law on our side."	8/7/96-8/20/96	3/26/96	11/5/96	☐	☐
"Edith"	IN-08	John Hostettler	☒		"Tell Hostettler to put the law on our side."	8/7/96-8/20/96	5/7/96	11/5/96	☐	☐
"Edith"	MN-01	Gil Gutknecht	☒		"Tell Gutknecht to put the law on our side."	8/7/96-8/20/96	9/10/96	11/5/96	☒	☐
"Edith"	NC-04	Fred Heineman	☒		"Tell Heineman to put the law on our side."	8/7/96-8/20/96	5/7/96	11/5/96	☐	☐
"Edith"	NC-02	David Funderburk	☒		"Tell Funderburk to put the law on our side."	8/7/96-8/20/96	5/7/96	11/5/96	☐	☐
"Edith"	KY-01	Ed Whitfield	☒		"Tell Whitfield to put the law on our side."	8/7/96-8/20/96	5/28/96	11/5/96	☐	☐
"Edith"	GA-08	Sax Chambliss	☒		"Tell Chambliss to put the law on our side."	8/7/96-8/20/96	7/9/96	11/5/96	☐	☐
"Protect"	PA-13	John Fox	☐	Medicare Prescription Drug Benefit	"Tell Shaw: quit putting special interests ahead of working families" *"Call Congressman Fox – [local telephone]"*	8/12/96-8/20/96	4/23/96	11/5/96	☐	☐
"Protect"	GA-08	Sax Chambliss	☐	Medicare Prescription Drug Benefit	"Tell Chambliss: quit putting special interests ahead of working families" *"Call Congressman Chambliss – [local telephone]"*	8/12/96-8/20/96	7/9/96	11/5/96	☐	☐
"Another"	ID-01	Helen Chenoweth & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Chenoweth we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Chenoweth – [800-number]"*	8/28/96-9/4/96	5/28/96	11/5/96	☐	☐

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"Another"	GA-10	Charlie Norwood & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Norwood we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Norwood – [800-number]"*	8/28/96-9/4/96	7/9/96	11/5/96	☐	☐
"Another"	TX-09	Steve Stockman & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Stockman we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Stockman – [800-number]"*	8/28/96-9/4/96	3/12/96	11/5/96	☐	☐
"Another"	WA-01	Rick White & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell White we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call White – [800-number]"*	8/28/96-9/4/96	9/17/96	11/5/96	☑	☐
"Another"	WA-05	George Nethercutt & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Nethercutt we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Nethercutt – [800-number]"*	8/28/96-9/4/96	9/17/96	11/5/96	☑	☐
"Another"	WA-09	Randy Tate & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Tate we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Tate – [800-number]"*	8/28/96-9/4/96	9/17/96	11/5/96	☑	☐
"Another"	CA-01	Frank Riggs & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Frank Riggs we know the truth about his vote to cut our Medica benefits. Another vote is coming. This time we'll be watching" *"Call Frank Riggs – [800-number]"*	8/28/96-9/4/96	3/26/96	11/5/96	☐	☐
"Another"	KY-01	Edward Whitfield & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Whitfield we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Frank – [800-number]"*	8/28/96-9/4/96	5/28/96	11/5/96	☐	☐
"Another"	NE-02	Jon Christensen & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Christensen we know the truth about his vote to cut our Medica benefits. Another vote is coming. This time we'll be watching" *"Call Christensen – [800-number]"*	8/28/96-9/4/96	5/14/96	11/5/96	☐	☐
"Another"	MI-08	Dick Chrysler & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Chrysler we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Chrysler – [800-number]"*	8/28/96-9/4/96	8/6/96	11/5/96	☐	☐
"Another"	ME-01	James Longley & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Longley we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Longley – [800-number]"*	8/28/96-9/4/96	6/11/96	11/5/96	☐	☐

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"Another"	NV-01	John Ensign & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Ensign we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Ensign – [800-number]"*	8/28/96-9/4/96	9/3/96	11/5/96	☑	☐
"Another"	OH-06	Frank Cremeans & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Cremeans we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Cremeans – [800-number]"*	8/28/96-9/4/96	3/19/96	11/5/96	☐	☐
"Another"	NY-25	Jim Walsh & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Walsh we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Walsh – [800-number]"*	8/28/96-9/4/96	9/10/96	11/5/96	☑	☐
"Another"	CA-22	Andrea Seastrand & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Seastrand we know the truth about her vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Seastrand – [800-number]"*	8/28/96-9/4/96	3/26/96	11/5/96	☐	☐
"Another"	IA-04	Greg Ganske & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Ganske we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Ganske – [800-number]"*	8/28/96-9/4/96	6/4/96	11/5/96	☐	☐
"Another"	OH-01	Steve Chabot & Newt Gingric	☐	Medicare Funding; Tax Fairness	"Tell Chabot we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Chabot – [800-number]"*	8/28/96-9/4/96	3/19/96	11/5/96	☐	☐
"Another"	IN-08	John Hostettler & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Hostettler we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Hostettler – [800-number]"*	8/28/96-9/4/96	5/7/96	11/5/96	☐	☐
"Another"	OH-10	Martin Hoke & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Hoke we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Hoke – [800-number]"*	8/28/96-9/4/96	3/19/96	11/5/96	☐	☐
"Another"	NH-02	Charles Bass & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Bass we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Bass – [800-number]"*	8/28/96-9/4/96	9/10/96	11/5/96	☑	☐
"Another"	OK-02	Tom Coburn & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Coburn we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Coburn – [800-number]"*	8/28/96-9/4/96	8/27/96	11/5/96	☐	☐

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"Another"	OR-05	Jim Bunn & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Bunn we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Bunn – [800-number]"*	8/28/96-9/4/96	5/21/96	11/5/96	☐	☐
"Another"	PA-21	Phil English & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell English we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call English – [800-number]"*	8/28/96-9/4/96	4/23/96	11/5/96	☐	☐
"Another"	NC-02	David Funderburk & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Funderburk we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Funderburk – [800-number]"*	8/28/96-9/4/96	5/7/96	11/5/96	☐	☐
"Another"	KS-04	Todd Tiahrt & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Tiahrt we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Tiahrt – [800-number]"*	8/27/96-9/4/96	8/6/96	11/5/96	☐	☐
"Another"	NC-04	Fred Heineman & Newt Gingrich	☐	Medicare Funding; Tax Fairness	"Tell Heineman we know the truth about his vote to cut our Medicare benefits. Another vote is coming. This time we'll be watching" *"Call Heineman – [800-number]"*	8/28/96-9/4/96	5/7/96	11/5/96	☐	☐
"Deny"	KY-01	Edward Whitfield & Newt Gingrich	☒	Medicare Funding	"Other votes are coming. Call Edward Whitfield at [800-number] and tell him that you know the truth about his vote to cut our medicare benefits. Tell Edward Whitfield next time we'll be watching"	8/28/96-9/4/96	5/28/96	11/5/96	☐	☐
"Deny"	TX-09	Steve Stockman & Newt Gingrich	☒	Medicare Funding	"Other votes are coming. Call Steve Stockman at [800-number] and tell him that you know the truth about his vote to cut our medicare benefits. Tell Steve Stockman next time we'll be watching"	8/28/96-9/4/96	3/12/96	11/5/96	☐	☐
"Deny"	CA-01	Frank Riggs & Newt Gingrich	☒	Medicare Funding	"Other votes are coming. Call Frank Riggs at [800-number] and tell him that you know the truth about his vote to cut our medicare benefits. Tell Frank Riggs next time we'll be watching"	8/28/96-9/4/96	3/26/96	11/5/96	☐	☐
"Deny"	IN-08	John Hostettler & Newt Gingrich	☒	Medicare Funding	"Other votes are coming. Call John Hostettler at [800-number] and tell him that you know the truth about his vote to cut our medicare benefits. Tell John Hostettler next time we'll be watching"	8/28/96-9/4/96	5/7/96	11/5/96	☐	☐

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"Deny"	NC-04	Fred Heineman & Newt Gingrich	☒	Medicare Funding	"Other votes are coming. Call Fred Heineman at [800-number] and tell him that you know the truth about his vote to cut our medicare benefits. Tell Fred Heineman next time we'll be watching"	8/28/96-9/4/96	5/7/96	11/5/96	☐	☐
"Deny"	NC-02	David Funderburk & Newt Gingrich	☒	Medicare Funding	"Other votes are coming. Call David Funderburk at [800-number] and tell him that you know the truth about his vote to cut our medicare benefits. Tell David Funderburk next time we'll be watching"	8/28/96-9/4/96	5/7/96	11/5/96	☐	☐
"Deny"	PA-13	John Fox & Newt Gingrich	☒	Medicare Funding	"Other votes are coming. Call John Fox at [800-number] and tell him that you know the truth about his vote to cut our medicare benefits. Tell John Fox next time we'll be watching"	8/28/96-9/4/96	4/23/96	11/5/96	☐	☐
"No Two Way"	GA-10	Charlie Norwood & Newt Gingrich	☒	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Norwood: don't write off our children's future. Tell him his priorities are all wrong."	9/5/96-9/15/96; 9/18/96-9/18/96	7/9/96	11/5/96	☐	☒
"No Two Way"	OH-16	Martin Hoke & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Hoke: don't write off our children's future. Tell him his priorities are all wrong." *"Call Hoke – [800-number]"*	9/5/96-9/15/96; 9/18/96-9/18/96	3/19/96	11/5/96	☐	☒
"No Two Way"	MN-01	Gil Gutknecht & Newt Gingric	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Gutknecht: don't write off our children's future. Tell him his priorities are all wrong." *"Call Gutknecht – [800-number]"*	9/5/96-9/15/96	9/10/96	11/5/96	☒	☒
"No Two Way"	WA-05	George Nethercutt & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Nethercutt: don't write off our children's future. Tell him his priorities are all wrong." *"Call Nethercutt – [800-number]"*	9/5/96-9/15/96	9/17/96	11/5/96	☒	☒
"No Two Way"	WA-04	Doc Hastings & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Hastings: don't write off our children's future. Tell him his priorities are all wrong." *"Call Hastings – [800-number]"*	9/5/96-9/15/96	9/17/96	11/5/96	☒	☒
"No Two Way"	WA-01	Rick White & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell White: don't write off our children's future. Tell him his priorities are all wrong." *"Call White – [800-number]"*	9/5/96-9/15/96	9/17/96	11/5/96	☒	☒
"No Two Way"	OK-02	Tom Coburn & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Coburn: don't write off our children's future. Tell him his priorities are all wrong." *"Call Coburn – [800-number]"*	9/5/96-9/15/96; 9/18/96-9/18/96	8/27/96	11/5/96	☐	☒

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Title	District	Officeholder/Candidate Named in normal type *Pictured in italic type*	Radio?	Issue(s) Discussed	Call to Action Audio in normal type *Video in italic type*	Dates: Broadcast	Dates: Primary	Dates: General Election	Broadcast within... 30 Days of Primary?	Broadcast within... 60 Days of General Election?
"No Two Way"	OH-08	Frank Cremeans & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Cremeans: don't write off our children's future. Tell him his priorities are all wrong." *"Call Cremeans – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/19/96	3/19/96	11/5/96	☐	☒
"No Two Way"	NC-02	David Funderburk & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Funderburk: don't write off our children's future. Tell him his priorities are all wrong." *"Call Funderburk – [800-number]"*	9/5/96-9/15/96	5/7/96	11/5/96	☐	☒
"No Two Way"	WA-09	Randy Tate & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Tate: don't write off our children's future. Tell him his priorities are all wrong." *"Call Tate – [800-number]"*	9/5/96-9/15/96	9/17/96	11/5/96	☒	☒
"No Two Way"	NE-02	Jon Christensen & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Christensen: don't write off our children's future. Tell him his priorities are all wrong." *"Call Christensen – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	5/14/96	11/5/96	☐	☒
"No Two Way"	OH-01	Steve Chabot & Newt Gingric	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Chabot: don't write off our children's future. Tell him his priorities are all wrong." *"Call Chabot – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	3/19/96	11/5/96	☐	☒
"No Two Way"	MI-08	Dick Chrysler & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Chrysler: don't write off our children's future. Tell him his priorities are all wrong." *"Call Chrysler – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	8/6/96	11/5/96	☐	☒
"No Two Way"	KY-01	Edward Whitfield & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Whitfield: don't write off our children's future. Tell him his priorities are all wrong." *"Call Whitfield – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	5/28/96	11/5/96	☐	☒
"No Two Way"	KS-04	Todd Tiahrt & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Tiahrt: don't write off our children's future. Tell him his priorities are all wrong." *"Call Tiahrt – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	8/6/96	11/5/96	☐	☒
"No Two Way"	IA-04	Greg Ganske & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Ganske: don't write off our children's future. Tell him his priorities are all wrong." *"Call Ganske – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	6/4/96	11/5/96	☐	☒
"No Two Way"	IN-08	John Hostettler & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Hostettler: don't write off our children's future. Tell him his priorities are all wrong." *"Call Hostettler – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	5/7/96	11/5/96	☐	☒

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"No Two Way"	ID-01	Helen Chenoweth & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Chenoweth: don't write off our children's future. Tell him his priorities are all wrong." *"Call Chenoweth – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/19/96	5/28/96	11/5/96	☐	☒
"No Two Way"	AZ-06	J. D. Hayworth & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Hayworth: don't write off our children's future. Tell him his priorities are all wrong." *"Call J. D. Hayworth – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	9/10/96	11/5/96	☒	☒
"No Two Way"	NV-01	John Ensign & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Ensign: don't write off our children's future. Tell him his priorities are all wrong." *"Call Ensign – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	9/3/96	11/5/96	☐	☒
"No Two Way" (Alt. Script)	PA-21	Phil English & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell English: don't write off our children's future. Tell him his priorities are all wrong." *"Call English – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	4/23/96	11/5/96	☐	☒
"No Two Way"	CA-01	Frank Riggs & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Riggs: don't write off our children's future. Tell him his priorities are all wrong." *"Call Riggs – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	3/26/96	11/5/96	☐	☒
"No Two Way"	TX-08	Steve Stockman & Newt Gingrich	☐		"Congress will vote again on the budget. Tell Stockman: don't write off our children's future. Tell him his priorities are all wrong." *"Call Stockman – [800-number]"*	9/5/96-9/18/96	3/12/96	11/5/96	☐	☒
"No Two Way"	NH-02	Charles Bass & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Bass: don't write off our children's future. Tell him his priorities are all wrong." *"Call Bass – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/18/96	9/10/96	11/5/96	☒	☒
"No Two Way"	GA-10	Charlie Norwood & Newt Gingrich	☐		"Congress will vote again on the budget. Tell Norwood: don't write off our children's future. Tell him his priorities are all wrong."	9/5/96-9/19/96	7/9/96	11/5/96	☐	☒
"No Two Way"	CT-05	Gary Franks & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Franks: don't write off our children's future. Tell him his priorities are all wrong." *"Call Gary Franks – [800-number]"*	9/6/96-9/19/96	9/10/96	11/5/96	☒	☒
"No Two Way" (Alt. Script)	OR-05	Jim Bunn & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Bunn: don't write off our children's future. Tell him his priorities are all wrong." *"Call Bunn – [800-number]"*	9/5/96-9/15/96; 9/16/96-9/19/96	5/21/96	11/5/96	☐	☒

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"No Two Way" (Alt. Script)	NC-04	Fred Heineman & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Heineman: don't write our children's future. Tell him his priorities are all wrong." *"Call Heineman – [800-number]"*	8/5/96-8/15/96	5/7/96	11/5/96	☐	☒
"No Two Way" (Alt. Script)	NY-25	Jim Walsh & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Walsh: don't write off o children's future. Tell him his priorities are all wrong." *"Call Walsh – [800-number]"*	8/5/96-8/15/96; 8/16/96-9/18/96	9/10/96	11/5/96	☒	☒
"No Two Way" (Alt. Script)	NJ-08	Bill Martini & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Martini: don't write off o children's future. Tell him his priorities are all wrong." *"Call Martini – [800-number]"*	8/5/96-8/15/96; 8/16/96-9/18/96	6/4/96	11/5/96	☐	☒
"No Two Way" (Alt. Script)	ME-01	James Longley & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Longley: don't write off our children's future. Tell him his priorities are all wrong." *"Call Longley – [800-number]"*	8/5/96-8/15/96; 8/16/96-9/18/96	6/11/96	11/5/96	☐	☒
"No Two Way"	CA-22	Andrea Seastrand & Newt Gingrich	☐	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Seastrand: don't write our children's future;" Tell her her priorities are all wrong" *"Call Seastrand – [800-number]"*	8/5/96-8/15/96; 8/16/96-9/18/96	3/26/96	11/5/96	☐	☒
"No Two Way"	TX-09	Steve Stockman & Newt Gingrich	☒	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Stockman: don't write o our children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96; 8/16/96-9/20/96	3/12/96	11/5/96	☐	☒
"No Two Way" (Alt. Script)	NC-04	Fred Heineman & Newt Gingrich	☒		"Congress will vote again on the budget. Tell Heineman: don't write our children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96	5/7/96	11/5/96	☐	☒
"No Two Way"	CA-01	Frank Riggs & Newt Gingrich	☒		"Congress will vote again on the budget. Tell Riggs: don't write off ou children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96; 8/16/96-9/18/96	3/26/96	11/5/96	☐	☒
"No Two Way"	NC-02	David Funderburk & Newt Gingrich	☒		"Congress will vote again on the budget. Tell Funderburk: don't write off our children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96	5/7/96	11/5/96	☐	☒
"No Two Way"	MA-06	Peter Torkildsen & Newt Gingrich	☒	Education Funding; Tax Fairness	"Congress will vote again on the budget. Tell Torkildsen: don't write our children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96; 8/16/96-9/18/96	9/17/96	11/5/96	☒	☒

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"No Two Way"	IN-08	John Hostettler & Newt Gingrich	☒		"Congress will vote again on the budget. Tell Hostettler: don't write o our children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96; 8/16/96-9/18/96	5/7/96	11/5/96	☐	☒
"No Two Way"	KY-01	Edward Whitfield & Newt Gingrich	☒		"Congress will vote again on the budget. Tell Whitfield: don't write off our children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96; 8/16/96-9/18/96	5/28/96	11/5/96	☐	☒
"No Two Way"	MN-01	Gil Gutknecht & Newt Gingric	☒		"Congress will vote again on the budget. Tell Gutknecht: don't write our children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96	9/10/96	11/5/96	☒	☒
"No Two Way"	GA-10	Charlie Norwood & Newt Gingrich	☒		"Congress will vote again on the budget. Tell Norwood: don't write of our children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96; 8/16/96-9/18/96	7/9/96	11/5/96	☐	☒
"No Two Way"	TX-09	Steve Stockman & Newt Gingrich	☒		"Congress will vote again on the budget. Tell Stockman: don't write o our children's future. Tell him his priorities are all wrong."	8/5/96-8/15/96; 8/16/96-9/20/96	3/12/96	11/5/96	☐	☒
"Retire"	NC-02	David Funderburk & Bob Etheridge	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-236-3463"*	9/28/96-10/8/96	5/7/96	11/5/96	☐	☒
"Retire"	TX-09	Steve Stockman & Nick Lampson	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-236-3463"*	9/28/96-10/8/96	3/12/96	11/5/96	☐	☒
"Retire"	PA-21	Phil English & Ron DiNicola	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-236-3463"*	9/28/96-10/8/96	4/23/96	11/5/96	☐	☒
"Retire"	OR-05	Jim Bunn & Darlene Hooley	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-236-3463"*	9/28/96-10/8/96	5/21/96	11/5/96	☐	☒
"Retire"	OK-02	Tom Coburn & Glen Johnson	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-236-3463"*	9/28/96-10/8/96	8/27/96	11/5/96	☐	☒

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Title	*District*	Named in normal type *Pictured in italic type*	*Radio?*	*Issue(s) Discussed*	Audio in normal type *Video in italic type*	*Broadcast*	*Primary*	*General Election*	*30 Days of Primary?*	*60 Days of General Election?*
"Retire"	OH-10	Martin Hoke & Dennis Kucinich	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	3/10/98	11/3/98	☐	☒
"Retire"	OH-01	Steve Chabot & Mark Longabaugh	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	3/10/98	11/3/98	☐	☒
"Retire"	NY-25	Jim Walsh & Marty Mack	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	9/10/98	11/3/98	☐	☒
"Retire"	NV-01	John Ensign & Bob Coffin	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	9/3/98	11/3/98	☐	☒
"Kids"	GA-10	Charlie Norwood & David Bell	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	7/8/98	11/3/98	☐	☒
"Retire"	NH-02	Charles Bass & Arnie Arnesen	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	9/10/98	11/3/98	☐	☒
"Retire"	WA-09	Randy Tate & Adam Smith	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	9/17/98	11/3/98	☐	☒
"Retire"	ME-01	James Longley & Tom Allen	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	6/11/98	11/3/98	☐	☒
"Kids"	WA-09	Randy Tate & Adam Smith	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	9/17/98	11/3/98	☐	☒
"Retire"	CA-01	Frank Riggs & Michela Alioto	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	3/26/98	11/3/98	☐	☒
"Retire"	CA-22	Andrea Seastrand & Walter Capps	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	3/26/98	11/3/98	☐	☒

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"Retire"	GA-08	Saxby Chambliss & Jim Wiggins	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	7/8/98	11/3/98	☐	☒
"Retire"	GA-10	Charlie Norwood & David Bell	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	7/8/98	11/3/98	☐	☒
"Retire"	IA-04	Greg Ganske & Connie McBurney	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	6/4/98	11/3/98	☐	☒
"Retire"	ID-01	Helen Chenoweth & Dan Williams	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	5/26/98	11/3/98	☐	☒
"Retire"	IN-08	John Hostettler & Jonathan Weinzapfel	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	5/7/98	11/3/98	☐	☒
"Retire"	NJ-08	Bill Martini & Bill Pascrell	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	6/4/98	11/3/98	☐	☒
"Kids"	NH-02	Charles Bass & Arnie Arnesen	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	9/10/98	11/3/98	☐	☒
"Retire"	AZ-06	J. D. Hayworth & Steve Owens	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	9/10/98	11/3/98	☐	☒
"Kids"	AZ-06	Steve Owens & J. D. Hayworth	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	9/10/98	11/3/98	☐	☒
"Kids"	ID-01	Helen Chenoweth & Dan Williams	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	5/26/98	11/3/98	☐	☒
"Retire"	KY-01	Edward Whitfield & Dennis Null	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/28/98-10/9/98	5/26/98	11/3/98	☐	☒

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"Kids"	IN-08	John Hostettler & Jonathan Weinzapfel	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	5/7/96	11/5/96	☐	☒
"Kids"	NC-02	David Funderburk & Bob Etheridge	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	5/7/96	11/5/96	☐	☒
"Retire"	WA-01	Rick White & Jeff Coopersmith	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	9/17/96	11/5/96	☐	☒
"Kids"	NV-01	John Ensign & Bob Coffin	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	9/3/96	11/5/96	☐	☒
"Kids"	OH-01	Steve Chabot & Mark Longabaugh	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	3/19/96	11/5/96	☐	☒
"Kids"	OH-10	Martin Hoke & Dennis Kucinich	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	3/19/96	11/5/96	☐	☒
"Kids"	OK-02	Tom Coburn & Glen Johnson	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	8/27/96	11/5/96	☐	☒
"Kids"	TX-09	Steve Stockman & Nick Lampson	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	3/12/96	11/5/96	☐	☒
"Kids"	WA-01	Rick White & Jeff Coopersmith	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	9/17/96	11/5/96	☐	☒
"Kids"	GA-08	Sax Chambliss & Jim Wiggins	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	7/9/96	11/5/96	☐	☒
"Kids"	CA-22	Andrea Seastrand & Walter Capps	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	3/26/96	11/5/96	☐	☒

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"Kids"	CA-01	Frank Riggs & Michela Alioto	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	3/26/96	11/5/96	☐	☒
"Kids"	IA-04	Greg Ganske & Connie McBurney	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	6/4/96	11/5/96	☐	☒
"Kids"	KY-01	Edward Whitfield & Dennis Null	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	5/28/96	11/5/96	☐	☒
"Retire"	NH-02	Charles Bass & Arnie Arnesen	☐	Pension Security	"When it comes to your pension, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	9/10/96	11/5/96	☐	☒
"Medicare"	KY-01	Edward Whitfield & Dennis Null	☒		"When it comes to Medicare there is a difference. Call and find out."	9/26/96-10/9/96; 10/10/96-10/15/96	5/28/96	11/5/96	☐	☒
"Students"	MT-AL	Rick Hill & Bill Yellowtail	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/1/96-10/14/96; 10/15/96-10/20/96	6/4/96	11/5/96	☐	☒
"Students"	TX-14	Lefty Morris & Ron Paul	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/1/96-10/14/96; 10/15/96-10/20/96	3/12/96	11/5/96	☐	☒
"Students"	IL-20	Jay Hoffman & John Shimkus	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/1/96-10/14/96; 10/15/96-10/20/96	3/19/96	11/5/96	☐	☒
"Kids"	GA-08	Sax Chambliss & Jim Wiggins	☒		"When it comes to education, there is a difference. Call and find out."	9/26/96-10/9/96	7/9/96	11/5/96	☐	☒
"Medicare"	MA-06	Peter Torkildsen & John Tierney	☒	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out."	9/26/96-10/9/96; 10/10/96-10/15/96	9/17/96	11/5/96	☐	☒
"Kids"	OR-05	Jim Bunn & Darlene Hooley	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	9/26/96-10/9/96	5/21/96	11/5/96	☐	☒

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"Kids"	NC-02	David Funderburk & Bob Etheridge	☒		"When it comes to education, there is a difference. Call and find out."	9/28/96-10/8/96	5/7/96	11/5/96	☐	☒
"Kids"	KY-01	Edward Whitfield & Dennis Null	☒		"When it comes to education, there is a difference. Call and find out."	9/28/96-10/8/96	5/28/96	11/5/96	☐	☒
"Kids"	GA-10	Charlie Norwood & David Bell	☒		"When it comes to education, there is a difference. Call and find out."	9/28/96-10/8/96	7/9/96	11/5/96	☐	☒
"Kids"	CA-01	Frank Riggs & Michela Alioto	☒		"When it comes to education, there is a difference. Call and find out."	9/28/96-10/8/96	3/26/96	11/5/96	☐	☒
"Retire"	KY-01	Edward Whitfield & Dennis Null	☒		"When it comes to your pension, there is a difference. Call and find out."	9/28/96-10/8/96	5/28/96	11/5/96	☐	☒
"Retire"	TX-09	Steve Stockman & Nick Lampson	☒		"When it comes to your pension, there is a difference. Call and find out."	9/28/96-10/8/96	3/12/96	11/5/96	☐	☒
"Retire"	NC-02	David Funderburk & Bob Etheridge	☒		"When it comes to your pension, there is a difference. Call and find out."	9/28/96-10/8/96	5/7/96	11/5/96	☐	☒
"Retire"	MA-06	Peter Torkildsen & John Tierney	☒	Pension Security	"When it comes to your pension, there is a difference. Call and find out."	9/28/96-10/8/96	9/17/96	11/5/96	☐	☒
"Kids"	NY-25	Jim Walsh & Marty Mack	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-335-3463"*	9/28/96-10/8/96	9/10/96	11/5/96	☐	☒
"Kids"	PA-21	Phil English & Ron DiNicola	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-335-3463"*	9/28/96-10/8/96	4/23/96	11/5/96	☐	☒
"Kids"	MA-06	Peter Torkildsen & John Tierney	☒	Education Funding	"When it comes to education, there is a difference. Call and find out."	9/28/96-10/8/96	9/17/96	11/5/96	☐	☒

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"Kids"	NJ-08	Bill Martini & Bill Pascrell	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-335-3463"*	9/28/96-10/8/96	6/4/96	11/5/96	☐	☒
"Kids"	ME-01	James Longley & Tom Allen	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-335-3463"*	9/28/96-10/8/96	6/11/96	11/5/96	☐	☒
"Kids"	IN-08	John Hostettler & Jonathan Weinzapfel	☒		"When it comes to education, there is a difference. Call and find out."	9/28/96-10/8/96	5/7/96	11/5/96	☐	☒
"Retire"	GA-08	Sax Chambliss & Jim Wiggins	☒		"When it comes to your pension, there is a difference. Call and find out."	9/28/96-10/8/96	7/9/96	11/5/96	☐	☒
"Retire"	GA-10	Charlie Norwood & David Bell	☒		"When it comes to your pension, there is a difference. Call and find out."	9/28/96-10/8/96	7/9/96	11/5/96	☐	☒
"Retire"	CA-01	Frank Riggs & Michela Alioto	☒		"When it comes to your pension, there is a difference. Call and find out."	9/28/96-10/8/96	3/26/96	11/5/96	☐	☒
"Retire"	IN-08	John Hostettler & Jonathan Weinzapfel	☒		"When it comes to your pension, there is a difference. Call and find out."	9/28/96-10/8/96	5/7/96	11/5/96	☐	☒
"Medicare"	GA-10	Charlie Norwood & David Bell	☒		"When it comes to Medicare there is a difference. Call and find out."	9/28/96-10/8/96; 10/10/96-10/16/96	7/9/96	11/5/96	☐	☒
"Medicare"	IN-08	John Hostettler & Jonathan Weinzapfel	☒		"When it comes to Medicare there is a difference. Call and find out."	9/28/96-10/8/96; 10/10/96-10/16/96	5/7/96	11/5/96	☐	☒
"Medicare"	GA-08	Sax Chambliss & Jim Wiggins	☒		"When it comes to Medicare there is a difference. Call and find out."	9/28/96-10/8/96; 10/10/96-10/16/96	7/9/96	11/5/96	☐	☒
"Medicare"	CA-01	Frank Riggs & Michela Alioto	☒		"When it comes to Medicare there is a difference. Call and find out."	9/28/96-10/8/96; 10/10/96-10/16/96	3/26/96	11/5/96	☐	☒

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"Medicare"	TX-09	Steve Stockman & Nick Lampson	☒		"When it comes to Medicare there is a difference. Call and find out."	9/26/96-10/9/96; 10/10/96-10/15/96	3/12/96	11/5/96	☐	☒
"Kids"	TX-09	Steve Stockman & Nick Lampson	☒		"When it comes to education, there is a difference. Call and find out."	9/26/96-10/9/96	3/12/96	11/5/96	☐	☒
"Medicare"	NC-02	David Funderburk & Bob Etheridge	☒		"When it comes to Medicare there is a difference. Call and find out."	9/26/96-10/9/96; 10/10/96-10/15/96	5/7/96	11/5/96	☐	☒
"Medicare"	GA-10	Charlie Norwood & David Bell	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	7/9/96	11/5/96	☐	☒
"Medicare"	NC-02	David Funderburk & Bob Etheridge	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	5/7/96	11/5/96	☐	☒
"Medicare"	ME-01	James Longley & Tom Allen	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	6/11/96	11/5/96	☐	☒
"Medicare"	AZ-06	J. D. Hayworth & Steve Owens	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	9/10/96	11/5/96	☐	☒
"Medicare"	KY-01	Edward Whitfield & Dennis Null	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	5/28/96	11/5/96	☐	☒
"Medicare"	IN-08	John Hostettler & Jonathan Weinzapfel	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	5/7/96	11/5/96	☐	☒
"Medicare"	IA-04	Greg Ganske & Connie McBurney	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	6/4/96	11/5/96	☐	☒

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"Medicare"	GA-08	Sax Chambliss & Jim Wiggins	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	7/9/96	11/5/96	☐	☒
"Medicare"	NH-02	Charles Bass & Arnie Arnesen	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	9/10/96	11/5/96	☐	☒
"Medicare"	OR-05	Jim Bunn & Darlene Hooley	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	5/21/96	11/5/96	☐	☒
"Medicare"	CA-01	Frank Riggs & Michela Alioto	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	3/26/96	11/5/96	☐	☒
"Medicare"	CA-22	Andrea Seastrand & Walter Capps	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	3/26/96	11/5/96	☐	☒
"Medicare"	ID-01	Helen Chenoweth & Dan Williams	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	5/28/96	11/5/96	☐	☒
"Medicare"	WA-09	Randy Tate & Adam Smith	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	9/17/96	11/5/96	☐	☒
"Medicare"	NV-01	John Ensign & Bob Coffin	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	9/3/96	11/5/96	☐	☒
"Medicare"	NY-25	Jim Walsh & Marty Mack	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	9/10/96	11/5/96	☐	☒
"Medicare"	OH-01	Steve Chabot & Mark Longabaugh	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	3/19/96	11/5/96	☐	☒

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"Medicare"	OK-02	Tom Coburn & Glen Johnson	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	8/27/96	11/5/96	☐	☒
"Medicare"	PA-21	Phil English & Ron DiNicola	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	4/23/96	11/5/96	☐	☒
"Medicare"	TX-09	Steve Stockman & Nick Lampson	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	3/12/96	11/5/96	☐	☒
"Medicare"	WA-01	Rick White & Jeff Coopersmith	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	9/17/96	11/5/96	☐	☒
"Medicare"	NJ-08	Bill Martini & Bill Pascrell	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	6/4/96	11/5/96	☐	☒
"Medicare"	OH-10	Martin Hoke & Dennis Kucinich	☐	Medicare Funding	"When it comes to Medicare there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	9/26/96-10/9/96; 10/10/96-10/15/96	3/19/96	11/5/96	☐	☒
"Student"	TX-09	Steve Stockman & Nick Lampson	☐	Education Funding	"When it comes to education, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/1/96-10/14/96	3/12/96	11/5/96	☐	☒
"Taxes"	WA-09	Randy Tate & Adam Smith	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	9/17/96	11/5/96	☐	☒
"Taxes"	WA-02	Jack Metcalf & Kevin Quigley	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	9/17/96	11/5/96	☐	☒
"Taxes"	WA-01	Rick White & Jeff Coopersmith	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	9/17/96	11/5/96	☐	☒

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"Taxes"	OR-05	Jim Bunn & Darlene Hooley	☒	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out."	10/16/96-10/25/96; 10/26/96-11/5/96	5/21/96	11/5/96	☐	☒
"Taxes"	PA-21	Phil English & Ron DiNicola	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	4/23/96	11/5/96	☐	☒
"Taxes"	OK-02	Tom Coburn & Glen Johnson	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96	8/27/96	11/5/96	☐	☒
"Taxes"	AZ-06	J. D. Hayworth & Steve Owens	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	9/10/96	11/5/96	☐	☒
"Taxes"	ID-01	Helen Chenoweth & Dan Williams	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	5/28/96	11/5/96	☐	☒
"Taxes"	OH-10	Martin Hoke & Dennis Kucinich	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96; 10/16/96-10/25/96	3/19/96	11/5/96	☐	☒
"Taxes"	CA-01	Frank Riggs & Michela Alioto	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	3/26/96	11/5/96	☐	☒
"Taxes"	CA-22	Andrea Seastrand & Walter Capps	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	3/26/96	11/5/96	☐	☒
"Taxes"	GA-08	Sax Chambliss & Jim Wiggins	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	7/9/96	11/5/96	☐	☒

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"Taxes"	TX-09	Steve Stockman & Nick Lampson	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96	3/12/96	11/5/96	☐	☒
"Taxes"	IA-04	Greg Ganske & Connie McBurney	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	6/4/96	11/5/96	☐	☒
"Taxes"	IN-08	John Hostettler & Jonathan Weinzapfel	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	5/7/96	11/5/96	☐	☒
"Taxes"	KY-01	Edward Whitfield & Dennis Null	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	5/28/96	11/5/96	☐	☒
"Taxes"	ME-01	James Longley & Tom Allen	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/28/96-11/5/96	6/11/96	11/5/96	☐	☒
"Taxes"	NC-02	David Funderburk & Bob Etheridge	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	5/7/96	11/5/96	☐	☒
"Taxes"	NH-02	Charles Bass & Arnie Arnesen	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	9/10/96	11/5/96	☐	☒
"Taxes"	OH-01	Steve Chabot & Mark Longabaugh	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96	3/19/96	11/5/96	☐	☒
"Taxes"	GA-10	Charlie Norwood & David Bell	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96	7/9/96	11/5/96	☐	☒

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"Taxes"	NY-25	Jim Walsh & Marty Mack	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96	9/10/96	11/5/96	☐	☒
"Taxes"	NV-01	John Ensign & Bob Coffin	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	9/3/96	11/5/96	☐	☒
"Taxes"	NJ-08	Bill Martini & Bill Pascrell	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96	6/4/96	11/5/96	☐	☒
"Taxes"	OR-05	Jim Bunn & Darlene Hooley	☐		"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	5/21/96	11/5/96	☐	☒
"Taxes"	MT-AL	Rick Hill & Bill Yellowtail	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/21/96-11/5/96; 11/1/96-11/5/96	6/4/96	11/5/96	☐	☒
"Taxes"	IL-20	John Shimkus & Jay Hoffman	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-2463"*	10/21/96-11/5/96	3/19/96	11/5/96	☐	☒
"Taxes"	MA-06	Peter Torkildsen & John Tierney	☒	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out."	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	9/17/96	11/5/96	☐	☒
"Taxes"	NC-02	David Funderburk & Bob Etheridge	☒		"When it comes to taxes, there is a difference. Call and find out."	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	5/7/96	11/5/96	☐	☒
"Taxes"	KY-01	Edward Whitfield & Dennis Null	☒		"When it comes to taxes, there is a difference. Call and find out."	10/10/96-10/15/96; 10/16/96-10/25/96; 10/28/96-11/5/96	5/28/96	11/5/96	☐	☒

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"Taxes"	IN-08	John Hostettler & Jonathan Weinzapfel	☒		"When it comes to taxes, there is a difference. Call and find out."	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	5/7/96	11/5/96	☐	☒
"Taxes"	GA-08	Sax Chambliss & Jim Wiggins	☒		"When it comes to taxes, there is a difference. Call and find out."	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	7/9/96	11/5/96	☐	☒
"Taxes"	TX-09	Steve Stockman & Nick Lampson	☒		"When it comes to taxes, there is a difference. Call and find out."	10/10/96-10/15/96; 10/16/96-10/25/96	3/12/96	11/5/96	☐	☒
"Taxes"	CA-01	Frank Riggs & Michela Alioto	☒		"When it comes to taxes, there is a difference. Call and find out."	10/10/96-10/15/96; 10/16/96-10/25/96; 10/26/96-11/5/96	3/26/96	11/5/96	☐	☒
"Homes"	OR-05	Darlene Hooley & Jim Bunn	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	5/21/96	11/5/96	☐	☒
"Homes"	GA-08	Jim Wiggins & Sax S. Chambliss	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96	7/9/96	11/5/96	☐	☒
"Homes"	NC-02	Bob Etheridge & David Funderburk	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	5/7/96	11/5/96	☐	☒
"Homes"	NY-25	Marty Mack & Jim Walsh	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96	9/10/96	11/5/96	☐	☒
"Home"	CA-01	Frank Riggs & Michela Alioto	☒	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out."	10/16/96-10/25/96; 10/26/96-11/5/96	3/26/96	11/5/96	☐	☒
"Home"	PA-21	Phil English & Ron DiNicola	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	4/23/96	11/5/96	☐	☒

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"Home"	NV-01	John Ensign & Bob Coffin	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	9/3/96	11/5/96	☐	☒
"Home"	IA-04	Greg Ganske & Connie McBurney	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	6/4/96	11/5/96	☐	☒
"Home"	AZ-06	J. D. Hayworth & Steve Owens	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	9/10/96	11/5/96	☐	☒
"Home"	OH-10	Martin Hoke & Dennis Kucinich	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96	3/19/96	11/5/96	☐	☒
"Home"	IN-08	John Hostettler & Jonathan Weinzapfel	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	5/7/96	11/5/96	☐	☒
"Home"	NJ-08	Bill Martini & Bill Pascrell	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96	6/4/96	11/5/96	☐	☒
"Home"	WA-02	Jack Metcalf & Kevin Quigley	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	9/17/96	11/5/96	☐	☒
"Home"	CA-01	Frank Riggs & Michela Alioto	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	3/26/96	11/5/96	☐	☒
"Home"	ID-01	Helen Chenoweth & Dan Williams	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	5/28/96	11/5/96	☐	☒
"Home"	NH-02	Charles Bass & Arnie Arnesen	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter information for Working Families 1-888-235-3463"*	10/16/96-10/25/96; 10/26/96-11/5/96	9/10/96	11/5/96	☐	☒

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"Home"	TX-09	Steve Stockman & Nick Lampson	☑	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out."	10/15/98-10/19/98	3/12/98	11/3/98	☐	☑
"Home"	IN-08	John Hostettler & Jonathan Weinzapfel	☑	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out."	10/16/98-10/25/98; 10/28/98-11/3/98	5/7/98	11/3/98	☐	☑
"Home"	KY-01	Edward Whitfield & Dennis Null	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/16/98-10/25/98; 10/28/98-11/3/98	5/26/98	11/3/98	☐	☑
"Home"	WA-01	Rick White & Jeff Coopersmith	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/16/98-10/25/98; 10/28/98-11/3/98	9/17/98	11/3/98	☐	☑
"Home"	KY-01	Edward Whitfield & Dennis Null	☑	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out."	10/16/98-10/25/98; 10/28/98-11/3/98	5/26/98	11/3/98	☐	☑
"Homes"	GA-08	Jim Wiggins & Saxby Chambliss	☑		"When it comes to protecting families, there is a difference. Call and find out."	10/16/98-10/25/98	7/9/98	11/3/98	☐	☑
"Home"	OH-01	Steve Chabot & Mark Longabaugh	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/16/98-10/25/98	3/18/98	11/3/98	☐	☑
"Home"	CA-22	Andrea Seastrand & Walter Capps	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/16/98-10/25/98; 10/28/98-11/3/98	3/26/98	11/3/98	☐	☑
"Homes"	NC-02	Bob Etheridge & David Funderburk	☑		"When it comes to protecting families, there is a difference. Call and find out."	10/16/98-10/25/98; 10/28/98-11/3/98	5/7/98	11/3/98	☐	☑
"Home"	TX-09	Steve Stockman & Nick Lampson	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/16/98-10/19/98; 10/16/98-10/25/98	3/12/98	11/3/98	☐	☑

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"Home"	WA-09	Randy Tate & Adam Smith	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/16/98-10/25/98; 10/28/98-11/3/98	9/17/98	11/3/98	☐	☑
"Home"	MA-06	Peter Torkildsen & John Tierney	☑	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out."	10/16/98-10/25/98; 10/28/98-11/3/98	9/17/98	11/3/98	☐	☑
"Homes"	OR-05	Darlene Hooley & Jim Bunn	☑		"When it comes to protecting families, there is a difference. Call and find out."	10/16/98-10/25/98; 10/28/98-11/3/98	5/21/98	11/3/98	☐	☑
"Taxes"	OR-05	Jim Bunn & Darlene Hooley	☑		"When it comes to taxes, there is a difference. Call and find out."	10/16/98-10/25/98; 10/28/98-11/3/98	5/21/98	11/3/98	☐	☑
"Home"	MN-01	Gil Gutknecht & Mary Rieder]	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/25/98-11/3/98	9/10/98	11/3/98	☐	☑
"Home"	MN-Sen	Paul Wellstone & Rudy Boschwitz	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/26/98-11/3/98	9/10/98	11/3/98	☐	☑
"Home"	OH-19	Steve LaTourette & Tom Coyne]	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/25/98-11/3/98	3/19/98	11/3/98	☐	☑
"Home"	MN-01	Gil Gutknecht & Mary Rieder	☑	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out."	10/25/98-11/3/98	9/10/98	11/3/98	☐	☑
"Taxes"	WI-01	Mark Neumann & Lydia Spottswood	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/23/98-11/3/98	9/10/98	11/3/98	☐	☑
"Home"	WI-01	Mark Neumann & Lydia Spottswood]	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/23/98-11/3/98	9/10/98	11/3/98	☐	☑

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"Taxes"	FL-15	Dave Weldon & John Byron	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/28/96-11/5/96	9/3/96	11/5/96	☐	☒
"Taxes"	MN-Sen	Paul Wellstone & Rudy Boschwitz	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/25/96-11/5/96	9/10/96	11/5/96	☐	☒
"Taxes"	MN-01	Gil Gutknecht & Mary Rieder	☒	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out."	10/29/96-11/5/96	9/10/96	11/5/96	☐	☒
"Home"	MN-Sen	Paul Wellstone & Rudy Boschwitz	☒	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out."	10/25/96-11/5/96	9/10/96	11/5/96	☐	☒
"Home"	FL-15	Dave Weldon & John Byron	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/25/96-11/5/96	9/3/96	11/5/96	☐	☒
"Taxes"	MI-08	Dick Chrysler & Debbie Stabenow	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/25/96-11/5/96	8/6/96	11/5/96	☐	☒
"Taxes"	MN-Sen	Paul Wellstone & Rudy Boschwitz	☒	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out."	10/25/96-11/5/96	9/10/96	11/5/96	☐	☒
"Taxes"	OH-19	Steve LaTourette & Tom Coyne	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/28/96-11/5/96	3/19/96	11/5/96	☐	☒
"Taxes"	MN-01	Gil Gutknecht & Mary Rieder	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/25/96-11/5/96	9/10/96	11/5/96	☐	☒
"Home"	MI-08	Dick Chrysler & Debbie Stabenow	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/25/96-11/5/96	8/6/96	11/5/96	☐	☒
"Home"	ME-01	James Longley & Tom Allen	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/28/96-11/5/96	6/11/96	11/5/96	☐	☒

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"Taxes"	OH-06	Frank Cremeans & Ted Strickland	☐	Tax Fairness	"When it comes to taxes, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/30/96-11/5/96	3/19/96	11/5/96	☐	☒
"Home"	OH-06	Frank Cremeans & Ted Strickland	☐	Health Care Costs	"When it comes to protecting families, there is a difference. Call and find out." *"Voter Information for Working Families 1-888-235-3463"*	10/30/96-11/5/96	3/19/96	11/5/96	☐	☒
"Values"	SD-AL	John Thune	☐	Education Funding; Tax Fairness	"Call Congressman Thune. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Thune – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	AR-04	Jay Dickey	☐	Education Funding; Tax Fairness	"Call Congressman Dickey. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Dickey – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	MO-09	Kenny Hulshof	☒		"Call Congressman Hulshof. Tell him to protect our kids, not special interests. Let's make the right choice for working families."	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	AL-04	Robert Aderholt	☐	Education Funding; Tax Fairness	"Call Congressman Aderholt. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Aderholt – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	WI-01	Mark Neumann	☐	Education Funding; Tax Fairness	"Call Congressman Neumann. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Neumann – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	WA-03	Linda Smith	☐	Education Funding; Tax Fairness	"Call Congressman Smith. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Smith – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	VA-05	Virgil Goode	☐	Education Funding; Tax Fairness	"Call Congressman Goode. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Goode – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	TN-09	James Maloney	☐	Education Funding; Tax Fairness	"Call Congressman Turner. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Turner – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐

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"Values"	NH-02	Charles Bass	☐	Education Funding; Tax Fairness	"Call Congressman Bass. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Bass – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	NV-01	John Ensign	☐	Education Funding; Tax Fairness	"Call Congressman Ensign. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Ensign – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	NC-07	Mike McIntyre	☐	Education Funding; Tax Fairness	"Call Congressman McIntyre. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman McIntyre – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	MO-09	Kenny Hulshof	☐	Education Funding; Tax Fairness	"Call Congressman Hulshof. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Hulshof – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	LA-07	Chris John	☐	Education Funding; Tax Fairness	"Call Congressman John. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman John – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	KS-04	Todd Tiahrt	☐	Education Funding; Tax Fairness	"Call Congressman Tiahrt. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Tiahrt – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	IN-08	John Hostettler	☐	Education Funding; Tax Fairness	"Call Congressman Hostettler. Tell him to protect our kids, not speci interests. Let's make the right choice for working families." *"Call Congressman Hostettler – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	FL-02	Allen Boyd	☐	Education Funding; Tax Fairness	"Call Congressman Boyd. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Boyd – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	CA-17	Sam Farr	☐	Education Funding; Tax Fairness	"Call Congressman Farr. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Farr – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	CA-01	Frank Riggs	☐	Education Funding; Tax Fairness	"Call Congressman Riggs. Tell him to protect our kids, not special interests. Let's make the right choice for working families." *"Call Congressman Riggs – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐

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"Values"	TX-17	Charles Stenholm	☐	Education Funding; Tax Fairness	"Call Congressman Stenholm. Tell him to protect our kids, not speci interests. Let's make the right choice for working families." *"Call Congressman Stenholm – [local telephone]"*	4/1/97-4/7/97	1998	1998	☐	☐
"Values"	CA-01	Frank Riggs	☒		"Call Congressman Tiahrt. Tell him to protect our kids, not special interests. Let's make the right choice for working families."	4/1/97-4/7/97	1998	1998	☐	☐
"Gut"	FL-Sen	Bob Graham	☒	Comp. Time	"Before Senator Bob Graham votes, he needs to hear from you. Call Senator Graham at [800-number], tell him to vote no on S4, the Ashcroft Comp Time law."	5/10/97-5/14/97	1998	1998	☐	☐
"Gut"	NH-Sen	Judd Gregg	☒	Comp. Time	"Senator Judd Gregg voted in favor of this scheme. Call Gregg at [800-number] This time tell him to do the right thing for Ohio's working families by voting no."	5/10/97-5/14/97	1998	1998	☐	☐
"Gut"	AR-Sen	Tim Hutchinson	☒	Comp. Time	"Senator Tim Hutchinson voted in favor of this scheme. Call Hutchinson at [800-number] This time tell him to do the right thing for Ohio's working families by voting no."	5/10/97-5/14/97	2002	2002	☐	☐
"Gut"	LA-Sen	John Breaux & Mary Landrieu	☒	Comp. Time	"Before Senators John Breaux and Mary Landrieu votes, he needs to hear from you. Call Senators Breaux and Landrieu at [800-number], tell him to vote no on S4, the Ashcroft Comp Time law."	5/10/97-5/14/97	1998, 2002	1998, 2002	☐	☐
"Gut"	VA-Sen	Chuck Robb	☒	Comp. Time	"Before Senator Chuck Robb votes, he needs to hear from you. Call Senator Robb at [800-number], tell him to vote no on S4, the Ashcroft Comp Time law."	5/10/97-5/14/97	2000	2000	☐	☐
"Gut"	OH-Sen	Mike Dewine	☒	Comp. Time	"Senator Mike Dewine voted in favor of this scheme. Call Dewine at [800-number] This time tell him to do the right thing for Ohio's workin families by voting no."	5/10/97-5/14/97	2000	2000	☐	☐
"Everybody"	RI-Sen	John Chafee & Newt Gingrich	☒	Minimum Wage	"Now they're trying to chip away at it. Don't let them do it. Call Congressman Chafee at [800-number] Tell him to protect the minimum wage and stand up for working families. Tell him, one minimum wage for everybody."	8/18/97-8/24/97	2000	2000	☐	☐

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"Everybody"	ME-Sen	Susan Collins & Newt Gingric	☑	Minimum Wage	"Now they're trying to chip away at it. Don't let them do it. Call Congresswoman Collins at [800-number] Tell him to protect the minimum wage and stand up for working families. Tell him, one minimum wage for everybody."	6/18/97-6/24/97	2002	2002	☐	☐
"Everybody"	AZ-06	J. D. Hayworth & Newt Gingrich	☑		"Now they're trying to chip away at it. Don't let them do it. Call Congressman Hayworth at [800-number] Tell him to protect the minimum wage and stand up for working families. Tell him, one minimum wage for everybody."	6/18/97-6/24/97	1998	1998	☐	☐
"Everybody"	FL-22	Clay Shaw & Newt Gingrich	☑	Minimum Wage	"Now they're trying to chip away at it. Don't let them do it. Call Congressman Shaw at [800-number] Tell him to protect the minimu wage and stand up for working families. Tell him, one minimum wag for everybody."	6/18/97-6/24/97	1998	1998	☐	☐
"Everybody"	MO-09	Kenny Hulshof & Newt Gingrich	☑	Minimum Wage	"Now they're trying to chip away at it. Don't let them do it. Call Congressman Hulshof at [800-number] Tell him to protect the minimum wage and stand up for working families. Tell him, one minimum wage for everybody."	6/18/97-6/24/97	1998	1998	☐	☐
"Everybody"	CA-01	Frank Riggs & Newt Gingrich	☑	Minimum Wage	"Now they're trying to chip away at it. Don't let them do it. Call Congressman Riggs at [800-number] Tell him to protect the minimu wage and stand up for working families. Tell him, one minimum wag for everybody."	6/18/97-6/24/97	1998	1998	☐	☐
"Everybody"	PA-Sen	Rick Santorum & Newt Gingrich	☑	Minimum Wage	"Now they're trying to chip away at it. Don't let them do it. Call Congressman Santorum at [800-number] Tell him to protect the minimum wage and stand up for working families. Tell him, one minimum wage for everybody."	6/18/97-6/24/97	2000	2000	☐	☐
"Fairness"	IA-02	Jim Nussle	☐	Minimum Wage	"Call Congressman Nussle. Tell him to fight for fairness. One minimum wage for everybody." *"Call Congressman Nussle – [800-number]"*	6/18/97-6/24/97	1998	1998	☐	☐
"Fairness"	AZ-06	J. D. Hayworth	☐	Minimum Wage	"Call Congressman Hayworth. Tell him to fight for fairness. One minimum wage for everybody." *"Call Congressman Hayworth – [800-number]"*	6/18/97-6/24/97	1998	1998	☐	☐

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"Fairness"	MO-09	Kenny Hulshof	☐	Minimum Wage	"Call Congressman Hulshof. Tell him to fight for fairness. One minimum wage for everybody." *"Call Congressman Hulshof – [800-number]"*	6/18/97-6/24/97	1998	1998	☐	☐
"Fairness"	WI-01	Mark Neumann	☐	Minimum Wage	"Call Congressman Neumann. Tell him to fight for fairness. One minimum wage for everybody." *"Call Congressman Neumann – [800-number]"*	6/18/97-6/24/97	1998	1998	☐	☐
"Fairness"	PA-Sen	Rick Santorum	☐	Minimum Wage	"Call Senator Santorum. Tell him to fight for fairness. One minimum wage for everybody." *"Call Senator Santorum – [800-number]"*	6/18/97-6/24/97	2000	2000	☐	☐
"Fairness"	NV-01	John Ensign	☐	Minimum Wage	"Call Congressman Ensign. Tell him to fight for fairness. One minimum wage for everybody." *"Call Congressman Ensign – [800-number]"*	6/18/97-6/24/97	1998	1998	☐	☐
"Fairness"	WA-03	Linda Smith	☐	Minimum Wage	"Call Congresswoman Smith. Tell him to fight for fairness. One minimum wage for everybody." *"Call Congresswoman Smith – [800-number]"*	6/18/97-6/24/97	1998	1998	☐	☐
"Fairness"	CA-01	Frank Riggs	☐	Minimum Wage	"Call Congressman Riggs. Tell him to fight for fairness. One minimum wage for everybody." *"Call Congressman Riggs – [800-number]"*	6/18/97-6/24/97	1998	1998	☐	☐
"Fairness"	AR-04	Jay Dickey	☐	Minimum Wage	"Call Congressman Dickey. Tell him to fight for fairness. One minimum wage for everybody." *"Call Congressman Dickey – [800-number]"*	6/18/97-6/24/97	1998	1998	☐	☐
"Paycheck"	NV-01	John Ensign, Newt Gingrich, Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Ensign needs to hear from you. Call Congressman Ensign at [800-number] and tell him to vote no on this tax plan. Tell Congressman Ensign to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	MN-07	John Peterson, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Peterson needs to hear from you. Call Congressman Peterson at [800-number] and tell him to vote no o this tax plan. Tell Congressman Peterson to put working families first	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	TX-04	Ron Hall, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Hall needs to hear from you. Call Congressman Hall at [800-number] and tell him to vote no on this tax plan. Tell Congressman Hall to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐

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"Paycheck"	IN-08	John Hostettler, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Hostettler needs to hear from you. Call Congressman Hostettler at [800-number] and tell him to vote no on this tax plan. Tell Congressman Hostettler to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	FL-18	Ileana Ros-Lehtinen, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Roslentine? needs to hear from you Call Congressman Roslentine? at [800-number] and tell him to vote no on this tax plan. Tell Congressman Roslentine? to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	KY-03	Anne Northup, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before she votes, Congresswoman Northup needs to hear from you. Call Congresswoman Northup at [800-number] and tell her to vote no on this tax plan. Tell Congresswoman Northup to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	IL-11	Jerry Weller, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Weller needs to hear from you. Call Congressman Weller at [800-number] and tell him to vote no on this tax plan. Tell Congressman Weller to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	WA-01	Rick White, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman White needs to hear from you. Call Congressman White at [800-number] and tell him to vote no on this t plan. Tell Congressman White to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	AR-04	Jay Dickey, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Dickey needs to hear from you. Call Congressman Dickey at [800-number] and tell him to vote no on this tax plan. Tell Congressman Dickey to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	WI-01	Mark Neumann, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Neumann needs to hear from you. Call Congressman Neumann at [800-number] and tell him to vote no on this tax plan. Tell Congressman Neumann to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	MO-09	Kenny Hulshof, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Hulshof needs to hear from you. Cal Congressman Hulshof at [800-number] and tell him to vote no on this tax plan. Tell Congressman Hulshof to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐

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"Paycheck"	AZ-06	J. D. Hayworth, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Hayworth needs to hear from you. Call Congressman Hayworth at [800-number] and tell him to vote no this tax plan. Tell Congressman Hayworth to put working families fir	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	NY-19 NY-02	Sue Kelly, Rick Lazio, Newt Gingrich, Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Kelly and Lazio needs to hear from you. Call Congressman Kelly and Lazio at [800-number] and tell him vote no on this tax plan. Tell Congressman Kelly and Lazio to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	CT-05 CT-04	Gary Franks, Chris Shays, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Franks and Shays need to hear from you. Call Congressman Franks and Shays at [800-number] and tell him to vote no on this tax plan. Tell Congressman Franks and Shays to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	CA-20	Cal Dooley, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Dooley needs to hear from you. Call Congressman Dooley at [800-number] and tell him to vote no on this tax plan. Tell Congressman Dooley to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	NE-02	Jon Christensen, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Christensen needs to hear from you. Call Congressman Christensen at [800-number] and tell him to vote n on this tax plan. Tell Congressman Christensen to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	OH-18	Bob Ney, Newt Gingrich, Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Ney needs to hear from you. Call Congressman Ney at [800-number] and tell him to vote no on this tax plan. Tell Congressman Ney to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	OH-19	Steve Latourette, Newt Gingrich, Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Latourette needs to hear from you. Call Congressman Latourette at [800-number] and tell him to vote no on this tax plan. Tell Congressman Latourette to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Paycheck"	NV-02	Jim Gibbons, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Gibbons needs to hear from you. C Congressman Gibbons at [800-number] and tell him to vote no on thi tax plan. Tell Congressman Gibbons to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐

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"Paycheck"	WA-03	Linda Smith, Newt Gingrich, Bill Clinton	☑	Tax Fairness	"Before he votes, Congressman Smith needs to hear from you. Call Congressman Smith at [800-number] and tell him to vote no on this t plan. Tell Congressman Smith to put working families first"	6/24/97-6/28/97	1998	1998	☐	☐
"Breaks"	NE-02	Bill Clinton & Jon Christensen	☐	Tax Fairness	"Call Congressman Christensen. Tell him to vote no and put working families first." *"Call Congressman Christensen – [800-number]"*	6/24/97-6/28/97	1998	1998	☐	☐
"Breaks"	NV-02	Bill Clinton & Jim Gibbons	☐	Tax Fairness	"Call Congressman Gibbons. Tell him to vote no and put working families first." *"Call Congressman Gibbons – [800-number]"*	6/24/97-6/28/97	1998	1998	☐	☐
"Breaks"	NV-01	Bill Clinton & John Ensign	☐	Tax Fairness	"Call Congressman Ensign. Tell him to vote no and put working families first. [800-number]" *"Call Congressman Ensign – [800-number]"*	6/24/97-6/28/97	1998	1998	☐	☐
"Breaks"	OH-18	Bill Clinton & Bob Ney	☐	Tax Fairness	"Call Congressman Ney. Tell him to vote no and put working familie first." *"Call Congressman Ney – [800-number]"*	6/24/97-6/28/97	1998	1998	☐	☐
"Breaks"	KY-03	Bill Clinton & Anne Northup	☐	Tax Fairness	"Call Congressman Northup. Tell her to vote no and put working families first." *"Call Congressman Northup – [800-number]"*	6/24/97-6/28/97	1998	1998	☐	☐
"Breaks"	IN-08	Bill Clinton & John Hostettler	☐	Tax Fairness	"Call Congressman Hostettler. Tell him to vote no and put working families first." *"Call Congressman Hostettler – [800-number]"*	6/24/97-6/28/97	1998	1998	☐	☐
"Breaks"	AR-04	Bill Clinton & Jay Dickey	☐	Tax Fairness	"Call Congressman Dickey. Tell him to vote no and put working families first. [800-number]" *"Call Congressman Dickey – [800-number]"*	6/24/97-6/28/97	1998	1998	☐	☐
"Bad Vote"	VA-02	Owen Pickett, Newt Gingrich, Bill Clinton	☑	Tax Fairness	"Call Congressman Pickett at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Pickett, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	MS-05	Gene Taylor, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Call Congressman Taylor at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Taylor, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐

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"Bad Vote"	IN-08	John Hostettler, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Call Congressman Hostettler at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Hostettler, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	KY-03	Anne Northup, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Call Congressman Northup at (local #) and tell her to fix the plan an support tax cuts that will focus on us. Tell Congressman Northup, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	OH-18	Bob Ney, Newt Gingrich, Bill Clinton	☑	Tax Fairness	"Call Congressman Ney at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Ney, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	NV-02	Jim Gibbons, Newt Gingrich, Bill Clinton	☑	Tax Fairness	"Call Congressman Gibbons at (local #) and tell him to fix the plan a support tax cuts that will focus on us. Tell Congressman Gibbons, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	MO-09	Kenny Hulshof, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Call Congressman Hulshof at (local #) and tell him to fix the plan an support tax cuts that will focus on us. Tell Congressman Hulshof, ne time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	NV-01	John Ensign, Newt Gingrich, Bill Clinton	☑	Tax Fairness	"Call Congressman Ensign at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Ensign, nex time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	CA-20	Cal Dooley, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Call Congressman Dooley at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Dooley, nex time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	LA-07	Chris John, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Call Congressman John at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman John, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐

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						Broadcast	Primary	General Election	30 Days of Primary?	60 Days of General Election?
"Bad Vote"	WI-01	Mark Neumann, Newt Gingrich, & Bill Clinton	☒	Tax Fairness	"Call Congressman Neumann at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Neumann, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	CA-18	Gary Condit, Newt Gingrich, & Bill Clinton	☒	Tax Fairness	"Call Congressman Condit at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Condit, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	IL-11 IL-03	Jerry Weller, William Lipinski, Newt Gingrich, & Bill Clinton	☒	Tax Fairness	"Call Congressmen Weller and Lipinski at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressmen Weller and Lipinski, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	CT-05 CT-04	Gary Franks, Chris Shays, Newt Gingrich, & Bill Clinton	☒	Tax Fairness	"Call Congressmen Franks and Shays at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressmen Franks and Shays, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	NY-19 NY-02	Sue Kelly, Rick Lazio, Newt Gingrich, Bill Clinton	☒	Tax Fairness	"Call Congressmen Kelly and Lazio at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressmen Kelly and Lazio, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	OH-19	Steve Latourette, Newt Gingrich, Bill Clinton	☒	Tax Fairness	"Call Congressman Latourette at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Latourette, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	VA-05	Virgil Goode, Bill Clinton, & Newt Gingrich	☐	Tax Fairness	"Call Congressman Goode. Tell him next time, put working families first;" via: "Call Congressman Goode" *"Call Congressman Goode [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	WA-01	Rick White, Newt Gingrich, & Bill Clinton	☒	Tax Fairness	"Call Congressman White at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman White, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	KY-03	Bill Clinton, Newt Gingrich, Anne Northup	☐	Tax Fairness	"Call Congressman Northup. Tell her next time, put working families first" *"Call Congressman Northup [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐

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Title	District	Officeholder/Candidate Named in normal type *Pictured in italic type*	Radio?	Issue(s) Discussed	Call to Action Audio in normal type *Video in italic type*	Dates			Broadcast within...	
						Broadcast	Primary	General Election	30 Days of Primary?	60 Days of General Election?
"Wrong"	AR-04	Bill Clinton, Newt Gingrich, Jay Dickey	☐	Tax Fairness	"Call Congressman Dickey. Tell him next time, put working families first" *"Call Congressman Dickey [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	NV-01	Bill Clinton, Newt Gingrich, John Ensign	☐	Tax Fairness	"Call Congressman Ensign. Tell him next time, put working families first" *"Call Congressman Ensign [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	AR-04	Jay Dickey, Newt Gingrich, & Bill Clinton	☒	Tax Fairness	"Call Congressman Dickey at (local #) and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Dickey, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	TN-05	Bob Clement, Newt Gingrich, Bill Clinton	☒	Tax Fairness	"Call Congressman Clement at (local #) and tell him to fix the plan a support tax cuts that will focus on us. Tell Congressman Clement, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	OH-18	Bill Clinton, Newt Gingrich, Bob Ney	☐	Tax Fairness	"Call Congressman Ney. Tell him next time, put working families first" *"Call Congressman Ney [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	NV-02	Bill Clinton, Newt Gingrich, Jim Gibbons	☐	Tax Fairness	"Call Congressman Gibbons. Tell him next time, put working families first" *"Call Congressman Gibbons [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	IN-08	Bill Clinton, Newt Gingrich, John Hostettler	☐	Tax Fairness	"Call Congressman Hostettler. Tell him next time, put working familie first" *"Call Congressman Hostettler [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	CA-20	Bill Clinton, Newt Gingrich, Cal Dooley	☐	Tax Fairness	"Call Congressman Dooley. Tell him next time, put working families first" *"Call Congressman Dooley [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	MO-09	Bill Clinton, Newt Gingrich, Kenny Hulshof	☐	Tax Fairness	"Call Congressman Hulshof. Tell him next time, put working families first" *"Call Congressman Hulshof [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	WA-03	Bill Clinton, Newt Gingrich, Linda Smith	☐	Tax Fairness	"Call Congressman Smith. Tell him next time, put working families first" *"Call Congressman Smith [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐

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"Wrong"	MS-05	Bill Clinton, Newt Gingrich, Gene Taylor	☐	Tax Fairness	"Call Congressman Taylor. Tell him next time, put working families first" *"Call Congressman Taylor [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	VA-02	Bill Clinton, Newt Gingrich, Owen Pickett	☐	Tax Fairness	"Call Congressman Pickett. Tell him next time, put working families first" *"Call Congressman Pickett [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	LA-07	Bill Clinton, Newt Gingrich, Chris John	☐	Tax Fairness	"Call Congressman John. Tell him next time, put working families fire *"Call Congressman John [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Wrong"	TN-05	Bill Clinton, Newt Gingrich, Bob Clement	☐	Tax Fairness	"Call Congressman Clement. Tell him next time, put working families first" *"Call Congressman Clement [local telephone]"*	7/1/97-7/3/97	1998	1998	☐	☐
"Bad Vote"	VA-05	Virgil Goode, Newt Gingrich, & Bill Clinton	☑	Tax Fairness	"Call Congressman Goode at [local #] and tell him to fix the plan and support tax cuts that will focus on us. Tell Congressman Goode, next time, put working families first"	7/1/97-7/3/97	1998	1998	☐	☐
"Rush"	IL-20	John Shimkus	☐	Fast Track	"Tell Congressman Shimkus to vote no on Fast Track so he can fight for trade deals that work for us." *"Call Congressman Shimkus [800-number]"*	9/16/97-9/22/97; 9/23/97-9/24/97; 10/22/97-10/24/97; 10/28/97-10/30/97	1998	1998	☐	☐
"Rush"	FL-05	Karen Thurman	☐	Fast Track	"Tell Congressman Thurman to vote no on Fast Track so he can fight for trade deals that work for us." *"Call Congressman Thurman [800-number]"*	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐
"Rush"	CT-06	Nancy Johnson	☐	Fast Track	"Tell Congresswoman Johnson to vote no on Fast Track so he can fight for trade deals that work for us." *"Call Congresswoman Johnson [800-number]"*	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐
"Get it Right"	FL-05	Karen Thurman	☑	Fast Track	"Call Congressman Thurman at [800-number] and tell him to stop fas track. Tell Congressman Thurman to fight for trade deals that work f us."	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐

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"Rush"	VA-05	Virgil Goode	☐	Fast Track	"Tell Congressman Goode to vote no on Fast Track so he can fight fo trade deals that work for us." *"Call Congressman Goode [800-number]"*	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐
"Rush"	Generic		☐	Fast Track	"Tell your Congressman to vote no on Fast Track so he can fight for trade deals that work for us." *"Call your Congressman [800-number]"*	9/16/97-9/22/97; 10/28/97-10/30/97	1998	1998	☐	☐
"Rush"	MN-06	Bill Luther	☐	Fast Track	"Tell Congressman Luther to vote no on Fast Track so he can fight fo trade deals that work for us." *"Call Congressman Luther [800-number]"*	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐
"Rush"	OH-14	Thomas Sawyer	☐	Fast Track	"Tell Congressman Sawyer to vote no on Fast Track so he can fight f trade deals that work for us." *"Call Congressman Sawyer [800-number]"*	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐
"Get it Right"	FL-20	Peter Deutsch	☑	Fast Track	"Call Congressman Deutsch at [800-number] and tell him to stop fast track. Tell Congressman Deutsch to fight for trade deals that work fo us."	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐
"Get it Right"	NJ-12	Michael Pappas	☑	Fast Track	"Call Congressman Pappas at [800-number] and tell him to stop fast track. Tell Congressman Pappas to fight for trade deals that work for us."	9/16/97-9/22/97; 9/23/97-9/24/97; 10/22/97-10/24/97; 10/28/97-10/30/97	1998	1998	☐	☐
"Rush"	PA-21	Phil English	☐	Fast Track	"Tell Congressman English to vote no on Fast Track so he can fight for trade deals that work for us." *"Call Congressman English [800-number]"*	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐
"Get it Right"	NY-02	Rick Lazio	☑	Fast Track	"Call Congressman Lazio at [800-number] and tell him to stop fast track. Tell Congressman Lazio to fight for trade deals that work for u	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐
"Get it Right"	NY-18	Nita Lowey	☑	Fast Track	"Call Congresswoman Lowey at [800-number] and tell him to stop fas track. Tell Congresswoman Lowey to fight for trade deals that work f us."	9/16/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐

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Title	District	Named in normal type *Pictured in italic type*	Radio?	Issue(s) Discussed	Audio in normal type *Video in italic type*	Broadcast	Primary	General Election	30 Days of Primary?	60 Days of General Election?
"Get It Right"	PA-13	Jon Fox	☑	Fast Track	"Call Congressman Fox at [800-number] and tell him to stop fast track. Tell Congressman Fox to fight for trade deals that work for us."	9/18/97-9/24/97; 10/22/97-10/24/97; 10/28/97-10/30/97	1998	1998	☐	☐
"Rush"	CO-02	David Skaggs	☐	Fast Track	"Tell Congressman Skaggs to vote no on Fast Track so he can fight for trade deals that work for us." *"Call Congressman Skaggs [800-number]"*	9/18/97-9/22/97; 9/23/97-9/24/97	1998	1998	☐	☐
"Rush"	NY-29	John LaFalce	☐	Fast Track	"Tell Congressman LaFalce to vote no on Fast Track so he can fight for trade deals that work for us." *"Call Congressman LaFalce [800-number]"*	10/7/97-10/9/97	1998	1998	☐	☐
"Rush"	KY-04	Jim Bunning	☐	Fast Track	"Tell Congressman Bunning to vote no on Fast Track so he can fight for trade deals that work for us." *"Call Congressman Bunning [800-number]"*	10/22/97-10/24/97; 10/28/97-10/30/97	1998	1998	☐	☐
"Rush"	IA-03	Leonard Boswell	☐	Fast Track	"Tell Congressman Boswell to vote no on Fast Track so he can fight for trade deals that work for us." *"Call Congressman Boswell [800-number]"*	10/22/97-10/24/97	1998	1998	☐	☐
"Get It Right"	KY-04	Jim Bunning	☑	Fast Track	"Call Congressman Bunning at [800-number] and tell him to stop fast track. Tell Congressman Bunning to fight for trade deals that work fo us."	10/22/97-10/24/97; 10/28/97-10/30/97	1998	1998	☐	☐
"Support"	HI-01	Neil Abercrombie	☐	Patients' Bill of Rights	"Congressman Neil Abercrombie supports the Patient Bill of Rights. Call and thank him and him to make sure Congress passes this law for working families" *"Call Congressman Abercrombie – [800-number]"*	7/15/98-7/21/98; 7/22/98-7/23/98	9/19/98	11/3/98	☐	☐
"Support"	IL-17	Lane Evans	☐	Patients' Bill of Rights	"Congressman Evans supports the Patient Bill of Rights. Call and thank him and him to make sure Congress passes this law for workin families" *"Call Congressman Evans – [800-number]"*	7/15/98-7/21/98; 7/22/98-7/23/98	3/17/98	11/3/98	☐	☐
"Support"	IA-04	Greg Ganske	☐	Patients' Bill of Rights	"Congressman Ganske supports the Patient Bill of Rights. Call and thank him and him to make sure Congress passes this law for workin families" *"Call Congressman Ganske – [800-number]"*	7/15/98-7/21/98; 7/22/98-7/23/98	6/2/98	11/3/98	☐	☐

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"Support"	WI-08	Jay Johnson	☐	Patients' Bill of Rights	"Congressman Johnson supports the Patient Bill of Rights. Call and thank him and him to make sure Congress passes this law for workin families" *"Call Congressman Johnson – [800-number]"*	7/15/98-7/21/98; 7/22/98-7/23/98	9/8/98	11/3/98	☐	☐
"Support"	Maloney CT-05	James Maloney	☐	Patients' Bill of Rights	"Congressman Maloney supports the Patient Bill of Rights. Call and thank him and him to make sure Congress passes this law for workin families" *"Call Congressman Maloney – [800-number]"*	7/15/98-7/21/98; 7/22/98-7/23/98	9/15/98	11/3/98	☐	☐
"Failed"	NM-03	Bill Redmond	☑	Patients' Bill of Rights	"But our Rep., Bill Redmond, has failed to endorse this law, and the insurance industry is spending millions to defeat it. Call Congressma Redmond at [800-number] and tell him to support the Patient Bill of Rights."	7/15/98-7/21/98	6/2/98	11/3/98	☐	☐
"Peas"	NY-01	Michael Forbes	☑	Patients' Bill of Rights	"Fortunately our Rep. Michael Forbes supports the Patient Bill of Rights. Call and thank him at [800-number] and ask him to make our Congress passes this law for working families"	7/15/98-7/21/98; 7/22/98-7/23/98	9/15/98	11/3/98	☐	☐
"Peas"	OH-19	Steven Latourette	☑	Patients' Bill of Rights	"Fortunately our Rep. Steven Latourette supports the Patient Bill of Rights. Call and thank him at [800-number] and ask him to make our Congress passes this law for working families"	7/22/98-7/23/98; 7/15/98-7/21/98	5/5/98	11/3/98	☐	☐
"Failed"	NJ-12	Michael Pappas	☑	Patients' Bill of Rights	"But our Rep., Michael Pappas, has failed to endorse this law, and th insurance industry is spending millions to defeat it. Call Congressma Pappas at [800-number] and tell him to support the Patient Bill of Rights."	7/15/98-7/21/98	6/2/98	11/3/98	☐	☐
"Support"	OH-06	Ted Strickland	☐	Patients' Bill of Rights	"Congressman Strickland supports the Patient Bill of Rights. Call and thank him and him to make sure Congress passes this law for workin families" *"Call Congressman Strickland – [800-number]"*	7/15/98-7/21/98; 7/22/98-7/23/98	5/5/98	11/3/98	☐	☐
"Failed"	WA-01	Rick White	☑	Patients' Bill of Rights	"But our Rep., Rick White, has failed to endorse this law, and the insurance industry is spending millions to defeat it. Call Congressma White at [800-number] and tell him to support the Patient Bill of Right	7/15/98-7/21/98	9/15/98	11/3/98	☐	☐

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"Call"	NV-01	John Ensign	☐	Patients' Bill of Rights	"Call Congressman Ensign. Tell him to stand up for us and support the Patient Bill of Rights Act" "Call Congressman *Ensign – [800-number]*"	7/15/98-7/21/98	9/1/98	11/3/98	☐	☐
"Call"	KY-03	Anne Northup	☐	Patients' Bill of Rights	"Call Congresswoman Northup. Tell her to stand up for us and support the Patient Bill of Rights Act." "Call Congresswoman *Northup – [800-number]*"	7/15/98-7/21/98	5/26/98	11/3/98	☐	☐
"Call"	IN-08	John Hostettler	☐	Patients' Bill of Rights	"Call Congressman Hostettler. Tell him to stand up for us and suppo the Patient Bill of Rights Act" "Call Congressman *Hostettler – [800-number]*"	7/15/98-7/21/98	5/5/98	11/3/98	☐	☐
"Call"	MS-05	Gene Taylor	☐	Patients' Bill of Rights	"Call Congressman Taylor. Tell him to stand up for us and support th Patient Bill of Rights Act" "Call Congressman *Taylor – [800-number]*"	7/15/98-7/21/98	6/2/98	11/3/98	☐	☐
"Call"	CA-20	Cal Dooley	☐	Patients' Bill of Rights	"Call Congressman Dooley. Tell him to stand up for us and support the Patient Bill of Rights Act" "Call Congressman *Dooley – [800-number]*"	7/15/98-7/21/98	6/2/98	11/3/98	☐	☐
"Call"	VA-02	Owen Pickett	☐	Patients' Bill of Rights	"Call Congressman Pickett. Tell him to stand up for us and support the Patient Bill of Rights Act" "Call Congressman *Pickett – [800-number]*"	7/15/98-7/21/98	6/9/98	11/3/98	☐	☐
"Call"	IA-02	Jim Nussle	☐	Patients' Bill of Rights	"Call Congressman Nussle. Tell him to stand up for us and support the Patient Bill of Rights Act" "Call Congressman *Nussle – [800-number]*"	7/15/98-7/21/98	6/2/98	11/3/98	☐	☐
"Call"	TN-08	John Tanner	☐	Patients' Bill of Rights	"Call Congressman Tanner. Tell him to stand up for us and support the Patient Bill of Rights Act." "Call Congressman *Tanner – [800-number]*"	7/15/98-7/21/98	8/6/98	11/3/98	☑	☐
"Call"	ID-01	Helen Chenoweth	☐	Patients' Bill of Rights	"Call Congresswoman Chenoweth. Tell her to stand up for us and support the Patient Bill of Rights Act" "Call Congresswoman *Chenoweth – [800-number]*"	7/15/98-7/21/98	5/26/98	11/3/98	☐	☐
"Call"	MO-Sen	Kit Bond	☐	Patients' Bill of Rights	"Call Senator Bond. Tell him to stand up for us and support the Patient Bill of Rights Act." "Call Senator *Bond – [800-number]*"	7/15/98-7/21/98	8/4/98	11/3/98	☑	☐

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"Call"	IA-Sen	Charles Grassley	☐	Patients' Bill of Rights	"Call Senator Grassley. Tell him to stand up for us and support the Patient Bill of Rights Act." "Call Senator *Grassley – [800-number]*"	7/15/98-7/21/98	6/2/98	11/3/98	☐	☐
"Call"	CT-Sen	Joe Lieberman	☐	Patients' Bill of Rights	"Call Senator Lieberman. Tell him to stand up for us and support the Patient Bill of Rights Act" "Call Senator *Lieberman – [800-number]*"	7/15/98-7/21/98	2000	2000	☐	☐
"Call"	UT-02	Merrill Cook	☐	Patients' Bill of Rights	"Call Congressman Cook. Tell him to stand up for us and support the Patient Bill of Rights Act" "Call Congressman *Cook – [800-number]*"	7/15/98-7/21/98	6/23/98	11/3/98	☐	☐
"Call"	ME-Sen	Olympia Snowe	☐	Patients' Bill of Rights	"Call Senator Snowe. Tell her to stand up for us and support the Patient Bill of Rights Act" "Call Senator *Snowe – [800-number]*"	7/15/98-7/21/98	2000	2000	☐	☐
"Call"	UT-Sen	Bob Bennett	☐	Patients' Bill of Rights	"Call Senator Bennett. Tell him to stand up for us and support the Patient Bill of Rights Act" "Call Senator *Bennett – [800-number]*"	7/15/98-7/21/98	6/23/98	11/3/98	☐	☐
"Call"	OH-01	Steve Chabot	☐	Patients' Bill of Rights	"Call Congressman Chabot. Tell him to stand up for us and support the Patient Bill of Rights Act" "Call Congressman *Chabot – [800-number]*"	7/15/98-7/21/98	[illegible]	11/3/98	☐	☐
"Call"	Generic	"your representative"	☐	Patients' Bill of Rights	"Call and tell your representative to stand up for us and support the Patient Bill of Rights Act" "Call *your representative at [800-number]*"	7/15/98-7/21/98		11/3/98	☐	☐
"Basic"	NV-01	John Ensign	☐	Patients' Bill of Rights	"Call Ensign and demand real HMO reform" "Call *Representative Ensign [800-number]*"	7/22/98-7/23/98	9/1/98	11/3/98	☐	☐
"Basic"	IN-08	John Hostettler	☐	Patients' Bill of Rights	"Call Hostettler and demand real HMO reform" "Call *Representative Hostettler [800-number]*"	7/22/98-7/23/98	5/5/98	11/3/98	☐	☐
"Basic"	KY-03	Anne Northup	☐	Patients' Bill of Rights	"Call Northup and demand real HMO reform" "Call *Representative Northup [800-number]*"	7/22/98-7/23/98	5/26/98	11/3/98	☐	☐
"Basic"	IA-02	Jim Nussle	☐	Patients' Bill of Rights	"Call Nussle and demand real HMO reform" "Call *Representative Nussle [800-number]*"	7/22/98-7/23/98	6/2/98	11/3/98	☐	☐

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"Soon"	UT-Sen	Bob Bennett	☐	Patients' Bill of Rights	"Call Bennett and demand real HMO reform" *"Call Senator Bennett [800-number]"*	7/22/98-7/23/98	6/23/98	11/3/98	☐	☐
"Soon"	IA-Sen	Charles Grassley	☐	Patients' Bill of Rights	"Call Grassley and demand real HMO reform" *"Call Senator Grassley [800-number]"*	7/22/98-7/23/98	6/2/98	11/3/98	☐	☐
"Basic"	ID-01	Helen Chenoweth	☐	Patients' Bill of Rights	"Call Chenoweth and demand real HMO reform" *"Call Representative Chenoweth [800-number]"*	7/22/98-7/23/98	5/26/98	11/3/98	☐	☐
"Basic"	UT-02	Merrill Cook	☐	Patients' Bill of Rights	"Call Cook and demand real HMO reform" *"Call Representative Cook [800-number]"*	7/22/98-7/23/98	6/23/98	11/3/98	☐	☐
"Liable"	NJ-12	Michael Pappas	☑	Patients' Bill of Rights	"But our Rep., Michael Pappas, still has not endorsed it. Call Rep. Pappas at [800-number] and demand real HMO reform."	7/22/98-7/23/98	6/2/98	11/3/98	☐	☐
"Soon"	MO-Sen	Kit Bond	☐	Patients' Bill of Rights	"Call Bond and demand real HMO reform" *"Call Senator Bond [800-number]"*	7/22/98-7/23/98	8/4/98	11/3/98	☑	☐
"Liable"	NM-03	Bill Redmond	☑	Patients' Bill of Rights	"But our Rep., Bill Redmond, still has not endorsed it. Call Rep. Redmond at [800-number] and demand real HMO reform."	7/22/98-7/23/98	6/2/98	11/3/98	☐	☐
"Basic"	OH-01	Steve Chabot	☐	Patients' Bill of Rights	"Call Chabot and demand real HMO reform" *"Call Representative Chabot [800-number]"*	7/22/98-7/23/98	5/5/98	11/3/98	☐	☐
"Liable"	WA-01	Rick White	☑	Patients' Bill of Rights	"But our Rep., Rick White, still has not endorsed it. Call Rep. White a [800-number] and demand real HMO reform."	7/22/98-7/23/98	9/15/98	11/3/98	☐	☐
"Deny"	PA-Sen	Rick Santorum	☐	Patients' Bill of Rights	"Tell Senator Santorum to vote no on S 2330 and demand a real patient protection law." *"Call Senator Santorum – [800-number]"*	9/10/98-9/21/98; 9/22/98-9/23/98	2000	2000	☐	☐
"Deny"	AR-01	Dale Bumpers	☐	Patients' Bill of Rights	"Tell Senator Bumpers to vote no on S 2330 and demand a real patie protection law." *"Call Senator Bumpers – [800-number]"*	9/10/98-9/21/98	N/A	N/A	☐	☐

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"Deny"	MO-Sen	Kit Bond	☐	Patients' Bill of Rights	"Tell Senator Bond to vote no on S 2330 and demand a real patient protection law." *"Call Senator Bond – [800-number]"*	9/22/98-9/23/98; 9/10/98-9/21/98	8/4/98	11/3/98	☐	☑
"Deny"	Generic		☐	Patients' Bill of Rights	"Tell your senator to vote no on S2330 and deman a real patient protection law." *"Call you Senator – [800-number]"*	9/10/98-9/21/98		11/3/98	☐	☑
"Deny"	WA-Sen	Slade Gorton	☐	Patients' Bill of Rights	"Tell Senator Gorton to vote no on S 2330 and demand a real patient protection law." *"Call Senator Gorton – [800-number]"*	9/10/98-9/21/98; 9/22/98-9/23/98	2000	2000	☐	☐
"Deny"	OH-Sen	Mike Dewine	☐	Patients' Bill of Rights	"Tell Senator Dewine to vote no on S 2330 and demand a real patien protection law." *"Call Senator Dewine – [800-number]"*	9/10/98-9/21/98; 9/22/98-9/23/98	2000	2000	☐	☐
"Deny"	ME-Sen	Susan Collins	☐	Patients' Bill of Rights	"Tell Senator Collins to vote no on S 2330 and demand a real patient protection law." *"Call Senator Collins – [800-number]"*	9/10/98-9/21/98; 9/22/98-9/23/98	2002	2002	☐	☐
"Deny"	ME-Sen	Olympia Snowe	☐	Patients' Bill of Rights	"Tell Senator Snowe to vote no on S 2330 and demand a real patient protection law." *"Call Senator Snowe – [800-number]"*	9/10/98-9/21/98; 9/22/98-9/23/98	2000	2000	☐	☐
"Deny"	IN-Sen	Dan Coats	☐	Patients' Bill of Rights	"Tell Senator Coats to vote no on S 2330 and demand a real patient protection law." *"Call Senator Coats – [800-number]"*	9/22/98-9/23/98; 9/10/98-9/21/98	N/A	N/A	☐	☐
"Deny"	KY-Sen	Mitch McConnell	☐	Patients' Bill of Rights	"Tell Senator McConnell to vote no on S 2330 and demand a real patient protection law." *"Call Senator McConnell – [800-number]"*	9/10/98-9/21/98; 9/22/98-9/23/98; 9/10/98-9/21/98	2002	2002	☐	☐
"Deny"	IA-Sen	Charles Grassley	☐	Patients' Bill of Rights	"Tell Senator Grassley to vote no on S 2330 and demand a real patie protection law." *"Call Senator Grassley – [800-number]"*	9/10/98-9/21/98; 9/22/98-9/23/98	6/2/98	11/3/98	☐	☑
"Deny"	NM-Sen	Pete Domenici	☐	Patients' Bill of Rights	"Tell Senator Domenici to vote no on S 2330 and demand a real patient protection law." *"Call Senator Domenici – [800-number]"*	9/22/98-9/23/98; 9/10/98-9/21/98	2002	2002	☐	☐

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"Spearmint"	KY-04	Jim Bunning *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Congressman Bunning and tell him to vote no on this tax scheme. Tell Bunning to put social security first" *"Call Congressman Bunning – [800-number]"*	8/22/98-8/24/98; 8/24/98-8/25/98	5/26/98	11/3/98	☐	☑
"Spearmint"	MS-04	Mike Parker *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Congressman Parker and tell him to vote no on this tax scheme. Tell Parker to put social security first" *"Call Congressman Parker – [800-number]"*	8/22/98-8/24/98; 8/24/98-8/26/98	6/2/98	11/3/98	☐	☑
"Spearmint"	VA-05	Virgil Goode *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Congressman Goode and tell him to vote no on this tax scheme Tell Goode to put social security first" *"Call Congressman Goode – [800-number]"*	8/22/98-8/24/98; 8/24/98-8/26/98	6/9/98	11/3/98	☐	☑
"Spearmint"	WI-02	Scott Klug *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Congressman Klug and tell him to vote no on this tax scheme. Tell Klug to put social security first" *"Call Congressman Klug – [800-number]"*	8/22/98-8/24/98; 8/24/98-8/25/98	9/8/98	11/3/98	☐	☑
"Spearmint"	OH-01	Steve Chabot *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Congressman Chabot and tell him to vote no on this tax scheme Tell Chabot to put social security first" *"Call Congressman Chabot – [800-number]"*	8/22/98-8/24/98; 8/24/98-8/25/98	5/5/98	11/3/98	☐	☑
"Barker"	OH-01	Steve Chabot & Newt Gingric	☑	Fast Track	"Call Rep. Shoot? at (local #) and tell him to vote no on fast track. T him we're still paying attention and fast track is still a bad idea"	9/22/98-9/25/98	5/5/98	11/3/98	☐	☑
"Barker"	MO-7	Roy Blunt & Newt Gingrich	☑	Fast Track	"Call Rep. Blunt at (local #) and tell him to vote no on fast track. Tell him we're still paying attention and fast track is still a bad idea"	9/21/98-9/25/98	8/4/98	11/3/98	☐	☑
"Spear"	AL-04	Robert Aderholt & Newt Gingrich	☑	Social Security; Tax Fairness	"Call Congressman Robert Aderholt at [800-number], and tell Aderhol to vote no on this election-year tax scheme. Call [800-number] and t Aderholt to put social security first"	8/22/98-8/24/98; 8/24/98-8/25/98	6/2/98	11/3/98	☐	☑
"Spear"	ID-02	Mike Crapo & Newt Gingrich	☑	Social Security; Tax Fairness	"Call Congressman Mike Crapo at [800-number], and tell Crapo to vo no on this election-year tax scheme. Call [800-number] and tell Crap to put social security first"	8/22/98-8/24/98; 8/24/98-8/25/98	5/26/98	11/3/98	☐	☑
"Spear"	ID-01	Helen Chenoweth & Newt Gingrich	☑	Social Security; Tax Fairness	"Call Congresswoman Helen Chenoweth at [800-number], and tell Chenoweth to vote no on this election-year tax scheme. Call [800-number] and tell Chenoweth to put social security first"	8/22/98-8/24/98; 8/24/98-8/25/98	5/26/98	11/3/98	☐	☑

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"Deny"	GA-Sen	Paul Coverdell	☑	Patients' Bill of Rights	"Call Sen. Paul Coverdell at [800-number] Tell Sen. Coverdell to vot no on S2330 and demand a real patient protection law."	8/22/98-8/23/98; 9/10/98-9/21/98	7/21/98	11/3/98	☐	☑
"Deny"	AZ-Sen	John Kyl	☑	Patients' Bill of Rights	"Call Sen. John Kyl at [800-number] Tell Sen. Kyl to vote no on S233 and demand a real patient protection law."	9/10/98-9/21/98; 9/22/98-9/23/98	2000	2000	☐	☐
"Deny"	PA-Sen	Rick Santorum	☑	Patients' Bill of Rights	"Call Sen. Rick Santorum at [800-number] Tell Sen. Santorum to vot no on S2330 and demand a real patient protection law."	9/10/98-9/21/98	2000	2000	☐	☐
"Deny"	OH-Sen	Mike Dewine	☑	Patients' Bill of Rights	"Call Sen. Mike Dewine at [800-number] Tell Sen. Dewine to vote no on S2330 and demand a real patient protection law."	9/10/98-9/21/98	2000	2000	☐	☐
"Deny"	RI-Sen	John Chafee	☑	Patients' Bill of Rights	"Call Sen. John Chafee at [800-number] Tell Sen. Chafee to vote no on S2330 and demand a real patient protection law."	9/10/98-9/21/98	2000	2000	☐	☐
"Deny"	NC-Sen	Lauch Faircloth	☐	Patients' Bill of Rights	"Tell Senator Faircloth to vote no on S 2330 and demand a real patie protection law." *"Call Senator Faircloth – [800-number]"*	9/16/98-9/23/98	5/5/98	11/3/98	☐	☑
"Spearmint"	WA-01	Rick White *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Congressman White and tell him to vote no on this tax scheme. Tell White to put social security first" *"Call Congressman White – [800-number]"*	9/22/98-9/24/98; 9/24/98-9/28/98	9/15/98	11/3/98	☐	☑
"Spearmint"	IA-01	Jim Leach *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Congressman Leach and tell him to vote no on this tax scheme. Tell Leach to put social security first" *"Call Congressman Leach – [800-number]"*	8/22/98-8/24/98; 8/24/98-8/25/98	6/2/98	11/3/98	☐	☑
"Spearmint"	IA-02	Jim Nussle *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Congressman Nussle and tell him to vote no on this tax scheme Tell Nussle to put social security first" *"Call Congressman Nussle – [800-number]"*	8/22/98-8/24/98; 8/24/98-8/25/98	6/2/98	11/3/98	☐	☑
"Spearmint"	KY-03	Anne Northup *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Congresswoman Northup and tell her to vote no on this tax schem Tell Northup to put social security first" *"Call Congresswoman Northup – [800-number]"*	8/22/98-8/24/98; 8/24/98-8/25/98	5/26/98	11/3/98	☐	☑

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"Spear"	NV-01	John Ensign & Newt Gingrich	☑	Social Security; Tax Fairness	"Call Congressman John Ensign at [800-number], and tell Ensign to vote no on this election-year tax scheme. Call [800-number] and tell Ensign to put social security first"	9/22/98-9/24/98; 9/24/98-9/25/98	9/1/98	11/3/98	☐	☑
"Spear"	WI-01	Mark Neumann & Newt Gingrich	☑	Social Security; Tax Fairness	"Call Congressman Mark Neumann at [800-number], and tell Neumann to vote no on this election-year tax scheme. Call [800-number] and tell Neumann to put social security first"	9/22/98-9/24/98	9/8/98	11/3/98	☐	☑
"Barker"	LA-07	Chris John & Newt Gingrich	☑	Fast Track	"Call Rep. John at (local #) and tell him to vote no on fast track. Tell him we're still paying attention and fast track is still a bad idea"	9/21/98-9/25/98	10/3/98	11/3/98	☑	☑
"Barker"	WI-02	Scott Klug & Newt Gingrich	☑	Fast Track	"Call Rep. Klug? at (local #) and tell him to vote no on fast track. Te him we're still paying attention and fast track is still a bad idea"	9/22/98-9/25/98	9/8/98	11/3/98	☐	☑
"Barker"	MO-08	Jo Ann Emerson & Newt Gingrich	☑	Fast Track	"Call Rep. Emerson at (local #) and tell him to vote no on fast track. Tell him we're still paying attention and fast track is still a bad idea"	9/21/98-9/25/98	8/4/98	11/3/98	☐	☑
"Barker"	KY-03	Anne Northup & Newt Gingric	☑	Fast Track	"Call Rep. Northup at (local #) and tell her to vote no on fast track. T her we're still paying attention and fast track is still a bad idea"	9/22/98-9/25/98	5/26/98	11/3/98	☐	☑
"Barker"	GA-01	Jack Kingston & Newt Gingrich	☑	Fast Track	"Call Rep. Kingston at (local #) and tell him to vote no on fast track. Tell him we're still paying attention and fast track is still a bad idea"	9/21/98-9/25/98	7/21/98	11/3/98	☐	☑
"Barker"	WA-01	Rick White & Newt Gingrich	☑	Fast Track	"Call Rep. White at (local #) and tell him to vote no on fast track. Tell him we're still paying attention and fast track is still a bad idea"	9/22/98-9/25/98	9/15/98	11/3/98	☐	☑
"Stock"	NV-01	John Ensign & Newt Gingrich	☑	Social Security	"Call Rep. Ensign at [800-number]," "Tell Ensign to vote no when the Gingrich plan comes up again. Tell him this time, put social security first"	10/2/98-10/6/98; 10/7/98-10/9/98	2000	2000	☐	☑
"Save"	WI-02	Scott Klug & Newt Gingrich *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Klug and tell him to vote no when the Gingrich plan comes up again. Tell him this time, put social security first" *"Call Representative Klug – [800-number]"*	10/2/98-10/6/98; 10/7/98-10/9/98	9/8/98	11/3/98	☐	☑

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"Save"	WA-01	Rick White & Newt Gingrich *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call White and tell him to vote no when the Gingrich plan comes up again. Tell him this time, put social security first" *"Call Representative White – [800-number]"*	10/2/98-10/6/98; 10/7/98-10/9/98	9/15/98	11/3/98	☐	☑
"Save"	ID-02	Michael Crapo & Newt Gingrich *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Crapo and tell him to vote no when the Gingrich plan comes up again. Tell him this time, put social security first" *"Call Representative Crapo – [800-number]"*	10/2/98-10/6/98; 10/7/98-10/9/98	5/26/98	11/3/98	☐	☑
"Save"	Generic	Newt Gingrich *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call your Representatives and tell them to vote no when the Gingric plan comes up again. Tel them, this time, put social security first" *"Call your representative – [800-number]"*	10/2/98-10/6/98		11/3/98	☐	☑
"Save"	IA-01	Jim Leach & Newt Gingrich *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Leach and tell him to vote no when the Gingrich plan comes up again. Tell him this time, put social security first" *"Call Representative Leach – [800-number]"*	10/2/98-10/6/98; 10/7/98-10/9/98	6/2/98	11/3/98	☐	☑
"Save"	IA-02	Jim Nussle & Newt Gingrich *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Nussle and tell him to vote no when the Gingrich plan comes up again. Tell him this time, put social security first" *"Call Representative Nussle – [800-number]"*	10/2/98-10/6/98; 10/7/98-10/9/98	6/2/98	11/3/98	☐	☑
"Save"	KY-03	Anne Northup & Newt Gingric *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Northup and tell her to vote no when the Gingrich plan comes u again. Tell her this time, put social security first" *"Call Representative Northup – [800-number]"*	10/2/98-10/6/98	5/26/98	11/3/98	☐	☑
"Save"	MS-04	Mike Parker & Newt Gingrich *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Parker and tell him to vote no when the Gingrich plan comes up again. Tell him this time, put social security first" *"Call Representative Parker – [800-number]"*	10/2/98-10/6/98; 10/7/98-10/9/98	6/2/98	11/3/98	☐	☑
"Save"	OH-01	Steve Chabot & Newt Gingric *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Chabot and tell him to vote no when the Gingrich plan comes u again. Tell him this time, put social security first" *"Call Representative Chabot – [800-number]"*	10/2/98-10/6/98; 10/7/98-10/9/98	5/5/98	11/3/98	☐	☑
"Save"	VA-05	Virgil Goode & Newt Gingrich *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Goode and tell him to vote no when the Gingrich plan comes up again. Tell him this time, put social security first" *"Call Representative Goode – [800-number]"*	10/2/98-10/6/98	6/9/98	11/3/98	☐	☑
"Save"	KY-04	Jim Bunning & Newt Gingrich *Newt Gingrich*	☐	Social Security; Tax Fairness	"Call Bunning and tell him to vote no when the Gingrich plan comes u again. Tell him this time, put social security first" *"Call Representative Bunning – [800-number]"*	10/2/98-10/6/98; 10/7/98-10/9/98	5/26/98	11/3/98	☐	☑

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"Side"	WA-Sen	Slade Gorton	☐	Patients' Bill of Rights	"Call Senator Gorton. Ask him which side he's on" *"Which side is Senator Gorton on? [800-number]"*	7/12/99-7/15/99	2000	2000	☐	☐
"Side"	MN-Sen	Rod Grams	☐	Patients' Bill of Rights	"Call Senator Grams. Ask him which side he's on" *"Which side is Senator Grams on? [800-number]"*	7/12/99-7/15/99	2000	2000	☐	☐
"Charge" Fitzgerald	IL-Sen	Peter Fitzgerald	☑	Patients' Bill of Rights	"Call Senator Fitzgerald at [800-number] and ask him which side he's on"	7/12/99-7/15/99	2004	2004	☐	☐
"Charge" Roth	DE-Sen	Bill Roth	☑	Patients' Bill of Rights	"Call Senator Roth at [800-number] and ask him which side he's on"	7/12/99-7/15/99	9/9/00	11/7/00	☐	☐
"Side"	MO-Sen	John Ashcroft	☐	Patients' Bill of Rights	"Call Senator Ashcroft. Ask him which side he's on" *"Which side is Senator Ashcroft on? [800-number]"*	7/12/99-7/15/99	2000	2000	☐	☐
"Side"	ME-Sen	Olympia Snowe	☐	Patients' Bill of Rights	"Call Senator Snowe. Ask her which side he's on" *"Which side is Senator Snowe on? [800-number]"*	7/12/99-7/15/99	2000	2000	☐	☐
"Side"	PA-Sen	Rick Santorum	☐	Patients' Bill of Rights	"Call Senator Santorum. Ask him which side he's on" *"Which side is Senator Santorum on? [800-number]"*	7/12/99-7/15/99	4/4/00	2000	☐	☐
"Side"	VT-Sen	Jim Jeffords	☐	Patients' Bill of Rights	"Call Senator Jeffords. Ask him which side he's on" *"Which side is Senator Jeffords on? [800-number]"*	7/12/99-7/15/99	2000	2000	☐	☐
"Side"	MI-Sen	Spence Abraham	☐	Patients' Bill of Rights	"Call Senator Abraham. Ask him which side he's on" *"Which side is Senator Abraham on? [800-number]"*	7/12/99-7/15/99	2000	2000	☐	☐
"Side"	ME-Sen	Susan Collins	☐	Patients' Bill of Rights	"Call Senator Collins. Ask her which side she's on" *"Which side is Senator Collins on? [800-number]"*	7/12/99-7/15/99	2002	2002	☐	☐
"Voice"	KS-04	Todd Tiahrt	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Tiahrt. Tell him next time put working families first" *"Call Congressman Tiahrt – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Voice"	KY-01	Edward Whitfield	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Whitfield. Tell him next time put working families first" *"Call Congressman Whitfield – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐

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"Voice"	KY-06	Ernie Fletcher	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Fletcher. Tell him next time put working families first" *"Call Congressman Fletcher – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Voice"	CA-49	Brian Bilbray	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Bilbray. Tell him next time put working families first" *"Call Congressman Bilbray – [800-number]"*	9/15/99-9/21/99	3/7/00	2000	☐	☐
"Voice"	AR-04	Jay Dickey	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Dickey. Tell him next time put working families first" *"Call Congressman Dickey – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Voice"	NM-02	Joe Skeen	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Skeen. Tell him next time put working families first" *"Call Congressman Skeen – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Voice"	PA-10	Don Sherwood	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Sherwood. Tell him next time put working families first" *"Call Congressman Sherwood – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Voice"	WA-05	George Nethercutt	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Nethercutt. Tell him next time put working families first" *"Call Congressman Nethercutt – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Voice"	WI-01	Paul Ryan	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Ryan. Tell him next time put working families first" *"Call Congressman Ryan – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Voice"	MI-Sen	Spence Abraham	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Abraham. Tell him next time put working families first" *"Call Senator Abraham – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐

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"Voice"	MO-Sen	John Ashcroft	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Ashcroft. Tell him next time put working families first" *"Call Senator Ashcroft – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Voice"	PA-Sen	Rick Santorum	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Santorum. Tell him next time put working families first" *"Call Senator Santorum – [800-number]"*	9/15/99-9/21/99	4/4/00	2000	☐	☐
"Voice"	WA-Sen	Slade Gorton	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Gorton. Tell him next time put working families first" *"Call Senator Gorton – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Voice"	LA-06	Richard Baker	☐	Budget Priorities; Medicare Funding; Tax Fairness	"Call Baker. Tell him next time put working families first" *"Call Congressman Baker – [800-number]"*	9/15/99-9/21/99	2000	2000	☐	☐
"Secure"	PA-Sen	Rick Santorum	☑	Medicare Prescription Drug Benefit; Tax Fairness	"Call Senator Santorum at [800-number]. Tell him that securing medicare and helping seniors pay for their prescription drugs is more important another tax cut for the wealthy. Next time, Senator, put working families first"	9/15/99-9/21/99	2000	2000	☐	☐
"Secure"	CA-03	Doug Ose	☑	Medicare Prescription Drug Benefit; Tax Fairness	"Call Congressman Ose at [800-number]. Tell him that securing medicare and helping seniors pay for their prescription drugs is more important another tax cut for the wealthy. Next time, Congressman, put working families first"	9/15/99-9/21/99	2000	2000	☐	☐
"Secure"	CA-49	Brian Bilbray	☑	Medicare Prescription Drug Benefit; Tax Fairness	"Call Congressman Bilbray at [800-number]. Tell him that securing medicare and helping seniors pay for their prescription drugs is more important another tax cut for the wealthy. Next time, Congressman, put working families first"	9/15/99-9/21/99	2000	2000	☐	☐
"Secure"	GA-07	Bob Barr	☑	Medicare Prescription Drug Benefit; Tax Fairness	"Call Congressman Barr at [800-number]. Tell him that securing medicare and helping seniors pay for their prescription drugs is more important another tax cut for the wealthy. Next time, Congressman, put working families first"	9/15/99-9/21/99	2000	2000	☐	☐

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"Decide"	MO-08	Jo Ann Emerson *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	NC-08	Robert Hayes *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	FL-08	Bill McCollum *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Watch"	CA-27	James Rogan *Not available*	☑	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Watch"	CA-27	*Not available*	☑	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Watch"	CA-23	*Not available*	☑	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	AR-04	Jay Dickey *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	LA-01	Bob Livingston *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Watch"	CA-49	*Not available*	☑	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	KY-01	Ed Whitfield *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	WA-05	George Nethercutt *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	TN-03	Zach Wamp *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	LA-06	Richard Baker *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐

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"Decide"	KY-03	Anne Northup *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	WI-08	Thomas Petri *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"Decide"	PA-10	Don Sherwood *Not available*	☐	Patients' Bill of Rights	Not available	10/4/99-10/7/99	2000	2000	☐	☐
"March"			☐		"As the world trade meetings open, join the march for global justice, and raise your voice for those who can't." *"AFL-CIO March for Global Justice."*	11/29/99-12/3/99		2000	☐	☐
"Justice"			☐		"As the world trade meetings open, join the fight for global justice, an raise your voice for those who can't" *"AFL-CIO Fight for Global Justince www. AFLCIO.org/WTO"*	11/29/99-12/3/99		2000	☐	☐
"Justice/CNN"			☐		"As the world trade meetings open, join the fight for global justice, as raise your voice for those who can't" *"AFL-CIO Fight for Global Justince www. AFLCIO.org/WTO"*	11/29/99-12/3/99		2000	☐	☐
"Label"	TX-16	Silvestre Reyes	☐	Permanent Trade Status for China	"Tell Congressman Reyes to vote no and keep China on probation un this label stands for fairness." *"Call Congressman Reyes – [local telephone]"*	2/23/00-2/28/00	3/14/00	11/7/00	☑	☐
"Label"	TX-14	Ron Paul	☐	Permanent Trade Status for China	"Tell Congressman Paul to vote no and keep China on probation until this label stands for fairness." *"Call Congressman Paul – [local telephone]"*	2/23/00-2/28/00	3/14/00	11/7/00	☑	☐
"Label"	MI-07	Nick Smith	☐	Permanent Trade Status for China	"Tell Congressman Smith to vote no and keep China on probation un this label stands for fairness." *"Call Congressman Smith – [local telephone]"*	2/23/00-2/28/00	8/8/00	11/7/00	☐	☐
"Label"	NC-09	Sue Myrick	☐	Permanent Trade Status for China	"Tell Congresswoman Myrick to vote no and keep China on probation until this label stands for fairness." *"Call Congresswoman Myrick – [local telephone]"*	2/23/00-2/28/00	5/2/00	11/7/00	☐	☐
"Label"	MO-7	Roy Blunt	☐	Permanent Trade Status for China	"Tell Congressman Blunt to vote no and keep China on probation until this label stands for fairness." *"Call Congressman Blunt – [local telephone]"*	2/23/00-2/28/00	8/8/00	11/7/00	☐	☐

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"Label"	MI-Sen	Spence Abraham	☐	Permanent Trade Status for China	"Tell Senator Abraham to vote no and keep China on probation until this label stands for fairness." *"Call Senator Abraham – [local telephone]"*	2/23/00-2/28/00	8/8/00	11/7/00	☐	☐
"Label"	WI-03	Ron Kind	☐	Permanent Trade Status for China	"Tell Congressman Kind to vote no and keep China on probation until this label stands for fairness." *"Call Congressman Kind – [local telephone]"*	2/23/00-2/28/00	9/12/00	11/7/00	☐	☐
"Label"	FL-15	Dave Weldon	☐	Permanent Trade Status for China	"Tell Congressman Weldon to vote no and keep China on probation until this label stands for fairness." *"Call Congressman Weldon – [local telephone]"*	2/23/00-2/28/00	9/5/00	11/7/00	☐	☐
"Label"	MO-Sen	John Ashcroft	☐	Permanent Trade Status for China	"Tell Senator Ashcroft to vote no and keep China on probation until th label stands for fairness." *"Call Senator Ashcroft – [local telephone]"*	2/23/00-2/28/00	8/8/00	11/7/00	☐	☐
"Label"	MA-Sen	John Kerry	☐	Permanent Trade Status for China	"Tell Senator Kerry to vote no and keep China on probation until this label stands for fairness." *"Call Senator Kerry – [local telephone]"*	2/23/00-2/28/00	2002	2002	☐	☐
"Label"	PA-11	Paul Kanjorski	☐	Permanent Trade Status for China	"Tell Congressman Kanjorski to vote no and keep China on probation until this label stands for fairness." *"Call Congressman Kanjorski – [local telephone]"*	2/23/00-2/28/00	4/4/00	11/7/00	☐	☐
"Label"	CO-01	Diana DeGette	☐	Permanent Trade Status for China	"Tell Congresswoman DeGette to vote no and keep China on probati until this label stands for fairness." *"Call Congresswoman DeGette – [local telephone]"*	2/23/00-2/28/00	8/8/00	11/7/00	☐	☐
"Label"	KY-01	Edward Whitfield	☐	Permanent Trade Status for China	"Tell Congressman Whitfield to vote no and keep China on probation until this label stands for fairness." *"Call Congressman Whitfield – [local telephone]"*	2/23/00-2/28/00	5/23/00	11/7/00	☐	☐
"Label"	FL-02	Allen Boyd	☐	Permanent Trade Status for China	"Tell Congressman Boyd to vote no and keep China on probation until this label stands for fairness." *"Call Congressman Boyd – [local telephone]"*	2/23/00-2/28/00	9/5/00	11/7/00	☐	☐
"Trust"	Generic		☐	Permanent Trade Status for China	"Tell your member of Congress to keep China on probation until Chin earns our trust" *"Call your member of Congress – [800-number]"*	4/4/00-4/13/00		11/7/00	☐	☐

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"Endure"	Generic		☐	Permanent Trade Status for China	"Tell your member of Congress to keep China on probation until Chin earns our trust." *"Call you member of Congress – [800-number]"*	4/4/00-4/13/00		11/7/00	☐	☐
"Endure"	MN-01	Gil Gutknecht	☐	Permanent Trade Status for China	"Tell Congressman Gutknecht to keep China on probation until China earns our trust." *"Call Congressman Gutknecht – [800-number]"*	4/25/00-4/30/00	9/12/00	11/7/00	☐	☐
"Trust"	NM-02	Joe Skeen	☐	Permanent Trade Status for China	"Tell Congressman Skeen to keep China on probation until China earns our trust" *"Call Congressman Skeen – [800-number]"*	4/24/00-4/30/00	6/6/00	11/7/00	☐	☐
"Trust"	TX-14	Ron Paul	☐	Permanent Trade Status for China	"Tell Congressman Paul to keep China on probation until China earn our trust" *"Call Congressman Paul – [800-number]"*	4/24/00-4/30/00	3/14/00	11/7/00	☐	☐
"Endure"	TX-14	Ron Paul	☐	Permanent Trade Status for China	"Tell Congressman Paul to keep China on probation until China earn our trust." *"Call Congressman Paul – [800-number]"*	4/24/00-4/30/00	3/14/00	11/7/00	☐	☐
"Trust"	MN-07	John Peterson	☐	Permanent Trade Status for China	"Tell Congressman Peterson to keep China on probation until China earns our trust" *"Call Congressman Peterson – [800-number]"*	4/24/00-4/30/00	4/4/00	11/7/00	☐	☐
"Endure"	MN-07	John Peterson	☐	Permanent Trade Status for China	"Tell Congressman Peterson to keep China on probation until China earns our trust." *"Call Congressman Peterson – [800-number]"*	4/24/00-4/30/00	4/4/00	11/7/00	☐	☐
"Trust"	NY-09	Anthony Weiner	☐	Permanent Trade Status for China	"Tell Congressman Weiner to keep China on probation until China earns our trust" *"Call Congressman Weiner – [800-number]"*	4/24/00-4/30/00	9/12/00	11/7/00	☐	☐
"Endure"	NY-09	Anthony Weiner	☐	Permanent Trade Status for China	"Tell Congressman Weiner to keep China on probation until China earns our trust." *"Call Congressman Weiner – [800-number]"*	4/24/00-4/30/00	9/12/00	11/7/00	☐	☐
"Trust"	IN-05	Steve Buyer	☐	Permanent Trade Status for China	"Tell Congressman Buyer to keep China on probation until China ear our trust" *"Call Congressman Buyer – [800-number]"*	4/25/00-4/30/00	5/2/00	11/7/00	☑	☐

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"Endure"	MA-05	Martin Meehan	☐	Permanent Trade Status for China	"Tell Congressman Meehan to keep China on probation until China earns our trust." *"Call Congressman Meehan – [800-number]"*	4/24/00-4/30/00	9/19/00	11/7/00	☐	☐
"Endure"	VA-Sen	George Allen	☐	Permanent Trade Status for China	"Tell Congressman Allen to keep China on probation until China earn our trust." *"Call Congressman Allen – [800-number]"*	4/25/00-4/30/00	6/13/00	11/7/00	☐	☐
"Endure"	KY-01	Edward Whitfield	☐	Permanent Trade Status for China	"Tell Congressman Whitfield to keep China on probation until China earns our trust." *"Call Congressman Whitfield – [800-number]"*	4/24/00-4/30/00	5/23/00	11/7/00	☑	☐
"Endure"	NM-02	Joe Skeen	☐	Permanent Trade Status for China	"Tell Congressman Skeen to keep China on probation until China earns our trust." *"Call Congressman Skeen – [800-number]"*	4/24/00-4/30/00	6/6/00	11/7/00	☐	☐
"Endure"	IN-05	Steve Buyer	☐	Permanent Trade Status for China	"Tell Congressman Buyer to keep China on probation until China ear our trust." *"Call Congressman Buyer – [800-number]"*	4/25/00-4/30/00	5/2/00	11/7/00	☑	☐
"Trust"	FL-05	Karen Thurman	☐	Permanent Trade Status for China	"Tell Congressman Thurman to keep China on probation until China earns our trust" *"Call Congressman Thurman – [800-number]"*	4/24/00-4/30/00	9/5/00	11/7/00	☐	☐
"Endure"	FL-05	Karen Thurman	☐	Permanent Trade Status for China	"Tell Congresswoman Thurman to keep China on probation until Chin earns our trust." *"Call Congresswoman Thurman – [800-number]"*	4/24/00-4/30/00	9/5/00	11/7/00	☐	☐
"Trust"	VA-Sen	George Allen	☐	Permanent Trade Status for China	"Tell Congressman Allen to keep China on probation until China earn our trust" *"Call Congressman Allen – [800-number]"*	4/25/00-4/30/00	6/13/00	11/7/00	☐	☐
"Endure"	MA-07	Ed Markey	☐	Permanent Trade Status for China	"Tell Congressman Markey to keep China on probation until China earns our trust." *"Call Congressman Markey – [800-number]"*	4/24/00-4/30/00	9/19/00	11/7/00	☐	☐
"Trust"	MA-07	Ed Markey	☐	Permanent Trade Status for China	"Tell Congressman Markey to keep China on probation until China earns our trust" *"Call Congressman Markey – [800-number]"*	4/24/00-4/30/00	9/19/00	11/7/00	☐	☐

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"Endure"	NY-29	John LaFalce	☐	Permanent Trade Status for China	"Tell Congressman LaFalce to keep China on probation until China earns our trust." *"Call Congressman LaFalce – [800-number]"*	4/25/00-4/30/00	9/12/00	11/7/00	☐	☐
"Trust"	KY-01	Edward Whitfield	☐	Permanent Trade Status for China	"Tell Congressman Whitfield to keep China on probation until China earns our trust" *"Call Congressman Whitfield – [800-number]"*	4/24/00-4/30/00	5/23/00	11/7/00	☑	☐
"Trust"	NY-29	John LaFalce	☐	Permanent Trade Status for China	"Tell Congressman LaFalce to keep China on probation until China earns our trust" *"Call Congressman LaFalce – [800-number]"*	4/25/00-4/30/00	9/12/00	11/7/00	☐	☐
"Trust"	MN-01	Gil Gutknecht	☐	Permanent Trade Status for China	"Tell Congressman Gutknecht to keep China on probation until China earns our trust" *"Call Congressman Gutknecht – [800-number]"*	4/25/00-4/30/00	9/12/00	11/7/00	☐	☐
"Endure"	NC-01	Eva Clayton	☐	Permanent Trade Status for China	"Tell Congresswoman Clayton to keep China on probation until China earns our trust." *"Call Congresswoman Clayton – [800-number]"*	4/25/00-4/30/00	5/2/00	11/7/00	☑	☐
"Trust"	NC-01	Eva Clayton	☐	Permanent Trade Status for China	"Tell Congresswoman Clayton to keep China on probation until China earns our trust" *"Call Congresswoman Clayton – [800-number]"*	4/25/00-4/30/00	5/2/00	11/7/00	☑	☐
"Endure"	CA-20	Cal Dooley	☐	Permanent Trade Status for China	"Tell Congressman Dooley to keep China on probation until China earns our trust." *"Call Congressman Dooley – [800-number]"*	4/25/00-4/30/00	3/7/00	11/7/00	☐	☐
"Trust"	WI-04	Gerald Kleczka	☐	Permanent Trade Status for China	"Tell Congressman Kleczka to keep China on probation until China earns our trust" *"Call Congressman Kleczka – [800-number]"*	4/25/00-4/30/00	9/12/00	11/7/00	☐	☐
"Endure"	WI-04	Gerald Kleczka	☐	Permanent Trade Status for China	"Tell Congressman Kleczka to keep China on probation until China earns our trust." *"Call Congressman Kleczka – [800-number]"*	4/25/00-4/30/00	9/12/00	11/7/00	☐	☐
"Trust"	MA-05	Martin Meehan	☐	Permanent Trade Status for China	"Tell Congressman Meehan to keep China on probation until China earns our trust" *"Call Congressman Meehan – [800-number]"*	4/24/00-4/30/00	9/19/00	11/7/00	☐	☐

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"Trust"	OH-16	Ralph Regula	☐	Permanent Trade Status for China	"Tell Congressman Regula to keep China on probation until China earns our trust" *"Call Congressman Regula – [800-number]"*	5/11/00-5/17/00	3/7/00	11/7/00	☐	☐
"Endure"	OH-16	Ralph Regula	☐	Permanent Trade Status for China	"Tell Congressman Regula to keep China on probation until China earns our trust." *"Call Congressman Regula – [800-number]"*	5/11/00-5/17/00	3/7/00	11/7/00	☐	☐
"Stand"	OH-18	Bob Ney	☑	Permanent Trade Status for China	"Call Congressman Ney, and thank him for standing up for Ohio's working families. He knows "made in China" should mean fairness to China's workers, and ours"	5/11/00-5/17/00	3/7/00	11/7/00	☐	☐
"Stand"	MI-08	Debbie Stabenow	☑	Permanent Trade Status for China	"Call Rep. Stabenow and thank her. Tell her to keep fighting for Michigan's working families."	8/2/00-8/8/00	8/8/00	11/7/00	☐	☐
"Sky"	NC-08	Robert Hayes	☐	Medicare Prescription Drug Benefit	"Call and make sure Hayes is putting working families ahead of special interests" *"Call Congressman Hayes – [local #]"*	8/1/00-8/7/00	5/2/00	11/7/00	☐	☐
"Sky"	AR-04	Jay Dickey	☐	Medicare Prescription Drug Benefit	"Call and make sure Dickey is putting working families ahead of special interests" *"Call Congressman Dickey – [local #]"*	8/1/00-8/7/00	5/23/00	11/7/00	☐	☐
"Sky"	CA-27	James Rogan	☐	Medicare Prescription Drug Benefit	"Call and make sure Rogan is putting working families ahead of special interests" *"Call Congressman Rogan – [local #]"*	7/18/00-7/24/00; 8/2/00-8/8/00	3/7/00	11/7/00	☐	☐
"Sky"	CA-38	Steven Kuykendall	☐	Medicare Prescription Drug Benefit	"Call Kuykendall, tell him to quit putting special interests ahead of working families" *"Call Congressman Kuykendall – [local #]"*	7/18/00-7/24/00; 8/2/00-8/8/00	3/7/00	11/7/00	☐	☐
"Sky"	NH-02	Charles Bass	☐	Medicare Prescription Drug Benefit	"Call and make sure Bass is putting working families ahead of special interests" *"Call Congressman Bass – [local telephone]"*	7/18/00-7/24/00; 8/2/00-8/8/00	9/12/00	11/7/00	☐	☐
"Sky"	KY-03	Anne Northup	☐	Medicare Prescription Drug Benefit	"Call and make sure Northup is putting working families ahead of special interests" *"Call Congresswoman Northup [local #]"*	8/1/00-8/7/00	5/23/00	11/7/00	☐	☐

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"Sky"	KY-06	Ernie Fletcher	☐	Medicare Prescription Drug Benefit	"Call and make sure Fletcher is putting working families ahead of special interests" "Call Congressman *Fletcher – [local telephone]*"	7/19/00-7/24/00; 8/2/00-8/6/00	5/23/00	11/7/00	☐
"Sky"	CA-49	Brian Bilbray	☐	Medicare Prescription Drug Benefit	"Call and make sure Bilbray is putting working families ahead of special interests" "Call Congressman *Bilbray – [local #]*"	8/10/00-8/16/00; 8/3/00-8/6/00	3/7/00	11/7/00	☐
"Sky"	FL-22	Clay Shaw	☐	Medicare Prescription Drug Benefit	"Call and make sure Shaw is putting working families ahead of special interests" "Call Congressman *Shaw – [local telephone]*"	8/1/00-8/7/00	9/5/00	11/7/00	☒
"Sky"	NM-01	Heather Wilson	☐	Medicare Prescription Drug Benefit	"Call and make sure Wilson is putting working families ahead of special interests" "Call Congresswoman *Wilson - [local #]*"	8/10/00-8/16/00; 8/3/00-8/6/00	6/6/00	11/7/00	☐
"Sky"	PA-10	Don Sherwood	☐	Medicare Prescription Drug Benefit	"Call and make sure Sherwood is putting working families ahead of special interests" "Call Congressman *Sherwood – [local telephone]*"	7/19/00-7/24/00; 8/2/00-8/6/00	4/4/00	11/7/00	☐
"Sky"	WA-05	George Nethercutt	☐	Medicare Prescription Drug Benefit	"Call and make sure Nethercutt is putting working families ahead of special interests" "Call Congressman *Nethercutt – [local #]*"	8/10/00-8/16/00; 8/3/00-8/6/00	9/19/00	11/7/00	☐
"Protect"	NH-02	Charles Bass	☐	Medicare Prescription Drug Benefit	"Tell Bass: quit putting special interests ahead of working families" "Call Congressman *Bass – [local telephone]*"	7/28/00-8/1/00; 8/2/00-8/6/00	9/12/00	11/7/00	☐
"Protect"	PA-10	Don Sherwood	☐	Medicare Prescription Drug Benefit	"Tell Sherwood: quit putting special interests ahead of working families" "Call Congressman *Sherwood – [local telephone]*"	7/28/00-8/1/00; 8/2/00-8/6/00	4/4/00	11/7/00	☐
"Protect"	CA-36	Steven Kuykendall	☐	Medicare Prescription Drug Benefit	"Tell Kuykendall: quit putting special interests ahead of working families" "Call Congressman *Kuykendall – [local telephone]*"	7/28/00-8/1/00; 8/2/00-8/6/00	3/7/00	11/7/00	☐
"Protect"	KY-06	Ernie Fletcher	☐	Medicare Prescription Drug Benefit	"Tell Fletcher: quit putting special interests ahead of working families" "Call Congressman *Fletcher – [local telephone]*"	7/28/00-8/1/00; 8/2/00-8/6/00	5/23/00	11/7/00	☐

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"Protect"	FL-22	Clay Shaw	☐	Medicare Prescription Drug Benefit	"Tell Shaw: quit putting special interests ahead of working families" "Call Congressman *Shaw – [local telephone]*"	7/28/00-7/31/00; 8/8/00-8/14/00; 8/2/00-8/6/00	9/5/00	11/7/00	☒
"Protect"	NM-01	Heather Wilson	☐	Medicare Prescription Drug Benefit	"Tell Wilson: quit putting special interests ahead of working families" "Call Congresswoman *Wilson – [local telephone]*"	8/10/00-8/16/00; 8/3/00-8/6/00; 7/27/00-8/2/00	6/6/00	11/7/00	☐
"Protect"	AR-04	Jay Dickey	☐	Medicare Prescription Drug Benefit	"Tell Dickey: quit putting special interests ahead of working families" "Call Congressman *Dickey – [local telephone]*"	7/25/00-7/31/00; 8/1/00-8/7/00; 8/8/00-8/14/00	5/23/00	11/7/00	☐
"Protect"	WA-05	George Nethercutt	☐	Medicare Prescription Drug Benefit	"Tell Nethercutt: quit putting special interests ahead of working families" "Call Congressman *Nethercutt – [local telephone]*"	8/10/00-8/16/00; 8/3/00-8/6/00; 7/27/00-8/2/00	9/19/00	11/7/00	☐
"Protect"	KY-03	Anne Northup	☐	Medicare Prescription Drug Benefit	"Tell Northup: quit putting special interests ahead of working families" "Call Congresswoman *Northup – [local telephone]*"	7/25/00-7/31/00; 8/8/00-8/14/00; 8/2/00-8/6/00	5/23/00	11/7/00	☐
"Protect"	NC-08	Robert Hayes	☐	Medicare Prescription Drug Benefit	"Tell Hayes: quit putting special interests ahead of working families" "Call Congressman *Hayes – [local telephone]*"	7/25/00-7/31/00; 8/8/00-8/14/00; 8/3/00-8/6/00	5/2/00	11/7/00	☐
"Protect"	CA-49	Brian Bilbray	☐	Medicare Prescription Drug Benefit	"Tell Bilbray: quit putting special interests ahead of working families" "Call Congressman *Bilbray – [local telephone]*"	8/10/00-8/16/00; 8/3/00-8/6/00; 7/27/00-8/2/00	3/7/00	11/7/00	☐
"Protect"	CA-27	James Rogan	☐	Medicare Prescription Drug Benefit	"Tell Rogan: quit putting special interests ahead of working families" "Call Congressman *Rogan – [local telephone]*"	8/2/00-8/6/00	3/7/00	11/7/00	☐
"Protect"	MI-Sen	Spence Abraham	☐	Medicare Prescription Drug Benefit	"Tell Abraham: quit putting special interests ahead of working familie "Call Congressman *Abraham – [local telephone]*"	8/7/00-8/13/00; 8/14/00-8/20/00	8/8/00	11/7/00	☒
"Protect"	MN-Sen	Rod Grams	☐	Medicare Prescription Drug Benefit	"Tell Grams: quit putting special interests ahead of working families" "Call Senator *Grams – [local telephone]*"	8/7/00-8/13/00; 8/14/00-8/20/00	9/12/00	11/7/00	☒

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"Help"	NH-02	Charles Bass	☐	Patients' Bill of Rights	"Call Bass and tell him he's on the wrong side." *"Call Congressman Bass – [local telephone]"*	8/29/00-9/8/00; 8/18/00-8/24/00	9/12/00	11/7/00	☒	☐
"Help"	CA-27	James Rogan	☐	Patients' Bill of Rights	"Call Rogan and tell him he's on the wrong side." *"Call Congressman Rogan – [local telephone]"*	8/18/00-8/24/00; 8/29/00-9/8/00	3/7/00	11/7/00	☐	☐
"Help"	KY-06	Ernie Fletcher	☐	Patients' Bill of Rights	"Call Fletcher and tell him he's on the wrong side." *"Call Congressman Fletcher – [local telephone]"*	8/18/00-8/24/00; 10/9/00-10/18/00; 8/29/00-9/8/00	5/23/00	11/7/00	☐	☒
"Help"	IN-08	John Hostettler	☐	Patients' Bill of Rights	"Call Hostettler and tell him he's on the wrong side." *"Call Congressman Hostettler – [local telephone]"*	9/25/00-10/1/00; 8/29/00-9/8/00; 8/18/00-8/24/00	5/2/00	11/7/00	☐	☒
"Help"	CA-38	Steve Kuykendall	☐	Patients' Bill of Rights	"Call Steve Kuykendall and tell him he's on the wrong side." *"Call Congressman Kuykendall"*	8/18/00-8/24/00; 8/29/00-9/8/00	3/7/00	11/7/00	☐	☐
"Help"	WA-05	George Nethercutt	☐	Patients' Bill of Rights	"Call Nethercutt and tell him he's on the wrong side." *"Call Congressman Nethercutt – [local telephone]"*	8/29/00-9/8/00; 9/7/00-9/15/00	9/19/00	11/7/00	☒	☒
"Help"	NC-08	Robert Hayes	☐	Patients' Bill of Rights	"Call Hayes and tell him he's on the wrong side." *"Call Congressman Hayes – [local telephone]"*	9/7/00-9/15/00; 8/29/00-9/8/00	5/2/00	11/7/00	☐	☒
"Help"	KY-03	Anne Northup	☐	Patients' Bill of Rights	"Call Northup and tell her she's on the wrong side." *"Call Congresswoman Northup – [local telephone]"*	10/9/00-10/18/00; 8/29/00-9/8/00; 9/7/00-9/15/00	5/23/00	11/7/00	☐	☒
"Help"	AR-04	Jay Dickey	☐	Patients' Bill of Rights	"Call Dickey and tell him he's on the wrong side." *"Call Congressman Dickey – [local telephone]"*	10/9/00-10/18/00; 9/7/00-9/15/00; 8/29/00-9/8/00	5/23/00	11/7/00	☒	☒
"Help"	FL-22	Clay Shaw	☐	Patients' Bill of Rights	"Call Shaw and tell him he's on the wrong side." *"Call Congressman Shaw"*	10/9/00-10/18/00	9/5/00	11/7/00	☐	☒

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"Help"	PA-10	Don Sherwood	☐	Patients' Bill of Rights	"Call Sherwood and tell him he's on the wrong side." *"Call Congressman Sherwood"*	10/9/00-10/18/00	4/4/00	11/7/00	☐	☒
"Teacher"		George W. Bush *George W. Bush*	☐	Social Security; Tax Fairness	*"Tell Bush: hands off social security" (no phone number)*	9/12/00-9/24/00		11/7/00	☐	☒
"Job"	PA-15	Pat Toomey	☐	Health & Safety (Ergonomics)	"Tell Toomey his politics causes pain." *"Call Congressman Toomey – [local telephone]"*	9/13/00-9/25/00	4/4/00	11/7/00	☐	☒
"Job"	NH-02	Charles Bass	☐	Health & Safety (Ergonomics)	"Tell Bass his politics causes pain." *"Call Congressman Bass – [local telephone]"*	9/13/00-9/25/00	9/12/00	11/7/00	☐	☒
"Job"	CA-36	Steven Kuykendall	☐	Health & Safety (Ergonomics)	"Tell Kuykendall his politics causes pain." *"Call Congressman Kuykendall – [local telephone]"*	9/13/00-9/25/00	3/7/00	11/7/00	☐	☒
"Job"	NM-01	Heather Wilson	☐	Health & Safety (Ergonomics)	"Tell Wilson her politics causes pain." *"Call Congresswoman Wilson – [local telephone]"*	9/25/00-10/1/00	6/6/00	11/7/00	☐	☒
"Job"	FL-22	Clay Shaw	☐	Health & Safety (Ergonomics)	"Tell Shaw his politics causes pain." *"Call Congressman Shaw – [local telephone]"*	9/13/00-9/25/00	9/5/00	11/7/00	☐	☒
"Job"	AR-04	Jay Dickey	☐	Health & Safety (Ergonomics)	"Tell Dickey his politics causes pain." *"Call Congressman Dickey – [local telephone]"*	9/14/00-9/25/00	5/23/00	11/7/00	☐	☒
"Job"	KY-06	Ernie Fletcher	☐	Health & Safety (Ergonomics)	"Tell Fletcher his politics causes pain." *"Call Congressman Fletcher – [local telephone]"*	9/13/00-9/26/00	5/23/00	11/7/00	☐	☒
"Job"	KY-03	Anne Northup	☐	Health & Safety (Ergonomics)	"Tell Northup her politics causes pain." *"Call Congresswoman Northup – [local telephone]"*	9/14/00-9/26/00	5/23/00	11/7/00	☐	☒

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						Broadcast	Primary	General Election	30 Days of Primary?	60 Days of General Election?
"Job"	KY-01	Edward Whitfield	☐	Health & Safety (Ergonomics)	"Tell Whitfield his politics causes pain." *"Call Congressman Whitfield – [local telephone]"*	9/13/00-9/25/00	5/23/00	11/7/00	☐	☒
"Job"	WA-05	George Nethercutt	☐	Health & Safety (Ergonomics)	"Tell Nethercutt his politics causes pain." *"Call Congressman Nethercutt – [local telephone]"*	9/18/00-9/25/00	9/19/00	11/7/00	☒	☒
"Job"	CA-49	Brian Bilbray	☐	Health & Safety (Ergonomics)	"Tell Bilbray his politics causes pain." *"Call Congressman Bilbray – [local telephone]"*	9/13/00-9/25/00	3/7/00	11/7/00	☐	☒
"Job"	PA-10	Don Sherwood	☐	Health & Safety (Ergonomics)	"Tell Sherwood his politics causes pain." *"Call Congressman Sherwood – [local telephone]"*	9/13/00-9/25/00	4/4/00	11/7/00	☐	☒
"Job"	NC-08	Robert Hayes	☐	Health & Safety (Ergonomics)	"Tell Hayes his politics causes pain." *"Call Congressman Hayes – [local telephone]"*	9/18/00-9/25/00	5/2/00	11/7/00	☐	☒
"Job"	CA-27	James Rogan	☐	Health & Safety (Ergonomics)	"Tell Rogan his politics causes pain." *"Call Congressman Rogan – [local telephone]"*	9/13/00-9/30/00	3/7/00	11/7/00	☐	☒
"Help"	PA-15	Pat Toomey	☐	Patients' Bill of Right	"Call Toomey and tell him he's on the wrong side." *"Call Congressman Toomey – [local telephone]"*	9/6/00-9/11/00	4/4/00	11/7/00	☐	☒
"Who" Detroit-REV	MI-Sen	Spence Abraham *Spence Abraham*	☐	Minimum Wage; Overtime Protections; Health & Safety	"Tell Abraham when he votes against our wages, our safety, he's not working for Michigan's working families" *"Call Senator Abraham [local #]"*	10/16/00-10/22/00	8/8/00	11/7/00	☐	☒
"Who" Lansing-REV	MI-Sen	Spence Abraham *Spence Abraham*	☐	Minimum Wage; Overtime Protections; Health & Safety	"Tell Abraham when he votes against our wages, our safety, he's not working for Michigan's working families" *"Call Senator Abraham [local #]"*	10/16/00-10/22/00	8/8/00	11/7/00	☐	☒
"Who" Grand Rapids-REV	MI-Sen	Spence Abraham *Spence Abraham*	☐	Minimum Wage; Overtime Protections; Health & Safety	"Tell Abraham when he votes against our wages, our safety, he's not working for Michigan's working families" *"Call Senator Abraham [local #]"*	10/16/00-10/22/00	8/8/00	11/7/00	☐	☒

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						Broadcast	Primary	General Election	30 Days of Primary?	60 Days of General Election?
"Who" Traverse City-REV	MI-Sen	Spence Abraham *Spence Abraham*	☐	Minimum Wage; Overtime Protections; Health & Safety	"Tell Abraham when he votes against our wages, our safety, he's not working for Michigan's working families" *"Call Senator Abraham [local #]"*	10/16/00-10/22/00	8/8/00	11/7/00	☐	☒
"Sure"		George W. Bush *George W. Bush*	☐	Social Security		10/28/00-11/7/00; 10/31/00-11/7/00		11/7/00	☐	☒
"Debate"		George W. Bush	☒	Patients' Bill of Rights	(none)	10/29/00-11/7/00		11/7/00	☐	☒
"Work"	DE-Sen	Bill Roth	☒	Patients' Bill of Rights	"Call Sen. Roth. Tell him to stop covering for the insurance industry. Ask him why he's working against working families."	11/1/00-11/7/00	9/9/00	11/7/00	☐	☒
"Track"	CT-02	Robert Simmons & "the President"	☐	Fast Track	"Tell Congressman Simmons to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Simmons – [local telephone]"*	7/26/01-7/28/01	2002	2002	☐	☐
"Track"	PA-07	Curt Weldon & "the President"	☐	Fast Track	"Tell Congressman Weldon to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Weldon – [local telephone]"*	7/26/01-7/28/01	2002	2002	☐	☐
"Track"	AL-05	Bud Cramer & "the President"	☐	Fast Track	"Tell Congressman Cramer to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Cramer – [local telephone]"*	7/26/01-7/28/01	2002	2002	☐	☐
"Track"	AR-02	Victor Snyder & "the President"	☐	Fast Track	"Tell Congressman Snyder to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Snyder – [local telephone]"*	7/26/01-7/28/01	2002	2002	☐	☐
"Track"	PA-10	Don Sherwood & "the President"	☐	Fast Track	"Tell Congressman Sherwood to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Sherwood [local telephone]"*	7/26/01-7/28/01	2002	2002	☐	☐
"Track"	NJ-03	Jim Saxton & "the President"	☐	Fast Track	"Tell Congressman Saxton to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Saxton – [local telephone]"*	7/26/01-7/28/01	2002	2002	☐	☐

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"Track"	AL-03	Bob Riley & "the President"	☐	Fast Track	"Tell Congressman Riley to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Riley – [local telephone]"*	7/25/01-7/29/01	2002	2002	☐	☐
"Track"	WV-02	Capito & "the President"	☐	Fast Track	"Tell Congressman Capito to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Capito – [local telephone]"*	7/25/01-7/29/01	2002	2002	☐	☐
"Track"	AL-04	Robert Aderholt & "the President"	☐	Fast Track	"Tell Congressman Aderholt to vote no on fast track so he can fight f trade deals that work for us." *"Call Congressman Aderholt – [local telephone]"*	7/25/01-7/29/01	2002	2002	☐	☐
"Track"	OH-16	Ralph Regula & "the President"	☐	Fast Track	"Tell Congressman Regula to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Regula – [local telephone]"*	7/26/01-7/29/01	2002	2002	☐	☐
"Track"	KS-03	Dennis Moore & "the President"	☐	Fast Track	"Tell Congressman Moore to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Moore – [local telephone]"*	7/25/01-7/29/01	2002	2002	☐	☐
"Track"	CA-20	Cal Dooley & "the President"	☐	Fast Track	"Tell Congressman Dooley to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Dooley – [local telephone]"*	7/26/01-7/29/01	2002	2002	☐	☐
"Track"	CA-16	Zoe Lofgren & "the President"	☐	Fast Track	"Tell Congresswoman Lofgren to vote no on fast track so she can fig for trade deals that work for us." *"Call Congresswoman Ofgren – [local telephone]"*	7/26/01-7/29/01	2002	2002	☐	☐
"Track"	IN-09	Hill & "the President"	☐	Fast Track	"Tell Congressman Hill to vote no on fast track so he can fight for trad deals that work for us." *"Call Congressman Hill – [local telephone]"*	7/26/01-7/29/01	2002	2002	☐	☐
"Track"	NJ-07	Mike Ferguson & "the President"	☐	Fast Track	"Tell Congressman Ferguson to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Ferguson – [local telephone]"*	7/25/01-7/29/01	2002	2002	☐	☐
"Track"	CA-14	Anna Eshoo & "the President"	☐	Fast Track	"Tell Congresswoman Eshoo to vote no on fast track so she can fight for trade deals that work for us." *"Call Congresswoman Eshoo – [local telephone]"*	7/26/01-7/29/01	2002	2002	☐	☐

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"Track"	KY-04	Lucas & "the President"	☐	Fast Track	"Tell Congressman Lucas to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Lucas – [local telephone]"*	7/25/01-7/29/01	2002	2002	☐	☐
"Track"	TX-02	Jim Turner & "the President"	☐	Fast Track	"Tell Congressman Turner to vote no on fast track so he can fight for trade deals that work for us." *"Call Congressman Turner – [local telephone]"*	7/25/01-7/29/01	2002	2002	☐	☐
"Track"	CA-49	Susan Davis & "the President"	☐	Fast Track	"Tell Congresswoman Davis to vote no on fast track so she can fight for trade deals that work for us." *"Call Congresswoman Davis – [local telephone]"*	7/26/01-7/29/01	2002	2002	☐	☐
"Now"	PA-10	Don Sherwood	☐	Fast Track	"Tell Congressman Sherwood to vote no on fast track;" man-on-stree "Tell them to sit down and take another look at this." *"Call Congressman Sherwood – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	OH-16	Ralph Regula	☐	Fast Track	"Tell Congressman Regula to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Regula – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	NC-04	David Price	☐	Fast Track	"Tell Congressman Price to vote no on fast track;" man-on-street "Tel them to sit down and take another look at this." *"Call Congressman Price – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	IN-02	Mike Pence	☐	Fast Track	"Tell Congressman Pence to vote no on fast track;" man-on-street "T them to sit down and take another look at this." *"Call Congressman Pence – [local telephone]"*	10/21/01-10/25/01	2002	2002	☐	☐
"Now"	GA-10	Charlie Norwood	☐	Fast Track	"Tell Congressman Norwood to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Norwood – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	KS-03	Dennis Moore	☐	Fast Track	"Tell Congressman Moore to vote no on fast track;" man-on-street "T them to sit down and take another look at this." *"Call Congressman Moore – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	KY-04	Kenneth Lucas	☐	Fast Track	"Tell Congressman Lucas to vote no on fast track;" man-on-street "Te them to sit down and take another look at this." *"Call Congressman Lucas – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐

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"Now"	CA-16	Zoe Lofgren	☐	Fast Track	"Tell Congresswoman Lofgren to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congresswoman Lofgren – [local telephone]"*	10/21/01-10/25/01	2002	2002	☐	☐
"Now"	TX-15	Ruben Hinojosa	☐	Fast Track	"Tell Congressman Hinojosa to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Hinojosa – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	TX-25	Ken Bentsen	☐	Fast Track	"Tell Congressman Bentsen to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Bentsen – [local telephone]"*	11/4/01-11/7/01	2002	2002	☐	☐
"Now"	IN-09	Baron Hill	☐	Fast Track	"Tell Congressman Hill to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Hill – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	PA-04	Melissa Hart	☐	Fast Track	"Tell Congresswoman Hart to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congresswoman Hart – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	CA-36	Jane Harman	☐	Fast Track	"Tell Congresswoman Harman to vote no on fast track;" man-on-stre "Tell them to sit down and take another look at this." *"Call Congresswoman Harman – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	NC-02	David Funderburk & Bob Etheridge	☐	Fast Track	"Tell Congressman Etheridge to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Etheridge – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	CA-14	Anna Eshoo	☐	Fast Track	"Tell Congresswoman Eshoo to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congresswoman Eshoo – [local telephone]"*	10/21/01-10/25/01	2002	2002	☐	☐
"Now"	CA-49	Susan Davis	☐	Fast Track	"Tell Congresswoman Davis to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congresswoman Davis – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	CT-01	John Larson	☐	Fast Track	"Tell Congressman Larson to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Larson – [local telephone]"*	10/21/01-10/25/01	2002	2002	☐	☐

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"Now"	AR-02	Victor Snyder	☐	Fast Track	"Tell Congressman Snyder to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Snyder – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	UT-02	Jim Matheson	☐	Fast Track	"Tell Congressman Matheson to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Matheson – [local telephone]"*	11/4/01-11/7/01	2002	2002	☐	☐
"Now"	FL-11	Jim Davis	☐	Fast Track	"Tell Congressman Davis to vote no on fast track;" man-on-street "Te them to sit down and take another look at this." *"Call Congressman Davis"*	11/4/01-11/7/01	2002	2002	☐	☐
"Now"	OR-03	Earl Blumenauer	☐	Fast Track	"Tell Congressman Blumenauer to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Blumenauer – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	WV-02	Shelley Capito	☐	Fast Track	"Tell Congressman Capito to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Capito – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	CT-02	Robert Simmons	☐	Fast Track	"Tell Congressman Simmons to vote no on fast track;" man-on-street "Tell them to sit down and take another look at this." *"Call Congressman Simmons – [local telephone]"*	10/21/01-10/25/01; 11/4/01-11/7/01	2002	2002	☐	☐
"Now"	WA-09	Adam Smith	☐	Fast Track	"Tell Congressman Smith to vote no on fast track;" man-on-street "Te them to sit down and take another look at this." *"Call Congressman Smith – [local telephone]"*	10/21/01-10/25/01	2002	2002	☐	☐
"Afford"	ME-Sen	Susan Collins	☐	Tax Fairness	"Now it's up to Senator Collins. Tell her we can't lift our economy if w leave working families behind." *"Call Senator Collins – [800-number]"*	11/8/01-11/18/01	2002	2002	☐	☐
"Afford"	OR-Sen	Gordon Smith	☐	Tax Fairness	"Now it's up to Senator Smith. Tell him we can't lift our economy if w leave working families behind." *"Call Senator Smith – [800-number]"*	11/7/01-11/18/01	2002	2002	☐	☐
"Afford"	KS-Sen	Sam Brownback	☐	Tax Fairness	"Now it's up to Senator Brownback. Tell him we can't lift our econom if we leave working families behind." *"Call Senator Brownback – [800-number]"*	11/7/01-11/18/01	2004	2004	☐	☐

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"Afford"	ME-Sen	Olympia Snowe	☐	Tax Fairness	"Now it's up to Senator Snowe. Tell her we can't lift our economy if w leave working families behind." *"Call Senator Snowe – [800-number]"*	11/5/01-11/16/01	2006	2006	☐	☐
"Afford"	Generic		☐		Not available	11/7/01-11/13/01		2002	☐	☐
"Afford"	LA-Sen	John Breaux	☐	Tax Fairness	"Now it's up to Senator Breaux to change that plan. We can't lift our economy if we leave working families behind." *"Call Senator Breaux – [800-number]"*	11/9/01-11/16/01	2004	2004	☐	☐
"Afford"	RI-Sen	Lincoln Chafee	☐	Tax Fairness	"Now it's up to Senator Chafee to change that plan. We can't lift our economy if we leave working families behind." *"Call Senator Chafee – [800-number]"*	11/9/01-11/16/01	2006	2006	☐	☐
"Afford"	OH-Sen	Mike Dewine	☐	Tax Fairness	"Now it's up to Senator Dewine to change that plan. We can't lift our economy if we leave working families behind." *"Call Senator Dewine – [800-number]"*	11/9/01-11/16/01	2006	2006	☐	☐
"Afford"	OH-Sen	George Voinovich	☐	Tax Fairness	"Now it's up to Senator Voinovich to change that plan. We can't lift o economy if we leave working families behind." *"Call Senator Voinovich – [800-number]"*	11/9/01-11/16/01	2004	2004	☐	☐
"Afford"	IL-Sen	Peter Fitzgerald	☐	Tax Fairness	"Now it's up to Senator Fitzgerald to change that plan. We can't lift o economy if we leave working families behind." *"Call Senator Fitzgerald – [800-number]"*	11/9/01-11/16/01	2004	2004	☐	☐
"Afford"	PA-Sen	Rick Santorum	☐	Tax Fairness	"Now it's up to Senator Santorum to change that plan. We can't lift o economy if we leave working families behind." *"Call Senator Santorum – [800-number]"*	11/9/01-11/16/01	2006	2006	☐	☐
"Afford"	NV-Sen	John Ensign	☐	Tax Fairness	"Now it's up to Senator Ensign to change that plan. We can't lift our economy if we leave working families behind." *"Call Senator Ensign – [800-number]"*	11/14/01-11/16/01	2006	2006	☐	☐
"Call"	ME-Sen	Susan Collins	☐	Tax Fairness	"Call Senator Collins—tell her she's on the wrong side." *"Call Senator Collins – [local telephone]"*	11/23/01-11/28/01	2002	2002	☐	☐
"Call"	OR-Sen	Gordon Smith	☐	Tax Fairness	"Call Senator Smith—tell him he's on the wrong side." *"Call Senator Smith – [local telephone]"*	11/23/01-11/28/01	2002	2002	☐	☐

Index of Advertising Run Under Coalition Names With Other Groups, 1998-2001

Counsel Only

Title	District	Officeholder/Candidate Named in normal type *Pictured in italic type*	Radio?	Issue(s) Discussed	Call to Action Audio in normal type *Video in italic type*	Dates: Broadcast	Dates: Primary	Dates: General Election	Broadcast within... 30 Days of Primary?	Broadcast within... 60 Days of General Election?
"Stand Up"			☑	Get Out The Vote		10/27/98-11/3/98		11/3/98	☐	☑
"My Name is Lisa Wilson"			☑	Get Out The Vote		10/27/98-11/3/98		11/3/98	☐	☑
"News Anchor" West Coast-Spanish		Newt Gingrich	☑	Get Out The Vote		10/27/98-11/3/98		11/3/98	☐	☑
"News Anchor"		Newt Gingrich	☑	Get Out The Vote		10/27/98-11/3/98		11/3/98	☐	☑
"Seniors"			☑	Get Out The Vote		10/27/98-11/3/98		11/3/98	☐	☑
"Block"	MI-Sen	Spence Abraham	☑	Patients' Bill of Rights	"Call Senator Abraham. Tell him to stop covering for the insurance industry and pass a real patient protection law. Tell him we're waiting	6/29/00-7/9/00; 6/2/00-6/6/00	8/8/00	11/7/00	☐	☐
"Block"	MO-Sen	John Ashcroft	☑	Patients' Bill of Rights	"Call Senator Ashcroft. Tell him to stop covering for the insurance industry and pass a real patient protection law. Tell him we're waiting	6/29/00-7/9/00	8/8/00	11/7/00	☐	☐
"Block"	WA-Sen	Slade Gorton	☑	Patients' Bill of Rights	"Call Senator Gorton. Tell him to stop covering for the insurance industry and pass a real patient protection law. Tell him we're waiting	6/29/00-7/9/00	9/19/00	11/7/00	☐	☐
"Block"	MN-Sen	Rod Grams	☑	Patients' Bill of Rights	"Call Senator Grams. Tell him to stop covering for the insurance industry and pass a real patient protection law. Tell him we're waiting	6/29/00-7/9/00	9/12/00	11/7/00	☐	☐
"Block"	PA-Sen	Rick Santorum	☑	Patients' Bill of Rights	"Call Senator Santorum. Tell him to stop covering for the insurance industry and pass a real patient protection law. Tell him we're waiting	6/29/00-7/9/00	4/4/00	11/7/00	☐	☐
"Block"	DE-Sen	Bill Roth	☑	Patients' Bill of Rights	"Call Senator Roth. Tell him to stop covering for the insurance industry and pass a real patient protection law. Tell him we're waiting	6/29/00-7/9/00	9/9/00	11/7/00	☐	☐

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"Block"	MO-Sen	Kit Bond	☑	Patients' Bill of Rights	"Call Senator Bond. Tell him to stop covering for the insurance industry and pass a real patient protection law. Tell him we're waiting	6/28/00-7/9/00	2004	2004	☐	☐
"Bank"	NE-Sen	Ben Nelson & Bush	☑	Tax Fairness	"So call Senator Nelson at (local #) and tell him to fight for a tax cut, but one that makes sense, a tax cut for working families, that won't break the bank."	4/11/01-4/13/01; 4/16/01-4/18/01	2006	2006	☐	☐
"Bank"	AR-Sen	Blanche Lincoln & Bush	☑	Tax Fairness	"So call Senator Lincoln at (local #) and tell him to fight for a tax cut, but one that makes sense, a tax cut for working families, that won't break the bank."	4/11/01-4/13/01; 4/16/01-4/18/01	2004	2004	☐	☐
"Bank"	SD-Sen	Tim Johnson & George W. Bush	☑	Tax Fairness	"So call Senator Johnson at (local #) and tell him to fight for a tax cut, but one that makes sense, a tax cut for working families, that won't break the bank."	4/11/01-4/13/01; 4/16/01-4/18/01	2002	2002	☐	☐
"Bank"	DE-Sen	Tom Carper & George W. Bush	☑	Tax Fairness	"So call Senator Carper at (local #) and tell him to fight for a tax cut, but one that makes sense, a tax cut for working families, that won't break the bank."	4/11/01-4/13/01; 4/16/01-4/18/01	2006	2006	☐	☐
"Bank"	RI-Sen	Lincoln Chafee & Bush	☑	Tax Fairness	"So call Senator Chafee at (local #) and tell him to fight for a tax cut, but one that makes sense, a tax cut for working families, that won't break the bank."	4/11/01-4/13/01; 4/16/01-4/18/01	2006	2006	☐	☐
"Bank"	GA-Sen	Max Cleland & Bush	☑	Tax Fairness	"So call Senator Cleland at (local #) and tell him to fight for a tax cut, but one that makes sense, a tax cut for working families, that won't break the bank."	4/11/01-4/13/01; 4/16/01-4/18/01	2002	2002	☐	☐
"Bank"	LA-Sen	Mary Landrieu & President Bush	☑	Tax Fairness	"So call Senator Landrieu at (local #) and tell him to fight for a tax cu but one that makes sense, a tax cut for working families, that won't break the bank."	4/11/01-4/13/01; 4/16/01-4/18/01	2002	2002	☐	☐
"Bank"	MT-Sen	Max Baucus & Bush	☑	Tax Fairness	"So call Senator Baucus at (local #) and tell him to fight for a tax cut, but one that makes sense, a tax cut for working families, that won't break the bank."	4/11/01-4/13/01; 4/16/01-4/18/01	2002	2002	☐	☐

[caption omitted]

DECLARATION OF JESSICA MITCHELL

I, Jessica Mitchell, hereby declare under penalty of perjury of the State of Florida:

1. I am a citizen of the United States and a resident of the State of Florida.

2. I am twelve years old, and was born on February 21, 1990.

3. Although I am not an adult, I understand that it is important to speak truthfully about the facts that I know, and admit honestly when I do not know something; I understand that not telling the truth in this statement would be a wrongful thing, and that I have the duty under the law to tell the truth.

4. Although I am not an adult, I understand the difference between facts and fantasy, and that my duty in making this statement is to testify to facts, and to avoid making up things that I cannot remember or do not know.

[end of page 1]

5. I am a Christian.

6. I am a home-schooled child, and I always have been.

7. Being home-schooled has also helped me to learn responsibility for myself and my schedule:

a. For example, I am accustomed to waking up by about 6:30 a.m.

b. After I wake I, I do all my chores in the morning.

c. Once my chores are finished, a friend and I will get some early morning exercise by riding bikes and such, usually while my mom is taking a walk.

d. By 7:30, we are back home and have breakfast.

e. And our school day starts, usually, no later than 8:15 a.m.

8. In addition to my studies at home about civics, government and history, I have had three great opportunities to learn about legislation and politics, by attending training programs sponsored by Teen Pact.

a. Teen Pact teaches kids about state legislation and political activities.

b. We listen to speakers, study materials, and have activities that allow us to look close up at legislative and political activities on the state level.

c. I have attended Teen Pact programs in Maine and Alabama, and I attended and graduated from the Teen Pact program held here in Florida this year.

d. During that program, I participated as a member of our "Rules Committee," we set up four committees similar to ones used in the legislature.

e. Also, we interviewed lobbyists at the legislature, and we heard from some

[end of page 2]

legislators, and had the opportunity to ask them questions.

f. Also, we visited with Governor Bush in the Capitol.

g. Participating in the Teen Pact programs has given me an understanding of how state legislatures work, including the process in the legislature and the outside activities of lobbyists and others who influence legislation.

h. I have become interested in government, politics and legislation, and the training at Teen Pact has increased my interest in these subjects, as well as my understanding.

9. As a family, we have also been involved in politics.

a. I worked with my mom and my sister in the mail room of the local headquarters for the 2000 Bush Presidential Campaign.

b. I also attended rallies for the campaign.

c. And I helped to assemble signs that the campaign distributed.

d. And I also walked a precinct with my family and distributed materials about the Bush campaign to encourage people to vote.

e. I also got to meet the President while he was still a candidate, because he was jogging in our neighborhood, so we got to meet him and I got a picture with him and got his autograph.

f. I also participated in some campaign activities when Bill McCollum ran, unsuccessfully, to become our United States Senator.

g. My sister worked on his campaign, and my best recollection is that we walked a precinct as part of an effort to encourage people to get out and vote, and to support his

[end of page 3]

campaign.

h. We are also volunteering to work for Governor Bush's re-election here.

i. We are going to be walking our neighborhood door-to-door handing out literature supporting him in October.

j. And, I think, we will also be distributing materials supporting Tom Feeney's campaign for the United States Congress.

k. In fact, I made a contribution to his campaign just recently, in the amount of Five Dollars.

l. That was from the money I earned in my own business.

10. The candidates that I have supported by volunteering, by the recent campaign donation, and by other activities, are ones that I have chosen after careful thought and research.

11. Because of my Christian faith, I will only support a candidate that is pro-life.

12. Also, I think that our government has gotten

too big, and that too many people have gotten used to relying on it, so I can only support candidates that agree with me about reducing the size of government.

13. And, I think of myself as a Republican because that is the political party that has taken a stand against abortion and for the rights of children before birth.

14. When I am thinking about a candidate to support, I do research to learn their views.

a. Sometimes another member of my family has materials about the candidate, a lot of the time my dad does.

[end of page 4]

b. Also, I use the Internet to visit the websites of candidates and study the information and materials available on the website.

15. I have learned that because of the new law on campaign reform that I will not be allowed to give the money I have earned to a candidate that I have chosen to support who is seeking federal elective office.

16. I have also learned that I will not be allowed to give the money I have earned to committees of the political parties I support or associate with.

17. Because of my interest in government, legislation, and politics, and because of my Christian faith, I plan and intend to continue seeking out candidates for federal elective office who represent my views and beliefs on important questions like the right to life of children before birth, and on the size of our government.

18. When I find such candidates, I plan and intend to make donations to them, just as I did recently with my donation to the campaign of Tom Feeney for United States Congress.

19. Working for the election of a candidate and giving financial support to the election of a candidate are two ways that I am able to demonstrate my association with those

candidates who share my beliefs and opinions.

20. While working on campaigns is an important activity, I also think that it is appropriate to give financial support to candidates.

21. So the new restrictions on my rights really do affect my rights and limit my ability to show that I share in the views and opinions of the candidates I choose.

22. A friend, Tali West, and I have a pet sitting business that we started together and

[end of page 5]

that we continue to run to this day.

a. It's called, "Doggone Perfect Pet Sitting."

b. We came up with the idea after reading an article in a magazine, the article listed several ideas for businesses that could be home-based.

c. We developed a price list for our services.

d. Also we prepared an advertisement that appears in our neighborhood newsletter, and that we have posted on the neighborhood bulletin boards.

e. We also put up flyers about our services.

f. As far as for our services, we walk the pets, feed them, clean up after them, and do the things that the pet's owner would do if they were at home.

g. Holly and I share the work, taking turns with the various jobs that we have, and we share the proceeds that we receive according to the work we do.

h. As part of our business plan, we take five percent of our proceeds and set them aside for business development, to make new flyers and to make t-shirts with our logo on them.

i. Two summers ago, I was able to put Two Hundred Dollars into my savings account as a result of our business, as well as pay for some things around the house that my puppy had torn up when he was little.

j. This year I added in about Fifty Dollars more.

23. I have saved, given or spent the money that I earn because of my own decisions, after talking with my parents about the choices I make.

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a. For example, I give a tithe out of my earnings because it is a scriptural principle and because my mom and dad have taught me to do so.

b. And, I have talked with them about things I was thinking of buying; sometimes they have asked me to give them some more thought, but I cannot recall a time they have ever told me that I could not spend my money as I chose.

[subscription and signature omitted]

[caption omitted]

DECLARATION OF PAMELA MITCHELL

I, Pamela Mitchell, hereby declare under penalty of perjury of the State of Florida:

1. I am a citizen of the United States and a resident of the State of Florida.

2. I am above the age of 18, and I am competent to testify to the truth of the matters asserted in this Declaration.

3. I am married to Charles Mitchell.

4. We are the parents of three children.

5. Our youngest child is a daughter, Jessica Mitchell.

6. Jessica is twelve years old.

7. She was born on February 21, 1990, in Florida.

[end of page 1]

8. As a family we have chosen to provide for Jessica's education at home, rather than by sending her out to a local public or other school.

9. In addition, along with her older sister, we have arranged for her to receive education and training related to citizen participation in the government process by having her attend and participate in Teen Pact.

10. Teen Pact is a nonprofit organization that provides instruction on the legislative and political process; it accomplishes its educational purposes by hosting young people in their state capitals for a four day period of intensive training and activities. As a result of her participation in Teen Pact's activities, she understands parliamentary procedure and she has learned about how people are elected to office. Of course, we all still have a lot to learn, but together we are in the process of understanding how the system works.

11. In addition to Teen Pact, our home schooling program has provided Jessica with information about the government and its operation.

12. As a family, we consider citizen involvement in government, legislative processes and politics to be an important duty.

13. During the 2000 presidential campaign, we were involved in George Bush's campaign very heavily. We went to many of his rallies. We took absentee ballots around and collected those. We worked in the Orange County mail-room and sent out mailers. We walked precincts.

14. We are also helping now with Governor Bush's re-election campaign coming up in the next couple weeks.

15. Our involvement in both of these campaigns, past and present, is a family thing.

[end of page 2]

16. In other words, we did many of the campaign activities together, as a family, except, of course, during the Presidential campaign, our son was at college at that time so he could not participate with us directly. But Jessica did, as did her older sister, Julia. We all went down and did the stamping. Jessica walked one of the precincts with us, too. And she attended the rallies with us.

17. Jessica has expressed an interest in politics, even at her young age, and has willingly participated as a volunteer and supporter in the campaign activities I mentioned above.

18. I am aware that legal limits on the amount of money that I can give to a candidate for federal office have been enacted by Congress.

19. I am also aware that federal law prohibits me from giving money to a candidate for federal office in the name of another, even in the name of one of my children, whether Jessica, who is a minor, or James and Julia, who are adults.

20. I have never used my daughter's name, or any other person's, in making a political donation, in order to avoid limits that the law places on my ability to support candidates of whom I approve.

21. Jessica has an entrepreneurial inclination, and has acted on that inclination, even at this young age by investigating, selecting, beginning and operating her own business.

22. Jessica's pet-sitting business has produced an income for her, and she has funds from that business that she has placed in a savings account, and some funds that she keeps on hand to use for various things.

23. Jessica controls the money she has earned; she chooses whether and how to spend her money. Admittedly, she always consults with her dad and me, and on occasion we have

[end of page 3]

asked her to give further thought to an intended purchase, but we have never prohibited her from spending her money as she chose to do.

24. Jessica is a responsible child. She began her pet-sitting business so that she could afford the expenses related to having and raising a dog. She has used monies she earned in the pet-sitting business to care for her dog, and, she has also used some of those funds to repair or replace personal property here at the house that her dog damaged while it was a puppy.

[subscription and signature omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 02-582 (CKK, KLH, RJL)
Consolidated Actions

SENATOR MITCH McCONNELL, et at.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants.

Direct Testimony of Edward L. Monroe Fact Witness For Plaintiff Associated Builders And Contractors And For Plaintiff Associated Builders And Contractors Political Action Committee

1. My name is Edward L. Monroe, and I am Director of Political Affairs for Associated Builders and Contractors. In that capacity, I often go by the name "Ned Monroe." Associated Builders and Contractors ("ABC") is a plaintiff in one of these consolidated actions that seeks a declaration that certain provisions of the Bipartisan Campaign Reform Act are unlawful. ABC's affiliated political action committee is known as Associated Builders and Contractors Political Action Committee ("ABC PAC"). I am the Treasurer of ABC PAC. I am giving this testimony on behalf of plaintiff ABC and plaintiff ABC PAC.

2. I have been employed by ABC since the spring of 1997. Immediately prior to that, I was the political director for U.S. Senator John Warner's senatorial campaign in Virginia. Prior to that, I held several other political positions.

3. Plaintiff Associated Builders and Contractors, Inc. ("ABC") is a Maryland non-profit corporation exempt from federal income tax pursuant to I.R.C. § 501(c)(6) that is funded primarily by membership dues. ABC is a national trade association representing more than 23,000 contractors and related firms in the construction industry. ABC's members, which include both unionized and non-union employers, share the philosophy that construction work should be awarded and performed on the basis of merit, regardless of labor affiliation. Representatives of ABC meet with officeholders, candidates, political party officials, and their respective staffs to encourage their support of legislation that advances ABC's goals. In addition, ABC has paid for broadcast communications that referred to clearly identified candidates for federal office and that aired within 60 days of a general election and within 30 days of a primary election.

4. ABC is the only national construction association devoted exclusively to the merit shop philosophy, the principle of providing the best management techniques, the finest craftsmanship, and the most competitive bidding and pricing strategies in the industry, regardless of labor affiliation. ABC is committed to developing a safe workplace and high-performance workforce through quality education and training with comprehensive safety and health programs.

5. ABC is concerned with many issues, which change over time. As a generality, however, ABC is active on free enterprise and tax issues. ABC favors the reduction of existing taxes and the avoidance of new taxes that impact our members. The reduction of federal, state and local taxes is one cornerstone of our association's philosophy.

6. ABC also is concerned with healthcare issues, such as rules affecting health maintenance organizations. This interest arises in two ways. First, healthcare expenses for employees is one of the primary expenses incurred by all our members. Those members are interested in legislation and regulations that impact the quality of healthcare they can offer their employees and its cost. Second, ABC has an insurance trust which puts the association in the insurance business. It insures members for up to some $23,000,000 in health insurance premiums per year. So healthcare is another of the core issues addressed by our association.

7. ABC often engages in political communications, including broadcast ads, that seek to protect merit shop firms from legislative initiatives or regulatory proposals that would restrict market opportunities for merit shop companies. Such initiatives often originate with or have the vigorous support of labor unions or labor organizations. Such an initiative might seek to prevent firms from bidding on government contracts or government funded contracts unless the bidding firm hires union members or uses restrictive union work rules.

8. Initiatives of interest or concern to ABC members arise or are actively contested within 60 days of a general election or within 30 days of a primary election. If ABC and coalitions in which it participates could not run ads that mention officials of the executive branch, members of Congress, or candidates for federal office, it would be much more difficult to use broadcast advertising to educate or motivate the public to take action ABC believes appropriate in the circumstances. Proponents of such initiatives could time them within such regulated windows with the express purpose of suppressing effective communications that might marshal opposition to the proposals.

9. ABC is concerned by the chilling effects of BCRA §214(c). A coordination investigation, or the threat of one, could inhibit activities in which ABC has participated in the past. For example, on a wide variety of legislative matters, representatives of ABC meet with elected officers and their staffs to explore legislative and policy matters relevant to the construction community. These meetings on political subjects necessarily encompass discussion

[3 PCS CDP 484]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No.: 02-CV-0582 (CKK, KLH, RJL)
CALIFORNIA DEMOCRATIC PARTY, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No.: 02-CV-0875 (CKK, KLH, RJL) CONSOLIDATED ACTIONS

[3 PCS CDP485]

AFFIDAVIT OF TIMOTHY J. MORGAN

I, TIMOTHY J. MORGAN, swear and depose as follows, of my personal knowledge:

1. I am a Plaintiff in this action, and serve as the current Republican National Committeeman from California, elected by the state central committee of the California Republican Party ("CRP") in 1996. As National Committeeman, I serve as a member of the Republican National Committee ("RNC"), one of its one hundred sixty-six members. Currently, I serve as a member of the RNC's Budget Committee, which is responsible for budgeting and expenditures of RNC funds used in connection with national, state and local election activity and a myriad of purposes related to building the Republican Party and

communicating its principles and ideals. I have served as an active member of the RNC Redistricting Task Force, which has coordinated Republican legislative redistricting activities over the past six years. I am a member of the state central committee, the Executive Committee and the Board of Directors of the CRP, and also serve as the Chairman of its Rules Committee. I have been a member of the state central committee since 1981, of the Executive Committee since 1991, and of the Board of Directors since 1996. I have also served as Chairman of the Plaintiff Santa Cruz County Republican Central Committee, during the years 1993 -1996, and as a member of that Central Committee during the years 1979 - 1998. I am familiar with the structures, operations and activities of these organizations, the interrelationships between them, and the roles each plays in supporting and assisting the operations of the others, as well as their importance in establishing, building and maintaining the Republican Party at the national, state and local levels.

2. CRP's Organic Relationship With the National Republican Party:

The California Republican Party has a long, close association with its national party. General John C. Fremont, who led pro-United States forces in establishing the Bear Flag [3 PCS CDP 486] Republic in 1848 which led to the State of California's admission to the Union in 1850, served as one of the first two United States Senators from the new State of California in 1850 and 1851, and was the Republican Party's first Presidential nominee in 1856. CRP has of course been instrumental in electing as Republican Presidents Californians Richard Nixon and Ronald Reagan in the modern era.

3. CRP's Status Under California and Federal Laws:

CRP is the duly authorized and officially recognized Republican Party of the State of California. It is a "state committee" within the meaning and purposes of the FECA 2 USCA § 431(15). Under II CFR § *102.5(a),* CRP maintains a "federal account" into which are deposited only contributions meeting the limits and prohibitions of the FECA (federally permissible contributions). CRP files regular public disclosure reports of its federal campaign activity with the Federal Election Commission ("FEC"). CRP is a registered political committee in accordance with California law under California Government Code § 84100 and files regular reports with the CA Secretary of State. CRP's non-federal campaign activities are regulated by the California Fair Political Practices Commission ("FPPC"). CRP pays for activities affecting both federal and non-federal political activity with funds drawn partly from its federal account, containing only federally permissible contributions, and partly reimbursed from its account governed by state law (its non-federal accounts).

CRP's federal and non-federal campaign committees are non-profit entities tax exempt under section 527 of the Internal Revenue Code.

4. CRP As An Association:

CRP has a little more than five million individuals who, as registered Republican voters, have joined together to advance common beliefs and principles. To advance those beliefs, CRP [3 PCS CDP 487] performs many functions, among them providing financial and material support to federal, state and local candidates, taking positions and publicizing those positions on public issues, including state and local ballot measures, and maintaining an administrative staff and structure to make its other goals possible, and to comply with extensive state and federal regulation. CRP opposed the Proposition 198 "blanket primary," and joined as a co-plaintiff in successfully challenging that legislation in *California Democratic Parly, California Republican Party, et al. v. Jones,* 530 U.S. 567 (2000).

5. CRP's Organizational Structure:

The CRP, local Republican county central committees, and the Republican National Committee are part of a federated national and state associational group. CRP is the official State Republican Party organization under Part 3 of Division 7 of the California Elections Code, commencing with section 7250. Chapter 3 of Part 3, commencing with Section 7350, and the CRP's own bylaws, Exhibit "A" hereto and found on the internet at <http://www.cagop.org/bylaws.htm>, provide for a "state central committee."

The state central committee consists of approximately 1,500 regular and appointive members. Among the regular members are federal and state [3 PCS CDP 488] officeholders and candidate nominees, including the offices of Governor and eight other statewide constitutional officers, two nominees for U.S. Senate, fifty-two nominees for U.S. House of Representatives, forty nominees for State Senate, eighty nominees for State Assembly, and four nominees for State Board of Equalization. (Bylaws, Article II, Section 2.01.01(A).)

The state central committee is the governing body of the CRP. (California Elections Code § 7350 et seq.; Bylaws, Article I, Section 1.03.) However, the CRP also operates through a one-hundred member Executive Committee that includes a number of federal and state officeholders and sixteen representatives of Republican county central committees (Bylaws, Article II, Section 2.04.0 1), and a twenty five member Board of Directors, that includes one federal officeholder, a sitting member of Congress appointed by the California Republican Congressional Delegation, three state elected officeholders, and representatives of the association of Republican County Central Committee chairmen. (Bylaws, Article II, Section 2.05.01.)

6. Relationship to Republican County Central Committees:

California Elections Code section 7385 provides that the state central committee (CRP) shall conduct party campaigns on behalf of the Republican Party and the candidates of the

Republican Party.

The fifty-eight Republican County Central Committees are established by state law, and are governed by Chapter 4 of Part 3 of Division 7 of the California Elections Code, commencing with section 7400. These committees are separate, self-governing legal entities, and are authorized by Elections Code 7440 "to have charge of the Republican party campaign within their jurisdictions, under general direction of the {CRP] or [CRP's] executive committee." Federal officials and candidates who were nominated as party nominees for partisan offices, including State constitutional and legislative offices, the Board of Equalization, and federal offices, including nominees for U.S. Senate and U.S. House of Representatives who represent all or a portion of the area within the county's jurisdiction are "ex officio" members of the Republican county central committee, and participate in its decision-making, either personally or through designated alternates or agents. (Elections Code § 7404.)

These committees also are considered separate organizations under California's campaign finance reform laws. (California Government Code § 85205.) However, they are considered "subordinate party committees" under existing FECA law. (2 USCA § 434; 11 CFR [3 PCS CDP 489] § 100.14(b).)

These Republican County Central Committees' federal and non-federal campaign committees also are tax exempt under section 527 of the Internal Revenue Code.

CRP's regular membership also includes the chairmen of California's fifty-eight county central committee organizations as well as chairmen of various volunteer party organizations.
(Bylaws, Article 11, Section 2.01.01 (B)(7), (8).)

7. CRP's Role in the Federal Electoral College Process:

The CRP is authorized by California Elections Code section 7300 and by its bylaws to select Presidential electors to participate in the Electoral College to elect a President and Vice President of the United States. (Bylaws, Art.IV, Section 4.01 et seq.)

8. CRP's Relationship to the Republican National Committee ("RNC"):

The CRP is a part of the RNC by provision of the Standing Rules of the Republican National Convention, as amended from convention to convention. CRP's elected chairman is a member of the RNC. (Rule No. 1, The Rules Of The Republican Party. as adopted by the 2000 Republican National Convention, July 31, 2000.) CRP elects two members of the RNC, a National Committeeman and a National Committeewoman. (RNC Rule No. 1; Bylaws Art.H, section 2.03.02(a).) The Republican National Committeeman and National Committeewoman are also members of the CRP's Board of Directors and Executive Committee. (Bylaws Art.II, section 2.05.01.)

Plaintiff Republican National Committeewoman Barbara Alby is a member of the RNC Executive Committee and the RNC Rules Committee. As set forth above, I am a member of the
RNC Budget Committee responsible for approving the budget and expenditures of the RNC.

CRP is part of the "federation" of State Republican parties that comprise the RNC, and [3 PCS CDP 490] the federated relationship of these States play in the RNC parallels the federal system embodied in our Federal Union of fifty States.

CRP derives program assistance from the RNC, and provides assistance to the RNC and to its sister State Republican parties through the national committee. Moreover, RNC has
provided resource and expertise to Republican County Central Committee programs, much as CRP has done and to which I have attested herein.

9. CRP's Principles and Goals:

CRP's principles, as set forth in Article I of its Bylaws, are "based upon the precepts of our Nation's Founding Fathers as reflected in the United States Constitution and the Bill of Rights, with particular emphasis upon the rights of the individual, limited governmental powers and equity under the law. The Committee affirms its belief in the free enterprise economic system, private property ownership, individual rights and representative government. The Committee shall forever be open, accessible to all and answerable to the people of the State of California." CRP's goals, as set forth in Article 1.00 of its Bylaws, are to nominate and elect "persons affiliated with the [Republican Party] to public offices at the federal, state, and local levels and supporting issues which reflect the Committee Platform and the principles set forth in [its] bylaws."

10. BCRA's Prohibition of National Committeemembers' Fundraising and Advising With Respect to State and Local Party Committees, State and Local Ballot Measures and Potentially State and Local Candidates:

As CRP's National Committeeman, and a member of its Budget Committee, I participate in the decisions of the RNC concerning its political program funding and other activities. Part of my role is to advise RNC on the California political climate, the opportunities to elect Republican local, stale and federal candidates in California. and the programs of the CRP and [3 PCS CDP 491]
local political party committees that are useful and important to the accomplishments of the RNC's and the CRP's objectives.

Also, because of my National Committeeman status, I am called on to assist CRP fundraising in various ways. I attend CRP fundraising events, both in the San Francisco Bay Area, at CRP conventions and meetings, and upon special invitation. Also, I am called on to assist Republican County Central Committees' fundraising in similar ways. In addition, I frequently report to the CRP and local Republican County

Central Committees on the activities and plans of the RNC, in particular with reference to California.

Because Section 323(a)(2) and 323(b)(2)(C) of the FECA, as enacted by section 101 of BCRA, together prohibit an officer or agent of a national party committee from soliciting, receiving, directing, transferring, or spending any non-federal funds permissible under California law or "Levin funds," I am uncertain whether my activities in connection with the fundraising events of CRP or of a Republican County Central Committee, including that of Plaintiff SANTA CRUZ COUNTY REPUBLICAN CENTRAL COMMITTEE, may be permitted or unlawful. Because of the potential criminal liability for violation of these provisions of Section 323 under Section 437g (d) of the FECA, and the potential exposure to substantial monetary fines and penalties therefore, I intend to avoid engaging in any activity that would place me in jeopardy, including:

a. Participating in any discussion or voting on any matter affecting the budget or political program of the CRP in my capacity as a voting member of its Board of Directors, because such activity may constitute the "spending" of non-federal funds or "Levin funds" subject to the aforementioned prohibitions, crimes and penalties. [3 PCS CDP 492]

b. Participating in any discussion or voting on any matter affecting the budget or program of the SANTA CRUZ COUNTY REPUBLICAN CENTRAL COMMITTEE for the same reasons.

c. Signing any fundraising appeal, letter or document either separately or jointly with any other member of the CRP or its Board of Directors which may solicit or direct the spending of non-federal or "Levin funds."

d. Making any request for the CRP to spend any funds for any political purpose, including but not limited to (1) the support of any state or local ballot measure that may ask or direct voters to "Vote November X" if that date is a federal election date, or (2) the support of any candidate for local or state elective office that has or may receive non-federal campaign funds from the CRP or a Republican County Central Committee for the support of his or her campaign for state or local office because such candidate may ask or direct voters to "Vote November X" if that date is a federal election date, or to fund any local political party committee's voter registration, voter identification, or get-out-the-vote activity, or generic political party activity that encourages voters to vote or register to vote as a Republican.

11. BCRA's Impacts Upon Activities of the CRP and the Santa Cruz County Republican Central Committee:

I have reviewed the provisions of BCRA applicable to state and local political parties. I share the concerns that BCRA will have a devastating effect on their ability to perform their traditional central roles in the political process, and particularly their primary role to foster the achievement of Republican principles through the communication of ideas and issue [3 PCS CDP 493] positions, the fostering of association of persons who share Republican principles and ideals, and the nomination and election of candidates to California statewide constitutional offices, the State Legislature, to local offices, and also to federal offices.

12. Other BCRA Effects:

I have reviewed BCRA's other provisions as well. Again, while some of the provisions of BCRA are uncertain, and their application may depend on interpretation by the courts and the Federal Election Commission, my view is that a number of the provisions of BCRA also will have a very substantial impact on CRP's ability to raise funds to support its activities, and will

substantially impair its ability not only to campaign effectively in support of its candidates, but also to speak on ballot issues and other issues, and to associate and to foster association among Republicans at the local, state and federal levels. In particular, the cutting off of relationships between the national, state and local parties will have a very detrimental impact on the grass roots organizational capabilities of the Republican Party.

a. *Prohibition on State's National Committee Members' Fundraising or Participating in Spending Decisions for CRP:* As set forth more fully above, RNC officials including our Chairman and National Committeemembers will no longer be able to raise non-federal money for CRP. [3 PCS CDP 494]

b. *Prohibition on State's National Committee Members ' Fundraising or Participating in Spending Decisions for Republican County Central Committees:* RNC officials including our Chairman and National Committee members will no longer be able to raise non-federal money for Republican County Central Committees.

c. *Prohibition on Federal candidates and Officeholders' Fundraising for CRP and Republican County Central Committees:* Federal candidates and members of Congress officials including our Chairman and National Committee members will no longer be able to raise non-federal money for CRP or Republican County Central Committees.

d. *Diminution of Political Party v Speech With Respect to Ballot Issues and Other issues:* CRP will no longer be able to support ballot measures and in particular state and local initiative, bonds, and referenda, because organizations formed to support such measures under California law are organized as tax exempt organizations under Section 501(c)(4) of the Internal Revenue Code. CRP will be unable to make contributions of money or "in-kind" to such organizations, which are considered "contributions" under California law and BCRA. Such ballot measure committees are organized as 501(c)(4) organizations, and often engage in what would be considered "federal election activity" including voter registration and get-out-the-vote because CRP's endorsement spending would be an "in-kind" contribution prohibited by section 323(d)(1) of FECA. [3 PCS CDP 495]

e. *Prohibition of Transfers of Non-Federal Funds from CRP to Republican County Central Committees:* CRP will no longer be able to provide substantial county support activities that help open party headquarters and phone banks during election periods, both under the prohibition of section 323(d)(2) of FEC as enacted by section 101 of BCRA, because such committees are organized under Section 527 of the Internal Revenue Code, and to a more limited extent, such CRP fund transfers will require federal or "Levin" funds and not funds that are permissible under California Government Code Section 85303(c) for these purposes.

f. *Substantial Interference with Grass Roots Voter Registration Activities of CRP's Operation Bounty:* CRP will be unable to operate its Operation Bounty program in which Republican County Central Committees, Republican volunteer clubs, and state and local candidates are the primary participants. All of these organizations are tax exempt Section 527 Internal Revenue Code organizations, including state and local candidates whose committees also are section 527 IRS organizations.

g. *Shifting of Voter Registration from Grass Roots Volunteers to Paid Professionals Will Discourage Grass Roots Participation in Party:* Rather than rely upon these grassroots volunteer organizations that are

Section 527 tax exempt organizations, CRP will be forced to rely more upon paid professional vendor operations, which will further discourage the grass roots volunteers, and frustrate their involvement in other party mobilization tasks. [3 PCS CDP 496]

h. *"Either/Or" Requirements of Section 441 a(d) (4) for Coordinated Expenditures and Independent Expenditures:* Because CRP would be prohibited from engaging in "coordinated expenditures" on behalf of a federal candidate if any local Republican County Central Committee made a single dollar of "independent expenditures" on behalf of such candidate, and vice versa, Republican County Central Committees would be prohibited from making "independent expenditures" such as putting a slate listing in a newspaper without coordinating that activity with the federal candidate, if CRP had made "coordinated expenditures" on behalf of the candidate. Because BCRA attempts to cut off coordination between the state and local parties in fundraising, and also restricts the interaction that they have traditionally had with respect to voter registration, phone bank and fundraising/transfer activity, their ability to communicate about such "coordinated expenditures" /"independent expenditures" activity also will diminish. CRP will need to spend resources to monitor such local activity in order to protect its ability to do "coordinated expenditures" on behalf of a federal candidate. Moreover, one, small last minute "independent expenditures"on behalf of a federal candidate by a Republican County Central Committee could make illegal previous, and more substantial, "coordinated expenditures" activity by the CRP.

i. *Fundamental Interference With California Law Promoting State and Local Campaign Contributions to and Expenditures by Political Parties:* BCRA conflicts with Proposition 34, and will directly affect CRP's and

RCCC's [3 PCS CDP 497] ability to accept contributions for state and local campaign activity specifically identified in Prop 34 to include voter registration and get-out-the- vote and other non-direct candidate support activities including communications with CRP's members, who are registered Republican voters (California Government Code § 85312). BCRA will interfere with CRP's and Republican County Central Committee's conduct of state and local election activity and associational rights.

j. *Third Party Supplanting of Role of Political Parties:* Parties like CRP and Republican County Central Committees will be supplanted by other third party groups, including Internal Revenue Code Section 501 (c)(4) groups that may engage in voter registration and even advocacy with respect to federal and non-federal candidates without BCRA restrictions.

The foregoing is true and correct. Executed under penalty of perjury under the laws of the United States this 3rd day of October 2002 at Santa Cruz, California.

/s/
TIMOTHY J. MORGAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al.,) Civil Action No. 02-0582 (CKK, KLH, RJL)

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,) **CONSOLIDATED ACTIONS**

Defendants.

DECLARATION OF LAURA W. MURPHY

Pursuant to 28 U.S.C.§ 1746, I hereby declare as follows:

1. I am the legislative director of the American Civil Liberties Union ("ACLU"), a position I have held since February 2, 1993.

2. Plaintiff ACLU is a nationwide, non-profit, non-partisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. It is also a tax-exempt organization under § 510(c)(4) of the Internal Revenue Code. The ACLU is incorporated in Washington, D.C.

3. The ACLU engages in non-partisan legislative activities designed to influence federal legislation involving civil rights and civil liberties issues of national importance.

As a 501 (c) (4) organization, the ACLU does not engage in any federal election activity as defined by the Federal Election Campaign Act.

4. The organization's legislative efforts include many activities directly associated with lobbying, but do not involve contributions to candidates, political parties, political committees or other participation at fundraising functions sponsored by candidates or political organizations. The ACLU regularly meets, speaks or corresponds with members of Congress and Executive Branch officials concerning proposed or pending legislation or executive action that may affect civil liberties. For instance, following September 11, 2001, the ACLU has had numerous direct contacts with members of both the United States House of Representatives and the United States Senate urging restraint in the rush to adopt legislation giving the Department of Justice and other federal agencies sweeping law enforcement powers curbing important civil liberties. Similarly, the ACLU met with FBI Director Robert Meuller to discuss post 9/11 terrorism investigations by his office. The ACLU also routinely testifies before Congress, conducts staff briefings for Congress and provides members with ACLU position papers.

5. In addition to these direct contacts and correspondence, the ACLU holds press conferences, issues press releases, offers public commentary, and makes regular media and other public appearances staking out the organization's civil liberties positions on different legislative and executive branch initiatives. Sometimes the ACLU is advancing legislation, sometimes it is opposing legislation. The ACLU also works to build coalitions around common issues and is associated with at least 20 coalitions with a combined membership of over 250 organizations. The organization's legislative activities are frequently coordinated with other coalition partners. The ACLU also maintains a congressional score card on important civil

liberties issues and periodically publishes different guides on important civil liberties issues.

6. A successful lobbying campaign is not conducted in a vacuum. Typically, a campaign is undertaken in conjunction with coalition partners and individual members of Congress who support the legislation being advanced or opposed by the ACLU. For instance, the legislative campaign opposing the Bipartisan Campaign Reform Act and its predecessor bills involved many different organizations and individuals, including Senator Mitch McConnell's (R,KY) - office. In particular, the ACLU, its coalition partners, and Senator McConnell shared a common interest in educating the public about the First Amendment risks posed by the BCRA. Accordingly, ACLU staff met frequently with Senator McConnell's staff, as well as with others in Congress, during the debate over the BCRA and its predecessor bills. Senator McConnell's office conferred with the ACLU during its early efforts to promote the election reform legislation following the debacle in Florida during the 2000 presidential election. Another plaintiff in the case, Representative Bob Barr (R.GA), worked with the ACLU to oppose key provisions of the U.S.A. Patriot Act. These examples are illustrative of many others. The point is that the ACLU and other organizations often work with members of Congress to ensure that proposed legislation is consistent with civil liberties principles.

7. Under the coordination provisions adopted by the BCRA many of the foregoing legislative activities coordinated with members of Congress engaged in by the ACLU could be treated as contributions to the candidate and expenditures on behalf of the candidate subject to the prohibition and limitations of the Federal Election Campaign Act. Thus, while the ACLU does not coordinate activities with candidates for the purpose of influencing an election, many of its coordinated activities designed to influence legislative outcomes are subject to the Act's broad definition

of coordination. To take the most basic example, if the ACLU works with Senator Christopher Dodd (D,CT) on the election reform legislation, and if any of the ACLU's subsequent media statements, publications or mailings refer to the Senator's support of the legislation, the organization's expenditures on the campaign could be treated as a contribution to the Senator.

8. A successful lobbying campaign is not dependent on any single factor. However, for a membership organization like the ACLU that does not contribute to candidate's political parties, or House or Senate leadership committees, the media is often a critical means of promoting our legislative goals. In furtherance of these goals, the ACLU seeks to influence how members vote on pending legislation. One way that is accomplished is by educating the public about our concerns and using them to communicate their concerns to their elected Representatives. The most effective way to communicate with the public is through the print and broadcast media. Inevitably, many of the ACLU's statements involving legislation or executive branch policies, including print and broadcast communications, refer to a clearly identified candidate, member or executive branch official. High profile legislation, such as the "McCain-Feingold" Bill, is almost always publicly identified with its sponsor. Similarly, the ACLU's public statements supporting or opposing the President's policies invariably refer to the President by name.

9. Historically, the ACLU has been limited to earned media, which is dependent on news or editorial coverage of the organization's activities and points of view. Earned media has its limits, however. The ACLU has no editorial control over how and when its views are conveyed. Indeed, there is no assurance that a press release issued by the ACLU will even be picked up by a news organization. Similarly, press conferences may be poorly attended or

ignored by some news organizations. Moreover, because of the media's concern with presenting a variety of views or equal air time to other organizations, the ACLU's position may not be printed or broadcast at all. In short, there is a finite amount of print and broadcast , Internet and cable space, for which every advocacy organization competes.

10. Recognizing the limitations of relying exclusively on earned media, the ACLU has budgeted $200,000 this fiscal year for the purchase of legislative ads targeting specific members of Congress on legislation important to the ACLU. The first ad campaign was directed at Speaker Hastert in March 2002 urging him to bring the Employment Non-Discrimination Act (ENDA) to a full vote in the House. A copy of the text of the both the broadcast ad and the print ad are attached as exhibits to this declaration. The ad was broadcast on multiple Chicago and Aurora radio stations throughout the weekend of 3/15-3/17/02. Simultaneously, ads were taken out in the Chicago Sun Times and Aurora Beacon. In total $49,757 was spent for the radio and newspaper ads. The ad, in a dramatic "double play," showcased the problem of workplace discrimination in America and the campaign finance legislation that is the subject of this lawsuit. The ad was run in March. At that point, ENDA had started to move in the Senate after the legislation had been stalled in the House for some time. The ACLU hoped the ad would be a catalyst to help bring the legislation up for a vote. The ACLU also hoped to highlight the constitutional flaws of the BCRA, which was then being debated in Congress. As the ACLU pointed out at the time, the Hastert ads would have been illegal under the BCRA because they were aired within 30 days of a primary election, even though Speaker Hastert was running unopposed.

11. In addition to the Hastert ad, in September 2002 the ACLU contributed $10,000 to the Leadership Conference on Civil Rights for the purpose of financing a *media campaign, including* broadcast spots urging certain

targeted Represenatives and Senators to support the pending election reform legislation. The Leadership Conference is a national coalition of 185 national organizations. At the eleventh hour, our offices were contacted by a United State Senator's office and notified that there was significant progress on the legislation. In consultation with the Leadership Conference the ads were pulled. If the BCRA was in effect during this election cycle, these proposed broadcast ads would also have been illegal.

12. Finally, it is important to emphasize that the blackout periods imposed by the BCRA – 60 days before a general election and 30 day s before a primary – are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of this debate occurs against the backdrop of pending legislative action or executive branch initiatives. Some of the President's or Attorney General's boldest initiatives are advanced during election years – often within 60 days of a general election. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period. The ACLU took out a full page advertisement in Congress Daily and CQ Monitor on September 30, 2002, urging Congress to safeguard civil liberties in connection with its consideration of the "Gramm – Miller" and "Lieberman" versions of the Homeland Security legislation. A copy of the ad is attached to this document. Thus, it is not unusual for the ACLU to be at its most vigilant and active during an election year, especially in the final days leading up to the election. Throughout this and other election years, the ACLU has issued numerous press releases, held numerous press conferences, and made numerous public appearances and commentary on pending legislation. Much of this activity occurred during the final 60 days before an election or otherwise during the broadcast ban blackout dates governing Presidential primaries. Much

of this activity and many of our communications refer to bills and amendments that often include the names of members of Congress or refer to particular actions by a member of Congress. While these activities are excluded from the BCRA's broadcast ban provisions, any paid broadcast media on the very same issues is illegal.

13. I am the custodian of the records of the legislative materials that have been produced in discovery or disclosed to the defendants in this case pursuant to the court's status scheduling Order. I am informed by counsel that these documents may be used at trial. They are true and correct copies of documents that are created and maintained in the ordinary course of the ACLU's legislative activities. Additionally, I certify that the Hastert and Congress Daily and CQ Monitor ads attached to this declaration were broadcast and/or printed on the dates indicated herein and that the text is accurate.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on this 3rd day of October 2002.

Laura W. Murphy

Exhibit A

Copy of Hastert radio ad paid for by the ACLU. The ad was broadcast on multiple Chicago and Aurora, Illinois radio stations the weekend of 3/15 – 3/17/02.

ACLU- Radio

60 Seconds
R201-x13 – ENDA Delays

Sound Effect: Long Tympani/ Drum Roll

Male Announcer – Master of Ceremonies (during sound effect): *And now...*

Sound Effect: Drum Roll Ends with Cymbal Crash
Sound Effect: 2 Seconds of Silence

Male Announcer: ......We're Waiting

Sound Effect: Long Tympani/ Drum Roll Starts Again
Sound Effect: Drum Roll Ends with Cymbal Crash
Sound Effect: 2 Seconds of Silence

Male Announcer: *Waiting for our Congressman,* (Sound Effect Music Up – Pop Goes the Weasal or Circus Music) *Dennis Hastert, to protect everyone from discrimination on the job.*

As speaker of the House, Representative Hastert has the power to stop the delays and bring the Employment Non-Discrimination Act – ENDA – up for a vote in Congress. It's about fairness. It's time to ensure equal rights for all who work, ***including lesbians and gay men,*** *and make sure that it's the quality of our work that counts, and nothing else.* (Music Out.)

Male Announcer: *So Congressman Hastert*

Sound Effect: Tympani/Drum Roll

Male Announcer – Master of Ceremonies (during sound effect): *What will it be?*

Sound Effect: Drum roll ends with Cymbal Crash

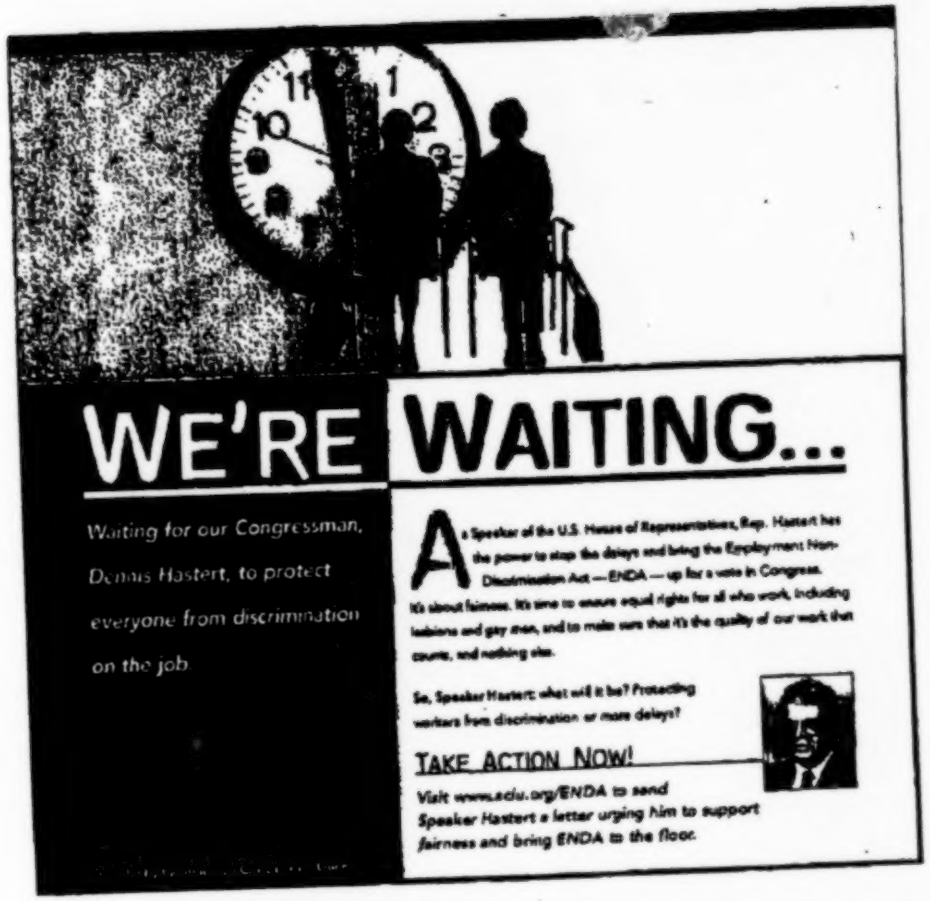
Male Announcer: *Protecting workers from discrimination, or more delays?*

Female Announcer: Take action now. Send Speaker Hastert a letter urging him to support fairness and bring ENDA to the floor by going to www.aclu.org/enda.

Male Announcer: Paid for by the American Civil Liberties Union.

Exhibit B

Copy of Hastert print ad paid for by the ACLU. The ad was taken out in the Chicago Sun Times and Aurora Beacon the weekend of 3/15 – 3/17



WE'RE WAITING...

Waiting for our Congressman, Dennis Hastert, to protect everyone from discrimination on the job.

As Speaker of the U.S. House of Representatives, Rep. Hastert has the power to stop the delays and bring the Employment Non-Discrimination Act — ENDA — up for a vote in Congress. It's about fairness. It's time to ensure equal rights for all who work, including lesbians and gay men, and to make sure that it's the quality of our work that counts, and nothing else.

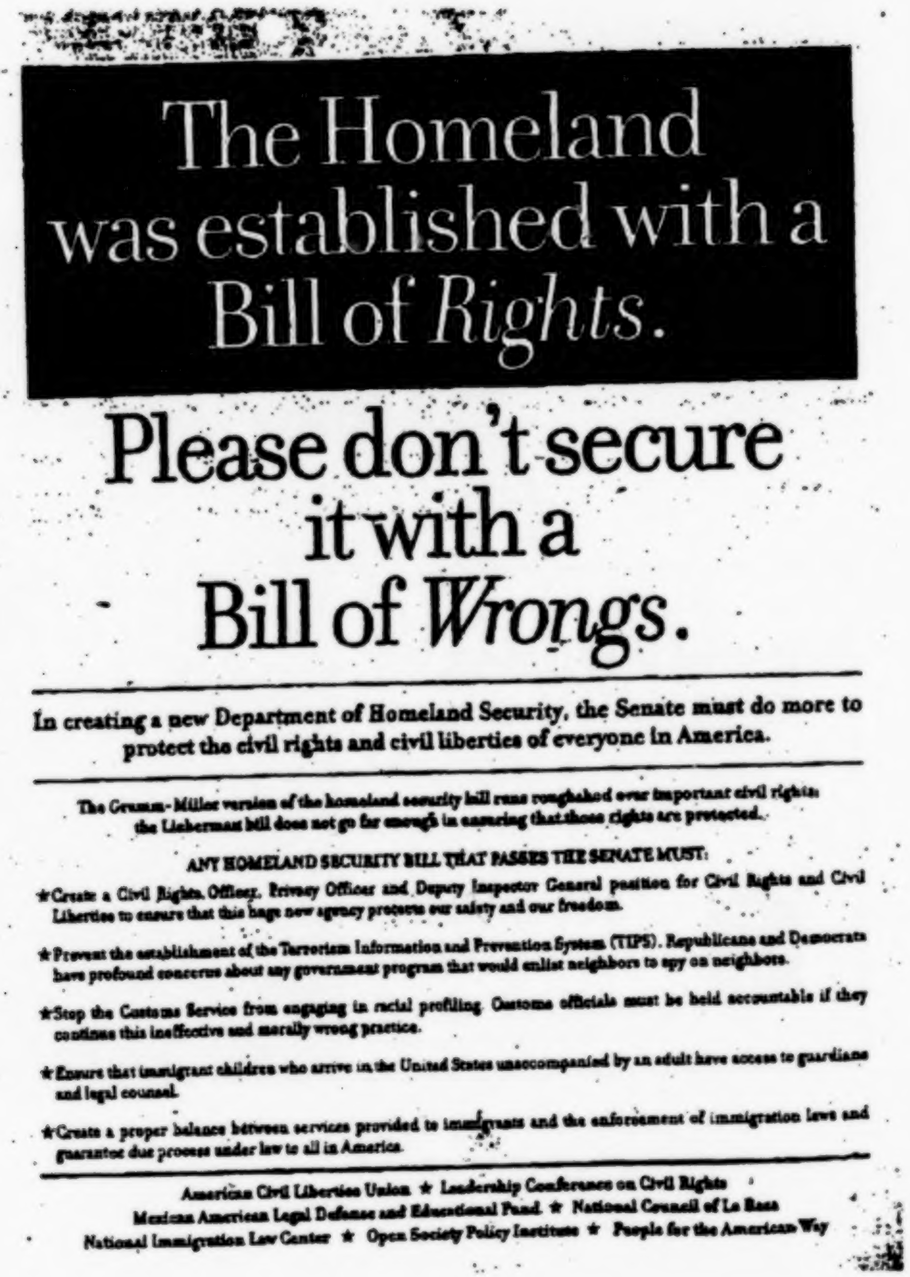
So, Speaker Hastert: what will it be? Protecting workers from discrimination or more delays?

TAKE ACTION NOW!

Visit www.aclu.org/ENDA to send Speaker Hastert a letter urging him to support fairness and bring ENDA to the floor.

Exhibit C

Copy of ACLU's full page advertisement in Congress Daily and CQ Monitor on September 30, 2002.



The Homeland was established with a Bill of *Rights*.

Please don't secure it with a Bill of *Wrongs*.

In creating a new Department of Homeland Security, the Senate must do more to protect the civil rights and civil liberties of everyone in America.

The Gramm-Miller version of the homeland security bill runs roughshod over important civil rights; the Lieberman bill does not go far enough in ensuring that those rights are protected.

ANY HOMELAND SECURITY BILL THAT PASSES THE SENATE MUST:

★Create a Civil Rights Officer, Privacy Officer and Deputy Inspector General position for Civil Rights and Civil Liberties to ensure that this huge new agency protects our safety and our freedom.

★Prevent the establishment of the Terrorism Information and Prevention System (TIPS). Republicans and Democrats have profound concerns about any government program that would enlist neighbors to spy on neighbors.

★Stop the Customs Service from engaging in racial profiling. Customs officials must be held accountable if they continue this ineffective and morally wrong practice.

★Ensure that immigrant children who arrive in the United States unaccompanied by an adult have access to guardians and legal counsel.

★Create a proper balance between services provided to immigrants and the enforcement of immigration laws and guarantee due process under law to all in America.

American Civil Liberties Union ★ Leadership Conference on Civil Rights
Mexican American Legal Defense and Educational Fund ★ National Council of La Raza
National Immigration Law Center ★ Open Society Policy Institute ★ People for the American Way

106th Congress

Congressional Action During the 60 Days Prior to November Election on Bills of Interest to the ACLU

Capital Punishment:

- "Sense of Congress" regarding the obligation of grantee states to ensure access to post-conviction DNA testing and competent counsel in capital cases (Amdt. 4345 to S. 3045): Introduced in the Senate on 10/26/2000.

Chruch-State:

- Bill to protect religious groups in land-use disputes (S 2869) signed by the President on 9/22/2000; P.L. 106-274.
- Allows faith-based organizations to receive federal support for programs to help low income fathers get more involved in their families' lives (HR 4678): Passed House 9/7/2000.

Criminal Justice:

- Provide grants to states to process backlog of DNA evidence (HR 4640): Passed House 10/2/2000.
- Pressure states into requiring HIV testing of rape suspects who have been formally charged, by threatening to withhold federal crime-fighting block grant money (HR 3088): Passed House 10/2/2000.
- Aimee's Law: cuts federal crime fighting money to states if convicted murderers & rapists did not serve stiff sentences and went on to commit offense in another state (part of HR 3244): Passed Senate 10/11/2000.

Gay and Lesbian Issues:

- Repeal federal charter of Boy Scouts, in reaction to Supreme Court: decision that allows Boy Scouts to discriminate against homosexuals (HR 4892): Defeated in House 9/13/2000.
- Prohibit using local or federal funds for needle exchange (amendment to HR 4942): Passed House 9/27/2000.
- Prohibit the use of Federal funds for the conduct or support of programs of HIV testing that fail to make every reasonable effort to inform the individuals of the results of the testing (HR 5615): Introduced in the House on 10/11/2000.

Hate Crimes:

- Expansion of federal hate crimes law (amendment to S 2549): House voted to instruct conferees to accept amendment 9/13/2000; conferees dropped language from bill 10/5/2000.

Immigration:

- Allow some immigrants who committed minor crimes long ago to apply to stay in US and not be deported; part of "Fix '96" (HR 5062); Passed House 9/19/2000.

Internet Filtering

- Force schools and libraries to use technology protection measures to block access by children to web pornography (amendment to HR 4577): Conferees added this provision to the bill 10/23/2000.

Media & Violence

- Require violent TV programming be limited to hours when children are not likely to be a substantial part of audience (S 876): Approved by Senate Commerce committee 9/20/2000.

Physician-Assisted Suicide:

- Overturns Oregon's law that permits physician-assisted suicide (amendment to HR 2614): Passed House 10/26/2000; Filibustered in Senate 10/27/2000.

Privacy:

- Restrictions on law enforcement use of electronic surveillance (HR 5018): Approved by House Judiciary subcommittee 9/14/2000; Mark-up by House Judiciary committee 9/20/2000.
- Creation of commission to study issue of privacy on the internet (HR 4049): Defeated in House 10/2/2000: failed to get 2/3's majority needed for passage under suspension of rules.
- Prohibit the appearance of Social Security account numbers on or through unopened mailings of checks (HR 3218): Passed House 10/18/2000; Passed Senate 10/25/2000.
- Enhance privacy protections for individuals, and to prevent fraudulent misuse of Social Security account numbers (HR 4857): House full committee mark up on 9/28/2000.

Reproductive Rights:

- Funding prohibition in DC Approp. (HR 4942; HR 5633): Passed both House and Senate on 11/14/2000.
- "Conscience clause" to employee-sponsored health plans coverage of contraceptives (amendment to HR 4942): Passed House 9/14/2000.
- Abortion restrictions on international family planning aid (HR 4811): Conference Committee appointed 10/19/2000; House debates conference report 10/25/2000;
- Define "human being;" seeks to protect humans born alive at any stage of pregnancy (HR 4292): Passed House 9/26/2000.
- Prevent abortion protestors convicted of violent crimes from seeking bankruptcy protection to avoid paying hefty legal penalties (amendment to S 3046): Senate voted to proceed with debate on 10/19/2000.
- Prohibit use of funds to distribute postcoital emergency contraception "morning after pill" on elementary or secondary school premises(HR 4577, Labor/HHS Approp.): Pre. Coburn announces intention to offer motion to instruct House conferees on this amendment on 9/18/2000.

Secret Evidence

- Makes it harder for INS to use secret evidence to deport immigrants or to deny tem asylum (HR 2121): Approved by House Judiciary Committee 9/26/2000.

Terrorism

- Provide clearer coverage over threats against former Presidents and members of their families (HR 3048): House disagreed with certain Senate amendments on 10/25/2000.

Trafficking Victims:

- Combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions (HR 3244): Passed Senate 10/11/2000.

Violence Against Women:

- Reauthorization of VAWA (HR 1248): Passed House 9/26/2000; Passed Senate as par of HR 3244 0/11/2000.

Voting Reform

- Proposing a constitutional amendment to abolish the electoral college and to provide for the direct popular election (SJRes 56): Introduced in the Senate on 11/01/2000. Proposing a constitutional amendment to abolish the electoral college (HJRes 113): Introduced in the House on 10/12/2000.

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[1 (8 PCS/MC 262)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, *et al.*,	)	
Plaintiffs,	)	Case No. 02-0582
v.	)	(CKK, KLH, RJL)
	)	*All consolidated*
Federal Election Commission, *et. al.*,	)	*cases.*
Defendants.	)	

Declaration of David N. O'Steen, Ph.D.
Executive Director,
National Right to Life Committee, Inc.

I, David N. O'Steen, declare the following based on personal knowledge and to the best of my recollection and belief:

1. I am an adult citizen of the United States of America.

2. I am the Executive Director of National Right to Life Committee, Inc. ("NRLC"), in which capacity I am familiar with the activities of NRLC.

3. NRLC, incorporated in 1973, was founded for the purpose of promoting respect for the worth and dignity of all human life from conception to natural death.

4. NRLC is a District of Columbia corporation exempt from federal taxation under I.R.C. § 501(C)(4).

5. NRLC has approximately 3,000 local chapters and fifty state affiliates.

6. NRLC regularly makes disbursements for the direct costs of producing and airing "electioneering communications" in a calendar year that: (a) refer to clearly identified candidates for federal office, (b) are made within 60 days before a general, special or runoff election for the [2 (8 PCS/MC 263)] office sought by the candidates and within 30 days before primary

elections, preference elections, and conventions and caucuses of political parties with authority to nominate candidates for the offices sought by the candidates, and (c) are targeted to the relevant electorate.

7. The purpose of these ads is to effect legislation.

8. On a regular and recurring basis, NRLC (a) lobbies candidate legislators on legislation, (b) consults with both incumbent and challenger candidates on their positions on issues, (c) engages in "electioneering communications" (as defined by the Act); and (d) publishes printed communications, including what are known as "voter guides."

9. Some of these communications are done without any communication with any candidate and some are done after communication with a candidate.

10. NRLC qualifies as an "MCFL-type" organization under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), in that it was not established as a business corporation or labor union, and has no shareholders or other persons affiliated with it who have a claim on its assets or earnings; its organizational purposes are to engage in public welfare activities, and its major purpose is not to nominate, elect, or defeat federal or state candidates; no part of its net earnings inure to the benefit of any private shareholder or individual and except for reasonable compensation for services rendered to the corporation it does not afford any pecuniary gains to its members, directors, officers, or any other persons; it has no capital stock; receipts from other corporations are *de minimus*, and its business income is insubstantial; and it is not affiliated with any political candidate, political party, or campaign committee. [3 (8 PCS/MC 264)]

11. NRLC is also an "expressive association" as described in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

12. NRLC and NRL-ETF communicate to members of NRLC through a publication called "National Right to Life News." This paper is paid for from general treasury funds with the exception of those portions that are paid for by NRL-PAC because they expressly advocate the election or defeat of a federal candidate.

13. NRLC has raised substantial funds in the past with the assistance of Representatives and Senators who were willing to record messages and sign thank you letters to potential contributors.

14. NRLC has received donations from political parties or committees in the past and persons associated with political parties or committees have assisted NRLC in raising funds.

15. NRLC intends to continue its described activities that are banned by the BCRA, but will not do so while the BCRA is in effect.

16. In my capacity as Executive Director of NRLC, I am responsible for overseeing the activities of NRLC's internal 501(C)(3) fund, the National Right to Life Educational Trust Fund ("NRL-ETF"). Thus, I am familiar with the activities of NRL-ETF.

17. NRL-ETF sponsors educational advertising and develops fact sheets, brochures, and booklets detailing the wonders of fetal development, abortion's impact on America, and the threat of euthanasia.

18. NRL-ETF has spent, and intends to do so again, in a calendar year on broadcast and print communications that mention no candidate but advocate for or against issues that are hotly [4 (8 PCS/MC 265)] contested in contemporaneous political campaigns on which candidates running in the same geographic area have taken a position. Under the vague alternative definition of "electioneering communication," which examines whether a "communication . . . promotes or supports" or "attacks or opposes a candidate," BCRA § 201(a), it is unclear whether such

conduct would be considered an "electioneering communication" in that context.

19. NRL-ETF qualifies as an "MCFL-type" organization under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), in that it was not established as a business corporation or a labor union, and has no shareholders or other persons affiliated with it who have a claim on its assets or earnings; its organizational purposes are to engage in public welfare activities, and its major purpose is not to nominate, elect, or defeat federal or state candidates; no part of its net earnings inure to the benefit of any private shareholder or individual, and except for reasonable compensation for services rendered to the corporation it does not afford any pecuniary gains to its members, directors, officers, or any other persons; it has no capital stock; receipts from other corporations are *de minimus*, and its business income is insubstantial; and it is not affiliated with any political candidate, political party, or campaign committee.

20. NRL-ETF is an "expressive association" as described in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

21. NRL-ETF also sponsors the "Proudly Pro-Life" banquet which has been attended by Representatives and Senators, some of whom have been honored by receiving the "Proudly Pro-Life Award." As an honoree their name and likeness have been used in fund raising materials. [5 (8 PCS/MC 266)]

22. NRL-ETF intends to continue in its described activities that are banned by the BCRA, but will not do so while the BCRA is in effect.

23. Also, in my capacity as Executive Director of NRLC, I am charged with overseeing the operations of the National Right to Life Political Action Committee ("NRL-PAC").

24. NRL-PAC, organized in 1979, is an internal § 527 fund of NRLC that is registered with the Federal Election Commission ("FEC") as a PAC subject to FECA.

25. NRL-PAC regularly makes contracts for independent expenditure communications in federal elections days, weeks, and months in advance of the time the actual independent expenditures are made.

26. NRL-PAC has suffered harassment and interference with contractual relationships as a result of federal candidates learning about arrangements with broadcasters to air independent expenditure communications in opposition to these candidates.

27. NRL-PAC intends to continue making independent expenditures, but its freedom of expression is burdened by the necessity of reporting when contracts are made instead of when the independent expenditure is made.

28. For the fiscal year ending April 30, 2002, NRLC's gross annual revenues were approximately $10,783,303.

29. For the fiscal year ending April 30, 2002, NRL-ETF's gross annual revenues were approximately $4,109,773.

30. For the fiscal year ending April 30, 2002, NRL-PAC's gross annual revenues were approximately $240,233. [6 (8 PCS/MC 267)]

31. To the best of my knowledge information and belief donations made to NRLC, NRL-ETF, and NRL-PAC, inclusive, by individuals, totaled approximately $13,578,862 for the most recent fiscal year.

32. Donations made by organizations, including corporations, nonprofit, religious and other similar groups were approximately $295,124 for the most recent fiscal year.

33. In addition to paying for the administrative costs of NRL-PAC, NRLC's general treasury funds are used for other activities.

34. These other activities include (a) lobbying, (b) communications with NRLC members regarding federal, state and local elections, and (c) communications with NRLC members and the general public regarding issues.

35. The issues on which NRLC lobbies are listed on the Lobbying Disclosure Act Reports that the NRLC files with the Secretary of the Senate and the Clerk of the House of Representatives, which are publicly available documents.

36. In accordance with applicable federal, state, and local law, NRLC or NRL-PAC have engaged in, and intend to engage in such activities as voter identification, get-out-the-vote efforts, polling, telephone banks designed to encourage voting, what are known as "voter guides," independent expenditures, and contributions to candidates.

37. NRLC, NRL-ETF, and NRL-PAC each raise funds through telemarketing, direct mail, and/or other fund raising mechanisms such as dinners, etc. [7 (8 PCS/MC 268)]

38. Each of the following paragraphs is intended to authenticate the attached documents and demonstrate the activities engaged in by NRLC, NRL-ETF, and NRL-PAC. Many of these activities will be severely burdened or forbidden once the BCRA takes effect.

39. NRLC, NRL-ETF, and NRL-PAC oppose all forms of abortion, euthanasia, and human cloning.

40. NRLC strongly supports a ban on Partial-birth Abortions, i.e. the procedure in which a physician delivers an unborn child's body until only the head remains inside the womb, punctures the back of the child's skull with a sharp instrument, and sucks the child's brains out before completing the delivery of the dead infant.

41. NRLC helped originate the Partial-Birth Abortion Ban Act, which was originally introduced in 1995 by Congressman Charles Canady (R-FL), who retired from Congress in 2000.

42. NRLC, NRL-ETF, and NRL-PAC have long provided educational materials about the development of unborn babies and facts about abortion. Attached hereto as Exhibit A-1 is a true and accurate copy of an educational document produced by NRL-ETF entitled "The Basics: a compilation of recent and noteworthy information on the abortion issue."

43. Attached hereto as Exhibit A-2 are true and accurate copies of the supporting documents and text of an ad, produced by NRLC, entitled "Congress to Vote November 1 on Banning Partial-birth Abortions," dated October 23-26, 1995. [8 (8 PCS/MC 269)]

44. This ad ran in the Manchester Union-Leader and mentions the names of U.S. Senator Bob Smith, Senator Judd Gregg, Congressman Bill Zeliff and Congressman Charles Bass.

45. Attached hereto as Exhibit A-3 is a true and accurate copy of a document, produced by NRLC, entitled "Update on Bill to Ban Partial-Birth Abortions," dated November 6, 1995.

46. This document, addressed to "Reporters, Editors, and Other Interested Parties, was intended to educate the media on the partial-birth abortion procedure and the bill to ban it.

47. This document also mentions the names of several Congressmen.

48. Attached hereto as Exhibit A-4 are true and accurate copies of a three versions of an ad called "Brenda Pratt Shafer \ PBA Advertisement." These ads, produced by NRLC, describe the partial-birth abortion procedure, mention the name of President Bill Clinton and the fact that he vetoed legislation that would have stopped partial-birth abortion, and were run after April 10, 1996 and prior to the 1996 Presidential election.

49. Because the year-end results from 1997 donor solicitations showed that "a letter signed by Congressman Henry Hyde had almost twice as high a return rate as the average of other fund raising letters" in 1997, NRLC decided to ask Representative Hyde to assist us again with fund raising in 1998.

50. Attached hereto as Exhibit A-5 are true and accurate copies of a proposal to have Congressmen Henry Hyde help

solicit donations for NRLC and the proposed scripts and donation fulfillment letter for his assistance. [9 (8 PCS/MC 270)]

51. In 1998, as a result of what NRL-ETF perceived to be a misperception by the news media and the public about the actual procedure known as partial-birth abortion, NRLC produced several ads to educate the public about the procedure and that the American Medical Association has determined that the procedure is "not good medicine."

52. Attached hereto as Exhibit A-6 are true and accurate copies of the scripts of those ads, called "Soft Doctor," "Hard Doctor," "Soft Scissors," "Hard Scissors," "Soft Baby," "Hard Baby," and "Doctor" in both Spanish and English translations.

53. As a part of its educational activities, NRL-ETF produces a newsletter called "Life Cycle."

54. The September 1999 issue of "Life Cycle" focused on partial-birth abortion. A true and accurate copy of that newsletter is attached hereto as Exhibit A-7.

55. As a part of its continuing efforts to protect the life of the unborn, NRLC has lobbied for several years for the passage of the Partial-Birth Abortion Ban Act.

56. On March 28, 2000, NRLC produced a document called "Key Facts on the Partial-Birth Abortion Ban Act. A true and accurate copy of that document is attached hereto as Exhibit A-8.

57. In 2000, NRLC produced educational materials called "Test Your Knowledge." Included in these materials were questions regarding presidential candidates George W. Bush and Al Gore and their positions on abortion. A true and accurate copy of those materials are attached hereto as Exhibit A-9. [10 (8 PCS/MC 271)]

58. As a part of its grass roots lobbying to override President Clinton's veto of the Partial-birth Abortion Ban Act, NRLC initiated a campaign called the "National Campaign to End Partial-Birth Abortions Hotline." This service encouraged the public to assist in lobbying for the override by sending messages through Western Union to be delivered to the caller's Senators, Representatives and President Clinton. It also allowed the caller to order educational materials to distribute if the caller wanted to be so involved. A true and accurate copy of the voice mail script of that hotline is attached hereto as Exhibit A-10.

59. Attached hereto, as Exhibit A-11, is a true and accurate copy of the thank you letter sent to those who requested Western Union messages be sent via the hotline.

60. Attached hereto, as Exhibit A-13, is a true and accurate copy of the ad called "What the nurse saw . . ." which was published to educate the public on the partial-birth abortion procedure and how to get involved with the hotline.

61. Also, as a part of its lobbying efforts to pass the Partial-Birth Abortion Ban Act, NRLC produced educational ads on the partial-birth abortion procedure and urged people to call their specific Senator, mentioned by name, who had voted against the act and ask him to change his vote.

62. Attached hereto, as Exhibit A-12, is a true and accurate copy of one such message called "You know its wrong" and asking "Why doesn't Russ Feingold?"

63. Although not directly related to abortion, euthanasia, or cloning, NRLC, NRL-ETF, and NRL-PAC have become involved in the fight against the BCRA and its predecessor bills [11 (8 PCS/MC 272)] because of the negative impact they would have on our educational and lobbying efforts to protect the right to life.

64. On November 8, 1995, NRLC sent a letter to Senators explaining its problems with S.1219, the "Senate Campaign Finance Reform act of 1995." Specifically, it explained that NRLC, NRL-ETF, and NRL-PAC would be harmed because (a) it would "almost entirely eliminate involvement in the political

process for ordinary citizens who are not independently wealthy," (b) the new definition of "express advocacy" would include "issue advocacy" such that citizen groups that were not PACs could not inform the public about the candidate's positions and voting records, and (c) that it "authorized an unconstitutional prior restraint" by allowing the FEC to enjoin an expenditure where there is a "substantial likelihood that a violation . . . is about to occur." A true and accurate copy of that letter is attached hereto as Exhibit B-1.

65. On December 12, 1995, a similar letter was sent to Representatives regarding H.R. 2566, the "House Bipartisan Clean Congress Act of 1995." In addition to the above objections, H.R. 2566 was problematic because the provision "balancing spending limits with independent expenditures is unworkable." A true and accurate copy of that letter is attached hereto as Exhibit B-2.

66. On March 13, 1996, I, David N. O'Steen, testified on behalf of NRLC and NRL-PAC before the U.S. Senate Committee on Rules and Administration Campaign Finance Reform. During that testimony, I outlined the above objections and explained their effect on NRLC and NRL-PAC. A true and accurate copy of that statement is attached hereto as Exhibit B-3. [12 (8 PCS/MC 273)]

67. On February 19, 1997, NRLC Legislative Director, Douglas Johnson, prepared "A Critique of the Speech-Restriction Provisions of the Shays-Meehan (HR 493) and Farr (HR 600) 'Campaign Reform' Bills." Specifically that critique outlined the First Amendment protections for political speech and how each bill contained provisions suppressing issue advocacy and independent expenditures. A true and accurate copy of that document is attached hereto as Exhibit B-4.

68. On that same day, Mr. Johnson also prepared and distributed "A Critique of the Speech-Restriction Provisions of the McCain-Feingold 'Campaign Reform' Bill." This critique, like the one above, described the First Amendment protections for political speech and how the provisions of S. 25 suppress issue advocacy and independent expenditures. A true and accurate copy of that document is attached hereto as Exhibit B-5.

69. On April 3, 1997, Douglas Johnson, NRLC Legislative Director, and Mike Beard, President of the Coalition to Stop Gun Violence, co-issued an article entitled "Thanks, Senator, But We Really Don't Need Your Permission to Publish Your Voting Record." This article details how "pending 'campaign reform' proposals would gag [their] institutions." A true and accurate copy of that article is attached hereto as Exhibit B-6.

70. On Aril 16, 1997, NRLC issued a press release criticizing a caucus of 23 Democratic members of the House of Representatives, known as the "Blue Dogs" for proposing "a so-called 'campaign reform' bill that would severely restrict the right of citizens and associations of citizens to communicate with the public about those who hold or seek public office." A true and accurate copy of that press release is attached hereto as Exhibit B-7. [13 (8 PCS/MC 274)]

71. On April 25, 1997, I, David N. O'Steen, testified before the Bipartisan Freshman Campaign Finance Reform Task Force, U.S. House of Representatives, regarding the "Freedom of Political Speech: The Heart of a Healthy Democracy." During that speech I spoke on behalf of NRLC and NRL-PAC and explained how the so-called campaign finance reform would have disastrous consequences for our organizations. A true and accurate copy of that statement is attached hereto as Exhibit B-8.

72. As a part of that testimony, I pointed out that the current "campaign finance reform" proposals would harm citizen groups such as NRLC by (a) redefining constitutionally protected "issue advocacy" as highly regulated "express advocacy," (b) limiting the amount that may be spent on "independent expenditures," (c)

limits publication of candidates' voting records and positions on current issues," (d) authorizing the FEC to seek injunctions to prevent political speech that it believes will violate the law, and (e) enhancing the political power of the institutional media at the expense of the ordinary citizen and citizens' group.

73. On July 21, 1997, NRLC published a press release detailing how a "'campaign reform' plan being promoted by the League of Women Voters (LWV) would trample on the rights of issue-oriented groups to communicate directly with the public regarding positions and votes of politicians." The LWV plan would ban "any paid communication with the general public that uses a federal candidate's name or likeness within ninety days of a primary or of a general election." Such a ban would harm issue-oriented citizen groups such as NRLC by prohibiting them from distributing congressional scorecards or any other voter education efforts [14 (8 PCS/MC 275)] for three months before each election. A true and accurate copy of that press release is attached hereto as Exhibit B-9.

74. As a part of its lobbying activities, NRLC sent a letter to Senators on September 9, 1997, explaining its opposition to the "revised" McCain-Feingold bill. Specifically, this letter details how "the First Amendment is not a 'Loophole'" and explains that the "definition of 'contribution' is so broad that it would effectively ban incorporated citizen groups or unions from engaging in many constitutionally protected lobbying and issue-advocacy activities at any time of the year" and that by treating issue-oriented groups as PACs and requiring them to file detailed reports, issue advocacy would be suppressed.

75. On September 15, 1997, NRLC issued a similar letter to Members of the House of Representatives. A true and accurate copy of that letter is attached hereto as Exhibit B-11.

76. On September 22, 1997, Doug Johnson, NRLC Legislative Director, issued a memo to journalists and other interested

parties once again explaining how McCain-Feingold had been mischaracterized "as addressing 'the misuse of advertisements that advocate issues' or 'campaigns that skirt restrictions by promoting candidates . . . [a] major . . . abuse." Specifically, asking that journalists "not characterize communications that are regarded as core protected speech under the First Amendment as 'abuses.'" A true and accurate copy of that memo is attached hereto as Exhibit B-12.

77. As yet another attempt to educate the press and public regarding campaign finance reform, on September 6, 1997, NRLC issued a press release explaining how the U.S. Supreme Court had refused to review a First Circuit ruling that struck down a set of speech-restrictive [15 (8 PCS/MC 276)] regulations issued by the FEC that were similar to those found in the McCain-Feingold bill. A true and accurate copy of that press release is attached hereto as Exhibit B-13.

78. On October 21, 1997, NRLC issued several radio ads mentioning the names of candidates who had endorsed the McCain-Feingold bill and demonstrating the effect of that endorsement on political speech. True and accurate copies of ads mentioning the names of Rep. Zach Wamp and Rep. Charlie Stenholm are attached hereto as Exhibits B-14 and B-15 respectively.

79. I believe that the effectiveness of the above ads can be demonstrated by an article written by Amy Keller in the Thursday, October 23, 1997, issue of Roll Call titled "National Right to Life Airs Radio Spots Blasting Two Members on Campaign Reform." Just the fact that the article was written shows, in my opinion, that the ads were successful in bringing attention to the problems of McCain-Feingold. A true and accurate copy of that article is attached hereto as Exhibit B-16.

80. On November 1 and 3, 1997, ads similar to those run regarding Reps. Wamp and Stenholm were run regarding Rep.

Chris Shays and Sen. Russ Feingold. Again these ads were intended to demonstrate the devastating effects of McCain-Feingold and Shays-Meehan on the political speech of citizens and citizen groups. True and accurate copies of the scripts of the ads mentioning Rep. Shays and Sen. Feingold are attached hereto as Exhibits B-17, B-19 and B-18 respectively.

81. On November 3, 1997, NRLC issued a press release describing its radio spots that were being run in Kentucky criticizing Rep. Scotty Baesler (D-Lexington) "for his authorship of [16 (8 PCS/MC 277)] a bill (HR 1366) that would severely restrict the right of citizens' groups to disseminate information on the voting records or positions of specific politicians." True and accurate copies of both the press release and the ads mentioning the name of Rep. Scotty Baesler are attached hereto as Exhibit B-21.

82. Also on November 3, 1997, NRLC issued a similar press release regarding ads being run in Wisconsin criticizing Sen. Russ Feingold (D-WI). True and Accurate copies of both the press release and the ads mention the name of Sen. Feingold are attached hereto as Exhibits B-22 and B-23 respectively.

83. On November 7, 1997, NRLC issued yet another press release regarding an incumbent's position on McCain-Feingold. Specifically, this press release highlighted the ads being run against Sen. McCain (R-AZ) in Arizona, Iowa and New Hampshire. True and accurate copies of the press release and the ads which began running on November 6, 1997, are attached hereto as Exhibit B-24.

84. On November 18, 1997, NRLC and Arkansas Right to Life jointly issued a press release criticizing Rep. Asa Hutchinson's "authorship of a bill to regulate ads by citizen groups if they mention the name of a member of Congress." True and accurate copies of both the press release and the ads are attached hereto as Exhibit B-25.

85. Attached hereto, as Exhibit B-26, are true and accurate copies of correspondence between NRLC and Sen. John McCain. Said letters were intended to demonstrate the restrictive nature of McCain-Feingold to one of its key authors and proponents. [17 (8 PCS/MC 278)]

86. In February 1998, NRLC continued to run issue ads criticizing Sen. Feingold and Sen. McCain for their sponsorship of McCain-Feingold. Further, NRL-PAC, in conjunction with South Carolina Citizens for Life Pac issued an ad expressly advocating the defeat of Sen. McCain in the primary to be held February 19, 2002. True and accurate copies of the press release and the ads are attached hereto as Exhibit B-27.

87. On March 5, 1998, NRLC issued "An Open Letter from the National Right to Life Committee to the Nation's Roman Catholic Bishops" in response to a letter from Senator McCain criticizing NRLC for opposing his "campaign reform" bill." The purpose of the letter was to explain why NRLC is vigorously opposed to the legislation. A true and accurate copy of that letter is attached hereto as Exhibit B-28.

88. On Wednesday, October 21, 1998, NRLC issued a press release regarding its Scorecard for the 1997-98 Congress. "The 12-page publication, 'Congress Roll Call Votes on Abortion and other Right-to-Life Issues During 1997 and 1998,' provides detailed and reliable information on the positions of all current members of Congress on major public policy issues relating to abortion, assisted suicide, and euthanasia" and gives each lawmaker "a score reflecting how often he voted in agreement with the positions taken by NRLC." A true and accurate copy of that press release is attached hereto as Exhibit B-29.

89. On October 26, 1998, NRLC issued a press release highlighting NRL-PAC's launch of radio ads "criticizing 'reformer' Baesler for his hypocritical silence as New York fat cat spends $400,000+ on pro-Baesler TV attack ads." True and

accurate copies of the press release, supporting documentation, and the ad are attached hereto as Exhibit B-30. [18 (8 PCS/MC 279)]

90. On October 29, 1998, NRLC issued a press release regarding NRL-PAC's ads exhorting votes for Ruddy Izzard over incumbent Charles Stenholm "for his promotion of legislation to restrict commentary on politicians by private advocacy groups such as Right to Life groups." True and accurate copies of both the press release and ad are attached hereto as Exhibit B-31.

91. Attached at Exhibit B-32 is a true and accurate copy of a press release issued by Sen. McCain on January 10, 2000, regarding NRL-PAC's ads against him. I believe that Sen. McCain's response shows that NRL-PAC's ads are effective or he wouldn't bother to refute them so publicly.

92. South Carolina and National Right to Life issued a joint press release regarding their PAC's "joint sponsorship of a 'substantial' week-long radio ad buy" urging "listeners who want 'a strongly pro-life president' not to vote for McCain." True and accurate copies of the press release and ads are attached hereto as Exhibit B-33.

93. On January 12, 2000, South Carolina Citizens for Life PAC and NRL-PAC issued a joint press release refuting the claims raised by McCain in his January 10, 2000, press release. The joint press release points out the inaccuracies in McCain's press release. A true and accurate copy of that press release is attached hereto as Exhibit B-34.

94. Attached as Exhibit B-35, is a true and accurate copy of a press release issued on January 10, 2000 by NRLC regarding Virginia Society for Human Life's victory over the FEC in a case challenging an FEC rule that expanded the definition of "express advocacy" to include "issue advocacy." [19 (8 PCS/MC 280)]

95. Attached as Exhibit B-36 are true and accurate copies of a press release issued on January 19, 2000, regarding an ad issued jointly by NRLC and New Hampshire Citizens for Life and an ad issued jointly by NRL-PAC and NHCL-PAC. The press release includes the text of the two ads and explains that the ad that specifically says "vote for somebody else" is express advocacy, paid for by the PACs, but that the other ad is issue advocacy because it does not expressly exhort the hearer to "vote for or against" any candidate. Further, true and accurate copies of the documentation supporting the claims in both the ads and the press release is included.

96. Attached, as Exhibit B-37, is a true and accurate copy a press release, issued February 16, 2000, by South Carolina Citizens for Life and National Right to Life regarding their PAC's joint "radio ad highlighting reasons why pro-life citizens should support Governor George Bush over Senator John McCain in Saturday's primary" and a true and accurate copy of the ad itself is attached as Exhibit B-38.

97. On Wednesday February 9, 2000, National Right to Life and South Carolina Citizens for Life issued a joint press release announcing their endorsement of George W. Bush for President. They also announced that their PACs "are launching new radio ads throughout South Carolina, urging pro-life voters to oppose John McCain and vote for George Bush." A true and accurate copy of that press release, ad, and supporting documentation are attached hereto as Exhibit B-39.

98. On July 11, 2001, NRLC sent a letter to members of Congress urging them to vote for the Ney-Wynn Substitute because the Manager's Amendment sent by Reps. Shays and [20 (8 PCS/MC 281)] Meehan would not solve the grave threats posed by the original bill. Specifically, NRLC and other similar citizens' advocacy groups and "member[s] of Congress could be deemed to have engaged in illegal 'coordinated' activity, for example, if the group distributed printed literature publicizing the results of a candidate questionnaire or "pledge" on one or more

issues." A true and accurate copy of said letter is attached hereto as Exhibit B-41.

99. On July 22, 2001, NRLC Legislative Director Douglas Johnson, on behalf of NRLC, sent a letter to members of Congress reiterating NRLC's strong opposition to "the Shays-Meehan bill (H.R. 2356) because of multiple provisions that would greatly impair the rights of NRLC and its affiliates to effectively inform the public about legislative events in Congress, and would place both such organizations and members of Congress at legal risk for engaging in constitutionally protected communications regarding public policy issues. The letter specifically asks members of Congress not to sign a discharge petition that would force the bill to the House Floor. A true and accurate copy of said letter is attached hereto as Exhibit B-42.

100. As a part of NRLC's goal of discouraging the passage of McCain-Feingold, I wrote an article called "Silencing America." That article explains in detail the U.S. Supreme Court's protection of "issue advocacy" and regulation of "express advocacy." It then goes on to explain the policy problems with passing the BCRA, the problem with the "two-pronged" attack that the broadened definitions of "contribution" and "coordination" cause by making independent express advocacy expenditures extremely difficult if not impossible to do, and the problem with defining "express advocacy" as any communication containing the name or likeness of a [21 (8 PCS/MC 282)] candidate within 30 days of a primary or 60 days of a general election, among others. A true and accurate copy of that article is attached hereto as Exhibit B-43.

101. Attached hereto, as Exhibit B-44, is a true and accurate copy of a brochure put out by West Virginians for Life, Inc., explaining the problems with so-called campaign reform. This brochure accurately reflects the problems that NRLC has with campaign reform.

102. Because President Clinton's health care plan would essentially require that abortion on demand be provided by insurance companies as part of the basic benefits package, NRLC decided to educate the public and others regarding the damage Clinton's plan would do to the pro-life cause.

103. In June of 1993, NRLC ran an ad in Roll Call asking Congress not to approve tax-funded abortion on demand by repealing the Hyde Amendment. A true and accurate copy of that ad is attached hereto as Exhibit C-1.

104. Attached hereto, as Exhibit C-2, is a true and accurate copy of an ad ran in the September 20, 1993, issue of Roll Call condemning Clinton's health care plan because of its provision including universal insurance coverage for abortion.

105. As a part of NRLC's continuing efforts to educate the public and Congress about the dangers of the Clinton Health Care plan, NRLC produced an ad asking "Should federal law force every working American . . . every employer . . . every state government . . . to pay for abortion on demand?" A true and accurate copy of said ad is attached hereto, as Exhibit C-3.

106. On August 4, 1994, NRLC ran an ad in Roll Call explaining how "the abortion 'opt-out compromise' is a stealth plan for federally funded, federally mandated abortion services. [22 (8 PCS/MC 283)] Specifically, even with the opt-out plan (a) "employers would be forced to pay for abortion on demand," (b) clinics which do not currently have abortion providers would be forced to do so because of the mandate that "federally guaranteed services, including abortion, be uniformly available across the nation," (c) the "proposed Medicare Part C Trust Fund and other federally subsidized health plans would extend tax funded abortion to over 40% of the population," and (d) the bill "would pre-empt state restrictions on federally guaranteed benefits" such as "parental consent laws, waiting periods, and limits on third-

trimester abortions." A true and accurate copy of said ad is attached hereto as Exhibit C-4.

107. Also in 1994, NRLC, published an ad called "What is the Abortion Mandate?" This ad, while explaining the mandates in the Clinton Health Security Act, i.e. the requirement that "every local health plan provide and pay for 'medically necessary or appropriate' abortions," explains that according to recent polls a majority of Americans oppose the abortion mandate. This ad was published in the National Catholic Register on June 28, 1994. True and accurate copies of this ad is attached hereto as Exhibit C-5 and Exhibit C-12.

108. Because of NRLC's dedication to preserving the right to life of all people, NRLC also ran ads explaining that Clinton's Medicare Plan would result in a rationing of care "which may someday prevent you or a loved one from receiving life-saving medical treatment" and make "it illegal for Americans over 65 to supplement government Medicare payments with their own money in order to get unrationed, unmanaged, fee-for-service health insurance to protect their own lives and health." Attached hereto, as Exhibit C-6, is a true and accurate copy of said ad. [23 (8 PCS/MC 284)]

109. NRLC also published ads called "When Bill Clinton says 'Health care for all' . . . he's forgetting someone" to educate the public about the problems with the Clinton health care plan and encourage citizens to get involved by sending messages to their Senators and Representatives telling them that they do not want to be forced to pay for abortion and are against health care rationing. Said ad is attached hereto as Exhibit C-7.

110. NRLC also produced a video called "Condemned to Rationing: The Clinton Medicare Plan." The purpose of this video was to show the negative impact that Clinton's Medicare Plan would have on our older citizens. True and accurate copies of the "final script," dated November 8, 1996, and the "script," dated

January 22, 1997, are attached hereto as Exhibits C-8 and C-9 respectively.

111. As a part of its campaign to educate the public and Congress regarding the Clinton-Gephardt and Clinton-Mitchell bills, NRLC published an ad called "Abortion as a Federally Mandated Benefit: It's Not the Status Quo!" This ad urges members of Congress to vote for the Hall-Hyde-Kaptur Amendment. A true and accurate copy of the ad is attached hereto as Exhibit C-11.

112. NRLC also ran an ad called "Your Tax Dollars at Work . . . If the Clintons Have Their Way" and depicting a check to the abortion industry in the amount of seven hundred forty-two million dollars ($742,000,000) representing 1.6 million abortions. This ad was intended to educate the public about the amount of money that American taxpayers would pay to fund abortions under the Clinton plan. A true and accurate copy of this ad is attached hereto as Exhibit C-13. [24 (8 PCS/MC 285)]

113. Further, NRLC produced an ad explaining how the Clinton Plan would create rationing by "plac[ing] strict price controls on insurance premiums, forcing private insurers to ration to cover costs" resulting in a "law that would prevent you and your family from obtaining adequate coverage." This ad, called "Clinton's Rationing Plan would deny lifesaving health care to these vulnerable people" and showing pictures of a pre-mature baby and an older gentleman explains how health care rationing in Europe "has come at the expense of the young, people with disabilities and older people." A true and accurate copy of this ad is attached hereto as Exhibit C-14.

114. NRLC also supports the Unborn Victims of Violence Act (H.R. 503, S. 480) "which would recognize unborn children as victims under 68 federal laws dealing with crimes of violence."

115. As a part of educating the public and Congress regarding its stance on the act, NRLC published ads urging Congress to

pass the Unborn Victims of Violence Act (H.R. 503, S. 480) without the Lofgren "one-victim" substitute. The ads featured the stories of Shiwona Pace and Tracy Scheid Marciniak and were run on April 23, 2001, and May 24, 2001. True and accurate copies of those ads are attached hereto as Exhibits D-1 and D-2 respectively.

116. NRLC also carries information regarding the Unborn Victims of Violence Act on its website. Attached hereto, as Exhibit D-3, are true and accurate hard copies of information that was on our site as of May 8, 2001, regarding that act.

117. Just as we have with other issues, NRLC has encouraged citizens to contact their Senators and ask them to vote for the Unborn Victims of Violence Act, through a hotline, [25 (8 PCS/MC 286)] utilizing pre-written messages from Western Union. True and accurate copies of the Western Union mailgrams are attached hereto as Exhibit D-4.

118. A true and accurate copy of the thank you letter sent to people who arranged to send telegrams to their U.S. Senators in support of the Unborn Victims of Violence Act is attached hereto as Exhibit D-6.

119. As a part of its ongoing efforts to encourage citizens to get involved by lobbying their Senators, NRLC sent letters to pastors in June 2001, educating them on the need for and encouraging them to engage their congregation in supporting the Unborn Victims of Violence Act. A true and accurate copy of this letter is attached hereto as Exhibit D-5.

120. Attached hereto as Exhibit E-1, is a true and accurate copy of a document entitled "85% of Voters Say YES to the Ros-Lehtinen/Abraham Child Custody Protection Act." This document shows the public support behind the Child Custody Protection Act and NRLC's support of the Child Custody Protection Act.

121. NRLC produced a series of communications concerning the issue of cloning and stating their position on the topic.

122. Attached hereto as Exhibit F-1, is a true and accurate copy of a document entitled "Legislative Alert – Via Fax Broadcast Where Possible," dated May 13, 1992.

123. This document is a fax which describes H.R. 2507 and the federal funding of fetal tissue transplants. The fax explains that NRLC co-sponsored ads on the issue in *Roll Call* and the faxed materials should be used in lobbying activities. It also includes advertisements urging [26 (8 PCS/MC 287)] Congress to vote no on H.R. 2507 along with a letter to members of Congress regarding H.R. 2507.

124. Attached hereto as Exhibit F-2, is a true and accurate copy of the March 1996 issue of "Life Cycles" produced by NRL-ETF.

125. This document explains ethical standards associated with fetal tissue transplants and live human embryo research. Further, it explains ethical problems associated with such issues by citing examples. Also included is a report from Paul Ranalli, M.D. concerning Fetal Tissue Transplants: Failure or Success. In addition, it contains an article from Christopher Currie on "Hopes of the ill should not rely on abortion-dependent research." Another report is issued by Richard Doerflinger, entitled "The Human Embryo Research Panel: Creating Life to Destroy It." The last article is "Human Embryos Research Sources?" by Joseph J. Piccione, J.D.

126. Attached hereto as Exhibit F-3, is a true and accurate copy of a document entitled "Facts About Frozen Embryos and the Adoption Alternative," dated July 17, 2001, produced by NRLC.

127. This document describes the myths and realties of frozen embryos through a series of Newspaper quotes and cited studies.

128. Attached hereto as Exhibit F-4, is a true and accurate copy of a document entitled "Take Action Now on the Unborn Victims of Violence Act," dated June 24, 2001 and produced by NRLC.

129. This document is a congressional alert about the Weldon-Stupak Bill to ban cloning of human embryos. The alert mentions Representative Dave Weldon, Representative Bart [27 (8 PCS/MC 288)] Stupak and Representative Jim Greenwood. It also urges citizens to contact their House representatives to vote for Weldon-Stupak.

130. Attached hereto as Exhibit F-5, is a true and accurate copy of a document entitled "Americans to Let Congress Know How They Feel About Stem Cell Research That Would Require the Destruction of Human Embryos," dated August 15, 2001 and produced by NRLC.

131. This communication includes a press release about NRLC's efforts to have Americans telegram their representatives about their opposition to stem cell research. It also includes a generic letter to the editor stating NRLC's opposition to stem cell research and provides information about their telegram program. Lastly, it includes an advertisement concerning human embryos and the telegram program sponsored by NRLC.

132. Attached hereto as Exhibit F-6, is a true and accurate copy of a document entitled "National Right to Life Launches New Radio Ads in Eight States, Urging Calls to Senators in Support of Brownback-Landrieu Bill to Ban All Human cloning and Human Embryo Farms," dated April 19, 2002, produced by NRLC.

133. This communication is a press release concerning radio advertisements created by NRLC about support for the Brownback-Landrieu bill, S. 1899, to ban cloning of human embryos. It also includes scripts of such advertisements in Arkansas, Georgia, Indiana, Iowa, Missouri, North Dakota, Rhode Island and South Dakota.

134. Attached hereto as Exhibit F-7, is a true and accurate copy of a document entitled "NRLC Congressional Alert: Cloning," dated 5/9/2002 and produced by NRLC. [28 (8 PCS/MC 289)]

135. This communication is an e-mail from NRLC regarding the U.S. Senate voting on whether to ban the cloning of human embryos. The e-mail urges citizens to phone, fax, or e-mail offices of Senators about the bill. The e-mail explicitly references the names of several U.S. Senators.

136. Attached hereto as Exhibit F-9, is a true and accurate copy of a document entitled "New Right to Life Radio Ad Slams Senators Johnson and Daschle for Blocking Bill, Backed by President Bush, to Ban Human Embryo Cloning," dated May 9, 2002, and produced by NRLC.

137. This communication includes a press release describing an NRLC advertisement titled "Does Tim Johnson Favor Harvesting Human Clones?" The press release describes the advertisement's criticism of Johnson and his co-sponsorship of S. 2076. The communication also includes a script of the advertisement.

138. Attached hereto as Exhibit F-11, is a true and accurate copy of a document entitled "You can help NRLC's 'No Human Embryo Farms' Ad Campaign!'" and produced by NRLC.

139. This communication is a copy of a NRLC web page asking supporters to donate money for this advertising campaign.

140. NRLC produced a series of documents and a legislative alert that described their position against the Freedom of Choice Act ("FOCA"). Each communication describes the ill-effects of FOCA while some include clear references to candidates for federal office.

141. Attached hereto as Exhibit G-1, is a true and accurate copy of a document entitled "National Right to Life Legislative Alert: Congress to Vote on Whether to Ban All Abortion Limits," dated June 25, 2002. [29 (8 PCS/MC 290)]

142. This legislative alert urges citizens to contact their Congressmen and Senators to oppose the FOCA. It also analyzes the bill along with comments from its major supporters. The alert mentions the names of presidential candidates George Bush, H. Ross Perot and Bill Clinton. It also mentions Congressman Don Edwards, Senator Edward Kennedy, Attorney General William P. Barr and Congressman Henry J. Hyde.

143. Attached hereto as Exhibit G-2, is a true and accurate copy of a document entitled "ABORTION: Will Congress Be Driven To EXTREMES?"

144. This document presents NRLC's opposition to FOCA and analyzes its effect, advocating for the defeat of FOCA.

145. Attached hereto as Exhibit G-3, is a true and accurate copy of a document entitled "The 'Freedom of Choice Act' . . . It Will Hit You Close to Home."

146. This document, produced by NRLC, explains the effect of the FOCA on the abortion laws of various states and urges the defeat of this legislation.

147. Attached hereto as Exhibit G-4, is a true and accurate copy of a document entitled "The 'Freedom of Choice Act' . . . It Will Hit You Close to Home", dated May 26-27, 1993.

148. This advertisement, produced by NRLC, was run in three publications circulated on Capitol Hill and it explains the effect of the FOCA on the abortion laws of various states and urges the defeat of this legislation.

149. Attached hereto as Exhibit G-5, is a true and accurate copy of a document entitled "ABORTION: Will Congress Be Driven To EXTREMES?"

150. This document presents NRLC's opposition to FOCA and analyzes its effect, advocating the defeat of FOCA. [30 (8 PCS/MC 291)]

151. Attached hereto as Exhibit G-6, is a true and accurate copy of a document entitled "The Freedom of Choice Act: Will Congress Go To EXTREMES?"

152. This document presents NRLC's opposition to FOCA and analyzes its effect.

153. Attached hereto as Exhibit G-7, is a true and accurate copy of a document entitled "The 'Freedom of Choice Act' . . . Whom Would It Protect?"

154. This document, produced by NRLC, indicates that the FOCA would protect Dr. Abu Hayat, a doctor who was "sentenced to 1 to 4 years in prison" for violating New York abortion laws. The document mentions Congressman Canady and Congresswoman Ros-Lehtinen and discusses the Ros-Lehtinen Amendment.

155. Throughout its existence, NRLC has produced Scorecards regarding the United States Congress members and their votes on abortion related issues. The communications provide an overview of annual abortion issues addressed by Congress and explicitly refer to federal officeholders' names while indicating whether they voted pro-life or pro-abortion.

156. Attached hereto as Exhibit H-1, is a true and accurate copy of a document entitled "U.S. Congress Roll Call Votes on Abortion: 1991", dated December 31, 1991.

157. This document describes votes a variety of Congress' votes related to abortion. It also mentions all the names of then-present members of the United States House of Representatives and the United States Senate. The document includes a roll call vote chart indicating whether named representatives have voted pro-life or pro-abortion. [31 (8 PCS/MC 292)]

158. Attached hereto as Exhibit H-2, is a true and accurate copy of a document entitled "Complete 1992 House of Representatives Roll Call Votes Scored by National Right to Life Committee."

159. This document describes a variety of the House of Representatives votes related to abortion. The document includes a roll call vote chart indicating whether named representatives have voted pro-life or pro-abortion.

160. Attached hereto as Exhibit H-3, is a true and accurate copy of a document entitled "Senate Roll Call Votes Scored By National Right To Life Committee: 1992."

161. This document describes a variety of the Senate's votes related to abortion. The document includes a roll call vote chart indicating whether named senators have voted pro-life or pro-abortion.

162. Attached hereto as Exhibit H-4, is a true and accurate copy of a document entitled "National Right to Life Scorecard, U.S. House 1993 Key Roll Call Votes on Abortion," dated December 16, 1993.

163. This document describes a variety of the House of Representatives' votes related to abortion. The document includes a roll call vote chart indicating whether named representatives have voted pro-life or pro-abortion.

164. Attached hereto as Exhibit H-5, is a true and accurate copy of a document entitled "National Right to Life Scorecard, U.S. Senate 1993 Key Roll Call Votes on Abortion," dated December 16, 1993. [32 (8 PCS/MC 293)]

165. This document describes a variety of the Senate's votes related to abortion. The document includes a roll call vote chart indicating whether named senators have voted pro-life or pro-abortion.

166. Attached hereto as Exhibit H-6, is a true and accurate copy of a document entitled "U.S. House of Representatives Votes on Abortion 1995," dated May, 1996.

167. This document describes a variety of the House of Representatives' votes related to abortion. The document includes a roll call vote chart indicating whether named representatives have voted pro-life or pro-abortion.

168. Attached hereto as Exhibit H-7, is a true and accurate copy of a document entitled "U.S. Senate Votes on Abortion 1995," dated May, 1996.

169. This document describes a variety of the Senate's votes related to abortion. The document includes a roll call vote chart indicating whether named senators have voted pro-life or pro-abortion.

170. Attached hereto as Exhibit H-8, is a true and accurate copy of a document entitled "NRLC-SCORED 1996 U.S. House Roll Call Votes," dated 10/9/96.

171. This document describes a variety of the House of Representatives' votes related to abortion. The document includes a roll call vote chart indicating whether named representatives have voted pro-life or pro-abortion.

172. Attached hereto as Exhibit H-9, is a true and accurate copy of a document entitled "NRLC-Scored 1996 Senate Roll Call Votes," dated 4/25/97. [33 (8 PCS/MC 294)]

173. This document describes a variety of the Senate's votes related to abortion. The document includes a roll call vote chart indicating whether named senators have voted pro-life or pro-abortion.

174. Attached hereto as Exhibit H-10, is a true and accurate copy of a document entitled "U.S. Congress Roll Call Votes on Abortion and Other Right-to-Life Issues During 1997 and 1998," dated October 1998.

175. This document describes a variety of the Congress' votes related to abortion. The document includes a roll call vote chart indicating whether named representatives have voted pro-life or pro-abortion.

176. Attached hereto as Exhibit H-11, is a true and accurate copy of a document entitled "U.S. Congress 1999 Roll Call Votes on Abortion and Other Right-to-Life Issues," dated January 2000.

177. This document describes a variety of the Congress' votes related to abortion. The document includes a roll call vote chart indicating whether named representatives have voted pro-life or pro-abortion.

178. Attached hereto as Exhibit H-12, is a true and accurate copy of a document entitled "National Right to Life Scorecard on Abortion and Other Right-to-Life Issues, U.S. House of Representatives 1999-2000," dated October 12, 2000.

179. This document describes a variety of the House of Representatives' votes related to abortion. The document includes a roll call vote chart indicating whether named representatives have voted pro-life or pro-abortion. [34 (8 PCS/MC 295)]

180. Attached hereto as Exhibit H-13, is a true and accurate copy of a document entitled "Senate Gives Final Approval to 'Clinic Access' Bill," dated May 24, 1994.

181. This document describes the "Clinic Access" bill and lists a roll call vote chart indicating whether named senators have voted pro-life or pro-abortion.

182. Attached hereto as Exhibit H-14, is a true and accurate copy of a document entitled "House Gives Final Approval to 'Clinic Access' Bill," dated May 24, 1994.

183. This document describes the "Clinic Access" bill and lists a roll call vote chart indicating whether named representatives have voted pro-life or pro-abortion.

184. In 1988, several candidates or their counsel wrote letters to radio stations regarding the broadcast of advertisements concerning candidates by independent political action committees.

185. Attached hereto as Exhibit I-1, is a true and accurate copy of a document entitled "Bob Kerrey For United States Senate," dated October 11, 1988.

186. This document is a letter from Bill Hoppner, Chairman, Kerrey for U.S. Senate, explaining that certain political advertisements ran by independent political action committees are "personal attacks." It goes on to explain that stations are not obligated to run such advertisements and states that such stations are not immune from liability if they broadcast "libelous attacks." Lastly, it explains the obligation stations have in affording affected candidates notice of such attacks and a "free opportunity to respond" to such attacks.

187. Attached hereto as Exhibit I-2, is a true and accurate copy of a document entitled "Station Manager," dated October 21, 1988. [35 (8 PCS/MC 296)]

188. This document is a letter from Robert F. Bauer, Counsel for the Democratic Senatorial Campaign Committee. It is a generic letter explaining that certain political advertisements ran by independent political action committees are "derogatory attacks." It goes on to explain that stations are not obligated to run such advertisements and states that such stations are not immune from liability if they broadcast "libelous attacks." Lastly, it explains the obligation stations have in affording affected candidates notice of such attacks and a "free opportunity to respond" to such attacks.

189. Attached hereto as Exhibit I-3, is a true and accurate copy of a document entitled "Jeffrey L. Eskin," dated October 28, 1998.

190. This document is a letter on behalf of "Friends of Bryan," Richard Bryan's authorized Campaign Committee for election to the United States Senate. The letter demands response time on behalf of Friends of Bryan to respond to advertisements aired by "the Auto Dealers." Attached hereto as Exhibit I-4, is a true and accurate copy of a document entitled "Jeffrey L. Eskin," dated October 28, 1998.

191. This document is a letter on behalf of "Friends of Bryan," Richard Bryan's authorized Campaign Committee for election to the United States Senate. The letter objects to the station running American Medical Association Political Action Committee advertisements and asks the station to cancel such advertisements. It goes on to note that the advertisements violate the Federal Election Campaign Act of 1971 as the author believes the advertisements are not independent. [36 (8 PCS/MC 297)]

192. Attached hereto as Exhibit I-5, is a true and accurate copy of a document entitled "Perkins Coie" dated October 31, 1998.

193. This document is a letter to a station manager from Robert F. Bauer, Counsel, Burdick Campaign Committee, Inc. It explains that certain political advertisements ran by independent political action committees are "derogatory attacks." It goes on to explain that stations are not obligated to run such advertisements and states that such stations are not immune from liability if they broadcast "libelous attacks." Lastly, it explains the obligation stations have in affording affected candidates notice of such attacks and a "free opportunity to respond" to such attacks.

194. Attached hereto as Exhibit I-6, is a true and accurate copy of a document entitled "Dear Station Manager:" dated October 31, 1998.

195. This document is a letter from Jeffrey L. Eskin regarding independent organizations and their "negative commercials" aired against Governor Richard Bryan. The letter sets forth the station's general obligations under the law with regard to the airing of such advertisements. In the letter, Mr. Eskin asks the station to review National Right to Life's advertisements concerning Governor Bryan's abortion position and to refuse the broadcast of such advertisements.

196. Attached hereto as Exhibit I-7, is a true and accurate copy of a document entitled "Fax Transmission Sheet, Friends for Bryan," dated 10/31/88.

197. This is a fax sent on behalf of "Friends for Bryan," the Bryan for U.S. Senate Campaign, to "KOH News." The fax urges radio stations to not air National Right to Life's [37 (8 PCS/MC 298)] advertisements concerning Senator Hecht's abortion funding position. The communication includes the name of Senate candidate Chic Hecht and refers to the Bryan for U.S. Senate campaign.

198. Attached hereto as Exhibit I-8, is a true and accurate copy of a document entitled "Fax Transmission Sheet, Friends for Bryan," dated 11/1/88.

199. The document is a fax from Jeff Eskin, on behalf of Friends for Bryan, to Ken Mendenhall. The letter informs the radio station of its legal obligations with regard to independent organizations running "negative commercials" against Governor Richard Bryan. It then asks the station to review one of National Right to Life's advertisements concerning Senator Hecht and his stance on abortion. Lastly, it urges the station to refuse to run these political advertisements of National Right to Life.

200. NRLC does not believe any of its activities corrupt or appear to corrupt any federal, state or local candidates or officeholders. NRLC and its members have various interests that are served through communications and other activities with its members and the general public, and these political activities are necessarily funded with money. Indeed, NRLC believes that its

activities, rather than creating an appearance of corruption, instill in the general public a sense of confidence that avenues for pursuing legitimate common interests are available to all. [38 (8 PCS/MC 299)]

I declare under penalty of perjury that the foregoing is true and correct. Executed on this date: October 4, 2002

/s/ David N. O'Steen
David N. O'Steen, Executive Director

[1 (8 PCS/MC 1)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, *et al.*,)
Plaintiffs,) Case No. 02-0582
v.) (CKK, KLH, RJL)
) *All consolidated*
Federal Election Commission, *et. al.*,) *cases.*
Defendants.)

Declaration of U.S. Representative Mike Pence

I, Michael R. Pence, declare the following on personal knowledge or on information and belief where noted:

1. I am the Representative to the Congress of the United States of America from the Second Congressional District of the State of Indiana.

2. I was first elected to this office in A.D. 2000 and am currently a candidate for reelection.

3. In the House of Representatives, I am the Assistant Majority Whip, Chairman of the Small Business Subcommittee on Regulatory Reform and Oversight, and serve on the Judiciary and Agriculture Committees.

4. I am a United States citizen, member of Congress, candidate, voter, recipient, fundraiser, and party member, and have been, and will continue to be, injured by the Bipartisan Campaign Reform Act of 2002 ("BCRA") in each of these capacities.

5. I have a longstanding relationship with Plaintiff Indiana Family Institute, Inc. ("IFI") dating back at least ten years. The purpose of IFI is to focus attention on public issues related to [2 (8 PCS/MC 2)] traditional family values, a view with which I essentially agree. Because we agree with IFI, I and my wife have

both served on its Board of Advisors, we have supported it financially, and I continue to be a featured guest and speaker at IFI events, including fundraising events. My wife and I consider it important to support organizations such as IFI that work to see that pro-family issues are considered in state public policy debates. I plan to continue this activity in the future with respect to both IFI and other nonprofit, expressive corporations whose efforts likewise influence state and local government.

6. The BCRA chills my free speech and association rights by inhibiting my ability to assist IFI and other nonprofit (under 501(c) of the Internal Revenue Code), incorporated, expressive associations in raising funds to advance pro-family issues in state public policy debates. I have so exercised my free speech and association rights and intend to continue, but for the chill imposed by the BCRA.

7. On information and belief, IFI is recognized as a 501(c)(3) organization by the IRS. *See Declaration of Curt Smith*. Appended as *Exhibit A* is an IFI fundraising letter noting that, in the wake of a slowed economy and the September 11 terrorist attack, giving to nonprofits was down and that giving to IFI had declined by thirty percent. The IFI letter encouraged recipients to join IFI's Leadership Council by contributing one thousand dollars, noting that donors would have the opportunity to meet with me at a private briefing:

> As a member of the Leadership Council, you will receive . . . regular private briefings with national and state newsmakers and policy leaders. **The Council will host Congressman Mike Pence in the near future, we anticipate (though it is not yet confirmed) holding a special Leadership Council event with Special Prosecutor Ken Starr in 2002, and a key White House official has also agreed to schedule a briefing for IFI's Leadership Council.** I ask you to join this key group today. [emphasis in original]

[3 (8 PCS/MC 3)]

8. IFI also does fundraising dinners, which charge a per-plate fundraising charge and feature a noteworthy speaker from the pro-family movement. Additional solicitations are commonly made at such events. I have attended such events, encouraged others to attend, and anticipate being asked to be a speaker or featured guest at such events.

9. Another example of my participation in a fundraising event for a nonprofit, expressive corporation was my keynote speech at the annual fundraising banquet of Vanderburgh County Right to Life (Indiana) on April 22, 2002. On information and belief, VCRTL is recognized as a 501(c)(4) organization by the IRS, and this annual banquet is the major annual fundraising event for the organization.

10. I participated in the events described with the understanding that they were fundraising events and with the intent of assisting these organizations in their efforts to raise funds. I did and do so because these organizations promote views that I personally hold as well.

11. At the Vanderburgh County Right to Life fundraising banquet, I emphasized the "unalienable Right[]" of "Life" of the *Declaration of Independence* and concluded by exhorting the audience of over 2000 listeners to "defend the right of life," knowing that immediately after that call to action the organization's Executive Director would rise to make a solicitation for contributions to the organization to assist it in its work.

12. Often the most effective way to raise funds for a nonprofit organization at fundraising events is to have the featured speaker actually make the express solicitation for money at the close of the speech, as opposed to having another individual come to the lectern and make the solicitation. I want to be able to

use both approaches in the raising of funds for organizations whose views I support, and I intend to do so in the future. [4 (8 PCS/MC 4)]

13. Such fundraising events as are described above commonly include a presentation on the past or planned activities of the organization, either as an oral presentation (often with audio-visual enhancement) or in printed form (such as in a booklet) to show what potential donors are supporting by their past and anticipated contributions.

14. Depending on the expressive association, the activities described in the presentation often include (a) public communications (such as grassroots lobbying, issue advertising, and voter guides) that refer to a clearly identified candidate for federal office near election time and could be perceived as "promot[ing] or oppos[ing]" or "attack[ing] or oppos[ing] (unconstitutionally vague terms) a candidate for that office (because of his or her position on issues); (b) voter registration within 120 days of a federal election that ends at the election, voter identification in connection with a federal election, and get-out-the-vote activity in connection with a federal election. Vanderburgh County Right to Life is a corporation that engages in a wide range of these activities with respect to federal, state, and local elections. IFI engages in some of these activities and has asserted its intent to continue doing so and to expand into doing more of these activities. *See Declaration of Curt Smith.*

15. Some expressive associations that are incorporated also engage in independent expenditures in connection with federal candidates, with or without a connected political action committee ("PAC"), and some make contributions through their PACs to federal candidates.

16. My advocacy to audiences to support an organization where I am asked to be a speaker at a fundraising event may readily be considered by listeners to be a solicitation for funds

that will or should be spent to support the sorts of activities described in the presentation of past and planned activities at the fundraising event, even if the language of this solicitation is expressed in general terms and does not specify how the funds will or should be spent. [5 (8 PCS/MC 5)]

17. It is unclear to me whether the "principal purpose" of an expressive association such as IFI or Vanderburgh County Right to Life is to engage in voter registration, voter identification, and get out the vote activity because "principal purpose" is undefined by the BCRA, the statute is unclear as to whether such activity must be *a* principal purpose or *the* principal purpose, and it unclear whether "principal purpose" means the same as "major purpose," the legal term of art used by the United States Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1976) ("*MCFL*").

18. As a result of the unclarity of the phrase "principal purpose," many of the expressive associations for which I have raised, and intend to continue raising, funds may be considered to have a principal purpose of engaging in voter registration, voter identification, and get out the vote activity, regardless of whether this is actually the case.

19. As to expressly soliciting funds for voter registration, voter identification, and get out the vote activity, or for soliciting contributions to an expressive association that can be determined to have such activity as a "major purpose," the BCRA limits me to making such a solicitation "only to individuals" and requires that "the amount solicited from any individual during any calendar year does not exceed $20,000."

20. There is no compelling governmental interest to so limit my free speech and association rights concerning solicitations for contributions to expressive association corporations, and receipt of de minimis business corporation contributions by expressive association corporations has already been held by the federal

courts to not affect the status of the expressive association corporation as an MCFL-type organization as described by the Supreme Court in the *MCFL* case. [6 (8 PCS/MC 6)]

21. The requirement that "the amount solicited from any individual during any calendar year does not exceed $20,000" is by its terms a limitation on *solicitation*, not *contribution*, and unconstitutionally exposes me to liability for asking individuals for a $20,000 contribution when the individual has already been solicited for a contribution of any amount in that calendar year. This problem is exacerbated by the fact that my solicitations are typically done to groups, in which it is impossible who all is in the audience and what solicitations have been made already to individuals.

22. It is my intent to continue implicit and explicit solicitation of funds for IFI and other nonprofit, issue-advocacy groups that stand for causes in which I believe. However, the BCRA chills my free association and speech rights to engage in such solicitation, and unless these unconstitutional burdens of the BCRA are lifted, I will not engage in such solicitation. [7 (8 PCS/MC 7)]

I declare under penalty of perjury that the foregoing is true and correct. Executed on this date: September 26, 2002

/s/ Mike Pence

Mike Pence, Member of Congress

DECLARATION OF ROCKY PENNINGTON

[DEV 8, Tab 31]

1. My name is Rocky Pennington.

2. I am a Republican political consultant. I am the owner and President of three Florida companies engaged in political activities: Southern Campaign Resources, Direct Mail Systems, Inc., and Summit Communications. Southern Campaign Resources, which I founded in 1982, does general consulting primarily for Florida state campaigns, but we have also done Congressional races in Florida, including Congressman Cliff Steams' first race in 1988 in Ocala, Bill Sublette's 2000 campaign in the Eighth Congressional district, and Congressman Jeff Miller's 2001 special election in the Panhandle. Direct Mail Systems, founded in 1981, is a direct mail company with about 100 employees that has done fundraising and voter contact mail for candidates, parties and interest groups in Florida and elsewhere, including doing mail for some of Florida's Republican Congressional delegation, as well as for state Republican parties in many other states. Summit Communications, which I founded in 2000, creates political [2] advertising for television and radio and buys air time for various campaigns, such as Congressman Miller's 2001 general election campaign. From 1984 to 1986, I worked on federal and state campaigns in Florida, Wisconsin and Washington state. From 1980 to 1984, I served as Executive Director of the Republican Party of Florida. From 1978 to 1980, I was a legislative aide in the Florida state legislature. From 1976 to 1978, I worked for the Republican Party of Florida, starting as a field person for Gerald Ford's 1976 Presidential campaign and other races, and moving up to organizational director at the time I left. I started in politics as a volunteer in legislative races while attending Florida State University in 1974.

3. General consultants like me typically prepare political campaign plans, then work with campaigns on an

ongoing basis to make sure the plans are being executed as designed, which includes overseeing the efforts of the campaign manager, the media advisor and the polling advisor. Each general consultant may do these plans somewhat differently, but here is my basic approach. The campaign plan starts with a lot of research, including precinct targeting and in-depth analysis of the strengths and weaknesses of your candidate and your opponents, including primary opponents. You take an accountancy of these strengths and weaknesses, and look at what messages you want to get out about your candidate and your opponents, and what messages they are likely to want to get out about themselves and your candidate. You develop a campaign theme. Then you set up a series of strategic objectives for the campaign to try to reach in order to get to 50% plus one in the election, explaining in narrative form why you need each and how you're going to get there. Then you write a communications plan. This includes a detailed narrative of your broadcast and cable television and radio, what the commercials will say, when they'll go up, when they have to be written and produced by, and so on. The communications plan includes a direct mail plan, and may also include a telemarketing plan to [3] identify voters or push them one way or the other, and to make get-out-the-vote calls. The organizational section of the campaign plan includes all the grassroots activities, such as precinct walks, signs, and coffees. You develop a budget and a finance plan. Once the plan is complete, you go over it in great detail with the candidate and key advisors, modify it as needed, and try to follow it through election day.

4. An important element running through modern campaign plans is consideration of what role political parties and interest groups are going to play in your campaign. You write the plan thinking about which of these groups can help you and how they can do so most effectively. It's also very important to try to predict what groups are going to come in on the other side, because you have to figure out how to

counter what they're going to be doing. Sometimes in recent years candidates have become almost spectators in the process, as others have pretty much hijacked the campaigns.

5. Political parties are important in campaigns at the federal and state levels. In federal races, the national and state parties can both play key roles. Of course parties at both levels run ads to help the campaign, as will be discussed below, but they also help in other ways. The national and state parties work together to help campaigns through grass roots activities. In addition, parties and campaigns often rely on common research and share information. It makes little sense to have the party and the campaign working on the same thing, and so information is often traded back and forth. For example, in preparing to do a poll to test issues that might be used in advertising, research is involved, and relevant information is shared. This happened in Bill Sublette's 2000 campaign for Florida's Eighth Congressional district, in which Ric Keller ultimately won a run-off election against Mr. Sublette and then the general election against the Democratic candidate Linda Chapin. I recall discussing an issue that was ultimately used in ads [4] run by the National Republican Congressional Committee ("NRCC") against Ms. Chapin relating to the purchase of a bronze frog during the time she was Orange County Chairman. As I recall, in that situation information was shared between our campaign and the Florida Republican Party before a poll was done, and there was general agreement between the Party and our campaign about where Ms. Chapin was vulnerable. Of course, this kind of sharing also happens between federal campaigns and the national parties. In state and local races, the national committees are rarely involved to any great extent. Of course, the state parties are focused on state races and in Florida they sometimes spend a lot of money on those. In my experience, the county parties in Florida are not very involved financially in political campaigns.

6. Interest groups have played an increasingly large role in recent federal and state races. In Florida races, you have to think about a number of groups that may be involved, including the trial lawyers, the physicians, the home builders, the unions, the nursing home operators, and Associated Industries, which is the largest business association in Florida, representing mainly large Florida corporations.

7. Some interest groups do what amounts to a vetting process to decide if they will help a particular federal or state candidate. These groups often do a lot of screening before deciding to commit resources and take an active role. Many make the candidates fill out lengthy questionnaires, and then bring them in and essentially grill them in what is almost a Star Chamber atmosphere about their positions on specific issues. Some groups, such as Associated Industries, actually videotape the interview so they can have it to show the candidate if they're successful and the issue comes up in the legislature, to remind them of what their position should be. The groups have gotten pretty sophisticated and pretty aggressive about trying to pin down the elected officials on what their vote's going to be ahead of time. [5]

8. If an interest group does decide to assist your candidate, it's usually helpful in the campaign, and even more helpful if you have good communications with the group and can persuade them to do things that you feel are more productive. Interest groups can help in different ways. They can raise funds from their members, and in federal races this may take the form of raising federal funds ("hard money") and bundling the checks, then delivering them all together. They can also produce and run TV and radio ads, using hard money to do independent expenditures, or non-federal funds ("soft money") to run electioneering that avoids express advocacy. They can create direct mail plans and do mass or targeted mailings, and buy billboards and print ads. They can set up phone banks, or do push polling to create positive impressions of your candidate or negative

impressions of your opponent. Just before the election they can do get-out-the-vote calls to help your candidate, or vote suppression calls to tell voters something bad about your opponent. In addition to trying to elect candidates, these groups are often trying to create appreciation or even obligation on the part of successful candidates. And candidates usually do appreciate this kind of help, even when they deny it publicly, which they usually do.

9. Effective electioneering is crucial in political campaigns. Television, an emotion-based medium, is the most effective. Radio can also be effective, depending on the specific market you're trying to reach. For example, if you're in a Republican primary and want to reach Republican males between the ages of 18 and 45, Rush Limbaugh radio is probably a good buy. Direct mail can also be very effective, in a different way, since it is more of an information-based medium. You're reaching voters at different levels, and it's good to have a good mix. The above media are good for both candidate and third party communications in a campaign.

10. I am aware of the distinction between the so-called "magic words" of express advocacy and electioneering that avoids the magic words. Many soft money ads that avoid the [6] magic words are clearly intended to affect federal elections. Parties and interest groups would not spend hundreds of thousands of dollars to runs these ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after. The usual final tag line for soft money electioneering is to "call" or "ask" or "tell" a candidate to stop or continue doing something, often something vague like fighting for the right priorities. This is pretty silly, because it's hard to imagine thousands of people calling the candidate in response to the ad and saying, keep doing this, this is wonderful. These standard final words, like "tell," have become the real "magic words" in modern

campaigning. I imagine some smart lawyer came up with them, because the real audience for them is not the voters, but the courts who may be examining the ad after the election.

11. Party and interest group attack ads can help a candidate in many ways. In addition to getting out a negative message about the opponent, they allow the candidate to conserve his limited resources and focus them on getting out a positive message about himself. At the same time, the candidate can disavow the negative ads, saying--with a wink--I didn't know anything about it and I condemn these things. I think this now happens in virtually every campaign. Very few politicians would stand up and say, I think it's great, keep it up. Of course, occasionally the approach these groups take is off base, and in those cases the ads may not be that helpful. But usually the ads are helpful and candidates appreciate them.

12. As noted above, I served as general consultant to Bill Sublette's 2000 campaign in Florida's Eighth Congressional district. We also did his direct mail. Mr. Sublette received more votes than Mr. Keller in the Republican primary in early September 2000, but not enough to avoid a run-off. In the run-off in early October 2000, Mr. Keller prevailed, and he went on to win the general election against Ms. Chapin. In my opinion, this race was a good example of a [7] situation where the candidates' campaigns became almost irrelevant, as parties and interest groups came to dominate the race. The role of the Club for Growth was pivotal. Early in the campaign, I remember Mr. Sublette coming back from a vetting meeting with the Club for Growth, indicating that he did not feel it had gone too well and that the group was talking about becoming very involved in the race. Shortly after that, we learned that Mr. Keller was making it known in Washington and Orlando that the Club for Growth was going to play a major role in his campaign, and to expose Mr.

Sublette's record on taxes and other issues. So the group was a cloud looming over our campaign from an early stage.

13. Political party and interest group broadcast "issue ads" played a key role in the 2000 race in Florida's Eighth Congressional district. I am aware that the national party committees often run electioneering ads through the state parties. In the 2000 race, the national Democratic party spent a great deal of money attacking Mr. Sublette with "issue ads" before the Republican primary, because they thought they could paint Mr. Keller as an extremist and defeat him in the general more easily than Mr. Sublette, a moderate Republican who could get Democratic and Independent cross-over votes. These party ads were a factor in Mr. Keller being able to force a run-off with Mr. Sublette. Storyboards representing two Florida Democratic Party ads that I understand were run just before the early October 2000 Republican run-off are attached as Exhibit 1 to this declaration. I understand that these storyboards and all others attached to this declaration were provided by the Brennan Center for Justice, which had obtained them by arrangement with the Campaign Media Analysis Group. Based on my observations, these ads were designed to make sure that Mr. Keller was the Republican nominee, especially the one attached at Exhibit 1 at 2 entitled "Sublette Sprawl," which is an entirely negative hit piece. [8]

14. The Republican national and state parties were also active against Ms. Chapin prior to the Eighth district Republican run-off in October 2000. These parties were trying to keep Ms. Chapin from building up a head of steam while Mr. Sublette and Mr. Keller were still duking it out in the primary and run-off. Storyboards representing two Florida Republican Party ads that I understand were run just before the Republican run-off are attached as Exhibit 2 to this declaration. The NRCC also ran ads against Ms. Chapin before the run-off. Storyboards representing two of these NRCC ads are attached as Exhibit 3 to this declaration. The

NRCC ad attached at Exhibit 3 at 1 ("FL/NRCC Chapin Spend and Tax"), focuses on the frog issue. As noted above, I had been involved with the state party in the research on which this ad was based. All of these ads were clearly intended to affect the election results.

15. Interest group broadcast ads had a very significant effect on the outcome of the 2000 Congressional race, especially the ads run by the Club for Growth. As noted above, the Club for Growth and Mr. Keller had made their relationship well known, and the Club for Growth ads clearly reflect an intent to help elect Mr. Keller. Storyboards representing two of these ads are attached as Exhibit 4 to this declaration. In my view, the ad entitled "Keller Sublette Higher Taxes," represented here at Exhibit 4-1, was a very, very effective one, and had it not run just before the primary, I believe Mr. Sublette would have reached 50% and there would have been no run-off. Our polling at that time indicated that we were in good shape, until the Club for Growth ads began. The other ad that is attached ran just before the run-off.

16. Other interest groups also ran ads trying to elect Mr. Keller in the Republican primary and the run-off. One ad run against Mr. Sublette that I thought probably cost us a couple points in the primary was a radio spot run, as I recall, primarily on conservative talk radio and maybe some Christian stations by Americans for Limited Terms. This ad attacked Mr. Sublette [9] on tax and other issues, basically calling him a big government liberal, while praising Mr. Keller as a real conservative. I also recall another business group running a broadcast ad attacking Mr. Sublette for not being conservative enough, though I can't remember which group it was.

17. Mr. Keller received benefits beyond the immediate messages these interest groups delivered on his behalf. The group ads allowed Mr. Keller to conserve his resources for a focused positive message about himself. Without the intervention of these groups, there is no way he could have gotten out a negative message about Mr. Sublette, while still getting his own name I.D. up enough to be competitive. The groups took a major burden off his campaign, and based on my experience in situations like this, it is likely that his campaign knew what the interest groups were going to be doing and adjusted their campaign plan to account for it.

18. One group that did step in to try to support Mr. Sublette in the primary and runoff was the Republican Leadership Council ("RLC"), a moderate Republican group. Storyboards representing two ads RLC ran are attached as Exhibit 5 to this declaration. Although I was generally aware that the RLC was going to run ads against Mr. Keller, I had no knowledge of details as to the content or size of the ad buy. Our campaign plan was written without any anticipation of the RLC's involvement. As I understand it, these ads were funded primarily by the Florida sugar industry. Mr. Keller had worked in a law firm that was a leader in a ballot initiative that would have raised the price of sugar, and the sugar industry did not want him in Congress messing with their subsidies. Frankly, I did not think these ads were very effective, though as a consultant I was grateful that someone was pounding on Mr. Keller while the Club for Growth was pounding on Mr. Sublette.

19. I agree with the public statements I understand were made by Mr. Sublette, former Republican Member of Congress Joe Scarborough, and the Club for Growth itself, to the effect [10] that the Club for Growth was the reason Mr. Keller survived the primary and won the run-off in the 2000 Florida Eighth district Congressional race. The Club for Growth ran the powerful broadcast ads described above, and also bundled significant hard money contributions for Mr. Keller. Mr. Keller's success in this race was basically a product of the Club for Growth.

20. I support the goals of the new McCain-Feingold legislation. Based on my observations, the use of soft money

in federal elections has gotten out of hand. I say that even as someone who makes money from this system, because I am also a voting American. Money has taken over the system. The people who paid huge amounts during the 1996 election cycle in order to sleep in the Lincoln Bedroom at the White House wanted access. And I don't feel that is an appropriate way to spend corporate treasury funds, whether it takes the form of soft money donations or interest group electioneering. I think that in general companies should stay out of that kind of government process, and the government should stay out of the market. If a company like Enron can't survive without using money to affect government policy, it ought not to survive. That kind of activity is a distortion of the market.

21. I understand that the new McCain-Feingold legislation, in addition to the national party soft money ban, prevents federal candidates from raising soft money for state and local parties, and also prevents the state and local parties from using soft money transferred among themselves to affect federal elections. Based on my experience, without these additional limits I think it's a fairly good prediction that soft money would flow to the state and local parties and still be used to influence federal elections. [10]

22. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

[PENNINGTON EXHIBIT 4-1]

CMR Ad Detector – CMAG Reports

BRAND: POL-CONGRESS+

TITLE: FL/Keller Sublette Higher Taxes

COMMERCIAL: FL/Keller Sublette Higher Taxes 1 of 1

LENGTH: 30

FRAMES: 4

[Frame 1 of 4]

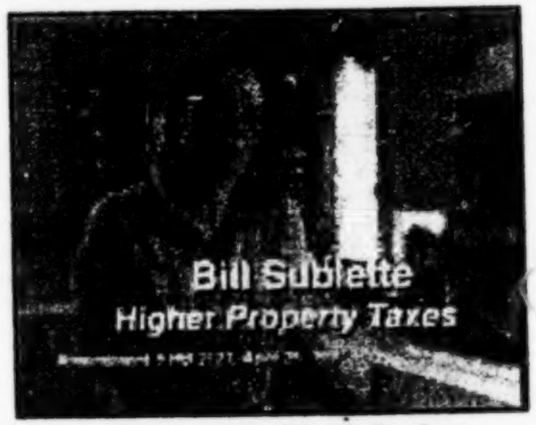
[Woman1]: "I hear about how well the economy is doing, but my husband and I are working harder than ever. Taxes are a big issue for us.

[PENNINGTON EXHIBIT 4-1]

[2 of 4]

That's why I was so upset that Bill Sublette was the only Republican to vote for higher property

[3 of 4]


Bill Sublette
Higher Property Taxes

taxes. Fortunately, Ric Keller is a fighter for lower taxes and a simpler tax plan. In the election for congress

[PENNINGTON EXHIBIT 4-1]

[4 of 4]

Ric Keller
Lower Taxes

it's a clear choice: higher taxes with Bill Sublette or lower taxes with Ric Keller.

[PENNINGTON EXHIBIT 4-2]

CMR Ad Detector – CMAG Reports

BRAND: POL-CONGRESS+

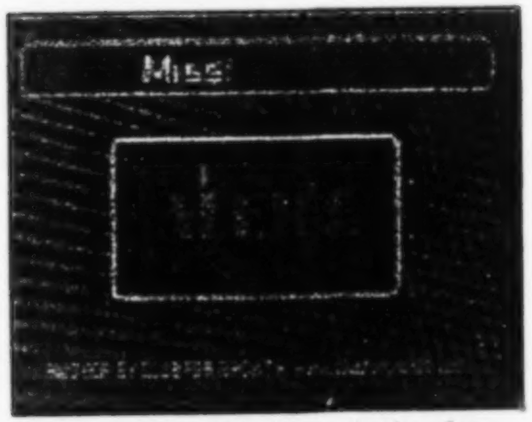
TITLE: FL/NA Keller Chapin Mission for Voters

COMMERCIAL: FL/NA Keller Chapin Mission for Voters
1 of 1

LENGTH: 30

FRAMES: 7

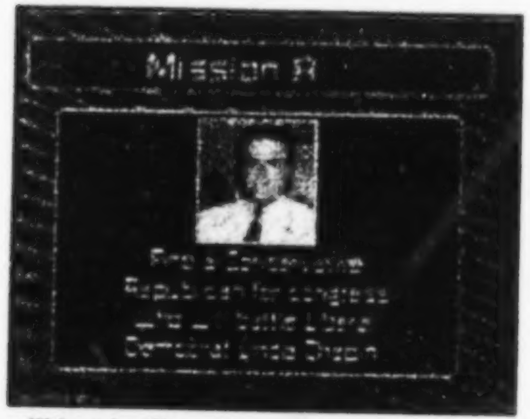
[Frame 1 of 7]



[Announcer]: This is a mission for Orange County Republican runoff voters. You must find a conservative Republican for Congress who

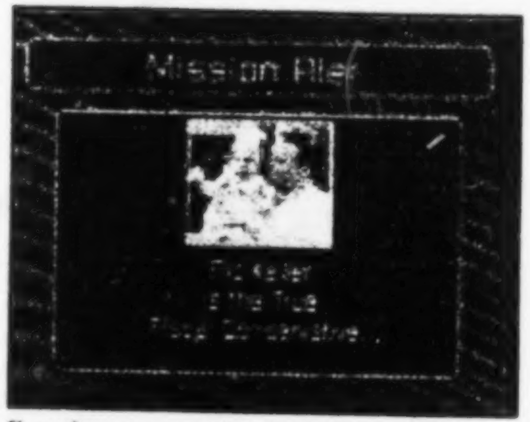
[PENNINGTON EXHIBIT 4-2]

[2 of 7]



will battle liberal Democrat Linda Chapin. Ric Keller is the true

[3 of 7]



fiscal conservative in the runoff. Only Ric Keller offers a

[PENNINGTON EXHIBIT 4-2]

[4 of 7]

Mission Alert
Offers a Sharp Contrast
Taxes and Spending

sharp contrast with Chapin with taxes
and spending. Keller is a champion

[5 of 7]

fighter for lower taxes and less
wasteful spending. This case will
self-destruct

[PENNINGTON EXHIBIT 4-2]

[6 of 7]

in ten seconds. Remember, only a
tax cutter like Ric Keller

[7 of 7]

can compete with liberal Linda
Chapin.

[PENNINGTON EXHIBIT 5-1]

CMR Ad Detector – CMAG Reports

BRAND: POL-CONGRESS+

TITLE: FL/RLC Keller An Embarrassment

COMMERCIAL: FL/RLC Keller An Embarrassment

1 of 1

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]

[Announcer]: Ric Keller has become an embarrassment. He claims to be a conservative but got caught getting help from liberal Democrat Linda

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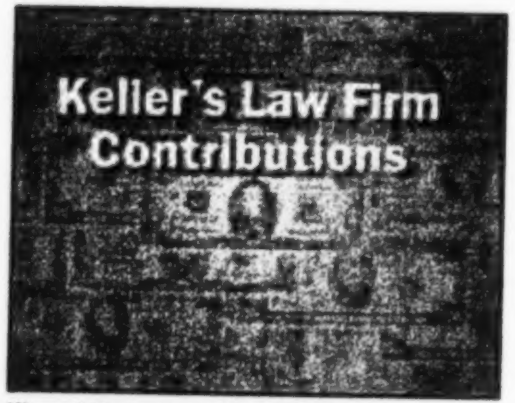
[PENNINGTON EXHIBIT 5-1]

[2 of 7]

ht Go
ght Ga
Liberal Democrat
Linda Chapin

Chapin, and Keller's law firm coughed up campaign contributions for

[3 of 7]


Keller's Law Firm
Contributions

liberal Democrat Buddy McKay. Ric Keller even supported

[PENNINGTON EXHIBIT 5-1]

[4 of 7]

Supported
Billion Dollar Tax
On Food

the Clinton-Gore billion dollar tax on food. Ric Keller, who

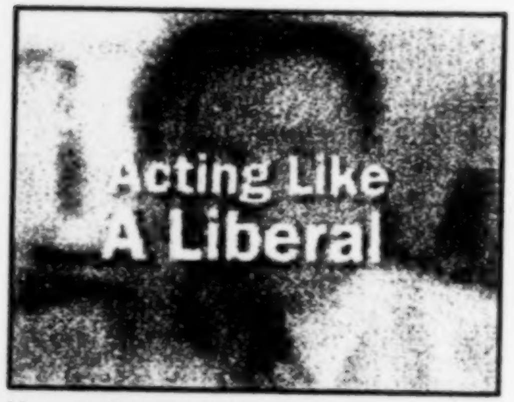
[5 of 7]

Call Ric Keller
1-407-447-0905

proclaims to be a conservative but gets caught acting like a liberal.

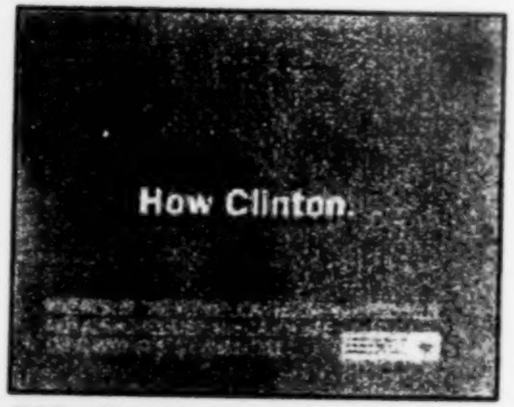
[PENNINGTON EXHIBIT 5-1]

[6 of 7]


Acting Like
A Liberal

How embarrassing. How wrong. How Cllinton.

[7 of 7]


How Clinton.

(PFB: Republican Leadership Council)

[PENNINGTON EXHIBIT 5-2]

CMR Ad Detector – CMAG Reports

BRAND: POL-CONGRESS+

TITLE: FL/RLC Keller Says He's Conservative

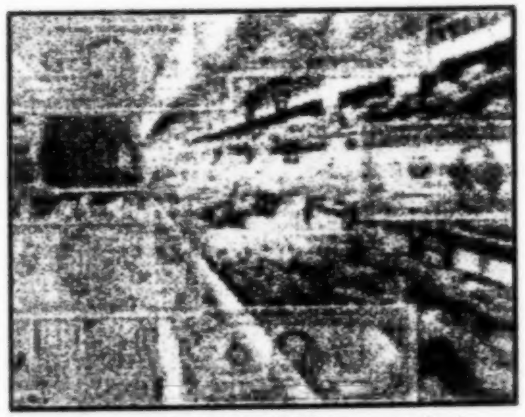
COMMERCIAL: FL/RLC Keller Says He's Conservative

1 of 1

LENGTH: 30

FRAMES: 7

[Frame 1 of 7]



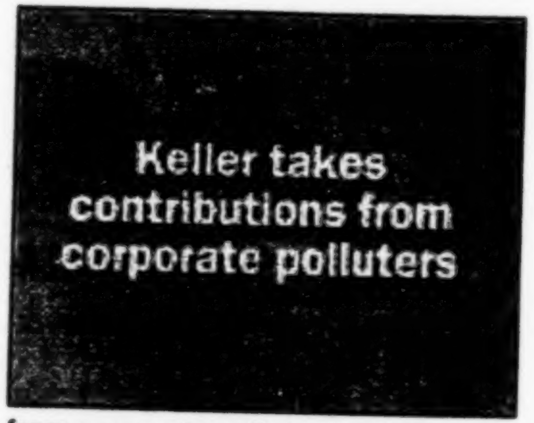
[Announcer]: Rick Keller says he's conservative. But Rick Keller supported the billion dollar tax on food. He says

[PENNINGTON EXHIBIT 5-2]

[2 of 7]

he wanted new taxes to help the environment, but he takes campaign contributions

[3 of 7]


Keller takes
contributions from
corporate polluters

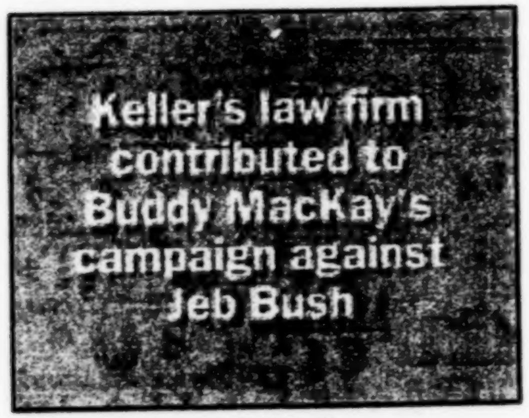
from corporate polluters. That is hypocritically liberal. And Rick

[PENNINGTON EXHIBIT 5-2]

[4 of 7]

Keller's law firm actuall contributed to Democrat Buddy MacKay's campaign

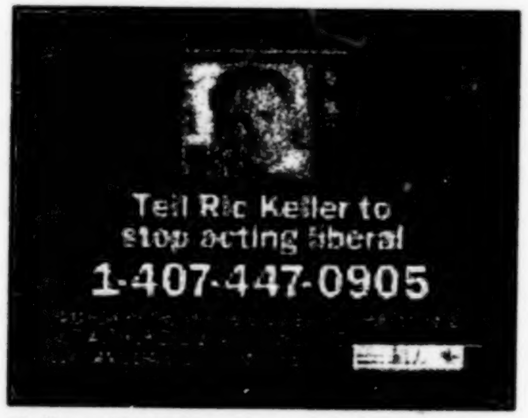
[5 of 7]


Keller's law firm contributed to Buddy MacKay's campaign against Jeb Bush

against Jeb Bush. That's outrageously liberal.

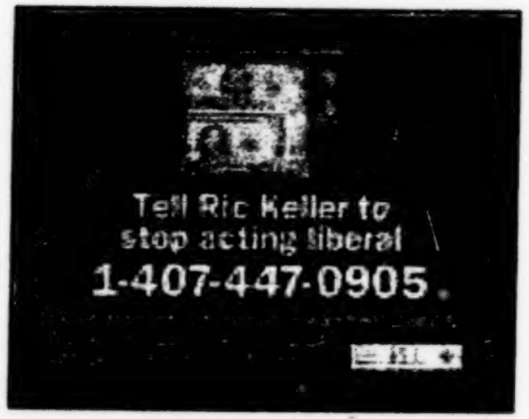
[PENNINGTON EXHIBIT 5-2]

[6 of 7]


Tell Ric Keller to stop acting liberal
1-407-447-0905

Keller. He talks conservative, but he acts like a liberal.

[7 of 7]


Tell Ric Keller to stop acting liberal
1-407-447-0905

[PFB Republican Leadership Council]

DECLARATION OF JOHN PESCHONG

I, John A. Peschong, hereby swear and depose as follows, based on my own personal knowledge:

1. I am currently the Republican National Committee's Regional Political Director for the Western Region. I am submitting this declaration to address two topics: (a) development and implementation of "Victory" plans and programs, and (b) my observation of interest group activity in recent election campaigns.

[*2] Personal Background

2. As Regional Political Director for the Western Region, I have responsibility for California, Nevada, Idaho, Washington, Oregon, Alaska, Hawaii, Guam, American Samoa, the Virgin Islands, and Puerto Rico. I work with the Republican party organizations in these states to assist them in communicating the Republican message and helping to elect Republican local, state, and federal candidates. I have held this position since 1998.

3. Before becoming Regional Political Director of the Western Region, I served as Executive Director of Campaign America, a multi-candidate political committee, from 1997 to 1998. From 1994 to 1997, I was the Executive Director of the California Republican Party. Prior to that, I held positions as press secretary for a United States Senate candidate, as partner in a private public relations firm, in the White House Office of Communications during the Reagan Administration, at the Commission on the Bi-Centennial of the United States Constitution, at the RNC, and at the Fund for America's Future (another multi-candidate political committee). I graduated from Loyola Marymount University in 1984.

Development and Implementation of Victory Plans

4. Each election year, every state Republican party drafts a "Victory Plan." These plans set forth programs designed to register voters, identify sympathetic voters, persuade undecided voters, mobilize voters and get them to the polls on election day, and encourage absentee voting by registered voters who are unable to vote in person on election day. These programs support the entire Republican ticket, and frequently place more emphasis on high profile state-wide races than on federal races, especially when no federal candidate is running state-wide. These Victory Plans generally have numerous components, including direct mail, [*3] telephone banks to identify and then mobilize sympathetic voters, brochures, slate cards, yard signs, and bumper stickers, rallies, and door-to-door volunteer activities to distribute literature and "door hangers." By their nature, the Victory Plans and the programs specified in them span the calendar year, not just the 60 or 120 days prior to the election.

5. Victory Plans are the result of a process that requires local, state, and national Republican organizations, as well as representatives from the candidates' campaigns, to work closely together. The initial drafting of the Victory Plan is the responsibility of the state party, but an important part of my job responsibility as western regional political director for the RNC is to consult with and advise the state parties during this initial drafting process. Each state party's Victory Plan reflects its own unique needs, opportunities, and circumstances.

6. Once the state party has prepared an initial draft of its Victory Plan, a meeting is convened to review and finalize the plan. Attendees at this meeting include officials from the state party, the RNC's regional political director, personnel from the Republican National Committee headquarters, and sometimes representatives from the

campaign organizations of state and/or federal candidates. It would not be unusual, for example, for representatives of a gubernatorial candidate to participate in the development of a Victory Plan.

7. At this meeting, a number of topics are discussed. The national party representatives are especially interested in ensuring that the programs set forth in the plan are likely to achieve maximum effectiveness for the entire ticket. The budget for the plan is also discussed as is staffing for the programs. Finally, participants in the meeting discuss how costs will be shared, the amount of funding the RNC will provide, and the RNC's assistance to the state party in raising the state party's share of the funding. As I understand it, Federal Election Commission regulations dictate the percentage of federally-regulated versus state-regulated [*4] funding that can go into the plan, but the relative financial participation in the plan as between the RNC and the state party is a matter of negotiation.

8. The RNC typically provides a very substantial share of the funding for the state victory programs. For example, attached to this declaration is the California Republican Party Victory Plan for 2000. See RNC Exhibit 762, attached as Attachment A hereto. Out of a total estimated cost of $23,735,100, the RNC provided $8.3 million. The RNC's assistance in funding these programs is essential to their effectiveness.

9. In addition to providing money directly to support the Victory Plans, the RNC also assists the state parties in raising money for their Victory Plans. For example, the RNC provides big-name surrogates to appear at fundraisers for the state party. This year, for example, the RNC arranged for President Bush to make an August 23 fundraising appearance and Vice President Cheney to appear on February 19 and August 7 to benefit the Republican gubernatorial candidate and the California Republican Party. It is my understanding that the RNC itself received none of the proceeds from those three fundraising events, but that the California Republican Party received approximately $2 million. Thus, when both its direct financial contributions and its fundraising assistance are considered, the RNC is often responsible for well more than half of the funding for the state Victory Plans.

10. It is my understanding that the Bipartisan Campaign Reform Act of 2002 will require radical changes in the way Republican Party plans, structures, funds, and implements its Victory Plans. In particular, I understand that all, or virtually all, of the funding for victory programs will be federally-regulated, since funding must consist of a combination of federal dollars and so-called "Levin funds." Whereas California state law allows the non-federal portion of the Victory programs to be funded with corporate, union, and individual contributions, the [*5] BCRA places a $10,000 limit on such donations. Moreover, I understand that BCRA will restrict the ability of national parties from transferring money to the state parties to fund the victory programs. I also understand that the BCRA prohibits national parties from assisting state parties in raising so-called "Levin funds." Finally, I understand that agents of the RNC are prohibited from being involved in raising, spending, or directing non-federal funds (including "Levin funds").

11. Thus, BCRA will discourage national party participation in the development and implementation of Victory Plans, since the "cost" of national party involvement is to require payment for the programs with 100% federal money. Moreover, the financial impact on the ability of state parties to fund these programs without national party assistance will be severe. In short, based upon my 9 years of experience with these programs in California and other states, it is my strong opinion that BCRA will severely impede the

ability of local, state, and national parties to work together on these full-ticket Victory Plans and programs, and will greatly diminish the resources available for such activities.

Interest Group Activity

12. During my time as Executive Director of the Californian Republican Party and as Regional Political Director for the RNC, I have had occasion to observe and follow carefully the election-oriented activities of numerous special interest groups. In California, a wide-range of interest groups adverse to the message and candidates of the Republican Party have been active in recent years, including the AFL-CIO, the National Education Association ("NEA") and its affiliate the California Teachers Association ("CTA"), the National Association for the Advancement of Colored People ("NAACP""), the Sierra Club, the National Abortion Rights Action League ("NARAL") and its affiliate the California Abortion Rights Action League **[*6]** ("CARAL"), and others. These special interest groups tend to focus on a single issue or a relatively narrow range of issues, and these groups in particular are reliable and vigorous opponents of the Republican message and candidates.

13. These and other interest groups use a variety of techniques to communicate their respective messages. These techniques include broadcast issue advocacy, direct mail, telephone banks, door-to-door mobilization, distribution of absentee ballots, and providing transportation to the polls for supporters.

14. In recent election cycles, I have observed that some of the major interest groups, such as the AFL-CIO, NEA, CTA, and NAACP, have reduced their reliance on broadcast issue advocacy, and shifted reliance to grassroots voter mobilization activities. Based on my observation, the activities of these groups follow a typical pattern:

a. These groups begin telephone bank activity to identify supporters 4-8 weeks before the election.

b. For the next few weeks, these groups proceed to a direct mail issue advocacy program targeted to their identified supporters and prior donors. Also during this period, these groups begin distribution of absentee ballot applications.

c. Two weeks before the election, I have observed these groups begin intensive get-out-the vote and voter mobilization activities. In particular, they begin transporting supporters to early voting locations, resume operating phone banks with strong get-out-the-vote messages, and employ persons to walk door-to-door in sympathetic neighborhoods to distribute literature and collect absentee ballots.

d. On election day, poll watchers for certain of these interest groups monitor turnout in heavily-Democratic precincts, and if turnout is low they direct their telephone hanks to focus calls on households within those precincts.

15. The net effect of these enhanced grassroots voter mobilization efforts has been impressive. In the 1996 and 2000 presidential elections, as well as the 1998 California **[*7]** gubernatorial election, the Democratic ticket significantly outperformed the Republican ticket in relation to the final pre-election day polls. Looking at the 2000 presidential election as an example, in the days leading up to the election, it was reported that a Zogby poll had Vice President Gore's lead over then Governor Bush pegged at 43 percent to 40 percent, a Rasmussen poll also predicted the margin to be 3 points, and a Research 2000 poll showed the vice president leading by seven percentage points. The actual margin of victory in California was 12 points. As a result, following the 2000

election, the RNC initiated a "72-hour Task Force" to analyze what the opposition was doing in the days and weeks leading up to the election and to formulate recommendations to improve turnout for the Republican ticket. I provided information and advice to the 72-hour Task Force. A portion of the Task Force's findings are included in RNC Exhibit No. 418, attached as Attachment B hereto. The findings of the 72-hour Task Force were consistent with my observations, set forth above. As a result of the task force, the RNC is redoubling its efforts to focus on voter mobilization and get-out-the-vote efforts. This year, for example, the plans in my region are as follows:

a. Beginning approximately 6 weeks before the election, the state Republican parties will operate volunteer phone banks to identify sympathetic voters. Using funds provided by their state counterparts, county Republican parties will open and staff volunteer support offices statewide for these activities. Volunteers are used for both the obvious financial reasons and because under Federal Election Commission regulations the costs associated with such volunteer activity need not be counted as in-kind contributions to federal candidates.

b. Starting in the fourth week before the election volunteers will begin hand distributing issue advocacy fliers door to door. These pieces will complement similar direct mail, as well as absentee ballot applications and slate cards. Volunteers will follow up with phone calls.

c. In the last 2 weeks before the election, the focus will turn to voter mobilization and turnout. This effort will be largely through volunteer telephone banks, and door-to-door activities. **[*8]** Volunteers will distribute slate card "door hangers" in targeted neighborhoods. These door hangers show the Republican slate of candidates. In California this year, there are 9 state candidates on the ballot, and only 1

federal candidate. In California alone, we anticipate spending approximately $4 million on the task force-inspired efforts. In view of the state versus federal composition of the ballot, the overwhelming majority of funding will be with state-regulated rather than federally-regulated funds.

16. Although the state Republican parties cannot hope to match the resources for these activities that the various interest groups will devote to them, we are guardedly optimistic that our efforts will show results for the Republican ticket at the polls on November 5th.

17. As set forth above, it is my understanding and firm belief that BCRA will severely impede the ability of the Republican Party to engage in these activities by limiting the amount of funding as well as the ability of local, state, and national party representatives to work together. Indeed, under BCRA, if I continued my current involvement in the planning and implementation of state party victory programs, my involvement alone could very well require the state parties to fund those programs with 100% federal dollars.

18. In contrast, I understand that BCRA places no restrictions whatsoever on the grassroots activities of interest groups. While I understand that BCRA restricts the ability of interest groups to air broadcast issue advertisements within 60 days of a federal election, it is my observation that the activities of many major interest groups during this "window" have already begun to shift to grassroots rather than broadcast activities. Because interest groups can use wholly unregulated and unreported money from union dues, corporate treasuries, or wealthy individuals for these activities, while political parties must use federally-regulated funds **[*9]** (including Levin funds), political parties will be at a severe disadvantage in relation to interest groups.

19. I believe the ability of political parties to function effectively is jeopardized by BCRA.

I declare under penalty of perjury that the foregoing is true and correct.

s/
John Peschong

Dated: October 3, 2002

[EXHIBITS OMITTED]

Declaration of Lawrence D. Pratt

* * *

[19]
These recordkeeping and reporting requirements, together with other FEC requirements, have been, and continue to be, extremely burdensome for both GOA and GOAPVF, involving significant expenditures of administrative time, effort, and expense, as well as actual out-of-pocket expenditures that have been considerable. As GOA's FEC reports indicate (*see* paragraph 14, below, and Exhibit D hereto), its gross contributions have not exceeded $290,000 per year, and they are normally substantially less (*e.g.*, $28,615 in 1993, $72,756 in 1994, $12,970 in 1995, $91,717 in 1998, $145,953 in 2001). Yet I would estimate the real cost of maintaining and operating GOAPVF, as an SSF complying with the FEC's recordkeeping and reporting requirements, at between $5,000 and $15,000 per year, at a [20] minimum, depending on the number of reports that were filed in a particular year. This amount could be substantially more, of course, if it became necessary to seek an advisory opinion, or FEC compliance questions arose, and legal advice and/or representation became necessary.

14. GOAPVF has filed various reports with the Federal Election Commission from the inception of GOAPVF in 1992 to the present. All of GOAPVF's reports are on file with the Federal Election Commission, and copies of those reports were furnished to the defendants during the course of discovery in this action. Attached hereto as Pratt GOA/GOAPVF Declaration Group Exhibit D are true copies of GOAPVF's year-end reports (FEC Forms 3X) filed by GOAPVF with the Federal Election Commission each year, from 1992 through 2001. These January 31 Year-End Reports (FEC Forms 3X) are only some of the reports that GOAPVF has been required to file with the FEC, but they are demonstrative of the recordkeeping detail that is required by the FECA/BCRA, and they help to illustrate the burdens

and restrictions imposed upon political committees under those laws, as indicated with more specificity in paragraph 13, above.

15. As pointed out by Mr. Walter Olson, one of the plaintiffs' expert witnesses in this action (Declaration of Walter J. Olson, ¶¶ 7-15, 116), who also serves as GOAPVF's treasurer, and as confirmed in paragraph 13 of this Declaration above, these FEC filing and reporting requirements with respect to SSFs are quite burdensome, and I can confirm that these burdens have been, and continue to be, extraordinary, unduly harmful burdens for GOAPVF.

16. The burdens and restrictions imposed upon GOAPVF by the FECA/BCRA, which GOA and GOAPVF contend are unconstitutional, include the following: as a political committee, GOAPVF is required to comply with statutorily-imposed licensing regulations, [21] editorial control, and discriminatory economic burdens, to wit: (i) registration with the FEC as a political committee, as required by 2 U.S.C. Section 433, in order to be permitted to engage in any communicative activity expressly advocating the election or defeat of a candidate for federal office; (ii) the filing of periodic reports, open to the public, of receipts and disbursements, as required by 2 U.S.C. Section 434, in order to be permitted to continue to engage in such communicative activity; and (iii) compliance with limits upon individual financial contributions, as specified by 2 U.S.C. Sections 441a, 441d, 441f, and 441g, and reporting to the FEC the names, addresses, occupations, and employers of said contributors, as required by 2 U.S.C. Section 434, in order to convey GOAPVF's candidate preferences in a federal election. These are substantial burdens, in terms of time and effort expended, out-of-pocket expense and employee salaries, and distraction from the substantive activities of GOAPVF (as well as GOA itself), that greatly interfere with the free exercise of the First Amendment rights of GOA and GOAPVF, and inhibit the ability of GOAPVF to carry out its activities with respect to federal elections.

17. As indicated in paragraph 43 of its Amended Complaint herein, GOAPVF has been, currently is, and will continue to be, injured by the BCRA/FECA's system of prior restraints and discriminatory regulation, including: (a) registration with, reporting to and disclosure of the names, addresses, occupations, and employers of certain contributors, to the FEC; and (b) compliance with contribution limits imposed upon political committees independent of a candidate and a political party, having been neither raised nor indexed by BCRA. Such prior restraints and regulations currently impose, and will continue to impose, discriminatory economic burdens and penalties upon GOAPVF's communicative activity [22] expressly advocating or opposing the election of candidates to federal office, thereby preventing GOAPVF, by threat of injunctive, and other restraining, action and civil and criminal penalties, as enhanced by BCRA, from engaging in the quality and quantity of political communications that GOAPVF would choose in its editorial discretion, but for the licensing power, editorial control and economic burdens and penalties placed upon them by BCRA/FECA.

* * *

[1 (8 PCS/MC 29)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, *et al.*,)
Plaintiffs,) Case No. 02-0582
v.) (CKK, KLH, RJL)
) *All consolidated*
Federal Election Commission, *et. al.*,) *cases.*
Defendants.)

Declaration of William H. Pryor Jr.,
Attorney General of Alabama

I, William H. Pryor Jr., declare the following on personal knowledge:

1. I am an Alabama resident and a U.S. citizen.

2. I am now the Attorney General of the State of Alabama, and I am presently the Republican Party candidate for this calendar year election for Attorney General. I may be a candidate for some other political office in future elections.

3. As an officeholder of and candidate for state office, I have and intend in the future to made public communications that refer to candidates for federal office and that promote or support candidates or attack or oppose candidates for federal office, including communications that do not expressly advocate a vote for or against a candidate. In the course of my campaigns and as an officeholder, I have referred to such candidates for federal office as now Senator Jeff Sessions (R.-Ala.), who I succeeded in office, Senator Richard Shelby (R.-Ala.), Congressman Spencer Bachus (R.-Ala.), now President Bush, and others in several ways for several purposes:

a. In my campaign literature, which I hereby verify a true and correct copy [2 (8 PCS/MC 30)] of which has

been attached as Exhibit A ("Attorney General Bill Pryor: Protecting the Security, Integrity, and Future of Alabama" brochure (1784-91)); Exhibit B ("Attorney General Bill Pryor: Protecting the Security, Integrity, and Future of Alabama" brochure (1792-93));

b. In press releases, which I hereby verify true and correct copies of which have been attached as Exhibit C (release mentioning now President George W. Bush (1794-1811)); Exhibit D (release mentioning now U.S. Senator Jeff Sessions (1812-29)); Exhibit E (release mentioning Congressman Spencer Bachus (1830-32)); and Exhibit F (release mentioning Senator Richard Shelby (1833-34));

c. In official communications, which I hereby verify true and correct copies of which have been attached as Exhibit G ("Testimony of Attorney General Bill Pryor on the Clean Air Act New Source Review Joint Hearing Before the Senate Committee on Environment and Public Works and the Senate Committee on the Judiciary" (July 16, 2002) (1835-41)); Exhibit H ("Testimony of Attorney General Bill Pryor on the Clean Air Act New Source Review Joint Hearing Before the Senate Committee on Environment and Public Works and the Senate Committee on the Judiciary" (July 16, 2002) (annotated) (1842-48); Exhibit I ("New Source Review: Recommendations" (June 2002, EPA) (1849-55)); Exhibit J (June16, 1998, letter from Bill Pryor to Janet Reno re "fighting election fraud in rural Alabama" (1856-57)); Exhibit K ("Time Sensitive" memo re amicus brief re Bush case seeking to halt Florida manual recounts (1858)); Exhibit L (June 28, 2002, letter from Bill Pryor to named senators and congressmen re Alabama [3 (8 PCS/MC 31)] Medicaid program (1859-

60)); Exhibit M (Alabama amici curiae brief in *Bush v. Palm Beach County Canvassing Board* (U.S. Supreme Court) (1861-80)); Exhibit N (Alabama amici curiae brief in *Bush v. Gore* (U.S. Supreme Court) (1881-1901)); and Exhibit O (Alabama amici curiae brief in *Siegel v. LePore* (11th Cir.)(1902-36)).

4. As a result of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), I will be forbidden to spend funds not subject to the Federal Election Campaign Act of 1971 ("FECA") for such activities. State political candidates and officeholders, such as I am and have been, are thus faced with a decision by the BCRA: I can continue to refer to candidates for federal office and thereby agree to be subject to the stringent requirements of the FECA in expending funds in public communications that refer to, attacks, promotes, or supports a candidate for federal office. This is a costly and chilling price to be paid for on any communication that even refers to a candidate for federal office. In the alternative, I can forego any reference to any possible candidate for federal office. This limitation is, however, a severe impediment on my ability to communicate my views on political and legal issues to potential voters in any campaign, especially for state-wide office, and makes it difficult or impossible to represent the people in an official capacity.

5. Being able, without penalty, to refer to federal candidates is important to my ability to effectively campaign and to communicate in my official capacity. Voters and citizens might more easily understand and identify with my proposed policies by associating them with other political figures, whether or not they are presently "candidates" for federal office. Further, to fulfill my office as Attorney General effectively, I must often refer to federal candidates because [4 (8 PCS/MC 32)] they offer legal proposals which must be analyzed and would affect state law and policy and because they often become involved in legal controversies.

My official duties would be significantly impeded if I were unable to refer to federal candidates who sponsor or propose legislation or who are involved in litigation that might affect the people of Alabama.

6. My references to federal candidates often has nothing whatever to do with trying to help any federal candidate to get elected, but rather is simply a means to communicate the nature of my ideas and policies to voters or to the citizens of Alabama. In fact, whether or not public figures I might refer to are presently federal "candidates" is usually entirely irrelevant to my purpose – and I often would not even know whether any specific public figure I referred to is presently a "candidate" for any federal office. Yet BCRA effectively forbids me from making any reference to any federal candidate, regardless of the reason that I might find it expedient or necessary to do so.

7. I have received and I hope and intend to receive in the future contributions, which are entirely legal under Alabama law, from the Republican National State Elections Committee, a division of the Republican National Committee ("RNC"), upon recommendation of Republican Attorneys General Association. I verify that a true and correct copy of a "Receipt Transaction List" of donations from the RNC (1937) is attached hereto as Exhibit P. Since the BCRA forbids national political parties to make such campaign contributions, I will certainly be harmed as a result of this law in any future campaign efforts for elective office.

8. As a candidate, I raised and spent funds in the past and in this election cycle without regard to the limitations, prohibitions, and reporting requirements of the FECA for the purpose of: (a) making public communications that refer to a clearly identified candidates for federal [5 (8 PCS/MC 33)] office and that promote or support candidates or attack or oppose candidates for that office, including communications that do not expressly advocate a vote for or against such candidates; (b) engaging in voter

registration activities conducted within 120 days of a federal election, and (c) engaging in voter identification, get-out-the-vote, and generic campaign activities conducted in connection with an election in which a candidate for federal office is on the ballot. The BCRA will henceforth forbid me from using funds that I received entirely in accord with Alabama law to conduct these activities, causing substantial harm to my ability to conduct a campaign effectively.

9. As a candidate in association with or in a group of candidates for state and local office and of individuals holding state and local office, I have in the past and intend in the future to spend funds lawfully raised to campaign for state office, but raised and spent without regard to the limitations, prohibitions, and reporting requirements of the FECA for the purpose of: (a) making public communications that refer to a clearly identified candidates for federal office and that promote or support candidates or attack or oppose candidates for that office, including communications that do not expressly advocate a vote for or against such candidates; (b) engaging in voter registration activities conducted within 120 days of a federal election, and (c) engaging in voter identification, get-out-the-vote, and generic campaign activities conducted in connection with an election in which a candidate for federal office is on the ballot. Yet the BCRA will henceforth forbid me from using funds that I received entirely in accord with Alabama law to conduct these activities, causing substantial harm to my ability to conduct a campaign effectively.

10. As a candidate on my own behalf and as a candidate in association with or in a group [6 (8 PCS/MC 34)] of candidates for state and local office and of individuals holding state and local office, I spend funds to engage in voter registration, voter identification, get-out-the-vote, and generic campaign activities in order to further my own election campaign, rather than to further the campaign of any candidate for federal office who might incidentally benefit from expenditure of such funds. It is more cost effective and efficient to join together with other state and local candidates in common cause to engage in such activities that we deem mutually beneficial to our campaigns, regardless how they might affect the campaigns of candidates for federal office. Yet the BCRA in effect penalizes state candidates, such as I am, who expend funds in this manner, regardless of the purpose for which such funds are intended.

11. Although I might raise funds subject to FECA for public communications that refer to federal candidates and to engage in voter registration, voter identification, get-out-the-vote, and generic campaign activities, this would involve significant restrictions and administrative costs on any such expenditure. Separate reports the Federal Election Commission and separate funds would be required, involving substantial administrative costs. Moreover, there would be severe limitations on the sources and amounts of funds that could be raised because, for example, no corporate or labor union contribution could be accepted and individual contributions are subject to the $5000 per individual and $25,000 gross annual individual contribution levels imposed by FECA. For a state candidate for political office such as myself, therefore, raising funds subject to FECA would substantially impair my ability to conduct a state campaign through such general activities as voter registration and get-out-the-vote efforts regardless how it might affect any candidate for federal office. [7 (8 PCS/MC 35)]

VERIFICATION OF DECLARATION

I verify that the foregoing Declaration of Alabama Attorney General Bill Pryor in *McConnell, et al. v. FEC, et al.*, Case No. 02-0582 (CKK, KLH, RJL) (consolidated action) is true and correct.

Executed this 1st day of October, 2002.

/s/ Bill Pryor
Bill Pryor
Attorney General
State of Alabama

DECLARATION OF WADE RANDLETT

1. My name is Wade Randlett.

2. I am Chief Executive Officer of Dashboard Technology ("Dashboard"), a World Wide Web technology consulting firm based in San Francisco, California. Dashboard specializes in the design, implementation and support of software that displays customized information for specific audiences. Prior to founding Dashboard in 2001, I served on the management teams of two other software companies: Sigma Storage from 2000 to 2001 and Red Gorilla from 1999 to 2000. From 1996 to 1999, I was the Democratic political director at the Technology Network, also known as TechNet, a Palo Alto-based non-profit corporation and political service organization which I co-founded in 1996. Prior to starting TechNet, I spent many years as a political fundraiser and general political consultant, working primarily in the Silicon Valley area of Northern California, but also throughout California and to some extent in major metropolitan areas in other parts of the nation. [2]

3. From the 1996 election cycle through the 2000 cycle, I raised seven-digit sums in both federal funds ("hard money") and non-federal funds ("soft money") for candidates and national party committees. During this same period, I hosted or helped organize over 100 fundraising events featuring federal candidates or office holders. Many of these events were attended by Democrats who held senior government positions, such as then-President Bill Clinton and then-Vice President Al Gore. When I was at TechNet, my Republican counterparts there arranged similar events involving senior Republicans, such as then-Governor George W. Bush.

4. In my experience, hard money contributions tend to differ from soft money donations in ways that are not just quantitative, but qualitative. Most hard money is given for reasons that are fundamentally personal. Even PAC

contributions originate with individuals. Hard money contributors tend to support only candidates whom they know, like, and/or are philosophically aligned with in a broad sense. Conservative Republicans don't usually give hard money to liberal Democrats and vice versa. Accordingly, the pitch from the politician raising hard money does not typically focus on a particular piece of legislation, or even a group of bills. Instead, it tends to be broader and more personal.

5. Conversely, many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal office holders who can protect or advance specific interests through policy action or inaction. Some soft money donors give $250,000, $500,000, or more, year after year, in order to achieve these goals. For most institutional donors, if you're going to put that much money in, you need to see a return, just as though you were investing in a corporation or some other economic venture. And even soft money donors whose primary motives are not financial usually [3] want attention, visibility, and support on a particular policy issue or set of issues, either from the candidate or office holder who makes the "ask," or from one or more others aligned with the solicitor.

6. National party committees often feel they need to raise a certain amount of soft money for a given election cycle. To reach that overall goal, they may divide up potential donors by geography, affiliated organization, or issue interests. The party committees decide which Members of Congress should contact these potential donors, and these Members then put in a certain amount of call time at the national committee soliciting the money. A Member and a potential donor may be matched because the Member is on a legislative committee in which the donor has a particular interest, whether economic or ideological. For example, Commerce Committee members will call potential donors from an industry with issues before the Committee, and Judiciary Committee members will call donors who have issues there. Members in leadership may also be able to make these calls, since they have a horizontal influence across all committees.

7. Members of Congress raise soft money to help with federal campaigns, not for "party building" activities. In my experience, most federal office holders care little about true party building. The Members and the donors understand that the soft money will be used to help federal candidates win elections.

8. I've been involved in political fundraising long enough to remember when soft money had little value to federal candidates. Ten years ago, a Senator might call a potential donor and the donor would say something like, "I would love to write you a check; I'm a big fan of yours; but I'm federally maxed, so I can't do it. If you like, I could write a soft money check [4] to your state party." And the Senator might say, "Don't bother. The soft money just doesn't do me any good."

9. However, in recent election cycles, Members and national committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns. Most soft money donors don't ask and don't care why the money is going to a particular state party, a party with which they may have no connection. What matters is that the donor has done what the Member asked.

10. Information about what soft money donors have given travels among the Members in different ways. Obviously the Member who solicited the money knows. Members also know who is involved with the various major donor events which they attend, such as retreats, meetings and conference calls. And there is communication among Members about who has made soft money donations and at

what level they have given, and this is widely known and understood by the Members and their staff.

11. As a donor with business goals, if you want to enhance your chances of getting your issues paid attention to and favorably reviewed by Members of Congress, bipartisanship is the right way to go. Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective.

12. Conversely, if you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed. They'll get a message that basically asks: "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" If your interests [5] are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. First of all, it's hard to get attention for your issue if you're not giving. Then, once you've decided to play the money game, you have to worry about being imbalanced, especially if there's bipartisan control or influence in Washington, which there usually is. In fact, during the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. Referring to someone's financial activity in the political arena used to be clearly off limits, and now it's increasingly common.

13. Soft money donors and fundraisers definitely get a special level of access, visibility, and appreciation from Members that is not available to smaller hard money donors, much less the average person. They get a level of attention that a $1,000 hard money donor never will. Even someone who wrote 25 $1,000 hard money checks but no soft money is going to get much less attention and appreciation than someone who wrote one large soft money check.

14. The raising and spending of soft money in recent election cycles has distorted the federal political system and the commercial marketplace. Many soft money donations are made in order to advance specific legislative agendas, and they do produce at least appreciation on the part of powerful federal office holders. Based on my observations, much of the business community believes that the federal campaign financing system is broken and needs to be fixed. People in business look for a reasonable, rational system and a level playing field. The current soft money-oriented system does not meet that standard. At the same time, many members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game. They are caught in an arms race that is accelerating, but that many feel they cannot afford to leave or speak out against. [6]

15. Soft money fundraising also takes a lot less time and effort than hard money fundraising. Like anyone else, politicians have only 24 hours in a day. As it has become increasingly valuable for office holders to spend time with people who are writing huge checks, they have allocated more of their time to that. That means they have less time to devote to other things that are part of their jobs, such as talking to their constituents.

16. It would be absurd to claim that the soft money ban will result in all the same soft money donors banding together to finance independent expenditures and that all this money will still have the exact same bad effect it has today. Most of these donations are made because they are solicited. The number of people sitting around trying to figure out how to spend a million dollars in electoral politics, and just getting advice from interest group or national party committee staff on how to do it, is very, very small. The core transaction is an elected official talking to an individual who

may write a soft money check in order to receive positive attention for an issue. When you take that act out of the equation, a great deal of the inappropriate influence leaves the system.

17. Without other restrictions, one potential method of evading the national party soft money ban that I would be concerned about would involve a political consultant, working with some level of pre-arrangement with an office holder, say a Senator, and persuading a corporate donor that the Senator wants the donor to run a lot of "issue ads" that will help him or her in a given state. Then some time in the following few months, the donor might get a phone call from the Senator, or be invited to a meeting or small event with the Senator, and be told how much he or she appreciates what they've been doing, but never having to say anything about what they did or what happened with that money. That kind of proxy, "wink and a nod" scenario takes the [7] core soft money transaction as it works today and adds one layer of complexity. But it's not a big layer.

18. In my experience, campaign advertising is meant to leave impressions or feelings about whether to elect a candidate, either positive or negative. Whether the "magic words" of express advocacy are included in the ad has no impact on whether a campaign ad is effective. For example, ads that portray a particular candidate as "for tax increases" or "against social security" are clearly electioneering, regardless of what particular words are used.

19. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)
SENATOR MITCH)
McCONNELL, et al.,) Civil Action No.
)02-0582
Plaintiffs,) (CKK, KLH, RJL)
)
v.)
)
FEDERAL ELECTION) **CONSOLIDATED**
COMMISSION, et al.,) **ACTIONS**
)
Defendants.)

DECLARATION OF ANTHONY D. ROMERO

Pursuant to 28 U.S.C.§ 1746, I hereby declare as follows:

1. I am the executive director of the American Civil Liberties Union ("ACLU"), a position I have held since September 2001. In that capacity, I am responsible for managing the operations of the entire organization – including its legislative activities. My responsibilities also include raising funds for the organization through membership and other fundraising activities.

2. The ACLU is a nationwide, non-profit, non-partisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied

in the Constitution. It is also a tax-exempt organization under § 510(c)(4) of the Internal Revenue Code. The ACLU is incorporated in Washington, D.C.

3. The ACLU engages in non-partisan legislative activities designed to influence federal legislation involving civil rights and civil liberties issues of national importance. As a 501 (c) (4) organization, the ACLU does not engage in any federal election activity as defined by the Federal Election Campaign Act. The ACLU has never taken a position in a partisan political election in its 82 year history. However, it frequently takes positions on public issues of significance to the organization and its members. As an advocacy organization, the ACLU has frequent conversations with federal officials and candidates about civil liberties issues. However, neither those conversations nor any subsequent communications by the ACLU are intended to encourage individuals to support or oppose a candidate for federal office.

4. Although the ACLU does not endorse or oppose the election of candidates, its public statements, member communications, and other similar activities frequently and necessarily refer to, praise, criticize, set forth, describe, or rate the conduct or actions of clearly identified public officials who may also happen to be candidates for federal office. The fact that a public official identified in ACLU statements or writings is also at the time a candidate for public office is not directly related to the intent or purpose of influencing the election or defeat of that candidate. The ACLU regularly publicizes in its membership mailings, and through pamphlets and other publications, the civil liberties voting records, positions and actions of elected officials some of whom are candidates for federal office. The ACLU sends out over 6.7 million pieces of mail each year to its members and potential members.

5. The ACLU has never operated a PAC and has no interest in establishing one. The creation of a PAC would be fundamentally inconsistent with the ACLU's mission and identity as a nonpartisan organization. Establishing a PAC would also have serious ramifications for the organization's members. Under the Federal Election Campaign Act, PACs are required to disclose the identity of its contributors. Many ACLU members and contributors request explicit assurances that their membership will remain confidential and that their contributions will remain anonymous. The ACLU has consistently defended the First Amendment right of its members and donors to remain anonymous if they so choose.

6. The ACLU is primarily a membership driven organization and membership is voluntary. Membership dues to the ACLU are not tax deductible. The basic membership fee is $35, though many members contribute more than that. There is also a reduced membership available for students and other low-income individuals. Membership dues accounted for $9,393,948 of the $13,625,051 contributed to the organization by individuals in 2001. Only 212 individuals contributed more than $1000. Although the ACLU does not maintain records on the corporate status of non-individual donors, less than $85,000 of the ACLU's total revenues was contributed by entities such as businesses and other organizations in 2001. None of the contributions from businesses exceeded $500. Annual contributions from labor organizations over the last 10 years have never exceeded $5000. Total contributions from political parties over the same 10 year period were $330. In sum, contributions from non-individual donors represent an insignificant percentage of the ACLU's total annual funding.

7. Historically, much of the ACLU's success has been dependent on the media attention the organization is able to attract. The organization is at the front line of many controversial issues and our views are often sought out. Thus the ACLU's views are frequently reported in both the

print and broadcast media. The ACLU is also regularly invited to discuss its views on broadcast programs such as *Crossfire* or the *The News Hour with Jim Lehrer*. The proliferation of cable television has increased these opportunities. Earned media, however, has serious limitations. The most significant limitation of being dependent on the earned media is the lack of editorial control over how and when the organization's views will be presented. The ACLU cannot always rely on the media to report its activities or to present its views accurately or completely, particularly given the media's dependence on "sound bites" which often skew the ACLU's position. These limitations have become increasingly obvious in the political climate following the 2000 Presidential election and the 9/11 attack on the World Trade Center. Civil liberties have come under fire like no other time since the McCarthy period. More than ever it is imperative that the ACLU's views be heard in an accurate and balanced way.

8. In an effort to curb the assault on civil liberties the ACLU has stepped up its fundraising and media campaigns. Membership in 2001 increased by 30% or 70,000 members. Contributions to the organization also increased 30% or almost 3 million dollars. Projections for 2002 are in line with these numbers. This money will be used to finance the ACLU's large, growing legislative operation and its many activities. The increased revenues will also be used to launch an aggressive media campaign that will involve the paid media. The ACLU's activities will always be heavily reliant on earned media, but hundreds of thousands of dollars have been budgeted to finance a paid media campaign targeting the constituents of elected officials on important civil liberties issues. The Hastert ad campaign that ran in March 2002, and which is described in the ACLU's complaint filed in this case, is just the first of many ads that the organization intends to launch in the future. With the success of our recent fundraising efforts, the ACLU is in a much stronger position to sponsor paid advertisements focusing on issues like the Department of Homeland Security and immigration reform. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period. The ACLU took out a full page advertisement in Congress Daily and CQ Monitor urging Congress to safeguard civil liberties in connection with its consideration of the "Gramm – Miller" and "Lieberman" versions of the Homeland Security legislation.

9. The provision of the BCRA that we are challenging in this lawsuit will severely restrain the ACLU's abilities to engage in many of these activities in the future.

10. I am the custodian of the documents that have been produced in discovery or disclosed to the defendants in this case pursuant to the court's scheduling Order. I am informed by counsel that these documents may be used at trial. They are true and correct copies of documents that are created and maintained in the ordinary course of the ACLU's operations.

11. I declare under penalty of perjury, that the foregoing is true and correct.

Executed on this 3rd day of October 2002.

____

Anthony D. Romero

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al.,	
Plaintiffs,	Civ. No. 02-582 (CKK, KLH, RJL)
v.	All consolidated cases.
FEDERAL ELECTION COMMISSION, et al.,	**COUNSEL ONLY**
Defendants.	
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al.,	
Plaintiffs,	
v.	
FEDERAL ELECTION COMMISSION, et al.,	
Defendants.	

DECLARATION OF STEVEN ROSENTHAL

Background

1. I am employed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") as Political Director. In this position I oversee the AFL-CIO Political Department and am responsible for its day-to-day operations. I have held this position since December 1995. I previously served as Associate Deputy Secretary of the United States Department of Labor from January 1993. I was Deputy Political Director of the Democratic [2] National Committee during 1992, and during the previous 13 years I worked in various organizing, political and legislative positions at the Communications Workers of America.

The AFL-CIO Political Program

2. The AFL-CIO Political Department has primary responsibility for implementing the AFL-CIO's political program, which principally involves the mobilization of union households in the labor movement's electoral political activities; engagement and coordination with the AFL-CIO's 66 affiliated national and international unions, 51 state federations and over 500 area and central labor councils in carrying out these activities; communications with and, where appropriate and advisable, common efforts with national, state and local political party committees and federal, state and local candidates to identify and turn out voters; and administration of the AFL-CIO's separate segregated funds that make contributions to party committees and candidates. Union members and their families are the labor movement's greatest resource for achieving its social and policy goals in advancing the rights and well-being of all working families.

3. The following description of the AFL-CIO's political activities generally applies to those efforts during the 1996, 1998 and 2000 two-year election cycles. The relative extent of these activities has changed somewhat but their basic elements have not. As permitted by the Federal

Election Campaign Act ("FECA"), the AFL-CIO uses its general treasury funds to pay for its membership mobilization efforts.

4. The 1994 general election produced conservative Republican majorities in the United States Senate and House of Representatives that had campaigned on, and proceeded to try to legislate, an agenda hostile to workers and unions and contrary to much of the broad and [3] longstanding legislative and policy positions and priorities of the AFL-CIO and its affiliates. Union household participation in the 1994 election fell from previous elections, in my view largely due to disillusionment over the Clinton Administration's failed health care plan and the passage of the North American Free Trade Agreement, and because the election insufficiently focused on working family concerns such as jobs, wages, Social Security, Medicare and education.

5. After John J. Sweeney's election as AFL-CIO President in October 1995, the AFL-CIO sought to redirect its political program by fostering greater involvement by union members and ending its largely reflexive support of the Democratic Party. The AFL-CIO adopted a revitalized approach to political matters that relied on union member engagement and activism and that supported candidates who embraced working family-friendly policies, regardless of party label, with an electoral goal of pro-working family majorities in Congress and state legislatures. This electoral goal has remained in place in successive election cycles.

6. More broadly, since 1995 the AFL-CIO has undertaken, in coordination with AFL-CIO affiliates, a year-round membership mobilization program centered on working family issues. This mobilization has sought to activate and engage union households; make the overall public policy agenda responsive to working family issues; hold elected officials and candidates accountable for their votes and policy positions; and elect pro-working family officeholders. Fundamentally, the AFL-CIO seeks to achieve officeholder accountability on legislative and policy matters in a political environment.

7. During 1996 the labor movement's overall program to shape the nation's issue and legislative debate, to elect worker-friendly candidates and to deal with ballot measures that addressed working family issues was called "Labor '96." In 1998 the term "Labor '98" was [4] applied more specifically to the membership mobilization program overseen by the Political Department, and the term "Labor 2000" was used similarly in 2000.

8. At the national level the AFL-CIO's political program has involved AFL-CIO staff and the staff of national and international union affiliates, usually overseen by their political directors. At the local level, this program has included union member activists in as many local unions as possible who provide information to other members and engage them in political action. We have sought especially to develop and maintain this field structure in states and districts where the electoral environment is most competitive; where union membership is most concentrated; where unions have greatest organizational strength; and where the AFL-CIO and its affiliates identify and participate in key elections involving candidates and ballot measures. That is because the presence of each of these elements enhances the impact and influence of our efforts.

9. The AFL-CIO regularly communicates with union members and their family members in order to engage them on issues, register them as voters, encourage them to vote in federal, state and local elections, and recommend their support of candidates who are committed to supporting working family issues. The AFL-CIO communicates where candidates stand on workplace issues, and, on the basis of their positions and commitments, the AFL-CIO often advocates the election or defeat of specific candidates. The AFL-CIO often prepares and disseminates sample ballots and slate cards that urge its members and their families to support specific candidates. The AFL-CIO also mobilizes union households to defeat anti-union and anti-worker ballot measures in the states, and to support ballot measures that would advance working family interests. These communications are disseminated by numerous means, principally including worksite conversations and leaflets, mailings, telephone banks, door-to- [5] door visits and union meetings. The AFL-CIO has also provided buttons and bumper stickers for its members in support of or opposition to specific candidates and ballot measures, and concerning particular issues.

10. The AFL-CIO has also undertaken a long-term effort to recruit union members to become candidates for public office at all levels. Originally called "2000 in 2000" (to express the goal of electing 2,000 union members by the year 2000), this program is now called "Target 5000" and expresses the labor movement's goal of electing 5,000 public officials with union backgrounds in the next few years.

11. The AFL-CIO supplements all these efforts with non-partisan voter registration and get-out-the-vote activities, particularly in minority communities, usually

through grants to organizations that undertake these activities.

12. The Political Department periodically contracts for polls and so-called "focus groups" to gauge how union members, their families and the general public feel about various issues and candidates, and to develop membership communications that are effective, and that will encourage AFL-CIO members to participate in the political process and support pro-working family candidates.

13. As required by FECA, the AFL-CIO reports to the Federal Election Commission ("FEC") the amount of direct expenditures for membership communications that are primarily devoted to the express advocacy of the election or defeat of clearly identified candidates for federal office. For example, the AFL-CIO expended approximately $4,220,679 for these membership communications during the 1999-2000 election cycle.

14. The principles and components of the AFL-CIO's "Labor '96" effort are described in various contemporaneous documents, including two resolutions adopted by the [6] AFL-CIO Executive Council on February 21, 1996, "Informing and Involving Union Members in National Legislative Debates" (Exhibit 1, 19151-53) and "Reclaim America" (Exh. 2, 19154); and two resolutions adopted by the AFL-CIO Special Convention on March 25, 1996, which approved a special assessment on all AFL-CIO affiliates to fund the "Labor '96" effort; "1996 AFL-CIO Issue-based Grassroots Legislative and Political Program" (Exh. 4, 17989) and "1996 AFL-CIO Principles for Political Endorsements" (Exh. 5, 17990-91).

15. On November 19, 1996, shortly after the general election, AFL-CIO President Sweeney gave a speech that reviewed the AFL-CIO's progress during his first year in office, including Labor '96. (Exh. 6, 19770-76). An AFL-CIO document that summarizes the 1996 election results and the labor movement's role in that election is "Labor '96: Key Facts on 1996 Election Results." (Exh. 7, 19231-37.)

16. AFL-CIO documents during the 1998 election cycle that describe the evolution of the membership mobilization program in the context of the labor movement's policy and programmatic objectives include the "Executive Council Report" to the AFL-CIO September 1997 Convention (Exh. 8, 18544-18559); a resolution adopted by that convention, "Making Government Work For Working Families" (Exh. 9, 18566-67); and a March 19, 1998 Executive Council resolution, "1998 Membership Mobilization" (Exh. 10, 19149-50).

17. AFL-CIO documents during the 2000 election cycle that describe the evolution of our membership mobilization program in the context of the labor movement's policy and programmatic objectives include a February 1999 "Report to the AFL-CIO Executive Council" on Labor 2000 (Exh. 11, 17291-17302); the "Executive Council Report" to the October 1999 AFL-CIO Convention (Exh. 12, 18600-18621); and a resolution adopted by that convention, "Making Government Work for Working Families" (Exh. 13, 18627-28). The AFL-CIO [7] summarized the labor movement's role in the 2000 election in a November 8, 2000 press release, "In the 'Cliffhanger' Presidential Election, Massive Mobilization and High Turnout by Union Members Made the Difference in Key States." (Exh. 14, 20136-37).

AFL-CIO Separate Segregated Funds for Political Uses

18. The Political Department administers the AFL-CIO's principal federal political action committee, the AFL-CIO Committee on Political Education Political Contributions Committee ("COPE PCC").

19. COPE PCC is a separate segregated fund consisting of so-called "hard money," that is, funds voluntarily contributed by individuals subject to the $5,000/year limit imposed by the Federal Election Campaign Act ("FECA"). COPE PCC is registered with the Federal Election Commission ("FEC") as a multi-candidate political committee and is regulated by Section 527 of the Internal Revenue Code. COPE PCC funds are almost entirely expended as contributions to the campaigns of federal candidates who share the AFL-CIO's commitment to working family issues and to political party committees that support such candidates; these funds are also occasionally spent on contributions to state party committees and to pay expenses for some AFL-CIO and AFL-CIO state federation employees as delegates to national political party conventions.

20. COPE PCC is funded by two sources. First, it can solicit and receive voluntary contributions from the AFL-CIO's executive and administrative staff, a class of under 200 people. Second, COPE PCC receives transfers from multi-candidate federal political action committees sponsored by seven of the AFL-CIO's 66 national and international union affiliates with which COPE PCC participates in joint fundraising arrangements, under which members of those unions authorize that their voluntary

political contributions may be allocated between their [8] own union's sponsored federal PAC and COPE PCC. These allocation decisions are made by those unions' PACs, not by COPE PCC.

21. COPE PCC files periodic reports with the FEC as FECA requires. In each report, COPE PCC itemizes the contributions and expenditures that it made during the pertinent reporting period, the contributions it received and the identities of the individuals who made them, and its operating expenses. These reports are public documents. Since 1998, COPE PCC's total annual receipts and their sources were as follows:

Year	**From Individuals**	**From Joint Fundraising Arrangements**
1998	$132,809	$1,253,000
1999	165,601	459,100
2000	182,652	935,100
2001	158,040	718,500

22. As a practical matter, the AFL-CIO is limited in its ability to raise more money for COPE PCC. The AFL-CIO's executive and administrative staff consists of a finite and static number of salaried employees. Efforts to increase their contributions would be labor-intensive and time-consuming and unlikely to yield much more than is already contributed. It is not feasible to solicit contributions directly from the AFL-CIO's 13 million members whose principal allegiance as political contributors is to the federal PAC of their own union, and the AFL-CIO would be unable to solicit them absent express permission from and cooperation with those unions. Also, in my experience every union considers its PAC funds insufficient to meet its political contribution goals. For that reason alone it would be extremely difficult to increase the COPE PCC share of receipts in joint fundraising arrangements; and, in my experience, union members do not contribute more when their PAC has a joint fundraising arrangement with the AFL-CIO than they do when there is no such arrangement. [9]

23. COPE PCC historically has not raised enough funds to make all the contributions it would like to make. Union members and staff ordinarily cannot afford to, and very rarely, if ever, contribute even $1,000 to their union's PAC, let alone the current (and unchanged by the Bipartisan Campaign Reform Act (BCRA)) maximum of $5,000 per year. (No individual has contributed as much as $2,000 during any year to COPE PCC during my tenure, and individuals have rarely contributed as much as $1,000.)

24. If the prohibition on union general treasury funding of "electioneering communications" under the BCRA takes effect, the AFL-CIO will be unable to make such communications via COPE PCC because of the current and prospective limited funds available to COPE PCC and the urgent priority to use its funds for contributions to candidates and party committees, as they are the only funds available for the AFL-CIO to make those contributions.

25. COPE PCC can also lawfully finance independent expenditures in connection with elections to federal office, although by choice it has not done so during my tenure as Political Director, with the exception of certain communications on the AFL-CIO website. (An independent expenditure is a communication to the general public, not coordinated with a party or candidate, that expressly

advocates the election or defeat of a candidate.) COPE PCC has no formal policy against making independent expenditures and, resources permitting, could decide to make such expenditures at any time.

26. I understand that the BCRA will require immediate disclosure to the FEC (and so, to the public) of contracts to make and disbursements of $10,000 for independent expenditures. If these provisions require advance disclosure of independent expenditures, this would be a significant deterrent to COPE PCC making independent expenditures because it would lose the impact and value of being able to communicate a public message when, where and how it [10] wishes. This requirement would also invite candidates that the future message would not support to pressure broadcast stations not to carry the message, and generally this would enable candidates and their parties and supporters to anticipate and try to counteract our message even before we can circulate it, significantly undercutting our ability to speak.

27. The AFL-CIO's general treasury funds pay the administrative costs of COPE PCC, as FECA permits. Any restriction on such funding that would involve a requirement that COPE PCC's hard money finance those costs would further exacerbate the limited-resource problem I have described.

28. The AFL-CIO Committee on Political Education-Treasury Fund ("COPE Treasury") is a separate segregated fund that is registered with the Internal Revenue Service ("IRS") under Section 527 of the Internal Revenue Code. COPE Treasury principally makes contributions and expenditures to the non-federal accounts of national party committees and, if allowed, in connection with state and local elections. As required by law, COPE Treasury regularly reports its contributions and expenditures to the IRS by filing a Political Organization Report of Contributions and Expenditures, Form 8872. These 8872 Forms are public documents. During the 2001 calendar year, COPE Treasury made contributions and expenditures totaling approximately $135,210.

29. COPE Treasury is funded by direct deposits of per capita tax receipts to the AFL-CIO from the general treasuries of its affiliated national and international unions. No AFL-CIO general treasury funds are transferred to COPE Treasury, and no individual solicitation efforts are undertaken by the AFL-CIO on behalf of COPE Treasury.

AFL-CIO Public Issues Media

30. Another vital and ongoing aspect of the AFL-CIO's ongoing efforts to change [11] laws and policies to promote working family-friendly policies is the public issue advocacy that is principally undertaken via broadcast media. That effort has been directed, developed and carried out by the AFL-CIO Public Affairs Department, principally in conjunction with the AFL-CIO Legislative Department. The Political Department played virtually no role in this advertising during the 1996 and 1998 election cycles due to uncertainty about what conduct constituted unlawful "coordination" under FECA. The Political Department is in regular contact with party committees and candidates, and sometimes works with them in undertaking union member mobilization activities. During the 1996 and 1998 cycles we were concerned that any involvement by the Political Department with AFL-CIO broadcast advertising that

referred to officeholders who were candidates or to non-incumbent candidates -- even if the Political Department had no contact with party committees or candidates about that advertising -- might be deemed to constitute "coordination" with them anyway and so be deemed an unlawful contribution to them by the AFL-CIO.

31. We were well aware throughout the 1996 and 1998 cycles that all our efforts were under considerable public and governmental scrutiny. Beginning in February 1996 various Republican Party committees filed a series of complaints against the AFL-CIO with the FEC falsely alleging, among other matters, that our public issue advocacy was unlawfully coordinated with Democratic Party committees and candidates. A lengthy and costly FEC investigation ensued and lasted until July 2000, when the FEC voted to dismiss all the complaints with a single minor exception not involving AFL-CIO public communications.

32. Effective in mid-2000, the AFL-CIO's internal policy regarding Political Department separation from public issues media changed as a result of the August 1999 decision in FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C.), and the FEC's subsequent rulemaking [12] on coordination issues. In fact, however, during 2000 the Political Department only occasionally conferred with the Public Affairs Department about the development, content and placement of AFL-CIO broadcast advertising, because patterns had been established and because the Political Department was so focused on the membership mobilization program, which required its full attention and involvement.

33. At no time have I, or to my knowledge anyone else in the Political Department, conferred with any candidate or party committee about prospective AFL-CIO broadcast advertising or sought their advice, suggestions or approval for any such advertising. Over the years I have received occasional telephone calls from candidates or their staff seeking to initiate a request about AFL-CIO advertising. In every instance I have informed the caller that it is inappropriate to have such a conversation and I have taken no steps to satisfy the request, nor have I informed the Public Affairs Department that it was made.

General Observation

34. I do not believe any of the activities I have described in this declaration corrupt or appear to corrupt any federal, state or local candidates or officeholders. The AFL-CIO and its members have important interests that are served through membership communications and other membership activities and through communications with the general public, and the AFL-CIO expends what resources it can on those programs. The AFL-CIO considers that the activities I have described instill in union members and their families, as well as in the public at large, a sense of empowerment and confidence that avenues for pursuing their common interests are available, and that their engagement in public life is both possible and effective.

[13] I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of October 2002.

/s/

Steven Rosenthal

1996 AFL-CIO Issue-based Grassroots Legislative and Political Program

Over the past 20 years, tremendous shifts have taken place in the political, social and economic strata of our country, nearly all of them detrimental to workers and our families.

Taking the low road through a murky deregulated economy, American corporations chose to compete in a new world marketplace by squeezing more productivity from fewer and less well-compensated workers. A succession of conservative occupants of the White House gave away billions of dollars worth of tax breaks to big business and the wealthy. And at every level of government, reactionary, anti-worker politicians seized the levers of authority and began systematically unravelling the cloak of economic and social justice arduously woven over the past 50 years by workers, our unions and our allies.

The result has been one of the largest transfers of power and money in the history of the United States. Over two decades, productivity went up 24 percent, executive compensation increased 360 percent and corporate profits soared. But real earnings for workers declined 12 percent and the number of Americans with health insurance coverage and pensions at work declined dramatically. Over 97 percent of the increase in household incomes went to the richest 20 percent. Today, the top fifth of households in our country get half the nation's income and control 85 percent of the wealth. The rest — 80 percent of all households — split the other half of total income and share 15 percent of the nation's wealth.

Working families are pressured as never before. More family members are working longer hours just to stay even, and parents have less and less time to spend with our children. Loaded with debt and threatened by downsizing, outsourcing and a growing pool of low-wage, no-benefit contingent labor, American workers are frustrated, anxious and angry. If they aren't out of work, they are out of hope, and you don't have to be an economist to realize that's a prescription for disaster in a nation that survives through optimism.

Incredibly, it is against this national backdrop that conservative members of Congress have launched a broad assault against federal laws and agencies which enhance wages and income security, protect worker health and safety, create and improve jobs, and defend the rights of workers to form and join unions:

- Under the guise of "reform," they have targeted Davis-Bacon, the Service Contract Act and the Fair Labor Standards Act, OSHA, MSHA and the National Labor Relations Board for virtual repeal.

- Using as justification a budget deficit they created, they are bent on decreasing funding for Medicare, Medicaid, and federal and postal retiree benefits, while increasing health care costs for the elderly, the disabled and the poor.

- With no pretense at fairness, they want to widen the wage and wealth gap by giving more tax breaks to the wealthy and the giant corporations, while slashing job training, welfare, nutrition, education and housing programs.

- And in order to perpetuate their control over workers and our families, they are determined to cripple worker organizations by crippling workers' rights, limiting transportation union bargaining rights, denying public access to union organizers, restraining advocacy organizations getting federal funds, legalizing company unions and passing a national right-to-work law.

The AFL-CIO and its unions are equally determined to reverse the flow of money and power that has working families mired in a wage and wealth sinkhole now big enough to swallow our entire economy. And we are committed to countering the politics and policies of elected officials who oppose the interest and welfare of working families. That's why we're responding as never before to rejuvenate our unions and build a strong, new nationwide movement of workers and our families. As the only organizations expressly representing the interest of working Americans, we're organizing an unprecedented effort to educate and mobilize working-class Americans around the issues that affect us and our children's future.

This is an extraordinary moment in our nation's history and the unions of the AFL-CIO have decided to assess themselves $ .15 per member, per month for a 12-month period beginning in May 1996 to fund an extraordinary response. The assessment is not an increase in the amount of dues members pay. Rather, it is an increase in the share of existing union funds devoted to education, training and mobilization to fight for the issues important to those members.

We will use the money to:

- Strengthen local unions, state federations and central labor councils by providing increased training, coordination and staff.

- Create standing grassroots action committees in every Congressional district, with a goal of recruiting and training at least 10,000 activists.

- Establish a National Labor Political Training Center to train staff as well as rank-and-file organizers and coordinators.

- Employ new techniques of advertising, direct mail and free media to educate workers and their families and motivate them to lobby elected officials.

- Register and mobilize voters around worker issues and get them to the polls in record numbers.

- Judge candidates by their positions on issues, not by whether they are Democrats or Republicans or Independents, and hold them accountable once we have elected them.

ROSENTHAL EXHIBIT 4

BEST AVAILABLE COPY

AFL-CIO Executive Council
March 19, 1998
Statement

1998 MEMBERSHIP MOBILIZATION

In 1996, the AFL-CIO committed itself to an historic legislative and political program d to "reverse the flow of money and power that has working families mired in a wage and inkhole now big enough to swallow our entire economy" and to counter "the politics and of elected officials who oppose the interests and welfare of working families."

Because of an unprecedented effort by our international unions, state labor federations, abor councils and local unions, the slopes of that sinkhole are today far less slippery. ause of the commitment and dedication of tens of thousands of union activists across our . those elected officials have turned their politics and policies a measurable number of back towards working families who elect them.

t our national level, we shredded the right wing's specious "Contract With America" led off attacks on federal health and safety and wage standards that workers and their depend upon.

Ve defeated an insidious attempt to slash Medicare, student loans and environmental ent, and to raid pension funds to pay for a tax cut for the wealthy.

nd against all odds, we raised the minimum wage, lowered a boom on comp time and M Act, and derailed the Administration's proposal for a renewed "fast track" authority in ng foreign trade agreements.

hat we've done over the past two years is indeed remarkable – but it is only a g – and much more is going to be demanded of the union movement.

a series of "Working Family Issues Forums" sponsored by the AFL-CIO in dozens of ion members and their families are telling us to revive and redouble our efforts to make ealth care available and affordable to all, strengthen Social Security and expand pension , ensure fair wages and raise the minimum wage and, most importantly, restore the right s to organize.

ow we face new challenges to the voices of America's working families – a phalanx of "paycheck protection" measures in Congress and in dozens of states by right-wing, er, anti-union organizations and individuals dead-set on retribution against the for our effective legislative and political efforts.

a result of our success over the last two years, the AFL-CIO and its affiliated unions ed that engaging the enemies of working families in open combat is a win-win national and political strategy.

ROSENTHAL EXHIBIT 10

Membership Mobilization

We have also learned that we must broaden our strategy beyond debate in the nation's l if we are to fully restore respect for working Americans and the jobs they do. Therefore, 8 and the years beyond, our primary emphasis in legislative and political activity will be to nd regularly exercise the grassroots power of our membership to hold elected officials at els accountable to working family issues and concerns.

To that end, we will:

Hold issues forums around the country, asking our members to help us build a consensus around a Working Families Agenda in which we will push for legislative solutions and measure the positions and records of officeholders.

Increase the size and scope of our legislative and political education campaign efforts, sharply focusing on grassroots membership mobilization.

Build on labor's effective fast track grassroots mobilization effort by utilizing highly-sophisticated direct mail and telemarketing techniques to augment our proven paid media strategies in educating workers and their families on issues affecting their lives.

ncrease participation of our 13 million members and the 40 million members of union ouseholds in the electoral and legislative process by providing more and better nformation on which they may base their decisions and involvement.

trengthen our grassroots electoral activity by redoubling – from 135 to 300 – the umber of full-time political coordinators in the field working to provide information to ur members to get them involved in elections and get them out to vote.

roaden our focus to include mobilization for political involvement at more levels – in ate legislative, gubernatorial, federal House and Senate, and local elections.

egister 4 million new voters from union households by the year 2000 and by the same ar have 2000 highly-trained union-member candidates running for public office at rious levels.

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DECLARATION OF SENATOR WARREN RUDMAN

[DEV 8, Tab 32]

The affiant, having been duly sworn, deposes and says:

1. My name is Warren Rudman.

2. I have worked in politics for much of my life. I have extensive experience as an elected official and as a public citizen with the workings of the electoral process at both the state and the federal level. In particular, I have deep experience with political fundraising, and I know first-hand and from working with colleagues just how beholden elected officials and their parties can become to those who contribute to their campaigns and to their party's coffers.

3. I first held public office in 1970, when I was appointed Attorney General of New Hampshire. In 1980, I was elected to the United States Senate from New Hampshire. I served two terms and retired from the Senate in 1992. While I was a Senator, I served as Vice Chairman of the Senate Select Committee investigating arms transfers to Iran. I was also a member and the Chairman of the Senate Ethics Committee. Since 1992, I have practiced law in Washington, D.C. During that time, I became a founding member of the Concord Coalition, a [2] non-profit group dedicated to increasing public awareness of national fiscal affairs and was co-chairman of John McCain's presidential campaign. In addition to serving on various Boards of Trustees, I am also member of the Senior Advisory Committee of the Institute of Politics of the John F. Kennedy School of Government at Harvard.

4. As a member of the Senate Select Committee in 1989, I presided over the so-called "Keating Five" hearings. The Committee investigated and reported on aspects of the savings-and-loan scandal. In particular, our report discussed how political contributions to political candidates, national and state parties, and non-profit groups involved in elections, necessitated by the then-current system of campaign finance,

created an aura of corruption that called into question the legitimacy of actions taken by certain elected and appointed officials. One of the "Keating Five" was John McCain, who went on to fight for campaign finance reform in a long and powerful crusade that resulted in the passage of the Bipartisan Campaign Finance Act (or "BCRA") in March, 2002. I greatly admire my friend John McCain for learning from the Keating Five incident that even the appearance of impropriety can be damaging to our democracy.

5. No one should have any idyllic illusions about the role of money in politics. By and large, the business world, including corporations and unions, gives money to political parties for a combination of two reasons: they believe that large contributions to a party (or, in some cases, to both major parties) will enable them to gain privileged access to and special influence over elected and appointed government officials so they can affect government decisions in Washington that affect their interests; and they believe that if they decline solicitations for such contributions, elected and appointed officials will ignore their views or, worse, that competing business interests who do make large contributions to the party in question will have an [3] advantage in influencing legislation or other government decisions. The same is true in the preponderance of cases where wealthy individuals give $50,000, $100,000, $250,000, or even more to political parties in soft money donations.

6. Nor should anyone have illusions about the solicitation side of the process. Much of the soft money raised for political parties is raised by elected officials—sitting members of the Senate and the House of Representatives. For example, the members of the National Republican Senatorial Committee (as well as the members of the Democratic Senatorial Campaign Committee) who raise large amounts of money are all sitting Senators. These and other elected officials solicit large sums of money from businesses, unions, and wealthy individuals who have

legislative matters pending before the Senate and the House. And make no mistake about it, elected officials who raise money for their party committees know exactly why most corporations, unions, and wealthy individuals contribute large sums of money to the party—they know it is exactly for the reasons outlined in the previous paragraph.

7. Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—nators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party -- to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so [4] you should do this to help us." No one needs to say it -- it is perfectly understood by all participants in every such meeting.

8. Individuals on both sides of the table recognize that larger donations effectively "purchase" greater benefits for donors. Larger donors receive greater access to elected officials. Some large donors will ask for help with personal causes, such as immigration matters, tax reform, or political appointments. Others attend meetings with elected officials in order to voice their company or industry's concerns with particular legislation and to affect the outcome of the legislation. These are not the requests or expectations of an average taxpayer. Elected officials may not intend to be affected by such access, but the fact is that they receive a disproportionate amount of input and advice from larger,

more wealthy contributors. This can skew their judgment. Equally important, the assumption that more money buys more influence gravely affects the public perception of the political process.

9. Large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done. They affect whom Senators and House members see, whom they spend their time with, what input they get, and -- make no mistake about it -- this money affects outcomes as well.

10. I understand that those who opposed passage of the Bipartisan Campaign Reform Act, and those who now challenge its constitutionality in Court, dare elected officials to point to specific interests of quid pro quo corruption. I think this misses the point altogether. What I described in the preceding paragraphs is inherently, endemically, and hopelessly corrupting. You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty.[5]

11. Almost every day, the press reports on important public issues that are being considered in Congress. Inevitably, the press draws a connection between an outcome and the amount that interested companies have given in soft money. Within just a few days last April two different national stories illustrated this point. On April 4, the *New York Times* ran an article that linked a recent executive order accelerating review of energy-related projects to a proposed energy bill submitted by the American Gas Association, a large donor to the Republican Party. (Attachment A). On April 6, the *Los Angeles Times* ran an article linking new, voluntary OSHA guidelines on ergonomics to large donors who opposed mandatory regulations. (Attachment B). These articles confirm my conclusion that the system is inherently, endemically, and hopelessly corrupting. Even if a Senator is supporting a position that helps an industry for reasons other than that the industry gave millions to his party, it does not appear that way in the public eye.

12. I understand that some people say that contributions to political parties from corporations, unions, and wealthy individuals of $50,000 or more are not inherently corrupting because they are not given directly to a candidate or his/her campaign committee. This is utter nonsense. The party's involvement does not sterilize the system. Elected officials often raise this money for their parties, sometimes pursuant to fundraising goals party leaders set for them. When party officials raise the money, they offer access to elected officials in return. Elected officials know exactly who the big party contributors are. The parties use soft money to help federal candidates get elected by running so-called "issue ads" funded with soft money in closely contested federal races. The parties also help federal candidates get elected in other ways.

13. The soft money system not only distorts the legislative process, it breeds deep cynicism in the minds of the public. I know this from my own experience in talking to citizens and voters over the years. I also see it reflected in polling results that I review from time to time.[6] For example, an ABC News/Washington Post Poll run in March 2001 asked the question: "Do you think politicians do special favors for people and groups who give them campaign contributions, or not? If 'Yes,' do you think that happens often or only sometimes." A staggering 80% of the respondents answered "Yes --often." Another 13% answered "Yes -sometimes." The total is 93%. If I had been a respondent, I would have been part of that 93%. The result of this poll is completely consistent with what I hear from and know about citizen attitudes. That attitude makes no distinction between contributions to candidate campaigns and contributions to political parties.

14. Make no mistake about the implications of this public attitude: when Americans believe overwhelmingly that their public servants are for sale, democracy is challenged at its roots. Kill the roots and you kill the tree.

15. I frequently speak on college campuses around the country. I almost always meet with students and talk about their attitudes toward the government, about the important issues of the day, and about how government deals with those issues. The palpable cynicism I encounter is widespread and deep. Many young people do not have faith in their government or elected officials. They do not think it is important to vote. They say their vote doesn't count because the government is for sale -- elected officials listen to the special interests, not the ordinary voter.

16. I speak frequently at community events as well. Ordinary citizens in large measure share the cynicism of young students, and for the same reasons.

17. The aura of corruption that surrounds our campaign finance system also deters able, qualified people from running for office. Before the Congress passed the BCRA, I tried to recruit a young, successful New Hampshire businessman to run for Congress. He declined, [7] telling me that he was not interested in large part because of the large amounts of both hard and soft money he would have to raise and everything that raising such enormous sums would entail.

18. As noted, I have been deeply involved in many federal election campaigns, and am therefore familiar with campaign advertising in such campaigns. Based on this experience, I believe that broadcast advertising does not need to use so-called "magic words" like "vote for" or "vote against" to be fully effective in supporting a clearly identified candidate. Many, if not most, campaign ads run by parties and by candidates themselves never use such "magic words." It is unnecessary. Usually the goal of an ad is to convey an image about the candidate's personal qualities and his or her views on important issues, or to contrast the candidate with his opponent. The idea is that if potential voters like the candidate and/or like his opinions, they will be inclined to vote for the candidate. Over the years -- and particularly in the last two election campaigns -- I have seen many, many

ads that in fact promote the election of a candidate that never say "vote for" the candidate. It is consumer fraud in my view for the parties -- and both parties are guilty of this -- to bombard citizens during the campaign season with broadcast ads about the party's candidates, all the while pretending that those ads are solely about "issues" and are not related to the candidates' campaigns. This conduct too breeds an unhealthy cynicism in the electorate, which generally harms our democracy and which specifically undermines the credibility of the major political parties.

19. To curtail soft-money fundraising and giving, it is necessary to have a comprehensive approach that addresses the use of soft money at the state and local party levels as well as at the national party level. The fact is that much of what state and local parties do helps to elect federal candidates. The national parties know it; the candidates know it; the state and local parties know it. If state and local parties can use soft money for activities that affect [8] federal elections, then the problem will not be solved at all. The same enormous incentives to raise the money will exist; the same large contributions by corporations, unions, and wealthy individuals will be made; the federal candidates who benefit from state party use of these funds will know exactly whom their benefactors are; the same degree of beholdenness and obligation will arise; the same distortions on the legislative process will occur; and the same public cynicism will erode the foundations of our democracy -- except it will all be worse in the public's mind because a perceived reform was undercut once again by a loophole that allows big money into the system.

20. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 02-582 (CKK, KLH, RJL)
Consolidated Actions

SENATOR MITCH McCONNELL, et at.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants.

DIRECT TRIAL TESTIMONY OF STEPHEN A. SANDHERR

The Chamber plaintiffs and ABC designated the attached pages 5:16 through 10:6 of the September 30, 2002, deposition of Stephen A. Sandherr as his direct trial testimony.

Respectfully submitted,

Thomas W. Kirby, Bar No. 915231
Wiley Rein & Fielding LLP
1776 K Street NW
Washington, DC 20006
TEL: 202.719.7062
FAX: 202.719.7049

Dated: October 4, 2002 Counsel for the Chamber Plaintiffs and ABC

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going to excuse myself for a second and see who is hammering on the door.

I'm going to direct your attention to 1996 and to an organization known as The Coalition. Does that ring a bell with you?

A. Yes, it does.

Q. Was AGC a member of The Coalition?

A. Yes, we were.

Q. How did that come to be?

A. How did The Coalition come to be?

Q. Yes, just in a nutshell.

A. It was very well publicized at the time that the AFL-CIO was -- had raised $35 million to use in the 1996 Congressional elections where it was their intention to unseat pro-business members of Congress, particularly Republicans, and the business community decided that it was in our interest to respond to that by trying to raise our own funds to counter the advocacy ads that the AFL-CIO was announcing that they were going to run in the elections.

Q. And this was Mr. Meeney (sic) who was making these announcements on that; is that right?

A. Sweeney.

Declaration of Representative Christopher Shays

* * *

[4 (11 PCS/ NRA 101)]

13. I personally feel that some of the ads run in 2000 attacking the character of President George W. Bush were inappropriate, including some that insinuated that he is a racist. While these ads may still be run under BCRA, I was very glad that the BCRA passed with a provision that would require the disclosure of all funding for broadcast ads mentioning a candidate for federal office, run within 30 days of a primary and 60 days of a general election.

* * *

DECLARATION OF BEVERLY ANN SHEA

I, Beverly Ann Shea, hereby swear and depose as follows, based on my own personal knowledge:

1. I am the Finance Director for the Republican National Committee ("RNC"). I submit this Declaration to discuss: (a) the RNC's federal and non-federal fundraising programs and donors; (b) the RNC's fundraising and direct financial assistance to state parties; (c) the financial impact of the Bipartisan Campaign Reform Act ("BCRA") on state parties and the RNC; and (d) the faulty supposition that the RNC provides its major donors with improper access to federal officeholders.

[*2] Education and Background in Political Fundraising

2. I have 21 years of experience in professional political fundraising and finance, through positions with the RNC, state political parties, and campaigns for elected office. This experience is summarized in my biographical statement. See RNC Exhibit 2263, attached as Attachment 1 hereto. From February 2001 to the present, I have served as Finance Director for the RNC. Previously, from March 1997 to December 2000, I was Deputy Finance Director for the RNC. In the two month interim period between these positions, I was Chief Deputy and Director of Special Services for the 54th Presidential Inaugural for President George W. Bush.

3. Before March 1997, I had a variety of political fundraising positions. From April 1993 until March 1997, I was President of Shea Consulting. In that position, I served as a fundraising consultant to the campaigns of many candidates for federal and state elected office. For various time periods between June 1981 and April 1993, among other positions, I was: (a) Regional Field Finance Director for the RNC; (b) Finance Director to the Republican Parties of New Mexico and Wisconsin; (c) Campaign Manager for congressional

candidate Michael Brown; and (d) National Finance Director to the Bush-Quayle '92 Primary Committee.

4. I received a Bachelor of Science degree in Journalism from West Virginia University in 1980.

General Description of the RNC's Finance Division

5. The Finance Division is responsible for all fundraising activities of the RNC. The Division is led by the Finance Director, who is chosen by the RNC's Finance Chairman, the Chairman of the RNC, or both. An organizational chart for the Finance Division is RNC Exhibit 2424, and is attached as Attachment 2 hereto.

[*3] 6. The Finance Division is organized into two marketing disciplines: (a) major donor programs, which are those involving contributions of $1,000 and up; and (b) direct marketing, which mostly involves small donations but also can include the RNC's $1,000 and $5,000 donor programs. From 1997 to 2001, the Finance Division had a full-time staff of 40 to 45 employees, not including the RNC's in-house telephone solicitation center.

7. In 2000, the Finance Division raised a total of $252,790,600. See RNC Exhibit 2429, attached as Attachment 3 hereto. Of this amount, $146,929,900 was raised through the RNC's "major donor" programs as described below, and $105,860,700 was raised through direct marketing, which consists of direct mail, telemarketing, and electronic commerce solicitations through email and the internet. Id. This overweighting of major donations is unique to presidential election years. In all other years, direct marketing typically accounts for 60-65% of the RNC's gross income. This return to the norm was borne out in 2001. In that year, the Finance Division raised a total of $82,027,300. Of this amount, $25,909,700 was raised through major donor programs, and $56,117,600 was raised through direct marketing. See id.

8. In 2000, federal money accounted for 60% of the total raised by the RNC, and the remaining 40% was non-federal money. See RNC Exhibit 535, attached as Attachment 4 hereto. In 2001, the RNC's total funds raised consisted of 78% federal money and 22% non-federal money.

9. The RNC's active donor base in calendar year 2000 was 1,030,666 donors, of whom 435,908 were new first-time contributors. See RNC Exhibit 2430, attached as Attachment 5 hereto. The RNC's donors in 2000 gave 2,470,093 separate donations during the year. Id. The average contribution to the RNC in 2000 was $102.34. Id. The RNC's active donor base in calendar year 2001 was 794,682 donors, of whom 219,135 were new first-time [*4] contributors. Id. The RNC's donors in 2001 gave 1,437,370 separate donations during the year. Id. In 2001, the average contribution to the RNC was $57.07. Id.

The RNC's Donor Programs

10. The Federal Election Campaign Act of 1971, as amended, allows individuals to contribute up to $20,000 per year to the RNC, and limits to $25,000 an individual's total annual federal contributions to all recipients. Federal law allows multi-candidate political committees ("PACs") to contribute up to $15,000 annually to the RNC. These federal contributions are deposited into the RNC's federal accounts.

11. I understand that the BCRA will increase to $25,000 the annual limit on an individual's federal contributions to political parties such as the RNC, and will increase to $57,500 the aggregate limit on an individual's total federal contributions. The new federal limit regarding political party contributions will not produce much additional fundraising revenue for the RNC because it will affect, at

most, only those 145 donors who presently contribute the current $20,000 federal limit, and perhaps other donors who contribute the $25,000 annual aggregate limit for federal money. Moreover, it is unclear how many, if any, of these donors will increase their contributions to the RNC as a result of the increased political party and aggregate limits.

12. The RNC also receives donations from sources that may not contribute to federal campaign activity, and also receives donations in amounts above the federal contribution limits. Donations from individuals above the federal limits, as well as donations from corporations, labor unions, and other sources that may not make federal contributions, are deposited into non-federal accounts. Of the non-federal funds donated to the RNC in calendar year 2000, for example, 58% were from individuals and 42% were from corporations and PACs. [*5] The RNC's non-federal accounts are maintained within the Republican National State Elections Committee ("RNSEC"). The BCRA will prohibit the RNC from raising, spending, transferring, or directing any non-federal money.

13. In 2000, the RNC voluntarily instituted a limit on the amount of non-federal money it would accept from a single individual or corporate donor during a given year. That limit was $250,000. On a handful of occasions in 2000, a donor offered a donation in excess of this voluntary limit and the RNC refunded the excess money. An internal RNC memorandum about one such refund is RNC Exhibit 636, attached as Attachment 6 hereto. Additional refunds of sums contributed above $250,000 in calendar year 2000 were made to The Kohler Company, Philip Morris Company, Mr. Sam Fox, and Mr. Michael Armstrong. Incidental fees paid by $250,000 donors for attendance at the Republican National Convention or similar events were not refunded.

14. The RNC raises federal and non-federal money through a variety of donor programs, as follows:

a. The "Sustaining Member" program seeks individual contributions of at least $25 per year to the RNC. Sustaining Members receive a subscription to the RNC magazine Rising Tide, access to a toll-free Members' Hotline and a members-only internet website, membership commemorative materials, access to the RNC "Museum," and members-only events hosted by the RNC's internet website, www.RNC.org. See RNC Exhibit 35a, attached as Attachment 7 hereto. In 2000, the RNC had 1,002,309 Sustaining Members and other donors who contributed less than $1,000 apiece, for a total of $ 95.65 million to the RNC, $94 million of which was federal money and $1.65 million of which was non-federal.

[*6] b. The "President's Club" is a fundraising program designed for contributions of $1,000 per person or $2,000 per couple, per year, to the RNC. Members of the President's Club are invited to an annual National Meeting featuring federal officeholders, and receive a special members-only newsletter and membership commemorative materials. See RNC Exhibit 35b, attached as Attachment 8 hereto. In 2000, the RNC had an active base of 5,232 President's Club members who contributed a total of $10.1 million to the RNC, $8 million of which was federal and $2.1 million of which was non-federal. See Attachment 4 hereto.

c. The "Chairman's Advisory Board" program requires an annual contribution of $5,000 per year in federal or non-federal money to the RNC or RNSEC. Members of the Chairman's Advisory Board are invited to two meetings held annually that are attended by party leaders. See RNC Exhibit 35c, attached as Attachment 9 hereto. In 2000, the RNC had an active base of 1,440 Chairman's Advisory Board members who contributed a total of $10.8 million to the RNC, $8.1 million of which was federal and $2.7 million of which was non-federal. See Attachment 4 hereto.

d. The "Eagles" program is the RNC's oldest "major donor" program. It requires members to contribute either $15,000 in federal money or $20,000 in non-federal money to the RNC or RNSEC each year. Again, Eagles are invited to many RNC events, including some that feature party leaders. See RNC Exhibit 35d, attached as Attachment 10 hereto. In 2000, the RNC had 1,449 members of the Eagles program who contributed a total of $30.7 million to the RNC, $20.3 million of which was federal and $10.4 million of which was non-federal. See Attachment 4 hereto.

e. The "Majority Fund" is directed at PACs that donate $15,000 per year in federal or non-federal money to the RNC or RNSEC. Members of the Majority Fund are [*7] invited to numerous RNC events, including some events specially designed for members of that group, and some of which feature party leaders. The RNC raises relatively little federal money from PACs, however, because PACs typically use their federal dollars to contribute to candidates. See RNC Exhibit 35e, attached as Attachment 11 hereto. In 2000, the RNC had 120 Majority Fund members that contributed a total of $2.4 million to the RNC, $400,000 of which was federal and $2 million of which was non-federal. See Attachment 4 hereto.

f. "Team 100" members donate $100,000 upon joining, and $25,000 in each of the three subsequent years, to the RNC or RNSEC. These donations typically include a mix of federal and non-federal money. Team 100 members are invited to many RNC events, some of which feature party leaders. See RNC Exhibit 35f, attached as Attachment 12 hereto. In 2000, the RNC had 614 active Team 100 members who contributed a total of $49.6 million to the RNC, $5.4 million of which was federal and $44.2 million of which was non-federal. See Attachment 4 hereto.

g. The "Regents" program asks the donor to give an aggregate amount of $250,000 to the RNC or RNSEC per each two-year election cycle. Regents members are invited to all events sponsored by the RNC. In 2000, the RNC had 180 active Regents who contributed a total of $34 million to the RNC, $1.5 million of which was federal and $32.5 million of which was non-federal. See Attachment 4 hereto.

15. In addition, the RNC establishes a special "Presidential Trust" program every four years to help raise the funds the RNC is permitted to spend directly on behalf of the Republican nominee for President of the United States, with certain amounts spent on behalf of other candidates for federal office as well. The programs asks the donor to contribute $20,000 in solely federal money, and no portion of the contribution is shared with state parties. [*8] Participation entitles the donor to a one-year membership in the Eagles or Majority Fund program.

16. To ensure strict compliance with federal laws regulating contributions to political party committees, the RNC provides current and prospective major donors with a set of Contribution Guidelines. The Guidelines explain the federal and non-federal RNC accounts and the extent to which contributions may be directed to one, or a combination, of these accounts. RNC Guidelines for the Regents, Team 100, and Majority Fund programs are RNC Exhibits 2155, 2071, and 2097, respectively, and are attached as Attachments 13-15 hereto.

17. I understand that some persons who are unfamiliar with the RNC's fundraising methods believe that Members of Congress regularly solicit donations to RNC major donor programs through telephone calls or personal meetings. Although it is true that Members of Congress occasionally sign fundraising letters for the RNC, it is exceedingly rare for them to solicit funds through telephone calls or personal meetings. As a matter of RNC policy, telephone and personal fundraising contacts for major donor

programs are initiated by RNC Chairman Marc Racicot, Co-Chairman Ann Wagner, Deputy Chairman Jack Oliver, National Finance Chair Lew Eisenberg, and myself, not Members of Congress.

18. Contributions toward the Sustaining Member, President's Club, and Chairman's Advisory Board programs consist of federal dollars. So do many of the contributions to the Majority Fund and Eagles programs. Further, many (if not most) members of the Team 100 and Regents programs fulfill their obligations with a combination of federal and non-federal dollars. Indeed, contrary to popular misimpression, the RNC's major donor programs ($1,000 and up) are a significant source of federal money. In 2000, for example, the funds raised through these programs were 32% federal money and 68% non-federal money.

[*9] Financial Impact of the BCRA on the RNC

19. Based on my personal experience in the RNC Finance Division, I calculate that the BCRA will cause the RNC to lose revenues of approximately $48.5 million per non-presidential election year, and $125 million per presidential election year. These losses will be caused almost entirely by the BCRA's prohibitions on the solicitation or raising of non-federal funds by national political parties. My experience demonstrates to me, contrary to the supposition of uninformed observers, that the RNC will not be able to recoup these lost non-federal revenues merely because the BCRA has increased the limits on contributions of federal money. As noted above, the new federal limit regarding political party contributions will affect only those 145 donors who presently contribute the current $20,000 federal limit, and those who have made aggregate federal contributions of $25,000. Moreover, it is unlikely that the RNC will be able to raise more federal money from lower-dollar contributors than it currently does, for the following reasons.

20. The RNC solicits participation in its donor programs through several methods: (a) soliciting donors to become first-time members in a major donor program; (b) soliciting existing major donors to renew their commitments; and (c) soliciting existing major donors to "upgrade" from lower dollar level programs to higher dollar level programs.

21. The amount of federal money the RNC is able to raise through its major donor programs, in particular, is limited by demographic, economic, and political constraints. For example, most individuals, corporations, and PACs participate in the RNC's major donor programs because the individuals or individual decisionmakers at corporations and PACs are philosophically compatible with the positions of the Republican Party. The number of such individuals who possess the financial resources to participate personally in the RNC's major **[*10]** donor programs -- or who are in a position to direct corporate or PAC participation in those programs -- is a very small fraction of the roughly 4.5 million individuals that comprise the RNC's base of potential donors at all levels. As noted above, although the RNC had a total of 1,030,666 donors in calendar year 2000, only 180 were Regents, 614 were Team 100 members, and 120 were Majority Fund participants. Also, the RNC's perceived political successes and failures affect the quantity and intensity of participation in the major donor programs. Finally, economic factors constrain the number of individuals, corporations, and PACs that participate in the RNC's major donor programs and the degree to which they participate.

22. There is a limit to the number of solicitations of new major donors that the RNC can profitably make. The farther from the RNC's base of likely donors that the RNC prospects for new participants in its major donor programs, the lower its yield. Also, there is a limit to the number of attempts that the RNC can reasonably make to renew or upgrade existing major donors to higher dollar level programs. Most major donors decide whether to renew their

participations or upgrade to a higher level on an annual basis. Thus, there is usually only one time during the year for each major donor that the RNC can profitably solicit an existing major donor to renew or upgrade his or her participation. Repeated solicitations to the same major donor risk alienating that donor and limiting the amount of money that the RNC may receive from the donor in the future.

The Motivation of Non-Federal Donors to the RNC

23. In my experience, donors of non-federal money are motivated by the same desires as donors of federal money. I believe there are three basic reasons why individuals and entities donate money to a political party, and the RNC appeals to these motivations in its fundraising activities.

[*11] 24. First, both federal and non-federal donors tend to be strong and loyal supporters of the party. From my discussions and observations over the years, I can safely state that donors to the RNC believe in the Republican Party philosophy of low taxes, limited federal government, strong defense, and high ethical standards for public officials. From the lowest level donors to the highest level, they share a common interest in politics and good government. Donor belief in the philosophy of the Republican Party is confirmed by their loyalty; for the most part, non-federal donors give money to the RNC regardless of the issues then pending before Congress or the Executive Branch.

25. The second reason that individuals join the RNC's major gift programs is that they enjoy being involved in RNC events, which often include speeches and presentations by prominent policymakers and commentators. The RNC expends much effort and money planning and holding receptions, dinners, retreats, and seminars for both federal contributors and non-federal donors. During the 1998 election cycle, the RNC spent $10.2 million planning, organizing, and staging major donor events. During the 2000

cycle, the RNC spent $18.5 million, and thus far for the 2002 cycle the RNC has spent $7.5 million. If the RNC did not believe donors were motivated by the opportunity to attend events, it would not expend so much money on them.

26. Although RNC events often "feature" party leaders, these leaders are not exclusively current federal officeholders. For example, this category very frequently includes the RNC Finance Chairman and Political Director, who provide insights on the current political climate. Party leaders also include former Cabinet officials from prior Republican Administrations. At one well-attended Team 100 event in 1998, for example, former Cabinet Secretaries Brent Scowcroft and Elizabeth Dole were featured. Other events have featured [*12] National Review writer Kate O'Beirne, author P.J. O'Rourke, and other nationally-known political celebrities.

27. Sitting Members of Congress and Executive Branch officials also are often featured at events for donors, but their roles at these events are commonly misstated by the pro-reform commentators. These officeholders (and candidates forf ederal office)d o not appear at RNC events to solicit either federal or non-federal donations. Rather, they appear to speak on political or policy topics, and the substance of these comments does not differ from comments they frequently make on television or on the House or Senate floor. Nor does the content of their comments differ from events attended primarily by federal contributors to events attended primarily by non-federal donors. Question-and-answer sessions at RNC donor events focus on general policy issues and do not provide an opportunity for any individual to advocate a particular position on pending legislation. Attendees at some events sometimes have the opportunity to socialize, or play golf or tennis, with the speakers, but efforts to lobby during these events are frowned upon as exceedingly rude and are quite rare.

28. Relatedly, participation in the RNC's major donor programs increases during presidential election years, when the RNC typically has more events, especially those centered around the quadrennial Republican National Convention. Major donors receive special invitations to each Convention, and are also invited to participate in special meetings and social occasions during the Convention proceedings. An example of such an invitation for Team 100 members to attend the 2000 Convention, which was held in Philadelphia from July 31-August 3, 2000, is RNC Exhibit 723 and is attached as Attachment 16 hereto. The Conventions also permit the RNC to host special Gala celebrations in honor of the Republican nominees for President and Vice-President. Attendance at such events is available for donations of $1,000 per person, and **[*13]** thus many attendees contribute only federal money to the RNC. A sample Gala invitation from the 2000 Convention is RNC Exhibit 847, and is attached as Attachment 17 hereto. Based on my personal experience, I conclude that participation in major donor programs increases during presidential election years for two basic reasons: (a) donors enjoy attending the unique events that can be made available only in presidential election years; and (b) donors are excited by the fact that so much more is at stake during presidential election years than in any other years.

29. Similarly, involvement in major donor programs also allows donors to meet and become friends with like-minded people in business and politics. Members of Team 100 and the Eagles, for example, tend to be successful entrepreneurs who have much in common. They enjoy the camaraderie of these social occasions and the non-political business opportunities that these associations with other major donors provide.

30. The third reason that individuals participate in the RNC's major donor programs is that they have a sense of philanthropy that often begins with similar commitments to

charitable organizations. Many members of Team 100, for example, are well known for their generosity to charitable causes. Members of RNC major donor programs are comfortable with the notion of giving to causes they support with no expectation of receiving tangible benefits in return.

31. Based upon these and other personal observations, I strongly believe that participants in the RNC's major donor programs do not expect, and do not receive, political favors in exchange for their donations.

[*14] Fundraising Assistance Provided by the RNC To State and Local Parties and Candidates

32. A core function of the RNC is to assist state Republican parties in their activities, including fundraising. The RNC provides this assistance in five major ways, all of which appear to be criminalized by the BCRA to the extent they involve non-federal money.

33. First, the RNC transfers and otherwise provides federal and non-federal funds to state parties (and candidates for state office). I understand that the Declaration of Jay Banning addresses this in more detail.

34. State parties quite obviously benefit from RNC transfers, which represent funds that the state parties might not have otherwise obtained through their own efforts. Further, certain state parties rely heavily on RNC non-federal funds for their very existence.

35. Second, the RNC shares its lists of fundraising prospects with state parties. A sample list-sharing agreement with the Massachusetts Republican State Committee for 2002 is RNC Exhibit 1801, attached as Attachment 18 hereto. As this document states in one of its initial clauses, because it is the "principal responsibility of the RNC to promote Republican candidates," and because "a component part of its

party-building activities is to develop and identify contributors who share common goals and ideals," the list exchange program is "to the mutual advantage and benefit of the parties" thereto. Id. Indeed, state parties benefit greatly from list-sharing because the RNC's fundraising lists are very comprehensive and detailed, and provide solid prospects for donations that state parties might otherwise be unable to obtain on their own. Additional list-sharing agreements with the Republican Party of Ohio, Wisconsin, Tennessee, Iowa, and Indiana are RNC Exhibits 1195, 933, 1001, 911, and 956, respectively, and are attached as Attachments 19-23 hereto.

[*15] 36. Third, the RNC co-hosts "tiered" fundraising events with state parties. "Tiered" fundraising events typically involve two or three separate events occurring on a single date at locations in the same vicinity. Typical tiered events will consist of a large low-dollar event for federal donors to candidates in the first tier, a middle-tier "photo op" event with larger donors, and often a separate top-tier dinner for the event Host Committee. Typically, the proceeds of the large first-tier event go to a candidate for state office, the proceeds of the middle-tier "photo op" go to the state party, and the proceeds of the top-tier dinner go to the RNC. So-called "tiered" fundraising events such as these serve to benefit state parties because they are able to increase their fundraising success through direct association with the RNC. In fact, without the RNC holding an event in the same city and on the same date as the state party event, it would likely be logistically and financially impossible for the state party to convince major-drawing surrogates to be the featured guest at their own event. Further, the RNC has a highly professional and experienced fundraising staff, which many state parties do not. Indeed, some state parties have no fundraising employees at all. Therefore, state parties necessarily benefit from the involvement of RNC personnel in tiered fundraising activities, both because RNC fundraising staffers are highly competent and because their involvement supplements the efforts of state party personnel.

37. The RNC also promotes state party events to its donors, in an effort to increase the fundraising ability of state parties. For example, since 1992 the Washington State Republican Party has hosted an annual GOP Picnic, often with the support of the King County Republican Party. Attendance at the Picnic has reached as high as 10,000 participants, and the event attracts elected officials from all levels of government, including members of Washington State's congressional delegation, candidates for Governor in gubernatorial election years, and [*16] state and local representatives. The RNC promotes the GOP Picnic to its major donors from Washington State, as demonstrated by the Team 100 letter that is RNC Exhibits 942 and 1126, attached as Attachment 24 hereto.

38. Fourth, the RNC has a program called "Finance PLUS," which provides financial incentives for state parties develop and improve their fundraising capacity. Through Finance PLUS, the RNC reimburses state parties for the costs they incur in organizing and hosting their own fundraising events. In my experience, Finance PLUS is an effective means for the RNC to encourage and strengthen state party fundraising.

39. Finally, the RNC permits its Regents and Team 100 members to designate (or "return") portions of their non-federal donations to state parties, and sometimes requests that its major donors make additional contributions to state parties that are in urgent need of funds. For example, in 2000, RNC Regents and Team 100 members designated $10.8 million in non-federal donations to state parties. By way of example, a spreadsheet describing state-by-state Regents transfers in 2000 is RNC Exhibit 663, attached as Attachment 25 hereto. Several letters from Team 100 members, requesting the designation of contributions to state parties in 2000, are RNC

Exhibits 881, 1522, and 1524, attached as Attachments 26-28 hereto.

40. Related to direct fundraising for state parties, the RNC also engages in fundraising on behalf of candidates for state and local office. For example, the RNC has sent direct-mail fundraising letters on behalf of Virginia gubernatorial candidate George Allen, New Jersey gubernatorial candidate Bret Schundler, and St. Paul, Minnesota mayoral candidate Norm Coleman. See RNC Exhibits 1162, 292, and 232, respectively, attached as Attachments 29-31 hereto. Donations made in response to these letters were made directly to the candidates themselves, not to the RNC, and the RNC did not track or otherwise record who among the [*17] recipients of the letters actually made contributions. Because contributions to state and local candidates are not federally regulated, the BCRA will prohibit this type of fundraising assistance.

Impact of the BCRA on State Parties

41. Major contributors often donate non-federal funds to the RNC in lieu of state parties. This can be explained by a variety of factors, all of which demonstrate that the RNC has a greater fundraising capacity than state parties do.

a. First, as the official national Republican Party committee, the RNC has a "brand name" and prestige that the state parties, by definition, do not. Prospective donors are much more likely to have heard of the RNC, to consider it accountable and credible, to understand its role in the political process, and to trust that its activities are aligned with the national Republican Party agenda. Further, several state Republican Party organizations are largely inactive, and thus are unable to present compelling reasons for donors to support them.

b. Second, the RNC has a large direct marketing and fundraising staff, consisting, in recent years, of between 40 and 45 employees. All of these personnel are full-time professionals with substantial experience in the field. State parties, in contrast, generally lack professional fundraising staff. The RNC, because it is a well-known national party committee, also tends to attract the most talented and dedicated marketing and fundraising employees. It is more difficult for state parties to do so.

c. Third, the size and scope of the RNC's direct marketing and fundraising operations enable it to achieve economies of scale that state parties simply cannot match. For example, the RNC's cost per mail piece in a nationwide fundraising campaign is substantially lower than the cost per mail piece of a statewide campaign conducted by a state [*18] party, because the volume of mailings is so different. The RNC, therefore, can conduct direct market fundraising more cost-effectively than state parties can.

d. Fourth, as a national organization, the RNC is able to "go where the money is" with much greater ease and ability than a state party. For example, under current law, the RNC can hold a fundraiser in New York, then re-distribute that money internally to support a candidate running for state office in Mississippi. The Republican Party of Mississippi, in contrast, is much less likely to have fundraising success in New York. The ability of the RNC to raise funds nationwide is demonstrated by the attached charts that sort the RNC's federal and non-federal contributions by state for 2000 and year-to-date for 2002 (as of June 28). See RNC Exhibits 2259 and 65, respectively, attached as Attachments 32-33 hereto. Both charts show that the RNC raised federal and non-federal money from all 50 states in 2000 and year-to-date in 2002.

e. Finally, as noted above, my experience has demonstrated to me that donors have fairly firm limits on the amount of money they are willing and able to contribute to political parties. This is a fact of the marketplace that will not change merely because of the BCRA. Because the RNC is so much more prominent than state parties are, my experience suggests that donors are -- and will continue to be -- inclined to allocate more of their contributions to the RNC than to state parties.

42. As described above, the BCRA threatens to outlaw the RNC's fundraising assistance to state parties in the form of joint and tiered fundraising for non-federal money, transfers of non-federal funds, and designation and direction of non-federal funds. Because the state parties have less fundraising capacity than does the RNC, the elimination of RNC assistance with respect to non-federal money would have a significant detrimental effect on state **[*19]** parties. Indeed, it is no exaggeration to observe that the BCRA threatens the very survival of the Republican Party committees in several particularly vulnerable states. I understand that the Declaration of Jay Banning sets forth information about the five most financially vulnerable state Republican Parties, namely those in Arkansas, Maine, North Carolina, Wisconsin, and Oregon.

The RNC Does Not Give Donors Improper Access to Candidates or Officeholders

43. I understand that persons unfamiliar with political fundraising often contend that individuals and entities that donate non-federal money to political parties do so to "buy access" to candidates and officeholders, so that the donor can attempt to achieve improper influence over the legislative process. Based upon my 21 years of experience as a political fundraiser and finance consultant, I categorically reject this contention with respect to the RNC.

44. As a matter of policy, the RNC Finance Division does not offer to arrange personal meetings between donors -- no matter how large -- and federal officeholders or candidates for office. During my tenure at the RNC, there have been a handful of occasions when individuals have attempted to condition donations on the arrangement of such meetings, and each time the RNC has rejected the donation and denied the request. In one related instance, the RNC rejected a contribution from a prospective Regents member because of public controversy involving his prior illegal contributions to Democratic candidates for federal office and his overnight stays in the Clinton White House as a major Democratic donor. See RNC Exhibit 552, attached as Attachment 34 hereto. The individuals who have sought to condition donations to the RNC on its arrangement of meetings with officeholders, more often than not, have proposed to contribute federal dollars to the RNC. One such recent instance involved a gentleman who proposed to condition his membership in the RNC Eagles program on a meeting **[*20]** with an officeholder. The RNC rejected the contribution. A ban on non-federal contributions to the RNC, therefore, would not stop most of these incidents from occurring.

45. It is obvious why major donors to the RNC do not regularly use their donations as a means to obtain "access." All or virtually all who have personal or organizational business with the federal government retain or employ professional lobbyists. Each election cycle, however, there are a very few instances in which federal or non-federal donors ask the RNC Finance staff or other RNC personnel to arrange meetings with federal officeholders. To confirm my recollection that such requests are very infrequent, I instructed my staff to review the RNC Finance Division's files about all contacts from major donors between 1997 and the end of 2001. These files record all contacts, in the form of letters, telephone calls, or personal meetings, between the RNC Finance Division and each major donor. There are literally thousands of such files, each of which contains multiple entries for each separate donor, with each entry showing the

date and the substance of the contact. Some files contain dozens of entries. This review demonstrated, consistent with my recollection, that on average in recent years the RNC has received fewer than fifteen requests per election cycle in which donors -- of both federal and non-federal money -- ask RNC personnel to arrange meetings with federal officeholders.

46. Such requests come from donors at all levels, and are more prevalent among federal contributors than among non-federal donors. In the relatively infrequent instances in which the RNC Finance staff receives such a request, our policy is to pass the request along to the officeholder's staff without inquiring into the purpose of the proposed meeting, but neither to advocate a meeting nor ascertain whether a meeting has been arranged. In passing along the request, we do not indicate the amount of money donated by the person requesting the meeting. I received one such request, for example, on February 22, 2001, and as a matter of course the **[*21]** request was passed along to the officeholders' staff. See Attachment 35 hereto (defendant-intervenors' exhibit). At no time did I or anyone on my staff advocate that the meeting occur, or follow up on whether it did occur.

47. I understand that the defendants in this case have contended that an employee in the RNC Finance Division's external affairs office, Stephanie Strategos, is employed for the purpose of arranging donor meetings with Members of Congress. The defendants are mistaken. In fact, it is the job of Ms. Strategos to arrange for Members of Congress, Cabinet officials, and other special guests and speakers to attend RNC events, which are attended by scores or even thousands of people.

48. Relatedly, I understand that the defendants have referenced several RNC documents in an effort to support their claim that the RNC provides improper "access" to its non-federal donors. In fact, none of these documents supports the defendants' claims.

a. First, the defendants point to an internal RNC memorandum dated October 23, 2001, which tracks Presidential appointments of Team 100 members. See Attachment 36 hereto (defendant-intervenors' exhibit). The purpose of the memorandum was to ensure that the RNC would refrain from future solicitations to these Team 100 members, because the RNC as a matter of policy does not solicit funds from Executive Branch officials or nominees.

b. Second, the defendants refer to an RNC memorandum dated May 15, 1995, from Tim Barnes, Director of Team 100, to former U.S. Senator Alphonse D'Amato, informing Senator D'Amato that a particular Team 100 member had designated $25,000 of his membership dues to the New York State Republican Party. See Attachment 37 hereto (defendant-intervenors' exhibit). This memorandum was sent in response to a specific request **[*22]** from Senator D'Amato, in his capacity as Chairman of the National Republican Senatorial Committee and as a leader of the New York State Republican Party, for information about the extent to which RNC members contributed funds to the state party. The RNC did not facilitate any "access" to Senator D'Amato for the individual referenced in the memorandum. Moreover, it is rare for a federal officeholder to inquire about donations or donors, even though this information is publicly available through the FEC.

c. Third, the defendants have identified an RNC memorandum dated October 8, 1999, from Dulce Zahniser to myself and my predecessor Margaret Alexander Parker, which in part references the possibility of fundraising telephone calls to Mississippi residents to be made by Congressman Charles ("Chip") Pickering and U.S. Senate Majority Leader Trent Lott. See Attachment 38 hereto (defendant-intervenors' exhibit). The memorandum makes clear that neither Congressman Pickering nor Majority Leader Lott had placed any such phone calls and, in fact, to my knowledge they never did. As noted above, it is exceedingly rare for Members of Congress or Senators to place RNC fundraising phone calls, and this memorandum is not to the contrary.

49. The overwhelming majority of fundraising events sponsored by the RNC include both federal and non-federal donors. In other words, a person does not need to contribute non-federal money to attend an RNC event and meet Republican officeholders and candidates. Even after the BCRA prohibits the RNC from raising non-federal money, I am confident that the RNC will still encourage candidates and officeholders to attend its events. Even today, for example, the RNC invites federal officeholders to attend the twice-yearly meetings of the Chairman's Advisory Board, which consists solely of federal money donors to the RNC.

[*23] 50. In my personal experience and observation, RNC fundraising events do not provide a forum conducive to or appropriate for lobbying. Virtually all of the RNC's events include at least several dozen donors of diverse business and economic interests, and many events are attended by hundreds or thousands of donors. For the most part, donors who attend RNC events receive no more opportunity to interact with officeholders than a brief "photo opportunity." Further, efforts to discuss business, much less to lobby an officeholder, at these events are considered rude and inappropriate. Attendees know that officeholders are uninterested in conducting business during RNC events.

51. Finally, it is a well-known fact that individuals and entities with important business before Congress virtually always hire lobbyists. These lobbyists meet directly with Congressmen, Senators, and their staffs to make presentations and discuss issues. These activities are perfectly appropriate and usually occur during normal business hours. A business need not donate non-federal money (or contribute any money) to retain an effective lobbyist, and many companies with important business before Congress do not donate non-federal money to either party.

52. The various RNC exhibits attached to this declaration, with the exception of the private letter attached as Attachment 35 hereto, are to the best of my knowledge true and correct copies of records prepared and kept by the RNC in the course of its regularly conducted business activities.

[*24] I declare under penalty of perjury that the foregoing is true and correct.

s/

October 4, 2002 Beverly Ann Shea

[EXHIBITS OMITTED]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,

Defendants.

Civ. No. 02-582 (CKK, KLH, RJL)

All consolidated cases.

COUNSEL ONLY

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,

Defendants.

DECLARATION OF GERALD M. SHEA

Background

1. I have spent most of my working life in various positions with the labor movement. In August 1993, I left the Service Employees International Union, where I had worked since 1972, and accepted what was intended as a

temporary assignment as Director of the Employee Benefits Department of the AFL-CIO. In 1994 I also assumed the position of Executive Assistant to Thomas R. Donahue, the Secretary-Treasurer of the AFL-CIO. In these [2] positions, I was responsible for the AFL-CIO's efforts to obtain national health care reform legislation. When Mr. Donahue became the President of the AFL-CIO in August, 1995, I continued as his Executive Assistant.

2. After John J. Sweeney won election as President of the AFL-CIO on October 25, 1995, I became Assistant to the President for Governmental Affairs, and I have held that position to this day. I am responsible for oversight and coordination of all of the AFL-CIO's policy-related activities, principally including the activities of the Legislative and Public Policy departments, but also dealing regularly with the Public Affairs, Political, Safety and Health, and Civil, Human and Women's Rights departments, and others at the AFL-CIO. Each of these departments is headed by a senior management person who reports directly to the officers of the AFL-CIO, and I am not normally involved in the day-to-day administration of these departments. Instead, my role is to make sure that all of the staff resources within the organization are working effectively and in concert to achieve our policy goals. In particular, this has been my role with respect to the AFL-CIO's broadcast advertising program since Denise Mitchell joined the AFL-CIO as head of the Public Affairs Department in November 1995.

Overview of the Structure and Purposes of the AFL-CIO

3. The AFL-CIO is a national labor federation comprised of 66 national and international labor unions that, collectively, have a total of approximately 13 million

members, who are also members of the AFL-CIO. These members work, and are represented for purposes of collective bargaining, in thousands of occupations in virtually every industry. The AFL-CIO is a tax-exempt organization under Section 501(c)(5) of the Internal Revenue Code. The AFL-CIO was formed in 1955 by the merger of its two predecessor confederations of unions, the [3] American Federal of Labor and the Congress of Industrial Organizations.

4. The purposes, structure, policies, and programs of AFL-CIO are described in the AFL-CIO Constitution (Exh. 1, 18282-320) and on its website, www.aflcio.org, which is updated regularly. The AFL-CIO's basic purposes, structure, policies and programs remain largely consistent from year-to-year. Since 1995, the AFL-CIO has regularly described four fundamental missions as underlying all of its activities:

a. Organizing all workers into unions so they can achieve dignity and security through common efforts in collective bargaining.

b. Providing an effective political voice to workers on public issues that affect their lives and fighting for an agenda for working families at all levels of government.

c. Establishing unions as an active force for workers in America's communities, in alliance with other organizations.

d. Enabling workers to influence the global economy by expanding their and their unions' roles in corporate decisions that affect their working lives and in the international marketplace.

5. The AFL-CIO's highest governing body is its convention, which is comprised of delegates representing its national and international affiliates, state federations and area and central labor bodies. The Convention sets policies and goals for the labor movement and elects the AFL-CIO's officers -- the President, Secretary-Treasurer and Executive Vice President (full-time executive officers) and 51 Vice Presidents (typically, chief officers of AFL-CIO affiliates). These officers comprise the AFL-CIO Executive Council, which meets periodically during the year and is the AFL-CIO's highest governing body between conventions. Since 1955 the [4] AFL-CIO Convention has met every two years; the 2001 Convention amended the AFL-CIO Constitution to make this interval four years, so the next convention will take place in 2005.

6. The AFL-CIO also includes 51 state labor federations that coordinate with local unions and other labor organizations that affiliate with them and give working families a voice in every state through political, legislative and other activities. These state federations are led by officers and boards elected by delegates from local union affiliates.

7. The AFL-CIO also includes nearly 580 area and central labor councils, which similarly give working families a voice at the county and local level, and which too are led by officers elected by local union affiliates.

8. The day-to-day work of the AFL-CIO is primarily conducted by the following programmatic

departments: Organizing; Field Mobilization; Corporate Affairs; Legislative; Political; Public Policy; Public Affairs; Civil, Human and Women's Rights; International Affairs; Safety and Health; and the Office of the General Counsel.

9. The AFL-CIO also includes trade and industrial departments that coordinate particular activities of affiliated unions arising from their representation of workers in common industries. These departments are governed by their own executive bodies, hold their own conventions and manage and finance their own affairs within the overall framework of the AFL-CIO.

General Financial Information

10. Until 2002 the AFL-CIO operated on a calendar year basis. Since 1998 the AFL-CIO's total annual gross receipts have ranged between $151,972,203 and $175,578,133. These AFL-CIO's receipts primarily consist of "per capita tax" payments from the AFL-CIO's 66 [5] affiliated national and international unions, calculated in accordance with a per-member formula established by the AFL-CIO Constitution. The AFL-CIO receives no membership dues; its members typically pay dues to their local unions. Virtually all the rest of the AFL-CIO's receipts derive from various royalty payments and interest on investments. The AFL-CIO does not solicit individual donations.

11. The AFL-CIO routinely spends from its general treasury to pay for the operational expenses underlying its programmatic initiatives and activities, including rents, mortgages, salaries, maintenance, utilities, supplies and equipment. For example, its total cash disbursements in 2001 amounted to $164,246,963.

Overview of the AFL-CIO's Public Policy Goals and Programs

12. In this Declaration, I will discuss the overall public policy goals pursued by the AFL-CIO from late 1994 though 2001, including the issues and legislation that were the subject of AFL-CIO broadcast advertising. As a general matter, these policy goals are established by the AFL-CIO Convention, the AFL-CIO Executive Council and the three Executive Officers of the AFL-CIO. Historically, the AFL-CIO has always researched, adopted and promoted policies on a broad and deep range of domestic and foreign policy matters, from its perspective as the coordinating body of the Nation's largest organized and enduring mass movement of people, comprised of many millions of members with daily and strong attachments to their unions. Among innumerable examples, the AFL-CIO and its affiliated unions were among the principal supporters of the 1960's Great Society programs; the establishment of Social Security and Medicare; the development and enactment of the Employee Retirement Income Security Act of 1974; and all the civil rights, women's rights and disability rights legislation enacted since the [6] 1960's.

13. During my tenure since 1993, the AFL-CIO has engaged in substantial policymaking, public advocacy and lobbying in Congress and before the Executive Branch on such issues as health care; trade and industrial policy; tax fairness; budget priorities; Social Security and retirement protection; Medicare; wage and hour and workplace safety standards; civil rights; immigration; and campaign finance

and election reform. Virtually all of these issues are perpetually the subject of popular debate, prospective legislation and regulation and enforcement policy by the Federal government.

14. The AFL-CIO has also always researched, developed and promoted policies that have a more union-institutional focus, or that otherwise arise more specifically from the nature and role of unions, such as the right to organize; labor-management relations; government intervention in labor disputes; and myriad regulations governing the workplace. Some of these issues are less regularly the focus of pending legislation, or are less familiar to the general public, and the AFL-CIO's ability to influence popular opinion is more attenuated, requires longer term strategies and is less conducive to mass communications like broadcast media.

15. The AFL-CIO's policy-related agenda and activities since 1994 are reflected in the Executive Council's and various Executive Officers' reports to the 1995, 1997, 1999 and 2001 conventions, and in many resolutions adopted by those conventions. See "Executive Council Report" (1995) (Exh. 2, 18386-510); "Policy Resolutions Adopted" (1995) (Exh. 3, 18511-43); "Executive Council Report" (1997) (Exh. 4, 18544-59); "Resolutions and Constitutional Amendments Adopted" (1997) (Exh. 5, 18560-99); "Executive Council Report" (1999) (Exh. 6, 18600-21); "Resolutions and Constitutional Amendments Adopted" (1999) (Exh. [7] 7, 18622-68); "Executive Council Report" (2001) (Exh. 8, 18669-723); "Resolutions and Constitutional Amendments Adopted" (2001) (Exh. 9, 18724-88).

16. These policies and activities are also reflected in various resolutions adopted by the Executive Council from 1995 through 2001. These include resolutions addressing federal budget and tax policy (Exh. 10, 19698, 19731-32); Social Security and retirement protection (Exh. 11, 19657-58, 19668-71, 19700-01, 19711-13, 19730); Medicare (Exh. 12, 19714-16); education (Exh. 13, 19702); trade and industrial policy (Exh. 14, 19651-52, 19664, 19703-08, 19719-20, 19736-38); international labor rights (Exh. 15, 19724-25, 19728-29); most-favored-nation status and permanent normal trade relations with China (Exh. 16, 19665, 19699, 19717-18, 19727); and immigration (Exh. 17, 19721-22, 19744-46).

17. The AFL-CIO's federal legislative priorities are also reflected in the annual "scorecards" prepared by the AFL-CIO Legislative Department after each annual congressional session adjourns. These scorecards select a relative handful of significant votes cast each year in the Senate and the House; assign a "right" or "wrong" designation to the "aye" or "no" votes on each; and calculate overall "right" and "wrong" percentages for the votes each Member of Congress. These scorecards reflect the Legislative Department's retrospective judgment regarding the most critical or exemplary votes on issues of importance to the ACL-CIO and the labor movement that were addressed during the previous session. These selections usually include both union-institutional issues that are less familiar to the general public and are relatively non-conducive to public advocacy efforts, as described above, such as the so-called "national right-to-work law" that the Senate defeated in 1996, and more general working family issues that are more publicly familiar and conducive to public advocacy, as described above, such [8] as the minimum wage increase that the Senate approved in 1996.

18. The AFL-CIO legislative scorecards are publicly available and distributed to Senators and Representatives. They are an important means of communicating AFL-CIO priorities and encouraging Members of Congress to be responsive to them. The scorecards for the seven Congressional sessions from 1995 to 2001 are attached. (Exh. 18, 19507-51, 19564-68, 19552-63, 19581-635.)

19. In order to inform the AFL-CIO's policy development and activities, the AFL-CIO both consults closely with its affiliated unions and conducts regular polling and other opinion research to determine which social and economic issues are regarded as important by union members and the general public. For example, in early 1996 the AFL-CIO commissioned two well-known public opinion research organizations, The Mellman Group, Inc. and Peter Hart Research Associates, to conduct ten focus groups and a national telephone survey aimed at determining public attitudes concerning a range of economic issues and the government's role in addressing them. (Exh. 19, 18944-93.)

"Stand Up For America's Working Families" (1995)

20. After President Clinton's health care plan failed consideration in the Fall of 1994, and the Republican Party took control of both Houses of Congress, the AFL-CIO undertook a comprehensive assessment of these events and the AFL-CIO's role in them. One of our conclusions was that union members throughout the country were no longer sufficiently responsive to union efforts to advise them how to vote at election time, and needed to be engaged on issues of importance on a continuous basis. At the same time, we

recognized that the AFL-CIO's old style of seeking to influence Congress primarily through the personal contacts of our [9] officers and legislative staff would no longer work. Instead, we needed to develop a much greater capability to mobilize union members and other workers and their families to respond to legislative issues at the grassroots level.

21. Our analysis of the 1994 events began to manifest itself in the way the AFL-CIO responded to the Republican Congress's attempts throughout 1995 to cut back on numerous benefits and protections of importance to workers and their families. At its February 1995 Executive Council meeting, the AFL-CIO adopted and announced a series of policy statements addressing virtually the entire range of the so-called "Contract With America" being pursued the new congressional majority's legislative agenda, and setting forth "The Needs of Working America." (Exh. 20, 19655-59, 19638-50.) And, rather than relying on traditional Washington-based lobbying, we undertook a major effort to mobilize workers in targeted congressional districts under the rubric "Stand Up For America's Working Families." AFL-CIO field staff and staff from AFL-CIO-affiliated unions were assigned to coordinate meetings with Members of Congress and undertake other local activities to express opposition to the Republican legislative agenda.

22. The AFL-CIO also retained a media and political consulting firm, Greer, Margolis, Mitchell, Burns & Associates, to assist us in developing and disseminating broadcast advertisements that would educate and mobilize the public against various elements of the "Contract with America." Although the AFL-CIO had engaged in issue-related advertising to a limited extent in the past, particularly

in connection with health care reform, our commitment to this form of advocacy increased substantially in 1995.

23. The AFL-CIO's broadcast program began with a flight of television [10] advertisements entitled "Cuts" that discussed attempts by the Republican Congress to cut federal funding for jobs, wages, health and safety, housing for senior citizens, and school lunches. (Exh. 21, 001311). As set forth in a memorandum from our media firm to me (Exh. 22, 001186-1187), the advertisements, which asked viewers to "Stand with Us" in opposing the Republican legislative agenda, were timed to run during the congressional Easter recess in eight media markets serving the districts of nine Republican Members of Congress who the AFL-CIO believed might be susceptible to grassroots lobbying pressure. In May, we ran a flight of similar radio ads targeting five additional Members.

24. In July, the AFL-CIO ran another flight of television and radio advertisements entitled "Sparkler," which also addressed the proposed budget cuts. These advertisements named approximately 14 Members of Congress who had been named in one of the earlier flights. And in August, we ran two flights of advertisements, entitled "Stand" and "Grain," (Exh. 23, 001181) which focused on Republican-led efforts to eliminate health and safety protections for workers in the Departments of Labor and Health and Human Services appropriations bill that passed immediately before the August congressional recess. These advertisements were accompanied by a systematic effort to earn "free" media coverage, including a press conference by AFL-CIO President Thomas Donahue, a satellite media tour and local press conferences. The August advertisements ran in approximately 23 media markets serving 26 Congressional

Districts. A report of our "Stand Up" activities during August 1995, which was prepared under my direction, is attached. (Exh. 24, 19049-19139.)

25. Finally, the "Stand Up" campaign included a concerted effort to focus attention on significant cuts in the Medicare and Medicaid programs proposed by the Republican Congress. [11] In August the AFL-CIO sent a mailing to 250,000 union households in 50 congressional districts. We also provided financial and logistical support for a series of town meetings on the Medicare cuts held by an organization known as "Save Our Security." In October the AFL-CIO worked with an ad hoc coalition of labor and community organizations to facilitate approximately 70 local events to dramatize the impact of the Republican cuts in Medicare and Medicaid. These local events were coordinated with the Democratic Minority Leader, Rep. Richard Gephardt, and numerous Members of Congress and Senators attended them. (Exh. 25, 001639-44.) At the same time, the AFL-CIO ran a flight of radio and television advertisements entitled "Medicare" in approximately 27 congressional districts

The Federal Budget Struggle (1995-1996)

26. The struggle between President Clinton and the Congress over the federal budget came to a head on November 20, 1995, when the House of Representatives approved a budget reconciliation bill that included substantial cuts in federal programs such as Medicare, education and college loans, as well as tax breaks for business and wealthy individuals, and President Clinton immediately indicated that he would veto the House bill. At a press conference on November 22, 1995, AFL-CIO President Sweeney released

the results of a poll commissioned by the AFL-CIO showing that a majority of Americans supported President Clinton and opposed the cuts being pushed by the Republican leadership in Congress. (Exh. 26, 001280-1281, 001286-1288.) In order to encourage President Clinton to hold firm in his opposition to the Republican budget plan and to convince Republican Members of Congress to vote against the plan and in favor of the President's budget, the AFL-CIO initiated a massive grassroots lobbying campaign targeting 55 Members of Congress who had voted for the budget reconciliation bill, including direct mail [12] messages sent to approximately one million union households, telephone banks, local events ranging from press conferences to demonstrations, and an extensive broadcast media program. (Exh. 27, 17348-17353.)

27. On December 8, 1995, President Clinton vetoed the budget reconciliation bill, and, after a period of fruitless negotiations, the Federal government had to be shut down. The budget impasse lasted until early January, when the Republican leadership in the Senate and then the House backed down and agreed to pass a series of temporary funding measures to keep the government operating until January 26, 1996. In order to keep pressure on Congress to reach a satisfactory agreement with the President, the AFL-CIO began a new round of grassroots activities focusing on Republicans who had supported the leadership in its efforts and so-called "Blue Dog" Democrats who were urging the President to compromise further with the Republican leadership. (Exh. 28, 17408-17414.) The AFL-CIO also sponsored another round of television and radio advertisements to support these local efforts.

Labor '96

28. On February 21, 1996, the AFL-CIO Executive Council issued a call to a special convention to be held on March 25, 1996 in Washington, D.C. in order to consider a grassroots legislative and political program for the balance of the year, to approve a special assessment of 15 cents per member per month to help finance this program, and to consider an AFL-CIO endorsement for President and Vice-President in the 1996 election. (Exh. 29, 19142.) The convention approved the assessment and the "Labor 96" legislative, advocacy and political agenda. (Exh. 30, 17989.)

29. The "Labor '96" effort is further described in numerous internal AFL-CIO [13] documents circulated during 1996 to frame and guide AFL-CIO activities and communications, including "Labor '96" (Exh. 31, 19161-62); "Labor '96 Mission Statement" (Exh. 32, 19163-64); "Talking Points on the AFL-CIO's Role in This Election" (Exh. 33, 19205-08); "Working Women Vote Talking Points" (Exh. 34, 19209-10); "Talking Points-Rebuilding the Labor Movement" (Exh. 35, 19211); "Talking Points - the AFL-CIO Ad Campaign" (Exh. 36, 19212); and "Guidelines for AFL-CIO Grassroots Lobbying Activity" (Exh. 37, 19944).

Increasing the Minimum Wage (1996)

30. One of the principal legislative goals of the AFL-CIO in 1996 was the enactment of an increase in the federal minimum wage, which had not changed since 1991. Bills to accomplish an increase had been introduced in intervening Congresses but had not been enacted. On March 28, 1996, the Democratic leadership in the House moved to attach an increase in the minimum wage from $4.25 to $5.15 to legislation raising the federal debt ceiling, but this motion

was defeated on procedural grounds by a vote of 192 to 228, with five Democrats voting against consideration of the increase and only seven Republicans joining 185 Democrats in voting in favor. In the Senate, a minimum wage increase was filibustered, and a vote, also on March 28, to break the filibuster failed by a vote of 55 to 45, with all Democrats and eight Republicans casting votes in favor of bringing the increase to a vote.

31. In response to these actions, the AFL-CIO decided to undertake a number of grassroots lobbying activities aimed at building support for a minimum wage increase and pressuring the Republican leadership to allow a vote to take place. These efforts focused on the April 1996 congressional recess. As described in a memorandum describing these grassroots efforts in detail, 400,000 pieces of direct mail, public events and workplace leafleting took place. [14] (See Exhs. 38 and 39, 17437-17455, 19970.) In addition, as set forth in detail in the Declaration of Denise Mitchell, in April the AFL-CIO sponsored a flight of television and radio advertisements in support of a minimum wage increase.

32. When Congress returned from this recess, a number of Republican House Members introduced their own proposal to increase the minimum wage, but the House voted again on April 25 not to bring the issue up for a vote. Similar votes took place on May 1, May 8 and May 15. During this period, the AFL-CIO continued to organize grassroots lobbying activities and sponsored radio and television advertisements to put pressure on the House leadership to allow a vote. Finally, the House leadership agreed to allow a vote on the increase on May 23. The AFL-CIO responded with several flights of broadcast advertisements targeting

Members who had voted in March against allowing the increase to be considered. As described in a memorandum from the AFL-CIO's Legislative Director, at the time that these advertisements ran the AFL-CIO organized a series of local press events to amplify our advertisements and call attention to the upcoming vote. (Exh. 40, 17468-17497.)

33. On May 23 the House approved the minimum wage increase. As described in a memorandum issued by the AFL-CIO following the vote, at least ten Republicans who had voted in March not to bring up the bill and who had been targeted by the AFL-CIO's advertisements and other lobbying activities voted in favor of the bill. (Exh. 41, 19168-19177.)

34. Attention then turned to the Senate, where Senator Edward M. Kennedy (D-MA) and other Democrats were expected to obtain a floor vote. On July 9, the day of the vote, the AFL-CIO sponsored a lobbying day in Washington, in which local union members visited Senators to urge them to vote for the minimum wage increase and other pro-worker bills due to [15] come up in the near future.

Medicare, Social Security and Tax Fairness

35. Among the major concerns of the AFL-CIO in connection with the fight over the FY 1996 budget were the Republican proposals make drastic cuts in the Medicare and Medicaid programs. Although the proposed cuts were significantly reduced in the final 1996 budget package agreed to by the President and Congress in January, 1996, the Medicare issue resurfaced very soon after Congress reconvened, when the Republican leadership in the House and Senate announced agreement on a budget resolution that

would set the parameters for all funding decisions for FY 1997. Budget resolutions embodying the joint leadership proposal were passed in the House on May 18 and in the Senate on May 23, 1996. (Exh. 42, 17647-48.) These resolutions included cuts of $169 billion over six years in the Medicare program and $72 billion over the same period in Medicaid funding. While the two budget Resolutions were being reconciled in Conference, the AFL-CIO initiated an aggressive lobbying campaign to eliminate or reduce the proposed cuts, including broadcast advertisements that began in June and a series of local press conferences timed to coincide with them. (Exh. 43, 17637-640, 17643, 17647, 17691-693.) As this legislative struggle continued throughout the summer and into September, the AFL-CIO sponsored several additional flights of advertisements, as detailed in the Declaration of Denise Mitchell.

36. In the Fall of 1999, as Congress again debated budget proposals that would have had a major impact on the Social Security and Medicare programs, the AFL-CIO argued that the surplus in these programs should be used to strengthen the Medicare program by providing a prescription drug benefit rather than a tax cut for wealthy individuals. [16]

37. In June of 2000, Congress debated the issue of prescription drugs. While the Senate tabled an amendment that would have provided strong prescription drug coverage, the House passed a bill that failed to guarantee prescription drug benefits to seniors. With the issue remaining on the congressional agenda, the AFL-CIO ran broadcast ads in July and August focusing on House members who had voted for the bill.

Retirement Security

38. Another important issue that emerged from the FY 1996 budget fight was retirement security. A Republican proposal to allow some companies to raid worker's pensions was included in the budget reconciliation bill, although due in part to the AFL-CIO's lobbying it was dropped in the final legislation enacted in January, 1996. After Congress returned, legislation was introduced in the House and Senate to address a similar problem with respect to 401(k) plans, H.R. 3688, the 401(k) Protection Act. As described in a letter from the AFL-CIO's Legislative Director, in August 1996 the AFL-CIO began a lobbying campaign to enact H.R. 3688. (Exh. 44, 19818-19.) In support of this effort, the AFL-CIO sponsored a flight of advertisements supporting enactment of H.R. 3688, as described in the Declaration of Denise Mitchell.

Education

39. After its August 1996 recess, Congress returned to Washington to consider an array of pending legislation. Of paramount importance to the AFL-CIO were the various appropriations bills for the Federal government, including the FY 1997 appropriations for the Department of Education, each of which had to be passed before the new fiscal year began on October 1. As discussed above, the AFL-CIO had been deeply concerned during the 1995 budget [17] stand-off about proposed cuts in college loan programs, which assist children of union members and other working families to attend colleges that they cannot otherwise afford, as well as other education programs. The Republican proposal for FY 1997 again would cut this program. The AFL-CIO supported an amendment to add $3.2 billion to the

budget for education programs. (Exh. 45, 19820.) Ultimately, Congress and the White House agreed on a catch-all appropriations bill that, in the words of the Wall Street Journal, was "heavily weighted toward education programs."

Overtime and FLSA Coverage

40. Although the AFL-CIO was able to achieve an increase in the federal minimum wage during 1996, the minimum wage and overtime protections of the Fair Labor Standards Act ("FLSA") have remained under constant threat from conservative and business interests. For example, the idea of "forced compensatory time" has long been on the legislative agenda and strongly opposed by the AFL-CIO each time it has arisen. In June 1997, after failing to defeat a similar provision in the House, the AFL-CIO was able to generate sufficient opposition through broadcast advertisements and other lobbying activities to prevent consideration in the Senate of S. 4, a compensatory time bill which would have amended the FLSA to permit employers to require their employees to work over 40 hours a week without paying them overtime.

41. When Congress substantially revised the nation's welfare laws in the mid-1990's to require welfare recipients to find gainful employment rather than remain on the welfare rolls, one of the most contentious issues involved the extent to which recipients would have to accept jobs that did not pay at least the minimum wage. The AFL-CIO successfully lobbied against Republican proposals to exclude workfare participants from coverage under the FLSA. As
[18] described in an AFL-CIO press release, during 1997, after Republicans in the House of Representatives renewed their efforts to remove welfare recipients from the minimum

wage protections as part of the FY 1998 Budge Reconciliation Bill, we joined with women's, civil rights, church and other groups in successfully opposing this proposal. (Exh. 46, 20016-17.)

Tax Fairness

42. In each of the 1995 and 1996 budget fights, the AFL-CIO opposed Republican proposals to provide various tax benefits to the wealthy while at the same time proposing cuts in federal programs such as Medicare and education. In early 1997, we continued to raise this issue in a series of broadcast advertisements that contrasted Congress's willingness to provide tax subsidies to companies that send jobs overseas with its neglect of crumbling schools in need of repairs. Later in 1997, the tax issue arose again in the context of competing tax proposals offered by the Republican leadership and the White House. The legislative fight came to a head when the House considered H.R. 2014 on June 26, 1997. During the period leading up to this vote, the AFL-CIO lobbied vigorously in opposition to the Republican plan and in support of the President's plan.

43. On September 17, 1998, the issue of tax fairness arose again when the House Ways and Means Committee marked up the Taxpayer Relief Act ("TRA"), a bill that proposed using surpluses in the Social Security Trust Fund to pay for $80 billion worth of tax cuts. The AFL-CIO launched a lobbying campaign to defeat this measure when it came to the floor of the House, including a series of television and radio advertisements before the vote later that month. After the House passed the TRA, we continued lobbying against the proposal in the Senate, which was expected to vote on the bill in early October. In addition,

since the bill would almost [19] certainly have to return to the House for another vote once it was approved in the Senate, we continued running ads in the congressional districts of Members who had voted for the bill the first time.

44. In early 2001, President George W. Bush submitted to Congress a proposal for massive tax cuts. The AFL-CIO joined with over 100 other organizations in the "Fair Taxes for All Coalition" to oppose these tax cuts because they were targeted to the wealthy, rather than working families. The budget resolution passed in the House on March 8, 2001 and in the Senate on May 10, 2001 by a 53-47 vote.

45. In November, 2001, in the aftermath of the September 11 terrorist attacks and the economic recession, the AFL-CIO backed an economic stimulus plan that included relief for workers, including enhanced unemployment insurance benefits. After the House passed a stimulus package that contained massive tax cuts for the rich, the AFL-CIO supported a contrary bill sponsored by Senator Max Baucus (D-MT). On November 14, 2001, the Baucus bill fell nine votes short of the 60 votes needed to force a floor vote. As negotiations continued, the AFL-CIO continued to lobby for elimination of the tax cuts proposed by the President and to provide benefits that would aid working families.

Trade Policies

46. The AFL-CO and its affiliates devoted considerable resources in opposing ratification of the North American Free Trade Agreement (NAFTA) when Congress considered and approved it in 1993. Trade issues have since

been ever-present before Congress, and they have a tremendous impact on domestic manufacturing industries where millions of union members work, and millions more have lost jobs due to what we consider misguided and [20] destructive trade policies. (Exhs. 47 and 48, 20013, 20020.) In May and June, 1997, the AFL-CIO lobbied against so-called "fast track" legislation that would give the President authority to make trade agreements that Congress could only approve or disapprove without amendment. In June 1997, AFL-CIO Secretary-Treasurer Richard L. Trumka testified before the Senate Finance Committee that the AFL-CIO would oppose legislation giving the President so-called "fast track" trade authority if the legislation did not require enforceable labor and environmental standards. That Fall, when Congress was expected to take up the "fast track" legislation, the AFL-CIO organized a vigorous lobbying campaign against the proposal, including extensive broadcast media, and "fast track" was pulled from the legislative agenda in November, shortly before Congress adjourned for the year.

47. In September 1998, the Republican leadership in the House of Representatives scheduled a vote on the "fast-track" legislation, which the AFL-CIO again opposed in a series of broadcast advertisements as well as extensive direct lobbying. The House rejected the proposal on September 25, 1998 by a vote of 243 to 180.

48. In the Fall of 1999, the AFL-CIO participated as part of a coalition of consumer, citizens, labor and other groups in protesting the secretive and regressive policies of the World Trade Organization.

49. In the Spring of 2000, Congress took up President Clinton's proposal to provide permanent normalized trade relations with China, a proposal that the AFL-CIO had long opposed. In addition to numerous grassroots lobbying events involving union members, throughout the months of February through June 2000 the AFL-CIO ran a series of flights of television and radio advertisements urging Senators and Representatives in both parties to vote [21] against the proposal. The House passed the bill in May and the Senate did so in September.

50. In May 2001 President Bush stated his intention to seek fast-track trade authority of the kind defeated in previous Congresses. The AFL-CIO ran flights of advertisements in July, October and December urging Members of Congress to vote against this proposal. On December 6, 2001 the House approved "fast track" by a vote of 215-214.

Patient's Bill of Rights/HMO Reform

51. In the early 1990's, the AFL-CIO was a major supporter of President Clinton's health care reform proposal that died in Congress. The issue of health care reform remained vital but relatively dormant legislatively until the Spring of 1998, when public focus on the excesses of HMOs and other managed care organizations increased. On March 31, 1998, "Patients' Bill of Rights" legislation to reform HMOs was introduced in both the House (H.R. 3605) and the Senate (S. 1890), and the AFL-CIO, along with consumer and citizens organizations, began a major grassroots lobbying effort in support of these proposals. In July the AFL-CIO broadcast five flights of advertisements urging Democratic and Republican Members of both Houses to support our

preferred legislation. A version of PBR opposed by the AFL-CIO passed the House on July 24, 1998, and Republicans in the Senate subsequently announced their support of a significantly weakened version of the PBR (S. 2330). In September this bill was scheduled for a vote, and in response the AFL-CIO and its coalition partners began a grassroots lobbying campaign, including significant broadcast media, aimed at defeating S. 2330 or forcing the bill to be removed from the Senate calendar. These efforts were successful and the bill died.

52. When the Senate again considered PBR in July 1999, the AFL-CIO continued to lobby in support of a bill (S. 6) proposed by Senators Thomas Daschle (D-SD) and Edward [22] Kennedy (D-MA), and in opposition to a weaker Republican bill (S. 326), and ran a flight of television ads calling on various Senators to take the right side. The Senate passed S. 1344 (formerly S. 326) by a vote of 53-47 on July 15, 1999. Later in the year, on the House side, the AFL-CIO pushed for passage of H.R. 2723, the bi-partisan Patients' Bill of Rights sponsored by Representatives Charles Norwood (R-GA) and John Dingell (D-MI), which passed on October 7, 1999 by a vote of 217-209.

53. In the Summer of 2000, the two different versions of the Patients' Bill of Rights that passed in 1999 were mired in conference. Senator Don Nickles (R-OK), who chaired the conference committee, refused to accept provisions from the stronger House-passed bill. In response, the Democratic leadership in the Senate pushed for a vote on the House-passed Norwood-Dingell legislation on June 8, 2000 in the form of an amendment to the Defense authorization bill, but the motion was tabled. The AFL-CIO continued to conduct grassroots lobbying, broadcast and

direct lobbying activities aimed at passing the stronger Norwood-Dingell bill, but the legislation died in conference.

Workplace Health and Safety

54. The AFL-CIO was one of the principal supporters of the Occupational Health and Safety Act of 1970, which created the Occupational Health and Safety Administration ("OSHA"). Over the years, the AFL-CIO's Safety and Health and Legislative departments have lobbied OSHA to adopt a broad range of strong regulatory protections for workers and to enforce its regulations aggressively. We have also appeared in numerous federal court cases to challenge the failure of OSHA to act in accordance with the legislative mandate or where business interests have challenged regulations that we supported. [23]

55. During 1995 the AFL-CIO vigorously opposed threatened cutbacks in workplace health and safety enforcement, and ran broadcast ads during April, August and September calling on the public to do so as well.

56. In June 2000, with OSHA prepared to promulgate an ergonomics standard concerning repetitive motion injuries that was supported by the AFL-CIO, the House Appropriations Committee adopted and attached a rider to H.R. 4577 that prevented the regulation from moving forward. The AFL-CIO conducted a number of lobbying activities aimed at defeating this rider. On June 8, 2000, the House of Representatives rejected House Amendment 760 to H.R. 4577, which would have stripped the rider from the bill by a vote of 203-220, with all but 19 Republicans voting for the amendment. The Senate adopted an amendment to FY 2001 Labor-HHS Appropriations bill to prohibit OSHA from issuing the regulations by a vote of 57-41 on June 22, 2000. With President Clinton threatening to veto the Labor-HHS appropriations bill due to the blockage of the ergonomics standard, the AFL-CIO ran television advertisements in September naming 14 Members of Congress who had supported the amendment repealing the ergonomics regulation.

Coordination With Members of Congress Concerning Legislative Activities

57. The AFL-CIO Legislative Department includes ten lobbyists who regularly meet and converse with Members of Congress and their staffs on a host of issues, such as those I have described above. Other AFL-CIO staff, and the AFL-CIO's Executive Officers, also often meet and converse with Members in coordination with the Legislative Department. The AFL-CIO's efforts to enact or defeat particular legislation regularly include coalition efforts with like-minded groups and organizations, and efforts to influence public opinion in favor of our legislative goals. [24] It is routine and necessary to work as closely as we can with congressional proponents of our positions in order to devise and carry out a legislative and public advocacy strategy that will succeed. Meanwhile, virtually every Member of Congress is a candidate for reelection at all times, and as a practical and unavoidable reality any legislative contact or action provides someone with potential fodder and issues during the next election campaign.

58. Any legal restrictions on the ability of an organization like the AFL-CIO to coordinate legislative and policy communications and activities with federal officeholders who happen to be candidates could

substantially interfere with our ability to maintain ordinary and necessary working relationships with Members of Congress and their staffs.

59. Since 1995 the AFL-CIO has regularly relied upon its contracts with Members and their staffs to gather information and advice about the status and prospects of particular legislation and the positions and considerations of other Members on legislation. We have used that information and evaluated that advice as significant factors in deciding whether or not to run broadcast issue advertising, and in determinating its placement and content.

[25] I declare under penalty of perjury that the foregoing is true and correct. Executed on October 2, 2002.

/s/

GERALD M. SHEA

LABOR '96

THE LABOR '96 PROGRAM: A united labor program to inform labor union members and the general public about the implications of the radical right-wing congressional agenda for working families and to build support for the Federation's legislative proposals which promotes economic opportunity, fairness and security for America's working families.

The Federation will work with a broad range of coalitions who share its legislative objectives and who work to encourage American citizens to register to vote and participate fully in the political process.

WHERE WILL LABOR '96 OPERATE: Labor '96 will operate in Congressional Districts in all areas of the country.

WHAT ACTIVITIES WILL THE LABOR '96 PROGRAM ENGAGE IN: The Labor '96 program will be multi-faceted consisting of the following elements:

Grassroots/Mobilization/Education - includes lobbying, letter-writing and phone campaigns, leafleting at worksites and organizing public events, issue education, and phone centers to assist education and mobilization efforts. Each affiliate will conduct internal education programs using phones, mailing, one-on-one communications, etc.

Media - Paid and free media to take the Federation's message directly to the American people.

Voter Registration - Early voter registration making full use of the national Voter Registration Act (Voter Motor Registration).

SHEA EXHIBIT 31

Non-Partisan GOTV - To ensure maximum participation in the November elections.

Intensive Training - A national labor political training center will be established to develop political organizing skills for all staff participants. 3,000 staff and union volunteers will be trained and deployed in the fall GOTV campaign.

State Legislative Issues - The program will target 10 states where we can affect the state legislative process, using substantive analysis of state legislation, grassroots education and mobilization and paid media.

WHO WILL STAFF THE LABOR '96 PROGRAM: Each affiliate will contribute volunteer staff for the implementation of the program.

WHO'S INVOLVED: All affiliates of the AFL-CIO will participate in the program.

Labor '96 will work with a broad coalition of progressive issue organizations and non-partisan voter participation groups such as APALA, LCLAA, CLUW, Operation Big Vote, APRI, CBTU, NCSC and Frontlash to register voters who are normally left out of the process to ensure maximum participation in 1996.

WHEN WILL THE PROGRAM BEGIN: The program's first training session will begin in early March. Staff will be deployed into the field late March.

HOW IS THE LABOR '96 PROGRAM BEING FINANCED: The overall budget for the Labor '96 program is $35 million. These funds will be provided by the Federation and its affiliates. Coalition partners may contribute cash or in-kind services.

The lion's share of this budget - $15-25 million - is targeted for media.

DECLARATION OF PAUL SIMON

[DEV 9, Tab 37]

1. My name is Paul Simon. I served as a U.S. Senator from Illinois from 1985 to 1997 and represented the 24th and succeeding Congressional Districts of Illinois in the U.S. House of Representatives between 1975-1985. Before being elected to Congress, I was the Lieutenant Governor of Illinois from 1968 until 1972. I also served in the Illinois House of Representatives from 1954 to 1962, and then in the Illinois State Senate until 1966.

2. Since retiring from the U.S. Senate, I have joined the faculty of Southern Illinois University ("SIU"), teaching courses in political science, journalism, and history. I am Director of SIU's Public Policy Institute, a center that provides objective assessments of public policy. I have also engaged in a number of volunteer activities, including co-chairing committees that monitored elections in countries such as Croatia and Liberia, and assisting the efforts of Alliance for Better Campaigns, an organization that advocates for free broadcast air time for candidates and for other reforms that reduce the cost and increase the flow of political communication. I was also appointed by President George W. Bush to the Commission on White House Fellows.[2]

3. Though I no longer hold elected office, I am still in involved in election campaigns. For example, I appear at a few fundraisers and campaign events for Democratic candidates during election years. I am the honorary chair of the campaign for the 2002 Democratic candidate for Illinois Attorney General. I have made a television commercial for Congressman Rod Blagojevich's campaign for Governor. In addition, I try to facilitate events where candidates from both parties are present.

4. While serving in the U.S. House, I made phone calls to raise money for the Democratic Congressional Campaign Committee (DCCC). I also attended their fundraising events,

both in the Washington area and in other cities. After I moved to the U.S. Senate, I did much the same thing, on a larger scale, for the Democratic Senatorial Campaign Committee (DSCC). I have raised both federal or "hard money" contributions and non-federal or "soft money" donations.

5. While some of the party committee events I attended were large affairs, most had 20-25 people and were held in somebody's home. They usually were held for the benefit of a specific Senate campaign as well as for the party committee itself. Each House Member or Senator present would say a few words, as would the Chair of the DCCC or the DSCC, and then we would socialize with the donors. About once a year I attended an all-day conference for major donors where Senators would each speak about legislation we were interested in, and answer questions.

6. Fundraisers today still usually involve about 20-25 people and are held in someone's home. Events where soft money is raised are broadly similar to hard money events, but important differences are that higher amounts are raised from each attendee, the more [3] powerful elected leaders of the party are more likely to be involved, and the events tend to be more exclusive.

7. While I was in Congress, the DCCC and the DSCC would ask Members to make phone calls seeking contributions to the party. They would assign me a list of names, people I had not known previously, and I would just go down the list. I am certain they did this because they found it more effective to have Members make calls. However, my phone manner is rather low key, lower key than the committees like.

8. I tried to avoid asking donors who had previously given to my campaigns to contribute to the party committees, because I didn't want to overdo my welcome. However, I did co-host party fundraising events in Illinois, where invitations were likely sent to my contributors.

9. If this were a DSCC event, the money raised would be credited to Senate candidates based on the DSCC's tally system, both hard and soft money. Donors would be told the money they contributed could be credited to any Senate candidate. The callers would make clear that this was not a direct contribution, but it was fairly close to direct. So contributors would have the sense that this would benefit my campaign, if they contributed to the party.

10. While I don't believe we were given a specific fundraising goal, we knew how much hard money the DSCC could contribute in Illinois, which in my campaigns was a little more than $1,000,000. It was recognized that the closer you came to that with your hard money tally, the more likely you were to get the full $1,000,000. There was also an expectation with respect to the soft money that you raised for the party that some of that money would be spent to help with your campaign.[4]

11. With regard to the Illinois Democratic Party, my own experience was that I more frequently got requests from them for money than the other way around. I sometimes made phone calls for them, or they would request a check for $5,000 to help with get out the vote activities, or a gubernatorial race. I may also have appeared at fundraising events for the State Party.

12. When I last ran for re-election in 1990, some people who had contributed the maximum amount to my campaign then made an additional donation to the Illinois state party thinking that it would help my campaign. However, I generally did not work closely with the State Party on anything, because I never regarded them as major players. This has been true historically in Illinois, although it may be different in other States. It may also be different in Illinois, with regard to state races. But they were not a significant factor in my Senate races. I understand that with the explosion of soft money in the 1990's, the national party committees now transfer significant amounts of soft money

to state parties that are then used to help with federal candidate campaigns.

13. It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties.[5]

14. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, "I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread." I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.

15. This type of distortion of the legislative process is more likely to occur if large soft money donations are permitted. When people have donated $50,000 or $100,000, they are going to want their pound of flesh after the election. I believe people usually contribute to party committees on both sides of the aisle for the same reason that Federal Express does, because they want favors. There is an expectation that giving to party committees helps you legislatively.

16. Giving to party committees also helps you gain access to Members. While I realize some argue donors don't buy favors, they buy access. That access is the abuse, and it affects all of us. If I got to a Chicago hotel at midnight, when I was in the Senate, and there were 20 phone calls waiting for me, 19 of them names I didn't recognize and the 20th someone I recognized as a $1,000 donor to my campaign, that is the one person I would call. You feel a sense of gratitude for their support. This is even more true with the prevalence of much larger donations, even if those donations go to party committees. Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions. When you increase the amount that people are allowed to give, or let people give without limit to the parties, you increase the danger [6] of unfair access. People who are unemployed or can't pay their hospital bills do not have the same access.

17. The fact that big donors have access gives them a huge leg up in the process. In a very real sense, we are going through the old fight between Thomas Jefferson and Alexander Hamilton: should propertied interests have preference in what goes on in government? And our answer, with our present system of financing campaigns, is yes, people with money are going to be given greater influence, because their names are going to be recognized. They are going to have greater access than those who did not contribute. The soft money system is the most egregious part of the abuse of political contributions resulting in preferred access.

18. I never promised anyone a thing for a campaign contribution. There is a problem, however, when it appears that people are buying influence. Sometimes people who had contributed to my campaign or to the Democratic party at my behest came to see me on a particular bill. Even if I agreed with them on the legislation without regard to the donation they made, it may have appeared to that person and to others

that I was taking the position because they had helped my campaign and my party. The larger the amounts that people are allowed to give, the greater is the appearance that influence has been bought.

19. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

DECLARATION OF ALAN K. SIMPSON

[DEV 9, Tab 38]

1. My name is Alan K. Simpson.

2. I served as a United States Senator from Wyoming from 1979 to 1997. During my time in the Senate, I served as both Assistant Majority Leader and Assistant Minority Leader. After I left the Senate, I directed the Institute of Politics at the Kennedy School of Government at Harvard University from 1998 through 2000. Currently, I teach at the University of Wyoming, practice law, and give speeches across the nation and abroad on current affairs. I am a member of the Presidential Debate Commission, I co-chair the Continuity in Government Commission, and I also sit on a number of corporate and nonprofit boards. Additionally, I was one of the national co-chairman of Project Independence, one of the largest-ever campaign reform movements.

3. During my tenure in the United States Senate, I became acutely aware of the need for campaign finance reform, particularly to remedy the impact of soft money on the political [2] system. I have seen firsthand how the current campaign financing system prostitutes ideas and ideals, demeans democracy, and debases debate.

4. The national parties often ask Senators to make phone calls to raise soft money, and the process is like a boiler room operation. When I was in the Senate, the Republican leadership would take us off Capitol Hill—usually to the Reagan Center—give us a list of heavy hitters, and tell us to make phone calls to get more money from these donors. Sometimes, the party asked us to solicit soft money for attendance at events that included access to the president; other times major donors were given access to certain lawmakers. The more money one donates, the higher-level players he or she has access to. I did not enjoy making these

phone calls, and after participating once or twice, I told the party that I would no longer telephone donors.

5. Although I rarely made phone calls for the party, I agreed to attend and speak at their donor events. Often, donors would give large sums of soft money to attend events with elected officials. Donors were often allowed to choose whom they wanted to sit with at events, provided they gave enough money. Party leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the people behind the donation, especially if you are told that the reason people donated was because they wanted to sit at the same table with you. At these events, it was not uncommon for the donors to mention certain legislation that affected them. Even if some Members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what.

6. The parties often ask Members to solicit soft money from individuals who have maxed out to the Member's campaign. Donors do not really differentiate between hard and soft [3] money; they often contribute to assist or gain favor with an individual politician. When donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign.

7. There is little practical difference between hard and soft money these days in terms of how the funds are used. Politicians care only that money is available; it doesn't matter where it came from. Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates. I always knew that both the national and state parties would find ways to assist my candidacy with soft money, whether it be staff assistance, polling, get-out-the-vote activities, or buying television advertisements.

8. Big labor and big business use large soft money donations to corrupt the system to the detriment of the little guy. Unions and corporations were not supposed to be part of our campaign finance system, yet they are playing with size 20 feet. The hundreds of thousands of dollars in soft money donated by unions, corporations, and other groups make a mockery of attempting to avoid corruption in the campaign system. I fear that we are reverting to the past, when Daniel Webster was on the floor of the Senate, passing banking legislation at the same time he worked for the Bank of Boston. Conflicts of interest like Webster's are no longer legal, but the appearance of buying influence still exists.

9. Large donors of both hard and soft money receive special treatment. No matter how busy a politician may be during the day, he or she will always make time to see donors who gave large amounts of money. Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member [4] when others are not. For example, one longtime contributor might come into my office and say, "Al, I'm really proud of the work you're doing here, and I'm proud to have supported you over the years. I just wanted to let you know that my company has an important issue up before Agency X. We don't want you to do anything; we just want to make you aware." A few months later, that same contributor would come back and say, "We're still waiting for the agency to make a decision. We probably don't need you, and we wouldn't want you to influence the decision, but maybe you could see if the agency would move the issue up on their priority list?" Without hesitation, I would make a call to the Secretary of the department in charge of the agency. I would not tell the Secretary how to decide the issue, nor would I make any threats; I would simply communicate that my constituent would appreciate a

prompt decision. Senators make these types of phone calls all the time.

10. Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform. When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation.

11. In addition to the examples listed above, I remember specific instances when Senators' votes were affected by the fear of losing future donations. One time, Senator Bob Dole and I were seeking votes on an important national issue. More than once, we heard a Senator tell us, "I realize it's an issue of great importance, but if I vote for that I won't get any more money.[5] I want to be here for another term. You do want me back here next year, don't you?" These Senators know that it's a bad idea to poison the well that nourishes the system.

12. Soft money also affects legislative priorities. I remember one Senator from a state with a large Asian population who came to me with a proposal to ease immigration restrictions on people from Asian countries. This Senator told me that the Asians have a lot of money and that they were ready to give it to the Republicans if the party would support immigration reform.

13. Another ugly practice involving soft money is the so-called issue ads that air right before an election. These advertisements are often paid for by unknown corporations and individuals who do not have to report who they are or where they received the money to pay for the ads. Although these ads may not explicitly say "vote against Senator Jones," the average guy on the street isn't looking for magic words. He's looking for negatives, and that's what these ads deliver. No matter what actual words are used, the message to vote against someone is usually unmistakable. These ads are very effective in influencing the outcome of elections, and the people who admit to running these ads will later remind Members of how the ads helped get them elected. Members realize how effective these ads are, and they may well express their gratitude to the individuals and groups who run them.

14. Both during and after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations. Students in my courses at Harvard and Wyoming, which have not even focused on election law, have spoken up about how disturbed they are about the corrupting effects of soft money in our political system. Even during my speaking engagements, I am sometimes asked whether I was captive to the NRA, the tobacco industry, or some other [6] special interest group that is known for donating large amounts of money. People can't believe that elected officials can function without looking at who is putting money in the kitty.

15. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

[1 (8 PCS/MC 12)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, *et al.*,	)	
Plaintiffs,	)	Case No. 02-0582
v.	)	(CKK, KLH, RJL)
	)	*All consolidated*
Federal Election Commission, *et. al.*,	)	*cases.*
Defendants.	)	

Declaration of Curt Smith, President of Indiana Family Institute, Inc.

I, Curt Smith, declare the following on personal knowledge:

1. I am an adult citizen of the United States of America and a resident of Indiana.

2. I am the President of Indiana Family Institute, Inc. ("IFI"), in which capacity I am familiar with the activities of IFI.

3. IFI is an Indiana Corporation exempt from federal taxation under I.R.C. § 501(c).

4. IFI is dedicated to encouraging and invigorating Indiana families by offering them time-proven solutions to problems that harm the family, the church, and society. For example, IFI provides information on home schooling techniques and curriculum as well as factual information on the effects of home schooling on the socialization of Indiana children. IFI provides information on the prevalence and purposes of partial birth abortion in Indiana, and on the battle against child pornography and for charter schools in Indiana. Because laws and [2 (8 PCS/MC 13)] regulations do, in fact, directly impact these issues, they are the subject of discussion in IFI communications.

5. Over ten thousand Indiana residents receive IFI publications and many hear IFI radio programs and commentaries throughout the State of Indiana.

6. State, local, and federal government policy, created and enforced by elected officials, largely determines how the interests at the core of IFI's purpose are treated. Therefore, keeping the voting public informed on the issues and the candidates' and officials' positions on them is an important IFI function. For example, IFI has tracked and publicized the progress of legislation affecting charter schools and partial birth abortion.

7. On a regular and recurring basis, IFI (a) lobbies candidate legislators on legislation, (b) consults with both incumbent and challenger candidates on their positions on issues, (c) engages in "electioneering communications," and (d) publishes printed materials that inform voters and potential voters of legislation, the positions and policies of legislators and other public officials, and of potential legislators and public officials. Some of these communications are (a) done without any communication with any candidate, (b) done after communication with a candidate, or (c) done with the agreement and/or formal collaboration of a candidate.

8. IFI has had and continues to have a relationship with Representative Mike Pence, based on their common views on issues such as home schooling, charter schools, partial birth abortion and the proliferation of child pornography; IFI and Rep. Pence help each other because doing so furthers their common views. U.S. Rep. Mike Pence has and will continue to raise and to assist in rasing funds for IFI, and IFI has communicated and will continue to communicate with Rep. Pence about raising and assisting to raise funds for IFI. [3 (8 PCS/MC 14)]

9. Appended as *Exhibit A* is a true and correct copy of an IFI fund-raising letter sent to potential donors to IFI noting that, in the wake of a slowed economy and the September 11 terrorist

attack, giving to nonprofits was down and that giving to IFI had declined by thirty percent. The IFI letter encouraged recipients to join IFI's Leadership Council by contributing one thousand dollars, noting that donors would have the opportunity to meet with Rep. Pence at a private briefing:

> As a member of the Leadership Council, you will receive . . . regular private briefings with national and state newsmakers and policy leaders. **The Council will host Congressman Mike Pence in the near future, we anticipate (though it is not yet confirmed) holding a special Leadership Council event with Special Prosecutor Ken Starr in 2002, and a key White House official has also agreed to schedule a briefing for IFI's Leadership Council.** I ask you to join this key group today. [emphasis in original]

10. IFI intended in this letter to make use of potential donors' esteem for featured guest Rep. Pence to solicit funds for IFI. In this and other situations, IFI and Rep. Pence have communicated, and will continue to communicate, with regard to raising and assisting in raising funds for IFI.

11. IFI also does fund-raising dinners, which charge a per-plate fund-raising charge and feature a noteworthy speaker from the pro-family movement. Additional solicitations are commonly made at such events. Rep. Pence and his wife, who have been members of our Board of Advisors, have attended such events, have asked others to attend, and IFI intends to ask Rep. Pence to be a speaker or featured guest at future such events.

12. IFI qualifies as an "MCFL-type" organization under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), in that it was not established as a business corporation or a labor union; has no shareholders or other persons affiliated with it who have a claim on its assets or earnings; its organizational purposes are to engage in public welfare activities; its

major [4 (8 PCS/MC 14)] purpose is not to nominate, elect, or defeat federal or state candidates; has no capital stock; receipts from business corporations, if any, are de minimis; its business income is insubstantial; and it is not affiliated with any political candidate, political party, or campaign committee.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this date: Sept. 25, 2002

/s/ Curt Smith
Curt Smith

[caption omitted]

DECLARATION OF BONNIE SOLID

I, Bonnie Solid, hereby declare under penalty of perjury of the State of Georgia:

1. I am a citizen of the United States and a resident of the State of Georgia.

2. I am above the age of 18, and I am competent to testify to the truth of the matters asserted in this Declaration.

3. I am married to Kevin Solid, and we are the parents of Daniel.

4. Daniel is fourteen years old.

5. He was born on December 28, 1987, in Georgia.

[end of page 1]

6. As a family we have chosen to provide for Daniel's education at home, rather than by sending him out to a local public or other school.

7. As a family, we consider citizen involvement in government, legislative processes and politics to be an important duty, and we have supported and encouraged Daniel's involvement in political campaigns.

8. We have also encouraged Daniel's involvement with Teen Pact, where he has gained important knowledge and training about the political and legislative processes.

9. I am aware that legal limits on the amount of money that I can give to a candidate for federal office have been enacted by Congress.

10. I am also aware that federal law prohibits me from giving money to a candidate for federal office in the name of another, even in the name of one of my children.

11. I have never used my children's name, or any other person's, in making a political donation, in order to avoid limits that the law places on my ability to support candidates of whom I approve.

12. Daniel has money that he has earned working for

neighbors, or that he has received as a gift.

13. Daniel manages his money, and he chooses whether and how to spend it.

[end of page 2]

14. Admittedly, he seeks counsel from his dad and me on intended purchases, and on occasion we have asked him to give further thought to an intended purchase.

[subscription and signature omitted]

[caption omitted]

DECLARATION OF DANIEL SOLID

I, Daniel Solid, hereby declare under penalty of perjury of the State of Georgia:

1. I am a citizen of the United States and a resident of the State of Georgia.

2. I am a minor, 13 years of age, and was born on December 28, 1987.

3. Although I am not an adult, I understand that it is important to speak truthfully about the facts that I know, and admit honestly when I do not know something; I understand that not telling the truth in this statement would be a wrongful thing, and that I have the duty under the law to tell the truth.

4. Although I am not an adult, I understand the difference between facts and fantasy, and that my duty in making this statement is to testify to facts, and to avoid making up things that I cannot remember or do not know.

[end of page 1]

5. My parents are Kevin and Bonnie Solid.

6. I am their oldest child, and I have one brother.

7. We live in Commerce, Georgia.

8. I am home-schooled.

9. In addition to my studies at home and in Christian school about civics, government and history, I have learned about legislation and politics, by attending training programs sponsored by Teen Pact.

10. Teen Pact is an organization founded by our neighbor, Tim Echols, to teach Christian students about the work of legislators and lawmakers, and about the basic operation of the political process in our country and our states:

    1. Teen Pact teaches kids about state legislation and political activities.

    2. We listen to speakers, study

materials, and have activities that allow us to look close up at legislative and political activities on the state level.

    3. Also, we interviewed lobbyists at the legislature, and we heard from some legislators, and had the opportunity to ask them questions.

    4. Participating in the Teen Pact programs has given me an understanding of how state legislatures work, including the process in the legislature and the outside activities of lobbyists and others who influence legislation.

    5. I have become interested in government, politics and legislation, and the training at Teen Pact has increased my interest in these subjects, as well as my understanding.

    6. Teen Pact has also been a benefit to my spiritual life and development

[end of page 2]

because that is an important component of the program.

11. As a result of my learning about legislation, government and politics, I have been involved in helping certain candidates for election in their campaigns.

12. For example, I have worked on Mike Beatty's campaign. I worked at his headquarters making campaign signs, and doing other needed work.

13. In addition, I have distributed and put up his campaign signs.

14. I am a Christian.

15. By that, I mean that I have accepted the gift of salvation that comes through Jesus Christ and His death on the cross.

16. My family and I attend Calvary Chapel, and my brother and I teach in the Sunday School program for the smaller children, with sometimes as many as 30 students in the class.

17. As a Christian I would like to spread the faith inside the legislative process, and hope that the result of that

will be to affect our country, change its direction, and hopefully, cause it to end legalized abortion.

18. I want to be involved in helping put into office men and women who will make a difference for the better of our country.

19. I also believe, as a principal of my faith, that it is important for persons who are followers of Christ to be involved in politics and in governing our Nation.

20. As I understand the new campaign reform law, after November 5, 2002, until I reach my eighteenth birthday, I will not be allowed to give my money to candidates for elective federal office, including candidates for the Presidency, for the Senate and for the House.

[end of page 3]

21. In addition, as I understand it, after November 5, 2002, until I reach my eighteenth birthday, I will not be allowed to give money to any committees of political parties.

22. Being barred from supporting candidates who share my beliefs, opinions, and views, deprives me of the ability that I currently have to give money to such candidates, and takes away a means I have of expressing two different things: my support for the candidate, and my association with the candidate toward common goals.

23. As things stand now, I am free to donate money to a candidate for federal office or the committee of a political party; but once the new law takes effect, I will lose that right.

24. Although I am young, I do have my own money, that is under my direction and control.

25. I earn money several different ways:

1. I have done painting to earn money, and I have done it for more than one of my neighbors.

2. I have also earned money by doing yard work in the neighborhood.

26. From time to time, as I accumulate money, I deposit some money into my savings account.

27. Together with earnings that I have not yet deposited, and with funds in my savings account, I have money that I can use as I wish, and would be able to make a donation to a candidate that fits my requirements for office because of his beliefs and opinions.

28. My parents have encouraged me to save money, and they have never forced me to spend my money in one way or another. If I wanted to do so, I could spend it in many ways; but

[end of page 4]

when the new law goes into effect, one way I will not be free to spend my own money is to support federal candidates with whom I agree.

[subscription and signature omitted]

DECLARATION OF GAIL STOLTZ

1. My name is Gail Stoltz. Since May 2001, I have been employed as the Political Director of the Democratic National Committee ("DNC"). From 1998 through 2001, I worked for the Service Employees International Union as Government Affairs Director. Prior to this I worked as Political Director for the DSCC and in various capacities for the DNC. I am making this declaration in response to a subpoena duces tecum served on the DNC by Intervening Defendants in this action, and in lieu of producing certain categories of documents.

2. As Political Director of the DNC I am responsible for ensuring that effective campaigns are mounted for Democratic candidates at all levels of the Democratic ticket. My duties include ensuring that the Democratic Party effectively registers, identifies and contacts voters and that our campaigns run smoothly. To accomplish these tasks, I oversee two separate divisions within the DNC: the five "regional desks" and the "base vote" directors. The regional [*2] desks oversee DNC activity in five geographic regions. They design political plans for each region, help design coordinated campaign plans for the states in the region, and give advice and assistance to the state parties in the region. The base vote department mobilizes the Democratic base vote and is structured by voter group, for example, African Americans, Latinos, Seniors, etc.

3. One of my major functions is overseeing our "coordinated campaign" programs in the various states. A coordinated campaign is a project of the state party to register, identify and turn out voters on behalf of the entire Democratic ticket, including federal, state and local candidates. The purpose is to increase turnout of Democratic voters for the benefit of all the Party's candidates, whether for state, local and federal office. Typically, the various state parties draft a "coordinated campaign" plan, which is then approved by the political staff at the DNC. The DNC's outside political consultants and donors to the "coordinated campaign," such as labor unions and other interest groups, also sometimes review the "coordinated campaign" plan.

4. State parties often hire campaign consultants such as direct mail and phone bank specialists to assist in the coordinated campaign. Direct mail consultants design mailings and then mail them to voters or prepare them for processing by volunteers. Phone bank consultants often organize and hire staff to run phone banks themselves, or they set up phone banks for Democratic Party volunteers. Sometimes the DNC provides recommendations to the State Parties about which vendors to use and sometimes the DNC endeavors to assist the State parties in negotiating contracts with these vendors.

5. A "coordinated campaign" is financed with a combination of funds raised by the state party itself and funds contributed to the state party by various national party committees, including the DNC, by candidate committees, and, as permitted by and pursuant to applicable [*3] state law, by individuals and entities such as labor organizations, corporations, state-registered political committees and other organizations. *See Exhibit A*. These funds are then spent for the operating expenses of the coordinated campaign (staff, rent, etc.) and for the costs of voter contact activities such as literature distributed by volunteers or paid workers, telephone banks, slate cards and mailings.

6. Federal, state and local candidates participate in the design and operation and, in some cases, the funding of the coordinated campaign. Candidates may participate because of their leadership roles in the party within the state or because they are running for office and will thus benefit from the coordinated campaign activities that assist their own campaign and the entire ticket. Sometimes these candidates contribute their own campaign funds from their authorized

committees to the coordinated campaign, but more frequently the candidates will ask donors to contribute funds directly to the coordinated campaign in both federal and non-federal funds.

7. If a participant in the coordinated campaign committee for a state, including the DNC, is responsible for a donation by a donor to the coordinated campaign, that donation is credited against the participant's funding commitment to the coordinated campaign. The DNC sometimes asks donors to give funds directly to state parties as part of an effort to fund fully as many coordinated campaigns as possible. For example, the DNC may ask a donor to contribute to one particular state's coordinated campaign. If the donor agrees, DNC staff normally contact the state party staff to tell them that a donation is coming, and that this donation should be credited towards the DNC's commitment to help fund the coordinated campaign.

8. Sometimes DNC staff find it hard to convince donors to give to coordinated campaigns since they are run by state parties. We then try to convince the donors that it is [*4] important to win at all levels of the ticket and remind them that their contribution will help federal as well as state candidates. The candidates who raised money from donors -- or had money raised on their behalf by the party -- to help complete their coordinated campaign commitment are aware when those donations come in or are made.

9. The DNC helps develop the coordinated campaign plan in a state and provides money, advice, and technical assistance. The DNC also helps with recruitment and training of staff and workers. The DNC decides which coordinated campaigns to invest in based on whether there are competitive federal and state elections in that state. For example, the DNC is more likely to contribute more funds to a state which has just received an added congressional seat

through redistricting or which has a competitive governor's race or an open U.S. Senate or Congressional seat.

10. The goal of the coordinated campaign is to win "from the top down," in other words, they are designed to help Democratic candidates at all levels of the ticket. Coordinated campaigns are also important for other reasons. For example, state legislature candidates often are the "farm team" for federal candidacies, especially in states with term limits. Also, the ground operations such as voter development and get out the vote activities can be important to the success of federal elections in the state. Also, races for governorships, mayoral offices, and other state and local offices are important because the candidates, and officeholders resulting from those races, can have significant effects on voter development and, thus, the success of the Democratic ticket, in the pertinent election or future elections.

11. Coordinated campaign committees generally are not involved in airing DNC issue ads, and I am not involved in the DNC's issue advertising strategy, although I am aware of ads being run, as well as other information such as poll results, as a part of weekly and even daily [*5] senior DNC staff meetings that involve exchanges of information about what's going on the campaign front and strategizing as to the best approach. Senior DNC officials, such as the executive director, political director, and general counsel are responsible for the DNC's issue advertising, however, the creative work is mostly done by outside consultants. We try to coordinate sufficiently with other DNC staff, campaign staff and outside consultants, to ensure that the message being sent in the media and by the coordinated campaigns do not conflict.

12. I am aware that, while state parties don't like to give their hard-earned donations to each other, they "swap" federal and non-federal dollars, the goal being to provide state

parties with the right mix of funds to maximize the usable funds that a state party may have.

13. As political director, I sometimes brief major donors at events planned for them on how various DNC campaigns are doing. I also sometimes speak at fundraising events for the DNC. Donors sometimes call me to receive "political reconnaissance."

14. The DNC's and Political Director's major focus during Presidential election years is the election of the Presidential candidate. In such years the DNC provides more resources to coordinated campaigns, in part to secure the election of the presidential candidate. The DNC hopes that the chosen presidential message is good for all Democrats on the ticket. During such years the DNC coordinates with presidential campaign committees regularly through frequent discussions and meetings between the DNC and campaign staff. DNC and presidential campaign staff are also in daily contact about which messages to focus on. This is particularly true once it is clear who the Democratic nominee will be. At that point, the DNC works in tandem with the Presidential campaign and the nominees. *See Exhibit B*. The DNC and the campaign exchange polling data, see each others' ad scripts, and in the 1996 and 2000 election cycles, used common campaign and/or media strategists and/or consultants. For example, during a particular week the **[*6]** presidential campaign may want to emphasize the candidate's views on Social Security. During a morning message call, the DNC, campaign staff and consultants may discuss this message and work to make sure the coordinated campaign emphasize this message.

15. One of the most desirable times for running TV or radio ads is in the last three weeks before an election. This is the time when most voters are paying attention and when the undecided voters are making up their minds. Advertising in August is not as effective as advertising closer to the election in November. We advise candidates running ads to "buy back from election day," in other words prioritize buying advertising closer to election day rather than earlier in the cycle.

16. In my experience, issue ads affect elections. The ads can either demoralize or confuse voters so that they do not vote, or they can energize a voter base for or against a party or its candidates. During a presidential election year, the ads definitely make a difference when a presidential candidate is featured.

17. I declare under penalty of perjury that the foregoing is true and correct to the best of my current knowledge, information and belief.

Dated: October 2, 2002 s/

Gail Stoltz

[EXHIBITS OMITTED]

[caption omitted]

DECLARATION OF CYNTHIA WHITE

I, Cynthia White, hereby declare under penalty of perjury of the State of Georgia:

1. I am a citizen of the United States and a resident of the State of Georgia.

2. I am above the age of 18, and I am competent to testify to the truth of the matters asserted in this Declaration.

3. I am married to John White, and we are the parents of Zachary.

4. Zachary is twelve years old.

5. He was born on July 7, 1989, in Georgia.

6. As a family we have chosen to provide for Zachary's education at home, rather than by sending him out to a local public or other school.

[end of page 1]

7. As a family, we consider citizen involvement in government, legislative processes and politics to be an important duty.

8. I work with the local Republican party, and Zachary often helps me with our activities.

9. Zachary and I have attended and worked at party conventions together; in addition, we have walked precincts together to support candidates.

10. Zachary is keenly interested in history and in politics, even at his young age, and has willingly participated as a volunteer and supporter in the campaign activities I mentioned above.

11. I am aware that legal limits on the amount of money that I can give to a candidate for federal office have been enacted by Congress.

12. I am also aware that federal law prohibits me from giving money to a candidate for federal office in the name of another, even in the name of one of my children.

13. I have never used my Zachary's name, or any other person's, in making a political donation, in order to avoid limits that the law places on my ability to support candidates of whom I approve.

14. Zachary has money that he has earned by doing chores, or that he has received as a gift.

15. Zachary controls his money, and he chooses whether and how to spend it.

16. Admittedly, he consults with his dad and me, and on occasion we have asked him to give further thought to an intended purchase.

[end of page 2]

[subscription and signature omitted]

[caption omitted]

DECLARATION OF ZACHARY WHITE

I, Zachary White, hereby declare under penalty of perjury of the State of Georgia:

1. I am a citizen of the United States and a resident of the State of Georgia.

2. I am twelve years old, and was born on July 7, 1989.

3. Although I am not an adult, I understand that it is important to speak truthfully about the facts that I know, and admit honestly when I do not know something; I understand that not telling the truth in this statement would be a wrongful thing, and that I have the duty under the law to tell the truth.

4. Although I am not an adult, I understand the difference between facts and fantasy, and that my duty in making this statement is to testify to facts, and to avoid making up things that I cannot remember or do not know.

[end of page 1]

5. I am a Christian.

6. I am a home-schooled child, and I always have been. This coming year I going into seventh grade.

7. Being home-schooled has also helped me to learn responsibility for myself and my schedule.

8. My favorite subject of study and interest is history.

9. I love reading about history, and can usually be counted on to bring a history book to the breakfast table in the morning.

10. I realize that not everyone shares my views and opinions, and that some people may disagree with them strongly, but I have concluded that our country is in grave danger from the collapse of its morals:

a. I am referring to legalized abortion, by

which children who are not yet born are legally killed; in the twenty-nine years that abortion has been legalized, something like thirty million babies have been slaughtered, and sometimes those abortions are paid for by the government.

b. I am also referring to the legalization of sodomy and other homosexual conduct.

c. I am also referring to the damage that divorce is causing in our country with so many children being raised in homes without both a mom and a dad.

d. In addition, I believe that our national weakness is to be blamed on the lack of a real standard of value for our money.

[end of page 2]

e. Many of these same factors coincided with the fall of the Roman Empire and with the collapse of other nations.

11. My interest in, and study of history, has also made me interested in and committed to being involved in political activities, including studying candidates for office, and providing support to candidates for office whose views and opinions on important matters I share.

12. Based on my study of history, I am searching for candidates to support who will serve as statesmen, and not just as politicians; in other words, the kinds of people who cannot be bought; people who are like James Madison, Benjamin Franklin, Theodore Roosevelt, and Ronald Reagan.

13. As a family, we have also been involved in politics.

a. My mom and I have attended party conventions of the Georgia Republican Party.

b. At these conventions, I have distributed leaflets, magnets, and other materials advertising my preferred candidate; no one told me to do this, I simply took quantities of the available materials and worked the crowd distributing the materials.

c. I also have attended campaign rallies.

d. With my dad, I have helped to distribute and set up yard signs for candidates.

e. And I have walked precincts with my family and distributed materials about the candidates to encourage people to vote.

[end of page 3]

f. In fact, I also have engaged in discussions with people that I met while distributing campaign materials door to door, and have some people tell me that they would vote for the first time, or for the party I represented for the first time, because of my presentation to them.

g. In fact, I have also contributed money to a candidate for office, in the amount of Five Dollars.

h. That contribution I made with my money that was under my own direction and control.

14. The candidates that I have supported by volunteering, by the recent campaign donation, and by other activities, are ones that I have chosen after careful thought and research.

15. Because of my Christian faith, I will only support a candidate that is pro-life.

16. Also, I think that our government has gotten too big, and that too many people have gotten used to relying on it, so I can only support candidates that agree with me about reducing the size of government.

17. And, I think of myself as a Republican because that is the political party that has taken a stand against abortion and for the rights of children before birth.

18. When I am thinking about a candidate to support, I research to learn their views on the matters about which I care.

19. My parents and I have not agreed on every candidate and every election that we have worked on. In one

recent election, I could not support the candidate my dad did, and my dad knew that I was helping the opponent but did not try to stop me from doing so.

[end of page 4]

20. When the campaign reform law takes effect, I will be forbidden to support with a donation a candidate that I have chosen to support who is seeking federal elective office.

21. Also, when the law takes effect, I will not be allowed to give the money I have earned to committees of the political parties I support or associate with.

22. Because of my interest in government, legislation, and politics, and because of my Christian faith, I plan and intend to continue seeking out candidates for federal elective office who represent my views and beliefs on important questions like the right to life of children before birth, and on the size of our government.

23. When I find such candidates, I plan and intend to make donations to them, just as I did.

24. Working for the election of a candidate and giving financial support to the election of a candidate are two ways that I am able to demonstrate my association with those candidates who share my beliefs and opinions.

25. While working on campaigns is an important activity, I also think that it is appropriate to give financial support to candidates.

26. The new restrictions on my rights really do affect my rights and limit my ability to show that I share in the views and opinions of the candidates I choose.

27. I have money that is my own and that I have control over; that money includes funds I have earned for doing chores, and money that was given to me as a gift, but not as a gift with the purpose of actually donating it to a political candidate.

[end of page 5]
[subscription and signature omitted]

Deposition of Wright H. Andrews
(October 22, 2002)

* * *

[16] THE WITNESS: Let me say that I think that the general public does not have a technical understanding of hard money versus soft money. And I'm talking if you went out to Joe Six Pack or almost the vast majority of Americans, it would be my personal bet, but I may be wrong.

BY MR. HUME:

Q. One last question on paragraph 20 which [17] is essentially what I was trying ask when I began, which is, is it therefore the case that in your view there is a disconnect between the reality of what goes on in Washington between lobbyists and politicians and the perception that the public has?

MS. GACKI: Objection, vague.

MR. HUME: You can still answer.

THE WITNESS: I would say there is not full understanding in many cases.

BY MR. HUME:

Q. I'd like to refer you to paragraph 6 in your declaration again. I'll just read it into the record for the sake of the record. Paragraph 6 reads, it's overly simplistic and inaccurate to say that legislative outcomes are generally "purchased" unquote by campaign contributions or expenditures. But there can be no doubt that political contributions serve at least two important political goals, securing access and building relationships. Is it your view that the effect, I'd like to stay on the public's perception for a moment, that the public's perception of the quote unquote [18] "corruption" or the misperception about how Washington works is a perception that powerful special interests use money to obtain disproportionate access to politicians?

MS. GACKI: Objection. Beyond the scope of the direct testimony and mischaracterizing the witnesses testimony.

BY MR. HUME:

Q. I apologize if I'm mischaracterizing, but that's partly why I am asking the question is to give you a chance to characterize it. I am trying to understand what I take. I understood paragraph 6 to be a very central part of what this declaration is saying, which is that there may not be quid pro quo corruption but there is long term relationship building and access, so I'm asking now trying to connect and ask you to connect to the extent you can, what you saying about the public's perception, and what you are also saying about this long term relationship building, so it is not beyond the scope of what you are saying. I am trying to understand what you are saying. [19]

MS. GACKI: Objection, compound. And could you restate the question?

BY MR. HUME:

Q. I'm happy to restate the question. I'm happy to restate the question. Is it your opinion, Mr. Andrews, that the public has a misperception that special, powerful special interest groups use money to gain disproportionate access to office holders and politicians?

A. Yes.

Q. And?

A. Many in the public, not everyone one but a broad section.

Q. Would you also agree that some organizations and some individuals gain access not because of money but for other reasons?

A. Absolutely.

Q. That, for example, celebrity individuals are going to have disproportionate access, would you agree with that?

A. They could.

Q. They may? [20]

A. They may.

Q. Some take advantage of it, some don't?

A. Celebrity individuals certainly do play some part sometimes on some issues. They tend to on most issues I think, in many cases I think they may seek not to advance, if you will, corporate interests but more broad social causes but sometimes they do come in, right.

Q. I'd like to move to another category, what I am going refer to as voluntary membership organizations, nonprofit groups that represent large constituencies of individuals?

A. The Sierra Club, for example.

Q. The Sierra Club, the AARP, that represents the interests of retired persons which I think is refuted to be one of the more powerful.

A. The National Rifle Association.

Q. The National Rifle Association, to use another example. All of those groups represent individuals mostly, and have for many years have been considered to be very influential in Washington, rightly or wrongly. My question with [21] respect to those groups is do you think that they have, that their access and their influence comes in part from the fact that they represent a huge number of constituents, individual constituents?

MS. GACKI: Objection. Lack of foundation.

THE WITNESS: I think that obviously there are many ways to influence the legislative process. One way in which the legislative process is influenced is by having a significant grass roots organization, for example, or a grass roots capability, that clearly improperly utilized will give influence in the legislative process. I find nothing wrong with that as a general proposition.

BY MR. HUME:

Q. I'd like to refer to paragraph 3 then. We continue to move backwards through your declaration. In paragraph 3 you give an account of some of the activities you've been involved in as a lobbyist and you list three specific ones. I'd like to refer to a third where you say that you've been involved in quote, and I'm quoting from your [22] declaration, counseling clients on how to use their money in quote "issues ads " legally to influence the legislative and political process. First some background, Butera and Andrews is the name of your firm, is that right?

A. Yes. Butera and Andrews is the name of my current law firm, yes.

Q. And it's a law firm but it's principly a lobbying firm?

A. A law firm that does a significant lobbying and litigation in two areas, principal areas of the firm.

Q. And how long has that, how long have you had that firm in operation?

A. I believe we began, I think it was January 1, 1990.

Q. And prior to that you were at the law firm of Sutherland Asbill and Brennan?

A. Sutherland Asbill and Brennan starting in 1975.

Q. You've never worked as a media consultant, have you? [23]

A. No.

Q. Your work as a lobbyist, I take it, has principally been, has principally involved the interests of your clients in pending federal legislation?

A. Principally, yes. Overall, I'm also involved in state legislation.

Q. How much of your work over the years has involved advising your clients on how to influence elections?

A. That would be a relatively small part. I don't know. That is just one thing that comes up during the lobbying discussion in, you say to influence elections, again, let me elaborate. That in dealing with clients, clients will ask, as I'm sure you understand, for recommendations concerning making PAC contributions, for how they might make other expenditures or take other positions within the bounds of law and where the law might be. Sometimes in the

past I used to give considerable amounts of election law advice. I've now moved away from that and tend to let clients have somebody else [24] who spends full time on that these days, give them specific advice but I will approach things from a lobbyist perspective, oftentime, and as a general counselor who has been in the trade for many years, and who does work from time to time with media consultants, I'm part of an overall team.

Q. So you have given advice to your clients on a professional basis in terms of how they should contribute their money to?

A. I have in the past, yes.

Q. On a professional basis?

A. Yes.

Q. And what is the expertise that they are paying you for in that case? In other words when it's not analysis of federal election law?

A. Well, when one says on a professional basis, I think in Washington we often have to have or we often have a combination in which clients look to you for both a legal advice or a general legal advice but also they look to Washington counsel for political advice on what is perceived to be the best and most effective way that they can further [25] specific or general legislative interest.

Q. Specifically with this third area that you reference in paragraph 3 where you say counseling clients in how to use their money and issue ads legally to influence the legislative and political process; how frequently during your career has that particular activity come up?

A. I have never kept count. Some, I do not know the specific amount of time but it comes up from time to time.

Q. Would you say it comes up less often in your career than does general advice for where to contribute?

A. Yes.

Q. And are you including within subparagraph 3 here, when you say how to use their money and issue ads, are you including there how to use their money generally through hiring additional law firms, lobbyists, making additional soft money contributions? I mean is this essentially a catch-all?

MS. GACKI: Objection. Compound. [26]

THE WITNESS: I think this three is referencing using political contributions primarily or political expenditures, it could certainly since I have spent and do spend time advising them other ways of using their money, and again campaign contributions are simply one means of influencing the process, but it does include the use of money, be it PAC contributions or soft money, or expending money for advertising.

BY MR. HUME:

Q. How many specific examples can you recall today where you advised clients to undertake an issue advertising campaign?

A. I honestly do not know, you know, specific a specific number. I can simply say that I have done so on more than one occasion.

Q. Can you tell me any specific examples?

A. And I will not disclose, you know, any specific clients that I have done so. I will say that you know, I have done so, and in fact, have done so recently, currently.

Q. And presumably the issue advertisements [27] that were run, were aired publicly?

A. With respect to the issue, there has been some issue ads that have been run.

Q. Can you tell me specifically which issue ads were run by clients that you advised to run those ads?

A. No.

Q. And on what grounds will you not tell me that?

A. Because you know I am not going into individual client activities.

Q. Are you claiming privilege?

A. I'm claiming privilege and I won't answer that.

BY MR. HELLMICK

Q. Can you elaborate on that, please, considering the protective order that is in place and that all of this testimony is sealed, that it's highly confidential and counsel and you volunteered. I don't mean to interrupt, Mr. Hume, but I'm just looking for clarification.

MR. KESSELMAN: I don't think the witness [28] needs to explain the privilege. You can certainly argue as anything to the weight of his testimony that you want, if he's not providing you with specific examples and you're unhappy with that, but if the witness is telling you that he thinks that it's privileged and he's giving you answers about things that he knows about, that's, I mean that's, I can just tell you I think those are the answers that you are going to get from the witness.

MR. HELLMICK: Ordinarily I would agree with you, however, in this instance the witness is using this as a sword and a shield. He's saying I know of instances where I have done this and it's impacting my testimony, but I won't tell that you what that is. And so that's completely unfair to us. How do we conduct legitimate discovery on the heart of his deposition which are, I shouldn't say heart, but one of them, which is issues ads. And he's saying I am doing it right now, but I'm not going to tell you who. That is something that is directly impacted by the BCRA as we all know and you.

[29] MS. GACKI: I don't know that you need names of clients and specific strategies that he's given.

MR. HELLMICK: It's all protected and that's why we have the protective order. He volunteered to be a witness.

MS. GACKI: And you need names in order to conduct, to effectively test this?

MR. HELLMICK: To explore whether or not it's an electioneering message, yes; to explore what the impact is or what the intent of the message; yes, and I would ask that the Department of Justice to take a position, because you're not representing this witness, take a position as to whether or not you will at least encourage him on the record to answer this because he's your witness.

MS. GACKI: We will not encourage him to answer.

MR. KELLEHER: We have encouraged the witness to answer truthfully, fully, honestly any question that is put before him. We cannot force this witness to testify about specifics, if he [30] believes that those are privileged, or if he's simply not willing to reveal them. Certainly you can make any arguments to the Court that you want about the weight of his testimony and we have encouraged him to give as full a testimony as he's willing to do, and you know, you can certainly ask questions and see what answers the witness gives, but the Department of Justice is encouraging the witness to testify honestly and truthfully and on the basis of personal experience and that's. Sorry about that, Hume.

BY MR. HUME:

Q. Mr. Andrews, can you tell me whether or not the Department of Justice advised you that you did not need to disclose specific instances of advice you've given to clients that you referred to in paragraph 3?

A. Not specifically that I recall.

Q. Did you ever ask them whether or not you could keep that confidential?

A. I may have had somewhere in the discussion with them a mention at least on my part, [31] that I would not feel it appropriate to go in detail into client matters. I think I may have said that at some point.

Q. Did they ever ask you, did they ever include other paragraphs that would have included more detail about specific instances that you were giving advice?

A. There I am very consciously in preparing this did not include specific client related matters where any client could be identified.

Q. But they prepared it originally, didn't they?

A. They prepared simply from my oral comments and I did significant redrafting and editing.

Q. But in your original oral comments, did you give them specific examples?

A. Not that I recall because I quite frankly, would not even want the Justice Department indicating how Wright Andrews might be doing certain strategies or advice to clients, not that I don't trust them. [32]

Q. So you didn't give the Department of Justice any specific example of a client whom you advised to undertake an issue ad?

A. Not that I recall, absolutely not.

Q. And today you, unless compelled by Court, you are not willing to tell me any specific example of a client that you advised for an issue ad?

A. I am not.

Q. And you say you recall that you have done that and now I'm focusing only on an advice to a client to run an issue ad, and I would like first to ask you to define what you understand an issue ad to be?

A. As I would term an issue ad, I am referencing an ad which relates to a specific issue, in which a client might have an interest. They might be for the issue, or against the issue. The ad could be run, for example, in a series of targeted Congressional districts, urging that Congressman XYZ be contacted with reference to the issue and urged to, for example, support the measure, oppose a measure, or some other action like [33] not continuing to support the measure. That ad would technically try to be designed so that it would not be a campaign as such, campaign expenditure, something to influence the election, but the effect, of course, of such an ad, depending on when it is run, how it is stated, and can have a political outcome. When I have advised clients with respect to the political running of such ads, the objective in my cases has been to influence the number usually, as opposed to influence directly his or her election.

MR. HELLMICK: I object to the entire answer as being in contempt of the subpoena. Well, I'm not sure that there is a subpoena, so maybe I ought to rephrase that. I object on the ground that the witness is refusing to provide specific examples of current ads that he's running, although he is specifically referencing ads, and is refusing to provide details of the types of ads and what the messages are. The witness stated that he designs them [34] so that they are not electioneering or intended but then he says they are intended to influence the election. That type of testimony goes directly to the heart of this act, and I think that the witnesses refusal to discuss current ongoing ads and ads where he is specifically referenced or that he has specifically advised clients to run such ads is discoverable and within the bounds. That's my objection.

THE WITNESS: I would make a correction. I do not believe that I said that they were designed to influence the election, I did not intend to say that. I said they were designed to influence a legislative outcome and the member, I recognize as does anyone that an ad, that an ad being run can have a political consequence and in fact influence an election.

MR. HELLMICK: Pardon me, and I did misspeak and I apologize. I intended to say that.

BY MR. HUME:

Q. And with respect to, but just to clarify, the ads that you advised your clients were intended [35] to influence a legislative outcome and the members voting?

A. Fully a legislative outcome of legislative factions, fully recognizing that such ads when viewed from a members perspective and when viewed from people within the members district, for example, that that has political implications that can flow over into the election.

BY MR. HUME:

Q. Fully recognizing that, but not having that being the reason for running the ad?

A. Not the prime purpose.

Q. Do you recall whether any of the issue ads you've advised your clients to run have been aired within 60 days of a general election or 30 days of a primary election for the member that they were referencing?

A. In recent times I do not. To the best of my recollection they have not.

* * *

[49] Q. Do you have any specific, are you aware of any specific instances where a federal elected official has changed his or her position on an issue in, as a result of an awareness that doing so would increase financial support, and in future elections from a particular group or a particular donor?

A. I am not aware of any member publicly acknowledging that they are unduly influenced by a significant amount of contributions. I think that I can't say I am aware, that having been involved in the process for many years, that a contributions will give one at a minimum, oftentimes better access, better access leads for a better opportunity to make ones case, and I think there is a level of human nature that one would try often to help their supporters, people who have helped them; that money does not necessarily always produce the desired [50] level of influence of many contributors. There are many factors that go into an officeholder's mind in making decisions but without a doubt in my mind, money does play a significant level of influence in the legislative process.

MR. HELLMICK: Objection. Move to strike all testimony after the words, I am aware, as nonresponsive. The question called for specific factual instances of a changed vote as a result of contributions. Thank you.

* * *

[59] Q. You state in paragraph 14 that, I won't read the precise account, but you were explaining [60] how a large

soft money donation of $100,000 can get the corporate donor, you say more benefit than several smaller hard dollar contributions by that corporation's PAC, is the reason for that simply because it's more money?

A. Generally yes. I mean within that regard, if a client's PAC is, you know, has been limited to 5,000 per election. When I started out in this town, a little of the history from the earlier days, when I was both raising money, lobbying and giving election law advice to certain members of Congress, I remember very well, how I and one member were very taken by the donor who gave in the house race for the member gave him a thousand dollars. A thousand dollars seemed very big in those days. It was $250 for a house member. $500 was sort of a thing. Today one does not even get a thank you most of the time for a thousand dollars contribution. When a $5,000 contribution is made, that is appreciated, but indeed, generally expected, and certainly not enough, in many instances a larger donation can have [61] much more impact in depending on how it is used and it can be appreciated deeply, in my judgment.

Q. And in your judgment if the amounts were equal would not a candidate prefer to have the money himself or herself to spend and control?

A. Depending on the circumstance, if the amounts were equal, you would generally go for direct hard dollars. Sometimes a member may much prefer that in they have some commitment to help raise money for a party committee, as part of meeting their obligations. They certainly would appreciate and respect a client donating money to that or even I suppose to a leadership fund with an appropriate account.

MR. HELLMICK: Objection. Move to strike as speculation.

BY MR. HUME:

Q. Is it your view that generally, well, let me try to rephrase that also. Do you have any specific knowledge of an instance where a client of yours has chosen to run an issue ad instead of making a soft money donation? [62]

A. In terms of making a conscious choice between the two, not that I recall you know, in that basis.

Q. Is it fair to say that, do you have any reason to disagree with the following proposition that most issue ads run in close proximity to a federal election are run by independent ideological organizations that wish to advocate on behalf of their particular ideological agenda?

MS. GACKI: Objection. Insufficient foundation. Calls for speculation.

BY MR. HUME:

Q. If you don't feel that you have specific.

A. Yes. I don't have the specific data to really answer that.

Q. Is it therefore also difficult for you to tell me whether or not you think the people who are running most of the issue ads in this country would be just as happy to give the money for those issue ads as soft money?

MS. GACKI: Again, objection.

BY MR. HUME: [63]

Q. I take it that you don't have any foundation for answering that question either?

A. Give me the question again and let me give you an answer response on that one to clarify.

Q. The one that you said you didn't have a foundation for?

A. No, this is a different.

Q. Well, I had asked you whether you had an opinion, whether you had any reason to disagree with the proposition that most issue ads run in proximity to a federal election are run by ideological groups seeking to advance their ideological agendas?

A. I do not know specifically all of the issue ads run in the country, who is running them and so forth, therefore it is difficult for me to give you an informed opinion, be it speculation or otherwise, so I don't have enough to be able to agree with it.

Q. Okay. How much do you know about the awareness that federal candidates for federal office know about issue ads run in their elections?

A. My belief is having heard members over [64] the years complain that they are running ads in my district, that members pay considerable attention to the ads, sometimes they are positive, sometimes they are negative. From a political perspective I think going back to your question a moment ago as to X dollars for soft money, versus X dollars for issue ad, if I am attempting to truly influence a members, be it vote on the issue or sponsoring a bill, or if I am secretly in my heart of hearts, and I'm speaking, I not just but trying to influence an election, one would think that you could get more bang for your bucks most of the time doing an issue ad if I had, you know, unlimited sums of money or large sums of money, depending on what my goal would be, I could certainly see using the money from the advertising perspective, not that an ad will always be published.

Q. Do you have specific instances in which you recall elected officials saying that they recognize the importance of an issue ad campaign in their race in their election?

A. I just recall again over time members [65] complaining, member staff complaining that groups are running ads attacking them and in their district. That's just sort of a general thing that you get. Again, I think that occurs on a bipartisan basis. Nobody likes to have anyone doing an attack ad in particular, at least there's a high level of paranoia on that because it might cost them votes.

Q. And do you have any specific anecdotes with respect to complaints about those kinds of attack ads?

A. Not with respect to specific members, no.

Q. And is it mostly the case that complaints that the, that members, that your recollection is that members refer to ads that attack them and not to ads that have helped them?

A. The attack has always been the principal thing. I've never heard a great deal about great Americans running

ads in their favor, not that they wouldn't appreciate that but people seem to carp more.

Q. Do you have any specific recollection of a conversation with a member who expressed gratitude [66] towards a group for running negative ads against his opponent or positive ads with respect to himself, him or herself?

A. No specific recollection. I would suggest you talk to members and former members and they will give you their direct views.

MR. HUME: What I'd like to do, if I could, is take a very short break. I'm pretty close to being finished, and then I can turn over the podium as it were. We'll take a short break.

(Recess.)

BY MR. HUME:

Q. Mr. Andrews, we'll go back on the record. I'd like to ask you a few more questions about issue ads. You described earlier in your deposition your experience with your clients and you would run issue ads. More generally, I'd like to ask you based upon your experience as a lobbyist, is it your experience that issue ads, as you understand that term, can sometimes be used to bring back attention to a public policy issue that the politicians are for whatever reason not devoting much time to talk [67] about?

A. Of course.

Q. Do you think that that is also possibly a use of issue ads in the context of an election when the candidates may be elected officials or candidates as well as elected officials would prefer not to have that campaign focus on a particular hot button issue but a campaign of issue ads may have the effect of forcing them to talk about it?

A. That is one possibility, absolutely.

Q. Do you also think that ads, the issue ads may serve to inform voters about the particular office holders or candidates voting record on a particular issue?

A. I think again, depending on the timing, I think you could run into issues of election airing. Depends on what's said in the ad. A quote, "issue ad " at least as I would talk in the generic sense certainly could reference a members support for or opposition to gun control, for example.

Q. And it gives voice to the constituents or supporters of that particular issue groups [68] supporters of what they think about that candidate's position on that issue, is that right?

A. Yes.

Q. In light of the fact that issue ads do these, well, one last question. Do you also agree that issue ads as your clients issue ads did, may be designed to impact the legislative process primarily, rather than the electioneering process?

A. It is certainly possible for them to be designed that way.

Q. Okay. In many respects then, would you agree that issue ads have many of the same characteristics and fulfill many of the same roles in the public political debates as is fulfilled by lobbyists in that they give voice to the constituents' view on a particular interest, it foments and generates public debate on that interest when there may otherwise be only limited or zero debate about that interest, and so that the two play a part in our Democratic system that are quite similar?

A. I would say that an issue ad, can be [69] multifaceted. It can do some of the informing of the public, for example, or the influencing in the legislative context. It can also be very clearly disguised as a mechanism that is in essence a political, intended for political purposes. I think we all know that, and you have to separate the good from the bad and I leave that to you.

* * *

[(Sen. Russell Feingold Dep. 41)] head.

Q. Is this ad pro-Gore or anti-Gore?

A. I don't know.

Q. But you do know that it's phony?

A. I know my belief is the purpose of this ad is to influence an election.

Q. But as a sitting United States Senator that's run for office and been elected twice as Senator, you cannot as you sit here today tell us whether this ad is pro-Gore or anti-Gore?

A. Let me review it again. Well, my understanding of the way these ads usually work is when you call the guy's office, you are usually attacking the guy. This certainly is not helpful to Al Gore because what it suggests is that he was somehow responsible for the Medicare cuts and it, in my view, it's sort of a sneaky way of trying to blame him without directly saying that he should be thrown out of office or not elected. So it looks to me like an ad that attempts to cause Mr. Gore to lose votes. But I'm not absolutely certain. It sure reads that way to me.

Q. But you are certain, aren't you, that this would be covered by the law?

A. I believe it would be. I don't think I

DEPOSITION OF SENATOR RUSSELL FEINGOLD

Q. But even if, even if the donations to the state party couldn't directly benefit the Federal officeholder?

A. You mean under the new law or under the old law?

Q. Under the old law.

A. I think under the old law it could benefit the Federal officeholder.

Q. Are you aware of any examples where people have sought to receive preferential access or undue influence because of the benefit provided by soft money donations to state parties for Federal candidates?

A. I don't think so.

MR. CARVIN: I notice it's 12:35. Do you know any more about the vote situation at this point?

(Discussion off the record.)

MR. HARTH: Let's take five minutes now.

(Recess.)

BY MR. CARVIN:

Q. Just to wrap up the question and I don't think I have asked you these particular questions. Are you aware of any instances where Federal **[*133]** legislators gave preferential access or influence to soft money donors to the state or local parties?

A. In particular that the soft money contribution to the party was the reason they gave access?

Feingold Dep. 132-133

Q. Reason or factor.

A. I don't know of any.

Q. Are you aware of any tallying or keeping track by the national committees of candidates who were responsible for soft money fund-raising to states?

A. I don't know how they do that or if they do it.

Q. You discussed this with Mr. Abrams, but just to make sure I'm clear, are you aware of any Representative who has ever changed their vote because of a soft money donor?

A. I cannot say to a moral certainty that that's occurred.

Q. Do --

A. It's in that person's mind.

* * *

[*189] BY MR. CARVIN:

Q. And if there was, can you think of any reason why it would make sense to allow Federal candidates or officeholders to solicit money for 501(c) organizations in the manner described, but prohibit officials or agents in the national party from doing the same activity?

A. Not off the top of my head. No.

Q. Is it your understanding that state parties are prohibited from raising soft money?

Feingold Dep. 133, 189

A. I don't believe they are prohibited if under their state law they are allowed to have soft money. I think they can raise soft money for their state elections.

Q. The prohibition, as it is now on state parties relates to the expenditure of what they call soft money, money not controlled by the Act?

A. Raising or spending, is that what you are asking?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

Washington, D.C.

Monday, September 9, 2002

Deposition of SENATOR RUSSELL FEINGOLD

* * *

[243] source of funds. I don't know what time period this covers. 2000, that during that time period I received 55.5 percent of all my, of all of my contributions from small individual contributions of less than $200. That's how I interpret this.

Q. How typical is that for a United States Senator? To have that kind of breakdown?

A. I'm not certain. My guess is it's pretty high percentage. I don't know for sure. I know there are some that rely on a much greater extent on PACs. Certainly candidate self-financing. Probably there are a much higher percentage of those that have individual contributions. I can't authoritatively speak to the fact that this is atypical. I don't have the statistics in front of me.

Q. Based on your experience and background and based on those numbers, have you found that the prior thousand dollars contribution limits were sufficient and adequate for you to run an effective campaign, get your message out?

A. I have never considered the prior thousand dollars limitation tc be a barrier to my ability to run for office.

Q. And can you comment in general about the importance of hard money contributions to political

* * *

[260] political office without access to wealthy friends, without access to wealthy interests running up against someone, an incumbent perhaps, or even a challenger with access to that kind of network, do you think the increased hard money contribution limits help or hurt that low-income candidate?

A. It would probably help the low-income candidate some but it would help the incumbent more.

Q. How does it help?

A. They would be able to identify a few people who are say close friends, a couple of people they know and get more money. On the other hand, the incumbent would probably be able to identify a lot more of those people, so there is always this question raised of, the way I have always looked at campaigns is not who has the most money, it's whether you have enough money to get your message out so it's always this question and there is the thing, the point of diminishing returns so the incumbent raises such an outrageous amount of money and runs a big money campaign against somebody who had raised enough.

I mean that person can sort of, as long as they can get their message out, they may win even though they have less money. The problem is a lot of

* * *

[264] BY MR. BONIFAZ:

Q. Yes?

A. It could go either way. We have multimillionaire senators and multimillionaire challengers. It depends on the race.

Q. Are you aware of the concept of war chests, campaign war chests?

A. As I understand the term, it's an attempt to build up a large amount of campaign contributions and the way it's been expressed sometimes is sometimes in politics, I have heard it is an attempt to discourage people from running against you. That's one connotation of the phrase war chest.

Q. Do you believe that the increased contribution limits will enable those who engage in building up campaign war chests and trying to discourage anyone from competing against them, do you think the increased contribution limits will advance that effort?

A. Far less so than the soft money system, but it is certainly more likely to advance that cause than not. Or that attempt to create a war chest than not.

Q. And what impact do you believe that will have on competition in Federal elections?

[265] A. If it has that impact, it could potentially discourage some people from running against a candidate.

Q. Do you believe that it protects and enhances the integrity of the campaign process to increase contribution limits?

A. I don't think it advances it. No. I don't think it necessarily does enormous damage at the level we are talking about here, but I certainly don't think it advances the process.

Q. Does it do any damage to the integrity of the electoral process?

A. I think every increase involves a greater possibility of damage. I am not able completely to counter the argument that's been made by Senator McConnell in the past which is what a thousand dollars was worth in 1973 versus what a thousand dollars is worth now. It's different. So I have never been entirely able to argue that the $2,000 now is really greater than the thousand was before.

Q. But your campaign experience shows that you have been able to run under the thousand dollars limit?

A. Sure. I'm just saying in terms of the net effect of the process, I'm not sure you could

* * *

[(Kenneth Goldstein (Vol II) Dep. 182)] talk about in the rebuttal report is that it goes both ways. So in seventy-five percent of the cases when it was originally electioneering — excuse me, on ads that were originally coded as electioneering, twenty-five percent of the time they thought it was genuine issue, but also on those ads that they thought were genuine issue, twenty-five percent of the time they thought they were genuine — they thought they were electioneering. So the net affect would be that it cancels itself out.

Q. Well it doesn't cancel itself out if what your focus on is determining how much speech that is genuine issue speech is affected by BCRA. We don't particularly care about the other half of the occasion, Professor Goldstein. All I'm interested in is that it's clear that twenty-five percent of the time reasonable people would disagree —

A. But you would, because it would be adding ones that aren't here to that, correct?

Q. No. You are just saying they're wrong twenty-five — they disagree twenty-five percent of the time if it's an issue ad and they disagree twenty-five percent of the time if it's an electioneering ad. That's all I'm saying.

A. Okay.

Q. I think we have previously marked and we will find it,

CROSS-EXAMINATION OF DONALD P. GREEN

THE WITNESS: That sounds correct.

BY MR. BURCHFIELD:

Q. And you would anticipate, wouldn't you as a knowledgeable observer that with the electioneering communication restrictions precluding such groups from engaging in broadcast issue advocacy within 60 days of a general election that such activities as phone banking, direct mail and door-to-door canvasing will increase among those groups, right?

MR. PHILLIPS: Objection, calls for a legal conclusion, misstates the law. You can answer the question.

THE WITNESS: I would agree with the thrust of what you're proposing, which is that as money that otherwise would go to mass media communication is channeled in other ways it will doubtless find more expression in get-out-the-vote activities.

BY MR. BURCHFIELD:

Q. Dr. Green, you are by training a broadly educated individual, but part of your training I take it is in statistics?

A. Correct.

* * *

[*58] Q. 1990. Now, what literature were you aware of since 1990 that you consider statistically reliable on the point

Green CX 24, 58

of whether PAC contributions or any political contributions affect roll call voting?

A. This paragraph doesn't say anything about roll call voting, this paragraph says -- it offers little support for the popular view this PAC money permits interests to buy or rent votes on matters that affect them. Those may or may not be roll call votes.

Q. Okay, let's stick to roll call votes. What statistical work are you aware of that you think is statistically valid since 1990 that correlates contributions to candidates to roll call votes?

A. None.

Q. Now, this -- I take it the qualification you have posed on my earlier question is what this article does, which is to correlate contributions or attempt to correlate contributions to what they refer to as legislative effort?

[*59] A. That's not the only difference. There is a difference between votes and roll call votes. For example, there could be committee votes, there could be informal votes in markup.

Q. Okay. Other than this study, what statistically significant analyses have you seen that correlate contributions to candidates to non roll call voting activity?

A. I would say that there are 3 and they are cited in my report. The first would be the analysis by Professors Romer and Professor Snyder, which examine how changes in PAC contributions followed changes in committee assignments. It did not look specifically at voting as an outcome, but I think in a very clever research design inferred the purchase of either votes or effort or something else of value such as perhaps administrative oversight from the way

Green CX 58-59

in which the money followed the institutional positions of the members involved controlling for that putative ideological position, since they were the same members who were switching committee.

Q. What page are you referring to of your report?

A. That's page 25. And I also refer on page 24 to a study by Cox and Magar, which gets at the **[*60]** same issue with respect to the change in the majority status of the two parties arguing that one way to infer the value of public office holding in the eyes of those who seek to buy access, effort, votes, oversight is to examine the way in way the pattern of contributions changes after party control changes, so these are two analyses by either economists or economically minded political scientists who are looking at what might be termed the compare statics of campaign contributions.

Q. But, Dr. Green, isn't that different, aren't those two studies measuring the effect of changes in the position of the office holder on contributors, not the effect of contributions on office holder behavior?

A. Well, they are trying to make the argument that those patterns would change -- that that pattern of change would be what we would expect if these contributors were investing their resources in something that -- some service that was provided to them by the office holders. And like many economic analyses backs out the effects of the money on the behavior by looking at how the contributions change as the power of the legislators change.

Q. But neither of those studies correlates **[*61]** increases in contribution to different legislative behavior, voting, or allocation of time by the member, true?

A. True. It is looking in some sense at the imputed value of all the things that members might provide.

Again including legislative effort, legislative access, legislative votes, legislative oversight and saying the sum total of all of those services provided can be inferred from the way in way contributions change as the institutional power of the members changes.

Q. But you're saying inferred, they are inferring that the conduct of the member may change simply because more money is following that member as his status in Congress changes, right?

A. Yes.

Q. They have not examined the other end of the coin of whether the member's activities actually do change, correct?

A. Well presumably if you were on the banking committee and you are no longer on the banking committee, your behavior has changed. You can't cast votes on the banking committee.

* * *

[*69] Q. Did you see there as independent variables, any variable or any proxy for amount of lobbying efforts spent by the PAC being studied?

A. As an independent variable?

Q. As an independent variable.

A. No.

Q. And indeed, if one were trying to find out how much effort a legislator put into a particular piece of legislation, it would be critically important, wouldn't it, Dr. Green, to know how much money that industry spent on case treat lobbyists to get the attention of that legislator?

MR. PHILLIPS: Would you read that back?

THE REPORTER: "Question: And indeed, if one were trying to find out how much effort a legislator put into a particular piece of legislation, it would be critically important, wouldn't it, Dr. Green, to know how much money that industry spent on case treat lobbyists to get the attention of that legislator".

THE WITNESS: Could you do it one more time?

BY MR. BURCHFIELD:

Q. Sure. To have a study that it evaluates **[*70]** the amount of -- that it tries to trace the -- let me start again.

A study that tries to trace the causes of a legislator's allocation of time to particular legislation should consider the amount of lobbying effort put into that legislation and that legislator by the industry group, true?

A. The point -- the problem that you're pointing to is sometimes a problem of collinearity, that there are two variables here, the amount of money that the PAC contributes and the amount of lobbying effort that they invest and those two things could be correlated. And what you're suggesting is that maybe it's not the money that's really causing this relationship between money and legislative effort. Maybe the correlation between money and legislative effort is a spurious manifestation on the amount of lobbying activity that these dairy interests are engaging in, independent of the money that they are spending and the answer is yes, that's possible. Although, you would think intuitively and I just don't know

the nature, the exact nature of the data that they are analyzing, that that money is really distinct from legislative effort -- lobbying effort, excuse me, but I just don't know.

[*71] Q. Well, you know that the PAC is limited to a $5,000 per election donation to a particular individual, right?

A. Yes.

Q. You also know in many industries, the dairy industry, we can go to the lobbying and disclosure act reports and find out, but they probably spend hundreds of thousand dollars on lobbyists, right?

A. Yes.

Q. They could withhold their $5,000, still spend the money on lobbyists and have the same effect on legislation as reported here, correct?

A. Correct.

Q. We just don't know from looking at this report?

A. That's correct.

MR. PHILLIPS: I'm sorry, this report is the Hall and Wayman?

MR. BURCHFIELD: The Hall and Wayman, correct.

THE WITNESS: Yes.

BY MR. BURCHFIELD:

Q. And the same would be true for the 1982 job training partnership act that is analyzed on **[*72]**table 2, true?

A. True.

Q. And the 1984 natural gas market policy act examined on table 3?

A. True.

MR. BURCHFIELD: We can take a break now.

(Recess.)

MR. BURCHFIELD: Let me ask the reporter to mark as Green cross-examination Exhibit 7 an excerpt from the Encyclopedia of the United States Congress.

(Green Exhibit No. 7 was marked for identification.)

* * *

[*142] BY MR. BURCHFIELD:

Q. Under the supremacy clause?

A. Yes.

MR. PHILLIPS: Calls for legal conclusion.

THE WITNESS: Yes.

BY MR. BURCHFIELD:

Q. Are you familiar with the Federalist Number 59?

A. Yes.

Q. And you know that it was a vigorously debated component of the Constitutional Convention as to who was going to control the election procedures at the state and federal level, don't you?

A. Yes.

Q. Because you're a student of the constitution and you're aware that that was a vigorously, maybe one of the most vigorously debated aspects of the constitutional structure, right?

MR. PHILLIPS: Object to the form of the question.

THE WITNESS: True.

MR. BURCHFIELD: Let me ask the reporter to mark the Federalist Number 59, February 22, 1788.

* * *

[*148] Q. Are you aware of any constitutional amendments to the federal election clause?

A. No, but when you think about the Tenth Amendment and the general -- it is not just a general statement about federalism, it is a very forceful statement about federalism and how that has become increasingly detached from the reality of our governmental system. You realize that our constitutional framework is both an organic outcome of accumulated policy making and the direct interpretation of the Constitution as passed.

Q. So you disagree with Hamilton in Federalist 59?

A. Well, his -- his -- what is his claim there? His claim is that the electors of his day would have regarded, in his view, that any appropriation of electoral authority on the part of the federal government as anathema, maybe that was true.

Q. But you don't think it is true now?

A. No.

Q. And indeed the Bipartisan Campaign Reform Act goes a lot farther than Hamilton indicated in Federalist Number 59?

MR. PHILLIPS: Objection, vague, **[*149]** incomprehensible, you can answer it, if you understand it.

THE WITNESS: Yes.

BY MR. BURCHFIELD:

Q. Dr. Green, I want to turn back to page 13 of your report where you say in the statement we read before: State parties influence federal elections directly even when they mobilize the supporters on behalf of a candidate for state office. And I take it that your view would be that if a state party runs an advertisement saying "Be sure to go to the polls on Tuesday and vote for Governor Davis," that that is appropriately regulable by the federal government.

A. Yes, because they are claiming -- they are asserting as far as I understand the hypothetical that you should go vote.

Q. And similarly if the state party runs an advertisement that says be sure you show up to vote on Tuesday, to vote for mayor Smith, that would be regulable?

MR. PHILLIPS: It calls for legal conclusion as did the prior question, but you can answer.

THE WITNESS: Yes, because it has that wording, be sure to get out and vote for.

* * *

[*158] BY MR. BURCHFIELD:

Q. Believe me, I'm really not in a position to answer specific questions about it, but I can ask some. Dr. Green, you've never seen a plan like this before, have you?

A. No, I have actually.

Q. Where?

A. Well, for example, I've seen plans like this, in the case of Michigan for example, the Michigan Democratic plan, I've seen that. I've seen the NAACP National Voter Fund's plan, it is not very different in the layout.

Q. The NAACP National Voter plan is not that much different?

A. It follows the same format of kind of a -- some vacant language up front on voter turnout and then the context of the election and then a series of budget items principally consisting of paid phone calls and direct mail. And that's what this budget is about.

[SOME EXHIBITS OMITTED]

* * *

[*365]FOR IMMEDIATE RELEASE

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THAI BUSINESSWOMEN SENTENCED ON CAMPAIGN FINANCING CHARGES

WASHINGTON, D.C. -- Pauline Kanchanalak, a Thai national, and her sister-in-law, Duangnet Kronenberg, were sentenced today to campaign financing-related charges in U.S. District Court in Washington, D.C. before Judge Paul L. Friedman. In June 2000, Kanchanalak pled guilty to felony conspiracy and misdemeanor campaign financing charges and Kronenberg pled guilty to one count of making an illegal $10,000 corporate political contribution to the Democratic National Committee's (DNC) federal account.

Kanchanalak was sentenced to three years probation, six months of home confinement with electronic monitoring, a $3,000 fine, and 200 hours of community service. Kronenberg received 18 months of probation and a $1,500 fine.

Between 1992 and 1996, Kanchanalak, 50, and her co-conspirators funneled approximately $690,000 of illegal foreign and/or corporate contributions to the DNC and other Democratic campaign committees. Kanchanalak used bank accounts held in the names of her sister-in-law, Duagnet

Kronenberg, and her mother-in-law, Praitun Kanchanalak, to make illegal contributions.

In determining Kanchanalak's sentence, Judge Friedman found that the sentencing calculations under federal guidelines should be increased because she was the organizer of the conspiracy and obstructed justice in the course of the investigation into her activities.

Pauline Kanchanalak and Duangnet Kronenberg are two of 26 individuals and two corporations charged by the Campaign Financing Taskforce, which was established four years ago by Attorney General Janet Reno to investigate allegations of campaign financing abuses in the 1996 election cycle.

In January 2001, James Tjahaja Riady paid a record $8.6 million in criminal fines and pled guilty to a felony charge of conspiring to defraud the United States by unlawfully reimbursing campaign donors with foreign corporate funds in violation of federal election law. In addition, LippoBank California, a California state-chartered bank affiliated with **[*366]** Lippo Group, will pled guilty to 86 misdemeanor counts charging its agents, Riady and John Huang, with making illegal foreign campaign contributions from 1988 through 1994.

On June 6, 2000, Audrey Yu, an employee of David Chang, pled guilty in U.S. District Court in Newark, N.J., to conspiring to obstruct justice by providing a false document to a federal district court during the grand jury's investigation into campaign financing violations in New Jersey.

On June 2, 2000, David Chang pled guilty to charges that as a principal of Nikko Enterprises, Bright & Bright Corporation, Panacom Inc., and Hudson Terrace Realty Management Corporation, he conspired to funnel illegal campaign contributions to Senator Robert Torricelli's 1996 campaign. Chang also pled guilty to four substantive violations of the FECA for his role in funneling illegal campaign contributions in others names. Chang further pled guilty to corruptly attempting to persuade a potential grand jury witness to give false statements related to a financial transaction which was material to the grand jury investigation. Chang's sentencing date has been set for September 7, 2000.

On June 1, 2000, Cha-Kuek Koo, a Korean national residing in New Jersey, pled guilty to violating federal election law by making illegal contributions to Senator Torricelli's campaign. Koo admitted to assisting David Chang in making conduit contributions using Koo's employees at LG Group, Executive Office of the Americas. Koo's sentencing has also been set for September 7, 2000.

On April 5, 2000, a federal grand jury indicted two Buddhist nuns, Venerables Yi Chu and Man Ho, with contempt of court for failing to appear as witnesses in the government's criminal trial against Maria Hsia. Yi Chu and Man Ho remain fugitives.

On March 2, 2000, Maria Hsia was convicted in federal district court in Washington, D.C., on charges of causing false statements to be submitted to the FEC. The trial had been postponed pending an appeal of a ruling by the U.S. District Court in Washington, D.C., which had dismissed some of the false statement counts. In May 1999, the U.S. Court of Appeals in Washington, D.C. overturned the ruling and reinstated those counts. The task force dismissed a second indictment on tax charges after a jury in Los Angeles failed to reach a verdict. Hsia awaits sentencing in September.

On December 17, 1999, Yogesh Gandhi was sentenced to one year in prison for mail fraud, tax evasion, and violating federal election laws by aiding and abetting the making of a political campaign contribution by a foreign national.

On November 1, 1999, Yah Lin "Charlie" Trie, a Little Rock, Arkansas businessman, was sentenced, after pleading guilty, to a two-count information filed in Little Rock, Arkansas, to three years probation, four months home detention, 200 hours of community service, and a $5,000 fine for violating federal campaign finance laws by making political contributions in someone else's name and by causinga false statement to be made the FEC. Antonio Pan was also indicted with Trie in the District of Columbia, but has not yet been prosecuted because he has remained outside the United States.

On September 15, 1999, Lawrence Penna, the former President of a now-**[*367]**defunct New Jersey securities firm, was charged with violating election laws by funneling illegal campaign contributions to the 1996 federal election campaigns of President Clinton and Senator Torricelli. Penna's case was transferred by agreement to the Southern District of New York, where charges relating to his violation of United States' securities laws were pending.

On August 16, 1999, a federal judge sentenced Robert S. Lee to three years of probation and 250 hours of community service for aiding and abetting the making of an illegal foreign campaign contribution to the Democratic National Committee.

On August 12, 1999, former Lippo Executive John Huang pleaded guilty to a felony charge, filed in U.S. District Court in Los Angeles, that he conspired with other employees of the Indonesia-based Lippo Group to make campaign contributions and reimburse employees with corporate funds or with funds from Indonesia. He was sentenced to one year of probation, 500 hours of community service, a $10,000 fine and directed by the judge to continue cooperating with the investigation as a condition of his probation.

In June 1999, Berek Don, former GOP party leader in Bergen County, NJ, pled guilty to another conduit contribution scheme to the Senator Torricelli Campaign. Don awaits sentencing. On December 1, 1999, Carmine Alampi, a Bergen County New Jersey attorney, pleaded guilty to the same scheme. He awaits sentencing.

On March 23, 1999, Juan C. Ortiz, the Chief Financial Officer of Future Tech International, Inc., was sentenced to two years probation, $20,000 in fines, and 200 hours in community service for acting as a conduit for an illegal campaign contribution and participating in the reimbursement of eight other conduit contributions.

On December 14, 1998, Johnny Chung was sentenced to probation and 3,000 hours of community service for bank fraud, tax evasion and two misdemeanor counts of conspiring to violate election law.

On November 24, 1998, Howard Glicken, a fund-raiser for the Democratic party, was sentenced to 18 months probation, an $80,000 fine, and ordered to perform 500 hours of community service for violating campaign finance laws.

On November 4, 1998, Franklin Haney was indicted on more than 40 counts, including among others, conspiring with another to defraud the United States by impairing and impeding the FEC and conspiring to violate specific provisions of federal election law. He was acquitted of all charges on June 30, 1999.

On September 30, 1998, Democratic fund-raiser Mark B. Jimenez was indicted in Washington, D.C. on 17 counts of

organizing, making and concealing illegal conduit contributions to a number of Democratic campaigns, including the Torricelli Campaign. In December 1998, Future Tech International, Jimenez's Miami based computer sales company, pleaded guilty to tax offenses resulting from its illegal deduction of a $100,000 contribution to the DNC and employee campaign contributions reimbursed through the company's payroll. On April, 15, 1999, Jimenez, who is now in the Philippines, was indicted in Miami on additional charges of tax evasion and fraud. The task force is pursuing Jimenez's extradition from **[*368]** the Philippines.

In 1997, the Task Force obtained guilty pleas from Democratic fund-raisers Nora and Gene Lum, and their daughter Trisha, and Michael Brown for illegal fund-raising activities after their cases were referred from Independent Counsel Daniel Pearson. In August 1998, Gene Lum pleaded guilty to filing a false 1994 tax return and falsely preparing Nora Lum's 1994 tax return. After cooperating with the government, he was sentenced in June 1999, to two years in prison. Nora Lum was sentenced to 5 months in a halfway house, 5 months in home detention, and ordered to pay a $30,000 fine, a sentence which Gene Lum also served separate and apart from the sentence he received for his tax-related conviction. Trisha Lum and Michael Brown each received probation, a $5,000 fine, costs of more than $7,000, and were ordered to perform 150 hours of community service.

# # #

01-182

DEPOSITION OF PAUL SCOTT HERRNSON

Q. I don't, I only have one. I will read it to you, and then I will hand you the book and you can look at it.

A. Okay.

Q. This is from page 237 and 238. It's a fairly long passage, but I think it's worth reading, and you can take whatever time you want to look at it.

"Nevertheless, not all soft money is the same. Party soft money is used to help a large, rather than a small, group of candidates because party soft money is given to and spent by party committees, which are umbrella organizations that represent a broad range of interests. It does not create such strong policy-oriented IOUs between contributors and legislators as those created by narrowly-focused interest groups that spend soft money to help only a few candidates."

I will stop there and ask you if this remains your view so far?

[*209] A. Let me just take a quick look.

I think that would remain my view. If I was rewriting this I would say, nevertheless, not all soft money is the same. Party soft money that is used to help a large, rather than a small group of candidates, such as get-out-the-vote drives, registration, generic ads is very good, even when targeted in a few races. Party issue ads, because they skirt the law -- I would create the hierarchy we just talked about. That would be an update, but it wouldn't be a major change in my view.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted In Printing]

DEPOSITION OF ARNOLD HIATT

September 26, 2002

* * *

[102] the most important as compared to smaller contributions or volunteer efforts for candidates?

A. Well, I think they tend to be. I think it varies if someone has a good mailing list, if a party does very well with mass mailings then it may not be as important.

Q. Mm-hmm. And based on your understanding how does that importance of hard money compare to the importance of raising soft money? Is it at least equal in your mind for the candidates and for the political process?

A. Well, I think hard money obviously accounts for infinitely more; I think it counted for four-fifths or more than four-fifths of the total amount of money spent in the last election. But on the other hand, there's less opportunity for quid pro quos or obligations to be incurred.

Q. Is it fair to say that those who are able to raise significant amounts of hard money contributions enjoy greater access than those who do not have the ability to contribute at all?

A. Certainly, yes.

* * *

[104] A. Very much so. I think it's turned off lots of voters and it's no small measure a reason of the continuous decline in voting in this country.

Q. So turning to the effects in these increases in the Bipartisan Campaign Reform Act, do you believe that you're going to be asked in the future to give the maximum to the new – to the new level –

A. Yes.

Q. – that exists? And is it your understanding that others you know who have previously given to that maximum level will also be asked to give to the maximum level?

A. Yes.

Q. What effect will that have on this disproportionate access and influence that those who give enjoy?

A. It will become even more disproportionate.

Q. I have one exhibit and then I'm done.

(Document marked as Exhibit 18 for identification.)

Q. I just want to turn your attention to the last page, which has the quote that may be highlighted. And I'll read it into the record

* * *

Deposition of Robert Hickmott
(October 23, 2002)

* * *

[9]Q. May I direct your attention, please, to. Paragraph 8, which begins on page 3 and continues on page 4. Please read the entire paragraph.

A. This is Paragraph 8 beginning on page 3? [10]

Q. Correct.

A. "As both a contributor to candidates and parties, and as a lobbyist who advises clients about political spending, I am personally aware of the fundraising practices of federal candidates. Once you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to the national party committees, the relevant state party (assuming it can accept corporate contributions), or an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign. These types of requests typically come from staff at the national party committees, the campaign staff of the candidate, the candidate's fundraising staff, or former staff members of the candidate's congressional office, but they also sometimes comes from a member of congress or his or her chief of staff (calling from somewhere other than a government office). Regardless of the precise [11] person who makes the request, these solicitations almost always involve an incumbent member of congress rather than a challenger. As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate financially in his or her election effort, both with hard and soft money."

Q. Okay. Now, specifically in reference to the sentence that begins at the top of page 4, "Once you've helped a federal candidate," and concludes "to help the candidate's campaign," do you personally know, Mr. Hickmott, specific instances in which someone who "helped a federal candidate by contributing hard money to his or her campaign" was then asked to "make donations of hard and/or soft money to the national party committees or to the relevant state parties"?

A. Yes.

Q. Do you know of many such instances more that ten?

A. Yes.

Q. Would you perhaps know of upwards of 100 [12] of such instances, specific instances?

A. I'm not sure I could cite specific instances in excess of 100.

Q. If you had to estimate how many you could cite, picking a rough number, what would that number be?

A. I'm going to pull a number out of the air, 50. I mean, that's given the fact that I've been involved in fundraising for 20 some years. My guess is I could think about instances where there was correlation between hard money contributions and soft money contributions for a specific candidate then leading into soft money contributions?

Q. Let's me just finish the question just so we're precisely on the same page. A donation -- a hard or a soft money -- after there was a hard money donation to the campaign, there was then a request for a donation specifically to the national party committees or to the relevant state parties?

A. Yes.

Q. We would be here a long time today if I [13] asked you to recount each of those, approximately 50 instances, would we not?

A. Yes.

Q. I want to ask you now a different question. Do you personally know of specific instances in which someone who "helped a federal candidate by contributing hard money to his or her campaign" was then asked by the staff at the national party committees to make a donation to an outside group that was planning on doing an independent expenditure or issue advertisement to help the candidate's campaign?

A. I can't point to any specific instance at this point.

Q. I'd like to give you some time to think about it if you think that there's another point at which you would have a recollection of a specific instance where that happened.

A. I can think of instances in which contributions were made to the federal limit for Congressman John Dingell and then there were other avenues that were not his campaign committee nor [14] were they the state party nor were they the DCCC that were -- where contributions could be directed that would be -- to be supportive of John Dingell's election.

Q. Was it staff at the national party committees specifically who asked that the contributions be so directed?

A. In that case, no.

Q. So you can think of no instance where a donation -- where it was staffed at the national party committee who asked that a subsequent donation be made to an outside group that was planning on doing an independent expenditure or issue advertisement?

A. No. But if one occurs to me before this is over, I'll bring it back.

Q. I would appreciate that. Do you know of any instance where the campaign staff of the candidate asked that such a donation be made to an outside group that was planning on doing an independent expenditure or issue advertisement to help the candidate's [15] campaign?

A. Again, I need to think about it. Nothing comes to mind right now.

Q. And if something does come to mind, you'll let me know. Do you know of any instance where the candidates fundraising staff asked that such a donation be made to such an outside group?

A. If you mean fundraising staff to also include consultants to the campaign, yes.

Q. I mean fundraising staff in the same sense that you mean it in your declaration. So please tell me whether the fundraising staff would include those consultants or not?

A. Yes, it would.

Q. And could you please tell me the specifics of that instance?

A. Again, I reference John Dingell congressional race where people who had already given the maximum amount to John Dingell's re-election were also told they could give to other entities that were supportive of John Dingell's [16] re-election.

Q. Who were those people who were told that?

A. You mean who received that --

Q. Yes.

A. I received calls like that.

Q. Do you know of any other people who received calls like that in this specific instance of John Dingell's campaign?

A. Colleagues of mine at my firm.

Q. Do you mind telling me their names?

A. Jim Free.

Q. Is he the only other colleague at your firm that received such a request?

A. That I'm aware of, yes.

Q. And what were the specific entities that you were asked to make your donations to?

A. I don't know their specific name, but it was something like the 17th Congressional District Fund. It was an entity set up in support of John Dingell's congressional re-election.

Q. Was that a PAC to the best of your [17] knowledge?

A. I don't know.

Q. Had it been in existence prior to John Dingell's campaign?

A. I don't know.

Q. Did you or Jim Free actually made a contribution to that entity?

A. I did not. I don't believe he did either.

Q. Do you know of any other instances associated with John Dingell's campaign or otherwise in which the candidate's fundraising staff, as you have defined it, asked that such a donation be made to such an outside group?

A. Not that currently comes to mind.

Q. Do you know of any instance where former staff members of the candidate's congressional office asked that such a donation be made to an outside group?

A. Not that comes to mind.

Q. Do you know of any instance where a member of Congress asked that such a donation be [18] made to such an outside group?

A. No.

Q. Do you know of any instance in which the chief of staff of a member of Congress asked that such a donation be made to such an outside group?

A. No.

Q. Is it fair to say, sitting the Dingell instance aside, that there are virtually no instances in which a contributor is asked in the context of donating to a particular campaign to then a donation to -- then asked by the campaign by the agents of the campaign to make an donation to an outside group engaging issue advocacy?

A. That I can specifically point to, no.

Q. In terms of your general experience and your best sense, is that also true?

A. That's correct.

Q. I'd like to turn now to Paragraph 9 in the declaration. You don't have to read all of this in its entirety. If you want to, please feel free.

A. Should I read it out loud or just review it myself?

[19] Q. To yourself, if you want to familiarize yourself with it.

A. Okay. Just Paragraph 9?

Q. Just Paragraph 9 and we'll move on from there. But you explain basically in Paragraph 9 that you advise your clients that they can obtain chits with members of Congress by making soft money donations that pass through individual members of Congress and the party committees. Is there comparable means by which your clients can obtain chits with members of Congress when they donate money to outside groups that are in issue advocacy?

A. My guess is that if a member of Congress were to approach a client and say, if you want to help me, you can also give money to this outside group, that would be deemed a chit.

Q. You know of no such hypothetical instance actually occurring, though, is that correct?

A. That's correct. [20]

Q. So setting that hypothetical aside, is it true in practice that your clients can obtain chits with members of Congress by donating to outside issue advocacy groups the same way that your clients can obtain chits when they make soft money donations?

A. That's my sense, yes.

Q. I think your prior declaration in the Colorado Republican case also describes a tally system that was in place at the DSCC at least the time that you worked there and that has been in place previously. Do you know if such a tally system is presently in place? Do you have a sense that it, in fact, is?

A. I believe it is. I don't know if it's still called the tally system, but I believe there is some mechanism like that.

Q. But in essence, in substance, the tally system allows the parties, Democratic and Republican to keep track of how much individual members of the party have raised in the form of soft money [21] donations to the party; is that correct?

A. I can't speak to the Republican party.

Q. Speaking only then to the Democratic party?

A. Yes.

Q. Do you think that that tally system is frequently referenced and used in order to determine how much soft money should be spent on behalf of the particular members of the party?

A. My experience with the tally system did not involve soft money. My experience with the tally system was hard money.

Q. And with respect to hard money, how would that tally system be used?

A. It was one of the criteria used to help determine how much of the finite resources that the party committee had would be expended on behalf of a federal candidate.

Q. And there it was used in the same sense that I described with respect to soft money to basically ascertain how much hard money the member of the party had raised for the party, and the party [22] would then -- strike that -- am I correct that the party would use the tally system to make sure it spent on behalf of the particular candidate roughly the same amount that that candidate had raised for the party?

A. That's not correct.

Q. How would it be used?

A. As I said before, it is one criteria that is used to help determine how much money the party committee will spend on behalf of the candidate.

Q. So it's only one criteria among others that would go into that ultimate determination?

A. That's correct.

Q. But it will weigh in favor or against that candidate depending whether the candidate has raised more money or less money for the party?

A. It's a factor.

Q. Is it your understanding that a similar tally system is used for soft money donations?

A. I don't know.

Q. Can the tally system, as you understand [23] it, track the amount of soft money that was contributed by particular donors?

A. I don't know.

Q. Did it work that way when you were?

A. We didn't track soft money when I was there.

Q. The particular amount of hard money that came from individual donor, then?

A. The tally system tracked the amount of hard money that was raised by candidates for the DSCC.

Q. And would it also track which donors had given a particular amount of that hard money that was raised by the candidate?

A. Yes. Although we were more concerned with the aggregate amount rather than the source.

Q. Do you know of any tally system that would track amount of money that a particular member of the party raises for outside issue advocacy groups?

A. No. [24]

Q. I'd like to direct your attention to Paragraph 10. Feel free to read that to yourself if you want to familiarize yourself with you.

A. All right.

Q. Toward the bottom of that paragraph you say, "As the general election draws nearer, I also receive requests from the same types of people for soft money for issue ads or for get-out-the-vote efforts." When you say you also receive requests from the same types of people for soft money for issue ads, what types of people are you referring to, Mr. Hickmott?

A. Usually fundraising consultants for candidates, or in some cases, other lobbyists who are raising money for candidates.

Q. And when you discuss soft money issue ads, are you referring primarily to those run by the parties or to those run by outside groups?

A. Parties.

Q. Are you, in fact, referring exclusively to those soft money issue ads run by the parties as [25] opposed to by outside issue advocacy groups?

A. Yes.

Q. Do outside issue advocacy groups typically sponsor the sort of events that you're describing in this paragraph?

A. No.

Q. Do they solicit donations --

MS. SEALANDER: Objection.

THE WITNESS: Rephrase, please.

BY MR. SHAFFER:

Q. Do outside issue advocacy groups solicit donations at event of the sort that you're describing in this paragraph?

MS. SEALANDER: Objection; foundation.

THE WITNESS: Not that I'm familiar with.

BY MR. SHAFFER:

Q. I believe this paragraph referred to Exhibits B where you have attached a host of different solicitations that you have received. And I'll simply represent to you that I think they're upwards of 100 such fundraising events that are [26] described in Exhibit B. Do any of these, to your knowledge, describe events run by outside groups that are devoted to issue advocacy as opposed to events run by individual campaigns, the democratic or republican parties or PACs?

MS. SEALANDER: Objection. The documents speak for themselves.

THE WITNESS: Not that I'm aware of.

BY MR. SHAFFER:

Q. Do any of the solicitations, to the best of your knowledge, request donations to outside issue advocacy groups?

MS. SEALANDER: Objection. The documents speak for themselves.

THE WITNESS: I'm not sure I know the answer to that.

BY MR. SHAFFER:

Q. Can you recall attending such an event at which solicitations were -- strike that question. Can you recall attending such an event at which donations were solicited to outside issue [27] advocacy groups?

A. No.

Q. And do you frequently attend such?

A. I frequently attend fundraising events for federal candidates.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

Washington, D.C.

Thursday, September 5, 2002
Deposition of EARL F. HILLIARD

* * *

[68] going to be anywhere else on it because their interests are so diverse to the interests of even the, maybe the average American.

Their issues are probably to 80 to 90 percent economic issues, and they are going to be against anything that they got to pay for that's going to be increased. They are going to be interested in more aid for dependent children. They are going to be interested in more aid for Title VII of the education act where they can get free lunches and free dinners for their kids in school. Those are the types of issues they have, more health care for the poor, those things.

And believe me, when you vote for them, you offend those people out there that's interested in bankers making money, interested in the bottom line for the stockholders, and to be honest with you, if you truly represent your interests in a district like mine, the interests of the people, eventually, you are going to be – money is going to kill you because you are going to elevate all those other people out there that you have the interest to protect.

Q. And in your campaigns over the years, excluding this past primary election for the moment

* * *

[86] candidates or Congressman or the elected official. That may or may not be true. He doesn't have to have access. He has money. And he can move that money around and that money can determine a whole lot of things in terms of influences on you. And an elected representative, and you can see that money move, and you know the problems you have got based on your voting for or against something.

And you know it as you vote. But if you vote the interests of the constituents, in the long run, it will not pay off. It will not pay off. Because the theory is when you vote for somebody, you vote against somebody. In our society, if you vote for the poor, you vote against someone who is powerful. If you vote against banks or any financial institution raising the amount of a checking account, you voted for the consumer. You are voting for poor. You are voting for even middle income people. But you're voting against the banker. You are voting against the Savings and Loan Association. You are voting against the credit union.

And eventually, it's going to work against your interests. Because, see, each bank has a political action committee, the bank association. And there are many bank associations, different

* * *

[88] increased contribution limits will have on the time pressures facing elected officials when raising money for the election?

A. They say that May 15th, you start working for yourself and any time between January 1st and May 15th you are working for Uncle Sam. Well, let me tell you

something. The day you are elected is the day you start raising money for the next race. Under this bill, that is definitely true, because you got to have money early on so that as you vote over the two years, and you vote your interest, the interests of your district, all the people you alienate, you will have gotten early on so that they would not be able to come in and withhold money from you. But at the same time, they will be able to still raise an even greater amount of money against you.

Now, let me give you an example of what happened. I raised money and when you raise money, you spend money. But not only do you spend money but the idea is not to wait until the last six weeks to buy radio ads and TV ads. So you have these regular TV ads that are nonpolitical, but you run an ad that says you are going to have a town hall meeting in Demopolis, so you run an ad in four or five counties, TV ads, radio ads.

* * *

[90] raised 1,333,000. I bet you he raised 1,333,000 dollars in the last six weeks of the election and he had less than 10 fundraisers. They had already been preplanned and he had all of that money to spend the last two months of the election, which made a big impact. He drown out the ads of the Governor, and the candidates that were running.

Q. So under the increased contribution limits, the problem of elected officials having to spend a lot of time raising money will be worsened, in your view?

A. Yes, it will. And you really have to work. You got to work. You are going to have to really work. Now, it takes away time from your actual campaign, but it also takes away time from your serving the district, and if you have a job, you got to take time off from the job.

What that means is that a person who is running for office, he has to be of means almost to submit his name because if he doesn't have the money, and he got to raise it, as opposed to someone who is wealthy, he really has a problem. He not only has to raise money, and campaign at the same time, but he got to feed his family, so you are taking out of the political process a person who may be the John

* * *

[95] A. Yes. "Those who give the most are the ones who have the most influence," the report says. "It is an indisputable fact of our political system that those candidates and laws favored by wealthy contributors usually prevail over those whose backers or would be backers cannot afford to give large sums."

Q. Do you agree with that statement?

A. Yes, I do. Because those people who give, they are the ones that, they are the ones that you think about every time you cast a vote. And you said now – especially on something very controversial. You think, now, who am I going to make angry by this vote. Who am I going to please. These are valid things that you think about when you vote.

(Exhibit No. 7 was marked for identification.)

BY MR. BONIFAZ:

Q. The next exhibit is a column by Bob Herbert of the New York Times dated July 19, 1998. This is a column that Bob Herbert of the New York Times wrote in

July 1998 reporting on a study in which the Joyce Foundation of Chicago had funded this study focusing on large donors and found that 95 percent of those contributors were white, 80 percent

* * *

[103] true.

Q. And what impact will the increased contribution limits have on that goal?

A. It will make the political system more of a rich man's game. The wealthier you are, the more you participate, the less you will have, the less you will participate. And it works in so many different ways, even from a perception standpoint, people don't participate because they feel that if they give a dollar, they give $10, $15, the contribution will be drown out by someone who gives $2,000. They won't even give you 5 or 15.

Q. It will make the system less equal?

A. Definitely.

Q. The next exhibit is an article from USA Today dated May 8th, 2001.

(Exhibit No. 9 was marked for identification.)

BY MR. BONIFAZ:

Q. And you are quoted in this article. It's bracketed down there, the fifth paragraph down. Do you see that?

A. Yes.

Q. Could you please read that quote into the record?

* * *

[(Craig Holman Dep. 42)] commercial was designed to influence their vote for or against a candidate or legislation or public policy.

Q. The choice the students were given, is it not, was whether or not the purpose of the ad was "to provide information about or urge action on a bill or issue or is it to generate support or opposition for a particular candidate", that was the choice they were given, correct?

A. And whether or not they are unsure and unclear and don't know.

Q. You're closely familiar with the ads that the students saw, are you not?

A. Yes.

Q. Were any of the ads in your view ones which had as their purpose both providing information about or urging action on a bill or issue and generating support or opposition for a particular candidate?

A. I do recall seeing ads that had both legislative matters that they were addressing plus they mention the name of a candidate and would appear to be trying to [(Craig Holman Dep. 43)] promote or attack the candidate.

Q. How was the student to respond to question 11 with respect to such an ad?

A. It would be their subjective choice. If they were unclear, they would then register 3 which is the unsure/unclear.

Q. Do you know why they weren't given another option to answer both?

A. No, I do not know that.

Q. Could you direct your attention to question 27 which asks, "In your judgment, is the primary focus of this ad on the personal characteristics of either candidate or on

policy matters" and there they did give the students the opportunity to say both, did they not?

A. Yes, they did.

Q. Did you ever speak with Professor Goldstein about whether the students should have been given an option in responding to question 11 of saying both?

A. No, I never did talk to him about that.

Q. Do you know what the results were

[(Craig Holman Dep. 73)]

genuine issue ad"?

A. That is what Luke wrote.

Q. Do you think this is an issue that reasonable people could disagree about?

A. Certainly. I mean when it comes to any subjective judgments such as the Q 11 question, it isn't a black and white issue I think as Luke's e-mail demonstrates.

Q. Was it in the end Professor Goldstein who decided that with respect to the 2000 study that Exhibit 13 should be treated as an electioneering ad?

A. Yes, it was Ken Goldstein's decision.

Q. Why was it his decision rather than the students who did the coding?

A. I don't know why Ken Goldstein would have made that decision. That's something you would have to ask him.

Q. Wouldn't the only circumstances be if the students had decided that it was a genuine issue ad?

A. There are occasions in which Ken overrode the student's judgment. Here in this

[(Craig Holman Dep. 77)]

particular words?

A. That is correct.

MR. ABRAMS: I'm going to mark now as Exhibit 15 an e-mail from you dated April 11, 2001 which also deals in part with Exhibit 13. You will see that attached to Exhibit 15 are copies of all the advertisements referred to in Exhibit 15.

(Plaintiff's Exhibit Holman 15, E-Mail dated April 11, 2001, marked for Identification.)

Q. Is Exhibit 15 an e-mail that you sent?

A. Yes, it is.

Q. Are the materials annexed to Exhibit 15 copies of the advertisements that are referred to in Exhibit 15?

A. Yes, they are.

Q. Focusing first on paragraph 3 in your e-mail to Jonathan Krasno you say, "The two genuine issue ads that mention a candidate in the database are ad codes 627 (KY/CFAW Call Northup) and 2862 (UT/COC Matheson Can't [(Craig Holman Dep. 78)] Decide). There is no question these are genuine issue ads that mention a candidate within 60 days." Focusing first on the advertisement relating to Congressman Northup, do you remain of the view that there is no question that that's a genuine issue ad?

A. Yes, I do.

Q. Is it at all critical of her?

A. It raises suspicions. It doesn't say that Congressman Northup did vote in favor of the foreign worker bill. It refers to a bill that is pending before Congress and makes it unclear how Northup is going to vote on this and so encourages viewers to call her and to try to influence her vote on the bill pending at congress.

Q. It does say, doesn't it, "based on her record Congresswoman Northup is likely to vote in favor" of the bill?

A. That's right.

Q. It's not a friendly ad with respect to her, is it?

A. It's not really a critical ad either. It's not something that I would label

And I was in charge of that operation and I was the direct report to our president.

Q So do you remember a discussion in The Coalition's management committee about setting up appointments with people on Capitol Hill in whose districts ads had been run?

A I remember we discussed that.

Q What do you remember about the discussion?

A Well, I remember two things: One, I didn't like the idea; two, we had the advice of competent counsel.

MR. KIRBY: Don't tell him what the advice was, please.

THE WITNESS: Okay.

MR. KIRBY: You can tell him that having received advice you had an opinion, but don't tell him what the lawyer told you.

THE WITNESS: We were informed that as long as it occurred after the ads had run, were no longer running, that it was all right.

I don't recall -- I know I certainly never did it because I just, you know, I didn't think -- I just didn't want to do it. I didn't feel that that was necessary.

I don't necessarily know who else in The Coalition might have done so. I just don't.

I do know it was discussed in the management committee and that we were certainly under the impression that it was legally unobjectionable.

I still didn't like the idea, and I certainly never did it personally. I'm not sure that Mr. Nichols ever did either.

BY MR. SCHWARZ:

Q Now, the "it" that you were using there was what?

A Showing a congressman a copy, you know, a tape, you know, VCR, you know, VHS tape of the ad that ran in his district some days, weeks, months before. That is what "it" meant.

Q Did the "it" also involve a conversation with the congressman?

A I'm sure it did. Unless you can communicate by mime, I assume if you are walking in

and plugging it into his VCR you are going to have some conversation with him.

Q Did the "it" include a hope that the congressman would say -- in words or substance,

CONFIDENTIAL DEPOSITION OF PAUL R. HUARD CONDUCTED ON THURSDAY, SEPTEMBER 26, 2002

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CONFIDENTIAL-COUNSEL ONLY-PAUL R. HUARD

in advance of an election or one month in advance of an election, there is always a fair amount of after-you-Alfonse-no-after-you-Gaston comity between different associations in the business community, and I'm sure there was no vote. I'm sure there was a consensus.

Those of you who don't care for the idea, we are sure we won't do it, and those of us who do care for it and feel it is legally sound and permissible will do it.

And I'm sure that is where it was left. We rarely, you know, had votes, you know, we voted four to three to send you this kit. We didn't do that.

Q Do you know who was advocating these visits should occur?

A Not specifically, no.

Q As you sit here today, do you have any recollection -- and I'm not asking for a precise number -- but of the representatives in whose districts you did run ads, what portion of them did someone in fact visit?

A I would suspect a minuscule, you know, number, 10 percent. Maybe not even that much.

Deposition of James Jeffords (September 27, 2002)

* * *

[6 (11 PCS/NRA 84)] Q. You are one of the Senators who intervened [7 (11 PCS/NRA 84)] in this case, are you not?

A. Yes, I am.

Q. Could you tell us why you did that?

A. My concern about the electioneering practices and trying to improve the laws to help make sure that the elections are fair.

Q. Is there any particular reason why you intervened personally as opposed to allowing the Department of Justice and the Federal Election Commission to defend the constitutionality of the statute?

A. Because I've been running in elections since 1970, I guess, '60 something, whatever. And at times, I have noticed problems and became concerned that one - I know my campaigns had a barrage of ads that was very close to the election, for which I had no opportunity to respond and realized that this was a serious problem.

Q. Could you be a little more specific with us in terms of your own campaigns?

A. My own campaign?

Q. Yes. And in terms of the nature of the [8 (11 PCS/NRA 84)] barrage of ads that you told us about?

A. Yes. As best I can recollect. It was my election for the Senate. I think it was my second term. And all of a sudden near the end of the campaign, within the last couple of weeks, why, there was a tremendous barrage of very inaccurate and damaging advertising and it came as a surprise, and we had little or no time to react to it. And the polling showed that once those ads started, my rather substantial lead had diminished substantially.

Q. Do you recall the subjects of those ads?

A. A little vague at this point. But it was - Jan Backus ran the ads, I know that. But I really can't remember.

Q. Do you recall who paid for the ads?

A. Well, my opponent paid for the ads out of her campaign.

Q. So these were - these were a barrage of inaccurate and damaging ads paid for by your opponent; correct?

A. Yes. [9 (11 PCS/NRA 84)]

Q. Have you ever been in a situation as a candidate where third parties paid for ads towards the end of a campaign?

A. I don't know.

Q. One of the documents that has been provided us in this case are certain responses by you and the other sponsors of the act to interrogatories, questions -

A. Yeah.

Q. - posed by some of the Plaintiffs. And I want to put this before you and ask you one or two questions and see if, consistent with the statement that you made at the start, you do recall certain matters which are set forth in this document. I'm going to mark it first as Jeffords Exhibit 1 a copy of Senate Resolution 323, which purports to authorize Senator Jeffords and other Senators who agree to participate in this litigation to testify except concerning matters for which a privilege should be asserted and when their attendance at the Senate is necessary for the performance of their legislative duties. [10 (11 PCS/NRA 84)]

If you mark this as Jeffords Exhibit 1, please.

(Jeffords Exhibit 1 identified.)

MR. ABRAMS: And I'll mark as Jeffords Exhibit 2 a document entitled "Intervenor's responses to Madison Center Plaintiffs' first set of interrogatories."

(Jeffords Exhibit 2 identified.)

BY MR. ABRAMS:

Q. Let me pass this to you. Do you recall, Senator Jeffords, seeing this document, your - I believe your signature is about -

A. I found it.

Q. - about 4/5ths of the way through. Do you recall seeing this?

A. I can't - I signed it, so I guess the answer is yes.

Q. Could you direct your attention to page 26, please. In fact, why don't we start at page 25. Interrogatory number 25 asks certain questions of all the Intervenors, including yourself. And it asks you all to state in detail certain matters. [11 (11 PCS/NRA 85)] And your response begins at page 26, which is what I want to ask you about.

MS. BREGMAN: The response of all the Intervenors.

BY MR. ABRAMS:

Q. The response of all the Intervenors, which speaks, as I understand it, Senator, for all of you. The signature page that you looked at states, does it not, "I declare that those responses specific to me as well as the general responses are true and correct"? That's the page that I think you saw earlier.

A. Page number what?

Q. That's the one with your signature on it.

A. Yes.

Q. Why don't we go back to page 26. There's a line, which is the beginning of the third paragraph, which is what I wanted to ask you about. I will shorten it a little bit in my reading of it. But it says in substance that Intervenors are tainted with the appearance of undue influence on their judgment to the extent certain things had [12 (11 PCS/NRA 85)] happened. And the first that it says is "to the extent that they have benefitted from soft money contributions channelled through the political parties." My question to you is, have you personally benefitted from that?

A. I don't -

Q. I'm sorry?

A. I don't know.

Q. The second one says that "Intervenors are tainted with the appearance of undue influence on their judgment to the extent that they have benefitted from electioneering communications." Do you know if you have benefitted from electioneering communications?

A. I don't know.

Q. The third says that "Intervenors are tainted with the appearance of undue influence on their judgment to the extent that they have granted access to any donor of soft money to their party or any entity which financed an electioneering communication benefitting them." [13 (11 PCS/NRA 85)] Have you so benefitted?

A. I have no memory of doing so.

Q. And the fourth is "Intervenors are tainted with the appearance of undue influence on their judgment to the extent that they have cast votes or undertaken other acts relating to any policy matter that are consistent with the preferences of any donor of soft money to their party or any entity which financed an electioneering communication benefitting them." Is that true of you? Do you know?

A. Not to my knowledge, no.

Q. And the last says "Intervenors are tainted with the appearance of undue influence on their judgment to the extent that they have acted in other ways that would violate the Bipartisan Campaign Reform Act." And do you know if you have taken actions which would violate the act?

A. Not to my knowledge.

Q. Do you recall, Senator Jeffords, if you joined with the other Intervenors, the other sponsors of the act in making a submission to the [14 (11 PCS/NRA 85)] Federal Election Commission with respect to what's referred to as "electioneering communications"?

A. I may have. But I have no immediate recollection.

Q. Do you recall if - well, let me put this in front of you.

MR. ABRAMS: I'll mark it as Jeffords Exhibit 3, a document dated August 23, 2002, address to Ms. Mai, M-a-i, Dinh, D-i-n-h, the acting assistant general counsel of the Federal Elections Commission.

(Jeffords Exhibit 3 identified.)

BY MR. ABRAMS:

Q. Could you read to yourself, Senator, just pages 1 and 2 of this document.

A. Uh-huh. Yes. I'm sorry. Do I go all the way through?

Q. No, just page 2 is all I'm going to ask you.

A. Right.

Q. And you're one of the people who signed it? [15 (11 PCS/NRA 85)]

A. Yes.

Q. And what did you mean by using the words "sham issue advertising"? What does that mean?

A. Well -

MS. BREGMAN: I'm going to object just because I'm not sure there's a foundation for the fact that he used the term or a term that this particular Senator uses. It is in the paper, which was prepared with counsel on the advice of his staff and counsel. But if he has an understanding, he can give it to you.

MR. ABRAMS: I move to strike counsel's statement of facts. I'm asking the Senator what certain language means in a document that he signed.

BY MR. ABRAMS:

Q. And the only language I'm going to ask you about is this use of the words "sham issue ads." What does that mean, Senator?

A. "Sham" means incorrect or misleading, in my mind. Probably both.

Q. What is a sham issue ad?

MS. BREGMAN: What is his understanding of [16 (11 PCS/NRA 85-86)] that term?

MR. ABRAMS: Yes.

THE WITNESS: It's that it raises an issue that is incorrect and that is misleading to the detriment of the campaign.

BY MR. ABRAMS:

Q. A false statement?

A. Basically. At least incorrect.

Q. And the words "issue ads," put aside the word "sham" for a moment, what do you understand an issue ad to be?

A. It's an issue that concerns the election and the - the parties to the election statements, or information.

Q. Are there some issue ads, to your knowledge, which deal with issues like how a Senator ought to vote on a particular piece of legislation or what approach a Senator ought to take to particular topics?

MS. BREGMAN: Again, you're asking for his use of this word?

MR. ABRAMS: Correct. [17 (11 PCS/NRA 86)]

THE WITNESS: That would be an issue ad.

BY MR. ABRAMS:

Q. I want to show you now a few documents which were prepared by an organization called the Brennan Center?

A. The what?

Q. The Brennan Center -

A. Brennan.

Q. - for Public Politics. They're amongst your lawyers in this case - I can ask you, not tell you. Are they among the lawyers representing you, do you know, in this case?

A. I don't know.

Q. Well, what they've done is put together documents which set forth the text of certain advertisements which appeared on television in the 1998 and 2000 campaigns.

A. Uh-huh.

Q. They photograph from satellites in the sky and they appear to set forth the language on the ads and pictures of the ads.

A. Uh-huh. [18 (11 PCS/NRA 86)]

Q. And I wanted to explore with you a little bit a few of those to get your own judgment as to whether they are sham issue ads.

MR. ABRAMS: Let me mark as Jeffords Exhibit 4 a document - the second line of which says "AFL/made in China Myrick," M-y-r-i-c-k.

(Jeffords Exhibit 4 identified.)

BY MR. ABRAMS:

Q. I would like to ask you to assume, Senator, that the language you see here is the language that, in fact, appeared on an advertisement paid for by the AFL/CIO.

A. I've read it.

Q. Now, for the record, I'll simply read a part of it in. This is an advertisement that reflects an announcer starting out saying the following: "Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as 13 cents an hour, of a country that routinely violates trade rules flooding our markets, draining American jobs. "Now Congress is set to scrap its annual [19 (11 PCS/NRA 86)] review of China's record and reward China with a permanent trade deal. Tell Congresswoman Myrick to vote no and keep China on probation until this label stands for fairness." Then it says "paid for by the AFL/CIO."

My question to you, Senator Jeffords, is this an example of what you would consider a sham issue ad?

MS. BREGMAN: I'm going to object just so the record is clear that this is not a term, "sham issue ad," that this witness uses in the same way or is familiar with as other Intervenors and other parties in the case might. And I am quite sure that this would be a confusing part of the transcript if we go forward.

You can certainly ask the questions. But perhaps clarify as to whether you are talking about whether this ad falls within the Snowe-Jeffords amendment or meets some definition that you have that is different than Senator Jeffords.

BY MR. ABRAMS:

Q. Let me rephrase it, Senator. [20 (11 PCS/NRA 86)] Assume with me that this ad ran within 60 days of Congresswoman Myrick's re-election day.

A. Uh-huh.

Q. I'm not telling you that that happened, but I'm asking you to assume that that happened. Would this ad be problematic, a concern to you if it were to run within 60 days of her re-election day?

MS. BREGMAN: Objection. You're asking for his personal opinion of whether it would be problematic.

THE WITNESS: Well, this is an issue is a little bit difficult. It's a complicated issue. I don't - just from what I see, I don't - I couldn't say one way or the other.

BY MR. ABRAMS:

Q. Is this, in your personal view, the sort of ad that ought not to run within 60 days of the election of, in this case, Congresswoman Myrick?

MS. BREGMAN: Where was it run?

BY MR. ABRAMS:

Q. I ask you to assume that it was run at least in her district. [21 (11 PCS/NRA 86-87)]

A. Uh-huh.

MS. BREGMAN: Can you also elaborate on what's the sort of the funding?

MR. ABRAMS:. The AFL.

MS. BREGMAN: Treasury funds?

MR. ABRAMS: I don't know.

THE WITNESS: Well, there are certain prerequisites under the law that - that I got in which you can't tell from reading this whether they met or not.

BY MR. ABRAMS:

Q. What sort of things would you want to know in order to answer it?

A. Well, who paid for the ad?

Q. ·Why don't you - it's nice to have this discussion, Senator.

A. Treasury funds?

Q. Assume that it came from AFL treasury funds.

A. Well, then, it would meet one criteria. And when was it run? If it was within the prescribed time limits, either

30 days to primary, [22 (11 PCS/NRA 87)] 60 days to general election, then it might qualify. But is it inaccurate? Misleading? I don't know.

Q. Is it - I'm sorry, Senator?

A. So I'm not sure that it meets the disqualifications.

Q. Is it your understanding that the disqualification applies to only inaccurate or misleading information?

A. Uh-huh.

Q. You have to say "yes" or "no."

A. Yes.

Q. So an ad that appeared within 60 days that is true, to your understanding, would not be covered by the act that you and Senator Snowe drafted?

MS. BREGMAN: I think that asks for a legal conclusion. Can you repeat the question?

BY MR. ABRAMS:

Q. What I'm asking is, is it your understanding - and I understand that you aren't appearing as a lawyer.

A. Right. [23 (11 PCS/NRA 87)]

Q. Let me ask you, are you a lawyer?

A. Yes.

Q. But I'm not asking you now as a lawyer. I just want your understanding as to whether an ad that appears within 60 days of an election that mentions a Congresswoman who was running for re-election and which is true falls within your understanding of the law that you and Senator Snowe drafted?

MS. BREGMAN: I'm going to object both on speech or debate and legal conclusion. You're asking him to match the ad with the act. Is that what you're doing? The act covers what the act covers. And his personal opinion is not relevant. The words of the act say what they say. And the ad is either false within it or not.

MR. ABRAMS: You can answer it, Senator.

MS. BREGMAN:' So you're asking him what his personal understanding of what the words are and whether this would fall under it?

THE WITNESS: Of course within the time limits and if the funds came from treasury, then it [24 (11 PCS/NRA 87)] could fall within.

BY MR. ABRAMS:

Q. And my next question to you is, as you sit here today, do you think - do you, Senator Jeffords - think that an advertisement which does appear within 60 days of an election, which does mention the name of a Congresswoman who is running for re-election, and which says that she should vote a certain way on a piece of legislation should fall within the realm of the statute that you and Senator Snowe drafted?

A. Well, "fall within the realm," I say yes. But that doesn't mean that it's in violation of the act or not.

Q. Why is that?

MS. BREGMAN: Objection. Whether something is in violation of the act or not clearly calls for a legal conclusion under the act. And this witness is not a legal scholar that has studied the act in order to answer such questions. It either falls within the act or it doesn't. [25 (11 PCS/NRA 87)]

MR. ABRAMS: Now -

MS. BREGMAN: And his personal opinion is irrelevant, or at least I think the witness should have an opportunity to read the words of the act.

BY MR. ABRAMS:

Q. I want to be clear, Senator, I'm not interested now whether it falls within the act. I'm interested in your views, as you sit here answering questions to me, as to whether an ad like this should be subject to the provisions of the law that you and Senator Snowe drafted, if that is what it says.

MS. BREGMAN: I'm going to have to object. I don't understand the question at all. Whether it should be subject to the law if it is or if it isn't, I guess that would call for speech or debate information. What led up to the act and what was determined to be covered by it is in the legislative record.

MR. ABRAMS: I'm not asking for what led up to the act or what's covered by it. I'm asking for Senator Jeffords' view as to whether this [26 (11 PCS/NRA 87-88)] particular ad, in his view, as he sits here today -

THE WITNESS: It could fall within the act from my understanding. But it depends on the law and other aspects as to whether it's accurate or all those kinds of things. Certainly if it's something which is put on by treasury funds, within those timeframes and it proves to be inaccurate and misleading, I say it's within.

BY MR. ABRAMS:

Q. I'm going to show you now, Senator Jeffords, a tape that we made up at my law firm of certain advertisements that were shown at different times by the AFL/CIO and the United States Chamber of Commerce. And I wanted to ask you first just to watch the tape. There are going to be seven ads on it. And after you watch it, I'll ask you a few questions about it.

MR. ABRAMS: I'm gong to mark the tape as Exhibit 5.

(Jeffords Exhibit 5 identified.)

(Jeffords Exhibit 5 video played.) [27 (11 PCS/NRA 88)]

BY MR. ABRAMS:

Q. Now you've just seen this exhibit, as I mentioned to you, contains seven separate advertisements and I would like to ask you a few questions about that. The first two advertisements paid for by the United States Chamber of Commerce refer to a Congressman Longley. Do you recall that?

A. Uh-huh.

Q. You have to say yes or no for the record.

A. Yes.

Q. I want you to assume with me for the moment that they were run within 60 days of an election that Congressman Longley was running in. And what I want to ask you is this, in your view, in light of the problems that you perceived to exist before the adoption of the Bipartisan

Campaign Reform Act, and before the adoption specifically of the legislation you and Senator Snowe drafted, were these two ads which refer to Congressman Longley the sort of things that you believed ought to be in some way limited with respect to the ability of the Chamber of Commerce to pay for it? [28 (11 PCS/NRA 88)]

MS. BREGMAN: Objection, speech and debate. What he considered and what his views are that led to the enactment of the legislation are protected and privileged. And I instruct the witness not to answer that question.

BY MR. ABRAMS:

Q. As you look at these ads that mentioned Longley now, are they what you consider to be sham issue ads?

MS. BREGMAN: Objection. That is not a term that this witness uses or was familiar with.

MR. ABRAMS: You keep telling me that, but you are not a witness.

MS. BREGMAN: I understand that.

BY MR. ABRAMS:

Q. Senator.

A. Well, I go by my counsel here. I don't know.

Q. The third ad refers to the Kennedy-McCain Bill. As you sit here now, does the reference to the name of Senator Kennedy or Senator McCain in that advertisement, if those ads had been shown in [29 (11 PCS/NRA 88)] either Massachusetts or Arizona prior to their election within 60 days, seem to you to be phony ads?

MS. BREGMAN: Objection. I'm not sure what "phony ads" are. If you have an understanding of the term, you can answer.

BY MR. ABRAMS:

Q. Let me rephrase it then in the language used in the letter signed by you. Does the reference to those names, as you sit here, seem to you to be sham issue ads?

MS. BREGMAN: Same objection as before, but you can answer your question using your understanding of the term, if any.

THE WITNESS: It could be. It depends upon the accuracy and circumstances.

BY MR. ABRAMS:

Q. What would you have to know, do you think, in order to be able to answer that question?

A. Well, you have to have adequate knowledge of the issues that are there which are, some, very complicated, and give you an opinion.

* * *

[75 (11 PCS/NRA 89)] Q. Have you, let's make it - have you ever been the subject of ads paid for by I'll say "outside groups," by that I mean nonparty groups or not your opponent in an election, which have criticized you in any way?

A. Yes.

Q. Did you seek to respond to those criticisms?

A. If I felt response was appropriate or needed, but normally I ignore them.

Q. I'm sorry?

A. Normally I would ignore them, unless I had a close election or something and felt compelled to do something.

Q. Can you recall an instance where you did seek to respond to criticisms by outside groups that [76 (11 PCS/NRA 89-90)] were aired in advertisements?

A. I'm sorry.

Q. Can you think of an instance where you did respond to advertisements by outside groups that have criticized you?

A. No. I don't believe so. Because I don't think when that occurred we had time to do so. That's the purpose of passing this law.

Q. Okay. When you say you didn't have time to do so, how would that have worked as a practical matter?

A. Well, first of all, can you buy space, that's the critical problem usually. And if they're run and you can't respond, which is one of the big purposes of our law, then you're defenseless.

Q. And how does that work, in your experience in Vermont? And I'm just - do you buy your - do you buy your advertisements in advance and try and get time in the period before the election?

A. It depends upon how much money you have obviously. But you try to buy your ads so that they will be within, you know, the closeness to the [77 (11 PCS/NRA 90)] election that they're affected. And if you find yourself you can't do that, it's a big disadvantage.

Q. And I'm just trying to get the practicalities of why you couldn't do it. Because you wouldn't necessarily have enough money or maybe all the slots have been filled?

A. All the slots have been filled.

Q. So even if you did have the money you might not be able to get air time to run?

A. Right.

* * *

DEPOSITION OF SENATOR JAMES JEFFORDS

Q. And again, just so we're clear, I know the last page says "vote for Bart Peterson," who was the mayoral candidate and the Democratic team for city council. And it lists various names, and it encourages people to vote on Tuesday, November 2nd. I'll represent to you that's a date when federal candidates were on the ballot. And again the Indiana Democratic Party paid for this with soft money.

Does this handout urging people to vote in local elections paid for by a state party with soft money, in your mind, raise an appearance of corruption for federal candidates or officeholders who appeared on the ballot the same day?

MS. BREGMAN: This is his personal --

MR. CARVIN: Yeah.

MS. BREGMAN: -- opinion sitting here looking than this. Nothing more than that.

THE WITNESS: Well, not on its surface. But again, it's not relative to -- related to the **[*84]** law that we're talking about, because that does not restrict the use of print.

BY MR. CARVIN:

Q. Yeah, and then I'm trying to get a general sense from you again with all the caveats, do you see a distinction between these kind of television, radio ads and what I would characterize as sort of generic, vote Democratic that lists candidates for state and local office that are either done in newspapers or handouts. Do you see a distinction?

MS. BREGMAN: Objection. I'm going to object because every answer that this witness is giving is displaying the fact that he relates everything to the legislation. And that all of his views that he's given you are trying to respond in a way that sheds light on how Congress drew lines. And that is -- that is what he keeps coming back to. That is why I think the questions, as he hears them and as he responds to them, do implicate the speech and debate clause.

He's going back to telling you why certain things may have been treated within certain portions **[*85]** of the act. And I think that renders it impossible, to be asking these questions in a way that does not implicate the speech or debate clause.

BY MR. CARVIN:

Q. That's why I was thinking maybe we could switch to a more general. I've given you certain illustrative examples. Again, without referring to the act or legislative history, just as somebody who knows the political process and has been involved, do you perceive a difference between the potential appearance of corrupting or -- corrupting effect of these radio ads or television ads and these efforts in print or in mailings to encourage people to get out to vote on an election day?

A. Yes.

Q. And --

A. That's why we handle them differently.

MS. BREGMAN: We keep coming back to the legislation. I don't think that this witness has a view that can be separated from his view as a legislator.

* * *

Q. For the Senatorial committee. Can you recall how many hours you might do in an election year for the Congressional committee when you were a Republican Congressman?

A. It was about the same.

Q. And I can go through all the questions. But in terms of your attendance at these fund-raising dinners and the conversations you had with people there, was the experience at the House fund-raisers essentially the same as you described with the Senate fund-raisers?

A. Yes.

Q. Okay. Did any of the party leadership that you've been involved with suggest or imply that preferential access should be given to large money -- large soft money donors to the national party committee?

MS. BREGMAN: Do they suggest it to him?

MR. CARVIN: Yeah.

MS. BREGMAN: To you personally. Do you **[*107]** recall?

THE WITNESS: I don't recall any.

BY MR. CARVIN:

Q. Have you ever heard of a conversation between a leader of one of the national party committees and any representative, Senator or Congressman, where it was implied or suggested that the federal officeholder should give preferential treatment or access to large soft money donors?

A. I don't have any recollection.

Q. Okay. Do you know any representative or Senator who has ever altered their vote in any way because of, in part, soft money donations?

A. No, I don't believe so.

Q. Okay. My questions up to this point have been about the national parties.

A. Yes. Uh-huh.

Q. And we chatted about this a little bit earlier. I'm not entirely clear. Did you do fund-raising for the Vermont Republican Party at any point?

A. Yes.

CONFIDENTIAL – BRUCE JOSTEN

A Well, I remember a meeting that I was in the for The Coalition management committee that discussed after the ads had been up and run and down off the air because there was a lot of interest, as I am sure you are aware, on what we were or weren't doing all over town, and some people, I believe, wanted to after the fact discuss that.

I did not attend any meeting to do that that is referenced here, so ...

Q So you are saying -- assuming the meeting happened as Mr. Nichols said it did, you are testifying you know you were not at it?

A I know you I was at none of these meetings.

Q You were at none of the meetings of the coalition's management committee?

A No, I was at none of the meetings on Mr. Nichols' memorandum.

Q Let me restate my question.

Do you have any reason to doubt there was a discussion in The Coalition's management committee about setting appointments on Capitol Hill?

A I have no reason to dispute that.

CONFIDENTIAL DEPOSITION OF BRUCE JOSTEN CONDUCTED ON WEDNESDAY, SEPTEMBER 11, 2002

Q Now, the four congressmen who are referenced in this document; do you see them? Chambliss, Chenoweth, Hostetler and Whitfield, do you see those names?

A Yes.

Q They were all congressmen in whose districts you were running ads to rebut the AFL-CIO, correct?

A I believe so.

Q Okay.

A Did you mean this to come across?

Q I don't think so. It adds general points, but I don't think it would have revealed very much. Thank you, though.

MR. SCHWARZ: Would you mark as Josten 21 a document produced by The Coalition Bates stamp 497 and 498.

(Thereupon, Josten Exhibit No. 21 was marked for identification and was attached to the transcript.)

BY MR. SCHWARZ:

Q This was produced by The Coalition, and it specifies a number of congresspeople in the left-hand column, correct?

A Yes.

[LaPierre Deposition—Exhibit 3]

[Letterhead of the National Rifle Association of America]

March 16, 2001

Dear:

On January 20th, as I stood in the sleet and rain watching George Bush being sworn in as President, I thought about you.

I was thinking about your dedication, your hard work, your willingness to dig into your pockets and send the badly-needed funds that enabled us to stop Al Gore from winning the presidential election by the barest of margins -- and to reclaim the White House from those who for eight years spared no effort to undermine and destroy our precious freedoms.

As I watched Bill Clinton hand over the reins of power to George W. Bush, it occurred to me that you and I won this battle in precisely the same way our forefathers did -- 225 years ago. We sacrificed, we worked together as a team. We stood together bravely, side by side, even at times when victory seemed out of reach.

And in the end, we won a great victory that will be remembered alongside the most pivotal battles that have ever been won by American patriots and freedom fighters.

After the election, Bill Clinton declared on national T.V. that the NRA made this victory happen. Clearly, our efforts made a pivotal difference in Arkansas, Florida, Ohio, Tennessee, and West Virginia.

Not only in these states, but in every state, you worked hard and you changed history -- and I thank you from the bottom of my heart.

And in the face of all we accomplished we have to remember to thank two great men -- the President of the

NRA, Charlton Heston, and the President of the United States, George W. Bush. They were our leaders, and they led us well.

Yet, while nothing can ever take away from our extraordinary accomplishments together, I do need to make it clear to top NRA members like yourself that our rights are by no means safe simply because George W. Bush now sits in the Oval Office and not Al Gore.

[2]Please understand: The anti-gunners have not signed a surrender agreement. They have not laid down their arms or abandoned their sworn pledge to take away your guns and your rights.

And I'm turning to you today, as an NRA leader, for three essential favors to help maintain and strengthen our defenses against attacks on your Second Amendment rights which are sure to come in the months ahead.

First, I'm asking you to sign, stamp and mail the enclosed Postcard to the new President of the United States, George W. Bush.

*****

At the same time, please grant my second request by mailing the other card I've enclosed to NRA President Charlton Heston.

*****

[3]

*****

And now I come to the third action I need you to take which is the most difficult of all. I need you to help me right now by sending the NRA a special contribution.

Last fall, I faced what I believed - and still believe -- was a life-or-death choice for the future of the Second Amendment. I could choose to spend as much as the NRA possibly could, to get our message to gun-owning voters in critical swing states -- or I could hold funds in reserve for battles during 2001 and beyond.

I made the decision I did -- to spend every dime and dollar we could -- because I didn't want to look back after a defeat and say, "My gosh, if we had only done a little more, we could have won."

Over the years, I've listened to you and I know you always want me to do whatever it takes to win. And that's what I did. I spent what it took to defeat Al Gore, which amounted to millions more than we had on hand.

According to national polls taken after the election, an extraordinary 74% of those who oppose new gun control laws voted for Bush.

[4]There is no doubt that the money we spent got our message out, drove our supporters to the polls, and changed history.

But now we are in the middle of new battles for our guns, our hunting, our freedom, and our way of life. And I can't go forward in the fight until I get the NRA back to even from the last battle. We spent what it took to win. Al Gore is not in the White House. But we are in debt. And now I've got to dig the NRA out financially.

*****

[5]

*****

I hope you'll join me in never forgetting what we accomplished last year. It was among our finest hours against the enemies of liberty.

And I've never been prouder of you and our NRA.

Now, I hope you'll tell me I did the right thing last year by sending your special contribution to the NRA today. Our enemies are watching and I need your contribution today to keep our battle flag waving high and proud.

If you send that contribution today, you'll prove to all Americans that I did the right thing last fall when I decided to do whatever it took to save your guns.

When the chips were down, you've been there for me and the NRA again and again. I'm counting on you. Please mail your postcards and send your contribution to the NRA today in the most generous amount that you and your family can spare.

Thank you.

Sincerely,
Wayne LaPierre
Executive Vice President

P.S. I can't thank you enough for standing with me over the last several years through all my T.V. battles with Bill Clinton and his allies, through all the nasty falsehoods the national media tried to pin on you and the NRA. You were always there. You are the very best, and on your shoulders we rode together to one of the NRA's greatest victories for freedom.

Now I need you to send the most generous contribution you can so that I can get the NRA out from under the bills from this historic victory and put us back on the offense. You know me -- I'll stand toe-to-toe against them every time if you give me the chance. But I need your help again right now if I'm going to do it.

Once again,- please accept my thanks and admiration for all your hard work.

[(Arthur Lupia Dep. 17)] answers start to come out contrary to the political preferences of the scholar who is seeking the funding?

A. In what sense to you mean appropriate?

Q. You don't understand the word?

A. Well, I do, sir, but there are several senses in which one could ask me that question.

Q. Do you think it is consistent with scholarly behavior of honor and seriousness as a member of a learned profession?

A. No, that I do not.

MR. ABRAMS: I'd like to mark as Exhibit 4 the following document obtained from the Brennan Center in discovery entitled to Sean Treglia, T-r-e-g-l-i-a, from Ken Goldstein, Brennan Center documents 012093, through 012097.

(Lupia Exhibit No. 4 was marked for identification.)

BY MR. ABRAMS:

Q. Have a look at that first and tell us whether you've seen that before.

A. Again, I don't recall.

Q. Professor Goldstein testified yesterday that this was an application he made for funding in the year 2000 with respect to his work, which was incorporated in some sense in the book called Buying

CROSS-EXAMINATION OF THOMAS E. MANN

Q. Do you have any reason to believe that interest groups, recognizing the other opportunities that will remain available to them under BCRA, the ground war within 60 days of the election, will not engage in the same sort of growth in using resources there that they have used in issue advocacy?

A. No. I anticipate more, I should say yes. I anticipate more ground war activities from interest groups. I anticipate more ground activities from political parties as well.

Q. At the bottom of page 33 of your report, you say groups may use their campaign contributions in conjunction with their lobbying operations to reinforce or activate rather than convert members. They may also try to curry favor by running helpful electioneering issue advocacy campaigns for or against particular Federal candidates. Are you with me there?

A. Yes.

Q. It is your view, I take it, that some **[*149]** interest groups engage in issue advocacy for the purpose of currying favor with office holders?

A. I'm saying that is a conceivable strategy. I don't have any evidence that documents this. I'm saying this is in the context of the variety of ways in which, in which money can intersect with the policy process. It's a whole paragraph worth. And I'm saying, I listed that, and I think my language was they may also try to.

Q. And you would, well, you would agree with me, wouldn't you, that to the degree interest groups were interested in currying favor with office holders, even under BCRA, they are going to have this ground game possibility they can use to curry favor?

A. That's correct. They will, and they will be able to do broadcasts outside of the window, in many respects, like independent expenditures of hard money.

(Recess.)

* * *

[*164] Q. Let me ask the reporter to mark as our last exhibit, at least my last exhibit, Mann Exhibit 17, a transcript of a panel discussion at the National Press Club on May 17, 2001 featuring, among others, Dr. Mann.

(Mann Exhibit No. 17 was marked for identification.)

BY MR. BURCHFIELD:

Q. Dr. Mann, I just wanted to ask you about one question/answer sequence in this transcript and see if you, if it still represents your view, and unfortunately, this version is not paginated, but if you thumb through here, I can tell you just for purposes of the record, it is --

A. Does it have Mr. --

Q. It's nine pages up from the bottom. It's a question from David Broder.

A. Okay. I have a Broder question followed by Morehouse.

Q. Let me read the question, David Broder says, from The Washington Post, it was mentioned in the opening questions and alluded to a couple of times, but I'd like to hear a little more discussion about what you see as the likely impact of this **[*165]** legislation on the balance of power between the parties as parties and the interest groups as interest groups?

A. Yes.

Q. And then three pages down is your answer.

A. Right.

Q. And in the second paragraph of your answer, you said, you are reported as saying, I think it is going to produce a tremendous shift in resources from television to ground activities, registration, mobilization, get out the vote. Yes, some of this will be by interest groups, and you know something, I think that's a good thing.

A. Yes. I see that.

Q. Is that an accurate transcription of at least part of your answer there?

A. I certainly, I certainly assume so, and it's plausible that I would have said that.

Q. And it's consistent with your current view?

A. Sure.

MR. BURCHFIELD: That's all I have. Thank you, Dr. Mann. You have been extremely gracious with your time and patience.

[EXHIBITS OMITTED]

DEPOSITION OF SENATOR JOHN McCAIN

Q. Last Sunday --

A. They ruled that --

Q. I'm sorry.

A. Where they ruled that you could put a limit on the amount of contributions that were given to a political campaign. I believe in this case by state party society, as I recall.

MR. WITTEN: I think you're talking about the Shrink, Missouri case.

SENATOR McCAIN: Oh, okay. I'm sorry, yeah.

BY MR. ABRAMS:

Q. Last Sunday on Meet the Press, you referred to the Federal Election Commission as an unelected corrupt commission. What did you mean by the use of the word corrupt?

[*16] A. I mean that they have failed to carry out their constitutional responsibilities of interpreting the law as it is written, and emasculated the law.

Q. Is that your understanding of what the word corrupt means?

A. That's what the reference in which I made it.

Q. You also referred to the Commission by saying that you had, quote, never seen such corruption in an independent Commission.

A. Never have.

Q. Did you use the word corruption in the same sense that you just told us?

A. Yes, they are, they are violating their constitutional duties to make regulations that conform with the law passed by Congress.

MR. ABRAMS: I want to mark a copy of a website entitled, itsyourcountry.com, and ask you if you can identify it. I'd like to mark this as McCain Exhibit 3.

* * *

[*89] A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:48 p.m.)

BY MR. ABRAMS:

Q. Senator McCain, you realize that you're still under oath, sir?

A. Yes.

Q. I asked you some questions earlier in the day about your assertion on Meet the Press about the FEC being a corrupt institution. I just want to make sure of two things about that. You're not saying that the FEC has been paid off by somebody to act in some improper fashion, are you?

A. No, I believe --

MR. WITTEN: Objection. Asked and answered.

THE WITNESS: What's that?

MR. WITTEN: I'm objecting that he asked that question before, and you've answered it. But you can go ahead and answer it.

THE WITNESS: I believe that anyone who willfully carries out their duties in direct violation and contravention of the law fits that description.

* * *

Deposition of John McCain
(September 25, 2002)

* * *

[94 (11 PCS/NRA 92)] Q…Let me mark as Exhibit 10 an advertisement of the Sierra Club referring to Senator McConnell. (Whereupon, the above-referred to document was marked as McCain Deposition Exhibit No. 10 for identification.)First, have you ever seen this, Senator McCain?

A. I have not.

Q. I ask you, for our purposes, to assume that this ad was broadcast in Arizona in January of 2000.

A. January of 2000?

Q. Yes.

A. Then, McCain-Feingold would not apply to [95 (11 PCS/NRA 92)] this ad.

Q. Well, why is that, Senator?

A. Because it's not within 30 or 60 days from the time of an election, 30 days of the primary and 60 days --

Q. Isn't it 30 days before the New Hampshire primary? At least until I tell you when it ran in January.

A. Did it run in New Hampshire?

Q. It ran in Arizona.

A. Well, then, how would it apply to the New Hampshire primary?

Q. Well, I shouldn't give testimony here today.

A. Yes, sorry.

Q. Is it your understanding that the law, as you drafted it, only applies within the particular state in which a primary is being held, with respect to a federal election for President?

MR. WITTEN: For this question and all others, the Senator is going to answer based on his own personal opinion. For speech and debate clause [96 (11 PCS/NRA 92)] reasons, he's not purporting to testify as to the intent of the entire United States Congress and the President who signed the --

MR. ABRAMS: Sure.

MR. WITTEN: If you don't mind, I won't bother saying that again.

MR. ABRAMS: Sure.

BY MR. ABRAMS:

Q. Why don't we move right ahead to the text of the ad, Senator. I simply ask you to assume that an ad with these words, and with pictures such as you've seen --

A. Let me just point out if it was in January of -- what year?

Q. Of 2000.

A. Then, it would be 60 days prior to the primary, because the primary in Arizona was in March, so it did -- it is -- it does fall under McCain-Feingold.

Q. Why don't we assume --

A. We had a March primary in the --

Q. Well, why don't we just assume for our [97 (11 PCS/NRA 92)] purposes --

MR. WITTEN: Thirty days for a primary.

THE WITNESS: Thirty days for a Presidential primary. Okay. Anyway --

BY MR. ABRAMS:

Q. Right. Well, why don't we just assume for our purposes now that this ad ran, that it ran in Arizona, that it had these words, and then at least it ran during your Presidential bid in 2000, and put aside for the moment what the new statute says. I want to understand how I can tell a sham issue ad from a non-sham issue ad. As you look at this, and simply accepting my representation that it ran in January of 2000, does this read to you as a sham issue ad?

A. Yes.

Q. And please tell me why.

A. Because it meets the objective criteria of mentioning my name or showing my likeness.

Q. Well, I'd like to take you back to the time period before we had the Bipartisan Campaign Reform Act, right? So I want to ask you not whether it would violate the statute. [98 (11 PCS/NRA 92)]

A. I see.

Q. I want to ask you if, in your personal view, this is the sort of ad that you would consider to be a sham issue ad.

A. Well, if we want to have a philosophical discussion that has nothing to do with the law, I would be glad to do that, although I'm not sure how that helps the Supreme Court decide the constitutionality of the law. Of course, I think it's an attack ad, because I don't think I attacked the President's plans to protect our national forests and to create the Grand Canyon. But, frankly, I think that's irrelevant because we passed a law, so that we wouldn't have to make subjective judgments, so we would have an objective set of criteria.

Q. But the question in this case --

A. Yes.

Q. -- is whether the law is constitutional, and we want to furnish the courts with as much relevant information as we can about that. So you are here today. You are terribly knowledgeable. You [99 (11 PCS/NRA 92)] were, as you say, the chief sponsor, the drafter, of the law. And I want to ask you some questions --

A. Sure.

Q. -- which deal not with what the new law does, but with the underlying situation that existed before we had a law. I want to know if in -- as of January 2000, if you had seen this --

A. I did not see this.

Q. -- you would have thought that this ad is what you had called a sham issue ad.

A. I probably would, because of, you know, so why is he attacking the President's plans to protect our national forests and to create the Grand Canyon. The Grand Canyon was created --

Q. The Grand Canyon National Monument.

A. Oh. Well, create the Grand Canyon National Monument. I don't think I "attacked" the President's position on that. But I -- I want to add, in the strongest terms, when we're talking about constitutionality or non-constitutionality, or what's a sham ad or what's not a sham ad, Senator Feingold and I were looking at the real world. [100 (11 PCS/NRA 92-93)] The real world is that the overwhelming majority of ads that we see running today are attack ads that are called issue ads, which are direct, blatant attacks on the candidates. The airwaves in South Dakota today cannot turn on a television set without seeing an attack ad against either John Koon or Tim Johnson. We don't think that's right. And the reason why we passed this law is not because there may be an exception or two that there's question about. But we talked to people like Congressman Adam Schiff, who said, "I used to come home in the evening and turn on the television to see which attack ads was being on my behalf and was running against me -- attack ads were being against me today."

Candidate after candidate has said, "We lost control of our campaigns." Republican National Committee buys these ads. The Sierra Club, whoever they are, they buy these ads attacking my opponent, supporting me, or vice versa.

And that's what we're trying to take care of. We're not too worried about the occasional ad [101 (11 PCS/NRA 93)] that there may be some question about, many of which you will show me.

Q. Are you worried about --

A. Because we're talking about political -- what has happened to American politics because of this fountain of soft money, which is now financing these attack ads.

* * *

[121 (11 PCS/NRA 94)] Q. The next ad, Exhibit 14, I really can't represent to you who put it on, but I'd like you to have a look at it.

A. All right.

Q. Now, assuming that this ad was put on in Nevada in the last 60 days of the Senatorial campaign involving Harry Reid and John Ensign in 1998, would you have considered this ad to be a sham issue ad, before there was any Bipartisan Campaign Reform Act? [122 (11 PCS/NRA 94)]

A. Sure.

Q. Who does it favor?

A. It attacks both, thereby perhaps having the effect of diminishing voter turnout. It's part of a campaign.

Q. But isn't it part of a campaign, as you read it, about an issue?

A. No, it's part of -- if it's a part -- about an issue, then they should stick with the issue.

Q. Why shouldn't they be fully permitted -- let me finish the question. Let me start again. Why shouldn't whatever group put this on that was saying, "Call Harry Reid and John Ensign and tell them no matter who goes to Washington, you want them to cut your taxes; otherwise, there will be "nothing left but the crumbs," why, in your view, Senator McCain, shouldn't a group be absolutely free to put an ad on this -- saying this on any time, however it's done?

A. Could I say, for starters it said -- ran, "Democratic State Central Committee"--

Q. I know.

A. -- at the top. What's that about? Who [123 (11 PCS/NRA 94)] did sponsor this? I think it's important to know. If the Democrats sponsored it, maybe there's something we don't know about that's going on in the State of Nevada at this time. I can't make a judgment when I'm just shown an ad without knowing what was going on at the time, what was in part of the campaign, what was -- what was Harry Reid saying, what was John Ensign saying.

If it was put on by the Democratic State Central Committee, I doubt seriously if they are running an ad that doesn't hurt John Ensign, or they should be fired for wasting a hell of a lot of money.

So, I'm sorry, I can't comment on an ad that I don't know the circumstances that prevailed at the time. But I'm sure there was a reason to mention the candidates' names, and they

weren't associated with an issue. They were associated with candidates.

Q. And none of these factors matter, do they, under the new law?

A. Well, as I say, we set up objective criteria because we couldn't go through lists of thousands and thousands of campaign ads. [124 (11 PCS/NRA 94)]

Q. So it doesn't matter --

A. But we know what is run, and we know what's running as we speak today.

Q. So it doesn't matter under the new law who paid for the ad, correct?

MR. WITTEN: Excuse me?

THE WITNESS: It matters whether it was hard money or not.

BY MR. ABRAMS:

Q. Yes. I said what organization -- by "who paid," I mean, who put the ad on?

MR. WITTEN: Objection.

THE WITNESS: I really don't care who put the ad on --

MR. WITTEN: Excuse me.

THE WITNESS: -- as long as they use hard money.

MR. WITTEN: The form of who put the ad on does matter, of course, and you're not trying to imply that it --

BY MR. ABRAMS:

Q. It doesn't matter, does it, whether the ad [125 (11 PCS/NRA 94)] was deliberately put on at the end of a campaign?

A. I don't know of an ad that's not deliberately put on at the end of a campaign.

Q. Well, you just said, Senator McCain, a number of things you'd like to know in order to offer us an informed judgment --

A. Sure.

Q. -- about this ad.

A. Sure.

Q. Under the new law, none of those things that you'd like to know are relevant, are they?

MR. WITTEN: I object to the form of the question. He has been trying to answer questions that you have asked, which he has repeatedly told you are irrelevant for purposes of the new law. But go ahead.

THE WITNESS: I can only answer to you, I thought the premise of our conversation was that it had nothing to do with the law.

BY MR. ABRAMS:

Q. It was. It was.

A. You said it has nothing to do with the law, and then you're asking me a question, what it has [126 (11 PCS/NRA 94-95)] to do with the law. So --

Q. Senator McCain, I'm --

A. -- I'm not sure I understand.

Q. -- continuing our --

A. Okay.

Q. -- conversation by taking advantage of the fact that you have now given an answer which mentioned a lot of different things that you'd like to know in order to answer the question I asked about this particular ad in 1998.

A. But you asked me --

Q. And you told me --

A. -- to give the answer with no relation to the law.

Q. Correct. Absolutely. I asked you to give that answer without regard to anything in the new law, and you did. And now I'm asking you a new question.

A. Okay.

Q. Which is prompted by your answer. And the new question is: under the new law, the various things that you would have wanted to know to answer the last question, aren't relevant at all, are they? [127 (11 PCS/NRA 95)]

A. No. What's relevant here is what happens in American politics, as I keep going back to. And what's happening in America today as we speak is that the airwaves, both television and radio, are flooded with negative attack ads in the guise of being issue ads. Everybody knows that they are not.

Now, we can find an ad from time to time like this one that there may be some question about. What we're trying to do is stop the practices that are going on which we all know are going on. I'm not talking about some ethereal atmosphere. I'm talking about what is going on which has harmed the practice of American politics.

* * *

[(Sen. John McCain Dep. 139)]

is that it implies that Al Gore was responsible for Medicare cuts, which is a pretty damning indictment. I think if Al Gore had a chance to respond, I think that he would argue that — knowing his record, that he was responsible for increases in Medicare funding. So it alleges something that I — that I think that at least Mr. Gore would say is not true.

Q. Exhibit 18. It's an advertisement published in Kentucky by a group with a name something like Coalition — oh, here it is — by a group called Coalition for the Future American Worker. And my question is: assuming that this ad ran within 60 days of an election involving Congresswoman Northup, is this a sham issue ad?

(Whereupon, the above-referred to document was marked as McCain Deposition Exhibit No. 18 for identification.)

A. I think that Congresswoman Northup, as I remember the issue, was the increased number of visas for people who were high tech, as I remember this, is what they're calling a foreign worker bill. I think

[(Sen. John McCain Dep. 141)]

Q. But when you use language of "sham issue ad," is this the sort of ad you had in mind?

A. Actually, the kind of ads that I had in mind are the ones that we see 999 times out of 1,000 from my viewpoint, my subjective viewpoint, and that is that are just outright distortions and attacks on people's character and record, which is really what is being run now as we speak.

Q. And would it be fair to say, then, that this particular ad, even if run within 60 days of Congresswoman Northup's bid for reelection, is not what you have in mind now as a "sham issue ad"?

A. It is exactly what I have in mind as a sham issue ad, because if the unions or corporations are paying for it, then they shouldn't be. Only PAC money should be used, as the candidates are required to use, to run these ads.

Q. And is that because it is critical of Congresswoman Northup?

A. I think it misportrays her position. I don't know Congresswoman Northup very well, but I do know enough about Congresswoman Northup that she's not

* * *

[*192] Q. They could use it for door-to-door --

A. Yes.

Q. -- Get Out the Vote activity.

A. Yes.

Q. They could use --

A. All those are good things. And as I mentioned, we're not a perfect piece of legislation, but we also know what affects voters, and that's broadcast advertising. We know that that's what our history tells us, that that's what affects elections.

Q. But I thought you said a few minutes ago, Senator, that you wanted to get political parties really out of the issue ad business and back to the ground -- the grass roots type of activities.

A. I did.

Q. Are you saying that the grass roots activities are going to be less effective than the broadcast activities?

A. The grass roots activities are the fundamentals of a democratic process -- Get Out the Vote, voter registration,

McCain Dep. 192

the kinds of activities that **[*193]** should be the basis of political action. We are encouraging that. We are discouraging the state parties from being the conduits of soft money and all kinds of money washing back and forth, and that being their only business, which is the case today.

Q. Let's go back to my hypothetical for a moment. A Senator raises money for the NAACP, soft money, non-federally regulated money, for the NAACP. And the NAACP uses that 60 days before a federal election in which that candidate is on the ballot for direct mail or phone bank and Get Out the Vote activities.

A. Yes. That's fine.

Q. It's legal under the statute.

A. Yes.

Q. Does that have the appearance of corruption?

A. Of course not. It's the broadcast television and radio ads that we believe are what is the problem. We tried to address the problem in the campaign finance reform bill.

* * *

[*205] Our firewall when the head of the NAACP or I try to raise money for the Grand Canyon Trust -- solicit money, then that money is fenced in by the Snowe-Jeffords, 30 to 60 days prior. It cannot pour directly right into a broadcast ad campaign.

So that was a lot of the thinking that went into the prohibition of elected federal officials and a chairman of the committee holding fund raisers where they directly solicited funds.

McCain Dep. 192-193, 205

Q. Okay. But my question is a bit different, and that is --

A. Okay.

Q. -- and that is, why are the office holders, whom the statute is intended to insulate from the influence of soft money, allowed to raise money for the NRA and the NAACP, but officials of the party, about whom I assume there is not the same concern, are not allowed to do --

MR. FRANKEL: In their official capacities.

[*206] THE WITNESS: I can only respond to you, again, that I believe that that money is prevented from going into a broadcast campaign at the crucial times of a campaign. So when I raise money for the NRA or the National Right to Life, or anybody else, then the majority of that money would be going into the activities hopefully -- Get Out the Vote, voter registration, phone banks, etcetera -- and not into the broadcast campaign, because of "Snowe-Jeffords."

BY MR. BURCHFIELD:

Q. Understand it. But why can't Mark Racicot appear with you when you walk up to a major donor and ask for a donation to the National Rifle Association?

A. I'll have to look at that. I did not -- I knew that he couldn't solicit money for the Republican National Committee from them, but I did not -- I'll have to check on the provision concerning soliciting money for outside groups.

Q. There is also a provision in the statute, Senator, that allows federal office holders and candidates to appear at fund raising events for state and local parties, those Lincoln Day dinner **[*207]** receptions, if you will. Why can't Mark Racicot appear at one of those dinners?

A. I think that Mark Racicot can appear at one of those dinners. He can't ask for money.

Q. But a federal office holder can.

A. A federal office holder can't ask for money. A federal office holder can appear, but the federal office holder cannot solicit money. And the reason why the law was crafted that way is because we don't want to prevent federal office holders or the Chairman of the RNC from appearing at events. We don't see anything wrong with that. But we don't believe that they should be soliciting funds there.

Q. Well, let me -- do you have a copy of the statute there on the table?

A. Yes. Let me see.

Q. If you don't, I've got a copy.

MR. WITTEN: We've got one, Bobby. Thank you. It's got some marks on it. Do you mind?

MR. BURCHFIELD: No, that's all right. That's fine.

MR. WITTEN: Somewhere we had --

[*208] MR. BURCHFIELD: Just so long as they're not yes and no.

(Laughter.)

MR. WITTEN: -- we had a colloquy on --

(Laughter.)

BY MR. BURCHFIELD:

Q. Senator, I am focusing on the exception --

A. Let me read to you the -- as I understand it. "Federal candidates and office holders cannot solicit soft money funds, funds that do not comply with federal contribution limits, and source prohibition for any party committee -- national, state, or local.

"This means that a federal candidate or office holder may continue to solicit hard money for party committees. A federal candidate or office holder may solicit up to $25,000 per year for national party committees from an individual. A candidate or office holder may solicit up to $15,000 per year for a national party committee from a PAC.

"A federal candidate or office holder may solicit hard money donations for state party **[*209]** committees to spend in connection with a federal election, including for voter registration and Get Out the Vote activities, up to $10,000 per year, from an individual and up to $5,000 per year from a PAC." That's the Levin -- the so-called Levin Amendment.

"In addition, a federal candidate or office holder may solicit money for a state party to spend on non-federal elections. The amount, however, will be subject to the federal limits and source prohibitions. Therefore, a federal candidate or office holder may solicit up to $10,000 a year from an individual, $5,000 a year from a PAC, for a state party's non-federal account, even if that same individual or PAC has already given a similar amount to the state party's federal or hard money," etcetera. So that's my reading of it.

MR. WITTEN: So just so it's clear, the Senator was reading from his remarks on March 20th.

BY MR. BURCHFIELD:

Q. Right. And it didn't sound like the statute. What I want -- and that's -- I don't disagree with what you just read, Senator, but I don't **[*210]** think it specifically -- it answers the specific question I was interested in.

Let me ask you to look -- this is going to be Section 323(e)(3), and I've --

A. Yes. Fund raising events, right?

Q. Right.

A. Okay.

Q. And that provision states, "Notwithstanding paragraph 1 or" -- which is the general ban on federal -- I guess the ban on federal candidates raising soft money -- "or Subsection B(2)(c), a candidate or an individual holding federal office may attend, speak, or be a featured guest at a fund raising event for a state, district, or local committee of a political party." Do you see that?

A. Yes.

Q. My question is: why does that exception relate only to federal candidates or office holders and not to political party officials?

MR. WITTEN: His views, right?

MR. BURCHFIELD: Yes, his views.

THE WITNESS: Because we believe that the **[*211]** candidate or the individual holding the office is one who obviously has a lot more individual clout.

BY MR. BURCHFIELD:

Q. But wouldn't that be a reason for the federal office holder not to be allowed to go out and raise --

A. They can -- but they can attend, speak, or be a featured guest at the fund raiser.

Q. But, again, wouldn't that be a reason why you wouldn't want a federal office holder in that situation, as opposed to a party official?

A. I think we're talking past each other here. A candidate or a federal office holder can attend, speak, be present, but not solicit funds. Okay? At a -- at any of these kinds of events. Why can't the Chairman of the RNC -- why isn't he prohibited also?

Q. Why isn't he allowed to do the same thing that a federal candidate or office holder can?

A. What, attend, speak, or be a featured guest?

Q. Correct. As I read that exception, it **[*212]** doesn't apply to federal -- to political party officials.

A. I'll have to give you an answer for the record, but I didn't know that it prohibited that person from attending.

Q. Well, under the general bar on soft money -- well, let me -- before I go there, you understand that the Federal Election Commission has interpreted this exception to allow a federal office holder to attend such a fund raising event and solicit funds.

A. And we'll be going to court.

Q. And I know you disagree with that, but that is

where the -- that is the state of the regulatory environment as we speak, correct?

A. Yes. We'll be going to court. As I said, the Federal Election Commission is acting in the most shameless and disgraceful fashion of any independent agency I have ever seen function, and they need to be abolished. We'll be trying to do that, too.

Q. Let me ask you a different question now. I'm now looking at the paragraph just above that. It's (e)(1), and let me just read you some provisions **[*213]** that -- you've got the statute there. Perhaps you could follow along.

"A candidate, individual holding federal office, agent of a candidate, or an individual holding federal office, or an entity directly or indirectly established, financed, maintained, or controlled by or acting on behalf of one or more candidates or individuals holding federal office" -- do you think you got it all?

(Laughter.)

"Shall not solicit," and then down to (b), "solicit, receive, direct, transfer, or spend funds in connection with any election, other than an election for federal office, or disburse funds in connection with such an election, unless the funds: 1) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under --

A. That's hard money.

Q. -- the hard money -- right. So, in other words, you could -- you, Senator McCain, can raise money for the gubernatorial candidate in Arizona, so **[*214]** long as you do not raise money for that gubernatorial candidate in excess of $2,000 per contribution, as I understand it. Does that sound right?

A. The next paragraph says, "Paragraph 1 does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a state or local office solely in connection with such election for state or local office, if the solicitation, receipt, or spending of funds is permitted under state law."

Q. I think that means if you decide to run for governor, you can raise money consistent with state law, as I read that. What I'm focusing on now is your fund raising activities on behalf of another person who is running for governor. And as I read this -- and if you either understand it differently or don't have a present understanding of it, just feel free to say so.

But as I read this, you can raise money for a gubernatorial candidate consistent with state law up to the federal limit of $2,000 per election.

A. I'm not sure that that is the reading, and **[*215]** maybe I can get you a -- we'll get a written response to you on that.

Q. That all is a big lead-up to this question. Where is the exception in there for a -- for the Chairman of the Republican National Committee to raise money for state gubernatorial candidates?

A. I don't see where he's prohibited.

Q. Wasn't he prohibited under Section 323(a)(1), which is a general prohibition of any agent or representative of a political party from raising any money that's not strictly regulated by federal law?

A. I'll have to get -- I'll have to get back to you on

that.

Q. You do understand that money that's raised for gubernatorial candidates goes into a state-regulated account, not a federally-regulated account, correct?

A. Yes.

Q. And so that would be soft money, right?

A. Yes.

* * *

[*223] Q. And hypothesize with me, because I do think it's true, that they spent that money in those state elections consistently -- they raised it and spent it consistently with state law. What's wrong with that?

A. It's not in keeping with the intent of the federal law. The intent of the federal law in 1974 -- the intent of the federal law in 1974 was to limit contributions to political campaigns to $1,000 per individual, etcetera, and certainly not to have corporate and union money go into these campaigns.

Could they prevent it from going into a state campaign? No. Because, like you say, it's up to the states.

Is it right? No, it's not right. That's why we're trying to set up this firewall between the money that goes -- is contributed to the Republican National Committee, the Democratic National Committee, etcetera, and the state parties.

[EXHIBITS OMITTED]

Appeal Docketed May 15, 2003
Probable Jurisdiction Noted June 5, 2003

No. 02-1674 *et al.*

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IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

JOINT APPENDIX

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FLOYD ABRAMS	KENNETH W. STARR
SUSAN BUCKLEY	*Counsel of Record*
BRIAN MARKLEY	EDWARD W. WARREN
CAHILL GORDON &	KANNON K. SHANMUGAM
REINDEL LLP	KIRKLAND & ELLIS
80 Pine Street	655 Fifteenth Street, N.W.
New York, NY 10005	Washington, DC 20005
(212) 701-3000	(202) 879-5000

(*additional counsel on inside cover*)

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KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
Frost Brown Todd LLC
400 West Market Street, Suite 3200
Louisville, KY 40202-3363
(502) 568-0222

Counsel in No. 02-1674

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

Washington, D.C.

Monday, September 23, 2002

Deposition of

MITCH McCONNELL

* * *

[12] Have you consulted with anyone in preparation for the testimony you're going to be giving today?

A I've consulted with my lawyers.

Q Have you consulted with anyone else?

A No.

Q Thank you. First, I'd like to get into your campaign background. When did you first run for the United States Senate?

A 1984.

Q To your recollection, how much did you raise in that campaign?

A A little under $2 million.

Q Do you remember how much you spent?

A Every penny of it.

Q Did you have an opponent in the primary in that –

A In the primary? There was a token opponent.

Q "Token" meaning what?

[13] A Someone who filed because he liked to see his name in the paper.

Q So did that opponent raise any money?

A I don't remember.

Q Did you have a general election opponent in 1984?

A I did indeed.

Q How much did that opponent raise?

A Oh, this is a guess, but in the range of a half a million dollars more than I.

Q Did that opponent spend every penny of it, to your knowledge?

A I don't recall specifically, but it was a hotly contested race. I don't recall specifically, but it was a very contested race.

Q You won that election; is that right?

A I did.

Q Do you remember the percentage of [14] the vote?

A Three-tenths of 1 percent. About a vote a precinct.

Q Then in 1990, you ran again for re-election.

A I did.

Q Did you have a primary opponent then?

A I believe there were – there was one or more token opponents again.

Q How much did you raise for that primary election?

A I don't recall.

Q Overall for the whole general election.

A Overall? Somewhere between 5 and 6 million.

Q Did you have a general election opponent that year?

A I did indeed.

Q Do you remember how much your general election opponent raised?

[15] A I don't. I don't. It was a very contested race. He was very visible.

Q Was it anywhere near your 5 million?

A It was not as much, but I don't recall exactly how much he spent.

Q Then again, this last cycle before this year 1996, do you remember how much you raised for the '96 general election campaign?

A That's the one we were just talking about, wasn't it?

Q 1990, we were talking about.

A Oh, I'm sorry. In '96, I think he raised slightly less than I did in '90, but in the same general range, roughly $5 million.

Q Did you have a primary opponent in '96?

A I believe I had a token opponent.

Q That token opponent raised how much?

[16] A I don't know.

Q Far less than 5 million?

A I'm certain of that, but I don't know. I'm not sure.

Q Did you spend nearly all that money in '96?

A I did.

Q Did you have a general election opponent in '96?

A Well, I thought you were referring to the general election. Yes, we spent virtually all of the money in the general election.

Q Your general election opponent, do you recall how much he or she raised?

A I don't.

Q Was it anywhere near your 5 to 6 million?

A It was certainly enough to be very competitive.

Q In all these races, Senator, that you've been in, were you able to effectively [17] compete in each of them for the office of the United States Senate?

A Well, since I was successful, I think I successfully competed.

Q You were able to get your message out.

A As were my opponents.

Q You had enough money to do that.

A In the dollars of that era, in each of the dollar – as you know, there's been a lot of inflation over the last 18 years. But based upon the cost of campaigning at that time, both myself and my opponents were able to get their message across.

Q As early as six years ago, you had enough money to get your message out.

A The difficulty was that the increase in cost is so dramatic that after each – over a six-year period, spending the same amount of money buys you considerably less. In other words, you get less [18] opportunity to reach the voters with the same amount of money with the passage of time.

Q I understand that, Senator, but I just want to make sure we're clear here. You said you've been able to effectively compete in each of these races, which includes the most recent one in 1996; is that right?

A Well, I was successful in the race, but I was able to reach fewer voters with the same amount of money in 1996 that I did in 1990.

Q Were you able to purchase television time in 1996?

A I was.

Q Were you able to purchase radio time?

A I believe we did, yes.

Q Were you able to pay for campaign staff in 1996?

A I was.

[19] Q Were you able to pay for printed materials for your campaign in 1996?

A I was.

Q Were you able to conduct mailings to potential voters in 1996?

A I don't believe we did mailings out of the – we probably did some fundraising mailings.

Q Were you able to conduct any get-out-to-vote efforts in 1996?

A That's typically done by the parties.

Q Your campaign did none of that on Election Day?

A My recollection is that that function is typically done by the parties.

Q What percentage of your contributors, Senator, give $1,000 or more to you for your campaigns?

MR. BARAN: I object to the form of the question. Which campaign are you talking about now?

* * *

[(Luke McLoughlin Dep. 23)] THE WITNESS: I believe it was the coding process that took place.

BY MR. ABRAMS:

Q. Would you have coded it as a genuine issue ad?

A. Yes.

Q. Why?

A. The ad's focus is on taxes. It explicitly does not show a preference for either of the two Nevada candidates for Senate.

Q. And had the ad been about taxes but indicated some preference for one of the candidates, would you have then viewed it as a sham issue ad?

A. I'm not sure how to answer that hypothetical.

Q. You're unable to answer?

A. I'm not sure I understand what you're — how you would change this ad to have me answer differently.

Q. Suppose the ad did not contain the name of both candidates, but it simply said call Harry Reid and left Ensign's name off entirely. Would that have made any difference in your coding if you had been involved in that?

So it would be very specific. Suppose

DEPOSITION OF ANGUS MCQUEEN

TAKEN ON BEHALF OF THE INTERVENORS

SEPTEMBER 24, 2002

*****

[113]

(Off the record)

(Video played)

"ANNOUNCER: The following is a paid program of the National Rifle Association.

MR. HESTON: This election could come down to battleground states like Pennsylvania, Michigan, Ohio and Missouri, states with lots of union members where the union vote could decide the outcome. But not all union members will vote as political observers might expect. So we sent **[114]** NRA correspondent Ginny Simone deep into the heart of union country to talk with union members about this election, about the candidates, the issues, and what to them really matters most. Here's Ginny's report.

UNIDENTIFIED SPEAKER: I've been a union member since 1972, and I've been a registered Democrat all my life. I've always just usually voted Democrat straight, but this time around, I -- I can't do it.

UNIDENTIFIED SPEAKER: Basically the union is always, you know, vote Democrat, vote Democrat, vote for Al Gore. Well, I don't see it that way. It's -- you know, I -- I want my freedom, I want to hold onto my guns, I want to vote for Bush.

UNIDENTIFIED SPEAKER: All this union leadership, they send you stuff all the time. I get stuff in the mail, vote for Al Gore, this is what Al Gore stands for. And of course, George Bush has a -- you know, an X out on his face and this will be the bad guy.

UNIDENTIFIED SPEAKER: I have to vote my heart. My heart says, well, I'm sorry, union. You say endorse this man, I can't do it in good **[115]** conscience.

GINNY SIMONE: Well, Gore's counting on you guys.

UNIDENTIFIED SPEAKER: He can count on who he wants to, but he's not going to get my vote.

UNIDENTIFIED SPEAKER: I believe that the Democrats at one time was a party for the working people. I believe now it's a party who wants to control the working people, not for the working people.

UNIDENTIFIED SPEAKER: My biggest issue probably is Gore's ideas about the Second Amendment, about wanting to take away your -- your freedom to carry a gun. Even though we're out in the country, crime does come out here, car jackings happen, robbery happens. It makes me feel safe. I know I'm safe with it, and it makes me feel safe having it.

GINNY SIMONE: Are there gun owners like yourself who may be registered Democrats who are looking at the race differently because of the current issue? I mean, do you hear them talking about it?

UNIDENTIFIED SPEAKER: Yeah, I know **[116]** that some are. I know that some are very opposed to what Gore has been saying. I know of two that actually changed their parties. They went down and reregistered as Republicans because they were so upset.

UNIDENTIFIED SPEAKER: Look at the crime in this country. I think I should have the basic right to defend not only myself but my family, my home, my castle, if you will. I don't want someone telling me that I can't do that.

UNIDENTIFIED SPEAKER: All the laws that they pass today have really done nothing to deter crime or change the situation. All they've done is interfere with my right as a law-abiding citizen.

UNIDENTIFIED SPEAKER: Al Gore has already stated that he would register all firearms, and I just -- I can't support that type of a philosophy.

UNIDENTIFIED SPEAKER: What concerns me the most is what Steve just said about registering our guns. I don't want to -- I have a hand gun, and I've had NRA training, and I'm a survivor of domestic violence, and I believe in self-protection, and I do not want my guns taken **[117]** away.

UNIDENTIFIED SPEAKER: A loss of my gun rights is what Al Gore represents. There's no ifs, ands, or buts about that. In my mind, this administration -- if Al Gore and his administration is voted in, we will lose firearm rights.

UNIDENTIFIED SPEAKER: Every move they made was a calculated effort to take us further down the road to having to give up our guns.

GINNY SIMONE: But Al Gore says I'm different, I'm a strong supporter.

UNIDENTIFIED SPEAKER: Al Gore, you know, discovered the Love Canal, and Al Gore invented the Internet.

UNIDENTIFIED SPEAKER: I resist a man who wants to take away guns. I would not believe Al Gore for a minute on anything.

GINNY SIMONE: These politicians, they go, I know that guy out there. I understand where he's coming from. Do those politicians in Washington really understand what you mean when you say I don't want you taking away my rights?

UNIDENTIFIED SPEAKER: The politicians in Congress and the politicians in the White **[118]** House don't have a clue what an average American lives through. I drive through a neighborhood now going to work every day that the crime rate has gone through the roof.

UNIDENTIFIED SPEAKER: It scares me to see four more years of this, because it's just more and more of these people in the White House, and that's the way -- that's the way you lose your rights. You don't lose them all at once. You lose them slowly over time.

UNIDENTIFIED SPEAKER: Al Gore, I can't trust the man, for one. The man is like watching a modern-day version of Dr. Jekyl and Mr. Hyde. He's says one thing out of this side of his mouth and then he goes with the other side. And I just believe he just wants to tear this country apart.

UNIDENTIFIED SPEAKER: I see him as the enemy of gun owners, the enemy of freedom.

GINNY SIMONE: What do you say to that union guy out there that says how could you vote your rights over your job?

UNIDENTIFIED SPEAKER: My rights are most important. My job, I can always find another one. My rights, I can't replace.

UNIDENTIFIED SPEAKER: Yes, it's nice **[119]** being part of my union, it helps protect me. But having my right to bear arms is something that is extremely important to me. It's something that's kind of just been engrained in me.

UNIDENTIFIED SPEAKER: You got to have your freedom. And the Second Amendment is one of them. And you take that away, something else is going to follow right behind it.

UNIDENTIFIED SPEAKER: First off, if a Republican is elected to office, the world's not going to end, the jobs aren't going to go away, unions aren't going to disappear. That's a great myth perpetuated by the Democrats.

UNIDENTIFIED SPEAKER: George Bush isn't going to take away my job as a union job, but I can see Al Gore taking away my freedom for firearms, my Second Amendment rights. I can see that coming. It's there.

UNIDENTIFIED SPEAKER: We wouldn't be Americans if we didn't have firearms.

UNIDENTIFIED SPEAKER: Apparently the people who don't know history are doomed to relive it, and that's where I see this going. If it weren't for firearms in this country, this country would never have been established as it **[120]** was over 200 years ago.

UNIDENTIFIED SPEAKER: Guns are part of our life, just like a hammer or a saw. And to lose that freedom, to be willing to give that up for our children and our grandchildren, I'm not willing to do that.

UNIDENTIFIED SPEAKER: We grew up with guns. We enjoy guns. I'm going hunting here in a couple of weeks. It's a heritage. It's American heritage.

UNIDENTIFIED SPEAKER: I risked my life to protect the freedoms of all the people, and they're trying to take some of that freedom away from me that I fought for, and I just can't believe that they would do something like that.

UNIDENTIFIED SPEAKER: It is a freedom, and I don't want it taken away. Someone worked very hard to give me that freedom, and I want to keep it, I want to keep it safe.

GINNY SIMONE: When you go to that voting booth in November, what do you think is really at stake?

UNIDENTIFIED SPEAKER: What's at stake? A way of life.

UNIDENTIFIED SPEAKER: The Second **[121]** Amendment is definitely in jeopardy this time, and America better wake up because this is one of our freedoms that we do enjoy, and it's in danger of being gone.

UNIDENTIFIED SPEAKER: You have to vote to keep your country free. You have to vote for the Constitution. That's one of the things on January 20th, when they go up and they swear to uphold the Constitution of the United States, you put that in the background and say it doesn't matter, you know, it's just -- it's crazy.

UNIDENTIFIED SPEAKER: I never thought it would be under attack like it is now. It really hurts me. And Al Gore's definitely going to try to take our rights away from us, just like they did in Australia, like they did in England. It's very disheartening.

UNIDENTIFIED SPEAKER: The freedoms we do have are very important to me, and when I go in to vote on November 7th, I am going to vote for my freedom first.

*****

[122]

*****

"MR. LAPIERRE: Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own any firearm? No hand gun, no rifle, no shotgun? And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they could have three new judges hand picked by Al Gore if he wins this election. **[123]** Imagine, what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Diane Feinstein do to your gun rights? There'd be nothing you can do. What you think wouldn't matter anymore, because the Supreme Court is the final interpreter of the Constitution.

When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights. So please, call this number now to join the NRA, or just find out how you can help. Thank you.

MR. HESTON: It's only days away, maybe a few hours, the day that the remarkable freedom you enjoy needs you to return that favor on election day. I urge you to protect your freedoms on November 7th. It's one way you can thank the many souls sacrificed in freedom's name over the past couple hundred years. They did their part then so you can do your part now. And that includes carefully considering which candidates promise to defend our freedoms and which candidates promise to diminish or even destroy them.

A good place to start is with the most **[124]** fundamental freedom of them all, the right to keep and bear arms. If you're like most Americans, you believe you have a constitutional right to own a firearm, but Al Gore's top government lawyers say you're wrong.

Quote, the Second Amendment does not extend an individual right to keep and bear arms. It must be considered as settled that there is no personal constitutional right under the Second Amendment to own or use a gun.

Shocked? Amazed? I was. I mean, sure, we've seen the Clinton-Gore administration trying to use the power of the federal government to help sue firearm makers into bankruptcy, but now Al Gore's top government lawyers have argued in federal court that you and I have no individual right to keep and bear arms.

In fact, witnesses reported that Al Gore's federal lawyers said the government can ban or confiscate your guns at will, because they say, quote, the Second Amendment does not extend an individual right to keep and bear arms.

That's chilling, especially when you consider that Al Gore has the power, if he wins the White House, to appoint Supreme Court **[125]** justices who agree with his government lawyers. And the next American president will likely appoint up to four justices to the highest court in the land. Imagine Justices Hillary Clinton, Charlie Schumer, and Diane Feinstein on the U.S. Supreme Court. Imagine how they would agree with Al Gore's government lawyers. And since the Supreme Court is the final interpreter of the Constitution, there's nothing that you or anyone else could do to stop them. When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, what freedom is next?

So whether it's affordable guns or expensive guns, advanced guns or antique guns, Al Gore's Justice Department says they're not protected under the Second Amendment. In fact, Al Gore says, quote, I think that we should ban so-called

junk guns. I think that the kinds of weapons that have no legitimate use for hunting or the kind of weapon that a homeowner would use, I think they should be banned, yes, those kind of weapons.

Now, maybe Mr. Gore's never had to worry about money, but is freedom only for those **[126]** who can afford it? Does the Second Amendment say the right to keep and bear high-priced arms shall not be infringed?

Don't get me wrong. Any firearm so poorly made it's unsafe to operate should be prohibited, and under product liability law, it is. But why should a senior citizen or low income working parent or a single mom or anyone on a fixed budget be denied access to self-defense because they can't afford Al Gore's prices? They shouldn't.

Al Gore's also called for a ban on semi-automatic firearms, saying they, quote, didn't exist in the past. But the truth is, the first semi-automatic pistol was produced 108 years ago.

Mr. Gore's contempt for and ignorance of your gun rights seems boundless. Al Gore says, quote, Incredibly, while 18- to 20-year-olds cannot legally buy a beer, cannot purchase a bottle of wine, cannot order a drink in a bar, they can walk into any gunshop, pawnshop, or gun show in America and buy a hand gun.

That's a lie. The fact is, for more **[127]** than 30 years, federal law has prohibited anyone under 21 from buying a hand gun from a licensed dealer.

But it seems Al Gore would rather pass new laws than enforce the laws we have on the books. In fact, in the first six years of his administration, Al Gore presided over a 44 percent drop in BATF federal gun law prosecutions of violent armed criminals. Yet while he tolerates reduced enforcement of laws against criminals, he wants new laws against gun owners.

Al Gore says, quote, I will fight for a national requirement that every state issue photo licenses for anyone who wants to buy a hand gun.

So to own a firearm in Al Gore's America, you'd be screened by passing the government's test, as if there were an abundance of shooting ranges, honest examiners and unbiased bureaucrats all ready to process millions of gun owners. And if they decided you passed their test, you'd have to be photographed and licensed at regular intervals, all to exercise a freedom that the Constitution says shall not be infringed.

But for Al Gore, that's still not **[128]** enough. Mr. Gore believes, quote, We should limit gun sales to one gun a month.

Since when is constitutional freedom rationed? It can't be. Freedom that can be rationed is freedom that can be revoked. A government given the power to say one a month also has the power to say none a month.

But the worst is this. Besides banning, testing, screening, licensing, and then rationing what little freedom is left, Al Gore wants gun registration. Quote, I believe all gun manufacturers and federally licensed dealers should have to report hand gun sales to a state authority.

Registration is the final fatal blow for firearm freedom, because what Al Gore isn't telling you is that where guns are registered, guns are confiscated.

You don't have to take my word for it. Ask the law abiding citizens of England, Australia, South Africa, Canada, even California. They dutifully lined up to register their guns, and all too soon they lined up to turn in their guns.

So an Al Gore government would seek to **[129]** ban affordable hand guns, ban semi-automatic guns, order government screening to pass their test, require national photo ID's and licenses, limit you to one gun a month, then require your gun be registered with state authorities. And we all know where that leads. All because Al Gore's government insists,

quote, The Second Amendment does not extend an individual right to keep and bear arms.

So what we have in Al Gore is a candidate who wants to ban guns, register guns, ration your right to buy a gun and make you pass tests and apply for a license, all to exercise a constitutional right.

What's more, if elected president, Al Gore may hand pick as many as four U.S. Supreme Court justices who might likely agree with his government lawyers that say you have no individual right under the US Constitution to own a rifle, a hand gun, a shotgun, or any gun.

Other issues may come and go, but no issue is as important as our freedom. And the day of reckoning is at hand. On election day, November 7th, you must choose. Your freedom and the freedoms of future generations will hinge on **[130]** how you choose. So when you go into the voting booth and close the curtain, consider the cost to our way of life when essential liberty is lost. Let's honor the full measure of freedom given to us by those who sacrificed their all. Thank you.

MR. LAPIERRE: Did you know right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own any firearm? No hand gun, no rifle, no shotgun? And when Al Gore's top government lawyers make it to the US Supreme Court to argue their point, they could have three new judges hand picked by Al Gore if he wins this election.

Imagine, what would Supreme Court Justices Hillary Clinton, Charlie Schumer and Diane Feinstein do to your gun rights? There'd be nothing you can do. What you think wouldn't matter anymore, because the Supreme Court is the final interpreter of the Constitution.

When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights. So please, call this number now to join the NRA, or just find out how you can help. Thank you.["]

Deposition of Martin T. Meehan
(September 25, 2002)

* * *

[51 (11 PCS/NRA 97)] Q. Can you tell me, sir, how an ad that is intended to influence the outcome of a federal [52 (11 PCS/NRA 97)] election gives rise to an appearance of corruption, if it does?

A. Well, it could. It could if you had a member of Congress who was running for reelection in his or her district and special interests opposed to Medicare prescription drug benefit for seniors started running advertisements that were negative advertisements, some of which are ads I have read, and the federal office holder knew that they were funded by interests against a Medicare prescription drug benefit for seniors and also knew that the ads were probably going to raise the candidate's negatives and potentially defeat that person and knew that the interests would take the ads off the air if they would vote or would somehow try to either within committee delay or try to gum up the works for passing a Medicare prescription drug benefit.

I would say in that instance that the advertisement could have a corrupting influence because in that instance, you would have a member of Congress, member of the Senate concerned about a [53 (11 PCS/NRA 97)] negative ad being run and taking an action to try to prevent the negative ad from airing.

That would be an instance where I would think that the advertisement, while the content – when you asked this question earlier, I was trying to specifically answer the question relative to is an ad corrupting, which – not per se, any more than a Diet Coke is corrupting.

But when an ad is having the effect of defeating a federal officeholder and the federal officeholder knows that the ads are being run by a certain interest and then that federal officeholder gives in to those interests, I think that would be an instance where an ad could have a corrupting influence in the sense that you got a member of Congress to go against his or her constituents.

Q. Let me ask you about that last piece, because the candidate in this example that you have provided would only have to fear the ads if the voters found them persuasive; right? I think –

A. In my experience over 10 years, 99 percent of the federal officeholders who have an ad being [54 (11 PCS/NRA 97)] run by any interest against them in their district are concerned about it.

Q. I didn't mean to cut you off.

A. An ad that's designed to throw mud at a candidate is of concern to anyone who is a federal officeholder.

Q. But is the reason they are concerned is that their constituents may find the message of the ad persuasive?

A. In some instances, yes, the constituents may believe the information that's contained in the ad. Oftentimes, in a 30-second ad it is very difficult to get across any substance. It is very easy to take bits and pieces of information, say something negative about anyone. So yes, 30-second advertisements paid for by either special interest groups or paid for by the political parties can have a negative impact on a federal officeholder.

* * *

[(Rep. Martin Meehan Dep. 124)] harder.' Call. Tell Al Gore to fight to restore the Medicare cuts. Keep the promise. "Help me help those who need it the most."

This was run in 2000, and assume that it was run in the 60 days prior to the general election. And my question to you is do you believe that this ad was intended to promote the candidacy of Al Gore?

(Witness examined the document.)

A. Probably.

Q. Now, let me just move on, because my time is growing short. Have any of your constituents complained to you about the volume of political ads that is visited upon them?

A. Some, yes.

Q. And do you share the concern that there is such a cacophony of negative political ads that it is hard sometimes for candidates to get their message out?

A. I'm of the opinion that 30-second television spots are not the best way to make substantive decisions about policy, about candidates

DEPOSITION OF REPRESENTATIVE MARTIN T. MEEHAN

Q. The Chamber of Commerce, The Business Roundtable and the other business entities listed on the bottom, out of corporate funds.

A. Well, I think it is certainly meant to influence – it appears to be meant to influence the election.

Q. Right, and my question is is there an appearance of corruption that arises out of this ad, in your opinion?

A. You keep referring to the appearance of corruption arising out of the ads. My view is that the appearance of corruption comes from the totality of the system that allows federal officials to raise unlimited amounts of money and that allows increasingly elections in America to be more about third-party interests and soft money than the individual moneys the candidates raise to spend on elections.

* * *

[*171] Q. And if they did use it for that purpose, then that would be an interest in achieving their ultimate goal of electing their candidates to office?

A. That's right.

Q. And then paragraph 5 states, does it not, "I am not aware of any occasions on which the Democratic Party, at the federal or state level, has sought to lobby members of Congress." Is that still true?

A. It is true in the sense that the parties have never -- I have never had the Democratic National Committee lobby me on an issue.

Meehan Dep. 128, 171

Q. And how about the Massachusetts Democratic Party?

A. Not that I can recall on a specific issue before the Congress, no.

[*172] Q. And are you aware of whether or not the Republican Party at either the federal or state level has sought to lobby members of Congress?

A. They certainly have never lobbied me.

Q. Are you aware of any efforts by them to lobby other members of Congress?

A. Not specifically, no.

Q. Are you aware of Democratic national party committees implying or stating that they would either provide or withhold soft money from a candidate to induce support for the party committee's policies?

A. I seem to recall reading something about Bob Franks not getting Republican Party support for his race to New Jersey for the United States Senate.

Q. I'm sorry. My question was the Democratic national party committees.

A. Not that I recall.

* * *

[*218] A. No, it doesn't, because in the first hypothetical, the party is taking a half a million dollars in soft money. We are trying to limit those unlimited dollars. But if organizations, both Democrat and Republican, ended up -- and

Meehan Dep. 171-172, 218

I don't think they will spend the money that they have contributed in soft money.

But if organizations, both in the Democratic and Republican and Independent and Libertarian and all sides of the spectrum, ended up encouraging their members to get out and vote, to register to vote and participate in elections, then the result would be the number of people voting in America would greatly increase. And I think that would be good for the system.

But what has happened is the soft money has been used largely for 30-second television ads. I know you don't want to get into a dialogue about **[*219]** it, but I make a distinction between get out the vote activities, registering people to vote and 30-second ads that technically qualify to be soft money expenditures because they don't happen to say "vote for" or "vote against."

Q. Fair enough. But the truth is the state parties are restricted under your Act from spending soft money on bread and butter grassroots efforts to mobilize their folks to get out and show up on Election Day, door hangers, vote Democratic bread and butter stuff.

I'm genuinely puzzled why you think that kind of what seems to me basic civic participation raises an appearance of corruption when state parties do it simply because of this indirect benefit for federal candidates.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

Washington, D.C.

Monday, September 9, 2002

Deposition of

JOHN L. OLIVER, III

* * *

[46] happy to have collective information as long as you are representing it's from Bush for President or Bush-Cheney 2000.

MR. BERGER: We are going to do our level best to make sure you get that information, whether it's from him or from me.

(Discussion off the record)

BY MS. DANETZ:

Q Once somebody was an authorized agent of the campaign and had a number, did they indicate in some way that donations were the result of their fund raising efforts to the campaign?

A What do you mean by indicate?

Q In other words – and I'll just, to move this along – press reports have indicated that if somebody raised money and they wanted attribution to their tracking number that they would write the tracking number on the check that they had solicited. Is that accurate?

[47] A Oh, I'm sure there are occasions where individuals indicated on the response device cards.

Q I'm sorry, the –

A A card. The federal law requires you to – I don't know if you have one of those or not. I don't know if there's one in existence.

The Federal Election Law requires you to get the following information when someone gives more than $200. Employer information. The wording – and don't quote me on this – but I think it's best estimates – best efforts to get that information.

Q What was that card called?

A It's a response device.

Q Response device?

A Uh-huh. If you are coming to a state, you've got to mail in a card and tell them you are coming. It's called a response device.

[48] Q So I guess I don't understand. How do tracking numbers relate to the response device card?

A There was a place on the response device where you could put in a tracking number.

Q So if an authorized agent – I guess I'm curious. Why would something sent out from an authorized agent result in a response device card coming back to the campaign?

A Well, if you send out a letter – let's say someone sent out a letter, okay? On behalf of the campaign. Then they would include in that response device – they would potentially include the response device and an envelope for it to be sent back by Bush for President.

Q When you say someone sent out a letter, you mean an agent of the campaign sent out a letter?

A Uh-huh.

[49] Q To a bunch of people? To who?

A To whomever he or she were soliciting contributions from.

Q So an authorized agent of the campaign would sent out – can I call it a solicitation?

A Sure.

Q So an authorized agent would send out a solicitation to people who they were trying to fund raise from, on behalf of Bush for President; is that accurate?

A Yes.

Q Then included in that letter would be this response device card that you were talking about?

A Sure.

Q In the letter from the agent to whoever was being solicited, would they indicate, you know, my tracking number is X? How did the person who was the target of the solicitation know a particular tracking number to write on the response device card?

[50] A I don't know how they would know. I mean, the response device card may – somebody may have filled it in before they sent in the little the space that said

tracking number, or they could have encouraged people in the body of the letter to put a tracking number on it.

Q Was it a common practice for the agents to write tracking numbers on the response device card?

A I don't know. I don't know if it was a common practice. I'm sure it occurred.

Q Well, by the definition of the word agent – I'm not trying to trick you, I'm really trying to understand here – if they were an agent of the campaign, they are doing it on behalf of the campaign?

A Right.

Q Is that true? You are here today to testify on behalf of the campaign; is that true?

[51] A That's correct.

Q So what I'm trying to understand is, was it a regular practice of the campaign through the particular agents to write a particular tracking number on the response device card that would then be sent back in?

A I think there are people that were authorized agents that did that, yes. I don't know if it was a regular practice of the campaign. It was probably more a practice of the agent, he or she themselves.

Q Do you know, in your capacity as a representative of Bush for President, do you know of other ways that agents conveyed or told the people they were soliciting, this is the tracking number, and I would like you to write it either on your response device card or somewhere else to let the campaign know?

A Sure. People put that in letters as well.

[52] Q I see. So if you know, what would be an example of something that someone would write in a letter?

A You are asking me for speculation. You could put, please put my personal tracking number, you know, 1234, on your checks, as I'm trying to become a Pioneer.

Q Now, when the campaign received checks and/or response device cards, and they had tracking numbers on it, what did they do with that information?

A I think it was – when the checks came in from individuals, they usually came in to – they would come in to one of the staff, and they would be tracked. There would be a computer indication, an entry into a computer, that they had received contribution on behalf – they had received a contribution with that tracking number on it.

Q I see, so was there a spreadsheet of some sort maintained?

[53] A We have produced for you – the lawyers have produced for you our information about how much people's tracking numbers had by them.

Q Right, and I appreciate that and I'm happy to have that document. I don't mean to be glib, but what I'm trying to determine is, if during the campaign there was a spreadsheet maintained that had a tracking number, perhaps other information, and also was used to track the contributions that came in for that particular tracking number.

A Oh, I think there probably – yeah, I don't know if it's a spreadsheet, but I think people kept lists, sure.

Q So I'm trying to understand, how was that information maintained? Who kept those lists?

MR. BERGER: I can help with part of that, because there may be come confusion. The spreadsheet that we produced [54] to you was merged in a document which we created, which was the identity of the Pioneer with the historical spreadsheet maintained by the campaign.

That's where the column in the information that says contributions as of March 31st comes from. That was a contemporaneous document prepared by the campaign, and we merged them for you so that you would have that.

I think the remaining part of your question is, who was responsible within the campaign for maintaining that spreadsheet?

THE WITNESS: Is that right?

MS. DANETZ: Yes.

THE WITNESS: The spreadsheet was kept by – the regional people kept them for individual people in the regions.

BY MS. DANETZ:

Q So again, I'm going to refer back to your individual testimony, and tell me and/or correct me if I'm mischaracterizing [55] it, but I believe you stated that there were four regional people who worked for the campaign; is that correct?

A That's correct.

Q I believe you identified them in your personal deposition; is that correct?

A That's correct.

MR. BERGER: Have their names changed in the last hour?

THE WITNESS: No.

BY MS. DANETZ:

Q They were, just for making it clear –

MR. BERGER: Beth Sturgeon?

THE WITNESS: Yes.

MR. BERGER: Travis Thomas?

THE WITNESS: Yes.

MR. BONIFAZ: Mary Kay Kelly, now Johnson?

THE WITNESS: Kelly, now Johnson.

MR. BERGER: Heather Larison?

THE WITNESS: Yes.

[56] BY MS. DANETZ:

Q So those were the four regional people that would have maintained spreadsheets for agents from their particular region?

A Sure.

Q This might go back to my confusion, so feel free to jump in if necessary.

Was there a form of how the spreadsheet was maintained? In other words, did they all maintain the same information within their respective spreadsheets?

A I don't know what particulars they kept within their individual spreadsheets. A lot of people kept their own list, too. A lot of the individual people who wanted to be Pioneers kept a list, too.

Q I want to go to Exhibit 2 again.

A This one?

Q Yes.

A Okay.

[57] Q There's a lot of information asked for in this document, and if you notice about halfway down, the form asks for the industry; is that correct?

A That's correct.

Q Could you tell me why the Bush Exploratory Committee and also the Bush for President, Inc. asked what industry the particular agent was affiliated with?

A For purposes of probably knowledge of what industry they were involved in.

Q Well, right, but I mean, I'm assuming that the campaign didn't ask for extraneous information, so I'm just wondering what particular interest the campaign had in the industry.

So for example, just by way of explanation, I can understand why it's of interest to the campaign that in this case – and correct me if I'm wrong – Peter Adams

pledged to try to raise $100,000 by September 1st, because the campaign was

* * *

[106] them.

Q Did individuals associated with the oil industry come to the campaign to reach out to members of the oil industry?

A I'm sure there were individuals who happened to be involved in the oil industry that raised resources for the campaign and, in doing so, talked to the people that they knew.

Q Were these tracking numbers helpful in understanding how those different kinds of efforts were going?

A The tracking numbers were for the purpose of being able to tell individuals and tracking what individuals did themselves as individuals.

Q Were they also helpful for that effort, to reach out to different industries?

MR. BERGER: Objection, ambiguous, but you may answer.

THE WITNESS: I don't know if they

* * *

[(Daniel Seltz Dep. 187)] you look?

A. I would ask Ken or Jon if they had it in their files.

Q. Was there any consideration given to giving the coders the option to answer question 6 both?

A. I don't remember conversations specific to number 6. I know that there was — one of the things I learned in doing this is there are times when you want to force the coder to make a decision and times where you want to be able to give the coder a third choice like the unsure unclear option here so my understanding was that this was — I don't remember conversations about the work, the particular wording of this question, I wasn't part of it.

Q. You will agree, won't you, you reviewed all the storyboards for the issue ads in 1998, haven't you, Mr. Seltz, have you?

A. Every single one?

Q. Yes.

A. I looked at the vast majority.

Q. You will agree there are many

CROSS-EXAMINATION OF ROBERT Y. SHAPIRO

Q. So when you refer to specific tables, we are not to understand that to mean that you are citing those tables as authority?

A. Here they are authority with respect to public attitudes with respect to corruption. The question is actually referring to corruption directly in the tables.

Q. So tables 3.1 to 3.9 are the support that you are citing for this statement?

A. Yes.

Q. Based on your review of the data, are you aware of any public opinion data that indicates to you that the BCRA will have the effect of reducing the appearance of corruption?

MS. PATTERSON: Objection to the form of the question.

THE WITNESS: Would you repeat that again, please.

BY MR. KELNER:

Q. Sure. Based on your review of the data, are you aware of any public opinion data that indicates to you that the BCRA will reduce the appearance of corruption?

[*115] MS. PATTERSON: Same objection.

THE WITNESS: There is no way to tell from the current, from the current data.

BY MR. KELNER:

Q. So is your answer to that question no?

MS. PATTERSON: If you could allow the witness to finish his response before you ask him another question.

BY MR. KELNER:

Q. I'm sorry. Were you not finished?

A. No. I wasn't finished. There is no way to do -- the data don't directly address what the future will look like because the future that we're about involves changes that are, that haven't occurred yet.

Q. And do I correctly understand, therefore, that you are not aware of any data that indicates that the BCRA will reduce the appearance of corruption?

A. No. No public opinion survey data of the sort that I have sought to find because the, the kind of data that you want, I haven't come across the data that would satisfy me to answer your question, that would deal directly with it.

Q. And so you as an expert on public opinion, **[*116]** just so I understand, have no basis for concluding that the BCRA will reduce the appearance of corruption?

MS. PATTERSON: Object to form and mischaracterizing testimony.

MR. KESSELMAN: Object.

THE WITNESS: I haven't seen any data. There are no available data that would enable me to answer that question.

BY MR. KELNER:

Q. I'm not sure you are answering my question when you put it that way.

A. Ask the question again and I'll try to give you a yes or a no.

Q. I'm trying to get a clear answer on this so that I can understand your position. And what I want to know is whether you are aware of any basis in your capacity as an expert on public opinion for believing that the BCRA will reduce the appearance of corruption?

MS. PATTERSON: Object as to form and to the extent it mischaracterizes previous testimony.

THE WITNESS: No data directly. In answer to one of your previous questions, based on theories about public opinion change, you can speculate, **[*117]** imagine under scenarios under which that would quite readily occur. But in terms of the answer to your original question, no based on the data.

BY MR. KELNER:

Q. Let me go back to something that counsel and I have discussed during one of the breaks, which is the topic that I raised at the beginning of the deposition. I understand you testified this morning that you were contacted in July, you think, by Mr. Kesselman, with regard to your being engaged as an expert witness in this case?

A. Yes.

Q. How many times, if you recall, did you meet with counsel after that initial conversation through today?

A. First time I met counsel was yesterday. So I did not meet them at all.

Q. Have you communicated with counsel?

A. Yes. We have communicated by telephone and by e-mail.

Q. And which attorneys were you communicating with?

A. I was communicating with Marc Kesselman and then with Krisan Patterson and then -- somebody else from this firm. Whitner?

DEPOSITION OF REPRESENTATIVE CHRISTOPHER SHAYS

Q. In what ways would raising the soft money as you have just described, if you had actually appealed for the soft money, in what ways would that have corrupted you?

A. In what ways do I think it corrupts all of us?

Q. Yes.

A. Because the money is large and it is unlimited and it is, in my judgment, against the law.

It has been against the law since 1907, and I believe that, even though the FEC has allowed this, I believe the intent has become so distorted. It was for educational purposes. It was not to help defeat or elect a candidate.

There is no one in Congress that I know of who will tell you that when we raise this money, it is for educational purposes. We all **[*41]** know it is to be used to help our colleagues who are in trouble to defeat a person who is running against a Republican, in my case, or to help elect them. We all know it. There is not a person in Congress who doesn't know it. Yet, it has been against the law since 1907.

Now, I am using corporate treasury money because that is mostly what Republicans seem to do. The Democrats get corporate money and they get union dues money.

I am outraged that my wife, when she was in Connecticut, was a member the CEA, and her money that she gave --

Q. What is that?

A. The Connecticut Education Association, and she was a member of the New Canaan Education Association.

She paid dues, and some of her union dues were used to help the Democratic candidate for Governor. It was not a Federal election. I was up for election at the same time as the State Representative.

[*42] Her money was used to help a Democrat who she opposed. She supported a candidate named Leroe (phonetic). What she had to do was go to her union and basically tell them she didn't want her union dues money. What happened, because of the law, was she had to leave the union, her union dues money, and she had to pay an agency fee.

It has always been eating at me that her union dues money was used to help an opponent who she opposed, who I opposed, and who, in the process of using her money, was helping the candidate who was on the same election cycle.

So, I have always thought about this and thought if I had a chance, I would want dearly to make sure we enforce the 1907 law and the 1947 law and make sure no union member has to see his union dues money go to a candidate they oppose.

Now, if that union wants to help a particular candidate, have a political action committee and ask the members to voluntarily give. My wife would not have objected if they had done that in Connecticut. She would not have given to **[*43]** that political action committee.

I am going to just say to you one of the things that has astounded me about my own Republican Party. They say they want union dues money to be voluntary, but they voted against a law, excuse me, union dues money not to be voluntarily; I want to say it correctly.

They said no one should be forced to give to a candidate through union dues they oppose, but when they had a chance to vote for a bill -- some of my colleagues, particularly my leadership -- that would have carried out that wish and enforced the 1907 law, amazingly, some of my Republicans voted against it. It is just something I have a hard time wrestling with.

Q. Congressman, I take it from your answer that the corrupting influence of corporate or union treasury money is that it is unlike PAC money because it is not contributed to the corporate treasury or the union treasury by the donor for the specific purpose of political activity.

[(Rep. Christopher Shays Dep. 111)] position. In this case, I have a bit of an advantage. I know John Ensign is for cutting taxes, and I know Harry Reid is not usually. That is a bias I have as a Republican, but I believe it to be true.

If this ran, it would clearly be under our law, and I think it is reasonable. It would be under our law because I think it agrees probably with one person's position, but not the other. I think it is designed to influence the election, frankly.

Q. On whose behalf or to whose favor do you believe this was designed to influence the election?

A. I would not know unless I was in Nevada and knew the group, so I am speculating in this case. My speculation is this was probably designed to help John Ensign. I could be wrong, but it was probably designed to help him.

In either case, even if I am wrong, it is designed to impact the outcome of the election. So, it would be a campaign ad and should be used

[(Rep. Christopher Shays Dep. 128)]

react to it.

No; I bring the context of my somewhat knowledge of the race, and I believe Al Gore was criticizing me and every Republican for making Medicare cuts and that he was the champion of Medicare.

So, I am pretty comfortable, I think, telling you this is clearly designed to benefit Al Gore. I could be wrong on that, but it does mention his name and it would be defined as a campaign ad.

- - -

(Whereupon a document was marked as Shays Deposition Exhibit Number 9.)

- - -

BY MR. COOPER:

Q. Another story board.

A. (Reading) McCain: For years, special interests and big money have had a negative influence on local, state, and national elections. Arizona's Clean Election Law changes that. In 1998, you voted for the Clean Elections Act and

CROSS-EXAMINATION OF REPRESENTATIVE CHRISTOPHER SHAYS

Q. Have pollsters, perhaps Mr. Luntz or others, indicated to you that, in terms of statistical validity and ability to project to the population as a whole, the self-selected response rate of something on the order of six and a quarter percent would probably not be fairly projectable to the entire population?

A. They would tell me that statistically it would not be what a professional pollster would depend on, but they did express appreciation that so many people did respond. In other words, they felt that we got a good response. So, as Congressional polls go, they thought it was a very good poll.

Q. Let's turn back, if we could now, to the RNC gala. I am now informed that the 2002 RNC gala was at the D.C. Convention Center. Does that ring a bell?

A. I've been to that convention center, but I don't think I've been in the last two years. I may have. I know I was scheduled to go, but I don't think I went. I do go -- I did go to -- as you were asking the question, I did go recently to the one on **[*11]** Connecticut Avenue at the Hilton which was honoring J. C. Watts.

Q. And when was that?

A. That was, gosh, jut a few weeks ago, J. C. Watts and Dick Armey.

Q. Was that a fund-raiser?

A. Absolutely.

Q. Were you asked to raise money for that event?

A. You know, that one I was not asked to raise money for. And let me say that the one that I was asked to raise money and which they gave me a list of soft money at the Presidential dinner in which we then responded by raising hard money, I would have gone had I been in Washington. I wasn't in Washington. But I would gladly have gone.

Q. With regard to the one recently at the Hilton honoring J. C. Watts, was that a fund-raiser for both hard and soft money to your knowledge?

A. I would think it had to have been. I will say that the focus was on hard money. It was a real effort, I think they raised like 6 million. And I think most of it was hard money, but not all of it. But it was I think an effort to raise hard money.

Q. Was that the fund-raiser with Mayor **[*12]** Guiliani as the headliner or was that a different one?

A. I think that was a different one.

Q. Sticking with the one at which J. C. Watts was honored, was it a sit-down dinner?

A. Correct.

Q. Do you recall anyone you sat with at that dinner?

A. I sat down with -- I do recall. I sat down with a member who I would have to look at my membership list to remember who it was. I sat down with one member who couldn't find his own seat and joined us. It was a --

Q. I think that should go without comment.

A. Thank you. I appreciate that.

MR. WITTEN: Anybody want to seal that portion of the transcript.

BY MR. BURCHFIELD:

Q. This was a Democrat, right, Congressman, who found the wrong fund-raiser too.

A. There were two families there. They were as I recall thrilled that they were sitting next to a member of Congress. And I felt very good that they felt that way. They had Indian background. They both had married Indian wives, who had found their **[*13]** wives going to India. And one of them had a precious child who probably was five years old who was there.

So it was I think either two families that were related, either the two brothers were related, the two men were related as brothers, and then their two wives and their daughter. And someone else during the course of the dinner sat down. But -- and I don't frankly remember their names.

I don't think I saw a list of who I was sitting with. And I will just tell you, I was kind of pleased because at this dinner I was more in the middle of the event. Usually, when I go, I'm kind of stuck out in the outer reaches. So I felt kind of pleased that I had a decent seat this time. I remember that event, it was a lovely event.

MR. BURCHFIELD: Let me ask the reporter to mark as Shays Cross-examination Exhibit 2 the seating chart from the May 2002 RNC gala which indicates that you were assigned a seat. That doesn't necessarily mean obviously that you attended, but I just want to ask you a couple questions about this.

THE WITNESS: You know, I would be able to answer the question if you give me the date, I could call my staff and they could tell me if I was at the **[*14]** event, if that would be helpful.

BY MR. BURCHFIELD:

Q. If that would -- it's up to you.

A. Would you mind if I did that.

Q. No, I'm fine with that.

A. The date again was May?

Q. May 14, 2002.

A. Of this year?

Q. Of this year.

A. I will just ask them.

MR. WITTEN: We'll go off the record.

(Discussion off the record.)

(Shays CX Exhibit No. 2 was marked for identification.)

BY MR. BURCHFIELD:

Q. Congressman, we put in front of you the seating chart which indicates, if you look, the names are alphabetized thankfully. So on page 39 you will see your name assigned to table 314.

I'm sorry, I meant to give you a copy of this.

MR. WITTEN: Thank you.

THE WITNESS: Let me use his so I can mark it up.

On page 39. Okay. C. Shays. That's **[*15]** interesting.

MR. WITTEN: He's pointing you to table ten.

BY MR. BURCHFIELD:

Q. It's table 314, seat ten. And you will see the schematic for the seating arrangements on the front page of this. And you were in the lower left-hand quadrant in the second -- middle of the second row, if you were there. And let me just -- we have the advantage, Congressman, of being able to ascertain what other people were assigned to your table. And let me just ask you about these names and see if any of them ring a bell.

A. Sure.

Q. Perhaps maybe, if your staff calls back, they can confirm that you were here. But, on the first page, one of 96, the first page of names. Maureen Agron was assigned to table 314.

A. Okay.

Q. Does that ring any bell?

A. No.

Q. The next page, Jane Anderson?

A. Okay.

Q. No bell?

A. No, it doesn't ring a bell.

[*16] Q. Page 16, Jay and John Froshaug?

A. That doesn't ring a bell.

Q. Page 20, Barbara Hayes and Jim Hayes who I take it are not spouses?

A. Okay.

Q. It doesn't ring a bell?

A. No.

Q. Page 22, John Hysom, H-y-s-o-m?

A. Is this the place you have to go up the escalator to go to the second floor in the convention center?

Q. I believe that's right.

A. I'm not sure I was there. I'm going to have you speak to my staff when she gets back directly without me even talking to her.

Q. All right. And the last person that we found assigned to that table was on page 30, Lloyd Moore. Still no recollection?

A. No. You know, I'm sorry about that. But none of these names ring a bell.

Q. It is quite possible, Congressman, that you did not attend. I take it that -- I take it that the --

A. Don't go into that assumption just because I don't know, because at these events it's noisy, **[*17]** someone can tell me, you know -- I can tell you the conversation I had with -- you know, there were two businessmen in the event that I went to and an older gentleman at the event that I went to at the armory. And so I remember that event.

So I think I would remember the people. But I can't tell you who the names of those individuals were. I did get cards from the two men, but I don't know what I did with them. I sometimes take cards and, if I don't mark where I get them and I leave them stacked up, I end up throwing away the card because I don't write notes on it. When I write notes on it, I do fine. So at any rate.

MR. WITTEN: You've answered the question. That's what you should try to do.

BY MR. BURCHFIELD:

Q. You have, you've fully and fairly answered that question. Let me ask you, and this exercise may prove no more fruitful, but at least it's not taking a lot of time. This is the seating chart for the RNC gala in May of 2001 which I'm informed was at the D.C. Armory. Let me show you a seating chart for that. Let's mark that as Shays Cross-examination Exhibit 3.

MR. WITTEN: Let the record reflect that **[*18]** the Congressman is talking to his office and relaying information he's getting from his office.

BY MR. BURCHFIELD:

Q. We need to go back on the record at this point and just let the Congressman state what he has found from checking with his scheduler in his office. And let's start, Congressman, with the May 2002 RNC gala on May 14, 2002. You've checked with your office and what do you now believe to be the case?

A. It is my strong sense that I was scheduled to go to it. I would have been happy to go to the event, but I was also being recognized by the Sikhs. I was being recognized, I think Congressman Honda was being recognized, and McDermott was being recognized.

We had put in legislation pointing out that the Sikhs should not be discriminated against and they're basically a wonderful part of our American society. And so I went to the event a little late. I ate and then I was -- I spoke. I felt I should stay to hear the others speak.

By the time I got out of there, it just was pointless to go to the event. And I'm very comfortable in saying I did not go to the event on the 14th. And I felt badly about it because I knew that they reserved a space for me and there were **[*19]** people expecting me.

Q. Did your scheduler also check your schedule on May 22, '01, for the 2001 RNC gala?

A. I didn't ask her to, but I might remember that one. What is that one again?

Q. That was at the D.C. Armory.

A. I went to an event at the D.C. Armory. If that was the event that the President spoke at and the Vice President spoke at, they left early before the dinner was over. I went and there was an older couple and there were two younger gentlemen there who were in business together.

MR. BURCHFIELD: Let me ask the reporter to mark as Shays Cross-examination Exhibit 3 this chart.

You've got that in front of you, Congressman, it's this one. This one is a little easier to deal with because we've determined you were assigned to sit at table 125 which is shown on page 5. And it lists the people who were also assigned to that table.

THE WITNESS: This one I can mark.

MR. WITTEN: You can mark it.

(Shays CX Exhibit No. 3 was marked for identification.)

[*20] BY MR. BURCHFIELD.

Q. Once you've had a chance to look at that, Congressman, could you just tell me if you recognize the names of any of the people there and could you confirm one way or another whether those were the people that actually sat at your table.

A. Sadly I can't. I don't recall. Usually the people they assign to me were not from my district. And I don't recall sitting with anyone who was from the district. I just -- I just remember a couple and I remember two brothers who were there.

Q. Okay. Congressman, has there ever been an instance that you can recall as you sit here today in which someone you have sat with at one of these fund-raising events, and I know Congressmen are asked to go to a lot of fund-raising events, a fund-raising event for the Republican National Committee has subsequently come to your office or called your office and sought to meet with you on a legislative issue?

A. I don't recall. But, if they had, I would have gladly met with them.

Q. And I take it, on some testimony that you gave the last time and on the tone of that answer, that you like

many Congressmen pretty much have an **[*21]** open-door policy to meet with people who want to talk to you about important legislative issues?

A. That's correct.

Q. Okay. That's all I have about fund-raising dinners. So we're going to turn to something different now that everyone is sufficiently hungry.

Congressman, and I'm asking you for your understanding in these questions, am I correct that the Bipartisan Campaign Reform Act of 2002 allows state parties to continue raising and spending state regulated money, soft money, for activities not encompassed within the definition of federal election activity?

A. You're correct subject to state law.

Q. Okay. And am I also correct that they can use 100 percent state regulated money in elections when no federal candidate appears on the ballot?

A. I believe that they can spend state money subject to their state law for state candidates as state law allows them, correct.

* * *

[*65] A. The answer is the only thing I was really aware of was that they ran a TV ad against the governor of Texas, my candidate, George W. Bush, that made it seem like he was racist. And I found the ads extraordinarily objectionable. And we never knew who ran those ads.

And part of my interest in the campaign finance reform was to make sure, if an ad like this ran 60 days to an election, that it couldn't happen with corporate treasury money, union dues money, and that, if these ads -- if the person who paid for this ad ran it themselves, not under the headline of the NAACP, that they would have to disclose. So, you know, there was some motivation in the legislation to get at that issue.

[EXHIBITS OMITTED]

Deposition of Carole Shields
(October 2, 2002)

* * *

[58] Q. I would just like to ask a couple questions about issue ads you were talking about earlier. Let he make sure I'm characterizing your testimony correctly. I believe you said sometimes it is important that the issue ads air on television instead of a newspaper, say, that sometimes for [59] People For the American Way to get its message out and accomplish its goal it is better for ad to air on television; is that right?

A. Mm-hmm.

Q. Is that a yes?

A. Yes. I'm sorry.

Q. Okay. Would those ads accomplish the same goals if they were paid for from People For the American Way's PAC as opposed to People For the American Way's regular fund?

A. Would they accomplish the same thing?

Q. Yes.

A. Yes.

Q. Okay. A similar question: You had said sometimes it is important to name candidates in advertisements some- times around election time; is that correct?

A. Yes.

Q. And you said that was important again for People For the American Way to get its message out and to inform citizens; is that correct?

A. Yes. [60]

Q. In your opinion would People For the American Way still be able to get its message out if those ads mentioning candidates were paid for by its PAC?

A. Yes.

MR. LEVINE: Okay. Thank you. I'll have a few more questions in a moment. We are waiting for some copies.

MR. LAWLER: I've got to tell you I'm not sure long they're going to be. It's just to authenticate the certificate.

MR. LEVINE: Yes.

MR. LAWLER: Well, let me just get that back.

THE WITNESS: Can I comment about something he just said --

MR. LAWLER: Sure.

THE WITNESS: -- because there are serious implications in what are making. I think there is an implicit assumption to what you just said, because there are limits on contributions to PACs, right? [61] If we took some larger amounts of money to run some of these ads and to build up enough money with the limit that there are for PACs, you would have to like do a mail program, which is where most of our C-4 money comes from. That would cost an incredibly prohibitive amount of money in a very quick amount of time to be able to build up that amount of money.

(Cell phone ringing.)

THE WITNESS: Excuse me for one second. I have a friend in trouble that I need to have access to.

MR. LAWLER: We're off the record while she takes the phone call.

(Discussion off the record.)

MR. LAWLER: We're back on the record. May I suggest that you read back the last sentence that Ms. Shields said.

(The reporter read the record as requested.)

THE WITNESS: If you were to move the ability to do issue work from a C-4 environment to a PAC environment, what you would essentially do is [62] when an issue comes up, like something comes before Congress, for example, that you want to let the public know is there, you would put a barrier there that would be just impossible to cross because, for

example, to use direct mail to get money and fast enough to be able to inform the public before a vote is taken, you would have to do direct mail that would cost you hundreds and hundreds of thousands of dollars upfront money to be able to do that.

People For the American Way is one of the largest liberal issue organizations out there, and we wouldn't be able to afford to do. Give me 750,000 dollars of money to spend tomorrow to bring in 2 million of dollars of money to be able to put those ads up, give me that.

And imagine if it is an organization that works on some smaller issue that has a total annual budget of $5 or something. So in order to work from an organization like you are suggesting, I mean there are realistic and pragmatic things that just make it impossible. So I don't want to let you said go by as if [63] there aren't implications.

* * *

Deposition of Senator Alan Simpson
(October 1, 2002)

* * *

[11] Q. And is it your sense that this was different either when you started in public office or at sometime earlier than that, or do you think this problem has always been with us?

A. Well, it was -- I'm a Republican, obviously. And when COPE came into the scene, my dad was active in politics. He was governor and U.S. senator. Committee On Political Action. They were big. They were a gorilla in the jungle, and they were cremating Republicans and business people.

So up came the PAC, P-A-C, Political Action Committee, and business industry, BIPAC, all the rest. How do we stop this pernicious union influence? And so they started PACs. And I thought that was a pretty good balance. And it's deteriorated to nothing, where the unions and the business community now have a word for it.

I mean, you used to give to someone who was or your philosophy. The NRA would give to people who were against gun control. I was the beneficiary of much of their largess and assistance. And Charlton Heston, who is a very close friend of mine, did a tape for me at my retirement. A magnificent man.

So here I am. The NRA, and all of them, as [12] far as I know now, huddle in their offices and say, Jesus, we might lose Dingell. So we better figure a way to give something to Rivers. Or, watch out, because they're going to have a new chairman over there in the House committee who doesn't like us at all. But we better get some scratch in there, too, or else he's going to cremate us when he or she gets in there. And there's a word for that. It's called whoring. And that's where you all are right now.

Q. I'm not sure I followed that.

A. Well, I could say it in clearer form. I don't know how. It's not giving according to your deep-held philosophy. It's giving so you can get access and kiss butt and do all the rest of the things so you won't get knocked off the perch.

Q. When you talk -- is it your view, then, that the perception of corruption that exists in our system is a perception that certain groups and individuals who give more money are going to have greater access to elected officials?

A. Number one, that is the case. Yeah, I feel that. That's my personal view, that if you give more money, you've got some guy on your staff who is going to tell your legislative assistant, when you're meeting with somebody from this industry, don't forget to tell [13] Al that these guys maxed out.

Q. And that's going to be true whether or not the person who gave the money is an individual or a group?

A. Doesn't matter. The politician -- you know, somebody does your accounting. And you have a treasurer to keep you out of the pen. And that person takes in money, checks to see if they're citizens of the United States, all the things you need to do. You don't know. You get a contribution from Kids PAC, BIPAC or PAC PAC. You don't even know what the hell it is. You say, check it out. Is it real?

And so the politician doesn't know if it's hard or soft. All he knows is that his counselors and his ad guy and all these people are saying, you need another buy. Go get some more money. And you get money from PACs.

Q. But I'd like to distinguish that appearance of corruption, which is that those who give money have greater access, from another question I'd like to ask you, which is related to what I'm going to call quid pro quo corruption. And when I say quid pro quo, what I mean, and as I'm sure you understand, is that there's some kind of an agreement or understanding between the donor and the elected official that if money is given, that that official will vote in a way that he or she [14] would not vote were money not given. That's what I mean by quid pro quo corruption.

And with that definition, I'd like to ask, is it your view that there is corruption in our system, in that the use of soft money has given rise to a higher prevalence, a quid pro quo type corruption?

A. I couldn't even possibly answer that. All I know is that I voted independently. People didn't bother me much because they usually knew where I was coming from. I didn't have people hanging around my offices because I wasn't always listed as undecided. If you have a U behind your name in Washington D.C. as U.S. Senator, you are visited like Charles Dickins with three spirits. They come in waves to see you.

I haven't the slightest -- I never saw – that is a violation of Wyoming law. That is called bribery. And it's in our statutes, right there on the wall. So that's something -- and I was in the legislature for thirteen years. I don't know people who said -- but if they did, they've been indicted by now. The guy from Pennsylvania, Traficant, who was the big cat on the transportation system, and he's now a big consultant, he's a big butter and egg man.

I don't know people who did that. But if they did, the ones I am aware of have been found out. You [15] just don't do that. That's a criminal thing.

Q. And the purpose of my asking the question, then, is to be clear that when, either in your declaration or this deposition, you refer to the corrupting influence of all of the money in our campaign finance system now, that you are talking about the corrupting effect of buying access, disproportionate access, as opposed to creating quid pro quo type corruption, which, as you say, has always been illegal, continues to be illegal.

A. Yeah. But this kind of money where a guy like Mariani can go to the clink, and yet if he'd done it another way, is a corrupting influence.

Q. In the sense that -- so –

A. It makes people look -- like Mondale said, it looks like hell.

Q. It looks bad -- I just want to make sure I understand what you're saying. Are you saying it looks bad because someone can go to jail for doing something that is almost indistinguishable from something that is legal?

A. That's part of it. Those are not precise things. I can't slice the salami that thin. You know where I'm coming from. I've said what I've said. It's a corrupting influence. It makes people look at the [16] system and say, what are they doing now? You can give money. I can only give five bucks, so my voice is not heard. I can pick up the paper during the campaign and see this guy got five grand. I couldn't give five cents. I tried to see him or her at a town meeting, but I couldn't. And I notice old fat cat Charlie was over there talking to him. So I'm left out.

And they look at that as rotten, evil corruption. They think they're being bought off. That's what Joe six-pack thinks. That's too bad.

* * *

[22] Q. I'm now trying to focus on when those groups or other incorporated groups use their money to directly pay for a political communications broadcast on television or on the radio that refers to the name of the candidate within the two-month period right before that candidate's election and whether or not you have a strong opinion about whether those groups ought to be able to do that.

A. As long as people know who they are and what they're doing, yes, I think that's all right. Then you're into the First Amendment. And they can play around in there all the time. But if you're going to do [23] an ad against somebody -- the 501(c)(3)s, that's what that section was about, I think. And now they've said that's a restraint on the freedom of speech. So here we go again. I believe that's what the decision just two days ago said. But that's immaterial for this.

Just say when somebody gets a group together -- and it was particularly tough on Republicans. And it was Bob Kasten, Senator Kasten of Wisconsin, who brought it up. He said, I'm getting hammered in my state by the sweetest-sounding group of groups that you could ever imagine, and they're eating me alive. And they all have names about better government forever and God looks faithfully on us and just marvelous things. And they were just highly partisan.

And so I don't know whether that's a part of this, but it certainly was part of a previous campaign finance reform.

Q. But your view is that those communications, that the harmful thing about them is when you don't know who's running them?

A. That's right.

Q. And that the solution, therefore, is to create a transparent system so you know who's paying for that?

A. Like you do with any other thing. It says, [24] this ad -- at the end of every ad, it says, this ad paid for by cowpokes for Simpson, box number so-and-so, instead of this marvelous hiding, as transparency is the key. Who is this group? Who's on their board? Who are their officers? You find the head of the Democratic National Committee on there and all these other people. My whole philosophy is to smoke them out. I don't care who does what.

That's why I go back to campaign contribution. Give a hundred thousand bucks and list your wife and what she is involved in and whether you're on the board of Procter and Gamble or whether you're getting money out of the treasury or whatever, whatever, whatever. Just smoke them out. Forget this esoteria of doing good or backing someone. Somehow that's --

Q. Let me make sure -- I think I understand that. If you had, in an electoral district, in a state or in a congressional district, a candidate who got all of his money, 100 percent of his campaign finance money from Enron, but it was known he was the Enron candidate, that it was literally Joe Smith, brought to you by Enron, please elect to the U.S. Congress, then that is a completely transparent system. And the voters of that district are then going to decide, do they want Joe Smith, brought to them by Enron, or do they want someone [25] else who is -- who also is transparent where he got his money?

Let's say the other candidate got his money only from residents of the district, and he lists all of their names, and then the voters decide, of that district, they decide who is going to represent them in the United States Congress.

Now, that's a long hypothetical I've given you. But if that's the way the system worked, do you think there would be an appearance of corruption? I mean, do you think that is a system that is a fair system?

A. It would be better now if I answered your questions and you played with the hypothetical. I don't even know where that's going. But I can tell you that the issue for me is as simple as you can get. You're going to set a limit, fifty thousand or a hundred thousand. Obviously it's not going to be a singular candidate. There's no hypothetical like that in the world. You're going to say you can't give over fifty thousand bucks or a hundred, but you're going to need two million, so you're not going to have every singular candidate. You're going to have lots. But you ought to know exactly where they get their money and who the people are that are giving them the money. There will [26] never be a singular candidate captive of a single entity. They will be captive of entities that everyone will know of.

Q. So are you saying my hypothetical is too far-fetched to comment on?

A. For me it is, yeah. When I practiced law for eighteen years, I never let a witness answer a hypothetical question. So I don't think I'll start.

Q. I don't know whether you mean that it's a bad tactic. I am allowed to ask you that.

A. Yes, you are. And I'm allowed to not answer it.

Q. Well, you can not answer -- you have to answer. But you can say --

A. Well, I can say I don't like hypothetical questions. And I don't. So I won't answer it. That ought to clear it up.

Q. Then let me try to explore another thing, which is the difference between getting support from a for-profit entity, versus getting if from a not-for-profit entity. And let me begin by asking you this question. If you were an elected representative in the U.S. Congress or the U.S. Senate, and in trying to make up your mind how to vote on a specific initiative, specific piece of legislation, you are influenced by the [27] views of the majority of your constituents who elected you -- which is not a hypothetical question, because I assume that, in your experience as a United States Senator, that that dynamic is something you're familiar with -- would you agree or do you believe -- let me not ask it in a leading way. Do you believe that that is the way in which our democratic system of electoral politics is supposed to work?

A. Well, yeah. But they hire you for your brains. I didn't always vote the way my letters read or the polls. I never took a poll. The only poll I ever took was election year.

Q. Let me be clear. I understand the difference in -- that you may not always be governed solely by your constituents, and you're not operating strictly as a delegate. But you are a leader and may choose to buck the majority trend and convince your constituents to change their mind, rather than simply doing what they say.

But I just want to make sure I understand that it is your understanding, as a former United States Senator, that there's nothing improper about that influence, that dynamic that constituents have on their representatives.

A. That's all day long. That's the essence of [28] politics. People are attempting to influence you day and night from every source on every bill. Please vote this way. Help me do this. We hope you'll vote for this amendment. You know, if the phone rings, that's democracy.

Q. Right. That's how democracy works.

A. Yeah.

Q. Instead of it being simply your constituents, your elected -- the residents of whatever district elected you, it is a nonprofit organization that gets its money from voluntary individual members like the NRA -- some of them may be your constituents, but which is organized to promote a particular viewpoint on a particular public policy issue like gun control or abortion or taxes or what have you, and they attempt to influence you by arguing substantively over the merits of an issue, the same way constituents would, isn't that also as distinguished from a for-profit entity – which I'll ask about in a minute -- isn't that also part of the give and take of a democratic system?

MS. SEALANDER: I'm going to object to the description of NRA.

A. I should describe the AARP, then, those worthy 33 million Americans bound together by a common love of airline discounts. You're all in it to get your thing [29] done, and you do it with intensity. I was there.

Q. (BY MR. HUME) Just so you're clear, when you say you –

A. The NRA. You ain't exactly one to wallflower. I mean, you guys got hog. You can terrorize people. You're like the NEA, the National Education Association, or the AARP. You don't think that a Congressman is less terrified, is the word, by the NRA or the AARP or the NEA? They're scared to death of them. And that's part of what I put in here.

But Dole and I would be looking for votes and say, yeah, God, we need your vote here. This is a national issue. And I'd say, I can't vote for that. Why? Because up in my state, the bastards will tear me to bits. And you say, well, yeah, but you're elected to due the national duty. Yeah, but I don't want to spend the rest of my time dealing with that group, because they're tough, they're mean, and they send letters, and they send scorecards. And come on, guys, let's get serious.

Q. In other words, these groups that you've mentioned as examples, the NRA --

A. And you.

Q. -- the NRA and AARP and other groups are powerful and influence the way legislators act because [30] they influence what constituents think?

A. They can go back and fan the flames. They can go back and drive you insane.

Let me tell you one that your group did, so you get the message. You'll like this. Dole and I and some others put together a little piece of legislation -- I think it was two and a half million bucks. You can find it somewhere -- for the inner city of Los Angeles to use -- to advertise that if you brought in your gun, if the Crips and the Blues and the Reds or whatever brought in their gun, they would give you two tickets to a Lakers game and some other things and five hundred bucks or three hundred bucks. And that was the purpose of the money, to try to get guns out of the hands of gangs. Sounded like a damn good thing to me.

And Dole and I and the rest of us got savaged by the NRA and others on the basis that this was a slippery slope. This was a slippery slope to doom. They're out there buying your gun, your precious gun. And God knows, when you're a guy that's been on federal probation for shooting mailboxes

and shot expert with damn near every weapon in the Army, I love guns. I can shoot them. I love it. I hunt.

But for God's sake, when you have that kind of [31] stringency and stridency and then pick on the people who are for you and fight your good fights, it's about purity. And let me tell you, the AARP is about purity. You, by God, help the old farts or you're out in the cold. And they'll send the troops. The scorecard will go back to your district. The scorecard on the NRA will go back to your district. Or AIPAC. AIPAC. We're not a PAC. That's the American Israel Political Action Committee. Power, pure power. And then the scorecard goes back.

And so you have guys who are chilled. And just because they're nonprofit, they're not chilled? Forget it. Forget it.

Q. What is a scorecard, when you refer to --

A. It says, on house bill so-and-so, this jerk voted this way. And here's how our association would have voted. And those go out day and night through your whole tour of duty.

* * *

[39] Q. I can. And I'm interested in the anecdote about the letters, the exchange you had with your constituents over this -- when the NRA sent its scorecard, they wrote these letters, and you responded. Was there ever a candidate who opposed you in any [40] election who made an issue out of this Los Angeles initiative?

A. I don't remember that specifically, because usually I was opposed -- I wasn't opposed in a primary after the first time I ran. And anyone who was a Democrat who ran against me who wasn't totally -- Democrats aren't as thorough on their issue of feeling about gun control sometimes as Republicans. So it never came up in that setting.

Q. What I'm just trying to explore is whether you have any gauge, any way to gauge whether the dialogue, essentially, you had with your constituents over this issue, whether you were able to succeed in explaining to them that you don't have to be an absolutist, you don't have to be an extremist, that you are in favor of gun rights, the Second Amendment, that you're in favor of the core agenda, let's say, of the NRA, but that doesn't mean that you can't see a good program in terms of having gang members in LA trading guns to solve the problem of gang violence in an inner city. Do you have any way of gauging whether you were effective in that dialogue?

A. I was always effective in the dialogue, because I drafted my own letters. I had a thing called the Correspondence Management System. There are [41] probably eight hundred paragraphs in it. And all eight hundred paragraphs, I had drafted. So when a guy wrote about gun control, I'd just say, hit lever Number 842. All mine, all my language. I crafted it. And I go through, and it would be long, two or three pages, and always irritated people.

Look, I wrote to you because I was bitching, and I get back an eight-page letter. I said, yeah, you did. And you asked about my response, and I've given it to you. And I'd often hear back, saying, I don't agree with you at all, but I wanted to know if your brain was engaged and thank you for this.

And I sure as hell did explain what Dole and I were trying to do that some jerk on a talk show had distorted. Today we find out that Al Simpson and Bob Dole have gone from their -- and that happens all day. All these damn talk show people, all they do is get people overwrought and their bowels twisted in a knot. They don't solve anything.

Q. And I hear you completely. But just to be clear, that, I can imagine, enormously annoying and frustrating reality of political life does not – and I'm asking this as a question, and I take it -- I'm asking it in a leading way, I'm afraid. Am I right in saying that despite that annoying reality, you don't [42] think that, for example, the NRA shouldn't be able to go on a talk show and say what it says, but it's just part of reality?

A. That's an absurd question, because I have never spoken about limiting anyone's First Amendment right to do anything. I just think that now you reach for the First Amendment, pull it out of the air, and if you can fit it to Buckley, you can fit it to anything, grass roots versus AstroTurf, you know, the old game back down, you know, how do we keep the grass roots and not the AstroTurf? And there's plenty of AstroTurf that flies around Washington, D.C. and comes out of groups like this. Veteran's groups, good God, try them.

Oh, don't get me started on that. We're about to have lunch, for God's sake.

Q. But let's just take it from that appearance on a talk show, something that is clearly an exercise of their First Amendment right, something that you don't oppose, to something that I also gather from your earlier testimony that you don't oppose but I want to explore, which is the running of issue advertisements, advertisements that satisfy the definition of what BCRA calls an electioneering communication, close to the election, mentioning a candidate.

MS. SEALANDER: Objection, targeted to [43] relevant constituency.

Q. (BY MR. HUME) But I think you understand. So, those types of advertisements. First of all, when the NRA pays for -- let me back up and first ask you, when an issue advocacy group like the NRA wants to convince people to agree with it on a public policy initiative, do you agree that public broadcasting over television is one effective way of trying to do so?

A. Well, they all do that, of course.

* * *

[50] A. Anyway, not the last time. You were talking about the NRA this, the NRA that, as if they were being denied the opportunity to respond. They're not being denied the opportunity to respond if they use a PAC. Isn't that correct? Is that right?

Q. So they are allowed to use a PAC. And it's your view that because the PAC is allowed, that that makes it not unfair. In other words, the individual can use their money, and the NRA or other groups can use their PAC money.

A. Well, first we're talking about media people and media groups.

Q. We've moved on from media.

A. Well, I'd like to move back. Because if the media gets to whack on you with an opinion and the NRA, quote, can't respond but the NRA PAC can respond, I think that's perfectly fair.

Q. Let me ask this question, then. When the NRA runs an advertisement, a political broadcasting communication, and when the NRA PAC runs it, do you think that the American public perceives a difference between the two broadcast communications?

A. Well, not only that, but I don't perceive any difference between a, quote, NRA pronouncement and an NRA PAC announcement. That really is dancing on the [51] head of a pin.

Q. And to the extent that there is any appearance of corruption associated with such an advertisement or broadcast communication, would you agree that there is no difference between that appearance of corruption whether the ad is paid for by the NRA or whether it is paid for by the NRA's PAC?

A. I've never picked a certain piece out of this puzzle and called it corruption on that instance. I'm talking, it has a -- the whole thing has a corruptive influence on Americans and on the political system, the whole issue.

So the one ad where you're coming up with, to name it as -- looking at it and say, boy, this is corrupting, the NRA ad, I'm not even going to address that. I'm saying the whole scheme of things here is corruptive. It doesn't look right. It looks like hell. People think it looks like hell. It doesn't work. It works, but it is not -- I'm not going to pick that one right there out of the air and say this is corruptive.

And you've got the NRA and the NRA PAC. You know, finally this old cowboy can wake up to that. There's no difference to the American public of who that is. None.

Q. When you say you don't want to pick out this [52] one piece of the system, namely the piece of issue advertising -- I'm afraid that is what I'm, as you know, have been asking you about and want to ask you about. And so when you say you don't want to pick it out, do you mean you don't have an opinion on whether or not issue advertising that's close to an election generates any kind of an appearance of corruption?

A. You haven't asked me that one before. You've talked about –

Q. I'm asking now.

A. I'm saying the whole scheme of things in campaign finance has the appearance of giving government and the electoral system a corruptive look. If you want to get down into all of it -- I mean, I don't know what ad you're talking about, if you're talking about an NRA ad or an NRA PAC ad. So let me slice it again.

I don't think the American people or me make any distinction whether the NRA is doing it or the NRA PAC. And if a radio station or a television outlet has an opportunity to hammer your shorts with an opinion, you ought to respond. And if the PAC can't respond, I think that's a phony restriction.

And now go back to, say, the rich guy, who you've asked about, has run an ad and you can't respond. That's phony. But if you're going to respond, then [53] respond with the money, which is the PAC. Don't try to say, we're not responding through our PAC because that's about money. We're responding from the goodness of our hearts of the NRA, the beleaguered members of our affiliation. I don't buy that one.

* * *

DEPOSITION OF SENATOR OLYMPIA J. SNOWE

Q. But you don't think that a similar problem is created when the unregulated undisclosed money in the corporate and union treasuries is expended on precisely the same kind of voter mobilization efforts that the state parties --

A. I don't have any specifics to tell you one way or the other on the amounts of money that are expended by corporations to get out the vote. I'm just not aware that corporations engage in that activity as much as labor unions engage in that activity.

Q. Let's focus on unions.

A. Getting out the vote is a grassroots activity. That's working within their own memberships. Frankly, that is a far different activity, I think, than talking about sponsoring advertisements over the airwaves, communicating to the maximum number of people possible about a **[*160]** particular view or a particular candidate without acknowledging it's a political campaign ad. That's much more insidious, you know.

Q. Unions do engage in that kind of get out the vote grassroots activity?

A. Yes.

Q. And is it your understanding of current law that they can only do that in communications with people who were members of the union?

MS. BREGMAN: Objection; asked and answered.

THE WITNESS: I really can't say.

Snowe Dep. 159-160

MS. BREGMAN: If you have a view on your interpretation of current law, but if you do not know that for sure --

THE WITNESS: I don't know if they are limited to their own membership in getting out the vote. I don't know that.

* * *

[*205] Q. I wanted to clarify that for the record.

A. I appreciate that. Thank you.

Q. I think I will switch to see if at least we can agree, and I will preface a little of this to avoid any potential confusion. When I'm asking you questions about your interaction with either the state or national political party committees, I'm obviously doing that in terms of yourexperiences or observations. I believe you participated in that process.

Are you aware of the Republican Party at either the state or national level lobbying you or other Members of Congress on pending legislation?

MS. BREGMAN: Objection; speech or debate.

You can answer that.

THE WITNESS: I don't know that I can cite **[*206]** any specific instances. I know it hasn't been true of the state party. The state generally has not approached me on any issues. I belive there have been times in which the Republican Party chairman might have indicated a preference on an issue at a policy lunch or something in the past on some issue, but I really can't recall any specific instances.

Snowe Dep. 160, 205-206

BY MR. CARVIN:

Q. And the last part of your answer was the Republican chairman meaning --

A. The national chairman. Sometimes the national party chairman since I have been in the Senate has frequently attended the policy lunches. So it may well be that they might have indicated somewhere along the line in the eight years I have been in the Senate talks about a preference. But I don't remember any specific instances.

Q. Are you aware of any instances where the national party committees -- and I would include in that the RNC, the Congressional committee and the Senatorial committee -- have implied or stated that they would provide or withhold soft money to induce **[*207]** a federal officeholder or candidate to support the party committee's policies? MS. BREGMAN: Objection; speech or debate.

You can answer it.

THE WITNESS: No, I don't have any indication that's happened.

BY MR. CARVIN:

Q. Have you looked at how the National Republican Senatorial Committee makes decisions on which races to fund or not to fund?

A. I have no idea how they make that decision. So that's a good question. I have no idea.

Q. I think I know the answer to this. In light of that, do you have any reason to believe that their expenditure decisions are in any way affected by the identity of the soft

Snowe Dep. 206-207

money donors or candidates who have raised a lot of soft money?

A. No. I don't know that to be true.

Q. And I may be really belt and suspenders here. I take it that is also true of the Democratic national committees?

[*208] A. I would assume so. I don't know.

Q. Does the Senatorial committee, as far as you know since you have been in the Senate, have a policy where Senators will contribute their personal excess campaign funds to the Senatorial committee?

A. Do they have a policy?

Q. Have they ever had a policy since you have been in the Senate?

A. They have asked us to contribute -- you mean left-over funds?

Q. Right.

A. That's correct.

Q. How about solicitation, requesting that Senators help them in fundraising for the Senatorial committee?

A. Yes.

* * *

[*231] Q. You don't have a leadership PAC?

A. No, I don't.

Q. And is it the chairman of the Senatorial committee? Is that what they call the ranking Senator?

A. Yes.

Q. Has the chairman of the Senatorial committee ever mentioned to you soft money donations in a context which even implies that he or she thinks it should influence a legislative activity by you?

A. No.

Q. I think you have answered this. To the extent you are aware of soft money donations, it has had no effect on your performance as a legislator in either the Senate or the House?

A. That's correct.

Q. Senator, do you recall Senator McConnell **[*232]** at any time suggesting that the expenditure decisions of the Senatorial committee would be affected by the amount which Senators raise soft money for the Senatorial committee?

A. No.

Q. Let me ask you a general question while we are looking at that. In your experience, are you aware of the Republican National Committee either soliciting or transferring money to state or local candidates?

A. Did you say soliciting?

Q. Yes. I can break it down for you if it would be clearer. Sending out a fundraiser letter for somebody who is running for governor of some state. Do you have any familiarity with that?

A. No. It is possible. I just don't recollect anything. But it may well be possible. I could have been at some point in time. So much comes across my desk. It is possible. I don't recall. I don't want to say absolutely not and find out that something did get my attention. But I don't recall.

Deposition of Raymond D. Strother
(October 24, 2002)

* * *

[18] Q. Whether we're talking about genuine issue ads, sham issue ads, or express advocacy ads, would you agree that all political advertisements are in some general way designed to influence the political opinions of the audience? [19]

A. It's to educate them. I think there are some campaigns that are not political, some issue campaigns that are not political.

Q. Fair enough, but there are advertisements that are either attempting to influence political opinions or public policy opinions or opinions about a public issue of some kind?

A. There are also those, yes.

Q. Would you agree also there is nothing inherently corrupt or undemocratic about engaging in that sort of public broadcasting in an effort to impact public opinion about a political issue?

A. You're talking about after the First Amendment?

Q. In other words, in your opinion, there is nothing in any way corrupt or undemocratic about the enterprise that your business is involved in of airing these political broadcasts?

A. I don't think so, no. [20]

Q. Do you believe not only is it not corrupt or undemocratic, as you say, you're an advocate of the First Amendment, that it actually makes a positive contribution to political debate generally?

A. It's a two-edged sword. It can make a positive contribution. It can be destructive, I think.

Q. Depending upon what?

A. There are thousands of factors. We can write a book about it. Let's talk about negative advertising. Negative advertising is a two-edged sword. It cuts both ways. In other words, can it be a positive force of communication, yes, but at the same time, it's a negative force. In other words, you can't escape the consequences of your actions when you communicate. There are both positive and negative actions, always. It isn't necessarily always constructive, is what I'm telling you.

* * *

[39] Q. Do you have any experience of any [40] candidate who has ever changed his vote specifically in response to someone who has given a lot of money to his campaign?

A. If I did, I wouldn't say so. I would keep that confidential. However, one thing I try to do is stay out of government. I don't go to Capitol Hill. I rarely have to because you can't do political business there anyway. I don't give advice on how to vote. I never have. It's a principle of mine. I don't do that.

* * *

[139] Q. As I understood your earlier testimony, you believe media consultants generally do not have both candidates and issue groups as clients. Is that right?

A. Generally. [140]

Q. Generally, they do not have both?

A. Right.

Q. In other words, your firm specializes in representing candidates. Isn't that right?

A. Correct.

Q. And other firms specialize in representing issue groups. Isn't that right?

A. Correct.

Q. Generally, they do not have both candidates and issue groups as clients?

A. Correct.

Q. I would like to move onto to your antidote about the F and the C grade from the NRA. This is in paragraph 14 of your declaration.

A. Correct.

Q. This is a specific antidote. Is that right?

A. It is.

Q. Can you tell me who it was that was the candidate?

A. No. [141]

Q. What is the reason --

A. Client confidence.

Q. I'm not sure I understand. How is --

A. It would be divulging a confidence of a client. If I sat in on a confidential meeting, I wouldn't talk about it.

Q. Was this a client of yours? This candidate was a client of yours?

A. Yes. A client of my firm's.

Q. Did the candidate tell you directly yourself, personally, about this episode with the Sarah Brady group and the NRA?

A. Yes.

Q. Do you recall specifically when she told you? It was a woman. Right? Was the candidate a woman?

A. (Pause.)

Q. Do you recall specifically when the candidate told you that? I really thought it was a woman for some reason, maybe because Sarah Brady's name is in the paragraph.

A. Okay. No, I don't recall. It was [142] this cycle.

Q. Do you recall who else was with you when he or she told you?

A. Yes.

Q. Who else was that?

A. I will not divulge that. It was a conference call.

MR. HUME: For the record, the NRA would like to object to your not being willing to divulge that.

THE WITNESS: I don't blame them.

MR. HUME: And for your not willing to divulge the earlier recollections you had of individuals or groups that may have been involved in the two-camera shoot antidote or example that you gave, and would reserve the right to move to strike your testimony, based upon your unwillingness to tell us that.

THE WITNESS: I understand.

MR. KESSELMAN: I just want to put something on the record in response to that objection. I think that Mr. Strother has given [143] a lot of specific examples where possible, where it wouldn't require him to divulge client confidences, and has been incredibly forthcoming in his testimony today. While he isn't willing to give the particular names of people involved in the incident in paragraph 14, an examination of the entire transcript would be littered with specific examples that talk about all the points illustrated in the declaration. You can go ahead and continue with the questioning.

MR. HUME: We'll reserve our right to get into the legal argument later.

BY MR. HUME:

Q. But, just to be very clear, I take it you did not refuse to disclose to me just now, the nature of the identity of this person to save us the time of uttering the name of that person or to save space on this document?

A. No. I refused.

Q. Based on your refusal to disclose a confidence -- what you perceive to be a [144] confidence?

A. That's right.

Q. Do you have personal, specific knowledge of how the NRA grading system works?

A. No.

Q. Do you know whether the NRA runs ads only on candidates who get an F grade?

A. Do not.

Q. Are you willing to disclose where this race took place, this candidates race took place?

A. No.

Q. Are you willing to disclose whether it was a state that is generally thought of pro gun or anti-gun?

A. I tend to represent conservative Democrats, and most places I work are pro gun.

Q. It would have had, I take it, a negative impact on this candidate's prospects for success in the election if the NRA had come out and said that she or he had accepted money from the Sarah Brady anti-gun group? [145]

A. Correct.

Q. The reason it would have had a negative impact on his or her prospects for success is that the voters in that state would not want to elect someone who is closely aligned with Sarah Brady's group. Is that right?

A. That's true.

Q. If that's true, let me ask you, isn't it simple a question of democracy? In other words, isn't the issue with this candidate simply whose side are you on? Do you want to be aligned with Sarah Brady? Do you want to be aligned with the NRA or do you want to be in the middle, and the voters have a right to know in this particular instance?

A. I'm not sure I can answer that.

Q. Do you know how the candidate made the decision between choosing to accept the check or not to accept the check?

A. It was a political decision. That's all I can tell you. It was a political [146] decision.

Q. When you say, "a political decision," you mean based upon what --

A. Based upon how the voter would react if it was disclosed where the check came from. Let me say this about checks so that we're clear about that. Mrs. Brady didn't come and hand a check to this person. Over the threshold you get checks. Checks come in from various group who want the ear or the friendship with the candidate later. This happens with river boat gambling companies, with all sorts of groups. You have to be very careful, when you go through these checks, which ones you accept and which ones would have a negative impact on your campaign. So, if you came across a Brady check and 40 other checks or 30 other checks from some fund-raiser somewhere, you would have to make a political decision, and you would probably say, "It would not benefit me to take this $500 and lose $100,000 worth of support on [147] the other side, which would be how much it would cost me to correct the problem I would create by taking the check." So it's a political decision.

Q. First, I would like to reserve the right to strike the part of your answer that described the phenomenon of checks other than the specific response to the question about how you believe this candidate made his or her decision. I'll now ask you, do you have any basis for believing that this candidate made their decision based upon a fear of not being able to raise money?

A. Yes.

Q. I thought it was your earlier testimony that the decision was made based upon the expected reaction of the voters once the NRA publicized the fact that he or she had accepted money from Sarah Brady's group?

MR. KESSELMAN: Objection, mischaracterization.[148]

THE WITNESS: You haven't contradicted yourself. Raising money is politics. It's all one in the same.

BY MR. HUME:

Q. You're saying it's part of a seamless hole?

A. Yes.

* * *

[223] Q. I also understand your testimony to be that you don't think there's any distinction the public understands between hard and soft [224] money. Is that right?

A. That's correct.

Q. Just to be clear, it's your view that you support BCRA because -- your support is for legislation that keeps special interests groups out of the election process, defined as within 60 days, regardless of whether they're using hard or soft money?

A. That's correct.

* * *

CROSS-EXAMINATION OF RAYMOND D. STROTHER

A. It was the start of what I call the insidious spread of this kind of advertising because they could come in and the candidate, the Republican -- they always were for Republicans. The Republican would say, "I don't know anything about them. I didn't ask them in. I don't know anything about their campaign. Therefore, it's not any of my business," and he was able to get away with that. That was the first of it I had ever seen was in '82 or maybe '80. '82, I think. That's a roundabout way to answer your question, but my beliefs are philosophic and not really specific when it comes to the law.

Q. In your example of the candidate with the $1,000 versus the candidate with $1,000 plus an extra million that he gets, you say that's where corruption comes into the system. I believe that's what you stated. Is that **[*39]** right?

A. That's right. That's my opinion.

Q. I understand. Is it your opinion that that is corrupting because it's simply unequal?

A. No. It's corrupting because it gives the $1 million person undue influence. I came out of a working class family. Let's say, my father wanted to see a congressman. He's dead, but, let's say, he wanted to see a congressman, and he went to Washington to see the congressman, but somebody was in the office at the same time who had helped engineer $1 million to the Democratic party. Who's going to get in first to see the candidate? I can tell you. There is never a question about that. It isn't a democratic process. The person with the most money has the most influence. Corrosion isn't what it does just to the campaign, but what it does to the legislative process. Like John Breaux said, "Renting votes."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

Washington, D.C.

Thursday, September 19, 2002

Deposition of BENNIE G. THOMPSON

* * *

[68] surveys show the voters perceive that money has an undue influence on our democratic process and that ordinary citizen voices are shut out of the process. What impact will increasing these contribution limits have on those public perceptions?

A. I think it will expand the public perception that by doubling the hard money contribution, money is the predominant factor in who gets elected and many times it's such a small segment of the population that has the ability to contribute at this proposed doubling level that democracy would in fact be damaged by that.

Q. What about the impact of increasing contributions on public policy, what will that impact be in your view?

A. Well, in my view many members of Congress react to those individuals who were able to contribute to their election or reelection and if now you had the ability to double many of those opportunities it could narrow the ability of the public to influence public policy and put it in the hands of a precious few who have means.

Q. And when you say many members react to those who contribute, are you referring to those who contribute at the maximum level or near that?

* * *

[87] Q. And why not?

A. Because it sets up barriers to participation by communities of low and moderate income individuals, minority communities and that's what this country should not be. This country should be involved with all its citizens, its citizens should have the ability to participate in the electoral process without being priced out of the market and in my opinion, by doubling the hard money contribution, you price low and moderate income communities out of the market for electoral participation.

MR. BONIFAZ: Thank you, Congressman, for your time. I have no further questions.

MR. HENRY: I just have a couple of follow up.

MR. MILES: I have two.

EXAMINATION BY COUNSEL FOR PAUL PLAINTIFFS

BY MR. MILES:

Q. Do you believe that there should be a law limiting the amount an individual can spend on his own race?

A. Yes.

Q. Thank you.

* * *

CROSS-EXAMINATION OF PAT WILLIAMS

Q. And do you understand the different rules that apply to the raising and expenditure of hard money as opposed to soft money?

A. Not a clear understanding of that, no.

Q. Okay. You understand that hard money is money that is raised subject to the regulation of the Federal Election Campaign Finance Act?

A. Yes.

Q. And that soft money is essentially all other money?

A. Yes.

Q. Okay. Do you oppose the presence of soft money in politics?

A. Basically, yes.

Q. Why?

A. Because so much of it is used for what I see as denigrative, negative ads, which lead to **[*22]** American's distrust in candidates and the system generally.

Q. There's a lot wrapped up in that answer.

A. It was a big question.

Q. Yes, it was. I want to break it down, I guess, into two separate parts. You have one problem with the way the money is expended, that you saw on issue advertising?

A. Yes.

Q. And could you explain that a little bit more?

A. Campaigns -- or, rather, advertisements, particularly on television, which have been used to lead the voter, or potential voter, to a negative view about a given candidate have served to denigrate the public's trust in the system and in candidates.

It has become so egregious that Americans, literally by the millions, are dropping out of politics, refusing to vote, to contribute, to attend forums, and, I think, are embarrassed by the system.

Q. Would you have less of a problem with soft money than if the issue advertisements that were purchased with soft money were all positive in tone, as opposed to negative?

A. I would have less of an issue with it.

* * *

[*56] Q. So a situation could arise very similar to the one in 1993, in which special interest groups could come together and, so long as it was not immediately before an election, air the same kind of advertisements --

MR. LEVINE: Objection.

(By Mr. Stowe) -- as those in 1993?

MR. LEVINE: Objection; calls for speculation.

A. Well, I don't know what -- I don't know what's going to happen. But if the way you present it, in fact, becomes the reality, then I believe campaign finance reform would not have been complete enough, and that groups such

as we are speculating about also be barred from running negative ads.

Q. You would support, then, a bar on special interest groups airing those kinds of negative ads outside the 60-day window?

A. Yes.

Q. And you don't have any reason to think that special interest groups, and the kind of soft-money [*57] expenditures that they make, are any less corrupting than soft-money expenditures by political parties, do you?

A. Any less corrupting?

Q. Correct.

A. Are they any less corrupting? No, I don't know that they're any less corrupting. They may be more corrupting.

Q. Okay. Can you think of some specific instances where issue advertising by special interest groups had negative effects on the political system, from when you were serving as a congressman?

A. Yeah. The Harry and Louise ads -- just to stay on the healthcare for a moment. I think the Harry and Louise ads painted a completely false picture of what former President Clinton and some of us were trying to achieve in the way that healthcare is paid for in the United States.

I can think of ads in Montana -- both print, radio, and television -- which have been run against Montana candidates by front groups for the extractive industries in Montana -- oil, gas, timber, mining -- which have painted what, in my view, is a false picture of candidates and, I think, have confused the voter, unnecessarily denigrated given **[*58]** candidates, individual candidates. And worse, have taken both time and money that should have and could have been spent talking about the issues that are, it seems to me, wholely important.

Let me give you an example -- two examples. We have a country headed, once again, for significant debt, probably headed for war, in which Americans and many others are going to lose their lives. We have a stock market that's lost eight-trillion, seven-hundred thousand dollars in funds; a huge portion of it pension funds, likely never to be recovered by people whose lifetime savings is lost.

And in Michigan, people want to argue about whether or not Paul Wellstone is a communist. And in Montana, they want to argue about whether Mike Taylor is gay.

With all of those issues, money is being spent on negative ads for things that make no difference to America's enormous problems, and the State of Montana's enormous problems right now.

So money is being used to divert attention from those things that the American people and Montanans want to and should focus on, and expect their parties and their elected officials to focus on. And we don't do it because we found out it's **[*59]** more effective to get elected by running negative ads, than talking about the real issues that confront us.

Q. Do you think that negative advertising by special interest groups is going to get worse, stay the same, or get better if parties are prohibited from using soft money to pay for issue ads?

A. Well, people have a way of finding loopholes. And so I don't truthfully know the answer to that question,

because I have great -- I have great belief in the fact that a lot of savvy people are hired to find ways to escape through various loopholes in the law.

I do think that campaign finance reform that is now under question in the courts, however, is a significant, major step over the threshold towards the eventual closing of those loopholes and reforming the system.

Q. You've stated that you refused to raise or accept money from healthcare-related industries back in your 1994 reelection campaign. Again, you're speak of hard money there?

A. Hard and soft.

[1(1 PCS/ER 00001)]

AN ANALYSIS OF THE 1998 AND 2000 BUYING TIME REPORTS

Dr. James L. Gibson

September 30, 2002

INTRODUCTION

I was retained by counsel for the AFL-CIO, the National Association of Broadcasters, and Senator Mitch McConnell to examine two reports produced by the Brennan Center on the subject of "issue advocacy" or political communication. These reports, and their abbreviated titles, are:

Buying Time 1998:

Krasno, Jonathan S., and Daniel E. Seltz. 2000. *Buying Time: Television Advertising in the 1998 Congressional Elections.* New York: Brennan Center for Justice.

Buying Time 2000:

Holman, Craig B., and Luke P. McLoughlin. 2001. *Buying Time 2000: Television Advertising in the 2000 Federal Elections.* New York: Brennan Center for Justice.

In addition, I have reviewed the depositions of three of the authors of these reports (Seltz, Holman, and McLoughlin). Finally, I directly examined and analyzed the raw data upon which these two reports were based. The analytical and statistical methods and techniques I have used in preparing this report are those customarily employed in quantitative analyses of social scientific data.[1] [2(1 PCS/ER 00002)]

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[1] A complete listing of the materials upon which I relied in preparing this report is attached as Exhibit 1.

QUALIFICATIONS

Evaluating these data and reports is entirely within my expertise and competence, as documented in my vita.[2] A few highlights are worth considering:

- I have taught statistics and data analysis for nearly thirty years, including regularly teaching a three-semester sequence on advanced statistics and data analysis for graduate students in political science and other social sciences.
- I have published widely in the leading political science journals, worldwide. I regularly contribute to what are considered to be the three most prestigious journals in our discipline: the *American Political Science Review,* the *Journal of Politics,* and the *American Journal of Political Science.*
- My research has been supported by millions of dollars of grants from the National Science Foundation.

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[2] A copy of my curriculum vitae is attached as Exhibit 2 to this report. In my vita, I list all of my articles and books published in the last 10 years.

I also note that, in the last four years, I have been deposed or testified at trial only a single time. My deposition was taken in *Warren vs. St. Louis Police Officers Association,* on February 22, 2002. My role may only have been that of fact witness, rather than an expert witness, but I note this deposition nonetheless.

My consulting fee on this case is $250 per hour (plus expenses). To date, I have worked approximately 194.25 hours, for a total fee of $48,562.50.

- My published research has won several awards, including an award in August, 2002, for the best paper presented at the Annual Meeting of the American Political Science Association.
- I serve as a peer reviewer for many different publications and agencies, including approximately two dozen academic journals, several publishing houses, [3(1 PCS/ER 00003)]and public and private research foundations ranging from the National Science Foundation and the Australian Research Council to the Russell Sage Foundation. I have also served as Associate Editor of the journal *Law and Society Review*.

Thus, I have had vast experience with data collection and analysis in projects precisely comparable to that reported in the Buying Time reports.

Because the 1998 and 2000 reports differ in many important respects, I report the results of my analyses separately.

BUYING TIME 1998

Summary of Conclusions about *Buying Time 1998*

- *Buying Time 1998* should not be accepted as the product of scientific inquiry, but is instead policy advocacy written by people with a strong ideological commitment to a particular position on campaign finance reform.[3] [4(1 PCS/ER 00004)]

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[3] Nowhere are the intentions and motives of the investigators better documented than in the research proposal "Issue Advocacy: Amassing the Case for

- In general, the conclusions drawn in *Buying Time 1998* should not be accepted because the data upon which the report is based are fundamentally flawed.
- Indeed, to the extent that any reliable inferences can be drawn from the data, the conclusion would be that a very large percentage of the advertisements whose purpose was coded as seeking to influence an election in fact had policy issues as their primary focus.

Reform." See Holman Deposition, Exhibit #3 (copy attached as Exhibit 3). In that proposal, conclusions about the extent of illicit issue advocacy and the dangers it poses are clearly asserted, prior to any data collection or analysis. Furthermore, the authors clearly state their policy objectives: "the purpose of our acquiring the data set is not simply to advance knowledge for its own sake, but to fuel a continuous and multi-faceted campaign to propel reform forward" (p. 2). Further: "The questions we expect to answer are not part of some abstract inquiry. Rather, they are linked directly to a strategy for promoting reform" (p. 3). One of the authors of the 1998 Report notes that one of the goals of the study was explicitly to provide empirical data that would help the campaign finance reform effort. See Seltz Deposition, p. 23, lines 4-5. (Referenced excerpts from the Seltz Deposition are included as Exhibit 4.) Further, he acknowledges that "we were constantly consulting with attorneys at the Brennan Center" (p. 68, lines 12-13) in making decisions about the data base. The strong policy and ideological commitments of the investigators are not compatible with the conventional canons of scientific objectivity and may have undermined the integrity of the data collection and analysis.

General Comments About the Report and the Investigators

At the outset, several characteristics *of Buying Time 1998* should be noted:

- This Report is not the product of any peer-review process. The Report was published by the Brennan Center, not by a commercial or academic press. Thus, the Report was not vetted in any way whatsoever prior to its publication, and consequently the normal process of explication of the project methodology, error correction, and review of substantive conclusions prior to publication did not take place. This seriously limits the confidence one can place in the Report.
- The Report largely consists of a series of tables filled with quantitative information. The tables are rarely explained, analyzed, or interpreted. For instance, Chapter 4 consists of one page of text (p. 87), then 21 pages of tables (pp. 88-108), a half page of text (p. 109), and another page with tables (p. 110). Such a chapter cannot be taken as serious scholarship. Serious scholarship would carefully explain the objectives of each of the analyses, the details of how the data [5(1 PCS/ER 00005)] were manipulated, and would carefully and clearly link any substantive conclusions with specific empirical evidence. None of this takes place in this chapter, or in this report more generally. This report was surely published "inhouse," by the Brennan Center itself, because, based on my experience as a reviewer for publishing houses (and the sort

of review I would submit were I called upon for publication advice), I doubt whether any academic publisher would publish a document like this.

- No data base has been (nor can be, it appears) produced that will generate the specific numbers found in this Report. This is in part because the data set is continuously being manipulated and changed. But it is also a function of the lack of transparency in the statistical analysis that underlies these tables. I will give specific illustrations of this throughout my report, but most tables do not provide sufficient information for an analyst to replicate the findings. In the social sciences, we demand that statistical analysis be replicable (that another investigator using the same data be able to reproduce exactly the same findings). This report is not replicable, and that undermines tremendously any confidence one should place in the findings produced.
- The Report is filled with questionable statistical techniques and applications.
- Finally, I must note that the authors of the Report apparently were not involved in collecting either the data about the airings (from CMAG) or the data describing the ads (from Professor Goldstein). As with any secondary analysis of [6(1 PCS/ER 00006)] data collected by others, this most likely limits the authors' understanding of the nuances and peculiarities of the data base. This is particularly so since this is a demanding data base involving large numbers of cases, multiple units of analysis, various data infirmities (e.g., missing data),

and variables based on highly subjective judgments made by undergraduate students.[4] Moreover, I note that one of the authors (Mr. Seltz) seems to have little if any training in statistical analysis, apparently learning whatever skills of data analysis he possesses on-the-job, in the course of preparing this report. Given that this data base is large, complicated, and difficult to analyze, it is extremely worrisome that the results are so heavily dependent upon the limited skills of an author who is a novice analyst.

The Sources of the Data for *Buying Time 1998*

The data for *Buying Time 1998* are drawn from two sources. First, information about the broadcasting of these advertisements was collected by Campaign Media Analysis Group (CMAG). Second, information about the content of the ads was coded by undergraduate students at Arizona State University under the direction of Professor Ken Goldstein. Both of these data sources require considerable scrutiny.

The first source of data analyzed by the authors *of Buying Time 1998* is the information [7(1 PCS/ER 00007)] about ad broadcasts. These data were purchased from CMAG, which relies upon a technology that purports to recognize "each separate commercial run, sending the storyboard (full audio and every four seconds of video) of every commercial to CMAG headquarters" *(Buying Time*

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[4] Professors Krasno and Goldstein acknowledge that the coding of some of the variables in the data set - explicitly including the so-called purpose of the ad - was a subjective enterprise. *See* Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-Feingold Bill." *PS: Political Science and Politics 35* (#2, June): 207-212, at page 207 and at page 209. A copy of this report is attached as Exhibit 5.

1998, 7). There are of course many limitations to the CMAG data, including:

- CMAG does not monitor all broadcasts; instead, its coverage is limited to only 75 media markets (out of 210 such markets in the country).[5] Given this limitation, one must be particularly careful about generalizing the findings of this study to all political communications.
- Media markets are not coterminous with electoral districts (e.g., the New York City media market), meaning that ads broadcast throughout a media market are reaching citizens with different relationships to politicians, candidates, and elections.
- The CMAG technology was not able to distinguish ads differing in only a few words, treating, for instance, "cookie cutter" ads mentioning Senator Kennedy as identical to ads mentioning Senator Boxer. Since ads apparently cannot be uniquely identified by the technology, the information in the data base about when any given specific ad was aired most likely contains errors.
- Complete visuals are not provided, meaning that some information depicted in the ad may be excluded and not captured, thus compromising the [8(1 PCS/ER 00008)]

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[5] Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-Feingold *Bill." PS: Political Science and Politics* 35 (#2, June): 207-212, at page 207. See Exhibit 5.

coders' ability to analyze the complete content of the ads.

- The technology is of course dependent upon the nature of the ads themselves. If ads display information in a way that is illegible, then the CMAG images will themselves be illegible.
- Not all methods of political advertising and communication are captured in the CMAG data, as for instance communication via radio and local cable ads.
- Crucial information was missing in the CMAG data, as for example, in more than a quarter of the broadcast data, the identity of the sponsor was not included in the data (*Buying Time 1998*, 8). Without accurate information about the sponsor of any given ad, the fundamental distinction drawn in *Buying Time 1998* among ads sponsored by candidates, parties, and groups becomes suspect. It appears that in some instances the ad sponsor was identified through methods independent of the CMAG data collection and analysis, although these methods are not thoroughly documented in the Report (e.g., *Buying Time 1998*, p. 8).
- The CMAG data apparently include subjective variables coded by CMAG staff, including judgments of the content of each ad and estimates of the cost of each ad. For example, it cannot be determined whether CMAG captured every ad that included the name of a public official or just those which CMAG deemed to be "political" in nature.

- Finally, no evidence has ever been adduced documenting the accuracy of the CMAG data. Indeed, insofar as the 1998 data were collected and assembled through methods similar to those apparently used in 2000, the lack of accuracy of [9(1 PCS/ER 00009)] the data has been documented.[6]

A second source of data comes from the review of the ads by student coders at Arizona State University. The students were asked to respond to 26 questions about the ads, using printed copies of the storyboards (see *Buying Time 1998*, pp. 193-194, for a copy of the questions asked). The coding sheet has some obvious and important errors (as I discuss in more detail below).

A series of significant questions emerges about the process by which these ads were coded. For instance, it is unclear how the students were recruited, what expertise they had prior to being employed for the project, whether the students had been exposed to Professor Goldstein's classes, whether the students had ideological and/or policy commitments to a particular outcome in the project, etc. Insofar as the 1998 data collection process is concerned, none of these details is presented in the published reports or in other material made available to me. The absence of answers to these questions raises questions about the overall accuracy of the data collection process.

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[6] No detailed description of the 1998 CMAG data has been published or otherwise made available to me. However, in Appendix E to Professor Goldstein's Report for this litigation, he discusses various problems in 2000 with the CMAG data and technology. The data difficulties seem to be numerous and formidable. Given the general trend for technology to improve over time, it is difficult for me to imagine that the 1998 CMAG data are any less problematic than the 2000 data.

The question of how the students were trained to make these difficult judgments is of considerable relevance to the quality of the data they recorded. *Buying Time 1998* discloses nothing about coder training. However, in a 2002 report, Krasno and Goldstein indicate that the student coders received *no training whatsoever,* although I acknowledge that there is some ambiguity about whether this practice (or lack thereof) pertains to both the 1998 and 2000 data [10(1 PCS/ER 00010)] sets.[7] They assert: "This consensus [referring to the students reaching the same conclusions about the "tone" of the ads] is perhaps more remarkable because we chose not to embark on any training program for coders, preferring instead that they use their common sense to give us a better feel of how the average viewer would characterize these ads."[8] If I am correct that the student coders were not trained, then this is a flaw of considerable proportion. Not only are undergraduates at Arizona State University (or, in the case of the 2000 study, the University of Wisconsin) indisputably not a representative sample of the "average viewer," in the absence of training, the students were apparently free to exercise unstructured discretion in coding the ads. Without instruction and guidelines for what

constitutes the difference between "providing information or urging action" and "generate support/opposition for candidate" - without training, practice coding, and discussion of coding rules based on the results of the practice coding - I do not believe that undergraduate students coders can make accurate assessments on highly subjective characteristics of these ads. This is, in my judgment, an extremely important limitation to the data generated by the coding process, leading me to have little confidence in the results.

A Data Set in Constant Flux

Based on the data sets on the CDs provided by the Brennan Center and Professor [11(1 PCS/ER 00011)] Goldstein, it is apparent to me that no single *Buying Time 1998* Data Set exists. This is in part due to the fact that Professor Goldstein was (and may still be) continuously making changes in the codes assigned to individual ads and airings. Of course, one would always correct obvious factual mistakes in objective variables, but to alter subjective variables of crucial importance requires a great deal more discussion, transparency, and justification.

Moreover, the motives for making such changes are important. To the extent that one only examines codings that undermine the preferred conclusions, and one does not examine codings supporting the preferred conclusion, asymmetrical bias is introduced in the data set. Under such conditions, confidence in the ability of the data set to produce useful results and conclusions plummets.

The Reliability and Validity of Coding the Ads

Since the accuracy of the coding of each individual ad is unusually important for the results drawn from this data base, it is crucial that the coding procedures and processes receive additional close scrutiny. Social scientists use the term "reliability" to refer to the accuracy of data collection. I will therefore adopt this convention by considering the degree to which the coding of the ads is reliable.

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[7] My reading of this report leads me to conclude that Krasno and Goldstein were describing their decision not to train the coders in 2000, but I have seen no documentation to suggest that their coders were trained in some way or another in 1998.

[8] Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-Feingold Bill." *PS: Political Science and Politics 35* (#2, June): 207-212, at page 211. See Exhibit *5.*

Some of the characteristics of the ads are no doubt easy to code with considerable reliability. Entirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad[9]) present few threats to reliability (although clerical errors are [12(1 PCS/ER 00012)] always possible, if not probable, in a large data base such as this).

However, other crucial attributes are far from being objective characteristics of the ads; instead, they are highly subjective and judgmental. For instance, consider Question 6 (from page *193, Buying Time 1998,* emphasis in the original):

> 6. In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a **particular candidate?**
>
> 1. Provide information or urge action (If so, skip to Question *#19)*
> 2. Generate support/opposition for candidate
> 3. Unsure/unclear

To answer this question requires a large number of subjective assessments. First, some judgment must be made about *whose* purpose is under consideration here. For some ads, the sponsor is readily apparent, but for others it is not, so the coders were often faced with the difficult and ambiguous task of considering to whom or what to attribute "purpose." The unreliability of the coding process is reinforced by the absence of any explicit guidelines for how to ascertain an ad's "purpose."

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[9] This comment only refers to the text of the ad. Since the storyboards are only captured in 4-5 second intervals, a telephone number not mentioned in the text but presented visually for a period of less than 4 seconds would not be properly coded with this methodology.

Second, the decisions of the coders on these ads were often overruled by Professor Goldstein. For example, consider the ad entitled "NPLA/Call Feingold and Kohl":

> [Announcer]: America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and disposed of their newborn baby in the dumpster. Most Americans couldn't believe that defenseless human life could be [13(1 PCS/ER 00013)] so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him, it would have been perfectly legal. Instead of murder or manslaughter it would have been called a partial-birth abortion. Killing late in the third trimester. Killing just one inch from full birth. Partial birth abortion inflicts a violent death on thousands of babies every year. Your Senators Russ Feingold and Herbert Kohl voted to continue this grisly procedure. Contact Senators Feingold and Kohl today. Their number in Washington is 202-224-3121. [Announcer]: To join the fight against partial-birth abortion, contact the National Pro-Life Alliance.

The visuals in frames 11 through 14 of the ad read:

> CALL SENS. FEINGOLD AND KOHL
>
> AT (202) 224-3121
>
> TELL THEM TO VOTE FOR THE
>
> PARTIAL BIRTH ABORTION BAN

This ad is especially interesting for several reasons. First, it seems obvious that the central focus of the ad is on the policy issue of whether to ban partial birth abortions. If one had to speculate about the motives behind the ad, one might reasonably judge that the ad sought to capitalize on the widely publicized incident in Delaware as a means of generating support for a congressional ban on partial birth abortions.[10] One might also reasonably conclude that one purpose of the ad was to elicit support for the National Pro-Life Alliance. The most reasonable [14(1 PCS/ER 00014)] overall assessment of this ad is that it is an example of issue advocacy by an interest group.

The student coders at Arizona State University recognized this as an issue ad, originally coding it in Question 6 as: "1. Provide information or urge action". However, subsequent to that coding, the data were apparently changed so that the value in the data set of variable Q6 (representing the coding of Question 6) is: "2. Generate support/opposition for candidate." After the coding process was completed, Professor Goldstein apparently decided to overrule the judgment of the coders and substitute his own view that this ad represents electioneering.[11] Though this decision was apparently controversial - indeed, it is striking that one of the authors of *Buying Time 2000* concluded in an e-mail to Professor Rick Hasen: "It reads to me like a

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[10] Note that the number depicted in the ad is the telephone number of Congress.

[11] One of the authors of *Buying Time 1998* reports that the data set was constantly evolving over time. Worse, it is not possible to "track the evolution of all the changes we made." See Seltz Deposition, p. 52, lines 20-21. (Exhibit 4.) Moreover, my comparison of the student coding sheets for several of the 1998 storyboards with the scores in the "final" version of the data reveals several instances of inconsistency, which apparently were brought about by the postcoding manipulations of Professor Goldstein.

genuine issue ad."[12] — since the final version of the data base supplied to me records this as an electioneering ad, Professor Goldstein apparently thought otherwise, and thus the Buying Time studies (in both 1998 and 2000) treated this as a "sham ad."[13] This process hardly contributes to the reliability of the variables in the data base. [15(1 PCS/ER 00015)]

I have examined the actual student coding sheets for 25 of the 1998 storyboards[14] and have compared them to the "final" version of the 1998 data set. Focusing on the coding of the extremely important question requiring the coders to ascertain the "purpose" of the ad, I discovered that changes were apparently made in at least eight ads between the student coding and this version of the data base.[15] On its face, eight may not seem like an especially large number, but these ads are responsible *for over 2400 airings* in the 1998 data base. Furthermore, considering the 20,432 airings in 1998 coded as sponsored by groups and as independent expenditures or issue ads, making Professor Goldstein's changes on just these 8 ads results in the percentages of ads said to be providing information or urging action decreasing from 70.2 (based on the original student coding) to 58.4% (based on the Goldstein recoding). Moreover, the changes in the data base are entirely asymmetrical: In not a single instance in these storyboards was a change made on an ad originally coded as having candidate support or opposition as its "purpose." Since no documentation of how individual ads were selected for reconsideration by Professor Goldstein has apparently been produced, one is left wondering why all of these changes could have had the same effect: issue ads being converted to candidate support ads. My most important observation is thus that the changes apparently made by Professor Goldstein have a rather dramatic impact on whether these ads are considered to be [16(1 PCS/ER 00016)] issue- or candidate-oriented.

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[12] Exhibit #14, Holman Deposition. E-mail on 01/18/2001 from Luke McLoughlin (one of the authors of *Buying Time 2000)* to Rick Hasen. (A copy of the E-mail is attached as Exhibit 6.)

[13] I understand that Professor Goldstein has indicated in his expert report of September 23, 2002, that he now views this ad (when broadcast in 2000) as a "genuine issue ad." The data set provided to me does not reflect any re-examination of this ad (which also aired in 1998). Rather the data set indicates that it was recorded by Professor Goldstein as a "sham ad."

[14] The id numbers for these coding sheets are: 2, 7, 10, 11, 12, 15, 16, 21, 22, 605, 797, 1043, 1045, 1355, 1374, 1411, 2406, 2512, 2521, 2531, 2532, 2533, 2637, 2640, and 3024. I also examined the coding sheets for ad #137, but since there are two separate sheets for this ad, and since the sheets do not agree between themselves on some of the codes, I have excluded that ad from this analysis.

[15] The coding sheets and the storyboards for these eight ads

There can be little question that the undergraduates were asked to make difficult subjective assessments of ads that are often ambiguous and ambivalent. How accurate are these subjective judgments? Social scientists do indeed often attempt to quantify subjective phenomena. But in doing so, certain procedures are essential so that the reliability of the data collected can be assessed. The methodology that is necessary involves the assessment of "intercoder reliability."

One common meaning of reliability is the ability to replicate or reproduce results. Consequently, a proper methodology for assessing inter-coder reliability would involve the following procedures.

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are attached as Exhibit 7 to this report.

1. The ads are coded.

2. A sample (or the population) of the ads is coded for a second time by an independent coder, using exactly the same procedures as the initial coding. The sample is typically randomly selected, although stratified sampling is sometimes used (e.g., to assure the inclusion of infrequently occurring types of cases). It is necessary that all procedures on the subsequent coding be identical to those of the initial coding, therefore precluding, for example, the use of "expert" or highly experienced coders for the subsequent coding.

3. A variable-by-variable assessment of the two codings is then conducted. An inter-coder reliability coefficient is calculated for each variable that indicates the degree of consensus between the codings. Thus, coding cases should not be said to be reliable; reliability is an attribute attaching to individual variables. [17(1 PCS/ER 00017)]

Using these procedures, one can assess the degree to which subjective phenomena have been coded reliably.

Social scientists care about more than reliability; they also care dearly about validity. One's bathroom scale can produce reliable results day after day, but if the scale is not properly calibrated, the results are not valid in the sense that the weight the scale reports is not an accurate representation of one's true weight (in this instance, many of us prefer results that are not valid). It is possible, for instance, that coders could reliably but invalidly code an attribute of the ads. For instance, assume that the coders are asked to judge whether the "purpose" of an ad is to "generate support/opposition for candidate" [sic - from the 1998 coding form]. Assume further that this is a highly subjective judgment.[16] Consequently, coders must seek easily discernable "cues" in the advertisements as a means of making the required judgment. Since the presence of a political figure who seems to be a candidate is a readily accessible cue, the coders then develop an implicit decision rule that says: "when a political figure is depicted in the ad, the ad involves electioneering." Using this rule, the variable might be reliably coded. But this does not mean that the data are *valid,* since political figures appearing in ads could well be doing something other than electioneering. Reliability is the *sine qua non* of useful analysis of subjective data, but reliability must also be considered in the context of validity. Without validity, the meaning of the [18(1 PCS/ER 00018)] variables is conflated and confused. Thus, it is crucial to consider both the reliability and validity of the data produced by Professor Goldstein.

Unfortunately, the 1998 study apparently involved no assessment whatsoever of intercoder reliability. Thus, unlike academic research based on subjective coding, no empirical evidence exists to indicate that the coders' subjective assessments of these ads were accurate. This is a very serious flaw in the methodology of the study, especially since

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[16] There is apparently no dispute among any of those involved in producing the Buying Time reports that the coding of these attributes of the ads is highly subjective - e.g., (as I have previously cited), *see* Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-Feingold Bill." *PS: Political Science and Politics* 35 (#2, June): 207-212, at page 207 and at page 209 (see Exhibit 5). See also the Holman Deposition, pages 68, 72-73 (referenced excerpts from the Holman Deposition are attached as Exhibit 8), and the McLoughlin Deposition, page 38 (referenced excerpts from the McLoughlin Deposition are attached as Exhibit 9).

the crucial variables under consideration require highly subjective judgments. Furthermore, as I demonstrate below, the consequences of error can be enormous in the sense that any coder errors are reproduced in the data base for every single airing of the advertisement.

The problems of unreliability and invalidity are exacerbated when non-expert data collectors are employed to code the data, as in this study, which employed undergraduate students at Arizona State University. At present, few details about the ways these students were recruited and trained have been reported, and we therefore do not know whether the students were competent to make the subjective judgments required by the coding process. (As noted, we do know that the students were *not* subject to any formal training process.) With student coders, however, it is highly probable that implicit coding rules evolved to aid the coders in making these subjective assessments of the advertisements.

Moreover, coding these advertisements is often simply difficult, irrespective of one's training and experience. For instance, the attributes of an individual airing are specific as to time. Consider a hypothetical ad depicting Senator Ted Kennedy. That ad, if shown in Boston in a year in which Senator Kennedy is a candidate for re-election, would be characterized as depicting a candidate for office. If shown two years later (when Kennedy is not a candidate for re-election), [19(1 PCS/ER 00019)] the identical ad should not be scored as depicting a candidate for office.[17] One must bring considerable knowledge to bear in making the various assessments of these ads. Thus, the lack of information about the reliability and validity of the coding is a very serious shortcoming of the 1998 study. In the absence of evidence that the coding of the ads is reliable and valid, one must approach these data with great caution.

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[17] *Buying Time 1998* provides no information concerning how information about who was and who was not a candidate in any given airing of an ad was made available to the student coders.

Analysis of the 1998 Data

For the purposes of this report, I have relied on what purports to be the "final" version of the 1998 data set.[18] This file was provided to me as an SPSS[19] file named: 'Final.1998__Cmag.sav'.[20] I understand that this file was produced by Professor Goldstein for the purposes of this litigation. Upon reviewing this data set, I discovered that the original raw data files - the files produced by CMAG for the airings and the data file Professor Goldstein produced from coding the ads themselves - had already been integrated (matched and merged), and the data had been documented (with labels, to the limited extent to which the file is [20(1 PCS/ER 00020)] documented) in a single file. Though this process of merging data is fraught with difficulty and potential for error, I have not been given any material that would allow me to

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[18] I put the word final in quotations marks because, as I understand the practices of Professor Goldstein, the data base is continuously subject to change and revision (as I have noted earlier).

[19] SPSS is statistical software that is widely used to analyze data of this sort.

[20] Frankly, the statistical analysis reported in *Buying Time 1998* is not at all transparent. In my analysis in this report, I have tried to provide sufficient details so that other analysts can reproduce my results. For the not-too-statistically inclined, the detail may seem excessive, even if it is recognized as necessary. For that, I apologize in advance.

judge the accuracy of the data merging. Indeed, one sees telltale signs in the data set that this match/merge process was not executed flawlessly (e.g., the assignment of the same identification number to ads with vastly different titles).

The total data set has 307,208 airings. The distribution of sponsors of these ads is as follows:

	Number of Airings
missing, unknown/not coded[21]	4,745
Candidate	235,613
Party	44,924
Group	21,926
Total	307,208

Since my report addresses only group-sponsored issue advertisements, I confine all of my analysis to the 21,926 airings coded in the data set as ads having been sponsored by groups.

Analysis of these data can be conducted using different "units of analysis." For instance, one approach would be to focus on the ads themselves. In the 1998 data base, there are over 100 [21(1 PCS/ER 00021)] discrete ads.[22] Such an approach is generally misleading because different ads are aired at vastly different rates. For example, ad number 12 (AFL/HMO Said No) was aired 2,808 times, according to the data base, while ad number 3026 (SIERRA/World is) was aired only a single time. To treat these two ads as equivalent makes little sense if one is interested in potential influence on the electorate.

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[21] When no code is provided for an airing, the computer program inserts a "missing value" code. In SPSS, this code is printed in the output as a period (i.e., ".") and is referred to as a system-missing code (assigned by SPSS as missing because the program had no other way to interpret the input data). In this data set, missing data (of this and other types) are extremely poorly documented, leaving one with little ability to discern the exact cause of missing codes.

[22] There are errors in the data base in how the ads are identified. There are two possible unique identifiers for each ad: the variables IDNUMBER and CUSTITLE. As

The second "unit of analysis," the one preferred by me and generally by the authors of *Buying Time 1998,* is the "airing."[23] This is the individual showing, which is of course

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it turns out, however, neither is unique. In most instances, the errors seem to be harmless, resulting from data entry mistakes. For example, I assume that the following two descriptions refer to the same ad: AFJS/Stabeno and AFJS/Stabenow Tu. Four discrete identification numbers suffer from this sort of malady.

However, ads with the id number 3431 seem to have a more serious mistake. The two titles that appear with this id number are:

NRA/Sorvino your and NV/CFCD/Not Abov. It is difficult to reconcile how these two ad titles could both be given the ad identification number of 3431.

I recognize that an ad may be coded differently when it is broadcast in different media markets. The process by which the identification numbers are assigned to the ads and airings is nowhere discussed in *Buying Time 1998.* A proper unique identifier would be one that is a combination of the ad identification number and the specific context within which it was aired. Such an identifier does not exist in the data base.

[23] One might quite reasonably use other units for conducting useful analysis of this data base, as, for instance, in measuring ads in terms of the number of minutes they

specific as to time and place. For instance, precisely the same ad may be aired in more than one media market and at more than a single point in time.

To reiterate, in the 1998 "final" data set, there are 21,926 airings sponsored by groups. However, for purposes of this analysis I will focus on the 20,432 group-sponsored airings in the data base coded as issue ads. [22(1 PCS/ER 00022)]

I consider the airings to be the appropriate unit of analysis for a study of this sort, and in fact *Buying Time 1998* relies on this unit for most of its analysis. However, it is important to note at the outset that a single discrepancy in coding an ad can have considerable consequences for the analysis of the airings data base. Let me give an example.

In the 1998 data base, Question 6, assessing the "purpose" of the ad, reveals that a majority of the airings had as their "purpose" providing information or urging action. The variable is distributed as follows:

	Percentage of Cases
Missing, not coded	3.3
Provide information or urge action	58.4
Generate support/opposition for a candidate	37.2
Unclear	1.0
Not coded	0.1
Total	100.0
N	20,432

Let us assume for a moment that the coding of a single ad was erroneous; in particular, assume that ad #11 was coded as "promoting issues" (provide information or urge action) rather than "promoting a candidate" (generate

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were aired.

support/opposition for a candidate).[24] If the coding of *only* this single ad changed, then the distribution of the "purpose" variable becomes: [23(1 PCS/ER 00023)]

	Percentage of Cases
Missing, not coded	3.3
Provide information or urge action	64.6
Generate support/opposition for a candidate	31.0
Unclear	1.0
Not coded	0.1
Total	100.0
N	20,432

By changing the coding of only a single *ad*, the percentage of *airings* promoting issues rises from 58.4% to 64.6%, or a change of over 6 percentage points. This example illustrates just how volatile this data base is, and how very small errors in coding can be amplified substantially (with significant implications for substantive conclusions). Obviously, the consequence of an error in coding the attributes of an individual advertisement varies according to the frequency with which that ad was aired. I provide this example merely to illustrate that for some ads, a single small error can have quite large consequences for the statistical results. This means the statistical findings of the study are not robust; they are instead highly sensitive to error.

General Comments on the Accuracy of the 1998 Data

The 1998 data provided by the Brennan Center/Professor Goldstein are riddled with internal inconsistencies and

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[24] I do not here make the allegation that the coding of this ad was in error. I am merely using this example to illustrate the consequences for the analysis of the coders making a single mistake in coding one of the attributes of an advertisement.

errors.[25] One important consequence flowing from this problem is [24(1 PCS/ER 00024)] that virtually none of the results in the 1998 report could be reproduced with any of the data sets made available to me.[26] This seriously undermines my confidence in the substantive conclusions drawn in the report.

The discrepancies are numerous. A few examples can illustrate the inconsistencies in the data set.

Number of media markets represented:	
Buying Time 1998 (p. 78):	75
"Final" data set:	76
Number airings analyzed in the report:	
Buying Time 1998 (p. 32):	302,860
"Final" data set:	307,208
Number of group-sponsored airings:	
Buying Time 1998 (p. 32):	22,151
"Final" data set:	21,926

[25(1 PCS/ER 00025)]

Many additional inconsistencies could be noted; because they are not documented in *Buying Time 1998* or any other material I have reviewed, one wonders how these discrepancies arose.[27]

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[25] The report also seems to have engaged in the practice of rounding all percentages less than 1.0 up to 1. Thus, according to my calculations, the 1% reported in the fir portion of Figure 1.3 on page 15 is actually 0.2%. This rounding convention is not part of accepted social science practice.

[26] Even more confusion is added if one tries to use the data available on the Buying Time web site to reproduce the results. See http://www.buyingtime.org/

Many variables in the data set are not properly documented; indeed, many variables have no documentation whatsoever. For instance, one of the most important variables in the data is that which describes the ad type. Two variables seem to represent this information: WHAT and WHAT4. The former is entirely undocumented while the latter's variable label in the SPSS data set read "four category ad type" and the values of the codes are listed as "1 cand camp" "2 coord exp" "3 ind exp" "4 issue ad". Thus, the implication seems to be that WHAT4 is the preferred depository of this information. However, when one tries to reproduce the figures in Figure 1.3 (for example) on page 15 *of Buying Time 1998,* the figures are more consonant with WHAT than with WHAT4, which, to say the least, is puzzling and confusing.

What is the difference in the coding of the two variables? Two differences occur. First, some of the airings coded as missing by WHAT4 in fact have valid values on WHAT. Second, a portion of the airings coded at 3 on WHAT are coded as "3 ind exp" on WHAT4, while another portion is coded as "4 issue ad." The distribution of the two variables is as follows. [26(1 PCS/ER 00026)]

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[27] I should perhaps note that the technical difficulty of merging data sets drawn from different sources and collected under different circumstances is substantial, and likely requires someone with considerable experience with statistical and data management software.

	Frequencies on WHAT[28]	Frequencies on WHAT4
missing	97	195
cand camp	342	342
ind exp	1,055	1,281
issue ad	20,432	20,108
Total	21,926	21,926

Thus, there is a great deal of confusion here. The most important implication is simple: The data provided cannot be used to replicate the findings *of Buying Time 1998.*

For purposes of my own analysis, I will focus on group sponsored ads that are coded as issue ads on the variable WHAT. There are 20,432 such airings sponsored by groups. These 20,432 airings represent approximately 117 individual advertisements. Exhibit 10 to this report lists the titles of these ads and includes each storyboard made available to me.

The Characteristics of Group Sponsored Issue Ads Aired Within 60 Days of the Election, 1998

Of considerable importance in analyzing the *Buying Time 1998* data are group-sponsored ads having the following characteristics: [27(1 PCS/ER 00027)]

1. Aired within 60 days of the election

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[28] The categories are not labeled on this variable so I have had to make some assumptions about the meaning of the individual codes. For instance, when I see that 20,108 airings appear in the data base in an unlabelled category, I make the assumption from the size of the group in comparison to the frequencies on the labeled variable that the meaning of this category is "issue ads." This is course an inference that may or may not be correct, but I have found no other source of documentation that would allow me to make more certain judgments about the meaning of the variables in the data set.

2. Do not contain "magic words"
3. Mention or picture one or more candidates

The final version of the 1998 data set provided by Professor Goldstein reflects a total of 6,640 group-sponsored airings have these characteristics.[29] Of the 6,640 airings with these attributes,

57.7% were coded as promoting candidates

42.3% were coded as promoting issues

In this "final" version of the data base, these 42.3% airings stem from a single ad —

12. AFL/HMO Said No

The 57.7% airings stem from 26 ads. The most common such ad is

11. AFL/CIOStrengthe

The full listing of the ads coded as "promoting candidates" follows:

ID Title	Number of Airings
2 AAHP/Look Out Fo	77
7 AFJS/Stabeno	129
9 AFL/Chavez His L	11
10 AFLCIO/Call ES	17
11 AFLCIO/Strengthe	1265
15 AFL/SS Trust Fun	575
16 AFLT/Stand Up Fo	142
[28(1 PCS/ER 00028)]	
17 AFLT/OR People S	45
20 AFLT/Call WU	5
21 AFTL/KY Lucas	1
22 AFTL/WI Tell Rya	213
137 AVO/Ashcroft Val	55
1043 MI/MICA Bonior L	108
1045 MICF/Fieger Stab	167
1355 NJ/AFJS FPallone	72
1411 NPLA/Call Feingo	3
2406 WI/ LCWAF Neuman	71
2512 AFL/PBR Call Tod	10
2521 AFLT/Call WU Rev	39
2531 AFTL/KY Stop Wil	76
2532 AFTL/UT Cook Sig	35
2533 AFTL/Willams is	210
2637 IA/Bosewell Edu	129
2860 NM/DCCC Redman D	281
3024 SIERRA/NC Faircl	4
3431 NV/CFCD/Not Abov	92

The testimony in this case reflects that the authors of *Buying Time 1998* regard *two* ads as genuine issue ads aired within 60 days of the 1998 election: ad #12 and ad #318. See Seltz [29(1 PCS/ER 00029)] Deposition, pages 100-102 (Exhibit 4); Holman Deposition, pages 50-53 (Exhibit 8). For reasons that are unclear to me, in this "final" version of the 1998 data set, ad #318 is coded as an issue ad, aired within 60 days of the election, but *not* as depicting a candidate.[30] On the basis of the depositions, I have accepted the author's judgment that the ad should be coded as depicting a candidate and have therefore treated it accordingly. As a result, the distribution of the "purpose" variable, based on 6,896 airings, then becomes:

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[29] Note that these airings represent a tiny fraction of all airings in 1998.

[30] Note that in some versions of the 1998 data base made available to me by the Brennan Center this ad is in fact coded as depicting candidates. I have no information about how, why, and when the codes for this ad were altered.

55.6% were coded as promoting candidates

44.4% were coded as promoting issue

Of course, the source of the 44.4% of the airings is two ads: #12 and #318.

It is important to take note of a highly significant attribute of the coding sheets for the 1998 ads. As reported on page 193 *of Buying Time 1998,* ads coded in Question 6 as "provide information or urge action" should *not* have been coded on *any of the variables indicating whether candidates were depicted or not.* When coders scored an ad as "providing information" on Question 6, the coding form says: "(If so, skip to question # 19)." That is, every single ad that was coded in 1998 as providing information or urging action should have been coded as "not applicable" on questions 7 through 18, *since the coders were not asked to make a judgment about these questions.* Thus, if the coders performed as instructed by the coding sheet, there would never be in this data base an ad that is coded as both providing information and depicting a candidate, since that information is captured in Questions 7 and 8. Thus, if one is interested in ads that provide information while depicting candidates, this data set, by the design of the coding [30(1 PCS/ER 00030)] form, can say absolutely nothing about these ads. To the extent that the data set includes information about the depiction of candidates for these ads, such information must stem from either (a) coders who ignored the instructions on the coding form, or (b) changes made to the data base after the students coded the data. It is unclear why an investigator interested in ads that both provided information and depicted candidates would design such a coding form. More important, the confusion in the instructions regarding Questions 7 through 18 may have introduced a degree of bias into how the students coded Question 6 by suggesting that any advertisement that included the name of a candidate should be coded as having a purpose of promoting or opposing a candidate.

The data base includes 7,606 group-sponsored airings coded as having a "purpose" of generating support or opposition to a candidate. My analysis reveals that *fully 97.7% of these airings were also coded as mentioning candidates.* The most important conclusion I draw from this analysis is that mentioning a candidate and promoting a candidate are virtually the same thing, as these data were coded by the undergraduate students (and/or Professor Goldstein). It seems highly likely to me that the student coders coded these three questions (6, 7, and 8) virtually simultaneously: A candidate (or what the coder thought was a candidate) was observed in the ad, and then Question 6 was coded as electioneering (in part because the coders knew that the presence of a candidate was not coded if Question 6 was coded as providing information), and then the student made the determination of whether the candidate was "the favored candidate" (Question 7) or the "favored candidate's opponent" (Question 8). Thus, the entire relationship - empirical and logical - between Questions 6 and Questions 7, and 8 renders the data set of little utility for answering important questions about these ads and airings. [31(1 PCS/ER 00031)]

The Focus of the Ads

As I have noted, *Buying Time 1998* places considerable emphasis on ads with three characteristics: those aired within 60 days of the election, which mention one candidate or the other, and which do not use so-called magic words.[31] As noted, this group represents 6,896 airings.

The authors *of Buying Time 1998* apparently believe it appropriate to consider prohibiting or regulating ads depicting candidates aired within 60 days of the election if in fact the content of these ads is nothing more than what they characterize as electioneering (the promotion of candidates, not issues). As I have noted, according to the coding in Q6, the bulk of these ads (55.6%) was judged to be promoting candidates. I will refer to these ads as possible "candidate promoting issue ads," by which I mean that they appear to be issue ads (sponsored by groups, not using "magic words"), but that they were coded by the undergraduate students as promoting candidates rather than promoting issues. It is instructive to consider these ads in greater detail.

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[31] Of course, were the ads to use so-called magic words, they would be characterized as express advocacy under *Buckley v. Valeo,* 424 U.S. 1 (1976).

The undergraduate students were also asked to code Question 22. It is useful to reproduce the exact content of Question 22 (from page 194 of the Report):

> 22. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?

1. Personal characteristics
2. Policy matters
3. Both [32(1 PCS/ER 00032)]
4. Neither

This variable is also given special attention in the Report on page 196 (see the variable "Focus"). One might predict that these possible "candidate promoting issue ads" ads would *not* be coded as primarily addressing policy matters; instead, they should be overwhelmingly coded as "personal characteristics" or "neither" personal characteristics nor policy.

In fact, that expectation is *not* supported by the data; instead, exactly the contrary conclusion is revealed by the data analysis. The coding on Question 22 for the 6,896 airings aired within 60 days of the election, the results are:

Question 22 Code	Percentage
missing	0.1
Personal characteristics	1.2
Policy matters	98.1
Both	0.7
Neither	0.0
Total	100.0
N	6,896

Thus, *virtually all* of the ads aired within 60 days of the election and depicting a candidate were coded as having a **"primary focus"** on policy matters. Thus, virtually of these ads have clear and obvious policy content. This is a very important conclusion that bears considerable emphasis:

> *More than 98% of the group-sponsored ads broadcast within 60 days of the 1998* [33(1 PCS/ER 00033)] *election and depicting one candidate or the other were coded by the coders (or Professor Goldstein) as having policy matters as their "primary focus."*

How should this result be understood within the context of the coding of Question 6? It is obvious that many ads were coded in Question 6 as promoting candidates but also as being "primarily" focused on policy matters in Question 22. Is it reasonable that coders would have coded the ads on these variables in this fashion?

I believe so, since Questions 6 and 22 differ in several obvious and extremely important respects. Question 6 requires that the undergraduate coder make a rigid distinction between two "purposes" of the ad. The specific question answered by the student is (from page 193, emphasis in the original):

> 6. In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a **particular candidate?**

1. Provide information or urge action (If so, skip to Question #19)

2. Generate support/opposition for candidate
3. Unsure/unclear

Note that in Question 6, the coders are not given the option of responding that the ad *both* provides information or urges action *and* generates support or opposition for a particular candidate. In the event of mixed content, the undergraduate coders were forced to make a [34(1 PCS/ER 00034)] dichotomous judgment about the ad's "purpose."[32] Question 6 does not ask the coder to discern the "primary" purpose of the ad. Indeed, the question provides no guidance whatsoever as to how to code mixed-content ads.

In contrast, the construction and coding of Question 22 is an improvement over Question 6 in a number of respects. First, the question allows the coders options of "3. Both" and "4. Neither". Thus, the problem of forcing a choice between different parts of the manifest content of the ad is resolved by allowing a coding of "mixed" content. One wonders why such a strategy was not used on Question 6, especially given its use by Professor Goldstein in Question 22. Second, the question provides at least some guidance for how to make the judgment required, telling the coder to consider the "primary focus" of the ad. This is still a difficult coding decision for the student coders — and there is no evidence that coders were trained or given formal coding rules for how to resolve ambiguity and ambivalence — but Question 22 is structured in such a way as to provide more reliable information than Question 6.

It is also revealing to note some of the characteristics of the ads coded as "candidate-promoting issue ads."

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[32] As I have discussed earlier, it is impossible for the coders to have known anything about the ad-maker's "purpose" or intention in broadcasting the ad, since such information was entirely unavailable to the coders.

According to the coders, the 6,896 airings in 1998 have the following characteristics:

> 95.6% of the airings urged the viewer to take some action
>
> 74.3% of these were coded as providing a toll-free telephone number in the ad
>
> Another 18.4% of the airings provided a toll number
>
> 4.4% were coded as missing data [35(1 PCS/ER 00035)]
>
> *And only 2.9% were coded as providing no telephone number*
>
> 45.7% were coded as addressing health care issues
>
> 30.1% were said to address the issue of taxes, and
>
> 27.8% addressed the Social Security issue.

And, of course, as already mentioned

> 98.1% were coded as having policy matters as their primary focus.

Thus, these ads certainly have quite a number of characteristics of what the authors of *Buying Time 1998* refer to as "genuine issue ads."

Thus, several conclusions emerge from analysis of these data:

1) The coding in Question 6 is deeply flawed.

2) When Question 6 and Question 22 clash (i.e., the coded attributes differ), the coding of Question 22 should be considered more valid and reliable.

3) According to the coding, the vast and overwhelming majority of ads said to be examples of illegitimate

electioneering (by virtue of promoting candidates) in fact were judged by their own coders to have "policy matters" as their "primary focus."[33]

The 7% Figure in *Buying Time 1998* — Deconstructing Figure 4.22 and Page 109

For the purposes of my analysis, perhaps the most relevant section *of Buying Time 1998* [36(1 PCS/ER 00036)] is Figure 4.22 (page 110) and the text purporting to interpret this figure (page 109).[34] It is crucial to understand the analysis that underlies this text (and the depositions have spent a great deal of time on this text and figure). With only a single paragraph of *Buying Time 1998* devoted to this crucial issue (the second paragraph on page 109), one can surmise that the Report left a great deal unsaid.

The conclusion drawn on page 109 is as follows:

> The results show that while 41 percent of issue ads that provide information or urge action appeared within 60 days of the fall election, just 7 percent of those ads (consisting of just two spots) appeared within 60 days and referred to a candidate.[35]

In his deposition, Mr. Seltz affirmed that, even now, he stands behind this conclusion as accurate (page 77).

Focusing on the 20,432 group-sponsored airings in the 1998 data base, I find that 38.5% of the airings promoting issues were aired within 60 days of the election. Thus, a significant majority of the airings (61.3%) were aired earlier than two months before the election.[36]

The authors of *Buying Time 1998* also claim that: [37(1 PCS/ER 00037)]

> ....just 7 percent of those ads (consisting of just two spots) appeared within 60 days and referred to a candidate.

The "those ads" phrase clearly refers to "issue ads" — the 11,939 airings in the data base. The question as the authors have framed it then becomes: Of the 11,939 airings, what percentage have *both* the characteristics of having been aired within 60 days of the election *and* referring to a candidate?

According to the version of the data base designated as the "final" version, the answer to this question is 25.7% (3,064 airings divided by 11,939 airings = 25.7%). Because this figure is so widely contested — and because so many different percentages have been proposed as being correct —

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[33] It is perhaps obvious but nonetheless important to note that in many if not most instances, the person who is a candidate for public office is also an *office-holder*. Thus, whatever else they might be, many of these ads are direct efforts to influence the actions of sitting elected representatives.

[34] Note that Figure 4.21, page 108, has a fairly obvious error in it. The figure for 30 second ads in September is reported as 97%. In fact, the figure seems to be 87%. This can be readily seen because the point on the line depicted at 97% is in fact lower (has a smaller score on vertical axis) than the adjacent point of 91% (for the first half of October).

[35] Note that in the terminology that has emerged, and in the terminology of this report, the "7 percent of those ads" phrase in the quoted text should be understood as "7 percent of those airings" and the "consisting of just two spots" actually means "consisting of just two ads."

[36] These percentages do not total to 100% because the data base includes 16 airings (0.1%) for which the date of the airing is unknown.

it is useful to examine the data with great care. The following table does so:

Group-Sponsored Airings Having as Their "Purpose" Providing Information or Urging Action (N = 11,939)

Was a candidate mentioned or pictured in the ad?	Date of Airing		
	More than 60 days before the election	60 days or closer to the election	Missing
Yes	0.0% (0)	25.7% (3,064)	0.0% (0)
No	61.3% (7,324)	12.9% (1,535)	0.1% (16)
Column total – Number of airings	7,324	4,599	16

Note: Total number of airings = 11,939. Cell entries are percentages of the total (11,939) and the number of airings in the cell. Thus, the 3,064 airings aired within 60 days of the election and depicting a candidate represent 25.7% of the 11,939 group-sponsored issue airings in the data base.

[38(1 PCS/ER 00038)]

This table is based on a denominator of 11,939, which represents *all* issue ads aired in 1998. All percentages in the table reflect that denominator (the numbers shown in parentheses are the actual numbers of airings). Thus, the first cell in the table indicates that 0% of the 11,939 issue airings (which is 0 actual airings) were shown more than 60 days prior to the election and depicted a candidate. The next figure in the table, 25.7%, indicates that of the 11,939 issue airings in the data (the total 1998 issue airings), 25.7% (or 3,064 actual airings) mentioned a candidate and were shown within 60 days of the election. Thus, according to this data base, were one to assume that all ads shown within 60 days of the election and depicting a candidate were electioneering

ads, one would be wrong 25.7% of the time. Or to put this in terms of actual airings, one would make 3,064 mistakes by assuming these airings to be electioneering ads.

Of course, using a denominator of all issue ads broadcast in 1998 for these calculations is arbitrary and makes little sense. Why use January 1, 1998, as the starting date for the total pool of issue ads (i.e., the denominator)? Why not include ads from December 1997, or even the entire election cycle beginning in November 1996? Why not limit the denominator to ads shown in the last half of 1998? The authors of *Buying Time 1998* selected a denominator for their calculations that has no theoretical meaning. Consequently, their choice is arbitrary. Unfortunately, their conclusions depend heavily on this choice.

What choice for a denominator would not be arbitrary? The pool of cases one might want to examine would be those aired within 60 days of the election. Suppose the question is:

> I will assume that all ads aired within 60 days of an election and which depict a candidate for public office have a particular characteristic (i.e., they are engaged [39(1 PCS/ER 00039)] in electioneering). What percentage of the time would this assumption result in an error in the sense that the assumed characteristic is not the same as the actual characteristic?

This question demands that one use a denominator of all airings shown within 60 days of an election and which depict a candidate. This is not an arbitrary choice of denominators. Instead, this is the only reasonable denominator that answers this question.[37]

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[37] As an analogy, when we ask: What percentage of jury trials falsely convict the innocent, we use as a denominator those defendants who are at risk (those who go to trial) and do not include those defendants who have their charges

The denominator chosen by the authors of *Buying Time 1998* relates to an entirely different, and virtually meaningless question: What percentage of the total ads run throughout the year that mentioned a candidate by name and were coded as providing information or urging action appeared *within* 60 days of the election, rather than *earlier than* 60 days before the election? Since, as noted above, the coders coded virtually all of the advertisements that mentioned a candidate by name as promoting a candidate, the percentage of such ads must be very small. However, this tells us nothing about the error rate over the course of the entire year or even in the 60 day period.

Using the 1998 data, I have run the analysis necessary to answer the more meaningful question. There are 6,896 airings in the denominator. To repeat, these are airings that were shown within 60 days of the election and which depicted a candidate (and, of course, which did not use so-called magic words). Of these airings 44.4% were coded as intended to promote issues. Thus, to answer the question posed above, *the assumption that these airings are electioneering ads* [40(1 PCS/ER 00040)] *would be wrong (empirically disproved) for 44.4% of the airings (3064 actual airings).*

There is quite some difference between a figure of 7%, reported in *Buying Time 1998*, and my calculations of 44.4%. How could there be such a large discrepancy?

The discrepancy is due in part to the use of different denominators (although using a conceptually equivalent denominator — all issue ads shown in 1998 — my estimate is 25.7%, not 7%). But the discrepancy is also very much a function of the after-the-fact recoding of airings by Professor Goldstein. As it turns out, the student coders may not have

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dismissed prior to trial (because they are not at risk at a trial).

done a valid job of coding the questions about whether candidates were depicted because they did not have the information about where the ad was broadcast. Thus, Questions 6, 7, and 8 could not be reliably and validly answered by the coders.

Through various unpublished and undocumented machinations, it appears that only a portion of the airings of ad #12 and #318 were eventually counted as "genuine issue ads" by the authors of the 1998 report. These are airings depicting a political figure that aired in areas in which that political figure was not a candidate for office. There is some confusion about the exact locations in which such ads were broadcast (e.g., it seems that Pittsburgh was often referred to as Philadelphia).[38] But for the correct figure to be 7%, as claimed by *Buying Time 1998*, the numerator must be approximately 836 airings. That is,

836 / 11,939 = 7% [41(1 PCS/ER 00041)]

Without conceding the numerator (because the codings of airings have changed so frequently and are not necessarily represented in the "final" version of the data set), it is important to understand exactly what this fraction depicts. The numerator is limited to ads appearing within 60 days of the election. The denominator refers to *all airings* of issue ads shown in 1998. As I noted above, however, a considerable proportion of these ads represented in the denominator were broadcast well before the election season even began. I can see no justification for making the denominator equal to all issue ads aired in 1998.

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[38] I believe this confusion stems mainly from the fact that neither Professor Goldstein nor the authors of *Buying Time 1998* nor CMAG has storyboards for each unique ad. Since the CMAG software cannot distinguish between ads that are generally the same but that substitute the name of different political figures in different airings (so-called cookie cutter ads), CMAG treats the airings as identical and does not capture a storyboard for each unique ad. Consequently, it cannot be known with certainty whether a particular ad mentions a candidate or not.

Returning to the data base, let us reconsider the Report's finding using issue ads aired within 60 days of the election. There are 3,064 issue airings shown within 60 days of the election and depicting candidates. If we assume that just 836 of these are valid (and this assumption should not be accepted as an accurate depiction of reality), then the percentage becomes:

836/3,064 = 27.3%

It is important *not* to accept the numerator of this quantity as 836 since it represents so many data manipulations after the fact (i.e., after the student coding). But if we assume that the authors of *Buying Time 1998* have reduced this figure to its smallest possible quantity, then the proper conclusion from their calculations, as measured against this data base, is that at least 27 percent of the ads would be improperly restricted by a rule banning or regulating ads depicting candidates within 60 days of the election. From my calculations above, this figure may range to as high as approximately 45% of the airings in 1998.

From page 109 and the accompanying data in *Buying Time 1998,* as well as from the data base itself, one can surmise that the report considers about 5,064 issue airings as having been [42(1 PCS/ER 00042)] shown within 60 days of the election.[39] With this denominator one can deduce the

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[39] This estimate is the quantity: 408 • 12,411. The 12,411 is number of issue ads in the data base (irrespective of how the ad type is coded). The .408 is my calculation from the data base of the percentage of such ads that were aired within 60 days of the 1998 election. Note that the figure .408 is entirely compatible with the claim on page 109 of

percentage of ads aired within 60 days of the election, depicting candidates, without using "magic words," but which had as their "purpose" providing information or urging action. If we accept the Buying Time numerator of 836 (and I repeat that I do not accept that figure), then according to the Brennan Center calculations, this percentage would be

836/5,064 = 16.5%

Thus, even accepting the flawed numerator and using the Brennan Center's own figures for calculating the proper denominator (airings within 60 days), 16.5% of the group ads were "genuine issue ads" (as defined by the Brennan Center) that would be, in the words of the Brennan Center authors, "unfairly caught by" application of the three criteria that I understand were adopted by the Bipartisan Campaign Reform Act (BCRA).[40]

The primary reason why I do not accept the numerator in this quantity is that it represents the post-coding manipulations of the variables by Professor Goldstein. If we return to the eight ads that the students determined were intended to provide information before they were overruled by Professor Goldstein (see my discussion of these ads above), and undo Professor Goldstein's changes by reverting back to the original coding of the students as revealed in the actual coding sheets, we find that these eight ads were aired a total of 2,405 times in the last 60 days of the [43(1 PCS/ER 00043)] 1998 election. According to the data, none of these ads used "magic words" and all mentioned candidates.

Buying Time 1998 that "41 percent of issue ads that provide information or urge action appeared within 60 days of the fall election."

[40] See Holman Deposition, page 89, line 15, through page 91, line 17.

Therefore, they are appropriate to add to the numerator of the above quantity, as in:

(836 + 2,405) / 5,064 = 64.0%

Thus, by this calculation, nearly two-thirds of the group ads that aired within 60 days of 1998 election were coded by the students as "genuine issue ads"; all of these (again in the words of the Brennan Center authors) would be "unfairly caught" by application of the criteria now set forth in BCRA.

CONCLUSIONS — *BUYING TIME 1998*

1. Careful examination of the Brennan Center/Professor Goldstein 1998 data provides little confidence that the data were collected and assembled accurately and reliably. For instance, the data provided for this analysis cannot reproduce the findings reported in the 1998 Report, and several obvious errors exist in the data base.

2. The methodology of coding the advertisement is deeply flawed.

3. The practice of engaging in idiosyncratic, standardless, and highly subjective post-hoc alteration of the data base by partisans severely undermines the credibility of the data set and the conclusions drawn therefrom.

4. The 1998 data provided by the Brennan Center/Professor Goldstein not only do not support the conclusions announced in the Report, but they in fact lead to exactly the opposite conclusion: The vast majority of ads broadcast within 60 days of the 1998 election, which depicted one candidate or the other, had as their primary focus issue advocacy. [44(1 PCS/ER 00044)]

Buying Time 2000

Summary of Conclusions about *Buying Time 2000*

- The data collected for *Buying Time 2000* are based on an improved methodology in which the authors clearly attempted to correct the considerable deficiencies *of Buying Time 1998.* For example, it appears that, in contrast to the 1998 study, at least some systematic effort was made to assess the reliability of the 2000 data. Many methodological flaws were not corrected, however, rendering the 2000 data base susceptible to many if not most of the same criticisms that have been applied to the 1998 data base.

- No evidence is adduced in the 2000 project that

  — the coding of the key variables is any less subjective than in the earlier study

  — the process of post-hoc data alteration has been abandoned or constrained

  — the biases so pervasive in *Buying Time 1998* have been made subservient to proper scientific procedures.

- Consequently, it should not be surprising that none of the multiple data bases provided by the Brennan Center and Professor Goldstein allow the figures and findings reported in *Buying Time 2000* to be reproduced.

- I adduce evidence that the *Buying Time 2000* data base produces such wildly divergent estimates of the number of airings with certain characteristics [45(1 PCS/ER 00045)] (such as issue ads that are aired within 60 days of the election and which depict a candidate), that the data cannot be used to provide useful conclusions about the characteristics of such ads and airings.

- As with the 1998 data, the most reliable finding that emerges from my analysis of the 2000 data is that most of the ads coded as promoting candidates in fact had "policy matters" as their "primary focus."

General Caveats and Reservations about *Buying Time 2000*

Many of the problems I have already identified in *Buying Time 1998* also plague the 2000 edition of the data base, so I will mention them only in passing:

- This is not a peer reviewed study and has not been, and, in my professional judgment based on being a peer reviewer for publishers, journals, and research foundations, could not be, published as an academic report. Since *Buying Time 2000* has not been through a process of peer review, the study has not been subject to the close scrutiny of objective reviewers and its methodology has not been judged to be acceptable by the social scientific community.
- The authors appear to be proponents of a particular policy point-of-view rather than disinterested scientists.
- One of the authors of this report (McLoughlin) appears to have little if any training in the methods of quantitative analysis and the skill level of the other [46(1 PCS/ER 00046)] author (Holman), when it comes to analyzing data bases of this sort, is unclear.[41]

- The data base has numerous errors and inconsistencies in it.
- The same ailments affecting the CMAG data base in 1998 continue to affect it in 2000, as for example the presence of missing data and the inability to capture each unique ad in its own storyboard.
- The analysis relies heavily on extremely subjective coding by students (at the University of Wisconsin), and the student coders were not trained in how to assess the ads.
- The data set is subject to continuous alteration by Professor Goldstein, in consultation with Brennan Center staff. No documents have been produced that indicate how Professor Goldstein has or should exercise his enormous discretionary powers to change or recode the data. On the basis of the data sets I have been provided by Professor Goldstein and the Brennan Center, I believe it likely that the data set as it exists today does not bear a strong relationship to the data coded by the students.

In sum, I conclude that one should not place any confidence in the data set or the conclusions drawn therefrom in *Buying Time 2000*. [47(1 PCS/ER 00047)]

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[41] There is the intimation in an e-mail on 09 Feb 2001 from Craig Holman to Ken Goldstein that Goldstein accused Holman of not understanding the database. Holman's e-mail reply to Goldstein defends against the charges laid by Goldstein. See 09 Feb 2001 e-mail from Craig Holman to Ken Goldstein (KG 00012853). A copy of the e-mail is attached as Exhibit 11 to this report.

The Data Provided for This Study

For the purposes of this report, I analyzed the following data set:

cmag_2000_labeled_data_may02_feb01_w_compet.sav.[42] This data set contains information on 970,428 airings. In general, the 2000 data are cleaner (fewer undocumented codes, internal consistencies, etc.) than the 1998 data, although (as documented later in this report), numerous errors still plague the data set.[43] Moreover, the processes by which errors in the data were identified and corrected are suspect and worrisome.[44] In the final analysis, one cannot have much confidence in the validity and reliability of this version of the data base.

Replicating the Findings of *Buying Time 2000*

The numerous changes in the data base mean that many specific findings from *Buying* [48(1 PCS/ER 00048)] *Time 2000* cannot be replicated. This stems in part from a basic discrepancy in the number of airings considered to be group-sponsored. According to my analysis, there are 133,956 such airings. According to the table reported on page 72 of *Buying Time 2000,* however, there are at least 142,421 group-sponsored airings. I simply do not understand this discrepancy. Without basic agreement on the number of ads and airings, it is impossible to reproduce the findings of that report. Indeed, given the additional issue of *post hoc* alterations applied to the data base, it is unclear that the authors of the study themselves could stand by any given figure reported in *Buying Time 2000.*

Group Sponsored Ads in 2000

My focus in this report is on group-sponsored advertisements. Two variables in the data set apparently address the identity of the ad sponsor: SPONSORI and SPONSOR. Inconsistent codings exist in the data base on 125,084 airings, with the variable SPONSOR reporting these as "1. Candidate Sponsored Airings Including Primary" but SPONSORI coding them as "6. Unclear Primary Sponsor Airings." This discrepancy, however, does not seem to implicate group-sponsored airings and therefore can be ignored for present purposes.

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[42] The Brennan Center/Professor Goldstein provided multiple versions of the 2000 data base, including a file named: Final CMAG data - merged.sav . Despite its name, that file seems to be an earlier iteration of the 2000 data base. The file I am analyzing for this report has a creation date of 8/1/2002. I understand that it was produced by Professor Goldstein in this litigation. I have not examined the "new" 2000 data set included in Professor Goldstein's expert report of September 23, 2002, except to establish that it differs from the data set previously produced.

[43] In an e-mail on 09 Feb 2001 from Craig Holman to Ken Goldstein, Holman identifies a significant error in a version of the data set transmitted from Goldstein to Holman. The error has to do with the transformation of a crucial variable. Holman asserts: "Q8New has been offered as a correction to Q8, but it is really a correction to Q 11, which is fine. However, the corrected version of Q11 by Q8New provides radically different results from the 1998 database." See 09 Feb 2001 E-mail from Craig Holman to Ken Goldstein (KG 00012853). This is one example of the sloppiness of the data base. A copy of this E-mail is attached as Exhibit 11 to this report.

[44] A variety of data correction processes were apparently used, but none is detailed in the report, and at least some of the description of what happened raises serious methodological questions (e.g., missing values were determined by "extrapolating from other data" — *Buying Time 2000,* 20).

For the purposes of this analysis, I focus on the 133,956 airings that are represented in the data base as being sponsored by interest groups in federal elections.[45] These airings were identified by a code of "1" on a variable named IGDUM. According to the ad identification [49(1 PCS/ER 00049)] variable (ADCODE), there are approximately 339 unique ads in this airings database. These ads are listed in Exhibit 12 to this report.[46]

The Reliability of the Coding

Unlike the 1998 data collection, it appears that the 2000 project made some serious attempt to assess the reliability of the data collected by the student coders. A great deal of information is still not available (e.g., how were the students recruited, to what degree had they been exposed to Professor Goldstein's courses and lectures), but *Buying Time 2000* does at least present some discussion of inter-coder reliability (e.g., *Buying Time 2000,* 19).

The most detailed explanation I have seen of the procedures undertaken to assess intercoder reliability is presented not in *Buying Time 2000* but in a 2002 report by Krasno and Goldstein.[47] Here we are told that a sample of 250 ads was recoded, but no details are provided on how these ads were sampled (e.g., random versus non-random selection), who the coders were (e.g., expert versus novice), and variable-by-variable reliability results for the full ad coding data set are not presented. Before the inter-coder reliability methods can be accepted as producing any useful information, a great deal more information must be revealed.

In footnote 4 of this publication, Professors Krasno and Goldstein discuss the reliability of the coding of the "purpose" of the ad, asserting that the coders differed on the "purpose" of the ad in only a single instance. Although the report does not so indicate, the implication is that this [50(1 PCS/ER 00050)] variable was reliably recoded in 249 instances and disagreement appeared over only 1 single ad. The footnote also discusses the reliability of the question assessing the "tone" of the ad. No other variables are discussed. It appears from this footnote, however, that Professors Krasno and Goldstein place considerable confidence in the coding judgments of their student coders.

Another Data Set in Constant Flux

As I noted at the outset of this section, this data set, like the 1998 data, is continuously being changed. Specifically, I mean that the original codings assigned to the ads and airings by the students are altered with some regularity by Professor Goldstein.

Over the life of the data set, practices and policies in this regard have varied. For example, in an e-mail from Craig Holman (Brennan Center) to Ken Goldstein dated 03/10/2001, Dr. Holman makes the following assertion:

> At our last conference call, the staff decided that we are on more solid ground not

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[45] These airings are identified in the data base by a code of "1. IG sponsored ads" on the variable IGDUM. Using the variable FEDERAL, I exclude 132 airings coded as "non-federal races." The titles of these ads are: MDCLT/Glendening Bell Overcharges, SC/NA Hodges Broken Promises, WVBC/Governor Underwood. Note that I included the 54,661 airings coded (implicitly) as missing data on this variable (FEDERAL).

[46] All of the available storyboards for the ads listed are also included in Exhibit 12.

[47] Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-Feingold Bill." *PS: Political Science and Politics* 35 (#2, June): 207-212, in footnote 4, page 211. See Exhibit 5.

> substituting our own judgment of the ads for the undergrad coder's judgments, except in the case of clearly factual errors, so I am reconverting a couple of key variables back to the original codes on q11. [the "purpose" of the ad variable][48]

Dr. Holman refers to ADCODE 1367 as an example of this decision.

The data base also provides some information about the alterations of the original data set. Consider the coding of Question 11 (the so-called purpose of the ad). In the 8/01/2002 version of the data base, there is a variable named Q11. This, I initially assumed, is the original [51(1 PCS/ER 00051)] coding of the students for the crucially important indicator of the purpose of the ad. I assumed this in part because the variable is in sequence in the data set with the other variables derived from the original coding of the ads. However, three additional variables exist, named OLDQ11, Q11.1, and NEWQ11. The variable OLDQ11 has different numerical codes for the categories, but is identical to Q11.1. Similarly, Q11 and NEWQ11 are identical.[49]

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[48] See 03/10/2001 E-Mail from Craig Holman to Ken Goldstein, Holman Deposition Exhibit #23. A copy of the E-mail is attached as Exhibit 13 to this report.

[49] There are actually a number of variables in the data set characterizing the ad. Though differences may exist outside the group-sponsored portion of the total data base, in the 133,956 airings considered in this report, the following variables are equivalent:

Q11 =NEWISSUE
Q11 =NEWELEC
Q11_1 = OLDISSUE
Q11_1 =NEWISSUE

My analysis suggests that the original coding of the ads on this attribute is most likely to be found in Q11_1.[50] I identify this variable because it contains the full range of codes, including unsure and missing data codes. The variable Q11_1 was apparently first transformed into the Q11 (which was then inserted in the sequential order that Q11_1 once occupied). One difference between the two variables is that Q11 has no missing data. How the problem of no information for the ads/airings was resolved is not apparent from the data set.

The data base contains 338 ads.[51] Of these, 276 are coded consistently throughout the various versions of this variable. That is 181 ads (and these are ads, not airings) were coded as designed to generate support or opposition to candidates and were not later altered by Professor [52(1 PCS/ER 00052)] Goldstein. Similarly, 95 ads were coded by the students as advocating issue positions and these codes were then apparently accepted by Professor Goldstein.

The codes for the remaining 62 ads appear from the data base to have had their codes changed on the "purpose of the ad." These findings thus bring an entirely new perspective to the 2000 Buying Time data base. It is certainly true that the original ad data were coded by the student coders. But it is apparent that a substantial number of these codes - 62 ads out of a total of 338 — apparently were not the product of the student coders but were instead based on the judgment of Professor Goldstein (often with the consultation of the staff of the Brennan Center). Unfortunately, very little information has been reported regarding what limits, if any, were placed on Professor Goldstein's discretion in making these changes, information which is highly important for assessing the findings of the 2000 Report.

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[50] There is yet another representation of the ad's purpose in the data set in the variable ADCODE. The differences between this variable and Q 11 are on four ads that are coded as electioneering on Q 11 but as genuine issue ads on ADTYPE. Being unable to discern why these changes were made, I will use Q 11 as the indicator of the ad's "purpose" throughout this report.

[51] Actually, there are 339 ads, but one ad is not consistently coded on Q11 so I excluded it from this analysis.

Let us return to the inter-coder reliability results reported for this variable by Professors Krasno and Goldstein. It now appears that changes in the codes for Question 11 were fairly common. One wonders therefore whether the inter-coder reliability results discussed in the report in *PS* reflect a comparison between the subsequent codings for the reliability test and (a) the original coding by the students or (b) the Goldstein-adjusted version of the variable. These data present a puzzle: Given that the student coding was deemed after the inter-coder reliability test to be so reliable for Question 11, why were so many changes subsequently made by Professor Goldstein in the codings of these variables? Were *reliable* student codings altered by Professor Goldstein? If so, on what basis and with what justification? Since it is difficult for me to imagine that one would conduct an inter-coder reliability test on data that had subsequently been altered by the investigator — such a test would obviously not provide evidence of the reliability of the [53(1 PCS/ER 00053)] *student* coding — I can only imagine that Professor Goldstein decided to alter the data base insofar as Question 11 is concerned *even after drawing the conclusion that the coding of the ads on Question 11 was reliable.* Whatever specifically happened with these data, the conclusion I am compelled to draw is that the data as presented in the data set cmag 2000_labeled_data_may02_feb01_w_compet.sav are of highly questionable reliability.

Two important concerns arise from this examination of the volatility in the coding of the ads.

1) What motives were involved in making the various changes to the codes for these ads? Were the changes solely a function of scientific concern for accuracy in the data, or were they instead related to disappointment that the initial findings did not support the expectations and preferences of the investigators?[52]

2) What specific standards did Professor Goldstein employ in judging the ads? Apparently, no documents exist that formalize and make explicit his decision rules and heuristics. Indeed, it is unclear to me that a specific formal definition has ever been provided for an ad that has as its purpose the generation of "support or opposition for a candidate" or for an advertisement that "provides information or urges action." Further, how should an ad that undeniably does both be coded? The investigators have asserted numerous times that subjective [54(1 PCS/ER 00054)] judgments are involved in coding Question 11. Presumably, some specific decisional heuristics exist to guide these judgments. Unfortunately, none has been produced, insofar as I am aware.

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[52] One sees evidence throughout the e-mail exchanges of the investigators of a clear preference that the data support a particular conclusion. For instance, in an e-mail of 11 Jan 2001 from Dr. Holman to various NYU people, Dr. Holman (referring to the 1998 data) asserts that "the numbers crunched for Rick do not paint as great a picture as previously thought." After summarizing his view that the number of issue ads in 1998 that would be deemed "electioneering within a 60-day regulatory period" is more likely 40% than the originally claimed 7%, Dr. Holman asserts: "Hopefully, we will get more positive results from the 2000 database." A copy of this E-mail is attached as Exhibit 14 to this report.

Additional Considerations Regarding the Coding of Question 11

One of the most important variables in the 2000 study is Question 11. The student coders were asked to respond to the following query *(Buying Time 2000,* 99):

> 11. In your opinion, is the purpose of the ad
> to provide information about or urge action on
> a bill or issue, or is it to generate support or
> opposition for a particular candidate?
>
> 1. Generate support or opposition for a candidate
> 2. Provide information or urge action
> 3. Unsure/Unclear

Thus, the wording of the question in the *1998* and 2000 projects is identical.[53]

Consequently, the coding of this variable contains all of the frailties of the *1998* coding. Without repeating my conclusions from my review of the 1998 data, I will simply summarize my concerns about the data collected with this question:

- The coders are asked to make a judgment about the "purpose" of the ads from the manifest content of the ad. Of course, no data are available on the "purpose" of the ads' sponsors so the student coders are obviously therefore not coding anything about the intention of the ad sponsor. [55(1 PCS/ER 00055)]

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[53] In 1998, the words "particular candidate" were printed in bold-face type; in *Buying Time 2000* the words were printed in ordinary type.

- The question is highly subjective, and it is not clear that any rules or guidelines were provided to the coders to guide the exercise of discretion. What constitutes "support" or "opposition" is nowhere detailed for the coders, requiring them to rely on their own subjective values in the exercise of their discretion in answering this question.
- The question is difficult to answer, requiring a great deal of information, including knowing whether someone depicted in the ad is in fact a candidate in the geographical area where the ad was aired.
- The question requires a forced choice of either providing information/urging action or generating support/opposition for a particular candidate, thus failing to recognize that many ads may have mixed content.
- In the event of mixed content ads, the question provides no instructions for how to weight the various parts of the ad in drawing a conclusion about its "purpose."

Thus, this analysis reinforces my deep and serious reservations about the quality of the data collected with this question.

The Issue Content of Candidate Support Ads

I have adduced in this report indirect logical and empirical evidence indicating that the student coders over-reacted to the appearance of a politician in these ads, often falsely coding [56(1 PCS/ER 00056)] issue advocacy ads as electioneering ads.[54] But it is unnecessary to rely on indirect evidence or conjecture in investigating these ads; instead, direct evidence as to their issue content is available from the data base itself.

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[54] As I have suggested earlier, many of the alterations in the data base were necessary because the student coders over-

In 2000, the student coders were required to answer the following question:

> 27. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Policy matters
> 2. Personal characteristics
> 3. Both
> 4. Neither

The question is superior (i.e., more likely to generate valid data) to Question 11 in at least two important respects. First, it allows ads to be coded as having mixed content. Second, it provides guidance to the coders, however vague, by asking them to judge the "primary focus" of the ad. This renders the coding of mixed content ads more reliable and valid.

Recall that 79,648 of the group-sponsored airings (59.5% of the total) were coded on Question 11 as having as their purpose the generation of support or opposition to a particular candidate.[55] The following table reports the coding on Question 27 of the 79,648 airings said to be electioneering ads in Question 11. [57(1 PCS/ER 00057)]

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reacted to the presence of a political figure in an ad, often wrongly assuming that if a political figure appeared, he or she was a candidate for public office, and that the ad were therefore highly likely to be engaged in electioneering.

[55] For the purposes of this analysis, I use variable Q 11, which I believe to be the Goldstein adjusted version of the original codings.

	Airings Coded as Having the Purpose of *Generating Support or Opposition for a Candidate*	
Coding on Question 27 – Primary Focus of the Ad	Number of Airings	Percentage
Policy Matters	62,764	**78.8**
Personal Characteristics	1,956	2.5
Both	14,035	**17.6**
Neither	379	0.5
Missing/not coded	514	0.6
Total	79,648	100.0%

Thus — and this is a very important conclusion — 78.8% of the ads coded as having "electioneering" purpose in Question 11 were simultaneously coded as having as their "primary focus" advocacy on "policy matters." Another 17.6 % of the airings had both policy and personal characteristics as their foci, *resulting in a total of 96.4% of the group-sponsored ads in 2000 having policy matters as their primary focus, or at least as part of their primary focus.*

As with the 1998 data, it is obvious that the coding of Question 27 highlights the deficiencies of the coding of Question 11. Indeed, the results I produce are entirely logical given the artificial nature of the coding decision required by Question 11. Question 11 produces the results it produces because (a) the coders failed to code mixed content ads, since Professor Goldstein provided them no coding category with which they could record mixed-content ads, and (b) they also over-reacted to the presence of politicians in the ads when they coded Question 11. Thus, their coding on Question 11 vastly underestimated the number of ads with policy [58(1 PCS/ER 00058)] content. When given a chance on Question 27 to acknowledge that ads might have mixed content, the coders overwhelmingly judged that these ads focused primarily on issues. To reiterate, due to the defects in the structure of Question 11, and the much sounder structure of the question asked in Question 27, the results of Question 27 should be accepted because the coding is both more reliable and more valid.

Exactly what is the issue content of these ads? In Questions 32 - 35, the student coders identified the specific policy issues addressed in the ads.[56] Fully 37.8% of the ads coded as electioneering addressed issues of "Health Care" and another 25.8% considered "Medicare."[57] A panoply of additional issues is addressed in these ads, clearly attesting to their issue content.

The Characteristics of Group-sponsored Issue Ads Aired Within 60 Days of the Election, 2000

Two variables become relevant when we consider ads and airings within 60 days of the 2000 election[58]: (1) The presence of "magic words" — the indicator of the presence of "magic words" is derived from the responses to Question 8[59], and (2) whether a candidate is mentioned [59(1 PCS/ER

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[56] There is an apparent error in some of the coding, since the undocumented code "9" appears in 514 of the airings.

[57] Note that "Health Care" and "Medicare" are independent and separate categories in the data base.

[58] There are 225 airings with a missing value on the variable SPOTDATE (date on which the airing was aired). It is not clear from the available documentation how these missing values were corrected to produce scores on the variable DAY60.

[59] Note that, according to Dr. Holman, this is not an objective variable; instead, the coding of this variable is subjective. Holman Deposition, page 72, lines 4-6. See Exhibit 8.

00059)] in the advertisement. Because it appears that this information was subject to considerable *post hoc* coding by Professor Goldstein, I merely accept for the purposes of this analysis the coding in the data set for the variable MENTION[60]:

Some 60,000 airings in 2000 satisfy these three criteria (aired within 60 days of the election, no "magic words," and a candidate for office was apparently mentioned or depicted). According to the data base (and without accepting the results), in the overwhelming majority of these airings — indeed, 59,997 out of 60,006 - the "purpose" of the ad was to generate support or opposition for a candidate.

On the other hand, consider how these ads were coded on Question 27:

Q27	Number of Airings	Percentage
Primary focus on policy matters	47,356	78.9
Primary focus on personal characteristics	541	0.9
Primary focus on both	11,884	19.8
Primary focus on neither	225	0.4
missing/not coded	0	0.0
Total	60,006	100.0%

Thus, the overwhelming conclusion is that, of the airings with these three characteristics, 78.9% were coded by the students or Professor Goldstein as having policy matters as their "primary focus" and another 19.8% were said to have *both* policy matters and personal characteristics as [60(1

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[60] There is some inconsistency between this variable and the coding on Questions 12 and 13. The causes of this inconsistency are not apparent to me, suggesting that it is due to Professor Goldstein's adjustments on the data base.

PCS/ER 00060)] their primary foci. *Thus, 98.7% of these ads in fact have a clear policy focus.*

An example of the coding of one of the ads might be useful to document how this coding works in actual practice. Consider ad # 1544, which reads:

> [Woman]: "Many people who have cancer are looking for miracles. At this point, it's my faith, my support from my family and my friends. And then there's the medicine." [Announcer]: Congresswoman Anne Northup is working to add a prescription drug benefit to Medicare and make sure medicines are available for every senior who need them. Call Congresswoman Anne Northup. [Woman]: "Without the medicine, I would not be where I am." [PFB Citizens for Better Medicare Inc.]

Frame #7 reads:

> Call Cong. Northup
>
> Support her Rx Plan for Seniors
>
> (502) 582-5129
>
> PAID FOR BY CITIZENS FOR BETTER MEDICARE INC.

This ad was coded as promoting a candidate (although this is itself a highly questionable assessment). But the ad was also coded as having policy matters as its primary focus, and was also properly coded as to the policy substance ("Medicare"). Surely the coders judged the "purpose" of this ad to be candidate promotion because they over-reacted to the mentioning of a candidate and because they were not allowed to code such ads as having mixed content. In this and many other instances, the coding of Question 27 regarding the primary focus of the ad is more reliable and valid than the coding of Question 11 (the "purpose" of the ad). [61(1 PCS/ER 00061)]

According to the data base, nearly all of these ads in 2000 were coded as "electioneering issue ads." But according to my analysis nearly all are primarily focused on issues. Which of the two conclusions should be accepted and believed?

To answer this question requires that we return to the relative value of the coding of Questions 11 and 27. I need not repeat the arguments nor reproduce the data analysis I presented above. The simple conclusion is that when the codings on Questions 11 and 27 seem to indicate different content in an ad, the results from Question 27 ought to be accepted due to the greater reliability and validity of the coding on Question 27.

Ads Aired Within 60 Days of the 2000 Election

Buying Time 2000 asserts: "Of all group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4% were found to be electioneering issue ads (see Figure 8-2). In absolute numbers, *only three genuine issue ads (which aired a total of 331 times in the 2000 elections) would have been defined as electioneering communications under the Snowe-Jeffords amendment*" (*Buying Time 2000*, page 73, emphasis in the original). From a statistical viewpoint, this conclusion ought to be fairly easy to reproduce from the version of the 2000 data base with a creation date of 8/1/2002 (the data base I have been analyzing for this report). In order to avoid any confusion, I will focus on a single number in this claim: 331, the number of airings represented by ads with these characteristics.

According to the data base, if this question is addressed with the coding on Question 11, *there are 9 airings with these characteristics.* Not even the authors of *Buying Time 2000* believe that this is a correct estimate of the number of airings. [62(1 PCS/ER 00062)]

According to the coding of Q11_1 (which I believe to be the original, student coded version of the "purpose" question), there are 1,082 airings with these characteristics. Thus, there are at least three possible answers to the question of how many ads were aired within 60 days of the election which depicted candidates and which had as their purpose providing information:

9 airings

331 airings, or

1,082 airings.

I have no doubt whatsoever that many additional estimates could be produced from the *Buying Time 2000* data base. In fact, however, I have confidence in none of these.

Just as important as the accuracy or inaccuracy of the data cited in the 2000 Report, however, is the extent to which changes in a relatively small number of the highly subjective codings can affect the results reported and the conclusions reached. To make this point, let us consider 30 specific ads from the 2000 data base. These ads are:

676, 704, 1270, 1367, 1381, 1422, 1552, 1648, 1757, 1761, 1844, 2065, 2088, 2089, 2107, 2158, 2301, 2344, 2502, 2558, 2588, 2695, 2712, 2810, 2900, 2935, 3158, 3170, 3220, 4001.[61] Let us assume for the purposes of this analysis that each of these ads could fairly be coded as "providing information."

When I examine the number of airings of these ads within 60 days of the election,[62] I discover that they were aired 14,133 times. The total number of genuine issue airings under this [63(1 PCS/ER 00063)] hypothesis is therefore the 331 acknowledged by the Brennan Center report and these 14,133, for a total of 14,464 airings. Since there were 60,006 issue airings (without "magic words") within 60 days of the 2000 election, this figure of 14,464 constitutes 24.1% of these airings. Thus, if one assumed that airings presented within 60 days of the 2000 election, which mentioned candidates, but which did not mention "magic words," were intended to promote candidates (or were, in the words of the Brennan Center authors, "electioneering ads"), one would be wrong, under this scenario, approximately 24% of the time.

Several conclusions should be drawn from this analysis. First, changes in the coding of very small numbers of ads can change the results dramatically. Second, the current version of the 2000 data base supports many possible estimates of the number of ads with these characteristics. And finally, given all of the deficiencies of the data base and the coding on which it is based, the wisest course is to draw no conclusions whatsoever about these ads on the basis of the empirical evidence in the data base.

Summary and Conclusions

One important conclusion from this analysis is that there is a great deal of subjectivity, ambiguity, and ambivalence in the coding of the content of these advertisements. The student coders often disagree with Professor Goldstein, Professor Goldstein occasionally disagrees with the staff of the Brennan Center, and indeed, Professor Goldstein himself seems to change his mind over time about the nature of some of these ads. Whether an ad is issue based or candidate focused is not an objective, clearly discernible attribute of the ads. Reasonable people disagree about the content of these ads. [64(1 PCS/ER 00064)]

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[61] This list of 30 ads was provided to me by counsel. The storyboards for these 30 ads are attached as Exhibit 15 to this report.

[62] Note that none of these ads uses "magic words;" all mention candidates.

Consequently, this data base is constantly in flux. The figures reported in *Buying Time 2000* have changed with alterations and manipulations of the data by Professor Goldstein and it is entirely possible they will change again in the future. Since no reports have been written about this process of data manipulation, there has been no transparency in this process. Since this research has not been subject to the peer review process — through which such procedures would have to be revealed, defended, and accepted by the academic community — one cannot help but worry quite a bit about the reliability and validity of the data collected. Without reliability and validity, no useful conclusions can be drawn from the data base.

This entire research process in *Buying Time 2000* thus deviates in many important ways from conventional scientific research. One cannot help but be impressed by the e-mail correspondence among the analysts. The conclusion one draws from a review of this e-mail is that the investigators were committed to drawing a particular set of substantive conclusions from the data. When the conclusions were not forthcoming, the data were scrutinized further and alterations were made in the data base. Indeed, at least with regard to some of the conclusions of the *Buying Time 1998,* internal disagreement among the investigators themselves about the veracity of the findings appears to have been substantial. Such strong *a priori* commitments to drawing certain substantive conclusions from the data base seriously undermine the credibility of the reports. [65(1 PCS/ER 00065)]

OVERALL CONCLUSIONS

The essence of science is replication. When scientists claimed to have discovered "cold fusion" excitement spread quickly throughout the world. That excitement dimmed and then was extinguished when it was discovered that crucial experiments could not be reproduced. Unless research procedures can be explained in such a way that others can repeat the procedures and produce the same results, then no value attaches to the information produced. We do not believe that cold fusion can be accomplished today because the initial claims of the investigators cannot be reproduced by others.

The Buying Time reports are not of the potential significance of cold fusion for the advancement of human welfare, but the reports do share the fatal flaw of relying on data that are not capable of generating reproducible findings and conclusions. For example, what proportion of issue ads in 1998 would have been improperly regulated or banned were a bright-line test imposed? *Buying Time 1998* says 7 percent; the depositions point to several figures between 13 and 40 percent; and my own analysis of the "final" 1998 data produces a figure of between 82 and 89% (based on the coding in Question 22). Similar ambiguity and ambivalence characterize the 2000 data.

Why is there so much disagreement about the correct statistics? Part of the answer resides in factors such as the sloppiness of the data base and the fact that published reports did not undergo a review process prior to publication. But the larger portion of the answer has to do with the inherently subjective nature of the coding process. Certainly neither the coders nor Professor Goldstein could have accurately coded the "purpose" of any of the ads since no effort whatsoever was made to investigate the intent of the ad sponsors. The coding of the content of the ads is [66(1 PCS/ER 00066)] inherently a subjective process — and proper scientific procedures for dealing with subjective phenomena were not followed — but subjectivity and coder discretion were exacerbated by failure to formally constrain and guide the exercise of discretion (including the exercise of discretion by Professor Goldstein) and by the inadequacies of the coding form itself (e.g., the failure to allow coders to acknowledge that ads typically have more than a single focus). And to allow coding decisions to be reversed on an idiosyncratic basis by those with a strong policy interest in the outcome of the research violates all canons of scientific objectivity. It is little wonder that the findings of *Buying Time 1998 and Buying Time 2000* concerning so-called sham issue advocacy were not published in peer-reviewed social scientific journals or monographs.

After reviewing the reports, the data, and the depositions, I conclude that the findings of these reports should not be accepted as accurate and valid descriptions of the nature of political advertising in the 1998 and 2000 federal elections. The Buying Time reports have not taught us much about sham issue advocacy but they have been instructive on the nature of sham science.

Dr. James L. Gibson
September 30, 2002

[1(2 PCS/ER 00794)]

Rebuttal to the Expert Reports of

Kenneth M. Goldstein and

Jonathan S. Krasno and Frank J. Sorauf

Dr. James L. Gibson

October 7, 2002

In my review of the original Buying Time reports (1998 and 2000), I drew several major conclusions about the reports, their conclusions, and the data upon which the studies were based. It is perhaps useful to begin this rebuttal with a brief restatement of these conclusions.

- As provided by Professor Goldstein, the 1998 and 2000 data bases are riddled with errors and inconsistencies and the findings of the reports cannot be replicated from the data.
- The key measures that are the focus of this litigation require highly subjective assessments and the student coders making those judgments never received any instruction on how to exercise their enormous discretion.
- The data bases are constantly being manipulated by Professor Goldstein, with many iterations of new scores being produced for the variables of primary interest in this litigation.
- Thus, the conclusions from those reports should not be accepted.
- Indeed, to the extent that the data bases are able to support any [2(2 PCS/ER 00795)] conclusions, they are that the ads under consideration in this litigation have policy matters as their primary

focus and therefore to ban or regulate them would be a substantial intrusion upon the freedom of interest groups to communicate with citizens and to attempt to shape public policy.

I will focus this rebuttal to the expert reports around the question of whether my conclusions are altered by the reports or the new data analysis that underlies them. I conclude that nothing in these reports has caused me to change the conclusions I expressed in my report of 9/30/2002.[1] Since nearly all of these issues are common to both the 1998 and 2000 studies, I will generally integrate my discussion of these studies in the analysis that follows.

Repudiating the Results from *Buying Time 1998* and *Buying Time 2000*

These new reports make plain that the authors and I agree on one basic point: The statistical analyses presented in *Buying Time 1998* and *Buying Time 2000* should not be accepted. Professor Goldstein now reports entirely new estimates of the effect of the Bipartisan Campaign Reform Act (BCRA) on "genuine issue speech,"[2] thereby repudiating the figures reported in *Buying Time 2000*, and Dr. Krasno and Professor Sorauf report new estimates for 1998 that differ from the numbers reported in *Buying Time 1998*.

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[1] A listing of additional materials upon which I have relied is attached as Exhibit 1.

[2] To assist readers in comparing my analysis with that of Goldstein/Krasno/Sorauf, I adopt some of their language (e.g., "genuine issue ads"). The use of these terms should not be taken to represent agreement with either the conceptualization or operationalization of these concepts and issues, but is instead simply a convention I adopt so as to facilitate communication.

The same conclusion applies to the data bases. Professor Goldstein has provided with his [3(2 PCS/ER 00796)] expert report yet another version of the 2000 data base, so presumably the earlier versions are defunct and should not be relied upon. Dr. Krasno and Professor Sorauf do not provide a newer version of the 1998 data base, but do offer calculations in the appendix that apparently render the old data base obsolete. I assume that one day these data bases will be archived and made available for use by other interested scholars, as most data bases of this sort are, and that at that point the authors will create clean, properly documented, and final versions of the data bases.[3] That day has not yet arrived.

As I have noted, the Buying Time data and studies are constantly evolving (with changes apparently being made in the codes of airings even in connection with this litigation), and with the conclusions of the authors representing targets that are always on the move. But at the same time, details about the methods employed by the studies are slowly beginning to emerge. Let us consider first the basic question of the quality of the data collected by CMAG.

Errors in the CMAG Data

The data collected by Campaign Media Analysis Group (CMAG) deserve closer scrutiny than they have received to date. Professor Goldstein professes confidence in these data,[4] but considerable empirical evidence exists to suggest that this confidence is misplaced.

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[3] While Appendix F of Professor Goldstein's report provides a document entitled "2000 Coding Sheet," this document provides information on only a tiny fraction of the variables included in the data set.

[4] See Ridout, Travis N., Michael Franz, Kenneth Goldstein, and Paul Freedman. 2002. "Measuring Exposure to

The CMAG data base should be scrutinized from several vantage points: [4(2 PCS/ER 00797)]

1) Were all of the airings represented in the data base in fact aired?

2) Does the data base represent all ads aired or instead were some airings not captured by the CMAG technology?

3) Did the CMAG "analysts" accurately code the content of the ads?

4) Was CMAG in fact able to capture storyboards for every unique ad?

Unfortunately, the answers to some of these questions cast very serious doubt on the CMAG data.

I have access to no independent information with which I can verify that the airings represented in the CMAG data base were actually broadcast, or that the information captured is in fact accurate.[5] However, Professor Goldstein has presented some evidence in his paper entitled "Measuring Exposure to Campaign Advertising" indicating that the accuracy of the information collected is certainly less than perfect (see Ridout et al. 2002).[6]

Campaign Advertising." Unpublished paper, June 19, 2002, at page 17.

[5] In the appendix to their expert report, Dr. Krasno and Professor Sorauf claim that the CMAG data base is incorrect in the information it depicts about the ad with the id number 13. They provide no explanation for the error in the data base. Unfortunately, the appendix is not paginated, but this seems to be the 15th page of text in the appendix.

[6] Counsel for the AFL-CIO has provided me a copy of the Declaration of Denise Mitchell, 10/4/2002. In her

An equally serious issue is whether the data base fails to capture all ads that are broadcast. The available evidence suggests that there are some very serious omissions. [5(2 PCS/ER 00798)]

Professor Goldstein has reported that he compared the information in the CMAG data base with the actual billing records of eight television stations in five different markets (see Ridout et al. 2002). He discovered that the error rate of the CMAG data varied from 0 to 20 % (see Table 2, page 28).[7] From the figures reported in Table 2, we can derive an estimate of the overall degree of accuracy of the CMAG data base.

Note first that station billing invoices appear to document more ads than found in the data base in every one

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Declaration, Mitchell asserts that she cannot reproduce from AFL-CIO records Professor Goldstein's calculations from the data base on the airings sponsored by the AFL-CIO. She notes that the CMAG data base makes two types of errors: errors of omission (failure to include ads aired by the AFL-CIO) and errors of commission (the inclusion of ads said to be aired by the AFL-CIO but that were in fact not aired). Since the AFL-CIO is the group with the second largest number of airings in the data base (well behind the Citizens for Better Medicare), any such failure to track accurately the airings of this organization would be a major indictment of the quality of the data base. See Declaration of Denise Mitchell, 10/4/2002, paragraph 64.

[7] Working through the example Professor Goldstein provides in the paper is useful for understanding the meaning of the error rate. The error rate for station WJRT is .01. This means that of the 618 airings for which the station has billing records, the CMAG data base includes only 612. Thus the error rate is .01: ((618 - 612) / 618) = .01.

of the stations examined. Thus, the CMAG data always under-represent the number of airings by each of these television stations.

By how much does the data base under-represent actual broadcasts in 2000? We can derive an estimate quite simply. For instance, the 8,526 airings in the data base for WJRT apparently represent 99 percent[8] of the actual airings broadcast by WJRT. Applying the arithmetic, this means that WJRT probably broadcast 8,612 spots, and that the CMAG methodology therefore failed to capture 86 of these.[9] Applying this methodology to the figures for each of the stations, we discover that the CMAG data for these 8 stations likely missed 1,764 ads.[10] This represents a small percentage of the overall airings of these eight stations (5.04%), [6(2 PCS/ER 00799)] but when this proportion is applied to the data base as a whole, it translates into an estimate of 48,864 airings that in fact were broadcast but that were not captured by the CMAG methodology. This is a sizable number indeed. Moreover, the number is of sufficient magnitude that failure to include these airings in the analysis most likely biases the substantive conclusions drawn from the data base.

We do not know any of the characteristics of these 48,864 missing airings. But one might reasonably hypothesize that the clearer and more obvious the political content of an airing, the more likely it is to have been included by the CMAG analyst. Conversely, to the extent that ads did not have a clear "political purpose" that could be discerned by the CMAG analysts, the more likely they were to have been excluded from the data base by the analysts. Thus, it seems reasonable to assume that these 48,864 missing airings are not simply a random sub-set of the data, but instead tend to include a disproportionate number of "genuine issue ads."

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[8] This figure is equal to 100% minus the error rate.

[9] (8,526/8,612) = .99.

[10] Were I to use the more demanding standard of "Percent correct within 1 sec." (the first data column in the table), the number of ads estimated to be missing or that contain serious errors would be significantly higher than the numbers I report here.

Having addressed the "errors of omission" in the CMAG data base, I now consider the evidence on "errors of commission." In footnote 4 (page 17) of the Ridout et al. paper, the authors note an important anomaly in the CMAG data base: ".... some advertisements .... were never coded in the original data set [the student codings of the ads]. This is because these ads were not political, but were nonetheless included in the data provided by CMAG." This sentence raises a host of questions about the data base, including: What criteria did CMAG employ for selecting ads to be included in the data base? How was the content of the ads (e.g., "political" versus not) coded, and by whom, according to what criteria, and with what degree of reliability? Perhaps this problem with the CMAG data accounts for some basic puzzles and discrepancies in the data base. [7(2 PCS/ER 00800)]

Finally, I return to the inability of the CMAG technology to capture text and storyboards for each unique ad. Because the technology cannot distinguish airings that are very similar but not identical, so-called cookie-cutter ads are not properly represented in the data base. The failure to capture all airings of all unique ads is a very serious limitation of the data base.

In conclusion, the CMAG data are apparently plagued by numerous errors, making reliance on these data bases for drawing conclusions about the nature of political communications in the United States extremely precarious, hazardous, and subject to error.

The Evolution of Question 11

The second portion of the data bases used for these two reports was created by the student coders at Arizona State University and the University of Wisconsin. In the 2000 data set, Professor Goldstein provides yet another incarnation of the ad's scores on the all-important Question 11.[11] In the 2000 data set appended as Appendix L to his expert report, an entirely new variable can be found. This variable was not present in any of the earlier versions of the data base previously provided by either Professor Goldstein or the Brennan Center. The name and label of this variable are:

BT00_Q11 oldest available q11 codes (older than feb version) This variable is of considerable interest given the importance of Question 11 to the findings and conclusions of Professor Goldstein's expert report. Where it came from, what it means (the [8(2 PCS/ER 00801)] individual response codes on the variable, ranging from 0 to 99, are unlabelled[12]), how it was match/merged to this data set, and indeed whether it is in fact the "oldest available" incarnation of Q11 all remain open questions. I assume that this variable gets closer to representing the original codes assigned to the ads by the student coders at the University of Wisconsin. I do not know if in fact some earlier version of this variable exists.[13]

Many issues surround the coding of Question 11 by the students and by Professor Goldstein. Since new information about this variable has come to light in Professor Goldstein's expert report, how this information about the ads was created deserves some additional scrutiny.

Inter-coder Reliability. In my report of 9/30/2002, I offered an analysis of both the reliability and validity of the information collected by the students. I surmised in that report that no formal test of inter-coder reliability was conducted in 1998. Nothing in the new expert reports leads me to a different conclusion about the 1998 data.

However, new information does indeed emerge about the 2000 data. In Appendix I to his expert report, Professor Goldstein offers a copy of a paper currently under review at *Political Communication*. In this paper, consideration of the reliability of the variables is presented, beginning on page 17 and extending through page 21. Here, the author reports an analysis of "the [9(2 PCS/ER 00802)] accuracy of the human coding" (page 17), based on a randomly selected sample of "150 unique advertisements from the over 4,000 advertisements airing in 2000" (page 17).[14] Goldstein asserts: "As part of a larger project, we asked five undergraduate students to code the ads using our coding sheet, thus allowing us to compare our original coding with five independent assessments. We then compared each coder's results with those of the CMAG data base" (pages 17-18). Several questions about this process emerge.

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[11] I will not repeat all of the objections I laid out in my report of 9/30/2002, but I do incorporate those objections into this analysis since I have not changed my views on any of the issues addressed in that report.

[12] Data sets are typically documented with a "codebook" that details the meaning of each variable and each code on each variable in the data set. Moreover, to facilitate understanding and avoid analytical errors, variables are typically fully documented with labels. This variable is labeled as to its possible content (e.g., "oldest available q11 codes (older than feb version)"), but the individual scores or codes (what we would call the "response set") are not documented. No codebook was provided with this data set, and the norm in the data set is for the variables to be entirely undocumented.

[13] I have confirmed that this variable differs from the variables Q11 and Q11_1 as represented in the data set: cmag_2000_labeled_data_may02_feb01_w_compet.sav.

[14] It is not clear how this sample of 150 ads relates to the 250 ads discussed in footnote 4 of the Krasno/Goldstein PS report (published in June 2002).

One first wonders about how Professor Goldstein compared the new codings to the "original coding." Is the original coding represented in the variable "BT00_Q11 oldest available q11 codes (older than feb version)"? If so, why is this variable referred to as the "oldest available" incarnation of the coding rather than the "original version" of the variable? This a most troubling discrepancy, unless BT00_Q11 purports to be the scores assigned to the ads by the students and before the various post-coding manipulations and changes by Professor Goldstein.

This "test" of the accuracy of the coding relies upon 143 advertisements (since some of the 150 selected had to be discarded due to the discrepancies in the CMAG data base). In order to establish the relevance of this test to the issues in this litigation some considerable attention must be given to this sample of 143 airings.

Consider the 2000 data base and the coding of Question 11 in the version represented by BT00_Q11. Once four pesky airings are removed from the data base, 970,424 airings remain.[15] [10(2 PCS/ER 00803)] When aggregated by the ad identification number, this produces 3,111 unique ads (or ads found to be unique by virtue of their ad identification number, to be absolutely precise).[16] Of these airings, 2 seemed to have been coded differently at different times (i.e., for different airings) on the "earliest known" Question 11. Furthermore, the student coders assigned what are apparently missing data scores to 19 of the ads.[17] Of the remaining ads, 2,953 were said to be "electioneering" ads (promoting support or opposition for a candidate) and only 127 ads were scored as providing information or [11(2 PCS/ER 00804)] urging actions ("genuine issue ads").

This distribution on the "purpose" variable has two very important consequences. First, in statistics, we call this a "skewed" distribution since almost all of the cases are scored in a particular way (and in the sense that deviation from a 50/50 split is extreme). When a variable is highly skewed, as this one, sampling cases on this variable becomes very difficult. A randomly selected sample of 100 ads from this "population" of 3,111 would be expected to find only 4 ads (actually 4.1 ads) that were coded as issue ads. A sample of 150 ads would be expected to generate 6 issue ads; and a sample of 250 would be expected to include no more than 10 issue ads. Thus, if one took a sample of 150 ads as Professor Goldstein asserts in his paper, one would find only a tiny number of ads that were coded as having a "purpose" of providing information or urging action.[18] Since group-sponsored ads constitute less than 14 % of the data base from which the sample was apparently drawn, one would expect that 21 group ads were included in the intercoder reliability data base (and of course that a tiny number of ads would be group-sponsored issue ads).

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[15] Professor Goldstein asserts on page 8 of his report that "the CMAG database collected 970,424 political television ad broadcasts ....". Yet the data base he attaches as an appendix to his report includes 970,428 airings. I removed the four airings with a "system missing" score on the variable named COUNT. This produces a data base with a number of airings consistent with the number identified in Professor Goldstein's report.

[16] It is unclear to me why Professor Goldstein refers to "4,000 advertisements airing in 2000." See Ridout, Travis N., Michael Franz, Kenneth Goldstein, and Paul Freedman. 2002. "Measuring Exposure to Campaign Advertising." Unpublished paper, June 19, 2002, at page 17.

[17] I say "apparently" since the codes "98" and "99" are conventionally used as "missing data" codes. However, the scores are undocumented in the data set.

Consequently, any conclusions about whether this sort of ad was in fact reliably coded cannot be accepted on the basis of an examination of such a small number of ads. Perhaps this reliability test provides some information about candidate and party ads, but it provides virtually no useful information about group-sponsored ads and especially the degree to which group-sponsored ads were reliably and validly coded as to the "purpose" of the ad.[19]

A second consequence of this distribution is that, for whatever reasons, the overwhelming decision of the coders was that these ads represent electioneering. Issue ads were not quite the equivalent of needles in a haystack, but they were exceedingly rare. Thus, it seems quite likely that even after coding only a few ads, the coders developed a strong expectation, implicit or explicit, that the next ad they coded would be an electioneering ad. It is very difficult to make subjective assessments of infrequently occurring events. Once a coder discerns a pattern in the responses to a subjective variable, it becomes difficult indeed for the coder to "break the habit." [12(2 PCS/ER 00805)] Especially in a circumstance in which there is an ideologically charged bias in favor of finding a particular outcome, "true" issue ads had a very heavy burden to overcome among the coders.

Substantive Consideration of the Results From Question 11

As I have noted, both Professor Goldstein and Dr. Krasno/Professor Sorauf have provided in their expert reports new estimates of the percentage of "genuine" ads/airings that mention or depict candidates and that were aired within the last 60 days of an election. Notwithstanding the flaws in their data bases, it is important that we give their reports close scrutiny.

Professor Goldstein offers Table 7 (immediately following page 24) as his calculations on the 2000 data base. He concludes:

> .... there is persuasive evidence that the BCRA definition of Electioneering Communication is not overbroad in the sense of applying to any meaningful number of advertisements that are perceived as Genuine Issue Ads. Using the coder's classifications, only 3.1 percent of the 45,001 Genuine Issue Ads broadcast by interest groups during the 2000 election cycle would have been covered by BCRA. (Pp. 26-27)

The denominator he uses for these calculations — 45,001 — represents the number of "genuine issue ads" broadcast in

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[18] The situation is little improved with a sample of 250 ads, the number said by Dr. Krasno and Professor Goldstein in their PS report to be subject to inter-coder reliability checks.

[19] The solution to this problem is stratified random sampling. That is, the proper methodology is one in which the original ads are segregated by type on this variable — "strata" — and then sampling takes place within stratum. Of course, with so few ads coded as issue ads in the first place, one would most likely have to adopt a strategy of recoding all ads coded as having an issue purpose and a random sample of those ads coded as having an electioneering purpose. There is no indication in any of the Buying Time documents, published or unpublished, that this was the strategy employed in assessing the reliability of this variable.

2000. In the use of such a denominator, Professor Goldstein is at odds with both the authors of *Buying Time 2000* and with me. But in order to make some progress, let us put aside the denominator issue for a moment and focus on the numerator.

In his expert report, Professor Goldstein analyzes only 6 ads as "genuine issue ads" that would be prohibited under the criteria adopted in BCRA. These ads are: [13(2 PCS/ER 00806)]

627 KY/CFAW Call Northrup

1389 FAIR/IA Latham Foreign Worker Bill

2862 UT/COC Matheson Cant Decide Rx

1269 CBM/Rx Plan for Seniors 60

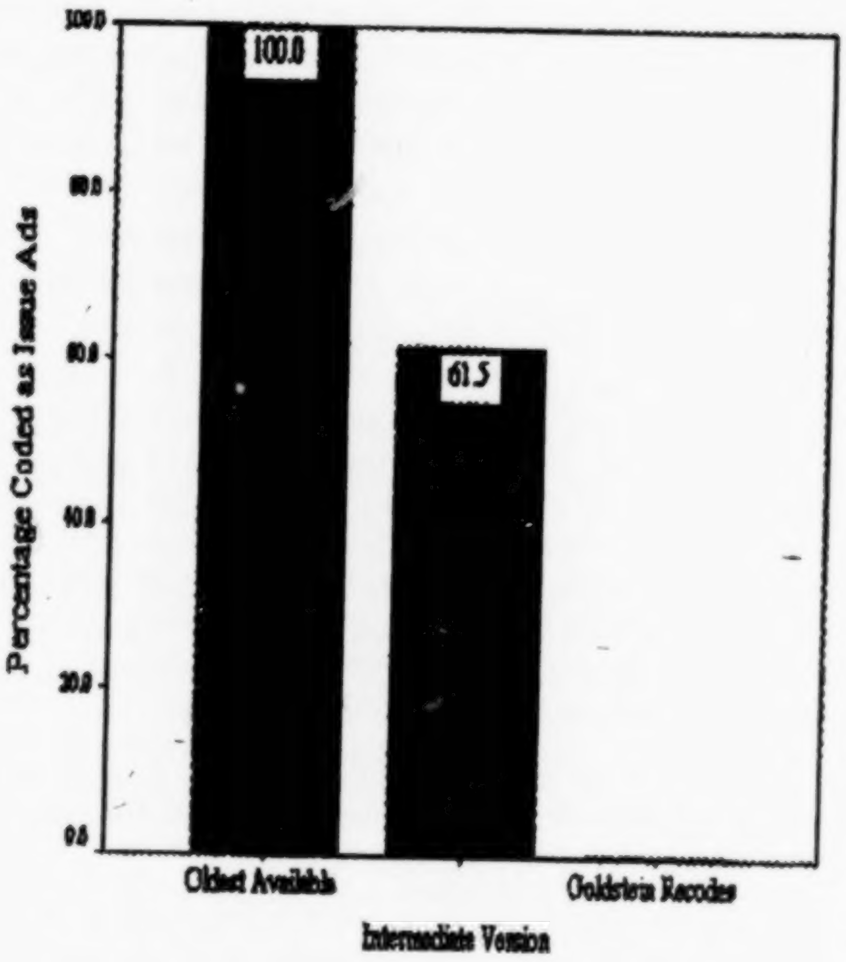
1367 RI/RIWV Langevin Abortion

2107 WI/NPLA Feingold Kohl Abortion 60

These six advertisements were aired 2,123 times in 2000. It is instructive to look at the results of the three codings on Question 11 as they have evolved over the course of the different manipulations of the data set. Figure 1 reports the transformation of these variables as represented in the most recent version of the 2000 data provided by Professor Goldstein as an appendix to his expert report.

The figure makes plain that these ads/airings were transformed from being coded entirely as issue ads to being almost entirely represented as electioneering ads! I recognize that Professor Goldstein, in his expert report, has converted these six ads yet again, changing them back to issue ads as originally coded by the students. But the treatment of these ads demonstrates two important points: Coding these ads is highly subjective and reasonable people disagree about their content, and Professor Goldstein seems to have claimed the authority to manipulate the data base at will. [14(2 PCS/ER 00807)]

Figure 1. The Transformation of the Coding of Question 11



Note: The percentage for the Goldstein transformation of the variable is 0.4 %.

Number of airings = 2,123.

The three variables represented here are:

BT00_Q11 Q11_1 Q11
[15(2 PCS/ER 00808)]

BEST AVAILABLE COPY

As noted above, Professor Goldstein identifies 6 ads in 2000 that would be adversely and unfairly affected because they are "genuine issue ads," broadcast in the last 60 days of the election, and mentioning candidates. Two of these ads (#1367 and #2107) are included in the 30 ads I focused on in my discussion of the 2000 data (see pages 62-63 in my report of 9/30/2002). It is instructive to revisit this analysis based on the new claim by Professor Goldstein that these six ads should now be identified as "genuine issue ads" in the 2000 data base.

Putting these two samples together, we find that these 34 ads (Professor Goldstein's six plus my non-duplicative ads) were aired 15,347 times during the last 60 days of the 2000 election, according to the data base. Using the denominator from my 9/30/2002 report, these airings therefore represent 25.6 % of the 60,006 issue airings (without "magic words") within 60 days of the 2000 election and which depicted or mentioned candidates. What this demonstrates again is that Professor Goldstein's estimates of the impact of the three criteria are wholly dependent on the subjective assessments of the "purpose" of individual ads, assessments that are reasonably subject to debate.

As I noted in my report of 9/30/2002, a more reliable variable exists characterizing the content of the ads. The students were asked to code Question 27:

> 27. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Policy matters
> 2. Personal characteristics
> 3. Both
> 4. Neither [16(2 PCS/ER 00809)]

In my opening report of 9/30/2002, I set forth the view that the data produced by this question are of superior reliability and validity.

The coding on Question 27 is more reliable in part because it does not seem to have been subject to the post-coding manipulations inflicted on Question 11. If we consider once more the ads with the three important characteristics, we discover that the "primary focus" of 51,144 airings was on policy matters. Applying the Goldstein denominator:

51,144 / 60,623 = 84.4 %

This means that any policy that banned ads with these three characteristics would in fact pertain to political communications that overwhelmingly (84.4 %) had policy matters as their "primary" focus. Or to restate Professor Goldstein's conclusions 7 and 8 (page 3):

> 7. An extremely large percentage (84.4 %) of the political television ads aired during 2000 that would have been covered by BCRA were perceived by project coders as having policy matters as their primary focus.
>
> 8. BCRA requirements would have applied to 42.9 % of ads broadcast by interest groups during 2000 which were perceived by the coders as having policy matters as their "primary focus."[20]

---

[20] This figure represents 48,370 divided by 112,844: ads with policy matters as their primary focus, mentioning candidates, and airing within the last 60 days of the election.

Comparing the Characteristics of Ads

In Table 9 of his expert report, Professor Goldstein reports data apparently designed to demonstrate that a) "Interest Group Ads with No Candidate" differ from "Interest Group Ads [17(2 PCS/ER 00810)] Mentioning Candidate 60 Days Before General Election," and b) that the latter share some characteristics with "Ads run by Candidates" and "Political Party Ads." The first part of this analysis is indeed interesting, although to the extent that the two types of issue ads do *not* exhibit different characteristics, the second part of the inquiry is not particularly revealing or relevant. Therefore, I set out to test the hypothesis that the two types of issue ads identified by Professor Goldstein in his analysis in Table 9 of his expert report are cut from different cloth.

In column 3 of this table, Professor Goldstein reports data concerning "Interest Group Ads with No Candidate" and in column 4, data for "Interest Group Ads Mentioning Candidate 60 Days Before General Election." The new data set provided as Appendix L to his expert report allows me to approximate his analysis, but also to consider a broader range of characteristics of the airings.[21] Professor Goldstein concludes that these two types of ads are fundamentally different in character. Unfortunately, his analysis fails to report the many ways in which these two groups of ads are similar.

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[21] I cannot replicate the findings in Professor Goldstein's Table 7. Although I can identify in the new data set 55,648 ads sponsored by groups and not depicting a candiate, 2.4 % of these (not 0.0 %) in fact mention "magic words." Moreover, I find from the data set that the size of the second group of ads is 60,087, not 60,623, although my analysis does indicate that 0.0 % of these 60,087 airings mention "magic words."

In Table 1, I report my analysis of the characteristics of these two types of ads. The table demonstrates that these ads are similar in a number of important respects. First, large majorities of both types of ads urge the viewer to take some action; for a majority of these ads, that action involves writing, calling, or telling someone to do something, or sending a message or calling someone to express yourself. Approximately none of either type of ad asks the viewer to vote for someone. A majority of both types of ads give a telephone number for viewers to call. Virtually [18(2 PCS/ER 00811)] all of both types of ads (93.7 % and 98.6%) have policy matters as either their primary focus or have a primary focus on both policy matters and personal characteristics. Interest group ads with no candidate mentioned or depicted tend to stress issues of health care more often than interest group ads mentioning a candidate and airing within 60 days of a general election, but the reverse is true in terms of the issue of Medicare. The most important conclusion I draw from analysis is that these two types of ads have quite similar attributes. This is not surprising since virtually all of them focus on policy matters. [19(2 PCS/ER 00812)]

Table 1. Comparing Group-Sponsored Ads in the 2000 Election

Ad Characteristic	Interest Group Ads with No Candidate (N=55,648)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (N=60,087)
Does the ad urge action?		
% urging some action	72.9%	65.8%
Type of actions urged		
% to vote for someone	1.2%	0.0%
% to write, call, or tell someone to do something, or to send a message or call someone to express yourself	54.1%	53.0%
Information Provided		
% giving telephone number (toll-free or toll)	76.6%	56.8%
Primary Focus of the Ad		
% with a primary focus on policy matters	93.3%	78.8%
% with either a primary focus on policy matters or a primary focus on both policy matters and personal characteristics	93.7%	98.6%
Issue Content		
% addressing Health Care	28.8%	39.2%
% addressing Medicare	34.9%	24.3%

[20(2 PCS/ER 00813)]

Summary of Conclusions about Professor Goldstein's Expert Report

Professor Goldstein's expert report continues to focus on the highly subjective coding of Question 11, ignoring his own evidence on the policy focus of the ads. As I have demonstrated in this rebuttal, ads that have policy matters as their primary focus predominate in the data set in general, as well as comprising a large majority of those ads depicting candidates and broadcast in the last 60 days of the 2000 election (and not mentioning "magic words"). Indeed, the key distinction Professor Goldstein seeks to make between ads with these characteristics and so-called genuine issue ads is not supported by the data, especially insofar as the policy foci of these ads is concerned.

The 1998 Conclusions

In my report of 9/30/2002, I concluded the following about the 1998 data:

> Thus, by this calculation, nearly two-thirds [64.0%] of the group ads that aired within 60 days of [the] 1998 election were coded by the students as "genuine issue ads"; all of these (again in the words of the Brennan Center authors) would be "unfairly caught" by application of the criteria now set forth in BCRA.

It is necessary to determine whether the report of Dr. Krasno and Professor Sorauf affects these calculations.[22]

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[22] For reasons I outline above (and in my report of 9/30/2002), I do not accept the method of calculation used in *Buying Time 1998*, and therefore I will not address the portion of the Krasno/Sorauf appendix entitled "SPREADSHEET: 1998 Formula" (pages 13-15,

My calculations were based on two groups of ads. First, I accepted the 2 ads that the [21(2 PCS/ER 00814)] authors of *Buying Time 1998* treated as "genuine issue ads." To that list of 2, Dr. Krasno and Professor Sorauf have now added a third ad (named CENT/Breaux, aired two times — see page 60 and page 20 of the appendix). Second, I accepted the original coding by the students of 8 ads. These are all ads that Professor Goldstein transformed from issue ads to electioneering ads after the coders had completed their job. Were I to re-do my calculations on the basis of the 2 newly designated CENT/Breaux airings, the figures would change insignificantly (since so few airings are involved).

Dr. Krasno and Professor Sorauf make several other important "corrections" to the original 1998 calculations (see pages 3-4 of the appendix) and ultimately derive a numerator of 713 ads. The authors refer to these as "all pure issue ads (as rated by the coders) by groups that appeared within 60 days of the election and mentioned a candidate by name" (see Appendix page 3). Since they acknowledge in their description of these ads the importance of coder ratings — and incorporating the justification I presented in my report of 9/30/2002 — I revert to the original student codings of the 8 ads I identified in my report, and (accepting their identification of 713 airings only for the sake of argument), calculate a new percentage as follows:

(713 + 2,405) / 5,064 = 61.6 %

Again for the sake of argument, let me accept their adjusted 60-day denominator, and the percentage becomes

(713 +2,405) / 4,847 = 64.3 %

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pagination I assigned to the pages). Instead, I will consider their calculations as reported in "SPREADSHEET: 2000 Formula" (pages 16-21, my pagination).

Thus, the substantive conclusions I drew in my report of 9/30/2002 remain unfazed by this new analysis.

Since my report was completed, new information has become available about the airings [22(2 PCS/ER 00815)] of these 8 ads. In particular, the "Index of AFL-CIO Issue Advertising, 1995-2001" has been produced as an Exhibit to Ms. Mitchell's declaration. This document allows me to address the problem of so-called cookie cutter ads. Two of the eight ads appear to be cookie-cutter ads (#11 and #15). According to the data base, these ads were broadcast in several different locations throughout the country. Unfortunately, however, the CMAG technology does not capture the text or images of such ads, so one cannot confirm from the storyboards that a candidate was actually mentioned (because storyboards do not exist, the name of the individual mentioned or depicted in each ad is not known and must be inferred). In their expert report, Dr. Krasno and Professor Sorauf have offered a methodology for addressing this problem (see their Appendix).

Following the methodology of Dr. Krasno and Professor Sorauf, I have reexamined the airings of these 8 ads. In 8 instances, we do not have any verifiable information as to whether a candidate was identified. These are:

Ad number	Market Location
2	Washington DC
1411	Greenville
11	Albuquerque
11	Birmingham
11	Kansas City
15	Albuquerque
15	Grand Rapids
15	Kansas City

For the remainder of the airings of #11 and #15, the data base is compatible with the information [23(2 PCS/ER 00816)] presented in the AFL-CIO document, and therefore I accept the data base's coding of these ads as mentioning candidates.

With this adjustment to the data, the figures are:

(836 + 1,736) / 5,064 = 50.8 %

Thus, using the methods adopted by Dr. Krasno and Professor Sorauf in the appendix to their expert report, about one-half of the airings in 1998 would be, in the words of the authors, "unfairly caught" by application of the BCRA criteria, if one were to accept (as Professor Goldstein does in his analysis of the 2000 data) the coders' determinations of the purposes of the ads prior to Professor Goldstein's manipulation of the data.

For the sake of argument, let me produce one additional calculation. Let me accept the new claim of Dr. Krasno and Professor Sorauf that their portion of the numerator is 713 airings. Let me accept their denominator as 4,847. And let me accept my new calculations on the 8 student-coded ads. The new percentage therefore becomes:

(713 + 1,736) / 4,847 = 50.5 %

Perhaps the only other adjustment that could be made to this figure would be to declare, as Dr. Krasno and Professor Sorauf do, contradictory evidence as missing data and exclude the airings from the calculations. Such a strategy would only serve to reduce the denominator in the above quantity, thereby increasing the percentage to some figure above 50.5 %.[23] To be clear, this analysis in effect assumes

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[23] For instance, the data base reports that ad #2 was aired in the Washington DC market, although the storyboard mentions North Carolina Senator Faircloth. According to the Dr. Krasno and Professor Sorauf methodology, these airings could be treated as missing data and therefore excluded from both the numerator and the denominator for

that none of the ads airing in the markets for which we have no [24(2 PCS/ER 00817)] independently verifiable information actually identified a candidate in that market. Consequently, this 50.5 % figure represents the statistical floor under the Krasno/Sorauf methodology; the 64 % figure cited in my report of 9/30/2002 (calculated from the data base itself) provides the ceiling.

The dispute over this percentage reflects two fundamental truths about this data set. First, the coding of the ads is highly subjective. It is difficult if not impossible to determine what the "purpose" of an ad is, and reasonable people will disagree even about categorizing the manifest content of an ad. Since errors in coding a single ad are amplified by the number of showings of that ad, the conclusions one draws from the data base are highly volatile and sensitive to errors.

Second, this data base has been subject to numerous post-coding manipulations. Not only does this undermine all of the conclusions and calculations reported in *Buying Time 1998*, but it also strongly undermines the claim that the student coding has much to do with the figures in the "final" analysis.[24] The figures Dr. Krasno and Professor Sorauf produce are no longer a function of the student coding, but instead reflect a series of ever-changing manipulations and recodings of the data base. Such a methodology sabotages any claim the study might make to scientific accuracy.

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purposes of these calculations.

[24] Indeed, I should note that the report by Dr. Krasno and Professor Sorauf may not be the final analysis, since there may ultimately be some means of resolving various missing data problems that afflict their calculations.

Groups Communicating With Citizens

Missing from the entire discussion of ads and airings in the expert reports submitted is any consideration of the people who consume these ads. After all, the purpose of all ads is to communicate with citizens. Fortunately, the Buying Time data sets provide some information [25(2 PCS/ER 00818)] that allows us some purchase on this important question.

The Buying Time data bases include a variable representing the "Gross Rating Points" of each airing. As described on page 6 of *Buying Time 1998:* "Gross ratings points are the sum of ratings for a particular time: if the local news is watched by ten percent of viewers with televisions, an ad run during the program represents ten gross ratings points." These points are of course idiosyncratic to each individual airing, and were apparently added to the data set by CMAG.

According to Dr. Krasno and Professor Sorauf, there were 713 airings in 1998 that the authors treat as "genuine issue ads," depicting a candidate and broadcast within 60 days of the election. These ads and the markets in which they were shown are listed on page 20 of their appendix. According to the data base, no Gross Ratings Points estimate is available for 6 of these airings.

Using the 1998-1999 Neilsen estimates of the number of households with television sets in the seven markets in which these ads were broadcast[25], and using the Gross Ratings Points to estimate the number of households viewing each airing, I find that these 707 airings represent communications with a staggering number of household — 30,108,857. Thus, were these ads (just the ads accepted by Dr. Krasno and Professor Goldstein as "genuine issue ads") prohibited, over

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[25] A copy of these estimates is attached as Exhibit 2.

30 million group-citizen political communications would be affected (and this figure is based on the quite conservative assumption that each household only has a single person viewing television). [26(2 PCS/ER 00819)]

Why Would Interest Groups Attempt to Persuade Citizens on Policy Matters During the Election Season?

Professor Goldstein asserts in his expert report that a reasonable interest group would not air its issue ads during an electoral period. His argument is based on a couple of suppositions:.

1) the ads are more expensive at this time of year
2) citizens are overwhelmed with information and will not pay attention to the ads, and
3) partisan attachments harden as the election draws near.

He cites the work of William McGuire and John Zaller. In fact the theory he cites argues in favor of exactly the opposite conclusion.

Issue advertising is an exercise in persuading citizens. Political Psychologists have long known (McGuire) that to persuade someone involves two steps. First, one must get the attention of the person one is attempting to persuade. Second, one must overcome the strength of existing attitudes if the attempt at persuasive communication is to result in attitude change. Unfortunately, these stages in the process are related to each other.

As it turns out, those with strong attitudes tend to pay attention to political communications while those with weak political attitudes tend to ignore them. This results in a paradox. Those most easily reached are least easily changed; those most easily changed are those most difficult to reach. This paradox has long bedeviled those researching processes of persuasion.

Those with strong political attitudes pay attention to politics year round, in part because the reason why they have strong attitudes in the first place is because political affairs are [27(2 PCS/ER 00820)] interesting to them. Those with weak attitudes, on the other hand, only pay attention to political affairs under the most extreme circumstances (indeed, perhaps only when there is little choice but to pay attention because the airwaves are saturated with political information). Thus, election periods open a window of opportunity to reach those citizens who are most likely to be influenced by policy advertising. During the election, those with weak and potentially alterable attitudes are paying attention to political affairs. It therefore makes sense that an interest group would attempt to influence people when in fact they are most "influencable." Just as one does not attempt to sell Christmas trees in July (because people will screen out such attempts and will not pay attention to them), interest groups will try to take advantage of the window of opportunity opened by the electoral season. Consequently, it is entirely reasonable that an interest group would attempt to reach citizens on public policy issues during any given election period.

The last point Professor Goldstein makes is that partisan attachments harden. By this logic, candidates should abandon advertising as the election approaches since these hardened attitudes are difficult to convert. In fact, that does not happen, since, as the election approaches, candidates try to reach an even greater percentage of marginal voters, who have little interest in politics, and relatively pliable issue views.

This point about susceptibility to persuasion within 60 days of an election turns out to be intimately related to the controversy concerning the most appropriate denominator to use in our calculations of the proportion of "genuine issue ads" affected by BCRA. Those who would use a denominator based on all issue ads aired in the year are

implicitly making the assumption that ads aired anytime throughout the year are equally as valuable as ads aired in proximity to the election. As I have indicated, this is not so. The damage of prohibiting an ad within 60 days of an [28(2 PCS/ER 00821)] election cannot be ameliorated by allowing that ad to be broadcast at some other point throughout the year.

Thus, I conclude that there is nothing peculiar or nefarious about interest groups seeking to influence citizens on policy matters during the last 60 days of an election period.

Overall Summary of This Rebuttal

The various reports based on the 1998 and 2000 data are built upon a house of cards. As more information about the methodology becomes available — information that would ordinarily have become public were these reports subject to peer review — one sees the numerous infirmities in the data base. From the inability of CMAG to capture each unique ad (even in the limited part of the country it purports to monitor), to the subjectivity of the student coding, to the unrestrained and undocumented recoding of the data by Professor Goldstein, one comes to see that this data set and the analyses based upon it cannot be trusted.

Dr. James L. Gibson

October 7, 2002

[1(2 PCS/ER 00831)]

Supplement to Rebuttal Expert Report of October 7, 2002

1998 Data

Dr. James L. Gibson

November 5, 2002

On Friday, November 1, 2002, I understand that Dr. Jonathan Krasno, principal author of *Buying Time 1998*, produced a compact disk with a variety of data files on it (JSK 00000001). My examination of these files has led me to conclude that a) most of these files have not been produced earlier in this litigation, and b) at least one of the new data sets differs from the earlier produced data base on the coding of the crucial variable Question 6. Because this new data base reveals new and different results for the coding of Question 6, I deem it essential to submit this brief supplement to my rebuttal report of October 7, 2002.

The New Data Bases

The earliest incarnation I have previously been provided of the *Buying Time 1998* data base is a file entitled 307K final5.sav, dated 3/31/2000 (6:57 AM). I believe this file was produced as a supplement to Dr. Krasno's expert report. Prior to receiving that data set, the earliest available version of the data set produced in the litigation was entitled Final_1998_Cmag.sav, dated 6/23/2000.

On the November CD produced by Dr. Krasno is a data set named 307K final3.sav, dated 1/15/2000. Also included on the CD are what appears to be two later versions of the data set: [2(2 PCS/ER 00832)]

307K final4.sav, dated 1/25/2000

307K final5.sav, dated 3/31/2000 (3:57 PM)

This latter data set seems to be similar to the data set Dr. Krasno produced as part of his expert report, although I have not undertaken the analysis necessary to confirm that conclusion, and the time stamp on the data set differs (and is later than the one for the data set produced by Dr. Krasno).

The crucial new data set is one Dr. Krasno did not produce as part of his expert report: 307K final3.sav, dated 1/15/2000. This data set does *not* appear to be the original version of the data base, since at least one of the syntax files (the files that include the statistical commands) provided on the new CD refers to a data set entitled 'c:\Cmag\master1.sav'. That file does not exist on the newly produced CD. Thus, the file 307K final3.sav is surely not the original data but is the earliest version of the 1998 data base I have been able to examine.

The Coding of Question 6 in "307K final3.sav"

The coding of 8 ads on Question 6 has been the object of considerable controversy in this litigation. These ads are: 2, 7, 11, 15, 16, 21, 22 and 1411. These ads are controversial since my examination of the original coding sheets completed by the student coders revealed that these ads were coded by the students as "genuine issue ads" on Question 6, but that in all of the data bases produced for 1998, these ads were scored as "electioneering" ads on Question 6.[1] It is instructive to note exactly which files contain the representations of these ads as "electioneering." The [3(2 PCS/ER 00833)] following table reports this information.

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[1] The coding sheets and the storyboards for these eight ads were attached as Exhibit 7 to my expert report of 9/30/2002.

Ad Id Numbering	Original Student Coding	Data Set #1	#2	#3	#4	#5	#6
2	issue	candidate	candidate	candidate	candidate	candidate	candidate
7	issue	candidate	candidate	candidate	candidate	candidate	candidate
11	issue	candidate	candidate	candidate	candidate	candidate	candidate
15	issue	candidate	candidate	candidate	candidate	candidate	candidate
16	issue	candidate	candidate	candidate	candidate	candidate	candidate
21	issue	candidate	candidate	candidate	candidate	candidate	candidate
22	issue	candidate	candidate	candidate	candidate	candidate	candidate
1411	issue	candidate	candidate	candidate	candidate	candidate	candidate

Data Set #:

1. 1998 new1.sav. Dated: 5/14/2002. Brennan Center CD #4.
2. 1998 sav. Dated: 5/9/2002. Brennan Center CD #4.
3. 1998 REAL.SAV. Dated: 3/7/2002. Brennan Center CD #4.
4. 307K final5.sav. Dated: 3/31/2000. Krasno CD.
5. Final _1998_Cmag.sav. Dated: 6/23/2000. Professor Goldstein. "1998 CMAG Data" CD.
6. CB.sav. Dated: 1/16/2001. Brenna Center CD #6.

Moreover, one of the newly produced data sets — 307K final4.sav — shows these ads as all coded as candidate ads.

However, the file 307K final3.sav (the earliest dated version of the data set produced last Friday) contains different results for Question 6 for these eight ads. Specifically, the ads are [4(2 PCS/ER 834)] scored as follows:

Id Number	Question 6 Coding
2	2. Candidate
7	99. Not coded
11	1. issue
15	1. issue
16	1. issue
21	1. issue
22	1. issue
1411	1. issue

Thus, the newly produced data sets indicate that changes were made in the coding of seven of these eight ads between the data sets 307K final3.sav and 307K final4.sav. Using the date on which these files were created, as indicated on Dr. Krasno's CD, the codings of these ads were altered between January 15, 2000, and January 25, 2002.[2] Based on my examination of the data sets and the associated computer codes provided by Dr. Krasno on this CD, I conclude that someone altered the student codings on Question 6 on these 7 ads sometime between January 15, 2000, and January 25, 2000. The data sets contain no information justifying this alteration of the data base. [5(2 PCS/ER 00835)]

The Consequences of the January Alteration

The result of altering the scores of these 6 ads is to convert 2,202 airings from "providing information/urging action" to "generating support/opposition to candidates."[3] This change has highly significant consequences for the substantive conclusions to be drawn from the data base. For instance, *Buying Time 1998* asserts that only two ads in 1998 were "genuine issue ads" that would be adversely affected by a law such as BCRA. With the original coding on Question 6, as reflected in the data base, that number quadruples, from 2 ads to 8 ads (2 + 6 ads).

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[2] I recognize that the date stamps on computer files can be easily altered. Nothing in my examination of the data sets on this CD generates suspicion that any such date stamp alteration has taken place.

[3] Note that the January alteration also resulted in another 129 airings being converted form missing data ("not coded") to "electioneering".

The representation of these ads in this earliest known (or produced) version of the 1998 data base also has implications for the calculations I reported in my expert rebuttal report of 10/7/2002 ("Rebuttal to the Expert Reports of Kenneth M. Goldstein and Jonathan Krasno and Frank J. Sorauf"). On pages 21-23 of that report, I conducted some calculations based on my examination of the original coding sheets for these ads. If I redo those calculations based not on the student coding sheets, but instead on the newly produced data set, 307K final3.sav, the following figures result.

- Page 21: The number of airings for the 6 ads shown to be issue ads in 307K final3.sav is 2,199, not the 2,405 reported on page 21 of my rebuttal report. Thus, the new calculations are:

(713 + 2,199) / 5,064 = 57.5%

Also on this page, I accept the Krasno/Sorauf adjusted 60-day denominator, resulting in the following percentage:

(713 + 2,199) / 4,847 = 60.1%

[6(2 PCS/ER 00836)] Thus, the substantive conclusions supported by the new figures do not differ from those I drew in my rebuttal report.

- Page 23: Here, I reported some calculations based on confirming the time period during which the ad was aired (within 60 days of the election), whether the ads used so-called magic words (they do not), and whether I could confirm that a candidate was mentioned in the ads (confirmed). Repeating this analysis based on the newly produced data set (307K final3.sav), rather than the original student coding sheets, results in exactly the same figure. That is:

(836 + 1,736) / 5,064 = 50.8%

and

(713 + 1,736) / 4,847 = 50.5%

Thus, according to the original student coding of the ads and *according to the data base produced by Dr. Krasno on November 1, 2002*, and accepting for the sake of argument the other calculations and adjustments of Dr. Krasno in his expert report, 50.5% of the airings in 1998 would be improperly subject to a law such as BCRA.

Concluding Comments

My earlier analysis of the reports and the data from the 1998 and 2000 studies led me to observe that the methodologies and procedures used in the analyses fall far below the standards of accepted scientific analysis. Nothing in this latest episode of manipulated data and additional data bases leads me to a different conclusion.

Dr. James L. Gibson
November 5, 2002

EXPERT REPORT OF KENNETH M. GOLDSTEIN ON BEHALF OF INTERVENOR DEFENDANTS

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EXPERT REPORT OF

KENNETH M. GOLDSTEIN

I. QUALIFICATIONS

I am an associate Professor of Political Science at the University of Wisconsin-Madison, where I specialize in the study of interest groups, political advertising, and survey methodology. I received my B.A. in Political Science from Haverford College in 1987 and my Ph.D. in Political Science from the University of Michigan in 1996. The focus of my Ph.D. studies was American politics and research methodology. I have served on the faculty at the University of Wisconsin-Madison since 2000, teaching courses and conducting research on American politics and survey research methodology. I was granted tenure at the University of Wisconsin-Madison during the last academic year.

I am on the Dean's Oversight Board of the Survey Research Center at the University of Wisconsin. In addition, I serve on the College of Letters and Science Human Subjects Committee, which approves all research involving human subjects within the college. I have also taught courses in survey research and served on the Dean's planning committee for the Survey Research Center at Arizona State University from 1996 to 2000. I have served on two planning committees for the National Elections Study, renowned as the premier survey research project on elections conducted in the scholarly community.

I am the author or co-author of 17 publications (books, book chapters, and refereed journal articles). The majority of my work has focused on studying the use and effectiveness of political advertising as well as interest group lobbying tactics. Attached as Appendix B is a copy of my curriculum vitae, which lists in more detail my academic background, positions, and publications.

[2] I am being paid $5,000, plus reimbursement of travel expenses, by the Brennan Center for Justice for my work in this litigation. I have also received a grant of $508,000 (of which my salary constituted $20,000) from the Pew Charitable Trusts to conduct research on political advertising during the 2002 election cycle. While that grant is unconnected with my work on this litigation, Pew has agreed to allow me to work concurrently on this litigation and the 2002 election project.

In the preceeding four years, I have testitified as an expert in *Luetzow v. Guardian Pipeline,* a condemnation hearing in Jefferson County, Wisconsin. I have also been retained as a testifying expert by ANR Pipeline Co. in the case *Arentz v. ANR Pipeline Co.*, pending in Wisconsin Circuit Court in Waukesha. In both of these cases, I bill my time at $300 an hour.

II. SUMMARY OF FINDINGS

I submit this report, describing the nature of political advertising in federal elections, to assist the Court in its assessment of the Bipartisan Campaign Reform Act (BCRA). BCRA's provisions focus on broadcast ads sponsored by parties and interest groups. My main focus in this report is on the nature of interest group advertising in the 2000 contest and, more specifically, the ads and sponsors that would be directly affected by BCRA provisions relating to ads that mention or depict a candidate and are broadcast within 60 days of a general election or 30 days of a primary election for federal office. A secondary focus is on the nature of advertising by political parties.

I draw primarily on a database of political television advertisements aired in the top 75 media markets, which serve 80 percent of the country's population. The data are compiled by the Campaign Media Analysis Group (CMAG), a commercial firm that tracks advertising for political clients.[1] University of Wisconsin-Madison graduate **[3]** assistants and I processed the 2000 CMAG data. I have used these data in a series of reports and articles to describe the source, content, and targeting of political advertising in the 2000 elections. In this report, I set forth nine principal conclusions that emerge from my study of the CMAG data:

1. Advertisements sponsored by parties and interest groups comprised a significant and increasing portion of political television ads broadcast in federal races over the course of the entire year and especially during the last 60 days of the 2000 election.
2. The "magic words" defined in *Buckley v. Valeo* do not provide an effective way to identify political television ads that have the purpose or effect of supporting or opposing candidates for election to a public office.
3. Interest group financed ads that depicted or mentioned candidates for federal office were concentrated in the weeks immediately preceding the election and stopped on Election Day. Interest group ads that did not mention or picture candidates for federal office were distributed more evenly throughout the year, rising and falling with the ebb and flow of the legislative calendar.
4. Interest group ads that mentioned a candidate within 60 days of the general election almost invariably targeted House or Senate candidates in hotly contested races or presidential candidates in battleground states.
5. Ads that mentioned or depicted federal candidates for office differ from ads that did not mention or picture candidates in other ways, such as their content, their distribution over time, their geographic dispersion, etc.
6. Ads that did not mention or depict a candidate are readily distinguishable from quintessential electioneering ads (such as ads run by a candidate seeking election to public office) in numerous ways such as their content, their distribution over time, their geographic dispersion, etc.

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[1] The scope of the CMAG data is discussed in Section IV below.

7. Virtually all (97.7 percent) political television ads aired during 2000 that would have been covered by BCRA were perceived by project coders as having an electioneering purpose.
8. BCRA requirements would have applied to 3.1 percent of ads broadcast by interest groups during 2000 which were perceived as genuine issue ads by coders.
9. Broadcasting issue ads in close proximity to an election is not necessarily an effective way to inform voters about public policy issues or generate action on such issues.

[4] To put these findings into context, I first summarize the salient characteristics of campaign finance regulations and how the information provided in this report is relevant. I also describe in more detail the major source of data used in this report and in my scholarly work on television advertising over the last six years.[2]

III. OVERVIEW OF CAMPAIGN FINANCE REGULATIONS AND BCRA

The Federal Election Campaign Act (FECA), passed in 1971, as interpreted in ensuing legal decisions—primarily *Buckley v. Valeo*, decided by the Supreme Court in 1976—has defined two classes of political money. *First*, money for express advocacy (commonly known as "hard money") is money that pays for activities that directly advocate the election of a federal officeholder. Hard money is subject to FECA's express advocacy regulations that require the disclosure of contributors and expenditures and contain certain limitations on the amounts of contributions and the eligibility of certain types of donors (*i.e.*, unions and corporations). *Second*, money to fund other political activities (such as general party building, educating citizens on issues or lobbying on legislation) is often described as "soft money." "Soft money" is exempt from some of the disclosure requirements

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[2] Tables attached as Appendix A to this Report constitute an integral part of the Report whether or not referenced in the text.

and source and amount limitations applicable to "hard money."

A footnote in the Supreme Court's *Buckley v. Valeo* decision defined express advocacy by reference to whether the ads used particular words or phrases such as "vote for," "defeat," or "Jones for Senate." These words have become widely known in political science and legal circles as "magic words."

BCRA generally proscribes soft money donations to political parties for any purpose, including financing advertising—almost always candidate-focused—that the **[5]** parties sometimes call "issue advertising." BCRA also imposes certain requirements on interest groups that broadcast Electioneering Communications, which BCRA defines as ads broadcast on radio or television that mention or depict a candidate, are broadcast within 60 days of an election (or 30 days of a primary), and are targeted at a candidate's voters. Any interest group broadcasting Electioneering Communications is required to disclose its contributions and expenditures (above certain minimum thresholds), raise money under particular contribution limits, and refrain from accepting contributions from union or corporate treasuries.

IV. THE CAMPAIGN MEDIA ANALYSIS GROUP DATA

Until recently, the lack of comprehensive data on the content, timing, volume and targeting of political advertising has limited what policymakers, journalists and scholars can report about the magnitude, content and targeting of political television ads.

A technology marketed by Competitive Media Reporting (CMR) now tracks television advertising activity in the country's major markets. The ad tracking technology monitors the transmissions of the national networks (ABC, CBS, NBC and Fox) as well as 42 major national cable networks (such as CNN, ESPN and TBS). The system monitors local television advertising in the country's top 75 media markets (comprising approximately 80 percent of the nation's population).[3] The system's software recognizes the electronic seams between programming and advertising. When the system first detects a commercial spot's unique broadcast pattern, it downloads the ad and creates a "storyboard" of the sort described below. Analysts at CMR classify the advertisements into particular categories by product for commercial clients and by candidate or sponsor for political clients. The ads are then tagged with unique digital fingerprints. Thereafter, **[6]** the system automatically recognizes and logs that particular commercial wherever and whenever it airs. The ad tracking information is marketed to political clients by the Campaign Media Analysis Group (CMAG).

In 2000, the Brennan Center for Justice at New York University purchased the CMAG data through a grant from the Pew Charitable Trusts.[4] The 2000 data were processed and coded by teams of graduate and undergraduate students working under my supervision at the University of Wisconsin-Madison.

CMAG supplied two different forms of data that were used in this project. First, for every political ad produced, CMAG created a storyboard, that is, a complete transcript of all audio and a still capture of every fourth second of the video. A nearly complete set of the storyboards for 2000 appears as electronic Appendix K to this report (other sample storyboards appear in other Appendices).

The second type of CMAG data involves tracking political ads in the nation's top 75 media markets, as well as all ads run on the major national broadcast and cable networks.

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[3] Lists of the markets and stations are included in Appendix G to this Report. CMAG data do not include ads broadcast on local cable channels.

[4] The Brennan Center published two reports, entitled *Buying Time: Television Advertising in the 1998 Congressional Elections* (*"Buying Time 1998"*) and *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (*"Buying Time 2000"*), which used databases prepared under my supervision, upon which I relied in part to prepare this report. These reports are attached as Appendices C and D.

The unit of analysis in these files is an individual broadcast, or "airing", of a unique ad. For each such airing, CMAG reported on the time, length, station, show, and estimated cost. For each ad, this frequency information was then merged with the coded content from the storyboards in order to produce a single, comprehensive data set. Appendix E contains an analysis describing in more detail the methodology used to code and process the CMAG data.

I have great confidence in the CMAG data in terms of tracking the airings of particular ads at particular times. Appendix I contains a copy of an analysis, **[7]** "Measuring Exposure to Campaign Advertising", that I have co-authored with two graduate students, Travis Ridout and Michael Franz, and a colleague at the University of Virginia, Paul Freedman. This analysis is currently under scholarly review at the journal, *Political Communication*. It provides a detailed explanation of the validity of the CMAG frequency data and the coding process.

The CMAG storyboards enabled us to undertake an extensive analysis of the ads and develop a database of information concerning political television advertising.[5] Specifically, a team of students (the coders), working under my supervision, assessed the content of each of these storyboards on a wide range of topics, such as content, tone, issues addressed, whether the ads mentioned a political candidate or provided a toll-free number to call, etc. (see Appendix F for complete coding sheet). Multiple coders reviewed a subset of storyboards as a check on the reliability of the coding. I reviewed all ads financed by interest groups and broadcast within 60 days of a general election. I also reviewed and revised the coding where coding by the initial coders was in conflict or where I determined that an error had been made.

In addition to collecting certain specific information concerning each storyboard reviewed, the study also asked coders: "In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?" In this report, I refer to ads coded as providing information or urging action as "Genuine Issue Ads," and ads coded as generating support or opposition for a particular candidate as "Electioneering Ads."

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[5] The database is attached to this this report as electronic Appendix L.

[8] V. THE SCOPE OF POLITICAL ADVERTISING

Advertising in the 2000 election was financed by three principal groups: (1) the candidates; (2) political parties; and (3) interest groups. Some interest groups formed political action committees (PACs), which are regulated under current election laws, and aired ads sponsored by these PACs. Most interest group ads, however, were not sponsored by PACs, and fell outside FECA regulation.

In the 2000 election cycle—*i.e.*, from January 1, 2000 through Election Day—the CMAG database collected 970,424 political television ad broadcasts, 838,169 of which applied to federal races, which were financed by candidates, political parties and interest groups at a cost roughly estimated at $720 million. Thirty-six interest groups financed the broadcast of political television advertisements that would have fallen within BCRA's coverage. During the federal elections in 2000, interest group spending comprised 16 percent of all political television ads broadcast at an estimated cost of $93 million; political parties paid for 27 percent at an estimated cost of $162 million; and candidates paid for 52 percent at an estimated cost of $338 million.[6]

These figures, in fact, underestimate television expenditures because the CMAG estimates only cover markets serving 80 percent of the nation's population and make no attempt to measure the increased cost of advertising

during the peak season of political campaigns when the demand for television advertising time pushes up spot prices.

In the federal election of 2000, a total of 838,169 ads were broadcast, of which 36 percent (301,521) were aired in the presidential contest, 29 percent (241,497) in Senate contests, and 29 percent (240,490) in House elections.[7]

[9] In House and Senate races, a total of 481,987 ads were broadcast in 2000, an increase of 64 percent over the 293,452 aired in 1998.

Interest group expenditures for political television ads increased most dramatically, rising from approximately $11 million in 1998 to an estimated $93 million in 2000.

Tables 1A and 1B set forth the breakdown of political advertising among candidates, political parties, and interest groups during the 1998 and 2000 election years (January 1 through Election Day):[8]

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[6] The remaining 5 percent of ads were coordinated expenditures in the presidential race, with almost $30 million spent on those advertisements. Coordinated expenditures are those in which a candidate and a party jointly pay for the cost of the advertisement.

[7] The remaining 6 percent of ads were coordinated expenditures.

[8] Aside from the "All Political Ads" category, the numbers in the tables reflect only those ads that refer to a candidate, and thus omit certain ads which may have run in the presidential, Senate, or House races which did not mention a candidate.

Table 1A: Political Advertising Activity in the 1998 Election Cycle[9]

	Total		Candidates		Parties		Interest Groups	
	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count
All Political Ads in Federal Races	$172,800,000	295,625	$136,600,000	229,850	$25,600,000	44,485	$10,700,000	21,290
Ads Referring to Federal Candidate	$163,100,000	277,537	$135,300,000	227,561	$24,600,000	42,599	$3,200,000	7,377
Ads Referring to Presidential Candidate	—	—	—	—	—	—	—	—
Ads Referring to Senate Candidate	$99,100,000	153,718	$83,600,000	127,004	$14,800,000	25,274	800,000	1,440
Ads Referring to House Candidate	$64,000,000	123,819	$51,700,000	100,557	$9,800,000	17,315	2,400,000	5,937

Table 1B: Political Advertising Activity in the 2000 Election Cycle[10]

	Total		Candidates		Parties		IG—PAC		IG—Non-PAC		Coordinated Expenditures	
	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count	Est. Cost	.Count	Est. Cost	Count
All Political Ads in Federal Races	$624,218,204	838,169	$338,443,584	433,811	$162,353,178	230,368	$2,073,436	3,688	$90,461,349	129,647	$29,166,653	37,938
Ads Referring to Federal Candidate	$581,295,000	780,281	$337,458,696	432,197	$162,163,762	229,860	$2,070,388	3,663	$48,756,139	74,024	$29,166,653	37,938
Ads Referring to Presidential Candidate	$205,603,871	300,959	$78,151,616	115,352	$81,467,696	123,517	$129,280	222	$16,447,813	23,628	$29,166,653	37,938
Ads Referring to Senate Candidate	$216,422,636	239,891	$168,021,425	171,713	$37,656,530	52,953	$1,113,163	2,061	$8,520,989	11,522	$0	0
Ads Referring to House Candidate	$159,263,459	239,416	$91,285,655	145,132	$43,039,536	53,390	$827,945	1,380	$23,782,303	38,859	$0	0

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[9] Figures taken from the expert report of Jonathan Krasno and Frank Sorauf.

[10] "Total" column includes ads for which the sponsor was unknown.

[11] VI. THE ROLE OF INTEREST GROUPS AND POLITICAL PARTIES IN POLITICAL TELEVISION ADVERTISING

As these tables demonstrate, political parties were the largest purchasers of television ads in the 2000 presidential campaign. Parties purchased 41 percent of such ads, candidates 38 percent and interest groups 8 percent.[11] Interest groups broadcast one commercial for every five broadcast by the candidates in the presidential election of 2000. Table 2 shows the breakdown by funding source of advertising in certain battleground states. In certain states, interest group advertising rivaled that of the candidates or parties. For example, in Missouri, interest groups ran almost three-quarters as many ads as candidates, while in Washington State, interest group ads exceeded 50 percent of the candidates' ads.

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[11] The remaining ads were coordinated expenditures.

Table 2:
Concentration of Interest Groups' Presidential Candidate-Mention Advertising in Battleground States Broadcast Within 60 Days of the 2000 Election[12]

State in which Candidate Is Mentioned	Interest Groups		Political Parties		Candidates	
Florida	3,338	11%*	9,370	10%*	6,527	9%*
Missouri	2,967	9%	5,309	6%	4,104	6%
Pennsylvania	2,807	9%	5,289	6%	4,895	7%
Washington	2,339	7%	5,621	6%	4,357	6%
Wisconsin	2,067	7%	3,983	4%	3,361	5%
Michigan	2,000	6%	5,068	5%	4,411	6%
Ohio	1,669	5%	6,199	7%	5,351	7%
Oregon	1,446	5%	2,082	2%	1,801	3%
Nevada	896	3%	1,160	1%	1,546	2%
New Mexico	796	3%	1,913	2%	2,500	3%
West Virginia	786	3%	2,112	2%	1,754	2%
Minnesota	558	2%	671	1%	105	0%
Tennessee	377	2%	2,074	2%	955	1%
Iowa	379	2%	1,514	2%	1,297	2%
Arkansas	228	1%	2,266	2%	1,564	2%
Maine	157	1%	1,109	1%	1,119	2%
New Hampshire	75	0%	2,159	2%	1,142	2%
Other States	8,384	27%	34,833	38%	24,92	35%
TOTAL	**31,269**	**100%**	**92,732**	**100%**	**71,716**	**100**

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[12] I determined which states were battleground states based on my professional review of various media sources. See, for example, http://www.cnn.com/interactive/allpolitics/0010/ battle-ground.states/battlegroundstates.html. In a few cases, a media market was capable of reaching viewers in multiple states. For example, ads aired in the Philadelphia market reached viewers in both Pennsylvania and New Jersey. In this Table, for media markets which reached more than one state, the number of ad airings are included in each of the states, resulting in a total which slightly overstates the total number of airings of candidate-mention ads within 60 days of the presidential election. This assignment of media markets to more than one state is also the reason why the Total numbers in this table do not correspond exactly to the numbers provided in Table 4's "Ads Referring to a Presidential Candidate Within 60 Days."

*Percentages may not total exactly to 100% due to rounding.

[13] As a general matter, interest group ads that would have been defined as electioneering under the BCRA formulation were even more significant in House elections, accounting for 17 percent of total House ad broadcasts during the 2000 election cycle. Parties accounted for 22 percent of total television ads run in House elections and candidates, 60.6 percent.[13]

Party expenditures on television advertising were almost exclusively devoted to promoting their candidates. 99.8 percent of party financed television ads mentioned or depicted a candidate. Only 1.8 percent even mentioned the name of the party and many fewer promoted the candidate by virtue of his of her party affiliation.[14]

VII. THE BCRA UNIVERSE OF INTEREST GROUP ELECTIONEERING

The CMAG database presents an informative view of the interest group financed political television ads that are the focus of BCRA's Electioneering Communication regulations, that is, ads that mentioned a candidate and were broadcast within 60 days of the general election. As shown in Table 3, 35 interest groups broadcast communications on television that would have been defined as electioneering by BCRA during the 2000 elections. The top ten of those interest groups, listed below, sponsored 87 percent of the total amount spent by all interest groups on such communications during the 2000 election:

Citizens for Better Medicare
Chamber of Commerce
Planned Parenthood

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[13] The remaining 0.4 percent were financed by undetermined ad sponsors.

[14] Virtually all ads contain a "tag line" which identifies the organization financing the ad, which may include the party name where appropriate.

AFL-CIO
Women Voters: A Project of Emily's List
Americans for Job Security
Business Round Table
[14] Handgun Control
Sierra Club
League of Conservation Voters

The top twenty interest groups accounted for 90 percent of all monies spent on communications that would have come under the BCRA regime.

The principal sources of interest group financing for Electioneering Communications were for the most part readily recognizable forces in American politics. An exception is an organization unrevealingly described as Citizens for Better Medicare. Citizens for Better Medicare, which turned out to be the largest interest group financier of Electioneering Communications in the 2000 election, is an organization representing certain pharmaceutical manufacturers.

That would have been the BCRA universe:[15] 59,632 broadcasts financed by 35 interest groups at an estimated cost of $40,491,141.[16]

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[15] That is, the BCRA universe revealed by the CMAG data, which covers television markets serving 80 percent of the nation's population. No comprehensive information is available for the balance of the markets or for ads airing on local cable stations, but based on my familiarity with political advertising I would estimate that there are few additional organisations which spent more than $10,000 on political advertising in 2000.

[16] In Table 4, there are 60,623 ads listed as aired within 60 days mentioning a candidate. The difference between that number and the 59,632 listed above and in Table 3 is due to the existence of ads for which the interest group sponsors were unclear.

Table 3:
Interest Group Broadcasts of Electioneering Communications as Defined by BCRA (Ads Which Mention a Candidate and are Broadcast Within 60 days of the Election) in the 2000 Election

Organization	Cost	Airings
Citizens for Better Medicare	$6,615,826	10,753
Chamber of Commerce	$5,480,846	7,574
Planned Parenthood	$5,340,506	5,916
AFL-CIO	$5,142,962	9,779
Women Voters: A Project of Emily's List	$3,635,178	2,645
[15] Americans for Job Security	$2,826,989	5,007
Business Round Table	$2,685,977	4,571
Handgun Control	$ 1,793,938	2,887
Sierra Club	$ 1,112,387	1,707
League of Conservation Voters	$ 900,601	1,705
Americans for Quality Nursing Home Care	$ 803,195	980
Right to Life Committee	$ 707,660	601
Voters for Choice	$ 699,024	683
American Medical Association	$ 477,077	543
Emily's List	$ 443,120	800
Campaign for a Progressive Future	$ 410,983	863
Coalition for Future American Workers	$ 241,001	172
NAACP	$ 212,106	461
National Rifle Association	$ 205,609	333
National Education Association	$ 179,601	511
Citizens for Better America	$ 137,337	72
Clean Air Project	$ 127,602	191
National Association of Realtors	$ 91,468	210
American Seniors, Inc.	$ 65,607	111
Associated Builders and Con-	$ 39,428	95

tractors		
NARAL	$ 35,367	66
Americans for Limited Terms	$ 26,699	195
Federation for American Immigration Reform	$ 25,718	81
Americans for Victory Over Terrorism	$ 7,782	8
US Term Limits	$ 5,702	37
Conservative Leadership PAC	$ 5,531	10
National Pro Life Alliance	$ 4,338	24
Young Conservative Voters	$ 2,429	16
West Virginians for Life	$ 1,326	24
Right to Work Committee	$ 221	1
TOTAL	**$40,491,141**	**59,632**

VIII. THE MAGIC WORDS TEST FAILS TO IDENTIFY POLITICAL ADVERTISEMENTS THAT HAVE THE PURPOSE OR EFFECT OF SUPPORTING A CANDIDATE FOR POLITICAL OFFICE

The vast majority of political ads broadcast on television fall into one of two distinct categories. Some plainly have the main purpose of persuading citizens to **[16]** vote for or against a particular candidate. Other ads have the purpose of seeking support for or urging some action on a particular policy or legislative issue.

Heretofore, the "magic words" test—derived from a footnote in the Supreme Court's 1976 decision in *Buckley v. Valeo*—has been the legal standard for distinguishing between the two types of ads. This test defines express advocacy (ads with an election goal) as advertisements that contain words such as "elect," "defeat" or "support." Ads that do not contain magic words are technically not election ads under this test. Is this test effective?

As candidate sponsored ads are paid for by hard money and clearly fall within the realm of partisan electioneering, the magic word test does not apply to them. Still, precisely because all advertisements sponsored by candidates are electioneering by definition, they can provide a test for the current standard of express advocacy. If the use of magic words provided an accurate way to classify an ad, then advertisements clearly and obviously created and aired to influence elections would be expected to employ such magic words.

Of the 433,811 ads broadcast by candidates, 11.4 percent contained the magic words. Just under nine in ten (88.6 percent) of candidate ads in 2000, unarguably examples of partisan electioneering, were technically undetected by the *Buckley* magic words test and would not have been classified as electioneering. The data from 2000 demonstrate that magic words are not an effective way of distinguishing between political ads that have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue.

[17] IX. INTEREST GROUP FINANCED TELEVISION ADS WHICH MENTION A CANDIDATE ARE CONCENTRATED WITHIN 60 DAYS OF AN ELECTION.

The two primary criteria by which BCRA defines Electioneering Communications are the ads' reference to a candidate and the proximity in time of their broadcast to the election. The CMAG database provides empirical evidence of a strong positive correlation between these two BCRA criteria and consequently of their validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office.

As Table 4 demonstrates, interest group ads that mention or depict a candidate tend to be broadcast within 60 days of the election. Interest group ads that do not mention a candidate tend to be spread more evenly over the year. More specifically, 78 percent of interest group ads that mentioned a candidate for federal office were broadcast within 60 days of the election. Fully 85 percent of interest group ads mentioning a presidential candidate ran within 60 days of the general election. By contrast, only 18 percent of interest group financed ads not mentioning a candidate were broadcast within 60 days of the election.

Similarly, the distribution over time of interest group ads mentioning candidates is closely correlated to the distribution of electioneering communications broadcast by candidates and political parties.

As illustrated in Table 4, 76 percent of all interest group sponsored ads that mentioned a House candidate were broadcast within 60 days of the House of Representatives election, as were 79 percent of candidate ads and 94 percent of political party ads. Similarly, in the Senate election, 74 percent of interest group ads that **[18]** mentioned a candidate aired within 60 days of the election, as did 67 percent of candidate ads and 81 percent of political party ads.

Amended Expert Report of Kenneth M. Goldstein

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[19]

Table 4: Advertising Activity by Interest Groups, Parties & Candidates in 2000

	Approximate Cost	Total Number*	Sponsor Type					
			Candidate		Party		Interest Group	
All Political Ads	$624,218,204	838,169	433,811		230,368		133,335	
Within 60 Days	$404,208,353	538,404	275,281	63%	152,084	66%	70,384	53%
Outside 60 Days	$220,009,851	299,765	158,530	37%	78,284	34%	62,951	47%
Ads Not Referring to Any Federal Candidate	$42,923,204	57,888	1,558		508		55,648	
Within 60 Days	$8,109,047	11,361	1,066	68%	360	71%	9,761	18%
Outside 60 Days	$34,814,157	46,527	492	32%	148	29%	45,887	82%

Ads Referring to a Federal Candidate	$581,295,000	780,281	432,197		229,860		77,687	
Within 60 Days	$396,099,306	527,043	274,159	63%	151,724	66%	60,623	78%
Outside 60 Days	$185,195,694	253,238	158,038	37%	78,136	34%	17,064	22%
Ads Referring to a Presidential Candidate	$205,603,871	300,959	115,352		123,517		23,850	
Within 60 Days	$110,254,205	161,257	44,035	38%	58,784	48%	20,198	85%
Outside 60 Days	$95,349,666	139,702	71,317	62%	64,733	52%	3,652	15%
Ads Referring to a Senate Candidate	$216,422,636	239,891	171,713		52,953		13,583	
Within 60 Days	$149,622,206	169,971	115,432	67%	42,898	81%	9,999	74%
Outside 60 Days	$66,800,430	69,920	56,281	33%	10,055	19%	3,584	26%
Ads Referring to a House Candidate	$159,263,459	239,416	145,132		53,390		40,239	
Within 60 Days	$136,217,861	195,800	114,692	79%	50,042	94%	30,411	76%
Outside 60 Days	$23,045,598	43,616	30,440	21%	3,348	6%	9,828	24%

**Ads in "total number" column do not equal sum of sponsor type because the identity of a small number of ad sponsors could not be determined and coordinated expenditures are excluded.*

[20] X. INTEREST GROUP SPONSORED TELEVISION ADS WHICH MENTION A CANDIDATE ARE CONCENTRATED IN COMPETITIVE DISTRICTS

The CMAG database shows that interest group financed television ads that mentioned a candidate and were broadcast within 60 days of an election were highly concentrated in states and congressional districts with competitive races. As shown in Table 5, during the 2000 senatorial elections, 89.2 percent of such interest group ads ran in states where the race was competitive.[17] Four states accounted for 77 percent of the ads broadcast by interest groups; political parties broadcast 65 percent of their ads in these four states. Interest group ads were particularly important in Michigan, where interest groups broadcast 22 percent of the total ads broadcast in the race.

[21] Table 5:
Concentration of Interest Groups' Candidate-Mention Advertising Broadcast Within 60 Days of Elections in 2000 Senate Races[18]

Senate Race in which Candidate I mentioned	Interest Groups		Political Parties		Candidates	
Michigan*	3,939	41%	6,114	14%	7,934	8%
Virginia*	1,651	17%	9,622	22%	11,354	11%
Washington*	1,094	11%	1,903	4%	8,370	8%
Florida*	661	7%	10,776	25%	11,492	11%
Rhode Island	434	5%	1,008	2%	2,692	3%
Missouri*	398	4%	2,695	6%	5,400	5%
Kentucky	384	4%	0	0%	0	0%
New Jersey*	348	4%	0	0%	6,463	6%
Delaware*	254	3%	787	2%	1,235	1%
Nebraska*	180	2%	3,000	7%	3,025	3%
Utah	123	1%	0	0%	597	1%
Pennsylvania	78	1%	1,978	5%	6,823	7%
New Mexico	38	0%	0	0%	722	1
Minnesota*	16	0%	652	2%	3,672	4%
Wisconsin	9	0%	204	0%	2,776	3%
Nevada*	7	0%	1,305	3%	2,500	2%
Georgia	0	0%	722	2%	1,550	2%
Indiana	0	0%	136	0%	2,507	2%
New York*	0	0%	1,966	5%	22,357	22%
TOTAL	**9,614**	**100%**	**42,868**	**100%**	**101,469**	**100%**

* *Competitive races.*

The geographical distribution of interest group ads in Senate elections closely paralleled that of the political parties, which ran 90.6 percent of their ads in those competitive states. The same was true in House elections. As demonstrated in Table 6, during 2000, 85.3 percent of interest group financed ads broadcast within 60 days of the election were aired in congressional districts with competitive elections. Similarly, the political parties ran 98.2 percent of their ads in those districts.

[22] In certain key congressional districts, such as California 49 and North Carolina 8, interest groups broadcast more ads than candidates or the political parties. In 22 congressional districts, interest group ads exceeded the number of ads run by the political parties. Overall, interest groups aired 17 percent of all ads aired in races for the U.S. House of Representatives.

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[17] In determining which races were competitive, I relied on my professional judgment, as informed by various media sources such as the Cook Report, attached here as Appendix H.

[18] Table includes only those states in which either interest groups or political parties, or both, ran candidate-mention ads within 60 days of the elections.

Table 6:
Concentration of Interest Groups' Candidate-Mention Advertising Broadcast Within 60 Days of Elections in 2000 House Races[19]

House Race In which Candidate Is mentioned	Interest Groups		Political parties		Candidates	
California 49*	3,133	10%	1,852	4%	2,012	3%
Kentucky 3*	3,112	10%	1,755	4%	3,477	5%
Kentucky 6*	2,175	7%	2,809	6%	3,182	4%
North Carolina 8*	2,129	7%	2,398	5%	1,457	2%
Arkansas 4*	2,084	7%	2,092	4%	1,693	2%
New Mexico 1*	1,784	6%	617	1%	2,167	3%
Washington 5*	1,755	6%	1,646	3%	1,822	2%
Pennsylvania 10*	1,430	5%	1,881	4%	3,481	5%
Florida 22*	1,169	4%	1,413	3%	3,579	5%
New Hampshire 2*	1,076	3%	130	0%	1,073	1%
Michigan 8*	1,001	3%	2,572	5%	2,794	4%
Florida 23	916	3%	0	0%	0	0%
Minnesota 6*	720	2%	687	1%	2,085	3%
Texas 12	568	2%	0	0%	0	0%
California 20*	548	2%	1,424	3%	2,438	3%
Ohio 12*	539	2%	926	2%	2,252	3%
Colorado 1	432	1%	0	0%	0	0%
South Carolina 1	423	1%	0	0%	0	0%
Florida 8*	371	1%	2,405	5%	1,245	2%
Nevada 1*	336	1%	752	2%	2,048	3%
Washington 2*	322	1%	1,321	3%	1,063	1%
Pennsylvania 4*	316	1%	1,817	4%	987	1%
New Jersey 7*	310	1%	354	1%	580	1%
Virginia 4	310	1%	0	0%	0	0%
Connecticut 5*	306	1%	393	1%	2,217	3%
Nebraska 1	267	1%	0	0%	0	0%
Georgia 9	262	1%	0	0%	0	0%
Virginia 1	261	1%	0	0%	0	0%
Minnesota 4*	247	1%	173	0%	964	1
Wisconsin 9	229	1%	0	0%	0	0%
Florida 12*	194	1%	1,409	3%	1,742	2%
Indiana 8*	178	1%	406	1 %	0	0%
Alabama 3	177	1%	0	0%	0	0%
Wisconsin 6	152	1%	0	0%	872	1%
Utah 2*	151	1%	2,104	4%	2,057	3%
Texas 25*	143	0%	186	0%	937	1%
North Carolina 11*	138	0%	1,033	2%	2,187	3%
Oklahoma 6	119	0%	0	0%	504	1%
Tennessee 6	117	0%	0	0%	419	1
Missouri 3	111	0%	0	0%	2,514	3%
Rhode Island 2	109	0%	0	0%	923	1%
Arizona 3	98	0%	0	0%	0	0%
Iowa 5	81	0%	0	0%	0	0%
Colorado 6	40	0%	0	0%	1,387	2%
Missouri 2	7	0%	359	1%	556	1%
Arkansas 3	0	0%	99	0%	0	0%
California 10	0	0%	41	0%	0	0%
California 15*	0	0%	668	1%	7	0%
California 27*	0	0%	626	1%	268	0%
California 36*	0	0%	1,062	2%	618	1%
Connecticut 2*	0	0%	537	1%	2,046	3%
Florida 3*	0	0%	794	2%	696	1%
Florida 4	0	0%	179	0%	168	0%
Illinois 10*	0	0%	861	2%	902	1%
Kansas 3*	0	0%	1,518	3%	2,159	3%
Kentucky 1	0	0%	52	0%	0	0%
Minnesota 2*	0	0%	44	0%	761	1
Missouri 6*	0	0%	2,381	5%	1,110	1%
New Jersey 12*	0	0%	1,317	3%	369	0%
New York 1	0	0%	181	0%	364	0%
New York 2*	0	0%	675	1%	136	0%
Oklahoma 2*	0	0%	1,729	3%	2,197	3%
Pennsylvania 13*	0	0%	278	1%	740	1%

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[19] Table includes only those districts in which either interest groups or political parties, or both, ran candidate-mention ads within 60 days of the elections.

Virginia 2*	0	0%	125	0%	2,343	3%
Washington 1*	0	0%	427	1%	1,550	2%
West Virginia 2*	0	0%	1,534	3%	3,787	5%
TOTAL	*30,346*	*100%*	*50,04*	*100%*	*76,93*	*100*

**Competitive Races*

[24] The CMAG database provides strong evidence that the interest group ads covered by BCRA are targeted at competitive electoral contests and closely parallel political party ads in their geographic distribution.

XI. CODERS' PERCEPTIONS OF INTEREST GROUP TELEVISION ADS AS ELECTIONEERING COMMUNICATIONS PROVES THAT BCRA CAPTURES ADS WHICH HAVE THE PURPOSE OR EFFECT OF SUPPORTING CANDIDATES

Another useful perspective on BCRA's definition of Electioneering Communications emerges from the coders' assessments of the political television advertisements as being either "Genuine Issue Ads" or "Electioneering Ads." The coders were asked to classify the ads by reporting their perception of whether the purpose of an ad was to provide information about or to urge action on a bill or issue or to generate support or opposition for a particular candidate. Applying this criterion, the coders, working under my supervision, classified all political television ads broadcast by interest groups during 2000 as being either "Genuine Issue Ads" or "Electioneering Ads."[20]

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[20] Specifically, coders were asked whether the purpose of the ad was to "generate support or opposition for candidate," or to "provide information or urge action." Coders were also given the option of "unsure/unclear."

Table 7:
Effect of BCRA on Interest Group Ads in 2000: Ads Perceived as Electioneering vs. Ads Perceived as Issue Advocacy

	Unique Ads	*Airings*	**Unique ads** *numerator*	*denominator*	**Airings** *numerator*	*denominator*
Perceived as Genuine Issue Ads	133	45,001				
Perceived as Electioneering	233	88,106				
% Genuine Issue Ads over calendar year that are captured by BCRA	4.51%	3.14%	6	133	1413	45,001
% of ads captured by BCRA (60 days and candidate mention) that are Genuine Issue Ads	4.00%	2.33%	6	154	1413	60,623
% of ads captured by BCRA/FECA (magic words or 60 days and candidate mention) that are Genuine Issue Ads	3.90%	2.32%	6	158	1413	60,784

[26] The coders' perceptions provide evidence that BCRA's definition of Electioneering Communications accurately captures those ads that have the purpose or effect of supporting candidates for election to public office. As shown in Table 7, the coders classified 97.7 percent of the 60,623 interest group sponsored political television ads that mentioned a candidate and were broadcast within 60 days of an election as Electioneering Ads. Only six distinct ads, which were broadcast a total of 1413 times, were classified as Genuine Issue Ads.[21]

For the year 2000 as a whole, the coders classified 33.8 percent (45,001) of interest group sponsored political television ads as Genuine Issue Ads and 66.2 percent (88,106) as Electioneering Ads. The fact that 97.7 percent of interest group ads that would have been classified by BCRA as Electioneering Communications were coded as having the purpose of generating support or opposition for political candidates, coupled with the coders' classification of a third of all interest group financed political television ads broadcast during 2000 as a whole as Genuine Issue Ads, are persuasive evidence that BCRA would capture political television ads that have the purpose or effect of supporting or opposing the election of electoral candidates.

Conversely, there is persuasive evidence that the BCRA definition of Electioneering Communications is not overbroad in the sense of applying to any **[27]** meaningful number of advertisements that are perceived as Genuine Issue Ads. Using the coders' classifications, only 3.1 percent of the 45,001 Genuine Issue Ads broadcast by interest groups during the 2000 election cycle would have been covered by BCRA.[22]

XII. OTHER CHARACTERISTICS OF THE ADS SUPPORT THE CODERS' CLASSIFICATION OF ADS AS GENUINE ISSUE ADS OR ELECTIONEERING ADS

To the extent that the coders' classifications are supported by other characteristics of the ads suggesting that the ads had the purpose or effect of supporting the election of candidates for office, these characteristics provide corroborative evidence of the validity of the coders' classifications of the ads as Electioneering Ads and of the utility of the virtually congruent BCRA definition of Electioneering Communications as a test for identifying these ads that have the purpose or effect of supporting a candidate.

Electioneering Ads financed by interest groups are concentrated in the two months before the election. As shown in Table 8, during the first six months of 2000, interest groups broadcast 72 percent of their Genuine Issue Ads, but only 7 percent of their Electioneering Ads. During the first eight months of the year, interest groups broadcast 35,413 of 45,001, or 79 percent, of their Genuine Issue Ads, while airing only 24,773 of 88,106, or 28 percent, of their Electioneering Ads. During the three months preceding the election, interest groups broadcast 23 percent of their Genuine Issue Ads while airing 82 percent of their Electioneering Ads, 72 percent of which were broadcast within the 60 days leading up to the November 7, 2000 election day.

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[21] The storyboards for these ads appear in Appendix J to this Report. These six ads represent every unique ad ever coded as a Genuine Issue Ad by the coders of the 2000 data. In some prior publications, fewer than six ads covered by BCRA were treated as Genuine Issue ads (see, e.g., *Buying Time 2000*, and "The Facts about Television Advertising and the McCain-Feingold Bills" by Jonathan Krasno and Kenneth Goldstein). In those publications, certain of these six ads—particularly those as to which there was disagreement among the student coders—were ultimately treated as electioneering. In fact, my own judgment is that five of these six ads were clearly intended to support or oppose the election of a candidate (the lone exception being the Feingold/Kohl Abortion Ad). However, in this report, I have chosen to take the most conservative approach and count all six as Genuine Issue Ads.

[22] In fact, this percentage overstates the proportion of all Genuine Issue Ads covered by BCRA, because it does not take into account the unregulated ads run in non-election years during a single Congressional Term, such as 1999.

[28] Table 8: Distribution of Interest Group Sponsored Electioneering and Genuine Issue Ads During 2000 Election Cycle

Month	Electioneering Ad		Genuine Issue Ad	
January	549	1%	3,397	8%
February	1,129	1%	2,861	6%
March	2,000	2%	1,992	4%
April	707	1%	7,294	16%
May	933	1%	6,250	14%
June	751	1%	10,731	24%
July	10,067	11%	2,114	5%
August	8,637	10%	774	2%
September	13,009	15%	5,142	11%
October/November	50,324	57%	4,446	10%
TOTAL	**88,106**	**100%**	**45,001**	**100**

Interest group expenditures for Electioneering Ads in congressional races were heavily concentrated in districts where there were competitive electoral contests. Approximately 91 percent of interest group funded Electioneering Ads in the Senate general election were spent in competitive states ($9,079,235 out of $9,941,797).[23]

The same is true of interest group expenditures directed at elections for the House of Representatives. Using sources such as the Cook Report, I determined that 45 House races were competitive.[24] Interest group Electioneering Ads ran in 41 House races covered by CMAG's top 75 markets. Ninety-one percent of interest group Electioneering Ads aired in House races were aired in races deemed competitive by the Cook Report.

[29] Political television ads coded as Electioneering Ads differed in content from those perceived as Genuine Issue Ads overwhelmingly in two aspects. First, 85 percent of Electioneering Ads mentioned a candidate; only 15 percent did not. Conversely, 94.2 percent of Genuine Issue Ads did not mention a candidate while 5.8 percent did. Second, Electioneering Ads broadcast by interest groups tend to be overwhelmingly negative in tone, while Genuine Issue Ads are not. During 2000, 60 percent of all Electioneering Ads broadcast by interest groups attacked a candidate; 2.9 percent of interest group sponsored Genuine Issue Ads were negative in tone.

Finally, Genuine Issue Ads differed from Electioneering Ads with respect to their publication of toll-free telephone numbers: 62.4 percent of Genuine Issue Ads contained toll-free numbers; by contrast, only 13 percent of Electioneering Ads contained a toll-free number.

To summarize, the information relating to the content of the ads, their timing, and their geographic distribution strongly corroborates the coders' classification of the ads as Electioneering Ads or Genuine Issue Ads.

XIII. ISSUE ORIENTED ADS BROADCAST BY INTEREST GROUPS ARE READILY DISTINGUISHABLE FROM QUINTESSENTIAL POLITICAL ADS

Interest group ads intended to inform the public concerning some issue, as opposed to supporting a candidate for elective office, are readily distinguishable. If we take interest group sponsored ads which do not mention or depict a candidate as a surrogate for quintessential issue oriented ads and compare them to ads sponsored by candidates or parties—a surrogate for quintessential electioneering ads—it becomes **[30]** readily apparent that issue oriented ads are markedly different with respect to timing, content, and coder perception.

First, as shown in Table 9, 63.5 percent of candidate ads and 66 percent of political party ads ran within 60 days of election; only 17.7 percent of group sponsored issue oriented ads were broadcast during that period.

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[23] I used the Cook Report, attached as Appendix H, to identify the following senatorial elections as competitive races in 2000: Delaware, Florida, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Virginia and Washington.

[24] See Appendix H.

Second, 45.0 percent of political party ads were negative in tone, whereas only 0.7 percent of group sponsored issue oriented ads were negative in tone. During the 15 days prior to election, negative political party ads rose to 68.4 percent of all party ads broadcast. Almost 69 percent of BCRA-regulated group ads were negative in tone. Similarly, 65 percent of group sponsored issue oriented ads contained a toll-free number whereas less than one percent of candidate or political party ads did so. Only 2.1 percent of BCRA-regulated group ads contained a toll-free number.

Finally, viewers perceived 99 percent of candidate ads and 100 percent of party ads as intending to generate support or opposition for a candidate. While 99.7 percent of BCRA-regulated group ads were perceived as supporting or opposing a candidate, none of the issue oriented interest group ads were so perceived.

Table 9: Comparing Quintessential Electioneering Ads and Quintessential Issue Ads in the 2000 Elections

	Quintessential Electioneering Ads		Quintessential Issue Ads		
	Ads Run by Candidates (n=433,811)	Interest Group Ads with Magic Words (n=2,876)	Interest Group Ads with No Candidate (n=55,648)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (n=60,623)	Political Party Ads (n=230,368)
Candidate Mention					
% Naming Candidate	99.6%	100.0%	0.0%	100.0%	99.8%
Magic Words					
% Using Magic Words	11.4%	100.0%	0.0%	0.0%	2.2%
Timing					
% Run January through March	16.0%	0.0%	17.0%	0.0%	0.0%
% Run April through June	6.4%	10.6%	45.0%	0.0%	5.8%
% Run July through August	10.5%	15.3%	18.8%	0.0%	23.3%
% Run 60 Days Before General Election	63.5%	74.1%	17.7%	100.0%	66.0%
% Run 30 Days Before General Election	42.2%	51.0%	7.3%	72.9%	40.7%
% Run 15 Days Before General Election	26.0%	40.1%	4.3%	44.2%	25.5%
Information Provided					
% Giving Toll Free Number	0.7%	0.0%	65.0%	2.1%	0.5%
Viewer Perception					
% Perceived as Electioneering	99.0%	100.0%	0.0%	97.7%	100.0%
% Negative	12.3%	29.6%	0.7%	68.6%	45.0%
% Negative for Ads Run 60 Days Before General Election	15.3%	24.8%	2.7%	68.6%	53.7%
% Negative for Ads Run 30 Days Before General Election	18.2%	36.0%	3.7%	68.7%	58.2%
% Negative for Ads Run 15 Days Before General Election	19.7%	37.8%	1.3%	66.5%	68.4%

[32] XIV. BROADCASTING ISSUE ADS NEAR AN ELECTION IS NOT AN EFFECTIVE WAY OF INFORMING VOTERS OR GENERATING ACTION ON THOSE ISSUES

One concern sometimes raised by those opposed to the BCRA regulations is that the restriction may harm interest groups by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics. There is no reason to believe that BCRA would significantly hinder interest groups from effectively getting out their messages on public policy issues. Running genuine issue ads near an election does not increase the effectiveness of those ads; in fact, it is likely that the ads' effectiveness actually decreases.

First, while there is evidence that interest in politics and *elections* rises as Election Day approaches, there is absolutely no evidence to support the position that interest in *public policy* issues rises as well during that time.

Second, communication theory has concluded that advertising is likely to be most effective (at informing or persuading) when viewers are exposed to one-sided flows of information in isolation from other advertising. See William McGuire, "The Myth of Massive Media Impact: Savagings and Salvagings," *Public Communication and Behavior* 1:173-257 (1986); John Zaller, *The Nature and Origins of Mass Opinion* (Cambridge Univ. Press 1992). The last two months before an election is the time period of the most intense political advertising activity. In 2000, for example, 538,404 political ads, or 64.2 percent of all political ads run during the year, appeared during the last two months before an election. With the flood of advertising taking place during the last two months before an election, an individual interest group's message on a public policy issue is likely to become lost. *Id.*

Third, in conjunction with an increased interest in politics and elections, partisan attachments also harden during the last two months of a campaign. These hardened partisan attachments make it more difficult to persuade otherwise open-

minded **[33]** viewers of the merits of an interest groups' policy stance. Zaller, *Nature and Origins of Mass Opinion.*

In addition to being less effective at conveying their messages, issue ads run close to an election are also less cost-effective, since the price of scarce television and radio air time is higher near an election than during the rest of the year.

Data from my study supports the conclusion that interest groups themselves understand that airing Genuine Issue Ads near an election carries no special advantage, and that it makes strategic sense to spread the airing of these ads over the course of the entire year. Of ads run by interest groups that do not name any candidate—quintessential issue ads—17.7 percent of those run within 60 days before a general election (Table 9). This approximates the 16.4 percent of issue ads which would have run if the ads had been equally distributed throughout the year. The frequency of issue ad broadcasts exceeds an even temporal distribution only in the April-June time frame. Forty-five percent of all issue ads were aired then, as against an expected percentage of 25 percent if the ads were spread evenly throughout the year (Table 9). This concentration of ads during April through June is a likely result of groups turning on the heat to pass or defeat bills before Congress adjourned for the summer. There is no concentration of these quintessential issue ads during the 60 days before a general election. This time—the most cluttered time for advertisements and a time with hardened partisan attachments—is probably the worst time for an interest group to educate the public on its particular issue.

[1 (DEV. 1-Tab 3)] Report on The Bipartisan Campaign Reform Act

Donald P. Green

A. Whitney Griswold Professor of Political Science

Yale University

September 23, 2002

Credentials

My name is Donald P. Green, Professor of Political Science at Yale University. I received my doctorate in political science from University of California, Berkeley in 1988 and have been teaching political science at Yale University since 1989. I was promoted to tenured professor in 1994. In 1996, I was appointed Director of Yale's Institution for Social and Policy Studies, an interdisciplinary policy center founded in 1968. I was recently reappointed for a third three-year term in this position. In 2001, I received an endowed chair.

My academic interests include elections, campaign finance, political parties, and public opinion. I have written extensively on each topic. My early work on campaign finance[1] used econometric models to gauge the effects of campaign expenditures on vote outcomes; more recently, my

work makes use of field experimentation to gauge the effectiveness and cost-efficiency of campaign tactics.[2] A long string of articles on [2 (DEV. 1-Tab 3)] parties, elections, and public opinion recently culminated in a book published by Yale University Press.[3]

Over the past 13 years, I have taught a variety of classes in the field of American politics and served as a reviewer for every major academic journal in this field. I have been a member of the American Politics section of the American Political Science Association since 1984 and have made scores of presentations at professional meetings and lecture series around the country. My scholarship won recognition from the National Science Foundation and substantial financial support from the Pew Charitable Trusts, Smith Richardson Foundation, Harry Frank Guggenheim Foundation, and Russell Sage Foundation.

I am being paid $150 per hour for my work on this case, plus expenses. During the past four years, I have testified as an expert in two cases, *California Prolife Council et al. v. Fair Political Practices Commission et al.* and *Daggett v. Webster*.

Introduction

The Bipartisan Campaign Reform Act of 2002 (hereafter BCRA) represents an attempt to close the loopholes that allowed vast and rapidly increasing sums of soft money to flow unregulated through political parties to campaigns between 1980 and 2002. In contrast to hard money contributions, the size of which has long been limited by the Federal Election Campaign Act of 1974 (FECA), soft money donations were not subject to limits on the theory that they contribute to campaign activities, such as voter mobilization drives, that are intended only in part to aid in the election of federal candidates. In 1978, the Federal Election Commission (FEC) ruled that a state party could raise funds otherwise not permitted by FECA to defray a portion of administrative overhead, voter registration activities, and voter mobilization activities that benefit both state and federal candidates. In 1979, the FEC ruled that national party committees could [3 (DEV. 1-Tab 3)] accept donations that were otherwise prohibited by FECA in order to finance a component of campaign activity associated with a combined federal-state election. The net effect of these rulings was to open the door to unlimited donations to parties by corporations, unions, PACs, and individuals. So long as the money was spent on nonfederal election activity or transferred to the nonfederal accounts of state parties, where it might be spent on state or joint state/federal activity, these funds were not limited by the federal regulatory regime established under FECA. The BCRA may be regarded as an attempt by Congress to reassert control of an increasingly dysfunctional regulatory regime. The Act comes to grips with a fact that political parties learned long ago, namely, that funding for state and local parties has implications for federal elections.

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[1] Green, Donald Philip and Jonathan S. Krasno. 1988. Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections. *American Journal of Political Science*. 32:884-907. Green, Donald Philip and Jonathan S. Krasno. 1990. Rebuttal to Jacobson's "New Evidence for Old Arguments." *American Journal of Political Science*. 34:363-372. Krasno, Jonathan S., Donald Philip Green, and Jonathan A. Cowden. 1994. The Dynamics of Campaign Spending in U.S. House Elections. *Journal of Politics*. 56:459-474.

[2] Gerber, Alan S., and Donald P. Green. 2000. The Effects of Canvassing, Direct Mail, and Telephone Contact on Voter Turnout: A Field Experiment. *American Political Science Review* 94:653-63. Gerber, Alan S., and Donald P. Green. 2001. Do Phone Calls Increase Voter Turnout? A Field Experiment. *Public Opinion Quarterly 65:75-85.*

[3] Green, Donald, Bradley Palmquist, and Eric Schickler. 2002. *Partisan Hearts and Minds: Political Parties and the Social Identities of Voters*. New Haven: Yale University Press.

In the years leading up to the passage of the BCRA, political parties and donors grew increasingly adept at exploiting the soft money loophole. It has been estimated that during the 1999-2000 election cycle soft money donations to the national parties totaled $495 million. A staggering figure of approximately $300 million, or 60% of these soft money

donations, came from just 800 individuals, labor unions, corporations, or groups of executives associated with corporations.[4] Whereas soft money constituted just 16% of the money contributed to the national political parties in the 1991-1992 election cycle, by 1999-2000, soft money accounted for 40% of all the money donated to the national parties. Although donations remained subject to disclosure requirements, a large fraction of the money flowing to national parties was now outside the system of contribution limits established under FECA.

In early 2002, campaign finance legislation, which had been stalled in Congress for years, came to the forefront of the national agenda. Like the federal campaign finance laws that came before it, the BCRA was propelled to enactment by a wave of financial and accounting scandals among large corporations, entities whose executives made lavish donations to both political parties and enjoyed much-publicized access to policy makers at the highest levels of government. Faced with an electorate that was becoming [4 (DEV. 1-Tab 3)] increasingly restive about revelations concerning massive corporate, labor, and individual contributions to parties working in close conjunction with candidates for federal office, Congress and the President enacted the BCRA.

The BCRA's regulatory regime contains, among other things, a series of provisions designed both to close the soft money loophole and to forestall attempts to circumvent the new regulatory system. First, the national party committees may no longer accept soft money. Second, the BCRA does not permit federal candidates or officeholders to raise or transfer funds unless those funds are subject to FECA as amended by the BCRA. Third, the BCRA requires that state and local political parties comply with FECA contribution limits insofar as the money that they raise goes to fund "federal election activity," which includes voter registration drives during the 120 days leading up to a federal election, voter mobilization activity conducted in connection with a federal election, mass communication that promotes or attacks a federal candidate, and the services of state or local employees who devote more than 25% of their time to campaign activities associated with a federal election.[5] Fourth, the BCRA prohibits the national and state parties from transferring funds to certain tax-exempt organizations that engage in electoral activity. These tax-exempt organizations include 501(c) organizations that engage in federal election activity as well as so-called Section 527 organizations other than political committees, sub-national parties, or sub-national campaign committees. Taken together, these provisions prevent parties and donors from circumventing the hard money limits on campaign contributions to federal candidates.

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[4] Holman, Craig B., and Luke P. McLoughlin. *Buying Time: Television Advertising in the 2000 Federal Election.* New York: Brennan Center for Justice.

Critics of the BCRA have leveled three principal constitutional objections. They argue that these contribution limits: (1) restrict their First Amendment rights of expression and association, by restricting how funds may be contributed and used, (2) undermine principles of federalism, insofar as the new federal regulations impose new restrictions on state political parties, and (3) violate the principle of Equal Protection, in [5 (DEV. 1-Tab 3)] that political parties are subject to regulations that are not applied to individuals, political action committees, corporations, and labor unions. Any such concerns must be weighed against the very real prospect that failure to regulate soft money donations will result in the actual or apparent corruption of public officials and undermine the legitimacy of our political system in the eyes of the electorate.

The Supreme Court's previous decisions have indicated that the regulation of campaign contributions, as distinct from campaign expenditures, represents an acceptable burden on First Amendment freedoms so long as the legislation addresses the problem of corruption inherent in a system in which actual and potential officeholders receive large sums of money from campaign contributors. When using the term corruption, the Court refers not only to quid pro quo exchanges of money for favors but also the indirect influence that actual or anticipated donations have on the judgment and behavior of officeholders. Moreover, the Court has recognized that the problem of corruption extends beyond the discovery of specific instances of improper influence to include both the threat of corruption and the electorate's perception that large campaign contributions corrupt public officials. The BCRA's restrictions on political parties are justified precisely because they address the reality, threat, and perception of corruption that grows out of a system of unregulated soft money donations.

This argument applies not only to national party committees but also to state and local parties engaging in activities that affect federal elections. If it is to be effective in reining in the kinds of large campaign donations that have a potentially corrupting influence on federal candidates and office-holders, the BCRA must regulate political parties in a comprehensive way. Parties are adaptable, vertically integrated institutions. To eliminate from the BCRA those provisions that affect subnational parties would be to ignore the many ways in which state and local parties affect federal campaigns and to invite political parties to restructure themselves so as to make subnational parties conduits for money flowing to federal campaigns. The state parties that would be the most attractive proxies would be precisely those that are subject to the weakest statewide regulatory oversight and the fewest safeguards against corruption.

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[5] The Levin Amendment provisions in Section 323(b)(2) allow subnational parties to use soft money to pay for a portion of certain federal election activities, so long as the money is raised by the subnational party making the expenditure in increments no greater than $10,000. "Levin funds" may be used only for those federal election activities that neither mention federal candidates nor involve broadcast media.

[6 (DEV. 1-Tab 3)] This report is organized into six sections. I begin by describing the special attributes of political parties within our system of political institutions and their unique relationships with federal officeholders and candidates. These attributes and relationships set them apart from other political actors (e.g., PACs, labor unions, individual donors) that Plaintiffs complain are subject to less regulatory scrutiny under the BCRA. The second section of this report discusses the nexus between national and state parties and between state parties and federal officials, arguing that a combination of institutional and informal connections between them help explain the ease with which they have coordinated their activity in the past, a pattern that would continue in the future were they given the opportunity to circumvent the new regulatory system. The third section discusses other circumvention tactics, such as co-opting tax-exempt organizations. The fourth section explicates the meaning and measurement of corruption in the political system. The fifth section describes the evolution of political parties and electoral competition over the past few decades, devoting special attention to the rise of capital-intensive campaigning and the risk of corruption that it engenders. The final section debunks the notion that political parties or the functions that they perform will be adversely affected by the BCRA provisions at issue here, namely, the restrictions on

campaign contributions made to local, state, and national political parties supporting generic voter mobilization activities.[6]

This report's recurrent theme is that parties are highly adaptable strategic actors. Notwithstanding their resistance to laws that restrict their ability to solicit and transfer large donations, parties will quickly adjust to the new incentive system created by BCRA, for example, by broadening their base of contributors. But it is the parties' very adaptability that poses a serious danger to the political system should provisions that limit the contributions that state parties may accept in order to finance federal election activity be struck down. Political parties are flexible, multi-tiered organizations that are structured in ways that are designed to win power. Regulations directed at them must [7 (DEV. 1-Tab 3)] take into account the many institutional, social, and ideological interconnections among local, state, and national party organizations, because a narrow regulatory strategy that focuses solely on the national parties would encourage political parties to reorganize their financial activities in ways that circumvent the new restrictions. The BCRA creates a comprehensive regulatory system covering activity that bears directly on the election of federal candidates; if the BCRA is undercut in ways that permit back-door financing of federal campaigns, one can be certain that these loopholes will be exploited.

I. Special Attributes of Parties

Political parties, it is often noted, are nowhere mentioned in the Constitution, Bill of Rights, or subsequent Amendments.[7] The Founders saw no reason to elevate political parties to a special or protected status within the framework of Constitution. Hostile though the Founders were to political parties and the factionalism they embodied, political parties have nevertheless come to play a ubiquitous role in our system of governance and in the careers of public officials.

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[6] In this report, I discuss issues related to the BCRA's regulation of political parties, as opposed to its electioneering communications provisions.

Even an abbreviated list of the functions of parties is impressively long.[8] In most state and federal elections, parties-as-organizations structure the lists of candidates that are presented to voters. To varying degrees, but with increasing probability as the prestige of the office increases, candidates for public office are recruited, endorsed, and financed by political parties. Federal candidates in particular must pass through a sieve of party caucuses or primaries in order to appear on the general election ballot with the mantle of a political party beside their names. Once elected to legislative office, public officials enter an environment in which political parties-in-government control the resources crucial to subsequent electoral success and legislative power. Political parties [8 (DEV. 1-Tab 3)] organize the legislative caucuses that make committee assignments. Power within each committee and subcommittee is distributed according to political party, with the majority party enjoying special

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[7] The Founders were suspicious of organized political parties, and even after the Federalist and Democratic Parties took root, the text of the Constitution remained blind to them. Even the Twelfth Amendment, which could have mentioned parties in its description of how the Electoral College would cast ballots after the debacle of 1800, did not do so.

[8] Because the functions of political parties are so variegated, political scientists have long made use of a tripartite distinction when characterizing them. The *party-in-government* administers the state and structures the leadership hierarchies within state institutions; the *party-as-organization* competes in elections; and the *party-in-the-electorate* provides its base of electoral support.

procedural prerogatives and staffing resources. When lawmakers or their critics attract media attention, the news is reported to the party-in-the-electorate with reference to the party affiliation of the people involved.

The scope and power of political parties undercuts the complaint that the BCRA unfairly singles out political parties and treats parties differently from individuals, political action committees, corporations, and labor unions. Political parties play a distinctive and in many ways privileged role. Other entities are not entitled to organize the slate of candidates presented to voters. Other entities do not organize legislative caucuses, assign committee chairs and members, or elect legislative leadership. Other entities do not enjoy de facto apportioned representation on the Federal Election Commission, which as a matter of practice comprises three Democrats and three Republicans. Even the largest political action committees cannot begin to approach the political scope, influence, or depth of electoral support characteristic of the Republican or Democratic Parties.

The prominence of political parties in both electoral and legislative institutions is not accidental.[9] In order to obtain power, a party must win elections; and in order to win elections, elected officials scramble to claim credit for good legislative deeds while publicizing the misdeeds of the opposition party.[10] Accordingly, parties loom large in the careers of professional politicians. Elected officials frequently emerge from the ranks of [9 (DEV. 1-Tab 3)] local activists and legislative aides. In order to win a place on the general election ballot, they must prevail in a party caucus or primary. (Since many elected officials gain office only after multiple attempts, the relationship between candidates and parties frequently goes back many years.) To locate donors and activists who might help them with their general election campaigns, these candidates must typically build a cordial relationship with party leaders—all the more so if candidates hope to secure direct campaign support from the parties or from prominent figures within the party. To be sure, many famous or wealthy candidates in recent years have been able to win party nominations with little or no political experience or party connections, but once elected they discover the importance of parties in advancing their legislative goals, facilitating their reelection, or satisfying their ambitions for higher office.

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[9] Despite the Founders' aversion to parties, parties quickly formed as a device to advance shared political objectives. By the 1820s, parties emerged as mass organizations designed to mobilize a geographically-dispersed and enlarged electorate. Parties solve important problems for politicians. They provide a way to mobilize and engage voters, to channel ambition (by providing career ladders and nomination procedures), and to facilitate legislative coalition-building. Parties thrive because they are deeply rooted in the incentive system created by our political institutions, and these basic incentives are scarcely affected, if at all, by the BCRA.

As political scientists have observed since the earliest studies of political party machines, there is often a disquieting closeness between the party-in-government and the party-as-organization. Modern day politicians no longer measure their influence by the patronage jobs they wield, but they remain apt fundraisers, and their access to donors makes them important assets to any campaign organization.

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[10] Reflecting the decentralized nature of our geographically based first-past-the-post electoral system, American political parties tend not to publicize broad ideological causes that might impair a given legislator's ability to campaign effectively in his or her home state. Their energies are devoted primarily to the practical challenges of winning electoral majorities. In some cases, legislative parties directly determine electoral outcomes, as in the case of party-line votes that determine the outcome of disputed elections.

Presidents and congressional leaders are favorite guests at fundraising affairs. Although fundraising is scarcely their favorite pastime, they fully recognize that their fundraising role both augments their power within the party-as-organization by lengthening the list of public and party officials who owe them favors and indirectly strengthens their power within the party-as-government by increasing the number of offices their party controls. As I shall point out below when summarizing recent scholarship on campaign finance, donations flow most vigorously to those in powerful official positions.

Political parties, it should be noted, are structured along very different principles from the American government. One such principle is the separation and dispersal of power, of which one finds many examples in the Constitution. Article I, Section 6 forbids federal legislators from simultaneously holding other offices.[11] Article II, Section [10 (DEV. 1-Tab 3)] 1 forbids federal legislators from appointment to the Electoral College.[12] Federal lawmakers thus constitute a distinct group from state officeholders; federal legislators, from officers in the federal executive branch, and so on. By contrast, political parties allow and even encourage the overlap between state and national officeholding. Indeed,

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[11] Article I, section 6: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States, shall be a member of either House during his continuance in office."

[12] Article II, section 1: "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

Plaintiffs complain that the BCRA would impinge upon their ability to automatically appoint the leaders of statewide parties to national party committees. Leaders of legislative party caucuses may also serve as members or leaders of party campaign committees. Furthermore, party leaders are drawn disproportionately from the ranks of those who hold important legislative leadership posts. When I later consider the threat of corruption posed by unrestricted contributions to political parties, it must be remembered that the internal structure of parties permits, for example, former U.S. Senator D'Amato, who chaired the Republican Senatorial Campaign Committee from 1995-97, to at the same time serve as chair of the Senate Banking, Housing, and Urban Affairs Committee. Parties, in contrast to the lawmaking institutions they inhabit, are organized in ways that concentrate authority, entrusting multiple roles to particular individuals.

II. State Parties, National Parties, and Federal Officeholders: Links that Structure the Scope of the BCRA's Regulatory Purview

In the preceding section, I discussed the unique attributes of political parties and their relationships with federal officeholders and candidates. In this section, I consider the relationship between state and local parties on the one hand and national parties and federal officials on the other. My aim is to underscore both the extensive institutional and informal links between national and subnational parties and the many ways that the behavior of subnational parties affects the fortunes of federal officials.

[11 (DEV. 1-Tab 3)] Although state and national parties are distinct institutions, rarely in American history have state and national political parties been in serious conflict, and even more rarely have state parties seen it in their interests to withdraw their support from the national presidential nominee.

This pattern should hardly be surprising, since one of the strands that links local, state, and national partisans is a deep sense of attachment to the political party to which they belong. Although there is often speculation that activists and voters feel a sense of attachment to their state parties that they do not feel toward the national party, survey evidence from the 1950s to the present demonstrates that split party attachments are unusual.[13] Local and state partisans want to see their team win federal office, and with good reason. National and subnational partisans generally share similar ideological and programmatic visions. Even when they disagree, subnational partisans recognize that federal officeholders and the resources they command can be enormously beneficial to state and local parties and candidates.

The links between state and national parties run deeper than an overlap in personnel and we-feeling, important though these may be. Indeed, the links run deeper than the informal social ties that state and national party members often share with their constituents and donors or the string of political connections that former state party leaders accumulate when they ascend to leadership positions in national political parties.[14] The American political system ties the fortunes of state legislators and U.S. House members through the institutional mechanism of redistricting. The most important legislative activity in the electoral lives of U.S. House members takes place during redistricting, a process that is placed in the hands of state legislatures. The chances that a House incumbent will be ousted by unfavorable district boundaries are often greater than the chances of defeat at the hands of the typical challenger. Thus, federal legislators who belong to the state majority party have a tremendous incentive to be attuned to the state legislature and the state party leadership.

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[13] On this point, see Green, Donald, Bradley Palmquist, and Eric Schickler. 2002. *Partisan Hearts and Minds*. New Haven: Yale University Press.

[14] Two of the many examples that could be adduced include Ann L. Wagner, Co-Chairman of the RNC and Chairman of the Missouri Republican Party, and Joe Carmichael, Vice-Chair of the DNC and Chair of the Missouri State Democratic Party.

[12 (DEV. 1-Tab 3)] For example, in early 1999 the Republican National Committee, recognizing that state legislatures in Tennessee and Georgia would soon control redistricting, transferred substantial sums of money to those states' Republican parties in an effort to win the few seats necessary to gain the majority. As Edwin Bender, in a report for the National Institute on Money in State Politics explains: "In a number of states with legislatures that are controlled by narrow margins, a win or two in the state House or Senate in 2000 could mean the difference between a redistricting committee controlled by Democrats or Republicans, and districts that favor one party over the other. . . . As a result, national party organizations have been flooding the states with campaign donations, both soft money and hard, to influence the redistricting process."[15]

Given the overlapping structure of officeholding in national, state, and local parties and the special incentives for federal officeholders created by redistricting, the regulatory environment created by the BCRA must encompass national, state, and local parties. The importance of primary election challenges to federal officeholders who inhabit districts with lopsided proportions of their fellow partisans coupled with the possibility that federal officeholders or their allies might make a bid for statewide office means that federal officials

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[15] Bender, Edwin. 2000. States, Redistricting, and Election 2000. The National Institute on Money in State Politics.

cannot afford to be out of favor with the political party of their home state.

The scope of the BCRA makes even more sense when one considers the many informal interactions between federal officeholders and state political parties. State parties and federal officeholders, after all, tend to have longstanding political relationships that not infrequently assign an important party fundraising role to federal officeholders. Federal officeholders and their allies often figure prominently within state parties. State parties and federal officeholders share many of the same campaign donors. State parties have no shortage of favors to ask of federal office-holders on behalf of important donors; federal office-holders in turn have considerable incentives to accede to or anticipate these requests, particularly since many of them aspire to higher office or aim [13 (DEV. 1-Tab 3)] to bequeath their seats to their allies or offspring. To exclude state and local parties from the purview of federal legislation ignores the many points of intersection between national parties and their subnational comrades in arms.

What justification is there for regulating the funding of federal and generic election activity of state parties in the context of federal elections? First, state and local parties play a direct role in the electoral campaigns of federal candidates. The appeals that state and local parties make to voters and funders frequently mention both federal and nonfederal candidates, particularly when presidential candidates or contested U.S. Senate seats are at stake. The reasoning behind this tactic is easy to discern. In addition to the economies achieved when multiple candidates are presented to voters, designers of campaign literature recognize that voters are often more interested in federal races than they are in state legislative races.[16]

What about state and local party communications that make no mention of federal candidates? Because the partisan proclivities of the electorate express themselves toward *both* state and federal candidates, state parties influence federal elections directly even when they mobilize their supporters on behalf of a candidate for state office. Consider, for example, the immense correlation between voting for state and federal offices in California, a state that maintains a database of how each vote on each ballot was cast. UCLA Professor Jeffrey B. Lewis assembled these data for the 1992 election using ballots cast in Los Angeles County. That election featured a U.S. Senate contest between Barbara Boxer, the Democratic candidate, and Bruce Herschensohn, the Republican candidate. The individual-level ballot data enable us to say precisely what proportion of voters who cast Democratic or Republican ballots for state legislative office voted for Boxer, who won with a plurality of 48%. Those who voted for a Republican state senate candidate were 5.6 times more likely to vote for Herschensohn than Boxer (531,081 vs. [14 (DEV. 1-Tab 3)] 95,675); those who voted for a Democratic assembly candidate were 5.9 times more likely to vote for Boxer than Herschensohn (600,373 vs. 101,590). No less striking patterns of party voting obtain regardless of which state and federal offices one examines. For example, among the 2,159,164 voters who cast a ballot for a Democratic or Republican state assembly candidate, 86.4% cast ballots for the same party when voting for U.S. House candidates.

These findings undercut the argument that funding for voter mobilization activity lies beyond the scope of federal authority because it does not directly involve federal candidates.[17] The evidence from California, as well as from numerous opinion surveys and exit polls that demonstrate the powerful correlation between voting at the state and federal levels, shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate. That parties recognize this fact is apparent, for example, from the emphasis that the Democrats place on mobilizing and preventing ballot roll-off[18] among African-Americans, whose solidly Democratic voting proclivities make them reliable supporters for office-holders at all levels. As a practical matter, generic campaign activity has a direct effect on federal elections.

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[16] The even-year federal elections mandated by the Constitution dominate the political landscape, particularly in presidential election years. By my calculation, the presence of a presidential candidate on the general election ballot raises statewide voter turnout by an average of 17 percentage-points over the period 1960-2000. (Voter turnout was calculated as number of voters divided by the size of the voting-age electorate, as measured by *America Votes* and *Statistical Abstract of the United States*.) Thus, a sizable fraction of all voters who cast ballots in joint state/federal elections show up precisely because there is a federal candidate on the ballot.

[17] This argument rekindles a time-honored tradition of using voter mobilization campaigns as a Trojan horse to open loopholes for partisan campaign spending; the original exemptions for soft-money were justified partly on the grounds that get-out-the-vote activity would help strengthen parties. As it happened, only a small fraction of the soft money (or hard money, for that matter) that flowed to state and national parties was spent on voter mobilization activity, even broadly conceived to include direct mail and commercial phone banking. According to the classification system presented by La Raja and Javish Shean (2001, p. 3), 8.5% of national party soft money expenditures went to "mobilization" and "grassroots." The figures for state and local parties are each 15%. La Raja, Ray, and Elizabeth Jarvis-Shean. 2001. Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections. Unpublished manuscript: Institute of Governmental Studies and Citizens' Research Foundation. Although the details of their classification scheme cannot be discerned from their paper, it seems likely that they have, if anything, overestimated spending on mobilization, since much of what parties and consultants call "get-out-the-vote" activity is direct mail or phone calls designed to call attention to particular issues or candidates. Such expenditures could fairly be classified along with other forms of mass communications aimed at persuading voters.

[15 (DEV. 1-Tab 3)] When considering the overlap between state and federal elections, it should be remembered that states at their discretion choose whether to hold their elections at the same time as federal elections. New Jersey and Virginia, for example, choose to hold their state elections during odd-numbered years. Against the argument that states are unable to change the timing of their elections is the fact that states in recent decades have changed the timing of their gubernatorial elections, so that they no longer coincide with presidential elections and the "coat-tails" associated with presidential victories. Indeed, in their complaint the California Democratic and California Republican Parties acknowledge that they exercise this discretion when they point out that California deliberately holds its elections so as to maximize voter turnout while minimizing administrative costs.

Thus, it is entirely reasonable that the BCRA prevents national parties from funneling soft money to subnational elections, whether on behalf of state candidates or to pay for voter mobilization or generic campaign activity. These activities have direct implications for the election of federal officials.

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[18] Roll-off refers to instances in which voters cast ballots for the prominent offices at the top of the ticket but do not cast ballots for lower offices.

Even if one were hypothetically to identify a component or target of subnational election activity that had no bearing whatsoever on the election of federal officials, one should not lose sight of the potential for federal corruption created by a loophole that allows national parties to amass soft money. The ubiquitous role that parties play in the lives of federal officials means that no official can ignore the fundraising ambitions of his or her party. If these ambitions center on the courtship of large donors, there is always the danger that the parties' fundraising interests will color the judgment of those who lead or depend on them.

III. The Need for a Comprehensive Regulatory Scheme that Prevents Circumvention

The BCRA contains an integrated set of provisions designed to prevent national, state, and local parties from circumventing fundraising restrictions. Many of these [16 (DEV. 1-Tab 3)] provisions involve prohibitions on the transfer of funds. For example, national parties are prevented from accepting soft money transfers from state parties. State parties may not fund federal campaigns, directly or indirectly, using soft money. National parties may not accept soft money donations even for purposes of supporting state party activity that has no direct bearing on federal offices. Local, state, and national parties are prevented from contributing hard or soft money to certain tax-exempt organizations. In this section, I discuss the rationale for these restrictions.

Before taking up the issue of corruption in the next section, let us imagine the practical consequences of relaxing any or all of these restrictions. If state parties could transfer soft money to the national parties, donors would simply be instructed to direct their soft money donations to state parties that are not subject to state contribution limits, which would serve as financial intermediaries for the national parties. A similar argument could be made about direct spending by state parties on federal campaigns, which is in some ways analogous to a transfer of funds. If state parties were allowed to spend soft money on federal campaign activity, states like Virginia or Illinois, which impose few restrictions on campaign contributions, would see their state parties become the political equivalent of offshore banks, funneling large sums of money to races around the country as though they were national parties.

The prohibition against national parties transferring soft money to state parties stems from concerns about the corrupting influence of unlimited donations, which I discuss below. Suffice it to say that lifting this prohibition returns us to the path that leads to an ever-widening soft money loophole. To create a system in which the national parties are banned from raising soft money, except for soft money raised on behalf of their state party allies, inevitably puts pressure on party operatives to construe national party expenditures as transfers to the states. Under the pre-BCRA provisions, the parties demonstrated great ingenuity in moving money around so as to minimize the amount of hard money needed to fund federal election activity. If the BCRA provisions regarding state and local parties were overturned, clever accountants will doubtless figure out ways to place a maximal share of the national parties' overhead and fundraising costs on the [17 (DEV. 1-Tab 3)] state parties' budget ledgers. This incentive system also puts pressure on the state parties to engage in as much federal election activity as possible so that the national parties can recoup their soft money investment. It would be no small irony if the BCRA provisions governing national-state party transfers were struck down on the grounds that Congress interfered unduly with state activity, because the resulting regulatory system would feature a dramatic increase in the role of state parties in federal

elections. For this reason, when reflecting on issues of federalism it is critically important that one consider not only the current role of state parties in federal election activity but also the probable future role should the regulatory system change in ways not intended by Congress.

The provisions governing state and national party transfers to tax-exempt organizations have a somewhat different character and rationale. The BCRA forbids the state and national parties from making donations—even hard money contributions—to certain tax-exempt organizations. At first, this provision may seem unnecessary, since presumably hard money has been collected in ways that reduce concerns about corruption. Why not let the parties make donations using hard money to tax exempt organizations involved in electoral activity?

When addressing this question, one must bear in mind that parties seek to win elections in order to gain power.[19] From an economic standpoint, it makes no sense for parties to transfer funds in order to assist political campaigns, since they could more efficiently (and with greater control over the end-product) spend directly on political activity. The parties' motive for transferring funds to tax-exempt organizations that are engaged in electoral activity is to gain control of these organizations, because doing so gives parties control over the soft money that tax-exempt organizations are free to raise.[20] [18 (DEV. 1-Tab 3)] For example, the Republican National Committee is alleged to have controlled the tax-exempt National Policy Forum and other pro-Republican organizations.[21] Correctly surmising that the national parties could easily circumvent the new regulatory regime by creating satellite party organizations in the guise of tax-exempt organizations, which would be free to collect donations of unlimited size, the authors of the BCRA closed this loophole. Parties are prevented both from making these transfers and from setting up placeholder party organizations. These restrictions do not impinge upon the parties' ability to foster interest groups or build political coalitions. Should parties wish to transfer money to political action committees (which themselves must raise only hard money), they remain free to do so under the BCRA.

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[19] A similar argument explains why the BCRA's provisions concerning "public communications" by parties, as distinct from communications by independent organizations, are not limited to those communications occurring during the 60 days preceding a federal election. Unlike interest groups, which pursue an issue-based agenda that transcends the election of candidates, parties are primarily and continuously concerned with acquiring power through electoral victory. Parties never engage in public communication without regard to its electoral consequences.

The ban on hard money transfers to so-called Levin accounts stems from the same concerns that led to a ban on transfers to tax-exempt organizations. If parties could contribute hard money to Levin accounts, they could gain influence over how the account is spent, including the money raised by the less restrictive Levin provisions. The underlying theory behind these BCRA provisions boils down to a simple and persuasive proposition: one should not allow the parties to skirt the soft money ban by using hard money to take control of soft money accounts.

The fungibility of campaign expenditures explains why donations to state parties solicited by state party officials for the purpose of conducting voter mobilization drives is a source of federal concern. In what way might they pose a threat of corruption to federal officeholders? Voter mobilization activities are an integral part of electoral campaigns; national parties spend millions on voter mobilization. National parties would be quite grateful to any other entity that engaged in this activity on their behalf, freeing up the national parties to spend their money on other things. From an accounting standpoint, this arrangement would be tantamount to a massive transfer of funds to the national parties. If a donor were intent upon currying favor with federal officeholders and the national parties they inhabit, there would be no better opportunity than making lavish [19 (DEV. 1-Tab 3)] donations to this type of generic campaign activity, were such donations outside the purview of the BCRA. The many informal connections between state and federal politicians and between national and subnational parties make this type of exchange easy to orchestrate.

Just as parties cannot co-opt tax-exempt organizations, they are not allowed under the BCRA to form ersatz party organizations in the guise of "leadership PACs." The BCRA prohibits state and national parties or their leaders from forming associations that raise soft money. Leadership associations not only represent a potential loophole; they constitute precisely the type of fundraising entity that amplifies the power of those public officials who are best positioned to raise large sums of money and act upon the donors' wishes. As I indicate in the next section, concerns about corruption become especially acute when large donors form close and enduring relationships with officeholders who occupy leadership positions within government.

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[20] In the regulatory environment that preceded the BCRA, the parties seldom received large donations from tax-exempt organizations. National parties had no need to acquire soft money through this indirect route; they could simply raise soft money themselves. National parties, on the other hand, frequently transferred large sums of money to tax-exempt organizations because, unlike state parties, these tax-exempt organizations are not bound by allocation formulas that specify how much hard money must be spent in conjunction with soft money expenditures.

[21] Washington Post, 2/10/98. RNC's Schemes 'Evade Federal Election Laws.' p. A6.

IV. Corruption

Powerful though parties may be, some of my colleagues in political science have often argued that they should be made more powerful still. A certain nostalgia for the ideologically cohesive parties of Europe or the urban party machines that once integrated European immigrants into American society encouraged some political scientists to endorse the soft money exemptions when they were first proposed in the late 1970s as a means of party-building. Parties continue to be viewed by many political observers as aggregators of preferences, coalitions that unify and give voice to pluralistic interests, hallmarks of free and competitive democratic polities. However, recognition of the many important functions of political parties should not overshadow the problems that arise when parties become conduits for large sums of money raised for and flowing to political campaigns. The fact that parties play a valuable role in representative democracy should not dissuade legislators from creating bulwarks against corruption.

[20 (DEV. 1-Tab 3)] What is corruption, and why does it deserve special weight in any policy discussion? Political scientists have long taken an interest in and an expansive view of corruption. In a seminal 1909 article entitled "The Nature of Political Corruption," political scientist Robert C. Brooks set the stage for later scholarship when he defined corruption as "[t]he intentional misperformance or neglect of a recognized duty . . . with the motive of gaining some advantage more or less directly personal" (p. 4).[22] Brooks'

definition clearly encompasses what is ordinarily termed quid pro quo corruption, of which vote-buying is a prime example. But Brooks cautioned those who are "too prone to think of all political corruption as consisting essentially of such gross cases and sordid transactions" to consider less clear-cut examples that meet the criteria of neglected duty motivated by selfish interests. This broad conception of corruption continues to dominate contemporary scholarship.[23]

Although Brooks had little to say about the campaign finance issues of his day, his analysis provides a useful framework for thinking about the forms of corruption that a system of large donations to candidates engenders. What I would term *favor-currying corruption* occurs when officeholders attempt to garner future donations by pandering to the putative wishes of large contributors. Unlike quid pro quo corruption, the latter forms involve no implicit contractual arrangement between those involved but do redound to the personal benefit of the candidate seeking to win election. The political consequences, moreover, are not dissimilar: excessive compliance with the wishes of large contributors.

Even more subtle is *obligation-driven corruption*, which occurs when officeholders alter their behavior because they sense a debt to their financial backers. A sense of obligation may grow out of the personal relationship that officeholders may have forged with donors; indeed, candidates quite often turn to their friends for campaign contributions. Delivering an outcome desired by the donor may be a way for the [21 (DEV. 1-Tab 3)] officeholder to maintain a good personal relationship with the donor and the donor's circle of friends. It may also bolster a legislator's reputation as someone who wields influence, which in turn attracts financial resources. Again, the net effect is that the officeholder motivated by private concerns pays undue attention to the aims of financial backers.

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[22] Brooks explains (pp.7-8) that "duty must exist or there is no possibility of being corruptly unfaithful to it . . . [S]ince an absolute despot is bound to no tangible duty, he cannot be corrupt in any way . . . Conversely, corruption necessarily finds its richest fields in highly organized communities which have entrusted their performance to the largest number of officials and citizens."

[23] See, for example, Thompson, Dennis. 1995. *Ethics in Congress: From Individual to Institutional Corruption.* Washington, DC: Brookings.

Like the motivations that underlie corruption, the manifestations of corruption may vary widely. A great deal of scholarly attention, as I note below, has been devoted to the ways in which campaign contributions influence legislative roll-call votes. Voting, however, is just one way in which legislators may express support for a donor's agenda. More subtle but no less important is the effort that a public official expends as a bill wends its way through the legislative process. One may readily imagine two legislators with identical voting records. One does nothing to assist the bill's passage. The other takes an active role shepherding the bill through the drafting and markup processes, buttonholing fellow legislators in an effort to drum up support in subcommittee and committee, acquiring a spot on the floor agenda, obtaining a favorable rule concerning amendments, and so forth. Although harder to quantify, legislative effort may ultimately be more consequential than roll-call votes.

In addition to encouraging legislative votes and behind-the-scenes effort, large campaign contributions may be rewarded by special access to elected officials. Mr. Buttenwieser's testimony provides an instructive glimpse of the access enjoyed by those who contribute large sums of money to national and state political parties. Mr. Buttenwieser readily acknowledges that his personal relationship with numerous U.S. senators and party leaders stems principally from his generosity as a campaign donor. By his account, the

link between donations and access is manifest in the practice of seating the largest donor next to the president at a political function. He also notes that the intimate fundraising affairs he attended frequently resolved into small group discussions between donors and elected officials, where lobbying and politicking occurred. There can be no doubt that donors enjoy special access to elected officials.

[22 (DEV. 1-Tab 3)] Even if federal officials were altogether immune to favor-currying motives and felt no sense of obligation whatsoever to these financial backers, they would nonetheless be exposed to the policy prescriptions that donors have special opportunities to present. These prescriptions may grow out of purely principled arguments or crass financial interests; the point is simply that this pattern of special access has corrosive implications for democratic governance. Continually upstaged by well-positioned insiders, the electorate may come to regard its political participation as meaningless.

The Supreme Court's conception of corruption seems in many ways to parallel that found in political science. The Court has made clear that its concerns about corruption extend well beyond patently illegal quid pro quo behavior. In *Shrink Missouri* (p. 201), the Supreme Court noted that "In speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." In *FEC v. Colorado Republican Federal Campaign Committee* (2001), the Supreme Court indicated its concern about the "obligation" that large financial contributions threatened to create.[24]

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[24] The Court's comments in this case are directed specifically at the role played by parties as transmitters of donations: "Parties thus perform

Recognizing that our democratic institutions rely on voters' trust and participation, the Court points out that Congress has a legitimate right to pass legislation designed to address the public's perception that money is corrupting federal legislators. In *Buckley* (p. 34), the Court argued: "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from the public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."

A pair of interesting empirical questions arise from this conception of corruption. To what extent do campaign contributions influence legislative voting, legislative effort, [23 (DEV. 1-Tab 3)] and access to elected officials? To what extent did the campaign finance system that the BCRA replaced appear corrupt?[25]

In order to ascertain whether campaign contributions affect roll call voting, legislative effort behind the scenes, or access to public officials, political scientists have used a variety of different research approaches. First, they have conducted extended interviews with those who make political contributions. Herndon's (1982) interviews with business and labor PACs suggest that their contributions to members of

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functions more complex than simply electing candidates; whether they like it or not, they act as agents on behalf of those who seek to produce obligated officeholders" (p. 154).

[25] One may also ask whether the appearance of corruption in fact undermines the legitimacy accorded to democratic institutions by the electorate. Among the few studies to address this question empirically is the cross-national investigation by Seligson (2002), who finds that countries with higher levels of corruption (as rated by specialists familiar with the inner workings of these countries) also have electorates that accord less legitimacy to the country's political institutions. Seligson, Mitchell A. 2002. The Impact of Corruption on Regime Legitimacy: A Comparative Study of Four Latin American Countries. *Journal of Politics*. 64:408-33.

Congress are motivated by a desire to gain access to legislators.[26] Second, political scientists conduct quantitative studies of how members of Congress allocate their time during a typical workweek. Langbein (1986) quantifies the link between money and access, finding a statistical relationship between PAC contributions and the ways that members of Congress allocate time during their weekly schedules.[27] Third, they conduct somewhat more qualitative studies of the effort that legislators expended on behalf of legislation before a committee. Hall and Wayman's (1990) study of the way that House members shepherd legislation through committees suggests that money may buy not only access, but legislative effort.[28] Although contributions were not related to floor voting on dairy price supports, job training, and energy deregulation, Hall and Wayman find that contributions predict the amount of effort that supporters exerted on these issues during the committee markup process. By far the most common approach involves a statistical analysis of the correlation between roll-call votes and campaign contributions. Here, as Hall and Wayman point out in their review of roll-call voting research, the evidence is quite mixed. On tobacco issues, for example, some analysts find strong statistical [24 (DEV. 1-Tab 3)] relationships between tobacco industry contributions and votes on tobacco regulation (Monardi and Glantz 1998), but on the whole it appears that the typical roll-call vote is weakly predicted by members' financial backing.[29]

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[26] Herndon, James F. 1982. Access, Record, and Competition as Influences on Interest Group Contributions to Congressional Campaigns. *Journal of Politics*. 44:996-1019.

[27] Langbein, Laura I. 1986. Money and Access: Some Empirical Evidence. *Journal of Politics* 48:1052-62. Note that the size of the PAC contributions at issue in Langbein's research pale in comparison with the immense soft money contributions that were seen toward the end of the 1990s.

[28] Hall, Richard L., and Frank W. Wayman. 1990. Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees. *American Political Science Review* 84:797-820.

The aforementioned studies are suggestive, but they suffer from a basic methodological limitation. Correlations between contributions and legislative behavior cannot disentangle whether contributions reward fealty, create it, or merely reflect ideological affinity between legislators and their financial backers. For that matter, one may imagine scenarios in which contributors show special generosity to their political adversaries in an effort to blunt their opposition. In response to this basic methodological critique, recent research on campaign finance has taken a more dynamic approach, examining how legislators and contributors behave over time. Here, the ideological proclivities of legislators are held constant, and what varies is their capacity to deliver favors to contributors.

One study of this kind is Gordon's (2001) analysis of a series of votes on California's Senate Governmental Organization Committee.[30] Gordon finds that contributions have a stronger effect on those votes that are crucial to the legislative outcome. The implication of this study is that while contributions may influence only a small proportion of legislative balloting, contributions may nonetheless have a significant impact on legislative outcomes. Another dynamic approach is to examine the manner in which interest groups allocate their campaign contributions as the power wielded

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[29] Monardi, Fred, and Stanton A. Glantz. 1998. Are Tobacco Industry Campaign Contributions Influencing State Legislative Behavior? *American Journal of Public Health* 88:918-23. See also the literature review in Sorauf, Frank J. 1992. *Inside Campaign Finance: Myths and Realities*. New Haven: Yale University Press, pp. 163-174.

[30] Gordon, Stacy B. 2001. All Votes Are Not Created Equal: Campaign Contributions and Critical Votes. *Journal of Politics* 63:249-69.

by legislators changes. Cox and Magar (1999) address the question "How much is majority status in the U.S. Congress worth?" by examining the flow of campaign dollars before and after a switch in party control of the House and Senate.[31] Cox and Magar find strong statistical evidence that donors favor the party in power, a clear indication that they see [25 (DEV. 1-Tab 3)] their donations as a means to gain access and influence, as opposed to a mere expression of ideological affinity. This work builds on the previous work of Romer and Snyder (1994), who examine how PAC contributions to members and chairs of congressional committees change as these elected officials switch committees or leadership assignments.[32] Romer and Snyder find powerful evidence that representatives who join the Banking Committee, for example, enjoy a substantial influx of new contributions from Banking PACs; the Ways and Means committee seems to be especially attractive to Corporate and Trade PACs; and committee leadership positions are always rewarded with an extra dollop of cash.[33] Whether contributors seek access or influence remains unclear from the dynamic relationship between legislative power and donations; there can be no doubt, however, that contributors target their donations to officeholders who are best positioned to reciprocate with valuable favors or to retaliate against them in the event that they do not contribute.

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[31] Cox, Gary W., and Eric Magar. 1999. How Much is Majority Status in the U.S. Congress Worth? American Political Science Review 93:299-309.

[32] Romer, Thomas, and James M. Snyder, Jr. 1994. An Empirical Investigation of the Dynamics of PAC Contributions. *American Journal of Political Science* 38:745-69.

[33] This analysis is confirmed by Dow et al.'s (1998) study of campaign contributions by economic interest groups to members of the California Assembly. Dow et al.'s statistical analysis shows quite clearly that industries (e.g., agriculture, labor, finance) target their contributions to members who sit on the committees with jurisdiction over them. Unlike the Romer and Snyder essay, however, Dow does not examine the manner in which contributions change as members change committee assignments. Dow, James K., James W. Endersby, Charles E. Menifield. 1998. The Industrial Structure of the California State Assembly: Committee Assignments, Economic Interests, and Campaign Contributions. *Public Choice* 94:67-83.

One particularly lurid example of the strategic way in which interest groups target their donations occurs when large donations are made to both parties simultaneously. In such cases, donors seem to throw ideological affinity to the wind, ensuring instead that whichever party wins remains in their debt. For purposes of illustrating this point, let us put aside instances where corporate or union donors give token amounts of money to one party while showering the other with cash (e.g., Union Pacific gave $676,858 to GOP committees in 1995-6, while giving Democratic committees just $5550). Let us also ignore donations made by corporate executives and focus solely on donations made by corporate entities and unions. According to the FEC, the list of lavish donations to both parties is lengthy. One notable example from the 1999-2000 election cycle is Enron's contribution of $607,065 to Democratic Party committees and $688,210 to Republican [26 (DEV. 1-Tab 3)] Party committees, but this pattern is by no means restricted to such celebrated cases. The tactic of two-party donations has become commonplace. During the 1999-2000 reporting cycle, AT&T donated $1,432,469 to the Democrats and $2,197,261 to the Republicans. MGM Mirage, Inc. gave $658,086 to the Democrats and $861,997 to the Republicans. Public spirited though these and many other corporations may be, it strains credulity to think that their evenhanded distribution of shareholders' money to both parties grows out of their desire to foster democratic discourse.

Ironically, the most strident charges of corruption of federal officeholders by party fundraising come from the parties themselves. In the wake of the Enron collapse at the beginning of 2002, Democrats charged the Bush administration with letting its energy policies be shaped by Enron executives, who were prominent Republican donors. The National Republican Senatorial Committee fired back with a memo entitled "Enron Corporation And Arthur Andersen: The Democratic Connection," which pointed out that the two companies and their employees donated $4.55 million to the Democratic Party and "affiliated committees," including 48 of 50 Democratic senators. The current scandal is reminiscent of the partisan crossfire that occurred in the wake of Democratic fundraising scandals, only here the Republican Party finds itself on the defensive and mounts a counterattack: "As Democratic officials fraudulently and maliciously attack the Bush administration for being 'an Enron government,' they ignore the deep, long relationship between Enron, [its accounting firm] Arthur Andersen and the Democratic Party." Among the traits common to the Republican and Democratic Parties is their shared belief that the opposition is beholden to special interest contributors.[34]

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[34] These charges are readily found in press releases issued by both parties. In an RNC press release issued on April 29, 2000, Jim Nicholson, then chairman of the RNC, charged that "there are just two reasons Clinton and Gore won't let reasonable legislation become law—first, because they'd rather have the political issue, and second, because they're dependent for campaign contributions on the trial lawyers, and are doing their bidding." In a DNC press release issued in March 28, 2002, Terry McAuliffe stated that "the Energy Secretary rubber-stamps rules and regulations drafted by a Republican energy donor [and that] every day there are more and more disturbing disclosures about the cozy relationship between the administration and Enron and the never-ending favors it dispensed for big donors."

One reason that the parties advance these charges is that they recognize that the public is receptive to the thesis that unlimited donations encourage corruption. It is not [27 (DEV. 1-Tab 3)] difficult to demonstrate empirically that the American public takes a very dim view of unlimited contributions, whether to candidates or political parties. Consider the overall impression that the public has developed about the undue influence of large campaign donations. A CBS News Poll of 1,030 adults conducted during January 15-17 of 2002 asked: "In general, do you think many public officials make or change policy decisions as a direct result of money they receive from major campaign contributors?" Respondents overwhelmingly said "yes" (72%). More said that they "don't know" (15%) than said "no" (13%).

This question talks about public officials and major campaign contributors.[35] What about political parties? The public, when presented with a balanced question that invites it to consider the risks of campaign finance reform, nevertheless endorses the basic principle of limiting contributions to

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[35] A poll of 903 adults conducted by TNS Intersearch during March 22-25, 2001 asked the following:

"Do you think politicians do special favors for people and groups who give them campaign contributions, or not?"

Yes: 93%

No: 6%

Don't know 1%

A more detailed breakdown of responses my be created based on the follow up question asked of those who responded "Yes": "Do you think that happens often or only sometimes?"

Yes, Often 80%

Yes, Sometimes 13%

No, Does Not Happen 6%

Don't know/No Opinion 1%.

political parties. A Reuters/ Zogby poll of 1,000 likely voters surveyed March 27-28, 2001 asked: "Which statement do you agree with more: Unlimited contributions to political parties should be banned as part of campaign finance reform or banning so-called soft money would hamper the political process, weaken the two parties and limit free speech?" Fully 66% of respondents said that unlimited contributions should be banned, as compared to 26% who said they should not, with 9% unsure.[36]

[28 (DEV. 1-Tab 3)] Is it reasonable for the public to worry that soft money donations to parties will lead to corruption? Sometimes those who study politics take the view that political parties, by aggregating the preferences of many interest groups, dilute the corrupting influence of particular special interests. By this account, money given directly to candidates might corrupt, but money given through parties is cleansed of its corrupting influence.

The problem with this argument is that it loses sight of the conditions that give rise to corruption. Scholars who study corruption have emphasized three such conditions: (1) large payoffs to those involved, (2) small probabilities of detection and punishment, and (3) enduring relationships between donors and politicians so that informal deals can be monitored and enforced.[37] Unlimited soft money donations satisfy all of these conditions.

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[36] There is also evidence of considerable public support for the policy of limiting business and labor contributions to political parties. A Gallup Poll conducted October 6-9, 2001 asked 920 registered voters: "As you know, 'soft money' is the amount of money that individuals, businesses, and labor unions are legally allowed to contribute to the national political parties. Would you favor or oppose new federal laws limiting the amount of 'soft money' that any individual or group can contribute to the national political parties?" Fully 72% said favor, 24% oppose, and the remainder expressed no opinion. Quite similar results were reported by an ABC News Poll of 1,020 adults conducted during October 13-19, 1999 and an ABC News/Washington Post Poll of 1,006 adults conducted December 12-15, 1999.

First, soft money is a highly valuable resource for both donors and candidates. The reality of soft money donations is that donors are often instructed to direct their funds to political parties, which use them in ways that benefit specific candidates (e.g., when the party runs "issue ads" attacking a candidate's opponent). As for detection and punishment, probabilities appear low given the small proportion of contributions that received appreciable negative publicity or regulatory sanction. Finally and most importantly is the ongoing relationship between donors and public officials. When donors make soft money donations to parties on behalf of candidates, neither the donors nor the parties have any incentive to hide this fact from the candidates, which is why the BCRA prohibits federal officials from raising soft money on behalf of state parties. Parties serve as matchmakers for donors and candidates, finding extra cash for candidates [29 (DEV. 1-Tab 3)] whose donors might otherwise confront hard money limits and gladly holding the money so that the transaction can be made. Parties, like banks, have an incentive to encourage these arrangements year after year, particularly as it gives them access to donors who might otherwise bypass parties and contribute directly to candidates. As parties become increasingly dependent on financial support in order to finance their growing overhead expenses and as their base of party activists diminishes (the subjects of the next section), parties' desire and capacity to resist perennial

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[37] Glaser, Daniel (ed.). 1974. *Handbook of Criminology*. Chicago: Rand McNally, p. 1062. On the shadow cast by the prospect of future interaction, see Axelrod, Robert. 1984. *The Evolution of Cooperation*. New York: Basic Books.

large donors' influence diminish.[38] Indeed, the economic efficiencies of raising money from smaller numbers of large donors create constant pressure on parties to narrow rather than broaden their financial bases.

V. Evolution of Political Parties and Electoral Competition

A century ago, when political scientists studied powerful and sometimes notorious urban party machines, they would raise the question: What features of contemporary parties and the electoral environment they inhabit make them prone to corruption? This question has again become timely, for parties now handle quantities of money that even in inflation-adjusted terms would have been unimaginable a century ago. Regardless of whether one considers actual or perceived impropriety, certain features of parties and the environment they inhabit make the threat of corruption more than a hypothetical possibility.

In order to place the concern about corruption in proper perspective, one must understand that parties are highly adaptable organizations. Pitted in closely contested, high stakes competition with one another, the two major parties constantly explore new [30 (DEV. 1-Tab 3)] technologies, fundraising strategies, and legal maneuvers. It is no accident that soft money loopholes were explored in the late 1980s, widened in the 1990s, and exploited to the hilt in the 2000 election. The parties are constantly on the prowl for opportunities to gain momentary advantage over their rivals. They are quick to imitate their opponents when it appears that they are on to something new.

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[38] It should be noted that the Supreme Court, too, has rejected the blithe argument that parties are immune to corrupting influences:

> When we look directly at a party's function in getting and spending money, it would ignore reality to think that the party's role is adequately described by speaking generally of electing particular candidates. The money that parties spend comes from contributors with their own personal interests . . . In fact, many PACs naturally express their narrow interests by contributing to both political parties during the same electoral cycle . . . Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors. (*FEC v. Colorado Republican*, p.153)

Adaptation is not simply a matter of exploiting regulatory loopholes. Innovation occurs at a rapid pace in every venue of political competition. While soft money has won the limelight in recent years, one should not lose sight of the fact that hard money fundraising has continued to rise over time, despite explosive growth in soft money fundraising. Parties complain about provisions in the BCRA that make it more difficult for them to raise large sums of money, but the fact is that parties have always managed to find a way to raise larger and larger sums of money under hard money constraints. Table 1 shows the trend in hard and soft money donations to the political parties since the 1991-1992 election cycle, when the FEC first began tracking these figures. Soft money donations rose from $86.1 million to $495.1 million between 1991-2 and 1999-2000, but hard money contributions rose markedly as well, from $445 million to $741 million. One should never underestimate a party's capacity to adapt and change, particularly in response to the behavior of the rival party.

Table 1: National Party Receipts 1992-2000

	1991-92	1993-94	1995-96	1997-98	1999-2000
Hard Money	$445.0	$384.7	$638.1	$445.0	$741.0
Soft Money	$86.1	$101.6	$262.1	$224.4	$495.1
Total	$531.1	$486.3	$900.2	$669.4	$1,236.1

Source: "FEC Reports Increase in Party Fundraising for 2000" release of May 15, 2001

With the advent of computerized data bases, commercial marketing firms, and private campaign consultancy, parties have grown increasingly capital-intensive. Many [31 (DEV. 1-Tab 3)] of the tasks formerly performed by party activists —phone banking, envelope-stuffing—are now subcontracted to private firms. Party activists have been supplanted to a large extent by campaign professionals who conduct polls, devise media campaigns, and the like. Party professionals have little incentive to court political activists, who can be unruly and willful, when pliant subcontractors follow orders for a fee. As a result of these changes, the proportion of the American public that reports working for a political party has declined steadily since the early 1970s. Robert Putnam reports that between 1973 and 1994, the proportion of Americans working for a political party fell by over 50%.[39]

As parties became less reliant on local activists and more reliant on a growing class of campaign professionals and subcontracted services, they also became more reliant on fundraising. Fundraising, too, became more professionalized and sophisticated. Unlike other party activities, fundraising is accorded special importance by party professionals, who recognize that their own financial livelihood depends on abundant donations.

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[39] Putnam, Robert D. 2000. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster, pp. 41, 448-9.

In contrast to the general public, those who derive economic benefits from a system of free-flowing donations display little enthusiasm for proposals designed to limit campaign contributions to political parties. In 1997-1998, Princeton Survey Research Associates conducted a survey of 200 principals and partners in consulting, media, polling, and fundraising firms involved in House or Senate campaigns— a group of people that includes many past party professionals and that has strong personal ties to such people. A series of questions began: "As I read you some changes that have been proposed to reform the way that political campaigns are financed, please tell me how you would rate each in terms of benefit to the country. . . . Ending soft money." Only 16% rated the idea "excellent," 17% "good," 34% "only fair," and 33% rated it "poor." By contrast, campaign professionals were much more enthusiastic about "increasing individual contribution limits": 38% called the idea "excellent," 27% "good," 14% "only [32 (DEV. 1-Tab 3)] fair," and 20% "poor." Despite the fact that many campaign professionals are ideologically sympathetic to groups that seek to limit the role of money in politics, those who make a living from campaign donations take a dim view of measures that would make fundraising less efficient.

Parties' and campaigns' enormous appetite for money augments concerns about corruption. In an era of capital-intensive campaigns, parties and officeholders are constantly pursuing large financial donors. This pressure creates strong incentives for the individuals who work with or within political parties to become increasingly entrepreneurial in the ways that they solicit cash from donors. Proving one's mettle as a successful party fundraiser is a way to march to the forefront of the party. Terry McAuliffe's meteoric rise to power within the DNC attests to the prominence one may attain as an artful and assiduous fundraiser.

Sometimes parties are less subtle and simply appoint their campaign contributors to leadership roles. For example, it may be recalled that in January of 1997, President Clinton appointed Steve Grossman, a Massachusetts businessman who ranked among the 50 largest donors to the DNC, as DNC co-chair. Lest one forget the overlap between state and national parties, it should be noted that Mr. Grossman had formerly served as Chairman of the Massachusetts State Democratic Party.

That big donors should wind up sleeping in the Lincoln Bedroom of the White House is one logical implication of an incentive system that revolves around soft money donations of unlimited size. Indeed, one virtue of a regulatory system that specifies a maximum amount that individuals may contribute to political parties is that fundraising activity no longer takes on the appearance of an unseemly auction designed to extract a maximal amount of cash from potential donors. The BCRA specifies the largest bid that an individual may make for the affections of a political party and the public officials who inhabit it. These new limits permit what the typical voter would consider a very generous contribution to the political parties while reducing the risk of undue influence by large donors by encouraging parties to broaden their base of contributors.

[33 (DEV. 1-Tab 3)] VI. **Money and Party-Building**

What will become of parties in the wake of the BCRA? Some campaign professionals who inhabit parties and who are dependent on their fundraising success would have us believe that parties cannot survive without access to unlimited donations. Their protests are hardly surprising, since campaign professionals have an interest in contending that campaigns cannot be waged on a large scale without large sums of money. Their livelihood revolves around the sale of services to parties and campaigns, services such as the preparation of media advertisements, the design and distribution of direct mail, the execution and analysis of opinion polls, and so forth. Naturally, campaign professionals are quick to paint a grim portrait of what campaigns and democracy would be without their ads, polls, and four-color mailers.

The history of federal hard money contributions, however, suggests that the parties have been quite capable of finding new ways to raise ever-larger quantities of hard money even under the old contribution limits. This point has already been made with respect to the national parties, whose hard money receipts have increased by hundreds of millions of dollars in the space of one decade.

At the state level, the history of fundraising belies the notion that contribution limits seriously impair parties' ability to raise money. Measuring state party fundraising is complicated by the fact that standardized reports are available from the FEC regarding only expenditures of allocable soft money. (Recall that under the pre-BCRA system, the parties could spend soft money for certain joint state/federal election activities, so long as a portion of these expenditures were also paid for with hard money.) Nevertheless, the trend is quite clear. Soft money expenditures have risen markedly over time, even when one focuses attention on federal midterm elections in which the vagaries of presidential campaign strategy are absent. According to the FEC, the state parties spent $80.2 million in allocable soft money in 1993-1994; four years later, this figure had risen to $153.2 million. This increase was not confined to states like Illinois or Virginia, which place no [34 (DEV. 1-Tab 3)] limits on contributions to political parties, even from corporations or labor unions. Consider, for example, Connecticut, which prohibits labor and corporate contributions as well as national party transfers and places a $5,000 individual contribution limit on donations to state parties. In 1993-1994, the parties spent $1,020,102 in money in accordance with state limits: despite some of the most stringent campaign finance laws in the country, this figure had doubled to $2,086,438 by 1997-1998. Parties are skilled at raising money and adapt their tactics to the regulatory regime within which they operate.

The recent testimony of Ryan M. Erwin, chief operating officer of the California Republican Party, provides a rare opportunity to examine closely the development of state level fundraising over time and the capacity of a political party to broaden its financial base when it chooses to do so. According to Chart 4 (p. 1278) under tab 19, the number of California Republican Party donors giving the maximum allowable hard money contribution of $5000 rose dramatically between the 1997-98 and 1999-2000 election cycles. Whereas the amount raised in $5000 amounts was $290,000 in 1995-1996 and $140,000 in 1997-1998, by 1999-2000 this figure had skyrocketed to $3,030,000. This surge in maximum federal contributions was due, according to Mr. Erwin, to the increased effort that the party expended in garnering this type of donation (p. 146). Broadening the hard money base of a party in this fashion is feasible, according to Mr. Erwin, so long as parties endeavor to "work even harder" to do so.

Viewed from the broader standpoint of whether limits on contributions restrict free expression or the vigorous communication of ideas, there is no evidence whatsoever that these state-level contribution limits have historically prevented state parties from engaging in what the Court has termed "effective advocacy." It is important to remember that in other Western-style democracies and in our own recent past, one finds vigorous political dialogue and high levels of electoral participation despite relatively small per capita campaign expenditures.[40]

[35 (DEV. 1-Tab 3)] If recent trends in campaign spending should be halted or even reversed by the BCRA, it is unlikely that either democracy or the parties themselves will suffer the dire consequences that Plaintiffs allege. The irony of the two parties' challenge to the Bipartisan Campaign Reform Act is that the parties—as distinct from the campaign professionals who inhabit them—might actually be better served by making campaign funds more difficult to raise. The shift away from labor-intensive campaigning has caused local party activism to die out, with a resultant drop in face-to-face mobilization activity. I have argued elsewhere that this decline in personal contact between campaigns and voters, as distinct from impersonal contacts by way of mass media, mail, or commercial phone banks—accounts for the long-term decline in voter turnout that the U.S. has experienced since the 1960s.[41] In the long run, the BCRA may well strengthen parties. First, by raising the marginal cost of fundraising, it provides incentives for parties to invest in local infrastructure rather than in the here-today-gone-tomorrow media campaigns that transfer large sums of money to commercial marketing firms but do little to inspire the ongoing loyalty and participation of the electorate. Second, by limiting the size of donations, it forces the parties

to broaden their base of financial backers. Third, by eliminating the soft money donations that enable large donors to gain special access to officeholders, it reduces the mounting tension between parties and democratic accountability.

[36 (DEV. 1-Tab 3)] I declare under penalty of perjury that the foregoing is true and correct.

Signed DONALD GREEN Executed on 9/23/02

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[40] See, for example, the figures presented for the United Kingdom in Butler, David. 1995. *British General Elections since 1945*, 2nd ed. Oxford: Basil Blackwell. Despite longstanding campaign spending limits at the constituency level and relatively limited national party spending prior to 1979, Britain's democratic institutions and level of electoral participation were quite vigorous.

[41] Gerber, Alan S., and Donald P. Green. 2000. The Effects of Canvassing, Direct Mail, and Telephone Contact on Voter Turnout: A Field Experiment. *American Political Science Review* 94:653-63.

[37 (DEV. 1-Tab 3)] Exhibit A: Curriculum Vita

Exhibit B:	List of Materials Considered in Preparing this Report
Exhibit C:	Data from Professor Jeffrey B. Lewis
Exhibit D:	Declaration of Peter L. Buttenwieser
Exhibit E:	Spreadsheets on Hard and Soft Money Trends, Transfers of Nonfederal Funds for Allocable Expenses as Reported by State Committees, and Top Donors from 1995-2001.

The Impact of the BCRA on Political Parties: A Reply to La Raja, Lott, Keller, and Milkis

Donald P. Green
A. Whitney Griswold Professor of Political Science
Yale University
October 7, 2002

Taken together, the reports of Professor La Raja, Professor Emeritus Keller, Professor Milkis, and Mr. Lott make the following arguments:

1. The Bipartisan Campaign Reform Act (BCRA) will lead to a decline in the amount of money available to parties.
    a. The decline in funds will adversely affect the "strength" of state parties.
    b. The decline in funds will adversely affect voter mobilization efforts, depressing turnout.
    c. The decline in funds will adversely affect the electoral prospects of challengers.
2. The BCRA, by banning soft money, will undermine the role of parties.
    a. The dearth of soft money will undermine the electoral accountability that party platforms provide and will expose the American political system to more influence from interest groups, which are prone to extremism.
    b. Strong parties are bulwarks against corruption. By weakening parties, the BCRA exacerbates the threat of corruption.

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[5]*Adaptation and Party Fundraising.* The adaptability of parties mentioned by Professor La Raja and charted in the historical narratives of Professors Milkis and Keller is central to understanding how the BCRA is likely to shape campaign finance in years ahead. The parties will not stand still once soft money becomes unavailable to the national party committees. To assume that the dollars that are currently donated as soft money will simply dry up fails to anticipate the actions that parties will take in order to recoup these funds. The recent attempts by the California Democratic and Republican Parties to demonstrate how the BCRA's provisions will result in a deadweight loss of revenues are premised on the assumption that neither party will do anything to gain a fundraising advantage over the other, which is absurd. The logic of interparty competition forces parties to innovate and adapt.

I therefore reject the flawed methodology of extrapolating from past contribution patterns as though no adaptation will occur. One can readily envision several compensating trends that will occur once the use of soft money for federal election activities is restricted. Under the provisions of the BCRA, which relaxes the hard money limits, state and national parties will be encouraged to broaden their financial base of hard money contributors. The dramatic increase in hard money fundraising over the past decade leaves little doubt that this can be achieved (see below). Indeed, the task of cultivating new party supporters will be made easier to the extent that the BCRA allays **[6]** public cynicism about corruption and party finance. Second, much of the soft money that formerly flowed through the national parties to the states in the form of nonfederal transfers will instead go to the states in the form of Levin contributions. As Professor La Raja points out (p.44), the parties now tap an abundance of small soft money contributors who, under the terms of the BCRA, will still be able to support the parties through Levin funds. And, of course, the BCRA does nothing to restrict soft money donations to state parties insofar as these funds are used to pay for activities that do not affect federal elections.

Let us not forget that if this debate were occurring in 1992 rather than 2002, the Plaintiffs would bemoan the irretrievable loss of $86.1 million in soft money donations to the national political parties during 1991-1992. Yet this figure has since been dwarfed by the $296 million growth in hard money receipts between 1991-1992 and 1999-2000, as hard money receipts grew from $445 million to $741 million (during a period when parties were free to raise soft money).[1] I therefore reject the notion that the BCRA will impoverish political parties.

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[8] *Soft Money Funding and Party Strength.* Suppose for the sake of argument that state parties were to lose substantial funding as the result of the BCRA. Suppose that the upward trajectory in state party *hard money* fundraising were suddenly halted.[2] Would the lack of money undermine the "strength" or "capacity" of state parties, as Professor La Raja asserts? What evidence suggests that party strength and funding are related? Professor La Raja on page 22 presents data from the Frendreis and Gitelson (1997) survey, the methodology of which is not described, to suggest that 335 local Republican committees became more likely to distribute lawn signs between 1980 and 1996, purportedly due to an infusion of soft money. Curiously, however, the chart on page 23 shows that these organizations simultaneously became *less* likely to conduct voter registration drives and *less* likely to organize telephone campaigns. Taken as a whole, these trends suggest that the infusion of soft money did not lead to a general increase in voter mobilization activity.

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[1] Source: "FEC Reports Increase in Party Fundraising for 2000" release of May 15, 2001.

[2] According to the Biersack declaration (Table 11), hard money receipts by the state parties rose from $111.2 million in 1991-92 to $180.5 million in 1995-96 to $309.6 million in 2000.

Even if one were to accept the notion that these local parties became more active, the causative role of soft money here is impossible to distinguish from a myriad of other factors, such as the revitalization of party competition in the South, the revival of **[9]** partisanship in the electorate, the ideological polarization of the parties after the Carter administration, and so forth.[3] Exactly the same criticism can be leveled at the 1980 vs. 2000 comparison of state parties that Professor La Raja presents on page 37. Professor La Raja later presents results from his own dissertation, in which he shows that an index of party strength (which includes such factors as "the size of party staff and off-season budgets," p.32) is correlated with the amount of money that the state parties receive. Professor La Raja correctly points out (p.33) that this relationship could be merely a spurious reflection of the fact that "strong party organizations tend to be better at raising money." Indeed, it could be a spurious reflection of many factors (e.g., the competitiveness of a state's elections), not least of which is the fact that off-season budgets are used to define and measure party strength. Inexplicably, however, Professor La Raja concludes that it is "clear" that preventing the national parties from raising soft money would weaken state parties. This conclusion is anything but clear from the numbers that Professor La Raja reports.

Nor is this conclusion sustained when one examines more closely the characteristics of state parties, after years of alleged party-building funded by soft-money. The Krasno and Sorauf case studies of Colorado and Missouri, cited in their expert report, dispel the blithe notion that soft money has created vital state parties. These authors point out that the RNC -- rather than the Colorado Republican Party -- was responsible for hiring the executive director of the state party, who resided in **[10]** Washington, D.C. before assuming his new job. Despite an infusion of money from the National Republican Senatorial Committee, which provided most of the state party's funding, the party was not able to organize a volunteer phone bank or print out mailing labels for its own members (pp.31-32).[4] The Missouri Republican Party was largely a check-writing organization that paid outside vendors to run its phone banks and send its direct mail. Its total list of contributors numbered just 1000 individuals and entities, of whom just 36 provided 80% of its receipts, excluding national party transfers (p.32). This assessment of the vitality of state parties under a soft money regime is echoed by Senator Brock, former chair of the RNC, who reports in his declaration that his experiences as a candidate in Maryland convinced him that "the enormous growth of so-called 'soft money' in the past decade had allowed both parties to substitute those funds for the more arduous task of grass-roots organizing, thereby inflating costs and devaluing personal participation" (Brock declaration, paragraph 3).

This desultory picture is quite different from the one that Professor La Raja conjures in his extended description of campaign hoopla and grassroots mobilization. Soft money turned state parties into the equivalent of offshore banks, whose principal activity was to shuttle money back and forth to satisfy allocation formulas and to pay for expensive mass media campaigns orchestrated by the national parties. Notice that this top-down integration of what had formerly been **[11]** a decentralized arrangement of local, state, and national parties has caused them to drift markedly from the idealized notion of a decentralized political party described by Professor

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[3] Green, Donald, Bradley Palmquist, and Eric Schickler. 2002. *Partisan Hearts and Minds: Political Parties and the Social Identities of Voters*. New Haven: Yale University Press.

[4] Lest it be argued that the capacities of state parties would deteriorate further were the national parties unable to provide state parties with technical assistance (p.62), training (p.17), daily messages (p.20), and websites (p.21), the BCRA allows for all of these collaborative activities so long as they are paid for with hard money.

Milkis (p.13). If decentralized party politics and local government are indeed the "bedrock of American democracy," soft money has contributed to its erosion.

Limiting soft money, far from weakening parties, will make them stronger. Parties will be encouraged to reach out to their supporters for volunteer labor and small donations. To do so, parties will be encouraged to inspire their activists with a policy agenda. The free flow of soft money has meant that parties have little need to inspire support; they can simply purchase all of the labor they require to execute a campaign. Professors La Raja, Milkis, and Keller pine for more ideologically robust and accountable parties but fail to recognize that the abundance of soft money reduces the role played by issues.[5]

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[5] The famous *Toward a More Responsible Two-Party System* report that these authors cite with reverence advocates not the mere strengthening or centralization of parties but instead the creation of parties that promote vigorous grassroots participation: "Party membership ought to become a year-round matter, both with constructive activities by members and with mechanisms by which party organizations can absorb the benefits of wider political participation." (1950, p.30) Soft money has proven inimical to this goal for the reasons articulated above by Senator Brock.

DECLARATION OF MORTON KELLER

I. Background and Qualifications

1. I was a professor of American history from 1956 until my retirement in 2001, specializing in American political, legal, and institutional history. I received my B.A. with Highest Honors from the University of Rochester in 1950, and M.A. and Ph.D. degrees from Harvard University in 1952 and 1956.

2. I taught at the University of North Carolina at Chapel Hill from 1956 to 1958, the University of Pennsylvania from 1958 to 1963, and at Brandeis University from 1964 until my retirement in 2001. I have been a visiting professor at Harvard (1963-64), Yale (1968), Sussex (England) (1968), and Oxford (1980-81), where I was Harmsworth Professor of American History.

3. I was awarded the American Historical Association's Littleton-Griswold Prize in Legal History (1995). I am an elected member of the Society of American Historians (1978-), the Massachusetts Historical Society (1979-), the American Academy of Arts and Sciences (1980-), and the British Academy (1999-).

[*2] 4. I have written or edited fifteen books, dealing with American political, legal, governmental, and institutional history. They include Affairs of State: Public Life in Late Nineteenth Century America (Harvard, 1977); Parties, Congress, and Public Policy (American Historical Association Bicentennial Essays on the Constitution, 1985); co-editor and contributor, The Encyclopedia of the United States Congress (4 vol's., Simon and Schuster, 1994), co-editor and contributor, Taking Stock: American Government in the Twentieth Century (1999).

5. I have published more than fifty articles, including "Reflections on Politics and Generations in America," Daedalus (1978); "Corruption in America," in A.S. Eisenstadt et al, Before Watergate (1978); "Anglo-American Politics, 1900-1930, in Anglo-American Perspective," Comparative Studies in Society and History (1980); "The Politics of State Constitutional Revision, 1820-1930," in K.L. Hall et al, ed's., The Constitutional Convention as an Amending Device (1981); "Powers and Rights: Two Centuries of American Constitutionalism," Journal of American History (1987); "The Cycles of Federalism," Governing (1988); "Political Parties and the Federal Government," in A Historical Guide to the U.S. Government (1998); and "The New Deal and Progressivism: A Fresh Look," in Sidney Milkis et al, ed's., The New Deal and the Triumph of Liberalism (2002).

6. My curriculum vitae, including a full list of my publications, is attached as Exhibit A hereto.

7. In preparing this declaration, I have relied upon my own writings and research concerning the history of political parties and American political history, and the writings and research of the leading historians of political parties and American political history, including the published sources cited herein. I am being compensated for my services in connection with this case at the rate of $250 per hour.

[*3] II. Political Parties, American Government, and Democracy

a. The Early Republic: 1789-1824

8. There is no reference to political parties in the Constitution; and the Founders were quick to condemn "parties." But "party," "faction," and "interest" were interchangeable words in the late eighteenth century. When he warned of parties or factions in his Federalist #10, James Madison had in mind something far closer to modern interest or advocacy groups than to today's political parties. He thought that a major function of the Constitution was to constrain the ability of factions to control the new government, and to strike a balance between rule by faction and rule by tyranny. It quickly became evident that the most effective instrument to accomplish that goal was a two-party system.[1]

9. Because the Constitution requires regularly scheduled elections to Congress and the presidency, and it is necessary to put together state and national coalitions to secure power in a winner-take-all system, a two-party structure was made necessary. By 1794 there were two national parties, Federalist and Republican, each with:

- recognized leaders (Washington, Hamilton, and Adams among the Federalists, Jefferson, Madison, and Burr among the Republicans);

- party positions on major issues such as Hamilton's economic program and Republican opposition to the Jay Treaty;

- national newspapers (John Fenno's United States Gazette for the Federalists, Philip Freneau's National Gazette for the Republicans);

- close links between the national and state parties (through associations such as the Society of the Cincinnati and the Washington Benevolent Societies for the Federalists, and the Democratic-Republican Societies for the Jeffersonian Republicans).

[*4] ■ The election of 1800--barely a decade after the establishment of the new nation--saw the full emergence of a two-party system, in which the challenger could both win and peacefully assume control of the government.[2]

10. While the parties quickly dominated the American political system, they did so in a political culture still under the sway of the eighteenth-century assumption that government should be run by an elite of talent, education, and social standing. The Federalists and the Jeffersonian Republicans have been called **cadre** parties--that is, organized and defined from the top down. As elite and limited parties, they did relatively little to foster the growth of American democracy.[3]

- John Adams was George Washington's designated successor in the presidency; his son John Quincy would be the next (and last) President with a Federalist pedigree;

- The Republican leadership was concentrated in the so-called "Virginia dynasty," which dictated the sequence of the Jefferson, Madison, and Monroe presidencies from 1801 to 1825.

- Voting, not high during the Federalist-Jeffersonian Republican years, plummeted after the War of 1812, when the relatively party-less "Era of Good Feelings" prevailed. In the 1820 presidential election, Baltimore had 568 voters out of a population of 63,000; Richmond had 17 out of a population of 12,000. Turnouts of two to three percent of eligible voters were not uncommon in state and local elections in Virginia, Maryland, and Massachusetts.

[*5] b. Mass Parties and Political Democracy: 1828-1848

11. The process of party adaptation to a more democratic American society began in the 1820s, and was substantially completed in the 1830s. Between the 1828 election of Andrew Jackson and the Civil War, the Democratic and Whig parties dominated the American political scene, as the Federalists and the Jeffersonian Republicans had from the 1790s to the 1820s. But unlike their

predecessors, the new parties were built from the bottom up, not from the top down. Strong state and local parties, and close relations between the national, state, and local levels from the first were essential to a vital party system and substantial popular participation.

- Local and state committees and clubs were conspicuous in the party-building process. Township committees of 200-400 were not uncommon; Clinton County, Ohio, with about 2,000 voters, had a Jackson Democratic Committee of Correspondence with 72 members, and a hundred-member-strong Committee of Vigilance.

- State leaders such as New Yorkers Martin Van Buren for the Democrats and Thurlow Weed for the Whigs played central roles in the rise of their parties.

- Local leaders set the rules for access to caucuses, conventions, and primaries.

- The parties printed and distributed their own ballots.[4]

12. The competitive electoral pressures imposed by the Constitution led to intense party efforts to recruit new voters and bring existing supporters to the polls:

[*6]

- In the early years of the century, New York Federalists supported free black voting; Republicans sought eased voting requirements for immigrants.

- White males without regard to religion or property could vote by the 1830s, as state constitutions such as those of New York and Virginia were revised.

- The election of 1840 saw a massive expansion of devices--pamphlets, political artifacts, symbols such as the log cabin to denote Whig William Henry Harrison's humble origins--designed to heighten turnout. Participation rose from 27% of eligibles in 1824 to 78% in 1840.

- After his retirement from politics in 1848, Martin Van Buren, Jackson's presidential successor and one of the creators of the Jacksonian Democratic party, wrote a treatise arguing that mass, national political parties were the natural instruments of democratic politics.[5]

13. The parties were called on to mediate among the multitude of local, state, regional, economic, and social interests concerned with major issues such as slavery, the territories, the tariff, and states' rights, that from the earliest days of the United States threatened to rend the Union. For some decades they managed to do so.

- The Missouri Compromise of 1819, which secured almost thirty years of political peace in the settlement and state-making of the Louisiana Purchase, was the work of party builders such as the future Whig leader Henry Clay. Ideologues such as John Randolph and John Taylor of Virginia, with weak party attachments, opposed it.

[*7] ■ Jackson stopped the incipient secessionist nullification movement of 1831 in South Carolina, rallying his still-young Democratic party to oppose the separatist effort led by his Vice President, John C. Calhoun.

c. The Crisis of the Party System, 1848-1865

14. While the election provisions of the Constitution all but required a two-party system, and a democratic politics called for close connections between local, state, and national party organizations, the realities of American life subjected that system to increasing strain. State and sectional loyalties warred with the idea of a political party as a national institution.

15. Two parties appeared to be essential to the functioning of the Constitutional system. But it was not initially evident that they had to be permanent parties. The Federalists, on the wrong side of the War of 1812 and slow to adapt to an increasingly democratic, inward-looking American society, faded away after 1815, eventually to be replaced by the Whigs. The same thing happened to the Whigs in the 1850s, with far more serious consequences.

16. As the parties' ability to temper ideological extremes and to act as intermediaries between local, state, and national politics and government eroded, the federal government and Congress were less and less able to cope: not only with slavery, the territories, and states' rights, but with more mundane issues such as the disposition of the public lands and the tariff. Congress was described in the 1850s as "a cave of the winds"; this was a time, said a later commentator, when "the springs of government were weakened everywhere."[6]

17. Public policy abhors a vacuum. As the parties' capacity to define issues declined, other voices--third parties, single-issue advocates, special-interest pressure groups--filled the gap.

- The American Temperance Society, founded in 1826, was one of a number of anti-alcohol groups that made the issue of drink a significant **[*8]** one in antebellum American life. But as this movement went from a call on individuals to take pledges of temperance, to advocating prohibitory state and local laws, the parties found it difficult to deal with so divisive an issue.

- Anti-immigration and anti-Catholicism, women's rights, education and prison reform, and opposition to imprisonment for debt and against capital punishment were other issues taken up by a host of advocacy organizations.

National parties, obliged to appeal to as wide a constituency as possible, were ill-fitted to deal with the challenges they posed.

- The most consequential issue to be defined increasingly by advocacy groups outside the party system was, of course, slavery. Organizations such as the American Anti-Slavery Society and the League of United Southerners, and advocates such as abolitionists William Lloyd Garrison, Wendell Phillips, and John Brown and proslavery proponents Hinton R. Helper, Robert Rhett, George Fitzhugh, more profoundly influenced antislavery sentiment in the North and proslavery and secessionist sentiment in the South than did party leaders.

- Both groups were contemptuous of the party process. Abolitionist Samuel May, Jr., observed: "Party organization, drill, and machinery are worthless"; Alabama secessionist leader William Yancey declared: "If this foul spell of party which binds and divides and distracts the South can be broken, hail to him who shall break it."

[*9] ■ Third parties flourished in an increasingly fractious political environment. The pioneering model was the Anti-Masonic Party of the late 1820s, opposed to what it saw as pervasive special privilege growing in America. The most consequential third parties were the antislavery Free Soilers of the 1840s and the nativist Know-Nothings of the 1850s. The Know-Nothings had a major role in the disintegration of the Democratic-Whig party system during the 1850s.[7]

18. The culmination of these developments was the 1860 election, in which four major candidates, each with a distinct regional/ideological appeal (Republican Abraham Lincoln, to the antislavery North, Stephen Douglas, to Northern Democrats; John C. Breckinridge, to Southern Democrats, Constitutional Union candidate John Bell, to the border states), faced each other. The election of Lincoln with

under 40 percent of the popular vote led directly to secession and civil war.

19. The combination of weak national parties, and third parties and advocacy groups more narrowly based in terms of issues, geography, or popular appeal, was a major factor in the coming of the Civil War. The prospect of some resolution of the issues of slavery and Union short of the bloodiest war of the nineteenth century was substantially reduced by the displacement of the major parties as the primary makers of national policy.[8]

20. By the same token, Lincoln's success in expanding the Republican party to include a wide range of pro-Union Northerners significantly strengthened the Union war effort.

d. The Age of Machine Politics, 1865-1930

21. After the Civil War, American political parties followed a very different trajectory. For almost a century and a half, the same two parties, the Republicans and the **[*10]** Democrats, have dominated American politics. Only in 1912 would a third party outdo one of them in popular and electoral votes.

22. What were the sources of the major parties' staying power? For one thing, they stressed issues designed to win and hold the support of large-scale coalitions of voters, but not of the sort that would too deeply rend the body politic.

- The Republican themes of patriotism, piety, and prosperity through a protective tariff, secured for decades the allegiance of a broad sweep of the Northern and Western middle class, farmers, workers, and non-Catholic immigrants.

- The Democrats' commitment to a laissez-faire state, free trade, and local government appealed both to Southerners and urban Catholics.[9]

23. Issues and ideology were effective party-sustaining devices because they went hand in hand with a high degree of party organization.

- Much of the success of the early Republican party was due to the close working relationship between the Republican National Committee and strong state parties.

- The state parties were the senior members of this partnership: they were, for example, free to decide how to choose delegates to the national conventions. The conventions themselves--massive affairs designed to foster party loyalty and enthusiasm--were forums in which state and national leaders chose the party's candidates and issues.

- State, city, and local party **machines** were run by an increasingly professional class of **bosses**: words that came into political use during the **[*11]** 1850s, but flowered after the Civil War. A contemporary called the party politicians "majority manufacturers." And indeed they were the political counterparts of the industrialists who were transforming the American economy along not dissimilar lines.[10]

24. This fusion of ideology and organization made campaigning much more labor- and cost-intensive. The parties responded to this challenge in a variety of ways:

- The party in power relied heavily on government workers in post offices and customs houses to take on political work.

- Friendly newspapers were rewarded with printing contracts.

- Northern Civil War veterans' loyalty to the GOP was secured through an elaborate pension system. Veterans' pensions consumed 34 percent of the federal budget in 1890: in effect a massive, party-created welfare program.[11]

25. Parties with broadly attractive ideologies, run by well-financed machines and bosses, produced uniquely high voter turnouts. Though vote fraud was not uncommon, in the late nineteenth century the percentage of qualified voters who cast their ballots, and did so on straight party lines, was the highest in American history.

- The intensity of party organization was reflected in the closeness of presidential election margins: 10,000 of almost 9 million cast in 1880, 13,000 of almost 10 million cast in 1884, 95,000 of almost 11 million cast in 1888.

- The parties increasingly relied on the education of voters through leaflets, pamphlets, and campaign speakers. The Republicans distributed 13 **[*12]** million pieces of campaign literature in 1872, and several hundred million pieces (and 1,400 hired speakers) in 1896.[12]

26. In order to function as the major instruments of politics and government in a large, complex society, the parties had to rely on substantial funds and close ties between their local, state, and national organizations.

- Marcus Hanna brought the fund-raising capacity of the Republican National Committee to a peak in 1896, when corporate campaign contributions for the first time became a significant element in a presidential campaign.

- While the National Committees became a major source of campaign funds, the voice of state and local party organizations remained strong, since influential Congressmen and Senators tended to have deep local and state political roots.[13]

27. As the post-Civil War parties solidified their position, the more overt forms of corruption--patronage, vote-buying, fraudulent counts, payments to journalists and newspapers--declined. Large issues--free silver, imperialism,

the trusts--came to be the prime determinants of American politics around the turn of the century.

28. For all the changes in American politics and government during the Progressive era of the early twentieth century, the post-Civil War party system retained its predominant place in the political system.

- Theodore Roosevelt's New Nationalism and Woodrow Wilson's New Freedom, programs which set the terms for the development of a more active American state, drew heavily on their respective party ideologies. [*13] Roosevelt advocated a strong national state and regulation rather than the breakup of big business. Wilson was more strongly inclined to old Democratic themes: anti-monopoly, a low tariff, and hostility to banks and other financial interests.

- Third parties such as the Populists helped to bring new ideas--the income tax, the direct election of Senators--into American political life. But the major parties, with their complex local, state, and national structures and their established presence in Congress, continued to dominate the opinion formation, voter mobilization, political wheeling and dealing, and presidential and Congressional leadership that made possible legislative achievements such as the Sherman and Clayton Anti-Trust Acts, the Income Tax Amendment, and the Federal Reserve Act.[14]

29. Some of the more destructive policies and political movements of the early twentieth century were the work of ideological coalitions that transcended the normal party process:

- Prohibition's political momentum came not so much from the parties, as from advocacy and special interest groups such as the Anti-Saloon League (arguably the most successful advocacy organization of the early twentieth century), which exerted pressure on Southern Democrats and

Midwestern Republicans to confront an issue that most national party leaders preferred to avoid. The result was a national policy with such negative consequences that in little more than a decade the Constitutional amendment that made it possible was repealed.

[*14] ▪ The Smoot-Hawley Tariff of 1930, generally considered a contributing cause of the Great Depression, was also the product of a welter of particular interests--state and regional, agricultural, manufacturing, and labor--unmediated by the parties and opposed by most informed national opinion.[15]

- The Ku Klux Klan, which briefly attained considerable local and state power in the 1920s, sought to take over the Democratic party in the South and the Republican party in the Midwest and West. The parties' need to appeal to the widest possible electorate played a significant role in the Klan's demise.

e. The Parties and Modern America: High Noon, 1930-1970

30. The Great Depression and World War Two did not diminish the central role of the major parties in American politics and government.

- The New Deal was shaped more by the interests and ideas of FDR's Democratic party (he once defined himself as a Christian and a Democrat) than by extra-party ideologues and ideologies.[16]

- The Republican response to the New Deal was not so much a repudiation as a critique. Its presidential candidates from Alfred Landon and Wendell Willkie to Thomas Dewey and Dwight Eisenhower sought constraints on, rather than the rejection of, the Roosevelt Revolution.

- The same would be true of major postwar domestic policy developments: most notably, the civil rights revolution, and modern public policy in realms such as poverty, the environment, education, and immigration.

- [*15] Party competition was a major force behind the expansion of the electorate through the enfranchisement of Southern blacks, reduction of the voting age to 18, and the elimination of poll taxes and other constraints on voting registration, as it had been in the early nineteenth century.[17]

31. The American Political Science Association recognized the continuing primacy of the major parties when in 1950 it published "Toward a More Responsible Party System."

- That document argued that the parties should become more programmatic, more open to intra-party diversity through primaries, and should foster closer links among its national, state, and local units.

- It called also for the repeal of "statutory limitations" which "work toward a scattering of responsibility for the collecting of funds among a large number of independent party and nonparty committees."[18]

f. The Parties and Modern America: Challenge, 1970-2000

32. The second half of the twentieth century would see not the implementation of this blueprint for greater party effectiveness, but (especially since the 1970s) a decline in the major parties' power over the electorate.

- Political parties, like all major American institutions, faced growing public skepticism during the late 1960s and the 1970s. The percentage of eligible voters participating in elections continued to decline.

- Their ability to command long-term, straight-ticket voter loyalty lessened during the second half of the twentieth century. There has been a commensurate increase in the proportion of voters who define themselves [*16] as independents. And access to the ballot by third parties has become much easier.

- The jobs and benefits of the New Deal initially strengthened the old boss—machine system. But the rise of the welfare state and the great trek to suburbia has led to that system's demise. Party patronage has all but disappeared, due to legislation and judicial decisions.

- Congressmen tend increasingly to their own fund-raising, and once in office rely on constituency services that draw not so much on the resources and connections of the party machine as on government itself. Presidential campaigns also are more autonomous with regard to the parties.

- Advocacy groups depend less on parties, and more on the media and their own public relations, to influence public opinion and public policy. With the rise of the courts as major players in the policy game, these groups have found an attractive alternative to the slower, less dependable process of a party-dominated polity.

33. It is understandable that one observer could conclude that "the party's over." Nevertheless the parties remain central to our Constitutionally prescribed system of elections. And more than ever, they are uniquely fitted to be "inclusive fora for public deliberation on the full range of issues on the public agenda."[19]

34. Now as in the past, the parties face the need to respond to the new realities of American political life. The primary challenges facing them are:

- to expand and solidify their bases of electoral support by raising and spending the funds necessary to reach a vast, TV-dependent electorate;

- to avoid the consequences of narrowly based advocacy groups--Madison's factions--taking command of the parties. The disastrous candidacies of Barry Goldwater in 1964 and George McGovern in 1972 are cases in point.

III. The Parties and Corruption

35. I turn now to an examination of the place that corruption has played in the history of American political parties, and offer a judgment as to its relative importance in politics today compared to the past.

a. Corruption and the Pre-Civil War Parties

36. Political corruption was hardly unknown in colonial America. A major theme in the movement for independence was the desire to escape from the aristocratic corruption of Old Regime England, where office was considered a form of property rather than a public trust. The Founders highly valued probity--virtue--in office. But this did not keep mutual accusations of corruption from being an integral part of party politics from the Republic's earliest days.[20]

37. The emergence of a democratic politics added new dimensions to political corruption:

- Nineteenth century public works--canals, railroads, government contracts, the infrastructure of the growing cities--greatly expanded the potential for the intermingling of money and politics.

- The characteristic forms of corruption in the age of democratic party politics--patronage, officeholder kickbacks, massive overpayments to **[*18]** contractors--were well in place before the Civil War, especially during the decade of the 1850s.

- The 1860 Covode investigation into charges of corruption in the Buchanan administration was the first such inquiry. It set the tone for its successors in that it was intensely partisan: Covode was a Pennsylvania Republican, Buchanan's was a Democratic administration.[21]

- While accusations of corruption were common in the pre-Civil War era, and during the war itself, the leading student of the subject thinks its pervasiveness is exaggerated: "The closer the Civil War era is inspected, the more unclear the extent and the less obvious the uniqueness of the corruption seem."[22]

b. Corruption and Reform in the Boss-Machine Era

38. The late nineteenth century--the Gilded Age--is commonly regarded as the high point of American political corruption. Major scandals, which reflected the new prospects for graft provided by a growing government and economy, included:[23]

- Credit Mobilier, in which leading politicians received stock in the Union Pacific Railroad's construction company;

- the Whiskey Ring, a web of collusion between Internal Revenue agents and distillers to avoid a federal excise tax;

- the Star Route scandals, where lucrative western mail delivery franchises were given to favored contractors;

- the spectacular corruption of organizations such as the Tweed Ring and the Pennsylvania Republican machine, which had counterparts in city halls and state houses across the nation.

[*19] 39. The true extent of corruption--the degree to which charges of malfeasance were real or the unsubstantiated rhetoric of party warfare--is debated by historians.[24] But it was enough to lead to a growing assault on party machines and bosses as corruption's primary source, and added up to a substantial body of legislation designed to lessen corruption, regulate nominations and elections, and increase the transparency of fundraising.

- Civil service reform was touted as a way of eliminating political patronage and the use of government workers for party purposes. A long series of civil service laws began with the Pendleton Act of 1883.

- State legislatures from the 1870s on regulated the political parties' nominating procedures, provided for primaries, and defined the character and rights of party membership.

- By the early 1900s the Australian ballot--state-printed, secretly cast, a severe blow at the ability of the parties to manipulate election results--was widely adopted by the states.

- In 1907, Congress passed the Tillman Act banning corporate campaign contributions, the first law regulating federal elections since Reconstruction. It was expanded in 1910 and 1911 to include financial disclosure requirements and set expenditure limits on pre-primary campaigns.

- In the wake of the Teapot Dome scandal Congress passed the Federal Corrupt Practices Act of 1925, which strengthened disclosure requirements and expanded the definition of illegal campaign contributions.

- The Seventeenth Amendment (1913), providing for the direct election of Senators, and the Nineteenth Amendment (1919), enacting woman's suffrage, were designed not only to expand popular participation but to purify the political process (by ending the practice of millionaires or party machines securing Senate seats from acquiescent state legislators, and under the assumption that women voters would be more likely to react to corrupt politics).

- The reform impulse led also to the initiative and referendum provisions adopted by a number of Western states, and the proportional representation voting systems instituted by some medium-sized cities.[25]

c. Corruption and Reform in the Modern Era

40. From the 1930s to the 1970s, political reform was more concerned with the improper use of political influence than with voting, elections, or campaign financing. But as before, the net effect was to add to the disclosure and other requirements that were making politics one of the most highly regulated of American institutions.

- The Foreign Agents Registration Act of 1938 required representatives of foreign firms or governments to disclose their employer and their remuneration.

- The Hatch Act (1939) extended civil service reform by prohibiting political activity by federal employees. This was a Congressional response to the rise of a greatly expanded federal bureaucracy during the New Deal.

[*21] 41. Since the 1970s, legislative oversight of the political process has reverted to the major concern of the late nineteenth and the early twentieth centuries: the role of money in elections.

- In the Progressive-New Deal tradition, the Federal Election Campaign Act of 1971, as amended in 1974, established a new government agency, the Federal Election Commission, to regulate campaign finance.

- Extensive state and federal legislation has been passed to require disclosure by the parties, candidates, and government officials of the receipt and expenditure of funds, and the activities of lobbyists. These include the Federal Ethics in Government Act of 1987, the Ethics Reform Act of 1989, and the Lobbying Disclosure Act of 1995 (replacing the failed Federal Regulation of Lobbying Act of the early 1950s).

- This legislative infrastructure imposed strong disclosure provisions and elaborate regulatory requirements on the electoral process and the behavior of government officials. Detailed "gift" rules (such as those defining "widely attended events" and "nominal refreshments") are part of this regulatory regime, which includes as well a substantial body of Senate and House ethics rules.

- Every state today has some form of campaign finance and lobbying disclosure statute. Most states limit the size of individual campaign contributions. The states have enacted, and continually update, regulations covering conflicts of interest, ethics, gifts, and the interaction of officeholders with their constituents.

[*22] 42. This modern reform effort has been directed at the major political parties more than at increasingly powerful advocacy and other special interest groups. It has not reduced the role of money in modern American politics.

- Political action committees (PACs) have rapidly grown in numbers. In 1970, the leading PAC was that of the AFL-CIO, dating from 1944. By March 31, 2002, there were 4,328 federal PACs.

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- The number of lobbyists has steadily risen, and major interest and advocacy groups pour money and personnel into election campaigns. But these have not been the chief targets of modern campaign regulation. My understanding is that advocacy groups do not face the same disclosure requirements imposed on political parties, and as a result their political activities are far less transparent than those of the parties.

43. It is worth asking why the political process, and fund-raising in particular, has come under such close scrutiny in recent decades. While the cost of elections has steadily risen since the Second World War, there is no evidence that the election process has become more corrupt. Indeed, the opposite is true. The modern electoral process--highly regulated, supervised, transparent, and reliant on difficult-to-tamper-with mechanized voting--is less subject to traditional forms of corruption than in the past.

44. Patronage, kickbacks, the assessment of officeholders, and outright legislative bribery--the mother's milk of the boss-machine era--still exist. But these are minor problems, and when they occur they usually are exposed by the media and/or are vigorously prosecuted by such bodies as the Public Integrity section of the Department of Justice or by state attorneys general.

[*23] 45. In my judgment it is historically inaccurate to see corruption in its traditional sense as a major problem in contemporary American politics.

- The elaborate structure of regulation, oversight, and disclosure that has come into being over the past century and more, and basic changes in the conduct of politics from the decline of bosses and machines to the rise of television-based campaigning, have consigned most of the traditional forms of corruption to the margin of American political life.

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- That this extended, extensive reform effort has failed to stem a rising level of electoral expenditure reflects not pervasive political corruption, but the fact that large financial resources are essential to the parties' ability to function in the American constitutional order. As was aptly observed in Buckley v. Valeo: "Virtually every means of communicating ideas in today's mass society requires the expenditure of money."

IV. BCRA and the Parties

46. I have been asked to assume that BCRA will have the following effects on the political parties:

- BCRA will disrupt the ability of national, state, and local party committees to work together. It will do so by prohibiting them from cooperating on non-federal fund-raising, and by forbidding the national party committees from transferring non-federal funds to state or local parties, or contributing such funds to state or local candidates.

- After BCRA comes into effect, interaction between the national, state, and local party levels, and between federal officeholders and candidates and their state and local counterparts, will decrease.

[*24]
- By prohibiting national party committees from raising and spending non-federal funds, and restricting the ability of state and local party committees to raise such funds, the parties will be placed at a disadvantage in raising and spending funds compared to special interest groups such as corporations, trade associations, and tax-exempt advocacy organizations.

- National party committees will be required to pay for "associational" activities (such as communications with supporters and members) with funds raised under strict limits on their source and amount. But corporations, trade associations, and tax-exempt advocacy groups will be able to use funds not subject to such limitations to communicate with their members, stockholders, and employees.

47. On the basis of these assumptions, I find that the historical record supports the following propositions:

- BCRA will make more difficult the access of the modern parties to the funding necessary for them to perform their time-honored role of mediating among varied interests and presenting party positions and candidates to a vast, difficult-to-reach public.

- BCRA's effort to erect a Chinese Wall between the national and state parties also will harm the parties' ability to fulfill their prescribed role in our political system. When links between the national, state, and local party organizations were strongest (as in the 1830s and the 1840s, the late nineteenth century, or during the New Deal), popular interest in public affairs was at its most robust. When those links were weakened, as in the [*25] Era of Good Feelings after the War of 1812, the 1850s, the Progressive Era, or most recently in the 1970s, the effectiveness of the parties in communicating to the public declined. The correlation between weakened parties and low turnouts in recent decades is not coincidental.

- There is ample historical reason to hold that close links between state and national parties are to be encouraged, not made more difficult. The GOP's 1994 Congressional victory was based on a high degree of national and state party cooperation. The fact that four of the nation's last five chief executives (Jimmy Carter, Ronald Reagan, Bill Clinton, and George W. Bush) were state governors before they became President testifies to the continuing importance and vitality of the federal-state relationship.

48. In addition, BCRA is notable for its failure to deal with the two major problems that, from a historian's perspective, face the contemporary American political system.

49. The first of these is low voter turnout, accompanied (and fostered) by skepticism verging on distrust of electoral politics.

- Limits on the parties' ability to raise, transfer, and spend non-federal funds will hardly help them to counter that trend. The new-style campaigning of candidate-centered television is at least as expensive as old-style campaigning through strong party organizations; and the size of the potential electorate to be reached keeps growing. The cost of modern campaigning does not seem outsized when one compares it to other forms of mass selling in modern America. The idea that restrictions on campaign fund raising (which is likely to have more of an adverse impact **[*26]** on challengers than on incumbents) will lead to greater public belief in and participation in politics, finds no support in the historical record.[26]

50. The second great problem in contemporary American politics is the degree to which the traditional issue-defining role of the major parties has been supplanted by other, more narrowly based interests.

- The growing influence of PACs and advocacy groups is one consequence of this development.

- Another is the discomfort of the parties with issues largely defined by special interest groups, such as abortion, gun control, education, and gay rights.

- Far from addressing this situation, BCRA's restrictions on non-federal fund raising are likely to weaken the parties relative to interest and advocacy groups, and thus their ability to bring these groups--Madison's "factions"--into some larger, tempering accord.

51. There are, of course, other reasons for the ebb and flow of voter interest. One-party states and a politics light on issues dampen popular political participation. But this only

reinforces the argument for strengthening, not weakening, the capacity of the parties to integrate their national, state, and local organizations, and to be able to convey their message to as large an audience as possible. To do otherwise is to reduce the capacity of the parties to adapt to the political demands of modern American life.

[*27] V. Conclusion

52. My review of the history of American political parties, of attempts to regulate them, and of BCRA's relationship to that record, leads me to the following conclusions:

- The Constitution did not specifically provide for parties. But it made the two-party system inevitable and inescapable, as more than 200 years of subsequent American history have amply demonstrated.

- To constrict the parties' access to funds, their ability to organize effectively on the local, state, and national levels, and their freedom to participate in election campaigns, is to strike at their ability to meet the responsibility in effect set for them by the Constitution: to mediate among interests and factions, and bend public policy toward a larger, national interest.[27]

53. Over the course of American history, the strength of the parties has waxed and waned. And so, in close concordance, has the health of American democracy.

- During the Era of Good Feelings after the War of 1812, the parties were weak--and voting was scant.

- The revival of the two-party system by the Jacksonian Democrats and the Whigs stimulated a massive increase in voter turnout, and a much richer range of issues.

- When the major parties weakened under the impact of the controversy over slavery and Union, and gave way in policy formulation to the media, advocacy groups, and narrowly based third parties, the ability of American democracy to resolve those issues eroded. The Civil War was the **[*28]** culmination of the greatest failure in the history of American politics and government.

- The parties during the late nineteenth and early twentieth centuries may be faulted for having reacted inadequately to racism and the welfare needs of a modern industrial society. But they played a crucial role in tempering religious and ethnic conflict during the late nineteenth and early twentieth centuries.

- The major American Presidents of the twentieth century--Theodore Roosevelt, Woodrow Wilson, Franklin D. Roosevelt, John F. Kennedy, Ronald Reagan--made their mark as leaders of their parties, using party structure and ideology to create effective voting coalitions and enact their programs.

- In more recent times the ability of the parties to perform their traditional mediating role has been substantially challenged: by the narrowly ideological campaigns of Barry Goldwater in 1964 and George McGovern in 1972, by the impact of the Watergate scandal and the general Vietnam Era disillusion with politics. Weakened parties became part of the malaise in American life so evident in the 1970s, with its accompanying maladies of declining voting and growing social discord.

54. Now, at the beginning of the twenty-first century, the major problems facing the parties--and American democracy--are the declining level of voting, and the growing influence of the media and advocacy groups. BCRA responds to neither of these concerns.

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55. My judgment as a historian is that "corruption or the appearance of corruption," the primary justification for BCRA, is less of a problem in American politics today than at any time in the past.

- The American system of campaign financing and elections has been subject to more than a century of statutory and judicial oversight, resulting in extensive supervision, disclosure, and transparency.

- The major forms of past political corruption--vote buying and fraudulent voting and counting; kickbacks from public employees and government contractors; the widespread use of patronage--are far less prevalent than in the past, and are subject to a dense system of oversight, disclosure, and susceptibility to the criminal process.

- The diversity of financial contributions to parties is itself a check on the influence of special interests. In addition, these contributions differ fundamentally from the kickbacks, bribes, and vote fraud that historically have defined political corruption: not least because regulating them raises questions of access and free speech that traditional corruption did not.

56. It is my judgment that, on the basis of the historical record, BCRA is likely to harm rather than assist the parties in adapting to the demands of a changing American society.

- The parties need to more closely integrate their national, state, and local levels in order to develop their message and mobilize voters. BCRA will constrain their ability to do so.

- The parties need to secure the funds necessary to convey their message and mobilize voters in a society where the costs of doing so of necessity **[*30]** are ever larger.

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BCRA is likely to add to the constraints on party fundraising and hamper parties' ability to raise the necessary funds.

57. The historical record makes it clear that when there are constraints on the parties, other voices--the media, interest and advocacy groups--grow proportionately in influence. James Madison wisely warned of that danger more than two hundred years ago. Political parties over the course of our history have been the institution that has done the most to avoid government by faction; to weaken them is to increase the danger of that happening.

- This caveat is especially in order when one considers the unintended consequences of previous campaign finance legislation: the growth of PACs and more powerful advocacy and interest groups. On the basis of this historical record, it is reasonable to expect BCRA to have similar results.

58. It may be argued that the parties do not, and never have, performed their historical function very well. But my conclusion is that they are, to use Winston Churchill's comment on democracy, "the worst form of government except all those other forms that have been tried from time to time."

I declare under penalty of perjury that the foregoing is true and correct.

s/
Morton Keller

Executed on September 22, 2002

[EXHIBITS OMITTED]

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[1] Richard Hofstadter, The Idea of a Party System ch. 2 ("A Constitution against Parties"), 80-86 (1970); James A. Gordon, "Can Party Politics be Virtuous?, Colum. L. Rev. 667-668 (2000) (for examples of the Founders' anti-party sentiment).

[2] William N. Chambers, Political Parties in a New Nation (1963) and James R. Sharp, American Politics in the Early Republic (1993) (on the rise of the party system).

[3] On cadre parties, see Chambers, supra note 2; on leadership, John H. Aldrich, Why Parties? 4 (1995)

[4] Alexander Keyssar, The Right to Vote 39-40 (2000); Morton Keller, Reflections on Politics and Generations, Daedalus (Fall 1978) 123-35 (on political language).

[5] See discussion in Hofstadter supra note 1, at 223-26; Chilton Williamson, American Suffrage (1960); Martin Van Buren, Inquiry into the Origin and Course of Political Parties in the United States (1867); Aldrich, supra note 3, ch. 4-5; Keyssar, supra note 4, ch. 2.

[6] James S. Young, The Washington Community (1966); Wallace Farnham, "The Weakened Spring of Government": A Study in Nineteenth-Century American History, 68 Amer. Hist. Rev. 662-90 (1963).

[7] Michael Holt, The Rise and Fall of the American Whig Party (1999), Joel Silbey, the American Political Nation, 1838-1893 (1991), and the Michael Holt, The Political Crisis of the 1850s (1978) are the best accounts.

[8] David Donald, An Excess of Democracy, in Donald, ed., Lincoln Reconsidered 209-235 (1961).

[9] Morton Keller, Affairs of State (1977) 552-564.

[10] Robert D. Marcus, Grand Old Party 22-25 et seq. (1971); Keller, supra note 11, 240.

[11] Keller, supra note 9, 311.

[12] Keller, supra note 9, 583.

[13] Marcus, supra note 12, 138-140, 245-250; Morton Keller, The Life Insurance Enterprise (1963) (on campaign contributions by large life insurance companies).

[14] Morton Keller, Regulating a New Economy (1990), ch. 2, 9.

[15] Morton Keller, Regulating a New Society 133-139 (1994); Keller, supra note 14, 198-199.

[16] Arthur M. Schlesinger, The Age of Roosevelt (1956-60).

[17] Keyssar, supra note 4, ch. 8.

[*32] [18] American Political Science Association, Toward a More Responsible Two-Party System, 44 Amer. Pol. Sci. Rev. 45 (Supp.) 1950), 11.

[19] Ronald N. Johnson and Gary B. Libecap, Courts, A Protected Bureaucracy, and Reinventing Government, 37 Ariz. L. Rev. 791 (1955) (on judicial destruction of remnants of patronage system); David Broder, The Party's Over (1972); Nancy L. Rosenblum, "Political Parties as Membership Groups," 100 Colum. L. Rev. 813 (2000)

[20] Bernard Bailyn, The Ideological Origins of the American Revolution (1967) (on corruption theme); Morton Keller, "Corporation in America," in Abraham S. Eisenstadt et al., ed's., Before Watergate (1978), 7-19.

[21] Mark W. Summers, The Plundering Generation (1987) 257-259.

[22] Mark W. Summers, The Era of Good Stealings 16 (1993).

[23] Keller, supra note 9, at 243-46; Summers, supra note 22.

[24] Keyssar, supra note 4, at 159-60, Peter Argersinger, New Perspectives on Election Fraud, 100 Pol Sci Q. (1985-86) 669-87 (on exaggeration of corruption).

[25] Keller, supra note 9, at 242-43, 524-31; Adam Winkler, Voters' Rights and Parties' Wrongs: Early political Party Regulation in the State Courts, 1886-1915, 100 Colum. L. Rev. 873-899 (2000); Keyssar, supra note 4, ch. 5; on the Tillman Act., Robert H. Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters," 69 U. Chi. L. Rev. 1128-35.

[26] Stephen Ansolabehere and James M. Snyder, Jr., Soft Money, Hard Money, Strong Parties, 100 Colum. L. Rev. 598 (2000) (on likely adverse effects on voter registration and other party activities of soft money ban).

[27] Rosenblum, supra note 19 (distinguishing political parties from business and adversary groups, the media, and professional associations as uniquely committed to making democracy work by providing a forum for the full range of issues and mollifying ideological conflict).

[1 (DEV. 1-Tab 2)] **Evaluating the Bipartisan Campaign Reform Act (BCRA)**

Jonathan S. Krasno
Yale University

Frank J. Sorauf
University of Minnesota

We write this report because we believe that our research and that of other political scientists speaks directly to issues in *McConnell v. FEC*, Civil Action No. 02-582 (D.D.C.) (including all consolidated cases). We hope the theoretical and empirical issues that we and other scholars have wrestled with in studies of public opinion, political parties, campaign finance, elections, and related subjects will be helpful to the courts as they seek to maximize electoral integrity and personal freedom in this case. To be more specific, we believe that a careful analysis of the empirical issues raised in this case provides very strong reason to support Congress's and the President's judgment and uphold the Bipartisan Campaign Reform Act of 2002 ("BCRA").

We must be clear from the outset that we limit our consideration of the BCRA to its two main components: the ban on the use of soft money donations by the national parties (extending to state and local committees with regard to federal elections), and the more realistic dividing line between electioneering and issue speech BCRA provides over the Federal Election Campaign Act ("FECA"). We are satisfied that the other pieces of the bill do not in any way conflict with our analysis of these two sections. While the soft money and electoral communications provisions are separate, our examination shows that they are highly complementary. For example, the notable rise in the national parties' soft money receipts in the last three election cycles from \$86.1 and \$101.6 million in 1991-2 and 1993-4 to \$262.1, \$224.4, and \$495.1 million in 1995-6, 1997-8 and 1999-2000 was [2 (DEV. 1-Tab 2)] fueled largely by the parties' ability to air candidate-oriented or electioneering "issue ads" with this money.[1] Though our analysis reveals the value of each provision by itself, in this case the whole is greater than the sum of its parts, a point we will demonstrate in greater detail below.

To address the major issues raised in this case we have organized our discussion into three parts. The first deals with soft money, the second with issue advocacy, and the third with the interaction between the two. In part one we initially speak to one of the core constitutional issues in this case, corruption and its appearance, then turn to two topics important to the jurisprudence on campaign finance: the impact of BCRA on political parties and on voter turnout. Part two begins with a description of issue advocacy in the 1998 and 2000 elections and an analysis of the free speech implications of BCRA's definition of issue advocacy, then proceeds with an examination of the corruptive potential of issue advocacy under the current system. Finally, part three addresses the interactions between BCRA's two halves and concludes by summing up the main findings and our view of BCRA. Our discussion is heavily informed by a variety of empirical data ranging from FEC reports, campaign finance information from several states, tracking of television advertising, polls, an array of declarations and depositions, and press reports. As political scientists concerned with the health of American democracy and its electoral system, we find it reassuring that our examination of these data lead us to conclude that BCRA is a reasonable response to a clear threat to the integrity of our electoral system and is likely to have little or no harmful impact on free speech rights, political parties, or voter turnout.

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[1] Federal Election Commission, *FEC Reports Increase in Party Fundraising for 2000, at http://www.fec.gov/press/051501partyfund/051501partyfund.html* (May 15, 2001).

[3 (DEV. 1-Tab 2)] I. Soft Money

A.Corruption

A1. Defining corruption

In applying the term "corruption" to campaign finance practices one immediately encounters both a variety of definitions and an evolving sense of how the public and politicians have come to view campaign financing. On the latter point, two leading scholars observe:

> A generation ago, few people would have questioned the propriety of contributions to political candidates; the dominant belief used to be that those who felt strongly about electoral outcomes were entitled to contribute time, resources, and funds to get their candidates elected. . . Public attitudes and norms have changed so much that politicians, for fear of appearing corrupt, are unwilling to acknowledge that large campaign contributors receive special favors or consideration. The politically correct position is that large contributors only obtain greater "access" to the candidate/politician.[2]

Putting aside public perceptions for the moment, we are left with various versions of corruption from case law and congressional debate. The most restrictive of these would limit its meaning to explicit quid-pro-quo bribery, while the more expansive one, typified by the term "privileged access," emphasizes unequal opportunities to influence policy-makers that accrue to big financial players. Another form of corruption, often called "undue influence," lies somewhere in between bribery and unequal access. In this version, well-financed actors exercise disproportionate influence on policy not through the existence of explicit quid-pro-quos arrangements but through the implicit understanding that a legislative vote or administrative action might generate financial support or opposition from a moneyed interest.

[4 (DEV. 1-Tab 2)] How to choose among these alternatives? The floor debates over BCRA and its 1974 predecessor, FECA, clearly indicate that members of Congress believe corruption encompasses both undue influence and unequal access. The Congressional Record is full of references to members' concern over their meetings with large contributors and the potential for influence that this face-to-face contact breeds. The Supreme Court appears to have a similar view. For example, in *Nixon v Shrink Missouri Government PAC* the majority notes directly that:

> In speaking of "improper influence" and "opportunities for abuse" in addition to "quid pro quo arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.[3]

And, in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* the Court expresses concern about privileged access by noting that parties often serve as "matchmakers whose special meetings and receptions give donors the chance to get their points across to candidates."[4]

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[2] Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity* (Chicago: University of Chicago Press), 1996, p. 5-6.

[3] 528 U.S. 377, 389 (2000).

This perspective is consistent with the one we adopt and other political scientists adopt and reflect in their research. Political influence has been a source of abiding concern since the inception of the discipline. Political scientists, who lack the resources to investigate bribery anyway, assume a broader approach to conceptualizing influence, recognizing that it derives from different resources and is exercised in subtler, less legalistic, ways. Thus it is no surprise that the availability of data on campaign contributions following 1974 spawned a sizable literature measuring their statistical effect on various behaviors like legislative voting, bill sponsorship, and activity in [5 (DEV. 1-Tab 2)] subcommittees.[5] By and large, these studies conclude that contributors may succeed in influencing policy in some areas, particularly on arcane questions of little interest to the broader public but of great import to a narrow group of involved citizens, corporations, unions and other organizations. Former SEC chairman Arthur Levitt's recent claim that substantial donations by

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[4] 533 U.S. 431, 461 (2001).

[5] For instance, see Janet M. Grenzke, "PACs and the Congressional Supermarket: The Currency is Complex," (*American Journal of Political Science* 33:1-24), 1989; John R. Wright, Contributions, Lobbying, and Committee Voting in the U.S House of Representatives," (*American Political Science Review* 84:417-38), 1990; John R. Wright, "Political Action Committees, Campaign Contributions, and Roll Calls: An Organizational Perspective," (*American Political Science Review* 79: 400-14), 1985; James B. Kau and Paul H. Rubin, *Congressmen, Constituents, and Contributors*, (Boston: Martinus, Nijhoff), 1982; John W. Kingdon, *Congressmen's Voting Decisions*, (3rd ed., Ann Arbor: University of Michigan Press), 1997; William Welch, "Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports," (*Western Political Quarterly* 35:478-95), 1982.

accounting firms derailed his efforts in the 1990s to enact reforms of the accounting industry is a perfect example. The benefits were highly concentrated, the costs (seemingly) defuse, and the issue hopelessly complex.[6]

It is only the absence of systematic data on access that prevents political scientists from searching for relationships between access and policy-makers' behavior.[7] Academics are no less aware than participants that successful lobbyists create relationships and trust with those they seek to persuade.[8] This simple truth is repeated in countless accounts of influential Washingtonians who are confidants of presidents, trusted advisors to legislators, or relatives of either.[9]

[6 (DEV. 1-Tab 2)] There is, moreover, ample anecdotal evidence that donations help build relationships with policy-makers. Indeed, an industry of experts (often called "government affairs specialists") exists to advise donors on how to use their funds to meet and interact with government officials.[10] The result, one contributor notes:

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[6] Referring to the industry resistance to his attempts to institute accounting reforms and the power of their contributions, Levitt claims: "They waged a war against us, a total war . . . It used to be that if industries had a problem they would try to work it out with regulatory authorities. Now they bypass the regulators and go right to Congress. It's almost impossible to compete with the effect that money has on these congressmen." Jane Mayer, "The Accountants' War," *New Yorker*, April 22 & 29, 2002, p. 64.

[7] For an exception, see Richard L Hall and Frank W. Wayman, "Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees," (*American Political Science Review* 84:797-820), 1990.

[8] For instance, see John Mark Hanson, *Gaining Access: Congress and the Farm Lobby, 1919-1981* (Chicago: University of Chicago Press), 1991.

[9] Carl Hulse, "In Capitol, Last Names Link Some Leaders and Lobbyists," *New York Times*, August 4, 2002, p. A1.

> There is no question that those who, like me, make large soft money donations receive special access to powerful office holders on the basis of the donations. I am close to a number of Senators, I see them on a regular basis, and I now regard the Majority Leader as a close friend. I understand that the unusual access I have correlates to the millions of dollars I have given to political party committees, and I do not delude myself into feeling otherwise. Not many people can give soft money on that scale, and it naturally limits the number of those with that level of access.[11]

This access and these relationships are highly prized. Several insiders explain why:

> While an elected official of course does not have to do something because somebody gave, a contribution helps establish a relationship, and the more you give the better the relationship. It is not that legislation is being written in direct response to somebody giving a lot of money. Rather it is one step removed: relationships are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want.[12]

> If you have a particular problem in getting to see a Senator you can always go to the Senate Campaign Committee, and all we say is "we want five minutes with Senator X." Like I say, we are not buying votes, we just want five minutes to see that person.[13]

Such statements suggest both that the line between access and influence is often hazy and, just as often, is inconsequential. The pursuit of access is so fervid precisely because it so often leads to political influence. And that is the nub of the matter of the issue of corruption. While it is inevitable that [7 (DEV. 1-Tab 2)] influence and access to policy-makers will be unevenly distributed in a large popular democracy, it is not inevitable that opportunities to sway the policy-making process—the very heart of the representative process—should be so skewed toward those who fund election campaigns most generously.

Aside from the first-hand knowledge of insiders, there are the impressions of the great mass of American citizens. Many of them believe that moneyed interests—whether corporations or trade associations or unions or wealthy individuals—use their cozy relationships with policy-makers to exert special influence over government. A majority of Americans, for instance, agree with survey statements such as "government is pretty much run by a few big interests looking out for themselves."[14] Unlike the insiders, they, as "outsiders" form opinions on the basis of second-hand knowledge—and from inferences and appearances. From

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[10] For example, see the affidavit of Daniel H. Murray, October, 1998.

[11] Declaration of Peter L. Buttenwieser, July 19, 2002, p. 6-7.

[12] Declaration of Robert Rozen (April 17, 1997), p. 3.

[13] Center for Responsive Politics, *PACs on PACs: The View from Inside* (Washington: Center for Responsive Politics), 1988, p. 7.

[14] "Would you say government is run by a few big interests looking out for themselves or that it is run for the benefit of all of the people?" This item has been repeated every two years since 1964 (except 1986) by the National Election Studies. See National Election Studies, *Is the Government Run for the Benefit of All 1964-2000, at http://www.umich.edu/~nes/nesguide/toptable/ ab5a_2.htm.*

their reactions arise a profound skepticism about the fairness and responsiveness of the American political system, and inevitably a lack of confidence in it and support for it. On the crisis of confidence, the current scandal enveloping the financial markets provides a useful analogy. Both democracy and markets function well only with the trust and confidence of the public. In both cases the Congress has sought to restore public confidence, whether in corporate accounting and the valuation of securities, or the integrity of elections and policy-making. Indeed we would argue that confidence in elections and government is a precious resource worthy of even greater vigilance than the accuracy of corporate accounting.

The parallels extend beyond the matter of confidence. In both instances the Congress and the president have faced the same pivotal regulatory question: whether it is [8 (DEV. 1-Tab 2)] better to punish wrong-doers after the fact, or to make wrong-doing less likely in the first place. In both, too, they believed that the systems in question create incentives for, and certainly allow, behavior inimical to the interests and desires of ordinary citizens, and they have chosen to alter those incentives and behaviors. While legislators depended on advice about corporate finance and governance from experts like Alan Greenspan and Warren Buffett, they had little need for outsiders to explain how policy-makers give special service and grant special attention, possibly even deference, to donors of large sums of soft money. Their reaction in both cases was to alter or eliminate the structural features that threaten to undermine these systems. Given the importance of public confidence to democratic government, we regard such prophylaxis, where possible and reasonable, as highly desirable.

A2. The corruptive potential of soft money

Allegations of corruption are a frequent part of partisan give and take as each side accuses the other of bad faith. For example, during the Clinton administration the overnight stays in the Lincoln bedroom helped spark a series of accusations of influence peddling ranging from special dispensation for burial in Arlington Cemetery for a large donor to more serious charges that defense procurement and foreign policy had been affected by contributions from Loral Industries and Chinese officials. Each case involved the raising of soft money by the DNC that was, at least in part, used to pay for issue ads aiding Democratic candidates.[15] In all instances, moreover, the chorus of disapproval prominently featured the RNC or its officials, whose filings in this case argue that soft [9 (DEV. 1-Tab 2)] money poses no danger to parties and that its availability will not encourage the parties to corrupt the policy-making process.

We do not know, nor do we have all the evidence necessary to determine, whether the DNC was guilty of trading legislative or policy favors for donations in any of these instances. What is clear, however, is that all of these charges are credible on their face. There are reasonable grounds from the public record to be suspicious of the Democrats' conduct and to be suspicious of the Republicans in other instances.[16] We are in better position to evaluate the RNC's broader claim in this case that soft money does not corrupt. Critics of

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[15] **See generally Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167, at Chapters 5, 7, 18 & 32 (Majority Report).**

[16] ***Ibid.*** **See also Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167, at Chapters 39, 10– 5, 22–25 (Minority Report).**

BCRA essentially assert that it cannot, that a variety of structural features insure money routed through parties has no impact on policy-making. This argument is familiar from the record in *Colorado II* where it was rejected by the Court. In its various forms it rests on three broad assumptions: that parties are physically separate from policy-makers, that identities of donors and their interests are obscured when money is given to parties, and that party ideology dominates the interests of donors. We review them to show how they apply in the current case where soft money is at issue.

First is the notion that parties are in a sense physically separated from the elected and appointed officials who make governmental policy. The current chairmen of the DNC and RNC, for instance, are not government officials. That is not true, however, of the parties' Senate and House campaign committees, organizations that raised $212 million in soft money during the 1999-2000 election cycle and are headed by sitting [10 (DEV. 1-Tab 2)] legislators.[17] Simply put, no wall between the national parties and the national government exists.

The challenge to BCRA also involves the state parties, since it would prohibit them from using soft money for almost all activities related to federal elections.[18] State parties are not ordinarily run by federal officials. But that does not preclude very close financial relationships with federal parties and federal officials. A recent study by the Center for Public Integrity shows that state parties received 46 percent of their funds in 2000 from the soft money

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[17] Federal Election Commission, *National Party Non-federal Activity, at http://www.fec.gov/press/051501partyfund/tables/nonfedsumm2000.html.*

[18] Levin Amendment funds are the exception.

accounts of federal committees.[19] Nor is it clear that the remaining 54 percent was raised without any help from Washington officials. Our examination of campaign finance data from Colorado and Missouri for two previous cases revealed that federal officials, from Cabinet secretaries to members of Congress, were the star attractions in major fundraising events sponsored by the parties in these states. One need only read the itinerary of Vice President Dick Cheney in 2000 to see this pattern repeated. Among the scores of events that the Vice President headlined were numerous fundraisers for gubernatorial candidates whose proceeds went to the state party. Again, we see no political distance between state party organizations and national policy-makers.

The involvement of federal parties and officials in the financial affairs of state parties highlights several realities that are relevant here. First, the overwhelming financial muscle of the national committees—the result of the roster of effective fundraisers holding federal office and donors' interest in federal matters—has rearranged [11 (DEV. 1-Tab 2)] the traditional relationship between state and federal parties with the former now operating frequently as virtual appendages of the latter. National organizations hire staff for state parties and are deeply involved in their operations. Even if they were not, we should point out that the state committees would retain an interest in federal elections within their boundaries. As former Senator Tim Wirth (D-CO) notes:

> When I solicited contributions for the state party, in effect I solicited funds for my election campaign. I understood the solicitees who made contributions to the party almost

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[19] The Center for Public Integrity, *at http://www.publicintegrity.org/dtaweb/index.asp?L1=20&L2=9&L3=0&L4=0&L5=0.*

> always did so because they expected that the contributions would support my campaign in one way or another, and for the most part they expected that I would remember their contributions.[20]

Such ties may be natural, but their existence shows that routing money through state parties does nothing to insulate it from federal policy-makers. Even if an official like Wirth were not directly raising money for state parties, these organizations might very well attract many of the same donors eager to make additional contributions beyond the federal limits to help a federal candidate's campaign.

What is less natural is the sheer complexity of the web of financial interactions between these organizations. The welter of state and federal regulations make it advantageous for parties to act through national committees in some cases and state organizations in others.[21] The result is a confusing blizzard of transactions between various federal, state, and local organizations as parties' accountants search for the regulatory environment most conducive to their intended action. Some of these maneuvers—nearly instantaneous transfers of funds between multiple committees—are worthy of anything practiced by Enron. These transactions deepen the relationships [12 (DEV. 1-Tab 2)] between various party organizations and have the additional effect of adding a level of opaqueness to campaign financing. The difficulty of tracking money once it reaches state parties is evident is the tribulations reported by the Center for Public Integrity in its study of state parties: compiling the data took a year (due to

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[20] Declaration of former Senator Timothy E. Wirth, May 5, 1997.

[21] This is particularly true because of the need to allocate varying portions of hard and soft money for different activities. See David B. Magleby, ed., *Financing the 2000 Elections* (Washington: Brookings Institution), 2002, especially chapters 4 & 6.

the vastly different arrangements in the states) and revealed sizable discrepancies between amounts reported by federal and state committees.[22] The use of state party organizations to campaign on behalf of federal candidates thus undermines the public disclosure that is one of the widely applauded hallmarks of FECA.

Rejecting the claim of physical separation between parties and policy-makers, however, does little justice to the central roles that parties and their leaders play in campaign financing and policy-making. Indeed, we argued earlier that money given to parties is a more effective way of seeking influence than merely giving to individual members of Congress.[23] As a former director of the Democratic Senatorial Campaign Committee (DSCC) explained:

> If you want to get to know Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at our various events than it would be to write fifteen $1,000 checks to fifteen Senators, or Senators and candidates.[24]

We agree and note that this is precisely the point that parties make to donors. But this still ignores the identity of the officials that donors meet. Party committees are headed by or enjoy close relationships with their leading officials, individuals who by virtue of their positions, reputations, and control of the legislative party machinery have special [13

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[22] The Center for Public Integrity, *at http://www. publicintegrity. org/dtaweb/index.asp?L1=20&L2=9&L3=10&L4=0&L5=0&State*

[23] Frank J. Sorauf and Jonathan S. Krasno, "Political Party Committees and Coordinated Spending," prepared for the Federal Election Commission in *Colorado II*, 1997.

[24] Declaration of Robert Hickmott (April 8, 1997), p. 10.

(DEV. 1-Tab 2)] influence on their colleagues.[25] Donations —especially six and seven figure soft money contributions —are usually made by the arrangement with or knowledge of these most influential members of the party. Little political sophistication is needed to see that these are the people that donors most wish to meet and persuade, and that the system obliges them. The nexus between donor and policy-maker is never closer than when a legislative campaign committee mediates the transaction.

Second, the argument persists that the interests of donors are essentially laundered from their contributions to parties. It presents this cleansing as a product of aggregating the hundreds of thousands of donations flowing to party committees. In the process, proponents claim, the identity of particular donors is lost. The Court specifically considered and rejected this claim in *Colorado II*, noting the systematic efforts of parties to link donations to specific campaigns via the "tally" system. In the 2000 elections tallying was superceded by an even more direct innovation, "joint fundraising committees" sponsored by Senate candidates and the party campaign committees, in which Senate candidates in effect raised soft money for use in their own races.[26] Contrary to claims, donating to parties does nothing to obscure the identity or interests of the donors. Indeed, as the Court notes,

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[25] The power of party leaders has waxed and waned considerably in the last hundred years, depending on institutional arrangements and the individuals involved. Recently, the attacks on the committee system and seniority following Watergate have left party leaders at their most powerful point in generations. See David W. Rohde, *Parties and Leaders in the Postreform House*, (Chicago: University of Chicago Press), 1991.

[26] See Common Cause, *Senate Joint Fundraisers Rake in $17.8 Million in Soft Money during 1999-2000, at http://commoncause. org/ publications/march01/031601st.htm* (March 16, 2001). Also see Declaration of Peter L. Buttenwieser, July 19, 2002.

the parties function as "matchmakers" introducing [14 (DEV. 1-Tab 2)] donors and candidates and providing opportunities for them to interact.[27] We cite one example among many:

> On February 27, 1997, Senate Majority Leader Trent Lott sent out a fundraising letter on behalf of the National Republican Senatorial Committee promising contributors "plenty of opportunities to share [their] personal ideas and vision with some of our top Republican leaders, senators, and panel members." Failure to contribute, the letter apprised potential donors, meant that "you could lose a unique chance to be included in current legislative policy debates—debates that will affect your family and business for many years to come."[28]

These patterns surely hold for soft money as well as hard. In fact, given the vastly greater sums of the largest soft money donations—the average amount given by the top 800 soft money donors in 1999-2000 was $375,000—it is easy to understand why parties would be reluctant to lose track of these benefactors.[29] Contributors believe that their generosity is not forgotten, as a government relations specialist notes:

> In recent years, contribution of soft money—that is, money that can be donated outside the purview of the Federal Elections Campaign Act—has proven to provide excellent access to federal officials and to candidates for

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[27] "(T)he record shows that even under present law substantial donations turn the parties into matchmakers whose special meetings and receptions give donors the chance to get their points across to the candidates." 533 U.S. at 461 (2001).

[28] Affidavit of Alan Baron, October 14, 1998, p. 21.

[29] See Brennan Center, *Letter From Political Scientists, at http://www.brennancenter.org/programs/downloads/polisci_letter71001. pdf* (July 9, 2001).

> federal elective office. Since the amount of soft money that an individual, corporation or other entity may contribute has no limit, soft money has become the favored method of supplying political support. As described above, soft money begets both access to law-makers and membership in groups which provide ever greater access and opportunity to influence.[30]

Thus the possibility that the sheer amount of money raised by the parties has had the effect of making each individual contribution less important runs into the countervailing trend of larger and larger donations. The largest soft money gifts are many times the $20,000 limit on hard money donations to parties, a limit that the Court characterized as [15 (DEV. 1-Tab 2)] "not small" in observing that these moneys may be used to benefit specific candidates.[31] It is also worth noting that none of the research on the impact of donations cited above tests the effect of six- and seven-figure donations (fn. 5), instead examining the more pedestrian four- and five-figure sums that individuals and PACs may give directly to candidates under the FECA of 1974. It seems clear that the much greater size of the individual donations at issue here pose a proportionately larger risk of influencing their beneficiaries than do contributions of hard money.

The third part of the argument that parties are structurally immune from being corrupted or corrupting involves their ideology. In this view the goals, programs, and interests of a monolithic Democratic or Republican party, not the interests of the original donor, attach to the party's contributions and expenditures. So, even though the Democrats receive money from corporations and the Republicans from labor unions,

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[30] Affidavit of Daniel H. Murray, October, 1998, p. 6-7.

[31] 533 U.S. at 461 (2001).

each party's views take precedence over these donors' positions. But this argument gives far too much credit to parties' need for ideological consistency. When it comes to elections, parties know only one ideology, the capital "D" or "R" after the candidates' names. That practicality is reflected in funding decisions made by party committees that reflect virtually every political consideration save the candidates' views on the issues; mavericks are more than welcome if they can win.[32] Thus the parties run issue ads that eschew using the words "Democrat" or "Republican" in favor of reciting the virtues or (more likely) the shortcomings of the candidates.[33] Those same ads may even take positions [16 (DEV. 1-Tab 2)] contrary to the party's orthodoxy when it is judged helpful to the candidate, such as a spot produced by the Republican Party of Wisconsin which praised its Senate nominee for having "stood up to his own party."[34]

These tendencies are exemplified by the rise of legislative campaign committees (LCCs). Once moribund extensions of the party caucuses, these organizations have gained prominence commensurate with their receipts since the late 1970s. In Congress the LCCs are the two parties' Senate and House committees; many states have similar organizations or the party's caucus or its leaders act as LCCs by raising and distributing funds. As appendages of the caucuses and their leadership, the LCCs stand apart from the traditional party organizations in two salient ways. First, they have virtually no link to the parties' local organizations or local activists or to its platform. Instead, LCCs are created by groups of sitting legislators and responsible to them and only to them.

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[32] The most recent example is the RNC's ill-fated involvement in the 2002 gubernatorial primary in California on behalf of former Los Angeles mayor, Richard Riordan, who eventually lost to a candidate who complained that Riordan's views were much closer to a Democrat's than to a Republican's.

[33] Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2:207-212), 2002.

[34] *Ibid.*

Second, the LCCs have a set of political interests quite separate from those of the broader party. They exist to win elections, to maximize the number of their partisans in a chamber and, above all, to win or maintain a legislative majority with all of the perks that come with it. As a result, their interest and concern for the rest of the party ticket is minimal, and they accept any party ideology at their own convenience. In at least one state, New York, they have intervened in local primaries in opposition to the endorsement of the local party. The leading observer of New York's LCCs writes:

> Traditional party leaders perceive these new units to be unconcerned with augmenting party membership, supporting the ticket, or aiding institutional support activities. The two camps do share a concern for winning state legislative elections and controlling a majority caucus, but that is about all. We may be hard pressed to distinguish LCCs in New York as little more than independent [17 (DEV. 1-Tab 2)] consulting firms working for the benefit of the legislative caucus and its leadership.[35]

In the end, there is no reason for its beneficiaries to view money routed through the parties as "party money" instead of associating it with its actual donors, whose identities are often well known to them.

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[35] Daniel Shea, *Transforming Democracy* (Albany: State University of New York Press), 1995, p. 112.

A3. Appearances

Buckley and its successors refer not only to corruption but also to its appearance. To this point the concern about appearances seems to be mainly rhetorical; we are not aware of any campaign finance cases decided solely on the basis of how a certain practice looks. One reason, of course, is that behavior that seems corrupting may in reality be benign. We would not argue that irrational beliefs should drive public policy. At the same time, however, the attention devoted to appearances reinforces the notion that the purpose of campaign finance regulation is to insure the public's faith in the electoral system. This seems to us to be clear both because of the obvious importance of trust for the functioning of democratic government and also because we doubt that some other justifications for combating corruption—such as the desire for honest and efficient administration—rise to the level of constitutional imperative.

If public confidence is the goal, then the public's perceptions are at least as important as reality. We do not take this as an excuse to prohibit a vast sweep of campaign finance activities or to use polls to legislate. We do argue that in this specific case that there is ample reason that the public's suspicions about the corruptive impact of soft money are reasonable. As we have noted, citizens skeptical about the influence of large donations can find agreement from majorities in Congress, from donors, from [18 (DEV. 1-Tab 2)] lobbyists, from reporters and editorial writers, and from academics. Unfortunately, the sheer complexity of campaign finance regulation makes it difficult for citizens to take specific stands on specific categories of behavior created by campaign finance statutes. Nonetheless, the evidence is overwhelming that people view extra large contributions—the sort that soft money makes possible—as contrary to honest and unbiased policy-making.

The evidence for this comes from a variety of polls. For example, in March 22-25, 2001, the Washington Post asked respondents (n=903) if they "think politicians do special favors for the people and groups who give them campaign contributions, or not?" Ninety-three percent agreed and the vast majority of this group believed that favors were granted often (as opposed to sometimes), that it is a big problem for government, and that this behavior is unethical, although they were split on whether this was illegal or not.[36] Under the circumstances, it is no surprise to discover that citizens overwhelmingly support restrictions on contributions to parties, occasionally in fairly specific terms:

> "As you may know, federal law limits the amount of money people can contribute to any presidential candidate's campaign, but people can give as much money as they want to any political party. Do you think the amount of money people can contribute to political parties should be limited, or unlimited?"— 63% limited, 33% unlimited.[37]

> "Congress is now considering campaign finance reform legislation proposed by Senator John McCain that would ban unregulated contributions to political parties, even though some leading Republicans oppose this bill. Do

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[36] PollingReport.com, *Influence, at http://www.pollingreport.com/politics.htm.*

[37] ABC News.com Poll, October 13-17, 1999. N=1,020. See *http://www.pollingreport.com/politics.htm.*

> you favor or oppose such legislation?"—56% favor, 26% oppose.[38]

> "As you may know, 'soft money' is the amount of money that individuals, businesses and labor unions are legally allowed to contribute to the national political parties. Would you favor or oppose new federal laws limiting the [19 (DEV. 1-Tab 2)] amount of soft money that any individual or group can contribute to national political parties?" —72% favor, 24% oppose.[39]

> "Congress is now considering a major campaign finance reform bill that would sharply limit the ability of businesses, labor unions and individuals to make large donations to politicians and political parties. Based on what you have heard of this legislation, do you favor or oppose this legislation?" —62% favor, 25% oppose.[40]

Public opinion on these matters is informed by a variety of sources. To begin with, it reflects the well-publicized opinions of the various insiders and experts that we have noted. These opinions are reported in countless reports and editorials about campaign financing and its reform. Several genres of stories use campaign finance extensively in their analysis. Campaign coverage routinely features extensive discussion of the candidates' fundraising, reinforcing the lessons that campaigns cost enormous sums, that candidates are in a desperate search for funds, and that those who succeed ~~in~~ raising the most money are the likeliest to win election. It takes little effort to infer a link between campaign financing and policy-making from this set of facts. Indeed it is probably more difficult to hold out against the logic that candidates in need of money and donors in need of favors fail to satisfy one another.

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[38] Bloomberg News Poll, July 31-Aug. 5, 2001. N=1,206. See *http://www.pollingreport.com/politics.htm.*

[39] CNN/*USA Today*/Gallup Poll, Oct. 6-9, 2000. N=1,052. See *http://www.pollingreport.com/politics.htm.*

[40] Bloomberg News Poll, March 12-17, 2002. N=1,203. See *http://www.nationaljournal.com.*

The exchange of favors is very much a part of reporting on policy-making. Naturally, when reporters sense possible corruption they seek out credible sources for confirmation, so many of these stories—like those we referred to at the beginning of the previous subsection about former President Clinton—feature leading political figures and other experts alleging or denying that influence-peddling has occurred. Obviously, not everything that Congress or the executive branch does lends itself to the question of how donations may have played a role, but where possible this linkage is often invoked. So it [20 (DEV. 1-Tab 2)] is no surprise to read in the midst of the current financial scandal of Enron chairman Kenneth Lay's contributions to President Bush's campaigns, accounting firms' financial support of Republican lawmakers (see fn.6), or the lobbying of Democrats by their contributors from the technology sector. The headline in the *New York Times*, "Enron's Collapse: Enron Spread Contributions on Both Sides of the Aisle," or the *Los Angeles Times*, "Global Pressured Employees to Make Campaign Donations" are fairly typical of stories that appeared in virtually every newspaper in the country and all of its leading broadcast news shows.[41] We need not endorse the general allegations of influence peddling in these cases to point out that the fact

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[41] Don Van Natta, Jr, *New York Times*, January 21, 2002, and Elizabeth Douglass and Karen Kaplan, *Los Angeles Times*, April 14, 2002. In fact, its supporters credited the Enron scandal as providing the impetus behind the House's passage of BCRA.

they are made creates the appearance that political contributions may have helped cause regulators and Congress to turn a blind eye to corporate malfeasance.[42]

Obviously, these suspicions color citizens' impressions of politicians and political parties, though neither have been held in particularly high regard throughout American history. We think it is likely that they also affect people's broader attitude toward government and their ability to influence it. Political scientists have attempted to measure trust in government and political efficacy for decades using a series of survey items appearing on the National Election Studies biennial survey like the one cited above (see fn.14).[43] Without exception all of these measures have worsened in the past decades [21 (DEV. 1-Tab 2)] as citizens have grown more suspicious about government and politicians and less confident of their own power. The explanation for these developments is complex, with both trust and efficacy related to presidential approval and satisfaction with the course of the country.[44] We think it likely that campaign financing —particularly the huge gifts of soft money given to the parties with the resulting skepticism it breeds—is among the developments undermining public opinion in these areas. That means, of course, that banning soft money will not restore public confidence to its highest levels. No single piece of legislation could. But by removing an obvious irritant, it is a step in the right direction. Results from several polls suggest as much:

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[42] Polls show that citizens perceive this link: 49% agreed that "political campaign finance system" was partially to blame for the corporate scandals, one of list of potential causes. Harris Survey, July 18-22, 2002. N=1,010. See *http://nationaljournal.com.*

[43] Additional questions of note include: "Do you think quite a few of the people running the government are crooked, not very many are, or do you think hardly any of them are crooked," "Public officials don't care what people like me think (agree or disagree)," "People like me don't have any say in what the government does (agree or disagree)." See National Election Studies, *at http://www.umich.edu/~nes/nesguide.*

[44] See Jack Citrin and Donald Philip Green, "Presidential Leadership and the Resurgence of Trust in Government," (*British Journal of Political Science* 16: 431-453), 1986.

> "I have more optimism about government since campaign finance reform passed Congress and will be implemented in November."—50% agree, 31% disagree.[45] "In general, if new campaign finance reform legislation were passed, do you think it would make our democratic form of government work much better than it does now, just a little better, about the same, just a little worse, or much worse than it does now?"—22% much better, 37% little better, 32% same.[46]

We cannot say that the effect will be as dramatic as these surveys indicate, but we have no doubt that the soft money ban in BCRA will help.

B. Building parties

B1. The role of political parties

Critics, including several of the plaintiffs in this case, argue that BCRA's ban on soft money will weaken political parties by depriving them of hundreds of millions of dollars. As political scientists, we take this charge very seriously. Parties' health is of grave concern to us and to many other scholars. All too often the ramifications for parties have been

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[45] Institute for Global Ethics/Pew, June 6-11, 2002. N=800. See *http://nationaljournal.com.*

[46] CNN/*USA Today*/Gallup, March 9-11, 2001. N=1,015. See *http://www.pollingreport.com/politics.htm.*

of little or no matter to many reformers. While most political scientists [22 (DEV. 1-Tab 2)] may not literally agree with E.E. Schattschneider that "parties created democracy, and . . . democracy is unthinkable save in terms of parties" they would recognize and appreciate the sentiment.[47] We certainly place ourselves among their number. But assessing BCRA's effect on parties is not as clear-cut as subtracting soft money from their total receipts. It requires, first of all, a more sophisticated understanding of what parties are and what they do.

Our appreciation for parties stems from many sources. It comes from the realization that no democracies exist elsewhere in the world without them, a pattern so well established that the U.S. government offers aid to build political parties in emerging democracies.[48] It grows from an understanding of how parties developed in this country, growing organically in the earliest Congresses as members organized themselves into "factions." These factions later—fairly quickly—spread to the public as citizens adopted allegiances to groups of politicians. Most of all, however, scholars have studied the ways in which parties affect government and citizens. This literature is enormous, but we would summarize it by pointing to a few of the main roles that parties play.

To begin, parties help organize government. The same need to form standing coalitions of policy-makers instead of creating new majorities from scratch with each issue that first impelled legislators into factions still exists. Indeed, many specialists believe that attempts to stifle parties within government—with civil service protections or nonpartisan forms of governance—have hindered the ability of leaders to make and [23 (DEV. 1-Tab 2)] institute policy.[49] Republicans in Congress have lent tremendous support, occasionally at some political risk to themselves, to the initiatives of President Bush, just as Democrats earlier rallied behind President Clinton. They do so because they know and trust one another, because they likely share a basic philosophical perspective on government, because they appeal to the same supporters, and because they are to some extent judged by the public as a group. The last adds an important element of accountability to the system. Measuring the performance of the president by one's sense of how well the nation is doing may be relatively easy, but party labels allow voters to make the same connection for legislators, heightening their stake in their party's and the nation's progress.[50]

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[47] E.E Schattschneider, *Party Government*, (New York: Reinhart), 1942, p. 1.

[48] Thomas Carrothers, *Aiding Democracy Abroad: The Learning Curve* (Washington: Carnegie Endowment for Peace), 1999.

Parties also help organize elections in several ways. First, parties recruit and nominate candidates for office, help them get elected, and work to increase the turnout of the faithful. Historically, parties have provided labor to candidate campaigns and for turnout efforts, a reflection of an enduring campaign style before the advent of television. Thus, V.O. Key argued that one of the three key elements of parties is their organizational structure, chiefly the card-carrying or active members who do much of the nitty-gritty work in elections.[51] The second way in which parties help organize elections (and citizens' perceptions in between) is more symbolic in nature. Scholars argue that, while the vast majority of Americans never formally join a political party, they identify themselves with one or the other. These ties, though cognitive in nature, are remarkably [24 (DEV. 1-Tab 2)] enduring and powerful, coloring how people think about political figures and political issues.[52] For example, Republicans with little knowledge of a particular proposal of the Bush administration are apt to be sympathetic once they know its provenance, while Democrats are more likely to approach the idea skeptically. In part this agreement within parties reflects a general ideology shared by many (but not all) of its adherents, but it also illustrates the parties' central position in the political psychology of individuals and, in turn, their role in simplifying the political conflict individuals observe and the information they receive.[53]

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[49] For example see James L. Sundquist, "The Crisis of Competence in Our National Government," (*Political Science Quarterly* 95:183-208), 1980.

[50] For two alternate views about party accountability see V.O Key (with Milton Cummings), *The Responsible Electorate: Rationality in Presidential Voting, 1936-1960*, (Boston: Harvard University Press), 1966; Morris P. Fiorina, *Retrospective Voting in American National Elections*, (New Haven: Yale University Press), 1981.

[51] V.O Key, *Politics, Parties, and Pressure Groups*, (5th ed., New York: Ty Crowell Co), 1964.

[52] The huge literature on party identification begins with Angus Campbell, Philip E. Converse, Warren E. Miller and Donald Stokes, *The American Voter*, ((Midway Reprint) Chicago: University of Chicago Press), 1960.

[53] It has been a long-standing goal of many of our colleagues to create more "responsible" parties, organizations with, among other things, clearer and more comprehensive ideologies. See American Political Science Association Committee on Parties, *Toward a More Responsible Two-Party System*, (New York: Rinehart), 1950. Party identification's value as a simplifying device is stressed by a huge amount of work on public opinion over the last fifty years. For one influential example see Anthony Downs, *An Economic Theory of Democracy*, (New York: Harper and Row), 1957.

What binds these different aspects of parties together is an overriding purpose to gain control of the government. Indeed, Schattschneider defined parties as an "organized attempt to get power."[54] In this respect parties are much different from interest groups whose goals are related to particular public policies. Parties are interested in policy, too, but often for pragmatic reasons; by some accounts parties strategically adopt positions to attract voters as they build a majority.[55] This emphasis on winning makes them both more malleable than groups and much broader in their appeal. Interest groups would happily elect candidates under their banner if they could, but their constituencies and their platforms are too narrow to compete successfully for office. Parties with their necessary "big tent" compete for the allegiances of multiple groups, demographic [25 (DEV. 1-Tab 2)] categories, and even various ideologues simultaneously, forcing accommodation and compromise on their constituent parts as they work toward the goal of winning the government. Parties thus are a part of government, but interest groups remain largely as outsiders, lobbying lawmakers and party leaders to attain their policy goals.

One consequence of the parties' intimate relationship to government has been a long tradition of regulation and jurisprudence stretching back into the 19th century. Part of this regulatory tradition has been aimed at controlling their power, including such diverse reforms as civil service, direct primaries, and a series of campaign finance laws of which BCRA is the latest example. But at the same time government has sought to limit parties, it has also acted to institutionalize them, especially the two major parties. State laws give automatic ballot lines to nominees of the Democrats and Republicans, and just occasionally to a few smaller parties, a major leg-up for parties in the struggle to contest elections. Governments sponsor party primaries, footing the bill and providing facilities for rank and file partisans to select their nominees. FECA also gives special consideration to parties in various ways, allowing them to coordinate spending with candidates and to collect larger hard money donations, and giving substantial public subsidies to the Democratic and Republican nominating conventions and presidential nominees. The result is that a leading scholar of American parties has compared them to "public utilities:"

> [T]he designation "public utility" . . . suggests an agency performing a service in which the public has a special interest sufficient to justify governmental regulatory control, along with the extension of legal privileges, but not government ownership or management of all of the agency's activities.[56]

[26 (DEV. 1-Tab 2)] B2. Building parties with soft money

There is no need to speculate about the immediate impact of a soft money ban on parties since there is a long record of soft money receipts and expenditures dating back a decade and longer.[57] The two national committees and the congressional campaign committees raised nearly $1.2 billion in soft money from 1991 to 2000, including more than $700 million in the 1997-8 and 1999-2000 election cycles.[58] Of this sum, more than $500 million was transferred to state parties during this period, in addition to the $235 million of hard money that the national committees sent to the states.[59] We evaluate the impact of these resources on parties by referring back to the various roles they play in our political system.

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[54] Quoted in Marty Cohen, David Karol, Hans Noel, and John Zaller, "Beating Reform: The Resurgence of Political Parties in Presidential Nominations, 1980-2000," (Presented at Annual Meeting of the American Political Science Association, 2001), p. 21.

[55] See Anthony Downs, *An Economic Theory of Democracy*, (New York: Harper and Row), 1957.

[56] Leon D. Epstein, *Political Parties in the American Mold*, (Madison: University of Wisconsin Press), 1986, p. 157.

[57] Soft money was "invented" earlier in 1979 from an FEC ruling, but the parties were not required to report until after the 1990 election.

To begin, there is no evidence that these financial resources have played any appreciable role in the historic level of party loyalty achieved within Congress over the last decade.[60] Leaders on all sides have gone to great pains to confirm their willingness to steer financial support to party colleagues regardless of their voting records, and there is no reason to doubt them. There is anecdotal evidence of some financial strong-arming in the states as party leaders in legislatures with highly centralized systems like New York's or California's have reputedly used their control of electoral resources to reward and punish legislators according to their support of the leadership. In Congress, however, this has not been the case. This conclusion does not contradict our earlier argument about the corruptive potential of soft money, for the behaviors in each situation are [27 (DEV. 1-Tab 2)] fundamentally different. The use of soft money to enforce party discipline involves leaders using their control of campaign resources as leverage on the entire caucus on a broad swath

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[58] See fn.1. These figures do not include the $308 million raised in the 2001-2 cycle as of June 30, 2002 (*http://www.fec.gov/press/20020919partyfund/20020919partyfund.html*). Nor do these figures include soft money raised directly by state parties (see fn.19).

[59] Federal Election Committee, *Campaign Finance Reports and Data, at http://www.fec.gov/finance_reports.html.*

[60] See fn.25.

of roll-call votes important to the leaders. Our argument about corruption, on the other hand, involves the donors' use of parties as conduits to route soft money to legislators in return for a wide variety of actions on a relatively narrow set of issues.

At first glance, the effect of soft money on the numbers of Americans voting and on electoral competition seems rather unimpressive. Voter turnout, already low, continued its slow decline in the 1990s with the exception of 2000 when a slightly greater percentage of Americans cast ballots than had four years earlier. Even so, voter turnout at the end of the 1990s was actually slightly lower than it had been at the start.[61] Similarly, electoral competition returned to historically low levels as soft money receipts rose. This was particularly true for the House of Representatives, the set of elections in which the lack of competition has been of greatest concern and which, because of their large numbers and equally-sized districts, offer analytical advantages. There the number of close contests has declined markedly since 1996 as spending has skyrocketed.[62] Granted, parties cannot be held completely responsible for these disappointments, but one of the main arguments for strengthening parties is for their ability to stimulate greater turnout and competition.

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[61] See *Statistical Abstract of the United States, 2002* edition. Estimated turnout in presidential elections was 55.1 percent of the voting age population in 1992, 49.1 percent in 1996, and 51.2 percent in 2000.

[62] Competitiveness has been measured in a variety of ways both before elections when forecasters attempt to predict which races will be close and after when returns are available. One familiar measure is to count the number of "marginal" districts, races where the incumbent won less than 60 percent of the vote. The number of marginals declined since the use of soft money in House elections from 115 in 1992, 119 in 1994 and 120 in 1996 to 91 in 1998 and 76 in 2000. See Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress, 2001-2*, (Washington: American Enterprise Institute), 2002.

[28 (DEV. 1-Tab 2)] Our concern here, however, has less to do with byproducts of stronger parties than with the actual strength of these organizations. The $1.2 billion raised and spent over the last decade suggests they today's parties should be more formidable than those in the recent past. Yet, there is much reason to doubt that assumption. To begin with, survey data show no real increase in the strength of partisan attachments. The National Election Studies asks respondents a series of questions about their identification with parties, from these building a seven-point scale that has been the academic measure of partisanship for 50 years. After a decade of lavish spending, however, the percentage of strong partisans, those with the greatest attachment to their party from whose ranks the most active citizens come, has shown virtually no advance.[63] In 1992, 29 percent of respondents identified themselves as strong Democrats or Republicans, compared to 31 percent in 2000.[64] These figures are near the historic low registered over the course of 50-year series of NES surveys, and this lack of enthusiasm for parties is echoed in responses to other questions about them that the NES asks.[65] The inference is obvious: whatever party-building the $1.2 billion of soft money has funded over the

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[63] See Angus Campbell, Philip E. Converse, Warren E. Miller and Donald Stokes, *The American Voter*, ((Midway Reprint) Chicago: University of Chicago Press), 1960.

[64] National Election Studies, *at http://www.umich.edu/~nes/nesguide/taptable/tab2a_1.htm*

[65] See National Election Studies, *at http://www.umichedu/~nes/nesguide/taptable/tab2b_1.htm* and *http://www.umich.edu/~nes/nesguide/taptable/tab2b_2.htm*

past decade, it has done little or nothing to attract citizens to the party banners.[66]

The most obvious explanation for these results is that parties have been remarkably restrained about proclaiming their virtues and only somewhat less shy about [29 (DEV. 1-Tab 2)] skewering their opponents. The chief way in which parties speak directly to citizens is through television advertisements.[67] Media tracking data from the top 75 media markets show that parties were extremely active advertisers in both 1998 and 2000, sponsoring ads that appeared over 310,000 times.[68] But the parties' commercials in these years were distinguished most notably for their failure to mention either party by name. Viewers with sharp eyes might have spotted a disclaimer like "Paid for by the Democratic

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[66] It is noteworthy that this time period has been regarded as one in which experts, influenced by parties' success raising funds, have pronounced them resurgent. One of the few scholars to question this conclusion has asked how it is possible for parties to prosper without followers. See John J. Coleman, "Resurgent or Just Busy? Party Organizations in Contemporary America," in *The State of the Parties: The Changing Role of Parties in American Parties*, (2nd edition, John C. Green and Daniel M. Shea eds., Lanham, MD: Rowman and Littlefield), 1996.

[67] For example, see Ray La Raja and Elizabeth Jarvis-Shean, "Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections, (Berkeley, CA: Institute of Governmental Studies), 2001, also available at *http://www.cfinst.org/parties/papers/laraja_softmoney.pdf*, showing television advertising was (after expenses) the parties' largest expenditure of soft money. It is a trait that parties share with candidates who have long been noted for their reliance on paid television. Parties, however, cannot count on the same level of free media coverage of their activities that candidates enjoy.

[68] See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

National Committee" near the end of an ad, but the words "Democrat" or "Republican" appear nowhere else in the vast majority of party ads run during 1998 (85 percent did not mention party) or 2000 (93 percent).[69]

While parties are curiously absent from their own commercials, candidates are nearly ubiquitous; their names were mentioned in 95 percent of ads aired by parties in 1998 and 99 percent in 2000.[70] The clear implication is that parties dedicated their advertising dollars to promoting the fortunes of their candidates, not themselves. Muting their partisanship served the needs of candidates, who in their quest for swing voters, were eager to attract support from independents and crossovers. Thus parties mimicked candidates by rarely invoking partisan labels, instead focusing on the characteristics of the candidates. The candidates that parties focused on, moreover, were usually not their [30 (DEV. 1-Tab 2)] own but their opponents. Party ads mentioned the opposing candidate in 51 percent of spots aired, their own candidate in 17 percent, and both candidates in 32 percent.[71] It is no surprise, then, to discover, that most of the spots parties aired were regarded as "attack" advertising by the coders who reviewed these ads.[72] Candidates displayed the opposite pattern, using their commercials to proclaim their virtues. The reason candidates shy away from attack advertising is the fear that it will make them appear mean. The fact that parties are left to do the dirty work of campaigning cannot make them more appealing to the public.

The data on parties' television advertising also illustrate another aspect of party-building over the last few elections: its remarkably narrow focus. The top 75 media markets serve at least half of households in more than 335 congressional districts. Yet in both 1998 and 2000, more than half of the advertisements that parties sponsored in these markets appeared in just a dozen races.[73] Clearly the parties were concentrating their resources on the contests where they judged their funds might be decisive, but in consequence the vast majority of Americans heard nothing from them about their candidates. There is clearly a tension between building parties everywhere—if their ads could somehow be construed to affect partisanship—and trying to win specific elections. We would not advocate that parties do only the first without regard to the second, but [31 (DEV. 1-Tab 2)] adopting the opposite strategy inevitably limits the amount of party building in which they engage.

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[69] Just 15 percent of party ads in 1998 and 7 percent in 2000 mentioned either political party. See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

[70] Coders were asked separate questions about both candidates and coded references in the text and/or visuals. For results, see Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2:207-212), 2002. For information about the coding, see *http://www.polisci.wisc.edu/tvadvertising/Coding%20the%20Ads.htm*.

[71] Calculated by the authors. The 1998 data set, the same one used to create *Buying Time: Television Advertising in the 1998 Congressional Elections*, is attached as an exhibit to this report. The calculation for 2000 makes use of a version of the 2000 data set from May 14, 2002. A later version of these data is provided with the Expert Report filed by Professor Kenneth Goldstein.

[72] The tone of a commercial was coded according to the following question: In your judgment, is the primary purpose of the ad to **promote** a specific candidate ("In his distinguished career, Senator Jones has brought millions of dollars home. We need Senator Jones."), to **attack** a candidate ("In his long years in Washington, Senator Jones has raised your taxes over and over. We can't afford 6 more years of Jones."), or to **contrast** the candidates ("While Senator Jones has been raising your taxes, Representative Smith has been cutting them.")? See Krasno and Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections*, (New York: Brennan Center, 2000).

[73] See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

Finally, there is the matter of formal party organizations. Here we are confronted with a dizzying array of organizations from the traditional state and local committees that have been such a large part of the scholarship on American democracy, to the newly-prominent LCCs and a variety of caucuses and offshoots affiliated with the parties or their leaders.[74] We focus on the former, the more locally based organizations that are closer to ordinary voters and historically have been the great source of grassroots political activity during campaigns. Indeed, even those political scientists who oppose restrictions on soft money argue mainly that soft money is worth saving for its effect on traditional party organizations.[75] We believe that close examination of the evidence suggests that soft money has had little lasting or positive impact on state and local organizations.

Our opinion is informed by two case studies we undertook for previous litigation, *Colorado II* and *Missouri Republican Party v. Lamb*.[76] In both instances, the plaintiffs argued that various restrictions on political parties would cripple their ability to act during and between campaigns. The facts, however, did not support these claims. The executive director of the Colorado Republican Party, for instance, at the time of this litigation was a resident of the Washington, D.C. area hired by the RNC. The Colorado party received most of its funds from the NRSC, and other money was raised for it, with little involvement by state officials, at events featuring visiting members of Congress and [32 (DEV. 1-Tab 2)] the first Bush administration. Despite this infusion of resources, the party was not able to organize a phone bank for volunteers or print out mailing labels for its own members.[77]

The situation in Missouri, several years later, was nearly identical. Again, the apparatus of the state party proved unwilling or unable to undertake basic tasks such as phone banking or leafleting on its own. In addition, without any state limits on the size of the contributions it received, Missouri's Republican party relied heavily on large donors: 80 percent of its receipts came from just 36 donors (excluding the national parties) from a total list of contributors numbering approximately 1,000.[78] Like its counterpart in Colorado, the Missouri party's direct involvement in campaigns was limited largely to writing checks. Both committees paid outside vendors to run their phone banks and send their mailings; in addition they sent much larger checks to consultants for advertising. A highly specialized campaign industry allows parties to purchase campaign services, leaving them to raise money and choose from a menu of options. With the variety of paid alternatives available, the parties have fewer incentives to seek out citizen involvement in campaigns beyond their cash. The mass-based party organizations so highly esteemed by scholars seem to have been largely abandoned for a newer version relying on commercial services.

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[74] Among the last we would include organizations like the Democratic Leadership Council or Log Cabin Republicans.

[75] E.g. Statement by Raymond La Raja, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?*, at *http://www.cfinst.org/parties/mf_responses.html*.

[76] Frank J. Sorauf and Jonathan S. Krasno, "Political Party Committees and Coordinated Spending," prepared for the Federal Election Commission in *Colorado II*, 1997; Frank J. Sorauf and Jonathan S. Krasno, Statement prepared for *Missouri Republican Party v. Lamb*, 2000.

[77] Frank J. Sorauf and Jonathan S. Krasno, "Political Party Committees and Coordinated Spending," prepared for the Federal Election Commission in *Colorado II*, 1997, p. 35-6.

[78] Frank J. Sorauf and Jonathan S. Krasno, Statement prepared for *Missouri Republican*, 2000.

Other scholars echo these concerns. For example, in a recent "cyber-forum" on parties for a group of experts invited to comment on BCRA, a number of participants questioned whether soft money has had any lasting effect on parties. One explained:

> [33 (DEV. 1-Tab 2)] Soft money does not appear actually to build party infrastructure . . . Soft money funds the "coordinated campaign," but leaves very little behind in terms of permanent assets for the party once the campaign is over.[79]

Another participant was blunter:

> I would argue that soft money doesn't really make the parties strong; it makes the people who bring soft money to the party strong.[80]

Impressions such as these reflect the extent to which parties have transformed themselves into organizations serving the immediate electoral needs of specific candidates. That was

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[79] Statement by Professor John C. Green, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?, at http://www.cfinst .org/parties/mf_responses.html.*

[80] Statement by Professor Robin Kolodny, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?, at http://www.cfinst. org/parties/mf_responses.html.*

always the purely electoral life of the LCCs, but state and local parties—though also preoccupied by elections—had an enduring organization of their own, and their strength was always measured by their ability to recruit candidates, mobilize activists, organize party legislators, and debate party issues—as well as to manage the assorted tasks of delivering the party vote. All of that meant that they had a complex set of roles and tasks far beyond raising money and serving as conduits for national party funds.

Against this critique of the development of state parties in recent decades are two objections. The first is that a technological revolution has overtaken and transformed the old ways of campaigning. Thus, parties have had to adapt or risk irrelevance; a number of our colleagues take the emergence of these "service parties" as signs of parties' inherent vitality and significance.[81] There is no doubting that technological changes have occurred, but they have not rendered obsolete the old-fashioned personal campaigning by candidates and volunteers. Our enthusiasm for volunteerism rather than subcontracted campaigns is not nostalgic; it is pragmatic. Research shows that face-to-face [34 (DEV. 1-Tab 2)] campaigning is vastly more effective in stimulating turnout than the phone banks and direct mail that have replaced it.[82] Even more fundamental, local activists bring energy and talent to the political sphere. They help educate citizens about politics and deepen their involvement in their communities. For parties, when the election is over and TV ads no longer aired, when the phone banks and direct mail vendors are abandoned, activists remain a durable asset that the parties can continue to count on. No one can help but be impressed by the vast amounts of money flowing through parties, but the money has passed through them without leaving behind any lasting benefit.

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[81] For example, see David Manafee-Libey, *The Triumph of Campaign-Centered Politics.* (New York: Chatham House Publishers), 1999.

[82] See p. 45 below.

Other political scientists accept the traditional model of state and local parties but argue that soft money has done them some good.[83] None of these scholars claim that anything more than a small fraction of each dollar raised has been spent to the benefit of state parties. By one estimate the soft money that state parties devoted to "grassroots party building" from 1992 to 1998 amounted to just under $20 million out of their total soft money expenditures of $520 million during this period.[84] Adding some of the other expenditures to the party building category—a portion of overhead costs, for example—may bring the totals higher, but they remain a small portion of the soft money they spent. Indeed, these data point to one major reason for the organizational weakness of the state parties: a chronic lack of investment.

[35 (DEV. 1-Tab 2)] B3. Candidates v. parties

That so little building of political parties, at least in a useful and lasting way, has occurred over the last decade does not mean that this trend will continue. Supporters of soft money place great stock in the possibility that the continued availability of vast sums of money will eventually work to the greater benefit of parties, even as they argue that some portion of these moneys are already spent in positive

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[83] See particularly, comments of Ray La Raja, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?, at http://www.cfinst.org/parties/mf_responses.html.*

[84] Ray La Raja and Karen Pogoda, , "Soft Money Spending by State Parties: Where does it really go?," (Berkeley: Institute of Governmental Studies and Citizens Research Foundation Working Paper), 2000, p. 17.

ways.[85] We are far less sanguine about the future, for we believe that party strategies over the last decade, far from being haphazard, are deliberate and well-considered responses to their need and desire to support candidates at all costs. As we noted above, that overwhelming concentration on the promotion of candidates conflicts with the building of parties.

One of the parties' greatest strengths is their breadth: parties encompass diverse constituencies. Democrats and Republicans contest elections in all corners in the country —sometimes with little success for long periods of time— and voters everywhere overwhelmingly identify with one of them. Thus, there is some sort of Democratic and Republican party in even the most inhospitable territory. With every presidential election we hear the plaintive appeals of Democrats and Republicans in various locales pleading for their national party to campaign more heavily in their areas. Victory, though seemingly impossible, is often argued to be within reach; moreover, local partisans hope to provide encouragement and resources to the other party candidates on the ballot. Indeed, according to press reports, California Republicans succeeded in convincing the RNC and Bush campaign to divert resources from several states including Florida in the [36 (DEV. 1-Tab 2)] final days of the 2000 campaign to avoid disheartening local partisans by seeming to abandon the state to the Democrats.

From the standpoint of Republicans in California, that decision surely made sense, but for the Bush campaign it might have been disastrous had the race in Florida turned out differently. Of course, other Republicans would also regret any allocation of funds that costs them the presidency. This shared interest in the White House is much less relevant for specific candidates for the House or Senate. Indeed, the competition for party resources among various congressional candidates is fierce, beginning with mandatory pilgrimages to Washington to seek the blessings of legislative campaign committees. Party operatives attempt to weed out the likely candidates from the hopeless so that the parties may invest wisely in those races where its help is most meaningful, a process often called "targeting."[86] But even if we assume that parties (or anyone) possess the prescience to predict which races might be close many months in advance, it is clear that the more parties are able to direct their funds to the small set of races thought to be teetering in either direction, the fewer Americans are affected by their efforts. As we noted earlier, the logic of targeting conflicts with the process of building stronger parties everywhere.

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[85] For example, see comments of Ray La Raja, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?, at http://www.cfinst.org/parties/mf_responses.html.*

The more fundamental question, however, is why so little of the soft money spent within a state is used to help its party organizations in any meaningful and lasting way. Given their acknowledged goal of targeting a small number of candidates, the answer [37 (DEV. 1-Tab 2)] must involve the perceived needs of those candidates as Election Day approaches. Candidates, unlike parties, have no certain political life

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[86] Parties could always target with their hard money, but their ability to shift resources to favorite candidates was constrained by limits on their direct contributions and coordinated expenditures. One result of these limits is that the NRSC for a time routinely spent the maximum allowed for coordinated expenditures on almost all of its candidates. This pattern contributed to the decision by one candidate in 1988 to sue the committee for additional money it had decided not to use on his race. See Jeff Holyfield, "Riegle Expected To Win Big Over Dunn," Associated Press Political Service, November 8, 1988.

following an election loss. All of the resources they can muster are expended in the attempt to win office. Parties that primarily serve candidates follow the same rule. The problem is that developing a grassroots organization—identifying leaders, recruiting volunteers, providing training and creating opportunities to interact and work together—might take years of effort. Candidates would happily accept the help of legions of party workers; they just have no interest in diverting time and money to help build that network, especially if those efforts fully ripen in later elections.[87]

Candidates have no reason to oppose stronger, more traditional party organizations, but they have even less reason to inconvenience themselves by helping build them. Incumbent public officials may have done much of the hard work of raising money for parties before a campaign, and even when they are not directly involved, specific candidates are often invoked in fundraising appeals by party officials. Furthermore, parties and party organizations are for the vast majority of donors of secondary importance to individual candidates. As a consequence, parties present themselves as allies of candidates, a natural inclination for party leaders who are eager supporters of their tickets. Even if a state or local party official hesitated to help an individual candidate, the financial power wielded by the LCCs in Washington, organizations explicitly controlled by federal officeholders, keeps state and local committees beholden to their wishes. The substantial financial transfers to states and the [38 (DEV. 1-Tab 2)] dependence of many state organizations on the federal committees leaves many of them as virtual agents of these committees.

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[87] It is worth noting that these volunteer efforts offer little or no profit for the campaign industry that provides services to parties and candidates.

The very notion that candidates and parties have separate interests may be surprising to those accustomed to see parties and candidates bound together by a common purpose. We would agree up to a point. We agree that control of government redounds to the benefit of all party members; few would advocate, for example, wasteful or foolhardy spending. Nonetheless, with respect to campaigns parties' interests are clearly distinct from those of candidates, even presidential candidates trying to win a nationwide election. Because parties embrace innumerable candidates running for innumerable offices, there is, in effect, a need to be everywhere at once. Because parties are enduring institutions (or hope to be), they stand to benefit from long-term investments that candidates cannot undertake. Because parties seek loyal adherents while candidates welcome voters of all stripes, invoking partisan labels serves parties better than candidates.

What if we are wrong? What if parties were to choose sometime in the future to devote greater dollars to their own needs by trying to attract supporters, polish their public images, and rebuild local organizations? We would applaud these developments, but we doubt that banning soft money would hinder them. Even more noteworthy than the parties' soft money receipts during the 1990s was the hard money fundraising by the national committees alone: $445 million (1991-2), $384 million (1993-4), $638 million (1995-6), $445 million (1997-8) and $705 million (1999-2000).[88] The total of $2.6 billion over these ten years is clearly sufficient to maintain the current, paltry investment [39 (DEV. 1-Tab 2)] in party building (fn.84) or even a much more expansive program. The money is available; parties have lacked the incentive or the control to spend it on themselves.

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[88] Federal Election Committee, *Campaign Finance Reports and Data, at http://www.fec.gov/finance_reports.html.*

Nor would a loss of soft money shrink parties to the point of being overshadowed by interest groups. The FEC reports that all PACs combined raised $2.3 billion from 1991 to 2000 and contributed about $1.1 billion to candidates.[89] Parties more than kept pace with hard money alone, helped by larger contribution limits and their roster of elected officials.[90] But this comparison overlooks the fact that much of the money flowing to parties is interested money, including contributions from PACs. More fundamentally, reducing the comparison between parties and interest groups solely to financial matters misses the crucial aspect of parties' nature, as well as the main advantages that they possess over interest groups. These advantages begin with the tens of millions of Americans who identify with the Democrats or Republicans, and the thousands of officeholders whose names are listed on ballots with their party affiliations. Interest groups—especially once the full array of organizations like 501s and 527s are included—may have more money than parties, but no combination of groups has constituencies outside or inside government that compare with the parties'.

Finally, no one should underestimate the parties' ingenuity and capacity for adaptation, skills they have successfully exercised for more than a century in meeting every change in American electoral politics. Certainly, BCRA's implementation will decrease the amount of money available to state and local party organizations in the short run, but that loss will stimulate them to broaden their base of contributors and raise more hard money. Belt tightening will also force them to use their money more efficiently and [40 (DEV. 1-Tab 2)] effectively; it may even lead to an era in which campaign budgets reflect some rational definition of need. Many parties will also substitute less expensive volunteer efforts for some of the high-priced services currently purchased with soft money. Rebuilding their cadres of activists and returning to a more mass-based form of campaigning would also help increase voter turnout and improve candidate recruitment. But most of all, these steps would reestablish the parties' ties to local electorates and restore one historic line of responsibility for the decisions they make. It would free the state parties from the "dole" and its accompanying interventions and control by national party committees. One may think of the soft money ban in BCRA as a form of "tough love," an affectionate rebuke likely to help state and local parties more than it hurts them.

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[89] *Ibid.*

[90] Individuals may give up to $20,000 yearly to parties, $5,000 to PACs under FECA. The BCRA raises the annual limit on contributions to national parties to $25,000.

C. Voter turnout

C1. Turnout in the U.S.

Voting is, by far, the most common way that people participate in politics.[91] It owes its popularity to the relative convenience of casting a ballot—a task usually requiring an hour or so every two to four years—and to the importance that people attach to it. Even nonvoters overwhelmingly agree that "voting in elections is extremely important in making someone a true American."[92] Scholars place similar importance on voting and often characterize it as a chief means of exercising popular control of government. It is no exaggeration to claim that voting is an essential responsibility of democratic citizenship.

[41 (DEV. 1-Tab 2)] In the comparative perspective, the proportion of eligible citizens who cast ballots in the U.S. lags far behind the turnout rate in most other industrial democracies. Most of that gap can be ascribed to a variety of legal differences—from registration requirements to the scheduling of elections—that make voting in the U.S. more difficult than elsewhere.[93] As a result, a better comparison may be historical. Even here, however, today's turnout rates are well below those in past elections. In 1960, for example, 62.8 percent of eligible citizens voted in one of the closest elections in U.S history; in 2000, just 51.2 percent cast ballots in an even closer contest.[94] This decline is part of a steady trend downward over the last four decades.[95]

The long-term decline in turnout has caused much consternation among policy-makers and scholars. For some

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[91] The National Election Studies asks respondents about a variety of activities: registration, voting, along with whether they tried to influence others, attended a political meeting, worked for a party or candidate, wore a button or put a bumper sticker on their car, and gave money to a campaign.

[92] Survey item from the 1991 National Election Studies Pilot Study. The full question reads: "Is voting in elections extremely important, very (important), somewhat (important), or not at all (important) in making someone a true American?"

[93] Among the legal arrangements increasing turnout rates in several other countries is mandatory voting whereby failure to cast a ballot is punishable by a fine. See David P. Glass, Peverill Squire, and Raymond E. Wolfinger, "Voter Turnout: An International Comparison," (*Public Opinion* 6: 49-55), 1984.

[94] Turnout rates in state and local elections are generally much lower when they do not coincide with the presidential ballot.

[95] This decline is especially vexing because it has occurred as blacks, always legally eligible to vote, were allowed to exercise the franchise in the South, and registration requirements were being eased throughout the nation. The 26th amendment giving 18 to 20 year-olds the right to vote, on the other hand, depressed turnout rates by adding millions of eligible voters from the age group with the lowest level of turnout.

of these observers, the low levels of voter turnout are an indication of a growing emergency in American politics in which citizens have grown disaffected or bored by their leaders and their government.[96] Others view these claims as overwrought and point to survey results showing that Americans typically report greater faith in their government and interest in campaigns than citizens in other countries. Regardless of how they interpret the decline in voting, there is widespread agreement that turnout rates merit close attention and that higher levels would be desirable. Parties, given their traditional emphasis on mobilizing their voters, could potentially play an [42 (DEV. 1-Tab 2)] important part in halting and reversing the shrinking percentage of Americans who vote.[97]

As a result, one must be concerned about the argument in the debates over BCRA that the ban on soft money would hinder parties' efforts to mobilize voters and thus depress turnout. The Congress attempted to soften the financial blow to parties' mobilization programs by passing the "Levin Amendment" allowing state and local parties to use limited amounts of soft money to conduct generic voter registration and turnout efforts. This concession will surely help make more funds available in these areas. The more basic issue, however, is whether the broader ban on soft money will hamper parties' ability to boost turnout. The answer reflects our argument about how parties have come to function primarily as purchasers of campaign services in their attempt to aid individual candidates. The data show that parties devote relatively meager amounts of soft money to promoting turnout, and further analysis reveals that they have spent most of this money in ways that minimizes even this limited impact.

We begin by citing a scholar on parties' use of soft money, Professor Ray La Raja, also an expert for the plaintiffs in this case. Working with a database of more than 500,000 separate expenditure entries reported to the FEC by federal, state, and local party committees in 1999-2000, Professor La Raja and his coauthor divided these items into six categories including the parties' spending on "mobilization."[98] Spending on mobilization by federal, state, and local party committees summed to $49.6 million in 2000. From [43 (DEV. 1-Tab 2)] 1992 to 1998, state party spending on mobilization slowly grew from $8.6 million to $22.6 million, reaching $41.8 million in 2000.[99]

The question is whether $49.6 million is a lot or a little money. We are inclined toward the latter. In 2000, the parties' spending to promote turnout accounted for 10.4 percent of their $478 million in soft money expenditures.[100]

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[96] For example, Walter Dean Burnham, *The Current Crisis in American Politics* (New York: Oxford University Press), 1983.

[97] Steven J. Rosenstone and John Mark Hansen, *Mobilization, Participation, and Democracy in America*, (New York: MacMillan Press), 1993.

[98] Ray La Raja and Elizabeth Jarvis-Shean, "Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections, (Berkeley, CA: Institute of Governmental Studies and Citizens' Research Foundation Policy Brief), 2001, p. 3. Mobilization is defined as "costs of registering and contacting voters through direct mail, telephone banks, canvassing, and voter files." Note that this characterization includes activity that might be more geared to persuading voters than to reminding them to vote.

[99] *Ibid.*, p. 3 & 6.

[100] *Ibid.* Direct comparisons are available only for state parties in previous years. State parties' spending on mobilization ranged from 9 to 16 percent of their soft money expenditures during this period. In 2000, state parties devoted the most money to mobilization, $41.8 of the $49.6 million spent by parties at all levels.

Granted, it is not realistic to expect the parties could spend all of their soft money on mobilization. Overhead and fundraising are costly, accounting for 47 percent of their soft money spending. Traditional grassroots activities like yard signs, bumper stickers, and rallies added up to another 2.6 percent of their expenditures. The remaining amount was spent on "media" (33.4 percent) and "other/unidentified" (6.6 percent).[101] Thus, nearly half of all soft money went toward administrative or fundraising expenses, leaving parties with about fifty cents of every soft money dollar to spend on a variety of purposes including mobilization.

Moreover, turning out voters came in a very distant second to spending on media advertising. From our perspective, this allocation and the fact that the parties' media focused so heavily on specific candidates (p. 17) are indicative of a broader trend toward service parties. Just as we argue above that party building is of little importance to candidates in the midst of their campaigns, we conclude here that mobilizing voters was a far lower priority than airing television ads and competing for undecided voters. Whether spending three times more on media than on turnout efforts made good political sense for [44 (DEV. 1-Tab 2)] parties or for candidates they support is an open question. The parties obviously thought so, a decision that severely limited the amount available to spend on mobilizing voters.

C2. Mobilization expenditures in the 2000 election

Before dismissing the $49.6 million spent by the parties in 2000 on voter mobilization, it is important to consider the impact of these funds. We attempted to do so by replicating

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[101] *Ibid.* Media refers to cost of television, radio and print ads, including production costs. Other/unidentified are items whose purpose could not be determined including consultants.

Professor La Raja's coding of mobilization expenditures in the 2000 elections.[102] Using the same FEC data, we identified 28,157 entries totaling $40.4 million in soft money as relating to voter mobilization by searching the parties' descriptions of the purpose of their expenditure for a series of key words or phrases like "absentee" or "election day."[103] We are not able to replicate exactly La Raja's painstaking coding, but we are satisfied that we capture all of the main components of spending that he describes as mobilization and that the resulting data set is reasonably close to his specification.[104] Given the analysis we undertake, they are sufficient for our purposes.

Our inquiry focused on two related questions. The first is the actual activities on which party mobilization funds were spent, such as mail, phone banks, or canvassing. The second is whether these expenditures were for services purchased from [45 (DEV. 1-Tab 2)] subcontractors or whether they pay for activities actions undertaken by the parties themselves. Both questions are inspired by a set of papers by Professors Alan Gerber and Donald Green measuring the impact of different activities on citizen turnout rates. Their studies used an experimental approach in which randomly assigned groups of respondents were exposed to reminders to vote delivered via mail, telephone, or in person. Their conclusions are an emphatic endorsement of the importance of face-to-face appeals. Regardless of the model estimated and the set of controls introduced, Gerber and Green found the impact of canvassing to be many times the effect of phone calls or mail. For example, in a large-scale experiment conducted during an election in New Haven, individuals who had been canvassed turned out to vote at a rate 8.7 percentage points higher than those in the control group.[105] By comparison, the impact of mail and phone calls was minimal, barely distinguishable from zero.[106] The authors have subsequently replicated this finding in a variety of other studies.[107]

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[102] These data were compiled by Krasno with the help of Robert Biersack of the FEC, and further coded by Krasno. The data set is included in the CD provided as part of the Appendix.

[103] The FEC asks filers to describe the purpose of their expenditure in their own words. The result is thousands of different descriptions, largely due to variations in describing the same activity. Following La Raja, we coded descriptions including the following key words or phrases as mobilization expenses, regardless of their timing: "GOTV" (acronym for "get-out-the-vote"), "voter," "absentee," and "election day." In addition, we also categorized entries containing the words "phone," "mail," "postage," "slate," "printing," "canvass," or "list" as related to turnout if they were made in the last two weeks of the campaign. The FEC file includes allocations of federal and nonfederal, or soft, money. In this discussion, we focus on only the latter.

[104] One possible explanation for the disparity is our decision to limit certain mobilization expenditures to those occurring in the last two weeks of the campaign. La Raja is not clear about how to treat these items, but by focusing on late phone calls, direct mail and other outreach programs, we felt certain that we included only those activities whose impact on mobilization are most direct.

We divided turnout expenditures into these and several other categories by again searching for key words or phrases

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[105] Alan S. Gerber and Donald P. Green, "The Effects of Canvassing, Telephone Calls and Direct Mail on Voter Turnout: A Field Experiment, (*American Political Science Review* 94:653-663) 2000.

[106] *Ibid*, p. 659. Phone calls may be more effective if the caller is familiar, such as a college student calling another college student, the sort of circumstance that rarely occurs with the paid phone banks that predominate in campaigns. See Alan S. Gerber and Donald P. Green, "Do Phone Calls Increase Voter Turnout?: A Field Experiment," (*Public Opinion Quarterly* 65:75-85), 2001.

[107] These papers are available at Yale University Institute for Social and Policy Studies, *Voter Mobilization Experiments, at http://www.yale.edu/isps/publications/voter.html.*

in the description of the purpose of each item. For instance, we listed as canvassing any entry that made reference to "canvass" (includes canvassing and canvasser), "field worker," "literature drop," "poll worker," or "walker." In the end, we identified seven distinct categories of expenditures: canvassing, mail, [46 (DEV. 1-Tab 2)] telephone, media, voter files, administration, and other/ unspecified.[108] The results show that parties spent the largest amount of soft money on mail ($14.9 million), telephone ($10.8 million), and voter files ($4 million).[109] Canvassing, the category of greatest interest and greatest impact, lagged well behind with just $1.2 million invested. Most of the money for canvassing was used to pay people to go door to door.[110] As a result, the average soft-money expenditure for canvassing was just $168, compared to an average of $16,100 for each outlay for mail. Entries relating to canvassing account for more than one fourth of 28,157 cases in the data set, but these cases only comprise 3 percent of total spending.

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[108] Mail includes entries with the key words "mail," "postage," or "voter labels"; telephone includes "phone," "call," or "voter id"; media includes "ad," "advertising," "television," "TV," or "radio"; list includes "list," "voter record/abstract/data/disk/ history/ info/ file", "phone match." Administration includes rents, payroll taxes and a variety of reimbursements. Other/unspecified, the largest category, is dominated by expenditures like "GOTV," "Election Day worker," or "absentee ballot program" that are most likely canvassing, mail or telephone, but cannot be determined. Other/unspecified also includes almost $1 million of spending on consulting unrelated to the other categories.

[109] Voter files, a standard tool in modern campaigning, generally provide a list of registered voters in a locale. They may be purchased directly from jurisdictions or from list vendors who frequently add vital information like phone numbers or other contextual data to the file. These lists are particularly useful in guiding direct mail and phone banks so that campaigners may focus their efforts on citizens most like to turn out on Election Day, or, in the case of the recently registered, on those eligible to vote. They are probably of less value to canvassers who tend to go to all of the doors in a neighborhood, not specific doors.

[110] We reached this conclusion by observing the size of the expenditures and noting that the purpose of these expenditures— typified by entries like "Election Day canvasser" or "Poll worker"—appeared to refer to individuals hired. In addition, our analysis of a sample of

It is possible that some of the $8.4 million in the other/ unspecified category should be attributed to canvassing.[111] Unfortunately, descriptions like "voter registration" or "generic GOTV" make it impossible to determine whether the activity involved was canvassing or telephone or mail or something else. Even if we were to include all payments apparently made to individuals as canvassing, it would add less than [47 (DEV. 1-Tab 2)] $1 million to the total devoted to face-to-face contact.[112] Political parties in several states—led by the Democratic parties in Louisiana, Kentucky and New Jersey—did devote considerable resources to canvassing, but in other states such expenditures were minimal. Altogether, parties spent 20 times more soft money on phone calls and mail than they spent on canvassing.

The likeliest explanation for the neglect of canvassing is the organizational weakness of parties. Canvassing is not among the services routinely available from the campaign service industry, leaving parties to fend for themselves. But organizing an extensive face-to-face campaign—recruiting workers, providing materials and maps, handling logistics

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disbursements described below confirmed that most entries were payments to individuals.

[111] The same is true of the $4 million spent on voter lists, although in this case it is likely that these lists served the parties' phone banks and direct mail, not their door walkers.

[112] This is accomplished by recoding all entries from the other/ unspecified category where soft money expenditures were less than $200 as canvassing.

—is a fairly labor intensive enterprise, whether one uses volunteers or paid labor. This is the case, furthermore, whether the face-to-face persuasion takes place at a front door, the local mall, or a membership meeting. The fact that three state parties named above accounted for the vast majority of spending on canvassing (80 percent) suggests that most other state committees either did not have the capacity to organize a canvassing effort or were unwilling to devote the resources.[113] Gerber and Green speculate that "the long-term decay of civic and political organizations may have reached such a point that our society no longer has the infrastructure to conduct face-to-face canvassing on a large scale."[114]

[48 (DEV. 1-Tab 2)] We tested this hypothesis by examining expenditures of individual parties to determine whether they were for subcontracted services or for activities that the parties performed themselves. The sheer number of separate expenditures in the data set made it impossible to check the recipient of each payment. Instead, we drew a random sample of 250 expenditures and used the optical records maintained by the FEC to determine whether payments were made to a company for services or not.[115] Two hundred and twenty six of the items we scrutinized were payments to individuals or for services organized and conducted by the parties, while just 24 were disbursements to subcontractors. But the latter group included virtually all of the largest expenditures in our sample, so that total payments to subcontractors ($340,280) greatly exceeded spending on the parties' own activities ($78,957). This pattern is reflected in the larger data set as well. The 25 largest soft money expenditures accounted for over 15 percent of mobilization spending ($6 million). All of these large payments were made to subcontractors, and almost all of them were for direct mail or phone banks. By comparison, there were more than 19,000 separate expenditures of $50 or less that added up to just $550,000 of spending. Judging from the data of our sample, we would surmise that nearly all of these small disbursements involved activities that parties undertook themselves.

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[113] It is possible that large expenditures for canvassing in several other states may have been overlooked because of different reporting conventions. For example, an activity described as "GOTV canvassing" in Louisiana or New Jersey might have been called "Generic GOTV" elsewhere, making it impossible to determine the activity involved. The total amount of money at stake, however, is relatively small because of the low cost of hiring canvassers. As we note above, the average disbursement for canvassing was $168.

[114] Alan S. Gerber and Donald P. Green, "The Effects of Canvassing, Telephone Calls and Direct Mail on Voter Turnout: A Field Experiment, (*American Political Science Review* 94: 653-663, 662) 2000.

In sum, the parties' efforts to mobilize voters in 2000 were much less impressive than they may at first seem. The amount of soft money devoted to turnout efforts was a relatively small portion of the total amount available, and just a third as much as the [49 (DEV. 1-Tab 2)] parties spent on media advertising for their candidates. Even worse, the soft money that the parties did spend on mobilization went overwhelmingly to vendors to pay for phone banks and direct mail. These activities have been promoted as staples of modern campaigning for years, but research shows that they have almost no impact on the likelihood of citizens' voting. Rather, experiments show that old-fashioned, face-to-face appeals are most effective in inspiring people to vote. This sort of canvassing was once the traditional focus of state and local party organizations, but in their dedication to serving candidates they are no longer interested in personal campaigning, and in their disrepair they may not be capable of mobilizing their voters.

There is no law requiring parties to spend wisely. The effectiveness of various strategies is difficult to test, especially during the heat of a campaign, and techniques that may appear to work well in one election can become outmoded later. Rather, we are responding to the concern that banning soft money will cause turnout to decline. We find that allegation to be groundless for the simple reason that the parties have done little to mobilize voters in recent years. The money has been there, but the commitment and the infrastructure necessary to organize an effective mobilization campaign have been missing. The parties have chosen to spend far more money to promote candidates than to turn out their vote, and they have chosen to hire others to send letters and make phone calls rather than organize their own, more personal effort to get people to the polls. There is more than enough hard money available to replace the soft money that parties have spent on mobilization, but it will be up to the parties to find ways to spend it usefully.

[50 (DEV. 1-Tab 2)] II. Issue advocacy

A. Regulating issue advocacy

A1. Candidate ads, candidate-oriented issue ads and pure issue ads

It took nearly twenty years for parties, interest groups, corporations, trade associations, unions and wealthy individuals to recognize that they could bypass FECA and still run thinly-veiled campaign ads by avoiding words that directly exhort viewers to vote for or against a candidate. These entities rely on the so-called "magic words" test to argue that their ads are not federal electioneering, but instead are speech about the issues of the day. For organizations and individuals who wish to aid their favorite candidates with television ads, the advantages of doing so in a way that avoids FECA's regulatory scheme are profound. Avoiding FECA allows advertisers to collect any sum of money from any source they can. Avoiding FECA allows advertisers to conduct their operations without disclosing their activities to the public. Issue advocates may even rename themselves; so, in 2000 the Pharmaceutical Research and Manufacturers Association became "Citizens for Better Medicare" and two brothers from Texas became "Republicans for Clean Air," organizations that sound more impressive and credible than their true sponsors.

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[115] Most of these calls were easy to make. Payments to individuals were obviously signs of party activity, as were expenditures for stamps (though large payments may have been made on behalf of direct mail vendors) or for food or catering. We also categorized several large payments to local party organizations as expenditures by the parties themselves, though we could not be sure this money was not passed on to one or more subcontractors.

The first candidate-oriented issue ads were aired by the DNC in 1995 to promote President Clinton and immediately inspired more sizable campaigns the next year as labor unions and pro-Republican business groups turned to issue advocacy to support congressional candidates. Soon the practice became widespread. The Annenberg Public Policy Center estimated spending on issue advocacy at $135 million in 1996, and $509 [51 (DEV. 1-Tab 2)] million just four years later.[116] Using media tracking data, other scholars estimated expenditures on airtime alone in the top 75 media markets at

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[116] Deborah Beck, Paul Taylor, Jeffrey Stanger and Douglas Rivlin, , "Issue Advocacy Advertising During the 1996 Campaign (Annenberg Public Policy Center, 1997), p. 3; Kathleen Hall Jamieson, Lorie Slass, Erika Falk, "Issue Advertising in the 1999-2000 Election Cycle" (Annenberg Public Policy Center, 2000), p. 4.

$31 million in 1998 and $260 million in 2000.[117] The disparity between the Annenberg figures and the expenditures for airtime is actually smaller than it may appear once overhead, expenses, inflation, and other costs are factored in.[118] By comparison, the same media tracking data show candidates spent $141 million on airtime in 1998 and, with the addition of a presidential race, $334 million in 2000.[119] Issue advocacy has come to rival, and in some cases outpace, advertising by federal candidates.

These issue ads, which appear overwhelmingly in the period just preceding Election Day, have had a great effect on campaigns and thus on elections. Especially in the most competitive districts—such as the Detroit media market where competitive presidential and senatorial races in 2000 prompted parties and groups to air almost 10,000 issue ads in just five weeks following September—viewers saw and frequently complained about a seemingly endless stream of political ads. At the same time, candidates struggled to regain control of their own campaigns in the aftermath of ads, and they also often confronted a shrinking supply of airtime for their own ads. The central regulatory question raised by this flood of issue ads never went away: should these ads [52 (DEV. 1-Tab 2)] be considered as federal electioneering, "working for the election of a candidate or party," as Webster's dictionary defines it?[120] The answer is critical, for if these commercials are campaign ads they should certainly be treated in the same way that the law treats other campaign ads, but if they are genuine discussions of policy issues, there is no need to regulate them in the same manner.

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[117] See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

[118] See Jonathan S. Krasno and Daniel Seltz, *Buying Time: Television Advertising the 1998 Congressional Elections*, (New York: Brennan Center), 2000, p. 197. The estimated cost of each ad is almost certainly low, especially for issue advertisers who are not able to take advantage of "lowest unit rate" occasionally available to candidates.

[119] Since the presidential campaigns are limited to the size of their public subsidy the campaigns have turned to parties for any additional advertising on their behalf. Virtually all of the commercials run by parties in the presidential campaign were issue ads. In addition, the race for the White House attracted greater involvement by an assortment of groups sponsoring issue ads. See Expert Report of Kenneth Goldstein.

The preponderance of evidence says that these ads are federal electioneering. Many of their sponsors have been frank about their intent to influence elections. For example, the AFL-CIO in the first issue ad campaign in House elections in 1996 acknowledged its intent to help Democratic candidates, and its results were measured accordingly.[121] The Club for Growth, a conservative Republican group, bluntly discusses its electioneering activities on its website; they include direct contributions, bundled contributions, and issue ads.[122] The goals of the parties, especially in presidential elections where candidates and their agents have been intimately involved in planning and paying for their party's ads, can hardly be doubted. Survey results show that citizens overwhelmingly view these advertisements as intended to

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[120] All references to electioneering should be taken as federal electioneering only.

[121] See Kevin Galvin, "Sweeney Unveils Reform Blueprint for Labor Federation," Associated Press, January 26, 1996.

[122] The Club for Growth, *Election 2000 Wrap-up, What's Next?, at http://www.clubforgrowth.org/news/wrapup.html*.

influence their support or opposition to particular federal candidates.[123]

Whatever may have been the intention of the sponsors of these ads, none of them used magic words. Two questions emerge: Does the magic words test distinguish between pure issue advocacy and federal electioneering? If not, would the alternate standard in BCRA work better? These questions are, for some observers, ideological. [53 (DEV. 1-Tab 2)] We regard them as essentially empirical matters to be evaluated in light of advertising practices in the last two election cycles. We address the first question (about the magic words test) in this subsection and the second (about BCRA's regulation) in the following subsection by examining media tracking data from 1998 and 2000 for the nation's 75 largest media markets.[124] Our analysis focuses on three types of ads: candidate ads, "candidate-oriented" issue ads and "pure" issue ads.[125] The first category represents the lion's share of all mass communications treated as electioneering under FECA.[126] The second two categories represent the vital First Amendment question faced by the sponsors of BCRA as they attempted to create a means to objectively define candidate-oriented issue ads without unintentionally regulating pure issue ads.

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[123] David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building, at http://www.byu.edu/outsidemoney/dictum/index.html.*

[124] We analyze a data set on television advertising compiled by a commercial tracking firm, the Campaign Media Analysis Group. Coding of these ads was supervised by Professor Ken Goldstein of the University of Wisconsin. These data are available for scholarly use going back to 1998. For more information, see Wisconsin Advertising Project, *at http://www.polisci.wisc.edu/tvadvertising* (last updated July 27, 2002).

[125] These candidate-oriented issue ads are also referred to as "sham" or "electioneering" issue ads. "Pure" or "genuine" issue ads address a public policy matter without promoting the prospects of a federal political candidate.

[126] Two other types of advertisements are also regulated by FECA: those which are either coordinated expenditures and independent expen-

The most direct way to evaluate the magic words test is to apply it to ads whose purpose—and origin—are clear. Commercials produced by candidates' campaigns are a perfect test group because their intent is self-evident, and they are regulated by FECA regardless of their language. Federal candidate ads appeared nearly 236,000 times in the top 75 media markets in 1998, 430,000 times in 2000. In 1998, just 4 percent of these spots used verbs like "vote for," "elect," or "defeat"; in 2000, just 5 percent did. Including slogans like "Smith for Congress," 10 percent of the candidate ads aired in 2000 would qualify as electioneering using the magic words test. The remaining 90 percent could have been categorized as issue advocacy had a party or group sponsored [54 (DEV. 1-Tab 2)] them. In short, the magic words test improperly categorizes candidate ads 9 times out of 10.[127]

One reason for this outcome may be that advertising practices have changed in the years since *Buckley*. No comparable data are available from that time period with which to test this hypothesis.[128] We believe, though, that the practices of political advertisers are not dissimilar from those of commercial advertisers. Car ads rarely exhort viewers to "buy" a Chevrolet, nor do soft drink ads urge people to "drink" their product. The most aggressive ads usually urge viewers to do no more than call or visit a website for information.[129] In fact, commercial advertising is often so subtle that the object of the commercial, though always present, is difficult to discern. This atmospheric approach to commercial advertising—where the product is presented in various desirable tableaus—has become increasingly popular. It serves the general strategy of advertisers to present viewers with a variety of reasons to choose their product, hoping that they will latch onto one. Too heavy-handed an approach might interfere with this process by raising viewers' defenses. Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls. That may or may not be an effective approach, but it is the one that advertisers use and that regulators and courts must reckon with.

If the magic words test fails to distinguish between candidate ads and either type of issue ads, what does? We separated candidate-oriented issue ads from pure issue ads [55 (DEV. 1-Tab 2)] with the help of undergraduate coders at the Universities of Arizona and Wisconsin who evaluated commercials by answering the following question:[130]

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ditures by parties and groups. Both are vastly outnumbered by candidate commercials.

[127] Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

[128] Krasno examined a videotape of 1976 advertisements for President Ford compiled by the Ford Presidential Library. Direct comparisons are impossible because there is no information about how often each of the separate commercials aired. Nonetheless, while the format and production values of these ads were noticeably different than today's, most of the individual spots did not use the language of footnote 52.

[129] Shopping channels, other products only available directly from a warehouse or distributor, and public television fundraising drives are obvious exceptions.

[130] Discussion of the media tracking data relies on earlier work or additional analysis performed by Krasno.

> In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?[131]

Several points speak to the accuracy of the coding of this item. The degree of inter-coder reliability was extremely high, even though no training was provided.[132] More reassuring, however, are several measures of criterion validity. Coders correctly regarded virtually all ads by candidates and parties as electioneering, while approximately half of the commercials sponsored by interest groups were rated as pure issue advocacy.[133] Moreover, the proportion of group ads categorized as electioneering increased sharply in the months immediately preceding the election.[134] That timing validates the coders' judgments.

The similarities between candidate and candidate-oriented issue ads, and the differences between these two types of commercials and pure issue ads do not end there. The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates. Candidate names appear in virtually all of these spots, with candidates

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[131] For the full text of the coding protocol see Jonathan S. Krasno and Daniel Seltz, *Buying Time: Television Advertising the 1998 Congressional Elections*, (New York: Brennan Center), 2000, p. 193-5.

[132] The hope was to allow each student to assess the various ads using their own common sense rather than imposing a uniform standard. It is noteworthy that Professor Goldstein reports little confusion over this or any of the other items on the coding protocol.

[133] We refer here and elsewhere to the number of times commercials aired, not the number of discrete spots produced and aired at least once.

[134] The rise for pure issue ads was much less pronounced. See Appendix, Table 6. This Appendix includes a variety of tables providing additional information about the 1998 data set.

most likely to identify themselves in their ads and candidate-oriented issue ads most likely to identify the opposing candidate (in some pejorative way). Pure issue ads, on the other hand, were much less likely to mention a candidate for federal [56 (DEV. 1-Tab 2)] office: candidates were featured in the text or video of just 6.4 percent of pure issue ads in 1998.[135]

Candidate ads and candidate-oriented issue ads also tended to cover the same themes. For instance, the top five issues raised in candidate ads in 1998 and 2000 were education (mentioned in 30 percent of ads), health care (27 percent), taxes (27 percent), Social Security (24 percent) and the background of the candidate (18 percent).[136] Candidate-oriented issue ads stressed virtually the same list of topics: health care (28 percent), Social Security (20 percent), taxes (20 percent), education (18 percent), and Medicare (17 percent). By contrast, pure issue ads stood out a bit for their content. The most popular themes in these spots, health care (29 percent) and Medicare (28 percent), are familiar, followed by a cluster of topics only one of which was the frequent focus of candidate-oriented issue ads: environment (9 percent), trade (9 percent), taxes (8 percent), and China (7 percent). It is clear that one of the arguments for issue advocacy—that it may introduce subjects ignored by the candidates—applies with greater validity to pure issue advocacy than to the candidate-oriented issue ads.

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[135] Ads were counted as identifying a federal candidate only when aired before the audience of his or her constituents. So, for example, a commercial about the McCain-Feingold bill only identifies candidates when it appears in the home states of Senators McCain and Feingold, not when it appears elsewhere. BCRA makes the same distinction.

[136] Ads were coded as having up to four themes. Coders chose from a list of approximately 60 issues in response to the following item: "Attached are a list of issues that frequently come up in the course of political commercials, such as education, the environment, and taxes. Please list the ones that come up in this ad in the order in which they appear." See Wisconsin Advertising Project at, http://www.*polisci.* wisc.edu/tvadvertising (last updated July 27, 2002).

Moreover, candidate ads and candidate-oriented issue ads also touched on more themes in each spot (averaging 2.6 and 2.2 themes in each commercial aired) than did pure issue ads (average of 1.3).[137] This pattern is consistent with our earlier observation that commercial advertising routinely provides viewers with a variety of causes to choose [57 (DEV. 1-Tab 2)] their product. Pure issue ads, however, appear less concerned with selling a product than with expressing a particular point of view or urging action on a specific policy matter before Congress.[138]

Finally, there is perhaps the most objective element of all: the timing of these ads. Candidate and candidate-oriented issue ads overwhelmingly appeared in the months before Election Day. Seventy-nine percent of the commercials aired by candidates in 1998 and 85 percent of candidate-oriented issue ads appeared after August. In 2000, the surge of advertising during the presidential primaries lowered the percentage of candidate ads aired during the last third of the year to 67 percent. Candidate-oriented ads followed suit with 74 percent appearing after August 31. By contrast most of the pure issue ads aired in 1998 (59 percent) and almost all the pure issue ads aired in 2000 (81 percent) appeared before September.[139] These findings reflect the different purposes of these advertisements. Commercials sponsored by the candidates and candidate-oriented issue ads are geared to Election Day and appear with increasing frequency as November approaches. Furthermore, as illustrated in Tables 4 and 5 in the Appendix, these ads are narrowly targeted to air in only the most closely contested elections. Pure issue ads are more likely to respond to the congressional calendar or an advertising strategy unrelated to an election.[140]

[58 (DEV. 1-Tab 2)] Our examination of advertising shows that there were two distinct types of issue ads broadcast in 1998 and 2000: candidate-oriented and pure issue ads. The first are similar to ads sponsored by candidates for their emphasis on individual candidates, their thematic content, and their timing, as well as viewers' perceptions of their intent. Pure issue ads differ from the candidate-oriented variety in all of these ways. They rarely mention federal candidates. They emphasize a somewhat different set of issues and focus more narrowly on a single topic. They air throughout the year. They appear to viewers to express a point of view unrelated to the upcoming election. The magic words test, however, does not distinguish between these two distinct types of issue ads; indeed it does not distinguish between ads sponsored by candidates and any type of issue

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[137] This is the average number of themes identified by coders for each spot from the list provided.

[138] Furthermore, pure issue ads are largely prospective in their emphasis, either asking viewers to lobby officeholders regarding a future action or to change their opinion on some matter. Candidate-oriented issue ads are overwhelmingly retrospective in that they look back in time to characterize candidates' previous actions, occasionally using these evaluations to speculate about their future behavior.

[139] See Table 6 in the appendix to this report and its corresponding table in the Expert Report of Professor Kenneth Goldstein.

[140] For additional information about the targeting of issue ads in competitive races see Appendix, Tables 4 & 5. For a graphic representation of the timing of advertising and the congressional calendar, see Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212, 2002).

ad, or even between political and commercial advertising. Whatever its utility might once have been, this standard is now irrelevant to how political ads are designed. We are left with a crucial distinction that no longer distinguishes, one that consequently created a loophole in FECA through which emerged a whole new form of unregulated campaigning in federal elections. The result has been to devastate the regulatory structure Congress established in 1974.

A2. BCRA's regulation of issue advocacy

The BCRA contains several provisions that define electioneering communications. For state parties, the law redefines "federal election activity" as public communications that refer to a clearly identified federal candidate and promote, support, attack, or oppose that candidate.[141] For interest groups, the standard is different: electioneering communications are those that refer to a clearly identified federal [59 (DEV. 1-Tab 2)] candidate (within the area in which they are running), and appear within 30 days of the primary or 60 days of the general election. By distinguishing between different sponsors of ads, the Congress is merely following its own lead in FECA whereby all expenditures by candidates are treated as campaigning. Given parties' avowed purpose of winning elections, it makes sense to include their communications that mention a candidate within FECA, regardless of when those communications appear. Interest groups, however, may have a different set of goals, thus the risk of confusing their communications about issues with their electioneering is much greater. BCRA attempts to minimize this danger by taking a more permissive approach to their

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[141] BCRA provides no special definition of issue advocacy for national parties but instead requires them to finance all of their activities with hard money.

advertisements by using the calendar to limit the period in which their speech might be treated as electioneering to 90 days over a two-, four-, or six-year federal election cycle. We focus on that attempt here.

The logic of BCRA's approach for groups seems compelling. At a minimum, advertisements intended to aide the fortunes of a political candidate must identify that candidate or his opponent and appear proximate to the election. Any ad that fails to mention the favored candidate or his opponent would likely be too obscure to affect a public whose normal attention to politics is short, as would an ad appearing more than two months from Election Day. A third consideration, words that make a direct appeal for the viewer's vote, may also indicate electioneering. As we have noted, however, language expressly advocating the election or defeat of a particular candidate has rarely been a part of campaign ads. The same data show that mentioning or picturing a candidate in the weeks leading up to an election were central elements of electioneering communications. BCRA defines campaign advertising in a way that makes sense both logically and empirically.

[60 (DEV. 1-Tab 2)] Does this definition also inadvertently sweep an unacceptable amount of genuine issue speech into the electioneering category? We addressed this question by using the media tracking data from 1998 and by referring to the Expert Report filed by Kenneth Goldstein about the 2000 data. In both years, the universe of genuine issue ads sponsored by parties is defined by coders' assessment of the purpose of these ads (see p. 55 above). Interest groups aired 11,785 pure issue ads in 1998, and almost four times that amount, 45,001, in 2000.[142] But only a small fraction of these airings—6 percent in 1998 and 3 percent in 2000—appeared within 60 days of the general election and identified a federal candidate and, thus would have been regulated as federal electioneering.[143] These affected airings included nine separate commercials, three in 1998 and six in 2000, which aired 713 times in 1998 and 1,413 times in 2000.[144] While BCRA has very little effect on pure issue advocacy, its impact on candidate-oriented issue ads is striking. In 1998, 58 percent of candidate-oriented issue ads by groups identified candidates and appeared within 60 days of the election, and in 2000, 67 percent did. These, of course, are the spots

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[142] These numbers differ slightly from those reported earlier by Krasno and Seltz and by Krasno and Goldstein because of additional coding performed for this litigation. For further discussion, see Appendix.

[143] The 2000 edition of *Buying Time* estimates the impact of BCRA differently. Instead of calculating its effect on genuine issue advocacy by dividing the number of "false positives"—pure issue ads incorrectly treated as electioneering by BCRA—by the number of pure issue ads aired throughout the year, the 2000 volume divides the number of false positives by the total number of group ads in the last 60 days that mention a candidate. The last number combines the false positives with the "true positives"—the candidate-oriented issue ads that BCRA was intended to affect. As a result, it is enormously susceptible to fluctuations in the volume of candidate-oriented issue advocacy. Since the absence of a presidential campaign in 1998 dramatically reduced the number of these ads, applying the 2000 edition's formula to the 1998 data set yields a different result for BCRA's 1998 impact: 14.7 percent. For a further discussion of these calculations see Appendix.

[144] One spot was added to earlier reports about 1998: a commercial featuring Senator John Breaux praising the good work done on teen alcoholism by Century Council and the Boys and Girls Club, and providing a toll-free number. This spot appeared one time in New Orleans just before the 60-day general election period began and two times immediately afterward.

that the Congress intended to regulate. It is clear that BCRA does a good job [61 (DEV. 1-Tab 2)] hitting what it is aiming at (candidate-oriented issue ads) and missing what it is not (pure issue ads).

Critics will surely complain that this analysis depends on subjective judgments made by coders about the purpose of the commercials. We believe those assessments, however subjective, are supported by a variety of additional criteria (see pp. 55-57). But the more important point is that these assessments correspond closely to the objective standards established by BCRA. BCRA's definition of electioneering is simple, concise, easily understood, and intuitively sensible.[145] The fact that it performs so well against the subjective impressions of individuals who examined the ads reassures us that this provision works as it was intended. The BCRA standards offer clear guidance to advertisers, and they separate candidate-oriented from pure issue ads quite effectively.

Critics will also question the impact of the 30-day period preceding primaries on our estimates of the percentage of pure issue ads affected by BCRA. The hodgepodge of different primary dates makes it difficult to factor this period into the analysis, but we are confident that it would have little effect on the proportion of pure issue ads incorrectly captured by BCRA for the simple reason that so few of these advertisements mention candidates at all (p. 55). Indeed, our examination of 1998 shows this to be true: no pure issue ads would have been captured by the 30-day primary period.[146] In fact, we would argue that the percentages of issue ads affected by BCRA that we report are likely too [62 (DEV. 1-Tab 2)] high, perhaps much too high. The data from which these estimates are derived cover broadcasting only during the 1998 and 2000 calendar years, not the thirteen-plus months preceding them. Were we able to factor in the total number of pure issue ads that appeared between elections, the percentage of pure issue ads affected by BCRA would decline.[147] We have no data about how such spots aired during these missing time periods, but we have no reason to assume—given the lack of relationship between pure issue ads and the election—that these numbers were much higher or lower than we observed during 1998 and 2000. We do know, however, about those two years, when we combine them to simulate BCRA's effect on a longer four-year period, the results change slightly and offer further reassurance about the legislation's small impact on genuine issue advocacy.[148] In short, BCRA is remarkably successful in differentiating

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[145] Coders reported no problem determining whether a candidate was identified in any spot. Rather, the only source of confusion was whether an individual mentioned in an ad was a candidate or someone else. Advertisers may try to circumvent this criterion by seeking ways to refer to a candidate without clearly identifying him or her, but the more obscure these references become, the less certain their impact. In the end, we doubt many advertisers will adopt this approach.

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[146] This turned out to be fairly simple to calculate since only one additional advertisement—a spot by the National Federation of Independent Business touting its work with Congressman Sununu (R-NH) on tax simplification—identified a federal candidate in his or her district. This commercial appeared in Boston in January of 1998, long before New Hampshire's congressional primary.

[147] Since BCRA's impact is properly measured over the full life of an election cycle, it is appropriate to include all the pure issue ads that appear during this period in the analysis. See Appendix.

[148] It is worth noting, for example, that all of the pure issue ads affected by BCRA in 1998 involved Senate candidates, suggesting a six-year analysis is appropriate. By combining the two years for which we have data, however, we find that BCRA would have affected 4 percent of pure issue ads aired. Using the *Buying Time 2000* formula produces an even lower estimate: 3 percent. See Appendix.

between the vast majority of pure issue ads and candidate-oriented issue ads.

Nevertheless, the ACLU has demonstrated with a commercial about gay rights, aired in House Speaker Dennis Hastert's district last spring before the GOP primary, that it is possible to deliberately create a pure issue ad that runs afoul of BCRA. This episode deserves special scrutiny, and we would emphasize several points. It is telling, from our perspective as students of elections and campaigns, that the ACLU was forced to fabricate its own example of a pure issue ad that would be improperly categorized by BCRA. Given the huge numbers of issue ads broadcast in 1998 and 2000, if plaintiffs are correct in their dire predications about how BCRA would damage free speech rights, it [63 (DEV. 1-Tab 2)] should have been easy to find numerous real-life examples to illustrate the same point. In fact, very few pure issue ads would have been affected by BCRA. Even more telling, however, the ad that the ACLU ran was designed in a specific way to trigger BCRA. It need not have done so.

This point deserves amplification. Why did so few pure issue ads broadcast during 1998 and 2000 refer to a federal candidate and appear close to Election Day? Most were concerned only with issues, seeking to move public opinion on abortion or trade or unions. Candidates were irrelevant to these appeals; in fact, invoking them might unnecessarily politicize the underlying message of these ads and undermine their effectiveness. As for the ads attempting to lobby the government about a particular policy, some of these spots mentioned specific officeholders, like Hastert, but most of the examples we examined did not.[149] Rather, viewers were asked to contact their Representative or their Senators, not specific individuals. This approach reflects the fact that media market boundaries are determined by the strength of their transmitters, not the boundaries of election districts. For example, the dominant media market in Hastert's district—Chicago—also reaches more than half the homes in thirteen other House districts. By focusing only on Hastert, more the 90 percent of the viewers, represented by other Members of Congress were essentially excluded from the message of this ad. In the real world, an advertiser in the Chicago area would have little reason to target an appeal [64 (DEV. 1-Tab 2)] so narrowly since any pressure exerted on any member of Congress is likely to serve their cause, even if only to bolster its supporters.

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[149] Our evidence is mainly impressionistic, since coders were not asked to record whether ads asked viewers to contact Congress or their

The practices of issue advocates in 1998 and 2000 suggest several alternative approaches for the ACLU, had it wished to air its ad without crossing the line dividing issue advocacy from electioneering. It could have—like most spots seeking to lobby Congress—urged its audience to contact their representative without identifying Hastert by name. Even if the Speaker was the only target of the ad, he could hardly have overlooked a surge of letters and phone calls reported by other Republicans (or even Democrats) in the Chicago area. Alternatively, the ACLU could have run its spot earlier

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(unnamed) senators or representatives. Nonetheless, we do note the pattern exhibited in ads sponsored by Citizens for Better Medicare, an industry group that was the largest sponsor of issue ads in 2000 (see Expert Report of Kenneth Goldstein). Coders rated a large majority of their commercials as pure issue ads. None of these spots named a specific member of Congress; rather they asked viewers to "call Congress." By contrast, CBM ads coded as electioneering in their intent did use candidate names. There is another clear distinguishing feature between these two sets of ads: the pure issue ads aired mainly before September, but the candidate-oriented ads aired exclusively after Labor Day.

or later to avoid the 30-day period before the primary. The fact that most pure issue ads did not appear proximate to Election Day suggests that this is a viable strategy.[150] Advertisers engaged in battles over specific votes go public when the congressional calendar demands; thus, commercials lobbying Congress often appear many months from any election. Certainly, legislators pay special attention to public opinion during their campaigns, but the evidence is overwhelming that they attend to their constituents' desires throughout their terms.[151] If neither of these options was appealing, the ACLU could have run its ad with hard money and reported its expenditure to the FEC as an independent expenditure. Finally, the ACLU might simply have used mail, the Internet, print ads or phone banks to deliver its message.

In the end, it is clear that the sheer scope and volume of candidate-oriented issue advocacy since 1996 has been enormous. Initial reports suggest that the 2002 election is [65 (DEV. 1-Tab 2)] shaping up as more of the same and, without BCRA, we would expect the trend to continue. Candidate-oriented issue ads have accounted for hundreds of millions of dollars of unreported campaign spending, and in some races —starting with the presidential contest—have exceeded advertising expenditures by the candidates. The widespread use of candidate-oriented issue ads circumvents the will of Congress, one upheld repeatedly by the Supreme Court, to limit the source and amount of campaign contributions and to require public reporting of receipts and expenditures for federal election campaigns. The Congress, thus, had substantial provocation to act to restore and protect the advances made under FECA.

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[150] There is a solid practical reason to avoid the crowded period right before an election, particularly a heavily contested one: the availability and price of airtime.

[151] For example, see Anthony King, *Running Scared: Why Politicians Spend More Time Campaigning Than Governing*, (New York: Simon & Schuster), 1998.

In conclusion, we believe that the impact of BCRA is primarily an empirical question best evaluated with the extensive data on issue advocacy developed over the last half dozen years. Advertising data show that there are two distinct types of issue ads, those that are basically candidate-oriented and electioneering in nature, and those that only present or urge action on an issue. The former are nearly identical in format, structure, and timing to ads produced by candidates, while the latter bear little or no resemblance to electioneering. These data also reveal that BCRA's definition of electioneering communications for interest groups distinguishes extremely well between these two sorts of issue ads, with the number of false positives—pure issue ads mistakenly categorized as electioneering—being but a very small fraction of the total ads of this type. Furthermore, the variety of formats in which pure issue ads appeared suggests that advertisers who wish only to address an issue can easily take one of several steps to avoid triggering BCRA. In short, the formula that Congress has developed is successful in realizing it own goal of regulating the great mass of candidate-oriented [66 (DEV. 1-Tab 2)] issue ads while affecting very few pure issue ads. Naturally, we wish that no pure issue ads would be inadvertently touched by BCRA, but the chaotic world of advertising is not so easily managed. We are satisfied that BCRA has a minimal effect on genuine issue advocacy, offers advertisers clear guidance and an array of options that serve nonpartisan purposes, and is, in short, a reasonable response to a serious threat against the existing campaign finance system.

B. The corruptive potential of issue advocacy

B1. Defining corruption

In our earlier discussion of soft money we argued that corruption encompassed bribery, undue influence and the more extreme forms of privileged access. We stand by that definition here, as we turn to issue advocacy. The following subsection (B2) provides an analysis similar to our evaluation of the corruptive potential of soft money, showing how issue ads may influence policy-makers to grant favors and access to those who purchase them.

The use of candidate-oriented issue ads for electioneering by an array of established interest groups, freshly minted "organizations," and parties in the last several election cycles has also created a broader set of problems about elections that we will address in this subsection. Our decision to place this discussion here is inspired in part by the Supreme Court's earlier concern for the "integrity of the electoral process," the controlling interest in campaign-finance and related jurisprudence before *Buckley*.[152] Indeed, by previous standards—and from our own perspective as long-time students of [67 (DEV. 1-Tab 2)] elections—we regard the recent use of issue ads as inimical to the integrity of the electoral system and, in that respect, corrupting.

We would judge the health of the electoral system by a few simple criteria. The first is choice: elections should offer voters an alternative between two or more candidates with a reasonable chance of winning. As desirable as it would be for voters to like their choices, it is even more essential that more than one of the names on their ballot have some possibility of election. This suspense, of course, raises the stakes of voting for citizens and spurs turnout. It also provides the chief means for popular control of elected officials; legislators for whom defeat is unthinkable have much less incentive to heed or serve their constituents than officials whose careers are even slightly precarious. Obviously, practical considerations like the underlying partisanship of many jurisdictions and the popularity of many incumbents shrink the odds of truly competitive elections in most states and districts. Even taking these considerations into account, however, the number of contested races, particularly for the House of Representatives, has sunk to dangerously low levels: as of August 6, non-partisan observers believe that just 39 House districts out of 435 are "in play" in the 2002 elections, a phenomenally small number in a redistricting year and one that leaves more than 90 percent of Americans living in districts written off this November.[153]

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[152] This includes two of the main precedents cited by the *Buckley v. Valeo*, 425 U.S. 946 (1976) court, *Burroughs v. United States*, 290 U.S. 534 (1934) and *Ex parte Yarbrough*, 110 U.S. 651 (1884). See Frank J. Sorauf, "Caught in a Political Thicket: The Supreme Court and Campaign Finance," (*Constitutional Commentary* 3:1 (1986)); Frank J. Sorauf, "Politics, Experience, and the First Amendment: The Case of American Campaign Finance," (*Columbia Law Review* 94:2 (1994)).

Second, we would point to the importance of citizen participation. Voting is the main form of participation, but not the only one. Citizens may also participate in politics by becoming candidates for office, an enormous but vital commitment. Scholars are largely agreed that the difficulty in recruiting candidates is a principal reason for the lack [68 (DEV. 1-Tab 2)] of competition in elections.[154] We should

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[153] Adam Nagourney, "Economy Stirs G.O.P. Worry In House Races," *New York Times* (Aug. 6, 2002).

[154] For example, see Gary C. Jacobson and Samuel Kernell, *Strategy and Choice in Congressional Elections* (New Haven: Yale University Press, 1984).

also not forget another group of participants, the shrinking percentage of Americans who volunteer on election campaigns or partisan endeavors.[155] These activists have always been a small minority of the population, but their energy and commitment are vitally important to the system. On a practical level, we know that personal face-to-face contact is the most effective way to increase voting. But our interest in volunteerism is broader, for we would argue that politics—and political careers—begin with local associations, local issues, and local organizations. Replacing that activity with a system driven by cadres of professionals, mainly in Washington, threatens to turn citizens into passive consumers of politics instead of active participants.[156]

Finally, there is accountability, a term we used earlier with reference to parties. In this case, however, we refer not just to voters' ability to hold groups of officials responsible for the actions of government, but their ability to assess individual candidates on their own actions and words. Much as we might like to see more informative and perhaps higher-minded campaigns, we know of no easily applicable standards to judge them or means to achieve them. Instead, we do insist on the simpler idea that it be relatively uncomplicated for voters to associate candidates with the ideals they actually espouse, the programs they actually propose, and the tactics they actually use. Transparency, a main goal of both FECA and BCRA, is indispensable for informing vote [69 (DEV. 1-Tab 2)] choice and influencing candidates' behavior in addition to its value as a deterrent to influence peddling.

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[155] Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000), chapter 2.

[156] For a broader discussion of the larger issue, see Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000).

The explosion of candidate-oriented issue ads undermines all of these goals. To begin with, issue advocacy has radically escalated the financial arms race for candidates and all other participants in elections. The average spending by winning House candidates has nearly tripled over the last twenty years with almost half of that increase coming after the first widespread use of issue ads in 1996.[157] Astonishing as the average expenditures of 2000's winners—over $850,000—may seem, this number is actually misleading because the vast majority of incumbents faced little more than token opposition. Candidates in the most competitive races averaged closer to $1.5 million.[158] Issue ads have helped drive these expenditures up by forcing candidates to consider not only what their opponents may do with hard money but also what outside groups do with soft money. Candidates have responded by raising more, spending more, and saving more; FEC reports show candidates with considerably more cash on hand following the 1998 and 2000 elections than previously.[159] And parties, given the opportunity to avoid limits on coordinated expenditures that encouraged them to allocate their resources over many states and districts, have spent most of their issue advocacy dollars on

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[157] Federal Election Commission, *FEC Reports on Congressional Financial Activity for 2000, at http://www.fec.gov/press/051501congfinact/051501congfinact.html* (May 15, 2001).

[158] *http://www.cfinst.org/studies/vital/3-3.htm.*

[159] For House figures see Federal Election Commission, *Financial Activity of General Election U.S. House of Representatives Candidates —1988-2000, at http://www.fec.gov/press/051501congfinact/tables/gehouse.html* (May 15, 2001). For Senate figures, see Federal Election Commission, *Financial Activity of General Election Senate Candidates—1988-2000, at http://www.fec.gov/press/051501congfinact tables/gesenate.html* (May 15, 2001).

just a [70 (DEV. 1-Tab 2)] handful of the best-funded House and Senate candidates, further raising costs in these races.[160]

This increased spending raises the fundraising bar for candidates and potential candidates. For individuals contemplating a run for federal office, the question that they have long been confronted with—"how much money can you raise?"—has taken on new urgency and new dimensions as the price of viability goes up and up.[161] It is obvious that the rising costs likely price some potential candidates out of the market, affecting both the nature of choices in many races (due to the effort to recruit rich candidates able to finance their own campaigns) and its existence in others (where potentially viable candidates choose not to run).[162] For the candidates who do run, the constant attention to their fundraising becomes another hurdle as parties and groups who run issue ads try to "target" their efforts in races where their spending might tip the balance. Thus a challenger who has raised $1 million (no longer such an impressive amount) and is a half dozen points back in the polls is seen as a less fruitful investment than one who has raised $2 million and is only three points behind, even though victory seems solidly in reach for both of them. The result is that standards of viability rise steadily, leaving fewer races that seem winnable or worth investing in. Put another way, we find it highly unlikely that [71 (DEV. 1-Tab 2)] just 39 House seats are "in play" this November[163] in the sense that victory is an all but foregone conclusion for one of the candidates, especially in early August when most campaigns have barely begun to contact the public.

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[160] This reflects the parties' effort to choose races where their involvement might tip the balance. But with parties and many interest groups all trying to do the same thing, outside involvement is concentrated in relatively few districts. Because of diminishing marginal returns, it is unclear whether this spending has any appreciable impact on the vote. See Jonathan S. Krasno, "The Electoral Impact of 'Issue Advocacy' in 1998 and 2000 House Races," in Kenneth Goldstein and Patricia Strach, eds., *The Medium and The Message*, (Upper Saddle River, NJ: Prentice-Hall), 2003.

[161] On the number of challengers raising various amounts of money, see http://www.fec.gov/press/051501congfinact/tables/number_of_house_nonincumbents.html

[162] The fact that the number of competitive House races (including 1998 and 2000) has fallen to its lowest point in several decades during a period in which party and interest group spending on issue ads was plentiful and matched by a rise in candidate receipts suggests, contrary to the conventional wisdom, that inadequate overall funding in not a main reason for the shortage of hard-fought campaigns.

The emphasis on financial resources also leaves non-financial resources undervalued. One sign is that candidates with potentially strong bases of support or formidable organizational capacity are often overlooked in favor of those with healthy bank accounts. Another is something we discussed earlier in reference to party-building: the failure of the parties to invest resources in their organizational structures. Their approach has been driven by demands to provide direct aid to candidates, particularly television advertisements. The result is that state and local parties have been used to move money around and to purchase advertising, not to build strong organizations, recruit activists, or engage in grassroots campaigning. Many interest groups play a similar game, focusing on advertising to the apparent exclusion of almost everything else.[164] Citizens are left as passive consumers of political campaigns conducted for their benefit by trained professionals rather than as participants in the

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[163] Adam Nagourney, "Economy Stirs G.O.P. Worry In House Races," *New York Times* (Aug. 6, 2002).

[164] The AFL-CIO, NAACP and Christian Coalition are notable exceptions.

struggle to lead the nation. Granted, technological change has played the major role in this transformation, but the growth of issue advertising has accelerated the process, leaving the grassroots to wither.

Finally, the impact of issue advocacy on accountability is unmistakably disastrous. The Annenberg Public Policy Center keeps tabs on over 100 groups (excluding parties) that sponsored issue ads in 2000. Some were familiar, but many others—"Voters for Campaign Truth," "Aretino Industries," "Montanans for Common [72 (DEV. 1-Tab 2)] Sense Mining Laws," "American Seniors, Inc."—were organizations about which literally nothing was publicly known, including information about their sponsors, their finances, and the extent of their activities.[165] Others, of course, turned out to be fronts for trade associations, labor unions, and even wealthy individuals, but these revelations came courtesy of reporters or, in some cases, the groups themselves. By creating organizations with names like "Citizens for Better Medicare" (Pharmaceutical Research and Manufacturers Association) or "American Family Voices" (American Federation of State, Local and Municipal Employees), the sponsors added credibility to their appeals and offered anonymity to their donors, but these advantages were realized only by withholding information from the public.[166] By comparison to all other players in campaigns—candidates, parties, and PACs—these organizations were enigmas.

Beyond the true identities of many issue advocates, there is also their relationship to the candidates' campaigns. In many instances, the degree of synchronization between the issue advocates and the candidates' campaigns belie the notion that issue ads are truly independent. For example, candidate ads in 1998 and 2000 were overwhelmingly positive in their tone, commercials whose primary purpose according to the coders was to "promote" a specific candidate. Issue ads, by contrast, were rarely positive; instead they usually concentrated on attacking the opponent or, somewhat less frequently, on drawing contrasts between pairs of candidates. Even ads that contrast candidates often have a critical edge to them, making them similar to pure attack ads. This pattern suggests a division of labor in campaigns where candidates take the high road and issue advocates [73 (DEV. 1-Tab 2)] are left to do the dirty work of bloodying the other side.[167] We are skeptical that viewers even noticed this division of labor, yet its existence illustrates the difficulty voters face determining who bears responsibility for the commercials they see.

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[165] Issue Ads @ APPC, *Club for Growth, at http://www.appcpenn.org/issueads/gindex.htm* (last modified Jan. 2001).

[166] Sometimes the benefits of a particular name are subtle. We found identical ads aired against two Republican incumbents by separate interest groups, FAIR and Coalition for the Future American Worker.

B2. The corruptive potential of issue advocacy

Issue advocacy, being in part a style of advertising, presents a somewhat different set of challenges to the integrity of the electoral system than does soft money. Those challenges, however, include many of the same concerns relevant to our earlier discussion of soft money and corruption. In particular, we believe that issue advocacy also produces special avenues of legislative influence for their sponsors and funders. The structure of the campaign finance system and the interests of the players within it make issue advocacy an attractive tool for those seeking to influence

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[167] This situation is similar to earlier allegations that the Bush campaign of 1988 quietly encouraged "Americans for Bush," an independent group to air an ad that used Willie Horton's mug shot, allowing the campaign to disclaim any responsibility for this commercial.

public officials. In this section, we return to the same definition of corruption we used earlier in conjunction with soft money to address the corruptive potential of issue advocacy.

Our analysis begins with the secrecy surrounding issue ads. Earlier we noted the nearly complete lack of disclosure of receipts and expenditures for issue advocacy, and how it reduces citizens' ability to discern the source of many of the communications they witness during a campaign. Secrecy is one of the outstanding characteristics of issue ads, especially those financed by interest groups. As a result, we—and regulators—are hampered by a remarkable paucity of information about them. The media tracking data we have referred to throughout our report fill in some of the blanks, but many key factual questions remain unanswered or may only be answered after painstaking investigation. Nonetheless, the dangers of issue advocacy are plain to see.

[74 (DEV. 1-Tab 2)] This secrecy, by itself, creates enormous opportunities for wrongdoing, for favors to be exchanged between issue advocates and public officials. Disclosure, of course, is a main accomplishment of FECA; it was seen by its sponsors and by the Court as an essential element—along with limits on contributions to candidates —in the Congress's system to guard against various forms of corruption. In fact, disclosure has been a central feature in reforms long predating FECA and in most states, and courts across the land have repeatedly affirmed attempts to make campaigns report their financial transactions.[168] Among its various advantages, disclosure is thought to combat corruption by illuminating the dark corners in which undue influence may be exerted far from public view. The idea is that politicians eager for popularity and votes will be loath to enter into situations that cast doubt on their probity; thus, the more these situations are revealed, the stronger the politician's impulse to avoid them.

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[168] Indeed the first precedent on campaign financing noted by the *Buckley* court, *Burroughs v. U.S*, involved the constitutionality of disclosure requirements. See Frank J. Sorauf, "Caught in a Political Thicket: The Supreme Court and Campaign Finance," (*Constitutional Commentary* 3:1 (1986)).

One of the ironies of this litigation is that many of BCRA's opponents are otherwise champions of disclosure. A serious argument advanced, primarily by conservatives, holds that campaign financing ought to be deregulated and disclosed, since transparency alone is sufficient to insure against corruption. We remain thoroughly skeptical about the full sweep of these claims, yet we share the same desire to shed light on the financial transactions of campaigning. The public's interest in revealing these transactions is countered by the private interest of many groups and donors to keep them secret. Thus, the ability to route money to groups for candidate-oriented issue ads without disclosure has attracted an increasing amount of money to this activity. In the [75 (DEV. 1-Tab 2)] growing opaqueness of campaign financing, the opportunity for donors and officeholders to forge close relationships or strike deals without risk of detection increases, too.

Among the mysterious groups sponsoring issue ads or the mysterious donors funding various organizations—all without making information known to the public—the example of "Republicans for Clean Air" stands out. This group sponsored ads praising then-Governor Bush and criticizing Senator McCain before the 2000 Republican presidential primaries in three states. Eventually, after the first of these primaries (South Carolina's) reporters uncovered that Republicans for Clean Air consisted of two brothers, Charles and Sam Wyly, long-time friends and supporters of Governor

Bush. Charles Wyly, in fact, was an authorized fundraiser for the Bush campaign.

One remarkable aspect of this situation is that the pivotal South Carolina primary came and went without voters there discovering who was responsible for these ads. At the same time, it is impossible to imagine officials of the Bush campaign were in the dark about "Republicans for Clean Air." According to press estimates, the Wylys spent $25 million on their ads for Governor Bush.[169] We find it inconceivable that an expenditure of that magnitude could remain unknown to the small circle of financial leaders close to both the Bush campaign and the Wylys (including Charles Wyly himself) or the even smaller circle of Republican media consultants. When the Wylys' involvement was later uncovered during the New York primary, the news qualified as a small bombshell and led to a wave of publicity critical of the brothers and the Bush campaign, which in turn distanced itself from "Republicans for Clean Air."[170] After the election, knowledge of the Wylys' activities during the primaries inspired reporters to pay particular attention to [76 (DEV. 1-Tab 2)] the brothers' role in advising the Vice President in connection with his energy task force.[171] In sum, we have a major campaign conducted in secrecy during a key part of the 2000 Republican primary campaign, and a marked change in the level of scrutiny once its sponsors became known. Much as we applaud the ingenuity of the reporters who eventually broke the story, we strongly believe that there is a compelling governmental interest in making these facts known to all from the start. BCRA would accomplish this.

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[169] The $25 million figure comes from the Annenberg Public Policy Center.

[170] T. Christian Miller & Janet Wilson, "Campaign 2000: McCain Blasts Pro-Bush TV Ad Campaign Financed by Texans," Los Angeles Times, March 4, 2000, p. A16.

[171] Craig Gordon, "The Fight for Computer Associates," Newsday, July 2, 2001, at A3.

Finally, issue advocacy, like soft money, allows funds from corporate and union treasuries to return to the electoral sphere after decades of absence. The purpose of the long-standing bans on these funds is multifaceted, but we focus on their potential to corrupt. That potential is largely determined by the sheer size of the financial resources available to corporations and unions. We do not pretend that wealthy individuals like the Wylys cannot mobilize enormous sums of money, but corporate and union assets dwarf all but the largest personal fortunes. Congressional fears of the potential impact of these funds both on elections and on legislative processes were a main reason for prohibiting them. We see the dangers as no less real today, especially as the technology of campaigning has changed and the emphasis on money has increased enormously along with the willingness of many corporate and unions leaders to participate in the electoral arena. For legislators to defy the wishes of Bill Gates or the executives of Microsoft is one thing; to defy Microsoft itself—should the company choose to dedicate a substantial part of its treasury to federal electioneering—remains quite another. It is difficult to point to specific examples of corporate influence felt through issue advocacy because of the newness of the phenomenon and the lack of disclosure. But the potential for legislators to perceive greatly higher stakes, to cite one example, in the lobbying they [77 (DEV. 1-Tab 2)] receive from the pharmaceutical industry because of the millions of corporate funds spent on candidate-oriented issue ads by Citizens for Better Medicare seems real enough.

B3. Appearances

Assessing public perceptions of candidate-oriented issue ads and their impact on public opinion is difficult because of the sheer complexity of the subject. Few people are aware of the distinction between express and issue advocacy, let alone the enormous consequences for behavior that flow from it. But because citizens are the intended audience for these ads, it is fair to ask what they think of them. The best answer to this question comes from "Dictum Without Data" by Professor David Magleby. Magleby conducted a survey using interactive television to show combinations of eight different issue ads aired in 2000 to a sample of 2,035 respondents.[172] All of the ads—a pair of spots from the presidential campaigns, from the parties' national committees, and from interest groups (one favoring Bush and the other favoring Gore), as well as two "pure" issue ads that mentioned no candidates —are entirely typical of the different types of commercials that aired in 2000.[173] Respondents were shown a random selection of three of the eight ads, eliminating concerns about ordering effects. Several of their perceptions are relevant here.

When asked to assess the "*primary* objective or purpose of the ad" (emphasis in the original), at least 85 percent of respondents found that the four issue ads by parties and interest groups were intended to persuade them to vote for or

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[172] David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building, at http://www.byu.edu/outsidemoney/dictum/index.html.*

[173] The two interest group ads were American Family Voices, which attacked Governor Bush as beholden to special interests, and the Republican Leader Coalition, which criticized Vice President Gore for his stands on Medicare and Social Security.

(much more often) against a candidate and only as many as 11 percent thought one of these ads was [78 (DEV. 1-Tab 2)] concerned mainly with presenting an issue.[174] In contrast, viewers were less likely to interpret the candidates' ads as electioneering (the results ranged between 64 and 74 percent) and more likely to see them as issue-oriented (20 and 30 percent).[175] These conclusions held for both the pro-Bush and pro-Gore ads in each category. It is likely that the issue ads seemed more partisan than those sponsored by the candidates because parties and groups criticized the opposing candidate while the Bush and Gore ads featured them speaking on camera about their plans without mentioning the other. This pattern is familiar; the overwhelming majority of candidate ads are positive in tone, while parties and groups emphasize attacks or commercials that contrast the candidates.[176] Respondents did draw an enormous distinction between these spots and the pure issue ads: at least 70 percent felt the primary objective of these latter ads was to present an issue and just 13 percent perceived any electoral purpose. In short, respondents' perceptions of the intent of the ads were remarkably accurate.

The respondents were less accurate, however, in determining who was responsible for a commercial.[177] In response to the question asking who paid for an ad, just over 60 percent of survey participants correctly attributed the candidate ads and the pure issue ads to their actual sponsors. Identification of the sponsors of the candidate-oriented issue ads was much more scattered, with most people (38 to 48 percent) assuming in each case that they came from candidates and fewest (9 to 18 percent) assuming that they were paid for by an interest group. These results, of course, suggest that the disclaimers that appear on [79 (DEV. 1-Tab 2)] these ads are almost completely ineffective. We applaud the section of BCRA mandating that they be made more prominent. But even if they were easier to read, we suspect that viewers would judge the ads on their underlying message, not the accompanying attribution. The confusion over sponsorship also illustrates the problem of accountability created by these advertisements, for one would need a fair amount of expertise, sharp eyes, and perhaps research skills to determine who was behind many of the commercials on television in an election year.

Ultimately, do these candidate-oriented issue ads, however confusing, appear corrupting to citizens? From our perspective there is no doubt that they do. The combination of findings above—candidate-oriented ads are seen as electioneering and they are frequently assumed to come from the candidate—show that the distinction between the actions of candidates and those of parties and interest groups is largely lost. By itself, the conflation of candidates with other, self-interested actors is disturbing and gives the appearance of impropriety. It also indicates that efforts to keep these actors separate from one another have little impact on public opinion. Citizens have the opportunity to view the results of decisions that candidates, parties, interest groups and their legions of consultants make, but they are in no position to see how these decisions get made or whether deals are made and understandings reached. From the perspective of the nation's

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[174] All the results discussed in this paragraph are summarized in Table 1 (Appendix).

[175] We discuss twin sets of numbers because two ads were shown in each category, one favorable to Bush and one to Gore.

[176] Krasno and Goldstein, "The Facts About Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212, 2002).

[177] All the results discussed in this paragraph are summarized in David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building, at http://www.byu. edu/outsidemoney/dictum/index.html.*

living rooms, most of the ads by parties and interest groups are no different than those by the candidates, nor do citizens have any reason, aside from blind faith, to assume that allies are not working in concert.

We conclude by recalling that campaign finance law is intended to increase public confidence in elections and campaigns. Yet the campaign finance system, without [80 (DEV. 1-Tab 2)] BCRA, asks citizens to disregard what they see, hear, and think—that the issue ads on their television sets are clearly designed to help or hurt a candidate—and believe that they are watching a rational, nonpartisan discussion of issues. No confidence can be built on a public reaction that either their senses are deceiving them or that their government is. We would argue that campaign finance law must have "integrity," so that undermining that integrity is neither good for the perception of the law nor for the government that makes it. The rise of candidate-oriented issue ads in recent elections has made a mockery of FECA, diminishing the transparency of its regime and demeaning its reasonable limits on contributions. Many Americans see those ads as no different than those run by candidates except that they are generally meaner and more aggressive. Pretending they are not campaigning generates further cynicism about the law and damages public confidence that government has the will and means to restore its integrity.

III. The relationship between soft money and issue advocacy

A. The hydraulics of campaign finance

Scholars and journalists have long used hydraulic metaphors to describe the campaign finance system. Cash flows like water with pressure behind it. Thus, if a point of exit or entry is closed off, the money will seek another route. Decades of experience with FECA show that political actors

strive to locate and exploit the most vulnerable points in the system. For FECA's critics, the hydraulic metaphors suggest the folly of campaign finance laws, especially the impossibility of controlling virtually uncontrollable behavior. Since any attempt to regulate campaign financing beyond the most general or egregious behavior is bound to fail, why bother?

[81 (DEV. 1-Tab 2)] This perspective ignores the obvious fact that hydraulic systems—including the infamous leaky garden hose—do manage to control and direct the flow of water. We would argue that these metaphors really demonstrate the need for attentiveness to the condition of campaign finance regulation and flexibility in responding to new developments. Practices change and the Congress, courts, and regulators need to adapt to new realities lest the entire system be overtaken with leaks and decay. No one expects any hydraulic system to last forever; just as plumbing and garden hoses are patched and repaired, so must be FECA. It is evident from the Congressional Record that fixing the holes that had developed in its structure, especially in the last half dozen years, is precisely what the sponsors of BCRA had in mind. Their goal was not to break new ground but to return to the status quo circa 1988 (in the case of soft money) or 1995 (in the case of issue advocacy).[178]

The hydraulic metaphors also illustrate another aspect of campaign financing: the degree to which the various components are interrelated. Pressure at one point may affect the entire system, just as a leak may cause all the nearby money to go rushing toward it. The most basic sort of relationship in the hydraulics of campaign financing is between money flowing in and money flowing out. The demand for funds leads politicians, parties, and groups to seek new ways to raise money, and the availability of funds sends these actors searching for ways to spend them. This symbiosis is clearly evident in the relationship between soft money and issue advocacy. Soft money came first, but expenditures were limited to a fairly narrow set of purposes. The Dukakis campaign in 1988 managed to find ways to use these moneys to fund substantial parts of [82 (DEV. 1-Tab 2)] their efforts. Those activities, however, required what seems in retrospect to be relatively modest amounts of money. The invention of issue advocacy, or, more accurately, the realization that issue ads could be used to promote specific candidates, came next with the purported success of the DNC ads supporting President Clinton in 1995. Once advertisers understood the ramifications of this development—that they could use soft money to pay for television commercials, the most basic and expensive staple of electioneering—the demand for soft money surged. The dramatic growth in soft money and issue advocacy in recent election cycles are thus connected, and they are not easily decoupled.

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[178] Others may date the start of soft money from its first appearance; in this report we date it from its first widespread use in campaigns.

The history of campaign financing is a story of evolution as participants have sought out and exploited weaknesses in the system, with each new innovation quickly adopted by others. This dynamic has led to a series of "unanticipated consequences" stemming from FECA or from subsequent administrative or judicial actions. This record provides a cautionary note about any attempt to predict, especially in the long range, the impact of BCRA. Nonetheless, our experience as students of campaigns and campaign financing, and our knowledge of the goals of contributors and political committees, make it possible to discern the broad contours of the likely consequences for options facing the courts.

No crystal ball is necessary to see the future should the courts overturn both the provisions on soft money and issue advocacy in BCRA. The steep growth in soft money and issue advocacy since 1996—including the run-up to the 2002 elections—will continue with some inevitable leveling off. Our forecast is predicated on the very real advantages that soft money and issue advocacy offer practitioners. Soft money is, [83 (DEV. 1-Tab 2)] especially compared to the small-dollar donations required by FECA, a quick, efficient, and lucrative means of raising large amounts of money. Not only is it easier for the parties or candidates to find a single $100,000 donor than one thousand $1,000 contributors, but also the fundraising costs associated with the first are generally much lower, leaving a greater net profit from soft money donations. Under those circumstances, it is no surprise to find, as we did in Missouri, that parties may become largely or entirely dependent on large donations (p. Z). For donors, soft money and issue advocacy allow corporations and unions to avoid old prohibitions on the use of their treasuries for political purposes. They also let the well heeled elude the contribution limits in FECA, and in some cases its disclosure requirements. In short, the myriad practical advantages of soft money and issue advocacy, particularly when used in concert with one another, are so profound that their growth would be certain.

This growth would have a variety of ramifications for politics. Several of the trends we noted earlier are certain to continue, including the rising cost of campaigns (as the parties and interest groups weigh in), along with the increasing centralization of funding in the hands of national organizations and the professionalization of campaign services. Citizens and political organizations will feel the effects of these trends in several ways. First, the low levels of electoral competition and voter turnout of the last half dozen years are likely to persist. The cost of campaigns will affect potential candidates' decision to run or not, and the ability of national organizations to lavish funds on targeted races will focus resources on the favored few leaving many candidates unable to run serious campaigns. Many Americans will find themselves in states and districts where their votes are hardly sought. For others, attempts to encourage voting will be [84 (DEV. 1-Tab 2)] largely confined to phone calls and direct mail purchased through subcontractors. The parties will be even richer than they are now, but there is no reason to expect those riches to translate into greater citizen activity in them. Rather, we expect the parties to continue to function mainly as fundraising vehicles to augment and occasionally overshadow the efforts of individual candidates. Political decisions and strategy will be set from the top, and citizens will be viewed as consumers of political propaganda, not as participants in party governance or in campaigning.

The potential for actual and perceived corruption in such a system will be proportional to the great sums of money moving through it. Earlier we addressed the corruptive potential of soft money and issue advocacy separately. Taken together, the problems are multiplied. The race to raise increasingly large sums of soft money is fueled by the demand for candidate-oriented issue ads. That demand insures more aggressive tactics by the parties and by interest groups to solicit large donations. Once the money comes into the system, it is laundered by cycling it through state parties or through interest groups to create maximum flexibility and minimum transparency to the public. Indeed, it is the attractiveness of an unregulated system of campaigning that makes soft money and issue advocacy so irresistible to those seeking to influence voters or public officials. These advantages will lure larger sums into the unregulated world of soft money and issue advocacy. In response, citizens will react with continued suspicion of their elected officials and their government, particularly when scandals give special resonance to allegations that donors might have received preferential treatment.[179]

[85 (DEV. 1-Tab 2)] In short, we expect the future without BCRA to be more of the same sort of campaign politics we have seen over the last half dozen years, with the emphasis on more. If we were to offer one deviation from this vision of an extended status quo, it would be an increasing diversion of party funds to groups under their control or that of trusted allies. There is already some sign of this development in the establishment of 527 groups affiliated with party leaders and in the parties' donations to interest groups.[180] We suspect the desire to avoid any disclosure of receipts and expenditures and to circumvent the allocation formulas that require parties to combine their soft money with some hard money will lead the parties to play a larger role in interest group politics, either in creating their own or in sending funds to their allies.[181] The coordination with groups will not be achieved by having the chairs of the DNC and RNC serve on the boards of various groups. Rather the coordination will be managed through networks of donors and party functionaries, and through the omnipresent offices of campaign consultants who help run both the parties' and interest groups' issue advocacy campaigns.

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[179] We note again that perceptions of corruption are likely to vary depending on a variety of factors including public satisfaction with the performance of government and the presence of a galvanizing event, like the Enron scandal, to focus attention on political donations.

[180] See "Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills," Public Citizen Reform, February 2002. Also from the same source, see "Déjà Vu Soft Money," Public Citizen Reform, April 2002; "Off to the Races," Public Citizen Reform, *at* http://www.citizen.org/documents/ 1stQ2002_527Report.pdf. In addition, the Annenberg Center reports that a group affiliated with House Majority Whip Tom DeLay (R-TX), "Americans for Economic Growth," ran issue ads against five Democrats during the 2000 campaign that closely resembled spots aired earlier by the NRCC. See Issue Ads @ APPC, *Club for Growth, at http://www.appcpenn.org/issueads/ American's%20for%20Economic%20Growth.htm* (last modified Jan. 2001).

[181] Donations to some of these groups may be tax deductible, another benefit for donors.

What if BCRA survives court challenge? This is, of course, the outcome we favor in light of our analysis of its effect on politics, the parties, and the public. Again, a fairly straightforward model of the post-BCRA world exists in the period prior to 1995.[182] Many complaints might be lodged against that system—and many were, starting with [86 (DEV. 1-Tab 2)] concern about the power of PACs—but by comparison to today, the sums of money moving through it were smaller and the fears of corruption then seem almost quaint.[183] Electoral competition as measured by the number of close races for the House of Representatives was higher than it is now, although not particularly high.[184] Voter turnout, too, was higher than currently, but again not particularly high.[185] Whatever the strengths or weaknesses of that supplanted system, one obvious point stands out: the absence of large-scale soft money receipts by the parties (at least by

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[182] Soft money existed earlier, but we date the beginning of the current system to 1995 when candidate-oriented issue ads make their appearance.

[183] Most attention was focused on the role of PACs, limited by law to donating up to $10,000 to a federal candidate ($5,000 in both the primary and general election). Even aggregating all the PACs in a single industry, for example, rarely resulted in donations rivaling the amounts of soft money given from a single source.

[184] The Campaign Finance Institute, at http://www.cfinst.org.

[185] See Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress, 2001-2*, (Washington: American Enterprise Institute), 2002.

today's standards) and of candidate-oriented issue ads by parties or groups. The parties and interest groups—not to mention candidates and citizens—still managed to thrive in those days, leading us to conclude they would thrive once BCRA goes into effect. There is simply no reason to think otherwise.

The situation in 2003, should BCRA be upheld, will be different in one important respect from earlier times: the sheer amount of money in the parties' coffers. The hard money receipts of the parties are several times larger than they were a decade ago. The largest part of this money (after expenses) has gone to candidate-oriented issue advocacy in the past two election cycles. With that option off the table, parties will face intense pressure to find useful ways to spend their hard money. Our hope is that some of it may go toward a real program of grassroots party building. That investment will, naturally, have to compete with the parties' other priorities, notably their desire to provide immediate, direct aid to candidates. The resources, even without soft money, are [87 (DEV. 1-Tab 2)] available to sustain a healthy level of investment in state and local organizations. The fact that the parties, in the absence of soft money, will be forced again to rely on small and medium donations for their funding will encourage them to expand their outreach efforts and may make party building more attractive. These changes in the hydraulics of how parties raise and spend money have led some congressional supporters and scholars to argue that BCRA will encourage stronger parties.[186] We are cautiously optimistic that they are right.

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[186] See, for instance, Anthony Corrado, "Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing," (Tempe: *Arizona State Law Review* forthcoming).

B. An historical perspective

Soft money and issue advocacy come together in one more crucial way—in their challenge to the integrity of Congress's regulation of campaign finance. Both are successful exploitations of loopholes in the 1974 legislation by political parties and other groups that have left its regulatory apparatus in disarray. Neither existed in 1974, and neither could have been anticipated then. Both reached their new importance in the 1990s, and both were clearly major stimuli to the Bipartisan Campaign Reform Act of 2002. Congress and the American people saw the logic of extending a transparent regulatory system to include new practices and their practitioners. Both the raising and spending of big soft money contributions and the media "campaigning" in the guise of discussing public policy had made the FECA an object of scorn and despair. In both instances they had grown so quickly simply because they were largely unregulated.

The American political parties, never mentioned in the text of the U.S. Constitution, have assumed an informal "constitutional" role in institutionalizing and organizing the emergence of a mass electorate and popular democracy in the Nineteenth [88 (DEV. 1-Tab 2)] Century. For more than 150 years they have continued that role by structuring political debate and alternatives, by recruiting and nominating candidates for public office, by mobilizing voters, and by organizing legislative chambers. Their visibility as the most salient labels and symbols of our politics makes them virtually synonymous with politics itself. All of that has assured parties a special and preferred status among political organizations. Having so important a position in American electoral politics, the parties also became lightening rods for the reform of those politics. Sometimes they were themselves the objects of reform—in the mandating of party conventions and layers of party organizations in the states,

and in the creation of direct primaries, all in response to the unrestrained power of local party machines and their autocratic bosses. Sometimes, as in the last two Congressional reforms of campaign finance, party reform was a secondary consideration. In both cases governmental action added to the web of regulation affecting the parties; in both it also reflected a legislative commitment throughout the country to protect the integrity of electoral and representational processes.

So, while the two major parties have enjoyed a duopoly over the organizing of electoral choice, candidates for office, and public officeholders for well over a century, they have also been the object of major state and federal regulation. And yet, they have long enjoyed many legislated benefits. In most states party money is only modestly regulated, and in some of them parties receive various public subsidies.[187] The Congress has not hesitated to treat their campaigning more severely than the states, but it subsidizes, very generously, the parties' national conventions and their presidential candidates. The resulting, somewhat contradictory status under American law—the [89 (DEV. 1-Tab 2)] combination of favor and disfavor—has, as we have noted, led one leading scholar of the parties to view them as a form of public utility, replete with the combination of privilege and restraint that governs a local electric company.[188]

Interest groups, on the other hand, were historically not greatly regulated, except for the general but toothless requirements that they register their lobbying with the Congress and state legislatures. Because they long stayed out of electoral politics, they were caught up in very few legislative attempts to protect the electoral process. Corporations and labor unions were prohibited from contributing to federal candidates in the first half of the Twentieth Century, but only with the development of political action committees (PACs) just before mid-century did groups, including unions and corporations, enter electoral politics and begin funding candidates.[189] Consequently, PACs of corporations, unions and associations fell under the comprehensive regulation of all contributors in the FECA of 1974. Finally, with groups and organizations of all kinds making soft money contributions and buying issue ads in very noticeable quantities, they were folded into the existing regulatory regime with BCRA. The division of labor by which parties were the political organizations of electoral politics and groups lobbied in legislative-executive politics had clearly disappeared.

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[187] We include both the public funding of party organizations and their nominees, and tax credits or rebates for contributions for parties.

[188] See fn.56.

So, regulatory cycles continued to repeat themselves —legislation, adaptation, then legislative repair, and then another round of adaptation, ad infinitum. Organizations as powerful and important as political parties and groups are formidable regulatees. They are capable of mustering substantial resources and political and legal expertise, and their [90 (DEV. 1-Tab 2)] defenses are buttressed always by nationwide organizations, contacts with many members of Congress, and support in many sectors of the American electorate. Moreover, their capacity for adaptation is maximized by the medium of influence they employ. Money is by nature

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[189] The CIO's Political Action Committee began operation in 1943. Political action committees must raise money only for political purposes, and they must keep it separate from the assets of the corporations, unions, or associations that sponsor them; hence the PACs of corporations and unions are legal, while the use of their parents' treasuries for electoral purposes is not.

easily transferable, completely mobile, and exchangeable for most other resources. Its fluidity quickly validates the old adage that in any transactional nexus activity flows from the more regulated portions to the less regulated ones. Thus, independent spending in campaigns gave way in the 1990s to unregulated issue advocacy, both by party committees and interest groups.

Adaptations to the regulatory regime that leave significant parts of it unregulated obviously threaten the regulatory regime and, more generally, the public sector of which it is a part. Successful avoidance leads to citizen cynicism not only about the specific regulation but also about the efficacy of the entire political system. It also generates questions about the fairness and even-handedness of public policy. As regulatory effectiveness declines, moreover, so does the will and commitment of other actors in the system to comply with the regulations. The loss of trust and confidence is a corrosive agent that no regulatory regime can long endure. Active enforcement is effective only as a supplement to the reliable self-enforcement we call compliance.

The stakes in a periodic "re-regulation" to reflect changes in activity and actors—in legislation like BCRA, that is—are very high indeed. At issue is not only the integrity of the regulation of campaign finance in federal elections and subsequent sessions of Congress, but also citizen trust and confidence in the elected officials of the United States government and in that government itself. While a Congress and a president will be legitimately concerned about the corrupting power of campaign money and its threats to [91 (DEV. 1-Tab 2)] the processes by which a representative democracy works, they must also be able to consider the very integrity and credibility of the institutions of government. Above all, they must consider the effects—both from authenticated realities and from inferences and appearances—of an inability to bring about the changes that popular majorities clearly want (p. X-Z). To break the democratic bargain with the electorate threatens more than their reelection campaigns—it threatens the very institutions of democracy itself.

The challenge in any new regulation of political parties is to reform them without crippling them. We believe that BCRA meets that challenge. The parties have proved once again in recent years that they are resilient and flexible organizations. We hope indeed that the reforms of BCRA will induce them to revitalize local and state party organizations by recruiting new activists, by developing new and local sources of funding, and by increasing the role of party activists in the discussion of party issues. That hope springs from our belief that a reinvigoration of the broader American electorate depends first on recruiting and reinvigorating local party activists and leaders.

Similarly, the challenge of drawing a dividing line between genuine issue advocacy and electioneering is to do so without significantly reducing the ability of parties and interest groups to address policy matters of concern to them. We believe that BCRA avoids this pitfall. Examination of the actual ads sponsored by issue advocates in the last two election cycles shows that very few genuine discussions of policy matters would have been affected by BCRA, and reveals that they may steer clear of regulation without diminishing the effect of their appeals. We are less concerned about the health of interest groups than we are about the parties' health, but our hope for them is virtually identical: that they rededicate themselves to developing membership rolls and [92 (DEV. 1-Tab 2)] publicizing their agendas, freed from the need to transform themselves into campaign organizations every two years. BCRA is a reasonable first step to help parties and groups achieve these goals. By bringing both organizations' ability to sponsor

campaign ads for candidates within FECA's system, reform may nudge them back toward their historical emphasis on mobilizing citizens and activists. By restricting soft money, legislators force political organizations to reach out to a broad base of contributors to fund their electioneering, and reduce the massive contributions that create such huge ethical concerns.[190] The end result for parties and interest groups is a return to more traditional activities and away from their dedication of the last half dozen years to purchasing television commercials. We are confident this transformation will benefit political organizations and the public alike.

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[190] Soft money is banned for political parties, and others may not use corporate or union funds to finance activities treated as electioneering communications by FECA as amended by BCRA.

APPENDIX

DISCUSSION

Measuring the Impact of BCRA on Pure Issue Ads

The various attempts by different analysts working at different times to assess BCRA's impact on pure issue advocacy has created a narrow range of results and some confusion. This Appendix is written to clarify the issues involved in calculating BCRA's effect on genuine issue advocacy. In all cases, calculations of BCRA's impact are based on the 60-day window before the general election. The body of our report provides the first estimate of how incorporating the 30-day pre-primary period would alter some estimates using the 1998 data (i.e., not at all), but the 30-day period is not relevant to the methodological discussion here.

A. Impact on what?

Footnote 143 above explains that the 1998 and 2000 editions of *Buying Time* calculate the impact of BCRA in two, quite different ways. In each case, the numerator—the number of pure issue ads affected by BCRA—is identical. The difference is in the denominator. The 1998 formula uses the total number of pure issue ads aired throughout the entire year. The 2000 formula uses the total number of issue ads identifying a candidate and airing in the last 60 days. The 2000 denominator, thus includes both pure and candidate-oriented issue ads that identify a candidate and air in the last 60 days.

We argue above that the 1998 formula is the more relevant statistic to use in evaluating BCRA's effect on genuine issue advocacy, since the pivotal question is whether the BCRA's combination of criteria—the timing of ads and their use of candidates—would incorrectly subject many pure issue ads to

FECA's regulation. The meaning of the 2000 formula, on the other hand, is harder to interpret. Because it includes candidate-oriented issue ads in its calculation, it appears closer to a measure of regulatory efficiency in a given period, not a measure of the legislation's impact on pure issue advocacy.

However one interprets the 2000 formula, it is clear that as an empirical matter, combining pure and candidate-oriented issue ads in the denominator means that the results of this algorithm will vary considerably depending on how many candidate-oriented ads air during the pre-election 60 day period. The presence or absence of a presidential election weighs very heavily because of the number of issue ads that presidential candidates attract. To put it another way, imagine a single media market where, because of a lack of competitive federal elections, no candidate-oriented issue ads air. If even a single pure issue ad is subject to regulation in that market because of BCRA, the 2000 formula would peg its impact there at 100 percent—1 divided by 1—even if hundreds of other pure issue ads air before the cutoff date or do not identify a federal candidate.

B. 1998 adjustments

In reviewing previous analysis for this paper, several corrections were made.

1. "HMO said no" in Pittsburgh and Milwaukee. The most prominent pure issue ad, a spot by the AFL-CIO, lobbying specific Republican senators on Senate bill S.2330 appeared in 13 markets. Because of the similarity of all 13 versions of this ad—a perfect example of a "cookie cutter" ad—the data set includes just one storyboard. In *Buying Time 1998*, Krasno and Seltz treated all markets where a Republican senator was running for reelection in 1998 (Pittsburgh, Raleigh/ Durham, Greensboro, and St. Louis) as the subjects of this ad. Examination of materials provided by the AFL-CIO for this litigation, however, reveals that its target in Pittsburgh (185 airings) was the state's other GOP senator, who was not a candidate for re-election in 1998. In addition, the discovery process clarified an error in the data regarding 174 airings of this ad in Milwaukee, where both senators are Democrats. The best we can determine is that another ad, not "HMO said no," aired in Milwaukee. Consistent with our treatment of missing data, therefore, we exclude it from the analysis.

Effect: Numerator = subtract 185 (from previous analysis); denominator = subtract 174.

2. "CENT/John Breaux." Senator John Breaux of Louisiana appeared in an ad advertising a teen alcohol program that aired in New Orleans two times just inside and one time just outside the 60- day period.

Effect: Numerator = add 2.

3. "CFF/Vote GOP" and "CFF/Vote GOP Reagan." An identical ad was listed under two different names in the data set. One of these ads was incorrectly listed as a party ad, but the spot comes from an interest group and is a nonpartisan reminder to vote.

Effect: 1998 Formula Denominator = add 102.

4. "CA/AVF HMO Refor." This ad refers to the state legislature in California.

Effect: 1998 Formula Denominator = subtract 11.

5. "NV/CCD Dont Be" and "PBA/This baby." No storyboards found. Treat as missing data.

Effect: 1998 Formula Denominator = subtract 71.

C. Calculating the BCRA's effect in 1998 under both *Buying Time* formulas

See attached Spreadsheets (following Tables). In both formulas, the numerator is identical: all pure issue ads (as rated by the coders) by groups that appeared within 60 days of the election and mentioned a candidate by name. In 1998, the following ads fit those criteria:

HMO said no – 3 markets (St. Louis, Raleigh-Durham, Greensboro)	455
CCS/No Matte® who	256
CENT/Breaux	2
Total =	**713**

1998 Formula Denominator (all pure issue ads):

Preliminary Total =	11939
HMO said no (Milwaukee missing data) =	-174
CFF/Vote GOP (Reagan)	+102
CA/AVF HMO Refor/NV/CCD Don't Be/PBA/This baby	-82
Final Total =	**11785**

2000 Formula Denominator (all issue ads mentioning candidates in the last 60 days):

Preliminary Total =	7200
Subtracting "HMO said no" airings where candidate not mentioned	-2353
Final Total =	**4847**

Thus, 1998 Formula = 713/11785 = **6.1%**; 2000 Formula = 713/4847 = **14.7%.**

D. The proposed FEC exceptions

The FEC is currently considering four different proposals to grant exceptions to BCRA for ads that lobby on bills before Congress. Three of the four would exclude the AFL-CIO's "HMO said no" ad from BCRA's coverage. We calculate the effect of this exclusion by adjusting the numerator in both calculations, and also the denominator in the 2000 formula. Note: "HMO said no" appeared 455 times in which candidates were mentioned.

1998 Formula = (713-455)/11785 = **2.2%**; 2000 Formula = (713-455)/(4847-455) = **5.9%**

E. Pooling the data

Since presidents and senators run every four and six years, BCRA's effect is limited to just 90 days every four or six years. As a result, it makes sense to think of its impact over a longer period than a single year. (Note that most of the officials mentioned in 1998's "HMO said no" were not candidates at the time.) Unfortunately, continuous data are not available over a longer period, but we can combine the 1998 and 2000 figures to estimate its total impact over these years. Pooling the data also has the advantage of smoothing the disruption caused by the huge volume of advertising in the presidential election. The calculation is straighforward:

1998 numerator: 713
1998 *Buying Time 1998* formula denominator: 11785
1998 *Buying Time 2000* formula denominator: 4847
2000 numerator (from Expert Report of Kenneth Goldstein): 1413

2000 *Buying Time 1998* formula denominator (from Expert Report of Kenneth Goldstein): 45001
2000 *Buying Time 2000* formula denominator (from Expert Report of Kenneth Goldstein): 60253

Buying Time 1998 Formula = (713+1413)/(11785+45001) = 2126/56786 = **3.7%**
Buying Time 2000 Formula = (713+1413)/(4847+60253) = 2126/65100 = **3.3%**

Table 1

Political Advertising Activity in the 1998 Election Cycle

	Total		Candidates		Parties		Interest Groups	
	Estimated Cost (in millions)	Count	Estimate Cost (in millions)	Count	Estimate Cost (in millions)	Count	Estimate Cost (in millions)	Count
All Political Ads	$172.8	295,625	$172.8	295,625	$172.8	295,625	$10.7	21,290
Ads Referring to Federal Candidate	$163.1	277,537	$135.3	227,561	$24.6	42,599	$3.2	7,377
Ads Referring to Senate Candidate	$99.1	153,718	$83.6	127,004	$14.8	25,274	$0.8	1,440
Ads Referring to House Candidate	$64.0	123,819	$51.7	10,557	$9.8	17,325	$2.4	5,937

Table 2:

Interest Group Broadcasts of Electioneering Communications (ads that mention a candidate and are broadcast within 60 days of the Election) in the 1998 Election

Organization	Estimated Cost (rounded to nearest thousand)	Airings
AFL-CIO	$ 1,178,000	2333
League of Conservation Voters	$ 302,000	632
Americans for Limited Terms	$ 281,000	766
Americans for Job Security	$ 248,000	201
Committee for Common Sense	$ 165,000	256
Committee for Fairness	$ 141,000	275
Campaign for America	$ 125,000	336
AMA	$ 71,000	416
Committee for Decency	$ 64,000	92
NEA	$ 57,000	129
American Association of Health Professionals	$ 54,000	77
American Values PAC	$ 21,000	55
Sierra Club	$ 3,000	4
National Pro-Life Alliance	$ 700	3
TOTAL	**$ 2,710,700**	**5575**

Note: Three additional unique advertisements, broadcast a total of 277 additional times, at an estimated total cost of $158,000 are omitted from this table because their sponsoring groups could not be positively identified.

Table 3:

Advertising Activity By Interest Groups, Parties & Candidates in 1998

			Sponsor type					
	Approximate Cost (in million)	**Total Number**	**Candidate**		**Party**		**Interest groups**	
All Political Ads								
Within 60 Days	$138.0	233789	182887	80%	40541	91%	10929	51%
Outside 60 Days	$34.9	61836	46963	20%	3944	9%	10361	49%
Ads Not Referring to Any Federal Candidate								
Within 60 Days	$4.4	7629	1958**	86%	1162	81%	4509	38%
Outside 60 Days	$4.0	7900	329**	14%	258	19%	7313	62%
Ads Referring to a Federal Candidate†								
Within 60 Days	$133.6	226160	180929	80%	39379	91%	5852	62%
Outside 60 Days	$30.8	53936	46634	20%	3686	9 %	3616	38%
Ads Referring to a Senate Candidate								
Within 60 Days	$78.6	121867	98169	77%	22363	88%	1335	93%
Outside 60 Days	$20.6	31851	28835	23%	2911	12%	105	7%
Ads Referring to a House Candidate								
Within 60 Days	$54.1	102466	82758	82%	16889	97%	2819	47%
Outside 60 Days	$9.8	21353	17799	18%	436	3%	3118	53%

** Cell comprised of Spanish language and missing data.

† Ads in the "Ads Referring to a Senate Candidate" and "Ads Referring to a House Candidate" column for each sponsor do not equal the "Ads Referring to a Federal Candidate" for the sponsor due to missing coding data as to the particular body of Congress with which a particular named candidate might be associated.

Table 4:

Concentration of Interest Groups' Candidate-Mention Advertising Broadcast within 60 Days of Elections in 1998 Senate Races[1]

Senate Race in which Candidate Is mentioned	Interest Groups		Political Parties		Candidates	
Nevada*	387	29%	1,287	6%	4,755	6%
Kentucky*	336	25%	3,939	18 %	6,743	8%
North Carolina*	325	24%	2,015	9%	10,981	13%
Missouri	211	16%	149	-%	3,542	4%
Wisconsin*	74	6%	1,084	5%	5,873	7%
Arkansas	0	0%	602	3%	1,434	2%
California*	0	0%	1,546	7%	7,884	9½%
Colorado	0	0%	219	1%	1,506	2%
Georgia	0	0%	470	2%	4,096	5%
Illinois	0	0%	647	3%	1,931	2%
Iowa	0	0%	43	-%	302	-%
Louisiana	0	0%	71	-%	529	1%
New York*	0	0%	7,728	3 5%	2 0,861	25%
Ohio	0	0%	729	3%	5,007	6%
South Carolina*	0	0%	1,390	6%	1,628	2%
Washington	0	0%	444	2%	6,279	7½%
TOTAL	1,333	100%	22,363	100%	83,351	100%

* Indicates Senate races ranked as toss-ups by the *Cook Political Report* (Oct. 20, 1998).

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[1] Table includes only those states in which either interest groups or political parties, or both, ran candidate-mention ads within 60 days of the elections.

Table 5:

Concentration of Interest Groups' Candidate-Mention Advertising Broadcast Within 60 Days of Elections in 1998 House Races[2]

House Race In which Candidate Is mentioned	Interest Groups		Political Parties		Candidates	
New Mexico 3*	493	22%	648	4%	1,499	3%
Michigan 8	296	13%	332	2%	367	1%
Kentucky 4*	287	13%	561	3%	1,553	3%
Kentucky 3	224	10%	168	1%	2,184	4%
Wisconsin 1*	213	9%	499	3%	1,799	4%
Utah 2	177	8%	580	4%	1,335	3%
Kentucky 6*	131	6%	478	3%	3,149	6%
Iowa 3*	129	6%	721	4%	1,392	3%
Washington 3*	124	5%	689	4%	858	2%
Michigan 10	108	5%	541	3%	646	1%
Oregon 1*	89	4%	246	2%	1,239	2%
Nevada 1*	10	-%	1,078	7%	1,383	3%
Alabama 4	0	0%	1	0%	1,496	3%
Arizona 4	0	0%	202	1%	67	-%
Arizona 6	0	0%	234	1%	1,568	3%
Arkansas 2	0	0%	459	3%	1,361	3%
Arkansas 4	0	0%	111	1%	489	1%
California 9	0	0%	134	1%	1,508	3%
Colorado 2*	0	0%	141	1%	1,632	3%

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[2] Table includes only those House races in which either interest groups or political parties, or both, ran candidate-mention ads within 60 days of the elections.

[Table 5 Cont'd]

Connecticut 5*	0	0%	440	3%	871	2%
Florida 3*	0	0%	527	3%	404	1%
Idaho 1*	0	0%	824	5%	1,217	2%
Illinois 12	0	0%	224	1%	422	1%
Indiana 9*	0	0%	369	2%	1,930	4%
Indiana 10	0	0%	325	2%	1,021	2%
Kansas 3*	0	0%	424	3%	1,908	4%
Massachusetts 6	0	0%	146	1%	344	1%
Michigan 1	0	0%	66	-%	101	-%
Michigan 12	0	0%	242	2 %	1,080	2%
Minnesota 2	0	0%	42	-%	171	-%
Minnesota 6	0	0%	55	-%	50	-%
New York 29	0	0%	109	1%	2,605	5%
New York 30	0	0%	327	2%	169	-%
North Carolina 4	0	0%	393	2%	935	2%
North Carolina 12	0	0%	337	2%	385	1%
Ohio 1*	0	0%	54	-%	2,383	5%
Ohio 6*	0	0%	1,319	8%	1,633	3%
Pennsylvania 10*	0	0%	479	3%	2,384	5%
Pennsylvania 13*	0	0%	237	1%	805	2%
South Carolina 5	0	0%	54	-%	135	-%
Texas 17*	0	0%	201	1%	95	-%
Texas 24	0	0%	345	2%	245	1%
Washington 1*	0	0%	153	1%	1,358	3%
Washington 5	0	0%	17	-%	742	2%
Washington 8	0	0%	169	1%	308	1%
Wisconsin 8*	0	0%	800	5%	1,372	
TOTAL	2,281	101%†	16,501	99%†	50,598	104%†

* Indicates House races ranked as toss-ups by the *Cook Political Report* (Oct. 20, 1998).

† Does not equal 100% due to rounding.

Table 6:

Distribution of Interest Group Electioneering and Genuine Issue Ads During the 1998 Election Cycle

Month	**Electioneering Ad**		**Genuine Issue Ad**	
January	0	0%	1,356	12%
February	0	0%	1,776	15%
March	0	0%	225	2%
April	60	1%	387	3%
May	1,424	18%	161	1%
June	280	4%	402	3%
July	1,447	18%	2,186	19%
August	289	4%	731	6%
September	911	12%	3,637	31%
October/November	3,512	44%	908	8%
Total	7,923	101%	11,769	100%

Note: Excludes 22 airings with no dates listed. None of the spots with missing data identify a federal candidate.

Table 7:

Comparing Quintessential Electioneering Ads and Quintessential Issue Ads in the 1998 Election

	Quintessential Electioneering Ads		Quintessential Issue Ads		
	Ads Run by Candidates (n=229,650)	Interest Group Ads with Magic Words (n=517)	Interest Group Ads with No Candidate (n=9,476)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (n=5,852)	Political Party Ads (n=44,463)
Candidate Mention					
% Naming Candidate	99%	89%	0%	100%	97%
Magic Words					
% Using Magic Words	4%	100%	3%	7%	1%

[Table 7 Cont'd]

	Quintessential Electioneering Ads		Quintessential Issue Ads		
	Ads Run by Candidates (n=229,650)	Interest Group Ads with Magic Words (n=517)	Interest Group Ads with No Candidate (n=9,476)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (n=5,852)	Political Party Ads (n=44,463)
Timing					
% Run January through March	3%	0%	28%	0%	0%
% Run April through June	10%	0%	8%	0%	2%
% Run July through August*	9%	0%	26%	0%	7%
% Run 60 Days Before General Election	78%	100%	38%	100%	91%
% Run 30 Days Before General Election	59%	100%	11%	77%	73%
% Run 15 Days Before General Election	40%	86%	8%	50%	46%
Information Provided					
% Giving Toll Free Number	0%	0%	41%	47%	1%

*Includes first days of September before 60-day period begins.

[Table 7 Cont'd]

	Quintessential Electioneering Ads		Quintessential Issue Ads		
	Ads Run by Candidates (n=229,650)	Interest Group Ads with Magic Words (n=517)	Interest Group Ads with No Candidate (n=9,476)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (n=5,852)	Political Party Ads (n=44,463)
Viewer Perception					
% Perceived as Electioneering	96%	90%	2%	88%	94%
% Negative	19%	62%	29%	65%	62%
% Negative for Ads Run 60 Days Before General Election	22%	62%	49%	65%	63%
% Negative for Ads Run 30 Days Before General Election	24%	62%	1%	58%	62%
% Negative for Ads Run 15 Days Before General Election	26%	55%	1%	36%	61%

SPREADSHEET: 1998 Formula

Total issue ads by groups, genuine issue ads only (q6 = 1)
CUSTITLE who = 3 & what = 3
q6 = 1

		Frequency	
Valid	AAHP/Bash HMOs	4	
	AAHP/Its a Big D	14	
	AFBI/1m a year C	70	
	AFFT/Tax what we	1685	
	AFFT/worth a goo	617	
	AFHGO/Small Idea	4	
	AFL-CIO/Nurse 30	2	
	AFL-CIO/Nurse 60	105	
	AFL/Credit Union	7	
	AFL/Harley you h	811	
	AFL/HMO Said No	2808	Pure IA,
	AFL/Its not eas	424	some candidates
	AFL/Look out for	172	mentioned
	AFL/Make me feel	654	(see below)
	AFL/Teachers	238	
	AFL/Teachers 60	4	
	ALCC/Moral Votes	16	
	AMREN/Dont go	22	
	AMREN/No Trip to	2	
	AMREN/Time to Re	109	
	AREN/Flag	20	
	AREN/Its Time Ch	46	
	BRT/Goat	19	
	BRT/Had Enough	99	
	BRT/Much to Lear	1243	
	BRT/The Farm	266	
	CA/AVF HMO Refor	11	CA legislative
	CCS/No Matte	2	ad-to be excluded
	CCS/No Matter Wh	254	Pure IA, candidate
	CEI/All This Tal	3	mentioned
	CEI/Remember The	8	Pure IA, candidate
	CENT/John Breaux	3	mentioned
	CENTURY/Winfield	18	
	CFA/Its Hate	1	
	CFF/Vote GOP	6	

LAMAR/Extra $140	386	
LAMAR/We the Par	385	
LAMAR/Worry	40	
LIB/Who Is Reall	3	
LIBERTARIAN/Keep	1	
LIFE/MN heart be	2	
LIKE/Mother	20	
MNPROLIFE/life t	3	
NAM/We Make	26	
NET/Theyll Say	23	
NFIB/Call Cong	45	
NH/AFHGO Stop t	10	
NICAC/Impeach Cl	3	
NOPBR/No PBR Cai	147	
NV/CCD Dont Be	61	No storyboard-treated as missing data
PBA/This baby	10	No storyboard treated as missing data
PFAW/Lets Move O	240	
PFAW/Whats Happe	126	
RTL/voices in th	134	
RTL/Youll know	15	
SIERRA/Dictate a	22	
SIERRA/If your s	45	
SIERRA/Make the	148	
SIERRA/Stop GW	83	
SIERRA/World is	1	
TOB/USCC I work	7	
TRUE/Call to sto	141	
WA/AFTL Power of	45	
Total	11939	

Total issue ads by groups, candidate mentions

who = 3 and what = 3
q6 = 1
q7 < 4 or q8 < 4
date > 90498

CUSTITLE

		Frequency
Valid	AFL/HMO Said No	2808
	Note additional cases described with storyboards above	

Versions of HMO said no where candidate is mentioned
MARKETLONG

		Frequency	
Valid	ALBUQUERQUE-SANT	285	
	CINCINNATI	256	
	GREENSBORO-HIGH candidate	118	candidate
	INDIANAPOLIS	261	
	LEXINGTON	120	
	LITTLE ROCK-PINE	163	
	LOUISVILLE	227	
	MILWAUKEE	174	outlier
	PITTSBURGH	185	
	PORTLAND-AUBURN	323	
	RALEIGH-DURHAM	126	candidate
	SEATTLE-TACOMA	359	
	ST LOUIS	211	candidate
	Total	2808	

Numerator = (includes HMO said no plus additional cases noted above)

CCS/No Matte	2	NV storyboard	Note: CCS is just one ad
CCS/No Matter who	254	NV storyboard	
CENT/Breaux	2		
HMO (Greensboro)	118		
HMO (Raleigh)	126		
St. Louis	211		
Total	713		

Denominator =	11939	above
Add CFF/Vote GOP	102	miscoded airings, see Discussion
Subtract WI HMO said no	174	missing storyboard, see Discussion
Subtract CA/AVF HMO	11	CA legislative ad
Subtract NV/CCD	61	missing storyboard, see Discussion
Subtract PBA/This baby	10	missing storyboard, see Discussion
Total =	11785	

Calculation:	Genuine issue ads affected / all issue ads affected	
713/11785 =	0.060500636	Effect of BCRA = 6.1%

Proposed FEC exception:	eliminating AFL-CIO ad from numerator by including only remaining cases	
CENT/Breaux	2	
CCS ad (NV)	256 (2+254)	
258/11785 =	0.021892236	Effect of BCRA = 2.2%

Note: "HMO said no" also appeared 97 times in Milwaukee under idnumber = 13,an ad identical to idnumber =12, except that Sen. Snowe of Maine is the subject. Since this ad is clearly not the one that ran in Milwaukee, it and the Milwaukee airings of idnumber 12 are most appropriately treated as missing data and excluded from the analysis. This is the standard approach to missing data and the one used in Buying Time 1998.

SPREADSHEET: 2000 Formula

Total issue ads by groups, irrespective of candidate mention or date who = 3 & what = 3

CUSTITLE

		Frequency
Valid	AAHP/Bash HMOs	4
	AAHP/Its a Big D	14
	AAHP/Look Out Fo	77
	ABC/Power of One	178
	AFBI/1m a year C	70
	AFFT/Tax what we	1685
	AFFT/worth a goo	617
	AFHGO/Small Idea	4
	AFJS/Stabeno	6
	AFJS/Stabenow Tu	123
	AFL-CIO/Nurse 30	2
	AFL-CIO/Nurse 60	105
	AFL/Chavez His L	11
	AFL/Credit Union	7
	AFL/Harley you h	811
	AFL/HMO Said No	2808
	AFL/Its not eas	424
	AFL/Look out for	172
	AFL/Make me feel	654
	AFL/PBR Call Sen	197
	AFL/PBR Call Tod	1037
	AFL/PBR Only One	254
	AFL/SS Trust Fun	575
	AFL/Teachers	238
	AFL/Teachers 60	4
	AFLCIO/Call ES	17
	AFLCIO/Strengthe	1265
	AFLT/Bob Inglis	80
	AFLT/Bobby Russe	261
	AFLT/Call WU	5
	AFLT/Call WU Rev	39
	AFLT/Goodlings r	151
	AFLT/Grave Thank	409
	AFLT/Its a crime	189
	AFLT/KY Scorsone	116
	AFLT/LA No Vitte	6
	AFLT/Maloof	169

AFLT/OR People S	45
AFLT/Scorsone an	80
AFLT/Shell game	47
AFLT/Stand Up Fo	142
AFLT/Williams Sh	143
AFTL/KY Lucas	1
AFTL/KY Stop Wil	76
AFTL/UT Cook Sig	35
AFTL/WI Tell Rya	213
AFTL/Willams is	210
ALCC/Moral Votes	16
AMREN/Dont go	22
AMREN/No Trip to	2
AMREN/Time to Re	109
AREN/Flag	20
AREN/Its Time Ch	46
AVO/Ashcroft Val	169
BBC/Vote On Nov	19
BRT/Goat	19
BRT/Had Enough	99
BRT/Much to Lear	1243
BRT/The Farm	266
CA/AVF HMO Refor	11
CCS/No Matte	2
CCS/No Matter Wh	254
CEI/All This Tal	3
CEI/Remember The	8
CENT/John Breaux	3
CENTURY/101	110
CENTURY/Talk lik	2
CENTURY/Winfield	18
CFA/Its Hate	1
CFF/My Bid Was L	61
CFF/Vote GOP	6
CFRG/KS Call Dav	26
IA/Bosewell Edu	129
LAMAR/Extra $140	386
LAMAR/We the Par	385
LAMAR/Worry	40
LIB/Who Is Reall	3
LIBERTARIAN/Keep	1
LIFE/MN heart be	2

LIKE/Mother	20
LV/CCD Look at H	48
MI/MICA Bonior L	108
MI/NA Sugars	9
MICF/Fieger Stab	167
MNPROLIFE/life t	3
NAM/We Make	26
NET/Theyll Say	23
NFIB/Call Cong	45
NH/AFHGO Stop t	10
NICAC/Impeach Cl	3
NJ/AFJS FPallone	72
NM/Davis Term Li	45
NM/DCCC Redman D	281
NOPBR/No PBR Cai	147
NPLA/Call Feingo	6
NV/CCD Dont Be	61
NV/CFCD/Not Abov	92
NV/CFF Big Spend	45
NV/CFF NV Diria	143
NV/CFF/Overtaxed	87
NV/LCV What We D	27
NY/CNYF NY needs	63
NY/NA Mother gre	40
PA/AFLT Goodling	115
PBA/This baby	10
PFAW/Lets Move O	240
PFAW/Whats Happe	126
RTL/RTL	7
RTL/voices in th	134
RTL/Youll know	15
SIERRA/Dictate a	22
SIERRA/If your s	45
SIERRA/Make the	148
SIERRA/NC Faircl	25
SIERRA/Stop GW	83
SIERRA/World is	1
TOB/NYGOV Dont	506
TOB/USCC I work	7
TRUE/Call to sto	141
UAW/Vote	8
WA/AFTL Power of	61

WI/ LCWAF Neuman	71	
WI/(JOE) Casino	162	
Total	20755	

Total issue ads by groups, candidate mentions only
who = 3 and what = 3
CUSTITLE q7 < 4 or q8 < 4& what = 3

		Frequency	
Valid	AAHP/Look Out Fo	77	
	AFJS/Stabeno	6	
	AFJS/Stabenow Tu	123	
	AFL/Chavez His L	11	
	AFL/HMO Said No	2808	genuine issue ad -
	AFL/PBR Call Sen	197	some versions
	AFL/PBR Call Tod	1037	with candidates
	AFL/PBR Only One	254	
	AFL/SS Trust Fun	575	
	AFLCIO/Call ES	17	
	AFLCIO/Strengthe	1265	
	AFLT/Bob Inglis	80	
	AFLT/Bobby Russe	261	
	AFLT/Call WU	5	
	AFLT/Call WU Rev	39	
	AFLT/Goodlings r	151	
	AFLT/Grave Thank	409	
	AFLT/Its a crime	189	
	AFLT/KY Scorsone	116	
	AFLT/LA No Vitte	6	
	AFLT/Maloof	169	
	AFLT/OR People S	45	
	AFLT/Scorsone an	80	
	AFLT/Shell game	47	
	AFLT/Stand Up Fo	142	
	AFLT/Williams Sh	143	
	AFTL/KY Lucas	1	
	AFTL/KY Stop Wil	76	
	AFTL/UT Cook Sig	35	
	AFTL/WI Tell Rya	213	
	AFTL/Willams is	210	
	AVO/Ashcroft Val	169	
	CCS/No Matte	2	genuine issue ad

CCS/No Matte Wh	2	genuine issue ad- identified to are above
CENT/John Breaux	3	genuine issue ad
CFRG/KS Call Dav	26	
IA/Bosewell Edu	129	
MI/MICA Bonior L	108	
MICF/Fieger Stab	167	
NJ/AFJS FPallone	72	
NM/DCCC Redman D	281	
NPLA/Call Feingo	6	
NV/CFCD/Not Abov	92	
NV/CFF Big Spend	45	
NV/CFF NV Diria	143	
NV/CFF/Overtaxed	87	
NV/LCV What We D	27	
PA/AFLT Goodling	115	
SIERRA/NC Faircl	25	
WI/ LCWAF Neuman	71	
WI/(JOE) Casino	162	
Total	10771	

Total issue ads by groups, candidate mentions only
and post 9/3 who = 3 and what = 3
CUSTITLE q7 <4 or q8 <4
date > 90398

		Frequency	
Valid	AAHP/Look Out Fo	77	
	AFJS/Stabeno	6	
	AFJS/Stabenow Tu	123	
	AFL/Chavez His L	11	
	AFL/HMO Said No	2808	genuine issue ad-
	AFL/PBR Call Tod	10	some versions with
	AFL/SS Trust Fun	575	candidate
	AFLCIO/Call ES	17	
	AFLCIO/Strengthe	1265	
	AFLT/Call WU	5	
	AFLT/Call WU Rev	39	
	AFLT/OR People S	45	
	AFLT/Stand Up Fo	142	
	AFTL/KY Lucas	1	
	AFTL/KY Stop Wil	76	
	AFTL/UT Cook Sig	35	

AFTL/WI Tell Rya	213	
AFTL/Willams is	210	
AVO/Ashcroft Val	55	
CCS/No Matte	2	genuine issue ad
CCS/No Matter Wh	254	genuine issue ad -
CENT/John Breaux	2	identical to one
IA/Bosewell Edu	129	above
MI/MICA Bonior L	108	genuine issue ad -
MICF/Fieger Stab	167	two showings after
NJ/AFJS FPallone	72	9/3
NM/DCCC Redman D	281	
NPLA/Call Feingo	3	
NV/CFCD/Not Abov	92	
NV/CFF Big Spend	45	
NV/CFF NV Diria	143	
NV/CFF/Overtaxed	87	
NV/LCV What We D	27	
SIERRA/NC Faircl	4	
WI/ LCWAF Neuman	71	
Total	7200	Denominator = 7200

idnumber = 12

HMO said no

MARKET LONG		Frequency	Per-cent	Valid Percent	Cumulative Percent
Valid	ALBUQUERQUE-SANT	285	10.15	10.15	10.15
	CINCINNATI	256	9.12	9.12	19.27
	GREENSBORO-HIGH	118	4.20	4.20	23.47
					candidate
	INDIANAPOLIS	261	9.29	9.29	32.76
	LEXINGTON	120	4.27	4.27	37.04
	LITTLE ROCK-PINE	163	5.80	5.80	42.84
	LOUISVILLE	227	8.08	8.08	50.93
	MILWAUKEE	174	6.20	6.20	57.12
					outlier
	PITTSBURGH	185	6.59	6.59	63.71
	PORTLAND-AUBURN	323	11.50	11.50	75.21
	RALEIGH-DURHAM	126	4.49	4.49	79.70
					candidate
	SEATTLE-TACOMA	359	12.78	12.78	92.49
	ST LOUIS	211	7.51	7.51	100.00
	Total	2808	100.00	100.00	candidate

Numerator =

CENT/Breaux	2		
CCS/No Matte	2		
CCS/No Matter who	254		
HMO (Greensboro)	118	AFL ad only:	118
HMO (Raleigh)	126		126
HMO (St Louis)	211		211
Total	711		455

Denominator =	7200	see above

Adjusting denominator: Eliminate HMO said no where candidates not mentioned

Total HMO said no	2808	
Subtract cand ment	455	
Total	2353	
Total showings	7200	see above
Subtract HMO said no	2353	
Total	4847	

Calculation: Genuine issue ads affected / all issue ads affected

713/4847 =	0.1471013	Effect of BCRA (2000 BT formula) = 14.7%

Proposed FEC exception: eliminating AFL-CIO ad

Numerator - 455	258
Denominator - 455	4392

256/4392=	0.05874	Effect of BCRA (2000 BT formula) = 5.9%

Note: "HMO said no" also appeared 97 times in Milwaukee under idnumber = 13, an ad identical to idnumber + 12, except that Sen. Snowe of Maine is the subject. Since this ad is clearly not the one that ran in Milwaukee, it and the Milwaukee airings of idnumber 12 are most appropriately treated as missing data and excluded from the analysis. This is the standard approach to missing data and the one used in *Buying Time* 1998.

Appeal Docketed May 15, 2003
Probable Jurisdiction Noted June 5, 2003

16

No. 02-1674 *et al.*

IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

**On Appeal From The United States
District Court For The District of Columbia**

JOINT APPENDIX

VOLUME IV (Pages 1406 to 1819)

FLOYD ABRAMS SUSAN BUCKLEY BRIAN MARKLEY CAHILL GORDON & REINDEL LLP 80 Pine Street New York, NY 10005 (212) 701-3000	KENNETH W. STARR *Counsel of Record* EDWARD W. WARREN KANNON K. SHANMUGAM KIRKLAND & ELLIS 655 Fifteenth Street, N.W. Washington, DC 20005 (202) 879-5000

(*additional counsel on inside cover*)

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KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
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JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
Frost Brown Todd LLC
400 West Market Street, Suite 3200
Louisville, KY 40202-3363
(502) 568-0222

Counsel in No. 02-1674

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DECLARATION OF RAYMOND J. LA RAJA

1. My name is Raymond J. La Raja. I submit this declaration to provide my expert opinion on the following:

(a) The activities and importance of political parties.

(b) The importance of nonfederal money for the effective operations of political parties.

(c) The effect of the BCRA on political parties.

(d) Whether less restrictive alternatives would have been less harmful than a unilateral ban on non-federal funds for national party committees.

I. Background and Qualifications

2. I am an assistant professor of political science at the University of Massachusetts, Amherst where my research and teaching focus on American political parties, elections and campaign finance.

3. I received my bachelor's degree from Harvard University in 1987, and a master's in public policy from the Kennedy School of Government in 1992. I was also a **[*2]** Coro Fellow in Public Affairs in 1988 in California where I gained political experience through internships working for a labor union, the public affairs division of a Fortune 500 company, a not-for-profit organization, and a congressional campaign.

4. I began studying campaign finance and political parties as a graduate student at the University of California, Berkeley where I earned my Ph.D. in political

science in 2001. My doctoral dissertation, "American Political Parties in the Era of Soft Money," examines how political parties spent non-federal funds during the 1990s.

5. I have written on campaign finance and political parties for chapters in edited books, reports for nonpartisan think tanks, and papers for academic conferences. In the past, I have also conducted research on the agencies that regulate elections and campaign finance. My current research focuses on campaign finance laws in the states.

6. I am on the academic advisory board of the Campaign Finance Institute, a non-partisan research organization in Washington, D.C. dedicated to developing ideas for improving the financing of politics. I am also the managing editor of the electronic journal, The Forum, which publishes the applied research of social scientists, historians and legal scholars on a wide range of topics related to contemporary American politics.

7. I have also had the benefit of working on Professor David Magleby's team of researchers that investigated how outside organizations, including political parties, spent money during the 2000 primary election in California. The findings **[*3]** of this study emphasized the pervasiveness and variety of campaign activity by interest groups in federal elections.

8. My curriculum vitae, including my publications during the past ten years, is attached as Exhibit A hereto.

9. In reaching the opinions set forth below, I have focused my comments on the activities of party organizations rather than the broader aspects of the American party system that include partisans in the electorate, party members in

government or the design of electoral institutions. My research gives particular attention to how the political parties spend money rather than contributions to the political parties. I have relied on data from the Federal Election Commission, the Center for Responsive Politics, the National Institute for Money in States and the Center for Public Integrity; surveys I conducted of the state political parties prior to the 2000 Election; my doctoral dissertation; interviews with party officials; declarations of non-party interest groups obtained by the RNC in this litigation; and the political science literature, including the various sources cited herein.

10. I am being compensated for my services in connection with this case at the rate of $175 per hour.

II. Activities and Importance of American Political Parties

11. Political parties are essential institutions in democracies. This is a widely accepted premise among political scientists. In the United States, political parties have played a critical role linking citizens to their government locally and nationally. Through efforts to build coalitions of candidates, officeholders and voters at every level of government, American political parties have been agents **[*4]** of consensus in a society characterized by individualism and diversity of interests. But unlike parties in Europe, American party organizations have not been highly centralized. Instead, political parties at each level have enjoyed considerable autonomy while they work together toward common goals.

(a) American political parties have focused primarily on winning elections rather than pursuing rigidly-defined ideological doctrines. While the major parties have articulated different principles and policies over the years, they choose to emphasize issues that allow them to build diverse and decentralized coalitions. Party leaders have continuously adapted the party organization over the years to help them build support among voters for the party and its candidates. In the early days of the republic, the party's electoral apparatus grew out of the need to mobilize electoral support among an increasingly diverse and large electorate. As the U.S. population expanded, party leaders and activists developed campaign technologies to attract and bring supporters to the polls. The earliest technologies included party-sponsored newspapers, the distribution of party ballots to voters, and "treating" voters to popular forms of entertainment. Technologies have changed through the decades, but the overriding goals remain the same: to attract support for the party and elect its candidates to office.

(b) Strong organizations are important for political parties and American democracy. Party organizations provide an arena for a varied set of party activists and professionals to coalesce behind party candidates. Among **[*5]** the varied set of political actors in American life, the party organization remains uniquely the ongoing operation that serves the interests of more than a single candidate or set of issues. It is the core "node" in a partisan network that extends from elected officials to candidate organizations, party-allied groups, campaign consultants, and ultimately, the voters. As such, these organizations serve an important function in coordinating party messages, supporting campaigns and building large coalitions.

(c) Parties are an essential institution for promoting political competition, which is a sine qua non of democracy. In a healthy party system, when the party candidates experience defeat at the polls the party organization assumes responsibility for evaluating the loss, for developing new strategies and for marshalling resources to win future elections (see, Klinker 1994; p Herrnson 1994). As the most recognizable organization within an extended party network, an active party committee that coordinates political activities augments accountability in an American electoral system that is highly decentralized among numerous candidate committees and political action committees.

(d) To maintain strong organizations the parties need to engage in general party building during election and non-election years. By party building I mean efforts to strengthen the capacity of the party organization to perform its traditional functions. These include year-round fundraising, recruiting and training candidates, researching and crafting campaign themes, identifying and mobilizing voters, and educating the public about **[*6]** policy issues. Party building does not include acting as a financial conduit for individual candidates to funnel money into their campaigns.

12. Political parties at every level work together toward common goals. While American party committees have considerable autonomy they rely on each other for information and resources. They are also bound to each other by the success of party candidates at different levels of government office. Martin Van Buren, for example, helped elect Andrew Jackson in 1828 through this important insight. He understood that local candidates benefited from being associated with a popular candidate like Jackson at the top of the ticket. But Jackson needed to get voters to the polls, a task that was ideally suited to local party organizations. The mutual necessities of local and national party figures help establish a thriving party organizational network that generate partisan loyalties in the electorate, economies of scale in campaigns and the sinews that tie local parties to a national party apparatus.

(a) To participate across federal, state and local elections, political parties at each level may keep three separate financial accounts: (1) **federal account**, which includes funds that are raised and spent under the guidelines of the Federal Campaign Election Act and its amendments; (2) **non-federal account**, which includes funds that are raised and spent under state laws, and which can only be used for state and local elections; (3) **allocation account**, which is a hybrid account that includes both federal and non-federal funds to be used for "party-building" activities that affect party candidates across the ticket. It is my understanding that state parties **[*7]** transfer funds from their non-federal accounts into the allocation accounts for party-building activities that may affect the entire party ticket, and not just state and local elections. In 1990, the Federal Election Commission (FEC) issued rules that established accounting guidelines to determine how much federal and non-federal funds could be allocated to particular activities.

(b) Party scholars observe that relationships among local, state and national organizations have strengthened in the past three decades. They attribute this strengthening to the role of the national parties in providing resources and expertise to lower levels of party (see Herrnson 1988; Bibby 2003). The national committees have raised money to spend on building the state and local parties. They do this by transferring funds, particularly nonfederal funds, to the state organizations. National committees also help state and county organizations develop programs to improve party operations and staff professionalism. Both the RNC and DNC hire personnel in Washington who are chiefly responsible for supporting party affairs in the states, including help for fundraising, voter identification, mobilization, and campaign strategies.

(c) This kind of party activity, coordinated by the national committees, is exactly what prominent political scientists hoped for when they issued their landmark report in 1950 to strengthen American political parties (see supplement to the *American Political Science Review*, vol. 44). By centralizing fundraising, merging party efforts at every level and working **[*8]** closely with candidates, the party committees have tightened the party nucleus, which is a development that encourages greater accountability in the electoral process. National parties have emerged as strong actors during the past three decades because they have been able to raise sufficient funds to invest in party building programs at every level.

(d) According to John Bibby, a preeminent party scholar who is an especially strong analyst of state political parties:

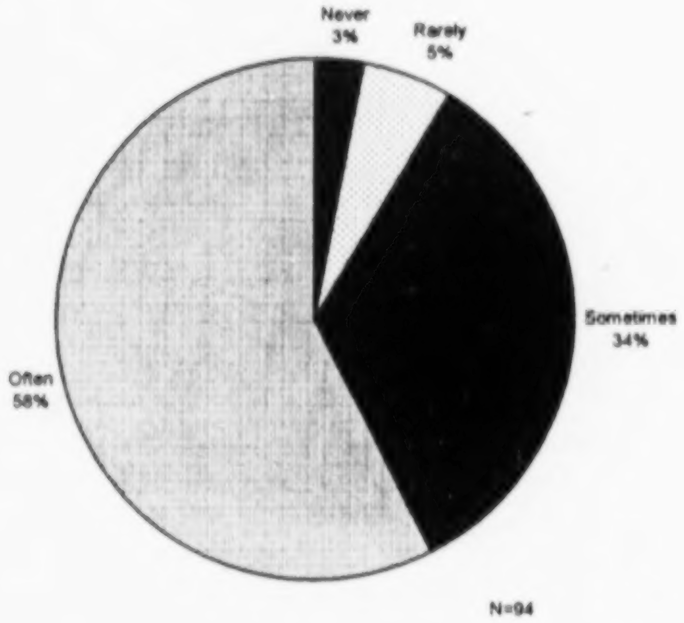
> *Fund transfers from the national organizations to state parties, joint national-state party campaign activities, and national party technical assistance to state affiliates have all resulted in a nationalizing of party campaign efforts and substantially heightened levels of integration between the two strata of party organization. Thanks to assistance provided by the national party committees, many state parties have been strengthened.* (2003:114)

13. Political parties are important agents for recruiting and training candidates. The institution of the direct primary has all but eliminated the ability of political party leaders to handpick their nominees as they did at the turn of the century, but seeking out and encouraging candidates to run for office remains a vital party function. Professors Moncrief, Squire and Jewell (2001) provide examples from Vermont and Alabama where leaders from party organizations that were historically in the minority invested time and resources in local districts seeking candidates to run against the opposition. In V.O. Key Jr.'s classic account of Southern politics (1949), he attributes the transient and demagogic nature of **[*9]** personal political factions in Alabama (as in other Southern states) to the lack of strong party organizations that could provide "a somewhat orderly and systematic means for the

development and grooming of party candidates and a continuity of personnel that encourages at least a germinal sense of group responsibility for party action (1949:46)." In the absence of strong parties, Key argues, Alabama political leaders were "self-appointed and self-anointed and attract to themselves sub-leaders by favor, chance or demagogic skill (p.46)."

(a) Parties have a strong incentive to invest in recruiting because they want to win majorities in the legislature. They are strategic in their efforts because they look for districts that are winnable and they seek good candidates. Good candidates usually have local name recognition and some experience in public affairs. They have the best shot at winning. In my survey of state party activity during the 2000 election cycle, 54 of 94 major state parties reported that they recruited candidates often and only 3 claimed they never performed this function. Figure 1 below illustrates that for most state parties, recruiting candidates is an important function.

Figure 1. Does State Party Staff Help Recruit Candidates?



(b) Party officials are the most likely source of recruitment contacts for state legislative candidates. According to Moncrief, Squire and Jewell (2001:43), 46% of 535 state legislative candidates that were surveyed said officials in the local party approached and encouraged them to run for office before they announced their candidacy (see Figure 2). About one-third said officials in the state party organizations approached them. In contrast, only 14% were approached by interest groups to run for office. The political party is the most effective agent of recruitment among the many groups that engage in electoral politics.

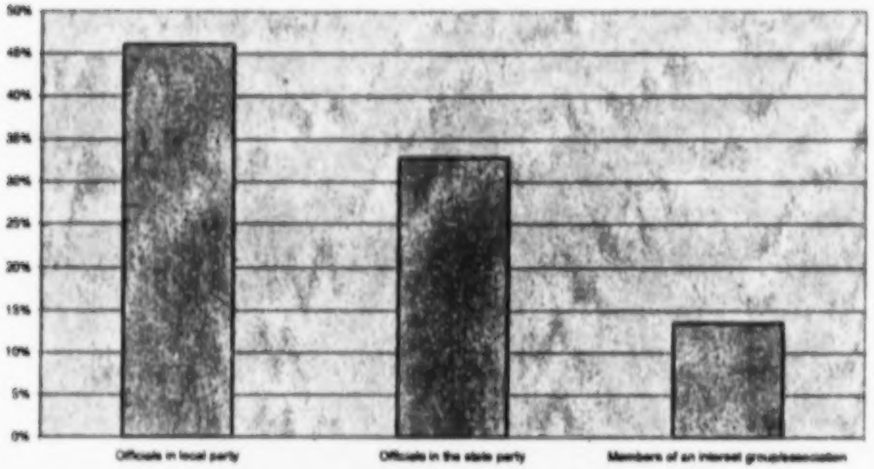
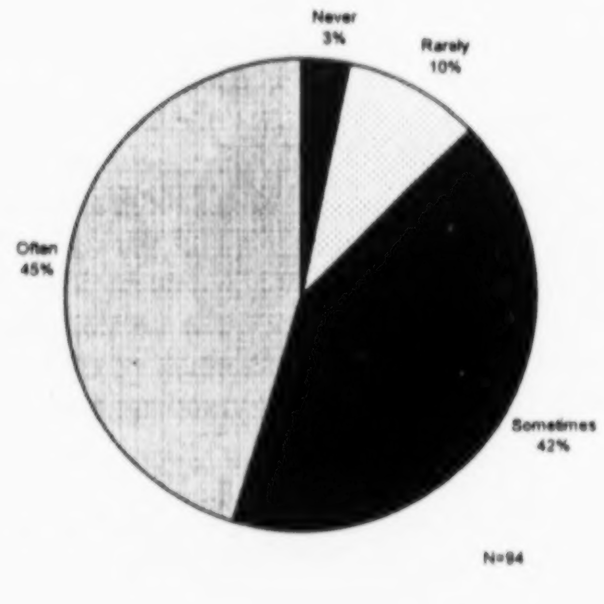


Figure 2. RECRUITING STATE LEGISLATIVE CANDIDATES:
"Before You Announced Your Candidacy,
Were You Approached and Encouraged to Run for Office by Any of the Following?"
(Percent Answering "Yes")

Source: Moncrief, Squire and Jewell (2001),
Legislative Candidate Survey (N=535)

(c) The parties help candidates by training them and their campaign staff. In my survey, almost half of the parties reported they frequently helped candidates this way; only 12 parties of 94 parties said they never or rarely performed this function (see Figure 3). Parties also steer donors to candidates, encourage well-known elected party officials to help the candidate with shared public appearances, and get voters to polls on Election Day (see Moncrief, Squire and Jewell 2001). The promise or refusal of support from the party organization can make an important difference in whether a candidate chooses to run for office, particularly in an era of cash-intensive campaigning that requires skillful application of advanced campaign technologies.

Figure 3. Does State Party train campaign staff who work for candidates?



14. National and state political parties can be an important source of campaign contributions for state level candidates facing tough races. There is wide consensus in political science that parties support challengers more than interest groups, which prefer to contribute to incumbents. The reason for this is rooted in the different incentives of these two groups. Parties desire to win majorities in legislatures so they invest in boosting their control of offices whenever possible. Most interest groups, in contrast, seek to build relationships with officeholders as a way of improving access to the legislative process and lobbying their position. In political science, there is strong empirical support for the theory that interest groups allocate resources primarily to pursue the "access" strategy, meaning they give to candidates who are most likely to win office, which is usually the incumbents (see, for example, Herrnson 2000). Political parties, however, **[*13]** allocate resources for electoral strategies, meaning they

contribute money to a party candidate who is in a potentially close election.

(a) As Figure 5 shows below, parties give more of their resources to non-incumbents than PACs. Interest groups may be reluctant to support challengers because these candidates are generally less likely to win. Supporting challengers also poses the risk of incurring the resentment of the incumbent legislator should he get reelected. The data in Figure 4 shows that PACs are much more likely to contribute to incumbents than political parties. In the 2000 Elections, three-fourths of PAC contributions to federal candidates went to incumbents while parties gave 39% to incumbents. Parties gave twice as much of their resources to challengers (22%) as PACs (11%) in federal elections.

[*14]

Figure 4. PAC Contributions to Federal Candidates 2000 Elections

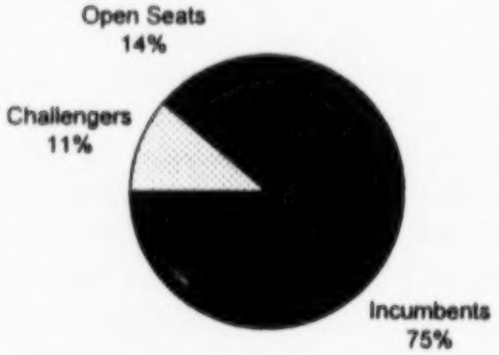
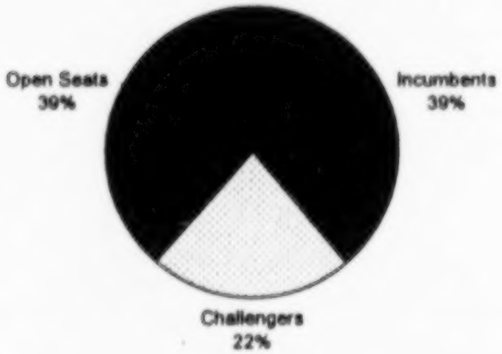


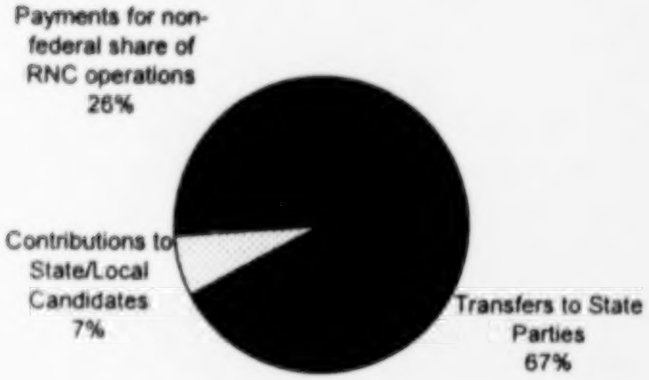
Figure 5. Party Contributions and Coordinated Expenditures for Federal Candidates, 2000 Elections



Source: Federal Election Commission

(b) National parties make contributions to state level candidates, including during years when there are no federal races. For example, the RNC contributed roughly $500,000 to the Republican gubernatorial candidate in Virginia in 1999 (Shaw, 2001) as well as substantial funds to the **[*15]** Republican gubernatorial candidate in New Jersey. The national parties also contribute money to local legislative candidates. During the 2000 election cycle, the Republicans, for example, allocated 7 percent ($9.5 million) of their non-federal funds for contributions to state and local candidates (see Figure 6 below). The national committees contributed a combined $19 million to state and local candidates. By helping state and local candidates win office, the national parties advance their policy agenda and public support for this agenda below the federal level. The desire of the national party to associate with state and local party affairs is also part of a long-term strategy to strengthen the party. National party leaders recognize the importance of developing a "farm team" of experienced candidates and elected officials who will eventually run for higher office. **[*16]**

Figure 6. RNC Disbursements from Non-Federal Accounts, 2000 cycle



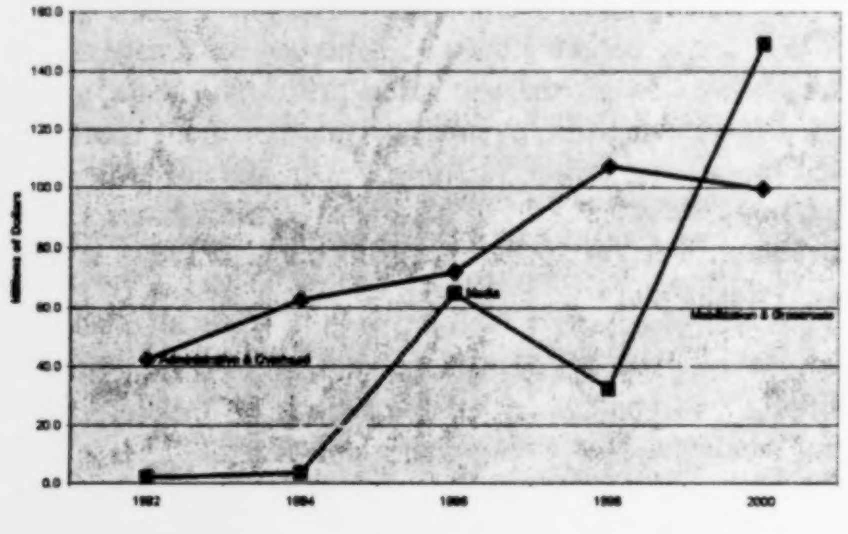
Source: Federal Election Commission

(c) National parties allocate about one-quarter ($136 million) of their non-federal money to party-based operations affiliated with the headquarters in Washington. Of this amount, $57.8 million (43%) went for administration such as paying salaries, benefits, office equipment and supplies. Another $52.6 million was invested in fundraising activities (39%). Only $10.3 million was allocated for media (8%), and $8.5 million for voter mobilization and grassroots activity (6%). A division of labor exists among the levels of parties, with the national organizations taking primary responsibility for administrative functions and fundraising, while state and local parties engage more directly in campaigns and voter mobilization activities.

[*17] 15. National parties assist state parties in raising funds. A common perception is that the national parties transfer nonfederal money to state parties for the sole purpose of funding issue ads. But national party support of state parties goes deeper than this. For example, the national committees provide expertise to state staff in raising money. Both the RNC and DNC sponsor regional fundraising seminars for staff from state and local parties. The national party staff can be invaluable in showing state party workers how to organize operations for fundraising and telemarketing. These tasks require considerable experience, which is often lacking in smaller states where staff turnover is high and much of the work is done through volunteers.

(a) National party transfers to state organizations also help with party building. Transfers from national parties are allocated for administration (which includes salaries, benefits, office equipment and supplies), voter mobilization and media campaigns. As transfers to the state parties increased so did spending on state party work. Between 1992 and the 2000 election cycles, spending on voter mobilization increased steadily from $9.6 to $53.1 million (see figure 7 below). **[*18]**

Figure 7. Soft Money Spending by State Parties, 1992-2000



(b) The most dramatic increase in state party spending was for media activities during presidential election years for issue ads. The emergence of significant amounts of issue advertising by state parties in 1996 is rooted in the deficiencies of a presidential public funding system that is severely out of step with important changes in the electoral season. Presidential primaries are "frontloaded," meaning that a party nominee emerges several months before the national conventions. Under this circumstance, the parties face what political scientists refer to as a "prisoner's dilemma" during the period leading up the party convention. Both parties can wait several months until their respective conventions when public funds are released to their presidential candidates for the general election. Alternatively, they can begin to set the issue agenda **[*19]** before the convention. The dilemma is complicated by the number of issue groups that have a strong incentive to shape the political dialogue by broadcasting messages early in the electoral process.

(c) The wide open period gives an advantage to any political party or interest group that chooses to broadcast issue ads before the conventions. If both parties and interest groups forego issue ads during this period, then the election will be fought during the few months beginning after the convention. If one party or major interest group decides to move earlier, it has a compelling advantage to set the policy agenda for the upcoming presidential campaigns. The fear of leaving an advantage to the opponent spurs the parties and interest groups to move first. Issue ads before the convention reflect an effort to capture this policy space rather than relinquish it to opponents and factional interests within either of the parties.

(d) It is my understanding that the BCRA does not allow political parties to air issue ads that refer to a federal candidate at any time using non-federal funds. The BCRA also prohibits interest groups from airing issue ads with non-federal funds during a blackout period. This does

not prevent interest groups from using non-federal funds early in the election by "frontloading" issue ads to set the policy agenda for presidential and other elections. If the last provision barring interest groups from using non-federal funds for issue ads during a blackout period does not withstand constitutional scrutiny, the political parties will be at even more of a **[*20]** disadvantage relative to interest groups since the latter will have relatively more ability to communicate their messages up through Election Day. Interest groups already dominate issue advertising (see section III. 1.b).

(e) While it is apparent that national committees target party building in competitive states, it is also true that every state party receives money from them, even if there are no competitive federal elections in the state. According the Marianne Holt, who led the "Outside Money" project for the 1998 elections sponsored by the Pew Charitable Trusts, the transfer of national party funds for GOTV drives "has increased the state and local party role as they spend more and more soft money....Such campaign activity has not only strengthened the national party committees but has infused the state parties with a vitality and power not seen in the past two decades." (see Magleby 2000)

16. Political parties use nonfederal money to develop and disseminate political messages. The national parties possess research divisions that focus on message development through the use of polling data and focus groups. In conjunction with the party leadership in government, party operatives craft issue themes that will frame the party's policy and campaign agenda. The national party committees help to coordinate the daily flow of political messages by sending out faxes and e-mails to the parties' elected officials at every level. The state parties also send out similar political information related to state policy issues and campaigns.

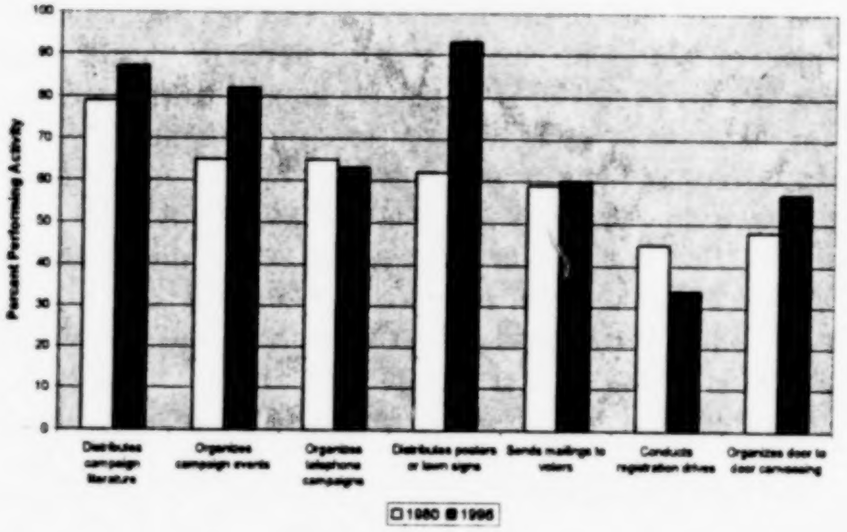
[*21] (a) Nonfederal money is used to spread the party message. In place of the traditional party newsletter, political parties now commonly use e-mail to spread the word among adherents. Every major state party has a web site where voters can get information about candidates and opportunities to serve the party. One of the most important and expensive methods of reaching partisans is through direct mail. The state political parties devote as much as 22 percent of nonfederal funds from their nonfederal accounts for this activity according to data provided by the Center for Public Integrity. Direct mail is useful because the parties can pursue several goals simultaneously: raise money, explain the party position on issues, and contrast their position with the opposition. Direct mail tends to be targeted toward the party's loyal or likely voters.

(b) Political parties also use broadcast media to spread their political messages. Broadcast media are particularly important in persuading "undecided" voters to side with the party and its candidates. Usually, party-based ads focus on selected issue themes developed before the start of the electoral season. The fact that these ads are sponsored by the national or state parties and used throughout the nation gives them a generic "cookie cutter" quality (see Krasno and Seltz, 2000: 198). Local candidates sometimes dislike this generic quality but the similarity of themes provides some policy coherence across party candidates. The theme-focused party ads encourage accountability in elections since voters will be able to know what the party candidates stand for collectively. **[*22]** Even when voters do not recognize the link between party-based ads and party candidates, institutional intermediaries, such as the news media, help make these links for the voter.

17. At the grassroots level, political parties mobilize volunteers and develop local support for the party and its candidates. The state political parties provide the support infrastructure that allows local volunteers to reach out to voters. They do this by creating detailed voter lists, operating phone banks, developing precinct maps for canvassing, purchasing yard signs and bumper stickers, and handling all the administrative paperwork involved with purchases and filing with the election regulatory agencies in the state and with the Federal Election Commission.

(a) Grassroots efforts at the local level have increased or been maintained since the 1980s. According to a survey of 335 local Republican committees by Frendreis and Gitelson (1997), a greater percentage of these organizations have been getting involved in a variety of grassroots efforts that Congress wanted to spur through its amendments to the FECA in 1979 (see Figure 8 below). For example, the percentage of committees distributing posters and lawn signs has increased from 62 to 92 percent between 1980 and 1996. The Democratic local committees show similar gains. **[*23]**

Figure 8. Grassroots Activity of Local Republican Party Organizations, 1980 and 1996



Source: John Frendreis and Alan R. Gitelson, "Continuity and Change in Electoral Roles of Local Parties," a paper prepared for delivery at the State of the Parties: 1996 conference, Ray C. Bliss Institute of Applied Politics, University of Akron, Oct. 9-10, 1997, as cited by Bibby (2003:136).

(b) The modern party organization relies heavily on outside campaign consultants to do much of its work. By "outsourcing" particular tasks to professionals, the modern party organization has adopted some of the same administrative strategies as contemporary business firms, governmental agencies and not-for-profits. One important aspect of the relationship between the party organization and its consultants is that the latter tend to work for only one of the major parties. In fact, many consultants gain political experience working for the party organization early in their careers. While some casual observers of politics may lament that politics has been overrun by "hired guns" working for any candidate **[*24]** with money, more acute observers have remarked how consultants constitute an extended network of party activists (see Kolodny and Logan 1998).

(c) What may be striking to the historian of political parties is how much more professionalized these operations are than in the days when party precinct captains routinely walked the local streets, building face-to-face support for the party. Earlier party organizers, however, relied on the best available technology to suit their needs. The modern party exploits new technology to achieve the same goal of spreading the party message and electing its candidates to office. That is why party workers employ many strategies developed by commercial enterprises to identify and inform citizens: direct mail, surveys and telephone calls. Political organizations need to reach large and dispersed audiences with their political messages, while competing in a broadcast and print environment saturated with entertainment and commercial information. For this reason, it is hardly surprising that they avail themselves of the latest communication technology and strategies.

(d) To perform the activities I have mentioned above, political parties need money. While party historians describe an era when the party organization relied on armies of volunteers to perform campaign activities, the modern party relies more on professionals to perform its work. In this they are no different from other modern organizations, including the many civic organizations throughout the nation. Increasingly, civic **[*25]** organizations and interest groups rely on "checkbook" volunteerism to perform their work (see Putnam 2000; Verba, Schlozman and Brady 1995). Citizens make contributions to favored organizations where professional staff executes the work to advance the goals of members.

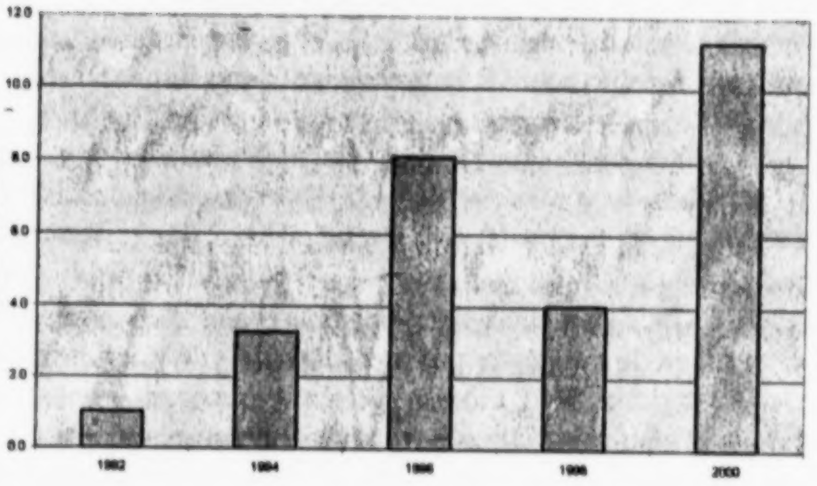
(e) Political parties rely more on professionals because they seek to reach out to voters with sophisticated technologies that require special expertise. These technologies include public polling, direct mail, telemarketing and broadcast advertising. Similarly, non-party interest groups, such as EMILY's List and the National Rifle Association have come to rely on the same kind of professionals to reach out to their members.

(f) While party activity at the national and state level has assumed a professional cast, party volunteers remain important at the local level. These volunteers usually participate in the weeks before Election Day. The ebb and flow of volunteers today appears no different than in the past. While conventional historical accounts of political parties suggest that citizens attended party meetings and rallies year-round, recent historical research suggests otherwise. The flow of partisan volunteers into politics was highly seasonal, and a rather small, core group of dedicated activists managed party affairs day-to-day (see Altshuler and Blumin 2000). Today, the modern party organization is also managed by a core of activists. The emerging strategies they adopt reflect the realities of changing technologies and demographics.

[*26] 18. Political parties provide the campaign "hoopla" that has been a staple of American politics. I define campaign hoopla as the traditional public display of partisan symbols such as yard signs, banners and bumper stickers, along with the revelry among partisans in the form of rallies and speeches in public spaces. In the aftermath of the FECA and its amendments, much of this hoopla was depressed because candidates – particularly the presidential candidates -- were afraid these displays of partisan ardor might be counted as political contributions that would violate the federal laws.

(a) Some professional campaign practitioners are skeptical of spending money on these kinds of grassroots activity. They see it as "wasted money" that could be spent getting voters to the polls or for more advertising. But this hoopla is important for generating enthusiasm about political campaigns and building the morale of party activists. An enthusiastic group of party activists are likely to spread the word among friends and neighbors, getting others involved in campaigns. In this way grassroots hoopla may generate network effects that encourage greater awareness about the party message and participation in campaigns among party activists. Based on my analysis of the reports filed with the FEC, state political parties spent $11.3 million in the 2000 cycle on party "hoopla," which I define as distributing yard signs, bumper stickers, banners, pins, holding rallies and fairs, and other volunteer work (see Figure 9 below). In contrast to the conventional wisdom, this sum reflects an increase over the decade. Between the midterm elections, 1994 and 1998, party spending on hoopla **[*27]** increased from $3.3 to $4 million. The growth during presidential elections has been more prominent: $1 million in 1992, $8.1 million in 1996, and $11.3 million in 2000.

Figure 9. State Party Non-Federal Disbursements on Grassroots and "Hoopla"



19. Parties mobilize voters by identifying likely supporters, registering them and getting them to the polls on Election Day. Since the early days of the Republic, political parties have been important agents of mobilization. In the so-called "heyday" of political parties, the organizations used a variety of techniques to get voters to the polls. They helped immigrants gain citizenship, registered voters, sponsored popular entertainments at the polling booth. The techniques have changed and parties face stiffer competition to get the attention of voters. Between the 1992 and 2000 election cycles, the combined nonfederal spending by 100 major state parties to mobilize voters increased from $8.6 to $41.8 million **[*28]** (see Figure 7 earlier). It is difficult to evaluate how this spending affects turnout, and there is vigorous debate among political scientists about factors that affect turnout. According to a two scholars from MIT, the reduction of party non-federal funds could decrease voter turnout by slightly more than two percentage points, which represents about two million voters (see Ansolabehere and Snyder, 2000:617).

III. Importance of nonfederal money for the effective operations of political parties

20. Political parties use nonfederal money for issue advertising, including advertising that relates to state and local elections when a candidate is mentioned.

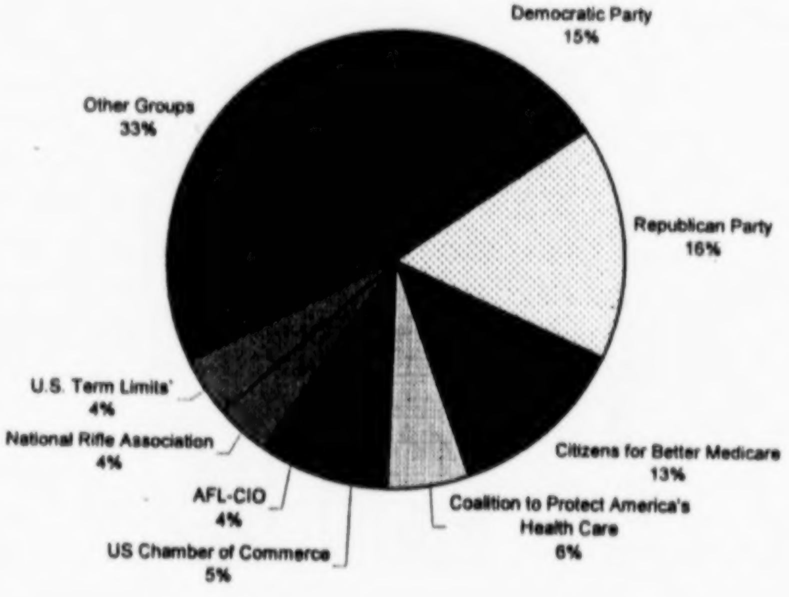
(a) Party spending on media activities reflects efforts to win support for the party and its candidates. Broadcast media efforts are targeted usually toward the undecided voters, in contrast to "ground" mobilization strategies, i.e., direct mail, telephone calls and canvassing, that urge partisan loyalists to go to the polls. While most ads occur during the final months of the campaign season, the parties will also spend money outside the campaign season to bolster support for particular party policies, or to challenge the policies of the opposition. The Democrats pursued this strategy in 1995, when the party sponsored ads attacking the Republicans in Congress on the issue of shutting down the government during the budget stand-off. The Republicans aired issue ads nationwide during discussions of the balanced budget amendment and welfare reform legislation.

[*29] (b) Political parties compete with interest groups when airing political ads. Political parties accounted for a little less than one-third of issue ads in the 2000 cycle, while interest groups accounted for two-thirds according to a report by the Annenberg Public Policy Center at the University of Pennsylvania. The Republican Party spent $83.5 million (16% of total) and the Democratic Party spent $78.4 million (15% of total). One non-party group, Citizens for Better Medicare, which is funded by the pharmaceutical industry, spent almost as much money on issue ads as either political party (see Figure 10 below). Overall, the top six non-party spenders accounted for almost one-fourth of issue ads for the cycle. The APPC reports notes that political party spending may be under-represented because researchers counted party spending only in the 75 largest media markets.

These figures, however, closely match my own data on party-based issue ads collected by examining financial reports filed with the FEC. The APPC data on issue ads reveal the breadth of interest group spending that competes with parties to disseminate political messages. Under the BCRA, the percentage of ads sponsored by non-party groups is likely to rise because national parties, unlike interest groups, will be required to pay for all advertising with federal money, regardless of when they are broadcast. State and local parties will have fewer resources to broadcast ads because they can no longer receive nonfederal funds from the national committees.

[*30]

Figure 10. Issue Ad Spending for the 1999-2000 cycle

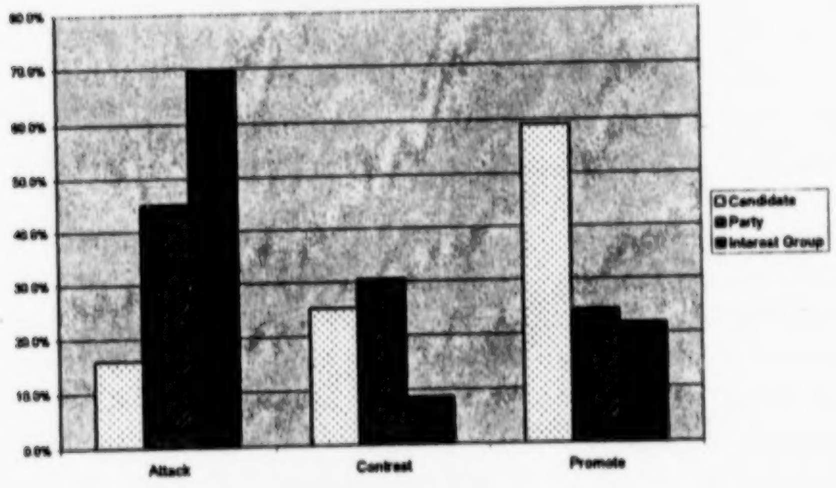


Source: Annenberg Public Policy Center

(c) The rate of growth for interest group advertising is rising faster than for political parties and candidates. According to data compiled by the Brennan Center for the 1998 calendar year, interest groups spent 42 cents for every dollar that the parties spent on advertising (electioneering and issue ads combined). In 2000, interest groups closed this gap considerably by spending 60 cents for every dollar the parties spent. If the national political parties are not able to raise and spend soft money for issue advertising this gap will diminish even more.

(d) According to the most recent data from the Brennan Center in 2000, interest group advertising that mentions federal candidates was more negative than similar party-based advertising (see Holman 2001). Figure **[*31]** 11 illustrates that almost 70 % of ads aired by interest groups were "attack" ads, while 45% of ads aired by parties were attack ads. Parties also aired more "contrast" ads, which tend to help viewers recognize key differences between the parties' candidates. Under the BCRA, it is conceivable that additional spending by interest groups will result in more negative advertising.

Figure 11. Ads by Candidates, Parties and Groups that Attack, Contrast or Promote Candidates



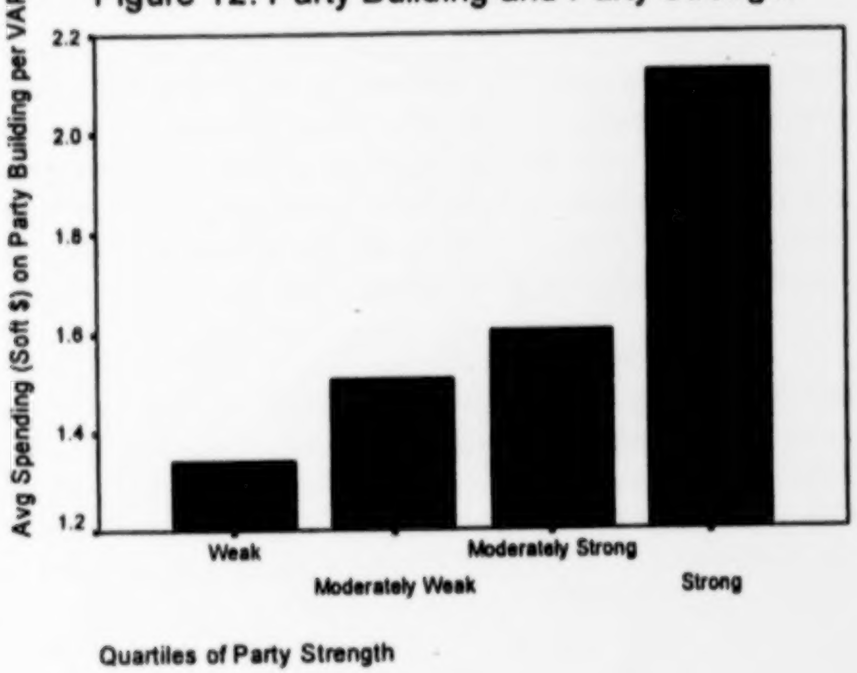
Source: Brennan Center

21. Nonfederal money helps parties perform important traditional party **[*32]** functions. My research shows that state political parties that spend more nonfederal money per voter tend to have stronger organizations. By stronger organizations I mean those that retain sizeable year-round headquarters and perform traditional party functions frequently, such as recruiting and training candidates, and running party-wide mobilization programs.

(a) To assess the relative strength of political parties, I sent out questionnaires to all 100 major state party organizations about the size and scope of operations and received responses from 94 organizations. I created a cumulative index of "party strength" based on how frequently the party said it performed several activities, as well as the size of party staff and off-season budgets.

(b) Stronger organizations possess relatively more staff per voter, and engage in party-based activities more frequently such as recruiting, mobilizing voters, researching the opposition party, conducting polls and helping train activists and volunteers to help candidate campaigns. For ease of comparison I arranged the parties into quartiles of party strength: weak, moderately weak, moderately strong and strong (see Figure 12 below). I then observed whether the amount of nonfederal money that state parties spent between the 1992 and 2000 election cycles (adjusted for the size of the voting population) corresponded with the relative strength of the parties.

Figure 12. Party Building and Party Strength

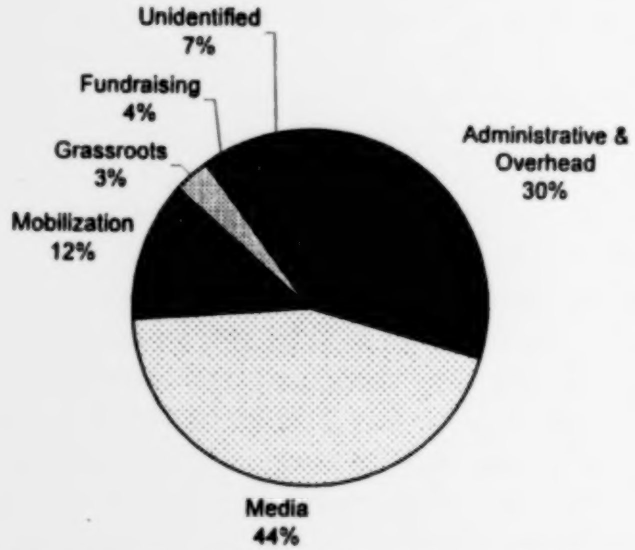


(c) The weakest state organizations spend the least amount of nonfederal money, while the strongest parties spend the most. This linear relationship shows that parties invest nonfederal money in party building activities. The more they spend nonfederal money, the larger the organization and the more activities they perform. This finding implies that state parties have not been merely conduits to pay for issue ads with nonfederal money as depicted in the news media. Instead, party spending reflects genuine investments in party-based work. I would not go so far as to argue that nonfederal money, by itself, creates strong political parties because the causal mechanism linking spending and party strength is difficult to untangle. For example, strong party organizations tend to be better at raising money. It seems clear, however, that reducing party budgets **[*34]** through a ban on soft money for national parties will

likely weaken party organizations by reducing their activity and presence during both non-electoral and electoral seasons.

22. Transfers of nonfederal money from the national committees to the state committees have helped sustain or expand state party activity. The amount of transfers from national organizations to state organizations has increased from $18 million in the 1992 cycle to $279 million in the 2000 cycle. The national committees of the Republican Party provided more than half of nonfederal receipts for its state party affiliates during the 2000 Election Cycle (adjusted from "swaps" of federal money transferred to national committees). The national committees of the Democratic Party provided 63% of state party nonfederal receipts. The conventional wisdom is that all the money went into issue ads that benefited federal candidates. But this is not so. While 44% went for media-related disbursements, almost half of nonfederal money paid for party building activities such as administration and voter mobilization (see Figure 13). **[*35]**

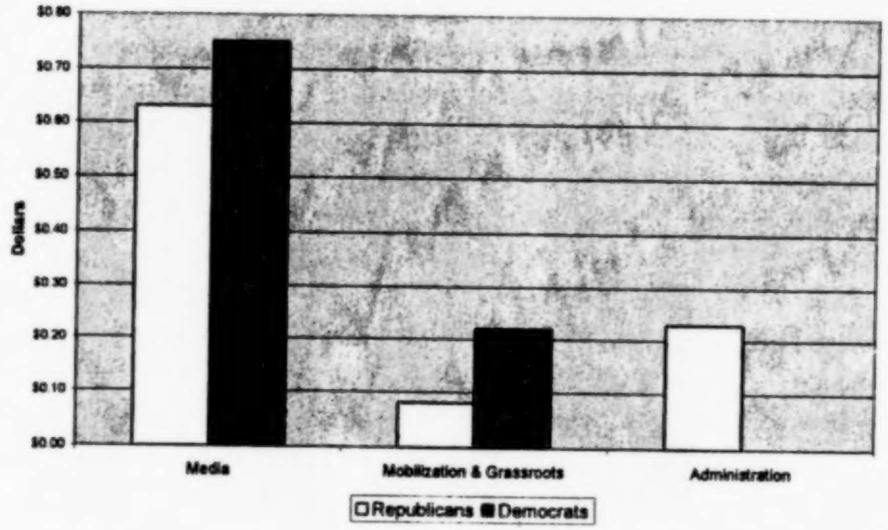
Figure 13. State Party Non-Federal Disbursements, 2000 Cycle



Source: Federal Elections Commission; data compiled by author.

(a) My doctoral research suggests that these transfers have enabled the state parties to perform more activities. Supporters of the BCRA have tended to focus on how the transfers to state parties are associated with increased spending on media. While this is certainly true, it should not be forgotten that the state parties use nonfederal money for other kinds of efforts. For example, an increase of one dollar transferred between 1994 and 1998 from national committees of the Democratic party to a state party resulted in an additional 22 cents of spending on mobilization activities such as voter identification, phone banks, direct mail, canvassing, and various forms of grassroots activity (see Figure 14 below; these estimates have been controlled for changes in the competitiveness of U.S. Senate, U.S. **[*36]** House, and gubernatorial contests in the states between 1994 and 1998). Similarly, a dollar increase in transfers by Republican national parties was associated with an increase of 23 cents on administrative spending and 8 cents for mobilization activities. In 1979, Congress intended to encourage this kind of party-based mobilization and grassroots activity when it amended the Federal Election Campaign Act.

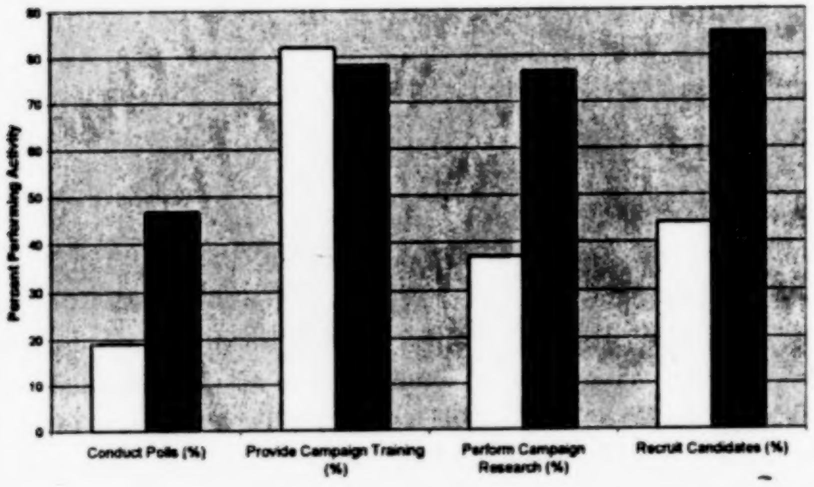
Figure 14. The Effect of an Additional Non-federal Dollar Transfer between 1994 and 1998 Elections on State Party Activity



See Appendix A for OLS coefficient estimates.

(b) Since 1979, when Congress passed these amendments to strengthen party organizations, parties appear to have gotten stronger. I compare data on political parties collected in 1980 (see Cotter et al., 1984) with the data I collected during the 2000 election cycle. On almost every measure for **[*37]** which my survey questions match the 1980 questionnaire, political parties appear to be more active today than in 1980 (see Figure 15 below). For example, in 1980 only 44% of the Democratic state parties recruited candidates while in 2000 cycle, 85% performed this activity. Similarly, the size of the organization has increased as measured by the number of employees, the size of budgets during the off-election year, and the existence of permanent party headquarters. The Republicans made solid gains as well, although not as dramatic because they began their party building efforts in the 1960s under RNC chairman, Roy C. Bliss (see Herrnson 1988; 1994). While I would not argue that the Democratic Party began its party building efforts with the rise of non-federal funds, it seems apparent that non-federal funds helped them expand party-based operations. **[*38]**

Figure 15. Democratic State Party Activity, 1980 vs 2000

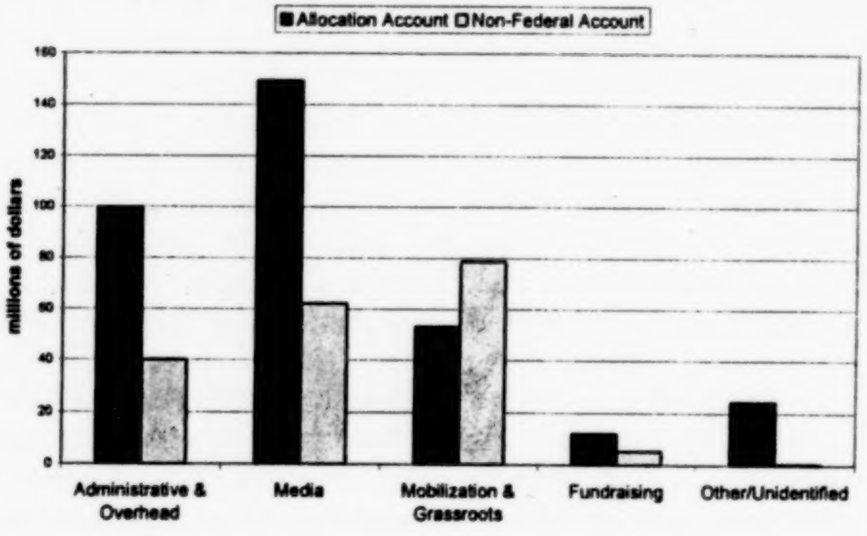


(c) Political parties work closely together through the exchange of nonfederal funds. By transferring funds among party committees, the party organizations increase interdependence and create an efficient use of campaign funds. The parties trade nonfederal dollars for federal dollars to meet specific needs of the campaigns in each state. In states where campaign finance laws permit parties to raise funds in larger increments than allowed under federal laws, these parties may transfer money they raise under "hard" limits of federal laws to states that need federal funds. In return they receive nonfederal dollars. The necessity of trading funds among parties provides opportunities to strengthen the party network across state boundaries and encourage party solidarity.

[*39] 23. National and state political parties use nonfederal dollars for nonfederal election activity. According the Center for Public Integrity, the state party organizations spent $232 million exclusively from the nonfederal accounts.

This money was spent on candidate contributions and party building activities that included voter registration, direct mail and various forms of get-out-the-vote strategies; it does not include transfers to other party committees. It should be emphasized that these disbursements are in addition to the sums of nonfederal money that the state parties reported to the Federal Election Commission in their allocation accounts. Figure 16 (see below) shows party nonfederal spending in the nonfederal account and the allocation account. Combined party disbursements on mobilization and grassroots in both accounts amounted to $132 million. While media activities account for 40% of nonfederal disbursements, state organizations invested one-quarter of their funds in "ground" mobilization activities. **[*40]**

Figure 16. State Party Non-Federal Spending, 2000 Cycle



IV. What will be the effect of the BCRA on political parties?

24. The ban on non-federal funds to national political parties will likely divert nonfederal money toward interest groups. Political parties compete with interest groups for donations. They also rely on some interest groups to

donate money to them. Under the BCRA, donors may not give nonfederal money to the national parties, but they may continue to donate to interest groups or state and local parties in some states. Interest groups will take advantage of the vacuum left by the national committees to raise the nonfederal funds that parties have raised in the past. According to recent articles in the Washington Post, interest groups are already positioning themselves to recoup the funds that parties will not receive once the BCRA takes effect. The Washington Post reports that lobbyists and **[*41]** activists are already developing strategies to develop "non-party vehicles to take soft money to pay for commercials, voter-mobilization, and other programs" designed to help candidates. (see Edsall and Eilperin, 8/18/02).

(a) Under the BCRA rules, several types of interest groups may continue to spend non-federal funds. For example, 527 and 501(c) organizations may use their non-federal funds to inform and mobilize their members and supporters. Professor David Magleby has shown that outside groups target key races with issue ads and voter mobilization programs. He estimates that 211 interest groups communicated with voters in the 17 most competitive congressional races during the 2000 cycle (see Magleby 2001). The number of outside groups engaged in issue ads and mobilization is likely to increase under the BCRA.

(b) Professor Emeritus, Herbert Alexander, the dean of scholars in the field of campaign finance and former Executive Director of the Citizens' Research Foundation, concurs with this opinion. He argues that "an examination of some serious problems affecting the electoral system indicates that the problems will remain and probably be exacerbated by the new law." Notably, Professor Alexander believes that "soft-money PACs and unincorporated associations will seek out soft money that formerly went to the parties...." (Alexander 2002).

(c) The largest and wealthiest interest groups have viable alternatives for using non-federal funds in elections if they cannot donate it to the political parties. Based on my research with Apollonio (2002) and that of Malbin, **[*42]** Wilcox, Rozell and Skinner 2002, it seems likely that groups that were the largest single non-federal funds donors to parties, such as labor unions and issue groups with large memberships, should benefit from the new laws because they have various options. These groups will substitute for non-federal funds donations to parties with direct membership mobilization and additional federal contributions to candidates. Large business organizations may do likewise, although they frequently lack the structural advantages to mobilize voters that membership groups possess. These groups gave to political parties in the past because of party fundraising requests, and because interest group leaders understood that the party was the most effective coordinator of campaign activity, i.e., the parties use resources efficiently across numerous elections. It is likely that membership groups, such as the AFL-CIO or NARAL will invest their nonfederal funds in their own campaign operations now that they cannot donate them to the national committees.

(d) Even if the provision imposing a blackout period on interest group issue ads paid for with non-federal funds is upheld, the national parties remain at a disadvantage relative to interest groups since the latter may continue to defray non-media costs, such as administration and voter mobilization, with non-federal funds. Under the BCRA, the national committees must pay for everything with federal funds. State parties will also suffer since they have come to rely on national party non-federal funds for party building activities.

[*43] (e) The organizations that gave both federal and non-federal funds will likely shift additional resources into federal funds contributions and lobbying. Those that are effective at electoral politics will invest additional amounts into campaigns that include member mobilization and issue ads. EMILY's List and the National Rifle Association will do particularly well under the provisions of the BCRA. They will be able to bundle contributions from members and channel them to favored candidates. They may also use their nonfederal funds to mobilize members and broadcast issue ads outside the blackout period prior to elections. Some activists are also forming 527 committees that may continue to raise and spend non-federal funds. For example, the founders of DaschleDemocrats.org claim they are completely independent from Senate Majority Leader Tom Daschle. The committee is headed by several former senators and Clinton administration officials. Even Senator McCain, a sponsor of the BCRA, acknowledges that groups may get around provisions that attempt to limit the use of nonfederal funds (see Edsall, 4/11/02).

(f) The largest non-federal donors are already giving significant amounts of federal (hard) money. My research with Apollonio on interest group political contributions shows that the median amount of federal money contributed to candidates is greater than $78,000 for groups that give both federal money to candidates and non-federal money to parties (data provided by the Center for Responsive Politics). The median non-federal **[*44]** donation to political parties for this group of "dual" donors is only $25,000. For groups that give only federal money to candidates the median federal contribution is slightly more than $10,000. These figures indicate that non-federal donors already dominate the federal money system of political contributions; they will have little trouble adjusting to a system that prohibits non-federal donations to national party committees.

(g) The number of groups that donate non-federal money is much larger than the number of groups that give federal contributions, and the vast majority of these non-federal donors are small donors. In the 1998 election cycle, there were 2,777 federal PACs that made federal funds

contributions. In contrast, there were 11,383 entities (corporations, labor unions, tax exempt organizations, etc.) that donated non-federal money, not including individual donations. One obvious reason there have been more non-federal donors is that it is easier to make these donations because groups do not need to form a Political Action Committee. Most groups that made non-federal donations were small, local business organizations such as construction firms, hotels, funeral homes, towing services, dental offices, hardware stores, landscape services, legal offices, accounting firms, and retail food outlets. The donations of these groups that give non-federal money only are rather small: the median is just $375 (Apollonio and La Raja 2002). While the intended target of the BCRA is the large, wealthy organizations, the new law also prevents smaller entities from **[*45]** participating at the federal level through contributions that could hardly be called "corrupting."

(h) As interest groups increase their spending in elections, political campaigns may lose thematic coherence. Political parties broadcast "cookie cutter" issue ads that employ selected themes that the parties want to associate with their candidates. If interest groups dominate the airwaves, we are likely to see a set of interests advertised before campaigns that reflect the concerns of a relatively small segment of the citizenry who feel intensely about a particular issue. Professor Jamieson's research team at the Annenberg Public Policy Center (APPC) shows that interest groups already account for two-thirds of the more than $500 million spent on issue ads during the 2000 election cycle. In the APPC report, Professor Jamieson wrote, "Over the last three election cycles, the number of groups sponsoring ads has exploded, and consumers often don't know who these groups are, who funds them, and whom they represent" (see APPC, p.1).

(i) Interest group ads lack the accountability that is present when a party sponsors ads. An important difference between advertising by outside groups and political parties is that the former are not linked at the ballot box with the candidate. Therefore, outside groups can air ads without facing reprisals from voters, an arrangement that undermines accountability in the campaign process. Professor Magleby, for instance, cites numerous groups in his study with indistinct names such as Foundation for Responsible Government, American Family Voices, **[*46]** Coalition to Make Our Voices Heard, and Committee for Good Common Sense (see Magleby 2002). More of these groups may emerge if non-federal funds are channeled away from the parties and toward interest groups.

(j) When parties broadcast political ads their candidates are perceived as responsible for these ads, even when these ads are not express advocacy. Evidence for this perception comes from the willingness of candidates to restrain the activities of their parties. In at least two important Senate contests the candidates publicly declared they would request the political parties not to spend non-federal funds in their races. In the Wisconsin 1998 Senate contest, Senator Feingold requested that the Democratic Party refrain from running issue ads in Wisconsin. The party complied even though it risked losing a very important seat. In the 2000 New York Senate contest both candidates agreed not to use party non-federal funds. The candidates were careful to articulate that they could not be held responsible for the advertisements done by outside groups. For example, candidate Clinton declared: "if we make an agreement to do away with soft money, I assume it will include everything. Now obviously there are groups that we have no direct control over that we will have to ask to abide by whatever agreement you reach…" (NY Times, Sept 21, 2000). Candidates can credibly deny their association with interest groups, even if these interest groups have had close relationships with the candidate in the past.

(k) The political parties keep each other accountable with their issue ads because they can easily identify the opposing party ads and link them to the party candidate. In his report on non-federal funds and issue advocacy in the 2000 elections, Professor Maglebly provides some examples of how this works:

> "The Republicans successfully challenged DCCC ads in Kentucky Six and New Jersey Twelve. The ads were pulled from the air, and the Republican candidates achieved public relations victories against not only the DCCC but also the Democratic candidates. A spokesperson for the Kentucky Sixth Congressional District candidate Scotty Baesler stated that having the ad pulled 'hurt us in a significant way. It allowed Fletcher to raise a credibility issue.' Interestingly, as the race progressed, the Democratic campaigns were more careful and it was the Republicans who had more controversial ads pulled. Both parties tried to make the opposing candidates take the heat for soft-money ads that went too far."

The example used by Professor Magleby demonstrates that parties and their candidates are jointly punished for becoming too controversial. The traditional head-to-head competition between the party candidates provides the natural mechanism for holding the party organizations accountable.

25. If party organizations lose their central role as coordinators of electoral activity, interest groups and individual candidates will pursue their campaign goals more independently. Instead of choosing the party as an arena to

build and coordinate **[*48]** campaign themes, interest groups, with narrower interests, will increasingly take up the functions that parties leave off. Already, groups like EMILY's List behave increasingly like political parties by using non-federal funds to identify and train candidates for office and to mobilize voters. See Affidavit of Joe Solmonese, Chief of Staff of EMILY's List, ¶¶ 4, 25). In the 2000 elections the Democratic Congressional Campaign Committee gave EMILY's List $1.3 million in non-federal funds for help in mobilizing voters. (Edsall, April 21, 2002) It is likely that EMILY's List will raise these funds on its own in upcoming elections, and deploy them to further its organizational goals.

(a) The last set of reforms in 1974 empowered Political Action Committees because parties were severely restricted (Sorauf 1992). The same consequences are likely with the BCRA. Membership PACs, such as EMILY's List, NARAL, NRA should have relatively greater influence in elections now that national committees will forego resources that are available to interest groups. Keeping track of the activities of outside organizations will be much more difficult than for parties. Professor Magebly's effort to assemble information about interest group activity in elections is notable for the very reason that it is so difficult to find out which groups engage in campaign activity. I was a part of a team in California that visited local broadcast stations, interviewed leaders of local interest groups and contacted candidates about political campaigns being waged against them.

[*49] (b) As much as the research team attempted to extend its network of "informers" who knew about campaign activity by outside groups, we had no way of ascertaining the full range of efforts by groups. For example, while officials from the California AFL-CIO would provide the cost of sending direct mail to members during the presidential primary, they would not provide figures about the cost of telephone banks. Nor would they cite figures about

administrative cost to support campaign activity. Regarding issue ads by outside groups, an organization called "Republicans for Clean Air" ran negative advertisements against John McCain. We could not determine the sponsors of this ad until reporters in Washington discovered that two brothers from Texas, who strongly supported George W. Bush, paid for these advertisements using a P.O. Box in Herndon, Virginia. When I tried to obtain figures from the local ABC affiliate about the cost of airtime they purchased, this office claimed they did not have to turn over these records. This direct personal experience trying to monitor outside electoral activity revealed to me the potential difficulties of identifying the source of interest group campaign activities, including issue ads. By reducing the amount of money that flows through political parties, the BCRA is likely to spark more outside activity that is difficult to track.

(c) Experience in the states illustrates how outside spending may increase if party funds are restricted. Professor Michael Malbin, Executive Director of the Campaign Finance Institute, co-authored a study of campaign **[*50]** finance in states with ambitious regulatory frameworks (see Malbin and Gais 1998). Malbin and Gais show that efforts to diminish the need for money in politics have not met with success. They point to Wisconsin as an example of a state that made a robust effort to reduce the role of money in politics by limiting contributions to and from the political parties. The result was the formation of "conduit" committees. Others have reported a rise in independent expenditures (see also, Ehrenhalt 2000). The most recent efforts to finance campaigns with "clean money" and reduce political spending in Maine have run aground because outside groups have augmented their spending to influence a few key seats that held the balance of power in the legislature (see *Associated Press*, March 21, 2002).

26. The ban on non-federal funds to national political parties encourages the formation and strengthening of shadow party organizations. Wisconsin's experience with tight restrictions on political parties saw the rise of "conduit" committees to channel money to candidates in competitive races because the parties could no longer perform this function (see Malbin and Gais).

(a) The reduction of party influence will spur factional groups within the parties to pursue their own brand of campaigning. For example, the New Democratic Network, which reflects the centrist wing of the Democratic Party, will compete more intensively for funds and political influence against the Progressive Donor Network, which reflects the liberal wing (see Foer, 2002). These two factions should attract the funds that formerly **[*51]** went to the Democratic national committees. They will invest their resources to support candidates who espouse their particular visions of the Democratic Party. Thus, by weakening the national committees relative to quasi-party groups, the BCRA reduces the parties' capacity to build coalitions during the electoral process and moderate the potential divisiveness of factional group politics.

(b) While the reformers hope that the enactment of the BCRA will diminish the importance of money in politics, research demonstrates that campaign finance laws have limited impact on the amount of money in elections. In a study of U.S. campaign spending between 1978-98, Ansolabehere, Gerber and Snyder (2001) conclude that growth in spending is associated with rises in the Gross Domestic Product (GDP). The authors provide two possible explanations. First, as GDP grows so does the size of government, which means more groups will seek to influence government activity. The second explanation is that, as personal income rises, giving rises (see Verba, Schlozman, and Brady 1995). Political spending, in this scenario, appears to rise like consumer spending for other goods and services

when the economy expands. Notably, even in Great Britain, where the government imposes strict spending limits on candidates and television advertising, the amount of political spending corresponds to changes in the GDP. The researchers conclude that "regulation of spending through limits and TV restrictions may be elusive (see Lubenow, p. 43)."

[*52] 27. The BCRA will make it tougher for political parties to work together on fundraising and reduce the level of interaction among levels of party committees. The ban on joint fundraising for Levin Amendment funds prevents state and local parties from working together to raise money for party-building activities.

(a) The BCRA prohibits party members at the national level from helping state and local parties raise nonfederal money. This prohibition will have negative consequences for state parties, particularly the parties in the small states. According to Beverly Shea, Finance Director of the RNC, whom I interviewed on September 6, 2002, "fundraising in the states is the toughest job of all." She says most party donors are not familiar with the work of state parties. While state parties appear to be doing a better job of fundraising in recent elections, Shea states that the leaders of many state party organizations are not well-positioned to raise money.

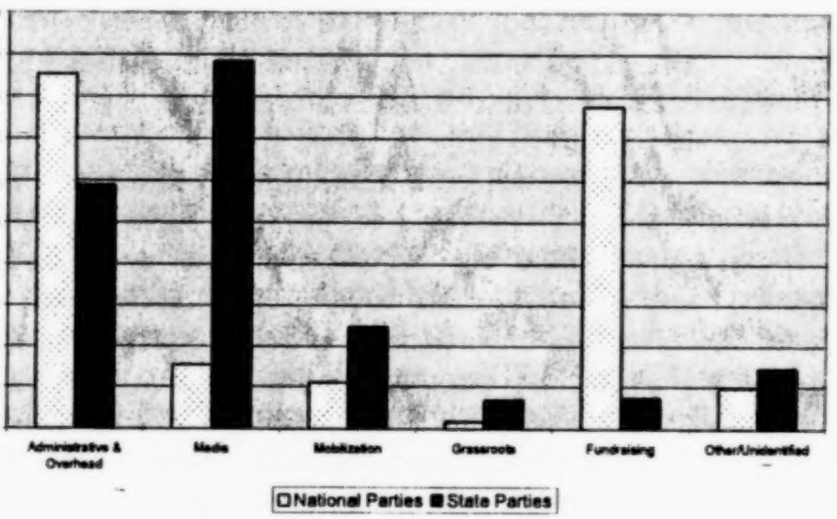
(b) State staff turnover is particularly high because state organizations cannot afford to pay salaries commensurate with that of the national organizations and consulting firms. The consequence is that fundraising can sometimes be a haphazard process. State organizations have not always invested in long-term strategies to develop donor networks, nor have they established professional routines for fundraising. According to Beverly Shea, who also has experience at the state level, the selection of party chairs "appears to drive a wedge between partisan factions within a state to a degree that it does not at the national level, leaving some prospective donors refusing to give to the state party." Fundraising at the national level draws from a **[*53]** larger and more diverse pool of donors, and the selection of the party chair appears less relevant to prospective donors.

(c) For these reasons, the RNC plays an important supportive role for state party fundraising by providing ongoing advice, continuity, technical assistance and transfers of nonfederal money. Now that national committees may no longer raise and transfer nonfederal money, state parties must invest additional resources in fundraising operations. Raising money costs money.

(d) State organizations will not make up this loss of party building money through their own fundraising in the near future. Based on the amount that state organizations currently invest in fundraising tasks, it seems unlikely. National committees spent about 40% of their nonfederal funds to raise approximately $500 million nonfederal dollars. In rough terms, about $300 million of national committee nonfederal funds were transferred to state organizations. For state committees to keep pace in the 2004 cycle, without national committee transfers, they may need to spend an additional $120 million on fundraising operations collectively (40% of $300 million = $120 million). According to reports from the Center for Public Integrity and the Federal Election Commission, state parties spend only 4% of their party building budget on fundraising (see Figure 17 below), which is less than $20 million dollars ($12.1 million in the allocation account and $5.4 million in the nonfederal account). This estimate suggests that state parties would need to invest almost six times**[*5 4]** as much in fundraising operations to bring them to the same level of resources that they received through national committee transfers. Instead of spending only $20 million, state parties would need to spend $140 million to get the same financial returns -- assuming it were even possible for them to raise that much money.

(e) The parties have evolved a division of labor and it would be difficult for the state parties to simply fill the vacuum of fundraising left by the national parties. This division appears efficient: resources are accumulated centrally and then allocated locally where party operatives know the political terrain.

Figure 17. Division of Labor:
Spending Percentages by Level of Party, 2000 Elections



(f) The BCRA also hampers state party fundraising by severely limiting federal candidates' ability to help the party raise nonfederal funds. **[*55]** Federal candidates have been a key source of help to state organizations, particularly in the smaller states. U.S. Senators sign fundraising letters for the state party or make phone calls to help fill the tables at the Jefferson-Jackson dinners (for Democrats) or Lincoln Day dinners (for Republicans). As I understand it, these candidates may only be featured guest speakers at such functions.

28. The BCRA will reduce support for challengers from political parties. Research demonstrates consistently that parties tend to support challengers in contrast to other kinds of

political actors that support incumbents. Parties do not contribute to challengers for sympathetic or altruistic reasons to help the underdog or encourage democratic competition. Rather, parties invest in challengers because they want to win elections and control government. The "by product" of their incentive to win is that challengers in potentially winnable races (meaning districts where partisan voters are distributed fairly evenly) receive party funds. In a 17-state study of campaign finance in state legislative elections during 1991-1992 (see Gierzynski and Breaux 1998), researchers found that parties gave as much of their funds to non-incumbents as to incumbents, even though the pool of incumbents is much larger. The Democrats and Republican parties each contributed about half of their funds to non-incumbents.

(a) Party contributions to challengers help provide an important threshold of financial support so they compete more effectively with incumbents. Although incumbents may raise more dollars than challengers, an additional dollar spent by challengers has a greater marginal impact on **[*56]** vote share than for incumbents. Professor Gary Jacobson of UC San Diego, who has done similar research for congressional races, explains that "incumbents are already familiar to voters at the outset of the campaign, whereas nonincumbents probably are not….Nonincumbents normally have much more to gain in the way of voter awareness during the campaign, implying that the more extensive – and therefore expensive – the campaign, the better known they will become" (Jacobson 1978).

(b) Campaign finance laws that curtail party finances adversely affect the amount of money that challengers raise. In research I conducted with Thad Kousser, Assistant Professor at UC San Diego, we collected campaign finance data from 15 states during the 1996 elections through the National Institute on Money in State Politics. We then observed the pattern of candidate fundraising, finding that political parties were the most generous to candidates in

potentially winnable races (those where prior elections were won or lost by 10 points or less), regardless of whether they were incumbents or challengers. Challengers fared slightly better with parties, providing an additional $66 per 1000 residents, but the more important point is that the parties did not favor incumbents. In contrast, PACs, interest groups and individual donors favor incumbents, providing an additional $295 per 1000 residents, a pattern that explains why these candidates possess fundraising advantages in elections. These findings confirm earlier studies of party and PAC contribution patterns.

[*57] (c) Campaign finance laws that restrict political parties may hurt the success of challengers in elections, precisely because parties are important sources of campaign contributions for challengers. Kousser and I examined whether variations in state laws affecting fundraising and contributions by parties altered patterns of fundraising among candidates. We found that state laws that restricted party financing adversely affected challengers. For example, a candidate running in a fairly competitive seat where past margins of victory averaged ten percentage points could expect to lose almost $500 per thousand residents when laws limit how much a party may contribute to a candidate.

(d) This loss of party money can affect how the candidate does on Election Day. A challenger who raises $500 more per thousand residents than the average challenger will capture an additional 1.8% of the vote. In contrast, an incumbent who raises $500 more than the average incumbent gains an estimated .7% of the vote (Kousser and La Raja 2002). These figures may not seem large but incumbents start out with more money than challengers. Additional funds that challengers receive from the party puts them on more equal footing with incumbents. The more money that a challenger raises above the average amount for challengers, the better she fares, even if the incumbent exceeds the average for incumbents by the same amount.

(e) Parties that are restricted from making contributions to candidates will try to help their candidates through generic party activities that include voter [*58] mobilization, issue ads and other party-based services. In other words, they should intensify party-building activities to attenuate the difficulties challengers face in elections. The BCRA, which eliminates non-federal funds at the national level and reduces party-building activity, will further hamper the ability of parties to help challengers through such broad-based party activities. Since the parties tend to concentrate mobilization efforts in winnable contests, it is likely that challengers will suffer the most.

V. Would less restrictive alternatives have been less harmful than a unilateral ban on non-federal funds for national committees?

29. There were many alternatives Congress could have adopted which would have been far less harmful to parties than the ban on national party non-federals funds, while addressing the major concerns of those who supported the BCRA. For example, a cap on non-federal donations would have done less harm to the political parties than a unilateral ban. The typical non-federal donation is actually quite low. In a study I did after the 1998 election cycle for the Institute of Governmental Studies and the Citizens' Research Foundation, I found that there were 24,546 non-federal funds donations to the political parties from individuals and entities. The average donation was only $8,750, and this does not include the many donors who gave in increments less than $200. More than 90% donated less than $25,000. The sum of donations under $25,000 amounted to almost 40% of party non-federal funds. The vast majority of donations come in under $100,000. The sum of donations under $100,000 amounted to just below 80% of party non-federal funds. Based on these numbers, it appears that a cap on non-federal donations at $100,000 would have addressed any perceived problems with [*59] mega-donors, without severely limiting party resources. Parties would have retained a good portion of nonfederal funds from donors under the $100,000 level, while the mega-donors that give more than this amount would have been eliminated. The BCRA, with its unilateral ban on non-federal funds to the national parties, uses a meat cleaver approach, which makes no distinction between small and large donors, and forces the party to lose an important source of funds for party building activity.

30. Another less restrictive alternative Congress could have adopted was to restrict issue ads paid for with non-federal funds. The focus of reformers has been to eliminate the issue ads that they believe have generated a huge demand for non-federal funds. Why could Congress not have simply restricted issue ads paid for with non-federal funds or imposed a blackout period as the law does for interest groups? I am not an expert on constitutional law so in noting this possibility, I am assuming here that there would be no serious constitutional problems with preventing the parties from spending non-federal funds on issue ads.

(a) A ban on non-federal funds for national political parties may weaken the incentive for parties to invest in long-term party building. With fewer resources, the national committees will be compelled to lay off staff that was assigned to help state parties. State parties benefit from the advice and technical support of the national committee staff when they fundraise, recruit and train candidates and develop voter programs. According to RNC Finance Director, Beverly Shea, the RNC staff frequently analyze fundraising operations and offer advice when state leaders ask for [*60] consultations. The national party has absorbed the cost of hiring experts to monitor and advise state level committees. These personnel have been paid for, in part, through nonfederal money.

(b) National committees will save precious federal funds for political contributions and independent spending rather than invest it in building up the state organizations. Drafters of the BCRA have assumed that the parties would simply shift their federal funds resources into voter mobilization and forego broadcast advertising. The national parties, however, may choose to use their hard dollars for independent expenditures and coordinated expenditures rather than invest more money in party-based mobilization campaigns in the states. Party operatives in Washington who are concerned chiefly about candidates at the top of the ticket may prefer to use federal funds on television ads, leaving the mobilization campaigns to outside groups. It would be risky for them not to save federal funds for broadcasting ads at the close of the campaign, especially when interest groups are increasingly active in campaigns. By cutting off non-federal funds to the national parties, the party's joint mobilization campaigns are jeopardized, particularly in states that lack the resources and expertise to mount these efforts on their own.

31. Provisions in the BCRA presuppose that state and local committees will be able to raise funds independently to compensate for the non-federal funds that will no longer come from national committee transfers. The national committees have been an important source of revenue for the state parties for both non-federal and **[*61]** federal funds. The Democratic committees at the national level transferred almost $170 million in non-federal funds to the state organizations for the 2000 elections, which comprised 63% of state party nonfederal receipts (when the figures are adjusted for swaps of federal and nonfederal funds between committees). In aggregate, the Republican state organizations were somewhat less reliant overall on their national committees for nonfederal money, receiving 53% of their non-federal funds through national committee transfers.

(a) I am skeptical of the claim by some advocates of the BCRA that parties will move additional resources into voter mobilization and grassroots programs now that they cannot use nonfederal money for issue ads.

This claim depends on whether state and local organizations can conduct comprehensive GOTV programs under the new federal requirement that parties use federal funds or a mix of federal funds and Levin Amendment money. Contrary to the intent of the drafters of the BCRA, federal law may actually reduce the amount of resources dedicated to voter mobilization, by taking the central coordinating organizations out of the picture – the national committees – and imposing greater administrative burdens on the local committees. The requirement that local committees raise and spend all their GOTV funds independently and file with the FEC once they surpass a relatively low threshold of federal funds spending is particularly onerous for committees that are run almost entirely by volunteers. In 2000, only 158 local party committees filed reports with the FEC from the many hundreds of active local organizations nationwide. It **[*62]** is not inconceivable that local committees will give up GOTV activity because the administrative burdens are too heavy.

(b) State and local organizations that rely primarily on large donors may find it difficult to meet the requirements of the BCRA and run GOTV and voter registration programs. According to the new federal law, state parties must pay for GOTV with federal funds or a mix of federal funds and Levin Amendment money, if there is a federal candidate on the ballot, which is a likely occurrence. That means that state organizations may not use money regulated under state laws that exceeds the source and limit restrictions of the BCRA. There are 30 states that allow unlimited contributions from one or more sources (such as individuals, PACs, unions, corporations); 11 states allow unlimited contributions from any source. As far as I know, there are no empirical studies to assess the reliance of state organizations on contributions that exceed the federal constraints. State organizations also invest more than $14 million in GOTV for state and local races, in addition to the $24 million that state parties spend on GOTV for all candidates, including federal, that is reported to the Federal

Election Commission. The fact that state organizations spend so much on GOTV should encourage careful scrutiny of the BCRA provisions regulating this important activity.

(c) In short, I think two basic adjustments – a cap on national party non-federal funds and restrictions on paying for issue ads with non-federal funds – would have addressed the chief concerns of reformers, without **[*63]** causing undue harm to the political parties. The BCRA's outright ban on national party non-federal funds will, however, significantly and unnecessarily weaken political parties at all levels.

I hereby declare under penalty of perjury that the foregoing is true and correct.

s/

Raymond J. La Raja

Executed on September 23, 2002

[LIST OF REFERENCES & EXHIBITS OMITTED]

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Appendix A. The Effect of an Additional Non-federal Dollar Transfer between 1994 and 1998 Elections on State Party Activity

	State Party Spending in Allocation Accounts					
Republicans	Media	S.E.	Mobil & Grsroots	S.E.	Admin	S.E.
Change in National Party Transfers of Nonfed Funds 1994-98(per 1000 voting age persons)	0.84	0.04	0.09	0.02	0.23	0.04
Change in State Party In-House Nonfederal Funds 1994-98(per 1000 voting age persons)	0.49	0.06	0.17	0.02	0.30	0.05
Change in Close Senate Race, 1994-1998	11.29	29.96	16.64	10.84	-26.28	25.90
Change in Close Gubernatorial Race, 1994-1998	-7.25	38.28	-10.47	13.13	-12.96	31.48
Change in the % of Close U.S. House Races, 1994-1998	12.14	63.70	-7.81	23.08	-7.85	55.29
Constant	-81.33		8.10		73.22	
Number of Observations	50		50		50	
R-squared	0.85		0.88		0.59	
Democrats						
Change in National Party Transfers of Nonfed Funds 1994-98(per 1000 voting age persons)	0.75	0.17	0.22	0.06	0.00	0.18
Change in State Party In-House Nonfederal Funds 1994-98(per 1000 voting age persons)	0.10	0.06	0.15	0.02	0.69	0.06
Change in Close Senate Race, 1994-1998	38.67	49.15	-1.73	18.23	-17.64	51.31
Change in Close Gubernatorial Race, 1994-1998	9.92	52.49	2.73	17.33	-5.32	54.79
Change in the % of Close U.S. House Races, 1994-1998	87.14	93.14	7.75	30.75	-99.80	97.23
Constant	-40.25		-13.15		47.48	
Number of Observations	50		50		50	
R-squared	0.58		0.82		0.84	

OLS estimates. Dependent Variables (media, mobilization & grassroots, administrative spending) measured in change in dollars between 1994 and 1998 per 1000 voting age persons
Data Sources: Federal Election Commission; *National Journal* for election results.
Media includes communication for TV, cable, radio, newspaper
Mobilization and grassroots includes direct mail, phonebanks, canvassing, voter identification and regis. rallies, fairs, volunteer precinct walks/ distribution of banners and lawn signs, bumper stickers.
Administration includes office related expenses: rent, salaries, benefits, computers, travel, utilities
Change in National Party Transfers = 1998 - 1994 nonfederal tranfers from 3 national committees
Change in State Party In-House = 1998 -1994 nonfederal funds raised independently by state party
Close Senate or Gubernatorial Race is when final vote margin is 10 perc. points or fewer
% of Close House Races reflect % of races when final vote margin is 10 perc. point of fewer

REBUTTAL DECLARATION OF RAYMOND LA RAJA

1. I submit this declaration to rebut the following claims put forth by one or more of defendants' political scientist experts:

- That state parties are mere conduits for national committees;
- That parties will thrive under the BCRA; and
- That the BCRA will have minimal adverse effects on the relationship among parties at the national, state and local levels.

2. I reject the claim that state parties are mere conduits for national committees. Several of defendants' experts make this argument, calling the state parties "virtual appendages" (Krasno and Sorauf, p. 11); "conduits" (Green, p. 5), and "surrogates" (Mann, p. 31). These assertions give the impression that state parties are not robust organizations capable of developing and executing campaign strategies and performing other party work. As I explained in my affirmative declaration in this case, my data about party spending and activities show that state organizations are doing far more than airing issue ads during the election campaign season. See La Raja Declaration at ¶¶ 22-23. During the 2000 election cycle, some 30% of state party non-federal **[*2]** disbursements from their "allocation" accounts were spent on administrative overhead. Approximately 15% was spent on voter mobilization and grass roots activity. See La Raja Declaration, Figure 13, at p. 35. I take exception to the assessment by Krasno and Sorauf that the state parties spend small sums on party-building. Their combined spending in the 2000 election cycle on mobilizing voters, distributing grassroots materials, and paying the administrative expenses of the party organization amounts to more than that spent on

issue ads. It is worth emphasizing that administrative expenses, which include everything from salaries to office supplies and computer equipment, are critical to building and maintaining party infrastructure. While defendants' experts single-mindedly focus on media, they overlook the substantial role played by transfers of non-federal funds from the national parties in subsidizing state parties' core spending on administrative overhead.

3. Green contradicts Krasno and Sorauf's claim that party spending on non-media activities is small potatoes. Green writes: "Voter mobilization activities are an integral part of electoral campaigns; national parties spend millions on voter mobilization" (Green, p. 18). What Green does not acknowledge is that state parties rely considerably on national organizations to fund their voter mobilization campaigns through transfers of non-federal funds -- transfers that will be banned under the BCRA. Fully 62% of state party disbursements for grass roots and voter mobilization activities are paid for with non-federal funds. My data show that during the 2000 cycle, spending on grass roots and voter mobilization more than doubled since the prior presidential election. Loss of all non-federal transfers from national parties is likely substantially to reduce state party spending on grass roots activity and mobilization.

[*3] 4. Magleby concedes that party spending for mobilization has indeed had profound effects. Magleby refers to non-media efforts, such as direct mail, telephone, Internet and person-to-person contacts as the "ground war." His observation that ground war efforts successfully mobilized voters (p.24) undermines Green' assertion that I overestimate money spent on mobilization since I also include direct mail and phone calls, which he says "are aimed at persuading voters" (Green , note 17 on p. 14).

5. My observation that state parties in fact perform diverse activities is supported by other scholars, including Morehouse, who is cited in the expert report of Mann, and Holt (2000), who wrote the chapter on political parties in Magleby's edited book, *Outside Money*. Morehouse, one of the nation's leading academic experts on state parties, concludes that "[m]any state political party organizations are becoming stronger, not weaker." She observes that like other organizations in our modern, technological society, state parties are making use of professionals to communicate with adherents and to mobilize voters. Morehouse writes:

> "Parties have adapted themselves to the new technology and provide valuable serves to state and national candidates….Since the late 1970s the national parties have reinforced their state parties providing cash grants, professional staff, data processing and consulting services, expertise in fundraising campaigning, media and redistricting. State parties now are proficient in voter list development and get-out-the-vote efforts….In view of this evidence, it is clear that state parties are not decomposing, as the academics and journalists have been predicting, but have been adapting to the media-driven society in which they find themselves. They provide needed technical information and financial resources to candidates. They have maintained their

> autonomy as they became more professionalized and durable."[1]

6. The expert reports of defendants' political scientists present a view that party issue ads have swamped all other forms of activity. While my data shows that [*4] spending on issue ads has increased, they also demonstrate that investments in other party activities have increased as well. Parties pursue multiple strategies that include broadcasting of political messages and "on the ground" voter mobilization programs to attract potential supporters and energize loyal partisans. See also, Magleby Report, p.39, and Morehouse (2000). In suggesting that non-federal funds have done "little to nurture grassroots participation," Mann cites to a Brennan Center report that uses my data about voter mobilization in a way that underestimates the increases in party spending on voter mobilization (Mann at p.31). The Brennan Center claims to have taken my figures for 1992-1998 from my report with Pogoda (2001).[2] The Brennan Center appears to use a different methodology for the 2000 data, which makes comparisons to my data inaccurate. In particular, they do not include money spent for direct mail as I did. The Brennan Center results make it appear as though party spending on voter mobilization has not been going up substantially as the parties spend more soft money. This is an obvious result of narrowing the definition of what constitutes voter mobilization for the last cycle. Our figures differ by almost $20 million dollars.[3] There is also no explanation for why the Brennan Center figure for money spent on voter

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[1] See Morehouse, (www.cfinst.org/parties/papers/morehouse_stateparties.pdf).

[2] See http://www.brennancenter.org/presscenter/pressrelease_2001_070301.html

[3] See Figures 5 and 6 of the report "The Purposes and Beneficiaries of Party 'Soft Money'", July 3, 2001; go to http://www.brennancenter.org/resources/downloads/purposes_beneficiaries 070301.pdf.

mobilization in 1996 is lower than what was listed in my report.

7. One conclusion on which political scientists agree wholeheartedly is that political parties at the national, state and local level have become more integrated over the past two decades. They work closely together in a variety of contexts. Where **[*5]** scholars seem to disagree is whether this is a good or bad outcome. Defendants' experts appear to take the position that party cohesion masks a malignant effort to get around federal campaign finance laws. Evidence of increasing party cohesion, they suggest, is justification for designing federal laws to separate the party components, even if these laws override state laws.

8. This line of reasoning, however, runs counter to what political scientists have long argued about the importance of party cohesion. Greater integration between the federal, state, and local levels of parties produces positive benefits, particularly in a federal system that disperses authority and responsibility. See, e.g., *Toward a More Responsible Party System* (1950).

9. Cohesive parties enhance electoral accountability by linking the campaigns and platforms of federal, state and local candidates. In this way, they provide voters with clear signals about what the party stands for collectively. The joint campaigns of political parties across federal, state and local candidates also generate electoral economies of scale that mobilize greater numbers of voters. The national parties have been the catalysts for party integration because they possess the resources to coordinate such activity. A ban on nonfederal money to national committees will surely weaken party cohesion by weakening the central coordinating organization.

10. Green, in fact, acknowledges that linking the races of federal with state candidates increases turnout. He

writes: "The appeals that state and local parties make to voters and funders frequently mention both federal and nonfederal candidates, particularly when presidential candidates or contested U.S. Senate seats are at stake. The reason behind this tactic is easy to discern. In addition to the economies achieved when **[*6]** multiple candidates are presented to voters, designers of campaign literature recognize that voters are often more interested in federal races than they are in state legislative races" (p.13). Professor Green articulates what party officials have known since the election campaign of Andrew Jackson, namely that the top of the ticket helps draw people to the polls. The BCRA discourages state and local parties from associating with their federal candidates, however. By Professor Green's own admission, party strategies that include federal candidates bring more voters to the polls. Weakening this link should hurt turnout.

11. Defendants' experts suggest that the "Levi amendment" will encourage state and local grassroots efforts. But allowing state and local parties to raise and spend "Levin funds" will hardly compensate for the loss of national and state committee transfers of federal and non-federal funds, which are now prohibited under the BCRA. The Levin amendment seems to have been enacted based on the misguided notion that state and local parties have the fundraising capacity to raise both federal funds and Levin funds necessary for GOTV and voter registration. The BCRA also assumes that local parties, which are run mostly by volunteers, will have the time and expertise to file reports with the Federal Election Commission. In fact, to avoid administrative hassles and the risk of running afoul of federal laws, I expect that many local parties will simply avoid engaging in any "federal election activity," as BCRA defines that term.

12. As part of the argument that state parties are merely conduits, several experts have made the argument

implicitly that nonfederal transfers have had no beneficial effects on either competition or voter turnout. Mann even suggests that non-federal funds have insulated incumbents and led to *less* competition since "the period in [*7] which the party soft money system exploded has coincided with a decline in competition in congressional elections" (p.31). Krasno and Sorauf make a similar argument (p.27). As scholars of congressional elections, they would acknowledge that this pattern is typical for U.S. House elections following the redistricting process at the start of the decade. Political competition declines over the decade because highly qualified non-incumbents exploit uncertainties early after redistricting to challenge incumbents who have not yet forged close links with their new constituents. The decade-long decline in political competition is not unique to the 1990s at all, and it is unfair to suggest that nonfederal money played a role in this customary intra-decade decline in competitiveness.

13. Given the unprecedented closeness of the partisan margins in both the House and Senate, it is all the more striking that the political parties spend *any* money on party-building, particularly in states where there was no competitive federal contest. The stakes in recent elections have been so high for winning the marginal seat that parties have a terrifically strong incentive to put all their chips in the handful of states where a contest might turn the balance. FEC reports show, however, that national committees transfer federal and nonfederal funds to all the state parties, regardless of whether there are competitive races in those states. They do so because the national parties have long-term objectives that transcend any particular election, including maintaining and building a strong and integrated party organization at the national, state, and local level. Many state parties are highly dependent on transferred national party funds, particularly in states that lack a substantial donor base.

14. Just as one cannot lay the blame for a decline in political competition during the 1990s at the feet of non-federal party money, it is equally unreasonable to argue that the party's use of these funds causes lower voter turnout. Defendants' expert witnesses have assumed that party campaign strategies have led to a downward trend in voter turnout. Recent research by McDonald and Popkin (see *American Political Science Review* 95(4): 963-974) demonstrates, however, that voter turnout is actually not going down. The share of the voting age population who are eligible to vote has been dropping because there is a growing proportion of noncitizens and felons. When these groups are removed from the voting age population, voter turnout (measured as a percentage of eligible voters) has been quite variable, but it has not trended downward since 1972. For arguments sake, even if voter turnout were declining, it might be that political parties' mobilization and grass roots activities run counter to societal trends that cause fewer citizens to vote. In other words, turnout might decline even further if parties did not invest in voter mobilization as much as they do.

15. I would also like to rebut the claim made by defendants' experts that parties will adapt easily and thrive under the BCRA. Adaptation is not the issue here. There is no doubt that parties will work hard to survive the harmful effects of the BCRA. The issue is whether parties will adapt in pathological ways and whether special interest groups will gain significant advantages over the parties.

16. Will the BCRA generate incentives for parties, or former party officials, to form quasi-party organizations, or to implement other non-transparent strategies to help candidates and spread the party message? Professor Green is correct to point out that *basic* incentives of parties will not change – they seek to mobilize support for their [*9] programs and candidates – but rules will affect how they pursue these goals (see Green, note 9, p. 8). Green writes that it would be easy for national party operatives to orchestrate campaign

activities outside the formal party apparatus, especially through state party organizations, unless the BCRA also limited the scope of state party activity (p.19). He believes that banning transfers from national committees to subnational organizations will prevent the former from "co-opting" the latter. First, I disagree that higher levels of party co-opt sub-levels since their interests and goals overlap considerably. Indeed, the RNC is governed by the state parties through its members, which include one committeeman, one committeewoman, and the state party chair from each state and the five territorial parties. And as Morehouse (2000) points out, state parties have considerable autonomy. Second, by preventing party transfers the BCRA increases transaction costs for parties to work together. Party personnel at different levels retain an incentive to work together, but they can no longer do so directly. Forcing every party unit to be self-sufficient prevents them from taking advantage of each other's strengths.

17. Defendants' experts assert that taking away nonfederal resources from national party organizations will make them stronger. This proposition defies logic. It is the "bloodletting" remedy for improving the health of parties. The argument runs as follows: parties invest "too much" money on issue ads, which whets their appetite for nonfederal funds; by banning nonfederal donations to national parties, they will be forced to expand their donor base to raise money in smaller increments and invest in more grassroots activities.

[*10] 18. As defendants' experts admit, the national parties have already made significant investments in raising federal funds. They simply assume that parties can further expand this federal donor base. In fact, the RNC's ability to raise additional federal funds is quite limited as Janice Knopp, RNC deputy director of finance/marketing director, makes clear in her witness statement (see Declaration of Janice L. Knopp at pp. 5-10). This also appears to be true of state

parties (see Declaration of Kathleen Bowler, Executive Director of the California Democratic Party, at pp. 28-29).

19. Defendants' experts appear to share a nostalgia for old-fashioned, non-professional party organizations. The days of torchlight party parades are over. Political parties are subject to same societal pressures as non-political organizations to modernize operations for maximum efficiency and effectiveness. The modern party relies more heavily on professional expertise and sophisticated technology rather than volunteers, although volunteers do still play an important role. In short, parties like other modern organizations have shifted from labor to capital intensive organizations.

20. There is a notable lack of context when defendants' experts argue that parties should be more grassroots-oriented. Green, for instance, cites research by Putnam (2000) about the decline in working for political parties (p. 31), but does not mention that participation in other traditional organizations has declined as well. Even civic organizations like the League of Women Voters rely more heavily on "checkbook" volunteerism than ever. Mann acknowledges the factors that changed the orientation of the parties, but he neglects to put them in the context of broader organizational shifts in society.

[*11] 21. The incentives that attract citizens to work for parties are varied. It was true historically, however, that the core party workers joined for material benefits, namely patronage. Today, the core party workers are campaign professionals who get paid for their expertise. My point is that it is unfair to hold party organizations to standards that have weak historical foundations. Krasno and Sorauf's historical reference to mass-based party organizations is slightly misleading in the sense that parties in the United States never really developed organizations that fully engaged dues-paying members in activities throughout the year, as in

Europe and elsewhere (see, for example, Epstein 1986; Beck and Hershey 2001; Altschuler and Blumin 2000). It is even more important to recognize that such standards of volunteer participation are not even achieved by contemporary civic organizations and interest groups.

22. Rather than enhancing prospects for strengthening the associational ties that bind different levels of party, the BCRA drives a wedge between them. The defendants' expert witnesses appear to ignore or deny that the national parties have played a role in strengthening the state party organizations and providing key resources and expertise to mobilize voters. Mann acknowledges that there have been some "spillover" effects that allow state and local parties to hire additional staff, update voter lists and expand activities. But he minimizes the importance of these broad-based party efforts simply because parties also engage in issue advertising.

23. Under the BCRA, the national parties have fewer incentives to support state and local party building efforts since they must use only federal funds. With more limited resources, the national parties will triage their work. Party operatives at the national level will be hesitant to spend precious federal resources on state party building **[*12]** when they know that federal candidates will face a barrage of ads run by outside groups. They will save federal funds for independent expenditure ads in order to counter attack ads sponsored by outside groups. Far from encouraging spending on grass roots activity, restricting non-federal funds will cause parties to husband their remaining federal funds to cover media costs.

24. The fundraising provisions of the BCRA are particularly onerous for state and local parties. State parties rely considerably on the national committees and federal officeholders to help them raise money. Supporters of the BCRA assume that state parties will simply raise nonfederal

funds that no longer go to the national committees. But state parties will need to invest considerably more in their fundraising operations to raise what they previously received through the national committee transfers. The efficient division of labor that had developed over the last two decades (national committees raise funds centrally and the state parties spend them) has minimized the amount of money that parties collectively must invest in fundraising. Now that state and local organizations are compelled to be self-reliant, they will have to devote greater resources to fundraising.

25. Preventing federal candidates from raising non-federal money also hurts the state and local parties, especially in states with weak donor bases. RNC finance director Beverly Shea says that many state organizations rely on federal officeholders to raise money. Green argues that the fundraising relationship between federal candidates and state party officials is unhealthy ("...state parties have no shortage of favors to ask federal officeholders on behalf of important donors; federal office-holders in turn have considerable incentives to accede to or anticipate these requests, particular since many of **[*13]** them aspire to higher office..." (p.12). I fail to see why federal laws should diminish the incentives for federal officeholders and state parties to work together, even in the domain of fundraising. On the contrary, the mutual dependency is healthy. When federal officeholders raise money at local party fundraisers, it encourages them to be more attentive to local interests at the expense of national constituencies represented by PACs in Washington.

26. A glaring problem with the defendants' expert reports is that they assess the effect of BCRA's regulations on the political parties without reference to the groups that are likely to gain the most relative to the political parties. These are the interest groups that may continue to use non-federal funds in ways that the parties are denied. Magleby points out that nothing in the BCRA prevents interest groups from

continuing to use nonfederal funds without limit for "ground mobilization" and for broadcasting political ads outside the 30 and 60-day blackout periods (p. 24). Krasno and Sorauf elaborate other ways for interest groups to spend non-federal funds post-BCRA that are not available to the parties (p.64). The blackout periods will simply lead interest groups to frontload their issue ads prior to the blackout periods. According to Mann, early issue advertising by the DNC in 1995 at the urging of Dick Morris helped frame the message for the presidential contest. There is no reason to believe interest groups will not pursue the same strategy. Of course, interest group advertising will be that much more dominant if the BCRA's restrictions on issue advertising during the 30 and 60-day periods are struck down. Moreover, interest groups will focus on "ground war" activities during the blackout period. According to RNC field operatives, interest groups are already **[*14]** increasing their non-media mobilization activities in the weeks immediately before elections. See Declaration of John Peschong at ¶ 18.

27. The increasing salience of interest group advertising may undermine electoral accountability and intensify negative advertising. As defendants' experts observe (see especially Magleby) interest groups have given themselves a variety of opaque names to conceal their true identities from the public. And contrary to data presented by Krasno and Sorauf for the 1998 elections (drawn from the Brennan Center's "Buying Time 1998" study), it appears that in 2000, interest group ads were more likely to be attack ads than party or candidate ads. There is no explanation for why Krasno and Sorauf did not use the most recent data from the Brennan Center's "Buying Time 2000" study. (The Buying Time 2000 data that they have left out of their report appears in Figure 11 on page 31 of my affirmative declaration in this case.) This oversight is perplexing since Krasno, as an author of the "Buying Time 1998" study, surely is familiar with the Buying Time 2000 study.

28. Defendants' experts present the BCRA as an effort to prevent the use of non-federal funds by donors to influence the policy process. They repeatedly claim that 800 donors accounted for the bulk of non-federal donations to the political parties in 2000. I have not been able to locate a published scholarly source for this figure or any description of the methodology used to construct this figure. Absent substantiation, this figure is highly dubious and should not be relied upon. I would note that advocacy groups favoring campaign finance reform have been known to aggregate such figures in a subjective manner.

[*15] 29. While defendants' experts portray the BCRA as reducing the "appearance of corruption," they notably have little to say about the BCRA's inevitable channeling of non-federal funds toward interest groups that are far more likely than parties to pursue narrow, access-based legislative strategies. These same interest groups are far less transparent than parties. It is difficult to discern how forcing non-federal money "underground" in this way, and directing it toward organizations with much narrower legislative agendas, in any way helps to insulate the political process from the "appearance of corruption."

I declare under penalty of perjury that the foregoing is true and correct.

s/

Raymond La Raja

Executed on October 7, 2002

Expert Affidavit of
John Lott, Jr.

* * *

[9 (11 PCS/ NRA 116)]
Besides regulations on what a donor can give a candidate, there are also limitations on soft money contributions to parties. Parties have in the past served as conduits for money to candidates. The new regulations should hurt challengers since it reduces the ability of the party to use its reputation and serve as intermediary between the candidates and potential donors, an aspect that is particularly important for challengers.

Table 1 provides some information on how important party contributions have been to challengers. For the U.S. House and Senate from 1984 to 2000, the percent of contributions for challengers that come from political parties averages between 7 and 13 percent when broken down by federal House and Senate and by party. A couple of facts stand out. While both incumbents and challengers received help from their parties, on average challengers are between 77 and 307 percent more dependent upon party help than incumbents. Indeed, for all these types of races over these nine elections, there is only one case (Democratic Senate races in 2000) where incumbents received more help from their party than did challengers. Republicans (both incumbents and challengers) get a greater percentage of their funds from their party than do their Democratic counterparts. Republican Senate challengers depend upon party funding much more than their Democratic counterparts, facing the biggest absolute gap -4 percentage points.

* * *

[Table 1 (11 PCS/ NRA 117)]

Table 1: The Relative Importance of Party Assistance to Incumbents and Challengers by Party

Years	% of money spent on Incumbents which came from Party (1)	% of money spent on Challengers which came from Party (2)	Ratio of Cols. (2) (1)		% of money spent on Incumbents which came from Party (1)	% of money spent on Challengers which came from Party (2)	Ratio of Cols. (2) (1)
	House Democrats				House Republicans		
2000	1	2	2		1	5	5
1998	2	4	2		2	8	4
1996	2	6	3		2	9	4.5
1994	3	11	3.67		2	10	5
1992	2	10	5		3	10	3.33
1990	1	9	9		2	7	3.5
1988	2	7	3.5		3	13	4.33
1986	1	6	6		2	10	2.5
1984	4	10	2.5		4	17	2.83
Avg.	2	7.2	4.1		6	9.9	3.9
	Senate Democrats				Senate Republicans		
2000	6	1	0.16		5	8	1.6
1998	7	10	1.4		6	8	1.3
1996	4	8	2		9	10	1.1
1994	8	13	1.63		6	5	0.8
1992	6	14	2.33		13	20	1.5
1990	5	9	1.8		7	12	1.7
1988	4	11	2.75		8	18	2.3

1986	7	9	1.3		8	18	2.3
1984	3	9	3		6	20	3.3
Avg.	5.6	9.3	1.8		7.6	13.2	1.8

Source: http://www.cfinst.org/studies/vital/3-8.htm

Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity

By

David B. Magleby

September 23, 2002

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[5] Report Concerning Interest Group Election Advocacy and Party Soft Money Activity

By: David B. Magleby

I. Executive Summary

This report summarizes the ways political parties, individuals and interest groups spend money opposing or supporting individual candidates in federal elections that fall outside regulation by the Federal Election Campaign Act (FECA). The two primary modes of circumventing the FECA are through party soft money and interest group election advocacy including electioneering communications as defined by the Bipartisan Campaign Reform Act (BCRA).

During the past two election cycles, I have supervised teams of academics who systematically monitored campaigns in many of the most competitive federal races as a part of my work with the Center for the Study of Elections and Democracy ("CSED"). The CSED teams focused on the often unregulated and unreported election advocacy and spending that have become known as "soft money" or "electioneering advocacy." As part of these studies, the academics collected data from radio and television stations, interviewed party and interest group leaders in Washington, D.C. and locally, established reconnaissance networks to collect political mail and tracked telephone and personal contacts by the campaigns and groups in the key districts. This work resulted in case studies for each district and several extensive studies that are cited throughout this report.

In addition to the case studies of these races, this report relies on the results of surveys I conducted to assess the perceived purpose of communications that are covered by FECA and those that are not. In 2000, I used focus groups conducted by Wirthlin Worldwide and a national Web-TV survey conducted by Knowledge Networks to ask random samples of voters in 2000 to assess the purpose of these communications, which include unregulated electioneering advocacy and party soft money advertising.

The major findings of my research show that:

Electioneering advocacy

- Interest groups - including corporations and unions - are increasingly sponsoring broadcast advertisements and other advocacy that communicate a message for or against a particular candidate but that fall outside FECA's regulatory scheme.
- These unregulated electioneering advertisements fall outside FECA's regulatory scheme primarily because they avoid the use of the "magic words" of express advocacy such as "vote for" or "vote against."
- The "magic words" defined in *Buckley v. Valeo* do not provide an effective way to determine whether advertisements have the purpose and/or effect of supporting or opposing particular candidates.
- **[6]** Groups and individuals often avoid using the "magic words" precisely so they can avoid FECA's disclosure requirements and bans on the use of corporate and union treasury funds for electioneering purposes.
- A number of indicia make clear that the ads run by individuals and interest groups are in

reality electioneering ads that are meant to influence, and do influence, elections: These electioneering ads generally name a candidate, run close in time to the election, target the named candidate's district, are run primarily in competitive races, and generally track the themes in the featured candidate's campaign.

- Voters perceive little difference between the purpose of ads run by the candidates themselves and ads run by individuals and interest groups that name a candidate. They overwhelmingly saw both sets of ads as aimed at influencing their vote. In contrast, voters view interest group advertisements that did not name a candidate as aimed at persuading them on a policy or legislative issue.

Party Soft Money

- In recent years, the major political parties have raised more and more soft money in larger and larger amounts, and from sources (such as corporations and unions) that are prohibited from making hard money contributions.
- This soft money is increasingly used to promote or attack specific candidates while parties have also reduced their coordinated expenditures and hard money contributions to candidates.
- The parties focus their soft money spending - often millions of dollars - on the competitive races.
- In competitive elections, the political parties use soft money to mount campaigns that parallel the candidate's, relying on their own

pollsters, media and mail consultants, and sponsoring their own candidate-centered, electioneering advertisements.

These unregulated electioneering communications and large soft money contributions and expenditures amount to a substantial erosion of FECA's core principles of disclosure, source prohibitions, and contribution limits for funds used to influence the election or defeat of candidates.

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[10] 2. Unlimited and undisclosed electioneering by groups and individuals The U.S. Supreme Court, when considering the constitutionality of the FECA in Buckley v Valeo drew a distinction between election related activity and other forms of political communication. The Court defined express advocacy communications as those that used words like "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."[25] These "magic words" of electioneering have become the standard to determine whether or not a communication falls under the disclosure, source limitations, and other provisions of the FECA.

By the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits.[26] This

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[6] *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

[7] The 1996 initiative by labor into unregulated and unlimited electioneering communications was substantial. The AFL-CIO spent a reported $35 million dollars (see Deborah Beck, Paul Taylor, Jeffrey Stanger, and Douglas Rivlin, "Issue Advocacy Advertising During the 1996 Campaign: A Catalog," report series by the Annenberg Public Policy Center, no. 16, 16 September 1997, 10), much-of it on television, aimed at defeating 105 members of Congress, including 32 heavily targeted Republican freshmen. See Paul Herrnson, Congressional Elections: Campaigning at Home and in Washington, (Washington, D.C.: Congressional

form of campaigning has important advantages. It allows corporations and unions to spend treasury funds on electioneering communications--wither directly or by contributing to groups that will actually sponsor the advocacy. It allows groups to avoid disclosing the identity of those individuals or organizations that are actually paying for the communications. Groups can take this a step further and mask their identity behind an innocuous name. For example, the pharmaceutical industry masked its identity by running ads in 2000 under the name "Citizens for Better Medicare" and some labor unions masked their identities behind "American

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Quarterly, 1998), 123. Labor broadcast television commercials in forty districts, distributed over 11.5 million voter guides in twenty-four districts and ran radio ads in many others. See "Labor Targets," *Congressional Quarterly Weekly Report*, 26 October 1996, 3084; Jeanne I. Dugan, "Washington Ain't Seen Nothin' Yet," *Business Week Report*, 13 May 1996, 3. The labor campaign triggered a complaint to Federal Election Commission by the National Republican Congressional Committee, which charged that when the AFL-CIO's ads are "heard, read, and seen" as a whole "a reasonable person can only view them as advocating the defeat of a clearly identified candidate in the 1996 Congressional election." *See In the Matter of AFL-CIO Project '95* (complaint filed with the Federal Election Commission Feb. 13, 1996) (Attached Appendix G).

The business community responded to this major effort by labor with their own unlimited and undisclosed communications, again avoiding any of the magic words. Partners in the business response were the National Federation of Independent Business (NFIB), U.S. Chamber of Commerce, the National Association of Wholesaler-Distributors, the National Restaurant Association and the National Association of Manufacturers. Their group, called the "Coalition-Americans Working for Real Change," was active in thirty-seven House races, spent an estimated $5 million on over thirteen thousand television and radio commercials, and mailed over two million letters mainly in support of Republicans, to owners of small business. See Paul Hermson, "Parties and Interest Groups in Postreform Congressional Elections," in *Interest Group Politics*, 5th ed., ed. Allan Cigler and Burdett A. Loomis (Washington, D.C.: Congressional Quarterly, 1998), 160-61. Others utilizing this tactic in 1996 included Triad Management Services. The activity of Triad Management Services is documented at Center for Public Integrity, "The 'Black Hole' Groups," *The Public-I*, at <www.public-i.org/watch_04 033000.htm>.

Family Voices."[8] Finally, this method of advocacy allows groups to accept unlimited contributions to pay for the communications.

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B. Why Conduct Electioneering Outside the FECA Framework?

There are several primary reasons to conduct electioneering outside the FECA framework. First, it permits groups and individuals to avoid disclosure. Second, it allows them to avoid contribution limits. Third, it permits some groups (such as corporations and labor unions) to spend from generally prohibited sources.

1. Avoid disclosure The 1996, 1998 and 2000 election cycles all saw examples of groups who sought to avoid accountability for their communications by pursuing an electioneering advertising /election advocacy strategy rather than limiting their activities to independent expenditures or other activities expressly permitted by the FECA. In 1996, an example of a group that masked its identity was Koch Industries, which financed, at least in part, a group acting in several races several race named, Triad. One of the congressional races where Triad was active in 1996 was the Kansas Third Congressional District.[27] In 1998 the AFL-CIO helped pay for ads in the Connecticut Fifth Congressional District race through a group named the "Coalition to Make Our Voices Heard." Steven Rosenthal defended campaigning under an obscure name in this case saying, "Frankly we've

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[8] Annenberg Public Policy Center, "Issue Ads @ APPC," *University of Pennsylvania*, at <www.appcpenn.org/issueads/gindex.htm>.

[28] Allan J. Cigler, "The 1998 Kansas Third Congressional District Race," in Magleby, *Outside Money*, 88.

taken a page out of their book [other interest groups] because in some places it's much more effective to run an ad by the 'Coalition to Make **[19]** Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO'"[28] Mr. Rosenthal accurately captures the reason why groups will continue to hide their identity-it improves the chances of persuading voters. This is more likely the case when voters would take less seriously a communication from a group they dislike or distrust.

There are many other examples of groups who sought to mask their identity usually while trying to persuade voters to vote against one candidate. One the most active groups in 2000 was "Citizens for Better Medicare." For voters watching or listening to an ad, naming the sponsor group evokes much more positive impression than advertising the name of the pharmaceutical industry, a major underwriter of the group.[29] This technique hides the kinds of interests paying for the advertisement. Another group with an unobjectionable name, the "Committee for Good Common Sense" aired ads that supported incumbent Jay Dickey in the Arkansas Fourth Congressional District race in 2000.[30]

2. Avoid source limitations Federal law has long banned corporations and labor unions from spending treasury funds for campaign communications other than communications to their stockholders, employees, or membership. The ban on using corporate treasury funds for contributions goes back to the Tillman Act of 1907; corporate expenditures in campaigns have been banned since 1947. The ban on the use of union treasury funds in campaigns goes back to the Smith-Connally Act of 1943, which was later included in the Taft-Hartley Act in 1947. A rationale for the bans is to reduce the threat that these groups will purchase influence over elected officials through large corporate and union expenditures in federal elections, as well as to prevent the boards of these organizations from spending treasury funds in the Political arena in ways that may not be representative of the members' or shareholders' views.[31]

The ability of corporations and trade unions to effectively campaign through electioneering advertisements and election advocacy makes a sham of these longstanding federal laws. The data CSED has gathered on television and mail communications clearly demonstrates that these communications are indistinguishable from candidate and party ads in terms of their purpose (See Tables 1 and 2).

3. Avoid contribution limits Another reason to conduct electioneering activities outside the FECA is that groups can raise larger amounts of money in less time. The ability to spend a million dollars or more in a particular U.S. House race as the AFL-CIO did in 1996 makes contribution limits to candidates and parties seem very low indeed. Even in Senate Races where spending is typically higher, groups like Citizens for Better Medicare, Pharmaceutical Research and Manufacturers of America, NAACP National Voter Fund, and NARAL, were able to far exceed what individuals, PACs or parties could do through hard money contributions.

[20] C. Nature and Extent of Electioneering Advocacy

As with PACs and other forms of participation in funding candidates, there is substantial diversity in those who engage in electioneering advocacy. CSED found substantial interest-

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[29] Rosenthal, lunchtime discussion panel at the Pew Press Conference.

[30] Tim Ryan, executive director, Citizens for Better Medicare, telephone interview by David B. Magleby and Anna Nibley Baker, 14 May 2001.

[31] According to the Annenberg Center the "Committee for Good Common Sense" is run mostly by Republicans with insurance and business ties. See Annenberg Public Policy Center, "Issue Ads @ APPC," *University of Pennsylvania*, at <www.appcpenn.org/issueads/gindex.htm>.

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[32] Anthony Corrado, "A History of Federal Campaign Finance Law," in *Campaign Finance Reform: A Sourcebook* (Washington, D.C.: Brookings Institution Press, 1997).

group election advertising in the 1998 elections. According to studies by the Annenberg Center that looked at electioneering and genuine issue advocacy together, more groups ran these ads in 1997-98 than in 1995-96, and the overall amount of money spent on these ads also rose.[32] And several of the races in our sample had as much campaign activity by interest groups as by candidates. Interest groups focused their efforts on the relatively small number of competitive House and Senate elections: in the twelve House and four Senate races we monitored, 111 interest groups were active in 1998. These groups ran altogether a minimum 218 ads on TV or radio and mounted at least 258 phone banks or direct mail efforts.[33] Most records show that groups used direct mail from before the primary election through Election Day, whereas they used phone banks more in the final month. Television ads aired throughout the election cycle, but most heavily in the final month and a half of campaigning. In contrast, genuine issue ads are more likely to run earlier since rates are cheaper and proximity to an election is less important. Our 1998 data also show that interest groups produced more direct mail, print, radio ads, and phone banks than the political parties but that the parties focused more on television advertisements.[34]

The 2000 presidential primaries provided interest groups an opportunity to influence the choice of both parties' standard bearers. Growing out of their ground-war strategy of 1998, organized labor and the teachers unions mounted a substantial grassroots mobilization for Al Gore, giving special emphasis to the Iowa caucuses and the New Hampshire

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[33] Beck, et al., "Issue Advocacy Advertising During the 1996 Campaign," and Jeffrey D. Stranger and Douglas G. Rivlin, "Issue Advocacy During the 1997-98 Election Cycle," a report by the Annenberg Public Policy Center; as cited in Magleby, *Outside Money*, 47.

[34] Magleby, *Outside Money*, 47.

[35] Magleby, *Outside Money*, Figure 3.1, 48.

primary.[35] In the primaries, John McCain was a lightening rod for interest group electioneering attacks in New Hampshire and South Carolina by groups critical of his stand on campaign finance reform, his support for fetal tissue research and his support of an increased tobacco tax. The attacks in New Hampshire did not hurt McCain and may have backfired, but in South Carolina they helped George W. Bush.[36] Some groups generally allied with one party used the primaries to launch attacks on the leading contender in the other party, while other groups sat out the primaries and saved their resources for the general election.[37]

[21] The 2000 primaries had perhaps the best-known example of electioneering advertisements during the New York Republican primary. A group calling itself "Republicans for Clean Air" ran television ads in the New York City and Pennsylvania markets attacking John McCain's environmental record. The ads sparked controversy, partially because no one knew who "Republicans for Clean Air" was. After 3 days the actual fenders of Republicans for Clean Air came forward. It was a group comprised of two brothers, Sam and Charles Wiley of Texas, known to be long-time financial supporters of then-Governor Bush. Some McCain senior staff believe the ad cost them victory in New York.[38]

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[36] Magleby, *Getting Inside the Outside Campaign*, 4; and David B. Magleby, ed., "Outside Money," *PS Online e-Symposium*, June 2001, at <www.apsa.com/PS/juneOl/outsidemoney.cfn> [accessed 6 August 2001].

[37] Linda Fowler, Constantine Spiliotes and Lyn Vavreck, "The Role of Issue Advocacy Groups in the New Hampshire Primary;" and Bill Moore and Danielle Vinson, "The South Carolina Republican Primary," in Magleby, "Outside Money," *PS Online e-Symposium*.

[38] The Sierra Club attacked Bush's environmental record early in the primary season. National Abortion and Reproductive Rights Action League also attacked Bush early, claiming he was a threat to choice on the abortion issue. To a much lesser extent Republican allied groups attacked Gore. See David B. Magleby, "Outside Money in the 2000 Congressional Elections and Presidential Primaries," in Magleby, "Outside Money," *PS Online e-Symposium*.

Electioneering by interest groups and individuals that is not covered by the FECA includes two general types of communications: first, television and radio advertising, and second, the "ground war," which includes direct mail, telephone, the Internet, newspaper advertising and personal contact. Only the broadcast advertisements are covered by BCRA.

1. Expanded activity Most groups already involved in electioneering advocacy expanded their involvement in the 2000 general elections. Examples of groups who reported increased activity in 2000 are the AFL-CIO,[39] the Chamber of Commerce,[40] NARAL,[41] and the NRA.[42] In the seventeen races we monitored in 2000, at least 237 interest groups (and at least 93 national and state party organizations) communicated with voters.[43] The Annenberg Public Policy Center of the University of Pennsylvania estimates that interest groups

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[39] Roy Fletcher, McCain deputy campaign manager, telephone interview by David B. Magleby and Jason Beal, 6 June 2000; as cited in Magleby, *Getting Inside the Outside Campaign*, 4.

[40] Karen Ackerman, AFL-CIO, interview by David B. Magleby, Washington, D.C., 9 November 2000; as cited in Baker and Magleby, "Interest Groups," 59.

[41] Bill Miller, U.S. Chamber of Commerce, telephone interview by David B. Magleby, 18 November 2000; as cited in Baker and Magleby, "Interest Groups," 56.

[42] Will Lutz, deputy communications director, and Gloria Totten, political director, National Abortion and Reproductive Rights Action League (NARAL), interview by David B. Magleby, Washington, D.C., 14 December 2000; as cited in Baker and Magleby, "Interest Groups," 60.

[43] Glen Caroline, National Rifle Association, interview by David B. Magleby, Washington, D.C., 15 November 2000; as cited in Baker and Magleby, "Interest Groups," 60.

[44] Magleby, *Other Campaign*, 229-30

spent an estimated $509 million overall in electioneering advocacy and pure issue advocacy in 1999-2000.[44]

Electioneering campaigning in the 2000 general elections showed greater congruence in issue agendas between party committees and candidates and between allied groups and candidates than in 1998.[45] Some Democratic leaning groups, like the NAACP and Emily's List, that had been active as interest groups or in funding campaigns through hard-money contributions in 2000 added electioneering advocacy to their activities. On the Republican side, new groups conducting electioneering advocacy included the Republican Majority Issues Committee (RMIC) and business and pharmaceutical interests funded Citizens for Better Medicare and Americans for Job Security.[46]

[22] 2. Broadcast and cable electioneering Broadcast advertising is the most visible mode of communicating an electioneering message and is also widely believed to be the most effective for reaching a mass audience. There is also little doubt that this is one of the most expensive. In all of the contests we monitored in 1998 and 2000, interest groups used broadcast, including television and radio, to communicate with voters. As our survey data and focus group data from 2000 demonstrate, interest groups effectively communicate an electioneering message without using the magic words of express advocacy.[47] More than four out of five voters said the interest group's ads "primary objective" or "purpose" was "persuading you to vote for or against a candidate" (See Table 1).

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[45] Lorie Slass, "Spending on Issue Ads," in *Issue Advertising in the 1999-2000 Election Cycle* (Philadelphia: Annenberg Public Policy Center at University of Pennsylvania, 2001), 4; at <www.appcpenn.org/political/issueads/1999-2000issueadvocacy.pdf5> [6 August 2001]; as cited in Magleby, *Other Campaign*, 4.

[46] Magleby, *Other Campaign*, 12.

[47] Ibid., 12-13.

[48] Magleby, *Dictum Without Data.*

Broadcast advertising was an especially important element in all of the competitive races we monitored in 2000 and occasionally campaign ads were even broadcast beyond voting district boundaries. In Senate races, television and radio were also major components of the candidate and outside money campaigns.[48] In our 2000 case studies, we conservatively estimate that $99.7 million was spent on radio and television, including cable television in the seventeen races we monitored.[49] When compared to candidate spending on these same media and in these same races, interest groups spent roughly two-thirds as much as candidates. And political parties exceeded either candidates or interest groups in spending on television and radio.[50]

Interest groups and parties also utilize the cheaper and more targeted cable stations. Citizens for Better Medicare made extensive use of cable spending over $70,000 in the California Twenty-seventh District alone.[51] In the Washington Second District in 2000 the Sierra Club spent about $45,000 on cable television ads.[52] Candidates also turned to cable, especially in races like the California Twenty-seventh. Democratic challenger Adam Schiff purchased a total of 21,072 units of airtime from Charter Communications, the Twenty-seventh District's cable television company, for nearly $600,000. James Rogan, Schiff s opponent, went even further purchasing 54,080 units from Charter Communications at a cost of over $1 million. These purchases included seventeen different ads from Rogan and six from Schiff. An anonymous Charter Communications employee remarked that this campaign was "buying all available airtime."[53]

Radio is also an effective communications tool for electioneering by interest groups. As with television, if the communications do not use the particular language of express advocacy, **[23]** the groups do not report the expenditures to the FEC, and stations do not provide the same disclosure that they provide for campaign communications by candidates. Academics monitoring our sample of competitive contests in 2000 found the interest groups making use of radio for electioneering efforts included the NRA, Americans for Limited Terms, U.S. Chamber of Commerce, NFIB, NEA, League of Conservation Voters, Million Mom March PAC, Planned Parenthood and the National Right to Life PAC. Of the 105 radio ads we recorded, only 20 ads contained the magic words.

One contest where interest groups made extensive use of radio was the Virginia Senate race in 2000. Radio ads began airing in early October, and various groups funded hundreds of ads. The Sierra Club topped the list with 234 ads, the NRA was second at 155 and the NAACP National Voter Fund aired 62 spots. Although these numbers represent only a sampling of radio stations, our research shows that interest groups outspent the candidates on the radio by a three-to-one ratio, while the parties doubled the amount interest groups spent on the radio.[54] The high numbers of ads by interest groups and parties reflects the ability of these groups to evade FECA contribution and source limits.

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[49] Magleby, *Other Campaign*, 229-30.

[50] Estimates of how much was spent on television in our races are unavoidably imprecise, whether relying on the ad-buy data retrieved from the stations or the CMAG ad buy estimates.

[51] Baker and Magleby, "Interest Groups," 67.

[52] Patrick McGreevy, "California Elections U.S. House; High-Profile Contest in Awash in Soft Money," *Los Angeles Times*, 22 October 2000, home edition.

[53] Todd Donovan and Charles Morrow, "The 2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 218.

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[54] Anonymous employee of Charter Communications, interview by Drew Linzer and David Menefee-Libey, 5 October 2000; as cited in Drew Linzer and David Menefee-Libey, "The 2000 California Twenty-Seventh Congressional District Race," in David B. Magleby, ed., *Election Advocacy: Soft Money and Issue Advocacy in the 2000 Congressional Elections* (Provo, UT: Center for the Study of Elections and Democracy at Brigham Young University, 2001), 134.

[55] Holsworth, et.al., "2000 Virginia Senate Race," in Magleby, *Other Campaign*, 118

A sixty-second spot from the Missouri Senate race is a good example of a typical radio ad. The spot begins with Don Wainwright, owner of Wainwright Industries in St. Peters, talking about his employees' health insurance. Wainwright says he's depending on John Ashcroft to get a real patient's bill of rights. The announcer then discusses Ashcroft's record. Wainwright says that Trial Lawyers and their friends in Congress are blocking reforms. The announcer then says, "Senator Ashcroft is fighting for you, call him . . . to say 'keep on fighting.'" The ad sponsor for this particular ad is the Health Benefits Coalition, but the tag line was different for various airings of the commercial. The five tag lines in the St. Louis area included: Business Roundtable, U.S. Chamber of Commerce, NFIB, National Association of Wholesalers-Distributors, and the National Association of Manufacturers. A similar thirty-second ad ran in the Delaware Senate race. In this spot a local businessman from southern Delaware voices his concern about health care for his workers and the ways in which Senator Roth has worked to make this a reality. The business owner says that Trial Lawyers are blocking progress in Washington. An announcer then takes over to explain that Roth has been working on this and encourages voters to call him to say, "Keep on fighting." Business Roundtable paid for the ad.[55] As this example illustrates interest groups can communicate an election message without using the magic words of express advocacy.

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[26] D. Strategies and Techniques of Electioneering Advertisements and Election Advocacy

For the most part, the electioneering advertisements that our study monitored sidestepped disclosure and source limitation because they avoided express advocacy language or

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[55] Baker and Magleby, "Interest Groups," 71.

were defined as internal communications.[69] Nevertheless, these communications were nearly universally oriented towards electing or defeating specific federal candidates, and have distinct characteristics demonstrating their electioneering character.

1. Theme and Message While the non-candidate campaigns are presumed to be independent of the candidates there is remarkable congruence between the themes of the candidate campaigns and those of the interest groups and parties. There is also remarkable similarity between the themes and messages raised by the parties through their soft money funded ads and the interest groups through their electioneering advocacy.[70]

The similarity in theme of candidate, party and group funded ads only reinforces the point that to voters the ads are all part of one campaign. The fact that interest groups play by very different rules as to how the ads are paid for and the absence of disclosure from those interest groups does not alter the fact that they are ads were clearly linked to the themes of the **[27]** candidate campaign.

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[69] As noted, internal communications not primarily about an election are not reported to the FEC at all. There are no limits on how much can be spent on internal communications.

[70] In the general election races we monitored in 2000 abortion and health care were common themes to both parties and groups, and recurrent mail themes included education, gun control, and Social Security. Despite general similarities, themes differed among groups and groups took up the causes of the parties they supported. For instance, education was a Democratic and Democratic-allied interest group theme. Taxes were the most prominent GOP theme. The economy and taxes together were common themes for both parties and Republican-allied interest groups, but taxes were not a top theme of Democratic allies and were ranked fifth behind jobs, gun control, health care, and abortion. Neither Republicans nor their interest group allies emphasized the environment, but it was a major concern for interest groups supporting Democrats. Interestingly, interest groups on both sides, more than parties, emphasized gun control.

Advertising themes also illustrate the electioneering intent of their sponsors because often they focus on issue that are not of prime concern to the sponsor's mission. For example an interest group doing electioneering primarily focused on the candidates arose in the New Mexico Third District in 1998. The AFL-CIO ran two television issue ad spots, spending more than any other interest group, totaling $183,380. These commercials were shown a total of 427 times. The commercials focused on tax cuts that were paid for by raiding the Social Security trust fund. Both ads had tag lines indicating voters should "call" their representative. But despite union funding, neither of these ads directly relates to core union issues, like working conditions, pay raises or employment benefits. The issue content of these ads, like most electioneering advocacy, appeared to be driven by the issue concerns of the campaign more than the policy focus of the interest group.

The convergence of theme and message can even go so far as to include messenger and images. Candidate campaigns sometimes pick up on the attack of the electioneering advocacy groups. In Washington's Second Congressional District in 2000, for example, the largest radio buy for any party, group, or candidate committee was made by the Building Industry Association of Washington (BIAW). The ad presented the plight of Vicki Klein, a previously-anonymous homeowner whose flood-plain zoning problem had been "ignored" by the Democratic candidate, Rick Larsen and the Snohomish County Council on which he served.[71] Some of the mail from Larsen's opponent, John Koster, also featured a quote about flood regulations from "Vicki Klein, homeowner."[72] Thus groups not only follow candidate campaigns but at times candidate campaigns adopted interest group messages.[73]

Interest groups also play defense on issues through electioneering advocacy, trying to diffuse the impact of issues like Social Security, prescription drug benefits, and expanded support for education. According to Dawn Laguens, Democrat Debbie Stabenow's media consultant, in the 2000 Michigan Senate race, "[Chamber of Commerce] activity was significant in the Michigan Senate race, helping muddy the water on prescription drugs. Pharmaceuticals also played a major role in muddying the water."[74] Interest groups appear to be able to muddy the waters of campaigns by giving themselves names that do not reveal who they are (ie, "Citizens for Better Medicare") and by the asserting that they have a plan with regards to an important issue like prescription drugs.

[28] Interest groups conducting electioneering advertisements appear to recognize the importance of reinforcing candidate themes and messages even more than communicating about the issues of central importance to the interest group. An example of a group attacking a candidate on an issue central to the campaign but not central to the interest group was the 1998 attack on Harry Reid's view on taxes mounted

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[71] Elliot Sweeny, Building Industry Association of Washington Political Affairs, telephone interview by Todd Donovan, November 2000; as cited in Todd Donovan and Charles Morrow, "The 2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 218. Sweeny offered this as a "ballpark estimate" and stated the group spent less than $100,000.

[72] Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 218.

[73] Also in 1998 in the Kansas third congressional district, the television ads of the AFL-CIO on social security and health care were seen by Alan Cigler of the University of Kansas as "almost lead-ins to the Moore commercials in early October. For example, one union ad invited viewers to call Snowbarger and protest the Republican stance on Social Security and health care; approximately fifteen minutes later a Moore commercial appeared talking about Moore's support for Social Security and health care choice." See Cigler, "1998 Kansas Third Congressional District Race," in Magleby, *Outside Money*, 86.

[74] Laguens, interview; as cited in Baker and Magleby, "Interest Groups," 58-59.

by the Foundation For Responsible Government, a group affiliated with the American Trucking Association.[75] Other examples of interest groups campaigning on issues not central to the group include National Right to Life and Americans for Tax Reform running ads against John McCain in the New Hampshire primary on campaign finance reform not abortion or taxes.[76]

Electioneering advertisements most frequently oppose a particular candidate by raising doubts about that candidate or criticizing that candidate along some dimension, but occasionally, an interest group devotes most of the time or space in the advertisement to an attack on one candidate and then quickly contrasts that with positives about the preferred candidate. This is fundamentally different from the way genuine issue advocacy works; it generally promotes a particular theme.

2. Masking identity Electioneering advertisements are often run by front groups, created at least in part to mask the identity of those interest groups funding them. Hiding behind a high sounding name usually increases the credibility of the group and thereby its chances of influencing election outcomes. Because disclosure laws do not apply to groups avoiding the magic words of express advocacy, this strategy often escapes the attention of most voters and sometimes even the media in a state. An example of a race in which masked identity troubled editors of at least one newspaper is the 2000 Montana Senate race where Citizens for Better Medicare (CBM) was active. Commenting on the inaccuracy of the CBM ads, a Missoulian editorial concluded that

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[75] Tim Fackler, Nathalie Frensley, Eric Herzik, Ted G. Jelen, Todd Kunioka and Michael Bowers, "The 1998 Nevada Senate Race," in Magleby, *Outside Money*, 125.

[76] National Right to Life communicated, at least in part, through independent expenditures in 2000. Fowler, Spiliotes and Vavreck, "The Role of Issue Advocacy Groups in the New Hampshire Primary," in Magleby, *Getting Inside the Outside Campaign*, 31.

Schweitzer had been "zinged ... by cleverly worded, but inaccurate, messages financed by a national group with a name that doesn't represent the forces behind it."[77] Another newspaper, while agreeing about the inaccuracy of CBM ads, went further in castigating CBM. The Billings Gazette labeled one ad a "total misrepresentation of Schweitzer's position. It had the credibility of a cockroach."[78] As previously noted, organized labor occasionally masks its identity as it did in 2000 when it contributed to American Family Voices.

An example of an interest group which not only masked its identity thorough an innocuous name, but ran ads on a topic unrelated to the function or purpose of the group was The Foundation for Responsible Government (FRG). In 1998 FRG spent nearly $300,000.[79] Who **[29]** was "The Foundation for Responsible Government?" The trucking industry. Upon investigation, Professor Eric Herzik of the University of Nevada-Reno found that the trucking industry was upset with Senator Reid for supporting legislation that would have banned tripletrailer trucks. Rather than discuss their policy difference with Reid on triple-trailer trucks, FRG ran mostly positive ads late in the campaign, discussing Reid's opponent, John Ensign's positions on health care and taxes.[80]

Voters evaluate the source of political communications as well as the content. Some sources are more distrusted than others. When groups believe it is in their political interest to campaign in their own name they do so. It is when they masquerade as "Citizens for ..." or "Coalition opposed to ..." that one can assume they fear liability or a less positive response to their message if they presented their true identity. This has often been the case in ballot initiative campaigns and appears to also be true in electioneering advocacy.[81] Most voters work from the assumption that the communications are from the candidates, though in several of the races we monitored, most of the communications were not. In our focus group and web-TV survey in 2000, we demonstrated that voters could not differentiate between the sources of political communications (including mail), and, they assume that communications come from the candidate.[82]

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[77] "Finding Your Way Through the Ad Maze," *Missoulian*, 19 April 2000; as cited in Craig Wilson, "The Montana 2000 Senate and House Races," in Magleby, *Other Campaign*, 142.

[78] "Ads Dump Political Garbage in Montana," Billings Gazette, 21 April 2000; as cited in Wilson, "Montana 2000 Senate and House Races," in Magleby, *Other Campaign*, 142.

[79] David Barnes, *Transportation Topics*, TT Publishing: 22 November 1998, 1 and 27; as cited in Fackler et al, "The 1998 Nevada Senate Race," in Magleby, *Outside Money*, 125.

[80] Fackler, et al., "1998 Nevada Senate Race," in Magleby, *Outside Money*, 125.

The current system places an unreasonable burden on voters to ascertain who is attempting to persuade them in an election. Our focus groups and survey data from 2000 show that to voters, party and interest group electioneering ads are indistinguishable from candidate ads. (See Table 2.) Even the candidates and their campaign mangers are unable to ascertain who some of the groups running ads were. In the 1998 Nevada Senate race, Mark Emerson, Chief of Staff for John Ensign's campaign said, "No voter out there knows [who the interest groups are], because I didn't even know."[83] A media consultant, David Weeks, working for Ensign in this same race observed, "the clutter on television during the last few weeks of the campaign really prevented our message from getting through as clearly as we would have liked. Voters had a tough time figuring out which ads were run by the candidates, which by the parties, and which by independent

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[81] See David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, 1984); See also, Arthur Lupia, "Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections," *American Political Science Review* 88 (1994): 63-76.

[82] Magleby, *Dictum Without Data.*

[83] Emerson, interview; as cited in Fackler, et al., "1998 Nevada Senate Race," in Magleby, *Outside Money*, 122.

groups."[84] Voters are unable distinguish who was behind the advertisement they saw on television, heard on the radio or mail they received. And in the CSED national survey, I found that respondents were often confused as to whether party ads were paid for by candidates or parties. More than 40 percent of the time, the respondents thought the party ads were paid for by a candidate.[85]

[30] The task of unraveling this information is too much even for most news media outlets. Not surprisingly, the news media has a difficult time helping voters sort out who is behind the numerous issue advocacy organizations, as well as the difference between party and candidate communications.[86]

Interest groups are well aware of the difficulty of unmasking their front organization set up to conduct electioneering. In the Connecticut Fifth Congressional District labor campaigned behind a group called "Coalition to Make Our Voices Heard." A combination of their masked identity and labor's emphasis on ground strategies made them difficult to track. Labor "fell below the radar" of journalists, according to Matthew Daly, the political reporter who covered the Maloney/Nielsen race for *The Hartford Courant*.[87]

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[84] David Weeks, media consultant, telephone interview by Ted Jelen, 24 June 1999; as cited in Fackler, et al., "1998 Nevada Senate Race," in Magleby, *Outside Money*, 114.

[85] During the focus' group discussions, 75 percent of focus group respondents said that candidate and party soft money ads are indistinguishable. David B. Magleby, "The Impact of Issue Advocacy and Party Soft Money Electioneering" (paper presented at the conference, "Measuring Advertising and Advertising Effectiveness: Political Advertising in the 2000 Elections," Chicago, Illinois, 18 April 2001), 25.

[86] One notable exception is Al Cross of the *Louisville Courier Journal*. Gross and Miller, "1998 Kentucky Senate and Sixth District Races," in Magleby, *Outside Money*, 206.

[87] Matthew Daly, *Hartford Courant* political reporter, interview by Sandra Anglund and Clyde McKee, 30 March 1999; as cited in Anglund

Voters, when asked, have consistently indicated that they would like to know who it is that is conducting electioneering. In 2000 voters in Montana faced a competitive U.S. Senate and a competitive U.S. House race. A late October Montana State University-Billings Poll found that, "78 percent of the survey respondents reported that it was 'very' or 'somewhat important' for them to know who 'pays for or sponsors a political ad.'"[88] Our focus group participants in 2000 had very similar views on the question of the importance of their knowing who is paying for or sponsoring and ad. More than four-fifths (81 %) said it was very or somewhat important to know the identity of the sponsor. In the national Knowledge Networks Survey in 2000, 78 percent said the same thing.

3. Targeting members demographic and other groups Electioneering advocacy comes in two broad categories. First, groups communicate with their members or other interested parties about their views of particular candidates generally. The NRA, a group known for targeting, communicates with its membership its views of candidates in races from state legislature through U.S. President. These communications are provided in magazines provided members as part of their affiliation with NRA and in other means. Other membership groups do the same things and increasingly corporations communicate this kind of message to employees. Groups like the NRA also often both communicate with their membership and also try and influence a larger group of voters likely to agree with their position. For example in the Washington Second Congressional District the NRA sent a "Dear Washington Hunter" mailer, reaching beyond NRA

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and McKee, "1998 Connecticut Fifth Congressional District Race," in Magleby, *Outside Money*, 165

[88] Craig Wilson and Joe Floyd, co-directors, "The MSU-Billings Poll," October 2000 (Montana State University: Billings, Mont.) 4-8; as cited in Wilson, "Montana 2000 Senate and House Races," in Magleby, *Other Campaign*, 144.

members to Washington hunters.[89] The National Federation of Independent Business (NFIB) sent out an internal communication that could fold out to become a poster with the intent that store owners would publicly display them.[90]

[31] Interest groups not only target memberships or affiliates, they also take aim at particular states with competitive U.S. Senate races or congressional districts where the outcome is in doubt. In 1998, 2000, and 2002, I conducted numerous interviews with key staff in scores of interest groups to assess where they engage in electioneering advertisements. Appendix D provides a listing of all interest group and party leaders interviewed for the 2000 and 1998 studies. The widely shared view of interest groups is that they campaign where their investment can make a difference and that is almost always in competitive contests. This tendency has been reinforced by the exceedingly close margin of party control in Congress in recent years. Interest groups routinely do their own polls to inform them on where to spend their electioneering advocacy money. For example, before they sent mailings, the NEA conducted surveys to determine "if they could make a difference" with their spending.[91]

Interest groups and parties also note the relative cost of media markets, and when a competitive race occurs in cheap media market, they target more there. Montana in 2000 and Nevada in 1998 provide good examples of this. Lisa Wade of the LCV said, Montana was a cheap media market, so you got lots of value for your money,"[92] and one Montana newspaper even editorialized on the extent of outside advertising in the Senate race when they said, "For better or worse, Montana has become a national political battleground and always will be. The reason is simple. A Senate seat can be purchased cheap in Montana."[93]

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[89] Magleby, *Other Campaign*, 230. This mail may have been funded by an independent expenditure.

[90] Sharon Wolff, National Federation of Independent Business, interview by David B. Magleby, Washington, D.C.: 14 November 2000.

[91] Kris Hanselman, political director, Washington Education Association, e-mail correspondence with Todd Donovan, December 2000; as cited in Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 219.

[92] Lisa Wade, League of Conservation Voters (LCV), interview by David B. Magleby, Washington, D.C., 13 November 2000; as cited in

Targeting discrete voter groups within the district that are persuadable on an issue with polling and communications has also become a preferred strategy. An example of this strategy is the California Twenty-Seventh Congressional District race in 2000. The National Abortion Rights Action League (NARAL) used independent expenditures and perhaps other money to fund paid phone banks to identify Schiff supporters from a file of ten thousand pro-choice voters it had accumulated over years of telephone identifications. After three or four rounds of persuasive calls, NARAL identified "86 percent to 88 percent" of the file as Schiff supporters. These voters then received get-out-the-vote (GOTV) calls on Election Day, reminding them to vote.[94] NARAL political director Gloria Totten commented, "We consider it our role to go to people who might be predisposed to Jim Rogan ... and take them away from him and give them to Adam Schiff."[95] Chris Mather, NARAL's deputy political director describes the strategy deployed in the Michigan Eight Congressional District as follows, "NARAL's niche in the prochoice movement is we do the best targeted voter contract work. We don't open a phone book." In the Eighth, there are "close to 25,000 pro-choice identified voters," and

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Magleby, *Other Campaign*, 14. LCV did independent expenditures in 2000.

[93] "Burns Is a Proven Voice in D.C. for Montanans," *Missoulian (Mont.)*, 2 November 2000; as cited in Wilson, "Montana 2000 Senate and House Races," in Magleby, *Other Campaign*, 137.

[94] Gloria Totten, NARAL political director, telephone interview by Drew Linzer and David Menefee-Libey, 17 November 2000; as cited in Linzer and Menefee-Libey, "2000 California Twenty-Seventh Congressional District Race," in Magleby, *Other Campaign*, 159.

[95] Ibid., 159.

"we worked 10 percent of the voters needed to win the election."[96] NARAL also used phone canvasses to **[32]** identify 35,000-40,000 voters to call in Washington 2 in 2000.[97] The NARAL activities in California and Michigan may have been funded by an independent expenditure.

Groups opposed to abortion have also used targeted phone banks. Professors Don Gross and Penny Miller of the University of Kentucky monitored the 1998 Kentucky Senate race as well as the Kentucky Sixth Congressional District race in 1998 and learned of targeted phone banks paid for by Right to Life. Phone calls on the Sunday before the election went to registered African Americans before they went to church. The gist of the message was that Democrats Scorsone and Baesler are pro-abortion-on-demand, and that, as good Christians, blacks should vote for pro-life candidates Fletcher and Bunning.[98]

Targeting is also done on television and radio. Consultants can learn the types of voters who view different types of programs and aim their electioneering advertisements at that audience by advertising on those programs. The NAACP National Voter Fund ad on hate crimes in 2000, for example, was aimed at young African American males.[99] This same pattern of targeting broadcast electioneering advocacy messages happens at the congressional district level. A Sierra

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[96] Chris Mather, NARAL's deputy political director, telephone interview by Eric Freedman, 5 December 2000; as cited in Freedman and Carter, "2000 Michigan Eighth Congressional District Race," in Magleby, *Other Campaign*, 176.

[97] Karen Cooper, Washington NARAL, telephone interview by Todd Donovan, November 2000; as cited in Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 219.

[98] Gross and Miller, "1998 Kentucky Senate and Sixth District Races," in Magleby, *Outside Money*, 201-02. These phone banks may have been an independent expenditure.

[99] Mike Lux, Progressive Strategies CEO, interview by David B. Magleby, Washington, D.C., 14 December 2000.

Club official commenting on the campaign in 2000 in Washington's Second Congressional District indicated that their anti-Koster ad ran primarily on cable during shows directed at "independent women voters aged 25-50 ... in Snohomish and Whatcom County."[100] Records show that in late October they spent about $45,000 on cable TV in that area.[101]

An exception to this widespread practice of investing in highly competitive races is groups who pursue a single issue and ask candidates to pledge to support their position on that issue if elected. The contests in which groups like Americans for Limited Terms becomes involved is therefore limited to those in which one candidate has taken the pledge and the other declined. These contests are not always highly competitive.

4. Timing The timing of electioneering advocacy often suggests coordination among the political parties, candidates and interest groups. Usually, electioneering ads are run in the heat of campaign. As Ken Goldstein and Jonathan Krasno noted, the time of ads is "related to the activity of candidates not the activity of Congress."[102] In some instances, like the Michigan Senate race, groups went in early in the election cycle to help keep Debbie Stabenow (D) competitive while she replenished her campaign war chest. After Governor Carnahan's death in **[33]** Missouri, Democratic party and allied groups capitalized on the tragedy and Re-

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[100] Bill Arthur, Sierra Club Northwest Seattle political director, telephone interview by Todd Donovan, December 2000; as cited in Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 218.

[101] Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 218. The Sierra Club is another group that both did independent expenditures and election advocacy in 2000. Some of their activity in this district was an independent expenditure.

[102] Krasno and Goldstein, "The Facts About Television Advertising and the McCain-Feingold Bill," 209.

publican-allied groups toned down their attacks.[103] After hearing about the death, the NFIB, for example, stopped the presses on a mailer that attacked Carnahan.[104]

In the contests we monitored in 1998, most interest group electioneering advocacy came in the final weeks of the campaign. In 2000, 58% of the interest group electioneering advocacy came in the last two weeks of the election.

V. Soft Money Electioneering by Political Parties

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B. How Soft Money Violates the Principles of the FECA

As originally intended, soft money provided resources to political parties for activities not linked directly to electing or defeating a particular federal candidate. In the 1982 election, for example, the Republican party mounted a generic, "Vote Republican for a Change" campaign, hoping voters would decide to change which party was in control of the House of Representatives. Generic party bumper stickers, slate mailers and the like were seen as how soft money would be spent. In an FEC advisory opinion the Kansas Republican Party was told that, "expenditures for registration and get-out-the-vote drives need not be attributed as contributions to such candidates unless the drives are made specifically on their behalf."

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[103] Martha E. Kropf, Anthony Simones, E. Terrence Jones, Dale Neuman, Allison Hayes and Maureen Gilbride Mears, "The 2000 Missouri Senate Race," in David B. Magleby, ed., *Election Advocacy: Soft Money and Issue Advocacy in the 2000 Congressional Elections* (Provo, UT: Center for the Study of Elections and Democracy at Brigham Young University, 2001), 79-80. "Six thousand [union] volunteers ... walked the streets, delivering the message 'Don't Let the Fire Go Out! Continue the Progress Mel Carnahan Started in Missouri! STAND UP FOR WORKING FAMILIES! Vote Democratic!

[104] Wolff, interview; as cited in Baker and Magleby, "Interest Groups," 58. This would have likely been an independent expenditure.

And finally, "the party may use printed material in a voter registration (or get-out-the-vote) drive which identifies candidates for Federal offices without allocating any costs to particular candidates, if those materials are within the slate card or sample ballot exemption."[107]

1. Contribution limits Because soft money was going to the parties and not the candidates and was not to be spent for the purpose of influencing federal elections, concerns about donors exercising quid pro quo demands on candidates were not great. Similarly concerns about large donors exercising undue influence over candidates, or about parties or corporations being able to deploy their treasury funds were assumed to be less applicable in the soft money exception since the money was to be spent on party-wide activities like voter registration.

Actual experience with soft money has demonstrated that soft money donors and federal candidates are very clearly linked and that connection has been enhanced through joint fundraising or victory committees. Donors who are barred from giving more than $2,000 per election cycle to a candidate can effectively channel unlimited amounts of money to that same contest through a soft money contribution. Moreover, party leaders are typically heavily involved as soft money fundraisers and so donors can develop relationships and ties to leadership.

2. Disclosure Soft money also violates the expectation of transparency or disclosure which was central to the FECA. The original soft money contribution to the national party is disclosed, but donations to state parties need not be disclosed, and parties routinely transfer soft and hard money back and forth to state parties making it difficult to track how soft money is used, and in some cases they even trade hard

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[107] Federal Election Commission, *Advisory Opinion* (Washington, D.C.: GPO, 1978), no. 10.

for soft money.[108] The state parties' practice of transferring funds to other state parties further impedes disclosure.

[36] Not only do parties benefit from soft money transfers, but interest groups, by giving soft money to the parties, can help fund an advertising campaign without having it linked to them. In some races an interest group spending money in its own name risks hurting the candidate the group hopes to elect. Such a strategy appears to have been part of the 1998 Nevada U.S. Senate Election. A team of political scientists at the University of Nevada, Las Vegas and the University of Nevada, Reno found that "it seems likely that attention to the efforts of interest groups may have been inhibited by the fact that some interest groups channeled their soft-money expenditures through the political parties. Environmental groups such as the Sierra Club and the League of Conservation Voters provide good cases in point. . . . The environmental groups appear to have feared a counter mobilization or a backlash if their advocacy of the Reid candidacy became too visible, so these groups attempted to influence the election via party contributions."[109]

The expenditure of soft money is also difficult to monitor because the level of detail provided by state parties to the FEC on expenditures is often such that it is difficult to know how the money was spent in terms of advertising, telephones, or other activities.

C. Why Use Soft Money to Conduct Electioneering?

As discussed more fully above, the parties learned that they could effectively communicate federal candidate specific messages without sanction from the FEC in the 1996 campaign. This more targeted use of soft money has enhanced its strategic value. The parties learned, as James Jordan of the DSCC puts it, that "what matters is tone, not the revenue source."[110]

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[108] For a discussion of such soft money transfers, see Diana Dwyre and Robin Kolodny, "Throwing Out the Rule Book: Party Financing of the 2000 Elections," in *Financing the 2000 Election*, ed. David B. Magleby (Washington, D.C.: Brookings Institution Press, 2002), 146, footnote 30.

[109] Fackler, et al., "1998 Nevada Senate Race," in Magleby, *Outside Money*, 128.

1. Avoid contribution and coordinated expenditure limits Soft money as it has developed in effect permits parties to target unlimited resources to any race, avoiding the contribution and coordinated expenditure limits discussed above. The only real constraints on the parties are the amount of hard money they can raise (because soft money generally must be spent in conjunction with hard money) and the number of competitive races worthy of this kind of investment. In the Delaware U.S. Senate race in 2000, for example, the DSCC and DNC could contribute a combined $17,500 while also spending a total of $67,560 in coordinated expenditures.[111] In this race they contributed $16,500 and spent nothing on coordinated expenditures; when these expenditures are added they pale in comparison to the $4.35 million in soft and hard money transfers by the DSCC to Delaware in 2000.[112]

2. Efficiency of Raising Soft Money Soft money is widely seen by party leaders as easier to raise than hard money. As Dave Hansen of the NRSC stated in response to the question, "What is the allure of soft money?" "It's easier

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[110] Jim Jordan, Democratic Senatorial Campaign Committee (DSCC), interview by David B. Magleby, Washington, D.C., 19 November 2002; as cited in Magleby, *Other Campaign*, 232.

[111] Federal Election Commission, "National Party Non-federal Activity through the Complete Two Year Election Cycle," press release, <www.fec.gov/press/051501partyfund/tables/nonfedsumm2000.html>, 15 May 2001 [accessed 23 August 2001]. Also, Federal Election Commission, "Record," 26, no. 3 (March 2000): 14-15.

[112] Federal Election Commission, data provided by Paul Clark at the FEC.

to get. You can get it in bigger chunks. **[37]** Soft money is harder to spend, though."[113]

Another reason raising soft money is easier for the parties is that two important sources, which are prohibited from giving hard money to parties, may give soft money. Corporate and union treasury funds may be used for soft money contributions. The willingness of interested individuals and groups to make large soft money contributions is well established.

Parties can stretch their soft money even further by transferring soft and hard money to state parties where they can achieve a better ratio of soft to hard dollars than if they spent the money themselves.[114] This is because the ratio of soft to hard dollars for party spending if done by the national party committees is 35 percent soft and 65 percent hard for presidential years, and 40 percent soft and 60 percent hard for off years, but if done by state parties the ratio of soft to hard dollars is greater. The reason for this difference is state parties are allowed to calculate their soft/hard ratio based on the ratio of federal offices to all offices on the ballot in any given year. Both political parties have found spending soft money with its accompanying hard money match through their state parties to work smoothly, for the most part, and state officials readily acknowledge they are simply "pass throughs" to the vendors providing the broadcast ads or direct mail. For example, in Michigan Republican State Party Chair, Rusty Hills, said much of the direct mail carried the state party's name but was actually financed with pass-through money.[115]

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[113] Dave Hansen, NRSC former executive director, telephone interview by David Magleby, Jason Beal, Anna Nibley Baker, and Emily Walsh, 2 July 2001.

[114] For a discussion of this practice, see Dwyre and Kolodny, "Throwing Out the Rule Book," 146.

[115] Freedman and Carter, "2000 Michigan Eighth Congressional District Race," in Magleby, *Other Campaign*, 174. Another example is the 1998 North Carolina Democratic party soft money spending. University

The ease of raising soft money has been enhanced by joint fundraising committees, which permit the parties and candidates to combine their hard and soft money fundraising efforts. Previously, a donor wishing to contribute hard and soft dollars to a candidate and her/his party had to write separate checks to the candidate, party (hard) and party (soft). Parties had an informal way of tracking the preferences of the donor as to the expenditure of her/his soft money donated in a given cycle. With the advent of joint fundraising committees, sometimes called victory committees, a donor can write a single check and the funds will be allocated according to the donor's wishes and applicable legal limits in terms of hard and soft, candidate and party.

3. Ability to communicate a candidate specific election message Parties have discovered that they can effectively campaign for their candidates and against the opposing candidates with soft money. As the memos from political consultant Dick Morris to the Clinton Gore campaign communicated, parties can very effectively communicate a "vote for" or "vote against" message **[38]** without using those words.[116] Our survey data in 2000 found four out of five voters seeing the party ads as attempts to persuade them to vote against a candidate. (See Table 1.)

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of North Carolina Political Scientist Thad Beyle and Communications Professor Ferrell Guillory found that the Democratic Party established a committee known as the N.C. Democratic Party Transfer Account, and by the end of the campaign, it had received $1.88 million in total contributions from the national party. Companion reports were received from two committees, identified as North Carolina Democratic National Senatorial Campaign Committee Soft Money and N.C. Democratic National Committee Soft Money. These committees were associated with the national Democratic committees and reported disbursements to the state account. The state committee, in turn, reported substantial allocations to the N.C. Democratic Party's federal account for the purpose of media buys. See Thad Beyle and Ferrel Guillory, "North Carolina Senate," in Magleby and Holt, *Outside Money*, 57.

[116] Morris, *Behind the Oval Office*, 141, 623-4.

Party committees have greater control of how their money is spent, even when it is transferred to state parties, with soft money than through contributions. Because coordinated expenditures may only be used for a limited array of purposes, this money is not under the party committee's control as much as soft money donations are.

It is clear from our interviews with party committee staff that the party committees exercise a great deal of control over how soft money is spent. In a few instances where party committees lack confidence in how state parties will utilize the soft money transferred to them, the national parties have spent the money from Washington and foregone the more favorable soft/hard ratio generally available to the state parties.

4. Target resources into competitive races Additional evidence that soft money is about electing or defeating candidates is the fact that it is often spent in a few competitive races. The lack of constraints on where soft money can be spent has meant that it has become a strategy parties use to target additional resources to competitive races. The heightened importance of getting soft money into competitive races is illustrated by the decline in party coordinated expenditure (Table 5) spending especially since 1996. When asked about this pattern, party committee staff indicate that parties chose to divert the hard dollars once given to coordinated expenditures in non-competitive races to hard dollar transfers to states where there were competitive House or Senate contests.

D. Growth of Soft Money Use in Recent Election Cycles

Before 1992, soft money spending was not reported to the FEC. In 1992, soft money spending was greater for Republican committees than for the Democratic committees, and was more concentrated in the DNC and RNC than the congressional committees. Since 1996, parties and interest groups have expanded their largely unregulated soft money-funded campaigns. Figure 1 plots party soft money receipts for the period 1994-2000. As documented in Figure 1, the congressional campaign committees all effectively started well under $10 million in 1994 and in six years none of them were under $40 million in soft money receipts. Soft money clearly has become a major tool of the congressional campaign committees.

The most dramatic growth in 2000 for any single party committee was for the Democratic Senatorial Campaign Committee (DSCC). In 1994 the DSCC raised $372,448 in soft money, less than 10 percent of what the National Republican Senatorial Committee (NRSC) raised that same year. In the 1999-2000 election cycle, the DSCC raised $63 million, and the NRSC raised $43 million.[117] House Democrats (DCCC) also dramatically increased their soft money receipts, raising more soft money than the House Republicans (NRCC). When all party committees are combined (DNC, DCCC, DSCC, RNC, NRCC, and NRSC), the two parties' soft money receipts **[39]** were at near parity for the first time.[118]

E. Party Soft Money Electioneering

Because of the disclosure limitations on party soft money expenditures discussed above we have found that monitoring the communications efforts of the parties combined with extensive elite interviewing of party officials, campaign staff, consultants and other informed observers is necessary to understand how soft money is actually spent. Such interviews with state party officials have been especially important in tracking soft money in U.S. House contests. Take the Washington Second Congressional District, for example. In

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[117] Federal Election Commission, "FEC Reports Increase in Party Fundraising for 2000," press release, <www.fec.gov/press/051501 partyfund/tables/cong2state2000.html>, 15 May 2002 [accessed 27 August 2001].

[118] Dwyre and Kolodny, "Throwing Out the Rule Book" in David B. Magleby, ed., *Financing the 2000 Election*. 142-43.

the 2000 election cycle, Republican and Democratic national committees transferred almost $22 million to Washington State—about 75 percent of which was soft money. The DCCC alone transferred $2.7 million, and the NRCC $2.6 million.[119] The Second District was clearly the most competitive House race in the state, and as a result, much of this money was directed there. A DCCC official reported that nearly all of their transfers to Washington went toward the Second.[120]

1. How soft money is spent Because parties are not required to carefully account for how soft money is expended, precise estimates of the amount spent on television as compared to mail, telephones and other ground war efforts is difficult. But our interviews with state and national party officials present a consistent picture that the party soft money funded campaigns are professionally run, rely heavily on survey research and deploy multi-faceted campaigns that include broadcast ads, direct mail, telephone contacts, personal contacts, and voter mobilization efforts on election day.

Soft money is largely aimed at competitive races. As discussed earlier in this report, and as documented in Figure 2, the party committees expend millions of dollars in competitive U.S. Senate races and hundreds of thousands of dollars and sometimes a million dollars or more in competitive U.S. House races. In small states like Delaware, Nevada or Montana, an expenditure of $2 million or more in party money is substantial. Interviews with party officials from those states and in Washington D.C. found a willingness to expend extraordinary amounts of soft money in hopes of picking up a seat. For example, "in early October, a spokesman for the Montana Democratic Party said his organization had spent $980,000 on television ads for Schweitzer, which at the time was almost twice as much as the candidate campaign; he also added that they were prepared to spend $400,000 more. The Montana Republican Party estimated its soft money television ad spending for Burns at $400,000.[121]

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[119] Federal Election Commission (FEC), "Party Fundraising Escalates," press release, 12 January 2001, <fecwebl.fec.gov/press/011201partyfunds.htm>, [accessed 12 January 2001]; as cited in Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 214.

[120] Karin Johanson, DCCC political director, telephone interview by Jason Beal, 10 January 2001; as cited in Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 214.

[40] The New Jersey Twelfth Congressional District contest in 2000 offers a good example. The NRCC financed a large portion of the media advertising supporting Dick Zimmer. In addition, Zimmer's campaign manager, John Holub, said that the NRCC sent a number of mailings emphasizing Zimmer's accomplishments in Congress and attacking Holt's record.[122] In the view of Princeton Political Scientist Adam Berinsky and Kean College Professor of Public Administration Susan Lederman, the DCCC "was a major player in the New Jersey Twelfth District contest as well."[123] Berinsky and Lederman point out that the DCCC spent aggressively in the New York City media market, with over four hundred commercials in the New York area run in

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[121] Kathleen McLaughlin, "Sea of Money," *Missoulian (Mont.)*, 2 November 2000; as cited in Wilson, "Montana 2000 Senate and House Races," in Magleby, *Other Campaign*, 137.

[122] John Holub, Zimmer Campaign Manager, telephone interview by Paul Gerber, 21 November 2000; as cited in Berinsky and Lederman, "2000 New Jersey Twelfth Congressional District Race," in Magleby, *Other Campaign*, 187.

[123] Berinsky and Lederman, "2000 New Jersey Twelfth Congressional District Race," in Magleby, *Other Campaign*, 187.

September at a cost of almost $1 million.[124] The DCCC also spent "an estimated $200,000 sending out glossy fliers."[125]

Another race in which both parties invested heavily in a particular house race was the Arkansas Fourth district. Political Scientist Hal Bass found that the DCCC allocated slightly more than $1.5 million to the Arkansas Democratic Party, designating that it should be used independently on candidate Mike Ross's behalf.[126] Similarly, the state and national arms of the Republican Party made about $1.6 million available to boost Dickey's prospects.[127]

Evidence that the parties conduct their own tracking polls was clear in 1998 and 2000. They use data from these polls as a primary basis for their soft money allocation decisions. In the 1998 South Carolina Senate contest party-funded soft money ads became a point of contention, and Republican candidate Bob Inglis, the intended beneficiary of the ads, disavowed them and asked that they be stopped. But "Republican Party officials claimed that their polling showed that the ads helped Inglis."[128] Another example where party strategy is reported to have been influenced by polling is the Connecticut Fifth Congressional race in 2000. Political Scientists Sandra Anglund and Joanne Miller state that while Republican candidate "Nielsen's campaign manager told us that he was pleased with the NRCC level of support,[129] others suspect that the NRCC had planned to spend more to help Nielsen, but pulled back based on polling and **[41]** perhaps dissatisfaction with Nielsen's campaign tactics."[130]

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[124] Berinsky and Lederman estimate that the DCCC spent a total of $2.6 million on advertising buys. Berinsky and Lederman, "2000 New Jersey Twelfth Congressional District Race," in Magleby, *Other Campaign*, 187.

[125] Johanson, interview by Jason Beal; as cited in Berinsky and Lederman, "2000 New Jersey Twelfth Congressional District Race," in Magleby, *Other Campaign*, 187-88.

[126] Patrice Hargrave, Arkansas Democratic Party executive director, interview by Harold F. Bass, Kathryn A. Kirkpatrick, and Amber E. Wilson, Little Rock, Ark., 5 December 2000; as cited in Harold F. Bass, Kathryn A. Kirkpatrick, and Amber E. Wilson, "The 2000 Arkansas Fourth Congressional District Race," in Magleby, *Election Advocacy*, 123.

[127] Chris Camahan, Arkansas Republican Party executive director, interview by Bass, Kirkpatrick and Wilson, Little Rock, Ark., 15 November 2000; as cited in Bass, Kirkpatrick and Wilson, "2000 Arkansas Fourth Congressional District Race," 123.

[128] Bill Moore and Danielle Vinson, "The 1998 South Carolina Senate Race," in Magleby, *Outside Money*, 103.

The previous examples clearly show that the ability of the parties to get their soft money (along with the necessary hard money match) into the right races is an important strategic consideration. In 2000 the Senate Democrats (DSCC) were more effective than their Republican counterparts (NRSC) in transferring soft money into the most competitive Senate races. Table 4 presents the hard and soft money transfers from the national party committees to state parties in the five Senate races monitored in our 2000 study. The ability of Democrats to deliver soft and hard money to the most competitive races was not isolated to our sample.

a. Broadcast and cable electioneering The parties have learned that they can very effectively deliver federal candidate specific TV ads with soft money. Indeed voters see the party soft money funded ads shown in our survey research as more about electing or defeating particular candidates than candidate ads. More than four out of every five respondents

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[129] Fergus Cullen, Nielsen campaign manager, interview by Sandra M. Anglund and Joanne M. Miller, West Hartford, Conn., 17 November 2000; as cited in Sandra M. Anglund and Joanne M. Miller, "The 2000 Connecticut Fifth Congressional District Race," in Magleby, *Election Advocacy*, 148.

[130] George Gallo, Connecticut Republicans executive director, interview by Sandra M. Anglund and Joanne M. Miller, 16 November 2000; and Scott Mason, AMPAC regional political director, telephone interview by Sandra M. Anglund and Joanne M. Miller, 20 November 2000; as cited in Anglund and Miller, "2000 Connecticut Fifth Congressional District," in Magleby *Election Advocacy*, 151.

saw the party ads as seeking to "persuade them to vote against a candidate." (See Table 1.)

The political parties as a rule are major players on television and radio in competitive races. For example, in one race, the 1998 Kansas Third Congressional District, "during the last weekend of the campaigns the RNC spent over a quarter of a million dollars in a negative TV blitz..."[131] In the 1998 Nevada Senate race, the medium of choice for the parties was television.[132] In our sample races in 2000, parties were the biggest broadcast spenders, outspending both the candidates and the issue advocacy groups."[133] As noted above, both parties spend considerable money on broadcast ads, even in places like New York City or Los Angeles where such ads are expensive.

The heavy media buys by party committees were a common theme across races in both 1998 and 2000. In the Washington, Second Congressional District race both parties outspent their respective candidates on television and radio by large margins. In the Oklahoma Second Congressional District in 2000, both the NRCC and the DCCC spent heavily on broadcast. "The DCCC spent about $525,000 to run four TV spots, two negative and two positive."[134] They also ran one independent negative radio spot. The NRCC, on the other hand, spent about $400,000 to run five television spots and one radio spot, all negative.[135] Similarly, in the 2000 Kentucky Sixth Congressional District race, the state Democratic Party spent more on television ads than Baesler's own campaign--$770,000 in funds transferred from the DCCC.[136]

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[131] Cigler, "1998 Kansas Third Congressional District Race," in Magleby, *Outside Money*, 85.

[132] Fackler, et al., "1998 Nevada Senate Race," in Magleby, *Outside Money*, 118.

[133] Magleby, "Outside Money," *PS Online e-Symposium*, June 2001, at <www.apsa.com/PS/juneOl/magleby.cfm> [accessed 24 August 2002].

[134] Estimated from the political files at Tulsa TV stations. Rebekah Herrick and Charlie Peadon, "The 2000 Oklahoma Second Congressional District Race," in Magleby, *Election Advocacy*, 231.

[135] Ibid., 231.

[42] There appears to be some variability from year to year in the party committees and in the proportion of party soft money resources devoted to broadcast ads. In races like the 1998 Nevada Senate race, it was frequently reported to us that more than half of party soft money spending in competitive races went to television.[137] Another example where roughly half of party soft money was spent on television is the Connecticut Fifth Congressional District Race in 2000. The DCCC's expenditures were split relatively evenly between television advertising and direct mail.[138] Estimates from party officials of the amount of money going to television went as high as 75 percent at the DCCC.[139]

As noted earlier, interest groups and parties also utilize the often less expensive cable television ads as well. Our ad buy data from the seventeen races in 2000 document that Democratic Party committees and allied groups conducting electioneering advocacy used cable TV much more than Republican Party committees and GOP electioneering advocacy allies. The Democratic allied interest groups purchased nearly three times as many cable spots as Republican allied interest groups (a difference of three thousand spots).

Parties also substantially outspent both interest groups and candidates in radio advertising. In the 2000 Virginia

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[136] Penny M. Miller and Donald A. Gross, "The 2000 Kentucky Sixth Congressional District Race," in Magleby, *Election Advocacy*, 177.

[137] The team studying the 1998 Nevada Senate Election report, "Party organizations spent more than $10 million on the Nevada senate race, more than half of it on television advertising." Fackler, et al., "1998 Nevada Senate Race," in Magleby, *Outside Money*, 119.

[138] The DCCC spent $192,000 on Media and $175,000 on direct mail. Karin Johanson, interview by Jason Beal; as cited in Anglund and Miller, "2000 Connecticut Fifth Congressional District," in Magleby, *Election Advocacy*, 150.

[139] Karin Johanson, DCCC political director, interview by David B. Magleby, Washington, D.C., 20 November 2000.

Senate race on the radio the parties doubled the spending of interest groups doing electioneering advocacy, and interest group electioneering exceeded candidate spending by a ratio of three-to-one.[140]

b. Ground war electioneering Both parties have been active in communicating with voters through the mail, on the telephone, via the Internet and with voter mobilization efforts. As with broadcast, these activities are most concentrated in competitive races. Fully 83 percent of respondents in our focus groups in 2000 saw party mail as about electing or defeating a candidate.[141] Parties have found ways to engage in federal candidate specific electioneering using soft money.

The amount of party mail can be substantial in competitive races. In our sample contests in 2000, we detected over 1500 unique election related mail pieces. Approximately three-fourths of party-funded mail is sent out during the three weeks prior to the election.[142] All four congressional campaign committees and most state parties have been listed as the return address on mail. When state parties are doing the mail, they are often expending soft and hard money **[43]** transferred to them by national parties for this purpose. One of the most active party committees in direct mail is the NRCC. John Haskell of Drake University who monitored the Iowa Third Congressional District race in 1998 stated that there was "a massive amount of [party] direct mail on behalf of McKibben," the Republican candidate in that race.[143] And similarly, "the NRCC mail in Michigan's Eighth Congressional District included at least a half-dozen pieces. One mailer attacked Byrum's vote against the state's $37.5 million Elder Prescription Insurance Coverage Program, 'which will provide affordable drug coverage for Michigan seniors.' It urged: 'Call and tell [Byrum] to stop voting against Michigan seniors and their health care needs.' The NRCC's 'Failed for Lack of Attendance' piece slammed Byrum for missing a key vote when attending a fundraiser 'held at a casino.'"[144]

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[140] Holsworth, et.al., "2000 Virginia Senate Race," in Magleby, *Other Campaign*, 118.

[141] Magleby, *Dictum Without Data*, iii and 9.

[142] In 2000, we found 489 unique mail pieces sponsored by the parties, 353 of which were delivered during the last three weeks leading up to the election. David B. Magleby and the Center for the Study of Elections and Democracy, Election Communication Database 2000 [dataset]. Provo, UT: Brigham Young University, Center for the Study of Elections and Democracy [producer and distributor], 2000.

The mail sent out by the parties often reinforces what candidates are communicating in their own commercials. For example in the 1998 Kentucky U.S. Senate race, Republican Candidate Jim Bunning ran an ad of his opponent Scotty Baesler in which Baesler is shown speaking in an angry manner with background music from Wagner's Ride of the Valkyries Kentucky journalists dubbed the ad, the "Hitler Ad."[145] A still image of Baesler from the ad was then used by the Republican party in mail relating to such issues as NAFTA. Two years later, in the 2000 Kentucky Sixth District race, the same image was used in a NRCC mailing. Another race in which the party adopted images from the candidates is the 2000 Michigan Eighth Congressional district race where the Republican state committee's mailings used the Rogers candidate committee campaign logo next to the return address.[146]

The typical pattern in 1998 and 2000 congressional races was for the mail to reinforce the themes the candidates were

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[143] John Haskell, "Iowa Third District," in Magleby and Holt, *Outside Money*, 97.

[144] Freedman and Carter, "2000 Michigan Eighth Congressional District Race," in Magleby, *Other Campaign*, 175.

[145] The National Journal Group, Inc., "Kentucky: Fallout from Bunning's 'Hitler' Ad," *The Hotline*, October 9, 1998.

[146] Freedman and Carter, "2000 Michigan Eighth Congressional District Race," in Magleby, *Other Campaign*, 175.

raising. In New Mexico's 1998 Third Congressional District race for example, "The Democratic Party of New Mexico also sent out several direct mail pieces. ... All of these themes were consistent with candidate [Democratic candidate] Udall's campaign message."[147] Another race in which the party echoed the candidate message was in Washington's Second Congressional District. There "large parts of two WSDCC mailings were indistinguishable from two ads sent by Larsen. One particular WSDCC mailer used photos, font, layout, and text that were identical to the content of an ad mailed by Larsen. The party ad and the candidate's ad both also contained identical images of a Koster fundraising letter and identical quotes from the letter stressing Koster's tough stance against abortion."[148]

The Arkansas Fourth Congressional District race in 2000 also saw a substantial amount of party mail. Political Scientist Hal Bass and his associates found that the political parties were the most active combatants in direct mail. The Arkansas Democratic Party sent six mailings, paying over $150,000 for them using funds passed along from the DCCC (Johanson 2001). **[44]** These mailings attacked Dickey on several issues, questioning his commitments to Social Security and higher wages, while heralding Ross's commitment to welfare reform. But in Dickey's defense, the NRCC distributed over a dozen mailings, roughly divided between endorsements of Dickey and attacks on Ross. In fact the Arkansas Republican Party paid over $300,000 in pass-through funds for these mailings that addressed both the candidates' personal qualities and issue stances.[149]

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[147] Lonna Rae Atkeson and Anthony C. Coveny, "The 1998 New Mexico Third Congressional District Race," in Magleby, *Outside Money*, 148.

[148] Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 216-17.

[149] Magleby, "Outside Money," *PS Online e-Symposium*, June 2001, at <www.apsa.com/PS/june01/bass.cfm> [accessed 24 August 2002].

One of the races we monitored in both 1998 and 2000 was the Connecticut Fifth Congressional district. The academics who monitored this race found substantially more mail activity by the party committees in 2000 than there was in 1998. While the state Democrats sent three relatively basic mailings in the 1998 campaign, the DCCC's 2000 campaign included at least six full-color, glossy direct mail brochures, which targeted specific audiences in different parts of the district. Of these, one was an attack piece claiming that Nielsen's "votes threaten our health." On the Republican side, the NRCC, which spent its money centrally to comply with the newly enacted Connecticut ban on national parties transferring money to state parties, used its soft money for television and radio advertising, and the state Republican Party paid for direct mail. Together, the two committees spent \$525,000-\$700,000. Of the total, the NRCC's portion was \$400,000-\$525,000, and the Connecticut Republican's, \$125,000-\$175,000.[150]

Parties also mount telephone campaigns for and against particular candidates. In 2000 party committees mounted more telephone campaign efforts than the candidates and they were more likely to attack than the candidates.[151] The Internet is also a means parties use to communicate their message, although to date not as much as telephone, mail and especially broadcast

A fundamental element of party activity in competitive races is voter mobilization on Election Day. In monitoring Nevada's 1998 Senate race our Nevada academics observed the activity on Election Day. They describe the activity as, "local union leaders collaborat[ing]5 with each other, national leaders, and the Democratic Party to mount a massive GOTV effort."[152]

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[150] Anglund and Miller, "2000 Connecticut Fifth Congressional District," in Magleby, *Election Advocacy*, 150.

[151] David B. Magleby and the Center for the Study of Elections and Democracy, Election Communication Database 2000 [dataset]. Provo, UT: Brigham Young University, Center for the Study of Elections and Democracy [producer and distributor], 2000.

2. Role of state parties in soft money electioneering State parties have largely provided bank accounts and accounting services for the national parties to direct their transferred soft money along with the hard money match to campaign communications aimed at defeating or electing a particular federal candidate. As noted above, between half and three-quarters of this money has been passed through the state party accounts on its way to pay for broadcast advertising.

State parties have also been way stations for national party money spent on direct mail, **[45]** again targeted to particular federal races and not generic party electioneering. For example, the Michigan GOP put resources into only two Michigan House districts in 2000, the Eighth where Rogers was running, and the First, where Democratic incumbent Bart Stupak defeated his challenger. In the Eighth, the party budgeted more than \$300,000 for broadcast aids, direct mail, phone banks and yard signs. State Chair, Rusty Hills, said "much of the direct mail carried the state party's name but was actually financed with pass-through money.[153]

F. Strategies and Techniques in Soft Money Electioneering

Soft money funded electioneering is generally funded by the national parties but managed by the state parties. The content, tactics and strategy are generally indistinguishable from the candidate campaigns, except that party campaign communications are generally more negative in tone. The campaigns run by the parties are professional, often using consultants who are running candidate campaigns in other states. These ads undermine the intent of the FECA rules because they are so candidate centered and so substantial, permitting very large contributions to enter a particular contest anonymously. Our focus groups and national survey in 2000 found that voters see party television ads as primarily about defeating or electing a particular candidate (See Tables 1 and 2).

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[152] Bowers, et al., "Nevada Senate Race," in Magleby and Holt, *Outside Money*, 46.

[153] Freedman and Carter, "2000 Michigan Eighth Congressional District Race," in Magleby, *Other Campaign*, 174

1. Theme and message of communications The theme and message of party soft money communications, as previously noted, often closely mirror the theme and message of the candidates. An example of this is the use of the same images and messages by the candidates and parties in Washington's Second Congressional District race in 2000. Here the candidate, party, and group campaigns were often structured on identical themes and issues. In one of Larsen's more heavily played television ads, for example, a narrator attacked Koster's record on abortion rights and suggested that Koster would limit access to birth control. Images from that ad also appeared in a Democratic Party mailer and in one of Larsen's mass-mailed advertisements attacking Koster on reproductive choice. Parts of the Democratic Party mailings and Larsen campaign mailers attacking Koster on abortion were identical."[154] The use of memorable images was also cited previously with regard to the "Hitler ad" in the Kentucky Senate race in 1998.[155]

a. Opposing Particular Candidates Most soft money funded communications attack the candidate of the opposite party. The two parties had nearly identical proportions of attack ads in 2000.[156] Consistent with the pattern across

states, the Democratic party in New Mexico's Third Congressional District race in 1998 "ran only issue ads against Redmond [the Republican] and no ads supporting Udall [the Democrat]." The ads originated with the DNC and the DCCC, which provided the soft money necessary to purchase TV time."[157] The Montana At-Large **[46]** House race in 2000 saw both candidates and their parties attacking the other candidate or even attacking groups supporting that candidate. Political scientist Craig Wilson observed that the Republican party and Dennis Rheberg ran "mailings and television commercials linking Nancy Keenan to 'liberal' organizations like NARAL and People for the American Way. For their part, the Keenan campaign and the Democratic Party portrayed Rehberg as an uncaring conservative who favored the rich and would not work to protect Social Security or Medicare or to improve education."[158]

The tendency to use soft money to attack the opposing party candidate was also found in the Washington Second Congressional District Primary. Political Scientists Todd Donovan and Charles Morrow found that "at stations that provided access to records, we found that the WSDP bought $1.5 million in ads, running three ads against Koster: one attacking his positions on reproductive rights, one attacking his positions on education, and one comparing Larsen and Koster. All of the ads echoed the main themes of Larsen's television ads."[159]

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[154] Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 213.

[155] Gross and Miller, "1998 Kentucky Senate and Sixth District Races," in Magleby, *Outside Money*, 190.

[156] Of 394 Democratic funded mail, radio and television ads, 68 percent attacked Republicans, while of 454 Republican funded mail, radio and television ads, 66 percent attacked Democrats. David B. Magleby and the Center for the Study of Elections and Democracy, Election Communication Database 2000 [dataset]. Provo, UT: Brigham Young University, Center for the Study of Elections and Democracy [producer and distributor], 2000.

[157] Terry Brunner, New Mexico Democratic Party campaign coordinator, telephone interview by Lonna Rae Atkeson and Anthony C. Coveny, 9 November 1998; as cited in Atkeson and Coveny, "1998 New Mexico Third Congressional District Race," in Magleby, *Outside Money*, 146.

[158] Wilson, "Montana 2000 Senate and House Races," in Magleby, *Other Campaign*, 138.

[159] Donovan and Morrow, "2000 Washington Second Congressional District Race," in Magleby, *Other Campaign*, 215.

The tendency of the party ads to take the attack while candidate ads are more positive was something we observed in several races. Overall in our sample races, candidates attack 34% of the time, compared to parties at 44% in 2000.[160] An example of this from the 1998 campaign would be the North Carolina Senate races where Democratic candidate John Edwards ran mostly positive spots but his party "spent nearly $2 million of soft money contributions in a parallel TV issue campaign aimed at Faircloth's voting record." The Democratic National Committee and the Democratic Senatorial Campaign Committee provided the spots and soft money contributions for the state Democratic Party to air the anti-Faircloth commercials. The tag lines did not explicitly instruct voters to support or oppose a candidate, but rather to "call Lauch Faircloth." According to Mike Davis, the consultant who managed the ads, the ads made a difference. He continues that the party funded ads "allowed John and his campaign to stay on the high road by and large. And it allowed the party to be the one to take out the long knives."[161]

One reason for the more frequent attack ads coming from the political parties and interest groups appears to be a shared sense that when an outside group was criticizing or attacking a candidate it was on safer legal ground than when it was promoting its own candidate. One reason that party soft money ads are more negative may be that party lawyers had advised that soft money can more clearly be spent on issue ads that attack one candidate rather than contrast the two candidates.[162] "One media consultant for the Republican Party agreed that it was safer to use attack ads to avoid accusations of coordination with the candidate when soft money was involved."[163]

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[160] David B. Magleby and the Center for the Study of Elections and Democracy, Election Communication Database 2000 [dataset]. Provo, UT: Brigham Young University, Center for the Study of Elections and Democracy [producer and distributor], 2000.

[161] Beyle and Guillory, "North Carolina Senate," in Magleby and Holt, *Outside Money*, 55.

[162] Magleby, *Other Campaign*, 226.

[47] b. Countering candidate themes and messages Party soft money funded communications are also surrogate campaigns in that they are also used to counter themes and messages of the opposing candidate or party. Outside money can be tremendously beneficial to candidates because it acts as a surrogate campaign, providing extra advertising support to a candidate when the candidate has run out of, or is low on, funds. Debbie Stabenow experienced this in her 2000 Senate race; unable to afford broadcast ads in the summer, her party and allied groups stepped in and ran ads supporting her. Because of this help, Stabenow was able to conserve her resources for later in the election cycle.[164] The Democratic party played a similar role in Chuck Robb's 2000 Virginia Senate race, spending over $9 million in hard and soft money."[165]

2. Masking identity Because the donors of soft-money are not identified in the actual communication to the voters, soft money itself is a means of masking the identity of donors. In some settings, a party communication will have more credibility than the same communication bearing the name of the donor. For example, trial lawyers who are a large soft money donor to Democrats, may have decided that they will be more successful campaigning through the Democratic party than buying their own ads.

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[163] Moore and Vinson, "1998 South Carolina Senate Race," in Magleby, *Outside Money*, 99.

[164] Michael Traugott, "The 2000 Michigan Senate Race," in Magleby, *Election Advocacy*, 62.

[165] Federal Election Commission, "FEC Reports Increase in Party Fundraising for 2000," press release, <www.fec.gov/press/051501 party-fund/tables/cong2state2000.html>, 15 May 2002 [accessed 27 August 2001]; as cited in Holsworth, et. al., "2000 Virginia Senate Race," in Magleby, *Other Campaign*, 107.

3. Targeting particular demographic or other groups One segment that is frequently a target of party soft money funded mail is seniors, and predictably one of the issues stressed with seniors is social security. Here as in other issue dimensions, the coordination of message between the candidates and their parties is apparent. An example is the Utah Second Congressional District race between Lily Eskelsen (D) and Merrill Cook (R) in 1998. One of the Democratic party mailers sent to seniors echoed the Eskelsen campaign against Cook's stand on Social Security with a picture of crossed fingers that reads, "Saying one thing; then doing another." Eskelsen's own campaign ads said, "Merrill Cook–Doing, Saying, and Spending Anything to Get Elected."[166]

Latino voters are another increasingly important target. The Democratic party targeted them in the California Twenty-seventh Congressional District race. David Menefee-Libey and Drew Linzer learned that Democratic party "mailers complemented Schiff s mail program, which, despite its size and sophistication, contained no ads targeted at Latino issues. Both Danny Medress of the California Democratic Party and Karin Johanson of the DCCC said that they believe Latinos were the Democrats' base in the Twenty-seventh district."[167] The investment on activating Latinos was substantial; "State and national Democrats, working in concert, spent $1.6 million on television ads and sent five direct mail pieces in English and Spanish just to Latino households."[168]

[48] 4. Timing In all of the races we monitored, the parties and candidates both ran ads in the crucial final weeks of the campaign. The Illinois Seventeenth Congressional District race in 1998 is illustrative of this. John Shockley monitored this race and found, that "the Republican and Democratic Parties' issue advocacy ads, through both TV and direct mail, ran right through election eve, alongside the candidates' own commercials, and they raised issues that the candidates' ads were using."[169]

In some races, the parties also stepped in during critical earlier periods of the campaign and helped keep their candidate viable, either by promoting her or attacking her opponent. An example of this is the 2000 Michigan Senate race. Michael Traugott observed "Stabenow, the challenger, had her advertising campaign propped up by soft money expenditures and interest groups during periods when she was reserving her resources."[170] Another reason why parties may invest while a candidate is relatively quiet is that the candidate has just won a competitive primary and has depleted resources. The party by spending substantial sums of soft money may keep that candidate viable until the candidate can raise more money. This occurred in the Oklahoma Second Congressional district race in 2000. Rebekah Herrick found that " Because Carson had to win the runoff, he had little time and money to start the general election.[171] Thus, the DCCC stepped in and ran a positive piece about Carson while he was raising money to run his own ads. This allowed Carson to preempt negative attacks."[172]

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[166] Jay Goodliffe, "The 1998 Utah Second Congressional District Race," in Magleby, *Outside Money*, 177.

[167] Karin Johanson, interview by David B. Magleby. See also Danny Medress, telephone interview by Drew Linzer and David Menefee-Libey, 1 November 2000; as cited in Linzer and Menefee-Libey, "2000 California Twenty-Seventh Congressional District Race," in Magleby, *Other Campaign*, 154.

[168] Ibid., 154.

[169] John S. Shockley, "Profile of Illinois Seventeenth Congressional District," in Magleby and Holt, *Outside Money*, 106.

[170] Michael W. Traugott, "The 2000 Michigan Senate Race," in Magleby, *Other Campaign*, 108.

[171] Doug Heyl, DCCC, telephone interview by Rebekah Herrick, 6 December 2000; as cited in Herrick and Peadon, "2000 Oklahoma Second Congressional District," in Magleby, *Election Advocacy*.

[172] Magleby, "Outside Money," *PS Online e-Symposium*, June 2001, at <www.apsa.com/PS/june01/herrick.cfm> [accessed 24 August 2002].

G. Coordination Between Parties and Candidates, Between Parties and Groups.

Academics in several races heard from party and campaign professionals that candidates were well aware of the activities of their political parties and vice versa. A team of political scientists who monitored the 2000 Virginia Senate race found, for instance, that "the party's [Republican] campaign was closely coordinated with the Allen campaign, and it reinforced the basic themes that the campaign had developed."[173] For example in the 1998 New Mexico Third Congressional District race, Lonna Rae Atkeson observes, "both parties indicated that they did not explicitly discuss or directly correlate their campaign themes with the candidates. However, both political parties indicated that such discussions were completely unnecessary because they knew their candidates and easily maintained consistent principles with them."[174] Atkeson's conclusion about the extent to which the parties and candidates were on the same page was also the assessment of the team of academics who studied the 1998 Nevada Senate race. They conclude, "although we were not privy to decisions by parties, candidates, or outside interests to **[49]** coordinate activities, several pieces of circumstantial evidence lead us to emphasize the coordinating function of Nevada's party organization."[175]

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[173] Holsworth, et. al., "2000 Virginia Senate Race," in Magleby, *Other Campaign*, 115.

[174] John Dendahl, New Mexico Republican Party chair, interview by Lonna Rae Atkeson and Anthony C. Coveny, Santa Fe, New M., 2 April 1999; Fred Harris, New Mexico Democratic Party chair, interview by Lonna Rae Atkeson and Anthony C. Coveny, Albuquerque, New M., 1 April 1999; Terry Brunner, interview; as cited in Atkeson and Coveny, "1998 New Mexico Third Congressional District Race," in Magleby, *Outside Money*, 145.

[175] Fackler, et al., "1998 Nevada Senate Race," in Magleby, *Outside Money*, 116.

H. To What Extent Is Soft Money Spent on Electioneering or Party Building?

When parties want to help elect or defeat a candidate, they may make contributions, spend money in coordination with the preferred candidate or make an independent expenditure. Contributions and coordinated expenditures are fully disclosed and limited. Independent expenditures are disclosed but not limited. All of these party activities are funded with contributions that are subject to the annual contribution limits for those making the contribution.

Our monitoring of state and federal party activity in 1998 and 2000 finds that party committees make no secret of their specific electioneering purposes in using soft money. Evidence that the real goal of soft money expenditures is winning particular elections and not party infrastructure is demonstrated in how the money has been allocated. Congressional campaign committees have clearly allocated their soft money to a relatively small number of competitive races.

As I discuss elsewhere in this report, our estimate is that over half, and sometimes as much as three-quarters, of soft money expenditures go to broadcast advertising. The content of these advertisements are candidate and not party centered. Indeed, only 15 percent of the ads in 1998 and 7 percent of the ads in 2000 mentioned the party by name in the ad, except in the tag line indicating which party committee paid for the ad.[176] The focus or referent of the ads is the particular candidate in an upcoming election, and there is no mention of any other candidate from the same party in most of the ads. Another empirical regularity discussed elsewhere in the report is that most party ads have as a primary theme an attack on the candidate of the opposing party. The content of such ads does nothing to foster party infrastructure. Those who make the ads and manage the campaigns are consultants, who often do not even reside in the state where the election is taking place.

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[176] Krasno and Goldstein, "The Facts About Television Advertising and the McCain-Feingold Bill," 210.

The second most common way soft money is expended is through direct mail. This campaign tool again is, in format, content and theme, very candidate centered. As we discuss elsewhere, parties even occasionally use themes and images taken directly from candidate communications. The lists for the mail are typically acquired from vendors who specialize in lists of registered voters, sorted along various dimensions. There appears to be little or no involvement of the state or local party organizations in the construction of the lists. Consultants with no enduring relationship with the state or local party also largely manage recorded phone calls, Internet communications, and other voter contact devices.

What elements of parties are then enhanced or built with soft money? The answer is the role of campaign consultants, accountants and party committee chairs. This latter category is made especially more powerful because of the very limited array of contests in which substantial amounts of soft money are targeted. As with candidate campaigns, there is little of enduring **[50]** "party-building" value in these transitory expenditures. One element of soft money expenditures that may have a lingering effect on party infrastructure is voter lists. To the extent these lists are kept and updated, this activity may aid in further party efforts.

Report of Thomas E. Mann

I. Qualifications

My name is Thomas E. Mann. I am the W. Averell Harriman Chair and Senior Fellow at the Brookings Institution. I served as Director of the Governmental Studies Program at Brookings between 1987 and 1999 and as Executive Director of the American Political Science Association from 1981 to 1987. I earned my Ph.D. in political science at the University of Michigan in 1977, specializing in elections, parties, public opinion, Congress, and American political behavior. A copy of my complete CV is attached.

I have written or edited numerous books and articles on these and related subjects. I have taught at Princeton University, Johns Hopkins University, the University of Virginia, Georgetown University and American University and delivered invited lectures at many other colleges and universities and at scholarly meetings. I was elected a Fellow of the American Academy of Arts and Sciences and presented with the Charles E. Merriam Award (for "a significant contribution to the art of government through the application of social science research") and the Frank J. Goodnow Award (for "distinguished service") by the American Political Science Association.

Over the last decade, much of my research and writing has focused on campaign finance in the United States and in other countries. In 1995, I assembled a Brookings Working Group on Campaign Finance Reform to evaluate alternative approaches to reform (Brookings 1996). I also started a campaign finance reform Web site at Brookings, which is regularly updated with materials on campaign finance law, administration, and politics (www.brookings.edu/campaignfinance). After the 1996 elections I joined several other scholars in analyzing the most serious problems with the campaign finance regulatory regime and in formulating a strategy to deal with those problems. We produced a report entitled "Five Ideas For Practical Campaign Reform," which was widely **[2]** circulated in the policy community (Ornstein et. al. 1996). Based on this work, I took an active role in the public debate on campaign finance reform over the last six years. In 1997, I co-edited *Campaign Finance Reform: A Sourcebook*; in 2002, I co-authored a reformatted and updated edition of this volume, which is being published by Brookings as *The New Campaign Finance Sourcebook.* I have not testified as an expert at trial or by deposition in any other case within the last four years.

II. Introduction and Summary

My primary purpose in preparing this statement is to provide a description and analysis of the development of federal campaign finance law and practice leading up to the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA). I will briefly review the major laws passed by Congress to regulate the flow of money in federal elections during the first half of the 20th century – most importantly the bans on corporate and union treasury funding of federal elections – as well as the central features of the regulatory regime defined by the 1974 amendments to the Federal Election Campaign Act (FECA). I will then discuss how that regime was undermined by the emergence of party "soft money"[1] and of electioneering under the guise of issue advocacy. Finally, I will discuss how the collapse of the FECA regime has transformed the role of political parties, elected officials, corporations and unions in the electoral

process and created glaring conflicts of interest and a widespread perception of corruption in the policy process.

III. Early Legislative History

Financing campaigns for federal office has been a concern of party and elected officials **[3]** since mass suffrage emerged in the Jacksonian era of the 1820s and 1830s. The need to communicate with a growing number of voters required parties to raise increasing amounts of campaign funds. For the next half-century, party leaders relied primarily upon an extensive patronage system for campaign money (Pollock 1928). But the passage of the Pendleton Civil Service Act of 1883, which outlawed party assessments on federal officeholders, initiated the end of one political financing era and the start of another. Soon political parties turned to the private sector, particularly corporations, for campaign funds. By the election of 1896, under the direction of William McKinley's legendary campaign strategist Mark Hanna, corporations were called upon to provide the bulk of campaign funds (Overacker 1932; Thayer 1973).

Critics charged that corporations and other wealthy donors were corrupting government and gaining special favors in return for their campaign gifts. In 1904, Democratic presidential nominee Alton B. Parker charged that corporations were providing President Theodore Roosevelt large campaign donations to buy influence with the administration. Roosevelt denied the charge but subsequently issued calls for campaign finance reform in his 1905 and 1906 messages to Congress. In 1907 Congress passed the Tillman Act, which prohibited corporations and national banks from making contributions in connection with federal election campaigns (Corrado 1997).

Subsequent reforms were enacted to require disclosure of campaign receipts and expenditures (1910), to limit expenditures in federal campaigns (1911), to broaden disclosure and raise spending limits (1925), and to limit contributions to federal candidates and national political parties (1940). But in each case, Congress failed to establish an effective enforcement mechanism or to close obvious loopholes, rendering the practical consequences of the legislation much less significant than the stated objectives (Overacker 1932; Sorauf 1988; Corrado 1997). Political **[4]** parties remained the major financial intermediaries throughout the first half of the century, relying heavily on a relatively small number of large individual donors (Overacker 1932; Heard 1960).

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[1] Soft money is an informal term that refers to "nonfederal" funds raised by political parties outside of federal limits on the source or size of contributions and ostensibly used for purposes other than influencing federal elections. Hard money refers to federal funds raised, spent, and publicly disclosed according to terms set by federal law.

The growth of organized labor as a political force in national politics led Congress in 1943 to enact a ban on union treasury contributions in federal elections comparable to the corporate ban in the Tillman Act. Because this measure was adopted as a war measure, it automatically expired six months after the end of the war. It was made permanent by the Taft-Hartley Act of 1947 and, like the ban on corporate donations, has been a permanent feature of federal election law ever since (Corrado 1997).

The rise of television and the increasingly candidate-centered nature of federal election campaigns after World War II led to a substantial increase in campaign costs and growing concerns about political financing. But it was not until the early 1970s that Congress began to wrestle seriously with the shortcomings of the old system and the challenges of the new. The Revenue Act of 1971 created a presidential public financing system funded with an income tax check-off, but its effective date was delayed until the 1976 election. Congress also passed the Federal Election Campaign Act of 1971 (FECA), which strengthened reporting requirements and repealed existing limits on contributions and expenditures that had proven ineffective. But it retained the ban on corporate and labor union contributions. It also put new limits on the amount candidates could contribute to their own campaigns and on expenditures for media advertising in presidential, Senate, and House elections (Sorauf 1988).

The fundraising scandals associated with Watergate and the committee to reelect President Richard Nixon – featuring attaché cases stuffed with thousands of dollars, illegal corporate contributions, and conduits to hide the original source of contributions – led Congress to return to the campaign finance drawing board (Sorauf 1988). In 1974, they produced major amendments to **[5]** FECA, which constituted the most serious and ambitious effort ever to regulate the flow of money in federal elections.

IV. The FECA Regulatory Regime

The 1974 amendments scrapped the 1971 limits on media advertising but replaced them with an elaborate set of limits on contributions and expenditures. The amendments also provided for public financing of presidential elections and created a new agency, the Federal Election Commission (FEC), to administer a strengthened disclosure system and to enforce the other provisions of the law. Barely a year after the 1974 amendments to FECA were signed into law, the Supreme Court in *Buckley v. Valeo* upheld the constitutionality of the contribution limits, disclosure requirements, and the presidential public financing system. But it struck down the limits on expenditures (by a candidate's campaign, by a candidate with personal funds, or by others spending independently), except for voluntary limits tied to public financing in presidential elections, and narrowed the class of political communications by independent groups subject to disclosure and limits on the source and size of contributions. For the purposes of this report, two sets of provisions are particularly germane: those governing the role of corporations and labor unions, and those governing political parties.

A. Corporations and Labor Unions

The new regulatory regime included one very familiar element: a ban on corporate and union contributions and expenditures in connection with a federal election. FECA added some enforcement bite to these decades-old prohibitions by also making it unlawful for anyone to accept such contributions. Two exemptions from this ban were included in the law. The first, the press exemption, specified that the term "expenditure" does not include "any news story, commentary, or editorial distributed through the facilities of any **[6]** broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." The second, the internal communications exemption, permits corporations to communicate with their restricted class (i.e. stockholders and executive and administrative personnel and their families) and unions to communicate with their members without any limitations. Finally, while continuing the ban on the use of general treasury funds of corporations and unions in connection with a federal election, the new law allowed thse organizations to set up political committees as separate segregated funds. These funds, one form of political action committee (PAC), whose administrative and fundraising expenses may be paid for by their parent corporation or union, raise voluntary contributions from their restricted classes and are subject to federal limitations (Potter 1997).

The intent of Congress as revealed by these provisions in the 1974 amendments to FECA was to ensure that corporate and labor union treasuries not be tapped to finance general federal election campaign activity. Decades of disappointing experience with earlier bans on corporate and union funding led not to a repeal of such bans but to a more rigorous regulatory strategy to make them enforceable.

B. Political Parties

The 1974 amendments to FECA treated political party committees as a type of "political committee" that is required to register with the FEC and is subject to federal limitations on amounts and sources of contributions. The latter included a prohibition on donations from corporations

and labor unions. But party committees, as part of the official political party structure at the national, state, or local level, were treated differently than other political committees in several respects. Individuals could contribute up to $20,000 per year to national party committees and an additional **[7]** $5,000 to a state party committee. Party committees could transfer unlimited sums to other party committees, without such transfers being treated as contributions. The national committees of each party could together contribute $17,500 during an election cycle to a candidate for the U.S. Senate. And national and state parties could make limited "coördinated" expenditures on behalf of their federal candidates. The expenditure amounts varied by office and state population, and were indexed to inflation.

With one exception, no reference was made in the law to different types and purposes of party accounts, one subject to the limitations of federal law, the other not. The text of the law includes no mention of "federal" or "nonfederal" accounts, much less "hard" or "soft" money. The sole exception to the law's limitations on contributions to party committees was that donations to building funds of national or state parties were exempt.

C. Groundwork for Soft Money

As soon as these limits on party funding went into effect in the 1976 elections, two sets of concerns – dealing with grassroots activity and the federal system – arose about the interpretation and impact of the law as it applied to political parties. The first – that traditional grassroots party activity was inappropriately and harmfully being subjected to limits on coordinated party spending – led Congress in 1979 to amend FECA. The 1979 revision is widely but inaccurately believed to have created soft money. Instead, soft money resulted from the response of the FEC to a second concern arising out of the federal system: how best to accommodate the fact that party organizations have roles in both federal and nonfederal election activity.

1. The 1979 Amendments to the FECA

One important feature of the 1979 amendments to the FECA was designed to allow state and local parties to spend unlimited amounts of funds raised under the act for grassroots campaign **[8]** materials and activities. Much of the traditional party paraphernalia and volunteer activities was reduced in the 1976 elections on the presumption that the FECA required them to be treated as in-kind contributions from the parties to federal candidates and therefore subject to limits. Congress in 1979 narrowly defined three sets of election-related activities by state and local parties that were exempt from the limitations on party contributions to and coordinated spending on behalf of federal candidates. These included grassroots campaign materials (e.g. yard signs and bumper stickers), slate cards and sample ballots, and voter registration and get-out-the-vote (GOTV) activities on behalf of the party's presidential ticket. Congress specified that these exempted sets of activities did not include the use of any broadcasting, newspaper, magazine, billboard, direct mail or other general public communication or political advertising. Moreover, to qualify for these exemptions from limitations on contributions and coordinated spending by parties, funds for these exempt activities had to be raised in compliance with FECA. In other words, the 1979 amendments did not authorize national party committees to accept unlimited contributions or to accept corporate or union treasury funds. They simply expanded the use that state and local parties could make of their federal (hard money) funds (Corrado 1997a).

2. FEC Rulings on Federal and Nonfederal Funds

An entirely separate set of administrative actions was laying the predicate for national parties to begin raising funds not subject to federal source and amount restrictions. The FECA limited party financing of activities conducted in connection with federal elections. But what of state and local elections? Parties clearly have interests in elections for state and local office. Many state campaign finance laws are more permissive than federal law, allowing contributions from corporations and unions and higher or unlimited donations from individuals and PACs[2]. (Some, **[9]** albeit many fewer, are more restrictive.) To what extent do federal restrictions apply when party activities have an impact on both federal and state and local elections? The FEC began grappling with this question soon after it was established. In a series of advisory opinions, the Commission sought to ensure that a portion of state party activities benefiting both federal and nonfederal candidates be paid for with hard money. In Advisory Opinion 1975-21, the Commission ruled that a local party committee had to use hard dollars to pay for a part of its administrative expenses and voter registration drives, on the grounds that these functions have an indirect effect on federal elections. It used this opinion in regulations it issued in 1977 governing allocation of administrative expenses between federal and nonfederal accounts. The allocation was to be made "in proportion to the amount of funds expended on federal and non-federal elections, or on another reasonable basis" (11 CFR 106.1(e) 1978).

The next year the Commission took an even tougher position on the use of nonfederal funds for voter registration and GOTV activities by party committees. In response to a request for guidance from the Illinois Republican State Central Committee, the Commission in Advisory Opinion 1976-72 approved the allocation of party overhead and administrative costs between federal and nonfederal accounts, based on the proportion of federal to state races being held that year. But it prohibited the use of nonfederal funds to finance such federal election-related activities as voter registration and GOTV: "Even though the Illinois law apparently permits corporate contributions for State elections, corporate/union treasury funds may not be used to fund any portion of a registration or get-out-the-vote drive conducted by a political party" (FEC AO 1976-72).

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[2] Table 1 summarizes the provisions of each state's law governing contributions to political parties, based on information available from the Federal Election Commission as of 2000.

Less than two years later the Commission reversed its position. The Kansas Republican State Committee requested permission to use corporate and union funds, which were legal under **[10]** Kansas law, to finance a portion of their voter drive that would benefit federal and state candidates. This time the Commission agreed, concluding in Advisory Opinion 1978-10 that expenses for voter registration and GOTV should be allocated between federal and nonfederal accounts in the same manner as party administrative costs.

At this point the FEC rulings on party financing had been made in response to state party requests for guidance on how the financing of their traditional activities was affected by the new federal election law. What emerged was that state parties had to maintain both federal and nonfederal accounts and allocate funds from the two accounts in a manner consistent with federal law. Direct assistance to federal candidates must be financed exclusively with federal funds. Comparable assistance to state and local candidates could be funded entirely with nonfederal funds. State party overhead and administrative expenses were to be allocated proportionately between federal and nonfederal accounts. Initially voter registration and GOTV were treated in the same way as aid to candidates – as a federal election activity requiring exclusively federal funds – but then the FEC reversed course and allowed state parties to allocate the costs of voter drives between the two accounts (FEC AD 00-95 2000).

Soon national party officials argued that the Commission rulings recognizing federal and nonfederal state party roles and financing arrangements should apply to them as well. They contended that national parties assist candidates for federal, state and local office; that they work with state and local party organizations on a variety of party-building and campaign activities; and that, therefore, they too ought to be able to maintain separate federal and nonfederal accounts, finance their nonfederal election activity with nonfederal funds, and allocate administrative and other expenses for joint federal/nonfederal activities between the two accounts. The Commission agreed. In Advisory Opinion 1979-17, it stated that a national party committee could establish a **[11]** separate account "for the deposit and disbursement of funds designated specifically and exclusively to finance national party activity limited to influencing the nomination or election of candidates for public office other than elective 'federal office'" (FEC AO 1979-17). The Commission thereby permitted the national parties to raise corporate and union funds and solicit unlimited donations from individuals "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office" (FEC AO 1979-17).

V. The Rise of Soft Money

Thus, at the same time Congress permitted state and local party organizations to spend unlimited amounts of federal funds on certain grassroots activities that benefited federal as well as state and local candidates, the FEC allowed parties (including national party committees) to pay for a share of the costs of these joint activities with funds not subject to federal limits. The convergence of these two regulatory changes set the stage for the solicitation and expenditure of so-called "soft money" in the 1980 election cycle. Soft money could be raised by national, state or local party committees, under limits, if any, set only by state, not federal law, and used to finance the ostensibly nonfederal share of the costs of these joint federal/nonfederal party activities.

A. Developments in the 1980s

The national parties quickly took advantage of this opportunity. They solicited funds for their nonfederal accounts from corporations, unions, and individuals who had already given the maximum amount permitted by federal law. The parties used these soft dollars to cover a portion of their administrative and fundraising costs as well as to finance a share of GOTV activities in states targeted for their presidential ticket or for crucial Senate races. The national parties often took the lead in raising the requisite amount of hard and soft dollars, which they then transferred to the state **[12]** party committees that were conducting the voter drives (Alexander 1983; Alexander and Haggerty 1987; Alexander and Bauer 1991; Corrado 1997a).

Soft money became an important part of national party finance beginning in the 1980 election. Just what amount of soft money activity the parties pursued in the 1980s is less certain. "Nonfederal" funds were not subject to federal disclosure requirements, only to the disclosure laws in states where soft money was spent. Many of these state requirements were nonexistent or ineffective. Thus, we have to rely on estimates of soft money activity in the 1980s rather than official reports of receipts and expenditures. Herbert Alexander, then director of the Citizens Research Foundation, is widely acknowledged as the most authoritative source of party campaign finance data during this period. Starting with the 1992 election cycle, when the FEC first began collecting and reporting data on nonfederal as well as federal accounts of national party committees, we can use official FEC data. Building on Alexander's work and FEC data, Anthony Corrado has assembled the best available data on national party spending between 1976 and 1998. I have updated his table with FEC data on the 2000 election cycle, added a column that computes soft money spending as a share of all national party spending, and reproduced it as Table 2 in this report. Chart 1 graphically displays the changes between 1976 and 2000. Table 3 presents party hard and soft money expenditures adjusted for inflation.

In 1980 the national Republican party spent roughly $15 million in soft money, the Democrats $4 million. This constituted 9% of total spending by the two national parties. In 1984 the amount of soft money spent by the national parties increased marginally to $21.6 million but it constituted a smaller share (5%) of total national party activity. In 1988, however, that pattern was altered. Party soft money spending more than doubled to $45 million, which was 11% of national party totals, and the Democrats reached parity with the Republicans on the soft money side of the ledger.

During this decade the national party committees explored the most efficient methods of allocating expenses between federal and nonfederal accounts and the most advantageous ways of spending soft money. The FEC approved alternative methods of allocation but gave party committees wide leeway in using "any reasonable basis" (11 CFR 106.1(e) 1978). Naturally, the parties found most attractive those allocation methods that allowed them to pay for as much of their expenses as possible with soft money. Priority in spending soft money was given to GOTV programs conducted by state party committees in presidential battleground states. The national parties also came to rely on soft money to cover an increasing share of the costs of their staff and operating expenses. By 1988, both parties had developed effective means of courting large soft money donors. After the election, Republicans revealed that they had received gifts of $100,000 each from 267 donors; Democrats counted 130 donors contributing $100,000 or more (Alexander and Bauer 1991).

The rise of soft money did not go unnoticed or unchallenged. In 1984, Common Cause petitioned the FEC to issue new rules relating to the use of soft money, based on the charge that party committees were unlawfully using nonfederal funds to influence federal elections. The Commission denied the petition in 1986, but Common Cause challenged that denial in the U.S. District Court. The court rejected the group's argument that no allocation method is permissible under FECA but agreed that the Commission's policy of allowing state party committees to allocate expenses for certain joint activities on "any reasonable basis" was contrary to law. It directed the Commission to replace this permissive standard with more specific allocation formulas. As part of that directive, the court stated that the Commission could "conclude that no method of allocation **[14]** will effectuate the Congressional goal that all moneys spent by state political committees on those activities permitted in the 1979 amendments be 'hard money' under the FECA" (*Common Cause v. FEC* 1987).

After an arduous rulemaking process and a return to the District Court by Common Cause with a petition for enforcement of the court's order, the Commission issued new soft money rules in 1990, effective January 1, 1991 (FEC 1990). The rules placed no restrictions on the sources or size of contributions to party nonfederal accounts, and they did not limit the amount of such soft money that could be spent. They did require all national party committees to file regular reports of their nonfederal receipts and disbursements with the FEC, and they required state party committees to report their soft money disbursements made in connection with federal elections. The regulations also replaced the "any reasonable basis" standard for allocating the costs of activities that influence both federal and state and local elections with a set of specific allocation methods. They also specified that the method to be used by party committees depended on the type of committee incurring the expense and the type of activity for which expenses were to be allocated.

National party committees were required to allocate a minimum of 65% of their administrative and generic voter drive expenses in presidential election years to their federal accounts, 60% in nonpresidential years. For state and local parties, the allocation of these expenses was determined by the proportion of federal offices to all offices on the state's general election ballot. This provision produced a large range among the states in the percentage of hard money required, but the average was substantially lower than that applying to the national committees. Joint fundraising expenses for all party committees were allocated based on the amount of federal and nonfederal funds raised. The cost of party communications was allocated according to the relative time or space devoted to federal and nonfederal candidates.

[15] These soft money regulations effectively routinized the raising and spending of soft money by the national parties (Corrado 1997a). The FEC rules gave the parties explicit guidelines on how to spend soft money on activities that benefit federal as well as state and local candidates without risking an enforcement action. They also provided the national parties with ways of increasing the share of their costs that could be paid for with soft money. One such method -- transferring federal and nonfederal funds to state parties to take advantage of more favorable allocation formulas -- would become a major element of national party funding strategy in the years ahead.

B. The 1992 Election

It was no surprise, therefore, to see soft money activity proceed apace in the 1992 election. (Since this was the first election in which soft money contributions and expenditures were reported to the FEC, the soft money figures reported below for the 1992 election cycle and after are based on FEC data.) Spending almost doubled again over the preceding presidential election cycle, from $45 million to $80 million, although this time with the Republicans outpacing the Democrats. (See Table 2 for nominal figures, Table 3 for inflation-adjusted figures.) Soft money as a share of total spending by the national parties jumped five percentage points to 16%. Both parties sought contributions of $200,000 or more from their top donors and put a high priority on soliciting corporate gifts. Table 4 lists the top 50 soft money contributors in the 1992 election cycle, with donations ranging from $206,207 to $1,374,500. (This table, as well as those reporting comparable data for the 1996 and 2000 election cycles, displays total amounts contributed and breaks those amounts down by party and by the percentage contributed from the organization's treasury.) Three of the four congressional party campaign committees – the Democratic Congressional Campaign Committee (DCCC), the National Republican Campaign Committee (NRCC), and the National Republican Senatorial Committee (NRSC) began to mount serious soft money operations. Together **[16]** they raised more than $20 million in the 1992 election cycle. The fourth – the Democratic Senatorial Campaign Committee (DSCC) – continued to raise soft money only for its building fund (Alexander and Corrado 1995).

The national parties exerted firm control over the ways in which soft money was spent. The primary goal was to support the election of federal, not nonfederal, candidates. Barely $2 million of the $80 million in "nonfederal funds" spent by the national parties in the 1992 elections was contributed directly to state and local candidates. The two national parties transferred almost $15 million to state party committees; each party directed two-thirds of its soft money transfers to ten presidential election battleground states. The bulk of these funds was used to finance voter identification and GOTV phone bank programs, typically according to a plan approved in advance by the national party. These voter mobilization activities benefited state and local as well as federal candidates in the targeted states, and state parties receiving these transfers were also able to use some of the funds to hire party workers, update voter lists, and pay for fundraising expenses. But the primary focus of these efforts orchestrated by the national parties was unmistakably the federal election (Alexander and Corrado 1995).

Another major use of soft money in the 1992 elections was "generic" party advertising. These mostly television ads, run in key states to reinforce the message of the presidential candidates, were financed on the party-building rationale of the FEC's allocation rules for joint federal/nonfederal activities. Around $14 million was expended for this purpose. The ads did not mention the names of the candidates. (The assumption was that only hard money could be used for such candidate-specific ads, as part of the parties' coordinated spending budget.) Instead they urged viewers to "Vote Republican" or "Vote Democratic" or stressed themes articulated in the presidential campaigns (Alexander and Corrado 1995).

[17] By the end of the 1992 election cycle, students of political parties and campaign finance came to recognize that important elements of party financing of federal elections were at variance with the FECA and with the initial rulings of the FEC that allowed the national parties to raise and spend soft money for limited purposes. Congress had sought to keep corporate and union money out of federal elections and to limit the size of individual contributions. Both objectives were undermined, however, by the growing role of soft money, which allowed national party officials and federal officeholders to solicit unlimited contributions and steer them in ways that would benefit their federal election campaigns. Initially, the Commission approved only the use of nonfederal or soft money accounts of the national parties "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office" (FEC AO 1979-17). Yet later the FEC allocation rules allowed much more generous shares of nonfederal or soft money than could be justified by the state and local campaign activity they financed. Only a trickle of soft money was directly contributed to or spent on behalf of state and local candidates. Some soft money helped state party organizations mobilize support for state and local candidates and expand their staffs and activities. But a major share of these "nonfederal" funds raised by national parties was spent to influence the outcome of federal elections. Soft money had become primarily a component of federal election financing, not a means of funding state and local election activity (Alexander and Corrado 1995; Sorauf 1992).

C. The 1996 Election Cycle: The Soft Money System Transformed

The accommodative regulatory environment, the failure to index for inflation the FECA limits on contributions to candidates and parties, and competitive pressures in presidential elections combined to increase demand for soft money. Between 1980 and 1992, the parties became more adept at raising nonfederal funds from corporations, unions, and wealthy individuals and directing **[18]** them toward locations and activities that would advance their presidential and congressional tickets (Alexander and Corrado 1995). But no one had yet questioned that there were still limits to what the parties could accomplish with soft money. While soft money was growing in importance, it remained a relatively small part of national party committee budgets. (See Table 2 and Chart 1.)

The increased activity of the national parties during this period was largely accomplished with hard money. The parties adapted well to the new environment of modern campaigning and FECA financing, in important part by becoming repositories of professional expertise and building effective networks linking candidates with donors and consultants (Herrnson 1988). Relatively generous coordinated spending limits gave them license to provide substantial direct assistance in elections, financed by contributions raised under the FECA. It was clear that effective campaigning required a large component of candidate-focused communications. And that, everyone assumed, required hard money.

1. Issue Advocacy

That view changed in the next presidential election cycle, thanks to the audacious move by then President Bill Clinton and his political consultant, Dick Morris, to finance an ambitious political advertising campaign under the guise of "issue advocacy." Starting in the fall of 1995 and continuing through the middle of 1996, Democratic party committees spent an estimated $34 million on television ads designed to promote Clinton's reelection. While the ads prominently featured the President, none of these costs were charged as coordinated expenditures on behalf of Clinton's campaign. Instead the party paid the entire cost, based on a legal argument never before made: that party communications which did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising and financed, according to the FEC allocation rules, with a mix of soft and hard money. Such communications were forms of **[19]** issue advocacy, it was argued, and neither subject to the spending limits that apply to presidential candidates accepting public funding, nor wholly subject to the limits on the source and size of contributions to political parties (Green 1999; Corrado 2000).

This argument, and the embrace of issue advocacy as a form of electioneering, had its genesis in *Buckley*. In that decision, the Court established an express advocacy test as a way of narrowing the scope of disclosure requirements and contribution limits for independent expenditures in light of a concern that the language crafted by Congress in the 1974 amendments to FECA was unconstitutionally vague and overbroad (Potter 1997a). The standard was defined by the Court as communications that "in express terms advocate the election or defeat of a clearly identified candidate for federal office." The Court elaborated in a footnote examples of express advocacy, which became known as the "magic words" test.

This express advocacy standard was constructed to determine which communications by individuals and groups independent of any candidate or party would be subject to regulation. The Court did not require express advocacy in candidate and political party ads for their financing to be subject to federal campaign finance laws. *Buckley* stated that spending by candidates and political committees (including parties) is "by definition, campaign-related." Students of campaign finance thought it an extraordinary leap for a presidential candidate, especially one accepting public funding, and a national political party to argue that the express advocacy standard gave them license to craft and broadcast unlimited political ads and to finance them in large part with soft money (Green 1999; Corrado 2000; Citizens Research Foundation 1997; Mann 1999).

2. Parties, Issue Advocacy and Soft Money

The express advocacy standard had little noticeable effect on the conduct and financing of federal campaigns for almost 20 years after it was set by the Court. It took the creativity and **[20]** bravado of Morris and Clinton and the failure of the FEC to challenge their use of party soft money to finance television ads promoting the President's agenda and accomplishments to open the flood gates (Corrado 2000). In May of 1996, the Republican National Committee announced a $20 million "issue advocacy" advertising campaign. Its purpose, in the words of the chairman, would be "to show the differences between Dole and Clinton and between Republicans and Democrats on the issues facing our country, so we can engage full-time in one of the most consequential elections in our history" (Corrado 2000). These presidential candidate-specific ads, like the Democratic ones, were targeted on key battleground states and financed with a mix of hard and (mostly) soft money. Both parties were now financing a significant part of the campaigns of their presidential candidates outside of the strictures of the FECA and well beyond the bounds of the 1979 FEC ruling that national parties may raise corporate and union funds and solicit unlimited donations from individuals "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office."

Very quickly the parties began to use the same funding strategy to campaign on behalf of their congressional candidates; outside groups did likewise (Green 1999; Corrado 2000). For groups, the advantage of electioneering through "issue advocacy" rather than through FECA "independent expenditures" was that the former could be conducted without disclosure and could be financed with soft (i.e. unregulated) rather than hard money. This meant that both political parties and groups could solicit contributions from corporations and unions as well as from wealthy individual donors to finance candidate-specific electioneering communications. Moreover, those same corporations and labor unions could tap their own treasuries to run such electioneering communications themselves or through convenient, largely anonymous intermediary organizations. Research on the 1996 election revealed extensive and elaborate efforts by parties, candidates, **[21]** unions, corporations and groups to exploit this new issue advocacy loophole to avoid the strictures of federal election law (Annenberg Public Policy Center 1997; Green 1999; Corrado 2000).

This research also suggested some degree of coordination among parties, groups and candidates in creating and broadcasting these issue advocacy electioneering communications. Published accounts by former White House insiders and the report of the Senate Committee that investigated campaign finance practices in the 1996 election contain detailed information about President Clinton's personal role in authorizing the "issue ad" campaign, editing the ads, selecting locations for their broadcast, and raising the funds needed to pay for them (Morris 1997; U.S. Senate Committee on Governmental Affairs 1998). Similar reports have been made of possible coordination between parties and outside groups regarding the strategic use of issue advocacy electioneering communications to shape the outcome of federal elections (AFL-CIO v. Federal Election Commission 2001). The Supreme Court's distinction between independent advocacy and advocacy coordinated with a candidate was critical to its finding that limits on independent expenditures were unconstitutional. Yet as issue advocacy emerged as a tool for electioneering communication in the 1996 election, it threatened to undermine a central feature of the FECA: that communications designed to help a candidate but not treated as contributions must be made independent of that candidate.

3. Demand for Soft Money Intensifies

The increased demand created by this novel interpretation of nonfederal election activity led to more than a threefold increase in national party soft money activity between 1992 and 1996 – from $80 million to $272 million. (See Table 2.) Soft money as a share of total national party spending jumped from 16% to 30%. Both parties and their elected officials worked hard to solicit soft money donations from corporations, wealthy individuals, and labor unions. During the 1996 **[22]** election the national party committees received nearly 1,000 contributions from individuals in excess of $20,000 (the annual federal party contribution limit) and approximately 27,000 contributions from federally prohibited sources (Corrado 2000). Table 5 contains the top 50 soft money donors in the 1996 election cycle; their contributions ranged from $530,000 to $3,287,175.

Less than $10 million of the $272 million was contributed directly to state and local candidates in the 1996 cycle, only 3.5% of the soft money spent by the parties. The two parties transferred a total of $115 million in soft money to state party committees, which financed two-thirds of state party soft money expenditures. The national Democratic party managed to finance two-thirds of its pro-Clinton "issue ad" television blitz by taking advantage of the more favorable allocation methods available to state parties. They simply transferred the requisite mix of hard and soft dollars to party committees in the states they targeted and had the state committees place the ads. State party soft money expenditures for political communication/advertising jumped from less than $2 million in 1992 to $65 million in 1996 (La Raja 2001). State parties enjoyed positive spillover effects from this national party campaign strategy, in terms of covering some of their staffing and administrative costs. But there is no doubt that they were used by national party officials as vehicles for implementing their newly-developed strategy of federal electioneering under the guise of issue advocacy (Green 1999; Corrado 2000).

After the 1996 election, the FEC audit division concluded that the party issue advertising campaigns should have been treated as campaign expenses of the two presidential candidates and thereby subject to spending and contribution limits. The Commission rejected the finding and unanimously declined to take any punitive action against the parties or their presidential candidates. The Commission also rejected the general counsel's recommendation for an enforcement proceeding, based on the conclusion that the party's issue ads were coordinated with the Clinton **[23]** campaign and therefore constituted illegal campaign contributions and expenditures (Corrado 2002). What had seemed a daring test (if not outright violation) of the boundaries of federal election law in 1996 had now received the de facto blessing of the Federal Election Commission. There remained few effective constraints on the ability of parties and other political actors to campaign for and against specific candidates for federal office with unlimited amounts of soft money.

D. The 1998 and 2000 Elections: A Regulatory Regime in Disarray

The 1998 midterm election cycle saw the parties focus their soft money strategy on Senate and House elections. The total amount of soft money spent -- $221 million -- was less than in 1996 but more than double the previous midterm election. And soft money as a share of total spending by the national parties jumped to 34%. (See Table 2.) The congressional party campaign committees put a premium on raising and spending soft money to advance the election prospects of their candidates. The two Senate campaign committees effectively abandoned formal coordinated expenditures on behalf of their candidates and delegated this financing tool to state parties. The DSCC made $12.3 million in coordinated expenditures in the 1994 midterm elections; that amount dropped to $8,424 in 1998. The NRSC spent $10.9 million of hard money in coordination with their candidates in 1994; the comparable amount in 1998 was $36,775. Both national party committees had discovered they could finance campaign activity on behalf of their senatorial candidates with soft money in the form of "issue advocacy." The same pattern, more pronounced with the Democrats than the Republicans, was evident in the House campaign committees (FEC 1999).

This was also the first election cycle in which scholars systematically monitored the issue advocacy campaigns of parties and groups, on television and on the ground (Krasno and Seltz 2000; **[24]** Magleby 2000, 2000a; Krasno and Goldstein 2002). Anecdotal evidence had previously suggested little difference in purpose and content between express advocacy and candidate-specific issue advocacy communications financed by parties and groups. This research by political scientists soon confirmed that suspicion. The evidence of the explicit electioneering purpose of candidate-specific issue advocacy near the election was overwhelming. Such electioneering issue ads run by parties and groups were largely indistinguishable from the campaign ads of candidates. Very few candidate ads used words of express advocacy; virtually all party issue ads mentioned the name of a federal candidate, mostly in an attack mode, but few mentioned the name of the party; and almost every issue ad featuring the name of a candidate and running near an election was clearly designed to support or attack a candidate, not to express a view on an issue. Voters were unable to differentiate candidate-specific issue ads (broadcast and print) sponsored by parties and outside groups from campaign ads run by candidates. Parties and outside groups used issue advocacy as a cover to finance campaigns for and against federal candidates in targeted races.

Given the breakthrough in the use of soft money to fund candidate-focused campaign ads in 1996, the FEC's decision not to pursue this apparent violation of law and regulation, and the emergence of issue advocacy as the campaign weapon of choice in the 1998 congressional elections, it is no surprise that soft money financing of party campaigning exploded in the 2000 election cycle. Soft money spending by the national parties reached $498 million, now 42% of their total spending. (See Table 2.)

Raising a half billion dollars in soft money took a major effort by the national parties and elected officials, but they had the advantage of focusing their efforts on large donors. That focus paid substantial dividends: 800 donors (435 corporations, unions and other organizations and 365 individuals), each contributing a minimum of $120,000, accounted for almost $300 million or 60 **[25]** percent of the soft money raised by the parties (Rogers 2001). The top 50 soft money donors, displayed in Table 6, each contributed between $955,695 and $5,949,000. Among the many soft money donors who gave generously to both parties were Global Crossing, Enron, and WorldCom (Makinson 2001).

The Republican and Democratic National Committees provided the soft and hard money needed to boost the campaigns of their presidential candidates in key battleground states. Electioneering issue ads were a central component of the political strategies of both presidential candidates and were fully integrated into the campaigns (Magleby 2002; Corrado 2002). One estimate based on monitoring television ads in the 75 largest media markets between June 1 and election day suggests the parties spent $3 on issue advocacy communications in the presidential campaign for every $1 they spent on express advocacy communications (Holman and McLoughlin 2001). Once again, the transfer of funds to state parties, which then placed the ads, provided the most efficient allocation method.

The House and Senate party campaign committees were especially active in the soft money arena. Together they spent $219 million in 2000, more than ten times their soft money activity in 1992. As in 1998, they largely abandoned the hard money coordinated expenditure route to assisting their candidates and focused their campaign activity on issue advocacy and GOTV, both of which could be financed with a large portion of soft dollars. For the first time, the two Democratic campaign committees actually raised and spent more unrestricted soft money than regulated hard money (FEC 2001; Corrado 2002; Magleby 2002). Research monitoring national party campaign activities in the 2000 election cycle confirms a massive increase in party federal electioneering activities – over the air and on the ground – in targeted states and districts and financed largely with **[26]** soft money (Krasno and Goldstein 2002; Magleby 2002; Magleby 2003; Holman and McLoughlin 2001).

A total of $280 million in soft money – well over half the amount raised by the six national party committees – was transferred to state parties, along with $135 million in hard money. By contrast, the national parties contributed only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000 (FEC 2001).

By the end of the 2000 election cycle, it simply was not credible to argue that soft money was exclusively or even primarily being used for state and local election activity. Nor was it credible to argue that "issue ads" run by national and state parties were anything other than communications intended to influence the outcome of federal elections. The

evidence that national parties were raising soft money, not subject to federal limits, and using it by working through state parties to influence federal elections was decisive. The language in *Buckley* that spending by parties is "by definition, campaign-related" was given powerful empirical support. Scholars might differ about how best to change the campaign finance system, but they could not avoid the conclusion that party soft money and electioneering in the guise of issue advocacy had rendered the FECA regime largely ineffectual.

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The targets of influence are less often victories on final roll-call votes than assistance, sympathy or access at some earlier stage of the legislative process (Hall and Waymann 1990).

In any event, this literature is often used to buttress the argument that political contributions do not corrupt the policy process. This is an odd inference, since it is based on studies of contributions that are limited as to source and size for the very purpose of preventing corruption or its appearance. PAC contributions are capped at $5,000 per election, an amount whose real value has shrunk by two-thirds since it was enacted in 1974. Are we to assume that studies of contributions of $50,000 or $500,000 or $5 million from corporations, unions and individuals would produce the same generally negative findings? What if the route of influence is not through individual members or on roll call votes? What if large soft money donors give generously to both political parties?

A more sophisticated understanding of the organizational features of Congress and of the multiple forms of political contributions leads one to take seriously the potentially corrupting effects of political contributions. Initial work along these lines suggests a myriad of ways in which groups receive or are denied favors beyond roll-call votes (Hall and Wayman 1990; Hall 1996; Beckmann and Hall 2002). Members can express public support or opposition in various legislative venues, offer amendments, mobilize support, help place items on or off the agenda, speed or delay action, and provide special access to lobbyists. They can also decline each of these requests. Beyond the chamber floor, venues include rules governing floor consideration, party leadership, party caucuses, standing committees and subcommittees, conference committees, and other collections of members inside the House and Senate. Groups may use their campaign contributions in conjunction with their lobbying operations to reinforce or activate rather than convert members. They may also try to **[*34]** curry favor by running helpful electioneering issue advocacy campaigns for or against particular federal candidates. Moreover, in the executive branch, influence can be sought over appointments and access to decision-making forums, as seen in recent revelations about the Enron Corporation.

The currency of campaign contributions extends well beyond PAC contributions to members' campaign committees. These include brokered if not bundled individual contributions, contributions to leadership PACs controlled by members, contributions to parties and candidates in targeted races and informally credited to members, soft-money contributions to parties and section 527 committees connected to members, and direct expenditures on "issue ad" campaigns. The ways and means of potential influence (and corruption) are much more diverse than those investigated in the early scholarly research.

The dramatic growth of soft money and the intimate involvement of elected officials in raising and spending that money to influence federal elections makes that potential influence and corruption all the more serious. That potential for abuse is most vividly illustrated by the series of reports issued by the Center for Responsive Politics tracking patterns of soft money contributions by groups with a strong interest in pending legislation (Keen and Daly 1997; Corrado 2000). Prominent examples include the tobacco, telecommunications, and oil and gas industries. In each case millions of dollars in soft money contributions were made to the national and congressional party committees of both parties as Congress was considering legislation that would significantly affect those industries. These are only several of the most noteworthy examples of a widespread phenomenon: most corporate soft money donors have a major stake in federal policymaking and many contribute to both major parties.

[Mellman-Wirthlin Report]

Research Findings of a Telephone Study Among 1300 Adult Americans

September 23, 2002

Overview of Findings

This study demonstrates that large political contributions to parties are seen by the public to have a significant and detrimental influence on the American political system and the actions of federally elected government representatives. Our principal finding is that the American public believes:

> The views of large contributors to parties improperly influence policy and are given undue weight in determining policy outcomes.

Another significant conclusion is that the American public believes:

> The amount of time federal officials spend raising money for their parties, compromises their ability to do the public's business properly,

The strength of these findings is also important to note. In this study, we saw an unusually high number of 70% or more responses when it came to questions regarding the impact of large contributions to political parties. In public opinion research, it is uncommon to have 70% or more of the public see an issue the same way. When they do, it indicates an unusually strong agreement on that issue. In addition, we asked most core questions in more than one way, to help ensure that responses were not an artifact of question design or wording.

Findings

1) A significant majority of Americans believe that those who make large contributions to political parties have a major impact on the decisions made by federally elected officials. Indeed, many believe the views of these big contributors sometimes carry more weight than do the views of constituents or the best interests of the country.

Over three in four Americans (77%) believe that big contributions to political parties have a great deal of impact (55%) or some impact (23%) on decisions made by the federal government. Just (6%) think that big contributions don't have much or any impact.

How much impact do you think big contributions to political parties have on decisions made by the federal government in Washington, D.C....a great deal of impact, some, not too much, or none at all, or don't you have an opinion on this?

77%	***TOTAL GREAT DEAL/SOME***
55%	*Great deal*
23%	*Some*
6%	***TOTAL NOT TOO MUCH/NONE***
5%	*Not too much*
1%	*None at all*
16%	*Don't have opinion*
0%	*Don't know/Refused*

Nearly 8 in 10 Americans believe that Members of Congress decide how to vote based upon what big contributors to their political party want at least sometimes. Almost half of Americans (45%) believe that this happens often. In contrast, only a quarter of Americans believe members of Congress often decide how to vote based on what they think is best for the country (25%), or what the majority of people in their district want (24%).

> *How frequently do you believe members of Congress decide how to vote on issues based on what big contributors to their political party want? Would you say [ROTATE] [often], [sometimes], [rarely] or [never], or don't you have an opinion on this?*

45%	*Often*
34%	*Sometimes*
8%	*Rarely*
1%	*Never*
12%	*No opinion*
0%	*Don't know/Refused*

> *How frequently do you believe members of Congress decide how to vote on issues based on what they think is best for the country? Would you say [ROTATE] [often], [sometimes], [rarely] or [never], or don't you have an opinion on this?*

25%	*Often*
52%	*Sometimes*
11%	*Rarely*
2%	*Never*
10%	*No opinion*

How frequently do you believe members of Congress decide how to vote on issues based on what the majority of people in their district want? Would you say [ROTATE] [often], [sometimes], [rarely] or [never], or don't you have an opinion on this?

24%	Often
50%	Sometimes
15%	Rarely
2%	Never
10%	No opinion
0%	Don't know/Refused

When the views of big contributors to political parties run contrary to the views of constituents or what's best for the country, most Americans believe that the will of contributors takes precedence.

Specifically, nearly three quarters (71%) of Americans think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or even if it's not what they think is best for the country (71%).

> *Do you think members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their districts want, or do you think this doesn't happen, or don't you have an opinion on this?*

71%	*Yes, does happen*
7%	*No, doesn't happen*
21%	*No Opinion*
1%	*Don't know/Refused*

Do you think members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what they think is best for the country, or do you think this doesn't happen, or don't you have an opinion on this?

71%	*Yes, does happen*
9%	*No, doesn't happen*
20%	*No Opinion*
0%	*Don't know/Refused*

A large majority (84%) think that members of Congress will be more likely to listen to those who give money to their political party in response to their solicitation for large donations.

Members of Congress will be more likely to listen to those who give money to their political party in response to their solicitations for large donations

84%	***TOTAL AGREE***
51%	*Agree Strongly*
33%	*Agree Somewhat*
13%	***TOTAL DISAGREE***
7%	*Disagree Somewhat*
5%	*Disagree Strongly*
3%	*Neither Agree nor Disagree*
0%	*Don't know/Refused*

Over two-thirds of Americans (68%) also think that big contributors to political parties sometimes block decisions by the federal government that could improve people's everyday lives.

Do you think that big contributors to political parties sometimes block decisions by the federal government in Washington, DC that could improve people's everyday lives, or do you think this doesn't happen, or don't you have an opinion on this?

68%	*Yes, does happen*
8%	*No, doesn't happen*
23%	*No Opinion*
1%	*Don't know/Refused*

About four in five Americans think a member of Congress would be likely to give special consideration to the opinion of an individual, issue group, corporation, or labor union who donated $50,000 or more to their political party (81%) or who paid for $50,000 or more worth of political ads on the radio or TV (80%). By contrast, only about one in four Americans (24%) think that a member of Congress is likely to give the opinion of someone like them special consideration. Americans see very little difference between the influence of a soft money donation to a political party and the funding of political ads on television and radio.

If an individual, issue group, corporation, or labor union donated 50,000 dollars or more to the political party of a Member of Congress, how likely would a Member of Congress be to give the contributor's opinion special consideration because of the contribution – would they be very likely, somewhat likely, somewhat unlikely, or very unlikely to consider the contributor's opinion, or don't you have a view on this?

81%	***TOTAL LIKELY***
41%	*Very likely*
41%	*Somewhat likely*
9%	***TOTAL UNLIKELY***
6%	*Somewhat unlikely*
3%	*Very unlikely*
9%	*Don't have opinion*
0%	*Don't know/Refused*

If an individual, issue group, corporation, or labor union paid for 50,000 dollars or more worth of political ads on the radio or TV that benefited a member of Congress, how likely would the Member of Congress be to give their opinion special consideration because of the ads – would they be very likely, somewhat likely, somewhat unlikely, or very unlikely to give them special consideration because of the ads, or don't you have an opinion on this?

80%	***TOTAL LIKELY***
37%	*Very likely*
43%	*Somewhat likely*
10%	***TOTAL UNLIKELY***
5%	*Somewhat unlikely*
5%	*Very unlikely*
9%	*Don't have opinion*
0%	*Don't know/Refused*

How likely is a Member of Congress to give the opinion of someone like you special consideration – would they be very likely, somewhat likely, somewhat unlikely, or very unlikely to give special consideration to the opinion of someone like you, or don't you have a view on this?

69%	**TOTAL LIKELY**
27%	Somewhat likely
42%	Very likely
24%	**TOTAL UNLIKELY**
4%	Somewhat unlikely
20%	Very unlikely
7%	Don't have opinion
0%	Don't know/Refused

Even fewer (27%) believe that members of Congress will do the right thing no matter who has given money to their political party. Similarly, just one in three Americans (34%) believe that the government can be trusted to make fair decisions when so much big money is involved. About one third of Americans (31%) think that large political contributions to political parties have little influence on the decisions that get made in Washington, D.C.

As you may know, current campaign finance laws allow individuals, issue groups, corporations, and labor unions to make contributions of 50,000 dollars or more to political parties, but not directly to candidates. Now I'm going to read you several statements dealing with these contributions to political parties. After I read each statement, please tell me whether you strongly agree, somewhat agree, neither agree nor disagree, somewhat disagree, or strongly disagree. The first/next statement is ... (READ LIST AS NEEDED) {RANDOMIZE}

The government can be trusted to make fair decisions even when so much big money is involved.

62%	***TOTAL DISAGREE***
25%	*Disagree Somewhat*
37%	*Disagree Strongly*
34%	***TOTAL AGREE***
9%	*Agree Strongly*
24%	*Agree Somewhat*
4%	*Neither Agree nor Disagree*
0%	*Don't know/Refused*

Large political contributions to political parties have little influence on the decisions that get made in Washington, D.C.

65%	***TOTAL DISAGREE***
24%	*Disagree Somewhat*
41%	*Disagree Strongly*
31%	***TOTAL AGREE***
11%	*Agree Strongly*
20%	*Agree Somewhat*
3%	*Neither Agree nor Disagree*
1%	*Don't know/Refused*

Members of Congress will do the right thing no matter who has given money to their political party.

68%	***TOTAL DISAGREE***
27%	*Disagree Somewhat*
40%	*Disagree Strongly*
27%	***TOTAL AGREE***
7%	*Agree Strongly*
19%	*Agree Somewhat*
5%	*Neither Agree nor Disagree*
1%	*Don't know/Refused*

DECLARATION OF SIDNEY M. MILKIS

I. Background and Qualifications

1. My name is Sidney M. Milkis. I am the James Hart Professor of Politics, at the University of Virginia. I also have an appointment in the Miller Center of Public Affairs, where I am a Senior Scholar and Co-Director of the American Political Development Program. I received my B.A., with High Honors and election to Phi Beta Kappa, from Muhlenberg College in 1972, and my M.A. and Ph.D. degrees from the University of Pennsylvania in 1975 and 1981.

2. Before coming to the University of Virginia, I taught at Franklin College (1979-1981), DePauw University (1981-1985), and Brandeis University (1985-1999). At Brandeis, my appointment was in the Department of Politics, of which I served as Director of Graduate Studies (1992-1996) and Chair (1996-1999). I have been a visiting professor at Harvard University (1994), and have been invited to teach at Oxford University for the 2003-2004 academic year, as the John M. Olin Visiting Professor of American Government.

[*2] 3. I have written or edited eight books, dealing with American politics and government, including: *The American Presidency: Origins and Development* (Congressional Quarterly, 1999), with Michael Nelson, now in its 3rd edition, which won the Benjamin Franklin Prize for history, politics, and philosophy; The *President and the Parties: the Transformation of the American Party System Since the New Deal* (Oxford University Press, 1993); *Political Parties and Constitutional Government: Remaking American Democracy* (Johns Hopkins University Press, 1999); and *The New Deal and the Triumph of Liberalism*, with Jerome Mileur (University of Massachusetts Press, 2002).

4. I have published more than 30 articles, including: "Programmatic Liberalism and Party Politics: The

New Deal Legacy and the Doctrine of Responsible Party Government," in Jerome Mileur and John Kenneth White, eds., **Challenges to Party Government**, Southern Illinois University Press, 1992; "'Direct" Democracy and Social Justice: The Progressive Party Campaign of 1912," with Daniel Tichenor, *Studies in American Political Development* (Fall, 1994); Remaking Government Institutions in the 1970s: Participatory Democracy and the Triumph of Administrative Politics," prepared for a special issue on the 1970s, *Journal of Policy History*, Spring, 1998; "Localism, Political Parties, and Civic Virtue," in **Dilemmas of Scale in America's Federal Democracy**, in Martha Derthick, ed. (Cambridge University Press, 1998); and, most recently, "The Presidency and Political Parties," in Michael Nelson, ed., *The Presidency and the Political System*, now in its seventh edition (Congressional Quarterly, 2002). My **[*3]** curriculum vitae, which includes my publications during the past ten years, is attached as Exhibit A.

5. In my writing and teaching I have been centrally concerned with the emergence of atwo-party system, the critical role it played in the awakening of American Democracy, and the enduring importance of party politics in maintaining an active and competent citizenry. I drew on this experience as a scholar and writer in preparing this declaration on the Party System and the Bipartisan Campaign Reform Act (BCRA). This declaration examines the relationship between the Political Parties and the American political system, reviews the Political Science literature on political parties, and analyzes the likely effect that the BCRA will have on political parties and the American political system.

6. In preparing this report, I have relied upon my review of the published political science literature relating to political parties and the American political system, my own writings and research relating to political parties and the American political system, interviews with RNC officials, non-party declarations of special interest groups obtained by the RNC in this case, documents reflecting the establishment of the RNC's non-federal accounts, and the various sources cited herein.

7. I have not testified as an expert at trial or by deposition within the last four years. I am being compensated for my services in connection with this case at the rate of $250 per hour.

[*4] II. Overview

8. Political parties have played a critical role throughout American history in making constitutional government work. Although the Framers' proscribed partisan conflict, fearing that parties might dangerously divide a free country, a party system developed in the early days of the republic that proved to be an essential part of American democracy. Parties were formed during the early part of the nineteenth century as a means of engaging the participation of ordinary citizens, and with localistic foundations that were critical for the maintenance of an engaged citizenry. The party system protected local self-government, yet gave rise to a democratic nationalism – to a federal democracy that balanced the claims of those who celebrated one national community and those who saw the country as many communities. Rooted in the states and localities, the parties drew Americans into debate about the leading issues of the day; moreover, outside of the Civil War, party debate and negotiations helped forge a consensus on controversial matters such as the regulation of the currency and social welfare policy. Most important, the party system has been virtually the only reliable source of collective identity in our rights-based culture. The parties' role in mediating among diverse constituencies, and moderating the influence of extremist forces and groups, has been critical to the success of American democracy.

9. Political Scientists have long recognized the value of the two-party system, defending it in the face of hard challenges posed by progressive reformers during the 20th and 21st centuries. Political scientists have not been unanimous in their [*5] praise of American political parties. For example, advocates of "responsible party government" have called for more centralized, disciplined, and policy-oriented party organizations that might be more effective than traditional decentralized parties have been in carrying out platforms or proposals presented to the people during the course of an election. Nonetheless, mainstream political scientists, whether champions or critics of the two-party system, have overwhelmingly viewed strong party organizations as essential to preserving the health and stability of American democracy. As E.E. Schattschneider, one of the great defenders of political parties wrote, "The political parties created modern democracy and modern democracy is unthinkable save in terms of parties."[i]

10. The Bipartisan Campaign Reform Act (BCRA) will substantially weaken political parties by impeding their ability to finance a range of vital associational activities and by isolating each party unit -- the national, state, and local party committees -- from each other. Moreover, the BCRA will shift power away from political parties toward interest groups, with serious adverse consequences for American democracy. Passed with the objective of making the political process less corrupt, the BCRA actually risks greater corruption by strengthening *pressure groups politics* at the expense of *party politics*.

III. Political Parties and the American Political System

11. Parties are not mentioned in the Constitution, and many of the Founding Fathers hoped to limit or restrict their influence. Indeed, James Madison's famous discussion of "factions" in *Federalist* 10 reveals the Framers' hope that the division and separation of powers, operating within a large and diverse society, [*6] would transform vital party debate and conflict into muted competition among a multitude of diverse interests. Madison voiced the Framers' fear that democratic values, cultivated by local communities and militant political associations, were but provincial prejudices that threatened to degenerate into anarchy, or worse, majority tyranny. Parties could not be abolished, for they represented rival interests and passions that inevitably were ignited in a free society. Yet, unless the Constitution controlled the *effects* of factionalism, popular government enabled a majority party to "sacrifice to its ruling passion or interest both the public good and the rights of other citizens." Political associations like parties give expression to the popular will and make government responsive to it. At the same time, the division and separation of powers, working in tandem with a multitude of economic and social interests, would frustrate the development of a strong party system, or, as Madison put it, "secure the public good and private rights against the danger " of a majority faction.[ii]

12. Nonetheless, political parties very quickly became central to the work of American democracy – and by the 1830s, parties became part of what Thomas Jefferson called the "living Constitution." Significantly, Madison, the principal architect of a Constitution designed to frustrate partisanship, became a principal defender of parties during the critical battles between the Democratic-Republicans and Federalists of the 1790s. Alexander Hamilton's success as secretary of the Treasury in the Washington Administration led Madison to rethink his understanding of republican government, to acknowledge that the original Constitution tended towards "consolidation," to the centralization of power that [*7] placed government beyond the influence of most citizens. By the early 1790s, he joined Jefferson in opposition to the Federalists (Hamilton's party), and played a leading part in the founding of the Democratic-Republican party. Jefferson and Madison founded the Democratic-Republican Party as a bulwark of local self-government: it stood for

limited government and states' rights; and opposed Hamilton's plan for an executive establishment that would create a large presence for the national government at home and in the world.

13. The Democratic-Republicans' triumph in the Election of 1800, the "Revolution of 1800" as Jefferson called it, dramatically reduced the size of the national government; this critical contest also marked a profound change in American constitutional government. Previously, gentlemen of status *offered themselves* to the voters as candidates. The Democratic-Republican party *asked voters for their support and provided an organization that reached out to them.* Significantly, a party that was committed to collective principles and claimed to represent a majority of the American people drove the unorganized and elitist Federalists from office. Jefferson's "great unconscious achievement," Henry Jones Ford wrote in his classic account of *The Rise and Growth of American Politics*, was "to open constitutional channels of political agitation." By organizing those who opposed the government's policies, change "became possible without destruction." Although, as Jefferson realized, the conflict between the Democratic-Republicans and Federalists resembled a revolution, with the emergence of political parties, a new means evolved for displacing governments from power.[iii]

[*8] 14. The extension of party organization over the country in the early days of the republic actually contributed to national unity. Presiding over the first government that claimed a popular mandate, Jefferson used the occasion of his first inaugural address to remind the people (including the bloodthirsty among his followers), "we are all republicans, we are all federalists." Jefferson's plea for harmony helped secure a peaceful transition of power and cultivated a political climate in which he could establish profound democratic changes without departing from the constitutional framework established by his Federalist predecessors.

15. Jefferson's success as a democratic leader was such that the Democratic-Republican party eventually killed off its Federalist rivals in elections. Federalists resisted the democratic politics that triumphed in the "Revolution of 1800"; in truth, the Jeffersonians were a bit squeamish about democracy too, and made little effort to sustain the vitality of their party. For a time, the U.S. fell into a one party mode of politics that from 1812 to 1820 degenerated into a no-party mode. Never was an era more inappropriately named than the so-called "Era of Good Feelings." The country suffered under fragmented leadership that had no means to build popular support. In the War of 1812, Jefferson's heir apparent, James Madison, fiddled while the British burned the national capital—a fitting symbol for the decline of national government that continued even after the British retreated. After the War of 1812, the nascent democracy awakened during the Jeffersonian era deteriorated: without parties, as Morton Keller's declaration in this case shows, voting declined, to the point that turnouts of two to three percent **[*9]** of the eligible voters were not uncommon in state and local elections in Virginia, Maryland, and Massachusetts.

16. The controversial presidential election of 1824 put an end to the Era of Good Feelings and led to the general acceptance and consolidation of the *party system*. During the Jeffersonian era, the national party structure was centered in the Congressional Caucus, which left the selection of presidential candidates and the development of policy programs to the Democratic-Republican membership in Congress. But the party machinery had run down badly by 1824, and its support was no longer tantamount to election. Four major candidates ran for the presidency, each representing the aspirations of a sectional constituency. The presidential choice of the forlorn Democratic-Republican caucus, William Crawford of Georgia, finished third in the electoral college behind Andrew Jackson of Tennessee and John Quincy Adams of Massachusetts (the son of John Adams), both of whom had been nominated by their state

legislatures. The powerful Speaker of the House, Henry Clay, came in fourth. Party politics had been displaced by narrow factionalism. No candidate had enough support to gain a majority of electoral votes, throwing the election to the House of Representatives.

17. The outcome of the 1824 election, in which the House selected Adams, even though Jackson had more popular and electoral votes, persuaded Jacksonian reformers that the Constitution's failure to cultivate an active and competent citizenry had not been remedied by Jeffersonian democracy. As Clay had not finished among the top three, he was, as the Constitution stipulated, removed [*10] from the competition. But the Speaker still exercised considerable influence with his fellow representatives, and he used that authority to help secure Adams's election. The new president rewarded the Speaker by naming him Secretary of State, the traditional stepping-stone to the presidency, thus virtually anointing Clay his successor. Adams and Clay, and their supporters in the House, acted within the law, but their indifference to Jackson's grass roots support confirmed how the Era of Good Feelings – the absence of partisan organization and competition – insulated the federal government from the popular sentiments in the states and localities.

18. Not surprisingly, Jackson responded vociferously and with hostility to the outcome in the House, declaring that Adams and Clay had connived to "conclude a corrupt bargain." Although no evidence exists that an unsavory agreement was struck, the House's willingness to disregard the popular will led to reforms that made elections and governing institutions work more democratically. Jackson's political supporters considered the renewal of partisanship as an essential ingredient of this reform. With the decline of party competition, Martin Van Buren, a Jackson ally, lamented a system of personal factions and virulent

sectionalism that displaced the "common sentiment" that had supported public accountability.

19. The "disease" of nonpartisanship yielded a fragmented and apathetic electorate (only 24% of the eligible electorate voted in 1824), allowing the House to select Adams. In the chaos of a partyless nation, divisions among the majority had led to a minority victory. Moreover, the House's selection of Adams portended [*11] important consequences for government. His State of the Union address, proposing an active role for the national government in the economy and society, showed that he shared some of the elitist tendencies of his father. Adams' entire presidency was marred by his lack of organizational or popular support. His aggressive push for a revival of Federalist heresies led democratic reformers to ask how federalism and self-rule could be protected while national unity was preserved. Their answer was a two-party system, which would guarantee, within the framework of the Constitution, that the will of the majority, and its policy commitments, would always triumph.

20. The failures of American government in the nonpartisan era thus encouraged a movement to make political parties a permanent part of constitutional government – Jacksonian democracy arose out of these party-building efforts. The Jeffersonians had merely tolerated the Democratic-Republican party as a temporary agent to advance a doctrine of local self-government; by the 1830s, Jacksonians were defending political parties, indeed, a party *system*, as an indispensable institution of constitutional government. Although Jackson's political enemies argued that a formal party system would threaten the original constitutional design, his supporters argued that mass political associations like parties could cultivate a strong attachment between the people and fundamental law. As one Jacksonian newspaper put it, "[Political parties] are the schools of political science, and no principle can be safely incorporated into the fabric of national

law until it has been digested, limited, and defined by the earnest discussions of contending parties."[iv]

[*12] 21. Constitutional doctrine was joined to the art of association; the Jacksonian ambition to make partisanship part of the "living Constitution" was embodied in the Democratic party, which organized voters on the basis of principles that were militantly decentralizing, as was the very process of party politics they established. With the collapse of the Congressional Caucus ("King Caucus" was condemned after the debacle of 1824), presidential tickets and party platforms were nominated by national conventions. National convention delegates were selected by conventions in the states, which consisted in turn of local party members. Implicit in this idea of the national convention was that the delegates sprang directly from the rank and file, as Jackson put it, "fresh from the people." The Jacksonians staffed this elaborate organization with the patronage, or "spoils system," which implanted a system of rotation into government personnel practices; the party that won federal or state and local elections had the opportunity to fill government appointments with their loyal partisans. In New York Senator William L. Marcy's famous words, the credo of the new patronage system was "to the victors belong the spoils of the enemy." The convention and patronage systems formed an elaborate organization that reached far beyond the halls of Congress and eventually penetrated every corner of the Union.

22. Jackson's enemies, the Whigs, led by Adams and Clay, and dedicated to expanding the economic and social responsibilities of the government, at first resisted participating in, and supporting, a mass party system. But the success of the Jackonian Democrats persuaded the Whig opposition that they had no recourse but to accept popular partisan campaigns and practices so as to avoid the **[*13]** fate of the Federalists. The Whig candidate William Henry Harrison's famous Log Cabin, Hard Cider campaign of 1840 signified that parties had become an enduring, integral part of

constitutional government in the United States. Electoral turnout increased substantially: the 2.4 million voters who cast their ballots in 1840 constituted 80% of the eligible electorate. What's more the emergence of a competitive two party system encouraged an expansion of the electorate, so that universal white manhood suffrage was achieved. Jacksonian democracy was limited to be sure; African-Americans and women had no place in it. Nonetheless, the emergence of mass party politics gave rise to a more democratic form of constitutional democracy that provided not only immigrant groups, but also women and African-Americans with justification to claim their right to participate in politics.

23. Once allied to the Constitution, political parties played *four* critical roles in maintaining it:

(a) With organizations and practices that were highly decentralized, political parties ensured that national campaigns and controversies focused on the partisan activities of townships, wards and cities, thus cultivating a delicate balance between local and national community. The localistic foundations of parties were critical for the maintenance of an active citizenry; thorough partisan campaigns and the patronage system, *local self-government*, the bedrock of American democracy, was invigorated. As the historian, Robert Wiebe has written, "The driving force behind nineteenth century democracy was thousands of people spurring thousands **[*14]** of other people to act. Many little favors, many personal connections, wound a host of little springs to make the mechanism work."[v] Political parties sustained local self-government through nationalizing experiences like the Civil War and the New Deal. "Many factors have influenced the historical development of federalism," states a 1986 report of the Advisory Commission of Intergovernmental Relations. "Among the most important of these was the decentralized, non-disciplined party which, the historical record suggests, had a significant decentralizing influence on intergovernmental relations by providing an often powerful institutional link between local, state, and national offices."[vi]

(b) Even as they sustained local self-government, political parties cultivated a set of beliefs and practices that gave rise to a spirited, but circumspect idea of *democratic nationalism*. Especially through the quadrennial conventions and presidential elections, the two-party system engaged citizens in debates and elections over national controversies.

- The Democrats and Whigs, for example, aroused the country to debate and resolution over the National Bank. When Jackson vetoed the bill to re-charter the National Bank prior to the 1832 election, he laid the controversy before the American people, asking them in his veto message to uphold his action by reelecting him, and returning his party to power. Henry Clay, the Whigs' nominee for president, welcomed Jackson's call for a referendum on the Bank fight, believing that the president's veto would cause **[*15]** Democrats from commercial states, such as Pennsylvania and New York, to abandon him. Instead, the contest between Jackson and Clay, fought through elaborate organizations that saturated the country, became a national partisan contest that appeared to uphold Jackson's veto of the bank bill. Jackson's popularity and his energetic concept of presidential leadership helped focus the country's attention on the bank controversy. But his popularity was joined to a collective enterprise, to the work of numerous party leaders in the state and the localities. The task of local partisans in both parties was to keep Democrats and Whigs working together effectively, understanding the stakes of the bank fight, and moving them to the polls. As Joel Silbey, a preeminent historian of the early party system, has written, the battle ultimately was joined "in the mountains of pamphlets issued, editorials written, fliers distributed, and speeches made, all constituting the basic coin of the realm of campaign activity—an exhaustive and repetitive enterprise."[vii] In the end, this exhaustive partisan work yielded a popular mandate.

Jackson's overwhelming defeat of Clay convinced even his political opponents, the Whig weekly, *Niles' Register* reluctantly reported after the election, "that when the president cast himself upon the support of the people against the acts of both houses of Congress," he had been "fully **[*16]** maintained."[viii] Jackson's partisan triumph transformed the Democratic doctrine of states' rights into a *national* creed.

- Lincoln and the Republicans drew the country into a national debate on slavery in 1860. The 1860 Republican convention came together not just to celebrate Lincoln's pioneering virtues as the "Rail-Splitter"; the delegates mixed image crafting with a serious debate over whether the Declaration of Independence, not the Constitution, was truly, as Lincoln argued, the nation's founding document. While the platform was under discussion. Joshua Giddings, the old stalwart of the Ohio underground railroad, offered an amendment that would add the words of the Declaration to the platform. The delegates voted the Giddings' proposal down the first time, but reconsidered when the revered opponent of slavery threatened to walk out of the convention hall. The principles of the Declaration became part of the Republican platform and were sanctified by the delegates as "essential to the preservation of our republican institutions." In this way, Lincoln and the Republican party drew the country into a great contest of opinion over the future of slavery in the country. Lincoln interpreted the Republicans' victory over Stephen Douglas and the Democrats as a mandate to stand firm on preventing the expansion of slavery. Lincoln's refusal to compromise on this issue, a position no Republican congressman dared to oppose, made it **[*17]** impossible for the parties to reach an agreement that might prevent Civil War. But the 1860 election helped give purpose to the Union cause, which Lincoln famously testified to in his Gettysburg Address.

- Just as the 1860 Republican platform included the Declaration of Independence, so the 1936

Democratic platform, which Franklin D. Roosevelt championed, was written as a pastiche of the Declaration, emphasizing the need for a fundamental reconsideration of rights. As the platform claimed with respect to the 1935 Social Security Act: "We hold this truth to be self-evident—that government in a modern civilization has certain inescapable obligations to its citizens, among which is the responsibility to erect a structure of economic security for [its] people, making sure that this benefit shall keep faith with the ever increasing capacity of America to provide a high standard of living for all its citizens." The Republican platform contested this novel view of rights, declaring, "America was in peril" and calling for the "preservation of … political liberty, which "for the first time" was "threatened by government itself." The immense Democratic triumph of 1936 appeared to sanction the New Deal Democratic party's redefinition of the social contract, confirming the status of programs like Social Security as entitlements.

[*18] • American political parties, therefore, have not been merely loose coalitions of state and local organizations. Although their organizations have been decentralized, the two parties have orchestrated national campaigns; and their representatives in Congress have tended to moderate sectional or local interests in supporting national policies. As a result, the Democratic and Republican parties developed as *national*, but not *centralized* organizations: they celebrated a Whitmanesque idea of national community that complemented a deep and abiding respect for localized politics and government. Even as the polity became more centralized after the 1930s, parties continued to be vital, and all the more important, organizations in maintaining America's federal democracy. In a large, complex political system, parties still have an important role in educating the public about their positions and accomplishments, and in helping to build popular support for their programs. During the past two decades, the Democratic and Republican parties have helped clarify the terms of debate over such issues as

health care reform, budgetary policy, abortion, and environmental protection. As Nelson Polsby and Aaron Wildavsky have written in the 10th edition of *Presidential Elections*, party identification provides citizens "with important guidance in learning about the issues that interest them as well as the many matters on which they cannot possibly be well informed. All of us, **[*19]** including full-time participants such as the president and other leading politicians, have to find a way to cut information costs on some issues. For most of the millions who vote, identification with one of the two major political parties performs that indispensable function most of the time."[ix]

(c) As national organizations that facilitated collaboration among federal, state, and local organizations, parties have been critical agents of *consensus* in the United States. Unlike parties in Western Europe, Great Britain, and Japan, political parties in the United States have never been highly centralized and doctrinaire. Instead, they have been national organizations that conformed to the looser genius of American democratic life. Democratic and Republican parties have been dedicated to obtaining majority support, but have done so by building diverse and decentralized coalitions. Even as they have been principled organizations, Democrats and Republicans have had to accommodate a diversity of interests that has made the creation of religious, racial, or class parties all but impractical in the United States. In this way, parties have helped Americans reconcile their ostensibly contradictory beliefs in majority rule and minority rights.

(d) Finally, parties have been the most important institutions to cultivate a sense of *community*, of *collective responsibility*, in a political culture principally dedicated to individualism, privacy, and rights. It is no accident that when parties have been weak, sectional and interest group politics have dominated the national and state capitals; similarly, the **[*20]** absence of strong parties has attenuated the link between the government and voters, leading to a decline in public trust and turnout in elections.

- The reform assault on parties during the Progressive era contributed to decline in voter turnout and the growing influence of advocacy groups such as the Anti-Saloon League, which championed Prohibition, and the Immigration Restriction League, which played an important part in the enactment of restrictive immigration laws during the 1920s. Although Prohibition and Immigration restriction emerged around the turn of the century with social reform dimensions, during and after the First World War, the darker implications of these causes came to the fore. Prohibition came to be identified with anti-Catholicism, as well as small town native hostility toward foreign filled cities. Immigration restriction was fueled by anti-Semitism and xenophobia.[x]

- Similarly, reforms in the 1970s that restricted the role of parties in nominating presidential candidates and financing campaigns made more difficult the tasks of building broad coalitions and drawing voters to the polls. The weakening of party organizations corresponded to an advocacy explosion, in which self-styled public interest groups, such as Common Cause, Ralph Nader's Public Citizen, and the National Resources Defense Council, exercised considerable influence by taking their causes before administrative **[*21]** agencies and courts. As the political scientists Benjamin Ginsberg and Martin Shefter have argued, the advocacy explosion of the 1970s led to a decline of voter turnout because public interest groups viewed "bureaucratic warfare" as a "substitute for party building." Although the causes these groups championed, such as a clean environment, consumer protection, and equal rights for African-Americans and women, were often popular, the decline of parties left the political process vulnerable to policy advocates on the left and right who were unrepresentative. As the political scientist, Morris Fiorina has written recently, the "dark side" of

advocacy politics is that it tends to put politics into the hands of "extreme voices in the larger political debate."[xi]

- The role of parties in giving meaning to citizenship suggests why campaign finance reforms and other measures that weaken parties threaten the vitality of the Constitution. Just as political parties were formed to make constitutional government in the United States safe for democracy—to remedy the Constitution's insufficient attention to an active and competent citizenry—so the weakening of political parties has exposed the fragile sense of citizenship in American political life.

IV. Political Parties and Political Science

24. Because they moderate the natural tendency of Americans to celebrate individualism and privacy, party organizations always have had an uneasy **[*22]** standing in the United States. Especially in the 20th and 21st centuries, they have been the bane of journalists, social reformers, and insurgent politicians who have attacked them for corrupting, or "appearing" to corrupt American democracy. Consequently, voters have tended to view parties skeptically, and sometimes with hostility, even as most citizens have found them to be essential guideposts for navigating the complexities of American constitutional democracy.[xii] There has emerged since the early part of the 20th century, an idea of *progressive democracy* that champions "pure democracy," a *direct* relationship between government and public opinion. The influential progressive reformer Herbert Croly, founder of the *New Republic*, gave voice to an antipartisan sentiment that would echo throughout modern American history: "The two-party system, like other forms of representative democracy, proposes to accomplish for the people a fundamental political task which they ought to accomplish for themselves." Champions of *progressive democracy* have pushed reforms, such as the direct primary, civil service reform, registration laws, the regulation of campaign finance, and policymaking

by initiatives and referenda, that have weakened party organizations.

25. In the face of this reform assault, Political Scientists have become the leading defenders of parties, and the fragile but indispensable role these political associations play in American political life. Benjamin Barber, a political theorist, and self-proclaimed communitarian, is almost singular in his rejection of political parties, viewing them as obstructing genuine, i.e., direct, citizen participation in the political community.[xiii] Most political scientists have taken a more practical **[*23]** position, defending parties as critical intermediaries between private and public interests. The vital connection parties forged between government and citizens made Woodrow Wilson, himself a leading reformer, reluctant to join the progressive attack on political parties. "Students of our politics," he warned, "have not always sufficiently recognized the extraordinary part political parties have played in making a national life which might otherwise have been loose and diverse almost to the point of being inorganic a thing of definite coherence and common purpose." National parties had played an indispensable part in forging a country out of America's local communities and national interests, even as these organizations recognized the legitimacy of provincial concerns: "It has been nothing less than a marvel how the network of parties has taken up and broken the restless strain of contest and jealousy, like an invisible network of kindly oil upon the disordered waters of the sea. It is in this vital sense that our national parties have been our veritable body politics."[xiv]

26. Early defenders of the party system did not deny their shortcomings. Wilson acknowledged that parties, outside of episodic national political battles, tended to be provincial and too dependent on the "spoils" of office. But the deficiencies of parties followed not from any inherent fault of partisanship but, rather, from the complexity of America's political institutions and the diversity of its society. Wilson's

protégé, Henry Jones Ford, offered the most vigorous defense of political parties in *The Rise and Growth of American Politics*, viewing them as indispensable institutions in making constitutional government work. Bridging the separation of powers, counteracting localism, making nominations for the myriad **[*24]** of elected offices created by America's federal democracy – all these tasks were "forced" on American parties by the constitutional system. These constitutional responsibilities created the need for huge and elaborate organizations, and the need for large-scale financial backing. Since no method existed for obtaining the funds officially, parties were forced to support themselves by patronage, which sometimes, Ford conceded, led to graft. Nonetheless, Ford insisted that parties were intrinsically *public* associations that made corruption less likely. Indeed, partisanship and corruption were "antagonistic principles": "Partisanship tends to establish a connection based on an avowed public obligation, while corruption consults private and individual interests which secret themselves from view and avoid accountability." The only hope for removing corruption from American politics, Ford argued, was to strengthen party organizations and their influence on government. Ford denied that the efforts of strong party leaders who presided over state politics at the end of the nineteenth century corrupted politics in their effort to "systematize relations" between interest groups and their organizations. He argued, for example, that drawing business interests into partisan coalitions "marked improvement in legislative behavior": "In proportion as party control is strengthened, a counteracting force is brought to bear." With resources to influence elections and public policy, Democratic and Republican organizations would be "in a position to interpose a party obligation between legislative marauders and their prey."[xv]

27. The *collective responsibility* of parties went beyond ameliorating corruption. More important, the art of partisan association was necessary to counteract the **[*25]** powerful attractions of family and commercial pursuits.

Without parties, the political science literature warns, citizens will tend to withdraw into their private lives; even if they were not so inclined, most Americans would not have the time, resources, or, most critically, organizational power to participate in politics effectively. Consequently, the result of weakening parties is not likely to be a more "participatory democracy"; instead, the outcome will be a polity dominated by interest and advocacy groups. Interest groups have always had an important place in American politics and government. But the growth of big government amid the development of a complex commercial society since the early part of the twentieth century has greatly increased the influence of interest groups that push government to enact policies that benefit small constituencies at the expense of the general public.

28. As E.E. Schattschneider, a leading scholar of the political process, wrote in 1960, "American politics provides the raw materials for testing the organizational assumptions of two contrasting politics, *pressure politics* and *party politics*." Pressure politics is essentially the politics of small groups, which have a direct influence on public officials and politics. Even relatively large groups, Schattschneider observed, such as the National Association of Manufacturers, will represent but a small part of the business interests they purport to serve. Only parties appeal to "diffuse interests," counteracting the influence of groups that cannot claim to represent the public. Party politics emphasized elections – and in that quintessential public arena, the Republicans and Democrats could not be captured by special interests. Indeed, interest groups on their own did not have the **[*26]** resources "to play in the great arena for the highest stakes." So long as special interests valued elections, they would have no recourse but to support the public principles and general platforms the parties championed. "It is a great achievement of American democracy," Schattaschneider argued, that business "has been forced to compete for power in the widest arena in the political system...*[T]he power of the Republican party to make terms with business rests on the fact that business cannot afford to be isolated.*" Similarly, the Democratic party was no slave to organized labor; in truth, labor had no recourse but to support the Democrats: "As long as it thinks that elections are important, it must support the Democratic party generally. The facts of political life are that neither business or labor is able to win elections by itself."

29. Schattschneider's greatest concern was the privileged position of business and labor in 20th century American politics, but he feared that so-called citizen groups also would limit political participation to a small circle of program activists. "Only a chemical trace" of African-Americans belonged to the National Association for the Advancement of Colored People; similarly, very few women belonged to the League of Women Voters and a tiny percentage of consumers belonged to the Consumers League. "The competing claims of pressure groups and political parties for the loyalty of the American public," Schattschneider insisted, "revolve about the difference between the results likely to be achieved by small scale and large-scale political organization." By a wide margin, the party system was the "largest mobilization of people in the country": "The parties lack **[*27]** many of the qualities of smaller organizations, but they have one overwhelming asset on their own. *They are the only organizations that can win elections.*"[xvi]

30. Schattschneider's warnings about pressure politics struck political scientists as prescient during the 1960s and 1970s. From the perspective of many political scientists, the consequences of political reforms and other developments that weakened the party system in that era were devastating: a decline in voting turnout; a startling drop in people's trust in government, and the explosion of advocacy politics that weakened the presidency and fragmented Congress. Viewing this fractious state of American politics as a recrudescence of the misnamed "Era of Good Feelings," Walter Dean Burnham, the most distinguished scholar of parties of his generation,

departed from his painstaking analysis on the long secular decline of parties long enough to champion their renewal: "To state the matter with utmost simplicity: political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually – or organizationally – powerful."[xvii]

31. Although most political scientists have defended parties, they have not spoken with one voice. Since the Progressive era, they have been divided between two approaches: advocates of "responsible party government" (represented by scholars such as Schattschneider); and defenders of indigenous institutions (represented by scholars such as Pendleton Herring[xviii]). The former have leveled criticism at the two party system, arguing that it should become more like those **[*28]** elsewhere – more centralized and programmatic – in light of the immense changes in American society wrought by the industrial revolution and world affairs. The latter have defended the traditional parties, citing especially the way they accommodate, even as they strengthen, the institutional arrangements of the Constitution and the principles embodied therein. Significantly, both of these schools defend partisanship; neither believes that the progressive assault on party organizations during the twentieth century will serve American democracy well.

32. Although the "indigenous" school has more than held its own, advocates of responsible parties and national developments have combined to effect important changes in the two-party system. Since the New Deal, its center of gravity has been the nation, rather than states and localities; and both Democrats and Republicans have become more unified and programmatic. Civil Service reform, which has caused parties to rely more on ideological compatibility than the spoils of office in recruiting supporters, has

intensified the move to a more national and ideologically combative two-party system. The more centralized and programmatic party system has come under criticism for suppressing, rather than registering the diversity of the nation. But, arguably, it has undergone a transformation that has better suited the Republicans and Democrats to fulfill their responsibilities in an age when the national government is expected to assume expansive responsibilities at home and in the world. To put it another way, the contemporary parties are still *national*, and not *federal*, in their organization, even though the principal actors and most of the resources are now in Washington rather than the states and localities. Consequently, even in the era of big (or bigger **[*29]** government), parties still perform the responsibilities marked out for them in the 1830s: linking a large complex government with a private regarding and rights conscious citizenry. As the bipartisan association of political scientists and practioners, the Committee for Party Renewal, declared in 1995: "Unlike special interest groups, parties must appeal to majorities in the electorate if they are to win; and unlike single candidate organizations, they must win many races if they are to govern. Parties, moreover, give coherence to American politics. We have a constitutional system and a political culture dominated by disunifying forces – separated powers, federalism, pluralism, and individualism. Parties have been a unifying force in this system, cutting across the branches and levels of government as well as across voting blocs to aggregate interests, build coalitions and make democracy possible."[xix]

V. Political Parties and the Bipartisan Campaign Reform Act (BCRA)

33. Since the dawn of the twentieth century, many factors have threatened the indispensable yet fragile place of parties in American politics, including the growth of the mass media and the development of a mass entertainment industry. But these forces would have been far less debilitating were it not for reforms such as the direct primary, registration laws,

and campaign finance reforms. The campaign finance laws of the 1970s -- the Federal Election Campaign Act of 1971 (FECA) and the 1974 amendments that were added to it -- further advanced a reform effort to "purify" politics – to eliminate even the "appearance" of corruption. But these initiatives, in fact, enhanced the role of special interests, attenuated the link between representatives and their constituents, and made **[*30]** political life seem less relevant and more remote from the every day lives of American citizens, thus contributing to the decline of participation in elections.

34. The campaign finance laws strengthened candidate centered campaigns and interest groups at the expense of parties. By limiting the amount of money parties could give to candidates, FECA required candidates to raise more money on their own. The success of candidates thus became dependent on their individual abilities to raise money needed for high media visibility and the construction of a personal organization. Moreover, by limiting the amount of money any individual could contribute, FECA reduced the role of large contributors and at the same time gave incentives for the formation of federal political action committees; FECA also encouraged the creation of unregulated groups that operated entirely outside of the disclosure requirements. Consequently, during the 1970s, the number of Political Action Committees (PACs) exploded.

35. PACs, organizations formed by interest groups for the primary or sole purpose of giving money to candidates, did not begin with the campaign finance laws. Prior to the 1970s, Labor and Business organizations, which were prohibited from making direct contributions to federal campaigns, formed political action committees that allowed them to participate in the political process. But PACs multiplied rapidly after the campaign finance laws restricted the role of parties in funding elections; indeed, FECA specifically legitimized PACs by explicitly granting to both

corporations and labor unions the right to create, administer, and raise funds for their PACs, and to cover all organizational expenses from corporate and union treasuries. From 1974 to 1982 the number of political action **[*31]** committees organized by business and unions more than quadrupled, increasing from 608 to 2,601; in the next six years, PACs of all types (including those unconnected to business and unions) rose to a total of 4,268 in 1988. There were 4328 federal PACs as of March 31, 2002.

36. PACs thus became a rival to political parties in support of candidates but without obligations to govern or to appeal broadly to electorates. Equally important, the growing influence of advocacy groups strengthened the pressure group politics that Schattschneider had proscribed: during the 1970s, advocacy groups exercised power by influencing Congressional committees, administrative agencies, and courts, advancing policies that were not vetted in elections and the legislative process. Some interest groups did generate large rosters of supporters through direct mail solicitations. But these appeals to the public asked not so much for the citizens' votes, time, energy, and ideas as for contributions to fund campaigns waged by policy experts. Consequently, as the political scientist Hugh Heclo has pointed out, with the reform legacy of the 1970s, American society further "politicized itself" and at the same time "depoliticized government leadership."[xx]

37. This development did not surprise anyone who understood and appreciated the role parties had played historically in providing a vital link between citizens and their government. By the late 1970s, that role, and the unhappy consequences of its serious decline, resulted in efforts of party renewal. The 1979 amendments to the campaign finance laws were designed deliberately with the idea of bringing the parties back into the political process. As Robert Tiernan, Chairman of the Federal Election Commission, admitted in testifying on this legislation: **[*32]** "Unfortunately, the FECA

has had, or is perceived to have had, some unforeseen effects on party and grass roots political activity…Changes in the [1974] statute are desperately needed to permit state and local party committees flexibility for vigorous campaign activity." Morley Winograd, President of the Association of State Democratic Chairpersons, echoed Tiernan's concerns, confirming the deleterious effect FECA had on political parties. The collaboration between local, state, and national committees had been weakened, in no small part due to the fear of violating regulations that were difficult to interpret. Local committees, in particular, Winograd reported, were "reluctant to engage in Federal-election related activity": "They generally do not have legal and accounting assistance available, and local committees, therefore, have not chosen to run risks of Federal regulation." State parties, he continued, "felt frozen out of the 1976 Campaign," thus diminishing "the politics of party, the politics of coalition and accommodation, which is our nation's best defense against the divisiveness of special interest politics."[xxi]

38. In response to these concerns, FECA was amended to allow state and local party committees "to purchase without limit, campaign materials used in connection with volunteer activities on behalf of a candidate (such as buttons, bumper stickers, and yard signs)." A similar exemption was created to allow State and local party committees "to engage in certain voter registration and get-out-the-vote activities on behalf of the nominees of such party for President and Vice President."[xxii] It is my understanding that even before the 1979 Amendments, the Republican National Committee had established nonfederal accounts to support **[*33]** state and local candidates and other party building activities – a traditional role for parties prior to FECA. During the 1980s and 1990s, both Republicans and Democrats made use of non-federal contributions, pumping new life into some state and local party organizations. As Ray La Raja's declaration in this case shows, Democratic and Republican state party organizations have gotten stronger

since 1979, becoming more likely to engage in such critical associational activities as conducting polls, providing campaign training, performing campaign research, and recruiting candidates.

39. The Republican and Democratic use of nonfederal funds to reinvigorate state and local party organizations has, therefore, buttressed the *national* character the parties. A. James Reichley, the foremost authority on the history of party organizations, has noted that some national party managers had some initial inclination to couple this growing financial support with even more control of operations. But the Constitutional division between the national and state governments provides state and local parties with powers and resources to resist centralized control. "If they have funds," Reichley wrote in 1992, "no matter at what geographical level they are raised, state and local parties will probably soon exert more independence, and in some cases are already doing so."[xxiii]

40. The enactment of BCRA threatens the reinvigoration of national parties and the revitalization of America's federal democracy. Condemned as "soft money" and viewed as an effort to circumvent campaign finance laws, nonfederal funds have been charged with corrupting or appearing to corrupt the political process. This charge, abetted by expensive campaigns mounted by the Brennan Center and Pew **[*34]** Charitable Trust Foundation, has become received wisdom. As the declaration that Whitfield Ayers prepared for this case shows, however, the public has been largely indifferent to the BCRA. In the midst of the debate on the Hill over this legislation, Americans did not consider "reforming election campaign finance laws" as a high priority for President Bush and Congress. BCRA, in fact, placed dead last on the list of Americans' political concerns, far behind more prepossessing issues as homeland security, the economy, and education. Indeed, even though John McCain made campaign finance reform the centerpiece of his presidential campaign in

2000, the public never considered "soft money" an important election issue. Like many party reforms, the BCRA has support in Congress, the media, and among "public interest" activists, but has scarcely touched politics outside of the capitol beltway.

41. Indeed, there is no evidence that "soft money" has corrupted parties or the political process. To the contrary, by strengthening parties, the use of nonfederal funds almost certainly has made the political process less corrupt and more responsive than it otherwise would have been. As political scientists have been arguing since the end of the nineteenth century, when the national government first sought to regulate partisan activity, party organizations help to reduce the amount of government corruption by linking representatives and interest groups to collective organizations with a past and a future. By the very act of supporting political parties, donors and interest groups must defend their political actions and policy positions publicly and in coordination with a large governing coalition. In this way, as Nelson Polsby has argued, party leaders and organizations can **[*35]** "deflect undo demands on the office holder, substitute with money from other sources money that is withheld or threatened to be withheld by importunate interest groups or individual donors, and assure that donations do not greatly distort the programmatic commitments embodied in party policy."[xxiv] Professor La Raja indicates that there is a wide consensus in political science that interest groups' campaign contributions tend to assist powerful incumbents, whereas political parties support challengers and candidates in closely contested campaigns. This difference between party and interest group disbursements supports Polsby's view that party politics pose a protective layer of decision makers between candidates and donors.

42. Indeed, nonfederal money strengthens parties' ability to act as a critical intermediary between government action, on the one hand, and donors and interest groups, on the other. It does so by addressing a critical problem in contemporary American democracy: how to energize party building activities and encourage citizen participation in an age when centralized decision making and mass media appeals threaten to dominate political life. National party committees use nonfederal accounts in collaboration with state and local party organizations in a way that strengthens the national character of parties – that makes it possible for parties to penetrate every corner of the Union, recruiting candidates, attracting volunteers, and mobilizing voters.

43. BCRA is thus a remedy for a disease that has been misdiagnosed. More ominously, it will short-circuit the efforts of the past two decades to revitalize **[*36]** political parties and the critical function they play in making American democracy work.

44. I have been asked by counsel to assume that the BCRA will reduce the collaboration among national, state, and local parties that nonfederal funds have facilitated by, among other things, restricting the ability of the national, state, and local committees of the same party to transfer and "swap" funds and restricting joint-fundraising among the national, state, and local committees. Indeed, the BCRA goes so far as to restrict collaboration among different state parties, for example, state parties are prohibited from engaging in joint-fundraising with other state parties in raising so called "Levin Funds" – nonfederal funds that state and local parties may raise, in contributions up to $10,000 per donor, so long as state law allows, for certain "federal election activity."

45. In my opinion, the restrictions on financial collaboration among national, state, and local party committees would diminish the *national* character of party organizations that historically has made them bulwarks of America's federal democracy. The Republican and Democratic National Committees in Washington are not federal parties, but national parties that contribute money and

other campaign support to state and local candidates. The BCRA, therefore, would establish federal standards on campaign finance decisions at the state and local level. More generally, national party organizations will no longer provide a powerful link between national, state, and local offices. The BCRA will sever the link, rendering parties both more *centralized* (as the national committees will be less able to support party-building activities at the state and local levels) *and* more **[*37]** *fragmented* (as cooperation between national, state, and local parties as well as among the state organizations will be restricted).

46. As was the case in the 1970s, the BCRA will weaken *party politics* and strengthen *pressure group* politics. Non-federal funds have served as an important incentive for candidates and interest groups to cooperate with political parties; consequently, these funds have strengthened political parties as intermediary organizations between public officials and special interests. By banning non-federal funds, the BCRA will encourage interest groups to exert influence directly on candidates and public policy.

47. The respected journalist, Thomas B. Edsall, has dubbed the BCRA "PAC Attack II." "Instead of reducing the power wielded by special interest groups in American elections, the [BCRA] reform bill is magnifying that power and making PACs, the *betes noires* of Common Cause and other good government groups, key players in finances once again."[xxv] In fact, the BCRA – and PAC Attack II – may be worse. The new reform legislation treats parties and interest groups unequally: for example, whereas a corporation or labor union can use unregulated funds to engage in issue advocacy, the new reforms will greatly burden political party advocacy. Consequently, political operatives of all ideological persuasions are likely to channel "soft money" to interest groups. Moreover, many political operatives are scrambling to create new organizations in which they can place the "soft money" that had been going to parties. According to Edsall, some of these groups, such as Progress for America, which has raised millions of dollars that it uses to promote President Bush's policy agenda, are being set up as 510c4 **[*38]** organizations, which do not have to reveal the sources of the money raised or the details of how it is spent.[xxvi] The result, Edsall states, will not only be a more fractious political process, but also a less accountable one: "When soft money was channeled through the parties, laws required full disclosure of both contributors and expenditures. But the new vehicles for this money are almost certain to be more secretive, with little or no obligation to reveal their activities."[xxvii]

48. Indeed, based on my September 20, 2002 interview with Jay Banning, the RNC's Director of Administration and Chief Financial Officer, it is my understanding that the BCRA prohibits the national committees' use of nonfederal funds for activities that in my opinion help define the national parties as political associations, including: support for state and local candidates; the coordination of activities of state and local party office holders (for example, the RNC supports meetings of, and communication among Republican State Attorneys General); political training and support of candidates, campaign managers, and grass roots activists; research on issues and policies; the organizational activities of allied groups, such as the Young Republicans; outreach to particular ethnic, racial, and women's groups; public advocacy through media, brochures, and direct mail of party policies; annual meetings and conferences; and internal communications with party members about campaigns and issues through media such as websites, direct regular mail, and direct e-mail. The ability of an organization to communicate with its membership goes directly to its associational role. What's more, the BCRA treats parties and interest groups unequally with respect to this critical associational activity: corporations, labor unions, and other membership **[*39]** organizations may use non-federal funds to communicate with their executives, administrative

personnel, members, and shareholders on any subject, including to urge support for particular candidates or issues.

49. Advocates of the BCRA claim that since 1996, parties have abused non-federal funds, employing issue ads for negative advertisements against candidates – oftentimes, without any reference to the political parties, their platforms, or the policies they support. It is important to point out, however, that interest groups have also increased their political advertisements that connect, indeed subordinate the discussion of issues to electioneering, much of it negative in tone. As an Annenberg Public Policy Center study indicates, the ads of special interest groups represented 68% of all spending on issue ads in the 1999-2000 cycle; interest groups spent more than $347 million on these issue advertisements. The names of these groups did little to tell viewers who the sponsors of these messages were; indeed, in some cases they were misleading. For example, The Citizens for Better Medicare, which spent $65 million on television ads, is funded primarily by the pharmaceutical industry. Not only were the funding sources of interest groups ads more misleading than party-sponsored ads, they also tended to be more negative, especially in the early stages of the 2000 campaign.[xxviii]

50. Whereas the BCRA will prohibit national parties from using non-federal funds for issue advocacy, interest groups can continue to use non-federal funds for issue advocacy, albeit with restrictions in the final 30 days before a primary and 60 days before a general election. It is unlikely, then, that the elimination of parties' use of nonfederal funds will reduce issue advertising. Instead, more funds will **[*40]** flow to interest groups that air issue advertising. Moreover, given the importance of the mass media in contemporary politics, restricting the funds that the political parties may use to pay for television and radio ads may very well have a deleterious effect on what deserves to called party building activities. Nearly every candidate who runs for office does so as a Democrat or Republican; consequently, it virtually is impossible for parties to separate completely support for candidates, issue advocacy, and party building. To ask parties to do so is to forget Schattschneider's refrain that they are the "only organizations that can win elections." It is ironic that as champions of BCRA criticize parties for muting their partisanship in issue ads, the public has recoiled at the growing partisan combat in Washington, D.C., so much so that parties have sought, with the help of nonfederal funds, to navigate toward somewhat more centrist and bipartisan positions.

51. Criticism of the parties' use of issue advertising should not lead to the elimination of national parties' nonfederal funds but to greater specification of its uses. Instead of a meat cleaver approach that eliminates soft money, reform could restrict its use to more conventional party building activities. Reformers have claimed that the national parties transfer nonfederal money to state parties for the sole purpose of funding issue ads. There is ample evidence, however, that Democrats and Republicans have used these funds for a number of routine, yet critical associational activities. Research that has focused on the states, rather than presidential elections, for instance, has shown that state parties use non-federal funds in identifying supporters, mobilizing them, and strengthening the **[*41]** organizations that hold their allegiance.[xxix] Cast against the history of parties, the use of nonfederal funds serves the same purpose that party pamphlets and patronage foot soldiers played in the nineteenth century. In fact, the use of nonfederal funds for voter mobilization efforts may be one of the few devices left to parties to encourage participation in an age when barely half of the eligible electorate bothers to vote in presidential elections. As Professor La Raja shows, between the 1992 and 2000 elections cycles, spending on voter mobilization by Democratic and Republican state parties increased steadily from $9.6 million to $53.1 million. The BCRA is likely to reduce voter mobilization efforts. According to two MIT political scientists, eliminating nonfederal funds "will starve

many grass activities of state and local parties.” Eliminating all current “soft money” expenditures, Stephen Ansolabehere and James Snyder estimate, “would lead to a 2% decline in voter turnout—without soft money, approximately 2 million fewer Americans would have gone to the polls in 1996.”[xxx]

VI. Conclusion

52. Since the Founding, parties have had an uneasy but critical role in making American constitutional government work.

(a) Parties have forged consensus among a diversity of interests, fulfilling Madison’s hope that constitutional government would balance majority rule and individual rights.

(b) They have tempered the potential for corruption in America’s sprawling democracy by mediating between candidates, on the one hand, and individual donors and interest groups on the other. Party politics has **[*42]** reduced corruption by bringing factionalism to light – by making political conflict and deliberation public. Interest groups – *the agents of pressure politics* --risk corruption by shrinking the scope of politics and by hiding their own efforts to influence the political process.

(c) The two-party system has helped educate voters about the leading issues of the day, and occasionally, have engaged American voters in critical contests of opinion and resolution on vital matters such as the National Bank, slavery, and the welfare state. The parties have thus fostered a strong connection between the complex institutions of constitutional government and American citizens – they have been the signposts directing American *individuals* through the pathways of *public* life.

(d) Political parties have enhanced political participation. Study after study has shown that partisan loyalty is a critical factor in determining whether people will vote and, more fundamentally, develop strong attachments to the political system. Paradoxically, participation in elections that pit Democrat against Republican transforms individuals into citizens. In this way, parties have helped fulfill the hallowed but elusive promise of the Constitution’s Preamble that ultimate sovereignty would rest in We the People.

53. The role parties have played in making American constitutional democracy work has long been recognized by political scientists. Mainstream political scientists – whether avowing progressive, centrist, or conservative principles – have **[*43]** overwhelmingly viewed the party system as a critical institution in connecting government and society.

54. Although parties have been weakened by a century of reform dedicated to forging direct ties between representative and citizens and to creating a more participatory democracy, partisanship remains the principal agent of popular rule in the United States. Party organizations have become more centralized organizations since the New Deal, but they remain, as they have always been, *national* organizations, facilitating collaboration among members at the federal, state, and local levels. Just as the country has developed historically from a decentralized rural republic into an extended commercial democracy, so parties have been living, breathing entities that have helped make self-government work on a grand scale.

55. This role of parties in strengthening civic culture has been threatened by reforms carried out in the hope of making the political process work more purely and directly – to eliminate, if you will, the *politics* of our democracy. But these reforms, unwittingly, or deliberately, hostile to the genius of American politics, have made the political process

less accountable and less democratic. Campaign finance laws have been particularly indifferent to the extraordinary power of interest groups in American politics and the important role political parties have played in ameliorating the deleterious influence of "pressure politics" on American constitutional government.

56. The BCRA brings to a dangerous culmination a regulatory regime that discourages participation, empowers special interests, and intensifies a growing crisis of citizenship. It will weaken the parties' ability to engage in the art of **[*44]** association, in those activities that have made them so important to the working of constitutional government in the United States. Moreover, the BCRA will shift money and the balance of power away from political parties and towards interest groups, with serious consequences for America's federal democracy.

I declare under penalty of perjury that the foregoing is true and correct.

s/
Sidney M. Milkis

Executed on September 22, 2002

[EXHIBITS OMITTED]

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[i] E.E. Schattschneider, *Party Government* (New York: Farrar and Rinehart, 1942), 1.

[ii] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1969), Number 10, 77-84.

[iii] Henry Jones Ford, *The Rise and Growth of American Politics: A Sketch of Constitutional Development* (New York: MacMillan, 1898), Chapters 7, 8. V.O. Key also provides important commentary on how the emergence of party politics transformed the Constitution. See Key, *Politics, Parties, and Pressure Groups* (New York: Thomas A. Crowell, 1964), 200-204.

[iv] "Political Proscription," *United States Magazine and Democratic Review* 9, no. 60 (October 1841): 345.

[v] Robert Wiebe, *Self-Rule* (Chicago and London: The University of Chicago Press, 1995), 71.

[vi] Advisory Commission on Intergovernmental Relations, *The Transformation of American Politics: Implications for Federalism* (Washington, D.C.: Advisory Commission on Intergovernmental Relations, 1986), 45.

[vii] Joel H. Silbey, "To One or Another of These Parties Every Man Belongs": The American Political Experience form Andrew Jackson to the Civil War," in *Contesting Democracy; Substance and Structure in American Political History, 1775-2000*, eds. Byron E. Shafer and Anthony J. Badger (Lawrence: University Press of Kansas, 2001), 76.

[viii] *Niles' Register*, November 17, 1832,177.

[ix] Nelson W. Polsby and Aaron Wildavsky, *Presidential Elections: Strategies and Structures of American Politics*, 10th edition (New York: Chatam House Publishers, 2000), 13.

[x] Morton Keller, "The New Deal and Progressivism: A Fresh Look," in *The New Deal and the Triumph of Liberalism*, eds. Sidney M. Milkis and Jerome Mileur (Amherst: University of Massachusetts Press, 2002), 316.

[xi] Benjamin Ginsberg and Martin Shefter, *Politics By Other Means: Politicians, Prosecutors, and the Press from Watergate to Whitewater*, revised edition (New York: Norton, 1999), 95-103; Morris Fiorina, "The Dark Side of Civic Engagement," in *Civic Engagement in American Democracy*, eds., Theda Skocpol and Morris Fiorina (Washington, D.C.: Brookings Institution Press, 1999), 409.

[xii] The National Election Surveys show that "pure" independent, those who lean towards neither party, is a small minority. But a growing number of party "leaners" characterize themselves as independent, signaling a growing ambivalence about the two-party system. Since 1960, the growth in the number of independents has increased on the average of .7% a year, reaching a level of nearly 40% of the electorate in 2000.

[xiii] Benjamin Barber, *Strong Democracy* (Berkeley: University of California Press, 1984).

[xiv] Woodrow Wilson, "Constitutional Government in the United States," in *The Papers of Woodrow Wilson*, ed. Arthur S. Link, 69 vols. (Princeton University Press, 1974), 18:213-214.

[xv] Ford, *The Rise and Growth of American Politics*, 322-323.

[*45] [xvi] E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in Amrerica* (Fort Worth, Indiana: Harcourt Brace Jovanovich, 1960), chapters 2,3 (emphasis in original).

[xvii] Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (New York: Norton, 1970), 133.

[xviii] Pendleton Herring, *The Politics of Democracy: American Politics in Action* (New York: Norton, 1965).

[xix] Brief Amicus Curia, Committee For Party Renewal, *Colorado Republican Federal Campaign Committee v. Federal Election*

Commission, United States Supreme Court, No. 95-489, February 16, 1996.

[xx] Hugh Heclo, "Issue Networks and the Executive Establishment," in *The New American Political System*, ed. Anthony King (Washington, D.C.: American Enterprise Institute, 1978), 124.

[xxi] Hearing Before the Committee on Rules and Administration, United States Senate, Ninety-Sixth Congress, First Session, "To Amend the Federal Election Campaign Act of 1971, as Amended, and for Other Purposes, 8-9, 34.

[xxii] Federal Election Campaign Act Amendments of 1979, House of Representatives, 96th Congress, 1st Session, Report No. 96-422, 2.

[xxiii] A. James Reichley, "Party Politics in a Federal Polity," in *Challenges to Party Government*, ed. John Kenneth White and Jerome M. Miller (Carbondale: Southern Illinois University Press, 1992), 60.

[xxiv] Declaration of Nelson W. Polsby, *Republican National Committee and Gant Redmon v. Federal Election Commission*, United States District Court for the District of Columbia, June 15, 1999.

[xxv] Thomas B. Edsall and Juliet Eliperin, "PAC Attack II: Why Some Groups are Learning to Love Campaign Finance Reform," *Washington Post*, August 18, 2002.

[xxvi] Thomas B. Edsall, "New Ways to Harness Soft Money in Works," *Washington Post*, August 25, 2002.

[xxvii] Edsall, "PAC Attack II."

[xxviii] Annenberg Public Policy Center, University of Pennsylvania, "Issue Advertising in the1999-2000 Election Cycle," 2001.

[xxix] Ray La Raja and Elizabeth Jarvis-Shean, "Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections<' Institute of Governmental Studies and Citizen's Research Foundation, Policy Brief.

[xxx] Stephen Ansolabehere and James M. Snyder, Jr., "Soft Money, Hard Money, Strong Parties," *Columbia Law Review*, vol. 100, no. 3 (April 2000), 619.

REBUTTAL DECLARATION OF SIDNEY M. MILKIS

1. I submit this declaration to respond to the expert reports submitted by political scientists on behalf of defendants in this case. In my view, those reports significantly understate the adverse impact of the BCRA on political parties and the harm to the American political system that is likely to result from its enforcement.

2. It is difficult to take seriously the unsupported suggestion by Professors Krasno and Sorauf that the BCRA, which will eliminate all non-federal funds (so-called "soft-money") raised by the national party committees (half a billion dollars during the 2000 election cycle alone) and severely restrict state party non-federal funds, "is likely to have little or no harmful impact on . . . political parties." Krasno/Sorauf Report at 2. The sudden and dramatic loss of funding on so large a scale will necessarily cause a pronounced reduction of party operations, including large-scale layoffs of the national parties' professional staff and a resulting loss of institutional expertise. It is my understanding that the RNC alone expects to lay off approximately 40 percent of its workforce as a direct consequence of the BCRA. See **[*2]** Declaration of Jay Banning, ¶ 32. It is simply not credible to suggest that any organization can sustain so dramatic a reduction in resources while suffering "little or no harmful impact."

3. In my opinion, the Democratic and Republican parties have used non-federal funds to revitalize the national character of their organizations. American political parties have never been merely federal organizations; nor have they been merely loose coalitions of state and local organizations. Although their organizations have been decentralized, the two parties have orchestrated national campaigns; and their representatives in Congress have tended to moderate sectional or local interests in supporting national policies. In the past two decades, the Democrats and Republicans have used non-

federal funds in a manner that is consistent with this traditional role – these funds have served to strengthen state and local parties, which had atrophied considerably by the end of the 1970s, and to enhance the collaboration among federal, state, and local organizations in recruiting and electing candidates as well as formulating a unified message.

4. The defendants' expert witnesses deny this, claiming that, especially since 1996, the parties have used non-federal funds to pay for expensive media advertising that has little to do with "party building" – in Professor Thomas Mann's words, as "vehicles for implementing their newly developed strategy of federal electioneering under the guise of issue advocacy" (Mann report at 22). It is my understanding, however, that nonfederal funds have been used to strengthen the most basic forms of associational activities – voter registration, get-out-the-vote activities, party communication with its members and subsidiary organizations, and promotion of the parties' ideological views. See Declaration of Jay Banning, at ¶ 28; Declaration of Thomas Josefiak, at ¶¶ 34, 36-39, 42, 48, 82-87, 91, 95. If non-federal funds have been used in ways that do not serve these essential associational services, the response, it seems, [*3] should be to address those abuses. Instead, the BCRA takes a meat cleaver approach that restricts national parties in their ability to sustain critical associational activities.

5. Moreover, the BCRA will undercut the efforts of the national parties to strengthen their state and local organizations. Because many state political party committees rely heavily on what are effectively cash subsidies from the national party committees, in the form of transfers of non-federal funds, reduced operations are likely at the state and local level as well. Professors Krasno and Sorauf indicate in their report that state parties receive 46% of their funds from non-federal transfers by the national party committees. See Krasno/Sorauf Report at 10. Again, it is exceedingly unlikely that such significant flows of money could be eliminated

without harming the recipients of those funds. State parties' ability to recover from this loss will be severely hampered by restrictions on fundraising, including fundraising assistance from national party committees and federal officeholders. Furthermore, as I indicate in my affirmative declaration for this case, the BCRA will severely restrict the ways in which parties may raise so-called "Levin Funds" – nonfederal funds that state and local parties may raise, in contributions up to $10, 000 per donor, so long as state law allows, for certain "federal election activity." For example, state parties are prohibited from engaging in joint-fundraising with other state parties in raising these funds (see Milkis affirmative declaration, at ¶44).

6. I disagree with the claim of the defendants' expert witnesses that state parties have not benefited from the injection of nonfederal funds into their organizations. My research on party organizations indicates that state parties are far from the Potemkin villages they are depicted to be in the accounts of the defendants' expert witnesses. The constitutional division between the federal and state governments has allowed state parties to use nonfederal funds to exert independence in formulating platforms, recruiting candidates, and carrying out [*4] their associational tasks. As Professor Ray La Raja has shown in his affirmative declaration for this case, state organizations are doing more than airing issue ads during the election campaign season: even in the 2000 election cycle, when media spending was high, combined spending on mobilizing voters, distributing grassroots materials, and paying the administrative expenses of the state party organization amounts to more than that spent on issue advertisements.

7. The sudden loss of funding on so large a scale will by itself be a heavy blow to the parties, but much more is at stake. The other crucial part of the story, which the defendants' political scientist experts either overlook or substantially understate, is the fact that the BCRA leaves

special interest groups largely free to continue their recent, massive use of non-federal funds to define the terms of political debate. This shift in the balance of power between broadly based parties and single-issue interest groups, a shift that favors "pressure politics" over "party politics," would in my view be one of the most significant and harmful legacies of the BCRA.

8. The view expressed by Professors Krasno and Sorauf that "a fairly straightforward model of the post-BCRA world exists in the period prior to 1995" simply ignores the ways the political environment has changed since then. See Krasno/Sorauf Report at 85. As research by the Annenberg Center for Public Policy and by Professor Magleby have clearly shown, since at least the mid-1990s, special interest groups have spent very large and growing sums of non-federal funds on issue advocacy. An Annenberg study showed that during the 2000 cycle special interests outspent parties on issue advertising by a ratio of 2 to 1. Parties have been forced to respond to this onslaught of special interest money with defensive advertising, in order to avoid having their messages drowned out in the cacophony of special interest advocacy.

[*5] 9. While BCRA imposes an absolute ban on the raising or spending of non-federal funds by national party committees, it does little to rein in interest groups. True, special interests will no longer be able to broadcast issue advertisements naming federal candidates within 30 days of a primary or 60 days of a general election (assuming that provision is not struck down). They will, however, remain entirely free to raise unlimited amounts of non-federal funds from wealthy individuals and corporations and to spend those funds on issue advertising naming candidates right up until the 31st day before a primary and the 61st day before a general election. Such advertising can serve to frame the terms of debate, all the more so because parties will be constrained in their ability effectively to respond. The DNC made effective use of just such a strategy to shape the political environment

by airing issue advertisements in 1995, long before the 1996 primary or general elections.

10. During the election season itself, when the 30-day and 60-day limits are in effect, special interest groups will remain free to spend unlimited sums on a wide range of activities that the BCRA will not regulate. These include so-called "ground war" functions, such as direct mail, telephone banks, door-to-door canvassing, and distribution of literature. According to Democratic media consultant Raymond Strother, in his experience, interest groups are known to spend large sums on television, radio, direct mail, and so-called "push polls" in the weeks before elections. Strother notes that because such activities are not subject to disclosure requirements, "[w]e had no idea where the money came from." Declaration of Raymond D. Strother, at ¶ 15. Under the BCRA, interest groups will remain free to use 100% non-federal funds for these purposes, although they may focus more of their effort late in the campaign season on direct mail, push polls, and the like.

[*6] 11. Under FECA and the BCRA, special interest membership organizations and corporations are free to use unlimited non-federal funds to pay for so-called "restricted class" campaign-related communications to their members, stockholders, executive or administrative employees, and the families of each of these groups. Unions and trade associations, and to a lesser extent corporations, already have made broad use of this exception. According to the FEC, during the 2000 election cycle, unions, interest groups, and corporations spent millions on restricted class communications. For example, the national AFL-CIO reported spending $4,220,500, in addition to amounts spent separately by AFL-CIO locals. The National Education Association reported spending $2,921,070. The National Rifle Association reported spending $1,795,198. Altogether, there were $17,757,818 in reported restricted class communications -- all paid for with 100% non-federal funds --

during the 2000 election cycle. See Declaration of Robert W. Biersack, at Table 13. It is my understanding that the actual amounts spent are likely to be higher, because not all such expenditures are required to be reported to the FEC. The use by interest groups of non-federal funds to pay for such communications, which may expressly advocate the election or defeat of specific federal candidates, will no doubt increase under the BCRA. We can expect that non-federal funds that cannot be spent on issue advertising during election seasons will be used for other forms of political communication, such as "restricted class" communications. Finally, special interest groups remain free to use non-federal funds to conduct broadcast advertising that does not refer to federal candidates but which may nonetheless be tailored to advance the agenda and reinforce the message of particular candidates.

12. As Professors Krasno and Sorauf state, "[m]oney is by nature easily transferable, completely mobile. . . . Its fluidity quickly validates the old adage that in any [*7] transactional nexus activity flows from the more regulated portions to the less regulated ones." Krasno/Sorauf Report at 90. After BCRA, the latitude enjoyed by special interest groups to raise and spend non-federal funds is, for that very reason, likely to attract non-federal funds currently directed to party committees. The emphasis that BCRA puts on federal funds ("hard money") also benefits interest group organizations like PACs and business groups, which can act as "bundlers" of individual contributions by gathering like-minded people from around the country to give the maximum amount permitted to many campaigns.

13. I am aware of no evidence suggesting that special interest groups will unilaterally disarm in the wake of the BCRA. To the contrary, these groups are likely to press their advantage once parties' ability to raise and spend non-federal funds is tightly restricted. Indeed, there is evidence that they already are making plans to do so. This past summer, the Business and Industry PAC (BIPAC), an organization supported by business and trade associations, held a strategy session of business and trade association executives. According to Gary Casey, BIPAC president and CEO, there was enthusiastic agreement at this meeting that PACs have become "the coin of the realm." Mr. Casey's view was that BCRA has restored the conditions prior to the enactment of the 1979 Amendments to FECA, which marked the beginning of efforts by Congress and the FEC to reinvigorate parties as a bulwark against growing interest group influence. "Now we are back," he predicted, "to where PACs are not only important, but good." (Thomas B. Edsall and Juliet Eilperin, *Washington Post*, August 18, 2002.)

14. As I point out in myaff irmative declaration prepared for this case, the new era of interest group domination is likely to be worse. Political activists formerly associated with the Democratic and Republican parties are reported to be creating new groups to fill the gap created by BCRA, employing provisions of the tax code that allow the creation of tax-exempt [*8] organizations that they claim are not covered by the new law. These groups include Progress for America, which champions policies of the Bush Administration, and the Progressive Donor Network, to help women's rights, environmental, and civil rights groups. As Mike Lux of the Progressive Donor Network testified in his deposition in this case, "[a] lot of givers instead of giving money to political parties, since that will be prohibited, they will be looking for other organizations that may be effective politically to give money to." See Deposition of Mike Lux, at 51:4-8. These new organizations, according to officials involved in forming them, can raise and spend "soft" money as long as they do not coordinate their efforts with the political parties or candidates. (Thomas Edsell, *Washington Post*, August 25, 2002).

15. Not only will these groups confound the desire of BCRA supporters to restrict "soft money," they also will raise and disseminate such funds with far less disclosure than

have political parties. As Professors Krasno and Sorauf point out, when nonfederal funds were channeled through parties, laws required full disclosure of both contributors and expenditures. (Krasno/Sorauf report at 85). But the new vehicles for this money are likely to be more secretive, with little or no obligation to reveal their activities. Ironically, Krasno and Sorauf suggest that without the enactment of BCRA, party organizations might have metastasized into interest groups, which would be "under their control or trusted allies, ...to avoid any disclosure of receipts and expenditures." In fact, the enactment of BCRA has encouraged, not proscribed, a proliferation of party surrogates. What's more, it is my opinion that these spin-off organizations will operate independently in the post-BCRA regulatory regime. They will do so, in part, out of consideration for the new law, which restricts collaboration with formal party committees. But legal concerns will combine with ideological considerations. For example, the Progressive Donor Network, representing liberal interests, will be unlikely to find organizational fellowship with the [*9] centrist, New Democratic Network, another organization formed to gain access to the nonfederal funds that, prior to BCRA, would have gone to political parties. BCRA thus threatens to badly fragment parties.

16. Consequently, the BCRA's substantial restriction of party financial resources and disruption of the ties that bind the national, state, and local party committees together as a cohesive political network will materially weaken the parties both in absolute terms and -- more ominously -- relative to special interest groups. Those special interest groups rarely share the parties' need to build consensus among a broad constituency. Rather, they are most often focused on a narrow set of issues, or even a single issue, and are far more likely to represent one or the other extreme end of the political spectrum than they are to represent the broad center. As Morton Keller and I explain in our affirmative declarations in this case, the consequences of reorienting our politics away from the parties and toward the

pressure politics of the special interests could be serious indeed. When parties have been weak – during the 1850s, the 1920s, and the 1970s, for example -- sectional and interest group politics have dominated the national and state capitals.

17. Professors Krasno and Sorauf thus ignore the important lessons of American political history when they claim that parties possess "natural" advantages over interest groups. (Krasno/Sorauf at 39) Parties always have had an indispensable but fragile place in the political life of the nation. American political culture, dominated by individualism, privacy, and rights, has bestowed important standing on interest groups. The power of interest groups, always significant, has become all the more so since the early part of the twentieth century. With the growth of big government amid the development of a complex commercial society, interest groups have become imposing rivals to political parties, capable of pressuring [*10] government to enact policies that benefit small constituencies at the expense of the general public. As the legislative history of the 1979 Amendments to FECA show, these changes in the campaign finance laws were made in the hope of correcting the advantage that the organic statute gave to interest group politics. As I noted in my affirmative declaration for this case, public officials, such as Morley Winograd, president of the Association of State Democratic Chairpersons, urged that steps be taken to strengthen the "politics of party, the politics of coalition and accommodation, which is our nation's best defense against the divisiveness of special interest politics" (paragraph 37). These amendments authorized state and local party committees to use funds more freely in carrying out their critical associational activities; during the 1980s and 1990s, both Democrats and Republicans made use of nonfederal funds to pump new life into their state and local organizations. BCRA risks reverting to the situation that prevailed during the 1970s, when advocacy groups dominated the councils of American government.

18. The defendants' expert witnesses deny that parties have made good use of nonfederal funds; in fact, they insist that "soft money," has corrupted or "appeared" to corrupt the political process. With regard to whether BCRA is necessary to address corruption or "the appearance of corruption," Professor Mann writes that "[m]ost importantly, soft money has led the parties to become the avenue by which elected officials and large private donors frequently come together. . . . As inducements for large contributions, policymakers grant access and provide opportunities for face-to-face discussions in intimate settings with the party's most prominent public officials." Mann Report at 29. Donors and officeholders were getting together long before "soft money" became the focus of reformers' efforts. The parties have long conducted "federal funds" (sometimes called "hard money") fundraising dinner galas and **[*11]** fundraising programs at which donors and candidates have an opportunity to meet. The RNC's "Eagles" fundraising program, for example, has long featured dinners and gatherings of the sort to which Professor Mann presumably objects, beginning in the late 1970s. These events, to which federal funds donors are invited, are, of course, perfectly permissible under both FECA and the BCRA and will likely continue after BCRA takes effect.

19. The BCRA does not purport to end such interaction between donors and officeholders. Nor does it prevent interest groups from hosting fundraisers much like those the parties conduct, featuring opportunities for wealthy donors and corporate executives to meet with federal officeholders. That interest groups use federal officeholders to raise funds, just as political parties do, is clear. See, e.g., Declaration of Joe Solmonese (EMILY's List), at ¶ 16; Declaration of Jane Gallagher (NARAL), at ¶ 20; Declaration of Debra Callahan (League of Conservation Voters), at ¶ 7; Declaration of Simon Rosenberg (New Democrat Network), at ¶ 12; Declaration of Deborah Sease (Sierra Club), at ¶ 15. If contacts between donors and officeholders somehow create

the "appearance of corruption," why is it that the BCRA leaves special interests free to be the "avenue by which elected officials and large private donors frequently come together"?

20. In my opinion as a political scientist who has long studied the role of political parties and interest groups in America, parties are far less likely than special interest groups to facilitate corruption. The worst episode of corruption in recent American history, Watergate, featured, as Professor Mann notes, attaché cases stuffed with thousands of dollars, illegal corporate contributions, and conduits to hide the original source of contributions (Mann report at 4). But Watergate did not implicate the Republican party, which the Nixon administration largely ignored; rather, it arose from the indiscretions of the Committee to Relect **[*12]** President Richard Nixon (CREEP). CREEP marked an advance in the candidate-centered campaign, which had been evolving since the Progressive era; it was set up to operate with almost complete independence from the Republican party. A principal lesson of Watergate, often missed by campaign finance reformers, is that candidates and public officials who are not held accountable to collective, public organizations like parties are more likely to engage in peculation and to abuse power.

21. The Republican and Democratic parties are large, complex associations representing very diverse coalitions of voters, adherents, and interests. Professors Krasno and Sorauf note that political parties are "big tent" organizations, dedicated to building coalitions that can win elections and govern (Krasno/Sorauf Report at 24). But they fail to acknowledge that this inclusive character of parties gives them the resources, as Henry Jones Ford noted more than a century ago in his classic account of *The Rise and Growth of American Politics*, "to interpose a party obligation between legislative marauders and their prey." Just as important, parties are *collective organizations* with long-

standing commitments to principles and platforms. American political parties have rarely been doctrinaire, to be sure; but they are not, as the defendants' expert witnesses caricature them, merely power-seeking organizations without public purposes. Indeed, writing at a time when the Republicans and Democrats relied on the "spoils system" and were far less subject to disclosure than today's parties, Ford noted that the need to win elections and govern, in the name of platforms and principles, made parties *sui generis* public institutions: "Partisanship tends to establish a connection based on an avowed public obligation, while corruption consults private and individual interests which secret themselves from view and avoid accountability" (Ford at 322-323).Weakening the parties by a massive reduction in their **[*13]** resources therefore undermines the one major American political institution that is publicly accountable and thus less prone to corruption.

22. Defendants' political science experts suggest that the appearance of corruption that they associate with large donations to parties derives from either (1) candidates' solicitation of non-federal funds for parties in a manner that effectively earmarks the funds for that candidate's use (e.g., through joint fundraising committees), or (2) candidates coordination with the party of the use of non-federal funds to benefit the candidate (e.g., the alleged coordination between the Clinton-Gore campaign and the DNC during the 1996 election cycle). (Mann Report at 19-20, 29-30). In both cases, their complaint lies with what they perceive to be lax enforcement by the Federal Election Commission of the existing rules against earmarking of funds and coordination between candidates and parties.

23. It is my understanding that under existing law, a candidate may not solicit a donation of non-federal funds that is earmarked for use in his or her campaign. If Congress believed it necessary to further clarify this point or to take protective measures to prevent such earmarking, it could have

done so without banning national party non-federal funds altogether. Concerns about the extent of coordination between candidates and parties with regard to issue advertising could likewise be addressed short of an absolute ban on national party non-federal funds. The draconian approach adopted by Congress -- an outright ban on national party non-federal funds -- was hardly necessary to address these earmarking and coordination concerns.

I declare under penalty of perjury that the foregoing is true and correct.

s/
Sidney M. Milkis

Executed on October 7, 2002

[2 PCS ER 983]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al*. Defendants.	Civil Action No.: 02-CV-0582 (CKK, KLH, RJL)
CALIFORNIA DEMOCRATIC PARTY, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al*. Defendants.	Civil Action No.: 02-CV-0875 (CKK, KLH, RJL) CONSOLIDATED ACTIONS

REBUTTAL REPORT OF
PROF. JAMES M. SNYDER, JR.
(REVISED)

CREDENTIALS

I am a Professor at the Massachusetts Institute of Technology, where I have been employed since 1992. I currently hold a joint appointment in the departments of political science and economics. I hold the Arthur and Ruth Sloan Chair in Political Science, and I am also a professor in the department of economics. From 1985-1992, I was employed as an assistant professor in the department of economics at the University of Chicago. I received my Ph.D. from the California Institute of Technology in 1985. A current version of my CV is attached to the affidavit.

[2 PCS ER 984]

My research is on American elections, campaign finance, political parties, and legislative behavior. I have published more than 45 articles, comment, and notes on these topics, most of which are in peer-reviewed professional journals. My research on campaign finance includes formal models and statistical analyses of several questions: What factors drive the distribution of campaign contributions across different types of candidates and races? What has caused the increase in campaign spending over time? What factors contribute to the accumulation of campaign "warchests"? I have also conducted several analyses attempting to identify what factors are most important in driving legislative roll call voting behavior. More recently, I have conducted several analyses attempting to estimate the relative importance of partisanship, incumbency and other factors in U.S. elections, and how and why the relative importance of different factors has changed over time.

I have not testified as an expert at trial or deposition in any other case within the last four years. I am being compensated at the rate of $325/hour for my work on this matter.

1. Campaign contributions and political influence.

In their expert reports, Donald Green, Derek Bok, Thomas Mann, Thomas Stratmann, and others argue that the current campaign finance system allows large donors to improperly influence the policymaking process. I begin by noting that there is a theoretical difficulty with this argument (point 1.1). In points 1.2-1.5, I discuss the quantitative empirical literature in political science and economics on this issue, and show that overall the evidence presented in this literature is quite weak. In point 1.6, I compare political contributions with other activities. Finally, in point 1.7, I consider the role political *parties* might play in mediating the relationship between individual politicians and interest groups.

1.1. If large campaign contributions by interest groups and individuals are "buying" or "renting" public policies, then why isn't there *more* money in politics?

Gordon Tullock (1972) made this point 30 years ago, but it is just as relevant today. Tullock and others used the term "rent-seeking" to describe the actions taken by economic interest groups seeking to influence government policies for their own benefits. The potential gain from such rent-seeking behavior is enormous - hundreds of billions of dollars in federal, state and local budgets, licensing, trade restrictions, price supports, and regulations that transfer billions more from one group to another. And the purported rates of return are equally enormous - groups that participate are said to reap hundreds or even thousands of dollars per dollar contributed to politics (see Ansolabehere, *et al.*, 2002). If so, then why don't interest groups give even *more* money for even *more* favorable treatment? And why don't *more* special interests enter this lucrative "market" for policy?

Soft money contributions are uncapped, so billions *could* flow there if it was worthwhile. And although hard money donations from PACs are capped, less than 5% of all such PAC [2 PCS ER 985] contributions to House and Senate candidates are at or near the $10,000 limit.[1] The average PAC contribution is $1,700. Corporations give an average

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[1] The limit is $5,000 for the primary election and $5,000 for the general election, so for most candidates the effective limit during each 2-year election cycle is $10,000.

contribution of approximately $1,400 to legislators; trade associations and membership groups give average contributions of approximately $1,700; and, labor unions give average contributions of $2,200. Viewed from the perspective of rent-seeking legislature, these sums are very small. The following hypothetical calculation makes the point: There were about 2,600 active corporate, labor, and trade association PACs in 1998, and about 470 congressional races. If each active PAC gave $10,000 to one candidate in each race, total contributions would be $10.8 billion. This is more than 50 times as much as these PACs actually contributed (about $200 million). Why are they not doing this?

Not only do existing corporate PACs give well below the legal limits, most corporations do not have a PAC at all. Even among Fortune 500 companies - all of which have revenues in excess of $3 billion a year, and all of which are affected by government policies - roughly 40% do not have a PAC. And about one-third of all industries have *no* firms with PACs (Grier, Munger and Roberts, 1994, p. 916, Table 1). If policy is so easy to buy, then why are these firms inactive?

In fact, most campaign contributions come, ultimately, from individuals. Such contributions constituted about 80% of the combined total hard and soft money raised for the 2000 federal elections.[2]

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[2] Ultimately, even PAC contributions to candidates come from funds the PACs raise from individual donors. Candidate and party committees raised nearly $3 billion during the 1999-2000 election cycle. About $620 million came from the public presidential fund, or directly from the treasuries of corporations, labor unions, and associations in soft-money donations to the parties. The remainder, nearly $2.4 billion, was from individuals. This includes contributions from candidates themselves. (See Ansolabehere, *et al.*, 2002, for details.)

Moreover, most of the "marginal" dollars raised by congressional campaigns are also from individuals. Consider, for example, the difference between U.S. senate campaigns in small states and large states. Table 1 below divides the states into three groups - small, medium, and large - based on the number of congressional districts in each, and summarized contributions for the 1997-98 election cycle.[3]

Table 1: Campaign Contribution by State Size

	Obs.	Avg. Total Receipts	Avg. Indiv. Receipts	Avg. PAC Receipts
Small states (1-6 districts)	58	1,450,000	961,000	329,000
Medium states (7-12 districts)	34	2,250,000	1,754,000	329,000
Large states (19-52 districts)	29	4,381,000	3,346,000	333,000
All states	121	2,377,000	1,755,000	329,000

[2 PCS ER 986]

The table shows clearly that the "demand" for campaign funds is much greater in large states than in small - most likely because there are many more voters to reach in large states. The "supply" of campaign funds *from individuals* is also much larger in large states - most likely because there are many more people in these states. But the supply of contributions from PACs is essentially constant. That is, even though senate candidates running in large states raise and spend far more than candidates in small states, virtually all of the difference in

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[3] All senate candidates with $10,000 or more in total receipts are included. Individual receipts include contributions by candidates to their own campaigns. PAC receipts include all receipts from corporate, labor, trade association, and cooperative PACs ("nonconnected" PACs excluded).

spending is accounted for by individual donations rather than PAC donations. The "marginal" dollar demanded is raised from individuals, not PACs.[4]

Table 2 shows the difference between lopsided and close races for U.S. house seats, where close races are defined as those where the winning margin was under 65%.

Table 2: Campaign Contributions by Winning Margin

	Obs.	Avg. Total Receipts	Avg. Indiv. Receipts	Avg. PAC Receipts
Lopsided races (margin > 65%)	323	446,000	234,000	166,000
Close races (margin < 65%)	374	754,000	447,000	205,000
All races	697	611,000	348,000	187,000

Not surprisingly, the "demand" for campaign funds is greater in close races than lopsided races. And, the "supply" of campaign funds *from individuals* is much larger in close races - nearly double the amount in lopsided races. PAC contributions are also larger in close races than in lopsided races. However, this difference is smaller than the difference for individual contributions, both in absolute and percentage terms. Thus, candidates in lopsided races raised about 37% of their money from PACs, while candidates in close races raised only about 27% from PACs. Again, most of the "marginal" dollars are from individuals rather than PACs - of the $308,000 additional dollars raised by candidates in close races (on average), $213,000, or 70%, came from individuals.[5]

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[4] See Snyder (1993) and Ansolabehere and Snyder (1999) for more detailed analyses.

[5] Party contributions and coordinated expenditures are also much greater in close races - the average for the lopsided races in Table 2 was just

Why does it matter whether campaign donations come from individuals or PACs? First, most individual contributions are small, almost surely too small to be a significant source of influence. For example, in the 1998 congressional races, candidates raised a total of $509 million from individuals and personal funds - of this, only $171 million (about 33%) came from individuals in amounts greater than $750. A typical incumbent raised $556,000 from individuals, so each $1,000 contribution only represents 0.18% of the total raised. This is hardly enough to believe that an incumbent would feel a "debt" to the contributor.

Second, virtually all of the theoretical models of rent-seeking activity that imply that a *small* amount of campaign contributions can "buy" a *large* amount in "policy favors" – *i.e.*, that the rate of return on contributions can be very large – make strong assumptions about what candidates can [2 PCS ER 987] and cannot do.[6] In particular, these models assume that candidates do *not* to have access to a large pool of individual donations, but instead rely heavily on interest group donations at the margin. The tables above suggest that this assumption is unrealistic, and therefore the conclusions of these models may not be empirically relevant. That is, since senators and representatives rely so much on *individual* contributions, both on average and at the margin, it seems unlikely that they would risk scandal by "selling" public policies worth hundreds of billions of dollars for relatively small amounts in interest group contributions.

Finally, what *does* drive the overall level of contributions? Ansolabehere, *et al.* (2002) argue that total national income does. As income rises, contributions rise proportionately. They show that this holds both at the national

level and the state level. For example, total campaign contributions in federal elections over the four-year period 1995-1998 were almost exactly the same fraction of GDP as they were over the period 1979-1982. Regression analyses show that per-capita campaign spending in gubernatorial races over the period 1976-2000 was strongly correlated with state per-capital income and electoral competition. Moreover, after controlling for income and electoral competition, campaign spending was *not* significantly related to per-capita state government spending. If rent-seeking was the main factor driving contributions, then government spending should have been a significant predictor of contribution levels (the greater the level of government spending, the more rents there are to seek). It was not.

1.2. Campaign contributions and roll-call voting.

Almost all quantitative studies that attempt to link campaign contributions and legislative actions focus on roll-call votes. Smith (1995), Baumgartner and Leech (1998), and Ansolabehere, *et al.* (2002) survey this literature in detail – about three dozen published studies in all. Ansolabehere, *et al*, summarize this literature as follows: "In three out of four instances, campaign contributions had no statistically significant effects on legislation or had the wrong sign (suggesting that more contributions lead to less support). Also, given the difficulty of publishing 'non-results' in academic journals, we suspect that the true incidence of papers written showing campaign contributions influence votes is even smaller" (Ansolabehere, *et al.*, 2002, p. 17). Smith concludes as follows: "While our understanding of interest group influence is better than it was a decade ago, it nevertheless remains quite tentative. This is certainly the case when it comes to understanding what role interest groups play in setting agendas, formulating policy alternatives, or in persuading,

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$3,200, while the average for the close races was $34,900.

[6] See, for example, Grossman and Helpman (2001) and Helpman and Persson (2001).

pressuring, and mobilizing the members of congressional subcommittees or committees. In these areas, there are only a smattering of studies, and so it's readily apparent that what we know is more speculative than definitive. But this is also true about our understanding of the role of interest groups in more heavily investigated areas - such as in what effects campaign contributions or lobbying activities have on roll-call voting on the House and Senate floors - where the finds are both conflicting and methodologically suspect, and thus ultimately inconclusive" (Smith, 1995, p. 122-123).

Virtually all analyses examining the impact of contributions on roll-call voting use some form of regression analysis - either a linear regression model, or a non-linear regression model, such as [2 PCS ER 988] probit or logit regression. Regression techniques allow researchers to control for other factors believed to influence roll-call voting behavior - such as party affiliation, constituent interests, and (if good measures can be found) the personal ideology of the legislator - and thereby isolate the independent effects of campaign contributions, at least in principle. The models are usually estimated via ordinary least squares (in the case of linear regression) or maximum likelihood (in the case of probit and logit regression).

As all three surveys discuss, however, estimating the independent effect of campaign contributions is an especially difficult problem, and single-equation regression models estimated via ordinary least squares or maximum likelihood methods are almost surely inadequate. There are two main reasons. First, campaign contributions by interest groups are not given out randomly. Rather, most groups tend to give to legislators that are friendly to their cause, or to candidates in tight races where the money is most likely to be effective, or, in some cases, to legislators in powerful positions. Second, it is extremely difficult to measure certain key variables. Two variables are especially problematic: the predominant view in each legislator's constituency on the issue involved in the roll-call (*e.g.*, how many people in the district favor a particular banking regulation, and how many oppose it?), and each legislator's personal views on the issue. Failure to deal adequately with these problems leads to two well-known sources of estimation bias: simultaneous-equation bias and omitted variable bias. And, most studies in the literature fail to deal adequately with these problems.

Donald Green and Thomas Stratmann acknowledge these weaknesses in their reports. Green puts it as follows: "The aforementioned studies are suggestive, but they suffer from a basic methodological limitation. Correlations between contributions and legislative behavior cannot disentangle whether contributors reward fealty, create it, or merely reflect ideological affinity between legislators and their financial backers" (p. 24). Stratmann puts it as follows: "Any research examining the effects of campaign contributions on voting behavior, and wanting to establish a causal effect going from contributions to voting behavior, has to recognize that contributors may give to their friends, and thus that a vote favoring a contributor may not indicate that the vote has been 'bought'" (point 16).

A standard technique for addressing simultaneous-equation bias is instrumental variables (two-stage least squares being a special case). However, as Ansolabehere, *et al.* (2002) note, only one-third of the studies they surveyed employ instrumental variables to deal with the problem of simultaneous-equation bias. These studies are no more likely to find statistically significant effects than the studies that fail to deal with the issue; in fact, overall they are slightly less likely to find significant effects.

Solving the second problem is equally difficult. The problem is that researchers typically cannot find adequate measures of how legislators' would vote in the absence of contributions. Moreover, because groups tend to give contributions to legislators that are sympathetic to their views (see the quotes from Green and Stratmann above), omitting a good measure of legislators' *ex ante* attitudes toward the group will result in estimates that are biased towards the conclusion that contributions buy roll-call votes.

A standard technique for dealing with omitted variable bias is fixed-effects, if the researcher has access to data with a panel structure. In some cases, instrumental variables might also be used [2 PCS ER 989] to reduce or eliminate omitted variable bias. Using legislator-specific fixed effects probably provides the most compelling estimates, because this technique controls for each legislator's own (average) preference in addition to district preferences. There is strong evidence that legislators are only moderately constrained by their constituencies when casting roll-call votes, so controlling only for district preferences is not sufficient.[7] To my knowledge, there are only three papers that use member-specific fixed effects, and all are quite recent (Bronars and Lott, 1997; Stratmann, 2002; and Ansolabehere, *et al.*, 2002).[8]

Stratmann (2002) finds that contributions had a statistically significant impact on roll-call voting on the repeal of the Glass Steagall Act. On the other hand, Bronars and Lott (1997) find that campaign contributions had *no significant effects* on members' voting on several different issues. Similarly, Ansolabehere, *et al.* (2002) study six interest group

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[7] See, for example, Kingdon (1989), Poole and Rosenthal (1984, 1997), Levitt (1996), and Ansolabehere, *et al.* (2001).

[8] In his report, Stratmann claims that his 2002 study was "the first study of its kind that examines whether changes in contributions over time lead to changes in legislators' voting" (point 22). He was evidently unaware of the Bronars and Lott (1997) paper. That study, entitled "Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?" was published five years ago in *The Journal of Law and Economics* (the leading journal on law and economics).

roll-call scores, and find *no significant effects* of contributions on any of the scores (the groups are the Chamber of Commerce of the U.S., the AFL-CIO, the American Security Council, the Consumer Federation of America, the League of Conservation Voters, and the National Education Association). Thus, even in these careful studies the evidence that contributions influence roll-call voting behavior is quite mixed. Two out of three studies fail to find significant effects. Moreover, counting issues rather than papers, there is evidence that contributions had a statistically significant effect on roll-call voting only on one issue out of six (Stratmann's paper studied only one issue, while the other papers each studied several). This is even lower that the ratio found in the full set of more than 36 studies (see above).

1.3. Campaign contributions and legislative effort.

Critics of the "non-findings" discussed at 1.2 above often point out that roll-call votes are highly visible acts. They argue that although legislators are unlikely to risk selling their votes for sums as small as $1,000 or $2,000, they might supply "effort" for contributions earlier in the legislative process when their actions are more hidden. There is basically one careful study of this idea (Hall and Wayman, 1990), which is cited time and again in the literature, and which Donald Green cites this paper in his report. The paper studies three cases: the 1982 Dairy Stabilization Act, the 1982 Job Training Partnership Act, and the 1984 Natural Gas Marketing Policy Act, and the dependent variable for each case is a measure of the "effort" exerted by each legislator on the relevant House committee. In fact, this study suffers from three severe methodological flaws. The three flaws are: (1) treating variables as instruments that are almost surely invalid instruments, (2) improperly estimating a regression with non-linear functions of an endogenous variable, and (3) running regressions with interacted variables but omitting the variables that measure the "main effects." [2 PCS ER 990]

First, Hall and Wayman (1990) use *party affiliation* and *group roll-call voting score* as instrumental variables.[9] These are *not* valid instruments, because they cannot be excluded from the second stage equation. Instruments are variables that *directly* affect the endogenous variable in the equation of interest, but do *not* directly affect the dependent variable in that equation. In the case of Hall and Wayman's study, party affiliation is a valid instrument only if a member's party affiliation is *not* a potentially significant predictor of how much effort a representative will devote towards legislation on issues such as job-training programs or business regulation. Similarly, the voting score is a valid instrument only if a member's roll-call support score for a group is *not* a potentially significant predictor of how much effort a representative will devote to helping or opposing legislation favoring that group. We must believe instead that a member's roll-call voting score *only* affects how much money the member receives from the group, not how hard he or she works for the group in committee. These are wholly implausible assumptions. As a result, it is quite likely that the estimates they present in their paper are biased, and, moreover, biased toward finding a significant effect of campaign contributions on behavior even when no such effect exists.

The literature that pays attention to simultaneous-equation bias uses two types of variables as instruments: the degree of electoral competition, and measures of members'

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[9] See footnote 18 of their paper, where they state: "In estimating the first state, we adapted the contributions model from the substantial literature on the allocation strategies of national PACs, ... including three variables that qualified as instruments: party, the relevant voting index, and the marginality of the district."

relative "power" inside the House (see Chappell, 1981, 1982; Welch, 1982; Kau, Keenan and Rubin, 1982; Grenzke, 1989; Stratmann, 1991, 1995; and Ansolabehere, *et al.*, 2002). The idea behind the first type of variable is that a close race increases an incumbent's demand for PAC contributions, producing an exogenous shift in contributions via in increase in the propensity to "sell" services, including roll-call votes. The idea behind the second variable is that groups give more to powerful members because their support is especially valuable. *None* of the studies mentioned above use party affiliation or roll-call voting scores as instruments.

Second, the main regressions shown in Hall and Wayman's (1990) paper are what Hausman (1983), Wooldridge (2002) and others call the "forbidden regression." (Note, the term forbidden is probably used to as a special warning to students, because although the procedure is intuitive and may appear reasonable, it leads to inconsistent, and therefore likely biased, estimates.) The problem arises when the researcher estimates non-linear simultaneous equation models. Hausman (1983, footnote 60) summarizes it as follows: "It is important to do true instrumental variable estimation here, not 'repeated least squares.' True IV estimation leads to consistent estimates while the analogue of 2SLS is often inconsistent. Inconsistency occurs when a non-linear function of a predicted endogenous variable is used in the second stage of the estimation procedure. At MIT this latter estimator is called the 'forbidden regression'." Wooldridge (2002, p. 2[illegible]5-236) also discusses the problem: "Trying to mimic 2SLS or 3SLS by substituting fitted values for some of the endogenous variables inside the nonlinear functions is usually a mistake: neither the conditional expectation nor the linear projection operator passes through nonlinear functions, and so such attempts rarely produce consistent estimators in nonlinear systems... This two-step procedure is *not* the same ... as 2SLS, and, except in special circumstances, it does *not* produce consistent estimates." (He gives a detailed example on page 236 of his book.) [2 PCS ER 991]

Hall and Wayman's analysis suffers from exactly this problem. Their model is non-linear because they interact the endogenous variable – campaign contributions – with measures of likely supporters and likely opponents.[10] They then use *exactly* the procedure that econometricians advise against. That is, they use non-linear functions of the predicted endogenous variable (the predicted endogenous variable multiplied by the "likely supporter" and "likely opponent variables") in the second stage regressions – this is the "forbidden regression." This means the estimates reported in the main tables in their paper are almost surely inconsistent, and therefore almost surely biased.

Finally, although interacted variables are included in the main regression equations, the variables measuring the "main effects" are omitted. That is, the regression includes the interaction variables *contributions ´ likely supporter* and *contributions ´ likely opponent*, but excludes the "main" variables *contributions*, *likely supporter*, and *likely opponent*. Omitting these terms can easily lead to improper inferences. Williams summarizes the situation as follows: "In general, models with interaction effects should also include the main effects of the variables that were used to compute the interaction terms, even if these main effects are not significant.

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[10] Hall and Wayman (1990) describe the construction of these interaction variables on p. 808: "Given that we expect very different effects of contributions on the behavior of likely supporters and opponents, however, the model requires two separate interactions: *Money to supporters* is the product of contributions and the member's distance from the mean NFU score where the members' rating is greater than the mean; the money-support term is zero otherwise. *Money to opponents* is the product of contributions and the member's distance from the mean NFU score, where the member's rating is less than the mean; the money-opposition term is zero otherwise."

Otherwise, main effects and interaction effects can get confounded. Further, it can be shown that, if main effects are not included, arbitrary changes in the zero point of the original variables can result in important changes in the apparent effects of the interaction terms."[11]

Overall, then, Hall and Wayman's (1990) study has three notable flaws. The main estimates presented in their paper are therefore almost surely quite biased, and the conclusions they draw from these estimates are not justified. Since the Hall and Wayman study is the only quantitative study attempting to measure the influence of campaign contributions on "effort" in committee proceedings and markup, there is essentially *no* quantitative evidence that campaign contributions influence legislators' behavior in committee.

1.4. Campaign contributions and policy outcomes.

Ultimately, if campaign contributions are "buying policy" then we should see some effects on actual policy outcomes. In his expert report, Bok describes what he sees as three shortcomings of public policy in the U.S. relative to other leading democracies: (i) legislation in the U.S. is "comparatively incoherent," (ii) the U.S. regulatory system is "unusually contentious, expensive and time consuming," and (iii) U.S. "laws are consistently less favorable to those of poor and working poor people." He then asserts that: "Our campaign finance laws contribute significantly to all three of these shortcomings." [2 PCS ER 992]

This is a bold assertion, but I know of no studies that make a convincing case that it is true. In fact, I know of no systematic cross-national studies published the academic campaign finance literature that even attempt to determine whether or not it is true. I know of only two published study of U.S. policy making that incorporates PAC contributions. Hansen and Park (1995) study antidumping and countervailing duty decisions by the International Trade Administration, and find that total PAC contributions by an industry typically have *no* effect on the industry's chances of obtaining a favorable decision. Golbe and Maggi (1999) study the pattern of trade protection, and estimate that the implicit weight the government places on campaign contributions is tiny compared to the implicit weight it places on social welfare.

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[11] Quoted in course material by Richard Williams, found at the following URL: http://www.nd.edu/~rwilliam/xsoc593/index.html.

I conducted a modest analysis at the state level, and also failed to find any evidence that campaign contributions or campaign finance laws affect public policy across U.S. states. I wanted to examine all three of Bok's criticisms of U.S. policy, but was only able to find a good measure of item (iii) – laws regarding the "poor and working poor people." The measure is the Erikson, *et al.* (1993) index of state policy "liberalism" circa 1980, which I call the *State Policy Liberalism Index*. It is constructed from seven policy measures, most of which include a clear element of redistribution from the well-off to the less-well-off. The seven measures are: (1) state educational expenditures per pupil, (2) scope of eligibility for Medicaid assistance, (3) scope of eligibility for AFDC, (4) a scale of state tax progressivity, (5) a scale of state consumer legislation, (6) a scale of criminal justice restrictions, and (7) state support of the Equal Rights Amendment.[12]

I merged data from three careful studies – Erikson, *et al.* (1993), Beyle and Jensen, and Malbin and Gais (1998) – and conducted the following straightforward regression analysis.

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[12] See Erikson, *et al.* (1993), pp. 75-77. The scores are taken directly from Table 4.2 on p. 77. I include all states Erikson *et al.* included in their regression analyses, so Alaska, Hawaii and Nevada are dropped.

The dependent variable is the policy liberalism index described in the previous paragraph. One key control variables is *State Opinion Liberalism*, also taken from Erikson, *et al.* (1993).[13] This variable is based on public opinion polls and Erikson, *et al.* (1993) find it to be an extremely important predictor of state policy liberalism in their analyses. Another control variable is *Per Capita Income*, which I obtained from the Bureau of Economic Analysis.

The main independent variables of interest are *Total Campaign Spending Per Capita*, and *Contribution Limit Index*. The first of these is from Beyle and Jensen. It is the average per-capita campaign spending in gubernatorial races (total spending by all candidates in race) held during the period 1976-1984. I chose the period because it straddles 1980. The second of these is an index of how stringent each state's campaign finance laws were in 1980, and is from Malbin and Gais (1998). The variable is defined as follows: Contribution Limit Index = 2 if a state limits contributions from individuals, PACs, and parties; Contribution Limit Index = 1 if a state limits contributions from some source but not all three; and Contribution Limit Index = 0 if state has no limits on contributions from any of the sources.[14] I also constructed two dummy variables from the campaign finance laws: *Individual and/or PAC Contribution Limit*, which is 1 if a state limited individual contributions [2 PCS ER 993] and/or PAC contributions but not party contributions and 0 otherwise; and *Individual, PAC, and Party Contribution Limit*, which is 1 if a state limited all three types of contributions and 0 otherwise.[15]

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[13] See Erikson, *et al.* (1993), pp. 16-19. The scores are taken directly from Table 2.2 on p. 16.

[14] See Malbin and Gais (1998), pp 17-19. The index is calculated directly from Tables 2-2, 2-3 and 2-4. I experimented with a number of different indexes – *e.g.*, Contribution Limit Index = 1 if a state limits contributions from individuals, PACs, and parties; and Contribution Limit Index = 0 otherwise – and the results were all similar to those shown in Table 3.

Table 3: Effect of Campaign Spending and Campaign Finance Laws on State Policy Liberalism

Dependent Variable = State Policy Liberalism Index

Total Campaign Spending Per Capita	-0.07 (-0.80)	–	–
Contribution Limit Index	–	0.05 (0.68)	–
Individual and/or PAC Contribution Limit	–	–	0.01 (0.12)
Individual, PAC, and Party Contribution Limit	–	–	0.06 (0.77)
State Opinion Liberalism	0.64** (6.01)	0.62** (5.80)	0.61** (5.70)
Per Capita Income	0.26* (2.40)	0.30** (2.79)	0.32** (2.91)
R-square	.73	.73	.73
Number of observations	47	47	47

All coefficients are standardized. t-statistics in parentheses.
* = statistically significant at the .05 level
** = statistically significant at the .01 level

As the table shows, the estimated effect of total campaign spending on the policy liberalism index is small and statistically insignificant.[16] The same is true for the campaign contribution limit index. The effects of the separate campaign finance law variables are also small and insignificant. In particular, there is no evidence that laws restricting political party contributions in addition to other types of contributions have any effect on overall policy liberalism.

Two examples reinforce the point. California and Oregon had two of the least restrictive campaign finance regulation systems in 1980, but the 3rd and 4th highest policy liberalism indexes, respectively. (California also had the 2nd highest level of per-capita welfare spending of any state.) Thus, these states exhibit exactly the *opposite* of the pattern Bok asserts: very lenient campaign finance regulations, but relatively favorable public policies for the poor and working poor.

To summarize, there are almost no quantitative studies attempting to estimate the effect of campaign contributions or campaign finance laws on actual *policy outputs* (as opposed to roll-call voting or legislative effort). The two published studies noted above on federal trade protection find [2 PCS ER 994] insignificant and/or tiny effects of campaign contributions on trade policies. My state-level analysis finds *no* significant effects of campaign contributions or campaign laws on overall state policy liberalism.

1.5. Parties and political influence.

Most of the discussion above is about the influence interest group campaign contributions might or might not have on individual candidates or politicians. One exception is section 1.4, where I discuss the aggregate impact of contributions and campaign finance regulations on policy outcomes. I did not propose a precise mechanism by which contributions or campaign finance laws might affect policy, so it is possible that the mechanism could involve political parties. Since the estimated effects were small and statistically insignificant, however, the point is moot – overall, policy does not appear to be affected either by the aggregate level of campaign contributions or by the presence or absence of laws restricting such contributions. Another exception is section 1.5, where I point out that since parties are *collections* of politicians, activists, and supporters that have different views on many issues – *i.e.*, the parties have relatively "big tents" – it is not surprising to see the same interest group, or even the same individual, give to candidates from both parties or committees from both parties.

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[15] All states that limited party contributions also had limits on individual and PAC contributions.

[16] The raw correlations are also low: the correlation between the policy liberalism index and per capita campaign spending is just -.16, and the correlation between policy liberalism and the contribution limit index is just .05 (neither are statistically significant). Taking natural of the independent variables and/or dependent variables does not change the basic results or conclusions.

There are many remaining questions regarding the role of parties. Two particularly important questions are: (1) Do political parties help "insulate" candidates and politicians from interest group pressures? (2) Do parties themselves act as "umbrella associations" for interest group money – *e.g.*, by raising money from groups and then transferring it to party members who are "loyal" to the party leadership on the issues of concern to these groups?

With respect to (1), there is some evidence from state-level research that interest groups tend to be stronger where parties are weaker. Morehouse (1981) and Zeigler (1983) classified states in terms of the strength of their political parties and the strength of their pressure groups. They both found a strong *negative* correlation between the two measures.[17] States with weaker parties tended to have stronger interest groups. There is also at least one good theoretical reason to suspect that the answer to question (1) is "Yes." Inside the legislature, strong and active party caucuses make *collective* decisions about what policies to support, and the process of collective deliberation is likely to reduce the influence of any one interest

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[17] See Morehouse (1981), p. 117, Table 3-4, and the discussion on pp. 116-118. Also see Zeigler (1983), p. 116, Table 4.7.

group. It is possible that this collective decision- making process could be emulated by a more decentralized system where, say, each committee acts as a miniature deliberative body. However, such a system is likely to be much worse than party caucuses at making *trade-offs* across issues, and some committees in the system with narrow jurisdictions would be prone to "capture" by particular interest groups.

With respect to (2), I am aware of three relevant studies. Leyden and Borrelli (1990, 1994), and Cantor and Herrnson (1997) study the relationship between party contributions to candidates and roll-call-based measures of party "loyalty." Leyden and Borrelli (1990) find a positive correlation between party contributions and loyalty for Democrats, but not for Republicans. Cantor and [2 PCS ER 995] Herrnson (1997) find *no* significant relationships for either party. They summarize their regression results as follows: "past party unity has no significant effect on the distribution of party assistance in campaign fundraising." Instead, party contributions are driven almost exclusively by how close a candidate's race is. Finally, Leyden and Borrelli (1994) claim to find some evidence that party contributions actually influence members' roll-call voting. However, this paper does not adequately control for the "baseline" degree of loyalty, that is, how members would have voted in the absence of party contributions. That is, the paper suffers from the same two problems that plague the vast majority of studies trying to estimate the independent effect of interest group contributions on roll-call voting (recall 1.2 above).

2. Voter Turnout

2.1. Has the increase in "impersonal" voter contact reduced turnout?

In his report, Donald Green argues that parties have shifted away from face-to-face communication toward media-based communication, and this has led to a decline in turnout: "I have argued elsewhere that this decline in personal contact between campaigns and voters, as distinct from impersonal contacts by way of mass media, mail, or commercial phone banks – accounts for the long-term decline in voter turnout that the U.S. experienced since the 1960s" (p. 35). Jonathan Krasno and Frank Sorauf also argue that turnout has declined in recent years, even as soft money has risen, and this shows that soft money has not helped mobilize voters or build parties (p. 17).

There are two problems with these arguments. First, in a recent paper published in the *American Political Science Review*, McDonald and Popkin (2001) argue convincingly that turnout has *not* declined over the past 30 years. Rather, the population of eligible voters has shrunk, due to increases in the relative proportion of non-citizens, felons, and other disenfranchised groups. Measured as a fraction of the eligible population, turnout in the 2000 presidential election was almost exactly the same as it was in the 1976 election, 56.9% vs. 57.1%. McDonald and Popkin also argue that turnout in the 1950s and 1960s was "quite unusual for the period after the weakening of political machines." They show that turnout in 1948 (as a percentage of the eligible population) was the *lowest* of all post-war elections, and note that Burnham (1987) also finds low turnout levels over the period 1920-1948: "[Burham's] results show that voter participation through 1948 is strikingly similar to the turnout rate after 1972" (McDonald and Popkin, 2001, p. 967). This suggests either that the level of "personal contact" has little to do with turnout, or that there was little personal contact in campaigning even during the pre-war period.

Second, in a series of field experiments Green and Gerber (2000, 2001a, 2002b) show that even "impersonal" contacts via telephone canvassing and direct mail can

significantly increase turnout.[18] In two of the studies, they found that phone calls had *no* significant effect on turnout ("1998 Connecticut Congressional & State Elections, Study I" in West Haven and "1998 Connecticut Congressional & State Elections, Study II" in New Haven). However, in a third study they found [2 PCS ER 996] that phone canvassing had an average treatment effect of 5 percentage points ("2000 Multi-City Study" on youth voter mobilization). That is, on average, each 100 phone calls increased turnout by 5 votes. Gerber and Green point out that the different results may be due to differences in the nature of the calls – the first two studies used commercial callers, while the third used young callers and an informal, "chatty" style. Another possibility is that the first two studies had methodological flaws. Imai (2002) argues that there was incomplete randomization of the treatment assignment in the Gerber and Green New Haven study ("1998 Connecticut Congressional & State Elections, Study II" in New Haven), as well as miscoding of the data, leading to improper inferences. He reanalyzes the data and finds that telephone canvassing increased turnout by 5 percent.

Non-partisan direct mail also had statistically significant turnout effects. Gerber and Green (2000) estimate that direct mail raises turnout by 0.6 percentage points per mailing, at least for the first 3 mailings ("1998 Connecticut Congressional & State Elections" in New Haven). Moreover, based on his reanalysis of their data, Imai (2002) argues that the effect of three mailings is even larger than Gerber and Green's estimate.[19]

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[18] The URL's of the Yale Civic Engagement Project and the Center for Information & Research on Civic Learning and Engagement summarize the findings from this work. For example, see URL: http://www.puaf.umd.edu/CIRCLE/whats_new/whatsnew_outside7.htm, and linked pages.

[19] On the other hand, in two others studies they found that partisan mailings had no statistically significant effect on turnout ("1999

Gerber and Green (2000) find that door-to-door canvassing has large effects on voter turnout – an average treatment effect of about 9-10 percentage points, depending on the study. Based on some straightforward calculations, they then argue that door-to-door canvassing is by far the most cost-effective way of producing turnout. These calculations are incorrect, however, if the actual average treatment effect of phone canvassing is 5 percentage points – which is what Gerber and Green found in their youth studies, and what Imai calculates after reanalyzing the data from Gerber and Green's West Haven and New Haven Studies. In fact, phone canvassing might be just as effective on a per-dollar basis. For example, the California Democratic Party estimates that they pay about $9 per hour for door-to-door canvassers and about $11 per hour for phone canvassers. (These comparative costs do not reflect additional costs that increase the over-all expense of door-to-door canvassing such as food, transportation, the cost of literature, higher training and supervision costs, and other liability-related costs.) Party officials estimate that door-to-door canvassers can contact about 8 households per hour and phone canvassers can contact about 12 households per hour, and experienced phone canvassers can contact 20 households per hour. Multiplying these figures, door-to-door canvassing produces an average of 8.0 votes per $100, while phone canvassing produces an average of 5.5 votes per $100, or even 9.1 votes per $100 for experienced phone canvassers. Even assuming that these numbers can vary somewhat depending upon variables such as time, place and the nature of the activity, it is apparent that the use of phone canvassers, particularly experienced phone canvassers, may be more cost effective (or as cost effective) as door-to-door canvassing in some circumstances. [2 PCS ER 997]

Thus, it is not obvious that the increased use of relatively "impersonal" contacts over the phone rather than "personal" contacts via door-to-door canvassing has led to a decline in voter turnout. Face-to-face contacts might be more effective on a *per contact* basis, but less effective on a *per dollar* basis. Moreover, if parties are using their resources efficiently, then we would hardly expect them to spend millions of dollars on phone calls if these contacts were clearly ineffective.

2.2. Would reducing party funds affect turnout?

What do the calculations in the previous paragraph imply about the possible effects of BCRA on turnout? Since political parties tend to conduct most of the get-out-the-vote activities that are done in the U.S., reducing the money available to parties could have a substantial impact on turnout.

In his report, Ray LaRaja estimates that each additional $100 in soft money results in an average of $8 spent ~~on~~ mobilization activities by Republican party committees and $22 by Democratic committees. Ansolabehere and Snyder (2002) obtained roughly similar figures ($16-$20) in their analysis of three states over the period 1992-1996. The Republican and Democratic parties each raised about $250 million in soft money in 2000. Using LaRaja's estimates, if two-thirds of this money was eliminated, then total spending on get-out-the-vote would fall by about $50 million.[20] If *all* of this money were eliminated, then total spending on get-out-the-vote would fall by about $75million.[21]

Suppose that each $100 in get-out-the-vote spending

New Jersey State Assembly Race" and "1999 Connecticut Mayoral Campaign"). Unfortunately, since these were both odd-year elections, we cannot tell whether the divergent findings are due to the partisan tone of the messages or to special difficulties in mobilizing voters when there are no federal offices or statewide offices on the ballot.

[20] (.08+ 22) ´ (2/3) ´ 250 million = $50 million.

[21] (.08+ 22) ´ 250 million = $75 million.

produces 7 votes. This would seem to be a reasonable figure given the calculations in 2.1 above. In fact, it might even be too low since the calculations are based on the assumption that contacting is done *randomly*. Get-out-the-vote activities could even have a greater impact if the various types of contacts are made in an efficient manner.

If parties reduced their spending on get-out-the-vote by $50 million, then total turnout in the U.S. would drop by 3.5 million votes, or about 3.33% of the total vote in the 2000 presidential elections.[22] If they reduced their spending on get-out-the-vote by $75 million, then total turnout in the U.S. would drop by 5.25 million votes, or about 5% of the total vote in the 2000 presidential elections.

Dated: October 11, 2002

/s/
James M. Snyder, Jr.

[2 PCS ER 998]

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[22] (7/100) ´ 50 million = 3.5 million votes. Total turnout in 2000 was about 105 million votes.

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[caption omitted]

[end of page 2]

ORDER CONSOLIDATING CASES

(April __ , 2002)

These cases come before the Court upon a suggestion to consolidate the three original cases by Defendants in all the matters and by Plaintiffs in the *McConnell* action. After reviewing the various filings in these matters, the Court has concluded, in its discretion, that the above-captioned cases shall be consolidated for all purposes pending further order of the Court. The Court has also designated the case *McConnell v. FEC* to be the lead case of this litigation.

Rule 42(a) provides, in pertinent part, that "[w]hen actions involving a common question of law or fact are pending before the court . . . it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Fed. R. Civ. P. 42(a). As is apparent from the text of Rule 42(a), the decision to consolidate is discretionary. *See* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2383 (2d ed. 1995 ("The district court is given broad discretion to decide whether consolidation would be desirable and the decision inevitably is contextual.").

Although it is not the usual practice for this Court to *sua sponte* order consolidation of cases, there is precedent from this District that such a practice is appropriate given the Court's wide latitude concerning case management. *In re Pepco Employment Litigation*, 1990 WL

[end of page 3]

236073, at *1 (D.D.C. Dec. 20, 1990) ("Although this circuit does not appear yet to have ruled on whether a court may *sua sponte* order consolidation, the court holds that the plain language of Rule 42(a) and the weight of authority give it the power to issue such an order.") (collecting cases); *see also*,

9 Wright and Miller, *supra*, § 2383 ("A motion is not required however, since the court may order consolidation on its own initiative."). Furthermore, as analogous precedent, the United States Court of Appeals for the District of Columbia Circuit has, by its own motion, ordered the consolidation of a number of related cases. *See, e.g.*, *United States v. Pless*, 1998 WL 315516 (D.C. Cir. May 18, 1998); *Resolution Trust Corp. v. Cohen*, 1994 WL 191734 (D.C. Cir. May 10, 1994). Thus, the Court finds it acceptable to *sua sponte* order consolidation of these matters.

The Court finds persuasive reasons to consolidate these cases. All of these actions present constitutional challenges to the recently enacted Bipartisan Campaign Reform Act of 2002. As such, the challenges all involve common issues of law and fact. Moreover, the Act requires this Court to "advance on the docket and to expedite to the greatest possible extent the disposition of this action." Bipartisan Campaign Reform Act of 2002 § 403(a)(4), Pub. L. No. 107-155 (2002). Thus, consolidation makes sense to the extent that unnecessary costs and delays in the administration of these various actions will be avoided, thereby vindicating the political branches' desire to see this litigation advanced as quickly as justice permits.

While consolidation of cases is "permitted as a matter of convenience and economy in administration," *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (discussing 28 U.S.C. § 734, the predecessor statute to Fed. R. Civ. P. 42 (a)), consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Id.*; *see also Cablevision Systems Development Co. v. Motion Picture*

[end of page 4]

Ass'n of America, Inc., 808 F.2d 133, 135-36 (D.C. Cir. 1987) (recognizing the holding in *Johnson*, but distinguishing on the facts). As such the Court has the discretion to deconsolidate these cases at any time and also can issue orders that pertain only to one of the consolidated matters. The discretion provided by Rule 42 also permits the Court to allow the parties to raise issues that might be relevant only to one case.[1] Of course, where it is feasible, the Court expects that the parties will avoid overlapping and duplicative arguments. The advantage of consolidation from the Court's perspective is that when Plaintiffs need to raise an issue with the Court, they need only file one document with the Court and that document will be deemed filed in all matters. Thus, to the extent practical, the Court expects the parties to work together to ensure joint filings.

The three earliest filed cases have requested that the Court deem *McConnell v. FEC* the lead case. That motion, however, confuses the concept of a related case with a consolidated case. When cases are related, there is no concept of a "lead" case. The cases proceed independently and are merely heard before the same Court. Thus, to the extent that the *McConnell* case has been filed after the *NRA* matter, there is nothing the Court can do to renumber the cases and have the *McConnell* case proceed as if it were filed first. However, the Court can consolidate matters around a single action. It is the Court's intention, therefore, to consolidate matters around the *McConnell* action, pursuant

to the spirit of this request.

[end of page 5]

Accordingly, it is, this [24] of April, 2002, hereby

ORDERED that the court *sua sponte* consolidates *NRA v. FEC*, Civil Action No. 02-cv-581, *Echols v. FEC*, Civil Action No. 02-cv-633, *Chamber of Commerce v. FEC*, Civil Action No. 02-cv-751, *NAB v. FEC*, Civil Action No. 02-cv-753, *AFL-CIO v. FEC*, Civil Action No. 02-cv-754, and *Paul v. FEC*, Civil Action No. 02-cv-781, with *McConnell v. FEC*, Civil Action No. 02-cv-582 for all purposes; it is further

ORDERED that all filings for *NRA v. FEC*, Civil Action No. 02-cv-581, *Echols v. FEC*, Civil Action No. 02-cv-633, *Chamber of Commerce v. FEC*, Civil Action No. 02-cv-751, *NAB v. FEC*, Civil Action No. 02-cv-753, *AFL-CIO v. FEC*, Civil Action No. 02-cv-754, and *Paul v. FEC*, Civil Action No. 02-cv-781, must be filed in *McConnell v. FEC*, Civil Action No. 02-cv-582 .

SO ORDERED.

[subscription and signature omitted]

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[1] Plaintiffs in *NRA v. FEC* and *Echols v. FEC* had argued in an earlier filing that they opposed consolidation. At oral argument on April 23, 2002, setting forth a scheduling motion in this action, counsel for Plaintiffs in these actions indicated that they would not oppose consolidation if they were permitted the opportunity to file their own brief and make their own presentation at oral argument. The Court agreed to this request.

[caption omitted]

SCHEDULING AND PROCEDURES ORDER

It is this [24] day of April, 2002

ORDERED that the parties shall adhere to the following schedule, bearing in mind the effective date of the Bipartisan Campaign Reform Act of 2002 and the mandate in section 403 thereof that: "It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal."

[end of page 1]

April 24, 2002 Begin general discovery.

May 5, 2002 Deadline for amendment of pleadings, intervention or joinder of additional parties and consolidation of additional cases.

May 27, 2002 Deadline for filing answers.

August 26, 2002 Deadline for exchange of document requests interrogatories and requests to admit.

September 18, 2002 Deadline for service of deposition notices.

September 30, 2002 End of discovery.

October 4, 2002 Begin period for cross-examination of fact and expert witnesses. Deadline to exchange fact witness affidavits.

October 14, 2002 Deadline to serve rebuttal affidavits, expert reports and documentary evidence.

October 25, 2002 End period for cross-examination of fact and expert witnesses.

November 4, 2002 Deadline for filing of opening briefs in support of judgment, accompanied by fact witness and expert testimony and documentary evidence.

November 15, 2002 Deadline for filling opposition briefs.

November 25, 2002 Deadline for filing reply briefs.

December 4, 2002 Oral argument.

Counsel are advised that the above schedule is firm.

Counsel are referred to Local Rule LCvR 26.2 and expected to fully conform with its directives. Moreover, counsel are required, under both Federal Rule of Civil

[end of page 2]

Procedure 26(f) and Local Rule LCvR 7.1(m), to confer in good faith in an effort to resolve any discovery dispute before bringing it to the court's attention.

Nothing in this order precludes any party from filing motions for summary judgment, in whole or in part, at the appropriate time. The parties shall comply fully with Local Rule LCvR 7.1(h), otherwise the submission will be stricken. Additionally, each submission must be accompanied by a table of cases and other authority cited therein. The parties are strongly encouraged to carefully review *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, et al.* 101 F.3d 145 (D.C. Cir. 1996), on the subject of Local Rule LCvR 7.1(h), formerly Rule 108(h).

SO ORDERED.

[subscription and signature omitted]

[caption omitted]

[end of page 3]

ORDER CONSOLIDATING CASES

(May [13], 2002)

Four cases have recently been filed with the Court challenging the Bipartisan Campaign Reform Act of 2002 ("BCRA"). All of these cases, *RNC v. FEC*, *CDP v. FEC*, *Adams v. FEC*, and *Thompson v. FEC* have requested that the Court consolidate their actions around *McConnell v. FEC*, the lead case in a seven action challenge to the BCRA. *See McConnell v. FEC*, No. 02-582 (D.D.C. April 24, 2002) (order consolidating seven cases challenging the BCRA). After reviewing the various filings in these matters, the Court has concluded, in its discretion, that *RNC v. FEC*, *CDP v. FEC*, *Adams v. FEC*, and *Thompson v. FEC* shall be consolidated with *McConnell v. FEC* for all purposes pending further order of the Court.

[end of page 4]

Rule 42(a) provides, in pertinent part, that "[w]hen actions involving a common question of law or fact are pending before the court . . . it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Fed. R. Civ. P. 42(a). As is apparent from the text of Rule 42(a), the decision to consolidate is discretionary. *See* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2383 (2d ed. 1995 ("The district court is given broad discretion to decide whether consolidation would be desirable and the decision inevitably is contextual.").

The Court finds persuasive reasons to consolidate these four cases with the seven cases already consolidated around *McConnell v. FEC*. All four of the actions present constitutional challenges to the recently enacted BCRA. As such, the challenges all involve common issues of law and fact. Moreover, the Act requires this Court to "advance on the docket and to expedite to the greatest possible extent the disposition of this action." Bipartisan Campaign Reform Act of 2002 § 403(a)(4), Pub. L. No. 107-155 (2002). Thus, consolidation makes sense to the extent that unnecessary costs and delays in the administration of these various actions will be avoided, thereby vindicating the political branches' desire to see this litigation advanced as quickly as justice permits.

While consolidation of cases is "permitted as a matter of convenience and economy in administration," *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (discussing 28 U.S.C. § 734, the predecessor statute to Fed. R. Civ. P. 42 (a)), consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Id.*; *see also Cablevision Systems Development Co. v. Motion Picture Ass'n of America, Inc.*, 808 F.2d 133, 135-36 (D.C. Cir. 1987) (recognizing the holding in *Johnson*, but distinguishing on the facts). As such the Court has the discretion to deconsolidate

[end of page 5]

these cases at any time and also can issue orders that pertain only to one of the consolidated matters. The discretion provided by Rule 42 also permits the Court to allow the parties to raise issues that might be relevant only to one case.[1] Of course, where it is feasible, the Court expects that the parties will avoid overlapping and duplicative arguments. The advantage of consolidation from the Court's perspective is that when Plaintiffs need to raise an issue with the Court, they need only file one document with the Court and that document will be deemed filed in all matters. Thus, to the extent practical, the Court expects the parties to work together to ensure joint filings.

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[1] Plaintiffs in *NRA v. FEC* and *Echols v. FEC* had argued in an earlier filing that they opposed consolidation. At oral argument on April 23, 2002, setting forth a scheduling motion in this action, counsel for Plaintiffs in these actions indicated that they would not oppose consolidation if they were permitted the opportunity to file their own brief and

Accordingly, it is, this [10] of May, 2002, hereby

ORDERED that the Motion for Consolidation [#4] filed in *RNC v. FEC*, Civil Action No. 02cv874, is GRANTED; it is further

ORDERED that *RNC v. FEC*, Civil Action No. 02cv874, is consolidated with *McConnell v. FEC*, Civil Action No. 02cv582, for all purposes; it is further

ORDERED that the Consent Motion for Consolidation [#6] filed in *CDP v. FEC*, Civil Action No. 02cv875, is GRANTED; it is further

ORDERED that *CDP v. FEC*, Civil Action No. 02cv875, is consolidated with *McConnell v. FEC*, Civil Action No. 02cv582, for all purposes; it is further

ORDERED that the Motion for Consolidation [#3] filed in *Adams v. FEC*, Civil Action No. 02cv877, is GRANTED; it is further

ORDERED that *Adams v. FEC*, Civil Action No. 02cv877, is consolidated with *McConnell v. FEC*, Civil Action No. 02cv582, for all purposes; it is further

ORDERED that the Motion for Consolidation of Cases [#4] filed in *Thompson v. FEC*, Civil Action No. 02cv881, is GRANTED; it is further

[end of page 6]

ORDERED that *Thompson v. FEC*, Civil Action No.

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make their own presentation at oral argument. The Court agreed to this request.

02cv881, is consolidated with *McConnell v. FEC*, Civil Action No. 02cv582, for all purposes; it is further

ORDERED that all filings for *RNC v. FEC*, Civil Action No. 02cv874, *CDP v. FEC*, Civil Action No. 02-875, *Adams v. FEC*, Civil Action No. 02cv877, and *Thompson v. FEC*, Civil Action No. 02-881 be filed in *McConnell v. FEC*, 02cv582; it is further

ORDERED that Plaintiffs in *RNC v. FEC*, Civil Action No. 02cv874, *CDP v. FEC*, Civil Action No. 02-875, *Adams v. FEC*, Civil Action No. 02cv877, and *Thompson v. FEC*, Civil Action No. 02-881, are to promptly familiarize themselves and comply with the Scheduling and Procedures Order issued April 24, 2002, by this Court in the previously consolidated matters; attached as an exhibit hereto.

SO ORDERED.

[subscription, signature and attachment omitted]

[caption omitted]

RESPONSES AND OBJECTIONS OF DEFENDANT FEDERAL ELECTION COMMISSION TO THE FIRST INTERROGATORIES BY THE ECHOLS PLAINTIFFS

[prefatory matter omitted]

GENERAL OBJECTIONS

[General objections omitted]

[end of page 1]
[end of page 2]
[end of page 3]
[end of page 4]

Subject to and without waiving any of the foregoing General Objections, which are hereby incorporated into each response given below, the Commission responds to the Interrogatories from the Echols plaintiffs as follows:

FIRST INTERROGATORIES

1. If you contend that there are any governmental interests that justify the ban on contributions by minors to candidates, please state and describe each such governmental interest in detail.

Response: The Commission objects to this request: (a) to the extent that this request seeks the discovery of facts, such as BCRA's legislative history, that are contained in publicly available sources such as the Congressional Record which are equally available to plaintiffs and are not within the custody or control of the Commission; and (b) to the extent that this request seeks to compel the production of purely legal opinions. The Commission also objects to this request because it calls for a legal opinion.

Notwithstanding the foregoing objections, the Commission notes that BCRA was enacted to advance more effectively the governmental interests and purposes already being addressed by the Federal Election Campaign Act of 1971, as

amended, 2 U.S.C. 431 et seq. (the "Act" or "FECA"). Like the FECA, BCRA addresses the opportunity for, and appearance of, corruption that the Supreme Court has found inherent in the system of private campaign financing. "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of

[end of page 5]

our system of representative democracy is undermined.... Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." Buckley v. Valeo, 424 U.S. 1, 26 – 27 (1976). Thus, there is a "'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604, 609 (1996). The ban on gifts by minors serves the important governmental interest of foreclosing circumvention of the statutory limits on individual campaign contributions by parents or guardians who may have legal control over minors.

2. For each such governmental interest stated and described by you in response to Interrogatory No. 1 above, if you contend that the existence of the interest is supported by any fact, state and describe each such fact relevant to determining the existence of such an interest.

Response: The Commission objects to this Interrogatory as overly burdensome to the extent that it requests the production of information already contained in the legislative history of the BCRA, which is as easily accessible to these plaintiffs as it is to the Commission. Pursuant to Fed. R. Civ. P. 33(d), because the answer to this Interrogatory can be ascertained from an examination, audit or inspection of the business records of the Commission, and the burden of deriving the answer is substantially the same for plaintiffs and for the Commission, the Commission specifies that relevant information in the Commission's possession may be contained in the following closed MURs: 3268, 4208, and 4484, which are available for inspection in the Commission's public reading room.

[end of page 6]

3. For each such governmental interest stated and described in response to Interrogatory No. 1, above, state and describe each such fact that manifests reliance by the United States Congress on such interest when the Congress considered and enacted the ban on contributions by minors to candidates.

Response: The Commission objects to this Interrogatory as overly burdensome to the extent that it requests the production of information already contained in the legislative history of the BCRA, which is as easily accessible to these plaintiffs as it is to the Commission. The Commission also objects to this request on vagueness grounds because the request is ambiguous and vague on whether it seeks information with respect to each member of Congress, the Senate as a whole, the House of Representatives as a whole, or from Congress as a whole.

4. Identify each source of the information that you provide in response to Interrogatories 2 and 3, above, giving for each such item the name, address, and telephone number of each human source, the title, date, author, and page number of each published source, and comparable detail for each other source. **Response:** The Commission objects to this interrogatory on attorney work product grounds. By seeking to compel the Commission to reveal at this early stage every document on which the Commission

may rely, plaintiffs will receive information relating to the opinion work product of the Commission's attorneys; moreover, providing plaintiffs with the FEC's mental impressions, conclusions, opinions, and legal theories that may later be abandoned and never made part of the Commission's case will lay bare much of its strategies, tactics and other opinion work product. The Commission also incorporates by reference its responses to Interrogatory numbers 2 and 3 above.

5. If you contend that there are any governmental interests that justify the ban on contributions or donations by minors to committees of political parties, please state and describe each such governmental interest in detail.

Response: See response to Interrogatory number 1 above.

[end of page 7]

6. For each such governmental interest stated and described by you in response to Interrogatory No. 5, above, if you contend that the existence of the interest is supported by any fact, state and describe each such fact relevant to determining the existence of such an interest.

Response: See response to Interrogatory number 2 above.

7. For each such governmental interest stated and described in response to Interrogatory No. 5, above, state and describe each such fact that manifests reliance by the United States Congress on such interest when the Congress considered and enacted the ban on contributions or donations by minors to committees of political parties.

Response: See response to Interrogatory number 3 above.

8. Identify each source of the information that you provide in response to Interrogatories 6 and 7, above, giving for each such item the name, address, and telephone number of each

human source, the title, date, author, and page number of each published source, and comparable detail for each other source. **Response:** See response to Interrogatory numbers 2 and 3 above.

9. If you contend that Congress considered and rejected any alternatives to a ban on contributions by minors to candidates, please state and describe each such alternative that the United States Congress considered and rejected, specifying as to each alternative the grounds on which Congress rejected the alternative.

Response: The Commission objects to this request (a) to the extent that it seeks the discovery of facts such as BCRA's legislative history, that are contained in publicly available sources such as the Congressional Record which are equally available to plaintiffs and are not within the custody or control of the Commission; and (b) to the extent that this request seeks to compel the production of purely legal opinions. Indeed, the extent to which Congress considered or rejected various alternatives can best be ascertained from the legislative history and not from any information that might be in the possession and control of the Commission. Nor is the Commission under any obligation under federal rules to review these publicly available sources on plaintiffs' behalf. The Commission also objects to this request on vagueness grounds because the request is

[end of page 8]

ambiguous and vague on whether it seeks information with respect to each member of Congress, the Senate as a whole, the House of Representatives as a whole, or from Congress as a whole.

10. State and describe each such fact relevant to whether and to what extent the alternatives that you identify in response to Interrogatory 9 would achieve the interests that the ban on contributions by minors to candidates seeks to achieve, specifying to which alternative each such item relates.

Response: See response to Interrogatory number 9.

11. Identify the sources of the information that you provide in response to Interrogatory 10, giving, for each such fact, the name, address, and telephone number of each human source, the title, date, author, and page number of each published source, and comparable detail for each other source.

Response: See response to Interrogatory number 9.

12. If you contend that Congress considered and rejected any alternatives to a ban on contributions or donations by minors to committees of political parties, please state and describe each such alternative that the United States Congress considered and rejected, specifying as to each alternative the grounds on which Congress rejected the alternative.

Response: See response to Interrogatory number 9. In addition, the Commission also objects to this interrogatory on the ground that responding to any contention interrogatory calling for the application of alleged facts to the potentially applicable law at this early stage in the discovery process is premature.

13. State and describe each such fact relevant to whether and to what extent the alternatives that you identify in response to Interrogatory 12 would achieve the interests that the ban on contributions or donations by minors to committees of political parties seeks to achieve, being specific as to the alternatives to which each such item relates.

Response: See response to the preceding Interrogatory.

14. Identify the sources of the information that you provide in response to Interrogatory 12, giving, for each such fact, the name, address, and telephone number of each human source, the title, date, author, and page number of

each published source, and comparable detail for each other source.

Response: See response to Interrogatory number 12.

[end of page 9]

15. Identify each person whose lay or expert testimony you expect to offer, stating the person's name, address, and telephone number, and summarizing the expected testimony of each such person.

Response: The Commission objects to this Interrogatory on attorney work product grounds to the extent that plaintiffs are seeking information about expert testimony that the Commission may consider but ultimately not offer in this litigation. By seeking to compel the Commission to reveal at this early stage every witness or expert on whom the Commission may rely, contrary to the Court's Scheduling Order which explicitly provides that the parties shall exchange expert reports upon which they do rely on October 4, 2002, plaintiffs are attempting to receive prematurely information relating to opinion work product of the Commission's attorneys.

16. State and explain in detail the construction that you advocate with respect to the ban on contributions by minors to candidates, and any alternative construction of the ban that you consider to be an alternative to invalidation of it.

Response: The Commission objects to this Interrogatory on grounds of vagueness. In addition, notwithstanding this objection, the Commission is conducting rule-making proceedings, pursuant to the provisions of the BCRA, which will determine how the Commission interprets the provisions of the BCRA.

17. State and explain in detail the construction that you advocate with respect to the ban on contributions or donations by minors to committees of political parties, and any alternative construction of the ban that you consider to be an alternative to invalidation of it.

be an alternative to invalidation of it.

Response: See response to the preceding Interrogatory.

18. Identify and describe each legislative finding that justifies Section 318, Title III, of the Bipartisan Campaign Reform Act of 2002, specifying the precise statutory provision or other legislative materials that establish each such finding.

[end of page 10]

Response: The Commission objects to this request (a) to the extent that this request seeks the discovery of facts, such as BCRA's legislative history, that are contained in publicly available sources such as the Congressional Record which are equally available to plaintiffs and are not within the custody or control of the Commission; and (b) to the extent that this request seeks to compel the production of purely legal opinions. The FEC also notes that plaintiffs can determine for themselves from a review of the legislative history which statutory provisions are supported by specific individual legislative findings as easily as the Commission can.

19. Identify by name each present member of Congress and other elected federal officer who has engaged in any corrupt act as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties.

Response: The Commission has not alleged in this litigation that individual members of Congress or specific elected federal officers have engaged in any particular corrupt acts as a result of contributions by minors to candidates or to political parties. Rather, like the FECA, BCRA addresses the opportunity for, and appearance of, corruption that the Supreme Court has found inherent in the system of private campaign financing. "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.... Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." Buckley v. Valeo, 424 U.S. 1, 26 – 27 (1976). Thus, there is a "'compelling' governmental interest in assuring the electoral system's legitimacy,

[end of page 11]

protecting it from the appearance and reality of corruption." Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604, 609 (1996).

20. Describe and with particularity each such corrupt act, stating the name, address, and telephone number of each person who participated in or induced the act, the date of each act, the place where each such corrupt act occurred, and providing a detailed identification of each source of information relied upon.

Response: See response to the preceding Interrogatory.

21. Identify by name each present member of Congress and other elected federal officer as to whom there has been an appearance of corruption as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties.

Response: The Commission has not made any express finding to date that any current member of Congress has engaged in any particular activity giving rise to an appearance of corruption as a result of contributions by minors to candidates or political parties. See also response to Interrogatory number 1. The Commission also objects to this request as burdensome to the extent that this request seeks newspaper and magazine articles, and compilations of information that exist on the public record, the legislative

history or information that could easily be obtained by the plaintiffs from the information in the Commission's public files

22. Describe and with particularity each such appearance of corruption, providing names, dates, and places involved in each such appearance, a description of the circumstances giving rise to the appearance, and a detailed identification of each source of information relied upon.

Response: See response to the preceding Interrogatory.

[end of page 12]

[subscription and signature omitted]

[caption omitted]

RESPONSE AND OBJECTIONS OF THE ATTORNEY GENERAL TO ECHOLS PLAINTIFFS' FIRST SET OF INTERROGATORIES

[prefatory matter omitted]

GENERAL STATEMENT AND OBJECTIONS

[end of page 1]

[General objections omitted]

[end of page 2]

[end of page 3]

Subject to and without waiving any of the foregoing General Objections, which are hereby incorporated into each response given below, Defendant makes the following specific objections and responses to the Interrogatories:

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

1. If you contend that there are any governmental interests that justify the ban on contributions by minors to candidates, please state and describe each such government interest in detail.

OBJECTION: Defendant specifically objects to this Interrogatory insofar as it seeks discovery of legal arguments and relates to pure legal conclusions. Furthermore, the legislative record surrounding BCRA is a matter of public record and is equally available to the Plaintiffs as it is to Defendant. This Interrogatory, therefore, is unduly burdensome, invasive of counsel's mental impressions and conclusions, premature, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure.

ANSWER: Subject to and without waiving the foregoing general and specific objections, and without purporting to provide a complete list, Defendant identifies the following as

some of the governmental interests that justify the ban on contributions by minors to candidates:

a. Preventing circumvention of the legal limits on contributions to political parties and to candidates for federal office through transfers, donations, or expenditures of money that amount to disguised contributions.

b. Facilitating deterrence and detection of violations of the legal source and amount limitations on federal campaign contributions.

[end of page 4]

2. For each governmental interest stated and described by you in response to Interrogatory No. 1 above, if you contend that the existence of the interest is supported by any fact, state and describe each such fact relevant to determining the existence of such an interest.

OBJECTION: Defendant specifically objects to this Interrogatory because it is dependent on Interrogatory No. 1, which is itself objectionable. Defendant further objects to this Interrogatory as unduly burdensome, overbroad, invasive of counsel's mental impressions and conclusions, premature, unlikely to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure, because the legislative record surrounding BCRA is a matter of public record and is equally available to Plaintiffs as it is to Defendant.

Defendant further objects to this Interrogatory to the extent that it calls for information protected by the attorney-client privilege, the law enforcement privilege, the investigatory files privilege, the deliberative process privilege, the work product doctrine, the confidential informant privilege, or Federal Rule of Criminal Procedure 6(e). Defendant objects, in addition, to the extent this Interrogatory calls for information contained in confidential criminal investigative files of the U.S. Department of Justice and calls for information provided to the U.S. Department of Justice subject to any agreement or commitment of confidentiality.

ANSWER: Subject to the foregoing objections, and without waiving them, Defendant responds, pursuant to Rule 33(d) of the Federal Rules of Civil Procedure, that the Criminal Division of the United States Department of Justice has in its possession the following documents, obtained during the course of investigations conducted by the Campaign Financing Task Force, some of which may contain information responsive to this interrogatory:

Documents provided by the Campaign Financing Task Force to the Senate Committee on Governmental Affairs

[end of page 5]

Documents provided by the Campaign Financing Task Force to the Senate Committee on the Judiciary

Documents provided by the Campaign Financing Task Force to the House of Representatives Committee on Government Reform

Documents provided by the Campaign Financing Task Force to the House of Representatives Committee on the Judiciary

Public documents pertaining to United States v. Alampi

Public documents pertaining to United States v. Brown, No. 97-336 (RMU) (D.D.C.)

Public documents pertaining to United States v. Chang, No. 99-0029 (D.N.J.)

Public documents pertaining to United States v. Chu, No. 00-0122 (D.D.C.)

Public documents pertaining to United States v. Chung, No. 98-0230 (C.D. Cal.)

Public documents pertaining to United States v. Don

Public documents pertaining to United States v. Gandhi, No. 98-00222 (N.D. Cal.)

Public documents pertaining to United States v. Glicken, No. 98-240 (D.D.C.)

Public documents pertaining to United States v. Green, No. 01-446-01 (D.D.C.)

Public documents pertaining to United States v. Haney, No. 98-0383 (D.D.C.)

Public documents pertaining to United States v. Ho, No. 00-0122 (D.D.C.)

Public documents pertaining to United States v. Hsia, No. 98-57 (D.D.C.)

Public documents pertaining to United States v. Huang, No. 99-524 (C.D. Cal.)

Public documents pertaining to United States v. Jiminez, No. 98-0343 (D.D.C.) and No. 99-281 (S.D. Fla.)

Public documents pertaining to United States v. Kanchanalak, No. 98-0241 (D.D.C.)

Public documents pertaining to United States v. Koo

Public documents pertaining to United States v. Lee, No. 99-327 (C.D. Cal.)

Public documents pertaining to United States v. Lum (Nora), No. 97-0207 (D.D.C.)

[end of page 6]

Public documents pertaining to United States v. Lum (Trisha), No. 97-0208 (D.D.C.)

Public documents pertaining to United States v. Lum (Gene), No. 97-0207 (D.D.C.)

Public documents pertaining to United States v. Ortiz

Public documents pertaining to United States v. Penna, No. 99-0527 (D.N.J.)

Public documents pertaining to United States v. Riady

Public documents pertaining to United States v. Trie, No. 4:98 CR 00239-001 (E.D. Ark.)

Public documents pertaining to United States v. Yu, No. 99-726 (D.N.J.)

Public documents pertaining to United States v. Pan, No. 98-0029 (D.D.C.)

Pursuant to Rule 33(d), Defendant will afford counsel for the *Echols* plaintiffs, upon request, and subject to a suitable protective order, a reasonable opportunity to inspect and copy responsive documents, subject to compliance with the terms of any commitments that may have been made to parties that provided some or all of these documents to the United States to treat the documents confidentially, or to provide the parties in question with notice and an opportunity to object in advance of their disclosure.

Defendant further responds that the Criminal Division and the Federal Bureau of Investigation have together in their possession numerous documents, relating to investigations conducted by the Campaign Financing Task Force, which may contain evidentiary material responsive to this interrogatory. Except with respect to the specific categories of documents noted above, Defendant objects to this interrogatory insofar as it calls for the recitation or other disclosure of information contained in the confidential criminal investigative files of the Department of Justice. Defendant further objects to the recitation or other disclosure of information contained in these files on grounds of undue burden, and to the extent the materials in question are protected from disclosure by any privilege or rule cited above.

[end of page 7]

3. For each such governmental interest stated and described in response to Interrogatory No. 1, above, state and describe each such fact that manifests reliance by the United States Congress on such interest when the Congress considered and enacted the ban on contributions by minors to candidates.

OBJECTION: Defendant specifically objects to this

Interrogatory because it is dependent on Interrogatory No. 1, which is itself objectionable. Defendant further objects to this Interrogatory as unduly burdensome, overbroad, unlikely to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure in that it purports to require Defendant to catalogue each piece of information referenced in the legislative record of BCRA § 318 and any similar provisions in predecessor bills, which is a matter of public record and equally available to the plaintiffs as it is to Defendant.

4. Identify each source of the information that you provide in response to Interrogatories 2 and 3, above, giving for each such item the name, address, and telephone number of each human source, the title, date, author, and page number of each published source, and comparable detail for each other source.

OBJECTION: Defendant specifically objects to this Interrogatory because it is dependent on Interrogatory Nos. 2 and 3, which are themselves objectionable. Defendant also objects to this Interrogatory on the grounds that it only compounds the burdens imposed by Interrogatory Nos. 2 and 3. *See also* objections to Interrogatory No. 2, which are incorporated herein by reference.

ANSWER: *See* Answer to Interrogatory No. 2, which is incorporated herein by reference.

5. If you contend that there are any governmental interests that justify the ban on contributions or donations by minors to committees of political parties, please state and describe each such government interest in detail.

[end of page 8]

OBJECTION: Defendant specifically objects to this Interrogatory insofar as it seeks discovery of legal arguments and relates to pure legal conclusions. Furthermore, the legislative record surrounding BCRA is a matter of public record and is equally available to the Plaintiffs as it is to Defendant. This Interrogatory, therefore, is unduly burdensome, invasive of counsel's mental impressions and conclusions, premature, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure.

ANSWER: Subject to and without waiving the foregoing general and specific objections, and without purporting to provide a complete list, Defendant identifies the following as some of the governmental interests that justify the ban on contributions by minors to political parties:

a. Preventing circumvention of the legal limits on contributions to political parties and to candidates for federal office through transfers, donations, or expenditures of money that amount to disguised contributions.

b. Facilitating deterrence and detection of violations of the legal source and amount limitations on federal campaign contributions.

6. For each governmental interest stated and described by you in response to Interrogatory No. 5, above, if you contend that the existence of the interest is supported by any fact, state and describe each such fact relevant to determining the existence of such an interest.

OBJECTION: Defendant specifically objects to this Interrogatory because it is dependent on Interrogatory No. 5, which is itself objectionable. *See also* Objections to Interrogatory No. 2, which are incorporated herein by reference.

ANSWER: *See* Answer to Interrogatory No. 2, which is incorporated herein by reference.

[end of page 9]

7. For each such governmental interest stated and described in response to Interrogatory No. 5, above, state and

describe each such fact that manifests reliance by the United States Congress on such interest when the Congress considered and enacted the ban on contributions or donations by minors to committees of political parties.

OBJECTION: Defendant specifically objects to this Interrogatory because it is dependent on Interrogatory No. 5, which is itself objectionable. Defendant further objects to this Interrogatory as unduly burdensome, overbroad, unlikely to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure in that it purports to require Defendant to catalogue each piece of information referenced in the legislative record of BCRA § 318 and any similar provisions in predecessor bills, which is a matter of public record and equally available to the plaintiffs as it is to Defendant.

8. Identify each source of the information that you provide in response to Interrogatories 6 and 7, above, giving for each such item the name, address, and telephone number of each human source, the title, date, author, and page number of each published source, and comparable detail for each other source.

OBJECTION: Defendant specifically objects to this Interrogatory because it is dependent on Interrogatory Nos. 6 and 7, which are themselves objectionable. Defendant also objects to this Interrogatory on the grounds that it only compounds the burdens imposed by Interrogatory Nos. 6 and 7. *See also* objections to Interrogatory No. 6, which are incorporated herein by reference.

ANSWER: *See* Answer to Interrogatory No. 6, which is incorporated herein by reference.

9. If you contend that Congress considered and rejected any alternatives to a ban on contributions by minors to candidates, please state and describe each such alternative that the United States Congress considered and rejected,

specifying as to each alternative the grounds on which Congress rejected the alternative.

[end of page 10]

OBJECTION: Defendant specifically objects to this Interrogatory because the legislative record surrounding BCRA § 318 and any similar provisions in predecessor bills, in which alternatives to the enacted provisions might be discussed, is a matter of public record and is equally available to the Plaintiffs as it is to Defendant. This Interrogatory, therefore, is unduly burdensome, invasive of counsel's mental impressions and conclusions, premature, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure.

10. State and describe in detail each such fact relevant to whether and to what extent the alternatives that you identify in response to Interrogatory 9 would achieve the interests that the ban on contributions by minors to candidates seeks to achieve, specifying to which alternatives each such item relates.

OBJECTION: Defendant specifically objects to this Interrogatory because it is dependent on Interrogatory Number 9, which is itself objectionable. Defendant further objects to this Interrogatory as unduly burdensome, overbroad, unlikely to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure in that it purports to require Defendant to catalogue responsive information referenced in the legislative record of BCRA and its predecessor bills, which is a matter of public record and equally available to the plaintiffs as it is to Defendant. Defendant also objects to this Interrogatory on the grounds that it seeks discovery of legal arguments, relates to pure legal conclusions, and is unduly burdensome, invasive of

counsel's mental impressions and conclusions, premature, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure to the extent that it calls for Defendant to speculate regarding the potential and putative effects of alternatives to the ban on contributions by minors to candidates that were not enacted.

[end of page 11]

11. Identify the sources of the information that you provide in response to Interrogatory 10, giving, for each such fact, the name, address, and telephone number of each human source, the title, date, author, and page number of each published source, and comparable detail for each other source.

OBJECTION: Defendant specifically objects to this Interrogatory because it is dependent on Interrogatory No. 10, which is itself objectionable.

12. If you contend that Congress considered and rejected any alternatives to a ban on contributions or donations by minors to committees of political parties, please state and describe each such alternative that the United States Congress considered and rejected, specifying as to each alternative the grounds on which Congress rejected the alternative.

OBJECTION: Defendant specifically objects to this Interrogatory because the legislative record surrounding BCRA § 318 and any similar provisions in predecessor bills, in which alternatives to the enacted provisions might be discussed, is a matter of public record and is equally available to the Plaintiffs as it is to Defendant. This Interrogatory, therefore, is unduly burdensome, invasive of counsel's mental impressions and conclusions, premature, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure.

13. State and describe in detail each such fact relevant to whether and to what extent the alternatives that you identify in response to Interrogatory 12 would achieve the interests that the ban on contributions by minors to candidates seeks to achieve, specifying to which alternatives each such item relates.

OBJECTION: Defendant specifically objects to this Interrogatory because it is dependent on Interrogatory No. 12, which is itself objectionable. Defendant further objects to this Interrogatory as unduly burdensome, overbroad, unlikely to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil
[end of page 12]
Procedure in that it purports to require Defendant to catalogue responsive information referenced in the legislative record of BCRA and its predecessor bills, which is a matter of public record and equally available to the plaintiffs as it is to Defendant. Defendant also objects to this Interrogatory on the grounds that it seeks discovery of legal arguments, relates to pure legal conclusions, and is unduly burdensome, invasive of counsel's mental impressions and conclusions, premature, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure to the extent that it calls for Defendant to speculate regarding the potential and putative effects of alternatives to the ban on contributions by minors to candidates that were not enacted.

14. Identify the sources of the information that you provide in response to Interrogatory 12, giving, for each such fact, the name, address, and telephone number of each human source, the title, date, author, and page number of each published source, and comparable detail for each other source.

OBJECTION: Defendant specifically objects to this

Interrogatory because it is dependent on Interrogatory No. 12, which is itself objectionable.

15. Identify each person whose lay or expert testimony you expect to offer, stating the person's name, address, and telephone number, and summarizing the expected testimony of each such person.

OBJECTION: Insofar as "offer" refers to "offer as a witness" during briefing on the merits of this case or any other hearing, Defendant objects to this Interrogatory. First, the interrogatory is premature, as Defendant has not yet made any determination concerning which witnesses he intends to offer as witnesses or experts. Second, Defendant objects insofar as this Interrogatory purports to impose a requirement for disclosure of each person to be offered as a witness or an expert before the date set by the Court for exchange of witness affidavits and expert
[end of page 13]
reports. Finally, Defendant objects to this Interrogatory on the grounds that it is overbroad, especially to the extent it seeks information about experts that will address issues not raised by the *Echols*' plaintiffs; unduly burdensome; calls for privileged information, legal theories, and attorney work product; is inconsistent with FRCP 26(a)(3); and otherwise exceeds the scope of the obligations imposed by the Federal Rules of Civil Procedure.

ANSWER: Subject to and without waiving the foregoing general and specific objections, defendants will supplement this response in accordance with Fed. R. Civ. P. 26(a)(3) and 26(e), and pursuant to the Court's scheduling order, unless otherwise agreed to by the parties or directed by the Court. Defendant is willing to discuss, at an appropriate time, a date for the parties to identify the witnesses and documents on which they will rely.

16. State and explain in detail the construction that you

advocate with respect to the ban on contributions by minors to candidates, and any alternative construction of the ban that you consider to be an alternative to invalidation of it.

OBJECTION: Defendant objects to this Interrogatory because it seeks discovery of legal arguments, relates to pure legal conclusions, and is unduly burdensome, invasive of counsel's mental impressions and conclusions, premature, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure. Defendant also objects to this Interrogatory to the extent that it calls for information protected by the deliberative process privilege.

17. State and explain in detail the construction that you advocate with respect to the ban on contributions or donations by minors to committees of political parties, and any alternative construction of the ban that you consider to be an alternative to invalidation of it.

[end of page 14]

OBJECTION: Defendant objects to this Interrogatory because it seeks discovery of legal arguments, relates to pure legal conclusions, and is unduly burdensome, invasive of counsel's mental impressions and conclusions, premature, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure. Defendant also objects to this Interrogatory to the extent that it calls for information protected by the deliberative process privilege.

18. Identify and describe each legislative finding that justifies Section 318, Title III, of the Bipartisan Campaign Reform Act of 2002, specifying the precise statutory provision or other legislative materials that establish each such finding.

OBJECTION: The legislative record surrounding BCRA § 318, in which the findings justifying § 318 are discussed, is

a matter of public record and is equally available to the Plaintiffs as it is to Defendant. This Interrogatory, therefore, is unduly burdensome, invasive of counsel's mental impressions and conclusions, premature, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure. Further, Defendant objects to this Interrogatory because it seeks discovery of legal arguments, relates to pure legal conclusions, and is unduly burdensome in a manner not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure.

19. Identify by name each present member of Congress and other elected federal officer who has engaged in any corrupt act as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties.

OBJECTION: Defendant objects to this Interrogatory because the Supreme Court has held, and Congress in the legislative record surrounding BCRA has found, that corruption, the appearance of corruption, and the opportunity for corruption are inherent in a system of private

[end of page 15]

election financing (and this would include one in which opportunity exists for the making of disguised contributions through minors (*see* Answer to Interrogatory Nos.1 & 5)); thus, it would be unduly burdensome to identify by name each member of Congress or other elected federal official that is tainted by such corruption. Further, to the extent information responsive to this Interrogatory may be found in the legislative record surrounding BCRA § 318, Defendant objects to this Interrogatory as unduly burdensome, invasive of counsel's mental impressions and conclusions, premature, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the obligations imposed by the Federal Rules of Civil Procedure, because the legislative record surrounding BCRA is a matter of public record and is equally available to the Plaintiffs as it is to Defendant.

Defendant further objects to this Interrogatory to the extent that it calls for information protected by the attorney-client privilege, the law enforcement privilege, the investigatory files privilege, the deliberative process privilege, the work product doctrine, the confidential informant privilege, or Federal Rule of Criminal Procedure 6(e). Defendant objects, in addition, to the extent this Interrogatory (i) calls for information contained in confidential criminal investigative files of the U.S. Department of Justice, (ii) calls for information provided to the U.S. Department of Justice subject to any agreement or commitment of confidentiality, and (iii) calls upon the Department of Justice in effect to render advisory opinions about the applicability of newly enacted legislation to past acts.

ANSWER: *See* Answer to Interrogatory No. 2, which is incorporated herein by reference.

20. Describe and [sic] with particularity each such corrupt act, stating the name, address, and telephone number of each person who participated in or induced the act, the date of each act, the place it occurred, and providing a detailed identification of each source of information relied upon.
[end of page 16]

OBJECTION: Defendant objects to this Interrogatory because it dependent on Interrogatory No. 19, which is itself objectionable. Defendant also objects to this Interrogatory on the grounds that it only compounds the burdens imposed by Interrogatory No. 19. *See also* Objections to Interrogatory No. 19, which are incorporated herein by reference.

ANSWER: *See* Answer to Interrogatory No. 19, which is incorporated herein by reference.

21. Identify by name each present member of Congress and other elected federal officer as to whom there has been an appearance of corruption as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties.

OBJECTION: *See* Objections to Interrogatory No. 19, which are incorporated herein by reference.

ANSWER: *See* Answer to Interrogatory No. 19, which is incorporated herein by reference.

22. Describe and [sic] with particularity each such appearance of corruption, providing names, dates, and places involved in each such appearance, a description of the circumstances giving rise to the appearance, and a detailed identification of each source of information relied upon.

OBJECTION: The United States and the FCC object to this Interrogatory because it dependent on Interrogatory Number 21, which is itself objectionable. Defendant also objects to this Interrogatory on the grounds that it only compounds the burdens imposed by Interrogatory No. 21. *See also* Objections to Interrogatory No. 19, which are incorporated herein by reference.

ANSWER: *See* Answer to Interrogatory No. 19, which is incorporated here by reference.
[end of page 17]

[certification, subscription and signature omitted]

[caption omitted]

[AMENDED SCHEDULING ORDER]

It is this [26th] day of July, 2002

ORDERED that the scheduling order filed April 24, 2002 is amended to read as follows:

The parties shall adhere to the following amended schedule, bearing in mind the effective date of the Bipartisan Campaign Reform Act of 2002 and the mandate in section 403 thereof that: "It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal."

[end of page 4]

April 24, 2002 Begin general discovery.

May 7, 2002 Deadline for amendment of pleadings, intervention or joinder of additional parties and consolidation of additional cases.

May 27, 2002 Deadline for filing answers.

August 16, 2002 Plaintiffs and Defendants exchange lists of fact and expert witnesses (and the subject matter of each expert's testimony) that they intend to use at trial and identify documents intended for use at trial.

August 26, 2002 Deadline for exchange of document requests interrogatories and requests to admit.

September 6, 2002 Plaintiffs and Defendants identify rebuttal fact and expert witnesses that they intend to use at trial, supplement their lists of fact and expert witnesses and their lists of documents that they intend to use at trial. (The Court will strictly construe rebuttal evidence.)

September 16, 2002 Deadline to exchange final lists of affirmative fact and expert witnesses that the parties intend to use at trial and for final production of documents, answers to interrogatories and requests to admit exchanged August

26, 2002.

September 18, 2002 Deadline for service of deposition notices.

September 23, 2002 Deadline to exchange final expert reports and supporting documentary evidence and final list of documents that the parties intend to use at trial.

September 30, 2002 End of discovery.

October 4, 2002 Begin period for cross-examination of fact and expert witnesses.

[end of page 5]

October 4, 2002 Deadline to exchange fact witness affidavits.

October 6, 2002 Deadline to exchange rebuttal affidavits, rebuttal expert reports and supporting documentary evidence for both.

October 25, 2002 End period for cross-examination of fact and expert witnesses (including rebuttal witnesses).

November 4, 2002 Deadline for filing of opening briefs in support of judgment, accompanied by fact witness and expert testimony and documentary evidence.

November 18, 2002 Deadline for filling opposition briefs.

November 25, 2002 Deadline for filing reply briefs.

December 4, 2002 Oral argument.

The Court is mindful that certain exchanges of information will occur before the end of discovery and therefore the parties are not foreclosed from seeking leave to supplement witness and exhibit lists and/or amend expert reports once discovery ends. Cf. Fed. R. Civ. P. 15.

The motion to compel responses to "contention" interrogatories is taken under advisement and the Court will issue an appropriate order at a later date.

Counsel

Counsel are referred to Local Rule LCvR 26.2 and expected to fully conform with its directives. Moreover, counsel are required, under both Federal Rule of Civil Procedure 26(f) and Local Rule LCvR 7.1(m), to confer in good faith in an effort to resolve any discovery dispute before bringing it to the court's attention.

Nothing in this order precludes any party from filing motions for summary judgment, in whole or in part, at the appropriate time. The parties shall comply fully with Local Rule LCvR 7.1(h), otherwise the submission will be stricken. Additionally, each submission must be accompanied by a table of cases and other authority cited therein. The parties are strongly encouraged to carefully review *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, *et al.*, 101 F.3d 145 (D.C. Cir. 1996), on the subject of Local Rule LCvR 7.1(h), formerly Rule 108(h).

Counsel are advised that the above schedule is firm.

[end of page 6]

SO ORDERED.

[subscription and signature omitted]

[3 PCS CDP 239]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No.: 02-CV-0582 (CKK, KLH, RJL)
CALIFORNIA DEMOCRATIC PARTY, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No.: 02-CV-0875 (CKK, KLH, RJL) CONSOLIDATED ACTIONS

INTERVENORS' RESPONSES TO PLAINTIFFS CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA REPUBLICAN PARTY'S FIRST SET OF REQUESTS FOR ADMISSIONS. INTERROGATORY, AND REQUEST FOR THE PRODUCTION OF DOCUMENTS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure and Rule 26 of the Rules of this Court, and the Court's Order of July 16, 2002 entering the Parties' Stipulation and Order Concerning Initial Disclosures and Discovery Procedures, and subject to their previously served specific and general objections, Intervenors Senator John McCain, Senator Russell Feingold, Representative

Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and
[3 PCS CDP 240] Senator James Jeffords ("Intervenors") respond to the First Set of Requests for Admissions, Interrogatory, and Request for Production of Documents of Plaintiffs California Democratic Party and California Republican Party ("Plaintiffs") as follows:

RESPONSES TO REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1

RFA No. 1 refers to Exhibit A ("Don't Let These Bills Become Law.... Byron Sher for State Senate"). If the California Democratic Parry wishes to do a mass mailing of Exhibit A by mail in support of Boron Sher for State Senate after BCRA goes into effect, admit the following:

(a) If the Mailer is done in connection with a special election at which no federal candidates will appear, it can be paid for completely with non federal money subject only to California law;

(b) If the exact same mailer is done, but the special election is held in conjunction with the State primary at which federal candidates will appear, this mailer will be considered federal election activity and must be paid for either completely with federal contributions or with a combination federal and Levin Amendment contributions.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: (a) admitted; (b) denied.

REQUEST FOR ADMISSION NO. 2

RFA No. 2 refers to Exhibit B ("Kevin Shelley Television Advertisement "). Admit the following:

(a) If State candidate Shelley wishes to run this advertisement after BCRA goes into effect, he can pay for it with completely non federal contributions;

(b) If the California Democratic Party wishes to run this advertisement on behalf of State candidate Kevin Shelley, it must be paid for completely with federal contributions, i.e., no non federal or Levin Amendment contributions may be used.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: (a) admit that the provisions of the BCRA, standing alone, do not prohibit the use of completely non-federal contributions; (b) denied.

[3 PCS CDP 241]

REQUEST FOR ADMISSION NO. 3

Assuming that the BCRA had been in effect when the following television advertisement was run in the State of Indiana by the authorized gubernatorial committee of then-U.S. Rep. David McIntosh, Republican nominee for Governor of Indiana, admit that under BCRA, such gubernatorial committee would be required to establish a federal political committee for the gubernatorial campaign, register with the Federal Election Commission, and pay the costs of the advertisement entirely with federal contributions.
Television advertisement:

(Bush looking into camera)

Chyron/graphic: "Governor George Bush (then a candidate for President) "

Bush speaking): ***"The recession today in America is not in the board room, it's in the classroom. David McIntosh knows this. As Indiana's next Governor he'll be a strong partner working with me to reform education.***

David and I both want to empower parents, raise standards and require accountability. You can improve Indiana schools by electing a reform minded Governor committed to change. David McIntosh-it's that important. "

Chyron/graphic: *David McIntosh, Governor*
New Leadership, a Fresh Start

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION NO. 4

RFA No. 4 refers to Exhibit C ("Our Vote is Our Voice . . . Keep Asian Pacific American Families Moving Forward"). If the California Democratic Party wishes to do a mass mailing of Exhibit C by mail after BCRA goes into effect, admit that it will be considered federal election activity and must be paid for either completely with federal contributions or with a combination of federal contributions and Levin Amendment contributions.

RESPONSE

Without waiving the previously-served specific and

General objections, and subject to them, Intervenors respond as follows: admitted.

[3 PCS CDP 242]

REQUEST FOR ADMISSION NO. 5

RFA No. 5 refers to Exhibit D ("On Nov. 5th, We 're Voting For Ourselves "). Admit that if the BCRA had been in effect at the time the newspaper advertisement featured at Exhibit D was run (Fall, 1996), it would have been considered federal election activity which identified a federal candidate and the California Democratic Party would have been required to pay for it completely with federal contributions.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION NO. 6

RFA No. 6 refers to Exhibit E ("Your Vote Is Crucial "). If the California Democratic Parry wishes to do a mass mailing of Exhibit E by mail after BCRA goes into effect and within 120 days of a federal election, admit that it will be considered federal election activity and must be paid for completely with federal contributions or with a combination of federal contributions and Levin Amendment contributions.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION NO. 7

RFA No. 7 refers to Exhibit F. If the California Democratic Party wishes to do a mass mailing of Exhibit F by mail after BCRA goes into effect and within 120 days of a federal election, admit that it will be considered federal election activity which promotes a federal candidate and must be paid for completely with federal contributions.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION NO. 8

RFA No. 8 refers to Exhibit G ("Vote Tuesday, March 5" San Francisco Doorhanger). The March 5 election included federal candidates. If the California Democratic Party wishes to distribute more than 500 pieces of Exhibit G to voters after BCRA goes into

[3 PCS CDP 243]

effect just prior to the election, admit that it will be considered federal election activity and must be paid for either completely with federal contributions or with a combination of federal contributions and Levin Amendment contributions.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: denied because any response would call for speculation.

REQUEST FOR ADMISSION NO. 9

RFA No. 9 refers to Exhibit H ("Antonio Villaraigosa. . . Something They Can All Agree On "). The April 10 election was a Los Angeles election that did not include federal candidates. If BCRA had been in effect and the California Democratic Parry had mailed Exhibit H to Los Angeles voters just prior to the election, admit that it would not have been considered federal election activity and could have been paid for completely with non federal money subject only to California restrictions.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admit that the provisions of the BCRA, .standing alone, do not prohibit the use of completely non-federal contributions.

REQUEST FOR ADMISSION NO. 10

RFA No. 10 refers to Exhibit I ("[Jesse] Jackson Prop. 38 Script "). If the California Democratic Party wishes to pay for a radio advertisement with the script contained in Exhibit I, admit that it will be considered federal election activity and must be paid for completely with federal contributions, i.e., no non federal or Levin Amendment contributions may be used.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION NO. 11

RFA No. 11 refers to Exhibit J ("Mean Spirited...No on

209"). If the California Democratic Party wishes to pay for a radio advertisement with the script contained in Exhibit J. admit that it will be considered federal election activity and must be paid for completely with [3 PCS CDP 244] *federal contributions, i.e., no non federal or Levin Amendment contributions may be used.*

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: denied because any response would call for speculation.

REQUEST FOR ADMISSION NO. 12

RFA No. 12 refers to Exhibit K ("Vote Democratic! Tuesday, November 7th! "). If the California Democratic Party wishes to distribute Exhibit K by mail after BCRA goes into effect, admit that it will be considered federal election activity and must be paid for either completely with federal contributions or with a combination of federal contributions and Levin Amendment contributions.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: denied.

REQUEST FOR ADMISSION NO. 13

Assume that George Sheldon is the Democratic nominee for Florida Commissioner of Education, John Cosgrove is the Democratic nominee for state insurance commissioner and Leslie Scales is the Democratic nominee for Florida State

Senate, District 11. The "election day" will be the general election in November which will include the election of federal officeholders. The Florida State Party wishes to call prospective voters with the following script:

> *"Hi, my name is . I know you have received an application to vote absentee in the mail. Please take a few minutes to fill in the last four digits of your social security, sign the application and put the application in the mail. This way you express your right to vote no matter how busy you are on election day. And be sure to vote for George Sheldon, John Cosgrove and Leslie Scales. "*

If this phone bank activity is done after BCRA goes into effect, admit that (a) the use of this script in a telephone bank, as defined in BCRA, during the months of September and October 2000, would constitute federal election activity, and would have to be paid for either completely with federal contributions or with a combination of federal contributions and Levin Amendment contributions; and

(b) the costs of the telephone bank could not lawfully be paid for with contributions otherwise lawful under Florida state law, unless the contributions also met the
[3 PCS CDP 245]
conditions and restrictions described in subparagraph (a) above.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: (a) admitted; (b) admitted.

REQUEST FOR ADMISSION NO. 14

RFA No. 14 refers to Exhibit L, a flyer for the Yolo County Democratic Central Committee annual "Bean Feed." If Congressman Thompson attends the Bean Feed after BCRA goes into effect, admit that he violates BCRA if he does any of the following:

(a) Addresses the crowd and urges them to "contribute to the Yolo County Democratic Central Committee";

(b) Addresses the crowd and urges them to "contribute to the California Democratic Party";

(c) Addresses the crowd and urges them to "contribute to the State candidates " also in attendance;

(d) Meets with individuals who have contributed to his campaign whom he thanks and urges them to "contribute to the Democratic Party" as well;

(e) Meets with individuals who have contributed to his campaign whom he thanks and urges them to "support the State candidates" to the extent permitted by State law.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: denied because any response would call for speculation.

REQUEST FOR ADMISSION NO. 15

RFA No. 15 refers to Exhibit M [invitation]. Exhibit M states that Congresswoman Waters is a sponsor and contains the following statement: "Contributions to the non-Federal account of any amount are permitted under state law and can be written from personal, corporate, union or PAC accounts... " Admit that after BCRA goes into effect, it will be unlawful for any federal officeholder or candidate to co-host or sponsor a California Democratic Party function where the invitation contains the language in Exhibit I, or which otherwise seeks to raise both federal and either non federal money or Levin Amendment money.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

[3 PCS CDP 246]

REQUEST FOR ADMISSION NO. 16

Assume that a Catholic parish pays for the distribution, by mail and in the Church building, on the Sunday prior to the 2004 general election, of a Church bulletin that includes the following announcement:

> *"Political Responsibility*
> *As Catholics, we need to share our values, raise our voices and use our votes to shape a society that protects human life, promotes family life, pursues social justice and practices solidarity.*
> *--U.S.. Catholic Bishops Administrative Board, Faithful Citizenship: Civic Responsibility for a New Millennium, p. 9. Next Tuesday, November 2, 2004, the national and local elections will be held. We urge all parishioners to exercise their right and responsibility to vote. "*

Admit that after if BCRA goes into effect, the chairman of a local committee of a political party would be forbidden from soliciting any funds for, or making or directing any donations to the parish

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: denied.

REQUEST FOR ADMISSION NO. 17

RFA No. 17 refers to Exhibit N ("Lift Every Voice and Vote "). Assuming that the organization that distributes Exhibit N is a tax exempt organization under Internal Revenue Code section 501(c)(3), admit that it would be unlawful for the California Democratic Party to contribute to such organization.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION NO. 18

Art Torres is the chair of the California Democratic Party. He is also a member of the Democratic National Committee Executive Committee. Assuming BCRA becomes effective, admit that Torres is prohibited from soliciting or raising nonfederal contributions for the California Democratic Party, even if such contributions meet the limitations of, and can be lawfully received under, California state law.

[3 PCS CDP 247]

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: denied.

REQUEST FOR ADMISSION NO. 19

The chairman of the Essex County, New Jersey, Democratic Committee is U.S. Rep. Donald Payne (D-N.J.). After BCRA becomes effective, admit that Rep. Payne will be prohibited from soliciting or raising any non federal contributions for the Essex County Democratic Committee, even if such contributions meet the limitations of, and can be lawfully received under, New Jersey state law.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: denied.

REQUEST.FOR ADMISSION NO. 20

Assume that both the California Democratic Party and the California Republican Party have programs whereby local party committees which engage in local voter registration activity receive an amount of money from the state party for each valid registration. Assuming BCRA goes into effect, admit the following:

(a) If the program is conducted within 120 days of a federal election, such programs can only be paid for by the state parties either completely with federal contributions or with a combination of federal contributions and Levin Amendment contributions;

(b) Such programs are prohibited tender BCRA because they are impermissible transfers between party committees.

RESPONSE

Without waiving the previously-served specific and

General objections, and subject to them, Intervenors respond as follows: (a) denied; (b) denied.

REQUEST FOR ADMISSION NO. 21

RFA refers to Exhibit 0. ("Delaware Democrat"). Assuming that BCRA were in effect at the time of its distribution, admit that BCRA would require the costs of distribution of the newsletter attached as Exhibit 0 by the Delaware State Democratic Committee to be paid for completely with federal contributions.

[3 PCS CDP 248]

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted, assuming that the mailing in question constitutes a "mass mailing" as defined by BCRA.

REQUEST FOR ADMISSION NO. 22

Assume that a California ballot measure committee is exempt from taxation under Internal Revenue Code section 501(c)(4) and is engaging in public communications encouraging persons to vote for the measure at an election at which federal candidates will appear. Its public communications feature the election date and information about voting locations. Admit that after BCRA's effective date

(a) It will be unlawful for the California Democratic Party to contribute to such a ballot measure committee;

(b) It will be unlawful for the California Democratic Party to make an "in-kind " contribution to such a ballot measure committee by, e.g., engaging in its own public communications if those communications are coordinated with the committee.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: (a) admitted; (b) admitted.

REQUEST FOR ADMISSION NO. 23

RFA No. 23 refers to Exhibit P. If the BCRA had been in effect at the time of the mass mailing of Exhibit P by the Indiana Democratic Party, admit that such mailing would constitute federal election activity and the cost of such mailing would have to be paid for either completely with federal contributions or with a combination of federal contributions and Levin contributions.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION NO. 24

RFA No. 24 refers to Exhibit Q ("Vote Democratic Nov. 6 [doorhanger]. "). If the Virginia Democratic Party distributes more than 500 doorhangers such as Exhibit Q after the effective date of the BCRA, admit that such expenditure would constitute federal election activity and would have to be paid for either completely with federal contributions or with a combination of federal contributions and Levin contributions.

[3 PCS CDP 249]

RESPONSE

Without waiving the previously-served specific and

General objections, and subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION N0. 25

RFA No. 25 refers to Exhibit R ("Their Teachers Ought To Know "). If the California Democratic Party sends out a mass mailing of Exhibit R after the effective date of BCRA, admit that such mailing would constitute federal election activity and the cost of such mailing would have to be paid for either completely with federal contributions or with a combination of federal contributions and Levin contributions.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: denied.

REQUEST FOR ADMISSION N0. 26

The California Democratic Party has in the past contributed to the R. Phillip Randolph Institute, a nonprofit organization under section 501(c)(3) of the Internal Revenue Code. The Institute engages in nonpartisan voter registration. Admit that such a contribution will be unlawful after the effective date of BCRA.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION N0. 27

RFA No. 27 refers to Exhibit S ("[Senator John] McCain [Non-Michigan] Script "). If the California Republican Party wishes to pay for a radio advertisement with the script contained in Exhibit 5, admit that it will be considered a federal election activity and must be paid for completely with federal contributions, i.e., no non federal or Levin Amendment contributions may be used.

RESPONSE

Without waiving the previously-served specific and General objections, and

[3 PCS CDP 250] subject to them, Intervenors respond as follows: admitted.

REQUEST FOR ADMISSION NO. 28

RFA No. 27 refers to Exhibit T ("Vote Republican Vote-By-Mail Application "). If the California Republican Party wishes to pay for the absentee ballot application and "party-slate" listing of Republican nominees, including non federal candidates and state ballot measures, and wishes to include the statement "Vote November _________. " admit that this expenditure will be considered federal election activity and must be paid completely with federal contributions, i.e., no non federal or Levin Amendment contributions may be used.

RESPONSE

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: admitted.

RESPONSES TO INTERROGATORY AND

DOCUMENT REQUEST

INTERROGATORY

If your response to any Request for Admission set forth above is other than an unqualified admission, for each denial or partial denial set forth in full the factual basis for your denial or partial denial, identifying any witnesses or documents you rely upon in support of your denial or partial denial.

DOCUMENT REQUEST

Produce all documents relied upon in responding to the requests for admissions set forth above.

Without waiving the previously-served specific and General objections, and subject to them, Intervenors respond as follows: BCRA, the terms and provisions of which speak for themselves.

[3 PCS CDP 251]

Dated this 16th day of September, 2002.

Respectfully submitted,
Roger M. Witten (D.C. B. No. 163261)
Seth P. Waxman (D.C. Bar No. 257337)
Randolph D. Moss (D.C. Bar No. 417749)
Eric J. Mogilnicki (D.C. Bar No. 443682)
Lynn Bregman (D.C. Bar No. 914226)
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
Tel: (202) 663-6000

David J. Harth
Charles G. Curbs, Jr.
Monica P. Medina

HELLER EHRMAN WHITE & McAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

Bradley S. Phillips
MUNGER, TOLLES
355 South Grand Avenue,
35TH Floor
Los Angeles, CA 90071

Prof. Burt Neuborne
Frederick A.O. Schwarz, Jr.
E. Joshua Rosenkranz
BRENNAN CENTER FOR JUSTICE
Avenue of the Americas, 12th Floor
New York, NY 10013

Fred Wertheimer
DEMOCRACY 21
1825 Eye, Street, N.W.,
Suite 400
Washington, DC 20006 161

Trevor Potter
THE CAMPAIGN AND MEDIA LEGAL CENTER
1101 Connecticut Ave., N.W.,
Suite 330
Washington, DC 20036

Counsel for the Intervening Defendants

[3 PCS CDP 252]

VERIFICATION OF REQUEST FOR ADMISSION RESPONSES

Washington D.C.
)
United States of America
)

I verify under penalty of perjury that the foregoing Responses to the Requests for Admissions propounded in the First Set of Requests for Admissions of Plaintiffs California Democratic Parry and California Republican Party in California Democratic Party. et al. v. FEC, et al., No. 02-CV-875, consolidated with McConnell. et al., v. FEC, et al.. Civil Action No. 02-CV-582 (CKK, KLH; RJL) (consolidated action) are true and correct.

Executed this ~ day of September, 2002

John McCain
United States Senator

[3 PCS CDP 253]

VERIFICATION OF REQUEST FOR ADMISSION RESPONSES

Washington D.C.
)
United States of America
)

I verify under penalty of perjury that the foregoing Responses to the Requests for Admissions propounded in the First Set of Requests for Admissions of Plaintiffs California Democratic Parry and California Republican Party in California Democratic Party. et al. v. FEC, et al., No. 02-CV-875, consolidated with McConnell. et al., v. FEC, et al.. Civil Action No. 02-CV-582 (CKK, KLH; RJL) (consolidated action) are true and correct.

Executed this ~ day of September, 2002_

Christopher Shays
United States Representative

[3 PCS CDP 254]

VERIFICATION OF REQUEST FOR ADMISSION RESPONSES

Washington D.C.
)
United States of America
)

I verify under penalty of perjury that the foregoing Responses to the Requests for Admissions propounded in the First Set of Requests for Admissions of Plaintiffs California Democratic Parry and California Republican Party in California Democratic Party. et al. v. FEC, et al., No. 02-CV-875, consolidated with McConnell. et al., v. FEC, et al.. Civil Action No. 02-CV-582 (CKK, KLH; RJL) (consolidated action) are true and correct.

Executed this ~ day of September, 2002_

Olympia J. Snowe
United States Senator

[3 PCS CDP 255]

VERIFICATION OF REQUEST FOR ADMISSION RESPONSES

Washington D.C.
)
United States of America
)

I verify under penalty of perjury that the foregoing Responses to the Requests for Admissions propounded in the First Set of Requests for Admissions of Plaintiffs California Democratic Parry and California Republican Party in California Democratic Party. et al. v. FEC, et al., No. 02-CV-875, consolidated with McConnell. et al., v. FEC, et al.. Civil Action No. 02-CV-582 (CKK, KLH; RJL) (consolidated action) are true and correct.

Executed this ~ day of September, 2002

James Jeffords
United States Senator

Keep Asian Pacific American families moving forward.

Vote Democrat.

"We owe it to our families and to ourselves to preserve progress and make our voices heard. On election day, let's vote for our future. Vote Democrat."

THE HONORABLE NORMAN Y. MINETA
First Asian Pacific American in history to be appointed to a cabinet position
Appointed by your Democratic Administration

Paid for by the California Democratic Party, 911 – 20th Street, Sacramento CA 95814

DEMOCRATIC POLICIES WILL KEEP US MOVING FORWARD.

EMPOWERING ASIAN PACIFIC AMERICAN COMMUNITIES. Democrats continue to do more to advance issues of importance to Asian Pacific Americans. This Democratic Administration tripled the number of Asian Pacific American appointments made over the previous Republican Administration and nominated more Asian Pacific Americans to the federal bench than any other previous Administration. Furthermore, Democrats have worked to ensure the Census 2000 counts all Americans

PRESERVING THE FUTURE OF ASIAN PACIFIC AMERICAN FAMILIES. This Democratic Administration continues to improve the quality of life of Asian Pacific Americans by saving Social Security, improving access to quality health care and eliminating racial and ethnic disparities in health and health care management. Democrats denounce measures to eliminate affirmative action programs and have fought against racial profiling

WORKING TO END HATE CRIMES. Democrats have a solid record fighting to end hate crimes in America. This Democratic Administration fought for and signed the Hate Crimes Sentencing Enhancement Act in 1994. Democrats are also fighting to pass the Hate Crimes Prevention Act — important legislation to underscore that our society will not tolerate crimes based on race, sexual orientation, gender, color or disability.

HELPING SMALL BUSINESSES. Democratic policies helped Asian Pacific Americans to open a record number of new businesses. Between 1993 and 2000, the Small Business Administration (SBA) approved over 30,200 loans to Asian Pacific American entrepreneurs. By the year's end, the SBA estimates they will back over $10 billion in loans to Asian Pacific American businesses.

GENERATING EMPLOYMENT, INCREASING WAGES. Democratic policies helped to create the best American economy in a generation. Wages continue to increase while unemployment is at its lowest in 30 years. Median annual income for Asian Pacific American households increased and homeownership reached record levels.

KEEPING OUR FAMILIES SAFE. Your Democratic Administration works tirelessly to protect our families and our communities. Democrats are putting 10,000 new police officers on the streets. In addition, they ensure programs are in place to help keep our kids and schools safe from guns and drugs. During this Democratic Administration, violent crime rates fell 27%.

INVESTING IN HIGHER EDUCATION. Your Democratic Administration's Balanced Budget Act made the largest investment in education in 30 years. HOPE Scholarships assist nearly 7 million students by providing a $1,500 tax credit to help make the first two years of college accessible for all. Pell Grants helped nearly 4 million low- and moderate-income students attend college in 1998.

BELIEVING IN OUR KIDS. Democrats believe in the future of our children. In 1998, your Democratic Administration introduced a plan to repair and rebuild over 5,000 public schools with $22 billion in public bonding authority. Democrats support a plan to reduce class sizes nationwide by completing the hiring of 100,000 teachers. Democrats also aim to recruit and train an additional one million new teachers.

FIGHTING FOR FAIR IMMIGRATION PRACTICES. Democrats have worked for fair immigration practices, support family based reunification and public benefits. Democrats have advocated for policies and funding that decrease the naturalization backlog and restore public benefits. Last year, the Administration approved legislation restoring food stamps benefits to more than 250,000 elderly, disabled and other legal immigrants. Democrats approved legislation to ensure disabled legal immigrants have access to Medicaid, SSI, and other related benefits. They announced new initiatives to ensure that legal immigrants get public housing, food stamps and Medicaid or health insurance for children and expectant mothers without the risk of losing their eligibility to become US citizens. Furthermore, Democrats extended the program to include childcare and emergency assistance.

VOTE FOR PROGRESS. VOTE DEMOCRAT. November 7, 2000

Our

Clean Water Clean Air Safe Parks
Coastal Protection

Voting Modernization Act of 2002

See other side for your polling place

[Req. for Adm. Ex: G; 3 PCS CDP 190]

A message to

Kimiko Burton

YOUR POLLING PLACE IS:

[Req. for Adm. Ex: G; 3 PCS CDP 190]

BEST AVAILABLE COPY

Jackson Prop. 38 Script
CapAd

Announcer: The Reverend Jesse Jackson, with special reasons to vote this election.

Jackson: On November 7th, your vote is not just about candidates. We need everyone in our community voting to defeat Prop. 38 .. .the school voucher initiative ...

Prop. 38 brings new discrimination to our schools ... Our children can be turned away based on test scores, religion or even family income.

I urge you to get out to vote on November 7th ...

Vote no on Prop. 38, KEEP HOPE ALIVE!!!

[Req. for Adm. Ex: I; 3 PCS CDP 197]

"MEAN SPIRITED"

:60 radio

Tuesday is the day we decide whether we let them turn the clock back on us.

Because Tuesday is election day, the day we can vote down Governor Wilson's scheme to take away our civil rights and end our chance for fairness.

The Republican scheme is Prop. 209 and it would eliminate affirmative action which helps make our society fair and gives every one of us a fair chance at the American Dream.

But to say yes to fairness and no to mean-spirited Prop. 209, we have to say yes to voting.

On Tuesday, we must go to the polls and cast a most important vote for fairness, for affirmative action - a vote against Prop. 209.

Vote no on 209. Vote no on the Republican scheme to turn the clock back and shut down equal opportunity for all.

On Tuesday, vote yes for our future and no on Prop. 209. Don't let the Republicans get away with it.

Don't stay home. That's what they're counting on.

Paid for by the California Democratic Party.

[Req. for Adm. Ex: J; 3 PCS CDP 199]

YOLO COUNTY DEMOCRATIC CENTRAL COMMITTEE

Bean Feed 2001

November 3, 2001
Veterans' Memorial Center
Davis

[Req. for Adm. Ex: L; 3 PCS CDP 204]

YOLO COUNTY DEMOCRATIC CENTRAL COMMITTEE

Officers
Scott Lay, Chair
Lisa Chin, Vice Chair
Bob Bockwinkel, Treasurer
Marianne Estes, Secretary
Kay Clement, Parliamentarian
Mariko Yamada, Immediate Past Chair

Affiliated Clubs
Davis Democratic Club
Davis High School Democratic Club
UC Davis College Democrats
West Sacramento Democratic Club
Woodland Democratic Club

ELECTION 2000 ACTIVITIES

- Opened three campaign offices, providing a gateway for volunteers in the three largest cities in the county: Davis, West Sacramento and Woodland.
- Recruited hundreds of volunteers for phone banks, precinct walking and other campaign activities.
- Made over 7,000 get-out-the vote phone calls, reaching important voters who may not have otherwise turned out to vote.
- Delivered 54.9% of the vote for Al Gore.
- Delivered 67.2% of the vote for Assemblywoman Helen Thomson, re-electing her to the Assembly

STAY UP-TO-DATE ONLINE AT WWW.YOLODEMS.NET

Design and printing donated.

[Req. for Adm. Ex: L; 3 PCS CDP 204]

PRESENTING SPONSORS

Congressman Mike Thompson
State Senator Mike Machado
Assembly Member Helen Thomson
Bob Buckwinkel, Lyon and Associates
Christopher Cabaldon
Dick Fisher
Paul Schapiro
Scott Lay & Kara Ueda
Lois & Bruce Wolk

HOSTS

Ruth & Vigfus Asmundson
Susie Boyd
Joan Branin
Martie Dote
Eleanor Fairclough
Sheryl & Hue Freeman
Sue Greenwald & Mike Syvanen
Steve & Jerri Hardy
Michael Harrington
Teresa & Jerry Kaneko
Sue & Mike McGowan
Barry Melton
Jeff & Adrienne Monroe
John Poulos
Donna & James Provenza
Ted Puntillo
Lea & Dave Rosenberg

Joan & Thomas Sallee
Don Saylor
Bob Schelen
Robin & Steven Souza,
Ultra Clean Pool Service
Paul Spitler
Cass Sylvia & Craig Reynolds
Bob Thompson
Katie & Oscar Villegas
Betty & William Weir
Dan Weitzman
Marty West
Don Winters
Mariko Yamada & Janlee Wong
Richard Yamagata,
Virtual Market Enterprises
Elaine Yamaguchi

FESTIVITIES

Reception

Music by Barry Melton and Friends
Beverages Donated by
Assembly Member Helen Thomson

Dinner

Catering by Tony & Rhonda Gruska

Program

Dave Rosenberg, Master of Ceremonies

Democratic Candidates for State Assembly
Christopher Cabaldon
Stephen Hardy
Lois Wolk

The Weir-Williamson Award
annually presented by the Davis Democratic Club
awarded by Assembly Member Helen Thomson

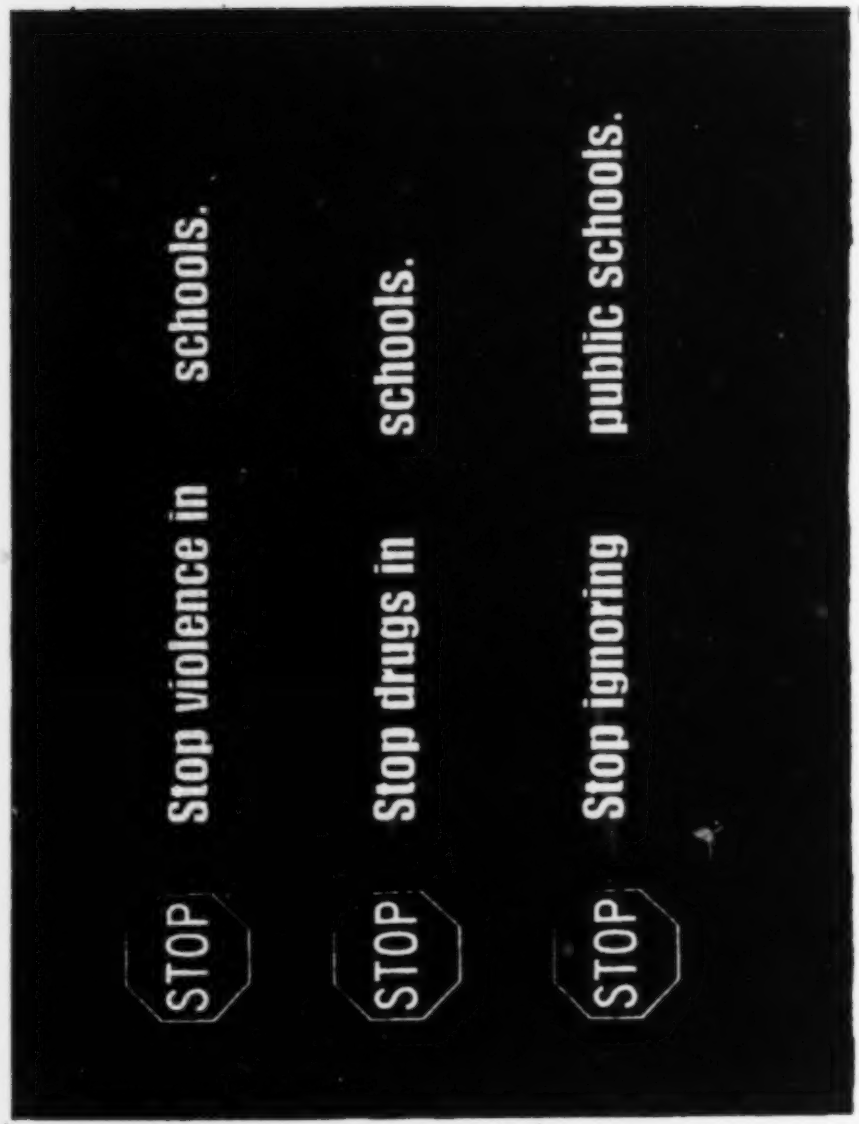
Raffle and Recognitions
Scott Lay, Chair

Raffle items generously donated by:
Aggie Fan Club
Assembly Member Helen Thomson
Chipotle Grill
Rose Diaz-Robles
Raley's and Bel Air

STOP
Non Profit Org.
US Postage
PAID
Permit No. [illegible]
Indianapolis, IN

Indiana Democratic Party
1 North Capitol Street
Suite 200
Indianapolis, IN 46204

[Req. for Adm. Ex: P; 3 PCS CDP 220]


STOP Stop violence in schools.
STOP Stop drugs in schools.
STOP Stop ignoring public schools.

[Req. for Adm. Ex: P; 3 PCS CDP 221]

GO

Tues., November 2nd.

Vote

Democrat Bart Peterson for Mayor

Safer Kids

Bart Peterson will make safe schools a top city priority by focusing more police efforts on the goal of protecting our kids in school and in our neighborhoods.

Teaching our children right from wrong

Bart Peterson will work with parents, administrators and teachers to teach our children the values of responsibility, respect and the difference between right from wrong in our schools.

After-school programs

Bart Peterson has a plan to establish more after-school programs and work with public schools to keep them open after 3:00 p.m. to keep kids out of trouble.

Commitment to our public schools

Bart Peterson believes that building a better city starts with building better public schools. He has a commitment to improve our children's chances, by improving their education and involving parents, teachers and the community in those improvements.

Democrat Bart Peterson for Mayor

Safer Kids, Better Education.

[Req. for Adm. Ex: P; 3 PCS CDP 222]

Vote for
Bart Peterson and the Democratic Team for City-County Council

Lonnell "King Ro" Conley

•

Joanne M. Sanders

•

Ron Gibson

•

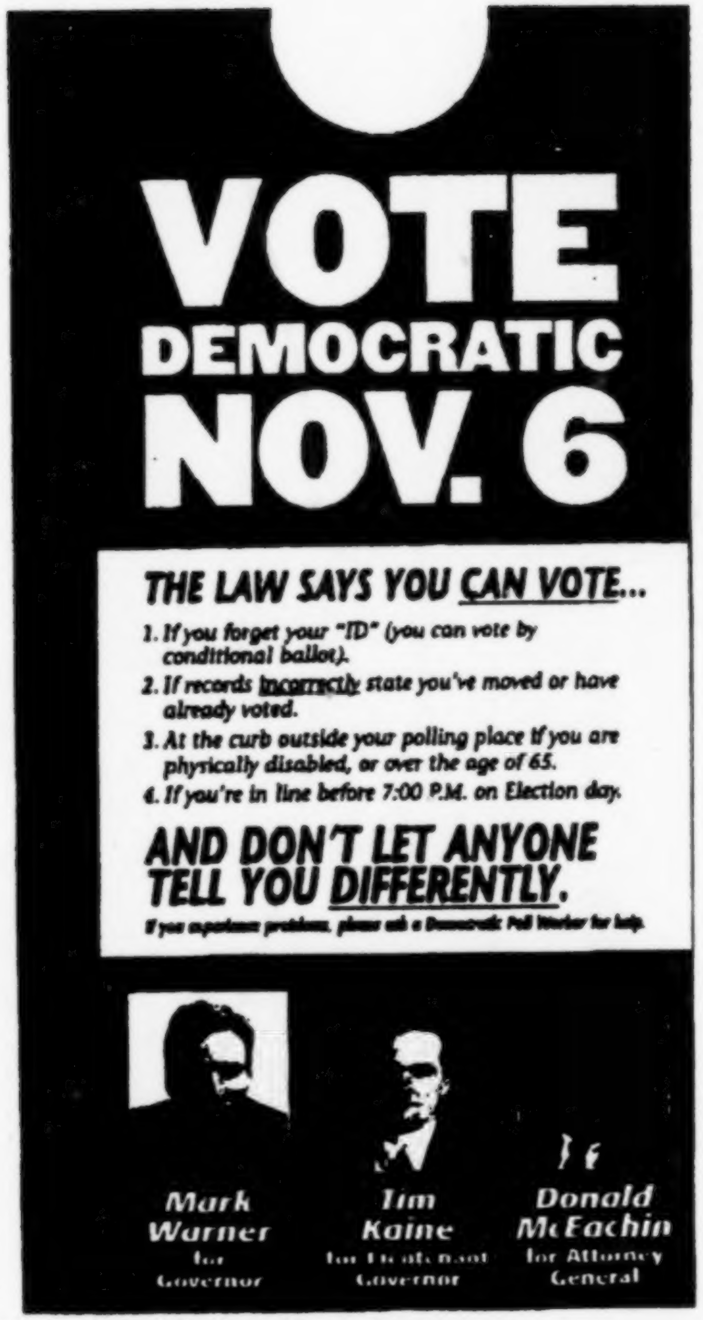
Karen Horseman

Vote Tuesday, November 2nd

If you need a ride to the polls, please call 231-7100

Paid for by Indiana Democratic Party, Robin Winston, Chairman.

[Req. for Adm. Ex: P; 3 PCS CDP 223]



VOTE
DEMOCRATIC
NOV. 6

THE LAW SAYS YOU CAN VOTE...

1. If you forget your "ID" (you can vote by conditional ballot).
2. If records incorrectly state you've moved or have already voted.
3. At the curb outside your polling place if you are physically disabled, or over the age of 65.
4. If you're in line before 7:00 P.M. on Election day.

AND DON'T LET ANYONE TELL YOU DIFFERENTLY.

If you experience problems, please ask a Democratic Poll Worker for help.

Mark Warner
for Governor

Tim Kaine
for Lieutenant Governor

Donald McEachin
for Attorney General

[Req. for Adm. Ex: Q; 3 PCS CDP 225]

THE COMMISSION'S RESPONSES TO THE FIRST AND SECOND REQUESTS FOR ADMISSION BY PLAINTIFF REPUBLICAN NATIONAL COMMITTEE

1. Defendants cannot identify any evidence that any United States Senator changed his or her vote on any legislation in exchange for a donation of non-federal money to that Senator's political party.

RESPONSE: Admitted with respect to evidence identified to date by the FEC.

2. Defendants cannot identify any evidence that any member of the United States House of Representatives changed his or her vote on any legislation in exchange for a donation of non-federal money to that Congressman's political party.

[*3] **RESPONSE**: Admitted with respect to evidence identified to date by the FEC.

* * *

[*6] 23. The Federal Election Commission can identify no evidence that, in exchange for a contribution of federal funds, the Republican National Committee ever attempted to change the position of a federal candidate or officeholder on pending legislation.

RESPONSE: Admitted.

24. The Federal Election Commission can identify no evidence that, in exchange for a donation of non-federal funds, the Republican National Committee ever attempted to change the position of a federal candidate or officeholder on pending legislation.

RESPONSE: Admitted.

FEC Response to RFA 2-3, 6

* * *

[*18] 101. Some organizations that are not political party committees engage in voter registration activities paid for with nonfederal money.

RESPONSE: Admitted.

102. Some organizations that are not political party committees engage in voter identification activities paid for with nonfederal money.

RESPONSE: Admitted.

103. Some organizations that are not political party committees engage in get-out-the-vote activities paid for with nonfederal money.

RESPONSE: Admitted.

[*19] 104. Some organizations that are not political party committees engage in issue advocacy paid for with nonfederal money.

RESPONSE: Admitted.

105. Some non-political party organizations that engage in voter registration activities paid for with nonfederal money lobby federal officeholders.

RESPONSE: Admitted.

106. Some non-political party organizations that engage in voter identification activities paid for with nonfederal money lobby federal officeholders.

RESPONSE: Admitted.

107. Some non-political party organizations that engage in get-out-the-vote activities paid for with nonfederal money lobby federal officeholders.

RESPONSE: Admitted.

108. Some non-political party organizations that engage in issue advocacy paid for with nonfederal money lobby federal officeholders.

RESPONSE: Admitted.

109. Non-political party organizations that pay for voter registration activity with nonfederal money and that also lobby federal officeholders corrupt the federal officeholders they lobby.

RESPONSE: The Commission objects to this request to the extent that it requires information not in the possession of the Commission and to the extent that it raises pure issues of law. The Commission also objects to this request because the term "corrupt" as used therein are vague. Admitted to the extent that there is a potential for corruption or the appearance of corruption when non-political party organizations that pay for voter registration activity with nonfederal money also lobby federal officeholders.

110. Non-political party organizations that pay for voter registration activity with nonfederal money and that also lobby federal officeholders appear to corrupt the federal officeholders they lobby.

[*20] **RESPONSE**: See Response to Request No, 109.

111. Non-political party organizations that pay for voter identification activity with nonfederal money and that also lobby federal officeholders corrupt the federal officeholder they lobby.

RESPONSE: The Commission objects to this request to the extent that it requires information not in the possession of the Commission and to the extent that it raises pure issues of law. The Commission also objects to this request because the term "corrupt" as used therein are vague. Admitted to the extent that there is a potential for corruption or the appearance of corruption when non-political party organizations that pay for voter identification activity with nonfederal money also lobby federal officeholders.

112. Non-political party organizations that pay for voter identification activity with nonfederal money and that also lobby federal officeholders appear to corrupt the federal officeholders they lobby.

RESPONSE: See Response to Request No. 111.

113. Non-political party organizations that pay for get-out-the-vote activity with nonfederal money and that also lobby federal officeholders corrupt the federal officeholders they lobby.

RESPONSE: The Commission objects to this request to the extent that it requires information not in the possession of the Commission and to the extent that it raises pure issues of law. The Commission also objects to this request because the term "corrupt" as used therein are vague. Admitted to the extent that there is a potential for corruption or the appearance of corruption when non-political party organizations that pay for get-out-the-vote activity with nonfederal money also lobby federal officeholders.

[EXHIBITS OMITTED]

EXHIBIT
15
Adams

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, *et al.*, Plaintiffs, v. Federal Election Commission, *et al.*, Defendants, and Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, Senator James Jeffords, Intervenors.	)	Civil Action No.: 02-CV-582 (CKK, KLH, RJL) Consolidated Action

INTERVENORS' RESPONSES TO CONTENTION INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Local Civil Rule 26, the Court's Order of July 16, 2002 entering the Parties' Stipulation and Order Concerning Initial Disclosures and Discovery Procedures, and the Court's Order of August 15, 2002 regarding contention interrogatories, and subject to and without waiving the General and specific Objections served on Plaintiffs regarding these Interrogatories, Intervenors

Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords ("Intervenors") respond to the contention Interrogatories below. In answering these Interrogatories, Intervenors do not seek to disclose non-public legislative information or waive any Speech or Debate Clause privileges or immunities. Intervenors expressly reserve the right to rely on any of the Responses of the governmental defendants to any of these Interrogatories. Intervenors' General and specific Objections, as set forth in the Objections previously served on Plaintiffs, are to be considered continuing objections to each Interrogatory that follows.

Interrogatories Identified in Section A of the Court's Order of August 15, 2002.

McConnell Interrogatory No. 1: *State and describe in detail each governmental interest that justifies the BCRA or any portion thereof, including in the description a specification of the provisions of the BCRA that each such interest justifies.*

Response: Subject to the Objections above, and without waiving any of them, Intervenors state that, as an examination of the Congressional Record, the legislative history of the Bipartisan Campaign Reform Act ("BCRA") and other information released by Congress in relation to the BCRA and other campaign finance legislation introduced in the 102nd through 107th Congressional sessions, including the Committee on Governmental Affairs United States Senate, 106th Cong., *Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns* 723 (Comm. Print 1999) ("Thompson

Committee Report") (collectively the "Legislative History") demonstrates, there are many governmental interests that justify the BCRA. The governmental interests that justify the BCRA include, but are not limited to:

1. preventing the circumvention and evasion of existing campaign finance laws, including but not limited to the Federal Election Campaign Act ("FECA") and Presidential Election Campaign Fund Act ("Fund Act"), while ensuring that candidates, parties, and other participants in the political process have ample opportunity to campaign effectively and to communicate their messages to the electorate;

2. preventing corruption and the appearance of corruption that results from unlimited financial contributions;

3. restoring Americans' faith in the electoral process and decreasing public cynicism about our system, of government;

4. preventing the adverse impact on candidates, parties, federal office holders and other participants in the political process from their participation in activities that create the appearance of corruption;

5. preventing the distortion of the political process that results when the special benefits our legal system bestows upon the corporate and union structures can be converted into political contributions or expenditures, and when corporations and unions can spend general treasury funds on election activity;

6. preventing the corruption and the appearance of corruption that result when corporations and unions spend substantial sums from their treasuries through soft money contributions and Electioneering Communications to influence the outcome of federal elections through Electioneering Communications;

7. preventing the corruption and appearance of corruption that result when groups or individuals spend large sums of money to influence the outcome of federal elections through Electioneering Communications without disclosing who they are and how much they are spending;

8. providing voters with increased information about who is paying for advertisements that have an impact on federal elections;

9. creating a system of disclosure that "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office" and alert "the voter to the interests to which a candidate is most likely to be responsive and thus facilitat[ing] predictions of future performance in office;" *Buckley v. Valeo,* 484 U.S.1, 66-67 (1976) (citations omitted);

10. informing the "electorate by 'exposing large contributions and expenditures to the light of publicity,' which will 'discourage those who would use money for improper purposes,'" *Buckley,* 484 U.S. at 67, and provide "an essential means of gathering the data necessary to detect violations of the contribution limitations." *Buckley,* 484 U.S. at 67-68;

11. limiting the ubiquitous influence of money, which is a more pervasive form of corruption than quid pro quo corruption; and

12. opening up the democratic system to ordinary citizens who have not had the financial resources to get the attention of candidates, thereby breaking the "cycle where the large contributors get more and more access and the average folks stop trying to get it;" *Landell v. Vermont Public Interest Research Group,* 300 F.3d 129, 2002 U.S. App. LEXIS 15770 at *54 (2nd Cir. 2002) (citation omitted).

Adams Interrogatory No. 1 *State and describe in detail each governmental interest which you contend is served by:*

(a) the increased individual contribution limits in the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA "), Sec. 307; and

(b) the modification of individual contribution limits in response to expenditures from personal funds, as set forth in the BCRA, Secs. 304 (Senate races) and 319 (House races).

Response: See Response to McConnell Interrogatory No. 1 above.

Adams Interrogatory No. 3 *For each of the governmental interests identified in response to Interrogatory No. 1 . . . indicate whether you contend that Congress considered or relied upon that governmental interest . . . in* *determining the dollar amount of the increased contribution limits of BCRA Secs. 304, 307 and 319.*

Response: Intervenors contend that the Legislative History reflects the governmental interests Congress considered and relied upon in determining the dollar amount of the increased contribution limits of BCRA.

NAB Interrogatory No. 2: *Identify in detail each governmental purpose or interest that Congress sought to advance in enacting BCRA's restrictions on electioneering communications so as to apply to "broadcast, cable or satellite communication" but not to apply to communications in print such as newspapers or magazines.*

Response: Subject to the Objections above, and without waiving any of them, Intervenors state that, as an examination of the Legislative History demonstrates, there are many governmental interests that justify the BCRA restrictions on electioneering communications. These interests include, but are not limited to:

1. preventing the circumvention and evasion of existing campaign finance laws, including, but not limited to, the Federal Election Campaign Act ("FECA") and Presidential Election Campaign Fund Act ("Fund Act"), while ensuring that candidates have ample opportunity to campaign effectively and to communicate their messages to the electorate;

2. preventing the actual and apparent corruption that results from the expenditures of large sums of money on broadcast, cable and satellite advertisements that have an impact on elections;

3. providing voters with increased information about who is paying for the broadcast, cable and satellite advertisements that have an impact on elections;

4. restoring Americans' faith in the electoral process and decreasing public cynicism about our system of government;

5. preventing the corruption and the appearance of corruption that result when corporations and unions spend substantial sums from their treasuries to influence the outcome of elections; and

6. advancing governmental interests underlying those restrictions by targeting the most acute problems identified by Congress. *See Buckley v. Valeo*, 424 U.S. 1, 105 (1976).

NAB Interrogatory No. 8: *Identify in detail each of Congress's purposes in failing to include communications in print such as newspapers and magazines in BCRA's restrictions on electioneering communications.*

Response: See Response to NAB Interrogatory No. 2.

NAB Interrogatory No. 10: *Identify in detail each governmental purpose or interest that Congress sought to advance in enacting BCRA's requirement that broadcast licensees collect and make publicly available any "request to purchase broadcast time" for communications "relating to any political matter of national importance" irrespective of whether any such communication is in fact broadcast by the licensee.*

Response: Subject to the Objections above, and without waiving any of them, Intervenors incorporate by reference the Objections and governmental interests identified in Response to NAB Interrogatory No. 2. Without limitation, Intervenors note that the new requirement provides voters and candidates with critical information about who is sponsoring or seeking to sponsor electioneering messages.

California Democratic Party and California Republican Party's Interrogatory No. 1: *State and describe in detail, for each of the following provisions of BCRA, each governmental interest that you claim justifies such provision; and for each such interest, describe separately, specifically and in detail exactly how you believe such provision achieves such interest:*

(a) The prohibition on spending by a state or local party of any non-Federal funds for broadcast communications urging citizens to register to vote within 120 days of an election or to get out and vote, at any time, or promoting the party's views and ideas, without mentioning the name of any candidate for any public office. Such prohibition is set forth in new sections 323(b)(1) and 301(20)(A) of FECA, as amended by section 101(a) of BCRA.

(b) The prohibition on spending by a state or local party of any non-Federal funds in excess of $10,000 from any one person, for communications of any kind urging such citizens to register to vote within 120 days of an election, or to get out to vote at any time, or promoting the party's views and ideas, without mentioning the name of any candidate for any public office. Such prohibition is set forth in new section 323(b)(1) and 301(20)(A) of FECA, as amended and added by section 101(a) of BCRA.

(c) The prohibition on spending by a state or local party of any non-Federal funds for broadcast communications expressly advocating the election or defeat of a candidate for state or local office, without mentioning any candidate for federal office or otherwise promoting the candidates of any political party for any office, to the extent such communications may constitute "voter identification, get out the vote activity or generic campaign activity" (as set forth in new section 301(20)(A)(ii) of FECA). Such prohibition is set forth in new sections 323(b)(1) and 301(20)(A) and (B) of FECA as added by section 101(a) of BCRA.

(d) The prohibition on spending by a state or local party of any non-Federal funds in excess of $10,000 from any one person, for communications not referencing any candidate for public office, including but not limited to communications which advocate support or defeat of a ballot measure and implicitly contain a get out the vote or generic message promoting the ideas or values of a political party. Such prohibition is set forth in new sections 323(b) and 301(20)(A) of FECA, as added by section 101(a) of BCRA.

(e) The prohibition on spending by a state or local party of any non-Federal funds for broadcast communications not referencing any candidate for public office, including but not limited to communications which advocate support or defeat of a ballot measure and implicitly contain a get out the vote or generic message promoting the ideas or values of a political party. Such prohibition is set forth in new sections 323(b) and 301(20)(A) of FECA, as added by section 101 (a) of BCRA.

(f) The prohibition on spending by a state or local party of any non-Federal funds for the salaries of party employees spending more than 25% of their time in any month on activities in connection with a federal election.

Such prohibition is set forth in new sections 323(b) and 301(20)(A) of FECA, as added by section 101(a) of BCRA.

(g) The prohibitions on the raising, for a state or local party, of "Levin Amendment" contributions otherwise permitted to be raised under new FECA section 323(b)(2), as added by BCRA, by any other state or local party or through joint fundraising activities of state or local parties. Such prohibitions are set forth in new sections 323(b)(2)(B)(iv)(I) and (C)(ii) of FECA, as added by section 101(a) of BCRA;

(h) The prohibition on the providing to a state or local party of "hard money" (i.e., contributions subject to the limitations, prohibitions and reporting requirements of FECA) by any national party committee or any other state, district or local committee of a political party, to pay for any portion of the costs of voter registration activity within 120 days of an election or get out the vote activity at any time, if such "hard money" is to be spend in combination with "Levin Amendment" contributions' (as permitted in new section 323(b)(2) of FECA). Such prohibition is set forth in new section 323(b)(2)(B)(iv) of FECA, added by section 101(a) of BCRA.

(i) The prohibition on officers of state party committees raising non-Federal funds for their own state parties, to the extent such state party officers are or may be also deemed to be officers or agents acting on behalf of a national party committee. Such prohibition is set forth in new section 323(a) of FECA, as added by section 101(a) of BCRA.

(j) The provision prohibiting any federal officeholder or candidate for federal office from soliciting, receiving, directing, transferring or spending of non-Federal funds, for or by any state or local party. Said provision is set forth in new section 323(e)(1) of FECA, as added by section 101(a) of BCRA.

(k) The prohibition on the making or solicitation of any contributions whatsoever, by any state or local party committee, or any officer or agent thereof, to any organization described in section 501(c) of the Internal Revenue Code that engages in activities or communications to encourage African American, Latino or Asian Pacific Islander American citizens to register to vote within 120 days of a federal election or to get out to vote at any time. Such prohibition is set forth in new section 323(d)(1) of FECA, as added by section 101(a) of BCRA.

(l) The prohibition on the making of independent expenditures by a state or local party for a candidate for federal office before or after such party committee has made an expenditure coordinated with such candidate. Such prohibition is set out in section 315(d)(4) of FECA as added by section 213 of BCRA.

(m) The prohibition on the making of an independent expenditure by a state party committee on behalf of a candidate for federal office if a national party committee has made an expenditure coordinated with such candidate. Such prohibition is set out in section 315(d)(4) of FECA as added by section 213 of BCRA.

(n) The prohibition of the transfer of "hard money," (i.e., contributions meeting the prohibitions and limitations of FECA) by a national party that makes a coordinated expenditures on behalf of a candidate to federal office, to a state or local party that has made or intends to make an independent expenditure with respect to the candidate

Such prohibition is set out in 2 U.S. C. §441 a(d)(4)(c), as added by BCRA section 213.

(o) The failure of BCRA to index for inflation the limitation on contributions to state committees of political parties of $10,000 from any individual in any calendar year, set forth in 2 U.S.C. §441 a(a)(1)(D) as amended by BCRA section 102, while BCRA provides for indexing for inflation of the applicable limits on contributions to national party committees and candidates for federal office.

(p) The failure of BCRA to index for inflation the limitation on contributions to local committees of political parties of $5,000 from any individual in any calendar year, set forth in 2 U.S.C. §441 a(a)(2)(C), while BCRA provides for indexing for inflation of the applicable limits on contributions to national party committees and candidates for federal office.

(q) Any requirement set forth in BCRA that a local party committee that is not a "political committee" within the meaning of FECA register and file disclosure reports with the FEC solely because such committee expends funds for voter registration, get out the vote activity or promotion of the party's views and ideas, without mentioning the name of any federal candidate at any time.

Response: Subject to the Objections above, and without waiving any of them, Intervenors state that, as an examination of the Legislative History demonstrates, there are many governmental interests that justify the BCRA. The governmental interests that justify the BCRA include, but are not limited to, those identified in response to McConnell Interrogatory No. 1 above.

NRA INTERROGATORY NO. 1:

Identify in detail each governmental purpose or interest that Congress sought to advance in enacting BCRA's restrictions on electioneering communications. With respect to your answer to this interrogatory, please;

A. Identify each person on whose testimony you will or may rely in support of this answer;

B. Identify each document on which you will or may rely in support of this answer.

Response: Intervenors continue to object to subparts (A) and (B) of this Interrogatory on the grounds that the requests for identification of witnesses and documents is duplicative of designations already made, is overly burdensome, and is beyond the scope of the Court's Order of August 15, 2002.

See Response to McConnell Interrogatory No. 1 above.

NRA INTERROGATORY NO. 4

Identify in detail each of Congress's purposes in enacting the exemption for news stories, commentaries, or editorials distributed through the facilities of any broadcasting station from BCRA's restrictions on electioneering communications. With respect to your answer to this interrogatory:

A. Identify each person on whose testimony you will or may rely in support of this answer;

B. Identify each document on which you will or may rely in support of this answer.

Response: Intervenors incorporate by reference the Objections and governmental interests identified in the

Response to NRA Interrogatory number 1. Without waiving the foregoing Objections, and without limitation, Intervenors note that exempting the media from BCRA's restriction on electioneering communications allows the broadcast media to report on newsworthy events, thereby providing citizens with information about the elections and candidates. The constitutionality of the media exemption is well-settled, as the U.S. Supreme Court has held: "even under such strict scrutiny, [Michigan's statute excluding the media from expenditure restrictions] pass[es] muster under the Equal Protection Clause." *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990). The Court relied on the "unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Id.* (citations omitted). The Court has previously recognized that the "press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama,* 384 U.S. 214, 219 (1966). Finally, news stories have been specifically excluded from the definition of "expenditure" under FECA since 1972 (2 U.S.C. § 431(9)(B)(i)).

Other outstanding Interrogatories

Madison Center Interrogatory No. 6 *Identify all conduct that you have engaged in, or wish in the future to engage in, that does not involve "agreement or formal collaboration" but that you believe will be within the scope of "coordinated communications" under BCRA § 214(c).*

Dated this 16th day of September, 2002.

Respectfully submitted,
/s/ Eric J. Mogilnicki
Roger M. Witten
(D.C. Bar No. 163261)
Seth P. Waxman
(D.C. Bar No. 257337)
Randolf D. Moss
(D.C. Bar No. 417749)
Eric J. Mogilnicki
(D.C. Bar No. 443682)
WILMER, CUTLER & PICKERING
2445 M Street N.W.
Washington, D.C. 20037-1420
(202) 663-6000

David J. Harth
Charles G. Curtis, Jr.
Monica P. Medina
HELLER EHRMAN WHITE & MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

Bradley S. Phillips
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

Prof. Burt Neuborne
Frederick A.O. Schwarz, Jr.
E. Joshua Rosenkranz
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas, 12th Floor
New York, NY 10013

Fred Wertheimer
DEMOCRACY 21
1825 Eye Street N.W., Suite 400
Washington, DC 20006

Trevor Potter
The Campaign and Media
Legal Center
1101 Connecticut Ave., N.W.,
Suite 330
Washington, DC 20036

Counsel for the Intervening Defendants

[caption omitted]

OBJECTIONS AND RESPONSES OF DEFENDANT FEDERAL ELECTION COMMISSION TO THE FIRST REQUESTS FOR ADMISSION BY PLAINTIFF EMILY ECHOLS, ET AL.

[prefatory material omitted]

GENERAL OBJECTIONS

[general objections omitted]

[end of page 1]

SPECIFIC OBJECTIONS TO PLAINTIFFS' REQUESTS TO ADMIT

1. Emily Echols, Hannah McDow, Isaac McDow, Zachary White, Daniel Solid and Jessica Mitchell are citizens of the United States.

2. Emily Echols, Zachary White and Daniel Solid are residents of Georgia.

3. Hannah McDow and Isaac McDow are residents of Alabama.

4. Jessica Mitchell is a resident of Florida.

5. Emily Echols, Hannah McDow, Isaac McDow, Zachary White, Daniel Solid and Jessica Mitchell are less than eighteen (18) (sic) are minor children.

6. Each of the minor plaintiffs has money that is under their sole direction and control, and that were given to them by others for the purpose of making a "covered political contribution."

RESPONSE TO REQUESTS NOS. 1 THROUGH 6: The Commission has made a reasonable inquiry into these requests, and the information that is readily known or available to it is insufficient to enable the Commission to admit or deny these requests.

7. Each of the minor plaintiffs possesses independence of judgment in the selection of candidates for federal elective office.

[end of page 2]

OBJECTION: The Commission objects to this request because the phrase "independence of judgment" is vague, and the request requires speculation about an individual's state of mind.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission to admit or deny this request.

8. After the effective date of the Act, each of the minor plaintiffs will be completely prohibited from making a covered political contribution.

OBJECTION: The Commission objects to this request on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: None.

9. Each of the minors is deeply and seriously interested in electoral politics and campaigning.

OBJECTION: The Commission objects to this request because the terms "deeply and seriously interested" are vague and the request requires speculation about an individual's state-of-mind.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission to admit or deny this request.

10. The minors have demonstrated their serious interest in electoral politics and campaigning by participating as volunteers in such electoral campaigns.

OBJECTION: The Commission objects to this request because the term "serious interest" is vague.

[end of page 3]

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission

to admit or deny this request.

11. Each of the minors consider (sic) the contribution of money to candidates and to committees of political parties a form of expression of support for those candidates and committees.

OBJECTION: The Commission objects to this request because it requires speculation about an individual's state-of-mind.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission to admit or deny this request.

12. Each of the minors consider (sic) the contribution of money to candidates and to committees of political parties a form of association with those candidates and committees.

OBJECTION: See response to Request No. 11.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission to admit or deny this request.

13. Each of the minors consider (sic) withholding the contribution of money from candidates and from committees of political parties a form of expression of opposition to those candidates and committees.

OBJECTION: See response to Request No. 11.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission to admit or deny this request.

[end of page 4]

14. Each of the minors consider (sic) the contribution of money to candidates and to committees of political parties a form of association in support of those candidates and committees.

OBJECTION: See response to Request No. 11.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission to admit or deny this request.

15. Each of the minors intends to make covered political contributions to suitable candidates for federal office during their minority.

OBJECTION: See response to Request No. 11.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission to admit or deny this request.

16. The ban on covered political contributions by minors takes effect on November 6, 2002.

OBJECTION: The Commission objects to this because it requires a pure legal opinion.

ADDITIONAL RESPONSE: None.

17. The colloquy between Senators McCain, Collins and Feingold found in the Congressional Record for March 20, 2002, at pages S2145-S2148, is the sole explanation offered during the debate of the Senate on passage of the Act for the addition of the ban on contributions by minors.

OBJECTION: The Commission objects to this request because it calls for an opinion on pure issues of law, and because the legislative history and the transcript of floor debates of the Senate are matters of public record that speak for themselves.

[end of page 5]

ADDITIONAL RESPONSE: The Commission admits that this colloquy appears to be the only reference to the ban on contributions to candidates and party committees by minors in the Senate floor debate in 2002.

18. No explanation was offered by any member of the House for the ban on contributions by minors during the debate on passage of the Act in the House of Representatives.

OBJECTION: See Response to Request No. 17.

ADDITIONAL RESPONSE: The Commission admits that no member of the House appears to have offered any explanation on the floor for the ban on contributions to candidates and party committees by minors in 2002.

19. The assertion made by Senator McCain during the Senate debate on passage of the Act that, "[I]ts legislative recommendations to Congress [in1998] cited 'substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors'" is incorrect.

OBJECTION: The FEC objects to this request because the pronoun "[I]ts" is vague and lacks an antecedent and because the request mischaracterizes the Senator's statements.

ADDITIONAL RESPONSE: The Commission responds to Request for Admission number 19 as clarified by plaintiffs' counsel at the Meet-and-Confer teleconference: The Commission admits that Senator McCain quoted the words "substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors." The Commission also admits that Senator McCain incorrectly attributed the quoted words to the FEC. The quotation instead was from the Recommendations of the Senate's Committee on Governmental Affairs (Thompson Committee) in its 1998 Final Report.

[end of page 6]

20. The FEC has never stated in its legislative recommendations that it had "substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors."

OBJECTION: The Commission objects on relevance grounds – whether or not the Commission has ever made any particular legislative recommendations in the past has no bearing on the validity of any provision of law that has been enacted by Congress.

ADDITIONAL RESPONSE: Admitted. See Additional Response to Request number 19 above.

21. One article relied on by Senator McConnell in the Senate debate on passage of the Act, "Members Cash in on Kid Contributions," was written by Alex Knott and appeared in the publication Roll Call.

RESPONSE: The Commission admits that Senator McCain asked for and received consent to have printed in the Congressional Record an article by Alex Knott entitled "Members Cash In On Kid Contributions."

22. That article also served as the basis for an internal referral in the FEC that led to the initiation of MURs 4252, 4253, 4254, and 4255.

RESPONSE: The Commission admits that the article entitled "Members Cash In On Kid Contributions" was the basis for the Commission's initiating inquiries that led to MURs 4252, 4253, and 4254. The Commission denies that the article was the basis for the Commission's initiating MUR 4255.

23. That article incorrectly reports the information relevant to the employer identified by Maryland Lieutenant Governor Kathleen Kennedy Townsend as "student."

RESPONSE: The Commission admits that publicly available Schedule A (Itemized Receipts—Individual Contributions) filed with the Commission on 7/30/93 by the Committee to Re-elect Sen. Edward M. Kennedy '94 lists the employer of Kathleen .

[end of page 7]

Kennedy Townsend as "M.D. Student Svcs. Alliance" and

Ms. Townsend's occupation as "Attorney."

24. In fact, at the time of her Two Hundred fifty Dollar ($250.00) donation to her uncle's senatorial re-election campaign, she listed her employer as Maryland Student Service Alliance, did not list her employment as a "student."

RESPONSE: The Commission has made a reasonable inquiry into this request, and the information that is readily known or available to it is insufficient to enable the Commission to admit or deny whether "she [Ms. Townsend] listed her employer as Maryland Student Service Alliance." The Commission generally does not receive the original or copies of informational sheets that contributors submit to recipient committees. The Commission does receive financial disclosure reports filed by the recipient committees, and those reports often provide employer and occupational information about contributors. See Response to #23.

25. In the Senate debate on passage of the Act, Senator McCain did not mention that one of the articles upon which he relied inaccurately reported the facts it asserted to be true.

OBJECTION: The Commission objects to this request on grounds of lack of foundation, vagueness and relevance. See also objection to Request No. 17.

ADDITIONAL RESPONSE: None.

26. The news reports relied on by Senator McCain included allegations regarding contributions by parents in the name of children in the Croopnick, St.Martins, and Harris families.

OBJECTION: The Commission objects to this request on grounds of lack of foundation, vagueness and relevance – plaintiffs fail to identify the news reports in question.

[end of page 8]

ADDITIONAL RESPONSE: The Commission admits that one of the articles that Senator McCain had placed in the Record, "Members Cash In On Kid Contributions," mentions some members of a family named Croopnick. The

Commission also admits that another article that Senator McCain had placed in the Record, "Sunday Report: Minor Loophole," includes among the individuals mentioned some members of a family named St. Martin. The Commission does not admit that either article discussed a family named "Harris." The Commission does admit that the "Sunday Report: Minor Loophole" article discusses a family named Simmons and that one daughter in that family was referred to as "Andrea Simmons Harris."

27. The Croopnick, St.Martins, and Harris donations were made by adults, not minor children.

OBJECTION: The Commission objects to this request on grounds of lack of foundation, vagueness and relevance – plaintiffs fail to identify the articles in question. In addition, the term "made by" is vague in this context.

ADDITIONAL RESPONSE: The Commission makes this additional response after plaintiffs' counsel specified at the Meet-and-Confer Teleconference the news articles to which the request was referring. The Commission admits that Jennifer Croopnick was at least 20 years old at the time she contributed to the campaign of Rep. Joe Kennedy. The Commission has made a reasonable inquiry and lacks any information whatsoever that would enable the Commission to admit or deny the request as to the ages of members of the St. Martin family and Andrea Simmons Harris.

28. In identifying their occupations on their donation forms, the Croopnick, St. Martins and Harris family members whose donations were at issue identified themselves as students.

[end of page 9]

OBJECTION: The Commission objects to this request on grounds of lack of foundation, vagueness and relevance – plaintiffs fail to identify the articles in question.

ADDITIONAL RESPONSE: The Commission has

made a reasonable inquiry into this request, and the information that is readily known or available to it is insufficient to enable the Commission to admit or deny whether "the Croopnick, St. Martins and Harris family members . . . identified themselves as students" "on their donation forms." The Commission generally does not receive the original or copies of the informational sheets that contributors submit to recipient committees. The Commission does receive financial disclosure reports filed by the recipient committees, and those reports often provide employer and occupational information about contributors. Some, although not all, of the recipient committees that listed Steven P. St. Martin on their publicly available reports as a contributor gave his occupation as "student." The occupation of Andrea Simmons Harris was given as "student" on at least one publicly available committee report during the 1991-92 election cycle. Citizens for Joe Kennedy listed Jennifer Croopnick as a contributor during the 1989-90 and 1993-94 election cycles and both times gave Ms. Croopnick's occupation as "student."

29. The FEC regulations in existence until the effective date of the Act do not require that the age of donors to candidates or committees of political parties be revealed.

OBJECTION: The Commission objects to this request on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: None.

30. An adult whose occupation is that of a student may identify themselves on a donation report as a "student."

[end of page 10]

OBJECTION: The Commission objects to this request on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: The Commission admits that certain adults whose occupation is that of student might choose at times to identify their occupation on a donation report as "student."

31. Not all persons identified as "students" on political donation reporting forms are minor children.

RESPONSE: Admitted.

32. The Act completely prohibits minors aged seventeen and younger from making covered political contributions.

OBJECTION: The Commission objects to this request on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: None.

33. Another provision of federal law, Title 2 U.S.C. Section 441f, already prohibits giving a covered political contribution in the name of another.

OBJECTION: The Commission objects to this request on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: None.

34. Title 2 U.S.C. Section 441f does not permit parents to make covered political contributions in the name of their minor children.

OBJECTION: The Commission objects to this request on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: None.

35. The Act makes no exception allowing minors who are serving as enlisted personnel in the United States Army, Navy, Air Force, Marine Corps., or Coast Guard to make covered political contributions.

[end of page 11]

OBJECTION: The Commission objects to this request on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: None.

36. The Act makes no exception to allow covered political contributions during primary elections by minors who will be eligible to vote in a general election by reason of attaining their majority after the primary election.

OBJECTION: The Commission objects to this request

on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: None.

37. The Act makes no exception to allow covered political contributions by those minors who possess their own financial resources and who make the decision to do so independently of the direction and control of others.

OBJECTION: The Commission objects to this request on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: None.

38. The Act does not grant to the FEC any discretion to allow for donations from those particular minors who possess maturity of judgment and independence from parental direction.

OBJECTION: The Commission objects to this request on the grounds that it raises a pure issue of law.

ADDITIONAL RESPONSE: None.

39. Congress never rejected, by a vote in either House, any alternative to the complete prohibition of political donations by minors.

OBJECTION: The Commission objects to this Request to Admit on grounds of relevance. See also objection to Request No. 17.

ADDITIONAL RESPONSE: None.

[end of page 12]

40. Congress made no express legislative finding justifying the Act's prohibition on political donations by minors.

OBJECTION: The Commission objects to this Request to Admit on grounds of relevance. See also objection to Request No. 17.

ADDITIONAL RESPONSE: None.

41. No present member of Congress and other elected federal officer has engaged in any corrupt act as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties.

OBJECTION: The Commission objects to this request because the terms "any corrupt act" and "as a result of" are vague.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request, and the information that is readily known or available to it is insufficient to enable the Commission to admit or deny the request.

42. No present member of Congress or any other elected federal officer has an appearance of corruption as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties.

OBJECTION: The Commission objects to this request because the terms "has an appearance of corruption" and "as a result of" are vague.

ADDITIONAL RESPONSE: See Additional Response to No. 41.

43. Some persons who will be eighteen years of age at the time of a general election, and therefore eligible to register to vote in an election for federal office, will still be less than eighteen years of age during the campaign for the primary election of a party's candidate.

OBJECTION: The Commission objects to this request on grounds of relevance and because it is hypothetical.

[end of page 13]

ADDITIONAL RESPONSE: The Commission admits that unknown numbers of citizens are likely to fall within the described categories each year.

44. In the circumstances described in the immediately preceding Request to Admit, a minor will be prohibited from giving financial support to the primary candidate of their choice.

OBJECTION: The Commission objects to this request because it is hypothetical and raises a pure issue of law.

ADDITIONAL RESPONSE: None.

45. The FEC has proposed to Congress that it adopt legislation regarding covered political contributions by minors that is less restrictive than the Act.

RESPONSE: The Commission admits that it has made recommendations to Congress regarding covered political contributions by minors that differ from the BCRA.

46. The FEC has submitted Annual Reports to Congress and to the President in compliance with the requirements of law.

RESPONSE: Admitted.

47. In its 1992 Annual Report, the FEC recommended that Congress establish a minimum, but unspecified, age for contributors.

RESPONSE: Admitted.

48. In its explanation of the recommendation for the 1992 Annual Report, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another."

RESPONSE: Admitted.

49. In each of its Annual Reports for the years 1993, 1994, 1995, 1996, 1997 and 1998 the FEC recommended that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

RESPONSE: Admitted.

[end of page 14]

50. In its explanation of the recommendation for the 1993-1998 Annual Reports, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that

parents are not making contributions in the name of another."

RESPONSE: Admitted.

51. In its 1999 and 2000 Annual reports, the FEC recommended that Congress establish a minimum age of 16 for making contributions.

RESPONSE: Admitted.

52. In its explanation of the recommendation for the 1999 and 2000 Annual Reports, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age of 16 for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another."

RESPONSE: Admitted.

53. On several occasions in the past, the FEC has opened MURs (Matters Under Review) in circumstances allegedly involving campaign contributions by parents in the name of their minor children.

RESPONSE: Admitted.

54. Such MURS could only be opened if there existed probable cause to believe that a violation of FECA or of FEC regulations had occurred.

RESPONSE: Denied. The Commission initiates an investigation only upon the affirmative vote of at least four of its members that there is reason to believe that a person has committed or is about to commit a violation.

55. A covered political contribution made by a parent in the name of a minor child violates 2 U.S.C. §441f.

OBJECTION: The Commission objects to this request because it is hypothetical and raises a pure issue of law.

ADDITIONAL RESPONSE: None.

[end of page 15]

56. In MUR 4484, the FEC investigated donations made by the Respondent, Stewart Bainum, in the name of his infant son, to the campaigns of four candidates for office.

RESPONSE: Admitted.

57. In MUR 4484, the FEC and the Respondent, Stewart Bainum, entered into a conciliation Agreement, by which Agreement, Stewart Bainum acknowledged donating Four thousand Dollars ($ 4000.00) in the name of his infant son, to the campaigns of four candidates for office.

RESPONSE: Admitted.

58. As part of the Conciliation Agreement in MUR 4484, Mr. Bainum agreed to pay a civil penalty to the FEC in the amount of Four thousand Dollars ($4000.00).

RESPONSE: Admitted.

59. The civil penalty agreed to in MUR 4484 is the only instance in which the FEC has assessed a civil penalty against a parent based on the covered political contribution by that parent in the name of a minor child.

RESPONSE: Denied. The Commission does not "assess[ ] a civil penalty" in conciliation agreements. The Commission further responds that the conciliation agreement in MUR 4484 is the only instance the Commission has thus far found in its search of its MUR records concerning a parent's contribution in the name of his child in which the respondent agreed to pay a proposed civil penalty.

60. Of all the MURs opened and investigated by the FEC, five percent or fewer involved covered political contributions by minors or by parents made in the name of their minor children.

RESPONSE: Admitted.

61. Of all the MURs opened and investigated by the FEC, four percent or fewer involved covered political contributions by minors or by parents made in the name of their minor children.

RESPONSE: Admitted.

[end of page 16]

62. Of all the MURs opened and investigated by the FEC, three percent or fewer involved covered political contributions by minors or by parents made in the name of their minor children.

RESPONSE: Admitted.

63. Of all the MURs opened and investigated by the FEC, two percent or fewer involved covered political contributions by minors or by parents made in the name of their minor children.

RESPONSE: Admitted.

64. Of all the MURs opened and investigated by the FEC, one percent or fewer involved covered political contributions by minors or by parents made in the name of their minor children.

RESPONSE: Admitted.

65. Every other MUR that has been concluded by the FEC involving covered political contributions by minor children or by their parents in the name of minor children, including those that were the subject of the news reports relied on by Senator McCain in the debate on passage of the Act, have been resolved without the imposition of civil penalties, fines or other monetary sanctions.

RESPONSE: Denied. The Commission does not "impos[e]" monetary sanctions in conciliating a MUR. See Response to Request #59.

66. Persons under the age of eighteen (18) may be eligible to enlist in the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, if they are otherwise qualified and have, or do not need, parental consent.

OBJECTION: The Commission objects to this request on grounds that eligibility to enlist in the armed forces is not relevant to the constitutionality of BCRA, that this request is overbroad and that this request raises a pure question of law.

ADDITIONAL RESPONSE: None.

67. Persons under the age of eighteen (18) are permitted, according to the laws of the State or territory where they reside, to obtain a permit for the operation of a motor vehicle.

[end of page 17]

OBJECTION: The Commission objects to this request on grounds that the ability to obtain a motor vehicle permit is not relevant to the constitutionality of BCRA, that this request is overbroad, and that this request raises pure questions of law.

ADDITIONAL RESPONSE: None.

68. Persons under the age of eighteen (18) are permitted, according to the laws of the State or territory where they reside, to consent to medical treatment.

OBJECTION: The Commission objects to this request on grounds that the ability to consent to medical treatment is not relevant to the constitutionality of BCRA, that this request is overbroad, and that this request raises pure questions of law.

ADDITIONAL RESPONSE: None.

69. Persons under the age of eighteen (18) are permitted, according to the laws of the State or territory where they reside, to consent to mental health treatment.

OBJECTION: The Commission objects to this request on grounds that the ability to consent to mental health treatment is not relevant to the constitutionality of BCRA, that this request is overbroad, and that this request raises pure questions of law.

ADDITIONAL RESPONSE: None.

70. Persons under the age of eighteen (18) are permitted, according to the laws of the State or territory where they reside, to consent to reproductive health care services.

OBJECTION: The Commission objects to this request on the grounds that the ability to obtain a consent to reproductive health care services is not relevant to the constitutionality of BCRA, that this request is overbroad, and that this request raises pure questions of law.

ADDITIONAL RESPONSE: None.

71. Persons under the age of eighteen (18) are permitted, according to the laws of the State or territory where they reside, to enter into the labor force and seek and hold gainful employment.

[end of page 18]

OBJECTION: The Commission objects to this request on grounds that the ability to enter the work force is not relevant to the constitutionality of BCRA, that this request is overbroad, and that this request raises pure questions of law.

ADDITIONAL RESPONSE: None.

72. Persons under the age of eighteen (18) are permitted, according to the laws of the State of territory where they reside, to obtain a declaratory judgment from a court of competent jurisdiction that they are emancipated from their parents.

OBJECTION: The Commission objects to this request on the grounds that the ability to obtain a declaratory judgment of emancipation is not relevant to the constitutionality of BCRA, that this request is overbroad, and that this request raises pure questions of law.

ADDITIONAL RESPONSE: None.

73. None of the fact witnesses identified by you for possible testimony in the trial of this matter has relevant, admissible testimony regarding the ban on covered political contributions by minors.

RESPONSE: Admitted.

74. None of the expert witnesses identified by you for possible testimony in the trial of this matter has relevant, admissible testimony regarding the ban on covered political contributions by minors.

RESPONSE: Admitted.

75. For each of the minor plaintiffs, the act of making a covered political contribution will be prohibited by federal law upon the effective date of the Act.

OBJECTION: The Commission objects to this request because it raises a pure question of law.

ADDITIONAL RESPONSE: None.

[end of page 19]

76. For each of the minor plaintiffs, the act of making a covered political contribution expresses their support for the beliefs, views, and opinions of the candidate for federal office or the committee of a political party.

OBJECTION: The Commission objects to this request because it requires speculation about an individual's subjective state-of-mind.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission to admit or deny this request regarding the beliefs, views, and opinions of these plaintiffs.

77. For each of the minor plaintiffs, the act of making a covered contribution expresses their support for the election of a candidate for federal office or the committee of a political party.

OBJECTION: See Response to the preceding Request.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information whatsoever that would enable the Commission to admit or deny this request regarding the beliefs of these plaintiffs.

78. For each of the minor plaintiffs, the act of making a covered political contribution evidences the agreement of the

minor plaintiff with the beliefs, views, and opinions of the candidate for federal office or the committee of a political party.

OBJECTION: See response to Request No. 76.

ADDITIONAL RESPONSE: The Commission has made a reasonable inquiry into this request and lacks any information that would enable the Commission to admit or deny this request regarding the beliefs, views, and opinions of any of these plaintiffs.

79. For each of the minor plaintiffs, the restriction imposed by the Act would be inapplicable to them but for their being less than eighteen (18) years of age.

OBJECTION: The Commission objects to this request because it raises a pure question of law.

ADDITIONAL RESPONSE: None.

[end of page 20]

80. Making a political contribution is an exercise of fundamental constitutional rights.

OBJECTION: The Commission objects to this request because it raises a pure question of law.

ADDITIONAL RESPONSE: None.

81. The Act treats the minor plaintiffs differently from citizens of the United States who have attained eighteen (18) years of age in the exercise of fundamental constitutional rights based upon their age.

OBJECTION: The Commission objects to this request on grounds that it raises a pure question of law.

ADDITIONAL RESPONSE: None.

82. Because the Act completely prohibits the minors from engaging in a kind of speech, namely the making of covered political contributions, it is subject to strict scrutiny.

OBJECTION: The Commission objects to this request on grounds that it raises a pure question of law.

ADDITIONAL RESPONSE: None.

83. Because the Act burdens the exercise of fundamental constitutional rights, it is subject to strict scrutiny.

OBJECTION: The Commission objects to this request on grounds that it raises a pure question of law.

ADDITIONAL RESPONSE: None.

84. To survive strict scrutiny, the ban on the making of covered political contributions by minors must be narrowly tailored to serve compelling government interests.

OBJECTION: The Commission objects to this request on grounds that it raises a pure question of law.

[end of page 21]

ADDITIONAL RESPONSE: None.

85. Alternatives to the complete prohibition of covered political contributions by minors exist.

OBJECTION: The Commission objects to this request because the terms "alternatives" and "exist" are vague, and because it raises a pure question of law.

ADDITIONAL RESPONSE: None.

86. Many of the existing alternatives to such a complete prohibition are adequate to insure that the interests of the government that motivated Congress to enact the Act would be satisfied.

OBJECTION: The Commission objects to this request on grounds that it raises a pure question of law. The request is also vague because it fails to identify any "alternative," fails to identify the "interests of the government," and because the term "adequate to insure" is vague.

ADDITIONAL RESPONSE: None.

87. No less restrictive alternative to the complete prohibition on covered political contributions by minors was considered by Congress during the floor debates of either House.

OBJECTION: The Commission objects to this request on grounds that the term "less restrictive" is vague. See also objection to Request No. 17.

ADDITIONAL RESPONSE: None.

88. Enforcing current restrictions on giving in the name of another is less restrictive of the rights of minors to make covered political contributions than the complete prohibition imposed by the Act.

OBJECTION: The Commission objects to this request on grounds that it raises a pure question of law.

ADDITIONAL RESPONSE: None.

[end of page 22]

89. A rebuttable presumption that minors under a selected age are not making a covered political donation under their own direction and control is less restrictive of the rights of minors to make covered political contributions than the complete prohibition imposed by the Act.

OBJECTION: The Commission objects to this request on grounds that it raises a pure question of law.

ADDITIONAL RESPONSE: None.

90. Allowing minors who will be eligible to vote in the general election for a federal office to donate to make covered political contributions during the primary and general elections is less restrictive of the rights of minors to make political contributions than the complete prohibition imposed by he Act.

OBJECTION: The Commission objects to this request on grounds that it raises a pure question of law.

ADDITIONAL RESPONSE: None.

91. Prosecuting persons who make a contribution in the name of another is a less restrictive means of insuring that the covered political contributions of minors are made by those minors from their independently controlled funds at their own direction.

OBJECTION: The Commission objects to this request on grounds that it raises a pure question of law.

ADDITIONAL RESPONSE: None.

ADDITIONAL INTERROGATORY

[Additional interrogatory and
response and objection thereto omitted]

[end of page 23]

[end of page 24]

REQUEST TO PRODUCE DOCUMENTS

[request to produce and objection thereto omitted]

[subscription and signature omitted]

[caption omitted]

RESPONSES OF DEFENDANT UNITED STATES TO PLAINTIFFS' REQUESTS TO ADMIT, SUPPLEMENTAL INTERROGATORY, AND REQUEST TO PRODUCE TO ALL DEFENDANTS

[end of page 1]

[prefatory matter omitted]

REQUESTS TO ADMIT

1. Emily Echols, Hanna McDow, Isaac McDow, Zachary White, Daniel Solid and Jessica Mitchell are citizens of the United States.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 1, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 1. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 1.

2. Emily Echols, Zachary White and Daniel Solid are residents of Georgia.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 2, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 2. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 2.

3. Hannah McDow and Isaac McDow are residents of

Alabama.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 3, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 3. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry

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reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 3.

4. Jessica Mitchell is a resident of Florida.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 4, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 4. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 4.

5. Emily Echols, Hanna McDow, Isaac McDow, Zachary White, Daniel Solid and Jessica Mitchell are less then eighteen (18) are minor children. (sic)

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 5, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 5. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 5.

6. Each of the minor plaintiffs has money that is under their sole direction and control and that were not given to them by others for the purpose of making a "covered political contribution."

[end of page 3]

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 6, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 6. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 6.

7. Each of the minor plaintiffs possesses independence of judgment in the selection of candidates for federal elective office.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 7, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 7. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 7.

8. After the effective date of the Act, each of the minor plaintiffs will be completely prohibited from making a covered political contribution.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 8.

9. Each of the minors is deeply and seriously interested in electoral politics and campaigning.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 9, the United States lacks the necessary information and knowledge to

[end of page 4]

respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 9. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 9.

10. The minors have demonstrated their serious interest in electoral politics and campaigning by participating as volunteers in such electoral campaigns.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 10, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 10. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 10.

11. Each of the minors consider the contribution of money to candidates and to committees of political parties a form of expression of support for those candidates and committees.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No.

11, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 11. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 11. [end of page 5]

12. Each of the minors consider (sic) the contribution of money to candidates and to committees of political parties a form of association with those candidates and committees.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 12, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 12. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 12.

13. Each of the minors consider withholding the contribution of money from candidates and from committees of political parties a form of expression of opposition to those candidates and committees.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 13, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 13. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known

or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 13.

14. Each of the minors consider the contribution of money to candidates and to committees of political parties a form of association in support of those candidates and committees.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 14, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to
[end of page 6]
Admit No. 14. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 14.

15. Each of the minors intends to make covered political contributions to suitable candidates for federal office during their minority.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 15, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 15. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 15.

16. The ban on covered political contributions by minors takes effect on November 6, 2002.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No.

16, the United States admits that BCRA § 318 concerning contributions by minors takes effect in accordance with BCRA § 402(a)(4).

17. The colloquy between Senators McCain, Collins and Feingold found in the Congressional Record for March 20, 2002, at pages S2145-S2148, is the sole explanation offered during the debate of the Senate on passage of the Act for the addition of the ban on contributions by minors.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 17.

18. No explanation was offered by any member of the House for the ban on contributions by minors during the debate on passage of the Act in the House of Representatives.

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RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 18.

19. The assertion made my Senator McCain during the Senate debate on passage of the Act that, "[I]ts legislative recommendations to Congress [in1998] cited 'substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors'" is incorrect.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 19.

20. The FEC has never stated in its legislative recommendations that it had "substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors."

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 20.

21. One article relied on by Senator McCain in the Senate debate on passage of the Act, "Members Cash in on Kid Contributions," was written by Alex Knott and appeared in

the publication, Roll Call.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 21.

22. That article also served as the basis for an internal referral in the FEC that led to the initiation of MURs 4252, 4253,4254,4255.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 22, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 22. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny

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Request to Admit No. 22. The United States, however, adopts the response of the FEC to this request.

23. That article incorrectly reports the information relevant to the employer identified by Maryland Lieutenant Governor Kathleen Kennedy Townsend as a "student."

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 23, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 23. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 23. The United States, however, adopts the response of the FEC to this request.

24. In fact, at the time of her Two Hundred Fifty Dollar ($250.00) donation to her uncle's senatorial re-election campaign, she listed her employer as Maryland Student Service Alliance, did not list her employment as a "student."

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 24, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 24. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 24. The United States, however, adopts the response of the FEC to this request.

25. In the Senate debate on passage of the Act, Senator McCain did not mention that one of the articles upon which he relied inaccurately reported the facts it asserted to be true.

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RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 25.

26. The news reports relied on by Senator McCain included allegations regarding contributions by parents in the name of children in the Croopnick, St. Martins, and Harris families.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 26.

27. The Croopnick, St. Martins, and Harris donations were made by adults, not minor children.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 27, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully

admit or deny the subject matter of Request to Admit No. 27. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 27. The United States, however, adopts the response of the FEC to this request.

28. In identifying their occupations on their donation forms, the Croopnick, St. Martins and Harris family members whose donations were at issue identified themselves as students.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 28, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 28. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or

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readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 28. The United States, however, adopts the response of the FEC to this request.

29. The FEC regulations in existence until the effective date of the Act do not require that the age of donors to candidates or committees of political parties be revealed.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 29.

30. An adult whose occupation is that of a student may identify themselves on a donation report as a "student."

RESPONSE: Subject to the Sept. 3, 2002 General

Objections and Specific Objections to Request to Admit No. 30, admit.

31. Not all persons identified as "students" on political donation reporting forms are minor children.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 31, admit.

32. The Act completely prohibits minors aged seventeen and younger from making covered political contributions.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 32.

33. Another provision of federal law, Title 2 U.S.C. Section 441f, already prohibits giving a covered political contribution in the name of another.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 33.

34. Title 2 U.S.C. Section 441f does not permit parents to make covered political contributions in the name of their minor children.

[end of page 11]

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 34.

35. The Act makes no exception allowing minors who are serving as enlisted personnel in the United States Army, Navy, Air Force, Marine Corps., or Coast Guard to make covered political contributions.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 35.

36. The Act makes no exception to allow covered political contributions during primary elections by minors who will be eligible to vote in a general election by reason of attaining their majority after the primary election.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 36.

37. The Act makes no exception to allow covered political contributions by those minors who possess their own financial resources and who make the decision to do so independently of the direction and control of others.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 37.

38. The Act does not grant to the FEC any discretion to allow for donations from those particular minors who possess maturity of judgment and independence from parental direction.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 38.

39. Congress never rejected, by a vote either House, any alternative to the complete prohibition of political donations by minors.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 39.

40. Congress made no express legislative finding justifying the Act's prohibition on political donations by minors.

[end of page 12]

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 40.

41. No present member of Congress and other elected federal officer has engaged in any corrupt act as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 41, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 41. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 41.

42. No present member of Congress or any other elected federal officer has an appearance of corruption as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 42, denied. *See* Response to Request to Admit No. 53.

43. Some persons who will be eighteen years of age at the time of a general election, and therefore eligible to register to vote in an election for federal office, will still be less than eighteen years of age during the campaign for the primary election of a party's candidate.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 43, admit.

44. In the circumstances described in the immediately preceding Request to Admit, a minor will be prohibited from giving financial support to the primary candidate of their choice.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 44.

[end of page 13]

45. The FEC has proposed to Congress that it adopt legislation regarding covered political contributions by minors that is less restrictive than the Act.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 45.

46. The FEC has submitted Annual Reports to Congress and to the President in compliance with the requirements of law.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 46, admit.

47. In its 1992 Annual Report, the FEC recommended that Congress establish a minimum, but unspecified, age for contributors.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 47. The United States, however, adopts the response of the FEC to this request.

48. In its explanation of the recommendation for the 1992 Annual Report, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another."

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 48. The United States, however, adopts the response of the FEC to this request.

49. In each of its Annual Reports for the years 1993, 1994, 1995, 1996, 1997 and 1998 the FEC recommended that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 49. The United States, however, adopts the response of the FEC to this request.

50. In its explanation of the recommendations for the 1993-1998 Annual Reports, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age

for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another."

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RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 50. The United States, however, adopts the response of the FEC to this request.

51. In its 1999 and 2000 Annual Reports, the FEC recommended that Congress establish a minimum age of 16 for making contributions.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 51. The United States, however, adopts the response of the FEC to this request.

52. In its explanation of the recommendations for the 1999 and 2000 Annual Reports, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age of 16 for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another."

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 52. The United States, however, adopts the response of the FEC to this request.

53. On several occasions in the past, the FEC has opened MURs (Matters Under Review) in circumstances allegedly involving campaign contributions by parents in the name of their minor children.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 53, admit.

54. Such MURs could only be opened if there existed a probable cause to believe that a violation of FECA or of FEC regulations had occurred.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 54. The United States, however, adopts the response of the FEC to this request.

55. A covered political contribution made by a parent in the name of a minor child violates Title 2 U.S.C. Section 441f.

RESPONSE: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 55.

56. In MUR 4484, the FEC investigation [*sic*] donations made by the Respondent, Stewart Bainum, in the name of his infant son, to the campaigns of four candidates for office.

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RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 56, admit that in MUR 4484, the FEC investigated donations made by the Respondent, Stewart Bainum, in the name of his infant son, to the campaigns of four candidates for office.

57. In MUR 4484, the FEC and the Respondent, Stewart Bainum, entered into a Conciliation Agreement, by which Agreement, Stewart Bainum acknowledged donated Four Thousand Dollars ($4000.00) in the name of another to federal candidate committees.

RESPONSE: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 57, admit.

58. As part of the Conciliation Agreement in MUR 4484, Mr. Bainum agreed to pay a civil penalty to the FEC in the amount of Four Thousand Dollars ($4000.00).

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No.

58, admit.

59. The civil penalty agreed to in MUR 4484 is the only instance in which the FEC has assessed a civil penalty against a parent based on the covered political contribution by that parent in the name of a minor child.

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 59, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 59. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 59. The United States, however, adopts the response of the FEC to this request.

60. Of all MURs opened and investigated by the FEC, five percent or fewer involved covered political contributions by minors or by parents in the name of their minor children.
[end of page 16]

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 60, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 60. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 60. The United States, however, adopts the response of the FEC to this request.

61. Of all MURs opened and investigated by the FEC,

four percent or fewer involved covered political contributions by minors or by parents in the name of their minor children.

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 61, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 61. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 61. The United States, however, adopts the response of the FEC to this request.

62. Of all MURs opened and investigated by the FEC, three percent or fewer involved covered political contributions by minors or by parents in the name of their minor children.

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 62, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 62. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry
[end of page 17]
reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 62. The United States, however, adopts the response of the FEC to this request.

63. Of all MURs opened and investigated by the FEC, two percent or fewer involved covered political contributions

by minors or by parents in the name of their minor children.

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 63, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 63. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 63. The United States, however, adopts the response of the FEC to this request.

64. Of all MURs opened and investigated by the FEC, one percent or fewer involved covered political contributions by minors or by parents in the name of their minor children.

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 64, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 64. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 64. The United States, however, adopts the response of the FEC to this request.

[end of page 18]

65. Every other MUR that has been concluded by the FEC involving covered political contributions by minor children or by parents in the name of their minor children, including those that were the subject of the news reports relied on by Senator McCain in the debate on passage of the Act, have

been resolved without the imposition of civil penalties, fines or other monetary sanctions.

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 65, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 65. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 65. The United States, however, adopts the response of the FEC to this request.

66. Persons under the age of eighteen (18) may be eligible to enlist in the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, if they are otherwise qualified and have, or do not need, parental consent.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 66.

67. Persons under the age of eighteen (18) are permitted, according to the laws of the State or territory where they reside, to obtain a permit for the operation of a motor vehicle.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 67.

68. Persons under the age of eighteen (18) are permitted, according to the laws of the State or territory where they reside, to consent to medical treatment.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 68.

[end of page 19]

69. Persons under the age of eighteen (18) are permitted, according to the laws of the State of territory where they

reside, to consent to mental health treatment.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 69.

70. Persons under the age of eighteen (18) are permitted, according to the laws of the State of territory where they reside, to consent to reproductive health care services.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 70.

71. Persons under the age of eighteen (18) are permitted, according to the laws of the State of territory where they reside, to enter into the labor force and seek and hold gainful employment.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 71.

72. Persons under the age of eighteen (18) are permitted, according to the laws of the State of territory where they reside, to obtain a declaratory judgment from a court of competent jurisdiction that they are emancipated from their parents.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 72.

73. None of the fact witnesses identified by you for possible testimony in the trial of this matter has relevant, admissible testimony regarding the ban on covered political contributions by minors.

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 73, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 73, in light of the fact that the United States has designated every fact witness thus far designated by each party to the litigation and the United States does not yet know the subject of the testimony of each witness in the case. Consistent with Fed.

R. Civ. P. 36(a), the United

[end of page 20]

States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 73.

74. None of the expert witnesses identified by you for possible testimony in the trial of this matter has relevant, admissible testimony regarding the ban on covered political contributions by minors.

OBJECTION: Subject to the Sept. 3, 2002 General Objections and Specific Objections to Request to Admit No. 74, the United States lacks the necessary information and knowledge to respond, and consequently cannot truthfully admit or deny the subject matter of Request to Admit No. 73, because the United States has designated experts as rebuttal experts who may cover the subject of minor contributions. Consistent with Fed. R. Civ. P. 36(a), the United States has made an inquiry reasonable in the extraordinary circumstances of this litigation, and the information known or readily obtainable by the United States is insufficient for the United States to admit or deny Request to Admit No. 73.

75. For each of the minor plaintiffs, the act of making a covered political contribution will be prohibited by federal law upon the effective date of the Act.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 75.

76. For each of the minor plaintiffs, the act of making a covered political contribution expresses their support for the beliefs, views, and opinions of the candidate for federal office or the committee of a political party.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 76.

77. For each of the minor plaintiffs, the act of making a

covered contribution expresses their support for the election of a candidate for federal office or the committee of a political party.

[end of page 21]

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 77.

78. For each of the minor plaintiffs, the act of making a covered political contribution evidences the agreement of the minor plaintiff with the beliefs, views, and opinions of the candidate for federal office or the committee of a political party.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 78.

79. For each of the minor plaintiffs, the restriction imposed by the Act would be inapplicable to them but for their being less than eighteen (18) years of age.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 79.

80. Making a political contribution is an exercise of fundamental constitutional rights.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 80.

81. The Act treats the minor plaintiffs differently from citizens of the United States who have attained eighteen (18) years of age in the exercise of fundamental constitutional rights based upon their age.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 81.

82. Because the Act completely prohibits the minors from engaging in a kind of speech, namely the making of covered political contributions, it is subject to strict scrutiny.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 82.

83. Because the Act burdens the exercise of fundamental

constitutional rights, it is subject to strict scrutiny.

[end of page 22]

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 83.

84. To survive strict scrutiny, the ban on the making of covered political contributions by minors must be narrowly tailored to serve compelling government interests.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 84.

85. Alternatives to the complete prohibition of covered political contributions by minors exist.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 85.

86. Many of the existing alternatives to such a complete prohibition are adequate to insure that the interests of the government that motivated Congress to enact the Act would be satisfied.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 86.

87. No less restrictive alternative to the complete prohibition on covered political contributions by minors was considered by Congress during the floor debates of either House.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 87.

88. Enforcing current restrictions on giving in the name of another is less restrictive of the rights of minors to make covered political contributions than the complete prohibition imposed by the Act.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 88.

89. A rebuttable presumption that minors under a selected age are not making a covered political donation under their own direction and control is less restrictive of the rights of

minors to make covered political contributions than the complete prohibition imposed by the Act.
[end of page 23]

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 89.

90. Allowing minors who will be eligible to vote in the general election for a federal office to donate to make covered political contributions during the primary and general elections is less restrictive of the rights of minors to make political contributions than the complete prohibition imposed by he Act.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 90.

91. Prosecuting persons who make a contribution in the name of another is a less restrictive means of insuring that the covered political contributions of minors are made by those minors from their independently controlled funds at their own direction.

OBJECTION: *See* Sept. 3, 2002 General Objections and Specific Objection to Request to Admit No. 91.

SUPPLEMENTAL INTERROGATORY

[interrogatory and response thereto omitted]

REQUEST TO PRODUCE DOCUMENTS

[request and response thereto omitted]

[end of page 24]

[certification, subscription and signatures omitted]

UNITED STATES' RESPONSES TO PLAINTIFF REPUBLIC NATIONAL COMMITTEE'S SECOND SET OF INTERROGATORIES TO DEFENDANTS

20. Do you contend, as a matter of historical fact, that the Congress enacted the BCRA pursuant to any Constitutional power other than the Federal Elections Clause, Article I, Section 4 of the United States Constitution? Unless your response is an unqualified negative, identify every constitutional provision that Congress utilized as authority to enact the BCRA, stating in full the factual basis for your belief with regard to each such provision, and identify the documents you believe support your position and any persons known to you who possess documents or information you believe support your position.

RESPONSE: The United States continues to object to this revised Interrogatory because its seeks discovery of legal arguments and relates to pure legal conclusions, which are impermissible under Fed. R. Civ. P. 33 as well as impermissible according to the Court's Order of August 15, 2002.

Subject to the above-noted objection, the General and Specific Objections to this Interrogatory as originally written (July 22, 2002), and pursuant to the Court's Order of August 15, 2002, the United States responds that in enacting Sections 305 and 504 of the BCRA to amend section 315 of the Communications Act, see 47 U.S.C. § 315, Congress invoked its power under the Commerce Clause, as it did when first enacting the Communications Act of 1934, *see* 47 U.S.C. § 151. This response is without prejudice to any argument that, as a matter of law regardless of "historical fact," any other Constitutional power supports the BCRA.

21. Do you contend that differential treatment of political parties relative to individuals, corporations, trade

associations, labor organizations and non-party advocacy groups is necessary to prevent corruption or the appearance of corruption of federal candidates and officeholders? Unless your response is an unqualified negative, please state in full the factual and legal basis for your response, and identify all documents and witnesses you may rely upon to support your position?

RESPONSE: The United States objects to this interrogatory as vague, ambiguous, and misleading as a mischaracterization of BCRA.

[caption omitted]

[end of page 3]

Briefing [obliterated in text]

(October [15], 2002)

ORDERED that the plaintiffs in 8[1] of the 11 actions (collectively, the McConnell group) shall file together one opening brief of no more than 335 pages, one opposition brief of no more than 205 pages, and one reply brief of no more than 160 pages. All legal

[end of page 4]

arguments shall be presented on a title-by-title basis, with a discrete section of each brief devoted to each title. Within each section, the omnibus arguments for or against that title shall be presented first, followed by a separate subsection for those additional arguments advancing different legal theories or different provisions of BCRA by each of the individual plaintiffs.

It is further **ORDERED** that the government defendants (the Federal Election Commission and the Department of Justice, jointly) and intervening Members of Congress (intervenors) shall file together one opening brief of no more than 395 pages, one opposition brief of no more than 245 pages, and one reply brief of no more than 180 pages. As with the McConnell group, all arguments shall be presented on a title-by-title basis, with a discrete section of each brief devoted to each title.

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[1] *National Rifle Association* (Civ. No. 02-581), *McConnell* (Civ. No. 02-582), *Echols v. FEC* (Civ. No. 02-633), *National Associations of Broadcasters* (Civ. No. 02-753), *AFL-CIO v. FEC* (02-754), *Republican National Committee* (Civ. No. 02-874), and *California Democratic Party* (Civ. No. 02-875). The Court subtracted the Paul plaintiffs from the McConnell group in order to treat the description of their brief separately.

It is further **ORDERED** that the McConnell group's opening brief be divided as follows:

- The McConnell group's omnibus portion of the brief shall be divided on a title-by-title basis and shall not exceed 100 pages in the aggregate.
- The RNC plaintiffs' challenges to Titles I & III of BCRA shall be addressed on a title-by-title basis and shall not exceed 75 pages in the aggregate.
- The California Democratic Party ("CDP") plaintiffs shall address their challenges to Title I in no more than 50 pages.
- The NRA plaintiffs shall address their challenges to Title II in no more than
[end of page 5]
50 pages.
- The Chamber of Commerce plaintiffs shall address their challenges to Title II in no more than 20 pages.
- The AFL-CIO plaintiffs shall address their challenges to Title II in no more than 20 pages.
- The ACLU shall address its challenges to Title II in no more than 20 pages.

It is further **ORDERED** that the defendants' opening brief shall be divided as follows:

- The Federal Election Commission and the Department of Justice shall address, jointly, the plaintiffs' constitutional challenges to BCRA on a title-by-title basis and their arguments shall not exceed 225 pages in the aggregate.
- The intervenors shall address the plaintiffs' constitutional challenges to BCRA on a title-by-title basis and their arguments shall not exceed 170 pages in the aggregate.

It is further **ORDERED** that the McConnell group's opposition brief be divided as follows:

- The McConnell group's omnibus opposition to the defendants' opening brief shall be presented on a title-by-title basis and not exceed 75 pages in the aggregate.
- The RNC plaintiffs' opposition to the defendants' opening brief shall be presented on a title-by-title basis and not exceed 50 pages in the aggregate.
[end of page 6]
- The CDP plaintiffs' opposition to the defendants' opening brief shall be presented on a title-by-title basis and not exceed 25 pages in the aggregate.
- The NRA plaintiffs' opposition to the defendants' opening brief shall be presented on a title-by-title basis and not exceed 25 pages in the aggregate.
- The Chamber of Commerce plaintiffs' opposition to the defendants' opening brief shall be presented on a title-by-title basis and not exceed 10 pages in the aggregate.
- The AFL-CIO plaintiffs' opposition to the defendants' opening brief shall be presented on a title-by-title basis and not exceed 10 pages in the aggregate.
- The ACLU's opposition to the defendants' opening brief shall be presented on a title-by-title basis and not exceed 10 pages in the aggregate.

It is further **ORDERED** that the defendants' opposition brief be divided as follows:

- The FEC and DOJ's opposition to the plaintiffs' opening briefs shall be presented on a title-by-title basis and not exceed 135 pages in the aggregate.
- The intervenors' opposition to the plaintiffs' opening briefs shall be presented on a title-by-title basis and not exceed 110 pages in the aggregate.

It is further **ORDERED** that the McConnell group's reply brief be divided as follows:

- The McConnell group's joint omnibus response to the defendants' opposition shall be presented on a title-by-title basis and not exceed 50 pages in the aggregate.

[end of page 7]

- The RNC plaintiffs' response to the defendants' opposition shall be presented on a title-by-title basis and not exceed 30 pages in the aggregate.
- The CDP plaintiffs' plaintiffs' response to the defendants' opposition shall be presented on a title-by-title basis and not exceed 25 pages in the aggregate.
- The NRA plaintiffs' plaintiffs' response to the defendants' opposition shall be presented on a title-by-title basis and not exceed 25 pages in the aggregate.
- The Chamber of Commerce plaintiffs' response to the defendants' opposition shall be presented on a title-by-title basis and not exceed 10 pages in the aggregate.
- The AFL-CIO plaintiffs' response to the defendants' opposition shall be presented on a title-by-title basis and not exceed 10 pages in the aggregate.
- The ACLU's response to the defendants' opposition shall be presented on a title-by-title basis and not exceed 10 pages in the aggregate.

It is further **ORDERED** that the defendants' reply brief be divided as follows:

- The FEC and DOJ's joint response to the plaintiffs' opposition briefs shall be presented on a title-by-title basis and not exceed 100 pages in the aggregate.
- The intervenors' response to the plaintiffs' opposition briefs shall be presented on a title-by-title basis and not exceed 80 pages in the aggregate.

It is further **ORDERED** that because of the type of challenges and focus of the Thompson, Adams, and Paul plaintiffs, it is the decision of the Court that the plaintiffs in

[end of page 8]

Paul (Civ No. 02-781) and the plaintiffs collectively in the Adams (Civ. No. 02-877) and Thompson plaintiffs (Civ. No.

02-811 (collectively, the Adams group) shall both address their challenges to BCRA in an opening brief consisting of no more than 30 pages, an opposing brief of no more than 20 pages, and a reply brief of no more than 10 pages. As with the other parties, both of these briefs shall present all arguments on a title-by-title basis in discrete sections of the brief.

It is further **ORDERED** that the deadline for the filing of the opening briefs, accompanied by fact witnesses and expert testimony and documentary evidence, is November 6, 2002, opposition briefs are to be filed on November 20, 2002, and reply briefs are to be filed on November 27, 2002.

[end of page 9]

The parties' proposals as to the submission of proposed findings of fact and conclusions of law are taken under advisement and the Court will issue a separate order.

SO ORDERED.

[subscription and signature omitted]

[caption omitted]

[end of page 3]

Order

Upon motion of this Court, it is this 15th day of November 2002 hereby

ORDERED that oral argument in these consolidated actions will take place on Wednesday, December 4 and Thursday, December 5, 2002, according to the following schedule:

[end of page 4]

Wednesday, December 4, 2002

9.00 am - 10.30 am Title I (plaintiffs)

- Arguments by the plaintiffs on the consolidated brief shall include no more than four arguing counsel and shall not exceed eighty minutes.
- Arguments by the Paul plaintiffs shall not exceed ten minutes.

10.45 am - 12.15 am Title I (defendants, intervenors)

1.45 pm - 3.15 pm Title II (plaintiffs)

- Arguments by the plaintiffs on the consolidated brief shall include no more than five arguing counsel and shall not exceed eighty minutes.
- Arguments by the Paul plaintiffs shall not exceed ten minutes.

3.30 pm - 5.00 pm Title II (defendants, intervenors)

Wednesday, December 4, 2002 (sic)

2.30 pm - 3.15 Title III (plaintiffs)

- Arguments by the plaintiffs on the consolidated brief shall include no more than three arguing counsel and shall not exceed thirty minutes.
- Arguments by the Adams plaintiffs shall not exceed ten minutes, and arguments for the Paul plaintiffs shall not exceed five minutes.

3.15 pm - 4.00 pm Title III (defendants, intervenors)

4.15 pm - 4.45 pm Title V (plaintiffs)

- Arguments by the plaintiffs on the consolidated brief shall include no more than two arguing counsel and shall not exceed thirty minutes. Any arguments on the issue of the lowest unit charged shall be presented during arguments on Title V, not Title III.

4.45 pm - 5.15 pm Title V (defendants, intervenors)

[end of page 5]

It is further **ORDERED** that counsel for the plaintiffs on the omnibus brief shall meet and confer and by 4.00 pm on Friday, November 23, 2002 submit to the Court–by delivering to the Clerk's Office in person and filing with the intake representative–the names of arguing counsel, the issue(s) each counsel plans to address, and the length of each counsel's argument. Plaintiffs' counsel are reminded that any rebuttal time must come from the total assigned time (per Title). Counsel for the Adams and Paul plaintiffs shall also each submit the name(s) of arguing counsel and the issues counsel plan to address.

It is further **ORDERED** that all counsel for the defendants and intervenors meet and confer and by 4.00 pm on Friday, November 22, 2002 submit to the Court–by delivering to the Clerk's Office in person and filing with the intake representative–the names of arguing counsel (up to a maximum of four per Title), the issue(s) each counsel plans to address, and the length of each counsel's argument.

The full scheduling order will issue upon receipt of the above information.

SO ORDERED.

[subscription and signature omitted]

[caption omitted]

[end of page 3]

ORDER

(November 26, 2002)

It is hereby **ORDERED** that the following format will apply to the oral argument scheduled to begin at 9.00 am on Wednesday, December 4, 2002, and to resume at 2.30 p.m. on Thursday, December 5, 2002, in the Ceremonial Courtroom, 6th Floor of the United States Courthouse:

[end of page 4]

Title I (Soft Money)

Plaintiffs (9.00 - 10.30)

Party /Length	Counsel
•Omnibus Plaintiffs 20 mins.	Kenneth W. Starr
•California Party Plaintiffs 20 mins.	Deborah B. Caplan
•Thompson Plaintiffs 5 mins.	Sherri L. Wyatt
•RNC Plaintiffs 35 mins.	Bobby R. Burchfield
•Paul Plaintiffs (Free Press) 10 mins.	Herbert W. Titus

Break

Defendants (10.45 - 12.15)

Party/Length	Counsel
•FEC 45 mins.	Richard B. Bader
• Intervenors (First Amendment)25 mins.	RogerW. Witten
• Intervenors (Tenth AmendmentEqual Protection 20 mins.	Randolph D. Moss

Lunch Break

Wednesday, December 4, 2002, 1.45 pm

Title II (Electioneering Communications)

Plaintiffs (1.45 - 3.15)

Party/Length	Counsel
•Omnibus Plaintiffs 43 mins.	Floyd Abrams
•AFL-CIO Plaintiffs 9 mins.	Laurence E. Gold
•ACLU 9 mins.	Joel M. Gora
•NRA Plaintiffs 19 mins.	Charles J. Cooper
•Paul Plaintiffs (Free Press) 10 mins.	Herbert W. Titus

Break

Defendants (3.30 - 5.00)

Party/Length	Counsel
•DOJ 40 mins.	James J. Gilligan
•Intervenors 35 mins.	Seth P. Waxman
•FEC 15 mins.	David Kolker

[end of page 5]

Thursday, December 5, 2002, 2.30 p.m.

Title II (Coordinated Expenditures)

Plaintiffs (2.30 - 3.00)

PartyLength	Counsel
• Omnibus/Chamber Plaintiffs 25 mins.	Jan Witold Baran
•California Party Plaintiffs 5 mins.	Charles H. Bell

Defendants (3.00 - 3.25)

Party Length	Counsel
•FEC 15 mins.	David Kolker
•Intervenors 10 mins.	Charles G. Curtis

Title III (Sections 304, 307, 316, 318 & 319

Plaintiffs (3.25 - 3.50)

Party/ Length	Counsel
• Echols Plaintiffs (Section 318) 10 mins.	James M. Henderson
• Adams Plaintiffs (Sections 304, 307, 316 & 319) 10 mins.	John C. Bonifaz
• Paul Plaintiffs (Sections 304, 307, 316 & 319) 5 mins.	Herbert W. Titus

Break

Defendants (4.05 - 4.35)

Party/ Length	Counsel
• FEC (Sections 304, 316, 318 & 319) 15 mins.	Stephen Hershkowitz

• Intervenors (Section 304, 316 & 319 15 mins. Bradley S. Phillips

Title III (Lowest Unit Charge), Title V

Plaintiffs (4.35 - 4.55)

Party/ Length	Counsel
•Omnibus/NAB Plaintiffs 20 mins.	Floyd Abrams

Defendants (4.55 - 5.15)

Party / Length	Counsel
•DOJ/FEC 20 mins.	Michael Raab

[end of page 6]

It is further **ORDERED** that in view of the number of arguing counsel and for the court's convenience, rebuttal will be permitted only to respond to the court's questions, if any.

It is further **ORDERED** that each arguing counsel file with the Court on or before Monday, December 2, 2002, a local contact number at which he or she can be reached beginning on Tuesday, December 3, 2002, in the event of inclement weather or other emergency.

It is further **ORDERED** that each arguing counsel will be seated at counsel table in the well of the Court. In addition, there will be reserved seating in the courtroom for only one person, who can be either counsel or a representative of the party, for each party in the eleven suits (minors are counted as one party). A list of those persons is to be provided to Sheldon Snook, Administrative Assistant to Chief Judge Hogan, at fax number 202-354-3412, no later than 12.00 noon on December 3, 2002, in order to secure reserved seating. Only those persons identified on the list will be eligible for reserved seating in the courtroom.

SO ORDERED.

[subscription and signature omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,

Defendants.

) Civil Action No.
) 02-0582
) (CKK, KLH, RJL)

) **CONSOLIDATED ACTIONS**

PLAINTIFF AMERICAN CIVIL LIBERTIES UNION MOTION FOR STAY PURSUANT TO RULE 62 (C)

Upon the attached affidavit of Anthony Romero, Executive Director of the American Civil Liberties Union, and incorporating by reference the relevant points in the Memorandum of Points and Authorities filed on May 7, 2003 by the National Rifle Association, the American Civil Liberties Union hereby moves for a stay pursuant to FRCP 62(C), pending appeal to the Supreme Court of the United States of this Court's May 2, 2003 Judgment with respect to the constitutionality of the definitions of "electioneering communications" contained in Title II of the Bipartisan Campaign Reform Act ("BCRA") Pub. L. No. 107-155.

The reasons for this motion, more fully set out in the Affidavit of Anthony Romero, are as follows:

First, if not stayed pending appeal, this Court's decision of May 2nd will cause irreparable injury to the American Civil Liberties Union in the immediate and near future. The net effect of this Court's decision - in upholding the so-called "fallback definition of "electioneering communication" while striking the limiting clause ("suggestive of no plausible meaning other than an exhortation to vote...") is that any broadcast communication paid for by the ACLU which can be deemed one that "promotes" or "supports" or "attacks" or "opposes" a candidate for Federal office (regardless of whether the communication expressly advocates a vote for or against that candidate) is subject to the full brunt of the Federal Election Campaign Act.

According to published reports, the Bush Administration is preparing new legislation, dubbed Patriot Act II, which would enhance the already broad powers granted to law enforcement under USA PATRIOT Act enacted in the wake of September 11th. It is vital that the country engage in a full and informed debate about these proposals and their civil liberties costs. The ACLU is committed to playing a central role in that debate and to using all the advocacy tools at its disposal, including radio and broadcast ads targeting key members of congress if we deem it appropriate, to ensure that civil liberties are not further eroded by legislation that is hastily adopted.

This court's May 2 decision confronts the ACLU with an intolerable and unacceptable dilemma. We can continue to speak out on these vital civil liberties issues at the risk of civil or criminal penalties if it is determined by governmental authorities that the speech comes within the Court's wholly new statutory definition of "electioneering communications." Or we can remain silent and not engage in any speech that could even arguably come within that definition until such time - perhaps 6 to 8 months from now - when the Supreme Court finally resolves these issues.

The day before the BCRA was passed, so far as the campaign finance laws were concerned, the ACLU could say anything about elected federal officials who will be running for office unless that speech "expressly advocated" the election or defeat of those officials. The day after this court's decision, so far as the campaign finance laws are concerned, the ACLU cannot say anything about elected federal officials who will be running for office if that speech in any way "promotes" "supports" "attacks" or "opposes" that official. This sea change in the right of non-partisan issue organizations to speak out on the vital issues of the day and the top-level officials who create those issues, should not be implemented until the Supreme Court has had the final say in these historic matters.

Finally, for the reasons set forth more fully in the Memorandum of Points and Authorities of the NRA, staying the enforcement of the fallback definition, and thus reinstating the potential applicability of the primary definition, properly balances the equities between the public interest in proper enforcement of campaign finance laws and the public interest in preserving the full measure of First Amendment freedoms. We adopt the pertinent reasoning and analysis set forth in the NRA's memorandum and therefore and do not submit a separate memorandum of points and authorities.

May 9, 2003

Respectfully Submitted,

____

Joel M. Gora
250 Joralemon Street
Brooklyn, NY 11201

Of Counsel
Mark J. Lopez
(*Pro Hac Vice)*
Steven R. Shapiro
American Civil
Liberties Union
125 Broad Street
17th Floor
New York, NY 10004
212-549-2608

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs,	) Civil Action No.) 02-0582)CKK, KLH, RJL)
v.	)
FEDERAL ELECTION COMMISSION, et al., Defendants.	) **CONSOLIDATED**) **ACTIONS**

DECLARATION OF ANTHONY D. ROMERO

Pursuant to 28 U.S.C.§ 1746, I hereby declare as follows:

1. I am the executive director of the American Civil Liberties Union ("ACLU"), a position I have held since September 2001. In that capacity, I am responsible for managing the operations of the entire organization – including its legislative activities. My responsibilities also include raising funds for the organization through membership and other fundraising activities.

2. The ACLU is a nationwide, non-profit, non-partisan organization with approximately 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. It is also a tax-exempt organization under § 510(c)(4) of the Internal Revenue Code. Membership dues finance the organization's activities. The ACLU is incorporated in Washington, D.C.

3. I have previously submitted a sworn declaration in this case that is included in the record. Romero Declaration 3 PCS: ACLU 3. In addition to providing membership and organizational information about the ACLU in that declaration, I described the mission and work of the ACLU, including its extensive public education and legislative program. As our membership has grown, from 275,000 to over 400,000 members since 9/11/01, our program has greatly expanded. Thus, while our activities have historically been dependent on earned media coverage of the positions staked out by the ACLU, our growing membership has allowed the organization to increase its paid advertising significantly. Accordingly, we have re-deployed our resources to allow for print and broadcast advertising. The reasons for this reallocation of resources are explained in my earlier statement. Romero Declaration ¶ 8: 3 PCS, ACLU 3.

4. The adoption of Title II of the Bipartisan Reform Act threatened to constrict the ability of the ACLU to participate in the public debate about numerous issues that are critical to the organization and its constituents. The broad sweep of the 30/60 day rule prohibiting broadcast communications that merely refer to a candidate virtually foreclosed any discussion of public issues that sought to hold federal candidates accountable for their actions. The adoption of the fall back definition as modified by this Court in its decision of May 2, 2003 potentially restricts even more speech than the provision that was enjoined by the Court. The new definition of electioneering upheld by the Court prohibits any broadcast communication by the ACLU *at any time* that can be construed as promoting, supporting, opposing, or attacking a candidate. I am concerned that any ACLU advertisement which is critical of the policy position or vote of a member of Congress, or can be construed as critical of a member of Congress, may provide the basis for federal prosecution. Yet, it is more important now than ever that issues involving the unprecedented assault on civil liberties following the 9/11 tragedy be fully discussed and that candidates be held accountable for their actions. The rush to adopt regressive post 9/11 legislation poses the single greatest threat to civil liberties since the McCarthy Era and it is not possible to discuss these issues or influence legislation in a meaningful way without identifying candidate positions.

5. Congress passed the USA PATRIOT Act immediately after September 11, 2001. The Act gave new sweeping powers to the federal government to conduct investigations and surveillance inside the United States. The Act was passed with almost no debate and before the ACLU and others could organize any effective opposition.

6. According to published reports, the Justice Department is now contemplating new legislation, the Domestic Security Enhancement Act (Patriot Act II), that would further expand the government's surveillance powers and further diminish the constitutional checks and balances on law enforcement. The ACLU has already expressed its determination to oppose Patriot Act II if it is introduced. Because of the critical civil liberties issues at stake, it is vital that the ACLU remain free to use all the advocacy tools at its disposal. This may well include, if we deem it appropriate as part of our legislative strategy, radio and broadcast ads targeted at key legislative figures.

7. While it is impossible to predict the timing or course of that legislative debate, it is certainly possible, and perhaps even probable, that it will take place before the Supreme Court can render a final decision on the constitutionality of the B.C.R.A. In the interim, the ACLU is facing the prospect of criminal penalties if the content of any ad we choose to broadcast is construed as supporting, opposing, promoting, or attacking a candidate for federal office. Given that risk, the ability of the ACLU to speak out on matters that go to the very core of the ACLU's mission will necessarily be hampered unless the stay is granted.

8. I declare under penalty of perjury, that the foregoing is true and correct.

Executed on this 9th day of May 2003.

____

Anthony D. Romero

Appeal Docketed May 15, 2003
Probable Jurisdiction Noted June 5, 2003

AUG 16 2003

No. 02-1674 *et al.*

IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

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FLOYD ABRAMS	KENNETH W. STARR
SUSAN BUCKLEY	*Counsel of Record*
BRIAN MARKLEY	EDWARD W. WARREN
CAHILL GORDON & REINDEL LLP	KANNON K. SHANMUGAM
80 Pine Street	KIRKLAND & ELLIS
New York, NY 10005	655 Fifteenth Street, N.W.
(212) 701-3000	Washington, DC 20005
	(202) 879-5000

(*additional counsel on inside cover*)

August 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
Frost Brown Todd LLC
400 West Market Street, Suite 3200
Louisville, KY 40202-3363
(502) 568-0222

Counsel in No. 02-1674

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FEC TWENTY YEAR REPORT

Shortly after the *MCFL* decision, the National Right to Work Committee (NRWC) filed a petition asking the FEC to rewrite its rules to adopt the Court's conclusion that "express advocacy" is the proper standard for determining when communications by corporations and labor organizations are prohibited under §441b. The Commission responded by publishing an Advance Notice of Proposed Rulemaking seeking comments on how the agency should respond to the *MCFL* decision.

The Commission received more than 17,000 comments in response to the Advance Notice, most of which supported the NRWC's position on express advocacy. Nevertheless, the comments, the testimony at public hearings on the subject and discussions among the Commissioners themselves all revealed a wide range of views on how broadly or narrowly the Commission should define express advocacy. Some encouraged the Commission to limit express advocacy to the words and phrases spelled out in *Buckley*, while others--citing *MCFL* and *Furgatch*--favored a broader interpretation.

In the wake of the *Austin* decision, the Commission published a second notice inviting comments on express advocacy and the MCFL exemption. Again, most of the those commenting supported adoption of a narrow express advocacy standard. Several also offered suggestions for implementing the MCFL exemption.

In its attempt to craft regulations, the Commission has struggled to find an express advocacy definition that is narrow enough to avoid impinging upon First Amendment rights, but broad enough to ensure the effectiveness of the federal election laws. The definition must distinguish express advocacy from issue advocacy without creating a loophole that would, in effect, allow corporations, labor unions and individuals to sidestep the requirements of the election law.

FEC, Twenty Year Report, Ch. 3, p. 4 (April 1995)

In August 1994, the Commission tentatively approved an express advocacy definition, but has not taken final action on the rulemaking.

The Commission is also considering proposals to implement the MCFL exemption allowing certain nonprofit advocacy groups to make independent expenditures using treasury funds. In addition, the rulemaking proposals under consideration would revamp the applicable standards for corporate and union activities such as the publication of voter guides and candidate endorsements, in line with the *MCFL* decision.

Soft Money

soft money- n. [slang]: funds raised and/or spent outside the limitations and prohibitions of the FECA. Sometimes called nonfederal funds, soft money often includes corporate and/or labor treasury funds, and individual contributions in excess of the federal limits, which cannot legally be used in connection with federal elections, but can be used for other purposes.

Soft money is one of the most difficult issues the Commission has addressed during the last 20 years. The origins of "soft money" lie in the United States' federal system of government. The Constitution grants each state the right to regulate certain activities within that state. In the area of campaign finance, each state may establish its own rules for financing the nonfederal elections held within its borders. As a result, committees that support both federal and nonfederal candidates frequently must adhere to two different sets of campaign finance rules--federal and state. (Sometimes, cities and counties create yet a third set of rules governing the financing of local elections.)

FEC, Twenty Year Report, Ch. 3, p. 4 (April 1995)

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of)
)
) MUR 4624
)
The Coalition)
National Republican)
Congressional Committee, *et al.*)

STATEMENT FOR THE RECORD

COMMISSIONER BRADLEY A. SMITH

I.

I voted in favor of the General Counsel's Report of April 20, 2001 recommending that the file be closed. However, while some commissioners seem to feel this case indicates that the Commission's rules regarding coordination and political committees do not sufficiently restrain political speech and participation,[1] I believe that this case is illustrative of the need for still further protections for Americans wishing to participate in the political life of our nation. In particular, limiting the Commission's reach in cases involving allegations of coordinated public communications to communications involving express advocacy,[2] is, in my view, sound interpretation of both the statute and judicial precedent, and is required by the Constitution.

---

[1] *See* Statement of Reasons of Commissioner Scott E. Thomas and Chairman Danny L. McDonald, (hereinafter "Thomas/McDonald Statement"); Statement for the Record of Commissioner Karl J. Sandstrom (hereinafter "Sandstrom Statement").

[1]

The broad facts and procedure of this case are substantially as put forth in the Statement of Reasons filed by Commissioner Thomas and Chairman McDonald.[3] In March of 1997, the Democratic National Committee ("DNC") filed a complaint alleging that various Republican Party affiliated committees, and a large number of business and trade associations supportive of the general agenda of Republicans in Congress, had in 1996 committed massive violations of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). This triggered a four-year investigation of more than 60 committees and organizations plus several individual respondents. The Commission's attorneys took nine depositions, collected thousands of pages of documents, and interviewed numerous other witnesses, before this case came to its merciful end.[4]

---

[2] The term "express advocacy" stems from the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). In that case, the court limited the reach of sections 608(e)(1) and 434(e) of the FECA to those communications that "in express terms advocate the election or defeat of a clearly identified candidate," *id.* at 44, then held that a cap on section 608(e)(1) expenditures, even as narrowed, was unconstitutional. As examples of express advocacy, the Court offered such terms as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley* at 44, n.52. This limitation on the reach of regulation has been reaffirmed by the Supreme Court, *see Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (hereinafter "*MCFL*"), and countless lower courts, *see infra* note 27. The question in this case is whether or not this limitation applies to communications that are coordinated with the campaign.

[3] *See* Thomas/McDonald Statement at 2-4.

[4] I joined the Commission on June 26, 2000, at which time the case had been going on for over three years. Two weeks later, on July 11, 2000, I joined in a 5-0 Commission vote in favor of an additional round of

Despite the fact that the Commission has now found no violations in this case, I strongly suspect that the original complainant, the Democratic National Committee, considers its complaint to have been a success. The complaint undoubtedly forced their political opponents to spend hundreds of thousands, if not millions of dollars in legal fees, and to devote countless hours of staff, candidate, and executive time to responding to discovery and handling legal matters. Despite our finding that their activities were not coordinated and so did not violate the Act, I strongly suspect that the huge costs imposed by the investigation will discourage similar participation by these and other groups in the future.[5]

We cannot fault the complainant DNC for pursuing its political goals through the legal tools made available to it, but nor can we on the Commission blind ourselves to the fact that the substantial majority of the complaints filed with the Commission are filed by political opponents of those they name as respondents. These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in

---

discovery. I now recognize the error of that vote, and, for the reasons stated below, will no longer lend my vote to any matter that prolongs the legal agony of citizens and groups whose communications do not contain express advocacy.

[5] Several of the Respondents in this MUR have also expressed their belief that the General Counsel's Report of April 20, 2001, while ultimately recommending that no action be taken against them, unfairly maligns their actions and insinuates illegal conduct. *See* Letter of Jan Witold Baran to Commission, June 13, 2001; Letter of Benjamin L. Ginsberg, et al. to Acting General Counsel Lois G. Lerner, July 5, 2001. I share the concerns of these respondents that reports to the Commission ought not be used to impugn the activities and motives of respondents when the evidence does not support continuing with the case or when no violation is found, and I believe that this type of tone will further discourage individuals and groups from participating in political activity in the future.

preventing "corruption or the appearance of corruption."[6] This knowledge makes it particularly important that we be sensitive to the possibility that our interpretations of the Act can, and sometimes do, chill what is and ought to be constitutionally protected political speech.

In this case, the Office of General Counsel concluded that it could not prove that the activities and disbursements of the respondents were coordinated with candidates and committees pursuant to the regulations promulgated by the Commission only last December. *See* 11 C.F.R. § 100.23. These coordination rules were themselves a salutary effort to address problems of vagueness and overbreadth in the Commission's prior practices, which lacked any clear definition of "cooperation, consultation, or concert," *see* 2 U.S.C. § 441a(a)(7)(B)(i), and provided inadequate guidance to groups and individuals as to what activities would be deemed "coordinated" under the Act. *See Federal Election Commission v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999); *see* also *Clifton v. Federal Election Commission*, 114 F.3d 1309 (1st Cir. 1997). Groups and individuals who petition the government, contact their elected representatives, or perhaps are friends or acquaintances of representatives or Congressional staffers, former staffers, or friends and acquaintances of the same, need guidance on what conduct falls short of coordination without concluding that the only clear way to avoid liability is to refrain from making independent expenditures. The conduct standard implemented by the new coordination rule is a vast improvement over the past practices of the Commission, providing much-needed guidance to makers of independent expenditures.[7]

Unfortunately, in promulgating 11 C.F.R. § 100.23, the Commission provided scant guidance to groups engaged in issue advocacy,[8] by not addressing the question of whether a content standard, as well as a conduct standard, would be required before coordinated public communications would be subject to the rule.[9] This failure is important, because as this case demonstrates, the conduct standard alone does not provide an adequately bright line to prevent the specter of investigation and litigation from chilling constitutionally protected speech. When a person decides to make independent political expenditures, he opens himself up to two potential burdens under the Act. The first burden is to report those independent expenditures in excess of $250.00. *See* 2 U.S.C. § 434(c). The second is to defend against allegations that the advocacy was somehow authorized by or coordinated with a candidate which, if true, would lead to still greater limits on the person's political activity. *See* 2 U.S.C. § 431(17). Respondents can spend substantial sums defending themselves against such allegations, and this possibility will cause many speakers to avoid engaging in what ought to be constitutionally protected

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[6] The phrase "corruption or appearance of corruption" comes from *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), and serves as the constitutionally valid rationale for regulating political speech in the form of campaign contributions and expenditures. Although this case involves the DNC complaining about Republican candidates and organizations and their allies, it goes without saying that Republicans file charges against Democrats.

[7] Commissioners Thomas and McDonald, who voted against adcption of the regulations, complain that the regulations are unduly strict. Thomas/McDonald Statement at 4-14. For reasons I state below, I believe they comply with the Act and that our old practices exceeded the scope of both the Act and the Constitution. Commissioners Thomas and McDonald also argue that the Commission has thwarted the will of the Senate, Thomas/McDonald Statement at 17, by implementing these regulations in the wake of the Senate's passage of S.27, the McCain-Feingold bill. Section 214 of S. 27 would effectively repeal the coordination rule of 11 C.F.R. 100.23. We are not, of course, entrusted with implementing the will of the Senate, at least not until such time as the House of Representatives manifests the same "will" and the President has either signed the bill, allowed it to become law without his signature, or had his veto over-ridden by the necessary two-thirds majority of each house. *See generally, INS v. Chadha*, 462 U.S. 919 (1983). I note that although the Senate received the proposed final rule on December 7, 2000, it did not "disapprove" the rule by resolution within thirty legislative days of its receipt, as it was free to do pursuant to 2 U.S.C. 438(d).

[8] As terms of art, "independent expenditures" expressly advocate the election or defeat of a candidate. Though not limited in amount, they are subject to other provisions of the Act. "Issue advocacy," on the other hand, is political discussion that does not contain explicit words of advocacy of election or defeat, and so has been protected by the Supreme Court from regulation. *See Buckley*, 424 U.S. at 44, n.52; *MCFL*, 479 U.S. at 249. The issue here is whether an issue ad, if coordinated with a candidate, becomes subject to the Act.

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[9] In the Explanation and Justification of the final rule, the Commission claims that it is "addressing the constitutional concerns raised in *Buckley* by creating a safeharbor for issue discussion." *See* Notice #2000-21, Final Rule on General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76138, 76141 (Dec. 7, 2000). This statement is true but applies only with respect to 11 CFR section 100.23(d), which makes clear that a candidate's response to an inquiry regarding her position on issues will not suffice to establish coordination. *Id.* Otherwise, the Commission has not provided an adequate safeharbor for issue discussion, for it has not, as of yet, determined the content standard necessary for regulating coordinated communications. *See id.* at 76141 ("The Commission is not adopting any content standard as part of these rules *at this time.*")(emphasis added). The Commission's conscious decision not to address a content standard should not be read as a presumption that the Commission has made a final decision against requiring a content standard, however, for as the Explanation & Justification also explains, "the Commission may revisit the issue of a content standard for all coordinated communications when it considers candidate-party coordination." 65 Fed Reg. at 76141.

speech. Thus, a bright line test is needed. A content test—express advocacy—provides such a bright line. If a financier of general public communications is not willing to defend against charges that his speech was authorized by a candidate, or prefers not to disclose the sources of his funding, *see e.g. NAACP v. Alabama*, 357 U.S. 449 (1958), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), he can simply delete from his message words of express advocacy and speak on any other topic of his choosing. If he is investigated nonetheless, he can be assured that the investigation will be short, non-intrusive, and inexpensive, merely by demonstrating the absence of express advocacy in his communications. Absent a content standard, however, no such immediate defense is available if the Commission launches an investigation into the alleged coordination with candidates. Further, such an investigation is likely to be highly intrusive, as is demonstrated by this case and another recent high-profile matter eventually resulting in no finding of a violation, MUR 4291 (American Federation of Labor and Congress of Industrial Organizations). The investigation can include extensive rifling through the respondents' files, public revelations of internal plans and strategies, depositions of group leaders, and the like. Such allegations and investigations may be avoided only by completely avoiding all contact with candidates, because even minimal contact could trigger a credible allegation. Oddly, the less immediately obvious evidence there is that the conduct would meet the standard of 11 C.F.R. § 100.23, the more intrusive the investigation is likely to be, as the Commission searches for evidence of the veracity of the complaint. The effect of the rule becomes essentially the same as that of the rule struck down in *Clifton*; "it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office," and is therefore, "patently offensive to the First Amendment."

114 F.3d 1309, 1314 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).

[4]

With that in mind, I believe that the Act, the Constitution, judicial precedent, and sound public policy require us to limit our enforcement to cases in which communications, whether or not coordinated with a candidate, expressly advocate the election or defeat of candidates for federal office. Failure to include such a content standard has and will have a chilling effect on political participation and speech.

II.

Institutional competence and prudence requires that executive agencies charged with enforcing the law, even more than the courts, ought to adhere to the general precept of not unnecessarily deciding Constitutional issues. Thus I first analyze our authority under the statute. I believe that the statute, as interpreted by the Supreme Court, does not authorize us to regulate issue advocacy, even when such advocacy is coordinated with a candidate.

Corporate expenditures and contributions are prohibited under section 441b of the Act. The phrase "contribution or expenditure" in section 441b is defined separately in 2 U.S.C. section 441b(b)(2).[10] Nevertheless, in

Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)("*MCFL*"), the United States Supreme Court looked to the general definitions section of the Act, 2 U.S.C. section 431, to define the scope of the term "expenditure" as used in section 44 lb. *See* 479 U.S. at 245-46. The *MCFL* Court also held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of44lb." *Id.* at 249. There is no reason to believe that section 431, the general definitions section, is not as applicable in construing the term "contribution" in section 441b as it is in construing the term "expenditure" in 441b. Section 431(8)(B)(vi) states that the term "contribution" does not include "any payment made or obligation incurred by a corporation or labor union which, under section 441b(b) of this title, would not [first] constitute an expenditure by such corporation or labor organization." 2 U.S.C. § 431(8)(B)(vi). Because the Court has determined that the term "expenditure," as used in section 441b, is limited to communications containing express advocacy, and because the Coalition did not engage in express advocacy, the corporate respondents in this MUR did not make prohibited "expenditures" under section 441b. They therefore cannot have made prohibited in-kind "contributions" under section 441b, by way of section 441a(a)(7)(B)(i). Likewise, the committees involved in this MUR could not have accepted in-kind corporate contributions from the Coalition in violation of 2 U.S.C. section 44lb.

[5]

Nor do I believe that non-corporate respondents violate the Act through coordinated issue advocacy. In *Buckley*, the Supreme Court held that the phrase "'for the purpose of influencing' an election or nomination," appearing in the definition of "expenditure" at 2 U.S.C.

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[10] 2 U.S.C. § 441b(b)(2) provides as follows:

> For the purposes of this section ... the term 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money or any other services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section. ...

section 431 (9)(A)(i), limited the meaning of "expenditure" to communications containing express advocacy, at least when, as in this case, the speaker was not a political committee. 424 U.S. 1 at 79-80. After the *Buckley* decision was handed down, Congress, fully aware of the Court's restrictive interpretation of the term "expenditure" in section 431 (9)(A)(i), used the term "expenditure" in amending section 441a(a)(7)(B)(i). Section 441a(a)(7)(B)(i) provides that "*expenditures* made by any person in cooperation, consultation, or concert with ... a candidate ... shall be considered to be a contribution to such candidate." (emphasis added). Congress's post-*Buckley* use of the term "expenditure"—where the statutory definition of the term as interpreted by the Supreme Court is limited to communications containing words of express advocacy—indicates that even coordinated public communications must contain express advocacy before they can be transformed into regulable in-kind contributions.[11]

Indeed, Congress has responded to the courts on this topic before. After *Buckley*, Congress limited the disclaimer provisions to apply specifically to express advocacy communications, 2 U.S.C. § 441d(a), even where those communications are coordinated with a candidate.[12] If

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[11] Additionally, section 431(8)(A)(i) of the Act limits the definition of "contribution" to any gift, etc. "made … for the purpose of influencing" a federal election. 2 U.S.C. § 431(8)(A)(i). This is the same statutory phrase as is used in the definition of "expenditure," 2 U.S.C. § 431 (9)(A)(i), and which was construed by the *Buckley* Court to require a showing of express advocacy. The *Buckley* Court referred to 2 U.S.C. § 431(8)(A)(i) arid 2 U.S.C. § 431(9)(A)(i) as "parallel provisions." *Buckley* at 77.

[12] *See* Pub. L. No. 94-283, 90 Stat. 497, May 11, 1976 (amending 2 U.S.C. § 441d). 2 U.S.C. § 441d(a)(2) provides in pertinent part:

> Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate ... such communication ... (2) if paid for by other persons but authorized by a candidate, an

Congress had intended for coordinated issue advocacy communications to be within the jurisdiction of the FECA, it surely would have required a disclaimer for such communications.

Finally, that the Act as currently written requires express advocacy before coordinated public communications are subject to its terms is evidenced by the fact that, in pending legislation, the Senate has approved an amendment to do away with any requirement of express advocacy in the coordination provisions of the Act.[13]

[6]

Given that the respondents in this case did not engage in express advocacy, this should have ended the matter in the spring of 1997, without the extensive investigation that followed. The Commission may only pursue violations of the FECA. *See* 2 U.S.C. § 437g(a)(2). For me this is adequate to dismiss the case.[14] However, recognizing that the statute is not a model of clarity in this regard, and in light of the apparent certainty of other commissioners that the Act

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> authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee.

Prior to *Buckley*, the Second Circuit had also held that issue advocacy could not be subject to the disclosure provisions of the FECA, *United States v. National Committee for Impeachment*, 469 U.S. 1135 (2d Cir. 1972).

[13] *See* S. 27, Sec. 214, 107th Congress, 1st Session (commonly known as the "McCain-Feingold" bill) (amending the Act's definition of "contribution" to include "any coordinated expenditure or other disbursement made by any person in connection with a candidate's campaign, regardless of whether the expenditure or disbursement is a communication that contains express advocacy.")

[14] The Commission also made "reason to believe" findings under section 441d for failure to make disclaimers. As section 441d, by its express terms, only applies to "communications expressly advocating election or defeat," this charge could have been easily dismissed as well.

at least allows for regulation of coordinated issue advocacy, I believe it worthwhile to set forth more fully why it is both wise policy, and constitutionally required, to limit our enforcement efforts to communications including express advocacy.

III. A.

The starting point for any analysis of the constitutional and policy issues involved in enforcing the FECA is the recognition that "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. With that in mind, a key concern of the Supreme Court's *Buckley* decision was to prevent the Act from having a "chilling" effect on speech pertaining to public issues and affairs. *See* 424 U.S. at 41, n. 47. The Court noted that:

> vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone... than if the boundaries of the forbidden areas were clearly marked.' 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'

424 U.S. at 41, n. 48 (citations omitted).

In *Buckley*, the Supreme Court accepted contribution limits as constitutionally permissible, but struck down limits on expenditures as violations of the First Amendment. There were three major reasons for providing greater protection to expenditures than to contributions. First, the Court noted that limits on contributions were a lesser burden on speech

because a contribution, unlike an expenditure for public communications, did not "communicate the underlying basis for the support. 424 U.S. at 21. Second, limits on expenditures "reduce [] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Limits on contributions to candidates, on the other hand, do not necessarily have the effect of materially reducing political discussion because they "leave the contributor free to become a member of any political association" and permit such associations "to aggregate large sums of money to promote effective advocacy." *Id.* at 22. Finally, limits on contributions "focus [3] precisely on the problem of ...

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corruption...." By contrast, limitations on expenditures raise the concerns of vagueness that cause "citizens to steer far and wide of the unlawful zone." *Id.* at 41, n. 48.

Thus, in analyzing section 608(e)(l) of the Act, which provided that "[n]o person may make any expenditure ... relative to a clearly identified candidate during a calendar year which ... exceeds $1,000," the Court held that "the use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." *Id.* at 41. It continued:

> The constitutional deficiencies [of vagueness] can be avoided only by reading §608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate. ... [F]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered.... [I]n order to preserve the provision against invalidation on vagueness grounds, §608(e)(l) must be

> construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.

Buckley at 43-44.

These same concerns arose when the Court considered the Act's disclosure provisions. Once again, the Court could have regulated issue advocacy, but did not. Rather, the Court chose again to give the term 'expenditure' a limiting construction. The Court stated:

> [T]he [disclosure] provision raises serious problems of vagueness, … [that] may deter those who *seek* to exercise protected First Amendment rights. Section 434(e) applies to '[e]very person ... who makes contributions or expenditures.' 'Contributions' and 'expenditures' are defined ... in terms of money or other valuable assets 'for the purpose of influencing' the nomination or election of candidates for federal office. It is the ambiguity of this phrase that poses constitutional problems.
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> There is no legislative history to guide us in determining the scope of the critical phrase 'for the purpose of ... influencing'.... Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislative purpose, to avoid the shoals of vagueness.
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> ***

> [8]
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> When we attempt to define 'expenditure' ... we encounter line-drawing problems of the sort we faced in §608(e)(1). Although the phrase 'for the purpose of ... influencing' an election or nomination, differs from the language used in §608(e)(1), it shares the same potential for encompassing both issue discussion and advocacy of a political result.

Id. at 76-79. (Citations omitted). The Court worried that the "general requirement that 'political committees' and candidates disclose their expenditures could raise similar vagueness problems, for 'political committee' is defined only in terms of the amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged purely in issue discussion." *Id* at 79. However, because the vagueness problems associated with the term "political committee" had already been largely resolved due to narrow readings of the statute by lower courts, it was not the effect upon groups defined as "political committees" under the Act that particularly concerned the Court.

The Court was more concerned about the effects that a vague and overbroad law could have upon the otherwise lawful First Amendment activities of other groups and individuals.[15] The Court, therefore, narrowed the term "for the purpose of influencing" to save the definition of the terms "expenditure" and "contribution" from being unconstitutionally overbroad: "To insure that the reach of §434(e) is not impermissibly broad, we construe "expenditure" ... in the same way we construed the terms of §608(e)— to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. Thus, the Court concluded:

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[15] *See Buckley* at 79. Our new coordination regulations deal specifically with groups and individuals, exempting party committees and authorized committees. 65 Fed Reg. 76141-76142.

> [Section] 434(e) as construed imposes independent reporting requirements on individuals and groups only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate ... to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.
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> ***
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> As [constitutionally] narrowed, §434(e), like §608(e)(1), does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.

Buckley at 80.

In reviewing the *Buckley* decision then, we see that each time the *Buckley* Court considered the definition of "expenditure," it narrowly interpreted the term to avoid

vagueness or overbreadth.[16] Concerns of vagueness and overbreadth were foremost in the *Buckley* Court's thinking in

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[16] *See also Federal Election Commission v. Survival Education Fund*, 65 F.3d 285, 294-95 (2d Cir. 1995) (holding that the phrase "contributions ... earmarked for political purposes" must, for reasons of vagueness, also be limited to contributions earmarked for communications that expressly advocate the election or defeat of candidates for office).

interpreting all aspects of the FECA. Most importantly, it found that the qualifying phrase "for the purpose of influencing," which is also part of the Act's definition of "contribution," 2 U.S.C. § 431(8)(A)(i), could be saved from vagueness problems only by construing it as applying to "words that in express terms advocate ... election or defeat."

The *Buckley* Court referenced coordinated communications only in passing. In arguing *Buckley*, the parties defending the Act contended that its limitation on independent expenditures was necessary to prevent would-be contributors from avoiding the contribution limitations of the Act by paying directly for media advertisements or other portions of the candidate's campaign activities. The Court addressed this concern with a brief statement that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act" under Section 608(c)(2)(B), *id.* at 46 (emphasis added), noting that "§608(e)(1) does not apply to expenditures 'on behalf of a candidate' within the meaning of §608(c)(2)(B). The latter subsection provides that expenditures 'authorized or requested by the candidate' ... are to be treated as expenditures of the candidate and contributions by the person making the expenditure." *Id.* at 46, n.53.

What the Court did not specifically address is whether it intended the same limiting construction of the term "expenditure" it had applied to sections 608(e)(l) and 434(e) to apply to section 608(c)(2)(B). Clearly the Court did not intend for independent issue advocacy to be regulated, but one might argue that in holding that authorized or requested "expenditures" are "contributions" under the Act, the Court meant to include coordinated issue advocacy. However, the *Buckley* Court's example of a coordinated "expenditure" that would be treated as a contribution, itself taken from the legislative history of the Act, is an express advocacy ad.

> [A] person might purchase billboard *advertisements endorsing a candidate*.... [I]f the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate—just as if there had been a direct contribution enabling the candidate to place the advertisement himself.

Buckley at 46, n. 53 (emphasis added). Nothing suggests that the Court did not intend to extend to section 608(c) the narrow definition of "expenditure" it had given the term in section 608(e). Of course, it is possible that the Court never considered that a candidate would request or authorize "media advertisements" that did not expressly advocate the election or defeat of one candidate or another. After all, the legal distinction between express ads and issue ads did not exist before *Buckley*, so there would have been no reason for a campaign to request an ad that did not expressly advocate election or defeat. Still, the most probable interpretations of *Buckley* are that it either limited the term "expenditure" in section 608(c)(2)(B) to disbursements for express advocacy, or simply did not address the issue. That the Court intended to find coordinated issue ads to be covered by the Act seems the least probable interpretation.

The question we face is whether, in light of Congress's actions, the holdings in *Buckley* and its progeny, the Constitutional concerns raised by the Supreme Court and lower courts, and our position as officials of the executive branch who have independently taken an oath to uphold the Constitution,[17] we can or should interpret the Act as reaching coordinated spending for issue advocacy communications.

In considering the question, I note first that each of the Constitutional concerns raised by the *Buckley* Court as reasons for providing greater protection to expenditures than to contributions is present in the context of coordinated issue advocacy disbursements. First, the coordinated issue advocacy disbursements do more than merely "serve as a general expression of support;" they do in fact "communicate the underlying basis for the support." *See Buckley*, 424 U.S. at 21. Second, restrictions on coordinated issue advocacy spending are, as a practical matter, likely to lead to a "reduc[tion] in the quantity of expression by restricting the number of issues discussed." *See id.* at 19. Arguably, of course, these groups might simply run their ads independently, so that no such speech reduction would result. As we know, however, groups regularly work with members of Congress to promote shared agendas. As the *Buckley* Court recognized, "[d]iscussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections." *Id.* at 43, n. 50. If the Act applies to coordinated issue advocacy, many groups will be unable both to work with elected representatives and to run ads attempting to influence public opinion on issues of mutual interest. In short, the groups will be asked to surrender either their rights of free speech and association or their rights of speech and to petition for redress. As already noted, the threat of investigation is itself often sufficient to chill speech. It is exactly our job, as the administrative agency with expertise in enforcing the Act, to recognize the practical effects of differing interpretations of the Act and to set policy accordingly.

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[17] Unlike some of my colleagues, I do not interpret that oath to mean that we can fulfill our constitutional obligations simply by ignoring constitutional considerations until and unless we are bound by judicial ruling. Rather, as representatives of a co-equal branch of government, our obligation requires us to consider the constitutional implications of our actions even when we have not been b6und by judicial decisions.

Most importantly, efforts to regulate coordinated issue advocacy raise exactly the vagueness concerns at the heart of *Buckley*. For example, if Common Cause, having coordinated its legislative efforts with Senator McCain, were to also run advertisements in support of its agenda that mentioned the Senator, whether or not their ads would violate the Act would depend upon whether or not the Commission believed that they were "for the purpose of influencing an election." This is the exact standard that the Supreme Court found, without more, to be unacceptably vague even in terms of the less burdensome disclosure provisions of the Act.

Because of the resulting vagueness, *see Buckley*, 424 U.S. at 41, n. 48, we can anticipate that groups will, in the future, "'steer far wider of the unlawful zone'... than if the boundaries of the forbidden areas were clearly marked." The present case illustrates that only too well. The enormous costs, imposition, and length of the investigation that has occurred in this case suggests that at least some of the more than 60 respondents involved, and who knows how many other groups and individuals that have witnessed the debacle, will "steer far wide" rather than risk a lengthy investigation, even if that investigation does ultimately lead to a finding of "no probable cause."[18]

At one time, a majority of the Commission *seems* to have recognized this vagueness problem. On June 24, 1999,

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[18] Everyone at this Commission is well aware of a favorite saying of the practicing campaign finance law bar: "The process is the punishment."

Commissioners Wold, Mason, and Sandstrom, joined by then Commissioner Elliott,[19] issued a statement of reasons rejecting the enforcement of coordination cases under a vague, "electioneering message" content standard.[20] The Commission majority at that time correctly concluded that the vague "electioneering message" standard offered no guideposts for free discussion, even in cases where such discussion was coordinated or presumably coordinated with a candidate, writing:

> The vagueness and overbreadth problems of the "electioneering message" and "relative to" standards are thus two sides of the same counterfeit coin. They are vague because it is not clear when they encompass issue discussion and not candidate advocacy. They are overbroad because, given the nature of campaigning, they will inevitably encompass both. For the same substantive reasons that the Supreme Court held the "relative to" standard in the FECA to be unconstitutional, the Commission may not employ the "electioneering message" standard. *Even in the context of coordinated, or presumably coordinated, communications in which the "electioneering message" test has generally been proposed* (see 11 C.F.R. §114.49c)(5)(ii)c)(5)(ii)(B)(E) (regulation of voter guides)), *the Commission may not ignore these constitutional requirements*.

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[19] I did not join the Commission until June of 2000.

[20] This appears to have been the standard used by the Commission in deciding whether or not coordinated issue advocacy was subject to the Act prior to adoption of 11 CFR § 100.23. *See* Advisory Opinion 1985-14 [1976—1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5819 at 11185.

"Clinton/Gore '96 General Election Legal and Compliance Fund" at 6, (June 24, 1999) (emphasis added).

Shortly thereafter, the Federal District Court for the District of Columbia decided *Federal Election Commission v. Christian Coalition,* 52 F. Supp.2d 45 (D. D.C. 1999). That decision held that corporate expenditures for coordinated issue ads were subject to the contribution prohibitions of 2 U.S.C. section 441b.[21] *Id.* Because this single district court decision seems to have contributed to a re-evaluation of the Commission's previously expressed appreciation for and insistence upon definite content standards, I will address this decision and related precedent at some length.[22]

III. B.

In *MCFL* the Supreme Court had held that issue advocacy by corporations and unions does not constitute an "expenditure" pursuant to the Act. 479 U.S. at 249. Thus, corporate and union communications lacking express advocacy are not only not "independent expenditures"[23] under Section 441b—they are not "expenditures" at all. Nevertheless, the *Christian Coalition* court concluded that whether or not corporate or union activity is prohibited or protected turns upon whether the activity is "in connection with an election," and not whether the activity is an "expenditure," under the Act because, "[t]he real issue ... is whether an expenditure is 'authorized' by a campaign or 'coordinated' with the campaign." 52 F. Supp.2d at 87-88. The *Christian Coalition* court went on to argue that "*Buckley*, in its treatment of coordinated expenditures as in-kind contributions, left undiscussed the First Amendment concerns that arise with respect to 'expressive coordinated expenditures.' ... It can only be surmised that the *Buckley* majority purposely left this issue for another case."[24] 52 F. Supp.2d at 85.

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[21] In doing so the district court failed to address the impact of 2 U.S.C. § 431(8)(B)(vi) in light of the Supreme Court's holding in *MCFL, supra. See ante* pp. 4-5.

[22] I presume that the *Christian Coalition* case was a factor in this change as all three Commissioners still on the Commission reversed course on the need for clear content standards after that opinion. Another possibility is that these commissioners believe that vagueness and overbreadth can be cured by a content standard somewhere between the "electioneering message" standard they specifically rejected and the express advocacy test they have so far not adopted, though to date no such standard has been proposed.

[23] The district court stated that "corporations and unions can make *independent expenditures* that are related to a federal election campaign so long as those expenditures are not for communications that advocate the election or defeat of a clearly identified candidate." *Christian Coalition* at 48 (emphasis in the original). Because the term "independent expenditure" is defined within the FECA as requiring express advocacy, *see* 2 U.S.C. § 431(17), and section 441b prevents corporations and unions from making *any* FECA "expenditures" we know that the district court meant "issue advocacy" by its use of the term "independent expenditures" in the above sentence.

[24] The *Buckley* Court allowed contributions to be carved from First Amendment protection largely because contribution limits "involve [] little direct restraint on [one's] political communication [and] does not in any way infringe on the contributor's freedom to discuss candidates and issues." *Buckley* at 21. Investigating issue advocates on the theory that their communications may be coordinated with a candidate is a direct restraint on a speaker's freedom to discuss candidates and issues.

In addressing the issue, the *Christian Coalition* court next recognized a need to differentiate between "expenditures on non-communicative materials, such as hamburgers or travel expenses for campaign staff," which, like direct contributions to the candidate, do not communicate the underlying basis of support, and expenditures "in which the spender is responsible for a substantial portion of the speech." *Id.* at 85, n. 45. The latter, which the court termed "expressive coordinated expenditures," are speech-laden or communicative, and therefore different from other non-communicative in-kind contributions. *Id.* Ultimately, however, the court concluded that coordinated issue advocacy could be regulated, believing that it is the "fact of coordination" that is significant, not the character of the underlying item that is coordinated. The court seemed to conclude that the lesson of *Buckley* is that it is the independence of the speech, rather than its communicative value, that determines its level of constitutional protection. In other words, the court focused only on the corruption side of the coin, but not on the First Amendment side. Thus, the court found that independent speech is deserving of clear content standards, but where independence fades—or at least a complainant alleges it has faded—speech may be extensively investigated regardless of its content and without regard for whether that speech constitutes speech of the spender. *See id* at 87, n. 50.

The district judge in *Christian Coalition* reasoned that *Buckley* specifically read an express advocacy standard only into the statutory provisions regarding *independent* expenditures 'relative to' a clearly identified candidate and 'for the purpose of influencing any election for Federal office.' 52 F. Supp.2d at 87, n.50. Therefore, the court concluded, for all other parts of the FECA, the *Buckley* Court must have "used the term 'expenditure' advisedly, leaving intact the normal, broad meaning Congress had given it." *Id.* But what "normal, broad meaning" had Congress given the definition of "expenditure"? Webster's Dictionary defines "expenditure" as "the act of expending; a spending or using up of money, time, etc.; disbursement." *Webster's New Twentieth Century Dictionary of the English Language*, p. 644, 2d ed., 1977. Clearly the Act did not intend, nor would it be constitutional to prohibit all expenditures or contributions by a person in excess of $1000, at least not in the broad, everyday meaning of the terms. Thus Congress had limited the scope of both the terms "expenditure" and "contribution" to, "[a]nything of value ... *for the purpose of influencing any election for Federal office.*" 2 U.S.C. §§ 431 (9)(A)(i) and 431 (8)(A)(i) (emphasis added). The *Buckley* Court, however, found that the phrase "for the purpose of influencing" was still insufficiently precise to overcome concerns of vagueness and overbreadth[25] and so narrowed it to cover only express advocacy. 424 U.S. at 79. If, as the *Christian Coalition* court maintained, the *Buckley* Court defined that critical phrase only with regard to *independent* expenditures, then that phrase must still be imbued with some semblance of meaning before deciding which coordinated disbursements are regulable "expenditures," and therefore "contributions" subject to the Act.

[14]

When a group engages in public discussion of political issues and coordinates its activity with a candidate or committee, the critical phrase that turns the speech into prohibited or limited activity is that it is speech "for the purpose of influencing an election." The court in *Christian Coalition* seemed to assume that because the Supreme Court did not specifically define the phrase as being limited to express advocacy in the context of coordinated expenditures, it must have decided that groups that are alleged to have engaged in coordinated speaking are not faced with the same concerns of vagueness and overbreadth. In fact, the Supreme Court has simply never specifically answered the question.[26]

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[25] There is no legislative history to guide [the courts] in determining the scope of the critical phrase 'for the purpose of influencing,"' *Buckley*, at 77, yet "[i]t is the ambiguity of this phrase that poses constitutional problems." *Id.*

There is no normal, accepted meaning of the phrase, "for the purpose of influencing," and Congress has not provided one. An "unconstitutionally overbroad statute may not be enforced *at all* until an acceptable construction has been obtained." *McGautha v. California*, 402 U.S. 183, 259 (1971), *reh'g denied*, 406 U.S. 978 (1972). Either the Commission or the courts must give the phrase "for the purpose of influencing" some prospective, content-based meaning.[27]

IV.

The approach to coordinated expenditures adopted by Commissioners Thomas and McDonald would relieve the Commission from any need to clearly define which speech is "for the purpose of influencing" elections until after an extensive investigation. They would have this determination made by the Commission on a case-by-case basis after an investigation which would be, in effect, a search for evidence of the respondent's true intent based upon a totality of the circumstances. These Commissioners believe a complete investigation in this case, for example, could have shown that the "the Coalition's communications were undertaken for the purpose of influencing federal elections" because the Coalition "aired ads in the weeks before the election;" "dropped direct mail ten days before the election;" and "took credit" for the reelection of many members of Congress. Thomas/McDonald Statement, at 12, n. 6, (internal citations omitted). Additionally, they would find that "[t]here is no indication that the Coalition was formed for any purpose other than building ... public support for certain candidates [and] nothing suggesting that the Coalition engaged in ... issue discussion outside the context of elections." Thomas/McDonald Statement at 15. The capstone for the Commissioners is a quote from the Coalition itself: "Our ultimate objective is to return a pro-business, fiscally responsible majority for the 105th Congress."

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[26] *See* ante at 13.

[27] In the context of FECA, the courts have consistently used an "express advocacy" test to give meaning to the Act's vague or overly broad provisions. *See e.g. Buckley v. Valeo*, 424 U.S. 1 (1976); *Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996), *cert. denied* 118 S. Ct. 52 (1997); *FEC v. Christian Action Network, Inc.*, 92 F.3d 1178 (4th Cir. 1996) (*summarily affirming* 894 F. Supp. 947 (W.D. Va. 1995)); *Faucher v. FEC*, 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980) (en banc); *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448 (D. Co.), *rev'd on other grounds*, 59F.3d 1015 (1061 Cir. 1995), *vacated on other grounds*, 116 S. Ct. 2309 (1996); *Right to Life of Michigan v. Miller*, 23 F. Supp.2d 766 (W.D. Mich. 1998); *FEC v. National Org. for Women*, 713 F. Supp. 428 (D. D.C. 1989); *FEC v. American Fed'n of State, County & Mun. Employees*, 471 F. Supp. 315 (D. D.C. 1979). *See also FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (holding that the First Amendment prohibits limits on independent expenditures that expressly advocate the election or defeat of a candidate, and noting in dicta "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages ... can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view."); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997) (holding that the Commission's efforts to regulate "issue advocacy" as "contributions" exceeded its powers under the FECA, and stating, "we do not take Congress to have authorized rules that sacrifice First Amendment interests.")

Thomas/McDonald Statement at 16 (emphasis omitted), quoting *The Washington Post*, August 8, 1996.[28]

These criteria offer no prospective guidance and contribute little if anything to overcoming the vagueness problem. Because, as the Supreme Court noted in *Buckley*, "campaigns themselves generate issues of public interest," 424 U.S. at 42, and because public interest in issues is often highest close to an election, the logical time to engage in

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[28] Commissioners Thomas and McDonald also cite these facts for the proposition that the Coalition was a "political committee" that must register under 2 U.S.C. § 433 and report its activity under 2 U.S.C. § 434. Thomas/McDonald Statement at 15-17. The Act defines "political committee" as "any ... association ... of persons which receives contributions ... or makes *expenditures* aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (emphasis added). The *Buckley* Court cautioned that the broad statutory definition of 'political committee,' which turns on the terms contribution and expenditure and on the phrase "for the purpose of influencing any election" had the potential for encompassing "both issue discussion and advocacy or a political result" and thus might encroach upon First Amendment freedoms. *Buckley* at 79. Therefore, to fulfill the purposes of the Act, the term political committee. "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* While an organization's purpose may be evidenced by its public statements of its purpose, *see MCFL* at 262, such an inquiry is secondary to the requisite of finding "expenditures" or "contributions" in excess of $1,000. So "[e]ven if the organization's major purpose is the election of a federal candidate or candidates [, as Commissioners Thomas and McDonald insist the evidence would conclude,] the organization does not become a "political committee" *unless* or *until* it makes *expenditures* in cash or in kind." *See Machinists* at 392. The argument that "major purpose" alone is enough to make a group a "political committee" or make disbursements into "expenditures" as defined by the Act was specifically rejected in *Federal Election Commission v. GOPAC*, 917 F. Supp. 851, 861-62 (1996)("As a matter of law, the Commission ... failed to demonstrate that GOPAC became a political committee within the meaning of the Act by *spending* or *receiving* $1,000 or more and engaging in 'partisan politics' and 'electioneering.'")(emphasis added).

issue advocacy is close to an election.[29] Similarly, groups will ultimately hope that if politicians do not adopt their positions on issues, the voters will turn against them. Surely, we cannot regulate issue ads simply because they will affect what issues and stances voters think are important. That does not make their conduct "for the purpose of influencing" a federal election as the meaning of that crucial phrase has been defined to avoid vagueness problems in the context of independent expenditures. *See Federal Election Commission v. GOPAC*, 917 F. Supp. 851 (D. D.C.) (1996). Thus the type of criteria on which Commissioners Thomas and McDonald would rely fails, even after the

fact, to provide any meaningful distinctions that would not chill constitutionally protected speech.

Equally important, "[n]o matter what facts [the Commission] finds through [an] investigation, the requisite jurisdiction for the investigation itself must stand or fall on the purely legal claim...." *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 390 (D.C. Cir. 1981) (hereinafter "*Machinists*"). In *Machinists*, the Circuit Court of Appeals for the District of Columbia had to determine whether to enforce a Commission subpoena against a "draft" committee where it was unclear whether the Commission had statutory authority to regulate draft committees at all. *Id.* The Court stated that any alleged compelling interests the Commission may assert in seeking information, can be compelling and granted effect if the

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[29] Furthermore, Congress is often still in session within, for example, 60 days of an election, and engaged in more than the usual number of floor votes while attempting to wrap up the session. *See* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. Legis. 179, 192 n. 85 (1998); *See also Mills v. Alabama*, 384 U.S. 214 (1966)(striking down a limited ban on express advocacy close to an election).

Commission first has authority to regulate a particular type of speech or activity. *Id.* But the Court held that "the highly sensitive character of the information sought simply makes it all the more important that the court be convinced that jurisdiction exists." *Id* at 389.

In the current MUR, the purely legal claim is that coordinated issue advocacy is "for the purpose of influencing elections" and so subject to regulation under the FECA. In deciding the question of Commission jurisdiction, the Machinists Court warns us that "[i]n this delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique references of Congressional intent...." Rather, "[a]chieving a reasonable, constitutionally sound conclusion in this case requires just the opposite. 'It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.'" *Id* at 394, quoting *Richmond v. United States*, 275 U.S. 331 (1928).

Certainly we, as Commissioners, should equally avoid interpretations of the statute that raise constitutional questions, at least absent a clear expression of intent from Congress. We are obliged to be certain we are acting within the confines of the FECA and the Constitution. We cannot use ambiguities to expand our regulatory authority. Even if Commissioners do not believe that the *Buckley* Court limited the phrase "for the purpose of influencing" to express advocacy when applied to coordinated communications, they must concede that our guidance in this area is at a minimum. To avoid serious constitutional concerns, we should adopt an objective, bright line express advocacy standard as a predicate to investigating allegedly coordinated issue discussion.

Indeed, the D.C. Circuit has also admonished this agency to use clear, bright line standards, not only to address constitutional concerns, but for more mundane, practical

reasons as well. In *Orloski v. F.E.C.*, 795 F.2d 156, 165 (D.C. Cir. 1986), the Court of Appeals wrote that, "[a]dministrative exigencies mandate that the FEC adopt an objective, bright-line test for distinguishing between permissible and impermissible corporate donations." Certainly this would apply to permissible and impermissible non-corporate donations as well. The *Orloski* court went on to add that, "an objective test is required to coordinate the liabilities of donors and donees. The bright-line test also is necessary to enable donees and donors to easily conform their conduct to the law and to enable the FEC to take the rapid, decisive enforcement action that is called for in the highly-charged political arena." *Id.* Each of these concerns apply in the context of coordinated issue advocacy—as the naming of over 60 respondents and the length of the investigation in this MUR show, without an objective content standard neither donees nor donors can "easily conform their conduct to the law," and the FEC cannot take "rapid, decisive enforcement action." And, of course, *Orloski* also warned of the need for a bright line to avoid a chilling effect on protected speech: "A subjective test based upon the totality of the circumstances [such as that favored by Commissioners Thomas and McDonald in this MUR] would inevitably curtail permissible conduct." *Id.*

In fact, *Orloski* warned of other practical problems with a subjective test, many of which are on exhibit in this case. Wrote the court:

> "[A subjective test] would also unduly burden the FEC with requests for advisory opinions ... and with complaints by disgruntled opponents who could take advantage of a totality of the circumstances test to harass the sponsoring candidate and his supporters. It would further

> burden the agency by forcing it to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations. It would also considerably delay enforcement action. Rarely could the FEC dismiss a complaint without soliciting a response because the FEC would need to know all the facts bearing on motive before making its "reason to believe" determination.

Id. at 165. These considerations, and in particular the chilling effect on speech of this uncertainty, argue for an objective, express advocacy test over the vague, post hoc, subjective test favored by Commissioners Thomas and McDonald.

Commissioner Sandstrom, in his turn, voices a concern for vagueness and overbreadth, but argues that the "express advocacy test is a *subjective*, content-based test about which reasonable minds can on occasion reach different results," and for that reason, ought to be applied "only where more objective criteria are unavailable." Sandstrom Statement at 6. Commissioner Sandstrom then argues that the objective criteria should be whether the ads were tested for their effect on voters' candidate preferences. Based on this, he voted against the General Counsel's recommendation to take no further action in this case.

First, Commissioner Sandstrom errs in thinking that the express advocacy test is subjective. A subjective test depends on the mental impression of the respondent at the time his communications were made. An objective test relies on independently verifiable facts, such as whether or not a communication contains express 'words of advocacy of election or defeat. While it is true that the inexactness of language means that reasonable minds can sometimes reach differing results on whether or not certain words are express words of advocacy of election or defeat,[30] in the overwhelming majority of cases the express advocacy standard is very easy to apply. The occasional disagreement does not mean that the express advocacy test is "subjective," that it fails to provide notice to the regulated community, or that it fails to provide courts a standard of reviewing the actions of legislatures, regulatory commissions, prosecutors, and inferior courts. By an "objective" test, it is not meant that every adjudicator will reach the same result in every case, but rather that the test will not rely on the subjective motives of the speaker. Commissioner Sandstrom's proposed objective criteria — whether or not the ad was tested for effect on voter candidate preferences — is, like the express advocacy test, objective in that it does not rely on intent, but is, like the express advocacy test, subject to disagreement as to whether it has been met.[31]

More important, Commissioner Sandstrom's proposed standard provides no guidance to a group that had not so tested its ads. That is, the presence of such testing might quickly allow the Commission to find a purpose to influence a federal election, but its absence would not allow the respondent to quickly demonstrate no such purpose. (I do not think that Commissioner Sandstrom means to propose that *only* issue ads that are tested for effect on voters' candidate preferences would be subject to regulation). Nor would the Commission be expected to routinely accept a respondent's denial of such testing without an investigation. Respondents would therefore continue to be subject to extensive investigations on the basis of allegations filed by their political adversaries. Thus, the chilling effects on speech, not to mention the other problems outlined in *Orloski*, would still be present. Furthermore, groups engage in issue advocacy in the ultimate hope of changing government policy. One way to assure that issue ads will be effective is to test them on voters to see if they are likely to encourage voters to put the desired pressure on legislators and candidates to adopt the favored positions. The right to engage in political issues discussion would lose much of its meaning if groups and individuals were limited to communications that were not effective in mobilizing voters.

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[30] *See e.g. Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), *cert den.* 484 U.S. 850 (1987); MUR 4922 (Suburban O'Hare Commission).

[31] For example, my standard for determining what constitutes "test[ing] an ad's influence on voters' choice of federal candidate" may differ from Commissioner Sandstrom's. Does it include, for example, asking generically whether a voter would be more or less inclined to favor a candidate who takes particular positions? Or asking not if the ad would affect one's vote or even preference, but merely the respondent's opinion of the individual in question? Or suppose that the ads are tested for voters using candidates in a Senate race, but then run in a House race? I am sure-many more variations are available.

The express advocacy test is an instrument of law designed to further constitutional aims by limiting actions of legislatures and regulatory bodies that would chill protected political speech through their overbreadth and vagueness. The existence of express advocacy is a threshold requirement for regulating the communicative expenditures of unions, corporations, groups or individuals. No matter the degree of dissatisfaction with the results the test yields, we are not permitted, nor would it be wise, to jettison the express advocacy test simply because we might believe in any given case that "more objective criteria" are available.[32]

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[32] It goes without saying that there is no basis in the statute or judicial interpretations of the statute for Commissioner Sandstrom's proposal to define groups as political committees by essentially redefining "expenditure" and "contribution" to include ads tested for their effect on voter candidate preferences. Commissioner Sandstrom is also justifiably concerned that the rules be made clear. Sandstrom Statement at 4-5. In

It is true that the express advocacy test often yields results with which some individuals are unhappy. Many observers fear that coordinated issue advocacy has the potential to corrupt candidates and officeholders. The *Christian Coalition* court, for example, warned that were the express advocacy standard "imported" into section 44lb's contribution prohibition, "it would open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat." 52 F. Supp.2d at 88. This would, feared the court, "present real dangers to the integrity of the electoral process." *Id* at 92. Of course, all of this is nothing more than the district court saying that its concern about *quid pro quo* corruption overrides the vagueness and overbreadth problems inherent in regulating issue advocacy. The Supreme Court faced the same issues in *Buckley* and reached the opposite conclusion, recognizing that issue advocacy would be used to influence campaigns: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." 424 U.S. at 45. Regulating coordinated issue advocacy, no matter how much it may or not benefit a campaign, plunges the discussion of issues back into a morass of regulation and resuscitates the concerns of vagueness and overbreadth the Court addressed in *Buckley*. A content standard is needed to alleviate this problem, but at this time our coordination regulations possess no content standard beyond the vague statutory language that expenditures be made for the purpose of influencing a federal

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addition to being well grounded in judicial precedent, the express advocacy test has the advantage of being clear, simple to understand for the inexperienced, easy to apply in the overwhelming majority of cases, and familiar to regular participants in campaigns.

election.[33] This is effectively no content standard at all, as the *Buckley* Court held in discussing the disclosure provisions of the Act, and as another Supreme Court case, cited extensively in *Buckley*, makes clear.

In *Thomas v. Collins*, 323 U.S. 516 (1945), Thomas, a national union leader, was accused of violating a Texas statute requiring "all labor union organizers operating in Texas ... to file [for an organizer's card] with the Secretary of State before soliciting any members for his organization." *Id* at 519, n. 1. The statute required organizers to carry the card whenever "soliciting" members, and to exhibit the same when requested to do so by prospective members. The statute was invalidated because speakers would not know in what ways they could speak about the labor movement, or about labor issues, without carrying a card. In short, the statute was invalidated because it lacked a definite content standard.

The Court suggested that had the statute included a precise content standard, equivalent to the express advocacy test later adopted in *Buckley*, the regulation could have been valid under the State's police power because, "[a] speaker in such circumstances could avoid the words 'solicit,' 'invite,'[or] 'join.'" *Id.* at 534. However,

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[33] Some have suggested that "the purpose of influencing" be found in 'any ad featuring a candidate's name or likeness.' But this is little improvement, for reasons of overbreadth, over the 'relative to a candidate' standard the Court rejected as vague in deciding *Buckley*. Limiting the content standard to any ad containing a clearly-identified candidate is unconstitutionally overbroad for as the Court observed in *Buckley*, "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." 424 U.S. at 42.

> [w]ithout such a limitation, the statute forbids any language which conveys, or reasonably could be found to convey, the meaning of invitation. How one might 'laud unionism' as the State and State Court concede Thomas was free to do, yet in these circumstances not imply an invitation, is hard to conceive.... In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation, puts the speaker in these circumstances wholly at the mercy of his hearers. ... Such a distinction offers no security for free discussion.

Id. at 535.

The Court made the point most relevant to the problem posed by our current coordination regulations:

> The vice [in a statute prohibiting the issuing of invitations without an organizer's card] is not merely that invitation ... is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely.

Id. at 535-36 (emphasis added). Similarly, the "vice" in the coordination regulations is not that they regulate ads that a candidate may authorize or request. The vice of the regulations is that unless they are limited to phrases of a particular kind, speakers who want to discuss more generic matters will not know whether they will be investigated under the regulations. A speaker *seek*ing to discuss issues without risking investigation can avoid words such as 'vote for,' 'elect,' 'vote against,' or 'defeat.' But absent a content standard, our regulations provide no guidance as to which types of phrases will be deemed to "influence the outcomes of elections," and our regulations will limit or chill much speech that is not or may not be "for the purpose of influencing" a federal election.

Nor can the lack of a content standard can be effectively offset through a restrictive test for coordination. While other considerations lead me to support a conduct test for coordination similar to that enunciated in *Christian Coalition* and since incorporated into our regulations at 11 C.F.R. § 100.23, the truth is that such a restrictive test for proving coordination can, absent a content standard, actually make investigations more intrusive and chilling of speech. The reason is because the more difficult evidentiary burden the Commission faces to prove coordination requires, a more intrusive investigation to gather facts that are usually in control of the respondent. Thus, while the

coordination rule of *Christian Coalition* solves the notice problem of the Commission's old "insider trading" standard, it does not address the fundamental vagueness problem. "The objectionable quality of vagueness and overbreadth does not depend [just] upon [the] absence of fair notice to a[n] accused ... but [more importantly] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a ... statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 432-433 (1963). A content standard provides advance notice to actors of what kind of speech the FEC may investigate, and reduces the risk of arbitrary, discriminatory, or capricious enforcement far more effectively than a purely conduct based standard.

Absent a content standard, it does not appreciably warm the environment for speech to say that the standard for actually proving and punishing coordination "must be restrictive," as the court did in *Christian Coalition*. 52 F.

Supp.2d at 88. This is because a restrictive conduct standard does nothing to alleviate the ease with which allegations may be made and intrusive, expensive investigations launched. The Supreme Court in *Thomas v. Collins*, assessing the chilling effect of the Texas statute upon speech, did not discuss the defendant's likelihood of success at trial, or the difficulty that the State would have in proving whether the defendant violated the organizer-card ordinance, or the elements involved in that proof The mere threat of prosecution was sufficient to chill speech and make the statute unconstitutional. ("The threat of ... arrest ... hung over every word." *Id.* at 534.) Because the threat of prosecution (or investigation) can itself chill speech, *see Virginia v. American Booksellers Ass'n.*, 484 U.S. 383, 392-93 (1998), a tough conduct standard does not eliminate the need for a clear content standard. A precise content standard along with the new conduct standards outlined in 11 CFR § 110.23 would work as bookends in enforcing the Act while removing an unconstitutional chill from protected speech and associational activities.

V.

Investigations into allegations of coordination will often involve demands for access to an organization's detailed legislative and political plans, including intrusion into the most sensitive internal political discussions. *See generally*, *AFL-CIO, et al. v. FEC*, Civ. Action No. 01-1522 (GK), Dist. Ct., District of Columbia. The express-advocacy content standard ensures that investigations into allegations of coordination are only visited upon those groups, corporations or unions who first cross a bright, content line.

The dangers to the First Amendment posed by such broad government investigations of political activity have been recognized time and again by the federal courts. *See e.g.*, *F.E.C. v. Larouche Campaign*, 817 F.2d 233, 234 (2d

Cir. 1987)(recognizing that the Commission's investigative authority should be constrained or clearly delineated due to the sensitive nature of the activities the agency regulates, and holding that where a case implicates First Amendment concerns, "the usual deference to the administrative agency is not appropriate and protection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny of the justification offered by the agency.") In *Buckley*, the Supreme Court recognized that "compelled disclosure [of political activities], in itself, can seriously infringe on privacy of associations and belief guaranteed by the First Amendment." 424 U.S. at 64. Justice Frankfurter made the same point over forty years ago: "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigatory process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 235 (1957) (Frankfurter, J., concurring). Investigations into such areas of constitutional sensitivity ought to be triggered only where respondents can know that they have crossed a bright line.[34]

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[34] I do not suggest that the Commission may make no inquiries at all until it is sure that express advocacy exists. The Commission could conduct a *Reader's Digest* inquiry, even to the point of enforcing subpoenas, to be certain no express ads were run. *See Reader's Digest Ass'n. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y) (where factual questions existed regarding whether the Commission had statutory authority to conduct a full investigation, the court adopted a two-step process to govern its continuation; the first stage of the investigation would be solely for the purpose of determining whether statutory authority existed). As a factual matter, complaints are normally filed because someone—usually the speaker's political opponent— has seen the ads in question. The ads are described in or attached to the complaint, so even a *Reader's Digest* inquiry will be rare. When the ads are not shown by the complaint to be issue ads, the respondent can typically attach the ads to the response, and if they do not include express advocacy, the enforcement ends there at very low cost to both respondent and Commission.

The suggestion that a bright line can be found by the fact of communicating with a candidate–in other words, that a speaker can find a safeharbor by not communicating at all with a candidate in the two, four or six-year period between elections, is not realistic.[35] Indeed, one reason for our passing the new coordination regulation was the recognition that our old enforcement standard, presumptively finding coordination based on any contact between the speaker and the candidate, was unrealistic. For example, in seeking to prove coordination between the Christian Coalition and various Republican candidates, the Commission's evidence included the fact that public officials addressed meetings of the organization. *See Christian Coalition*, 52 F. Supp.2d at 68, 71, 76. Public officials have a legitimate need to communicate with their constituents, these constituents have a right to listen to their elected officials, and "nowhere in the Act did Congress expressly limit an incumbent's right to communicate with his constituency." *Orloski v. Federal Election Commission*, 795 F.2d 156, 163 (D.C. Cir. 1986).

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[35] Chairman McDonald and Commissioner Thomas state that the Act and the *Buckley* Court required only a "general understanding" to find coordination and presumably would state that persons speaking with legislative officials or candidates in the 2, 4 or 6 years between elections do so at their own risk. *See* Thomas/McDonald Statement at 7. I disagree with this conclusion, for the reasons stated in *Clifton*. *See* 114 F.3d 1309 at 1314. The district court in *Christian Coalition* also seemed not to appreciate the First Amendment dilemma in this area, mischaracterizing the choice as one between "lobbying the *campaign* on issues but spending no money on the election … or remaining walled off from the *campaign* so that all campaign-related expenditures are clearly independent." *Christian Coalition*, 52 F. Supp. 2d at 89, n. 53 (emphasis added). Approximately fifty percent of all "campaigns" involve officeholders who make up "the government," and with whom the speaker may wish to confer on legislative issues pursuant to the First Amendment right to "petition for a redress of grievances." U.S. CONST. amend. I.

Groups and candidates talk all the time, and to force groups to choose between talking to candidates or losing their safeharbor is likely to be as chilling on the First Amendment rights to speak and to petition the government as the conduct standard the Commission just rejected.

[23]

Issue discussion ought not, and constitutionally cannot, be regulated merely because an issue ad may be of benefit to the candidate or his campaign. Issue discussion will almost always, at some point, benefit some campaign, as the *Buckley* Court understood. The purpose of the express advocacy test is not to neatly separate those communications that are intended to influence a campaign from those that are not, but to protect the rights of all citizens to engage in protected speech. In this respect, the test is similar to many other prophylactic tests found in the law. For example, in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court recognized that "to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda*, at 467.[36] The warnings that law enforcement officials have been required to give to suspects ever since are not a sifting screen to divine the subjective intent of the suspect; not one tool among many for determining whether his confession was voluntary. Likewise, the express advocacy test is not a sifting screen to divine the subjective intent of a respondent, to determine whether in his mind the speech he engaged in was for the purpose of influencing an election. Rather, both the Miranda warnings and the express advocacy test are objectively ascertainable threshold requirements promulgated

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[36] The *Miranda* warnings were re-affirmed last year as a constitutionally based approach for determining the admissibility of statements made during a custodial interrogation that could not be overruled by statutory enactment. *Dickerson v. United States* 530 U.S. 428 (2000).

by Courts to protect the constitutional rights of citizens. Neither test is disposable, even though there may be other evidence that a confession was voluntary, or that a respondent's speech was "for the purpose of influencing" an election. As stated by the Court in *Miranda*, the "privilege is so fundamental to our system of constitutional rule and the expedient of giving adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda* at 468. The First Amendment is no less fundamental,[37] and the expedient of applying the express advocacy test so simple, that we may not and ought not pause to inquire in individual cases whether *speech* can be "for the purpose of influencing" an election without first finding express advocacy.[38]

Campaign finance laws and regulations have, over time, become weapons in the arsenals of candidates and party committees, and we should not quickly minimize the far-reaching aspects of these regulations. In 2000 the Congressional Committee Chairman of one major political party went so far as to sue his counterpart under the RICO statute.[39] If our coordination regulations proceed without an adequate content standard, it will take the political elite about three minutes to deduce that nearly all allegations of coordination will be followed by an FEC investigation, to which the respondent can offer no affirmative defense that will quickly terminate the investigation. Given that groups frequently have contacts with officeholder/candidates, credible allegations of coordination will be easy to make. If the complaint is reasonably well-crafted,[40] the Commission will have no choice but to find "reason to believe" that a violation has occurred. This is low-hanging fruit for any party, candidate, person or group seeking to silence and harass opposing voices in an election cycle.

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[37] *See* e.g., *Buckley v. Valeo*, 424 U.S. at 14 ("Discussion of public issues and debate [is] integral to the operation of the system of government established by our Constitution.")

[38] The law is full of blanket rules, in addition to *Miranda*, that are adopted in order to protect rights or to provide for increased accuracy or efficiency, even if in a particular case the application of the rule does not *seem* to achieve its purpose. For example, statutes of limitations may prevent an action even when evidence is not stale; the exclusionary rule often prevents evidence from being used in trials though it is known to be probative; the parole evidence rule may make a contract unenforceable though the evidence is clear that such a deal was made, to name just a few.

[39] In 2000, DCCC Chairman, Patrick Kennedy (D-R.I.) sued the NRCC and Tom DeLay (R-Tx.) under the

Whether express advocacy is present in any written or broadcast message, however, is a legal question susceptible of a quick preliminary determination by the Commission. It therefore acts as an affirmative defense the Commission can accept or reject in the initial stages of the MUR. Absent such a test, a respondent's preliminary denial of coordination, even when backed by signed affidavits, will never amount to anything more than a self-serving factual (not legal) representation. If in the future the Commission adopts an incorrect content standard, or effectively no content standard, there will be no affirmative defense that could save an advocate from a protracted investigation. The express advocacy bright line serves as that affirmative defense. If the Commission abandons that bright line, any group or individual which seeks to both engage in issue discussion and has even a passing contact with elected officials may be subject to allegations that will trigger the type of massive investigation, and corresponding costs, seen in this MUR. Thus it will be among the most aggressive moves the Commission has taken towards chilling debate in the United States.

The expensive, intrusive, lengthy investigation of MUR 4624, like the similar four-year investigation in MUR 4291, would have been readily avoided by the simple application of an express advocacy content standard. Adopting this standard is, in my view, required by both the statute and the Constitution. But even if not required, it is certainly a permissible standard under the statute, and offers many benefits. It provides clear notice to the community; it should result in fewer Advisory Opinion requests than the mere conduct standard; it will result in fewer expansive investigations which eat up Commission resources; it will reduce the role of litigation in campaigns; and most importantly, it avoids any concerns about constitutionality, and will not have the chilling effect on speech of an approach without a clear content standard.

Thus I would have ended this MUR on much simpler grounds, at a much earlier date, by finding that the Coalition's spending for issue advocacy, whether or not otherwise coordinated, was as a matter of law not for the purpose of influencing an election and not subject to regulation under the FECA.

RICO statute. *See* Juliet Eilperin, *House Democrats Sue DeLay, Action Accuses Whip of Extortion, Money Laundering in Fundraising*, THE WASHINGTON POST, May 4, 2000, at A06.

[40] Commission policy has been to treat complaints liberally. If the complainant swears an affidavit (as he is essentially required to do in swearing out a complaint, *see* 2 U.S.C. §437g(a)), the Commission will nearly always be required to launch into a full investigation to fairly decide whether the complainant or respondent has the better factual representation. "Rarely could the FEC dismiss a complaint ... because the FEC would need to know all the facts bearing on motive before making its ... determination." *Orloski* at 165.

/s/ Bradley A. Smith

Bradley A. Smith, Commissioner

11/6/01

Date

[26]

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[pages 1- 63 omitted]

Contributions from Minors

Section: 2 U.S.C. Sec.441a(a)(1)

Recommendation: Congress should establish a minimum age for contributors.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

[pages 65 - end]

Federal Election Commission
Annual Report 1993
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[pages 1- 49 omitted]

Contributions from Minors

Section: 2 U.S.C. Sec.441a(a)(1)

Recommendation: The Commission recommends that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

[pages 51 - end]

Federal Election Commission
Annual Report 1994
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[pages 1- 55 omitted]

Contributions from Minors

Section: 2 U.S.C. Sec.441a(a)(1)

Recommendation: The Commission recommends that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

[pages 57 - end omitted]

Federal Election Commission
Annual Report 1995
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[pages 1- 55 omitted]

Contributions from Minors

Section: 2 U.S.C. Sec.441a(a)(1)

Recommendation: The Commission recommends that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

[pages 57 - end omitted]

Federal Election Commission
Annual Report 1996
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[pages 1- 54 omitted]

Contributions from Minors

Section: 2 U.S.C. Sec.441a(a)(1)

Recommendation: The Commission recommends that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

[pages 56 - end]

Federal Election Commission

Annual Report 1997

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[pages 1- 53 omitted]

Contributions from Minors

Section: 2 U.S.C. Sec.441a(a)(1)

Recommendation: The Commission recommends that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

[pages 54 - 96 omitted]

Federal Election Commission

Annual Report 1998

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[pages 1- 43 omitted]

Contributions from Minors

Section: 2 U.S.C. §441a(a)(1)

Recommendation: The Commission recommends that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

[pages 45-92 omitted]

Federal Election Commission
Annual Report 1999
[FEC logo omitted]
[pages 1- 49 omitted]

Contributions from Minors (revised 2000)

Section: 2 U.S.C. §441a(a)(1)

Recommendation: The Commission recommends that Congress establish a minimum age of 16 for making contributions.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age of 16 for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

[pages 51-86 omitted]

Federal Election Commission
Annual Report 2000
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[pages 1- 42 omitted]

Contributions from Minors

Section: 2 U.S.C. Sec.441a(a)(1)

Recommendation: The Commission recommends that Congress establish a minimum age of 16 for making contributions.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age of 16 for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

[pages 43 - 93 omitted]

Federal Election Commission
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THE RULES OF THE REPUBLICAN PARTY

As adopted by the
2000 Republican National Convention
July 31, 2000

PREAMBLE

BE IT RESOLVED, That the Republican Party is the party of the open door. Ours is the party of liberty, the party of equality of opportunity for all and favoritism for none.

It is the intent and purpose of these rules to encourage and allow the broadest possible participation of all voters in Republican Party activities at all levels and to assure that the Republican Party is open and accessible to all Americans.

BE IT FURTHER RESOLVED, That the following be and hereby are adopted as the Rules of the Republican Party, comprised of the rules for the election and government of the Republican National Committee until the next national convention, the rules under which delegates and alternate delegates shall be allotted to the respective states in the next national convention and the rules under which such delegates and alternate delegates shall be elected and under which contests shall be considered, and the rules of business of this national convention.

THE REPUBLICAN NATIONAL COMMITTEE

RULE NO. 1

Organization of the Republican National Committee

The Republican National Committee shall have the general management of the Republican Party, subject to direction from the national convention. The members of the Republican National Committee shall consist of one (1) national committeeman and one (1) national committeewoman from, and the chairman of the state Republican Party of, each state. For the purposes of this rule and all other rules, the definition of "state" or "states" shall be that as defined in Rule No. 26.

RULE NO. 2

Method of Election

(a) Where the rules adopted by a state Republican Party provide a method of election of the national committeeman and the national committeewoman, they shall be elected pursuant to such method.

(b) Where the rules adopted by a state Republican Party do not provide a method of election of the national committeeman and the national committeewoman, and where state laws do provide such a method of election, they shall be elected pursuant to such method provided by state laws.

(c) Where neither the rules adopted by a state Republican Party nor state laws provide a method of election of the national committeeman and the national committeewoman, the national convention delegation from such state shall elect them.

(d) At each national convention, the roll shall be called and the delegation from each state shall report, through the chairman of the delegation, the names of the elected national committee members whose election shall be ratified by the national convention if otherwise in accordance with these rules.

RULE NO. 3

Term of Office

(a) National committeemen and national committeewomen shall serve from the adjournment of the national convention until the adjournment of the following **[*3]** national convention, and until their successors shall have been elected and ratified. For seniority purposes, newly elected committee persons shall be ratified in order of the date of their individual election.

(b) The duly elected and acting chairman of each state Republican Party shall be a member of the Republican National Committee during his or her term in office.

RULE NO. 4

Vacancies

(a) Election of members to fill vacancies in the Republican National Committee shall be ratified by the Republican National Committee upon their election by the state Republican Party in and for the state in which the vacancy occurs.

(b) The Republican National Committee shall have the power to declare vacant the seat of any member who refuses to support the Republican nominee for President of the United States or Vice President of the United States.

(c) In the event of the death, resignation, disqualification, or disability of any officer of the Republican

National Committee or member of a committee of the Republican National Committee, as enumerated in the Rules, such vacancy shall be filled by the same body and in the same manner as provided therein for the election of such officer or officers or committee members in the first instance.

(d) In the event of the death, resignation, disqualification, or disability of any member of the Republican National Committee, the vacancy shall be filled according to adopted Republican state party rules. If no rule exists, vacancies shall be filled by majority vote of the state committee.

RULE NO. 5
Officers of the Republican National Committee

(a) The Officers of the Republican National Committee shall consist of:

(1) A chairman and a co-chairman of the opposite sex who shall be elected by the members of the Republican National Committee. Except as otherwise ordered by a majority of the members of the Republican National Committee present and voting on the matter, the chairman and **[*4]** the co-chairman shall be full-time, paid employees of the Republican National Committee. The chairman shall be the chief executive officer of the Republican National Committee. The chairman or co-chairman may be removed from office only by a two-thirds (2/3) vote of the entire Republican National Committee.

(2) Eight (8) vice chairmen, comprising one (1) man and one (1) woman from each of the following four (4) regions:

(i) The Western States Association: Alaska, American Samoa, Arizona, California, Colorado, Guam, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming;

(ii) The Midwestern States Association: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin;

(iii) The Northeastern States Association: Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, and the Virgin Islands; and

(iv) The Southern States Association: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

(3) A secretary, a treasurer, and such other officers as the Republican National Committee shall deem necessary, all to be elected by the Republican National Committee.

(b) The chairman, co-chairman, and all other officers shall be elected in January of each odd-numbered year. All officers, except the vice chairmen, shall be nominated from the floor, and candidates must have at least the majority vote of the Republican National Committee members in each of three (3) states in order to have their names placed in nomination. There shall be no nominating committee.

(c) The eight (8) vice chairmen shall be elected at regional caucuses by the Republican National Committee members of the four (4) regions and shall be residents of and Republican National Committee members from their respective regions. The election shall take place in January of each odd-numbered year. The election of vice chairmen shall not require confirmation by the Republican National Committee.

(d) The chairman shall appoint a general counsel for the Republican National Committee and a chairman of the Republican Finance Committee, both of whom shall be confirmed by the Republican National Committee.

RULE NO. 6
Executive Committee

(a) There shall be an Executive Committee of the Republican National Committee to consist of eleven (11) members of the Republican National Committee: three (3) to be appointed by the chairman, to serve at the will of the chairman and whose terms shall be coterminous with that of the chairman, and eight (8) additional members to consist of one (1) man and one (1) woman elected by and from each of the four (4) regional caucuses. In addition, the following shall serve as ex-officio members of the Executive Committee: the chairman, the co-chairman, the vice chairmen, the secretary, the treasurer, the general counsel, the chairman of the Republican Finance Committee, the chairman of the Republican State Chairmen's Advisory Committee, the chairman of the Budget Committee, and the president of the National Federation of Republican Women.

(b) The Executive Committee may exercise all the executive and administrative functions required of the Republican National Committee between meetings of the Republican National Committee, with the exception of the following:

(1) election of officers of the Republican National Committee;

(2) ratification of the election of members of the Republican National Committee;

(3) issuance of the call and designation of the time and place for holding the national convention; and,

(4) filling a vacancy in the office of Republican candidate for President of the United States, or Republican candidate for Vice President of the United States.

(c) The Executive Committee shall meet on the call of the chairman and such meetings shall be held at least twice in each year. In addition, upon written petition of at least **[*6]** twenty-five percent (25%) of the members of the Executive Committee, the chairman, within ten (10) days of his receipt of said petition, shall call a meeting of the Executive Committee to be held in a city to be designated by the chairman. The date of such meeting shall fall between ten (10) and twenty (20) days from the date of the call. The minutes of all Executive Committee meetings shall be distributed as promptly as practicable to all members of the Republican National Committee.

(d) In addition to the foregoing, the Executive Committee shall encourage and solicit the advice and counsel of Republican groups and organizations.

RULE NO. 7
Rules of Order

(a) The current authorized edition of *Robert's Rules of Order: Newly Revised* ("*Robert's Rules of Order*") shall govern in all meetings of the Republican National Committee and its committees insofar as they are applicable and not inconsistent with these rules.

(b) All meetings of the Republican National Committee and all of its committees shall be open meetings, except as provided for by *Robert's Rules of Order*.

(c) A member of the Republican National Committee may give a written and witnessed proxy to an eligible and declared Republican voter of the same state, which shall be effective for one (1) meeting and may include all committees of the Republican National Committee and other meetings held in conjunction with the Republican National Committee meeting that the proxy grantor is eligible to attend. A member of a committee of the Republican National Committee may give a written and witnessed proxy to an eligible and declared Republican voter of the same state or to a member of that member's state delegation to the Republican National Committee. Proxies to attend Republican National Committee meetings shall be filed with the secretary of the Republican National Committee. Proxies to attend a committee of the Republican National Committee shall be filed with the chairman of the respective committee.

(d) No votes (except elections to office when properly ordered pursuant to the provisions of *Robert's Rules of Order*) shall be taken by secret ballot in any open meeting of the Republican National Committee or of any committee thereof.

[*7] (e) A prayer and the pledge of allegiance shall be conducted at the beginning of all meetings of the committees listed in these rules, including meetings of all subcommittees, immediately following the call to order by the chairman.

RULE NO. 8
Meetings of the Republican National Committee

(a) The Republican National Committee shall meet at least twice in each year. A tentative agenda for each

meeting shall be mailed to the membership at least ten (10) days prior to such meeting. The minutes, including all resolutions and motions, shall be mailed to all members of the Republican National Committee within thirty (30) days after the close of the meeting.

(b) The first meeting of the Republican National Committee shall take place within five (5) days after the adjournment of the national convention. Such meeting and all other meetings of the Republican National Committee shall take place upon call of the chairman or, in case of a vacancy in the chairmanship, upon call of the co-chairman or, in case of a vacancy in the chairmanship or the co-chairmanship, upon the call of the vice chairman senior in time of service as a member of the Republican National Committee; provided, however, that such call shall be issued at least ten (10) days in advance of the date of the proposed meeting, except that if one of the purposes of a meeting of the Republican National Committee is to fill a vacancy in the office of Republican candidate for President of the United States or Republican candidate for Vice President of the United States then only five (5) days notice of the purpose, date, and place of said meeting shall be required. Upon written petition of sixteen (16) or more members of the Republican National Committee, representing no fewer than sixteen (16) states, filed jointly or severally with the chairman, requesting a meeting of the Republican National Committee, it shall be the duty of the chairman, within ten (10) days from receipt of said petition, to issue a call for a meeting of the Republican National Committee, to be held in a city to be designated by the chairman, the date of such called meeting to be not later than twenty (20) days or earlier than ten (10) days from the date of the call.

RULE NO. 9
Filling Vacancies in Nominations

(a) The Republican National Committee is hereby authorized and empowered to fill any and all vacancies which **[*8]** may occur by reason of death, declination, or otherwise of the Republican candidate for President of the United States or the Republican candidate for Vice President of the United States, as nominated by the national convention, or the Republican National Committee may reconvene the national convention for the purpose of filing any such vacancies.

(b) In voting under this rule, the Republican National Committee members representing any state shall be entitled to cast the same number of votes as said state was entitled to cast at the national convention.

(c) In the event that the members of the Republican National Committee form any state shall not be in agreement in the casting of votes hereunder, the votes of such state shall be divided equally, including fractional votes among the members of the Republican National Committee present or voting by proxy.

(d) No candidate shall be chosen to fill any such vacancy except upon receiving a majority of the votes entitled to be cast in the election.

RULE NO. 10
Committees of the Republican National Committee

(a) There shall be the following committees:

(1) There shall be a Standing Committee on Rules of the Republican National Committee, composed of one (1) member of the Republican National Committee from each state, to review and propose recommendations with respect to the Rules of the Republican Party. The members of the Republican National Committee from each state shall caucus, and by majority vote, choose from their number within eight (8) months following the national convention appointees to serve on this committee. If the members of the Republican National Committee from any state do not within this period submit to the chairman of the Republican National Committee their choice to serve on the Standing Committee on Rules, the chairman of the Republican National Committee shall select, from among the members of the Republican National Committee from each such state, one (1) member to serve on the Standing Committee on Rules. The chairman of the Standing Committee on Rules shall be elected by the committee from among its members.

(2) There shall be a Committee on Arrangements to plan for and manage the next national convention. The **[*9]** chairman and co-chairman of the Republican National Committee shall be members of the Committee on Arrangements and the chairman of the Republican National Committee shall appoint to the Committee on Arrangements at least one (1) member of the Republican National Committee from each state. The chairmen of the Committee on Arrangements and of its subcommittees shall be appointed by and serve at the pleasure of the chairman of the Republican National Committee from among the members of the Committee on Arrangements and, together with such other officers as shall be elected by the Committee on Arrangements, shall be members of the Executive Committee of the Committee on Arrangements. The chairman of the Standing Committee on Rules and the chairman of the Committee on Contests shall also be members of the Committee on Arrangements.

(3) There shall be a Committee on the Call, composed of a chairman and at least seven (7) members of the Republican National Committee who shall be appointed by the chairman of the Republican National Committee. This

committee shall assist the Republican National Committee in connection with the issuance of the call for the next national convention pursuant to Rule No. 12. This committee shall be appointed after the selection of the Committees on Rules and Arrangements.

(4) There shall be a Committee on Contests, which shall be composed of two (2) members of the Republican National Committee from each of the four (4) regions described in Rule No. 5, elected by members of the Republican National Committee from each such region, and a chairman appointed by the chairman of the Republican National Committee from among the members or officers of the Republican National Committee. This committee shall perform the duties relating to the resolution of contests prescribed in Rule No. 22. This committee shall be elected after the selection of the Committees on Rules and Arrangements.

(5) There shall be a Committee on the Site of the Republican National Convention, which shall be composed of two (2) members of the Republican National Committee from each of the four (4) regions described in Rule No. 5, elected by the members of the Republican National Committee from each such region, and a chairman appointed by the chairman of the Republican National Committee from among the members or officers of the Republican National Committee. This committee shall be responsible for investigating potential sites for the next national convention and for recommending a **[*10]** site to the Republican National Committee for selection. This committee shall be selected no later than two (2) years following the presidential election.

(6) There shall be a Committee on Resolutions, which shall be composed of two (2) members of the Republican National Committee from each of the four (4) regions described in Rule No. 5. elected by the members of the Republican National Committee from each such region,

and a chairman appointed by the chairman of the Republican National Committee from among the members of the Republican National Committee. This committee shall consider all resolutions submitted by any member for adoption by the Republican National Committee and shall report to the Republican National Committee all resolutions timely submitted to it together with its recommendations for adoption, amendment, or other disposition. The Committee on Resolutions shall report out, without amendment and for consideration by the Republican National Committee, any resolution submitted in writing and supported by at least one (1) member of the Republican National Committee from each of ten (10) states which is dated and submitted to the Chairman of the Resolutions Committee at least thirty (30) days before any regularly called meeting of the Republican National Committee or at least ten (10) days before a specially called meeting.

(7) Each member of the Republican National Committee shall be a member of at least one (1) of the above mentioned committees. The general counsel of the Republican National Committee shall be counsel to each of such committees. The minutes of these committees shall be distributed as promptly as practicable to all members of the Republican National Committee. Any of these committees may meet and act by telephone conference upon twenty-four (24) hours notice.

(b) The Republican National Committee shall create a Republican Finance Committee and any subcommittees thereof which it deems desirable to which it may delegate the responsibility of developing and implementing a broad-based fundraising plan. The chairman of the Republican Finance Committee shall be appointed pursuant to the provisions of Rule No. 5(d).

(c) The Republican National Committee shall create a Budget Committee and any subcommittees thereof which it deems desirable to which it may delegate the responsibility of developing a budget and reviewing income and expenditures of the Republican National Committee. The Budget **[*11]** Committee shall be composed of seven (7) members of the Republican National Committee, three (3) of whom shall be appointed by the chairman of the Republican National Committee and one (1) of whom shall be elected by each of the four (4) regional caucuses in January of each odd numbered year (as provided in Rule No. 5(c)). In addition, the general counsel of the Republican National Committee shall be counsel to such committee and the following shall serve as *ex officio* members of the Budget Committee: the chairman, co-chairman, and treasurer of the Republican National Committee, and the chairman of the Republican Finance Committee. The chairman of the Republican National Committee shall make every effort in such appointments to ensure that an equal number of men and women serve on the Budget Committee. The chairman of the Republican National Committee shall appoint the chairman of the budget Committee from among the members thereof.

(d) The annual budget shall be approved at the first meeting of the Republican National Committee held in each year. The proposed budget, in reasonable detail, shall be mailed to all members of the Republican National Committee at least ten (10) days prior to such meeting.

(e) The chairman of the Republican National Committee, with the approval of the Republican National Committee, may appoint such other committees and assistants as he or she may deem necessary. Whenever such committees are appointed, they shall consist of a chairman and an equal number of men and women.

RULE NO. 11
Candidate Support

(a) The Republican National Committee shall not, without the prior written and filed approval of all members of the Republican National Committee from the state involved, contribute money or in-kind aid to any candidate for any public or party office except the nominee of the Republican Party or a candidate who is unopposed in the Republican primary after the filling deadline for that office. In those states where state law establishes a non-partisan primary in which Republican candidates could participate, but in which the general election may not include a Republican candidate, the candidate endorsed by a convention held under the authority of the state Republican Party shall be recognized by the Republican National Committee as the Republican nominee.

(b) No state party rule or state law shall be observed that allows persons who have participated or are participating in **[*12]** the selection of any nominee of a party other than the Republican Party, including, but not limited to, through the use of a multi-party primary or similar type ballot, to participate in the selection of a nominee of the Republican Party for that general election. No person nominated in violation of this rule shall be recognized as the nominee of the Republican Party from that state.

CONVENING OF THE NEXT NATIONAL CONVENTION

RULE NO. 12
Call of Next Convention

The Republican National Committee shall issue the call for the next national convention to nominate candidates for President of the United States and Vice President of the United States prior to January 1 of the year in which the national convention is to be held. The Republican National Committee shall issue and promulgate the call in a manner consistent with these rules. The call shall include the text of the rules relating to the convening and the proceedings of the national convention.

RULE NO. 13
Membership in Convention

Subject to the provisions of Rule No. 16, the membership of the next national convention shall consist of:

(a) Delegates.

(1) Ten (10) delegates at large from each of the fifty (50) states.

(2) The national committeeman, the national committeewoman and the chairman of the state Republican Party of, each state and American Samoa, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

(3) Three (3) district delegates for each Representative in the United States House of Representatives from each state.

(4) Six (6) delegates at large from American Samoa, sixteen (16) delegates at large from the District of Columbia, six (6) delegates at large from Guam, twenty (20) delegates at large from Puerto Rico, and six (6) delegates at large from the Virgin Islands; provided, however, that if Puerto Rico shall become a state prior to the next national **[*13]** convention, the number of delegates from Puerto Rico shall be calculated in accordance with the same formula used for the other states.

(5) From each state having cast its electoral votes, or a majority thereof, for the Republican nominee for

President of the United States in the last preceding election: four and one-half (4 1/2) delegates at large plus a number of the delegates at large equal to sixty percent (60%) of the number of electoral votes of that state; provided, however, that if Puerto Rico shall become a state prior to the next national convention, it shall be presumed that it would have cast its electoral votes, or a majority thereof, for the Republican nominee in the last preceding election. (In the computation of the number of delegates at large, any sum of the four and one-half (4 1/2) plus the sixty percent (60%) representing a fraction shall be increased to the next whole number.) In addition, one (1) delegate at large shall be awarded to a state for any and each of the following public officials elected by such state in the year of the last preceding presidential election or at any subsequent election held prior to January 1 of the year in which the next national convention is held:

(i) A Republican governor, provided that no such additional delegate at large award to any state shall exceed one (1);

(ii) Membership in the Republican Party of at least one-half (1/2) of the Representatives representing a state in the United States House of Representatives; provided that no such additional delegate at large award to any state shall exceed one (1);

(iii) Membership in the Republican Party of a majority of the members of any chamber of a state legislature, if such chamber has been organized, and is presided over (if the presiding officer is elected by the chamber), by Republicans; provided that no such additional delegate at large award to any state shall exceed one (1).

(iv) Membership in the Republican Party of a majority of all chambers of a state legislature, if all such chambers are presided over (if the presiding officer is elected by the chamber), by a Republican; provided that no such additional delegate at large award to any state shall exceed one (1).

(6) In addition, one (1) delegate at large shall be awarded to a state for any and each Republican United States **[*14]** Senator elected by such state in the six (6) year period prior to January 1 of the year in which the next national convention is held; provided that no such additional delegate at large award to any state shall exceed two (2).

(7) In addition, if the District of Columbia shall have cast its electoral votes, or a majority thereof, for the Republican nominee for President of the United States in the last preceding presidential election: four and one-half (4 1/2) delegates at large plus the number of delegates at large equal to thirty percent (30%) of the sixteen (16) delegates at large allotted to the District of Columbia. In the computation of the number of delegates at large, any sum of the four and one-half (4 1/2) plus the thirty percent (30%) representing a fraction shall be increased to the next whole number.

(b) Alternate Delegates.

One (1) alternate delegate for each delegate to the national convention, except that no alternates shall be selected for Republican National Committee members.

(c) Any state party may set the date for any primary, caucus, convention, or meeting for the purpose of voting for a presidential candidate and/or selecting delegates to the national convention. To the extent a state party's rules are in conflict with its state's laws with respect to this rule, the provisions of this rule and the state party's rules shall control. To the extent the provisions of the rule are inconsistent with the provisions of Rule No. 15, the provisions of this rule shall be controlling for all purposes.

RULE NO. 14
Participation

(a) The Republican National Committee shall assist the states in their efforts to inform all citizens as to how they may participate in delegate selection procedures. The states, in cooperation with the Republican National Committee, shall prepare instructive material on delegate selection methods and make it available for distribution.

(b) Participation in a Republican primary, caucus, or any meeting or convention held for the purpose of selecting delegates and alternate delegates to a county, district, state, or national convention shall in no way be abridged for reasons of sex, race, religion, color, age, or national origin. The Republican National Committee and the Republican state committee or governing committee of each state shall take **[*15]** positive action to achieve the broadest possible participation by men and women, young people, minority and heritage groups, senior citizens, and all other citizens in the delegate selection process.

(c) Unless otherwise provided by the laws of the state in which the election occurs, in those states where delegates and alternate delegates are elected through the convention system or a combination of convention and primary systems, the precinct, ward, township, or county meetings shall be open meetings and all citizens who are qualified shall be urged to participate.

(d) Each state shall endeavor to have equal representation of men and women in its delegation to the Republican National Convention.

(e) The provisions of these rules are not intended to be the basis of any kind of quota system.

RULE NO. 15
Election of Delegates and Alternate Delegates

(a) Order of Precedence.

Delegates at large and their alternate delegates and delegates from congressional districts and their alternate delegates to the national convention shall be elected in the following manner:

(1) In accordance with any applicable Republican Party rules of a state, insofar as the same are not inconsistent with these rules; or,

(2) To the extent not provided for in the applicable Republican Party rules of a state, in accordance with any applicable laws of a state, insofar as the same are not inconsistent with these rules; or,

(3) By a combination of the methods set forth in paragraphs (a)(1) or (a)(2) of this rule; or,

(4) To the extent not provided by state law or party rules, as set forth in paragraph (c) of this rule.

(b) General.

In all elections of delegates or alternate delegates to the national convention, the following rules shall apply:

[*16] (1) In any jurisdiction in which Republican representation upon the board of judges or inspectors of elections for primary elections is denied by law, delegates and alternate delegates shall be elected as provided in paragraph (a)(1) or (a)(4) of this rule.

(2) In selecting delegates and alternate delegates to the national convention, no state law shall be observed which hinders, abridges, or denies to any citizen of

the United States, eligible under the Constitution of the United States to hold the office of President of the United States or Vice President of the United States, the right or privilege of being a candidate under such state law for the nomination for President of the United States or Vice President of the United States or which authorizes the election of a number of delegates or alternate delegates from any state to the national convention different from that fixed in these rules.

(3) Alternate delegates shall be elected to the national convention for each unit of representation equal in number to the number of delegates elected therein and shall be chosen in the same manner and at the same time as the delegates and under the same rules; provided, however, that if the law of any state shall prescribe another method of choosing alternate delegates, they may be chosen in accordance with the provisions of the law of the state in which the election occurs, except that no alternates shall be selected for Republican National Committee members.

(4) Delegates and alternate delegates at large to the national convention when serving as delegates and alternate delegates shall be residents of and duly qualified voters in their respective states. All delegates and alternate delegates allocated as delegates and alternate delegates at large shall be elected at large in the several states; provided, however, that such allocation and method of election may be varied in any state to the extent, and only to the extent, necessary to avoid conflict with state law applicable to the selection of national convention delegates if such varying allocation and method of election were those pursuant to which delegates at large and alternate delegates at large were elected to the 1988 Republican National Convention from that state.

(5) Delegates and alternate delegates to the national convention representing congressional districts shall be residents of and qualified voters in said districts

respectively when elected and when serving as delegates and alternate delegates. There shall be three (3) delegates and three (3) alternate delegates allocated to represent each **[*17]** congressional district of the several states, who shall be elected by each such congressional district; provided, however, that such number of delegates and alternate delegates allocated to represent, and elected by, any congressional district of a state may be reduced or increased to the extent, and only to the extent, necessary to avoid conflict with state law applicable to the selection of national convention delegates if such varying allocation was that pursuant to which district delegates and alternate district delegates were elected to the 1988 Republican National Convention from the state.

(6) No delegate or alternate delegate to the national convention shall be required to pay an assessment or fee in excess of that provided by the law of the state in which his or her election occurs as a condition of serving as a delegate or alternate delegate to the national convention.

(7) There shall be no automatic delegates to the national convention who serve by virtue of party position or elective office, except as provided for in Rule No. 13 (a)(2).

(8) Delegates and alternate delegates to the national convention may be elected only in one of the following manners:

(i) by primary election;

(ii) by the Republican state committee, where specifically provided by state law;

(iii) by state and congressional district conventions;

(iv) by any method consistent with these rules by which delegates and alternate delegates were selected to the most recent Republican National Convention from that state;

(v) by Rule No. 13 (a)(2) of these rules.

(9) No state law shall be observed which permits any person to participate in a primary delegate and alternate delegate selection process that also permits that person at the same primary to participate in the choosing of nominees of any other party for other elective office. Delegates and alternate delegates to the national convention shall in that event be selected pursuant to state party rules that are not inconsistent with the Rules of the Republican Party; provided, however, that the selection process established by the state **[*18]** party rules shall provide that only persons eligible to vote who are deemed to be Republicans pursuant to state law or state party rules shall participate in such delegate selection process.

(10) No delegates or alternate delegates shall be selected pursuant to any Republican Party rule of a state or state law which materially changes the manner of selecting delegates or alternate delegates or the date upon which such state party holds a presidential primary, caucus, convention, or meeting for the purpose of voting for a presidential candidate and/or selecting delegates to the national convention if such changes were adopted or made effective after the first Tuesday in October of the year before the year in which the national convention is to be held. Where it is not possible for a state party to certify the manner and the date upon which it holds a presidential primary, caucus, convention, or meeting for the purpose of voting for a presidential candidate and/or selecting delegates to the national convention in effect in that state on the date and in the manner provided in paragraph (d) of this rule, the process for holding the presidential primary, caucus,

convention, or meeting for the purpose of voting for a presidential candidate and/or selecting delegates to the national convention shall be conducted in the same manner and held upon the same date as was used for the immediately preceding national convention. If it is not possible to hold a presidential primary, caucus, convention, or meeting for the purpose of voting for a presidential candidate and/or selecting delegates to the national convention upon the same date as was used for the immediately preceding national convention, then delegates or alternate delegates shall be selected by congressional district or state conventions pursuant to paragraph (c) of this rule.

(11) Except with respect to delegates and alternate delegates elected under paragraph (b)(8)(ii) of this rule and if consistent with paragraph (c)(5) of this rule:

(i) No presidential primary, caucus, convention, or other meeting may be held for the purpose of voting for a presidential candidate and/or selecting delegates or alternate delegates to the national convention, prior to the first Tuesday of February or after the third Tuesday of June in the year in which the national convention is held; and,

(ii) The selection process of choosing those who will select delegates or alternate delegates shall not begin before September 1 of the year before the year in which the national convention is to be held.

[*19] (12) The Republican National Committee may grant a waiver to a state party from certain provisions of this rule in the following instance:

Where it is not possible for a state party to comply with the first Tuesday in October deadline delineated in paragraph (d) of this rule and not possible for a state party to hold its presidential primary, caucus, convention, or meeting for the purpose of voting for a

presidential candidate and/or selecting delegates to the national convention as was used for the immediately preceding national convention or to select delegates or alternate delegates by congressional district or state conventions pursuant to paragraph (c) of this rule, and the Republican National Committee determines that granting such waiver is in the best interests of the Republican Party.

(c) Conventions.

Wherever state law permits or the Republican Party rules of a state require the election of delegates and alternate delegates by convention or there is no applicable state law or Republican Party rule, delegates and alternate delegates to the national convention shall be elected by congressional district or state conventions pursuant to the following rules:

(1) Congressional district or state conventions shall be called by the Republican state committee.

(2) Delegates to congressional district conventions may be elected in precinct caucuses, mass meetings, mass conventions, or county conventions in which only eligible voters in such precinct, county, or district, as the case may be, shall vote.

(3) Notices of the call for any such caucus, meeting, or convention shall be published in a newspaper or newspapers of general circulation in the county, district, or state, as the case may be, not less than fifteen (15) days prior to the date of such caucus, meeting, or convention.

(4) Only persons eligible to vote who are deemed as a matter of public record to be Republicans pursuant to state law or, if voters are not enrolled by party, by Republican party rules of a state, shall participate in any primary election held for the purpose of electing delegates or alternate delegates to the national convention or in any

Republican caucus, mass meeting, or mass convention held for the purpose of selecting delegates to the county, district, or state conventions, and only such legal and qualified voters shall be elected as delegates to county, district, and state conventions; **[*20]** provided, however, that in addition to the qualifications provided herein, the applicable Republican party rules of a state may prescribe additional qualifications not inconsistent with law, which additional qualifications shall be adopted before the first Tuesday in October in the year before the year in which the national convention is to be held and published in at least one (1) newspaper having a general circulation throughout the state, such publication to be at least ninety (90) days before such qualifications become effective.

(5) No delegates shall be deemed eligible to participate in any congressional district or state convention the purpose of which is to elect delegates to the national convention who are elected prior to the date of the issuance of the call of such national convention.

(6) Congressional district conventions shall be composed of delegates who are persons eligible to vote and who are deemed to be Republicans pursuant to state law or party rules. State conventions shall be composed of delegates who are persons eligible to vote and who are deemed to be Republicans pursuant to state law or party rules in the respective districts which they represent in said state conventions. Such delegates shall be apportioned by the state Republican Party among counties, parishes, and cities of the state or district having regard to the Republican vote or the population therein.

(7) There shall be no proxies at any district or state convention (which shall not include meetings of a Republican state committee) held for the purpose of selecting delegates to the national convention. If alternate delegates to such selection convention are selected, the alternate delegate and no other shall vote in the absence of the delegate.

(d) Certification and filing by state committees.

On or before the first Tuesday in October of the year before the year in which the national convention is to be held, each Republican state committee shall adopt rules, procedures, policies, and instructive materials (prepared pursuant to Rule No. 14(a)) governing the selection of delegates and alternate delegates to the national convention to convene during the following year and shall certify and file with the secretary of the Republican National Committee true copies of the same and of all statutes governing the selection of such delegates and alternate delegates.

[*21]

RULE NO. 16

Enforcement of Rules

(a) If any state or state party violates the Rules of the Republican Party relating to the timing of the selection process resulting in the election of delegates or alternate delegates to the next national convention, such state shall suffer a loss of its delegates and alternate delegates to that national convention as follows:

(1) If a state or state party violates the Rules of the Republican Party relating to the timing of the selection process resulting in the election of delegates or alternate delegates to the national convention before the call to the national convention is issued, then the number of delegates to the national convention from that state shall be reduced by fifty percent (50%), and the corresponding alternate delegates shall also be reduced.

(2) If a state or state party violates the Rules of the Republican Party relating to the timing of the selection process resulting in the election of delegates or alternate delegates to the national convention after the call to the national convention is issued, then the number of delegates

to the national convention from that state shall be reduced by ninety percent (90%), and the corresponding alternate delegates shall also be reduced.

(3) Any sum representing a fraction shall be increased to the nearest whole number, so long as such rounding does not prevent a state from having at least one (1) delegate or alternate delegate to the national convention.

(b) If a violation has occurred before the issuance of the call to the national convention, the chairman of the Republican National Committee shall notify the offending state of the violation and shall inform the state of the number of delegates and alternate delegates it will lose. This reduced number of delegates and alternate delegates will be reflected in the call to the national convention, and will be reported to the secretary of state or responsible election official of the offending state and to the chairman of every state party. Said reduced number will be the only number recognized as the official delegation of the state to the national convention.

(c) If a violation has occurred after the issuance of the call to the national convention, the chairman of the Republican National Committee shall notify the state of the violation and shall inform the state of the number of delegates and alternate delegates it will lose. This reduced number of **[*22]** delegates and alternate delegates will be reported to the secretary of state or responsible election official of the offending state and to the chairman of every state party, and such reduced number will be the only number recognized as the official delegation of the state to the national convention.

(d) If the chairman of the Republican National Committee does not act upon a violation of the Rules of the Republican Party relating to the selection and/or allocation of delegates or alternate delegates to the national convention, then a statement may be filed against a state or state party by any three (3) members of the Republican National Committee

Standing Committee on Rules who feel that a violation has occurred.

(1) A statement filed against a state or state party by any three (3) members of the Standing Committee on Rules shall be written and shall specify the reasons why the members believe the state or state party is in violation. The statement shall be signed and dated by each Rules member filing the statement, and shall be filed with the secretary of the Republican National Committee. The secretary of the Republican National Committee shall, within twenty (20) days of receipt, distribute such statement to all members of the Republican National Committee.

(2) The Standing Committee on Rules shall meet upon the call of the chairman of the Rules Committee, and shall vote upon whether a state or state party is in violation. If by majority vote the Standing Committee on Rules finds a violation, then such state or state party shall suffer the penalties described in paragraph (a) of this rule.

(e) If a state or state party is determined to be in violation:

(1) No member of the Republican National Committee from the offending state shall be permitted to serve as a delegate or alternate delegate to the national convention.

(2) After the Republican National Committee members are excluded from being part of the offending state's delegation to the national convention, the state party shall determine which of the state's remaining delegates (and corresponding alternate delegates) are entitled to serve as part of the state's reduced delegation to the national convention.

[*23] (3) In addition to the penalties provided for in paragraphs (e)(1) and (2) of this rule, the Republican

National Committee Standing Committee on Rules may impose additional sanctions relating to the offending state's hotel location at the national convention, guest privileges and VIP passes at the national convention, and seating location in the national convention hall.

(f) A state or state party shall have no appeal from either a finding of a violation against it or a penalty imposed upon it under this rule.

RULE NO. 17
Excess Delegates and Alternate Delegates

(a) No state shall elect a greater number of persons to act as delegates and alternate delegates than the actual number of delegates and alternate delegates respectively to which it is entitled under the call for the national convention. Provided, however, that if a state is found in violation of the delegate selection rules under Rule No. 16, then that state shall not elect a greater number of persons to act as delegates and alternate delegates than the actual number of delegates and alternate delegates respectively to which it is entitled under Rule No. 16. No unit of representation may elect any delegate or alternate delegate with permission to cast a fractional vote.

(b) Where more than the authorized number of delegates from any state is certified and forwarded to the secretary of the Republican National Committee in the manner provided in Rule No. 18, a contest shall be deemed to exist and the secretary shall notify the several claimants so reported and shall submit all such credentials and claims to the whole Republican National Committee for decision as to which claimants reported shall be placed upon the temporary roll of the national convention.

RULE NO. 18
Certification of Election

(a) All delegates and alternate delegates shall be elected not later than thirty-five (35) days before the date of the meeting of the national convention, unless otherwise provided by the laws of the state in which the election occurs.

(b) Election of delegates and alternate delegates shall be certified:

(1) In every case where they are elected by convention, by the chairman and secretary of such convention **[*24]** or by the chairman and secretary of the Republican state committee, and forwarded to the secretary of the Republican National Committee;

(2) In every case where they are elected by primary, by the canvassing board or officer created or designated by the law of the state in which the election occurs, to canvass the returns and issue certificates of election to delegates or alternate delegates to national conventions of political parties, and all certificates shall be forwarded by said duly elected delegates and alternate delegates in the manner herein provided; and,

(3) In every case where they are elected by the Republican state committee, by the chairman and secretary of the Republican state committee, and forwarded to the secretary of the Republican National Committee.

(c) No later than thirty (30) days before the time set for the meeting of the national convention, the credentials of each delegate and alternate delegate shall be filed with the secretary of the Republican National Committee for use by the secretary in making up the temporary roll of the national convention, except in the case of delegates or alternate delegates elected at a time or times in accordance with the laws of the state in which the election occurs rendering impossible the filing of credentials within the time above specified.

RULE NO. 19
Contests: Resolution by States

All contests arising in any state electing district delegates by district conventions shall be decided by its state convention or, if the state convention shall not meet prior to the national convention, then by its state committee. Only contests affecting delegates elected at large shall be presented to the Republican National Committee; provided, however, if the contest regarding a district delegate arises out of the irregular or unlawful action of the state committee or state convention, the Republican National Committee may take jurisdiction thereof and hear and determine the same under the procedures provided in Rules No. 21 and No. 22.

[*25]

RULE NO. 20
Temporary Roll

(a) The names of the delegates and alternate delegates presenting certificates of election from the officials designated in Rule No. 18 shall be placed upon the temporary roll of the national convention by the Republican National Committee.

(b) No person on the temporary roll of the national convention and whose right to be seated as a delegate or alternate delegate is being contested shall be entitled to vote in the national convention or in any committee thereof until by vote of the national convention the contest as to such person has been finally decided and such person has been permanently seated, except that any such person may be accorded the right to so vote, except in matters involving the credentials of that person, by an affirmative vote of a majority

of the members of the Republican National Committee or the Committee on Credentials.

RULE NO. 21
Contest Filing

(a) Notices of contests shall state the grounds of the contest and shall be filed, no later than thirty (30) days before the time set for the meeting of the national convention, with the secretary of the Republican National Committee and shall be sent, simultaneously, by registered mail to the person or persons being contested, except in the case of delegates or alternate delegates elected at a time or times in accordance with applicable state law rendering impossible the filing of the notice of contest within the time above specified.

(b) Notices of contests may be filed only by a resident of the state whose delegation is challenged who was eligible to participate at any level in the delegate selection process of that state.

(c) Only contests that are timely filed under these rules shall be considered.

(d) For purposes of the rules relating to contests and credentials, the term "party" shall mean a person or persons who shall have filed a notice of contest pursuant to this Rule No. 21, and the person or persons whose right to be seated as a delegate or alternate delegate is the subject of such notice of contest.

[*26]

RULE NO. 22
Contest Procedure

(a) The Committee on Contests shall have the power to adopt procedural rules, not inconsistent with these rules, which shall govern the expeditious resolution of contests before the Committee on Contests. When any deadline set out in this rule falls on a Sunday or legal holiday, such deadline shall be extended to the following day.

(b) No later than twenty-two (22) days before the convening of the national convention (or, in the case of delegates or alternate delegates elected at a time or times in accordance with applicable state law rendering impossible compliance with this requirement, within five (5) days after such election), each of the parties shall file with the secretary of the Republican National Committee at least three (3) printed or typewritten copies of the statement of position in support of the party's claim to sit as delegates or alternate delegates to the national convention together with such affidavits or other evidence as desired. The secretary of the Republican National Committee, upon receiving the statement of position of a party, shall furnish the opposing party a copy of said statement of position. Each statement of position shall begin with a summary of not more than one thousand (1,000) words setting forth succinctly a synopsis of the statement of position and a specific statement of the points relied upon.

(c) The Committee on Contests shall promptly hear the matter; decide which issues are involved, either of law or fact, or both; decide upon its recommendation for resolution of such issues; and submit such issues and its recommendations for resolution to the Republican National Committee. The issues so submitted by the Committee on Contests shall be the sole issues passed upon and determined by the Republican National Committee unless the Republican National Committee shall, by a majority vote, extend or change the same. If the Committee on Contests for any reason shall fail to state the issues either of law or fact, the Republican National Committee shall decide upon what issues the contest shall be tried, and the hearing shall be limited to such issues unless the Republican National Committee, by a majority vote, shall decide otherwise.

(d) The Committee on Contests shall make up a report of each contest filed, showing the grounds of contest; the statute and rule, if any, under which the contest is waged; and the contentions of each party thereto. The report shall conclude with a statement of the points of issue in the contest, both of fact and law, and a statement of the recommendation **[*27]** of the Committee on Contests as to resolution of such points of issue, and shall be signed by the chairman or his designee. When the Committee on Contests has prepared such report stating the issues of law and fact, a copy of the statement of such issues shall be submitted forthwith to a person in the convention city, whom the parties must appoint at the time of filing the contest to receive such statement, and a copy shall be served forthwith by the chairman of the Committee on Contests upon the parties by the most expeditious method available, providing for written evidence of receipt including, but not limited to, overnight delivery service.

(e) The parties shall have eight (8) days to file written objections to the Committee on Contests' statement of the issues of fact or law, or both, unless the Republican National Committee is called to act upon the contest sooner, in which case such objections shall be made before the meeting of the whole committee. If the parties reside in American Samoa, Guam, Alaska, Hawaii, Puerto Rico, or the Virgin Islands, they shall be entitled to ten (10) days to file written objections. The objections shall contain any additional statement of issues of either law or fact, or both, claimed by the party submitting the same to be involved in and necessary to be decided in the contest.

(f) When the Republican National Committee is called to pass upon any contest that may arise, the members of the Committee on Credentials shall also be notified of the time and place of such meeting and shall have the right to attend all hearings of all contests but without the right to participate in the discussion or the vote.

RULE NO. 23
Convention Committee on Credentials

(a) When the national convention shall have assembled, the secretary of the Republican National Committee shall deliver to the Committee on Credentials all credentials and other papers forwarded under Rule No. 18(c).

(b) An appeal may be taken to the Committee on Credentials from any ruling of the Republican National Committee on any contest, by and only by a party to such contest in the proceedings conducted pursuant to Rules No. 21 and No. 22; provided, however, that notice of such appeal must be filed with the secretary of the Republican National Committee within twenty-four (24) hours after the decision, that such notice shall specify the grounds upon which the appeal is taken, and that only the grounds so specified shall be heard by the Committee on Credentials upon such appeal. No **[*28]** evidence other than that taken before the Republican National Committee shall be taken up by the Committee on Credentials unless it shall, by a majority vote of its members present and voting, so direct.

(c) No issue involving the status of one or more delegates or alternate delegates or any contest relating thereto may originate before the Committee on Credentials of the national convention. All contests must first be presented to the Committee on Contests of the Republican National Committee or to the whole Republican National Committee.

(d) No motion with respect to delegates or alternate delegates from more than one (1) state or territory shall be in order before the Committee on Credentials.

PROCEEDINGS OF THE NATIONAL CONVENTION
Temporary Rules

RULE NO. 24
Order of Business

The convention shall proceed in the order of business prepared and printed by the Republican National Committee.

RULE NO. 25
Committee Reports

(a) The report of the Committee on Credentials shall be disposed of before the report of the Committee on Rules and Order of Business is acted upon; the report of the Committee on Rules and Order of Business shall be disposed of before the report of the Committee on Resolutions is acted upon; and the report of the Committee on Resolutions shall be disposed of before the convention proceeds to the nomination of candidates for President of the United States and Vice President of the United States.

(b) The report of any such committee listed in Rule No. 25(a) shall be considered as read if made available to the delegates prior to its consideration.

RULE NO. 26
Definition of "States"

Whenever used in these rules, "state" or "states" shall be taken to include American Samoa, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, except in Rule No. 13 and unless the context in which the word "state" or "states" is used clearly makes such inclusion inappropriate.

RULE NO. 27
Admission to Convention Hall

(a) No person except members of the several delegations, officers of the convention, members of the Republican National Committee and incumbent Republican governors, incumbent Republican United States Senators, and incumbent Republican members of the United States House of Representatives, shall be admitted to the section of the convention hall restricted to delegates.

(b) Press and staff shall be admitted to the section(s) of the hall authorized for them.

(c) The chairman of the Republican National Committee shall insure that guest passes to the convention are distributed in an equitable fashion. Each delegate and alternate delegate to the convention shall receive at least one guest pass to each session of the convention.

(d) Each state, through its Republican National Committee members, shall be allocated full sets of additional guest passes equal to thirty-three percent (33%) of the total number of delegate and alternate delegate membership for that state, rounded to the next whole number.

RULE NO. 28
Voting

(a) Each delegate to the convention shall be entitled to one (1) vote, which may be cast by an alternate delegate in the absence of the delegate.

(b) In the absence of any delegate at large or any delegate from any congressional district, the roll of alternate delegates for the state or district shall be called in the order in which the names are placed upon the roll of the convention, unless the law governing the state or district electing the absent delegate, the state or district convention, or the Republican state committee or governing committee shall otherwise provide, or the delegation shall otherwise direct at the time of certification, in which event the alternate delegates from the state or district shall vote in the order established pursuant to the foregoing, as set forth in the delegation's certification. The form of certificate provided by the Republican National Committee shall provide a means by which an order for voting by alternate delegates may be specified.

[*30]

RULE NO. 29
Rules of Order

The Rules of the House of Representatives of the United States shall be the rules of the convention, except that the current authorized edition of *Robert's Rules of Order: Newly Revised* ("*Robert's Rules of Order*"), shall be the rules for committees and subcommittees of the convention, insofar as they are applicable and not inconsistent with the rules herein set forth; provided, however, that the convention may adopt its own rules concerning the reading of committee reports and resolutions.

RULE NO. 30
Length of Debate

No delegate shall speak more than once or longer than five (5) minutes upon the same question, unless by leave of the convention, except in the presentation of the name of a candidate for nomination for President of the United States or Vice President of the United States.

RULE NO. 31
Suspension of Rules

A motion to suspend the rules shall always be in order, but only when made by authority of a majority of the delegates from any state and seconded by a majority of the delegates from each of five (5) or more other states severally.

RULE NO. 32
Platform Resolutions

All proposed resolutions relating to the platform shall be submitted in writing to the Committee on Resolutions without reading and without debate.

RULE NO. 33
Minority Reports; Amendments

(a) No resolution or amendment pertaining to the report of the Committee on Resolutions or the Committee on Rules and Order of Business shall be reported out or made a part of any report of such committee or otherwise read or debated before the convention, unless the same shall have been submitted to the chairman, vice chairman, or secretary of such committee or to the secretary of the convention in writing not later than one hour after the time at which such committee votes on its report to the convention and shall have been accompanied by a petition evidencing the affirmative written **[*31]** support of a minimum of twenty-five percent (25%) of the membership of such committee.

(b) No amendment pertaining to the report of the Committee on Credentials affecting delegates or alternate delegates from more than one (1) state shall be in order.

RULE NO. 34
Motion to Table

It shall be in order to lay on the table a proposed amendment to a pending measure and such motion, if adopted, shall not carry with it or prejudice such original measure.

RULE NO. 35
Previous Question

When the previous question shall be demanded by a majority of the delegates from any state, and the demand is likewise seconded by a majority of delegates from each of two (2) or more other states severally, and the call is sustained by a majority of the delegates to the convention, the question shall then be proceeded with and disposed of according to the Rules of the House of Representatives of the United States in similar cases.

RULE NO. 36
Roll Call

(a) Upon all subjects before the convention requiring a roll call, the states shall be called in alphabetical order.

(b) In the balloting, the vote of each state shall be announced by the chairman of such state's delegation, or his or her designee; and in case the vote of any state shall be divided, the chairman shall announce the number of votes for each candidate, or for or against any proposition; but if exception is taken by any delegate from that state to the correctness of such announcement by the chairman of that delegation, the chairman of the convention shall direct the roll of members of such delegation to be called, and the result shall be recorded in accordance with the vote of the several delegates in such delegation.

(c) In balloting, if any delegation shall pass when its name is called, then at the conclusion of the roll call all delegations which passed shall be called in the order herein before established. No delegation shall be allowed to change **[*32]** its vote until all delegations which passed shall have been given a second opportunity to vote.

(d) Except in a roll call for nomination for President of the United States and Vice President of the United States, or where the majority of delegates of fifteen (15) or more states severally have requested that a roll call be conducted by voice call of the roll, the chairman of the convention may order that the balloting on any subject placed before the convention requiring a roll call be conducted by electronic, telephonic or computer device which will display votes to the convention simultaneously. Each delegation chairman shall record and tally any such votes of the delegation on official roll call tally sheets provided by the secretary of the convention, showing the individual vote of the delegates, and file such tally sheets with the secretary of the convention not more than thirty (30) minutes after the completion of the roll call vote.

RULE NO. 37
Unit Rule

No delegate or alternate delegate shall be bound by any attempt of any state or congressional district to impose the unit rule.

RULE NO. 38
Record Vote

If a majority of the delegates of any six (6) states severally shall demand a roll call vote, the same shall be taken of the states in the order hereinbefore established.

RULE NO. 39
Nominations

(a) In making the nominations for President of the United States and Vice President of the United States and voting thereon, the roll of the states shall be called separately in each case; provided, however, that if there is only one candidate for nomination for Vice President of the United States who has demonstrated the support required by paragraph (b) of this rule, a motion to nominate for such office by acclamation shall be in order and no calling of the roll with respect to such office shall be required.

(b) Each candidate for nomination for President of the United States and Vice President of the United States shall demonstrate the support of a majority of the delegates from each of five (5) or more states, severally, prior to the presentation of the name of that candidate for nomination.

[*33] (c) The total time of the nominating speech and seconding speeches for any candidate for nomination for President of the United States or Vice President of the United States shall not exceed fifteen (15) minutes.

(d) When at the close of a roll call any candidate for nomination for President of the United States or Vice President of the United States has received a majority of the votes entitled to be cast in the convention, the chairman of the convention shall declare that the candidate has been nominated.

(e) If no candidate shall have received such majority, the chairman of the convention shall direct the roll of the states be called again and shall repeat the calling of the roll until a candidate shall have received a majority of the votes entitled to be cast in the convention.

(f) For the 2000 Republican National Convention, notwithstanding any other provision of these rules or any Rule of the House of Representatives, it shall be in the discretion of the Chair to suspend the roll call conducted to nominate the candidate for President of the United States at any time in order to conduct other Convention business under the established order of business.

RULE NO. 40
Convention Committees

(a) The delegates elected to the convention from each state, promptly once all such delegates are elected, shall elect from the delegation a delegation chairman and their members of the Committees on Resolutions, Credentials, Rules and Order of Business, and Permanent Organization of the convention, consisting of one (1) man and one (1) woman for each committee, and shall file notice of such selection with the secretary of the Republican National Committee; provided, however, that no delegate may serve on more than one (1) committee of the convention. Alternate delegates may not serve as delegation chairmen or as members of the convention committees, except when the number of delegates attending the convention is less than the number of committee positions to be filled, then an alternate delegate can serve, except as noted above.

(b) Committees and subcommittees may set time limits for speaking on any question by a simple majority vote; provided, however, that not less than twenty (20) minutes, equally divided between proponents and opponents on any **[*34]** question, shall be allowed in any case on any debatable motion, order, or appeal.

(c) Upon request of twenty percent (20%) of the members of a committee or subcommittee of the convention, a vote shall be recorded in the manner provided by these rules, and no votes in the committees or subcommittees of the convention shall be taken by secret ballot.

(d) No later than twenty-five (25) days prior to the national convention, members of the Committee on Rules and Order of Business and members of the Republican National Committee shall be provided a copy of the existing Rules of the Republican Party along with all recommended changes to those rules approved as of that date by the Standing Committee on Rules of the Republican National Committee since the previous national convention. Any changes shall be prominently noted. A letter shall be attached to the document stating that all proposed rules are still subject to change prior to the meeting of the Committee on Rules and Order of Business. After this information is provided, any additional recommendations regarding changes in the Rules of the Republican Party approved by the Republican National Committee shall be provided to the members of the Committee on Rules and Order of Business as soon as practicable.

RULE NO. 41
Temporary Rules

Rules No. 24 through No. 40 shall be the temporary rules of the next national convention and its committees and subcommittees

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* * *

[*1] REPUBLICAN NATIONAL COMMITTEE
Jim Nicholson, Chairman
310 First Street, S.E.
Washington, D.C. 20003

ELECTION ALERT ELECTION ALERT ELECTION ALERT

October 8, 1997

Mr. Owen Green
Maple Manor
Apartment 401
1920 19th Avenue N.W.
Rochester, MN 55901-0714

Dear Mr. Green:

I urgently need you to rush the most generous contribution you can afford to the "Coleman for Mayor" campaign to help reelect Republican Norm Coleman mayor of St. Paul.

The polls are very close, and victory depends on an all-out advertising blitz and get-out-the-vote drive right through Election Day!

That is why I am asking the RNC's strongest grassroots supporters like you to make a special contribution as soon as possible.

Your check for $25, $35, $50 or whatever you can afford should be made payable to "Coleman for Mayor" and mailed directly to the campaign in the postage-paid return envelope I've enclosed with this letter.

This is one of the most important elections in the nation this year.

Since Bill Clinton was elected president, over 300 elected Democrat officials have switched parties. Norm Coleman is one of the most prominent to do so.

As mayor of St. Paul, Norm Coleman has fought to . . .

- Stabilize and reduce city taxes;
- Streamline municipal permits and regulations;
- Slash overhead and dead weight in city agencies;
- Revitalize the downtown with new private sector investment, based on a pro-growth, pro-small business philosophy;
- Reduce crime through effective community policing;
- Pull the people of St. Paul together as one team, instead of dividing people along class and racial lines.

It's an impressive record. It has won Norm Coleman broad support cutting across party lines.

But like so many others, Norm Coleman discovered that the entrenched special interests and back-room power brokers in the DFL were not interested in straight-forward government and common sense reform.

(Next page, please)

[*2] Page Two - Mr. Green

That's why he became a Republican -- and I'm proud to be working for his reelection today. I hope I can count on your help.

So please send your contributions for $25, $35, $50 or more to "Coleman for Mayor" today. The election is November 4. There is no time to lose. Please act today. Thank you.

Sincerely,
Jim Nicholson, Chairman

P.S. A new generation of Republican mayors across the country are now cutting crime and turning urban America around. Norm Coleman is an important part of this Republican Renaissance. Please rush your contribution for $25, $35, $50 or whatever you can afford to "Coleman for Mayor" today to help reelect a strong Republican mayor in St. Paul. Thank you.

[RESPONSE FORM OMITTED]

* * *

[*1] October 4, 2001

Dear Salutation,

Please join me in supporting Bret Schundler and his campaign for Governor of New Jersey. Bret's victory is incredibly important to the Republican Party, let me tell you why.

Bret represents what is best about the Republican Party. He consistently reaches out to every segment of our society to bring people together so our communities benefit. Look at his record as Mayor of Jersey City, Jersey City is an ethnically diverse city that Democrats outnumber Republicans 11-1. Yet, thanks to Bret's outreach he has handily won three landslide elections.

I am proud to support Bret, because he is doing the same thing President Bush did in Texas - reach out to every part of society. In doing so, he has proven once again that Republican ideas win elections and also work brilliantly in practice.

In this year's Governor's race, Bret won the Republican nomination for Governor by upsetting his front-runner primary opponent by 14 percentage points. Everyone here at the Republican National Committee wants to help Bret as he faces the challenge of defeating his well-funded liberal Democratic opponent in the general election this November.

Bret is a leading proponent of school choice. He led the successful fight for charter school legislation in New Jersey and has raised more than $1 million in scholarship money for low-income families to have a better selection of schools for their children. Proving once again the success of compassionate conservative policies.

Bret supports medical savings accounts and tax cuts to help working families. A win in New Jersey for Bret Schundler could easily spur breakthroughs for these policies throughout America.

Bret has a touch election and needs your support. There are a lot of important things going on these days, but rest assured the entire political world will be watching this election.

I would like you to make a contribution to Bret's campaign. New Jersey law allows individuals, corporations and PACs to contribute up to $2,600. Please make checks payable to Schundler for Governor, Inc. I would greatly appreciate it if you **[*2]** would contribute at least $2,000 to this effort and send it to Schundler for Governor, P.O. Box 419 W.O.B., West Orange, NJ 07052-0419.

Please join us in helping this outstanding leader. Thank you in advance for your participation.

Yours truly,

Jack Oliver

P.S. The last few weeks have underscored the importance of America's Democracy and principles of Freedom. You have consistently proven that you will be involved in making our Republic strong. And I look forward to working with you now and in future political campaigns. Your involvement is part of what keeps our country proud, strong and free.

Republicans Have Huge Edge In Campaign Cash

Thomas B. Edsall and David VonDrehle
Washington Post Staff Writers

Friday, February 14, 2003

The Washington Post
A Section

Long before issues emerge and nominees are chosen for the 2004 elections, Republicans are opening a huge advantage in ready cash.

New campaign finance laws, plus control of the White House and Congress, have given President Bush and his party an unprecedented edge in all-important "hard money." Strategists in both parties and independent experts believe Bush is likely to raise three to five times more than his Democratic opponent in this type of contribution, which can be used for any purpose in a campaign.

Republican campaign committees are positioned to raise at least twice as much as their Democratic counterparts, enabling them to help GOP candidates up and down the ballot by expanding the party's successful grass-roots organizing efforts and coordinated advertising campaigns.

"The spending advantage will be enormous," said veteran Democratic strategist Harold Ickes. "Not overwhelming -- because that means it's hopeless -- but enormous."

The Center for the Study of Elections and Democracy at Brigham Young University, which studied campaign spending in the 2002 elections, concluded that the GOP's hard money advantage provides "an ominous warning for Democrats in the 2004 election cycle."

Ironically, much of the Democrats' financial dilemma stems from their success in passing the McCain-Feingold campaign finance law last year, party fund-**[*A6]**raisers believe. The measure, which received minimal support from congressional Republicans, prohibits the national political parties and federal candidates from raising and spending "soft money" contributions.

Soft money contributions are unlimited donations often made directly from corporate or union treasuries, and from rich people. Hard money contributions can be made only by individuals and political action committees. Individuals can give candidates $2,000 and political parties $25,000 in hard money; PACs can give candidates $5,000.

In the most recent election cycle, nine of the top 10 "soft money" donors backed the Democrats, including Haim Saban, creator of "Power Rangers," who gave $9.3 million; television station owner Fred Eychaner ($7.4 million); the American Federation of State, County and Municipal Employees ($6.6 million) and the Service Employees International Union ($4.7 million), according to PoliticalMoneyLine.

Thanks to these superdonors, the Democratic Party's senatorial, House and national campaign committees essentially matched their GOP counterparts -- $245.8 million to $250 million -- in soft money in the 2002 election cycle.

Under the new law banning soft money in national campaigns, however, these Democratic supporters now can give only relatively small sums to federal candidates and party groups. This increases the importance of hard-money fundraising, where Republicans traditionally have excelled. The new law, which took effect in November, raised the maximum legal hard money contribution to candidates from $1,000 to $2,000 per donor.

In the 2002 election cycle, GOP campaign committees outraised Democrats in hard money by $332 million to $163 million. Looking to 2004 and beyond, Republicans have a much larger pool of reliable donors and a more effective operation for finding new contributors.

"The Republican Party just has a much broader base of large and small donors, and on average they give more," said Anthony Corrado, a campaign finance expert at Colby College in Maine.

No one has used this advantage more effectively than George W. Bush. In 1999 and 2000, as governor of Texas, he raised about $100 million in hard-money donations for his presidential campaign and shattered all records. At least $60 million came in $1,000 donations, much of it collected by "Pioneers," supporters charged with raising at least $100,000 each. Bush tapped as many donors willing to give the maximum hard-money contribution as did all his competitors combined.

"If just one-third of them double up and give the new maximum of $2,000 each this time, Bush will start with a base of $80 million," Corrado calculated.

One Pioneer, GOP lobbyist Ed Rogers, said that should be no problem now that Bush is a president seeking reelection. "I don't think the step from $1,000 to $2,000 will be consequential," he said. "There's no gag factor there."

Republicans also have far more small-check donors, who give, on average, $20 more apiece than their Democratic counterparts. "Twenty dollars per gift, times 30,000 more donors -- pretty soon you're talking real money," Corrado said.

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The bottom line: Few if any experts believe Bush will raise less than $125 million for the primary phase of the 2004 campaign. Some people believe the number might be far higher. "I take it as an article of faith that he will raise $225 million to $250 million," Ickes said. "Or maybe much more."

The same experts say the most successful Democratic presidential contender -- whoever it turns out to be -- won't come close to that amount. No Democrat in a presidential campaign has ever raised enough hard money to opt out of the public financing system, as Bush did during the 2000 primary election and is virtually certain to do again next year. Most, if not all, of the 2004 Democratic contenders are expected to take public subsidies during the primaries -- which means they must agree to spend no more than about $44 million before the midsummer nominating convention.

The eventual Democratic nominee may need all of that money just to prevail by March or April. From that point until the party convention [*A7] in late July, the winner may be nearly broke, while Bush is awash in cash. He and his party can use that money not only for his campaign, but also to help GOP candidates at the congressional and state levels.

The national Republican Party made such efforts in 2002, contributing not only to gains in the House and Senate, but also to the unexpected retention of a majority of governorships and to winning a plurality of state legislatures, ending 50 years of Democratic dominance.

The power to set the legislative agenda -- now firmly in Republican hands -- is always important in winning the support of lobbyists, corporate executives and trade association executives who can encourage their clients, employees and their members to make donations.

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"The business community writ large is going to be very supportive of this president," said Bruce Josten, executive vice president of the U.S. Chamber of Commerce.

Ickes and other Democratic strategists are looking into establishing "independent" groups that could receive soft money donations to air "issue ads" in support of their party's candidates. While the new campaign finance law will not allow the candidates to coordinate with such groups, "there's no great mystery to figuring out what messages the candidate wants to send," Ickes said. "Just pick up the paper and watch TV."

A provision of the new law, however, would ban such advertising within 60 days of the general election. If courts uphold that provision, such groups would be of limited value.

What appears certain, experts said, is that special-interest groups -- such as labor unions, abortion rights groups and the National Rifle Association -- will use the cash they once sent to the political parties as soft money to air ads and organize voters directly. These groups' leaders might enjoy that power, Corrado said.

"I don't think [AFL-CIO President] John Sweeney liked sending that money to the Democratic National Committee, anyway," Corrado said. But such a system is likely to be less efficient than a coordinated campaign run by a party and its candidates.

Democratic National Committee Chairman Terence R. McAuliffe, perhaps the most renowned fundraiser of the 1990s, has vowed to boost DNC hard-money fundraising by $100 million to fill the gap left by the ban on soft money. He said his staff is pressing the party's large individual donors to give the maximum allowable to party headquarters -- $25,000 per person per year, under the McCain-Feingold law.

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He said the money will go into a separate "Presidential Trust Fund" devoted exclusively to help the eventual nominee. He is also urging presidential candidates to ask their top donors to give to the fund.

"Any major contribution check that comes into this party, that money is now going into an account which will be given to the nominee the day they are nominated, maybe March 10 [2004]," McAuliffe said.

McAuliffe and others say that advancing the primary process will give the party more time to raise cash -- especially from supporters of defeated candidates who would want to establish ties with the nominee. But McAuliffe's earlier efforts to wean his party from soft money have been marginally successful. Hard-money contributions to the DNC rose by just $7 million from the 1997-98 election cycle to 2001-02.

The likely Republican money edge may add further leverage at a time when the political terrain is already favorable. Analysts in both parties believe the GOP is well-situated to expand its majorities in both the House and Senate next year. Democratic strategists rating the most vulnerable Senate seats in 2004 list a dozen that are held by Democrats, and five in Republican hands.

In the House, some analysts feel the 10 most vulnerable seats are held by Democrats representing districts that voted strongly for Bush in 2000.

Many leading Democrats argue that no amount of fundraising will save Bush and his congressional comrades from a laggard economy.

"I can envisage a scenario in which 2004 would not be a hostile or bad year," Democratic lobbyist Lawrence F. O'Brien III said, citing rising unemployment, the troubled stock market and the president's controversial tax cuts.

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He added, however: "The one thing I find immutably troubling is the money."

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Liberals Meeting To Set '04 Strategy; Labor, Rights Groups Focus On Getting Out The Vote To Help Democrats

Thomas B. Edsall
Washington Post Staff Writer

Sunday, May 25, 2003

The Washington Post
A Section

Major liberal organizations, from labor unions to civil rights groups, have begun to meet privately to develop a coordinated strategy to oppose President Bush's reelection in 2004. Their goal is to buttress the Democratic Party and its nominee by orchestrating voter mobilization and independent media in as many as a dozen battleground states.

All of the organizations are free to accept unlimited contributions, or "soft money" from wealthy individuals, unions and corporations. These donations are the kind that the new campaign finance law prohibits political parties and federal candidates from collecting.

Together, these organizations have the potential to target $40 million to $50 million in key states including Florida, Michigan and Pennsylvania. The amount could be much higher if organized labor invests heavily and a new, pro-Democratic committee gearing up to run television advertisements is successful. In addition, these organizations are expected to play a crucial role in Election Day get-out-the-vote efforts.

Liberal organizations have backed Democratic presidential candidates in the past, but never have they been able to work together to maximize the value of every dollar by minimizing

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overlap in direct mail, person-to-person voter contact or television advertising.

Leaders of these organizations contend they are driven to work together by the threat of massive spending by Bush and the Republican Party; by the undermining of Democratic Party finances, which have suffered from the new prohibition on large, "soft money" contributions, and by the likelihood of continued legislative and regulatory setbacks if Republicans maintain control of the government.

"The Democratic Party goes into this next election weak on money, weak on the ground. There is a huge vacuum for us to fill," said one of the organizers who asked not to be quoted by name. "Organizations that agree they have to defeat a Republican president want to come together and figure out the best way to do it. This is an uncommon event in the history of Democratic organizational politics."

Emily's List President Ellen Malcolm, who hosted the groups' first meeting on May 8, said, "There is a tremendous amount of common motivation given what the Bush administration has been doing to virtually every issue we care about."

In addition to Malcolm, other leaders of the drive are Carl Pope, executive director of the Sierra Club; Andrew L. Stern, president of the Service Employees International Union; Harold Ickes, a former Clinton White House aide who is setting up a special committee to raise money for independent TV advertising during the campaign; and Steve Rosenthal, former political director of the AFL-CIO who now runs the labor-financed Partnership for America's Families.

Among the other groups at the first meeting who are expected at a larger gathering in early June are the NAACP, the League of Conservation Voters, NARAL-Pro Choice America, the pro-gay rights Human Rights Campaign and the

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American Federation of State, County and Municipal Employees.

Money, and the damaging effects of the 2001 McCain-Feingold campaign finance law on the Democratic Party, are two key factors driving the mobilization effort.

"We are looking at a president who can raise $250 million if he wants to, and the RNC [Republican National Committee] can match that. We're talking about half a billion dollars," said a political operative for one of the interest groups.

He pointed out that in 2000, the RNC raised $213 million in the kind of "hard money" that remains legal under McCain-Feingold, while the DNC that year raised $124 million in "hard money," its best year ever when the party had an incumbent president to help pull in contributions.

The Bush campaign is expected to raise at least $200 million to spend by September 2004, while Democratic presidential candidates will have about $48 million to spend before the convention in July if they accept public subsidies.

Many labor and liberal interest groups say they are convinced that the presidency offers the Democrats its best chance to win one branch of the federal government, as GOP majorities in the House and Senate look tough to defeat.

Historically, efforts to get liberal groups to work under a coordinated strategy have run into problems. Few organization leaders have been willing to cede power; competitive fundraising strategies have emerged among groups appealing to similar constituencies; and fundamental agenda conflicts forced splits, such as those between environmentalists and the more pro-development labor movement.

This election cycle, some participants say, will be different.

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"The Democrats have always been reliant upon liberal special interest groups to fund the Democratic National Committee," said Republican National Committee spokesman James Dyke. "Now it looks like they have just set up an organization that will work with instead of for the DNC."

Dyke argued that the emergence of a liberal alliance vindicated Republican arguments that the new campaign finance law undermines political parties.

The McCain-Feingold law passed last year restricted contributions from individuals to a $2,000 maximum when made to federal candidates, and $25,000 when made to parties. This is known as "hard money." The law bars candidates and parties from raising unlimited donations, or soft money, from wealthy people, corporations and unions.

Most of the groups at the May 8 meeting at Emily's List's offices in Washington have special committees, known by their tax designations as "501c4s" or "527s," that are generally not restricted by McCain-Feingold. Most are competing for large contributions from many of the "soft money" donors to the Democratic Party.

While no umbrella structure has been developed, participants discussed ways to coordinate messages through the campaign and, in eight to 12 key battleground states, appointing "traffic cops" who would try to find the most cost-effective methods to contact voters, run ads and build coalitions.

Union Do's and Don'ts For the Democrats

Harold Meyerson
Editorial

Wednesday, May 28, 2003

The Washington Post
A Section

For a moment there, it almost looked as if the Democrats were getting their act together.

Leaders of the key Democratic constituency groups have begun meeting to develop a strategy and the wherewithal for winning the battleground states in the 2004 presidential election. On May 8 the president of Emily's List, Ellen Malcolm, hosted a gathering of the heads of various environmental, pro-choice, civil rights and labor organizations to look at how they could have the greatest impact in next year's race. (The gathering was a tribute, in its way, to the regular meetings of conservative leaders hosted by anti-tax zealot Grover Norquist.)

The centerpiece of the May 8 meeting was a presentation by Steve Rosenthal, until recently director of the AFL-CIO's political program and now director of the labor-backed Partnership for America's Families. The Partnership is one of myriad so-called 527s -- the tax code designation for organizations that are springing up now that campaign reform has banned the two parties from collecting soft money to fund voter registration and mobilization campaigns.

Rosenthal was speaking because long before the McCain-Feingold campaign finance bill became law, the AFL-CIO began waging its own campaigns to turn out union members for pro-labor candidates. The unions' decision, quite daring at the time, to strike out on their own came shortly after John

Sweeney became president of the AFL-CIO in 1995. Under the leadership of Sweeney and Gerald McEntee, president of the American Federation of State, County and Municipal Employees and longtime chairman of the AFL-CIO's political committee, labor developed the most successful get-out-the-vote program in the land. In 1994, the year of the last pre-Sweeney-and-McEntee election, voters from labor households constituted just 14 percent of the nation's electorate. By the election of 2000, that figure had risen to 26 percent, and 59 percent of those voters backed the Gore-Lieberman ticket.

The turnaround of labor's political program is the movement's signal achievement of the past decade. Had labor not moved the resources and developed the expertise to get its own political house in order, the Democrats would be in receivership today, rather than at a precarious parity with George W. Bush's Republicans. Working-class perspectives -- for instance, the need for universal health insurance -- would be marginalized within the party, rather than the centerpiece of several presidential campaigns.

But with union membership at an anemic 13 percent of the workforce, the union household vote can take the Democrats only so far. The goal of the Partnership is to augment labor's efforts with its own members by mobilizing the rest of the Democratic base -- in particular, the millions of African Americans, Latinos and working women who aren't union members. Any doubt that such a program is needed was effectively dispelled by the 2002 elections. As the Los Angeles Times exit poll and some election night polling by Fox News made clear, the Republicans owed their successes to a marked decline in African American and Latino voting.

In the election's wake, a number of unions concluded that the sooner the McEntee-Rosenthal operation could be brought to the rest of the Democratic base, the better. A $30 million registration, education and mobilization campaign ($20 million from unions, the remainder from other groups and individuals) is being put in place.

For Democrats, that's the good news. The bad news is that turf battles have arisen during the past couple weeks over the Partnership's mandate. The objections haven't come from the other Democratic constituencies -- one civil rights activist attending the May 8 meeting said, "I've attended 527 meetings about 527s, and this is the first one that made sense."

Ironically, the reservations have come from within labor itself, where certain cross-union constituency groups such as the Coalition of Black Trade Unionists have felt threatened by the Partnership. Stunningly, AFL-CIO Executive Vice President Linda Chavez-Thompson and McEntee himself have left the Partnership's board.

But the Partnership is the prime exponent of one of the few successful electoral models the Democrats have. In Los Angeles the success of that kind of campaign is evident in the labor movement's mobilization of non-union Latino voters, which has made the city a liberal bastion and California a Democratic stronghold. In Philadelphia, the Partnership, in its first few weeks in existence, has already registered 10,000 African American voters in preparation for this year's mayoral election. There is no way the Democrats can prevail in 2004 absent a massive, unified working-class mobilization based on the Sweeney-McEntee-Rosenthal model -- as Karl Rove well knows.

"John Sweeney and Jerry McEntee should be proud that their work has become the basis of the Democratic constituencies' political action programs," says Andrew Stern, president of the Service Employees International Union, which is a major backer of the Partnership. For either of them to pull back their support from this campaign for working-class votes would not only damage the Democrats' prospects, but also undermine their own historic achievement in revitalizing labor's political program and clout. It should hardly be necessary to remind them that in union there is strength.

The writer is editor at large of the American Prospect.

Lobbying Organizations Spent Record $925.8 Million On Washington Lobbying in Last Half of '02

Kenneth P. Doyle

June 24, 2003

BNA, Money & Politics Report

Organizations spent a record-breaking $925.8 million on Washington lobbying in the last six months of 2002, according reports filed under the federal Lobbying Disclosure Act and analyzed by PoliticalMoneyLine, an online disclosure service tracking money in politics.

The latest six-month report on lobbying issued June 23 by PoliticalMoneyLine said the $925 million spent in the last six months of 2002 was a 7.7 percent increase ($66 million) over the previous record-setting $859 million spent during the first six months of 2002. Lobbying reports covering the first six months of 2003 are not due until August.

Organizations with large increases included the spending of the U.S. Chamber Institute for Legal Reform at nearly $17.4 million--up from $4.9 million in the previous reporting period. Also, the institute's parent organization, the Chamber of Commerce of the U.S. spent $11.3--up from $7.9 million. The Chamber and its legal affiliate had previously announced record lobbying spending for the period.

The Business Roundtable also posted a big increase--spending $8.4 million, up from nearly $3.5 million.

The health care industry remained the top lobbying spender of all sectors for the eighth straight six-month period, with spending at $135 million, up $6 million from $129 million, according to PoliticalMoneyLine.

Top Organizations, Firms

The top-10 organizations spending on lobbying were:
1. U.S. Chamber Institute for Legal Reform: $17.4 million
2. Chamber of Commerce of the U.S.: $11.3 million
3. 60 Plus: $10.7 million
4. Business Roundtable: $8.4 million
5. Pharmaceutical Research & Manufacturers Association: $8.1 million
6. American Medical Association: $7.2 million
[*2]7. General Electric: $7 million
8. Altria Corporate Services: $6.8 million
9. Seniors Coalition: $6.3 million
10. American Hospital Association: $6.0 million

The top-10 lobbying firms reporting receipts for paid lobbying were:
1. Cassidy & Associates: $14.1 million
2. Patton Boggs: $12.9 million
3. Akin Gump Strauss Hauer & Feld: $11.4 million
4. Piper Rudnick (fka Verner Liiphert): $11.1 million
5. Greenberg Traurig: $9.5 million
6. Van Scoyoc Associates: $9.2 million
7. Barbour Griffith & Rogers: $6.4 million
8. Washington Council Ernst & Young: $6.3 million
9. Dutko Group: $5.6 million
10. Williams & Jensen: $5.6 million

Detailed listings of all industries, sectors, companies and organizations, rankings, clients, and searches are available via FECInfoPro, a subscription service on the PoliticalMoneyLine web site www.PoliticalMoneyLine.com.

BNA, Money & Politics Report (June 24, 2003) 1-2

[1 (11 PCS/ NRA 106)]

[NRA] Bylaws

ARTICLE I

Name

The name of this organization is the National Rifle Association of America.

ARTICLE II

Purposes and Objectives

The purposes and objectives of the National Rifle Association of America are:

1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, collect, exhibit, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens.
2. To promote public safety, law and order, and the national defense;
3. To train members of law enforcement agencies, the armed forces, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms;

4. To foster and promote the shooting sports, including the advancement of amateur competitions in marksmanship at the local, state, regional, national, and international levels;

5. To promote hunter safety, and to promote and defend hunting as a shooting sport and as a viable and necessary method of fostering the propagation, growth and conservation, and wise use of our renewable wildlife resources.

The Association may take all actions necessary and proper in the furtherance of these purposes and objectives.

[1 (11 PCS/ NRA 133)]

NATIONAL RIFLE ASSOCIATION OF AMERICA
INCORPORATED 1871
12250 WAPLES MILLS ROAD - FAIRFAX, VA 22030

WAYNE LAPIERRE
EXECUTIVE VICE PRESIDENT

EMERGENCY MEDIA STATEMENT ENCLOSED

[Address blacked out]

Dear [name blacked out]

Because of Bill Clinton's recent and repeated appearances on national television to attack your Second Amendment rights, I am forced to send you this EMERGENCY MEDIA STATEMENT and to ask for your help.

This statement represents a one-time extra payment for freedom over and above your NRA member dues.

And I hope I can count on you to put this EMERGENCY MEDIA STATEMENT with your monthly bills right now, and pay it just as you would any other bill.

This statement represents your fair share of the extra funds that NRA must raise for our efforts in the media this year, now that Bill Clinton has declared his intent to spend his final months in office campaigning FULL TIME against your Second Amendment rights and lying about you as a gun owner.

My friend, this national NRA media effort cannot wait another year or another month or another week. As long as the American people remain in the dark about the critical difference between gun control and crime control, the odds of the Second Amendment suffering a knockout defeat in this election will continue to grow each and every day.

I don't know if you saw Bill Clinton on the *Today* show with Katie Couric recently. But if you did, you know that Bill Clinton now believes that trashing the NRA and personally trashing NRA members like you is the best way to destroy your Second Amendment rights.

On national T.V., before an audience of tens of millions of your fellow Americans, Bill Clinton declared that NRA members like you are "basically against anything that requires anybody to do anything as a member of society that helps to make it safer."

That's a direct quote. And it's just one of the many personal attacks and lies [2 (11 PCS/ NRA 134)] he has recently aimed straight at you and your family because you own a gun.

There is no way the media would let Bill Clinton get away with personal attacks like this against the members of any other group. But because you and I are gun owners, we cannot expect the media to challenge any of Bill Clinton's smears or slanders.

It's become clear that the only way we are going to win the debate in this election year is to buy and pay for the media opportunities we need -- including T.V., radio, and newspaper ads nationwide -- to get our message to the American people and make sure they hear our side of the story.

And I need you to pay this statement so that throughout this year, whenever Bill Clinton or Charles Schumer or Sarah Brady or some big media conglomerate blasts us, we'll have the strength and dollars to buy ads and run commercials to wage the war and be heard.

There's no alternative. Without your EMERGENCY MEDIA STATEMENT payment, they will demonize us, ridicule us, distort our issues beyond recognition and rob our country of its greatest and most important freedom.

And your fellow voters will come to believe these lies and slanders during the most critical election year that the Second Amendment and gun owners have ever faced.

Because of Bill Clinton's planned attacks against us – and in order to get our message to America's 65 million gun owners -- we will need to increase our media budget by at least $3,270,000 over what we had already planned for the Year 2000.

I'm asking you to do your part, by paying $21.37 to help us reach 425 of these gun owners and voters, or $42.74 to help us reach 850.

To put my request in perspective, either of these amounts is less than most Americans willingly pay for cable T.V. for just one month. This EMERGENCY MEDIA STATEMENT is the price I am asking you to pay, not every month but just this one time to keep the torch of freedom burning in your own home and across our nation in this critical election year.

If we are to fight and win this year we must be heard. Rosie O'Donnell must know that when she tries to trample freedom she is on the wrong side of American history. We must not let the *Washington Post*, the *New York Times*, or the big T.V. networks keep the truth from our fellow citizens. Or let Hillary Clinton go unanswered with her vicious attack letters trying to scare your neighbors against you, your gun freedoms and the NRA.

By paying your EMERGENCY MEDIA STATEMENT, you'll make it possible for us to pay for the T.V. time we need to reach your fellow voters with our NRA "infomercial"--a special broadcast that spotlights how gun control and registration [3 (11 PCS/ NRA 135)] inevitably lead to confiscation as we've seen in England, Australia, and around the globe.

You'll enable us to fund a nationwide campaign of radio ads telling America how it was the NRA--not Bill Clinton--who first got behind "Project Exile" and demanded that the federal government punish armed, violent criminals under the gun laws now on the books.

And you'll enable us to run ads in newspapers telling the American people about Bill Clinton and Janet Reno's refusal to prosecute violent criminals.

Every law enforcement officer on the street knows that the one thing that will stop crime is apprehending and convicting violent criminals with and without guns and putting them in jail.

Yet, Bill Clinton -- with the consent of anti-gun Congressmen and Senators -- is allowing thousands of criminals every day to walk away from multiple felonies committed when they try to buy a gun.

Meanwhile his Attorney General, Janet Reno, talks of forcing law-abiding gun owners like you to line up in gov-

ernment indoctrination classrooms for the "privilege" of owning a gun.

Bill Clinton tells America that the crime problem can't be solved until the "culture" of hunters and shooters can be made to "evaporate." And every time there's another heinous crime, Bill Clinton gets millions more dollars worth of free airtime to attack not only the Second Amendment -- but now you personally.

Meanwhile, marksmanship programs are being pulled out of our public schools. Scout troops and summer camps are being pressured to discontinue NRA-endorsed programs that teach safety, responsibility, and respect for firearms.

Anti-gun reporters in local newspapers are attacking our lifesaving Eddie Eagle gun safety program just because it's sponsored by the NRA.

And you can't turn on your T.V. set or pick up the newspaper without being hit in the face by one of the big media conglomerates trying to demonize you, me, the NRA, the Second Amendment and our freedom.

These are not just the usual year-in, year-out skirmishes that we have fought with the media and the gun-ban lobby for the past decade.

In many ways, this year marks the final battle with the most powerful anti-gun forces in American history, all determined to elect an unstoppable anti-gun majority in this election and close the final chapter in Second Amendment history forever.

And the future of your freedom all comes down to whether or not your NRA can [4 (11 PCS/ NRA 136)] reach your fellow voters with our side of the story between now and Election Day, November 7, 2000.

Your timely payment of the enclosed EMERGENCY MEDIA STATEMENT is the key.

George Washington went house to house raising the dollars and the army to fight. If I could, I would sit down with you face to face in your home, to tell you how important the fight is, and try to persuade you to contribute as much as you can.

And I do hope to see you in person and say thanks-- but for now this is my only way to reach you personally, and ask for your support in this fight to win the hearts and minds of the American people.

So please, every day is crucial. President Clinton and Al Gore and the American media are telling folks you're to blame... That you don't deserve to be heard... And that you are part of a culture that needs to be eliminated from the face of America.

I say on his best day Bill Clinton is not worthy of the American soldiers who have fought and died over the years to give birth to our freedom and to keep our American culture alive. And he is not worthy of NRA members like you who, with that same conviction and courage, have fought so valiantly to defend our precious Constitution.

So please mail this EMERGENCY MEDIA STATEMENT today or put it with your monthly bills, so that we may have the dollars we need to tell America the truth during the do-or-die months just ahead.

When you do it, know that you are helping to save our guns and our nation's Bill of Rights.

Thank you very much.

Sincerely,

/s/ Wayne LaPierre

Wayne LaPierre
Executive Vice President

P.S. You are under no legal obligation to pay this statement. But I was under the obligation to send it to you because of what Bill Clinton has said about you and me and our fellow law-abiding NRA members.

And I hope you will agree that you and I have a moral obligation -- to our country and to future generations– to do all we can to win the battle for freedom, just as those who came before us willingly fought life and death battles for us. I urge you as strongly as I can to pay this EMERGENCY MEDIA STATEMENT today or put it with your monthly bills right now. Thank you again.

Annenberg Public Policy Center
Issue Advertising in the 1999-2000 Election Cycle

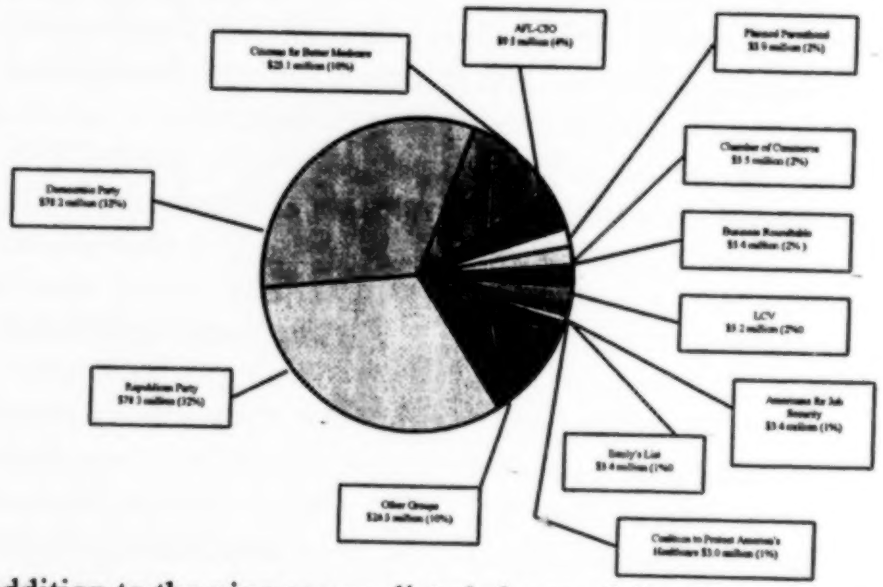
* * *

[7 (11 PCS/ NRA 197)]
The two major political parties and one other group, Citizens for Better Medicare, account for almost three out of every four dollars (74%) spent on television issue advertising after Super Tuesday.

Despite the fact that more than 70 groups ran television spots during this period, spending on issue advertising was dominated by a small number of groups. In fact, the two parties and nine groups (Citizens for Better Medicare, the AFL-CIO, the Business Roundtable, the US Chamber of Commerce, the League of Conservation Voters, Planned Parenthood, Americans for Job Security, Emily's List, and the Coalition to Protect America's Healthcare) accounted for 90% of the spending on issue ads. Sixty-five other groups account for only ten percent spending.

Nine groups and the two major parties accounted for 90% of the spending on television issue ads in the top 75 media markets after Super Tuesday.

Chart 2: Spending on Television Issue Ad Air Time in the Top 75 Media Markets After Super Tuesday



In addition to the nine groups listed above, eight other groups spent over $1 million on television issue ads: the Alliance for Quality Nursing Home Care ($2.2 million), Handgun Control ($1.9 million), the National Rifle Association ($1.6 million), Prochoice Decision ($1.6 million), the Sierra Club ($1.4 million), the National Abortion Rights Action League ($1.3 million), the Pharmaceutical Research & Manufacturers of America ($1.2 million) and the National Shooting Sports Federation ($1.1 million).

* * *

BEST AVAILABLE COPY

[27] **Appendix 1**

GROUPS RUNNING ISSUE ADS

The Annenberg Public Policy Center tracked issue advertising from over 100 groups. Complete descriptions of the groups and their activities can be found at www.appcpenn.org/issueads. The following groups sponsored issue advocacy advertising during the 1999-2000 cycle:

AARP
AFL-CIO
Alabama Hospital Association
Alliance for Florida Economy
Alliance for Quality Nursing Home Care
American Association of Health Plans
American Cancer Society
American Civil Liberties Union
American Conservative Union
American Family Voices
American Federation of Teachers
American Immigration Control Foundation
American Medical Association
American Seniors Inc.
American Society of Anesthesiologists
Americans for Balanced Energy Choices
Americans for Economic Growth
Americans for Hope, Growth & Opportunity
Americans for Job Security
Americans for Responsible Medicare Spending
Americans for Tax Reform
Antitrust Coalition for Consumer Choice in Health Care
Aretino Industries
Association of Builders & Contractors
Better World Campaign
Black America's Political Action Committee
Business Leaders for Sensible Priorities
Business Roundtable
Campaign for a Progressive Future

Campaign for America's Children/Coalition for Better Education
Catholic Health Association
Center for Reclaiming America
Center for Reproductive Law & Policy
Christian Action Network
Citizens for a Better America
Citizens for Better Medicare
Citizens for Life
Clean Air Trust/Clean Air Project
Club for Growth
Coalition for Affordable Quality Health Care
Coalition for Asbestos Resolution
Coalition for the Future American Worker/Americans for Better Immigration
Coalition to Protect Americans Now
Coalition to Protect America's Health Care
Committee for Good Common Sense
Competitive Broadband Coalition
Conservative Leadership PAC
Council for a Livable World
Cuban American National Foundation
Democratic Party
Education Reform Alliance
Emily's List
Federation for American Immigration Reform
Federation of American Health Systems
First American Education Project
Friends of the Earth
Handgun Control, Inc.
Hands Across New Jersey
Hands off the Internet
Health Benefits Coalition
Health Insurance Association of America
Healthcare Reform Project
Healthtrack.org
Heritage Forests Campaign
Human Rights Campaign
Judicial Watch Org.
League of Conservation Voters
League of Women Voters
Log Cabin Republicans
Montanans for Common Sense Mining Laws
Motorola/Business Coalition for China Trade
National Association for

the Advancement of Colored People
NASA Langley Community Support Team
National Abortion Rights Action League
National Association of Realtors
National Center for Policy Analysis
National Cttee. To Preserve Social Security & Medicare
National Environmental Trust
National Pro Life Alliance
National Rifle Association
National Right to Life
National Right to Work Committee
National Shooting Sports Federation
National Smokers Alliance
Natural Resources Defense Council
Negative Population Growth
New York Conservative Party
North Carolina Voters Education Fund
Nuclear Energy Institute
PARCA
Peace Action Committee/ Peace Voter Fund
People for the American Way
People for the Ethical Treatment of Animals
Pharmaceutical Research & Manufacturers of America
Planned Parenthood Action Fund
Priests for Life
Pro Choice Decision
Project Abolition
Republican Ideas Political Committee
Republican Jewish Coalition
Republican Leadership Coalition
[28]
Republican Leadership Council
Republican Party
Republicans for Choice
Republicans for Clean Air
RuffPAC
Shape the Debate
Sierra Club
Solutions for a New Century
South Carolina Heritage Coalition
Susan B. Anthony List
Taxpayers for Common Sense
Traditional Values Coalition

U.S. Term Limits/ Americans for Limited Terms
Union of Concerned Scientists
United Bowhunters of Pennsylvania
United Steelworkers of America
US Action
US Chamber of Commerce
Voters for Campaign Truth
Voters for Choice
Washington Conservation Voters
West Virginia Rivers Coalition
World Campaign Organization
Youth Christian League

Gross Revenues from Businesses* - NRA and ILA

	2001	% of Revenue	2000	% of Revenue	1999	% of Revenue	1998	% of Revenue	1997	% of Revenue	1996	% of Revenue	1995	% of Revenue
Royalties and other[1]	$ 6,440,900	3.613%	$ 11,537,653	6.047%	$ 5,995,459	3.966%	$ 5,890,957	4.832%	$ 3,057,115	2.622%	$ 2,573,927	2.009%	$ 1,966,875	1.355%
Rental income[2]	1,717,461	0.963%	1,743,342	0.914%	1,441,175	0.953%	1,360,506	1.116%	1,101,466	0.945%	709,118	0.554%	553,621	0.381%
Advertising (magazine)[3]	13,208,111	7.410%	10,315,876	5.407%	7,664,660	5.070%	7,945,013	6.517%	7,440,001	6.381%	9,268,728	7.235%	11,283,575	7.775%
Subtotal	21,366,472	11.987%	23,596,871	12.368%	15,101,294	9.990%	15,196,476	12.466%	11,598,582	9.948%	12,551,773	9.798%	13,804,071	9.512%
Business alliances - NRA[4]	66,187	0.037%	69,307	0.036%	32,050	0.021%	29,600	0.024%	41,492	0.036%	69,323	0.054%	116,337	0.080%
Businesses -ILA[5]	221,967	0.125%	314,227	0.165%	280,265	0.185%	294,426	0.242%	339,998	0.292%	363,121	0.283%	450,829	0.311%
Subtotal	288,154	0.162%	383,534	0.201%	312,315	0.207%	324,026	0.266%	381,490	0.327%	432,444	0.338%	567,166	0.391%
Total from Business Sources	$ 21,654,626	12.148%	$ 23,980,405	12.569%	$ 15,413,609	10.196%	$ 15,520,502	12.731%	$ 11,980,072	10.275%	$ 12,984,217	10.135%	$ 14,371,237	9.903%
Total Revenues	$ 178,253,381		$ 190,787,834		$ 151,169,157		$ 121,906,353		$ 116,591,535		$ 128,110,423		$ 145,126,536	

* The NRA does not maintain records that would allow it, without great effort and expense, to attempt to determine the form of organization of the businesses that provide revenues to the NRA. Solely for the purposes of the NRA's facial challenge to BCRA, the NRA is prepared to assume that the business revenues reflected on this spreadsheet are received from businesses organized in the corporate form.

[1] Royalties are amounts received from an outside vendor who has used the NRA membership list as a customer source. Royalty relationships include, but are not limited to, the following: Member Insurance Programs (where the NRA member is able to purchase medical, life, property and casualty insurance), Affinity Credit Card (where the NRA member acquires a credit card with the vendor and the NRA receives royalties based on card usage), and other similar programs where the NRA receives royalties based on the sales made to NRA members (Affinity Hotel Discounts, Check Sales, Moving, Car Rentals, NRA related book library sales, Holiday Cards, and other smaller affiliated programs). Other revenues include sales in the NRA Cafe, other advertising revenues (primarily royalty/affinity vendor advertising for their programs by including inserts in NRA magazines), and other miscellaneous revenues (I.e., insurance proceeds, vending machine sales, etc.)

[2] Rental income is from outside tenants who lease office space in the NRA Headquarters' Building.

[3] Advertising income is from vendors who purchase advertising space in the various NRA magazines. These magazines include American Rifleman, American Hunter, America's 1st Freedom, InSights, and Shooting Illustrated. This advertising income partially defers the cost of publications, which was $28,708,000 in 2001.

[4] While the NRA does not accept businesses as members, it does allow businesses to participate in the NRA through its Business Alliance program. For a $35 annual fee, participants in the Business Alliance receive one of the NRA's magazines, may list their business in the NRA's online directory, and receive decals and stickers so that they can display their support for the NRA and its efforts to defend the Second Amendment.

[5] This figure represents the contributions by businesses to the endowment of the National Rifle Association's Institute for Legislative Action. The purpose of the endowment is to finance the activities of the Institute in furtherance of its mission to protect and defend the Constitution of the United States. During each calendar year 4-5% of principal amount is to be spent on the purposes for which the Endowment was created.

CONFIDENTIAL/
ATTORNEYS' EYES
ONLY

	Number	Gross	Net	Total
Total Calls Received	[redacted]			
Total Orders and Contributions	[redacted]			
IVRU Orders and Contributions	[redacted]			
Live Operator Orders and Contributions	[redacted]			
[illegible]	[redacted]	[redacted]		
[illegible]	[redacted]		[redacted]	
Credit Card Orders (not counting EPL's)	[redacted]	[redacted]	[redacted]	
Credit Card Contributions	[redacted]	[redacted]	[redacted]	
Gross EPL Orders (first $25 paid by credit card - $725 invoiced quarterly)	[redacted]	[redacted]	[redacted]	
Net EPL Orders Expected at 72% of invoices + 100% of CC portion ($25)	[redacted]		[redacted]	
Gross Dollars Promised (before discounting Bill-Me's and adding EPL's)		[redacted]		
Net Dollars Expected (after discounting Bill-Me's and adding EPL's)				[redacted]
Paying Orders	[redacted]			
NET NEW MEMBERS (Paying orders minus contributions)	[redacted]			
Media Cost				[redacted]
Premium Cost at [redacted] per paid order			[redacted]	
Life full paid Premium Cost at [redacted] per premium			[redacted]	
Total Premium Cost				[redacted]
IVRU Cost at [redacted] per IVRU call		[redacted]		
IVRU Transcription Cost at [redacted] per IVRU order				
Live Operator Cost at [redacted] per Live Operator call		[redacted]		
Total Telemarketing Cost (Unadjusted)			[redacted]	
Total Telemarketing Cost (Adjusted)				[redacted]
Less Networks and Markets Not Placed				
Total Cost				[redacted]
Net Profit				[redacted]
Net Expected ROI				[redacted]

NRA INFOMERCIAL

YEAR-TO-DATE PERFORMANCE (2000)

1/7/2000 =====> 12/20/2000

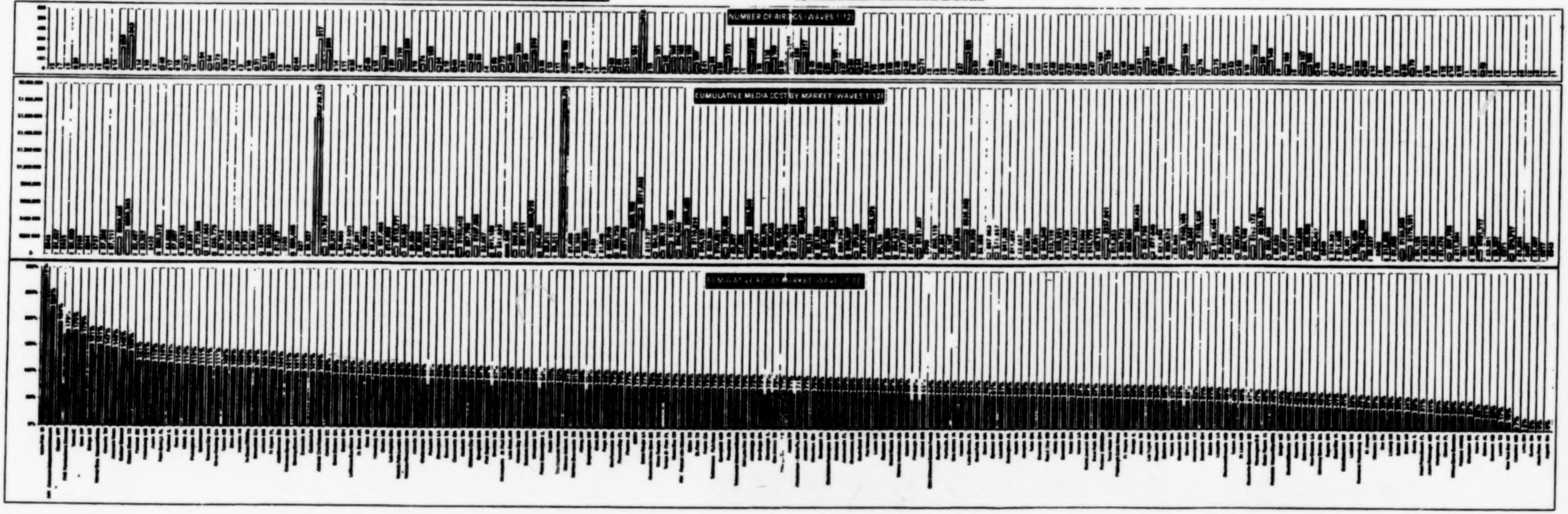
This Report Created:

Thursday 12/21/2000 11:50 AM

CONFIDENTIAL

Melanie Hill

Graph includes all markets at which the infomercial has run in 2000



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ATTORNEY'S EYES
ONLY

NRA Infomercial
January - December 2000

Total No. of Airings [illegible]
Cumulative Gross Media Costs [illegible]

Market	No. of Airings	Market	No. of Airings	Market	No. of Airings	Market	No. of Airings	Market	No. of Airings
Abilene, TX	184	Chico-Redding, CA	30	Hattiesburg, MS	3	Odessa-Midland, TX	8	South Bend, IN	34
Access TV	135	Cincinnati, OH	41	Honolulu, HI	10	Oklahoma City, OK	94	Speedvision	68
Ada/Sherman, TX	2	Cleveland, OH	190	Houston, TX	228	Omaha, NE	30	Spokane, WA	20
AIN - American Independent Network	7	Colorado Springs, CO	44	Huntsville, AL	2	Orlando, FL	14	Springfield, MA	4
Albany, NY	7	Columbia, MO	8	Idaho Falls, ID	2	Ottumwa/Kirksville, MO	52	Springfield, MO	173
Albuquerque - Santa Fe, NM	217	Columbia, SC	14	Indianapolis, IN	77	Outdoor Channel	349	St. Joseph	14
Amarillo, TX	74	Columbus, GA	27	Jackson, MS	88	Outdoor Life	324	St Louis, MO	18
America One Network	208	Columbus, OH	29	Jacksonville, FL	60	Paducah, KY	54	Sunshine Network	219
America's Voice	228	Corpus Christi, TX	14	Johnstown., NY	40	Palm Springs, FL	17	Syracuse, NY	141
Anchorage, AK	12	D2U (National Satellite Feed)	2	Joplin-Pittsburgh, MO	5	Panama City, FL	64	Tallahassee - FLA News	26
Atlanta, GA	23	Dallas, TX	107	Kansas City, MO	99	Pax Network	10	Tampa St. Pete, FL	160
Augusta, GA	1	Davenport, IA	20	Knoxville, TN	14	Peoria-Bloomington, IL	13	Telemundo (National Cable)	1
Austin, TX	40	Dayton, OH	25	LaCrosse-Eau Claire, WI	4	Philadelphia, PA	94	Terre Haute, IN	34
Bakersfield, CA	55	Denver, CO	23	Lafayette, LA	36	Phoenix, AZ	154	The Nashville Network	198
Baltimore, MD	103	Des Moines, IA	27	Lake Charles, FL	53	PIN - Product Info Network	182	Toledo, OH	29
Bangor, ME	107	Detroit, MI	79	Lansing, MI	3	Pittsburgh Cable News	49	Topeka, KS	14
Baton Rouge, LA	13	Dothan, AL	5	Laredo, TX	1	Pittsburgh, PA	71	Traverse City, MI	73
Beaumont, TX	43	Duluth, MN	11	Las Vegas, NV	57	Portland, MAINE	1	Tri Cities (TN/VA)	31
Bend, OR	3	EL Paso, TX	41	Lima, OH	2	Portland, OREGON	128	Tucson, AZ	62
Billings, MT	5	Erie, PA	12	Lincoln, NE	18	Providence, RI	9	Tulsa, OK	25
Biloxi, MS	3	Eugene, OR	44	Little Rock, AR	168	Quincy, IL	5	Utica, NY	3
Binghampton, NY	1	Eureka, CA	6	Los Angeles, CA	116	Raleigh-Durham, NC	255	Waco-Temple, TX	92
Birmingham, AL	10	Evansville, IN	9	Louisville, KY	38	Rapid City, SD	40	Warner Bros National Cable	24
Bismarck, ND	3	Fargo, ND	82	Lubbock, TX	66	Reno, NV	67	Washington D C	98
Bluefield/Beckley, WV	6	Flint-Saginaw, MI	58	Madison, WI	15	Richmond-Petersburg, VA	66	Waterton, NY	3
Boise, ID	18	Florence, SC	10	McAllen-Brownsville, TX	12	Roanoke, VA	127	Wausau-Rhinelander, WI	18
Boston, MA	60	FNC-Florida News Channel	25	Medford, OR	2	Rochester, NY	31	West Palm Beach, FL	18
Bowling Green, KY	1	Fresno, CA	84	Memphis, TN	35	Rochester-Mason City (MN)	9	Wichita Falls-Lawton, OK	215
Buffalo, NY	33	Ft. Myers, FL	3	Miami, FL	55	Rockford, IL	16	Wichita-Hutchinson, KS	46
Burlington, VT	6	Ft. Smith, AR	46	Milwaukee, WI	36	Sacramento, CA	24	Wilkes Barre Scranton	18
Butte/Bozeman, MT	13	Ft. Wayne, IN	22	Minneapolis - St. Paul, MN	88	Salt Lake City, UT	232	Yakima, WA	7
Casper, WY	5	Grand Junction, CO	57	Mobile, AL	5	San Antonio, TX	39	Yuma,AZ	2
Cedar Rapids, IA	148	Grand Rapids, MI	40	Monroe, LA	23	San Diego, CA	116	Zanesville, OH	2
Champaign, IL	159	Great Falls, MT	8	Monterey-Salinas, CA	1	San Francisco, CA	55		
Charleston, SC	9	Green Bay, WI	162	Montgomery, AL	12	Santa Barbara, CA	11		
Charleston-Huntington, WV	131	Greensboro, NC	64	Nashville, TN	96	Savannah, GA	37		
Charlotte, NC	72	Greenville-New Bern, SC	161	New Orleans, LA	48	Seattle, WA	75		
Chattanooga, TN	132	Greenville-Spartanburg, SC	182	New York City, NY	1	Shreveport, LA	19		
Cheyenne, WY	94	GRTV	512	Norfolk, VA	9	Sioux City, IA	34		
Chicago, IL	81	Harrisburg, PA	133	North Platte, NE	1	Sioux Falls, SD	106		

BEST AVAILABLE COPY

[1 (11 PCS/ NRA 216)]

NRA Infomercial
California
Fall 2000
Airdates: Tuesday 8 29 00 –Sunday 11 5 00

Total No. Of Airings	857
Cumulative Gross Media Costs	$770, 868.00

Market	
Fresno-Visalia	180
San Francisco	94
Los Angeles	208
Chico-Redding	33
Bakersfield	63
Eureka	40
San Diego	105
Santa Barbara	76
Sacramento	8
Monterey-Salinas	4
Palm Springs	46

[Layout altered to fit on page]

Intervenors' Comments to FEC

* * *

[10 (11 PCS/ NRA 209)]

We therefore propose the following exemption for the Commission's consideration:

The term "electioneering communication" does not include any communication that:

* * *

> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter, (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter, (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.
>
> (B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

This formulation allows individuals and entities concerned about legislation to run true issue ads [11 (11 PCS/ NRA 210)] with a legislative objective and a request to contact an

elected official during the 30 or 60 day windows. Permitting the use of "Your Congressman" and similar expressions that clearly identify the person or persons to be contacted, but continuing to prohibit the use of a candidate's name makes it less likely that the exemption will used to accomplish an electoral objective. This proposal also guards against critiques of a political party being used as a proxy for attacking a candidate. This exemption would be an appropriate use of the Commission's authority under 2 U.S.C. § 434(f)(3)(B)(iv). We do not think it is useful to try to distinguish between communications that discuss a general issue as opposed to a particular piece of legislation.

* * *

MD/SHRIVER BLOCKED NRA

Brand: POL-CONGRESS (B332)
Parent: POLITICAL ADV
Aired: 08/27/2002 – 08/28/2002

Creative Id: 2609471

FRAME 1

[Shriver]: "I stood up on the floor of the House of Delegates and defeated a piece of legislation backed by the NRA that would have allowed convicted felons to own handguns.

FRAME 2

That's bad public policy. We shouldn't allow people who are convicted of domestic

FRAME 3

violence to own a handgun. We need further locks on our handguns. We need

FRAME 4

to eliminate the gunshow loophole. We need to make gun licensing

FRAME 5

the law of the land. I welcome the fight from the NRA. Nothing would

FRAME 6

give me more pleasure than defeating the NRA."
FRAME 7

[PFB]: Citizens for Mark Shriver

[1 (11 PCS/NRA 226)]

MD/SHRIVER TOUGH FIGHTS

Brand: POL-CONGRESS (B332)
Parent: POLITICAL ADV
Aired: 09/03/2002 – 09/03/2002

Creative Id: 261746

FRAME 1

[Shriver]: "If you believe in something passionately, then who cares who's opposed to you."

FRAME 2

[Announcer]: He took on the gang and drug dealers in Baltimore to save young lives. And battled the NRA in Annapolis,

FRAME 3

taking guns away from domestic abusers. He led the fight for all-day

FRAME 4
kindergarten and childcare for working families. Mark Shriver's always

FRAME 5

taken on the tough fights to make a difference for people. [Shriver]: "If the NRA or the pharmaceutical industry or the polluters

FRAME 6

are opposed to me, that's fine with me. Bring it on. I welcome that fight."

FRAME 7

[PFB]: Shriver for Congress

[1 (11 PCS/NRA 227)]

MD/SHRIVER VAN HOLLEN WENT NEGATIVE

Brand: POL-CONGRESS (B332)
Parent: POLITICAL ADV
Aired: 09/07/2002 – 09/07/2002

Creative Id: 2621512

FRAME 1

[Announcer]: He promised not to do it, but now Chis Van Hollen's gone negative with a blizzard of false and disingenuous attacks on Mark Shriver's record.

FRAME 2

The Washington Post calls Shriver, "exceptionally well qualified" praising his

FRAME 3

innovative CHOICE program to save kids from gangs and drugs. He led the

FRAME 4

fight in Annapolis for all day kindergarten earning the support of Maryland's teachers

FRAME 5

and took on the NRA to block guns for domestic abusers. Elect a proven

FRAME 6

fighter for people. Mark Shriver for Congress.

FRAME 7

[PFB: Citizens for Mark Shriver]

[1 (11 PCS/NRA 228)]

MD/VAN HOLLEN RECORD

Brand: POL-CONGRESS (B332)
Parent: POLITICAL ADV
Aired: 08/27/2002 – 08/28/2002

Creative Id: 2608231

FRAME 1

[Announcer]: The Washington Post called Chris Van Hollen 'one of Maryland's best legislators.' The Baltimore Sun called him a 'rising star, one of the senate's

FRAME 2

most effective advocates.' Time Magazine called him a 'hero to environmentalists,

FRAME 3

education groups, and gun control advocates.' He wrote the plan that will bring an additional

FRAME 4

130 million per year to our schools, authored laws that protect

FRAME 5

the Chesapeake Bay and took on the NRA and passed the nation's first

FRAME 6

trigger lock law. Chris Van Hollen, a congressman for people who care

FRAME 7

about issues. [PFB]: Van Hollen for Congress

[1 (11 PCS/NRA 229)]

BRAND: POL-CONGRESS+
TITLE: CA/CADP Cunneen NRA 15
COMMERCIAL: CA/CADP Cunneen NRA 15
LENGTH : 15
FRAMES : 3

FRAME 1

[Announcer] : Jim Cunneen voted with the NRA to allow adults to carry concealed weapons in pubic places such as parks, restaurants, or the workplace.

FRAME 2

Under pressure, we can't count on Jim Cunneen. Tell Jim Cunneen

FRAME 3

to vote against the NRA and for public safety. [California Democratic Party]

[1 (11 PCS/NRA 230)]

BRAND: POL-CONGRESS+
TITLE: MA/Jacques Gun Violence
COMMERCIAL: MA/Jacques Gun Violence
LENGTH : 30
FRAMES : 8

FRAME 1

[Jacques] "As a criminal prosecutor, I saw the impact gun violence had on peoples' lives.

FRAME 2

That's why I led the fight to ban assault weapons and pass the toughest

FRAME 3

gun control law in the nation. I think the NRA already

FRAME 4

has too many friends in Washington." [Announcer] Senator Stephen Lynch

FRAME 5

voted against the '96 ban on assault weapons.

FRAME 6

A top rating and friend of the NRA. Can we trust his priorities?

FRAME 7

[Jacques] "I'll be a leader who puts your safety before the NRA."

FRAME 8

[PFB: Cheryl Jacques for Congress]

[1 (11 PCS/NRA 231)]

BRAND: POL-CONGRESS+
TITLE: FL/FLDP Who is Jennifer Carroll
COMMERCIAL: FL/FLDP Who is Jennifer Carroll
LENGTH : 30
FRAMES : 8

FRAME 1

[Announcer]: Who is Jennifer Carroll? She's anti-choice, pro-gun, pro-tobacco.

FRAME 2

Siding with extremists, that's Republican Jennifer Carroll.

FRAME 3

She has a plan to cut taxes for the rich, but raise taxes on low income

FRAME 4

families. Siding with the rich against working families. That is also

FRAME 5

Jennifer Carroll. She supports a law that lets people carry concealed weapons.

FRAME 6

Siding with the NRA against our families, that's Jennifer Carroll

FRAME 7

too. Tell Jennifer Carroll she is too extreme for our families.

FRAME 8

[PFB Florida Democratic Party]

[1 (11 PCS/NRA 232)]

[1 (11 PCS/ NRA 343)]

The Washington Post

September 21, 2002, Saturday, Final Edition

SECTION: STYLE; Pg. C01; THE TV COLUMN LISA DE MORAES

LENGTH: 948 words

HEADLINE: Political 'Reality': Viewers to Pick 2004 Candidate

BYLINE: Lisa de Moraes

BODY:

Rupert Murdoch has finally found a way to get what he wants in Washington.

His cable network FX announced yesterday it has bought a TV series in which it gets to select a candidate for the 2004 presidential election.

"American Candidate" will allow TV viewers to choose their "people's candidate" over a six-month period, the network said.

The show was conceived by R. J. Cutler. He's the guy who produced the 1993 oscar-nominated documentary "The War Room," about the '92 presidential campaign of Bill Clinton.

"Finally! Reality television is returning to its natural home," Cutler told the TV column yesterday.

"Presidential politics is the Great Reality Television Platform."

"American Candidate" will have elements of "The War Room," Cutler told us, as well as elements of "American Idol," another reality series brought to us by a Murdoch network.

"We will be making available to every American who is qualified, the opportunity to run for president," Cutler said

Just like Fox's "American Idol" made available to every American the opportunity to become a recording star. So long as they were young and hot and didn't do opera or anything like that.

Cutler partnered on the new project with Jay Roach (a good choice to help pick a U.S. president since he directed all three Austin Powers movies) and Tom Lassally. Lassally is another excellent choice since he was the Warner Bros. executive who shepherded the film "Dave," in which the fabulous Kevin Kline became U.S. president -- twice.

I'd definitely vote for Kevin Kline!

But Mr. Murdoch, alas, cannot run for president. That's because if you prick him, he bleeds Aussie. In 1985 Murdoch was made a U.S. citizen faster than you can say "station duopoly." That was right around the time he was adding to his U.S. media empire TV stations that a foreigner is not allowed to own.

[2 (11 PCS/ NRA 344)]

Presidential candidates must, owing to that pesky U.S. Constitution, be natural-born American citizens.

That leaves Simon Cowell out as well. Too bad. I'd vote for him.

To vie for a chance to be crowned American Candidate, applicants must fill out questionnaires, make a video in which they explain why they think they should be picked -- kind of like those "Survivor" audition tapes -- and produce a petition signed by 50 supporters. That's 50 live supporters -- not Dudley Moore or Saint Paul, both of whom turned up on Mayor Tony Williams's petitions.

"We expect to receive thousands and thousands of applicants," Cutler said. "Each is going to be sponsored by 50 members of the applicant's community. We see this show as tapping into grass-roots politics. Word will spread and interest will spread and, as a result, galvanize not only the viewing audience but a broad cross section." of the voting-age population, he forecast.

A panel of experts -- I'm thinking Paula Abdul, Randy Jackson, Shepard Smith and Sean Hannity -- will look over all the applicants and choose about 100 candidates. They will be unveiled in the first episode, which will debut in January 2004. Those candidates will square off in various competitions that Cutler said, will test their "presidential mettle." The competitions will reveal the candidates' core beliefs, oratory skills, wisdom, stamina, leadership, family background, ability to answer multiple-choice questions, proficiency with Burt Bacharach songs and drugged-pig-killing skills.

A handful of presidential hopefuls will be whacked each week, based on a point system that factors in those competition results, the live audience's preferences, and telephone and Internet voting.

Each episode will originate from some location that just screams America, like Mount Rushmore or Gettysburg

The final episode, which will be telecast right around the Fourth of July, will be an "American Candidate" convention, which Cutler hopes will be staged on the Mall here in Washington. Viewers will determine the winning candidate from three finalists.

The winner decides whether to actually run for president that fall.

Should he or she decide to got ahead, the producers will follow the candidate a[grv] la "The War Room," and telecast the campaign trail in a weekly series right up until election night.

But, Cutler emphasized, "we won't be running them for office; we won't require them to run for office. We certainly hope they will choose to run."

And how will this made-for-TV candidate finance her campaign? Let us not forget that in the last presidential election George W. Bush spend about $186 million and Al Gore not much less than that.

"They're going to have to figure that out," Cutler said.

"We're certainly not going to provide them. This show is going to function squarely within whatever finance regulations there are. That's why we are being very careful not to say our goal is to run anybody for office. . . . We know that a television show or a cable channel or a media organization cannot run anyone for office."

Of course, it might look kinda suspicious when the candidate promises if elected she'll make sure a media

company can own as many major league baseball teams as it likes and the DirecTV/EchoStar merger will be declared unconstitutional.

[3 (11 PCS/ NRA 345)]

And if this works and our made-for-TV candidate actually gets elected, who knows, we might even see Bernie Mac named secretary of state, Homer Simpson as energy secretary, Agent Mulder brought back to run the FBI and daily briefings held by White House Press Secretaries Brian Dunkleman and Ryan Seacrest.

And what becomes of the "American Candidate" winner who decides not to run?

"Maybe we'll give them a Winnebago," Cutler said.

LOAD-DATE: September 21, 2002

[1 (11 PCS/ NRA 352)]

Copyright 1998 M2 Communications Ltd.
INTERNET BUSINESS NEWS

July 1, 1998

LENGTH: 313 Words

HEADLINE: INTERNET DOUBLES CLAIMS NEW SURVEY, FRAUD WARNINGS MADE

BODY:

Matrix Information and Directory Services have estimated that the number of Internet users as of January 1998 was 102m compared with an estimated 57m in January 1997. The company has pointed out that the use of the Internet has been growing almost 100% each year since 1988 and shows no sign of slowing down for several years yet. Meanwhile business on the Internet could rise from US$ 2.6bn to US$ 220bn in 2001 according to the Federal Trade Commission's report to the subcommittee on Telecommunications, Trade and Consumer Protection of the House Commerce Committee. The FTC has warned however, that if the trend is to continue consumers must feel confident that the Internet is safe from fraud. The Commission has launched its Consumer Sentinel fraud database as part of its strategy for dealing with online fraud to provide secure access to consumer complaints for over 150 law enforcement organisations across the US and Canada. The FTC has also revealed that consumers have very little privacy protection on the Internet. A FTC survey of over 1,400 web sites revealed that only 14 percent of the sample provided any notice of their information collection practices and approximately two percent provided a comprehensive privacy policy. The most troubling statistic is possibly the fact that fewer than 10 percent of the sites directed at

children provide for some form of parental control over the collection of information from their offspring. Meanwhile Schema has published results of a study conducted across the European Internet Protocol services market which suggests that the number of companies using e-commerce to sell goods and services will increase from 500,000 to eight million by 2003. This will represent 40% of all European businesses and that the use of IP telephony and real time video will increase dramatically over the next three years.

LOAD-DATE: August 3, 1998

[1 (11 PCS/ NRA 444)]

Introduction and Summary: Internet Sapping Broadcast News Audience

Pew Research Center for the People & the Press
Survey Reports

Internet Sapping Broadcast News Audience

Released: June 11, 2000

Introduction and Summary

Traditional news outlets are feeling the impact of two distinct and powerful trends. Internet news has not only arrived, it is attracting key segments of the national audience. At the same time, growing numbers of Americans are losing the news habit. Fewer people say they enjoy following the news, and fully half pay attention to national news only when something important is happening. And more Americans than ever say they watch the news with a remote control in hand, ready to dispatch uninteresting stories. To some extent, these trends are affecting all traditional media, but broadcast news outlets -- both national and local -- have been the most adversely affected.

These are the principal findings of the Pew Research Center's biennial survey of the national news audience, which documents the rapid emergence of the Internet as a news source, as well as a significant decline in regular viewership of broadcast television news. Fully one-in-three Americans now go online for news at least once a week, compared to 20% in 1998. And 15% say they receive daily reports from the Internet, up from 6% two years ago. At the same time, regular viewership of network news has fallen from 38% to 30% over this period, while local news viewership has fallen from 64% to 56%.

Among younger and better-educated people, the Internet is making even bigger inroads. Many more college graduates under the age of 50 go on the Internet every day than regularly watch one of the nightly network news broadcasts. And generally, the survey finds that people who are interested in the news and go online tend to watch less network TV news. The survey also finds modest declines in the viewership of television news magazines and the morning news shows, but these slips appear unrelated to Internet news competition.

The digital tide is having less of a direct negative impact on cable TV news, radio and print outlets. The Pew Research Center survey finds no evidence that Internet use is driving down regular use of cable news channels, daily newspapers, or radio news. However, all news outlets are being affected by the public's slowly declining appetite for the news.

Less than half of the public (45%) now says it enjoys keeping up with the news a great deal and just 48% say they follow national news closely most of the time. Both of these percentages represent a modest decline from two years ago, when 50% said they enjoyed keeping up with the news and 52% reported following national news closely most of the time. But the percentage of Americans saying they enjoy keeping up with the news has fallen steadily since the mid-1990s.

[2 (11 PCS/ NRA 445)]

The generational divide on these questions is striking. Just one-in-three young adults (31%) enjoy keeping up with the news. In contrast, well more than half (57%) of those age 50 and over enjoy following the news. While younger people don't like the news so much, they do like having a wide variety of information sources from which to choose. Older Americans, who have a greater affinity for the news, often feel overwhelmed by the increasingly crowded media landscape.

As a consequence, Internet news is attracting many younger people who have only a marginal interest in the news as well as serious news consumers. In fact, Internet news has a relatively larger place in the lives of those with access who don't enjoy the news than among those who do. The Internet, with its headline news format and capacity for quick updates, is clearly attractive to this type of consumer. On the other hand, the Internet's capability for providing more depth on a given subject appeals to those with large news appetites, such as affluent college graduates.

In that regard, the growth of Internet news has had a dramatic impact on the way Americans, particularly those with access to technology, get information on business and financial matters. For active investors--those who have traded stocks within the past six months--the Internet has largely supplanted traditional media as the leading source for stock quotes and investment advice. The Internet's capacity for personally-designed news and information is clearly a factor here. Nearly six-in-ten (58%) active traders who log on to the Internet for such information have customized online stock portfolios.

So far, this quiet revolution in financial news has had less of an impact on the general public and less active investors, who still tend to go to the traditional media for stock quotes and advice. But underscoring the general popularity of the Internet for financial news, 16% of all Americans volunteered that they would turn first to the Internet for news if the market were to crash 1,000 points; cable news was mentioned second most frequently, at 14%.

As Americans grow more reliant on the Internet for news, they also have come to find online news outlets more credible. Despite the controversy over news-gathering techniques employed by some Internet sites, those who go online generally give Internet news operations high marks for believability. In fact, the online sites of such well-known news organizations as ABC News get better ratings from Internet users than the ratings accorded the traditional broadcast or print outlets.

But having a familiar name clearly helps. Internet-only news sources such as Yahoo,

* * *

[Graphics entitled *Broadcast News vs. Online News* and *Logging On for News, Advice* omitted]

January/February 1991

[Photograph Omitted]
No GE Lightbulb on Today Show

Extra!, January/February 1991

THE GE BOYCOTT:

A Story NBC Wouldn't Buy

By Todd Putnam

When I got a call from NBC's *Today* show in June 1990, telling me they were interested in airing a story on consumer boycotts, naturally, as the editor of *National Boycott News*, I was enthusiastic. But I suspected there might be a problem when Amy Rosenberg from *Today* asked me for "the biggest boycott going on right now."

I already had a good idea, but I wanted to do a little more research before I gave her my answer. When I looked at major boycotts in terms of visibility, effectiveness, scope and public support, one stood out: the boycott of GE products led by the group INFACT, prompted by GE's leading role in the production and promotion of nuclear weapons.

The only trouble was, GE has owned NBC since 1986, when the company bought RCA. Would NBC News be willing to discuss a boycott against its own corporate parent?

When I next talked to Rosenberg, I broke the news to her: "The largest boycott in the county is against General Electric."

"We can't do that one," she responded immediately. "Well, we could do that one, but we won't."

She asked for some other major boycotts, but she didn't seem too interested in any of them -- most of which were against major corporations with large TV advertising budgets. She thanked me and said goodbye.

Three weeks later, in July, she called again, saying the show was now interested in doing something about "small" boycotts. We had a couple of conversations, the upshot of which was that *Today* might do something about the boycott against shrimp producers provoked by the killing of sea turtles.

In September, Today told me that I was scheduled to be on air Oct. 5 and that a plane ticket would be sent. When I called on Oct. 4 to say that I hadn't gotten a ticket, I was told that it had been rescheduled for Oct. 15. When I hadn't received anything by Oct. 12, I called again, and learned the segment had been canceled.

I had a few more conversations with Amy Rosenberg, where I learned that *Today* was looking for a boycott that was "small," "local" and "sexy." By this point I seriously doubted NBC would ever do a segment on any sort of boycott.

But on Friday, Nov. 23, Roland Woener, a *Today* show producer, called me and told me that "the bottom fell out" of the next Monday's show, and that I should immediately book a flight -- NBC would reimburse me. He told me the idea was to have a table with some of the products that were targets of major boycotts, and he wanted to know what they should feature.

When GE came up as one of the most important boycotts, he signed audibly. "You guys," he said.

"I had to say it, it's a major boycott," I said.

"OK, tell me about it," he said.

I gave him a brief description of the INFACT boycott, which is promoted by a grassroots network involving hundreds of organizations nationwide, and is supported by an estimated 1 percent of U.S. consumers. I added that I had heard that David Letterman's producer got in trouble after comic-book writer Harvey Pekar was brought on as a guest and said some unflattering things about GE on the show.

"Yeah, I'll be looking for a new job on Tuesday," he said.

As it turned out, his job was in no jeopardy. The boycotted products that *Today* selected were Marlboros and Miller beer from Philip Morris, which supports homophobic Sen. Jesse Helms; Spam and Dinty Moore stew from Hormel, involved in a bitter labor dispute; tennis shoes by Nike, criticized for not supporting the African-American community; California grapes, which are boycotted for both labor and environmental reasons; and canned tuna, some producers of which continue to kill dolphins There was not a GE lightbulb to be found.

Finally, after months of waiting, I was interviewed live by Deborah Norville. She asked me briefly about the featured products, not dwelling on the reasons for any of the boycotts. My interview lasted all of three minutes.

When I left the studio, heading out into the hallway to catch an elevator, I was finally asked about the GE boycott -- by an NBC janitor. "So how is the INFACT boycott of GE doing?" he asked, apparently [3 (12 PCS/ NRA 689)] having

seen the segment on a monitor. I told him that GE had reportedly lost $60 million in sales because of the boycott, largely from hospitals refusing to buy their medical equipment. "That's the way to hit 'em," he said.

That night (11/26/90), the NBC Nightly News had a segment on the Japanese corporation Matsushita buying MCA, which owns Universal Studios and MCA records. The NBC news correspondent focused on whether the Japanese owner would "interfere in content." He expressed no concerns about U.S. corporations doing the same.

[1 (12 PCS/ NRA 696)]

COLUMBIA JOURNALISM REVIEW
www.cjr.org

MEDIA MONEY

How Corporate Spending Blocked Political Aid Reform & Other Stories of Influence

BY CHARLES LEWIS

In his January 1998 State of the Union address, after decrying the campaign fundraising "arms race," President Bill Clinton proposed a major new policy that would address a big part of the problem--the high cost of campaign commercials. "I will formally request that the Federal Communications Commission act to provide free or reduced-cost television time for candidates," the president said. "The airwaves are a public trust, and broadcasters also have to keep us in this effort to strengthen our democracy." Within twenty-four hours, Federal Communications Commission chairman William Kennard announced that the FCC would develop new rules governing political ads.

But days later, the powerful broadcast corporations and their Capitol Hill allies managed to halt this historic initiative. In the Senate, Senator John McCain of Arizona, the Commerce Committee chairman, and Conrad Burns, a Republican from Montana and the chairman of that panel's communications subcommittee, announced that they would legislatively block the FCC's free-air-time initiative. "The FCC is clearly overstepping its authority here," McCain said. In the House of Representatives, seventeen Republicans--including Majority Whip Tom DeLay, Appropriations chairman Bob Livingston, future House Speaker Dennis Hastert, and Billy Tauzin, chairman of the House Commerce Committee's telecommunications subcommittee -- sent a blunt letter to Kennard: "Only Congress has the authority to write the laws of our nation, and only Congress has the authority to delegate to the Commission programming obligations by broadcasters." John Dingell, the Michigan Democrat and ranking House Commerce Committee member, also sent an opposing letter to Kennard. Faced with the very real threat that his agency's [2 (12 PCS/ NRA 697)] budget would be cut, Kennard had no choice but to retreat from the opposed rule making.

It was a humiliating and metaphorical moment for the FCC. The threat of a shrunken budget and a congressional backlash--"the likes of which would not be pleasant to the Federal Communications Commission under any circumstances" is the way Livingston described it -- was too much for the FCC. Many politicians in power tend to fear free air time for the leg up it would give to challengers. More than that, free air time for political candidates would directly affect the bottom line of a very important industry and Washington player -- the media industry. It would cost broadcasters millions of dollars in lost advertising revenue, and they wee not about to allow a direct affront to their financial self-interest become law. Free air time quickly went from the fast track to the back burner. In a very public way, the agency and the White House had been "rolled like a pancake," recalls former FCC chairman Reed Hundt, Kennard's immediate predecessor.

Indeed, the media's success in handling the threat of free air time for candidates is but one of a stack of pancakes that media companies have rolled in Congress and the White House in recent years. Which is why the media industry is widely regarded as perhaps the most special interest today in Washington.

How do media corporations win friends and influence people in our nation's capital? The old-fashioned way, by using the time-honored techniques with which business interests routinely reap billions of dollars worth of subsidies, tax breaks, contracts, and other favors. They lobby vigorously. They give large donations to political campaigns. They take politicians and their staffs on junkets.

LOBBYING --An investigation by cjr and the Center for Public Integrity found that since 1996, the fifty largest media companies (defined as companies that derive half or more of their revenues from broadcasting, cable operations, publishing, online media, and their content providers) and four of their trade associations have spent $111.3 million to lobby Congress and the executive branch of government. The number of registered, media-related lobbyists has increased from 234 in 1996, the year the historic Telecommunication Act became law, to 284 in 1999. And last year, the amount of money spent on lobbyists was $31,408,965, up 26.4 percent from the $24,835,961 spent in 1996.

[1 (12 PCS/ NRA 862)]

Introduction and Summary: Self Censorship: How Often and Why

Pew Research Center for the People & the Press
Survey Reports

Self Censorship: How Often and Why
Journalists Avoiding the News

Released: April 30, 2000

Introduction and Summary

A Survey of Journalists in Association with Columbia Journalism Review

Self-censorship is commonplace in the news media today, according to a survey of nearly 300 journalists and news executives by the Pew Research Center and the Columbia Journalism Review. About one-quarter of the local and national journalists say they have purposely avoided newsworthy stories, while nearly as many acknowledge they have softened the tone of stories to benefit the interests of their news organizations. Fully four-in-ten (41%) admit they have engaged in either or both of these practices.

The poll of 206 reporters and 81 news executives—150 from local news outlets and 137 from national news organizations--found widespread concern over commercial and competitive pressures. As a result of these pressures, say journalists, good stories all too frequently are not pursued.

There is general agreement about the extent of the self-censorship and its principal causes. Market pressures--manifested when newsworthy stories are avoided because they are too boring or complicated--are seen as the most common factor. Majorities in the print and broadcast media acknowledge that newsworthy stories are often or sometimes avoided because of their complexity or lack of audience appeal.

Nearly eight-in-ten (77%) say stories that are seen as important but dull are often (27%) or sometimes avoided (50%). A majority (52%) also says that overly complex stories are at least sometimes ignored. Fewer but still significant percentages report that such stories are not pursued because they conflict with organizational interests. More than one-third [2 (12 PCS/ NRA 863)] (35%) say news that would hurt the financial interests of a news organization often or sometimes goes unreported, while slightly fewer (29%) say the same about stories that could adversely affect advertisers.

The survey highlights the difficult challenges faced by local journalists in the increasingly competitive media environment. About one-third (32%) of local reporters acknowledge they have softened the tone of a news story on behalf of the interests of their news organization; only 15% of those in the national media say they have done so. And 26% of local reporters say they have been told to avoid a story because it was dull or overly complicated, but suspect the real reason for the decision was that the story could harm their company's financial interests. Just 2% of national reporters harbor such suspicions.

Investigative journalists, who were surveyed separately from the local and national reporters and editors, are most likely to cite the impact of business pressures on editorial decisions. Fully half of this group -- drawn from members of Investigative Reporters and Editors (IRE) -- say newsworthy stories are often or sometimes ignored because they conflict with a news organization's economic interests. More than six-in-ten (61%) believe that corporate owners exert at least a fair

amount of influence on decisions about which stories to cover; 51% of local journalists and just 30% of national journalists agree. Since this group is comprised of members of IRE, and thus does not represent a cross-section of journalists, its responses are not included in the total.

Broadcasters Cite Audience Factors

The reasons for avoiding stories can be many and varied. Often, time-starved reporters say they simply do not have the opportunity to follow up on important subjects. But market forces are seen as the primary reason why worthwhile stories are not pursued, and this factor is especially prevalent in the broadcast arena.

Three-quarters of national broadcast journalists (and nearly six-in-ten of their local counterparts) say newsworthy stories are at least sometimes ignored because they are regarded as too complicated for the average person. Print journalists, both local and national, are far less likely to cite this as a factor.

In general, local journalists and news executives cite conflicts of interests--financial and otherwise--more often than their national colleagues. In particular, more local than national print reporters say stories that are damaging to the financial interests of news organizations are commonly or sometimes avoided. At the local level, print reporters and executives are about as likely as broadcast news professionals to cite this as a reason for ignoring stories. But among national journalists, broadcasters cite this as more of a factor than print reporters.

Perhaps surprisingly, peer pressure -- fear of embarrassment or potential career damage -- is mentioned by about half of all journalists as a factor for avoiding newsworthy stories. But the survey finds little evidence that journalists steer clear of newsworthy stories because they [3 (12 PCS/ NRA 864)] might aggravate community problems. Only about one-in-five (19%) of all journalists say newsworthy stories are often or sometimes avoided for this reason.

Journalists say that, typically, they do not decide on their own to avoid newsworthy stories. More than half of those who think stories are sometimes ignored (54%) say they either get signals from their bosses to avoid such stories (30%) or ignore them based on how they think their bosses would react (24%). Of those who believe newsworthy stories are being ignored to protect corporate interests, fully three-quarters say journalists get signals or anticipate negative reactions from superiors, and just 8% say journalists decide to avoid such stories completely on their own.

Suspicions, Some Unfounded

Just as journalism is often more art than science, the process of determining when, why and even whether good stories are being ignored is an imperfect one--as journalists themselves freely admit. A strong majority (58%) says that journalists at least sometimes wrongfully suspect stories are killed or buried because of conflicts of interest, when the stories in question simply lack merit.

On the other hand, the survey provides considerable evidence that at least for some journalists, there has been an unmistakable intrusion of commercial interests into newsroom decisions. For instance, about one-in-five local (20%) and national (17%) reporters say they have faced criticism or pressure from their bosses after producing or writing a piece that was seen as damaging to their company's financial interests.

Overall, journalists have a more pessimistic attitude toward their profession than in the Pew Research Center's last major poll of journalists in early 1999. More local journalists report influence by corporate owners and advertisers in decisions on which stories to cover. And on the question of whether the media does a good job of informing the public, both local and national journalists give themselves poorer marks than last year.

At that time, about half of national (49%) and local (55%) journalists said the news business did a good or excellent job of balancing journalism's twin goals of telling the public what it wants to know and what it needs to know. Now, only 37% of national journalists and 35% of local journalists give the profession high marks, with majorities in both groups saying the media does only a fair job at this crucial task.

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[Graphics entitled *Three Kinds of Self-Censorship* and *Pressures to Avoid Stories* omitted]

[1 (12 PCS/ NRA 885)]

NRA Television Advertisement Addressing the Brady Bill
As Aired in 1994

*** From NRA-ACK 0001. *See* Videotape Attached as NRA App. A.**

There's a better way than Brady to check gun buyers, the Staggers Instant Check Bill. The only one that requires criminal record checks to catch felons buying guns, the only one that keeps police free to fight crime, the only one that computerizes criminal records, so its fair to honest citizens. The Justice Department agrees and so will **your Congressman,**[*] if you call now. Ask for something better or you'll get something worse.

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[*] Reference to candidate for federal office is in bold.

[1 (12 PCS/ NRA 886)]

NRA Television Advertisement Addressing the Crime Bill
As Aired in 1994

*** From NRA-ACK 0001. *See* Videotape Attached as NRA App. A.**

Crime Bill 1:

What President Clinton's not telling you about the Crime Bill should be a crime. He says it'll put a 100,000 new police in the street, it's not true, it would only fully fund 20,000 police, that's only one new officer for every police department in the Nation. In fact, it hires two social workers for every one cop. Before they spend your money, call **your Congressman,**[*] because what they're not telling you about the crime bill should be a crime.

***Crime Bill 2*:**

What President Clinton's not telling you about the Crime Bill should be a crime, such as who it really protects. Oh, it protects the rights of convicted killers from years of death row appeals and even protects the privacy of the violent sexual predator released in your town. They don't tell you or even his victim that he's there. So who does it protect? Ask **your Congressman**, because what they're not telling you about the crime bill, should be a crime.

Crime Bill 3:

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[*] References to candidates for federal office appear in bold.

What President Clinton's not telling you about the Crime Bill should be a crime, for example they eliminated mandatory sentences for criminals who use guns, they even want to release drug dealers now serving mandatory prison time and they call this a tough crime bill. Come on, before they spend $33 billion of your tax dollars, call **your Congressman**, because what they're not telling you about the crime bill should be a crime.

***Crime Bill 4*:**

What President Clinton's not telling you about the Crime Bill should be a crime, maybe you think it will put drug dealers behind bars, but instead it could release 10,000 felons from federal prisons onto your streets - drug dealers now serving mandatory prison time. Before they spend $33 billion of your tax dollars, call **your Congressman**, because what they're not telling you about the crime bill should be a crime.

[2 (12 PCS/ NRA 887)]

Crime Bill 5:

What President Clinton's not telling you about the Crime Bill should be a crime, almost a third of the nearly $9 billion goes to social welfare programs, dance lessons, arts and crafts, midnight basketball and kids programs that can teach don't use dirty drug needles, but can't teach thou shalt not kill. Call **your Congressman**, because what they're not telling you about the crime bill should be a crime.

Crime Bill 6:

What President Clinton's not telling you about the Crime Bill should be a crime, he says it'll put 100,000 new police on the streets. It's not true; it would only fully fund 20,000 police, that's only one new officer for every police department in the Nation. In fact, it hires two social workers for every one cop. Before they spend your money, call **your Congressman** because what they're telling you about the crime bill should be a crime.

***Crime Bill 7*:**

What President Clinton's not telling you about the Crime Bill should be a crime, such as who it really protects. Oh, it protects the rights of convicted killers from years of death row appeals and even protects the privacy of the violent sexual predator released in your town. They don't have to tell you or even the victim that he's there. So who does it protect? Ask **your Congressman**, because what they're not telling you about the crime bill should be a crime.

***Crime Bill 8*:**

What President Clinton's not telling you about the Crime Bill should be a crime, for example, they eliminated mandatory sentences for criminals who use guns, they even want to release drug dealers now serving mandatory prison time, and believe this is a tough crime bill. Come on, before they spend $33 billion of your tax dollars, call **your Congressman**, because what they're not telling you about the crime bill should be a crime.

***Crime Bill 9*:**

What President Clinton's not telling you about the Crime Bill should be a crime, maybe you think it'll put drug dealers behind bars, but instead it could release 10,000 felons from federal prisons onto your streets, drug dealers now serving mandatory prison time. Before they spend $33 billion of your tax dollars, call **your Congressman**, because what they're not telling you about the crime bill should be a crime.

[3 (12 PCS/ NRA 888)]

Crime Bill 10:

What President Clinton's not telling you about the Crime Bill should be a crime, almost a third of the nearly $9 billion goes for social welfare programs, dance lessons, arts and crafts, midnight basketball and kids programs that can teach don't use dirty drug needles, but can't teach thou shalt not kill. Call **your Congressman**, because what they're not telling you about the crime bill should be a crime.

Crime Bill 11:

What President Clinton's not telling you about the Crime Bill should be a crime, he says it'll put a 100,000 new police on the streets. It's not true. It would only fully fund 20,000 police, that's only one new officer for every police department in the Nation. In fact, it hires two social workers for every one cop. Before they spend your money, call **your Congressman**, because what they're not telling you about the crime bill should be a crime.

[1 (12 PCS/ NRA 892)]

"CALIFORNIA"
*From NRA-ACK 00005. Videotape attached as NRA App. D.

(As Aired for the NRA in the 60 Days Prior to the 2000 General Election)*

The following is a paid program of the National Rifle Association

Charlton Heston: How often have you heard politicians tell honest gun owners that nobody wants to take away your guns or your Second Amendment rights. You've heard them say they'll never make you a criminal when they register then ban and then confiscate your guns. That'll never happen here they say. Not in America. In England and Australia and Canada, sure. But that can't happen in a free country. That would be outrageous. Well what's outrageous is that it has happened here. Out in California. And it won't stop happening unless you and all freedom-loving Americans get registered to vote and get informed about the candidates and vote on November 7th. As you are about to see, California's gun hating politicians believe with good reason that by bringing

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***(References to candidates for federal office appear in bold).**

California gun owners to their knees, the rest of the nation will soon follow. Please watch.

Interviewee: We in the legislature must have the courage to stand up to the bully on the block, the National Rifle Association.

Interviewee: I'm here today to urge you, all of you, to stand up to the National Rifle Association, to refuse their campaign contributions, to refuse to do their bidding on this issue. If this bill is law, violent deaths will not occur in the State of California next year that otherwise would have. Thank you, congratulations.

[Applause]

Reporter: The stage now set. The strategy in place. California's coalition of anti-gun bureaucrats admitting their outright assault on the Second Amendment and its champion the NRA. The year 1989. The new law, banning a long list of semi-automatic firearms. The first in the country and the model used for the 1994 Clinton-**Gore** assault weapons ban. But California's momentum drives on. In ten years gun control has become a cottage industry expanding the semi-automatic ban this time to include characteristics no just model number or name. One handgun a month. A ban on small affordable handguns. A proposed massive licensing and registration scheme for all new handgun buyers and in L.A. County, a push to ban the sale of ammunition.

Interviewee: Whether it's ammunition or whether its registration or whether it's adding a new firearm to the assault weapon ban, everyone one of them is just another chip away.

Interviewee: Ultimate goal is citizen disarmament. That's what they're pushing towards. None of this has anything to do with crime.

Interviewee: I'm sickened by the things that are being taken from us. That our liberties are being stripped. How are we to protect ourselves?

Reporter: Personal freedoms stolen by misleading politicians pledging false promises.

State Legislator: First let me say what this legislation does not do. It does not infringe on the rights of legitimate sportsmen.

Reporter: False promises that have now turned into cries for prohibition.

State Senator: If people have a weapon like this, the law enforcement officials can confiscate the weapon, charge the individual and then the prosecution could take place.

Interviewee: You can't trust the government anymore. They've always said they'd never do it, there is nothing to worry about, and it's a big fat lie.

Interviewee: Rely on us. The government we'll protect you, we'll take care of you. And it's just a bunch of bull.

Interviewee: Gun control is a bunch of garbage. Used almost entirely to gain political votes. The long-term effect is that we lose a very valuable freedom.

Reporter: A political agenda forcing law-abiding citizens to obey laws that they can't even understand. Laws that have been expanded, re-written and re-defined again and again, but still with no clear definition. Turning gun owners into victims and criminals all at the same time. The result – mass confusion.

Interviewee: I hate to look over my shoulder all the time and worry about am I doing something wrong? They pass so many laws so fast you can't keep up with anything they are doing. Nobody has a clue as what's legal and what isn't legal. An average citizen could sure get locked up in a hurry for having the wrong gun locked up in his trunk or whatever.

Interviewee: The law-abiding citizen, um, who is unfamiliar with the law, they could become instant felons here in a few months. And they're not even gonna know it.

[3 (12 PCS/ NRA 894)]

Interviewee: They're not making anybody any safer. All they're doing is taking people that want to target practice, recreational use of firearms, and making them criminals.

Reporter: Worse yet, when can't concerned gun owners try to find out what's legal and what's not, they can't get an answer. Lawyers admit they're even confounded by the law.

Interviewee: The State of California has had more changes in their interpretations of the new assault weapons law then most of us attorneys can count. They're confused. They don't even know what they're doing.

Reporter: And when gun owners call ATF directly or the California Attorney General's Office, they can't get a straight answer from them either.

Interviewee: You get shuffled through four different people to get an answer and when you do get an answer it's vague.

Reporter: Even California police and Sheriff's deputies are baffled. How can they enforce laws they don't understand and without the manpower they need.

Interviewee: I can walk you in the police department down here and I can get you a hundred, two hundred, cops, and I will bet you a month's salary that less than one percent of them will have any idea if I put two weapons in front of them which is illegal and which is not illegal.

Orange County Sheriff: I have gun owners that will ask me when I'm out giving a speech, this type of weapon, and they'll define it for me, can I carry it? Can I own this weapon? And frankly, I don't know the answer to that question.

Deputy Sheriff: If we spent all of our time trying to enforce all the local, state, federal laws that we have now for firearms and ammunition and the rest, we'd have no time to catch murders, rapists, real, real, criminals. There's so many of those laws and so few of us.

Reporter: The power of confusion and contradiction calculating politicians was the method behind their anti-gun madness. Hassling and harassing gun owners into giving up their guns.

Interviewee: It'll just become too difficult, too difficult, too expensive, too much liability.

Interviewee: Many people are just saying um they've won, I give up, and uh it's not worth owning a firearm.

[4 (12 PCS/ NRA 895)]

Interviewee: The irrational gun laws that we have now are not designed for public safety. They're designed to keep people from entering the shooting sports out of fear.

Interviewee: My daughter, you know, she's six and a half years old now, I would like for her to get into the shooting sports if that's what she wants to do. Five years down the road, is she going to be able to do that? Probably not with the way the legislation is going.

Reporter: America's cherished Second Amendment freedoms now on trial. Haunting images that once seemed worlds away have found a port of entry, California, and the anti-gun forces at work believe if gun owners here can be brought to their knees, the rest of the nation will soon follow.

Interviewee: California is just a testing ground. If they get a foothold here, they have a tremendous impact on the rest of the nation.

Orange County Sheriff: If people think that gun ownership cannot be taken away from them by the simple vote of an elected official, they're wrong.

Interviewee: Eventually, we're just gonna end up like Australia and their crime rate went way up after they took away all the guns.

Interviewee: Better wake up pretty soon. Because they're coming to get em. And it doesn't matter why. It doesn't matter whether they have a good reason, a bad reason, anything else. The tools that they're using in California to advance their agenda here, are going to be shipped out of state. It's coming soon to a neighborhood near you.

Wayne LaPierre: Hello, I'm Wayne LaPierre of the National Rifle Association. If you're outraged at what's happening in California, if you think it's wrong to criminalize gun owners, if you don't want California-style laws imported to your doorstep, then call this number now to join NRA. **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and Reading "Clinton to the Gore"].** Your one-year NRA membership includes a subscription to NRA magazines, a no-fee Mastercard, and special member benefits. But if you call now you'll also get this silver bullet memento engraved with Charlton Heston's signature. It tells the world you're doing your part to keep California madness from infecting our entire country. So call this toll-free number now to get your silver bullet keepsake and join the NRA.

Interviewee: Registration in this case led to confiscation. They confiscated my firearm. No, they didn't break down the door in the middle of the night and come and get my gun. But what they told me is that if you don't turn in the gun we are gonna break down the door and come and get you.

[5 (12 PCS/ NRA 896)]

Reporter: Bill Doss, retired Air Force officer and airline pilot followed the law, but was still declared an instant criminal.

Interviewee: It was always my hope, [crying] my intention, to retire in Oregon.

Reporter: Roy Denney spent his life savings fighting to prove his innocence because the gun he bought 30 years ago suddenly became illegal.

Interviewee: I'm facing a crime now. You've got to be kidding me. I go out there and I uphold the law. I arrest people who are law offenders. By me possessing a weapon, I'm a danger to society?

Reporter: And police officer Steve O'Connor now on the wrong side of the law and at risk of losing his job. All three law-abiding citizens now victims of California's semi-automatic gun ban that has been redefined three times overnight accidental felons in jeopardy of losing their careers, their savings and their peace of mind because California's gun ban amounts to a blank check for gun owner prosecutions and firearm confiscations.

Interviewee: Immediately you're a criminal. For owning by definition an assault weapon which I mean is, it's really a sporting rifle.

Reporter: Looking through these records Bill Doss still can't believe it. When he and his wife decided to move to California, he checked with the authorities to make sure his gun, an SKS Sporter semi-automatic rifle, was still legal. First, he called ATF in Washington.

Interviewee: The agent I talked to was very informative and said not it was not listed and I said, well, uh, can you send me any information? He said sure. He says I'll send you pages out of my ATF manual.

Reporter: This was the document ATF sent to Bill. A page and picture from its official manual verifying that the SKS Sporter was legal. But just to be safe, Bill Doss decided to contact the California Attorney General's Office in Sacramento. He sent along his correspondence from ATF and within ten days Bill got a letter back.

Interviewee: This is the letter from the Attorney General to me saying that the SKS Sporters with a detachable magazine are not an assault weapon in California. So with the cover letter and the drawing annotated O.K., I had every reason to believe that bringing the SKS Sporter into California was a perfectly legal action on my part.

Reporter: Perfectly legal that is until the rules changed because the Attorney General changed his mind and changed the definition of an assault weapon. Suddenly, Bill got this letter warning him that his SKS Sporter was now illegal to own.

[6 (12 PCS/ NRA 897)]

Interviewee: Total confusion. It's like, this is not really addressed to me, it's really not the gun we're talking about, it must be a mistake.

Reporter: But it was no mistake. In the end, Bill did what any honest, law-abiding American would do and these photos are a reminder of a day he'll never forget. The day he turned in his SKS Sporter to the police.

Interviewee: I think mine is a classic case. They had my name as an owner of an SKS Sporter. When it came time for them to redefine the SKS Sporter, they knew where to find me. That's registration.

Reporter: Roy Denney, another victim, because even to this day, California authorities can't agree on what guns are banned and what guns are legal.

Interviewee: I bought that rifle I was charged with in 1971. In 1989 when the law was first passed, that rifle was not even on the list because of the nomenclature that they used. Later, a few months later, they corrected the nomenclature for my gun and it was on the list but I never checked.

Reporter: Roy paid a harrowing price for not knowing. He saw his finances drained along with his emotions. But as Roy's attorney points out, the vagueness and uncertainty that underscores this gun ban may have been put there for a purpose.

Interviewee: This case was not about public safety or keeping bad people from having guns. It was purely politically motivated, uh, to try and harass law-abiding gun owners.

Reporter: Roy Denney made into an example. A stern warning to other gun owners that their freedoms are unwelcome in the State of California. And putting them on notice that Senate Bill 23 could add hundreds of rifles, shotguns and handguns to the list of banned firearms.

Interviewee: The criminal justice system has treated me like I was guilty from the get-go and, uh, I feel very much like a victim. This is a bad law. And SB 23 that was recently passed here in California is gonna make more people like me criminals. Uh, knowingly or unknowingly.

Interviewee: SB 23 can be applied to almost any firearm that's semi-automatic in the State of California. So it will be enforced. It's going to be enforced wrong. It's going to be enforced incorrectly and innocent people are gonna fall into that pit.

Reporter: Innocent people who are also police officers caught in the contradictions of the law. Officer Steve O'Connor knows that first-hand.

[7 (12 PCS/ NRA 898)]

Police Officer: I purchased it before the law was in effect, but the law goes back. It goes back whereas they can take people who lawfully purchased a firearm and prosecute them for a crime that was not a crime when they purchased it.

Reporter: And that's exactly what happened to Officer O'Connor. This is a letter he got from the State Attorney General's Office approving the sale and registration of his firearm under the 1989 gun law. But believe it or not, Office O'Connor is now being accused by his own police department because it claims Officer O'Connor's gun is an illegal assault weapon under that same law. Once again, proving the absurdity of it all. Not even the chief law enforcement officer in California can agree with local police departments about what is or is not illegal.

Police Officer: This is something that potentially could end my career.

Interviewee: I mean I don't know how much more convoluted and screwed up things can get. The bottom line, I mean that's the right word, these people are getting screwed.

Reporter: Law-abiding citizens becoming instant felons and politicians working overtime enacting gun laws no one can understand and drafting definitions no one can define.

Interviewee: Conspicuously protruding pistol grip. They're on three revisions, and they still don't have it clear enough to where the average person can understand what a conspicuously protruding pistol grip is. It's pretty ridiculous.

Reporter: Ridiculous, maybe. But a recent ruling by the California Supreme Court requires every law-abiding citizen to know every nuance of every law. If they don't, they can be prosecuted, sent to prison, no excuses.

Police Officer: I'm incredibly angry about it. I don't, as an officer I don't want to go out and arrest good citizens for "illegal possession of a firearm." I don't agree with it. If you're a good citizen, I don't care what firearm you have, you should be able to own it.

Reporter: The vicious cycle of gun control California style. Politicians and judges who refuse to recognize your individual rights. In fact, California Supreme Court Justice Janice Rogers Brown blatantly admits in a recent opinion that "no mention is made in a State Constitution of a right to bear arms."

Interviewee: Our government just doesn't care anymore about the Second Amendment. I mean, they could care less that there is people out there trying to change our Constitution. They could care less what our forefathers did to get us where we are now.

[8 (12 PCS/ NRA 899)]

Police Officer: And I don't . . . mean to get over philosophical here but so many people died for our freedoms. Why is it that so many people are so quick to give them away? I don't understand that. I really don't.

Reporter: Law-abiding citizens. Victims of registrations schemes and gun bans that erode a basic freedom while at the same time their State Attorney General relishes the right to add to his list of banned firearms virtually whenever he decides. From those who have already felt the long-arm of the law, this disparity should serve as a wake-up call.

Interviewee: Open your eyes. Wake up. It's happening. It's happening whether you want to believe it or not. And, I'm here to tell you that

registration leads to confiscation and I am living proof.

Interviewee: If we don't take a stand now, we may not have the opportunity when they come knocking on our doors and taking them.

Police Officer: If it's happening to me, then it can happen to you. That's the very point. It it's going to happen to anybody in society, and you're worried about just Joe Citizen saying it can't happen to him, well I hate to say it, if it's happening to a police officer, then you're fair game.

Wayne LaPierre: Hello, I'm Wayne LaPierre of the National Rifle Association. If you're outraged at what's happening in California, if you think it's wrong to criminalize gun owners, if you don't want California-style laws imported to your doorstep, then call this number now to join NRA. **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and reading "Clinton to the Gore."].** Your one-year NRA membership includes a subscription to NRA magazines, a no-fee Mastercard, and special member benefits. But if you call now you'll also get this silver bullet memento engraved with Charlton Heston's signature. It tells the world you're doing your part to keep California madness from infecting our entire country. So call this toll-free number now to get your silver bullet keepsake and join the NRA.

Interviewee: What a scapegoat I am. They're trying to blame me for what goes on in this city in the way of crime. Our customers are honest citizens.

Reporter: A blatant and calculated strategy that is forcing Laura Segal to close up the gun shop her family has run for 57 years. A well thought out plan by cities across California burdening businesses with taxes no one can afford to pay and in the end guns no one will be able to buy.

[9 (12 PCS/ NRA 900)]

Interviewee: My business tax used to be a $1.20 per thousand and it got bumped up to $24 per thousand. They don't want gun shops in this city and that's what they're doing. If they can't legislate, they just tax you out of business.

Deputy Sheriff: Their agenda was to eliminate firearms any way they could. This is the easiest way is to tax everything that comes out of the store. I've seen a number of businesses fall in the last ten years.

Interviewee: If we are out of business, there will be no Second Amendment rights.

Interviewee: They are stripping people of their gun ownership rights is what they're doing. If people can't shop at a store like this, they can't buy guns. And that's exactly what their intent is.

Reporter: An assault from all angles. Gun dealers being forced out and competitive shooters who may have to move out for a shot at the Olympic gold. 18-year-old Lauren Santovinez of San Diego already has a record of National and International titles. But she soon may have another record, a criminal one.

Interviewee: I never saw this coming. Just from being a competitive athlete I would be labeled a criminal.

Reporter: Lauren's custom-made target pistol is now categorized as an assault weapon under California's new gun law because of its design. Outlawed just like tens of thousands of other pistols and rifles used by competitive shooters throughout the State.

Interviewee: The law the way it stands now it will probably kill Olympic-style shooting in California.

Reporter: Olympic dreams threatened, but still that doesn't muster much sympathy from the author of this gun ban. In fact, Senator Don Perado of Oakland could only offer Lauren this bit of advice. "If Olympic shooting is her goal, she may be better off living in Texas."

Interviewee: I was kind of offended by that comment because I have my whole life here and at the time I was a high school student and you can't just tell a high school teenager to just go pack off to Texas.

Interviewee: This is totally ridiculous.

State Senator: Our gun laws are making the guns she wants to use in an Olympic competition illegal. That's nuts. That is completely and absolutely nuts.

[10 (12 PCS/ NRA 901)]

Reporter: Olympic athletes now joining the ranks of other law-abiding gun owners who have been labeled instant criminals. Also in the line of fire, handgun owners soon to be victims of a proposed massive licensing and registration scheme. A scheme with just one goal in mind.

Interviewee: To take every gun away there is in the nation. There is no doubt in my mind.

Interviewee: This is the way to confiscation. This is a file card. This is a way to confiscation and the new registration card is set up exactly to give them the proper information to come back later on and seize the gun.

Interviewee: I see eventually they're going to take that list and they're going to come to your door and say where's your gun? They're already registered when you purchase the handgun. Why do they need another list?

Interviewee: I do believe registration would lead to confiscation. It's a perfect paper trail to go right back and say hey you have all these things, we want them.

Interviewee: All guns are gonna end up on their list. They want them totally banned. That's what's eventually gonna happen. I hope I'm not around when it does.

Reporter: Registration and confiscation. A total ban on the rights of honest citizens to own a firearm and an ever-expanding list of gun laws that won't infringe on the ability of criminals to get their guns.

Interviewee: It's posturing politicians. Because we have enough laws in place and they don't enforce the ones they have. What they need to do is clamp down on the people that abuse the system.

Interviewee: If you take somebody that commits a crime with a gun and actually prosecute them and actually put them in jail, well they probably won't do it again. But when you have people that continually commit crime after crime after crime after crime after crime, and they just keep walking away, well when are they gonna take it serious?

Interviewee: If I could say anything to the politicians it would be that you need to start enforcing the laws that are on the books and quit trying to make up new laws that are only gonna affect law-abiding citizens. Go after the criminals.

Sheriff: So, do we need more laws? No. Do we need to enforce the laws we have? Absolutely.

Interviewee: Enforce the laws on the street and just leave my guns alone.

Reporter: This is the upside-down world of gun control being played out in California. Where plenty of politicians and police chiefs, like L.A.'s Chief Bernard Parks, [11 (12 PCS/ NRA 902)] still insist on banning all small or portable handguns and push mandatory registration to help combat crime. But the U.S. Supreme Court has already made it very clear in *Haines v. U.S.* that convicted felons can't be required to register a firearm. Because it's a violation of their Fifth Amendment rights. Self-incrimination. So who's kidding who?

Interviewee: It's only the law-abiding citizens who are gonna have their guns confiscated. That have to go through all this extra registering. The criminals don't have to do it.

Interviewee: Well since when did they get all the rights and I don't have any? That's my problem. It's all backwards, completely turned around. The criminals have all the rights and the honest citizen has none.

Reporter: A dangerous game of politics that only denies the law-abiding their right to protect themselves from a system that refuses to.

Interviewee: How are we going to be protected? Especially someone like me who lives out in the backcountry and there is no law out there until they get there.

Interviewee: What you end up doing is make it so that the criminal has the advantage. Now if the police could be at your house in 20 to 30 seconds every single time you call them, this wouldn't be a problem. But they can't.

Reporter: In fact, Los Angeles, a leader in the victim disarmament movement, has seen its violent crime rate jump 7.5 percent in the past year. Proof it's gun control schemes have backfired.

Interviewee: I really predicted a bleak future and no new laws are gonna stop that. The criminals are gonna do what they always have done and what they want to do and crime is gonna go up.

State Senator: It typifies the mindset that your constitutional rights, your freedoms are irrelevant. It's whatever we the government want to do and we're gonna go after you. Regardless.

Reporter: Laws that aren't being enforced and a political agenda forcing honest citizens into obeying laws they don't understand. Calculated confusion led by an unholy alliance of anti-gun politicians and trial lawyers.

State Senator: Without question, once they figure they've gotten all the guns away, the political will to eliminate the Second Amendment will be there.

[12 (12 PCS/ NRA 903)]

Interviewee: This is not a case of the camel's nose under the tanter of the slippery slope, these are people who are pushing an agenda, who are well-financed by the liberal foundations making multi-million dollar block grants and who have the media in their pockets.

Reporter: California gun owners now realizing their worst nightmare. Registration is not the end, it's just the beginning of the end.

Interviewee: I believe in my heart that the State of California, the politicians, want to remove all firearms from the homes of our citizens.

Interviewee: If you get California to go along and fall in line, then pretty much they feel they could just start working state by state by state.

Reporter: That's why this election season those who have lived it have a resounding compelling warning for Americans concerned about protecting their personal freedoms.

Interviewee: What happens in California, watch out. It's gonna hit the other 50 states through our federal government later. So if we can't stop it in California, we're in trouble.

Interviewee: Just better wake up and start fighting for your rights because they're gonna come and take your guns away. It's what it boils down to.

Interviewee: You need to protect your rights. 'Cause if they take away your guns they're gonna take away your other liberties eventually.

Interviewee: Vote. Vote for the people that are on our side.

Interviewee: I think that what the gun owners need to do is to be organized and probably the best way is to join the National Rifle Association and support it the best they can.

Police Officer: Of course, I strongly suggest you get involved in the NRA.

Interviewee: Well, if it wasn't for the NRA, we would have total gun confiscation today.

Interviewee: Join the NRA.

Deputy Sheriff: Tell the average citizen, tell the city council, tell elected officials, tell the government that you do not want your rights infringed.

[13 (12 PCS/ NRA 904)]

Deputy Sheriff: Their rights to own a firearm is under attack and the only way they are going to circumvent that system is to go to the polls and vote for those people that will support the Second Amendment rights.

Wayne LaPierre: Hello, I'm Wayne LaPierre of the National Rifle Association. If you're outraged at what's happening in California, if you think it's wrong to criminalize gun owners, if you don't want California-style laws imported to your doorstep, then call this number now to join NRA. **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and reading "Clinton to the Gore."].** Your one-year NRA membership includes a subscription to NRA magazines, a no-fee Mastercard, and special member benefits. But if you call now you'll also get this silver bullet memento engraved with Charlton Heston's signature. It tells the world you're doing your part to keep California madness from infecting our entire country. So call this toll-free number now to get your silver bullet keepsake and join the NRA.

The preceding was a paid program of the National Rifle Association.

[1 (12 PCS/ NRA 905)]

TODAY SHOW INTERVIEW OF BILL CLINTON

***From NRA-ACT 17894. *See* videotape attached as NRA App. C.**

Narrator: From NBC News this is Today with Katie Couric and Matt Lauer.

K. Couric: On Close-up this morning the President of the United States. We wanted to talk with him about this weeks shooting. President Clinton joins us now - live - from the Roosevelt Room in the White House. Mr. President thank you so much joining us.

President Clinton: Good morning, Katie.

K. Couric: Good Morning. Let me ask you first of all, when you heard the story of a six-year old boy, in Michigan, a first grader, bringing a gun to school and shooting to death his six-year old classmate. What was your reaction?

President Clinton: Well first I think I had a normal human reaction, I didn't respond as President, I was just -- as a parent I was heartbroken and then I was angry. I thought, you know, how did this child get the gun in the first place. What's a six-year old doing with a gun.

K. Couric: When something like this happens politicians often jump on it as an excuse for more gun control. But I know that Mr. President you're very proud of pointing out that gun deaths have dropped to their lowest levels in more than 30 years in this country. So, should we view this more as a tragedy than a reason to call for more gun control?

President
Clinton: Well, it's both. The gun death rate has dropped to its lowest point in thirty years, but its still by far the highest of any advanced nation in the world, and if we had passed the child trigger lock provision and we applied it to all new guns, then at least those guns would not be used by six-year olds to kill other six-year olds. I think that's very important and that's a part of this bill which also closes the gun show loophole in the background check law, bans the import of large ammunition clips, that the Congress has had for eight months now with no action. So, I am, I'm gonna call the leaders of both parties in both Houses and ask them to come down here and break the logjam. There's been a House version and a Senate version to this bill for eight months and they have done nothing and meanwhile 13 kids everyday, every single day, there are 13 children who die from guns in this country. So I do think we need more legislation.

[2 (12 PCS/ NRA 906)]

K. Couric: Well, why is it locked in committee, why has it been stalemated, and when would you like them to come to the White House?

President

Clinton: Well, I think it has been locked in committee because the Senate, the Vice President cast the tie-breaking vote in the Senate, so we've got a tough bill in spite of fierce lobbying against it by the NRA and the two Houses can't resolve their differences, but maybe this tragic death will help. I mean, we need these child trigger locks on the new handguns. That will begin to make a big difference and then in this year's budget I've asked them to fund some more research into smart gun technology which would enable us to have guns that could only be fired by the adults who own them. That also would be a big advance. We had, one of the things that is being debated in Michigan is whether there should be a parental accountability provision. So we had provisions in our law for that so that all states would have these laws, several do, but most don't. And those were taken out, so maybe they'll be revisited in the conference as well. But the main thing is, if we can just get the child trigger locks and fund investment in the smart gun technology, I think we'll be a long way down the road. Of course, I think ultimately what we ought to do is license handgun owners, the way we license people who drive cars. I think that is the critical next step. And I hope that we will consider that as well. Now,

K. Couric: Let me ask you.

President
Clinton: this guy stole a gun apparently, that's the allegations in the house where the child took

it, but it would clearly make a big difference in the future to peoples' lives.

K. Couric: Let me deal with some of those issues that you just raised Mr. President. What about registering guns, all Americans are required to register their cars, why not require them to register guns?

President Clinton: Well I, you could do that, but the problem is there are over 200 million guns out there, some say 250 million guns out there now, and most of the experts with whom I've talked before I made my proposal believe that if we required all hand gun owners to be licensed, we could achieve the same results, that is whether you've got an old gun or you're buying a new gun, if people could come in when they do get new guns and get a license, I believe we would have the same result. I'm not sure practically that we could get all the guns registered in this country because there are so many out there already, so I'd like to begin with that, you know, keep in mind, we had all those kids besides Columbine and when I fought for the Brady Bill, which has kept a half a million fellow fugitives and stalkers from [3 (12 PCS/ NRA 907)] getting guns and the assault weapons ban about somewhere between 8 and 12 members of Congress were defeated in the next election by the NRA because they voted for that, and then when all those kids were killed in Columbine I thought surely we can close the gun show loopholes, have the child safety locks, and maybe have the parental responsibility provisions and ban ammunition clips and both those have been lingering for 8 months, I don't think that most Americans have any idea what a strangle-hold the NRA has had on this Congress and the people in our party have taken the lead with a few brave Republicans in trying to fight for sensible legislation. But we need the public aroused on this; we need the public to be heard. I would not be opposed to registering guns as well, but I just want you to understand that there are practical problems with that and you get most of the benefit if you license the gun owners. So I would like to see a start with that.

K. Couric: When it comes to licensing, Mr. President, Wayne LaPierre, whom you know is Executive Vice President of the NRA said "Criminals aren't going to stand in line to get their photos taken, they're not going to stand in line, stand rather for licenses, you're walking way out on a limb."

President Clinton: Well, you could say that about people with automobile licenses, too. But when people don't have gun licenses, and they're found with guns, then they're in violation of a law for that. Very often you can get them before they commit a crime. This is, if the facts as they've been reported are true about the tragic circumstances in which this six-year old boy lived, and had the even more tragic consequence of killing that totally innocent young girl, this man apparently stole that gun, but the point is he could never get a license to carry a hand gun.

K. Couric: But, meanwhile, is it practically possible to check every gun owner in America to see if he or she is carrying a license?

President Clinton: Well, none of these things will happen instantaneously overnight. But yet they will begin to make a difference. Look, when we passed the Brady Bill, Katie, let me remind you, people said well this won't make any difference because criminals don't get their guns at gun stores. Turned out a lot of them did, it turned out we were able to deny 500,000 people who were trying to buy handguns the right to do so, because they were felons, fugitives and stalkers. Now there are a lot of kids alive and there are a lot of adults alive in America because we did that. Now a lot of them are using the gun shows and these urban flea markets, if we close that loophole, do the background check there, license new hand guns, license, excuse me, license hand gun owners, and put safety locks, these trigger locks, on the guns to protect the kids, and then the next big step is to [4 (12 PCS/ NRA 908)] technologically develop guns that can only be fired by their lawful owners. We can turn this situation around, but you know, like I said we got over 200 million guns out there were losing 13 kids a day, the accidental rate of children, that's another thing I'd like the American people to think about. The rate of kids being killed by accidents with guns is 9 times higher in America than that of the next 24 biggest countries combined, combined. So we have not done nearly enough and we need to identify these things and just systematically go do them. None of them interfere with the right of any lawful citizen to hunt or to engage in sport shooting. And it is an unbelievable thing after what we saw clearly at Columbine and all the problems that were there, that 8 months have gone by and the Congress can't act and the reason they can't act is because the heat the NRA has put on them.

K. Couric: Mr. President why haven't you publicly asked gun manufacturers to produce these so-called smart guns voluntarily?

President Clinton: Oh, I have. We've worked, and let me say, we're getting some support from responsible gun manufacturers, many of them have already said they want to put the child safety locks on their new guns, many of them are engaged in this technology but what I want to do is to have the government also fund some of the research just as we funded the initial research that led to the internet, just as we fund the initial research that is leading to secrecy of the human gene element. A lot of this basic research to solve big national problems often starts with government funding. So I'd like to see the government [do] its part, but I have asked the gun manufacturers to do so and some of the responsible manufacturers have already said yes we're gonna go with the child safety locks and we want this smart gun technology. I just think we ought to get there as quickly as we can which is why I want the government to invest as well.

K. Couric: All the presidential candidates seem to agree on this point, so you would think it could be accomplished. What is the NRA's biggest beef in your estimation about the technology that would enable only the person who owns the gun to actually fire it?

President Clinton: Well, first of all, I don't think that's accurate that all the presidential candidates do.

K. Couric: Well, George W. Bush favors trigger locks, I understand.

President Clinton: This morning..

[5 (12 PCS/ NRA 909)]

K. Couric: Pardon

President Clinton: This morning but Senator McCain voted against the Brady Bill.

K. Couric: But he says he favored technology that would enable the gun user to wear a special bracelet; he said that last night.

President Clinton: Yeah, but they were against the Brady Bill, they're against extending, closing the gun show loophole. They're against the licensing of handgun owners. Now, you know, but nobody could be against technology, so I hope that we can get a hundred percent of the

Congress to at least vote for the research of the new technology.

K. Couric: What is the NRA's biggest beef about smart guns?

President Clinton: I don't know that they'll be against smart guns, but they're basically against anything that requires anybody to do anything as a member of society that helps to make it safer, that is, if they were making this argument on car licensing or licensing of car drivers, they would say that everybody has an individual right to drive a car and therefore no lawful car owner should be required to undergo the terrible burden of getting a car license because they're are some people who are irresponsible and shouldn't be driving cars. I mean that's the essential argument they're making, they're saying guns are special, guns are different than cars and the rights of individual citizens are far, far more important than the safety of society as a whole. That's their argument, and I just disagree with them.

K. Couric: An NRA spokesman actually told us last night, that this isn't about making guns safer, its about prosecuting criminals and that your Justice Department hasn't done enough in that area.

President Clinton: Well, we've increased gun prosecution since I've been here, and we have a lot of people in jail for it. All I can tell you is we have a higher percentage of people in jail than all the other advance countries, and they have a lower gun death rate, why is that? That's because they don't have an NRA in their country, and they take sensible steps to protect children and society as a whole from people having guns who shouldn't have them doing things they shouldn't do with them. You gotta keep guns away from criminals and children if you want a safe society. Look, if the NRA were arguing years ago in this vein, they'd be against airport metal detectors because, after all, everybody, most people that go through airport [6 (12 PCS/ NRA 910)] metal detectors are innocent, why should we burden them with having to go through and empty their pockets and take out their money clips and all that because there's just a few criminals around and you know you're interfering with their individual rights to walk on an airplane. I mean that's the argument they make, you shouldn't burden an individual law abiding handgun owner because most of them are lawful, just because there are few criminals. But the point is that society takes steps with speed limits, with licensing laws, with airport metal detectors and any number of other ways. There were we all make a little bit of sacrifice and time and effort to comply with the system, that makes us all freer and we still get to do our lawful activity. So I just think they're wrong about this, they're saying that guns are different, guns are different than cars, and guns are different than any other area of our national life where we seek for common safety. We protect ourselves from the people who would abuse our liberty, abuse our freedom and abuse our safety. And I just

think they're wrong about this and I hope that a majority of the Congress will agree and I hope that more and more members of the Republican Party will agree. As I say, we have had some few brave members of the Republican party that have joined the vast majority of Democrats in trying to responsibly deal with this without in any way undermining the right of people to do legitimate hunting or sports shooting activities. And we can do this; we can make America a lot safer.

K. Couric: Mr. President, before we go in closing, when do you plan to invite congressional leaders to the White house to discuss the juvenile justice bill?

President Clinton: Well, I'd like them to come down next week as soon as we can set it up, because we're running out of time, we need to get out of this terrible log jam and I hope these tragedies will give a little impulse, a profound sense of obligation to do that. Again, I say, nobody's trying to interfere with individual rights here, what we're trying to do is promote the common safety of the American people, and we're not nearly safe enough, all you've gotta do is look at these incidents. Can we eliminate every problem? No. Is there is silver bullet that will solve it overnight? No. Can we save a lot of lives including a lot of children, 13 every day, 13 funerals a day? You bet we can, and we ought to.

K. Couric: Mr. President, again, thank you very, very much for spending some time with us this morning, we really appreciate it.

President Clinton: Thank you, Katie.

[1 (12 PCS/ NRA 917)]

"It Can't Happen Here"

***From NRA-ACK 00012. *See* Videotape attached as NRA App. E.**

(As Aired for the NRA in the 60 Days Prior to the 2000 General Election)[*]

Charlton Heston: It's been a long time since Americans fought a border war. Well there's one under way, I doubt you knew about. But in a few minutes you will. It's the struggle to keep our American shores free of the anti-gun epidemic that's swept through much of the world. Around the globe countries have been systematically disarming their citizens leading to higher crime rates, deaths of innocents and government oppression of human rights in countries as diverse as England, Australia, South Africa, Brazil, Canada and many more. That contagion has broken through our borders in the State of California, which is now controlled by newly-elected gun-hating politicians with national ambitions. And our gun forces believe with good reason that if they can bring California gun owners to their knees, the rest of the nation will soon follow. Please watch.

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[*] **(References to candidates for federal office appear in bold).**

Legislator: We in the legislature must have the courage to stand up to the bully on the block, the National Rifle Association.

Speaker: I'm here today to urge you, all of you, to stand up to the National Rifle Association, to refuse their campaign contributions, to refuse to do their bidding on this issue.

Speaker: If this bill is law, violent deaths will not occur in the State of California next year that otherwise would have. Thank you. [Applause]. Congratulations.

Reporter: The stage now set. The strategy in place. California's coalition of anti-gun bureaucrats admitting their outright assault on the Second Amendment and its champion the NRA. The year 1989. The new law, banning a long list of semi-automatic firearms. The first in the country and the model use of the 1994 Clinton-**Gore** assault weapons ban. But California's momentum drives on. In ten years gun control has become a cottage industry expanding the semi-automatic ban this time to include characteristics not just model number or name. One handgun a month. A ban on small affordable handguns. A proposed massive licensing and registration scheme for all new handgun buyers and in L.A. County, a push to ban the sale of ammunition.

Interviewee: Whether it's ammunition or whether its registration or whether it's adding a new firearm to the assault weapon ban, everyone one of them is just another chip away.

[2 (12 PCS/ NRA 918)]

Interviewee: Ultimate goal is citizen disarmament. That's what they're pushing towards. None of this has anything to do with crime.

Interviewee: I'm sickened by the things that are being taken from us. That our liberties are being stripped. How are we to protect ourselves?

Reporter: Personal freedoms stolen by misleading politicians pledging false promises.

State Legislator: First let me say what this legislation does not do. It does not infringe on the rights of legitimate sportsmen.

Reporter: False promises that have now turned into cries for prohibition.

Interviewee: If people have a weapon like this, the law enforcement officials can confiscate the weapon, charge the individual and then the prosecution could take place.

Interviewee: You can't trust the government anymore. They've always said they'd never do it, there is nothing to worry about, and it's a big fat lie.

Interviewee: Rely on us. The government we'll protect you, we'll take care of you. And it's just a bunch of bull.

Interviewee: Gun control is a bunch of garbage. Used almost entirely to gain political votes. The long-term effect is that we lose a very valuable freedom.

Reporter: A political agenda forcing law-abiding citizens to obey laws that they can't even understand. Laws that have been expanded, re-written and re-defined again and again, but still with no clear definition. Turning gun owners into victims and criminals all at the same time. The result – mass confusion.

Interviewee: I hate to look over my shoulder all the time and worry about am I doing something wrong? They pass so many laws so fast you can't keep up with anything they are doing. Nobody has a clue as what's legal and what isn't legal.

Interviewee: An average citizen could sure get locked up in a hurry for having the wrong gun locked up in his trunk or whatever.

Interviewee: The law-abiding citizen, um, who is unfamiliar with the law, they could become instant felons here in a few months. And they're not even gonna know it.

Interviewee: They're not making anybody any safer. All they're doing is taking people that want to target practice, recreational use of firearms, and making them criminals.

[3 (12 PCS/ NRA 919)]

Reporter: Worse yet, when concerned gun owners try to find out what's legal and what's not, they can't get an answer. Lawyers admit they're even confounded by the law.

Interviewee: The State of California has had more changes in their interpretations of the new assault weapons law then most of us attorneys can count. They're confused. They don't even know what they're doing.

Reporter: And when gun owners call ATF directly or the California Attorney General's Office, they can't get a straight answer from them either.

Interviewee: You get shuffled through four different people to get an answer and when you do get an answer it's vague.

Reporter: Even California police and Sheriff's deputies are baffled. How can they enforce laws they don't understand and without the manpower they need.

Interviewee: I can walk in the police department down here and I can get you a hundred, two hundred, cops, and I will bet you a month's salary that less than one percent of them will have any idea if I put two weapons in front of them which is illegal and which is not illegal.

Orange County Sheriff: I have gun owners that will ask me when I'm out giving a speech, this type of weapon, and they'll define it for me, can I carry it? Can I own this weapon? And frankly, I don't know the answer to that question.

Deputy Sheriff: If we spent all of our time trying to enforce all the local, state, federal laws that we have now for firearms and ammunition and the rest, we'd have no time to catch murderers, rapists, real, real, criminals. There's so many of those laws and so few of us.

Reporter: The power of confusion and contradiction. Calculating politicians was the method behind their anti-gun madness. Hassling and harassing gun owners into giving up their guns.

Interviewee: It'll just become too difficult, too difficult, too expensive, too much liability.

Interviewee: Many people are just saying um they've won, I give up, and uh it's not worth owning a firearm.

Interviewee: The irrational gun laws that we have now are not designed for public safety. They're designed to keep people from entering the shooting sports out of fear.

[4 (12 PCS/ NRA 920)]

Interviewee: My daughter, you know, she's six and a half years old now, I would like for her to get into the shooting sports if that's what she wants to do. Five years down the road, is she going to be able to do that? Probably not with the way the legislation is going.

Reporter: America's cherished Second Amendment freedom is now on trial. Haunting images that once seemed worlds away have found a port of entry, California, and the anti-gun forces that believe if gun owners here can be brought to their knees, the rest of the nation will soon follow.

Interviewee: California is just a testing ground. If they get a foothold here, they have a tremendous impact on the rest of the nation.

Orange County Sheriff: If people think that gun ownership cannot be taken away from them by the simple vote of an elected official, they're wrong.

Interviewee: Eventually we're just gonna end up like Australia and their crime rate went way up after they took away all the guns.

Interviewee: Better wake up pretty soon. Because they're coming to get'em. And it doesn't matter why. It doesn't matter whether they have a good reason, a bad reason, anything else.

Interviewee: The tools that they're using in California to advance there agenda here, are going to be shipped out of state. It's coming soon to a neighborhood near you.

NRA Spokesman: If you want the Bill of Rights to survive the election of our lifetimes, call and join the NRA now. **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and reading**

"Clinton to the Gore"]. Your one-year NRA membership includes a subscription to NRA magazines, a no-fee MasterCard and special member benefits. **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and reading "Clinton to the Gore"].** But if you call now you'll also get this silver bullet memento engraved with Charlton Heston's signature. It tells the world you're doing your part in this election year to preserve firearm freedom. Because this may be the last chance for gun owners to unite against the gun-hater's campaigns. Think about it. Nobody's gonna fight for your rights like the NRA. From state capitals to Congress to the White House, but only if gun owners like you stand up now with your voice and your vote and your membership. So call this toll free number now to get your silver bullet keepsake and join the NRA.

Interviewee: Registration in this case led to confiscation. They confiscated my firearm. No, they didn't break down the door in the middle of the night and come and get my [5 (12 PCS/ NRA 921)] gun. But what they told me is that if you don't turn in the gun we are going to break down the door and come and get you.

Reporter: Bill Doss, retired Air Force officer and airline pilot followed the law, but was still declared an instant criminal.

Interviewee: It was always my hope, my intention, to retire in Oregon.

Reporter: Roy Denney spent his life savings fighting to prove his innocence because the gun he bought 30 years ago suddenly became illegal.

Interviewee: I'm facing a crime now. You've got to be kidding me. I go out there and I uphold the law. I arrest people who are law offenders. By me possessing a weapon, I'm a danger to society?

Reporter: And police officer Steve O'Connor now on the wrong side of the law and at risk of losing his job. All three law-abiding citizens now victims of California's semi-automatic gun ban that has been redefined three times. Overnight accidental felons in jeopardy of losing their careers, their savings and their peace of mind because California's gun ban amounts to a blank check for gun owner prosecution and firearm confiscation.

Interviewee: Immediately you're a criminal. For owning by definition an assault weapon which I mean is, it's really a sporting rifle.

Reporter: Looking through these records Bill Doss still can't believe it. When he and his wife decided to move to California, he checked with the authorities to make sure his gun, an SKS Sporter semi-automatic rifle, was still legal. First, he called ATF in Washington.

Interviewee: The agent I talked to is very informative and said no it was not listed and I said, well, uh, can you send me any information? He said sure. He says I'll send you pages out of my ATF manual.

Reporter: This was the document ATF sent to Bill. A page and picture from its official manual verifying that the SKS Sporter was legal. But just to be safe, Bill Doss decided to contact the California Attorney General's Office in Sacramento. He sent along his correspondence from ATF and within ten days Bill got a letter back.

Interviewee: This is the letter from the Attorney General to me saying that the SKS Sporter with a detachable magazine are not an assault weapon in California. So with the cover letter and the drawing annotated O.K., I had every reason to believe that bringing the SKS Sporter into California was a perfectly legal action on my part.

[6 (12 PCS/ NRA 922)]

Reporter: Perfectly legal that is until the rules changed because the Attorney General changed his mind and changed the definition of an assault weapon. Suddenly, Bill got this letter warning him that his SKS Sporter was now illegal to own.

Interviewee: Total confusion. It's like, this is not really addressed to me, it's really not the gun we're talking about, it must be a mistake.

Reporter: But it was no mistake. In the end, Bill did what any honest, law-abiding American would do and these photos are a reminder of a day he'll never forget. The day he turned in his SKS Sporter to the police.

Interviewee: I think mine is a classic case. They had my name as an owner of an SKS Sporter. When it came time for them to redefine the SKS Sporter, they knew where to find me. That's registration.

Reporter: Roy Denney, another victim, because even to this day, California authorities can't agree on what guns are banned and what guns are legal.

Interviewee: I bought that rifle I was charged with in 1971. In 1989 when the law was first passed, that rifle was not even on the list because of the nomenclature that they used. Later, a few months later, they corrected the nomenclature for my gun and it was on the list but I never checked.

Reporter: Roy paid a harrowing price for not knowing. He saw his finances drained along with his emotions. But as Roy's attorney points out, the vagueness and uncertainty that underscores this gun ban may have been put there for a purpose.

Interviewee: This case was not about public safety or keeping bad people from having guns. It was purely politically motivated, uh, to try and harass law-abiding gun owners.

Reporter: Roy Denney made into an example. A stern warning to other gun owners that their freedoms are unwelcome in the State of California. And putting them on notice that Senate Bill 23 could add hundreds of rifles, shotguns and handguns to the list of banned firearms.

Interviewee: The criminal justice system has treated me like I was guilty from the get-go and, uh, I feel very much like a victim. This is a bad law. And SB 23 that was recently passed here in California is gonna make more people like me criminals. Uh, knowingly or unknowingly.

Interviewee: SB 23 can be applied to almost any firearm that's semi-automatic in the State of California. So it will be enforced. It's going to be enforced wrong. It's going to be enforced incorrectly and innocent people are gonna fall into that pit.

Reporter: Innocent people who are also police officers caught in the contradictions of the law. Officer Steve O'Connor knows that first-hand.

[7 (12 PCS/ NRA 923)]

Police Officer: I purchased it before the law was in effect, but the law goes back. It goes back whereas they can take people who lawfully purchased a firearm and prosecute them for a crime that was not a crime when they purchased it.

Reporter: And that's exactly what happened to Officer O'Connor. This is a letter he got from the State Attorney General's Office approving the sale and registration of his firearm under the 1989 gun law. But believe it or not, Office O'Connor is now being accused by his own police department because it claims Officer O'Connor's gun is an illegal assault weapon under that same law. Once again, proving the absurdity of it all. Not even the chief law enforcement officer in California can agree with local police departments about what is or is not illegal.

Police Officer: This is something that potentially could end my career.

Interviewee: I mean I don't know how much more convoluted and screwed up things can get. The bottom line, I mean that's the right word, these people are getting screwed.

Reporter: Law-abiding citizens becoming instant felons and politicians working overtime enacting gun laws no one can understand and drafting definitions no one can define.

Interviewee: Conspicuously protruding pistol grip. They're on three revisions, and they still don't have it clear enough to where the average person can understand what a conspicuously protruding pistol grip is. It's pretty ridiculous.

Reporter: Ridiculous, maybe. But a recent ruling by the California Supreme Court requires every law-abiding citizen to know every nuance of every law. If they don't, they can be prosecuted, sent to prison, no excuses.

Police Officer: I'm incredibly angry about it. I don't, as an officer I don't want to go out and arrest good citizens for "illegal possession of a firearm." I don't agree with it. If you're a good citizen, I don't care what firearm you have, you should be able to own it.

Reporter: The vicious cycle of gun control California style. Politicians and judges who refuse to recognize your individual rights. In fact, California Supreme Court Justice Janice Rogers Brown blatantly admits in a recent opinion that "no mention ~~is made~~ in a State Constitution of a right to bear arms."

Interviewee: Our government just doesn't care anymore about the Second Amendment. I mean, they could care less that there is people out there trying to change our [8 (12 PCS/ NRA 924)] Constitution. They could care less what our forefathers did to get us where we are now.

Police Officer: And I don't mean to get over philosophical here but so many people died for our freedoms. Why is it that so many people are so quick to give them away? I don't understand that. I really don't.

Reporter: Law-abiding citizens. Victims of registrations schemes and gun bans that erode a basic freedom while at the same time their State Attorney General relishes the right to add to his list of banned firearms virtually whenever he decides. From those who have already felt the long-arm of the law, this disparity should serve as a wake-up call.

Interviewee: Open your eyes. Wake up. It's happening. It's happening whether you want to believe it or not. And, I'm here to tell you that registration leads to confiscation and I am living proof.

Interviewee: If we don't take a stand now, we may not have the opportunity when they come knocking on our doors and taking them.

Police Officer: If it's happening to me, then it can happen to you. That's the very point. It it's going to happen to anybody in society, and you're worried about just Joe Citizen saying it can't happen to him, well I hate to say it, if it's happening to a police officer, then you're fair game.

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Congress to the White House, but only if gun owners like you stand up now with your voice and your vote and your membership. So call this toll free number now to get your silver bullet keepsake and join the NRA.

Interviewee: What a scapegoat I am. They're trying to blame me for what goes on in this city in the way of crime. Our customers are honest citizens.

Reporter: A blatant and calculated strategy that is forcing Laura Segal to close up the gun shop her family has run for 57 years. A well thought out plan by cities across [9 (12 PCS/ NRA 925)]California burdening businesses with taxes no one can afford to pay and in the end guns no one will be able to buy.

Interviewee: My business tax used to be a $1.20 per thousand and it got bumped up to $24 per thousand. They don't want gun shops in this city and that's what they're doing. If they can't legislate, they just tax you out of business.

Deputy Sheriff: Their agenda was to eliminate firearms any way they could. This is the easiest way is to tax everything that comes out of the store. I've seen a number of businesses fall in the last ten years.

Interviewee: If we are out of business, there will be no Second Amendment rights.

Interviewee: They are stripping people of their gun ownership rights is what they're doing. If people can't shop at a store like this, they can't buy guns. And that's exactly what their intent is.

Reporter: An assault from all angles. Gun dealers being forced out and competitive shooters who may have to move out for a shot at the Olympic gold. 18-year-old Lauren Santibanez of San Diego already has a record of National and International titles. But she soon may have another record, a criminal one.

Interviewee: I never saw this coming. Just from being a competitive athlete I would be labeled a criminal.

Reporter: Lauren's custom-made target pistol is now categorized as an assault weapon under California's new gun law because of its design. Outlawed just like tens of thousands of other pistols and rifles used by competitive shooters throughout the State.

Interviewee: The law the way it stands now it will probably kill Olympic-style shooting in California.

Reporter: Olympic dreams threatened, but still that doesn't muster much sympathy from the author of this gun ban. In fact, Senator Don Perata of Oakland could only offer Lauren this bit of advice. "If Olympic shooting is her goal, she may be better off living in Texas."

Interviewee: I was kind of offended by that comment because I have my whole life here and at the time I was a high school student and you can't just tell a high school teenager to just go pack off to Texas.

Interviewee: This is totally ridiculous.

[10 (12 PCS/ NRA 926)]

Interviewee: Our gun laws are making the guns she wants to use in an Olympic competition illegal. That's nuts. That is completely and absolutely nuts.

Reporter: Olympic athletes now joining the ranks of other law-abiding gun owners who have been labeled instant criminals. Also in the line of fire, handgun owners soon to be victims of a proposed massive licensing and registration scheme. A scheme with just one goal in mind.

Interviewee: To take every gun away there is in the nation. There is no doubt in my mind.

Interviewee: This is the way to confiscation. This is a file card. This is a way to confiscation and the new registration card is set up exactly to give them the proper information to come back later on and seize the gun.

Interviewee: I see eventually they're going to take that list and they're going to come to your door and say where's your gun? They're already registered when you purchase the handgun. Why do they need another list?

Interviewee: I do believe registration would lead to confiscation. It's a perfect paper trail to go

right back and say hey you have all these things, we want them.

Interviewee: All guns are gonna end up on their list. They want them totally banned. That's what's eventually gonna happen. I hope I'm not around when it does.

Reporter: Registration and confiscation. A total ban on the rights of honest citizens to own a firearm and an ever-expanding list of gun laws that won't infringe on the ability of criminals to get their guns.

Interviewee: It's posturing politicians. Because we have enough laws in place and they don't enforce the ones they have. What they need to do is clamp down on the people that abuse the system.

Interviewee: If you take somebody that commits a crime with a gun and actually prosecute them and actually put them in jail, well they probably won't do it again. But when you have people that continually commit crime after crime after crime after crime after crime, and they just keep walking away, well when are they gonna take it serious?

Interviewee: If I could say anything to the politicians it would be that you need to start enforcing the laws that are on the books and quit trying to make up new laws that are only gonna affect law-abiding citizens. Go after the criminals.

Reporter: So, do we need more laws? No. Do we need to enforce the laws we have? Absolutely.

Interviewee: Enforce the laws on the street and just leave my guns alone.

[11 (12 PCS/ NRA 927)]

Reporter: This is the upside-down world of gun control being played out in California. Where plenty of politicians and police chiefs, like L.A.'s Chief Bernard Parks, still insist on banning all small affordable handguns and push mandatory registration to help combat crime. But the U.S. Supreme Court has already made it very clear in *Haines v. U.S.* that convicted felons can't be required to register a firearm. Because it's a violation of their Fifth Amendment rights. Self-incrimination. So who's kidding who?

Interviewee: It's only the law-abiding citizens who are gonna have their guns confiscated. They have to go through all this extra registering. The criminals don't have to do it.

Interviewee: Well since when did they get all the rights and I don't have any? That's my problem. It's all backwards, completely turned around. The criminals have all the rights and the honest citizen has none.

Reporter: A dangerous game of politics that only denies the law-abiding their right to protect themselves from a system that refuses to.

Interviewee: How are we going to be protected? Especially someone like me who lives out in the backcountry and there is no law out there until they get there.

Interviewee: What you end up doing is make it so that the criminal has the advantage. Now, if the police could be at your house in 20 to 30 seconds every single time you call them, this wouldn't be a problem. But they can't.

Reporter: In fact, Los Angeles, a leader in the victim disarmament movement, has seen it's violent crime rate jump 7.5 percent in the past year. Proof its gun control schemes have backfired.

Interviewee: I really predicted a bleak future and no new laws are gonna stop that. The criminals are gonna do what they always have done and what they want to do and crime is gonna go up.

Interviewee: It typifies the mindset that your constitutional rights, your freedoms are irrelevant. It's whatever we the government want to do and we're gonna go after you. Regardless.

Reporter: Laws that aren't being enforced and a political agenda forcing honest citizens into obeying laws they don't understand. Calculated confusion led by an unholy alliance of anti-gun politicians and trial lawyers.

Interviewee: Without question, once they figure they've gotten all the guns away, the political will to eliminate the Second Amendment will be there.

[12 (12 PCS/ NRA 928)]

Interviewee: This is not a case of the camel's nose under the tanter of the slippery slope, these are people who are pushing an agenda, who are well-financed by the liberal foundations making multi-million dollar block grants and who have the media in their pockets.

Reporter: California gun owners now realizing their worst nightmare. Registration is not the end, it's just the beginning of the end.

Interviewee: I believe it my heart that the State of California, the politicians, want to remove all firearms from the homes of our citizens.

Interviewee: If you get California to go along and fall in line, then pretty much they feel they could just start working state by state by state.

Reporter: That's why this election season those who have lived it have a resounding compelling warning for Americans concerned about protecting their personal freedoms.

Interviewee: What happens in California, watch out. It's gonna hit the other 50 states through our federal government later. So if we can't stop it in California, we're in trouble.

Interviewee: Just better wake up and start fighting for your rights because they're gonna come and take your guns away. It's what it boils down to.

Interviewee: You need to protect your rights. If they take away your guns they're gonna take away your other liberties eventually.

Interviewee: Vote. Vote for the people that are on our side.

Interviewee: I think that what the gun owners need to do is to be organized and probably the best way is to join the National Rifle Association and support it the best they can.

Police Officer: Of course, I strongly suggest you get involved in the NRA.

Interviewee: Well, if it wasn't for the NRA, we would have total gun confiscations today.

Interviewee: Join the NRA.

Deputy Sheriff: Tell the average citizen, tell the city council, tell elected officials, tell the government that you do not want your rights infringed.

Interviewee: Their rights to own a firearm is under attack and the only way they are going to circumvent that system is to go to the polls and vote for those people that will support the Second Amendment rights.

[13 (12 PCS/ NRA 929)]

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The preceding was a paid program of the National Rifle Association.

[1 (PCS 12/ NRA 930)]

"MILLION MOM MARCH/PROSECUTION"

***From NRA-ACK 00007. See videotape attached as NRA App. F.**

(As Aired for the NRA in the 60 Days Prior to the 2000 General Election)[*]

The following is a paid program of the National Rifle Association

Charlton Heston: In this next segment, you'll see the one trait that always reveals enemies of personal freedom. Those who want to take it away always give themselves away with their hypocrisy. Enemies of freedom want laws that apply to you but not to them. As they want to restrict your rights but not their own. They want to preach less freedom for you but practice more freedom for themselves. In the case you are about to see, there; celebrities and politicians who want to disarm you while they live with armed body guards behind security gates. Hypocrisy is their hallmark, but it should stir those of us who love personal freedom to come to her defense. Please watch.

Rosie O'Donnell: We have had enough. [Applause]. Enough of the NRA and their tactics. [Applause].

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[*] **(References to candidates for federal office appear in bold).**

Enough of the stranglehold the NRA has in Congress and in the Senate.

Female: Rosie O'Donnell preaching from the pulpit at the Million Mom March. Spelling out a political agenda masquerading as motherhood, recruiting the crowd to push for more gun control, proclaiming it's all in the name of protecting children.

Rosie: We want all guns registered. All gun owners to have a license. We want child safety locks. [Chanting from crowd].

Female: Then finally admitting it's really about restricting your right to protect yourself and your family. Your right to own a firearm.

Female: There are just too many guns. It's too easy.

Female: The police department need to have it, that's all that need to have it. And you don't need no gun. What you need a gun for?

[2 (12 PCS/ NRA 931)]

Female: Mothers led to believe but lied to by Rosie. Just a few weeks after the march it was front page news. Anti-gun Rosie's bodyguard had applied for a concealed carry permit to protect Rosie and her children. Did Rosie have a change of heart? We called Rosie's office to find out.

Female: We were interested in seeing if we could chat with Rosie about the story that's making

headlines up in Connecticut about her bodyguard applying for a gun permit.

Female: Yeah, no, she's not gonna talk about that.

Female: But don't you think it's kind of interesting that she's against guns and she wants to restrict the ownership for other people?

Female: She's not against guns. That's not her stance.

Female: In other words, Rosie's not against guns as long as her bodyguard is the only one who has them. A double standard set by doubletalking Rosie who just last year took to the airwaves on her own show declaring it's time to re-write your rights out of the Constitution. Rosie said "I think they should have a law, no one can have a gun in the U.S. If you have a gun, you go to jail. Only police should have guns." And when it comes to the issue of right to carry, this past May, Rosie was asked on ABC TV's *This Week* if she opposed right to carry laws and she quickly responded "Of course I'm against them. That would do more harm than good."

Female: What gives her the right to decide what I do with my life when you're doing the same thing?

Orrin Hatch: **It's wrong for you or me to have arms to protect our families, but her detective that's with her. There's nothing wrong with him having a gun to protect her**

children. Now why is that double standard. It's hypocritical.

Female: No guns allowed unless of course you're Rosie O'Donnell. Or anti-gun Senator Diane **Feinstein** who once held a rare California firearms permit for personal protection. It's a hypocrisy that really hit home. Celebrities and politicians preaching gun control for the rest of us but don't practice what they preach when it comes to their safety and their rights. They can afford to hire security guards and live behind gated communities. But for single family mothers and for senior citizens who live alone, the right to own a firearm isn't a luxury, it's a lifesaver.

Female: 911 isn't there by my side protecting me. They'll respond eventually to write up the paperwork.

[3 (12 PCS/ NRA 932)]

Female: I live alone. Nobody's going to be there to help me except my gun if I'm lucky enough to be able to get to it.

Female: That's the very reason these women are opposed to mandatory safety locks. They point to a recent press conference where Maryland Governor Paris Glendenning couldn't remove a lock from a gun and that was during a scripted photo op. Imagine when every second counts.

Female: They want the pick-a-locks on the guns. Well I contend then you have a lock for the

criminals. When he come it to rob me let him give me six minutes to take my pick-a-lock off.

Female: A false sense of security and more gun laws that only disarm the defenseless. Like Rosie, these women have had enough. Enough of the false promises from politicians. Enough of the lax prosecutions and enough of laws that never get enforced.

Female: The federal referrals for prosecution in this administration have fallen 40%. That means we aren't prosecuting the violent criminals who are using firearms to commit crimes.

Female: Like the young man that uh robbed me. He had a 25-year sentence for armed robbery. But he served only a few years and the let him out and then in a month or so he was back doing the same thing.

Female: The legacy of this Administration is gonna be less safety and more deaths. And if you're not prosecuting people then there's more people on the streets who are going to commit crimes.

Female: Even women marching with the Million Moms speak the truth when asked about the real problem. Admitting that criminals like the ones who killed Lucille Dunn's son are getting away with murder.

Female: The boy got 15 to life, the girl got 7-22. That's not enough time. They shot my baby in the head then they put my baby out on the back porch with a blanket over his head and just, you know, just like he was a piece of garbage.

Female: The tragic reality of a failed political agenda. Families urging that if protecting kids is the real agenda, then make sure they get the education they need.

Female: Educate. We don't need to legislate any more. We have enough laws. If we just enforce those laws and educate and care for our children we all wouldn't be here. We would all be home taking care of our kids.

[4 (12 PCS/ NRA 933)]

Female: If you teach a child not to touch a hot stove or cross a busy street you could certainly teach them firearm safety. In my mind that will prevent more deaths than anything else.

Female: And this fifth grader makes it very clear that if her parents didn't teach her about gun safety she never would have learned it.

Female: They expect that the schools are going to do this but I must admit that I'm in fifth grade and they haven't given us one gun lesson yet. So I think that it's important for the parents to be there to tell their kids what's right and what's not.

Female: Putting kids' safety first. Mothers and fathers, families and gun owners who won't be duped by Rosie's double standards.

Rosie: The NRA you have been put on notice. The gig is up.

Female: Women support firearms and not all moms are being hoodwinked by the politicians who are trying to say that the problem is law-abiding citizens..

Female: Families well aware that this so-called Million Mom grassroots movement was choreographed from Pennsylvania Avenue.

Female: This is completely about politics. It was organized by a friend of the Clinton Administration who's Dan Rather's publicist. This is just an intent to cram new gun control laws into the education reauthorization bill. It is President Clinton, **Hillary**, Schumer, you name them, they're all out there. They're using it for their own political gain. I mean if you want safety for kids you educate your children.

Rosie: They say we cannot defeat the gun lobbies. They are wrong. We will. We must.

Female: For millions of moms and Americans concerned about their freedoms, it's a call to action that can't be ignored. That's why for the safety of their families and their right to protect them, they plan a different march this November. A march to voting booth to make their voices heard.

Female: Stand up for your rights. Speak up. Don't get put on the sidelines and let somebody else do it for you.

Female: Maybe they ought to start listening to the NRA. Because we have a lot to say as NRA women about how to handle firearms safely. We have a lot to say about education. We have a lot to say about what works and what doesn't work.

[5 (12 PCS/ NRA 934)]

Female: Gun owners of America get involved before it's too late.

Male: If you want the Bill of Rights to survive the election of our lifetimes, call and join the NRA now. **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and reading "Clinton to the Gore"].** Your one-year NRA membership includes a subscription to NRA magazines **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and reading "Clinton to the Gore"]**, a no-fee MasterCard and special member benefits. But if you call now, you'll also get this silver bullet memento engraved with Charlton Heston's signature. It tells the world you're doing your part in this election year to preserve firearm freedom. Because this may be the last chance for gun owners to unite against the gun-haters' campaigns. Think about it. Nobody's gonna fight for your rights like the NRA. From State Capitals to Congress to the White House. But only in gun owners like you stand up now with your voice and your vote and your membership. So call this toll free number now to get your silver bullet keepsake and join the NRA.

Charlton Heston: If you're like me you'll find this next story disturbing. Not because it happened but because it shouldn't have happened. It's the story of two brutal crimes that have one thing in common. They were entirely preventable if existing law had been enforced. As you'll see investigators say these are murders committed by criminals who by every measure could have and should have been behind bars. Plenty of tough laws were in place. Plenty of police did their job. But somehow, some way these armed violent felons were set free to murder innocent people. As prosecution under federal gun law has dropped, police say such stories are not the rare exception but very often the rule. Please watch.

Female: A 911 call that never should have been made. A Sheriff's deputy from Fulton County, Georgia who never should have been killed. And the suspect Former Black Panther Atrap Brown now know as Jamiel Alamein who never should have been out on the street.

Male: The shame of the matter is that there's laws on the books that should have had that guy already in jail and he should have never been able to possess a firearm.

Female: For Marie August the tears that never stop, the grief too hard to bear and too many questions left unanswered.

Female: Just wanna know why that person killed my brother.

[6 (12 PCS/ NRA 935)]

Female: Marie's brother, manager of this Wendy's on Main Street in Flushing, New York was brutally murdered along with five other employees. These two suspects arrested. Accused of gagging the victims. Covering their heads with plastic bags. Then herding them into a walk-in refrigerator and shooting them one by one in the head execution style.

Female: He would be alive. My brother would be here alive today if they still in jail.

Female: The senseless and calculated killings here at Wendy's in New York. The tragic gunning down of a Sheriff's Deputy in Georgia. Both with one common accomplice. A catch and release criminal justice system that put dangerous felons back on the street to kill and kill again. In each case, the men charged with these terrible murders were no strangers to the law.

Female: These people who have had long rap sheets should be held forever. They should die in there.

Female: In the Wendy's massacre, suspect Craig Goodenau, convicted of a host of crimes dated back to 1989. Robbery, possession of a weapon and sale of a controlled substance. Out on parole.

Male: The breakdown is in the courts. We bring them in. They let them out.

Female: The other suspect John Taylor an even more disturbing story. At the time of the shootings he was being sought on an outstanding warrant for failing to show up in court. Back in June he was accused of a string of fast food robberies and caught with a gun, but disappeared after a Judge released him on $3,500 bail, even though prosecutor urged bond be set at a hundred thousand dollars.

Male: I have no idea how that Judge let someone out with that record on that amount of low bail. I mean I'm shocked.

Male: I think the families should sue the Judge. I think if more families sued Judges for cases such as this we'd have less problems on the street.

Male: Governmental conspiracy. Governmental conspiracy.

Female: Conspiracy? Or a conscious decision not to prosecute? That's the question in the case of Jamiel Alamean. Once on the FBI's most wanted list and a rap sheet with felony arrests and gun convictions stretching back over 30 years. 1967 accused of inciting a riot but disappeared before the trial. 1971 sentenced to 5 years in prison for his role in a robbery that ended in a shoot-out with New York police. Paroled in 1976. But then in 1995 this warrant charging Alamean with aggravated assault after [7 (12 PCS/ NRA 936)] shooting a man in his neighborhood. The victim later recanted his story. Investigators say because Alamean intimidated him. So the assault charges were dropped. But police reports also show when Alamean was arrested for that shooting he was carrying a concealed unlicensed firearm. A convicted felon with a gun. Then why wasn't he prosecuted? Why was a Sheriff's Deputy killed?

Male: He was a convicted felon and he was in possession of a firearm he should have been locked up and prosecuted for it. He should not be on the street.

Female: Federal authorities refusing to press charges. We called President Clinton's Chief Prosecutor in Atlanta at the time former U.S. Attorney Ken Alexander to try to get some answers. His response.

Male: Yeah, actually I'm not interested in commenting on it though I appreciate your calling and asking.

Female: No comment and no commitment to enforce existing laws. Over and over again this Administration's indifference is costing innocent lives.

Female: You got human beings out here. You got lives that we're trying to protect, we're trying to protect and we're losing our lives and somebody has to stop and say look enough is enough.

Male: I think Bill Clinton should feel guilty about what's going on in this country. If he would have his agencies enforce the laws on the books today a lot of this wouldn't happen.

Female: For police, it's a legal charade. Over and over officers risking their lives making arrests only to watch hardened criminals set free by politicians who can't be bothered to prosecute.

Male: If it's 30 years to life then give them 30 years to life. There's people who commit murder in this city in New York and the State of New York and they're out in 7 years. They're out in 8 years. They're out in 12 years. That's wrong and they kill again.

Female: A public outcry that goes unheeded. In fact, a study of federal law enforcement conducted at Syracuse University shows that in the first 6 years of the Clinton-**Gore** era federal firearm prosecutions were the exception rather than the rule. Cut by 44 percent. Instead, they keep pushing one new anti-gun law after another.

Male: It seems like it's a great cliché that if you don't know how to fight crime it's a great way to validate, you know, you just say we need more gun control.

[8 (12 PCS/ NRA 937)]

Male: It's window dressing for politicians. It sounds good. Good soundbites. There's two things that people have to know about criminals. Criminals don't obey the law, that's why their criminals and criminals don't buy guns legally.

Female: The bottom line on the streets, because the Clinton-**Gore** White House has turned its back on real justice, defenseless citizens are living in fear.

Female: it's the same thing that happened to me. I mean I didn't get shot but I got stuck up at my workplace. It was very very frightening and very scary.

Male: It happened to them, but it could have happened to us too and myself.

Female: Police and citizens who understand. Passing new laws with no intention of enforcing them and denying the law-abiding their rights without curtailing a felon's freedom is the most cynical and dangerous political gain imaginable.

Male: There would be a lot of women alive today who are involved in domestic disputes that had orders of protection. A piece of paper. Um, that if they had access to a weapon, they would be alive today.

Female: They're looking at the wrong people to give up their guns. You understand the criminals are not giving up their guns.

Male: When a criminal wants a gun, he's gonna get a gun. You think he's gonna go register his gun? No way. He's gonna go get guns off the street.

Male: There's plenty of guns on the street to buy. Those laws are worthless.

Female: That's why this November millions of Americans will deliver a verdict of their own. Voting for tough prosecution of criminals then for the absolute unaltered right to defend themselves with a firearm guaranteed by the Constitution. There have been too many tears shed, too many innocent lives lost and all of us asking how many more times.

Male: That'd say to every mother and father, every store owner, every female victim of domestic abuse that that's one subject that your right to bear arms that you should definitely take into consideration when you go to the polls in November.

Male: If you want the Bill of Rights to survive the election of our lifetimes, call and join the NRA now. **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and reading "Clinton to the Gore"].** Your two-year NRA membership includes a [9 (12 PCS/ NRA 938)] subscription to NRA magazines, a no-fee Mastercard and special member benefits. But if you call now, you'll also get this silver bullet memento engraved with 'Heston's signature. It tells the world you're doing your part in this election year to preserve firearm freedom. Because this may be the last chance for gun owners to unite against the gun-haters' campaigns. Think about it. Nobody's gonna fight or your rights like the NRA. From State

Capitals to Congress to the White House. But only if gun owners like you stand up now with your voice and your vote and your membership. So call this toll free number now to get your silver bullet keepsake and join the NRA.

* * *

[1 (12 PCS/ NRA 943)]

"TRIBUTE TO CHARLTON HESTON"

***From NRA-ACK 00006. Videotape attached as NRA**

App. G.

(As Aired for the NRA in the 60 Days Prior to the 2000 General Election)[*]

The following is a paid program of the National Rifle Association.

Wayne LaPierre:	Hi, I'm Wayne Lapierre. You know if you looked at every political leader in America today, you'd find nobody stands up for the cause of pure freedom as passionately or as persuasively as Charlton Heston. At colleges across the country, he's shaking America's future leaders awake with the infinite promise of freedom and challenging Americans everywhere to have the courage and conviction to fight for their beliefs. Join us now for a look at how Charlton Heston is taking the fight for freedom to future generations.
Narrator:	Actor, Author, Civil Rights Champion, Patriot, he hasn't just spoken the word of God; he's also spent his life defending the freedoms God gave us. Today with your rights under

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[*] **(References to candidates for federal office appear in bold).**

the fiercest attacks in history, Heston is there on TV, in auditoriums, colleges, conferences, Congressional hearings and rallies. He's taking your belief to America and America is listening. He's not a professional politician, so he can't be unseated from the debate, but like a politician, he gets the airtime and ink and coverage our freedoms depend on. Never before has anyone been elected to three consecutive terms as President of the NRA. Never before has our cause been more visible or more vocal when it is more urgently needed.

Heston: I accepted a call from the National Rifle Association of America to help protect the Second Amendment. In 1963 I marched on Washington with Dr. Martin Luther King to uphold the Bill of Rights. Supporting Civil Rights then was about as popular as supporting gun rights now.

Narrator: And Heston has paid a price for his convictions.

Heston: Spike Lee ridiculed my work on behalf of the Second Amendment. Spike said I should be shot for my beliefs. I've been blasted from Time Magazine to the Washington Post to the Today Show and the guy down the street who called me everything from ridiculous, duped to a brain-injured, senile crazy old man. Coming from today's media that could be construed as a compliment. [Laughter].

Narrator: Why the media attacks? Maybe because when it comes to hypocrisy and dishonest thinking, Heston calls them as he sees them, and sets the record straight whether it's in the media---

Heston: How can we entrust to you the Second Amendment when you were so stingy with your own First Amendment.

Narrator: or the gun control lobby--

Heston: Anti-gun organizations that wouldn't know a semi-auto from a sharp stick.

Narrator: or even the Clinton/**Gore** administration.

Heston: What President Clinton's not telling you about the crime bill should be a crime. So, does Bill Clinton tolerate a level of gun debts to further his political agenda? Shh---you decide.

Narrator: That takes courage and honest debate. Virtues he's fighting for on college campuses where young minds are learning wrong ideas.

Heston: Telling us what to think has evolved into telling us what to say. So telling us what to do can't be far behind. Don't let America's universities serve as incubators for a rampant epidemic of this new brand of McCartheism. Why do you, who are supposed to debate ideas, surrender to their suppression? And as long as you shrug your shoulders and abide it, then by the standards of your grandfathers, you are culture cowards. Democracy is dialogue.

Narrator: And it's dialogue Heston refuses to be shut out of.

Heston: Still I go out in the road catching redeye flights, speaking at rallies in Seattle, eating pancakes in Peoria and rubber chicken in Des Moines. Yet I choose to engage in this debate. Why? Because it matters.

Narrator: Personal freedom, individual rights. Heston stands for all that's good and right and unique about America.

Heston: It's been said that the creation of the United States is the greatest political act in history. I'll sign that. The Bill of Rights wasn't cut into stone tablets, but the text surely has that same righteous feel to it. I say that the Second Amendment is in order of importance. The First Amendment, the right to keep and bear arms is the one right that allows rights to exist at all. That's why I so deeply love this great nation and the Constitution that defines it.

Narrator: And it's that love for freedom that drives Heston to demand the same courage from others that he demands from himself.

[3 (12 PCS/ NRA 945)]

Heston: So, what can you do? Dare to consider both sides of any issue, and find the courage to question authority. Don't be shamed or startled into lock step conformity by seemingly powerful people. But politicians and the press feed you lies and

deceit-- expose them, embarrass them. When a law firm joins in the greedy litigation to put gun makers out of business, bar them and their clients from your business relationships. When someone you elected is seduced by political power and betrays you, expose them, petition them, oust them, banish them. We just need to unite and then disobey, boycott, march, embargo, speak up, shout down, [a loud rallying] defy, interrupt, overwhelm, raise hell till the heavens hear us.

Narrator: Americans who cherish their freedoms could ask for no better champion than Charlton Heston. From college campuses to the halls of Congress, from political rallies to network TV, he's taking the fight for your beliefs to the front lines of the cultured war in America, and with reason, passion, and personal conviction, he's winning young allies in the unlikeliest of places. In this election year, with so much of our freedom at stake, Heston's rallying cry could prove decisive. If you want to help Charlton Heston mobilize future generations to fight for our freedoms, then join the National Rifle Association now. **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and reading "Clinton to the Gore"].** Your one-year NRA membership includes a subscription to NRA magazine, a no-fee MasterCard and special member benefits. Call now, and you'll also get the silver bullet commemorative engraved with Charlton Heston's signature--a symbol of your election year active duty service in defense of the Second Amendment. Remember without every American gun owner behind this fight, our freedoms could be lost in this year's election. So don't wait, call this toll free number now to raise your voice with Charlton Heston. Get the silver bullet commemorative and join the NRA now.

Wayne LaPierre: You know, it's not easy or cheap to be a guardian of freedom, but that's what makes our country and our cause unique in the history of the world. The simple steely commitment to fight one more battle, go one more mile. **[Appearing as text at bottom of screen: National gun registration plan from Sen. Dianne Feinstein - Campaign Centers on Gun Photo ID's."]** and give that last full measure of devotion that determines the difference between freedom and defeat. Charlton Heston stands as a perfect example of that virtue in action. **[Appearing as text at bottom of screen: "Candidates demand a 'stand up to NRA' Gephardt pleas for gun bans"].** See for yourself why in this critical election year everyone of us owes him so much.

Heston: It looks like I'm back for one more encore. [Applause]. I've been asked to serve a third term as your president. [Applause and Hollering]. I don't think anyone has done that before, but George Washington hung around until the Revolutionary War was over. Roosevelt hung around until World War II was won. Reagan hung around until the Cold War was won; so if you want, I'll hang around until we win this one, too. [Much Applause]. Do you people are remarkable. You feel that

[4 (12 PCS/ NRA 946)] incredible energy in the air here today? I'll tell you what it is. It's the feeling you get when you're making a difference in the future of your country. That was my goal--to make a difference when I became the president two years ago. First, I asked you to rebuild our NRA membership, and you have--not by just a few thousand members, but by 1,000,000 members. [Applause]. Second, I asked you to rebuild our NRA war chest and you have. I don't mean just in dollars, but in sense--the good sense of the NRA leadership you see here before you. [Applause]. Your leaders are qualified, competent, unified and believe me, fearless. [Applause]. Third, I wanted to bring the NRA back to the table of mainstream political debate, and we have. You saw Wayne on that tape. I'd say we're not just at the table; we are eating their lunch. [Much Applause]. But more than anything else, I asked you to believe in each other again--to believe that gun ownership is as wholesome as it is constitutional, to believe that an NRA sticker on your windshield is a sign of pride, to believe that a kid who wants to plick at tin cans is not a kid gone wrong, to believe that the great flame of freedom our founding fathers ignited has not grown cold. The NRA is baaaaaaack. [Much Applause]. All of this spells very serious trouble for a man named **Gore**. [Applause]. That leads me to that one mission that is left undone--winning in November. That's why I'm staying on for a third tour of duty. [Applause]. And, today, I challenge you, all of you, to find your third term and serve it. Find your extra mile and walk it; only you know what you can do between now and that decisive November day to turn the tide of these elections in favor of freedom. I ask you to find it and fulfill it. Go the extra distance. Find that extra member; write the extra check, knock on one more door, work one more hour, make one more call, convince one more friend, turn the other cheek if you must, but find your third term and serve it! [Applause]. That's your part to play, all of you. What more important role could there be than to bequeath our freedom to the next generation as pure and intact as it was given to us. Each of us in his own way plus all of us in our collective millions, must give that extra measure that freedom demands of us. Let me tell you what I mean. Until a few hours ago, I was finishing my 80th film in Vancouver, Canada; I was there because I love my craft and I also love to feed my family [laughter]. So, you'll forgive me if I look a little tired today. I flew all night across a continent and through three time zones to be here with you. [Applause]. No, you don't need to applaud that because I'm here because I love my country and I love this freedom. [Applause]. But that flight last night was just the most recent flight in thousands of flights, the most recent mile on thousands of roads I've traveled in my ten years of active service to this great association. It's been a hell of a ride! I remember a decade ago at my first annual meeting in St. Louis after my banquet remarks to a packed house, they presented me with a very special gift. It was a splendid hand-crafted musket. I admit I was overcome by the power of its simple symbolism. I

looked at that musket and I thought of all the lives given for that freedom, I thought of all the lives saved with that freedom, and it dawned on me that the doorway to all freedoms is framed by muskets. So, I lifted that musket over my head for all to see, and as flashbulbs popped around the room, my heart and a few tears swelled in and I uttered five unscripted words that weren't in the speech. When I did that, the [5 (12 PCS/ NRA 947)] room exploded in a sustained applause and hoots and shouts and hollers that seemed to last forever. At that moment I bonded with this great association and in thousands of moments since, I've been asked to repeat those five words in airports and hotels and rallies and speeches across the whole country. In your own way, you've already heard them. That's why you're here. Everytime our country stands in the path of danger, an instinct seems to summon her finest first. Those who truly understand her. When freedom shivers in the cold shadow of true peril, it's always the patriots who first hear the call. When loss of liberty is looming, as it is now, the siren sounds first in the hearts of freedom's vanguard. The smoke in the air of our Concorde bridges and Pearl Harbors is always smelled first by the farmers who come from their simple homes to find the fire and fight because they know that sacred stuff resides in that wooden stock and boot steel—something that gives the most common man the most uncommon of freedoms. When ordinary hands can possess such an extraordinary instrument that symbolizes the full measure of human dignity and liberty.

That's why those five words issue an irresistible call to us all, and we must [Laugher and Applause]. So, as we set out this year to defeat the divisive forces that would take freedom away, I want to say those fighting words for everyone within the sound of my voice to hear and to heed and especially for you, Mr. **Gore**. "From my cold dead hands." [Much Applause].

Narrator: Join Charlton Heston in giving your one extra mile for firearm freedom by joining the National Rifle Association. Your NRA membership includes **[Appearing on screen is the cover of First Freedom depicting Bill Clinton morphing into Al Gore and reading "Clinton to the Gore"].** Our great monthly magazine, a no-fee MasterCard and exclusive member benefits like the silver bullet keepsake engraved with Charlton Heston's signature, a symbol of your commitment to give another tour of duty for the right to keep and bear arms. This year's elections mean survival or surrender for your gun rights, so don't set them out. Help Charlton Heston and the NRA defend your Second Amendment rights from the White House to your house, from the halls of Congress to your hometown City Hall. Call this toll free number now to join the fight and win. You'll get the silver bullet keepsake and you'll be doing your duty to defend our precious freedoms.

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[1 (12 PCS/ NRA 974)]

NRA INFOMERCIALS (2000)

Total No. Airings: 11,443
Relative Gross Media Costs: $13,791,488.00

Market	No. of Airings	State Totals
Alabama:	34	
% of Total No. Airings:	0.30%	34
Alaska:	12	
% of Total No. Airings:	0.105%	12
Arizona:	218	
% of Total No. Airings:	1.910%	218
Arkansas:	214	
% of Total No. Airings:	1.870%	214
California:	498	
% of Total No. Airings:	4.352%	498
Colorado:	124	
% of Total No. Airings:	1.083%	124
Washington, D.C.	98	
% of Total No. Airings:	0.856%	98

Florida:	714	
% of Total No. Airings:	6.240%	714
Georgia:	88	
% of Total No. Airings:	0.769%	88
Hawaii	10	
% of Total No. Airings:	0.087%	10
Idaho:	20	
% of Total No. Airings:	0.175%	20
Illinois:	274	

[2 (12 PCS/ NRA 975)]

% of Total No. Airings:	2.39%	274
Indiana:	176	
% of Total No. Airings:	1.538%	176
Iowa:	229	
% of Total No. Airings:	2.001%	229
Kansas:	60	
% of Total No. Airings:	0.524%	60
Kentucky:	93	

% of Total No. Airings:	0.813%	93
Louisiana:	139	
% of Total No. Airings:	1.215%	139
Maine:	108	
% of Total No. Airings:	0.944%	108
Maryland:	103	
% of Total No. Airings:	0.900%	103
Massachusetts:	64	
% of Total No. Airings:	0.559%	64
Michigan:	253	
% of Total No. Airings:	2.211%	253
Minnesota	108	
% of Total No. Airings:	0.944%	108
Mississippi:	94	
% of Total No. Airings:	0.821%	94
Missouri:	367	
% of Total No. Airings:	3.207%	367
Montana:	26	
% of Total No. Airings:	0.227%	26

Nebraska:	49	
[3 (12 PCS/ NRA 976)]		
% of Total No. Airings:	0.428%	49
Nevada:	124	
% of Total No. Airings:	1.084%	124
New Mexico:	217	
% of Total No. Airings:	1.896%	217
New York:	260	
% of Total No. Airings:	2.272%	260
North Carolina:	391	
% of Total No. Airings:	3.417%	391
North Dakota:	65	
% of Total No. Airings:	0.568%	65
Ohio	318	
% of Total No. Airings:	2.779%	318
Oklahoma:	334	
% of Total No. Airings:	2.919%	334

Oregon:	177	
% of Total No. Airings:	1.547%	177
Pennsylvania:	377	
% of Total No. Airings:	3.295%	377
Rhode Island	9	
% of Total No. Airings:	0.079%	9
South Carolina:	376	
% of Total No. Airings:	3.286%	376
South Dakota:	146	
% of Total No. Airings:	1.276%	146
Tennessee:	293	
% of Total No. Airings:	2.561%	293
Texas:	931	
[4 (12 PCS/ NRA 977)]		
% of Total No. Airings:	8.136%	931
Utah:	232	
% of Total No. Airings:	2.027%	232
Vermont:	6	

% of Total No. Airings:	0.052%	6
Virginia:	217	
% of Total No. Airings:	1.896%	217
Washington:	102	
% of Total No. Airings:	0.891%	102
West Virginia:	137	
% of Total No. Airings:	1.197%	137
Wisconsin	235	
% of Total No. Airings:	2.054%	235
Wyoming:	99	
% of Total No. Airings:	0.865%	99
National:	2,224	
% of Total No. Airings:	19.435%	2,224
TOTAL NUMBER OF AIRINGS:		11,443

[1 (12 PCS/ NRA 978)]

“THE TRUTH ABOUT PROSECUTION”
HUD INFOMERCIAL
From NRA-ACK 00004.

(As Aired for the NRA in the 60 Days Prior to the 2000 General Election)[*]

Charlton Heston: **[Background - a display of different facial expressions of President Clinton] Mr. Clinton**, this message is for you. There are eighty million decent lawful gun owners in this country and we’re not going to take it anymore. You’ve made it popular, even commendable, to condemn the Second Amendment and the Bill of Rights. You’ve led the arrogant, unprecedented assault upon this most precious of freedoms. Well, I’m going to call a fraud, a fraud. I’m here to reveal your lies about the right to keep and bear arms and expose your hopes for its demise. You incite media bias and fuel the politics of hate against the National Rifle Association. You slander our century-long contribution to society as America’s firearms safety training authority. Instead, you pervert current events to sentence the Second Amendment to slaughter. Demonizing lawful guns and their owners as agents of the evil in American culture. You never miss a chance to step before the cameras and play out the gun-haters drama of distortion, defamation and downright lies. For example, that fatherless six-year old kid living in a crack house infested with drug dealers and stolen guns who tragically shot a schoolmate. I'd expect a **President** to demand a crackdown on crack houses, busting gun theft rings and calling for responsible parenting. But no, **Mr. Clinton**, you blamed the NRA and said "We need these child trigger locks on the new handguns, that'll begin to make a big difference." **[Flash picture of President Clinton's face in background].** Don't get me wrong, we support safety locks and most gun makers already provide them, but your solution is to knock on crack-house doors and hand drug dealers safety locks for stolen guns. There are already twenty thousand gun laws on the books, but with a straight face you said "We've increased gun prosecutions since I've been here and we have a lot of people in jail for it." **[Flash picture of President Clinton's face in background]. Mr. Clinton**, that's a lie. On your watch, federal gun prosecutions have dropped 46%, that's almost half of what they used to be. Let me give you a sampling - of the thousands of gun criminals that could have been sent to prison in 1998 guess how many went? 8 in San Francisco, 14 in New Jersey, 9 in Pittsburgh, 2 in Washington, D.C. **[Flash picture of President Clinton's face in background].** With odds that good, gun violence is a lottery criminals can't loose. Speaking of winning criminals, you claim that "The Brady **Bill** has kept a half-million felons, fugitives and stalkers from getting guns." **[Flash picture of**

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[*] **References to President Clinton are in bold.**

President Clinton's face in background]. If that's true, **Mr. Clinton**, where are a half million arrests? Where are even a thousand [2 (12 PCS/ NRA 979)] prosecutions? Where are even a hundred felons in jail for trying to buy guns? They're not there. The truth is, it was the NRA who pioneered and passed the National Instant Criminal background check on gun buyers. Not **Bill Clinton**. He wants criminals turned away; we want criminals turned in and prosecuted. Still you blame and complain that "Eight months have gone by and the Congress can't act. And the reason they can't act is because of the heat the NRA has put on them." **[Flash picture of President Clinton's face in background].** That's a lie **Mr. Clinton**, it was you and your friends in the U.S. House that defeated legislation that required safety locks on new firearms, required instant background checks on gun show buyers and banned gun possession for violent juveniles forever. That's right, it's your fault, but you blame the NRA. Apparently we're to blame for everything. You said "They're basically against anything that requires anybody to do anything as a member of society that helps make it safer." **[Flash picture of President Clinton's face in background]. Mr. Clinton**, it's hard to imagine an uglier insult. The NRA's programs have taught safe and responsible gun ownership for 130 years. The NRA does more for gun safety in a day than your laws can in your lifetime. Still you vilify the NRA by feeding the media made for TV lies like "We're loosing 13 kids a day [to gun accidents], 13 funerals a day." **[Flash picture**

of President Clinton's face in background]. Mr. Clinton, that's not only a lie, it's an insult, to the thousands of teachers and school systems and twelve million kids who've used the NRA's award winning accident prevention programs. Nobody, including your administration, invests a fraction of what we do to keep kids safe from gun accidents through education. As a result, guns are involved in far fewer accidental childhood deaths than biking or swimming. About 130 a year. That's the lowest in history, but still too many. And we won't rest until there are none. And finally, **Mr. Clinton**, you said "Should people have to register their guns like they register their cars? Do I think that? Of course I do, of course I do." **[Flash picture of President Clinton's face in background].** But since criminals won't bother signing up, your big federal register will list only honest gun owners, right? So, the government bureaucrats will know who has what guns and where they live and whenever it's politically expedient they'll come and get them. The truth, **Mr. Clinton,** is that you admire countries with no Second Amendment. You said "Other countries have a lower gun death rate. Why is that? Because they don't have an NRA in their country." **[Flash picture of President Clinton's face in background]. Mr. Clinton**, with that cruel slur, you have not only blamed gun owners for the savage acts of same criminals you won't prosecute, you also revealed what we've said all along, you want a county with no NRA, you want a country with no Second Amendment. **Mr. Clinton**, the Bill of Rights is not yours to

rewrite, and this election year we're taking it back. Yes, the mainstream media may be on your side, but on our side stand more than three million NRA members with thousands more joining every day whose votes and voices are going to thunder this election year, and the message is this, freedom will abide no more lies. Across this land, decent, lawful, honorable people are rising up to turn back the tide of your dishonesty. They will no longer be shamed, labeled and libeled just because they own firearms. One by one, and by the thousands, they're putting their names, their time and their money [3 (12 PCS/ NRA 980)] on the line. They know gun owners must preach the truth and reclaim their freedom now or never. They know the make or break moment for the Second Amendment is upon us and these are the most important votes of our lifetimes. So **Mr. Clinton**, to you and to every candidate campaigning on a gun hating, NRA hating, Second Amendment hating platform, you're in for the political licking of a lifetime.

[COMMERCIAL]: If you want the Bill of Rights to survive the election of our lifetimes, call and join the NRA now. Your one-year NRA membership includes a subscription to NRA magazines, a no-fee MasterCard, and special member benefits. But if you call now, you'll also get this silver bullet memento engraved with Charlton Heston's signature. It tells the world you're doing your part in this election year to preserve firearm freedom because this may be the last chance for gun owners to unite against the gun haters campaigns. Think about it nobody's gonna fight for your rights like the NRA. From state capitals to congress to the White House, that only if gun owners like you stand up now with your voice and your vote and your membership. So call this toll free number now to get your silver bullet keepsake and join the NRA.

Wayne LaPierre: Hello, and welcome back to news about your gun rights you won't get anywhere else. This year is the election of a lifetime for gun owners if congress and the White House fall into the wrong hands, if the next **President** appoints up to four new Supreme Court justices who hates your guns as much as he does, the Second Amendment could be gone forever. For example, did you know this administration is using its public housing projects to file a huge lawsuit against gun makers to put them out of business. That's right, the same politicians who couldn't take away your guns in Congress, are trying to take them away in court. This government is regulating and suing gun makers at the same time to get with lawyers what they can't get with law makers. That ought to scare you to death. But nobody cares except the NRA and the innocent residents of those housing projects whose gun rights are gone. Take a look.

Interviewee: Walking through the projects alone you can get mugged, raped, beaten, shot in the head, stabbed.

Interviewee: I can remember going out on Fridays and you had to get in at a certain time because you were ducking from gun shots.

Interviewee: Its like, 24-hours a day, 7 days a week,

Interviewee: Just the other day somebody got shot up the block right here.

Interviewee: You gotta watch your back, every minute, every second.

[4 (12 PCS/ NRA 981)]

Interviewee: Every morning before I leave out of my house I pray that I come back and I find my home the way I left it.

Reporter: Life in the projects. A world of graffiti stained walls and broken glass. Of gun shots in the night and police sirens that arrive too late, if at all.

Interviewee: If I pick up that phone to call 911, I probably be dead by the time the police get there, or be hurt, or robbed or anything else.

Interviewee: They're afraid they're going to get shot at; they're afraid somebody's going to come out of the woodwork and just shoot them right in the head.

Reporter: It's an upside down world, where law abiding people in some of the Nation's worst neighborhoods live in prisons behind bars. Stripped of their safety and even their most basic civil rights - self-protection. All because the police have no authority and gangs and drug dealers have no fear of prosecution.

Interviewee: Instead of taking my gun away as a law-abiding citizen what they should do is take away the felons gun and put the felon in jail and get the felon out of the projects. That'll stop the majority of the crime that's going on in the projects.

Reporter: False promises instead of prosecutions. And now to cover up for a horrendous history of mismanaging innocent people's lives the Department of Housing and Urban Development backed by **President Clinton**, plans to use your tax dollars to sue gun manufacturers for the cost of violence in the housing projects.

Senator Larry Craig: I say to this **President** and to that Secretary, you really ought to be ashamed of yourselves - that you're playing this kind of game with your trial lawyer friends. Congress is gonna have to step in and say no. Government cannot promote lawsuits.

Reporter, Ginny Simone: Suing the gun industry to reduce crime and make public housing communities like Abreene Green here in Chicago safer. Talk to the residents and they'll tell you that the lawsuits are a flat out fraud.

Interviewee: Suing the gun industry is not gonna stop people from killing people. The criminal is always gonna have his gun.

Interviewee: It may be possible given jobs can cut down crime; maybe possibly getting a better education system in inner cities to give some of these kids hope is a better system but taking away guns, that's not gonna take away the crime.

Interviewee: It's way more than guns. Its drugs, its poverty, its lack of education.

[5 (12 PCS/ NRA 982)]

Interviewee: It's not gonna clear the projects at all. And instead of doing all that, they should just sue **Clinton** for not doing what he's supposed to be doing for his public. We're his public.

Ginny Simone: For the past ten years police have conducted what they call "Operation Cleansweep" door-to-door sometimes warrantless searches, to get rid of gangs and confiscate guns.

Interviewee: They don't have no search warrants - nothing like that - they just come in your house without even, you know, like I said, without not even askin, just knockin on the doors, so. . yeah . . a big violation on my rights.

Ginny Simone: Has it worked? Take a look for yourself. The gangs are still here and the violence continues.

Interviewee: The police will come in a grab a whole set of guns, and these guys are gonna buy a stack of guns and come back and start it all over.

Ginny Simone: Residents who feel they're just powerless pawns in a political game. The HUD lawsuits, just another dishonest diversionary tactic drawing attention away from the real problem. A total collapse in federal gun law enforcement. In fact, in just six years under the **Clinton** administration federal gun law prosecutions cut by almost half.

Interviewee: Janet Reno as Attorney General, is a very poor example of a prosecutor. She needs to enforce the laws that we have on the books now. That would stop a lot of the violence.

Police Officer: In the past I've locked up people for possession of firearms and two and three times they've been arrested for firearms and they never go to jail. There put on probation and its totally ludicrous.

Ginny Simone: Law enforcement instead of lawsuits. The talk at this year's shooting, hunting and outdoor trade show was about more than just products and promotion. It was about the full frontal assault on the gun industry. Lawsuits that are driving some gun makers out of the handgun business and others out of business altogether.

Thomas
Millner,
Pres. & CEO,
[6 (12 PCS/ NRA 983)]

Remington: The very fact that our own elected officials would try and litigate a lawful legal industry that, in fact, that they regulate, out of business, should terrify every businessperson in America whatever industry they're in. Cause if they can do it to us, they can do it to anybody.

Ginny Simone: A predictable reaction you say. Well this legal assault by HUD has also been condemned, by some you might not expect. A public housing official is quoted in this housing affairs letter saying "This whole thing is absurd. The housing authorities hardly have enough for operating expenses. It's preposterous to ask them to file a suit and fund the expenses with their revenue." The bottom line, public housing authorities would have less money to afford security for residences and that means more crime and more victims.

Interviewee: I want to ask them seriously, I want to ask them particularly the Secretary of HUD, and his boy **Bill Clinton**, to be serious. Play politics someplace else, not with these poor peoples lives.

Interviewee: Instead of spending the money on suing the gun industry, you should take the money and use it on housing police and use it for the community.

Ginny Simone: A political sham that makes a mockery of our democracy. That's how Robert Wright, a liberal democrat and former member of **President Clinton**'s cabinet sees it. In this commentary for the Wall Street Journal he writes "Fed up with trying to move legislation, the White House is launching law suits to succeed where legislation has failed. The strategy may work, but at the cost of making our frail democracy even weaker.

Intereviewee: My freedom, I feel my freedom is way more important than a law suit.

Ginny Simone: It's a dangerous precedent. Trampling the rule of law and ultimately the rights of law-abiding citizens. The harsh reality of a long-term agenda - first lawsuits, then gun registration and owner licensing, photo ids and, in the end, confiscation. Your gun rights threatened like never before, but your voice and your vote speak volumes.

Thomas Millner: The election's in November; for anybody that cares about liberty are the most crucial elections of our lifetime.

Interviewee: So you've gotta become aware of what's going on, you've gotta start fighting for your right for the Second Amendment because we won't have it any longer.

Interviewee: Join the NRA.

[7 (12 PCS/ NRA 984)]

Interviewee: NRA's probably, not only the best voice we have, its probably the only voice we have at this time.

Interviewee: Don't give an inch. All they wants is a toe in the door, once they gotta toe, they gotta foot, and they gotta leg, and they got the whole body. Don't ever give up.

[COMMERCIAL]: If you want the Bill of Rights to survive the election of our lifetimes call and join the NRA now. Your two-year NRA membership includes a subscription to NRA magazines, NRA magazines, a no-fee MasterCard, and special member benefits. But if you call now, you'll also get this silver bullet memento engraved with Charlton Heston's signature. It tells the world you're doing your part in this election year to preserve firearm freedom because this may be the last chance for gun owners to unite against the gun haters campaign. Think about it nobody's gonna fight for your rights like the NRA. From state capitals to congress to the White House, that only if gun owners like you stand up now with your voice and your vote and your membership. So call this toll free number now to get your silver bullet keepsake and join the NRA.

* * *

NRA Infomercial
Budget Recap
Client Gross ($M)

2000

Month	National*	TMT	MCM	AMc	Total	Budget	% vs. Goal
January	$ 610.0	n/a	n/a	$ 433.8	$ 1,043.8		
February	$ 815.3	n/a	n/a	$ 398.5	$ 1,213.8		
March	$ 903.1	n/a	n/a	$ 397.2	$ 1,300.3		
April	$ 780.6	n/a	n/a	$ 305.5	$ 1,086.1		
May	$ 672.2	n/a	n/a	$ 296.7	$ 968.9		
June	$ 763.3	n/a	$ 394.8	$ 275.5	$ 1,433.6	$ 2,000.0	72%
July	$ 637.3	$ 365.8	$ 517.6	$ 21.9	$ 1,542.6	$ 2,500.0	62%
August	$ 632.5	$ 731.2	$ 1,371.1	$ 12.3	$ 2,747.1	$ 3,000.0	92%
September	$ 653.6	$ 1,468.1	$ 1,522.7	$ 9.9	$ 3,654.3	$ 2,850.0	128%
October	$ 373.0	$ 887.8	$ 629.4	n/a	$ 1,890.2	$ 2,350.0	80%
November	$ 171.7	$ 190.1	$ 100.6	n/a	$ 462.4	$ 500.0	92%
December	$ 211.9	$ -	$ -	n/a	$ 211.9	$ 200.0	106%

*TMT dollars included in "National" January-June.

September Recap

Category	Budget	$	% vs Goal
California	$ 500.0	$ 407.7	82%
Heavy-Up	$ 1,500.0	$ 1,436.5	96%
Other	$ 600.0	$ 1,810.1	302%
Total	$ 2,600.0	$ 3,654.3	

October Recap

Category	Budget	$	% vs Goal
California	$ 415.0	$ 397.1	96%
Heavy-Up	$ 1,250.0	$ 1,080.3	86%
Other	$ 600.0	$ 412.8	69%
Total	$ 2,265.0	$ 1,890.2	

November Recap

Category	Budget	$	% vs Goal
California	$ 85.0	$ 85.4	100%
Heavy-Up	$ 250.0	$ 205.3	82%
National	$ 172.0	$ 171.7	100%
Total	$ 507.0	$ 462.4	

December Recap

Category	Budget	$	% vs Goal
National	$ 211.9	$ 211.9	100%

4Q National Buys include only Outdoor Channel, Outdoor Life Network & America's Voice.

EXHIBIT 6 - ADAMS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

George W. Bush
PRESIDENTIAL EXPLORATORY COMMITTEE, INC.

MEMORANDUM

TO: **ROBBIE AIKEN**
BUD ALBRIGHT
DAVID BROWN
HALEY FISACKERLY
KERRILL SCRIVNER
PATSY THOMPSON
JEANNE WOLAK
JOHN MAXSON

FROM: **TOM KUHN /s/**

RE: **JUNE 22 RECEPTION WITH GOV. GEORGE W. BUSH**

DATE: **MAY 27, 1999**

My personal thanks to all of you for taking a leadership role is gathering support for the June 22 reception honoring Governor George W. Bush. I believe that it will be a great evening, and I know that the electric utility industry will show their continued support and enthusiasm for the Governor's exploratory campaign committee.

Enclosed is a copy of the June 22 invitation, along with a list of cities and dates for upcoming fundraising events. We can give you as many invitations as you need to mail out to friends and colleagues. Please let Joanne Igoe know how many invitations you will need and we'll get them over to you as soon as possible. The Bush Exploratory

Committee has also produced a very impressive video profiling the Governor's career and his campaign platforms. I'd be happy to make this video available to you if you believe that it can be helpful to your efforts.

As you know, a very important part of the campaign's outreach to the business community is the use of tracking numbers for contributions. Both Don Evans and Jack Oliver have stressed the importance of having our industry incorporate the #1178 tracking number in your fundraising efforts. ***LISTING YOUR INDUSTRY'S CODE DOES NOT PREVENT YOU, ANY OF YOUR INDIVIDUAL SOLICITORS OR YOUR STATE FROM RECEIVING CREDIT FOR SOLICITING A CONTRIBUTION. IT DOES ENSURE THAT OUR INDUSTRY IS CREDITED, AND THAT YOUR PROGRESS IS LISTED AMONG THE OTHER BUSINESS/INDUSTRY SECTORS.*** If you have any questions about your industry's tracking information, please do not hesitate to let me know.

I look forward to working with you and will help in any way that I can to support your efforts on behalf of our industry. Please don't hesitate to let me know if there's any other information that you need, or if you have any questions. Once again, thank you for your ongoing efforts!

George W. Bush
PRESIDENTIAL EXPLORATORY COMMITTEE, INC

MEMORANDUM

TO: **ASSOCIATION EXECUTIVES FOR BUSH**

FROM: **TOM KUHN**

RE: **UPCOMING EVENTS**

DATE: **MAY 26, 1999**

Many thanks to those of you who were able to join us on the May 3 conference call. I believe it was an excellent opportunity for us to discuss the Governor's campaign with our friends Jack Oliver and Don Evans, and I know they were very appreciative of the work this group is doing on behalf of the Governor Bush Presidential Exploratory Committee.

As we heard from Don and Jack, the campaign is heavily focused on the next Federal Election Commission filing deadline of June 30, 1999. It is critical that we reach our to our colleagues, associates and friends to encourage them to send their personal contributions of $1,000 to the campaign before June 30.

Governor Bush will be traveling across the country in June attending a number of fundraising events. While the campaign is still in the process of finalizing dates for each of the events, we do have a list of the cities, which is attached for your reference.

NOW IS THE TIME FOR EACH OF US TO IDENTIFY OUR INDUSTRY COLLEAGUES IN EACH OF THESE MAJOR CITIES, AND ASK THEM TO SERVE AS A VICE CHAIR OR CO-CHAIR FOR THEIR CITY'S EVENT. As soon as the Texas legislature adjourns, the

Governor will begin traveling, so it is important that we begin our outreach *now.* Also enclosed is a form that you can complete and return to the Bush exploratory committee to help them build their host committees in each of these states.

The focal point of our efforts in the coming weeks will continue to be the June 22 reception honoring Governor Bush here in Washington, D.C. Most of our Association Executives group has committed to serve as either a Vice Chair or Co-Chair for the event, and I know that our efforts are very important to the success of the national capitol area event.

Many of you have already received your invitations for the June 22 event. We have been advised by the Bush Exploratory Committee that you can pick up additional invitations at their National Capital Area Fundraising Event office, located at 2100 M Street, Second Floor, Washington, D.C. 20037. The phone number for the office is (202) 785-5111.

The Bush Exploratory Committee has also produced a very impressive video profiling the Governor's career and his campaign platforms. We have requested a copy of this video for each of you, and will forward that to you just as soon as is received.

We have scheduled our next group conference call for Monday, June 7, at 5 pm Eastern Daylight Time. We will be sending you a "reminder" fax next week with the conference call number and code. We look forward to having additional members of the Bush campaign team join us for this call, and to discussing our "success stories" for the June 22 event.

Finally, I want to remind you that a very important part of the campaign's outreach to the business community is the use of tracking numbers for contributions, and both Don and Jack reiterated the importance of having your industry incorporate your tracking number in your fundraising efforts. ***LISTING YOUR INDUSTRY'S CODE DOES NOT PREVENT YOU, ANY OF YOUR INDIVIDUAL SOLICITORS OR YOUR STATE FROM RECEIVING CREDIT FOR SOLICITING A CONTRIBUTION. IT DOES ENSURE THAT YOUR INDUSTRY IS CREDITED, AND THAT YOUR PROGRESS IS LISTED AMONG THE OTHER BUSINESS/INDUSTRY SECTORS.*** If you have any questions about your industry's tracking information, please do not hesitate to let me know.

This group of Association Executives for Bush has been and will continue to play a pivotal role in the campaign's outreach to the business/industry community. Each day, we welcome another association president or executive to the group. If you know of someone who may want to be a part of our efforts, please complete the enclosed form and fax it back to me at your earliest convenience. We will contact them and provide them with the necessary information so that they can be a part of what promises to be an exciting campaign to elect the next President of the United States.

Once again, I appreciate your taking the time to join us for the May 3 conference call, and look forward to talking with you again on June 7 and working with you all in the coming weeks to ensure that the June 22 Washington, D.C., event is an unprecedented success.

EXHIBIT 34 - ADAMS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

Senate takes up rival to McCain-Feingold spending limits JIM ABRAMS; Associated Press Writer

WASHINGTON (AP) _ The Senate debate on **campaign finance**▷ law came down Tuesday to the question of whether unlimited soft money should be banned from American politics, as sought by Sen. John McCain, or just restricted.

In the main challenge to legislation championed by McCain, R-Ariz., and Sen. Russ Feingold, D.-Wis., a measure proposed by Sen. Chuck Hagel, R-Neb., would cap largely unregulated soft money donations that corporations, unions and individuals can make to national political parties. Hagel's proposal also would triple to $3,000 the hard money contribution limit on what individuals can make directly to candidates.

A vote is expected around noon Tuesday.

Each side said the other's measure would fail to reform the current system where monied interests spend millions to influence the outcome of elections.

Sen. Pat Roberts, R-Kan., a Hagel supporter, said McCain-Feingold was a "whack-a-mole" approach to special interests finding new ways to spend money.

Sen. Charles Schumer, D-N.Y., a backer of McCain, said that under Hagel's measure, a couple could still contribute $540,000 every election cycle in hard and soft money. The

"Hagel bill is so watered down, has so many loopholes in it, it is like Swiss cheese," he said.

McCain contends the measure offered by Hagel, a close friend, would make the current system of money politics even worse by reaffirming the legality of soft money. "I don't think Americans want us to do that," he said.

The Senate is now in its second week of debate on the McCain-Feingold bill, with a goal of coming to a final vote by the end of the week.

Hagel's measure would allow donations of up to $60,000 a year to the national parties. It would triple the current hard money donations to candidates and political action committees that individuals can make and increase disclosure for individuals and groups that participate in elections.

Hagel says his bill provides a middle ground on ◁**campaign finance**▷ that does not raise the constitutional free-speech problems that McCain-Feingold might face; would not weaken the influence of political parties, particularly at the state level; and would win the president's signature.

"We believe our ◁**campaign finance** proposal would pass constitutional muster," Hagel said. "What good does it do to pass legislation we know will be struck down by the courts?"

The constitutionality issue came to the forefront Monday when the Senate passed, 51-46, a proposal by Sen. Paul Wellstone, D-Minn., that would ban late-campaign advertising by advocacy groups such as the National Right to Life Committee and the Sierra Club.

Wellstone said this provision was needed to close a loophole in the McCain-Feingold bill that would keep corporations and unions from paying for attack ads in the final 60 days of an election but keep nonprofit groups from placing an identical ad.

McCain said he liked the idea of the Wellstone amendment but voted against it because of significant questions about its constitutionality. He said the passage of the Wellstone amendment, supported by numerous Republican opponents of McCain-Feingold, made it more important to fend off an amendment expected later this week that would nullify the entire legislation if the courts found just one part of it unconstitutional.

McCain-Feingold says nothing about increasing the $1,000 limit on individual contributions, although both sponsors have acknowledged that they will have to accept some increase in the 27-year-old ceiling.

"There's legitimacy to the fundamental argument that $1,000 in 1974 is not $1,000 today," McCain said.

But some supporters of McCain-Feingold are uncomfortable with raising the hard money limit.

Sen. Christopher Dodd, D-Conn., called it a "cost-of-living adjustment for less than 1 percent of the American public that can afford to write a $1,000 check. . . . It is incredible to me that we would even entertain such a thought as part of the campaign reform mechanism."

On Monday the Senate defeated, 56-40, an attempt by Sen. Ernest Hollings, D-S.C., to amend the Constitution to allow Congress and the states to place reasonable limits on campaign spending. Hollings and others argued that the amendment was needed to avoid the possibility that the courts would strike down the changes McCain-Feingold is meant to legislate.

"The current system is rotten, it's putrid, it stinks, and the people of this country ought to really know what this system is giving to them and what it is taking from them," said Sen. Robert Byrd, D-W.Va., who supported the amendment.

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The bill is S.27

On the Net: Senators' Web sites: http://www.senate.gov/senators/index.cfm

Keywords: Washington

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JIM ABRAMS; Associated Press Writer
Senate takes up rival to McCain-Feingold spending limits, 03-27-2001

[MMc 0095]

COUNSEL ONLY

The Republican Party of Kentucky

Capitol Avenue at Third Street * P.O. Box 1068 * Frankfort, Kentucky 40602
Phone (502) 875-5130 FAX (502) 223-5625

March 2, 2001

Mrs. Jan S. Karzen
205 Coralberry Road
Louisville, KY 40207

Dear Jan:

As you know, my reelection is right around the corner, and I am busily preparing for another hard-fought race. Thank you for the generosity you have shown me in already contributing the legal maximum amount to my Senate reelection campaign, the McConnell Senate Committee. I value your friendship and want you to know that your support is deeply appreciated.

Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2002 program. As you may know, Victory 2002 is the volunteer get-out-the-vote effort the Republican Party of Kentucky will run on behalf of my campaign and other campaigns in Kentucky. This program was an important part of President George W Bush's impressive victory in Kentucky last year, and it will be critical to my race, and others next year.

As you may know, an individual may contribute up to an aggregate maximum of $25,000 annually to all federal campaigns and party committees. Under federal election rules, the $2,000 you already contributed to my campaign counts against your 2002 limit. Contributions to Victory 2002, however, will count in the year in which they are made, so contributions made to this program this year will count against your 2001 limit, rather than your 2002 limit. Within this annual aggregate limit, you may contribute up to $7,500 to Victory 2002 in each calendar year, and a couple may jointly contribute up to $15,000 each year to Victory 2002. I hope you will consider contributing as much as possible this year.

With the election just a little more than a year away, I am preparing for what promises to be a well-funded, well-organized opponent wholeheartedly supported by the Democratic Party and its outside interest groups.

As you may know, the other side has already produced one candidate to run against me, and I will not be surprised to see more people step up in the coming months.

I look forward to hearing from you soon and hope you will help us fund this very important program. For your convenience, I have enclosed a contribution form and reply envelope. As always, should you have any questions or need anything further, please do not hesitate to call me or Scott Douglas at (202) 628-4636.

Thank you again for your friendship and support.

Sincerely,

Mitch McConnell
United States Senator

Jan –
My best to Ron. You
may not want to mess with the
request at this time. If not –
no problem. I'm thinking
about you both.

Paid for by The Republic Party of Kentucky, Catherine D. Bell Treasurer

[Confidential Only]
[Huard Deposition – Exhibit 4]
[Letterhead of The Tarrance Group]

MEMORANDUM

TO: The Coalition Steering Committee

FROM: Ed Goeas
Brian C. Tringali
Bill Cullo

DATE: June 28, 1996

RE: Preliminary Testing of AFL-CIO Advertising & Responses

The Tarrance Group was commissioned to conduct electronic focus groups among 24 "swing" voters in the Cleveland, Ohio media market on June 17th. The facility used for the focus group was Opinion Nation Research in Parma. Dr. David Hughes of Decision Labs, Ltd. of Chapel Hill, North Carolina assisted with his Speedback direct response system.

It is our considered opinion that Members of Congress currently under attack by AFL-CIO advertising are ill-prepared to respond. Essentially they are outgunned and outclassed. If targeted Republican Members ever hope to be operating on an even playing field during the 1996 election, it will require that an outside voice come to their defense. Finding a message for that voice is what we have been charged with in our research.

A reel of 10 ads were tested, which included 4 AFL-CIO ads that have already run and 6 potential Coalition response ads. The net result among swing voters in Cleveland was that 25% of participants were moved closer to voting for a Republican candidate for Congress and about half of the participants were moved against national labor leaders. In other words, the response ads not only levelled the playing field, but put some points on the board for Republican candidates as well.

The following include our recommendations for responding to the AFL--C10 series:

Negative ads work

The AFL-CIO ads are fundamentally altering the political environment, by running commercials that are typically not seen until October. Their tone and quality reflect the negative advertising usually not seen until late in an election cycle. However, although voters may not like these ads they are having a tremendous impact on the electorate. Our findings indicate that again, negative advertising works – and works well.

From our own experience we have seen this impact first hand with Congressman Greg Ganske in Des Moines.

It is imperative that Republican candidates begin responding to these charges. And because most individual campaigns cannot begin to wage this war alone, it makes sense for an entity like the coalition to come to their defense.

Produce two ads

We would recommend that the Coalition consider producing the following two ads:

- **Flag** – This ad builds continually on the "cognitive" level until the viewer is left with a positive impression. Yet it can communicate the parameters of what the AFL-CIO has been doing with their advertising. It sets the stage and that is vital.

  Some elements about labor bosses need to be pumped up to include use of mandatory dues and better highlight their $35 million dollar investment in order to return Congress to the ways of the past.

We might consider using an actual labor union member who perhaps retired recently to help make the point that the leadership does not reflect the rank & file.

The Chabot response worked extremely well to have members who are under attack answer the charges directly. But if we are answering charges on Medicare, then the 48% or 61% figures lend little credibility to our argument. Consider using language that calls attention to the fact that the Congressman has more than protected Medicare by voting for an increase that more than compensates the individual beyond even the "rate of inflation" (maybe the "rate of inflation in medical care").

The rate of inflation seems to be a personal economic indicator for many voters. As a result, protecting against the rate of inflation makes them feel secure.

- **8mm** – This ad starts out strong and remains strong both at an "affect" and "cognitive" level. In its current format, it is probably too offensive to seniors to consider running, but with some changes it could be the strongest ad in the bunch.

Visually, the picture of speed boat is probably not ideal. The most important thing to do is change the rhetoric so that we do not present the life of our parents as perfect – something with wider appeal would be better. The ad currently offends some seniors in claiming that they led the "life of Riley."

A line such as "they might not have been able to do all that they wanted to do, but we never felt like we went without..." might be a little less offensive to seniors.

A balanced budget does not need to be an integral part of this ad and could be replaced. The tax message is what is important to the ad. But, as we have seen before, a number of individuals expressed concern about foreign aid, which might make a better issue for inclusion in the ad.

Additional Research

We would like the group to consider the suspension of additional focus groups and the use of these two spots in two key test markets. These test markets could include:

1. Des Moines, Iowa
2. Erie, Pennsylvania

In each market, about 1,200 gross rating points could be run of one or both of these television spots.

Prior to running commercials, a survey could be conducted in order to determine the political landscape. After the television spots have reached saturation, a telephone survey in the form of a panel-back design could be conducted again to determine the impact of the spots. That would give the Coalition two case studies from which to draw conclusions and legitimize their activities with regard to fund raising.

Because of our current work with Congressman Ganske, we would ask that the Tarrance Group be used only for the survey research in Erie.

*****

[Confidential-Counsel Only]

[Huard Deposition – Exhibit 18]

The Coalition: Americans Working for Real Change

Post Election Survey Analysis

November 22, 1996

MEMORANDUM

TO: Chuck Greener
The Coalition

FROM: Brian Tringali
Gary Ferguson

RE: Key Findings from Post-Election Surveys in OH-6, IA-4, WA-1, WA-5, WA-9 and KY-1

DATE: November 22, 1996

American Viewpoint and The Tarrance Group are pleased to present the following findings from our latest surveys of voter attitudes in six key Congressional Districts following the 1996 elections. The Tarrance Group and American Viewpoint were commissioned by the business Coalition to conduct a survey of N=300 voters from the 1996 election for each of seven Congressional Districts where both the Coalition and the AFL-CIO were active during the campaign. These districts include OH-6, IA-4, WA-1, WA-5, WA-09 and KY-01. For each survey, the margin of error for a sample of this type is likely to be within ±5.8%. Responses to the survey were gathered November 13-14, 1996.

The Coalition commissioned this research to assess the impact of their two-month advertising campaign and its relative effect on voters in the face of the very aggressive, year-long campaign sponsored by the AFL-CIO. Given that four of the six Republican candidates tested in this research won their respective races, one could conclude that the Coalition's efforts were a success – as they were in the vast majority of the targeted districts in which the Coalition was involved.

To be sure, the most compelling empirical evidence that Coalition dollars were spent effectively is the fact that although the AFL-CIO outspent the Coalition by nearly 7 to 1 and began their onslaught almost a year earlier, voters in the tested districts were only twice as likely (36% average) to recall having seen, read, or heard the labor union's advertising as they were the business coalition's advertising (16% average). This, despite the fact that the Coalition has no "brand name" awareness -- unlike the AFL-CIO labor union.

The following are our key findings that emerged from our analysis of each of the six districts and are grouped into (1) lessons learned, (2) impact of advertising, and (3) future messages:

COALITION SURVEY COMPARISON

Political Environment

Financial Status Compared to Four Years Ago

It is clear that the overwhelming proportion of voters either feel that, financially, they are better off, are or about the same as they were four years ago. In fact, 70% of voters in every district share this sentiment. This is reflective of the political environment which allowed Bill Clinton to be re-elected easily, and for incumbent members of Congress to hang on to their seats. Voters, in effect, voted for the status quo, as we find that only a small number of incumbents were defeated nationwide

	IA 4	OH 6	WA 5
Better Off	32%	27%,	22%
Worse Off	15%	16%	26%
About the Same	50%	54%	50%
Don't Know/Refused	3%	3%	2%

Most Important Issue

The common issues that were the most important factors influencing voter decision making in the three districts were Medicare, taxes, and a balanced budget. Medicare was the number one issue in two of the districts, while balancing the budget ranked number one in one district. Education is also on the minds of a significant number of voters.

	IA 4	OH 6	WA 5
Medicare	6%	7%	5%
Taxes	7%	6%	4%
Education	5%	5%	3%
Balancing the Budget	4%	5%	8%
Republican Extremism	4%	3%	3%
Democratic Liberalism	3%	3%	3%
Control of Congress	2%	2%	2%
The Environment	1%	1%	3%
Welfare Reform	2%	1%	2%
Social Security	1%	2%	1%
Health Care	2%	2%	*
Someone to work with Clinton	*	*	*
Bill Clinton	1%	1%	1%
Newt Gingrich	*	*	1%

When responses were combined, we find that voters were most likely to have hinged their vote for Congress on lifestyle issues such as Medicare, social security, education, and the environment, rather than on fiscal issues (balanced budget, taxes) or political issues. We find that voters focused on lifestyle issues were more likely to be of Democratic persuasion, while those focused on fiscal issues were more likely to be Republican. Voters focused on political issues are the most partisan voters, and decided who they were going to vote for the earliest.

	IA-4	OH 6	WA 5
Lifestyle issues	17%	18%	14%
Fiscal issues	11%	10%	12%
Political issues	10%	9%	11%
Other	26%	27%	29%
Don't Know/Refused	36%	37%	34%

AFL-CIO Advertising

Generic Impact on Candidate Supported by AFL-CIO

When voters were asked to if they would be more likely or less likely to support a candidate who is being promoted by AFL-CIO advertising, many more voters say they are less likely to support that generic candidate. It is also apparent that the majority of voters say that it makes no difference to them. Those who say more likely are most likely to be partisan Democrats. Republicans and men drive those who are less likely to vote for that candidate.

	IA 4	OH 6	WA 5
Less likely	25%	25%	29%
More likely	8%	12%	6%
No Difference	63%	58%	60%
Don't Know/Refused	4%	5%	4%

Seen, Read or Heard AFL-CIO Advertising

Between 34% and 38% of voters in all of our districts say they have seen read or heard of the AFL-CIO campaign. Voters in OH 6 were least likely to have heard of the campaign, while voters in IA 4 were most likely to have heard. These highs and lows correspond with the number of spots that were run in each area. Approximately half of voters in all of these districts say they did not see, read or hear advertising by the AFL-CIO during the campaign.

Men, who are typically more politically aware, were more likely to have seen, read or heard the ads when compared with women. In IA 4, 47% of men were aware of the campaign, while only 30% of women were. The same was true in OH 06 and WA 5, where the breakdown was 39% men to 28% women, and 38% men to 34% women, respectively.

It is clear from our research that Democrats and those in union households were most aware of the AFL-CIO advertising campaign.

	IA 4	OH 6	WA 5
Yes	38%	34%	36%
No	47%	47%	46%
Don't recall	15%	19%	18%

Effect of AFL CIO Advertising on vote for GOP Incumbent

In two of our districts, we find that there was a backlash against the AFL-CIO by voters, as higher percentages of voters said they were more likely to vote for the Republican candidate after hearing this ad campaign. These backlash

voters are most likely to be Republicans and conservatives. Only in OH 6 were voters less likely to support the Republican candidate after hearing the advertising by the AFL-CIO. These voters were most likely to Democrats, and senior citizens. Overall, we find that the most partisan and politically aware voters were most likely to respond to AFL-CIO advertising, while the less partisan, and less engaged mainstream of voters said that the ads made no difference in their vote behavior.

	IA 4	OH 6	WA 5
Less likely	13%	26%	16%
More likely	23%	14%	19%
No Difference	63%	58%	63%
Don't Know/Refused	1%	6%	2%

Coalition Advertising

Generic Impact on Candidate Supported by Business Groups

It is apparent from the research that a generic candidate being supported by a coalition of business groups has no major impact on voter support for that particular candidate. Exactly 73% of voters in each district said that support from business groups made no difference to them. The other 27% of voters who responded to the question gave business mixed reviews, with slightly more of these voters being less likely to support a candidate being supported by the National Chamber of Commerce or the National Association of Independent Businesses.

	IA 4	OH 6	WA 5
Less likely	12%	13%	12%
More likely	9%	10%	9%
No Difference	73%	73%	73%
Don't Know/Refused	6%	4%	6%

Seen, Read or Heard Coalition Advertising

Approximately 17% of voters in each district say they had seen, read, or heard of advertising supporting their Republican candidate paid for by the Coalition. A large majority of voters in each district said they had no awareness of the Coalition's advertising. Awareness of the Coalition ads were approximately half of what the awareness of the AFL-CIO advertising was.

	IA 4	OH 6	WA 5
Yes	17%	16%	17%
No	66%	64%	61%
Don't recall	17%	20%	22%

Effect of Coalition Advertising on vote for GOP Incumbent

A majority of voters in all of our districts who said they were aware of the Coalition ad campaign, said the campaign made no difference on their vote for the Republican incumbent. It is important to remember that many voters were confused by the volume of political advertising, and may have had trouble distinguishing one ad campaign from the other.

In two of our districts, we find that of the voters who say they were impacted by Coalition advertising, a higher percentage said they were less likely to vote for the Republican candidate. In IA 4 the results were mixed, with 14% of voters saying they less likely and 14% saying they were more likely.

	IA 4	OH 6	WA 5
Less likely	14%	14%	20%
More likely	14%	10%	12%
No Difference	67%	74%	.65
Don't Know Refused	6%	2%	4%

Election 1996 Results

Timing of Voter Decision Making

The largest portion of voters made up their minds in September or before, and these voters tend to be more partisan, more educated, and more politically informed. A majority of voters in WA 5 made up their minds in September or before, while pluralities did the same in OH 6 and IA 4.

A majority of voters made up their minds in the final five weeks of the campaign, except in WA 5. Of those voters who made up their mind in the last week of the campaign, 29% were in IA 4, 28% in OH 6, and only 17% in WA 5. The data supports the premise that late advertising is a way to influence the outcome of races. Voters who decided in the final weeks of the campaign are more likely to be less educated, of lower socio-economic status, working women, and ticket-splitters:

	IA 4	OH 6	WA 5
Election Day	12%	13%	4%
Weekend before the election	10%	8%	8%
First week in November	7%	7%	5%
Last two weeks of October	16%	12%	13%
First two weeks of October	7%	6%	12%
In September	11%	8%	13%
Before September	32%	38%	39%
First Week in November	29%	28%	17%
October	22%	18%	25%
In September or Before	43%	46%	52%

Presidential Vote

The data shows that Bob Dole lost in every district. Dole took the worst beating in OH 6, where the Republican incumbent lost by two percentage points. The top of the ticket was a drag on Republicans in 1996, and especially hurt those incumbents that were in trouble.

	IA 4	OH 6	WA 5
Dole	38%	29%	37%
Clinton	41%	41%	38%
Perot	6%	8%	9%
Don't Know/Refused/Other	14%	22%	17%

Congressional Vote

Of the three Republican incumbents in these districts, two were returned to office (Greg Ganske and George Nethercutt), while one was defeated (Frank Cremeans). Our surveys show results that correspond with the election results, though it should be noted that Frank Cremeans received more of the vote on election day than is shown in our survey.

	IA 4	OH 6	WA 5
GOP Incumbent	53%	34%	52%
Democrat Challenger	34%	47%	36%
Don't Know/Refused/Other	13%	19%	13%
GOP Incumbent Advantage	**+19**	**-13**	**+16**

- The gender gap was apparent in our surveys, but only in OH 6 did the Democrat challenger receive a larger percentage of women and men than the Republican incumbent. In OH 6, Cremeans lost men by a close margin (37% to 42%) and lost women (32% to 53%). In IA 4, Greg Ganske carried women 48% to 38%, while he won a with a large margin among men, 57% to 29%. In WA 5, Nethercutt carried women 47% to 39% and won with men 57% to 32%.

- Where ticket-splitters broke against the Republican, the Republican lost. Ticket-splitters went for the Republican incumbent in Ganske's (56%-16%) and Nethercutt's (48%-28%) districts (IA 4 & WA 5), but against Cremeans (16%-48%) in OH 6.
- Among voters who were aware of the AFL-CIO campaign, two districts showed that the Republican received more of the vote. In IA 4 a majority of voters who had seen, read or heard of the AFL-CIO ad campaign voted for Ganske. In WA 5, 46% of voters who were aware of the ad campaign voted for Nethercutt. In OH 6 the trend went the other way, with 50% of voters aware of the AFL-CIO campaign voted for the Democrat challenger.
- In all three districts, voters who said they were aware of the Coalition advertising, gave the Republican challenger larger percentages of the vote. In OH 6, 45% of voters aware of the ad campaign voted for Cremeans. In WA 5, 53% of the voters that knew about the Coalition ads voted for Nethercutt. Similarly, in IA 4 45% of voters went for Ganske.

Perceptions - GOP Incumbents

Not surprisingly, the Republican incumbents who won their races have a much higher favorability ratio than does the incumbent who lost his race. Greg Ganske and George Nethercutt had very high favorables, while Frank Cremeans was not so fortunate.

	IA-4	OH 6	WA 5
Favorable	64%	43%	58%
Unfavorable .	26%	32%	32%
No Opinion	7%	19%	8%
Never Heard Of	2%	6%	2%

- Among voters who say they were aware of the AFL-CIO advertising, Ganske's favorables were higher at 67% favorable, 26% unfavorable. Among voters who were aware of the Coalition's advertising, Ganske had 59% of voters viewing him favorably, and 35% of voters viewing him unfavorably.

- Among voters who say they were aware of the AFL-CIO advertising, Nethercutt's favorables were at 56% favorable, 36% unfavorable. Among voters who were aware of the Coalition's advertising, Nethercutt had 55% of voters viewing him favorably, and 35% of voters viewing him unfavorably.
- Among voters who say they were aware of the AFL-CIO advertising, Cremeans favorables were at 48% favorable, 35% unfavorable. Among voters who were aware of the Coalition's advertising, Cremeans had 53% of voters viewing him favorably, and only 18% of voters viewing him unfavorably.

Perceptions - Democrat Challengers.

Among the Democrat challengers, we find that Judy Olson was in the worst shape in WA 5, while Connie McBurney and Ted Strickland fared much better. Strickland, who had the highest favorables, was the only candidate who won the race.

	IA 4	OH 6	WA 5
Favorable	53%	54%	46%
Unfavorable	32%	26%	29%
No Opinion	11%	16%	21%
Never Heard Of	4%	3%	4%

- Among voters who say they were aware of the AFL-CIO advertising, McBurney's favorables were at 61% favorable, 27% unfavorable. Among voters who were aware of the Coalition's advertising, McBurney had 61% of voters viewing her favorably, and 25% of voters viewing her unfavorably.
- Among voters who say they were aware of the AFL-CIO advertising, Olson's favorables were at 52% favorable, 31% unfavorable. Among voters who were aware of the Coalition's advertising, Olson had 49% of voters

viewing her favorably, and 35% of voters viewing her unfavorably.

- Among voters who say they were aware of the AFL-CIO advertising, Strickland's favorables were at 57% favorable, 33% unfavorable. Among voters who were aware of the Coalition's advertising, Strickland had 53% of voters viewing him favorably, and 24% of voters viewing him unfavorably.

Newt Gingrich

Gingrich Influence on Vote Behavior

Newt Gingrich was not a major factor in the vote behavior of majorities of voters in our districts. Approximately one quarter of voters said that their vote was against Gingrich, and these voters were most likely to be partisan Democrats. WA 5 had the largest majority of voters who said they voted against Gingrich, while IA 4 voters were most likely to say that Gingrich was not a factor. Only a small percentage of voters said their vote was for Gingrich, and this sentiment was driven mostly by Republican men.

	IA 4	OH 6	WA 5
Vote was for Gingrich	8%	7%	6%
Vote was against Gingrich	21%	23%	28%
Gingrich was not a factor	69%	64%	58%
Don't Know	2%	6%1	9%

Perceived Effectiveness of AFL-CIO Efforts to Tie Members to Gingrich

Approximately one-third of voters in each of our districts believes that the AFL-CIO attempt to link Newt Gingrich to individual members of Congress was very effective. These voters are most likely to be Democrats, especially Democrat men, less educated voters, and women at home. A majority of voters in IA 4 believe the effort was not effective, while a plurality of voters in OH 6 and WA 5 say it was not effective.

	IA 4	OH 6	WA 5
Effective	33%	34%	32%
Not effective	50%	43%	47%
Don't Know	16%	23%	21%

Perceptions of AFL-CIO Campaign/Campaign Finance

AFL-CIO's Use of Union Dues to target Republicans

Overall, an overwhelming majority of voters in each of our districts say they disapprove of the AFL-CIO's use of mandatory union dues to defeat Republicans and give Democrats control of the House of Representatives. Those saying that they approve are the most partisan Democrats, while the other segments of the electorate are against the AFL-CIO's tactics.

	IA 4	OH 6	WA 5
Approve	16%	17%	11
Disapprove	65%	64%	70%
No Difference	9%	7%	8%
Don't Know	10%	12%	11%

Future Campaign Finance Reform Should Restrict AFL-CIO Spending and Make them Follow the Same Rules and Spending Limits as Other Organizations

Large majority of voters in all of our districts agree with the assertion that the AFL-CIO should be included in future campaign finance reform, specifically restricting the use of mandatory dues, and making the AFL-CIO comply with the same spending limits and rules that other organizations follow.

	IA-4	OH 6	WA 5
Agree	76%	69%	74%
Disagree	8%	16%	13%
Don't Know/Depends	16%	15%	13%

Priorities For GOP Congress/Perception of Medicare

Importance of Republican Efforts to Reform Medicare to Vote Decision

More than 60% of voters in each district say that the Republican efforts to reform Medicare were important to their vote decision. Voters in WA 5 were more likely to believe that Medicare was important, while less educated voters in OH-06 said that the Medicare issue was not as important to them. Seniors and women were most likely to be driving the intensity on the importance of the Medicare issue to vote behavior.

	IA-4	OH 6	WA 5
Important	65%	64%	70%
Not Important	16%	17%	11%
No Difference	9%	7%	8%
Don't Know	10%	12%	11%

First Thing You Would Like to See the New GOP Congress Address

In all of our surveys, we find that the top issues voters expect the new Republican majority to address are resolving Medicare, balancing the budget, and implementing tax relief for working families. It is not surprising that voters are focused on these three issues, as they were the core of the 1996 campaign. It is also interesting to note that the issues that these voters are focused on, were also the major themes of Coalition advertising. Welfare Reform and Education were also on the minds of a significant number of voters.

	IA 4	OH 6	WA 5
Resolving Medicare	29%	32%	27%
Balancing the Budget	23%	22%	27%
Tax Relief for working families	15%	11%	13%
Education Reform	8%	7%	6%
Welfare Reform	9%	8%	9%
Campaign Finance Reform	5%	4%	7%
Superfund	1%	3%	2%
Energy Deregulation	1%	1%	*

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IN THE
Supreme Court of the United States

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AMERICAN CIVIL LIBERTIES UNION,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT ACLU

Joel M. Gora
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7926

Mark J. Lopez
(Counsel of Record)
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
125 Broad Street
New York, New York 10004
(212) 549-2608

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REPLY BRIEF OF APPELLANT ACLU

I. The Right of Organizations Like the ACLU to Engage in Public Debate on Critical Issues of the Day Through Any Medium the Organization Deems Appropriate, Including Broadcast Ads, Lies at the Core of Constitutionally Protected Speech, as this Court Recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976).

The government's and the intervenors' conception of the First Amendment is stunningly at odds with this Court's First Amendment and campaign finance jurisprudence. Speech that refers to or discusses the qualifications of candidates lies at the core – not the fringes – of the First Amendment's protection. In a participatory democracy, where an informed electorate is essential, any restrictions on speech that interfere with the ability to praise, criticize or debate the qualifications of candidates, or discuss the issues that they campaign on, necessarily reduces the candidates' accountability by shielding them from scrutiny. Title II's restrictions take on greater significance when the candidate is already a public official and the effect of the restriction is to stifle criticism of government itself. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Moreover, by targeting radio and television ads, the statute perversely bans the most effective form of speech by suppressing information that is intended to reach the largest audience. Far from advancing the interests asserted by the government in this case, Title II disserves the goal of an informed electorate and thereby undermines the democratic process.

The defending parties' startling response to this charge is that the problem of corruption justifies a ban on criticizing government or discussing the qualifications of candidates. This far-reaching argument is foreclosed by

Buckley v. Valeo, 424 U.S. 1 (1976). This Court's opinion in *Buckley* repeatedly stressed that campaign finance laws must be narrowly tailored to avoid "unnecessary abridgement of [First Amendment] freedoms." *Id.* at 64. Both the government and the intervenors critically misperceive the substantial reach of Title II and its impact on heretofore constitutionally protected speech. One aspect of *Buckley* is particularly critical here. *Buckley* held that the government's regulation of expenditures must be limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate…." *Id.* at 45. This "express advocacy" doctrine, which *Buckley* adopted to " distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons…." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), has played a critical role for almost three decades in protecting issue-oriented speech by providing a bright line between permissible and impermissible government regulation. The ban on electioneering communications unapologetically targets issue advocacy and brushes aside the bright line distinction between words of express advocacy and all other speech that merely refers to a candidate. In an ill-conceived effort to avoid the vagueness problems present in *Buckley,* the defendants have targeted the very speech that the Court sought to protect in *Buckley* when it drew a distinction between contributions which could be limited, and expenditures which could not.

Nevertheless, the defendants maintain that the principles established in *Buckley* have been overtaken by time and experience and that the empirical judgment the Court made in that decision about the inherent worth of issue advocacy speech should be jettisoned. That judgment, however, is linked inextricably to broader and enduring First Amendment principles that were well established long before *Buckley,* and which have been reaffirmed by the Court many times since. Neither the government nor the intervenors

make any attempt to grapple with those overriding First Amendment principles, and instead defend Title II as if the Court's campaign finance jurisprudence was developed completely untethered from those principles. This short-sighted approach represents an unalloyed assault on traditional First Amendment analysis and on *Buckley* itself. The *Buckley* decision has served as a bulwark against laws that masquerade as campaign finance reform, but which stifle criticism and debate over the qualifications of candidates and elected officials. The careful balance made in *Buckley* between fully protected candidate-referred speech and more specific exhortations to vote serves the important First Amendment interests that animate a free society and a participatory democracy.

A. *Buckley* and the First Amendment Tradition

Buckley's central holding is that any regulation of non-candidate expenditures must stop short of stifling dissent or debate on public issues or criticism of our elected officials. That holding is firmly rooted in traditional and enduring First Amendment principles that reflect "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open…" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). These principles and our unflagging commitment to debate on public issues are strained to the limit by the government's defense of Title II. The very notion that advocacy groups like the ACLU can be prohibited from using the broadcast medium to question the policy positions of our elected officials during an election season is completely foreign to the First Amendment.

"Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940). It is for this reason that debate on matters of public concern, lies at the very heart of the First Amendment. *Connick v. Meyers*, 461 U.S. 138, 145 (1983). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* At 145 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). The debate on matters of public concern can fulfill its purpose in a democratic society only if it is free and unrestrained. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times v. Sullivan*, 376 U.S. at 269.

By stark contrast, Congress has sought to moderate the debate over public issues and the qualification of candidates by adoption of the broadcast ban on terms that prohibit non-profit corporations – including thousands of traditional non-partisan issue advocacy organizations like the ACLU, Sierra Club, NOW, AARP, and the NRA -- from directly participating in that debate through the broadcast media. Laws that prohibit all corporations from engaging in otherwise constitutionally protected speech, for no other reason than that they hold corporate charters, threaten the ability of organizations like the ACLU and its members to participate fully in the important national debates of our time.[1]

The speech of the ACLU and other issue advocacy organizations on pending legislative matters and on the

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[1] No less so does the defendants' response to this objection that the ACLU and other advocacy groups remain free to participate in the debate if they agree to be regulated as if they were political committees. The ACLU has resisted attempts to classify it as a political committee for reasons that have been affirmed by the Court in *Buckley*. See *American Civil Liberties Union v. Jennings*, 366 F. Supp 1041 (D.D.C. 1973)(three judge court) *vacated as moot sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975). The organization cannot be required to forego its independence from FECA in order to participate in the debate over the direction of this country. *See Infra*, Point II. B.

positions of candidates is part of a nationwide debate in which the listener is being asked to make an important choice about the government's policies, and to think more broadly about the role and responsibilities of our elected officials. The timeliness and significance of that discussion is clear. *See Thornhill*, 310 U.S. at 102-03. It is equally clear, however, that there is sharp disagreement over how those choices should be resolved. The ACLU's right to participate in this debate is qualitatively different than the interests Congress sought to address by adoption of Title II. The BCRA calls speech of this nature "electioneering communications" if they are made within the applicable blackout periods. The government's suggested labels, however, cannot control this Court's First Amendment analysis. *See New York Times Co. v. Sullivan*, 376 U.S. at 269; *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 627-28 (1996)(Kennedy, J., concurring in part, dissenting in part).

In a participatory democracy, the First Amendment does not allow the government to substitute its judgment for the people's in evaluating conflicting arguments on matters of public concern by suppressing the flow of information essential to informed decision making. *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978). It is "'[t]he very purpose of the First Amendment….to foreclose public authority from assuming a guardianship of the public mind…'" *Riley v. National Federation of the Blind*, 487 U.S. 781, 791 (1988) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945)(Jackson, J. concurring)).

B. Elections and the First Amendment Tradition

Congress is not free to interfere with the debate over the conduct of our elected officials on the grounds that the ACLU's statements "refer" to a candidate or because they may be perceived as "supporting" or "opposing" a candidate. This is particularly true, where as here, Congress has acted to hobble an entire class of speakers in the debate based on their organizational form. As stated in *Bellotti* "the inherent worth of speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." 435 U.S. at 777. Congress' paternalistic instincts in this case about the worth and influence of speech communicated by corporate speakers, especially non-profit corporations, are simply misplaced. *Id.* at 785-86. So too are its efforts to moderate the debate by controlling the timing of it, *see Mills v. Alabama*, 384 U.S. 214 (1966), and by closing off the medium likely to reach the widest audience. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 481 (1974)(consolidation of the newspaper industry does not justify Florida's Right of Reply statute under the First Amendment).

Under the defendants' formulation of the First Amendment interests at stake in this case, the very same speech that is entitled to full constitutional protection outside the blackout period preceding an election, is entitled to no protection if uttered during the blackout period. This notion sets the First Amendment on its head. There is a direct and inherent correlation between the substance and vigor of political debate and the conduct of elections. Both the government and the intervenors gloss over the importance of this correlation and the consequences for our democratic traditions. As recognized in *Buckley*, "[d]iscussion of public issues and debate on qualification of candidates are integral to the operation of the system of government established by our Constitution…,"424 U.S. 14-15. Moreover, "[n]ot only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." 424 U.S. at 42. Thus, the electoral context of the debate provides *less* – not more -- justification for imposing restrictions on speech. What the defendants describe as narrow tailoring, in fact cuts a wide swath in the First Amendment by directly targeting the content, timing, and mode of expression that is most closely linked to our democratic processes. Far from being narrowly tailored, the broadcast ban strikes a profound blow to the political discourse so essential to informed decision-making and government accountability.

The sweepingly broad primary definition contained in the statute unavoidably captures speech that has no electioneering purpose or message whatsoever, but instead is based solely on the proximity of the speech to a pending election. As Judge Leon's opinion correctly observed, this type of arbitrary line drawing cannot justify treating otherwise constitutionally protected speech as an electioneering communication and bringing it within FECA's coverage. The backup definition's attempt to link the communication to an electioneering purpose is no less flawed and, indeed, does more harm to First Amendment interests because the blackout period is much longer than the 30/60 rule applicable to the primary definition. The backup definition both as written and as construed by the lower court, is a return to the vague and imprecise efforts of the past to regulate speech critical or supportive of public officials under the pretense of regulating campaign finances.[2]

Finally, it is no response to argue, as both the government and the intervenors do, that the electioneering communications provision falls short of a total ban on speech and thus, presumably, should be judged more sympathetically under the First Amendment. That claim is misguided for three fundamental reasons. First, Title II effectively functions as a total ban on electioneering communications by nonprofit advocacy groups like the NRA and the ACLU given the strict reading of *MCFL* adopted by the FEC and endorsed by the government and the intervenors in this case.[3] Second, this Court has recently rejected the notion that content-based regulations on speech are entitled to greater judicial deference than content-based prohibitions. "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *United States v. Playboy Entertainment Group,* 529 U.S. 803, 826 (2000). Finally, the "alternative" of speaking through a PAC poses severe First Amendment problems as well. *See Infra*, Point II. B.

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[2] Neither the government nor the intervenors make any effort to defend the truncated, fallback definition of "electioneering communications" that the district court adopted. And, neither the government nor the intervenors make much of an effort to defend the fallback definition that Congress adopted and that the district court found unconstitutionally vague. That strategic judgment is well-warranted.

II. Title II's Regulation of Non-Candidate Expenditures is Foreclosed by *Buckley* and Its Progeny, and Cannot be Conditioned on the Establishment of a Segregated Fund or PAC.

A. *Buckley* and Its Progeny

Even if the broadcast ban is analyzed on the government's own terms as involving campaign activity and nothing more, Title II cannot be reconciled with *Buckley* and would upset the balance made in that case between expenditures that are entitled to full constitutional protection and other campaign activity. The regulation of expenditures for political speech runs head long into numerous decisions of this Court holding that the First Amendment forbids the imposition of expenditure limits on candidates, individuals, and groups – including political parties, political committees, and issue advocacy organizations. The only departure from this steadfast rule is the prohibition against expenditures that exhort the listener to vote for or against a candidate when paid for from corporate treasury funds in the narrow circumstances present in *Austin v. Michigan Chamber of Commerce* 494 U.S. 652 (1990). That case provides no support for expanding FECA's coverage to the immensely broader goal of prohibiting all broadcast communications that simply "refer[] to" a clearly identified candidate if paid for from corporate treasury funds. *Austin,* with its concern over aggregate corporate wealth, provides even less support for regulating the speech of membership organizations, comprised of individuals, like the ACLU, during the 60 days prior to a general election or 30 days before a primary. To argue that *Austin* provides the very source of the power to regulate the ACLU's activities, distorts the holding in *Austin* and ignores the fundamental interest at stake in this Court's cases striking down expenditure limits as a violation of the First Amendment.

In crafting the argument that Congress may legitimately place temporal limits on the ACLU's broadcast communications during the period before federal elections, the defending parties cast aside the clear import of this Court's numerous decisions involving expenditure limits imposed on candidates and non-candidates alike. We know from *Buckley* that expenditure limits of any kind may not be imposed on individuals, groups, or candidates. *FEC v. National Conservative PAC*, 470 U.S. 480 (1985) teaches that they may not be imposed on political committees (in that case one which was a non-membership, nonprofit corporation), and *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) instructs that they may not be imposed on traditional issue advocacy groups that are not linked with for-profit corporate interests. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (*Colorado I*), the Court reaffirmed that expenditure limits operate as direct restraints on speech and that they may not be imposed on political parties. *See also Bellotti*, which protects a corporation's right to engage in issue advocacy. Indeed, direct or temporal limits have never been upheld by this Court, except in the narrow circumstances presented in *Austin*.

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[3] *See MCFL* discussion *Infra,* Point II. A. and n. 7.

As these cases make clear, under no conception of the First Amendment is it permissible to stifle dissent or debate on public issues or criticism of our elected officials simply because the debate occurs in the context of elections or based on the identity of the speaker. Nothing in *Austin* or in the Court's broader First Amendment jurisprudence remotely supports such a far-reaching conclusion. The defendants have lost sight of the First Amendment principles at work in this Court's political expenditure cases and which fully protect political advocacy by organizations constituted for that purpose. If anything, groups like the ACLU, whose commentary on public issues is divorced from any partisan purpose, merit greater - not lesser - protection than individuals and organizations seeking to influence electoral outcomes. For this reason, neither Title II's ban on electioneering communications nor its disclosure requirements can be constitutionally applied to the ACLU and organizations like it.

To be sure, this Court twice has been called upon to define the permissible reach of expenditure limits as they affect issue advocacy groups not organized as political committees. *See FEC v. Massachusetts Citizens For Life, Inc., supra; Austin v. Michigan Chamber of Commerce, supra*. Two limiting principles emerge from those cases.

First, when the Court reaffirmed the express advocacy rule in *MCFL,* limiting the reach of FECA, it specifically noted that the rule had been crafted "in order to avoid problems of overbreadth". *Id.* at 248. [4] The BCRA does not avoid problems of overbreadth, it embraces them as supposedly essential to addressing the proliferation of so-called "sham" issues ads. The primary definition of "electioneering communications" may be more specific than the expenditure provisions struck down in *Buckley*, but specificity alone does not resolve the overbreadth problem. *Board of Airport Commissioners v. Jews for Jesus, Inc.,,* 482 U.S. 569 (1987)(striking down policy that barred all "First Amendment activities" at Los Angeles International Airport). Furthermore, unlike the statute involved in last Term's decision in *Virginia v. Hicks,* ___ U.S. ___ (2003), Title II is targeted at expressive activity and has been challenged by groups, including the ACLU, that seek to engage in core political speech.[5]

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[4] Contrary to the defendants' view, the express advocacy doctrine reflects more than a concern about vagueness. It embodies a substantive and fundamental principle of First Amendment law. If any mention of a candidate in the context of a discussion about issues subjected the speaker to campaign finance controls, the consequences for "free discussion" would be intolerable and speakers would be compelled to "hedge and trim." *Buckley*, 424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945). Accordingly, all speech that does not "in express terms advocate the election or defeat of a clearly identified candidate" is outside the scope of permissible regulation. *Id.* at 44.

[5] The overbreadth of the primary definition is amply demonstrated in Judge Leon's opinion. It is also demonstrated by its impact on the ACLU itself. The government and the intervenors attempt to dismiss the significance of the ACLU's experience by claiming that we have pointed to only a single radio ad that would be prohibited under Title II. However, two separate declarations submitted in this case by Anthony Romero, the ACLU's Executive Director, make clear that the ACLU has recently raised new funds that it plans to use, in part, for broadcast ads designed to promote the organization's legislative agenda. J.A. 721-722; J.A. 1817. In fact, the ACLU has just purchased five radio spots that are scheduled to run over the Labor Day Weekend. These spots highlight a recent House vote repealing the "sneak and peek" provisions of the USA PATRIOT Act, and urge critical Senators to take a similar position when they return from the August recess. Under the BCRA, these ads would be illegal if the legislative calendar had been different and this vote had occurred within the 30/60 day period set forth in Title II. Nor is that possibility speculative or unlikely. As pointed out in an exhibit attached to the declaration of Laura Murphy, Director of the ACLU's Washington Office, many important civil liberties issues are debated and voted upon

Second, in both cases the Court drew the critical distinction between the permissible regulation of certain types of nonprofit groups linked to traditional business corporations and other nonprofit groups that are more like political advocacy organizations and that do not function as a conduit for the types of business corporations subject to FECA regulation under 2 U.S.C. § 441. The distinction is justified by, among other things, the absence of plausible concerns over concentrated corporate wealth, and the fact that membership in the organization is both voluntary and based on ideological agreement with the organization's views and activities. *MCFL,* 479 U.S. at 257-58. This of course perfectly describes the ACLU. Indeed, people join the ACLU and contribute their membership dues precisely because they want the organization to use those funds to advocate on their behalf and to praise or criticize public officials for their positions on important civil liberties issues.[6] The fact that the ACLU receives a *de minimis* amount of corporate or union support does not change the fundamental character of the organization or justify treating it as the type of organization under consideration in *Austin*. Contrary to the position advanced by both the government and the intervenors in this case, the factors identified by the Court in *MCFL* are not rigid criteria defining the outer limits of permissible regulation of issue advocacy groups, but

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in the period immediately preceding congressional elections. J.A. 613, 622 - 626. It is fanciful to suggest that such advertisements by the ACLU and other similar groups implicate the concerns with corporate corruption of the political system in any real or substantial way or that if they were run in September 2004, rather than September 2003, they would warrant prohibition.

[6] Following the September 11, 2001 terrorist attacks, there was a significant increase in the ACLU's membership that reflected concern with the subsequent attack on civil liberties. *See* Declaration of Anthony Romero J.A. 1817.

general guideposts for insuring that true issue advocacy groups remain free to express their views.

It is true that the Court has expressed concern that certain politically powerful and influential advocacy groups could act as a conduit for large corporate contributions. *FEC v. Beaumont*, __ U.S. ___ (2003). But such groups are hardly representative of the ACLU or thousands of nonprofit issue advocacy groups which do not seek in any way to influence elections. Moreover, the Court's concern in *Beaumont* came in the context of the FECA's longstanding prohibition against corporate *contributions*. Accordingly the perceived danger of corporate contributions to the political process was sufficient to justify the statutes prophylactic approach under the lesser standard of First Amendment scrutiny that this Court applies in cases upholding limits on contributions. Under the heightened scrutiny applicable to independent expenditures, however, Congress is not free to regulate so broadly. *See MCFL*, 479 U.S. at 260. *Beaumont* reaffirmed this Court's holding in *MCFL* by hewing to the constitutional distinction between permissible regulation of contributions and impermissible regulation of expenditures by non-profit corporations. The concerns that animate the Court's decision in *Beaumont* are largely absent in the case of expenditures because those expenditures – unlike contributions to candidates -- are independent and in many cases totally unrelated to any electioneering purpose or motive. While some non-profit advocacy groups may engage in more focused candidate or campaign related expenditures, that cannot provide the justification for broadly regulating the speech of the ACLU and other advocacy organizations that receive a modest amount of corporate money or have not adopted a formal policy of returning all corporate contributions – regardless of the size or identity of the corporate contributor.

The District Court was obviously constrained by *MCFL* and construed Title II to exclude qualified *MCFL* corporations. At the very least, this Court should affirm that holding. But the real danger that inheres in the lower court's analysis is that it contemplates that pure issue advocacy organizations like the ACLU may not qualify for an *MCFL* exemption. In fact, under recently promulgated FEC regulations, the ACLU presumably does not qualify for exemption because it has not returned the exceedingly modest amount of money that has been contributed to the organization in recent years from sources other than individuals. *See* Brief of Appellant ACLU, p. 9, n.8.; 11 C.F.R. § 114.10. *See also, FEC v. National Rifle Association,* 254 F.3d. 173 (D.C. Circuit 2001). The possibility that the ACLU might not qualify for an *MCFL* exception cannot provide the justification for treating the organization as if it were General Motors or Microsoft. Rather it highlights the extraordinary breadth of the statute.[7]

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[7] We agree that this case is not the proper vehicle to determine whether the ACLU qualifies for an *MCFL* exception, or whether the nature of the organization and the controversial positions it takes entitles it to an exemption from any obligation to disclose its members and contributors. However, if *only MCFL* corporations will be allowed to engage in "electioneering communications," we do think it is appropriate for this Court to clarify the scope of the *MCFL* rule. Specifically, we urge this Court to hold that nonprofit advocacy groups, like the ACLU, are entitled to be treated as *MCFL* corporations, even if they receive *de minimis* corporate or union contributions. In particular, it is clear from *Austin* that the ban on corporate express advocacy has been justified by two related concerns: the fact that corporations can amass significant fortunes as a result of the unique legal benefits conferred upon them, and the fact that the resources of a business corporation do not measure the extent of its ideological support. Neither of those concerns applies to the ACLU, which received less than 1% of its budget from non-individual sources and whose membership directly reflects the level of support for its ideological positions. Requiring the ACLU to forgo the modest amount of support it receives from non-individual sources, amounting to $85,000 in 2001 (although none of those contributions exceeded $500), is tantamount to exacting an excessive fee as a condition of exercising First Amendment rights. *See Forsyth County v. National Movement,* 505 U.S. 123 (1992). *See Appellant ACLU's Brief,* pg. 29, n. 15.

B. The PAC "Alternative"

The defendants' answer to the First Amendment objections raised in this case is that the ACLU can reconstitute as a PAC if it wants to speak. But, Congress cannot circumvent *Buckley* by requiring the ACLU to finance constitutionally protected speech through a segregated fund or PAC. While this requirement may be understandable in the context of contributions made by non-profit corporations to candidates, *see Beaumont,* it cannot be justified in the context of independent expenditures, *see MCFL* – much less those expenditures that do not purport to seek to influence elections. Political committees are regulated as such because their primary purpose is to influence federal elections. The ACLU and thousands of other organizations like it are not created for this purpose and therefore should not be required to operate as if they were. If at some time it is determined that the ACLU has crossed the line and become an organization whose primary purpose is to influence federal elections, it would then become subject to the obligations and restrictions applicable to political committees. See *MCFL,* 479 U.S. at 262. That time has not come and there is no justification for advancing FECA's coverage to the organization's speech.

The consequences are not insignificant. Creating a PAC would compel the ACLU to adopt a partisan form in order to speak, which is prohibited by our corporate charter, is at fundamental odds with our 82-year tradition of non-partisan advocacy of civil liberties and casts us in a false light of partisanship. Thus, for the ACLU and other organizations like it, the mandatory creation of a PAC is a form of compelled speech that cannot be the price of exercising our rights under the First Amendment. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943). Similarly, the new "electioneering communication" regulations would require us to file a statement disclosing, inter alia, "all clearly identified candidates referred to in the electioneering communication and the elections in which they are candidates." 11 CFR ¶ 104.20 (c) (1). Being thereby forced to characterize our criticism of government officials as election-related is an athema to the non-partisan stance that is at the core of our organizational identity. *See Wooley v. Maynard*, 430 U.S. 705 (1977). It is particularly offensive to First Amendment principles for the government to dictate the format of speech that tends to be critical of the government itself. The intervenors' suggestion that we can avoid any misimpression of partisanship by labeling our PAC the "ACLU Election-Period Non-Partisan Legislative Advocacy Fund," Intervenors' Brief at 73, borders on the frivolous. It also ignores the administrative burdens associated with establishing and maintaining a PAC that this Court found significant in *MCFL*. The basic compliance regulations governing political committees are incredibly detailed and span over fifty densely-packed pages in the Code of Federal Regulations. *See* 11 CFR, Parts 102-105, 109. They would also subject the organization to impermissible disclosure requests. *See FEC v. MCFL; supra; ACLU v. Jennings, supra.* Finally, political committees are subject to FECA restrictions limiting the amount of money that can be contributed to the organization from any single source – even though the ACLU has no political purpose.

As we have emphasized throughout, the ACLU has consistently resisted the persistent attempts to use the FECA to regulate and restrain issue advocacy in a manner violating time-honored First Amendment principles. The New York Civil Liberties Union was a party in *Buckley* itself challenging the FECA's expenditure limitations and disclosure provisions. *See also, United States v. National Committee for Impeachment*, 462 F. 2d 1135 (2d Cir. 1972); *American Civil Liberties Union v. Jennings*, *supra*. Those cases helped fashion the critical principles designed to limit the impermissible reaches of the FECA and to establish

without doubt that non-partisan, issue-oriented organizations cannot be subject to campaign finance controls. Building on those principles, this Court has repeatedly reaffirmed, in *Buckley* and elsewhere, not only the bright line distinction between issue advocacy and more focused campaign activity that the BCRA now seeks to obliterate, but also the impermissible reach of campaign finance regulation to organizations like the ACLU which are non-partisan and do not seek to influence elections.

In those early ACLU cases, Congress attempted to control and limit even newspaper ads that mentioned and criticized federal candidates. Now, Congress seeks to control and limit broadcast ads that mention and criticize federal candidates. If this Court interprets the First Amendment to uphold the latter, can efforts to reassert control over the former be far behind?

CONCLUSION

For the reasons stated above, the challenged provisions of Title II of the BCRA should be declared unconstitutional.

Joel M. Gora
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201

August 21, 2003

Mark J. Lopez
Counsel of Record
Steven R. Shapiro
American Civil
Liberties Union
Foundation, Inc.
125 Broad Street
New York, NY 10004
(212) 549- 2608

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In The
Supreme Court of the United States

◆

VICTORIA JACKSON GRAY ADAMS, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

◆

On Appeal From The United States District Court, District Of Columbia

◆

APPELLANTS' REPLY BRIEF

◆

JOHN C. BONIFAZ
Counsel of Record
BONITA TENNERIELLO
LISA J. DANETZ
BRENDA WRIGHT
NATIONAL VOTING RIGHTS INSTITUTE
27 School Street
Suite 500
Boston, MA 02108
(617) 624-3900

DAVID A. WILSON
HALE AND DORR LLP
1455 Pennsylvania Avenue, NW, 10th Floor
Washington, DC 20004
(202) 942-8400

Attorneys for Appellants

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The appellees argue that the *Adams* appellants' claims lack merit principally because, under BCRA's hard money increases, the *Adams* appellants are free to choose not to give or accept contributions up to $2,000 per individual or up to $12,000 per individual in races involving self-funded opponents.[1] That "freedom" argument is divorced from reality, misconstrues the appellants' claims, and ignores Supreme Court precedent prohibiting wealth discrimination in the electoral process. The illusory "freedom" posited by the appellees is no more relevant to the BCRA's hard money increases than to electoral barriers such as the poll tax and candidate filing fees that have been struck down by this Court. BCRA's hard money increases can hardly be deemed to bestow any meaningful freedoms on non-wealthy voters and candidates. Rather, they make access to personal wealth and affluent backers a pre-requisite for electoral participation, in violation of the constitutional guarantee of equal protection for all.

The *Adams* appellants, as potential candidates for federal office and as voters, have standing to challenge their exclusion from the electoral process as caused by BCRA's hard money increases. More than four decades of federal case law make clear that the *Adams* appellants have the right to challenge electoral barriers which exclude them based on their economic status and that BCRA's hard money increases violate their equal protection rights.

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[1] The appellees' claim recalls Anatole France's observation that the "law, in its majestic equality, forbids the rich, as well as the poor, to sleep under the bridges, to beg in the streets, and to steal bread." Anatole France, LE LYS ROUGE, (Calmann-Laevy, 1894). Non-wealthy voters obviously do not have the luxury of *deciding* whether to make large campaign contributions.

I. THE *ADAMS* APPELLANTS HAVE STANDING TO CHALLENGE THE INCREASED HARD MONEY CONTRIBUTION LIMITS OF BCRA.

In order to have standing, a litigant must have suffered a concrete and particularized injury in fact, which is fairly traceable to the defendant's conduct and will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The appellants in this case present such an injury. The record demonstrates that candidate appellant Cynthia Brown has standing because the BCRA hard money increases will, in every practical sense, make meaningful competition for federal office impossible for her and other candidates lacking access to wealth. The hard money increases will multiply the advantages enjoyed by candidates with access to networks of large donors,[2] and will thereby diminish or eradicate the prospects of candidates lacking such access.[3]

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[2] *See Adams* Exh. 1, Declaration and Expert Report of Derek Cressman, (hereinafter "Cressman Decl."), J.S. App. 21a-29a; *Adams* Exh. 2, Declaration and Expert Report of Prof. John C. Green, ¶4 (hereinafter "Green Decl."), J.S. App. 30a-44a; *Adams* Exh. 3, Declaration and Expert Report of Craig McDonald, (hereinafter "McDonald Decl."), J.S. App. 45a-54a.

[3] *See Adams* Exh. 22, Declaration of Cynthia Brown (hereinafter "Brown Decl."), J.S. App. 93a-95a. As documented by expert witness Derek Cressman, fundraising nearly always determines success. Candidates with a substantial financial advantage won 94 percent of the time in the 2000 elections, Cressman Decl. ¶ 2, J.S. App. 22a, and maximum contributions made up 60 percent of individual donations to those winners. *Id.* ¶ 5, J.S. App. 23a. Candidates lacking access to large

(Continued on following page)

The voter appellants have standing because the BCRA hard money increases will exclude them from the electoral process based on their economic status and will deny voter-supporters, such as appellant Carrie Bolton,[4] an equal opportunity to elect the candidates of their choice. *See Adams* appellants' opening brief at 2-13.

A. Candidate Appellant Cynthia Brown, Among The *Adams* Appellants, Has Competitor Standing.

In denying that appellants have suffered cognizable harm, the appellees ignore case law explicitly recognizing competitive electoral injury as a justiciable claim. "[I]t is well-settled that an economic actor may challenge the government's bestowal of an economic benefit on a competitor. . . . Courts within this Circuit and elsewhere have expanded the competitor standing doctrine to the political

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networks of maximum donors have testified that, under BCRA's hard money increases, they will be deterred from seeking federal office. *See also Adams* Exh. 19, Declaration of Dr. Thomas A. Caiazzo, J.S. App. 79a-82a; *Adams* Exh. 20, Declaration of Gail Crook, J.S. App. 83a-87a; *Adams* Exh. 21, Declaration of Victor Morales, J.S. App. 88a-92a; *Adams* Exh. 23, Declaration of Ted Glick (hereinafter "Glick Decl."), J.S. App. 96a-99a.

[4] *See Adams* Exh. 25, Declaration of Carrie Bolton (hereinafter "Bolton Decl."), J.S. App. 103a-106a; *Adams* Exh. 24, Declaration of Victoria Jackson Gray Adams, J.S. App. 100a-102a; *Adams* Exh. 26, Declaration of Daryl Irland, J.S. App. 107a-109a; *Adams* Exh. 27, Declaration of Anuradha Joshi, J.S. App. 110a-112a; *Adams* Exh. 28, Declaration of Howard Lipoff, J.S. App. 113a-115a; *Adams* Exh. 29, Declaration of Nancy Russell, J.S. App. 116a-118a; *Adams* Exh. 31, Declaration of Kate Seely-Kirk, J.S. App. 127a-129a; *Adams* Exh. 32, Declaration of Stephanie L. Wilson, J.S. App. 130a-132a; *Adams* Exh. 30, Declaration of Chris Saffert, J.S. App. 119a-126a.

arena, recognizing that political actors may bring suit when they are competitively disadvantaged by government action." *Buchanan v. FEC*, 112 F.Supp.2d 58, 63 (D.D.C. 2000) (internal citations omitted). To deny cognizable injury from a candidate's loss of competitive advantage "would tend to diminish the import of depriving a serious candidate for public office of the opportunity to compete equally for votes in an election." *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989) ("*Fulani I*"); *cf. Fulani v. Brady*, 953 F.2d 1324, 1327 (D.C. Cir. 1991) ("*Fulani II*").[5] *See also Becker v. FEC*, 230 F.3d 381, 386 (1st Cir. 2000) (candidate had standing to challenge FEC regulations disadvantaging his campaign); *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26, 37 (1st Cir. 1993) (candidate had standing to challenge campaign finance law that placed her campaign at a competitive disadvantage). The Court in *Becker* warned against second-guessing "a candidate's reasonable assessment of his own campaign," which "would require the clairvoyance of campaign consultants or political pundits – guises that members of the apolitical branch should be especially hesitant to assume." *Becker*, 230 F.3d at 387. Thus, an injury to a candidate's competitive advantage – such as that suffered by candidate appellant Cynthia Brown – provides the concrete, direct, and personal stake necessary to confer standing. The three-judge

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[5] The Court in *Fulani* II noted that "[u]nquestionably, there is such a concept as 'competitor standing,'" 953 F.2d at 1327, but denied standing because plaintiff sued under the Internal Revenue Code and plaintiff's injuries were not fairly traceable to the tax status of the debate sponsor. The *Buchanan* decision notes that in *Fulani* II "the fact that the plaintiffs did not sue under FECA, but rather under the Internal Revenue Code, proved dispositive . . . . The FECA, unlike the Internal Revenue Code, confers a broad grant of standing." *See Buchanan*, 112 F.Supp.2d at 63.

district court below acknowledged as much in its Order of May 3, 2002, which granted the Motion to Intervene of the Defendant-Intervenors. *See* Order of May 3, 2002, at 7, (*citing Buchanan*, 112 F.Supp.2d at 65; *Vote Choice,* 4 F.3d at 37), Appendix to Madison Center Plaintiffs-Appellants' Reply Brief, 6a-7a.

B. The Voter Appellants And Candidate Appellant Cynthia Brown Have Standing Based On Their Exclusion From The Electoral Process.

The appellants' injury – exclusion from the electoral process based on economic status – is precisely the injury that voters and candidates claimed in the cases successfully challenging mandatory candidate filing fees. *See Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974). The Supreme Court held that candidates "lacking both personal wealth and affluent backers" were "in every practical sense" excluded from the electoral process by filing fees. *Bullock*, 405 U.S. at 143-144. This Court has declared that the rights of candidates are "intertwined with the rights of voters." *Lubin*, 415 U.S. at 716; *see also Anderson, et al. v. Celebrezze*, 460 U.S. 780, 786-787 (1983).

The standing of voters to challenge exclusionary electoral barriers is further affirmed by *Baker v. Carr*, 369 U.S. 186 (1962), and successor cases granting standing to voters who suffer a debasement of their vote due to legislative apportionment. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1963); *Gray v. Sanders*, 372 U.S. 368 (1963). Like the plaintiffs in those cases, appellants here are free to vote and to seek office, but their "influence on the political process as a whole" is impaired. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986). This is so because the *Adams* appellants cannot participate in any meaningful way under hard money ceilings that are so far out of their reach. Under BCRA's hard money increases, the voters among the *Adams* appellants simply can no longer make contributions at a level that ensures them an equal opportunity to elect the candidates of their choice. Even if candidate appellant Cynthia Brown were to collect contributions from thousands more supporters than her well-financed opponents, she could not hope to collect enough campaign dollars to approach the size of the war chests, under BCRA's hard money increases, of candidates with access to large networks of wealthy donors. "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555; *see also Int'l Assn. of Machinists v. FEC*, 678 F.2d 1092, 1098 (D.C. Cir. 1982) (finding standing for voters who alleged "a relative diminution in their political voices – their influence in federal elections" due to a financial disadvantage conferred on their preferred candidates by the Federal Election Campaign Act).

With regard to the *Adams* appellants' challenge to BCRA §§ 304 and 319 (collectively referred to as the "millionaire provisions"), the appellees ignore the concrete and particularized injury in fact suffered by appellant Cynthia Brown and her voter-supporter, appellant Carrie Bolton. Appellant Brown has testified that she was a candidate for the United States Senate from North Carolina in the 2002 Democratic Primary, Brown Decl. ¶ 3, J.S. App. 94a; that one of her opponents was a millionaire who "contributed enormous sums of money to his own campaign," *id.* ¶ 5, J.S. App. 94a; that another opponent

"raised large sums of money from wealthy contributors," *id.*; that her own contributions averaged approximately $25, *id.* ¶ 4, J.S. App. 94a; and that she would consider running again for the U.S. Senate, but the BCRA millionaire provisions would "seriously discourage" her from participating. *Id.* ¶ 7, J.S. App. 94a-95a.

> If I were to run for the U.S. Senate again from North Carolina, I would likely face again a millionaire opponent. Under the increases in the hard money contribution limits, my other opponents would be free to raise up to $12,000 per individual per election. The people I know can hardly afford to contribute twenty-five dollars, let alone $12,000. There is no way that any candidate like me can compete under these new conditions. These increases in the hard money contribution limits would effectively eliminate any future campaign I might hope to wage for the U.S. Senate.

Id. ¶ 8-9, J.S. App. 95a.[6]

Appellant Brown and the other appellants filed this lawsuit during the 2002 election cycle. If Ms. Brown were to run for Senate in North Carolina in 2004, she likely would be in a race where the millionaire amendment provisions apply. Incumbent Senator John Edwards spent $6.15 million of his own money to win election in 1998, *see* Center for Responsive Politics, "John R. Edwards: Politician Profile," *available at* http://www.opensecrets.org/1998os/

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[6] Appellant Bolton, a North Carolina voter supporting Ms. Brown, also testified regarding her desire to support Ms. Brown in future elections. Bolton Decl., J.S. App. 103a-106a.

index/N00002283.htm, and he will face re-election in 2004. Further, North Carolina press accounts have already noted that the millionaire provisions will likely be triggered even if Edwards does not run, since, in that event, Charlotte investment banker Erskine Bowles – who spent $6.8 million in his 2002 Senate bid – reportedly plans to enter the race. *See* Jim Morrill, *Law May Level Political Funding Field*, Charlotte Observer, June 24, 2003, *available at* http:/www.charlotte.com/mld/observer/news/6156128.htm. Another entrant in the primary, U.S. Rep. Richard Burr, has reportedly begun fundraising and would take advantage of the higher contribution limits if the millionaire amendment were triggered. *See id.*

The exclusion of appellant Brown and the voter appellants from the electoral process constitutes a concrete and particularized injury in fact.

C. The Appellants' Injury Is "Fairly Traceable" To The Challenged Provisions.

The appellants' injury is "fairly traceable" to the BCRA hard money increases. By enacting the increases, Congress enabled candidates with access to vast networks of wealthy donors to dominate the electoral process, denying candidates lacking access to wealth – such as candidate appellant Cynthia Brown – any meaningful opportunity to run for federal office. Further, by enacting the increases, Congress prevented voters lacking access to wealth – such as the voter appellants – from having an equal opportunity to elect the candidates of their choice.

Congress may not raise contribution limits to a level that effectively excludes voters and candidates based on their economic status and that debases and dilutes the fundamental right to vote. With the BCRA hard money increases, Congress has created two distinct classes of voters: those who, as a result of the increases, can employ vast networks of wealthy donors in support of the candidates of their choice and those who cannot. The Constitution prohibits the State from unlawfully weighting a citizen's vote in this way. *See Reynolds*, 377 U.S. at 565 (The Constitution requires "that each citizen have an equally effective voice. . . . ") *See also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., joined by Ginsburg, J., concurring) (*citing Reynolds*, 377 U.S. at 565).

D. A Favorable Decision Will Redress The Appellants' Injury.

Finally, the appellants' injury will be redressed by a favorable decision. An invalidation of the BCRA increases would return the hard money limits to the levels established by the Federal Election Campaign Act ("FECA") before BCRA's enactment. *See Conlon v. Adamski*, 77 F.2d 397, 399 (D.C. Cir. 1935) ("[A] void act cannot operate to repeal a valid existing statute. . . ."). As discussed in Section I:A of the appellants' opening brief, a constitutional violation may arise when existing disparities reach a level that causes injury of constitutional magnitude. Disparities of influence certainly existed under the previous FECA limits. The BCRA increases, however, impose insurmountable obstacles to the voter and candidate appellants' effective exercise of their basic rights to participate in the political process.

II. BCRA'S HARD MONEY LIMIT INCREASES VIOLATE THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION FOR ALL.

As demonstrated by the *Adams* appellants' opening brief, BCRA's hard money increases violate the equal protection rights of non-wealthy voters and candidates, such as the *Adams* appellants. The appellees' responsive brief fails to address longstanding Supreme Court precedent prohibiting wealth discrimination in the electoral process. In its landmark ruling, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966), the Court struck down the poll tax on equal protection grounds, finding that "[v]oter qualifications have no relation to wealth." In *Bullock v. Carter*, 405 U.S. 134 (1972), the Court struck down mandatory candidate filing fees, stating: "We would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 144; *see also Lubin v. Panish*, 415 U.S. 709 (1974); *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) ("The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.").

The appellees attempt to sweep aside this precedent with the Orwellian assertion that the appellants "have the same opportunity as any other donors and candidates to make and receive contributions in the increased amounts." Brief for the Federal Election Commission, et al. at 128.[7] Under that reasoning, the *Harper* plaintiffs had the same

opportunity to pay the $1.50 poll tax in Virginia's state elections, and the *Bullock* plaintiffs had the same opportunity to pay the candidate filing fees in Texas' primary elections. The Court in *Bullock*, in fact, rejected this precise argument, finding that the candidates were "unable, not simply unwilling, to pay the assessed fees. . . . " *Bullock*, 405 U.S. at 146.

There is no substantive difference between the economic barriers to the political process imposed by the State in *Harper* and *Bullock* and the economic barrier imposed by BCRA's hard money increases. In *Bullock*, this Court acknowledged that "[t]he problem presented by candidate filing fees is not the same" as that presented by the poll tax in *Harper*. *Id.* at 142.

> Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast. Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose. . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.

Id. at 143 (internal citations omitted). In reviewing the Texas system, this Court concluded:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote.

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[7] *See also* Brief for the Federal Election Commission, et al. at 126 (appellants "themselves can now make and receive contributions up to the new $2,000 limit . . . ").

Id. at 143-144. Thus, although the problems were not the same, the candidate filing fees in *Bullock* represented a distinction without a difference from the poll tax in *Harper*.

As with the candidate filing fees in *Bullock*, under BCRA's hard money increases, appellants and other potential office seekers who "lack[ ] both personal wealth and affluent backers are in every practical sense precluded" from running for federal office. This Court "would ignore reality were [it] not to recognize that [the BCRA hard money increases] fall[ ] with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 144; *see also Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 462 (2001) (evaluating the impact of campaign finance law in the context of "actual political conditions").

Appellant Cynthia Brown has run for the U.S. Senate from North Carolina in a race involving a self-funded candidate and other opponents supported by affluent backers, and she is considering running again for the U.S. Senate in 2004, facing similar circumstances. Under BCRA's hard money increases, candidates like appellant Brown will find it impossible to compete, because they are "unable, not simply unwilling," *Bullock*, 405 U.S. at 146, to gather contributions of up to $2,000 from wealthy donors or, under BCRA's millionaire provisions, up to $12,000 from such donors. *See* Brown Decl., ¶¶ 8-9, J.S. App. 95a; *see also* Glick Decl., ¶6, J.S. App. 98a ("It is impossible to participate facing that tremendous disparity in resources. I just do not run in the circles of people who can contribute $12,000.").

Similarly, it is ludicrous to argue that voter-supporters of candidates such as appellant Brown have the same opportunity as other donors to make contributions in the increased amounts. As appellant Bolton testified: Under BCRA's millionaire provisions, "I would not even get on the scale with those making significant contributions." Bolton Decl., ¶11, J.S. App. 105a.

> Cynthia Brown is like most of us. She is not connected to people who have that kind of money. I could put up all the signs I wanted in that kind of future race, but I would never be able to get my voice heard. It would be like fighting a fire with a cup of water.
>
> The increases in the hard money contribution limits make it no longer conceivable that I can access the political process. They undermine the meaning and value of my vote.

Id., ¶¶11-12, J.S. App. 105a-106a.

As demonstrated by the *Adams* appellants' opening brief, BCRA's hard money increases will deprive non-wealthy voters of the ability to support meaningfully the candidates of their choice and will violate the right to vote as concretely as previous wealth barriers. The hard money increases will make access to "personal wealth and affluent backers" a prerequisite for electoral participation as surely as any filing fee and will allow such affluent backers to achieve a stranglehold on the electoral process. Even Defendant-Intervenor Senator Russ Feingold, the co-sponsor of BCRA, concedes that BCRA's hard money increases will likely further enable certain candidates to build up campaign war chests, "potentially discourag[ing] some people from running" for federal office. Deposition of Senator Russ Feingold, September 9, 2002, 264, line 14 to

265, line 3 (hereinafter "Feingold Deposition"), Jt. App. at 858. Defendant-Intervenor Feingold has also admitted that the hard money increases will benefit incumbent candidates facing candidates without access to wealth. Feingold Deposition, 260, lines 7-8, Jt. App. at 857.[8] Thus, BCRA's hard money increases will serve to entrench incumbents in power, thereby creating an "entrenched political regime[ ]," *Baker v. Carr*, 369 U.S. 186, 248 (1962) (Douglas, J., concurring), which locks out voters and candidates, like appellants, who lack access to wealth.

A statute that increases campaign contribution limits should be assessed for its impact on the equal protection rights of voters and candidates lacking access to wealth. Just as this Court may find that a contribution limit is justified to prevent corruption and the appearance of corruption – as this Court did in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court may also find that an increased contribution limit discriminates against voters and candidates according to their economic status.

The appellees turn a statement in the Court's ruling in *Buckley* on its head in an attempt to find justification for the hard money increases. Brief for the Federal Election Commission, et al. at 127. The *Buckley* Court stated that "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000," *Buckley*, 424 U.S. at 30, in the context of its holding that the

individual $1,000 contribution limit was justified to prevent corruption and the appearance of corruption. The reliance on that statement here – involving contribution limit *increases* that do not address corruption but rather serve to entrench those in power – is entirely misplaced. In fact, BCRA's hard money increases will have precisely the effect the Court in *Nixon v. Shrink* held would be constitutionally impermissible. *See Nixon v. Shrink*, 528 U.S. at 397 (contribution limits are permissible unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beneath the level of notice, and render contributions pointless."). Thus, while the Constitution may prohibit some contribution limits because they are too low, it may also prohibit some limits because they are too high. Under BCRA's hard money increases, vast infusions of cash will drown out the voices of non-wealthy candidates, making the association of their supporters ineffective and rendering small contributions pointless.

BCRA's hard money increases debase and dilute appellants' right to vote, "a fundamental political right . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As such, these increases offend core equal protection principles that serve as the foundation of our constitutional democracy. This Court has a duty to uphold those principles and to prevent the imposition of this new economic barrier in the political process.

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[8] The factual record in this case demonstrates that the primary beneficiaries of the increases will be the very incumbents who enacted them. *See Adams* appellants' opening brief at 10-11; Cressman Decl., ¶19, J.S. App. 29a; *Adams* Exh. 4, Declaration and Expert Report of Professor Thomas Stratmann, ¶¶5-12, J.S. App. 57a-60a.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court; declare that sections 304, 307, and 319 of BCRA, codified in 2 U.S.C. § 431 *et seq.*, violate the equal protection guarantee incorporated by the Due Process Clause of the Fifth Amendment to the United States Constitution; and remand the case to the district court with instructions to enter a permanent injunction restraining the appellees from enforcing or otherwise applying sections 304, 307, and 319 of BCRA and ordering the appellees to enforce the provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, that were amended by sections 304, 307, and 319 of BCRA as such provisions existed prior to the enactment of BCRA. In the alternative, the Court should reverse the district court's ruling of nonjusticiability and remand the case for consideration on the merits.

Respectfully submitted,

JOHN C. BONIFAZ
Counsel of Record
BONITA TENNERIELLO
LISA J. DANETZ
BRENDA WRIGHT
NATIONAL VOTING RIGHTS INSTITUTE
27 School Street
Suite 500
Boston, MA 02108
(617) 624-3900

DAVID A. WILSON
HALE AND DORR LLP
1455 Pennsylvania Avenue, NW, 10th Floor
Washington, DC 20004
(202) 942-8400

Attorneys for Appellants

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Supreme Court of The United States

CONGRESSMAN RON PAUL, GUN OWNERS OF AMERICA, INC.,
GUN OWNERS OF AMERICA POLITICAL VICTORY FUND,
REALCAMPAIGNREFORM.ORG, CITIZENS UNITED,
CITIZENS UNITED POLITICAL VICTORY FUND,
MICHAEL CLOUD, AND CARLA HOWELL,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *ET AL.*,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANTS CONGRESSMAN RON PAUL, *ET AL.*

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Attorneys for Appellants
**Counsel of Record*

August 21, 2003

(Counsel continued on inside front cover)

27 pp

Richard O. Wolf
Moore & Lee, LLP
1750 Tysons Boulevard
Suite 1450
McLean, VA 22102
(703) 506-2050

Gary G. Kreep
U.S. Justice Foundation
Suite 1-C
2091 East Valley Parkway
Escondido, CA 92027
(760) 741-8086

Perry B. Thompson
6127 Carroll Lake Road
Commerce, MI 48382
(248) 390-2058

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ARGUMENT

INTRODUCTION

According to the Government and the six intervening members of Congress ("intervening incumbents"), the First Amendment challenge to the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), can only be resolved by plowing through a mammoth record of thousands of pages of testimony and expert reports to determine whether Congress had a compelling or substantial government interest to override the constitutional rights of free speech and association. In so doing, the Government and the intervening incumbents would lead this Court into a legislative thicket of self-serving statements and studies that will not yield a rule of law, but only an underbrush of cases either tangled together by factual similarities or pulled apart by legal niceties. *Compare* results obtained in FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986) *with* those in FEC v. Beaumont, ___ U.S. ___, 123 S.Ct. 2200 (2003).

This Gordian knot of precedent from Buckley v. Valeo, 424 U.S. 1 (1976) through FEC v. Beaumont, will not be cut unless this Court is willing to reexamine Buckley, which occupies its core. And only the Paul Plaintiffs, among the all the plaintiffs in this case, have offered a solution to unravel the strings with which Congress has entangled campaigns for election to federal office. The solution proposed is not a new one, and is rooted in a long line of this Court's precedents interpreting and applying the First Amendment's freedom of the press.

Overlooked by Buckley and its progeny, the freedom of the press offers bright-line rules, free from the balancing tests urged by the Government and the intervening incumbents, that, if followed, would open up the political process to all people on equal terms, not close the door to "ordinary folk" because they cannot afford to own a newspaper or broadcast facility, and therefore, cannot take advantage of the corporate media exemption, or because they cannot afford the cadre of lawyers, accountants, and political consultants that are necessary to keep a candidate out of harm's way should a government form or report fail to meet the requisite legal standard.

In an unbroken line of authority, beginning with Sir William Blackstone's description of the liberty of press as belonging to "every man" in 1769, adopted by this Court in Near v. Minnesota, 283 U.S. 697 (1931), and recently reaffirmed in Watchtower v. Village of Stratton, 536 U.S. 150 (2002), freedom of the press has been expressly recognized as **a right equally available to all**, not merely the corporate media.

The impermissibility of **licensing** systems for the dissemination of ideas has been firmly established in a line of cases stretching unbroken from Lovell v. Griffin, 303 U.S. 444 (1938), Schneider v. State, 308 U.S. 147 (1939), and Thornhill v. Alabama, 310 U.S. 88 (1940), to the recently decided Watchtower. The decisions in Near v. Minnesota, 283 U.S. 697 (1931), and New York Times v. U.S., 403 U.S. 713 (1971), establish and confirm that **prior restraint** of press activity is permitted under only the most extreme of circumstances. Those decisions, together with others such as Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), establish that imposing **editorial control** over press activities is not permitted. The right to engage in **anonymous** press activities is established in cases such as Talley v. California, 362 U.S. 60 (1960), and McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995). Finally, the impermissibility of **discriminatory economic burdens** on press activities has been established in a line of cases which includes Grosjean v. American Press Co., Inc., 267 U.S. 233 (1936), Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221 (1987), and Miami Herald, *supra*. BCRA and the Federal Election Campaign Act of 1971, 2 U.S.C. § 431, *et seq.* ("FECA"), violate all of these press principles and entitle the Paul Plaintiffs to judgment. *See* Paul Plaintiffs' Br. at 32-50.

I. THIS COURT MUST RE-EXAMINE BUCKLEY.

The Paul Plaintiffs present squarely to this Court the claim that freedom of the press protects the right of citizens to publish what they choose in criticizing incumbents, without fear of serving a five-year sentence in federal prison, even if those publications both affect the outcome of federal elections and bring incumbents into disrepute. For if *The New York Times* has the right to criticize incumbents without being licensed by the Government, and without having its sources of income limited and publically disclosed, then so do the Paul Plaintiffs.

In their briefs, neither the Government nor the intervening incumbents have deigned address the merits of the Paul Plaintiffs' press claims. The sole response in either brief to the 50-page brief of the Paul Plaintiffs is a footnote in the Government's brief (p. 126, n. 58) stating a general jurisdictional objection to the Paul Plaintiffs' challenge to certain contribution limits (discussed in Section IV herein). The Government and the intervening incumbents have ignored the challenge of the Paul Plaintiffs in the same way they want this Court to ignore the substance of this challenge.[1]

The Government and the intervening incumbents have pretended that they have "joined issue" by addressing the claims of the other plaintiffs. But the challenge of the Paul Plaintiffs is **not** indistinguishable from that brought by the other plaintiffs. Although the Paul Plaintiffs have attacked many of the same provisions of BCRA as the other plaintiffs in this consolidated litigation, the constitutional attack of the Paul Plaintiffs is, and has been throughout, clearly separate and unique:

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[1] If this Court actually places special reliance on the "gray briefs"to present fairly to the Court all of the issues in a case, it will be sorely disappointed by the selective approach undertaken in this case, omitting all discussion of important claims by the Paul Plaintiffs.

- Only the Paul Plaintiffs have asked this court to overturn Buckley v. Valeo. It would appear that the Paul Plaintiffs in the instant case are the only litigants to ask this Court to overturn Buckley in the 27 years since that case was decided.
- Only the Paul Plaintiffs have relied on freedom of the press, the application of which to campaign finance regulation has gone unlitigated before this Court.
- Only the Paul Plaintiffs have attacked Congress' regulation of campaign finance as an impermissible licensing scheme designed by and for incumbents.

The challenge of the Paul Plaintiffs is not illegitimate, "beyond the pale," or undeserving of a response, but well-grounded in the Constitution and the factual record of this case. The "rope-a-dope" strategy, adopted by the Government and intervening incumbents, whereby they would absorb the energy of each factual and legal punch rather than join issue with the Paul Plaintiffs, may deprive this Court of the benefits of vigorous advocacy,[2] but it should not stand in the way of this

Court's re-examining Buckley. If it does, it will find a ruling based upon forecasts, unrelated to a factual record of the actual effect of FECA, on the electoral playing field. *See, e.g.*, Buckley at 424 U.S. 21-22, 31 n.33, 32-34, 69-74, 82-83. But the real-world, factual case presented by the Paul Plaintiffs demonstrates that the current system of federal campaign finance regulation makes it extremely difficult for challengers to defeat incumbents, and virtually impossible for minor party candidates to defeat Republican and Democratic candidates. In light of the five substantive press claims of the Paul Plaintiffs, well-grounded in established precedents and the record (*see* Paul Plaintiffs' Br. at 19-27), together with the consequences wrought by the statutory provisions challenged herein, wholly unrebutted by the Government and the intervening incumbents, the challenge of the Paul Plaintiffs should be upheld.

II. THIS COURT MUST NOT DEFER TO CONGRESS.

The Government and intervening incumbents insist that this Court abjectly defer to the expertise of Congress on the corrupting power of money in the political process, invoking repeatedly the shibboleth of "appearance of corruption." *See, e.g.*, Brief for the Federal Election Commission, *et al.* ("Govt. Br.") at 28, 39 n.14, 89, 93; Brief for Intervenor-Defendants ("Int. Br.") at 11, 34, 36 n.27. Indeed, the Government has contended that a long line of decisions by this Court proves that there is no credible basis to question the constitutionality of the exercise of "Congress's authority to protect the integrity of federal elections and prevent corruption of federal office-holders." Govt. Br. at 2-3. This simply is not true, even in the cases cited by the Government. *Id.* at 3.

Prior to Buckley, members of this Court did not defer to congressional efforts at campaign finance regulation. In 1948, with a bare majority of the Court refraining from passing constitutional judgment upon § 313 of the Corrupt Practices Act (which prohibited union expenditures in connection with any federal election), the entire "liberal wing" — Justices Rutledge, Douglas, Black, and Murphy — found the law an unconstitutional abridgment of the freedoms of speech and of the press, and the right of assembly. United States v. Congress of Industrial Organizations, 335 U.S. 106, 139-55 (1948) (Rutledge, J., concurring). In these four justices' opinion, the Court was "duty bound to ... decide in its own independent judgment" whether § 313 "abridged" the rights secured by the First Amendment:

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[2] Neither has the challenge brought by the Paul Plaintiffs found favor with other plaintiffs making limited challenges to BCRA not grounded in freedom of the press. None have challenged Buckley; indeed, all give it homage. None find fault with the federal licensing of election campaigns. None have expressed serious concern about the adverse effect of these laws on challengers and minor parties. All agree that Congress indeed may regulate elections despite the First Amendment, and make only the limited claim that BCRA goes just a bit too far in restricting speech, or perhaps that it is not the least restrictive means to accomplish such regulatory goals. It is no wonder that certain plaintiffs are uncomfortable with the challenge of the Paul Plaintiffs that attacks the foundation of the current system under which they have gained the political power that they seek to preserve. In its order of August 4, 2003, this Court accepted the proposal of certain plaintiffs to exclude the Paul Plaintiffs from oral argument. Accordingly, this Reply Brief will be the last word from the Paul Plaintiffs, who would respectfully request that these unique arguments receive careful review.

> That office cannot be surrendered to legislative judgment [which] does not bear the same weight and is not entitled to the same presumption of validity, when the legislation ... restricts the rights ... protected by the [First] Amendment, as are given to other regulations having no such tendency. [*Id.* at 140.]

Not only did the four justices deny the usual presumption of validity to a law "trenching on [the] basic rights" secured by the First Amendment, they found an actual **"presumption ... against** the legislative intrusion into these domains," because they threatened the "very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly." *Id.* at 139, 140 (emphasis added).

Nine years later, two members of this concurring opinion, Justices Douglas and Black, (Justices Rutledge and Murphy having passed away), joined by Chief Justice Warren, had occasion to articulate more fully the "constitutional foundation" of the American democratic republic. Dissenting from a majority opinion that had declined to address the constitutionality of § 313 of the Corrupt Practices Act, Justice Douglas observed that "whether a union can express its views on issues of an election and on the merits of candidates, unrestrained and unfettered by Congress ... is **as important an issue as has come before the Court** for it reaches the very vitals of our system of government":

> Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important — vitally important — that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community. [United States v. UAW-CIO, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting) (emphasis added).]

Upon this principle, Justice Douglas rested his case that the "exercise of First Amendment rights," if they are to remain "'full, fair and untrammeled,'" cannot permit "an indictment charging no more than the use of union funds for broadcasting television programs that urge and endorse the selection of certain candidates for Congress of the United States." *Id.* at 593, 594. In so doing, Justice Douglas recognized that "the preferred rights of the First Amendment," especially the freedom of the press, is abridged by limiting "the expenditure of money," whether that limit applies to a union or a newspaper in that it "usually costs money to communicate an idea to a large audience." *Id.* at 594.

Despite this rich legacy of judicial counsel, this Court in Buckley dropped its First Amendment guard. With Chief Justice Warren and Justices Douglas and Black gone from the Court, and in the aftermath of Watergate, a new majority of compromise was formed, a compromise made possible only by deference to Congress, fueled by the litigants' neglect of the freedom of the press. By ignoring the freedom of the press in Buckley, the Court was able to find constitutional a brand new licensing system governing campaigns for federal election.

III. BCRA RESTS UPON AN UNCONSTITUTIONAL FOUNDATION.

In their opening brief, the intervening incumbents have rested their constitutional case for BCRA on the claim that the ultimate purpose of campaign finance regulation is "[t]o protect democracy" by laying down new rules of popular political engagement designed to combat "a dramatic loss of public confidence" in the current system of government by restoring the ordinary citizen's faith in his or her elected representatives. Int. Br. at 1-2. Thus, these intervenors maintain that the mere "perception of corruption"[3] would be sufficient to sustain every BCRA provision because campaign finance regulation is, after

all, designed to save America's democracy, including themselves as incumbent officeholders, from the power of money. *See, e.g.,* Int. Br. at 15-17.

Less dramatically, but no less significantly, the Government has insisted that campaign finance regulation is necessary because the very "integrity of the federal work force" is at risk. Govt. Br. at 30. Thus, the Government has argued that campaign finance regulation is not just about the integrity of the elections, but about insulating the "federal work force," including elected federal officials such as the intervening incumbents, no matter the degree of temptation of money in the formulation and implementation of the nation's public policy. *See, e.g.,* Govt. Br. at 30-34, 41-43.

Both the intervening incumbents' and the Government's claims rest BCRA upon an errant constitutional foundation, having presumed that the common good depends upon the people thinking well of Government. Instead, the United States Constitution is based upon the principle that the common good depends upon a free people protected from governmental abridgment of their First Amendment rights. *See* United States v. CIO, 335 U.S. at 140 (Rutledge, J., concurring).

A. The American Government is Established upon the Sovereignty of the People.

The sovereignty of the people is enshrined in both the Declaration of Independence and the Constitution of the United States. As James Madison wrote:

> As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived. [*Federalist No. 49,* as reprinted in A. Hamilton, *et al.*, The Federalist 262 (Liberty Fund, Indianapolis: 2001).]

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[3] When President Nixon named Judge Clement Haynsworth for the U.S. Supreme Court in 1969, he learned firsthand about Congress' reliance on "appearances" to appoint to itself greater powers. Congressional opponents of the Haynsworth nomination could point to no actual impropriety committed by the judge, but rather justified their opposition based on an alleged appearance of impropriety. In his memoirs, President Nixon observed, "It was a vicious circle: the nominee would not be condemned for what he had done but for what he had been accused of having done by his detractors." Richard M. Nixon, *The Memoirs of Richard Nixon* at 421 (Grosset & Dunlap: 1978). That type of machination is also applicable to BCRA which was passed largely to combat the "appearance of corruption," not the objective reality of corruption which supporters of McCain-Feingold generally denied existed (*see, e.g.*, McCain Depo. at 20, Rec. 199; Statement of Sen. Dodd, 148 Cong. Rec. S2099 (daily ed. Mar. 20, 2002); Statement of Rep. Boehlert, 148 Cong. Rec. H405 (daily ed. Feb. 13, 2002); Statement of Rep. Udall, 148 Cong. Rec. H355 (daily ed. Feb. 13, 2002)), but a matter of perception which can be created by the very congressmen who seek the reelection assistance which flows from it, working hand-in-glove with the corporate media — the only component of American society exempted from its application.

In 1798, however, this commitment to popular sovereignty was severely challenged. Fearful that the system of government established in the U.S. Constitution would be transformed by the French Revolution and the emerging Republican Party led by Thomas Jefferson, the Federalist Party-dominated Congress enacted the Sedition Act of 1798, which prohibited the publication of "false, scandalous, and malicious ... writings against the government of the United States, or either House of Congress, or the President of the United States, with intent to defame [them]." Act of July 14, 1798, 1 *Stat.* 596.[4] This law was immediately challenged by Madison as a violation of the freedom of the press. J. Madison, *Report on the Virginia Resolutions* (*Va. Res.*) (Jan. 1800), reprinted in 5 *The Founders' Constitution* (*Founders' Const.*) 141 (P. Kurland and R. Lerner, eds., Univ. Chi.: 1987). Reminding his fellow Virginians that "[i]n the United States ... [t]he People, not the Government, possess the absolute sovereignty," he contended that "[t]he security of the press requires that it should be exempt ... not only from the previous inspection of licensers, but from the subsequent penalty of law." J. Madison, *Report on the Virginia Resolutions*, reprinted in 5 *The Founders' Const.* at 142.

While Madison's view of the freedom of the press did not prevail in the courts during his lifetime, it found favor with this Court in New York Times v. Sullivan, 376 U.S. 254 (1964), which relied heavily upon Madison's comments in support of the Bill of Rights and in opposition to the Sedition Act:

> If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not the Government over the People.... In every state ... in the Union, the press has exerted a freedom canvassing the merits and measures of public men.... On this footing the freedom of the press has stood; and on this foundation it yet stands. [*Id.* at 275].

The Court in New York Times v. Sullivan, therefore, concluded that "[t]he right of free public discussion of the stewardship of public officials was thus ... a fundamental principle of the American form of Government." *Id.*

B. Elected Officials Are Servants of the People.

In recognition of the people's continuing sovereignty, the people of the several states insisted upon frequent and free elections so as to ensure that elected officials would "be restrained from oppression, by feeling and participating in the burdens of the people ... [by] be[ing] reduced to a private station, return[ing] to that body from which they were originally taken." *See, e.g.,* 1776 *Va. Const,.* §5, reprinted in *Sources of Our Liberties* (*Sources*) at 311-12 (Perry, ed., Rev. Ed., ABA Found., Chicago: 1978). The people of the United States followed suit, providing for two-year terms for persons elected to the House of Representatives, six-year terms for persons elected to the Senate, and four-year terms for the President of the United States. *See Sources* at 405-06.

Additionally, the people of the states secured constitutional protection for the freedom of the press, as "one of the great bulwarks of liberty." 1776 *Va. Const.*, reprinted in *Sources* at 312. As a rampart of liberty, the freedom of the press had long been recognized as essential to ensure that elected representatives served the people faithfully as their "agents and trustees." J. Adams, "A Dissertation on the Canon and Feudal Law," reprinted in J. Adams, *The Revolutionary Writings of John Adams* 28 (Liberty Fund, Indianapolis: 2000). Adams' view that elected government officials were the "agents and trustees" of the people was reflected in the early state constitutions. The 1784 New Hampshire Constitution is illustrative:

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[4] In seeking to limit the press activities of Americans to preserve the reputation of Government, the Sedition Act can be viewed as a forerunner of FECA and BCRA.

> All power residing originally in, and being derived from the people, all the magistrates and officers of the government, are their substitutes and agents, and at all times accountable to them. [1784 *N.H. Const.*, Art. VIII, reprinted in *Sources* at 383.]

The United States Constitution rests upon the same premise:

> The government of the Union ... is, emphatically, and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. [McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819).]

As a "government of the people, by the people, and for the people," elected federal officials are the servants and trustees of the people, and as such, are accountable to the people. Thus, in sponsoring a Bill of Rights for the United States Constitution, James Madison introduced a series of proposals "based largely on the declarations of rights in the state constitutions, particularly of Virginia." *Sources* at 422. Foremost among them: "the freedom of the press."

The Government and the intervening incumbents reject the sovereignty of the people and ask this Court to turn upside-down the relationship between the Government and the people, transferring sovereignty to incumbent officeholders and making the people the servants of the Government. BCRA thus converts elected officials (and candidates for election to federal office) into ordinary Government employees (and potential Government employees), accountable **not** to the American people, but to incumbent-appointed bureaucrats that populate

the Federal Election Commission ("FEC"). This point can be best illustrated by a careful assessment of the Government's and intervenor-incumbents' defense of BCRA § 101 creating new FECA § 323(e).

C. New FECA § 323(e) Created by Title I of BCRA Treats Elected Officials as Government Employees.

The Government's defense of § 323(e) **explicitly** rests upon the argument that elected federal officials (and candidates for election to federal office) are "employees" (or potential employees) of the Government and, therefore, are subject to greater restrictions upon their First Amendment activities than ordinary citizens. *See* Govt. Br. at 57-58. In support of this novel claim, the Government relies upon two cases upholding the constitutionality of the Hatch Act, a law designed to protect the merit civil service system from "partisan politics." *See* Govt. Br. at 57 and n. 27. By extending the reach of the Hatch Act precedents to **elected** officials, the Government has taken the incredible position that elected officials should be as insulated from the vicissitudes of the popular will as career Government employees, presumably so that the "integrity of the federal work force" can be preserved. *See* Govt. Br. at 30. Not only is the Government's position on § 323(e) based upon a misreading of this Court's Hatch Act cases, but, if embraced, would put an end to the American constitutional democratic republic, not preserve it.

This Court has justified limitations upon the partisan activities of merit-based civil servants on the primary ground that such a limitation was necessary to ensure that the law would be "administer[ed] in accordance with the **will** of Congress, rather than in accordance with their own will or the will of a political party." U.S. Civil Service Comm. v. Nat'l. Ass'n. of Letter Carriers, 413 U.S. 548, 565 (1973) (emphasis added). Secondarily, the Court reasoned that "public ...

confidence in the system of **representative** Government [would otherwise] be eroded," if it appeared that the will of Congress was being thwarted by career Government employees attempting to implement their own political agendas. *Id.* (emphasis added). Thus, the Hatch Act was designed to ensure that everyday government operations would reflect the will of elected officials, and that those elected officials would serve as representatives of the electorate accountable to the people.

Section 323(e) does just the opposite, preventing candidates for office, whether they be incumbents or challengers, from freely soliciting funds to help their fellow citizens to have a more effective voice in federal elections, by interposing between candidates and their fellow citizens a set of restrictive rules enforceable by an unelected Federal Election Commission. Thus, federal candidates and officeholders become accountable to unelected government officials, rather than to the people. Such a violation of the sovereignty of the people necessarily transgresses freedom of the press (*see* Paul Plaintiffs' Br. at 40-43).

The intervening incumbents have also ignored the freedom of the press, because they, too, have abandoned the popular sovereignty principle upon which it is based. They have justified § 323(e) as a welcome prophylactic to "the risk that the donor will acquire (or appear to acquire) **undue** influence" (Int. Br. at 36 (emphasis added)), without regard for any differences between incumbents and challengers, insider incumbents and outsider officeholders, and major party candidates and minor party candidates. It is enough for the intervening incumbents that § 323(e) is "**aimed** at the core problems of corruption and appearance of corruption," without regard for the likelihood or degree of "influence." *See id.* (emphasis added). As Justice Rutledge pointed out 55 years ago, "'undue influence' ... may represent no more than the convincing weight of argument fully presented, which is the very thing that the [First] Amendment and the electoral process it protects were intended to bring out." United States v. CIO, 335 U.S. at 145 (Rutledge, J., concurring). Additionally, as Justice Douglas observed 46 years ago, money is necessary if one's ideas are to be communicated effectively "to a large audience," and any restriction on the amount of money spent on such activity threatens the freedom of the press. *See* United States v. UAW, 352 U.S. at 594 (Douglas, J., dissenting).

The intervening incumbents' view of the First Amendment, however, is directly the opposite. In their eyes, § 323(e) is constitutional because it forces more of the American citizenry's money through the FEC sieve (Int. Br. at 36) and, in so doing, makes the ordinary citizen more accountable to the unelected members of the FEC, than to one another. Hence, § 323(e) is diametrically opposed to the principle that elected officials are the trustees or servants of the people. It squeezes power out of the people's money and transfers that power to the FEC, reconstituting the people's money as "federal funds" to impress upon elected officeholders, as well as candidates, who their boss really is.

D. BCRA/FECA Treats the American People as Indentured Servants.

In its zeal to eliminate "soft money" and other "nonfederal funds" from all communicative activities that influence the outcome of federal elections, BCRA continues the congressional attack begun with FECA in the 1970's to upend the sovereignty of the American people, by a steady process of indenturing the American people. Instead of standing in the way of this attack, this Court failed in Buckley v. Valeo even to detect it. Indeed, Buckley has accelerated the attack by placing the Court's imprimatur upon the Government's claim that FECA could be justified by the "appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." Buckley, 424 U.S. at 27. In support of this claim, the Buckley Court cited only one case, CSC v. Letter Carriers, 413 U.S. 548 (1973), likening an individual citizen's contribution to a political campaign to the individual "partisan political conduct" of a career employee of the Federal Government:

> Here, as there, Congress could legitimately conclude that the avoidance of improper influence "is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent." [Buckley, 424 U.S. at 27].

In Buckley, the Court made absolutely no effort to assess the validity of this comparison, assuming it to be self-evident from the Letter Carriers opinion, when just the opposite was true.

Letter Carriers was based upon a categorical First Amendment distinction between the Government's "interest in regulating the conduct and 'the speech of its employees ... from those it possesses in connection with regulation of speech of the citizenry in general.'" *See id.*, 413 U.S. at 564. Indeed, it was assumed in Letter Carriers, that the Government's interest in "the appearance of improper influence" of the private political activity of a career Government employee in the carrying out of "the will of Congress" is quite distinct from any "appearance of improper influence" of the private political activity of a citizen in shaping "the will of Congress," itself. *See id.* The "will of Congress," by definition, cannot be insulated from "partisan politics," as the entire BCRA Title I attempts to do, without a foundational change in the American democratic republic. *See Federalist 10,* reprinted in *The Federalist, supra,* at 42. Nor can the will of Congress be walled off from "uninhibited, robust and wide-open debate" (New York Times v. Sullivan, 376 U.S. at 270), as BCRA Title II does, without trampling upon the freedom of the press, the primary means by which the people exercise their continuing sovereignty over their government. By misapplying the Court's "Hatch Act" precedents, the Buckley Court stifled the political activities of the American citizenry as if the people themselves, unless constrained like an unelected federal career bureaucrat, posed a threat to the American form of representative government!

One of the most egregious examples of the American people's new status as chattel servants of the government is BCRA Title II's revocation of the long-held American right to anonymous political discourse. Section 201 of BCRA (new FECA § 304(f)) requires disclosure of the name and address of any person or group spending $10,000 or more per year for "electioneering communications" that mention elected officials one to two months prior to federal elections. This section also requires disclosure of the names and addresses of all contributors of $1,000 or more for such communications. BCRA § 212 (new FECA § 304(g)) imposes a similar reporting requirement for independent expenditures in excess of $1,000 expressly supporting or opposing a candidate within 20 days of a federal election. BCRA's violation of the right to anonymous publication is an extension of disclosure requirements instituted by FECA, which have rarely been challenged and apparently never on press grounds. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982). However, this Court has repeatedly held that the freedom of the press does not allow the Government to force the disclosure of the identity of a person disseminating ideas. *See, e.g.,* Talley v. California, 362 U.S. 60 (1960), McIntyre v. Ohio Election Commission, 514

U.S. 334 (1995).[5]

BCRA, and the FECA which it amends, masquerading as reform measures to "preserve American democracy," work as wholesale transfers of sovereignty from the people to the current incumbent elected officeholders, and their appointed FEC bureaucrats, who are, when it comes to federal elections, the people's masters, **not** as they should be, the people's servants.

IV. THE PAUL PLAINTIFFS HAVE STANDING TO CHALLENGE BCRA § 307, AS WELL AS THE RELATED FECA REPORTING REQUIREMENTS.

In the only specific reference to the Paul Plaintiffs in the briefs of the Government and the intervening incumbents, the Government has argued that this Court lacks jurisdiction over the Paul Plaintiffs' claim regarding Congress' failure to increase the contribution limit set forth in FECA § 315(a)(1), 2 U.S.C. § 441a(a)(2)(a), applicable to multicandidate political committees. It is clearly mistaken.

The essence of the Government's argument is that, because the contribution limit applicable to political committees in FECA was not expressly modified by BCRA, BCRA Title III's § 307 is immune from attack in this lawsuit. *See* Govt. Br. at

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[5] Arguing against legally mandated financial disclosure does not mean that the Paul Plaintiffs believe that if they prevail there would be no disclosure to voters. If voters demand it, political "market forces" would be brought to bear that would cause candidates to disclose donor information, paying the political price of withholding such information only when deemed necessary to protect donors from harassment. *See* Miller Report at 27, Paul Plaintiffs' Brief Appendix at 39a. Voluntary disclosure could result in even more disclosure than currently required. For example, in his reelection campaign, President Bush is once again disclosing every donor who gives one dollar or more to the Bush campaign at http://www.GeorgeWBush.com.

126, n.53.[6] This argument is mistaken, first, because it is based upon a misreading of the Paul Plaintiffs' complaint. That complaint was not limited to BCRA's failure to increase the contribution limit applicable to multicandidate political committees, but extended to other FECA contribution limits, including those individual contribution limits modified by BCRA, and related FECA enforcement provisions. *See* Paul Plaintiffs' Br. at 32-50, and App. 1a-8a, 109a-120a.

The Government also misreads BCRA's § 403(a), which extends jurisdiction to "any action ... brought for declaratory or injunctive relief to challenge the constitutionality of any provision of [BCRA] or any amendment made by [BCRA]." The Government would limit the reach of this section to claims challenging the constitutionality of "any provision" of BCRA or "any amendment" of BCRA. Such a construction, however, is not permissible, flying in the face of the well-established rule of interpretation that a "statutory provision" should not be read "so as to render superfluous other provisions in the same enactment." Pennsylvania Dept. of Public Welfare v.

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[6] This argument of the Government is quite different from the determination of the district court that the Paul Plaintiffs lack standing to maintain that claim. The district court held that the Paul Plaintiffs lacked standing to challenge the constitutionality of BCRA § 307. Supp. App. at 8sa. But that determination lacks any reasonable support. As pointed out in their Brief (at 45-47), the Paul Plaintiffs submitted unrebutted testimony that establishes, concretely and with particularity, the invasion of a legally protected interest, which is actual (under FECA) and imminent (under BCRA), there being no doubt about either a causal connection between those injuries and the limitations imposed by the statutes complained of or the fact that future injury will be redressed by a favorable decision. This is sufficient for constitutional standing under the standard articulated by this Court in Lujan v. National Wildlife Federation, 504 U.S. 555, 561-62 (1992). Indeed, any argument, or even any comment whatsoever, by the Government or the intervening incumbents regarding this issue has been conspicuously absent in this case.

Davenport, 495 U.S. 552, 562 (1990). Because "provision" and "amendment" are separated by the disjunctive "or," § 403(a) has extended to this Court jurisdiction over claims based either on a "provision of" BCRA or on an "amendment made by" BCRA to FECA. Thus, § 403(a) encompasses claims like the Paul Plaintiffs' challenge to the individual contribution limits under 2 U.S.C. § 441a and the entire FECA individual contribution scheme, including the reporting requirements, because the FECA provision governing **contribution limits** was the object of an "amendment made by" BCRA § 307(a). *Cf.* United States v. Generix Drug Corp., 460 U.S. 453, 458-59 (1983).[7]

CONCLUSION

For the reasons stated herein, and in Paul Plaintiffs' opening brief, this Court should find that the BCRA/FECA provisions challenged by the Paul Plaintiffs violate their freedom of the press and should be struck down.

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[7] Alternatively, as a matter of ancillary jurisdiction, this Court should address the merits of the Paul Plaintiffs' challenge to the contribution limits and the reporting/disclosure requirements of 2 U.S.C. §§ 432 through 434. *See* 17 Charles A. Wright, *et al.*, *Federal Practice and Procedure*, § 4234 at 600, § 4235 at 603-04, 624-25, 626 (2d ed. 1988 & Supp. 2002). *See also* Page v. Bartels, 248 F.3d 175 (3d Cir. 2001). If contribution limits, as amended by BCRA, are unconstitutional as violative of the press freedom, then the constitutionality of the companion forced disclosure provisions of FECA must be reexamined. *See* Buckley v. Valeo, 424 U.S. at 66-86.

While there is no requirement that claims within the ancillary jurisdiction of this Court be heard, determining such claims in this action would be consistent with longstanding U.S. Supreme Court decisions. *See, e.g.*, Allee v. Medrano, 416 U.S. 802 (1974); United States v. Georgia Public Service Comm., 371 U.S. 285 (1963). In this case, the Paul Plaintiffs' claims are closely interrelated, resting upon similar factual, and identical legal, foundations. A decision on the merits of all of the claims is in the interests of fairness as well as judicial economy.

Respectfully submitted,

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

RICHARD WOLF
MOORE & LEE, LLP
1750 Tysons Boulevard
Suite 1450
McLean, VA 22102
(703) 506-2050

PERRY B. THOMPSON
6127 Carroll Lake Road
Commerce, MI 48382
(248) 390-2058

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

GARY G. KREEP
U.S.JUSTICE FOUNDATION
Suite 1-C
2091 E. Valley Parkway
Escondido, CA 92027
(760) 741-8086

Attorneys for Appellants
**Counsel of Record*
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IN THE

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REPUBLICAN NATIONAL COMMITTEE, CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN NATIONAL COMMITTEE, ET AL.,

Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF THE POLITICAL PARTIES

LANCE H. OLSON
DEBORAH B. CAPLAN
OLSON HAGEL & FISHBURN
555 Capitol Mall
Suite 1425
Sacramento, CA 95814
(916) 442-2952

BOBBY R. BURCHFIELD
Counsel of Record
THOMAS O. BARNETT
ROBERT K. KELNER
RICHARD W. SMITH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

(additional counsel on inside cover)

JOSEPH E. SANDLER
NEIL P. REIFF
JOHN HARDIN YOUNG
SANDLER, REIFF & YOUNG
50 E STREET, S.E.
SUITE 300
WASHINGTON, D.C. 20003
(202) 479-1111
Counsel for California Democratic Party Appellants

CHARLES H. BELL, JR.
BELL, MCANDREWS, HILTACHK & DAVIDIAN LLP
455 Capitol Mall
Suite 801
Sacramento, CA 95814
(916) 442-7757

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
Counsel for California Republican Party Appellants

THOMAS J. JOSEFIAK
CHARLES R. SPIES
REPUBLICAN NATIONAL COMMITTEE
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8500

BENJAMIN L. GINSBERG
ERIC A. KUWANA
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

MICHAEL A. CARVIN
JONES DAY REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for RNC Appellants

JAMES BOPP, JR.
RICHARD E. COLESON
THOMAS A. MARZEN
JAMES MADISON CENTER FOR FREE SPEECH
BOPP COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434
Counsel for Libertarian National Committee, Inc.

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BCRA's restrictions on political parties are much more severe than its restrictions on either federal officeholders or special interests. The Government asserts that BCRA's restrictions on political parties are necessary to prevent actual or apparent corruption *by* special interests *of* federal officeholders and candidates. Even if this were true, the Government cannot explain why parties are treated so much more harshly than officeholders and candidates, or even interest groups themselves. This glaring discrepancy in treatment calls into question the purported justification for Title I, and at the same time proves that Title I is neither narrowly tailored nor even closely drawn, but is instead fundamentally irrational.

Members of Congress made sure that BCRA expressly allowed them to raise nonfederal funds for the very special interest groups whose efforts to buy influence are said to justify Title I.[1] *See* new § 323(e)(4) (permitting federal officeholders and candidates – but not party officials – to solicit nonfederal money for tax-exempt interest groups, including those engaged in "Federal election activity"). BCRA leaves those interest groups largely unfettered to spend nonfederal funds on activities ranging from voter mobilization to various kinds of broadcast advertising. Congress also allowed federal officeholders and candidates – but not national party officials – to raise nonfederal funds for state and local candidates. *See* new § 323(e)(1)(B). It allowed them – but not national party officials – to speak at state-party fundraising events. *See* new § 323(e)(3). Neither the Government nor BCRA's sponsors can explain BCRA's preferential treatment of federal officeholders and candidates over political parties. *See* J.A. 854-55, McCain Dep. 205-15; J.A. 944-52, Feingold Dep. 189.

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[1] Like all three judges of the district court and even the Federal Election Commission itself, this brief employs the term "nonfederal funds" rather than the more pejorative "soft money." *See Per Curiam* 31sa n.9 (Kollar-Kotelly; Leon, J.J.); Henderson 182-183sa n.30; 67 Fed. Reg. 49,064, 49,064-65 (July 29, 2002). Also, whereas the factual statement in our opening brief drew from the findings of the lower court majority, *see* Pol. Parties Br. 7 n.4, the Government and Intervenors repeatedly invoke the findings of a single judge.

In our opening brief, ("Pol. Parties") Br. 1, we cited four paradigmatic examples of Title I's overbreadth. To lessen the force of these examples, Intervenors assert that they are "obscure" or only "remotely conceivable." Intervenors' ("Int.") Br. 6, 35. To the contrary, activities such as support of state and local candidates, campaigns for ballot measures, and full ticket voter mobilization are at the very heart of the American political process.

Defendants' dismissive tone cannot mask their inability to explain away these statutory flaws. *First*, we showed that new Section 323(a) makes it a felony for the Chairman of the RNC to send a fundraising letter on behalf of his party's gubernatorial nominees during the upcoming off-year elections. Intervenors confirm our point, asserting "the FEC and Justice Department have made clear that national party officials may solicit *hard money* on behalf of any candidate." Int. Br. 6 (emphasis added). As explained, Pol. Parties Br. 42, however, funds raised for a state candidate's campaign are regulated by and reportable under *state* law; they are *nonfederal* funds. New Section 323(a) makes it a *crime* for the RNC or its agents to raise nonfederal funds under any circumstances.

The Government, in turn, suggests that state candidates may simply "establish a *federal PAC*" for the sole purpose of accepting federal funds raised for their state campaigns by national party officials, since "*so far as federal law is concerned*" such money can be used for state election activity. Gov't Br. 54 n.22 (emphasis added). But as the FEC undoubtedly knows, a state candidate's formation of multiple campaign committees – that is, one subject to state regulation and another to federal – is typically *illegal under state law*.[2] Even if it were not illegal, the gratuitous burden of establishing and running a federally-regulated PAC cannot be justified by any substantial *federal* interests in regulating national party solicitations for *state* candidates. This very suggestion discloses a disdain for the authority of states to regulate their own elections.[3]

Second, Intervenors correctly observe that the California Secretary of State has now (since our opening brief was filed) fortuitously scheduled the recall election for October 7, 2003, 160 days rather than 120 days before the next federal election. Although the California parties may donate money to PACs formed to support or oppose a recall occurring in October, so long as the donee PAC does not otherwise engage in "Federal election activity," *see* new § 323(d), the very same contribution by a state party for an election later in the year (after the November filing deadline for federal candidates) would be illegal, even though no federal candidate is involved in either. It would also be illegal for the state parties to conduct their own get-out-the-vote ("GOTV") activities in a later recall election unless they used only federally permissible funds. Strikingly, Intervenors are silent about restrictions on national parties during the currently-scheduled recall campaign. *See* new § 323(a).

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[2] *See, e.g.*, Cal. Fair Pol. Practices Comm'n Adv. Op. A-91-448, 1991 WL 772902 ("a candidate for elective office may have only one campaign bank account and one controlled committee for each specific election") (California); Colo. Const. art. XXVIII, § 2(3) (Colorado) ("A candidate shall have only one candidate committee."); Iowa Code Ann. § 56.5A (West 2003) (Iowa) ("Each candidate for state, county, city, or school office shall organize one, and only one, candidate's committee for a specific office sought. . ."); Ohio Rev. Code Ann. § 3517.10(J) (West 2003) (Ohio) ("A candidate shall have only one campaign committee at any given time for all of the offices for which the person is a candidate or holds office.").

[3] We have addressed the Government's unrealistic and constitutionally suspect assertion that national party officials solicit in their "individual capacities." Pol. Parties Br. 41. The Government's attempt to analogize national party officials to Executive Branch employees, charitable organizations, and municipal securities dealers fails because none of those persons has political speech as its core function.

Third, new Section 323(b) and the definition of "Federal election activity" subject voter registration and GOTV activity by state and local parties to pervasive regulation during federal election years (including *monthly* reporting), even if only state or local candidates or ballot measures are named. *See* Henderson 311sa (major focus of state and local party activities is on state and local elections); Leon 1227sa (same). Nonsensically, Intervenors claim that "merely address[ing] the size and source of contributions used to finance [these activities] . . . *does not regulate*" them. Int. Br. 7 (emphasis added). But that is *exactly* how it regulates them.

Fourth, and perhaps most important, we showed that Title I criminalizes national party participation in traditional voter mobilization "Victory Programs" and "Coordinated Campaigns," even during years when there are no federal candidates on the ballot. According to Senator McCain, these "grassroots activities are the fundamentals of the democratic process." J.A. 943-44, McCain Dep. 192-93. As the district court found, prior to BCRA national party officials sat down with party officials in every state at the start of each election year and jointly decided how to raise and spend a mix of federal and nonfederal funds on voter mobilization. *See* Pol. Parties Br. 19-20; Henderson 305sa, 306sa; Leon 1222sa, 1223sa. Because the greatest emphasis was placed on state and local races, these plans relied most heavily on nonfederal funds. In 2000, for example, 60 percent of Republican Victory Program budgets were paid with nonfederal funds. *See* Henderson 306sa; Leon 1223sa.

Critically, neither the Government nor the Intervenors can deny that the essence of Victory Programs and Coordinated Campaigns is joint *decisionmaking* by national, state, and local parties concerning fundraising, fund allocation, and spending on voter mobilization programs. J.A. 296-97, Josefiak Decl. ¶¶ 31-32; J.A. 694-95, Peschong Decl. ¶¶ 5-7; J.A. 823-24, 825-26, Stoltz Decl.¶¶ 3, 9.[4] New Section 323(a) prohibits national party involvement in any such program unless it is funded with 100% federal dollars – even when there are no federal candidates on the ballot. Moreover, new Section 323(b)(2)(B)(iv) prohibits national parties from transferring even *federal* dollars into these programs if the state or local party is using any nonfederal "Levin" money. The Government confirms the statutory overbreadth by pointing out that the Levin Amendment's "homegrown" requirement is intended to prevent the national parties from "gain[ing] *influence* over how the [Levin] account is spent." Gov't Br. 50-51 (emphasis added).

Each of these four examples concerns traditional, core political party activities. The briefs describe many other examples of core party activity swept within the overbroad rubric of "Federal election activity." In their effort to close "loopholes," BCRA's drafters created a Rube Goldberg statute with effects so bizarre – and apparently unanticipated even by its proponents – that it cannot survive any level of scrutiny.

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[4] While Intervenors assert without citation that national parties may participate in these programs "so long as the national parties do not *solicit* soft money or *control* its expenditure," Int. Br. 7, they fail to explain how beginning-to-end collaboration on fundraising, budgeting, and spending for such programs does not constitute "solicit[ing], . . . transfer[ing] . . . or spend[ing]" nonfederal Funds. *See* new § 323(a)(1).

I. BCRA's RESTRICTIONS ON POLITICAL PARTIES OFFEND THE FIRST AMENDMENT.

A. Title I's Many Restrictions on Party Association, Spending, and Solicitation Call for Strict Scrutiny.

1. The Statute Is Subject to, and Fails, Strict Scrutiny.

As shown, Pol. Parties Br. 35-36, Title I's restrictions on intra-party communication and cooperation demand strict scrutiny under this Court's precedents addressing political party rights of association. *See California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000) (law burdening political parties' right of free association is "unconstitutional unless it is narrowly tailored to serve a compelling governmental interest"); *see also Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 225 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). Our showing that restrictions on party association activity are subject to strict scrutiny goes unrebutted and virtually unaddressed.[5] As the district court found, the relationships among national, state, and local party organizations have strengthened in the past three decades, have never been closer, and are generally healthy for American democracy. *See* Henderson 304sa; Leon 1221-22sa. By creating what Senator McCain called "firewalls" separating the national, state, and local parties, J.A. 952, McCain Dep. 223, Title I strikes directly at the parties' core associational functions. *See* Leon 1082sa (BCRA "transforms [national, state, and local parties'] relationship with each other").

Title I drives wedge after wedge within and among the party organizations. For example:

- Title I penalizes state and local parties for associating with national parties in developing, funding, and implementing Republican Victory Programs and Democratic Coordinated Campaigns. *See* new § 323(a).

- If the state or local parties use any nonfederal funds or "Levin money" to pay for voter registration or GOTV, Title I bars the national parties from transferring even *federal* funds to state and local parties for those purposes. *See* new § 323(b)(2)(B)(iv) (the "homegrown" requirement).

- If they use "Levin money," Title I bars state and local party committees from transferring *among themselves*, even within the same state and with no national party involvement, *federal* funds for the broad range of activities that the statute defines as "federal election activity." *See* new §§ 323(b)(2)(B)(iv), 323(b)(2)(C).

- Title I requires the RNC and LNC to spend 100 percent federal funds for internal party communications aimed at party members and adherents, *see* new § 323(a), whereas corporations, unions, and membership organizations may spend unlimited nonfederal funds on even express advocacy directed to their stockholders, executives, and members. *See* 11 C.F.R. § 114.3 (2003).

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[5] The Government ignores *Eu* and *Tashjian* altogether, but meekly suggests that the broad holding in *California Democratic Party* should be limited to laws that allow nonmembers to participate in party affairs. Gov't Br. 65 n.32. The Intervenors ignore all three precedents.

Neither the Government nor the Intervenors explain why these restrictions deserve less than strict scrutiny.

Moreover, even under the *Buckley* "contribution/expenditure" dichotomy, strict scrutiny must apply. In its zeal to obtain the most "complaisant scrutiny," the Government is forced to mischaracterize the statute. While the very text of new Section 323(a) makes it a felony for the RNC or LNC to "solicit, receive, or direct . . . transfer . . . or spend" nonfederal money – not just for themselves but for anyone else – the Government claims the provision is "directed solely at the *acquisition* of funds," Gov't Br. 13 (emphasis in original); *see id.* 34 ("receiving funds," "receiving any donation"), 35 ("solely as a source and amount limit"). To the contrary, new Section 323(a) is, in Intervenors' words, an "across-the-board prohibition." Int. Br. 23. It prohibits national party fundraising for state and local candidates or allied interest groups, as well as national party participation in the spending of state parties' nonfederal funds, even though none of the money involved is "receiv[ed]" by the national party.

As for new Section 323(b), the Government admits that "the applicability of these restrictions turns on the *use* to which the relevant funds are ultimately put," Gov't Br. 45 (emphasis added), but again attempts to denominate the provision as a contribution limit. The Government's claim that state and local parties are free to spend as much *federal* money as they want on so-called "Federal election activity" misses the point: Title I restricts the right of state and local parties to *spend* nonfederal funds raised legally pursuant to state law on behalf of state and local candidates.

Similarly, new Section 323(d) prohibits national and state political parties from spending even a single penny, even of *federal* funds, to support tax-exempt I.R.C. Section 501(c) organizations, if those organizations spend any money for "Federal election activity." *See infra* pp. 25-28. That is a flat ban on spending, without regard to the source and amount of funds involved. And, new Section 323(f) regulates the *spending* of campaign funds raised pursuant to state law. Try as they might, the Government and Intervenors simply cannot fit this multitude of interrelated restraints on spending into the contribution limit cubbyhole. Indeed, their semantic gymnastics confirm a very serious problem.

The solicitation restrictions are another component of this oppressive regime. The Government argues against strict scrutiny because "[t]he provisions at issue here . . . are directed not at the content of the fundraising appeal, but at the identity of the fundraiser." Gov't Br. 52. Again, the Government is wrong. The RNC or LNC can solicit money from any U.S. citizen if its message seeks a contribution to itself, but it cannot ask that very same individual to contribute the same amount to Jones for Governor. *See* new § 323(a). Likewise, the CDP can solicit Levin money from a labor union for itself, but it cannot ask that same labor union to give the same amount of Levin money to a county Democratic party. *See* new § 323(b)(2)(B)(iv).[6]

Although it is not precisely clear, the Government appears to be saying that intermediate scrutiny should be the rule for restrictions on political parties, whereas strict scrutiny is but an exception applicable only to limits on the *amount* of money parties can spend. The Government has it exactly backwards. Strict scrutiny is the rule; only when reviewing limits on contributions to candidates has the Court employed intermediate scrutiny. *See* Pol. Parties Br. 36. *Cf.*

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[6] *FEC v. National Right to Work Committee*, 459 U.S. 197, 200-01 (1982) ("*NRWC*"), applied intermediate scrutiny to solicitations that NRWC did *for itself* of funds that it was prohibited from receiving. The solicitation restrictions here are far broader.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296-97 (1981) ("contribut[ion] to a *candidate*" is "single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment."). In *FEC v. Beaumont*, 123 S. Ct. 2200, 2210 (2003), the Court observed that "the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association." As shown, Title I's pervasive restrictions impact the very core of political party speech and association.

If, as shown, strict scrutiny applies, the Government implicitly concedes the statute must fall. The asserted interest is not compelling (nor is it argued to be), the restrictions are not narrowly tailored (nor are they argued to be), and the Government's experts conceded that there is no evidence that Title I will reduce the appearance of corruption one whit. Henderson 337-38sa (*citing* J.A. 987-89, Shapiro CX 114-17 and Sorauf CX 191). This ends the inquiry.

2. The Statute Fails Even Intermediate Scrutiny.

Even applying intermediate scrutiny, Title I must fail. *See* Leon 1111sa. Both the Government and Intervenors repeatedly plead with the Court simply to defer to the legislators' personal experience in the realm of campaign finance. *See* Gov't Br. 27-28, 37, 42, 52, 72; Int. Br. 19, 20, 63. Doubtless legislators have greater personal experience in political debate than most judges, but this experience cannot insulate restrictions on political speech and association from the most searching First Amendment inquiry. A legislative decision setting the level of contribution limits, to which this Court might defer, is a far different matter from the novel and wide-ranging restraints at issue here.

The Record Rebuts the Existence of Any Substantial Corruption or Appearance of Corruption. The Government's exegesis on "the extensive network of laws" targeting corruption of federal officials, Gov't Br. 30, serves to confirm Dr. Morton Keller's undisputed testimony that "'[c]orruption or the appearance of corruption' . . . is less of a problem in American politics today than at any time in the past." J.A. 1267, Keller Decl. ¶ 55.[7] Indeed, the Government ignores this Court's observation in *Colorado I*, confirmed by the record here, that the "opportunity for corruption" posed by "unregulated 'soft money' contributions to a party for certain activities, such as electing candidates for state office or for voter registration and 'get out the vote' drives" is "*at best, attenuated.*" *Colorado Republican Fed. Campaign Committee v. FEC*, 518 U.S. 604, 616 (1996) ("*Colorado I*") (emphasis added). Against this background, the factual case for BCRA is weak.

The Government concedes that it lacks evidence of actual *quid pro quo* corruption, Gov't Br. 39 n.15,[8] but claims that federal officeholders inhabit "an environment" in which political parties "control the resources crucial to subsequent electoral success and legislative power," *id.* at 33. The Government's own political party experts unequivocally rejected the claim that parties use resources to pressure Members as not "credible," "self-defeating," and "politically naïve." Mann CX 113-15; *see also* Herrnson Dep. 185-86. The FEC admitted that there is no evidence of the RNC ever using contributions in an attempt to get a federal officeholder to change his or her position on legislation. *See* Henderson 325sa; Leon 1254sa.

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[7] The Government's effort to analogize Title I to bribery and gratuity statutes, Gov't Br. 28-31, is of limited assistance here. Restrictions on political giving and spending implicate speech and associational values at the heart of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*per curiam*) ("contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities"). In short, contributions for political speech and association are different from gratuities such as Super Bowl tickets.

[8] Intervenors continue to claim actual corruption, *see* Int. Br. 14, even though the district court flatly rejected their claim. Henderson 326sa; Leon 1256sa. Every Member who testified below denied being influenced by nonfederal money, and only two claimed to know a colleague who had been so influenced. *See* J.A. 918-19, Jeffords Dep. 106-07; J.A. 974-75, Meehan Dep. 171-72; McCain Dep. 170-71; Rudman Dep. 45-46; J.A. 1011-13, Simpson Dep. 13-15; J.A. 1026-28, Snowe Dep. 205-08; J.A. 405, McConnell Decl. ¶ 8; Barr Decl. 5; Shays Dep. 171, 176 (refusing to identify any specific incidents). Intervenors repeat vague allegations made by Senators Feingold and Simon that (...continued)

According to Intervenors, it is the raising of the money, "regardless of how the national party spends that money," that creates "the potential for corruption." Int. Br. 26. The district court found, however, that it is "exceedingly rare" for the RNC to rely upon federal officeholders for personal solicitation of major donors. *See* Henderson 308sa; Leon 1245sa. Moreover, most RNC nonfederal money goes to purely state and local campaign activity, administrative overhead, and other uses besides the feared candidate-specific advertisements. Pol. Parties Br. 13. Lack of officeholder involvement in fundraising, coupled with spending for activity not affecting federal elections,

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nonfederal donations from Federal Express impacted legislation. *See* Int. Br. 13. *But see* Leon 1254sa (describing the testimony of Senators Feingold and Simon, among others, as, "at best, their personal conjecture"). Intervenors fail to mention that former Senator Wendell Ford, the subject of the claim, has denied the allegation. *See* James R. Carroll, *Court to Hear McConnell's Challenge to Campaign Finance Law*, The Courier-Journal (Nov. 25, 2002) (Sen. Ford stated, "I wouldn't be going to Russ Feingold asking him to vote for FedEx. . . . He just got his facts wrong."). Senator Feingold asserted that the legislation would not "have passed had it not been for soft money," Feingold Dep. 133-34, but it passed the Senate by a vote of 92 to 2, with Senator Feingold himself in the majority. *See* 142 Cong. Rec. S27158 (Oct. 3, 1996).

confirms that the potential for corruption for most nonfederal money is, indeed, "attenuated." *Colorado I*, 518 U.S. at 616.

The Government admits that officeholders do not raise money for the RNC, but speculates that a blanket prohibition is necessary "to guard against the possibility that the RNC *might begin* to employ" techniques used by other national party committees. Gov't Br. 41 (emphasis added). This response highlights the lack of tailoring in this one-size-fits-all statute, which inaccurately assumes that *every* national party committee *inherently* raises *all* its nonfederal money through *federal officeholders*, for use in *federal campaigns*. The Government cannot explain why a more limited measure directly restricting federal officeholders and candidates from raising nonfederal funds – such as new Section 323(e) standing alone – is insufficient to address this claimed possibility.

As for the observation that the RNC invites officeholders to events with donors, Gov't Br. 41, the FEC admitted that both federal and nonfederal donors attend those events. *See* Henderson 329sa; Leon 1263sa. Moreover, Senator McCain admitted to attending "numerous" such events, but could not recall the "individuals who were present," and none of the matters discussed "made enough of an impression on [him] to influence any legislative judgments." McCain Dep. 236-38. Likewise, presented with a list of persons with whom he dined at a recent major donor event, Representative Shays testified that he could not recall a single one. *See* J.A. 1004, Shays CX 20.[9]

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[9] The district court majority declined to credit Intervenors' anecdotes of apparent corruption. For example, Intervenors suggest that nonfederal donations affected congressional action on prominent legislation, including tobacco-control legislation. *See* Int. Br. 13. Yet the record shows that while the tobacco legislation was pending in 1998, the tobacco industry's nonfederal donations to political parties actually *declined*,
(...continued)

Defendants repeatedly state that some corporate donors made nonfederal donations to both political parties, Gov't Br. 38; *see also* Int. Br. 12, but fail to note that the stated figures include donations not just by the listed corporations, but also by their affiliates and individual executives. Further, at a time of almost historical equipoise between the two political parties – the 2000 presidential election was the closest in over a century; the Senate comprises 51 Republicans, 48 Democrats, and 1 Independent; the House 229, 205, and 1 – it should not be surprising that many donors support both sides of the aisle. *See* Snyder Reb. Decl. at 11. A large corporation, with thousands of employees and perhaps millions of stockholders of varying political affiliations, may feel obligated to divide its political contributions between the two major parties.

Neither Narrowly Tailored Nor Closely Drawn, Title I Is Fundamentally Irrational. As shown without rebuttal, Pol. Parties Br. 44-48, the very structure of the statute demonstrates that its restrictions on political parties are neither narrowly tailored nor closely drawn. Indeed, as a scheme to protect officeholders from special interest influence, the restrictions are fundamentally irrational. The restrictions on political parties are far more severe than those imposed on both the feared influenc*ors* (special interest groups) and those who would be influenc*ed* (federal officeholders and candidates). Interest groups are permitted to engage in a wide array of federal election activities with unregulated and undisclosed funds. Officeholders and candidates are allowed to solicit nonfederal donations to interest groups engaged in those activities, new § 323(e)(4), as well as for state and local candidates, new § 323(e)(1)(B).

The Government simply does not and cannot explain why parties are subject to the most severe restrictions, or why the limits on federal candidates and officeholders in new Section 323(e) are by themselves insufficient to address the claimed evil. Nor does the Government deign to explain why state parties are subject to more severe restrictions than special interest groups engaged in the very same voter mobilization activities. *See* new § 323(b)(1).

The Government's view appears to be that once a proper subject of regulation is found, all manner of collateral restraints can be tacked on to prevent "circumvention" (mentioned 45 times by the Government and Intervenors), or to close "loopholes" (17 times). This reasoning is the very antithesis of narrow tailoring or close drawing. As the Court put it in *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 501 (1985), "[w]e are not quibbling over fine-tuning of prophylactic limitations, but are concerned about *wholesale restriction of clearly protected conduct*." (emphasis added). The number and breadth of the restraints here far surpass those struck down in *NCPAC*. *Compare NRWC*, discussed at n.6 above.

Title I Is Worse Than the Disease It Is Intended To Cure. In addition to showing "that the recited harms are real," it is the Government's burden to "demonstrate that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). The Government's abject failure to show that Title I will reduce the alleged appearance

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while its spending on *lobbying* and *issue advocacy* dramatically *increased*. *See* FEC Resp. to Req. for Admis. Nos. 45-50 & 52-54 in *RNC v. FEC*, No. 98-CV-991 (D.D.C.).

Sadly, Intervenors cannot resist distorting congressional testimony by the RNC's counsel. Int. Br. 28-29. *Compare* Const. & Reform Hrgs., Sen. Comm. on Rules & Admin., 106th Cong., 2d Sess. 301 (2000) (testimony of Bobby R. Burchfield) ("*Again, recognizing that* a prohibition of soft money donations to national party committees alone would be wholly ineffective, *legislative proposals to ban receipt of soft money often seek to impose soft money restrictions on state parties as well.*") (material omitted by Intervenors italicized).

of corruption is exacerbated by its own experts' concessions that it probably won't. *See* J.A. 987-89, Shapiro CX 114-17, Sorauf CX 191. Indeed, the record compellingly shows Title I will have the opposite effect.

Whereas Intervenors refer to instances of donors directing their nonfederal donations to state rather than national parties in unsuccessful efforts to influence the Federal Government, the Levin Amendment continues to allow a single donor to donate an unlimited aggregate amount in increments of $10,000 to multiple state and local parties for use on "Federal election activity."[10] Although the parties dispute that such amounts were actually corrupting, the fact is that Title I continues to allow the very donations that were invoked to justify its passage. Under the Government's unsupported "premise" that "federal candidates are likely to regard large donations used to finance 'Federal election activity' within their States or districts as substantially assisting their own campaigns," Gov't Br. 47, the fundamental irrationality of Title I is apparent.

Nor does Title I restrict federal officeholders' importunings for corporations or unions to give unlimited amounts to any special interest group (such as the NAACP or NRA) that engages in, but whose principal purpose is not, "Federal election activity," *see* new § 323(e)(4)(A). If Intervenors are correct that "[a] federal officeholder cannot be expected to ignore the fact that a donor had made a substantial contribution at his request to a political ally," Int. Br. 37, the irrationality is complete. And, whether solicited by a federal officeholder or not, the donor may still tout the

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[10] Intervenors refer to Roger Tamraz and Carl Lindner, Int. Br. 30, who admitted donating, in smaller increments, aggregate amounts of $300,000 and $500,000 respectively to state parties.

aggregate amount of its donations to these "allies" – politically active tax-exempt entities – through the Halls of Congress. Whatever salutary, insulating benefit parties have had is now gone; to "test the limits of the current law," *Beaumont*, 123 S. Ct. at 2207, officeholders will surely go *directly* to corporations, unions, and interest groups to request donations to ideologically-friendly tax-exempt groups.[11]

Moreover, Title I channels non-federal funds *away* from parties and *toward* the very corporations, trade associations, and special-interest membership organizations that, according to the Government's own experts, seek to "curry favor" with candidates, J.A. 1561-62, Mann Decl. 33-34, and create "strong policy oriented IOUs between contributors and legislators." J.A. 877, Herrnson Dep. 208.

Even the Government's experts predicted that BCRA will drive some portion of the nonfederal donations previously made to political parties to special interests for use in the political process. *See* J.A. 928-29, Mann CX 164-65; J.A. 861, Green CX 24; Bok CX 55. That shift of resources is proceeding full throttle. The media are reporting, for example, the formation of an organization that intends to spend *$75 million* in nonfederal funds – including a reported $10 million donation raised from a single individual – on voter mobilization during the 2004 federal elections. *See* Thomas B. Edsall, *Liberals Form Fund to Defeat President*, WASH. POST, A3 (Aug. 8, 2003). According to the author, the new organization was formed in part because the national parties are now prohibited from raising nonfederal money to pay for such voter mobilization efforts as "'coordinated campaign' activities." *Id.*; *see also* Pol. Parties Br. 24-25.

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[11] Senator McCain testified that officeholders receive more requests to participate in such fundraisers for special interest groups "than they can shake a stick at." McCain Dep. 166-67. Gun Owners of America, Inc. ("GOA"), received more than $2 million in nonfederal donations as a result of solicitation letters sent by federal officeholders. *See* GOA's Resp. to Ds.' First Set of Ints. No. 4.

While there is no evidence in the record of *quid pro quo* exchanges of nonfederal donations to parties for legislative action by federal officeholders, there *is* record evidence that *special interests* have offered to provide campaign support to federal candidates in exchange for legislative action. *See* Becket Decl. ¶ 7; Chapin Decl. ¶ 6; Strother Decl. ¶ 14. Congress's decision to shackle the political parties while leaving special interests largely unfettered simply defies reason.

B. New Section 323(a) Infringes the First Amendment.

As shown, new Section 323(a) is so broad that it prohibits or at least severely hampers national party participation in state and local elections, severely restricts the ability of national party committees to participate with state and local parties in full ticket voter mobilization plans, and in numerous other ways restricts the ability of national political parties to associate with their component state and local parties and members. Neither the record in this case nor common sense discloses a national crisis of officeholder corruption driven by the two major national political parties, or by minor parties such as the LNC, that would be sufficient to justify such a dramatic change in the democratic system.[12]

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[12] The Government misconstrues the "principal thrust" of the argument of the Libertarian National Committee ("LNC"), which it describes as claiming that no federal regulation should apply to LNC candidates because none has ever been elected to federal office. Gov't Br. 44, n.18. While the LNC reserves its right to argue this point elsewhere, the point here is that the BCRA is overly broad and restricts extensive nonfederal (...continued)

Moreover, the legislative record is clear that Congress intended the restrictions on national parties to be as broad-ranging and unequivocal as new Section 323(a) in fact is. On its face, new Section 323(a) is not narrowly tailored, closely drawn, or even rational. No mere striking of a word here or there could salvage it, and, in any event, Congress passed exactly what it intended. New Section 323(a) is invalid.

C. New Section 323(b) Infringes the First Amendment.

In order to justify the extensive regulation of state and local parties, the Government mischaracterizes them as mere extensions of the national parties pursuing the interests of federal candidates. In contrast, the district court found that state and local parties exist primarily to participate in state and local elections, and that they spend the majority of their resources on those elections. *See* Henderson 311-14sa; Leon 1227-31sa. Their voter registration and GOTV activities, in particular, are directed primarily at state and local elections. *See* Henderson 312-14sa; Leon 1228-31sa. Even if one assumes (contrary to fact) the parties "'never engage in public communication without regard to its electoral consequences'," Gov't Br. 48 (*quoting* D. Green), state and local parties place their principal focus and the majority of their resources on state and local "electoral consequences," not federal. These state and local election activities are regulated by state law.

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activity by the LNC that does not affect federal elections. The fact that no LNC candidate has been elected to federal office underscores that the party's nonfederal activities are legitimate efforts to participate in state and local elections and/or simply to educate the public independent of any election. Congress has no interest – and certainly no authority – to restrict such nonfederal LNC activities.

The Government claims new Section 323(b) regulates only "federal" election activities. It sweeps to regulate activities directed to state and local elections, we are told, because those activities may potentially have an incidental effect on federal elections. This possible incidental effect, in turn, raises a potential for the appearance of corruption of the federal candidates incidentally benefited. This chain of potential–incidental–possible was specifically rejected by the district court, confirming this Court's observation that any potential for corruption stemming from these activities is "at best, attenuated." *Colorado I*, 518 U.S. at 616.

Congress knew it was crossing the line. Although the Government asserts that the Levin Amendment was an exercise of legislative grace, the legislative history makes clear that Congress deemed the provision essential to avoid, as Senator Levin himself repeatedly said, going "too far" in regulating "some of the most core activities in which State parties are involved." 147 Cong. Rec. S3124 (Mar. 29, 2001); *see also* 147 Cong. Rec. S3247 (Apr. 2, 2001) (Sen. Levin) ("too far"); 147 Cong. Rec. S3240 (Apr. 2, 2001) (Sen. Nelson) (same). As shown, Pol. Parties Br. 60, 62-64, the Levin Amendment cannot salvage new Section 323(b), and in some respects (such as the "homegrown" requirement) it makes matters worse.

The Broad Scope of New Section 323(b) Cannot Be Justified By Any Anti-Corruption Rationale. As shown, Pol. Parties Br. 51-52, BCRA abandons any requirement that contributions or expenditures be made "for the purpose of influencing a *federal* election." Nor can new Section 323(b) be seen as simply another contribution limit. *See* p.8 above. After all, it restricts virtually all state and local political party activity in federal election years – even activities related to state and local *ballot measures*. This Court has previously held that restrictions on the funding of ballot measure campaigns cannot pass First Amendment challenge because these activities have no likelihood of corrupting a candidate. *See Citizens Against Rent Control*, 454 U.S. at 296-99; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

By its clear terms, new Section 323(b) goes beyond activities related to federal candidates and specifically includes GOTV communications that refer *solely* to candidates for state or local office. Since GOTV activities typically include the parties' most basic election activities – direct mail, phone banks, and door-to-door canvassing with the distribution of doorhangers, flyers, and brochures – each of these activities is now "Federal election activity" whenever a federal candidate is on the ballot, even if conducted solely on behalf of state or local candidates or ballot measures.[13] Not surprisingly, the court below found that, under the rubric of "Federal election activity," new Section 323(b) actually regulates state and local party activities solely in support of state or local candidates. *See* Henderson 436-37sa; Leon 1118-22sa.

The district court similarly found that other state party activities unrelated to federal candidates do not give rise to actual corruption or the appearance of corruption of federal officeholders or candidates. *See* Henderson 438sa ("[n]othing in the record remotely suggests" that generic and noncandidate-specific activities "corrupt or appear to corrupt federal candidates"); Leon 1123sa ("mere conjecture" that "appearance of corruption arises from donations to state parties" used for "generic or noncandidate-specific activities"). It thus found the definition of "Federal election activity" unconstitutionally overbroad. *See* Henderson 438sa; Leon 1123sa.[14]

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[13] In fact, Intervenors have *admitted* that Title I regulates each of the following communications: A radio advertisement urging voters to vote against a school voucher initiative; a phone bank supporting three state candidates; a newsletter mailed by a state party to its members; a mail advertisement in support of an Indiana mayoral candidate; a doorhanger supporting three Virginia state candidates; "generic" GOTV mail pieces (*e.g.*, "Our Vote is Our Voice...Vote Democratic"); and a vote-by-mail application supporting Republican candidates. They also agreed that it would be illegal for CDP to make a contribution to any ballot measure committee if the measure appeared on a ballot with a federal candidate, or a donation to the A. Phillip Randolph Foundation, which conducts *nonpartisan* voter registration. Int. Resp. to Req. for Adm., Nos. 4, 5, 6, 10, 13, 21, 22, 23, 24, 26, 28.

Since the prevention of corruption or the appearance of corruption is the only governmental interest that has been accepted by the Court as sufficiently compelling to justify substantial burdens upon freedom of speech and association, the findings by Judges Henderson and Leon effectively remove the only governmental justification that could support the restrictions imposed by new Section 323(b). The clear implication of the district court's findings is that donations for activities that are sufficiently removed from federal candidates (such as activities on behalf of state candidates) do not share the same potential for corruption and therefore cannot be justified by the anti-corruption rationale accepted in other contexts. Since new Section 323(b) indiscriminately includes all state and local party voter mobilization activities when federal candidates are on the ballot, it is neither narrowly tailored nor closely drawn. *See* Henderson 441sa; Leon 1123sa.[15]

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[14] Judge Leon found that new Section 301(20)(A)(iii) ("public communications") was the only exception to this conclusion. Leon 1123sa.

[15] The trial court found no likelihood of corruption arising from state party disbursements on behalf of state and local candidates. Thus, the need to avoid circumvention of the federal limits cannot independently justify restrictions on the state parties for disbursements that are unrelated to federal candidates.

The Restraints Imposed by Title I Directly on State and Local Parties Severely Restrict Their Direct Political Expression and Association. The Government asserts several times that parties are free to transfer funds among themselves, but the Levin Amendment plainly prohibits any transfers or joint fundraising – of even federal money – if the receiving party uses nonfederal funds (including Levin funds) for voter registration, GOTV (including for state candidates), or generic advertising. New §§ 323(b)(2)(B)(iv) & (C). Although a state or local party may elect to fund these activities with 100 percent federal funds, if it chooses not to do so (or, more probably, cannot do so), the price of using Levin funds is that it must forego all transfers and joint fundraising, as well as national party participation.

The restrictions on transfers and joint fundraising apply to *both* federal and nonfederal money, and at all levels of the party. The result is not only that the national party is prohibited from transferring federal money to a state with a hotly contested U.S. Senate race; the state party is prohibited from transferring money to a county committee for GOTV activities in a district with a particularly competitive State Assembly race, and county committees are prohibited from jointly raising money to support local voter registration efforts.

The Government claims that restrictions on joint fundraising and transfers are necessary to prevent donors from evading the limit by making the maximum $10,000 donation to multiple committees and earmarking those donations for transfer to a single party committee. Of course, this rationale is completely inapplicable to transfers or joint fundraising of *federal* money – which is subject to a strict aggregate limit and earmarking prohibitions. Nor does it explain why concerns about large transfers of Levin money could not be addressed by similar provisions.

The claim that the restriction on transfers of federal money is necessary to keep the national party from gaining "influence" over how Levin money is spent, Gov't Br. 51, fails because the ban applies not just to national parties, but to state and local party committees as well. Moreover, the bans on transfers and joint fundraising are imposed irrespective of the amounts involved. If the state or local party is using any nonfederal funds for "Federal election activity," all transfers to and joint fundraising for it – even of federal money – are banned.

New Section 323(b) Will Prevent State and Local Parties from Amassing the Resources Necessary for Effective Advocacy. We have submitted essentially unrebutted evidence that Title I's restrictions on state and local party activities will dramatically reduce the parties' ability to disseminate their messages and elect state and local candidates. *See* Pol. Parties Br. 61-64. Defendants argue that the parties will simply have to raise money from more people. The evidence shows that the federal revenues of the *state* parties have not significantly increased despite increased fundraising efforts, and the majority of their nonfederal revenues will be unavailable because of the Levin limits. *See* J.A. 124, Bowler Decl. ¶ 19; *see also* Henderson 315sa, 317sa; Leon 1240-41sa.

As the district court found, federalization of state party disbursements in support of state and local candidates and ballot measures will severely constrain the ability of the parties to reach voters with their messages. *See* Henderson 317sa; Leon 1242sa. CDP has raised approximately $4 million in federal money, and $12-16 million in nonfederal money per cycle in the last three election cycles. Henderson 315sa; Leon 1240-41sa. This federal money is primarily used for the federally-required share of administrative costs and, to a lesser extent, for expenditures relating to federal candidates. J.A. 130-31, Bowler Decl. ¶¶ 21-22. CDP spent the largest share of the nonfederal money ($7-8 million) on its mail program in support of candidates for eight state constitutional officers, 120 legislators, and numerous statewide ballot measures. *Id.* ¶ 20b, J.A. 126-29. Even if all federal money were redirected to state candidate and ballot measure activities (and this would be impossible because of the required federal share of administrative costs), the mail program would still be reduced by almost half.

In short, the district court correctly found that requiring state parties to spend federal money for activities unrelated to federal candidates will result in a significant reduction in the parties' ability to perform traditional functions such as voter registration, party-building, and grassroots organizing. Henderson 315-317sa; Leon 1242sa.

D. New Section 323(d) Infringes the First Amendment.

New Section 323(d) prohibits the parties at all levels from soliciting on behalf of, or making a donation to, certain tax-exempt organizations. None of the Government's arguments support restrictions on political party solicitations for, or donations to, these organizations; in particular, none justify the restrictions on state party donations to state-based organizations such as ballot measure committees or local Democratic and Republican Clubs.[16]

The Government states (in another context) that restrictions on solicitation are "in the nature of conflict-of-interest regulations and serve to prevent individuals who have acquired power or influence . . . from utilizing it" in circumstances where corruption of federal officeholders may result. *See* Gov't Br. 52; *see also* Int. Br. 36. Inexplicably, however, new Section 323(d) bans solicitation and donation by the political parties, but new Section 323(e)(4) allows federal officeholders to solicit up to $20,000 per donor for organizations primarily engaged in "Federal election activity," and unlimited amounts per donor for organizations that engage in "Federal election activity" as long as it is not their primary purpose.

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[16] As one *ex post facto* justification, the Government asserts that Congress can restrict the donations these tax-exempt entities may accept as a condition of their tax-exempt status. Gov't Br. 56 n.25. But new Section 323(d) restrains the political party *donors*, not the tax-exempt *recipients*.

Nor is new Section 323(d) limited to the solicitation of large donations. For example, it is perfectly legal for an individual to make a $5,000 contribution to a political party – national, state or local. Yet, new Section 323(d) makes it illegal for a representative of any political party to ask the same individual to give $5,000 to a Section 501(c)(4) organization that does nonpartisan voter registration. It is similarly legal for state parties (in California) to receive contributions from unions, but illegal for those parties to ask the same union to contribute to a ballot measure committee registered under Section 501(c)(4). In short, new Section 323(d) bans solicitation of funds for nonprofit organizations even when it would be completely legal for the party to solicit and accept such funds directly.

In a related argument, the Government urges that the parties will be tempted to circumvent contribution limits by setting up "sham" or "satellite" organizations that will accept "large" or "unlimited" donations. But the Government cannot explain why the concern about "sham" organizations could not be addressed by a provision that extends all restrictions applicable to the parties to organizations that are directly or indirectly established, financed, maintained, or controlled by any party committee. *See, e.g.*, new § 323(a)(2).

The Government contends that the parties donate to tax-exempt groups in order to "control" them. Gov't Br. 55 n. 24. Again, the statute is far too broad for this asserted purpose. New Section 323(d) bans all such donations, regardless of whether the donation is of a size sufficient to allow such control. The average CDP donation to such groups was under $1,000, an amount within the federal limits and hardly likely to allow control of any organization. J.A. 166-67, Bowler Reb. Decl. ¶ 9.

The rationale that new Section 323(d) is necessary to force political parties to make disbursements in their own names rather than through "surrogates" is similarly disingenuous. Any disbursement by a political party to a tax-exempt group is reported by the donating party and sometimes by the group as well.

In advancing the "control" and "disclosure" theories, the Government pointedly ignores the central argument of the California parties that they have a right to participate in ballot measure advocacy both by their direct spending – such as by including an endorsement or opposition of the measure in party mail – and by their donations to allied groups. The ban on donations imposed by new Section 323(d) most definitely restrains the parties' "direct political expression" in the context of pure ideological advocacy.

As shown, Pol. Parties Br. 70, California ballot measure committees are typically registered under Section 501(c)(4). Since these committees normally engage in GOTV activity during federal election years, they meet the overbroad definition of "Federal election activity." There is surely no argument that the parties seek to "control" the nonfederal money of ballot measure committees, since those committees exist for only one election, and usually spend all the money they raise on the campaign itself. Nor can there be a disclosure issue, since all ballot measure donations and expenditures are reportable in California.

Intervenors apparently concede that *Citizens Against Rent Control* prohibits restrictions on donations to a ballot measure committee. Int. Br. 22, n.15. In a tortured reading of that case, however, Intervenors distinguish *Citizens Against Rent Control* on the basis that the Court found "no nexus" to corruption of officeholders or candidates whereas "political parties have a close connection to officeholders and candidates, which enable them to serve as highly efficient conduits of corruption." *Id.* Intervenors fail to explain, however, how this reasoning justifies prohibiting the parties not from *receiving* donations, but from *making* them. There is no hint at how a donation to a ballot measure committee "corrupts" a federal candidate or officeholder, particularly when anyone seeking to use the party as a "conduit" could give an unlimited amount of money directly to the ballot measure committee.

Finally, while it is true that Section 527 committees are engaged in "political activity," they are not necessarily involved in *federal* political activity. The clearest illustrations in California are the local Democratic and Republican "Clubs." While not part of the official party structure, they are groups that provide much of the grass-roots support for the parties, and are often organized by city or university campus. They have historically received modest financial assistance from the state or county parties. The Government can advance no reason why the parties should be precluded from providing limited financial support to these groups.

E. The Government Raises No Issues that Were Not Rejected Unanimously by the District Court in Invalidating Section 213.

Section 213 has nothing to do with nonfederal money; rather, it forces political parties to choose between two uses of federal money – independent expenditures and coordinated expenditures. The district court unanimously and correctly rejected each argument to sustain the provision raised by the Government here. Gov't Br. 60-65; *see Per Curiam* 7sa; Henderson 385sa, 396-97sa; Kollar-Kotelly 886sa; Leon 1170-76sa.

The Government's claim that Section 213 "provide[s] party committees an additional spending option [that] creates no constitutional infirmity" is without merit. Gov't Br. 61. To the contrary, Section 213 forces the parties to choose between two pre-existing "spending options."

The constitutional focus, as the district court recognized, must be on Section 213's requirement that party committees forego making constitutionally-protected independent expenditures if any single party committee – local, state or national – makes *any* coordinated expenditure of any amount *first*. One party committee's "choice" forecloses all other committees from making any independent or coordinated spending choice whatsoever. This burdening of the right to make independent expenditures strikes squarely at the holding of *Colorado I.*

BCRA withdraws a statutory right from political parties as punishment for engaging in constitutionally-protected activity. This removal of a protected "benefit" was rejected in the line of "unconstitutional conditions" cases, such as *Perry v. Sindermann*, 408 U.S. 593 (1972), which were not analyzed by the *Buckley* court in upholding the public funds provisions of FECA. *See also Elrod v. Burns*, 427 U.S. 347 (1976).

The Government cannot salvage Section 213 by asserting that Congress passed the coordinated expenditure provisions in 1976 because it failed to comprehend the right of parties to make independent expenditures. *See* Gov't Br. 62-63. As this Court made clear in *Colorado I*, this congressional intent is insufficient to limit independent spending by political parties. 518 U.S. at 621.

The Government's attempt, Gov't Br. 65 & n.32, to distinguish *California Democratic Party v. Jones* is meritless. Section 213 requires a national party committee to consult with and control the activities of numerous state and local party committees, because the national party committee's decisions may be completely foreclosed by the separate and independent campaign spending decisions of state and local party committees. Apart from the irony of BCRA forcing collaboration on this issue while restricting collaboration on voter mobilization programs, this interference in the way political parties operate is, if anything, even more intrusive than that struck down in *California Democratic Party*.

Finally, the Government erroneously claims that Section 213 imposes no "forced choice," because party committees at the national, state, and local levels already are "affiliated." State and local party committees are not conclusively affiliated if those local party committees have not been "established, financed, maintained or controlled" by the state party committee, however. *See* 2 U.S.C. § 441a(a)(5).[17] Yet under BCRA Section 213(2), such affiliation is conclusively presumed for purposes of the "forced choice" provision. Moreover, the national committees and state committees have separate coordinated expenditure limits. *See* 2 U.S.C. §§ 441a(d)(2) & (3). The Levin Amendment prohibits parties from raising certain funds together, or sharing certain funds. New § 323(b)(2)(B). Thus, the conclusive presumption of affiliation is both factually inaccurate and at odds with other statutory provisions.

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[17] *See* FEC Advisory Op. 1978-9 (Dallas County (Iowa) Republican County Central Committee not affiliated with Iowa state party).

F. Section 214 Infringes the First Amendment.

As shown in our opening brief, Pol. Parties Br. 78-90, Section 214 violates the First Amendment because any definition of coordination that treats mere "consultation" with a candidate or political party as coordination, even where there is no agreement concerning an expenditure of funds, is fatally overbroad.

The Government defends Section 214 on the ground that the language of Section 214(a) is essentially the same as the definition of candidate coordination found in FECA since it was first enacted, *see* 2 U.S.C. § 441a(a)(7)(B)(ii). Gov't Br. 123.[18] But Section 214(c) now makes clear that nothing more than informal collaboration – whatever that means – is necessary to support a finding that otherwise independent expenditures were coordinated with the candidate. It is the nature of the political process for candidates to have discussions with their supporters and with their political parties. The very real threat here is that even the most casual and innocent discussions will lead to charges that independent spending is "informal collaboration," and thus an illegal contribution. There is no question that association and independent speech will be chilled.

Nor must the political parties await judicial review of the FEC's new coordination regulations to pursue their facial challenge to Section 214. This is not a case in which judicial review of the agency's regulations "might eliminate, limit, or cast" the constitutional claims "in a different light." *Nixon v. Adm'r Gen. Servs.*, 433 U.S. 425, 430 (1977). Here Congress *required* the FEC to adopt a definition of coordination that would necessarily be unconstitutional on its face. Because Section 403(a) of BCRA vests exclusive jurisdiction in the court below and this Court on appeal to consider any constitutional challenge to the statute, this case – not a challenge to the rulemaking – is the appropriate vehicle to advance this constitutional challenge to the statute.

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[18] In *Colorado I*, the Court rejected the FEC's view that expenditures by political parties were *per se* coordinated with candidates. 518 U.S. at 619-23. Likewise, in *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431, 465 (2001), the Court upheld the constitutionality of FECA's coordinated party expenditure provision. In neither case did the Court confront a challenge to the definition of coordination found in 2 U.S.C. § 441a(a)(7)(B)(ii).

II. CONGRESS EXCEEDED ITS POWER UNDER THE FEDERAL ELECTIONS CLAUSE AND INTRUDED UPON STATE SOVEREIGNTY.

As shown, Pol. Parties Br. 78-91, this Court has long recognized that the Federal Elections Clause, U.S. CONST. art. I, § 4, cl. 1, vests the power to regulate state and local elections in the sovereign states.[19] *Federalist 59* and Justice Story's *Commentaries* confirm that federal regulation of state elections was inconceivable to the Founding Fathers. Even the Government's lead expert, Dr. Donald Green of Yale, confirmed that BCRA "goes a lot farther" than the Founders envisioned. J.A. 868-69, Green CX 148-49. Whereas the Government cites Dr. Green at least eight times in its discussion of Title I, and Intervenors cite him at least twice, they ignore both *Federalist 59* and Dr. Green's accurate but fatal admission.

Every even-numbered year, state parties engage in purely state and local campaign activity. Indeed, the district

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[19] *See e.g., Tashjian*, 479 U.S. at 217; *Oregon v. Mitchell*, 400 U.S. 112, 134-35 (1970) (controlling opinion of Black, J.) ("Our judgments . . . save for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them.").

court found that state and local parties exist *primarily* to engage in those activities and spend the majority of their resources on them. Henderson 311sa; Leon 1227sa. Those activities are now swept within the federal regulatory regime even though they are unrelated to any federal candidate.

Further, the district court unanimously found that during the 2001 off-year elections, the RNC spent $15.6 million of nonfederal money, not including associated overhead, on state and local races. *See* Pol. Parties Br. 11-12. The RNC engages in similar purely state and local election activities in even years. *Id.* 12. Section 323(a) federalizes all this activity.

Effectively repudiating the Federal Elections Clause, the Government (Br. 42-43) makes the case for full federal authority to regulate any and all state election activity.[20]

> Because money is fungible, a donation that defrays the costs of state electoral advocacy will free up funds for other activities that

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[20] The Government admitted that the Federal Elections Clause was the sole congressional basis for Title I. Pol. Parties Br. 79. Nevertheless, the Government invites the Court to sustain Title I as based on the Federal Government's "more general power to superintend and protect the integrity of the federal workforce." Gov't Br. 30. This "more general power" is derived, we are told, from the Necessary and Proper Clause, which this Court has aptly described as "the last, best hope of those who defend ultra vires Congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). Congress can no more use the Necessary and Proper Clause to override the limits of the Federal Elections Clause than it can to override the Commerce Clause: "When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier . . . , it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Id.* at 923-24 (quoting *The Federalist No. 33* (A. Hamilton)).

> may directly and tangibly affect federal elections. . . . Because the decennial redrawing of congressional district lines is typically performed by state legislatures, a party's congressional candidates can expect to benefit if the party obtains a legislative majority within the State. . . . A presidential candidate's likelihood of winning a state's electoral votes may be increased if the State's Governor is a member of the candidate's own political party.

While we agree that such a broad view of federal power would be essential to uphold Title I, settled precedent unequivocally rejects the Government's view. For example, in *Blitz v. United States*, 153 U.S. 308, 314-15 (1894), the Court held that "[*v*]*oting*, in the name of another, *for a state officer, cannot possibly affect the integrity of an election for Representative in Congress*." (emphasis added).

The Government's invocation of the Supremacy Clause, Gov't Br. 66, 69, simply begs the question. Supremacy Clause issues arise only for "Laws of the United States which shall be *made in Pursuance*" of the Constitution. U.S. CONST., art. VI, cl. 2 (emphasis added). Because Title I exceeds the grant of power under the Federal Elections Clause, the Supremacy Clause is not at issue.

Equally odd is the Government's claim that the federalism arguments are completely subsumed within the First Amendment arguments, since (we are told) a federal interest sufficient to overcome the serious First Amendment problems would, *ipso facto*, be sufficient to justify federal intrusion into state election regulation as well. To the contrary, even an overriding federal interest (not present here) could not justify federal regulation of state election activity in contravention of the Federal Elections Clause. New Section 323(b) regulates virtually all state and local party activity occurring proximate to federal elections even though the vast majority of that activity is directed solely at state or local elections and has no discernible effect on a federal election. And, a very substantial part of the RNC's activities relate exclusively to state and local elections. This effort to regulate activity having no effect on a federal election is, by itself, sufficient to invalidate the statute as exceeding Congress' Article I, § 4 powers.[21]

Moreover, it is offensive to our federal system for the Federal Government to supercede rather than accommodate the state regulatory structure, especially in an area so central to sovereignty and self-governance. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy:*

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[21] *None* of the FECA provisions cited by the Government as restricting state and local election activity, Gov't Br. 67, were enacted pursuant to the Federal Elections Clause. Although the Government asserts that FECA prohibits contributions by federal government contractors in state and local elections, the FEC's *own* regulations state that the prohibition "does not apply to contributions or expenditures in connection with State or local elections." 11 C.F.R. § 115.2(a). FECA's prohibition on contributions to federal or state candidates by national banks and federally-chartered corporations was first enacted as part of the Tillman Act of 1907, 34 Stat. 864, under Congress's unquestioned authority, recognized as long ago as *McCullough v. Maryland*, 4 Wheat. 316 (1819), to regulate creatures of the Federal Government. *See also* S. Rep. No. 59-3056, at 2 (1906) ("The Congress has the undoubted right thus to restrict and regulate corporations of its own creation."). FECA's ban on foreign national contributions to federal or state candidates originated in the 1966 amendments to the Foreign Agents Registration Act, Pub. L. No. 89-486, 80 Stat 244, *codified at* 22 U.S.C. § 611 *et seq.;* this provision is a valid exercise of Congress's plenary power over immigration. *See* Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 Yale L. & Pol'y Rev. 503, 528 (1997). Municipal securities dealers are licensed and extensively regulated by the SEC, pursuant to the Commerce Clause, *see* 15 U.S.C. § 78o-4, 78q, 78u; regulation of political contributions by municipal securities dealers grew out of that regulation. *See Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995).

Federalism for a Third Century, 88 Colum. L. Rev. 1, 41 (1988) ("[S]tates should have the power to control the procedures by which their government officials are selected").[22] In this federal system, state regulation of state elections is more than a mere "policy choice" which can be "displac[ed]" by Congress. *See* Gov't Br. 66. For all their flaws, the FEC's allocation regulations allowed purely state activity to be funded with purely nonfederal dollars, and for "mixed" activities at least made an attempt to accommodate the state interests. Title I makes no such effort.

Finally, the Government claims Title I does nothing more than regulate "financial transactions" to prevent corruption of federal officeholders. Gov't Br. 66. As shown, Title I does much more than regulate financial transactions. Most pertinently here, it restricts or prohibits political parties from participating in state election activity on terms that the states expressly allow. Further, the record confirms that any potential corruptive effect on federal elections from political party participation in purely state and local election activities is, as *Colorado I* put it, "at best, attenuated."

III. TITLE I DENIES POLITICAL PARTIES EQUAL PROTECTION OF THE LAWS BY PLACING THEM AT A SEVERE DISADVANTAGE IN RELATION TO SPECIAL INTEREST GROUPS.

This Court has recognized, and the record in this case confirms, that "players" in the political process other than political parties "could marshal the same power and sophistication for the same electoral objectives as political parties themselves," *Colorado II*, 533 U.S. at 455. Unlike parties, those players tend to be "most concerned with advancing their narrow interest[s]." *Id.* at 451. Even as they seek to "curry favor" with federal officeholders, J.A. 1561-62, Mann Decl. 33-34, special interests use those same federal officeholders to raise nonfederal funds, which they then spend, generally without public disclosure, on voter mobilization through direct mail, door-to-door canvassing, telephone banks, member communications, and both broadcast and non-broadcast advertising. *See* Pol. Parties Br. 92-93, 95-96. While severely restricting the activities of political parties, BCRA leaves corporations, labor unions, trade associations, and other special interest groups largely free to raise and spend nonfederal funds for all of these purposes at any time, with no disclosure.[23]

The Government cannot deny that Title I imposes on political parties uniquely burdensome restrictions. Its sole defense against the equal protection claim is that political parties receive certain "benefits" not available to other groups. As support, the Government cites *California Medical Association v. FEC*, 453 U.S. 182, 200-01 (1981), which did not, of course, address a political party. *See* Gov't Br. 70-72.

Strikingly, Defendants choose to ignore the relevant precedents cited in our opening brief. Pol. Parties. Br. 95. In those decisions, this Court uniformly struck down unique restrictions on political parties. *See, e.g., Colorado I,* 518 U.S. at 616; *California Democratic Party*, 530 U.S. at 582;

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[22] The Ninth Circuit's recent decision in *Jacobus v. State of Alaska*, No. 01-35666, 2003 WL 21911191 (9th Cir. Aug. 12, 2003), upholding Alaska's restrictions on contributions to state political parties' nonfederal accounts, confirms the authority of states to regulate nonfederal funds.

[23] Even if upheld, Title II's restrictions on broadcast issue advertising would restrict and require disclosure of only *broadcast* advertising that refers to a federal candidate immediately prior to a federal election. BCRA §§ 201, 203. Interest groups remain free to spend 100 percent nonfederal funds for voter mobilization, non-broadcast advertising, and even cleverly-crafted broadcast advertising *during* the blackout period.

Eu, 489 U.S. at 225; *Tashjian*, 479 U.S. at 217. In none of these cases was the mere fact that political parties enjoyed some benefits relative to other players mentioned by the Court as supporting the challenged restrictions.

Indeed, in *Colorado I*, the Government cited *California Medical Association* to support its claim that parties could be precluded from making independent expenditures. *See* Gov't Br. in *Colorado I*, at 39-40. This Court disagreed, explaining in the principal opinion, "[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." *Colorado I*, 518 U.S. at 618.

Ignoring *Colorado I*, the Government quotes the Court's observation in *Colorado II* that parties' coordinated expenditure limits afford them a "special privilege . . . others do not enjoy," Gov't Br. 71 (*quoting Colorado II*, 533 U.S. at 455). The question addressed, however, was the degree to which Congress could limit the "special privilege" of coordinated party expenditures, not whether that "privilege" could justify a plethora of wholly-unrelated restrictions.[24]

Finally, the Government's suggestion that parties' supposed closeness to federal officeholders justifies disparate treatment, Gov't Br. 71-72, makes little sense in view of the fact that Title I expressly permits close collaboration between officeholders and interest groups. Common sense suggests that the more "heightened risk that a federal candidate will regard a large donation . . . as a direct benefit to himself," *id.* 72, comes from a disbursement by a special interest directly benefiting the candidate, rather than a special interest donation to a party, which might or might not be used by the party in a manner beneficial to the candidate.

IV. THE APPROPRIATE REMEDY IS TO DECLARE TITLE I UNCONSTITUTIONAL.

The components of Title I are an integrated, interrelated whole. Defendants' experts have asserted that neither new Section 323(a) (governing national parties) nor new Section 323(b) (governing state and local parties) can meaningfully function without the other. *See* Mann CX 109-10 ("the whole effort would be lost" if new Section 323(a) were struck down); *id.* ("the objective Congress had in mind would be undermined" if new Section 323(b) were struck down); *see also* Green CX 118-19. Indeed, if this Court strikes down one of them as unconstitutional, the other must fall as well. The same is true for the other provisions of new Section 323, which make little sense without new Section 323(a) or (b), or vice versa.

Although BCRA includes a "severability clause," *see* § 401, a severability clause does not by itself require this Court to sever provisions of a statute. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 312-13 (1936) (refusing severance despite clause materially identical to BCRA § 401); *Hill v. Wallace*, 259 U.S. 44, 69-71 (1922) (same). Rather, severability depends in part on whether Congress would have enacted the remaining provisions without those invalidated and whether what remains "is fully operative as a law." *Buckley*, 424 U.S. at 108. The provisions of new Section 323 are so "mutually dependent," *Carter*, 298 U.S. at 313, that no single subsection would retain vitality absent the others.

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[24] Public funding of political party conventions is provided only if the party agrees in writing to forego certain rights, 2 U.S.C. § 9008 *et seq.*; 11 C. F. R. § 9008.1 *et seq.*, and obviously cannot be used by the Government's lawyers to justify additional, unrelated burdens.

CONCLUSION

For the reasons stated, the Court should hold Title I, Section 213, and Section 214 to be unconstitutional.

Respectfully submitted,

LANCE H. OLSON
OLSON HAGEL & FISHBURN
555 Capitol Mall, Suite 1425
Sacramento, CA 95814
(916) 442-2952
Counsel for California Party Appellants

BOBBY R. BURCHFIELD
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000
Counsel for RNC Appellants

JAMES BOPP, JR.
JAMES MADISON CENTER
FOR FREE SPEECH
BOPP COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434
Counsel for Libertarian National Committee, Inc.

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No. 02-1756 *et al.*

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF THE "BUSINESS PLAINTIFFS" CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC.

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
LEE E. GOODMAN
CALEB P. BURNS
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Appellants Chamber of Commerce of the United States, National Association of Manufacturers, Associated Builders and Contractors, Inc.

Of counsel

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 637-3055

August 21, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement is included on page iii of the Business Plaintiffs' Jurisdictional Statement.

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The Business Plaintiffs submit this reply to the Brief For The Federal Election Commission, et al. ("FECBr.") and the Brief For Intervenor-Defendants Senator John McCain, et al. ("IntDefBr."), collectively the "Defendants."

I. DEFENDANTS DO NOT DISPUTE KEY ASPECTS OF THE BUSINESS PLAINTIFFS' BRIEF.

Strikingly, Defendants do not contest most of the key factual premises for the challenges to the electioneering communication and coordination provisions presented in the Business Plaintiffs' Brief ("BPBr.").[1] For example, **Defendants do not dispute that:**

- BCRA's electioneering communication standard targets and suppresses *independent* speech concerning issues and candidates. BPBr. 34-40.
- Business corporations are vitally affected by and interested in the formulation and implementation of federal legislation and policy and in assuring that their knowledge and concerns are fully and effectively communicated to the public and to federal officials. BPBr. 4, 16-17.
- All Americans, including American voters and government officials, have a vital interest in hearing what business corporations have to say on the key issues of the day. BPBr. 4.
- Because the electioneering communication standard focuses on electronic signals that do not respect political boundaries, the minimum 90 day blackout periods for mentioning candidate names in independent speech imposed by the primary definition of electioneering communication

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[1] The Intervenor-Defendants have gratuitously cited certain confidential materials in their briefs. *See, e.g.*, IntDefBr. 47, 51. Not one of the district judges, in their lengthy opinions, saw any need to quote or cite this material, nor did the Solicitor General in his brief. Judge Kollar-Kotelly's May 2, 2003, Memorandum Opinion and Order declined to make the material public, 251 F. Supp. 2d 919 (D.D.C. 2003), and the Intervenor-Defendants elected not to appeal that ruling.

will be considerably extended for tens of millions of Americans to half the election year or more in some cases. BPBr. 5, 8-10.[2]

- Blackout periods mandated by the primary electioneering communication standard encompass times when important legislative developments often occur, and other major matters involving incumbent officeholders—urgently requiring public corporate comment—have and will occur. BPBr. 16-17.
- Americans tend to be most focused upon and receptive to discussions of public policy issues in months prior to elections, the very periods covered by the electioneering communication blackouts.[3]
- References to candidates in public speech serve important communicative functions independent of an electoral effect, such as (i) identifying bills, proposals, or policies; (ii) providing important and efficient cues as to the merits of such matters (*e.g.*, a "Kennedy tax bill" or a "Gingrich tax cut"); (iii) directing public response to involved public leaders; and (iv) persuading. BPBr. 16-18.

- Participation of business corporations and their representatives, such as the Business Plaintiffs, in developing, adopting, and implementing legislation and policy requires extensive, long-term communication and association with Members of Congress and other government and political leaders who are candidates or political party officials. These legislative and policy issues also become important in federal campaigns. BPBr. 13-15.
- Although BCRA's coordination provisions make coordinated speech unlawful and potentially criminal, the present law fails to provide clear guidance as to what types of association and communication with candidates or party officials will render corporate speech coordinated. BPBr. 46-48.
- Charges of unlawful coordination are commonly employed to punish and deter speech by political opponents. Such charges threaten serious burden and expense to the accused speakers, making them effective weapons. BPBr. 23-24.
- Business corporations and their representatives right now are limiting highly protected communication and association with federal officials and candidates to avoid burdensome charges that future corporate speech has been impermissibly coordinated and constitutes an unlawful contribution. BPBr. 29.

II. FAR FROM ACHIEVING WHAT *BUCKLEY* INTENDED, DEFENDANTS' ATTEMPT TO SUPPRESS ALL SPEECH LIKELY TO AFFECT AN ELECTION IS DIRECTLY CONTRARY TO *BUCKLEY* AND *MCFL*.

Buckley v. Valeo stressed that independent public speech concerning issues and candidates receives the very highest level of First Amendment protection. 424 U.S. 1, 42, 44-45 (1976). *Buckley* and subsequent cases have jealously safeguarded such independent speech, rejecting claims that it causes or appears to cause *quid pro quo* corruption or that such independent persuasive efforts may create constitutionally unacceptable political debts. *Buckley*, 424 U.S. at 45-47, *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497-98 (1985); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616-18 (1996).[4] Only in the very narrow context of speech that places itself at the heart of the electoral process by using explicit words to expressly advocate voting for or against clearly identified candidates has this Court allowed such speech to be suppressed. *Compare FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) ("*MCFL*") (applying express advocacy standard to burdens on corporate speech supporting candidates), *with First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1977) (independent corporate discussion of issues may not be suppressed). And suppression of express advocacy has been allowed only on the claim that permitting corporations to deploy immense aggregations of wealth would seriously distort the electoral process. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990).[5]

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[2] For example, New York City television and radio will be blacked out for their entire listening area by nominating events in New Jersey, Pennsylvania, and Connecticut; Washington, D.C., radio and television will be blacked out by nominating events in Maryland and Virginia. Users of satellite radio broadcasts and night-time clear channel AM broadcasts—*e.g.*, farmers and truckers—will be blacked out much of the election year by nominating events throughout the multistate region reached by those signals.

[3] The Intervenor-Defendants respond that broadcast time is more expensive during the pre-election period and "the airwaves are crowded with campaign ads." IntDefBr. 65. True enough. It also is true that a location in a busy mall often is more expensive than isolated space, and it is crowded with other stores, including competitors. Nevertheless, many businesses vie for mall locations. The fact is that it is easiest to sell a public policy idea to the public when people are most interested in public policy issues. BPBr. 16.

Buckley treated contributions differently than independent speech, allowing considerably greater scope for regulation. 424 U.S. at 20-21. This key distinction has been carefully maintained. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-42 (2001). The recent *Beaumont* decision, so heavily relied upon by the Defendants, emphasized this distinction and stressed that it was dealing with limits on contributions, not independent speech. *FEC v. Beaumont*, 123 S. Ct. 2200, 2207, 2210 (2003).[6]

BCRA's new electioneering communication standard goes far beyond this Court's precedents, seeking to suppress a wide range of *independent* speech during much of each even-numbered year. Nevertheless, Defendants claim that the electioneering communication standard really does nothing more than achieve what *Buckley* originally intended. FECBr. 81-83; IndDefBr. 61-62. The Defendants' arguments boil down to: the *Buckley* Court really meant to allow suppression of all speech likely to affect an election, but it adopted a naïve standard that turned out to be subject to unforeseen circumvention. Thus, Defendants suggest that the electioneering communication provisions merely restore a degree of tailoring that *Buckley* already held to be acceptable. *Id.*

This is revisionism at its worst. In fact, *Buckley was emphatic that its express advocacy standard would not and was not intended to encompass all or most speech likely to affect a federal election.* Defendants are asking this Court to

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[4] Defendants' claim that independent speech imposes burdens of gratitude that corrupt candidates is flawed. FECBr. 88-89; IntDefBr. 54-56. Candidates generally *dislike* independent speech. *See, e.g.*, 147 Cong. Rec. S3043 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe: "I want to control my own campaign."). There is no evidence that independent speech is particularly likely to create gratitude. Of the wide range of acts that might induce gratitude, BCRA suppresses independent speech—the activity with the greatest claim to constitutional protection. There is no public perception or evidence that candidates tend to be crippled by gratitude for yesterday's favors.

[5] *Austin*'s unique holding cannot be extended beyond express advocacy. Its legal premise—that the choice of the corporate form may be conditioned on giving up core rights—is a classic example of an unconstitutional condition. *See Speiser v. Randall*, 357 U.S. 513 (1958). And the corporate characteristics *Austin* relied upon—limited liability, perpetual life, and favorable treatment of the accumulation of assets, 494 U.S. at 658—now also characterize a wide range of other entities, including law firms. Wealthy individuals, including those who are identified with, and whose wealth derives from, corporations, *e.g.*, Warren Buffett and Senator Jon Corzine, are active politically, both in supporting speech and as candidates. At the same time, many campaigns now are incorporated. *See* 11 C.F.R. § 114.12. Moreover, because *Austin*'s rationale would not reach unions, which often take opposite positions from corporations, expanding *Austin* would threaten a lopsided regime Congress could not have intended.

[6] Furthermore, in response to questions from Justice O'Connor during oral argument in the *Beaumont* case, the FEC explained that BCRA did not affect the statute that was directly at issue in that case. *See* Oral Arg. Tr. in No. 02-403, 2003 WL 1798493, *14.

overturn Buckley, not to restore or implement it. And they similarly are attacking *MCFL*.

In developing the express advocacy standard, *Buckley* explained: "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions," so that "[d]iscussions of those issues . . . tend naturally and inexorably to exert some influence on voting." 424 U.S. at 42-43 (citations omitted). As a result, *Buckley* observed that there was little difference "in practical application" between issue advocacy and candidate advocacy, *id.* at 42, and that both types of speech were likely to affect elections. *Buckley* also recognized that persons intent on promoting or opposing candidates easily could craft speech that would do so without using explicit words of express advocacy. *Id.* at 45. *Buckley* said that it "would naively underestimate" political speakers to believe that they required express advocacy to craft speech that "benefited the candidate's campaign." *Id.* Yet, *Buckley* would only permit limited regulation of independent speech, that which used explicit words to expressly advocate the election or defeat of a clearly identified candidate. *Buckley*'s goal thus was *not* to regulate all or most speech likely to affect elections, but, instead, to clearly identify a *narrow category of speech directly and unambiguously tied to an election*—express advocacy.

A decade later, *MCFL* reinforced these points. It quoted *Buckley*'s observation that there is little difference "in practical application" between discussing issues and electoral advocacy. 479 U.S. at 249. It said that *Buckley* did not seek to regulate all campaign advocacy, but only "more pointed exhortations" that employ express advocacy. *Id.* It stressed that the express advocacy standard was crafted to prevent "overbreadth." *Id.* at 248. In short, *MCFL* achieved narrow tailoring by *deliberately* excluding from suppression a wide range of speech that it knew was likely to influence elections.

Defendants also claim that, whatever *Buckley*'s intent, the electioneering communication standard merely restores the tailoring that the express advocacy standard originally achieved. FECBr. 90-96; IntDefBr. 56. That claim lacks empirical support. Although Defendants claim that today's campaign speech often omits any express advocacy, they ignore that virtually all such speech must include disclaimers identifying the sponsor, which often embody express advocacy, *e.g.*, "Paid for by the Smith for Congress Committee." *See* 47 C.F.R. § 73.1212; 11 C.F.R. § 110.11. Thus, most current campaign speech contains express advocacy. But be that as it may, *Defendants cite no evidence that, at the time of Buckley and MCFL, most political speech likely to affect elections contained express advocacy*, and the Business Plaintiffs know of no such evidence.

In sum, *Buckley* and *MCFL* rejected as "overbroad" any effort to suppress or limit all speech likely to affect an election. Instead, given the highly protected status of such speech, they narrowed the provisions at issue so that they regulated only speech that, by its explicit terms, was directly and unambiguously part of the election process. Because the electioneering communication standard attempts a much broader scope of regulation—one that *Buckley* and *MCFL* reject—it is not narrowly tailored and must be struck down.

III. BECAUSE THE ELECTIONEERING COMMUNICATION STANDARD SUPPRESSES CORE SPEECH, IT IS SUBJECT TO STRICT SCRUTINY.

Defendants acknowledge that the effect of BCRA is to deny corporations and other speakers "the most effective means of communicating" to "the largest audience." FECBr. 93. Defendants' assertions that Title II "does not ban any speech whatever," FECBr. 97, IntDefBr. 9, 43, 56, thus are misleading at best. Defendants do not deny that, during periods of three to six months or more in every even-numbered year, corporations that broadcast a public message that mentions a Member of Congress or an incumbent

President who is seeking re-election face serious penalties, potentially including criminal liability.[7] Nor do they deny that the electioneering communication standard is intended to and will *substantially* reduce the total amount and effectiveness of corporate speech on public issues. Indeed, Defendants seek to justify the electioneering communication standard precisely as a way of effectively suppressing a great deal of such speech. FECBr. 80-81; IntDefBr. 53-54.

What Defendants mean by "no ban" is that corporations are "not absolutely gagged." Corporations may speak only in ways that Congress deems sufficiently burdensome, inefficient, and ineffective that total corporate speech will be greatly reduced.[8] When Alabama's law forbade "electioneering" one day a year—election day—this Court saw a fundamentally objectionable "suppression" of core speech, and it questioned whether the fact that the suppression occurred only one day was even "relevant to the constitutionality of the law." *Mills v. Alabama*, 384 U.S. 214, 219-20 (1966).

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[7] Tucked away in a footnote is an assertion that the "hypothetical threat of criminal prosecutions" serves more as a scarecrow than as a living threat. FECBr. 104 n.43. But it is the scarecrow function of such criminal provisions that is problematic. A prudent corporate executive will be particularly reluctant to authorize corporate speech that may be described, however hypothetically, as exposing the corporation to criminal liability. Thus, the chilling effects will occur. We must presume that Congress included the criminal provisions for a purpose and that this or some future administration may well enforce them. Defendants offer no assurance that they will not do so.

[8] The Court previously has recognized that creating and maintaining corporate PACs is a "severely demanding task" and is not an effective substitute for direct corporate speech. *MCFL*, 479 U.S. at 255-56. Because organizing a PAC and raising its funding takes time, it is an utterly impractical vehicle for corporations who speak only occasionally in response to unpredictable events. Moreover, because only PAC funds can be contributed to federal candidates and political parties, and those funds must be raised in limited amounts, 2 U.S.C. § 441a(a), restricting spending for speech to the artificially constrained resources of PACs forces corporations to trade off speech expenditures against contributions.

Defendants hint that the blackout periods are mere "time, place, and manner" restraints, but that position cannot be sustained. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977). *Linmark* unanimously held that an ordinance forbidding "For Sale" signs in front of houses was *not* a time, place, or manner restriction. This was because the "primary effect" that the ordinance sought to avoid did not derive from the particular media being suppressed—*e.g.*, the size, shape, or location of the signs—but from the content being communicated. *Id.* at 94. Moreover, other means of communication "involve[d] more cost and less autonomy" in "less effective media." *Id.* at 93. Similarly, BCRA seeks to regulate the message being conveyed and the type of speaker, not the method of communication. Corporate broadcasts on commercial subjects—"commercials"—thus are not restricted. And BCRA is deliberately aimed at types of speech deemed most effective, relegating speakers to less effective means. FECBr. 114. It is *not* a "time, place, and manner" restriction, but rather a content-based suppression of independent speech.

The Business Plaintiffs call this a "ban," and so do BCRA's sponsors outside the courtroom.[9] But the issue is moot since even Defendants acknowledge that the electioneering communication standard triggers strict judicial scrutiny, requiring Defendants to prove narrow tailoring and First Amendment clarity. FECBr. 24, 85; IndDefBr. 56, 63.

IV. DEFENDANTS FAIL TO SHOW THAT THE ELECTIONEERING COMMUNICATION PROVISIONS ARE NARROWLY TAILORED.

Defendants mistakenly argue that, because the Constitution grants Congress authority to regulate federal elections, Congress has "broad leeway" to regulate speech that is "likely to influence" a federal election. FECBr. 78.[10] Whether Congress's elections power actually sweeps so broadly is addressed by the Title I briefs. But even assuming that the basic power is that broad, it does not follow that Congress may freely *suppress* highly protected independent speech that happens to fall within the power's outer boundaries. To the contrary, Defendants concede that First Amendment strict scrutiny applies. FECBr. 85; IndDefBr. 63. The whole point of such strict scrutiny is to narrowly and stringently limit otherwise permissible regulation when it impacts fundamental rights or suspect categories. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Congress has no "broad leeway" to suppress core speech, and no precedent from this Court suggests otherwise.

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[9] *See, e.g.*, 147 Cong. Rec. S2712 (daily ed. Mar. 22, 2001), S3034-35 (daily ed. Mar. 28, 2001) (statements of Sen. Snowe).

This distinction between a basic power to regulate and the power to suppress speech is clearly drawn in cases concerning judicial control of litigation-related speech by lawyers. Because lawyers are officers of the court and owe a fiduciary obligation to the system of justice, their professional speech is well within the basic authority of the courts. Even so, the courts have no broad leeway to suppress out-of-court statements. To the contrary, "the substantive evil must be extremely serious *and the degree of imminence extremely high* before utterances can be punished." *Wood v. Georgia*, 370 U.S. 375, 384 (1962) (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)) (emphasis added).[11]

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[10] Defendants actually use a variety of phrases. Sometimes the reference is comparative, targeting speech "most likely to influence" an election. FECBr. 92. Other times the reference is to speech that "in all likelihood ha[s] the effect of influencing." FECBr. 92-93. Whether the speech must merely affect the policy views of one voter or whether it must alter the outcome is not clear.

[11] This Court generally has ruled that public "discussion of the problems of society" may be suppressed only when the speech presents "an imminent, not merely a likely threat [that is not] remote, or even probable [but] must immediately imperil." *Wood*, 370 U.S. at 384-85

In seeking to achieve clarity, the primary definition of electioneering communication adopts procrustean terms that are far from tailored. The key basis for suppression—a mere reference to a candidate, including an incumbent President, Senator, or Member of Congress—is not evil or troubling in itself.[12] To the contrary, the First Amendment was adopted to protect just such references. *Buckley*, 424 U.S. at 40-44.

As noted above, Defendants do not dispute that corporations have important information to impart on public policy issues, and Americans and their leaders have a strong need to receive such information. Nor do Defendants dispute that references to political leaders, including incumbent Members of Congress or the President, are an important part of such speech. Thus, *the criterion of a candidate reference, in itself, serves as much to identify speech that merits special First Amendment protection as it does to suggest any basis for suppression.* Such a criterion may contribute to a tailored standard, as it does in the express advocacy context, but in itself it certainly is not a narrow and tailored means of identifying speech that merits suppression. Certainly merely referring to a candidate does not establish a "substantive evil" that is "extremely serious" with an "imminence [that is] extremely high." *See Wood*, 370 U.S. at 384.

(internal quotations and citations omitted). The general issue was recently reviewed in *Karhani v. Meijer*, No. 03-CV-71654-DT, 2003 WL 21554338 (E.D. Mich. June 6, 2003). The court collected and discussed cases for the proposition that there must be "much more than a . . . reasonable likelihood" of "a grave threat." *Id.* at *6 (internal citations and quotations omitted).

[12] Nor, for that matter, is the standard of referring to a candidate clear on its face. Is a reference to an office held by a candidate, or to an act of the candidate as a function of the candidate's office a sufficient reference? *Buckley*'s express advocacy standard required that the speech itself clearly identify the candidate. 424 U.S. at 43. Some such narrowing construction would have to apply to the electioneering communication standard if it otherwise were to survive.

The so-called "targeting" provisions do not provide the needed tailoring. The minimum blackout period in each state—90 days for congressional candidates and 120 days for major party presidential candidates due to the national nominating conventions (BPBr. 9)—is a lengthy period of time. And the actual blackout periods in many jurisdictions will be much longer—approaching half a year or more for the many tens of millions of Americans who live within 80 to 100 miles of 50,000 residents in another jurisdiction or two. *See* BPBr. 5, 8-10.

Nothing about those lengthy periods makes them unimportant from a First Amendment viewpoint. To the contrary, Defendants do not dispute that legislation often reaches critical phases toward the end of the session, which often overlaps the blackout periods. Nor do Defendants deny that national and world events calling for important government action have occurred and will occur during those times.

Indeed, although Defendants quarrel over the exact numbers, their own evidence indicates that a substantial amount of speech in the 60 days before the 1998 and 2000 elections was "true" issue advocacy. Henderson, J., Supp. App. 242sa-45sa. If that speech affected the election, it did so as the secondary consequence of policy discourse. And those years were, relatively speaking, good times for our country. Certainly we have seen far more tumultuous and contentious times, and BCRA's provisions must provide rules that will fit such times. Defendants' notion that all references to candidates, including incumbent officeholders, could be banned from our nation's primary means of communication for up to half a year would flabbergast the Founding Fathers. (Although John Adams toyed with the concept to his regret in The Alien and Sedition Acts.)

Defendants assert that Members of Congress are "uniquely positioned" to identify speech that influences elections. FECBr. 92. Certainly incumbents are in a position to say that *independent* speech that refers to them is an unpredictable and unscripted factor and a political challenge that they prefer not to face in seeking reelection. But nothing shows that Congress could or did determine how much of the speech encompassed by the electioneering communication standard poses such an immediate threat of serious evil that the constitutional balance favors suppression. *See supra* p. 10-11.

Defendants argue that the electioneering communication standard is perfectly tailored—because any speech that refers to a candidate during the months prior to an election is "*likely*" to influence the election. FECBr. 24, 72-73 (emphasis added); IntDefBr. 58, 64. This clever rhetorical ploy attempts to obscure the imprecision of BCRA's standard by claiming that its compelling purpose is to identify speech that is likely to cause, to some degree, an effect that, if it were severe enough, might justify suppression. This confuses the issue of tailoring with the issue of compelling interest.

Precision of regulation is the touchstone in this area. *Buckley*, 424 U.S. at 41 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). It is not enough for the Defendants to assert that the core speech suppressed by the electioneering communication standard is likely to have some effect to some degree on some aspect of an election. Instead, Defendants must show that substantially all independent broadcast corporate speech during three to six months of an even-numbered year that so much as refers to anyone who is a federal candidate poses such a serious threat of highly deleterious consequences that suppression is warranted. *See supra* p. 10-11. No such showing has been made.

V. CORPORATE SPEECH DOES NOT OVERSHADOW OTHER SPEECH DURING ELECTION PERIODS.

In a further effort to evade *Buckley* and *MCFL*, Defendants suggest that corporate and union speech unforeseeably has "exploded" to overshadow political discourse during federal campaigns. FECBr. 80-81; IntDefBr. 53-54. They suggest that *Buckley* and *MCFL* could not have foreseen the need to cast a net broad enough to reach all corporate speech likely to affect an election.

The FEC Defendants bemoan the "spectacular rise" in "candidate-centered" issue advertising by corporations and labor unions, culminating in what they claim to be the expenditure of $500 million during the 1999-2000 election cycle. FECBr. 80. Yet, they cite findings by Judge Kollar-Kotelly based on a study that does not support their position. *See* Annenberg Public Policy Center, Issue Advertising in the 1999-2000 Election Cycle ("Annenberg Study") [DEV 38 Tab 22].

The Annenberg Study does in fact estimate that $500 million was spent on issue advocacy during the entire two-year 1999-2000 cycle; its estimate is *not* based on ads near federal elections. Annenberg Study at 1. Nor is the $500 million estimate limited to funds spent by corporations and labor unions, or "candidate-centered" issue advocacy. Instead, its figures measure all issue advocacy which includes candidate-centered, legislation-centered, and general image-centered advocacy. *Id.* at 13. Roughly one-third of the $500 million was spent by political parties. The remaining two-thirds was spent by approximately 130 other groups, and the Annenberg Study could only conclude that roughly one-quarter of the $500 million was spent by groups that represent corporate interests. *Id.* at 4.

The Annenberg Study shows that many organizations contributed to the $500 million in issue speech from 1999 to 2000. The FEC Defendants' assertion that the $500 million was spent only by corporations and labor unions, and only on candidate-centered speech, is unsupported.

The numbers Defendants cite are part of a general increase in campaign speech by all participants—something that the First Amendment favors—and surely do not show that corporations suddenly are exercising an overwhelming influence. To the contrary, Defendants were unable to contest the Business Plaintiffs' showing (at 38-40) that,

according to Defendants' own data, *recent spending by candidates and parties accounts for the great majority of political speech near elections; independent "organizations" account for a much smaller percentage; and corporations and unions are some fraction of organizational spending (the burden being on Defendants).*[13] Thus, the data show no dramatic sea change since *Buckley* and *MCFL* that would warrant throwing their express advocacy standard overboard.

VI. DEFENDANTS MAKE NO SERIOUS ATTEMPT TO DEFEND BCRA'S BACKUP DEFINITION OF ELECTIONEERING COMMUNICATION.

The three district court judges agreed that BCRA's backup definition of electioneering communication was unconstitutionally vague. Henderson, J., Supp. App. 362sa; Leon, J., Supp. App. 1164sa-66sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa. Judges Leon and Kollar-Kotelly sought to save part of the backup definition by imposing a "broadening construction" that severed and discarded a provision that narrowed the definition with a vague standard. Leon, J., Supp. App. 1164sa-66sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa. However, Judge Leon later conceded that the remaining part of the definition failed to give sufficient "guidance" to stand on its own. Bus. Pls.' Juris. Stmnt. App. 19a.

Defendants do not defend this unprecedented attempt to cure vagueness by expanding the burden on speech. FECBr. 116. Indeed, the Intervenor-Defendants tacitly denounce the backup definition. IntDefBr. 71.

The FEC Defendants argue that the vagueness of the final clause of the backup definition should be excused because its purpose was to benefit speakers by narrowing the definition. FECBr. 117. In fact, clear standards benefit all Americans—

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[13] "Organizations" like the Sierra Club, Emily's List, the NRA, and the like presumably account for a large part of this spending. Whether or not these groups qualify for a technical *MCFL* exemption, the issues that they raise clearly are distinct from those posed by business corporations.

listeners as well as speakers—and they are *required* by the First Amendment, not granted as a matter of grace. Thus, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991), held that Nevada's rule restricting public statements by lawyers was "void for vagueness" because its "safe harbor provision" was unclear.

VII. BCRA'S "COORDINATION" PROVISIONS ARE INVALID AND SUBJECT TO REVIEW IN THIS ACTION.

Defendants do not dispute that (i) effective participation in developing and implementing legislation and public policy requires business corporations and their representatives to associate and communicate on a long-term, ongoing basis with government and political leaders, many of whom also are federal candidates; (ii) such associating and communicating lies at the core of the First Amendment's protection of speech, association, and petition; (iii) if this association and communication causes future public speech supported by a corporation to be "coordinated" with a candidate or political party, that speech is unlawful and potentially criminal; (iv) political opponents effectively use FEC complaints charging unlawful coordination to punish and deter speech to which they object; and (v) uncertainty over the meaning of coordination is forcing corporations at this moment to curtail their association and communication with government and political leaders to avoid creating a basis for coordination charges that could render their future speech unlawful.

Defendants also do not deny that, because the coordination doctrine substantially burdens core First Amendment activities of speech, association, and petition, it is subject to strict scrutiny, including the elevated standard of clarity that the First Amendment imposes. Nor do they deny that the coordination provisions fail to provide such a clear standard. Instead, they assert that, despite the mandate of BCRA section 403(a)(4) to expedite resolution of constitutional challenges to the greatest extent possible, this Court cannot now address the issue.[14] They are mistaken.

A. BCRA's New Provision Restricting Coordination With Political Parties Clearly Is Subject To Review Now.

BCRA section 214(a) adds a new and distinct provision under which expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions." Since corporations cannot make such contributions, this new provision bans corporate expenditures that are coordinated with a political party. Today, corporations are curtailing communication and association with party leaders to avoid future charges of coordination.

The Business Plaintiffs, the AFL-CIO, and others challenged this new provision as unconstitutionally vague, and Defendants do not squarely contest that challenge. Instead, they argue that (i) the new provision uses the same statutory definition of coordination—"in cooperation, consultation, or concert with, or at the request or suggestion of"—that preexisting provisions used, and (ii) Plaintiffs have not shown that this standard is more vague with respect to political parties than with respect to candidates. FECBr. 123. These two points are both true and irrelevant.

This Court has not approved the prior statutory definition, nor has that standard been implemented without serious difficulty. To the contrary, the prior law spawned uncertainty and dispute, massive burdens on protected speech, and, ultimately, a narrowing construction by a district court and the FEC that sections 214(b) and (c) of BCRA now reject. *See* BPBr. 19-24, 44-46. If anything, the prior uses of this statutory definition demonstrate that it falls far short of the clarity demanded by the First Amendment.

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[14] The Intervenor-Defendants do not address the coordination issue at all. Presumably they intend to rely on the arguments presented at FECBr. 122-25.

Perhaps BCRA's special judicial review provision may not allow this Court to reach out and strike down pre-existing provisions where the "in cooperation, consultation, or concert with, or at the request or suggestion of" standard appears. But that is no reason to reject Congress's mandate to resolve the constitutional challenge to the provision that clearly is before this Court. This Court regularly evaluates the provisions that are before it without insisting that all related provisions also be at issue. *See, e.g., Buckley*, 424 U.S. at 75-81.

Defendants argue that, in carrying out its duty to promulgate regulations to define coordination, the FEC might "alleviat[e] any uncertainty" as to what the statute means. FECBr. 124. But this Court never has held that the possibility of rulemaking precludes a challenge to the statute. And any such preclusion would be particularly unwise where, as here (i) the challenged statutory provision is self-enforcing, (ii) private parties who have a history of abusing similar provisions are free to file complaints directly under the statute, and (iii) Congress has mandated this Court to resolve such constitutional challenges as swiftly as possible.

Moreover, the content of the FEC's coordination regulations are not a mystery; they were adopted months before the district court ruled. Per Curiam, Supp. App. 155sa. If Defendants thought those regulations saved the statute, they were free to seek an opportunity from the district court to make that demonstration, but they did not. Nor did they respond to the Business Plaintiffs' showing that vagueness remained. BPBr. 46-48.

B. BCRA's Specification That Speech May Be Condemned As A Coordinated Contribution In The Absence Of Any Agreement Is Unconstitutional.

Defendants do not deny that, read as a whole, BCRA sections 214(a)-(c) establish that "coordination" may be found, and otherwise fully protected independent speech may be condemned as an unlawful contribution, even though there is no element of agreement between speaker and candidate, campaign, or political party. BPBr. 46 n.29, 49. Nor do Defendants make any attempt to explain how such a result can be squared with the basic theory of the coordination doctrine—that spending for speech pursuant to an understanding with a candidate is the functional equivalent of a contribution. BPBr. 44. Instead, Defendants simply assert that "FECA has long provided . . . that expenditures made 'at the request or suggestion of' a candidate will be treated as contributions to that candidate." FECBr. 124-25. Once again, the statement is both true but irrelevant. If FECA's phrase "at the request or suggestion of" did not call for some element of agreement, it was unconstitutional, but that does not change the fact that BCRA's express preclusion of any element of agreement also is unconstitutional for the same reason. *See* Henderson, J., Supp. App. 393sa-94sa.

In fact, the phrase "*at* the request or suggestion of" means something more than a mere temporal sequence; it is different from the phrase "*after* the request or suggestion of." And that difference is the existence of an agreement or understanding. The importance of this point is demonstrated by what happened with The Coalition in the late 1990s. As is described in the Business Plaintiffs' Brief (at 20-21), a key basis for the charge of coordination brought against The Coalition was that, shortly after the AFL-CIO announced its ad campaign, Congressman Boehner gave a public speech in which he supposedly urged business interests to respond. In fact, there was a dispute as to what he said, but, more fundamentally, the members of The Coalition were unanimous that the need for a response was obvious and that, regardless of what Congressman Boehner may have said, they were acting independently and not pursuant to any understanding with him. BPBr. 19-20. In other words, they may have acted after his suggestion, but not "at" his suggestion. And, once the FEC recognized that the Constitution compelled a narrow construction of "coordination," it dismissed the complaint against The Coalition. BPBr. 23.

This is a critical point. The Business Plaintiffs cannot control the unilateral suggestions and requests that candidates or political parties may make. However, such unilateral action by others should not operate to deprive plaintiffs of their constitutional right to engage in independent speech. Instead, a proper test of coordination must require some element of agreement between speaker and candidate, campaign, or political party.

CONCLUSION

The electioneering communication and coordination provisions of BCRA should be struck down.

Respectfully submitted,

Jan Witold Baran
Counsel of Record
Thomas W. Kirby
Lee E. Goodman
Caleb P. Burns
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
Counsel for Appellants Chamber of Commerce of the United States, National Association of Manufacturers, Associated Builders and Contractors, Inc.

Of counsel
Stephen A. Bokat
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Jan Amundson
National Association Of
Manufacturers
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 637-3055

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AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

**On Appeal from the United States District Court
For the District of Columbia**

REPLY BRIEF OF AFL-CIO APPELLANTS/CROSS-APPELLEES

LARRY P. WEINBERG
1101 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 775-5900

Of Counsel

JONATHAN P. HIATT
LAURENCE E. GOLD
Counsel of Record
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5130

MICHAEL B. TRISTER
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 328-1666

Counsel for Appellants/Cross-Appellees

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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I. BCRA'S PROSCRIPTION OF UNION AND CORPORATE TREASURY FUNDING OF "ELECTIONEERING COMMUNICATIONS" IS UNCONSTITUTIONAL

A. BCRA's Primary Definition of "Electioneering Communication" Is Not Narrowly Tailored to Serve a Compelling Governmental Interest and Is Unconstitutionally Overbroad

The Government defends the definition of "electioneering communication" in § 201 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") as a "clear and objective" "bright-line, readily administrable test" that avoids the "pitfalls" of "attempting to distinguish between advertisements based on subjective and manipulable inquiries such as the intent of speakers or understanding of listeners" that *Buckley v. Valeo*, 424 U.S. 1 (1976), eschewed in construing provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, to reach only express advocacy. See FEC Br. at 91. But the Government premises the constitutional sufficiency of this definition as narrowly tailored on overreaching assumptions about speaker intent and listener understanding, and its proposed "test" for proscribable speech charts a sharp and dangerous new direction in First Amendment jurisprudence.

1. The Government asserts that in § 201 Congress "identif[ied] the factors that separate communications that are intended to influence the outcome of . . . elections and communications that are simply intended to promote debate on particular issues." FEC Br. at 92. The Government reasons that "'most advertisements designed to influence federal elections refer to a federal candidate,'" *id.* at 93, quoting S.A. 847sa and n. 129 (Kollar-Kotelly), but the proposition that would support § 201's demarcation of speech with electoral intent is quite different: that most advertisements that refer to a federal candidate are designed to influence the outcome of federal elections. However, both the Government and the intervenor-defendants now disclaim

reliance upon the "subjective" conclusions of the *Buying Time* studies, namely, the student coding of candidate-referential ads as either "issue" or "electoral" in purpose that produced the assertedly low percentages of so-called "genuine" issue advertisements that figured so prominently in both the congressional debates and the briefing below. See FEC Br. at 110-11; Intervenors Br. 67.[1] *See also* S.A. 768sa (Kollar-Kotelly) (rejecting retrospective evaluations of nature of particular advertisements because "one person's genuine issue advertisement is another's electioneering commercial").

The Government otherwise justifies its contention that § 201 defines ads with electoral intent with the claim that "the uncontroverted evidence shows that it is not necessary to refer to 'specific candidates for federal office in order to create effective [issue] ads.'" See FEC Br. at 93, quoting S.A. 846sa (Kollar-Kotelly). But such evidence in fact *was* vigorously controverted below—for example, the AFL-CIO's public affairs director testified that naming a federal *officeholder* (who is a "candidate" within the meaning of § 201 at virtually all times, see AFL-CIO Br. at 25 n.16) in broadcast advertisements is often necessary in order effectively to influence his or her conduct and the issue debate. See Denise Mitchell Dec. ¶¶ 11-12 (J.A. 428-30); Mitchell Dep. 19-20, 205-06; Mitchell Cross 122-23, 127-28, 141-42, 199. And, even if such references were "not necessary," it hardly follows that their use reflects *electoral* intent rather than a variety of other possible considerations and judgments, including even ill-informed and poorly considered ones that speakers are nonetheless privileged to make.

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[1] The defendants' shift in emphasis on this appeal from the subjective aspects of the *Buying Time* studies marks a highly significant tactical retreat that implicitly acknowledges both the empirical flaws inherent in the students' uninformed and context-free review of printed storyboard versions of broadcast ads, and the dramatic impact a few changes in the evaluation of advertising would have on the bottom-line results, where recoding just eight distinct ads in 1998 would cause the 14.7% "genuine" figure to leap to 64%, and recoding just six ads in 2000 would trigger a rise from 3.1% "genuine" to 17.0%. *See* FEC Br. at 111-12; McConnell Br. at 54-56. As one of defendants' *amici* aptly observed, "no study—especially a study that asks college students to discern the purpose of a political advertisement completely devoid from context—can provide a court with a precise percentage of hypothetical future speech that will raise significant First Amendment concerns." Brief of *Amici Curiae*, Former Leaders of the American Civil Liberties Union ("Former ACLU Leaders Br.") at 12-13.

2. The Government variously expresses a second principal argument as to why § 201 is narrowly tailored: that the advertisements it covers "will influence candidate elections," FEC Br. at 95; are "likely to have the same effect on the outcome of federal candidate elections" as express advocacy, *id.* at 96; or "can be expected to influence federal elections." *Id.* at 15. See also Intervenors Br. at 43 ("almost certainly will convey . . . an electioneering message"), 64 ("very likely to have some actual effect on an election".)[2] But

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[2] The defendants' insistence that plaintiffs' facial challenge be rejected because they may pursue as-applied claims later offers an alternative with little value. Due to the rigidity of the definition, "it is difficult to imagine that the [statute] could be limited by anything less than a series of adjudications, and the chilling effect of the [statute] on protected speech in the meantime would make such a case-by-case adjudication intolerable." *City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987). And, those who "abstain from protected speech" "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation . . . harm[] not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 123 S.Ct. 2191, 2196 (2003).

The inadequacy of as-applied challenges is especially acute with respect to broadcast messages, which are often extremely time-sensitive, particularly when aimed at imminent legislative action. And, notwithstanding the Government's downplaying of the risk of criminal prosecution, see FEC Br. at 104 n. 43, given the clarity (if overbreadth) of the primary definition, a speaker's "knowing and willful" *mens rea*, see 2 U.S.C. § 437g(a)(5)(C), might be easy to prove, strongly deterring a union or corporation from hazarding a communication in the hope that its First predicating censorship on a presumed impact on voter behavior of particular messages that contain no express advocacy—and, under § 201 need not refer to individuals as candidates or to elections at all—cannot be squared with the Court's consistent and steadfast protection of speech on matters of public concern that can affect election outcomes.

Thus, the Court in *New York Times Co. v. Sullivan*, made clear that our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" includes tolerance for "vehement, caustic and sometimes unpleasantly sharp attacks on government officials," 376 U.S. 254, 270 (1964), and "'breathing space'" for its expression. *Id.* at 272, *quoting NAACP v. Button*, 371 U.S. 415, 433 (1963). In *Buckley* itself the Court's identification of express advocacy as the category of regulable public speech was premised on its analysis that issues, candidates and political campaigns are inextricably connected, and that "[p]ublic discussion of public issues which are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct," and "tend[s] naturally and inexorably to exert some influence on elections." 424 U.S. at 42 & n.50 (interior quotation marks omitted).[3] As these decisions teach, the fact that speech may have some indeterminate impact on elections is not a constitutionally sufficient reason to restrict it.

Defendants, however, consign these vital, longstanding and controlling First Amendment principles to the sidelines with barely a nod, and they fail to acknowledge that if "likely-to-influence-an-election" suffices as a predicate for the proscription of categories of union and corporate speech on

matters of public concern, or on any matter at all, then Congress is empowered to impair or extinguish speech well beyond even § 201's broad parameters. Indeed, defendants' proposed First Amendment test is equally applicable to print advertisements, leaflets, and letters within the 30-and 60-day periods, or to such references in *any* communications medium for even longer periods of time. Or, constituent-targeted messages that refer to *no* candidate at all but that discuss issues or themes central to ongoing electoral campaigns in a manner that influences how voters evaluate the candidates are just as, or even more, "likely to influence" voter behavior than are stray legislative or other references to candidates that are devoid of election-related issue content. And, the same is true of union and corporate speech that is explicitly directed at elections concerning referenda that appear on the same ballot as elections concerning candidates. Such elections are often caught up with each other in public debates and voter perceptions, yet corporate and union treasury spending aimed at referenda, protected under *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), is vulnerable to prohibition under the Government's theory in the case at bar.

3. The AFL-CIO's broadcast advocacy experience, summarized at AFL-CIO Br. at 1-7, illustrates both the utility of broadcast communications to achieving organizational policy goals and the ordinary and inherent interplay between legislative policymaking and electoral pressures. Defendants, however, misportray the AFL-CIO's broadcasts as a single-minded ruse to elect Democrats to federal office. Thus the Government ascribes to the AFL-CIO (and other plaintiffs) only "post hoc account[s] of the purpose behind [their] advertisements." FEC Br. at 106 (emphasis omitted). In fact, there is a significant record, adduced in discovery, of contemporary AFL-CIO documents – many of which were internal to the organization – that explained that the broadcast advertising was aimed at influencing congressional action and

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Amendment claim would prevail in defending against enforcement of the § 203 ban.

[3] BCRA's sponsors admit that this is precisely the speech §§ 201 and 203 were intended to encompass. See Intervenors Br. at 66.

public opinion about the labor movement's legislative and policy priorities.[4]

The defendant-intervenors quote the AFL-CIO's public affairs director, Denise Mitchell, as testifying below that ads were targeted where they could have a "'big impact" in "'marginal districts,'" Intervenors Br. at 51, implying that the intended "impact" was an electoral outcome; but Ms. Mitchell's actual testimony described that "impact" entirely otherwise, and well summarized the range of goals served by the AFL-CIO's broadcast efforts: "chang[ing] laws"; "creating an environment where positive changes would happen and negative changes wouldn't happen, so elevating working family issues like Medicare and Social Security and minimum wage"; "provid[ing] information to constituents, to television viewers"; "positioning the AFL-CIO" as "championing for working families while we were doing real things"; and "hav[ing] an impact on the officeholders themselves by putting them on notice that somebody is watching what they are doing, and we would aim to sort of set the agenda for the legislative and political environment," which could be more influential when broadcast where an officeholder had been elected with "52 or 55 percent of the vote" rather than "70 percent." See Mitchell Dep. 17-20. See also *id.* at 46-47, 165, 170, 204-06.[5]

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[4] See, e.g., Denise Mitchell Dep. Exhs. 24, 32, 34, 40, 52, 55, 56, 58, 60, 79, 81, 89, 93, 104, 106, 110, 115, 119, 121, 122, 126, 135, 136, 143, 151, 157; Steven Rosenthal Dep. Exhs. 1, 4, (514-937); Gerald Shea Dep. Exhs. 2, pp. 50-51; 4, p. 11; 18, 24-27, 30, 35, 36, 38, 40, 43, 46. The Government's discussion of two AFL-CIO 1996 ads, "Job" and "No Two Way," similarly implies that they were divorced from any current legislative struggle, see FEC Br. at 107-08, but in fact the record is to the contrary. See Mitchell Dec. ¶¶ 41 and 61 (J.A. 446-47, 457).

[5] The defendant-intervenors also distort a November 1996 speech by AFL-CIO President John J. Sweeney, linking as if they comprised a single quotation two phrases that in fact were distinct and two pages apart. *Compare* Intervenors Br. 48 *with* Denise Mitchell Dep. Exh. 12, pp. 2-4. Other comments attributed to Mr. Sweeney are taken from newspaper articles, including one (Mitchell Dep. Exh. 5) that addressed only the AFL-CIO's member-oriented electoral program, not AFL-CIO advertising. And, the National Public Radio interview with AFL-CIO Political Director Steven Rosenthal that the defendant-intervenors quote, see Intervenor Br. 48 and n. 38, was not produced below and is not in the record, and, at Mr. Rosenthal's deposition, defendants asked him only about a *different* portion of the same interview. See Rosenthal Dep. 12-13. In any event, Mr. Rosenthal played no role at all in the AFL-CIO's broadcast efforts in 1996 (or 1998) due to a "Chinese wall" arrangement that the AFL-CIO adopted due to its uncertainty at the time about the application of coordination principles under FECA. See Rosenthal Dec. ¶¶ 30-32 (J.A. 734-36); Rosenthal Dep. 35-40, 45-46, 67-68; Mitchell Dec. ¶¶ 9, 15-19 (J.A. 427, 431-33); Mitchell Dep. 15-17.

The intervenors also emphasize documents prepared not by the AFL-CIO but by two AFL-CIO consultants in 1996. See Intervenors Br. at 46, 47. As the unrebutted record discloses, however, the comments at issue of the consultant who evaluated prospective advertising firms did not reflect the AFL-CIO's description to him of its goals, and they were neither invited nor endorsed by the AFL-CIO. See Mitchell Dec. ¶ 20 (J.A. 434); Mitchell Dep. 108-11, 122-23, 143, 217; Mitchell Cross 76. As for the AFL-CIO's fall 1996 "electronic voter guides" (a format not repeated since), which compared candidate positions on key AFL-CIO issues, they were designed to promote those issues, portray the candidates' positions fairly while conveying the AFL-CIO's viewpoint on them, and pressure the candidates to embrace that viewpoint. See Mitchell Dec. ¶¶ 42-44 (J.A. 447-49); Mitchell Dep. 137-38.

Indeed, it bears emphasis that § 201's reach to "refer[ences]" to "candidates" is tantamount to reaching references to all federal officeholders, and of 76 distinct AFL-CIO advertising "flights" (substantially identical clusters of advertisements run during the same period of time and differing only by the name of the person referred to) that were broadcast between 1995 and 2001, only two referred to no incumbent officeholders. See Mitchell Dep. Exh. 1 (J.A. 464).

4. The Government asserts that the overbreadth inquiry should focus on whether the § 201 definition of "electioneering communication" "will impermissibly chill protected expression on a *prospective* basis." FEC Br. at 110 (emphasis

in original). The answer is surely yes. Speech on matters of public concern is the lifeblood of an open and democratic society, supplying information and argument from all quarters so the people and their elected representatives and leaders may knowledgeably decide policy and engage in self-government. *New York Times Co. v. Sullivan*, 376 U.S. at 269-72. Thus, at stake here is not so much whether particular speakers enjoy the full panoply of First Amendment rights, but the provision to the public of information and ideas about public matters, which are "indispensable to decisionmaking in a democracy." *First National Bank of Boston v. Bellotti*, 435 U.S. at 777 (footnote omitted). *See also id.* at 781-83; *Virginia v. Hicks*, 123 S.Ct. at 2196; *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 8-9 (1986).

The defendants hardly advert to this core First Amendment function, and they attribute to the government the authority to override it with respect to union and corporate speakers wherever a likely electoral intent or effect may also be discerned. But only the people are "entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments," including "the source and credibility of the advocate," *First National Bank of Boston v. Bellotti*, 435 U.S. at 791-92 (footnotes omitted); and, "in the free society ordained by the Constitution, it is not the government, but the people—individually as citizens and candidates and collectively as associations and political communities—who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57 (footnote omitted). *See also Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940). BCRA § 203 cuts too deeply into core political speech and deprives the public of information and debate that the First Amendment was intended to guarantee.

5. The Government justifies § 203 in part on the contention that it serves the compelling governmental interest of protecting union members and corporate shareholders from contributing to the support of political candidates whom they may oppose. See FEC Br. at 86. But members of voluntary organizations such as unions and incorporated membership groups understand and expect that their dues are used in part for legislative and public advocacy that further the organization's goals, see AFL-CIO Br. 20-21, and "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The First Amendment protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). This "right to associate for expressive purposes" is protected from all "[i]nfringements" save those "adopted to serve compelling state interests, *unrelated to the suppression of ideas*, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623 (emphasis added). BCRA § 203, however, on the basis of the content of associational speech, compels union and other groups' members, who are typically of ordinary means,[6] to make a separate payment distinct from their dues if they wish to continue to fund that speech together, and despite the fact that they had considered it to be an ordinary function of the organization's regular, dues-funded activities. Prohibiting unions and other organizations from spending member dues when they broadcast references to candidates thus directly impairs the associational rights and democratic choices of

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[6] In this regard, the Government's suggestion that "individuals who are affiliated with corporations or labor unions remain free to use their own funds for electioneering communications," FEC Br. 99, is as plausible as the original utterance of "let them eat cake"—for, as all agree, broadcast is a costly medium inaccessible to all but the very wealthy. The government relies upon *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200, 2210 n. 8 (2003), for this suggestion, but that case was concerned with *contributions*, which entail no minimum amount.

their members, while only in the most attenuated sense protects members from an undesired support of political candidates. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66 (1990). And, in so doing, § 203 further contravenes the First Amendment by depriving organizations and their members of the "right . . . to advocate their cause" by "what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

B. That Unions and Corporations Retain the Option of Financing "Electioneering Communications" Through Their Separate Political Action Committees Does Not Render BCRA's Ban on Their Use of Treasury Funds For This Purpose Constitutional.

The governmental and intervenor defendants, as well as several of their supporting *amici*, repeatedly assert that Title II of BCRA does not "ban" unions and corporations from undertaking electioneering communications because these entities instead may raise funds from their members or shareholders to finance political action committees that could pay for these communications.[7] In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, ("MCFL"), 479 U.S. 238 (1986), however, the Court enumerated the burdensome FECA solicitation, administration and reporting requirements applicable to group-sponsored political committees and concluded that while a ban on treasury funding of express-advocacy independent expenditures "is not an absolute restriction on speech, it is a substantial one," *id.* at 252, whose "practical effect on MCFL in this case is to make engaging in protected speech a severely demanding task." *Id.* at 256. The Court therefore refused to compel ideological non-profit corporations, whose political activities posed no serious risk of corrupting the electoral process, to use separately funded federal political committees to engage in independent expenditures and held that they must be allowed to use their regular corporate treasury funds to finance them.[8] *See also id.* at 265-66 (O'Connor, J., concurring).

Just as *MCFL* involved little or no risk of corruption because of the nature of the group involved, corporate and union electioneering communications entail no risk of corruption or the appearance thereof because of the nature of the speech that is being regulated. As the Court found in striking down a state prohibition on corporate contributions and expenditures in connection with ballot measures, "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 790 (citations and footnote omitted). *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981). Requiring unions and corporations to conduct "electioneering communications" through their PACs rather than with their ordinary treasuries is therefore no more justified here than it was in *MCFL*. *See also Austin v. Michigan Chamber of Commerce*, 494 U.S. at 658.

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[7] Only Judge Henderson addressed this argument below, and she rejected it on the basis of the factual record. See S.A. 347sa n.142.

[8] *Federal Election Commission v. Beaumont*, *supra*, is not to the contrary. There, the Court upheld application of FECA's ban on corporate contributions to federal candidates as applied to an *MCFL* corporation. In doing so, the Court distinguished limits on independent expenditures from limits on corporate contributions in light of "the risks of harm posed by corporate political contributions, of the expressive significance of contributions, and of the consequent deference owed to legislative judgments on what to do about them." *Id.* at 2209. Although *Beaumont* pointed to the "PAC option" as evidence that FECA does not completely ban corporate contributions, *id.* at 2211, the Court echoed *MCFL's* recognition of "PAC regulatory burdens." *Id.* That burden is less justifiable with respect to union and corporate "electioneering communications," which, as described above, exert a far more attenuated effect on elections than do either contributions or independent expenditures, and comprise core First Amendment-protected speech on matters of public concern.

Moreover, forcing unions and corporations to sponsor electioneering communications through their political action committees is constitutionally inadequate because it imposes a regime of compelled speech that the First Amendment does not tolerate. *See generally Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197-200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988); *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. at 11. Requiring unions and corporations to identify their non-electoral broadcast communications as having been paid for by their political committees, see 2 U.S.C. § 441d(a)(1), and to report to the FEC "[t]he elections to which the electioneering communications pertain," 2 U.S.C. § 434(f)(2)(D), labels those communications as having an electoral purpose regardless of their true nature. The so-called PAC option thus violates the "principle of autonomy to control one's own speech." *Hurley v. Irish-American Gay, Lesbian And Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995). This distinguishes the PAC option for electioneering communications from the same requirement for union and corporate independent expenditures, which by definition expressly advocate the election or defeat of candidates, and union and corporate contributions to candidates, which likewise are explicitly and inherently electoral in nature.

Further, because the definition of "electioneering communication" includes broadcast advertisements made for legislative and educational purposes, rather than for the purpose of influencing the outcome of elections, using a political committee to pay for these broadcasts could cause the committee to lose its tax-exempt status under 26 U.S.C. § 527 with respect to either the costs of those communications or all of its activities. Section 527(e)(2) requires that a political committee expend its resources on "the function of influencing or attempting to influence the selection, nomination, election or appointment of any individual" to any public office or to any political organization office, and § 527(c)(3) imposes a tax on all other political committee spending. And, if a political committee commits most of its spending to "electioneering communications" that are not for the purpose of influencing elections, the political committee would no longer satisfy § 527(e)(1)'s "primary purpose" definition of a political committee and could lose entirely the tax exemption § 527 otherwise affords.

Finally, union and corporate political action committees are unable as a practical matter to raise sufficient funds from voluntary contributions to support a fraction of the "electioneering communications" that unions and corporations can and do undertake with treasury funds. Thus, for example, Judge Henderson found that if the AFL-CIO is prohibited from so using its general treasury funds, it will "be unable to finance such ads to the same degree" with separately contributed funds to its political action committee because the amount of money that can be raised from union members or employees "is generally limited and unlikely to increase to the extent necessary to replace the treasury funds now spent on issue advocacy." S.A. 270sa (Finding 53f). Defendants make no attempt to rebut Judge Henderson's findings. And, union political action committees that typically are unable now to raise sufficient hard money contributions to adequately support the core political activities they engage in, namely, contributions and independent expenditures, should not be forced to divert those resources to fund other communications whose electoral purpose or effect may be non-existent or highly attenuated.[9]

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[9] Moreover, there are over 30,000 labor organizations in the private sector alone, most of which are small organizations with modest treasuries. See "Record-Keeping Under the Labor Management Reporting and Disclosure Act (LMRDA): Do DOL Reporting Systems Benefit the Rank and File?", Joint Hearing Before the Subcommittee on Workforce Protections and the Subcommittee on Employer-Employee

C. BCRA's Backup Definition of "Electioneering Communication" Is Unconstitutionally Vague.

The government defendants make no attempt to defend the truncated version of BCRA's backup definition of "electioneering communication" endorsed by a majority of the district court.[10] See FEC Br. at 116. Indeed, defendants virtually ignore the first prong of the definition and appear to rely upon the second "no plausible meaning" prong of that definition, which was invalidated by the majority below, to cure any vagueness in the first prong. See *id.* at 119.[11] But, defendants fail to demonstrate that the second prong of the backup definition meets constitutional standards.[12]

Relations of the House Committee on Education and the Workforce, 107th Cong., 2d Sess. 115-16 (2002). The FECA "affiliation" rule provides that, for purposes of political committee sponsorship, fundraising and spending, all affiliates of a national labor organization are collectively considered to comprise a single entity, see 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 110.3(a)(2)(ii) and (iii), meaning that every national union and all of its local unions and other affiliates collectively are effectively confined to sponsoring a *single* federal PAC, self-evidently impairing the ability of any one union affiliate to access and direct the spending of funds for the speech defined by § 201 that § 203 now precludes it from undertaking.

[10] Intervenors do not address the backup definition at all. Only one of the *amicus* briefs supporting defendants attempts to defend its constitutionality, and it does so in a short and conclusory passage that neither treats the actual text nor supports the district court's conclusion. See Former ACLU Leaders Br. at 13-14.

[11] Furthermore, the government makes no argument in support of the majority's conclusion that the second prong of the backup definition is severable from the first, and fails to address our showing that neither prong is severable from the other. See AFL-CIO Br. at 31-33. Thus, if the Court finds that either prong of the definition is unconstitutionally vague, it should strike down the entire backup definition without regard to whether the other prong independently would satisfy constitutional requirements.

[12] Defendants' assertion that the Court is especially reluctant to invalidate a law for vagueness when the challenge is made to a law on its face, FEC Br. at 117, is not supported by the cases cited. The Court's

Defendants ignore the language of the second prong and simply assert that it is not unconstitutionally vague because "[a]ny degree of uncertainty in a standard designed to protect speech . . . is not the kind of vagueness that should condemn a statute." See FEC Br. at 117. The logic of this argument is hard to fathom: the second prong *restricts* speech rather than "protect[s]" it, and it does so in a manner that neither the regulated community nor law enforcement officials can comprehend, thereby unacceptably leaving speakers to "'hedge and trim,'" *Buckley*, 424 U.S. at 43, *quoting Thomas v.* Collins, 323 U.S. 516, 535 (1945), in order to navigate the restrictions imposed by the statute.[13]

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rejection of the vagueness challenge in *National Endowment For the Arts v. Finley*, 524 U.S. 569, 588-90 (1998), did not even mention the facial nature of the challenge and relied entirely on the fact that the case involved a grantmaking statute. In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court did refuse to facially invalidate a statute on vagueness grounds, but it did so only after finding that the statute was clear in the vast majority of its intended uses and that any possible vagueness existed only in hypothetical situations not before the Court. *Id.* at 733. Such is not the case here, where the backup definition eschews the express advocacy standard and cannot confidently be applied to the great majority of broadcast communications that mention candidates or address issues of legislation and public policy.

[13] The principal decision cited by defendants in support of this novel theory does not support it. In *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997), the provision in question defined an *exception* to an otherwise broad injunction that allowed certain "sidewalk counselors" to approach persons seeking the services of abortion clinics. Here, however, the "savings clause" is not an exception in the sense that it attempts to define *permissible* conduct; it is an additional element of the basic *prohibition* in BCRA's backup definition. Furthermore, the prohibition involved in *Schenck* was not content-based and therefore was subject to a lesser level of judicial scrutiny than the backup definition here.

Defendants' reliance on *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), is also of little avail. Unlike the second prong of the backup definition, which permits a finding of "exhortation" based entirely on the communication's context and without regard to the words used, the Ninth Circuit stated that

Defendants also argue, that the second prong is not unconstitutionally vague because "a corporation or labor union preparing to broadcast such an advertisement would have [no] difficulty in determining" whether an ad falls within the second prong "based on its understanding of the context in which its own advertisement will be aired." FEC Br. at 118. But an advertisement's "context" involves a broad range of circumstances, including all of those identified by Judge Leon, see S.A. 1164sa, and a union or corporation cannot know which of these contextual elements will matter to the "reasonable person" or "ordinary observer" whose judicially determined perspective the government says would be dispositive.[14] See FEC Br. at 118 and n. 49. Like the

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"[c]ontext remains a consideration, but an ancillary one, peripheral to the words themselves," *id.* at 863, and it held that the express advocacy standard permits only "a limited reference to external events." *Id.* at 864. Moreover, the Ninth Circuit recently made clear that "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (2003) (emphasis in original). Other courts of appeal have refused to go as far as *Furgatch*, finding even its limited reliance on a communication's context to be "too vague," *Chamber of Commerce v. Moore*, 288 F.3d 187, 194 (5th Cir.), *cert. denied*, 123 S.Ct. 536 (2002), and "unpredictable." *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 392 (4th Cir. 2001). *See also Federal Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1052-1057 (4th Cir. 1997).

[14] Defendants' reliance on the standards used by the Court to define obscene materials subject to government regulation is also misplaced. See FEC Br. at 118 n. 49. Obscene communications are not protected by the First Amendment, whereas political speech, even speech containing express advocacy, is. See *Miller v. California*, 413 U.S. 15, 35-36 (1973). Moreover, under the Court's jurisprudence, whether the average person, applying contemporary community standards would find that a work, taken as a whole, appeals to the prurient interest, is only one prong of a three-part test, the other prongs of which rely on the content of the material itself and not on the perception of reasonable listeners or viewers. *Id.* at 24. *See also Ashcroft v. ACLU*, 535 U.S.564, 578 (2002). Here, both prongs of BCRA's backup definition of electioneering communications depend upon the perceptions of listeners and viewers. And, the context in which allegedly obscene materials must be evaluated is largely created by the speaker himself, such as the manner in which the material is advertised, whereas under the common observer standard advanced by defendants for BCRA political speakers may not even be aware of many of the contextual factors under which their communications will be evaluated. The same is true of the contextual factors relied on in the Court's Establishment Clause cases, such as *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), to determine whether governmental use of religious symbols constitutes an endorsement of religion, and the Establishment Clause test is also inapposite because the question presented in such cases is whether government action, not protected private speech, is permissible.

"neutral[ity]" standard of the first prong, the "no plausible meaning" standard of the second prong unconstitutionally "'puts the speaker wholly at the mercy of the varied understanding of his hearers.'" *Buckley,* 424 U.S. at 43, *quoting Thomas v. Collins,* 323 U.S. at 535.

II. BCRA'S COORDINATION PROVISIONS ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Regarding BCRA's coordination provisions, the Government does not even address BCRA §202, which provides that "coordinated" electioneering communications shall be treated as contributions, and makes only a half-hearted attempt to defend BCRA § 214(a), which provides that expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of" a political party committee shall be considered contributions to that committee.[15]

Without even discussing the statutory language itself, defendants argue that §214(a) is not vague or overbroad because similar language already existed in FECA to define expenditures coordinated with *candidates*. See FEC Br. at

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[15] The AFL-CIO plaintiffs do not question *Buckley*'s conclusion that coordinated expenditures may be treated as in-kind contributions; we challenge only the expansive manner in which Congress sought to *define* coordinated expenditures in BCRA when it overturned a narrower and more explicit definition fashioned by the lower federal courts and the FEC itself.

123. But this is no answer at all, both because FECA's language was subject to limiting judicial and agency interpretations that Congress in BCRA has now rejected, and because vague and overbroad language in one statute can hardly validate its repetition elsewhere. The FEC itself has acknowledged with respect to coordination under FECA that "[t]he statutory terms are not inherently clear," Final Rule, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg.76138, 76141 (Dec. 8, 2000), and four Justices of this Court recently concluded that FECA's definition of coordination is unconstitutionally overbroad. See *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 467-68, 471 (2001) (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). Thus, incorporating the same overly broad language into BCRA's general coordination provisions cannot warrant upholding the decision below.

Defendants further argue that "any uncertainty that regulated entities may feel regarding the scope of BCRA § 214(a)" may be "alleviated" by BCRA's provision mandating the FEC to issue new coordination regulations, see FEC Br. at 124, a view embraced by the district court. The problem with this argument is that the FEC has *already* issued new coordination regulations that do *not* cure the statute's vagueness or overbreadth; and, the district court incongru-ously refused even to consider those regulations in upholding § 214(a). The government's position—that the mere *possibility* of curative administrative regulations is sufficient to defeat an otherwise meritorious vagueness or overbreadth challenge—has never been adopted by this Court and ignores the important First Amendment rights jeopardized by the statute challenged here. Just as the Court has long permitted pre-enforcement facial challenges to statutes on First Amendment grounds rather than requiring plaintiffs to face the risks of enforcement actions, it should not allow the government to defend a facially unconstitutional statute because it *might* be saved some day by agency regulations.[16]

III. BCRA'S ADVANCE DISCLOSURE REQUIREMENTS VIOLATE THE FIRST AMENDMENT.

Although the governmental defendants discuss BCRA's disclosure requirements for electioneering communications in general, see FEC Br. at 119-22, they make only a cursory attempt to justify the advance disclosure aspect of those requirements that the district court unanimously struck down. See *id.* at 121-22. Significantly, they do not contend that *any* of the governmental interests relied on in *Buckley* to support after-the-fact disclosure are also served by compelled disclosure of communications *before*, and irrespective of *whether*, they are ever disseminated. Moreover, their defense that prospective disclosure of communications "would neither prevent any person from speaking nor require disclosure of the specific content of any advertisement," *id.* at 122, ignores both that "compelled disclosure [of political activities], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," *Buckley*, 424 U.S. at 64, and the uncontroverted evidence in this case concerning the chilling and confusing effects of this requirement. See S.A. 114sa (*per curiam*); 271sa (Henderson). Finally, there is no basis for defendants' suggestion that the constitutional infirmity in the statute has been cured by regulation, FEC Br. at 122, an argument that the district court accepted with respect to advance disclosure of independent expenditures but rejected with respect to electioneering communications in a careful analysis, see S.A. 108sa-111sa, that defendants similarly fail to address.

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[16] This is especially true here because Congress mandated expedited judicial review of BCRA's provisions and the statute's coordination provisions are impairing political actors even while this case is pending. Defendants' argument that BCRA § 214(b)-(c) "imposes no substantive obligation upon any private party, but simply requires the promulgation of rules by an Executive Branch agency," see FEC Br. at 125 n. 52, has no application to BCRA §§ 202 and 214(a), which manifestly *do* impose immediate, substantive constraints on private parties.

CONCLUSION

The decision of the district court concerning BCRA's prohibition against union and corporate spending for the primary definition of "electioneering communication" should be affirmed; its decisions upholding the backup definition and BCRA's coordination provision should be reversed; and its decision striking down BCRA's advance disclosure provision should be affirmed.

Respectfully submitted,

LARRY P. WEINBERG
1101 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 775-5900

Of Counsel

JONATHAN P. HIATT
LAURENCE E. GOLD
Counsel of Record
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5130

MICHAEL B. TRISTER
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 328-1666

Counsel for Appellants/Cross-Appellees

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(46)

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Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION ET AL.,

Appellees/Cross-Appellants.

On Appeal From The United States District Court For The District of Columbia

REPLY BRIEF FOR APPELLANTS/CROSS-APPELLEES SENATOR MITCH McCONNELL ET AL.

FLOYD ABRAMS SUSAN BUCKLEY BRIAN MARKLEY CAHILL GORDON & REINDEL LLP 80 Pine Street New York, NY 10005 (212) 701-3000	KENNETH W. STARR *Counsel of Record* EDWARD W. WARREN KANNON K. SHANMUGAM KIRKLAND & ELLIS LLP 655 Fifteenth Street, N.W. Washington, DC 20005 (202) 879-5000

(*additional counsel on inside cover*)

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KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL
FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
FROST BROWN TODD LLC
400 West Market Street
32nd Floor
Louisville, KY 40202
(502) 589-5400

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN &
FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

JACK N. GOODMAN
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

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INTRODUCTION

Defendants constantly seek to reassure the Court that BCRA represents nothing more than an incremental "adjustment" or "refinement" of our Nation's already labyrinthine campaign finance regulations. That claim, however, is utterly belied by the sprawling nature of the law, and indeed by the extraordinary nature of this litigation. Just as BCRA radically revamps our campaign finance laws, so too would upholding BCRA require this Court to overhaul settled constitutional jurisprudence. In order to uphold BCRA's central provisions, this Court would have to overturn the two cornerstone holdings of *Buckley v. Valeo*, 424 U.S. 1 (1976): its distinctions between contribution and expenditure limits, and between express advocacy and other types of political speech. The Court would also have to betray its commitment to the bedrock and uniquely American principle of dual sovereignty, in a context in which the States' competing regulatory interest could not be more fundamental. And the Court would have to create broad exceptions to the basic precept that similarly situated speakers be treated alike.

Defendants' submissions positively bristle with hostility toward any role for money in politics — and therefore toward the speech that money indisputably enables. What defendants derisively and pervasively characterize as "evasion" or "circumvention," however, is in fact nothing less than the exercise of one of our most cherished rights. The net effect of defendants' position, if accepted, will be to make regulation of political speech the rule, rather than the exception, and to "force[] a substantial amount of political speech underground," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting) — a result directly at odds with our Nation's unrivaled constitutional commitment to robust and uninhibited debate. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That debate sometimes may be unpleasant and undignified, but never is it unprotected. The challenged provisions of BCRA should be invalidated.

ARGUMENT

I. THE "SOFT MONEY" PROVISION OF BCRA IS UNCONSTITUTIONAL.

A. In attempting to sustain section 101 against First Amendment challenge, defendants would trivialize the speech and associational rights at issue, urge the most deferential level of scrutiny, and define the governmental interests in regulation in the most amorphous and unbounded terms. This Court's First Amendment jurisprudence rebukes them at every turn.

1. Defendants do not seriously question that section 101 burdens the speech and associational rights of donors and political parties much like the restrictions at issue in *Buckley*. Instead, defendants attempt to minimize the additional associational burdens that section 101 imposes on political parties. *See, e.g.*, FEC Br. 69-70; McCain Br. 22-23.

Although it is true that section 101 does not *ban* associations between party committees altogether, the associational burdens on party committees are far more than merely incidental. Section 101 imposes numerous restrictions on the ability of party committees to engage in coordinated fundraising, and thus to structure their affairs as they see fit. And, as defendants fail to recognize, section 101 also severely impairs the ability of party committees to associate with others — including, most notably, the parties' own federal officeholders and candidates. Those associational burdens are substantial and unprecedented.

2. Defendants next suggest that section 101 should be subject to the lower degree of scrutiny applicable to limitations on contributions. *See, e.g.*, FEC Br. 35-36, 45-46. In our view, section 101, which contains disparate restrictions, *inter alia*, on expenditures and solicitations,[1] should be treated as an integrated whole and subject to strict scrutiny — the baseline level of scrutiny for restrictions on political speech. *See, e.g.*, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2565 (2003) (Breyer, J., joined by O'Connor, J., dissenting).

Defendants nevertheless urge that the subsection of section 101 applicable to national party committees should be reviewed under lesser scrutiny simply because it contains a limitation on contributions. *See, e.g.*, FEC Br. 35-36. But defendants virtually ignore *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981), which treated limits on the amount of contributions to *third parties* as the equivalent of limits on the amount of expenditures by those third parties. *See id.* at 299. Moreover, notwithstanding defendants' claim that the subsection "is directed solely at the *acquisition* of funds," FEC Br. 13, it plainly regulates *both* contributions to, and expenditures by, national party committees. And it does not impose any new limits on the *amounts* of contributions to national committees, but instead merely regulates the *uses* for which money is raised and spent. *Buckley* and its progeny hold only that a regulation that limits the amount of contributions, not any regulation that does *not* limit the amount of *expenditures*, is subject to lower scrutiny. Defendants' position would therefore turn *Buckley* on its head, and render meaningless *Buckley*'s bedrock distinction between contribution and expenditure limits.[2]

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[1] Defendants suggest that limitations on solicitations should be subject to lesser scrutiny. *See, e.g.*, FEC Br. 51-52; McCain Br. 21-22. This Court has repeatedly noted, however, that a restriction on solicitations is the most direct form of restriction on speech. *See* McConnell Br. 15. The Court's decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), is readily distinguishable, because the solicitation restriction at issue there (the restriction on solicitations for corporate and union PACs) was directly intertwined with an underlying contribution restriction (the ban on contributions by corporations and unions).

[2] Defendants urge that even the subsection of section 101 applicable to state party committees should be subject to lesser scrutiny, even though it plainly regulates only expenditures, on the ground that the provision, by restricting the uses of certain types of contributions, is "functionally identical" to a limit on those contributions. McCain Br. 28 n.19; *see also* FEC Br. 45-46 (same). That reasoning, too, would gut *Buckley*'s distinction between contribution

3. Defendants make no serious effort to suggest that section 101 is sufficiently tailored to prevent actual or apparent *quid pro quo* corruption. *See* FEC Br. 39 n.15. Instead, defendants claim, notwithstanding the utter absence of legislative findings, that the core restriction on donations of state-regulated funds to national committees is necessary because large donations of such funds allow donors to buy "access" to officeholders, which can eventually be converted into influence over "policy" even if particular votes are not affected. *See id.* at 11, 22, 37-41; McCain Br. 1-2, 12-17.[3] Defendants then seek to justify the manifold other restrictions in section 101 on the ground that they are necessary to prevent hypothesized circumvention of the core restriction on donations to national committees. *See* FEC Br. 22-23, 51-60; McCain Br. 31, 39.

Defendants do not, because they cannot, articulate any limiting principle for these novel and breathtakingly broad governmental interests for campaign finance regulation. Defendants' anti-access and anti-circumvention rationales would support virtually *any* form of campaign finance regulation. *See* McConnell Br. 20-23. Moreover, in contending that section 101 is sufficiently tailored to these interests, defendants hardly so much as cite this Court's pathmarking decision in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (*Colorado I*), which recognized, in the context of independent expenditures by political parties (and thus, by logical extension, contributions to political parties) that political parties serve as buffers between contributors and candidates, and squarely rejected the argument that there are "any special dangers of corruption associated with political parties" justifying the regulation of independent expenditures by those parties. *See id.* at 616 (plurality opinion). This Court has since recognized that political parties may act as "agents" of contributors, *see* FEC Br. 32, but only in the context of expenditures that are *coordinated* with candidates, *see FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001) (*Colorado II*). And in *Colorado I*, the plurality observed that the opportunity for corruption posed by donations of state-regulated funds "is, at best, attenuated." 518 U.S. at 616. Because state-regulated funds may concededly be spent only on activities that have "less tangible benefits to a federal candidate or office-holder," FEC Br. 43, donations of state-regulated funds naturally will have less potential to corrupt than contributions of federally regulated funds.

Finally, defendants pointedly ignore the availability of more narrowly tailored alternatives. Defendants and their *amici* repeatedly state that section 101 was primarily targeted at *large* donations of state-regulated funds to *national* party committees. Whether the problem lay in donations over $50,000 (CED Br. 13), $100,000 (McCain Br. 30), or $1 million (Common Cause Br. 10), Congress could have merely imposed a cap on the amount of such donations, like the $60,000 aggregate cap proposed in the Hagel Amendment. *See* McConnell Br. 25. Alternatively, Congress could have limited donations of state-regulated funds only when a contributor had "maxed out" on federally regulated contributions to the same party committee — a situation in which, according to defendants, the potential for corruption is "magnified." *See* FEC Br. 43. And to the extent Congress was concerned about the transfer of state-regulated funds from national party committees to state committees in order to take advantage of the more generous

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and expenditure limits. Indeed, under defendants' position, the application of strict scrutiny even to the expenditure limit at issue in *Buckley* would have been erroneous, since that provision, contrary to defendants' assertion, *see id.*, similarly limited only certain types of expenditures and not others, *see Buckley*, 424 U.S. at 41.

[3] The mere fact that some donors give to *both* parties, *see, e.g.*, FEC Br. 38-39; McCain Br. 15, is not surprising. As Judge Posner has noted, many "political hermaphrodites" support both parties because "the pervasive role of government in modern American life has made it important for business firms to be on good terms with the major political groupings in the society." *See LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983).

allocation formulas available to those committees, *see id.* at 11; McCain Br. 5, 29, Congress could have subjected state and national committees to the same allocation formulas. Congress did none of these things, but instead banned *all* donations of state-regulated funds to, and disbursements by, national party committees, and imposed a bewildering array of other restrictions with no evident nexus to Congress' supposed concern about large donations. Given the ready availability of more narrowly tailored alternatives, section 101 violates the First Amendment.[4]

B. Section 101 goes well beyond Congress' power to regulate the financing of federal elections.

1. Defendants almost entirely ignore the history of the Elections Clause and the long line of cases interpreting it, which make clear that the Elections Clause gives Congress the power to regulate the financing of only federal, not state, elections. Defendants contend that the Elections Clause gives Congress plenary power to regulate campaign financing whenever federal elections are being held, even if the activity

being financed affects *both* federal and state elections. *See, e.g.*, FEC Br. 66-67; McCain Br. 32-33. The few cases defendants cite, however, do not support that view. Most notably, in *Ex parte Siebold*, 100 U.S. 371 (1879), and *Ex parte Yarborough*, 110 U.S. 651 (1884), the Court recognized only that, when a State held simultaneous elections for state office, Congress retained its power to regulate federal elections — not that Congress thereby acquired the power to regulate *both* federal and state elections. *See Siebold*, 100 U.S. at 393; *Yarborough*, 110 U.S. at 662.[5]

While defendants wistfully maintain that the Elections Clause provides a "fully sufficient constitutional basis" for the enactment of section 101, they alternatively (and somewhat inconsistently) claim that Congress has a "more general power to superintend and protect the integrity of the federal work force." FEC Br. 30. Defendants, however, locate no constitutional home for this free-floating power.[6] Even assuming that Congress has the power to enact laws regulating the improper personal enrichment of government *officials*, there is no reason to think that such a power extends to laws regulating the conduct of federal officeholders *and candidates* even in connection with state elections — much less the conduct of political parties and state officeholders and candidates.

2. Section 101 impermissibly infringes on the ability of States to regulate their own elections.

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[4] *Amicus* former Senator Fred Thompson contends that section 101 of BCRA was justified by the notorious abuses uncovered by a congressional investigation in the wake of the 1996 presidential election. *See* Thompson Br. 6-27. Those abuses, however, were fully addressed by a number of other features of BCRA not challenged in this litigation, including the strengthened ban on foreign contributions, *see* BCRA § 303; the prohibition against fundraising on federal property, *see* BCRA § 302; and the extension of the concept of "coordination" to political parties, *see* BCRA § 214(a).

Defendants repeatedly claim that state-regulated funds were solicited and donated for the purpose of influencing federal elections. *See, e.g.*, McCain Br. 17-20, 25-26 & n.16, 27. In fact, *amici* quote at least one donor who freely admitted that he gave money for that purpose. *See* CRP Br. 16. Under preexisting federal law, however, *any* donation made "for the purpose of influencing any [federal] election" constitutes a "contribution" subject to FECA's source-and-amount limits. *See* 2 U.S.C. § 431(8)(A)(i). To the extent that donors were giving "non-federal" funds expressly for the purpose of influencing federal elections, or were asked to do so, the proper remedy is stricter enforcement of that requirement.

[5] In *Burroughs v. United States*, 290 U.S. 534 (1934), the Court suggested only that Congress had discretion to choose the appropriate means of protecting *federal* elections from corruption, not that it had the power to do so in a way that reached *state* elections as well. *See id.* at 547-48.

[6] The federal defendants cite a number of provisions of federal law that restrict contributions to state as well as federal candidates. *See* FEC Br. 67. Those provisions, however, can readily be justified on other constitutional grounds. *See, e.g.*, *Blount v. SEC*, 61 F.3d 938, 949 (D.C. Cir. 1995) (upholding restriction on securities professionals under Commerce Clause).

As to national party committees, defendants do not deny that section 101 prohibits those committees from receiving or spending any state-regulated funds, even if they are to be used solely for state and local elections (as in the case of "off-year" election activity). The primary argument defendants advance to justify this plain regulation of state election activity is that money is fungible, and therefore that a donation of state-regulated funds for activity relating to state elections "free[s] up" funds for activity relating to federal elections. *See*, *e.g.*, FEC Br. 42-43; McCain Br. 27-28. But the mere fact that national committees could spend more of their already federally regulated funds (which, by definition, are contributed "for the purpose of influencing [federal] election[s]") on activities affecting *federal* elections does not somehow give Congress the power to regulate the donation of *state-regulated* funds for activities that affect only *state* elections.[7]

As to state party committees, defendants freely concede that many activities defined as "federal election activity" have effects on *both* federal and state elections. *See, e.g.*, FEC Br. 8, 46. However, with their repeated claims that "federal election activity" "by its nature" affects federal elections, *e.g.*, *id.* at 22, and only "incidentally" affects state elections, *see*, *e.g.*, *id.* at 66, defendants willfully overlook the fact that many activities labeled as "federal election activity" either have *no* practical effect on federal elections at all, or are directed *only* toward state and local elections — as in the vast number of districts in which federal elections are actually or practically uncontested (because of redistricting, the advantages of incumbency, or both, *see* Ornstein Br. 11-12; Community Orgs. Br. 15). And even with regard to activities that affect *both* federal and state elections, section 101, by requiring state parties to pay for these activities *solely* with federally regulated funds, impermissibly overrides the laws of numerous States that had allowed unlimited donations, or donations from corporations and unions, to be used for those activities. *See* McConnell Br. 33.[8]

Finally, as to federal officeholders and candidates, section 101 plainly regulates their fundraising activities even solely in connection with state and local elections. The Elections Clause, however, gives Congress the power only to regulate *federal elections* — not plenary power to regulate the activities of federal officeholders or candidates even in connection with state elections. Here, as elsewhere, the Court should reject defendants' unbridled theory of Congress' Elections Clause power, and invalidate section 101 in full.

C. Defendants' arguments in response to our equal protection challenge are similarly unavailing.

Defendants seek to justify section 101's disparate treatment of political parties on the ground that the parties were treated more favorably than other groups in the pre-BCRA regime. *See, e.g.*, FEC Br. 71. Although that was true in some respects, it was not in others: party committees, for instance, were required to use an allocation of federally regulated and state-regulated funds for certain activities, whereas interest groups other than "political committees" were not. Even assuming,

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[7] Defendants also suggest that Congress can regulate state elections because the activities of state officials, such as redistricting, can have an impact on subsequent federal elections. *See* FEC Br. 42-43. But any such effect on federal elections is surely too attenuated to allow Congress entirely to displace the competing state interest in regulating state election activity.

[8] Although defendants characterize the Levin amendment as restoring to the States some ability to regulate certain election activities by state party committees, *see* FEC Br. 49-51; McCain Br. 31-32 & n.24, that provision, like the rest of section 101, overrides state law, by imposing a new federal limit ($10,000) for funds used for the specified activities.

Remarkably, *amici* Iowa *et al.* contend that States can avoid the regulation of "federal election activity" simply by holding elections for state elections in off years. *See* Iowa Br. 18 n.7. There is no reason, however, that the ability of States to regulate their own elections should be conditioned on their willingness to forgo the many advantages of holding simultaneous state elections (most notably, higher voter turnout).

however, that the parties were treated more favorably than interest groups under the pre-BCRA regime, those advantages will be overwhelmed by the disadvantages imposed by section 101. Whether or not Congress' *purpose* in enacting section 101 was to "destroy" the party system, *see* McCain Br. 20, defendants (and their *amici* with responsibility for the equal protection issue, *see* Ornstein Br. 22-23) do not dispute that the *effect* of section 101 will be to divert the massive amount of state-regulated funds previously raised by the parties to interest groups, which will be able to use those funds for virtually all the same purposes that the parties did. Section 101 will thus empower narrowly focused interest groups at the expense of the parties, and indeed render officeholders and candidates more beholden to those groups. As defendants themselves recognize, "the parties' distinct role * * * demands distinct treatment." FEC Br. 71. By impermissibly disadvantaging our venerable political parties, section 101 is unconstitutional.

II. THE "ELECTIONEERING COMMUNICATIONS" PROVISIONS OF BCRA ARE UNCONSTITUTIONAL.

A. Attempting to uphold BCRA's sweeping prohibition on "electioneering communications," defendants have largely abandoned their approach below in favor of a new theory. They make little of their former claim — inaccurate as it was — that Title II will prohibit only a modest amount of supposedly "genuine" issue advertisements. Instead, defendants now seek to sustain the statute on the ground that *no* corporate- or union-sponsored speech broadcast in proximity to an election that contains the name of a candidate is worthy of First Amendment protection, *whatever it says*, since such speech by its nature "may influence," is "likely to influence," or "will in all likelihood have the effect of influencing" a federal election. *See* FEC Br. 14, 24, 84, 92-93, 94; McCain Br. 42-43.

Defendants make little effort to demonstrate that Title II will not significantly limit speech about "issues and candidates" — speech that this Court has repeatedly insisted is entitled to the fullest protection of the First Amendment. *See* McConnell Br. 39-41. Instead, defendants urge that an entire category of close-to-election broadcast advertisements relating to "issues and candidates" may be criminalized. This is not only directly inconsistent with *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), but also with first principles of the First Amendment that have formed the basis of this Court's campaign finance decisions.

It was no accident that *Buckley* itself began with a discussion of core constitutional principles: namely, that FECA's "limitations operate in an area of the most fundamental First Amendment activities" because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," *Buckley*, 424 U.S. at 14; that "'a major purpose'" of the First Amendment "'was to protect the free discussion of governmental affairs * * * of course includ(ing) discussions of candidates,'" *id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); and that we have a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 270). From beginning to end, *Buckley*, particularly in its analysis of restrictions on independent expenditures, is rooted in the principle that "[i]n the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign." *Id.* at 57.

Defendants nonetheless insist that express advocacy is, after all, core political speech. If it can be regulated, the argument proceeds, so too can all other advocacy that *might* influence a federal election. *See* FEC Br. 85-86; McCain Br. 62-63. But that turns the constitutional principles that have driven this

Court's campaign finance jurisprudence on their head. *Buckley* did not offer a broad "roadmap" for restricting political speech. *See* McCain Br. 62. Instead, *Buckley* crafted a single and intentionally narrow exception to the otherwise indisputable proposition that, since speech about candidates and issues lies at the very heart of the First Amendment, it is not subject to governmental restriction. *See, e.g., Citizens Against Rent Control*, 454 U.S. at 296-97.

B. In defense of their newly proffered standard, defendants and their *amici* criticize the express-advocacy test first adopted in *Buckley* and reaffirmed by this Court since. The formulation is, we are told, "impractical" (FEC Br. 103), "inflexible" (*id.*), and "worse than irrelevant" (McCain Br. 42). According to defendants, it simply fails adequately to identify speech that is "likely to influence" elections. *See, e.g.*, FEC Br. 14, 73, 80; McCain Br. 42-43, 58. Such arguments, however, cannot survive any fair reading of *Buckley*. *Buckley* is a decision about limiting governmental power to regulate expenditures, not expanding it. It is about protecting independent advocacy, not restricting it. And it most certainly did not reflect an effort to "identify" (much less criminalize) all speech engaged in "for the purpose of influencing a federal election"; indeed, that was precisely the statutory formulation that the Court *narrowed* in *Buckley* in order to comport with First Amendment principles, with full knowledge that doing so would permit speech that was virtually indistinguishable from express advocacy to flourish. *See* 424 U.S. at 45.[9] If *Buckley* is wrong, as defendants insist, it is because it restricts too much speech, not too little.[10] At the very least, it is no authority for restricting more.

C. Defendants' reliance on *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in support of their new formulation is also misplaced. Although defendants choose to ignore the point altogether, there can be no dispute that *Austin* was a case upholding restrictions on express advocacy and nothing more, *see* McConnell Br. 48-49, and that it has always been understood to be so.[11] There can also be no dispute that this Court has drawn an impregnable line between contributions and express advocacy on the one hand and all other independent expenditures on the other. *See FEC v. Beaumont*, 123 S. Ct. 2200, 2208-09 (2003); *Shrink Missouri*, 528 U.S. at 386-88; *Colorado I*, 518 U.S. at 614-15.

Attempting to extend *Austin* beyond its express-advocacy context, defendants essentially contend that the government has an interest in regulating speech by corporations simply because they are corporations. *See, e.g.*, FEC Br. 86-88; McCain Br. 57. There is no justification, however, for subjecting *non-commercial* speech by corporations to more stringent regulation, especially speech that is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

In addition, *Austin*'s supposed recognition of a governmental interest in regulating corporations *qua* corporations rests on a problematic premise: namely, that corporations benefit from

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[9] The Court adopted the express-advocacy test as its means of narrowing FECA's definition of "expenditures" as those made "for the purpose of * * * influencing" a federal election. *See Buckley*, 424 U.S. at 79-80 (narrowing FECA § 431(f)); *cf. MCFL*, 479 U.S. at 245-46, 249 (narrowing definition of "expenditure" under FECA § 441*b*). Defendants' effort to dispose of *MCFL* by urging that it was simply a case about statutory construction, *see* FEC Br. 101-02; McCain Br. 60-61, is disingenuous. Without even a mention of vagueness, the *MCFL* Court applied the express-advocacy test "in order to avoid problems of overbreadth." 479 U.S. at 248-49.

[10] *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 314-15.

[11] *See, e.g.*, Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 Minn. L. Rev. 1773, 1803 (2001); Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. Legis. 179, 197 (1998).

"special advantages" conferred by state law which justify additional regulation. 494 U.S. at 658. The necessary implication is that the right to engage in unfettered expenditures for political speech must be sacrificed as a prerequisite of incorporating in the first place — a classic example of an unconstitutional condition. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958). And the specific advantages to which *Austin* refers — "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," 494 U.S. at 658-59 — are available to political committees and indeed to a wide range of other entities besides corporations, such as law firms and other partnerships. Whatever the continued viability of this rationale in the express-advocacy context at issue in *Austin*, the Court should not stretch it to apply here.

It is also inaccurate for defendants to say that corporations and unions have been relegated to the burdensome alternative of funding their expenditures through PACs for decades. *See* FEC Br. 76, 78; McCain Br. 3. As a consequence of this Court's holding in *MCFL*, corporations and unions (with the exception of certain non-profit corporations) have been forced to use PACs when they wish to engage in express advocacy, a difference in treatment that already takes into account the distinction defendants repeatedly seek to draw between *MCFL*-protected entities and other corporate and union speakers. This Court has never sanctioned spending through PACs as a constitutionally sufficient alternative to otherwise unhampered independent spending on speech. In fact, this Court has recognized that the PAC alternative significantly burdens the exercise of First Amendment rights and has only found that burden to be overcome in the context of contributions or their *de facto* equivalent, express advocacy. *See Austin*, 494 U.S. at 657-59; *id.* at 707-09 (Kennedy, J., dissenting); *MCFL*, 479 U.S. at 252 (plurality opinion); *id.* at 266 (O'Connor, J., concurring in part and concurring in the judgment).[12]

D. In a similar vein, defendants assert that BCRA's proscriptives can simply be avoided by omitting any reference to a candidate's name. *See* FEC Br. 92, 106; McCain Br. 64. Not only would such a limitation significantly limit the ability of organizations to have their say about "issues and candidates," but it would be flatly at odds with long-established authority. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."). It would be difficult to devise a more effective statutory scheme to protect incumbents from criticism than by criminalizing the use of their names.

E. Having banished *Buckley* and its contribution/ expenditure distinction to the dustbin of legal history, defendants concede that the "electioneering communications" provisions are subject to strict scrutiny. *See* FEC Br. 85. At the same time, defendants eschew the burdens associated with that standard, urging that it is plaintiffs' burden to demonstrate that the statute is "substantially overbroad." *See id.* at 104-05; McCain Br. 62. In support of this argument, defendants cite a number of overbreadth cases in which litigants who engaged in unprotected activities were held to have standing to challenge a statute on the ground that it violated the rights of third parties. *See, e.g.*, *Virginia v. Hicks*, 123 S. Ct. 2191, 2196-97 (2003).[13] However, the term "overbreadth" is also used to describe challenges by litigants such as plaintiffs here, who are engaged in protected activity and are challenging statutes that are "'overbroad' in the sense of restricting more speech than the Constitution permits." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992). In such cases, even where (as here) the litigant brings a facial challenge, the *government* bears the burden of demonstrating that its restrictions survive constitutional scrutiny. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000); *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

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[12] *See also* Sullivan, *supra*, at 312 (noting that expenditures for express advocacy are properly viewed as "*de facto* contributions"); *cf. Beaumont*, 123 S. Ct. at 2208 (characterizing *Austin* in similar fashion).

[13] One such case not cited by defendants is *Virginia v. Black*, 123 S. Ct. 1536 (2003), where the Court facially invalidated the *prima facie* evidence provision of a Virginia cross-burning statute, finding that it "would create an unacceptable risk of the suppression of ideas" because the "act of burning a cross * * * may mean only that [a] person is engaged in core political speech." *Id.* at 1551 (internal quotation omitted).

F. Defendants finally turn to the task of demonstrating that the "electioneering communications" provisions are not overbroad and suggest that only a modest amount of speech at the fringes will be prohibited by the statute. *See* FEC Br. 105-06, 111; McCain Br. 10, 63.[14] The claim is belied by defendants' own behavior, their experts, and their examples.

As the intervenors note, *see id.* at 65, BCRA's sweep is so broad that even its sponsors petitioned the FEC in an effort to exempt speech that all would agree is prohibited by BCRA, but could not possibly be prohibited consistent with the Constitution. One request would have exempted any political communication that used a candidate's name in the context of specific legislation, such as a reference to the Helms-Biden Amendment or the Kennedy-McCain Bill. Another would have provided a carve-out for advertisements that urge support of, or opposition to, pending legislation, and urge the listener to contact a named official. The FEC (correctly) concluded that it had no authority to create such carve-outs in the face of the

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[14] Defendants' solution to the problem presented by what they characterize as "marginal" ads is to invite plaintiffs to assert individualized claims through as-applied challenges. *See* FEC Br. 106; McCain Br. 64-65. To suggest that a speaker must commence litigation in the overheated pace of an election campaign anytime he or she may wish to criticize an elected official, however, is to offer little meaningful judicial recourse at all.

clear and contrary command of Congress. *See* Electioneering Communications, 67 Fed. Reg. 65,190, 65,200-65,202 (Oct. 23, 2002). For the same reason, the FEC declined to exempt ads regarding ballot initiatives or referenda, ads promoting local tourism, or paid public service announcements, feeling obliged to leave BCRA as Congress had drafted it. *See id.* The denied exemptions alone reveal BCRA's impermissible sweep.

Although they were the linchpin of defendants' failed effort in the district court to demonstrate that BCRA is not overbroad, defendants now largely abandon the two empirical studies relied on by Congress for that very proposition, and complain that plaintiffs should not now be permitted to rely on them affirmatively to demonstrate that BCRA *is* overbroad.[15] *See* FEC Br. 109-12; McCain Br. 67-69. Defendants' effort to flee from their own studies reveals more than any statistic can: as the district court concluded, these studies, biased as they are in favor of defendants, prove *plaintiffs'* overbreadth case. *See* Supp. App. 367sa n.149 (Henderson), 1157sa (Leon). Whether the percentage of what defendants characterize as "genuine issue ads" prohibited by BCRA is 17%, as defendants' expert conceded, or 64%, as their unadulterated data show, the studies themselves demonstrate that BCRA's primary definition of "electioneering communications" is irredeemably overbroad.[16]

Defendants also suggest that plaintiffs' proffered examples of specific ads banned by BCRA are unpersuasive. To make their point, the intervenor defendants cite, among others, the ad featuring congressional candidate David Wu, *see* McCain Br. 69-70, and the federal defendants cite the ad referring to senatorial candidate Debbie Stabenow, *see* FEC Br. 107. Both ads are included in the appendix to our opening brief, and both, along with many others in the record below, *see* Gibson decl., exhs. 10, 12, indisputably illustrate BCRA's sweeping overbreadth, notwithstanding any debate about numerators and denominators. An ad urging a candidate for Congress to sign a term-limits pledge, and another criticizing a candidate for the Senate for her position on estate-tax reform, are precisely the type of political speech that has always been accorded the highest level of First Amendment protection. Defendants' claim that this speech about issues may be banned because it "may," "might," or "in all likelihood" could influence an election simply indicates how far from the First Amendment BCRA has obliged its defenders to stray.

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[15] After criticizing the very question that formed the foundation of their flawed claims to Congress, *see* McCain Br. 68-70, the intervenor defendants urge that the studies could be read to suggest that many of the ads analyzed focused primarily on "electioneering," *see id.* at 70. That claim, however, is flatly incorrect. The *Buying Time* data actually revealed that 98% of the ads had "policy matters" as their "primary focus." *See* J.A. 1079.

[16] Even if one were to accept defendants' wildly understated estimate of BCRA's impact on what defendants characterize as concededly "genuine issue advocacy," had BCRA been in effect during the 1998 election, it would have banned core political speech that was seen by more than 30 million American households. *See* Supp. App. 1158sa (Leon).

III. OTHER PROVISIONS OF BCRA ARE UNCONSTITUTIONAL.

Remarkably, the sponsors of BCRA have abandoned the field with respect to BCRA's other provisions, leaving the Solicitor General dutifully to defend their constitutionality. These egregiously unconstitutional provisions scarcely merit additional comment.

A. As to the "advance notice" provisions (section 201 and 212), defendants do not contest that the FEC's regulation "construing" section 212 so as *not* to require advance disclosure is flatly contrary to the language of the statute itself. *See* FEC Br. 122. And defendants offer no response to our argument that the governmental interests supporting disclosure requirements would be fully served simply by requiring disclosures after expenditures have actually been made. *See id.*

B. On "coordination" (section 214), defendants virtually ignore our primary argument that, when considered as a whole, section 214 impermissibly treats expenditures as "coordinated" even absent agreement between a spender and a candidate or party. *See id.* at 124-25. Defendants note that, in *Colorado II*, this Court held that coordinated spending includes even "wink or nod" arrangements. *See* 533 U.S. at 442. But as we have noted, section 214 sweeps well beyond even implicit "wink or nod" agreements, and includes even mere discussions with a candidate or political party. *See* McConnell Br. 66. As such, section 214 will immediately chill protected petitioning activity.

C. Regarding BCRA's "attack ad" provision (section 305), although it is true, as defendants observe, that the FCC has long required disclosures in candidate ads, no attempt has ever previously been made to deny a benefit (here, the lowest unit charge) merely because a candidate has engaged in speech that does nothing more than criticize an opponent. Defendants cannot connect the viewpoint-based requirements of section 305 to any of its purported purposes. *See* McConnell Br. 68.[17]

D. As to BCRA's "forced choice" provision (section § 213), defendants repeatedly assert that the ability of political parties to make a greater amount of coordinated expenditures is not constitutionally required. *See, e.g.*, FEC Br. 61. But it would be illogical to require that a "benefit" itself be constitutionally mandated before conditions on the ability to receive the "benefit" can be unconstitutional. Defendants' analogy to the public financing of presidential campaigns, *see id.* at 61-62, is inapposite because those provisions place conditions *on the receipt of public funds*. And the mere fact that Congress originally intended that parties could not make independent expenditures, *see id.* at 62-63, does not allow Congress to burden what this Court has since recognized, in *Colorado I*, is a constitutionally protected right.

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[17] Defendants claim that section 305 is content-based, not viewpoint-based, because it applies to "all * * * broadcasts that make a 'direct reference' to a candidate's opponent." FEC Br. 130. This ignores not only the title of the provision, which announces that it regulates "attack ads," but also common sense. As the NRA put it, "the world has never seen, and never will see, a law *aimed at praise* of the lawmakers." NRA Br. 8. Nor does a single ad surveyed in preparation for the *Buying Time* studies contain praise by a candidate for an opponent. As *amici* members of Congress have conceded, section 305 is concerned with "negative advertising." *See* Castle Br. 26.

Defendants also contend that Senator McConnell, who testified that he intends to run ads critical of his opponents in the future, nevertheless lacks standing under traditional standing requirements to challenge section 305. *See* FEC Br. 130. Senator McConnell's testimony, however, is at a minimum sufficient to satisfy this Court's relaxed requirements for standing *in First Amendment challenges*. *See* McConnell Br. 67.

E. On "minors" (section 318), it suffices to note that defendants offer no response to our arguments that *Buckley* itself requires that section 318 be subject to strict scrutiny, and that there were manifold more narrowly tailored alternatives short of an outright ban. *See* McConnell Br. 71-72.

F. Finally, as to BCRA's "broadcaster records" provision (section 504), defendants, in the face of a unanimous ruling concluding that this provision is unconnected to any valid government interest, still fail to identify a single valid government interest that justifies it. Instead, defendants' only argument is that section 504 is similar (although by no means identical) to certain existing FCC regulations that have never been challenged. *See* FEC Br. 133. Even if that were a legitimate defense to section 504's unconstitutionality, however, defendants' claim that section 504 is no more intrusive than these pre-BCRA regulations is simply erroneous. In fact, section 504 imposes unprecedented obligations, requiring, among other things, detailed disclosures of even *requests* by private citizens and groups to run ads about important, often controversial, issues. As such, section 504 cannot withstand exacting scrutiny, and should be struck down.

CONCLUSION

The challenged provisions of BCRA should be invalidated.

Respectfully submitted,

FLOYD ABRAMS
SUSAN BUCKLEY
BRIAN MARKLEY
CAHILL GORDON &
REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

Attorneys for Senator Mitch McConnell and National Association of Broadcasters

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

Attorney for Senator Mitch McConnell

KENNETH W. STARR
Counsel of Record
EDWARD W. WARREN
KANNON K. SHANMUGAM
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Attorneys for Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN &
FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Attorneys for Senator Mitch McConnell

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL
FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

Attorneys for Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

G. HUNTER BATES
FROST BROWN TODD LLC
400 West Market Street
32nd Floor
Louisville, KY 40202
(502) 589-5400

Attorney for Senator Mitch McConnell and Thomas E. McInerney

August 21, 2003

JACK N. GOODMAN
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

Attorneys for National Association of Broadcasters

Lexis

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v.
FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

◆

On Appeal From The United States District Court For The District Of Columbia

◆

REPLY BRIEF FOR APPELLANTS THE NATIONAL RIFLE ASSOCIATION, *ET AL.*

◆

CLETA MITCHELL
FOLEY & LARDNER
3000 K Street, N.W.
Suite 500
Washington, D.C. 20007
(202) 295-4081

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HAMISH P.M. HUME
DEREK L. SHAFFER
COOPER & KIRK, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

BRIAN S. KOUKOUTCHOS
COOPER & KIRK, PLLC
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

August 21, 2003

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTRODUCTION

The central thesis of Defendants' Title II argument is that Congress has merely taken an "evolutionary step" to "plug a loophole" in the regulation of corporate participation in federal elections. Brief for Federal Election Commission, *et al.* (filed Aug. 5, 2003) ("SG Br.") 72-85; Brief for Intervenor-Defendants (filed Aug. 5, 2003) ("Int. Br.") 42-54. This defense rests on the premise that Congress may constitutionally prohibit any corporation from using general treasury funds to pay for electioneering through express advocacy: if that is so, Defendants argue, Congress must necessarily be able to prohibit any corporation from using general treasury funds to pay for communications that Congress has deemed to be substantively equivalent to express advocacy.

The fundamental flaw in Defendants' premise is that this Court has thrice rejected legislative restrictions on corporate political speech funded purely through individual donations. *See FEC v. MCFL*, 479 U.S. 238 (1986); *FEC v. NCPAC*, 470 U.S. 480 (1985); *Buckley v. Valeo*, 424 U.S. 1 (1976). And the only governmental interest ever held sufficiently compelling to justify a restriction on corporate independent expenditures was that of preventing the "use [of corporate] resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) (internal quotations omitted). This Court's campaign finance cases thus make clear that there is a fundamental constitutional line between the independent political expenditures of certain types of corporations: the electioneering expenditures of the Massachusetts Citizens for Life cannot be regulated, while those of the Michigan Chamber of Commerce can.

The question raised by the NRA here is where along that line it and other grassroots advocacy groups fall. We respectfully submit that it is clear from the reasoning that protected MCFL and doomed the Michigan Chamber of Commerce that the line falls between, on the one hand, corporate organizations funded by individual members and defined by a political mission (*e.g.*, NRA, ACLU, Sierra Club), and, on the other, corporate organizations funded by business profits and defined by an economic mission (*e.g.*, business corporations, trade associations). The First Amendment guarantees individuals an unfettered right to engage in political discourse. Given the practical realities of modern mass media, however, individuals of ordinary means must pool their resources in order to exercise their speech rights in a meaningful way, and grassroots advocacy organizations spanning the political spectrum serve a vital role in allowing the voices of like-minded individuals to be joined, and heard.

BCRA's principal sponsors attempted in Section 203(b) to exempt 501(c)(4) organizations from Title II because they thought that such an exemption was likely required by this Court's decisions. *See* Brief for Appellants the National Rifle Association, *et al.* (filed July 8, 2003) ("NRA Br.") 6, 29-30. Their constitutional warnings against the Wellstone Amendment, however, were ignored (primarily by BCRA's *opponents*), and Section 203(b) was nullified (but preserved in the statute to ensure the severability of the Wellstone Amendment). We submit that the initial constitutional judgment of BCRA's main sponsors was sound, and that narrow tailoring requires the invalidation of the Wellstone Amendment and the restoration of Section 203(b).

But even if this Court accepts the premise that Congress may restrict the independent electioneering speech of individually funded advocacy groups like the NRA, Title II cannot survive. First, Defendants cannot rebut the overwhelming evidence demonstrating that the animating purpose of Title II was the impermissible desire to suppress speech because of its substantive content – the "negative attack ads" that Members of Congress denounced as a "nightmare." *See* NRA Br. 7-14; NRA Br. Appendix of Legislative History ("LH App. _a") 1a-57a. And while this impermissible purpose infects all of Title II, it is nowhere more evident – and nowhere more fatal – than it is in explaining why Congress passed the Wellstone Amendment. Second, the political speech that Title II sweeps within its definition of "electioneering communications" includes a substantial quantity of speech that is *not* "electioneering." Using Defendants' own methodology, fully one-third of the speech that would have been covered by BCRA had it been in effect in 2000 was genuine issue advocacy – speech that even Defendants have never suggested may be constitutionally regulated. Accordingly, whatever regulations may be permissible with respect to express advocacy, Defendants cannot carry their heavy burden of sustaining Title II.

I. THE WELLSTONE AMENDMENT IS UNCONSTITUTIONAL.

Strikingly, the Government says *nothing* in defense of the Wellstone Amendment's curtailment of 501(c)(4) organizations' ability to run electioneering communications funded by individuals. Indeed, the Government does not disavow its representation below that the amendment was designed to "prevent large soft-money donations from individuals" from going toward independent electioneering communications. Reply Brief for Federal Election Committee, *et al.* (filed Nov. 27, 2002) 58-59, *McConnell v. FEC*, 251 F. Supp. 2d (D.D.C. 2003) (No. 02-582). Nor does the Government deny that such a purpose is patently impermissible and in any event readily achieved through the less restrictive alternative of capping the amount of an individual donation that may be used to fund such political speech. *See* NRA Br. 31 & n.27; *see also* NRA Br. 28-29. It likewise offers no account of why the original Snowe-Jeffords provision (Section 203(b)), by limiting the electioneering communications of advocacy organizations to the amount of their support from individuals, is not the less restrictive and thus constitutionally requisite means of addressing any genuine corruption concern behind Title II. *See* NRA Br. 31-33. The Wellstone Amendment is therefore unconstitutional on its face, both because it has an impermissible purpose and because it is not narrowly tailored.

Rather than defend the Wellstone Amendment, the Government seeks to avoid consideration of it. It reasons that *MCFL*-qualified entities remain free to speak and that the arguments of particular nonprofits that they so qualify should be resolved via separate, as-applied challenges. *See* SG Br. 112-13; *see also* Int. Br. 74-75. That is true, but irrelevant. The NRA agreed below to stay its as-applied arguments that, notwithstanding the FEC's contrary position, it qualifies for a special exemption under *MCFL*. *See* S.A. 833.[1] But the NRA did not thereby abandon its facial arguments that the Wellstone Amendment has an impermissible purpose and is not narrowly tailored.

Section 204 on its face restricts, in *any* conceivable application, the ability of all 501(c)(4) advocacy groups to fund independent expenditures with individual contributions – that is its *raison d'etre*. The question before this Court is whether that restriction, which deprives all such corporations of the ability they would otherwise have under Section 203(b) to draw upon individual donations in order to fund electioneering communications, satisfies strict scrutiny. Far from preserving the proper course of judicial review, upholding the Wellstone Amendment without rigorous analysis of its ends and means would be an abdication of strict scrutiny.[2]

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[1] Although the NRA has briefed its specific features as a political speaker, it has done so simply to illustrate the facial overbreadth and impermissible purpose of Title II, whose supporters trumpeted the NRA as the prototypical speaker they sought to muzzle. *See* LH App. 52a-59a.

[2] Contrary to half-hearted suggestions from the Defendants, *see* SG Br. 113; Int. Br. 73-75, this Court has never had occasion to undertake this analysis. MCFL did not offer a less restrictive alternative, as it mounted an as-applied challenge (in response to an enforcement action) and prevailed on narrower grounds, without regard for the rights of other nonprofits or alternatives for regulating them. *See* 479 U.S. at 245. Nor did the Michigan State Chamber of Commerce present the issue in *Austin*, for its challenge turned on its specific facts as a 501(c)(6) trade association funded overwhelmingly by business profits.

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The Intervenors, having been abandoned by the Government's lawyers, thus stand alone in attempting to justify the Wellstone Amendment.[3] *See* Int. Br. 74. None of their *post hoc*, hypothesized justifications for the statute is cognizable under strict scrutiny. *See* NRA Br. 15-16. And, in any event, each of the Intervenors' purported justifications for the Wellstone Amendment is substantively meritless, as explained in the NRA's opening brief. *See* NRA Br. 31-33. The Intervenors assert that "individuals who support a nonprofit's basic mission . . . do not necessarily want their funds to be used to support or oppose candidates," Int. Br. 73-74, but fail to answer any of the NRA's points that (i) there is no indication in the *legislative* record that Congress shared this concern, (ii) there is no evidence in the *litigation* record to substantiate it, (iii) it would apply equally to PACs and political parties, and (iv) it would enable Congress to deprive individuals of modest means of their ability to gain an effective voice in our democracy by "delegat[ing] authority" to nonprofit organizations that spend their donations "in a manner that best serves the shared political purposes of the organization and contributor," *MCFL*, 479 U.S. at 261; *see NCPAC*, 470 U.S. at 494-95. *See* NRA Br. 32-33, 29. Moreover, even if this concern had truly motivated Congress, it could "be met . . . by . . . simply requiring that contributors be informed that their money may be used for such a[n electioneering] purpose." *MCFL*, 479 U.S. at 261.

See 494 U.S. at 664. The Court's suggestion in *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), that advocacy groups like the NRA may warrant regulation merely because they are "politically powerful organizations," *id.* at 2209, relates specifically to *contribution* limits, does not contemplate strict scrutiny, and therefore is untethered to a particular regulatory purpose or alternative means of achieving it.

[3] The irony of their predicament is exquisite: all four of the Senator-Intervenors voted *against* the Wellstone Amendment, *see* LH App. 41b-42b (appended hereto), and Senator Feingold expressly did so on constitutional grounds. *See* NRA Br. 29-30; LH App. 58a, 63a.

The Intervenors similarly posit that the Wellstone Amendment responds to the prospect that, under Section 203(b), "corporate . . . contributions could be used to fund *all* the organization's non-campaign activities, freeing individual contributions for electioneering communications." Int. Br. 74. Again, nothing in the legislative record suggests that this concern occurred to Congress. And Intervenors ignore that this "fungibility" phenomenon is built into existing law. *See* NRA Br. 31-32. Nor do they deny that, by limiting nonprofits' funding of electioneering communications to no more than the amount voluntarily donated by individuals, Section 203(b) would ensure the appropriate "correlation" between political expenditures and support from individuals, and wholly foreclose nonprofits from becoming mere "conduits" through which business corporations might spend their own general treasuries on electioneering. *Austin*, 494 U.S. at 660, 664; *see* NRA Br. 32; LH App. 15b-18b (appended hereto).

Finally, the Intervenors attempt to invent a compelling interest in avoiding the complexity of administering and enforcing Section 203(b). *See* Int. Br. 74. This hypothesized rationale would likewise suffice for Congress to abolish separate segregated funds, with all of the intricate and nettlesome rules that attend them; or the *MCFL* exception, with its much-controverted criteria; or, for that matter, any inconvenient aspect of a tailored speech restriction that could more simply and surely be replaced with an across-the-board ban on speech. Suffice it to say that if this rationale, without more, indeed satisfied strict scrutiny, it would be ruinous of First Amendment protections.

II. TITLE II WAS ENACTED TO STIFLE SPEECH.

Defendants do not dispute that, because Title II demands strict scrutiny, defense of it must be confined to Congress's *actual* purpose and cannot rest upon hypothesized or *post hoc* justifications. *See* NRA Br. 15-16. They nonetheless concoct a stew of purported rationales for Title II – *see* Part III, *infra* – that Congress never contemplated, while eliding Congress's avowed and plainly impermissible objective: suppressing "negative attack ads" that criticize candidates and otherwise disrupt their well orchestrated campaigns. *See* NRA Br. 3-4, 7-14; LH App. 1a-51a.[4]

The Government does not deny that the legislative record manifests the impermissible intent behind Title II. Evidently, the Government's theory is that its recitation of the purposes behind *different* statutes regulating campaign finance by itself suffices, under strict scrutiny, to justify *any* law that might expand existing regulations. But a crucial role of strict scrutiny is to root out an impermissible purpose of the specific speech restriction under review. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 580 (1983). And here there is no doubt that the animating purpose of Title II was to insulate candidates against attack and thereby protect incumbents. *See* NRA Br. 7-11; LH App. 49a-51a. Title II can no more be justified as an anti-corruption measure than could the Sedition Act.

The Intervenors at least mention the legislative history of Title II. But they do not grapple with the litany of floor statements demonstrating Title II's impermissible purpose, *see* LH App. 1a-51a, apart from offering their own relatively meager selection of legislative statements said to be more "representative" of congressional intent. Int. Br. 59 n.48. In particular, they do not deny that Members of Congress passed Title II with the express intention of getting "'poison politics off television'" and "'making sure the flow of negative attack ads by outside interest groups does not continue to permeate the airwaves.'" NRA Br. 9

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[4] The underinclusiveness of Title II confirms that Defendants' *post hoc* purposes did not animate Congress. Unlike the laws at issue in *Buckley* and *Austin*, Title II regulates electioneering only at certain times and in certain media, inexplicably leaving corporations free in all other respects to spend their treasuries on electioneering speech that may contravene contributors' wishes. *See* NRA Br. 8-9 n.5.

(citing LH App. 8a-9a); *see also* NRA Br. 10 n.6; LH App. 1a-45a, 49a, 56a.[5]

The scraps of legislative history cited by Intervenors are not remotely "representative" of a legitimate, let alone compelling, purpose for Title II. First, most of the 21 Members of Congress whose floor statements are carefully excerpted by the Intervenors *expressly avow* an impermissible purpose for Title II – be it the suppression of negative attack ads or the equalization of voices by restricting wealthy individuals from funding independent expenditures.[6] Second, only some four Members of Congress quoted by Intervenors specifically connected Title II's prohibition of corporate electioneering to an attempt to combat corruption as identified by this Court.[7] Those isolated remarks are overwhelmed by the chorus of impassioned speeches detailing how and why Title II would rid the airwaves of the negative attack ads that are the bane of incumbent politicians. Third, virtually all of the floor

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[5] Indeed, the Intervenors themselves have been quite clear about this. *See, e.g.*, J.A. 915 ("if [critical ads are] run and you can't respond, which is one of the big purposes of our law, then you're defenseless") (Sen. Jeffords); J.A. 936 ("Candidate after candidate has said, 'We lost control of our campaigns.' . . . And that's what we're trying to take care of.") (Sen. McCain); LH App. 1a-6a.

[6] Appended to this brief are many of the relevant floor statements, including excerpts tellingly omitted by Intervenors, which, combined with the legislative history appended to the NRA's opening brief, offer a complete sense of the unconstitutional intendment they reflect. Portions of legislative history specifically appended to this brief are cited as "LH App. _b" as opposed to "_a." *See Sen. Bryan* at LH App. 1b-2b; *Sen. Collins* at LH App. 22a-23a, 2b-3b; *Sen. Dodd* at LH App. 24a-27a, 3b-5b; *Sen. Dorgan* at LH App. 18a-22a, 5b-12b; *Sen. Edwards* at LH App. 12b-13b; *Sen. Feinstein* at LH App. 19b-22b; *Sen. Glenn* at LH App. 42a; *Sen. Jeffords* at LH App. 4a-6a, 25b-29b; *Sen. Kennedy* at LH App. 15a; *Sen. Lieberman* at LH App. 15a, 31b-32b; *Sen. McCain* at LH App. 1a-4a; *Rep. Borski* at LH App. 35b-36b; *Rep. Nadler* at LH App. 37b-38b.

[7] *See Sen. Snowe* at Int. Br. 12a-13a; *Sen. Feingold* at Int. Br. 15a-16a; *Sen. Jeffords* at Int. Br. 16a; *Sen. Edwards* at Int. Br. 17a-18a.

statements subvert Defendants' case in at least one of two crucial respects: they focus on a need to require *disclosure*, which Title II does wholly apart from, and presumptively as a less restrictive alternative to, *prohibiting* corporate electioneering communications, *see* NRA Br. 16 n.12, and/or they identify an interest in suppressing the *overall volume* of electioneering communications, thereby belying Defendants' characterization of Title II as a source restriction indifferent to the quantity of speech.[8]

Finally, none of the statements compiled by the Intervenors even purports to justify the Wellstone Amendment, the impermissible purpose of which goes undisputed. *See supra* at 3-4; *see also* NRA Br. 28-31; LH App. 65a-68a. Nine of the twelve Senators quoted by the Intervenors, including all four relevant sponsors of BCRA (Senators Feingold, Jeffords, McCain, and Snowe), voted *against* the Wellstone Amendment. *See* LH App. 41b-42b. Indeed, Senator Feingold explained in the very statements quoted by Intervenors that Section 203(b), in contradistinction to the Wellstone Amendment, was the constitutionally requisite approach to addressing any corruption concerns. *See* LH App. 13b-19b. In sum, whatever purpose the Intervenors may drape over Title II generally, the unconstitutional design of the Wellstone Amendment remains naked before this Court.

III. DEFENDANTS' JUSTIFICATIONS FOR TITLE II CANNOT SURVIVE STRICT SCRUTINY.

A. The Government's main defense of Title II is that it protects the electoral process from *Austin*-style

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[8] Although the Intervenors also cite some congressional reports and hearings, they cite no evidence that any Member of Congress relied upon those hearings and reports in addressing Title II. With respect to the Thompson Committee Report, its role in the legislative debates over BCRA was strictly limited to *Title I* and its regulation of *parties' use of soft money*, as apparent from Sen. Thompson's own *amicus* brief. *See, e.g.*, Thompson Br. 28-30 & n.24; *see also* LH App. 22b-25b.

"corruption." SG Br. 73-78, 86-87; *see also* Int. Br. 57, 73. This rationale was anticipated and answered in the NRA's opening brief. *See* NRA Br. 20-23. Defendants' principal authority for extending *Austin*'s rationale from businesses or trade associations funded by corporate earnings (*e.g.*, the Chamber of Commerce) to ideological nonprofit groups funded by small individual membership dues (*e.g.*, NRA, ACLU, Sierra Club), is this Court's recent decision in *Beaumont*. But *Beaumont* itself reaffirmed that *Austin*'s rationale for restricting independent political *expenditures* was limited to preventing businesses from "'us[ing] *resources amassed in the economic marketplace* to obtain an unfair advantage in the political marketplace.'" 123 S. Ct. at 2206 (quoting *Austin*, 494 U.S. at 659) (emphasis added). *See* NRA Br. 21-22.

Defendants offer three grounds for rehabilitating their *Austin* argument. First, they retreat to the proposition that even if 501(c)(4) advocacy groups lack business-generated wealth, they still enjoy a tax exemption. *See* SG Br. 75 n.34 (citing *Beaumont*, 123 S. Ct. at 2209). Regardless of whether that attenuated *post hoc* rationale might satisfy the minimal judicial scrutiny appropriate to laws restricting *contributions*, it cannot survive the strict scrutiny required for Title II's limits on *independent expenditures*. *See* NRA Br. 21-22 & n. 17. Title II makes no effort to connect the speech restrictions it imposes on 501(c)(4) corporations to the amount of their tax savings, nor permits them to forego their tax exemption in order to fund electioneering communications. That is, the one simply has nothing to do with the other.

Second, Defendants assert (again, without offering any evidence) that advocacy groups "could quickly become easy-to-use . . . conduits for unlimited campaign spending by unions and for-profit corporations." Int. Br. 73. But Title II itself, as previously detailed, contains a much less restrictive alternative for shutting down these supposed "conduits": Section 203(b) requires advocacy groups to fund their political speech exclusively with individual contributions. *See* NRA Br. 28; *supra* at 3-4; *see also* LH App. 15b-18b.

Third, Defendants assume (without explanation, let alone support in the legislative record) that grassroots advocacy groups like the NRA present the same danger as business corporations simply because the former, too, share the corporate form of organization. But the money that the NRA spends on political advocacy does not flow from the "'special advantages'" of incorporation such as "'perpetual life'" or "'favorable treatment of the accumulation and distribution of assets'" that allows the aggregation and transmission of wealth. SG Br. 74-75 (quoting *Beaumont*, 123 S. Ct. at 2206). Rather, the NRA annually receives voluntary donations from millions of individual members to support its efforts to protect their Second Amendment rights. If mere use of the corporate form, with its "special advantages," indeed sufficed to justify regulation, then the electoral speech of either NCPAC or MCFL could be silenced as well.

The reality, of course, is that Congress did not pass Title II (let alone the Wellstone Amendment) because it was concerned that the electioneering communications of advocacy groups might be amplified by business profits, but because it resented the political speech of such corporations and the individuals who support them. *See supra* at 7-9. Defendants nonetheless urge *deference* to the expert judgment of the Members of Congress, who are "uniquely positioned," we are told, by their personal experience as political candidates to determine the proper scope of regulation of electioneering speech. SG Br. 92; Int. Br. 56. But what Members of Congress are truly "expert" at is protecting their incumbencies. *See* NRA Br. 10-13. Title II is not about "corruption." It is about shutting down paid political ads that focus the electorate's attention, and that incumbents consequently loathe. NRA Br. 9-10 & n.6. Courts may not defer to legislators where such deference risks the "constitutional evil[ ]" of "permitting incumbents to insulate themselves from effective electoral challenge." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

B. Defendants' second rationale for Title II is the supposed need to protect members of advocacy organizations from having their dues "misused" for political purposes. SG Br. 86; Int. Br. 57, 73-74. Once again, this argument was anticipated and has been answered. *See* NRA Br. 23-24 & n.19, 32-33; *supra* at 5.

C. Defendants' third rationale for Title II is the "risk of real or apparent quid pro quo corruption" that supposedly arises if a candidate is "'appreciative'" of favorable independent electioneering communications by a nonprofit advocacy group. SG Br. 89, 83 (quoting S.A. 837); *see also* Int. Br. 57. Defendants acknowledge that this rationale has never been held to justify restrictions on *independent expenditures* as opposed to *contributions*. *See* SG Br. 88 (discussing *NCPAC*). And they do not deny that this rationale would apply equally to such political speech as candidate endorsements and fundraisers, and to such political speakers as PACs and wealthy individuals. A politician who is benefited is obviously as grateful for one, or to one, as the other. *See* NRA Br. 17-18 & n.13. The terms and stakes of this dispute are thus starkly laid out; either the ever-expanding notion of "corruption" or the tenets of our democracy must yield, for if Defendants' line of argument is accepted the former will inexorably engulf the latter.

Although the Government correctly observes that "gratitude for political support in the form of *contributions* directly from a corporate or union treasury has long been viewed as corruption," it is quite disingenuous in adding, "as has gratitude for political support in other forms." SG Br. 89. This "gratitude for political support in other forms" to which the Government refers in fact encompasses such things as "gifts," "bribes," or "illegal gratuities" – that is, money or its functional equivalent – given directly to candidates. *See* SG Br. 28-29. But this Court's jurisprudence establishes that the independent expenditures of outside groups cannot be equated with "bribes" or even contributions, either in terms of their corruption potential or their associational and expressive value under the First Amendment. *See, e.g., FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-41 (2001).

If independent political speech could *ever* be treated as direct contributions for purposes of government regulation, the requisite showing assuredly has not been made here. The "evidence" cited by Defendants to show the supposedly corrupting effect of independent expenditures consists of nothing more than conclusory generalizations that candidates "appreciate" issue ads that praise their positions or denigrate those of their opponents. *See* Int. Br. 55 & n.42. Title II obviously was not designed to combat *this* phenomenon, since candidates will "appreciate" issue ads whether they are paid for by PACs, by wealthy individuals, or by general treasury funds. *See* NRA Br. at 25 & n.20. The Congress that passed Title II was motivated not by a desire to curb "appreciation," but rather by its distaste for "negative" issue ads. *See* NRA Br. 7-10; LH App. 1a-3a, 35a, 40a-45a, 57a. And far from sharing the Defendants' supposed concern that gratitude and political debts would follow from these outside issue ads, Congress was convinced that "all of us should hate them," LH App. 8a, because the "candidates themselves disapprove of [them]," LH App. 1a, and they tend to "bring[ ] in other issues that the two candidates themselves do not even want to talk about." LH App. 40a. Therefore, when Defendants try to justify Title II with their notion that Congress deemed politicians *unduly grateful* for the independent expenditures of outside groups, they are not only departing from the legislative record, but affirmatively contradicting it.

The evidentiary record compiled in the district court bears out the fundamental difference between contributions and expenditures in terms of their corruption potential. *See* NRA Br. 18-19 & n.14. Defendants' briefs only further highlight this difference by touting the evidence of corruption that they claim supports their defense of Title I's soft money contribution limits. *See* SG Br. 22, 37-42; Int. Br. 8-9, 12-16. But there is no evidence – none – demonstrating even a remotely comparable system of gaining "more access and influence" in exchange for "more issue ads."

Votes may be *influenced* by large *contributions* to parties, *see* Int. Br. 15, but issue ads can be effective only through the *political accountability* that lies at the heart of democracy. Such ads "fan the flames," J.A. 1017-19, and appeal to the "grassroots." J.A. 837-39. Thus, where "candidates as well as elected officials would prefer not to have th[e] campaign focus on a particular hot button issue . . . a campaign of issue ads may have the effect of forcing them to talk about it," thereby "serv[ing] to inform voters about the particular office holders' or candidates' voting record on a particular issue." J.A. 850-52; *see also* Deposition Transcripts Unified Filing at Chapin Dep. 57 (admitting that issue ads about taxation and crime "changed the focus of the main issues that were being discussed between the candidates"); *see* NRA Br. 19-20 n.16. Thus, issue advocacy groups have power precisely because they *speak to the voters*, not because they add to partisan coffers. In contrast, Title I soft money is corrupting precisely because it does not have "an ideological motivation," but instead is explicable solely as an effort to "buy[ ] access." SG Br. 38 (quoting S.A. 621).[9]

In short, while Defendants must satisfy far stricter scrutiny in defending Title II than in defending Title I, they have far less in the way of concrete evidence. Their *post hoc*, generalized claim that politicians may be "grateful" for broadcasts aired by advocacy groups is sorely at odds with Congress's own view and cannot in any event suffice to meet the strict scrutiny applicable to Title II.

D. Defendants' fourth and final justification for Title II is that its limits on independent expenditures "prevent[ ] the circumvention of existing statutory limits." SG Br. 89-90; *see also* Int. Br. 58 & n.46. But this justification

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[9] According to Defendants, the proof positive that soft money is intended solely to buy favors rather than to promote ideological causes is that most major donors systematically give to *both* parties. *See* SG Br. 38; Int. Br. 15. No comparable practice exists with respect to issue advocacy.

cannot stand by itself with respect to the independent expenditures that Title II would regulate. *See Buckley*, 424 U.S. at 44-47. And the Defendants have not identified a compelling corruption rationale for regulating the independent political speech, be it electioneering or otherwise, of nonprofit advocacy groups funded by individuals.[10]

E. The pretextual nature of the interests hypothesized by the Government is further confirmed by Title II's failure to regulate PACs, notwithstanding that their helpful ads would be no less appreciated by candidates, they enjoy the "'special advantages'" of the corporate form, SG Br. 74-75 (quoting *Beaumont*, 123 S. Ct. at 2206), and they are no less likely than advocacy organizations to fund political speech that may not reflect the views of every last contributor. *See* NRA Br. 25.

Conversely, the genuine purpose behind Title II, that of speech suppression, is reflected in the obvious reality that requiring issue advocacy organizations to fund electioneering communications through their PACs will muffle the collective voice of their members to a whisper. Defendants offer no answer to our demonstration that Title II's PAC requirement will significantly diminish the collective voice of the NRA's members. *See* NRA Br. 25-26. Defendants simply ignore Judge Henderson's finding, which was not contested by either of the other members of the panel below, that many of the NRA's members are unable both to pay membership fees and to contribute to the PAC. *See* S.A. 259.[11] Thus, the "individuals who . . .

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[10] The Intervenors offer as an aside that "Title II's rules help prevent circumvention of Title I," Int. Br. 58 n.46, but ignore inherent differences between political parties and outside groups in terms of their corruption potential that obviate any such interest. *See, e.g.*, SG Br. 32, 36-37, 71-72; Int. Br. 8-9.

[11] As for the Intervenors' suggestion that "nothing prevents the NRA from reducing its membership dues by some amount," such a response to Title II would diminish the funds available for the NRA's speech in two ways. First, under the FEC's regulations, the NRA would have to incur additional expenses to make a separate solicitation for

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remain free to use their own funds for electioneering communication," SG Br. 99, are not the millions of ordinary Americans who belong to the NRA and other grassroots organizations, but rather the few wealthy elite who can afford to purchase airtime on the mass media.

Wholly apart from the financial burden that the PAC requirement places on the speech rights of citizens of modest means, the limitations on PACs' fundraising activities will artificially diminish the political voices of grassroots organizations. The Government touts the fact that "the NRA is free to solicit funds from its members," SG Br. 98 (citing 2 U.S.C. 441b(b)(4)(C)), but this is a draconian limitation on the NRA's nationwide solicitation practices. And it entails a perverse Catch-22 whereby the NRA itself is foreclosed from running electioneering communications that proved so successful throughout 1999 and 2000 in attracting new members and raising funds, *see* J.A. 1964, while its PAC (which *can* run electioneering communications) is foreclosed from appealing to a national audience to fund this speech. Not surprisingly, the NRA is able to generate only a fraction – some five percent – of the amount of funds for its PAC that it generates for its general treasury. *See* S.A. 259; *see also* S.A. 656 (noting that non-PAC interest groups ran twenty times more ads than did interest group PACs).[12]

By artificially deflating the resources available to the NRA and other issue advocacy groups, Title II tilts the

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contributions to the PAC. *See* 11 C.F.R. §§ 114.5(g), 114.7(a), 114.1(e). Second, in response to the separate solicitation, an NRA member of modest means, who fully supports the NRA's political speech, might nevertheless naturally limit his support to the annual membership fee.

[12] Despite the Intervenors' unsubstantiated suggestion to the contrary, *see* Int. Br. 73, it is clear that the NRA's PAC could have funded only a fraction of the NRA's "electioneering communications," even if the NRA had paid the PAC's administrative expenses. *See, e.g.*, J.A. 2096, 2115.

playing field sharply in favor of politicians, who remain free to fundraise from any citizens who agree with their message, may spend unlimited amounts of their own money broadcasting references to outside groups in the periods preceding elections, and will invariably leverage their special access to media corporations that are left unfettered in their electioneering. Likewise, Title II cedes the airwaves to those wealthy individuals who can afford the steep price of admission, while impeding Americans of modest means from banding together into advocacy groups that would otherwise channel their collective voice.

IV. TITLE II IS OVERBROAD.

A. Defendants' discussion of overbreadth fails to come to grips with the central defect in all of their objective and subjective evidence: none of their studies takes into account the NRA's 30-minute news magazines, which totaled more than twice the amount of speech of all other groups combined. *See* NRA Br. 42. Nor do Defendants cast doubt on Judge Henderson's finding that if Defendants' studies had accounted for the NRA's speech, they would have demonstrated that 34 percent of the speech covered by Title II was "genuine" issue advocacy. *See* S.A. 257-58. Rather, Defendants now disavow the methodology of the very studies that form the centerpiece of their defense on the ground that they are "subjective" and the Court should assess the likely *effects* of the speech. *See* SG Br. 92-94, 106-07.

Even under this newly-minted "objective" inquiry, it is clear that Judge Henderson's finding is correct. Put simply, the undisputed evidence demonstrates that the vast majority of the airings of NRA's 30-minute programming in 2000 was not "likely to influence the outcome of federal elections." SG Br. 94. Specifically, it is uncontested that the "California" and "It Can't Happen Here" news magazines aired more than a thousand times during the two months prior to the 2000 presidential election. *See* S.A. 256-57. As the Intervenors effectively concede, the references to Vice-President Gore were "incidental." Int.

Br. 72. These incidental references in a 30-minute program plainly had no effect on the outcome of the presidential election in California, which was never competitive. *See* J.A. 367-68. Not surprisingly, there is no evidence that any of these airings in a landslide state in any way gave rise to "indebtedness" or "appreciation" on the part of any candidate, as the outcome plainly had nothing to do with this speech. Although Defendants focus considerable attention on the NRA's program detailing Vice President Gore's interpretation of the Second Amendment, this is a straw man – the NRA conceded that one of the purposes behind "Heston/Union" was electioneering, and thus Judge Henderson counted these airings as such. *See* S.A. 257-58; NRA Br. 42-43 n.34.[13] In short, a comprehensive analysis of the overbreadth of Title II conclusively demonstrates that it criminalizes speech that has neither the purpose nor the effect of influencing federal elections.

B. Defendants suggest that Title II's sweep is permissible because speakers "may easily avoid [its restrictions] by simply not referring to a candidate for federal office." SG Br. 92. In other words, government censorship of political speech is tolerable because of the "ease" of self-censorship. BCRA's removal of candidates' names from the political lexicon is a particularly acute form of censorship for a speaker such as the NRA, which *constantly* refers to federal officeholders, whether they are standing for reelection or not, for reasons wholly unrelated to electioneering. *See* NRA Br. 38-41. And Defendants do not dispute that implementation of Title II will be a practical nightmare for the NRA as it attempts to sift through its unscripted footage for any reference to one of the thousands of candidates for federal office in an election year. *See* NRA Br. 43 & nn.35-36.

Moreover, a moment's reflection refutes Defendants' suggestion that the NRA's issue advocacy "would [not] be materially impeded" were it stripped of references to federal candidates. Int. Br. 72 n.57. In educating the public about threats to individual liberties, the NRA and other issue advocacy groups seek to identify officeholders that personify such threats. The First Amendment does not condemn Americans to the world of Harry Potter, where those who threaten liberty must be referred to as "He Whose Name Cannot Be Spoken." Nor would a response to an attack on the NRA be effective if the NRA could not reference the attacker by name. *See* S.A. 256-57; J.A. 420-21. And generic references to abstract threats to the Second Amendment are far less effective in fundraising messages than are references to specific politicians that openly espouse legislative restrictions on guns. *See* 11 PCS/NRA 42.

BCRA itself provides perhaps the best answer to the Government's ease of censorship defense. There would be no need for a media exception if wide-open discussion of political issues could be accomplished without naming particular federal candidates. Yet it was universally understood even by BCRA's supporters that the media companies could not perform their functions without naming candidates for federal office, and funding such speech out of their general treasuries. So too with the NRA and like advocacy groups.

V. TITLE II'S MEDIA EXCEPTION IS INVALID.

Defendants insist that "[n]othing has changed" in the media marketplace since this Court's decision in *Austin*, and that Title II therefore does not unconstitutionally discriminate in favor of media companies. In addition to defying the undisputed record, *see* NRA Br. 44-50, this assertion contradicts the Government's own conclusions as set forth in a recent FCC decision, overhauling a variety of longstanding media regulations because "[t]he modern media marketplace is far different than just a decade ago," when "the world wide web was still nascent" and "there were far fewer choices for news and entertainment than there are today." FCC 03-127, Report and Order and Notice of Proposed Rulemaking (July 2, 2003) ("FCC Order"), at ¶ 87, ¶¶ 86-128. One Commissioner observed that the FCC was treating the media "like any other big business" and that broadcasters have become "more and more captives to Wall Street and Madison Avenue expectations." Statement of Michael J. Copps, Dissenting from FCC Order (June 2, 2003) at 1, 15. The evolving realities of the political marketplace emphasized by Defendants are thus equally observable with respect to media corporations; and if Congress's decision to specially exempt them from Title II is upheld in this case, it follows that, "[i]f and when" Congress reaches a contrary decision, Int. Br. 64 n.52, it may force, say, the NEW YORK TIMES and CBS to fund references to federal candidates in the periods preceding elections out of separate PACs.[14]

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[13] Judge Henderson's overbreadth analysis did not quantify the effects of two other NRA 30-minute news magazines, "Million Mom March" and "Tribute." *See* NRA Br. 40-41 & n.33. Defendants do not deny that the airings of "Million Mom March" that would have been covered by Title II occurred in noncompetitive races and thus would not have had an effect on the outcome of those elections. *See* NRA Br. 41. Likewise, although Defendants argue that "Tribute" had electioneering content, a claim we dispute, Defendants fail to explain how the airing of this fundraising program in Texas and California in 2000 could possibly have effected the results of the elections in these two landslide states.

CONCLUSION

For the foregoing reasons, this Court should enjoin enforcement of Title II's prohibition of electioneering communications or, alternatively, the Wellstone Amendment.

Respectfully submitted,

CLETA MITCHELL
FOLEY & LARDNER
3000 K Street, N.W.
Suite 500
Washington, D.C. 20007
(202) 295-4081

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HAMISH P.M. HUME
DEREK L. SHAFFER
COOPER & KIRK, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

BRIAN S. KOUKOUTCHOS
COOPER & KIRK, PLLC
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

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[14] Given the undisputed fact that "the media industry is widely regarded as perhaps the most powerful special interest today in Washington," J.A. 1998, it is simply disingenuous to suggest, as Intervenors do, Int. Br. 64 n.52, that applying Title II to media companies could create an overbreadth problem that Title II itself does not. *See generally* J.A. 1997-99.

SELECTED FLOOR STATEMENTS EXCERPTED BY INTERVENORS*

Statement of Sen. BRYAN:

"The McCain-Feingold proposal addresses two important issues that could begin to turn our campaign system around. **The legislation proposes** to ban soft money contributions to our national political parties and **to curb the use of attack advertisements** hidden behind so-called 'issue advocacy' campaigns.

. . . .

Mr. President, the recent explosion in the so-called 'independent expenditure or issue ads' also causes me great concern. *Independent expenditure ads are one of the very reasons the campaign system is out of control.* **During the last election cycle, a large number of television ads that saturated the media weeks before the elections were attack ads** on candidates, challengers and incumbents. No one is accountable for sponsoring the ad. **There is no disclosure requirement which is what I find most frustrating.** *We all know that these ads are really intended to defeat a candidate and are often coordinated with the opposition campaign. Simply put, these ads are not genuinely independent nor are they strictly concerned with issue advocacy.*

. . . .

While I am a cosponsor and a strong supporter of the McCain-Feingold legislation, I wish it included other important reforms. **It does not include what I believe is one of the most critical components of reform which is overall spending limits.** I have consistently supported legislation **to limit the amount candidates can spend** and have been a cosponsor since coming to the Senate of a proposal to limit spending offered by my good friend Senator Hollings. I believe this should be included in any effort to reform our campaign laws.

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* All portions of a selected floor statement that Intervenors' quote in their appendix are italicized herein; salient portions are emphasized in bold.

Last year, my distinguished colleague, the senior Senator from Arkansas, announced on the floor of the Senate that he too **would now support Senator Hollings's constitutional amendment to limit campaign spending despite his reservations about amending the Constitution.**"

144 Cong. Rec. S1038-39 (Feb. 26, 1998). (Int. App. 20a).

Statement of Sen. COLLINS:

"Why should this matter, we are asked by those all too eager to equate freedom of speech with freedom to spend? It should matter **because political equality is the essence of democracy, and an electoral system driven by big money is one lacking in political equality.**

. . . .

To explain this aspect of the bill in more detail, and to share with my colleagues an experience that contributed to my becoming a cosponsor, I need to go back to the 1996 race for Maine's First Congressional District in the House of Representatives. In the course of that election, the AFLCIO spent $800,000 to defeat the Republican candidate. **They did this by running a steady barrage of blatantly negative ads.**

. . . .

Mr. President, the situation I have described has led to the biggest sham in American politics. Nobody in Maine believed that the AFLCIO's ***negative ads*** *were for any purpose other than the defeat of a candidate.* Indeed, at least one newspaper which endorsed the Democratic candidate blasted the union ads against his opponent. *Ads of that nature make an absolute mockery out of the prohibition against unions and corporations spending money on Federal elections.*

The 'express advocacy' provision in McCain-Feingold is designed to do away with this sham. Contrary to what some have said, it would not affect independent ads financed other than by a union or corporation, except to enhance the reporting requirements, which everyone in this body purports to favor. It also would not stop unions and corporations from running the issue ads."

143 Cong. Rec. S10,125 (Sept. 29, 1997). (Int. App. 22a).

Statement of Sen. DODD:

"[N]o democracy can thrive – if indeed survive – if it is awash in massive quantities of money:

Money that threatens to drown out the voice of the average voter of average means; money that creates the appearance that a wealthy few have a disproportionate say over public policy; and money that places extensive demands on the time of candidates – time that they and the voters believe is better spent discussing and debating the issues of the day. The McCain-Feingold legislation before the Senate today is a good first start toward reform of a campaign system that is broken, plain and simple. I, for one, would like to have public financing of our Federal Campaigns. I would like to see free or reduced-rate TV and radio time for candidates during the peak of the campaign season. I would like for any negative ad to display the face and voice of the candidate on whose behalf that ad is aired.

The McCain-Feingold legislation is not as comprehensive as some of us would prefer. But it *does address two of the most pressing deficiencies in our system of campaign finance: Undisclosed soft money contributions, and sham issue ads*.

. . . .

Let me be clear – I cannot agree more that political speech should be unlimited. The free flow of information and ideas is the hallmark of a democracy. **But to equate speech with money is not only a false equation, it is also a dangerous one to our democracy.**

When that speech and those ideas are paid for overwhelmingly by a few wealthy individuals or groups or foreign nationals or anonymous groups or by undisclosed contributors, **the speech is neither free nor democratic**. It is encumbered by the unknown special interests who have paid for it. **And it minimizes or excludes the speech of those who lack substantial resources to counter it.**

This special interest speech – paid for with unlimited, undisclosed soft money – creates, at a minimum, the appearance of undue influence, if not an implied quid pro quo by the contributor."

147 Cong. Rec. S2435-36 (Mar. 19, 2001). (Int. App. 18a).

Statement of Sen. DORGAN:

"Some say money is speech and we like free speech. That is the political golden rule. I guess those who have the gold make the rules.

I suppose if I was part of a group that had a lot more money than anybody else I suppose there would be an instinct deep inside to try to persuade you to say this situation is great. We not only have more money but we have access to more money than anyone else in the history of civilization. **Why would we want to change the rules? We ought to change the rules** because this system is broken and everybody in this country knows it and understands it.

Let me go through some examples to describe what is happening in this system. And both political parties have had problems in these areas, both parties. Let me give one example. In 1996, $4.6 million of soft money went from the Republican National Committee to an organization called Americans for Tax Reform, $4.6 million. This soft money, then, comes from contributors whose identities are often unknown – they often do not need to be disclosed – contributing money in amounts that would be prohibited under our federal election laws, to influence a Federal election. $4.6 million from a major political party to this organization, Americans for Tax Reform. That was four times the total budget of this organization in the previous year.

How was the money spent, this soft money raised in large undisclosed chunks from sources in many cases prohibited from trying to spend money to influence Federal elections? How was it used? To influence Federal elections, 150 of them, to be precise – 17 million pieces of mail to 150 congressional districts.

You say the system isn't broken? Mr. President, $4.6 million? This is the equivalent of a political Swiss bank account. Large chunks of money, blowing into the system to a group that never has to disclose what it does with it.

And what about the issue ads which Senator Durbin mentioned as well? **These issue ads – are they ads that contribute to this political process? Eighty-one percent of them are negative. They represent the slash, burn and tear faction of the political system.** Get money, get it in large chunks from secret sources and put some issue ads on someplace **and try to tear somebody down.**

Let's discuss one group, and one ad in particular. Look at this scenario.

The Citizens for Republic Education Fund is a tax-exempt organization incorporated June 20, 1996, that raised more than $2 million between June and the end of the year in this election year – $1.8 million of which was raised between October 1 and November 15. They spent $1.7 million after October 11 and before the election in a matter of a couple of weeks. Remember, these funds are not intended to influence Federal elections, but here's all this money being spent in just three weeks before the election.

You be the judge. Consider the following, and then you tell me whether these were intended to influence a Federal election. The vast majority of the money was spent after October 11 in an election year. The group didn't come into existence until June of the election year. The group never had any committees or programs, had no offices, no staff, no chairs, no desks and no telephones. **All it had was millions of dollars to pump into attack ads.**

The ads did not advocate on behalf of any one set of issues. Instead, **the ads were almost universally tailored to a particular unfavored candidate's perceived flaws, just like any campaign attack ad would be.** In fact, you could ask whether they advocate any issues at all.

. . . .

*A political ad, paid for with soft money from a political Swiss bank account. It's like a Swiss bank account because it is from a secret source, **designed to be used to create attack ads, to be used at election time to influence Federal elections**, something that, frankly, is supposed to be prohibited by law. But this has now become the legalized form of cheating. In fact, we are not even sure it is legal, but it is being done all across this country and it is being done with big chunks of secret money.*

In fact, one secret donor put up, I'm told, $700,000 to spend on so-called issue ads to influence federal campaigns. We don't even know for certain the identity of that person. And that soft money, that big chunk of money prohibited from ever affecting Federal races was used in this kind of advertising to directly try and influence Federal campaigns.

Now, I just ask the question, is there anyone here who will stand in the Senate with a straight face and say that this isn't cheating? Anyone here who will stand with a straight face and say this isn't designed to affect a Federal election? Anybody think this is fine? Go to a friend someplace that has $40 million and say, will you lend us $1 million, we have these two folks we don't like – one in one State up north and one in a State down south. **We want to put half a million into each State and defeat them because they happen to be of a political persuasion we don't like, and we don't want them serving in the U.S. Senate.** If you give us $1 million we will package it in two parts, half a million into each State. Your name will never be used. No one will know you did it. **We will package up these kind of 30-second slash, tear and burn political ads** and claim they are issue ads and they can be paid for with soft money.

Does anybody in this body believe this is a process that the American people ought to respect? That this is a process the American people think makes sense? **Do we really believe that money is equal to speech and that anything that we would do to change the amount and kind of money spent in the pursuit of any campaign is somehow inhibiting the political process?"**

144 CONG. REC. S880-81 (Feb. 24, 1998). (Int. App. 21a).

Statement of Sen. DORGAN:

"This nearly $1 million, with other funds included, was brought into the system in the form of issue ads – **sham**

ads that were clearly direct 30-second advertisements expressly waged for one purpose, and that was to attack and destroy a candidate of the other party. *This was done, by the way, with a legal form of cheating made possible by today's campaign finance law and current court decisions permitting issue ads, not so thinly disguised, to be waged in unlimited quantity using unlimited corporate money, unlimited individual money and undisclosed so that no one, no one in this country, will discover where the money came from. That is what is wrong with this current system.*

. . . .

We are told somehow that money is speech in politics: The more money you have, the more speech you have, the more you are able to speak. Some of us believe that there ought to be in politics campaign finance reform that begins to set some reasonable limits on what kind of money is spent in political campaigns. We think that the current regime of campaign finance is just completely spiraling out of control, and **we think the McCain-Feingold bill, while not perfect, is a good piece of legislation for this Congress to enact**.

Mr. President, I also intend to offer, if I am allowed in the context of these debates, one additional piece of legislation I would like to mention just for a moment. Federal law currently provides that all television stations must offer candidates for Federal office the lowest rate on their advertising rate card for commercials for a certain amount of time preceding the election. To repeat, under current law, we say candidates are entitled to the lowest rate on the rate card for political advertising for a certain period prior to the election.

Everyone has a right to put on the air what they wish to put on the air about their opponent. In politics, unlike most other forms of competition, the normal discourse is to say, 'There's my opponent. Look at what an awful person that opponent is. Let me tell you 18 awful things about my opponent.' Is that the way you see airlines advertise? 'Look at my competing airline over here. Let me tell you about how awful they are, how awful their maintenance record is.' I don't think so. Is that the way automobile companies advertise? No. It is the way people in politics advertise because it has worked.

My point is this. I am going to offer an amendment that says we will change the Federal law that requires the lowest rate on the rate card for the 60 days prior to elections. We will say that the television stations are required to offer that lowest rate only to television commercials that are 1 minute in length and only in circumstances where the candidate appears on the commercial 75 percent of the time.

Why do I do that? Because I would like candidates to start taking some ownership of their commercials instead of the 30-second slash-and-burn commercial that the candidate never appears on. Oh, everybody has a right to continue to run those. However, we are not required, in my judgment, to tell television studios they must offer the lowest rate for these kinds of ads.

Air pollution in this country is a problem. We have been concerned about air pollution for some long while. One form of air pollution in this country is the kind of political commercial that has been very successful. I don't deign to suggest now we can ban it. We can't. Free speech in this country and free political speech allows anybody to do anything they want in their campaigns in a 30- or 60-second ad.

But I believe we ought to give an incentive for those who put commercials on the air during political campaigns that say to the American people, 'Here's what I stand for, here's what I believe, here's what I want to fight for as we debate the future of this country,' **in which the candidate himself or herself asserts positions that they think ought to be a part of public discourse and public debate.** It seems to me we ought to try to provide incentives for that by saying the lowest rate card in campaigns, the lowest rate on the bottom of the card, will go to commercials that are at least 1 minute in length and on which the candidate appears 75 percent of the time.

I don't know if we are going to get to that. I intend to offer it as an amendment.

First and foremost, I rise to say I support the McCain-Feingold bill. I think Senator McCain and Senator Feingold have done a good job. Is it perfect? No. It is an awfully good start to try to bring some order and establish some thoughtful rules to a campaign finance system that is now a mess.

I want to be involved in the debate in the coming hours, when I hear people stand on the floor of the Senate and say, 'Gee, we think the campaign finance system is wonderful,' because I want to ask them what they have been reading, **what they have been watching. Not the campaigns that I have seen,** not the reports that I have seen about campaign finance awash in soft money, **awash in issue ads financed by soft money flying all over the country to pollute the air waves,** that never allow the American people to understand who was the donor, who put in half a million dollars to go after this or that candidate. That has become a perversion of fair rules and fair standards in campaign finance reform, and I hope when we pass McCain-Feingold we will finally begin to make some order and some thoughtful response to campaign finance reform.

144 CONG. REC. S805-06 (Feb. 23, 1998). (Int. App. 21a-22a).

Statement of Sen. EDWARDS:

"The second issue is these bogus sham issue ads. In addition to the fact folks see all this money flowing into the system, they feel cynical, they feel they do not own their Government anymore, and that they have no voice in democracy.

In addition to that, **they turn on their televisions in the last 2 months before an election and see mostly hateful, negative, personal attack ads posing as issue ads.** Any normal American with any common sense knows these are pure campaign ads. **Those are the ads we are trying to stop.**

Senator Snowe actually said it very well when she said these ads are a masquerade. *In fact, they are more than a masquerade, they are a sham, they are a fraud on the American people, and they are nothing but a means to avoid the legitimate election laws of this country.*

. . . .

We will talk about this issue later, but it is also clear that Snowe-Jeffords, under the constitutional test established in Buckley v. Valeo, is constitutional. There are only two requirements that have to be met: One, that there be compelling State interest under Buckley. *The Court has already held that what we are doing in these sham issue ads and with soft money is a compelling State interest because of the need to avoid corruption or, more importantly, in this case, the appearance of corruption.*" 147 CONG. REC. S2636 (Mar. 21, 2001). (Int. App. 17a-18a).

Statement of Sen. FEINGOLD:

"I believe this is an extremely valuable addition to the bill. It is the second big loophole in the system. No. 1 is the soft money loophole. No. 2 is the phony issue ads. . . .

. . . .

Snowe-Jeffords gets at the heart of the issue ad loophole. Right now wealthy interests are abusing this loophole at a record pace. They are flouting the spirit of the law, there is no question about it. They advocate for the election or defeat of a candidate, even though they don't say those 'magic words,' such as 'vote for,' 'vote against,' 'elect' or 'defeat.' These ads might side-step the law, Mr. President, but they certainly don't fool the public. . . .

. . . .

. . . The magic words test is completely helpless to stem the tide of sham issue ads, ads from the parties, ads from unions or corporations, or **ads from outside groups**

that are acting on behalf of those unions or corporations. We need to close the loophole, and Snowe-Jeffords does just that.

Here is how **Snowe-Jeffords navigates the difficult** political and **constitutional terrain** of this debate. **Here I am talking about the original Snowe-Jeffords provision, before adoption of the Wellstone amendment.** The first thing that the provision does is define a new category of communications in the law – we call them electioneering communications. . . .

The original Snowe-Jeffords provides that **for-profit corporations** and labor unions cannot make electioneering communications using their treasury funds. If they want to run TV ads mentioning candidates close to the election, they must use voluntary contributions to their political action committees. We believe that this approach will withstand constitutional scrutiny, because corporations and unions have long been barred from spending money directly on Federal elections.

. . . .

We are merely saying through this provision that that **actual public support**, shown by voluntary contributions to a PAC, **must be present** when corporations and unions want to run ads mentioning candidates near in time to an election.

The Snowe-Jeffords provision goes on to permit spending on these kinds of ads by non-profit corporations that are registered as 501(c)(4) advocacy groups, by 527 organizations, and by other unincorporated groups and individuals. **But it requires disclosure** of the spending and of the large donors whose funds are used to place the ads once the total spending of the group on these 'electioneering communications' reaches $10,000.

. . . .

Mr. President, **I believe that these disclosure provisions will pass constitutional muster**. The Buckley case, it should be remembered, rejected limits on independent expenditures but upheld the requirement that the expenditures be disclosed. Rules that merely require disclosure are less vulnerable to constitutional attack than outright prohibitions of certain speech. The information provided by these disclosure statements will help the public find out who is behind particular candidates. **This disclosure can help prevent the appearance of corruption that can come from a group secretly spending large amounts of money in support of a candidate.**

. . . .

The incorporation of the Snowe-Jeffords amendment into the McCain-Feingold Bill is a well-reasoned attempt to define electioneering in a more realistic manner **while remaining faithful to First Amendment** vagueness and **overbreadth concerns**. . . . While no one can predict with certainty how the courts will finally rule if any of the these provisions are challenged in court, we believe that the McCain-Feingold Bill, as current drafted, is consistent with First Amendment jurisprudence.

. . . .

It is important to note that Snowe-Jeffords contains provisions designed to prevent the laundering of corporate and union money through non-profits. Groups that wish to engage in this

particular kind of advocacy must ensure that only the contributions of individual donors are used for the expenditures.

. . . .

I have discussed here the original Snowe-Jeffords provision. The Wellstone amendment, in effect, **broadens that provision** to cover ads run by corporations and unions. **I voted against adding that amendment. I thought and still think that it makes Snowe-Jeffords more susceptible to a constitutional challenge, but it passed when many Senators who oppose the bill and the Snowe-Jeffords provision voted for it.** In any event, the Wellstone amendment was written to be severable from the remainder of the Snowe-Jeffords provision. That gives even more significance to the vote we will have today on severability. But if we win that vote, Snowe-Jeffords will survive even if the Wellstone amendment is held to be unconstitutional."

148 CONG. REC. S3071-73 (Mar. 29, 2001). (Int. App. 14a).

Statement of Sen. FEINGOLD:

"Let me talk for a moment how the Snowe-Jeffords amendment navigates the difficult political and **constitutional shoals** that face us in this debate.

The first thing the amendment does is more clearly define a category of communications in the law. We call them electioneering communications.

. . . .

The Snowe-Jeffords amendment provides that **for-profit corporations** and labor unions **cannot make electioneering communications using their treasury funds.** If they want to run TV ads mentioning candidates close to the election, they must use voluntary contributions to their political action committees. *We firmly believe that this approach will withstand constitutional scrutiny because corporations and unions have for a very long time been barred from spending money directly on Federal elections.*

The Senator from Kentucky suggested we lack case law for these propositions, but the Supreme Court upheld the ban on corporate spending in the Austin v. Michigan Chamber of Commerce case. Mr. President, it is noted that a Michigan regulation that prohibited corporations from making independent expenditures from treasury funds prevented 'corruption in the public arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' According to the Court, the Michigan regulation 'ensured that the expenditures reflect actual public support for the political ideas espoused by the corporations.'

We are merely saying through this amendment that actual public support, shown by voluntary contributions to a PAC, must be present when corporations and unions want to run ads mentioning candidates near in time to an election.

The Snowe-Jeffords amendment goes on to permit spending on these kinds of ads by nonprofit corporations, if they are registered as 501(c)(4) advocacy groups, and other unincorporated groups and individuals. **The rules about corporations and unions do not apply in the same way to these groups, but the amendment,** but it **makes one requirement.** It requires disclosure of the groups' large donors whose funds are used to place the ads once the total spending of the group on the electioneering communications reaches $10,000. It only applies if the total spending over a total amount of $10,000.

. . . .

Mr. President, it is also important to note that **the Snowe-Jeffords amendment contains provisions designed to prevent the laundering of corporate and union money through nonprofits.** Groups that wish to engage in this particular kind of advocacy must ensure that **only the contributions of individual donors are used for the expenditures.**

Because the prohibition in the Snowe-Jeffords amendment is limited to unions and corporations spending money from their treasuries on these kinds of ads, many of the concerns that opponents of McCain-Feingold voiced about the effect of the bill on speech by citizens groups are eliminated. Keep that in mind. One of the things people claimed was **the real problem of McCain-Feingold** – there has been sort of a shifting bottom line of what the real problem is – but that portion **has been modified in Snowe-Jeffords.**

Senators who oppose this amendment must be willing to stand on two positions now that I think are both unsupportable. First, Mr. President, those who still oppose McCain-Feingold, if it is amended by Snowe-Jeffords, must defend the rights of unions and corporations using treasury money – **not citizens groups like the**

National Right to Life Committee or the Christian Coalition or the Sierra Club – to run essentially campaign advertisements that dodge the Federal election laws by not using the magic words 'vote for;' or 'vote against' or to finance those ads through other groups. So that is the conclusion: Corporations and unions, apparently, should just be allowed to do this freely, despite the almost unanimous complaints by Members of the Senate with regard to this question.

Secondly, those who are still holding out, even though they represent a minority of the Senate, in terms of supporting McCain-Feingold as it will be amended, argue that the public is not entitled to know, **in the case of advocacy groups that run these ads close to an election,** what the identities of these people are. They say that they should not be known to those who are about to vote. Many opponents of McCain-Feingold have trumpeted the virtues of full disclosure and say that is what we need – disclosure; not McCain-Feingold. I have, at times, doubted how serious they were about disclosure because they would never acknowledge the **important advances our bill provides with regard to disclosure."**

144 CONG. REC. S984-86 (Feb. 25, 1998). (Int. App. 15a-16a).

Statement of Sen. FEINSTEIN:

"Campaigns simply cost too much and it is long past time that Congress does something about it.

I believe very strongly that this will be the final real opportunity this millennium to make significant structural reforms to our campaign finance system. **Two of the**

fundamental changes that I believe must be made are a complete ban on soft money contributions to political parties and **making independent campaign ads subject to contribution limits** and disclosure requirements as are a candidate's campaign ads.

While I have a great deal of respect for the persistence the Senators from Arizona and Wisconsin have demonstrated in pushing the Senate to act on campaign finance reform, I am concerned that the underlying bill, S. 1953, is too narrow to constitute a real reform of the campaign finance system. *Banning soft money without addressing issue advocacy will simply redirect the flow of undisclosed money in campaigns. Instead of giving soft money to political parties, the same dollars will be turned into 'independent' ads.*

The issues of soft money ban and independent advertisements go hand in hand and one cannot be addressed without the other.

. . . .

The ability of corporations, unions, and wealthy individuals to give unlimited amounts of soft money to political parties is the largest single loophole in the current campaign finance structure. The lack of restrictions on soft money **enables anonymous individuals and anonymous organizations to play a major role in campaigns**. **They can hit hard** and no one knows from where the hit is coming. **The form that soft money is increasingly taking is negative, attack ads that distort, mislead, and misrepresent a candidates position on issues. These ads have become the scourge of the electoral process.**

. . . .

At some point this escalation of campaign spending has got to stop. We simply cannot continue down this path. A complete ban on soft money contributions to political parties is the first and most basic way to reduce the amount of money in our campaigns.

. . . .

That brings me to the other disturbing trend in the American political system: the rise of issue advocacy. *This campaign loophole allows unions, corporations, and wealthy individuals to influence elections without being subject to disclosure or expenditure restrictions.*

During last year's debate, I mentioned a study released by the Annenberg Public Policy Center that estimated that during the 1995-96 election cycle independent groups spent between $135 and $150 million on issue advocacy.

The Center has done a similar study for the 1997-98 cycle and **the result is quite disturbing. They estimate that the amount spent on issue advocacy more than doubled to between $275 million and $340 million.**

These ads do not use the so-called 'magic words" that the Supreme Court identified as express advocacy and, therefore, are not subject to FEC regulation. The Annenberg study found, however, that 53.4 percent of the issue ads mentioned a candidate up for election.

The Center found another unfortunate twist to issue advocacy. Prior to September 1, 1998, that is in the first 22 months of the election cycle, only 35.3 percent of issue ads mentioned a candidate and 81.3 percent of the ads referred to a piece of legislation or a regulatory issue.

After September 1, 1998, during the last 2 months of the campaign, a dramatic shift occurred. The proportion of ads naming specific candidates rose to 86.3 percent and those mentioning legislation fell to 21.6 percent.

A similar shift can be seen in terms of attack ads. Prior to September 1, 33.7 percent of all ads were attack oriented. After September 1, over half were.

These findings clearly demonstrate that **as election day gets closer, issue ads become more candidate oriented and more negative. This kind of unregulated attack advertisements are poisoning the process and driving voters away from the polls."**

145 Cong. Rec. S12,661-62 (Oct. 15, 1999). (Int. App. 18a-19a).

Statement of Sen. GLENN:

"It is beyond question that raising soft money and broadcasting issue ads are not, in themselves, unlawful. The evidence suggests that much of what ***the parties and candidates did*** *during the 1996 elections was within the letter of the law. But no one can seriously argue that it is consistent with the spirit of the campaign finance laws for* ***parties to accept contributions of hundreds of thousands – even millions – of dollars****, or for corporations, unions and others to air candidate attack ads without being required to meet any of the federal election law requirements for contribution limits and public disclosure.* The evidence indicates that the soft-money loophole is

fueling many of the campaign abuses investigated by the Committee. **It is precisely because parties are allowed to collect large, individual soft-money donations** that fundraisers are tempted to cultivate big donors by, for example, providing them and their guests with unusual access to public officials. In 1996, **the soft-money loophole provided the funds both parties used** to pay for televised ads. **Soft money also supplied the funds parties used** to make contributions to tax-exempt groups, which in turn used the funds to pay for election-related activities. The Minority Report details, in several instances, how **the Republican National Committee deliberately channeled funds** from party coffers and Republican donors to **ostensibly 'independent'** groups which then used the money to conduct 'issue advocacy' efforts on behalf of Republican candidates.

Much was made the other day on the floor about the same thing happening on the Democratic side. That doesn't mean either one was excusable or right. But it happened, and it should not.

Together, the soft-money and issue-advocacy loopholes have eviscerated the contribution limits and disclosure requirements in federal election laws and caused a loss of public confidence in the integrity of our campaign finance system. By inviting corruption of the electoral process, they threaten our democracy. If these and other systemic problems are not solved, the abuses witnessed by the American people in 1996 will be repeated in future election cycles.

. . . .

The Committee's investigation also showed that the legal distinction between 'issue ads' and 'candidate ads' has proved to be largely meaningless. The result has been that *millions of dollars, which otherwise would have been kept out of the election process, were infused into campaigns obliquely, surreptitiously, and possibly at times illegally.*

The issue of **soft money abuses is inevitably tied to the question of how access to political figures is obtained through large contributions of soft money.** It is also tied to the question of how tax-exempt organizations have been used to hide the identities of soft money donors. A system that permits large contributions to be made for partisan purposes, without public disclosure, invites subversion of the intent of our election law limitations.

Despite a highly partisan investigation, the Committee **has built a record of campaign fundraising abuses by both Democrats and Republicans.** This record will hopefully be useful to the Federal Election Commission, the Internal Revenue Service and to the Department of Justice as they investigate the 1996 campaign. Most importantly, the Committee's investigation should spur much-needed reform of the campaign finance laws and strengthening of the Federal Election Commission. Congress should provide the Federal Election Commission with the necessary resources to significantly enhance its investigative and enforcement staff. Ultimately, the most important lesson the Committee learned is that the abuses uncovered are part of a systemic problem, and that the system that encourages and permits these abuses must be reformed [if] not now, as a result of the legislative votes that we have had the last couple of days, sometime, and hopefully in the very near future.

The McCain-Feingold legislation that we are considering here today goes a long way to address these abuses. The bill rids the system of soft money, and brings 'issue advertising' funded by corporate and union interests within the campaign finance system. . . .

. . . .

The ready availability soft money combined with **the national party's ability to air so called 'issue ads' also resulted in an explosion of advertising which clearly benefited both party's Presidential candidates.** This apparently legal activity will be halted if we simply act to get rid of the soft money that is raised to pay for these ads."

144 CONG. REC. S1048-49 (Feb. 26, 1998). (Int. App. 20a-21a).

Statement of Sen. JEFFORDS:

"I can just imagine a candidate, and this happens now, I am sure, **when they think they are running their campaign, they had it all organized** and they are watching carefully the amount of money their opponent has, **and then they wake up one morning thinking they are in fine shape and every channel they turn on on the television has this ad attacking them at the last moment, the last couple of weeks before the election,** and they don't know who it is coming from or what to do about it; they were not aware of it.

. . . .

That is the real world we are faced with. It happened last time. It happened to the tune of $135

million. The least we could do, the very least, is to say at least you ought to know it is coming, first; and No. 2, where it is coming from **so you have an idea when you get this last-minute flurry of advertising you are ready to do the best you can to protect yourself against it.**

. . . .

. . . The last few election cycles have shown the **spending has grown astronomically** in two areas that cause me great concern: First, issue ads that have turned into blatant electioneering; second, the unfettered spending by corporations and unions to influence the outcomes of elections.

As an example of how this spending has grown, a House Member from Michigan in 1996 faced nearly $2 million in advertisements alone before the fall campaigning season had begun. **Campaigning really starts early and then there is a big boost at the end. Early on you want to knock the candidate out before he has a chance to get on the scene, and at the end it is because you know a large percentage of the people who vote really don't pay much attention until the last couple of weeks.** The Snowe-Jeffords amendment addresses these areas in a reasonable, equitable, and, last but not least, constitutional way.

Mr. President, **citizens across this Nation have grown weary of the tenor of campaigns in recent years.** This disappointment is reflected in low voter participation and the diminished role of individuals in electing their representatives. Increasing the information available to the electorate will help return the power of this democratic aspect to the people who should have it – the voters. **Expanded disclosure will bring daylight to this process.** Increased disclosure will rid corruption; more disclosure will protect the public and the candidates.

. . . .

The second part of our amendment considers an area Congress has long had a solid record on: imposing more strenuous spending restrictions on corporations and labor unions. Remember, under the law, these are not given the same freedom of speech rights that individuals are, and rightfully so. *Corporations have been banned from electioneering since 1907; unions, since 1947. As the Supreme Court pointed out in United States v. UAW, Congress banned corporate and union contributions in order to 'avoid the deleterious influences on Federal elections resulting from the use of money by those who exercise control over large aggregations of capital.'*

Our amendment would ban corporations and unions from using General Treasury funds to fund electioneering communications in the last 60 days of the general election and the last 30 days before a primary. They still have the right to foster and to approve PACs, organizations for their employees or members of the union, to contribute to, in order that they individually, working together in the PACs, can influence the election process.

The Snowe amendment takes a reasoned, incremental and constitutional step to address the concerns many of my colleagues have voiced on campaign finance reform proposals.

. . . .

As the Court declared in Buckley, the governmental interests that justified disclosure of election-related spending are considerably broader and more powerful than those justifying prohibitions or restrictions on election-related spending.

Disclosure rules, the Court said, enhance the information available to the voting public. **Who can be against that? Disclosure rules, according to the Court, are 'the least restrictive means of curbing evils of campaign ignorance and corruption.'**"

144 CONG. REC. S974-75 (Feb. 25, 1998). (Int. App. 16a).

Statement of Sen. JEFFORDS:

"[T]he perseverance of Senators McCain and Feingold should be recognized as the reason we are here today. I would especially like to thank my colleague, Senator Snowe, for all her hard work and leadership in developing the language in this bill, **the so-called Snowe-Jeffords provisions,** which **is a full and fair solution to the proliferation of electioneering communications**.

. . . .

I am especially proud of the provisions in this legislation that reform the law concerning broadcast advertisements near an election that escape even minimal disclosure by not using the 'magic words.' These electioneering communications are cleverly and clearly seen by the electorate to be trying to influence their vote, ***but the true nature of the sponsors and funding for these advertisements remain cloaked in the veil of secrecy. The American public deserves to know who is trying to influence their vote, and the Snowe-Jeffords provisions will provide them this necessary information.***

. . . .

. . . In the 2000 elections approximately$629 million was spent on television advertising for federal elections. **This represents an all-time high.** Even looking at the amount spent just on Congressional races, **the $422 million spent in 2000 overwhelms the $177 million spent just 2 years earlier. That gives you an idea of what is occurring**.

. . . .

One of the most important findings of this comprehensive study of television advertising during the 2000 elections is that **the Snowe-Jeffords provisions are exceptionally well crafted and not too broad.**"

148 CONG. REC. S2117 (Mar. 20, 2002). (Int. App. 13a).

Statement of Sen. KERRY:

"I commend Senators Snowe, Jeffords and Chafee for their courage and for their serious effort to keep hope for real campaign finance reform alive. In the context of McCain-Feingold, it deserves our support. Their amendment, offered to replace the Lott-McConnell proposal, would, in essence, **prevent** both labor unions and **for-profit corporations from using their treasury funds** to run any broadcast ads which mention candidates within 30 days of a primary and within 60 days of a general election. The Snowe-Jeffords-Chafee amendment thereby places essentially the same limits on union and corporate spending as S. 25, the McCain-Feingold bill – but it takes the added step of specifically naming unions and corporations as the target of those limits.

It is important to note that the Snowe amendment would not restrict unions or corporate PACs from using 'hard money' – that is, funds regulated by federal campaign finance laws – to pay for such ads, but these PACs would be subject to all the reporting and contribution limits applying to all other PACs.

The ads which are the targets of this legislation are ads paid for with union and corporate soft money, and which clearly identify candidates and are aired close to the election, despite the phony claim that they are 'issue ads.' They are not now subject to federal election laws and their greatly expanded use was a major new development in the 1996 elections. The Annenberg Center for Public Policy estimates that all such soft money ads totaled at least $135 to $150 million. The political parties spent about $78 million of this amount for such soft money ads in the 1996 cycle. The AFL-CIO spent about $25 million. Big business groups, including the Coalition, the Coalition for Change, the Nuclear Energy Institute, the U.S. Chamber of Commerce and others, spent nearly $10 million dollars. *If we were simply to ban soft money contributions to the parties, the soft money expenditures made by Labor and corporations* ***would increase exponentially****.*

The Snowe Amendment also makes it unlawful for corporations or unions to launder their treasury funds by contributing to the costs of such ads produced by outside groups, including the so-called non-profits which took a much more active, and largely negative, role in the last election.

. . . .

In considering what this amendment can achieve, we should remember that the McCain-Feingold substitute

itself, with its soft money ban, **would prohibit the national party ads** for which payment is made with soft money (that is, contributions not subject to regulation under the federal campaign laws) **that attack candidates.** The recent special election to replace the retiring Congresswoman from the 13th District of New York featured $800,000 of such ads paid for by the Republican Party – and all of them were broadcast in the last ten days of that election."

144 Cong. Rec. S1039-40 (Feb. 26, 1998). (Int. App. 20a).

Statement of Sen. LIEBERMAN:

"The law says that corporations and unions cannot contribute from their treasuries for political purposes to affect elections. Some might say that was an abridgement, a violation of their free speech, but that has been upheld as constitutional.

But what has happened? *Soft money, issue ads, which are clearly ads for or against candidates have been used to evade those clearly constitutional restrictions on contributions to political campaigns. The current ability of parties and outside groups to disguise candidate-focused electioneering ads as issue ads undermines these longstanding and important Federal elections policies.*

A study by the Annenberg Public Policy Center found that in 1996, 29 groups spent as much as $150 million on what the groups called issue ads, but which the Annenberg study leaves little doubt were mostly aimed at electing or defeating particular candidates. Mr. President, $150 million, that is approximately one-third of the total spent for all ads by all candidates. That study found that over 85 percent of those so-called issue ads mentioned a candidate by name, almost 60 percent used a candidate's picture and, **worst of all, more than 40 percent of those were pure attack ads."**

144 CONG. REC. S973 (Feb. 25, 1998). (Int. App. 21a).

Statement of Sen. SNOWE:

"We can't just shut off the flow of soft money to parties and call it a day. *We also must close off the use of corporate and union treasury money used to fund ads influencing Federal elections.* That's the only way we can claim to have enacted truly balanced and fair reform.

. . . .

What we are talking about are broadcast advertisements that are influencing our Federal elections and, in virtually every instance, are designed to influence our Federal elections. Every focus group and every study group that has been conducted over the last few years proves this, and I'll detail those studies later. And yet, no disclosure is required and there are none of the funding source prohibitions that for decades have been placed on other forms of campaigning.

Why is this so? Because they don't contain the so-called 'magic words' like 'vote for candidate x' or 'vote against candidate x' that make a communication what is called 'express advocacy,' and therefore, subject to Federal law requiring disclosure and requiring that the ad be paid for with hard money.

These ads must be extraordinarily effective, **because their use has exploded within the last decade.** According to a 2001 report from the Annenberg Public Policy Center, which has been studying this trend almost since its inception in the 1996 election cycle, in the past three cycles we have seen spending on issue ads go from about $150 million in 1996, to about $340 million in 1998, to over $500 million in 2000. One hundred million of that was spent in the last 2 months alone. **And there is not one dime of disclosure required on any of it.**

It's time we closed this loophole. ***It's time to remove the cloak of anonymity.*** *Otherwise, we are saying that it really doesn't matter to the election process. That we should not know who is behind these types of commercials that are run 60 days before the election, 30 days before a primary, whose donors contribute more than $1,000.* ***We ought to have disclosure on these ads where there currently is no disclosure.*** *And that's what the Snowe-Jeffords provision in this bill does, in simple, straightforward and unambiguous terms.*

. . . .

And second, it prohibits the use of union or corporate treasury money to pay for these ads, in keeping with longstanding provisions of law. Corporations have been banned from direct involvement in campaigns since the Tillman Act of 1907. Unions were first addressed in the Smith-Connally Act of 1943 and the prohibition was finally made permanent in 1947 with the Taft-Hartley Act.

And these laws have stood because the Court has recognized – as recently as 1990 as this quote from Justice Marshall in the Austin versus Michigan Chamber of Commerce decision shows – 'the corrosive and distorting *effects of immense aggregations of wealth that are accumulated with the help of the corporate form, and that have little or no correlation to the public's support for the corporation's political ideas.'*

. . . .

The most important, bottom line components to this legislation are **disclosure**, and **a requirement that** these so-called issue ads that are really **campaign ads be funded from voluntary, individual contributions** just like any other campaign ad."

148 CONG. REC. S2135 (Mar. 20, 2002). (Int. App. 12a).

Statement of Sen. SNOWE:

"At the same time we address the soft money issue, I also think it is critical that we address ***the ever burgeoning segment*** *of electioneering popularly known as sham issue advertising. We do so in a way carefully constructed as to pass constitutional muster. I am speaking of advertisements influencing the Federal elections in this country but get off scot-free when it comes to any degree of disclosure or any degree of prohibitions normally associated with campaigning.*

Let there be no mistake. The record I intend to outline will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws.

. . . .

I have spoken of the **exploding phenomenon** of the so-called issue advertising in elections. **That phenomenon continues unchecked and will continue unchecked if we turn a blind eye** to reality."

147 CONG. REC. S2455 (Mar. 19, 2001). (Int. App. 14a).

Statement of Rep. BORSKI:

"Soft money is used to finance the second loophole in campaign finance law: sham issue advertisements. This loophole allows special interests to spend huge sums of money on campaign ads advocating either the defeat or election of a candidate. As long as these ads do not use the magic words 'vote for' or 'vote against' they are deemed 'issue advocacy' under current law and therefore not subject to campaign spending limits or disclosure requirements.

During the 1996 elections, the television and radio airwaves were flooded with these sham issue ads – many of which were negative attack ads. Americans who see or here [sic] these ads have no idea who pays for them because no disclosure is required. **They drown out the voice of the average American citizen, and even sometimes of the candidates themselves. Without reform, we can certain expect a huge increase in these sham issue ads.**

. . . .

In an effort to ban campaign advertisements that masquerade is [sic] *'issue advocacy,' Shays-Meehan tightens the definition of 'express advocacy' communications. Under the bill, any ad that is clearly designed to influence an election is deemed 'express advocacy' and must therefore* *abide by federal contribution and expenditure limits and disclosure requirements. . . .*

. . . .

The Meehan-Shays proposal will not cure our campaign finance system of all its evils – and **I certainly support more far reaching restrictions on campaign** contributions and **expenditures**. However, **the bill will take a modest but significant first step** toward restoring integrity in our political system. **It will limit the influence of wealthy special interests and help to restore the voice of average American citizens in our political process.** In short, enactment of this legislation is essential to the survival of American democracy."

145 CONG. REC. E1888 (Sept. 15, 1999). (Int. App. 19a).

Statement of Rep. KLECZKA:

"H.R. 2356, the Bipartisan Campaign Reform Act of 2001, is necessary if we are to remove the undue influence of soft money on our political process and the unregulated issue advertisements **that inundate our airwaves during each election season.**

. . . .

An ***equally troubling*** *aspect of today's campaign system* ***is the number of issue advertisements broadcast*** *on the television and radio. Although these ads technically adhere to federal campaign regulations, they violate the spirit of the law."*

148 CONG. REC. H410 (Feb. 13, 2002). (Int. App. 17a).

Statement of Rep. NADLER:

"Money does provide the ways and means for getting a candidate's message out, but **we should not live in a society where those with the most dollars can monopolize the debate**. We should not live in a society **where, in the name of free speech, one side has a megaphone with which to drown out everyone else.**

For those who are concerned about the proposals we have here before us, the onus is really on them, I think, to explain either why the current system is consistent with a healthy democracy, or else what other steps they would take to rectify the situation. Should we make greater demands on those who have been given control over the scarce public airwaves? Should we provide public financing to level the playing field? **Should we reconsider the Supreme Court's unfortunate decision in 1886 that corporations are persons under the meaning of the 14th amendment, from which I think a lot of the problems in our system flow?** What restrictions can we place on the use of money consistent with the first amendment to preserve the survival of our democracy?

. . . .

I must say parenthetically that I do not agree with the Supreme Court that the only justification for campaign finance regulation is to eliminate corruption or the appearance of corruption. It is also to preserve the ability of different voices to be heard so that the people, and not just those with huge amounts of money, can, in fact, be sovereign in our system.

. . . .

I just want to explore something you said a moment ago when in referring back to the question – to the ads that Mr. Meehan had talked about, *you said that of course incumbent politicians, many of them, some of them don't want to be criticized, so therefore there is an attempt to restrict the speech.*

But isn't it the case that really this has nothing to do with criticism? This bill is not saying you can't criticize the Congressman, or whatever; the bill is saying if you want to criticize the Congressman, one, do it with hard money and subject to the other – basically with hard money disclosure; and two, by implication, be honest about it and call him up and tell him to stop beating his wife, say don't vote for him, although that is not the requirement. *Isn't the issue really not that you can't criticize, but that if you want to criticize you can't do it with multimillion-dollar contributions?"*

Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Congress 16-17, 151, 1st Sess. (2001). (Int. App. 17a).

Testimony of Donald J. SIMON:

"I appreciate the opportunity to testify on behalf of Common Cause regarding the role of so-called 'issue advocacy' in the 1996 campaign, and how advertisements run under the guise of 'issue ads' were used as a means to evade the federal campaign finance laws. Common Cause strongly believes there is a need for Congress to enact legislation to address this problem and to close what is emerging as a major loophole in the system of federal campaign finance regulation.

This matter raises a question of fundamental importance to the continued viability of the Federal Election Campaign Act (FECA), as well as to the broader goal of regulating money in the political process: whether the Congress will permit the creation of a loophole in the FECA through which unlimited, unregulated and undisclosed money can flow into federal campaigns, thereby subverting the FECA's purpose of protecting the integrity of the electoral process from corruption and the appearance of corruption – interests which the Supreme Court found to serve compelling public purposes in Buckley v. Valeo, 424 U.S. 1 (1976).

The mechanism of this subversion is electioneering for candidates that takes place in the form of so-called 'issue advocacy.' The purpose of the FECA is to regulate money spent to advocate the election or defeat of candidates in federal campaigns. The FECA is not intended to regulate or limit money spent on the discussion of public issues.

. . . .

These are not speculative or hypothetical fears – such evasion occurred in the 1996 elections, involving tens of millions of dollars spent outside the scope of the FECA, simply because the ads were carefully crafted to avoid the use of 'magic words.' The Annenberg Public Policy Center, in a study released earlier this week, estimated that the two political parties and other groups spent $135 to $150 million on campaign ads in the guise of 'issue advocacy' during the 1996 campaign. *Bluntly speaking, this spending represented a means of massive cheating on the federal campaign finance laws.*

But even more is at stake in this matter than the evasion of the Nation's most fundamental anti-corruption laws. **The rise of so-called issue advocacy as a means to evade the campaign finance laws is changing the basic nature of our political campaigns.** It is making our political discourse less subject to public accountability.

Indeed, **candidates are losing the ability to control their own campaigns.** As Paul Taylor notes in his introduction to the Annenberg report:

'This [spending on issue advocacy] is unprecedented, and represents an important change in the culture of campaigns. **Candidates now share the election megaphone with a cacophony of other voices.** . . . To the naked eye, these issue advocacy ads are often indistinguishable from ads run by candidates. But in a number of key respects, they are different. Unlike candidates, issue advocacy groups face no contribution limits or disclosure requirements. Nor can they be held accountable by the voters on election day.'"

The First Amendment and Restrictions on Issue Advocacy: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 140-43, 1st Sess. (1997) (statement of Donald J. Simon, Executive Vice President and General Counsel, Common Cause). (Int. App. 27a).

BIPARTISAN CAMPAIGN REFORM ACT OF 2001 K

2001 Senate Vote No. 48
107th Congress
1st Session
03/26/2001

Amendment Sponsor: Senator Paul Wellstone D-MN

DESCRIPTION: The Senate agreed to Wellstone Amendment No. 145, to apply the prohibition on electioneering communications to targeted communications of certain tax-exempt organizations.

Tally 51-46
Democrats: 27-21
Republicans: 24-25

. . . .

VOTES BY STATE:

ARIZONA:

1 McCain (R)	**NAY**

. . . .

CALIFORNIA:

1 Feinstein (D)	NAY

. . . .

CONNECTICUT:

1 Dodd (D)	NAY
2 Lieberman (D)	NAY

. . . .

MAINE:	
1 Snowe (R)	**NAY**
2 Collins (R)	NAY
. . . .	
MASSACHUSETTS:	
1 Kennedy (D)	AYE
2 Kerry (D)	AYE
. . . .	
NORTH CAROLINA:	
. . . .	
2 Edwards (D)	NAY
NORTH DAKOTA:	
. . . .	
2 Dorgan (D)	AYE
. . . .	
VERMONT:	
. . . .	
2 Jeffords (R)	**NAY**
. . . .	
WISCONSIN:	
. . . .	
2 Feingold (D)	**NAY**

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02-1674 (48)

Supreme Court, U.S.
FILED

AUG 20 2003

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No. 02-1676 and consolidated cases

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *et al.*

Appellants

vs.

SENATOR MITCH MCCONNELL, *et al.*

Appellees.

On Appeal from the United States
District Court for the District of Columbia

Joint Reply Brief on the Merits of Appellees Emily Echols and Barret Austin O'Brock, *et al.* (FINAL VERSION)

JAMES BOPP, JR.
RICHARD E. COLESON
THOMAS J. MARZEN
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
(812) 232-2434
Attorneys for Appellee Barrett Austin O'Brock

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
STUART J. ROTH
COLBY M. MAY
JOEL H. THORNTON
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue NE
Washington, DC 20002-5703
(202) 546-8890
Attorneys for Appellees Emily Echols, et al.

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GLOSSARY

BCRA – Bipartisan Campaign Reform Act of 2002
Op. Br. – Opening Brief
FEC Br. – FEC Merits Brief
JA – Joint Appendix
JS – Jurisdictional Statement

SUMMARY OF REPLY ARGUMENT

This Court has not abandoned its teaching in *Buckley v. Valeo*, 424 U.S. 1 (1976) that *political contributions* embody the exercise of fundamental rights at the core of the First Amendment. 424 U.S. at 14 ("contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities"); *id.*, 424 U.S. at 22 ("The Act's contribution and expenditure limitations also impinge on protected associational freedoms"). The First Amendment dimension of contributions is obvious:

> a decision to contribute money to a campaign is a matter of First Amendment concern . . . . Through contributions the contributor associates himself with the candidate's cause, helps the candidate communicate a political message with which the contributor agrees, and helps the candidate win by attracting the votes of similarly minded voters.

Nixon v. Shrink Missouri Gov. PAC, 528 U.S. 377, 400 (2000) (BREYER, J., joined by GINSBURG, J., concurring).

On appeal, then, unless *Buckley* is to be overturned, the Government is bound to this Court's teaching in *Buckley* that *political contributions* have an important constitutional stature. Thus, it fell to the Government to show that the district court erred in concluding that Section 318 failed constitutional scrutiny under *Buckley*. In its two paragraph argument against the judgment below, however, the Government omitted even an express contention of error by the district court. *See* FEC Br. at 133-34. The Government offered no legally sufficient reason to reverse the judgment below.

The Government did not dispute that the complete ban on political donations by minors is subject to the exacting scrutiny described by *Buckley*. Nor did the Government identify any error in the manner of the district court's application of *Buckley* scrutiny to Section 318.[1] Instead, the Government offers only two meritless arguments in its attack on the judgment below.

REPLY ARGUMENT

I. BECAUSE SECTION 318 DOES NOT SURVIVE SCRUTINY UNDER *BUCKLEY V. VALEO*, IT IS UNNECESSARY TO DECIDE WHETHER IT IS SUBJECT TO STRICT SCRUTINY.

The Government opens its defense of Section 318 by arguing against the application of strict scrutiny to Section 318. The Government urges that, in light of this Court's

decision in *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), strict scrutiny is not applicable to the ban on political contributions by minors. *See* FEC Br. at 133-34.[2] That argument is a distraction because even under the more lenient scrutiny called for by *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), Section 318 is unconstitutional. *See* Op. Br. at 3-4 (discussing holding).

The Government's argument responds to a *footnote* in the Opening Brief for these Appellees. *See* Op. Br. at 34 n.38. There, these minor Appellees noted that strict scrutiny is apt in the analysis of Section 318 because that section completely prohibits political campaign contributions by minors. *Id.* Key differences between the corporation contributions ban sustained in *Beaumont* and the complete ban on political contributions by minors imposed by Section 318, *see* Op. Br. at 37-39, undoubtedly justify the application of strict scrutiny.

The Government leaves unmentioned the fact that the footnote in question is appended to an explanation of the harmony between *Beaumont* and the judgment below. *See* Op. Br. at 34, Argument I(D). Remarkably, while attacking the call for application of strict scrutiny, the Government failed to respond to, or rebut, the meticulous showing by these Appellees that the judgment below rested on the sound application of *Buckley* scrutiny. *See*

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[1] Invoking the literary device of the hounds that did not bark in the night, *see* SIR ARTHUR CONAN DOYLE, SILVER BLAZE, in THE ADVENTURES AND MEMOIRS OF SHERLOCK HOLMES 272 (Modern Library 2001), this Court and individual Justices have occasionally considered the meaning to be drawn from unexpected silences. *See INS v. St. Cyr*, 533 U.S. 289, 320 n.44 (2001); *Martinez v. Court of Appeal*, 528 U.S. 152, 159 and n.6 (2000); *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 588 n.20 (1982) (Stevens, J., joined by Blackmun, J.) (dissenting); *Jenkins v. Anderson*, 447 U.S. 231, 244 (1980) (Stevens, J.) (concurring in the judgment); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, (1980) (Rehnquist, J.) (dissenting). The Government is curiously silent about the choice of standards below and their application.

[2] It is worth noting, however, that the Government characterizes Section 318 as a *ban*, not a *limitation*. *See* FEC Br. at 134 ("the fact that BCRA § 318 bans rather than limits contributions by minors . . . is relevant to the First Amendment analysis").

Op. Br. at 19-34. Because, as the district court correctly concluded, Section 318 does not survive *Buckley* scrutiny, this Court need not decide whether strict scrutiny applies to Section 318.[3]

II. THE GOVERNMENT FAILED TO SHOW THAT SECTION 318 IS CLOSELY DRAWN IN SUPPORT OF A SUFFICIENTLY IMPORTANT GOVERNMENT PURPOSE.

The Government asserts that Section 318 is "a valid means of preventing circumvention" of contribution limits by adults. *See* FEC Br. at 134. The Government's "validity" standard is inconsistent with the First Amendment values at stake here and does not comport with this Court's application of a "rigorous standard of review," 424 U.S. at 29, in *Buckley*.

Instead of mere "validity," *Buckley* calls for an examination of the interest to be served and of the means chosen to serve the interest. Only sufficiently important purposes suffice to sustain limitations on contributions. 424 U.S. at 25. Moreover, there must be a sufficiently close drawing of the means to the end. *Id.*

The judgment below – that Section 318 violates the Constitution – rests on the conclusions of law separately reached by Judges Henderson and Kollar-Kotelly that the challenged provision did not survive scrutiny under *Buckley*.[4] Rather than showing how the district court erred in its choice of the applicable standards or its application of them, the Government chooses here only to repeat its highly abbreviated, "children cannot vote so they do not count" argument. FEC Br. at 134.

A. THE GOVERNMENT FAILED TO ESTABLISH AN EVIDENTIARY BASIS SHOWING A SUFFICIENTLY IMPORTANT GOVERNMENT INTEREST IS TO BE SERVED BY SECTION 318.

The Government asserts that Section 318 is a "valid means of preventing circumvention of the FECA/BCRA contribution limits by adults who might otherwise use minors as surrogate contributors." *See* FEC Br. at 134.

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[3] This Court need not decide the level of scrutiny applicable to Section 318 unless it concludes, first, that the district court erred in concluding that Section 318 fails scrutiny under *Buckley*.

[4] See Op. Br. at 3-4; Supp. App. 462sa (Henderson, J.) ("the government has not even demonstrated under *Buckley*'s contribution-to-candidate standard of review that section 318 serves a 'sufficiently important interest' by means 'closely drawn to avoid unnecessary abridgement of [First Amendment] freedoms'"); Supp. App. 1009sa (Kollar-Kotelly, J.) ("even if exacting scrutiny were applied to the present situation, Defendants have failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important government interest"). Judge Leon concurred in the legal conclusions that formed the basis of the view expressed by Judges Henderson and Kollar-Kotelly that Section 318 failed scrutiny under *Buckley*. Supp. App. 1180sa.

Mere conjecture or speculation about circumvention of contribution limitations cannot justify the wholesale denial of constitutional rights of minors. All three judges below concluded that the Government had failed to carry its evidentiary burden on this question:

- *Judge Henderson* concluded that "[t]he government's evidence of corruption-by-conduit . . . is remarkably thin . . . ." Supp. App. 463sa.
- *Judge Kollar-Kotelly* found that "the evidence presented is insufficient to support government action that abridges constitutional freedoms," Supp. App. 1010sa, and that "[t]he Government's failure" to proffer "a more robust record establishing that such corruption exists" "dooms their argument and Section 318 of BCRA," Supp. App. 1011sa.
- *Judge Leon* concluded that, "[i]f there were in fact more substantial evidence of such circumvention . . . then restrictions, which are somewhat more onerous on children than on adults given a child's lack of independence, may be justifiable based on a compelling government interest. *That is not the case here.*" Supp. App. 1180sa (emphasis added).

Absent a quantum of evidence sufficient to support the asserted justification for Section 318, this new federal ban on political contributions only serves the speculations of Congress. *Cf. Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508-09 (1969) ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). Conjecture and speculation, however, do not equate with the kind of

substantive evidence necessary to sustain a burden on First Amendment rights. This Court has explained: "We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . ." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000) (SOUTER, J., joined by REHNQUIST, C. J., and STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ.).

The district court's conclusion regarding the Government's weak evidentiary showing to establish the relevant governmental interest echoes this Court's view in *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985). There, this Court explained:

> the FEC attempted to show actual corruption or the appearance of corruption by offering evidence of high-level appointments in the Reagan administration of persons connected with the PACs and newspaper articles and polls purportedly showing a public perception of corruption. . . . A tendency to demonstrate distrust of PACs is not sufficient. We think the District Court's finding that 'the evidence supporting an adjudicative finding of corruption or its appearance is evanescent,' was clearly within its discretion, and we will not disturb it here.

470 U.S. at 499-500 (REHNQUIST, J., joined by Burger, Ch. J., and Brennan, Blackmun, Powell, STEVENS, and O'CONNOR, JJ.) (citation omitted). The Government's "thin" evidence here was just as evanescent.

1. *Lack of Evidence Provided by the FEC to Congress.*

Senator McCain offered the only explanation for Section 318 in the floor debates of either the House or the Senate:

> we believe that wealthy individuals are easily circumventing contribution limits to both political candidates and parties by directing their children's contributions. Indeed, the FEC in 1998 notified Congress of its difficulties in enforcing the current provision. *Its legislative recommendations to Congress that year cited "substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors.*"[5]

The FEC denied, however, that it had ever "stated in its legislative recommendations that it had 'substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors.'"[6]

2. *Lack of Evidence in the Hands of the FEC.*

The FEC admitted below that it lacked relevant, probative evidence of corruption or the appearance of corruption resulting from contributions by minors to candidates or to committees of political parties. The *Echols* Appellees asked the FEC to admit as true that '[n]o

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[5] 148 Cong. Rec. S2145 (daily ed. March 20, 2002) (statement of Sen. McCain) (emphasis added).

[6] *See* JA 1756-57 (FEC Response to Request to Admit No. 20).

present member of Congress" or "other elected federal officer" had "engaged in any corrupt act as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties."[7] In response, the FEC stated that it had "made a reasonable inquiry into this request, and the information that is readily known or available to it is insufficient to enable the Commission to admit or deny the request."[8]

Not only did the FEC lack evidence of actual corruption, its lacked evidence of an appearance of such corruption. The *Echols* Appellees asked the FEC to admit that "[n]o present member of Congress or any other elected federal officer has an appearance of corruption as a result of contributions by minors or donations by minors to committees of political parties."[9] In response, the FEC again averred that it lacked sufficient information to allow it to admit or deny that fact statement.[10]

It would have been difficult, in any event, for the FEC to provide evidence probative of parental circumvention because the FEC never required the reporting of the ages of donors. *See* 11 C.F.R. 102.9(a)(1) (requiring committees to record name and address only of donors).

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[7] *See* JA 1762-63 (FEC Response to Request to Admit No. 41).

[8] *See* JA 1762-63 (FEC Response to Request to Admit No. 41).

[9] *See* JA 1763 (FEC Response to Request to Admit No. 42).

[10] *See JA* 1763 (FEC Response to Request to Admit No. 42).

3. *Lack of Grasp of "Corrupt Acts" or "Appearance of Corruption" by the FEC.*

The FEC admitted lacking a key prerequisite to the task of identifying and collecting evidence about corruption or the appearance of corruption resulting from political contributions by minors: an understanding of what constitutes corruption or the appearance of it. As noted, the *Echols* Appellees asked the FEC about evidence of corrupt acts or the appearance of corruption. In response, the FEC objected that the terms "any corrupt act" and "has an appearance of corruption" were vague.[11]

B. THE GOVERNMENT FAILED TO ESTABLISH AN EVIDENTIARY BASIS SHOWING THAT SECTION 318 WAS CLOSELY DRAWN.

Judge Henderson noted the ample reasons to conclude that Section 318 did not reflect such an exercise in careful tailoring that the ban on political contributions by minors might be described as "closely drawn." Supp. App. 466sa; *see also* Supp. App. 1180-81sa (opinion of Judge Leon) (adopting Judge Henderson's conclusion regarding lack of narrow tailoring). Here, the Government fails to rebut those points.

1. *Section 318 Prohibits Even Symbolic Political Contributions by Minors.*

These Appellees have shown the overreaching breadth of Section 318. *See* Op. Br. at 28-30, 45-47. As this Court taught in *Buckley*, 424 U.S. at 30, and as Judge Henderson noted below, "distinctions in degree become significant . . . when they can be said to amount to differences in kind." Supp. App. 464sa. *Cf. Shrink Missouri Gov. PAC*, 528 U.S. at 402 (BREYER, J., joined by GINSBURG, J.) (concurring) ("[i]n service of these objectives, the statute imposes restrictions of degree. *It does not deny the contributor the opportunity to associate with the candidate through a contribution*, though it limits a contribution's size") (emphasis added). The complete prohibition of political contributions by minors, however, reflects that kind of significant distinction in degree that amounts to a difference in kind. No mere *limitation* like the contributions ceiling affirmed in *Buckley*, Section 318 is a *ban*. FEC Br. at 134 ("BCRA § 318 bans rather than limits contributions by minors"). Nor is this ban comparable to the "limitation" sustained in *Beaumont*, for corporations remained at liberty to form PACs as a means of supporting candidates of their preference. 123 S. Ct. at 2203-04. Even nominal donations by minors, however, are banned by Section 318. Under a limitation scheme, even a severe one, the symbolic act of giving would have been preserved as a means for minors to express their association with a candidate or a committee of a political party:[12]

> A limitation . . . permits the symbolic expression of support evidenced by a contribution . . . .

Buckley, 424 U.S. at 21.

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[11] *See* JA 1762-63 (FEC Response to Request to Admit Nos. 41 and 42).

[12] Four States do just that. *See* Op. Br. at 32 (citing statutes).

2. *Section 318 Prohibits Political Contributions by Minors Regardless of the Source of Funds, Potential for Corruption, or the Circumstances of the Minors.*

This Court has construed the Constitution as requiring specificity when regulating in the area of activities protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("[p]recision . . . must be the touchstone"). By contrast, Section 318 bans *all* donations by *every* minor in *any* amount to *every* candidate for *any* federal office and to *every* committee of *any* political party. Section 318 reflects a careless approach to the crafting of a legislative response.

(a) Banning donations regardless of source

Section 318 is not limited to the donations of funds obtained from parents or guardians. The minors' uncontradicted evidence showed that they had funds from which they could make donations that were not attributable to parental conduit giving. *See* Op. Br. at 9 and n.13; *id.* at 10-11. No ready or apparent nexus exists between parental conduit contributions and donations minors make with money gotten by running a pet-sitting service, working as a church secretary, giving lessons in horsemanship, or by making and selling seasonal crafts. Despite the lack of a nexus, Section 318 bans *all* contributions from minors without regard to source. Such a prohibition is utterly disconnected from Congress's intention to address *parental* circumvention of donation limitations. Section 318 simply does not differentiate donations based on the source from which minors draw

their funds: employment, gift, devise, bequeath, or intentional parental circumvention.

(b) Banning de minimus donations

Section 318 bans donations that do present the risk of corruption or the appearance of corruption: donations like Jessica Mitchell's five dollar gift to a candidate,[13] or Barret O'Brock's twenty dollars to his Sunday School teacher when he ran for Congress.[14] If the ban on donations in such *de minimus* amounts is to be justified by the interest in preventing corruption or the appearance of it, the claim is impossible to justify in light of the FECA's tolerance of significantly larger donations from adults. There is simply no sensible explanation why nominal donations of five, ten or twenty dollars present too great risk of corruption when given by minors while the risk of corruption from the contributions by adults remains tolerable until donations exceed two thousand dollars in each election cycle. *See* FEC JS at 57a (BCRA § 307(a)).

(c) Banning Donations Regardless of the Circumstances of the Minors Affected

In a perfect world, children and their parents would enjoy continuous harmony and accord, including in the choice of candidates for elected office. Section 318 screens reality. Parents and children do not always agree on the merits of political candidates.[15] There is no principled justification for banning donations made by minors in disagreement with the political opinions and choices of parents.

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[13] *See* Op. Br. at 22 n.23.

[14] *See* Op. Br. at 10.

[15] *See* JA 833-34, Declaration of Zachary White, ¶ 19.

In a perfect world, the United States would be free from the dangers of international conflict. Section 318 utterly disrespects the self sacrifice and devotion of minors who choose to serve the common good as members of the Armed Forces while still in their minority. Title 10 U.S.C. § 505 (2002). The Government allows minors to serve as airmen, soldiers, Marines and sailors, putting at risk life and limb, but bars them from making political contributions from their meager military pay.

In a perfect world, no minor would be an orphan. But in the real world, Section 318 prohibits political contributions even by orphaned minors whose deceased parents simply cannot use their children as a conduit.

The Government's short-hand assertions regarding the legal status of minors also screens reality in important ways. The Government asserts, "[m]inors have historically been barred from voting, from entering into binding contracts, and from disposing of property." FEC Br. at 134.[16] To the contrary of the Government's view, the States take distinct and varied approaches to answering the questions related to what disabilities, if any, State law imposes on minors and when and under what circumstances. While an extended discussion is beyond

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[16] Curiously absent from the Government's argument, however, is any reference to supporting authority for its general propositions.

the range of pages permitted on reply, a few brief observations serve to fully undermine the Government's assertion.

First, while attaining majority at age eighteen undoubtedly bears social and personal significance to minors, the law of the Several States recognize that many minors become capable of managing their affairs before turning eighteen. The States in which the minor Appellees reside illustrate the broad variety of approaches under state law.[17] Second, despite the claim that minors traditionally have been barred from entering into contracts, laws across the Nation broadly evidence the willingness of the States to permit minors to enter into contractual arrangements in at least one discrete area: employment.[18] Yet, under Section 318, not even fully emancipated minors may make political contributions, not even from funds earned through lawful employment.

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[17] The Government's argument regarding the status of minors at law fails to reflect the variety of approaches taken amongst the States. For example, Alabama, Florida, Georgia and Louisiana – the States of residence of the minor Appellees – have enacted varying provisions regarding the age of majority and regarding the conditions under which a minor below the age of majority may be legally emancipated from the custody, care and control of their parents. *See* Ala. Code § 26-1-1(1) (2002); Ala. Code § 26-13-1(1)-(3) (2002); Ala. Code § 26-13-8 (2002); Fla. Stat. Ann. § 743.07(1) (2001); Fla. Stat. Ann. § 743.01 (2001); Fla. Stat. Ann. § 743.015(1), (7) (2001); Ga. Code Ann. § 39-1-1(a) (2002); La. Civ. Code Ann. art. 29 (2002); La. Civ. Code Ann. art. 385 (2002); La. Civ. Code Ann. art. 3993 (2002).

Moreover, the Government's contention regarding the traditional rule that minors lack capacity to contract fails to reflect the nuances and development of the law in this area. For example, minors may contract for the provision of necessaries and cannot avoid responsibility for payment for such necessaries except in limited circumstances. *See* Ga. Code Ann. § 13-3-20(a), (b) (2002).

3. *Section 318 Prohibits Political Contributions by Minors Even Though the FEC Never Sought a Ban on Contributions.*

There is no pretense of tailoring about the complete ban on political contributions by minors. By contrast, in its Annual Reports, the FEC recommended that Congress take a closely drawn approach to this issue. *See* Op. Br. at 6-7. The FEC variously suggested adopting statutory presumptions regarding donations from minors under the age of sixteen and the adoption of lower minimum ages for eligibility to make political contributions. *Id.*

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[18] Alabama, Florida, Georgia and Louisiana all permit minors to be employed, even at ages as young as 11, although work permits are required, and minors are subject to hour, school and type-of-work restrictions that vary according to age. *See* Code of Ala. § 25-8-33 (2002), *et seq.*; Fla. Stat. § 450.012 (2001), *et seq.*; Ga. Code Ann. § 39-2-1 (2002), *et seq.*; La. R.S. 23:161 (2002), *et seq.*

4. *Section 318 Prohibits Political Contributions by Minors Even Though A Prior FEC Regulation Insured that Donations by Minors were not Conduit Contributions from Parents or Guardians.*

Prior to the enactment of Section 318, the FEC enforced a regulation that insured that contributions from minors were not, in fact, conduit contributions from parents. *See* 11 CFR 110.1(i)(2) (2002 rev. ed.).[19] That regulation focused precisely on the likely means of conduit giving by parents. It required that donations by minors be made knowingly and voluntarily, from funds under the minor's exclusive control, and not from funds given for the purpose of funding such contributions.

The FEC closely drew its regulation to meet the relevant government interests. Congress ignored that model in drawing Section 318: it bears no sign of precision on the important issues of sources of funds, independence of judgment, and absence of conduit. In response, the Government avers that while Section 318 certainly is a ban, rather than a limitation, minors remain free to participate in the political process in other ways. *See* FEC Brief at 134. This Court has rejected the very approach the Government condones. *See Schneider v. State*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"); *see also* Supp. App. 466-67sa (rejecting Government's argument "[u]nder long-standing First Amendment principles") (citing cases).

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[19] The regulation, former 11 CFR 110.1(i)(2) (2002 rev. ed.), permitted contributions by minors so long as:

> (i) The decision to contribute is made knowingly and voluntarily by the minor child;
>
> (ii) The funds, goods, or services contributed are owned or controlled exclusively by the minor child, such as income earned by the child, the proceeds of a trust for which the child is the beneficiary, or a savings account opened and maintained exclusively in the child's name; and
>
> (iii) The contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or is not in any other way controlled by another individual.

CONCLUSION

The judgment of the District Court – holding Section 318 of the BCRA unconstitutional – should be affirmed.

Respectfully submitted,

JAMES BOPP, JR.
RICHARD E. COLESON
THOMAS J. MARZEN
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
(812) 232-2434
Attorneys for Appellee Barrett Austin O'Brock

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
STUART J. ROTH
COLBY M. MAY
JOEL H. THORNTON
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue NE
Washington, DC 20002-5703
(202) 546-8890
Attorneys for Appellee Emily Echols, et al.

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In The

Supreme Court of the United States

NATIONAL RIGHT TO LIFE COMMITTEE, INC. *et al.*,
Appellants/Cross-Appellees,
v.
FEDERAL ELECTION COMMISSION *et al.*,
Appellees/Cross-Appellants

On Appeal from the United States District Court
for the District of Columbia

Reply Brief of Appellants/Cross-Appellees National Right to Life Committee *et al.*

James Bopp, Jr., *Counsel of Record*
Richard E. Coleson
Thomas J. Marzen
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
Aug. 21, 2003 812/232-2434

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Corporate Disclosure Statement

As stated in the *Jurisdictional Statement*, none of the appellants has a parent corporation and no publicly held company owns ten percent or more of the stock of any of the appellants. Rule 29.6.

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Glossary

BCRA	Bipartisan Campaign Reform Act of 2002
CFG	Club for Growth
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
GOTV	get out the vote
JA	*Joint Appendix*
JDT	Joint Deposition Transcripts
JMC Plaintiffs	present plaintiffs-appellants/cross-appellees in trial court
JS	*Jurisdictional Statement*
JSA	*Jurisdictional Statement Appendix*
NRLC	National Right to Life Committee
NRL ETF	NRL Educational Trust Fund
NRL PAC	NRL Political Action Committee
NRLC Plaintiffs	present plaintiffs-appellants/cross-appellees in this brief
PCS	Plaintiffs' Consolidated Evidentiary Submission
SA	*Supplemental Appendix to Jurisdictional Statements*

ARGUMENT[1]

I. Blurring Key Distinctions: How BCRA Assaults People of Ordinary Means.

The briefing confirms what Appellants ("NRLC Plaintiffs") observed in their opening brief – that the "electioneering communications" debate hinges on two views of issue advocacy. NRLC Br. 3. Defendants insist they should be able to restrict anything that affects elections, including issue advocacy, either without limitation or at least if done by a corporation. Plaintiffs believe that issue advocacy by incorporated citizen groups is essential to participation by persons of ordinary means in our democratic republic and is protected from abridgement by the First Amendment, even if it affects elections.

As to regulating the activities of corporations, Defendants rely on cases permitting the regulation of direct political activity of corporations but ignore key distinctions established by this Court that apply especially to the right of people of ordinary means to band together in citizen groups (incorporated for liability purposes) to amplify their voices so they can be heard in the marketplace of ideas. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ."). These groups are the only means by which citizens of ordinary means can make their opinions effectively heard. *See National Conservative Political Action Committee v. FEC*, 470 U.S. 480, 495 (1985) ("To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources."). Barring unfettered issue advocacy by groups bars citizens of ordinary means from participation in all aspects of government.

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[1] NRLC Plaintiffs adopt consistent arguments made by other plaintiff groups in their briefing.

Wealthy individuals have no need of citizens groups because they are permitted to freely spend their own money for issue advocacy or "electioneering communications." Corporations owning broadcast stations are exempted from any restrictions on "electioneering communications." Incumbent politicians promote themselves and the issues they support through taxpayer-supported government activities and their political campaigns. Thus, BCRA further enhances these powerful voices by stripping ordinary citizens of their only means of effective participation in public debate, i.e., incorporated citizen groups.

But this Court has made key distinctions that Defendants blur to assert precedential support for BCRA. Examining these vital distinctions reveals that Defendants' appeal to cases permitting regulation of direct political activity of corporations provides no support for the BCRA.

A. The Blurred Issue/Express Advocacy Distinction: The First Amendment Protects Issue Advocacy.

The first key distinction that Defendants blur is the sharp one this Court created between issue advocacy and express advocacy. Judge Kollar-Kotelly's opinion below demonstrates the fruit of Defendants' effort to blur the line between issue advocacy and express advocacy by moving the focus elsewhere. She attempted to demonstrate that *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), drew the critical distinction, not between issue advocacy and express advocacy, but between "[1] issue discussion and [2] advocacy of a political result." SA 792-93sa.

But NRLC Plaintiffs provided eight pages of textual analysis establishing that this Court actually drew the critical distinction between "[1] discussion of issues and candidates and [2] advocacy of election or defeat of candidates," *MCFL*, 479 U.S. at 249, and that what this Court held in *Buckley* and *MCFL* was that the First Amendment requires that where government restrictions border on issue advocacy, issue advocacy must be protected by a bright-line test that examines the words of a communication to see if it contains explicit words of advocacy of the election or defeat of a clearly identified candidate. NRLC Br. 4-12.

Although the limited textual analysis in the numerous lower federal cases that followed this Court's express advocacy test was a key factor in the lower court's dismissal – as mere "dicta" – of those cases, *see* NRLC Br. 12-14 (answering the "dicta" charge), the Government and Intervenor Defendants made no effort to respond to NRLC Plaintiffs' careful textual analysis. Instead, Defendants continue to assert the now discredited argument that *Buckley* and *MCFL* were just about avoiding vagueness and creating bright lines, ignoring the carefully-articulated, substantive constitutional mandate of *Buckley* and *MCFL* that issue advocacy must be protected from regulation by the express advocacy test. NRLC Br. 4-14.

So while there is precedent for the general proposition that corporations are subject to more government regulation than associations, this general rule has been qualified by the protection for issue advocacy, which this Court held that the First Amendment guarantees to corporations.

B. The Blurred Contribution/Independent Expenditure Distinction: The PAC Alternative Is Inadequate.

The second key distinction Defendants blur is between contributions and independent expenditures. This shows up most starkly in Defendants' effort to make *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), support the notion that requiring citizen groups to do *issue advocacy* through a PAC adequately protects their free expression and association rights.

But the sole issue in *Beaumont* was whether a nonprofit ideological corporation that qualified for the *MCFL* exemption from the statutory ban on independent expenditures could also make *contributions*. And this Court clearly articulated that the decision hinged on the distinction between independent expenditures and contributions:

> NCRL cannot prevail, then, simply by arguing that a ban on an advocacy corporation's direct *contributions* is bad tailoring. NCRL would have to demonstrate that the law violated the First Amendment in allowing *contributions* to be made only through its PAC and subject to a PAC's administrative burdens. But a unanimous Court in *National Right to Work* did not think the regulatory burdens on PACs, including restrictions on their ability to solicit funds, rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political *contributions*. See 459 U.S., at 201-202, 103 S.Ct. 552. There is no reason to think the burden on advocacy corporations is any greater today, or to reach a different conclusion here. [*Beaumont*, 123 S. Ct. at 2211 (emphasis added).]

So *Beaumont* plainly stands solely for the proposition that requiring corporations, even *MCFL*-types, to use the PAC alternative for *contributions* is not an unconstitutional burden.

But *MCFL* had already established that requiring the PAC alternative for *independent expenditures* by *MCFL*-type corporations was an unconstitutional burden. *MCFL*, 479 U.S. at 252-55. *A fortiori* it would be an unconstitutional burden to require *issue advocacy* or "electioneering communications" to be done through a PAC.

C. The *MCFL*-Exemption Is Inadequate.

Defendants tout BCRA's "*MCFL*-exemption" as permitting certain corporations to engage in now prohibited issue advocacy. NRLC Plaintiffs adopt arguments by others on the inadequacies of the overly-cramped statutory exemption, making only the point that this also represents an enormous expansion of the law. Since *First National Bank v. Bellotti*, 435 U.S. 765 (1978), all corporations have been free to engage in issue advocacy. That decision, along with others would have to be overturned to sustain BCRA's "electioneering communications" restrictions.

D. Plaintiffs Have Made an Inadequate Showing to Overcome Stare Decisis for Numerous Precedents.

NRLC Plaintiffs set out this Court's standards for overruling prior decisions and demonstrated how BCRA's required overruling of precedents did not fit the standards. NRLC Br. 15-18. Defendants made no direct response to these arguments. However, their primary approach is to argue that this Court's express advocacy test is outmoded because of "new" facts proving circumvention. *See* FEC Br. 80-82.

1. Alleged "New" Facts Are Irrelevant, Flawed, and Do Not Justify Eliminating an Essential Element of Representative Democracy at Key Times.

As to alleged "new" facts, NRLC Plaintiffs note three things. First, as already noted, NRLC Br. 7-8 & n.8, this Court in *Buckley* noted that issue advocacy could affect elections, but established the express advocacy test anyway to protect issue advocacy because issue advocacy is vital to citizen participation in our system of government. *Buckley*, 424 U.S. at 14, 45; *cf.* SA 353sa (Henderson). This makes "new" facts that the people are actually engaged in issue advocacy that may affect elections irrelevant.

Second, Defendants rely primarily on their disputed studies. NRLC Plaintiffs adopt the arguments of others regarding the problems with those studies but note one critical flaw in the assertions by the Government Defendants that most modern campaign advertisements by candidates do not contain express advocacy. FEC Br. 82-83, and the lower court, SA 658sa (Kollar-Kotelly), 1296sa (Leon). The flaw is that these studies uniformly ignore the presence of the "disclaimer" that must be on candidate's public communications. 11 C.F.R. § 110.11(b)(1). These disclaimers themselves are express advocacy. *Buckley*, 424 U.S. at 44 n.52 ("express words of advocacy of election or defeat, such as

'Smith for Congress'"); 11 C.F.R. § 100.22(a) ("*Expressly advocating* means any communication that – (a) Uses phrases such as . . . "Smith for Congress," "Bill McKay in '94," . . . "Carter '76," "Reagan/Bush," or "Mondale!"). The required disclaimers provide the express advocacy message.

Third, in the debate over the *quantitative* number of "genuine issue ads" (itself a debated concept) a *qualitative* element has been largely neglected, namely, that the "electioneering communication" restrictions would eliminate a whole *category* of American political speech by citizen groups for nearly a fourth of a year (counting only 30 days before primaries and 60 days before elections without considering areas, such as the District of Columbia, where broadcasting reaches multiple jurisdictions).

That whole category of speech is *grass roots lobbying*, in which Citizens Associated for Amplified Free Expression, Inc. – during the bustling days of legislative activity just before the fall election as representatives try to ram through bills to buy votes before taking a recess to run home for final campaigning before the polls open – buys broadcast ads in the district of the legislator with an important vote needed to pass legislation protecting the nation from ruin by encouraging citizens to "Call Representative Swing-Vote and ask her to vote for the bill sponsored by Representatives Commonweal and Controversy."

Defendants assertions that (1) "'genuine' issue advocacy can readily be accomplished in a manner that does not trigger Title II of BCRA," FEC Br. 93, and (2) that "it is not necessary to refer to 'specific candidates for federal office in order to create effective [issue] ads." *id.* (citation omitted), simply does not apply to grass roots lobbying. And citizen groups need to remain free to engage in grass roots lobbying through the media that Defendants concede is the most effective, FEC Br. 93, during the time when legislation is being considered, which often can and often does fall during the days just before an election – the timing of which is wholly beyond

the control of citizen groups and wholly in the hands of incumbent politicians.

Grass roots lobbying is a fundamental part of our system of representative government that must remain available whenever it is needed. It is not "a few 'marginal applications.'" FEC Br. 105 (citation omitted). And it is profoundly, negatively affected by Title II of BCRA. No statute can be called narrowly tailored that so grievously and permanently wounds the essence of representative government. That fact has not changed.

2. Circumvention Is an Auto-Expanding Rationale.

As to the notion that organizations have *circumvented* current election laws and so must be cabined, there are several problems. First, the situation might be differently, but accurately, described as organizations simply doing what this Court said the First Amendment gave them a right to do, i.e., issue advocacy while eschewing express advocacy. *Buckley*, 424 U.S. at 43 n. 50 ("As long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."). How can spending money on what is legal properly be described as circumvention? What is sinister about engaging in legal association and free expression? Rather, there is something sinister (i.e., threatening great risk of harm to the Constitution and the American system of government) about describing the exercise of a constitutional right as circumvention of the law. The First Amendment is not some loophole needing to be plugged. If there is a bright dividing line between what is permissible and what is not, there is nothing wrong or sinister about standing with others on the permissible side of the line and combining one's voice with others to speak often, loudly, and long.

Second, the "circumvention" rationale has no end. As long as any freedom remains, people will exercise their freedom, which will spawn calls to further cabin such circumvention activity. If BCRA's sponsors succeed in banning *broadcast* electioneering communications, they will next pursue a ban on printed communications (including voter guides), phone banks, and the like. The circumvention rationale, that would uphold a broadcast ban, would immediately justify its extention to other media as soon the broadcast ban is upheld, i.e., organizations switching to Internet, print, and phone communications will be "circumventing" the broadcast ban.[2]

In response to an underinclusion challenge, Defendants have already argued that they are permitted to go step by step. Where will it end? This auto-expanding rationale must be forcefully rejected

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[2] States with a temporal ban on communications naming candidates, have banned not only broadcast communications but all such public communications. *See Right To Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998) (striking down rule that banned all corporate or union communications using the name or likeness of a candidate for 45 days before an election); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998) (same); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2d Cir. 2000) (striking down reporting requirement for mass media communications with candidate's name or likeness); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) (striking down disclosure requirement if print or broadcast material names candidate); Alaska Stat. § 15.13.400(14) (banning all "electioneering communications," i.e., that identify a candidate's position on a regionally important issue within 30 days of an election); Ariz. Rev. Stat. § 16-901.01.A.2 (banning communications that "expressly advocate," i.e., "[m]aking a general communication, such as in a broadcast medium, newspaper, magazine, billboard, or direct mailer referring to one or more clearly identified candidates and targeted to the electorate of that candidate(s) . . . (b) in the sixteen-week period immediately preceding a general election"); Colorado Const. Am. 27, §§ 2(7) and 6 (banning all "electioneering communications," i.e., that identify a candidate 30 days before a primary and 60 days before a general election); Conn. Gen. Stat. 9-333c (defining regulated "expenditure" as either broadcast or print communication that names a candidate and appears 90 days before an election); Haw. Rev. Stat. § 11-207.6 (banning ads referring to a candidate that are broadcast, published in any periodical or newspaper, or sent by bulk mail 30 days before a primary and 60 days before a general election).

before it consumes all of citizens participation in American democracy. This Court's express advocacy test drew precisely the correct, and only possible, line that properly balances free association, free expression, the need of citizens of ordinary means to participate in the political system, and the need for a corruption-free political system.

3. There Is International Support for Unfettered Issue Advocacy.

In arguing that the standards for reversing precedent have not been met, i.e., that the *Buckley* and *MCFL* holdings have not been "undermined by subsequent changes or developments in the law," NRLC Br. 15 (citation omitted), NRLC Plaintiffs noted that "unfettered issue advocacy enjoys international support." NRLC Br. 15 n.18. Defendants failed to respond to this argument, but the *Brief of Amici Curiae International Experts in Support of Appellees/Cross-Appellants* ("International Br.") responded in some curious ways.

First, the amici brief mischaracterized what NRLC Plaintiffs said, stating that "[i]f . . . [NRLC Plaintiffs] suggest that other countries do not generally impose restrictions on *paid political advertising* they are simply wrong." International Br. at 10 (emphasis added). Only in footnote did they acknowledge that NRLC Plaintiffs might be saying something other than the strawman created in text:

> An alternative reading of [NRLC Plaintiffs'] proclamation is that other countries do not restrict the advertisement of *issue-oriented* (and non-election-related) political messages. Whether this claim is true or not, it is irrelevant to the case at hand. There is no question here as to whether BCRA may proscribe the use of such funds for true issue-oriented advertisements, [sic] because the statute does not attempt to limit such advertisements by unions and corporations. The degree to which other countries support issue-

> oriented, non-election related advocacy therefore does not speak to the question before the Court. [*Id.* at 10 n.25.]

Amici misunderstand the arguments in this case, such as the issue of BCRA's effect on grass roots lobbying.[3]

Second, amici invest a great deal of time saying what various countries do in terms that are meaningless because they are undefined, and so do not inform the reader whether the restriction is on express advocacy, issue advocacy, or some attempted hybrid such as "electioneering communications." The amici's brief uses "paid political advertising" the most ofen, but it is never defined. So what does it mean when amici say that "[t]he substantial majority of developed nations . . . impose burdens on *paid political advertising* that are much more restrictive than those mandated under BCRA?" *Id.* at 10-11 (emphasis added). Does this mean these nations restrict express advocacy, issue advocacy, issue advocacy that happens to coincide with an election, or "electioneering communications?" Do these restrictions apply to candidate advertising, political party advertising, broadcast ads, print ads, bulk mail ads, phone banks, or what?

Only occasionally do amici tell us what a nation actually prohibits, such as when it says that Israel has "a complex and restrictive regime governing *political broadcasts*," *id.* at 13, and provides a footnote, *id.* at 13 n.38, further saying that Israel's high court called it "election propaganda" (phrases that are so vague as

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[3] Plainly the argument made by NRLC Plaintiffs has been that this Court correctly held that the First Amendment protects the right of citizens to associate in issue advocacy corporations for the purpose of engaging in unfettered issue advocacy, even if some of it might affect elections. In this particular case, there has been no debate over issue advocacy that might not have some effect on elections, and the precise focus of the case has been whether this Court's holdings in *Buckley* and *MCFL* that the proper dividing line for protecting issue advocacy is the express advocacy test should be overruled. Therefore, amici's two characterizations of NRLC Plaintiffs' position are both wide of the mark and fail to comprehend the debate.

to be useless). Australia is said to even ban "issue advocacy" for three months before an election, although the phrase is undefined, and it is difficult to imagine that Aussies are banned from promoting, say, the "issue" of legislation to ban sport utility vehicles in portions of the Outback for three months before every election.

The terms being undefined, it is all a meaningless comparison of apples and oranges, without even the ability to tell whether a ban is in the apple or orange basket, or is instead a kiwi. So when we learn that Paraguay bans "political advertising" for two days before an election and does not allow it to begin until 60 days before an election, *id.* at 15 n.47, we can't respond with "Well, if Paraguay does it, so should we" because we don't know what "it" is. And on the subject of Paraguay, there's a world of difference between a two day ban and a sixty day ban, even if both were dealing with "electioneering communications" as defined in BCRA.

Third, amici attempt to make the two cases that NRLC Plaintiffs cited, NRLC Br. 15 n.18, support their position. These cases involved election-related restrictions in two countries very close to our common-law tradition, Canada[4] and Great Britain.

As to the Canadian case, *Harper v. Canada*, 2002 ABCA 301 (2002) – with its on-point quote about a one-day blackout on "election advertising" violating the Charter because it encompassed "tak[ing] a position on an issue with which a registered party or candidate is associated," and so "encroached upon the freedom of expression of those who seek to voice public concerns which are inconsequential to partisan advocacy," *see* NRLC Br. 15 n.18 (providing citations) – amici simply make that case disappear with remarkable prestidigitation. A search of their Table of Authorities reveals that without doubt the case has vanished.

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[4] At least Canada has a Charter that protects free expression and association in a manner similar to the U.S. Constitution, as amici concede. International Br. 18-19.

In the place of the vanished *Harper* case, amici substitute another Canadian case that they represent as "*reluctantly* conclud[ing] that . . . [a] near-total ban on third-party spending" that prohibited many from participating in advocating or opposing referenda "went too far." International Br. 20 (emphasis added). "Reluctantly" or not, the *holding* of the court was that people couldn't be shut out from participation in issue advocacy. But seeking to make this on-point holding also disappear, amici move from irrelevant speculation about "reluctance" to the Court's discussion of a statute and a case that amici openly acknowledge was "not before it." *Id.* 20-21. Amici apparently like what the court said about matters not before it, but such comments are obiter dictum. Remarkable.

As to the ECHR case of *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1 (1986), which struck down British restrictions that "operated, for all practical purposes . . . as a total barrier to Mrs Bowman's publishing information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate," *id.* at ¶ 47, amici attempt another feat of legerdemain to make this case disappear. Amici claim, with many italicized flourishes, that some of the quotes in the brief description of the case, NRLC Br. 15 n. 18, were not actually things the *court* said but were part of a report presented to the court. International Br. 25-26. But the quoted portions were all part of the court's *opinion*, provided with appropriate paragraph citations to briefly set the factual pattern and then the holding of the case.

And the case doesn't disappear under more extended examination. This was a case about voter guides that set forth candidates' positions on abortion and human embryo experimentation. *Bowman*, 26 Eur. Ct. H.R. at ¶¶ 10-12 (court opinion section entitled "Facts"). Mrs. Bowman, the executive director of the Society for the Protection of the Unborn Child, distributed 25,000 copies of her leaflet "immediately before the Parliamentary elections in April 1992" in Halifax, where she was charged with violating a statute that permitted her to only spend five pounds sterling for such issue advocacy "to electors with a view to promoting or procuring the election of a candidate. *Id.* at ¶¶ 10, 12, 13.

Her leaflet began with the words, "We are not telling you how to vote, but it is essential for you to check on Candidates' voting intentions on abortion and the use of the human embryo as a guinea pig," and proceeded to describe the positions of three candidates, two of whom seemed favorable to the SPUC position and the other opposed. At the bottom it said in bold, capital letters the name of the organization (SPUC). On the back was a photograph labeled "unborn baby ten weeks after conception" and a description of fetal development. *Id.* at ¶ 12. Pure issue advocacy.

What did the court say? In the section labeled "Judgment," the court

> f[ound] it significant that the limitation . . . was set as low as £500. It recalls that this restriction applied only during the four to six weeks preceding the general election. [footnote] However, although it is true that Mrs Bowman could have campaigned freely at any other time, this would not, in the Court's view, have served her purpose of publishing the leaflets which was, at the very least, to inform the people of Halifax about the three candidates' voting records and attitudes on abortion, during the critical period when their minds were focused on their choice of representative. [*Id.* at ¶ 45.]

The parallels to arguments made in the present case by Defendants are too obvious to require explanation. Paragraph 46 went on to explain that the law had taken away Mrs. Bowman's chosen means of communication, leaving her without "effective channels" to communicate her message. One is, of course, reminded that BCRA's ban on broadcast communications is justified by Defendants because the broadcast media are the most effective communication channels.

The Court then went on to its holding:

> In summary, therefore, the Court finds that . . . the Act operated, for all practical purposes, as a total barrier to Mrs Bowman's publishing information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate. . . . It accordingly concludes that the restriction in question was disproportionate to the aim pursued. [*Id.* at ¶ 47.]

NRLC Plaintiffs stand by their assertion that these two cases demonstrate international support for issue advocacy. There is no legal change justifying the overruling of this Court's protection of issue advocacy.

4. This Court Would Have to Overturn Multiple Cases to Uphold the Electioneering Communications Restrictions.

To approve BCRA's "electioneering communication" restrictions would require this Court to overrule not only *Buckley* and *MCFL*, and *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), as to the express advocacy test and the protection of corporate issue advocacy, but also other holdings, including all cases recognizing the right of corporations to engage in issue advocacy must be rejected, reaching back to *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978).

Buckley would also have to be overruled as to its holding that independent speech poses no threat of corruption. *Buckley*, 424 U.S. at 45. *MCFL* would have to be overruled as to its holding that forcing nonprofit ideological corporations to use the PAC alternative for making independent expenditures was an inadequate protection of their constitutional rights. *MCFL*, 479 U.S. at 252-55.

The whole line of cases that make the distinction between contributions and independent expenditures would have to be overruled as to the significance of that distinction, extending from *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (*NRWC*), to *FEC v. Beaumont*, 123 S. Ct. 2200.

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), would have to be overruled, as to its holding that a $250 limit on the amount that could be given to a ballot measure committee was not just a contribution limit but was a regulation of an expenditure, if Defendants prevail on their argument that BCRA really doesn't really limit expenditures by groups.

Mills v. Alabama, 384 U.S. 214 (1966), would have to be overruled as to its rejection of the argument that speech at election time could be regulated because the whole rest of the year was available and its holding that election time was the most important and most protected time for speech related to elections.

II. From Quid Pro Quo to "Gratitude": How BCRA Assaults Representative Democracy.

In *Buckley*, this Court began with a clearly articulated concept of corruption as a quid pro quo exchange, i.e., dollars for votes or a last-minute endorsement by a rival candidate for promised appointment. *See Buckley*, 424 U.S. at 24; *NCPAC*, 470 U.S. 480. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389 (2000) (*Shrink*), this Court expanded corruption slightly to "a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."

Now Defendants urge this Court to consider "gratitude" for support as corrupting to our political system. But gratitude is one of those auto-expanding concepts, as circumvention was described above. Politicians will be grateful for any sort of support they receive. If the law restricts present means of engaging in activity for which candidates would be grateful, then citizen groups will do other things for which candidates will be grateful. Those things will then be capable of being banned on the basis of grateful candidates.

And candidates are already grateful for endorsements, editorials, appearance by celebrities at their events, volunteers, and so on. Should all these be banned?

This is another line that needs to be drawn firmly now, lest it devour our American system of government. Because the only way to eliminate gratitude is to eliminate all things for which candidates can be grateful. This requires elimination of elections and thus our representative democracy. There is a compelling interest in protecting the best system of governance yet devised from those who would destroy it in the name of fixing it.

III. The Independent Speech of State Candidates and Officeholders Cannot Be Subjected To Federal Contribution Limits And Disclosure Requirements.

In support of § 323(f)'s restrictions on state candidates and office-holders, the Defendants essentially argue that the statute is drawn narrowly because it prevents state candidates from being used as a means of influencing federal elections without complying with federal regulations. FEC Br. 58-60, Interv. Br. 39. However, this argument ignores the standards set by this Court for evaluating both reporting requirements and contribution limits, each of which is violated by this restriction.

With regard to reporting and disclosure requirements, it is undisputed that this restriction violates the express advocacy test which this Court has established as the regulatory boundary. *Buckley*, 424 U.S. at 80-81. Indeed, the use of subjective terms such as "attack" or "support" raise the precise vagueness problems that necessitated the use of express advocacy as a bright line standard. *Id.* at 41-44.

General Pryor's own communications amply demonstrate the vagueness and overbreadth inherent to this content-based restriction upon his speech. One of his flyers includes a full page picture of himself shaking hands with President Bush, with the caption that "Bush appointed Pryor to be Alabama co-chairman of the George W. Bush for President campaign." Pryor Decl., Ex. A, 8 PCS/MC 43. Another displays the two men shaking hands directly above the phrase "Protecting the Security, Integrity, and Future of Alabama." Pryor Decl., Ex. A, 8 PCS/MC 45. While the context of each focused upon General Pryor's re-election, either could easily have been viewed as supporting President Bush as well. Thus, there can be little doubt that this provision will have chilling consequences on numerous candidates during the coming primaries as it threatens double regulation upon Republicans who tout their support for President Bush, and upon Democrats who wish to burnish their credentials to the party faithful by attacking the President or by touting their support for one of the Democratic candidates.

Importantly, this restriction targets speech that will necessarily be intended to promote state candidacies. Unlike other organizations whose purposes may encompass aiding the election or defeat of federal candidates, the campaign committee of a candidate for state office is charged solely with promoting the election of that state candidate. Any impact on federal campaigns is necessarily incidental to accomplishing such election. While such candidates may refer to a federal candidate or officeholder as a means of establishing their own reputations or positions, there is no basis in logic or the record to suggest that state candidates will divert resources contributed to their own campaigns to support federal candidates, unless such efforts are viewed as beneficial to their own elections.

With regard to the federal contribution limits triggered by this provision, the anti-conduit justification is inapplicable, because the money never reaches a federal candidate but is instead used for independent communications.[5] This Court has never upheld limits on contributions that did not ultimately flow to candidates, but has struck down limits on contributions to entities which lacked the anti-corruption justification that supports limitations on contributions to candidates. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290. While limits on contributions to entities that contribute to candidates can be regulated as corruption-risking conduits, such justification evaporates when the money is used only for independent communications. As Justice Blackmun explained, while organizations that contribute to candidates are essentially conduits that "pose a perceived threat of actual or potential corruption" but "contributions to a committee that makes only independent expenditures pose no such threat." *California Medical Association v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring).

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[5] Disclosure regulations are based upon an informational interest that does encompass some independent communications. *Buckley*, 424 U.S. at 81.

Although this Court has not directly forbidden limitations on contributions for independent communications, limiting such contributions would ignore the "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *NCPAC*, 470 U.S. at 497. The independence from the federal candidate, "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id.* (quoting *Buckley*, 424 U.S. at 47). Naturally, the link between candidates and those who contribute to independent speakers is even more attenuated. As this Court has recognized, "an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same . . . independent expenditure made directly by that donor." *Colorado Republican Federal Election Campaign Committee v. FEC*, 518 U.S. 604, 617 (1996). Moreover, placing a limit "on individuals wishing to band together . . . while placing none on individuals acting alone, is clearly a restraint on the right of association," that "cannot be allowed to hobble the collective expressions of a group." *Citizens Against Rent Control*, 454 U.S. at 296. Hence, there can be no basis for prohibiting persons from contributing $2,001 to a state candidate, who independently mentions the name of a federal candidate, while allowing donors to individually spend millions of dollars to run the same ad themselves.[6]

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[6] Defendants failed to respond to (1) the problems Rep. Pence articulated concerning the raising of funds for Indiana Family Institute and the absence of any public perception of corruption in the relationship, NRLC Br. 36-39, (2) the standing to intervene of Sen. McCain et al., NRLC Br. 46-49, relying instead, Interv. Br. 11 n.8, on the district court opinion which is appended hereto because it was not included in the Joint Appendix, and (3) NRLC's description of a specific example demonstrating the potential for opposition mischief pose by treating a contract to broadcast as an actual communication. NRLC Br.44-46.

As to the point about treating a contract as a communication, NRLC Plaintiffs rely on arguments made by other plaintiffs but note that Defendants' argument that treating an "expenditure" as a communication is justified because FECA defines "expenditure" to include a contract for an expenditure, FEC Br. 122, is flawed. The definition of "independent expenditure" (far more relevant because it is about the actual communication), requires a" communication." *See* 11 C.F.R. § 100.16 ("The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate . . . .").

Conclusion

For the foregoing reasons, this Court should strike down Title I's bans on "soft money" use by political parties, federal officeholders and candidates, state officeholders and candidates, Title II's ban on "electioneering communications," and § 201(5)'s "advance notice" requirement as violating constitutional free expression and association guarantees. Also, this Court should hold that the grant of intervention to Sen. McCain et al. was erroneous.

Respectfully submitted,

James Bopp, Jr., *Counsel of Record*
Richard E. Coleson
Thomas J. Marzen
James Madison Center for Free Speech
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (fax: 812/235-3685)
Counsel for Appellants/Cross-Appellees,

APPENDIX

ORDER GRANTING MOTION TO INTERVENE
[Docket #40]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed May 3, 2003]

SENATOR MITCH McCONNELL, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-582 (CKK, KLH, RJL)
NRA, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-581 (CKK, KLH, RJL)
ECHOLS, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-633 (CKK, KLH, RJL)

[*2]

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-751 (CKK, KLH, RJL)
NATIONAL ASSOCIATION OF BROADCASTERS, Plaintiff, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-753 (CKK, KLH, RJL)
AFL-CIO, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-754 (CKK, KLH, RJL)

[*3]

CONGRESSMAN RON PAUL, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-781 (CKK, KLH, RJL)

ORDER GRANTING MOTION TO INTERVENE
(May 3, 2002)

Pursuant to Rule 24(a)(1) of the Federal Rules of Civil Procedure and section 403(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA or Act), Senators John McCain, Russell Feingold, Olympia Snowe and James Jeffords and Representatives Christopher Shays and Martin Meehan (movants) move to intervene in these consolidated actions to defend BCRA's constitutionality. While the defendants do not object to the motion, several of the plaintiffs (objectors)[1] oppose it on the ground that the movants "do no have the requisite Article III standing" to support intervention. Opp'n at 3 (capitalization [*4] altered). We disagree. Accordingly, and for the following reasons, the motion to intervene is granted.

Rule 24(a)(1) provides that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when a statute of the United States confers an unconditional right to intervene." Fed. R. Civ. P. 24(a)(1). Section 403(b) of the Act, in turn provides that

> [i]n any action in which the constitutionality of any provision of this Act or any amendment made by this Act is raised . . . any member of the House of Representatives . . . or Senate shall have the right

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[1] Specifically, Representative Mike Pence, Alabama Attorney General Bill Pryor, Libertarian National Committee, Inc., Alabama Republican Executive Committee, Libertarian Party of Illinois, DuPage Political Action Council, Jefferson County Republican Executive Committee, Christian Coalition of America, Inc., Club for Growth, Indiana Family Institute, National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, Martin J. Connors and Barret Austin O'Brock oppose the movants' intervention.

> to intervene either in support of or opposition to the position of the party to the case regarding the constitutionality of the provision or amendment.

2 U.S.C. § 437h note. Because the plaintiffs have challenged numerous provisions of the Act on constitutional grounds, section 403(b) plainly confers upon each and every one of the movants an unconditional statutory right to intervene in the consolidated actions now before us.

The objectors argue that the standing inquiry does not end with the satisfaction of Rule 24(a)(1). Under Article III of the United States Constitution, our "judicial Power" extends only to live "Cases" or "Controversies". U.S. Const. art. III. The D.C. Circuit has long held that "because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene . . . must satisfy the same Article III standing requirements as original parties." *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1285 (D.C. Cir. 1994); *see S. Christian Leadership Conf. v. Kelley*, 747 F.2d [*5] 777, 779 (D.C. Cir. 1984); *see also Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996) ("An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well.").[2]

Building & Construction Trades and *Kelley* address the question of Article III standing under Rule 24(a)(2) as opposed to Rule 24(a)(1). To date, neither the Supreme Court nor the D.C. Circuit has specifically addressed whether an Article III standing analysis is as appropriate in the Rule 24(a)(1) context as it is in the Rule 24(a)(2) context. The movants suggest that "[t]he argument for a relaxed rule of standing where the intervenor has an unconditional statutory right to participate seems . . . stronger than the argument for relaxed standing in the (a)(2) context." Movants' Reply at 5 n.3. However, we see no need in this case to address that distinction or to resolve the question whether the movants must satisfy the constitutional requirements of standing – i.e., that they have suffered or will suffer "an injury in fact" which is "concrete and particularized," "actual [*6] or imminent," "fairly . . .trace[able] to the challenged action" and "redress[able] by a favorable decision," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted)–because we believe, as discussed below, that the movants have satisfied those requirements in any event.

The movants allege that

> [a]s federal officeholders and candidates for, or potential candidates for, election to federal office, they are among those whose conduct the Act regulates, and among those whom the Act seeks to insulate from the actual or apparent corrupting influence of special interest money. They want to run in elections, participate in a political system, and serve in a government in which all participants comply with the reasonable contribution restrictions and other federal campaign finance regulations that the Act imposes in order to stop

---

[2] In *Diamond v. Charles*, 476 U.S. 54 (1986), the United States Supreme Court held that an intervenor seeking to continue its suit in the absence of the party on whose side intervention was permitted must demonstrate that it fulfills the standing requirements of Article III. *See id.* at 68. Nonetheless, the Court reserved for another day the broader question of whether an intervenor must have Article III standing where the party on whose side intervention is sought remains in litigation. *See id.* at 68-69. The circuits are split on that issue. *See Ruiz v. Estelle*, 161 F. 3d 814, 831-32 (5th Cir. 1998) (D.C., Seventh and Eighth Circuits require intervenors to have Article III standing while Second, Fifth, Sixth, Ninth, and Eleventh Circuits do not).

> evasion and to prevent actual and apparent corruption. If any of the reforms embodied in the Act are struck down, . . . [the] movants will once again be forced to attempt to discharge their public responsibilities, raise money, and campaign in a system that [they believe to be] significantly corrupted by special-interest money.

Mem. in Supp. of Mot. to Intervene at 3-4; *see Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury . . . may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." (internal quotations and alteration omitted)); 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1914, at 418 (2d ed. 1986) (intervention pleading "is construed liberally in favor of the pleader and the court will accept as true the well-pleaded allegations" therein). These allegations are sufficient to support Article III standing.

The objectors' contrary position that (1) the movants "have not shown that they [*7] have an interest distinct from that of every other citizen," Opp'n at 8; (2) the movants have no legally protected interest "as sponsors and supporters" of the Act or "in upholding an unconstitutional statute," *id.* at 8, 10; and (3) any injury the movants suffer cannot be redressed by a favorable decision, *see id.* at 12, is, simply stated, without merit.

First, as opposed to members of the general public, the movants have a concrete, direct, and personal stake–as candidates and potential candidates–in the outcome of a constitutional challenge to a law regulating the processes by which they may attain office. *See Buchanan v. FEC*, 112 F. Supp. 2d 58, 65 (D.D.C. 2000) ("Precluding candidates from challenging [election] rules under the FECA would leave few others to do so . . . [I]t is relatively self-evident

that the people who have the most to gain and lose from the criteria governing [the election process] are the candidates themselves."); *see also Vote Choice, Inc. v. DeStefano*, 4 F.3d 26, 37 (1st Cir. 1993) ("[A]n impact on the strategy and conduct of an office-seeker's political campaign constitutes an injury of a kind sufficient to confer standing." (citing *Buckley v. Valeo*, 424 U.S. 1, 12 & n.10 (1976) (per curiam))). The objectors have cited no case law to the contrary.

Second, notwithstanding the objectors' assertions, *see* Opp'n at 8-9, the movants do not seek to vindicate a "sponsorship" interest in the Act. Nor are they precluded from intervening to *defend* (rather than challenge) the Act. In arguing that "no litigant has a legally protected interest in upholding an unconstitutional statute," *id.* at 10, the objectors conflate the threshold issue of standing with the merits of the case and ignore the fact that BCRA provisions the movants seek to defend are presumed constitutional until proven [*8] otherwise. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). Moreover, a movant may intervene in support of government defendants where "it will be injured in fact by the setting aside of the government's action it seeks to defend," the "injury will have been caused by that invalidation" and "the injury would be prevented if the government action is upheld." *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001); *see also Meek v. Metro Dade County*, 985 F.2d 1471, 1480 (11th Cir. 1993) (movants seeking to intervene in defense of "election system that governed their exercise of political power" sufficiently "alleged a tangible actual or prospective injury" under *Lujan*); *Marshall v. Meadows*, 921 F. Supp. 1490, 1492 (E.D. Va. 1996) (U.S. Senator seeking intervention to defend constitutionality of state election law permitted to intervene because he had "a vital interest in a procedure through which he [sought] election").

Finally, the injury the movants allege here – that they will be forced to raise money in a corrupt system *in the event the Act is struck down* – plainly would be redressed by a favorable decision *upholding* the Act's provisions. Accordingly, because it is clear from the face of the pleadings that the movants have an unconstitutional statutory right – and Article III standing – to seek such a decision, it is this 3rd day of May, 2002 hereby [*9]

ORDERED that the objectors' request for an oral hearing on the motion to intervene is denied, *see Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 693-94 (1961) (district court had discretion to decide motion to intervene without hearing when result was clear from face of application); and it is further

ORDERED that the motion to intervene is granted.

SO ORDERED.

/s/ Karen LeCraft Henderson
KAREN LECRAFT HENDERSON
United States Circuit Judge

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

VOL. I

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No. 02-1674 *et al.*

IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States
District Court For The District of Columbia

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENTS

VOLUME I

FLOYD ABRAMS
SUSAN BUCKLEY
BRIAN MARKLEY
CAHILL GORDON &
REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

KENNETH W. STARR
Counsel of Record
EDWARD W. WARREN
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

(*additional counsel on inside cover*)

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KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
1215 Cliffwood Drive
Goshen, KY 40026
(502) 473-7557

Counsel in No. 02-1674

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UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

[May 1, 2003]

No. 02-582 CKK,KLH,RJL, 02-581 CKK,KLH,RJL,
02-633 CKK,KLH,RJL, 02-751 CKK,KLH, RJL,
02-753 CKK,KLH,RJL, 02-754 CKK,KLH,RJL,
02-781 CKK,KLH,RJL, 02-874 CKK, KLH,RJL,
02-875 CKK,KLH,RJL, 02-877 CKK, KLH, RJL,
02-881 CKK, KLH, RJL

Senator Mitch McConnell, *et al.*,
Plaintiffs,
v.
Federal Election Commission, *et al.*,
Defendants.
National Rifle Association of America, *et al.*,
Plaintiffs,
v.
Federal Election Commission, *et al.*,
Defendants.
Emily Echols, a minor child, by and through her next friends, Tim and Windy Echols, *et al.*,
Plaintiffs,
v.
Federal Election Commission, *et al.*,
Defendants.
Chamber Of Commerce of the United States, *et al.*,
Plaintiffs,
v.
Federal Election Commission, *et al.*,
Defendants.
National Association Of Broadcasters,
Plaintiff,
v.
Federal Election Commission, *et al.*,
Defendants.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

CONGRESSMAN RON PAUL, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*
Defendants.

CALIFORNIA DEMOCRATIC PARTY, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

VICTORIA JACKSON GRAY ADAMS, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

REPRESENTATIVE BENNIE G. THOMPSON, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

MEMORANDUM OPINION

PER CURIAM [1]

Presently before this three-judge District Court are eleven consolidated actions challenging as unconstitutional the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA") and seeking declaratory and injunctive relief to prohibit its enforcement. The wide range of legal challenges raised by this litigation are highly complex, interrelated, and raise issues of fundamental importance not only to the conduct and financing of federal election campaigns but to the other rights involved that we enjoy under the Constitution. Because of the complexity of our positions, this *per curiam* opinion, by Judge Kollar-Kotelly and Judge Leon, includes a schematic description of the three-judge panel's conclusions in regard to each of BCRA's challenged provisions and a chart as to the rulings on each provision's constitutionality. The *per curiam* opinion also includes: (1) a brief history of campaign finance regulation in the United States (pp. 16-42); (2) the legislative history behind BCRA's enactment (pp. 42-50); (3) a procedural history of the litigation in this case (pp. 50-57); (4) a description of the specific provisions in BCRA at issue in these lawsuits (pp. 57-80); (5) certain Findings of Fact relating to the identities of the parties and BCRA's disclosure provisions (pp. 80-106); and (6) conclusions of law relating to claims of the Paul Plaintiffs and most of BCRA's disclosure provisions (pp. 106-170). The separate opinions of each judge hearing this matter follow thereafter.

I. DESCRIPTION AND CHART OF THE COURT'S RULINGS

In light of the number of provisions in BCRA being challenged, the complexity of the issues presented by each challenge, and the variety of positions and voting combinations taken by the three judges on this District Court, we set forth a brief description and a chart, on a section by section basis, of the various rulings

---

[1] Judge Henderson does not join this opinion.

A. *Title I*

Section 323(a) of BCRA bans national parties from soliciting, receiving, directing, transferring, and spending nonfederal funds (*i.e.*, soft money). Judge Henderson strikes this section down as unconstitutional in its entirety. Judge Leon, for different reasons, files a concurrence, joining with Judge Henderson, except with respect to the ban on national parties from using (*i.e.*, "directing," "transferring," and "spending") nonfederal funds (*i.e.*, soft money) for "federal election activity" of the type defined in Section 301(20)(A)(iii). As to that type of conduct, Judge Leon upholds the constitutionality of Congress's ban on the use of nonfederal funds by national parties for Section 301(20)(A)(iii) communications. Judge Kollar-Kotelly upholds Section 323 (a) in its entirety. Accordingly, Judge Leon's decision regarding Section 323(a) controls.

Section 323(b) prohibits state parties from using nonfederal money for "federal election activities" as defined in Section 301(20)(A) of BCRA. Judge Henderson strikes these sections down as unconstitutional in their entirety. Judge Leon, for different reasons, joins Judge Henderson in a separate concurrence, but only with respect to those party activities set forth in Subsections (i), (ii), and (iv) of Section 301(20)(A). As to Section 301(20)(A)(iii), Judge Leon upholds the constitutionality of Congress's prohibition on state and local parties from spending nonfederal funds for communications that promote, oppose, attack or support a specific federal candidate. In a separate opinion, Judge Kollar Kotelly finds Section 323(b) constitutional and concurs with Judge Leon's discussion of Section 301 (20)(A)(iii).

Section 323(d) prohibits national, state, and local parties from soliciting funds for, or making donations, to § 501(c) organizations that make expenditures, or disbursements, in connection with federal elections, or to § 527 national organizations. Judge Henderson strikes this section down as unconstitutional in its entirety. Judge Leon, for different reasons, joins in that conclusion in a separate concurrence. Judge Kollar-Kotelly files a separate dissent in which she finds the entire section constitutional.

Section 323(e) prohibits, but for certain enumerated exceptions, federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending, nonfederal money in connection with any local, state, or federal election. Judge Henderson and Judge Kollar-Kotelly, for different reasons, in separate opinions uphold the constitutionality of this section in its entirety. Judge Leon concurs with respect to the restriction on federal officeholders and candidates receiving, directing, transferring or spending any nonfederal funds in connection with any federal or state election, but files a separate dissent with regard to any prohibitions on a federal candidate, or officeholder, from soliciting funds for the national parties.

Section 323(f) prohibits state officeholders and candidates from using nonfederal funds for public communications that refer to a clearly identified candidate for federal office and that promote, oppose, attack, or support a candidate for this office. Judge Leon upholds this section in its entirety. Judge Kollar-Kotelly concurs with Judge Leon's opinion. Judge Henderson, dissents and finds the entire section unconstitutional.

B. *Title II*

Section 201 of BCRA sets forth a primary, and "backup" definition, of an "electioneering communication" (*i.e.*, so-called "issue ads"). In addition, it sets forth certain disclosure requirements for those who fund these electioneering communications. Judge Henderson strikes down both the primary and backup definition as unconstitutional. Judge Leon, for different reasons, concurs in her judgment with respect to the primary definition. Judge Kollar-Kotelly dissents and upholds the primary definition as constitutional as discussed in her separate opinion. With respect to the backup definition, Judge Leon, who writes a separate opinion, upholds its constitutionality with its final clause severed. Judge Kollar-Kotelly, as expressed in her opinion, concurs in that conclusion solely as an alternative to this Court's finding that the primary definition is unconstitutional. Finally, with regard to Section 201's disclosure requirements, Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, uphold their constitutionality with one exception. Judge Henderson strikes down the disclosures requirements in a separate dissent.

Section 202 provides that disbursements by persons for electioneering communications, or contracts to purchase the same, that are coordinated with either a federal candidate or a candidate committee, or a political party committee will be treated as contributions to that candidate's campaign or political party committee. Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, find this section constitutional. Judge Henderson, in a separate dissent concludes that this Section is unconstitutionally overbroad.

Section 203 of Title II prohibits labor unions, corporations and national banks from using money from their general treasury to fund "electioneering communications," as defined by Section 201. Instead, under Section 203, such communications must be paid from a separately segregated fund ("SSF"). Section 203 also includes an exception from the SSF requirement for certain nonprofit corporations (*i.e.*, the "Snowe-Jeffords exception"). Judge Kollar-Kotelly upholds this section as constitutional. Judge Leon joins Judge Kollar-Kotelly's opinion upholding the constitutionality of this section as it applies to the backup definition in Section 201. Judge Henderson strikes down this Section as unconstitutional in its entirety. Judge Kollar-Kotelly and Judge Leon additionally uphold the disclosure and SSF requirements as well as the Snowe- Jeffords exemption provision for certain nonprofit corporations organized under Sections 501(c)(4) and 527 of the Internal Revenue Code in their respective opinions.

Section 204 ("The Wellstone Amendment"), in effect, withdraws the Snowe- Jeffords exception of Section 203. Judge Henderson strikes down Section 204 in its entirety. Judge Leon concurs in her result as it applies to MCFL exempt organizations only. As to nonprofit corporations that do not qualify for the MCFL exemption, Judge Leon concurs with Judge Kollar-Kotelly's conclusion, but for different reasons, in upholding Section 204 as it applies to non MCFL organizations.

Section 212 provides certain reporting requirements for independent expenditures. Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, conclude that challenge to this provision is not ripe for review, and therefore hold that the Court does not have jurisdiction to resolve the plaintiffs' challenges at this time. Judge Henderson dissents from this view and finds Section 212 unconstitutional in its entirety.

Section 213 requires national parties, in essence, to choose between making coordinated expenditures under the Party Expenditures Provision or unlimited independent expenditures on behalf of their federal candidates. All three judges concur that this section is unconstitutional. Judge Henderson's opinion includes a discussion of her separate reasons. Judge Kollar-Kotelly concurs in Judge Leon's separate opinion on this section.

Section 214 addresses coordinated expenditures paid for by persons other than party committees and candidate committees. Section 214 repeals the current FEC regulations on coordinated expenditures, and directs the FEC to promulgate new regulations that do not require "an agreement or formal collaboration to establish coordination." Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, find that the plaintiffs' challenge under Section 214(b) and Section 214(c) is nonjusticiable and the Court therefore lacks jurisdiction to consider their challenge. As to Sections 214(a) and 214(d), however, they find those sections constitutional for the reasons set forth in the *per curiam* opinion. Judge Henderson dissents, finding the Section unconstitutional in its entirety.

C. *Title III and V*

Sections 304, 316, & 319, collectively known as the "Millionaire Provisions," allow opponents of self-financed candidates, and in certain circumstances, to raise money in larger increments and accept unlimited coordinated party expenditures. All three judges conclude, for the reasons set forth in Judge Henderson's opinion, that this Court lacks standing to entertain challenges to these provisions.

Section 305 denies a candidate the "lowest unit charge" for broadcast advertisements on radio and television unless the candidate promises not to refer to another candidate in his or her advertisements. For the reasons set forth in Judge Henderson's opinion, all three judges conclude that this Court lacks standing to entertain the plaintiffs' challenge at this time.

As explained in Judge Henderson's opinion, the Court similarly finds that the plaintiffs do not have standing to challenge Section 307, which increases and indexes contribution limits.

Section 311 establishes certain disclosure requirements for the sponsors of electioneering communications. Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, uphold this provision as constitutional. Judge Henderson, dissents, and finds this section unconstitutional for the reasons set forth in her opinion.

Section 318 prohibits donations by minors to federal candidates, or to a committee of a political party. All three judges agree that this section is unconstitutional. Each judge writes a separate concurrence setting forth his/her reasoning as to this section.

Section 504 requires broadcast licenses to collect and disclose records of any request to purchase broadcast time for communications that "is made by or on behalf of a legally qualified candidate for public office" or that relates "to any political matter of national importance," including communications relating to "a legally qualified candidate," "any election to federal office," and "a national legislative issue of public importance." Judge Henderson finds this section unconstitutional. Judge Leon and Judge Kollar-Kotelly, concur in that result, but not in her reasoning. Judge Kollar-Kotelly concurs in Judge Leon's separate opinion on this section.

Chart of the Court's Rulings

BCRA Provision	Constitutional	Unconstitutional	Nonjusticiable
323(a): nonfederal fund restrictions on national parties	Judge Kollar-Kotelly Judge Leon (only as to using nonfederal funds for 301(20)(A)(iii) activities	Judge Henderson Judge Leon (except as to using nonfederal funds for 301(20)(A)(iii) activities	
323(b): nonfederal fund restrictions on "federal election activity" by state and local parties	Judge Kollar-Kotelly Judge Leon (only as to 301(20)(A)(iii) activities	Judge Henderson Judge Leon (only as to 301(20)(A)(i),(ii),(iv) activities)	
301(20): definition of "federal election activity"	Judge Kollar-Kotelly Judge Leon (only as to 301(20)(A)(iii))	Judge Henderson Judge Leon (only as to 301(20)(A)(i).(ii).(iv))	
323(d): nonfederal fund restrictions on tax-exempt organizations	Judge Kollar-Kotelly	Judge Henderson Judge Leon	
323(e): nonfederal fund restrictions on federal candidates	Judge Henderson Judge Kollar-Kotelly Judge Leon (except solicitation of non-federal funds	Judge Leon (only as to solicitation of non-federal funds)	
323(f): nonfederal fund restrictions on state candidates	Judge Kollar-Kotelly Judge Leon	Judge Henderson	

BCRA Provision	Constitutional	Unconstitutional	Nonjusticiable
201: "electioneering communication" definition	Judge Kollar-Kotelly (primary definition and, in the alternative, backup definition) Judge Leon (backup definition only)	Judge Henderson (primary and backup definitions) Judge Leon (only as to primary definition)	
201: disclosure of "electioneering communications"	Judge Kollar-Kotelly (severing subsection (5)) Judge Leon (severing subsection (5))	Judge Henderson Judge Kollar-Kotelly (subsection (5) only) Judge Leon (subsection (5) only)	
202: coordinated "electioneering communications" as contributions	Judge Kollar-Kotelly Judge Leon	Judge Henderson	

BCRA Provision	Constitutional	Unconstitutional	Nonjusticiable
203: prohibition of "electioneering communications" by corporations and unions	Judge Kollar-Kotelly Judge Leon (as to backup definition)	Judge Henderson	
204: nonprofit organization exception ("Wellstone Amendment")	Judge Kollar-Kotelly Judge Leon (as to non-MCFL groups)	Judge Henderson Judge Leon (as to MCFL groups)	
212: disclosure of independent expenditures		Judge Henderson	Judge Kollar-Kotelly Judge Leon
213: choice between independent and coordinated expenditures		Judge Henderson Judge Kollar-Kotelly Judge Leon	

BCRA Provision	Constitutional	Unconstitutional	Nonjusticiable
214: definition of coordinated communications	Judge Kollar-Kotelly (as to 214(a) and 214(d)) Judge Leon (as to 214(a) and 214(d))	Judge Henderson	Judge Kollar-Kotelly (as to remainder of 214) Judge Leon (as to remainder of 214)
304, 316, & 319: "Millionaire Provisions"			Judge Henderson Judge Kollar-Kotelly Judge Leon
305: limitation on lowest unit charge for candidates referring to other candidates			Judge Henderson Judge Kollar-Kotelly Judge Leon

BCRA Provision	Constitutional	Unconstitutional	Nonjusticiable
307: increased contribution limits and indexing of limits			Judge Henderson Judge Kollar-Kotelly Judge Leon
311: identification of sponsors	Judge Kollar-Kotelly Judge Leon	Judge Henderson	
318: prohibition of donations by minors		Judge Henderson Judge Kollar-Kotelly Judge Leon	
504: disclosure of broadcasting records		Judge Henderson Judge Kollar-Kotelly Judge Leon	

II. BACKGROUND

It is necessary to canvass the history of federal campaign finance regulation in order to provide the appropriate context for understanding the structure and practices of federal campaign finance that Congress confronted when it enacted BCRA. *See United States v. UAW-CIO*, 352 U.S. 567, 570 (1957) ("*UAW*") ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."). Following this overview, the Court will move to a discussion of the legislation enacted by Congress to resolve the perceived shortcomings of the pre-BCRA campaign finance structure and a procedural history of the litigation in this case.

A. *The Framework of Federal Campaign Finance Regulation*

One might be tempted to agree with Plaintiffs' assertion that the history of federal campaign finance regulation is "relatively short," McConnell Br. at 9, if one were comparing it to the history of Western civilization. In the judgment of Judge Kollar-Kotelly and Judge Leon, however, the history of federal campaign finance regulation, having its origins in the Administration of President Theodore Roosevelt, is a long-standing and recurring problem that has challenged our government for nearly half of the life of our Republic.

At the close of the nineteenth century, the concentration of the nation's wealth in the hands of a "small portion of the population" began to threaten the stability and integrity of the political system. *UAW*, 352 U.S. at 570 (quoting 2 Morrison and Commager, *The Growth of the American Republic* at 355 (4th ed. 1950)). At the time, the widely accepted view was that "aggregated capital unduly influenced politics, an influence not stopping short of corruption." *Id.* To that end, many states began experimenting with disclosure laws requiring candidates and their political committees to make public the sources and amounts of contributions to their campaigns and the amounts of their campaign expenditures. *Id.* at 570-571. These laws proved to be largely futile. *Id.* at 571.

Concern with both the size and source of campaign funds relating to the 1904 presidential campaign "crystallized popular sentiment for federal action to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *Id.* at 571-72. President Roosevelt's presidential messages to Congress in both 1905 and 1906, strongly encouraged Congress to enact a law prohibiting political contributions by corporations. 40 Cong. Rec. 96 (1905); 41 Cong. Rec. 22 (1906). In response to these concerns, Congress enacted the Tillman Act, Ch. 420, 34 Stat. 864, which prohibited corporations from making any contribution in connection with any election for federal office and which represented "the first concrete manifestation of a continuing congressional concern for elections free from the power of money." *UAW*, 352 U.S. at 575 (internal quotation marks and citation omitted). The Tillman Act demarcates the beginning of the "modern era" of federal campaign finance regulation and is the predecessor of the prohibition on corporate and labor union contributions and expenditures in connection with any federal election from their general treasuries that appears in the Federal Election Campaign Act ("FECA"). *Buckley v. Valeo*, 519 F.2d 821, 904 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).[2] The "underlying philosophy" of the Tillman Act was "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *UAW*, 352 U.S. at 575.

In 1909, Congress endeavored to broaden the Tillman Act by including within the Act's scope, state legislative races and in-kind contributions. *See id.* While this effort ended in failure, in 1910, Congress "translated popular demand for further curbs upon the political power of wealth into a publicity law that required committees operating to influence the results of congressional elections in two or more States to report all contributions and disbursements and to identify contributors and recipients of substantial sums." *Id.* (citing Act of June 25, 1910, ch. 392, § § 5-6, 36 Stat. 822, 823) (disclosure required of all transactions greater than $100). The 1910 law further directed the reporting of expenditures exceeding $50, made independently of a political committee for the purpose of influencing congressional elections in more than one State. Act of June 25, 1910, ch. 392, § § 7, 36 Stat. 824. In 1911, Congress further amended the 1910 Act, and for the first time, included overall expenditure ceilings on campaigns for the House ($5,000) and for the Senate ($10,000). *Buckley*, 519 F.2d at 904-905 (citing Act of Aug. 19, 1911, ch. 33, § 2, 37 Stat. 26). Additionally, the 1911 provisions required all candidates for the Senate and the House of Representatives to make detailed reports with respect to their nominating and election campaigns. *UAW*, 352 U.S. at 576. Hence, candidate disclosures included primary, convention, and other pre-nomination periods. *Buckley*, 519 F.2d at 905. The 1911 law also prohibited candidates from promising employment for the purpose of securing an individual's support. *UAW*, 352 U.S. at 576 (citing 37 Stat. 25). In 1918, Congress again amended the law and added criminal penalties for offering anything of value to influence voting. *Id.* (citing Act of Oct. 16, 1918, ch. 187, 40 Stat. 1013).

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[2] The ban on corporate and labor union contributions and expenditures was eventually codified at 18 U.S.C. § 610, and later transferred to the Federal Election Campaign Act, 2 U.S.C. 441b, when Congress re-evaluated the Act in the aftermath of the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Federal Election Campaign Act Amendments of 1976, P.L. 94-283, 90 Stat. 475. *See also* S. Rep. No. 677, 94th Cong., 2d Sess. 2-3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 929, 930-31.

In the only instance of a criminal prosecution under the Act, Truman Newberry was convicted in Michigan of violating the expenditure ceiling in his 1918 primary campaign for the United States Senate. Newberry's conviction was overturned by the Supreme Court in 1921. The Court invalidated the law insofar as it extended to Senate primary elections. *Newberry v. United States*, 256 U.S. 232, 258 (1921) ("We cannot conclude that authority to control party primaries or conventions for designating candidates was

bestowed on Congress by the grant of power to regulate the manner of holding elections."). Four Justices of the Court held that primaries were intra-party affairs not amenable to congressional regulation under the Elections Clause. *Id.* Justice Joseph McKenna, who provided the crucial fifth vote for judgment, limited the reach of the decision to the facts by concluding that the statute under consideration was enacted prior to the Seventeenth Amendment and, therefore, left open the question of whether that Amendment gave Congress authority to regulate Senate primary elections. *Id.*

In 1925, in the wake of *Newberry*, Congress passed the Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070, which was a comprehensive amalgamation of the surviving provisions of the existing campaign finance laws. *UAW*, 325 U.S. at 576. The Federal Corrupt Practices Act strengthened the Tillman Act by broadening the definition of contribution, extending the ban on corporate contributions to Delegates and Resident Commissioners that were elected to Congress, and punishing the recipient of any illegal contribution in addition to the contributor. *Id.* at 577. The law also generally broadened disclosure provisions. *Buckley*, 519 F.2d at 905.

The Supreme Court upheld the Federal Corrupt Practices Act in the *Burroughs* case of 1934:

> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone. Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the

> corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied. When to this is added the requirement contained in section 244, that the treasurer's statement shall include full particulars in respect of expenditures, it seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption.

Burroughs v. United States, 290 U.S. 534, 547-48 (1934) (internal citation omitted). As is obvious from this language, the *Burroughs* opinion provided Congress with broad discretion to regulate federal elections including the financing of campaigns.

The next instance of congressional action in the area of campaign finance was in 1940 when Congress amended the Hatch Act, a law which placed restrictions on the political activities of the civil service, by making it unlawful for any political committee to receive contributions totaling more than $3,000,000 or to make expenditures of more than that amount in any calendar year. *UAW*, 352 U.S. at 577 (citing Act of July 19, 1940, ch. 640, 54 Stat. 767). The Hatch Act amendments also limited gifts to candidates or political committees to $5,000 in any calendar year. *Buckley*, 519 F.2d at 905 (citing Act of July 19, 1940, ch. 640, 54 Stat. 767).

One year later, the Supreme Court again returned to the question it had squarely addressed in *Newberry:* namely whether congressional power under the Elections Clause extended to the pre-election period. *United States v. Classic*, 313 U.S. 299 (1941). This time, the Court upheld the congressional enactment holding that "the authority of Congress, given by [Article I, section 4], includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress." *Id.* at 317. The case involved a Louisiana Democratic primary for the House of Representatives, which history showed was the determinant of who would win the general election. *Id.* at 314. The Supreme Court in *Classic* disregarded *Newberry* because only four Justices in *Newberry* had adopted the view that the Elections Clause forbade congressional regulation of primary elections. Consequently, as the issue had never "been prejudged by any decision of [the Supreme] Court," *Classic* overruled the *Newberry* plurality. *Id.* at 317; *see also id.* at 325 n.8 ("No conclusion is to be drawn from the failure of the Hatch Act, to enlarge § 19 by provisions specifically applicable to primaries. Its failure to deal with the subject seems to be attributable to constitutional doubts, stimulated by *Newberry v. United States*, which are here resolved.") (internal citations omitted). Under *Classic*, Congress was given authority to impose criminal penalties for activities of state officials conducting a primary election for federal candidates under the auspices of state law. *See id.* at 307.

Following the rise of organized labor during World War II, in 1943, Congress passed the Smith-Connally Act which included a section that extended the Federal Corrupt Practices Act to organized labor. *UAW*, 352 U.S. at 578 (citing War Labor Disputes Act (Smith-Connally Act), ch. 144, § 9, 57 Stat. 163, 167) ("Wartime strikes gave rise to fears of the new concentration of power represented by the gains of trade unionism. And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process."). Congressman Gerald Landis, the author of this provision in the Smith-Connally Act observed that "[t]he public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials." *Id.* at 579 (quoting Hearings before a Subcommittee of the

House Committee on Labor on H.R. 804 and H.R. 1483, 78th Cong., 1st Sess. 1, 2, 4).

Despite the provision in the Smith-Connally Act tightening the reins on political activity of labor unions, Congress was prompted to investigate "enormous" financial outlays by some unions in connection with the 1944 national elections. *Id.* The Senate's Special Committee on Campaign Expenditures investigated and concluded that while there was "'no clear-cut violation of the Corrupt Practices Act,'" *id.* at 580 (quoting S. Rep. No. 101, 79th Cong., 1st Sess. 23), the law was being evaded by large scale spending by labor unions on expenditures (as opposed to contributions), which were not explicitly prohibited by the Federal Corrupt Practices Act, *id.*[3] Congress, it appears, considered a prohibition on contributions to be equally applicable to expenditures. *Id.* at 582 ("'The committee is firmly convinced, after a thorough study of the provisions of the act, the legislative history of the same, and the debates on the said provisions when it was pending before the House, that the act was intended to prohibit such expenditures.'") (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 40). In commenting on how this exception threatened to eviscerate the Federal Corrupt Practices Act, the House Committee studying this problem stated that "'[t]he intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit [directly] contributing to a candidate and yet permit the expenditure of large sums in his behalf?" *Id.* at 581 (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 40).

Therefore, in order to prevent further "evasion" and to "plug the existing loophole," Congress "again acted to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power." *Id.* at 582 (internal quotation and citations omitted). Accordingly, in 1947, Congress passed the Taft-Hartley Act of 1947, ch. 120, 61 Stat. 136, which amended the Federal Corrupt Practices Act "to proscribe any 'expenditure' as well as 'any contribution' [and] to make permanent [its] application to labor organizations" in addition to corporations. *Id.* at 582-83. The Taft-Hartley Act implemented *Classic* by applying its provisions to primary elections. *Buckley*, 519 F.2d at 906.

Following the Taft-Hartley Act, from the late 1940's through the end of the 1950's, Congress sought unsuccessfully to amend the dollar expenditure limits to reflect more "realistic" costs, but no action was taken. *Id.* In 1960, the Senate passed a bill that strengthened reporting requirements for candidates and political committees, adopted individual contribution limits, rationalized current expenditure limits, and placed ceilings on Presidential campaigns. *Id.* The bill, however, died for lack of a companion in the House of Representatives. *Id.* In 1962, President Kennedy's Commission on Campaign Costs recommended "tax incentives and credits for small political contributions, realistic ceilings, and suspension of the equal time provision as to media debates."

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[3] A sampling of the extraordinary size of the expenditures by labor on federal elections demonstrates that "One [labor organization] was found to have an annual budget for 'educational' work approximating $1,500,000, and among other things regularly supplies over 500 radio stations with 'briefs for broadcasters.' Another, with an annual budget of over $300,000 for political 'education,' has distributed some 80,000,000 pieces of literature, including a quarter million copies of one article. Another, representing an organized labor membership of 5,000,000, has raised $700,000 for its national organizations in union contributions for political 'education' in a few months, and a great deal more has been raised for the same purpose and expended by its local organizations."' *UAW*, 352 U.S. at 580-81 (quoting H.R. Rep. No. 2093, 78th Cong., 2d Sess. 3).

Id. In 1966, Congress passed a one dollar tax checkoff to provide public funding for Presidential general elections, which was later repealed in 1967. *Id.*

Late in 1971, Congress reinstituted the tax form checkoff to finance Presidential general elections and, in early 1972, passed the Federal Elections Campaign Act of 1971, Pub. L. No. 92-255, 86 Stat. 3 ("FECA"), requiring disclosure of all contributions in excess of $100 and disclosure of expenditures by all candidates and political committees spending more than $1000 per year. *Id.* The 1971 law also expressly provided corporations and unions with the ability to establish and administer separate, segregated funds for the purpose of making political contributions and expenditures. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 410 (1972).

Despite passage of FECA, the "infinite ability" to "eviscerate[] statutory limitations on contributions and expenditures," which amounted to "wholesale circumvention" became a source of further congressional concern. *Buckley*, 519 F.2d at 837. Congress concluded that costs for federal elections had increased at an "'alarming'" rate. *Id.* (quoting H.R. Rep. No.93-1239, 93d Cong., 2d Sess. 3 (1974), U.S. Code Cong. & Admin. News 1974, p. 5587). Congress was further troubled by the "interaction" between large-scale campaign expenditures and a reliance "on large contributions from monied and special interests." *Id.* In *Buckley*, it was undisputed that "one percent of the people accounted for 90 percent of the dollars contributed to federal candidates, political parties and committees." *Id.* (citing agreed to Findings of Fact). It was also undisputed that illegal contributions to both parties were made in 1972 by Gulf Oil and by American Milk Producers, Inc., a large dairy cooperative. *Id.* at 838. Notably, the circuit court in *Buckley* concluded:

> Large contributions are intended to, and do, gain access to the elected official after the campaign for consideration of the contributor's particular concerns. Senator Mathias not only describes this but also the corollary, that the feeling that big contributors gain special treatment produces a reaction that the average American has no significant role in the political process.

Id.; see also id. n.32 ("Congress found and the District Court confirmed that such contributions were often made for the purpose of furthering business or private interests by facilitating access to government officials or influencing governmental decisions, and that, conversely, elected officials have tended to afford special treatment to large contributors.") (citations omitted). Indeed, the lower *Buckley* court documented the "lavish contributions by groups or individuals with special interests to legislators from both parties." *Id.* at 840 n.37.

In 1974, in direct response to the 1972 elections which were a "watershed for public confidence in the electoral system," *id.* at 840, and the "shock of its aftermath," *id.* at 837, Congress enacted and President Gerald Ford signed the sweeping FECA Amendments of 1974. *Id.* Broadly speaking, the amendments imposed dollar limitations on contributions by individuals and by political committees to candidates for federal office, to political party committees, and to independent political committees. 2 U.S.C. § 441a(a). The 1974 amendments also imposed limits on expenditures that individuals, candidates, political committees, and political parties could spend to help federal candidates win elections. Moreover, the law treated expenditures that were "coordinated" with a candidate as contributions. 2 U.S.C. 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."). The amendments also included a variety of recordkeeping and disclosure requirements. *See* 2 U.S.C. § § 432-434. The Federal Election

Commission was also created by the amendments and tasked with monitoring and enforcing the campaign finance laws. *See generally* 2 U.S.C. § § 437c(b)(1), 437d(a), 437g. Finally the law, as amended, provided public funding primarily for qualified presidential candidates and some public funding for nominating conventions of major political parties.

The first day after the FECA amendments went into effect, the law was challenged. *Buckley*, 519 F.2d at 901. In a lengthy opinion, the United States Court of Appeals for the District of Columbia Circuit found all but one of the provisions of FECA constitutional. *Id.* at 843-44 (striking down disclosure provision 2 U.S.C. § 437a). In 1976, the Supreme Court affirmed in part and reversed in part the D.C. Circuit's ruling in its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Generally speaking, in examining FECA's provisions against the free speech and association provisions of the First Amendment the Supreme Court found constitutional FECA's contribution limitations, *Buckley*, 424 U.S. at 23-38, and unconstitutional those provisions of FECA that imposed expenditure limitations, *id.* at 39-59. The contribution-expenditure dichotomy first developed in *Buckley* was grounded in the Supreme Court's view that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21 (observing that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."). Expenditure restrictions, on the other hand, "while neutral as to the ideas expressed, limit political expression at the core of our electoral process and of the First Amendment freedoms." *Id.* at 39 (internal quotation marks and citation omitted).

In *Buckley*, the Supreme Court upheld as well the general disclosure provisions contained in FECA. *Id.* at 60-84.[4] The Supreme Court likewise found constitutional the public funding scheme for presidential candidates. *Id.* at 85-109. Finally, the Supreme Court struck down the structure of the FEC as it was constituted under FECA in violation of the Appointments Clause of the Constitution. *Id.* at 109-143.

Hence, in the aftermath of *Buckley*, it was FECA's contribution restrictions that remained intact, while its expenditure provisions were vitiated.[5] Under FECA, as it emerged from *Buckley*, no "person"[6] was permitted to contribute in excess of $1,000 to a candidate for federal office, 2 U.S.C. § 441a(a)(1)(A); no person could contribute to the political committees established and maintained by a national political party, in any calendar year which, in the aggregate, exceed $20,000, 2 U.S.C. § 441a(1)(B); and no person could contribute to any other political committee in any calendar year which, in the aggregate, exceed $5,000,2 U.S.C. § 441a(a)(1)(C).[7] In addition, no multicandidate political committee could contribute in excess of $5,000 to a candidate for federal office. 2 U.S.C. § 441a(a)(2)(A); no multicandidate political committee could contribute in excess of $15,000 to the political committees established and maintained by a national political party, 2 U.S.C. § 441a(a)(2)(B);and finally, no multicandidate political committee could contribute to any other political committee in any calendar year which, in the aggregate, exceeded $5,000. 2 U.S.C. § 441a(a)(2)(C). In order to "prevent evasion" of these limitations *Buckley* upheld the Act's $25,000 limitation on total contributions during any calendar year. *Buckley*, 424 U.S. at 38. As a result, under 2 U.S.C. § 441a(a)(3), no individual was permitted to make contributions aggregating more than $25,000 in any calendar year. 2 U.S.C. § 441a(a)(3).[8] In addition, under 2 U.S.C. § 441b, corporations and labor unions are prohibited from using their general treasury funds to "make a contribution or expenditure in connection with any election to any political office." 2 U.S.C. § 441b(a). In sum, the Supreme Court found that:

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[4] The D.C. Circuit's decision striking down 2 U.S.C. § 437a was not appealed to the Supreme Court. *Buckley*, 424 U.S. at 11 n.7.

[5] Following *Buckley*, there have been a number of important Supreme Court opinions that have addressed application of *Buckley* in other contexts. It is more appropriate to discuss these cases in the context of each Judge's separate opinion.

[6] FECA defines "person" as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. § 431(11).

[7] Under BCRA, these contribution limits have been raised. Persons can now contribute $2,000 to candidates and $25,000 to national political party committees. BCRA § § 307(a)(1), 307(a)(2); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1). Also under BCRA, Congress has carved state party committees out of § 441a(a)(1)(C) and increased the contribution limit for state party committees from $5,000 to $10,000. BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1). Moreover, the contribution limits

> The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

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applicable to candidates and national party committees have been indexed to the consumer price index and will increase with inflation. BCRA § 307(d); FECA § 315(c); 2 U.S.C. § 441a(c).

[8] BCRA has increased the aggregate limit on individual contributions from $25,000 per year to $95,000 per two-year election cycle, of which $37,500 may be contributed to candidates. BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3).

Buckley, 424 U.S. at 21-22. Indeed, what emerged from *Buckley* was a tightly focused regime whereby contributions (and coordinated expenditures) to candidates and political parties and committees were limited or even banned (in the case of corporate and union treasury funds) and independent political advocacy was left unimpeded.

Contribution is defined in FECA as including, "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

Since the adoption of FECA, it is clear that the Commission has struggled with interpreting the phrase "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). In 1975, the FEC examined the case of a local party committee that had established separate accounts for federal funds and for corporate contributions which were permitted under state law, but which were prohibited by federal law for use in connection with federal elections. In Advisory Opinion 1975-21, the Commission determined that the appropriate course was to have the local party allocate both its administrative expenses and its voter registration drives between the two accounts, given that these expenses had an impact on both state and federal elections. FEC Advisory Op. 1975-21 (allocation based on the ratio of "the total amount which the [local party] directly contributes to and expends on behalf of Federal candidates, to . . . the total of all direct contributions to and expenditures on behalf of all candidates-Federal, State, and local"). The FEC slightly reversed course, in Informational Letter 1976-72, where it determined that voter registration efforts could not be paid for from an account containing funds raised from corporate and union general treasuries. FEC Informational Letter 1976-72 ("Thus, even though the Illinois law apparently permits corporate contributions for State elections, corporate/union treasury funds may not be used to fund any portion of a registration or get-out-the-vote drive conducted by a political party.").

However, in its 1977 rulemakings implementing FECA, the Commission permitted any political committee to make a choice between creating a separate federal account for its federal election activities, or to establish a single account containing only funds subject to the federal contribution limits to finance all of its activities with respect to both state and federal elections. 11 C.F.R. § 102.6(a)(2) (1977). To the extent that segregated accounts were created, the committees were required to "allocate administrative expenses on a *reasonable basis* between their Federal and non-Federal accounts in proportion to the amount of funds expended on Federal and non-Federal elections, or on another reasonable basis." 11 C.F.R. § 106.1(e)(1977) (emphasis added). The following year, the Commission essentially reversed its 1976 advisory opinion and in Advisory Opinion 1978-10, determined that "the costs of [voter] registration and get-out-the-vote drives" by a state party committee "should be allocated between" federal and nonfederal accounts "in the same manner as other general party expenditures" under the Commission's 1977 regulations. FEC Advisory Op. 1978-10. In Advisory Opinion 1979-17, the Commission extended the conclusions reached in Advisory Opinion 1978-10 regarding separate accounts to the national party committees. FEC Advisory Op. 1979-17 ("[Regulations] thus would permit the RNC to establish and administer separate, segregated bank accounts through an auxiliary organization of the national party which accounts could be used for the deposit and disbursement of funds designated specifically and exclusively to finance national party activity limited to influencing the nomination or election of candidates for public office other than elective 'Federal office.'") (citation omitted).

Accordingly, by the middle of 1979, the FEC permitted national and state party committees to solicit and accept

donations outside of FECA's source and amount limitations ("nonfederal money")[9] provided that these monies were placed in separate accounts from the federal funds. In other words, political committees were permitted to establish two sets of accounts-one for federally- regulated money (federal accounts) and one for non-federally regulated money (nonfederal accounts).[10]

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[9] There is a degree of skirmishing in the briefs over the appropriate terminology for "nonfederal money." Defendants use the phrase "soft money." Plaintiffs refer to "soft money" as "state-regulated" or "nonfederal" money. The Court has, for the most part, adopted the nomenclature "nonfederal" money because that is the term that the FEC has used during the rulemaking process implementing BCRA, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064 (July 29, 2002) ("Because the term 'soft money' is used by different people to refer to a wide variety of funds under different circumstances, the Commission is using the term 'non-Federal funds' in the final rules rather than the term 'soft money.'"), even though BCRA uses the term "soft money," BCRA § 101 (entitled "*Soft money* of political parties") (emphasis added) and even though on occasion the Supreme Court has also used the phrase "soft money," *see, e.g., Colorado Republican Federal Campaign Committee v. FEC ("Colorado I")*, 518 U.S. 604, 616 (1996) ("Unregulated 'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute."), Despite the references in the case law and the statute to the term "soft money," for the sake of clarity in an area of law that demands absolute precision, the Court generally eschews the phraseology "hard money" or "soft money" in favor of "federal funds" or "nonfederal funds." Federal funds are those monies regulated under FECA, as amended, and nonfederal funds are those monies that may or may not be regulated under state law, but not federal law.

[10] In 1979 Congress again amended FECA to exempt two new sets of activities from the definition of contribution and expenditure. First, state and local party disbursements for campaign materials such as pins, bumper stickers, and yard signs used in connection with volunteer activities on behalf of the party's nominees were exempted from FECA's contribution limits provided that the activity was paid for with federal money. 2 U.S.C. § § 431(8)(B)(ix), 9(B)(viii). The second exemption

Essentially, the FEC's opinions and rulemakings permitted state and national party committees to pay for the nonfederal portion of their administrative costs and voter registration and turnout programs with monies raised under relevant state laws (not FECA), even if those state laws were in direct contravention of FECA, such as permitting contributions from corporate and labor union general treasury funds. As a result, national and state parties began to raise so-called "soft money," which described these nonfederal funds, not subject to FECA limits and restrictions, that were used to pay for these administrative and generic voter drive expenses.

With these developments, nonfederal funds became an increasingly important means of party financing. During the 1980 election, the RNC spent approximately $15 million in nonfederal funds and the DNC spent roughly $4 million, constituting 9% of the national parties total spending. Mann Expert Rep. at 12.[11] In 1984, the national parties spent collectively an estimated $21.6 million in nonfederal money, which accounted for 5% of their total spending. *Id.* By 1988,

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related to a state party's payment for "the costs of voter registration and [GOTV] activities" conducted on behalf of the party's presidential ticket. 2 U.S.C. § § 431(8)(B)(xi), (9)(B)(ix). This exemption was also conditioned on the use of federal money for the activity. Hence, for both of these activities unlimited federal money could be used to pay for them because they were exempted from the definition of "contribution" and "expenditure." For state and local parties that opted to use nonfederal funds to pay for these activities, allocation was still permitted.

[11] As Defense Expert Mann plainly concedes, "Just what amount of soft money activity the parties pursued in the 1980s is less certain [because] '[n]onfederal' funds were not subject to federal disclosure requirements, only to the disclosure laws in states where soft money was spent." Mann Expert Report at 12. It was not until 1992 that the FEC began collecting official data on national parties use of nonfederal funds, so any attempts at pinpointing the amount of nonfederal funds spent by the national parties before 1992 are estimates. Notably, Plaintiffs do not challenge any of the pre-1992 estimates (or any of the post-1992 data collected by the Commission). Therefore, the Court relies on these statistics.

national party nonfederal money had increased to an approximate $45 million, or 11% of national party spending. *Id.*

In 1990, the FEC promulgated regulations to provide for some consistency in the methods used to determine the relative portions of federal and nonfederal money to be used in financing these generic party activities. Prior to 1990, the regulations specified that the allocation rate between nonfederal and federal accounts was to be done on a "reasonable basis." 11 C.F.R. § 106.1(e) (1977). The regulations promulgated by the Commission were designed to give certainty to this subjective standard and were in response to a district court's decision which held that the allocation rules required specific guidance from the Commission. *Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987) ("Indeed, it is possible that the Commission may conclude that no method of allocation will effectuate the Congressional goal that all monies spent by state political committees on those activities permitted in the 1979 amendments be 'hard money' under the FECA. That is an issue for the Commission to resolve on remand.").[12] Under the new regulations, national party committees (other than Senate and House national party committees) were required to allocate at least 65% of their administrative and generic voter drive expenses [13] to their federal accounts in presidential election years and 60% in non-presidential election years. 11 C.F.R. § § 106.5(b)(2)(i), (ii)(1991). Senate and House committees were to allocate these expenses on the basis of the ratio of federal expenditures to total federal and nonfederal disbursements made by the committee during the two-year federal election cycle. 11 C.F.R. § 106.5(c)(i). For state and local parties, the allocation between the federal and nonfederal accounts for these expenses were determined by the proportion of federal offices to all offices on a state's general election ballot. 11 C.F.R. § 106.5(d) (1991). Generally, the state parties' allocation rate was substantially lower than the national party allocation rate. Mann Expert Rep. at 14. The new rules also mandated that the national party committees disclose the details of their nonfederal accounts. 11 C.F.R. § § 104.8(e), (f) (1991) (requiring national parties to report for nonfederal and building fund accounts the donating individual's name, mailing address, occupation or type of business, and the date of receipt and amount of any such donation). State parties, however, were exempted from these disclosure requirements. 11 C.F.R. § 104.9(a) (1991) (reporting committees required to disclose information pertaining to "the committee's federal account(s) only"). The Commission's regulations, therefore, provided the national parties with an incentive to channel these expenditures through state party committees, since this approach generally permitted more nonfederal dollars to be spent than if a national party spent the money without disclosing the sources of the funds.

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[12] The Court observes that *Common Cause v. FEC* demonstrates that as early as 1984, before any official statistics on nonfederal funds were kept by the Commission, there was concern over the influence of these monies on federal elections. However, the Commission in 1984 determined that, "Common Cause has not presented evidence of instances in which 'soft money' has been used to influence federal elections sufficient to justify the stringent rules proposed in its petition." *Common Cause*, 692 F. Supp. at 1393 (citing the Commission's April 17, 1986, Notice of Disposition).

[13] The Commission permitted, *inter alia*, the following expenses to be allocated: administrative expenses, which included rent, utilities, office supplies, and salaries, 11 C.F.R. § 106.5(a)(2)(i) (1991); the direct costs of

In 1992, spending on nonfederal money by the national parties reached $80 million, or 16% of the national parties total spending. Mann Expert Rep. at 15 (citing to official figures from the FEC). Of that total amount, the national parties contributed only $2 million directly to state and local candidates. Mann Expert Rep. at 16. In addition, the two national parties transferred over $15 million to state party committees-two thirds of which was transferred to presidential election battleground states. *Id.* Along these lines, the national parties expended $14 million in nonfederal funds for "generic" party advertising, consisting predominantly of television advertisements that did not mention candidates names, but urged viewers to simply vote for a particular party or stressed themes from the presidential campaigns. *Id.* Although the Commission had only approved the use of nonfederal funds by the national parties "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office," by 1992, with the new allocation rules firmly in place, national parties were using nonfederal money to impact federal elections as permitted by the Commission. FEC Advisory Op. 1979-17.

With the 1996 election cycle, the national parties' total nonfederal funds spending reached $272 million, which was 30% of the national party committees' total spending. Mann Expert Rep. at 21. Starting in the Fall of 1995 and continuing through 1996, Democratic party committees used soft money to fund advertisements that either promoted President William J. Clinton by name or criticized his opponent by name, while avoiding words that expressly advocated either candidate's election or defeat.[14] *Id.* at 18. In May of 1996, the

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a fundraising program or event, where federal and nonfederal funds are collected by one committee, 11 C.F.R. § 106.5(a)(2)(ii) (1991); and "generic voter drives," which included voter identification, voter registration, and get-out-the-vote ("GOTV") drives where a specific candidate was not mentioned. 11 C.F.R. § 106.5(a)(2)(iv) (1991).

[14] The argument that such advertisements could be paid for with nonfederal funds had its origins in *Buckley*. The Supreme Court in *Buckley*, in an attempt to save from unconstitutional vagueness the independent expenditure prohibitions, narrowed them to apply "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. In a footnote, the *Buckley* Court found that "[t]his [narrowing] construction would restrict the application of § 608(e)(1) to

Republican National Committee announced its plans to spend $20 million onan "issue advocacy" campaign. *Id.* at 20.

Although many of the advertisements featured the presidential candidates, none of the costs of these advertisements were charged as coordinated expenditures on behalf of the candidate's campaign, which would have subjected the expenditure to FECA's contribution limits. Instead, the parties paid the full cost, with a mix of federal and nonfederal funds as permitted by FEC allocation rules.[15] Often the advertisements were paid for by state party committees, where the allocation rules permitted greater spending of soft money. Mann Expert Report at 22 (noting over $115 million was transferred from the national parties to the state party committees). In fact, state party nonfederal funds for political communication/advertising went from $2 million in 1992 to

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communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. Even though the Supreme Court narrowed the provision of the law, it struck down the expenditure provision as unconstitutional as written and as narrowed by the Court. *Id.* at 44.

It was based on this language that the national parties in 1995 and 1996 argued that as long as they ran advertisements that did not mention "express words of advocacy of election or defeat," they could use nonfederal money to run advertisements that supported their presidential candidate or attacked his opponent.

[15] The FEC had previously ruled that party committees could sponsor issue advocacy advertisements that did not feature a federal candidate and pay for these advertisements with a combination of federal and nonfederal dollars as permitted under the allocation regulations. FEC Advisory Op. 1995-25 (discussing that allocation rules were permissible to allocate funding for "RNC plans to produce and air media advertisements on a series of legislative proposals being considered by the U.S. Congress, such as the balanced budget debate and welfare reform"). The national parties used this advisory opinion as justification for their issue advocacy campaigns featuring candidates for federal office and paid for with nonfederal money.

$65 million in 1996. *Id.* at 22; *see also* La Raja Expert Report at 18. A similar strategy was also used by the parties to support their candidates for congressional office. Mann Expert Report at 20. Following the 1996 election, the FEC began a series of investigations over the parties' 1996 election practices. Statement of Reasons of Commissioner Scott E. Thomas for MURs 4553 and 4671, 4713, 4407 and 4544 at 2-5 [DEV 51]. In 2000, the FEC deadlocked over whether there was reason to believe that the national parties advertising program constituted an excessive in-kind contribution to the presidential campaigns. *Id.* at 5.

The Senate and House also conducted extensive investigations into the 1996 federal elections. Both the majority and minority reports in the Senate investigation concluded that permitting nonfederal donations to political parties eviscerated FECA's longstanding ability to prevent corporate and labor union treasury funds from influencing federal elections. Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 (6 vols.), Mar. 10, 1998, ("Thompson Committee Report"); *id.* at 4468 (majority report) ("[S]oft money spending by political party committees eviscerates the ability of the FECA to limit the funds contributed by individuals, corporations, or unions for the defeat or benefit of specific candidates."); *id.* at 4572 (minority report) ("The soft money loophole undermines the campaign finance laws by enabling wealthy private interests to channel enormous amounts of money into political campaigns."). In the House, the Committee on Government Reform and Oversight conducted a wide ranging investigation, which culminated in public hearings during 1997, into, *inter alia,* campaign fundraising by political parties from foreign sources. *See* Campaign Finance Investigation: Hearings Before the House Committee on Government Reform and Oversight, 105th Cong. 6 (October 8, 1997) (statement of Chairman Dan Burton) ("This

Committee's hearings will cover many subjects . . . . Our initial focus has been how political parties took or raised contributions from foreign sources. I am gravely concerned about foreign governments, foreign companies or foreign nationals trying to influence our electoral processes."); Conduit Payments to the Democratic National Committee: Hearings Before the House Committee on Government Reform and Oversight, 105th Cong. 6 (October 9, 1997) (statement of Chairman Dan Burton) ("Today, marks the first day of hearings into illegal foreign fundraising and other violations of law during recent campaigns.").

Nevertheless, without any congressional action, nonfederal funds emerged as a significant source of party resources. With these strategies firmly in place, the national parties spent $221 million of nonfederal money on the 1998 midterm elections, or 34% of their total spending, which was more than double the amount of nonfederal funds spent during the previous midterm election. Mann Expert Report at 23. With the 2000 elections, the national parties spent $498 million worth of nonfederal funds,which was 42% of their total spending. *Id.* at 24.

The use of nonfederal funds by the political parties was paralleled to some degree by a similar development in the rise of issue advocacy by corporations and labor unions. Aside from the political parties making advertisements that supported their candidates or attacked the opponent without using words of direct "express advocacy," unions and corporations began to mount "issue advocacy" campaigns, particularly beginning with the 1996 election, that were paid directly from their general treasuries. For example, in 1996 the AFL-CIO ran the following advertisement from September 26 to October 9 in the district of House Republican incumbent Steve Stockman:

> [Narrator] What's important to America's families? [Middle-aged man] "My pension is very important because it will provide a significant amount of my income when I retire." [Narrator] *And where do the candidates stand?* Congressman Steve Stockman voted to make it easier for corporations to raid employee pension funds. Nick Lampson opposes that plan. He supports new safeguards to protect employee pension funds. When it comes to your pension, there is a difference. Call and find out.

AFL-CIO 000593; [DEV 124] (emphasis added); *see also* AFL-CIO 000602.

Advertisements such as the above illustration were permitted by the Supreme Court's ruling in *FEC v. Massachusetts Citizens for Life, Inc.* In that case, the Supreme Court found that the prohibition on corporate and union treasury spending on expenditures found in 2 U.S.C. § 441(b) needed to be narrowly construed to only apply to express advocacy. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*") ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."). As a result, corporations and labor unions were free to use general treasury funds to finance issue advocacy campaigns. It does not appear that prior to 1996, the practice of using issue advertising to influence federal elections was a widespread practice.

In addition, the issue advocacy campaigns by corporations and labor unions were free from the disclosure provisions upheld in *Buckley* because they were considered outside of FECA's regulatory purview. This lack of disclosure permitted various interest groups to conceal the true identity of the source behind the advertisement. Thus, following both the 1996 and 2000 elections, corporations and unions used their general treasury funds to run advertisements apparently aimed at influencing federal elections and avoiding FECA's longstanding disclosure provisions.

With regard to both political party spending of nonfederal funds and political party, corporate, and labor union issue advocacy, there does not appear to be any dispute among the litigants to the fact that much of this behavior was not regulated or was permitted by the FEC. Rather, the dispute between the parties centers around the effect of engaging in these tactics, whether the measures needed addressing, and how Congress ultimately remedied what it perceived to be a problem. It is the congressional response to which the Court now turns.

B. *The Bipartisan Campaign Reform Act of 2002*

In response to what it perceived were burgeoning problems with federal campaign finance laws, Congress began to consider reform legislation over six years ago, during the 105th Congress.[16] The overhaul of our Nation's existing campaign finance laws—culminating with the enactment of BCRA—would consume the attention of three separate Congresses[17] and require navigation through atypical parliamentary procedures.

During the 105th Congress, the House of Representatives considered House Bill 2183, the Bipartisan Campaign Integrity Act of 1997, offered by Representative Asa Hutchinson. The bill was first considered on May 22, 1998.[18] 144 Cong. Rec. H3774 (daily ed. May 22, 1998). On August 3, 1998, during consideration of Representative Hutchinson's bill on the House floor, the Committee of the Whole[19] adopted an amendment in the nature of a substitute offered by Representatives Christopher Shays and Martin Meehan.[20] 144 Cong. Rec. H6947 (daily ed. Aug. 3, 1998). Finally, on August 6, 1998, the House passed House Bill 2183, as amended (the Bipartisan Campaign Reform Act of 1998), by a vote of 252-179. 144 Cong. Rec. H7330 (daily ed. Aug. 6, 1998). The bill was referred to the Senate on September 9, 1998, 144 Cong. Rec. S10, 114 (daily ed. Sept. 9, 1998), but was not considered prior to adjournment, *sine die*, on October 21, 1998. As a result, the Bipartisan Campaign Reform Act of 1998 died in the Senate during the 105th Congress.

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[16] *See* Bipartisan Campaign Finance Reform Act of 1998, H.R. 2183, 105th Cong. (1998), *available at* http://thomas.loc.gov.

[17] *See id.;* Bipartisan Campaign Reform Act of 1999, H.R. 417, 106th (1999); Bipartisan Campaign Finance Reform Act of 2002, H.R. 2356, 116 Stat. 81 (2002).

[18] According to *Congressional Quarterly* reporter David Mark, the House Leadership only allowed floor consideration of House Bill 2183 after it appeared that supporters of the bill had nearly secured the requisite 218 signatures on a discharge petition to automatically bring the bill to the floor, which did not require the consent of the leadership. *See* David Mark, *Campaign Finance Discharge Petition Off to Fast Start*, Congressional Quarterly Daily Monitor (July 31, 2001).

[19] When considering most major legislation, the House of Representatives typically adopts a rule, in the form of a House Resolution, that governs, and generally limits, debate on the underlining bill. In order to expedite consideration of the underlining bill, the rule suspends the proceedings of the House of Representatives, and the body operates as one large committee, the Committee of the Whole House on the State of the Union ("Committee of the Whole"). Walter J. Oleszek, *Congressional Procedures and the Policy Process* 151-53 (5th ed., CQ Press 2001). This parliamentary mechanism enables the House to act with a quorum less than the requisite 218 members; only 100 members are needed to constitute a quorum in the Committee of the Whole. *Id.* at 152. (There are numerous other technical distinctions between the Committee of the Whole and the House of Representatives that enable expeditious consideration of legislation). *Id.* at 152-53. After the Committee of the Whole considers the underlining legislation, generally, the rule governing debate automatically dissolves the Committee of the Whole, and the House of Representatives reconvenes to vote on the underlining bill for final passage.

[20] Beyond making numerous substantive changes to the underling bill, the Shays-Meehan substitute amendment changed the title of the bill from the "Bipartisan Campaign Integrity Act of 1997," 144 Cong. Rec. H3774 (daily ed. May 22, 1998), to the "Bipartisan Campaign Reform Act of 1998," 144 Cong. Rec. H4790-96 (daily ed. June 18, 1998).

On January 19, 1999, during the 106th Congress, Representative Shays introduced House Bill 417, the Bipartisan Campaign Reform Act of 1999, which attracted the support of 96 original cosponsors. *See* H.R. 417, 106th Cong. (1999). Upon introduction, the bill was referred to the Committee on House Administration, where it received an unfavorable report. H.R. Rept. 106-297, pt. 1, at 17 (1999). Nonetheless, the proponents of campaign finance reform secured floor consideration through the threat of a discharge petition. *See* David Mark, *Campaign Finance Discharge Petition Off to Fast Start*, Congressional Quarterly Daily Monitor (July 31, 2001). When the Bipartisan Campaign Reform Act of 1999 reached the floor for a vote, it passed comfortably, by a vote of 252-177. 145 Cong. Rec. H8286 (daily ed. Sept. 14, 1999). On September 16, 1999, the Senate received House Bill 417, and on September 29, the Senate referred it to the Senate Committee on Rules and Administration, 145 Cong. Rec. S11,638 (daily ed. Sept. 29, 1999), where it would remain for the balance of the 106th Congress. The Senate responded to the House's action by considering Senate Bill 1593, also titled the Bipartisan Campaign Reform Act of 1999, which was introduced on September 16, 1999, by Senators McCain and Feingold, shortly after House Bill 417 secured passage. S. 1593; *see also* 145 Cong. Rec. H8286 (daily ed. Sept. 14, 1999). The Senate, however, failed to invoke cloture,[21] thereby failing to

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[21] While debate on the Senate floor does not always lead to an all-out filibuster, on controversial legislation, the Senate typically invokes cloture to end the threat of unlimited debate or simply to gauge support for the underlining bill. *See* Walter J. Oleszek, *Congressional Procedures and the Policy Process* 231-34 (5th ed., CQ Press 2001). Under Rule XXII of the Standing Rules of the Senate, if "three-fifths of the Senators duly chosen and sworn" (60 Senators if the Senate is at its full membership) vote in the affirmative on a motion for cloture, further debate on the question shall be limited to no more than one hour for each Senator, and the time for consideration of the matter shall be limited to 30 additional hours, unless

limit debate on two separate amendments to Senate Bill 1593, and the bill floundered. 145 Cong. Rec. S12,800 (daily ed. Oct. 19, 1999); *id.* at S12,803. As a result, for the second time in as many years, the campaign finance reform bill died in the Senate.

Circumstances changed during the 107th Congress; this time it was the Senate that acted first and passed campaign finance reform legislation, Senate Bill 27,[22] by a vote of 59-41. 147 Cong. Rec. S3258 (daily ed. Apr. 2, 2001). The bill was then transferred to the House of Representatives.

Representatives Shays and Meehan had already introduced House Bill 380, the Bipartisan Campaign Reform Act of 2001, when the Senate secured passage of Senate Bill 27. *See* H.R. 380, 106th Cong. (1999). On June 28, 2001, in an effort to make their legislation conform with the Senate-passed bill,[23] Representatives Shays and Meehan introduced new legislation, House Bill 2356, also titled the Bipartisan Campaign Reform Act of 2001. The House Leadership, which, through the Speaker of the House, controls access to

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increased by another three-fifths vote. *See* Standing Rules of the Senate, Rule XXII, *available at* http:// rules.senate.gov/senaterules/rule22.htm.

[22] Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001).

[23] Faced with the fact that Senate Bill 27 was unlikely to garner the support of a majority of the House, and given the fact that House Bill 380 differed from Senate Bill 27, Representatives Shays and Meehan met with members of the Senate to work out a compromise bill. The agreement they reached was reflected in House Bill 2356. *See* David Mark & John Cochran, *House Panel to Mark Up Dueling Campaign Finance Bills*, Congressional Quarterly Daily Monitor (June 27, 2001) ("The revisions are designed to encourage the Democratic-controlled Senate to accept a House-passed bill, thus avoiding the need for a conference committee. 'We're trying to pre- conference with supporters of the bill, rather than going to conference with opponents,' Shays said.").

the House floor,[24] agreed to consider House Bill 2356. However, in a last minute effort to tweak the legislation, Representatives Shays and Meehan proposed several amendments. John Cochran, *Not Victory but Vitriol for Campaign Finance Bill*, Congressional Quarterly Weekly (July 13, 2001). The package of amendments offered by Shays and Meehan reflected the need for additional changes to ensure that House Bill2356, if passed by the House, would be considered without amendment by the Senate, thereby eliminating the need for a conference committee.[25] *See id.* In addition, Shays and Meehan requested that the Rules Committee write a rule for consideration and debate on the House floor that would treat this package as a single amendment, which could be considered in one vote. *Id.* The Rules Committee refused, drafting a resolution for consideration and debate that would treat each change,

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[24] The Speaker of the House picks the 9 majority-party members that serve on the powerful House Committee on Rules—the gateway to the House floor. The Rules Committee writes the rules that govern debate and determines which amendments will be considered. The committee currently consists of 13 members, 9 majority-party members chosen by the Speaker of the House and 4 minority-party members chosen by the House Minority Leader. *See* Walter J. Olsezek, *Congressional Procedures and the Policy Process* 119 (5th ed., CQ Press 2001).

[25] Members of a conference committee are formally appointed by the Speaker of House and the presiding officer of the Senate. Walter J. Oleszek, *Congressional Procedures and the Policy Process* 252-54 (5th ed., CQ Press 2001). In the House, after initial appointment, the Speaker retains the authority to add and remove members. *Id.* at 254. Although the House rules provide that the Speaker shall "appoint no less than a majority [of conferees] who generally supported the House position [on the legislation] as determined by the Speaker," Rules of the House of Representatives, 108th Cong. (2003) *available at* http://www.house.gov/rules/house_rules.htm, in practice, the Speaker is vested with significant discretion to ensure that the House delegates are amicable to the leadership's position. *See* Walter J. Oleszek, *Congressional Procedures and the Policy Process* 252-54 (5th ed., CQ Press 2001).

fourteen in total, as separate amendments. *Id.; see also* H.R. Res. 188, 107th Cong. (2001). Shays, Meehan, and their supporters opposed the rule, claiming that the House Leadership used "technicalities" to defeat the bill, and called upon their colleagues to reject the rule. 147 Cong. Rec. H3984 (daily ed. July 12, 2001) (statement of Rep. Meehan). The House voted and the rule failed.[26] In the aftermath, however, the bill's proponents and the House Leadership were unable to come to an agreement over a compromise rule for the consideration and debate of House Bill 2356, John Cochran, *Not Victory but Vitriol for Campaign Finance Bill*, Congressional Quarterly Weekly (July 13, 2001), and the bill was pulled from the House Floor.

On July 30, 2001, Representative Jim Turner filed a discharge petition to bring House Bill 2356 to the floor for consideration. H.R. Discharge Pet. No. 3, *available at* http://clerkweb.house.gov/107/lrc/pd/Petitions/Dis3.htm. As congressional procedure scholar Walter J. Oleszek noted:

> [t]he discharge procedure, adopted in 1910, provides that if a bill has been before a standing committee for thirty legislative . . . days, any member can introduce a motion to relieve the panel of the measure . . . . If the requisite number of members (218) sign the petition, this procedure permits a majority of the House to bring a bill to the floor even if it is opposed by the committee that has jurisdiction over the measure, the majority leadership, and the Rules Committee.

Walter J. Oleszek, *Congressional Procedures and the Policy Process* 138 (5th ed., CQ Press 2001). While the discharge petition permits a majority of the House to circumvent a stacked committee or the House Leadership, it has not been a highly effective tool for passing legislation, let alone securing its enactment into law. As Walter Oleszek went on to observe:

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[26] This marked the first occasion in which Speaker J. Dennis Hastert lost a vote on a rule during his first two years as Speaker of the House. Karen Foerstel, *A Bitter Day for the GOP*, Congressional Quarterly Weekly (July 13, 2001).

> Few measures are discharged from committee. From 1931 through 1994 (approximately the period during which the modern version of the rule has been in effect), more than five hundred discharge petitions were filed, but only forty-six attracted the required signatures and only nineteen bills were discharged and passed by the House. Of those, only two became law: the Fair Labor Standards Act of 1938 and the Federal Pay Raise Act of 1960.

Id. at 139. Despite this history of failure, on January 24, 2002, Representative Turner's petition attracted 218 signatures, the requisite number to achieve discharge. *See* H.R. Discharge Pet. No. 3. Consequently, the bill was sent to the floor and scheduled for debate. *See* H.R. Res. 203, 107th Cong. (2001); H.R. Res. 344, 107th Cong. (2002); 148 Cong. Rec. H266 (daily ed. Feb. 12, 2002). On February 13, 2002, the House began to consider House Bill 2356. During consideration, the House rejected three substitute amendments—one offered by House Majority Leader Dick Armey[27] and two offered by House Administration Committee Chairman Robert Ney[28]—before agreeing to Representative Shays' substitute amendment by a vote of 240-191, 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002). Like the earlier amendment package, the Shays Substitute was designed to avoid a conference committee, where opponents would have

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[27] The Armey Substitute, Amendment 415, failed by a vote of 179-249. 148 Cong. Rec. H376-77 (daily ed. Feb. 13, 2002).

[28] The first Ney Substitute, Amendment 416, failed by a vote of 53-377. 148 Cong. Rec. H392 (daily ed. Feb. 13, 2002). The second Ney Substitute, Amendment 430, failed by a vote of 181-248. *Id.* at H464-65.

another opportunity to scuttle the bill,[29] by making changes likely to garner the support of a majority of the Senate without forcing them to alter the text of the House-passed bill. *See* 148 Congr. Rec. H402 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (observing that the Shays substitute amendment was drafted after having "met with Senators from both sides of the aisle to learn what was needed in that bill in order to pass [BCRA]").[30] After considering a series of amendments to the newly amended, underlining bill (House Bill 2356), the House passed BCRA by a vote of 240-189. 148 Cong. Rec. H465-66 (daily ed. Feb. 13, 2002). On March 20, 2002, the Senate followed suit, passing BCRA by a vote of 60-40. 148 Cong. Rec. S2160-61 (daily ed. Mar. 20, 2002).

On March 27, 2002, President George W. Bush signed BCRA into law; the first major overhaul of the Federal Election Campaign Act since the 1974 Amendments and their revision following *Buckley*. Broadly speaking, Title I attempts to regulate political party use of nonfederal funds, while Title II seeks to prohibit labor union and corporate treasury funds from being used to run issue advertisements that have an ostensible federal electioneering purpose.

C. *Procedural History of the Litigation of this Case*

On the morning of March 27, 2002, President Bush signed BCRA into law. Within hours, Senator McConnell and the

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[29] The process of going to conference creates three additional hurdles to the enactment of legislation. First, the conferees must come to an agreement, and in addition, the Conference Report must pass both the House and the Senate. Moreover, the House and Senate Leadership appoint members to the conference committee and enjoy considerable discretion over its composition. *See* Walter J. Oleszek *Congressional Procedures and the Policy Process* 252-54 (5th ed., CQ Press 2001); *see also supra* note 25.

[30] The Shays Substitute, Amendment 417, also amended the title of the bill to its present form: the "Bipartisan Campaign Reform Act (BCRA) of 2002." 148 Cong. Rec. H393 (daily ed. Feb. 13, 2002).

National Rifle Association ("NRA") filed complaints challenging the constitutionality of various provisions in BCRA. On April 16, 2003, pursuant to Congress's directive, BCRA § 403(a)(1),[31] those cases were assigned to a district court of three judges consisting of District Court Judge Colleen Kollar-Kotelly, District Court Judge Richard J. Leon, and Circuit Court Judge Karen LeCraft Henderson. A week later, on April 23, 2002, the three-judge court held a status conference, in which it heard the parties' proposals on consolidation, intervention, discovery, and the filing of motions.

The primary issue confronting the Court at the status conference was the scope of discovery required to develop a satisfactory factual record. The defendants, in their pleading, argued that "wide-raging discovery" was necessary "even in the context of a facial challenge, . . . [in order to] look to the record of the case for evidence substantiating the governmental interests asserted in support of legislation said to violate the First Amendment." Def.'s Report in Response to the Court's Order of April 16, 2002, at 9 (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664-68 (1994); *Colorado Republican Fed. Campaign Comm. v. FEC ("Colorado I")*, 518 U.S. 604, 618-19 (1996) (plurality opinion)).[32] Mindful that the Supreme Court remanded a First

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[31] BCRA § 403(a)(1) states: "The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code."

[32] The plaintiffs did not disagree that some discovery was necessary:

> JUDGE KOLLAR-KOTELLY: So, as I understand it, then, everybody wants to do depositions, everybody wants to do some exchange of expert reports, and everybody wants to have some sort of lay statement, affidavits or statements. Is that accurate? . . . If somebody disagrees with that, let me know.
>
> MR. ABRAMS: That's entirely accurate from our point of view, Your Honor.

Amendment case to a three-judge district court in *Turner Broadcasting* to "permit the parties to develop a more thorough factual record," 512 U.S. at 668,[33] this Court agreed with the defendants that extensive discovery was necessary[34] to review the evidentiary grounds for BCRA, and in part, to avoid the "disaster" of remand. Status Conference Tr., April 23, 2002, at 51 (statement of James Gilligan).[35] Notwith-

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Status Conference Tr., April 23, 2002, at 13; see also Status Report and Proposed Schedule of Plaintiffs Senator Mitch McConnell et al., April 22, 2002 (stating that their proposed schedule "is designed to ensure that a full record is compiled for submission to this Court, and ultimately to the United States Supreme Court").

[33] At issue in *Turner* was a constitutional challenge to the "must-carry" provisions that required carriage of local broadcast stations on cable systems. The Supreme Court remanded the case to the three-judge district court, explaining that in order to assure that Congress drew "reasonable inferences based on substantial evidence" that a harm truly existed, the Court needed "substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, *or the introduction of some additional evidence*." *Id.* at 667 (emphasis added). Because of the "paucity of evidence" and "lacking" of findings on the effect of the regulations, the Court could also not undertake the narrow tailoring step: "unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress 'substantially more speech . . . than necessary' to ensure the viability of broadcast television." *Id.* at 667-68. What followed was "another 18 months of factual development on remand" to the three-judge panel, *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 187 (1997) (citation and internal quotations omitted), and, here, the defendants in this case warned that "[t]he factual inquiry . . . could be on a scale similar to that of *Turner*," Status Conference Tr., April 23, 2002, at 48 (statement of James Gilligan).

[34] This Court recognizes that "we've got to have an adequate factual record." Status Conference Tr., April 23, 2002, at 10 (statement of Judge Henderson).

[35] In *Colorado I*, the Supreme Court remanded the issue of whether coordinated party expenditures are constitutional, *Colorado I*, 518 U.S. at 623-26; *see also* 2 U.S.C. § 441a(d)(3), and the Tenth Circuit subsequently passed the case on to the district court, stating that

standing Congress's directive "to expedite to the greatest possible extent the disposition of the action and appeal," BCRA § 403(a)(4), it was also clear from the legislative record that Congress did not want this Court to "compromise informed and deliberate judicial decision-making in the process." *See* Def.'s Report in Response to the Court's Order of April 16, 2002, at 8. Indeed, Senator Feingold, one of the principal Senate sponsors, explained during the Senate debate:

> Finally, and most importantly, although [Section 403(a)(4)] provides for the expedition of these cases to the greatest possible extent, we do not intend to suggest that the courts should not take the time necessary to develop the factual record . . . This case will be one of the most important that the Court has heard in decades, with ramifications for the future of our political system for years to come. By expediting the case, we in no way want to rush the Court into making its decision without the benefit of a full and adequate record.

147 Cong. Rec. S3189 (March 30, 2001) (statement of Sen. Feingold); *see also id.* at S3189-90 (statement of Sen. Dodd) (supporting the expedition provision, but stating "I do not want to suggest that the Court should not take adequate time to review any such challenge").[36]

Accordingly, the next day, the Court issued a unanimous order outlining a discovery and briefing schedule, which allowed for over five months of discovery and almost an additional month for cross-examination of fact and expert witnesses; set May 7, 2002, as a deadline by which all other actions would be filed; and decided that briefing was to take place between November 4 and November 25, 2002. In a highly unusual accommodation to Congress's request for expedition, the Court set oral arguments to begin on December 4, 2002, just over a week after the parties submitted their final briefs. *See* Scheduling Order of April 24, 2002. By May 10, 2002, 101 parties were involved in the consolidated action, with the eighty-four plaintiffs challenging twenty-three provisions of BCRA.[37] After the

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> [T]he issues are too important to be resolved in haste. It seems inevitable that not only this court but the Supreme Court itself will have to address these issues. We will both benefit by the parties fleshing out the record with any evidence they and the district court deem relevant to the issues' resolution.

FEC v. Colorado Republican Fed. Campaign Comm., 96 F.3d 471, 473 (1996). The district court then allowed the parties to conduct discovery for eleven and a half months, significantly longer than our total discovery schedule for many issues of similar complexity. Status Conference Tr., April 23, 2002, at 63 (statement of James Gilligan); *cf. FEC v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d 1197 (D.Co. 1999); *see also* 213 F.3d 1221, 1225 (10th Cir. 2000) (stating that the parties "compiled an extensive record").

[36] Judge Henderson maintains that the *Buckley* case was handled with much greater efficiency than the three-judge panel here. Henderson Op. at 6 n.1. In *Buckley v. Valeo*, the lawsuit was filed on January 2, 1975, but a decision was not issued by the D.C. Circuit until seven and a half months later on August 15, 1975. *Buckley*, 519 F.2d at 821, 901. While this case required thirteen months from filing to disposition, the parties also undertook six months of discovery-at least four months of discovery and fact-finding more than that undertaken in *Buckley*. *Id.* at 902-03. That four months of discovery alone accounts for most of the discrepancy in the two expedited, yet complicated, campaign finance cases. Moreover, given the vast record developed through the six months of discovery in this case, it is not surprising that this Court required a few more months than the *Buckley* court to arrive at a decision after the arguments-for only careful consideration of the record before us could reduce the risk of committing clear error in our findings. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

[37] On May 10, 2002, the Court consolidated all cases that were not consolidated on April 24, 2002, *see* Order, May 10, 2002; Order Consolidating Cases, April 24, 2002, and also permitted Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator

Court dismissed seven plaintiffs from the suit without prejudice, *see infra* note 55, seventy-seven plaintiffs and seventeen defendants remained. *See id.* (listing all plaintiffs and defendants).

During the discovery process, the parties filed a total of twenty-three motions with the Court, including motions to compel responses to document requests, motions to compel responses to interrogatories, and motions for protective orders. At a hearing on July 25, 2002, the Court heard arguments as to many of the discovery disputes. Thereafter, the Court resolved the disputes with memorandum opinions. *See, e.g.*, Order Denying Federal Election Commission's Motion for Entry of Protective Orders, August 12, 2002; Order Denying in Part and Granting in Part Plaintiffs' Motions to Compel Interrogatory Responses, August 15, 2002; Order Denying Adams Plaintiffs' Motion to Compel Intervenors to Respond to Interrogatories and Produce Documents, September 10, 2002.

On October 7, 2002, the Court ordered the parties to meet and confer and to deliver a proposed format on the briefing and proposed findings of fact. *See* Order, October 7, 2002. In their joint response, the plaintiffs (absent the Adams and Thompson plaintiffs) requested 751 pages, the Adams Plaintiffs requested 115 pages, and the defendants requested 750 pages. *See* Joint Submission in Response to the Court's Order of October 7, 2002. The Court ordered that the plaintiffs, including the Adams and Paul plaintiffs, submit three rounds of briefs not to exceed 840 pages and that the defendants' briefs submit three rounds of briefs (*i.e.*, opening, opposition, and reply) not to exceed 820 pages.[38] The Court also directed the plaintiffs collectively, and the defendants collectively, to each submit proposed findings of fact of no more than 300 pages. Briefing Order, October 15, 2002; Order, October 19, 2002.

On November 25, 2002, a little over a week before oral arguments were scheduled to begin, the parties filed their last round of briefs, bringing the total briefing to 1,676 pages (not including *amicus curiae* briefs). A day later, the parties submitted 576 pages of proposed findings of fact. The evidentiary submissions themselves included forty-one boxes (plus thirteen additional binders), which, by a conservative estimation, comprised the testimony and declarations of over 200 fact and expert witnesses and over 100,000 pages[39] of material.[40] With the record and pleadings before it, the Court commenced oral arguments on December 4, 2002. The Court heard six hours of arguments that day, and three hours of oral

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James Jeffords to intervene as defendants supporting the constitutionality of BCRA, *see* Order, May 10, 2002.

[38] Each side was originally given an aggregate of 820 pages, however, the Court, in an Order dated October 29, 2002, granted the Adams and Thompson Plaintiffs the ability to file their own independent briefing which increased the aggregate page amount for Plaintiffs.

[39] *See* Joint Submission in Response to the Court's Order of October 7, 2002.

[40] The record in this case was described by one advocate during the oral argument as "elephantine." Oral Argument Tr. at 152 (statement of Floyd Abrams); *see also id.* at 279-80. We agree. Both sides should be commended for their extraordinary efforts in gathering and organizing the evidence in such a short period of time. We agree with Seth Waxman, attorney for the Intervenor-Defendants, who urged us to carefully review the record before us:

> I think it's very, very important for the court to look carefully at the record . . . . We have worked, all of us on both sides of this case have worked harder than I ever believed I could be made to work in order to give you this record . . . . I think the ads itself and the reports and affidavits that have been submitted I think are very, very important. I know everybody feels that way.

Id. at 279-80 (statement of Seth Waxman).

arguments the following day, from a total of twenty-four attorneys.[41]

D. *Description of the Specific Provisions in BCRA At Issue in These Lawsuits*

The Court briefly next sets forth the provision of the law that are at issue in the litigation.

1. Title I: Reduction of Special Interest Influence

a. *The National Party Soft Money Ban: Section 323(a)*

The first provision of Title I involves the addition of a new section to FECA, section 323, entitled "Soft Money Of Political Parties." Section 323(a) states that national party committees (including national congressional campaign committees) "may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." BCRA § 101(a); FECA § 323(a)(1); 2 U.S.C. § 441i(a)(1). The law applies to "any . . . national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee." BCRA § 101(a); FECA § 323(a)(2); 2 U.S.C. § 441i(a)(2). The clear import of this provision is

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[41] We disagree with Judge Henderson's statement that "there was a consensus [at the hearing] that the [Supreme] Court had to receive the case no later than early February." Henderson Op. at 6 n.1. A fair reading of former Solicitor General Waxman's colloquy with Judge Henderson, prompted by her questions, in our judgment, would be that the Supreme Court has the ability to adjust the briefing and oral argument schedule, and has done so in the past, to hear cases exactly such as this one. In short, neither former Solicitor General stated his conclusion in categorical terms, and neither provided an estimate of how long after a hearing the Supreme Court would need to issue its opinion. *See generally* Tr. at 18-20; 277-280.

that national party committees are banned from any involvement with nonfederal money.

b. *The State and Local Party Soft Money Ban: Section 323(b)*

In summary terms,-Section 323(b) provides, that subject to certain exceptions, a State, district, or local committee of a political party may not use nonfederal funds to pay for "Federal election activity." BCRA § 101(a); FECA § 323(b); 2 U.S.C. § 441i(b).

In general, section 323(b)(1) prohibits state and local political parties from spending any money not raised in accordance with FECA on "Federal election activity." BCRA § 101(a); FECA § 323(b)(1); 2 U.S.C. § 441i(b)(1). Federal election activity is defined by the Act as:

> (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election; (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot); (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or (iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

BCRA § 101(b); FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). Federal election activity does not include:

> (i) public communication that refers solely to a clearly identified state or local candidate (unless the communication otherwise qualifies as Federal election activity, for instance, as GOTV); (ii) a contribution to a state or local candidate (unless designated to pay for some other kind of Federal election activity); (iii) a state or local political convention; or (iv) grassroots campaign materials (stickers, buttons, etc.) that name only a state or local candidate.

BCRA § 101(b); FECA § 301(20)(B); 2 U.S.C. § 431(20)(B).

1) The Levin Amendment

Section 323(b)(2)-commonly referred to as the "Levin Amendment"-carves out an exception to the general rule in section 323(b)(1). BCRA § 101(a); FECA § 323(b)(2); 2 U.S.C. § 441i(b)(2). Section 323(b)(2) permits state and local parties to use an allocation of nonfederal money ("Levin money" or "Levin funds") for voter registration, voter identification, and GOTV activities provided that certain specified conditions are met. First, the permitted activities may not refer to a clearly identified federal candidate. Second, those activities may not involve any broadcast communication except one that refers solely to a clearly identified state or local candidate. Third, no single donor may donate more than $10,000 to a state or local party annually for those activities. Finally, all money (federal and Levin money alike) spent on such activities must be "homegrown"-i.e., raised solely by the spending state or local party-and may not be transferred from or raised in conjunction with any national party committee, federal officeholder or candidate, or other state or local party. *See* BCRA § 101(a); FECA § § 323(b)(2)(B), 323(b)(2)(C); 2 U.S.C. § § 441i(b)(2)(B), 441i (b)(2)(C).

c. *Fundraising Costs: Section 323(c)*

Section 323(c) requires national, state, and local parties to use federally- regulated funds to raise any money that will be used on "federal election activities," as defined in the statute. BCRA § 101(a); FECA § 323(c); 2 U.S.C. § 441i(c).

d. *Tax Exempt Organization Soft Money Ban: Section 323(d)*

Section 323(d) prohibits any political party committee-national, state, or local-or its agents from "solicit[ing]'' funds for or "mak[ing] or direct [ing]'' any donations to either: (i) any tax-exempt section 501 organization, *see* 26 U.S.C. § 501(c), that spends any money "in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (ii) any section 527 organization, *see* 26 U.S.C. § 527, (other than a state or local party or the authorized campaign committee of a candidate for state or local office). BCRA § 101(a); FECA § § 323(d)(1), 323(d)(2); 2 U.S.C. § § 441i(d)(1), 441i(d)(2). A section 501(c) organization is an organization that is tax exempt as described in that section of the tax code-a good example of which is a charity. A section 527 organization is a political committee that is exempt from taxation. *See* 26 U.S.C. § 527(a) ("A political organization shall be subject to taxation under this subtitle only to the extent provided in this section. A political organization shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes."); *see also* 26 U.S.C. § § 527(e)(1) and (2) (defining a "political organization" as an organization that is "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for . . . the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice- Presidential electors").

e. *Federal Officeholder and Candidate Soft Money Ban: Section 323(e)*

Section 323(e) generally prohibits federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending any soft money[42] (i) in connection with a federal election or (ii) in connection with a state or local election. BCRA § 101(a); FECA § 323(e)(1); 2 U.S.C. § 441(e)(1). There are, however, several exceptions to the general prohibition in section 323(e). First, a federal officeholder or candidate may solicit money for state and local candidates from sources and in amounts that would be allowed by Federal law. BCRA § 101(a); FECA § § 323(e)(1)(B)(i), 323(e)(1)(B)(ii); 2 U.S.C. § § 441i(e)(1)(B)(i), 441i(e)(1)(B)(ii). Second, the federal officeholder or candidate ban on nonfederal funds does not apply to the solicitation, receipt, or spending of funds by an individual who is also a candidate for state or local office solely in connection with such election. BCRA § 101(a); FECA § 323(e)(2); 2 U.S.C. § 441i(e)(2). Third, a federal officeholder or candidate may attend or speak at a fundraising event for a state or local political party. BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3). Fourth, a federal officeholder or candidate may solicit such funds on behalf of any tax- exempt section 501 organization that spends money in connection with federal elections in

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[42] If the federal candidate or officeholder is soliciting, receiving, directing, transferring, or spending funds in connection with an election for federal office, the funds must "be subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441(e)(1)(A). However, if the candidate is doing so in connection with a state or local election, then the funds must be "not in excess of the amounts permitted with respect to contributions to candidates and political committees" and "not from sources prohibited by the Act from making contributions in connection with an election for Federal office." 2 U.S.C. § 441(e)(1)(B).

either of two instances: (i) he or she may solicit unlimited funds for a section 501 organization whose "principal purpose" is not voter registration, voter identification, or GOTV activity, so long as the solicitation does not specify how the funds will be spent; and (ii) he or she may solicit up to $20,000 per person per year specifically for voter registration, voter identification, or GOTV activity, or for an organization whose "principal purpose" is to conduct any or all of those activities. *See* BCRA § 101(a); FECA § § 323(e)(4); 2 U.S.C. § 441i(e)(4).

f. *State Candidate Soft Money Ban: Section 323(f)*

Lastly, Section 323(f) generally prohibits state officeholders or candidates from spending soft money (that is, money not raised pursuant to FECA's regulations) on any public communication that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" a candidate for that office. BCRA § 101(a); FECA § 323(f); 2 U.S.C. § 441i(f).

2. Title II: Noncandidate Campaign Expenditures

a. *Definition of Electioneering Communication: Section 201*

Section 201[43] of BCRA amends section 304 of FECA by adding the following definition of an "electioneering communication":

> (i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

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[43] Section 201 also contains disclosure provisions which are discussed *infra*.

> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A).[44] Under this definition, in order to constitute an electioneering communication, therefore, the communication (a) must be disseminated by cable, broadcast, or satellite, (b) must refer to a clearly identified Federal candidate, (c) must be distributed within certain time periods before an election, and (d) must be targeted to the relevant electorate. *Id.* The fact that the communication must be "targeted to the relevant electorate," means that, in the case of House and Senate races, the communication will not constitute an "electioneering communication" unless 50,000 or more individuals in the relevant congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. BCRA § 201; FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C). For example, if a broadcast advertisement refers to a federal House candidate within 60 days of the general election, but can only be received by 30,000 individuals, it is not an electioneering communication and permissibly could be made with funds from the general treasury of a corporation or labor union.

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[44] The regulations implementing this definition clarify that the operative event for making an electioneering communication is the "dissemination of the communication, rather than the disbursement of funds related to creating a communication." Electioneering Communications, 67 Fed. Reg. 65190, 65191 (Oct. 23, 2002).

In the event that a court of competent jurisdiction finds the definition of electioneering communication to be constitutionally infirm, the statute provides a backup definition:

> (ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii). With the exception of the final clause, the fallback definition essentially tracks the language found in section 301(20)(A)(iii) of FECA which addresses one of the four activities which fall within the definition of the term Federal Election Activity. BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431 (20)(A)(iii).

b. *Prohibition of Corporate and Labor Union General Treasury Fund Disbursements for Electioneering Communications: Section 203 Rules Relating to Certain Targeted Electioneering Communications: Section 204*

Section 203 of BCRA extends the prohibition on corporate and labor union general treasury funds being used in connection with a federal election to cover electioneering communications. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. § 441b(b)(2) ("[T]he term 'contribution or expenditure' includes a contribution or expenditure, as those terms are defined in [FECA], and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section *or for any applicable electioneering communication*.")(emphasis added). The prohibition on electioneering communications only applies to the general treasury funds of national banks, corporations, and labor unions, or any other person using funds donated by these entities.

Like the original prohibition in section 441b, Section 203 of BCRA, is not an absolute ban on corporate and labor union spending on "electioneering communication." FECA expressly permits corporations and labor unions to create "separate segregated fund[s] to be utilized for political purposes." 2 U.S.C. § 441b(b)(2)(C). These segregated funds are known as political committees under the Act (or PACs). 2 U.S.C. § 431(4)(B) (A political committee is "any separate segregated fund established under the provisions of section 441b(b) of this title."). These segregated accounts are subject to the source and amount limitations contained in FECA. *See, e.g.*, 2 U.S.C. § 441a(a)(1)(C) (providing that no person shall make contributions "to any other political committee in any calendar year which, in the aggregate, exceed $5,000"). To fund the segregated account, a corporation is permitted to solicit contributions from "its stockholders and their families and its executive or administrative personnel and their families." 2 U.S.C. § 441b(b)(4)(A)(i).[45] Likewise, in establishing their segregated funds, labor unions are allowed to solicit contributions to the fund from their members and their families. 2 U.S.C. § 441b(b)(4)(A)(ii). From these accounts, corporations and labor unions are permitted to make contributions to federal candidates and spend unlimited amounts of segregated funds on electioneering communica-

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[45] For membership organizations, cooperatives, or corporations without capital stock, solicitations of the membership are permitted to fund the segregated account. 2 U.S.C. § 441b(b)(4)(C).

tions and independent expenditures, provided that federal funds are used to pay for these activities.

Snowe-Jeffords Provision

BCRA Section 203 provides an exception to certain types of nonprofit corporations from the requirement that corporations, labor unions, and national banks must use separately segregated funds[46]—and not general treasury funds to pay for electioneering communications. However, this exception, commonly known as the "Snowe-Jeffords Provision" after its sponsors, was later, in effect, withdrawn by Section 204, known as the "Wellstone Amendment," *see infra* at 69; *compare* BCRA § 203; FECA § 316(c)(2); 2 U.S.C. § 441b(c)(2) (Snowe-Jeffords Provision) *with* BCRA § 204; FECA § 316(c)(6)(a); 2 U.S.C. § 441b(c)(6)(A) (Wellstone Amendment).

The Snowe-Jeffords Provision permits nonprofit organizations to use their general treasury funds to pay for electioneering communications if they are incorporated under Section 501(c)(4) and/or Section 527(e)(1) of the Internal Revenue Code. This exception for nonprofit corporations is an expansion of the law as it existed prior to BCRA. While FECA did not provide an exception from its separately segregated fund requirement for nonprofit corporations, the Supreme Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*") had provided an as-applied exception for nonprofit corporations which satisfied certain criteria set forth by the Supreme Court.[47] Under BCRA, it is not necessary that a nonprofit corporation establish that it has met the three criteria of *MCFL* in order to use its general treasury funds to pay for electioneering communications; instead, it may do so under Snowe- Jeffords simply by virtue of being incorporated under Sections 501(c)(4) or 527(e)(1).

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[46] As discussed *supra*, FECA section 304(f)(2)(E) refers to a segregated bank account made up of contributions for electioneering communications from United States citizens, nationals, or permanent residents where all the names and addresses of all contributors who contribute an aggregate amount of $1,000 or more to the account is disclosed. Also as discussed *supra*, FECA section 304(f)(2)(F) refers to electioneering communications paid from a general treasury. If an electioneering communication is paid for with general treasury funds under section 304(f)(2)(F), then all contributors of more than $1,000 in a calendar year have to disclose their name and address. Hence, under the Snowe-Jeffords Provision, 501(c)(4) organizations and 527(e)(1) organizations, who are permitted to make electioneering communications with money contributed by individuals, must disclose the names and addresses of those individuals who contributed the funds to pay for the electioneering communication. BCRA § 203; FECA § 316(c)(2); 2 U.S.C. § 441b(c)(2).

While a nonprofit corporation under Snowe-Jeffords is permitted to use general treasury funds for electioneering communications, it is important to note that these corporations are not permitted to use funds donated by a corporation, labor union, or national bank to purchase them. Under Snowe-Jeffords, a nonprofit corporation may only use funds donated by individuals to pay for electioneering communications. If a nonprofit corporation, for example, has accepted corporate contributions and mixed those contributions with general treasury funds that contained individual donations, the nonprofit corporation would not be permitted to use their general treasury funds to engage in electioneering communications.

Finally, although Snowe-Jeffords exempts nonprofit corporations from the separately segregated fund requirement, they are not similarly exempted from the disclosure requirements set forth in Section 201. Nonprofit corporations, like any other entity engaging in electioneering communications, must make public the names and addresses of all contributors who contributed over $1,000 to the account from which the corporation paid for the communications.

The Wellstone Amendment

Despite drafting and including the Snowe-Jeffords' provision in the Act, an amendment offered by Senator Paul Wellstone and adopted by the Senate effectively eviscerates the Snowe-Jeffords' Provision from the Act. The "Wellstone Amendment," codified in section 204 of BCRA states that the exemption created by the Snowe-Jeffords Provision for section 501(c)(4) corporations and section 527(e)(1) corporations is inapplicable "in the case of a targeted communication." BCRA § 204; FECA § 316(c)(6)(A); 2 U.S.C. § 441b(c)(6)(A). The Wellstone Amendment describes a "targeted communication" as "an electioneering communication" that is "distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." BCRA § 204; FECA § 316(c)(6)(B); 2 U.S.C. § 441b(c)(6)(B). The direct consequence of the Wellstone Amendment is that organizations organized under section 501(c)(4) and section 527(e)(1) of the Internal Revenue Code, or those entities who have received funds from corporations, are not permitted to use their general treasury funds for electioneering communications.

The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability: hence, if the Court finds the inclusion of section 501(c)(4) organizations and section 527 organizations within the ban on electioneering communications to be unconstitutional, the Wellstone Amendment can be cleanly struck from the law

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[47] That is, 1) whether the corporation is "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; 2) "has no shareholders or other persons affiliated," so that members have "no economic disincentive for disassociating with it if they disagree with its political activity; and 3) the corporation "was not established by a business corporation," and has a policy of refusing "contributions from such entities." *MCFL* at 264.

and the original Snowe-Jeffords exception for these groups will be restored. *See* BCRA § 401 (discussing that BCRA is subject to severability).

* * *

To briefly summarize, section 201 provides two definitions of "electioneering communication," a primary one and a backup definition in the event a court finds the main definition unconstitutional. Section 203, in conjunction with section 204, prohibits corporations and unions from using general treasury funds to pay for an electioneering communication. Corporations and unions need to establish political action committees if they want to engage in electioneering communication.

c. *Disclosure of Electioneering Communications: Section 201*

Section 201 amends Section 304 of FECA, 2 U.S.C. § 434, by requiring disclosures related to electioneering communications. Section 201's disclosure requirements mandate the reporting of "disbursements" for the "direct costs of producing and airing electioneering communications" aggregating more than $10,000 during any calendar year. BCRA 201(a); FECA § 304(f)(1); 2 U.S.C. § 434(f)(1). The reports must be made to the Commission within 24 hours of each "disclosure date." *Id.* The statute defines "disclosure date" as the first time during the calendar year a person's electioneering communication disbursements exceed $10,000, and each subsequent aggregation of $10,000 in electioneering communication disbursements made in the same calendar year. BCRA § 201(a); FECA § 304(f)(4); 2 U.S.C. § 434(f)(4). "Disbursements" under Section 201 include executed contracts to make disbursements for electioneering

communications. BCRA 201(a); FECA § 304(f)(5); 2 U.S.C. § 434(f)(5).[48]

The section requires the reports, made under penalty of perjury, to include the following information:

- the identities of the person making the disbursement, any person sharing or exercising direction or control over that person, and the custodian of the books and accounts of the person making the disbursement;
- the person's principal place of business, if not an individual;
- the amount of each disbursement over $200 during the statement's period and the identity of the person who received the disbursement;
- the elections to which the electioneering communications pertain and the names of the candidates identified in the communications, if known;
- if the disbursements are made from a segregated account funded solely by direct contributions by individuals for the purpose of making electioneering communication disbursements, the names and addresses of all persons who contributed over $1,000 to the account during the calendar year; and
- if the disbursements are made from a different source, the names and addresses of all contributors to that source who contributed over $1,000 during the calendar year.

BCRA 201(a); FECA § 304(f)(2); 2 U.S.C. § 434(f)(2).

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[48] The provision states, "For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement." BCRA 201(a); FECA § 304(f)(5); 2 U.S.C. § 434(f)(5).

d. *Coordinated Communications as Contributions: Section 202*

Section 202 of BCRA amends Section 315(a)(7) of FECA, 2 U.S.C. 441a(a)(7) by adding the following language:

> If—
>
> (i) any person makes, or contracts to make, any disbursement for any electioneering communication . . . ; and
>
> (ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;
>
> such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party

BCRA § 202; FECA § 315(a)(7)(C); 2 U.S.C. § 441a(a)(7)(C). Section 202 essentially makes clear the import of the definitions of "electioneering communication" and "coordination" in Sections 201 and 214; coordinated electioneering communications constitute contributions.

e. *Reporting Requirements for Certain Independent Expenditures: Section 212*

Section 212 amends Section 304 of FECA (2 U.S.C. § 434) by adding certain disclosure requirements for independent expenditures.[49] The provision requires persons, including political committees, to report independent expenditures, or contracts to make such expenditures, aggregating $1,000 or more after the twentieth day before the date of an election.[50] BCRA § 212; FECA § 304(g)(1)(A); 2 U.S.C. § 434(g)(1)(A). These reports must be made within 24 hours of making the expenditure or the contract to make the expenditure. *Id.* Such reports must be supplemented within 24 hours of making additional expenditure contracts or expenditures aggregating an additional $1,000 toward the same election. BCRA § 212; FECA § 304(g)(1)(B); 2 U.S.C. § 434(g)(1)(B). For expenditure contracts or expenditures made more than twenty days before an election, persons must also file reports but only after the expenditures aggregate to $10,000 or more and they have 48 hours in which to file their disclosure. BCRA § 212; FECA § 304(g)(2)(A); 2 U.S.C. § 434(g)(2)(A). These reports must also be supplemented whenever additional expenditure contracts or expenditures aggregate an additional $10,000 toward the same election. BCRA § 212; FECA § 304(g)(2)(B); 2 U.S.C. § 434(g)(2)(B).

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[49] Section 211 defines "independent expenditure" as:

> an expenditure by a person—
>
> (A) expressly advocating the election or defeat of a clearly identified candidate; and
>
> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

BCRA § 211; FECA § 301; 2 U.S.C. § 431(17).

[50] The reports must be filed with the FEC and must include "the name of each candidate whom an expenditure is intended to support or oppose," BCRA § 212; FECA § 304; 2 U.S.C. § 434(g)(3)(B), as well as the name and address of each

> person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee

2 U.S.C. § 434(b)(6)(B)(iii).

f. *Coordination with Candidates or Political Parties: Section 214*

The Supreme Court has found treating coordinated expenditures as contributions constitutionally justifiable under the rationale of preventing circumvention. *Buckley*, 424 U.S. at 47 ("[C]ontribution ceilings . . . prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions."). Section 214 makes changes to FECA's coordinated expenditure regime.

Section 214(a) amends Section 315(a)(7)(B) of FECA, 2 U.S.C. § 441a(a)(7)(B), by adding the following provision:

> (ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee

BCRA § 214(a); FECA § 315(a)(7)(B)(ii); 2 U.S.C. § 441a(a)(7)(B)(ii). This language is virtually identical to that in 2 U.S.C. § 441a(a)(7)(B)(i)[51], passed in 1976 as an amendment to FECA, which defines expenditures made in coordination with candidates.[52]

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[51] In *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"), the Supreme Court considered the applicability of Section 441a(a)(7)(B)(i) to political party expenditures. Despite the fact that four Justices found the provision overbroad, *Colorado II*, 533 U.S. at 467 (Thomas, J., dissenting), the majority found that Section 441a(a)(7)(B)(i) applied to political party expenditures coordinated with candidates, *id* at 465.

[52] As presently codified, the provision states: "expenditures made by any person in cooperation, consultation, or concert, with, or at the request

Section 214 also repeals the FEC's regulations "on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees," and requires the FEC to promulgate new regulations. BCRA § 214(b), (c). Congress instructed that the new regulations "shall not require agreement or formal collaboration to establish coordination." BCRA § 214(c); 2 U.S.C. § 441a note. Congress also instructed that the regulations should address

> (1) payments for the republication of campaign materials;
>
> (2) payments for the use of a common vendor;
>
> (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and
>
> (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

Id.

Lastly, Section 214 amends Section 316(b)(2) of FECA, 2 U.S.C. 441b(b)(2), to include within the meaning of "contributions or expenditures by national banks, corporations, or labor organizations," the definitions of "contribution or expenditure" found in Section 301 of FECA, 2 U.S.C. § 431(8), (9). BCRA § 214(d).

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or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate". 2 U.S.C. § 441a(a)(7)(B)(i).

3. Title III: Miscellaneous

a. *Use of Contributed Amount for Certain Purposes: Section 301*

Section 301 sets forth the permitted and prohibited uses of contributions. For example, a candidate can transfer contributions to political parties but cannot convert contributions to personal use. BCRA § 301; FECA § 313; 2 U.S.C. § 439a.

b. *"The Millionaire Provisions": Sections 304, 316, & 319*

In Sections 304, 316, and 319 of BCRA, Congress allowed opponents of self-financed candidates to raise money in larger increments and, in certain circumstances, to accept unlimited coordinated party expenditures. Specifically, the provisions state that if a self-financed candidate's "opposition personal fund amount"[53] exceeds a threshold amount,[54] then the candidate's opponent can raise funds through increased contribution limits. BCRA § 304(a); FECA § 315(i); 2 U.S.C. § 441a(i); BCRA § 319; FECA § 315A; 2 U.S.C. § 441a-1. Moreover, if the opposition personal fund amount is ten times the threshold amount in Senate races, or merely exceeds the

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[53] The "opposition personal funds amount" is not simply the amount of personal funds expended by a self-financed candidate. It also takes into account the gross receipts advantage of both candidate's authorized committees so that incumbents with large war chests will not be able to take advantage of the new law unless the self-financed candidate expends an even greater amount of personal funds. BCRA § § 304(a)(ii); FECA § 315(i)(1)(D); 2 U.S.C. § 441a(i)(1)(D); BCRA § 316; FECA § 315(i)(1)(E); 2 U.S.C. § 441a(i)(1)(E); *see also* BCRA § 319(a); FECA § 315A(a)(2); 2 U.S.C § 441a-1(a)(2).

[54] The threshold amount in Senate races is equal to the sum of $150,000 plus $.04 multiplied by the voting age population in the candidate's state, BCRA § 304(a)(2); FECA § 315(i)(1)(B); 2 U.S.C. § 441a(i)(1)(B), while in House races the threshold amount is simply $350,000. BCRA § 319(a)(1); FECA § 315A(a)(1); 2 U.S.C. § 441a-1(a)(1).

$350,000 threshold for House races, the self-financed candidate's opponent can also be exempted from limits on coordinated party expenditures imposed by 2 U.S.C. § 441a(d). Any contributions or party expenditures under the increased limits is capped to the amount spent by the self-financed candidate: the enhanced contributions cannot exceed 110% and 100% of the opposition personal funds amount for Senate and House races respectively.

c. *Lowest Unit Charged: Section 305*

In the 1972 FECA legislation, Congress added the "lowest unit charge" provision to the Communications Act of 1934. The provision states that, for forty-five days before a primary or sixty days before a general election, the broadcast stations have to sell a qualified candidate the "lowest unit charge of the station for the same class and amount of time for the same period." 47 U.S.C. 315(b)(1). BCRA Section 305, however, denies a candidate the lowest unit charge for broadcast advertisements on radio and television unless the candidate "provides written certification to the broadcast station that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office" in any broadcast. BCRA § 305; FECA § 315(b); 47 U.S.C. § 315(b). The candidate can be exempted from this provision, and thus be eligible for the lowest unit charge without such a promise, if the candidate clearly identifies himself at the end of the broadcast and states that he approves of the broadcast. In a television broadcast, this message must include the candidate's image for at least four seconds. *Id.*

d. *Increased Limits for Contributions and Indexing of Limits: Section 307*

Section 307(a)(1) increases the amount individuals can contribute to candidates per election from $1000 to $2000. BCRA § 307(a)(1); FECA § 315(a)(1)(A); 2 U.S.C. § 441a(a)

(1)(A). It also changes the aggregate amount of contributions a donor can give to candidates and political committees (including parties) from $25,000 in a calendar year to $37,500 in a two-year period to candidates and $57,500 in a two-year period to political committees. BCRA § 307(b); FECA § 315(a)(3)(A); 2 U.S.C. § 441a(3)(A). Congress also increased the limits to a national party committee by $5,000 and doubled the amount of money individuals can donate to a state party committee, so that individuals may now contribute no more than $25,000 per calendar year to a national party committee, no more than $10,000 per calendar year to a state committee, and no more than $5,000 per calendar year to a local committee. BCRA § § 102, 307(a)(2); FECA § 315(a)(1)(B), (D); 2 U.S.C. 441a(a)(1)(B), 441a(a)(1)(C), 441a(a)(1)(D). Finally, Congress also indexed all contributions for inflation, except for limits on contributions to state and local party committees. BCRA § 307(d); 2 U.S.C. § 441a(c).

e. *Identification of Sponsors: Section 311*

Section 311 requires that "whenever any person . . . makes a disbursement for an electioneering communication," the communication, if it was authorized by a candidate or the candidate's political committee, must clearly identify the candidate or the candidate's political committee. If the communication was not authorized by the candidate or the candidate's political committee, then the communication "shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." BCRA § 311; FECA § 318(a)(3); 2 U.S.C. § 441d(a)(3).

f. *Prohibition of Donations by Minors: Section 318*

In Section 318, Congress prohibited minors, defined as any children under eighteen years of age, from making donations, regardless of the amount, to candidates or political parties. BCRA § 318; FECA § 324; 2 U.S.C. § 441k.

4. Title V: Additional Disclosure Provisions

a. *Public Access to Broadcasting Records: Section 504*

In Section 504, Congress requires broadcast licensees to collect and disclose records of any "request to purchase broadcast time" that "is made by or on behalf of a legally qualified candidate for public office" or that relates "to any political matter of national importance," including communications relating to "a legally qualified candidate," "any election to Federal office," and "a national legislative issue of public importance." BCRA § 504; FECA § 315(e)(1); 47 U.S.C. § 315(e)(1). The record must include whether the request to purchase was accepted or rejected; the rate charged for the broadcast; the date and time on which the communication aired; the class of time that is purchased; the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers; in the case of a request on behalf of a candidate, the name of the candidate, the authorized committee, and the treasurer of the committee; and in the case of any other request, the name of the person purchasing the time, the name and contact information for such person, and a list of chief executive officers or members of the executive committee or board of directors. *Id.*

III. FINDINGS OF FACT

The Findings of Fact include a description of the identities of the parties and include findings related to the disclosure provisions included in this *per curiam* opinion.

A. *Parties to the Litigation* [55]

1. Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and is a member of the Republican Party. McConnell Aff. ¶ 1. He has long been active in the Republican Party at the national, state and local levels. *Id.* ¶ 2. Senator McConnell was first elected in 1984, was reelected in 1990, 1996, and was a candidate for election in 2002. *Id.* ¶ 7.

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[55] As of the May 7, 2002, deadline for amendment of pleadings, intervention orjoinder of additional parties and consolidation of additional cases, *see* Scheduling Order of 4/24/02, 84 plaintiffs were parties to the consolidated actions. Since then, seven plaintiffs-the Alabama Republican Executive Committee, Martine J. Connors, the Jefferson County Republican Executive Committee, the Christian Coalition of America, Inc., the Libertarian Party of Illinois, Inc., the DuPage Political Action Council, Inc., and the National Association of Wholesaler-Distributors-have been dismissed from the suit without prejudice. *See generally* Orders of 8/15/02, 9/13/02, 9/18/02, and 9/30/02 Dismissing Pls. Without Prejudice.

Remaining in the suit are 77 plaintiffs in 11 actions: in No. 02-CV-0582 are Senator Mitch McConnell, Representative Bob Barr, Representative Mike Pence, Alabama Attorney General William H. Pryor, the Libertarian National Committee, Inc., the American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, the Center for Individual Freedom, Club for Growth, Inc., Indiana Family Institute, Inc., the National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, the National Right to Work Committee, 60 Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. d/b/a ProEnglish, Thomas McInerney, Barret Austin O'Brock and Trevor M. Southerland (collectively, the *McConnell* plaintiffs); in No. 02-CV-0581 are the NRA and National Rifle Association Political Victory Fund (collectively, the *NRA* plaintiffs); in No. 02-CV-0633 are Emily Echols, Hannah McDow, Isaac McDow, Jessica Mitchell, Daniel Solid and Zachary C. White (collectively, the *Echols* plaintiffs); in No. 02-CV-0751 are the Chamber of Commerce of the United States, the National Association of Manufacturers, National Association of Wholesaler-Distributors, and U.S. Chamber Political Action Committee (collectively, the *Chamber of Commerce* plaintiffs); in No. 02-CV-0753 is the National Association of Broadcasters; in No. 02-CV-0754 are the American Federation of Labor and Congress of Industrial Organizations and AFL-CIO Committee on Political Education Political Contributions Committee (collectively, the *AFL-CIO* plaintiffs); in No. 02-CV-0781 are Congressman Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.org, Citizens United, Citizens United Political Victory Fund, Michael Cloud and Carla Howell (collectively, the *Paul* plaintiffs); in No. 02-CV-0874 are the Republican National Committee, Mike Duncan, Republican Party of Colorado, Republican Party of Ohio, Republican Party of New Mexico, and Dallas County (Iowa), Republican Central Committee (collectively, the *RNC* plaintiffs); in No. 02-CV-0875 are the California Democratic Party, Art Torres, Yolo County Democratic Central Committee, California Republican Party, Shawn Steel, Timothy J. Morgan, Barbara Alby, Santa Cruz County Republican Central Committee, and Douglas R. Boyd, Sr., (collectively, the *CDP* plaintiffs); in No. 02-CV-0877 are Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Peter Kostmayer, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group, Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, the Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now (collectively, the *Adams* plaintiffs); and in No. 02-CV-0881 are Representative Bennie G. Thompson and Representative Earl F. Hilliard (collectively, the *Thompson* plaintiffs).

The 17 defendants in these consolidated actions are the Federal Election Commission; the United States of America; the United States Department of Justice; the Federal Communications Commission; John Ashcroft, in his official capacity as Attorney General of the United States of America; David M. Mason, Karl J. Sandstrom, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas and Michael E. Toner, in their official capacities as Commissioners of the FEC; and Senators John McCain, Russell Feingold, Olympia Snowe and James Jeffords and Representatives Christopher Shays and Martin Meehan (collectively, the Intervenors), as intervening defendants.

The Court finds it unnecessary to make findings with respect to all 77 Plaintiffs and 17 Defendants in these actions and therefore the Findings of Fact reflect the primary parties in this litigation.

2. William H. Pryor, Jr. is Alabama Attorney General and was a candidate for reelection as Alabama Attorney General in 2002. Pryor Decl. ¶ 2.

3. The Libertarian National Committee, Inc. ("LNC") is the governing body of the Libertarian Party at the national level. Dasbach Decl. ¶ 4. The LNC is a non-profit corporation incorporated in the District of Columbia and governed by section 527 of the Internal Revenue Code. *Id.* The LNC represents and advocates the principle that all individuals have the right to live in whatever manner they choose so long as they do not forcibly interfere with the right of others to do the same. *Id.*

4. The American Civil Liberties Union ("ACLU") is a tax-exempt corporation incorporated in the District of Columbia and is governed by section 501(c)(4) of the Internal Revenue Code. Romero Decl. ¶ 1. The ACLU is a nationwide, non-profit, non-partisan organization with approximately 300,000 members "dedicated to the principles of liberty and equality embodied in the Constitution." *Id.*

5. Associated Builders and Contractors, Inc. ("ABC") is a non-profit tax- exempt organization governed by section 501(c)(6) of the Internal Revenue code, incorporated in Maryland, and is funded primarily by membership dues. Monroe Direct Test. ¶ 3. It is a national trade association representing more than 23,000 contractors and related firms in the construction industry. *Id.* ABC's members, which include both unionized and non-union employers, "share the philosophy that construction work should be awarded and performed on the basis of merit, regardless of labor affiliation." *Id.*

6. Associated Builders and Contractors Political Action Committee ("ABC PAC") is a connected political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of ABC pursuant to 2 U.S.C. § 441b(b). *Id.* ¶ 22. ABC PAC makes contributions to federal candidates who support the principles of ABC and funds independent expenditures for communications on their behalf. *Id.*

7. The Club for Growth, Inc. ("The Club") is a nationwide membership organization dedicated to advancing public policies that promote economic growth. Keating Decl. ¶ 5. The Club is a Virginia corporation organized under section 527 of the Internal Revenue Code. McConnell Second Am. Compl. ¶ 29. The Club "is dedicated to promoting the election of pro-growth, pro-freedom candidates through the bundling of political contributions and issue advocacy campaigns." Keating Decl. ¶ 6. The Club for Growth advocates tax rate reduction, fundamental tax reform, tax simplification, capital gains tax reduction, estate tax repeal, overall reduction in government spending, school choice, and personal investment of Social Security. *Id.* ¶ 5.

8. The National Right to Life Committee ("NRLC") is a tax-exempt corporation incorporated in the District of Columbia and is governed by section 501(c)(4) of the Internal Revenue Code. O'Steen Decl. ¶ 4. The NRLC is a nationwide, non-profit, non-partisan organization with approximately 3,000 local chapters and fifty state affiliates dedicated to "promoting respect for the worth and dignity of all human life from conception to natural death." *Id.* ¶ ¶ 5, 3.

9. The National Right to Life Educational Trust Fund ("NRL-ETF") is an organization governed by section 501(c)(3) of the Internal Revenue code. *Id.* ¶ 16. NRL-ETF sponsors educational advertising and develops materials detailing "fetal development, abortion's impact on America, and the threat of euthanasia." *Id.* ¶ 17.

10. The National Right to Life Political Action Committee ("NRL PAC"), organized in 1979, is an internal § 527 fund of

NRLC that is registered with the FEC as a PAC subject to FECA. O'Steen Decl. ¶ 24.

11. Thomas E. McInerney is a U.S. citizen, a registered voter in the State of New York and a member of and contributor to various Republican Party organizations and committees at the national, state and local levels. McInerney Aff. ¶ 1.

12. Barret Austin O'Brock is a U.S. citizen and a resident of the State of Louisiana. O'Brock Decl. ¶ 1. He is fourteen years of age and intends to make contributions to federal candidates in future elections, including the 2004 election. *Id.* ¶ ¶ 2-3.

13. The National Rifle Association ("NRA") is a tax-exempt corporation governed by section 501(c)(4) of the Internal Revenue Code and incorporated in the State of New York. NRA Compl. ¶ 8. The primary purpose of the NRA is to preserve and protect the Second Amendment's guarantee that individuals shall have the right to "keep and bear arms." LaPierre Decl. ¶ 2. In addition, the NRA promotes public firearm safety, trains law enforcement agencies in the use of firearms, sponsors shooting competitions, and advances hunter safety. *Id.* The NRA has approximately four million members and represents their views on legislative and public policy issues before federal, state and local officials and the general public. NRA Compl. ¶ 8.

14. The National Rifle Association Political Victory Fund ("NRA PVF") is a connected political committee governed by 2 U.S.C. § 431(4) and section 527(e)(1) of the Internal Revenue Code and is a separate segregated fund of the NRA pursuant to 2 U.S.C. § 441b(b). NRA Compl. ¶ 9.

13. Emily Echols, Hannah and Isaac McDow, Zachary White, Daniel Solid and Jessica Mitchell are U.S. citizens who range in age from twelve to sixteen. Echols Pls.' Proposed Findings of Fact ¶ 45. They intend to seek out and contribute to federal candidates "who represent their views and beliefs on important questions like the right to life of children before birth, and on the size of government." *Id.* ¶ 44.

14. The Chamber of Commerce ("The Chamber") is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code. Josten Direct Trial Test. ¶ 3. The Chamber is the world's largest not-for-profit business federation, representing over 3,000,000 businesses and business associations. *Id.*

15. The U.S. Chamber Political Action Committee ("U.S. Chamber PAC") is a connected political committee organized under section 527(e)(1) of the Internal Revenue Code and is registered with the FEC. Josten Direct Trial Test. ¶ 26. U.S. Chamber PAC is funded by contributions voluntarily made by individual Chamber of Commerce executives, administrative employees, members and their families. *Id.* ¶ 27.

16. The National Association of Manufacturers ("NAM") is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code and is the oldest and largest broad-based industrial trade association in the United States. Huard Direct Trial Test. ¶ 2. Its membership comprises 14,000 companies and 350 member associations. *Id.*

17. The National Association of Broadcasters ("NAB") is a non-profit corporation that serves as a trade association of radio and television stations and broadcasting networks in the United States. Goodman Decl. ¶ 3. NAB serves and represents the American broadcasting industry, composed of approximately 7,300 member stations. *Id.* All of NAB's voting members are broadcast licensees within the meaning of the Communications Act. *Id.*

18. The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a national labor federation comprised of 66 national and international labor

unions that, collectively, have a total of approximately 13 million members. G. Shea Decl. ¶ 3. The AFL-CIO is a tax-exempt organization under Section 501(c)(5) of the Internal Revenue Code. *Id.* The AFL-CIO also includes 51 state labor federations, nearly 580 area and central labor councils and numerous trade and industrial departments. *Id.* ¶ ¶ 6,7, 9. One of the four major missions of the AFL-CIO is to provide "an effective political voice to workers on public issues that affect their lives." *Id.* ¶ 4b.

19. Congressman Ron Paul is a Member of the United States House of Representatives from the Fourteenth Congressional District of Texas and is a member of the Republican Party. Paul Decl. ¶ 1. He was first elected to represent the Fourteenth Congressional District of Texas in 1996, *id.,* and also served as a Member of the House of Representatives for the Twenty-Second Congressional District of Texas, first elected in 1976 and to successive terms until 1984, *id.* ¶ 2. Congressman Paul is a registered voter in the state of Texas, a donor to the campaigns of candidates for federal office, and a fundraiser and recipient of campaign contributions. Paul Pls.' Compl. ¶ 11. He will face reelection in 2004. Paul Decl. ¶ 1.

20. Gun Owners of America, Inc. is a not-for-profit, tax-exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Pratt Decl. ¶ 2. It is dedicated primarily to defending the rights that its members believe are guaranteed by the Second Amendment to the Constitution; its principal function is the dissemination of information concerning such rights through educational programs and advocacy. *Id.* ¶ 3.

21. Gun Owners of America Political Victory Fund is a connected political committee governed by 2 U.S.C. § 431 and is a separate segregated fund of Gun Owners of America. *Id.* ¶ 4.

22. RealCampaignFinance.Org is a not-for-profit, tax exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Babka Decl. ¶ 2. It is dedicated to defending the campaign and election-related rights its members believe are guaranteed by the First Amendment to the Constitution through educational programs and advocacy. *Id.* ¶ 3.

23. Citizens United is a not-for-profit, tax exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Bossie Decl. ¶ 2. It is dedicated to the principles of limited government and national sovereignty and to defending the rights its members believe are secured in the United States Constitution; its principal function is the dissemination of information concerning such beliefs and advocacy. *Id.* ¶ 3.

24. Citizens United Political Victory Fund is a connected political committee governed by 2 U.S.C. § 431 and is a separate segregated fund of Citizens United. *Id.* ¶ 4.

25. Michael Cloud was the Libertarian Party's candidate for United States Senate from the Commonwealth of Massachusetts in the 2002 election and is a registered voter. Cloud Decl. ¶ 1.

26. Carla Howell was the Libertarian Party's candidate for Governor of the Commonwealth of Massachusetts in the 2002 election and is a registered voter. Howell Decl. ¶ ¶ 1-2. She was also the Libertarian Party's candidate for election to the United States Senate for the Commonwealth of Massachusetts in the 2000 election. *Id.* ¶ ¶ 2-3.

27. The Republican National Committee ('RNC") is an unincorporated association created and governed by The Rules of te Republican Party. Josefiak Decl. ¶ 13. It consists of three members from the Republican Party in each of the fifty States, the District of Columbia, Puerto Rico, American Somoa, Guam, and the U.S. Virgin Islands. Duncan Decl. ¶ 4;

see also Josefiak Decl. ¶ 15. Each state and territorial Republican Party elects a national committeeman and a national committeewoman. Duncan Decl. ¶ 4; Josefiak Decl. ¶ 15. In addition, the state and territorial Republican Party chairmen serve as members of the RNC. Duncan Decl. at ¶ 4; Josefiak Decl. ¶ 15.

28. Mike Duncan is a member of the RNC from the State of Kentucky and currently serves as the General Counsel of the RNC. Duncan Decl. ¶ 5. Prior to becoming General Counsel, he was Treasurer of the RNC and in that capacity signed all RNC reports filed with the FEC. *See id.* In both his official capacity as an officer of the RNC and in his personal capacity, Duncan has participated in and (unless prohibited by BCRA) will continue to participate in national, state and local political party activities. *Id.* ¶ ¶ 6, 9. He will also (unless prohibited by BCRA) continue to solicit, receive, or direct non- federal funds to other persons. *See id.* ¶ ¶ 8-9.

29. The Republican Party of New Mexico is the state party committee of the Republican Party in New Mexico. *See* Dendahl Decl. ¶ ¶ 3-4. It supports federal, state and local candidates for office in New Mexico and promotes Republican positions on public policy issues. *Id.* Under New Mexico law, the Republican Party of New Mexico is permitted to raise and spend corporate, labor union and individual funds in unlimited amounts in support of state and local candidates. *See* N.M. Stat. Ann. § § 1-19-25 to 1-19-36 (1978); Dendahl Decl. ¶ ¶ 5-7.

30. The Dallas County (Iowa) Republican County Central Committee is a local political party committee that the FEC has deemed independent of any state or national political party committee. Josefiak Decl. ¶ 21. It is actively involved in supporting state and local candidates for office in Iowa. *Id.*

31. The California Democratic Party ("CDP") is an unincorporated association of approximately seven million

members and is the authorized Democratic Party of the State of California. Bowler Decl. ¶ 2. The CDP performs many functions, among them providing financial and material support to federal, state and local candidates; taking positions on public issues (including state and local ballot measures) and publicizing those positions; engaging in voter registration, get-out-the-vote and generic party-building activities; and maintaining an administrative staff and administrative structure to support these goals and activities and to comply with extensive federal and state regulation. *Id.* The CDP is required by state law to govern itself through the Democratic State Central Committee (DSCC). *Id.* ¶ 3. The DSCC is made up of approximately 2,710 members, about 849 of whom are elected by the 58 county central committees. *Id.* Other members serve on the DSCC because of their status as federal or state officials, as nominees of the CDP, as members of the Democratic National Committee (DNC) from California or as elected representatives of 80 Assembly District Committees (AD Committees). *Id.* CDP bylaws provide for local party AD Committees, which elect delegates to the DSCC and are the districtlevel organizational blocks of the CDP. *Id.* ¶ 4. The AD Committees are primarily involved in local voter registration, get-out-the-vote and grassroots activities and they act as liaisons with the campaign organizations of Democratic candidates in their area. *Id.*

32. Art Torres is the elected Chair of the CDP. Torres Decl. ¶ 1. Torres also serves on the DNC and has been elected by the DNC to serve on the DNC Executive Committee. *Id.* ¶ 3. As Chair of the CDP, Torres assists the CDP and county central committees in fundraising efforts by meeting and talking regularly with potential donors and attending fundraising events. *Id.* ¶ 2; *see also* Bowler Decl. ¶ 5

33. The Yolo County Democratic Central Committee is one of the 58 county central committees authorized and

governed by the California Elections Code. CDP Pls.' Compl. ¶ 11; *see also* Bowler Decl. ¶ ¶ 3-4. Members of the county central committees are elected at each statewide primary election. Bowler Decl. ¶ 4. All members of the CDP who are also state senators, members of the state assembly or Members of the Congress serve as *ex officio* members of their respective county central committees. *Id.* The county central committees are primarily involved in local voter registration, get-out-the-vote and grassroots activities and act as liaisons with the campaign organizations of Democratic candidates in their area. *Id.*

34. The California Republican Party ("CRP") is an association of over five million members and is the authorized Republican Party of the State of California. Morgan Aff. ¶ ¶ 3-4. The CRP performs many functions, among them providing financial and material support to federal, state and local candidates; taking positions on public issues (including state and local ballot measures) and publicizing those positions; engaging in voter registration, get-out-the-vote and generic party-building activities; and maintaining an administrative staff and administrative structure to support these goals and activities and to comply with extensive federal and state regulation. *Id.* ¶ 4. The CRP is governed by the Republican State Central Committee (RSCC). *Id.* ¶ 5. The RSCC consists of about 1,500 regular and appointive members. *Id.* The regular members include federal and state officeholders as well as the CRP's nominees for governor, seven other state constitutional offices, United States Senate, 52 congressional districts, 40 state senate districts, 80 state assembly districts and four State Board of Equalization districts. *Id.* The RSCC also includes the chairmen of the 58 county central committees and the chairmen of volunteer party organizations. *Id.* ¶ 6. The CRP operates as well through (1) a 100-member Executive Committee, which includes federal and state office holders and 16 representatives of county central committees; and (2) a 25- member Board of Directors, which includes a Member of Congress appointed by the delegation, three state elected officeholders and representatives from an association of Republican county central committee chairmen. *Id.* Under the CRP's bylaws and the RNC's rules, the CRP is part of the RNC. *Id.* ¶ 8. The CRP's elected chairman is a member of theRNC. *Id.* The CRP elects two other representatives to the RNC—a national committeeman and national committeewoman, each of whom is a member of the CRP Executive Committee and Board of Directors. *Id.*

35. Timothy J. Morgan is (1) a member of the RNC; (2) a member of the CRP Executive Committee; and (3) a member of the CRP Board of Directors; he also served as (4) Chairman of the Santa Cruz County Republican Central Committee. Morgan Aff. ¶ 1.

36. The Santa Cruz County Republican Central Committee is one of the 58 county central committees authorized and governed by the California Elections Code. CDP Pls.' Compl. ¶ 19; *see also* Morgan Aff. ¶ 6. Federal officials and candidates who were nominated as party nominees for partisan offices, including State constitutional and legislative offices, the Board of Equalization, and federal offices, including nominees for U.S. Senate and U.S. House of Representatives who represent all or a portion of the area within the county's jurisdiction are *ex officio* members of the Republican county central committee, and participate in its decision-making, either personally or through designated alternates or agents. *Id.*

37. The Federal Election Commission ("FEC") is a government a gency headquartered in Washington, D.C., created pursuant to FECA, 2 U.S.C. § 437(c), and is charged with enforcing the Act as amended by BCRA. David M. Mason, Karl J. Sandstrom, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner serve as the commissioners of the FEC.

38. The United States, through the Department of Justice ("DOJ"), is charged with enforcement of the criminal provisions of the Act as amended by BCRA, and has an interest in defending the constitutionality of duly enacted laws of the Nation. United States Mot. to Intervene at 5. John Ashcroft is Attorney General of the United States.

39. The Federal Communications Commission ("FCC") is a government agency headquartered in Washington, D.C., and is charged with enforcing the FECA as amended by BCRA.

40. The intervenors are Members of the Congress who were principal sponsors and authors of BCRA. Senator John McCain is a Republican United States Senator from the State of Arizona. Senator Russell Feingold is a Democratic United States Senator from the State of Wisconsin. Senators McCain and Feingold face reelection in 2004. Senator Olympia Snowe is a Republican United States Senator from the State of Maine. Senator James Jeffords is an Independent United States Senator from the State of Vermont. Senators Snowe and Jeffords face reelection in 2006. Congressman Christopher Shays is a Republican member of the House of Representatives from the Fourth Congressional District in Connecticut. Congressman Martin Meehan is a Democratic member of the House of Representatives from the Fifth Congressional District in Massachusetts.

B. *Findings Regarding BCRA's Disclosure Provisions*

41. The NRA presents evidence that some people have been reluctant to give money to the organization or the NRA PVF, the NRA's PAC, fearing that such contributions would be publicly reported. LaPierre Decl. ¶ 62 [NRA App. at 24-25] ("Throughout the years, hundreds, if not thousands, of NRA members have told me that they do not wish to disclose their contributions to the NRA . . . . If . . . members are forced to disclose their identities, I firmly believe that many will not make contributions that trigger such disclosure."); Adkins Decl. ¶ ¶ 4-6 [NRA App. at 50] ("A conspicuous and disproportionate number of contributors" to the NRA PVF "contribute just below the $200 disclosure level."). Members who have expressed their desire to keep their contributions confidential have provided a variety of reasons. LaPierre Dep. at 306 ("A lot over the years have said, I donate to you, but gee, I just don't want my neighbors to know. I don't want my school board to know. I don't want my employer to know . . . . I might lose my job. I might not get my school board thing. I might have—I mean, they fear—I mean, when you have as much hate as people have put out on this issue, it's natural for people to fear repercussions."); Adkins Dep. at 15-19 (testifying that notes received from individuals refusing to provide information for disclosure to the FEC did not give the reasons for their objections, or just stated they did not wish to have the information disclosed to the FEC); *id.* at 21-23 (testifying that she had received 3 telephone calls in the previous five or six years from individuals who feared their employer would find out that they donated to the NRA PVF). The NRA does not know the amount those who did protest disclosure gave to the organization. LaPierre Dep at 309; LaPierre Cross at 91; Adkins Dep. at 23. Of the between five and 50 persons estimated to have voiced disclosure concerns to LaPierre in 2000, LaPierre believes "not a lot" of those persons gave the NRA more than $1,000 in 2000 "[b]ecause we don't . . . get a lot of contributions more than $1,000." LaPierre Dep. at 306-309. The average NRA donor donates approximately $30 per year. LaPierre Cross at 92. Beginning in 2003, the NRA's policy is to "pay for [their] television and broadcast programming exclusively out of funds provided by individual members." *Id.* at 93. Mr. LaPierre states that "NRA's position . . . . is that . . . it ought to be disclosed who is running those ads [run with funds from anonymous donors] . . . . [a]nd who pays for the ads." LaPierre Dep. at 294-95 [JDT Vol. 14].

42. Edward Monroe, Director of Political Affairs for the Associated Builders and Contractors ("ABC") and the Treasurer of ABC's PAC, testifies that he had been told that a number of ABC contributors had suffered substantial vandalism after their names were disclosed and that the contributors believed the vandalism was the result of labor unions learning of their contributions. Monroe Cross at 86. He also testified that two corporations refused his solicitations due to their "policy of not supporting [ABC] based on previous incidents . . . . [T]hey did not elaborate." *Id.* at 87. Some contributors to ABC's PAC "specifically donate" less than $200. *Id.* at 88. Monroe believes this practice is the result of the contributors' desire to prevent public disclosure of the contributors' names. *Id.* Two corporations declined Mr. Monroe's solicitations because of "previous incidents," but did not elaborate. *Id.* at 87. Monroe also "believe[s]'' that some companies do not contribute because they "do not trust [ABC's] ability to keep . . . information confidential." *Id.* at 89.

43. Stephen Sandherr, Chief Executive Officer of Associated General Contractors of America ("AGC"), testifies in a deposition that between a dozen and two dozen members had expressed concerns to him about their contributions being publicly disclosed. Sandherr Dep. at 43-44. He believes that the number of members who share this concern is much higher but, because the AGC has made an effort to publicize the fact they do not disclose the names of contributors, concerned members do not feel the need to bring the issue up. *Id.* These members expressed two reasons for concern. Some were concerned that if their contributions were made known, "their local building trades would take offense and would threaten actions on the job site or would threaten to make life miserable for them." *Id.* at 45. Others were concerned that if their union became aware of their contribution, they would "cease bargaining over industry advancement funds," that local chapters depend on to support their activities. *Id.* at 46. The non-unionized members who expressed their concerns about disclosure to Sandherr did not express their reasons for wanting to remain anonymous. *Id.* at 48. No contributor to AGC's PAC ever told Sandherr that they planned to contribute less than $200 in order to prevent disclosure of its identity, and no contributor to the AGC's PAC ever reported being subjected to retaliation from unions for giving money to the PAC. *Id.* at 55-56.

44. Bruce Josten, Executive Vice President for Government Affairs, U.S. Chamber of Commerce, gave deposition testimony that some contributors to "Americans Working for a Real Change," a coalition established to respond to AFL-CIO issue advertisements, did not want to be publicly identified. Josten Dep. at 13-14, 27. The reason these entities gave for not wanting to be identified was that they feared becoming "targets or recipients of corporate campaigns or other types of what some would call union harassment activities." *Id.* at 28.

45. Mr. Romero, the ACLU's legislative director, attests that "[m]any ACLU members and contributors request explicit assurances that their membership will remain confidential and that their contributions will remain anonymous. The ACLU has consistently defended the First Amendment right of its members and donors to remain anonymous if they so choose." Declaration of A. Romero ¶ 5. Mr. Romero notes that "[o]nly 212 individuals contributed more than $1,000 to the organization. *Id.* ¶ 6.

46. A poll conducted by Mark Mellman and Richard Wirthlin, two reputable political pollsters, found that 61 percent of Americans want to know who is paying for political advertisements, while 24 percent say knowing such information does not matter to them. Mark Mellman & Richard Wirthlin, *Research Findings of a Telephone Study Among 1300 Adult Americans* (Sept. 23, 2002) at 20 [DEV 2-Tab 5].

47. At least one study has found that the public has a difficult time determining who is responsible for issue advertisements that identify candidates.

In response to the question asking who paid for an ad, just over 60 percent of survey participants correctly attributed the candidate ads and the pure issue ads to their actual sponsors. Identification of the sponsors of the candidate-oriented issue ads was much more scattered, with most people (38 to 48 percent) assuming in each case that they came from candidates and fewest (9 to 18 percent) assuming that they were paid for by an interest group. These results, of course, suggest that the disclaimers that appear on these ads are almost completely ineffective.

Krasno & Sorauf Expert Report at 78-79 (summarizing results from David B. Magleby, Dictum Without Data: The Myth of Issue Advocacy and Party Building, available at http://www.byu.edu/outsidemonev/dictum/index.html).

48. The problem of determining the true sponsors of issue advertisements is not only experienced by the general public; politicians and political strategists also have difficultly determining the source of these commercials. For example, former Senator Dale Bumpers, relates that

> [o]ne of the most insidious things about soft money "issue ads" is that the ordinary viewer doesn't have a clue as to who paid for the ad. I first noticed this problem in 1996, when I saw several issue ads before it ever dawned on me that those ads were not being paid for by the candidate . . . . At first I just assumed that the ads were paid for by the opposing candidates' campaign funds, though I did think it was very strange that the opposing candidates' names were never mentioned. In those ads, everything is honed in on the candidate the ad is trying to defeat. At that time, I did not know that they were soft money spots.

Declaration of Senator Dale Bumpers ¶ 29 [DEV 6-Tab 10]. Democratic political consultant Terry S. Beckett testifies that

> [t]he Republican Leadership Council ("RLC") also ran so-called "issue ads" on television in the 2000 Congressional campaign . . . . [Two of t]hese ads accuse [Republican Candidate Ric] Keller of acting "like a liberal." I found it [] ironic, not to mention unsettling, to learn of reports that the hundreds of thousands of dollars the RLC spent on these ads trying to defeat Mr. Keller were actually provided by the Florida sugar industry . . . . And the fact that I, a general consultant in this same race with long high-level experience in Florida politics, was not aware until earlier this year of whose money was behind these ads strongly underlines the need for disclosure of this kind of stealth electioneering financed with corporate funds.

Declaration of Terry S. Beckett ("Beckett Decl.") ¶ 14 [DEV 6-Tab 3].[56] Similarly, political media consultant Raymond Strother comments that

> one of the biggest problems that a candidate's media consultant now faces is the lack of disclosure associated with third parties running these ads. A few years ago, Jill Docking ran for the United States Senate against Sam Brownback in Kansas . . . . In the last two weeks of a very tight election, an unidentifiable group came in and poured a million dollars into the race. They ran

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[56] The following is an audio transcript from one of these "Florida sugar industry"—sponsored advertisements:

> Ric Keller has become an embarrassment. He claims to be a conservative but got caught getting help from liberal Democrat Linda Chapin, and Keller's law firm coughed up campaign contributions for liberal Democrat Buddy McKay. Ric Keller even supported the Clinton-Gore billion dollar tax on food. Ric Keller, who proclaims to be a conservative but gets caught acting like a liberal. How embarrassing. How wrong. How Clinton.

Beckett Decl. Ex. 5 [DEV 6-Tab 3].

> television, radio, direct mail, and push polls throughout Kansas telling voters that Jill wasn't a Christian, and all we could find was a fax machine. We had no idea where the money came from. I have had similar experiences in other races as well. Without knowing who is funding the groups that run these ads, we are often unable to correct the distortions.

Declaration of Raymond D. Strother ¶ 15 [DEV 9-Tab 40]. Joe Lamson, campaign manager for Bill Yellowtail's 1996 campaign, testified that

> The Yellowtail campaign had trouble finding out who was running the 1996 Citizens for Reform ads in Montana [which portrayed Yellowtail in a negative light]. As I recall, a local television station pointed us to a group in New Orleans. That group said they didn't know anything, but gave us a telephone number in Oklahoma that turned out to be connected to the J.C. Watts campaign. I believe someone there then flipped us to a phone number in Washington, D.C., and we finally found Citizens for Reform. We later learned that Citizens for Reform was actually a front for Triad, a group that ran broadcast attack ads against many Democrats nationwide in the 1996 election cycle.

Declaration of Joe Lamson ¶ 12 [DEV 7-Tab 26]; *see also* Declaration of Larry LaRocco (former Member of Congress, stating he was never able to find the source of attack advertisements run against him in the 1994 campaign because none of the sponsoring organizations were registered with the FEC); Magleby Expert Report at 29 [DEV 4-Tab 8] (providing examples illustrating the point that "even candidates and their campaign managers are unable to ascertain who some of the groups running ads [in the 2000 campaign] were").

49. Krasno and Sorauf find that:

> Secrecy is one of the outstanding characteristics of issue advertisements, especially those financed by interest groups. As a result, we—and regulators—are hampered by a remarkable paucity of information about them. The media tracking data we have referred to throughout our report fill in some of the blanks, but many key factual questions remain unanswered or may only be answered after painstaking investigation . . . . This secrecy, by itself, creates enormous opportunities for wrongdoing, for favors to be exchanged between issue advocates and public officials . . . . Among its various advantages, disclosure is thought to combat corruption by illuminating the dark corners in which undue influence may be exerted far from public view. The idea is that politicians eager for popularity and votes will be loath to enter into situations that cast doubt on their probity; thus, the more these situations are revealed, the stronger the politician's impulse to avoid them. One of the ironies of this litigation is that many of BCRA's opponents are otherwise champions of disclosure . . . . The public's interest in revealing these transactions is countered by the private interest of many groups and donors to keep them secret. Thus, the ability to route money to groups for candidate-oriented issue ads without disclosure has attracted an increasing amount of money to this activity. In the growing opaqueness of campaign financing, the opportunity for donors and officeholders to forge close relationships or strike deals without risk of detection increases, too.

Krasno & Sorauf Expert Report at 73-75 [DEV 1-Tab 2 at 146]. According to Plaintiffs' expert Sidney Milkis, a professor at the University of Virginia, "the names of these [issue advertising] groups did little to tell viewers who the sponsors of these messages were; indeed, in some cases they were misleading." Milkis Decl. ¶ 49.

50. Defendants' Expert Report, produced by Professor David Magleby, finds that

> [t]he current system places an unreasonable burden on voters to ascertain who is attempting to persuade them in an election. Our focus groups and survey data from 2000 show that to voters, party and interest group electioneering advertisements are indistinguishable from candidate advertisements. (See Table 2.) Even the candidates and their campaign managers are unable to ascertain who some of the groups running ads were . . . . And in the CSED national survey, I found that respondents were often confused as to whether party ads were paid for by candidates or parties. More than 40 percent of the time, the respondents thought the party ads were paid for by a candidate . . . . Voters, when asked, have consistently indicated that they would like to know who it is that is conducting electioneering. In 2000 voters in Montana faced a competitive U.S. Senate and a competitive U.S. House race. A late October Montana State University-Billings Poll found that, "78 percent of the survey respondents reported that it was 'very' or 'somewhat important' for them to know who 'pays for or sponsors a political ad.'" Our focus group participants in 2000 had very similar views on the question of the importance of their knowing who is paying for or sponsoring an ad. More than four-fifths (81%) said it was very or somewhat important to know the identity of the sponsor. In the national Knowledge Networks Survey in 2000, 78 percent said the same thing.

David B. Magleby, *Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity*, at 29-30 [DEV 4-Tab 8].

51. The Annenberg Public Policy Center finds that

> [b]ecause issue ads are not federally regulated, sponsors are not subject to disclosure requirements. As a result, who paid for an ad may not be apparent to viewers when they see it. Some organizations do identify themselves in

> the course of an advertisement, but their names may be unfamiliar to viewers and/or deliberately vague. For example, "Citizens for Better Medicare" is not a grass-roots generated group of citizens, but an arm of the Pharmaceutical Research and Manufacturers Association (PhRMA).

Annenberg Report 2001 at 18; *see also id.* at 3 (commenting that "[t]racking spending on issue advocacy is far from an exact science" because of the lack of disclosure). One of the conclusions the Center has reached after seven years of study is that "[i]ssue advocacy masks the identity of some key players and by so doing, it deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility." *Id.* at 2.

52. A prominent example of an organization running advertisements that influenced a federal election but were able to skirt FECA's disclosure provisions is the "Republicans for Clean Air" campaign. The issue advocacy campaign sponsored by Republicans for Clean Air during the 2000 Republican primary highlights how groups can use candidate-centered issue advocacy to avoid FECA's disclosure requirements. Defendants' experts Krasno and Sorauf provided uncontroverted testimony that:

> [a]mong the mysterious groups sponsoring issue ads or the mysterious donors funding various organizations-all without making information known to the public-the example of "Republicans for Clean Air" stands out. This group sponsored ads praising then-Governor Bush and criticizing Senator McCain before the 2000 Republican presidential primaries in three states. Eventually, after the first of these primaries (South Carolina's) reporters uncovered that Republicans for Clean Air consisted of two brothers, Charles and Sam Wyly, long-time friends and supporters of Governor Bush. Charles Wyly, in fact, was an authorized fundraiser for the Bush campaign . . . . According to press estimates, the Wylys spent $25

> million on their ads for Governor Bush . . . . When the Wylys' involvement was later uncovered during the New York primary, the news qualified as a small bombshell and led to a wave of publicity critical of the brothers and the Bush campaign, which in turn distanced itself from "Republicans for Clean Air." . . . In sum, we have a major campaign conducted in secrecy during a key part of the 2000 Republican primary campaign, and a marked change in the level of scrutiny once its sponsors became known. Much as we applaud the ingenuity of the reporters who eventually broke the story, we strongly believe that there is a compelling governmental interest in making these facts known to all from the start.

Krasno and Sorauf Report at 75-76 (footnotes omitted) [DEV 1-Tab 2]; *see also* FEC MUR 4982, Statement of Reasons, Comm'rs Thomas and McDonald, April 2002, INT 003684 [DEV 133-Tab 1] ("The week before the 'Super Tuesday' primaries, a $2 million advertising campaign praising presidential candidate George W. Bush and attacking his opponent, John McCain, ran in the important primary states of California, New York, and Ohio. The ads stated that they were paid for by a group calling itself 'Republicans for Clean Air.' In actuality, the ads apparently were financed mostly by two brothers, both of whom were strong financial supporters of then Governor Bush and one of whom was an authorized fundraiser for the Bush presidential campaign. At issue in MUR 4982 was whether there should have been some disclosure to the voting public of who really paid for the ads; whether the ads were coordinated with any agent of the Bush campaign and, thus, should be viewed as an in-kind contribution to the Bush campaign, and finally, whether the advertising effort should have registered with the Federal Election Commission as a 'political committee' subject to the reporting requirements and funding restraints."). Even Plaintiffs' expert agrees that the candidate-centered issue advocacy of the Republicans for Clean Air highlights the fact that this technique can be used to influence federal elections without complying with FECA's disclosure provisions. La Raja Decl. ¶ 25(b) ("We could not determine the sponsors of this ad until reporters in Washington discovered that brothers from Texas, who strongly supported George W. Bush, paid for the advertisements using a P.O. Box in Herndon, Virginia . . . . This direct personal experience trying to monitor outside electoral activity revealed to me the potential difficulties of identifying the source of interest group campaign activities, including issue ads.").

IV. CONCLUSIONS OF LAW

As part of the *per curiam* opinion, the Court resolves the Paul Plaintiffs' discrete claims and most of the new disclosure provisions of BCRA.

A. *Paul Plaintiffs' Press Clause Challenge*

Paul Plaintiffs[57] focus their complaint on the guarantees of free press embodied in the First Amendment. Paul Pls.' Br. at 8. Specifically, Paul Plaintiffs contend that BCRA imposes certain restrictions on their "press" activities, which violate the basic tenets on which the freedom of the press rests.[58] *See id.* at 10, 13-18. In doing so, Plaintiffs advance a new, if not novel, challenge—a tack that has not been used in the campaign finance realm. *See id.* at 11 ("To date, however, [campaign finance challengers] that are engaged in non-exempt press activities have not invoked the freedom of the press in their numerous challenges to the constitutionality of federal campaign finance regulations . . . .'').[59] While the Court recognizes the import of Paul Plaintiffs' innovative legal theory, it finds their arguments unpersuasive.

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[57] "Paul Plaintiffs" include: United States Representative Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.Org, Citizens United, Citizens United Political Victory Fund, Michael Cloud, and Carla Howell.

[58] According to Paul Plaintiffs, BCRA imposes unconstitutional licensing restrictions, economically burdensome regulations, editorial control, and prior restraint on their "press" activities.

In essence, Paul Plaintiffs characterize their activities (for example, candidate press releases, broadcast and radio advertisements, and campaign literature)[60] as falling under the constitutional protections afforded to the press. The freedom of the press, as Plaintiffs contend, "was never designed as a special privilege of the institutional media," Paul Pls.' Br. at 11; rather it extends to "every freeman," *see id.* at 12 (citing *Near v. Minnesota,* 283 U.S. 697, 713-14 (1931)). They argue further that while other First Amendment rights—of speech and association, for example—may be

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[59] As discussed at oral argument:

> MR. TITUS: Now, if that's true of the institutional press, that a prior restraint has to be tested by such a high standard, all the more true for the Paul plaintiffs who in this particular case are indicating to you, Your Honors, that what they are engaged in are press activities, they are entitled to the same immunity from prior restraint as the institutional press.
>
> JUDGE LEON: Is that a novel theory?
>
> MR. TITUS: No, I don't believe it's a novel theory. I don't think it has ever been pressed.
>
> JUDGE LEON: Do you have any Supreme Court cases that support it or Circuit cases?
>
> MR. TITUS: In financial campaign law cases, no. No one has argued this claim in any campaign finance case that I know of.

Tr. at 340-41 (Titus).

[60] The vast-majority of activities cited by Paul Plaintiffs fall well-outside the scope of BCRA's prohibition on "electioneering communications." *See* BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A) (not applying to press releases or campaign literature). Moreover, Paul Plaintiffs bring a facial challenge to the constitutionality of this statute, and have clearly not met their burden of demonstrating that the law is substantially overbroad.

limited by a compelling governmental interest, the freedom of the press is insulated from such limitations.[61] *Id.* at 9 n.3. Under Plaintiffs' theory, the same governmental interests that survive a constitutional challenge in *Buckley v. Valeo,* 424 U.S. 1 (1976), may not be used to justify any limitation on the general press, which includes all persons and organizations disseminating information. *See id.* at 28 ("[T]he Paul Plaintiffs urge this Court not to follow *Buckley v. Valeo* here, because the press guarantee lays down a different and more stringent standard . . . .'').

In order for Paul Plaintiffs' arguments to prevail, however, they must demonstrate that the freedom of the press provides rights superior to those under the Speech and Association Clauses of the First Amendment. If Paul Plaintiffs cannot demonstrate that their claims warrant separate and unique guarantees—guarantees that are not provided under the other clauses of the First Amendment—then there is no need for the Court to treat their grievances separately.

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[61] Paul Plaintiffs fail to provide the Court with a standard to apply where the government obstructs "press" activities, nor do they delineate the additional, substantive rights provided under the First Amendment Freedom of the Press Clause. Plaintiffs contend that "[t]he freedom of the press provides guarantees that are distinct from, and significantly greater than, the guarantees of free speech and association, and of equal protection . . . . '' Paul Pls.' Br. at 9 n.3. Moreover, they note that "[w]hile the compelling government interest test has been applied to free speech, association, and equal protection claims, it is not applicable to the freedom of the press." *Id.* Plaintiffs do not, however, explicitly state instances where the freedom of the press has been found to be superior to the other guarantees provided under the First Amendment. Nonetheless, Paul Plaintiffs ask—although not explicitly—that the Court review any government interference with "press" activities under a more stringent standard than "exacting scrutiny," which would normally be applied where a law burdens core political speech. *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978) (holding that state restrictions on political speech are subject to "exacting scrutiny"). Without guidance from the parties, the Court, therefore, assumes that Paul Plaintiffs request the application of a standard on par with strict scrutiny.

The Supreme Court has not explicitly stated whether the freedom of the press affords greater protections than that of speech or association; two leading First Amendment scholars have observed, however, that the Press Clause provides no greater rights. 2 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech*, § 22:10 (2002) ("Does the Press Clause today have jurisdictional significance distinct from the Speech Clause? For the most part, the answer appears to be 'no.'"); *see also* Laurence H. Tribe, *American Constitutional Law* § 12-1, at 785 n.2 (2d ed. 1988).[62] Part of the problem, as Professor Smolla has observed, is that "in modern First Amendment jurisprudence, the Press Clause has largely been subsumed into the Speech Clause." *Id.* at § 22:6.

The Supreme Court's treatment of the First Amendment in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), illustrates this point. In *Bellotti*, the Supreme Court considered a Massachusetts criminal statute that prohibited corporations "from making contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters." *Bellotti*, 435 U.S. at 768 (internal quotations and ellipses omitted). The plaintiff-bank wanted to spend money to publicize its views on a proposed state constitutional amendment that was to be submitted to the voters as a ballot question in an upcoming election. *Id.* at 769. After being informed that the state Attorney General

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[62] Professor Tribe, in his chapter on "Rights of Communication and Expression," does not allude to any greater or distinct rights afforded by the First Amendment Freedom of the Press Clause. In fact, Tribe states: "Throughout this chapter, 'freedom of speech' will be employed as shorthand for the entire collection of freedoms (other than those pertaining specifically to religion) secured from government interference by the first amendment." Laurence H. Tribe, *American Constitutional Law* § 12-1, at 785 n.2 (2d ed. 1988).

would enforce the statute, the bank sought declaratory relief. *Id.* The case was not exclusively framed around the Press Clause, *see id.* at 779, yet the Supreme Court engaged in a careful discussion of the freedom of the press and entertained whether media corporations enjoy superior rights as compared to those of general corporations. *Id.* at 781. The majority deemed that the "institutional" media "does not have a monopoly on the First Amendment," *id.* at 781-82, but went on to consider whether the state could "show[] a subordinating interest which is compelling" to justify the statute's impact on First Amendment rights, *id.* at 786. The Supreme Court then determined that the state's concern failed to meet the compelling interest test.[63] *Id.* at 788-91.

Bellotti is significant because, despite considering rights under the Press Clause, the Supreme Court nonetheless applied the compelling interest test. *Id.* In other words, in the context of an election law statute, as it applied to a non-media corporation, the Supreme Court treated the Press and Speech Clauses as indistinct.[64] What is more, the Supreme Court alluded to no rights under the Press Clause that are superior to or different than those under the other clauses of the First Amendment.

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[63] The Supreme Court distinguished the statute in *Bellotti* from traditional campaign finance laws, which involve expenditures directed towards or otherwise contributed to *candidates*. *Bellotti*, 435 U.S. at 790. "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involved in candidate elections simply is not present in a popular vote on a public issue." *Id.* (citation omitted).

[64] The Supreme Court did not, however, consider whether the media exemption under most campaign finance laws, *see, e.g.*, BCRA § 201(a); FECA § 304(f)(3)(B)(i); 2 U.S.C. § 434(f)(3)(B)(i), violates the First Amendment or the Equal Protection Clause. That is, by exempting the "institutional" media, do such provisions unfavorably discriminate against the rights of the general press? The Supreme Court settled this question in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), when it simply stated: "Although the [institutional] press' unique societal role may not entitle the [institutional] press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." *Austin*, 494 U.S. at 668.

Even if the Court were to find that the Press Clause provides greater or different protections than the other provisions of the First Amendment, Plaintiffs' arguments must fail.[65] As noted above, Paul Plaintiffs have failed to identify any case that has applied "press" guarantees in the campaign finance context. Tr. at 341 (Titus); *see also* Paul Pls.' Br. at 11. To hold for Paul Plaintiffs would be to invite a new and wholly unsupported theory of First Amendment jurisprudence; litigants could besiege the courts with a host of challenges to laws previously upheld by the Supreme Court on First Amendment grounds, merely by characterizing themselves in their complaints as members of the "press" because their purpose is to disseminate information to the public. As Chief Justice William Rehnquist and Associate Justice Antonin Scalia observed in *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995), "of course, if every partisan cry of 'freedom of the press' were accepted as valid, our Constitution would be unrecognizable." *McIntyre,* 514 U.S. at 373 (Scalia, J., dissenting).[66]

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[65] If the Press Clause affords greater or different rights, it might force the courts to make a distinction between the "institutional" and "general" press. The difficulty in making this distinction compelled Chief Justice Burger to write his concurring opinion in *Bellotti. See Bellotti,* 435 U.S. at 796 (Burger, C.J., concurring) (noting the "difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from [non-media] corporations"). Nonetheless, this Court refuses to resolve Plaintiffs' Press Clause claims in this context.

[66] In *McIntyre,* the Supreme Court applied the *Speech Clause* to invalidate an Ohio statute that prohibited the anonymous distribution of campaign literature on general, referendum questions. *McIntyre,* 514 U.S. at 336-37, 349-51. Justice Thomas concurred in judgment, but "would [have applied] . . . a different methodology to [the] case." *Id.* at 358-59. According to Justice Thomas, the "practices and beliefs held by the

Paul Plaintiffs can cite no precedent in support of their claims. Since the Supreme Court has not affirmatively provided superior rights under the Press Clause, and has suggested that such claims fall under the general First Amendment compelling interest test, this Court rejects the argument that Paul Plaintiffs' claims under the Press Clause warrant a higher level of constitutional protection.[67] Therefore, this Court will apply the same scrutiny to all First Amendment claims, whether presented under the Speech or Press Clauses, and subsumes all of Paul Plaintiffs' Title I, and essentially all of their Title II, arguments into the First Amendment challenges advanced by the other litigants in this case.[68]

Founders" provided for an author's right to publish anonymously under the Press and Speech Clauses. *Id.* at 360. Justice Scalia, with whom Chief Justice Rehnquist joined, was not persuaded by Justice Thomas's arguments. *Id.* at 373. As Justice Scalia observed, "not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional, or else modern election laws such as those involved in *Buckley v. Valeo,* 424 U.S. 1 (1976) would be prohibited, as would . . . modern antinoise regulation] . . ., and modern parade permitting regulation." *Id.* (citations omitted).

[67] Given this conclusion, the Court holds that there is no reason to remand the Paul Plaintiffs' separate challenges to FECA's pre-BCRA provisions under this theory to a single-judge court. *See* Paul Pls.' Compl. ¶ 1 ("This is an action for declaratory and injunctive relief with respect to certain provisions of [BCRA] as it amends the [FECA], *as well as certain related provisions of the FECA*] . . . on the grounds that these integrally related provisions deprive the Plaintiffs of the Freedom of the Press in violation of the First Amendment of the Constitution of the United States.") (emphasis added) (citations omitted).

[68] Paul Plaintiffs briefly challenge the constitutionality of section 301 of Title III in their pleadings—most notably and independent of their Press argument, that section 301 discriminates against non-incumbent office holders by placing limitations on personal use expenditures. Paul Pls.' Br. at 25. However, the Court is not able to discern any basis for these arguments in their Amended Complaint. Accordingly, the Court does not address this issue.

B. *BCRA's Disclosure Provisions*

Section 201: Disclosure Provisions

1. *Introduction*

With one exception, the Court also finds the disclosure provisions relating to "electioneering communications" constitutional. The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public. BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. Plaintiffs challenge BCRA's restrictions on electioneering communications on the premise that they should be permitted to spend corporate and labor union general treasury funds in the sixty days before the federal elections on broadcast advertisements, which refer to federal candidates, because speech needs to be "uninhibited, robust, and wide-open." McConnell Br. at 44 (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964)). Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). Findings ¶ ¶ 44, 51, 52. Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public. McConnell Br. at 44. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment

values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace. As a result, the Court finds Section 201 facially constitutional, with the exception of one subsection which the Court determines to be broader than necessary to achieve the legitimate governmental interest at stake.

2. *Discussion*

The provision's disclosure requirements are challenged by the McConnell, AFL-CIO, Chamber of Commerce, NAB, NRA, and Paul Plaintiffs. Plaintiffs' challenge to Section 201's disclosure provisions focuses on two aspects of the law: (1) its requirement of disclosure prior to the airing of electioneering communications; and (2) its requirement that disbursers disclose the names of contributors who gave over $1,000 to the disbursing fund. The Court addresses each in turn.

a. Prior Disclosure

The McConnell Plaintiffs, AFL-CIO, Chamber of Commerce, and NAM object to Section 201's disclosure requirements on the ground that they mandate disclosure of not only actually aired electioneering communications, but also contracts to make such communications. *See* McConnell Br. at 56 n.22; AFL-CIO Br. at 14-17; Chamber/NAM at 20 n.13. This advance disclosure, Plaintiffs argue, "serve[s] no governmental interest and will chill the exercise of free speech by forcing groups . . . to disclose ongoing and confidential political strategies and decision-making processes, and by giving adversaries the opportunity to try to thwart broadcasts or counter them with their own messages." AFL-CIO Br. at 16.[69]

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[69] McConnell Plaintiffs, the Chamber of Commerce and NAM make a passing suggestion that Section 201 might constitute a "prior restraint" in

Defendants argue that the then-pending (and now final) regulations interpret the notice requirements as not mandating disclosure until after the advertisements have been publicly distributed. Gov't Opp'n at 111. The content of the regulations, argue Defendants, "moot plaintiffs' concerns, [make] plaintiffs' claims to injury . . . wholly speculative[,] and their challenge to this aspect of BCRA's disclosure provisions is therefore unfit for judicial resolution." *Id.*

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violation of the First Amendment. McConnell Plaintiffs Br. at 55-56 ("But if this Court agrees that the electioneering communications provisions cannot stand, the attendant disclosure provisions should likewise fall, because the disclosure provisions constitute a regulation of-and in some cases a prior restraint on- speech that the government may not regulate in the first place."); Chamber/NAM Br. at 20 n. 13 ("The timing of the BCRA's electioneering communication disclosure requirement is an unconstitutional prior restraint.").

This argument cannot be squared with the Supreme Court's definition of "prior restraint." *See Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) ("[T]he regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.'") (*citing Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)); *see also Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001) ("By 'prior restraint' . . . modern courts . . .mean censorship—an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive. The censor's concern is with the content of speech, and the ordinary judicial safeguards are lacking. 'Prior restraints' that do not have this character are reviewed under the much more permissive standard applicable to restrictions merely on the time, place, or manner of expression.") (citations omitted); *Wisconsin Realtors Ass'n v. Ponto*, No. 02-C-424-C, 2002 WL 31758663 * 12 (W.D. Wis. Dec. 11, 2002) (subjecting Wisconsin statute's prior reporting requirements to "time, place, or manner of expression" analysis); FEC Opp'n at 112.

Given the paucity of Plaintiffs' briefing on this matter and the precedent cited above, this Court believes further analysis of "prior restraint" in this context is not warranted.

The Court cannot agree that Plaintiffs' challenge to the disclosure requirements in Section 201 is not ripe for review. Unlike the situation confronted by the Court in examining the disclosure requirement of Section 212, discussed *infra* at 140, the regulations promulgated for Section 201 do not eliminate Plaintiffs' prior disclosure concerns. The regulations, despite the FEC's explanation of the provision,[70] appear to still require prior disclosure of electioneering communications that have not yet aired. Specifically, the definition of "disclosure date" leaves uncertain what must be disclosed after the airing of an electioneering communication when the disburser has executed contracts for electioneering communications aggregating over $10,000.[71] The regulations

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[70] In issuing the final regulations, the FEC noted that

> All of the commenters who addressed this issue . . . advocated adopting a final rule that would define "disclosure date" as the date of the public distribution of the electioneering communication. They argued that there is no electioneering communication, and therefore no reporting requirement, until the communication is actually publicly distributed . . . .
>
> This [adopted definition of disclosure] date reflects the Commission's concerns that there are legal and practical issues associated with compelling disclosure of potential electioneering communications before they are finalized and publicly distributed, and premature disclosure may require reporting entities to divulge confidential strategic and political information about their possible future activities.

Explanation and Justification of 11 C.F.R. 104.20, Reporting Electioneering Communications, 68 Fed. Reg. at 404, 409 (Jan. 3, 2003).

[71] The regulations provide in part:

> (i) Disclosure date means: (i) The *first date* on which *an* electioneering communication is *publicly distributed* provided that the person making the electioneering communication has made one or more disbursements, *or has executed one or more contracts to make disbursements*, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000; or

suggest that if a person has executed $10,000 in electioneering communications contracts, 24 hours after the first such communication is aired, the disburser must make a disclosure encompassing all of the electioneering communications under the contract(s). The Court notes that its jurisdiction does not extend to the FEC's BCRA regulations, *see* BCRA § 403 (providing this Court with jurisdiction to hear challenges to "the constitutionality of any provision of this Act or any amendment made by this Act"), and therefore it makes no determination on their validity or proper construction. However, given the uncertainty it finds with regard to the scope of the regulations, the Court cannot conclude that Plaintiffs' challenge is not ripe.[72] "[T]he extent of the chill upon first amendment rights induced by vague or overbroad statutes is the most significant factor in determining whether an otherwise premature or abstract facial attack . . . is ripe for decision." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 384 (D.C. Cir. 1980). Where other cases have found facial First Amendment challenges ripe for review, "either the activities in which the complainants wished to (or had) engaged or the enforcing authority's particular intent to enforce the statute, or both, were clear enough to show the adversarial posture assumed by the parties and the contours of their dispute." *Id.* at 387. Here, Plaintiffs have clearly engaged in "electioneering communications" in the past, and the FEC regulations promulgated on January 3, 2003, indicate that the agency intends to enforce BCRA Section 201, including its "contracts" provision. Given these facts, the Court finds that Plaintiffs "have alleged an actual and well-founded fear that the law will be enforced against them," which threatens the danger of "self-censorship; a harm that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).[73]

> (ii) Any other date during the same calendar year on which *an* electioneering communication is *publicly distributed* provided that the person making the electioneering communication has made one or more disbursements, *or has executed one or more contracts to make disbursements*, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000 since the most recent disclosure date during such calendar year.

BCRA Reporting; Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 404, 419 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 104.20) (emphasis added).

[72] In analyzing Section 212, *infra* at 140, the Court finds that the FEC's final regulations completely and unequivocally address Plaintiffs' concerns and therefore renders their challenge to that provision unripe for adjudication at this time. In the analysis of Section 214(c), *infra* at 155, the Court finds that the regulations related to Section 214, promulgated after briefing and oral argument in this case, have affected the contours of the dispute between the parties to such an extent that the challenge is not ripe for review.

[73] The Court notes that arguments could be made that the FEC's regulations do render Plaintiffs' challenge unripe. For example, under the regulations, to be an "electioneering communication" the broadcast must be "publicly distributed within 60 days before a general election." BCRA, FCC Database on Electioneering Communications; Final Rules, 67 Fed. Reg. 65190, 65210 (Oct. 23, 2002) (to be codified at 11 C.F.R. § 100.29(a)(2)). Therefore, it could be argued that a broadcast is not an "electioneering communication" until it is aired, and therefore contracts to make broadcasts are not contracts to make electioneering communications unless and until the broadcasts have been publicly disseminated.

This reasoning leads to the conclusion that one cannot have $10,000 in electioneering communications contracts to disclose until $10,000 worth of advertisements have been publicly disseminated. However, as this analysis demonstrates, such a conclusion is not unequivocally apparent, and therefore could lead to the chilling of First Amendment rights. Again, had the FEC promulgated regulations which clearly addressed this issue as it did for Section 212, the Court's ripeness determination for Section 201 would likely have been different. Given the possibility of different interpretations of the regulations, the chilling effect of that uncertainty, and the fact this Court lacks jurisdiction to rule on the regulations, the Court has determined that Plaintiffs' challenge to Section 201's disclosure provisions is ripe.

Analysis of Section 201 commences with the guidance that disclosure provisions "in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68. However, disclosure provisions are subject to exacting scrutiny analysis "because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Id.* at 66. The Supreme Court has found three categories of "governmental interests sufficiently important to outweigh the possibility of infringement." *Id.* The Supreme Court stated:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return . . . .
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

Id. at 66-68 (citations omitted). *Buckley* upheld the constitutionality of Section 434(e) of FECA, which required disclosure of independent expenditures, although the Supreme Court did limit the provision to only those expenditures used for "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. The provision was found to be "part of Congress' effort to achieve total disclosure . . . in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence as possible." *Id.* at 76 (footnote and quotation marks omitted). The Supreme Court deemed the measure "responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of FECA." *Id.* at 76 (footnote omitted). The Supreme Court also determined that

> it is not fatal that [section] 434(e) encompasses purely independent expenditures uncoordinated with a particular candidate or his agent. The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies.

Buckley, 424 U.S. at 81.

Addressing Plaintiffs' prior disclosure concerns, Defendant FEC maintains that even with the "contracts" language, Section 201 is constitutional because it "does not prevent anyone from speaking," and "[t]he reports themselves would not have to reveal the specific content of the advertisements, yet they would perform an important function in informing the public about various candidates' supporters *before* election day." FEC Opp'n at 112 (emphasis in original). Although the Court agrees that the function cited is a substantial one, *see Buckley*, 424 U.S. at 67 ("[F]ull disclosure during an election campaign tends to prevent the corrupt use of money to affect elections.") (citation and quotation marks omitted), the FEC does not explain how this goal is any less served by requiring disclosures only after the expenditures for electioneering communications have been publicly disseminated. Information concerning contracts that have not been performed, and may never be performed, may lead to confusion and an unclear record upon which the public will evaluate the forces operating in the political marketplace. By limiting disclosures to expenditures actually made, the government's legitimate interest is served without the constitutional and practical shortcomings implicated by requiring prior disclosures. This is so because Section 201 requires disclosure within 24 hours of the disbursement.[74]

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[74] The Court does not address the question of whether or not the 24-hour disclosure deadline included in Section 201 is constitutional, as this provision was not challenged nor its constitutionality briefed by Plaintiffs and consequently not responded to by Defendants. *See* McConnell Plaintiffs Br. at 56 n.22; AFL-CIO Br. at 14-17; ACLU Br. at 17-19; Chamber/NAM Br. at 18-20; NRA Br. at 48-50; FEC Opp'n at 112 n.116 ("In *Citizens for Responsible Gov't State Political Action Comm* . . . the court invalidated a 24-hour notice requirement because it believed 'such immediate notice' was unduly burdensome- *claim* [*sic*] *not raised by plaintiffs here* . . . .") (emphasis added); *McConnell v. FEC*, No. 02-582 (D.D.C. Oct. 15, 2002) (Briefing Order) ("*All* legal arguments shall be presented on a title-by-title basis, with a discrete section of each brief devoted to each title.") (emphasis added); *see also Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 101 n.6 (D.D.C. 2001) ("The court makes no ruling on such acts, however, because the United States has not briefed the issue."); *Carter v. Cleland*, 472 F. Supp. 985, 989 n.4 (D.D.C. 1979) ("This issue was not briefed by the parties. No decision will be rendered on it."); *cf. Kattan v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) ("[T]his Court has recognized that a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously."). Circuit Courts of Appeal routinely consider issues that are not briefed as "abandoned." *United States v. Wade*, 255 F.3d 833, 839 (D.C. Cir. 2001) (*citing Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997)).

The Court finds that Section 201, by including subsection 5 of Section 201, BCRA § 201(a); FECA § 304(f)(5); 2. U.S.C. § 434(f)(5), which equates contracts to make disbursements with actual disbursements requiring disclosure of contracts to make electioneering communications prior to their public dissemination, lacks a "relevant correlation" or "substantial relation," *Buckley*, 424 U.S. at 64, to a legitimate governmental interest.

This constitutional flaw, however, does not render Section 201 unconstitutional in its entirety. BCRA provides that "[i]f any provision of this Act . . . or the application of a provision . . . to any person or circumstance[] is held to be unconstitutional, the remainder of this Act . . . and the application of the provisions . . . to any person or circumstance, shall not be affected by the holding." BCRA § 401; 2 U.S.C. 454 note. As the Supreme Court noted in *Buckley*, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley*, 424 U.S. at 108-09 (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)); *see also Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 441 (D.C. Cir. 1982) ("The presence of a severability clause, which expressly sets forth congressional intent that a statute stand in the event one of its provisions is struck down, makes it extremely difficult for a party to demonstrate inseverability."), *aff'd*, 463 U.S. 1216 (1983); *Buckley*, 424 U.S. at 108-09 (finding that unconstitutional provisions did not render all of Subtitle H of FECA unconstitutional); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560- 61 (2d Cir. 1988) (finding that "the words 'or indecent' are separable so as to permit them to be struck and the statute otherwise upheld . . . . [T]he invalid part of section 223 may be dropped and . . . the remainder of the statute is fully operative."), *cert. denied*, 488 U.S. 984 (1988). Given this guidance and the clear import of Section 401 of BCRA, the Court holds that the remainder of Section 201 is severable from subsection (5). It is clear that the value of disclosing electioneering communications disbursements is not dependent on their disclosure prior to broadcast, and the Court cannot say that it is "evident that the legislature would not have enacted" the remaining disclosure provisions of Section 201 in the absence of subsection (5). *Buckley*, 424 U.S. at 108-09. The remainder of Section 201 adequately serves the purpose of "informing the public about various candidates' supporters *before* election day," FEC Opp'n at 112 (emphasis in original), without requiring advance disclosures that could potentially chill the exercise of free speech rights.

The Court therefore finds that Section 201's requirement that electioneering communications that have not yet aired but have been contracted for is unconstitutional, but that by severing subsection (5), the provision's prior disclosure concerns are remedied and the remainder of the section is constitutional.

b. Disclosure of $1,000 Contributors

Plaintiffs ACLU, Chamber of Commerce, NAM, and NRA challenge Section 201's requirement that electioneering communications disbursers disclose the names of persons who have given $1,000 or more to the disbursing fund. Plaintiffs argue that for "controversial groups, such threatened disclosure can have a deadly chilling effect on the group's advocacy." ACLU Br. at 19; *see also* Chamber/NAM Br. at 19; NRA Br. at 50. The NRA argues that the provision suffers from the same infirmities as those in FECA struck down by the D.C. Circuit, as BCRA's "disclosure requirements reach the very same outside 'groups engaging in nonpartisan discussion.'" NRA Br. at 49-50 (quoting *Buckley*, 519 F.2d at 873). Finally, the Chamber of Commerce argues that Section 201's disclosure requirements are overbroad, because at least "[w]hen the advertiser is the Chamber [of Commerce], the interest served by the ad is reasonably clear." Chamber/NAM Br. at 20 (quoting Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 Ind. L. Rev. 755, 757 (2002)).

Defendants argue that the disclosure of individual contributors is necessary because many sponsors of issue advertisements conceal "their identity from the public by electioneering pseudonymously, through front organizations such as 'The Coalition: Americans Working for Real Change,' [*sic*] 'Citizens for Reform.'" FEC Br. at 173.[75] Indeed, the Supreme Court has observed that "when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (rejecting the argument that a limit on contributions to committees formed to support or oppose ballot measures was necessary "to make known the identity of supporters and opponents" of such measures, given that another provision of the ordinance "requires publication of lists of contributors in advance of the voting"). This observation has been buttressed by the evidence presented in this case. *See* Findings ¶ ¶ 48-52. For example, PhRMA, a pharmaceutical industry trade group, the Chamber of Commerce, and two brothers from Texas, have produced issue adds under the names "Citizens for Better Medicare," "Americans Working for a Real Change," and "Republicans for Clean Air," respectively. *Id.* ¶ ¶ 51, 44, 52. A recent poll showed that 61 percent of Americans want to know who is behind these issue advertisement organizations. *Id.* ¶ 46. Plaintiffs' briefs provide no evidence to the contrary and do not attempt to argue that the government lacks a legitimate interest related to the disclosure requirements; in fact, many of their experts voice the same concerns. *Id.* ¶ ¶ 49 (Milkis), 52 (La Raja). The Court finds that the evidence presented establishes that a legitimate governmental interest is served by the donors disclosure requirement, and reaffirms the *Buckley* observation that "[t] he corruption potential of [independent uncoordinated] expenditures may be significantly different [than coordinated expenditures], but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." *Buckley*, 424 U.S. at 81. Without disclosure of donors, it is difficult, if not impossible for the voting public to know who is sponsoring political advertisements under amorphous and nondescript pseudonyms. *See* Findings ¶ ¶ 47, 50-51. Indeed, even those experienced in politics, political scientists, and members of the media find it difficult to know who is behind some political advertisements. *Id.* ¶ ¶ 48, 52. Without Section 201's

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[75] In justifying the provision, one Senator commented:

> We deter the appearance of corruption by shining sunlight on the undisclosed expenditures for sham issue advertisements. Corruption will be deterred when the public and the media are able to see clearly who is trying to influence the election. In addition our provisions will inform the voting public of who is sponsoring and paying for an electioneering communication.

147 Cong. Rec. S3034 (daily ed. Mar. 28, 2001) (Sen. James Jeffords). In a similar vein, a Representative stated:

> No one is trying to gag anybody. If they want to do a political ad that essentially wants people to vote for or against, what they say is [*sic*] fall within the independent expenditure and other provisions of the law, which has limits on what can be expended and has requirements for disclosure, which is not true of these ads that are clearly campaign ads, that are clearly political ads. But the people do not know who put the money up. They are hidden. They are endless. There is a flood of hidden, in terms of its support, of hidden money. That is what we say should not happen.

144 Cong. Rec. H4866 (daily ed. June 19, 1998) (statement of Rep. Sander Levin).

disclosure requirements, it will continue to be extremely difficult for the public to learn that groups, such as PhRMA, or individuals, like the Wylys, are the true source of millions of dollars in potential advertisements run under banners such as "The Coalition" or "Citizens for Better Medicare." *Id.*

This conclusion, however, does not end the inquiry. The Supreme Court has been mindful of the chilling effect disclosure can have on associational rights, and has declared that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-61(1958). "The strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Although disclosure requirements are often "the least restrictive means" of regulating campaign finance practices, "[i]n some instances disclosure may even expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68.

In *Buckley*, the Supreme Court considered the argument that contributions made to independent candidates and minor parties should be exempt from FECA's disclosure requirements. The Supreme Court rejected the challenge, concluding that the evidence presented was "not of the sort proffered in *NAACP v. Alabama*." [76] *Buckley*, 424 U.S. at 71.

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[76] In *NAACP*, the NAACP challenged a court order forcing the group "to reveal to the State's Attorney General the names and addresses of all of its Alabama members and agents." *NAACP v. Alabama*, 357 U.S. 449, 451 (1958). The State had obtained a restraining order, enjoined the group from operating in Alabama due to its failure to file a corporate charter with the Secretary of State. *Id.* In response, the NAACP sought to dissolve the restraining order, but refused to comply with Alabama's request for the production of documents including the NAACP's "records containing the names and addresses of *all* Alabama members and agents of the Association." *Id.* at 453 (quotation marks omitted) (emphasis added). The court then ordered the NAACP to comply. *Id.* The evidentiary record

The evidence that was presented in *Buckley* was found by the Supreme Court to be "at best . . . the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure," and therefore failed to persuade the Supreme Court that "the substantial public interest . . . outweighs the harm generally alleged." *Id. Buckley* instructs that when a legitimate government interest is served by a disclosure provision, constitutional challenges claiming the disclosure will chill associational rights must be accompanied by evidence which shows

> a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

Buckley, 424 U.S. at 74; *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (finding Ohio

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before the Supreme Court consisted of uncontroverted evidence "showing that on past occasions revelation of the identity of [the NAACP's] rank-and-file members has exposed these member to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. Based on this evidence, the Court found that

> compelled disclosure of [the NAACP's] membership is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which, they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."

Id. at 462-63. As such, the Supreme Court found that Alabama's interest in the information was insufficient to justify the disclosure. *Id.* at 466.

disclosure provisions could not be constitutionally applied to the Socialist Workers Party ("SWP") due to the "substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters").[77]

For this reason, the ACLU's facial challenge to Section 201 is unavailing. Neither *NAACP* nor *Brown* stand for the proposition that disclosure laws that apply to organizations "whose positions are often controversial and whose members and contributors frequently request assurances of anonymity" are facially unconstitutional. ACLU Opp'n at 10. Rather, as explained above, the statutes in those cases were held inapplicable to the groups in question based on the facts presented, not invalid on their face. *See NAACP*, 449 U.S. at 462- 63 ("[W]e think it apparent that compelled disclosure of *petitioner's* Alabama membership is likely to affect adversely the ability of *petitioner and its members*" to engage in their freedom to associate.") (emphasis added); *Brown*, 459 U.S. at 102 ("Ohio's campaign disclosure requirements cannot be constitutionally applied *to the Ohio SWP*.") (emphasis added). The Court is given no information as to why these donors wish to maintain their confidentiality and no indication is given that revelation of their affiliation with the group would result in harassment, threats or reprisals. Since the ACLU has presented the Court with no facts that place it in the same category of threatened associations such as the NAACP or the Socialist Workers Party ("SWP"), *see* Finding ¶ 45 [78] the Court finds no basis for invalidating the statute on its face or as applied to the ACLU based on the present record.

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[77] In *Brown*, the Supreme Court examined an Ohio election campaign law which required "every candidate for political office to file a statement identifying each contributor and each recipient of a disbursement of campaign funds." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 89 (1982). The District Court in the case had found "substantial evidence of both governmental and private hostility toward and harassment of [Socialist Workers Party ("SWP")] members and supporters." *Id.* at 98-99. The evidence presented included specific incidents which took place within four years of the trial, and included "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office. There was also evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership." *Id.* at 99. This evidence was found to present a reasonable probability that disclosing the names of contributors and recipients will subject them to threats, harassment, and reprisals. *Id.* at 100. The Supreme Court concluded that "[i]n light of the substantial evidence of past and present hostility from private persons and government officials against the SWP, Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP." *Id.* at 102.

Plaintiffs have also provided evidence regarding the effect disclosure under Section 201 would have on four other organizations. The Court considers each in turn.

The NRA provides testimony that some of its members do not wish to have their contributions to the group disclosed, and estimates that between five and 50 persons voiced their concerns in the year 2000. *Id.* ¶ 41. The group also provides testimony that a "conspicuous and disproportionate number of contributors" to its PAC contribute "justbelow the $200 disclosure level." *Id.* Although Mr. LaPierre testified that one reason given for members not wanting their contributions disclosed was fear of losing one's job, many other reasons were given as well, such as a desire not to have one's neighbors or school board know about their affiliation with the organization. *Id.* Some simply stated that they did not wish to have such information provided to the government.

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[78] The ACLU provides no information as to why ACLU's donors wish to maintain their confidentiality and no indication is given that revelation of their affiliation with the group would result in harassment, threats or reprisals. As an aside, the Court notes that according to the ACLU, "[o]nly 212 individuals contributed more than $1,000 to the organization. Findings ¶ 45.

Id. No evidence of the basis for these fears is presented to the Court, only speculations. Nor is any evidence presented to the Court of actual instances of retaliation due to the disclosure of someone's membership in the NRA. These fears are the result of conjectures by those expressing them, but unless there is a reasonable probability that these fears will be realized as a result of disclosure, *Buckley* instructs that such worries do not overcome the state's legitimate interest in disclosure.

Edward Monroe, Director of Political Affairs for the Associated Builders and Contractors ("ABC") and the Treasurer of ABC's PAC, testified that *he had been told* that a number of ABC contributors had suffered substantial vandalism after their names were disclosed and that the contributors *believed* the vandalism was the result of labor unions learning of their contributions. *Id.* ¶ 42. This evidence is essentially hearsay and no evidence is presented showing that the vandalism was actually retaliation in response to the disclosure as opposed to speculation on the part of contributors. Although some contributors to ABC's PAC donate less than $200, the Court has no way of knowing why they donate at this level other than Mr. Monroe's belief that it is to prevent disclosure of their names. *Id.* The same is true for the two companies that declined Mr. Monroe's solicitations. *Id.* On the basis of this evidence alone, the Court cannot find that ABC meets the *Buckley* standard.

The Court also considers evidence regarding the membership of the Associated General Contractors of America ("AGC") and the Chamber of Commerce's coalition titled "Americans Working for a Real Change." Between a dozen and two dozen AGC members expressed concern to its Chief Executive Officer, Stephen Sandherr, that if their contributions to AGC are disclosed publicly they will be subjected to union action that "would threaten to make life miserable for them." *Id.* ¶ 43. Although this testimony demonstrates that AGC members may "fear" the potential consequences of their names being disclosed in connection with AGC, there is no evidence before the Court that these feared consequences have been, or would be, realized. Similarly, the Chamber of Commerce provides evidence that some contributors to its coalition, "Americans Working for a Real Change," did not want to be publicly identified due to fears of "what some would call union harassment activities." *Id.* ¶ 44. Once again, the Court was not presented with evidence of a reasonable basis for these fears. Furthermore, no member ever told Mr. Sandherr they were contributing $200 or less to AGC's PAC in order to avoid disclosure, and no contributor to AGC's PAC has reported union retaliation in response to their contribution to the PAC. *Id.* ¶ 43. Neither group's evidence meets the *Buckley* standard.

In sum, although many deponents relate what they believe, or have been told, were the reasons contributors did not want to have their names disclosed, that is union retaliation or employment termination, the lack of specific evidence about the basis for these concerns leaves the Court unable to findthere exists "a reasonable probability that the compelled disclosure of [any of these organizations'] contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties." *Buckley,* 424 U.S. at 74. Furthermore, no Plaintiff cited to evidence, and the Court has found none, that their organization, as opposed to the organization's members or contributors, has been subjected to threats, harassment or reprisals. Although these groups take stands that are controversial to segments of the public, and may believe that they are targeted because of the positions they take, none has provided the Court with a basis for finding that their organization, and thereby their membership, faces the hardships that the NAACP and SWP were found to suffer by the Supreme Court. However, nothing in this Court's decision affects the ability of groups in the future from challenging, as the NAACP and the SWP did in the past, the application of Section 201's disclosure provisions to their organization.

The Court addresses next the NRA's argument that the D.C. Circuit's invalidation of FECA's Section 437a, *Buckley,* 519 F.2d at 878, renders Section 201's requirements invalid as well. In *Buckley,* the D.C. Circuit found FECA's independent expenditure disclosure provision [79] unconstitutional. The Court of Appeals stated that "issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections . . . . [and] are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes." *Buckley,* 519 F.2d at 873. Even so, the D.C. Circuit rested its decision on the overbreadth of Section 427a's "crucial terms[:] 'purpose of influencing the outcome of an election' and 'design[] to influence' individuals in voting at an election." *Buckley,* 519 F.2d at 875. Unable to find a "readily available narrowing interpretation" of the crucial terms in light of Congress's manifested intent, *Buckley,* 519 F.2d at 877, the Court of Appeals held the section unconstitutional, *id.* at 878.

Given that the basis for the D.C. Circuit's invalidation of Section 427a rested on the provision's language and legislative history, the Court does not accept the NRA's suggestion that the Court of Appeals's decision controls this

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[79] Section 437a's "demand for disclosure is activated-without any expending of any funds whatever-(1) by any act directed to the public for the purpose of influencing the outcome of an election; or (2) by any material published or broadcast to the public which refers to a candidate (by name, description, or other reference) and which (a) advocates the election or defeat of such candidate, or (b) sets forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or (c) is otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate." *Buckley,* 529 F.2d at 870 (paraphrasing FECA § 427a) (internal punctuation and footnotes omitted).

Court's analysis of Section 201's disclosure requirements. NRA Br. at 50. Section 201 only requires disclosure of "electioneering communications," the definition of which this Court finds is constitutional. The disclosure trigger is much narrower and more definite than that of FECA Section 427a, and does not include its invalidating "crucial terms." In addition, the record before the Court clearly demonstrates that contrary to the situation facing the Court of Appeals in 1975, where "issue discussions" were indeed "unwedded to the cause of a particular candidate," the evolving present use of issue advertisements, specifically the use of "issues" to cloak supportive or negative advertisements clearly identifying a candidate for federal office, "threaten the purity of elections." *Buckley*, 519 F.2d at 873.[80] For these reasons, the Court declines to find the Court of Appeals's decision on FECA Section 427a binding on this Court's disposition of the challenges to BCRA Section 201's disclosure requirements.

Finally, the Chamber of Commerce argues that Section 201 as applied to its electioneering communications, is overbroad because the public knows that the Chamber represents the interests of American business. Chamber/NAM Br. at 20. The Court interprets the Chamber's position, encompassing all of three sentences, to mean that under BCRA it should be sufficient that the Chamber report that it is behind advertisements sponsored by, for example, "Americans Working for a Real Change" and that listing its $1,000 contributors would be unnecessary for the voting public to know the interest behind the advertisement. The Court first notes that the Chamber does not provide, and the Court

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[80] For example, as mentioned above, the "group" "Republicans for Clean Air" spent $2 million the week before the "Super Tuesday primaries" in advertisements supporting presidential candidate George W. Bush and attacking his opponent John McCain. Findings ¶ 52. "Republicans for Clean Air" was actually a front for two brothers who had ties to the Bush campaign. *Id.*

cannot formulate, a disclosure rule that would take into account the notoriety of the groups involved (for example, a law that exempts "well-known" groups from disclosing the names of their $1,000 contributors, while "less well-known" groups would be required to make the disclosures). In addition, the Chamber provides no legal support for its theory, and the Court declines to consider its argument based on a record comprised of a single quotation from the Indiana Law Review and the Chamber's statement that it "is a well-known association of American businesses that has been in existence for 90 years." Chamber/NAM Br. at 20. The Court therefore rejects the Chamber of Commerce's argument.

In conclusion, the Court states what Section 201's disclosure requirements do and do not require. First, they apply only to electioneering communications, which we find constitutional. Second, Section 201 does not prevent anyone from making electioneering communications; it only requires that when persons do make such advertisements that they disclose the source of the communication's funding after they are broadcast. Lastly, the provision does not require the wholesale disclosure of all donors to the sponsoring organization, rather only donors contributing $1,000 to the disbursing account must be disclosed. Organizations are free to set up "segregated bank account[s]," funded by individuals' contributions, for electioneering communication disbursements. BCRA § 201(a); FECA § 434(f)(2)(E); 2 U.S.C. § 434(f)(2)(E). If electioneering communication disbursements made from such segregated accounts then reach the $10,000 threshold, only the names of the segregated account's $1,000 contributors will have to be disclosed. Lastly, any group can file suit to challenge the constitutionality of the *application* of Section 201's disclosure provisions to their contributors based on a showing such as "threats, harassment, or reprisals from either government officials or private parties." *Buckley*, 424 U.S. at 74.

In conclusion, the Court finds Section 201 constitutional on its face, with the exception of subsection (5), which the Court determines to be broader than necessary to achieve the legitimate governmental interest at stake because of its inclusion of future contracts for electioneering communications. For that reason, the Court severs subsection (5) and finds the remainder of Section 201 constitutional.

Sections 202, 212, and 214[81]

1. *Section 202*

Section 202 is challenged by the Chamber of Commerce, NAM, and the McConnell Plaintiffs. Plaintiffs' arguments with regard to Section 202 relate to those made with respect to Sections 201 and 214.[82] For example, Plaintiffs argue that the definition of "electioneering communication" is unconstitutional, and for that reason Section 202 must also be found unconstitutional. Chamber/NAM Br. at 12; McConnell Br. at 83 n.42. As this argument was addressed and rejected in this Court's examination of Section 201's definition of "electioneering communication," it is rejected here as well.

Plaintiffs also contend that "the First Amendment limits the coordination concept to express advocacy," and for that reason Section 202 should be found unconstitutional. Chamber/NAM Br. at 12. Although Plaintiffs cite to FEC Commissioner Smith for support, *id.*, this view has been rejected by courts in this Circuit. *See Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986) (finding the "express advocacy" limitation "not constitutionally required for those statutory provisions limiting contributions"); *Christian Coalition*, 52 F. Supp. 2d at 86-87 & n.50 (finding the argument that "the 'express advocacy' limitation must apply to expressive coordinated expenditures" to be "untenable" in light of *Orloski* and *Buckley*).

Finally, the AFL-CIO contends that "the BCRA § 202 ban on coordinated 'electioneering communications' inevitably will criminalize efforts by the AFL-CIO to coordinate legislative public advocacy with Members of Congress, and interfere with ordinary and necessary lobbying contacts and the AFL-CIO's use of them to plan broadcast and other advocacy. For that reason alone, § 202 violates the First Amendment." AFL-CIO Br. at 14 (citing to the Declaration of Gerald M. Shea ¶ ¶ 57-59). The Court notes first that Section 202 *bans* nothing. What the Court presumes the AFL-CIO complains of is the effect of Section 202 on some entities as read in conjunction with BCRA Section 203. This issue is dealt with in this Court's examination of Section 203. The group's allegation that Section 202 will criminalize AFL-CIO contacts with Members of Congress and subsequent advocacy activities is conclusory and is asserted without any legal support. Similarly, the declaration of Gerald M. Shea, the AFL-CIO's Assistant to the President for Governmental Affairs, does nothing to help the Court discern the legal basis for its argument. Mr. Shea states that "[a]ny legal restrictions on the ability of an organization like the AFL-CIO to coordinate legislative and policy communications and activities with federal officeholders who happen to be candidates could substantially interfere with our ability to maintain ordinary and necessary working relationships with Members of Congress and their staffs." Shea Decl. ¶ 58. The fact that Mr. Shea believes that the AFL-CIO's current activities *may* be affected by Section 202 does not provide the

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[81] Although Plaintiffs ask for judgment as to BCRA's Section 211, described *supra*, at oral argument they stated that they were not challenging the provision. *See* Tr. at 341-42 (Judge Henderson: Mr. Starr, I've got down that you all are challenging [Section] 211. Am I wrong about that? . . . . Baran: We are not challenging section 211...). Furthermore, other than a description of the provision, McConnell Br. at 82, Plaintiffs' briefs are silent on the provision.

[82] In addition, the Court observes that Plaintiffs' arguments blur Section 202's provisions with those of Sections 201 and 214, making the Court's task of discerning and addressing their arguments more difficult.

Court with a legal basis for invalidating the provision. Furthermore, to the extent that the AFL-CIO challenges the scope of activities covered by BCRA's definition of "coordination," the Court finds, *infra*, that such arguments are not ripe given the statutory construction of Section 214 and the recent promulgation of final regulations on coordination by the FEC.[83]

The Court therefore finds that Plaintiffs' arguments are unavailing and the Court has been presented with no basis for finding Section 202 unconstitutional.

2. *Section 212*

Section 212 is challenged by the AFL-CIO and the McConnell Plaintiffs. Plaintiffs object to Section 212 on the grounds that it requires disclosure of not only actual expenditures, but also contracts to make independent expenditures. *See* McConnell Br. at 56 n.22; AFL-CIO Br. at 14-17. This advance disclosure, Plaintiffs argue, "serve[s] no governmental interest and will chill the exercise of free speech by forcing groups . . . to disclose ongoing and confidential political strategies and decision-making processes, and by giving adversaries the opportunity to try to thwart broadcasts or counter them with their own messages." AFL-CIO Br. at 16.[84]

A Court may not entertain a suit that is not ripe for review.

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[83] In the Court's discussion of Section 214, *infra*, it is noted that the regulations contain an explicit "safe harbor for responses to inquiries about legislative or policy issues." *See* Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 455 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21(f).

[84] As they did for Section 201, McConnell Plaintiffs, the Chamber of Commerce and NAM make a passing suggestion that Section 212 might constitute a "prior restraint" in violation of the First Amendment. The Court addresses this argument in its discussion of Section 201. *See supra* note 69.

The basic rationale behind the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). Furthermore, "[t]he power of courts . . . to pass upon the constitutionality of acts of Congress arises only when the interests of the litigants require the use of this judicial authority for their protection against actual interference.A hypothetical threat is not enough." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-90 (1946); *see also id.* at 90 n.22 ("It has long been this Court's 'considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . .'") (*citing Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945)). In situations where a statute is challenged on First Amendment grounds, the Supreme Court has found that litigants need not wait for actual enforcement if the existence of the law would chill the exercise of First Amendment rights "even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). However, in those cases, plaintiffs must "allege[] an actual and well-founded fear that the law will be enforced against them" in order to assuage the troubling aspects of "the preenforcement nature of [such] suits." *Id; see also Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1185 (7th Cir. 1998) (Easterbrook, J.) (observing that if a group's concern that a law will be enforced is not well-founded, "Article III of the Constitution precludes a federal court from ruling."), *cert. denied*, 525 U.S. 873 (1998); *Nat'l Treasury Employees Union v. Kurtz*, 600 F.2d 984, 988 (D.C. Cir. 1979) ("[E]ven where allegations of unconstitutionality on the face of a regulation are made, a concrete factual dispute is required to make the case justiciable."); *Nat'l Student Ass'n v. Hershey*, 412 F.2d 1103, 1113-14 (D.C. Cir. 1969) ("[W]e are not persuaded that every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy.").

The Court finds that Plaintiffs' challenge to Section 212 is not ripe for review. At the time of briefing in this case, the FEC had proposed regulations that required disclosure only *after* independent advertisements have been "publicly disseminated." These proposals were recently promulgated as final regulations. *See* BCRA Reporting; Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 404, 452 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.10).[85]

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[85] The regulations provide in part:

> The pers~~on makin~~g the independent expenditures [more than 20 days before an election] aggregating $10,000 or more must ensure that the Commission receives the report or statement by 11:59 p.m. Eastern Standard/Daylight Time on the second day *following the date on which a communication is publicly distributed or otherwise publicly disseminated* . . . .
>
> Every person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating $1,000 or more with respect to a given election must report those independent expenditures and ensure that the Commission receives the report or signed statement by 11:59 p.m. Eastern Standard/Daylight Time on the day *following the date on which a communication is publicly distributed or otherwise publicly disseminated.*

68 Fed. Reg. at 452 (to be codified at 11 C.F.R. § 109.10(c), (d)) (emphasis added).

This fact makes the challenge unfit for judicial resolution, as the regulations provide Plaintiffs with the exact remedy they seek: the FEC will not require disclosure of independent express advocacy expenditures prior to their "public[] disseminat[ion]." This situation presents the Court with the question Judge Easterbrook posed in *Wisconsin Right to Life:* "How can a suit present a 'case or controversy' when all the litigants are on the same side?" *Wisconsin Right to Life*, 138 F.3d at 1185.

This conclusion is bolstered by the decisions of other courts faced with similar circumstances. For example, the Seventh Circuit Court of Appeals rejected a group's claim that it had a "well-founded" fear of prosecution under Wisconsin campaign finance laws, where an advisory opinion of the Attorney General of Wisconsin and the Election Board's regulations codified the interpretation of the law the group sought. *Wisconsin Right to Life*, 138 F.3d at 1185-86; *see also Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1193 (10th Cir. 2000) (describing the *Wisconsin Right to Life* holding and distinguishing the case from the one before it, which lacked "such administrative regulations"). Similarly, in *Shoemaker v. Handel*, the Third Circuit Court of Appeals upheld the lower court's determination that amended regulations, put into effect before becoming final, cured the challengers' privacy concerns, and thus made "[t]heir privacy contentions ... not ripe for adjudication." *Shoemaker v. Handel*, 795 F.2d 1136, 1144 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986). There was no need to enforce the amendments through injunctive or declaratory relief, because "[i]f the Commission cease[d] to comply with the proposed confidentiality rules, the [challengers could] return to court with a new lawsuit." *Id.*

Plaintiffs do not contest the import of the regulations. Instead, Plaintiff AFL-CIO argues that the FEC regulations do not remedy BCRA's alleged constitutional defect, as the regulations "may not be approved by Congress [,] [a]nd there is nothing to prevent the Commission itself from reversing its position as soon as this litigation is over, as part of a litigation settlement or independently." AFL-CIO Reply at 10; *see also* AFL-CIO Br. at 17 n.16 ("[G] iven the statutory text at issue plaintiffs have no assurance as to how the FEC will interpret or enforce it in the future."). These uncertainties amount to a "hypothetical threat" which the Supreme Court has stated "is not enough" to warrant judicial consideration. *United Public Workers of America,* 330 U.S. at 89-90. Should this hypothetical threat manifest itself as a "concrete factual dispute," *Nat'l Treasury Employees Union,* 600 F.2d at 988, nothing prevents Plaintiffs from "return[ing] to court with a new lawsuit," *Shoemaker,* 795 F.2d at 1144.

As Plaintiffs have presented "a controversy that has not yet arisen and may never arise," *Wisconsin Right to Life,* 138 F.3d at 1187-88, the Court lacks jurisdiction to resolve their challenge to Section 212 at this time.

3. *Section 214*

Section 214 is challenged by the McConnell Plaintiffs, the Chamber of Commerce, NAM, the RNC and the AFL-CIO. Plaintiffs' basic argument is that Section 214, "[b]y repealing the FEC's current regulation and failing to supply any clear statutory definition of what constitutes prohibited coordination, . . . will chill First Amendment speech and association." Chamber/NAM Br. at 11; *see also* ACLU Br. at 19-20; AFL-CIO Br. at 13 ("BCRA's vague and overbroad coordination standards will inevitably spur . . . wide-ranging and burdensome investigations" by the FEC.). Plaintiffs also charge that the directive of Section 214(c) that "'agreement or formal collaboration' not be a prerequisite to considering an expenditure 'coordinated,' . . . exceeds the constitutional

bounds established in *Buckley.*" McConnell Br. at 83; *see also* Chamber/NAM Opp'n at 8; RNC Br. at 72 (Section 214 "can only be understood as an impermissible effort to overrule this court's decision in *FEC v. Christian Coalition* . . . which warned against overbroad definitions of 'coordination.'"). The Chamber of Commerce and NAM, in their Opposition brief, argue that Section 214(a)(2), by classifying coordinated expenditures with parties as contributions, will "chill both party contacts, and contacts with legislators," and that Section 214(d) expands the definition of what may constitute a coordinated contribution or expenditure. Chamber/NAM Opp'n at 8.[86]

a. Section 214(a)

Under Section 214(a)(2), expenditures by a person, other than a candidate or a candidate's authorized committee, made in "cooperation, consultation, or concert with, or at the request or suggestion of, a national, State or local committee of a political party," are considered to be contributions to those party committees. BCRA § 214(a)(2); FECA § 315(a)(7)(B)(ii); 2 U.S.C. § 441a(a)(7)(B)(ii).[87] As noted *supra,* this same definition has been applied to expenditures coordinated with political candidates for over 25 years and was recently found by the Supreme Court to apply to political party expenditures. *See* 2 U.S.C. § 441(a)(7)(B)(i); *Colorado II*, 533 U.S. at 467.

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[86] The Court notes at this juncture that Plaintiffs' Section 214 arguments, especially those involving Defendants' justiciability arguments, were sparse and in many instances difficult to discern. Although the Court understands that the page limitations imposed on the parties may have been a contributing factor, the lack of clarity has made the Court's task more difficult.

[87] For the sake of clarity, the Court points out that contrary to Plaintiffs' description, Section 214(a) does not establish a "ban" on coordination, Chamber/NAM at 8, or a "year round prohibition on all communications made by a corporation," ACLU Br. at 20. Section 214(a) classifies such contacts as contributions, but does not prevent coordination from taking place.

Plaintiffs argue that the definition of coordination in Section 214(a) is "unconstitutionally vague." McConnell Br. at 85 n.44. This lack of precision, Plaintiffs allege, violates the First Amendment's "demand[] that the conduct that constitutes coordination be precisely, objectively, and narrowly defined," and leaves citizens unsure of what contact they may have with political parties without having future speech regulated as "coordinated." Chamber/NAM at 12. Plaintiffs discount the fact that BCRA orders the promulgation of clarifying regulations because regulations are "subject to the ebb and flow of administrative practice," and speakers "will thus be forced to 'steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Id.* (quoting *Buckley*, 424 U.S. at 41 n.48).[88] Finally, Plaintiffs maintain that the existence of an

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[88] The Chamber of Commerce and NAM also allege that regulations cannot save Section 214(a)

> for four key reasons: (i) some unconstitutional aspects such as its inclusion of 'electioneering communication' are clearly mandated and are beyond the FEC's power to change; (ii) the vagueness as to what conduct may constitute coordination, and hence make future speech unlawful, is chilling association and petitioning activities right now; and[sic] (iii) there is no assurance that the FEC will be able to agree on new regulations at all, [sic] and (iv) there is no assurance that any regulations that may be adopted will survive Congressional and judicial review.

Chamber/NAM Br. at 13. These arguments can be disposed of with expedition. First, the Court does not understand how Section 214(a), on its face, includes "electioneering communication" and Plaintiffs have not explained their statement. Second, alleged chilling of rights incurred prior to the promulgation of the FEC's regulations, as well as the uncertainty over whether the FEC would be able to agree on new regulations, are rendered moot by the promulgation of the final regulations in early January 2003. FECA also provides protection for those who act in good faith reliance on FEC regulations. *See* 2 U.S.C. § 438(e). Finally, the

"agreement" is a constitutional prerequisite to finding an expenditure to be "coordinated" with political parties.[89] The Court analyzes each concern in turn.

1) Vagueness

As the Court noted above, the campaign finance system has been functioning for over 25 years despite the presence of the very same "vague" language to which Plaintiffs object. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Plaintiffs have provided no explanation as to why the application of this coordination formula to the context of political parties chills political speech any more than when applied to expenditures coordinated with political candidates. Furthermore, the Court notes that the FEC's regulations have now been promulgated in final form. It is therefore possible that many, perhaps even all, of Plaintiffs' vagueness concerns have been remedied by the regulations' contents. *See* Chamber/NAM Br. at 13 (stating that while the FEC's now-repealed regulations on coordination "did not solve all the vagueness problems, it took useful steps toward alleviating them").[90] Although

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possibility that the regulations may be struck down by Congress or a court is the type of speculative injury that does not rise to the level of a present case or controversy required for Article III standing. *See infra* at 155.

[89] Although Plaintiffs have not directed this argument specifically at Section 214(a) (it is directed more explicitly at Section 214(c)), it is a central theme of the McConnell Plaintiffs' briefing and the Court presumes that they intend for it to be applied to Section 214(a) as well.

[90] The regulations promulgated by the FEC define coordinated communications as those not paid for by the candidate or the political party, that meet one content and one conduct standard. Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21). The conduct standards include: (1) communications made, produced, or distributed at the request or suggestion of the candidate or party, or at the request or suggestion of a payor who receives the candidate or party's assent; (2) material involvement by the candidate or party in decisions regarding the content, intended audience, means or mode, media outlet used, the timing or

Plaintiffs discount the value of such regulations because of the "ebb and flow of administrative practice," they provide no support for their theory that laws restricting speech cannot be shaped by regulations because of the nature of administrative practices. In addition, as described in more detail below, *see infra* at 167, any issues arising from the enforcement of these regulations can be challenged via lawsuit under the Administrative Procedure Act (APA), or clarified through the advisory opinion procedure codified at 2 U.S.C. § 437f.[91]

2) Agreement

The Court addresses next Plaintiffs' argument that Section 214(a) violates the Constitution because it does not require the existence of an "agreement" as a predicate to the finding of coordination. Plaintiffs cite to four cases in support of their theory that an agreement is required for an expenditure to be coordinated. The Court addresses each in turn, finding that none support Plaintiffs' argument.

In *Buckley*, the Supreme Court found that Congress could

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frequency, or the size or prominence of the communication; (3) one or more substantial discussions about the communication between the payor and the candidate clearly identified in the communication which concern the candidate's or political party committee's campaign plans, projects, activities, or needs that are material to the creation, production or distribution of the communication. *Id.* at 454. The regulation also creates a safe harbor for responses to inquiries about legislative or policy issues. *Id.* at 455. The content standards can be found at 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21(c)).

[91] The statute provides in part:

> *Not later than 60 days* after the Commission receives from a person a complete written request concerning the application of [FECA] . . . or a rule or regulation prescribed by the [FEC], with respect to a specific transaction or activity by the person, the [FEC] *shall* render a written advisory opinion relating to such transaction or activity to the person.

2 U.S.C. § 437f(a)(1) (emphasis added).

limit coordinated expenditures to "prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47. In rejecting FECA's limitation on independent expenditures, the Supreme Court distinguished independent from coordinated expenditures, noting that expenditures "made *totally* independently of the candidate and his campaign . . . . may well provide little assistance to the candidate's campaign and indeed may prove counter-productive." *Id.* (emphasis added). The Supreme Court noted that "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley*, 424 U.S. at 47. The coordinated expenditure provision *Buckley* upheld defined coordinated expenditures as those "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate." *Id.* at 47 n.53 (quoting FECA § 608(c)(2)(B)). The Supreme Court cited to the House and Senate reports, especially the more detailed Senate report which included the following "example illustrating the distinction between 'authorized or requested' expenditures . . . and independent expenditures":

> "(A) person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's (sic) that would constitute an 'independent expenditure on behalf of a candidate' under section 614(c) of the bill. The person making the expenditure would have to report it as such.
>
> "However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate just as if there had been a direct contribution enabling the candidate to place

> the advertisement himself. It would be so reported by both."

Id. (quoting S.Rep. No. 93- 689, p. 18 (1974), U.S. Code Cong. & Admin. News 1974, p. 5604) (alteration in original). Based on this guidance, the Supreme Court found that "the 'authorized or requested' standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions." *Id.*

In *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), the Supreme Court found that an advertisement made by a political party was not a coordinated expenditure, in part because of "uncontroverted evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate." *Colorado I*, 518 U.S. at 614 (plurality opinion) ("[W]e therefore treat the expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution.").

This District Court grappled with the troublesome First Amendment line between coordinated and independent expenditures in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). In her decision, which was not subjected to appellate review, Judge Joyce Hens Green explained:

> This Court is bound by both the result and the reasoning of *Buckley*, even when they point in different directions. While Buckley confidently assured that coordinated expenditures fell within the Act's limits on contributions, it also reasoned that spending money on one's own political speech is an act entitled to constitutional protection of the highest order. Expressive coordinated expenditures bear certain hallmarks of a cash contribution but also contain the highly-valued political speech of the spender. I take from *Buckley* and its

> progeny the directive to tread carefully, acknowledging that considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate.

Christian Coalition, 52 F. Supp. 2d at 91 (citations omitted). In addressing "coordination as it applies to expressive coordinated expenditures by corporations," *id.*, Judge Green noted that "[t]he fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." *Id.* at 92. However, the absence of such overtures would not, in Judge Green's view, prevent an expenditure from being coordinated.

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners. This standard limits § 441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants.

Id. Judge Green acknowledged that this standard still left "room for factual dispute," which in turn could "chill some speech." *Id.* But such deficiencies were deemed acceptable given that "expressive coordinated expenditures present real dangers to the integrity of the electoral process." *Id.*

In *Colorado II,* the Supreme Court expounded on the difficulty in determining the point at which an expenditure becomes a coordinated expenditure. The Supreme Court also commented on the functional approach which Congress had adopted, and the *Buckley* Court accepted, to balance First Amendment rights and the state's interest in preventing campaign finance corruption.

> The First Amendment line between spending and donating is easy to draw when it falls between independent expenditures by individuals or political action committees (PACs) without any candidate's approval (or wink or nod), and contributions in the form of cash gifts to candidates. But facts speak less clearly once the independence of the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify. As already seen, Congress drew a functional, not a formal, line between contributions and expenditures when it provided that coordinated expenditures by individuals and nonparty groups are subject to the Act's contribution limits, 2 U.S.C. § 441a(a)(7)(B)(i). In *Buckley,* the Court acknowledged Congress's functional classification, and observed that treating coordinated expenditures as contributions "prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley,* in fact, enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on contributions (by individuals and nonparty groups), as defined to include coordinated expenditures.

Colorado II, 533 U.S. at 442-443 (citations omitted). Also, in that case, the Supreme Court found that "coordinated spending . . . covers a spectrum of activity." *Id.* at 445.

This Court agrees that "First Amendment clarity demands a definition of 'coordination' that provides the clearest possible guidance to candidates and constituents, while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and political association." *Christian Coalition,* 52 F. Supp. 2d at 91. However, the Court finds nothing in the cited precedent, or Plaintiffs' arguments, demanding that for an expenditure to be coordinated there must be an agreement. The Court's reading of these cases suggests the very opposite. At the very least, the cases state that substantive requests and suggestions, or "wink or nod" arrangements, can render subsequent expenditures to be "coordinated," a standard that does not equate to agreement.[92] Therefore, the Court rejects the argument that agreements are a constitutional prerequisite to the finding that an expenditure is coordinated, and finds that Plaintiffs have not demonstrated that Section 214(a) violates the Constitution.

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[92] Defendants offered this hypothetical to illustrate the type of coordination the "request or suggestion" standard is intended to cover:

> A candidate suggests to a wealthy individual, "If you want to help, you might finance some political advertisements advocating my election"; the individual does not reply, but a week later, buys $100,000 worth of air time to advocate the candidate's election.

Gov't Br. at 185. According to the Chamber of Commerce, this hypothetical "is realistic . . . . Candidates and their parties routinely make general requests for public support." Chamber/NAM Opp'n at 6.

b. Section 214(b)

Section 214(b) repealed the FEC regulations on coordination in effect at the time BCRA was enacted. BCRA § 214(b). Plaintiffs concede that Congress has the power to repeal the regulations. What Plaintiffs argue, however, is that "Congress had a duty to provide a narrow, precise, and objective definition for the coordination concept" but failed to do so and "by repealing the FEC's regulatory definition, Congress substantially aggravated the constitutional violation." Chamber/NAM Br. at 13 n. 6. Since the FEC promulgated regulations on January 3, 2003, this "aggravation" claim is moot.

c. Section 214(c)

Because Defendants argue that Plaintiffs' challenge to Section 214(c) is nonjusticiable, Gov't Br. at 183-85; Int. Br. at 139-40, the Court will address this issue first as its resolution may preclude consideration of the merits of the Plaintiffs' other arguments. Preliminarily, the Court notes that BCRA provides this Court with jurisdiction to hear "any action brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act," and instructs it to "expedite to the greatest possible extent the disposition of the action." BCRA § 403; 2 U.S.C. § 437h note. This grant does not extend to the consideration of FEC regulations, and it does not permit the Court to go beyond its Article III powers to address claims that are nonjusticiable. *Clark v. Valeo,* 559 F.2d 642, 650 n. 11 (D.C. Cir. 1977) ("To the extent [the dissent's] language may be read as suggesting a view that Congress may 'command' the judiciary to act contrary to the rules relative to ripeness the Supreme Court has developed 'for its own governance in the cases confessedly within its jurisdiction,' we respectfully disagree.") (citations omitted). Cognizant of its authority, the Court now turns to each of Defendants' justiciability claims.

1) Article III Standing

Plaintiffs have the burden of establishing standing to bring their suit by demonstrating that they have: (1) suffered an "injury in fact;" (2) which is "fairly traceable to the conduct complained of;" and (3) is capable of judicial redress. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). In the First Amendment context, the standing requirements are somewhat relaxed. Parties have

> standing to challenge a statute on grounds that it is facially overbroad, regardless of whether [their] own conduct could be regulated by a more narrowly drawn statute, because of the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.
>
> Of course, in order to have standing, an individual must present more than allegations of a subjective chill. There must be a claim of specific present objective harm or a threat of specific future harm.

Bigelow v. Virginia, 421 U.S. 809, 816-17 (1975) (citation and internal quotation marks omitted).

In terms of the "injury in fact" prong, it is true that Plaintiffs have "not alleged any concrete and particularized injury from [Section] 214(c)'s instructions to the Commission to promulgate a new regulation." Gov't Br. at 184. However, *Bigelow* instructs that Plaintiffs do not have to allege a particularized injury, they must only show a specific objective harm. *Bigelow,* 421 U.S. at 816-17. Plaintiffs allege that the Constitution requires an agreement before an expenditure may be considered coordinated. McConnell Br. at 84; Chamber/NAM Opp'n at 8 n. 10 (stating that Section 214(c) "fairly read, rejects the constitutional holding" that the "First Amendment demanded a narrow agreement standard of coordination"). The fact that Section 214(c) directs that the

FEC's regulations on coordination not require "agreement or formal collaboration," from Plaintiffs' perspective, presents a specific future harm of impermissibly overbroad regulations. McConnell Opp'n at 53 n.24 (arguing that "since" no constitutional regulation consistent with BCRA can be promulgated (because of the statute's disavowal of an 'agreement' standard)" it would be futile to delay "litigation until regulations are promulgated, litigation is appropriate now").[93] This argument was addressed above and found to be inconsistent with the holdings of *Buckley* and its progeny.[94]

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[93] Plaintiffs, despite purporting to have standing to challenge Section 214(c), have not clearly articulated the basis for their position. This theory represents what the Court has gleaned from their terse briefings. *See* Chamber/NAM Opp'n at 7-8; Chamber/NAM Reply at 7-10; McConnell Opp'n at 53 ("For reasons discussed fully in the submission of the Chamber of Commerce Plaintiffs . . . this assertion [that plaintiffs' coordination arguments are not justiciable at this time] are meritless.").

[94] McConnell Plaintiffs argue that the language of Section 214(c) violates the Constitution because it does not require "*some form of agreement* with the candidate [to] be present to find coordination. BCRA, of course, forbids the FEC from requiring that any sort of agreement - *formal or otherwise* - be required." McConnell Opp'n at 54 n.26. The Court disagrees with Plaintiffs, interpreting Section 214(c) under the doctrine of *noscitur a sociis*. "The maxim noscitur a sociis, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jareki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Given that "agreement" in Section 214(c) is immediately followed by the words "or formal collaboration," narrows the Court's reading of the term to cover formal agreements. This interpretation also appears to match the intent of Congress. *See* 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (Sen. Russ Feingold) ("Unfortunately, based on a single district court decision, the Federal Election Commission's current regulation defining when general public political communications funded by outside groups are considered coordinated with candidates or parties fails to account for certain types of coordination that may well occur in real-world campaigns. The FEC regulation is premised on a very narrowly defined concept of 'collaboration or agreement' between outside groups and candidates or

Therefore, Plaintiffs' allegation that they will be injured by regulations which by Congressional direction will be constitutionally overbroad, is not an injury-in-fact.[95]

Even if this Court were to find that Plaintiffs have alleged an injury-in- fact, Plaintiffs would still lack standing to bring their Section 214(c) challenge because their claim lacks redressability. To establish standing, Plaintiffs are required to show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Even if this Court were to strike Section 214(c) from BCRA, other provisions dealing with coordinated expenditures to candidates and parties

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parties. This current FEC regulation fails to cover a range of *de facto* and *informal* coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill.").

[95] The AFL-CIO, the Chamber of Commerce and NAM assert that "BCRA's vague and overbroad coordination standards will inevitably spur more . . . wide-ranging and burdensome investigations." AFL-CIO Br. at 13; Chamber/NAM at 14 ("[T]he Chamber and NAM[] know from painful, first-hand experience how a vague and overbroad concept of 'coordination' permits unfounded charges and investigations that seriously burden and chill participation in legislative initiatives.") These Plaintiffs point to the FEC's investigations into their broadcasts made in 1995 and 1996 (the Chamber of Commerce's advertisements were run in response to those aired by the AFL- CIO) to support this proposition. The Court finds a harm that may be caused by potential future investigations to be the type of speculative injury *Lujan* rejects as a basis for standing. Furthermore, the Court notes that the regulatory regime under which these investigations were conducted was far broader than that which BCRA appears to endorse. *See Christian Coalition*, 52 F. Supp. 2d at 89-91 (rejecting the FEC's "insider trading" or "conspiracy" standard for coordination). The regulations in place prior to 2000 considered expenditures to be coordinated when they were "[m]ade by *or through* any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent." 11 C.F.R. § 109.1(b)(4)(i)(B) (1999 ed.) (*repealed* 2001) (emphasis added).

would still govern and count contributions as any expenditures made at the request or suggestion of a candidate-covering behavior which falls short of formal collaboration or agreement. *See* 2 U.S.C. § 441a(a)(7)(B)(i), (ii). As the Court explained above in finding Section 214(a) constitutional, there is nothing inherently unconstitutional about the "cooperation, consultation, or concert with, or at the request or suggestion of" language found in FECA § 441(a)(7)(B)(i) or (ii), 2 U.S.C. § 441(a)(7)(B)(i), (ii). There-fore, Plaintiffs' challenge to Section 214(c) cannot redress their claimed injury of having coordination defined as something broader than an agreement.

Based on the foregoing, the Court concludes that Plaintiffs have failed to establish the injury in fact and redressability elements required for Article III standing with regard to their challenge to Section 214(c).

2) Ripeness

In the alternative, the Court examines Defendants' assertion that Plaintiffs' Section 214(c) claims are not ripe for judicial review at this time. Defendants maintain that since Section 214(c) does not require or prohibit any actions by Plaintiffs, but merely directs the FEC to promulgate new regulations which were not final until after briefing and oral arguments in this case were completed, "neither the Court nor plaintiffs can know how the revised regulations will affect plaintiffs or have any basis for evaluating whether those regulations will contravene constitutional principles." Gov't. Br. at 183-84; *see also* Int. Br. at 140 ("[T]here is nothingmeaningful for this Court to review . . . until there is actually a new definition in place."). This defect, Defendants argue, renders Plaintiffs' claims not yet ripe.

It is presumed that "federal courts lack jurisdiction unless the contrary appears affirmatively from the record," and "[i]t is the responsibility of the complainant clearly to allege facts

demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Renne v. Geary*, 501 U.S. 312, 315 (1991). In commencing the ripeness analysis, the Eighth Circuit provides guidance:

> In order for a claim to be justiciable under Article III, it must be shown to be a ripe controversy. Ripeness is peculiarly a question of timing, intended to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. In short, the doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in clean-cut and concrete form . . . .
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> [The] ripeness inquiry in the context of this [First Amendment] facial challenge . . . focuses on three elements: (1) hardship to the parties by withholding review; (2) the chilling effect the challenged law may have on First Amendment liberties; and (3) fitness of the controversy for judicial review. Our ripeness inquiry is not to be applied mechanically but rather, with flexibility.

New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499-1500 (10th Cir. 1995) (citations and quotation marks omitted).

Plaintiffs' arguments focus on the first two prongs of the ripeness analysis. They allege that Section 214 creates a situation whereby it is unclear what actions may render an expenditure "coordinated" under BCRA. This predicament, Plaintiffs claim, chills their speech and associational rights, which is the direct and immediate hardship they assert. *See* Chamber/NAM Opp'n at 10. Since BCRA is "self-enforcing," in that "it can be used against people in its current form," Plaintiffs maintain that the case is fit for judicial review. Tr. at 296 (Baran).

In light of the authority presented by the D.C. Circuit, the Court disagrees with Plaintiffs and finds their challenge to Section 214(c) not ripe for review. In *Martin Tractor Co. v. FEC*, a number of parties sought declaratory and injunctive relief from certain provisions of FECA. *Martin Tractor Co. v. FEC*, 627 F.2d 375, 377 (D.C. Cir.), *cert. denied sub nom. Nat'l Chamber Alliance for Politics v. FEC*, 449 U.S. 954 (1980). Limited to "soliciting" its hourly employees twice a year, the Martin Tractor Company complained that Section 441b(b)(4)(B) of FECA had restricted, in a constitutionally impermissible manner, its ability to communicate with its hourly employees about its PAC. *Id.* at 382. Neither the statute nor the regulations defined "solicit" or "solicitation." *Id.* at 383. The Court of Appeals determined, despite the vagueness of the undefined term "solicit" and the lack of clarifying regulatory language, that "the extent of the chill induced by the statutory provision at issue . . . is a very limited one." *Id.* at 384. This conclusion was based on two factors. First, the statute provided an "advisory opinion (AO) mechanism . . . authorized to give advice concerning the Act's application to specific factual situations," and mandated that such counsel be provided within 60 days of a request for advice. *Id.* 384-86. Second, the D.C. Circuit found that the legal rights alleged by Martin Tractor were "uncertain," *id.* at 386, and that unlike cases which had found ripeness in similar circumstances, the "adversarial posture assumed by the parties and contours of their dispute" were not clear, *id.* at 387. Specifically, the fact that the FEC "has said or done nothing . . . to indicate how it construes the term 'solicit,'" left the court "without substantial guidance to decide this case or even to frame the constitutional issues at stake." *Id.* at 387.

The situation this Court faces is virtually identical to that of *Martin Tractor*. Plaintiffs here similarly complain about the chilling effect of an ambiguous term. Plaintiffs, like those in *Martin Tractor,* have the option of seeking a chill-reducing AO if they fear their actions may be construed as

"coordination."[96] In addition, since briefing and oral argument in the case occurred prior to the FEC's promulgation of final regulations and the regulations affect the vagueness alleged, the Court does not know the "contours of [the] dispute." In other words, the Court does not know to what extent the regulations have clarified the vagueness Plaintiffs contend would chill their rights. Regulations in the past have clarified this very issue, Chamber/NAM Br. at 13

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[96] Plaintiffs' argument that *Buckley* should be construed as rejecting the opportunity for AO guidance as a factor in determining ripeness is completely incorrect, and in their own words, is "[n]onsense." Chamber/NAM Reply at 8. *Buckley* found that since the AO procedure in FECA *at that time* was available *only* to "candidates, federal officeholders, and political committees," the AO mechanism did "not assure that the vagueness concerns will be remedied prior to the chilling of political discussion by individuals and groups in this or future years." *Buckley*, 424 U.S. at 41 n. 47. This is no longer the case. *See Martin Tractor*, 627 F.2d at 386 n.44 (explaining why *Buckley* rejected the AO rationale and noting that "[b]oth of these aspects of the AO mechanism have been amended and the susceptibility of the FECA to challenge on the grounds of vagueness has consequently been reduced.").

Section 437f of FECA requires the FEC to provide an advisory opinion within 60 days of receiving a "written request concerning the application of [FECA] ... or a rule or regulation prescribed by the" FEC. 2 U.S.C. § 437f(a)(1). The advisory opinions may be relied upon by the requester or any other person involved in an "identical transaction or activity with respect to which such advisory opinion is rendered." *Id.* at § 437f(c)(1). Such persons who "act[] in good faith in accordance with the provisions and findings of such advisory opinion, shall not, as a result of any such act, be subject to any sanction provided by" FECA. *Id.* § 437f(c)(2).

Plaintiffs also assert that it is "wildly implausible" and "impractical" to believe that the FEC could handle the thousands of AO requests they envision would result from the Court's decision today. Chamber/NAM Reply at 8. Whether or not there would be such an influx of requests, and whether or not the FEC would be in a position to handle them, are not questions before this Court and Plaintiffs have provided the Court with no basis, other than their unsupported assertion, for finding that the AO mechanism would be unworkable for solving coordination problems.

(stating that the FEC's now-repealed regulations on coordination "took useful steps toward alleviating" vagueness problems), and it is therefore likely that some, if not all, of Plaintiffs concerns have been addressed. For example, the ACLU maintains that because of Section 214 it "may not be able to discuss a . . . vote or position with a Representative or Senator if the ACLU will subsequently produce a box score that praises or criticizes the official's stand. This feature of BCRA acts as a continuing prior restraint . . . ." ACLU Br. at 20. However, the FEC's recently promulgated regulations appear to assuage this fear, creating a safe harbor for "inquiries about legislative or policy issues." Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. at 455 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21(f)). To decide Plaintiffs' claims at this juncture would entangle the Court in a dispute that has not been "presented in a clean-cut and concrete form," the exact situation the ripeness doctrine is designed to avoid. *Gonzales*, 64 F.3d at 1499.

The Chamber of Commerce and NAM seek to distinguish *Martin Tractor* from the current case on its facts. Chamber/NAM Reply at 8. First, they state that "[p] laintiff there did not claim immediate injury." *Id.* This is not the case. Martin Tractor alleged that "but for the [section] 441b restrictions and the threat of sanctions, [it] would resume the extent and manner of communication [it] engaged in previously." *Martin Tractor*, 627 F.2d at 382. Second, Plaintiffs presume, based on the fact the court stated that the AO mechanism "argues against constitutional adjudication on a barren record," *Id.* at 385, that the appellants in that case had "provided no factual record." Chamber/NAM Reply at 8. If the Plaintiffs had referred to the footnote immediately following the court's statement, they would have seen that the court meant a record bare of any indication of how the FEC planned to enforce the provision, as opposed to a barren factual record. *See Martin Tractor*, 627 F.2d at 385 n.39 (citing cases holding "equitable relief inappropriate where administrative intent has not come to fruition or is unknown" and "case ripe where pertinent regulations *and AO* have been issued") (emphasis added). Next, the Chamber of Commerce and NAM appear to suggest that the *Martin Tractor* decision was the product of prudential concerns, and not an Article III ripeness determination. Chamber/NAM Reply at 8. Although the court stated, "we find the cases nonjusticiable as a constitutional matter and inappropriate for adjudication as a prudential matter," if Plaintiffs had looked at the footnote immediately following that statement, they would have read the Court's conclusion that "[s]ince we hold that these appellants present no justiciable 'case or controversy' we need not decide or consider the circumstances under which a court might decline for prudential reasons alone to reach the merits of a constitutional challenge to FECA." *Martin Tractor*, 627 F.2d at 378 & n.5. Lastly, the Chamber of Commerce and NAM point out that *Martin Tractor* discounted *Buckley*'s ripeness holding for "lack of a broad package of expedited challenges such as exist here." Chamber/NAM Reply at 8. The *Martin Tractor* court did note that the case before it provided "no similar urgency of decision . . . that outweighs the inadvisability of premature constitutional adjudication," although its decision was also informed by "the comparative speed with which an advisory opinion on specific conduct can be secured." *Martin Tractor*, 627 F.2d at 388.[97]

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[97] The Court also notes that although the *Martin Tractor* court took *Buckley*'s statement that "ripeness is peculiarly a question of timing," *Buckley*, 424 U.S. at 114, to describe the timing of that case in relation to the 1976 Presidential election, *Martin Tractor*, 627 F.2d at 388, a close reading of *Buckley* shows that the Supreme Court was referring to developments that had taken place in "the passage of months between the time of the decision of the Court of Appeals and our present ruling," *Buckley*, 424 U.S. at 114. The Supreme Court made its ripeness determination in the context of a separation of powers challenge to FECA's establishment of the FEC. *Id.* at 113. The Court finds that the challenge considered here differs greatly from that *Buckley* faced when it conducted the ripeness analysis described above. The separation of

Accordingly, the Court finds that *Martin Tractor* is applicable to the pending cases.

The cases at bar do differ from *Martin Tractor,* in one material respect. Unlike the case before the *Martin Tractor* court, where there was no indication the FEC would ever promulgate regulations to reduce the vagueness of the undefined term, Congress in this instance has explicitly ordered the FEC to promulgate regulations on this very matter in an expedited fashion, and the FEC did so on January 3, 2003. This fact argues against finding these cases ripe for adjudication. As the Eighth Circuit explained,

> [m]any ripeness cases require finality of the government action that is challenged. This requirement is intended, in part, to guard against courts passing on the legality of actions that do not, in and of themselves, alter or burden the rights, duties or obligations of the claimant. For example, orders that merely embody a precursor to the later formulation of actual regulations will, as a general rule, not support a finding of ripeness.

Gonzales, 64 F.3d at 1504 n.5 (citations omitted) (finding that, unlike the cases presented here, since the "challenged provision itself delineates the proscribed conduct and neither directs nor requires further administrative or legislative enactments for its effect" the case was ripe for adjudication); *see also El Dia v. Hernandez Colon,* 963 F.2d 488, 496 (1st Cir. 1992) (finding the "policies that underscore the ripeness doctrine militate strongly against granting discretionary

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powers concerns raised in *Buckley* did not depend on the future promulgation of regulations, but focused solely on the constitutionality of the powers granted to the FEC. *See id.* at 113. The *Buckley* defendants could not claim that future regulations would shape the contours of the plaintiffs' claims. As such, this Court finds that the *Buckley* ripeness determination was made under circumstances that distinguish it from the case at bar and that its reasoning does not require the Court to forego Article III justiciability requirements in this case.

(declaratory) relief" where the executive order challenged was "merely a precursor to the later formulation of actual regulations"). Moreover, as long as Plaintiffs abide by the regulations in good faith, they will not be subject to sanctions under FECA. 2 U.S.C. § 438(e) ("[A]ny person who relies upon a rule or regulation proscribed by the [FEC] . . . and who acts in good faith in accordance with such rule or regulation, shall not, as a result of such act, be subject to any sanction provided by [FECA].").

The Court acknowledges that the regulations may still be vetoed by Congress [98] or face a court challenge. Regardless, the regulations shape the "contours" of Plaintiffs' complaints regarding Section 214(c). However, since the regulations are not properly before this Court, Plaintiffs' claims in this regard are not ripe. Again, it is possible that many, perhaps all, of Plaintiffs' concerns have been remedied by the recently promulgated regulations. The proper venue for any complaints Plaintiffs believe have not been addressed by the new regulations is not this special court, but in a single-judge court pursuant to a lawsuit brought under the Administrative Procedure Act (APA). *See* BCRA § 403. Although Plaintiffs decry the lengthy nature of suits brought under the APA, the Court lacks the jurisdiction to rule on the regulations and cannot ignore the absence of Article III ripeness in order to provide Plaintiffs with the forum they prefer.[99]

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[98] Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), the FEC's regulations must be submitted to Congress and do not take effect until 60 days after Congress receives the FEC's report on the regulations or the rule is published in the Federal Register, whichever is later. 5 U.S.C. § 801(a)(3). The regulations were transmitted to Congress on December 18, 2002 and published in the Federal Register on January 3, 2003. Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003). Congress can veto the regulations within 60 days by passing a joint resolution disapproving the regulations. *See* 5 U.S.C. § 802.

Accordingly, the Court does not reach the merits of Plaintiffs' challenges to Section 214(c), as they are not ripe for adjudication.

d. Section 214(d)

In their Opposition Brief, the Chamber of Commerce and NAM claim that Section 214(d)

> specifies that coordination applies not only to a "contribution or expenditure" in the defined sense that requires express advocacy, but "*also* includes any direct or indirect payment . . . ." (emphasis added). BCRA § 214(d) extends coordination to an "electioneering communication." These provisions remove express advocacy as a *content* standard and give no substitute.

Chamber/NAM Opp'n at 8 (emphasis in original). The Court does not find Section 214(d) to have the effect on FECA that Plaintiffs assert. Section 214(d) amends FECA Section 441b, which limits contributions or expenditures by national banks, corporations, or labor organizations, so that the definition of "contribution or expenditure" under that section "includes a contribution or expenditure, as those terms are defined in section 301" of FECA, 2 U.S.C.

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[99] Plaintiffs should also be aware that should they challenge the FEC's regulations, they may seek a stay from the FEC or a court to prevent the application of the rule pending its review. 5 U.S.C. § 705. The law provides: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." *Id.*

§ 431(8), (9). BCRA § 214(d); FECA § 441b(b)(2); 2 U.S.C. § 441b(b)(2). The definitions of"contribution" and "expenditure" in FECA Section 301 have not been amended by BCRA.[100] Plaintiffs' complaints about the definition's inclusion of "direct or indirect payment" are also misplaced as this provision preexisted BCRA and is therefore not subject to this Court's review.

Given the fact that Plaintiffs' understanding of Section 214(d) is mistaken, the Court has no basis upon which to review the provision, cannot fathom the nature of their claims, and therefore does not find the provision unconstitutional.

C. *BCRA Title III*

Section 311: Clarity Standards for Identification of Sponsors of Election- Related Advertising

Section 311 amends Section 318 of FECA, 2 U.S.C. 441d, adding details and requirements for the identification of sponsors of political advertising. Included in the provision is the extension of FECA's requirements to electioneering communications, as defined in BCRA Section 201. BCRA § 311(1); FECA § 318(a); 2 U.S.C. § 441d(a). Pursuant to Section 318 of FECA, such communications must clearly state information about the sponsor, 2 U.S.C. § 441d(a); Section 311 adds various requirements related to the identification of the sponsor in the communication itself which are not challenged in the present litigation. *See* BCRA § 311(2), FECA § 318(c)-(d); 2 U.S.C. § 441d(c)-(d).

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[100] BCRA Section 203 adds "electioneering communication" to FECA Section 441b(b)(2)'s definition of "contribution or expenditure."

Plaintiffs' briefing on Section 311 is limited to a single sentence in a footnote in the McConnell Plaintiffs' Opening Brief:

> BCRA's requirement that political ads contain information identifying the candidate supported by the communication,[101] the party responsible for the content of the information, and/or an indication that the candidate approves the content of the communication . . . is . . . invalid, at least when applied to electioneering communications (and, for that matter, anything other than express advocacy).

McConnell Pls.' Br. at 56 n.22; *see also* Tr. at 303 (Baran).[102] This argument is presented as a corollary to Plaintiffs' contention that "if the Court agrees that the electioneering communications provisions cannot stand, the attendant disclosure provisions should likewise fall, because the disclosure provisions constitute a regulation of . . . speech that the government may not regulate in the first place. *Id.* at 55-56. Given that the Court finds BCRA's electioneering communication definition constitutional, Plaintiffs' argument is rejected.

V. CONCLUSION

Accordingly, the Court finds that the Paul Plaintiffs' challenge is without merit. The Court finds that the disclosure

requirements in Section 201, with one exception, are constitutional, as well as Sections 202, 214(a), 214(d) and 311. The Court concludes that a challenge to Sections 212 and the remainder of Section 214 is not justiciable.

In contrast with Judge Henderson's characterization of our approach, we believe that the resolution of these eleven suits required a careful and judicious review of all the evidence, pleadings, and arguments in a fair manner to all the parties. We are satisfied that we accomplished this goal in an as expedited a manner as possible and thereby served "the strong public interest in election law clarity and stability." Henderson Op. at 6 n.1.

Three separate opinions by the members of this three-judge panel follow this *per curiam* opinion. Given the complexity of the rulings, and the fact that not any one opinion is fully dispositive, the opinions are presented in order of seniority of the members of this three-judge panel. Accordingly, Judge Henderson's opinion appears first, followed by Judge Kollar-Kotelly's opinion and then Judge Leon's opinion.

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[101] It is not clear to the Court where the Plaintiffs find this purported requirement from the text of Section 311.

[102] JUDGE HENDERSON: . . . Jumping to 311, only because I think this is the last time we're going to hear from the omnibus [Plaintiffs], and I think you all are the only ones challenging 311, and it's not down here to be argued in Title 3 and I just want to make sure that it has been challenged . . . .

MR. BARAN: I'd have to rely on the briefs on that, Your Honor. I'm not in a position to address that today.

TR. at 303 (Baran).

"To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas."

—Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).

HENDERSON, *Circuit Judge*, concurring in the judgment in part and dissenting in part.

I believe the statute before us is unconstitutional in virtually all of its particulars; it breaks faith with the fundamental principle—understood by our nation's Founding Generation, inscribed in the First Amendment and repeatedly reaffirmed by the United States Supreme Court—that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). My colleagues' *per curiam* opinion and their other opinions ignore the statute's transparent infirmity and leave standing its most pernicious provisions, apparently on the ground that candidate-focused political speech inevitably "corrupts" the individuals to whom it refers. Their reasoning and conclusions treat a First Amendment with which I am not familiar. *See Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) ("[T]he prospect that voters might be persuaded by . . . endorsements is not a *corruption* of the democratic political process; it *is* the democratic political process." (emphasis in original)). Further, the opinions are similarly flawed in their dissection of the statute's dense and interlocking provisions, upholding a portion here and striking down a fragment there until they have drafted legislation the Congress would never have enacted—all in the name of *deference* to that body. *See, e.g.*, Per Curiam Op. at Part I; Memo Op., RJL, at Parts I.A.2, I.A.3, I.B, II.C.[1]

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[1] To the extent this opinion overlaps with or is non-responsive to the other opinions, the disconnect is necessitated by the statute's mandate that we "advance on the docket and . . . expedite to the greatest possible extent the disposition of the action[s]." BCRA § 403(a)(4); FECA § 310 note; 2 U.S.C. § 437h note.

In light of that mandate, the panel held a status hearing on April 23, 2002—now over one year ago—at which the court and the parties discussed expedition and the significance of the statute's delayed effective date. *Compare* Status Hearing Tr. at 23, 39, 82 (counsel for plaintiffs suggesting parties "ought to do our best" to "put[ ] this court in a position where, if it can, it can resolve everything by the effective date of the statute"), *with id.* at 58-61 (counsel for defendants disagreeing with "assumption . . . that section 403, the expedition section, requires some type of decision by this court by November 6th [of 2002]"); *see also id.* at 61 (court stating "I read [the statute] to mean that they want it to happen before [November 6th]" (Henderson, J.)). At that time, the parties differed somewhat as to the latest date on which the Supreme Court could receive the case and still decide it during the Court's October 2002 Term. *Compare, e.g., id.* at 60, 69-70, 73-74 (counsel for government and intervenors proposing that "this court . . . resolve all the issues by early February" so that "the Supreme Court of the United States could in the ordinary course resolve this [case] by the end of the 2002 [T]erm"), *with id.* at 76, 82 (counsel for plaintiffs suggesting "the schedule that is being proposed by the government does place an extraordinary burden on the Supreme Court" and that "things should be done before November 6th if at all possible"); *see also id.* at 60 (court stating "[t]hat's putting an awful lot on the Supreme Court to decide this if we don't hear it until February. . . . As far as I'm concerned, I'd rather put the burden somewhere [other than on the Supreme Court] [as] an inferior court." (Henderson, J.)). All agreed, however, that the Supreme Court had to receive the case no later than the first week of February. *See id.* at 23, 39-40, 58, 60, 69- 71, 73-74, 82.

On April 24, 2002 the panel issued a scheduling order setting out a discovery and "paper trial" timetable that fixed an argument date of December 4, 2002. During the next eight months—a necessarily-compressed discovery and trial period—the parties conducted extensive discovery and submitted an "elephantine" record, Oral Arg. Tr. Vol. 1, Afternoon Session, at 152 (counsel for Senator McConnell), an impressive achievement due in no small measure to their extraordinary efforts to keep delay to a minimum. At the oral argument held on December 4 and 5, the parties again gave their estimates of the latest date on which an appeal could reach the Supreme Court in time for a final decision by June 30, 2003. Again there was consensus that the Court had to receive the case no later than early February. *See* Oral Arg. Tr. Vol. 1, Morning Session, at 19 (counsel for Senator McConnell stating "it would be very helpful to the [C]ourt" if district court issued its judgment "as of the end of January or as soon into February as possible"); *id.*, Afternoon Session, at 277-78 (counsel for intervenors stating Court could hear the case "in the regular

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course of briefing" if district court issued its judgment during "the third week in January"); *see also id.*, Morning Session, at 19 ("I estimated actually less [time] than that, but, all right." (Henderson, J.)).

The panel's subsequent delay in resolving these actions has not only defied the statute's expedition mandate but, regrettably, has ill-served the strong public interest in election law clarity and stability. In my view, the delay could have been avoided--as it was avoided in *Buckley v. Valeo*—by the Congress's lodging judicial review of constitutional questions in an *en banc* court of appeals instead of a three-judge district court. By contrast to BCRA section 403, which provides for judicial review "by a 3-judge court convened pursuant to section 2284 of title 28, United States Code," BCRA § 403(a)(1); FECA § 310 note; 2 U.S.C. § 437h note, FECA's judicial review provision provided--and still provides--that the Federal Election Commission, any national political party committee or any eligible voter "may institute such actions in the appropriate district court of the United States . . . as may be appropriate to construe the constitutionality of any provision of [FECA]" and that such court "immediately shall certify all questions of constitutionality of [FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting *en banc*," 2 U.S.C. § 437h. Pursuant to 2 U.S.C. § 437h, and noting a comment of the provision's sponsor that "it is in the interest of everyone" to have "serious question[s] as to the constitutionality of this legislation . . . determined by the Supreme Court at the earliest possible time," *Buckley v. Valeo*, 387 F. Supp. 135, 139 (D.D.C. 1975) (quoting 120 CONG. REC. S5707 (daily ed. April 10, 1974) (statement of Sen. Buckley)), *remanded by Buckley v. Valeo*, 519 F.2d 817 (D.C. Cir. 1975), the district court in *Buckley* certified 28 such questions to the *en banc* D.C. Circuit, *see Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975). The D.C. Circuit, in turn, resolved the questions—which were no less novel than the ones the panel decides today—two months after oral argument. *See Buckley*, 519 F.2d at 821. A similarly swift resolution here would have yielded a decision by the first week of February.

That the *Buckley en banc* panel consisted of eight members, not three—and that it did not have, as we have had, the benefit of a statutorily-prescribed eight-month stay in the effective date of the legislation—did not prevent it from issuing a decision more expeditiously than has this panel. Although the actions before us have produced a large (but probably unnecessary) record, *see infra* pages 64-65, we have decided the constitutional questions presented in the same manner as the *Buckley* panel did—after briefing and oral argument and in lieu of a full-blown

On March 27, 2002—after nearly seven years of congressional wrangling—the President signed into law the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (BCRA) (codified at 2 U.S.C. §§ 431 *et seq.*),[2] which amends and supplements the Federal Election Campaign Act of 1971 (FECA or Act), Pub. L. No. 92-225, 86 Stat. 3 (1971 Provisions) (codified as amended at 2 U.S.C. §§ 431 *et seq.*). Among BCRA's most significant and controversial features are provisions: prohibiting any corporation or labor organization from making a disbursement for any "electioneering communication," BCRA § 203, which is defined as "any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . [and which] is made within . . . 60 days before a general, special, or runoff election . . . or . . . 30 days before a primary or preference election . . . for the office sought by the candidate," *id.* § 201; requiring any person who "makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year" to file certain disclosures with the Federal Election Commission (FEC or Commission), *id.;* limiting the source and amount of disbursements that are "coordinated" with a federal candidate or a national, state or local political party committee, *id.* §§ 202, 214; severely restricting any national, state or local political party committee and its agents from soliciting, receiving or transferring non-federal (i.e., "soft money") funds, which are not subject to FECA's source-and-

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trial. While both the district court and the circuit court have their strengths, the circuit court is more familiar with, and far better equipped to handle, the briefing-and-argument mode of judicial decision-making than is the trial court—as the excessive prolongation of these actions manifests. The Congress would do well to leave 28 U.S.C. § 2284 out of any future amendment to FECA. *See also infra* note 55.

[2] A full copy of the statute is available online at http:// www.fec.gov/pages/bcra/major_resources_bcra.htm.

amount limitations and reporting requirements but are subject to state regulation, *see id.* § 101; and prohibiting any individual who is 17 years old or younger from making any contribution whatsoever to any candidate for federal office or any contribution or donation to any political party committee, *see id.* § 318. The Congress enacted these and other innovations in response to perceived regulatory gaps in the Act. By many popular accounts, a "soft money loophole" had allowed corporations, unions, wealthy individuals and political parties themselves to distort the political process in violation of the spirit, if not the letter, of the Act. 148 CONG. REC. S2104 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold); *see* Gov't Br. at 3 (contending "soft money loophole has grown from a narrow exception to FECA's limitations into a huge and ever-growing means of circumventing" them). More troubling, according to BCRA's proponents, was that corporations and unions had used vast portions of their treasury funds—and political parties had used a large percentage of their non-federal funds—to pay for campaign advertisements that steered clear of FECA's limits only by "masquerading" as ads about issues of public concern. *E.g., Regarding the First Amendment and Restrictions on Issue Advocacy: Hearings Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 105th Cong. (1997) (statement of Donald J. Simon), *available at* http://www.house.gov/judiciary/22343.htm; *see* Intervenors Br. at 72 ("The parties spent much of [the] soft money on broadcast advertising that supposedly addressed only 'issues,' but in fact was designed to influence the election of candidates for federal office." (citing Mann Expert Report at 18-26)).

As soon as BCRA was signed into law, Senator Mitch McConnell and the National Rifle Association (NRA) filed separate suits in this court challenging the statute's constitutionality. Since then, nine additional complaints have been filed and a total of 75 additional plaintiffs have joined

Senator McConnell and the NRA in challenging the validity of the new law.[3] The plaintiffs pray for relief in the form of

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[3] As of the May 7, 2002 deadline for amendment of pleadings, intervention or joinder of additional parties and consolidation of additional cases, *see* Scheduling Order of 4/24/02, 84 plaintiffs were parties to the consolidated actions. Since then seven plaintiffs—the Alabama Republican Executive Committee, Martin J. Connors, the Jefferson County Republican Executive Committee, the Christian Coalition of America, Inc., the Libertarian Party of Illinois, Inc., the DuPage Political Action Council, Inc. and the National Association of Wholesaler-Distributors--have been dismissed from the suit without prejudice. *See generally* Orders of 8/15/02, 9/13/02, 9/18/02 and 9/30/02 Dismissing Pls. Without Prejudice.

Remaining in the suit are 77 plaintiffs in 11 actions: in No. 02-CV-0582 are Senator McConnell, former Representative Bob Barr, Representative Mike Pence, Alabama Attorney General Bill Pryor, the Libertarian National Committee, Inc. (LNC), the American Civil Liberties Union (ACLU), Associated Builders and Contractors, Inc. (ABCI), Associated Builders and Contractors Political Action Committee (ABC PAC), the Center for Individual Freedom, Club for Growth, Inc., Indiana Family Institute, Inc., the National Right to Life Committee, Inc. (NRLC), National Right to Life Educational Trust Fund (NRL ETF), National Right to Life Political Action Committee (NRL PAC), the National Right to Work Committee, 60 Plus Association, Inc., the Southeastern Legal Foundation, Inc., U.S. d/b/a ProEnglish, Thomas McInerney, Barret Austin O'Brock and Trevor M. Southerland (collectively, the *McConnell* plaintiffs); in No. 02-CV-0581 are the NRA and the National Rifle Association Political Victory Fund (NRA PVF) (collectively, the *NRA* plaintiffs); in No. 02-CV-0633 are Emily Echols, Hannah McDow, Isaac McDow, Jessica Mitchell, Daniel Solid and Zachary C. White (collectively, the *Echols* plaintiffs); in No. 02-CV-0751 are the Chamber of Commerce of the United States (Chamber of Commerce), the National Association of Manufacturers (NAM) and U.S. Chamber Political Action Committee (collectively, the *Chamber of Commerce* plaintiffs); in No. 02-CV-0753 is the National Association of Broadcasters (NAB); in No. 02-CV- 0754 are the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the AFL-CIO Committee on Political Education Political Contributions Committee (COPE PCC) (collectively, the *AFL-CIO* plaintiffs); in No. 02-CV-0781 are Congressman Ron Paul, Gun Owners of America, Inc., Gun Owners of America

(1) an order and judgment declaring the challenged provisions of BCRA unconstitutional; (2) an order and judgment permanently enjoining the defendants [4] and their agents from enforcing, executing or otherwise applying the challenged provisions; (3) costs and attorneys' fees pursuant to any applicable statute or authority; and (4) any other relief the court in its discretion deems just and appropriate. *See, e.g.*, McConnell Second Am. Compl. (McConnell Compl.) at 51.

Political Victory Fund, RealCampaignReform.org, Citizens United, Citizens United Political Victory Fund, Michael Cloud and Carla Howell (collectively, the *Paul* plaintiffs); in No. 02-CV-0874 are the Republican National Committee (RNC), Mike Duncan, the Republican Party of Colorado, the Republican Party of Ohio, the Republican Party of New Mexico and the Dallas County (Iowa) Republican County Central Committee (collectively, the *RNC* plaintiffs); in No. 02-CV- 0875 are the California Democratic Party (CDP), Art Torres, the Yolo County Democratic Central Committee, the California Republican Party (CRP), Shawn Steel, Timothy J. Morgan, Barbara Alby, the Santa Cruz County Republican Central Committee and Douglas R. Boyd, Sr. (collectively, the *CDP* plaintiffs); in No. 02-CV-0877 are Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Peter Kostmayer, Rose Taylor, Stephanie L. Wilson, the California Public Interest Research Group, the Massachusetts Public Interest Research Group, the New Jersey Public Interest Research Group, the United States Public Interest Research Group, the Fannie Lou Hamer Project and the Association of Community Organizers for Reform Now (collectively, the *Adams* plaintiffs); and in No. 02-CV-0881 are Representative Bennie G. Thompson and Representative Earl F. Hilliard (collectively, the *Thompson* plaintiffs).

[4] The defendants in these consolidated actions are the FEC; the United States of America (United States); the United States Department of Justice (DOJ); the Federal Communications Commission (FCC); John Ashcroft, in his official capacity as Attorney General of the United States of America; Ellen L. Weintraub, Bradley A. Smith, David M. Mason, Danny L. McDonald, Scott E. Thomas and Michael E. Toner, in their official capacities as Commissioners of the FEC; and Senators John McCain, Russell Feingold, Olympia Snowe and James Jeffords and Representatives Christopher Shays and Martin Meehan (collectively, the intervenors), as intervening defendants.

In my view, all of the challenged provisions except the one discussed in Part IV.D.4 (which I believe must be sustained) and those discussed in Parts IV.F and IV.G (as to which I would pass no judgment [5]) are unconstitutional. Accordingly, and for the reasons stated*infra* in Parts III and IV of this opinion, I would (1) declare that BCRA sections 201, 202, 203, 204, 212, 213, 214, 311, 318 and 504 violate the First Amendment to the United States Constitution; (2) declare that new FECA sections 301(20), 323(a), 323(b), 323(c), 323(d) and 323(f)—as added by BCRA section 101—violate the First Amendment to the United States Constitution; (3) permanently enjoin the defendants and their agents from enforcing, executing or otherwise applying BCRA sections 201, 202, 203, 204, 212, 213, 214, 311, 318 and 504; and (4) permanently enjoin the defendants and their agents from enforcing, executing or otherwise applying new FECA sections 301(20), 323(a), 323(b), 323(c), 323(d) and 323(f), as added by BCRA section 101.

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[5] I believe that no plaintiff who challenges BCRA section 305 has standing to do so. *See infra* Part IV.F. Likewise, I am convinced that no plaintiff has standing to challenge the increased contribution limits set out in BCRA sections 304, 307, 316 and 319. *See infra* Part IV.G. Therefore, I would not decide the constitutionality of those provisions even though upon examination of the record and despite BCRA's severability provision, *see* BCRA § 401, I doubt that the Congress, upon elimination of the numerous provisions I believe are invalid, would have been "satisfied" with the contribution limit increases. *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 235 (1932) (severability clause "discloses an intention to make [a statute] divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained"); *see Buckley v. Valeo*, 424 U.S. 1, 255 (1976) (Burger, C.J., concurring in part and dissenting in part) ("To invoke a severability clause to salvage parts of a comprehensive, integrated statutory scheme . . . exalts a formula at the expense of the broad objectives of Congress.").

This opinion begins with a factual recitation divided into two Parts.[6] Part I provides a history of congressional efforts to regulate campaign finance and discusses the Supreme Court's seminal decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the jurisprudential starting point of my analysis. Part II describes BCRA's interwoven provisions; it details the ways in which BCRA changes the existing regulatory scheme and it catalogues the constitutional bases upon which the plaintiffs in these consolidated actions challenge the new statute. With that foundation established, Part III addresses *in limine* matters including, most importantly, the findings of fact that I would make (in lieu of those of the majority) and the standards of review that guide my substantive analyses. Part IV then addresses the myriad constitutional questions raised by the new law. Part V provides a brief conclusion. Given the complexity of the undertaking, the number of issues to be addressed, the plain need for clarity and the length of this opinion, I provide a table of contents on the following pages.

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Table of Contents

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I. A Brief History of Campaign Finance Regulation

Although federal campaign finance legislation dates back at least to the late nineteenth century,[7] federal campaign contributing and spending were not heavily regulated until the 1970s. In 1971, following an expensive 1968 presidential election, the Congress enacted FECA, which relied upon public disclosure of campaign contributions[8] and expenditures[9] as the primary method of identifying and weeding out political *quid pro quos*.[10] *See* 1971 Provisions §§ 301-311;

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[6] In the interest of rendering an opinion that reads as a coherent whole—and, again, for the sake of expedition—I have retained introductory sections that overlap (but only somewhat) with scattered portions of the *per curiam* opinion. *Compare infra* Part I *with* Per Curiam Op. at Part II.A; *compare also infra* Part II *with* Per Curiam Op. at Part II.B.

[7] *See Ex parte Curtis*, 106 U.S. 371, 375 (1882) (upholding constitutionality of Act of Aug. 15, 1876, 19 Stat. 169, which prohibited non-appointed federal employees from requesting or receiving anything of value for political purposes); *see also id.* at 376-77 (Bradley, J., dissenting) (voting to strike down statute on First Amendment grounds because "deny[ing] to a man the privilege of associating and making joint contributions with such other citizens as he may choose, is an unjust restraint of his right to propagate and promote his views on public affairs").

[8] Under FECA, the term "contribution" includes

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
>
> (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. § 431(8)(A); *see also id.* § 431(8)(B) (exemptions from definition of "contribution").

[9] Under FECA, the term "expenditure" includes

> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. § 431(9)(A); *see also id.* § 431(9)(B) (exemptions from definition of "expenditure").

[10] Previous disclosure requirements, which FECA replaced entirely, can be found in the Act of June 25, 1910, 36 Stat. 822, *see United States v. UAW*, 352 U.S. 567, 575 (1957) (describing how 1910 Act "translated popular demand for . . . curbs upon the political power of wealth into a publicity law that required [political] committees . . . to report all contributions and disbursements and to identify contributors and recipients of substantial sums"), and in the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, *see Burroughs v. United States*, 290 U.S. 534, 540-42, 545 (1934) (upholding requirement that political committees accepting

see also ACLU v. Jennings, 366 F. Supp. 1041, 1054 & nn.18-20 (D.D.C. 1973) (three-judge court) (describing FECA's Title III, which "establishe[d] an elaborate system of record keeping and public disclosure of campaign contributions and expenditures"), *vacated as moot sub nom., Staats v. ACLU*, 422 U.S. 1030 (1975). By 1974 many legislators who were not content to rely exclusively on a "disclosure-centered regime" to prevent corruption called for tighter campaign finance restrictions. Joel M. Gora, *"No Law . . . Abridging,"* 24 HARV. J.L. & PUB. POL'Y 841, 856-57 (2001) ("Even though not all of the abuses that we put under the rubric of 'Watergate' involved illegal or questionable campaign funding, Watergate seemed to have become at least in part a poster child for campaign finance excess and corruption."). The resulting amendments to FECA, *see* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974 Amendments) (codified as amended at 2 U.S.C. §§ 431 *et seq.*), included several innovations warranting a detailed recitation here.

The 1974 Amendments prohibited any person [11] from contributing more than $1,000 per election [12]—and any political committee[13] from contributing more than $5,000 per elec-

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contributions or making expenditures "for the purpose of influencing" presidential and vice-presidential elections report totals donated and spent as well as names of donors contributing $100 or more).

[11] FECA defines "person" broadly to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 2 U.S.C. § 431(11).

[12] An "election" is, statutorily speaking, a "general, special, primary, or runoff election," a "convention or caucus of a political party which has authority to nominate a candidate," a "primary election held for the selection of delegates to a national nominating convention of a political party" or a "primary election held for the expression of a preference for the nomination of individuals for election to the office of President." 2 U.S.C. § 431(1).

[13] In order to qualify for the higher contribution ceiling as a "political committee," an entity (that would otherwise be a "person" subject to the

tion—to any one candidate [14] for federal office. *See* 1974 Amendments § 101. They also barred any person from contributing more than an aggregate of $25,000 to all recipients per election cycle. *See id.*

In addition, the 1974 Amendments sharply curtailed the amount of money that could be *spent* for the purpose of influencing any election for federal office. For instance, they prohibited any person from spending more than $1,000 "relative to a clearly identified candidate" during any calendar year. *Id.* They precluded any candidate from spending more than a given amount of personal funds—$50,000 in the case of a presidential or vicepresidential candidate, $35,000 in the case of a senatorial candidate and $25,000 in the case of any other congressional candidate[15]—"in connection with his campaigns during any calendar year." *Id.* And they placed restrictions on overall campaign spending by candidates: a presidential candidate could spend a maximum of

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lower limit) must register with the FEC and meet certain statutory requirements. *See* 2 U.S.C. § 433; *see also infra* note 17 (defining "political committee").

[14] Under FECA, the term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—

> (A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or
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> (B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

2 U.S.C. § 431(2).

[15] Under the 1974 Amendments, a candidate for the office of Representative from a State entitled to only one Representative was permitted to spend up to $35,000 in personal funds.

$10,000,000 in seeking nomination for office and a maximum of an additional $20,000,000 in the general election campaign; in any senatorial primary election, a candidate was limited to spending either $100,000 or eight cents times the relevant voting-age population, whichever was greater; in the general election, a senatorial candidate could spend either $150,000 or 12 cents times the relevant population, whichever was greater; in both the primary campaign and the general election campaign for the House of Representatives, the limit was $70,000.[16] *See id.*

Finally, the 1974 Amendments expanded the disclosure and reporting requirements of the 1971 Provisions. *See id.* §§ 201-209. Together with the earlier provisions, the 1974 Amendments mandated, *inter alia,* that each political committee [17]: register with the FEC, *see id.* §§ 208-209; keep detailed records of both contributions and expenditures, *see* 1971 Provisions §§ 302-304, 1974 Amendments §§ 202-204;

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[16] The senatorial ceilings applied to those candidates seeking nomination or election to the office of Representative from a State entitled to only one Representative.

[17] Under FECA, a "political committee" is

> (A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or
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> (B) any separate segregated fund established under the provisions of section 441b(b) of this title; or
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> (C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure . . . aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

2 U.S.C. § 431(4); *see also Jennings,* 366 F. Supp. at 1054 (explaining how "[c]ategorization as a political committee sets into motion certain detailed disclosure and reporting requirements").

include in its records the name and address of anyone who made any contribution in excess of $10,[18] together with the date and amount of the contribution, *see* 1971 Provisions § 302, 1974 Amendments § 202; and include as well the occupation, employer and/or principal place of business of anyone contributing more than $100 [19] during any calendar year, *see* 1971 Provisions § 302, 1974 Amendments § 202. The disclosure provisions also required each candidate to file with the FEC quarterly reports containing detailed financial information, including the full name, mailing address, occupation and principal place of business of each person contributing more than $100 [20] during any calendar year, as well as the amount and date of the contributions. *See* 1971 Provisions § 304, 1974 Amendments § 204. Further, the provisions required the Commission to make the reports "available for public inspection . . . and copying." 1971 Provisions § 311, 1974 Amendments § 208. Finally, they mandated that any individual or group (other than a political committee) making independent expenditures of over $100 [21] during any calendar year file a statement to that effect with the Commission. *See* 1974 Amendments § 204.

A diverse group of plaintiffs—including United States Senator James L. Buckley, who was seeking re-election, a candidate for the presidency of the United States, a potential contributor, the Committee for a Constitutional Presidency, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party and the

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[18] The figure has been raised and is currently $50. *See* 2 U.S.C. § 432(c)(2).

[19] The figure has been raised and is currently $200. *See* 2 U.S.C. § 432(c)(3); *see also id.* § 431(13).

[20] The figure has been raised and is currently $200. *See* 2 U.S.C. § 434(b)(3).

[21] The figure has been raised and is currently $250. *See* 2 U.S.C. § 434(c)(1).

New York Civil Liberties Union—challenged FECA's provisions on a variety of constitutional grounds, spawning the massive and now-legendary litigation known as *Buckley v. Valeo*. What follows is a synopsis of the United States Supreme Court's decision in *Buckley*.[22]

Although the *Buckley* Court recognized that monetary contributions to candidates and political committees play an "important role . . . in financing political campaigns," *Buckley*, 424 U.S. at 21, that contribution limitations "implicate fundamental First Amendment interests," *id.* at 23, and that such limitations "could have a severe impact on political dialogue if [they] prevented candidates and political committees from amassing the resources necessary for effective advocacy," *id.* at 21, it upheld all three of the Act's major contribution limits because there was "no indication" that they would have "any dramatic adverse affect on the funding of campaigns," *id.* More specifically, the Court rejected free speech and equal protection challenges to the provision barring any person from contributing more than $1,000 per election to any one candidate. *See id.* at 23-35. "[U]nder the rigorous standard of review established by our prior decisions," the Court held, "the weighty interests served by restricting the size of financial contributions to political candidates"—namely, "limit[ing] the actuality and appearance" of *quid pro quo* corruption of federal candidates and officeholders—"are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Id.* at 26, 29. It upheld as well the provision prohibiting any political committee from contribbuting more than $5,000 per election to any one candidate, *see id.* at 35-36, concluding that it "serve[s] the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees," *id.* And it sustained the provision prohibiting any person from contributing more than $25,000 in the aggregate per election cycle, *see id.* at 38, holding that "this quite modest restraint upon protected political activity" likewise "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party," *id.*

The Court found, however, that in contrast to the Act's contribution restrictions, the limits on expenditures "impose[d] direct and substantial restraints on the quantity of political speech." *Id.* at 39; *see id.* at 19-20 (expenditure ceilings "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication" (footnotes omitted)). Rejecting the notion that "the dependence of a communication on the expenditure of money operates itself to . . . reduce the exacting scrutiny required by the First Amendment," *id.* at 16, the Court held that

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media

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[22] The legal framework laid out by *Buckley* and its progeny is discussed in greater detail *infra* in Part IV.

> for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19; *see id.* at 19 n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.").[23] Addressing first the $1,000 limit on any person's expenditure "relative to a clearly identified candidate," the Court observed that no provision of the Act lent potential spenders (and, therefore, speakers) any interpretive aid in discerning what "relative to" might mean. *Id.* at 41. Because the use of such an "indefinite phrase" failed to "clearly mark the boundary between permissible and impermissible speech," *id.*, offered "no security for free discussion," *id.* at 43 (quotation omitted), "blanket[ed] with uncertainty whatever may be said," *id.* (quotation omitted), and would "compel[] the speaker to hedge and trim," *id.* (quotation omitted), the Court—in order to preserve the provision from invalidation—construed it to apply only to expenditures "for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44; *see id.* at 44 n.52 ("This construction would restrict the application of [the provision] to communications containing express words of advocacy of election or defeat, such as 'vote

for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"). Even so construed, however, the provision failed the Court's scrutiny:

> [T]he governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the $1,000] ceiling on independent expenditures. . . . The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. . . . [Moreover, the ceiling] heavily burdens core First Amendment expression. . . . Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

Id. at 45-48; *see id.* at 39-51. For similar reasons, the other expenditure restrictions under review failed the First Amendment test as well. The limit on a candidate's spending of personal resources was not justified given that: (1) "[t]he candidate, no less than any other person, has a . . . right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates," *id.* at 52; and (2) "the use of personal funds *reduces* the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's . . . limitations are directed," *id.* at 53 (emphasis added); *see id.* at 51-54. Likewise infirm were the limits on overall candidate campaign spending—which, the government stressed, were designed to reduce allegedly "skyrocketing" costs of campaigns, *id.* at 57—

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[23] *Cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (*Shrink Missouri*) (Breyer, J., concurring) (even "a decision to *contribute* money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it enables speech." (emphasis altered)); *id.* at 416 n.4 (Thomas, J., dissenting) ("[T]he First Amendment protects the right to pay others to help get a message out."); *but see id.* at 398 (Stevens, J., concurring) ("Money is property; it is not speech.").

because "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise," *id.; see id.* at 54-59.

Finally, although the *Buckley* Court recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," *id.* at 64 (citing, *inter alia, NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958)), it upheld the Act's numerous disclosure and reporting requirements, *see id.* at 60-84, concluding that they vindicated three governmental interests "sufficiently important" to outweigh their infringement of First Amendment freedoms:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . . The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the [Act's] contribution limitations . . . .

Id. at 66-68 (quoting, *inter alia*, LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 62 (National Home Library Foundation ed. 1933) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.")). Specifically, the Court sustained the disclosure provisions against the plaintiffs' contentions that they were overbroad both in their application to minor-party and independent candidates and in their extension to *de minimis* contributions, *see id.* at 68-74, 82-84; the Court found that "any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors" was "highly speculative," *id.* at 70. Not without apparent misgivings, it also sustained the provision requiring any individual or group (other than a political committee or candidate) making expenditures of over $100 during any calendar year (other than by contributions to political committees or candidates) to file a statement with the FEC. *See id.* at 74-82. The plaintiffs had contended that the provision would impose "very real, practical burdens . . . certain to deter individuals from making expenditures for their independent political speech." *Id.* at 75. Noting that the Act's definition of "expenditure" spoke in terms of funds used "for the purpose of . . . influencing" the nomination or election of any candidate for federal office, *id.* at 77, the Court recognized that the $100 disclosure provision could indeed have a drastic chilling effect on protected speech in the form of campaign spending, *see id.* at 76-77. Thus, in order to steer the provision clear of the "shoals of vagueness," *id.* at 78, and "[t]o insure that [its] reach [was] not impermissibly broad," *id.* at 80, the Court construed the term "expenditure" under the disclosure provision in the same way it construed the Act's $1,000 spending cap—"to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.* (footnote omitted).

Buckley left in its wake a regime that has been described as a "nonsensical, loophole-ridden patchwork," *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 518 (1985) (*NCPAC*) (White, J., dissenting), one that some observers believed was not worth the regulatory candle. *See, e.g., Buckley*, 424 U.S. at 236 (Burger, C.J., concurring in part and dissenting in part) ("[W]hat remains after today's holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program."); *see also, e.g.*, Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 939 n.1 (1985) (expressing doubt that "a rational legislature would ever have passed" as "a unified package" the "crazy quilt" of statutes and regulations governing campaign finance after *Buckley*).[24] The following paragraphs describe the regulatory scheme that unfolded after *Buckley;* the discussion is included to provide a context for BCRA's enactment and to help make clearer what BCRA is designed to accomplish.

As noted, the *Buckley* Court left in place several of the Act's major components. Significantly, *all* of the Act's contribution limits remained (and, indeed, the Congress even added some more in the 1976 amendments): no person could contribute to any candidate more than $1,000 per election,[25] *see* 2 U.S.C. § 441a(a)(1)(A); no person could contribute to the committees of a national political party more than $20,000 during any calendar year,[26] *see id.* § 441a(a)(1)(B); no person could contribute to any political committee (other than a national political party committee) more than $5,000 during any calendar year,[27] *see id.* § 441a(a)(1)(C); no

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[24] When faced with the task of enacting emergency amendments in response to *Buckley*, the Congress had little time to reevaluate the combination of provisions the decision left standing. As then Assistant Attorney General Antonin Scalia put it, the "whole purpose of our [amendments] is to submerge those issues that are controversial and to do the minimum amount necessary to enable the 1976 elections to proceed." Office of Legal Counsel Statement accompanying § 2911, Legislative History of FECA Amendments of 1976, at 142 (Feb. 18, 1976).

[25] BCRA raises the limit to $2,000 per election. *See* BCRA § 307(a)(1); *see also infra* Part II.G.

[26] BCRA raises the limit to $25,000 during any calendar year. *See* BCRA § 307(a)(2).

[27] BCRA amends the Act to permit a person to contribute up to $10,000 per year to a state political party committee. *See* BCRA § 102; FECA § 315(a)(1)(D); 2 U.S.C. § 441a(a)(1)(D).

political committee could contribute to any candidate more than $5,000 per election, *see id.* § 441a(a)(2)(A); no political committee could contribute to the committees of a national political party more than $15,000 during any calendar year, *see id.* § 441a(a)(2)(B); and no political committee could contribute to any other political committee more than $5,000 during any calendar year, *see id.* § 441a(a)(2)(C). Moreover, if any national or state political party committee coordinated its *expenditures* with a specific candidate for the purpose of benefiting the candidate, i.e., if the committee spent funds "in connection with" the candidate's campaign, the expenditures were treated like contributions—they were subject to formula-driven monetary ceilings, albeit ones that were slightly higher than the $5,000 limit on any political party committee's contributions to any candidate.[28] *Compare id.* § 441a(a)(2)(A), *with id.* § 441a(d); *see FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (*Colorado Republican II*) (holding section 441a(d) not facially unconstitutional because "a [political] party's *coordinated* expenditures . . . may be restricted to minimize circumvention" of FECA's contribution-to- candidate limits (emphasis added)); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 613-23 (1996) (*Colorado Repub-*

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[28] National political party committees could not (and still cannot) make any expenditure "in connection with" the general election campaign of any candidate for President "which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States." 2 U.S.C. § 441a(d)(2). National and state political party committees could not (and still cannot) make any expenditure "in connection with" the election campaign of any candidate for the office of Senator—or of Representative from a State which is entitled to only one Representative—"which exceeds . . . the greater of . . . 2 cents multiplied by the voting age population of the State . . . or . . . $20,000." *Id.* § 441a(d)(3)(A). And, finally, the national and state political party committees could not (and still cannot) make any expenditure "in connection with" the election campaign of any candidate for the office of Representative, Delegate or Resident Commissioner "which exceeds . . . $10,000." *Id.* § 441a(d)(3)(B).

lican I) (plurality opinion) (holding section 441a(d) unconstitutional as applied to political party's *independent* expenditures). Finally, a sweeping source restriction not challenged in *Buckley* prohibited (and still prohibits) any national bank, corporation or labor organization from making—or any officer thereof from approving—a contribution "in connection with" any federal election.[29] 2 U.S.C. § 441b(a). The same provision also forbade (and still forbids) "any candidate, political committee, or other person knowingly to accept or receive" any corporate or labor contribution. *Id.*

FECA's post-*Buckley* source-and-amount provisions thus restricted all of the money contributed—and much of the money spent—"in connection with" or "for the purpose of influencing" federal elections. In a 1978 advisory opinion, however, the FEC made clear that these "federal" or "hard" money restrictions extended only so far and that the Act permitted political parties to use funds, including corporate and union funds, not subject to source-and-amount limits to pay for activities benefiting both federal and state candidates. *See generally* FEC Advisory Op. 1978-10: Allocation of Costs for Voter Registration, *available at* http://herndon3.sdrdc.com/ao/ao/780010.html. Commission regulations then in effect permitted parties to "allocate" administrative expenses—including rent, utilities and supplies—between federal and state candidates based upon the proportionate benefit received. Under the allocation regime, amounts spent on administrative expenses for state candidates were not subject to FECA's source-and-amount restrictions. That is, administrative expenses could be paid for with state-regulated

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[29] For a brief history of the ban on corporate and labor funds, *see Buckley*, 519 F.2d at 904-07 (noting Tillman Act of 1907, War Labor Disputes Act of 1943 and Taft-Hartley Act of 1947 barred corporate and labor contributions). *See also* Gov't Br. at 12-15 (citing, *inter alia*, WILLIAM A. WHITE, THE OLD ORDER CHANGETH 11-15 (1910)).

"non-federal" funds—a.k.a. "soft money"[30]—because such funds were not given or spent "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i) (defining "contribution" and "expenditure"). When the Kansas Republican State Committee asked the FEC whether it was permitted to allocate expenses for voter registration and get-out-the-vote drives that benefited both the state and federal candidates on a given ticket, the FEC responded that

> the costs of [such activities] should be allocated between Federal and non-Federal elections in the same manner as other general party expenditures. . . . That portion of the costs allocable to Federal elections . . . must come from funds . . . contributed in accordance with the limitations and prohibitions contained in 2 U.S.C. §§ 441a, 441b, 441c, 441e, 441f and 441g. . . . The costs allocable to non-Federal elections may be paid out of party funds

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[30] As the FEC recently observed in regulations promulgated pursuant to BCRA, "the term 'soft money' is used by different people to refer to a wide variety of funds under different circumstances." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49064-65 (July 29, 2002). The Commission's *Twenty Year Report*, *see* FED. ELECTION COMM'N, TWENTY YEAR REPORT (1995) (hereinafter TWENTY YEAR REPORT), *available at* http://www.fec.gov/pages/20year.htm, provides a helpful, rough-and-ready definition of a commonly misunderstood term:

> [S]oft money—*n.* (slang): funds raised and/or spent outside the limitations and prohibitions of the FECA. Sometimes called nonfederal funds, soft money often includes corporate and/or labor treasury funds, and individual contributions in excess of the federal limits, which cannot legally be used "in connection with" federal elections, but can be used for other purposes.

TWENTY YEAR REPORT, *supra*, at ch.3. Because the FEC itself has chosen to use the term "non-federal funds"—and because such funds *are* regulated by *state* law, *see* 67 Fed. Reg. at 49065—this opinion generally uses the terms "federal funds" and "non-federal funds" in lieu of "hard money" and "soft money."

> raised and expended pursuant to applicable Kansas law. . . . [W]ith respect to an election in which there are candidates for [both non-Federal] and Federal office, expenditures for registration and get-out-the-vote drives need not be attributed as contributions to [Federal] candidates unless the drives are made specifically on their behalf.

FEC Advisory Op. 1978-10. Because "applicable Kansas law" did not prohibit corporate and union donations and placed no ceilings on donations for state and local campaigns, federal candidates in Kansas were able to benefit—albeit indirectly—from such donations. *See* TWENTY YEAR REPORT, *supra,* at ch.3 (detailing history and pre-BCRA treatment of non-federal funds and explaining "[t]he origins of 'soft money' lie in the United States' federal system of government," under which "each [S]tate may establish its own rules for financing the nonfederal elections held within its borders").

The use of non-federal funds grew during the 1980s. New FEC regulations permitted political committees to allocate expenses between federal and non-federal accounts on a "reasonable basis." Proponents of tighter campaign finance restrictions criticized the standard, claiming that committees underestimated the federal share of their contributions and expenditures and thereby influenced federal elections with funds that would otherwise be subject to FECA's source-and-amount restrictions. In 1984 Common Cause petitioned the FEC to promulgate more stringent regulations to close the perceived loophole. After the FEC denied its petition, Common Cause sought relief in this court, which ordered the Commission to clarify its rules. *See generally Common Cause v. FEC,* 692 F. Supp. 1391 (D.D.C. 1987).

The amended regulations—which took effect on January 1, 1991—served as the basis of the federal/non-federal funding system until BCRA's enactment. The regulations set forth several formulae fixing the maximum amount of money a political committee could use for an activity benefiting both federal and non-federal candidates, *see* 11 C.F.R. § 106.5(b)-(d) (1997), and required expanded reporting of mixed federal and non-federal giving and spending, *see* TWENTY YEAR REPORT, *supra,* at ch.3. "Despite the new rules," the Commission reported in 1995, some legislators and "reform" groups remained troubled by the growing influence of non-federal funds:

> They say, for example, that soft money spending—even for the non-federal share of expenses—influences federal elections because it permits committees to conserve federal funds that can later be spent to support federal candidates. Many are also concerned about the way committees raise soft money. They believe that the active role federal candidates and their associates play in raising large sums of soft money, at the very least, creates an appearance of undue influence by the contributors on the federal candidates involved.

Id. at ch.3. Non-federal donations to the two major political parties did, in fact, grow exponentially during the 1990s—from $86.1 million in the 1992 election cycle to $487.5 million in the 2000 cycle. *See infra* Findings of Fact (Findings) 65-66 at pages 139-40.

Proponents of tighter restrictions were disturbed by this trend not simply because, in their view, corporations and unions were effectively contributing funds to federal campaigns. *See* Mann Expert Report at 15 & Tbl.4. They worried as well about the parties' spending of non-federal funds on "issue ads"—issue-based but, at least to their ears, candidate-focused advertisements that do not expressly advocate the election or defeat of an identifiable federal candidate. *See* Intervenors Br. at 8-9 (discussing expanded role of non-federal funds in issue advertising during 1996 campaign); *see infra* note 75 (defining "issue ad" for purposes of this opinion). They lamented that permitting such ads—which might discuss, for example, a candidate's record, ideological bent, accomplishments or failures but do not "exhort the viewer to take a specific electoral action for or against a particular candidate"—would "allow [ ] individuals and organizations to circumvent [FECA's restrictions] simply by omitting from their communications the genre of words and phrases" found in *Buckley*'s famous footnote 52. *Chamber of Commerce v. Moore*, 288 F.3d 187, 195 (5th Cir.) (holding that, under *Buckley*, political advertisement may be regulated constitutionally only if it contains explicit words advocating election or defeat of clearly identified candidate), *cert. denied*, 123 S. Ct. 536 (2002); *see Buckley*, 424 U.S. at 44 n.52 (express words of advocacy include "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'").

BCRA's provisions, to which I now turn, embody the first congressional response to these and other perceived dropped stitches in the federal election law patchwork.

II. A Catalogue of BCRA's Provisions and the Challenges Thereto

BCRA contains 38 sections that, *inter alia*, prohibit corporate and labor disbursements for "electioneering communications," require certain disclosures to the FEC, limit the source and amount of "coordinated expenditures," severely restrict the use of non-federal funds, bar minors from making contributions or donations, condition the lowest unit charge for broadcast ads on their content and increase the Act's existing contribution limits. The plaintiffs in these consolidated actions challenge—on free speech, free association, free press, right-to-petition, vagueness, equal protection and federalism grounds—nearly half of them. The following

sections describe the provisions at issue and catalogue all of the plaintiffs' constitutional challenges to the new law.[31]

A. The Ban on Corporate and Labor Disbursements for "Electioneering Communications"

Section 203 of BCRA amends the Act to prohibit any corporation or labor organization from making any disbursement "for any applicable electioneering communication." BCRA § 203(a); FECA § 316(a), (b)(2); 2 U.S.C. § 441b(a), (b)(2). Under BCRA section 201,

> [t]he term "electioneering communication" means any broadcast, cable, or satellite communication which—(I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
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> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party

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[31] I discuss the statutory provisions here in the same sequence that I analyze them in Part IV. I address the "electioneering communications" provisions of Title II *before* analyzing Title I's restrictions on non-federal funds not simply because several plaintiffs initially raised their constitutional challenges in that order, *see generally* McConnell Compl., but because, under the Supreme Court's jurisprudence, any analysis of restrictions on non-federal funds must take account of the case law (discussed in the context of Title II) holding that issue advocacy cannot constitutionally be restricted. *See* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 199 (1998) (hereinafter Smith, *Hard Realities*) ("[C]lear Supreme Court precedent instructs us that not only is party spending on issue advocacy protected, but so are donations, including corporate donations, to parties to engage in that advocacy."); *see also infra* Part III.C (courts are to apply "exacting" (i.e., strict) scrutiny to campaign finance restrictions on donations to political party committees that make independent expenditures in order to engage in collective issue advocacy).

> that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A)(i); 2 U.S.C. § 434(f)(3)(A)(i). Section 201 provides a fallback definition set to take effect in the event the primary definition is invalidated:

> [T]he term "electioneering communication" [in that event] means any broadcast, cable, or satellite communication which promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for [Federal] office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii). Additionally, section 201 exempts from either definition of electioneering communication

> (i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;
>
> (ii) a communication which constitutes an expenditure or an independent expenditure under [FECA]; [or]
>
> (iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum . . . .

BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B). While section 201 purports to authorize the Commission to exempt by regulation certain communications from either definition, *see* BCRA § 201(a); FECA § 304(f)(3)(B)(iv); 2 U.S.C. § 434(f)(3)(B)(iv), the Commission may not under any circumstances exempt

> a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)[.]

BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii). Because the language of section 101(b) prohibits promulgation of a regulation that retreats from either the primary or fallback definition of electioneering communication, it leaves the Commission no room to adopt a more permissive restriction than that set forth in section 201.[32]

BCRA's ban on corporate and labor disbursements for electioneering communications applies to entities other than unions and for-profit corporations. Section 203(a) extends to *any* incorporated entity and therefore bars both incorporated non-profit organizations (as defined by section 501(c) of the Internal Revenue Code) and incorporated political organizations (as defined by section 527 of the Internal Revenue Code) from making disbursements for electioneering communications.[33] True, section 203(b) provides that

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[32] It should come as no surprise, then, that "[t]he definition of 'electioneering communication' at 11 C.F.R. 100.29(a)"—adopted by the FEC pursuant to BCRA—"largely tracks the definition in BCRA at 2 U.S.C. 434(f)(3)." Electioneering Communications, 67 Fed. Reg. 65,190, 65,191 (October 23, 2002).

> the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) . . . if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence[.]

BCRA § 203(b); FECA § 316(c)(2); 2 U.S.C. § 441b(c)(2). But section 204—referred to by the parties as the "Wellstone Amendment"—eliminates the section 203(b) exception:

> EXCEPTION DOES NOT APPLY.—[FECA section 316(c)(2)] shall not apply in the case of a targeted communication that is made by an organization described in such paragraph. . . . [T]he term "targeted communication" means an electioneering communication (as defined in [FECA] section 304(f)(3)) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.[34]

BCRA § 204; FECA § 316(c)(6)(A), (B); 2 U.S.C. § 441b(c)(6)(A), (B). By definition, an "electioneering communication" is "distributed from a television or radio broadcast station or provider of cable or satellite television service" and either refers to a candidate for President or Vice President or is "targeted to the relevant electorate" of any other candidate. The Wellstone Amendment therefore ensures that no electioneering communication made by an incorporated political organization or non-profit corporation can shelter under section 203(b)—if a communication is an "electioneering communication," it fails *a fortiori* to qualify for the exception.

The *McConnell, NRA, Chamber of Commerce, NAB* and *AFL-CIO* plaintiffs challenge the ban on corporate and labor disbursements for electioneering communications on several interrelated constitutional grounds. First, they allege that the ban abridges their First Amendment rights to engage in core political speech and expressive association by "limiting speech that does not expressly advocate the election or defeat of a clearly identified candidate, either under the original definition or the fall-back definition of 'electioneering communication,'" McConnell Compl. at ¶¶ 48, 62; *see also, e.g.*, McConnell Br. at 44-56; Chamber of Commerce Br. at 4-5; AFL-CIO Br. at 3-11; ACLU Br. at 4-7, 11-16; and by failing to exempt non-profit advocacy organizations like

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[33] Under section 203's "special operating rules,"

> [a] section 501(c)(4) organization that derives amounts from business activities or receives funds from [a national bank, corporation or labor union] shall be considered to have paid for any communication out of [prohibited funds] unless such organization paid for the communication out of a segregated account to which only individuals can contribute . . . .

BCRA § 203(b); FECA § 316(c)(3)(B); 2 U.S.C. § 441b(c)(3)(B). Section 204 makes the "special operating rule" irrelevant because, under that provision, a section 501(c)(4) organization is treated like any other corporation and will be "considered to have paid for any communication out of [prohibited funds]" even where it does *not* receive funds from a national bank, for-profit corporation or labor union.

[34] Under BCRA section 201, a communication is "targeted to the relevant electorate" if it "can be received by 50,000 or more persons . . . in the district the candidate seeks to represent, in the case of a candidate for Representative [or] . . . in the State the candidate seeks to represent, in the case of a candidate for Senator." BCRA § 201(a); FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C).

those identified in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), *see, e.g.*, McConnell Compl. at ¶ 49; *see also, e.g.*, ACLU Br. at 16-17.

Second, these plaintiffs claim that the ban—under either the primary or the fallback definition and even without reference to *Buckley*'s express advocacy test—is unconstitutionally overbroad, void for vagueness and so underinclusive that it fails to serve a compelling governmental interest. *See, e.g.*, McConnell Br. at 56-77; NRA Br. at 14-39.

Third, these plaintiffs assert that the ban violates the First Amendment and the equal protection component of the Fifth Amendment by (1) prohibiting non-media corporations, labor organizations, section 501(c) non-profit organizations and section 527 political organizations from engaging in certain broadcast speech while permitting individuals, unincorporated organizations and corporations that own broadcast stations to engage in the same or similar speech, *see, e.g.*, NRA Br. at 39-48; and (2) prohibiting disbursements for broadcast, satellite and cable communications while permitting disbursements for other communications, including the printed word, *see, e.g.*, NAB Compl. at ¶ 24; McConnell Br. at 77-81.[35]

I consider the constitutionality of the ban on corporate and labor disbursements for electioneering communications in Part IV.A *infra*.

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[35] In a somewhat similar vein, the *Paul* plaintiffs claim that the ban violates the First Amendment's guarantee of a free press by imposing upon them "unconstitutional editorial control through discriminatory . . . economic burdens and penalties" not placed upon certain media organizations. Paul Am. Compl. (Paul Compl.) at ¶ 53; *see id.* at ¶¶ 47, 50; Paul Br. at 17-18, 21-24.

B. Disclosure and Reporting Requirements

Section 201 of BCRA amends the Act to require "[e]very person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year" to file with the FEC, under penalty of perjury and "within 24 hours of each disclosure date,"[36] BCRA § 201(a); FECA § 304(f)(1); 2 U.S.C. § 434(f)(1), a "statement" containing, *inter alia:*

- The identification of the person making the disbursement;
- The principal place of business of the person making the disbursement, if the person is not an individual; The amount of any single disbursement over $200;
- The identification of persons to whom any disbursement over $200 is made;
- The election to which an electioneering communication pertains;
- The candidate identified, or to be identified, in an electioneering communication; and

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[36] Under BCRA section 201, the term "disclosure date" means

> (A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and
>
> (B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

BCRA § 201(a); FECA § 304(f)(4); 2 U.S.C. § 434(f)(4).

- If an organization makes the disbursement from funds donated by individuals, the names and addresses of any individuals donating $1,000 or more.

See BCRA § 201(a); FECA § 304(f)(2); 2 U.S.C. § 434(f)(2).[37] A person must disclose the foregoing information not only when he makes a disbursement for electioneering communications but also when he *contracts* to make the disbursement.[38] *See* BCRA § 201(a); FECA § 304(f)(5); 2 U.S.C. § 434(f)(5).[39]

BCRA section 212 contains disclosure requirements pertaining not to electioneering communications but to "independent expenditures."[40] Amending section 304 of the Act,

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[37] BCRA directs the FCC to "compile and maintain" the information filed with the FEC and to "make such information available to the public on the [FCC's] website." BCRA § 201(b); FECA § 304 note; 2 U.S.C. § 434 note.

[38] Thus, in some circumstances (i.e., if a contract to disburse is not performed), BCRA mandates disclosure about planned disbursements for communications that never air.

[39] Under another Title (Title III), BCRA section 311 similarly amends the Act to provide that "whenever any person . . . makes a disbursement for an electioneering communication," the communication itself (1) if authorized by a candidate or an authorized political committee of a candidate, "shall clearly state that the communication is paid for by [the] person[ ] and authorized by such authorized political committee," BCRA § 311; FECA § 318(a)(2); 2 U.S.C. § 441d(a)(2); or (2) if *not* authorized by a candidate or an authorized political committee of a candidate, "shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee," BCRA § 311; FECA § 318(a)(3); 2 U.S.C. § 441d(a)(3).

[40] As amended by BCRA section 211, the Act states that

> the term "independent expenditure" means an expenditure by a person—
>
> (A) expressly advocating the election or defeat of a clearly identified candidate; and

section 212 requires any person (including any individual) who disburses more than $1,000 in independent expenditures within 20 days of an election, BCRA § 212(a); FECA § 304(g)(1); 2 U.S.C. § 434(g)(1)—or more than $10,000 at any time up to and including the twentieth day before an election, BCRA § 212(a); FECA § 304(g)(2); 2 U.S.C. § 434(g)(2)—to file with the FEC, under penalty of perjury, a "report" specifying:

- The name and address of the recipient of any expenditure(s);
- The date, amount and purpose of the expenditure(s); and
- The name of, and office sought by, the candidate supported or opposed by the expenditure(s).

See BCRA § 212(a); FECA § 304(g)(3)(B), (b)(6)(B)(iii); 2 U.S.C. § 434(g)(3)(B), (b)(6)(B)(iii). A report on an independent expenditure made within 20 days of an election must be filed with the FEC within 24 hours of the expenditure; a report on an independent expenditure made at any time up to and including the twentieth day before an election must be made within 48 hours of the expenditure. *See* BCRA § 212(a); FECA § 304(g)(1), (2); 2 U.S.C. § 434(g)(1), (2). Just as a contract to make a disbursement for an electioneering communication triggers the pertinent disclosure requirements, *see* BCRA § 201(a); FECA § 304(f)(5);

> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

BCRA § 211; FECA § 301(17); 2 U.S.C. § 431(17).

2 U.S.C. § 434(f)(5), so does a contract to make an independent expenditure, *see* BCRA § 212(a); FECA § 304(g)(1), (2); 2 U.S.C. § 434(g)(1), (2).[41]

A final cluster of new disclosure rules under challenge is found in Title V of BCRA. Section 504, which amends section 315 of the Federal Communications Act of 1934 (FCA), mandates disclosure of certain broadcast records. It requires broadcast licensees to "maintain, and make available for public inspection, a complete record" of any "request" of any person "to purchase broadcast time" for communications "relating to any political matter of national importance."[42] BCRA § 504; FCA § 315(e)(1); 47 U.S.C. § 315(e)(1). Each record maintained must include the following information:

- Whether the request to purchase broadcast time is accepted or rejected by the licensee;[43]
- The rate charged for the broadcast time;
- The date on which and the time at which the communication is to be aired;

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[41] Thus, in some circumstances (i.e., if a contract to make expenditures is not performed), BCRA mandates disclosure about expenditures that are never made. *Cf. supra* note 38.

[42] Under section 504, a "political matter of national importance" includes any matter regarding "a legally qualified candidate," "any election to Federal office" or "a national legislative issue of public importance." BCRA § 504; FCA § 315(e)(1)(B); 47 U.S.C. § 315(e)(1)(B).

[43] Because section 504's requirements are triggered not when the communication in question is broadcast but instead when any person makes "a *request* to purchase broadcast time," BCRA § 504; FCA § 315(e)(1); 47 U.S.C. § 315(e)(1) (emphasis added), BCRA in some circumstances (i.e., if a request is denied) mandates disclosure about communications that never air. *Cf. supra* notes 38, 41.

- The name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers or the issue to which the communication refers;
- In the case of a request made by or on behalf of a candidate, the name of the candidate, his authorized committee and the treasurer of that committee; and
- In the case of any other request, the name of the person seeking to purchase the time, the name, address and phone number of "a contact person for such person" and a list of the chief executive officers or members of the board of directors of the person (if the person is not an individual).

BCRA § 504; FCA § 315(e)(2); 47 U.S.C. § 315(e)(2).

The *McConnell, NRA, Chamber of Commerce, NAB and AFL-CIO* plaintiffs challenge BCRA's disclosure and reporting requirements on three First Amendment grounds. First, they allege that the provisions mandating detailed statements about disbursements for electioneering communications, *see* BCRA §§ 201 and 311, violate their First Amendment rights to free political expression and association by restricting in an overbroad, vague and underinclusive fashion their airing of communications that do not contain express advocacy. *See, e.g.*, McConnell Br. at 44-77; NRA Br. at 48-50; Chamber of Commerce Br. at 18-20; ACLU Br. at 11-19.

Second, these plaintiffs claim that the reporting requirements of BCRA section 212, pertaining to independent expenditures, impermissibly burden their First Amendment rights to free political expression and association by requiring "*advance* disclosures of planned and prospective communications, including communications that ultimately are never made." AFL-CIO Compl. at ¶ 35 (emphasis added); *see, e.g.*, AFL-CIO Br. at 14-17.

Third, these plaintiffs assert that the disclosure requirement of section 504, pertaining to requests to purchase broadcast time, burdens their First Amendment rights to engage in political expression and association by, *inter alia*, imposing vague and overbroad recordkeeping requirements that "lack[ ] any rational relationship to a legitimate governmental objective." McConnell Br. at 99; *see, e.g., id.* at 98-100; AFL-CIO Br. at 18-20.

I consider the constitutionality of the disclosure and reporting provisions in Part IV.B *infra*.

C. Limits on "Coordinated Expenditures"

BCRA section 202 amends the Act to provide that if

> (i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of [FECA] section 304(f)(3)); and
>
> (ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal [sic], State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

then the disbursement or contract to disburse "shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party." BCRA § 202(2); FECA § 315(a)(7)(C); 2 U.S.C. § 441a(a)(7)(C). By treating a "coordinated" disbursement for an electioneering communication as a "contribution" to the supported candidate, section 202 subjects it to the Act's source-and-amount limitations.[44] Moreover, as amended by BCRA,

the Act equates "cooperation," "consultation," "concert" and "suggestion" with "coordinat[ion]''—a disbursement made in any such fashion will be treated as a contribution. *See* BCRA § 214(a); FECA § 315(a)(7)(B); 2 U.S.C. § 441a(a)(7)(B). BCRA directs the FEC to define "coordination" broadly; section 214, which repeals the Commission's existing regulations on coordinated communications, provides that in prescribing the prerequisites for coordination, the new regulations "shall not require agreement or formal collaboration to establish coordination" between a candidate (or political party committee) and a person making a disbursement.[45] BCRA § 214(c); FECA § 315(a)(7) note; 2 U.S.C. § 441a(a)(7) note.

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[44] For a recap of FECA's major source-and-amount limitations, *see supra* Part I, especially the text accompanying notes 25-29. It bears emphasizing that because any corporation or labor organization is prohibited from making a "contribution or expenditure in connection with any election" for federal office, 2 U.S.C. § 441b(a), it is likewise banned under BCRA from making "coordinated" disbursements.

[45] In accordance with that mandate, the FEC on January 3, 2003 promulgated a final rule on "coordinated expenditures." *See generally* Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003); *see also infra* Finding 57 at pages 129-32. Not surprisingly, the rule provides that a disbursement for an electioneering communication is "coordinated" with a candidate or political party committee—"whether or not there is agreement or formal collaboration" between the disburser and the candidate or committee—if (1) "[t]he communication is created, produced, or distributed at the request or suggestion" of the candidate or committee; (2) the candidate or committee "is materially involved in decisions regarding" the communication; or (3) "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication" between the disburser and the candidate or committee. 68 Fed. Reg. at 453-55. Under the rule, "[a]greement means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination" and "[f]ormal collaboration means planned, or systematically organized, work on the communication." *Id.* at 455 (emphasis omitted).

The other "coordinated expenditure" provision at issue, BCRA section 213, amends the Act to provide that

> [o]n or after the date on which a political party nominates a candidate, no committee of the political party may make—
>
> (i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in [FECA] section 301(17)) with respect to the candidate during the election cycle; or
>
> (ii) any independent expenditure (as defined in [FECA] section 301(17)) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle. BCRA § 213; FECA § 315(d)(4)(A); 2 U.S.C. § 441a(d)(4)(A).

In other words, section 213 compels a political party committee, at the time the party's candidate is nominated, to make a binding choice between independent expenditures and "coordinated" disbursements in support of the candidate. In addition, "all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee" under the provision. BCRA § 213; FECA § 315(d)(4)(B); 2 U.S.C. § 441a(d)(4)(B). That is, regardless whether any of the related political committees has any control over, influence on or knowledge of the disbursement decisions of the others, the first disbursement decision made on behalf of the "single political committee" binds the other component committees.

The *McConnell, Chamber of Commerce, AFL-CIO, RNC* and *CDP* plaintiffs challenge BCRA's "coordinated expenditure" provisions primarily on two constitutional grounds. First, they allege that sections 202 and 214 infringe their First Amendment rights to free speech, association and petition for redress of grievances by defining coordination too broadly. *See, e.g.*, McConnell Br. at 82-85; Chamber of Commerce Br. at 6-18; AFL-CIO Br. at 12-14; ACLU Br. at 7-9, 19-20.

Second, the political party plaintiffs claim that the binding choice provision, section 213, burdens their First Amendment freedoms of speech, association and petition by requiring them to forgo "future coordinated expenditures as the 'price' of exercising their constitutional right to make independent expenditures." RNC Compl. at ¶ 60; *see, e.g.*, McConnell Br. at 85-88; RNC Br. at 72; CDP Br. at 47-49.

I consider the constitutionality of the limits on "coordinated expenditures" in Part IV.C *infra*.

D. Restrictions on Non-Federal Funds

The most publicized provision of BCRA, section 101, is also the statute's lengthiest and most complex. Section 101, in a nutshell, curtails political party committees' use of non-federal funds—funds not subject to FECA's source-and-amount limitations, *see supra* note 30 and accompanying text—in order to reduce such funds' allegedly corrupting influence on federal officeholders. In the following paragraphs, I discuss in turn (and, for the sake of precision, reproduce at length) the provision's major components.

Adding section 323 ("Soft Money of Political Parties") to the Act, section 101 first prohibits, in FECA section 323(a), any national political party committee from soliciting, receiving, directing or spending non-federal funds for any purpose whatsoever:

> A national committee of a political party (including a national congressional campaign committee of a political

> party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

BCRA § 101(a); FECA § 323(a)(1); 2 U.S.C. § 441i(a)(1). The ban, which has no exceptions, applies broadly to

> any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

BCRA § 101(a); FECA § 323(a)(2); 2 U.S.C. § 441i(a)(2).

Adding section 323(b) to the Act, BCRA further prohibits any state, district or local political party committee from spending or disbursing non-federal funds for any "Federal election activity":

> [A]n amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

BCRA § 101(a); FECA § 323(b)(1); 2 U.S.C. § 441i(b)(1). "Federal election activity" is defined to include:

> (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

> (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);
>
> (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or
>
> (iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

BCRA § 101(b); FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). The definition of "Federal election activity" *excludes* any "amount expended or disbursed by a State, district, or local committee of a political party" for

> (i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);
>
> (ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);
>
> (iii) the costs of a State, district, or local political convention; and

> (iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

BCRA § 101(b); FECA § 301(20)(B); 2 U.S.C. § 431(20)(B). At paragraph (2)—commonly known as the "Levin Amendment"—section 323(b) provides a narrow exception to the general rule against state-party spending of non-federal funds on "Federal election activity." The Levin Amendment allows state and local parties to use an FEC-specified amount of federally-regulated "Levin funds" for voter registration, voter identification, "generic campaign activity" and get-out-the-vote activity as long as

> (i) [such] activity does not refer to a clearly identified candidate for Federal office;
>
> (ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;
>
> (iii) . . . *no person . . . donate[s] more than $10,000* to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and
>
> (iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement . . . .

BCRA § 101(a); FECA § 323(b)(2)(B); 2 U.S.C. § 441i(b)(2)(B) (emphasis added); *see* RNC Br. at 22-23 (discussing Levin Amendment's conditions, including "homegrown" funds requirement of subsection (iv), which prohibits a state party committee from receiving transferred funds from a national party committee or another state or local committee of a political party).

At new FECA section 323(c), BCRA requires every political party committee—national, state or local—to use federal funds to raise any money that will be used, in turn, on "Federal election activity." BCRA § 101(a); FECA § 323(c); 2 U.S.C. § 441i(c).

Under new FECA section 323(d), BCRA prohibits any political party committee—national, state or local—or its agents from "solicit[ing] any funds for, or mak[ing] or direct[ing] any donations to" (1) any organization that is described in section 501(c) of the Internal Revenue Code of 1986, is exempt from taxation and "makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (2) any organization (other than a political committee) that is described in section 527 of such Code. BCRA § 101(a); FECA § 323(d); 2 U.S.C. § 441i(d).

At new FECA section 323(e), the statute prohibits any federal candidate or officeholder (or any agent of a federal candidate or officeholder) from soliciting, receiving, directing, transferring or spending non-federal funds "in connection with an election for Federal office, including funds for any Federal election activity."[46] BCRA § 101(a); FECA § 323(e)(1)(A); 2 U.S.C. § 441i(e)(1)(A).

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[46] Notwithstanding the general ban on any federal candidate or officeholder's connection with non-federal funds, such a candidate or officeholder may "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party," BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3), or "make a general solicitation of funds on behalf of any organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation . . . where such solicitation does not specify how the funds will or should be spent," BCRA § 101(a); FECA § 323(e)(4)(A); 2 U.S.C. § 441i(e)(4)(A); *see also* BCRA § 101(a); FECA § 323(e)(4)(B); 2 U.S.C. § 441i(e)(4)(B) (permitting certain other solicitations).

Finally, at new FECA section 323(f), the statute bars any *state* candidate or officeholder (or any agent of a state candidate or officeholder) from spending any non-federal funds for

> a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).

BCRA § 101(a); FECA §§ 323(f)(1), 301(20)(A)(iii); 2 U.S.C. §§ 441i(f)(1), 431(20)(A)(iii).

The *McConnell*, *RNC* and *CDP* plaintiffs challenge BCRA's restrictions on non- federal funds on three grounds. First, they allege that the restrictions "intrud[e] upon the sovereign power of the [S]tates to regulate the financing of their own elections" and thereby violate the Tenth Amendment to the United States Constitution. RNC Compl. at ¶ 39; *see, e.g.*, McConnell Br. at 9-25 (challenging restrictions on their face and as applied to Libertarian National Committee); RNC Br. at 25-37; CDP Br. at 20-27.

Second, these plaintiffs assert that section 101 violates their rights to engage in free speech and expressive association by, *inter alia:* preventing "the funding of core political speech that does not expressly advocate the election or defeat of a clearly identified federal candidate," RNC Compl. at ¶ 48, restricting "the amount of speech in which political parties are able to engage," *id.*, preventing political parties from "pooling the resources of party members and contributors in support of campaigns for office," McConnell Compl. at ¶ 100, and precluding them from raising funds for or accepting funds from "like-minded party committees and non-party organizations and individuals," *id. See, e.g.*, McConnell Br. at 25-40; RNC Br. at 37-56; CDP Br. at 27-46.

Third, these plaintiffs charge that section 101 denies them equal protection (and violates their First Amendment rights) to the extent that it subjects them to speech restrictions not placed upon similarly situated entities.[47] *See, e.g.*, McConnell Br. at 40-43; RNC Br. at 57-70.

I consider the constitutionality of section 101 in Part IV.D *infra*.

E. The Ban on Minors' Contributions and Donations

In contrast to most of BCRA's provisions, section 318 is quite simple—it prohibits any person under the age of 18 from making (1) any contribution whatsoever to any federal candidate; or (2) any contribution or non-federal "donation" to any political party committee. *See* BCRA § 318; FECA § 324; 2 U.S.C. § 441k ("An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party."). Period.

The *McConnell* and *Echols* plaintiffs contend that such a "sweeping restriction" on an entire class of expressive and associational activity by minors cannot be upheld under the First Amendment's guarantees or the Fifth Amendment's equal protection component.[48] *E.g.*, Echols Am. Compl. at ¶¶ 55, 57, 62, 65; *see also, e.g.*, McConnell Compl. at ¶ 93; McConnell Br. at 91-95. I address this challenge in Part IV.E *infra*.

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[47] Additionally, the *Thompson* plaintiffs contend that "[a]s Federal office holders and candidates" they are "unfairly prejudiced" by section 101—in violation of their rights to free speech, association and equal protection—to the extent that the provision has a "disproportionate effect on minority communities" in their districts. Thompson Compl. at ¶ 41; *see* Thompson Br. at 1-12. And the *Paul* plaintiffs claim that section 101 abridges their freedom of the press "by exercising editorial control of their press activities." *E.g.*, Paul Br. at 18 (capitalization altered).

F. The Conditions on the Lowest Unit Broadcast Charge

Until BCRA's enactment, section 315 of the FCA required licensed broadcast stations to provide a candidate for public office—during the 45 days before a primary election and the 60 days before a general or special election—the benefit of "the lowest unit charge of the station" on any broadcast advertisement "in connection with" the candidate's campaign. FCA § 315(b); 47 U.S.C. § 315(b). BCRA section 305, however, amends the FCA to deny a candidate the lowest unit charge for television or radio broadcast advertisements unless the candidate "provides written certification to the broadcast station that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office." BCRA § 305(a)(3); FCA § 315(b)(2)(A); 47 U.S.C. § 315(b)(2)(A). If the candidate *does* make a direct reference to another candidate, he can nonetheless meet the content requirements for the lowest unit charge if, in the case of a television broadcast, at the end of such broadcast there appears simultaneously, for a period no less than 4 seconds—

> (i) a clearly identifiable photographic or similar image of the candidate; and
>
> (ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast[;] or if, in the case of a radio broadcast, the broadcast includes a personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast.

BCRA § 305(a)(3); FCA § 315(b)(2)(C), (D); 47 U.S.C. § 315(b)(2)(C), (D).

The *McConnell* plaintiffs contend that BCRA section 305 violates the First Amendment's guarantee of free speech by "conditioning the cost of advertisements on their content." McConnell Compl. at ¶ 96; *see* McConnell Br. at 89-91. I discuss section 305 in Part IV.F *infra*.

G. Increased Contribution Limits

BCRA contains two types of provisions that increase the contribution limits of the Act. The first type raises the "hard money" ceilings of the Act by permitting individual donors to contribute greater amounts to candidates and national and state political party committees. The second type permits a candidate for either house of the United States Congress to accept and spend contributions in excess of otherwise applicable limits if his opponent expends a substantial amount in personal funds. I discuss these two types of provisions, and the plaintiffs' challenges thereto, in turn.

1. General Increases

BCRA section 307 raises the Act's limit on any individual's contribution to any given candidate (or his authorized political committee) from $1,000 to $2,000.[49] *See* BCRA § 307(a)(1); FECA § 315(a)(1)(A); 2 U.S.C. § 441a(a)(1)(A). It also changes the aggregate limit an individual contributor may give to all candidates from $25,000 during any calendar year to $37,500 over a two-year period and changes the aggregate limit an individual contributor may give to all political party committees to $57,500 over a two-year period.[50] *See* BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3). Together with BCRA section 102, section 307 increases as well the Act's limits on an individual's contributions to a national political party committee (from $20,000 to $25,000 per calendar year) and to a state political party committee (from $5,000 to $10,000 per calendar year). *See* BCRA §§ 102, 307(a)(2); FECA § 315(a)(1)(B), (D); 2 U.S.C. § 441a(a)(1)(B), (D). The provisions leave in place, however, the Act's $5,000 limit on an individual's contributions to "any other political committee." *See* 2 U.S.C. § 441a(a)(1)(C). Finally, BCRA section 307 indexes for inflation all but the $10,000 limit on any individual's contributions to a state political party committee and the $5,000 cap on any individual's contributions to "any other political committee."[51]

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[48] Similarly, one of the *Thompson* plaintiffs alleges that section 318 violates his First and Fifth Amendment rights to the extent that it prevents him from "protect[ing] the rights" of one of his minor constituents. Thompson Compl. at ¶ 48; *see* Thompson Br. at 13-18.

[49] The Act now provides that "no person shall make contributions . . . to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000." 2 U.S.C. § 441a(a)(1)(A).

The *Adams* and *CDP* plaintiffs challenge BCRA's general contribution increases on rather novel constitutional grounds. The *Adams* plaintiffs charge that the higher ceilings violate their Fifth Amendment right to equal protection by

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[50] The Act now provides that

> [d]uring the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—
>
> (A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;
>
> (B) $37,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

2 U.S.C. § 441a(a)(3).

[51] The Act's indexing guidelines, as amended by BCRA section 307(d), appear at 2 U.S.C. § 441a(c).

"precluding equal participation in the political process on the basis of economic status." Adams Compl. at ¶ 60; *see* Adams Br. at 9-18. The *CDP* plaintiffs allege that to the extent BCRA indexes for inflation the limits on contributions to national party committees and federal candidates but does not index the limits on contributions to state and local party committees, it "severely erode[s]" their ability to engage in political communications and thus deprives them of equal protection.[52] CDP Compl. at ¶ 105; *see* CDP Br. at 50.

2. The "Millionaire Provisions"

BCRA section 304 amends the Act to permit a candidate for the United States Senate to accept and spend individual contributions in excess of otherwise applicable "hard money" limits in order "to allow response to expenditures from personal funds" of a wealthy opponent. BCRA § 304(a)(2); FECA § 315(i); 2 U.S.C. § 441a(i) (capitalization altered). For example, if a candidate's opponent spends over two but less than four times a specified "threshold amount"[53] in

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[52] In a similar vein, the *Paul* plaintiffs assert that by "failing to raise . . . and to index [contribution] limits with respect to political committees functioning independently from candidates, their authorized campaign committees, or political parties," BCRA violates the First Amendment's guarantee of a free press. Paul Compl. at ¶ 57; *see* Paul Br. at 27 n.11.

[53] The subparagraph pertaining to "threshold amount" provides as follows:

> (i) STATE-BY-STATE COMPETITIVE AND FAIR CAMPAIGN FORMULA.—In this subsection, the threshold amount . . . is an amount equal to the sum of—
>
> (I) $150,000; and
>
> (II) $0.04 multiplied by the voting age population.
>
> (ii) VOTING AGE POPULATION.--In this subparagraph, the term "voting age population" means in the case of a candidate for the office of Senator, the voting age population of the State of the candidate (as certified under [FECA] section 315(e)).

BCRA § 304(a)(2); FECA § 315(i)(1)(B); 2 U.S.C. § 441a(i)(1)(B).

"opposition personal funds,"[54] the candidate may accept individual contributions of $6,000 per donor per election. *See* BCRA § 304(a)(2); FECA § 315(i)(1)(C)(i); 2 U.S.C. § 441a(i)(1)(C)(i) ("[I]f the opposition personal funds amount is over . . . 2 times the threshold amount, but not over 4 times that amount . . . the increased limit shall be 3 times the applicable limit . . . ."). If the opponent spends from four to ten times the threshold amount in personal funds, the candidate may accept individual contributions of $12,000 per donor per election. *See* BCRA § 304(a)(2); FECA § 315(i)(1)(C)(ii); 2 U.S.C. § 441a(i)(1)(C)(ii). And if the opponent spends over ten times the threshold amount in personal funds, not only may the candidate accept individual contributions of $12,000 per donor per election but also, significantly, the restrictions on any political party committee's spending "in coordination with" the candidate are lifted. *See* BCRA § 304(a)(2); FECA § 315(i)(1)(C)(iii); 2 U.S.C. § 441a(i)(1)(C)(iii).

Likewise, BCRA section 319 amends and supplements the Act to permit a candidate for the United States House of Representatives to accept and spend individual contributions of $6,000 per donor per election if his opponent spends over $350,000 in personal funds. *See* BCRA § 319(a); FECA § 315A(a)(1)(A); 2 U.S.C. § 441a-1(a)(1)(A). Again, significantly, in that same circumstance the restrictions on any political party committee's spending "in coordination with" the candidate are lifted. *See* BCRA § 319(a); FECA § 315A(a)(1)(C); 2 U.S.C. § 441a-1(a)(1)(C).

Finally, BCRA sections 304 and 319 impose reporting requirements on Senate and House candidates who intend to expend substantial personal funds in support of their candidacy. Section 304 requires a Senate candidate to file with his opponent(s) and the FEC—within 15 days of becoming a candidate—"a declaration stating the total amount of expenditures from personal funds that [he] intends to make, or to obligate to make, with respect to the election that will exceed the State-by-State competitive and fair campaign formula." BCRA § 304(b); FECA § 304(a)(6)(B)(ii); 2 U.S.C. § 434(a)(6)(B)(ii). It also requires the candidate to file with his opponent(s) and the FEC a notification if and when he spends more than twice the threshold amount and, thereafter, each and every time he spends more than $10,000 in additional personal funds. *See* BCRA § 304(b); FECA § 304(a)(6)(B)(iii), (iv); 2 U.S.C. § 434(a)(6)(B)(iii), (iv). Section 319 imposes similar requirements on a candidate for the House of Representatives. *See* BCRA § 319(a); FECA § 315A(b)(1); 2 U.S.C. § 441a-1(b)(1).

The *RNC* and *Adams* plaintiffs challenge BCRA's "millionaire provisions" on separate constitutional grounds. The *RNC* plaintiffs claim that the provisions "discriminate among similarly situated federal candidates and thereby violate the equal protection component of the Fifth Amendment." RNC Br. at 73 (capitalization altered); *see id.* at 73-75; RNC

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[54] The "opposition personal funds" amount is "an amount equal to the excess (if any)" of

> (i) the greatest aggregate amount of expenditures from personal funds (as defined in [FECA] section 304(a)(6)(B)) that an opposing candidate in the same election makes; over
>
> (ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

BCRA § 304(a)(2); FECA § 315(i)(1)(D); 2 U.S.C. § 441a(i)(1)(D); *see* BCRA § 316; FECA § 315(i)(1)(E); 2 U.S.C. § 441a(i)(1)(E) ("aggregate amount of expenditures from personal funds" includes "gross receipts advantage" of candidate's authorized committee). In turn, an "expenditure from personal funds" is

> (I) an expenditure made by a candidate using personal funds; and
>
> (II) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

BCRA § 304(b)(2); FECA § 304(a)(6)(B)(i); 2 U.S.C. § 434(a)(6)(B)(i).

Compl. at ¶ 74. The *Adams* plaintiffs assert that they are denied equal protection as well, to the extent that the millionaire provisions "preclud[e] [their] equal participation in the political process on the basis of economic status." Adams Compl. at ¶ 62; *see* Adams Br. at 9-18.

I discuss the two types of increased contribution limits in Part IV.G *infra*.

III. *In Limine* Matters

Before reaching the merits of the plaintiffs' claims, I first attend to important preliminary matters.

A. Procedural Posture

In these consolidated actions, the panel is asked to declare most of BCRA unconstitutional and to enjoin the defendants and their agents from enforcing, executing or otherwise applying several of its provisions to anyone. *See, e.g.*, McConnell Compl. at 51. In other words, the plaintiffs bring a facial challenge to the statute. As the Supreme Court emphasized in *United States v. Salerno*, 481 U.S. 739 (1987), a facial challenge is "the most difficult challenge to mount successfully" because, in the usual case, "the challenger must establish that no set of circumstances exists under which the [statute] would be valid," *id.* at 745. The case before us, however, is not the usual case. Where, as here, First Amendment freedoms are at stake, a facial challenge will succeed if there exists "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (citing, *inter alia, Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)); *see Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973) (facial invalidation "is, manifestly, strong medicine" that will be invoked only if statute's provisions are substantially overbroad when "judged in relation to the statute's plainly legitimate sweep"); *see also Salerno*, 481 U.S. at 745 (recognizing First Amendment overbreadth doctrine as exception to general "no- set-of-circumstances" principle). In my view, all of the challenged provisions of BCRA—except the one discussed in Part IV.D.4 (which I believe must be sustained) and those discussed in Parts IV.F and IV.G (as to which I would pass no judgment)—are substantially overbroad when "judged in relation to [their] plainly legitimate sweep" and are therefore facially unconstitutional. *Broadrick*, 413 U.S. at 615.

Because my view that most of BCRA is unconstitutional rests squarely and solely on First Amendment free association and free speech grounds, I would not reach the merits of the plaintiffs' federalism, free press or equal protection claims except with respect to the provision discussed in Part IV.D.4. Thoroughgoing discussion of these subjects would further complicate an already difficult task; more importantly, it would be unnecessary to the disposition of these actions and, as such, would fly in the face of the "venerable principle of [federal] adjudicatory processes," *Webster v. Reproductive Health Services*, 492 U.S. 490, 525 (1989) (O'Connor, J., concurring in part and concurring in judgment), to abstain from "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it," *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quotation omitted).

B. Alternative Findings of Fact

Before proceeding to the facts, I emphasize the Supreme Court's teaching that "casual statements from the floor debates" in the Congress—not to mention "post-legislation legislative history" like that constructed during discovery in these actions—merit little evidentiary weight. *See United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in judgment) ("post- legislation legislative history" is an "oxymoron"); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974) ("[P]ost-passage remarks of legislators, however explicit, cannot serve to change the [expressed] legislative intent of Congress. . . ."). And while the Congress's factual findings and committee reports are entitled to somewhat greater weight, *see Garcia v. United States*, 469 U.S. 70, 76 (1984) (Court "eschew[s] reliance on the passing comments of one Member" and has "stated that Committee Reports are more authoritative than comments from the floor" (quotations omitted)); *but cf. Int'l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 715, 718 (D.C. Cir. 1987) (Buckley, J., concurring) (because "Congress is a political as well as a legislative body, and [because] its members will put the privileges and facilities of their respective chambers to political as well as legislative uses," "not every utterance to be found [even] in committee reports . . . may be assumed to represent statutory gold"), such evidentiary sources are negligible or non-existent in the case of BCRA. I point out as well the Court's reminder that "[t]he justification" for a restriction on constitutionally protected liberties "must be genuine, not hypothesized or invented *post hoc* in response to litigation." United States v. Virginia, 518 U.S. 515, 533 (1996). Finally, I would note that I am in substantial agreement with the plaintiffs' observation that, especially with respect to Title II, their facial challenges to BCRA's provisions are based upon established First Amendment jurisprudence in the campaign finance realm. *See, e.g.*, McConnell Br. at 44 ("[T]his [c]ourt need not go beyond *Buckley v. Valeo* to determine that Title II cannot possibly stand under the First Amendment."). Accordingly, I believe the constitutional challenges discussed in Part IV can be resolved even without extensive reference to the record. Nonetheless, in recognition of the fact that the Supreme Court may see things differently and may indeed revisit established jurisprudence, I offer the following set of findings—as an

alternative to those of the majority—based on my view of the record as a whole.[55]

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[55] To be clear, I do not join in the *per curiam* statement of facts, nor do I join the factual findings set forth in the other opinions. This does not mean, however, that the filing of an alternative set of findings is necessarily for naught. While the Supreme Court made clear as recently as two years ago that it will review a three-judge district court's factual findings for "clear error" only, it reversed the three-judge court's findings in that case because "on the entire evidence" it was "left with the definite and firm conviction that a mistake ha[d] been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quotation omitted).

The majority's view of the factual record—not to mention the record's legal significance—is quite different from mine, leaving me "with the definite and firm conviction that a mistake has been committed" with respect to several of its findings. *See, e.g.*, Memo Op., CKK, Finding 2.13 ("[I]t is entirely possible to distinguish pure issue advocacy from candidate-centered issue advocacy . . . ."); Memo. Op., RJL, Finding 292 ("[G]enuine issue advertisements are less likely to refer to a federal candidate by name."); *see also, e.g.*, Memo. Op., CKK, Findings 1.82-1.83 ("The immense quantity of testimonial and documentary evidence in the record demonstrates that large nonfederal contributions provide donors special access to influence federal lawmakers. . . . [I]t is clear that large donations, particularly unlimited nonfederal contributions, have corrupted the political system. The record [also] demonstrates that . . . [l]arge donations made by groups or persons with an interest in pending legislative activity . . . create an appearance of corruption."); Memo. Op., RJL, Finding 250 ("The defendants have offered substantial evidence that the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of . . . influence with . . . the officeholders of that party . . . ."). If the Supreme Court concludes as it did in *Easley* that the majority's "key findings are mistaken," *Easley*, 532 U.S. at 243, it may be helpful for the Court to have an alternative set of findings that reads as a cohesive whole. I note that several factors common to *Easley* and the consolidated actions before us suggest the Court may be more willing here than in the normal case to undertake an "extensive review" of the record and to set aside findings with which it disagrees:

> Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not "lightly overturn" the concurrent

1. The Litigants

As to the litigants in the consolidated actions before us,[56] I would find that:

1. Senator Mitch McConnell is the senior United States Senator from Kentucky and is a member of the Republican Party. He has long been active in the Republican Party at the national, state and local levels. He was first elected in 1984 and was reelected in 1990, 1996 and 2002. *See* McConnell Aff. at 1-3.

2. The National Rifle Association (NRA) is a non-partisan, tax-exempt organization governed by section 501(c)(4) of the Internal Revenue Code. It is dedicated

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> findings of the two lower courts. *E.g., Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972). But in this instance there is no intermediate court, and we are the only court of review. Moreover, the trial here at issue was not lengthy and the key evidence consisted primarily of documents and expert testimony. . . . Accordingly, we find that an extensive review of the District Court's findings, for clear error, is warranted. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500-501 (1984).

Easley, 532 U.S. at 242-43. I note as well that an additional factor, absent in *Easley*, may justify an extensive review of the record here—the factfinders are not of one mind. *Cf. Wright v. Rockefeller*, 376 U.S. 52, 68 (1964) (Goldberg, J., dissenting) ("My difficulty with [the Court's] conclusion is that the record does not support [its] treatment of the District Court's finding. The District Court was a three-judge court and the three judges did not agree upon . . . express findings of fact.").

[56] I believe that we lack jurisdiction over the *Adams* plaintiffs' claims. *See infra* Part IV.G. Accordingly, I would make no findings with respect to any of the *Adams* plaintiffs. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869))). Moreover, in the interest of avoiding unnecessary or cumulative findings, I would not make findings of fact with respect to each and every litigant over whose claims the court *does* have jurisdiction.

primarily to defending the rights its members believe are guaranteed by the Second Amendment to the United States Constitution; its principal function is to disseminate information regarding those rights. The NRA has approximately four million members and represents their views on legislative and public policy issues before federal, state and local officials and the general public. *See* LaPierre[57] Decl. at 1; NRA App. at 106 (setting forth NRA bylaws).

3. The NRA Political Victory Fund (NRA PVF) is a political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of the NRA pursuant to 2 U.S.C. § 441b(b).

4. Bill Pryor is the current Alabama Attorney General and was a candidate for reelection as Alabama Attorney General in 2002. *See* Pryor Decl. at 1.

5. The Libertarian National Committee, Inc. (LNC) is the governing body of the Libertarian Party at the national level. The LNC is a non-profit organization incorporated in the District of Columbia and is governed by section 527 of the Internal Revenue Code. The LNC advocates the principle that all individuals have the right to live in whatever manner they choose so long as they do not forcibly interfere with the right of others to do the same. *See* Dasbach[58] Decl. at 2.

6. The American Civil Liberties Union (ACLU) is a tax-exempt organization incorporated in the District of Columbia and is governed by section 501(c)(4) of the

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[57] Wayne LaPierre is the Executive Vice President of the NRA and is responsible for the organization's operations. *See* LaPierre Decl. at 1.

[58] Stephen Dasbach is Senior Advisor and former National Chairman of the LNC. *See* Dasbach Decl. at 1.

Internal Revenue Code. The ACLU is a nationwide, non-profit, non-partisan organization with approximately 300,000 members "dedicated to the principles of liberty and equality embodied in the Constitution." Romero[59] Decl. at 1.

7. Club for Growth, Inc. is a nationwide membership organization governed by section 527 of the Internal Revenue Code. It is dedicated to advancing, *inter alia*, school choice, overall reduction in government spending, personal investment of social security, tax rate reduction, capital gains tax reduction and estate tax repeal. *See* Keating[60] Decl. at 2.

8. The National Right to Life Committee (NRLC) is a tax-exempt organization incorporated in the District of Columbia and is governed by section 501(c)(4) of the Internal Revenue Code. The NRLC is a nationwide, non-profit, non- partisan organization with approximately 3,000 local chapters and fifty state affiliates dedicated to "promoting respect for the worth and dignity of all human life from conception to natural death." O'Steen[61] Decl. at 1.

9. The National Right to Life Educational Trust Fund (NRL ETF) is an organization governed by section 501(c)(3) of the Internal Revenue Code. NRL ETF sponsors educational advertising and develops materials detailing "fetal development, abortion's impact on America, and . . . euthanasia." O'Steen Decl. at 3.

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[59] Anthony Romero is the Executive Director of the ACLU and is responsible for the organization's operations, including its legislative activities. *See* Romero Decl. at 1.

[60] David Keating is the Executive Director of Club for Growth and is familiar with the day-to-day operation of the organization. *See* Keating Decl. at 1.

[61] David O'Steen is the Executive Director of the NRLC and is familiar with the day-to-day operation of the organization. *See* O'Steen Decl. at 1.

10. The National Right to Life Political Action Committee is a political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of the NRLC pursuant to 2 U.S.C. § 441b(b). *See* O'Steen Decl. at 5.

11. Thomas E. McInerney is a U.S. citizen, a Registered voter in the State of New York and a member of and contributor to various Republican Party organizations and committees at the national, state and local levels. *See* McInerney Aff. at 1.

12. Barret Austin O'Brock is a U.S. citizen and a resident of the State of Louisiana. He is 14 years of age and intends to make contributions to federal candidates in future elections, including the 2004 election. *See* O'Brock Decl. at 1.

13. Emily Echols, Hannah and Isaac McDow, Zachary White, Daniel Solid and Jessica Mitchell are U.S. citizens who range in age from 12 to 16. They intend to seek out and contribute to federal candidates "who represent their views and beliefs on important questions like the right to life of children before birth, and on the size of government." Echols Pls.' Proposed Findings of Fact at 11.

14. The U.S. Chamber of Commerce is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code. It is the world's largest not- for-profit business federation, representing over 3,000,000 businesses and business associations. *See* Josten[62] Direct Test. at 1.

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[62] R. Bruce Josten is Executive Vice President for Government Affairs of the U.S. Chamber of Commerce and has supervisory responsibility for the organization's government affairs activities. *See* Josten Direct Test. at 1.

15. The U.S. Chamber Political Action Committee (U.S. Chamber PAC) is a political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of the Chamber of Commerce pursuant to 2 U.S.C. § 441b(b). U.S. Chamber PAC is funded by contributions voluntarily made by individual Chamber executives, administrative employees, members and their families. *See* Josten Direct Test. at 5.

16. The National Association of Manufacturers (NAM) is the oldest and largest broad-based industrial trade association in the United States. Its membership comprises 14,000 companies and 350 member associations. Like many trade associations, NAM is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code. *See* Huard[63] Direct Test. at 1.

17. Associated Builders and Contractors, Inc. (ABCI) is a non-profit tax-exempt organization governed by section 501(c)(6) of the Internal Revenue Code and is funded primarily by membership dues. It is a national trade association representing more than 23,000 contractors and related firms in the construction industry. ABCI's members, which include both union and non-union employers, "share the philosophy that construction work should be awarded and performed on the basis of merit, regardless of labor affiliation." Monroe[64] Direct Test. at 1-2.

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[63] Paul Huard is NAM's Senior Vice President for Finance and Administration and has served as the organization's chief lobbyist. *See* Huard Direct Test. at 1.

[64] Edward Monroe is Director of Political Affairs for ABCI and also serves as Treasurer of ABC PAC. *See* Monroe Direct Test. at 1.

18. Associated Builders and Contractors Political Action Committee (ABC PAC) is a political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of ABCI pursuant to 2 U.S.C. § 441b(b). ABC PAC makes contributions to federal candidates who support the principles of ABCI and makes independent expenditures for communications on their behalf. *See* Monroe Direct Test. at 9.

19. The National Association of Broadcasters (NAB) is a non-profit, incorporated trade association of radio and television stations and broadcasting networks in the United States. *See* Goodman[65] Decl. at 2.

20. The AFL-CIO is a national labor federation comprised of 66 national and international labor unions that, collectively, have a total of approximately 13 million members. The AFL-CIO also includes 51 state labor federations, nearly 580 area and central labor councils and numerous trade and industrial departments. A core mission of the AFL-CIO is to provide "an effective political voice to workers on public issues that affect their lives." G. Shea[66] Decl. at 2-3.

21. The Republican National Committee (RNC) is an unincorporated association headquartered in Washington, D.C. It consists of three members each from the Republican Party in each of the fifty States, the District of Columbia, Puerto Rico, American Somoa, Guam and

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[65] Jack Goodman is Senior Vice President and General Counsel of the NAB and is involved in developing the organization's regulatory and policy objectives. *See* Goodman Decl. at 1-2.

[66] Gerald Shea serves as Assistant for Government Affairs to the President of the AFL-CIO and, as such, is responsible for oversight and coordination of all of the AFL-CIO's policy-related activities. *See* G. Shea Decl. at 2.

the U.S. Virgin Islands. Each state and territorial Republican Party elects a national committeeman and anational committeewoman. In addition, the state and territorial Republican Party chairmen serve as members of the RNC. *See* Josefiak[67] Decl. at 4; Duncan Decl. at 3.

22. Mike Duncan is a member of the RNC from the State of Kentucky and currently serves as the General Counsel of the RNC. Prior to becoming General Counsel, he was Treasurer of the RNC and in that capacity signed all RNC reports filed with the FEC. *See* Duncan Decl. at 3. In both his official capacity as an officer of the RNC and his private capacity, Duncan has participated in and (unless prohibited by BCRA) will continue to participate in national, state and local political party activities. He will also (unless prohibited by BCRA) continue to solicit, receive or direct non-federal funds to other persons. *See id.* at 3-6.

23. The Republican Party of New Mexico is a state committee of the Republican Party under BCRA. It supports federal, state and local candidates for office in New Mexico and promotes Republican positions on public policy issues. *See* Dendahl[68] Decl. at 1. Under New Mexico law, the Republican Party of New Mexico is permitted to raise and spend corporate, labor union and individual funds in unlimited amounts in support of

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[67] Thomas Josefiak is Chief Counsel of the RNC and is primarily responsible for the day-to-day legal operations of the RNC, including ensuring that all of the RNC's activities, officers and employees comply with applicable federal and state election laws. *See* Josefiak Decl. at 1-2.

[68] John Dendahl is the State Chairman of the Republican Party of New Mexico and is responsible for recruiting and supporting federal, state and local candidates in the State and for raising funds to support the state committee's operations. *See* Dendahl Decl. at 1.

state and local candidates. *See* N.M. STAT. ANN. §§ 1-19-25 to 1-19-36 (1978); *see also* Dendahl Decl. at 2.

24. The Dallas County (Iowa) Republican County Central Committee is a local political party committee the FEC has deemed independent of any state or national political party committee. It is actively involved in supporting state and local candidates for office in Iowa. *See* Josefiak Decl. at 5.

25. The California Democratic Party is an unincorporated association of approximately seven million members and is the authorized Democratic Party of the State of California. Similarly, the California Republican Party is an unincorporated association of over five million members and is the authorized Republican Party of the State of California. The CDP and the CRP perform many functions, among them providing financial and material support to federal, state and local candidates; taking positions on public issues (including state and local ballot measures) and publicizing those positions; engaging in voter registration, get-out-the-vote activities and generic party-building activities; and maintaining an administrative staff and structure to support the parties' goals and activities and to comply with extensive federal and state regulation. *See* Bowler[69] Decl. at 2-3; Morgan Aff. at 2-3.

a. Pursuant to state law, the CDP is governed by the Democratic State Central Committee (DSCC). The DSCC is made up of approximately 2,710 members, about 849 of whom are elected by the 58 county central committees. Other members serve on the

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[69] Kathleen Bowler is the Executive Director of the CDP and oversees the day-to-day administrative operations of the organization. *See* Bowler Decl. at 1-2.

DSCC in their capacities as federal or state officials, as nominees of the CDP, as members of the Democratic National Committee (DNC) from California or as elected representatives of 80 Assembly District Committees (AD Committees). *See* Bowler Decl. at 2-3. CDP bylaws provide for local party AD Committees, which elect delegates to the DSCC and are the district-level organizational blocks of the CDP. The AD Committees are primarily involved in local voter registration, get-out-the-vote and grassroots activities and they act as liaisons with the campaign organizations of Democratic candidates in their area. *See id.* at 3.

b. The CRP is governed by the Republican State Central Committee (RSCC). The RSCC consists of about 1,500 regular and appointive members. The regular members include federal and state officeholders as well as the CRP's nominees for governor, seven other state constitutional offices, United States Senate, 53 congressional districts, 40 state senate districts, 80 state assembly districts and four state board of equalization districts. The RSCC also includes the chairmen of the 58 county central committees and the chairmen of volunteer party organizations. *See* Morgan Aff. at 3-5. The CRP operates as well through (1) a 100-member Executive Committee, which includes federal and state officeholders and 16 representatives of county central committees; and (2) a 25-member Board of Directors, which includes a Member of the Congress[70] appointed by the delegation, three state elected officeholders and representatives from an association of Republican county central committee chairmen. *See id.* at 3-4. Under the CRP's bylaws and the RNC's rules, the CRP is part of the RNC. The CRP's elected chairman is a member of the RNC. The CRP elects two other representatives to the RNC—a national committeeman and national committeewoman, each of whom is a member of the CRP Executive Committee and Board of Directors. *See id.* at 5-6.

26. Art Torres is the elected Chair of the CDP. Torres also serves on the DNC and has been elected by the DNC to serve on the DNC Executive Committee. As Chair of the CDP, Torres assists the CDP and county central committees in fundraising efforts by meeting and talking regularly with potential donors and attending fundraising events. *See* Bowler Decl. at 4; Torres Decl. at 1-2.

27. The Yolo County Democratic Central Committee and Santa Cruz County Republican Central Committee are two of the 58 county central committees authorized and governed by the California Elections Code. Members of the county central committees are elected at each statewide primary election. All members of the CDP who are also state senators, members of the state assembly or Members of the Congress serve as *ex officio* members of their respective county central committees. *See* Bowler Decl. at 3. The county central committees are primarily involved in local voter registration, get-out-the-vote activities and grassroots activities and they act as liaisons with the campaign organizations of Democratic candidates in their area. *See id.*

28. Timothy J. Morgan is (1) a member of the RNC; (2) a member of the CRP Executive Committee; (3) a member of the CRP Board of Directors; and (4) Chairman of the Santa Cruz County Republican Central Committee. *See* Morgan Aff. at 1.

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[70] As it is used in these alternative findings and throughout this opinion, the term "Members of the Congress" includes both United States Representatives and United States Senators.

29. The FEC is a government agency headquartered in Washington, D.C., constituted pursuant to FECA, 2 U.S.C. § 437c, and charged with enforcing the Act as amended by BCRA.

30. The United States, through the DOJ, is charged with enforcing the criminal provisions of the Act as amended by BCRA.

31. The FCC is a government agency headquartered in Washington, D.C., and is charged with enforcing the FCA as amended by BCRA.

32. The intervenors are Members of the Congress who were principal sponsors and authors of BCRA. Senator John McCain is a Republican United States Senator from the State of Arizona. Senator Russell Feingold is a Democratic United States Senator from the State of Wisconsin. Senators McCain and Feingold face reelection in 2004. Senator Olympia Snowe is a Republican United States Senator from the State of Maine. Senator James Jeffords is an Independent United States Senator from the State of Vermont. Senators Snowe and Jeffords face reelection in 2006. Congressman Christopher Shays is a Republican member of the House of Representatives from the 4th Congressional District in Connecticut. Congressman Martin Meehan is a Democratic member of the House of Representatives from the 5th Congressional District in Massachusetts.

2. The Ban on Corporate and Labor Disbursements for "Electioneering Communications" and the Disclosure and Reporting Requirements

As to BCRA's ban on corporate and labor disbursements for "electioneering communications" and the statute's disclosure and reporting requirements, *see generally supra* Parts II.A and II.B, I would find that:

33. After the *Buckley* decision in 1976 and subsequent amendments to the Act, the Act's prohibition on the use of corporate and union treasury money and its disclosure requirements applied to independent political spending only if it funded express advocacy of the election or defeat of a clearly identified candidate. *See* 2 U.S.C. § 431(17).

34. Few candidate or party advertisements use words of express advocacy. In the 1998 election cycle only four per cent of ads sponsored by candidates used words of express advocacy. In 2000 only 11.4 per cent of ads sponsored by candidates and only 2.2 per cent of ads sponsored by political parties used words of express advocacy. *See* Krasno[71] & Sorauf [72] Expert Report at 53; Goldstein[73] Expert Report at 16, 31.

35. Before BCRA was enacted, interest groups[74] running issue advertisements[75] often did not disclose the

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[71] Defense expert Jonathan Krasno is a visiting fellow at Yale University's Institution for Social and Policy Studies.

[72] Defense expert Frank Sorauf is Regents' Professor Emeritus at the University of Minnesota.

[73] Defense expert Kenneth Goldstein is an Associate Professor of Political Science at the University of Wisconsin-Madison, where he specializes in the study of interest groups and political advertising. *See* Goldstein Expert Report at 1.

[74] As it is used in these alternative findings and throughout this opinion, the term "interest group" refers to any person or entity—whether a corporation, union, trade association, advocacy group or the like (but not a political party)—that (1) is interested in a particular issue; (2) participates in the political process; and (3) associates with others of like mind. *See infra* Finding 79 at pages 176-80.

[75] As they are used in these alternative findings and throughout this opinion, the terms "issue advertisement" and "issue ad" are interchangeable and refer to an advertisement that does not contain words of express advocacy. *See Buckley*, 424 U.S. at 44 n.52 (express words of advocacy include "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'").

sources of their funding. *See* Krasno & Sorauf Expert Report at 72; Magleby[76] Expert Report at 18-19. Among the groups that did not disclose their sources was Citizens for Better Medicare, which is funded by the pharmaceutical industry. In 1999 and 2000 Citizens for Better Medicare was one of the top sponsors of issue advertisements that also name federal candidates; it spent approximately $65 million on television advertising during that period. *See* Magleby Expert Report at 18-19; Ryan[77] Dep. at 13-15.

36. From 1996 to 2000 the majority of advertisements run by interest groups were not regulated by the Act because they did not use words of express advocacy. By 2000, for every interest group ad covered by the Act, 20 interest group ads mentioning federal candidates were not covered. *See* Krasno & Sorauf Expert Report at 53; Goldstein Expert Report at 10; ANNENBERG PUBLIC POLICY CENTER, ISSUE ADVERTISING IN THE 1999-2000 ELECTION CYCLE 12-15 (2000) (hereinafter ANNENBERG STUDY).

37. From 1996 to 2000 the number of issue advertisements—as well as the number of organizations sponsoring issue ads and the amounts spent on issue advocacy—increased.

a. In the 1996 election cycle a total of approximately $135 million to $150 million was spent on national and local television and radio broadcasts of about 100 distinct ads on national issues sponsored by relatively few organizations. In the 1998 election cycle approximately 77 organizations aired 423 distinct ads at a cost of between $250 million and $341 million. In the 2000 election cycle approximately 130 organizations aired over 1,100 distinct ads at a cost of more than $500 million. In the 2000 cycle the Republican and Democratic parties accounted for almost $162 million (32 per cent) of the spending on issue advocacy; Citizens for Better Medicare accounted for $65 million (13 per cent); the Coalition to Protect America's Health Care accounted for $30 million (six per cent); the Chamber of Commerce accounted for $25.5 million (five per cent); and U.S. Term Limits accounted for $20 million (four per cent). *See* ANNENBERG STUDY at 1, 4.

b. By way of comparison, a total of approximately $100 million was spent in 1995 alone to advertise syndicated reruns of "Seinfeld," a television sitcom. *See* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 42 & n.4 (2001).

38. In some competitive races, interest group issue advocacy often rivals and even outpaces advertising by federal candidates themselves. *See* Krasno & Sorauf Expert Report at 51; Goldstein Expert Report at 12, 22; Magleby Expert Report at 20, 22.

39. Many of the interest group issue ads that also name a federal candidate and air near an election avoid using words of express advocacy but end with an exhortation to "call" the named candidate and "tell" him something or "thank" him for his stance on a particular issue. *See, e.g.*, Magleby Expert Report at App. G. Both the Chamber of Commerce and the AFL-CIO agree that

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[76] Defense expert David Magleby is a Distinguished Professor of Political Science at Brigham Young University, where he also serves as Dean of the College of Family, Home and Social Sciences and as Director of the Center for the Study of Elections and Democracy. *See* Magleby Expert Report at 7.

[77] Timothy Ryan currently serves as Vice President for Advertising at Sawyer Miller Weber Shandwick, an advertising firm in Washington, D.C., and was formerly Executive Director of Citizens for Better Medicare. *See* Ryan Dep. at 6-7.

"the ultimate way to tell an elective official to do something is through the voting process." G. Shea Dep. at 46; *see* Josten Dep. at 230.

a. Republican political consultant Rocky Pennington testified that "[t]he usual final tag line [of an issue ad] is to 'call' or 'ask' or 'tell' a candidate to stop or continue doing something, often something vague like fighting for the right priorities. This is pretty silly, because it's hard to imagine thousands of people calling the candidate in response to the ad and saying, keep doing this, this is wonderful." Pennington Decl. at 6. Senator Feingold testified similarly, stating that the plea to "call somebody's office" is at "the heart of the phony issue ad." Feingold Dep. at 14. Senator Feingold acknowledged, however, that his constituents often do contact him in response to television advertisements. *See id.* at 238-39.

b. In 1996 Citizens for Reform, an interest group, spent $2 million on television issue ads that did not expressly advocate the election or defeat of any candidate but were directed at influencing congressional races. That year it sponsored the notorious "Bill Yellowtail" ad, which aired during the final weeks of a Montana congressional race and accused Yellowtail, the challenger, of spousal abuse: "He preaches family values but he took a swing at his wife." Thompson Comm. Rep. at 6301-05. In addition to its television and radio ads opposing Yellowtail, Citizens for Reform "did direct mail and phone banking against [him]," which would not be prohibited by BCRA. Lamson[78] Decl. at 3.

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[78] Joe Lamson managed Bill Yellowtail's 1996 campaign. *See* Lamson Decl. at 1.

c. The NAB "admits that a [p]olitical [a]dvertisement might conceivably influence a federal election without the use of any particular words as might many other factors depending upon the circumstances of each individual race." Resp. of NAB to FEC's First Reqs. for Admis. at 5.

d. Republican political consultant Douglas Bailey testified that "[i]n the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.' . . . All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat. This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians." Bailey Decl. at 1-2.

40. Interest group issue advertisements that air near election time more frequently refer to federal candidates than do interest group ads that air at all other times. For example, from January 1, 2000 until September 4, 2000 Citizens for Better Medicare sponsored 28,867 television ad spots, none of which named a federal candidate. *See* Goldstein Expert Report at App. A & Tbl. 17A. During the three weeks preceding the 2000 election, by contrast, Citizens for Better Medicare sponsored 6,000 ad spots that identified a federal candidate. *See id.*

41. Beginning in 1996 corporations, unions and interest groups—to which the defendants refer as "outside groups," *e.g.*, Intervenors Proposed Findings of Fact at 31—began large-scale use of their treasury funds to sponsor issue advertisements that to some observers "looked and sounded like campaign ads," *id.* (citing ANNENBERG STUDY at 3, 7-8; Thompson Comm. Rep. at 5927 & n.4).

42. Issue advertisements are heavily concentrated in the final weeks leading up to an election and are often intensely partisan. They are concentrated most heavily in jurisdictions with competitive election contests—commonly known as "battleground states"—where a small change in voter preference can affect the outcome of the election. Interest groups often broadcast ads in competitive contests where their investment is most likely to make a difference. *See* Goldstein Expert Report at 21 Tbl. 5; Magleby Expert Report at 20, 31 ("Interest groups . . . take aim at particular states with competitive U.S. Senate races or congressional districts where the outcome is in doubt. . . . This tendency has been reinforced by the exceedingly close margin of party control in Congress in recent years."); LaPierre Dep. at 24-25, 118, 157-59. The following subparagraphs contain representative examples of such ads.

a. During the 60 days leading up to the 2000 general election the NRA ran a 30-minute infomerical known as "Union/Gore" which would constitute an "electioneering communication" under BCRA. The infomercial opened with NRA President Charlton Heston stating that "[t]his election could come down to battleground states like Pennsylvania, Michigan, Ohio and Missouri, states with lots of union members where the union vote could decide the outcome. But not all union members will vote as political observers might expect. So we sent NRA correspondent Ginny Simone deep into the heart of union country to talk with union members about this election, about the candidates, about the issues, and what to them really matters most. Here's Ginny's report." The infomercial then focused on union members' comments in response to the NRA reporter's questions:

- "All this union leadership, they send you stuff all the time [telling you to] vote for Al Gore. Well,

I don't see it that way. It's —you know, I—I want my freedom, I want to hold onto my guns, I want to vote for Bush."

- "I have a hand gun, and I've had NRA training, and I'm a survivor of domestic violence, and I believe in self-protection, and I do not want my guns taken away."

- "A loss of my gun rights is what Al Gore represents. There's no ifs, ands, or buts about that. In my mind, . . . if Al Gore and his administration is [sic] voted in, we will lose firearm rights."

- "Yes, it's nice being part of my union, it helps protect me. But having my right to bear arms is something that's extremely important to me. It's something that's kind of just been engrained [sic] in me."

The infomerical then turned back to Heston, who urged voters "to protect your freedoms on November 7th. It's one way you can thank the many souls sacrificed in freedom's name over the past couple hundred years. . . . And that includes carefully considering which candidates promise to defend our freedoms and which candidates promise to diminish or even destroy them." McQueen Dep. at 113-23.

b. During the 60 days leading up to the 2000 general election the interest group Planned Parenthood aired an ad called "Bush Doesn't Say Much," which under BCRA is an "electioneering communication." The ad claimed that "[a]s President, Bush could appoint Supreme Court Justices who could take away our right to choose. Get the facts about George W. Bush's Texas record." Defs.' Exhs. Vol. 48, Tab 3 (CMAG Storyboard No. 29).

c. During the 60 days leading up to the 2000 general election the interest group Handgun Control Inc. ran an ad called "Handgun/Martin Sheen," an "electioneering communication" under BCRA. Actor Martin Sheen stated in the ad that "[b]etween now and election day, at least two thousand Americans will die from gunfire. Should the next president be a candidate of the gun lobby? Should he have signed a bill that allows hidden handguns in churches, hospitals, and amusement parks? ... That's Governor Bush's record. Find out more at bushandguns.com." Defs.' Exhs. Vol. 48, Tab 3 (CMAG Storyboard No. 32).

d. RNC political operations director Terry Nelson testified that, as a general rule, issue advocacy is not as effective in August of an election year as it is in October or early November. *See* Nelson Dep. at 90-91 ("I would tell candidates that they needed to spend their money when people are paying attention, which tends to be towards the election.").

e. The 2000 United States Senate race between Spencer Abraham and Debbie Stabenow is illustrative of recent issue advocacy campaigns across the country.

1) During the 60 days preceding the general senatorial election between Abraham and Stabenow interest groups aired 4,323 ad spots. During the other ten months of the year the groups aired only 926 ad spots, for a year-long total of 5,249 ad spots.

2) By way of comparison, Abraham and Stabenow themselves ran (together) a total of 11,381 ad spots during the year 2000 and the political parties ran 7,905 ad spots in the same period.

3) The AFL-CIO ran one ad critical of Abraham 269 times from October 16 to October 22. On October 20 the ad aired 26 times in Detroit and 29 times each in the markets of Grand Rapids, Battle Creek and Kalamazoo. The Michigan and U.S. Chambers of Commerce ran five distinct ads against Stabenow a total of 1,635 times between September 20 and November 6.

4) During the 60 days preceding the general election not a single candidate- sponsored ad and only one party-sponsored ad (accounting for ten per cent of party ad airings during that period of time) employed words of express advocacy. The issue ads regularly criticized Abraham and Stabenow for votes they had taken in the past and did not focus heavily on forthcoming legislative initiatives. *See* Intervenors Proposed Findings of Fact at 37-38.

5) A Michigan Chamber of Commerce issue ad entitled "Stabenow Against Local Schools"—now an "electioneering communication" under BCRA—stated: "Local schools, local teachers, local parents electing local school boards. That is the way our schools work best. So why did Debbie Stabenow vote against a bi- partisan plan to make our schools better? To reduce federal red tape and increase student performance in five years? Why did she vote against allowing teachers to control their own classrooms? ... Call Debbie Stabenow and tell her we want to run our own neighborhood schools." Defs.' Exhs. Vol. 48, Tab 3 (CMAG Storyboard No. 6).

43. No credible evidence in the record supports the defendants' assertion that BCRA's "electioneering communication" provisions will affect "very few genuine discussions of policy matters." *E.g.*, FEC's Am. Proposed Findings of Fact at 153. To the contrary, credible record evidence indicates that BCRA will

actually capture a *vast* number of "genuine" issue advertisements. *See, e.g., infra* Findings 43f-43h, 51d at pages 90-99, 109.

a. The Brennan Center for Justice (Brennan Center) played a "central role" in the adoption of BCRA. Holman[79] Dep. at 14-15, Exh. 3. The Brennan Center helped "craft the design of the McCain-Feingold bill," *id.* at 11, and provided "legal opinions" on what it believed would be "constitutionally defensible," *id.* at 13.

b. The Brennan Center promoted campaign finance regulation by, *inter alia:* drafting for legislators memoranda that "directly addressed concerns that were being debated in the Congress concerning the McCain-Feingold and Shays-Meehan bills," *id.* at 11; meeting with Members of the Congress to review research findings, *see id.* at 16-17; drafting and publishing a "scholars' letter" and a signed statement by former leadership figures of the ACLU, which documents deemed the bills constitutional and were "very influential in the Senate debate and in influencing media perceptions," *id.* at 11, 12, 19-20, Exh. 3.

c. In addition to undertaking these wide-ranging activities in support of new campaign finance regulation, the Brennan Center published two reports: CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS (Brennan Center 2001) (hereinafter *Buying Time 2000*), and JONATHAN S. KRASNO & DANIEL E. SELTZ, BUYING TIME 1998: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS (Brennan Center 2000) (hereinafter *Buying Time 1998*). *See generally* Defs.' Exhs. Vols. 46, 47.

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[79] Craig Holman was a senior policy analyst at the Brennan Center and the principal co-author of *Buying Time 2000*. *See* Holman Dep. at 8; *see also infra* Finding 43c at pages 87-88.

d. The *Buying Time* reports were based on data gathered by Kenneth Goldstein with the help of his political science students at Arizona State University (for the 1998 report) and the University of Wisconsin (for the 2000 report). Goldstein's students were shown "storyboards"—prepared by the Campaign Media Analysis Group (CMAG)—of certain political advertisements broadcast during 1998 and 2000. The students were asked to "code" the ads based on their content. *See* Defs.' Exhs. Vol. 46 at 19; Defs.' Exhs. Vol. 47 at 7. According to the Brennan Center, the *Buying Time* reports were "the central piece of evidence marshaled by defenders of" BCRA's electioneering communication provisions "in support of [their] constitutional validity." Holman Dep. Exh. 3 at 2. While the government claims that "[t]he *Buying Time* databases show that ... BCRA will correctly capture" almost all so-called "sham" issue advertisements "but very few genuine issue advertisements," FEC's Am. Proposed Findings of Fact at 192, the *Buying Time* reports are flawed. *See infra* Findings 43e-43h at pages 88-99.

e. The Brennan Center and the authors of the *Buying Time* reports sought to achieve a certain result and therefore sacrificed scientific objectivity.

1) Funds to underwrite *Buying Time 1998* were solicited on the basis of the explicit promise that the study would be abandoned midstream if the results being obtained were not helpful to the cause for more stringent campaign finance regulation. *See*

Goldstein Dep. Exh. 2 at 6 ("Whether we proceed . . . will depend on the judgment of whether the data provide a sufficiently powerful boost to the reform movement."). Money to fund *Buying Time 2000* was solicited on the promise that the study would be "design[ed] and execute[d]" to achieve "reform" and the study was so designed and executed. Goldstein Dep. (Vol. 1) at 37-38 ("Q: So I take it that it was your goal to design and execute the study in a way that would help move the campaign reform ball forward: is that right?" "A: Yes.").

2) The Brennan Center submitted a grant proposal to the Pew Charitable Trusts (Pew) to gain funding for *Buying Time 1998* and, later, *Buying Time 2000*. *See* Krasno Dep. at 51, 55-56, Exh. 4. The Brennan Center understood that Pew's "bottom line" was "regulating sham issue advocacy." *Id.* at 52-53, Exh. 3. Most of the funding Pew subsequently agreed to provide was to be put toward publicity and advocating "reform" rather than purchasing and analyzing data. *See id.* at 63-64, Exh. 5.

3) The grant proposal to Pew was authored by Jonathan Krasno, who—before he had approached Pew or had performed any studies—had already "come to believe that political parties were using the magic words test as cover to sponsor thinly-veiled campaign ads masquerading as issue advocacy." Krasno Dep. at 66, Exh. 6, Exh. 13 at 2.

4) Each element of the Brennan Center's grant proposal to Pew was aimed at "overcoming the obstacles to reform" and at "influencing at least one of the four critical audiences that [would] play a pivotal role in determining the success or failure of any reform: Legislators, journalists, academics and courts." Holman Dep. Exh. 4 at 2-3; *see id.* ("[T]he purpose of our acquiring the data is not simply to advance knowledge for its own sake, but to fuel a continuous and multi-faceted campaign to propel reform forward."). According to the proposal, the Brennan Center planned to implement the 1998 study in two "phases," during the first of which the Center would "acquire" the data and "adapt it so that it might be easily used" to "develop a strategy for responding to the threat posed by issue advocacy." Goldstein Dep. Exh. 2 at 3.

f. *Buying Time 1998* miscalculates the percentage of so-called "genuine" issue advertisements that would have been regulated in 1998 by a statute like BCRA.

1) The key question included in the 1998 study was Question 6,[80] which asked coders: "In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?"[81] Defs.' Exhs. Vol. 47 at 193 (emphasis in original); *see* Seltz[82] Dep. at 184-85. If coders concluded that an ad provided information about or urged action on a bill or issue, the ad was to be coded as a "genuine" issue ad. If the coders concluded that the ad

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[80] Question 6 was not included in the original coding protocol that was pre-tested before the study began. *See* Goldstein Dep. (Vol. 2) at 29, Exh. 11; Krasno Dep. at 115. Krasno added the question to the coding protocol in an attempt to help student coders "avoid confusion" on subsequent questions. Krasno Dep. at 116-17, 121.

[81] The words "particular candidate" were printed in boldface type because the authors "wanted [students] to be thinking of candidates" when answering the question. Krasno Dep. at 122-23.

[82] Daniel Seltz was a research associate and later a project coordinator in the Democracy Program at the Brennan Center in the late 1990s; during that time he co-authored *Buying Time 1998*. *See* Seltz Dep. at 4-5; *see also supra* Finding 43c at pages 87-88.

generated support for or opposition to a particular candidate, the ad was to be coded as a "sham" issue ad.

2) The authors of *Buying Time 1998* claimed that just seven per cent of "genuine" issue advertisements aired during 1998 would be regulated by a statute like BCRA. In arriving at this figure, the authors counted as "genuine" only two ads in the source database. *See* Seltz Dep. at 77-80, 101-02, Exh. 1 at 109-110, Exh. 4; Krasno Dep. at 149-50; Holman Dep. at 51-52, Exh. 6.

3) Joshua Rosenkranz, Executive Director of the Brennan Center, testified before the Congress in April 2000 and highlighted the seven per cent figure. He asserted that "[w]ith solid empirical data of this type, Congress can be confident that the major campaign finance reform proposals currently before it do not inhibit true issue advocacy." Holman Dep. Exh. 25 at 5 (Rosenkranz testimony). In January 2001, however, Rosenkranz discovered the seven per cent figure to be "flat out false." *Id.* Exh. 28 (e-mail from Rosenkranz); *see id.* Exh. 27 (e-mail from Holman stating that "[w]hile only 7% of groups placing genuine issue ads would be captured, those groups bought about 40% of all issue ads within [60 days of the 1998 general election]. So, in reality, according to the 1998 database, about 40% of genuine issue ads would be deemed electioneering within a 60-day regulatory period."); *id.* Exh. 29 (e-mail from McLoughlin[83] stating the seven per cent finding was "either false or so vague as to mislead the reader"); *id.* Exh. 31 (subsequent e-mail from McLoughlin reporting correct percentage to be 11.38 per cent); *id.* Exh. 36 (subsequent memo from Holman reporting correct percentage to be 13.8 per cent).

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[83] Luke McLoughlin, now a first-year law student, was a research associate in the Democracy Program at the Brennan Center from 2000 to 2002 and during that time co-authored *Buying Time 2000*. *See* McLoughlin Dep. at 3-6; *see also supra* Finding 43c at pages 87-88.

4) Craig Holman, a co-author of *Buying Time 2000*, "decided that since *Buying Time* [was] already published and distributed," he would not "rekindle the issue" even though he had concluded that "[t]here was no mistake in the reassessment" that the seven per cent figure was false. *Id.* Exh. 30.

5) Although the Brennan Center now claims that it "is sticking by the 7 percent figure," *id.* at 142, Holman apparently still believes that 13.8 per cent is the correct percentage "with respect to airings," *id.* at 155-56; *see also id.* at 154 (stating that authors of *Buying Time 1998* should have been clear "whether [the study was] referring to airings or unique ads").

6) According to two of the defendants' experts, if the formula used by the Brennan Center in *Buying Time 2000* had been applied to the data underlying *Buying Time 1998*, the *Buying Time 1998* study would have reported that the percentage of "genuine" 1998 issue ads that would be regulated by BCRA was 14.7 per cent. *See* Krasno & Sorauf Expert Report at 60 n.143.

7) Goldstein's students originally coded as "genuine" at least eight of the ads the Brennan Center later counted as "sham" issue ads in *Buying Time 1998*. Analysis of the handwritten student coding sheets—produced pursuant to a subpoena issued to Goldstein—demonstrates that the students determined that the eight ads "provide[d] information about or urge[d] action on a bill or issue." Goldstein Dep. (Vol. 2) at 65-69 & Exhs. 19-21, 78-79 & Exhs. 22-23; 79-80 & Exhs. 24-25, 80-82 & Exhs. 26-27, 83 & Exhs. 28-29, 84-85 & Exhs. 30- 32, 85-87 & Exhs. 33-35, 87-88 & Exhs. 36-37.

8) According to one of the plaintiffs' experts, James Gibson,[84] *Buying Time 1998* would have shown—if the students'

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[84] Plaintiffs' expert Gibson is the Sidney W. Souers Professor of Government at Washington University. *See* Gibson Expert Report, Exh. 2.

original codings had not been disregarded—that 64 per cent of all group-sponsored issue ads aired during the last 60 days of the 1998 election were "genuine" and would have been covered by BCRA. *See* Gibson Expert Report at 42-43.

9) Although the defendants' experts filed three rebuttal reports in response to Gibson's expert report, none challenged his 64 per cent finding. In his rebuttal expert report, Gibson reconsidered his analysis using the methodology used in Krasno's expert report. *See* Gibson Rebuttal Report at 23. Crediting the students' judgments once again, Gibson concluded that no less (and likely more) than 50.5 per cent of "genuine" issue ads aired within 60 days of the 1998 general election would have been regulated by BCRA. *See id.*

g. Like *Buying Time 1998, Buying Time 2000* is based on a flawed methodology and is therefore unreliable as evidence of how many "genuine" 2000 issue advertisements would have been regulated by BCRA.

1) The authors of *Buying Time 2000* concluded that only three "genuine" issue ads in the 2000 database—numbers 627, 1389 and 2862—would have been "unfairly caught by [BCRA]'' in the 2000 election season. Holman Dep. at 89-90, Exh. 18.

2) But at least six distinct ads were originally coded as "genuine" by the student coders for *Buying Time 2000*. *See* Goldstein Dep. (Vol. 2) at 126-27; Goldstein Expert Report at 26 n.21. These included numbers 627, 1389 and 2862 and three others as well. *See* Goldstein Dep. (Vol. 2) at 131-33; Goldstein Expert Report at App. J. That is, three of the six ads were changed from being coded as "genuine" issue ads to "sham" ads in the *Buying Time 2000* database. *See* Goldstein Rebuttal Report at 16; Holman Dep. Exh. 15; McLoughlin Dep. at 44, 47-48, Exh. 13. The students' original coding decisions for the 2000 report have not been preserved and Goldstein has no way of determining precisely how each of the ads was originally coded. *See* Goldstein Dep. (Vol. 2) at 129; Goldstein Rebuttal Report at 16.

3) In March 2001—shortly before *Buying Time 2000* went to press—the Brennan Center called Goldstein on his cell phone at the West Palm Beach airport seeking his judgment on an unknown number of ads aired within 60 days of the 2000 election, all of which were coded by the students as "genuine." After the text of each ad was read to him over the phone, Goldstein overruled the students' judgments and reclassified each ad as an "electioneering" ad. *See* Goldstein Dep. (Vol. 2) at 57-59, 147-150 ("Q: What was the urgency?" "A: I think the book was going to press. . . . Feingold was being debated the next week, and Brennan wanted to be able to write a report. . . . [T]he Brennan Center was trying to get a report out the door around that debate.").

h. Both of the *Buying Time* reports contain additional flaws that further undermine their evidentiary value.

1) As plaintiffs' expert Gibson testified, the 1998 and 2000 databases upon which the *Buying Time* studies are based are "subject to continuous alteration by Professor Goldstein, in consultation with the Brennan Center staff." Gibson Expert Report at 46 ("No documents have been produced that indicate how Professor Goldstein has [exercised] or should exercise his enormous discretionary powers to change or recode the data."). There are approximately 12 versions of databases connected to the *Buying Time* reports. *See* Gibson Dep. at 210. These databases have been repeatedly changed so that "[n]o database has been . . . produced that will generate the specific numbers found in [the *Buying Time* reports]." Gibson Expert Report at 5, 44.

2) *Buying Time 1998,* in particular, is a "fundamentally flawed" study. Gibson Expert Report at 4. Because the study contains little, if any, explanation or analysis of the data upon which it relies, even members of the Brennan Center have

had difficulty understanding it. *See, e.g.*, Holman Dep. at 32 ("To tell the truth, I couldn't understand much of *BuyingTime 1998*.''); Krasno Rebuttal Report at 8 (co-author of *Buying Time 1998* acknowledging data set upon which study is based is "maddeningly complex"); Goldstein Dep. Exh. 17 (e-mail from Holman stating "[t]he missing data category is uncomfortably large in the 1998 database").

3) Daniel Seltz, a co-author of the 1998 study, has had little if any training in the methods of quantitative analysis. *See* Seltz Dep. at 8 (Seltz received a B.A. in 1996 in history and East Asian studies); *see also* Gibson Expert Report at 6, 45 (neither 1998 nor 2000 study has been subject to scrutiny of objective peer reviewers and methodology underlying each study "has not been judged to be acceptable by the social scientific community").

4) In each of the studies, student coders were all of a "certain educational level" and "certain age level" and were all "[l]iving in a certain geographical area." Holman Dep. at 228-29. The Brennan Center conceded that the coders were "not representative of the general population" and, therefore, intercoder reliability—i.e., the technique of using multiple respondents to code the same ad "to try to weed out any kind of bias that may be present in one of the coders versus another," *id.* at 189—could at most establish that "this particular group of students roughly of [the same] age roughly of the same educational background living in roughly the same part of the country with contacts to the same professors tend to see things about the same way," *id.* at 228, 232, Exh. 1 at 19.

5) One finding from the *Buying Time* data that was *not* described in the two reports stemmed from a question asking student coders to determine whether the "primary focus" of a particular advertisement was (1) "personal characteristics"; (2) "policy matters"; (3) "both"; or (4) "neither." Gibson Expert Report at 31-32. The students' answers to this question

differed significantly from their answers to Question 6 (in the 1998 study) and Question 11 (in the 2000 study), which asked them to evaluate the "purpose" of a particular ad. In 1998 98.1 per cent of the interest group-sponsored ads broadcast within 60 days of the general election and mentioning a candidate were coded as having policy matters as their "primary focus." *See id.* at 32-33. In 2000 98.7 per cent of the group-sponsored ads broadcast within 60 days of the general election and mentioning a candidate were coded as having policy matters as their "primary focus." *See id.* at 59-60. One defense expert acknowledged—and it would be difficult not to acknowledge—that "a very large percentage of the advertisements . . . had policy issues as their primary focus." Lupia[85] Rebuttal Report at 12. Plaintiffs' expert Gibson concluded that the "primary focus" question was superior to Question 6 of the *Buying Time 1998* study because it included the option "both" and therefore did not force the student coders into an artificial choice between candidate speech and issue speech. *See* Gibson Expert Report at 34; *see also Buckley*, 424 U.S. at 42 ("[T]he distinction between discussion of issues and . . . advocacy of election or defeat of candidates may often dissolve in practical application.").

6) Seltz acknowledged that "many ads both provide information about or urge action on a bill or issue and generate support or opposition for a candidate." Seltz Dep. at 188. Krasno, his co-author, acknowledged that the test established by the Supreme Court in *Buckley* does not distinguish between "candidate-oriented" issue ads and "genuine" or "pure" issue ads. Krasno & Sorauf Expert Report at 58. When asked if he would have designed his studies any differently had he known that speech about *both* candidates and issues was constitutionally protected, Goldstein conceded that he would have. *See* Goldstein Dep. (Vol. 2) at 186-89.

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[85] Defense expert Arthur Lupia is a Professor of Political Science at the University of Michigan. *See* Lupia Rebuttal Report, App. A.

7) The reports' authors and the database's creator cannot seem to agree about what constitutes a "genuine" issue ad and what constitutes a "sham" issue ad. An ad sponsored by the National Pro Life Alliance entitled "Feingold Kohl Abortion 60," which aired within 60 days of the 2000 election, announced that

> America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121.

Defs.' Exhs. Vol. 48, Tab 3 (CMAG Storyboard No. 80). McLoughlin testified that the ad was "genuine" because "[t]he ad's focus is primarily on the issue of partial birth abortion." McLoughlin Dep. at 42. Holman disagreed with his co-author, concluding that the ad was an "electioneering issue ad." Holman Dep. at 67-69. Goldstein—who was so certain in 2000 that the ad was not "genuine" he reversed a student determination that it was—concluded during the course of this litigation that the ad was indeed a "genuine" issue ad. Goldstein Dep. at 135.

44. The ACLU engages in non-partisan political activities designed to influence federal legislation involving civil rights and civil liberties issues of national importance. *See* Romero Decl. at 1.

a. The ACLU has never taken a position in a partisan political election in its 82-year history, although it frequently takes positions on public issues of significance to the organization and its members. *See id.* at 2.

b. As an advocacy organization, the ACLU actively lobbies for its positions and frequently talks with federal officials and candidates about civil liberties issues. Although the ACLU does not endorse or oppose the election of particular candidates, its public statements, member communications and other similar activities frequently and necessarily refer to, praise, criticize, set forth, describe or rate the conduct or actions of clearly identified public officials who often are also candidates for federal office. *See id.*

c. The ACLU regularly publicizes in its membership mailings—and through pamphlets and other publications—the civil liberties voting records, positions and actions of elected officials, all of whom are at some point candidates for federal office. It sends out over 6.7 million pieces of mail each year to its members and potential members. *See id.*

d. The ACLU has never operated a political action committee and has no interest in establishing one. The creation of a political action committee would be inconsistent with the ACLU's mission and identity as a non-partisan organization. Establishing a political action committee would also have adverse consequences for the organization's members. Under FECA political action committees are required to disclose the identities of their contributors. Many ACLU members and contributors seek explicit assurances that their membership will remain confidential and that their contributions will remain anonymous. *See id.* at 2-3.

e. The ACLU is primarily a membership-driven organization. Membership dues are not tax deductible. The basic membership fee is $35, although many members contribute more than that. A reduced membership rate is available for students and other low-income individuals. Membership dues accounted for $9,393,948 of the $13,625,051 contributed to the organization by individuals in 2001. Only 212 individuals contributed more than $1,000. Although the ACLU does not maintain records on the corporate status of non-individual donors, less than $85,000 of the ACLU's total revenues were contributed by business entities and other organizations in 2001. None of the contributions from businesses exceeded $500. Contributions from non-individual donors represent less than one per cent of the ACLU's total annual funding. *See id.* at 3.

f. Many of the ACLU's public statements involving legislation or executive branch policies—including print and broadcast communications—necessarily refer to clearly identified federal candidates, Members of the Congress or executive branch officials because high profile legislation (like "McCain- Feingold" or "Shays-Meehan") is often publicly identified with its sponsors. Likewise, the ACLU's public statements supporting or opposing the President's policies invariably refer to the President by name. *See* Murphy Decl. at 4.

45. The NRLC regularly pays to broadcast what BCRA defines as "electioneering communications." *See* O'Steen Decl. at 1-2.

a. The primary purpose of the NRLC's electioneering communications is to affect legislation. *See id.* at 3.

b. The NRLC qualifies as an *MCFL*-type organization under the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life*. *See* O'Steen Decl. at 2.

c. The NRLC has received donations from political party committees in the past and persons associated with political parties have assisted the NRLC in raising funds. *See id.* at 3.

d. The NRLC strongly supports a partial-birth abortion ban. It helped initiate the Partial-Birth Abortion Ban Act and published numerous print ads, press releases and educational materials in support of the Act and in an effort to override President Clinton's veto. Some of the ads and materials mentioned federal officials and some mentioned President Clinton after April 10, 1996 while he was a candidate for the 1996 presidential election. *See id.* at 7-10, Exhs. A-1 to A-12.

e. The NRLC has a long history of opposing campaign finance legislation like BCRA. *See id.* at 10-21, Exhs. B-1 to B-44.

1) In November 1995 the NRLC sent to all United States Senators a letter opposing newer and stricter campaign finance legislation on grounds that it would "almost entirely eliminate involvement in the political process for ordinary citizens who are not independently wealthy" and would regulate issue advocacy such that groups not organized as political action committees would be unable to inform the public about candidates' positions and voting records. *See id.* at 11.

2) The NRLC has broadcast advertisements in opposition to campaign finance legislation like BCRA. Many such ads mentioned federal candidates and were broadcast within 30 days of a primary or within 60 days of a general election. *See id.* at 15-19, Exhs.

B-14 to B-19, B-21 to B-25, B-27, B-30, B-31, B-33, B- 36 to B-39.

3) In January 2000, when Governor Bush and Senator McCain were seeking the Republican presidential nomination, the NRLC used the national attention focusing on the two candidates to continue its long-term battle against campaign finance legislation like BCRA, just as Senator McCain used the national attention to promote the McCain-Feingold legislation. *See id.* at 19.

46. Common Cause, an interest group not a party to these consolidated actions, has a long history of supporting campaign finance legislation like BCRA.

a. Since its creation in 1970 Common Cause has promoted and supported a strict regulatory regime over campaign finance. *See* Keller[86] Dep. at 17-18. While it has not run electioneering communications in support of campaign finance restrictions, it has engaged in a variety of activities mentioning federal candidates in the weeks leading up to elections. For example, as the 2000 New Hampshire presidential primary approached, Common Cause "staged an event with both Senator McCain and former Senator Bradley around the issue of [c]ampaign [f]inance [r]eform generally," an event at which the candidates were to pledge their support for campaign finance legislation like BCRA. *Id.* at 105. At that time, an opinion editorial published on Common Cause's website extolled Senators McCain and Bradley as presidential candidates who uniquely understood the need for campaign finance reform. *See id.* Exh. 20. The purpose of the editorial "was to raise the visibility of the issue" of campaign finance, not to influence a federal

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[86] Matt Keller serves as Common Cause's Legislative Director. *See* Keller Dep. at 7-9.

election. *Id.* at 106. A Common Cause official acknowledged it was "possible" that the editorial influenced the 2000 election but he made clear "that was not [its] intent." *Id.* at 106-07.

b. During the 2000 election season Common Cause financed a number of "Town Hall Meetings" or "Town Hall Forums" in New Hampshire and other States to promote campaign finance legislation. At least one of the events coincided with active primary campaigns. Several other events mentioned Members of the Congress who would be candidates in the general election and, at still others, Members themselves were present. A Common Cause official stated that while the events might have affected the outcome of the 2000 election, their purpose was not to influence any election or to promote or oppose any candidate. *See id.* at 116-17, Exh. 23; *id.* at 132-36, Exh. 30; *id.* at 136-39, Exh. 31; *id.* at 139-42, Exh. 32.

c. Within 30 days of a primary election and while Vice President Gore was a presidential candidate, Common Cause distributed a nationwide press release subtitled "Gore Sets Forth Innovative Plan for Reform." *Id.* at 113-15, Exh. 23. The press release described Gore's proposal as "innovative and promising" and commented that "Gore is again putting forth strong reform proposals in contrast to Governor George W. Bush." *Id.* Exh. 23. Common Cause stated that the purpose of the press release was not to influence the election but to highlight that "yet another candidate for President was making [c]ampaign [f]inance [r]eform a primary issue in his campaign." *Id.* at 115. A Common Cause official did not believe the press release promoted or supported Gore but he acknowledged that the statement "could affect a federal election." *Id.*

d. On October 18, 2000 (shortly before the 2000 general election) Common Cause issued a nationwide press release announcing a "Reform Report Card" that graded Members of the Congress on their support for tighter campaign finance restrictions and listed legislators who had signed a "Public Integrity Pledge," which promised to support campaign finance legislation. *See id.* at 119-21, Exhs. 25-27. While a Common Cause official acknowledged that the press release could be interpreted to promote particular candidates, he stated that the press release's purpose was not to influence any election or to promote any candidate but to "encourage ... Members of Congress to vote for the Shays-Meehan, McCain- Feingold Bill." *Id.* at 122-23.

47. NRL ETF has spent and intends to spend funds on broadcast and print communications that do not refer to a candidate but do (1) appear within 60 days of a general election and (2) discuss issues that are contested and on which the candidates have taken a position. *See* O'Steen Decl. at 4. NRL ETF qualifies as an *MCFL*-type organization under the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life*. *See* O'Steen Decl. at 4.

48. NRL PAC regularly enters contracts for independent expenditure communications days, weeks and months in advance of the time the actual expenditures are made. *See id.* at 5.

49. Club for Growth's goal is to help its members identify races to which their contributions—combined with those of many other members—should be sent so that they can influence public policy in accord with the Club's values of economic freedom. *See* Keating Aff. at 3.

a. Club for Growth is involved in the political process in two major ways; it bundles contributions to candidates and it engages in broadcast issue advocacy. *See id.* at 4-5.

b. Club for Growth's television and radio ads do not contain express words of advocacy but identify candidates' positions on tax cuts, tax reform, free-market issues and other economic issues of concern to the Club. *See id.* The Club's ads are frequently broadcast during the 30 days before a primary election and the 60 days before a general election and are intended to educate voters about federal and state candidates' records and platforms. *See id.* at 5-6.

50. The NAB serves and represents the American broadcasting industry and has approximately 7,300 member stations throughout the country. All of the NAB's voting members are broadcast licensees within the meaning of the FCA. *See* Goodman Decl. at 2.

a. The NAB's members broadcast, on television and radio, an extensive number of political advertisements that take positions on issues of public importance. The ads are funded by individuals, groups, labor unions, incorporated entities and others. They often refer to a candidate for federal office and are broadcast in that candidate's district within 60 days of a general election or within 30 days of a primary. Thus, many of the ads fall within BCRA's definition of "electioneering com munication." *See id.* at 3.

b. The NAB's Annual Report and Member Resource Guide and its "Political Broadcast Catechism" publication provide member stations with guidance as to their obligations under the rules of political broadcasting. *See id.* at 2-3, Exhs. 2-3.

c. Although the precise amount of money paid to the NAB's member stations by the sponsors of electioneering communications is not specifically known, NAB members collectively receive millions of dollars every election cycle to air such ads. *See id.* at 3.

d. BCRA section 504 requires the personnel at NAB member stations to make what will often be a difficult and sensitive decision about whether a particular communication relates to a "political matter of national importance," a decision for which station sales personnel are not trained. Section 504 will also materially add to the amount of records NAB members must maintain. *See id.* at 6.

e. NAB members are likely to have difficulty discerning whether a particular communication relates to a "political matter of national importance" and are therefore likely to have difficulty discerning whether and under what circumstances recordkeeping and disclosure are required. *See id.* at 7.

51. The NRA's frequent references to candidates for federal office in the programming it broadcasts throughout the election cycle—including the periods immediately preceding primaries and general elections—are essential to its political mission of educating the public about Second Amendment and related firearm issues. *See* LaPierre Decl. at 1-3. They also enable the NRA to respond directly and effectively to frequent criticism by politicians and the media. *See id.* at 12, 15-17; McQueen[87] Decl. at 9-14; *see also, e.g.,* NRA App. at 223-44 (examples of ads criticizing NRA).

a. The NRA 30-minute news magazine entitled "California" aired more than 800 times in California from August 29, 2000 through November 5, 2000 and 595 of the airings were in one of the nation's top 75 television markets. *See* LaPierre Decl. at 5; NRA App. at 216. Although the program pictured Vice President Gore, it focused primarily on the history of gun confiscation in California. *See* LaPierre Decl. at 5-6 (only reference to federal candidate occurred when "a cover of an issue of the NRA's magazine 'First Freedom' depicting Vice President Gore, then a presidential candidate, flashed on the screen for several seconds").

b. In 2000—on at least 438 occasions in the 60 days prior to the general election—the NRA aired a 30-minute news magazine entitled "It Can't Happen Here." *See* NRA App. at 1005-49. The program contained the same brief depiction of Vice President Gore as the "California" news magazine did. *See* LaPierre Decl. at 6.

c. In response to the media's coverage of the Million Mom March, the NRA aired a 30-minute news magazine that examined the forces and influences behind the March. *See id.* at 17. The news magazine aired dozens of times in the 60 days prior to the 2000 general election. *See* NRA App. at 245-48. The program made references to Senators Hatch and Feinstein and senatorial candidate Clinton and several of the references would have been covered by BCRA if the statute had then been in effect. *See id.* at 245-51; *id.* at 931 (Senator Hatch stating "[i] t's hypocritical" for Rosie O'Donnell's bodyguard to carry a gun); *id.* at 933 (woman stating candidate Clinton was at the March "for [her] own political gain").

d. The 60,623 airings of all issue ads (whether "genuine" or "sham") considered in *Buying Time 2000* ran for 31,069 minutes. *See* NRA App. at 1005-49. "California" and "It Can't Happen Here" aired in top television markets for 25,140 minutes in the 60 days prior to the 2000 general election. *See id.* at 216, 1005-49. The "Union/Gore" program featuring Charlton Heston, *see supra* Finding 42a at pages 83-84, ran for 17,220 minutes in top television markets in the 60 days prior to the 2000 general election. *See* NRA App. at 108 (NRA infomercial data). If *Buying Time 2000* had considered these airings—and had coded them as "genuine" —at least 34 per cent (by duration) of the issue advertising that BCRA would have regulated in the 60 days prior to the 2000 general election would have been "genuine."

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[87] Angus McQueen is the Chief Executive Officer of Ackerman McQueen, Inc., a communications and advertising firm headquartered in Oklahoma City, Oklahoma. *See* McQueen Decl. at 1. Ackerman McQueen has provided communications advice and services to the NRA and NRA PVF for approximately 22 years. *See id.* at 2.

e. On March 2, 2000 President Clinton appeared for a 15-minute interview on NBC's "Today Show," during which he repeatedly criticized the NRA by name and stated that "most Americans have [no] idea what a stranglehold the NRA has had on [the] Congress." *Id.* at 907 (interview transcript). In order to respond to what it believed were unfair comments, the NRA developed a series of 30- and 60-second paid television ads in which NRA President Heston responded to President Clinton by name. *See id.* at 914 ("Mr. Clinton, you say . . . the NRA is 'against anything that requires anybody to do anything as a member of society that helps to make it safer.' Are you talking about the NRA whose gun accident prevention program has been distributed to 12 million school kids? Are you talking about the millions of NRA members who pay for it all?"). The NRA intended this series of ads to highlight the controversy with the President and to gain a forum in the national news media. The NRA's strategy succeeded in large measure because of the NRA's ability to purchase broadcast time and to respond to the President by name. *See* LaPierre Decl. at 11-12; McQueen Decl. at 9-14.

f. The NRA's financial strength is derived from pooling the resources of millions of Americans who seek to preserve what they believe is their constitutional right to keep and bear arms. *See* LaPierre Decl. at 23. Almost all of the NRA's net revenues are derived from individual contributions, which averaged $30 per person in 2000. *See id.* at 23-24. Corporate contributions account for less than one per cent of the NRA's funds. *See id.* at 24.

g. The NRA's political action committee, NRA PVF, is unable to raise funds that fairly reflect individuals' support for the NRA's political mission and message.

1) While NRA PVF raised $17.5 million during the 2000 election cycle, the NRA received over $300 million in contributions from individuals during the same period. *See* NRA App. at 198; Cross Exam. of Pl. Witness Adkins[88] at 41. The disparity stems from the inability of NRA members—most of whom are individuals of modest means—to pay the NRA's membership fees and then contribute beyond that amount to NRA PVF. *See* LaPierre Decl. at 15.

2) Political action committees cannot finance more than a small fraction of the electioneering communications that corporations and unions have been able to fund from their treasury funds. *See id.* at 14-15; Boos[89] Decl. at 4-13; Keating Decl. at 11; Pratt [90] Decl. at 13-20.

3) Because many NRA members believe they face a risk of retaliation and harassment as a result of their views, they would not donate to NRA causes if doing so required them to disclose their identities. *See* LaPierre Decl. at 24-25; Adkins Decl. at 2; NRA

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[88] Mary Rose Adkins is the Treasurer of the NRA PVF and is responsible for maintaining records and accounting information on contributions thereto. *See* Adkins Decl. at 1.

[89] Michael Boos is Vice President and General Counsel of Citizens United, a non-profit tax-exempt interest group organized under the laws of Virginia. *See* Boos Decl. at 1.

[90] Lawrence Pratt is the Executive Director of Gun Owners of America, a non-profit tax-exempt interest group organized under the laws of Virginia. *See* Pratt Decl. at 1.

App. at 884 (letter from member to NRA PVF Treasurer upon being informed that FEC requires information about all persons who contribute $200 and over: "I am 73 years old and retired [but] I do not want to expose my current part-time employer to retaliation, so could you please send me a penny so that my contribution will be $199.99?").

52. Business associations need to be able to communicate their views to the public. Accordingly, many businesses regularly sponsor television, radio, cable and other public communications about matters of public interest. *See* Josten Direct Test. at 1; Monroe Direct Test. at 7.

a. Sometimes business associations sponsor broadcast communications directly and in their own names. In 1999, for example, Chamber of Commerce President Tom Donohue delivered a series of radio talks entitled "Speaking of Business." *See* Josten Direct Test. at 1. On two occasions in the late 1990s NAM sponsored in its own name issue ads supporting the President's tax proposals. *See* Huard Direct Test. at 1.

b. On other occasions business associations contribute to coalitions of like-minded organizations that prepare and air the communications. *See* Josten Direct Test. at 1-2; Huard Direct Test. at 1-2.

1) In March 2000 the Chamber of Commerce supported issue ads run by American Business for Legal Immigration. *See* Josten Direct Test. at 2.

2) "The Coalition: Americans Working for Real Change" is one example of a coalition joined by many businesses. In early 1996 the AFL-CIO announced that it would spend a large sum—allegedly $35 million—on issue advertisements attacking the Republican legislative agenda. The business community immediately decided that a response was necessary. In April 1996 five leading business associations—including the Chamber of Commerce and NAM—formed the Coalition. *See* Huard Direct Test. at 1-2. The Coalition recruited about 30 organizations as public members, in addition to many contributors who asked not to be identified publicly. The Coalition ultimately raised and spent about $5 million on broadcast issue ads during 1996. *See* Josten Dep. at 29; Huard Dep. at 66.

c. The Chamber of Commerce, NAM and ABCI find that their ability to assure contributors that contemplated advertisements will not be "express advocacy"—and that the contributors, therefore, will not be required to be disclosed—is vital to obtaining contributions. Contributors seek anonymity with respect to particular issue ads for a wide range of reasons. Some fear that the ads may provoke or exacerbate difficulties with opposing groups such as labor organizations. Others fear that state or federal officials may retaliate. *See* Huard Direct Test. at 4; Josten Direct Test. at 4; Monroe Direct Test. at 5.

1) The Chamber of Commerce's Bruce Josten testified that members who support ads do "not want to be identified out of concerns that they may become targets or recipients of corporate campaigns or other types of what some would call union harassment activities." Josten Dep. at 28.

2) Stephen Sandherr, Chief Executive Officer of the Associated General Contractors of America, said his members "were concerned that if their contributions were publicly disclosed . . . their local building trades would take offense and would threaten actions on the job site or would threaten to make life miserable for them." Sandherr Dep. at 45.

3) ABCI's Edward Monroe testified that ABCI lost members who suffered acts of vandalism after their contributions were publicly disclosed. *See* Monroe Direct Test. at 5. Monroe also testified that potential members sometimes decline to join ABCI because they "do not trust our ability to keep [their] information confidential." Cross Exam. of Pl. Witness Monroe at 88-89.

d. In a rapidly moving communications environment, BCRA's requirement that a public report be filed within 24 hours each time a business association or its agent executes a contract to disburse a certain amount of funds for an electioneering communication imposes a severe burden on businesses' political advertising efforts, as does BCRA's requirement that all contributors of more than $1,000 be publicly identified. *See* Josten Direct Test. at 4; Monroe Direct Test. at 6.

1) Because expenditure amounts often become clear only as an advertising project progresses, it can be difficult to determine whether a particular contract (or subcontract or addendum) requires disbursements of more than $10,000. It can also be difficult to deter mine which of an ad's revisions is a new contract requiring disbursements of more than $10,000. *See* Huard Direct Test. at 4; Josten Direct Test. at 4; Monroe Direct Test. at 6.

2) BCRA's requirement of public notice when a contract to disburse is executed informs other associations and individuals what is being planned. Ideological opponents may take preemptive measures to render the planned communication impossible or ineffective. *See* Josten Direct Test. at 5.

e. Business associations' issue ads often, and of necessity, refer to federal candidates.

1) Federal officeholders and candidates are prominent individuals whose support of or opposition to a particular policy or bill may have important persuasive and informational effects. Calling proposed legislation a "Gingrich tax proposal" or a "Kennedy labor bill" often reveals more to the electorate than does a complex description of the policy or bill. *See* Huard Direct Test. at 2-3 ("[M]any people understand the general political inclinations of prominent officials or candidates better than they understand the intricacies of legislative policy.").

2) A flurry of legislative action often occurs near the end of a congressional session, *see* Cross Exam. of Def. Expert Mann at 176, and often, therefore, within 60 days of a general election. If business associations and coalitions cannot air near-election ads mentioning federal candidates or officeholders, they will have greater difficulty educating the public about, and motivating it to take action on, legislative proposals of interest to the business community. *See* Monroe Direct Test. at 3; Monroe Dep. at 60.

f. Some business associations have chosen to establish political action committees. For example, the Chamber of Commerce and ABCI have established, respectively, U.S. Chamber PAC and ABC PAC. *See* Josten Direct Test. at 5; Monroe Direct Test. at 9. Other business associations, including NAM, have considered sponsoring a political action committee but have concluded that the regulatory and financial burdens of doing so outweigh the political utility. *See* Huard Direct Test. at 3.

53. Two of the AFL-CIO's primary missions are to provide an effective political voice to workers on public issues that affect their lives and to fight for an agenda at all levels of government for working families. *See* G. Shea Decl. at 3. BCRA's ban on corporate and labor disbursements for electioneering communications and the statute's disclosure and reporting requirements significantly interfere with the AFL-CIO's missions.

a. The AFL-CIO maintains an active lobbying program aimed at influencing federal and state legislation and executive branch decisions affecting workers and their families. *See id.* at 5-23, Exhs. 2-18. The AFL-CIO's lobbying activities focus on a broad range of domestic and foreign policy matters of importance to union members, non-union workers, retirees and their families. *See id.*

b. The AFL-CIO relies on an extensive, year-round broadcast advertising program to gain public support for its legislative and policy agendas.

1) Between 1995 and 2001 the AFL-CIO sponsored in its own name over 70 "flights"[91] of television or radio advertisements, including seven flights in 1995, 25 in 1996, 10 in 1997, 12 in 1998, six in 1999, 13 in 2000 and four in 2001. *See* D. Mitchell[92] Decl. Exh. 1. During the same period the AFL-CIO co-sponsored seven flights of radio ads with other organizations under the name of a coalition or a coalition partner. *See id.*

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[91] A "flight" is a series of virtually identical ads broadcast during the same period of time in multiple media markets.

[92] Denise Mitchell is Special Assistant for Public Affairs to the President of the AFL-CIO and oversees all public relations activities of the AFL-CIO, including use of broadcast and print media. *See* D. Mitchell Decl. at 1-2.

2) The primary focus of the AFL-CIO's broadcast advertising in 1999 and 2000 was the "Patient's Bill of Rights," which had failed to gain approval in the previous Congress. *See id.* at 28, 30, Exhs. 117-123, 137-138; G. Shea Decl. at 21-22. The AFL-CIO also aired several flights of ads from February 2000 through June 2000 in opposition to President Clinton's proposal for permanent, normalized trade relations with China.[93] *See* D. Mitchell Decl. at 29-30, Exhs. 127-136; Cross Exam. of Pl. Witness D. Mitchell at 98; G. Shea Decl. at 20-21.

3) The timing of the AFL-CIO's broadcast advertisements is often dictated by upcoming votes in the Congress or by other events relatedto the legislative process. *See* D. Mitchell Decl. at 16-35 (providing specific examples); G. Shea Decl. at 9-23 (providing specific examples); *see also* D. Mitchell Dep. at 27-29, 31-32. During the weeks and months following an election or when the Congress adjourns its annual session, the AFL-CIO does not generally air ads because the public's attention usually turns to the upcoming holidays. *See* G. Shea Dep. at 55-57. When the Congress was in session in December 1995 during the federal budget crisis, however, the AFL-CIO broadcast a series of ads to influence its resolution. *See* D. Mitchell Decl. at 16-17.

4) While the AFL-CIO often broadcasts advertisements to influence short-term legislative action, it also broadcasts them to create long-term support for its positions. *See* D. Mitchell Dep. at 30-32; G. Shea Dep. at 52-53.

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[93] When President Bush reintroduced similar legislation in 2001 the AFL-CIO again ran broadcast advertisements opposing the proposal. *See* D. Mitchell Decl. at 35, Exhs. 154-58; G. Shea Decl. at 21.

5) The "targets" of the AFL-CIO's broadcast advertisements are selected on the basis of substantive and tactical factors, including the legislative issue involved; a legislator's committee assignments, prior voting record on similar legislation or leadership role with respect to particular legislation; the extent to which the target might help generate "free media" for the AFL-CIO's political message; and the concentration of union members in the jurisdiction targeted. *See* D. Mitchell Decl. at 7-8; D. Mitchell Dep. at 20-21, 205-06, 209- 12; Cross Exam. of Pl. Witness D. Mitchell at 198-200.

(A) The AFL-CIO's ads have targeted both Democratic and Republican officeholders and candidates. *See* D. Mitchell Decl. at 7-8, Exhs. 1-22; Cross Exam. of Pl. Witness D. Mitchell at 100, 179-80; Cross Exam. of Pl. Witness G. Shea at 31-32.

(B) The AFL-CIO's ads have targeted more Republicans than Democrats because Republicans generally favor legislation opposed by organized labor. *See* D. Mitchell Decl. at 7-8; Cross Exam. of Pl. Witness D. Mitchell at 100, 127-28; G. Shea Decl. at 13.

(C) The AFL-CIO's ads have targeted Democrats when Democrats have taken positions opposed by organized labor or when Democrats have been undecided on issues such as trade policy. *See* G. Shea Decl. at 12; Cross Exam. of Pl. Witness G. Shea at 31-32; D. Mitchell Dep. at 26-28, Exh. 2; Cross Exam. of Pl. Witness D. Mitchell at 100-01, 180-81.

6) With respect to advertisements run in the weeks and months immediately preceding a general election, the AFL-CIO sometimes selects jurisdictions in which the candidates named in the advertisements are expected to be involved in close races. Based on experience and on advice it receives, the AFL-CIO believes that policymakers and the public are far more likely to pay attention to the organization's political message when an election is competitive than when an officeholder has no significant opposition. *See* D. Mitchell Decl. at 8; D. Mitchell Dep. at 17-20, 74, 205-06; Cross Exam. of Pl. Witness D. Mitchell at 128, 199; *see also* Rosenthal[94] Dep. at 95-97 (asserting that "if you are trying to help shape public debate, if you are helping to move elected officials to support a certain issue agenda, [issue] ads work best if they are run in a place where there is a competitive political environment").

7) The AFL-CIO's broadcast advertisements identify the AFL-CIO as their sponsor by using phrases like "paid for by the working men and women of the AFL-CIO." D. Mitchell Decl. Exhs. 2-22; *see* D. Mitchell Dep. at 103-04; G. Shea Dep. at 58-59; Rosenthal Dep. at 18. There have been only a few exceptions to this practice, all of which involved the AFL-CIO's sponsorship of advertisements under the name of coalitions created with other organizations. In those circumstances, it was not appropriate to list only the AFL-CIO as the sponsor. *See* D. Mitchell Dep. at 101-06; G. Shea Dep. at 59-60.

8) For cost reasons, the AFL-CIO runs virtually identical broadcast advertisements in several jurisdictions, often changing only the name of the targeted officeholder or candidate. *See* D. Mitchell Decl. at 5-6, Exh. 1.

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[94] Steven Rosenthal serves as Political Director of the AFL-CIO, oversees the organization's Political Department and is responsible for its day-to-day operations. *See* Rosenthal Decl. at 1.

c. Pre-BCRA, eighteen flights of AFL-CIO issue ads were broadcast within 60 days of a general federal election in which the officeholders named in the ads were candidates. If BCRA had been in effect at the time the ads aired, the AFL- CIO would be subject to civil and criminal penalties for spending any funds on any of the ads in the eighteen flights, including the following ads.

1) "No Two Way"—a television and radio advertisement focusing on an incipient fight in the Congress over the education budget—ran between September 5 and September 17, 1996 in media markets serving approximately 35 congressional districts. *See id.* at 21-22, Exh. 1; Cross Exam of Pl. Witness D. Mitchell at 27. The ad informed viewers and listeners that the named congressman in their area had voted with House Speaker Newt Gingrich to cut the college loan program in October 1995 and that the "Congress will vote again on the budget." D. Mitchell Decl. at 22. It ended by urging viewers and listeners to "Tell [the named congressman] 'don't write off our children's future.' . . . Tell him his priorities are all wrong." *Id.* The ad included a toll-free number to be used in contacting the named congressman.

2) "Deny," another flight of television and radio ads, ran between September 10 and September 23, 1998, shortly before the Senate was scheduled to vote on an HMO reform bill the AFL-CIO considered "extremely inadequate." *Id.* at 27, Exh. 1. "Deny" referred to approximately 17 Senators the AFL-CIO and its allies believed could be persuaded to vote for a stronger version of the bill. Thirteen of the Senators were not candidates in the 1998 election but four were. *See id.* at 27.

3) "Barker," an AFL-CIO radio advertisement, ran in eight congressional districts beginning on September 21, 1998 after a vote on "Fast Track" trade legislation was hastily scheduled for September 25. The ad urged listeners to call their congressman to "tell him to vote no on Fast Track. Tell him we're still paying attention. And Fast Track is still a bad idea." *Id.* at 28.

d. The AFL-CIO's broadcast advertisements would be significantly less effective if they did not mention legislative events. *See id.* at 16-35; G. Shea Decl. at 9-23; *see also* D. Mitchell Dep. at 27-29, 31-32. Furthermore, many of the AFL-CIO's broadcast advertisements would be significantly less effective if they had to be aired outside of the weeks immediately preceding primary and general federal elections—during which period a substantial amount of legislative business occurs and citizens, officeholders and candidates are more likely to pay attention to the AFL-CIO's political message. *See* D. Mitchell Decl. at 8; Mitchell Dep. at 17-20, 74, 205-06; Cross Exam. of Pl. Witness D. Mitchell at 128, 199; Rosenthal Dep. at 95-97; Gibson Rebuttal Report at 26-28 (refuting defense expert Goldstein's assertion that "a reasonable interest group would not air its issue ads during an electoral period").

e. The AFL-CIO's broadcast advertisements would be significantly less effective in influencing legislation and policy if they did not identify federal officeholders and candidates by name. Issue advertisements that identify policymakers by name and describe in detail their records can have greater impact on those policymakers than do issue ads that refer to issues more generically. Likewise, an ad that urges viewers or listeners to contact a specific policymaker regarding a political issue is more likely to engage them on the issue than is an ad that does not ask them to take any action. *See* D. Mitchell Decl. at 8; D. Mitchell Dep. at 33-34; G. Shea Dep. at 33-34; *see also* Feingold Dep. at 238-39 (acknowledging that constituents often call in response to television advertisements).

f. If the AFL-CIO is prohibited from using its general treasury funds to sponsor broadcast issue advertisements of the kind it has run in the past, it will be unable to finance such ads to the same degree using federal contributions to its federally-registered political action committee, the AFL-CIO Committee on Political Education Political Contributions Committee (COPE PCC). *See* Rosenthal Decl. at 7-9; Rosenthal Dep. at 57-65.

1) Contributions to COPE PCC may be made only by union members and their families—or by certain employees of the AFL-CIO itself—and the amount of money that can be raised from these sources is generally limited and unlikely to increase to the extent necessary to replace the treasury funds now spent on issue advocacy. *See* Rosenthal Decl. at 7-8.

2) During 1998 and 2000 the AFL-CIO *spent* $8.4 million and $17.9 million, respectively, on its broadcast advertising program, *see* D. Mitchell Decl. at 15, while COPE PCC *raised* only $1.4 million and $1.1 million during those years, *see* Rosenthal Decl. at 8.

3) Any amount of funds COPE PCC spends on issue advertising necessarily reduces the amount of funds available for cash and in-kind contributions made directly to candidates, as well as the money available to support independent expenditures on behalf of candidates. *See id.* at 7-9.

4) Union members and other workers are generally unable to make large contributions of federal funds to political action committees or similar entities to

support broadcast advertising. *See id.* at 9. Also, in contrast to many corporate officials and other wealthy individuals, union members and other workers are generally unable to afford the high cost of personally sponsoring broadcast issue advertisements.

g. Since 1996 the AFL-CIO's political adversaries have made numerous efforts to pressure broadcast stations into refusing to run the AFL-CIO's ads. Some of the stations have given in to the pressure. *See* D. Mitchell Decl. at 12-13, Exh. 24; D. Mitchell Dep. at 174-76. If the AFL-CIO is required to file reports with the FEC regarding its proposed broadcast advertisements—or if broadcast stations are required to obtain such information and make it available to the public in advance of actually running the ads—efforts to interfere with the AFL-CIO's advertising program will likely intensify. *See* D. Mitchell Decl. at 13-15.

h. Advance disclosure of the AFL-CIO's advertisements will interfere with and have a chilling effect on the organization's broadcasting program by forcing it to reveal its plans and strategies before they are finalized and by giving opponents the opportunity to prepare counter-messages. *See id.*

i. For similar reasons, BCRA's requirement that a committee like COPE PCC disclose to the FEC within 24 to 48 hours its contracts to make independent expenditures will deter COPE PCC from making such expenditures. *See* Rosenthal Decl. at 9-10.

54. The record reflects that BCRA's ban on corporate and labor disbursements for electioneering communications will not prevent actual or apparent corruption of federal candidates.

a. To the extent that corporate and labor disbursements for electioneering communications corrupt or appear to corrupt federal candidates—and little or nothing in the record suggests that they do, *see infra* Finding 54b at pages 127-28—BCRA leaves unregulated many communications that pose as great a risk of actual or apparent corruption.

1) Newspaper ads often dwarf broadcast ads, especially radio ads, in terms of their expense. For instance, a full-page ad in the *New York Times* can cost $65,000 whereas a 60-second radio broadcast that recites precisely the same text in a small market such as Peoria would cost only $75. *See* McQueen Decl. at 8; NRA App. at 256-57.

2) Direct mail is a vital, expensive and effective component of mass advertising campaigns designed to influence federal elections. *See* Magleby Expert Report at 25, 53; LaRocco[95] Decl. at 2 (in 1994 election "the Christian Coalition circulated 370,000 'voter guides' in the 1st District of Idaho that were intended to create negative impressions among voters and influence the outcome of the election"); Pennington Decl. at 2-3.

3) Ads broadcast over the internet are comparable to those broadcast over television and radio in terms of their public reach and impact and will almost certainly grow in influence in the coming years. *See* McQueen Decl. at 6-7.

(A) More than 168 million Americans, or 60 per cent of the general public, use the internet. *See* NRA App. at 348-49. More Americans use the internet than read a daily newspaper, *see id.*, and internet usage is growing rapidly, *see id.* at 352. This trend is likely to continue because internet usage has grown at close to a rate of 100 per cent per year in recent years. *See id.*

(B) As a source of news and information, the internet rivals and is displacing the broadcast media. *See id.* at 443-99 (Pew Research Center study entitled "Internet Sapping Broadcast News Audience"). The rapid growth in internet usage is one of the reasons for the dramatic decline in broadcast news program viewing. *See id.* The internet has also become an increasingly popular source of political news during election periods. *See id.* at 408, 427.

(C) Numerous websites provide an alternative source of daily news that challenges the market dominance previously enjoyed by the traditional media. *See id.* at 500-01, 505-08. For example, the Drudge Report—an internet news service started by a single individual unaffiliated with any media company—receives up to five million visits per day. *See id.* at 507.

4) Issue ads broadcast outside the 30-day window preceding a primary election and the 60-day window preceding a general election can influence the election. *See* Milkis Rebuttal Report at 5.

5) The media industry is no longer "unique" in the way that it was 10 or 15 years ago.

(A) Over the past decade the role of the traditional media in informing and educating the public has been profoundly altered by the emergence of the internet. *See supra* Finding 54a.3 at pages 125-26.

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[95] From 1990 to 1995, Larry LaRocco served as a member of the House of Representatives from the 1st Congressional District of Idaho. *See* LaRocco Decl. at 1.

(B) Since the mid-1980s many media entities have been subsumed within larger corporate conglomerates and have devoted their resources to bottom-line profits. *See* NRA App. at 620, 625-26, 631-39, 671-72. CBS has been acquired twice in the past decade, first by Westinghouse and then by Viacom; it is now a subsidiary of a conglomerate that runs oil companies, farms, theme parks and mining companies. *See id.* at 546-50, 554-56. Similarly, ABC is now part of the entertainment empire of Walt Disney Corporation, *see id.* at 522-26, NBC is owned by General Electric, *see id.* at 541-45, and Fox Television is part of Rupert Murdoch's global News Corporation, which owns transportation companies and sports teams, *see id.* at 532-38.

(C) Media subsidiaries in some circumstances have been pressured by their non- media parent corporations to advance the interests of the parent or of the affiliated non-media businesses. *See id.* at 600, 861-81. Some media companies have refused to cover stories that might compromise the interests of the parent or of the affiliated entities. *See id.* at 687-93.

6) The media industry is better able to influence elections than are corporations in any other industry because it can use its news reporting and editorial functions to influence public opinion about politicians and political candidates. *See id.* at 714-803.

b. None of the evidence the defendants have offered materially supports the proposition that corporate and labor disbursements for issue advocacy corrupt or appear to corrupt federal candidates. Nor does the evidence show that BCRA would alleviate actual or apparent corruption "in a direct and material way" to the extent that either exists. *Turner Broad. Sys., Inc. v. FCC*, 512

U.S. 622, 664 (1994). The defendants submit only unexamined anecdotal accounts of political consultants, legislators and former legislators for three propositions that, even if true, do not demonstrate that corporate and labor disbursements for issue advocacy corrupt or appear to corrupt federal candidates:

- "Unlike the general public, federal candidates and parties know who runs advertisements covered by the BCRA, sometimes because those running the ads make sure they know." FEC's Am. Proposed Findings of Fact at 214 (capitalization altered); *see id.* at 214-15.

- "Federal candidates who benefit from advertisements covered by the BCRA are grateful for the outside help." FEC's Am. Proposed Findings of Fact at 215 (capitalization altered); *see id.* at 215-18.[96]

- "Parties whose candidates benefit from advertisements covered by the BCRA are grateful for the outside help." FEC's Am. Proposed Findings of Fact at 218 (capitalization altered); *see id.* at 218-19 (citing Resp. of AFL-CIO and COPE PCC to FEC's First Reqs. for Admis. at 10 (acknowledging that "[a]t least one [p]olitical [p]arty has expressed appreciation or gratitude for [the AFL-CIO's] financing of at least one" electioneering communication)).

3. Limits on "Coordinated Expenditures"

As to BCRA's limits on "coordinated expenditures," *see generally supra* Part II.C, I would find that:

55. Since 1976 the Act has treated an expenditure that is "coordinated" with a candidate as a contribution. *See* 2 U.S.C. § 441a(a)(7)(B)(i).

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[96] A portion of this cited material remains sealed pursuant to a separate order by Judge Kollar-Kotelly.

56. In December 2000 the FEC promulgated new regulations that defined "coordination" narrowly in the context of "general public political communications." *See* General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76138 (Dec. 6, 2000). Under the FEC's December 2000 regulations, a disbursement for a communication was "coordinated" with a candidate if the communication was created, produced or distributed (1) "[a]t the request or suggestion of" the candidate or party committee; (2) after the candidate or party committee had "exercised control or decision-making authority" over the content or distribution of the communication; or (3) after "substantial discussion or negotiation" resulting in a "collaboration or agreement" between the creator, producer, distributor or payer of the communication and the candidate or party committee about the content or distribution of the communication. 11 C.F.R. § 100.23(c)(2).

57. BCRA section 214 repealed the FEC's December 2000 coordination regulations because, according to one of BCRA's sponsors, they were "far too narrow to be effective in defining coordination in the real world of campaigns and elections and threaten[ed] to seriously undermine the soft money restrictions contained in [BCRA]." 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). The provision directed the FEC to promulgate new regulations that "shall not require agreement or formal collaboration to establish coordination" between a candidate (or political party committee) and an entity making a disbursement. BCRA § 214(c); FECA § 315 note; 2 U.S.C. § 441a note. In accordance with that mandate, the FEC on January 3, 2003 promulgated a final rule on "coordinated communications." *See supra* note 45. The rule provides as follows:

§ 109.21 What is a "coordinated communication"?

(a) *Definition*. A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication:

(1) Is paid for by a person other than that candidate, authorized committee, political party committee, or agent of any of the foregoing;

(2) Satisfies at least one of the content standards in paragraph (c) of this section; and

(3) Satisfies at least one of the conduct standards in paragraph (d) of this section.

. . .

(c) *Content standards*. Each of the types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section. (1) A communication that is an electioneering communication . . . .

(2) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). . . .

(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(4) A communication that is a public communication . . . about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.

(i) The communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. (d) *Conduct standards*. Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:

(1) *Request or suggestion*.

(i) The communication is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee, political party committee, or agent of any of the foregoing; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, political party committee, or agent of any of the foregoing, assents to the suggestion.

(2) *Material involvement*. A candidate, an authorized committee, a political party committee, or an agent of any of the foregoing, is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) *Substantial discussion*. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

. . .

(e) *Agreement or formal collaboration*. Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent's authorized committee, a political party committee, or an agent of any of the foregoing, is not required for a communication to be a coordinated communication. *Agreement* means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. *Formal collaboration* means planned, or systematically organized, work on the communication.

(f) Safe harbor for responses to inquiries about legislative or policy issues. A candidate's or a political party committee's response to an inquiry about that candidate's or political party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in paragraph (d) of this section.

68 Fed. Reg. at 453-55.

58. The ACLU's legislative efforts include many activities directly associated with lobbying but do not involve contributions to candidates, political parties, political committees or participation at fundraising functions sponsored by candidates or political organizations. *See* Murphy[97] Decl. at 2.

a. The ACLU regularly meets, speaks or corresponds with Members of the Congress and executive branch officials regarding proposed or pending legislation or executive action that may affect civil liberties. *See id.*

b. The ACLU routinely testifies before the Congress, conducts staff briefings for the Congress and provides Members with ACLU position papers. *See id.*

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[97] Laura Murphy is the Legislative Director of the ACLU. *See* Murphy Decl. at 1.

c. The ACLU holds press conferences, issues press releases, offers public commentary and makes regular media appearances and other public appearances asserting the organization's civil liberties positions on different legislative and executive initiatives. *See id.*

d. The ACLU works to build coalitions around common issues. It associates with at least 20 coalitions in a combined membership of over 250 organizations. The ACLU's legislative activities are frequently coordinated with other coalition partners. *See id.*

e. The ACLU maintains a congressional scorecard on important civil liberties issues and periodically publishes different guides on such issues. *See id.* at 3.

f. The ACLU and other organizations often work with Members of the Congress to ensure that proposed legislation is consistent with civil liberties principles. *See id.*

59. Under BCRA's definition of"coordination," as implemented by the FEC's regulations, many of the ACLU's legislative activities are subject to the prohibitions and limitations of FECA even though the ACLU does not engage in those activities for the purpose of influencing federal elections. *See id.* at 3-4.

60. The NRLC regularly lobbies federal legislators, consults with federal candidates about their positions on certain issues, disburses funds for electioneering communications and publishes printed communications, including what are known as "voter guides." Some of these activities are undertaken without communication with candidates and some are undertaken after communication with candidates. *See* O'Steen Decl. at 2.

61. A given business association's broadcast advertisments often address issues the association has discussed with Members of the Congress, representatives of political parties

and various cooperating organizations of all types. *See* Josten Direct Test. at 2. Business associations want to maintain contacts with Members of the Congress while participating in issue advocacy at the same time. *See* Huard Direct Test. at 3.

a. An association operating under a vague or overbroad definition of coordination faces serious risks each time it sponsors public communications either directly or through groups of like-minded organizations or individuals because any discussion with a legislator may later serve as the basis for an allegation that an association has coordinated a particular communication's content with the legislator. Likewise, a meeting with a legislator whose policy views are consistent with the association's views and with its advertisements may lead to a charge of coordination. *See* Josten Direct Test. at 3; Monroe Direct Test. at 3-4; DeFrancis[98] Dep. at 12, 21, 35, 43, 57.

b. The threat posed by a vague or overbroad definition of "coordination" is illustrated by the experience of the Chamber of Commerce, NAM and other business associations that were investigated in FEC Matter Under Review (MUR) 4624. The investigation in MUR 4624 pertained to the 1996 activities of an issue advocacy group called "The Coalition: Americans Working for Real Change." All of the Coalition's members were instructed to avoid any contact that could be perceived as coordination of the content, location or frequency of certain broadcast ads. Alleging that the Coalition's issue ads were coordinated with federal candidates, campaigns and political committees, however, the FEC pursued the

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[98] Suzanne DeFrancis is a former Deputy Director of Communications at the RNC and currently serves as Senior Vice President, Director of Public Affairs at Porter Novelli, an advertising firm. *See* DeFrancis Dep. at 5-7.

investigation for years and, in the Chamber of Commerce's and NAM's judgment, it deterred the Coalition's members from supporting a similar advertising effort in 1998.[99] *See* Huard Direct Test. at 3-4; Josten Direct Test. at 2; Josten Dep. at 12-13.

1) On June 9, 1998—18 months after the Coalition's ads were broadcast—the FEC instituted MUR 4624 to investigate charges by the DNC that the Coalition, 28 of its members and R. Bruce Josten (Executive Vice President of the Chamber of Commerce) had coordinated their efforts with the National Republican Congressional Committee (NRCC), its treasurer and seven candidate committees. Parallel charges were leveled against candidates and committees with whom the Coalition had allegedly coordinated its advertising efforts.

2) The crux of the FEC's coordination charge was that Coalition members—who met regularly with Congressman John Boehner to discuss and promote pro-business legislative aspects of the "Contract With America"—had the opportunity to coordinate issue ads with Congressman Boehner, who was then the fourth-ranking Republican House member, the Republican Conference Chair and an *ex officio* board member of the NRCC. *See* Josten Direct Test. at 2.

3) After four years of extensive discovery, the FEC's General Counsel concluded there was "circumstantial evidence that the activities of the Coalition

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[99] Although most records relating to MUR 4624 are confidential under 2 U.S.C. § 437g(a)(12), the FEC's public file contains a General Counsel's Report (Apr. 23, 2001) (General Counsel Report), a Statement for the Record by Commissioner Scott E. Thomas and Chairman Danny L. McDonald (Sept. 7, 2001), and a Statement for the Record by Commissioner Bradley A. Smith (Nov. 6, 2001) (Smith Statement).

were loosely coordinated with the Republican Party leaders, specifically Representative John Boehner and other candidates." General Counsel Report at 2. The General Counsel conceded, however, that "loosely coordinated" was not a viable standard in light of recently-enacted FEC regulations defining coordination, *see id.*, and therefore recommended that the case be dismissed. *See id.* at 3.

4) MUR 4624 was disruptive, burdensome and expensive. As a result of the investigation, Coalition members' willingness to participate in or support the Coalition evaporated. The Coalition financed only a few ads in 1998 and is now defunct. In his Statement for the Record, Commissioner Smith observed:

> Despite the fact that the Commission has found no violations in this case, I strongly suspect that the original complainant, the Democratic National Committee, considers its complaint to have been a success. The complaint undoubtedly forced [the DNC's] political opponents to spend hundreds of thousands, if not millions of dollars in legal fees, and to devote countless hours of staff, candidate, and executive time to responding to discovery and handling legal matters. Despite our finding that their activities were not coordinated and so did not violate the Act, I strongly suspect that the huge costs imposed by the investigation will discourage similar participation by these and other groups in the future.

Smith Statement at 2.

62. The AFL-CIO does not discuss its decisions regarding the content or placement of its broadcast advertising with any candidate, candidate committee, party or party official. *See* D. Mitchell Decl. at 9; D. Mitchell Dep. at 229- 32, 235, 238; G. Shea Dep. at 71-72, 80-81.

a. The AFL-CIO's Political Department—and other persons who have regular contact with candidates and political party officials—played no role in broadcasting decisions during the period from 1995 to 1998 and virtually no role during the period from 1999 to 2000. *See* Rosenthal Decl. at 10-11; D. Mitchell Decl. at 9-10.

b. On the few occasions over the years that a candidate or a candidate's agent has approached the AFL-CIO and has encouraged it to run ads in a particular State or congressional district, the AFL-CIO has declined. *See* D. Mitchell Decl. at 9; D. Mitchell Dep. at 232-35, 243, Exh. 20; G. Shea Dep. at 91-92.

c. As a matter of policy, the AFL-CIO has likewise declined to honor requests from candidates *not* to air ads identifying them or their opponents because the AFL-CIO believes it has both the right and the ability to decide whether and what kind of broadcast advertising will advance its legislative and policy agenda. *See* D. Mitchell Decl. at 12, Exh. 23; D. Mitchell Dep. at 169.

63. Lobbyists from the AFL-CIO's Legislative Department regularly meet with Members of the Congress and employees of the executive branch on a host of issues. The AFL-CIO's executive officers and other staff also meet with Members on policy matters.

a. The AFL-CIO seeks through such contacts to influence the policy positions of legislators and officials.

b. The AFL-CIO also relies on such contacts to gather information about the status of particular legislation and the positions of other Members. Such information has often been a significant factor in deciding whether or not to run broadcast issue advertisements on particular issues and in determining the timing, placement and content of the ads. *See* G. Shea Decl. at 23-24; G. Shea Dep. at 82-85, 89-90; D. Mitchell Dep. at 253-57.

64. If the AFL-CIO is prohibited from sponsoring broadcast ads because of its lobbying contacts with Members of the Congress, it will be forced either to curtail its lobbying activities or to refrain from airing public communications during elections.

a. The AFL-CIO is likely to refrain even from permissible lobbying contacts if it is unable to determine with utmost confidence that it can do so. *See* D. Mitchell Decl. at 9.

b. Even when the AFL-CIO *is* confident that a lobbying contact is permitted, it may nonetheless refrain therefrom if the contact can be construed by political opponents as improper or illegal. The AFL-CIO has been the target of complaints of improper coordination by its political adversaries in the past. Throughout 1996, for example, the AFL-CIO's political opponents filed a series of complaints with the FEC charging that the AFL-CIO had coordinated its broadcast advertisements and other activities with the Democratic Party and with certain Democratic candidates for federal office. *See* Rosenthal Decl. at 11; D. Mitchell Decl. at 8-9, 11. After a four-year investigation, the Commission concluded that no violation of FECA had occurred. *See* Rosenthal Decl. at 11; *see also AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 52-53 (D.D.C. 2001).

4. Restrictions on Non-Federal Funds

As to BCRA's restrictions on non-federal funds, *see generally supra* Part II.D, I would find that:

65. The FEC began tracking non-federal donations in the 1992 election cycle. During that cycle the Democratic and

Republican parties together raised $86.1 million in non-federal funds. During the 1994 election cycle the two major parties raised $101.6 million in non-federal funds; during the 1996 cycle they raised $263.5 million in non-federal funds; during the 1998 cycle they raised $222.5 million in non-federal funds; during the 2000 cycle they raised $487.5 million in non-federal funds; and during the 2002 cycle they raised $495.8 million in non-federal funds. *See* FED. ELECTION COMM'N, NEWS RELEASE: PARTY FUND-RAISING REACHES $1.1 BILLION IN 2002 ELECTION CYCLE (Dec. 18, 2002), *available at* http://www.fec.gov/press/20021218party/20021218party.html.

66. During the 1996 election cycle the 50 donors who gave the most in non-federal funds to the national political party committees each contributed between $530,000 and $3,287,175. During the 2000 election cycle the top 50 non-federal donors to the national committees each gave between $955,695 and $5,949,000. During the 2000 cycle 800 donors—435 corporations, unions and other organizations and 365 individuals—each gave a minimum of $120,000 to the national committees and accounted for almost $300 million, or 60 per cent, of all non-federal money raised by the committees. *See* Mann[100] Expert Report at 22-25, Tbls. 5, 6.

67. Senator McConnell routinely participates in political and fundraising events for state and local candidates and party committees.

a. For example, on July 5, 2002 Senator McConnell participated in an election strategy conference call with Kentucky state senator Robert Leeper; on August 15 he headlined a state party fundraiser to benefit state senate candidates; on August 20 he participated in a fundraiser for a state senate candidate; and on September 28 he attended a rally for the Republican candidate for judge-executive in Butler County, Kentucky. *See* McConnell Aff. at 2.

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[100] Defense expert Thomas Mann is the W. Averell Harriman Chair and Senior Fellow in Governance Studies at the Brookings Institution. *See* Mann Expert Report at 1.

b. Since his election to the Senate, Senator McConnell has been a member of the National Republican Senatorial Committee (NRSC), which advocates Republican principles and supports Republican candidates at the federal, state and local levels. Senator McConnell chaired the NRSC in the 1998 and 2000 election cycles and, as chairman, he raised non-federal funds. These funds were used for voter registration, identification and get-out-the-vote activities, issue advocacy, building projects and national support for state and local candidates. During his tenure as NRSC Chairman, Senator McConnell also directed non-federal NRSC donations to dozens of state and local candidates, including Virginia Republican gubernatorial candidate Jim Gilmore (in 1997); California Republican gubernatorial candidate Dan Lungren (in 1998); and the Republican candidate for mayor of Warwick, Rhode Island (in 2000). *See id.* at 3.

c. BCRA prohibits Senator McConnell from raising money for state or local parties or candidates from corporate or union donors, or in excess of $10,000 from individual donors. Absent BCRA, Senator McConnell would raise money for state and local parties in compliance with applicable state laws. *See id.* at 4-5.

d. During his 18 years in the United States Senate, Senator McConnell has met thousands of Americans with whom he has shaken hands, posed for photographs, answered questions and discussed legislative issues. The overwhelming majority of the meetings were with people who do not donate funds to the Republican Party

at the national, state or local level. Senator McConnell is usually unaware of the donation history of individuals with whom he meets. *See id.* at 8.

68. Plaintiff Thomas McInerney shares the Republican Party's general philosophy on policy issues. He has pursued his political and public policy goals by pooling his resources with like-minded Americans in Republican organizations at the national, state and local levels to promote Republican principles and candidates at the federal, state and local levels. *See* McInerney Aff. at 1-2.

a. Prior to BCRA's enactment McInemey donated amounts in excess of $57,500 per cycle to the national political party committees of the Republican Party and in excess of $10,000 per year to state and local Republican Party organizations. His donations were intended to support state and local candidates; voter registration activities for state and local parties; near-election voter identification activity; get-out-the-vote activity; generic campaign activity for state and local parties, including broadcast communications that promote the Republican Party when a federal candidate is on the ballot; slate cards, palm cards and sample ballots for state and local parties; absentee ballot programs for state and local parties; phone bank programs for state and local parties; public communications discussing policy issues, including communications that mention federal candidates in a manner that could be construed to "promote, support, attack or oppose" such candidates; and staff salaries of employees who spend 25 per cent of their paid time in any given month on any of these activities. *See id.* at 2-3.

1) In the 2002 election cycle McInerney donated more than $57,500 to Republican Party organizations

at the national, state and local levels—funds that were spent on many or all ofthe activities described above. *See id.* at 5.

2) In the 2000 election cycle McInerney donated more than $57,500 to Republican Party organizations at the national, state and local levels—funds that were spent on many or all of the activities described above. *See id.* at 6.

b. The laws of the State of New York permit McInerney to donate funds in excess of what BCRA permits him to donate.

1) New York law permits McInerney to donate $76,500 per year to state and local political party organizations—funds that may be spent on any of the activities listed *supra* in Finding 68a at page 142, including state and local candidate support, voter identification activity, slate cards, palm cards, sample ballots and phone bank programs for state and local parties. *See* McInerney Aff. at 3; *see also* N.Y. ELEC. LAW §§ 14-100 to 14-124 (West 2003).

2) New York law permits McInerney to make unlimited non-federal donations to the housekeeping accounts of state and local political party organizations—funds that may be spent on administrative expenses such as rent, utilities, printing costs, supplies and legal and accounting services; salaries and benefits, including the salaries of individuals who spend 25 per cent of their paid time in any given month on grassroots activities; activities that are not for the express purpose of promoting the candidacy of specific candidates, including issue advocacy referring to federal candidates and near-election voter registration activity. *See* McInerney Aff. at 4; *see also* N.Y. ELEC. LAW §§ 14-100 to 14-124 (West 2003).

3) New York law permits McInerney to make unlimited non-federal donations to the RNC, the NRSC, the Republican National State Elections Committee of the Republican National Committee (RNSEC), among others—funds that may be spent on any of the activities listed *supra* in Finding 68a at page 142. *See* McInerney Aff. at 4; *see also* N.Y. ELEC. LAW §§ 14-100 to 14-124 (West 2003).

4) BCRA prohibits McInerney from donating amounts in excess of $57,500 per cycle to Republican Party organizations at the national, state and local levels and in excess of $10,000 per year to state and local Republican party organizations—funds that McInerney would like to be used on the political activities listed *supra* in Finding 68a at page 142. *See* McInerney Aff. at 5.

c. McInerney's support for Republican Party organizations at the national, state and local levels reflects his shared philosophy and values with the Republican Party, not any corrupt motive.

1) Nothing in the record suggests that McInerney has ever attempted to make a non-federal donation to change the vote or official action of any federal official; has ever been solicited by any federal officeholder or agent of a national political party based on a promise or offer of any official action; or has ever donated funds that, to his knowledge, affected the vote or official action of any public official, including a federal official. *See id.* at 7.

2) Nothing in the record suggests that McInerney's support for the Republican Party at the national, state and local levels is dependent upon gaining access to federal officeholders. *See id.* at 8.

d. BCRA permits McInerney to make unlimited non-federal donations to interest groups that engage in many or all of the activities listed *supra* in Finding 68a at page 142, while prohibiting him from making similar donations to Republican Party organizations at the national, state and local levels. Absent BCRA, McInerney would continue to make such donations to Republican Party organizations in compliance with the laws of the relevant States. *See* McInerney Aff. at 8.

e. Under BCRA, McInerney would be subject to criminal fines and imprisonment of up to five years for funding—at the same level and using non-federal funds—the same political activities he has funded in the past. *See id.* at 10.

69. Attorney General Pryor has sponsored public communications that refer to federal candidates and promote, support, attack or oppose such candidates, including communications that do not expressly advocate a vote for or against any such candidate. *See* Pryor Decl. at 1-3, Exhs. A-F. Pryor has received and hopes in the future to receive contributions from the RNSEC. *See id.* at 4. As a candidate for state office, Pryor has raised and spent funds for voter registration activities conducted within 120 days of a federal election and for voter identification, get-out-the-vote and generic campaign activities conducted in connection with elections in which a federal candidate has also appeared on the ballot. He intends to continue raising and spending funds for such activities, on his own and in association with other candidates for state and local office. *See id.* at 4-6.

70. Political parties have played and continue to play at least four critical roles in our country's political process.

a. First, the parties have coordinated the political activities and messages of various national, state and local entities within the federal system. *See* Milkis[101] Expert Report at 13-14; Keller[102] Expert Report at 6-7.

b. Second, the parties encourage "democratic nationalism" by nominating and electing candidates and by engaging in discussions about public policy issues of national importance. Milkis Expert Report at 14-19. For example, the RNC has recently participated in public policy debates regarding a balanced budget amendment, welfare reform and education policy. *See* Josefiak Decl. at 27-29; RNC Exhs. 1711, 2428, 2440.

1) The parties recruit and nominate candidates, aggregate public preferences and provide a means of democratic accountability. *See* Green[103] Expert Report at 7; Magleby Expert Report at 33; Mann Expert Report at 28. Political scientists also credit parties with increasing voter turnout, encouraging volunteer grassroots political participation, fostering broader electoral competition by supporting challengers against incumbents and diluting the influence of organized interests. *See* Cross Exam. of Def. Expert Green at 83-84; Cross Exam. of Defense Expert Mann at 53; Keller Expert Report at 5-6; Milkis Expert

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[101] Plaintiffs' expert Sidney Milkis is the James Hart Professor of Politics at the University of Virginia; he is also a Senior Scholar and Co-Director of the American Political Development Program at the Miller Center of Public Affairs. *See* Milkis Expert Report at 1.

[102] Plaintiffs' expert Morton Keller was a Professor of American History from 1956 until 2001; he taught at the University of North Carolina at Chapel Hill, the University of Pennsylvania and Brandeis University. *See* Keller Expert Report at 1.

[103] Defense expert Donald Green is a Professor of Political Science at Yale University, where he also serves as Director of the Institution for Social and Policy Studies. *See* Green Expert Report at 1.

Report at 12-13; La Raja[104] Expert Report at 5, 7-8.

2) Party competition in general is healthy for democracy; it was a major force behind the expansion of the electorate through the enfranchisement of blacks in the South, reduction of the voting age to eighteen and the elimination of poll taxes and other constraints on voting registration. *See* Keller Expert Report at 15.

c. Third, the parties act as critical agents in developing consensus in the United States. *See* Milkis Expert Report at 19. In the words of one defense expert, parties are "the main coalition building institution[s] . . . by a good measure." Cross Exam. of Def. Expert Green at 84; *see* Cross Exam. of Def. Expert Mann at 53, 56 ("[n]o other group could come close to political parties" in moderating extreme views); Krasno & Sorauf Expert Report at 24 ("Parties with their necessary 'big tent' compete for the allegiances of multiple groups . . . .").

d. Fourth, the parties cultivate a sense of community and collective responsibility in American political culture. *See* Milkis Expert Report at 19-21; La Raja Expert Report at 3-4. Parties have been integral in forming a consensus on such divisive issues as social welfare policy. *See* Milkis Expert Report at 4.

71. As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the federal state and local levels. *See* Josefiak Decl. at 5, 11-17; *see also* Milkis Expert Report at 28-29. The RNC seeks to advance its core principles by

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[104] Plaintiffs' expert Raymond La Raja is an Assistant Professor of Political Science at the University of Massachusetts, Amherst. *See* La Raja Expert Report at 1.

advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views at the federal, state and local levels. *See* Josefiak Decl. at 6; *see also* La Raja Expert Report at 20-22.

a. In pursuit of its objectives, the RNC engages in frequent communications with its members, officeholders, candidates, state and local party committees and the general public. These communications occur both during campaign seasons and at all other times. *See* Banning[105] Decl. at 11-13; Josefiak Decl. at 26, 32.

b. The RNC engages in activities intended to influence federal elections and supports those activities with federal funds. *See* Josefiak Decl. at 6, 26. The RNC spends federal funds on recruiting and training candidates; contributing to federal candidate campaign committees; coordinated expenditures on behalf of federal candidates; communications calling for the election or defeat of federal candidates; the federal share of research and issue development; and the federal share of voter registration, voter identification and get-out-the- vote campaigns. *See* Banning Decl. at 11; Josefiak Decl. at 7, 10, 26; La Raja Expert Report at 5-6; Magleby Expert Report at 48.

1) In 1996, following the Supreme Court's ruling in *Colorado Republican I* that political parties have a constitutionally protected right to make unlimited independent expenditures, the NRSC made independent expenditures on behalf of several candidates for

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[105] Jay Banning is Director of Administration and Chief Financial Officer of the RNC and his responsibilities include managing the RNC's budget, overseeing its finance and accounting personnel, maintaining books and records, overseeing the RNC's annual audit, paying all bills and (before BCRA) serving as assistant treasurer for the RNC's various non- federal accounts. *See* Banning Decl. at 1-2.

the United States Senate while the RNC simultaneously made coordinated expenditures on behalf of the same candidates.

(A) The NRSC disbursed approximately $10.5 million in independent expenditures in 17 States where the RNC disbursed more than $4.3 million in coordinated expenditures: Alabama, Arkansas, Colorado, Georgia, Iowa, Kansas, Louisiana, Maine, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Rhode Island, South Dakota and Wyoming. *See* Josefiak Rebuttal Decl. at 3.

(B) As part of its efforts, the NRSC took measures to assure no coordination with candidates, including the removal from the NRSC's office building of any staff working on the independent expenditures. *See id.*

2) Under BCRA, if the RNC decides to make a coordinated disbursement with respect to a candidate, it must first confirm that *no* other political committee—whether national, state or local—has made or is about to make an independent expenditure with respect to the same candidate. Likewise, if the RNC decides to make an independent expenditure with respect to a candidate, it must first confirm that no other political committee—national, state or local—has made or is about to make a coordinated disbursement with respect to the same candidate. The RNC's Chief Counsel, who is responsible for giving legal approval to all RNC coordinated disbursements, believes it will be difficult or even impossible under BCRA for a national party to police every party entity to make sure none has made or is about to make a coordinated or independent disbursement. *See id.* at 2.

c. The RNC also undertakes activities exclusively in connection with state and local elections. These activities are substantial both in their importance to the RNC's mission and in their resource commitment.

1) For elections in which there is a federal candidate on the ballot, the RNC trains state and local candidates, donates to state and local candidates and candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities.

(A) In 2000 the RNC donated approximately $5.6 million in non-federal funds to state and local candidates for such activities. *See* Josefiak Decl. at 17.

(B) The RNC devotes substantial resources to state and local political activities during federal election years even when the federal races are not competitive in a particular State (as in California in 2002 and Indiana in 2000). *See id.* at 18; Peschong[106] Decl. at 4.

2) Even for elections in which there is *no* federal candidate on the ballot, the RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities. *See* Banning Decl. at 8-14; Josefiak Decl. at 5, 11-17.

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[106] John Peschong is currently the RNC's Regional Political Director for the Western Region and works in that capacity with Republican Party organizations in Alaska, American Samoa, California, Guam, Hawaii, Idaho, Nevada, Oregon, Puerto Rico, the Virgin Islands and Washington to assist them in their objective to elect federal, state and local Republican candidates. *See* Peschong Decl. at 1-2.

(A) Five States—Kentucky, Louisiana, Mississippi, New Jersey and Virginia—hold elections for state and local office in odd-numbered years when there are normally no federal candidates on the ballot. *See* Josefiak Decl. at 11-12. Likewise, numerous cities—including Houston, Indianapolis, Los Angeles, Minneapolis and New York City—hold mayoral elections in odd-numbered years. *See id.* at 12.

(B) For the 2001 election, an "off-year" election with no federal candidates on the ballot, the RNC spent more than $15.6 million in non-federal funds on state and local election activity through donations to state and local candidates, transfers to state parties and direct spending. *See* Banning Decl. at 8-9. In the last two off-year elections combined, the RNC spent over $21 million in non-federal funds to support state and local election activity, not including substantial commitments of staff time and other resources. *See id.* at 7-15; Duncan Decl. at 9; Josefiak Decl. at 5, 11-17; Cross Exam. of Defense Expert Mann at 71; *see also* La Raja Expert Report at 15.

3) The RNC supports its non-federal activities with funds raised pursuant to the laws of the pertinent States and localities.

(A) Until BCRA's effective date the RNC maintained twelve non-federal accounts, known as RNSEC accounts. *See* Banning Decl. at 5.

(B) Because of the variations among state campaign finance laws, the RNC set up different rules to govern each RNSEC account according to the type and amount of donations that could be deposited therein and the type of disbursements that could be made therefrom. *See id.* at 3.

(C) Some RNSEC accounts were reserved for corporate funds, which were used to make donations or expenditures in States permitting the use of such funds in connection with state and local elections. *See id.*

(D) Other RNSEC accounts were reserved for individual funds, which were used to make donations or expenditures in States not permitting the use of corporate funds in connection with state and local elections. *See id.* at 4.

(E) Still other RNSEC accounts held funds raised and spent pursuant to the unique legal requirements of particular States; the RNC set up state-specific RNSEC accounts for California, Massachusetts, Michigan, Missouri, New York, North Carolina and Rhode Island. *See id.* at 4-5.

d. Prior to BCRA's effective date the RNC also engaged in "mixed" activities—that is, activities undertaken in connection with both federal and state or local elections.

1) The RNC supported voter registration, get-out-the-vote, generic party-building and grassroots activities that benefited all Republican candidates—federal, state and local—on the ballot in any given election. *See* Benson[107] Decl. at 4; Duncan Decl. at 7-8.

2) Pursuant to the Act and FEC regulations in force prior to BCRA's effective date, the RNC and other political parties paid for mixed activities using an "allocation" of federal and non-federal funds. Josefiak Decl. at 6.

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[107] Bruce Benson is the Chairman of the Colorado Republican Party and oversees the organization's party building programs and candidate support efforts. *See* Benson Decl. at 1.

(A) During presidential election years the RNC was required to pay and did pay for its mixed activities with at least 65 per cent in federal funds. *See* 11 C.F.R. § 106.5 (2001).

(B) During non-presidential election years the RNC was required to pay and did pay for its mixed activities with at least 60 per cent in federal funds. *See id.*

3) Recognizing that the RNC, like other national political party committees, is heavily involved in activities at both the federal and state levels, the FEC historically allowed the RNC to pay its administrative overhead—including salaries, employee benefits, equipment and supplies for party operations at RNC headquarters in Washington, D.C.—with a mix of federal and non-federal funds. *See* Banning Decl. at 8; Josefiak Decl. at 6.

4) The RNC used a mix of federal and non-federal funds to pay for a wide range of activities not directly connected to the election of federal, state or local candidates. *See* Banning Decl. at 9-14; Josefiak Decl. at 27-29 (describing numerous "instances in which the RNC [paid] for broadcast issue advertising for the exclusive purpose of influencing the legislative and policy debate"). During the 2000 election cycle the RNC spent $43.6 million in non-federal funds and $27.6 million in federal funds—either directly or through state parties—on issue advertising. *See* Banning Decl. at 7. Thus, the RNC spent about one-third (approximately $43.6 million) of its total non-federal resources (approximately $130 million) on issue advocacy in that cycle. *See id.* at 8 (noting RNC spent almost as much non-federal money, $35.6 million, on administrative overhead costs in 2000 cycle); *see also* B. Shea Decl. at 3; RNC Exh. 2429.

5) The RNC used a mix of federal and non-federal funds to engage in significant non-broadcast communications with its supporters. For example, through the magazine "Rising Tide," the RNC provided a more in-depth explanation of the Republican issues agenda than is possible in a 30-second television advertisement. *See* Josefiak Decl. at 31; RNC Exh. 977. Also, the RNC uses the internet, e-mail and direct mail to spread its message. *See* La Raja Expert Report at 21; Magleby Expert Report at 42.

6) The RNC used a mix of federal and non-federal funds to support redistricting efforts, including redistricting litigation. In 2002, for example, the RNC budgeted approximately $4.1 million on redistricting. Seventy per cent of the redistricting budget was to be funded with non-federal money. *See* Banning Decl. at 14; Josefiak Decl. at 21-22. The RNC spends more overall on state legislative redistricting than on congressional redistricting. *See* Josefiak Decl. at 22.

7) The RNC used a mix of federal and non-federal funds to conduct training seminars for Republican candidates, party officials, activists and campaign staff, many of whom are involved in state and local campaigns and elections. Topics included grassroots organizing, fundraising and compliance with campaign finance regulations. During the 2000 election cycle at least 10,000 people attended RNC-sponsored training sessions, including 117 "nuts-and-bolts" seminars on grassroots organizing and get-out-the-vote activities. During the same cycle the RNC spent $391,000 in non-federal funds and $671,000 in federal funds on such training and support. *See* Banning Decl. at 10-11; *see also* La Raja Expert Report at 11 (parties "help candidates by training them and their campaign

staff," support which is particularly important "in an era of . . . campaigning that requires skillful application of advanced campaign technologies").

8) The RNC used a mix of federal and non-federal funds to promote grassroots initiatives and to support interstate cooperation on state issues among Republican state and local officials. For example, the RNC provided $100,000 of seed money for the formation of a Republican state attorneys general association that focuses on state issues. *See* Josefiak Decl. at 25; RNC Exh. 978. During the 2000 election cycle the RNC spent $199,000 in non-federal funds and $33,500 in federal funds on state and local governmental affairs. *See* Banning Decl. at 9-10.

9) The RNC used a mix of federal and non-federal funds to support efforts to increase minority involvment and membership in the Republican Party. During the 2000 election cycle the RNC spent $1,211,000 in non-federal funds and $2,163,000 in federal funds on minority outreach and support of allied groups. *See id.* at 12.

e. The RNC provides considerable direct and indirect financial assistance to state and local parties. The RNC assists state and local parties in and through fundraising training, candidate training, fund transfers, advertising, policy discussions, polling, forums, coalition building, research and consulting support, voter mobilization and list sharing. *See* B. Shea[108] Decl. at 14-16; Josefiak Decl. at 18-21; Banning Decl. at 8-14.

1) During the 2000 election cycle the RNC made transfers of approximately $129 million—$93.2 million in non-federal funds and $35.8 million in federal funds—to state and local parties. *See* FED. ELECTION COMM'N, NATIONAL PARTY TRANSFERS TO STATE/LOCAL COMMITTEES: JANUARY 1, 1999 TO DECEMBER 31, 2000, *available at* ttp://www.fec.gov/press/051501partyfund/tables/nat2state.html.

2) Prior to BCRA's effective date the RNC also provided significant fundraising assistance to state and local candidates and parties through a variety of means.

(A) The RNC helped state and local parties through donor list exchanges; joint fundraising events; promotion of state party fundraising events; facilitating contributions from interested donors; providing matching incentives to encourage state parties to develop their in-house fundraising capabilities through the RNC's "Finance PLUS" program; and devoting personnel to state party fundraising needs. *See* Dendahl Decl. at 3; Duncan Decl. at 8-9; Josefiak Decl. at 12-13, 19-21; B. Shea Decl. at 14-17; *see also* La Raja Expert Report at 7, 11-12, 53.

(B) RNC officers sent fundraising letters on behalf of state and local candidates and parties, including during election off-years. *See, e.g.*, RNC Exh. 292; RNC Exh. 1762; RNC Exh. 1766; Feingold Dep. Exh. 12.

(C) RNC officers were substantially involved in helping state and local parties and candidates raise money in accordance with state and federal law.

(i) After becoming Chairman of the RNC in February 2002, Marc Racicot made 82 trips to 67 cities in 36 States in 2002. Virtually all of these trips involved fundraising assistance to state and local parties and candidates. *See* Josefiak Decl. at 21.

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[108] Beverly Ann Shea is the Finance Director for the RNC and oversees all of the RNC's fundraising activities. *See* B. Shea Decl. at 1-3.

(ii) RNC Co-Chairwoman Ann Wagner and Deputy Chairman Jack Oliver made 31 and 33 trips, respectively, the majority of which involved fundraising assistance to state and local parties and candidates. *See id.; see also, e.g.*, RNC Exh. 301.

(iii) Mike Duncan, current General Counsel and former Treasurer of the RNC, was actively involved in fundraising activities for the Republican Party of Kentucky and for Kentucky state candidates. In the past few years Duncan sponsored a reception to support the reelection of a Kentucky state senator and he also hosted and attended numerous fundraising dinners in support of the Kentucky Republican Party. *See* Duncan Decl. at 3-5.

f. The RNC cooperates and works closely with state and local political parties to support the entire Republican platform and ticket at the federal, state and local levels.

1) Political scientists agree that "relationships among local, state, and national organizations have strengthened in the past three decades" and they attribute the cohesion to "the role of the national parties in providing resources and expertise to lower levels of the party." La Raja Expert Report at 7 (citations omitted); *see* Mann Expert Report at 30 ("The relationship between the national parties and their state parties has never been closer than it is today.").

2) Cooperation among national, state and local parties is generally healthy for American democracy:

> Cohesive parties enhance electoral accountability by linking the campaigns and platforms of federal, state and local candidates. In this way, they provide voters with clear signals about what the party stands for collectively. The joint campaigns of political parties across federal, state and local candidates also generate electoral economies of scale that mobilize greater numbers of voters. The national parties have been the catalysts for party integration because they possess the resources to coordinate such activity.

La Raja Rebuttal Report at 5.

3) Perhaps the best examples of national, state and local political party cohesion are the Republican Party "Victory Plans" and the Democratic Party "Coordinated Campaigns." All levels of the Republican Party structure actively participate in the design, funding, fundraising and implementation of Victory Plans, *see* Josefiak Decl. at 7-11, just as all levels of the Democratic Party participate in the design, funding, fundraising and implementation of Coordinated Campaigns, *see* Bowler Decl. at 23-24.

(A) The RNC's Victory Plans are voter contact programs designed to support the entire Republican ticket at the federal, state and local levels. The RNC works with every state party to design, fund and implement the Plans. *See* Benson Decl. at 3; Josefiak Decl. at 7; Peschong Decl. at 2-3.

(B) Victory Plans are formulated and implemented after collaboration between the RNC and the state parties; each Plan is tailored to the unique needs of each State and designed to stimulate grassroots activism and to increase voter turnout with the goal of benefiting candidates at all levels of the ticket. *See* Josefiak Decl. at 7-11. The involvement of RNC national and regional field personnel in developing, funding and implementing the plans is essential for their success. *See* Benson Decl. at 3; Peschong Decl. at 4.

(C) In 2000 the RNC transferred $42 million to state parties to use in Victory Plan programs, 60 per cent (about $25 million) of which was non-federal money and none of which was spent on broadcast issue advertising. *See* Josefiak Decl. at 9.

(D) Although Victory Plans are designed to benefit Republican candidates at the federal, state and local levels, they often place the greatest emphasis on state and local races because in most instances there are far more state and local candidates than federal candidates on the ballot. *See* Bennett[109] Decl. at 15 (ratio of state and local candidates to federal candidates on ballot in Cuyahoga County, Ohio in 2002 was 18 to 1); Benson Decl. at 3.

(E) The Victory Plans are long-term programs spanning the entire election calendar year and are not limited to the 60 or 120 days prior to an election. *See* Peschong Decl. at 2-3.

(F) The Victory Plans generally include rallies, direct mail, telephone banks, brochures, slate cards, yard signs, bumper stickers, door hangers and door-to- door volunteer activities. *See id.*

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[109] Robert Bennett is the Chair of the Republican State Central and Executive Committee of Ohio and oversees the organization's party building programs and candidate support efforts. *See* Bennett Decl. at 1.

g. With regard to the RNC's fundraising activities generally, I would find that:

1) In 2000 the RNC raised $99,178,295.61 in non-federal funds and $152,127,759.12 in federal funds. *See* RNC Exh. 2259.

2) The RNC engages in fundraising through direct marketing—i.e., direct mail, telemarketing and internet solicitations—and through "major donor" programs. In 2000 the RNC raised $105,860,700 through direct marketing and $146,929,900 through major donor programs. *See* B. Shea Decl. at 3. In 2001 the RNC raised $56,117,600 through direct marketing and $25,909,700 through major donor programs. *See id.*

(A) On average, 60 per cent of the total amount the RNC raises each year is obtained through direct marketing. *See id.;* Knopp[110] Decl. at 3. The direct marketing messages that "perform the best are those that emphasize the Republican Party's core political philosophy of lower taxes and less government and the RNC's important role in federal and state elections. In short, the RNC's fundraising success depends on its appeal to persons desiring to associate with its governing philosophy." Knopp Decl. at 19.

(B) "Major donors" are defined as individuals who give $1,000 or more per year. *See* B. Shea Decl. at 3. Like its smaller donors, the RNC's major donors are most responsive to appeals based on the RNC's ideology. *See id.* at 10-11. The RNC has six major donor programs: the President's Club is designed to raise federal contributions of $1,000 per person or

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[110] Janice Knopp is the Deputy Director of Finance and Marketing Director for the RNC, in which capacities she oversees the RNC's direct marketing fundraising efforts. *See* Knopp Decl. at 1.

$2,000 per couple per year, *see id.* at 6; the Chairman's Advisory Board is designed to raise federal contributions of $5,000 per year, *see id.;* the Eagles program, the RNC's oldest major donor program, is designed for donors who either contribute $15,000 in federal funds or donate $20,000 in non-federal funds per year, *see id.;* the Majority Fund is directed at PACs that donate $15,000 in either federal or non-federal funds per year, *see id.* at 6-7; Team 100 is designed for donors who donate $100,000 in non-federal funds upon joining and then donate $25,000 in each of the three subsequent years, *see id.* at 7; and the Regents program is designed for donors who give an aggregate amount of $250,000 in non-federal funds per two-year election cycle, *see id.* In addition, every four years the RNC establishes a special "Presidential Trust," designed for contributions of $20,000 in federal funds. *See id.*

3) The RNC raises the bulk of its non-federal money from individuals—not corporations—and the average corporate donation of non-federal funds is significantly lower than the average individual donation. In 2000, for example, the average corporate donation of non-federal funds was $2,226, while the average individual donation of non-federal funds was $10,410. *See id.* at 5.

4) It is "exceedingly rare" for the RNC to rely on federal officeholders for personal or telephonic solicitations of major donors. *See* B. Shea Decl. at 8. By RNC policy and practice, the RNC Chairman, Co-Chairwoman, Deputy Chairman, fundraising staff and members of major donor groups—not federal officeholders—undertake initial contact and solicitation of major donors of both federal and non-federal funds. *See id.*

72. The CDP and the CRP are subject to extensive federal and state regulation with respect to their campaign activities.

a. The CDP and the CRP each maintain a federal committee registered with the FEC. The federal committee maintains a federal account, contributions to which comply with FECA's source-and-amount limitations and reporting requirements. *See* Bowler Decl. at 5-6; Morgan Decl. at 2.

b. The CDP and the CRP are registered as political party committees in accordance with California law. Each maintains a non-federal account into which donations permissible under California law are deposited. The parties' non- federal campaign activities are subject to regulation by the California Fair Political Practices Commission and each party regularly files disclosure reports of receipts and expenditures with the California Secretary of State. *See* Bowler Decl. at 6-7; Morgan Decl. at 2.

c. Prior to BCRA's effective date the costs of the CDP's and the CRP's "mixed" activities were "allocated" between each party's federal account and non-federal account.

1) The CDP and the CRP were required to allocate funds for administrative expenses such as rent or employee salaries; generic voter identification activities; voter registration activities; get-out-the-vote activities that were not candidate-specific; fundraising expenses; and communications on behalf of both federal and non-federal candidates. *See* Bowler Decl. at 8.

2) The CDP and the CRP allocated funds in accordance with the FEC's regulations. They allocated funds for administrative expenses, generic voter identification activities, voter registration activities and get-out-the-vote activities based on a "ballot composition" formula that calculated the ratio of federal

offices and non-federal offices expected to appear on the general election ballot in a given election cycle. They allocated funds for public communications supporting or opposing federal and non-federal candidates using a "time-and-space" formula. And they allocated funds for fundraising expenses on a "funds raised" basis. *See id.* at 8-9.

d. In November 2000 California voters adopted Proposition 34 to govern campaign donations in the State.

1) Under Proposition 34, expenditures by political party committees on behalf of state candidates are unlimited. Donations by political party committees to state candidates are likewise unlimited, although donations by other donors to state candidates are limited depending upon the elective office. Donations to state and local political parties for the purpose of making donations to state candidates are limited to $25,000 per donor per year. Donations to state and local political parties for other purposes—e.g., funding administrative and overhead costs, voter Registration or get-out-the-vote activities or supporting ballot measures or issue advocacy—are unlimited. Donations to state and local political parties are not source-limited; that is, corporations and labor unions may donate funds in accordance with generally applicable limits. *See id.* at 6-7; Erwin[111] Decl. at 7; *see also, e.g.,* CAL. GOV'T CODE §§ 85301, 85303 (West 2003).

2) In adopting Proposition 34, California voters made a specific policy choice to increase the role of political parties in California elections. The voters determined that "[p]olitical parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions."*See* CDP App. at 1193 ("Proposition 34: Text of Proposed Law").

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[111] Ryan Erwin is the Chief Operating Officer of the CRP and oversees its day-to-day operations. *See* Erwin Decl. at 1.

73. State and local political party committees generally, and the CDP and the CRP specifically, focus the majority of their resources on supporting state and local candidates, participating in state and local elections and influencing state and local policies.

a. The CDP and the CRP are more actively involved in state and local races than in federal races.

1) In States simultaneously holding their elections with federal elections, including California, state and local races on any particular ballot substantially outnumber federal races, of which there will ordinarily be a maximum of three in any election cycle. *See* Bowler Decl. at 8.

2) California holds elections for 120 legislative officers, eight statewide-elected officers and four members of the state board of equalization. It holds still more elections for local offices and for judicial offices and ballot measures at both the state and local levels. *See id.* at 5; Erwin Decl. at 5.

3) During the 2002 election cycle—in which there was only one competitive congressional race in California—the CDP was actively involved in eight statewide non-federal races and one dozen state legislative races. *See* Bowler Decl. at 5.

4) The CDP actively participates in municipal elections. In recent years the CDP has spent several million dollars in non-federal funds supporting candidates in major cities such as Los Angeles and San Francisco. *See* CDP Pls.' Proposed Findings of Fact at 6.

5) The CDP actively supports and opposes state and local ballot measures. In the March 2002 primary, for example, the CDP contributed over $3 million to a 501(c)(4) statewide ballot measure committee in an effort to extend term limits for members of the state legislature. *See id.*

b. The CDP and the CRP register voters primarily to influence state and local races.

1) The CDP registered over 300,000 new Democratic voters throughout California during 2002 when there was only one competitive congressional race. *See* Bowler Decl. at 13.

2) The CDP's expenditures on voter registration—consisting of a mix of federal and non-federal funds—were approximately $145,000 in the 1996 election cycle; $300,000 in the 1998 cycle; $100,000 in the 2000 election cycle; and $185,000 during the period from January 1, 2001 to June 30, 2002. *See id.*

3) The CDP's expenditures for voter registration were higher in 1998 (a year with eight statewide elections) than in 2000 (a presidential election year). *See id.*

4) The CRP has paid for voter registration—with a mix of federal and non-federal funds—through its Operation Bounty program, in which Republican county central committees, Republican volunteer organizations and Republican candidates for federal and state office participate. Through Operation Bounty drives, the CRP has typically registered over 350,000 Republican voters in each election cycle since the 1984 cycle. *See* Erwin Decl. at 13; *see also* CDP App. at 1185 (charting CRP's voter registration activity by election cycle since 1984 cycle).

c. The CDP and the CRP conduct direct mail campaigns primarily to influence state and local races.

1) The CDP typically spends approximately $7 million to $8 million in non- federal funds on its mail program in support of state and local candidates.[112] *See* Bowler Decl. at 14-15.

2) The CDP's mailing materials typically do not mention federal candidates; instead, they mention the date of a given election, the locations of polling places and the hours the polls are open.*See id.*

3) In 2000 the CDP produced and sent out over 350 different mail pieces in support of state and local candidates and ballot measures. *See id.* at 15.

4) In most election cycles the CRP mails an absentee ballot application to registered Republican voters. In the 1994, 1996 and 1998 cycles the CRP sent between 2.25 and 2.5 million absentee ballot mailers to Republican voters. In the 2000 cycle the CRP sent approximately 5.2 million absentee ballot mailers. *See* Erwin Decl. at 15.

d. The CDP conducts get-out-the-vote telephone banks primarily to influence state and local races.

1) Approximately 40 to 50 per cent of the CDP's paid phone banking is conducted in connection with a specific state or local race and does not make reference to any federal candidate. *See* Bowler Decl. at 15-16.

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[112] The cost of communicating with voters by mail in California is staggering. The average cost of a CDP mail piece is approximately $0.25 to $0.35. (Postage alone is at least $0.10 per piece.) The average number of mail pieces for a state senate district is 150,000; the average number for a state assembly district is 90,000. *One* statewide mail piece costs approximately $260,000. *See* Bowler Decl. at 19-20.

2) Prior to BCRA's effective date, to the extent the CDP's phone banking mentioned both federal and non-federal candidates, expenditures therefor consisted of a mix of federal and non-federal funds. *See id.* at 15.

3) Prior to BCRA's effective date, to the extent the CDP's phone banking did not endorse any federal candidate, expenditures therefor consisted entirely of non-federal funds. *See id.*

e. The CDP and the CRP conduct get-out-the-vote door-to-door canvassing campaigns primarily to influence state and local races.

1) The CDP and the CRP routinely mail slate cards and hand deliver door hangers listing endorsed candidates, urging voters to vote on election day and informing voters of the date of the election and the polling place. *See id.* at 16; Erwin Decl. at 15-16.

2) Slate cards and door hangers are usually tailored for a particular local area. State and local races dominate numerically over federal races and in some instances no federal candidate is listed at all. *See* Bowler Decl. at 16; Erwin Decl. at 15-16.

3) Prior to BCRA's effective date, to the extent slate cards or door hangers mentioned both federal and non-federal candidates, expenditures therefor consisted of a mix of federal and non-federal funds. *See id.* Bowler Decl. at 16.

74. The CDP and the CRP cooperate with their national counterparts to support their candidates and platforms at all levels of the ticket.

a. The CDP works with the DNC in planning and implementing a Coordinated Campaign, the purpose of which is to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket. Party officials, candidates at all levels of the ticket and their agents participate in the Coordinated Campaign and collectively make decisions regarding the solicitation, receipt, directing and spending of the CDP's funds, both federal and non-federal. *See id.* at 4, 23-24.

b. The CRP works with the RNC in planning and implementing a Victory Plan, the purpose of which is to allocate resources and coordinate plans for the benefit of Republican candidates up and down the entire ticket. The Victory Plan is implemented in the general election cycle with the involvement of RNC staff, CRP staff and state legislative leadership. *See* Erwin Decl. at 3-4.

75. With regard to the CDP's and the CRP's fundraising activities generally, I would find that:

a. The CDP has always raised more non-federal money than federal money.

1) The CDP raises a relatively constant amount of federal money. It raised $4,316,528 in federal funds in the 1996 election cycle; $4,076,870 in federal money in the 1998 cycle; $4,837,967 in federal money in the 2000 cycle; and $3,455,887 in federal money during the period from January 1, 2001 to June 30, 2002. The funds were raised directly by the CDP; the figures do not include any transfers from other party committees or from candidates. *See* Bowler Decl. at 6, Exh. A.

2) Even with increased efforts, it will be difficult for the CDP to raise more federal money under BCRA than it has in the past. *See id.* at 6.

(A) Over the years the CDP has tried many methods of raising more federal money, with little success. Through its telemarketing program, which has been the most successful method of raising federal funds, the CDP has raised between $800,000 and $2 million with an average contribution of $27. The telemarketing program is expensive to run; it costs approximately $0.40 to $0.50 for every dollar raised. *See id.* at 28.

(B) Since 1995 the number of contributions made to the CDP at the $5,000 level—the pre-BCRA federal maximum—was very small, usually accounting for less than five per cent of the CDP's total in federal contributions. The total amount the CDP has received from maximum federal contributions ranged from $170,000 (in the 2000 election cycle) to $355,000 (in the 1996 cycle). Because the number of contributions at the $5,000 level is insignificant, BCRA's doubling the limit from $5,000 to $10,000 will not likely cause a substantial increase in federal funds contributed to the CDP. *See id.* at 28-29.

3) Prior to BCRA's effective date the CDP raised a relatively constant amount of non-federal money. It raised $12,991,251 in non-federal funds in the 1996 election cycle; $15,957,831 in non-federal money in the 1998 cycle; $15,617,002 in non-federal money in the 2000 cycle; and $13,928,496 in non-federal money during the period from January 1, 2001 to June 30, 2002. The funds were raised directly by the CDP; the figures do not include any transfers from other party committees or from candidates. *See id.* at 7, Exh. A.

4) Approximately 76 per cent to 86 per cent of the total amount in non-federal funds the CDP has received has been from donations exceeding the $10,000 "Levin Amendment" limit. *See id.* at 11-12, Exh. A; Torres Decl. at 3.

b. The CRP has always raised more non-federal money than federal money and it has employed several fundraising techniques to raise more federal money, with little success. *See* Erwin Decl. at 17-18.

1) The CRP raises federal funds through direct mail. To maintain a current and effective direct mail fundraising donor list, the CRP must continually spend funds prospecting for new donors. Such prospecting is expensive and often loses money. *See id.* at 18. Federal returns on direct mailings range, on average, from $20 to $40 per contributor. CRP direct mail returns reached a high in 1986 of over $2 million and have declined to under $1 million since 1997. *See id.;* CDP App. at 1189 (charting CRP's major funding sources by year since 1985).

2) The CRP also uses telemarketing to raise federal funds. Federal returns on the CRP's telemarketing range, on average, from $20 to $40 per contributor. Like direct mail prospecting, telemarketing prospecting is expensive and often unproductive. *See* Erwin Decl. at 19; CDP App. at 1189.

c. BCRA's prohibition against national party transfers of non-federal funds will impair the CRP's ability to engage in grassroots, voter identification, voter registration and get-out-vote activities, as well as issue advocacy.

1) BCRA's ban on national party transfers will reduce the CRP's available budget by approximately 40 per cent in presidential election cycles and 20 per cent in non-presidential election cycles. *See* Erwin Decl. at 29.

2) Had BCRA been in effect in the 1994, 1996, 1998 and 2000 election cycles, its ban on national party transfers would have reduced the CRP's overall

spending from $30 million to $18 million during presidential electioncycles and from $17.5 million to $14 million during non-presidential election cycles. *See id.*

d. Under BCRA, Torres (who, as Chair of the CDP, serves on the DNC Executive Committee) and Morgan (who serves as the CRP's National Committeeman to the RNC) may solicit, receive or direct *federal* funds only. *See* Bowler Decl. at 21- 22; Torres Decl. at 5; Morgan Decl. at 7-8.

76. BCRA's definition of "Federal election activity" restricts a large amount of state and local party activity undertaken primarily—and in many instances, *solely*—in support of state and local candidates. *See* Bowler Decl. at 14.

a. The term "get-out-the-vote" is not defined in BCRA. As interpreted by new FEC regulations, the term includes a significant amount of state and local party activity that is directed at state and local candidates and ballot measures and has little effect on federal elections. *See* Erwin Decl. at 25-26.

1) The CDP, the CRP and local party committees regularly send mass mailings addressed to individual voters within 72 hours of an election to provide information about the date and location of the election and to endorse non-federal candidates or ballot measures without referring to any federal candidate. Under BCRA, the mailings will be considered get-out-the-vote activity—and, therefore, "Federal election activity"—if a federal candidate is listed on the ballot. *See* Bowler Decl. at 14-15; Erwin Decl. at 15.

2) The CDP, the CRP and local party committees regularly deliver door hangers to individual voters on election day to provide information about the location of the election and to endorse non-federal candidates or ballot measures without referring to any federal candidate. Under BCRA, the door hangers will be considered get-out-the-vote activity—and, therefore, "Federal election activity"—if a federal candidate is listed on the ballot. *See* Bowler Decl. at 16; Erwin Decl. at 15-16.

3) The CDP, the CRP and local party committees regularly place phone calls to individual voters within 72 hours of an election to provide information about the date and location of the election and to endorse non-federal candidates or ballot measures without referring to any federal candidate. Under BCRA, the phone calls will be considered get-out-the-vote activity—and, therefore, "Federal election activity"—if a federal candidate is listed on the ballot. *See* Bowler Decl. at 15-16; Erwin Decl. at 14-15.

4) The CDP and the CRP regularly send mass mail addressed to individual voters to provide them with absentee ballot information and to endorse non-federal candidates or ballot measures without referring to any federal candidate. Under BCRA, the mailings will be considered get-out-the-vote activity—and, therefore, "Federal election activity"—if a federal candidate is listed on the ballot. *See* Bowler Decl. at 14-15; Erwin Decl. at 15.

b. The CDP, the CRP and local party committees conduct the vast majority of their voter registration activities within 120 days of elections in which a federal candidate is listed on the ballot. Under BCRA, the registration activities must be funded with 100 per cent federally-regulated money even if the activities do not expressly promote or oppose any federal (or non-federal) candidate. *See* Bowler Decl. at 12-14; Erwin Decl. at 13-14. Voter registration activities will have to compete with candidate-support activities for federally-limited contributions and it is likely that the CDP's registration activities will be significantly reduced or eliminated as a result. *See* Bowler Decl. at 14.

c. The CDP and the CRP regularly send mass mailings that contrast one party's position on an issue with that of the other. Under BCRA, the mailings will most probably be considered generic party activity and will have to be funded with 100 per cent federally-regulated money. *See id.* at 14-17. The CDP routinely sends a postcard to newly-registered Democratic voters explaining the principles of the Democratic Party and urging them to support the Party. Under BCRA, although the postcard does not refer to a federal candidate, it will most probably be considered generic party activity and will have to be funded with 100 per cent federally-regulated money. *See id.* at 16-17.

d. The CDP and the CRP regularly broadcast public communications that promote or oppose a political party but do not refer to federal or non-federal candidates. Under BCRA, the communications will most probably have to be funded with 100 per cent federal funds. *See id.* at 17.

77. BCRA prohibits the CDP and the CRP from donating *any* funds (federal or non-federal) to (1) any organization that is described in section 501(c) of the Internal Revenue Code of 1986, is exempt from taxation and "makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (2) any organization (other than a political committee) that is described in section 527 of the Code. BCRA § 101(a); FECA § 323(d); 2 U.S.C. § 441i(d).

a. Most committees that are organized to support or oppose ballot measures in California are tax-exempt entities organized under section 501(c) of the Code. Virtually all of the ballot measure committees in California engage in activity that can be characterized as

get-out-the-vote activity under BCRA. *See* Bowler Decl. at 24.

b. Section 527 organizations include political clubs. The CDP has contributed to Democratic political clubs engaged solely in state-focused grassroots, voter registration and get-out-the-vote activities. *See id.* at 24-25. Likewise, most of the organizations participating in the CRP's Operation Bounty program, *see supra* Finding 73b.4 at page 166, are section 527 organizations, *see* Erwin Decl. at 13.

78. Under BCRA, the CDP and the CRP will have to reduce their communications with voters. Not only will some administrative costs have to be reduced, accounting costs will increase because of BCRA's additional monthly reporting requirements. Moreover, fundraising costs will increase because only federal money can be used to raise federal or Levin funds. Thus, simply to maintain current fundraising efforts, the parties' program and candidate-support activities will most probably have to be reduced. Because candidate support and get-out-the-vote activities are likely to remain the parties' priorities, voter registration, generic party-building and grassroots activities will likely be reduced or perhaps even eliminated. *See* Bowler Decl. at 18-19; Torres Decl. at 4.

79. Interest groups include persons and entities—whether corporations, unions, trade associations, advocacy groups or the like (but not political parties)—that (1) are interested in a particular issue; (2) participate in the political process; and (3) associate with others of like mind.

a. Interest groups normally do not build broad-based political coalitions but instead use discrete and issue-specific alliances to address issues at hand. In contrast, political parties generally seek to construct the broad-based coalitions necessary to achieve electoral victories and stability over longer periods of time. *See* La Raja Expert Report at 12-13.

b. Interest groups are subject to less regulation than are political parties. For example, unlike political parties, interest groups are rarely required to make public disclosure of their receipts, donors, disbursements or activities. *See* Beinecke[113] Decl. at 2, 4 (National Resources Defense Council is not required to file disclosure forms with FEC or disclose to the public amounts donated by foundations or individuals); Callahan[114] Decl. at 2-3 (certain amounts donated to League of Conservation Voters do not have to be reported to FEC); Gallagher[115] Decl. at 5-6 (National Abortion and Reproductive Rights Action League (NARAL) is not required to track whether it receives donations from persons outside United States and it respects rights of donors to remain anonymous); Sease[116] Decl. at 4 (Sierra Club is generally not required to report identity of individual donors to any government entity); *see also* Keller Expert Report at 22 (political activities of interest groups "are far less transparent than those of parties").

c. Interest groups engage in a wide array of political activities paralleling the activities of political parties.

1) Interest groups engage in voter registration, voter identification, get- out-the-vote activities and lobbying of officeholders. *See* Bennett Decl. at 4; Benson Decl. at 4-5; Dendahl Decl. at 3-4; Cross Exam. of Def. Expert Green at 158-59.

2) Interest groups have increased their grassroots, direct mail, telephone bank and door-to-door mobilization efforts and they increasingly distribute absentee ballots and provide supporters with transportation to the polls. *See* Peschong Decl. at 6-7; Cross Exam. of Def. Expert Green at 21-22.

3) During the closing weeks of the 2000 campaign the NAACP National Voter Fund registered over 200,000 people, put 80 staff in the field, contacted 40,000 people in each target city, promoted a get-out-the-vote hotline, ran three newspaper print ads on issues, made seven separate direct mailings, operated telephone banks and provided grants to affiliated organizations. *See* Cross Exam. of Def. Expert Green at 15-20, Exh. 3; Cross Exam. of Def. Witness McCain at 70-72. The NAACP reports that its efforts turned out one million additional voters and increased turnout (over 1996 numbers) among targeted groups by 22 per cent in New York, 50 per cent in Florida and 140 per cent in Missouri. *See* Cross Exam. of Def. Expert Green Exh. 3. The NAACP's effort, which cost approximately $10 million, was funded in large part by a single $7 million donation by an anonymous individual. *See id.* at 20, Exh. 3; Cross Exam. of Def. Witness McCain at 73-74.

4) In 2000 NARAL spent $7.5 million to mobilize 2.1 million pro-choice voters by making 3.4 million phone calls and mailing 4.6 million pieces of election mail. *See* Gallagher Decl. at 8.

d. Because FECA and BCRA place few restrictions on the sources or amounts of money that interest groups may receive,[117] numerous interest groups have announced their intention to solicit donations from donors who prior to BCRA's implementation made non-federal donations to political parties.

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[113] Frances Beinecke is the Executive Director of the National Resources Defense Council. *See* Beinecke Decl. at 1.

[114] Debra Callahan is the President of the League of Conservation Voters. *See* Callahan Decl. at 1.

[115] Mary Jane Gallagher is the Executive Vice President of NARAL. *See* Gallagher Decl. at 1.

[116] Deborah Sease is the Legislative Director of the Sierra Club. *See* Sease Decl. at 1.

1) Kate Michelman, the President of NARAL, has stated that non-federal donors seeking to "elect people who embody their values will be looking to [donate to] groups like NARAL, which do serious political work and are seasoned operatives." Gallagher Decl. at 16 ("If [non-federal donors] can't give to the parties . . . they are going to find other means." (quoting Michelman)); *see* Lux[118] Dep. at 50-52 ("There will be organizations who will be able to raise more money because folks who used to give to the party will now give to outside groups. And hopefully I will be involved in many of those projects.").

2) Several defense witnesses acknowledge that the non-federal donations previously made to political parties will now be made to interest groups. *See* Cross Exam. of Def. Expert Mann at 164-65; Cross Exam. of Def. Expert Green at 24; Cross Exam. of Def. Witness Bok[119] at 55 ("Congress . . . cannot keep powerful interests from wanting to have an influence

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[117] The Act as amended by BCRA *does* restrict certain tax-exempt interest groups from receiving transfers from political party committees. *See* BCRA § 101(a); FECA § 323(d); 2 U.S.C. § 441i(d); *see also supra* Finding 77 at page 175; *see generally infra* Part IV.D.3.

[118] Michael Scott Lux is the President and co-founder of Progressive Strategies, LLC, a consulting firm that assists for-profit and non-profit groups, individuals and labor unions to engage in issue advocacy. *See* Lux Dep. at 5, 16.

[119] Derek Bok is currently the University Professor at the Kennedy School of Government at Harvard University; he is a former Dean of the Harvard Law School and President of Harvard University. *See* Bok Decl. at 1.

on government [and] so long as that desire remains[,] added limits on political donations will simply cause interest groups to seek other ways of exerting leverage that are not prohibited and may even be immune from any restriction under the Constitution. It is always possible that the new ways will be even more dangerous than the old.").

80. There is no record evidence that non-federal donations to political party committees result in actual *quid pro quo* corruption of federal candidates and officeholders.[120] *See generally* FEC's Am. Proposed Findings of Fact at 20-134;[121] *see also* Intervenors Proposed Findings of Fact at 6-7 (alleging "[t]he record reflects various specific instances that reflect actual corruption" but citing no instances of *quid pro quo*).

a. Nothing in the record suggests that any Member of the Congress has ever cast or changed his vote on any legislation in exchange for a donation of non- federal funds to his political party. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-3 (conceding lack of evidence); McCain Dep. at 171-74 (unable to identify any federal officeholder engaged in *quid pro quo* corruption); Snowe Dep. at 15-16 (same); Jeffords Dep. at 106-07 (same); Meehan Dep. at 181-83 (same);

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[120] The government's theory of actual (as opposed to apparent) corruption rests on two different propositions: (1) "soft money is often given to build or maintain relationships with federal candidates and officeholders that become the basis for future influence," FEC's Am. Proposed Findings of Fact at 20 (capitalization altered); and (2) "political party committees use soft money to influence federal elections," *id.* at 61 (capitalization altered). Neither proposition, assuming its accuracy, establishes that non-federal donations to political party committees result in *quid pro quo* corruption of federal candidates and officeholders.

[121] Portions of this cited material remain sealed pursuant to a separate order by Judge Kollar-Kotelly.

Shays Dep. at 171 (same); *see also* 148 CONG. REC. S2099 (daily ed. March 20, 2002) (statement of Sen. Dodd) ("I have never known of a particular Member whom [sic] I thought cast a ballot because of a contribution."); 147 CONG. REC. S3048 (daily ed. Mar. 28, 2001) (statement of Sen. DeWine) (BCRA's proponents "have failed in their burden" of proving corruption); 147 CONG. REC. S2936 (daily ed. Mar. 27, 2001) (statement of Sen. Wellstone) ("I want to say again that I don't know of any individual wrongdoing by any Senator of either party.").

b. No valid statistical evidence suggests that non-federal donations corrupt federal candidates or officeholders.

1) No valid statistical evidence supports the conclusion that non-federal donations influence roll call votes.

(A) Defense expert Green testified that there are no statistically valid studies showing a correlation between political donations (federal or non- federal) and legislative voting behavior. *See* Cross Exam. of Def. Expert Green at 58-61. Indeed, Green acknowledged that "[s]ome studies have even found a negative correlation." *Id.* at 54-55; *see* Cross Exam. of Def. Expert Sorauf at 132 ("political scientists lack the means to observe . . . such things"); Cross Exam of Def. Witness Bok at 18-21, 35-36 (existing studies erroneously assume "that because money goes to people who vote a particular way, the money must have caused the vote").

(B) Defense expert Mann testified that "[t]here is little statistical evidence that campaign contributions to members of Congress directly affect their roll call decisions. Party, ideology, constituency, mass public opinion and the president correlate much more with voting behavior in Congress than do . . . contributions." Mann Expert Report at 32; *see* Milkis Expert Report at 34-35 (political parties prevent *quid pro quo* corruption by providing a "protective layer of decision makers between candidates and donors").

2) Novalid statistical evidence supports the conclusion that non-federal donations influence other legislative actions such as committee voting, offering amendments or filibustering. *See* Cross Exam. of Def. Expert Green at 55, 68-72, 95 (noting the one study that attempts to marshal such evidence fails to take lobbying and other activities into account); Cross Exam. of Pl. Expert Primo[122] at 136-38, 142-43 (only study's findings are mathematically unsupported).

c. Federal candidates and officeholders are typically unaware of who donates money to their parties. *See, e.g.*, Feingold Dep. at 115-16 ("Q: How generally are . . . Senators made aware of, if at all, the amounts and identities of soft money donors to the national committees? A: I don't know exactly how that's done or how much it's done."); Snowe Dep. at 223-24 (unaware of non-federal donors to RNC); Jeffords Dep. at 94-97 (generally unaware of non-federal donors to RNC and DNC); Meehan Dep. at 179 (aware of some non-federal donors to national party committees only because "from time to time I read who they are in the newspaper"); *see also, e.g.*, Rudman Dep. at 76 (unaware); Wirth Dep. at 66-67 (unaware); Hickmott Dep. at 66-68 (noting that as Deputy Chief of Staff to former Senator Wirth he was unaware who donated non-federal funds to national party committees).

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[122] Plaintiffs' expert David Primo is an Assistant Professor of Political Science at the University of Rochester in Rochester, New York. *See* Primo Expert Report at 1.

d. There is no record evidence that political parties lobby federal officeholders and nothing in the record suggests that the RNC or any other party committee has ever attempted through the use of non-federal funds to persuade a federal officeholder to formulate or change his position on legislation. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 6; Vosdingh[123] Dep. at 89 (FEC unaware of any national party committee using non-federal funds to induce federal officeholder to support or oppose specific legislation); *see also*, *e.g.*, Meehan Dep. at 171-72 ("I am not aware of any occasions on which the Democratic Party, at the federal or state level, has sought to lobby Members of Congress."); *compare* Shays Dep. at 172-84 (stating Republican Party never attempted to change his vote; asserting someone had threatened to withhold funding from Republican Congressmen who voted in favor of BCRA; acknowledging he did not know who made the threat; and refusing to provide names of threatened officeholders), *with* Cross Exam. of Def. Expert Mann at 113-15 ("I would be shocked if [the RNC] ever did such a thing . . . . [T] he point is to win the marginal seat, to control the majority for the party, not to weaken a potentially vulnerable candidate . . . . It would be self-defeating. That isn't how it works.").

81. The defendants' contention that "party committees provide soft money donors with special access to federal office holders," *e.g.*, FEC's Am. Proposed Findings of Fact at

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[123] Rhonda Vosdingh is an employee of the FEC and was deposed pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. *See* Vosdingh Dep. at 6.

24 (capitalization altered); *see id.* at 24-37;[124] Intervenors Proposed Findings of Fact at 7-9,[125] is supported only by unconvincing anecdotal evidence. More importantly, there is no record evidence that "access" to federal candidates and officeholders itself corrupts.

a. The RNC does not offer non-federal donors unique access to federal candidates and officeholders.

1) The RNC does not arrange meetings with government officials for any of its donors—federal or non-federal—and whenever a donor attempts to condition a donation on securing such a meeting, the RNC rejects the donation. *See* B. Shea Decl. at 19-20.

2) Based upon a review of the RNC's donor files, the RNC's Finance Director testified that, during the typical two-year election cycle, the RNC receives no more than 15 requests—most of them from contributors of *federal* funds—for meetings with Members of the Congress. For its part, the RNC passes the request on to the Member's scheduling staff without further input or follow-up. *See id.* at 20.

3) Federal candidates and officeholders appear at RNC-sponsored events for donors of federal funds as well as for donors of non-federal funds. *See id.* at 22; *see also* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4-5 (both federal and non-federal donors attend political party fundraisers and all six major national political party committees' fundraisers are open to both types of donors).

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[124] A portion of this cited material remains sealed pursuant to a separate order by Judge Kollar-Kotelly.

[125] A portion of this cited material remains sealed pursuant to a separate order by Judge Kollar-Kotelly.

b. No valid statistical evidence supports the conclusion that non-federal donations secure special access to federal candidates and officeholders. Experts for the plaintiffs and for the defense—and other experts who have not testified in this case—agree that there exists no valid study linking donations and "access" or "legislative effort." Cross Exam. of Def. Expert Green at 55, 69-72 (existing studies fail to control for effect of lobbying expenditures and are not "statistically sound"); *id.* at 95 (studies make no effort to "track access specifically"); Krasno & Sorauf Expert Report at 5 ("[T]he absence of systematic data on access . . . prevents political scientists from searching for relationships between access and policy-makers' behavior."); Primo Expert Report at 8-9 (noting only "scant evidence in the political science literature that money secures access" and stating that existing literature is statistically flawed); *see also RNC v. FEC,* Civ. No. 98-CV-1207 (D.D.C.) (Hermson Dep. at 300 (testifying on behalf of FEC that existing studies on "access" are "kind of weak and wishy washy")).

c. There is no record evidence that federal officeholders are more likely to meet with non-federal donors than with federal contributors. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4 (conceding lack of evidence); *see also* Feingold Dep. at 116 ("I cannot imagine a situation where . . . I would meet with somebody because they gave soft money."); Snowe Dep. at 210-11 (stating she has never given preferential access to any donor, federal or non- federal, and that "[e]verybody has access to my office to the extent that I have time available"); Jeffords Dep. at 96-97 (stating person's status as donor to national party committee does not "affect [his] decisions as to who [he] meet[s] with or give[s] access to"); Meehan Dep. at 180 (stating he provides no preferential access to non-federal donors); Cross Exam. of Def. Witness Shays at 20-21

(acknowledging that, like most congressmen, he "pretty much [has] an open door policy to meet with people who want to talk to [him] about important legislative issues"). The evidence the defendants have offered to support their contention that non-federal donations secure "access" is unconvincing and fails to establish corruption.

1) The defendants rely on the testimony of several lobbyists for the proposition that corporations donate non-federal funds to gain "access." *See, e.g.,* FEC's Am. Proposed Findings of Fact at 27, 124-25 (citing, *inter alia,* Andrews[126] Decl.; Hickmott[127] Decl.; Rozen[128] Decl.).

2) These witnesses testified in depositions and on cross-examination that their corporate clients hire them in large part because of their contacts on Capitol Hill and because they have access to federal officeholders whether or not their clients have donated money to candidates, officeholders or parties. *See* Hickmott Dep. at 46-47, 50-51; Cross Exam. of Def. Witness Andrews at 19-20; *compare* B. Shea Decl. at 20 ("It is obvious why major donors to the RNC do not regularly use their donations as a means to obtain 'access.' All or virtually all who have personal or organizational business with the federal government retain or employ professional lobbyists.").

3) Lobbying is far more effective in securing "access" to federal officeholders than is donating campaign funds.

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[126] Wright Andrews is a lobbyist with the firm Butera & Andrews.

[127] Robert Hickmott is Senior Vice President of the Smith-Free Group, a "governmental affairs" firm located in Washington, D.C. Hickmott Decl. at 1-2.

[128] Robert Rozen is a partner at Washington Council Ernst & Young, a lobbying firm. *See* Rozen Decl. at 1.

(A) As former Senator Bumpers, a defense witness, testified previously, lobbying expenditures are more likely to secure non-incidental contact with a federal officeholder than are campaign donations. *See RNC v. FEC*, Civ. No. 98-CV-1207 (D.D.C.) (Bumpers Dep. at 38-40).

(B) Many entities and individuals who donate non-federal funds to political parties also spend money lobbying federal officeholders. The amount of money spent by such organizations on lobbying is often larger than the amount they donate to political parties. *See* Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24 (admitting that top five corporate donors of non-federal funds during 1995 and 1996 donated $9,009,155 to national party committees and same five corporations spent $27,107,688 on lobbying during 1996 alone); *see id.* at 24-25 (admitting that top five corporate donors of non- federal funds during 1997 and 1998 donated $7,774,020 to national party committees and same five corporations spent $42,000,000 on lobbying during same period).

d. Even if the defendants could establish that the donation of non-federal funds secures access to federal candidates and officeholders, they have not established that such access corrupts.

1) Two of the intervenors testified that they could remember few, if any, of the attendees of major donor events they had attended.

(A) Senator McCain has attended and spoken at a number of Republican Party "Team 100" events but does not recall the individuals who were present at the events nor the questions they asked. *See* McCain Dep. at 236-38 (like many Members of the Congress, Senator McCain "give[s] 20 speeches a week" and "[o]f course" does not remember donors).

(B) Similarly, Congressman Shays has attended numerous events at which non- federal donors were present. When shown a list of names of persons with whom he sat at a then-recent event, however, he could not recall a single one. *See* Cross Exam. of Def. Witness Shays at 20.

2) Contact between federal candidates or officeholders and the electorate is inherent in the democratic process. *See RNC v. FEC*, Civ. No. 98-CV-1207 (D.D.C.) (Herrnson Dep. at 302 (acknowledging that "access by interest groups to a congressman is an important facet of democracy")); Cross Exam. of Pl. Expert Primo at 150 ("[I]f it were the case that money influenced who got seen by a legislator[,] . . . you can't make a claim that that is necessarily bad for democracy, precisely because it could be that the ones that give money are the ones most informed about the issues at hand."); *see generally* U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances.").

82. There is no credible record evidence that "solicitation and use of soft money by political parties . . . has created an appearance of corruption," *e.g.*, FEC's Am. Proposed Findings of Fact at 87 (capitalization altered); *see id.* at 87-134; Intervenors Proposed Findings of Fact at 9-12 (anecdotal evidence in support of assertion that non-federal donations "appear to shape and skew . . . governmental decision making"),[129] nor, more significantly, any evidence

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[129] A portion of this cited material remains sealed pursuant to a separate order by Judge Kollar-Kotelly.

that BCRA will remedy whatever perception of corruption exists.

a. Public opinion surveys purporting to show an appearance of corruption of federal candidates and officeholders arising from non-federal donations in particular are equivocal at best. *See, e.g.*, Mellman[130] & Wirthlin[131] Expert Report at 6 ("Over three in four Americans (77%) believe that *big contributions* to political parties have a great deal of impact (55%) or some impact (23%) on decisions made by the federal government." (emphasis added)).[132]

1) The surveys are poorly worded. *See* Primo Expert Report at 18-23; Cross Exam. of Pl. Expert Primo 112-14 (stating "the claim made by defense and proponents of campaign finance reform that the American public views the [campaign finance] issue as . . . a high priority . . . is not supported by the public opinion evidence," which "does not force a comparison with other issues"); Cross Exam. of Def. Expert Mellman at 38 ("Q: What does 'big' mean?

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[130] Defense expert Mark Mellman is the Chief Executive Officer of the Mellman Group, a polling and consulting firm. *See* Mellman & Wirthlin Expert Report at 2.

[131] Defense expert Richard Wirthlin is Chairman of the Board of Wirthlin Worldwide, a public opinion research firm. *See* Mellman & Wirthlin Expert Report at 2.

[132] According to Mellman and Wirthlin's expert report, 46 per cent of respondents agreed that "individuals and/or groups should be free to give as much money to political parties as they want" and 49 per cent agreed that "it is important for individuals, issue groups, corporations and labor unions to have the freedom to express their views by making large political contributions." Mellman & Wirthlin Expert Report at 13. The report's authors have largely dismissed these findings, however, because "Americans are more likely to agree with any statement that includes . . . the words 'free' or 'freedom'" than with a statement that does not use them. *Id.*

A: Larger than small. Even larger than medium. Q: Can you give me a more precise definition? A: No. Q: In connection with campaign contributions, what does 'big' mean? A: Larger than medium, larger than small. Q: Can you give me an amount? A: Well, it's sort of like what the Supreme Court says about pornography, people know [it] when they see it. Even if I can't actually give you a precise amount."); *id.* at 38-41, 60-62 (acknowledging imprecision of survey).

2) It appears that the public does not understand the distinction between federal and non-federal funds and is not aware of campaign finance regulations. *See* Ayres[133] Expert Report at 3-4 (citing evidence that "public opinion about campaign finance regulations is shallow and poorly informed").

3) The Mellman and Wirthlin study upon which the defendants rely did not measure the public's understanding of the campaign finance system, did not ask if the respondents understood the difference between federal and non-federal funds and did not ask if BCRA would change the respondents' view of the campaign finance system. *See* Cross Exam. of Def. Expert Mellman at 31-35.

b. There is no record evidence that BCRA will remedy whatever appearance of corruption exists.

1) To the extent that the defendants' evidence of an appearance of corruption is based on legislative access afforded non-federal donors, similar access is granted to and through interest groups and lobbyists.

(A) Representatives of EMILY's List, NARAL, the League of Conservation Voters, the New Democratic Network and the Sierra Club have all stated that federal officeholders appear at their group-sponsored events. *See* Callahan Decl. at 2; Gallagher Decl. at 6-7, Exh. D; Rosenberg[134] Aff. at 3, Tab B; Sease Decl. at 5; Solmonese[135] Aff. at 5, Tab F.

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[133] Plaintiffs' expert Q. Whitfield Ayres is the President of Ayres, McHenry & Associates, Inc., a public opinion research firm. *See* Ayres Decl. at 1.

(B) BCRA does not prohibit interest groups from providing access to federal officeholders; indeed, it appears BCRA may result in an enhancement of such access.

(C) BCRA does not prohibit interest groups from lobbying federal officeholders.

2) To the extent the public believes that non-federal donations corrupt, federal contributions are subject to the same public cynicism. *See* Ayres Rebuttal Report at 1-5; Milkis Rebuttal Report at 10-11 (any cynicism that exists will continue under BCRA).

(A) Under BCRA, individual donors can contribute up to $57,500 in federal funds to the political party committees during each two-year election cycle. Defense expert Green testified that a typical American would believe $57,500 is an amount that (in the words of Mellman and Wirthlin) "ha[s] a great deal of impact . . . on decisions made by the federal government." *See* Cross Exam. of Def. Expert Green at 267.

(B) Plaintiffs' expert Ayres replicated the survey conducted by defense experts Mellman and Wirthlin but substituted BCRA limits for the word "big." He found that "every conclusion that the Wirthlin-

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[134] Simon Rosenberg is the President of the New Democrat Network and is familiar with its day-to-day operations. *See* Rosenberg Aff. at 1.

[135] Joe Solmonese is the Chief of Staff of EMILY's List and is familiar with its day-to-day operations. *See* Solmonese Aff. at 1.

Mellman report reached about 'large' or 'big' contributions and contributors applies with equal force to the new . . . hard money limits in BCRA." Ayres Rebuttal Report at 4-5.

3) Among the "corruptions" the defendants' witnesses identify are negative campaign ads, *see, e.g.*, Williams[136] Decl. at 3; intense fundraising efforts, *see, e.g.*, Meehan Dep. at 128; high campaign costs generally, *see, e.g.*, Cross Exam. of Def. Witness Strother[137] at 38-39; and the FEC itself, *see, e.g.*, McCain Dep. at 15-16, 89.

4) Defense expert Shapiro[138] conceded that he knows of no public opinion evidence showing that BCRA will reduce the appearance of corruption, *see* Cross Exam. of Def. Expert Shapiro at 114-17, and that any public cynicism about the role of money in politics is longstanding, existed before the 1990s and has been stable over time, *see id.* at 39-41.

5) Defense expert Mann testified that "a major restructuring of campaign finance law"—which BCRA plainly is—"would not dramatically reduce corruption and purify politics and government." Cross Exam. of Def. Expert Mann at 31.

6) Defense expert Sorauf acknowledged that "it's speculative" whether BCRA will remedy whatever

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[136] From 1979 to 1997, Pat Williams served as a member of the United States House of Representatives from the State of Montana. *See* Williams Decl. at 1.

[137] Raymond Strother is a professional media consultant at the firm Strother Duffy Strother. *See* Strother Dep. at 12-14.

[138] Defense Expert Robert Shapiro is a Professor in the Department of Political Science at Columbia University and currently serves as Chairman of the Department. *See* Shapiro Expert Report at 1.

perception of corruption exists. Cross Exam. of Def. Expert Sorauf at 191.

5. The Ban on Minors' Contributions and Donations

Finally, as to BCRA's ban on minors' contributions and donations, *see generally supra* Part II.E, I would find that:

83. Barret Austin O'Brock contributed his own money (not received from any other person for purposes of the contribution) to John Milkovich, who was his Sunday school teacher for two years and was a candidate for United States Representative for the 4th Congressional District of Louisiana. O'Brock intends to contribute to federal candidates in the future unless prohibited by BCRA. *See* O'Brock Decl. at 1.

84. None of the parents of the *Echols* plaintiffs has used his or her child's name—or any other person's name—to make a contribution that FECA would otherwise prohibit. *See* T. Echols Decl. at 6; B. Solid Decl. at 2; D. McDow Decl. at 2; P. Mitchell Decl. at 3; C. White Decl. at 2. All of the *Echols* plaintiffs plan to contribute funds within their own direction and control—earned from allowances and part-time jobs—to federal candidates who share their views on political issues like abortion, divorce and the size of government. *See* E. Echols Decl. at 4-6; D. Solid Decl. at 4-5; H. McDow Decl. at 4-5; I. McDow Decl. at 4-5; J. Mitchell Decl. at 5-6; Z. White Decl. at 4-5.

C. Standards of Review

In *Buckley,* the Supreme Court began its constitutional analysis of FECA by iterating some "General Principles," *Buckley,* 424 U.S. at 14-23, that necessarily serve as the starting point for the analyses set forth in Part IV of this opinion:

> [C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. . . . [T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates. . . . This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. . . . [I]t can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Buckley, 424 U.S. at 14-15 (quoting, *inter alia, Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971); *Mills v. Alabama,* 384 U.S. 214, 218 (1966); *New York Times Co.,* 376 U.S. at 270) (internal quotations omitted); *see Republican Party v. White,* 122 S. Ct. 2528, 2538 (2002) ("[T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." (quotation omitted) (emphasis in original)); *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). In proceeding below to apply an "array of formulas, tests, prongs, and tiers, often phrased in highly abstract legal jargon—'overinclusiveness and underinclusiveness,' 'narrow tailoring,' 'intermediate scrutiny,' and so on," it will be important to bear these "first principles" in mind. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine,* 114 HARV. L. REV. 26, 46 (2000); *see United States v. Lopez,* 514 U.S. 549, 552 (1995) (in evaluating constitutionality of congressional enactment, "[w]e start with first principles"); L.A. Powe, Jr., *Mass Speech and the Newer First Amendment,* 1982 SUP. CT. REV. 243, 258 ("let us not lose sight of the speech"); *see generally* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). With that said, I turn now to the standards of review that *Buckley* and its progeny have established—and which the panel must follow—in evaluating governmental restrictions on campaign financing.

Under the Supreme Court's jurisprudence, the rigor of our review of BCRA's provisions varies according to the type of campaign financing restricted. It has long been understood that, consistent with *Buckley,* courts are to apply a slightly lower level of scrutiny in evaluating a restriction on contributions to candidates than in analyzing a restriction on expenditures. *See, e.g., Colorado Republican II,* 533 U.S. at 440 ("ever since we first reviewed the 1971 Act, we have understood that limits on political expenditures deserve closer scrutiny than restrictions on political contributions" to candidates); *but see Colorado Republican I,* 518 U.S. at 640 (Thomas, J., concurring in judgment and dissenting in part) (declaring that "there is no constitutionally significant difference between campaign contributions and expenditures," that "[b]oth forms of speech are central to the First Amendment" and that curbs on either "must be strictly scrutinized"). The Court held in *Buckley* that a ceiling on campaign expenditures "impose[s] direct and substantial restraints on the quantity of political speech," *Buckley,* 424 U.S. at 39, and that its constitutionality therefore "turns on whether the governmental interests advanced in its support satisfy the *exacting scrutiny* applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45 (emphasis added); *see NCPAC,* 470 U.S. at 496 (restriction on expenditures, which are "entitled to full First Amendment protection," must be "narrowly tailored" to serve a "strong governmental interest").

"[B]y contrast," the Court stated in *Buckley,* a limit on contributions to candidates and their campaign committees imposes only a modest restraint upon contributors' ability to engage in free speech because

> [a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Buckley, 424 U.S. at 20-21; *see Cal. Med. Ass'n v. FEC,* 453 U.S. 182, 196 (1981) (*Cal-Med*) (plurality opinion) ("The 'speech by proxy' that [a contributor] seeks to achieve through its contributions . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection."). Thus, the Court recognized in *Buckley* that "the primary First Amendment problem raised by . . . contribution limitations" is not their encroachment upon direct expression but "their restriction of one aspect of the contributor's freedom of political association." *Buckley,* 424 U.S. at 24-25. Pointing out that "[m]aking a contribution . . . serves to affiliate a person with a candidate" and his ideas, *id.* at 22, the Court held that a contribution-to-candidate limitation can be sustained only if the state affirmatively "demonstrates a sufficiently important interest" and "employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25; *see Shrink Missouri*, 528 U.S. at 387-88.

A court, therefore, is to apply "exacting scrutiny"[139] to an expenditure cap[140] and something just short of that in examining a contribution-to-candidate limit. Nonetheless, the boundary between expenditures and donations does not place the two types of funding into "watertight compartments." *Springer v. Philippine Islands*, 277 U.S. 189, 209, 211 (1928) (Holmes, J., dissenting) (declaring, in separation-of-powers context, that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white"). Not all expenditures are precisely alike, nor are all donations; accordingly, the distinction between the two is a fluid one. For example, in holding that the Congress may constitutionally limit a party expenditure that is coordinated[141] with

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[139] In the campaign finance context, the Court has placed "exacting scrutiny" on an even plane with the more familiar "strict scrutiny." *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (in determining constitutionality of restriction on independent expenditures, Court "must ascertain ... whether it is narrowly tailored to serve a compelling state interest"); *MCFL*, 479 U.S. at 251-52 (burdens on independent expenditures, which are reviewed with exacting scrutiny, must be "justified by a compelling state interest"). In no case of which I am aware does the Court hold that exacting scrutiny is any *less* rigorous than strict scrutiny.

[140] Courts are also to apply exacting (i.e., strict) scrutiny to disclosure and reporting requirements triggered by expenditures. *See Buckley*, 424 U.S. at 64; *see also infra* Part IV.B.

[141] Under the Act, as amended by BCRA, an expenditure is coordinated with a candidate or with a party committee—and is treated as a contribution thereto—if it is made "in cooperation, consultation, or concert, with, or at the request or suggestion of" the candidate or committee. BCRA § 214; FECA § 315(a)(7)(B)(i), (ii); 2 U.S.C. § 441a(a)(7)(B)(i), (ii).

a federal candidate by treating it as a contribution, *see Colorado Republican II*, 533 U.S. at 465, the Court observed:

> The First Amendment line between spending and donating is easy to draw when it falls between independent expenditures by individuals or political action committees (PACs) without any candidate's approval (or wink or nod), and contributions in the form of cash gifts to candidates. . . . But facts speak less clearly once the independence of the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify. . . . [We have] observed that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." . . . But [we have] also observed that "many [coordinated expenditures] are . . . virtually indistinguishable from simple contributions."

Id. at 442-45 (quoting *Colorado Republican I*, 518 U.S. at 616, 624 (plurality opinion)). Under *Colorado Republican II*, then, if a coordinated expenditure is "virtually indistinguishable from [a] simple contribution[ ]," we review any limit placed thereon by the same standard we use to review a contribution-to-candidate cap—both must be "'closely drawn' to match a 'sufficiently important interest.'" *Colorado Republican II*, 533 U.S. at 446 (quoting *Shrink Missouri*, 528 U.S. at 387-88).

By the same token, however, the Court has recognized that in some instances a contribution restriction will function, for all intents and purposes, as a limit on fully-protected independent expenditures. In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), for example, the Court struck down a Berkeley, California ordinance that placed a $250 limit on contributions to *committees* making independent expenditures in support of, or in opposition to, ballot measures submitted to popular vote. In doing so, the Court strongly reaffirmed its commitment to protecting the right of individuals and entities to associate in order to engage in political issue advocacy, a right that is undermined by limiting the amount of money that can be given to committees spending funds on such advocacy:

> *Buckley* identified a single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*. . . . Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression. . . . [A]n individual may make expenditures without limit under [the ordinance] on a ballot measure but may not contribute beyond the $250 limit when joining with others to advocate common views. The contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue . . . . A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression.

Id. at 296-300 (emphasis in original). Subjecting the $250 contribution-to-committee limit to the same "exacting judicial scrutiny" that *Buckley* had applied to the *expenditure* limits, *Citizens Against Rent Control,* 454 U.S. at 294, 298, the Court struck it down, finding that it intolerably "hobble[d] the collective expressions of a group." *Id.* at 296. I can only conclude from the *Citizens Against Rent Control* decision—and the rest of the Court's free association jurisprudence—that the courts are to apply "exacting scrutiny" to laws

limiting donations to associations that make independent expenditures in order to engage in collective political issue advocacy. Because my analysis of BCRA's restrictions on party use of non-federal money is shaped in large measure by this particular conclusion—and because the decision about which standard of review to apply often proves outcome-determinative, *see Shrink Missouri,* 528 U.S. at 400 (Breyer, J., concurring) (observing that "a strong presumption against constitutionality [is] often thought to accompany the words 'strict scrutiny'")—I explain in greater detail in Part IV.D.1.a, *infra,* my view that the restrictions are subject to "exacting" (i.e., strict) review.

IV. Constitutional Analyses

With the foregoing precepts in mind, I turn now to the plaintiffs' constitutional challenges.

A. *The Ban on Corporate and Labor Disbursements for "Electioneering Communications"*

The First Amendment provides, in pertinent part, that the "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The text itself prompts a few observations that are particularly relevant to an analysis of BCRA's ban on corporate and labor disbursements for electioneering communications. First, the Amendment does not restrict its protection of political speech to natural persons only. As the Supreme Court recognized in *First National Bank v. Bellotti,* 435 U.S. 765 (1978), political speech

> is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity

> of its source, whether corporation, association, union, or individual. . . . The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [a law] abridges expression that the First Amendment was meant to protect.

Id. at 776-77; *see also Austin,* 494 U.S. at 657 ("mere fact" of being corporation "does not remove its speech from the ambit of the First Amendment").

Second, the Amendment's command that the "Congress shall make no law" means that, however benign its intentions, the Congress has no license to decide how best to ensure that the electorate's deliberation about candidates is rational or balanced. *See Brown v. Hartlage,* 456 U.S. 45, 60 (1982) ("It is simply not the function of government to select which issues are worth discussing or debating . . . in the course of a political campaign." (quoting *Police Dep't v. Mosley,* 408 U.S. 92, 96 (1972))); *see also White,* 122 S. Ct. at 2538 (same, quoting *Brown,* 456 U.S. at 60); *Austin,* 494 U.S. at 679 (Scalia, J., dissenting) ("[G]overnment cannot be trusted to assure, through censorship, the 'fairness' of political debate."); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle,* 30 STAN. L. REV. 299, 317 (1978) (hereinafter BeVier, *Political Speech*) ("[I]t is the *fact* of participation in the political process that the amendment protects, not its qualities of sanity and objectivity." (emphasis in original)). Instead, the First Amendment delegates to the populace at large the responsibility of conducting an "uninhibited, robust, and wide-open" debate about government affairs and political candidates. *See Buckley,* 424 U.S. at 14, 57 ("In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."); *see also Riley v. Nat'l Fed'n of the Blind, Inc.,* 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); *Cohen v. California,* 403 U.S. 15, 24 (1971) (First Amendment places "the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry"); *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."). This time-honored "marketplace" conception of the First Amendment, *see Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), "derives its instrumental justification in part from straightforward mistrust of the motives of elected officials (and the suspicion that they are relentlessly incumbent-protective) and in part from skepticism about the competence of even the best-motivated politicians to design and to craft legal rules" tailored so that they do not dampen the debate. Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis,* 85 VA. L. REV. 1761, 1774 (1999) (hereinafter BeVier, *Issue Advocacy*).

Drawing support from these observations—and from the "express advocacy" test announced in *Buckley*—the plaintiffs contend, *inter alia,* that BCRA's ban[142] on corporate and

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[142] The defendants emphasize throughout their briefs that section 203 "is not a ban on speech." *E.g.,* Gov't Br. at 129; *see also, e.g.,* Gov't Opp. Br. at 55; Intervenors Opp. Br. at 56 (provision "is not a ban—although it is an important restriction"); Gov't Reply Br. at 53-62; Intervenors Reply Br. at 63-70. Their contention is constitutionally irrelevant under the Supreme Court's decision in *MCFL,* as the Fourth Circuit recently

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observed in striking down FECA's restriction on corporate expenditures and contributions as applied to a non-profit advocacy corporation:

> [The FEC] submits that the Act . . . allows all corporations to make campaign contributions through a separate segregated fund, and corporations that do not fall within 11 C.F.R. § 114.10's exception to make independent expenditures through such a fund. *See* [2 U.S.C.] §§ 441b(a) and (b)(2)(C). Given the availability of this alternative avenue through which to make contributions and expenditures, the FEC maintains that it is factually incorrect to contend that an absolute ban is at issue in this case.
>
> However, the FEC's view has already been rejected by the Supreme Court in *MCFL*. While restricting MCFL's campaign spending to use of a separate segregated fund "is not an absolute restriction on speech, it is a substantial one. Moreover, even to speak through a segregated fund, MCFL must make very significant efforts." *MCFL*, 479 U.S. at 252. . . . A segregated fund is a "political committee" under the Act. 2 U.S.C. § 431(4)(B). As a consequence, organizations that use a segregated fund must adhere to significant reporting requirements, staffing obligations, and other administrative burdens. These burdens stretch far beyond the more straightforward disclosure requirements on unincorporated associations. *See MCFL*, 479 U.S. at 252-53. . . . [Thus,] "while [the statute] does not remove all opportunities for independent spending . . . , the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *MCFL*, 479 U.S. at 255 [.] . . . Accordingly, we have little difficulty concluding that the prohibitions of [2 U.S.C] § 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 burden the exercise of political speech and association.

Beaumont v. FEC, 278 F.3d 261, 269, 271 (4th Cir.) (Wilkinson, C.J.), *cert. granted*, 123 S. Ct. 556 (2002); *see Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("That [speakers] remain free to employ other means to disseminate their ideas does not take their speech ... outside the bounds of First Amendment protection. . . . That [a restriction] leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." (citing *MCFL*, 479 U.S. 238)); *see also supra* Finding 44d at page 100 (explaining how ACLU's speech would be burdened if ACLU were forced to establish political action committee), 51g at pages 110-11 (stating NRA's political action committee is

labor disbursements for electioneering communications violates the First Amendment because it restricts, in both overbroad and underinclusive fashion, speech that does not expressly advocate the election or defeat of a clearly identified candidate. I agree.

* * *

As I have mentioned, *see supra* Part I, the Court in *Buckley* held that the government's interest in "limit[ing] the actuality and appearance of corruption" arising from large campaign donations to candidates was sufficiently compelling to justify the Act's limits on contributions. *Buckley*, 424 U.S. at 26. The Court has acknowledged several times since then that funds given (and, in certain narrow circumstances, spent) on expressly advocating the election or defeat of federal candidates can be restricted to prevent corruption of federal candidates and officeholders.[143] *See Shrink Missouri*, 528

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incapable of raising funds that fairly reflect NRA members' support for NRA's political message), 53f at pages 122-23 (same, with respect to AFL-CIO and its political contributions committee). I can put it no better than the Fourth Circuit, although I note that *MCFL* and *Beaumont* addressed "expenditures" and "contributions" made "for the purpose of influencing" federal elections, *not* disbursements for issue advocacy, which under *Buckley* and its progeny merit even greater First Amendment protection and make rejecting the defendants' argument even easier.

[143] It bears noting, however, that the Court has held preventing actual or apparent corruption of federal candidates and officeholders is the *only* possible justification for restricting campaign finances. *See NCPAC*, 470 U.S. at 496-97 ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests[.]"); *see also Colorado Republican I*, 518 U.S. at 623 (plurality opinion) ("where there is no risk of 'corruption' of a candidate, the Government may not limit even contributions" (citing *Bellotti*, 435 U.S. at 790)); *cf. infra* note 148 and accompanying text (noting Court's definition of "corruption" is somewhat unclear).

U.S. at 389 (citing cases); *see also Austin*, 494 U.S. at 658-60. Nonetheless, in *Buckley* the Court rejected the government's contention that an interest in preventing corruption justified the Act's $1,000 limit on any person's "expenditures relative to a clearly identified candidate." *Buckley*, 424 U.S. at 39-51. Expressing concern that the expenditure cap imposed criminal penalties "in an area permeated by First Amendment interests," *id.* at 41, and emphasizing that "First Amendment freedoms need breathing space to survive," *d.* at 41 n.48 (quoting *NAACP v. Button*, 371 U.S. at 433), the Court found that the phrase "relative to" lacked sufficient specificity to be sustained. *Id.* at 41 ("The use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech . . . ."). Likewise, it found that the Court of Appeals' narrowing construction—under which the $1,000 limit applied to money spent on "advocating," expressly or otherwise, "the election or defeat of [a] candidate," *Buckley*, 519 F.2d at 853—was also too imprecise and sweeping to eliminate vagueness and overbreadth problems because it failed to account for the fact that

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.
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> *Buckley*, 424 U.S. at 42. Emphasizing the need for a bright line to ensure proper "breathing space" for political issue advocacy—the funding of which cannot be regulated even though it may affect the outcome of elections and, therefore, potentially could be used to

> obtain *quid pro quos* from candidates, *see id.* at 45-46—the Court formulated the "express advocacy" test: [I]n order to preserve the [$1,000 expenditure limit] against invalidation on vagueness grounds, [it] must be construed to apply only to expenditures for communications that *in express terms* advocate the election or defeat of a clearly identified candidate for federal office. . . . This construction would restrict the application of [the provision] to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

Id. at 44 & n.52 (emphasis added); *see id.* at 80 & n.108 (express advocacy construction of "expenditure" necessary "[t]o insure that the reach of [the statute] is not impermissibly broad").

In focusing on the precise *words* used in a political message, the Court declined to adopt a standard that would require discerning the intent of the speaker or the message's effect on a given listener because such a standard would not fully alleviate vagueness and overbreadth problems or their "chilling" effect on political speech:

> [W]hether words intended and designed to fall short of invitation [to vote for a candidate] would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject [of politics] would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. . . . [A] distinction [based on intent or effect]

> offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)); *see also id.* at 80.

The defendants contend that "*Buckley* does not prohibit Congress from enacting narrowly tailored anti-corruption measures simply because they are not limited to communications containing express advocacy." Gov't Br. at 148 (capitalization altered); *see id.* at 148-53; Intervenors Br. at 99-103. Several courts of appeals have held, however, that the express advocacy test is not simply the Supreme Court's interpretation of FECA but an irreducible constitutional minimum that no campaign finance restriction can diminish. *See, e.g., Moore,* 288 F.3d at 190 (holding Mississippi statute could constitutionally extend only to political advertisements "advocat[ing] *in express terms* the election or defeat of a candidate" (emphasis in original)); *Citizens for Responsible Gov't State PAC v. Davidson,* 236 F.3d 1174, 1187, 1193-95 (10th Cir. 2000) (stating "distinction between permissible restrictions on 'express advocacy' and impermissible restrictions on 'issue advocacy' remains viable" and holding Colorado statute regulating "political messages" unconstitutional because it extended to issue advocacy); *Perry v. Bartlett,* 231 F.3d 155, 162 (4th Cir. 2000) (per curiam) (North Carolina statute was unconstitutionally overbroad because it regulated "political expression . . . which on its face [was] issue advocacy"), *cert. denied,* 532 U.S. 905 (2001); *Vt. Right to Life Comm., Inc. v. Sorrell,* 221 F.3d 376, 386 (2d Cir. 2000) (provisions of Vermont statute "necessarily unconstitutional unless they apply only to advertising and mass media activities that expressly advocate the election or defeat of a clearly identified candidate" (quotation omitted)).

In the conspicuous absence of contrary precedent, I would be loath to hold that the Congress was free to reject the express advocacy test in enacting Title II, even if I agreed with the defendants—and I do not—that the test "ha [s] become all but meaningless." Intervenors Br. at 100 (citing Thompson Comm. Rep. at 4564 (ability of corporations and unions to influence federal elections with ads that do not use words of express advocacy is "biggest . . . loophole [ ]" in federal election law)). The defendants assert that, since *Buckley,* federal elections have seen "a full-fledged effort by outside groups to use 'issue advocacy' as a means of evading both FECA's limitations on corporate and union campaign spending as well as its disclosure requirements, beginning a trend that continued and accelerated through the 2000 election cycle." Gov't Br. at 37. Even if the defendants' assertion is accurate—and on this record I am not convinced that it is—it is beside the point. The Court in *Buckley* was well aware that the express advocacy test would permit loophole-seekers to influence elections: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Buckley,* 424 U.S. at 45; *see* McConnell Br. at 48 ("[T]he *Buckley* Court recognized that this construction would not capture all electorally-motivated or related advocacy."). Nonetheless, the Court held that the express advocacy construction of FECA was constitutionally necessary to ensure that protected issue advocacy had the requisite "breathing space." *See* McConnell Br. at 49 ("*Buckley*'s message is clear: the government must err on the side—the First Amendment side—of leaving protected political speech unregulated."); *see also Ashcroft v. Free Speech Coalition,* 122 S. Ct. 1389, 1404 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."). I cannot agree with the defendants, *see, e.g.*, Intervenors Br. at 99-109, that the electoral experience since *Buckley* justifies abandoning the express advocacy test, especially when: (1) no court of which I am aware, from the Supreme Court to the state courts, has ever explicitly held that the test is a statutory one tied only to FECA;[144] (2) several courts of appeals have held to the contrary,[145] *see supra;* and (3) the Court, in adopting the test,

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[144] *But cf. Wis. Realtors Ass'n v. Ponto*, No. 02-C-424-C, 2002 WL 31758663, at *5-*8 (W.D. Wis. Dec. 11, 2002) (district court was "not convinced that *Buckley* . . . establish[ed] an unalterable principle of constitutional law" but observed nonetheless that "[e]ven if *Buckley* did not establish *the* definitive test for determining what types of political communications are subject to regulation, [it] recognized that 'groups engaged purely in issue discussion' were beyond the reach of regulators" (quoting *Buckley*, 424 U.S. at 79) (emphasis in original)); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F.Supp. 2d 1300, 1325 (S.D. Ala. 2002) ("*Buckley* articulated an express electoral advocacy benchmark in order to *avoid* deciding the permissible reach of disclosure requirements." (emphasis in original)).

[145] A number of district courts and state courts have followed the lead of the courts of appeals. *See, e.g., Kansans for Life, Inc. v. Gaede*, 38 F. Supp. 2d 928, 936 (D. Kan. 1999) (holding Kansas statute unconstitutional because it attached disclosure requirements to ads that "discuss[] an issue while disparaging one candidate and commending his opponent . . . without expressly advocating the election or defeat of [either] candidate"); *Right to Life, Inc. v. Miller*, 23 F. Supp. 2d 766, 769 (W.D. Mich. 1998) (holding Michigan statute prohibiting use of candidate's name or likeness in corporate communications within 45 days of election facially overbroad because it did "not merely prohibit communications that expressly advocate[d] the election or defeat of a clearly identified candidate" but "prohibit[ed] *any* mention of the name of a candidate . . . *regardless* of the context in which that name [was] mentioned" (emphasis in original)); *Planned Parenthood Affiliates, Inc. v. Miller*, 21 F. Supp. 2d 740, 746 (E.D. Mich. 1998) (same); *W. Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 959 (S.D. W. Va. 1996) ("By creating a presumption [of] express advocacy, the West Virginia

foresaw its costs and dismissed them as insufficient to justify overbroad restrictions on issue-driven speech at the core of the First Amendment.

I point out as well that express advocacy is itself entitled to full constitutional protection in the absence of a sufficiently compelling governmental interest in limiting it. *See Buckley*, 424 U.S. at 48 ("Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."). After narrowing the $1,000 expenditure limit's applicability to express advocacy only, the Court in *Buckley* nonetheless found that the provision failed the "exacting scrutiny" applicable to expenditure restrictions because

> the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. . . . Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expen-

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Legislature attempts to change the definition of express advocacy laid down by the United States Supreme Court. . . . Obviously, a state legislature cannot alter the Supreme Court's interpretation of the Constitution."); *see also, e.g., Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 4 P.3d 808, 824 (Wash. 2000) ("[U]nder *Buckley* issue advocacy is not subject to regulation, and our conclusion that the advertisement in question is issue advocacy necessarily means that [the statute in question] is unconstitutional insofar as it restricts [an] expenditure for the ad."); *Osterberg v. Peca*, 12 S.W.3d 31, 50-54 (Tex.), *cert. denied*, 530 U.S. 1244 (2000).

> diture to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 46-47. Not all restrictions on independent expenditures for express advocacy have failed the Court's exacting scrutiny, however; in *Austin* the Court upheld a Michigan statute that prohibited any corporation from spending its treasury funds in support of or in opposition to any state candidate because the State had articulated a compelling interest to support the ban:

> Regardless of whether [the] danger of "financial *quid pro quo*" corruption . . . may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.

Austin, 494 U.S. at 659-60. Nonetheless, it bears emphasizing that the Court's holding in *Austin* was limited to corporate expenditures on *express* advocacy.

Buckley and its progeny have thus established a rough framework for measuring a campaign finance restriction's constitutionality. If by its vagueness the restriction appears to limit both express advocacy and issue advocacy, the reviewing court must (if possible) construe the provision narrowly to restrict only the former and not the latter. *See Buckley,* 424 U.S. at 40-44; *see also Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 397 (1988) (federal court will uphold statute if it is "readily susceptible [of] a narrowing construction that would make it constitutional" (internal quotations omitted)). Of course, not every speech restriction can be refashioned to prevent its invalidation; as

the Court admonished in *Aptheker v. Secretary of State,* 378 U.S. 500 (1964), it must be remembered that

> although [the courts] will often strain to construe legislation so as to save it against constitutional attack, [they] must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it. . . . To put the matter another way, [the courts] will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutionaldefects.

Id. at 515 (quotation omitted); *see Erznoznik,* 422 U.S. at 216 (statute must be "easily susceptible" of narrowing construction); *see also* Frederick Schauer, Ashwander *Revisited,* 1995 SUP. CT. REV. 71, 74 ("[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute."). Accordingly, if a restriction plainly limits issue advocacy, the reviewing court will strike down the provision as unconstitutionally overbroad because "the statute's very existence may cause others not before the court to refrain from [that form of] constitutionally protected speech." *Broadrick,* 413 U.S. at 612 (discussing reach of overbreadth doctrine); *see Perry,* 231 F.3d at 160-62. If the provision—either by its text or by fair construction—relates only to express advocacy, the court must then ask what sort of campaign financing the provision restricts. If the provision restricts independent spending, or if it limits donations to committees engaged in such spending, the court is to apply exacting (i.e., strict) scrutiny, *see supra* Part III.C; if the provision restricts contributions to candidates, the court asks whether the restriction is "closely drawn to match a sufficiently important interest," *Shrink Missouri,* 528 U.S. at

387-88 (quotation omitted). No matter which standard of review is applied, the restriction passes constitutional muster only if it serves the government's interest in preventing the actual or apparent corruption of federal candidates and officeholders. *See NCPAC*, 470 U.S. at 496-97.

Returning to the text of BCRA's ban on corporate and labor disbursements for electioneering communications, *see generally supra* Part II.A, I believe that it cannot survive *Buckley*. The constitutionality of the ban turns, of course, upon the definition of "electioneering communication," which BCRA section 201 furnishes:

> The term "electioneering communication" means any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A)(i); 2 U.S.C. § 434(f)(3)(A)(i). Because a knowing violation of BCRA can result in substantial fines and/or prison time, *see* BCRA § 312(a), FECA § 309(d)(1)(A), 2 U.S.C. § 437g(d)(1)(A), any careful corporation or labor union will want to know what "refers to" means before it expends money to broadcast

any political communication within two months of an election. But BCRA does not define "refers to" or otherwise describe the communications that are covered.

On its face, then, the term "electioneering communication" can include any near-election communication that merely *mentions* a clearly identified candidate (whether by name or not). Indeed, under one common dictionary definition of "refer," BCRAprohibits near-election disbursements for broadcast communications "relative to" a given candidate. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1907 (1993) (including "relate" as synonym of "refer"). But "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." *Buckley*, 424 U.S. at 41. The synonym "refers to," then, suffers from the same flaw. And just like the $1,000 expenditure limit at issue in *Buckley*, BCRA section 203 would appear to prohibit (through BCRA section 201) near-election corporate and union broadcasting of both express advocacy *and* issue advocacy, an overbroad regulation that the First Amendment will not tolerate. *See Buckley*, 424 U.S. at 40-44, 80.

It must be determined, therefore, whether BCRA sections 201 and 203 are "readily susceptible [of] a narrowing construction that would make [them] constitutional." *Am. Booksellers*, 484 U.S. at 397 (quotation omitted). One way to get the provisions over the express advocacy hurdle of *Buckley* would be, of course, to limit their application "to communications that include explicit words of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 43. When read as a whole,[146] however, the statute will not bear such a construction. The wording—indeed the very inclusion in the statuteof the fall-back definition informs any interpretation of the primary definition:

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[146] The Supreme Court's "whole act rule" reminds reviewing courts that "[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n v. Timbers of Inwood Forest*

> If [the primary definition] is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for [Federal] office (*regardless of whether the communication expressly advocates a vote for or against a candidate*) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii) (emphasis added). I presume the Congress would not have inserted the fall-back definition if it did not believe the provision would "support the regulation provided" by section 203 and effectuate the same legislative purpose as the primary definition. *Cf. Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 182 (1989) (similar provisions should be read *in pari materia*). The text of the alternate definition, as well as the rest of BCRA section 201, reveals that the legislative purpose is to reduce what the Congress believes to be the corrupting influence of issue ads that affect elections but do *not* expressly advocate a vote for or against a candidate. Notably, section 201 enumerates several exceptions to both definitions but does not exempt issue advocacy,[147] *see* BCRA

Assocs., 484 U.S. 365, 371 (1988); *see* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 263 (2000).

[147] *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) *("Expressio unius est exclusio alterius.")*.

§ 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B), and it precludes the FEC from exempting from either definition

> [any] public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (*regardless of whether the communication expressly advocates a vote for or against a candidate*)[.]

BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii) (emphasis added); *see* BCRA § 201(a); FECA § 304(f)(3)(B)(iv); 2 U.S.C. § 434(f)(3)(B)(iv). The legislative history—to which the defendants extensively refer—bolsters the conclusion that the Congress sought to regulate issue advocacy, not to have it read out of the primary definition: The Shays-Meehan bill [provides] a reasonable solution to the problem of unlimited and undisclosed advertising that fails to qualify as "express advocacy" under federal election law, even though it clearly is designed to influence the outcome of an election. . . . Since these ads stop just short of using the magic words [of express advocacy], their sponsors are not subject to full public disclosure, the ads need carry no disclaimer, and they may be paid for with unlimited dollars from any source. . . . [The bill] addresses the problem[.]

H.R.REP.NO. 107-131, pt. 1, at 50 (2001) (minority views); *see, e.g.*, 147 CONG. REC. S3118 (daily ed. Mar. 29, 2001) (statement of Sen. Specter) ("If left unchecked, the explosive growth in the number and frequency of advertisements that are clearly intended to influence the outcome of Federal elections yet are masquerading as issue advocacy has the potential to undermine the integrity of the electoral process."); 147 CONG. REC. S2457 (daily ed. Mar. 19,

2001) (statement of Sen. Snowe) (discussing need to regulate electioneering communications because candidates and interest groups "believed the nonmagic words . . . were more effective in getting their campaign message across" than was express advocacy); *see generally* Intervenors Br. at 75 et seq. (detailing at length "the legislative history . . . regarding sham 'issue' ads run by corporations, unions, and other interest groups" (capitalization altered)). Accordingly, because the primary definition is not "readily susceptible" of a narrowing construction that would limit its applicability to express advocacy only, this panel cannot undertake to interpret it in a way that will save it from invalidation. *Am. Booksellers*, 484 U.S. at 397 (quotation omitted); *see Fawn Mining Corp. v. Hudson*, 80 F.3d 519, 523 (D.C. Cir. 1996) ("Neither lawyers nor judges serve as back-seat lawmakers who may extend statutes beyond their bounds or change the rules that Congress has set."). When read together with the rest of the statute, the primary definition is impermissibly overbroad; while we do not know with precision what its boundaries are, we do know that it prohibits near-election issue advocacy and that, therefore, its "very existence may cause [persons] not before the court to refrain from [that form of] constitutionally protected speech." *Broadrick*, 413 U.S. at 612; *see Perry*, 231 F.3d at 160-62; *Vt. Right to Life Comm.*, 221 F.3d at 386.

BCRA's alternate definition of "electioneering communication" is constitutionally flawed as well; it states explicitly that it includes any broadcast communication (not merely one broadcast near election time) that "supports" or "opposes" a candidate but does not expressly advocate "a vote for or against [the] candidate." BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii). For reasons I have already stated, the First Amendment will not tolerate regulation of independent issue advocacy, even if (or, perhaps, especially if) intended to influence a federal election. *See Renne*, 501 U.S. at 349 (Marshall, J., dissenting).

But suppose I am wrong about *Buckley*. Even if the express advocacy test is not constitutionally required, BCRA's ban on corporate and labor disbursements for electioneering communications nonetheless fails First Amendment review because it prohibits too much political speech and not enough corruption. Section 203 forbids any corporation or labor organization to *spend* anyfunds on any electioneering communication. *See* BCRA § 203; FECA § 316(a), (b)(2); 2 U.S.C. § 441b(a), (b)(2). Because the provision restricts spending, it must satisfy strict scrutiny—that is, it must serve a compelling governmental interest and do so in a narrowly tailored way. It does neither.

First, section 203 fails to serve a compelling governmental interest. To be clear, I do not deny that preventing the mere *appearance* of corruption is a compelling interest under the Supreme Court's case law.[148] *See, e.g., Shrink Missouri*, 528

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[148] The Court has not settled on a precise definition of "corruption." Some of its cases suggest that the government's interest in preventing corruption is limited to *quid pro quo* arrangements, while others speak more broadly in terms of "improper influence." *Compare Shrink Missouri*, 528 U.S. at 389 ("In speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' we recognized [in *Buckley*] a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."), *with id.* at 422 (Thomas, J., dissenting) (Court in *Buckley* "repeatedly used the word 'corruption' in the narrow *quid pro quo* sense, meaning '[p]erversion or destruction of integrity in the discharge of public duties by bribery or favour'" (quoting 3 OXFORD ENGLISH DICTIONARY 974 (2d ed. 1989))), *and NCPAC*, 470 U.S. at 497 ("The hallmark of corruption is the financial *quid pro quo:* dollars for political favors."). *Amici* Cato Institute and the Institute for Justice argue cogently that, given the First Amendment interests at stake, the panel should be careful to define precisely and narrowly the government's interest in preventing "corruption." *See* Br. of *Amici Curiae* Cato Institute et al. at 2, 16-21. Because I believe BCRA does not serve to prevent actual or apparent "corruption" even in the broadest sense of the word, however, I also believe the panel need not decide today on a precise definition.

U.S. at 390 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."). Yet even if I were to accept as a fact that corporate and labor disbursements for electioneering communications corrupt or appear to corrupt federal candidates—and I do not, *see supra* Finding 54b at pages 127-28—it would not necessarily follow that BCRA provides the solution. *See Turner*, 512 U.S. at 664 ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that . . . the regulation will in fact alleviate these harms *in a direct and material way*.'' (citations omitted) (emphasis added)).

Under either of the definitions contained in section 201, "electioneering communication[s]'' include only "broadcast, cable, or satellite communication[s]." BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A). Thus, any print, direct mail or internet advertisement—even a "targeted" one that refers to a clearly identified candidate, is made within 60 days before a general election and is *intended to influence* the election—gets "a free pass." NRA Br. at 34; *see* 67 Fed. Reg. at 65,196 ("[E]xemption[s] include[ ] communications appearing in print media, including a newspaper or magazine, handbills, brochures, bumper stickers, yard signs, posters, billboards, and other written materials, including mailings; communications over the Internet, including electronic mail; and telephone communications."). With television and radio "electioneering" foreclosed, corporations and unions wishing to "exploit" BCRA's "loopholes" for "sham" issue advertising to "distort" federal elections will have every incentive, and the means, to do so through print and electronic media. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999) ("[E]very reform effort to constrain political actors

produces a corresponding series of reactions by those with power to hold onto it."). Moreover, to the extent issue advertising may corrupt federal candidates, it is no less corrupting when disseminated through exempted print and electronic channels. As the NRA points out,

> [n]ewspaper advertisements often dwarf radio advertisements in terms of their expense, potency, and overall impact upon the public, particularly the *voting* public; they therefore promise to "spread by other means" the same electioneering speech, to the same mass audience, that was supposedly of utmost concern to Congress. . . . Thus, a corporation such as the Campaign for America may run a full-page political ad in the *New York Times* at a cost of $65,000, whereas a radio broadcast reciting the same text in a small market such as Peoria would cost a grand total of $75. The notion that only the latter expenditure implicates a concern about political corruption is preposterous.

NRA Br. at 35 (citation and footnotes omitted) (emphasis in original); *see also Reno v. ACLU*, 521 U.S. 844, 853 (1997) (internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers [and] viewers"). It does not "require a wild flight of imagination," *McCain v. Lybrand*, 465 U.S. 236, 254 (1984), to envision that the very same "sham" ads that aired on television in the past election will be webcast, telemarketed, postmarked, e-mailed or prominently displayed in the Sunday newspaper in the next. *See supra* Findings 54a.1-54a.3 at pages 12

And not only will the same ads be seen and heard everywhere else, they will *still* be aired on the television and the radio; the only difference is that they will be sponsored by a smaller (and less diverse) class of privileged speakers. *See supra* Finding 54a at pages 124-27. BCRA does not prohibit wealthy individuals, PACs or unincorporated associations from making disbursements for electioneering communications. *See* BCRA § 203(a); FECA § 316(a), (b)(2); 2 U.S.C. § 441b(a), (b)(2). Nor does it prohibit media corporations from endorsing specific candidates by name, at any time, expressly or through "sham" editorializing. *See* BCRA § 201(a); FECA § 304(f)(3)(B)(i); 2 U.S.C. § 434(f)(3)(B)(i) (exempting from coverage "a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station"). "This means that the Disney Corporation may through its subsidiary ABC (or General Electric through NBC) broadcast the very same 'electioneering communications' that Congress has forbidden the NRA from funding." NRA Br. at 39.

The statute's underinclusion, in my view, is fatal to BCRA's ban on corporate and labor disbursements for electioneering communications. Although campaign finance legislation "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Buckley*, 424 U.S. at 105 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)), even an incremental restriction on campaign expenditures must serve a compelling governmental interest. BCRA's ban on corporate and labor electioneering falls short of the mark; its underbreadth "diminsh[es] the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *see also White*, 122 S. Ct. at 2537, 2539 (restriction prohibiting candidate for judicial office from announcing his political views—but "only at certain times and in certain forms"—failed strict scrutiny because it was "so woefully underinclusive as to render belief in [its stated] purpose a challenge to the credulous"). While BCRA's sponsors may have intended the ban to be a first step only, *see, e.g.*, Press Release, Senator John McCain, McCain Declares Reform Crusade Continues (November 14, 2002) ("Reform is a process. It is not a one-time fight."), *available at* http://mccain.senate.gov/, its

negligible utility in battling corruption or its appearance cannot justify the statute's ham-handed regulation of core First Amendment activity.

Even were I convinced that the ban served the government's interest in preventing the actual or apparent corruption of federal candidates and officeholders, it would not do so narrowly enough. The fact that an ad is aired within 60 days of a general election and mentions a federal candidate may in many instances suggest that the ad is designed to affect the electorate's view of that particular candidate.[149] Yet that fact alone does not justify prohibiting disbursements for the ad. *See Bellotti*, 435 at 790 ("[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it [.]"). Nor does that fact alone establish that the ad raises a danger of corrupting, or of appearing to corrupt, the target candidate. Money and ads *themselves* are not a corruption of the system; instead, "a subversion of the political process" occurs when "[e]llected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *NCPAC*,

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[149] The parties quarrel at length over what percentage of "genuine" issue ads--ads not intended to influence the outcome of a federal election—BCRA's electioneering provisions would prohibit. Two studies upon which the defendants and the statute's sponsors place considerable weight suggest that BCRA would have prohibited between one per cent and seven per cent of any "genuine" issue ads aired during the 1998 and 2000 elections. *See generally Buying Time 2000; Buying Time 1998*. Yet neither study has any significant evidentiary weight. *See supra* Findings 43e-43h at pages 88-99. Moreover, like the *McConnell* plaintiffs, I reject the studies' distinction between "genuine" issue advocacy and "sham" issue advocacy because it is "subjective, immune to empirical proof, and totally antithetical to *Buckley*." McConnell Br. at 66 n.29. Finally, even if I accepted the distinction, the record as a whole suggests that BCRA would prohibit too much protected expression—anywhere from 11.38 per cent to 50.5 per cent of (what even the defendants characterize as) "genuine" issue ads broadcast during the 60 days before an election in a typical election year. *See supra* Findings 43f-43h, 51d at pages 90-99, 109.

470 U.S. at 497. That a particular ad may influence the outcome of an election does not mean it will influence the legislative actions or positions of the candidate it supports or opposes. In many instances, a victorious candidate may not know which groups funded ads that sunk his opponent; plainly, then, he could hardly feel obligated to those groups. More importantly, many organizations support candidates with electioneering ads because they believe, often correctly, that the candidate will share their legislative agenda once he is elected or reelected *whether or not* they have "infus[ed]" his campaign with money. In short, they want him to win simply because, in their view, he best represents them. *See Colorado Republican I*, 518 U.S. at 640 (Thomas, J., concurring in judgment and dissenting in part) (groups "spend money in support of . . . candidates . . . because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy"). BCRA's electioneering provisions ignore the simple fact—acknowledged by the defense—that advertising disbursements often follow a candidate's legislative preferences, not the other way around. *See* Cross Exam. of Def. Witness Bok at 19 (testifying that in contribution context, legislators' roll call "votes influence the gifts rather than the gifts influencing the votes").

Additionally, BCRA's ban on corporate and labor disbursements for electioneering communications is not narrowly tailored because it extends to non-profit and political advocacy corporations. In *MCFL*, the Court held that a nonprofit advocacy corporation which poses no danger of "unfair deployment of wealth for political purposes" cannot constitutionally be prohibited from making expenditures even for *express* advocacy.[150] *MCFL*, 479 U.S. at 259. The Wellstone

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[150] The Court considered three factors in deciding that MCFL could "not constitutionally be bound by [2 U.S.C.] § 441b's restriction on independent spending," *MCFL*, 479 U.S. at 263-64: (1) the corporation "was formed for the express purpose of promoting political ideas, and [could]

Amendment (BCRA section 204) prevents any such corporation, from the ACLU to the NRA to MCFL itself, from making a disbursement for any electioneering communication. *See* BCRA § 204; FECA § 316(c)(6)(A), (B); 2 U.S.C. § 441b(c)(6)(A), (B); *see also supra* Part II.A (explaining operation of Wellstone Amendment). The government contends that the prohibition's extension to non-profits "does not impair its constitutionality," citing the Court's decision in *Austin:*

> The Supreme Court's decision in *Austin* is dispositive. In that case, the Michigan Chamber of Commerce, a nonprofit corporation, challenged a statute which, like FECA § 441b, required for-profit and nonprofit corporations alike to make independent expenditures through a separate segregated fund. In upholding the statute, the Court rejected the argument that the statute was "overinclusive, because it includes within its scope closely held corporations that do not possess vast reservoirs of capital." . . . The Court found that, due to the "special benefits conferred by the corporate structure," all corporations present the potential to distort the electoral process . . . .

Gov't Br. at 165 (citations omitted). Before the Court in *Austin*, as in *MCFL*, was a limit on expenditures disbursed for *express* advocacy and, were a similar limit before us here, the government's argument would be more persuasive. But BCRA restricts near-election *issue* advocacy. The claim that organizations like the ACLU—which "has never taken a position in a partisan political election" and relies almost exclusively on individual membership dues, ACLU Br. at 2-3

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not engage in business activities," *id.* at 264; (2) no "persons connected with the organization [would] have [an] economic disincentive for disassociating with it if they disagree with its political activity," *id.*; and (3) it "was not established by a business corporation or a labor union, and it [was] its policy not to accept contributions from such entities," *id.*

& n.2; *see supra* Finding 44e at pages 100-01—corrupt or appear to corrupt particular federal candidates with non-partisan, issue-based ads is an "undifferentiated fear" insufficient to justify BCRA's overreach in curtailing protected speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) ("[I]n our system, undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression."); *see FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001) (under First Amendment as interpreted in *MCFL* and *Austin*, government "must demonstrate that the recited harms are real, not merely conjectural" (quoting *Turner*, 512 U.S. at 664)).

* * *

I would hold, therefore, that BCRA sections 201, 203 and 204 are facially invalid because they are overbroad under *Buckley* and cannot pass strict scrutiny in any event.[151] Corporations and unions no less than individuals are entitled to spend money for the sake of engaging by broadcast in "uninhibited, robust, and wide-open ... [d]iscussion of public issues and debate on the qualifications of candidates," *Buckley*, 424 U.S. at 14; *see Bellotti*, 435 U.S. at 776-77, *especially* during the weeks immediately preceding an election, *see Mills*, 384 U.S. at 219 (Alabama statute prohibiting newspaper editor from publishing election day editorial urging particular outcome on ballot measure unconstitutional because it "silence[d] the press at a time when it [would] be most effective"); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1972) (emphasizing need to protect "speech about how we are governed," including "a wide range of evaluation, criticism, *electioneering* and propaganda" (emphasis added)); *see generally* Kirk L. Jowers, *Issue Advocacy: If It Cannot Be Regulated When It is Least Valuable, It Cannot Be Regulated When It is Most Valuable*, 50 CATH. U.L. REV. 65 (2000).

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[151] In light of this disposition, I would not reach the *McConnell*, *NRA*, *Chamber of Commerce*, *NAB* and *AFL-CIO* plaintiffs' equal protection claims or the *Paul* plaintiffs' claim that the provisions "abridge[ ] the freedom of the press by imposing discriminatory editorial control upon [their] press activities." Paul Br. at 21 (capitalization altered).

B. Disclosure and Reporting Requirements

The Supreme Court in *Buckley* took pains to emphasize that provisions requiring disclosure and reporting of election-related disbursements are no less the subject of First Amendment concern than are restrictions on the disbursements themselves. *See Buckley*, 424 U.S. at 64. Indeed, the Court recognized that in some circumstances

> compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. . . . It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the inter ests which Congress has sought to promote by [its] legislation.

Id. at 64, 68 (citations omitted). It is well-established, therefore, that the government's interests in mandating disclosure "must survive exacting scrutiny." *Id.* at 64 & n.73 (citing *NAACP v. Alabama*, 357 U.S. at 463; *Gibson v. Fla. Legislative Comm.*, 372 U.S. 539, 546 (1963); *NAACP v. Button*, 371 U.S. at 438; *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)). The Court in *Buckley* found three governmental interests sufficiently compelling to support FECA's disclosure and reporting provisions:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters

> in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. . . . Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the [Act's] contribution limitations.
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> . . .

Buckley, 424 U.S. at 66-68 (footnotes and citations omitted).[152] BCRA's disclosure and reporting provisions, however, are far more intrusive than the requirements upheld in *Buckley*. Sections 201, 311 and 504 require disclosure and reporting not of expenditures and contributions "made for the purpose of influencing" a federal election but of disbursements for "electioneering communications" and of requests to broadcast communications "relating to any political matter of national importance." My belief that *Buckley's* express advocacy test is constitutionally required, *see supra* Part IV.A, leads me to conclude that these provisions impermissibly abridge protected speech by inhibiting in an overbroad fashion the airing of near-election broadcasts containing only issue advocacy. Furthermore, I do not believe that the provisions serve any of the three interests discussed in *Buckley;* I would hold, therefore, that they cannot survive "exacting scrutiny" in any event. Finally, I would likewise invalidate BCRA section 212, which places advance reporting requirements on independent expenditures; although the provision limits only express advocacy, it imposes an unconstitutional prior restraint.

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[152] Acknowledging these benefits, even critics of recent campaign finance proposals have suggested that *carefully constructed* reporting provisions would be the least problematic method of regulating campaign spending and giving. *See, e.g.*, Gora, *supra,* at 892 & n.103 (explaining ACLU's support for "disclosure of large contributions to mainstream party candidates"); Issacharoff & Karlan, *supra,* at 1736-37.

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A complete examination of BCRA's disclosure and reporting requirements must first consider the D.C. Circuit's unanimous holding in *Buckley* invalidating one of FECA's reporting requirements, then codified at 2 U.S.C. § 437a,[153] as unconstitutionally vague and overbroad. *See Buckley,* 519

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[153] Section 437a, which was strikingly similar to BCRA's electioneering disclosure requirements, provided in part that

> [a]ny person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports . . . set[ting] forth the source of the funds used in carrying out any activity described in [this] sentence in the same detail as if the funds were contributions within the meaning of [the Act], and payments of such funds in the same detail as if they were expenditures within the meaning of [the Act].

Buckley, 519 F.2d at 869-70.

F.2d at 869-78. Because the government did not appeal the holding, *see Buckley*, 424 U.S. at 10 n.7, it remains controlling authority for this court to this day:

> Section 437a, with a "purpose of influencing" and a "design[ ] to influence" [federal elections] as criteria undertaking to partially shape its operation, does not meet the governing [vagueness and overbreadth] standards. These criteria do not mark boundaries between affected and unaffected conduct with narrow specificity; they do not clearly inform . . . [of] what is being proscribed. Rather, they leave the disclosure requirement open to application for protected exercises of speech, and to deterrence of expression deemed close to the line. Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, as well as more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections. In this milieu, where do "purpose" and "design[ ]" "to influence" draw the line? . . . [W]hile we have continued our struggle for an interpretation of section 437a which might bypass its vagueness and overbreadth difficulties, we have been unable to [find one].

Buckley, 519 F.2d at 875 (quotations omitted). The appeals court's recognition that the imprecise disclosure requirement intolerably chilled protected issue advocacy is notable given that the court upheld every other provision of FECA (including its expenditure limitations). Its observations about section 437a foreshadowed the Supreme Court's subsequent holding that the FECA provision requiring disclosure by individuals making contributions or expenditures over $100 annually "other than by contribution to a political committee or candidate" could be salvaged only by construing it, like the

Act's $1,000 spending limit, "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80 & n.108

As I have discussed, the federal courts of appeals have reached a consensus that *Buckley's* express advocacy test is constitutionally required, whether in the context of disbursement ceilings or disclosure. *See supra* Part IV.A. They have held, and I agree, that any statute permitting issue advocacy only on the condition that the speaker submit to cumbersome disclosure and reporting requirements must be invalidated on the ground of overbreadth. *See Moore*, 288 F.3d at 190 (state disclosure provision could constitutionally extend only to political advertisements "advocat[ing] *in express terms* the election or defeat of a candidate" (emphasis in original)); *Davidson*, 236 F.3d at 1187, 1193-94 (same); *Perry v. Bartlett*, 231 F.3d at 162 (same); *Vt. Right to Life Comm.*, 221 F.3d at 386 (same); *cf. Talley v. California*, 362 U.S. 60, 65 (1960) (finding "void on its face" ordinance barring distribution of any handbill that did not contain name and address of writer and distributor); *Thomas*, 323 U.S. at 539 ("As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly."). As a noted law professor has put it, "the *Buckley* bottom line" is that

> [w]hile independent expenditures for speech that expressly advocates the election or defeat of a clearly identified candidate—i.e., expenditures for "express advocacy"—may not be limited in amount, such spending may be subjected to disclosure requirements. [But] [e]xpenditures for speech that does *not* expressly advocate the election or defeat of a candidate—i.e., expenditures for issue advocacy—may neither be limited in amount *nor* subjected to disclosure requirements.

BeVier, *Issue Advocacy, supra*, at 1769 (emphases added). Thus, BCRA's disclosure requirements are subject to a doctrinal framework similar to the one I applied to the statute's ban on corporate and labor disbursements for electioneering communications. *See supra* Part IV.A. That is, if by its vagueness a disclosure requirement appears to stifle both express advocacy and issue advocacy, the reviewing court must (if possible) construe the provision narrowly to apply only to the former and not the latter. *See Buckley*, 424 U.S. at 80. If the requirement is not readily susceptible of such a construction— and thereby causes individuals and entities to refrain from engaging in constitutionally protected issue advocacy, *see Broadrick*, 413 U.S. at 612—the reviewing court will strike down the provision as overbroad. *See, e.g., Perry*, 231 F.3d at 161-62. Even if a provision can be construed to require disclosure of express advocacy only, it is subject nonetheless to "exacting scrutiny." *Buckley*, 424 U.S. at 64; *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 202 (1999) ("[E]xacting scrutiny is necessary when compelled disclosure of campaign-related payments is at issue." (quotations omitted)). Under that standard of review, a court must determine whether a given requirement is narrowly tailored—i.e., whether there exists a "substantial relation" between, on the one hand, the government's "subordinating interests" in informing the electorate and preventing corruption, and, on the other, "the information required to be disclosed." *Buckley*, 424 U.S. at 64 (quoting *Gibson*, 372 U.S. at 546). I note, as the Supreme Court has noted, that such scrutiny is warranted "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

Sections 201, 311 and 504 fail the express advocacy test. Section 201 requires any person who makes, or contracts to make, "a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year" to file within 24 hours after making each disbursement (or entering a contract to make a disbursement) a statement containing: the person's name and, in some instances, the person's address; the person's place of business, if the person is not an individual; the amount disbursed; the names of recipients; and the election to which the communication pertains. BCRA § 201(a); FECA § 304(f)(1), (2); 2 U.S.C. § 434(f)(1), (2). All of these details are then made public on the internet, at the FCC's website. *See* BCRA § 201(b); FECA § 304 note; 2 U.S.C. § 434 note. Section 311 amends the Act to mandate that "whenever any person . . . makes a disbursement for an electioneering communication," the communication *itself* must state whether it was authorized by a candidate and, if it was not, it must "clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication." BCRA § 311; FECA § 318(a); 2 U.S.C. § 441d(a); *see supra* note 39 (discussing section 311). Along the same lines, section 504 requires broadcast licensees to "maintain, and make available for public inspection, a complete record" of any "request" of any person "to purchase broadcast time" for communications "relating to any political matter of national importance." BCRA § 504; FCA § 315(e)(1); 47 U.S.C. § 315(e)(1). Many, if not most, communications "relating to any political matter of national importance" do not contain words expressly advocating the election or defeat of a candidate. And both of BCRA's definitions of "electioneering communication" sweep within their purview ads that do not expressly advocate the election or defeat of a candidate. *See supra* Part IV.A. Thus does section 201 require individuals spending funds on issue ads independent of a candidate's campaign to jump through a set of hoops that *Buckley* held could be required only of express advocates. Thus does section 311 require that disclosure be included in protected issue ads themselves. And thus does section 504 attach disclosure requirements to issue advocacy sent over the airwaves. Under *Buckley*, these provisions are unconstitutionally overbroad unless they can reasonably be construed to apply only to express advocacy.

Limiting the application of sections 201, 311 and 504 (if possible) to express advocacy is mandated not only by *Buckley* but by the Framers' intention—confirmed by longstanding tradition—to protect the right to express one's views on political issues and candidates anonymously and without fear of retaliation. *See McIntyre*, 514 U.S. at 343 & n.6 (First Amendment "embrace[s] a respected tradition of anonymity in the advocacy of political causes" (citing, *inter alia*, ENCYCLOPEDIA OF COLONIAL AND REVOLUTIONARY AMERICA 220 (J. Faragher ed. 1990); 2 THE COMPLETE ANTI-FEDERALIST (H. Storing ed. 1981))); *see also id.* at 369 (Thomas, J., concurring in judgment) ("Records from the first federal elections indicate . . . that anonymous political pamphlets and newspaper articles remained the favorite media for expressing views on candidates." (citing, *inter alia*, 15 PAPERS OF JAMES MADISON 66-73 (T. Mason, et al. eds. 1985); 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 246-362 (M. Jensen & R. Becker eds. 1976); 15 PAPERS OF ALEXANDER HAMILTON 33-43 (H. Syrett ed. 1969))); *Talley*, 362 U.S. at 65 (because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance," the state in certain circumstances "may not compel members of groups engaged in the dissemination of ideas to be publicly identified"). In striking down an Ohio statute that required the writer of any campaign literature tending to influence the outcome of an election to include his name on the material itself, the Court in *McIntyre* reaffirmed that *Buckley's* approval of disclosure requirements has no application to issue advocacy independent of a candidate's campaign, especially if such advocacy is anonymous. *See McIntyre*, 514 U.S. at 354; *Buckley*, 424 U.S. at 80. But, plainly, neither of BCRA's definitions of "electioneering communication" can be interpreted reasonably to exclude protected issue advocacy. *See supra* Part IV.A. Nor can "any political matter of national importance" be construed fairly to exclude issue advocacy. Accordingly, sections 201, 311 and 504 run afoul of the First Amendment.

Even if *Buckley's* express advocacy test were not constitutionally required, sections 201, 311 and 504 would not survive "exacting scrutiny" because they do not serve any of the three "subordinating interests" mentioned in *Buckley*. The provisions make no distinction between independent issue advocacy and advocacy coordinated with a candidate. To the extent that a corporation, union or individual *independently* disburses funds for an electioneering communication, the government's interest in preventing corruption is lacking because the requisite arrangement of, or even opportunity for, a *quid pro quo* is lacking. *See Buckley*, 424 U.S. at 47 (independent disbursements and ads "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive"); *see also Colorado Republican I*, 518 U.S. at 615 (plurality opinion) ("[T]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitmentsfrom the candidate." (quoting *Buckley*, 424 U.S. at 47)); *Buckley*, 519 F.2d at 873 ("[I]ssue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes."). Similarly absent in the independent electioneering context is the government's interest in informing the electorate about how political funds are spent by the candidate, *see Buckley*, 424 U.S. at 66, because the funds disbursed are not given to, coordinated with or spent by the candidate himself. Also attenuated is the government's interest in informing the electorate by "alert[ing] the voter to the interests to which a candidate is most likely to be responsive." *Id.* at 67. The bare fact that an individual or organization disburses funds to broadcast an advertisement "referring to" a particular candidate does not, without more, lead a voter to a confident conclusion that the candidate (or his opponent) will be "responsive" to the interests of that individual or organization. Therefore, to put the matter as the Court did in *McIntyre*,

> [i]nsofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a [communication], we think the identity of the speaker is no different from other components of the [communication's] content that the [speaker] is free to include or exclude. . . . The simple interest in providing voters with additional relevant information does not justify a state requirement that a [speaker] make statements or disclosures she would otherwise omit.

McIntyre, 514 U.S. at 348.

The reporting requirements contained in BCRA section 212, relating to independent expenditures, are infirm for a different reason. Section 212 requires any person (including any individual) who disburses more than $1,000 in "independent expenditures" within 20 days of an election, or more than $10,000 in "independent expenditures" at any time up to and including the twentieth day before an election, to file with the FEC a "report" specifying: the name and address of any recipient of any expenditure; the date, amount and purpose of any expenditure; and the name of, and office sought by, the candidate supported or opposed by the expenditure.

See BCRA § 212(a); FECA § 304(g), (b)(6)(B)(iii); 2 U.S.C. § 434(g), (b)(6)(B)(iii). As amended by BCRA section 211, the Act defines "independent expenditure" to include

> an expenditure by a person—
>
> (A) expressly advocating the election or defeat of a clearly identified candidate; and
>
> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

BCRA § 211; FECA § 301(17); 2 U.S.C. § 431(17). Because section 212 requires reporting of express advocacy only—reporting that sufficiently serves anti-corruption and informational interests—it is fully consistent with *Buckley*. Because it is not consistent with the First Amendment's prohibition on prior restraint, however, it cannot be sustained.

Under section 212, reports regarding independent expenditures made within 20 days of an election must be filed with the FEC within 24 hours "after each time [a] person makes or *contracts to make* [such] expenditures." BCRA § 212(a); FECA § 304(g)(1); 2 U.S.C. § 434(g)(1) (emphasis added). Reports on independent expenditures made at any time up to and including the twentieth day before the election must be filed with the FEC within 48 hours "after each time [a] person makes or *contracts to make* [such] expenditures." BCRA § 212(a); FECA § 304(g)(2); 2 U.S.C. § 434(g)(2) (emphasis added). These deadlines—which in many instances will require reporting of expenditures not yet made—are constitutionally problematic. Consider two recent cases from other circuits. In *Davidson*, the Tenth Circuit struck down a Colorado statute that required "[a]ny person making an independent expenditure in excess of [$1,000]'' to notify the secretary of state and each candidate in the race—and to forward thereto a detailed description of the expenditure—

"within twenty-four hours after obligating [the] funds." *Davidson*, 236 F.3d at 1196 & n.9. Although the court acknowledged that "[a] state may constitutionally require that independent expenditures be reported to some governmental entity and made available to the public," *id.* at 1197 (citing *Buckley*, 424 U.S. at 80-81), it nonetheless invalidated the statute because of the "patently unreasonable" 24-hour notice requirement:

> To require such immediate notice severely burdens First Amendment rights, and the provision is a far cry from being narrowly tailored. None of the State's compelling interests in informing the electorate, preventing corruption and the appearance of corruption, or gathering data would be at all compromised by a more workable deadline.

Id. Likewise, in *Florida Right to Life, Inc. v. Mortham*, 1998 WL 1735137 (M.D. Fla.), a Florida district court struck down a state statute requiring any individual or organization "making an independent expenditure in excess of $1,000 on behalf of or in opposition to a candidate" to provide notice and a general description of the expenditure to every candidate in the race. *Id.* at * 8 (quotation omitted). Under the law, "[a]n expenditure [was] obligated upon the purchase of any political advertising or the *entering into any agreement* . . . to purchase any political advertising." *Id.* (quotation omitted) (emphasis added). While the district court recognized that *Buckley* "upheld an after-the-fact reporting requirement for independent expenditures," *id.*, it nonetheless found the law unconstitutional because "[t]he requirement of giving advance notice to the government of one's intent to speak inherently inhibits free speech," *id.* (quotation omitted), and because "a prior disclosure requirement is not necessary to satisfy the state's interests, as articulated by the *Buckley* Court," *id.*

These cases are consistent with the Supreme Court's longstanding declaration that advance reporting and registration requirements are "quite incompatible with the requirements of the First Amendment." *Thomas*, 323 U.S. at 540; *see generally Watchtower Bible & Tract Soc'y, Inc. v. Stratton*, 122 S. Ct. 2080 (2002) (striking down ordinance requiring individuals to obtain permit prior to engaging in door-to-door advocacy). BCRA section 212 is similarly "incompatible with the requirements of the First Amendment"; while this panel "cannot substitute [its] own judgment for that of the legislature as to a more appropriate and reasonable time frame," *Davidson*, 236 F.3d at 1197, it should be able to say with confidence that the provision's advance disclosure requirements are not necessary to serve the government's subordinating anti-corruption, informational and enforcement interests.[154] *See Wis. Realtors*, 2002 WL 31758663, at *11-*12 (Wisconsin statute prohibiting group from sponsoring communication featuring candidate within 30 days of election "unless it has filed a report detailing the name of each candidate who *will be* supported or whose opponent *will be* opposed and the total disbursements *to be* made" violated First Amendment (quotation omitted) (emphasis in original)). As the AFL-CIO points out, the provision's advance deadlines will serve only to "chill the exercise of free speech by forcing groups . . . to disclose ongoing and confidential political strategies" and to "giv[e] adversaries the opportunity to . . . thwart broadcasts." AFL-CIO Br. at 16; *see supra* Findings 48, 52d, 53g-53i at pages 105, 114-15, 123-24. Accordingly, I believe that section 212 cannot stand.

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[154] *Davidson* makes clear that even if the phrase "or contracts to make" is read out of section 212 in an effort to save the provision--which would itself be a dubious proposition, *see, e.g., Erznoznik*, 422 U.S. at 216 (statute must be "easily susceptible" of narrowing construction)--the provision would nonetheless fail exacting scrutiny because of its "patently unreasonable" 24- and 48-hour notice requirements. *Davidson*, 236 F.3d at 1197. The defendants do not explain how such a short time frame is even related--much less narrowly tailored—to serving the governmental interests that *Buckley* recognized. Instead, they argue that the FEC has rendered the prior restraint problem moot by issuing "regulations [that] interpret [BCRA's disclosure] provisions not to require disclosure until after 'the date on which a communication is publicly distributed.'" Gov't Opp. Br. at 111 (quoting BCRA Reporting, 67 FED. REG. 64,555, 64,565-66 (Oct. 21, 2002)). Even assuming the regulations can be sustained as a reasonable interpretation of section 212 with respect to prior disclosure, neither the FEC nor this court is free to disregard the plainly mandated and plainly unconstitutional 24- and 48-hour notice requirements. *See Davidson*, 236 F.3d at 1197; *see also Locke*, 471 U.S. at 96 ("We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.))).

* * *

I would hold that the disclosure and reporting requirements included in sections 201, 311 and 504 are facially invalid because they are overbroad under *Buckley* and cannot withstand "exacting scrutiny" in any case. I would find as well that section 212 is facially invalid because it imposes an impermissible prior restraint and is not narrowly tailored to serve the government's interests in preventing corruption and informing the electorate.[155]

C. *Limits on "Coordinated Expenditures"*

I have thus far concluded that the Congress may not regulate issue advocacy by banning, or attaching disclosure and reporting requirements to, independent disbursements on "electioneering communications." *See supra* Parts IV.A and IV.B. In the following paragraphs, I conclude that BCRA sections 202, 213 and 214 are facially invalid because, by defining "coordinat[ion]" in an overbroad way, they tote the same impermissible restrictions through the back door.

* * *

BCRA section 202 treats as a "contribution"—and therefore subjects to the Act's source-and-amount limits and disclosure requirements—any disbursement made by any person for any electioneering communication where "such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal [sic], State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee." BCRA § 202(2); FECA § 315(a)(7)(C); 2 U.S.C. § 441a(a)(7)(C); *see supra* text accompanying notes 25-29 (detailing several of FECA's source-and-amount limits). Section 202 therefore prohibits, *inter alia:* (1) any corporation or labor organization from disbursing any amount for a "coordinated" electioneering communication, *see supra* note 29 and accompanying text; and (2) any individual from disbursing more than $2,000 per election for "coordinated" electioneering communications, *see supra* note 25 and accompanying text.

At first blush, these restrictions might not appear constitutionally suspect. With support from *Buckley* and *Colorado Republican II,* the defendants correctly point out that an expenditure arranged between the spending organization and the supported candidate raises the specter of *quid pro quo* corruption and, if unregulated, can subvert the Act's contribution limits. *See* Gov't Br. at 186- 89; Intervenors Br. at 135-36. In *Buckley,* the Court upheld a FECA provision treating as a contribution any expenditure "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate" because the provision "prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley,* 424 U.S. at 46-47 & n.53; *see FEC v.*

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[155] In light of this disposition, I would not reach the *Paul* plaintiffs' claim that BCRA's disclosure provisions "abridge[ ] the freedom of the press by imposing discriminatory editorial control upon [their] press activities." Paul Br. at 21 (capitalization altered).

Christian Coalition, 52 F. Supp. 2d 45, 85 (D.D.C. 1999) (while *Buckley* introduced notion of coordinated expenditures" and, for constitutional analysis, treated such expenditures as contributions, it reserved for another day the task of defining "coordinated expenditures" for constitutional purposes). And in *Colorado Republican II* the Court sustained against a facial attack the Act's party expenditure provision, 2 U.S.C. § 441a(d), because "a [political] party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of [the Act's] contribution limits." *Colorado Republican II*, 533 U.S. at 465. The Court has recognized, however, that "coordinated expenditures . . . share some of the constitutionally relevant features of independent expenditures." *Colorado Republican I*, 518 U.S. at 624 (plurality opinion); *see id.* at 626-31 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 631-40 (Thomas, J., concurring in judgment and dissenting in part). Indeed, it has made clear that any coordinated expenditure analysis must "ultimately turn[ ]" on whether the regulated expenditures are "potential alter egos for contributions" or "functionally true expenditures, qualifying for the most demanding First Amendment scrutiny." *Colorado Republican II*, 533 U.S. at 463.

The statutory definition of "coordinat[ion]," then, is critically important; it must clearly and precisely draw a line between "alter ego" expenditures and "functionally true" expenditures. Because a bare *allegation* of coordination can subject any given spender to a series of costly and intrusive enforcement proceedings—whether the spender is in compliance with the law or not, *see* Smith Statement at 2 (cited in note 99, *supra*)—the definition "must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions." *See*

Christian Coalition, 52 F. Supp. 2d at 88-89. That is, in the absence of a clear and narrow definition of coordination, an organization's ideological opponents need only assert that it is engaged in such activity to initiate a crippling litigation process that could prevent the organization from participating, legally, in protected lobbying or speech activities. *See* 2 U.S.C. § 437g(a)(1), (2) (FEC authorized to investigate potential election law violations brought to its attention by private-party complaints); *supra* Findings 61b, 64b at pages 134-39; *see also* Chamber of Commerce Br. at 14 et seq. (explaining how "coordination allegations seriously burden and chill speech" (capitalization altered)). A properly-drawn definition is especially important where, as here, "coordinated expenditures" for *issue advocacy* are restricted—"as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the [government] cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate." *Clifton v. FEC*, 927 F. Supp. 493, 500 (D. Me. 1996), *modified on other grounds and remanded*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998). But that is precisely what BCRA does.

Under the Act as amended by BCRA section 214, any electioneering disbursement made "in cooperation, *consultation*, or concert, with, or at the request or suggestion of" a candidate or his agents is thereby "coordinated" with the candidate and treated as a contribution thereto. BCRA § 214(a); FECA § 315(a)(7)(B)(i); 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added). Likewise, any electioneering disbursement made in like fashion with a national, state or local committee of a political party is thereby "coordinated" with the committee and treated as a contribution thereto. *See* BCRA § 214(a); FECA § 315(a)(7)(B)(ii); 2 U.S.C. § 441a(a)(7)(B)(ii). BCRA section 214 repeals the FEC's existing coordination regulation[156] and provides that any new regulations "shall not require agreement or formal collaboration to establish coordination" between a candidate (or political party committee) and an entity making a disbursement. *See* BCRA § 214(c); FECA § 315 note; 2 U.S.C. § 441a note. In accordance with section 214's mandate, the FEC recently promulgated a final rule on "coordinated communications." *See supra* Finding 57 at pages 129- 32; *see also supra* note 45 and accompanying text. The rule provides that a disbursement for an electioneering communication is "coordinated" with a candidate or political party committee—"whether or not there is agreement or formal collaboration" between the disburser and the candidate or committee—when (1) "[t]he communication is created, produced, or distributed at the request or suggestion" of the candidate or committee; (2) the candidate or committee "is materially involved in decisions regarding" the communication; or (3) "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication" between the disburser and the candidate or committee. *See* 68 Fed. Reg. at 453-55. Under the regulation, "[a]greement means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination" and "[f]ormal collaboration means planned, or

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[156] Before BCRA became effective, an expenditure for a communication was "coordinated" under 11 C.F.R. § 100.23(c)(2) if the communication was created, produced or distributed (1) "[a]t the request or suggestion of" the candidate or party; (2) after the candidate or party had "exercised control or decision-making authority" over the content or distribution of the communication; or (3) after "substantial discussion or negotiation" resulting in a "collaboration or agreement" between the creator, producer, distributor or payer of the communication and the candidate or party regarding the content or distribution of the communication. *Supra* Finding 56 at pages 128-29 (quoting 11 C.F.R. § 100.23(c)(2)); *see* Gov't Br. at 183.

systematically organized, work on the communication." *Id.* at 455 (emphases omitted). Finally, the regulation purports to provide a "[s]afe harbor" for "responses to inquiries about legislative or policy issues":

> A candidate's or a political party committee's response to an inquiry about that candidate's or political party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards . . . of this section.

Id.

The district court in this circuit recently confronted the question whether, and to what extent, the government may regulate "coordinated expenditures [on communications] not limited to express advocacy." *Christian Coalition,* 52 F. Supp. 2d at 86 (capitalization altered) (quotation omitted). The court's views on the matter are worth quoting at length:

> This Court is bound by both the result and the reasoning of *Buckley,* even when they point in different directions. While *Buckley* confidently assured that coordinated expenditures fell within the Act's limits on contributions, it also reasoned that spending money on one's own political speech is an act entitled to constitutional protection of the highest order. Expressive coordinated expenditures bear certain hallmarks of a cash contribution but also contain the highly-valued political speech of the spender. . . . I take from *Buckley* and its progeny the directive to tread carefully, acknowledging that *considerable* coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some *consultations* . . . with a federal candidate.

Id. at 91 (emphases added). Pointing to the *Christian Coalition* decision—and, more importantly, to the Supreme

Court's decision in *Colorado Republican I*—the plaintiffs argue that BCRA's coordination provisions are overbroad. *See, e.g.*, McConnell Br. at 82-85; Chamber of Commerce Br. at 11-14. I agree; many of the expenditures BCRA defines as "coordinated" are not "disguised contributions" of the sort described in *Colorado Republican II* and *Buckley*. *Colorado Republican II*, 533 U.S. at 443; *see Clifton*, 927 F. Supp. at 495, 499 (despite its contact with candidate to "seek explanation of particular votes or statements," Maine Right to Life Committee's publication of voting records and guides represented "direct issue advocacy" as opposed to "the mere third-party billpaying for a *candidate's* media advertisements or a volunteer's incidental expenses that *Buckley* was talking about when it treated coordinated spending as a contribution under different statutory language" (emphasis added)). Suppose, for example, that a corporation purchases broadcast time for an electioneering communication that does not expressly advocate the election (or defeat) of candidate Smith but, instead, favorably compares Smith's voting record on tax cuts to that of his opponent. Governed by "both the result and the reasoning of *Buckley*,'' *Christian Coalition*, 52 F. Supp. 2d at 91, I think it clear that the ad would "communicate the underlying basis for the [corporation's] support" of Smith. *Buckley*, 424 U.S. at 21. Just as significantly, the ad would provide the electorate with a degree of "knowledge of the comparative merits and demerits of the candidates for public trust," 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 575 (Jonathan Elliot ed. 1888) (hereinafter ELLIOT'S DEBATES) (eighteenth century speech of James Madison to General Assembly of Virginia), and would assist voters in "mak[ing] informed choices" about the candidates, *Buckley*, 424 U.S. at 14-15. If the corporation "consult[s]'' with Smith's office before purchasing the ad—perhaps to confirm Smith's voting record and to ensure the ad's accuracy—does that fact, by itself, render the information in the ad less independent or less valuable as an

expression of a political position? I do not think so; the corporation's disbursement for the ad would constitute direct speech by the corporation itself and a "functionally true expenditure[ ] qualifying for the most demanding First Amendment scrutiny."[157] *Colorado Republican II*, 533 U.S. at 463; *see Clifton*, 927 F. Supp. at 499 (where "both the disbursements and the speech are *direct political speech by the [corporation]*, not by the candidate," they are "at the heart of the Court's First Amendment's concerns" notwithstanding their allegedly "coordinated" nature (emphasis in original)). Nor would the minimal "consultation" be "extensive enough to make the potential for corruption through legislative *quid pro quo* palpable." *Christian Coalition*, 52 F. Supp. 2d at 89. Yet without sufficient regard for the corporation's speech interest or the electorate's interest in information, BCRA restricts such a disbursement.

Evidently, the FEC envisioned this very scenario and was concerned that BCRA'sdefinition of coordination was overbroad—as I mentioned, the Commission in its final rule on "coordinated communications" attempted to provide a "[s]afe harbor" for "responses to inquiries about legislative or policy issues." 68 Fed. Reg. at 455. While sections 202 and 214 are indeed overbroad, *see infra*, the FEC's attempt to narrow them cannot save them from invalidation. The statute declares that any electioneering expenditure made "in cooperation, *consultation*, or concert" with a candidate or his agents is "coordinated" with the candidate and treated as a contribution thereto. *See* BCRA § 214(a); FECA § 315(a)(7)(B)(i); 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added). Under two common definitions, to "consult" means to "discuss" or "refer to esp. [sic] for information." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 490 (1993); cf. Fund for Animals, Inc. v. Thomas, 127 F.3d 80, 84 (D.C. Cir. 1997) (in Endangered Species Act context, "consultation . . . includes all discussions, correspondence, etc." (quoting 50 C.F.R. § 402.13(a))). The FEC's safe-harbor provision appears to contravene the plain language of sections 202 and 214, which need not be stretched in the slightest in order to reach an electioneering communication that a corporation, union or individual merely "discuss[es]" with (through "inquiries" of and "responses" from) a candidate like Smith. Thus, the corporation wishing to "consult[ ]" with Smith "about legislative or policy issues" cannot be sure that the safe-harbor provision will provide any shelter at all against the statute, given the rule's variance from the statute's text. The corporation is on the horns of a dilemma. It can choose to (1) "consult[ ]" with Smith and hope the safe harbor rule is eventually upheld on Administrative Procedure Act (APA) review;[158] (2) forgo the consultation and risk the ad's inaccuracy; or (3) forgo the communication itself in an act of self-censorship.

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[157] The four dissenters in *Colorado Republican II* concluded similarly in the political party context:

> Take, for example, a situation in which the party develops a television advertising campaign touting a candidate's record on education, and the party simply "consult[s]," 2 U.S.C. § 441a(a)(7)(B)(i), with the candidate on which time slot the advertisement should run for maximum effectiveness. [We] see no constitutional difference between this expenditure and a purely independent one. In the language of *Buckley*, the advertising campaign is not a mere "general expression of support for the candidate and his views," but a communication of "the underlying basis for the support." . . . It is not just "symbolic expression," . . . but a clear manifestation of the party's most fundamental political views.

Colorado Republican II, 533 U.S. at 468 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).

In their briefs—filed before the FEC's final rule was promulgated—the plaintiffs focus primarily on section 214's declaration that the FEC "shall not require agreement or formal collaboration to establish coordination" between a candidate (or political party committee) and an entity or individual making a disbursement. *See* BCRA § 214(c); FECA § 315 note; 2 U.S.C. § 441a note. They claim, essentially, that any rule promulgated pursuant to that mandate will inevitably violate the Constitution. *See, e.g.*, Chamber of Commerce Br. at 6-14. The defendants respond that (1) the assertion that "unconstitutional rules are inevitable" is faulty because the Constitution does not require agreement or formal collaboration, Intervenors Br. at 140-42; and (2) the plaintiffs' coordination challenges are non-justiciable in any event, *see* Gov't Br. at 183- 85. The defendants are mistaken on both counts.

First, the Supreme Court has never suggested that the Congress can define "coordinat[ion]" so broadly that it can occur absent at least *some* type of agreement. Quite the contrary, the Court has made clear that the government's "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Colorado Republican I*, 518 U.S. at 621-22 (plurality opinion). Although the Court has recognized that "general . . . understanding[s]" and "wink or nod" arrangements may be regulated, *see Colorado Republican II*, 533 U.S. at 442; *Colorado Republican I*, 518 U.S. at 614 (plurality opinion), these are themselves "agreements." I therefore reject the notion that section 214's directive—and the FEC's final rule, *see supra* Finding 57 at pages 129-32; *see also supra* note 45—requiring no "agreement or formal collaboration" to establish coordination "is materially more narrow than the 'general understanding' and 'wink or nod' approaches recognized in the *Colorado* decisions." Intervenors Br. at 142 n.521. Read in conjunction with the statute's equating of "coordinat[ion]" with "consultation," the regulation will inevitably deter contact between independent spenders and their elected representatives, a result "patently offensive to the First Amendment." *Clifton*, 114 F.3d at 1314 (FEC regulation limiting organization's oral contact with candidate unconstitutional because it "tread[ed] heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives").

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[158] As the Chamber of Commerce points out, "ordinary APA review [is] a process that can take years [and it would] thus defeat[ ] BCRA's mandate that constitutional issues presented by the statute be resolved in a special . . . expedited proceeding." Chamber of Commerce Br. at 13-14 n.7.

Second, sections 202 and 214 are impermissibly overbroad without reference to any regulation that eventually takes hold. The provisions explicitly and *unambiguously* equate "consultation" and "coordinat[ion]."[159] I agree with the district court's statement in *Christian Coalition* that a "spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some *consultations* . . . with a federal candidate." *Christian Coalition*, 52 F. Supp. 2d at 91 (emphasis added); *see id.* (only "*considerable* coordination will convert an expressive expenditure into a contribution" (emphasis added)). I am constrained to conclude, therefore, that sections 202 and 214 will violate the First Amendment no matter what the Commission does, for no regulation it promulgates may depart (as

the safe- harbor rule does) from the provisions' plain text. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the . . . agency . . . must give effect to the unambiguously expressed intent of Congress."). Were sections 202 and 214 "readily susceptible" of a saving construction, *Am. Booksellers*, 484 U.S. at 397, we could simply read the word "consultation" out of the statute or give it a meaning narrower than "discuss" or "refer to . . . for information." But the Congress clearly intended the broader interpretation—why else would it have directed the FEC to repeal its current rules and promulgate regulations that do not require agreement or formal collaboration? *See* BCRA § 214(c); FECA § 315 note; 2 U.S.C. § 441a note; *see also* 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("[T]he [former] FEC regulation [was] far too narrow to be effective in defining coordination in the real world of campaigns . . . ."). As the ACLU demonstrates, this inclusion of spender-candidate "consultation[s]" will undoubtedly have perverse and impermissible effects:

> Section 214 . . . effectively impose[s] a year round prohibition on all communications made by a corporation like the ACLU where there has been . . . "discussion" about the communication with a candidate. [Thus], the ACLU may not be able to discuss a civil liberties vote or position with a Representative or Senator if the ACLU will subsequently produce a box score that praises or criticizes that official's stand.

ACLU Br. at 20. And, as the Chamber of Commerce argues, the dilemma facing the plaintiffs—i.e., choosing between "consultation" with and communication about a candidate—"has bite right now because contacts with legislators or political party officials today may lead to claims that future speech is 'coordinated' and, hence, is an unlawful contribution." Chamber of Commerce Br. at 7. Accordingly, under thefirst part of the pre-enforcement review test enunciated in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), the plaintiffs' challenges to sections 202 and 214 are "appropriate for judicial resolution at this time" because the outcome of any further FEC rule-making will not affect this court's merits analysis.[160] *Id.* at 149. Under the second prong of *Abbott Laboratories,* moreover, the "hardship to the parties of withholding [judicial] consideration," *id.,* would be extreme because ordinary APA review of the regulations could take several months or even years.

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[159] While section 202 does not itself use the word "consultation," it incorporates by reference section 214's overbroad definition of "coordinat[ion]":

> [I]f . . . any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of [FECA] section 304(f)(3)) [and] such disbursement is *coordinated* with a candidate or an authorized committee of such candidate, a Federal [sic], State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee[,] such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party. . . .

BCRA § 202(2); FECA § 315(a)(7)(C); 2 U.S.C. § 441a(a)(7)(C) (emphasis added).

* * *

I would hold, therefore, that BCRA's definition of "coordinat[ion]'' is overbroad. Sections 202 and 214 subject to the Act's source-and-amount limitations disbursements for electioneering communications made merely in "consultation" with a candidate or political party. In my view, the provisions impermissibly restrict *independent* disbursements and are therefore facially invalid.

Likewise invalid, I believe, is BCRA section 213, which compels a political party committee, at the time the party's candidate is nominated, to make a binding choice between disbursing either independent or "coordinated" disbursements in support of the candidate. *See* BCRA § 213; FECA § 315(d)(4)(A); 2 U.S.C. § 441a(d)(4)(A); *see also supra* Part II.C. Under BCRA's overbroad definition of "coordinat[ion]," section 213 is necessarily unconstitutional because it restricts political parties in exercising their First Amendment "right to make unlimited independent expenditures." *Colorado Republican I,* 518 U.S. at 618. If *any* national, state or local committee of a political party makes an expenditure in "consultation" with a candidate, BCRA brands the expenditure "coordinated" instead of independent and, for the rest of the election cycle, *every other* committee of the party—national, state and local—is prohibited from making independent disbursements "with respect to the candidate." BCRA § 213; FECA § 315(d)(4)(B); 2 U.S.C. § 441a(d)(4)(B) ("For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee."). That section 213 *compels* party committees to work together in this fashion—as though the hand of one were the hand of all—is especially perverse in light of the fact that the statute elsewhere severely *restricts* them from working together to raise certain kinds of funds and to decide how such funds should be used. *See, e.g.,* BCRA § 101(a); FECA § 323(a), (b)(2)(B)(iv); 2 U.S.C. 441i(a), (b)(2)(B)(iv); *see generally infra* Part IV.D. I believe that, in light of *Colorado Republican I,* the provision cannot stand.

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[160] Additionally, as the plaintiffs suggest, *see supra* note 158, piecemeal and delayed review of their constitutional claims would defeat BCRA's mandate that judicial consideration of such claims "shall be . . . expedite[d] to the greatest possible extent." BCRA § 403(a)(4).

D. *Restrictions on Non-Federal Funds*

I turn now to BCRA Title I, "Reduction of Special Interest Influence," and, in particular, to section 101, which regulates "[s]oft money of political parties." BCRA § 101. In a five-part analysis, I examine in turn the provision's restrictions on (1) the national, state and local political party committees, *see* FECA §§ 301(20), 323(a), (b); (2) fundraising, *see* FECA § 323(c); (3) any political party committee's solicitation of "any funds" for, or transfer of "any funds" to, certain tax-exempt organizations, FECA § 323(d); (4) any federal candidate's solicitation or transfer of non-federal funds, *see* FECA § 323(e); and (5) any state candidate's spending of non-federal funds on certain "public communication[s]," FECA § 323(f).[161] I would hold that new FECA section 301(20) and sections 323(a), (b) and (d) violate the First Amendment's guarantee of expressive association; sections 323(c) and (f) are inseverable from section 301(20); and section 323(e) is constitutionally sound.[162]

1. The Party Restrictions: New FECA Sections 301(20) and 323(a) and (b)

In the following subsections, I first explain at some length my reasons for concluding that BCRA's restrictions on a party committee's use of non-federal funds are subject to strict scrutiny under *Citizens Against Rent Control* and other Supreme Court First Amendment jurisprudence. I then discuss the constitutionality of new FECA section 323(a)—which forbids the national party committees to use non-federal funds in any way whatsoever—and conclude that it fails strict scrutiny. Finally, I discuss the constitutionality of FECA sections 301(20) and 323(b)—which severely diminish the ability of state and local party committees to spend non-federal funds on so-called "Federal election activity"—and conclude that they likewise fail strict review.

a. The Party Restrictions are Subject to Strict Scrutiny

The *McConnell, RNC* and *CDP* plaintiffs claim that FECA sections 301(20) and 323(a) and (b) are subject to strict scrutiny; they contend, *inter alia,* that the provisions severely burden their right to expressive association by prohibiting the political parties from pooling non-federal donations and

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[161] Although I recognize that my references to FECA sections as opposed to BCRA section 101 may be distracting, I use FECA references in this Part because of BCRA section 101's regulatory complexity and its division into six separate components—new FECA sections 323(a), (b), (c), (d), (e) and (f).

[162] Accordingly, I would not reach the merits of various plaintiffs' federalism, free press or equal protection claims except with respect to section 323(e). *See infra* Part IV.D.4.

spending them on speech that does not expressly advocate the election or defeat of, and is not coordinated with, any federal candidate.[163] *See* McConnell Br. at 25-26 & n.9, 33; RNC Br. at 51-53; CDP Br. at 27-31; McConnell Opp. Br. at 17-19; RNC Opp. Br. at 35-39; CDP Opp. Br. at 14-15. I agree.

When it comes to the right of expressive association, one must start with the baseline announced in *NAACP v. Alabama:* "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama,* 357 U.S. at 460-61. Seeking to justify a departure from this standard, the defendants argue that sections 323(a) and (b) are straightforward contribution limits akin to the ones the Supreme Court sustained in *Buckley* and, as such, need only be "closely drawn" to further a "sufficiently important interest." Intervenors Br. at 51 (quotations omitted); *see id.* at 14-16; Intervenors Opp. Br. at

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[163] Relying on *California Democratic Party v. Jones*, 530 U.S. 567 (2000), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the plaintiffs argue as well that sections 301(20) and 323(a) and (b) are subject to strict review because they irretrievably "splinter[] the various elements of the political party apparatus" and thereby burden the political parties' associational rights. RNC Br. at 37 (capitalization altered); see, e.g., id. at 37-44; McConnell Br. at 28, 31-32 (restrictions "work[] an unprecedented intrusion into the ability of political party committees to coordinate strategy on a nationwide basis, and to associate among each other and with their principal officeholders and candidates"); CDP Br. at 35; RNC Opp. Br. at 22-24; McConnell Opp. Br. at 15-17. And relying on *United States v. Kokinda*, 497 U.S. 720 (1990), *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Bates v. State Bar*, 433 U.S. 350 (1977), they urge the court to apply strict scrutiny to the extent that sections 301(20) and 323(a) and (b) prohibit political parties and their agents from soliciting campaign funds. See, e.g., RNC Br. at 46-49; McConnell Br. at 26-27; CDP Br. at 40; RNC Opp. Br. at 34-35; CDP Opp. Br. at 21-22; RNC Reply Br. at 17-18. In light of the discussion infra, I would not reach the merits of these claims.

17-23; Gov't Opp. Br. at 3-4. More specifically, they claim that *Buckley's* decision to uphold FECA's $25,000 ceiling on aggregate contributions to committees and candidates was "premised on the Court's understanding that virtually *all* donations of value to a national political party were 'contributions' within the meaning of FECA." Gov't Br. at 64 (emphasis in original); *see* Intervenors Opp. Br. at 18. Rending from context a snippet of a footnote, the government suggests the Court held that all "'[f] unds provided to a candidate *or political party* or campaign committee either directly or indirectly . . . constitute a contribution.'" Gov't Br. at 64 n.57 (quoting *Buckley,* 424 U.S. at 23 n.24) (emphasis the government's). But *Buckley* held no such thing. The footnote upon which the government relies states (with the omission included) that, under the Act, "[f]unds provided to a candidate or political party or campaign committee either directly[,] or indirectly *through an intermediary*[,] constitute a contribution." *Buckley,* 424 U.S. at 23-24 n.24 (emphasis added). Thus, as the *McConnell* plaintiffs contend, the footnote

> stands only for the proposition that funds that would *otherwise* constitute a contribution still constitute a contribution if provided through an indirect *source*—not that [non-federal] funds constitute a contribution. Indeed, if the Court had interpreted the FECA definition of "contribution[ ]" in the manner defendants suggest, the FEC allocation regulations, treating [non-federal] funds as a discrete category from federally regulated "contributions," would have been flatly inconsistent with the language of the statute.

McConnell Opp. Br. at 19 (first emphasis added). The Act defines a "contribution" as a donation made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). But non-federal donations to political parties are *not* made for that purpose; they are made instead to pay for grassroots campaign materials, voter registration efforts, get-out-the-vote drives and issue advocacy, much of which is directed toward elections for *state* office. *See Jacobus v. Alaska,* 182 F. Supp. 2d 881, 888 n.8 (D. Alaska 2001) ("'Soft money' describes [donations] to political parties (as opposed to candidates) that solely support party-building activities, such as: voter registration, 'get out the vote' drives, issue advocacy, and the purchase of campaign items such as slate cards, bumper stickers, and yard signs." (citation omitted)). That is precisely why such funds are called *non-federal* funds. *See* TWENTY YEAR REPORT, *supra,* at ch.3 (FEC recognizing "Constitution grants each [S]tate the right to . . . establish its own rules for financing the nonfederal elections held within its borders" and therefore funds used "in connection with" state, and not federal, elections are not subject to federal regulation); *see also supra* note 30 and accompanying text. If the Court had adopted the "contribution" definition the defendants say that it did, *see* Gov't Br. at 64, there would have been no need for the Congress's hard-fought effort to enact BCRA; proponents of tighter restrictions simply could have brought suit under the APA to overturn the FEC's allocation regulations. *See* 5 U.S.C. § 706(2)(A) (reviewing court shall "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

Next, the defendants claim that the Supreme Court's *Cal-Med* judgment reduces our review to less-than-strict scrutiny. *See* Gov't Br. at 65-66; Intervenors Opp. Br. at 18-19. I recognize that their position finds some support in the plurality of *Cal-Med,* which involved a challenge to FECA's limits on contributions to non-party, multi-candidate committees. The plurality reasoned that

> [i]f the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute

> to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee . . . which advocates the views and candidacies of a number of candidates.

Cal-Med, 453 U.S. at 197 (plurality opinion). Although the defendants acknowledge that Justice Blackmun (the fifth member of the majority) did not concur in the above analysis, *see* Gov't Br. at 66, they downplay the significance of his separate opinion. Unlike the plurality, which limited its discussion to conduit committees established for the purpose of passing contributions to candidates, Justice Blackmun suggested that "a different result would follow if [FECA] were applied to contributions to a political committee established for the purpose of making *independent expenditures*, rather than contributions to candidates." *See Cal-Med*, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in judgment) (emphasis added).

In any event, whatever confusion may have existed after *Cal-Med* regarding the applicable standard of review was resolved less than six months later when a majority of the Court held that *Buckley* and *Cal-Med* carved out only "a single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*." *Citizens Against Rent Control*, 454 U.S. at 296-97 (emphasis in original); *see supra* Part III.C. In a footnote, the intervenors dismiss *Citizens Against Rent Control* as "inapposite" to the actions at bar because "the recipient committee had been formed to support a local ballot measure . . . rather than to advocate the election or defeat of candidates for public office" and because "the Court found [that] there was no risk of actual or apparent corruption" in that setting. Intervenors Opp. Br. at 20 n.49. But the fact that political party committees are not formed for the sole purpose of supporting ballot measures does not determine our standard of review. *Buckley* itself would suggest that, if anything, the constitutional necessity of protecting associational speech is *more* acute in the candidate context than in the ballot measure context; because "the ability of the citizenry to make informed choices among candidates for office is essential, . . . it can hardly be doubted that the constitutional guarantee [of associational speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 14-15 (quotation omitted). And although I recognize the risk of *quid pro quo* corruption in the candidate context—a risk absent in the ballot measure context, *see Bellotti*, 435 U.S. at 790—the governmental interest in preventing corruption enters the constitutional equation only *after* one has decided upon the appropriate standard of review.

Returning to the strict-scrutiny baseline of *NAACP v. Alabama*, I acknowledge that the simple grouping of individuals or entities is not protected for its *own* sake:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . It is beyond debate that freedom to engage in association *for the advancement of beliefs and ideas* is an inseparable aspect of . . . freedom of speech.

NAACP v. Alabama, 357 U.S. at 460 (citations omitted) (emphasis added). In other words, not all associations are created equal under the First Amendment; only those groups that are organized to engage in protected speech are guaranteed full constitutional shelter. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engagesin 'expressive association.'"); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (to recognize right of expressive association "is not to say, however, that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution"). Put specifically in campaign finance terms, *see Beaumont*, 278 F.3d at 267 ("[L]anguage from non-funding decisions does not suddenly become inoperative when contributions and independent expenditures are at issue." (citing, *inter alia*, *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Mills*, 384 U.S. at 218; *New York Times Co.*, 376 U.S. at 270; *NAACP v. Alabama*, 357 U.S. at 460)), this straightforward observation explains the differing levels of scrutiny in *Buckley*, which dealt with contribution-to-candidate limits, and *Citizens Against Rent Control*, which involved a donation-to-committee limit. While the association between donor and candidate produces a type of expression—i.e., it lets the rest of the world know that the donor is behind the candidate and presumably supports what he stands for—the First Amendment *value* of the association is not particularly significant because, most often, the purpose of the association is the election of the candidate and not "the advancement of beliefs and ideas." *NAACP v. Alabama*, 357 U.S. at 460; *see* Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 23 (under *Buckley*, contribution to candidate "is an expression of solidarity with the candidate and little more"). It logically follows, and *Buckley* holds, that restrictions on contributions to candidates receive heightened scrutiny but not full protection. *See Shrink Missouri*, 528 U.S. at 387-88 ("under *Buckley's* standard of scrutiny," contribution-to-candidate limit survives review if "[g]overnment demonstrate[s] that [the] regulation [is] 'closely drawn' to match a 'sufficiently important interest'" (quoting *Buckley*, 424 U.S. at 25)).

In contrast, "[c]ontributions by individuals . . . to political committees . . . permit the pooling of resources. This amplifies the contributors' individual voices." Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1064 (1985) (hereinafter BeVier, *Money and Politics*). And unlike restricting the "undifferentiated, symbolic act of contributing" to a candidate, *Buckley*, 424 U.S. at 21, restricting donations to a political party "automatically affects" the amount of protected expression in which the party may then engage on behalf of its adherents, *Citizens Against Rent Control*, 454 U.S. at 299. Here I return to first principles. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Therefore, political parties that make independent expenditures—to engage in issue advocacy referring to candidates, to support ballot measures or to fund voter registration and get-out-the-vote activities—provide a service essential to our representative democracy by accepting donations for the sake of amplifying and channeling the political speech of other organizations and individual citizens. *See Citizens Against Rent Control*, 454 U.S. at 294 ("[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost."); *Kusper*, 414 U.S. at 57 ("The rightto associate with the political party of one's choice is an integral part of this basic constitutional freedom."); *see also Colorado Republican I*, 518 U.S. at 618 (plurality opinion) ("[P]ooling resources from many . . . contributors is a legitimate function and an integral part of party politics." (quoting S. REP. NO. 93-689, at 7 (1974))); *id.* at 629 (Kennedy, J., concurring in judgment and dissenting in part) ("[p]olitical parties have a unique role in serving" principle that "debate on public issues should be uninhibited, robust, and wide-open" because "they exist to advance their members' shared political beliefs" (quotation omitted)). As the Court explained in *NCPAC:*

> the 'proxy speech' approach is not useful . . . [where] the contributors obviously like the message they are hearing from [an] organization[ ] and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

NCPAC, 470 U.S. at 495; *see* THE FEDERALIST NO.35, at 214 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (contributors "are aware that however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by [another] than by themselves"). Thus does the collective input of donor-participants—and, in turn, the output of recipient political parties—assist fellow voters in "mak[ing] informed choices among candidates for office," i.e., the individuals who "will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15; *see United States v. CIO*, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring in judgment) ("There is . . . an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate . . . of the advantage of free and full discussion[.]"); 4 ELLIOT'S DEBATES, *supra*, at 575 (speech of James Madison) ("value and efficacy" of right to vote "depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively"); *see generally*

ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF- GOVERNMENT (1948) (free speech necessary for informed electorate).

As Alexis de Tocqueville cautioned long ago, the courts have special reason in the issue advocacy context to scrutinize strictly any governmental interference with any step of the process:

> If once the [state] has a general right of authorizing associations of all kinds upon certain conditions, [it] would not be long without claiming the right of superintending and managing them, in order to prevent them from departing from the rules laid down by [it].

ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 312 (Phillips Bradley ed., 1990) (1840). That is, a reviewing court should be especially wary of any restriction that might stifle issue-driven evaluation (and sometimes criticism) of the law's enactors by preventing a party's pooling of resources collected, at least in part, for that very activity. *See Eu*, 489 U.S. at 223-24 ("A 'highly paternalistic approach' limiting what people may hear is generally suspect, . . . but it is particularly egregious where the State censors the political speech a political party shares with its members." (citations omitted)); *see also Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring) (no deference to legislature warranted "where that deference . . . risk[s] such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge"); HARRY KALVEN, JR., A WORTHY TRADITION 63 (1988) ("[P]olitical freedom ends when government can use its powers and its courts to silence its critics."); JOHN HART ELY, DEMOCRACY AND DISTRUST 106 (1980) ("Courts must police inhibitions on [protected] political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.").

In sum, *Citizens Against Rent Control* requires no less than strict scrutiny of limits on non-federal donations to political party committees and neither *Buckley* nor *Cal-Med* holds to the contrary. *See Citizens Against Rent Control*, 454 U.S. at 294, 296-98; *Lincoln Club v. City of Irvine*, 292 F.3d 934, 936-39 (9th Cir. 2002) (applying strict scrutiny to ordinance imposing limit on amount of donations person or committee may receive from single source during election campaign); *see also Colorado Republican I*, 518 U.S. at 627-28 (Kennedy, J., concurring in judgment and dissenting in part) ("[W]e cannot allow the Government's suggested labels to control our First Amendment analysis. . . . We had no occasion in *Buckley* to consider possible First Amendment objections to limitations on . . . parties."); *see generally* John C. Eastman, *Strictly Scrutinizing Campaign Finance Restrictions (and the Courts that Judge Them)*, 50 CATH. U.L. REV. 13 (2000). By banning the national political party committees from receiving or spending any non-federal funds whatsoever, section 323(a) operates as a restriction on those who would donate non-federal funds to the parties for the sake of participating in collective, protected issue advocacy *via* a party's independent expenditures. And to the extent that section 323(b) prohibits state, district and local party committees from spending non-federal funds on "Federal election activity" such as

> a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (*regardless of whether the communication expressly advocates a vote for or against a candidate*),

BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii) (emphasis added), it operates to restrict collective speech in much the same manner as the national party ban. BCRA § 101(a); FECA § 323(b)(1); 2 U.S.C. § 441i(b)(1). By arguing that section 323(b) is not subject to strict scrutiny because it "simply requires that the money used to fund 'Federal election activity' [as defined by section 301(20)] be raised in compliance with the longstanding federal contribution restrictions," Gov't Opp. Br. at 3, the defendants merely beg the First Amendment issue before us—whether and to what extent the Congress may limit donations *not* made "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A)(i), *not* expended on advocating the election or defeat of a federal candidate and *not* coordinated with the candidate. In my view, sections 301(20) and 323(a) and (b)—which plainly restrict such donations—survive First Amendment review only if they serve, in a narrowly tailored fashion, the government's compelling interest in preventing actual or apparent corruption of federal candidates and officeholders.

b. Section 323(a) Fails Strict Scrutiny

Having decided the applicable standard of review, I conclude in the following sections that (1) the national party ban does not serve the government's interest in preventing actual or apparent corruption; and (2) even if the ban did alleviate corruption, it would sweep too broadly to be sustained in any event.

(1)

The defendants refer us to a mountain of discovery—mostly anecdotal in nature—gathered to support the Congress's judgment that "soft money has been used to evade the law and, in actuality and appearance, corrupts the political process." Intervenors Br. at 20 (capitalization altered); *see, e.g.*, *id.* at 6- 12, 20-50; Gov't Br. at 22-36, 68-86. I note at the outset, however, that they have identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees. *See supra* Finding 80a at pages 180-81; *see also, e.g.,* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-3 (conceding lack of evidence that any United States Senator or Representative "changed his or her vote on any legislation in exchange for a donation of non-federal money to that [person's] political party"); McCain Dep. at 170-71 (same); Feingold Dep. at 132 (same); Snowe Dep. at 206-07 (same); Jeffords Dep. at 107 (same); *see also, e.g.,* 148 CONG. REC. S2098 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd) ("I have never known of a particular Member whom [sic] I thought cast a ballot because of a contribution."); *cf.* McConnell Aff. at 8 ("During my 18 years in the United States Senate, I have never witnessed any colleague who changed his vote or took any official action as a result of either a federal contribution or a nonfederal donation to a political party at the national, state or local level."). Nor have they supported with credible evidence their contention that "party committees provide soft money donors with special access to officeholders." FEC's Am. Proposed Findings of Fact at 24 (capitalization altered); *see supra* Findings 80c, 81 at pages 182-89; *see also, e.g.,* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4 (conceding lack of evidence that "officeholders are more likely to meet with donors of non-federal money than with donors of federal money"); Cross Exam. of Def. Witness Fowler at 45 (same). Although the defendants point to certain notorious incidents they believe underscore the corrupting effect of non-federal funds, *see, e.g.,* Intervenors Br. at 11 & n.33 (noting Enron "gave over $400,000 to each political party" but not asserting funds affected any federal official's decision-making); *id.* at 29 (noting Roger Tamraz "made enormous soft money contributions" to DNC and was granted six meetings with President Clinton to obtain backing for pipeline project but "never received the backing he sought"), they have not identified any empirical link between large non-federal contributions and legislative voting behavior. *See supra*

Finding 80b at pages 181-82; *see also, e.g.,* Cross Exam. of Def. Expert Green at 58 ("Q: . . . What statistical work are you aware of that you think is statistically valid since 1990 that correlates contributions . . . to roll call votes? A: None."). Given the Supreme Court's working definition of corruption—i.e., "a subversion of the political process" that occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain," *NCPAC*, 470 U.S. at 497—I would need to see far more powerful evidence to accept the defendants' claim that non-federal donations corrupt or appear to corrupt federal candidates.

Likewise, the defendants have not established a convincing correlation between the "explosion" of non-federal funds on the one hand and an intensified public sense—i.e., appearance—of corruption on the other. *See supra* Finding 82 at pages 189-93; *see also, e.g., The Constitution and Campaign Reform: Hearings on S.522 Before the Comm. on Rules and Admin.*, 106th Cong. (2000) (sharpest decline in voter turnout, from 60.84 per cent to 50.11 per cent, occurred between 1968 and 1988, when non-federal funds were mostly *absent* from party fundraising). Nor have they persuasively rebutted evidence indicating that, to the extent the voting public *does* perceive corruption, that perception has been fueled not only by non-federal donations but also by lobbying efforts, *see supra* Finding 81 c.3 at page 187, federal contributions, *see supra* Finding 82b.2 at page 192, and the mass media's "populist demonologies" of politics in general, Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1356 (1994). *See* Primo Rebuttal Report at 11-25; *see generally* Ayres Rebuttal Report.

Turning to the defendants' broader assertions of massive national party "soft money" laundering, *see, e.g.,* Gov't Br. at 70 ("[S]oft money has become the conduit through which wealthy individuals, labor unions and corporations have in many ways seized control of our political process." (quoting 147 CONG. REC. S2449 (daily ed. Mar. 19, 2001) (statement of Sen. Collins))); Intervenors Br. at 35 (arguing that national, state and local political parties serve as "offshore banks, whose principal activity [is] to shuttle money back and forth . . . to pay for expensive mass media campaigns orchestrated by the national parties" in aid of federal candidates (quotation omitted)), I find that they are largely discounted by the Supreme Court's decision in *Colorado Republican I*. Acknowledging that "FECA permits individuals to contribute more money . . . to a party than to a candidate" and that it also allows "unregulated 'soft money' contributions to a party for certain activities, such as electing candidates for state office, see § 431(8)(A)(i), or for voter registration and 'get out the vote' drives, see § 431(8)(B)(xii)," the plurality in *Colorado Republican I* observed nonetheless that

> *the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated.* Unregulated 'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute. See § 431(8)(B).

Colorado Republican I, 518 U.S. at 616 (plurality opinion) (emphasis added); *see id.* at 647 (Thomas, J., concurring in judgment and dissenting in part) ("[T]here is little risk that an individual donor could use a party as a conduit for bribing candidates."). Although a majority of the Court in *Colorado Republican I* dismissed the defendants' parties-as-conduits theory, neither the intervenors nor the government discusses the case at any length. The government mentions the decision but once in its opposition discussion of Title I. *See* Gov't Opp. Br. at 4 n.2 (citing decision for ironic proposition that "the government interests supporting BCRA are plainly compelling"). The intervenors treat the case primarily in

footnotes, once to note that the Justices used the term "softmoney" instead of "non-federal funds," *see* Intervenors Opp. Br. at 5 n.14; twice to suggest that the plurality's observations were dicta based on an inadequate evidentiary record,[164] *see id.* at 28 n.73; *see also* Intervenors Reply Br. at 38 n.114; and once to point out that the "plurality stated that it could understand how Congress, were it to conclude that the potential for evasion of individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties," Intervenors Opp. Br. at 50 n.146 (quoting *Colorado Republican I*, 518 U.S. at 617 (plurality opinion)). While the intervenors assert that "precisely what Congress did" in enacting the national party ban was change the contribution-to-party limit, *id.*, they neglect the key distinction between federal and non-federal funds. The plurality in *Colorado Republican I* did state that it "could understand how Congress . . . might decide to change the statute's limitations on *contributions* to political parties," *Colorado Republican I*, 518 U.S. at 617 (plurality opinion) (emphasis added), but it was not speaking—as the intervenors are—in terms of *non-federal* donations to parties. Indeed, it had just explained that such donations present only an "attenuated" danger of corruption. *Id.* at 616-17 (plurality opinion). Instead, the plurality was speaking in terms of *federal* "contributions," i.e., donations that are made "for the purpose of influencing an[ ] election for Federal office,"

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[164] I do not disagree that the plurality's statement about the attenuated influence of non-federal funds was *obiter dictum*. I am mindful, however, that while "the Court sometimes changes its tune when it confronts a subject directly," we would be prudent as an inferior court to "take its assurances seriously" and to "respect what the majority says rather than read between the lines." *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992) ("If the Justices are pulling our leg, let them say so."), *cert. denied*, 508 U.S. 950 (1993).

2 U.S.C. § 431(8)(A)(i), and that might therefore have a corrupting effect on federal candidates. *See Colorado Republican I*, 518 U.S. at 616-17 (plurality opinion).

Even were I to infer from the record that the use of non-federal funds has to some extent promoted actual or apparent corruption of federal candidates—and I do not, *see supra* Findings 80-82 at pages 180-93—the defendants have offered only scant and contradictory support for the proposition that the national party ban "will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664. Although the statute aims explicitly at the "reduction of special interest influence," much evidence in the record indicates that the ban will in fact *magnify* that influence.

First, while prohibiting national political party committees from raising or spending non-federal funds for issue advocacy—whenever the advocacy occurs, whether or not it refers to a federal candidate and whether or not it is broadcast—BCRA continues to permit other groups to raise and spend non-federal funds at any time for non-broadcast, candidate-focused issue advertising. To the extent that *any* candidate-focused issue ad is corrupting—as the defendants would have us believe—single-issue ads sponsored by interest groups are no less likely (and perhaps more likely) to buy political influence than are more broad-based party-sponsored ads. *See Colorado Republican I*, 518 U.S. at 617 (plurality opinion) ("If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor."); La Raja Expert Report at 19-20, 46 (because interest groups "are not linked at the ballot box with the candidate," they "can air ads without facing reprisals from voters, an arrangement that undermines accountability in the campaign process"); Milkis Expert Report at 25 (interest groups "push government to enact policies that benefit small constituencies at the expense of the general public"); *RNC v.FEC*, Civ. No. 98-CV-1207 (Hernson Dep. at 208-09 (parties' use of non-federal funds "does not create such strong policy-oriented IOU's between contributors and legislators as those created by narrowly-focused interest groups that spend soft money to help only a few candidates")); *see also* Keller Expert Report at 27 (political parties have historically countered undue influence of groups with narrow agendas by mediating political processes and "bend[ing] public policy toward a larger, national influence"); Issacharoff & Karlan, *supra*, at 1714 ("groups that engage in independent advocacy have strong incentives to stress one issue around which to mobilize supporters and contributors as opposed to the range of programmatic positions" that candidates and political parties must take); *The Supreme Court, 1995 Term—Leading Cases: Political Party Expenditures*, 110 HARV. L. REV. 236, 242-43 (1996) ("In a country of diverse views and competing interests, political parties . . . enable[ ] the electorate to transcend the parochial interests of PACs and voluntary associations, which are usually united by self-interest, narrow ideologies, or particular issues."); *compare supra* Finding 70 at pages 145-47 (political parties exert moderating influence on public policy), *with supra* Finding 79 at pages 176-80 (interest groups arrange discrete and temporary alliances to address narrow issues and their political activities "are far less transparent than those of parties" (quoting Keller Expert Report at 22)).

Second, both the record and common sense suggest that if BCRA section 101 passes constitutional muster, the supply of non-federal funds currently flowing to the political parties will be channeled to interest groups. *See supra* Finding 79d at pages 178-80; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 7 (admitting "[d]efendants have no evidence establishing that current donors of nonfederal money to national political party committees will, after the effective date of BCRA, cease donating or spending non-federal money in ways that might influence federal elections"); Gallagher Decl. at 16 (expecting increased contributions to NARAL after BCRA); La Raja Expert Report at 40 ("Interest groups will take advantage of the vacuum left by the national committees to raise the nonfederal funds that parties have raised in the past."); Lux Dep. at 51 (agreeing with "widely discussed" prediction of increased non-federal donations to interest groups); Cross Exam. of Def. Witness Bok at 61 (same); Issacharoff & Karlan, *supra*, at 1713 (observing that speakers "spend money on politics because they care about political outcomes" and that "[t]he money reform squeezes out of the formal campaign process must go somewhere"); *cf. SEC v. Int'l Loan Network, Inc.*, 968 F.2d 1304, 1305 (D.C. Cir. 1992) ("Money is always there but the pockets change." (quoting Gertrude Stein)).

Third, the record indicates as well that non-federal funds made available to interest groups will be used for a wide range of election-related activities, including grassroots and get-out-the-vote activities, voter registration and fundraising events with federal officeholders. *See supra* Finding 79c at pages 177-78; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 18-19; Cross Exam. of Def. Expert Green at 15-24; Cross Exam of Def. Expert Mann at 164-65; Milkis Rebuttal Report at 11; Gallagher Decl. at 6 (NARAL uses federal officeholders to raise funds); Rosenberg Aff. at 3 (New Democrat Network uses federal office holders to raise funds); Sease Decl. at 5 (Sierra Club uses federal officeholders to raise funds); Solmonese Aff. at 5 (EMILY's List uses federal officeholders to raise funds). To the extent that any one or any combination of these activities is corrupting when sponsored by the national party committees—although, in light of *Colorado Republican I*, 518 U.S. at 616-17 (plurality opinion), I do not presume that they are—they are no less corrupting when sponsored by interest

groups. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 19-20; Cross Exam of Def. Expert Mann at 148-49.

I do not suggest that the record, as a whole, supports the proposition that BCRA *encourages* corruption. In light of the strict scrutiny applicable here, however, the record *does* "diminish the credibility of the government's rationale for restricting [non-federal funds] in the first place." *City of Ladue*, 512 U.S. at 52. Just last Term the Court reminded us that a speech restriction "cannot be regarded as protecting an interest of the highest order"—and will therefore fail strict scrutiny—if "it leaves appreciable damage to that supposedly vital interest unprohibited." *White*, 122 S. Ct. at 2537 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in judgment)). Indeed, the evidence I have just described leads me to conclude that "the interest given in justification of [section 323(a)] is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *see Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995) (speech restriction will be struck if it "provides only ineffective or remote support for [its] asserted goals" (quotations omitted)), *cert. denied*, 517 U.S. 1119 (1996); Cross Exam of Def. Expert Sorauf at 191 ("it's speculative" whether "banning soft money will . . . restore public confidence").

(2)

Even were I convinced that new FECA section 323(a) materially served to prevent actual or apparent corruption, I am not persuaded that it would do so narrowly enough to comport with the First Amendment's guarantees. Surprisingly, the defendants engage in only a half-hearted attempt to convince the court otherwise.[165] *See* Gov't Br. at 86-87;

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[165] Arguing that strict scrutiny is inapplicable, the defendants make *no* attempt to establish that section 323(a) is narrowly tailored. While they do

Intervenors Br. at 55-57; Gov't Opp. Br. at 44-46; Intervenors Opp. Br. at 24-27; Gov't Reply Br. at 35-36; Intervenors Reply Br. at 25-29. Boiled down to its essence, their tailoring argument rests on a single, flawed premise—namely, that under the Supreme Court's jurisprudence, we owe substantial deference to the Congress's conclusion that "anything less" than BCRA's broad prophylactic ban on the national party committees' use of non-federal funds "would not adequately reduce the appearance and reality of corruption." Gov't Opp. Br. at 44; *see* Intervenors Br. at 55-57. This hardly seems like a tailoring argument at all, *see NAACP v. Button*, 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect."), and, in any case, I would reject it.

The defendants believe that *Colorado Republican II* supports the ban on grounds of "loophole closing" or "evasion prevention." Gov't Br. at 60-61, 71-72; *see* Intervenors Br. at 53-55; Intervenors Opp. Br. at 24-27. The Court in *Colorado Republican II* sustained against a facial attack FECA's party expenditure provision, 2 U.S.C. § 441a(d), because "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." *Colorado Republican II*, 533 U.S. at 465. Perceiving "no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate," the Court found "good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly *that kind* of spending." *Id.* at 464 (emphasis added). Quoting selectively from the decision, the defendants parrot the Court's concern that, "whether they like it or not," political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders" because donors "give to the party with the tacit understanding that the favored candidate will benefit." *Id.* at 452, 458. The Court's observation, however, related only to the danger of corruption presented by *coordinated* expenditures. *See id.* at 449-60. While upholding the party expenditure provision because it targets precisely *that* danger, *see id.* at 452, 464, the Court was careful to limit its "anticircumvention" rationale to party spending that functions like a direct donor-to-candidate contribution. *See id.* at 464; *see also* McConnell Opp. Br. at 23 ("To the extent that the Court has recognized an anti-circumvention rationale, . . . it has only used it to justify limits on contributions that can be used for all of the same purposes as direct contributions to federal candidates themselves."). The Court was also careful to distinguish *Colorado Republican I*, which held that a party's *independent* expenditures present little or no danger of "corruption-by- conduit." *Colorado Republican II*, 533 U.S. at 463-64. Thus, the Court advised, its decision did nothing to upset a party's "right under *Colorado I* to spend money in support of a candidate without legal limit so long as it spends independently." *Id.* at 455. Indeed, the Court emphasized that "[a] party may spend independently *every cent it can raise* wherever it thinks its candidate will shine, on every subject and any viewpoint." *Id.* (emphasis added). But that is precisely what the ban on national party non-federal funds intends to prevent. The defendants' response that a party may spend independently every cent it can raise *subject to federal limits* is insufficient. *See* Gov't Br. at 63 (BCRA requires "merely" that independent party expenditures "be financed by funds that are subject to the 'contribution' limits of FECA"). While the ban will slow if not stop coordinated activity, it also "automatically affects" a national party's ability to engage in issue advocacy and party-building activities independent of any candidate's campaign. *Citizens Against Rent Control*, 454 U.S. at 299. Thus does the ban impermissibly fail to distinguish between fully-protected and less protected asso-

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contend that the ban is "closely drawn to achieve its objectives," *e.g.*, Gov't Br. at 86, they collectively spend fewer than 20 pages (out of 800) in briefing that claim.

ciational activity. *See Colorado Republican I*, 518 U.S. at 617 (plurality opinion) ("the constitutionally significant fact" in donation-to-party context "is the lack of coordination between the candidate and the source of the expenditure"); RNC Opp. Br. at 38 ("fundamental error" underlying ban "is the assumption that *all* funds received by the party can be subjected to a federal contribution limit just because *some* of the party's activities are regulable" (emphasis in original)); *see also Free Speech Coalition*, 122 S. Ct. at 1404 (notion that "protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down").

I note finally that the defendants, like BCRA's sponsors, have suggested that it is primarily the *size* and *source* of certain non-federal donations that corrupts or appears to corrupt federal candidates. *See, e.g.*, Gov't Br. at 68 (emphasizing top 50 donors of non-federal funds in 1996 election cycle gave more than $500,000 each); Gov't Opp. Br. at 16 (emphasizing "common sense proposition that the problem of corruption and perceived corruption grows with the size of the contributions at issue"); Feingold Dep. at 123 ("I have been very clear that I consider the soft money contributions to be extremely corrupting because of their size."); *see also supra* Findings 65-66 at pages 139-40. The government points out that in the 2000 election cycle, "[a] pproximately 60 percent of the parties' total soft money receipts were donated by approximately 800 entities, with more than 400 of those corporations and unions." Gov't Br. at 68 (citing Mann Expert Report at 24-25). Coupling that statistic with the sensible proposition that "[t]he diversity of [similar sized] financial contributions to parties is itself a check on the influence of special interests," Keller Expert Report at 29, one would think a *cap* on the amount of non-federal donations from any single source would serve to root out the most corrupting influences while attempting to honor the First Amendment at the same time. The Congress rejected such a proposal, *see* 147 CONG. REC. S2908 (daily ed. Mar. 26, 2001) (Hagel amendment proposing aggregate cap of $60,000), and the defendants—returning to their "deference axiom," Intervenors Br. at 56—confidently assure us that we may not "second-guess" that judgment:

> In determining whether campaign finance regulations are closely drawn, the Supreme Court has consistently refused to second-guess Congress either as to the need for prophylactic measures or the particularities of those measures. Thus, in responding to the claim that a $1,000 contribution limit was "unrealistically low," the *Buckley* Court held that it would neither second- guess Congress's "failure to engage in such fine tuning" nor use a "scalpel" to scrutinize Congress's judgment about the appropriate limit. *Buckley*, 424 U.S. at 30. . . . This principle of deference to Congress's expert judgment has since *Buckley* become firmly embedded in the Supreme Court's jurisprudence.

Intervenors Opp. Br. at 24. I disagree. Strict scrutiny *mandates* that we second-guess the Congress's means-ends judgment where the means chosen restrict at least some degree of protected speech. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *see also MCFL*, 479 U.S. at 265 (courts must be "vigilant against [even] the modest diminution of speech" and ensure the Congress "curtail[s] speech only to the degree necessary to meet the particular problem at hand"); BeVier, *Money and Politics*, *supra*, at 1084-85 (Court's strict scrutiny jurisprudence cautions "reluctance to yield passively to legislative determinations of 'the need for prophylactic measures"' and requires courts "to assure in every case that the legislatively chosen means bear a relation of imminence and likelihood to the harm sought to be prevented"); BeVier, *Political Speech*, *supra*, at 314 (while

"Court's general doctrine allows legislatures a relatively free choice of means," Congress's choice of means is greatly limited in cases where "strict review" is applicable (citing *NAACP v. Button*, 371 U.S. 415; *Shelton v. Tucker*, 364 U.S. 479 (1960))). For reasons I have explained in detail, *see supra* Part IV.D.1.a, whatever "principle of deference" *Buckley* announced in the contribution-to-candidate context is inapposite here. The Congress fashioned a broad prophylactic ban on non-federal donations to any national political party committee in *any* amount from *any* entity or individual, irrespective whether the party spends the funds *independently*. That handiwork reflects the use not of a sharp and sure legislative scalpel but a blunt and misdirected bludgeon. *See NCPAC*, 470 U.S. at 501 ("We are not quibbling over fine-tuning . . . but are concerned about wholesale restriction of clearly protected conduct."). The ban is not narrowly tailored; indeed, it is not tailored at all.

* * *

New FECA section 323(a)'s ban on national party use of non-federal funds fails to serve the government's interest in preventing actual or apparent corruption of federal candidates and, worse, it indiscriminately restricts independent expenditures disbursed for protected issue advocacy and non-corrupting party-building activities. In my opinion, the ban is substantially overbroad, *see supra* Part IV.D.1.b.(2), and represents an impermissible burden on the expressive associational rights of the national political party committees and their donors, *see Sweezy*, 354 U.S. at 250 (plurality opinion) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."). Accordingly, I would hold that it is unconstitutional on its face.

c. Sections 301(20) and 323(b) Fail Strict Scrutiny

Under strict scrutiny, sections 301(20) and 323(b)—which restrict state and local party spending of non-federal funds for "Federal election activity"—likewise fall far short of passing constitutional muster. I conclude below that (1) the state and local party restrictions do not serve the government's interest in preventing actual or apparent corruption of *federal* candidates; and (2) even if the restrictions did retard corruption, they are not narrowly tailored.

(1)

The plaintiffs suggest that to the extent section 323(a) is constitutionally invalid, section 323(b) must be struck down on grounds of inseverability. *See, e.g.*, RNC Br. at 71 ("[W]ere § 323(a) struck down and national parties freed to use nonfederal money, § 323(b) would cease to have any real effect. . . ."); RNC Opp. Br. at 48. At least one defense expert opined to the same effect:

> Q: . . . If the provision[ ] restricting national party committees were struck down, would it make sense to continue the restrictions on state and local parties?
>
> A: In this case, the whole effort would be lost. . . . [The national parties] would no longer need state and local parties as, as vehicles. . . . [Y]ou have already lost the whole show if the national party soft money ban is declared unconstitutional. If it's gone, it's hard for me to see how the court would then find a rationale for maintaining the limits in the law [on] state and local parties.

Cross Exam. of Def. Expert Mann at 110. While I am inclined to agree, I do not believe it necessary to decide whether the state party restrictions are severable—sections 301(20) and 323(b) cannot be sustained even on their own terms.

To repeat, *see supra* Part II.D, sections 301(20) and 323(b) limit state and local party committee spending of non-federal funds on "Federal election activity," which is defined broadly as (1) any voter registration activity within 120 days of a regularly scheduled federal election; (2) voter identification, get-out-the-vote activity or generic campaign activity conducted "in connection with" any election in which a federal candidate appears on the ballot; (3) issue advocacy which "refers to" a clearly identified candidate for federal office and which "promotes," "supports," "attacks" or "opposes" a candidate for that office, regardless when the advocacy occurs and how it is transmitted; and (4) services provided by a state or local party employee who spends more than 25 per cent of his paid time during any one month on activities "in connection with" a federal election. BCRA § 101(b); FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). As a general rule, a state or local party committee must pay for such activities solely with funds subject to FECA's source-and-amount restrictions, *see* BCRA § 101(a); FECA 323(b)(1); 2 U.S.C. § 441i(b)(1), which are substantially more stringent than those of many States. *See* Br. of *Amici Curiae* Delaware et al. at 5-8 (discussing "diverse array" of state campaign finance laws and noting 29 States permit corporate treasury contributions to state candidates (capitalization altered)); *see also* CDP Br. at 8 (current California campaign finance law "was specifically designed to allow the political parties . . . to play a greater role in State and local elections, on the theory that empowering the parties to raise and spend more money relative to candidates reduced the appearance and threat of corruption by providing an 'insulating' effect between large contributors and candidates"). The Levin Amendment carves out a heavily-conditioned exception to the general rule against state-party spending of non- federal funds on the four classes of "Federal election activity." Under the Levin Amendment, a state or local party committee may spend an FEC-specified amount of federally-regulated "Levin funds" on voter registration, voter identification, generic campaign activity and get-out-the-vote activity as long as (1) the activity does not refer to a federal candidate; (2) the funds are not spent on any broadcast communication, unless the broadcast refers solely to a state or local candidate; (3) no person donates more than $10,000 to the committee; and (4) the funds spent are raised exclusively by the spending committee itself. *See* BCRA § 101(a); FECA § 323(b)(2)(B); 2 U.S.C. § 441i(b)(2)(B). If any *one* of these conditions is unmet, all bets are off; the committee may not reap the narrow benefits of the Levin Amendment and must pay for the listed activities with funds subject to FECA's source-and-amount limits.

The defendants assert that the restrictions on state and local party committees "are supported by the same interests as the ban on [the use of] soft money by national party committees." Gov't Br. at 100. I think it more accurate to say that sections 301(20) and 323(b) are *unsupported* by the same interests. The defendants could not cite a single instance of "dollars-for-political- favors" corruption, *NCPAC*, 470 U.S. at 497, stemming from donation of non- federal funds to the national party committees. *See supra* Part IV.D.1.b. They fail again with respect to state and local party committees. *See supra* Finding 80 at pages 180-83; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-4; McCain Dep. at 170-71; Feingold Dep. at 132; Snowe Dep. at 206-07; Jeffords Dep. at 107. And while they repeatedly recount as an exhaustive set of corruptive examples the "access and influence afforded Roger Tamraz, James Riady and Carl Linder [sic] after they made large contributions to various state Democratic parties," Intervenors Opp. Br. at 13 n.38 (citing Intervenors Br. at 32-33), they have not established a convincing link between nonfederal donations to state parties on the one hand and "access" to federal candidates on the other. *See supra* Findings 80c, 81b-81c atpages 182-83, 185-87; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4 (conceding lack of evidence that "officeholders are more likely to meet with donors of nonfederal money than with donors of federal money"). It is not surprising, then, that the defendants barely attempt to justify the state party restrictions as a *direct* means of preventing actual or apparent *quid pro quo*, or even "access," corruption; their primary contention instead is that the restrictions are necessary to prevent circumvention of the constitutionally flawed national party ban. *See, e.g.*, Gov't Br. at 103 ("If BCRA only regulated soft money contributed to national party committees, donors would simply funnel soft money in unlimited amounts to state and local party committees to influence federal elections . . . ."); Intervenors Br. at 13, 59 (same); Intervenors Opp. Br. at 29-30 (same); *see also* 147 CONG. REC. S2928 (daily ed. Mar. 27, 2001) (statement of Sen. Schumer) ("[R]egulating soft money without dealing with the soft money that goes to State parties is like the person who drinks a Diet Coke with his double cheeseburger and fries: It does not quite get the job done."). As the *CDP* plaintiffs point out, however, "the circumvention rationale is only valid to the extent that [BCRA] prevents violation of the [Act's] underlying contribution limits," which are designed to prevent actual or apparent corruption of federal candidates. CDP Opp. Br. at 16 (emphasis omitted). Although the defendants would have us believe the "Congress recognized that allowing state-level party committees to expend unlimited amounts of unregulated funds on activity that influences federal elections would ... promote the appearance and reality of political corruption," Gov't Br. at 100, their assertion is flawed in at least four respects, *see infra;* indeed, the record leads me to conclude that sections 301(20) and 323(b) are not targeted to prevent actual or apparent corruption.

First, the Congress *qua* Congress made no findings of fact in support of BCRA generally or the state- and local-party restrictions specifically. Accordingly, and especially through the lens of strict scrutiny, I view with a good deal of skepticism the defendants' reliance on sound-bite legislative history thought to support the notion that sections 301(20) and 323(b) are "necessary . . . to protect the integrity of Federal elections." Gov't Br. at 100 (citing 148 CONG. REC. S2138-39 (daily ed. Mar. 20, 2002) (statement of Sen. McCain)); *see Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (deriding congressional "evidence consist[ing] almost entirely of isolated sentences clipped from floor debates and legislative reports," most of which was anecdotal or resembled *ipse dixit* reasoning); *see also supra* pages 64-65. As evidenced by the House Committee on Administration's "Adverse Report" on both the national and state provisions, the legislative history is, at the very least, inconsistent on the necessity of sections 301(20) and 323(b):

> No evidence has been produced to this Committee of a "corruption" problem stemming from soft money contributions to political parties. Even if there had been such a showing, H.R. 2356 does not even attempt to be a narrowly tailored remedy. If it were ever to become law, it would have precisely the opposite effect its proponents intend. Rather than diminish the power of "special interest" groups, it would actually make those groups even more powerful than they are today.

H.R. REP. NO. 107-131, pt. 1, at 2 (2001).

Second, donations to state and local party committees are neither unlimited nor unregulated. If such funds are directed to influencing state elections, they are ordinarily regulated by state law. *See generally* Br. of *Amici Curiae* Delaware et al. More importantly, if such funds are donated "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A)(i), they are "contributions" already subject to FECA's source-and-amount restrictions. *See, e.g.*, BCRA § 102; FECA § 315(a)(1)(D); 2 U.S.C. § 441a(a)(1)(D) ("[N]o person shall make contributions . . . to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000."); 2 U.S.C. § 441a(a)(2)(C) ("No multicandidate political committee shall make contributions . . . to any other political committee in any calendar year which, in the aggregate, exceed $5,000."); 2 U.S.C. § 441a(a)(8) ("[A]ll contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate."); 2 U.S.C. § 441b(a) ("It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any [federal] election . . . ."). In light of preexisting federal law, the defendants' charge that state-party use of non-federal funds "distort[s] the legislative process" and "is inherently, endemically, and hopelessly corrupting," Gov't Br. at 81 (quoting Rudman Decl. at 4), is hyperbolic. In litigation involving a state political party committee, the Supreme Court itself recognized that under FECA "[u]nregulated 'soft money' [donations] may not be used to influence a federal campaign, except when used in the limited, party-building activities specially designated in the statute." *Colorado Republican I*, 518 U.S. at 616 (plurality opinion) (citing 2 U.S.C. § 431(8)(B)). It observed further that "[a] party may not simply channel unlimited amounts of even undesignated contributions to a candidate, since such direct transfers are also considered contributions." *Id.* at 616-17.

Third, the defendants resist the plain import of FECA and *Colorado Republican I*, asserting that "soft money, by definition, is nothing more than a donation that exceeds FECA's contribution limits or comes from a source that the statute prohibits." Gov't Opp. Br. at 1. As the *CDP* plaintiffs demonstrate, however, much non-federal money is raised at the state and local levels, *see supra* Finding 75a.3 at pages 170-71, and little if any of it is used "for the purpose of influencing" a federal election, *see supra* Finding 73 at pages

164-68; *see also, e.g.*, CDP Br. at 4 (California Democratic and Republican parties have traditionally spent majority of non-federal resources on state and local ballot measures and elections for state and local offices (citing Bowler Decl. at 5; Erwin Decl. at 5)); CDP Opp. Br. at 5-6. Quoting former Senator Thompson, the defendants nonetheless insist that state party spending of non-federal funds—especially on issue advocacy that happens to mention a federal candidate—"affects" federal elections and therefore has the "potential" to corrupt federal candidates:

> Republican and Democratic Senate candidates set up joint fundraising committees, joining with party committees, to raise unlimited soft money donations. The joint committees then transferred the soft money funds to their Senate party committees, which transferred the money to their state parties, which spent the soft money on "issue ads" . . . promoting . . . federal candidates[.]

Gov't Br. at 101 (quoting 147 CONG. REC. S3251 (daily ed. Apr. 2, 2001) (statement of Sen. Thompson)). Against the backdrop of FECA, the defendants' assertions and BCRA's restrictions on state and local parties reflect little more than frustration with First Amendment principles firmly rooted in *Buckley, Citizens Against Rent Control* and *Colorado Republican I.* Taken together, these cases hold that the Congress cannot constitutionally regulate non-federal donations to political parties if the funds are then spent independently of a candidate—whether for issue advocacy or for generic party-building activities—given that "the opportunity for corruption posed by" such funds "is, at best, attenuated." *Colorado Republican I*, 518 U.S. at 616 (plurality opinion); *see Buckley*, 424 U.S. at 45 ("So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."); *see also Citizens Against Rent Control*, 454

U.S. at 299 ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.").

Fourth, the defendants' evidence that non-federal donations to state and local parties "raise the possibility of the *appearance* of corruption," Feingold Dep. at 196 (emphasis added), is no stronger than their evidence (or notable lack thereof) that such donations have in fact produced political favors from federal candidates. *See supra* Finding 82 at pages 189-93. Characteristic "evidence" of apparent corruption can be found in a string cite in the government's opposition brief:

> [D]efendants have presented considerable evidence of soft money donations that at the very least appear to have been made to secure political *quid pro quos. See* . . . Simon Decl. ¶ 13 ("[I]t is not unusual for large contributors to seek legislative favors in exchange for their contributions."); Simpson Decl. ¶ 10 ("[D]onations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform."); Hickmott Decl. ¶ 9 (corporate donors frequently give soft money to parties to "influence the legislative process for their business purposes"); Andrews Decl. ¶ 7 ("Those who are able to provide the largest sums of money are often more likely to have more consideration given to their views. Not only does it help provide a foot in the door into a federal elected official's office and a chance to make the donor's pitch, but also it naturally may tend to foster a more sympathetic hearing."). Congress noted similar concerns. *See, e.g.,* 147 CONG. REC. S3107-10 (daily ed. Mar. 29, 2001) (Sen. Feingold) ("[I]t is important for us to acknowledge that millions of dollars are given in an attempt to influence what we do.").

Gov't Opp. Br. at 16 n.18 (bracketed evidentiary citations omitted); *see* Gov't Br. at 79-81 (quoting similar sources); *see also, e.g.,* McCain Decl. at 3 ("I believe, based on my experience, that elected officials do act in particular ways in order to assist large soft money donors and that this skews and shapes the legislative process."). Of course, the statute's sponsors and supporters are not the Congress itself. And, as I have mentioned, the Congress made no finding that non-federal donations to state and local parties appear to corrupt federal elections; indeed, it made no findings in support of BCRA whatsoever. The Supreme Court views with skepticism evidence that "consists not of legislative findings, but of unexamined, anecdotal accounts." *Bd. of Trustees v. Garrett,* 531 U.S. 356, 370 (2001); *see Kimel,* 528 U.S. at 89 (same); *City of Boerne v. Flores,* 521 U.S. 507, 530-31 (1997) (same); *Lopez,* 514 U.S. at 562 (striking down provision of Gun Free School Zones Act because, *inter alia,* "[n] either the statute nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone"). Skepticism is particularly appropriate in the context of First Amendment strict scrutiny, where "the usual presumption of constitutionality afforded congressional enactments is reversed." *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 817, 822 (2000) (to carry burden of strict scrutiny under First Amendment, government "must present more than anecdote and supposition"); *see Landmark Communications,* 435 U.S. at 841 (striking down speech restriction subject to strict scrutiny where government "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined"); *see also CIO,* 335 U.S. at 145 (Rutledge, J., concurring in judgment) (First Amendment "forces upon [a speech restriction's] authors the burden of justifying the contraction by demonstrating indubitable public advantage arising from the restriction outweighing all disadvantages, thus reversing the direction of presumptive weight [applicable] in other cases"). As I have mentioned, *see supra* pages 64-65, the Court has also made clear that the

Congress may not justify the infringement of constitutionally protected liberties with rationalizations that are "hypothesized or invented post hoc in response to litigation." Virginia, 518 U.S. at 533. Accordingly, the post-enactment anecdotal record amassed in this court to suggest that non-federal donations to state parties appear to corrupt federal candidates, see Intervenors Br. at 32-38; see generally Andrews Decl.; Feingold Decl.; Geshke Decl.; Hassenfeld Decl.; Hiatt Decl.; Hickmott Decl.; Kirsch Decl.; McCain Decl.; Rudman Decl.; Simon Decl.; Simpson Decl.; Wirth Decl., is no substitute for the record that should have been assembled down the street in the years leading up to BCRA's passage.

In the campaign finance context, the courts "have never accepted mere conjecture as adequate to carry [the] First Amendment burden." Shrink Missouri, 528 U.S. at 392. I am unwilling to start now. The defendants' hypothesis that non-federal donations to state and local political party committees appear to corrupt federal candidates is an especially novel one given that such donations, by definition, are *not* made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Thus, because the defendants have proffered no convincing empirical evidence in support of their theory, cf. McCain Dep. at 195 ("I've campaigned all over America, and I've seen the air waves inundated with soft money attack ads, and that was not the way it was before the loopholes were opened. *So I don't have to have statistics.*" (emphasis added)), I believe that they have failed to carry their substantial evidentiary burden. *See Shrink Missouri*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). Sections 301(20) and 323(b) cannot withstand strict scrutiny because they do not serve a compelling governmental interest; on this record, actual or apparent corruption of federal candidates "remains a hypothetical possibility and nothing more." *NCPAC*, 470 U.S. at 498; *see Austin*, 494 U.S. at 689 (Scalia, J., dissenting) ("[T]he mere potential for harm does not justify a restriction upon speech. . . ."); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) ("The question in every case is whether the [speech is] used in such circumstances and [is] of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent.").

(2)

Sections 301(20) and 323(b) apply wholesale to state and local party expenditures for state-focused election activities that barely affect federal elections on the theory that they may *potentially* corrupt a given federal candidate. *See, e.g.*, Intervenors Opp. Br. at 13; Feingold Dep. at 196 (unlimited non-federal donations to state and local parties "raise the *possibility* of the appearance of corruption" (emphasis added)). I conclude in the following discussion that even if sections 301(20) and 323(b) served in some instances to prevent corruption or its appearance, *but see supra* Part IV.D.1.c.(1), they could not survive strict scrutiny because they are not narrowly tailored. In my view, the provisions restrict too much non-corrupting political speech.

> It is undisputed that state and local party committees undertake "mixed" activities on behalf of both state and federal candidates; they pay overhead expenses, mobilize full-ticket voting, communicate with party supporters and engage in certain "joint" advertising. *See supra* Findings 72a, 72c, 73b-73e, 74 at pages 162-63, 166-69; *see also, e.g.*, Benson Decl. at 3 (describing Colorado Republican Party programs that "support the entire ticket" but "often place a greater emphasis on state-wide and state legislative races than on federal races"); Cardenas Decl. at 3-4 (describing Florida Republican Party's payment of mixed activities); Dendahl Decl. at 6-12 (describing certain "ticket-wide" activities of New

Mexico Republican Party). And it is no doubt true, as the defendants repeatedly assert, that "[b]ecause the partisan proclivities of the electorate express themselves toward *both* state and federal candidates, state parties influence federal elections directly even when they mobilize their supporters on behalf of a candidate for state office." *E.g.*, Gov't Opp. Br. at 27 (quoting Green Expert Report at 13 (emphasis in original)). Manifesting this fact, the FEC's pre-BCRA allocation regulations required that a certain percentage of federal funds be used on mixed activities to the extent that voter identification, voter registration, get-out-the-vote drives and "other activities that urge the general public to register, vote or support candidates of a particular party" affected simultaneous federal elections. 11 C.F.R. § 106.5(a)(2)(iv) (2001); *see supra* Findings 72a, 72c at pages 162-63; *see also* TWENTY YEAR REPORT, *supra*, ch.3 ("Some expenses incurred by [state and local party] committees . . . may in fact relate to both federal and nonfederal elections. Party committees, for example, may purchase generic get-out-the-vote advertisements that benefit both their federal and nonfederal candidates. To pay for these ads, committees must use federal funds for the portion that benefits federal candidates, but may use soft money for . . . the portion that benefits nonfederal candidates[.]"); CDP Opp. Br. at 6 n.5 (in 2000 election cycle FEC regulations required the CDP "to pay all administrative, generic [get-out-the-vote] and general party-building activities with at least 43% *federal* money" (emphasis in original)). Sections 301(20) and 323(b), however, abandon the rough balance struck by the allocation regulations. They require state parties to spend federal funds on activities that will not plausibly corrupt any federal candidate. Consider an example the *CDP* plaintiffs raised at oral argument. In 1996 the CDP used non-federal funds to pay for the following radio ad

> urging the California electorate to vote against a controversial ballot initiative: Tuesday is the day we decide whether we let them turn back the clock on us. Because Tuesday is election day, the day we can vote down Governor Wilson's scheme to take away our civil rights and end our chance for fairness. The Republican scheme is Prop. 209 and it would eliminate affirmative action which helps make our society fair and gives every one of us a fair chance at the American dream. But to say yes to fairness and no to mean-spirited Prop. 209, we have to say yes to voting. On Tuesday, we must go to the polls and cast a most important vote for fairness, for affirmative action—a vote against Prop. 209. Vote No on 209. Vote no on the Republican scheme to turn the clock back and shut down equal opportunity for all. On Tuesday, vote yes for our future and no on Prop. 209. Don't let the Republicans get away with it. Don't stay home. That's what they're counting on. Paid for by the California Democratic Party.

Feingold Dep. Exh. 15. Conceding that sections 301(20) and 323(b) would require the CDP to fund the foregoing ad with federal money,[166] the intervenors contend that "it is inconceivable that an ad like this, which encourages voters to go to the polls to ensure that 'Republicans [don't] get away with it,' would have no effect on the contemporaneous federal election." Intervenors Opp. Br. at 11 n.30, 31-32. Their contention, even if correct, is irrelevant. The Congress cannot, consistent with First Amendment strict scrutiny, limit a political party's pooling of individual, corporate or union donations to pay for an ad that so plainly has no corrupting effect, real or imagined, on any federal candidate or officeholder. As the Court held in *Bellotti*,

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[166] The government contends that under the FEC's newly-issued regulations, the radio ad would not constitute get-out-the-vote activity because it was not disseminated by "*individualized* means." Gov't Opp. Br. at 31 (quoting 11 C.F.R. § 100.24(a)(3) (emphasis the government's)). As the *McConnell* plaintiffs demonstrate, however, if the CDP simply "'broadcast' the same advertisement via a phone bank, rather than the radio, and did so within 72 hours of the election, it would still constitute get-out-the-vote activity even under the FEC's regulations." McConnell Reply Br. at 9-10. The CDP ad would be no less speech and no more corrupting of a federal candidate if transmitted by phone than if broadcast on the radio.

> [t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it[.]

Bellotti, 435 U.S. at 790; *see* Intervenors Opp. Br. at 20 n.49 (noting that Court invalidated contribution-to-committee limit in *Citizens Against Rent Control* because "the recipient committee had been formed to support a local ballot measure" and "the Court found [that] there was no risk of actual or apparent corruption" (citing *Citizens Against Rent Control*, 454 U.S. at 292, 298)). I note a few more of the *CDP* plaintiffs' examples of state-oriented, non-corrupting "Federal election activit[ies]" the non-federal funding of which sections 301(20) and 323(b) restrict:

> 1. A generic get-out-the-vote mailer stating: "Our Vote is Our Voice. Keep Asian Pacific American families moving forward. Vote Democrat." CDP App. at 177; *see* Resp. of Intervenors to CDP's First Set of Reqs. for Admis. at 3 (admitting mailer is "Federal election activity" under BCRA and FEC regulations and must be paid for either entirely with federal funds or with a combination of federal funds and Levin funds).
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> 2. A generic get-out-the-vote newspaper advertisement stating: "On Nov. 5th, We're Voting for Ourselves. Vote Democratic '96. It's Too Important Not To." CDP App. at 180;*see* Resp. of Intervenors to CDP's First Set of Reqs. for Admis. at 4 (admitting advertisement is "Federal election activity" under BCRA and FEC regulations and must be paid for entirely with federal funds).
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> 3. A get-out-the-vote phone script featuring Jesse Jackson urging voters: "On November 7th, your vote is not just about candidates. We need everyone in our community voting to defeat Prop. 38[,] the school voucher initiative. Prop. 38 brings new discrimination to our schools. Our children can be turned away based on test scores, religion or even family income. I urge you to get out to vote on November 7th. Vote no on Prop. 38, KEEP HOPE ALIVE!!!" CDP App. at 197; *see* Resp. of Intervenors to CDP's First Set of Reqs. for Admis. at 5 (admitting phone script is "Federal election activity" under BCRA and FEC regulations and must be paid for entirely with federal funds).
>
> 4. A get-out-the-vote mailer urging addressees to "Give Anaheim two strong voices" by voting for Gray Davis and Tom Daly for state office "on November 3," a date on which a candidate for Federal office also appeared on the ballot. CDP App. at 51.

See generally CDP Br. at 17-20 & nn.16-20. The first of these communications features the name and likeness of Norman Y. Mineta and notes (in very small print) that he is the "[f]irst Asian Pacific American in history to be appointed to a cabinet position." CDP App. at 177. None of the other communications mentions anyone even remotely tied to federal office, much less a federal candidate. Thus, none of them poses anything more than a "hypothetical possibility" of *corrupting* a federal candidate. *NCPAC*, 470 U.S. at 498. Yet every one of these core speech activities must be funded either entirely with federal funds or with strictly-limited Levin funds.[167]

If the Congress was concerned about the allegedly corrupting effect of state-oriented "Federal election activit[ies]" that might (or might not) incidentally affect a federal election, it was troubled for naught. Nothing in the record remotely suggests that the "Federal election activit[ies]" listed above corrupt or appear to corrupt federal candidates. And whether or not BCRA's sponsors and supporters have also overstated their concern that state and local parties have operated as "pass-through accounts for . . . large, direct contributions from corporations, unions, and wealthy individuals," *e.g.*, Intervenors Br. at 35 (quoting 148 CONG. REC. S2138-39 (daily ed. Mar. 20, 2002) (statement of Sen. McCain)), sections 301(20) and 323(b) do not represent a narrowly tailored response. If conduit corruption is indeed a problem at the state-party level, the most measured solution is stronger enforcement of provisions that already regulate "contributions" made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). As I noted earlier, the Court itself has observed that under FECA

> [a]ny contribution to a party that is earmarked for a particular campaign is considered a contribution to the candidate and is subject to the contribution limitations. § 441a(a)(8). A party may not simply channel unlimited amounts of even undesignated contributions to a candidate, since such direct transfers are also considered contributions and are subject to the contribution limits on a "multicandidate political committee." § 441a(a)(2).

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[167] The government claims that certain of these flyers and mailers would be excepted from section 323(b) by FEC regulation, "particularly if [they are] 'mass mailing[s]' of over 500 pieces." Gov't Opp. Br. at 31. The intervenors make no such argument because some of them are currently challenging the regulation on which the government relies. *See Shays v. FEC*, No. 02-CV-1984 (D.D.C., filed Oct. 8, 2002). Even if the government is correct about the regulation (and the regulation withstands APA review), its argument has little bearing on the outcome of the facial challenge before us; as the RNC demonstrates, if a state-focused flyer or mailer "is mailed to 499 homes, or is 'individualized' by hand-delivery to 10,000, or if the [same] message is by phone, it *is* covered by § 323(b)" even under the regulations. RNC Reply Br. at 9-10 n.5 (emphasis in original).

Colorado Republican I, 518 U.S. at 616-17 (plurality opinion); *see Colorado Republican II*, 533 U.S. at 481 (Thomas, J., dissenting) ("Vigilant enforcement of [the earmarking] provision is a precise response to . . . circumvention concerns. If a donor contributes [$4,000] to a candidate (the maximum donation in an election cycle), he cannot direct the political party to funnel another dime to the candidate without confronting the Federal Election Campaign Act's civil and criminal penalties . . . ."). Finally, if the problem is that "the six national political party committees transferred over $420 million in hard and soft money to state and local parties during the 2000 election cycle, principally for the purpose of influencing federal elections through 'issue ads,'" Intervenors Opp. Br. at 13; *see* McCain Dep. at 193 ("It's the broadcast television and radio ads that we believe are what is the problem."), it is one problem the Congress lacks the constitutional authority to solve. Under the Court's case law, party issue advocacy is entitled to full First Amendment protection and may not be regulated (even on the supply side) if expenditures therefor are disbursed independently of a candidate's campaign.[168] *See Colorado*

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[168] Significantly, new FECA sections 301(20) and 323(b) are substantially broader than the facially overbroad "electioneering communication" provisions of BCRA Title II inasmuch as they restrict party issue advocacy transmitted at any time and by any means (besides the internet). *See* BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii) (definition of "Federal election activity" includes "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication

Republican I, 518 U.S. at 618 (plurality opinion) ("We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."); *Citizens Against Rent Control*, 454 U.S. at 299-300; *Buckley*, 424 U.S. at 45-47; *see also* Smith, *Hard Realities, supra*, at 199. And even if issue advocacy funded by transfers from the national parties were within the Congress's regulatory reach, sections 301(20) and 323(b) must target that "problem" more precisely than they do, perhaps by prohibiting *only* national party transfers[169] and permitting state parties to raise non- federal funds without limit. *See* CDP Br. at 32. Moreover, as the *CDP* plaintiffs aptly point out,

> a cap on [non-federal] spending (i.e., the $10,000 Levin limit) that is not adjusted in any way for the size of the [S]tate or the population to be reached presents particular problems for large [S]tates such as California. With all due respect to Senator McCain, when the cost of one statewide mail piece is approximately $260,000 (Bowler Decl. [at] 20), $10,000 does *not* allow for a lot of communication. McCain Dep. [at] 278 ("You can print a lot of handouts for $10,000."). . . . The [California] parties cannot possibly raise the money under the federal limits necessary to reach a massive California audience in a meaningful way. . . . Congress has failed to properly narrow the focus of "federal" activities in any meaningful way, and has imposed a limit upon the parties' abilities to spend state funds that is completely unrelated to the likelihood of corruption or the appearance of corruption of federal candidates.

CDP Br. at 32, 34 (emphasis in original). I agree. In unrestrained fashion, sections 301(20) and 323(b) "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. They fail the narrow tailoring requirement of First Amendment strict scrutiny.

* * *

New FECA sections 301(20) and 323(b)'s restrictions on state and local party use of non-federal funds fail to serve the compelling governmental interest in preventing the actual or apparent corruption of federal candidates. Moreover, they invalidly inhibit core political speech directed in the main toward state and local candidates and issues. I believe that the provisions are substantially overbroad, *see supra* Part IV.D.1.c.(2), and impermissibly burden the expressive associational rights of state and local political party committees and their donors, *see Sweezy*, 354 U.S. at 250 (plurality opinion). Therefore, I would hold that they are unconstitutional on their face.

2. Fundraising Costs: New FECA Section 323(c)

New FECA section 323(c) requires any national, state or local political party committee to use federal funds to raise any money that is expended or disbursed for "Federal election activity." BCRA § 101(a); FECA § 323(c); 2 U.S.C. § 441i(c). The provision demands only passing attention. Having concluded that FECA section 301(20)'s definition of "Federal election activity" cannot be sustained, *see supra* Part IV.D.1.c., and despite BCRA section 401 ("If any provision of this Act . . . is held to be unconstitutional, the remainder

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expressly advocates a vote for or against a candidate)"); *see also* 67 Fed. Reg. at 49111 ("The term public communication shall not include communications over the Internet.").

[169] Of course, even this restriction would raise serious constitutional questions. *See, e.g.*, CDP Br. at 36 et seq. (arguing that BCRA's "prohibitions on transfers" themselves "impose substantial burdens that are not narrowly tailored to meet a compelling government interest" (capitalization altered)).

. . . shall not be affected by the holding."). I would hold that section 323(c) is inseverable and therefore invalid as well. As the Supreme Court made clear long ago, a statutory provision

> cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall. . . . [A severability clause] provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command.

Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (Brandeis, J.). Because the purpose for which section 323(c) fundraising is intended—that is, for "Federal election activity"—cannot be met, no coherent legal effect can be given to section 323(c), which I believe must be struck down with section 301(20).

3. Tax-Exempt Organizations: New FECA Section 323(d)

I analyze at greater length section 323(d), which prohibits any national, state or local political party committee or its agents from "solicit[ing] *any* funds for, or mak[ing] or direct[ing] *any* donations to" (1) an organization that is described in section 501(c) of the Internal Revenue Code of 1986, is exempt from taxation and "makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (2) an incorporated political organization (other than a political committee) described in section 527 of the Code.[170] BCRA § 101(a); FECA § 323(d); 2 U.S.C. § 441i(d) (emphases added). Like section 323(c),

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[170] Two examples of section 527 organizations covered by new FECA section 323(d) are (1) the Democratic clubs to which the CDP donates funds for state-focused grassroots, voter registration and get-out-the-vote activities, *see supra* Finding 77b at page 175; and (2) the organizations participating in the CRP's Operation Bounty voter registration drives, *see supra* Findings 73b.4, 77b at pages 166, 175.

section 323(d) incorporates the term "Federal election activity." I would not decide whether section 323(d) is severable, however, because I believe the provision would fail First Amendment review even if it did not include that tainted term.

* * *

Like its counterparts at sections 323(a) and (b), section 323(d) limits the associational activities of any national, state or local political party committee by prohibiting it from giving non-federal funds to groups engaged—*independently* of any federal candidate—in core political activities like voter identification and registration, get-out-the-vote drives and, of course, unbridgeable issue advocacy. *See supra* Part IV.D.1. But the provision does not stop there. Section 323(d) prohibits any political party committee or its agents from donating even *federal* funds to a tax-exempt 501(c) organization making expenditures "in connection with" a federal election, or to a section 527 organization *whether or not* the organization spends the funds "in connection with" a federal election. As I have discussed, *see supra* Part IV.D.1.a, the Supreme Court has been quite clear that in the campaign finance context there exists only "a single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*." *Citizens Against Rent Control*, 454 U.S.at 296-97 (emphasis in original). Accordingly, I have strictly scrutinized BCRA's restrictions on non-federal funds insofar as they operate to inhibit the political speech of those who donate non-federal funds to the parties in order to participate in collective, protected issue advocacy *via* a party's independent expenditures. Strict scrutiny is no less appropriate when a political party committee donates funds to a tax-exempt organization than when it accepts donations from corporations, labor unions and individual citizens. In both instances, the party facilitates the "[d]iscussion of public issues and debate on the qualifications of candidates [that is] integral to the operation of the system of government established by our Constitution." *Buckley,* 424 U.S. at 14. Moreover, a party's political speech is often "undeniably enhanced by [its] group association" with a tax-exempt organization. *NAACP v. Alabama,* 357 U.S. at 460.

Consider once again a concrete example from the State of California. In any given election, California voters consider a large number of state and local ballot measures pertaining to any number of legislative matters. *See supra* Findings 73a.5, 76a at pages 165-66, 172-74; *see also, e.g.,* Bowler Decl. at 15 (San Francisco general ballot in November 2002 contained seven statewide measures and 20 local measures). Recently, such issues as affirmative action, education of immigrant children, welfare reform, restrictions on union membership and term limits have been the subject of ballot initiatives. *See* Bowler Decl. at 24. Significantly, most committees formed to support or oppose ballot measures in California are tax-exempt 501(c)(4) organizations. *See supra* Finding 77a at page 175; *see also, e.g.,* Bowler Decl. at 24. Under section 323(d), the CDP is prohibited from giving *any* funds (federal or non-federal) to a 501(c)(4) ballot-measure organization that purchases a radio ad like the one urging the California electorate to vote against Proposition 209, a ballot measure that would eliminate affirmative action in the State. *See* Feingold Dep. Exh. 15; Resp. of Intervenors to CDP's First Set of Reqs. for Admis. at 10 (admitting that section 323(d) would prohibit such a donation). It is hard to imagine speech more eligible for First Amendment protection. But by barring the CDP from donating non-federal funds to the ballot-measure organization, section 323(d) stifles such speech; it "automatically affects" the organization's expenditures, *Citizens Against Rent Control,* 454 U.S. at 299, which are "in connection with an election for Federal office" only because a federal candidate appears on the same ballot as the state initiative. BCRA § 101(a); FECA § 323(d)(1); 2 U.S.C. § 441i(d)(1). The defendants argue that the provision's broad restraint on the trade of political ideas is justified as a means to "prevent the parties from collecting soft money and laundering it through other organizations engaged in federal electioneering." Gov't Br. at 117 (quoting 148 CONG. REC. S1992 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold)). Under settled First Amendment jurisprudence, however, section 323(d) cannot be justified on this ground or any other.

First, as the government acknowledges, section 323(d) operates as a "restriction on the general freedom to [use] *hard money.*" Gov't Reply Br. at 27 (emphasis added). Therefore, even if the Congress enacted the provision with an eye toward preventing the "laundering" of "soft money," section 323(d) goes well beyond circumvention prophylaxis, which is itself a questionable governmental objective in the realm of political speech. *See NAACP v. Button,* 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect.").

Second, to the extent the Court has recognized an "anti-circumvention" rationale, it has carefully limited the application of that governmental interest to circumstances in which the disbursement of funds may corrupt a federal candidate. *See Colorado Republican II,* 533 U.S. at 464-65 (while coordinated party expenditures have "power to corrupt" candidates, independent party expenditures do not "form[ ] a link in a chain of corruption-by-conduit" and do not subvert Act's contribution limits (citing *Colorado Republican I,* 518 U.S. at 617 (plurality opinion))); *NCPAC,* 470 U.S. at 496-97; *see also Colorado Republican I,* 518 U.S. at 623 (plurality opinion) ("where there is no risk of 'corruption' of a candidate, the Government may not limit even contributions" (citing *Bellotti,* 435 U.S. at 790)). The intervenors' exaggerated assertion to the contrary notwithstanding, *see* Intervenors Opp. Br. at 46 ("[B]allot measure committees are just as susceptible to the parties' campaign finance machinations as any other group."), I believe that a *state* party's donation to a *state* ballot measure organization that opposes a *state* initiative poses no risk of corrupting (or appearing to corrupt) any *federal* candidate.[171] *See Citizens Against Rent Control*, 454 U.S. at 297-98; *Bellotti*, 435 U.S. at 790; *see also* Gov't Opp. Br. at 36 ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." (quoting *McIntyre*, 514 U.S. at 352 n.15)).

Third, the defendants' "evidence" of section 323(d)'s prophylactic necessity is insufficient to support the provision:

> Congress recognized that tax-exempt organizations served as virtual arms of party committees, conducting federal electioneering activities to benefit candidates of a particular party without being subject to any of the funding source or contribution limitations or disclosure requirements that are applicable to party committees. For example, the RNC infused Americans for Tax Reform ("ATR"), a 501(c)(4) tax-exempt organization, "with over $4.5 million in the weeks leading up to the 1996 election," and ATR then paid "its bills for a direct mail and phone bank campaign involving four million calls and 19 million pieces of mail explicitly disputing the Democrats' position on Medicare as it related to the November 5th election." 144 CONG. REC. S840 (Feb. 23, 1998) (Sen. Lieberman). The DNC engaged in similar conduct. . . . Moreover, donations solicited or directed by national party committees to benefit tax-exempt organizations that conduct political activities create the same *potential* problems of corruption that other unregulated fund-raising by the national parties engenders, i.e., the creation of obligated officeholders, and of donors who feel compelled to contribute in order to obtain access to, and consideration from, federal officials.

Gov't Br. at 117-18 (emphasis added); Gov't Opp. Br. at 38 n.39 (citing 144 CONG. REC. S1048 (daily ed. Feb. 26, 1998) (statement of Sen. Glenn) (in 1996 "soft money" "supplied the funds parties used to make [donations] to tax-exempt groups, which in turn used the funds to pay for election-related activities"); 144 CONG. REC. S977 (daily ed. Feb. 25, 1998) (statement of Sen. Levin) ("These soft money and issue ad loopholes are used to transfer millions of dollars to outside organizations to conduct allegedly independent election-related activities that are, in fact, benefiting parties and candidates."); 144 CONG. REC. S898 (daily ed. Feb. 24, 1998) (statement of Sen. Ford) ("[W]e now know that many of these so-called independent organizations, many claiming tax- exempt status, are established, operated, and financed by parties and candidates themselves—and their finances are totally unregulated.")); *see* Intervenors Opp. Br. at 47 (recounting that CDP in 1999 violated FEC regulations by contributing more than $700,000 to tax-exempt organization opposing state spending reduction referendum). If this is the best the defendants have to offer, I am unimpressed. The Congress *qua* Congress has never "recognized that tax-exempt organizations serve[ ] as virtual arms of party committees." Gov't Br. at 117. As I have mentioned, it made no findings of fact on that or any other matter. But even if the generalized opinions of three former or current Senators constituted an institutional recognition that tax-exempt organizations conduct "electioneering activities" without being subject to FECA's limits, it would not matter. In relying on an anti-circumvention rationale, the defendants assume that "electioneering activities" like voter registration, get-out-the-vote drives and protected issue advocacy are properly the subject of FECA's limits. But such activities are *not* restricted under FECA, *see* 2 U.S.C. § 431(8)(A)(i) (regulated "contributions" include only donations made "for the purpose of influencing any election for Federal office"), for good reason—they *cannot* be restricted, constitutionally, given the conspicuous lack of evidence suggesting that they corrupt federal candidates or officeholders. *See Colorado Republican I,* 518 U.S. at 616-17, 623 (plurality opinion). Are we to presume (absent any evidence whatsoever) that candidates and officeholders are corrupted by "direct mail and phone bank campaign[s] involving four million calls and 19 million pieces of mail explicitly disputing [a] position on Medicare"? Gov't Br. at 117-18. I do not think there is anything inherently subversive about such activity, *see Renne,* 501 U.S. at 349 (Marshall, J., dissenting); *CIO,* 335 U.S. at 145 (Rutledge, J., concurring in judgment) ("'[U]ndue influence' . . . may represent no more than convincing weight of argument fully presented, which is the very thing the [First] Amendment and the electoral process it protects were intended to bring out."), and the defendants do not seriously contend that there is. Any "*potential* problems" associated with the transfer of *federal* funds from a party committee to a tax-exempt organization—" i.e., the creation of obligated officeholders, and of donors who feel compelled to contribute in order to obtain access to, and consideration from, federal officials," Gov't Br. at 118 (emphasis added)—

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[171] The government, which wisely makes no attempt to minimize the First Amendment value of speech regarding ballot measures, observes that "although BCRA regulates [donations] by political parties to tax-exempt organizations, the statute leaves the party committees entirely free to make *independent expenditures* to support or oppose a ballot measure." Gov't Reply Br. at 28 (emphasis in original). The Court has made clear, however, that the danger of corruption is absent in the ballot-measure context, *see Citizens Against Rent Control*, 454 U.S. at 297-98; *Bellotti*, 435 U.S. at 790, and that "[t]he First Amendment . . . presume[s] that speakers, not the government, know best both what they want to say and how they want to say it." *Riley*, 487 U.S. at 790-91; *see Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."). Therefore, if the CDP believes its message about affirmative action will be more effective if channeled through a ballot- measure organization than if funded directly, the First Amendment guarantees it that choice.

are insufficient to sustain section 323(d). *See NCPAC,* 470 U.S. at 498 (statute restricting expenditures of independent political committees unconstitutional because, on record before Court, "an exchange of political favors for uncoordinated expenditures remain[ed] a hypothetical possibility and nothing more"); *Tinker,* 393 U.S. at 508 ("undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression").

Fourth, section 323(d) prohibits any national, state or local political party committee from transferring any funds (federal or non-federal) to any section 527 organization *whether or not* that organization makes expenditures or disbursements "in connection with" a federal election. *See* BCRA § 101(a); FECA § 323(d)(2); 2 U.S.C. § 441i(d)(2). For example, the provision prohibits the CDP from giving a single dollar—even for "very basic administrative and organizational costs"—to a local California Democratic club engaged solely in state-focused voter registration and get-out-the-vote activities. Bowler Decl. at 24-25. The government insists that the restriction can be justified "in light of the fungibility of money" and the fact that "receipt of such funds by an organization's treasury may effectively serve as a subsidy for other political activities during federal election years that benefit federal candidates." Gov't Reply Br. at 28. Not even the most expansive definition of "corruption" can accommodate the government's theory, however, because nothing in the record, or in law, even remotely suggests that those "other political activities"—such as voter registration, get-out-the-vote activity and issue advocacy—would corrupt any federal candidate. *See supra* Findings 80-82 at pages 180-193.

* * *

In sum, section 323(d) is an impermissible restriction on the expressive associational rights of party committees and their would-be donees. *See Tashjian,* 479 U.S. at 214-15

("[A] [p]arty's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association. . . . [A] prohibition of potential association with nonmembers would clearly infringe upon the rights of the [p]arty's members under the First Amendment to organize with like-minded citizens in support of common political goals."); *see also Jones*, 530 U.S. at 574 (same). Prohibiting the transfer of funds from a party committee to a tax- exempt organization, to my way of thinking, does not serve the government's compelling interest in preventing actual or apparent corruption of candidates for federal office.[172] Even if it did, I believe section 323(d) would prohibit too much non-corrupting political speech. Accordingly, I would find the provision unconstitutional on its face.

4. Federal Candidates: New FECA Section 323(e)

Section 323(e) prohibits any federal candidate or officeholder from soliciting, receiving or transferring non-federal funds "in connection with" a federal, state or local election.[173]

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[172] Nor does prohibiting a party committee's *solicitation* of funds for a tax exempt organization—even if section 323(d)'s prohibition on transfers could be severed from its prohibition on solicitation, the latter would be invalid nonetheless (and whatever the standard of review) because it serves no legitimate governmental interest whatsoever.

[173] More specifically, section 323(e)(1) provides that a federal candidate or officeholder shall not

> (A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, *including funds for any Federal election activity*, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or
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> (B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—

See BCRA § 101(a); FECA § 323(e)(1); 2 U.S.C. § 441i(e)(1). The provision admits of numerous exceptions, however, and so there are numerous ways in which a federal candidate or officeholder can participate in fundraising. Specifically, a candidate or officeholder may (1) solicit, receive or transfer *federal* funds, *see* BCRA § 101(a); FECA § 323(e)(1)(A), (B); 2 U.S.C. § 441i(e)(1)(A), (B); (2) "attend, speak, or be a featured guest at a fundraising event" for a state or local political party committee, BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3); (3) solicit unlimited non-federal funds on behalf of a tax-exempt 501(c) organization whose "principal purpose" is *not* to conduct voter registration, voter identification or get-out-the-vote activity if the "solicitation does not specify how the funds will or should be spent," BCRA § 101(a); FECA § 323(e)(4)(A); 2 U.S.C. § 441i(e)(4)(A); and (4) solicit up to $20,000 per individual per calendar year *specifically for* voter registration, voter identification and get-out-the-vote activity, or for an organization

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> (i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of [FECA] section 315(a); and
>
> (ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

BCRA § 101(a); FECA § 323(e)(1); 2 U.S.C. § 441i(e)(1) (emphasis added). I would hold that section 301(20)'s definition of "Federal election activity" cannot be sustained. *See supra* Part IV.D.1.c. I believe, however, that section 323(e)(1)(A) can be read permissibly to exclude the non-essential phrase "including funds for any Federal election activity" because--in light of BCRA's severability clause, *see* BCRA § 401—"it appears both that, standing alone, legal effect can be given to [section 323(e)(1)(A)] and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." *Dorchy*, 264 U.S. at 290. Thus, under a congressionally-mandated saving construction, section 323(e)(1)(A) would provide that no federal candidate or officeholder shall "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act."

whose "principal purpose" *is* to conduct any or all of those activities, BCRA § 101(a); FECA § 323(e)(4)(B); 2 U.S.C. § 441i(e)(4)(B). It bears emphasizing that the plaintiffs do not challenge this provision with the same vigor as they do BCRA's other restrictions on non-federal funds. In three briefs, the *McConnell* plaintiffs spend scarcely more than a paragraph on the provision, arguing without full analysis that it "seriously impinges upon the right of free association between state and local committees and [federal] officeholders and candidates, many of whom until now played a significant role in state and local politics." McConnell Br. at 30. The *RNC* and *CDP* plaintiffs raise similar associational claims in lukewarm fashion, *see, e.g.*, RNC Br. at 41-42; CDP Br. at 42, and only incidentally assert that the provision unconstitutionally infringes a federal candidate's First Amendment right of solicitation, *see, e.g.*, CDP Br. at 39-40 (mentioning prohibition on candidate solicitation in conjunction with section 323(a) and 323(b)'s restrictions on national party leaders). I believe these claims lack merit,[174] *see infra*,

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[174] I would reject as well the *McConnell* plaintiffs' federalism claim and the *Thompson* plaintiffs' equal protection claim.

The *McConnell* plaintiffs allege that "[b]y restricting the activities of federal officeholders and candidates with respect to state and local election campaigns and processes, [section 323(e)] violates the Tenth Amendment and principles of federalism." McConnell Compl. at ¶ 115; *see* McConnell Br. at 23 (section 323(e) "dramatically limits the ability of federal officeholders and candidates to raise money for state and local candidates" where they would otherwise be permitted to do so under state law). While I express no opinion on the *McConnell* plaintiffs' other federalism challenges to BCRA's non-federal fund provisions, *see supra* Part III.A, I reject the notion that the Congress's power does not reach the solicitation and transfer of non-federal funds where a *federal candidate* is the one soliciting. *See* U.S. CONST. art. I, § 4, cl. 1 (granting Congress power to regulate "Times, Places and Manner of holding Elections for Senators and Representatives," except as to "the Places of chusing Senators"); *Burroughs*, 290 U.S. at 546-47 (recognizing broad congressional authority to regulate elections for President and Vice-President);

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see also U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to "regulate Commerce . . . among the several States"). The D.C. Circuit has held that the Tenth Amendment does not deny the federal government the authority to restrict municipal securities professionals from soliciting contributions for the political campaigns of state officials from whom they obtain business:

> [The regulation] neither compels the [S]tates to regulate private parties, as the Tenth Amendment prohibits, *New York v. United States*, 505 U.S. 144 (1992), nor regulates the [S]tates directly, a question on which the Supreme Court's Tenth Amendment jurisprudence "has traveled an unsteady path," *id.* at 160. Further, the rule does not have anything resembling the kind of preemptive effect on [S]tates' ability to control their own election processes that might be perceived as "destructive of state sovereignty." *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985); *cf. Gregory v. Ashcroft*, 501 U.S. 452, 460-62 (1991).

Blount, 61 F.3d at 949. I believe that each of the D.C. Circuit's observations is applicable here and that the broader, more invasive power of the federal government to regulate *municipal securities professionals* who solicit funds for state officials includes the narrower power to regulate *federal candidates* who solicit funds for state officials.

With respect to the *Thompson* plaintiffs' claim that section 323(e) violates equal protection principles and the First Amendment by preventing them from competing effectively in the political process, *see* Thompson Compl. at ¶¶ 40-41, the government's response is sufficient:

> BCRA's restrictions on federal officeholders make no distinctions on the basis of race or any other suspect classification. The statute accords exactly the same treatment to all federal candidates, regardless of their race or ethnicity. Indeed, [the *Thompson*] plaintiffs allege no intent by Congress to discriminate on the basis of race; they allege only a "disproportionate effect" on "minority communities." Thompson . . . Compl. [at] ¶ 41. In the absence of intentional discrimination, however, plaintiffs can state no equal protection claim. *See, e.g.*, *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). And plaintiffs' claim of discrimination on the basis of wealth ignores the fact that equal protection principles do "not require absolute equality or precisely equal advantages," and do not "require the State to equalize economic conditions." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (citations omitted).

Gov't Br. at 127.

and I am inclined to agree with the RNC's assessment that because "[i]t is the corruption of federal officeholders and candidates—not the corruption of political parties—that the Supreme Court has recognized as a legitimate interest in its campaign finance cases," section 323(e) is the one component of BCRA section 101 that actually makes constitutional sense. *See* RNC Br. at 51; *see also* Oral Arg. Tr. Vol. 1, Morning Session, at 46 (RNC counsel arguing the same).

* * *

I first consider the standard by which the court is to review section 323(e). The plaintiffs contend that the provision should be subject to strict scrutiny because it drives an association-inhibiting wedge between political parties and their candidates, *see, e.g.*, McConnell Br. at 31 (citing, *inter alia, Jones*, 530 U.S. at 582; *Eu*, 489 U.S. at 231), and because restrictions on the solicitation of funds are always "subject to exacting First Amendment scrutiny," *e.g.*, CDP Br. at 40 (quotation omitted). The defendants argue, however, that section 323(e) passes muster if it is "closely drawn to further an important [c]ongressional interest." *E.g.*, Intervenors Opp. Br. at 23. The case law on the subject is mixed. *Compare Jones*, 530 U.S. at 582 (burden on political party's associational freedom is "unconstitutional unless it is narrowly tailored to serve a compelling state interest"), *with Colorado Republican II*, 533 U.S. at 448 n.10 (noting uncertain nature of political parties' associational rights under Court's First Amendment jurisprudence); *compare also Riley*, 487 U.S. at 788 (because solicitation "involve[s] a variety of speech interests . . . that are within the protection of the First Amendment," government's restriction thereof must be "narrowly tailored to achieve [its] principal asserted interest" (quotation omitted)), *with Schaumburg*, 444 U.S. at 632 ("Soliciting financial support is undoubtedly subject to *reasonable* regulation . . . ." (emphasis added)). In view of

unclear precedent, I would take the same cautious approach as the D.C. Circuit did in a fairly recent solicitation case:

> The proper categorization of [the regulation] is not clear-cut. . . . We are uncertain [about what level of scrutiny to apply.] . . . If the rule can withstand strict scrutiny there is no need to decide the issue. Accordingly we turn to applying such scrutiny and ask . . . whether the rule is narrowly tailored to serve a compelling government interest.

Blount, 61 F.3d at 942-43. For the following reasons, I agree with the defendants that section 323(e) is constitutional even if viewed through the lens of strict scrutiny. *See* Intervenors Opp. Br. at 23 n.55.

First, it is hardly a novel or implausible proposition that a federal candidate's solicitation of large donations from wealthy individuals, corporations and labor organizations—whether or not the funds are used "for the purpose of influencing" a federal election—can raise an *appearance* of corruption of the candidate. *See UAW*, 352 U.S. at 576 ("Many believe that when an individual or association of individuals makes large contributions . . . they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions . . . ." (quotation omitted)). Accordingly, I am more willing in the candidate context than in the party context to consider the defendants' generalized, anecdotal evidence in support of BCRA's restrictions. *See Shrink Missouri*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). Moreover, I believe the evidence is sufficient for the court to conclude that section 323(e) may alleviate, "in a direct and material way," *Turner*, 512 U.S.

at 664, at least the appearance of federal candidate and officeholder corruption:

- Gerald Greenwald, the former Chairman and CEO of United Airlines, testified that "sitting Members of Congress . . . who solicit large corporate contributions sit on committees that directly affect the corporation's business. Similarly, these Members' actions affect issues of interest to labor unions[,] . . . from tax legislation to industry deregulation, to environmental legislation, to list just a few examples." Greenwald Decl. at 3.

- Wade Randlett, CEO of Dashboard Technology, hosted and helped organize over 100 fundraising events featuring federal candidates and officeholders from 1996 to 2000, and "raised seven-digit sums in both federal funds . . . and non-federal funds." Randlett Decl. at 2. Randlett testified that "[t]he core transaction is an elected official talking to an individual who may write a soft money check in order to receive positive attention for an issue. When you take that out of the equation, a great deal of the inappropriate influence leaves the system." *Id.* at 6.

- Senator McCain testified that "Members of Congress interact with donors at frequent fundraising dinners, weekend retreats, cocktail parties, and briefing sessions that are held exclusively for large donors . . . . When, as a result of a Member's solicitation, someone makes a significant soft money donation, and then the donor calls the Member a month later and wants to meet, it's very difficult to say no, and few of us do say no." McCain Decl. at 3-4; *but cf.* McCain Dep. at 236-38 (acknowledging that he could not "recall any of the individuals who were present" at fundraising events and that no donor "made enough of an impression . . . to influence any legislative judgments").

- Senator Zell Miller once publicly described how he "locked himself in a room with an aide, a telephone, and a list of potential contributors. The aide would get the 'mark' on the phone, then hand me a card with the spouse's name, the contributor's main interest, and a reminder to 'appear chatty.' I'd remind the agribusinessman that I was on the Agriculture Committee; I'd remind the banker I was on the Banking Committee. And then I'd make a plaintive plea for soft money. . . . I always left that room feeling like a cheap prostitute who'd had a busy day." 147 CONG. REC. S2445 (daily ed. Mar. 19, 2001) (statement of Sen. Feingold) (quoting Zell Miller, *A Sorry Way to Win,* WASH. POST, Feb. 25, 2001, at B7).

- Defense expert Robert Shapiro testified about a recent survey "reveal[ing] that fully 77 percent of the public in 2001 [viewed] the way in which candidates raised money as unethical if not fully corrupt, with 31 percent viewing [it] as corrupt." Shapiro Expert Report at 12; *but cf.* Ayres Rebuttal Report at 4-5 (appearance of corruption stems not only from large donations of non-federal funds but of federal funds as well).

These statements (and others in the record like them) are hardly evidence that federal candidate and officeholder solicitation of non-federal funds results in actual *quid pro quo* corruption. But in severing the most direct link between the federal candidate and the non-federal donor, *see* Gov't Br. at 123, section 323(e) can serve to prevent the appearance of corruption where it is most acute. *See Stretton v. Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991) ("[W] e cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate."). Although the defendants have again offered the court no *empirical* evidence, "no smoking gun is needed where, as here, the conflict of interest is apparent." *Blount*, 61 F.3d at 945.

Second, if BCRA's "key purpose" is indeed to prevent "the use of soft money as a means of buying influence [over] federal officials," *e.g.*, 148 CONG. REC. H408 (daily ed. Feb. 13, 2002) (statement of Rep. Shays); *see also, e.g.*, Meehan Dep. at 128 ("My view is that the appearance of corruption comes from the totality of the system that allows *federal officials* to raise unlimited amounts of money . . . ." (emphasis added)), section 323(e) may be the least restrictive means of meeting the objective. Unlike sections 323(a), (b) and (d)—which target non-corrupting, core political activities of national, state and local political party committees, *see supra* Parts IV.D.1 and IV.D.3—section 323(e) does not unnecessarily inhibit protected political speech or association. It is true that by limiting a federal candidate or officeholder's solicitation of non-federal funds, section 323(e) burdens his association with the party with whom he is linked by ideology and with whom he engages "in the common enterprise of electing candidates up and down the ticket." CDP Br. at 40. Nonetheless, the provision leaves him free to associate with his party—and with other like-minded organizations—in significant ways. As I have mentioned, he may still solicit, receive or transfer *federal* funds, *see* BCRA § 101(a); FECA § 323(e)(1)(A), (B); 2 U.S.C. § 441i(e)(1)(A), (B); "attend, speak, or be a featured guest at a fundraising event" for a state or local political party committee, BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3); solicit unlimited non-federal funds on behalf of a tax-exempt 501(c) organization whose "principal purpose" is *not* to conduct voter registration, voter identification or get-out-the-vote activity if the "solicitation does not specify how the funds will or should be spent," BCRA § 101(a); FECA § 323(e)(4)(A); 2 U.S.C. § 441i(e)(4)(A); and solicit up to $20,000 per individual per calendar year *specifically for* voter registration, voter identification and get-out-the-vote activity, or for an organization whose "principal purpose" *is* to conduct any or all of those activities, BCRA § 101(a); FECA § 323(e)(4)(B); 2 U.S.C. § 441i(e)(4)(B). Thus, section 323(e) "permits federal candidates to solicit money in connection with state or local elections, but minimizes the dangers of corruption" by setting source-and-amount limits analogous to those in FECA. Gov't Br. at 125. To my way of thinking, this moderate cap on federal candidate and officeholder solicitation is not nearly so troubling as an outright ban would be. The Court has held that solicitation

> involve[s] a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that *without* solicitation the flow of such information and advocacy would likely cease.

Schaumburg, 444 U.S. at 632 (emphasis added). Because section 323(e) does not flatly prohibit a federal candidate or officeholder from soliciting campaign funds, it does not preclude him from expressing the full range of his "particular views on economic, political, or social issues." *Id.* Whether he is soliciting $10 or $10,000—or for that matter, whether he is soliciting federal or non-federal funds—a candidate or officeholder may, as vigorously as he wishes, "seek[ ] support for particular causes." *Id.* The provision therefore seems to present little danger of stifling the flow of candidate-to-donor advocacy; I would conclude that it is no more restrictive of political speech than may be necessary to prevent apparent corruption of the federal candidates and officeholders it regulates.

* * *

Section 323(e), therefore, is consistent with the First Amendment's guarantees[175] and, I believe, must be sustained.

5. State Candidates: New FECA Section 323(f)

Under new FECA section 323(f), a state candidate or officeholder "may not spend any funds for a communication described in section 301(20)(A)(iii) unless the funds are subject to the limitations, prohibitions, and reporting requirements" of the Act. BCRA § 101(a); FECA § 323(f); 2 U.S.C. § 441i(f); *see also* BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii). In light of my conclusion that FECA section 301(20) cannot be sustained, *see supra* Part IV.D.1.c, I would conclude as well that no coherent legal effect can be given to section 323(f), which I would strike down on the ground of inseverability. *See Dorchy*, 264 U.S. at 290 (statutory provision "cannot be deemed separable unless it appears . . . that, standing alone, legal effect can be given to it"); *cf. supra* Part IV.D.2.

E. The Ban on Minors' Contributions and Donations

Turning finally from BCRA section 101's restrictions on non-federal funds, I next examine BCRA section 318, which, as the *Echols* plaintiffs' counsel aptly observed at oral argument, "falls into the category of 'who knows where it came from.'" Oral Arg. Tr. Vol. 2 at 326 (counsel for *Echols* plaintiffs). Section 318 bans any person under the age of 18 from making (1) any contribution whatsoever to any federal candidate; or (2) any contribution or non-federal "donation" to a political party committee. BCRA § 318; FECA § 324; 2 U.S.C. § 441k ("An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party."). The *McConnell* and *Echols* plaintiffs contend that the provision runs afoul of the First Amendment. *See* McConnell Br. at 91-95; McConnell Opp. Br. at 59-61; McConnell Reply Br. at 47-48. For the following reasons, I agree.[176]

* * *

It is well-settled that minors are entitled to the full range and force of the First Amendment's guarantees. *See Tinker*, 393 U.S. at 511-13; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *cf. Bellotti*, 435 U.S. at 784- 85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the *speakers* who may address a public issue." (emphasis added)). While the Supreme Court's case law reflects that the government often possesses an especially strong interest in regulating the activities of minors, *see, e.g.*, *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) ("[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" (quoting *Prince v.*

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[175] This includes the guarantee of a free press. The *Paul* plaintiffs claim that section 323(e) violates their right to a free press to the extent that it prohibits Representative Paul from "signing solicitation letters on behalf of" Gun Owners of America, Citizens United or Real Campaign Reform.org. Paul Br. at 18-19. But because the provision narrowly may serve the government's compelling interest in preventing the appearance of corruption—and does not exert "editorial control" on anyone's press activities, *id.* at 18 (capitalization altered)—the *Paul* plaintiffs' free press claim is without merit.

[176] Accordingly, I would not reach the *McConnell* and *Echols* plaintiffs' claim that the ban violates the Fifth Amendment's equal protection component, *see* McConnell Br. at 95, nor would I decide the *Thompson* plaintiffs' claim that the provision violates their First and Fifth Amendment rights to the extent that it prevents them from "protect[ing] the rights" of their minor constituents, Thompson Compl. at ¶ 48.

Massachusetts, 321 U.S. 158, 170 (1944))), no case of which I am aware holds that a minor's speech is less valuable to himself—or to the political marketplace—simply because of his youth. Therefore, the fact that section 318 restricts the speech of minors as opposed to adults does not affect the standard by which the court is to review the provision.

I believe section 318 is subject to strict scrutiny for the same reasons I have strictly scrutinized BCRA's limits on non-federal donations to political party committees—the ban operates to restrict the political speech of minors who would donate non-federal funds to the political parties in order to participate in collective advocacy *via* independent party expenditures. *See* BCRA § 318; FECA § 324; 2 U.S.C. § 441k ("An individual who is 17 years old or younger shall not make a . . . *donation* to a committee of a political party." (emphasis added)); *see also Citizens Against Rent Control*, 454 U.S. at 296-97, 299; *see generally supra* Part IV.D.1.a. Because the plaintiffs do not press this point at any sustained length,[177] however, and because the government has not even demonstrated under *Buckley*'s contribution-to-candidate standard of review that section 318 serves "a sufficiently important interest" by means "closely drawn to avoid unnecessary abridgement of [First Amendment] freedoms," *Buckley*, 424 U.S. at 25, there is no need to decide whether strict scrutiny or "*Buckley* scrutiny" applies. *Cf. Blount*, 61 F.3d at 942-43 (where outcome of First Amendment challenge does not depend upon standard of review, no need to settle upon applicable standard).

First, section 318 does not serve *any* governmental interest, much less a "sufficiently important" or "compelling" one.

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[177] *But see* McConnell Br. at 95 n.48 ("To the extent that section 318 not only limits contributions of federally regulated funds to candidates and party committees, but also limits donations of *state-regulated* funds to party committees, it is also unconstitutional for the reasons given above in [the discussion of BCRA section 101]." (emphasis in original)).

Repeatedly citing one floor statement of one Senator, the government claims the "Congress recognized that some parents use their influence over their children and their control over their children's assets to circumvent the limits on contributions to candidates and parties." Gov't Br. at 199 (citing 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (provision added "to prevent evasion of the contribution limits")). The court is told that "[t]he need for the prophylactic measure adopted by Congress here is clear." *Id.* at 200. But the government's evidence of corruption-by-conduit, *see id.* at 200-02 & nn.137-141, is remarkably thin:

- A decade-old FEC report to the Congress states without further explanation that "contributions are sometimes given by parents in their children's names." FED. ELECTION COMM'N, ANNUAL REPORT 1992, at 64 (1993).
- The Thompson Committee Report resulting from an investigation of "improper activities in connection with 1996 federal election campaigns" states—once again, without further explanation—that "[t]here is . . . substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors." Thompson Comm. Rep. at 4506.
- Senator Dodd, "an experienced fundraiser," Gov't Br. at 201 n.138, stated on the Senate floor that "[n]ormally when we go out and solicit campaign contributions we do not limit it to the individual. We also want to know whether or not their spouse or their minor or adult children would like to make some campaign contributions." 147 CONG. REC. S2933 (daily ed. Mar. 27, 2001) (statement of Sen. Dodd).
- Articles ranging from "The Kiddie-Cash Caper" on *Slate.com* to "The Young and the Generous" in the

Washington Post have asserted that "gifts from minors are the next big campaign loophole." Gov't Br. at 201 n.139 (capitalization altered).

- Senator McCain, relying on other newspaper articles, reported on the Senate floor that "some" contributions have been made by infants and toddlers, although he provided no examples. 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). He cited only two adolescents' contributions specifically. *See id.* (stating *Los Angeles Times* "found that two high school sisters contributed $40,000 to the Democratic Party in 1998" based on a "'family decision'").

Were I convinced by the government's evidence that "wealthy individuals are easily circumventing contribution limits . . . by directing their children's contributions," 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain)—and I am not—section 318 does nothing more to alleviate the problem than do federal laws already on the books. FECA prohibits any person from "mak[ing] a contribution in the name of another person" or "knowingly accept[ing] a contribution made by one person in the name of another person." 2 U.S.C. § 441f. And an FEC regulation that remained in effect until January 1, 2003 ensured that a minor child could make a contribution only if he did so "knowingly and voluntarily," with "funds, goods, or services . . . owned or controlled exclusively" by him, and *not* with "the proceeds of a gift, the purpose of which was to provide funds to be contributed." 11 C.F.R. § 110.1(i)(2). By the government's own admission, all section 318 adds to the statutory landscape is a provision that will (we are told) be easier to administer than existing laws:

> [C]ontributions by minors of all ages, even adolescents, present . . . practical difficulties. The Commission either can accept at face value self-serving, conclusory, and sometimes lawyer-crafted statements of family members, or it can probe for the truth by querying youngsters about their knowledge of politics and their relationship with their parents in ways that may threaten the privacy of the family.

Gov't Br. at 207. The government's "interest" in the smoothest possible enforcement of campaign finance restrictions is not one articulated in the legislative record. *See* 148 CONG. REC. S2145-48 (daily ed. Mar. 20, 2002). Neither is it one the Supreme Court has recognized as "sufficiently important" or "compelling" to justify limiting campaign contributions (much less banning them), *see NCPAC,* 470 U.S. at 496-97, nor one I am prepared to accept for the first time today, *see Frontiero v. Richardson,* 411 U.S. 677, 690 (1973) ("[W] hen we enter the realm of strict judicial scrutiny, there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality." (quotations omitted)).

Second, even if section 318 served to prevent actual or apparent corruption of federal candidates in a material way not served by existing law, the provision could not be sustained because—far from being "closely drawn" or "narrowly tailored"—it is grossly overbroad. The government contends "[i]t makes no difference that § 318 is a limited prohibition of contributions rather than a limit on their dollar amount." Gov't Opp. Br. at 125 n.133. I disagree; that section 318 is a prohibition makes *all* the difference. True, the Court has rejected the argument that the Act's $1,000 contribution ceiling employs "unrealistically low" dollar-limits and has held that the "Congress' failure to engage in . . . fine tuning does not invalidate the legislation." *Buckley,* 424 U.S. at 30 (dismissing assertion that "much more than [$1,000] would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder"). And the Court has reminded us that we have "no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* (quoting *Buckley,* 519 F.2d at 842). But the Court has also taught us that in the contribution-to-candidate context, "distinctions in degree become significant . . . when they can be said to amount to differences in kind." *Id.* The Congress's decision to enact a prophylactic ban on minors' contributions rather than capping them was not one that involved "fine tuning." *Buckley* makes clear that "[a] *limitation* on the amount of money a person may give to a candidate . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution." *Id.* at 21 (emphasis added). In contrast, section 318 prohibits even the "symbolic expression" of a minor donor's support for a candidate, whether or not (1) the minor makes a contribution or donation from funds he has earned himself, *see supra* Findings 83-84 at page 194; (2) the minor's parents have "maxed out" on their federal contributions and might therefore seek to use the minor as a conduit contributor, *see supra* Finding 84 at page 194; (3) the contribution or donation is *de minimis* and cannot even remotely corrupt or appear to corrupt any federal candidate; or (4) the minor makes a non-federal donation to a *state* political party committee that spends the funds on voter registration, voter identification, get-out-the-vote activity or issue advocacy relating solely to *state* candidates. The government defends section 318 by calling the prohibition "limited" and pointing out that it leaves open alternative channels for a minor's speech. *See* Gov't Br. at 204-05 (minors may still "volunteer their services to a candidate for federal office or to a political committee," "make unlimited independent expenditures to express their views" and "contribute to independent political committees"). Under longstanding First Amendment principles, however, this is no defense at all. *See Texas v. Johnson,* 491 U.S. 397, 416 n.11 (1989) (rejecting notion that defendant's flag-burning could be criminalized simply because "his act . . . conveyed nothing that could not have been conveyed . . . just as forcefully in a

dozen different ways" (quotation omitted)); *Riley,* 487 U.S. at 791 ("[S] peakers, not the government, know best both what they want to say and how to say it."); *Schneider,* 308 U.S. at 163 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

* * *

Notwithstanding the government's insupportable assertions to the contrary, *see, e.g.,* Gov't Opp. Br. at 124 (section 318 embodies "a reasonable policy choice by Congress [that] easily survives judicial review"), the minors' ban reflects a profound congressional disregard of the First Amendment and settled jurisprudence thereunder. I would hold that the provision is invalid on its face.

F. The Conditions on the Lowest Unit Broadcast Charge

Until the enactment of BCRA section 305, the Federal Communications Act (FCA) required a licensed broadcast station to provide a federal candidate—during the 45 days preceding a primary or runoff election and during the 60 days preceding a general or special election—the benefit of the "lowest unit charge of the station" on any broadcast advertisement "in connection with" the candidate's campaign. FCA § 315(b); 47 U.S.C. § 315(b). BCRA section 305 amends the FCA to deny a candidate the lowest unit charge unless the candidate either certifies in writing that he will not "make any direct reference to another candidate for the same office," BCRA § 305(a)(3); FCA § 315(b)(2)(A); 47 U.S.C. § 315(b)(2)(A), or, if he does so refer, he includes a statement in the advertisement clearly identifying himself, *see* BCRA § 305(a)(3); FCA § 315(b)(2)(C), (D); 47 U.S.C. § 315(b)(2)(C), (D). The *McConnell* plaintiffs challenge section 305 on First Amendment free speech grounds, claiming that it impermissibly "condition[s] the cost of advertisements on their viewpoint." McConnell Br. at 89 (capitalization altered). I believe that we lack Article III jurisdiction to consider their claim, however, and I would not pass upon it or upon the constitutionality of section 305.

* * *

Under Article III of the United States Constitution, our "judicial Power" extends only to live "Cases" or "Controversies." U.S. CONST. art. III. As the Supreme Court held in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), "an essential and unchanging part of the case-or-controversy requirement of Article III" is the "core component" of standing:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." . . .
>
> The party invoking federal jurisdiction bears the burden of establishing these elements. . . . Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. . . . In response to a motion for summary judgment, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" byaffidavit or other evidence "specific facts." . . . And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

Lujan, 504 U.S. at 560-61 (citations omitted). I believe that the *McConnell* plaintiffs—the only plaintiffs in these consolidated actions who challenge section 305—are unable on the record before us to carry their burden of establishing that the provision causes them an "actual or imminent, not 'conjectural' or 'hypothetical'" injury sufficient to confer standing. *Id.*

Section 305 applies exclusively to candidates for federal office. Thus, only three of the *McConnell* plaintiffs—Senator McConnell, Representative Pence and former Representative Barr—are conceivably affected by the provision.[178] *See* McConnell Compl. at ¶¶ 15-17. Neither Pence nor Barr has alleged or provided evidence that he intends in a future campaign to run a broadcast advertisement that will both "make any direct reference to another candidate for the same office," BCRA § 305(a)(3); FCA § 315(b)(2)(A); 47 U.S.C. § 315(b)(2)(A), and omit his own identification, *see* BCRA § 305(a)(3); FCA § 315(b)(2)(C), (D); 47 U.S.C. § 315(b)(2)(C), (D). Indeed, Representative Pence testified that he ran nine advertisements during the period from January 1, 1999 to December 31, 2001, *see* Resp. of Rep.

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[178] To the extent that any of the other individual plaintiffs in the *McConnell* action might someday become federal candidates, my observation that Senator McConnell, Representative Pence and former Representative Barr (all of whom might in the future *again* become federal candidates) are the only plaintiffs "conceivably" affected by section 305 is something of an overstatement. Nevertheless, like the Senator and the two Congressmen, none of these plaintiffs has alleged (much less adduced "specific facts" to demonstrate) "actual or imminent injury" stemming from section 305.

Pence to Defs.' First Set of Interrogs. at 6-7, that none of the ads "made direct reference to another [c] andidate for the same office," *id.*, and that he does not "believe that [he] will wage a campaign differently . . . after BCRA than [he] did before," Pence Dep. at 36. And although Senator McConnell has testified without contradiction that in the future he intends to run campaign ads critical of his opponent and "will be subject to . . . BCRA's discriminatory penalty for doing so," McConnell Aff. at 8, he is not "*immediately* in danger of sustaining some direct injury as [a] result" of section 305, *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (emphasis added), because the earliest date he could feel the effect of the provision is 45 days before the Republican primary election in 2008. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (under Article III, litigant must "clearly demonstrate" injury is "imminent" in "temporal sense") (quoted in *Lujan*, 504 U.S. at 560). Accordingly, I would hold that no plaintiff has constitutional standing to challenge the provision.

The *McConnell* plaintiffs resist this conclusion on two interrelated grounds. They observe that BCRA section 403(c) specifically contemplates a facial challenge to any provision of the statute by any member of the Senate, *see* McConnell Reply Br. at 46 n.28, and they argue that, under relaxed First Amendment standing rules, Senator McConnell has standing to challenge section 305 "on a facial basis with respect to all its unconstitutional applications," *id.* Neither assertion is availing. First, while I recognize the importance of effectuating the Congress's clearly-expressed intent to resolve expeditiously and in a single proceeding any facial challenge to the statute, *see* BCRA § 403(a), the legislature cannot grant us authority we are not constitutionally entitled to exercise. *See Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *see also* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65 (1996) (it is "fundamental that Congress [may] not expand the jurisdiction of the federal courts beyond the bounds of Article III" (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))). That BCRA permits "[a]ny Member of Congress [to] bring an action . . . for declaratory or injunctive relief to challenge the constitutionality of any [of its] provision[s]," BCRA § 403(c), is therefore beside the point with respect to Article III standing to challenge section 305. Second, the relaxed standing rules to which the plaintiffs refer, *see* McConnell Reply Br. at 46 n.28 (citing *Gooding v. Wilson*, 405 U.S. 518, 520 (1972)), are applicable only to claims of First Amendment *overbreadth* (like the many I addressed *supra* at Parts IV.A to IV.E). The overbreadth doctrine embodies an exception to the general rule against third-party standing, *see Board of Trustees v. Fox*, 492 U.S. 469, 482-83 (1989), one that may be invoked only where there exists "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent*, 466 U.S. at 801-02; *see generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 202-13 (4th ed. 1996) (discussing relation of overbreadth and standing doctrines). The case on which the plaintiffs rely for a relaxed standard makes clear that the overbreadth doctrine is generally reserved for situations in which potential speakers "may well refrain from exercising their rights for fear of *criminal sanctions* provided by a statute susceptible of application to protected expression." *Gooding*, 405 U.S. at 521 (emphasis added). Unlike the provisions analyzed above, however, *see supra* Parts IV.A to IV.E, section 305 imposes no criminal sanction for a violation thereof. Instead, it simply denies the lowest rate to a federal candidate who runs a broadcast advertisement (1) referring to another candidate for the same office, and (2) omitting the speaker's identification. *See* BCRA § 305(a)(3); FCA

§ 315(b)(2); 47 U.S.C. § 315(b)(2). Whatever other First Amendment infirmities may accompany section 305, the provision raises only a marginal danger of chilling the speech of parties not before the Court. *See Taxpayers for Vincent*, 466 U.S. at 801. Thus, in my view, the court cannot ignore the standard jurisdictional requirements of Article III to consider the plaintiffs' challenge, nor has it any authority to say anything more on the matter. *See Steel Co.*, 523 U.S. at 94.

G. *Increased Contribution Limits*

BCRA contains two sets of provisions that increase the contribution limits of the Act. *See supra* Part II.G. I would hold that no plaintiff who challenges either set of provisions has standing to do so.

1. General Increases

In sections 102 and 307, BCRA (1) raises the Act's "hard money" ceilings by permitting individual donors to contribute greater amounts to candidates and national and state political party committees, *see* BCRA §§ 102, 307; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1); and (2) indexes for inflation all but the Act's $10,000 limit on an individual's contributions to a state political party committee and the $5,000 cap on an individual's contributions to "any other political committee," *see* BCRA § 307(d); FECA § 315(c); 2 U.S.C. § 441a(c); *see generally supra* Part II.G.1. The *Adams* plaintiffs claim that the higher ceilings violate the equal protection component of the Fifth Amendment by "multiplying the hard money contributions of the wealthy" and thereby "depriv [ing] non-wealthy voters and candidates of the ability to participate" in the electoral process "on an equal basis" and with a "meaningful voice." Adams Br. at 9 (capitalization altered); Adams Opp. Br. at 5. In passing, the *CDP* and *Paul* plaintiffs raise similar claims with respect to BCRA's failure to index for inflation the Act's limits on contributions to state political party committees and "other political committee[s]." *See* CDP Br. at 50 ("By . . . severely disadvantaging state and local party committees [in] their ability to engage in political communication and otherwise participate in the political process, BCRA deprives [them] of the equal protection of the laws guaranteed by the Due Process Clause of the Fifth Amendment."); Paul Br. at 27 n.11 (arguing that "disparate treatment" of political action committees with respect to increases and indexing violates freedom of press). None of these plaintiffs, however, has Article III standing to challenge the general increases or indexing.

Under Article III, the plaintiffs must set forth "specific facts"—as opposed to "mere allegations"—establishing the elements of constitutional standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (alterations in original) (citations omitted). To my mind, no plaintiff has carried his burden. Indeed, the *Adams* plaintiffs have failed on at least two elements. First, they have not suffered an invasion of a *legally protected* interest. As the Eleventh Circuit recently held—in finding that the plaintiffs had no standing to raise an equal protection claim identical to that of the *Adams* plaintiffs—no one has a "right to equal influence in the overall electoral process." *Ga. State Conference of NAACP Branches v. Cox*, 183 F.3d 1259, 1263-64 (11th Cir. 1999) (quoting *MCFL*, 479 U.S. at 257 ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.")). And none of the *Adams* plaintiffs has been, or conceivably will be, stripped of his right to vote or of access to the ballot. Second, even if one of the plaintiffs did suffer such an injury, it would not be "fairly . . . trace[able]'' to BCRA. *Lujan*, 504 U.S. at 560. As the Second Circuit has observed—once again, in finding that the plaintiffs had no standing to raise an equal protection claim identical to that of the *Adams* plaintiffs—contribution limits, high or low, do not "*require* that contributions be made to any candidate." *Albanese v. FEC*, 78 F.3d 66, 68 (2d Cir.) (emphasis added), *cert. denied*, 519 U.S. 819 (1996). Thus, any inequality the *Adams* plaintiffs may suffer would be at the hands of other individuals, not BCRA. *See Cox*, 183 F.3d at 1264 (plaintiffs' "alleged inability meaningfully to participate in and influence elections is attributable to the conduct and resources of private individuals, not the state"); *NAACP, Los Angeles Branch v. Jones*, 131 F.3d 1317, 1323 (9th Cir. 1997) (rejecting equal protection claim similar to that of *Adams* plaintiffs because "no state action put[s] wealthy voters in a better position to contribute to campaigns than nonwealthy voters"), *cert. denied*, 525 U.S. 813 (1998); *see also Kruse v. City of Cincinnati*, 142 F.3d 907, 917 n.17 (6th Cir.) (rejecting equal protection argument similar to that of *Adams* plaintiffs and refusing to "attribute societal differences in income or the high cost of running a . . . campaign to the State" (quoting *NAACP, Los Angeles Branch*, 131 F.3d at 1323)), *cert. denied*, 525 U.S. 1001 (1998); Gov't Br. at 209 (aptly describing plaintiffs' "real claim" as notion that "the Constitution requires the government to prevent other citizens from raising and contributing more than they do"); *cf. Citizens Against Rent Control*, 454 U.S. at 295 ("*Buckley* . . . made clear that contributors cannot be protected from the possibility that others will make larger contributions[.]'').

Relying upon a wealth of inapposite voting rights cases, the *Adams* plaintiffs insist they have standing to raise their "meaningful voice" claim. Adams Opp. Br. at 1-5; *see Buckley*, 424 U.S. at 49 n.55 (voting rights cases do not support "abridg[ing] the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society"). In doing so, however, they confront none of the case law I have just discussed.[179]

For the same reasons, the *CDP* and *Paul* plaintiffs lack standing to challenge BCRA's failure to index certain contribution limits for inflation. Additionally, in the less than two pages of collective briefing on the matter, *see* CDP Br. at 50; Paul Br. at 27 n. 11, neither the *CDP* nor the *Paul* plaintiffs have cited to us any "specific facts," *Lujan*, 504 U.S. at 561, tending to show that BCRA's indexing scheme will "severely disadvantag[e]'' them in "their ability to engage in political communication," CDP Br. at 50. Their "mere allegations," *see, e.g.*, Boos Decl. at 14 (indexing scheme "arbitrarily limit[s]'' Citizens United Political Victory Fund's "activities in supporting or opposing federal candidates" and "unfairly discriminate[s] against" Fund); Pratt Decl. at 22 (indexing scheme "arbitrarily limit[s]'' Gun Owners of America Political Victory Fund's "activities in supporting or opposing federal candidates" and "unfairly discriminate[s] against" Fund), are insufficient to confer constitutional standing at this (the trial) stage of the litigation. *Lujan*, 504 U.S. at 561.

2. The "Millionaire Provisions"

Likewise, neither the *Adams* plaintiffs nor the *RNC* plaintiffs have constitutional standing to challenge BCRA's so-called “millionaire provisions,” which collectively provide for a series of staggered increases in otherwise applicable contribution-to-candidate and coordinated expenditure limits if the candidate’s opponent spends a “personal funds amount” over a sum certain. *See* BCRA § § 304, 316, 319; FECA § 315(i); 2 U.S.C. § 441a(i); *see generally supra* Part II.G.2.

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[179] The plaintiffs' failure even to *acknowledge* the applicable case law until their reply brief—in which they curtly dismiss any reliance upon it as "misplaced," Adams Reply Br. at 4—is disturbing given that counsel for the *Adams* plaintiffs represented the unsuccessful equal protection claimants in each of the four circuit decisions cited above.

As they did with respect to section 307, the *Adams* plaintiffs claim that the millionaire provisions violate the equal protection component of the Fifth Amendment by “multiplying the hard money contributions of the wealthy” and thereby “depriv[ing] non-wealthy voters and candidates of the ability to participate” in the electoral process “on an equal basis” and with a “meaningful voice.” Adams Br. at 9 (capitalization altered); *see id.* at 17-18; Adams Opp. Br. at 5, 8-9.For reasons I have already explained, *see supra* Part IV.G.1, the *Adams* plaintiffs are unable to carry their Article III burden of demonstrating that they have suffered or will imminently suffer “an invasion of a legally protected interest” which is “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” *Lujan,* 504 U.S. at 560 (alterations in original) (citations omitted). Moreover, none of the *Adams* plaintiffs is a candidate in an election affected by the millionaire provisions—i.e., one in which an opponent chooses to spend the triggering amount in his own funds—and it would be purely “conjectural” for the court to assume that any plaintiff ever will be. *Id.* at 560, 562 (noting difficulty in establishing standing if one or more of essential elements “depends on the unfettered choices made by independent actors . . . whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict” (quoting *ASARCO Inc. v. Kadish,* 490 U.S. 605, 615 (1989))).

Raising an equal protection claim of their own, the *RNC* plaintiffs contend that the millionaire provisions “discriminate among similarly situated federal candidates.” RNC Br. at 73 (capitalization altered); *see id.* at 73-75. Yet none of the RNC plaintiffs *is* a federal candidate. Mike Duncan, the only individual plaintiff in the *RNC* action, does not allege that he will ever be a federal candidate, much less a candidate running in an election affected by the millionaire provisions. *See* RNC Compl. at ¶ 20; *see also McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 189 (1936) (plaintiff “must allege in his pleading the facts essential to show jurisdiction”). And to the extent the *RNC* plaintiffs allege that the provisions “interfere[ ] with the right of political party committees to support and associate equally with their candidates,” RNC Compl. at ¶ 74—a claim nowhere argued in their briefs—they will suffer no injury “fairly . . . trace[able]” to BCRA because even in circumstances where the provisions *permit* a party committee to engage in unlimited coordinated spending, they do not *require* a committee to do so. *See Albanese,* 78 F.3d at 68.

* * *

I would hold that on the record and pleadings before us, we lack jurisdiction to entertain any of the plaintiffs’ challenges to BCRA’s general increased contribution limits and millionaire provisions. I would therefore refrain from deciding the provisions’ constitutionality. *See Steel Co.,* 523 U.S. at 94.

V. Conclusion

For the reasons stated in Parts III and IV of this opinion, I believe that all of the challenged provisions of BCRA—except the one discussed in Part IV.D.4 (which, in my view, must be sustained) and those discussed in Parts IV.F and IV.G (as to which I would pass no judgment)—violate the First Amendment to the United States Constitution. Accordingly, I would permanently enjoin the defendants and their agents from enforcing, executing or otherwise applying sections 201, 202, 203, 204, 212, 213, 214, 311, 318 and 504 of BCRA, and from enforcing, executing or otherwise applying new FECA sections 301(20), 323(a), 323(b), 323(c), 323(d) and 323(f), as added by section 101 of BCRA.

VOL. III

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No. 02-1674 *et al.*

IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENTS

VOLUME II

FLOYD ABRAMS
SUSAN BUCKLEY
BRIAN MARKLEY
CAHILL GORDON &
REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

KENNETH W. STARR
Counsel of Record
EDWARD W. WARREN
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

(*additional counsel on inside cover*)

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
1215 Cliffwood Drive
Goshen, KY 40026
(502) 473-7557

Counsel in No. 02-1674

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MEMORANDUM OPINION

KOLLAR-KOTELLY, *District J.*

I. INTRODUCTION

The recent issues confronting Congress related to campaign finance are neither novel nor unfamiliar:

> The idea is to prevent . . . the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it.

Elihu Root, *Addresses on Government and Citizenship* 143 (Bacon and Scott ed. 1916) (original statement made before the Constitutional Convention of the State of New York in 1894).

> Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.

65 Cong. Rec. 9507-9508 (1924) (Statement of Sen. Joseph Robinson).

> We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose of paying the expenses of campaigners sent out into the country to spread propaganda, both true and untrue.

86 Cong. Rec. 2720 (1940) (Statement of Sen. John Bankhead).

> The unchecked rise in campaign expenditures coupled with the absence of limitations on contributions and expenditures, has increased the dependence of candidates on special interest groups and large contributors.

H.R. Rep. No. 93-1239, at 3 (1974).

> We have gone from basically a small donor system in this country where the average person believed they had a stake, believed they had a voice, to one of extremely large amounts of money, where you are not a player unless you are in the $100,000 or $200,000 range, many contributions in the $500,000 range, occasionally you get a $1 million contribution. . . . Many Members are tired of picking up the paper every day and reading about an important issue we are going to be considering, one in which many interests have large sums at stake and then the second part of the story reading about the large amounts of money that are being poured into Washington on one side or the other of the issue—the implication, of course being clear, that money talks and large amounts of money talk the loudest.

147 Cong. Rec. S2958 (daily ed. March 27, 2001) (statement of Senator Fred Thompson). Although these statements each reflect discrete points in the history of campaign finance regulation in this country, they reflect the same sentiment: over the course of the last century, the political branches have endeavored to protect the integrity of federal elections with carefully tailored legislation addressing corruption or the appearance of corruption inherent in a system of donor-financed campaigns.

In the area of campaign finance regulation, congressional action has been largely incremental and responsive to the most prevalent abuses or evasions of existing law at particular points in time. For example, consistent with the Constitution, Congress has been permitted to prohibit the use of corporate treasury funds for contributions and expenditures to federal candidates and their parties, forbid the use of union dues in connection with federal elections, cap contributions by individuals to candidates and parties, offer presidential candidates the option of financing their general election campaigns with money from the public fisc, and subject coordinated expenditures to contribution limitations. This process has been evolutionary, and the deliberative nature of the legislative effort is not unexpected given the fact that campaign finance is an extraordinarily challenging area to legislate, particularly given the strong First Amendment interests at stake. On the one hand, congressional action in this area plainly implicates an individual's right to be free from government regulation, a right that is unquestionably at its apogee in the context of political speech. On the other hand, legislation in this area is designed to embolden public confidence in the political system, which thereby ultimately encourages individuals to participate and engage in the electoral process. *See Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n* ('*Colorado I*'), 518 U.S. 604, 609 (1996) (per curiam) (observing that in assessing the constitutionality of FECA's various provisions the Supreme Court 'essentially weigh[s] the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption'); *see also Burson v. Freeman*, 504 U.S. 191, 198 (1992) ('Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings.').

Mindful of these competing constitutional interests, Congress has moved deliberately and often slowly to address evasion or abuse of the law. Building a consensus in an area so penetratingly close to the heart of the First Amendment requires serious consideration. In fact, in the case of the legislation presently before the Court, the legislative process took over six years of study and reflection by Congress.[1]

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[1] Although campaign finance reform was considered during the 104th Congress, *see, e.g.*, Campaign Reform Act of 1996, H.R. 3820, 104th Cong. (1996) (considered on the House floor, but failed by a vote of 162-259, 142 Cong. Rec. H8,516 (daily ed. July 25, 1996)), deliberations on BCRA's precursors did not begin until the One Hundred and Fifth Congress. The bills introduced in the One Hundred and Fifth Congress, One Hundred and Sixth Congress, and One Hundred and Seventh Congress, relating to campaign finance, include, but are not limited to: 'Bipartisan Campaign Reform Act of 1997,' H.R. 493 (105th Cong.); 'Campaign Reform and Election Integrity Act of 1998,' H.R. 3485 (105th Cong.); 'Campaign Finance Improvement Act of 1998,' H.R. 3476 (105th Cong.); 'Bipartisan Campaign Integrity Act of 1997,' H.R. 2183 (105th Cong.); 'Campaign Reporting and Disclosure Act of 1998,' H.R. 3582 (105th Cong.); 'Bipartisan Campaign Reform Act of 1997,' S. 25 (105th Cong.); 'Senate Campaign Financing and Spending Reform Act,' S. 57 (105th Cong.); 'Campaign Finance Reform and Disclosure Act of 1997,' S. 179 (105th Cong.); 'Clean Money, Clean Elections Act,' S. 918 (105th Cong.); 'Grassroots Campaign and Common Sense Federal Election Reform Act of 1998,' S. 1689 (105th Cong.); 'Voter Empowerment Act of 1999,' H.R. 32 (106th Cong.); 'Bipartisan Campaign Reform Act of 1999,' H.R. 417 (106th Cong); 'Clean Money, Clean Elections Act,' H.R.

This thoughtful and careful effort by our political branches, over such a lengthy course of time, deserves respect. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 223-224 (1991) (O'Connor, J., dissenting) ('This Court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with great gravity and delicacy when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment.') (internal quotation marks and citations omitted); *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197,209 (1982) ('This careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.') (citation and quotation marks omitted). Nevertheless,

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1739 (106th Cong.); 'FEC Reform and Authorization Act of 1999,' H.R. 1818 (106th Cong.); 'Campaign Integrity Act of 1999,' H.R. 1867 (106th Cong.); 'Citizen Legislature and Political Freedom Act,' H.R. 19 22 (106th Cong.); 'Campaign Reform and Election Integrity Act of 1999,' H.R. 2668 (106th Cong.); 'PAC Limitation Act of 1999,' H.R. 2866 (106th Cong.); 'Open and Accountable Campaign Financing Act of 2000,' H.R. 3243 (106th Cong.); 'FEC Reform and Authorization Act of 2000,' H.R. 4037 (106th Cong.); 'Campaign Finance Improvement Act of 2000,' H.R. 4685 (106th Cong.); 'Campaign Finance Disclosure on Sales of Personal Assets Act of 2000,' H.R. 4989 (106th Cong.); 'Informed Voter Act of 2000,' H.R. 5507 (106th Cong.); 'Campaign Finance Improvement Act of 2000,' H.R. 5596 (106th Cong.); 'Bipartisan Campaign Reform Act of 1999,' S. 26 (106th Cong.); 'Federal Election Enforcement and Disclosure Reform Act,' S. 504 (106th Cong.); 'Clean Money, Clean Elections Act,' S. 982 (106th Cong.); 'Bipartisan Campaign Reform Act of 1999,' S. 1593 (106th Cong.); 'Campaign Finance Integrity Act of 1999,' S. 1671 (106th Cong.); 'Open and Accountable Campaign Financing Act of 2000,' S. 1816 (106th Cong.); 'Campaign Finance Reform and Disclosure Act of 2000,' S. 2565 (106th Cong.); 'Bipartisan Campaign Reform Act of 2001,' H.R. 2356 (107th Cong.); 'Campaign Reform and Citizen Participation Act of 2001,' H.R. 2360 (107th Cong.); and 'Bipartisan Campaign Finance Reform Act of 2001,' S. 27 (107th Cong.).

it is the province of the judiciary to intervene when Congress has struck the wrong balance and disproportionately transgressed First Amendment rights in the name of reform. While navigating this balance is undoubtedly complex, such a task is demanded by the dictates of the Constitution and the well worn path of interpretation of congressional action relating to campaign finance legislation by the Supreme Court of the United States.

It is within this historical framework that the incremental changes Congress strives to accomplish in enacting the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ('BCRA') are properly understood. BCRA is yet another step in the careful evolution of the campaign finance laws targeted at addressing exceptions to the constitutionally permissible laws that are already in force. Indeed, BCRA was enacted in large measure to amend the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq*. ('FECA'), and any constitutional interpretation of BCRA must, as its starting point, recognize the role BCRA plays within the current state of federal law. In other words, it must be remembered that the statutory provisions at issue were designed by Congress as a comprehensive approach to the abuses of FECA that legislators and candidates were acutely aware of in their capacity as political actors.[2] BCRA was designed to ameliorate FECA's most glaring abuses, while staying true to the constitutional boundaries set forth by the judiciary.

Presently before this three-judge District Court are eleven consolidated actions challenging much of BCRA as unconstitutional and seeking declaratory and injunctive relief to prohibit its enforcement. Plaintiffs and Defendants have filed cross motions for judgment pursuant to Rule 54 of the Federal Rules of Civil Procedure. Suffice it to say, the legal challenges raised by this litigation are complex and raise issues of fundamental importance to the conduct and financing of federal election campaigns.

In resolving these challenges, I have endeavored to adopt a cohesive constitutional framework in adjudicating Plaintiffs' claims, premised on the extensive record in this case and Supreme Court precedent. It is an approach that I believe is consistent with our common law traditions: a decision is rooted in the record of this case and guided by the constitutional boundaries established by the Supreme Court's campaign finance jurisprudence. Under this approach, I have only found three of the challenged sections unconstitutional: Sections 213, 318, and 504. The provisions I have found unconstitutional are all provisions of BCRA that are not central to its core mission and are entirely severable without doing injustice to the remainder of the law. The rest of the challenged provisions I find either constitutional or nonjusticiable, with the small exception, as observed in the *per curiam* opinion, of one disclosure provision contained in Section 201. In the case of Section 201, Judge Leon and I have severed subsection (5) of Section 201; a relatively minor change that does not impair the remaining disclosure provisions of the Act.[3]

---

[2] As Senator Fritz Hollings wryly observed during the Senate debate on BCRA:

> It amused me the other day when they said we finally had some debate going on in the Senate. The reason we have a debate is because this is the first subject we know anything about. All the rest of it is canned speeches that the staff gives you, and you come out and you talk about Kosovo, you talk about the defense budget, or you talk about the environment, and you read scientific statements and everything - but we know about money. Oh boy, do we know.

147 Cong Rec. S2852-53 (daily ed. March 26, 2001) (statement of Senator Fritz Hollings).

[3] I cannot agree with Judge Henderson, who appears to characterize my opinion, along with the *per curiam* opinion, and Judge Leon's opinion, as

II. FINDINGS OF FACT

Reviewing a record in a case involving protected First Amendment rights requires serious examination and analysis of the underlying testimony and documentary evidence. Therefore, with few exceptions, I have not relied on or cited to the Findings of Fact proposed by the litigants. To ensure accuracy and to eliminate any gloss or characterizations added by the parties, I have reviewed and cited the underlying documents, depositions, or declarations and have, in many instances, chosen to quote directly from the original sources.[4]

'upholding a portion [of BCRA] here and striking down a fragment [of BCRA] there until *they* [Judge Leon and Judge Kotelly] have drafted legislation the Congress would never have enacted—all in the name of *deference* to that body.' Henderson Op. at 5 (first emphasis added, second emphasis in original). I would observe that my opinion does not sift through various sections of BCRA that have been challenged, adopting some and rejecting others. Rather, my decision is predicated on lengthy discussions of both the record and the governing caselaw. In undertaking this analysis, I have only found three sections unconstitutional in their entirety; the same three sections that Judge Henderson and Judge Leon have each found unconstitutional. I have also, with Judge Leon, severed one section from a disclosure provision in Section 201; but this is no different from Judge Henderson severing a phrase from Section 323(e). Henderson Op. at Part IV.D.4. Itis also important to note that I have not 'drafted legislation.' *Id.* Nothing in my opinion rewrites BCRA in any manner whatsoever. I have accepted the statute on its face, finding its core provisions constitutional, with exceptions noted above as to some ancillary provisions.

[4] Almost exclusive reliance on the litigants' proposed findings of fact, which I have already indicated is a method of fact finding that I do not employ, should lead to a careful examination by the reviewing Court of the adopted findings. *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1404 (D.C. Cir. 1988) (per curiam) ('While 'the fact that the trial judge has adopted proposed findings does not, by itself, warrant reversal,' 'it does raise the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the con-

I have endeavored to develop a factual record that is commensurate with my legal approach. Accordingly, even though in regard to my Conclusions of Law I am in dissent on most of Title I, as well as in dissent with regard to the primary definition of electioneering communication in Title II, I have found it appropriate to adequately set forth the bases of my Factual Findings to assist the appellate review of the three-judge District Court's decisions, and because the nature of my legal positions demand it.

Having set forth the following preliminaries, I now turn to my Findings of Fact. While the record is exhaustive-replete with multiple sources for each point-I have focused on selecting from the complete record, facts that are probative in supporting my legal conclusions, distinguishing, where appropriate, between disputed and uncontroverted evidence. In short, I have exercised my discretion to be selective without sacrificing, to the best of my ability, my due diligence.[5]

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sideration it deserves.'') (quoting *Photo Elecs. Corp. v. England*, 581 F.2d 772, 777 (9th Cir.1978)); *id* at 1408.

[5] I am compelled to respond to Judge Henderson, who, without *any elaboration*, has criticized three of my Findings in particular as leaving her "with the definite and firm conviction that a mistake has been committed.' Henderson Op. at 67 n.55 (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citing my Findings ¶¶ 2.13; 1.82-1.83). In the examples Judge Henderson cites, she points to two summaries and an introduction; ignoring the surrounding Findings in support of the evidentiary record. I have in my Findings discussed in great detail the foundation and basis for the particular Findings she cites. *See infra* Findings ¶¶ 2.8, 2.8.1- 2.8.3.5; 1.73-1.81; 1.83.1-1.83.7. Judge Henderson does not assail that analysis nor does she in any way indicate a reasoned basis for her disagreement. As such, I must respectfully disagree with her view that a 'mistake has been committed' in regard to these three Findings of Fact.

In addition, although Judge Henderson determines that the record is largely superfluous to her legal conclusions, *see* Henderson Op. at 7 n.1 ('[a]lthough the actions before us have produced a large (*but probably*

TITLE I: BCRA NONFEDERAL MONEY ('SOFT MONEY') PROVISIONS

National Party Nonfederal Money Fundraising and Spending

1.1 As discussed both in the *per curiam* opinion and my own conclusions of law, FECA was silent on how to draw lines around money raised outside of FECA's source and amount limitations for political parties to spend on activities that were expected not to be used for the purpose of influencing a federal election. The FEC's opinions and rulemakings drew that line by permitting state and national party committees to pay for the nonfederal portion of their administrative costs and voter registration and turnout programs with monies raised under relevant state laws (not FECA), even if they permitted contributions from sources such as corporations and labor unions that were prohibited under FECA. As a result, national and state parties began to raise so-called 'soft money,' which described these nonfederal funds-not subject to FECA limits and restrictions-to pay for a share of election-related activities.

1.2 It is undisputed that over the past two decades the parties have raised and spent an increasing amount of nonfederal funds.

1.3 In 1980 the national Republican party spent roughly $15 million in soft money, the Democrats $4 million. This constituted 9% of total spending by the two national parties. In 1984 the amount of soft money spent by the national parties increased marginally to $21.6 million but it constituted a smaller share (5%) of total national party activity. In 1988 . . . . [p]arty soft money spending more than doubled to $45 million, which was 11% of national party totals . . . . By 1988, both parties had developed effective means of courting large soft money donors. After the election, Republicans revealed that they had received gifts of $100,000 each from 267 donors; Democrats counted 130 donors contributing $100,000 or more. . . . Mann[6] Report at 12-13 [DEV 1-Tab 1] (citations omitted).

1.4 The FEC began tracking nonfederal donations in the 1992 election cycle. During that cycle the Democratic and Republican parties together raised $86.1 million in nonfederal funds. During the 1994 election cycle the two major parties raised $101.6 million in nonfederal funds; during the 1996 election cycle they raised $263.5 million in nonfederal funds; during the 1998 election cycle they raised $222.5 million in nonfederal funds; during the 2000 election cycle they raised $487.5 million in nonfederal funds; and during the 2002 election cycle they raised $495.8 million in nonfederal funds. *See* FEC, News Release: Party Fundraising Reaches $1.1 Billion in 2002 Election Cycle (Dec. 18, 2002), *available* at http:// www.fec.gov/press/20021218party/20021218party.html.

1.4.1 There was

> a threefold increase in national party soft money activity between 1992 and 1996—from $80 million to $272 million. Soft money as a share of total national party spending jumped from 16% to 30%. Both parties and

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unnecessary) record") (emphasis added), she seemingly urges the Supreme Court to adopt her 'Alternative Findings of Fact' 'as an alternative to those of the majority,' *id.* at 67, and in conclusory fashion alleges mistakes in the Findings of Fact of the 'majority,' without any specificity. *Id.* Given that Judge Henderson's findings are 'an alternative to those in the majority,' I have not found it prudent to catalogue each instance where I disagree with her factual conclusions. I would simply observe that I respectfully disagree that Judge Henderson's 'Alternative Findings of Fact' are a more appropriate and accurate 'alternative to those [Findings of Fact] of the majority.' *Id.*

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[6] Thomas Mann is one of Defendants' experts. I note that neither Plaintiffs nor Defendants have challenged the qualifications of any of the designated experts in this case.

> their elected officials worked hard to solicit soft money donations from corporations, wealthy individuals, and labor unions. During the 1996 election the national party committees received . . . approximately 27,000 contributions from federally prohibited sources . . . Less than $10 million of the $272 million was contributed directly to state and local candidates in the 1996 cycle. . . . The two parties transferred a total of $115 million in soft money to state party committees, which financed two-thirds of state party soft money expenditures. . . . State party soft money expenditures for political communication/advertising jumped from less than $2 million in 1992 to $65 million in 1996.

Mann Report at 21-22 [DEV 1-Tab 1] (citation omitted). During the 1996 election cycle, the top 50 nonfederal money donors made contributions ranging from $530,000 to $3,287,175. *Id.* at 22. Three of the top 50 nonfederal money donors to the national political parties in 1996 were state political parties. Mann Expert Report Tbl. 5 [DEV 1-Tab 1].

1.4.2

> The total amount of soft money spent [in the 1998 midterm election cycle]—$221 million—was less than in 1996 but more than double the previous midterm election. And soft money as a share of total spending by the national parties jumped to 34%. The congressional party campaign committees put a premium on raising and spending soft money to advance the election prospects of their candidates. . . . Both national party committees had discovered they could finance campaign activity on behalf of their senatorial candidates with soft money in the form of 'issue advocacy.' The same pattern, more pronounced with the Democrats than the Republicans, was evident in the House campaign committees.

Mann Report at 23 [DEV 1-Tab 1] (citation omitted).

1.4.3

> [S]oft money financing of party campaigning exploded in the 2000 election cycle. Soft money spending by the national parties reached $498 million, now 42% of their total spending. Raising a half billion dollars in soft money [in 2000] took a major effort by the national parties and elected officials, but they had the advantage of focusing their efforts on large donors. . . .The top 50 soft money donors . . . each contributed between $955,695 and $5,949,000. Among the many soft money donors who gave generously to both parties were Global Crossing, Enron and WorldCom.

Mann Report at 24-25 [DEV 1-Tab 1] (citation omitted). 'A total of $280 million in soft money—well over half the amount raised by the six national party committees—was transferred to state parties [in 2000], along with $135 million in hard money.' *Id.* at 26. 'By contrast, the national parties contributed . . . only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000.' Mann Report at 26 [DEV 1-Tab 1] (citation omitted). The table below 'shows the trend in hard and soft money donations to the political parties since the 1991-1992 election cycle, when the FEC first began tracking these figures. Soft money donations rose from $86.1 million to $495.1 million between 1991-2 and 1999-2000, but hard money contributions rose markedly as well, from $445 million to $741 million.' Green[7] Expert Report at 30 [DEV 1-Tab 3].

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[7] Donald Green is one of Defendants' experts.

	1991-92	1993-94	1995-96	1997-98	1999-2000
Hard Money	$445.0	$384.7	$638.1	$445.0	$741.0
Soft Money	$86.1	$101.6	$262.1	$224.4	$495.1
Total	$531.1	$486.3	$900.2	$669.4	$1,236.1

Id. (Tbl. 1: National Party Receipts 1992-2000) (figures in millions) (based on 'FEC Reports Increase in Party Fundraising for 2000' release of May 15, 2001). Defendants' expert Donald Green points out that while the amount of money flowing into the campaign finance system has continued to grow, 'the lawmakers subject to its influence remain constant in number.' Green Rebuttal Report at 22 [DEV 5-Tab 1].

1.4.4 During the first 18 months of the 2001-2002 election cycle the parties reported nonfederal receipts of $308.2 million, which is a 21 percent increase over the same period during the 1999-2000 cycle. The FEC notes that this increase is 'all the more significant given that typically parties raise more in Presidential campaign cycles than in non-presidential campaigns.' Press Release, Federal Election Commission, Party Fundraising Growth Continues (Sept. 19, 2002) FEC141-0001 [DEV 28]. By October 16, 2002, the parties had raised over $421 million in nonfederal funds. News Release, Federal Election Commission, National Party Fundraising Strong in Pre-Election Filings, *available at* http://www.fec.gov/press/20021030partypre.html/20021030p arty pre.html.

The Rise of Nonfederal Money Spending

1.5 The figures above demonstrate that although nonfederal receipts and spending began to grow in the 1980s, this trend accelerated beginning in 1996.

1.6 Experts from both parties attribute the accelerated rise in nonfederal money spending to President Bill Clinton and his political consultant Dick Morris' use of such funds during the 1996 campaign to fund

> television ads designed to promote Clinton's reelection. While the ads prominently featured the President, none of these costs were charged as coordinated expenditures on behalf of Clinton's campaign. Instead the party paid the entire cost, based on a legal argument never before made: that party communications which did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising and financed, according to the FEC allocation rules, with a mix of soft and hard money.

Mann Report at 18 [DEV 1-Tab 1]. In the words of Plaintiffs' expert Raymond La Raja, this 'maneuver . . . catapulted soft money.' La Raja Cross Exam. Ex. 3 at 45 [JDT 15] (Raymond Joseph La Raja, American Political Parties in the Era of Soft Money (2001) (unpublished Ph.D. dissertation, University of California at Berkeley).

> The strategy to deploy soft money for [political advertising] is described in a series of memos from Dick Morris . . . . Morris says, 'I met with . . . attorney [s] . . . and explained the kinds of ads I had in mind. Fortunately, they said the law permitted unlimited expenditures by a political party for such 'issue-advocacy' ads. By the end of the race, we had spent almost thirty-five million dollars on issue-advocacy ads (in addition to about fifty million dollars on conventional candidate-oriented media), burying the Republican proposals and building a national consensus in support of the president on key issues.'

Magleby [8] Expert Report at 11 (quoting Dick Morris, Behind the Oval Office: Getting Reelected Against All Odds 141, 624 (1999)) [DEV 4-Tab 8]. 'The national Democratic party managed to finance two-thirds of its pro-Clinton 'issue ad' television blitz by taking advantage of the more favorable allocation methods available to state parties. They simply transferred the requisite mix of hard and soft dollars to party committees in the states they targeted and had the state committees place the ads.' Mann Expert Report at 22 [DEV 1-Tab 1]; *see also* La Raja Cross Exam. Ex. 3 at 14, 37-48 [JDT 15] (discussing the emergence of 'party soft money'); Finding ¶ 1.26.1 (discussing allocation regime).

1.7 Experts for both sides agree that '[i]t did not take the Republican party long to respond in kind by promoting Bob Dole and Jack Kemp.' Magleby Expert Report at 11 [DEV 4-Tab 8]; *see also* La Raja Cross Exam. Ex. 3 at 46 [JDT Vol. 15] ('The Dole-Kemp campaign responded to the Morris plan with its own party- based media strategy.').

> In May of 1996, the Republican National Committee announced a $20 million 'issue advocacy' advertising campaign. Its purpose, in the words of the chairman, would be 'to show the differences between Dole and Clinton and between Republicans and Democrats on the issues facing our country, so we can engage full-time in one of the most consequential elections in our history.' These presidential candidate-specific ads, like the Democratic ones, were targeted on key battleground states and financed with a mix of hard and (mostly) soft money. Both parties were now financing a significant part of the campaigns of their presidential candidates outside of the strictures of the FECA and well beyond the bounds of the 1979 FEC ruling that national parties may raise corporate and union funds and solicit unlimited donations from individuals 'for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office.'

Mann Expert Report at 20 (citation omitted) [DEV 1-Tab 1]; *see also infra* Findings ¶ 1.20.1 (Republican consultants' discussion about whether such advertisements met the 'issue advocacy test').

1.8 This approach for the use of nonfederal funds spilled over into congressional races. Mann Expert Report at 20 [DEV 1-Tab 1]; *see also* Lamson [9] Decl. ¶ 9 (describing both parties' national committees' use of nonfederal money to run advertisements in a race for Congress in Montana). 1.9 By the end of the 2000 election cycle, it was clear that although '[s] cholars might differ about how best to change the campaign finance system, . . . they could not avoid the conclusion that party soft money and electioneering in the guise of issue advocacy had rendered the FECA regime largely ineffectual.' Mann Expert Report at 26.

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[8] David Magleby is an expert for Defendants.

[9] Since January 2001, Joe Lamson has served as the Communications Director for the Office of Public Instruction of the State of Montana, a post he also held from early 1997 until January 2000. During 2000, Lamson managed Nancy Keenan's campaign to represent Montana's Congressional district. During 1996, Lamson managed Bill Yellowtail's campaign to represent Montana's Congressional district. From 1983 through 1996, Lamson served as the state director for United States Representative Pat Williams' Congressional office in Montana. During this same period, Lamson also managed Congressman Williams' election campaigns in Montana. From 1981 to 1983, Lamson was Executive Director of the Montana Democratic Party. Lamson provided a sworn declaration in *Colorado Republican Fed. Campaign Comm. v. FEC*, 41 F. Supp. 2d 1197 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir. 2000), *rev'd*, 533 U.S. 431 (2001). Lamson Decl. ¶¶ 2-3 [DEV 7-Tab 26].

The Rise of Nonfederal Money Is Not Related to 'Party Building'

1.10 'The parties' expanding use of soft money for the promotion or attack of particular candidates . . . . [runs] counter to the stated purposes of soft money which were to permit parties to raise unlimited amounts of money for 'party building' purposes, unlike hard money which is subject to the contribution limits given to the parties to help elect or defeat candidates.' Magleby Expert Report at 11 [DEV 4-Tab 8]. Magleby notes that '[t]he content of such ads does nothing to foster party infrastructure. Those who make the ads and manage the campaigns are consultants, who often do not even reside in the state where the election is taking place.' Magleby Expert Report at 49 [DEV 4-Tab 8]. Plaintiffs' expert La Raja concurs, finding that the political parties 'exploit federal campaign finance laws by using soft money for candidate support even though federal laws require them to use it for generic party building.' La Raja Cross Exam. Ex. 3 at 74-75; *see also* La Raja Cross Exam. at 67 [JDT Vol. 15] (finding that 'more non-federal funds in the allocation accounts are used for media rather than what I call party building').

1.11 As former Senator Brock[10] attests, nonfederal money

> by and large is not used for 'party building.' To the contrary, the parties by and large use the money to help elect federal candidates—in the Presidential campaigns and in close Senate and House elections. Far from reinvigorating the parties, soft money has simply strengthened certain candidates and a few large donors, while distracting parties from traditional and important grassroots work.

Brock Decl. ¶ 6 [DEV 6-Tab 9]; *see also* Boren[11] Decl. ¶ 4 [DEV 6-Tab 8] ('[S]oft money is not used purely for 'party building' activities'); Buttenwieser[12] Decl. ¶ 15 [DEV 6-Tab 11] (explaining that there is little difference between federal and nonfederal money beyond the source and amount limitations on federal money, because national and state political parties use nonfederal money to influence federal elections).

National Party 'Issue Advocacy' Campaigns Funded With Nonfederal Money

1.12 As the experts for both parties note, the rise in nonfederal money fundraising was spurred by the new-found ability to run 'issue advertisements' designed to affect federal elections.

1.13 Witnesses involved in the political process all agree that political party 'issue advocacy' includes communications, paid for in whole or part with nonfederal money, that attack or support a candidate by name while claiming to be an issue discussion outside the reach of federal election laws and do not use the *Buckley* express advocacy language referred to as 'magic words.'[13]

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[10] Senator William Brock he served as United States Representative from Tennessee from 1963 until 1971. From 1971 until 1977, he served as a United States Senator from the State of Tennessee. From 1977 until 1981, he served as Chairman of the Republican National Committee. Brock Decl. ¶ 2 [DEV 6- Tab13].

[11] Senator David Boren served as a United States Senator from Oklahoma from 1979-1994. Boren Decl. ¶ 2 [DEV 6-Tab 8]

[12] Peter Buttenwieser is a large contributor to the Democratic Party. He estimates that from the 1996 election cycle through the 2002 cycle, he has donated over $2.8 million in non-federal funds to national committees of the Democratic Party, including over $1.2 million in the 2000 election cycle. Also from the 1996 election cycle through the current cycle, he estimates that he and his wife have contributed approximately $100,000 per cycle in federal funds to federal candidate committees and other federal political committees not affiliated with political parties. During this same period, he has also hosted many hard money fundraising events for federal candidates in Philadelphia. Buttenwieser Decl. ¶ 6 [DEV 6-Tab 11].

Members of Congress and candidates for federal office agree that political party advertisements paid for with nonfederal funds often influence elections. *See* 146 Cong. Rec. H428 (Feb. 15, 2000) (Rep. Ganske) (noting that parties in the 1996 election cycle 'took . . . [nonfederal] money and they did not use it to just go out and get a voter registration guide, they used that money for issue ads on TV that were nothing less than full campaign attack ads. Independent surveys have shown that 80 percent of those, quote, issue ads were actually attack ads.'); Shays Decl. in *RNC* ¶¶ 7, 8 [DEV 68-Tab 40] ('The political parties ... use these [nonfederal] funds not for general party-building activities, but instead on television advertisements that are designed to influence the outcome of federal elections (and are often indistinguishable from candidate-sponsored campaign ads.'); Meehan Decl. in *RNC* ¶ 13 [DEV 68-Tab 30] ('I believe that 'issue ads' by party committees are designed to and do affect the outcomes of elections, that they defeat candidates, and that they drive up the costs of elections.'); Rudman[14] Decl. ¶ 12 [DEV 8-Tab 34] ('The parties use soft money to help federal candidates get elected by running so-called 'issue ads' funded with soft money in closely contested federal races.'); McCain Decl. ¶¶ 15, 17 (describing political party advertising demonstrating that political 'parties circumvent federal contribution and spending limits by running candidate ads under the guise of 'issue advocacy."); Chapin[15] Decl. ¶ 11

[DEV 6-Tab 12] (stating that the National Republican Campaign Committee ('NRCC') ran television advertisements during her 2000 Congressional campaign designed to influence the result of the election); Bloom Decl. ¶ 10 [DEV 6-Tab 7].

Political consultants agree as well. *See* Beckett[16] Decl. ¶ 11 ('The NRCC itself ran television ads in the 2000 Congressional campaign . . . . which as I recall were run in the two months prior to the general election . . . . [which]

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[13] *See Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

[14] Senator Warren Rudman was elected to the United States Senate from New Hampshire in 1980 where he served two terms. Rudman Decl. ¶¶ 1, 3 [DEV 8-Tab 34].

[15] Since early 2001, Linda Chapin has been the Director of the Metropolitan Center for Regional Studies at the University of Central Florida. Chapin Decl. ¶ 2 [DEV 6-Tab 12] received about 49% of the votes cast. *Id.* ¶ 4. From 1998 to 2000, Chapin directed the Orange County (Florida) Clerk's Office. *Id.* ¶ 2. Prior to that, Chapin was elected to two successive four-year terms, in 1990 and 1994, as County Chairman of Orange County. *Id.* The County Chairman is a strong executive position roughly equivalent to a mayoral office. *Id.* In recognition of Chapin's work as County Chairman, she received a Public Service Excellence Award from then- President Bill Clinton in 1997, and an Alumni Achievement Award from the Kennedy School of Government at Harvard University in 1999. *Id.* Prior to her tenure as County Chairman, she was elected to a four-year term on the Orange County Commission in 1986.

[16] Terry S. Beckett is a Democratic political consultant who has spent about 25 years working on political campaigns. Beckett Decl. ¶ 2 [DEV 6-Tab 3]. Beckett worked on the 1976 and 1980 Presidential campaigns of Jimmy Carter, the 1978 Bill Nelson Congressional campaign, and she ran Dick Batchelor's 1982 Congressional campaign. *Id.* Beckett also endeavored to establish a House Democratic Caucus within the Alabama legislature in the mid 1980's. *Id.* Beckett ran Gary Hart's 1988 Presidential campaign in Florida and Louisiana, and Dick Gephardt's 1988 Presidential campaign in Florida. *Id.* In 1986, Beckett did the polling on Linda Chapin's campaign for Orange County (Florida) Commissioner, and ran Chapin's 1990 and 1994 campaigns for Orange County Chairman. *Id.* Beckett also served as general consultant on Ms. Chapin's 2000 campaign to represent Florida's Eighth Congressional district, overseeing the work of the campaign manager and the media and polling consultants. *Id.* Beckett has also been involved in government having worked on the Executive Staff for Bob Graham from 1981-82 when he was the Governor of Florida and also serving as Ms. Chapin's Chief of Staff from 1991 to 1994 when she was County Chairman. *Id.* In addition, Beckett worked for a polling firm during the 1980s. *Id.*

were clearly intended to influence the election result.') & Ex. 3 (storyboards of two of these advertisements) [DEV 6-Tab 3]; *id.* ¶ 9 (describing Democratic Congressional Campaign Committee ('DCCC') efforts during the same election); Lamson Decl. ¶¶ 9, 17, Ex. 2-4 [DEV 7-Tab 26] (noting that political parties ran 'issue ads' designed to influence the outcome of the Montana Congressional election in both 1996 and 2000); Pennington[17] Decl. ¶ 10-11, 13-15 [DEV 8-Tab 31] (discussing how parties can and have used issue advocacy to affect federal elections). The DNC's political director also concurs. Stoltz[18] Decl. ¶ 16 [DEV 9-Tab 39] ('In my experience, issue ads affect elections. The ads can either demoralize or confuse voters so that they do not vote, or they can energize a voter base for or against a party or its

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[17] Rocky Pennington is a Republican political consultant. Pennington Decl. ¶ 2 [DEV 8-Tab 31]. He is the owner and President of three Florida companies engaged in political activities: Southern Campaign Resources, Direct Mail Systems, Inc., and Summit Communications. *Id.* Southern Campaign Resources, which Pennington founded in 1982, does general consulting primarily for Florida state campaigns, but has also done Congressional races in Florida, including Congressman Cliff Steams' first race in 1988 in Ocala, Bill Sublette's 2000 campaign in the Eighth Congressional district, and Congressman Jeff Miller's 2001 special election in the Panhandle. *Id.* Direct Mail Systems, founded in 1981, is a direct mail company with roughly 100 employees that has done fundraising and has sent voter contact mail for candidates, parties and interest groups in Florida and elsewhere. *Id.* Direct Mail Systems has also sent voter contact mail for some of Florida's Republican Congressional delegation, as well as for state Republican parties in many other states. Finally, Summit Communications, which Pennington founded in 2000, creates political advertising for television and radio and buys airtime for various campaigns, such as Congressman Miller's 2001 general election campaign. *Id.*

[18] Gail Stoltz has been employed as the Political Director of the DNC since May 2001. From 1998 through 2001, she worked for the Service Employees International Union as Government Affairs Director. Prior to this she worked as Political Director for the Democratic Senatorial Campaign Committee ('DSCC') and in various capacities for the Democratic National Committee ('DNC'). Stoltz Decl. ¶ 1.

candidates. During a presidential election year, the ads definitely make a difference when a presidential candidate is featured.').

In addition, experts for both sides agree that these 'issue ads' are intended to and do support the campaigns of federal candidates. *See* La Raja Cross Exam. Ex. 3 at 15 [JDT Vol. 15], 101-04; Magleby Expert Report at 40-42 [DEV 4-Tab 8].

Characteristics of National Party Nonfederal Campaign Advertisements

1.14 Many national political party committee 'issue ads' have focused on the positions, past actions, or general character traits of federal candidates, as part of efforts to influence federal elections.

Scripts of these advertisements confirm this. *See, e.g.*, ODP0021-01393 [DEV 70-Tab 48] (Republican National Committee's ('RNC') advertisement titled 'Pledge,' discussed *infra* Findings ¶ 1.20.2; ODP0023-02288 to 95 [DEV 70-Tab 48] (sample scripts of 'Keep More' with different sponsors identified (*i.e.* RNC, CRP, '[state party name]'). Some versions of the advertisement end with '[Member Name] kept his promise and voted for the middle-class tax cut. Clinton vetoed it,' while others end with 'Congressman [____] voted for the largest tax increase in American history . . . and against Republican efforts to roll it back.'); ODP0023-02308 [DEV 70-Tab 48] (national political party advertisement titled 'Fool Me Once,' beginning with the line 'Compare the Clinton rhetoric with the Clinton record,' discussing statements President Clinton made and actions on the same issues, and concluding with the line 'Tell President Clinton you won't be fooled again.'); ODP0023-02313 [DEV 70-Tab 48] (RNC advertisement titled 'Stripes,' which states in part: 'Bill Clinton . . . He's really something. He's now trying to avoid a sexual harassment lawsuit claiming he is on active military duty . . . . Active Duty? Bill

Clinton . . . He's really something.'); ODP0023-02314 [DEV 70-Tab 48] (script of the RNC's 'The Story,' discussed *supra* Finding ¶ 1.20.1); ODP0023-02326 (national political party advertisement titled 'More,' stating that 'Under President Clinton, spending on illegal[] [immigrants] has gone up. While wages for the typical worker have gone down . . . . Tell President Clinton to stop giving benefits to illegals, and end wasteful Washington spending.'); ODP0023-02389-92 [DEV 70-Tab 48] (three versions of a national political party advertisement titled 'Control' stating that 'Washington labor bosses and liberal special interest groups want to buy control of Congress,' and explaining why these groups think a named candidate 'will vote their way . . . to return to higher taxes and more wasteful spending'); ODP0029-00010-25 [DEV 70-Tab 48] (national political party advertisement titled 'High Taxes' and related documents. 'High Taxes' states that a Congressional candidate while 'in the state legislature . . . voted to raise corporate and personal income tax rates almost 18 percent. He even supports raising social security tax limits.'); ODP0029-00031 [DEV 70-Tab 48] (national political party advertisement titled 'Family Budget,' stating that a Congressional candidate raised taxes while in state and local government, and concluding: 'If you think *your* family pays *enough* in taxes . . . Call [_____]. Tell her to stop raising your taxes.') (emphasis in original); ODP0029-00041 [DEV 70-Tab 48] (national congressional committee advertisement supporting a candidate who 'knows you have better things to do with your money than pay higher taxes'); *see also* ODP0029-00114 [DEV 70-Tab 48]; ODP0029-00169 [DEV 71-Tab 48]; ODP0029-00177 to 79 [DEV 71-Tab 48]; ODP0029-00235 to 37 [DEV 71-Tab 48]; ODP0029-00329 [DEV 71-Tab 48]; ODP0029-00339 [DEV 71-Tab 48]; ODP0041-00177 to 78 [DEV 71-Tab 48]; ODP0041-00202 to 06 [DEV 71-Tab 48]; ODP0041-00220 to 23 [DEV 71-Tab 48]; ODP0041-00280 to 82 [DEV 71-Tab 48]; ODP0041-00352 to 54 [DEV 71-Tab 48]; ODP0041-01261 [DEV 71-Tab 48]; ODP0041- 01275 [DEV 71-Tab 48]; ODP0029-00138 to 47 [DEV 71-Tab 48]; ODP0036-01403 to 06 [DEV 71-Tab 48]; ODP0036-02931-32 [DEV 71-Tab 48]; ODP0041-00269-71 [DEV 71- Tab 48]; ODP0041-01024 to 27 [DEV 71-Tab 48]; ODP0041-01219 [DEV 71-Tab 48] (other political party advertisements that focus on the positions, past actions, or general character traits of federal candidates, and related documents).

1.15 Many political party committee 'issue ads' have compared the positions or past actions of competing federal candidates, portraying one position negatively and the other positively, as part of efforts to influence federal elections. Scripts provided to the Court confirm this fact. *See, e.g.*, ODP0023- 02387 [DEV 70-Tab 48] (national political party advertisement comparing candidate positions on issues, stating that 'Congressman [_____] voted for our plan to give families a $500 per child tax credit. . . . [Opponent] voted for Jim Florio's $2.8 billion tax increase which increased your income, sales and gas taxes.'); ODP0029-00149 [DEV 71-Tab 48] (national political party advertisement stating that one candidate 'support[s] the $500 per child tax credit and ending the tax penalty on married couples,' while the other 'voted against' those ideas); ODP0029-00159 [DEV 71-Tab 48] (national political party advertisement stating that one candidate 'wants Washington *bureaucrats* to decide what's right for our kids,' while the other 'supports local school control') (emphasis in original); ODP0041-00585-86 [DEV 71-Tab 48] (national congressional campaign committee advertisement stating that one candidate 'supports a program' that 'spends millions to hire more bureaucrats,' while the other 'supports proposals that spend less on bureaucrats and more on local schools'); ODP0041-00729-32 [DEV 71-Tab 48] (national political party advertisement stating that one candidate supports a welfare program that 'is restoring responsibility, pride and self-worth,' while the other 'voted *against* moving able-bodied welfare recipients from welfare to work') (emphasis in original); ODP0041-01152 [DEV 71-Tab 48] (national political party advertisement stating that one candidate 'doesn't support tax cuts for Idaho working families,' while the other 'has a different view'); ODP0041-01177 [DEV 71-Tab 48] (national political party advertisement stating that one candidate was 'the only member of Congress who did not want to tell parents when a child molester moved into their neighborhood,' while the other 'supports laws that protect our children and keep violent criminals in jail for their full terms'); ODP0041-01189 [DEV 71-Tab 48] (national political party advertisement stating that one candidate voted against a measure to 'abolish the tax code to force meaningful reform,' while the other 'wants to abolish the tax code, so we can create a tax code that is fairer and simpler for working families'); ODP0041-01198 [DEV 71-Tab 48] (national political party advertisement noting that one candidate 'supports tax cuts for working families,' while the other 'voted against billions worth of tax cuts for working families'); ODP0041-01266 [DEV 71-Tab 48] (national political party advertisement noting that one candidate 'pushed for tax increases' while the other 'knows lower taxes and responsible government spending are better policies'); ODP0041-01337 [DEV 71-Tab 48] (national political party advertisement noting that one candidate 'supports Senator Kennedy's ultra liberal plan to mandate spending increases of 25 billion dollars over the next five years,' while the other 'supports lower taxes').

1.16 Political parties aim their nonfederal money largely at competitive races. The political party committees spend millions of nonfederal dollars in competitive U.S. Senate races and hundreds of thousands of dollars or more in competitive U.S. House races. Magleby Report at 39 [DEV 4-Tab 8]. *See also* McConnell Dep. at 237 [JDT Vol. 19] ('I think every Senator realizes that the resources of the National Republican Senatorial Committee ['NRSC'] are going to be deployed to the . . . maximum extent in places where there are competitive races'); Bumpers[19] Decl. ¶ 4 [DEV 6-Tab 10] ('Party committees focus their resources on competitive races.'); McCain Decl. ¶ 22 [DEV 8-Tab 29] ('[P]arties generally focus their soft money spending first on taking care of the parties' current officeholdersand on the candidates running for open seats and after that on the challengers running against incumbents').

1.16.1 For example, television and radio electioneering advertising by political parties played an important role in the 2000 Congressional elections in Florida's Eighth District, 'a very close open-seat race.' Beckett Decl. ¶¶ 4, 9 [DEV 6-Tab 3] (noting that the winning candidate garnered 51% of the vote). Political parties on both sides of these campaigns ran so-called 'issue ads' that were financed partly with nonfederal money but clearly directed at influencing the outcome of the election. The DCCC ran television advertising praising Linda Chapin, the Democratic candidate, or criticizing the Republican candidates, through the Democratic State Party in order to take advantage of the more favorable hard money-soft money allocation ratios enjoyed by state parties.[20]

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[19] Senator Dale Bumpers served two terms as Governor of Arkansas, from 1971 to 1975. Bumpers Decl. ¶ 2 [DEV 6-Tab 10]. After his time as Governor, Bumpers served as a Member of the United States Senate, representing the State of Arkansas, from 1975 to 1999. *Id.* After he retired from the Senate, Senator Bumpers spent one year directing the Center for Defense Information, a nonprofit think-tank based in Washington, D.C. *Id.* He currently practices law in Washington D.C. at the law firm Arent Fox Kintner Plotkin & Kahn, PLLC. *Id.* ¶ 3.

[20] One advertisement run during the final 60 days of the election campaign, paid for by the DCCC through the Florida Democratic Party, attacked Chapin's challenger, stating the following:

> Announcer: 'I'm pro-gun.' That's how he described himself to the Orlando Sentinel. Pro-gun. He wants to get rid of the Brady Bill, the common-sense law that says we should just wait 5 days before purchasing a handgun. Pro-gun. He even opposes mandatory trigger locks to keep children safe from harm. 'I'm pro-gun.' He's Ric

Beckett Decl. ¶ 9, Ex. 1 [DEV 6-Tab 3]; Chapin Decl. ¶ 9 [DEV 6-Tab 12]; *see also* Bloom Decl. ¶ 10, Ex. 1-1, 1-4, (describing a similar situation for the 2000 election campaign in Florida's 22nd Congressional District) [DEV 6-Tab 7]. The NRCC and the Florida Republican Party also ran television advertisements in the two months prior to the general election, most of which criticized Chapin's record or positions, and which witnesses testify were clearly intended to influence the election results.[21] Chapin Decl. ¶ 10, Ex. 2 [DEV 6-Tab 12]; Beckett Decl. ¶ 10, Ex. 2 [DEV 6-Tab 3]; Pennington Decl. ¶ 14, Ex. 3 [DEV 8-Tab 31]; *see also* Bloom[22] Decl. ¶ 11, Ex. 2 (Republican party ads in 2000 Florida 22nd District Congressional race) [DEV 6-Tab 7].

> Keller, and you should tell him to support sensible gun safety for change.

Chapin Decl. ¶ 9 & Ex. 1-2 [DEV 6-Tab 12]; Beckett Decl. ¶ 9-DEV 6-Tab 3].

[21] One advertisement paid for by the NRCC ran within 60 days of the election and stated the following: Announcer: It was Tyson vs. McNeeley, the fight shown on Pay-Per-View, bought and paid for by the county jail system. Linda Chapin's county commission ran the jail system that paid for Cable TV for convicts at [its] work-release center. Under Chapin, Convicts also got new TVs and VCRs. The Sentinel wrote cells are carpeted. The day room has padded furniture, such is life for hundreds of Orange County Jail prisoners. Ask Chapin why convicts got Cable TV.

Chapin Decl. ¶ 11 & Ex. 3-2 [DEV 6-Tab 12]; Beckett Decl. ¶ 11; Pennington Decl. ¶ 14.

[22] Elaine Bloom is currently engaged in consulting, public speaking, and community activities. Bloom Decl. ¶ 2 [DEV 6-Tab 7]. In 2001, Bloom was a candidate for Mayor of Miami Beach, Florida. *Id.* In 2000, Bloom was the Democratic candidate in the general election to represent Florida's 22nd Congressional district, running against the incumbent Republican Clay Shaw, who had served in Congress for nearly 20 years. *Id.* (Shaw won the race by approximately 500 votes out of over 200,000 cast). Prior to the 2000 race, Bloom served as a member of the Florida House of Representatives for over 18 years, from 1974 to 1978 (representing Northeast Dade County) and from 1986-2000 (representing Miami

1.16.2

> Most interest groups, in contrast [to political parties], seek to build relationships with officeholders as a way of improving access to the legislative process and lobbying their position. In political science, there is strong empirical support for the theory that interest groups allocate resources primarily to pursue the 'access' strategy, meaning they give to candidates who are most likely to win office, which is usually the incumbents (see, for example, Herrnson 2000). Political parties, however, allocate resources for electoral strategies, meaning they contribute money to a party candidate who is in a potentially close election.

La Raja Expert Report ¶ 14 [RNC Vol. VII].

1.17 'Almost 92% of party ads in the 2000 election never even identified the name of a political party, let alone encouraged voters to register with the party, to volunteer with the local party organization, or to support the party.' *Buying Time 2000* at 64 [DEV 46]. Defense Expert Magleby concurs, finding 'only 15 percent of the ads in 1998 and 7 percent of the ads in 2000 mentioned the party by name in the ad, except in the tag line indicating which party committee paid for the ad.' Magleby Expert Report at 49 [DEV 4-Tab 8].

1.18 Out of the estimated $25.6 million spent by political parties on advertisements in the 1998 election cycle, $24.6 million went to fund advertisements that referred to a federal candidate. *See* Krasno & Sorauf[23] Expert Report at Table 1. Out of 44,485 commercials, 42,599 referred to a federal

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Beach and Miami). *Id.* Bloom was Speaker Pro- Tempore of the Florida House from 1992 to 1994, and also served as chair of several legislative committees, including the Health Care Committee, the Joint Legislative Management Committee, the Joint Legislative Auditing Committee, and the Tourism and Cultural Affairs Committee. *Id.*

[23] Jonathan Krasno and Frank Sorauf are experts for Defendants.

candidate. *Id.* Viewers perceived 94 percent of these advertisements as electioneering in nature. *Id.* at Table 7.

1.19 Plaintiffs' own experts and witnesses testify that '[i]ssue advertising outside the context of electioneering by political parties is rare.' RNC expert Nelson Polsby Dep. in *RNC v. FEC*, 98-CV-1207 (D.D.C) (hereinafter '*RNC*') Ex. 3, at 5 [DEV 66-Tab 5]. In this case, the Plaintiffs' expert, Professor Raymond La Raja, acknowledges that 'issue advertisements' are intended to and do support the campaigns of federal candidates. La Raja Cross Exam. Ex. 3 at 14-15 [JDT Vol. 15] ('[I]ssue ads, however, have been designed with the intent of boosting the campaigns of targeted candidates. . . . Rather than use soft money to shore up weak state and local organizations, or enforce party discipline in government, parties invest primarily in issue ads that help candidates.') [JDT Vol. 15]; La Raja Decl. ¶ 16(b) [RNC Vol. VII] ('Political parties use nonfederal money to develop and disseminate political messages.'). RNC political operations director Terry Nelson[24] testifies that the RNC engages in 'issue advocacy in order to achieve one of our primary objectives, which is to get more Republicans elected.' Nelson Dep. at 191 [JDT Vol. 24]. This conclusion is echoed by Defense Expert Magleby. Magleby Expert Report at 45 [DEV 4-Tab 8] ('The content, tactics and strategy [of political party advertisements] are generally indistinguishable from the candidate campaigns, except that party campaign communications are generally more negative in tone.')

1.19.1 An RNC official provides examples of advertisement campaigns he claims the RNC ran for 'the exclusive purpose of influencing the legislative and policy debate.' Josefiak[25] Decl. ¶ 91 [RNC Vol. I]. These campaigns dealt with the issues of the balanced-budget amendment, welfare reform, and education. *Id.* One of these advertisements' purpose

> was to communicate the Republican Party's position that the federal government must control its reckless appetite for deficit spending. This particular advertisement featured President Clinton, and included numerous clips of him stating a different number of years in which he would balance the budget. The advertisement explained, 'Talk is cheap. Double talk is expensive. Tell Mr. Clinton to support the Balanced Budget Amendment.

Id ¶ 91(c). Josefiak calls this advertisement 'one of the most memorable and effective broadcast advertisements in [RNC] history.' *Id.* This commercial was run in May 1996, *id.*, the same time the RNC was running very similar so-called 'issue advertisements' attacking President Clinton as part of an effort to assist the Dole presidential campaign which was low on funds, *see infra* Findings ¶ 1.20. RNC advertisements addressing welfare reform were also run in the summer of 1996, 'comparing Clinton's rhetoric on welfare reform with his record on welfare reform.' Josefiak Decl. ¶ 91(d)[RNC Vol. I]. Comparing President Clinton's statements with his record was a major theme of RNC advertisements run during this period in aid of the Dole campaign. *See infra* Findings ¶¶ 1.20, 1.20.2. Another RNC advertisement ran in October 2002, the month before a federal election, 'nationwide in support of the Republican Party's education agenda,' and had the following script:

> Male: Every child can learn . . .
>
> Female: . . . and deserves a quality education in a safe school.
>
> Male: But some people say some children can't learn . . .

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[24] Terry Nelson is the RNC's Deputy Chief of Staff and Executive Director of Political Operations. Nelson Dep. at 8-9 [JDT Vol. 24]

[25] Thomas Josefiak is Chief Counsel of the RNC. Josefiak Decl. ¶ 1 [RNC Vol. I].

Female: . . . so just shuffle them through.

Male: That's not fair.

Female: That's not right.

Male: Things are changing. A new federal law says every child deserves to learn.

Female: It says test every child to make sure they're learning and give them extra help if they're not.

Male: Hold schools accountable. Because no child should be in a school that will not teach and will not change.

Female: The law says every child must be taught to read by the 3rd grade. Because reading is a new civil right.

Male: President Bush's No Child Left Behind Law.

Female: The biggest education reform and biggest increase in education funding in 25 years. Male: Republicans are working for better, safer schools ...

Female: . . . so no child is left behind.

Male: That's right . . . Republicans.

Announcer: Learn how Republican education reforms can help your children. Call 1-800-843-7620. Help President Bush and leave No Child Behind.

Paid for by the Republican National Committee.

Josefiak Decl. ¶ 91(e) & RNC Ex. 2428 [RNC Vol. I]. The decision by the RNC to run this advertisement, about legislation that had already passed, within one month of a federal election raises questions about whether promoting education policy was the only goal of this advertisement.

These presumably are the best examples the RNC had of its 'genuine issue advocacy.' I find that two of these

commercials, when viewed in context, clearly had an electioneering purpose in addition to any policy goal. The third, concerning education, may also have sought to promote Republican candidates. These examples reinforce the determination of the RNC's own experts: genuine issue advocacy on the part of political parties is a rare occurrence. *See supra* Findings ¶ 1.19.

1.20 Political parties also engage in 'issue advocacy' to help their candidates whose campaigns are low on funds. For example, the RNC spent $20 million on issue advertisements from March 18, 1996, through the Republican National Convention in August, designed to boost Senator Dole's image at a time when he had virtually run out of federal matching primary funds. The RNC paid for a portion of these issue advertisements with nonfederal funds, including the costs of creating and/or disseminating advertisements that attacked President Clinton's record on welfare reform, taxes, and budgetary policy. Thompson Comm. Report at 4014-16, 7520, 8294; Annenberg Report 1997 at 66; Huyck[26] Decl. in *Mariani v. United States,* 3: CV-1701 (M.D. Pa) (hereinafter *Mariani*) ¶¶ 3, 5 [DEV 79-Tab 60]; *see also* Huyck Decl. in *Mariani* Attach. A [DEV Supp.-Tab 9] (text of advertisements paid for by the RNC and other Republican party committees in part with nonfederal money).

The RNC conducted a detailed analysis of several advertisements it was planning to run in various markets. The advertisements consisted of two themes: build up then-Senator and Republican presidential candidate Bob Dole, and attack President Bill Clinton. These advertisements were tested in focus groups to see the effect they had on undecided voters. The advertisement used to build up Senator Dole told his life story and never mentioned the words 'vote for,' 'elect,' or any of the 'magic words' of express advocacy. The second set of advertisements showed President Clinton speaking on a certain issue, then publicly stating the opposite. All of the commercials were tested to see which would give help Senator Dole and hurt President Clinton in the polls. Memorandum to Haley Barbour from Charlie Nave and Joel Mincey, dated May 28, 1996, FEC MUR 4553, Fabrizio Dep. Ex. 5 [DEV 55-Tab 113] (INT011830); FEC MUR 4553, Fabrizio Dep. at 83-94 [DEV 55-Tab 113] (despite working as a consultant for Senator Dole, Fabrizio McLaughlin and Associates were sharing their data with the RNC, NRSC, and NRCC).

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[26] Pat Huyck was the RNC's Director of Accounting as of 1999. Huyck Decl. in *Mariani v. United States,* 3: CV-1701 (M.D. Pa) ¶¶ 3, 5 [DEV 79-Tab 60].

1.20.1 One example from this effort is 'The Story':

> Audio of Bob Dole: We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in.
>
> Voice Over: Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called ... he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.
>
> Audio of Bob Dole: I went around looking for a miracle that would make me whole again.
>
> Voice Over: The doctors said he'd never walk again. But after 39 months, he proved them wrong.
>
> Audio of Elizabeth Dole: He persevered, he never gave up. He fought his way back from total paralysis.
>
> Voice Over: Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system.

> The principle of discipline to end wasteful Washington spending.
>
> Voice of Bob Dole: It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.

Fabrizio Dep. Ex. 2; McCain Decl. ¶ 15. The RNC paid for 'The Story,' in part with nonfederal money, and it was intended to help Senator Dole in the Presidential election. Huyck Decl. in *Mariani* ¶ 3 [DEV 79-Tab 60]; FEC MUR 4553, Fabrizio Dep. at 50 [DEV 55-113]; McCain Decl. ¶ 15 [DEV 8-Tab 29].

The RNC's Curt Anderson and Wes Anderson wrote to the RNC Chairman regarding the Dole 'Story' advertisement, stating: 'We could run into a real snag with the Dole Story spot. Certainly, all the quantitative and qualitative research strongly suggests that this spot needs to be run. Making this spot pass the issue advocacy test may take some doing.' ODP0025-02018-20 [DEV 70-Tab 48]. Senator Levin commented: '[a]ny reasonable person looking at that ad at that particular time in the Presidential season would say: It's not an ad about welfare or wasteful spending; it is an ad about why should we elect that particular nominee.' 145 Cong. Rec. S12747 (1999) (Sen. Levin). Senator Dole himself stated that 'The Story' 'never says I'm running for President. I hope that it's fairly obvious since I'm the only one in the picture.' Center for Responsive Politics, A Bag of Tricks: Loopholes in the Campaign Finance System (1996) at 13, ODP0018-00172 [DEV 69-Tab 48].

1.20.2 Another example from the RNC's 1996 issue advocacy campaign is 'Pledge'

> Clinton: I will not raise taxes on the middle class.
>
> Announcer: We heard this a lot.

> Clinton: We gotta give middle class tax relief, no matter what else we do.
>
> Announcer: Six months later, he gave us the largest tax increase in history. Higher income taxes, income taxes on social security benefits, more payroll taxes. Under Clinton, the typical American family now pays over $1,500 more in federal taxes. A big price to pay for his broken promises. Tell President Clinton: You can't afford higher taxes for more wasteful spending.

Annenberg Report 1997 at 66; *see also* Huyck Decl. in *Mariani* ¶¶ 3 & Attach. A [DEV 79-Tab 60].

1.21 The political parties understand that their issue advocacy campaigns affect federal elections, and they sponsor them with that purpose. This fact is evident from the 1998 'Operation Breakout' issue advocacy campaign mounted by the NRCC in cooperation with the RNC. 'Operation Breakout' was touted as an effort to 'ensure that the [Republican] party not only maintains, but expands our majorities in Congress.' ODP0031-00299 [DEV 71-Tab 48] (September 25, 1998, letter from RNC Chair Nicholson to donor thanking him for his donation to 'Operation Breakout'); *see also* ODP0033-00534 [DEV 71-Tab 48] (RNC Solicitation letter for 'Operation Breakout,' describing it as an effort to 'hold onto our majority in the House').

1.22 The nature of the political parties' issue advertisements, detailed *supra*, demonstrates what any observer of politics has come to know: political party 'issue advocacy' campaigns are targeted at federal elections, particularly competitive races, and are intended to, and do affect the outcome of those contests.

National Parties Expend A Large Proportion of their Nonfederal Funds for 'Issue Advocacy'

1.23 The national political parties spend a large proportion of their budgets on 'issue advertisements' that are designed to

help elect federal officeholders and candidates. In 2000, for example, the RNC spent an estimated $70-75 million dollars on the production and broadcasting of television and radio advertisements, including both issue advocacy and coordinated expenditures. Oliver[27] Dep. at 148-49 [DEV Supp.-Tab 1]. *Id.* 'During the 2000 presidential election year, the largest single portion of the DNC budget was used for issue advertising.' Marshall Decl. ¶ 3 [DEV 8-Tab 28].

1.24 Defense expert David Magleby's study estimates that 'over half, and sometimes as much as three-quarters, of soft money expenditures go to broadcast advertising.' Magleby Expert Report at 49 [DEV 4-Tab 8].

1.25 As Defendants' expert Donald Green, relying on an article by Plaintiffs' expert La Raja, observes:

> [T]he original exemptions for soft-money were justified partly on the grounds that get-out-the-vote activity would help strengthen parties. As it happened, only a small fraction of the soft money (or hard money, for that matter) that flowed to state and national parties was spent on voter mobilization activity, even broadly conceived to include direct mail and commercial phone banking. According to the classification system presented by La Raja and Jarvis-Shean (2001, p.3), 8.5% of national party soft money expenditures went to 'mobilization' and 'grassroots.' The figures for state and local parties are each 15%.

D. Green Report at 14 n.17 [DEV 1-Tab 3] (citing Raymond La Raja and Elizabeth Jarvis-Shean, Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections. (Unpublished manuscript: Institute of Governmental Studies and Citizens' Research Foundation 2001).

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[27] John Oliver is Deputy Chairman of the RNC.

National Parties Funnel Nonfederal Funds Through State Parties for the Purchase of Advertisements Designed to Affect Federal Elections

1.26 The evidence clearly demonstrates that a large proportion of nonfederal funds transferred from the national to the state parties is targeted for the purchase of specific issue advertisements designed by the national parties. These advertisements are overwhelmingly intended to affect federal elections. This is done in large part because the state parties have better federal/nonfederal allocation ratios which allows such state-bought advertisements to be purchased with a greater proportion of nonfederal funds.

1.26.1 Defense expert Magleby explains how the FEC's allocation regime makes nonfederal fund transfers to the state parties attractive to the national parties.

> Parties can stretch their soft money even further by transferring soft and hard money to state parties where they can achieve a better ratio of soft to hard dollars than if they spent the money themselves. This is because the ratio of soft to hard dollars for party spending if done by the national patty committees is 35 percent soft and 65 percent hard for presidential years, and 40 percent soft and 60 percent hard for off years, but if done by state parties the ratio of soft to hard dollars is greater. The reason for this difference is state parties are allowed to calculate their soft/hard ratio based on the ratio of federal offices to all offices on the ballot in any given year. Both political parties have found spending soft money with its accompanying hard money match through their state parties to work smoothly, for the most part, and state officials readily acknowledge they are simply 'pass throughs' to the vendors providing the broadcast ads or direct mail.

Magleby Expert Report at 37 [DEV 4-Tab 8]. Other witnesses and evidence support this contention, which no one disputes.

See, e.g., Marshall Decl. ¶ 3 [DEV 8-Tab 28] (testifying that in 2000 the DNC transferred funds to the state parties to take advantage of their allocation rates); *see also* 11 C.F.R. § 106.5(b)(2)(i) (2001) (during presidential election years national party committees required to pay for their mixed activities with at least 65 percent in federal funds); *id.* at § 106.5(b)(2)(ii) (during nonpresidential election years national party committees required to pay for their mixed activities with at least 60 percent in federal funds).

1.26.2 The national political parties take advantage of this allocation regime when planning and executing their advertising budgets. One RNC memorandum contains a chart which

> clearly demonstrates what we already clearly know, that any media we place in the target presidential states should be placed through state parties. The average ballot allocation in the top 17 target states is 37% federal—63% non- federal, this obviously contrasts very well with our 65% federal—35% non- federal allocation.

RNC Memorandum dated March 18, 1996, titled 'Ballot Allocation of Target States' ODP0025-02720 to 21 [DEV 70-Tab 48]. The memorandum concludes that by using the state political parties, rather than directly making the purchase, the RNC would save $2.8 million in federal funds on a $10 million media buy. *Id. see also* ODP0021-1365 to 1367 [DEV 70-Tab 48] (memorandum from Haley Barbour to the California House Republicans, discussing the need to make a media buy in California and stating that '[t]o accomplish this buy, the [RNC] would transfer funds to the California Republican Party, which would actually buy the advertising. Under FEC regulations, the California Republican Party must pay for the advertising with one-third FEC contributions and two thirds nonfederal dollars'); McConnell Dep. at 267-77 [JDT Vol. 19] (stating that the NRSC prefers to transfer funds to state parties who then purchase NRSC advertisements with a more favorable federal/nonfederal fund allocation ratio); Nelson Dep at 76-77 [JDT Vol. 24] (stating that purchasing political advertisements through state parties has two advantages: (1) better federal/nonfederal fund allocation ratios and (2) 'having [a] state disclaimer [on the advertisement] is generally better than having a national disclaimer on it'); Marshall Decl. ¶ 3 [DEV 8-Tab 28] (noting that in 2000, the largest single portion of the DNC budget was used for issue advertising, but that '[t]he DNC typically did not expend money for these issue ads itself, but instead transferred both federal and non-federal money to the state parties to make these expenditures'); ODP0023-02358 to 65 [DEV 70-Tab 48] (RNC tally of '1996 Media Buys,' listing advertisements purchased, price, and the amount of federal and RNSEC funds used); ODP0023-03560 to 660 [DEV 70-Tab 48] (RNC report of 1996 fund transfers to state parties used for 'party building/media buy'); ODP0025- 01560 [DEV 70-Tab 48] (memorandum from the Republican National Finance Committee dated May 24, 1996, titled 'California T.V. Money,' discussing the need to raise $4 million in nonfederal funds in two weeks which would then be transferred to the CRP in order to '*get on the air and stay on the air* for the next three months in CA') (emphasis in original); *supra* Findings ¶¶ 1.6 (in 1996 the DNC financed two-thirds of its Clinton presidential campaign issue advocacy through state party transfers), 1.4.3 (Mann) (over half of the nonfederal money raised by the national party committees was transferred to the state parties during the 2000 election cycle).

1.26.3 The national political party committees transferred $9,710,166 in federal funds to state political party committees during the 1992 election cycle, $9,577,985 during the 1994 election cycle, $49,967,893 during the 1996 election cycle, $30,475,897 during the 1998 election cycle, and $131,016,957 during the 2000 election cycle. The national political party committees transferred $18,646,162 in nonfederal funds to state political party committees during the 1992 election cycle, $18,442,749 during the 1994 election cycle, $113,738,373 during the 1996 election cycle, $69,031,644 during the 1998 election cycle, and $265,927,677 during the 2000 election cycle. Biersack[28] Decl. Tbls. 4, 8 [DEV 6-Tab 6].

1.26.4 State political parties use a large portion of the transferred nonfederal money to finance public communications that support or oppose a federal candidate. *See* Bowler[29] Decl. ¶ 15 (explaining that '[t]he majority of [national transfers to the CDP] were for issue advocacy'). According to Plaintiffs' expert La Raja, '[i]t appears that both parties . . . use soft money transfers primarily to execute national campaign strategy through state parties.' La Raja Cross Exam. Ex. 3 at 103 [JDT Vol. 15]. La Raja finds that 'more non-federal funds in the allocation accounts are used for media rather than what I call party building,' La Raja Cross Exam. at 67 [JDT Vol. 15] (La Raja's definition of 'party building' does not include administrative spending); La Raja Expert Report ¶ 22 [RNC Vol. VII] (finding that in 2000, 44 percent of transferred nonfederal funds were used for media expenditures and 30 percent for administrative overhead). La Raja concludes that 'state parties invest most soft money from the national parties in federal races,' but notes that 'these investments have considerable effects on races further down the ticket.' La Raja Cross Exam. Ex. 3 at 139 [JDT Vol. 15] (La Raja dissertation) [JDT Vol. 15]; *see*

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[28] Robert W Biersack served as the Supervisory Statistician for the FEC from 1983 to February 2002. As the Supervisory Statistician, he was responsible for evaluating the quality, reliability, and validity of information contained in the FEC disclosure databases. Currently, he is Deputy Press Officer for the FEC, a position he has held since February 2002. Biersack Decl. ¶ 1 [DEV 6-Tab 6].

[29] Kathleen Bowler is the Executive Director of the CDP. Bowler Decl. ¶ 1.

also La Raja Cross Exam. 17-18 (stating that he stands by the conclusions reached in his dissertation).

1.26.4.1 A good example of this system comes from the Republican Party of New Mexico ('RPNM'). A 1998 financial statement from the state party shows that it received revenues of $1,524,634 in nonfederal transfers from other Republican organizations, $1,110,987 in individual contributions, and just $389,552 in federal transfers from Republican organizations. The RPNM spent over one-third of its 1998 revenues, $1,062,095, on 'issue advocacy—television, radio and mail.' INT810-1605 to 12 (RNC NM0406326—33) [DEV 114].

1.26.5 These issue advertisements funded by nonfederal transferred funds are mainly intended to support federal candidates. Plaintiffs' expert La Raja notes that 'one of the goals' of national party allocation of nonfederal funds to state parties is to help federal candidates in close elections, and that his 'impression' is that it is their primary goal. La Raja Cross Exam. at 73-74 [JDT Vol. 15]; *see also* Magleby Expert Report at 39 ('[National party s]oft money is largely aimed at competitive [federal] races.'). La Raja finds that the parties 'are highly functional rather than responsible. Rather than use soft money to shore up weaker organizations, or reward state party members for moving closer to national party ideology, the national organizations use soft money like hard money—to pursue the short-term goal of winning elections.' La Raja Cross Exam. Ex. 3 at 75 [JDT Vol. 15]; *see also id.* at 15 (stating that parties invest soft money primarily 'in issue ads that help candidates'). According to La Raja, the national parties' spending of nonfederal funds is proof that 'they are functional parties dedicated to winning elections.' *Id.* at 25; *see also* La Raja Cross Exam. Ex. 1 (La Raja Decl.) ¶ 11(a) ('American political parties have focused primarily on winning elections . . . .') [JDT Vol. 15].

1.26.6 Representatives of the Congressional committees acknowledge that fund transfers from their committees to state parties are used primarily for federal election advertising. *See* Jordan[30] Decl. ¶ 68 [DEV 7-Tab 21] ('In my experience, the large majority of the DSCC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. Frequently, these communications refer to Democratic Senate candidates or their Republican opponents, while not expressly advocating any candidate's election or defeat.'); Vogel[31] Decl. ¶ 63 [DEV 9-Tab 41] ('In my experience, the large majority of the NRSC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. Frequently, these communications refer to Republican Senate candidates or their Democratic opponents, while not expressly advocating any candidate's election or defeat.'); McGahn[32] Decl. ¶ 55 [DEV 8-Tab 30] ('In my experience, the large majority of the NRCC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. . . . Frequently, these communications refer to Republican House candidates or their Democratic opponents, while not expressly advocating any candidate's election or defeat.'); Wolfson[33] Decl. ¶ 63 [DEV 9-Tab 44] ('In my experience, the large majority of the DCCC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. Frequently, these communications refer to Democratic House candidates or their Republican opponents, while not expressly advocating any candidate's election or defeat.') *see also* La Raja Cross Exam. Ex. 3 at 69 (La Raja dissertation) [JDT Vol. 15] ('It would be particularly surprising for congressional campaign committees to venture outside their traditional scope of helping candidates and invest in state party organizations.').

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[30] James Jordan is the Executive Director of the DSCC. Jordan Decl. ¶ 1 [DEV 7-Tab 21].

[31] Alexander Vogel is General Counsel for the NRSC. Vogel Decl. ¶ 1 [DEV 9-Tab 41].

[32] Donald McGahn is General Counsel for the NRCC. McGahn Decl. ¶ 1 [DEV 8-Tab 30].

[33] Howard Wolfson is Executive Director of the DCCC. Wolfson Decl. ¶ 1 [DEV 9-Tab 44].

1.26.7 Representatives of the congressional campaign committees also admit that they retain control over the advertisements their nonfederal money transfers are used to purchase. Jordan Decl. ¶¶ 72-73 [DEV 7-Tab 21] ('When the DSCC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with media consultants, who are generally retained by the state party at the request or suggestion of the DSCC, and then provides the communications to the state party, together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The DSCC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by DSCC counsel and DSCC senior employees.'); Vogel Decl. ¶ 67-68 [DEV 9-Tab 41] ('When the NRSC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with the state party and media consultants, who are generally retained by the state party at the request or suggestion of the NRSC, and then provides the communications to the state party, together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The NRSC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by NRSC counsel and NRSC senior employees.'); McGahn Decl. ¶¶ 58-59 ('When the NRCC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with the state party and media consultants, and then provides the communications to the state party, together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The NRCC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by me, as NRCC counsel, and NRCC senior employees.'); Wolfson Decl. ¶¶ 66-67 ('When the DCCC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with media consultants, who are generally retained by the state party at the request or suggestion of the DCCC, and then provides the communications to the state party together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The DCCC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by DCCC counsel and DCCC senior employees.').

1.26.7.1 On September 28, 1998, NRSC Executive Director Steven Law wrote then-NRSC Chairman Senator Mitch McConnell recommending that the NRSC fund an issue ad playing off an article that appeared in Nevada's largest newspaper. Democratic Senatorial candidate Harry Reid 'got bad reviews for an over-the- top, hostile performance, suggesting a line of attack that builds on our six-month-long message that Harry Reid says one thing in Nevada and does the opposite in Washington. . . . If we went in this direction, I would suggest running this spot for one week at 1000 [gross ratings point], to be followed with our last ad in the Nevada issue advocacy campaign, on lawyers' fees.' ODP0036-02931-32 [DEV 71-Tab 48]. Law's idea was later implemented in an advertisement paid for by the Republican State Central Committee of Nevada. ODP0036-01403 to 06 [DEV 71-Tab 48].

1.26.7.2 Documents in the record also demonstrate that the state political parties are merely conduits between the national political parties and their media consultants. *See, e.g.*, CRP 00367 [IER Tab 28] (fax from the NRCC to the CRP's Victory 2000 project proving CRP 'wiring info' and informing the state party that the '[m]oney will be in your account today . . . . Please wire back to Strategic Media'); CDP 02095-101, 2103-04, 2106 [IER Tab 12] (wire transfer instructions from the DNC to the CDP for media buys); CDP 02984-89 [IER Tab 12] (detailing transfer of funds from DCCC to CDP for media buy).

1.26.7.3 The RNC and DNC also transfer nonfederal funds to state parties to pay for advertisements over which the national party committees retain control. *See* Castellanos Dep. (Sept. 27, 2002) at 111-12 (stating that when working on advertisements for state parties, National Media dealt with an RNC representative, not a state party member); Marshall Decl. ¶ 4 (noting that the DNC normally approved the content of the advertisement and the amount of money to be spent before calling the state party in question 'to let it know that an ad was coming'); Josefiak Dep. at 97-98 [JDT Vol. 11] (acknowledging that the RNC transfers funds to state parties to pay for RNC advertisements); Huyck Decl. in *Mariani* ¶ 4 (stating that in 1995-1996 the RNC transferred funds to state party committees to pay for issue advertisements related to the 1996 Presidential election campaign) [DEV 79-Tab 60]; Hazelwood[34] Dep. at 118- 19 (RNC transfers funds to state parties to pay for issue advertisements). In 2000, the RNC raised over $254 million, a majority of which was transferred to the state parties for various activities. Josefiak Dep. at 76 [JDT Vol. 11]; *see also* FEC, National Party Transfers to State/Local Committees: January 1, 1999 to December 31, 2000, *available at* http://www.fec.gov/press/ 051501party fund/tables/nat2state.html (during the 2000 election cycle the RNC made transfers of approximately $129 million—$93.2 million in nonfederal funds and $35.8 million in federal funds—to state and local parties). The greatest expenditures from these transfers were for political advertising and administrative expenses. Josefiak Dep. at 76-77 [JDT Vol. 11].

1.27 The evidence above clearly demonstrates that the national political parties transfer nonfederal money through their state party affiliates for the purpose of buying so-called 'issue advertisements' at a better allocation ratio. These advertisements are created and controlled by the national political parties, with the state political parties merely accepting the nonfederal money transfers and passing the funds on to media consultants as directed by the national political parties. These advertisements are intended to affect federal elections without using express advocacy terminology.

Get-Out-The-Vote (GOTV)

1.28 It is undisputed that GOTV efforts, paid for with nonfederal funds by national party committees and targeted at federal elections, *directly* assist federal candidates, as well as state and local candidates of the same party whose elections are held on the same day. Declarations from representatives of the four major congressional campaign committees attest to the fact that these committees 'transfer[] federal and nonfederal funds to state and/or local party committees for . . . *get-out-the-vote efforts*. These efforts have a significant effect on the election of federal candidates.' Jordan Decl. ¶ 69 [DEV 7-Tab 21]; Wolfson Decl. ¶ 64 [DEV 9-Tab 44]; Vogel Decl. ¶ 64 [DEV 9-Tab 41]; McGahn Decl. ¶ 56 [DEV 8-Tab

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[34] Elizabeth Blaise Hazelwood is the RNC's political director. Hazelwood Dep. at 10.

30] (emphasis added); *see also* Josefiak Decl. ¶ 26 [RNC Vol. I] (Republican Party 'Victory Programs' which include GOTV components are designed to benefit candidates at the *federal*, state and local levels) (emphasis added); Philp[35] Dep. at 47, 49 (when asked '[are there a]ny other services that the party provides to federal candidates,' answering that the Colorado Republican Party's GOTV 'program is designed to benefit all candidates.').

1.28.1 Documentary evidence corroborates the testimony that GOTV efforts assist federal candidates. *See, e.g.*, CDP 00859 [IER Tab 1.I] (letter thanking a CDP donor and noting that CDP's '*get-out-the-vote efforts*' would help 'increase the number of Californian Democrats in the United States Congress, continue Democratic leadership in the State Senate, take back the State Assembly—and deliver California's 54 electoral votes for President Bill Clinton's and Vice President Al Gore's re-election.') (emphasis added); CRP 07164 [IER Tab 1.F] (letter from the Executive Director of the Dole-Kemp campaign, stating in part: 'Unfortunately, federal law prohibits the Dole/Kemp campaign from accepting any contributions after the last day of the national convention. However, you can still support the Dole/Kemp ticket by sending your contribution to the Victory '96 fund, which will support the party's '*get out the vote*' operation and help us ensure a successful campaign in California . . .') (emphasis added); *infra* Findings ¶ 1.60 (McConnell letter noting that the Kentucky Victory 2000 campaign, which included a GOTV component, 'was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year').

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[35] Alan Philp testified on behalf of the Colorado Republican Party. Philp Dep. at 9 [JDT Vol. 26].

1.28.2 Defendants' expert Donald Green concludes that

> [t]he evidence from California, as well as from numerous opinion surveys and exit polls that demonstrate the powerful correlation between voting at the state and federal levels, shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate. That parties recognize this fact is apparent, for example, from the emphasis that the Democrats place on mobilizing and preventing ballot roll-off among African-Americans, whose solidly Democratic voting proclivities make them reliable supporters for office-holders at all levels. As a practical matter, generic campaign activity has a direct effect on federal elections.

Green Expert Report at 14 [DEV 1-Tab 3].

1.28.3 The RNC transfers nonfederal funds to state political parties to subsidize voter mobilization activities of the state parties. Banning[36] Decl. ¶ 31 [RNC Vol. III]; *see also* Duncan[37] Decl. ¶¶ 11-12 [RNC Vol. VI]. According to Josefiak, the RNC also helps state and local parties fundraise for these voter mobilization efforts. *See* Josefiak Decl. ¶¶ 63, 65-72 [RNC Vol. I]; *see also* Benson[38] Decl. ¶ 10 [RNC Vol.

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[36] Jay Banning has served as the RNC's Director of Administration and Chief Financial Officer since 1983, and has been employed by the RNC in these and other capacities for twenty-six years. Banning Decl. ¶ 1 [RNC Vol. III].

[37] Robert Duncan is a Member of the RNC from the State of Kentucky. At the time the RNC's Complaint in this case was filed, he served as Treasurer of the RNC, but as of July 2002 he became its General Counsel. Duncan Decl. ¶ 1 [RNC Vol. VI].

[38] Bruce Benson is Chairman of the Colorado Republican Party. Benson Decl. ¶ 1 [RNC Vol. VIII].

VIII] ('[T]he Republican national party committees also assist [the Colorado Republican Party] in raising money for these party building programs.').

1.29 The CDP and the CRP conduct GOTV door-to-door canvassing campaigns, phone banks and mailings. Since federal, state and local candidates are on the same ballot in California, these efforts affect all the candidates on the ballot. This fact explains why these efforts usually required the state parties to use a mix of federal and nonfederal money to pay for such activities. *See, e.g., Bowler* Decl. ¶ 20.b. (noting that CDP slate cards and door hangers often mention both federal and nonfederal candidates and thus were funded with the mix of funds); *id.* (50 to 60 percent of CDP's paid phone banks make reference to a federal candidate and must therefore be paid for with a mix of funds); *see also* Erwin Aff. ¶ 10. It is important to note, however, that under BCRA's Levin Amendment state political parties may still use a mix of nonfederal and federal funds to pay for GOTV efforts for elections that include federal candidates, as long as they use nonfederal funds raised in accordance with the provision. Of course, for elections without a federal candidate on the ballot, BCRA does not impose any restrictions.

1.30 It is clear that nonfederal funds used to finance GOTV efforts for elections with federal candidates on the ballot affect federal elections. It is clear that GOTV activities target a certain political party's likely voters and attempts to get them to the polls. Even if the intent behind such efforts were to only affect state and local contests, increasing the number of Democrats, for example, who vote in a state and local election will undoubtedly increase the number of votes for the federal Democratic candidates who share the same ballot. This fact is well-known and appreciated by the national political parties and federal candidates.

Voter Registration

1.31 It is undisputed that voter registration efforts, paid for with nonfederal funds by the national party committees in the period before federal elections, *directly* assist federal candidates, as well as state and local candidates from the same party whose elections are held on the same day. As Dr. Mann notes:

> In a series of advisory opinions, the Commission sought to ensure that a portion of state party activities benefiting [sic] both federal and nonfederal candidates be paid for with hard money. In Advisory Opinion 1975-21, *the Commission ruled that a local party committee had to use hard dollars to pay for a part of its administrative expenses and voter registration drives, on the grounds that these functions have an indirect effect on federal elections.* It used this opinion in regulations it issued in 1977 governing allocation of administrative expenses between federal and nonfederal accounts. The allocation was to be made 'in proportion to the amount of funds expended on federal and non-federal elections, or on another reasonable basis.' (11 C.F.R. 106.1(e) 1978).

Mann Expert Report at 9 [DEV 1-Tab 1] (emphasis added).

1.32 Representatives of the four major congressional campaign committees, confirm that the four committees 'transfer[] federal and nonfederal funds to state and/or local party committees for . . . *voter registration* . . . efforts. These efforts have a significant effect on the election of federal candidates.' Jordan Decl. ¶ 69 [DEV 7-Tab 21]; Wolfson Decl. ¶ 64 [DEV 9-Tab 44]; Vogel Decl. ¶ 64 [DEV 9-Tab 41]; McGahn Decl. ¶ 56 [DEV 8-Tab 30] (emphasis added); *see also* CDP 00859 [IER Tab 1.I] (letter thanking a CDP donor and noting that CDP's '*voter registration* ... efforts' would help 'increase the number of Californian Democrats in the United States Congress, continue Democratic leadership in the State Senate, take back the State Assembly—and deliver California's 54 electoral votes for President Bill Clinton's and Vice President Al Gore's re-election.') (emphasis added); *see also* Findings ¶ 1.60 (McConnell letter noting that the Victory 2000 campaign, which included a voter registration component 'was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year'); Philp Dep. at 49 (when asked '[are there a]ny other services that the party provides to federal candidates,' answering that the Colorado Republican Party's GOTV 'program is designed to benefit all candidates. That could include voter registration and so on and so forth.').

1.33 CRP official Erwin[39] testifies that '[t]he overwhelming amount of [voter registration] activity is 'generic' voter registration activity urging potential registrants to 'Register Republican.'' Erwin Aff. ¶ 9. Erwin testifies that the CRP has paid for voter registration—with a mix of federal and nonfederal funds—through its Operation Bounty program, in which Republican county central committees, Republican volunteer organizations and Republican candidates for federal and state office participate. Through its Operation Bounty drives, the CRP has typically registered over 350,000 Republican voters in each election cycle since the 1984 election cycle (except 1997-98). *See* Erwin Aff. ¶ 9; *see also* CDP App. at 1185 [PCS 4] (charting CRP's voter registration activity by election cycle since 1984 cycle).

Ms. Bowler states that the CDP's expenditures on voter registration— consisting of a mix of federal and nonfederal funds—were approximately $145,000 in the 1996 election cycle; $300,000 in the 1998 cycle; $100,000 in the 2000 election cycle; and $185,000 during the period from January 1, 2001 to June 30, 2002. *See* Bowler Decl. ¶ 20.a. Ms. Bowler notes that the CDP's expenditures for voter registration were higher in 1998 (a year with eight statewide elections) than in 2000 (a presidential election year). *Id.* CRP and CDP officials testify that 'it is often the case that these voter registration activities are primarily driven by the desire to affect State and local races.' Erwin Aff. ¶ 14a; Bowler Decl. ¶ 20.a.

Whatever their intention, the evidence *supra,* makes clear that these efforts affect federal elections; particularly as demonstrated by the CDP's fundraising materials. *See* Findings ¶ 1.32). Moreover, under the Levin Amendment state political parties may still use a mix of nonfederal and federal funds to conduct voter registration efforts for elections that include federal candidates, as long as they use nonfederal funds raised in accordance with the provision. Of course, for those elections without a federal candidate on the ballot, BCRA does not impose any restrictions.

Redistricting

1.34 The national parties use nonfederal funds, as well as federal funds, toward their redistricting efforts, and these efforts are of value to Members of Congress because the changes in the composition of a Member's district can mean the difference between reelection and defeat.

1.34.1 As Defendants' expert Donald Green notes:

> The most important legislative activity in the electoral lives of U.S. House members takes place during redistricting, a process that is placed in the hands of state legislatures. The chances that a House incumbent will be ousted by unfavorable district boundaries are often greater than the chances of defeat at the hands of the typical challenger. Thus, federal legislators who belong to the state majority party have a tremendous incentive to be attuned to the state legislature and the state party leadership.

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[39] Ryan Erwin is the Chief Operating Officer of the CRP. Erwin Aff. ¶ 1.

> For example, in early 1999 the Republican National Committee, recognizing that state legislatures in Tennessee and Georgia would soon control redistricting, transferred substantial sums of money to those states' Republican parties in an effort to win the few seats necessary to gain the majority. As Edwin Bender, in a report for the National Institute on Money in State Politics explains: 'In a number of states with legislatures that are controlled by narrow margins, a win or two in the state House or Senate in 2000 could mean the difference between a redistricting committee controlled by Democrats or Republicans, and districts that favor one party over the other . . . . As a result, national party organizations have been flooding the states with campaign donations, both soft money and hard, to influence the redistricting process.

Green Expert Report at 11-12 [DEV 1-Tab 3].

1.34.2 The RNC uses a mix of federal and nonfederal funds to support redistricting efforts, including redistricting litigation. Josefiak Decl. ¶ 74 [RNC Vol. I]. In 2002, for example, the RNC budgeted approximately $4.1 million on redistricting. Seventy percent of the redistricting budget was to be funded with nonfederal money. Banning Decl. ¶ 28.i [RNC Vol. III]. The RNC spends more overall on state legislative redistricting than on congressional redistricting. Josefiak Decl. ¶ 74 [RNC Vol. I]; *see also infra* Findings ¶ 1.78.1 (Fortune 100 Company nonfederal money budget request noting that 'because both [national] parties will be working to influence redistricting efforts during the next two years, we anticipate that we will be asked to make soft money contributions to these efforts. Redistricting is a key once-a-decade effort that both parties have very high on their priority list.').

1.34.3 Mr. Alan Philp, of the Colorado Republican Party, testifies that his party and the Colorado Democratic Party

played a significant role in the state's legislative redistricting process. Philp Dep. at 65 [JDT Vol. 26]. Philp states that the results of the redistricting process '[c]an have a significant impact' on candidates for federal office. *Id.* at 66. He notes that the Colorado Congressional delegation discussed redistricting with the Colorado Republican Party. *Id.*

Other Activities Paid for with Nonfederal Funds

1.35 *Administrative Expenses:* The FEC allowed the RNC to pay for its administrative overhead—including salaries, benefits, equipment, and supplies for party operations at RNC headquarters in Washington, D.C.—with a mix of federal and nonfederal funds. *See* Banning Decl. ¶ 27 [RNC Vol. III]; Bowler Decl. ¶ 15. 'During the 2000 election cycle, the RNC spent $35.6 million of nonfederal funds and $52.9 million of federal funds on administrative overhead.' Banning Decl. ¶ 27 [RNC Vol. III]. 'Administrative overhead includes the operating costs of RNC facilities, such as utility bills and maintenance, fundraising costs, and routine expenses for travel and supplies. Administrative overhead also includes the salaries of RNC employees.' *Id.* According to Plaintiffs' expert La Raja, the RNC spent about one-quarter of their nonfederal disbursements on administration and overhead during the 2000 election cycle and transferred 67 percent to the state parties. La Raja Expert Report ¶ 14(c) [RNC Vol. VII]. State parties spent about 30 percent of their nonfederal money disbursements during the 2000 election cycle on administrative expenses and overhead. La Raja Expert Report ¶ 22 [RNC Vol. VII]; *see also* Bowler Decl. ¶ 15 (stating that allocation is required for administrative expenses like rent, utilities, and salaries). The fact these expenditures required a mix of federal and nonfederal funds demonstrates that these activities affect federal elections. *See also supra* Findings ¶ 1.26.4 (Plaintiffs expert La Raja stating administrative expenses are not 'party building' activity).

1.36 *Training Seminars:* Banning testifies that the RNC used a mix of federal and nonfederal funds to conduct training seminars for Republican candidates, party officials, activists and campaign staff, many of whom are involved in state and local campaigns and elections. Topics included grassroots organizing, fundraising and compliance with campaign finance regulations. During the 2000 election cycle at least 10,000 people attended RNC-sponsored training sessions, including 117 'nuts and bolts' seminars on grassroots organizing and get-out- the-vote activities. During the same cycle the RNC spent $391,000 in nonfederal funds and $671,000 in federal funds on such training and support. *See* Banning Decl. ¶ 28(c) [RNC Vol. III]; *see also* La Raja Expert Report at 11 [RNC Vol. VII] (parties 'help candidates by training them and their campaign staff,' support which 'can make an important difference in whether a candidate chooses to run for office, particularly in an era of cash-intensive campaigning that requires skillful application of advanced campaign technologies'). According to La Raja, the RNC spent $8.5 million in nonfederal funds directly on all of its grassroots and voter mobilization activities for the 2000 election cycle. La Raja Expert Report ¶ 14(c) [RNC Vol. VII]. This constitutes about one-half of one percent of all RNC nonfederal spending during the 2000 election cycle. *See* Biersack Decl. Table 2 [DEV 6-Tab 6] (showing the RNC spent $163,521,510 in nonfederal funds during the 2000 election cycle). Furthermore, by virtue of the fact these activities were paid for with a mix of federal and nonfederal funds demonstrates that they affect federal elections.

1.37 *State and Local Governmental Affairs:* The RNC provided $100,000 of seed money for the formation of a Republican state attorneys general association that focuses on state issues. RNC Ex. 978; *see also* Josefiak Decl. ¶¶ 82-84 [RNC Vol. I]. According to Banning, during the 2000 election cycle the RNC spent $199,000 in nonfederal funds and $333,500 in federal funds on state and local governmental affairs. *See* Banning Decl. ¶ 28.b [RNC Vol. III]. The nonfederal funds the RNC spent on state and local governmental affairs constituted a minuscule percentage of the RNC's $163,521,510 nonfederal budget for the 2000 election cycle. *See* Biersack Decl. Table 2 [DEV 6-Tab 6]. Furthermore, by virtue of the fact these activities were paid with a mix of federal and nonfederal funds demonstrates that they affect federal elections.

1.38 *Minority Outreach:* Banning states that the RNC used a mix of federal and nonfederal funds to support efforts to increase minority involvement and membership in the Republican Party. During the 2000 election cycle the RNC spent $1,211,000 in nonfederal funds and $2,163,000 in federal funds on support of allied groups and minority outreach. *See id.* ¶ 28.e. This nonfederal expenditure also constituted a minuscule percentage of the RNC's total non-federal spending for the 2000 election cycle. *See* Biersack Decl. Table 2 [DEV 6-Tab 6]. Furthermore, by virtue of the fact these activities were paid for with a mix of federal and nonfederal funds demonstrates that they affect federal elections.

1.39 *State and Local Elections:* The RNC's Josefiak testifies that 'the RNC actually focuses many of its resources on purely state and local election activity,' Josefiak Decl. ¶ 19 [RNC Vol. I]; however, the figures provided to the Court do not support this contention. For example, in 1999 and 2000 the RNC donated approximately $7.3 million in nonfederal funds to state and local candidates. Josefiak Decl. ¶ 61 [RNC Vol. I]; Banning Decl. ¶ 28(a) [RNC Vol. III]. However, this amount is a small fraction of the $163,521,510 in nonfederal funds it spent during the 2000 election cycle. Biersack Decl. Table 2 [DEV 6-Tab 6]. Plaintiffs' expert La Raja finds that the Republican Party allocated just seven percent ($9.5 million) of their nonfederal funds during the 2000 election cycle for contributions to state and local candidates. La Raja

Expert Report ¶ 14(b) [RNC Vol. VII]. Furthermore, according to Defense expert Mann, the two national parties donated 'only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000.' Mann Report at 26 [DEV 1-Tab 1] (citation omitted).

1.39.1.1 The RNC also provides testimony that it 'sometimes devotes significant resources toward states with competitive gubernatorial races even though the races for federal offices are less competitive.' Josefiak Decl. ¶ 62 [RNC Vol. I]. According to Josefiak, in 2000, most observers believed that Indiana was a 'safe' state for George W. Bush and that it did not have a competitive Senate race. 'Nevertheless, the RNC committed significant resources to the state in hopes of influencing the gubernatorial race.' Josefiak Decl. ¶ 62 [RNC Vol. I]. Josefiak's declaration provides no figures to allow the Court to determine what constitutes 'significant resources.' Furthermore, although Indiana may have been a 'safe' state for the Republican presidential candidate and the Republican candidate for U.S. Senate, the Indiana ballot provided voters with three federal races in which to vote, meaning that many expenditures, even if intended to only influence a single state race, affected federal election races. Most importantly, nothing in BCRA prevents the RNC from using unlimited amounts of federal funds to affect any state election.

1.39.1.2 Five States—Kentucky, Louisiana, Mississippi, New Jersey and Virginia—hold elections for state and local office in odd-numbered years when there are typically no federal candidates on the ballot. *See* Josefiak Decl. ¶ 41 [RNC Vol. I]. Likewise, numerous cities—including Houston, Indianapolis, Los Angeles, Minneapolis and New York City—hold mayoral elections in odd- numbered years. *See id.* RNC officials state that for elections in which there is no federal candidate on the ballot, the RNC frequently trains state and local candidates, contributes to state and local candidate campaign committees, funds communications calling for election or defeat of state and local candidates, and supports get-out-the-vote activities. *See* Banning Decl. ¶ 28(a) [RNC Vol. III]; Josefiak Decl. ¶¶ 19, 41-59 [RNC Vol. I]. The RNC's CFO Jay Banning testifies that in 1999 and 2001, including transfers to state parties, direct contributions to local and state campaigns, and direct RNC expenditures, the RNC spent approximately $21 million in nonfederal funds in 1999 and 2001 (approximately $5.7 million in 1999, $15.7 million in 2001). Banning Decl. ¶ 28(a) [RNC Vol. III]; *see also* Duncan Decl. ¶¶ 14-15 [RNC Vol. VI] (discussing RNC contributions to Kentucky state and local races). Defendants' expert Mann states that donations to gubernatorial candidates in an odd numbered year is not something intended to affect a Federal election. Mann Cross Exam. at 71. Again, BCRA does not preclude the national political parties from spending unlimited federal funds on such activities. Furthermore, state political parties can spend nonfederal funds on such campaigns without limit as long as no federal election is held at the same time. *See, e.g.*, Torres[40] Decl. ¶ 8 [3 PCS] (stating that the CDP has spent millions of dollars in nonfederal funds supporting candidates in Los Angeles).

1.40 With the exception of administrative expenses, the activities paid for with nonfederal funds listed *supra* constituted a very small portion of the political parties' nonfederal expenditures during the 2000 election cycle. Furthermore, administrative expenses, training seminars, expenditures on state and local governmental affairs, and minority outreach, were all paid for with a mixture of federal and nonfederal funds meaning that these activities have some impact on federal elections.

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[40] Art Torres is the elected chair of the CDP. Torres Decl. ¶ 1 [3 PCS].

The State Parties Have Become 'Branches' of the National Parties

1.41 The evidence *supra* clearly demonstrates that nonfederal money has not been used primarily for 'party building' activities as the authorizing rationale envisioned; rather, the funds are being used by the national parties for electioneering activities and the state parties have been coopted as part of this effort.

1.42 The emergence of nonfederal money as a potent force in national politics has made the state political parties, according to Plaintiffs' expert La Raja, 'more reliant on the national parties. They have worked more with the national parties. They have become what I term branch organizations, which to me is not a pejorative. It means they work more closely with the national organization,' 'they still retain autonomy. However, they're integrated more with the national party structure.' La Raja Cross Exam. at 43-44, 60 [JDT Vol. 15]. This has lead to a 'nationalized party system, [where] state parties use national party resources to advance national party goals.' *Id.* at Ex. 3 at 88, 101. 'The national parties employ the state parties as instruments to pursue federal electoral goals, particularly through issue ads sponsored by state organizations [paid for with nonfederal money transferred from the national political parties].' *Id.* at 104.

1.43 The close affiliation between the state, local and national parties is clear from their cooperation during election campaigns that include state and federal elections.

1.43.1 Ms. Bowler testifies that the CDP works closely with the DNC in planning and implementing 'Coordinated Campaigns,' the purpose of which is to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket. Party officials, candidates at all levels of the ticket and their agents participate in Coordinated Campaigns and collectively make decisions regarding the solicitation, receipt, directing, and spending of the CDP's funds, both federal and nonfederal. Bowler Decl. ¶¶ 5, 29 [3 PCS]. According to Bowler, the CDP is 'integrally related to the [DNC].' *Id.* ¶ 5.

1.43.2 The RNC's 'Victory Plans' are voter contact programs designed to support the entire Republican ticket at the federal, state, and local levels. The RNC works with every state party to design, fund and implement the Plans. *See* Benson Decl. ¶ 8 [RNC Vol. VIII]; Josefiak Decl. ¶ 26 [RNC Vol. I]; Peschong Decl. ¶¶ 4-5 [RNC Vol. VI].

1.43.2.1 According to RNC Chief Counsel Josefiak, Victory Plans are formulated and implemented after extensive and continuous collaboration between the RNC and the state parties; each Plan is tailored to the unique needs of each State and designed to stimulate grassroots activism and increase voter turnout in the hopes of benefitting candidates at all levels of the ticket. Josefiak Decl. ¶¶ 25-40 [RNC Vol. I]. According to Mr. Erwin, the CRP works closely with the RNC in planning and implementing a Victory Plan. The Victory Plan is implemented in the general election cycle with the full involvement of RNC staff, CRP staff, state legislative leadership and representatives from the top of the ticket campaigns. *See* Erwin Aff. ¶ 4 [3 PCS]. 'By their nature, the Victory Plans and the programs specified in them span the calendar year, not just the 60 or 120 days prior to the election.' Peschong Decl. ¶ 4 [RNC Vol. VI]. The Victory Plans generally incorporate rallies, direct mail, telephone banks, brochures, state cards, yard signs, bumper stickers, door hangers, and door-to-door volunteer activities. *Id.*

1.43.2.2 According to Josefiak, in 2000 the RNC transferred approximately $42 million to state parties to use in Victory Plan programs, 60 percent (about $25 million) of which was nonfederal money, not including money spent on broadcast 'issue advertising.' Josefiak Decl. ¶ 31 [RNC Vol.

I]; *see also* Peschong[41] Decl. ¶¶ 4, 8-9 [RNC Vol. VI] (stating that '[t]he RNC typically provides a very substantial share of the funding of state victory programs.').

1.43.2.3 State Republican party officials observe that because there are often numerically more state and local races than federal races during a given election, Victory Plans 'often place greater emphasis' on the non-federal races. *See* Benson Decl. ¶ 8 [RNC Vol. VIII]; Bennett Decl. ¶ 17.k [RNC Vol. VIII] (stating that the average ratio of state and local candidates to federal candidates in Ohio in 2002 is 18 to 1). This observation does not change the fact that Victory Plans are designed to 'support the entire ticket.' Benson Decl. ¶ 8 [RNC Vol. VIII] (emphasis added).

Efforts to Address the Role of Nonfederal Funds in Campaign Finance Must Limit State Party Use of Nonfederal Funds that Affect Federal Elections

1.44 It is clear that state political party electoral activities affect federal elections, especially when state and federal elections are held on the same date. The record establishes that federal officeholders value these services and that they solicit nonfederal donations for the state political parties in order to assist their own campaigns. National political parties also solicit nonfederal donations for their state counterparts and transfer nonfederal funds as part of their efforts to affect federal elections. *See infra* Findings ¶ 1.59. The workings of this campaign finance system demand that if one wants to address the impact of nonfederal money, one cannot ignore the state role in the system. Former Members of Congress concur. Former Senator Rudman states clearly:

> To curtail soft-money fundraising and giving, it is necessary to have a comprehensive approach that addresses

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[41] John Peschong is the RNC's Regional Political Director for the Western Region. Peschong Decl. ¶ 1.

> the use of soft money at the state and local party levels as well as at the national party level. The fact is that much of what state and local parties do helps to elect federal candidates. The national parties know it; the candidates know it; the state and local parties know it. If state and local parties can use soft money for activities that affect federal elections, then the problem will not be solved at all. The same enormous incentives to raise the money will exist; the same large contributions by corporations, unions, and wealthy individuals will be made; the federal candidates who benefit from state party use of these funds will know exactly whom their benefactors are; the same degree of beholdenness and obligation will arise; the same distortions on the legislative process will occur; and the same public cynicism will erode the foundations of our democracy—except it will all be worse in the public's mind because a perceived reform was undercut once again by a loophole that allows big money into the system.

Rudman Decl. ¶ 19 [DEV 8-Tab 34]. Former Senator Brock comments:

> It does no good to close the soft money loophole at the national level, but then allow state and local parties to use money from corporations, unions, and wealthy individuals in ways that affect federal elections. State and local parties use soft money to help elect federal candidates both by organizing voter registration and get-out-the-vote drives that help candidates at all levels of the ticket, and by using soft and hard money to run 'issue ads' that affect federal elections. Therefore, for soft money reforms to be truly effective, it is vitally important to require the use of hard money at the state level to pay for activities that affect federal elections.

Brock Decl. ¶ 8 [DEV 6-Tab 9].

Summary

1.45 The evidence *supra* clearly demonstrates that nonfederal money has become an increasingly important part of the national political parties' campaign efforts. The increase in nonfederal fundraising and spending, especially since 1994, has been dramatic, and is due to the advent of the so-called 'issue advertisement.' Political party issue advertisements do not include words of express advocacy, but are engineered to still have an impact on federal elections. Despite their effect, the fact that these advertisements do not constitute express advocacy has allowed the political parties to use nonfederal money, raised in part from the treasuries of corporations and labor unions, to fund these commercials and thereby skirt campaign finance laws. Furthermore, these advertisements make a mockery of the original justification for allowing the political parties to raise these funds, as they have nothing to do with 'party building.' Plaintiffs' own expert finds that these funds have been spent primarily on electioneering and not on strengthening the political parties.

The fact that the national political parties found a huge loophole through which to circumvent the federal campaign finance regime was only the first step. In order to maximize the power of this new-found political tool, the national political parties coopted their state party affiliates, or branches as Plaintiffs' expert calls them, and funneled nonfederal funds through them in order to take advantage of the state political parties' more attractive allocation ratios. By doing so, the national parties minimized the amount of federal funds needed to purchase advertisements designed to affect federal elections-advertisements that in the spirit of FECA should have been paid for completely with federal funds. As a result, the state political parties became an integral part of the national political parties' nonfederal money strategy, and therefore any effort to deal with the use of nonfederal funds in the campaign finance regime requires addressing the state political parties.

Not all nonfederal funds are spent on political advertisements, but these advertisements constitute the largest category of nonfederal spending of the national and state political parties. Furthermore, other activities, such as voter registration and GOTV, that are paid for in part with nonfederal funds clearly affect federal elections when state and local elections are held on the same day as the federal election. Redistricting efforts affect federal elections no matter when they are held. In sum, the political parties used nonfederal funds to circumvent FECA and affect federal elections.

The Role of Federal Lawmakers in Political Party Nonfederal Fundraising

1.46 Unlike other entities, political parties have uniquely close relationships with candidates they nominate and support, and who, in turn, lead the party. *See* D. Green Expert Report at 7-9 [DEV 1-Tab 3]; McCain Decl. ¶¶ 22- 23 [DEV 8-Tab 29]. The Colorado Republican Party has stated in past litigation: 'A party and its candidate are uniquely and strongly bound to one another because: [a] party recruits and nominates its candidate and is his or her first and natural source of support and guidance[;] [a] candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books[;] [a] successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns[;] [a] party's public image largely is defined by what its candidates say and do[;] [a] party's candidate is held accountable by voters for what his or her party says and does[;] [a] party succeeds or fails depending on whether its candidates succeed or fail. No other political actor shares comparable ties with a candidate.' Brief of Colorado Republican Party in *FEC v.*

Colorado Republican Fed. Campaign Comm. (*'Colorado II*'), 533 U.S. 431, 457 (2001), at 19-20; *see also id.* at 7-8, 26-31; Philp Dep. at 47-54 [JDT Vol. 26].

Federal Lawmakers Run the Party Committees

1.47 The national committees of the two major political parties are: the Republican National Committee ('RNC'); the National Republican Senatorial Committee ('NRSC'); the National Republican Congressional Committee ('NRCC'); the Democratic National Committee ('DNC'); the Democratic Senatorial Campaign Committee ('DSCC'); and the Democratic Congressional Campaign Committee ('DCCC'). Vogel Decl. ¶ 6 [DEV 9-Tab 41]; McGahn Decl. ¶ 6 [DEV 8-Tab 30]; Jordan Decl. ¶ 6 [DEV 7-Tab 21]; Wolfson Decl. ¶ 6 [DEV 9-Tab 44]. The primary purpose of the congressional committees is to ensure the election of candidates from their respective parties to their respective legislative body and otherwise support the goals of their party. *Id.*

> The national party committees are dominated by elected public officials—the president or presidential candidate in the case of the Republican and Democratic National Committees, the top House and Senate party leaders for the congressional campaign committees. . . . There is no meaningful separation between the national party committees and the public officials who control them.

Mann Expert Report at 29 (citations omitted) [DEV 1-Tab 1]; *see also* Krasno & Sorauf Expert Report at 9-10 ('Simply put, no wall between the national parties and the national government exists.'), 12-13 ('Party committees are headed by or enjoy close relationships with their leading officials, individuals who by virtue of their positions, reputations, and control of the legislative machinery have special influence on their colleagues.') [DEV 1-Tab 2]; Green Expert Report at 9-10 [DEV 1-Tab 3] ('Political parties, it should be noted, are structured along very different principles

from the American government. One such principle is the separation and dispersal of power, of which one finds many examples in the Constitution. . . . Leaders of legislative party caucuses may also serve as members or leaders of party campaign committees. Furthermore, party leaders are drawn disproportionately from the ranks of those who hold important legislative leadership posts. . . . [T]he internal structure of parties permits, for example, former U.S. Senator D'Amato, who chaired the [RSCC] from 1995-97, to at the same time serve as chair of the Senate Banking, Housing, and Urban Affairs Committee. Parties, in contrast to the law-making institutions they inhabit, are organized in ways that concentrate authority, entrusting multiple roles to particular individuals.'); Rudman Decl. ¶ 6 [DEV 8-Tab 34]; Vogel Decl. ¶ 4 [DEV 9-Tab 41] (NRSC is comprised of sitting 'Republican Members of the United States Senate . . . . The chair of the NRSC is elected by the Republican Caucus of the United States Senate.'); Jordan Decl. ¶ 4 [DEV 7- Tab 21] (the DSCC 'is comprised of sitting Democratic Members of the United States Senate . . . . The chair of the DSCC is appointed by the Democratic Leader of the United States Senate.'); McGahn Decl. ¶ 4 [DEV 8-Tab 30] (the NRCC includes the 'entire elected Republican leadership' and its executive committee includes 'the Speaker of the House, the Majority Leader, the Republican Whip, Conference Chairman, the Conference Vice-Chairman, the Conference Secretary, the Policy Chairman and the NRCC Chairman'); Wolfson Decl. ¶¶ 4 [DEV 9-Tab 44] (the DCCC is comprised of sitting Democratic Members of (or Delegates to) the United States House of Representatives, and the Chair of the DCCC is elected by the Democratic Caucus of the United States House of Representatives).

1.48 'For at least a century [the national party committees] have been melded into their party's presidential campaign every four years, often assuming a subsidiary role to the presidential candidate's personal campaign committee. The presidential candidate has traditionally been conceded the power to shape and use the committee, at least for the campaign.' Sorauf/Krasno Report in *Colorado Republican* at 27 [DEV 73-Tab C].

Political parties are primarily concerned with electing their candidates and the money they raise is spent assisting their candidates' campaigns. As Congressman Meehan explained:

> The ultimate goal of a political party such as the Democratic Party is to get as many Party members as possible into elective office, and in doing so to increase voting and Party activity by average Party members. The Party does this by developing principles on public policy matters the Party stands for, and then by finding candidates to run for the various political offices who represent those principles for the Party. When the Party finds its candidates, it tries to raise money to help get like-minded people to participate in the elections, and to try to get the Party's candidates the resources they need to get their message out to voters. In my experience, political parties do not have economic interests apart from their ultimate goal of electing their candidates to office.

Meehan Decl. in *RNC* ¶¶ 3-4 [DEV 68-Tab 30]. Senator Bumpers testifies that he is 'not aware that the [Democratic] party has any interest in the outcome of public policy debates that is separate from its interest in supporting and electing its candidates.' Bumpers Decl. ¶ 6 [DEV 6-Tab 10]. Senator McCain testifies that '[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected.' McCain Decl. ¶ 23 [DEV 8-Tab 29].

1.49 In general, the RNC espouses three core principles as guiding the mission of the national Republican Party, which

includes electing candidates to national, state and local offices who represent the RNC's political views. In practice, electing these candidates is the RNC's primary focus.

1.49.1 The RNC's Chief Counsel, Thomas Josefiak, attests that

> [t]he Republican Party has a long and rich history advocating some core principles: a smaller federal government, lower taxes, individual freedom, and a strong national defense. The RNC achieves these principles through three primary means: (1) promoting an issue agenda advocating Republican positions on issues of local, state, regional, national and international importance; (2) electing candidates who espouse these views to local, state and national offices; and (3) governing in accord with these views. Although these efforts sometimes overlap, they also frequently occur independently of one another.

Josefiak Decl. ¶ 22 [RNC Vol. I]. Other documents in the record, however, show that the RNC and Republican state parties' primary purpose is to elect Republican candidates to office. *See, e.g.*, RNC's Resp. to FEC RFA's in *RNC*, No. 40 [DEV 68-Tab 35]; ODP0021-02003 [DEV 70-Tab 48] (RNC Memorandum in which Chairman Haley Barbour states: 'The purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president. . . . Electing Dole is our highest priority, but it is not our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures.'); Knopp[42] Cross Exam. at 10 [JDT Vol. 13] (stating that the primary purpose of the RNC is 'to elect Republicans to state, local, and national office'); Brister[43] Decl. ¶ 4 [RNC Vol.

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[42] Janice Knopp is the RNC's Deputy Director of Finance/Marketing Director. Knopp Decl. ¶ 1 [RNC Vol. V].

[43] Pat Brister is the Chairman of the Republican Party of Louisiana. Brister Decl. ¶ 1 [RNC Vol. VIII].

VIII] ('The Republican Party of Louisiana's primary purpose is to help elect Republicans to office 'from the courthouse to the White House''). Whether the Republican Party's 'core principles' drive its pursuit of electoral majorities, or vice versa, is a chicken-or-the-egg type quandary that I need not resolve at this juncture. What is clear from the evidence, however, is that regardless of whether or not it is done to advocate the party's principles, the Republican Party's primary goal is the election of its candidates who will be advocates for their core principles. As Dr. Green observes: 'In order to obtain power a party must win elections; and in order to win elections, elected officials scramble to claim credit for good legislative deeds while publicizing the misdeeds of the opposition party.' Green Expert Report at [DEV 1-Tab 3].

1.50 The evidence makes clear that the national party committees are creatures of their elected federal politician members, who run them and set their priorities. It is clear that the national party committees are focused on electing their candidates to federal office, and in the case of the DNC and RNC are actually subsumed by their respective Presidential candidates' campaigns. Given these facts, it is not surprising that the national party committees use their elected officials to solicit donations.

Federal Lawmakers Solicit Nonfederal Funds for the National Party Committees

1.51 It is a common practice for Members of Congress to be involved in raising both federal and nonfederal dollars for the national party committees, sometimes at the parties' request. The personal involvement of high-ranking Members of Congress is a major component of raising federal and nonfederal funds.

Current and former Members of Congress acknowledge this fact. *See, e.g.*, Rudman Decl. ¶ 12 [DEV 8-Tab 34];

Bumpers Decl. ¶¶ 7-9 [DEV 6-Tab 10]; Simon[44] Decl. ¶ 7 [DEV 9-Tab 37] ('While I was in Congress, the DCCC and the DSCC would ask Members to make phone calls seeking contributions to the party. They would assign me a list of names, people I had not known previously, and I would just go down the list. I am certain they did this because they found it more effective to have Members make calls.'); Simpson[45] Decl. ¶ 4 [DEV 9- Tab 38]; McCain Decl. ¶¶ 2, 21 [DEV 8-Tab 29] ('Soft money is often raised directly by federal candidates and officeholders, and the largest amounts are often raised by the President, Vice President and Congressional party leaders.'); Feingold Dep. at 91-93 [JDT Vol. 6]; Shays Decl. ¶ 18 [DEV 8-Tab 35] ('Soft money is raised directly by federal candidates, officeholders, and national political party leaders. National party officials often raise these funds by promising donors access to elected officials. The national parties and national congressional campaign committees also request that Members of Congress make the calls to soft money donors to solicit more funds.'); Meehan Decl. in *RNC* ¶ 6 [DEV 68-Tab 30] ('Members of Congress raise money for the national party committees, and I have been involved in such fund-raising for the Democratic Party. At the request of the Party Members of Congress go to the [DCCC] and call prospective donors from lists provided by the Party to ask them to participate in Party events, such as DCCC dinners or [DNC] dinners. These lists typically consist of persons who have contributed to the Democratic Party in the past.').

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[44] Senator Paul Simon served as a United States Senator for Illinois from 1985 to 1997, and was a Member of the House of Representatives from 1975 to 1985. Prior to being elected to Congress, Senator Simon served as Lieutenant Governor of Illinois from 1968 to 1972, and served in the Illinois House of Representatives from 1954 to 1962 and in the Illinois State Senate from 1962 to 1966. Simon Decl. ¶ 1 [DEV 9-Tab 37].

[45] Senator Alan Simpson served as United States Senator from Wyoming from 1979 to 1997. Simpson Decl. ¶ 2 [DEV 9-Tab 38].

Representatives of the House and Senate congressional campaign committees testify that their committees and their leadership ask Members of Congress to raise funds in specified amounts or to devote specified periods of time to fundraising. Jordan Decl. ¶ 33 [DEV 7-Tab 21]; Vogel Decl. ¶¶ 32-33 [DEV 9-Tab 41]; McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Wolfson Decl. ¶ 35 [DEV 9-44] (stating that the DSCC, NRSC, NRCC, and DCCC ask members of Congress to raise money for the committees).

Political donors also testify that Members of Congress solicit nonfederal money. *See, e.g.*, Randlett[46] Decl. ¶¶ 6-9 [DEV 8-Tab 32] ('I've been involved in political fundraising long enough to remember when soft money had little value to federal candidates. Ten years ago, a Senator might call a potential donor and the donor would say something like, 'I would love to write you a check; I'm a big fan of yours; but I'm federally maxed, so I can't do it. If you like, I could write a soft money check to your state party.' And the Senator might say, 'Don't bother. The soft money just doesn't do me any good.' However, in recent election cycles, Members and national committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns. Most soft money donors don't ask and don't care why the money is going to a particular

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[46] Wade Randlett is Chief Executive Officer of Dashboard Technology, a World WideWeb technology consulting firm based in San Francisco, California. Prior to founding Dashboard Technology, Mr. Randlett served on the management teams of two other software companies. He was the Democratic political director at the Technology Network, also known as TechNet, a Palo Alto-based non-profit corporation and political service organization which he co-founded in 1996. Prior to starting TechNet, he spent many years as a political fundraiser and general political consultant, working primarily in the Silicon Valley area of Northern California, but also throughout California and to some extent in major metropolitan areas in other parts of the nation. Randlett Decl. ¶ 2 [DEV 8- Tab 32].

state party, a party with which they may have no connection. What matters is that the donor has done what the Member asked.').

Lobbyists also find that Members of Congress are involved in fundraising for their political parties. *See* Rozen[47] Decl. ¶ 15 [DEV 8-Tab 33] ('Even though soft money contributions often go to political parties, the money is given so that the contributors can be close to, and recognized by, Members, Presidents, and Administration officials who have power. Members, not party staffers or party chairs, raise much of the large soft money contributions. Party chairs do not have that much power because the DNC and the RNC by themselves don't have power to do anything. So people are not giving to be close to the party chairs. The Members of Congress and the President are the heart of the national parties. The elected officials are the ones who are really raising the money, either directly or through their agents.'); *see also* Murray[48] Dep. in

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[47] Robert Rozen worked as a lobbyist for various interests at the law firm Wunder, Diefenderfer, Cannon & Thelen from 1995 until 1997. For the last six years, he has been a partner in a lobbying firm called Washington Counsel; now Washington Council Ernst & Young. Mr. Rozen represents a variety of corporate, trade association, non-profit, and individual clients before both Congress and the Executive Branch. His work includes preparing strategic plans, writing lobbying papers, explaining difficult and complex issues to legislative staff, and drafting proposed legislation. He also organizes fundraisers for federal candidates and from time-to-time advises clients on their political contributions. Rozen Decl. ¶ 4 [DEV 8-Tab 33]

[48] Daniel Murray served as a government relations specialist for Sprint, GTE and BellSouth Corporations from 1982 until 1995. As Executive Director of those companies, he assisted them and their PACs in selecting candidates and political groups for financial support in both federal and nonfederal funds. During this period he also served on the Democratic Business Council of the DNC, the Advisory Council of the Democratic Leadership Council, the 1998 and 1992 DNC Convention Site Selection Committees, the DSCC Leadership Circle, the DCCC Annual Dinner Committee, the RSCC Annual Dinner Committee, and steering com-

Mariani at 41-42 [DEV 79-Tab 58]; Rozen Decl., Ex. A ¶ 7 [DEV 8-Tab 33].

Finally, documentary evidence corroborates this testimony. ODP0037-00062 [DEV 71-Tab 48] (Letter to NRSC Chairman's Foundation member seeking a renewal contribution signed by Senator McConnell); ODP0037-00884 [DEV 71-Tab 48] (letter from Senator McConnell thanking donor for $5,000 federal and $25,000 nonfederal donation to NRSC's issue advocacy campaign); ODP0031-00821 (letter from contributor to RNC with contribution, stating 'Congressman Scott McInnis deserve [sic] most of the recruitment credit'); ODP0037-00882 (a solicitation letter from Senator McConnell to potential donor at the Microsoft Corporation, expressing the hope that this person would 'take a leadership role with [McConnell] at the NRSC in support of the Committee's issue advocacy campaign. The resources we raise now will allow us to communicate our strategy through Labor Day. . . . Your immediate commitment to this project would mean a great deal to the entire Republican Senate and to me personally.'); ODP0037-01171 to 72 [DEV 71-Tab 48] (correspondence referencing solicitations by federal officeholders and candidates); *infra* Finding ¶ 1.74.3 (Fortune 100 company's documents stating that Members of Congress had requested nonfederal donations).

1.52 'The parties often ask Members to solicit soft money from individuals who have maxed out to the Member's campaign.' Simpson Decl. ¶ 6 [DEV 9-Tab 38]; *see also* Meehan Decl. in *RNC* ¶ 6 ('Party leaders also ask a Member to call his or her own 'maxed out' donors—those who have contributed to that Member the maximum amount of 'hard money' allowed under the [FECA]—in order to request further donations to the Party including those which are not restricted by the Act ('soft money').') [DEV 68-Tab 30]; Billings Decl., Ex. A ¶ 12 [DEV 6-Tab 5]; Jordan Decl. ¶ 20 [DEV 7-Tab 21] ('When donors have reached their federal contribution limit, the DSCC frequently encourages them to make additional donations to the DSCC's nonfederal account.'); Wolfson Decl. ¶ 21 (same for DCCC); Vogel Decl. ¶ 20 (same for NRSC); McGahn Decl. ¶ 21 (same for NRCC); Sorauf/Krasno Report in *Colorado Republican*, at 13-14 [DEV 68-Tab 44]; ODP0018- 00620 to 21 [DEV 69-Tab 48] (federal candidate noting that he 'recently sent a letter to [his] maxed out donors suggesting contributions to the NRCC'); Kirsch[49] Decl. ¶ 8 ('[O]nce a federal candidate understands that a donor has maxed out, there will often be a request that the donor make soft money donations to a national party committee, as has been suggested when I have been in that situation.') [DEV 7-Tab 23]; La Raja Cross Exam. Ex. 3 at 54 [JDT Vol. 15] ('[I]t is common practice for a candidate to encourage donors to give to the party when they have 'maxed' their federal contributions to his or her committee').

1.53 Mr. Vogel, General Counsel of the NRSC, testifies that '[s]ometimes, the NRSC urges Republican Senators to contact particular donors because of shared public policy views, such as outreach efforts to the high-tech community by Senators with an interest in those issues.' Vogel Decl. ¶ 28 [DEV 9-Tab 41]; *see also id.* Tab D at NRSC 066-000009 (draft letter from chairmen of the NRSC and NRCC Technology Committees inviting High Technology CEOs to the 1998 Republican House-Senate Dinner in response 'to your industry's plea for a voice on the cutting edge issues so

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mittees for many House and Senate campaigns. Since 1995, he has acted as a government relations consultant for business and other clients. Murray Aff. in *Mariani* ¶¶ 3-5 [DEV 79-Tab 59].

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[49] Steven T. Kirsch is founder and Chief Executive Officer of Propel Software Corporation. He has donated millions of dollars to the Democratic Party and to 'progressive candidates and groups.' Kirsch Decl. ¶¶ 2, 4 [DEV 7-Tab 23].

important to the future of high technology' and noting that the dinner is the 'most prestigious annual event, and all Republican members of the U.S. House and Senate will be in attendance.') [DEV 9-Tab 41]. The DCCC engages in similar practices. Wolfson Decl. ¶ 31 [DEV 9-Tab 44] ('Sometimes, the DCCC urges Democratic House Members to contact particular donors because of shared public policy views. For example, the DCCC has sought and received assistance from particular Democratic House Members in fundraising from the labor community, because those Members had a strong public record of support for labor.'); *see also* Randlett Decl. ¶ 6 [DEV 8-Tab 32] ('National party committees often feel they need to raise a certain amount of soft money for a given election cycle. To reach that overall goal, they may divide up potential donors by geography, affiliated organization, or issue interests. The party committees decide which Members of Congress should contact these potential donors, and these Members then put in a certain amount of call time at the national committee soliciting the money. A Member and a potential donor may be matched because the Member is on a legislative committee in which the donor has a particular interest, whether economic or ideological.').

1.54 Despite the foregoing evidence, the Finance Director of the RNC states that it is 'exceedingly rare' for the RNC to rely on federal officeholders for personal or telephonic solicitations of major donors. *See* B. Shea[50] Decl. ¶ 17 [RNC Vol. V]. She states that by RNC policy and practice, the RNC Chairman, Co-Chairwoman, Deputy Chairman, fundraising staff or members of major donor groups—not federal officeholders—undertake initial contact and solicitation of major donors of both federal and nonfederal funds. *Id.* Whether or not initial solicitations by federal officials on behalf of the RNC are rare, the record shows that they are made. RNC0178497 (May 10, 1996, letter from RNC Chairman Haley Barbour to Senators, asking to use their name for a 'membership recruitment package,' which while 'not directly solcit[ing] funds,' 'will serve as a set-up letter for the membership invitation package that will be mailed several days after this letter.'). Furthermore, Members of Congress solicit funds for the RNC from those who have donated in the past. *See, e.g.*, RNC0266088-91 (handwritten notes determining which Member of Congress would call particular potential donors); RNC0250514-15 (April 1997 solicitation letter from Speaker Gingrich asking donors 'to continue [their] support [for] the President's Club'); Moreover, it is clear that Ms. Shea does not speak for the NRSC or the NRCC which clearly use Members to solicit funds. *See, e.g.*, Findings ¶ 1.51.

1.55 Raising nonfederal funds for the political parties can be in a Member's interest. For example, the amount of money a Member of Congress raises for the national political party committees often affects the amount the committees give to assist the Member's campaign. *See, e.g.*, Boren[51] Decl. ¶ 4 [DEV 6- Tab 8] ('[T]he DSCC and other national party organizations kept records, or 'tallies' of how much soft money a Senator had raised for the party. The DSCC then gave little [nonfederal] money to the campaigns of those Senators who had not raised adequate [nonfederal] party funds. In my view, this practice demonstrates very clearly that soft money is not used purely for 'party building' activities, but that there is at least a working understanding among the party officials and Senate candidates that the money will benefit the individual Senators' campaigns.'); *id.* (explaining that because he 'minimized' the amount of time he spent raising soft money for the DNC, he 'received almost no money from the Democratic Party for my campaigns.');

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[50] Beverly Shea is the RNC's Finance Director. Shea Decl. ¶ 1 [RNC Vol. V].

[51] Senator David Boren served as a United States Senator from Oklahoma from 1979-1994. Boren Decl. ¶ 2 [DEV 6-Tab 8]

Bumpers Decl. ¶ 11 [DEV 6-Tab 10] ('Members who raise money for the DSCC expect some of that money to come directly back to them. Part of this unwritten but not unspoken rule is that if you do not raise a certain amount of money for the DSCC, you are not going to get any back. The DSCC does not give a candidate the maximum allowed unless he or she has raised at least a certain amount for the DSCC.'); *infra* Findings ¶ 1.56.1 (statement of Senator Simpson).

Members also have an interest in a strong party that can assist its federal officeholders. *See, e.g.,* Bumpers Decl. ¶ 10 [DEV 6-Tab10] ('When a Member raises money for the party, there is a sense on the part of the Member that he or she is helping his or her own campaign by virtue of raising that money. When Members raise funds for the DNC, it helps the DNC perform its function of keeping tabs on statements, policies, and votes of opposition party members and groups.').

Former DNC and DSCC official and current lobbyist Robert Hickmott[52] testifies that even incumbents with safe

seats have incentives to raise money for the parties. He explains:

> Incumbents who were not raising money for themselves because they were not up for reelection would sometimes raise money for other Senators, or for challengers. They would send $20,000 to the DSCC and ask that this be entered on another candidate's tally. They might do this, for example, if they were planning to run for a leadership position and wanted to obtain support from the Senators they assisted. This would personally benefit them, in addition to doing their part to retain Democratic control of the Senate, which would preserve the legislative power of all Democratic Senators.

Hickmott Decl., Ex. A ¶ 18 [DEV 6-Tab 19]; *see also id.* ¶ 13 (attesting that Senators were very concerned about whether or not donors' checks were tallied to them); *infra* Findings ¶ 1.56.3 (describing the DSCC tallying/credit system). Senator McCain attests that

> [t]he parties encourage Members of Congress to raise large amounts of soft money to benefit their own and others' re-election. At one recent caucus meeting, a Member of Congress was praised for raising $1.3 million dollars for the party. James Greenwood, a Republican Congressman from Pennsylvania, recently told the New York Times that House leaders con-

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[52] In 1980, during President Carter's re-election campaign, Robert Hickmott worked at the Democratic National Committee ('DNC') as an Associate Finance Director. Hickmott Decl. ¶ 2 [DEV 6-Tab 19]. Following the general election, Hickmott became the Executive Director of a new DNC entity, the Democratic Business Council ('DBC'), where he served until 1983. *Id.* During 1985-86, Hickmott served as National Finance Director for then-Congressman Timothy Wirth's Senate campaign, and from 1987 until early 1989, on Senator Wirth's Senate staff. *Id.* After that, Hickmott was in private practice as an attorney until January 1991, when he joined the Democratic Senatorial Campaign Committee ('DSCC') as Deputy Executive Director. *Id.* In 1993, Hickmott worked for four years as the Associate Administrator for Congressional Affairs at the Unites States Environmental Protection Agency, then for two years as a counselor to then-Secretary Andrew Cuomo at the United States Department of Housing and Urban Development ('HUD'). *Id.* In 1999, Hickmott left HUD and joined The Smith- Free Group ('Smith-Free'), a small governmental affairs firm located in Washington, D.C. *Id.* ¶ 3. Hickmott is currently a Senior Vice President at Smith-Free and one of the six principals in the firm. *Id.* Hickmott is a regular contributor to candidates for Congress, for President, and the national party committees, primarily to Democratic candidates, but also to several Republicans, as well. *Id.* In the 1999-2000 cycle, he contributed just over $7,000 and in the 2001-2002 cycle, he has contributed a little more than $10,000. *Id.* Hickmott provided a declaration in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir. 2000), *rev'd*, 533 U.S. 431 (2001) ('Colorado II'); *See Colorado II*, 533 U.S. at 458.

> sider soft money fundraising prowess in assigning chairmanships and other sought-after jobs. . . . I share Mr. Greenwood's concerns.

McCain Decl. ¶ 7 [DEV 8-Tab 29]. Finally, the political parties' power over Members of Congress provides additional incentive to fundraise for the national party committees. As Dr. Green notes: 'The ubiquitous role that parties play in the lives of federal officials means that no official can ignore the fundraising ambitions of his or her party.' Green Expert Report at 15 [DEV 1- Tab 3].

Nonfederal Funds are Given with Intent to Assist Specific Members of Congress; Political Parties Keep Track of Contributions Members of Congress Raise

1.56 Nonfederal money is often given to national parties with the intent that it will be used to assist the campaigns of particular federal candidates, and it is often used for that purpose.

1.56.1 Senator Simpson testifies that '[d]onors do not really differentiate between hard and soft money; they often contribute to assist or gain favor with an individual politician. When donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign.' Simpson Decl. ¶ 6 [DEV 9-Tab 38]. 'Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates.' *Id.* ¶ 7. Senator Wirth[53] understood that when he raised funds

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[53] Senator Timothy Wirth served in the U.S. House of Representatives from 1974 to 1986, representing the Second Congressional District of the State of Colorado. From 1987 through 1992 he served as Senator for the

for the DSCC, donors expected that he would receive the amount of their donations multiplied by a certain number that the DSCC had predetermined, assuming that the DSCC had raised other funds. Wirth Decl. Ex. A ¶¶ 5, 8 [DEV 9-Tab 43]; *see also FEC v. Colorado Republican Fed. Campaign Comm.* ('*Colorado II*'), 533 U.S. 431 (2001); Bumpers Decl. ¶¶ 10-12 [DEV 6-Tab 10]; Simon Decl. ¶ 10 [DEV 9-Tab 37].

1.56.2 Individual nonfederal money donors have made specific requests that the national political party apply their nonfederal money gifts to particular federal campaigns. *See, e.g.*, RNC0035464 [DEV99], RNC0032733-34 [DEV 92] (fundraising letters requesting that nonfederal money donations be used for particular federal elections). As one experienced donor observes: 'The committee receiving . . . a soft money donation [solicited by a Member of Congress from a 'maxed out' contributor] understands that it has been raised by or for a particular federal candidate, and this affects how much the committee spends on behalf of that candidate. I have discussed with national party committees the spending of such soft money to benefit federal candidates.' Kirsch Decl. ¶ 8 [DEV 7-Tab 23]; *see also* Hiatt[54] Dep. at 114-18 (explaining that anyone donating nonfederal money is indirectly giving it to the campaigns of federal candidates and officeholders, and stating that his soft money donations were

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State of Colorado in the United States Senate. Wirth Decl. Ex. A ¶ 2 [DEV 9-Tab 43].

[54] Arnold Hiatt engaged in substantial political spending for a number of years. He estimates that from the 1992 election cycle through 1997, he donated approximately $60,000 in federal funds, mostly to federal candidates, with a few contributions to federal political action committees ('PACs'). In October of 1996, he gave a $500,000 nonfederal donation to the DNC. In February of 2001, he made a $5000 hard money donation to the League of Conservation Voters' PAC, and believes that is the only hard money donation he has given since 1997. Hiatt Decl. ¶ 5 [DEV 6-Tab 18].

earmarked for particular candidates but that he does not know if the money was actually spent on those candidates).

1.56.2.1 Plaintiff Thomas McInerney, a large individual contributor to the Republican Party, states that he donated amounts in excess of $57,500 per election cycle to Republican organizations at the national, state and local levels. For example, in 2002, he donated $250,000 to the RNC, in addition to other donations to national, state and local political committees. He states that his donations were intended to support state and local candidates and political parties. McInerney Aff. ¶¶ 4, 10, 12 [9 PCS]. Mr. McInerney's affidavit does not state whether or not these funds were used in the manner he desired, only that 'it is his understanding' that they were used for such activities. *Id.* ¶¶ 11, 13, 15. Regardless of whether his donations were used for state and local political activities, the record is clear that Mr. McInerney represents an exception to the general rule that donors give money to the national parties with the intent that they will be used to assist federal candidates. Furthermore, if Mr. McInerney wants to donate funds to state parties for activities that affect state and local elections, nothing in BCRA prevents him from doing so. *See also infra* Findings ¶ 1.61.

1.56.3 The DSCC maintains a 'credit' program that credits nonfederal money raised by a Senator or candidate to that Senator or candidate's state party. Jordan Decl. ¶¶ 36-39 [DEV 7-Tab 21]. Amounts credited to a state party can reflect that the Senator or candidate solicited the donation, or can serve as a donor's sign of tacit support for the state party or the Senate candidate. Jordan Decl. ¶¶ 37-40, Tabs F, G [DEV 7-Tab 21]. According to former DSCC official Hickmott, Senators were very concerned about whether or not donors' checks were tallied to them. Hickmott Decl., Ex. A ¶ 13 [DEV 6-Tab 19]; *see also supra* Findings ¶ 1.55 (Senator Boren commenting on the tallying system and effect of a candidate's fundraising for the national political committee on the support the candidate's campaign received from the national party).

1.56.4 Both the NRCC and NRSC are aware of which Members have raised funds for their committees, and may advise Members of amounts they have raised, in order to encourage Members to aid the collective interest of preserving or obtaining a majority in the House or Senate. McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Vogel Decl. ¶¶ 33, 36 [DEV 9-Tab 41]. Similarly, although the DCCC uses 'no formal credit or tally program,' it 'advises Democratic House Members of the amounts they have raised for the DCCC, ascribing particular contributions to the fundraising efforts of the Member in question.' Wolfson Dec. ¶ 36 [DEV 9-Tab 44]; Thompson Dep. at 28-29 [JDT Vol. 32] (testifying that the DCCC 'provide[s] the entire Democratic Caucus with the amounts of money raised by name of every Democratic member of Congress. . . . [a]t the Democratic Caucus meeting. . . . I think it's a method used to let people know that if the DCCC is going to be successful all members should participate.').

1.57 Federal candidates also raise nonfederal money through joint fundraising committees formed with national committees. *See* Buttenwieser Decl. ¶¶ 8-14 [DEV 6-Tab 11]. One common method of joint fundraising is for a national congressional committee to form a separate joint fundraising committee with a federal candidate committee. A joint fundraising committee collects and deposits contributions, pays related expenses, allocates proceeds and expenses to the participants, keeps required records, and discloses overall joint fundraising activity to the FEC. Wolfson Decl. ¶ 40 [DEV 9-Tab 44]; Vogel Decl. ¶¶ 39-45 [DEV 9-Tab 41]; Jordan Decl. ¶¶ 41, 50 [DEV 7-Tab 21]; Oliver Dep. at 258 [DEV Supp.-Tab 1].

> A typical allocation formula for joint fundraising between the [congressional campaign committees] and a federal candidate will allocate the first $2,000 of every contribution from an individual to the participating candidate, with $1,000 designated to the primary election and $1,000 to the general election; and the next $20,000 to the [congressional campaign committee's] federal account. Because the [congressional campaign committee] is normally the only participant eligible to receive nonfederal funds, any remaining amounts of an individual contribution will be allocated to the [congressional campaign committee's] nonfederal account, as will the entirety of any contribution from a federally prohibited source.

Wolfson Decl. ¶ 42 [DEV 9-Tab 44]; Vogel Decl. ¶ 41 [DEV 9-Tab 41]; Jordan Decl. ¶ 45 [DEV 7-Tab 21]. Two experts characterize the joint fundraising system as one 'in which Senate candidates in effect raise[] soft money for use in their own races.' Krasno and Sorauf Expert Report at 13 [DEV 1-Tab 2].

1.58 It is clear from the record that in practice Members of Congress actively solicit large nonfederal donations to their political parties, often at the behest and direction of the political parties. The political parties encourage Members to solicit such donations and reward those who are successful by assisting their campaigns. Furthermore, although the raising of nonfederal funds is rationalized as an effort to pay for 'party building' activities, it is clear that this money is solicited by Members and given by donors with the understanding that it will be used to assist the campaigns of particular federal candidates.

Federal Lawmakers and National Party Committees Solicit Nonfederal Funds for State Parties

1.59 National party committees direct donors to give nonfederal money to state parties in order to assist the campaigns of federal candidates. *See, e.g.*, Kirsch Decl. ¶ 9 [DEV 7-Tab 23] ('The national Democratic party played an important role in my decisions to donate soft money to state parties in [the 2000 election] cycle, recommending that I donate funds to specific state parties just before the election. They said, essentially, if you want to help us out with the Presidential election, these particular state parties are hurting, they need money for get-out-the-vote and other last minute campaign activities.'). Robert Hickmott, a former DNC and DSCC official testifies:

> Once you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to the national party committees, the relevant state party (assuming it can accept corporate contributions), or an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign. These types of requests typically come from staff at the national party committees, the campaign staff of the candidate, the candidate's fundraising staff, or former staff members of the candidate's congressional office, but they also sometimes come from a Member of Congress or his or her chief of staff. . . . Regardless of the precise person who makes the request, these solicitations almost always involve an incumbent Member of Congress rather than a challenger. As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate financially in her or her election effort, both with hard and soft money.

Hickmott Decl. ¶ 8 [DEV 6-Tab 19]; *see also* Buttenwieser Decl. ¶ 16 [DEV 6-Tab 11] ('The DSCC has also requested that I provide assistance to state parties.'); Hassenfeld[55] Decl. ¶ 9 [DEV 6-Tab 17] ('In 1992, when I told the Democratic Party that I wanted to support then-Governor Bill Clinton's presidential campaign, they suggested that I make a $20,000 hard money contribution to the DNC, which I did. The Democratic Party then made clear to me that although there was a limit to how much hard money I could contribute, I could still help with Clinton's presidential campaign by contributing to state Democratic committees. There appeared to be little difference between contributing directly to a candidate and making a donation to the party. Accordingly, at the request of the DNC, I also made donations on my own behalf to state Democratic committees outside of my home state of Rhode Island. . . . Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign.'); Randlett Decl. ¶ 9 [DEV 8-Tab 32] ('[N]ational committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns.'); Josefiak Decl. ¶ 68 [RNC Vol. I] ('It is . . . not uncommon for the RNC to put interested donors in touch with various state parties. This often occurs when a donor has reached his or her federal dollar limits to the RNC, but wishes to make additional contributions to the state party. When this happens, the RNC will often suggest that the donor make contributions to certain state parties that are most in need of funds at that time.').

1.60 Federal officeholders have directed contributors to the state parties when the contributors have 'maxed out' to the candidate or when it appears that the state party can most effectively use additional money to help that officeholder or other federal candidates. As one candidate's solicitation letter stated, 'you are at the limit of what you can directly contribute to my campaign,' but 'you can further help my campaign by assisting the Colorado Republican Party.' *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 458 (2001) (quoting an August 27, 1996 fundraising letter from then- Congressman Allard); *see also* Philp Dep. Ex. 14 [JDT Vol. 26] (same letter); MMc0014 [DEV 117-Tab 2] (letter to a contributor stating: 'Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2000 program . . . . This program was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year' signed by Senator McConnell with the handwritten note: 'This is important to me. Hope you can help'); Buttenwieser Decl. ¶¶ 15-16 [DEV 6-Tab 11] ('Federal candidates have often asked me to donate to state parties, rather than the joint committees, when they feel that's where they need some extra help in their campaigns. I've given significant amounts to the state parties in South Dakota and North Dakota because all the Senators representing those states are good friends, and I know that it's difficult to raise large sums in those states.'); Hickmott Decl. ¶ 8 [DEV 6-Tab 19] (quoted *supra* Findings ¶ 1.59); Randlett Decl. ¶ 9 [DEV 8-Tab 32] ('Members [of Congress] . . . have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns.').

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[55] Alan G. Hassenfeld has served as Chairman of the Board and Chief Executive Officer of Hasbro, Inc. since 1989, a global company based in Rhode Island with annual revenues in excess of $3 billion. Hasbro designs, manufactures, and markets toys, games, interactive software, puzzles and infant products. He also sits on a number of civic and philanthropic boards. He is a member of the Board of Trustees of the University of Pennsylvania and Deerfield Academy, he serves on the Dean's Council of the Kennedy School of Government at Harvard, and sits on the board of Refugees International. He also run three charitable foundations: the Hasbro Charitable Trust, the Hasbro Children's Foundation, and a family foundation. Hassenfeld Decl. ¶¶ 2-3 [DEV 6-Tab 17].

1.61 Plaintiff Thomas McInerney states that he donates over $10,000 per year to state and local political party organizations to be spent on state and local organizations and elections. McInerney Aff. ¶¶ 4, 10, 12 [9 PCS]. Mr. McInerney's affidavit does not state whether or not these funds were used in the manner he desired, only that 'it is his understanding' that they were used for such activities. *Id.* ¶¶ 11, 13, 15. Regardless, nothing in BCRA prevents Mr. McInerney from donating funds to state and local party organizations—the law only restricts the types of activities on which these nonfederal funds may be spent. However, if Mr. McInerney's purpose in donating these funds is to assist state and local parties and candidates, BCRA ensures that his funds will be spent only on activities that exclusively affect state and local parties and elections, and not on practices that constitute federal election activity.

Summary

1.62 The evidence clearly demonstrates that federal officeholders not only solicit nonfederal donations for the national political committees, but also for state political parties. The testimony and documentary evidence makes clear that candidates value such donations almost as much as donations made directly to their campaigns and that these donations assist federal candidates' campaigns. Furthermore, the evidence makes clear that the national parties also direct nonfederal donations to their state party affiliates for the purpose of affecting federal elections. This evidence also corroborates the findings that GOTV and voter registration efforts by state parties affect federal elections. *See, e.g., supra* Findings ¶¶ 1.28, 1.31. Most importantly, the close nexus between the national political parties and federal officeholders led BCRA's framers to conclude that:

> Because the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process. The only effective way to address this [soft money] problem of corruption is to ban entirely all raising and spending of soft money by the national parties.

148 Cong. Rec. H409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

Corruption

1.63 The fact that Members of Congress are intimately involved in the raising of money for the political parties, particularly unlimited nonfederal money donations, creates opportunities for corruption. The record does not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money; however, the evidence presented in this case convincingly demonstrates that large contributions, particularly those nonfederal contributions surpassing the federal limits, provide donors access to federal lawmakers which is a critical ingredient for influencing legislation, and which the Supreme Court has determined constitutes corruption. *See Buckley v. Valeo*, 424 U.S. 1, 27 n.28 (1976) (citing *Buckley*, 519 F.2d at 839 nn.37-38).

Vote Buying/Bribery

1.64 No Member of Congress testifying in this case states that he or she has ever changed his or her vote on any legislation in exchange for a donation of nonfederal funds to his or her political party. *See, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-3 (admitting lack of evidence); McCain Dep. at 171-74 (unable to identify any federal officeholder who changed his or her vote on any legislation in exchange for a donation of non-federal money to a political party); Snowe Dep. at 15-16 (same); Jeffords Dep. at 106- 07 (same); Meehan Dep. at 181-83 (same); Shays Dep. at 171 (same); *see also* 148 Cong. Rec. S2099 (daily ed. March 20, 2002) (statement of Sen. Dodd) ('I have never known of a particular Member whom [sic] I thought cast a ballot because of a contribution.'); 147 Cong. Rec. S2936 (daily ed. March 27, 2001) (statement of Sen. Wellstone) ('I don't know of any individual wrongdoing by any Senator of either party.').

1.65 Senator Rudman notes:

> I understand that those who opposed passage of the Bipartisan Campaign Reform Act, and those who now challenge its constitutionality in Court, dare elected officials to point to specific [instances of vote buying]. I think this misses the point altogether. [The access and influence accorded large donors] is inherently, endemically, and hopelessly corrupting. You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty.

Rudman Decl. ¶ 10 [DEV 8-Tab 34].

1.66 Consistent with Senator Rudman's testimony, the record, while not containing evidence that nonfederal funds have purchased votes, includes testimony from former and current Members of Congress describing the influence of nonfederal funds on the political system. Former Senator Simpson states:

> Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation.

Simpson Decl. ¶ 10. Senator Simpson also relates that

> Large donors of both hard and soft money receive special treatment. No matter how busy a politician may be during the day, he or she will always make time to see donors who gave large amounts of money. Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.

Id. ¶ 9. Former Senator Simon testifies:

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.

Simon Decl. ¶¶ 13-14 [DEV 9-Tab 37]; *see also Colorado II*, 533 U.S. 431, 451 n.12 (2001) (quoting Senator Simon); Feingold Dep. at 62 [JDT Vol. 6] (testifying that in the fall of 1996 a senior Senator suggested to Senator Feingold that he support the Federal Express amendment because 'they just gave us $100,000'). Former Senator Boren testifies:

> Donations, including soft money donations to political parties, do affect how Congress operates. It's only natural, and happens all too often, that a busy Senator with 10 minutes to spare will spend those minutes returning the call of a large soft money donor rather than the call of any other constituent. . . .
>
> As a Member of the Senate Finance Committee, I experienced the pressure first hand. On several occasions when we were debating important tax bills, I needed a police escort to get into the Finance Committee hearing room because so many lobbyists were crowding the halls, trying to get one last chance to make their pitch to each Senator. Senators generally knew which lobbyist represented the interests of which large donor. I was often glad that I limited the amount of soft money fundraising I did and did not take PAC contributions, because it would be extremely difficult not to feel beholden to these donors otherwise. I know from my first-hand experience and from my interactions with other Senators that they did feel beholden to large donors.

Senator Boren Decl. ¶¶ 7-8 [DEV 6-Tab 8]; *see also id.* ¶ 9 ('Many Congressmen vie for positions on particular committees such as Finance and Ways and Means in large part because it makes it much easier for them to raise money. They then spend large amounts of their scarce time raising money for their party from businesses that have specific matters pending before their committees.').

1.67 It is clear that political parties are involved in efforts to influence federal officeholders with regard to the passage or defeat of specific legislation. The motivation behind these efforts may not be imparted to the officeholder. However, an internal document shows that on at least one occasion the motivation for doing so was associated with donors' interest in the legislation.

1.67.1 Senator Rudman testifies that while the RNC would lobby him to take a position on legislation, it never asked him to take a particular position because a donor had contributed soft money to the party. Rudman Dep. at 77-82 [JDT Vol. 27]. Senator McCain testifies that 'there are many times where the Republican National Committee tried to change my votes and other votes of other Republicans . . . [T]he Republican National Committee constantly weighs in on legislation before the Congress of the United States,' McCain Dep. at 171-72 [JDT Vol. 18], but he also states that he does not 'know [if it was] in exchange for donations not.' *Id.* The record, however, also contains a call sheet titled 'Team 100 One-On-One with [a national association],' for a call that took place on February 28, 2000, in Chairman Jim Nicholson's office. RNC0159740 [DEV 95]. Included on the sheet were instructions to thank the group for upgrading to Team 100. *Id.* The call sheet includes handwritten comments, including: 'Gary Miller sponsoring Brownfield Legislation. Boehlert + Bliley against. Working w/ Speaker. Asked JN help. JN agreed to talk to Boehlert @ the possible time. When appropriate. . . . Call Sen. Abraham about support homebuilders—Property Rights Bill . . . . Lott good friend of homebuilders.' *Id.*

1.68 Although one Defense expert believes it does not occur, two present Members of Congress testify that threats have been made by the political parties to withhold financial support due to Members' positions on issues. *See* Shays Dep. at 172-84 [JDT Vol. 29] (stating Republican Party never attempted to change his vote, but that '[i]t was made clear to a number of my colleagues if they voted for the campaign finance reform, they would get no campaign contributions'); McCain Decl. ¶ 7 [DEV 8-Tab 29] ('At times, when

Members seek to support legislation their congressional leaders oppose, they are threatened with the prospect that their leaders will withhold soft money being spent on their behalf.'); Defense Expert Mann Cross Exam. at 113-15 [JDT Vol. 17] ('I would be shocked if [the RNC] ever did such a thing. . . . [T]he point is to win the margin seat, to control the majority for the party, not to weaken a potentially vulnerable candidate. . . . It would be self-defeating. That isn't how it works.'). The FEC does not investigate or make determinations of national parties using federal money to induce federal legislators to support or oppose specific legislation, and therefore has no knowledge of whether such practices occur. Vosdingh Dep. at 89 [RNC Vol. VIII].

1.69 Plaintiffs' own expert Raymond La Raja recognizes the corruption potential inherent in nonfederal donations to the political parties. In a recently published book, La Raja argues that limiting nonfederal money donations reduces 'the potential for corruption by eliminating the super donors.' Green Rebuttal Report at 4 [DEV 5-Tab 1] (quoting Raymond La Raja, Sources and Uses of Soft Money: What Do We Know?, *in* A User's Guide to Campaign Reform at 106 (Gerald C. Lubenow ed., 2001). He continues:

> If only a modest portion of party soft money goes to fund issue ads, it is worth re-examining the question: how is soft money harmful? The obvious answer is that it permits candidates, contributors, and parties, to circumvent federal laws limiting campaign contributions. If party soft money can help a specific candidate, then corporations, unions, or wealthy individuals can simply funnel contributions to candidates through the parties. And the potential for quid pro quo exchange between contributor and policymaker escalates with the size of the contribution.

Id. (citing same at 105). In fact, La Raja asserts that '[t]o reduce the potential for corruption, I recommend that Congress place a cap on soft money contributions or, if soft money is banned, raise the limits on hard money contributions.' *Id.* (citing same at 106). In his dissertation, La Raja makes a similar recommendation. La Raja Cross Exam. Ex. 3 at 147 [JDT Vol. 15]; *see also id.* at 105 ('In a society in which political participation is unequal among socioeconomic groups it is discomforting to think that wealthy people and organizations might have disproportionate influence on government policies simply because they can write large checks to politicians. For this reason alone, policymakers might pause before granting dispensations to political parties though these institutions may perform valuable functions in democratic politics.'). La Raja concludes that

> [t]here are two distinct benefits of using soft money. First, the parties can raise these funds in large increments. Although most soft money contributions are relatively small—the average per source is less than $10,000—the parties solicit large amounts from corporations, unions and wealthy individuals. . . .
>
> Another important advantage of soft money is that the parties can concentrate these funds in key races. *By exploiting soft money rules, the parties effectively sidestep the federal ceilings that prevent them from allocating resources efficiently in the closest contests.* To navigate around the federal restrictions on soft money the parties have developed close ties with their state parties because these affiliates receive special exemptions for party building activity.

Id. at 51 (emphasis added); *see also id.* at 74-75 (concluding that parties 'exploit federal campaign finance laws by using soft money for candidate support even though federal laws require them to use it for generic party building'); La Raja Cross Exam. 17-18 [JDT Vol. 15] (stating that he stands by the conclusions reached in his dissertation).

Donors are Pressured to Make Contributions to Political Parties

1.70 Corporate donors, trade associations, and individual donors are pressured to make large contributions to the parties.

1.70.1 The Committee for Economic Development (CED)[56] released a 'survey, which was conducted by the Tarrance Group, . . . drawn from telephone interviews of a random sample of 300 corporate executives employed by major U.S. corporations.' Kolb[57] Decl. ¶ 9 [DEV 7-Tab 24]. The survey showed that '[n]early three-quarters of [senior executives of the nation's largest businesses] (74 percent) say pressure is placed on business leaders to make large political donations. The main reasons corporate America makes political contributions, the executives said is fear of retribution and to buy access to lawmakers. Seventy five percent say political donations give them an advantage in shaping legislation; and nearly four-in-five executives (78 percent) called the system 'an arms race for cash that continues to get more and more out of control.'' *Id.* ¶ 9 & Ex. 6.

1.70.1.1 Plaintiffs challenge these poll results, noting that Kolb, CED's President, could not provide details regarding how the Tarrance Group conducted the survey. *See* Proposed Findings of Fact of the RNC, Republican Party of Colorado, the Republican Party of Ohio, the Republican Party of New Mexico, the Dallas County (Iowa) Republican County Central Committee, and Mike Duncan ('RNC Proposed Findings') ¶ 115(b) (citing Kolb Dep. at 128, 145 [JDT Vol. 13]). They also state that many of the survey questions did not distinguish between federal and nonfederal funds. *Id.* (citing

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[56] CED is 'an independent non-partisan research and policy organization of some 200 Trustees who are prominent business leaders and educators.' Kolb Decl. I ¶ 1 [DEV-Tab 24].

[57] Charles Kolb is CED's president. Kolb Decl. I ¶ 1 [DEV 7-Tab 24].

Kolb Dep. Ex. 5). With regard to the first criticism, the fact that a person who commissioned a study could not explain how the polling firm actually conducted the survey, without more, does not render the poll flawed. Plaintiffs have provided no information which indicates that the Court should view the Tarrance Group's work with caution. In fact, in his deposition, Kolb explained that the Tarrance Group is 'a professional polling firm. They know how to do their business pretty well and they're fairly well respected from everything we could tell,' Kolb Dep. at 145 [JDT Vol. 13], and the RNC did not challenge this assessment in the deposition or in their filings. In fact, the record shows that The Coalition- an organization supported by a number of Plaintiffs-used the Tarrance Group for its own polling. *See infra* Findings ¶ 2.6.2.2. As for the second criticism, it is true that the pollsters did not ask those surveyed to distinguish between federal and nonfederal funds; however, the fact that nearly 80 percent called the campaign finance system 'an arms race for cash that continues to get more and more out of control' strongly suggests that political party contribution coercion does not stop once a donor reaches the federal contribution limits.

1.70.2 Lobbyist Robert Rozen testifies that

> [i]n some cases corporations and trade associations do not want to give in amounts over the hard money limits, but they feel pressured to give in greater amounts and end up making soft money donations as well. They are under pressure, sometimes subtle and sometimes direct, from Members to give at levels higher than the hard money limits. For example, some Members in a position to influence legislation important to an industry naturally wonder why a company in that industry is not participating in fundraising events.

Rozen Decl. ¶ 8 [DEV 8-Tab 33]; *see also* Brian McGrory, Businesses Drawn to Campaign Reform, Boston Globe, February 13, 1997, ODP0018-00457-60 [DEV 69-Tab 48] (quoting Howard Marlowe, a Washington lobbyist, as saying: 'We are spending tens of millions of dollars to satisfy the constant craving of congressmen or the parties for money and our own craving for access. . . . You don't know if you say 'no'—and you may have given five times already—whether they will shut off the access you have been buying with all these other contributions. We need the access.').

1.70.3 A national survey of major congressional donors conducted in 1997 found that a majority were critical of the campaign finance system and supportive of reform. John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded* (1998), FEC 101-0282, 0283 [DEV 45-Tab 110]. Eighty percent of respondents agreed that 'office-holders regularly pressure donors for contributions,' while one-half agreed 'that contributors regularly pressure office-holders for favors and seek access to government.' *Id.* at 0290.

1.70.4 Former Senator Boren testifies that 'Donors . . . feel victimized. Now that I've left office, I sometimes hear from large donors that they feel 'shaken down.'' Boren Decl. ¶ 10.

Federal Officeholders' Awareness of Who Donates to Parties

1.71 Some present and past officeholders, corroborated by separate documentary evidence, testify that many in Congress are aware of the identities of contributors of large donations to the political parties. Some officeholders testify that they personally are unaware of who donates to the political parties, but they are mostly BCRA co-sponsors, aligned against these types of large, unregulated contributions and not active participants in nonfederal fundraising, or Members who have distanced themselves from receiving this information.

1.71.1 Some Members of Congress testifying in this case state that they *personally* are unaware of who donates money to their parties. *See* Feingold Dep. at 115-16 [JDT Vol. 6] ('Q: How generally are . . . Senators made aware of, if at all, the amounts and identities of soft money donors to the national committees? A: I don't know exactly how that's done or how much it's done.'): Snowe Dep. at 223-24 [JDT Vol. 31] (unaware of nonfederal donors to the RNC); Jeffords Dep. at 96 [JDT Vol. 11] ('somewhat' aware of nonfederal donors to the national political parties); Meehan Dep. at 179 [JDT Vol. 22] (aware of few nonfederal donors to national party committees, only because 'from time to time I read who they are in the newspaper'). The record shows that when Members do not know the identity of contributors, it is sometimes because those officeholders made a conscious effort to remain unaware or that their staff handled such information. *See, e.g.*, Senator Feingold Dep. at 115 [JDT Vol. 6] (explaining that while he does not know how Senators are made aware of the identity of donors of nonfederal money to national parties, it is because he 'made a real effort to be far away from that part of the process so [he is] not privy to or aware of exactly how that's done and to what extent it's done.'); Congressman Meehan Dep. at 178-79 [JDT Vol. 22] (explaining that he was unaware of the Democratic National Committee's 'tallying' process, by which the amount of money the DNC spends on a particular candidate is related to the amount of nonfederal money that candidate raised for the DNC, but that he was 'probably one of the last people that they would let know about the tallying process'); Rudman Dep. at 75-78 [JDT Vol. 27] (explaining that while he did not know the identity of contributors who donated 'either hard or soft money' to the RNC, that the RNC 'probably' provided him with that information but he 'didn't have any interest in it. I was the most disinterested candidate in money of anyone you've probably ever run into. . . . And [if such reports] came to the office, the [administrative assistant] took them and probably read them.').

Senator McConnell has stated that during his 18 years in the United States Senate he has met thousands of Americans with whom he has shaken hands, posed for photographs, answered questions and discussed legislative issues. The overwhelming majority of these meetings were with people who do not donate funds to the Republican Party at the national, state, or local level. Senator McConnell also states that he is typically unaware of the donation history of individuals with whom he meets. McConnell Aff. ¶ 13 [2 PCS]. While Senator McConnell may generally not be aware of the donation history of each of the individuals he meets, he is aware of the donation history of some specific large donors. For example, Senator McConnell sent the following letter to a contributor which stated in part:

> It was a pleasure seeing you at the Senate-House Dinner last week. The dinner was not a good time to talk, but I wanted to let you know about the August 12 fundraiser I am having at your neighbor['s] . . . home. . . .
>
> In addition to your $2,000 contribution in the last election cycle, I was proud to also receive $1,000 each from [five other donors]. Their support again would be greatly appreciated.

McConnell Dep. Ex. 11 [JDT Vol. 19] (MMc0987). The letter is signed 'Mitch' and includes the following handwritten note: 'As you may recall, any contributions to my '02 campaign will count against your $25,000 annual hard money limit in '02 + not '99. Hope you can help.' *Id.*

Another handwritten letter states: 'Thanks so much for your continuing friendship and support. Your commitment for $2000 each from you + your lady will be very helpful in my reelection next year. Thanks again + I look forward to hearing from you soon. Mitch.' *Id.* Ex. 5 (MMc0753); *see also* Findings ¶ 1.60 (letter to contributor noting that he had given the maximum amount of federal funds to Senator McConnell's campaign); McConnell Dep. at 38-41 [JDT Vol. 19] (explaining that a particular company collected $47,000 for his campaign because its chairman, who is a friend of Senator McConnell's, hosted a fundraiser for the McConnell campaign)

1.71.2 Many others testify that federal officeholders and candidates are typically aware of who donates to their parties. Former and current Members of Congress state that they and their colleagues are aware of who makes large contributions to their parties. *See, e.g.*, Bumpers Decl. ¶¶ 18, 20 [DEV 6-Tab 10] (explaining that officeholders of both parties are aware of contributors' identities, that he had 'heard that some Members even keep lists of big donors in their offices,' and that 'you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party. If someone in Arkansas gave $50,000 to the DNC, for example, I would certainly know that.'); 148 Cong Rec. H352 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (recognizing that 'it's the candidates themselves and their surrogates who solicit soft money. The candidates know who makes these huge contributions and what these donors expect. Candidates not only solicit these funds themselves, they meet with big donors who have important issues pending before the government; and sometimes, the candidates' or the party's position appear to change after such meetings.'); Senator Simpson Decl. ¶ 5 [DEV 9-Tab 38] (explaining that '[p]arty leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the person behind the donation. . . . Even if some members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what.'); Senator Boren Decl. ¶ 6 [DEV 6-Tab 8] (testifying that '[e]ach Senator knows who the biggest donors to the party are' because '[d]onors often prefer to hand their [nonfederal money contribution] checks to the Senator personally, or their lobbyist informs the Senator that a large donation was just made.'); Congressman Bennie G. Thompson Dep. at 28-29 [JDT Vol. 32] (testifying that the DCCC 'provide[s] the entire Democratic Caucus with the amounts of money raised by name of every Democratic member of Congress.'); McCain Decl. ¶ 6 [DEV 8-Tab 29] ('Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money,' and '[d]onors or their lobbyists often inform a particular Senator that they have made a large donation.'); Senator Simon Decl. ¶ 16 [DEV 9-Tab 37] (stating that he was more likely to first return the telephone call of a donor to his campaign than someone who had not donated, and that increased access for those who give large contributions to the party is not fair to those who cannot afford to give contributions at all); Wirth Decl. Ex. A ¶ 17 [DEV 9-Tab 43] ('[C]andidates were generally aware of the sources of the funds that enabled the party committee to support their campaigns.').

Party officials and a political donor state that Members of Congress are made aware of who makes large donations to their party. Vogel Decl. ¶¶ 25-28 [DEV 9-Tab 41] (explaining that the NRSC distributes lists of potential donors to incumbents so that they can solicit donations); McGahn Decl. ¶¶ 21, 34-37 [DEV 8-Tab 30] (same for NRCC); Jordan Decl. ¶¶ 20, 25-28 [DEV 7-Tab 21] (same for DSCC); Wolfson Decl. ¶¶ 21, 28-31 [DEV 9-Tab 44] (same for DCCC); Randlett Decl. ¶ 10 [DEV 8-Tab 32] ('Information about what soft money donors have given travels among the Members in different ways. Obviously the Member who solicited the money knows. Members also know who is involved with the various major donor events which they attend, such as retreats, meetings and conference calls. And there is communication among Members about who has made soft money donations and at what level they have given, and this is widely known and understood by the Members and their staff.').

1.71.3 The record also contains evidence showing that sometimes large donors make their identities known to Members of Congress. This memorandum from a large, influential interest group consisting of major corporations from a particular industry, discusses an upcoming meeting between the group's representatives and Senator McConnell, then head of the NRSC. [citation sealed]. The 'objectives' of the meeting included 'apprising him of [sic] industry's concern with attention on' an issue directly related to their industry and 'expressing [the group's] willingness to be a resource, substantively and politically, to assist in maintaining a Republican majority in 2000.' *Id; see also* Findings ¶¶ 1.75.1 (testimony about donors choosing to personally deliver donations to Senator Chuck Robb when he was Chairman of the DSCC), 1.75.2 (Senator McCain statement: 'Donors or their lobbyists often inform a particular Senator that they have made a large donation.'), 1.75.2 (statement by Sen. McCain).

1.72 It is clear from the evidence *supra* that many Members of Congress know who donates to their political parties, and that those who do not can easily find such information. In fact the record suggests that for a Member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves. This finding is not particularly unexpected given that many Members of Congress actively solicit federal and nonfederal contributions for their parties. *See supra* Findings ¶ 1.51.

The fact that some Members know who donates large amounts of money to their political parties is a necessary corollary to the next set of findings which demonstrates that many who give large donations to the political parties, particularly unrestricted nonfederal donations, are provided with access to federal lawmakers. This access provides these donors with the opportunity to influence legislation.

Evidence Regarding Contributions and Access to Federal Lawmakers

1.73 The record contains a substantial amount of evidence showing that large donations to the political parties, particularly nonfederal contributions, provide donors with special access to federal lawmakers. This access is valued by contributors because access to lawmakers is a necessary ingredient for influencing the legislative process. Contributors find that nonfederal funds are most effective at obtaining special access, and to ensure that they maintain this access donors contribute to both political parties. The political parties take advantage of contributors' desire for access by structuring their donor programs so that as donations increase, so do the number and intimacy of special opportunities to meet with Members of Congress. The facts below make clear that this effect of nonfederal donations corrupts the political system.

Donors Give Nonfederal Donations in Order to Obtain Special Access to Federal Lawmakers

1.74 Testimony in the record from lobbyists, Members of Congress, and individual and corporate donors, demonstrates that major contributors to the political parties give nonfederal donations for the purpose of obtaining increased access to, and strengthening their relationships with federal officeholders.

1.74.1 Lobbyists state that their clients make donations to political parties to achieve access. According to lobbyist, and former DNC and DSCC official, Robert Hickmott '[t]here is a very rare strata of contributors who contribute large amounts to the DSCC because they actually believe in Democratic politics. . . . The majority of those who contribute to political parties do so for business reasons, to gain access to influential

Members of Congress and to get to know new Members.' Hickmott Decl., Ex. A. ¶ 46 [DEV 6-Tab 19]; *see also* Rozen Decl. ¶ 10 ('[L]arge political contributions are worthwhile because of the potential benefit to the company's bottom line.') [DEV 8-Tab 33]; Andrews[58] Decl. ¶ 8 (stating that sophisticated political donors 'typically are trying to wisely invest their resources to maximize political return.') [DEV 6-Tab 1]. Wright Andrews explains:

> Sophisticated political donors—particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups—are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. Sophisticated donors do not show up one day with a contribution, hoping for a favorable vote the next day. Instead, they build longer term relationships. The donor seeks to convey to the member that he or she is a friend and a supporter who can be trusted to help the federal elected official when he or she is needed. Presumably, most federal elected

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[58] Mr. Andrews is an attorney and lobbyist at the Washington, D.C. firm of Butera & Andrews, specializing in government relations and federal legislative representations. He has been an active lobbyist before Congress since 1975. Prior to that time, he served as Chief Legislative Assistant to then United States Senator Sam Nunn. Prior to forming Butera & Andrews, he worked in the government relations practice at the Washington office of the law firm of Sutherland, Asbill & Brennan. During his career, he has represented clients from throughout the nation and abroad, and they have included major corporations, trade associations, coalitions, and state governmental entities. He has worked with clients on a broad array of issues including environmental matters, federal taxation, banking, financial services, housing, and many others. He has served two terms as President of the American League of Lobbyists, and Washingtonian magazine named him as [sic] of 'Washington's Top 50 Lobbyists.' Andrews Decl. ¶ 1 [DEV 6-Tab 1]

> officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.

Andrews Decl. ¶ 8 [DEV 6-Tab 1]. Lobbyist Robert Rozen testifies that

> [t]ypically, a contributor gives money to establish relationships, to be able to lobby on an issue, to get close to Members, to be able to have influence. While an elected official of course does not have to do something because somebody gave, a contribution helps establish a relationship, and the more you give the better the relationship. It is not that legislation is being written in direct response to somebody giving a lot of money. Rather, it is one step removed: relationships are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want, because you have established a relationship.

Rozen Decl., Ex. A ¶ 12 [DEV 8-Tab 33].

1.74.2 Some former and current Members of Congress testify that donors expect to establish relationships with officeholders in return for their nonfederal donations to the national political parties. Former Senator Rudman explains:

> By and large, the business world, including corporations and unions, gives money to political parties... [because] they believe that if they decline solicitations for such contributions, elected and appointed officials will ignore their views or, worse, that competing business interests who do make large contributions to the party in question will have an advantage in influencing legislation or other government decisions. The same is true in the preponderance of cases where wealthy individuals give

> $50,000, $100,000, $250,000, or even more to political parties in soft money donations.').

Rudman Decl. ¶ 5 [DEV 8-Tab 34]; *see also* Bumpers Decl. ¶ 14 [DEV 6-Tab 10] ('Although some donors give to Members and parties simply because they support a particular party or Member, the lion's share of money is given because people want access. If someone gives money to a party, out of friendship with a Member, that donor may never ask for anything in return. However, although many people give money with no present intention of asking for anything in return, they know that if they ever need access they can probably get it. Donations can thus serve as a type of insurance.'); *id.* ¶ 13 (testifying that people give money to party committees feel that they are 'ingratiating themselves' with the federal officeholder who solicits the donation); Wirth Decl., Ex. A. ¶ 5 [DEV 9-Tab 43] (stating that those donors who made contributions to the state party 'almost always did so because they expected that the contributions would support my campaign,' and that, generally, 'they expected that [the Senator] would remember their contributions.'); Brock Decl. ¶ 5(a) [DEV 6-Tab 9] (testifying that large givers 'for their part, feel they have a 'call' on these officials. Corporations, unions, and wealthy individuals give these large amounts of money to political parties so they can improve their access to and influence over elected party members. Elected officials who raise soft money know this.'); Boren Decl. ¶ 9 [DEV 6-Tab 8] ('[Members of Congress] know exactly why most soft money donors give—to get access and special influence based on their contributions.').

1.74.3 Business contributors also testify that nonfederal donations to parties are made to obtain access to federal officeholders. Roger Tamraz, an American businessman involved in investment banking and international energy projects, made donations to the DNC during the 1996 election cycle. When asked during Congressional hearings whether one of the reasons he made the contributions was because he 'believed it might get [him] access?,' Mr. Tamraz responded: 'Senator, I'm going even farther. It's the only reason-to get access. . . .' Thompson Comm. Report at 2913 n.46 (quoting page 63 of Mr. Tamraz's testimony before the committee). Some corporate donors view nonfederal donations as the cost of doing business. *See* Hassenfeld Decl. ¶ 16 ('Many in the corporate world view large soft money donations as a cost of doing business, and frankly, a good investment relative to the potential economic benefit to their business. . . . I remain convinced that in some of the more publicized cases, federal officeholders actually appear to have sold themselves and the party cheaply. They could have gotten even more money, because of the potential importance of their decisions to the affected businesses.') [DEV 6- Tab 17]; Randlett Decl. ¶ 5 [DEV 8-Tab 32] (stating that 'many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal officeholders who can protect or advance specific interests through policy action or inaction. Some soft money donors give $250,000, $500,000, or more, year after year, in order to achieve these goals. For most institutional donors, if you're going to put that much money in, you need to see a return, just as though you were investing in a corporation or some other economic venture.'); *see also* Kirsch Decl. ¶ 14 (stating that '[major] donors perceive that they are getting a business benefit through their special access, and that it is a good investment for them.') [DEV 7-Tab 23].

Documents submitted show that a Fortune 100 company makes large contributions to national party committees with the expectation that its contributions will cultivate or strengthen its 'relationships' with particular Members of Congress. *See, e.g.*, Internal Fortune 100 company memorandum entitled 'Justification for donation to [DSCC]' (October 25, 2000) [citation sealed] ('I am requesting a check for

$50,000.00 to the Democratic Senatorial Campaign Committee (DSCC). Senator Robert Torricelli is the chairman for the DSCC and in a recent conversation with the Senator, he requested the above amount from [our company]. Senator Torricelli has been a friend to [our company] for many years and he has shown himself to be a thoughtful voice regarding issues in our industry. He currently serves on the Judiciary, Foreign Relations & Governmental Affairs and Rules and Administration Committees. I feel this would be a great opportunity to strengthen our relationship with Senator Torricelli and the DSCC.'); Internal Fortune 100 company memorandum entitled 'Justification for donation to [DSCC]' (December 12, 2000) [citation sealed] ('I am requesting a check in the amount of $50,000 to the Democratic Senatorial Campaign Committee (DSCC). Senator Patty Murray (D-WA) is the new chairman of the DSCC . . . . Senator Murray sits on the Senate Committees on Appropriations, Budget, Health, Education, Labor and Pensions, and Veterans Affairs. This donation would further enhance our ties with the DSCC and get our relationship with Senator Murray off to a good start.'); Internal Fortune 100 company memorandum entitled '[DCCC]/Congressman Bill Luther' (May 7, 2001) [citation sealed] ('I am requesting a check for $25,000.00 to the [DCCC] to support party building activities in response to a request from Congressman Bill Luther. Congressman Luther has been a friend to [our company] for many years . . . . He currently serves on the Commerce Committee, the Subcommittees for Telecommunications, Trade & Consumer Protection as well as the Finance and Hazardous Materials. I feel this would be a great opportunity to strengthen our relationship with Congressman Luther.'); Internal Fortune 100 company memorandum entitled 'Georgia Senate 2002' (July 19, 2001) [citation sealed] ('I am requesting a check for $10,000.00 on behalf of Georgia Senate 2002. Senator Cleland has been reaching out to his key supporters and he has contacted [our company] for financial assistance with

Georgia Senate 2002. This is very important to Senator Max Cleland and over the years, Senator Cleland has been a good friend to [our company]. I feel this would be a great opportunity to strengthen our relationship with Senator Cleland.'). One legislative advocate from this company described the benefits reaped from contributing $100,000 to the NRCC: 'I think we established some goodwill with [Congressman] Tauzin, both by [our company] contributing at the $100,000 level to the NRCC dinner he chaired last month and by my participation in the NRCC Finance Committee for the dinner. Tauzin understood that [our company] participated at the same level as the major . . . companies [in our industry] did, and he expressed genuine interest in trying to begin to reach out to the competitive industry. In sum, I think the event was a real positive for [our company].' Internal Fortune 100 company memorandum entitled'NRCC Leadership Dinner 2000,' dated April 4, 2000, [citation sealed].

An internal RNC document also shows that donors often give to the national parties to achieve access to lawmakers. RNC0177216 [DEV 95] (note written on stationery of RNC's Team 100 Director, Haley Barbour, stating 'they have pretty much decided to join T-100 . . . . They want access to political players . . . . Their top issue is tort reform').

1.74.4 One experienced individual donor testifies that '[l]arge soft money donors give in order to obtain access and influence.' Hiatt Decl. ¶ 11 [DEV 6- Tab 18].

1.74.5 Plaintiffs' expert La Raja testifies that interest groups probably pursue an access strategy when they give money to political parties. La Raja Cross Exam. at 89 [JDT Vol. 15].

Large Nonfederal Donations Provide Donors Access to Federal Lawmakers

1.75 The record demonstrates that large donations, especially nonfederal contributions, to the political parties provide donors with access to Members of Congress. The record is a treasure trove of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that contributions, especially large nonfederal donations, are given with the expectation they will provide the donor with access to influence federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized. As one former Member of Congress puts it: '[A]ccess is it. Access is power. Access is clout.' Boren Decl. ¶ 7 [DEV 6-Tab 8] (quoting Rep. Mazzoli). 1.75.1 Testimony from lobbyists demonstrates that large donations, particularly in nonfederal form, are a necessary ingredient for a successful lobbying campaign because they provide their clients with access to federal lawmakers, which allows them to influence legislation.

Lobbyist Robert Rozen testifies that large nonfederal donations are essential for developing relationships with Members of Congress, which in turn lead to access, which in turn lead to influence over policy.

> I know of organizations who believe that to be treated seriously in Washington, and by that I mean to be a player and to have access, you need to give soft money. As a result, many organizations do give soft money. . . . They give soft money because they believe that's what helps establish better contacts with Members of Congress and gets doors opened when they want to meet with Members. There is no question that money creates the relationships. Companies with interests before particular committees need to have access to the chairman of that committee, make donations, and go to events where the chairman will be. Even if that chairman is not the type of Member who will tie the contribution and the legislative goals together, donors can't be sure so they want to play it safe and make soft money

> contributions. The large contributions enable them to establish relationships, and that increases the chances they'll be successful with their public policy agenda. Compared to the amounts that companies spend as a whole, large political contributions are worthwhile because of the potential benefit to the company's bottom line.

Rozen Decl. ¶ 10 [DEV 8-Tab 33]; *see also id.* ¶ 14 ('You are doing a favor for somebody by making a large [soft money] donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone—that is, write a larger check—and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings: the Member has received a favor and feels a natural obligation to be helpful in return. This is how human relationships work. The legislative arena is the same as other areas of commerce and life. It is similar to a situation that has been in the news recently: an investment banking firm made shares of hot initial public offerings available to the officers of Worldcom Inc., while Worldcom Inc. executives were giving the firm tens of millions of dollars in investment-banking business. There doesn't have to be a specific tie-in to achieve the result.').

Lobbyist Robert Hickmott, who is a former DNC and DSCC official, testifies that he advises his clients to make contributions in order to 'establish relationships. Having those relationships in many ways then helps us get meetings and continue that relationship.' Hickmott Dep. at 50 [JDT Vol. 10]. Hickmott testifies that when Senator Robb was chairman of the DSCC he would go to the DSCC offices where he would 'accept checks from individuals or organizations who wanted to give money to the DSCC and they wanted face time with Chairman Chuck Robb.' *Id.* at 94-95. Donors would 'use this as an opportunity not only to

make a contribution to the DSCC, but also to convey to Senator Robb what their group or individual position was on an issue.' *Id.* at 95.

Lobbyist Daniel Murray's testimony in a prior case, which has been incorporated into the record of this case, states that

> contribut[ing] soft money . . . has proven to provide excellent access to federal officials and to candidates for federal elective office. Since the amount of soft money that an individual, corporation or other entity may contribute has no limit, soft money has become the favored method of supplying political support. . . . [S]oft money begets both access to law-makers and membership in groups which provide ever greater access and opportunity to influence.

Murray Aff. in *Mariani* ¶ 14 [DEV 79-Tab 59].

1.75.1.1 Although there are varying views as to whether lobbying efforts are a more effective means of achieving access to federal officeholders than large nonfederal contributions, there is no dispute that large nonfederal contributions provide an additional means of obtaining access to officeholders and are generally part of modern lobbying plans. While one lobbyist concedes that his clients hire him because he is able to provide them access to lawmakers regardless of the client's donation history, one of the ways he is able to provide this service is through nonfederal donations he and his firm arrange for Members of Congress and their political parties. Moreover, Plaintiffs have not presented the testimony of a single lobbyist who believes that nonfederal money donations do not assist clients in their efforts to gain access to influence federal lawmakers.

1.75.1.2 Some testimony presents lobbying as a more effective method of obtaining access to federal lawmakers than nonfederal donations. *See* RNC Finance Director B. Shea Decl. ¶ 45 [RNC Vol. V] ('It is obvious why major donors to the RNC do not regularly use their donations as a means to obtain 'access.' All or virtually all who have personal or organizational business with the federal government retain or employ professional lobbyists.'); Former Senator Bumpers Dep. in *RNC* at 39 [DEV 63-Tab 1] ('[M]oney really does buy access . . . . [a]t some level that's true of campaign contributions, and it's almost always true in the cases of lobbying') *but see infra* Findings ¶ 1.75.2 (Former Senators Rudman, Boren and Simpson's views on access). Evidence was also presented that many entities that donate nonfederal funds to political parties also spend vast sums of money lobbying federal officeholders, sometimes exceeding their donations by many multiples. *See* Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24 (admitting that top five corporate nonfederal donors during the 1996 election campaign donated $9,009,155 to national party committees and same five corporations spent $27,107,688 on lobbying during 1996 alone[59]); *id.* at 24-25 (admitting that top five corporate donors of nonfederal funds during 1997 and 1998 donated $7,774,020 to national party committees and same five corporations spent $42,000,000 on lobbying during that same period[60]); *see also* Primo Cross Exam. at 164 [JDT Vol. 27] (noting that nonfederal donations 'is a piddling amount of money . . . relative to what corporations spend on lobbying and . . . philanthropy'); Mann Cross Exam. at 49 [JDT Vol. 17] ('It's not either or. Is more money spent on lobbying than soft money donations? Yes. It varies tremendously. In some sectors it's 2-1, in others 4-1, 10-1. You have given an example in a particular case of 15-1, but the fact is mostof the organizations and economic interests doing that lobbying, inside and outside lobbying, are also intimately involved in the political financing game and making large contributions to political parties.'). One lobbyist states that his clients hire him in large part because of his contacts on Capitol Hill and because he has access to federal officeholders whether or not their clients have donated money to candidates, officeholders or parties. *See* Hickmott Dep. at 46-47, 50-51 [JDT Vol. 10]; *but see id.* at 50 (noting that his firm gives 'contributions to establish relationships. Having those relationships in many ways then helps us get meetings and continue that relationship.'); Andrews Cross Exam. at 19-20 [JDT Vol. 1] (acknowledging that some organizations gain access by means other than money, such as by using celebrity individuals).

1.75.1.3 Lobbyists maintain that 'basic' or traditional lobbying activities are 'alone insufficient to be effective in many instances in lobbying endeavors. To have true political clout, the giving and raising of campaign money for candidates and political parties is often critically important.' Andrews Decl. ¶ 5 [DEV 6-Tab 1]; Murray Aff. in *Mariani* ¶¶ 6-7 [DEV 79-Tab 4] (testifying that '[a]long with each . . . legislative plan [a plan to 'advance the client's legislative agenda'], and essential to achieving the client's goals, I develop a parallel political financial support plan. In other words, I advise my clients as to which federal office-holders (or candidates) they should contribute and in what amounts, in order to best use the resources they are able to allocate to such efforts to advance their legislative agenda. Such plans also would include soft money contributions to political parties and interest groups associated with political issues.'); *see also* Meehan Dep. in *RNC* at 40-41 [DEV 66-Tab 4] ('[P]ower and influence in Washington is not just the amount of soft money an industry contributes to the political parties. I would say that also it's the amount of PAC money that they contribute to the political candidates, it's the amount of hard money they contribute, it's the amount of lobbying money that they expend in order to influence members of Congress.'). Furthermore, testimony from lobbyists shows contributions help lobbyists gain access to lawmakers. Lobbyist Wright Andrews comments:

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[59] The donors were Philip Morris ($3,017,036 in nonfederal contributions to national political parties, $19,580,000 in lobbying expenditures), Joseph E. Seagram & Sons ($1,938,845 in nonfederal contributions to national political parties, $550,000 in lobbying expenditures), RJR Nabisco ($1,442,931 in nonfederal contributions to national political parties, $1,637,688 in lobbying expenditures), Walt Disney Co. ($1,359,500 in nonfederal contributions to national political parties, $980,000 in lobbying expenditures), and Atlantic Richfield ($1,250,843 in nonfederal contributions to national political parties, $4,360,000 in federal and state lobbying expenditures). Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24.

[60] The donors were Philip Morris ($2,446,316 in nonfederal contributions to national political parties, $38,800,000 in lobbying expenditures), Communications Workers of America ($1,464,250 in nonfederal contributions to national political parties, $460,000 in lobbying expenditures), AFSCME ($1,340,954 in nonfederal contributions to national political parties, $2,460,000 in lobbying expenditures), Amway Corp. ($1,312,500 in nonfederal contributions to national political parties.

> The amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients infuse into the political system. Some lobbyists help raise large 'soft money' donations and/or host many fundraising events for key legislators. Some simply represent a single client with very deep pockets and can easily reach into large corporate or union funds for 'soft money' donations or other allowable expenditures that may influence legislative actions. Those who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly, the lobbyists with the most political clout.

Andrews Decl. ¶ 12 [DEV 6-Tab 1]; *see also* Hickmott Dep. at 50 [JDT Vol. 10]. Andrews testifies that it has become a common practice for lobbyists to 'host a number of fundraisers.' Andrews Decl. ¶ 16 [DEV 6-Tab 1] He explains that '[w] hereas the political parties periodically organize 'gala' events in large ballrooms filled with hundreds of donors, lobbyists now often prefer attending smaller events hosted by other lobbyists, with only ten or fifteen people participating, all sitting at a dinner or breakfast table with the invited guest elected official. This type event allows lobbyists a better opportunity to build more personal relationships and toexchange views.' *Id.*

1.75.2 Former and current Members of Congress testify that contributions provide donors with access to influence federal lawmakers. Former Senator Rudman describes the system bluntly:

> Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party—to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: 'We gave money so you should do this to help us.' No one needs to say it—it is perfectly understood by all participants in every such meeting. . . .
>
> Large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done. They affect whom Senators and House members see, whom they spend their time with, what input they get, and—make no mistake about it—this money affects outcomes as well

Rudman Decl. ¶¶ 7, 9 [DEV 8-Tab 34]. Senator Simpson testifies that groups used 'to give to someone who was for your philosophy,' but now '[i]t's giving so you can get access.' Simpson Dep. at 11-12 [JDT Vol. 30]. Senator Boren finds the 'comments some of [his] colleagues have made about the system are completely consistent with [his] own experience. For example, former Rep. Romano Mazzoli (D-Kentucky) said: 'People who contribute get the ear of the member and the ear of the staff. They have the access—and access is it. Access is power. Access is clout. That's how this thing works. . .' Similarly, Rep. Jim Bacchus (D-Fla.) has explained: 'I have on many occasions sat down and listened to people solely because I know they had contributed to my campaign.' Boren Decl. ¶ 7 [DEV 6-Tab 8] (citation omitted). Former Senator Simon attests:

> Giving to party committees also helps you gain access to Members. While I realize some argue donors don't buy favors, they buy access. That access is the abuse and it affects all of us. If I got to a Chicago hotel at midnight, when I was in the Senate, and there were 20 phone calls waiting for me, 19 of them names I didn't recognize and the 20th someone I recognized as a $1,000 donor to my campaign, that is the one person I would call. You feel a sense of gratitude for their support. This is even more true with the prevalence of much larger donations, even if those donations go to a party committee. Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions. When you increase the amount that people are allowed to give, or let people give without limit to the parties, you increase the danger of unfair access.

Simon Decl. ¶ 16 [DEV 9-Tab 37]. Senator McCain notes:

> At a minimum, large soft money donations purchase an opportunity for the donors to make their case to elected officials, including the President and Congressional leaders, in a way average citizens cannot. Many legislators have been in situations where they would rather fit in an appointment with a soft money contributor than risk losing his or her donation to the party. Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money. Members of Congress interact with donors at frequent fundraising dinners, weekend retreats, cocktail parties, and briefing sessions that are held exclusively for large donors to the party. Donors or their lobbyists often inform a particular Senator that they have made a large donation. When, as a result of a Member's solicitation, someone makes a significant soft money donation, and then the donor calls the Member a month later and wants to meet, it's very difficult to say no, and few of us do say no.

McCain Decl. ¶ 6 [DEV 8-Tab 29]; *see also* Shays Decl. ¶ 9 [DEV 8-Tab 35] ('Soft money donations, particularly corporate and union donations, buy access and thereby make it easier for large donors to get their points across to influential Members of Congress. The donors of large amounts of soft money to the national parties are well-known to the leadership and to many other Members of Congress. The access to elected officials that large donors receive goes far beyond an average citizen's opportunity to be heard.').

1.75.2.1 Defendant-Intervenors who testified in this case state that they personally do not provide special access to individuals or corporations that provide large contributions to parties, regardless of whether the donation is in federal or nonfederal funds. *See* Feingold Dep. at 116 [JDT Vol. 6] ('I cannot imagine a situation where . . . I would meet with somebody because they gave soft money.'); Snowe Dep. at 210-11 [JDT Vol. 31] (stating she has never given preferential access to any donor, federal or nonfederal, and that '[e] verybody has access to my office to the extent that I have time available'); Jeffords Dep. at 96-97 [JDT Vol. 11] (stating person's status as a donor to national party committee does not 'affect [his] decisions as to who [he] meet [s] with or give[s] access to'); Meehan Dep. at 180 [JDT Vol. 22] (stating he provides no preferential access to nonfederal donors); Cross Exam. of Shays at 20-21 [JDT Vol. 29] (agreeing he 'pretty much [has] an open door policy to meet people who want to talk to [him] about important legislative issues'). Given the efforts these Members of Congress have made over the past years to reform the political system, it is not surprising that they would have such policies. These Members, however, do not claim to speak for the rest of their colleagues.

1.75.3 Corporate donors testify that contributions provide access to influence lawmakers. Wade Randlett testifies that 'many members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game. They are caught in an arms race that is accelerating, but that many feel they cannot afford to leave or speak out against.' Randlett Decl. ¶ 14 [DEV 8-Tab 32].

Chairman Gerald Greenwald[61] testifies that

> labor and business leaders are regularly advised that—and their experience directly confirms that—organizations that make large soft money donations to political

> parties in fact do get preferred access to government officials. That access runs the gamut from attendance at events where they have opportunities to present points of view informally to lawmakers to direct, private meetings in an official's office to discuss pending legislation or a government regulation that affects the company or union. . . . [Some unions and corporations] give large soft money contributions to political parties—sometimes to both political parties—because they are afraid to unilaterally disarm. They do not want their competitors alone to enjoy the benefits that come with large soft money donations: namely, access and influence in Washington. Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the opportunity to argue for their corporation's or union's position on a particular statute, regulation, or other governmental action. Labor and business leaders believe—based on experience and with good reason—that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties.

Greenwald Decl. ¶¶ 10, 12 [DEV 6-Tab 16]; *see also* Hassenfeld Decl. ¶¶ 23-24 ('I think companies in some industries have reason to believe that because their activities are so closely linked with federal government actions, they must participate in the soft money system in order to succeed.') [DEV 6-Tab 17].

An Eli Lilly and Company memorandum states that its 1995-96 political 'contributions and the related activities we have participated in have been key to our increased role and ability to get our views heard by the right policy makers on a timely basis; in other words, a smart investment.' Eli Lilly and Company Memorandum (Jan. 15 1997), ODP0018-00481 to 86 [DEV 69-Tab 48].

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[61] Mr. Greenwald is currently Chairman Emeritus of United Airlines, the largest employee majority-owned company in the United States. From 1994 through his retirement in 2000, he served as the Chairman and CEO of United. Prior to that, he was vice chairman at Chrysler Corporation and worked at Ford Motor Company. Greenwald Decl. ¶ 2 [DEV 6-Tab 16]

1.75.4 The former Chairman of the DNC testifies that '[m]any contributors of large sums of money- both Republicans and Democrats—gain access to party and governmental officials that they otherwise would not have. With this access, contributors are able to make their cases to people who make public policy and take official governmental action.' Fowler[62] Decl. ¶ 6 [DEV 6-Tab 13]

1.75.5 Individual donors testify that contributions provide access to influence federal officeholders on issues of concern to them. Steven Kirsch testifies that

> [p]olicy discussion with federal officials occurs at major donor events sponsored by political parties. I have attended many such events. They typically involve speeches, question and answer sessions, and group policy discussions, but there is also time to talk to Members individually about substantive issues. For example, at a recent event. I was able to speak with a Senator representing a state other than California and we had a short conversation about how our respective staffers were working together on a particular issue.

Kirsch Decl. ¶ 12 [DEV 7-23]. Similarly, Peter Buttenwieser testifies:

> Events, meetings and briefings held for soft money donors provide opportunities for the donors to hear speeches and engage in policy discussions with federal office holders. There is also a certain amount of politicking and lobbying at these events. This is true particularly in the side discussions, in which donors can approach office holders and discuss their issues.

Buttenwieser Decl. ¶ 25 [DEV 6-Tab 11]. He also observes that

> [t]here is no question that those who, like me, make large soft money donations receive special access to powerful federal office holders on the basis of the donations. I am close to a number of Senators, I see them on a very consistent basis, and I now regard the Majority Leader as a close friend. I understand that the unusual access I have correlates to the millions of dollars I have given to political party committees, and I do not delude myself into thinking otherwise. Not many people can give soft money on that scale, and it naturally limits the number of those with that level of access.

Id. ¶ 22. Arnold Hiatt testifies that

> [a]s a result of my $500,000 soft money donation to the DNC, I was offered the chance to attend events with the President, including events at the White House, a number of times. I was offered special access as a result of the contributions I had made, though I generally never took advantage of that access. One event that I did attend was a dinner at the Mayflower Hotel in Washington, D.C. in approximately March 1997 with President Clinton and Vice- President Gore. The dinner was for the largest donors to the DNC, about thirty people. I did not plan on attending but I went because several people urged me to use the occasion to speak in favor of campaign finance reform. I used the opportunity to talk to the President about how the campaign finance system in this country had become a crisis, and argued that the crisis provided an opportunity for the President to provide some leadership. I don't think that we got the leadership I was seeking on the campaign finance issue,

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[62] Mr. Donald Fowler from 1971 until 1980, he served as Chairman of the South Carolina Democratic Party and from January 1995 until January 1997 he served as Chairman of the Democratic National Committee. Fowler Decl. ¶ 2 [DEV 6-Tab 13].

> but I did get the chance to make a personal pitch to the President as a result of my donation.

Hiatt Decl. ¶ 9 [DEV 6-Tab 18]. Hiatt testifies that others in attendance also shared their views on policy matters of importance to them as the event was advertised as an opportunity to 'give advice to the president.' Hiatt Dep. at 119-21 [JDT Vol. 10]; *see also* Hassenfeld Decl. ¶ 12-13 [DEV 6-Tab 17] ('[W] hen given the opportunity, some donors try to pigeonhole or corner Members, in a less than diplomatic way, to discuss their issues at these events.'); Geschke[63] Decl. ¶ 5 [DEV 6-Tab 14] (testifying that in connection with $50,000 in federal and nonfederal donations made to the DNC he and his wife attended a dinner of 10 to 12 people with President Clinton 'last[ing] two or three hours, and consist[ing] primarily of a conversation about issues of importance to the nation and the President's program'); RNC 0026901 [IER Tab 7] (note from the director of the RNC's Team 100 program thanking a donor for 'facilitating Dow [Chemical]'s generous contribution to the Republican Party. It's a timely donation as we head into the final hours of the campaign. Give me a call . . . and we can figure out when is a good time to bring your Dow [Chemical] leadership into town to see [RNC Chairman] Haley [Barbour], [Senate Majority Leader Robert] Dole & [Speaker of the House] Newt [Gingrich].'); RNC 00031843 [IER Tab 7] (letter from donor to RNC Chairman Jim Nicholson telling him 'I do feel I have benefited [sic] from Team 100 in the audience it has afforded me with party leaders'); RNC 0194817 [IER Tab 1.E] (letter from RNC to a pharmaceutical company asking the company for its opinion and suggestions on the enclosed RNC 'health

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[63] Mr. Charles Geschke is Chairman of the Board of Adobe Systems, Inc., which he co-founded in 1982. Geschke Decl. ¶ 1 [DEV 6-Tab 14]. Since 1994, Mr. Geschke estimates that he has donated over $150,000 in federal funds to federal political committees, and over $18,000 in nonfederal funds to national party committees. *Id.* ¶ 3 [DEV 6-Tab 14].

care package' and a $250,000 donation to join the RNC's Season Pass program).

Thomas McInerney, a large contributor to the Republican party, states that his support for the Republican Party at the national, state, and local levels is not dependent upon gaining access to federal officeholders. McInerney states that he would support the Republican Party whether or not he was solicited by a federal officeholder and whether or not his contribution resulted in attendance at an event that included federal officeholders. McInerney Aff. ¶ 17 [9 PCS]. Even so, McInerney attests that he has been *offered* access to federal officeholders in exchange for his donations of nonfederal funds. *Id.*[64]

The Political Parties Facilitate Access to Members of Congress for Their Large Contributors

1.76 Party leaders facilitate direct communications on matters of policy between nonfederal money donors and officeholders. Several documents in the record demonstrate this fact.

For example, a handwritten note dated February 21, 1995 from RNC Chairman Haley Barbour to [a major donor] stated, in part: 'Dear [_____]: Thank you for your very thoughtful memo on the estate and gift tax law. I've read it and will pass it along to appropriate Senators, Representatives and staff folks when I'm on the Hill tomorrow.' ODP0031-01403 to 04 [DEV 71-Tab 48]. A March 28, 1995, letter from House Ways and Means Committee Chairman Bill Archer (R-TX) to the donor thanked the donor for his 'intriguing' proposal, noting Archer's personal preference that the estate and gift taxes be repealed completely. ODP0031-01412 [DEV 71-Tab 48]. A March 31, 1995 letter from the donor to Team 100 Director Timothy Barnes enclosed the donor's 1995 Team 100 membership check and requested that Barnes provide Barbour with a copy of Archer's March 28, 1995 letter. ODP0031-01406 to 11 [DEV 71-Tab 48]. Team 100 membership requires a $100,000 donation every four years, with $25,000 donations in each intervening year. Findings ¶ 1.77.1.

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[64] Mr. McInerney's affidavit includes statements about his understanding of the legal effect of New York campaign laws which is irrelevant to the cases at bar. *See* McInerney Aff. ¶ 8 [9 PCS]. His affidavit also contains statements which suggest an incomplete understanding of the impact BCRA will have on his campaign donations.

A handwritten note dated Oct. 27, 1995, from RNC Chairman Haley Barbour asks Senate Majority Leader Bob Dole to meet with the CEO of Pfizer, a member of the RNC's 'Team 100' nonfederal money donor group, to discuss an extension of the Section 936 tax credit:

> Dear Bob
>
> [____], CEO of Pfizer, has asked to see you on Wed. 11/1. He is extremely loyal and generous. He also is not longwinded. He'll tend to his business and not eat up extra time. They have proposed a [Internal Revenue Code §] 936 solution that [Republican Senator William] Roth and [Republican Congressman Bill] Archer are considering. I'm sure that is the issue. I'd appreciate it if you'd see Bill. [signed] Haley.

ODP0025-02456 to 57 [DEV 70-Tab 48].

A letter from the chairmen of the Congressional Forum of the NRCC addressed to the Association of Trial Lawyers of America discusses an upcoming Congressional Forum Chairman's Dinner, and notes: '[o]ur event will give you an excellent opportunity to meet with the Members of the [Judiciary Committee] to discuss issues relevant to your organization.' ODP0042-00025 [DEV 71-Tab 48]; *see also* July 10, 1996 letter from John Palmer to [redacted addressee] (reminding addressee that Palmer had asked him to join the RNC's Team 100, and noting that RNC Chair Barbour escorted new Team 100 member and Energy CEO [______] on four appointments that were 'very significant' in legislation affecting companies like his and made him 'a hero in his industry'), ODP0023-02043 [DEV 70-Tab 48]; RNC0044465 [DEV 93] (Memorandum from Tim Barnes of the RNC to Royal Roth noting that someone from [a company] had been 'trying to establish a contact in Senator Dole's office for [a company executive]. As you know, [this executive] has been very generous to the RNC. If there is any way you can assist, it would be greatly appreciated.'); ODP0030-03512 to 13 [DEV 71-Tab 48] (notes of telephone call between Jim Nicholson of the RNC and a Team 100 member, which states that Nicholson will take up an issue discussed with Senator Trent Lott); [DEV 71] Letter from RNC Chairman Jim Nicholson to [a donor], August 18, 1998, copies to House Speaker Newt Gingrich, House Majority Leader Dick Armey and Congressman John Linder ODP0033-00534 (stating 'I appreciate your interest in helping us hold onto our majority in the House. . . . I can tell you every single dollar of your contribution will go directly into *Operation Breakout* If you will make your check out (which can be personal or corporate) to the Republican National Committee and annotate it for *Operation Breakout* I will personally show a copy of it to Newt, Dick Armey and John Linder. Please feel free to accompany it with a transmittal letter containing any other message that you choose.'); ODP0042-000654 (memorandum to all Congressional Forum members from the chairmen, informing them of an upcoming dinner featuring members of the Banking Committee, noting that '[o]ur event will give you an excellent opportunity to meet with members of the committee to discuss issues relevant to your organization') ; ODP0042-01111 [DEV 71-Tab 48] (letter from NRCC to the Federal Managers' Association, noting an upcoming dinner where the addressee could express 'interests and concerns regarding upcoming legislation'); RNC0156717 (letter from RNC to

Senator Hagel staffer, asking Senator Hagel to meet with a donor for four 'key' reasons including: '[h]e runs [sic] $80,000,000 high tech business,' and '[h]e just contributed $100,000 to the RNC.').

In addition to these documents, the record includes corroborating testimony like that of former Senator Wirth who states:

> The Democratic national campaign committees sometimes asked me to meet with large donors to the party whom I had not met before. At the party's request, I met with the donors. I understood that the donors' goal in making the large contributions was often to occasion meeting(s) with me or other prominent Democratic congressional leaders to press their positions on legislative issues. On these occasions, sometimes all I knew about the donor would be the issue in which he was interested.

Wirth Decl. Ex. A ¶ 15 [DEV 9-Tab 43]. Former DNC Chairman Donald Fowler testifies:

> Party and government officials participate in raising large contributions from interests that have matters pending before Executive agencies, the Congress, and other government agencies. Party officials, who are not themselves elected officials, offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities—White House and congressional meetings—to press their views on matters pending before the government.

Fowler Decl. ¶ 8 [DEV 6-Tab 13].

1.76.1 The RNC's Finance Director attests that the RNC does not arrange meetings with government officials for any of its donors—federal or nonfederal. B. Shea Decl. ¶ 44 [RNC Vol. V]. She states that the RNC Finance Division, '[a]s a matter of policy,' passes along requests from donors for meetings with a federal officeholder to that officeholder's scheduling staff 'without inquiring into the purpose of the proposed meeting,' 'neither . . . advocate[s] a meeting nor ascertain[s] whether a meeting has been arranged,' does not provide to the officeholder's scheduler the amount of the money that donor has contributed to the party. *Id.* at 44, 46. When asked about this policy during her cross-examination, Ms. Shea testified that the policy is an informal, unwritten policy. B. Shea Dep. at 80 [JDT Vol. 29]. She does not say whether this policy applies only to the RNC Finance Division or to the entire committee. Furthermore, the policy is more nuanced than Ms. Shea's declaration implies. According to Ms. Shea, the RNC Finance Division's 'policy' is to not 'force' federal officeholders to meet with donors, but that it may pass along requests to a Member's scheduler and say 'this is a Team 100 member, could you see if you could fit them in.' *Id.* at 82. Indicating that a person is a Team 100 member, which means they give the RNC $100,000 every four years, with $25,000 donations each intervening year, while not informing the scheduler of the precise amount of money the donor gave the RNC, does give the Member's office the message that the individual interested in a meeting is a major donor. *See also supra,* Findings ¶ 1.76 (other instances of RNC officials setting up meetings for major donors with Members of Congress). Furthermore, as Senator Simon has stated, 'Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.' *See supra* Findings ¶ 1.66.

1.77 The political parties have structured their donation programs so that donors are encouraged to contribute larger amounts in order to get access to more exclusive and intimate events at which Members of Congress are present. The evidence also shows that the parties use the enticement of access to secure larger donations. For example, a letter from then-RNSC Chairman Senator McConnell explained that a $25,000 nonfederal fund donation would provide the donor membership in the NRSC's Chairman's Foundation whose benefits 'include four to five small dinner meetings annually, each focused on a specific Senate Committee. The meetings consist of a briefing with the top committee staff members, followed by a reception and dinner with the staffers and Republican members of the committee to discuss the issues. Foundation members are also invited to all Senatorial Trust events which provide an additional four opportunities year to meet with our Republican Senate Majority.' ODP0037-02271 [DEV 71-Tab 48].

1.77.1 RNC documents show that the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors. ODP0018- 00113 to 36 [DEV 69-Tab 48] (RNC Brochure 'Donor Programs'); *see also* Resps. RNC to FEC's First RFA's, No. 62 [DEV 12-Tab 10]. The RNC offers its donors a range of different donor programs, for a range of different donor financial levels and interests. ODP0025-00375 to 79 [DEV 70-Tab 48] ('Summary of RNC's Donor Programs'). The RNC President's Club required a $1,000 annual contribution, or $2,000 per couple per year, and held a meeting in Washington, D.C. at least once a year which included policy briefings and discussions led by Republican political leaders. *Id.* at ODP0025-00375; B. Shea Decl. ¶ 14.b [RNC Vol. V]. The Chairman's Advisory Board required a $5,000 annual hard money contribution and offered a 'vigorous and informal exchange of views among Board members and party leaders. . . . Board meetings include three or four panel discussions, each chaired by a Congressional leader or senior policy adviser with particular expertise in the area under consideration.' ODP0025-00375 to 77 [DEV 70-Tab 48]. According to the document, the Chairman's Advisory Board was established 'to enlist the personal energy and professional expertise of Republican leaders in business and community affairs in developing policy and campaign strategies at the highest levels for the party.' ODP0025-00375 to 77 [DEV 70-Tab 48]. The Republican Eagles required an annual contribution of $15,000 (individual) or $20,000 (with spouse or nonfederal/corporate). *Id.* ODP0025-00377 to 0378, ODP0025-00429 [DEV 70-Tab 48]. The Eagles program offered a series of national and regional meetings with elected Republican Congressional leaders, special access to Republican events, and other benefits. ODP0025-00428 [DEV 70-Tab 48]; ODP0030-02838 to 39 [DEV 71-Tab 48]. The Team 100 program required a donation of $100,000 upon joining and every fourth year thereafter, with $25,000 donations required in each of the three intervening years. ODP0014-00983, ODP0014-01457 to 58 [DEV 69-Tab 48]. The Team 100 program offered members national and regional meetings with the Republican Party leadership throughout the year, special events, membership in the Eagles program, the opportunity to participate in international trade missions, and other benefits. ODP0025-00377, ODP0025-00424, ODP0025-01705 to 13 [DEV 70-Tab 48]. The Season Ticket program required a donation of $250,000 upon joining and renewals thereafter. ODP0022-03045 to ODP0022-3046, ODP0023-02480, ODP0025-01569 [DEV 70-Tab 48]; ODP0030-03408 [DEV 71-Tab 48]. The 'Season Ticket' or 'Season Pass' program offered the greatest and most exclusive range of RNC donor program benefits, including one Team 100 membership, two Eagle memberships, special access to a range of Republican Party events, and the assistance of RNC support staff. ODP0025-01569 [DEV 70-Tab 48]. The RNC also offers the Regents program designed for members who give an aggregate amount of $250,000 in nonfederal funds per two-year election cycle. B. Shea Decl. ¶ 14.g [RNC Vol. V].

1.77.2 The NRSC also offered several major donor programs. In 1995 and 1996, the NRSC offered a corporate donor program called 'Group 21' or 'G21,' which required an annual donation of $100,000. ODP0037-02246, ODP0037-

02275, ODP0037- 02281 [DEV 71-Tab 48]. The 'Group 21' program offered donors 'small dinners with [then-NRSC Chairman] Senator D'Amato and other senators' and other 'VIP benefits.' ODP0037-02275 [DEV 71-Tab 48]. The Chairman's Foundation required an annual corporate (meaning nonfederal money) donation of $25,000. ODP0036-03603 [DEV 71-Tab 48]. The Senatorial Trust required an annual donation of $10,000 (personal) or $15,000 (corporate). ODP0036-03873 to 74 [DEV 71-Tab 48]. The Presidential Roundtable required an annual donation of $5,000 in personal or corporate funds. ODP0037-00315 [DEV 71-Tab 48]. *See also* ODP0036-03525 (letter signed by Senator McConnell to NRSC member asking him to renew his membership, noting that '[y]our non-federal contribution to the Chairman's Foundation will allow us to put our federal dollars directly towards the Senate campaigns, where they are desperately needed.'); ODP0036-3562 (letter signed by Senator McConnell thanking addressee for joining the Chairman's Foundation); ODP0036- 03595 (letter signed by Senator McConnell soliciting someone to join the Chairman's Foundation); ODP0037-01861 to 69 (NRSC brochure) [DEV 71-Tab 48]; Vogel Decl. ¶ 51 ('The NRSC uses a variety of donor programs to motivate persons to donate funds. These programs tend to be associations of donors and fundraisers, who are grouped by the nature and extent of the funds given or raised.'), Tabs A, J [DEV 9-Tab 41] (2002 Senatorial Trust materials).

1.77.3 'The DSCC hosts several different types of events to motivate persons to donate funds. These events are often attended by Democratic Senators, Democratic Senate candidates, other Democratic holders of federal office, Democratic Cabinet officials and other celebrities who neither seek nor hold federal office.' Jordan Decl. ¶ 52 [DEV 7-Tab 21]. For example, during the 1996 election cycle, the DSCC offered memberships in its 'Leadership Circle.' COL0002-00698 [DEV 78-Tab 152]. Membership required a

$10,000 annual contribution for individual donors, and $15,000 for PACs. *Id.* Benefits included 'special Leadership Circle weekend retreats and issue seminars with Senators and Washington officials. . . . Leadership Circle members also receive tickets to the annual Senate Fall Dinner, followed by a day of issue oriented meetings with Senators and political experts.' *Id.* The DSCC also offered memberships to its 'Majority Trust,' 'the premiere donor program of the DSCC for individuals who contribute $20,000 per calendar year.' *Id.* 'The Majority Trust offers important programs, weekends and retreats throughout the year attended by Democratic Senators.' *Id.* The DSCC also solicits donations for special events. For example, for the DSCC's 1999 Annual Fall Dinner, a $50,000 nonfederal donation bought the donor benefits including a priority table at the dinner and one ticket to the VIP Reception. Jordan Decl. Attach. L (DSCC-L-0025).

1.77.4 The NRCC offers individuals or PACs that contribute $15,000 annually, or corporations that give $20,000 annually, membership in its Congressional Forum which 'has been designed to give its members an intimate setting to develop stronger working relationships with the new Republican Congressional majority,' ODP0042-01226 [DEV 71-Tab 48], and the 'benefit that attracts most Forum members are the dinners with Committee Chairmen and the Republican members from each Committee,' ODO0042-00028 [DEV 71-Tab 48]. These dinners 'average about 75 people including Members—that means at least two Committee Members at every table.' ODP0042-00171 to 72 [DEV 71-Tab 48]. 'In addition to the monthly dinners, we offer two annual meeting weekends, a golf tournament and a dinner with the Elected Leadership and all the Committee Chairs is included as a benefit of . . . . Forum membership.' *Id.* Forum benefits also include all the Benefits of the NRCC's House Council program. ODP0042-01226 [DEV 71-Tab 48]; *see also* ATT 000018 [DEV 7-Tab 20] (invitation to

1999 Republican Senate-House Dinner, with escalating benefits including meetings, receptions and a breakfast with Congressional leaders).

1.77.5 'The DCCC uses a variety of donor programs to motivate persons to donate funds. These programs tend to be associations of donors and fundraisers, who are grouped by the nature and extent of the funds given or raised.' Wolfson Decl. ¶ 53 [DEV 9-Tab 44]. For the 2002 election cycle, the DCCC's 'Major Donor Programs' included the Business Forum, which required an annual contribution of $10,000. *Id.* at Tab J (DCCC-J-0007). Business Forum Members' benefits included '[b]i-monthly political briefings and receptions with the House Democratic Leadership and other Democratic pro-business Members in the House of Representatives[, an a]nnual retreat with Chairwoman Lowey and the House Democratic Leadership[, an] annual Democratic Congressional Dinner event package[, and a] bi-monthly conference call/briefing with Leader Gephardt and Chairwoman Lowey. *Id.* (capitalization altered). The Majority Council required a $50,000 annual contribution, and included the bi-monthly conference call, 'complementary invitations to all DCCC fundraising events, including the Annual Democratic Congressional Dinner with private reception and political briefing [, and] complementary invitations to Premiere Retreats with Leader Gephardt, Chairwoman Lowey, House Democratic Leadership and Ranking Members. *Id.* (capitalization altered). Membership to the National Finance Board required a $100,000 annual contribution, and included as benefits all of the 'Majority Council' benefits as well as 'two private dinners with Leader Gephardt, Chairwoman Lowey, House Democratic Leadership and Ranking Members[and] two retreats with Leader Gephardt and Chairwoman Lowey in Telluride, CO and Hyannisport, MA.' *Id.* (capitalization altered).

1.77.6 The state parties also use the promise of access to federal lawmakers to encourage larger donations. *See, e.g.*, CDP 0098 [DEV 106] (CDP brochure showing that those who contribute $100,000 to the CDP are classified by the party as 'Trustees,' and that the CDP 'recognizes its extraordinary supporters with extraordinary opportunities,' providing 'Trustees' with '[e]xclusive briefings, receptions and meetings with officials such as U.S. Senator Dianne Feinstein, U.S. Senator Barbara Boxer, Lt. Governor Gray Davis, Controller Kathleen Connell and other national figures.'); CRP-00269 (flyer titled 'The California Golden Circle,' noting that '[t]hrough Golden Circle contributions, California Republicans have been able to elect leaders from the White House to the State House,' that Golden Circle members will assist the CRP 'goal ... to deliver fifty-five electoral votes for our Republican Presidential nominee in 2004, maintain a Republican majority in Congress, and elect a Republican Legislature,' and including among Golden Circle 'Membership Benefits' 'private receptions/meetings held throughout California with local, state and national Republican leaders to discuss current political issues').

1.77.7 Contributors request tobe seated with certain lawmakers at these donor events. For example, an RNC 'Table Buyer's Guest List' sheet for 'The Official 1995 Republican Inaugural Gala' filled out by 'Am. Banker's Ass'n/Nation's Bank' contained a request to sit with certain Members of Congress and 'anyone on House Banking Comm.' ODP0023-3288 [DEV 70-Tab 48]; *see also* 2000 RNC Gala Leadership Levels, undated, RNC0022509 [DEV 92]; 2000 RNC Attendance Forms, April 20, 2000, RNC0236323 [DEV 97] (filled out by Microsoft attendee requesting to be seated with a particular Senator or 'Leadership Commerce Comm. or Judiciary'); RNC0145258 [DEV 93] (filled out by Chevron corporation attendee, requesting to be seated with a Member from California, Louisiana or Texas); RNC0202199 [DEV 96] (filled out for the MBNA table, requesting to be seated with five particular Senators); RNC0202200 [DEV 96] (filled out for the Reliant Resources, Inc. table, asking to be seated with one specific Representative and five named Senators); RNC 0032805—06, RNC 0032799 [DEV 92] (request for Burger King Chairman and Team 100 member who donated $100,000 to be seated with Senator Fred Thompson and three other Senators, and document showing Senator Thompson was placed at the Burger King table). PhRMA's Judith Bello testifies that the five Members of Congress PhRMA listed as requested 'VIP' to be seated at its table at the 2000 Republican House-Senate dinner were all Members who had responsibility or oversight over issues of importance to the pharmaceutical industry. Bello Dep. at 82 [JDT Vol. 1].

1.77.8 The political parties have used such opportunities to promote their various donor clubs. For example, Senator McConnell, as head of the NRSC, wrote a solicitation letter which noted that the Republican Senate Council ($5,000 annual PAC contribution) and the Chairman's Foundation ($25,000 annual corporate gift) provide 'excellent opportunities for both corporate executives and Washington representatives to meet and discuss current issues with leading Republican Senators.' ODP0036-03603 [DEV 71-Tab 48]; *see also* RNC 0286400 [IER Tab 4] (offering $250,000 donors to the RNC Gala Co-Chairman status which included a 'Breakfast and Photo Opportunity with [Senate Majority Leader] Trent Lott and [Speaker of the House] Newt Gingrich,' as well as a 'Luncheon with Republican House and Senate Leadership and the Republican House and Senate Committee Chairmen of your choice').

1.77.9 According to lobbyist Robert Rozen:

> [S]oft money contributions built around sporting events such as the Super Bowl or the Kentucky Derby, where you might spend a week with the Member, are even more useful. At the events that contributors are entitled to attend as a result of their contributions, some contributors will subtly or not-so-subtly discuss a legislative issue that they have an interest in. Contributors also use the events to establish relationships and then take advantage of the access by later calling the Member about a legislative issue or coming back and seeing the Member in his or her office. Obviously from the Member's perspective, it is hard to turn down a request for a meeting after you just spent a weekend with a contributor whose company just gave a large contribution to your political party.

Rozen Decl. ¶ 11 [DEV 8-Tab 33]; *see also* COL0002-00698 (flyer listing DSCC Donor Programs, and including as part of its Majority Trust 1996 program, 'a weekend in Aspen, CO in January, Superbowl weekend, Mardi Gras with Senator Breaux, a Jefferson Weekend in Charlottesville, VA in June, and the annual summer retreat on Nantucket Island in July.').

1.77.10 Sometimes the link between large donations and special access to elected federal officials is even more direct. A call sheet prepared for then- DNC Chair Fowler instructs him to call a number of large contributors ask for donations, and invite them for lunch with the President of the United States ('POTUS'). DNC 113-00137 to 38 [DEV 134-Tab 7] ('Ask her to give 80k more this year for lunch with Potus on October 27th.') ('Ask him to write another 100K to become a Managing Trustee for the campaign and come to lunch with POTUS on Oct. 27.'). A CDP call sheet entitled 'Child Call List, 5/16/96,' includes the notation that a potential donor should be asked 'if they might be able to do $25,000 for a small mtg with the President, you know it's steep, but want to include them in these types of meetings.' CDP 00124 [IER Tab 11].

Nonfederal Donations are More Effective than Federal Contributions at Procuring Access for Donors

1.78 Donors give nonfederal money, rather than federal money, to political parties because large nonfederal donations are more effective for obtaining access to federal officials than several small federal contributions. *See, e.g.*, Hickmott Decl., Ex. A. ¶ 47 [DEV 6-Tab 19] (explaining that '[i]f you want to get to know Members of Congress, or new Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at the various events than it would be to write fifteen $1,000 checks to fifteen different Senators, or Senators and candidates.'); Andrews Decl. ¶ 14 [DEV 6-Tab 1] (stating that 'a properly channeled $100,000 corporate soft money donation to the national Republican or Democratic congressional campaign committees can get the corporate donor more benefit than several smaller hard dollar contributions by that corporation's PAC. Although the donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly the senior officials, are likely to remember the donation and to recognize that such big donors' interests merit careful consideration.'); Randlett Decl. ¶ 13 [DEV 8-Tab 32] ('[Soft money donors] get a level of attention that a $1,000 hard money donor never will. Even someone who wrote 25 $1,000 hard money checks but no soft money is going to get much less attention and appreciation than someone who wrote one large soft money check.'); Rozen Decl. ¶ 12-13 [DEV 8-Tab 33] ('Donors to the national parties understand that if a federal officeholder is raising soft money—supposedly 'non-federal' money—they are raising it for federal uses, namely to help that Member or other federal candidates in their elections. Many donors giving $100,000, $200,000, even $1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed. . . . The bigger soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions.'); Geschke Decl. ¶ 9 [DEV 6-Tab 14] ('Corporations and individuals can use soft money donations to get special access to federal office holders and at least the appearance of influence on issues that are important to them financially or politically. Hard money contributions do not provide the same opportunities for influence on federal policy as soft money donations do.'); Simon Decl. ¶ 16 [DEV 9-Tab 37] ('Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions.'); Kirsch Decl. ¶ 9 [DEV 6-Tab 14] ('Corporations and individuals can use soft money donations to get special access to federal office holders and at least the appearance of influence on issues that are important to them financially or politically. Hard money contributions do not provide the same opportunities for influence on federal policy as soft money donations do.').

1.78.1 In a memorandum to a high-level Fortune 100 company executive outlining a proposed $1.4 million nonfederal fund budget for FY 1999, members of the Company's governmental affairs staff noted that

> [w]ith both houses of Congress and the White House hotly contested this cycle, the importance of soft money,

> and consequently the efforts by the parties to raise even more soft money, is greater than ever. On the Democratic side, [our company's] advocates have already fielded soft money calls from House Democratic Leader Gephardt, House Democratic Caucus Chairman Frost, Democratic Congressional Campaign Chairman Kennedy, and Democratic Senatorial Campaign Chairman Torricelli. Similar contacts to raise soft money have been made by Republican congressional leaders.
>
> In addition to the increased pressure from party and congressional leaders, it is clear that our direct competitors and potential competitors are weighing in with big soft money donations.

Memorandum from a Fortune 100 company's legislative advocate to a high-level executive, dated March 4, 1999, [citation sealed]. The nonfederal budget request was justified by a number of rationales:

> First, due to a significant [sic] in the number of events scheduled by the parties for their donors, the number of opportunities . . . to develop relationships with elected and administration officials has never been greater. As the parties compete more vigorously for soft money dollars, the number and quality of events for interacting with both the leadership and rank and file Members has been greatly increased. Between the six main committees (DNC, DSCC, DCCC. RNC, NRCC, NRSC) there are events both in and out of [Washington, D.C.] almost every day of the week.
>
> Two, . . . the parties have become increasingly reliant on soft money and both feel it is critical to their success in coming elections. Not surprisingly, this has made the parties especially sensitive to which companies contribute soft money, and which don't. As noted, our traditional competitors continue to contribute large amounts of soft money and as [our company] expands its business into new areas (e.g. cable, internet, networking) it faces new types of competitors, primarily in the computer and high tech industry, that also contribute heavily. Failure to maintain our soft money participation during this election cycle—given the heightened scrutiny those contributions will receive in the current competitive climate—*may* give our new and traditional competitors an advantage in Washington.

> Three, the next Administration will also be determined in this election cycle. Consequently, we will be asked to use soft money contributions to support both national parties at an even greater level than during a non-Presidential year. Funding for the national conventions and next year's national party committee requests should be anticipated in this year's budget and contributed when appropriate to foster the development of relationships with the key officials of the next Administration. Finally, because both parties will be working to influence redistricting efforts during the next two years, we anticipate that we will be asked to make soft money contributions to these efforts. Redistricting is a key once-a-decade effort that both parties have very high on their priority list. Given the priority of the redistricting efforts, relatively small soft money contributions in this area could result in disproportionate benefit.

Id.

Donors Often Contribute Nonfederal Funds to Both Major Political Parties in Order to Ensure Access and Prevent Retaliation

1.79 The record shows that many large contributors give to both political parties. Forty of the top 50 nonfederal money donors in 1996 donated to both political parties, as did 35 of the top nonfederal money donors in 2000. Mann Expert Report at Tbls. 5-6 [DEV 1-Tab 1]. Most of the top nonfederal contributors who gave to only one political party were either state political party committees (four in 1996) or labor unions (three in 1996, seven in 2000). *Id.* Those involved in political fundraising explain that this practice is a result of donors' desire to have special access to lawmakers from both parties, and also out of concern that if the contributor gives to only one political party the other will perceive an imbalance and punish the donor.

Evidence from the corporate world demonstrates that major nonfederal donors give to both political parties in order to ensure access to lawmakers from both political parties. CEO Randlett comments that '[a]s a donor with business goals, if you want to enhance your chances of getting your issues paid attention to and favorably reviewed by Members of Congress, bipartisanship is the right way to go. Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective.'

Internal corporate documents corroborate Mr. Randlett's testimony. An Eli Lilly and Company memorandum shows that the company was concerned about a *Washington Post* article listing it as a significant donor to the Republican party. The memorandum discusses contributions being made at Democratic party events occurring in the near future. The memorandum concludes with: '[____] has talked to the White House and we can get back into this by giving $50[,000]—100,000 to the DNC- says they would be pleased with this.' ODP0018-00463 [DEV 69-Tab 48]; *see also id.* at ODP0018-00461 (the *Washington Post* article), ODP0018-00462 (photocopy of part of the article with handwritten note stating 'Dems are upset. Calls from employees about imbalance. White House stays Dem we are in trouble'). Similarly, an internal Fortune 100 company memorandum states the following:

> Attached please find an invoice from the NRSC for [our company's] commitment of $25,000 in soft money. As you know, this request was approved during the PAC meeting this week. We recently approved a soft money donation to the New Dominion Fund, requested by Senator Chuck Robb. At the time this request was approved, the team determined that our support in this race would be equal. The request attached balances [our company's] support in this race, as a contribution to the RNSC has been requested by George Allen.

Internal memorandum (Oct. 26, 2000), [citation sealed].

One lobbyist explains that many 'companies and associations that do give soft money typically contribute to both parties . . . because they want access to Members on both sides of the aisle.' Rozen Decl. ¶ 7 [DEV 8-Tab 33]. Members of Congress are also cognizant that donors give nonfederal funds to both parties. As former Senator Bumpers observes: 'Giving soft money to both parties, the Republicans and the Democrats, makes no sense at all unless the donor feels that he or she is buying access.' Bumpers Decl. ¶ 15; *see also id.* (noting that the 'business community makes such donations quite often').

Individual donors also acknowledge that nonfederal money donors give to both parties in order to ensure special access to federal lawmakers on both sides of the aisle. Hiatt Decl. ¶ 12 [DEV 6-Tab 18] (testifying '[p]eople give soft money donations to both parties because they want to make sure they have access regardless of who's in the White House, filling the Senate seat, or representing the Congressional district.'); Buttenwieser Decl. ¶ 23 [DEV 6-Tab 11] ('I am aware that some soft money donors, such as some corporations, give substantial amounts to both major political parties. Based on my observations, they typically do this because they have a business agenda and they want to hedge their bets, to ensure they get access to office holders on the issues that are important to them. This occurs at the national and state levels.'); Geschke Decl. ¶ 10 [DEV 6-Tab 14] ('In my view, donors who give large amounts of soft money to both major parties are probably hedging their bets in trying to get influence. They may feel that influence with one party is not sufficient to achieve their financial or policy goals, especially now that power in Congress is pretty evenly balanced.').

1.80 The political parties are aware of this practice, as evidenced by an Ohio Republican Party document titled 'Why People Give,' which lists 'so that they will have access to whoever is the winner' as one reason behind contributions. RNC OH 0418778 [IER Tab 1.H]. The record demonstrates that they have parlayed this knowledge into leverage which they use to pressure donors who have given to the other party to give to theirs as well. CEO Randlett explains how the political parties take advantage of this situation:

> [I]f you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed. They'll get a message that basically asks: 'Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?' If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. First of all, it's hard to get attention for your issue if you're not giving. Then, once you've decided to play the money game, you have to worry about being imbalanced, especially if there's bipartisan control or influence in Washington, which there usually is. In fact, during the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. Referring to someone's financial activity in the political arena used to be clearly off limits, and now it's increasingly common.

Randlett Decl. ¶ 12 [DEV 8-Tab 32].

1.80.1 Plaintiffs maintain that the record 'establishes that organizations and individuals may give to both parties because they desire to be actively involved in the political process.' RNC Proposed Findings of Fact ¶ 119 (citing Bello Dep. at 39 [stating that it is 'traditional' for PhRMA to 'support the convention activities for both Republicans and the Democrats' because 'we are good civic participants'] and Herrnson[65] Dep. at 495 [DEV 65] [acknowledging 'it is possible' that 'donors of soft money provide money to political parties because they support some members of ... one party, and some members of another party']). This self-serving statement of a PhRMA representative and Dr. Herrnson's acknowledgment that a hypothetical scenario was possible, support the RNC's contention that 'organizations and individuals *may* give to both parties because they desire to be actively involved in the political process.' The extensive testimony and documentary evidence discussed *supra*, however, shows that the primary reason why entities and individuals *do* give to both parties is to ensure access to federal lawmakers. Moreover, interests in participating in the political process and an interest in obtaining access to legislators to influence them are neither incompatible nor mutually exclusive.

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[65] Professor Paul Herrnson is one of Defendant's experts.

Empirical Evidence Linking Donations to Corruption

1.81 Experts testifying in this case agree that no study attempting to statistically or empirically link donations to corruption by federal officials is without flaws. However, even if these studies were universally accepted, it is clear that they would be of limited utility for the purposes of this case. As Defendants' expert Thomas Mann notes, '[m]ost of this research has examined the connections between PAC contributions (a surrogate for interested money) and votes in the House and Senate.' Mann Expert Report at 32 [DEV 1-Tab 1]. However, as Mann observes, there are

> a myriad of ways in which groups receive or are denied favors beyond roll- call votes. Members can express public support or opposition in various legislative venues, offer amendments, mobilize support, help place items on or off the agenda, speed or delay action, and provide special access to lobbyists. They can also decline each of these requests.

Id. at 33 (citations omitted). In addition, Mann notes that the

> currency of campaign contributions extends well beyond PAC contributions to members' campaign committees. These include brokered if not bundled individual contributions, contributions to leadership PACs controlled by members, contributions to parties and candidates in targeted races and informally credited to members, soft-money contributions to parties and section 527 committees connected to members, and direct expenditures on 'issue ad' campaigns.

Id. at 34. Mann concludes that the 'ways and means of potential influence (and corruption) are much more diverse than those investigated in the early scholarly research.' *Id.* at 34.[66] Many of these studies also suffer from the fact that the interactions between donations and legislative action are difficult to observe. *See, e.g.,* Sorauf Cross Exam. at 132 [JDT Vol. 31]; *see also* Appendix ¶ III (for more analysis of these studies).

Summary

1.82 The immense quantity of testimonial and documentary evidence in the record demonstrates that large nonfederal contributions provide donors special access to influence federal lawmakers. This access is shown to be coveted by these donors because it provides them the opportunity to have their voices heard and to influence legislation on policy matters of concern to them. Testimony from lobbyists, major donors, federal lawmakers and political party officials, as well as internal political party and corporate documents, shows that donors expect to receive this access, that this expectation is fostered by the political parties and federal lawmakers, and that special access is in fact provided to major donors. Corroborating this evidence is the fact that nonfederal money donors often give to both political parties, which demonstrates that in many cases, large nonfederal donations have less to do with political philosophy than with obtaining access to power. The record also makes clear that the best method of obtaining special access to federal lawmakers is through large nonfederal donations, rather than smaller donations under the federal campaign finance regime.

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[66] Mann notes that where the variables of '[p]arty, ideology, constituency, mass public opinion and the president . . . . are less significant, there is evidence that interest group contributions, particularly to junior members of Congress, have influenced roll call votes - for example, on financial services regulation.' Mann Expert Report at 32-33 DEV 1-Tab 1] (citing Thomas Stratmann, Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation. Paper (prepared for delivery at the 2002 Annual Meeting of the American Political Science Association, Boston, 29 August—1 September), available from the APSA Proceedings Web site: http://apsaproceedings.cup.org/Site/papers/022/022023 StratmannT.pdf. 2002.

The political parties have taken advantage of the desire of donors for special access by structuring their entire fund-raising programs to entice larger donations with the promise of increased and more intimate access to federal officials. The political parties have also pressured donors to give donations, playing off donors' fears of denial of access or political retribution. From this record it is clear that large donations, particularly unlimited nonfederal contributions, have corrupted the political system. This fact has not been lost on the general public, as is explored *infra*.

Public Perception of Corruption

1.83 The record demonstrates that the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of access to, and influence on, the officeholders of that political party that the donor enjoys thereafter.

1.83.1 A research poll of 1,300 adult Americans conducted by two prominent political pollsters, Mark Mellman[67] and Richard Wirthlin,[68] finds that the public perceives that large

donations as having a corrupting influence on federal officeholders.[69] *See* Mellman and Wirthlin Report [DEV 2-Tab 5].

Mellman and Wirthlin conclude that '[a] significant majority of Americans believe that those who make large contributions to political parties have a major impact on the decisions made by federally elected officials.' In addition, Mellman and Wirthlin find that many Americans believe that the 'views of these big contributors sometimes carry more weight than do the views of constituents or the best interests of the country.' *Id.* at 6 [DEV 2-Tab 5]. The major findings of their poll include:

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[67] Mark Mellman is 'CEO of The Mellman Group, a polling and consulting firm. . . . Mellman has helped guide the campaigns of some fifteen U.S. Senators, over two dozen Members of Congress, and three Governors, as well as numerous state and local officials. In addition, Mellman works with a variety of public interest organizations . . . and corporate clients . . . He has served as a consultant on politics to CBS News, a presidential debate analyst for PBS, a contributing analyst for The Hotline, National Journal's daily briefing on politics, and is currently on the faculty of The George Washington University's Graduate School of Political Management.' Mellman and Wirthlin Report at 2 [DEV 2-Tab 5].

[68] Richard Wirthlin is 'Chairman of the Board of Wirthlin Worldwide, a strategic opinion research firm he founded in 1969, which now is one of the top companies in its field. Wirthin is perhaps best known as President Reagan's strategist and pollster. . . . Mellman and Wirthlin Report at 2-3 [DEV 2-Tab 5]. He is widely respected in the 'field of social science research and one of this country's most respected political and business strategists.' *Id.* Wirthlin 'was chief strategist for two of the most sweeping presidential victories in the history of the United States. In 1981 he was acclaimed Adman of the Year by Advertising Age for his role in the 1980 campaign and in 2001 was one of four Republicans awarded American University's 'outstanding contribution to campaign consulting.' In the same year, he was designated 'Pollster of the Year' by the American Association of Political Consultants.' *Id.* at 3. The *Washington Post* named Wirthlin 'the prince of pollsters' and George Gallup, Jr. said Wirthlin is 'one of the very best at our craft.' *Id.*

[69] The survey was conducted over a period of five days (August 28, 2002 through September 1, 2002), and the pollsters made an average of 4.58 dialings per telephone number in the sample set in order to ensure that the sample was representative. *See* Mellman and Wirthlin Report at 22-23 [DEV 2- Tab 5]. The study's contact rate was 38 percent, more than double the industry average of 15 percent. *Id.* at 23. The rate of refusal of the respondents who refused to be polled was within the normal range for a random telephone survey conducted in the United States. *Id.* The pollsters took several steps to avoid bias. *Id.* at 24; *see also* Wirthlin Cross Exam. at 40 (explaining that the pollsters took steps to avoid bias by randomly ordering the questions, 'so that there is no sequence developed where one question may, if always asked in the same order, affect[] the second question.'). The statistical margin of sampling error, that is, the error due to sampling versus if the pollsters talked to every American in ~~the United~~ States, is 2.7 percentage points: the actual opinions of Americans will be within 2.7 percentage points of those reported in the study 95 percent of the time. *Id.* at 22.

- Seventy-seven percent of Americans believe that big contributions to political parties have at least some impact on decisions made by the federal government. Fifty-five percent thought big contributions had a great deal of impact; 23 percent thought such donations had some impact. *Id.*
- Seventy-one percent of Americans 'think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or even if it's not what they think is best for the country.' *Id.* at 7.
- A 'large majority (84%) think that members of Congress will be more likely to listen to those who give money to their political party in response to their solicitation for large donations.' *Id.* at 8.
- 'Over two-thirds of Americans (68%) . . . think that big contributors to political parties sometimes block decisions by the federal government that could improve people's everyday lives.' *Id.* at 8.
- '[A]bout four in five Americans think a Member of Congress would be likely to give special consideration to the opinion of an individual, issue group, corporation, or labor union who donated $50,000 or more to their political party (81%) or who paid for $50,000 or more worth of political ads on the radio or TV (80%). By contrast, only one in four Americans (24%) think that a member of Congress is likely to give the opinion of someone like them special consideration.' *Id.* at 9.

1.83.1.1 The Mellman and Wirthlin Report did not measure the public's understanding of the campaign finance system,

and did not ask if the respondents understood the difference between nonfederal and federal donations. *See* Cross Exam. of Mellman at 31-35 [JDT Vol. 22]. Mellman testifies that the purpose of the poll was to measure the public's perceptions. *Id.* at 31. According to Plaintiffs' expert, Q. Whitfield Ayres, the public does not understand the distinction between federal and nonfederal donations and is not aware of campaign finance regulations. *See* Ayres Expert Report ¶ 8(a). Dr. Shapiro, an expert for Defendants, responds that

> [t]he public does not need detailed knowledge about . . . the nuances of existing campaign finance regulations, and the extent to which these regulations are enforced in order to form strong opinions toward campaign finance. The public can easily understand how political donations can lead to political access and influence—how political parties and politicians will pay attention to those who give money to the parties. The public has long questioned the motivations of, and responded with distrust toward labor unions, corporations, special interests more generally, and the government itself. The public is especially troubled and animated by these problems when they become blatantly visible in widely publicized incidents and scandals such as those involving Enron and the large soft money donations to the Democratic Party and the roles played by the Clinton Administration, President Bill Clinton, and Vice President Al Gore.

Shapiro Rebuttal Report at 9 [DEV 5-Tab 2] (citations omitted). Mr. Ayers also comments that his research finds that 'every conclusion that the Wirthlin-Mellman report reached about 'large' or 'big' contributions and contributors applies with equal force to the new, hard money limits in the BCRA.' Ayers Rebuttal Report at 4 [RNC Vol. VIII]. Mr. Wirthlin notes that what Mr. Ayers' research demonstrates is that 'in the eyes of most Americans . . . $50,000 is considered

[a] large' contribution, but comments that if that is the case then the nonfederal donations given in the past which far exceed $50,000 would be viewed as even larger. Wirthlin Cross Exam. at 148, 155 [JDT Vol. 32]. And, 'as you move up the scale, there's going to be pretty close to unanimity on what constitutes big in the form of campaign contributions.' Mellman Cross Exam. at 69 [JDT Vol. 22].

1.83.2 The results of the Mellman-Wirthlin study are confirmed by the research of Robert Shapiro, a professor at Columbia University, who analyzed public perception of nonfederal money contributions to political parties by reviewing all publicly available opinion survey data sources. Shapiro Expert Report at 7-8. [DEV 2-Tab 6]. The survey data Shapiro examined was comprised mostly of telephonic opinion polls. *Id.* at 8. Specifically, Shapiro focused on 'public opinion data based on responses to surveys that were fielded since 1990' to determine the public's answers to several questions, including two questions which read: 'To what degree has the public perceived corruption in politics connected to the influence of money and large campaign donations?' and 'What have been the public's perceptions and opinions toward the substantial political donations in the form of soft money contributions to political parties?' *Id.* at 3; 8. According to Shapiro, poll results show that the 'public has opposed large unregulated soft money contributions to political parties [and] that the public has been troubled by large soft money donations.' *Id.* at 13. In addition, Shapiro concluded that the poll data showed 'that a substantial proportion of the public has perceived corruption in the political system, and that we have been losing ground.' *Id.* at 11.

1.83.3 Former and current Members of Congress testify that their constituents believe that these large contributions to parties present an appearance of corruption. *See* Simpson Decl. ¶ 14 DEV 9-Tab 38] (testifying that '[b]oth during and

after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations.'); 144 S. Cong. Rec. S1041 (Feb. 26, 1998) (statement of Sen. Baucus) (stating that '[p]eople tell me they think that Congress cares more about 'fat cat special interests in Washington' than the concerns of middle class families like theirs. Or they tell me they think the political system is corrupt.'); 146 Cong Rec. S4262 (May 23, 2000) (statement of Sen. Feingold) (stating that '[t]he appearance of corruption. . . . We all know it's there. We hear it from our constituents regularly. We see it in the press, we hear about it on the news.'); Letter from Representative Asa Hutchinson to RNC Chairman Nicholson dated July 9, 1997, ODP0014-00003-4 (declining to support Nicholson's proposed campaign finance legislation because Hutchinson had to balance Nicholson's concerns 'with a concern of my constituents which is that their influence in politics is being diminished by the abuses of soft money .... If our party is unable to enact meaningful campaign finance reform while we're in control of Congress, then I believe this failure to act will result in more cynicism and create a growing lack of confidence in our efforts.'); Congressman Meehan Decl. in *RNC* ¶¶ 15-17 [DEV 66-Tab 4] (stating that 'there is a strong feeling in my [Congressional] district that soft money is corrupting the political process and influencing elections. My constituents feel that very large donations to the party committees, on the order of twenty-five, fifty or one hundred thousand dollars from one company or individual, have a corrupting influence.'); Rudman Decl. ¶ 13 [DEV 8-Tab 34] ('The soft money system not only distorts the legislative process, it breeds deep cynicism in the minds of the public. I know this from my own experience in talking to citizens and voters over the years.').

1.83.4 Large donations made by groups or persons with an interest in pending legislative activity, even if not corrupting, create an appearance of corruption, especially when the donations are given in close proximity to legislative action on bills of interest to the donors. Senator McCain states:

> While the [generic drug] bill was pending [in 2002], the NRSC and NRCC held a large gala fundraiser to raise almost $30 million in largely soft money contributions, a substantial portion from pharmaceutical companies. According to newspaper reports, among the largest contributors to the gala were GlaxoSmithKline PLC ($250,000), PhRMA ($250,000), Pfizer ($100,000), Eli Lilly & Co. ($50,000), Bayer AG ($50,000) and Merck & Co. ($50,000).

McCain Decl. ¶ 11 [DEV 8-Tab 29].

> [T]here's an appearance [of corruption] when there's a million dollar contribution from Merck and millions of dollars to your last fundraiser that you held, and then there is no progress on a prescription drug program. There's a terrible appearance there. There's a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation.

McCain Dep. [JDT Vol. 18] at 174-175.

Senator Feingold commented that

> members of the National Consumer Bankruptcy Coalition, an industry lobbying group made up of the major credit card companies such as Visa and Mastercard and associations representing the Nation's big banks and retailers, gave nearly $4.5 million in contributions to parties and candidates. . . . Some of the campaign contributions from these companies seem to be carefully timed to have a maximum effect. It is very hard to argue that the financial largess of this industry has nothing to do with its interest in our consideration of bankruptcy legislation. For example, on the very day [in 1998] that the House passed the conference report last year and sent it to the Senate, MBNA Corporation gave a $200,000 soft money contribution to the National Republican Senatorial Committee.

145 Cong. Rec. S14067-68 (Nov. 5, 1999); *see also* Feingold Dep. at 67 [JDT Vol. 6]. '[A] $200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA. OK, it is not illegal. Conceded. Maybe it is not even corrupt, but it certainly has the appearance of corruption to me and I think to many people.' 145 Cong. Rec. S12593 (Oct. 14, 1999) (statement of Sen. Feingold). Senator Feingold has also stated that '[t]he appearance of corruption is rampant in our system, and it touches every issue that comes before us.' 147 Cong. Rec. S2446 (Mar. 19, 2001) (statement of Sen. Feingold); *see also* 147 Cong. Rec. S3248-49 (April 2, 2001) (statement of Sen. Levin) ('[P]ermitting the appearance of corruption undermines the very foundation of our democracy —the trust of people in the system.').

1.83.5 The Defendants have also submitted a substantial number of press reports which suggest that large soft money donations present the appearance of corruption. *See, e.g.*, Jackie Koszczuk, *Soft Money Speaks Loudly on Capitol Hill This Season*, Cong. Q., June 27, 1998, at 1736; Jill Abramson, *Money Buys A Lot More Than Access*, N.Y. Times, Nov. 9, 1997, at 4; Jane Mayer, *Inside the Money Machine*, The New Yorker, Feb. 3, 1997, at 32; Don Van Atta, Jr. and Jane Fritsch, *$25,000 Buys Donors 'Best Access to Congress'*, N.Y. Times, Jan. 27, 1997, at A 1; *see also* Krasno and Sorauf Report at 19-20 DEV 1-Tab 2]; Primo Rebuttal ¶ 7 [2 PCS] (stating that '[t]he news media reinforces this view [that money distorts the political process] by portraying the political process as being driven by campaign contributions . . . .'). Senator Rudman states

> Almost every day, the press reports on important public issues that are being considered in Congress. Inevitably, the press draws a connection between an outcome and the amount that interested companies have given in soft money. . . . Even if a Senator is supporting a position that helps an industry for reasons other than that the industry gave millions to his party, it does not appear that way in the public eye.

Rudman Decl. ¶ 11 [DEV 8-Tab 34].

1.83.6 High-level political contributors testify that large nonfederal donations corrupt the political system or present an appearance of corruption. *See, e.g.*, Hassenfeld Decl. ¶ 19 [DEV 6-Tab 17] ('It is obvious to me that large soft money donations do buy access, that they can influence federal policy, and that they are corrupting to federal officeholders and to donors. Additionally, these unlimited donations to political parties pose a far greater risk than do hard money contributions to candidates of at least the appearance, if not the reality, of special interest influence on federal policy.'); Kirsch Decl. ¶ 15 [DEV 7-Tab 23] ('[T]he current system of financing federal elections permits corruption to flourish.'); Buttenwieser Decl. ¶ 30 [DEV 6-Tab 11] ('Large soft money donations can create at least the appearance of influence on federal policy making. . .').

A national survey of major congressional donors conducted in 1997 found that a majority were critical of the campaign finance system and supportive of reform. John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded* (1998), FEC 101-0282, 0283 [DEV 45-Tab 110]. Seventy-six percent of those surveyed believed the campaign finance system is either 'broken and needs to be replaced,' or 'hasproblems and needs to be changed.' *Id.* Three-quarters of those surveyed supported a 'ban on large 'soft money' donations.' *Id.* at 0291.

1.83.7 Plaintiff's expert La Raja notes that

> [O]ne cannot ignore the central claim of reformers that the cash-based electoral environment fosters mistrust of the political system. Observing the amounts of money raised and spent in campaigns makes the average American skeptical that the political process is fair. Such doubts raise questions about political legitimacy. Even if politicians are not corrupt—and there has been minimal evidence to prove this claim—there is certainly the appearance of corruption. . . .
>
> It does not help matters that parties contribute to the arms race in campaigns. By using soft money parties raise the ante in elections. Candidates feel vulnerable to parties and interest groups that sponsor issue ads so they raise more money than ever. Campaign costs increase as each side fights to a draw . . . . Thus, the foraging for campaign money contributes to the perspective that money corrupts the system.

La Raja Cross Exam. Ex. 3 at 144-45 [JDT Vol. 25].

Summary

1.84 It is clear that the effect of large contributions on the political process has not been lost on the public. The polling surveys entered into the record provide powerful proof that the presence of large donations create the appearance of corruption in the eyes of the majority of Americans. Although Plaintiffs point out that BCRA's new federal limits are considered by Americans to constitute large contributions, the fact remains that nonfederal donations made under FECA were often much larger and therefore would be seen by Americans as more corrupting. Major donors who participate and witness nonfederal fundraising believe that these donations present at the very least an appearance of corruption. Members of Congress have seen first-hand the cynicism these large, unregulated donations have bred in the minds of their constituents, and acknowledge the appearance of corruption inherent in large contributions made by those interested in legislation as the legislation is being considered by federal lawmakers. While it is not clear whether or not the public understands the exact contours of the campaign finance system and the nonfederal/federal money distinction, it is clear they view large contributions as corrupting.

Nonprofit Groups' Involvement in Federal Elections

1.85 Political parties and federal candidates work with nonprofit groups on campaign activities, and they have raised nonfederal money for, and directed and transferred nonfederal money to nonprofit groups for use in activities that affect federal elections.

1.85.1 The national party committees direct donors to donate nonfederal money to certain interest groups that then use such funds for broadcast issue advertisements and other activities that influence federal elections. For example, Steve Kirsch testifies that the national Democratic Party played an important role in his decision to donate soft money to 'certain interest groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL. The assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential election.' Kirsch Decl. ¶ 10 [DEV 7-Tab 23]; *see also* Buttenwieser Decl. ¶ 18 [DEV 6-Tab 11] ('I estimate that, over the last decade, I have given roughly $2 million to interest groups engaged in political activity, including non-profit corporations. . . . [because I believe the field work they do] can have important effects on political campaigns. I decide which of these groups to give to primarily on my own, though I have also discussed with DSCC personnel which groups are effective at these grassroots activities.').

1.85.2 The RNC, NRSC, and NRCC have all made nonfederal donations to the National Right to Life Committee, an independent group that assists Republican candidates through 'issue advocacy' activities. Resps. Nat'l Right to Life Pls. To Defs.' First Interrogs., No. 3 [DEV 10-Tab 5]; *see also* RNC0065691A, RNC0065691 [DEV Supp.-Tab 3] (October 18, 1996, letter from the Republican National State Elections Committee to National Right to Life with enclosed $500,000 donation, stating in part '[y]our continued efforts to educate and inform the American public deserves recognition'). After the NRSC's 1994 donation, then-NRSC Chairman Senator Phil Gramm told the *Washington Post* that the party made this donation because it knew the funds would be used on behalf of several specific Republican candidates for the Senate, saying he had 'made a decision . . . to provide some money to help activate pro-life voters in some key states where they would be pivotal to the election.' *Id.* at 5975; *see also* RNC 0373365 [IER Tab 31] (letter from the Republican National State Elections Committee to the American Defense Institute notifying the group of a $300,000 donation from the RNSEC's 'nonfederal component' to assist the group's 'efforts to educate and inform Americans living overseas of their civic responsibilities.'); RNC 0373370, 0373376, 0373381 (three letters to Americans for Tax Reform all dated in October 1996, providing the group $1,000,000, $2,000,000, and $600,000 donations in recognition of the group's 'efforts to educate and inform the American public); Thompson Comm. Report at 4013 (majority report) ('In addition to direct contributions from the RNC to nonprofit groups, the senior leadership of the RNC helped to raise funds for many of the coalition's nonprofit organizations.'); *id.* at 5934 (minority report) ('[T]he Committee received evidence indicating that both political parties suggested to supporters that they make contributions to sympathetic groups), 5983 ('Tax-exempt 'issue advocacy' groups and other conduits were systematically used to circumvent federal campaign finance laws'.)

1.85.3 The DNC has also made contributions to nonprofit groups to be used on activities that affect federal elections. Marshall Decl. ¶ 9 [DEV 8-Tab 28] (DNC official attesting that '[i]nfrequently, the DNC also makes small contributions to outside groups such as non-profit voter registration and get out the vote organizations focusing their efforts on minority and low-income communities, to assist with these groups' important work in empowering minority and low-income citizens.').

1.85.4 The National Right to Work Committee 'pays for its advertising from its treasury, [and] admits that certain Members of Congress or Executive Branch Officials have generally encouraged financial support for the Right to Work cause and, specifically, for the support of NRTWC in advocating for these issues, through lobbying as well as issue advertising.' Resp. Nat'l Rt. Work Comm. to Defs. First RFAs, No. 17 [DEV 12-Tab 2].

1.85.5 Members of Congress assist nonprofit groups raise funds for the purpose of affecting national elections. Congressman Ric Keller signed a Club for Growth fundraising letter dated July 20, 2001 which credited the Club for his own 2000 electoral success and assured potential donors that their money would be used to 'help Republicans keep control of Congress.' CFG00208-10 [DEV 130-Tab 5]; *see also* NRW-2812 [DEV 129-Tab 2] (letter from Congressman Pete Sessions asking the recipient to meet with National Right to Work Committee personnel regarding the Committee's effort to 'stop Big Labor from seizing control of Congress in November'). Nonprofit groups have influenced the outcome of federal elections.*See* Pennington Decl. ¶¶ 15, 19 [DEV 8-Tab 31] (discussing the Club for Growth's impact on the 2000 Congressional election in Florida's Eighth District); *see also infra* Findings ¶ ? (Bumpers) ('Members or parties sometimes suggest that corporations or individuals make donations to interest groups that run 'issue ads.' Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups.').

1.85.6 Ms. Bowler testifies that most committees that are organized to support or oppose ballot measures in California are organized as 501(c)(4) committees. She states that virtually all of the ballot measure committees in California engage in activity that can be characterized as get-out-the-vote activity under BCRA. Bowler Decl. ¶ 30 [3 PCS]. This fact is undoubtedly known to the CDP as summary judgment was entered against the state political party for its nonfederal contribution to a ballot measure committee which was not reported to the FEC and spent almost entirely on voter registration activities. *See FEC v. CDP*, No. S-97-0891 (E.D. Cal. Oct. 14, 1999) (order granting summary judgment). Judge Garland E. Burrell, Jr. of the Eastern District of California found that on the basis of this conduct the CDP had 'violated the FECA and the allocation rules by funding a generic voter drive that targeted Democrats.' *Id.* at 15. This example shows that ballot measure committees engage in voter mobilization efforts that affect federal elections, *see also* Findings ¶¶ 1.28, 1.32, and that permitting nonfederal donations and solicitations to such groups would allow political parties to circumvent BCRA.

1.85.7 'Virtually every member of Congress in a formal leadership position has his or her own 527 group. . . . In all, Public Citizen found 63 current members of Congress who have their own 527s. Another 38 members of Congress have a stake in the Congressional Black Caucus [] 527. 527 groups are also popular with influential congressional committee chairmen. . . . And 527s are increasingly popular with other members of Congress, who want to be more influential. . . .' Public Citizen Congress Watch, Congressional Leaders' Soft

Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 6 [DEV 29-Tab 3]. 'For congressional leaders, 527 groups appear to collect about as much money as their campaign committees and often as much as their leadership PACs.' *Id.* at 9.

1.85.7.1 'There are basically two kinds of 527s active in federal politics: those that exist to promote certain politicians (which Public Citizen calls 'politician 527s') and those that exist to promote certain ideas, interests and partisan orientations in election campaigns. . . . Politician 527s generally serve as soft money arms of 'leadership PACs,' which incumbents use to aid other candidates and otherwise further their own careers. Like the campaign committees of members of Congress, leadership PACs can receive only 'hard money' contributions, which are limited in amounts and may not come directly from corporations or unions. Politician 527s use their soft money mainly to sponsor events that promote their own careers, help create a 'farm team' of successful state and local candidates, and spur partisan 'get-out-the-vote (GOTV)' efforts.' *Id.* at 6.

1.85.7.2 Many donors to Member 527 organizations donate with the intent of influencing federal elections. For example, Peter Buttenwieser testified that in early 2002 he donated $50,000 to a 527 organization, Daschle Democrats, which ran broadcast ads in South Dakota supporting Senator Tom Daschle in response to the attacks that had been made against him. Mr. Buttenwieser stated: 'I was willing to do this because I felt that the attacks were hurting Senator Daschle and Senator Tim Johnson's re-election campaign as well.' Buttenwieser Decl. ¶ 20 [DEV 6-Tab 11].

1.85.7.3 Twenty-seven industries (including individuals, such as executives, associated with the industries) contributed $100,000 or more in just a single year to the top 25 politician 527 groups. These industries accounted for 52 percent of all contributions to the top 25 politician 527s. The top 10 industries contributing were: computers/Internet, securities & investments, lawyers/law firms, telephone utilities, real estate, TV/movies/music, air transport, tobacco, oil & gas, and building materials and equipment. Top corporate contributors included AT&T, SBC Communications, Philip Morris, Mortgage Insurance Companies of America, Clifford Law Offices, U.S. Tobacco and American Airlines. Overall, only 15 percent of total contributions to the top 25 politician 527's came in amounts of less than $5,000. Democratic party committees and unions also contributed over $100,000 to the top politician 527s. In fact, Democratic party committees (mainly the DNC) were the single largest contributor to politician 527s. Almost all of this money (81 percent) went to the Congressional Black Caucus 527. Public Citizen Congress Watch, Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 10-11 [DEV 29-Tab 3].

1.85.8 According to Kathleen Bowler of the CDP, Section 527 organizations include political clubs. The CDP has contributed to these groups 'to assist [them] with very basic administrative and organizational costs, as well as for voter registration activities.' Bowler Decl. ¶ 31. Bowler attests that these groups 'traditionally engaged in grass-roots GOTV activity, they are not engaged in direct activities in connection with federal elections.' *Id.* Similarly,

> CRP for many election cycles has provided and paid for partisan voter registration, through its Operation Bounty program in which Republican County Central Committees, Republican volunteer organizations and Republican candidates for state and federal office may participate, and through supplementary paid voter registration drives. Most of these participating groups and organizations are Internal Revenue Code section 527 organizations.

Erwin Aff. ¶ 9. Since California's state elections are held at the same time as federal elections, GOTV efforts in California will affect federal elections, even if these effects are unintentional. *See supra* Findings ¶ 1.28.

1.86 It is clear that prior to BCRA, the political parties donated nonfederal funds to nonprofit entities which then used those funds to affect federal elections in ways that assisted the political party that donated the money. Furthermore, federal candidates have solicited funds for nonprofit corporations that have assisted them in their campaigns, and donors note that the political parties and federal candidates have directed them to donate to specific nonprofit groups in order to affect federal elections. What the record shows is that BCRA's framers were aware of this budding practice which would become a gaping loophole if not addressed by the campaign finance reform legislation in light of BCRA's other provisions affecting the collection and use of nonfederal funds by the national and state political parties.

The Effect of BCRA on Interest Group Activity

1.87 Experts expect that little of the nonfederal money donations to political parties barred by BCRA will now be made to interest groups. *See* Mann Cross Exam. at 164-65 [JDT Vol 17] ('I think [BCRA] is going to produce a tremendous shift in resources from television to ground activities—registration, mobilization, get out the vote. Yes, some of this will be by interest groups.'); Green Rebuttal Report at 19 [DEV 5-Tab 1] ('I doubt that much of the money that currently goes to parties in the form of soft money will go instead to PACs and other tax-exempt organizations. The money donated to political parties is given with an eye toward the special favors that only a political party can deliver by dint of its ubiquitous role in all levels of government. No interest group can approximate the scope or influence of a political party; no interest group has the same presence in the lives or careers of politicians. It therefore seems unlikely that money seeking access will flow in appreciable quantities to much less propitious interest group destinations.').

1.88 One interest group and one political consultant predict that some nonfederal money donors will donate their money to interest groups. Kate Michelman, President of NARAL, has stated that nonfederal donors seeking to 'elect people who embody their values will be looking to [donate to] groups like NARAL, which do serious political work and are seasoned operatives.' Gallagher Decl. ¶ 61 [RNC Vol. XIII] ('If [nonfederal donors] can't give to the parties . . . they are going to find other means.' (quoting Michelman)). Michael Lux, President and Co-founder of Progressive Strategies, L.L.C., a political consulting firm, testifies that he expects that '[t]here will be organizations who will be able to raise more money because folks who used to give to the party will now give to outside groups. And hopefully I will be involved in many of those projects,' although 'obviously you never know the unintended consequences of specific pieces of legislation'). Lux Dep. at 50-52 and Ex. 2 [RNC Vol. 16].

1.89 One RNC official testifies that she does not believe interest groups can replace political parties. B. Shea Dep. at 90 [JDT Vol. 29] (agreeing that interest groups could never replace political parties).

1.90 Plaintiffs supply the Court with testimony showing that prior to BCRA, interest groups, unlike political parties, were rarely required to make public disclosure of their receipts, donors, disbursements, and activities. *See* Beinecke[70] Decl. ¶¶ 3, 9 [RNC Vol. IX] (prior to BCRA, National Resources Defense Council (NRDC) did not have to file disclosure forms with FEC or disclose to the public amounts donated by foundations); Gallagher Decl. ¶ 15 [RNC Vol. XIII] (prior to

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[70] Frances Beinecke is the Executive Director of the NRDC. Beinecke Decl. ¶ 1 [RNC Vol. IX].

BCRA National Abortion and Reproductive Rights Action League (NARAL) was not required to track whether it received donations from persons outside United States); Sease[71] Decl. ¶ 11 [RNC Vol. XIX] (prior to BCRA, Sierra Club was not generally required to report identity of individual donors to any government entity); *see also* Keller[72] Expert Report ¶ 42 [RNC Vol. VIII] (stating that his understanding is that the political activities of interest groups 'are far less transparent than those of parties').

While this may have been the case prior to BCRA, BCRA contains provisions addressing the lack of transparency in interest group political activity. *See* BCRA §§ 201, 212. Therefore, this testimony describes conditions under a different campaign finance regime and does little to assist the Court in determining the impact on campaign finance disclosure of any hypothetical future increase in interest group activity.

1.91 State Republican party officials comment that interest groups engage in voter registration, voter identification, get-out-the-vote activities, and lobbying of officeholders, Dendahl[73] Decl. ¶ 11 [RNC Vol. VIII]; Bennett[74] Decl. ¶ 11 [RNC Vol. VIII] (declaring he has read about such interest group activities in the media). Bruce Benson, the Chairman of the Colorado Republican Party predicts that 'Special Interest Groups will fill the void caused by the reduction in Political Party activity since they will not have to report the unlimited

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[71] Deborah Sease is the Legislative Director of the Sierra Club. Sease Decl. ¶ 1 [RNC Vol. XIX].

[72] Morton Keller is an experts for the Plaintiffs.

[73] John Dendahl is the State Chairman of the Republican Party of New Mexico. Dendahl Decl. ¶ 1 [RNC Vol. VIII].

[74] Robert Bennett has served as Chair of the Ohio Republican Party since 1988. Bennett Decl. ¶ 1-2 [RNC Vol. VIII].

contributions from any source they will be able raise and spend.' Benson Decl. ¶ 12 [RNC Vol. VIII].

It appears that Mr. Benson's assessment does not take into account BCRA's new disclosure requirements for certain expenditures made by interest groups. *See* BCRA §§ 201, 212.

1.92 John Peschong, the RNC's Regional Political Director for the Western Region states that 'In recent election cycles, I have observed that some of the major interest groups, such as the AFL-CIO, NEA, CTA, and NAACP, have reduced their reliance on broadcast issue advocacy, and shifted reliance to grassroots voter mobilization activities.' Peschong Decl. ¶¶ 13-14 [RNC Vol. VI].

1.93 During the closing weeks of the 2000 campaign, the NAACP National Voter Fund registered over 200,000 people, put 80 staff in the field, contacted 40,000 people in each target city, promoted a get-out-the-vote hotline, ran three newspaper print ads on issues, made several separate direct mailings, operated telephone banks, and provided grants to affiliated organizations. *See* Green Cross Exam. at 15-20, Ex. 3 [JDT Vol. 9]; McCain Cross Exam. at 70-72 [JDT Vol. 18]. The NAACP reports that the program turned out a million additional black voters and increased turnout (over 1996 numbers) among targeted groups by 22 percent in New York, 50 percent in Florida and 140 percent in Missouri. Green Cross Exam. Ex. 3 [JDT Vol. 9]. The NAACP's effort, which cost approximately $10 million, was funded in large part by a single $7 million donation by an anonymous individual. *Id.* at 20, Ex. 3; McCain Cross Exam. at 73-74 [JDT Vol. 18].

1.94 According to Mary Jane Gallagher, NARAL's Executive Vice President, in 2000, NARAL spent $7.5 million and mobilized 2.1 million pro-choice voters. The group also made 3.4 million phone calls and mailed 4.6 million pieces of election mail. *See* Gallagher Decl. ¶ 24 [RNC Vol. XIII].

1.95 I find the effect BCRA will have on interest group activity unclear. While testimony in the record reveals that some nonfederal donations that went to the national political parties under FECA, and are now barred under BCRA, will go to interest groups, no witness has provided an assessment as to how much nonfederal money will be redirected to interest groups. Furthermore, the evidence regarding the lack of transparency with regard to interest group political activity does not take into account BCRA's new disclosure requirements that apply to such activities, and therefore is not helpful to the Court.

State Party Fundraising

Fundraising By National Party Officials & Federal Officeholders for State Parties

1.96 According to RNC officials, the RNC provides financial and fundraising assistance to state and local candidates and parties through a variety of means. *See* Dendahl Decl. ¶ 10 [RNC Vol. VIII]; Duncan Decl. ¶ 13 [RNC Vol. VI]; Josefiak Decl. ¶ 44, 65-72 [RNC Vol. I]; B. Shea Decl. ¶¶ 32-40 [RNC Vol. V]; *see also* La Raja Expert Report ¶ 12(b) [RNC Vol. VII] (discussing national party support for state parties generally). For example, RNC officers have sent fundraising letters on behalf of state and local candidates during off-year election cycles. *See, e.g.*, RNC Ex. 292 (RNC 0332976) (fundraising letter signed by Deputy RNC Chairman Jack Oliver on behalf of Bret Schundler's New Jersey gubernatorial campaign); Josefiak Decl. RNC Ex. 1162 [RNC Vol. I] (fundraising letter signed by Haley Barbour on behalf of George Allen's Virginia gubernatorial campaign); Josefiak Decl. RNC Ex. 1766 [RNC Vol. I] (fundraising letter signed by Haley Barbour on behalf of New Jersey Republican Party); Feingold Dep. Ex. 12 [JDT Vol. 6] (fundraising letter from Jim Nicholson on behalf of Norm Coleman's Minneapolis mayoral campaign). Robert Duncan, current General Counsel and former Treasurer of the RNC, was actively involved in fundraising activities for the Republican Party of Kentucky and for Kentucky state candidates. He sponsored receptions and hosted and attended fundraising dinners in support of the Kentucky Republican Party. Duncan Decl. ¶ ¶ 5-6 [RNC Vol. VI].

The RNC states that prior to BCRA,

> RNC officers were intimately and substantially involved in helping state and local candidates raise money in accordance with state and federal law. Since becoming Chairman of the RNC in February 2002, Marc Racicot has made 82 trips in his capacity as Chairman to 67 cites in 36 states. Virtually all of these trips have involved assisting state and local parties and candidates with fundraising. *See* Josefiak Decl. ¶ 70. RNC Co-Chairwoman Ann Wagner and Deputy Chairman Jack Oliver have made 31 and 33 trips respectively since becoming RNC officers, the majority of which involved providing fundraising assistance to state and local parties and candidates. *Id.* For example, Ann Wagner was the keynote speaker at a fundraising dinner for the Shelby County Tennessee Republican Women's Club on September 8, 2001. *See* RNC Exh. 301.

RNC Proposed Findings of Fact ¶ 42. However, the Josefiak Declaration upon which the RNC relies does not support its contention. Josefiak only states that the 'majority of these trips have had significant fundraising components to them,' Josefiak Decl. ¶ 70 [RNC Vol. I]; he says nothing about the type of fundraising accomplished during these trips. Only one of these 146 trips is documented to have been for the purposes of state or local party fundraising. *See* RNC Ex. 301.

Nothing prevents RNC officials from raising federal funds for state candidates. *See* BCRA § 101(a); FECA § 323(a); 2 U.S.C. § 441i(a) (barring officers of agents of national political party committees from soliciting or directing contributions 'that are not subject to the limitations, prohibitions, and reporting requirements of this Act.').

1.97 Senator McConnell attests that he engages in fundraising activities for state and local candidates, such as speaking at a state party fundraiser or attending a candidate rally. McConnell Aff. ¶ 5 [2 PCS]. Under BCRA, Senator McConnell may continue 'to attend, speak, or be a featured guest at a fundraising event for a State, district or local committee of a political party.' BCRA § 101; FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3).

CDP and CRP Fundraising

1.98 The CDP and the CRP present evidence regarding their general fundraising activities and claim that BCRA will adversely affect their revenues. *See* Bowler Decl. ¶¶ 10, 12, 19, 23, 35 & Ex. A [3 PCS] (discussing CDP's federal and nonfederal fundraising achievements, methods, and difficulties, and the impact BCRA will have on CDP fundraising); Torres Decl. ¶ 9 [3 PCS] (discussing the effect of BCRA on CDP fundraising and therefore CDP activities); Erwin Aff. ¶¶ 12, 13, 15(a) & CDP App. at 1189 [3 PCS] (discussing CRP's fundraising programs and activities and the effect BCRA will have on these activities). These claims, however, are speculative and not based on any analysis. Bowler Dep. at 9-14 [JDT Vol. 3] (acknowledging that the CDP had not discussed any strategies for changing either its fundraising or operational activities to adjust to the requirements of the BCRA, that no one at the CDP had talked with any strategists or consultants with respect to ways in which the party might change either its fundraising or operational activities in response to the BCRA, and acknowledging that CDP's assessment of BCRA's effect was based on an analysis on how the law would have affected their past fundraising without looking at different ways money could have been raised); Erwin Dep. at 131-40 [JDT Vol. 5] (admitting the CRP did not conduct an analysis of how it would change its fundraising or operations to adapt to BCRA, that the party does not 'know what the ramifications' of BCRA will be on its fundraising receipts, and that he does not know how much of the nonfederal money that was collected by the national parties will now be directed at the CRP); *see also* Philp Dep. at 18-22 [JDT Vol. 26] (testifying that the Colorado Republican Party has done no formal analysis to determine BCRA's effect on the political party's revenue flow, and has not consulted with fundraising experts to determine different ways to fundraise under BCRA).

Furthermore, since the state political parties collect many donations in small increments, they could be classified as either federal or nonfederal contributions. No party has provided the three-judge panel with analysis taking this fact into account. The CDP and CRP also present testimony and documentary evidence concerning the effect the Levin Amendment will have had on their nonfederal fundraising. *See* Bowler Decl. ¶ 19 & Ex. A [3 PCS]; Torres Decl. ¶ 7 [3 PCS]; Erwin Aff. ¶ 13 [3 PCS]. In addition to not being the product of a serious, forward-looking analysis, the testimony is not sufficiently precise and leaves as many questions as it answers. For example, the CDP's evidence regarding the impact of the Levin amendment on its nonfederal money fundraising does not make clear if the amount of funds it claims will be 'reduced' includes the initial $10,000 of these donations which are permitted to be used for federal election activity under BCRA, or deducts those sums to present a more accurate calculation. *See* Bowler Decl. ¶ 19 & Ex. A [3 PCS].

Finally, Plaintiffs' own expert Raymond La Raja finds that 'new rules that limit soft money fundraising will not present a problem for parties already constrained by similar limits under state law.' La Raja Cross Exam. Ex. 3 at 148 [JDT Vol. 15] (La Raja dissertation). He notes that 'in states where campaigns are expensive and where parties rely on major donors' such measures 'will hamper party activity and create some confusion. . . . Although state parties will adapt, the middling and weaker state parties might suffer the most. . . .' *Id.* However, he concludes that the '[o]ne thing we can be sure of is that parties will figure out the ground rules and they will find an important role for themselves within the new campaign finance regime.' *Id.* at 150.

As such, I find the CDP and CRP's analysis of BCRA's impact on their fundraising activities speculative and lacking probative value.

1.99 The amount of nonfederal money the CRP and CDP raise themselves is much more than the nonfederal funds they receive from transfers from the national parties. CDP/CRP 1171 [3 PCS] (in the 2000 election cycle, 19.1 percent of all CRP nonfederal money came from national party transfers); CDP/CRP 35, 37, 39 [3 PCS] (in 2000, 36 percent of all CDP nonfederal money was from national party transfers). Ms. Bowler states, however, that 'the percentage of 'soft money' falling into this category would vary from state to state, as well as by election cycle . . .' Bowler Rebuttal Decl. ¶ 3 [3 PCS].

1.99.1 According to Ms. Bowler '[t]he majority of [national transfers] were for issue advocacy, although money has been transferred for voter registration, get-out-the-vote activities, and even administrative expenses. We are able to raise a substantial amount of money for our non-Federal activities and do not rely on national party transfers for those purposes.' Bowler Decl. ¶ 16 [3 PCS]; *see also id.* ¶ 12 (explaining that in the 1999-2000 cycle, the CDP raised $15,617,002 in nonfederal funds, which it used to fund state and local activities); Bowler Rebuttal Decl. ¶ 4 [3 PCS] (explaining that the CDP pays for much of its voter registration and get-out-the-vote activities with money raised by the state party). To the extent the CDP uses its nonfederal funds for purely state campaign activity, BCRA has no effect on such expenditures. As noted *supra,* Findings ¶ 1.28, 1.32, GOTV and voter registration activities affect federal elections in states like California that hold their state and local elections in conjunction with federal elections. As such, these activities could be paid for with federal funds or with an FEC-specified allocated mix of federal and nonfederal funds (raised pursuant to the Levin Amendment). *See* BCRA § 101; FECA § 323(b)(2)(a)-(c); 2 U.S.C. 441i(b)(2)(a)-(c).

TITLE II: ELECTIONEERING COMMUNICATIONS THAT AFFECT FEDERAL ELECTIONS

2.1 *The Origins of the Problem Congress Sought to Solve With Title II*

Federal law has long prohibited corporations and labor unions from spending general treasury funds in connection with a federal election. The Supreme Court's interpretation of FECA in a series of cases beginning in 1976 has limited FECA's control over corporate and labor union involvement with federal elections. Prior to BCRA, corporations and labor unions exploited these limitations and spent general treasury funds in massive amounts to influence federal elections with 'issue advertising' campaigns.

2.1.1 In *FEC v. Massachusetts Citizens for Life, Inc.*, the Supreme Court held that the prohibition on corporations and labor unions using general treasury funds on expenditures in connection with a federal election was overbroad, narrowing the restriction to corporate and union spending on 'express advocacy.' *FEC v. Massachusetts Citizens for Life, Inc.* ('*MCFL*'), 479 U.S. 238, 249 (1986) ('We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.'). In *Buckley,* the Supreme Court provided examples of express advocacy: ''vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'' *Buckley,* 424 U.S. at 44 n.52. These examples have been referred to as the 'magic words' because if they are invoked by an organization, they trigger FECA's limitations.

2.1.2 As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures[75] did not contain words of 'express advocacy.' In other words, corporations and labor unions could use their general treasury funds to pay for an advertisement which influenced a federal election, provided that the corporation or labor union did not use any of *Buckley*'s 'magic words' in the advertisement. Magleby Expert Report at 5-6, 9, 10 [DEV 4-Tab 8]; *see also* Krasno and Sorauf Expert Report at 50 [DEV 1-Tab 2].

2.2 *The Rise of Issue Advocacy Campaigns Funded by Corporate & Labor Union General Treasuries*

Approximately ten years after *MCFL*, during the 1996 election cycle, corporations and labor unions began aggressively to use general treasury funds to pay for 'issue advocacy' campaigns that avoided express advocacy but were designed to influence federal elections.

2.2.1 The Annenberg Center for Public Policy has been studying issue advocacy since the early 1990s. *See* Annenberg Public Policy Center, Issue Advocacy Advertising During the 1999-2000 Election Cycle ('Annenberg Report 2001') at 1 [DEV 38 Tab-22]. In addition to Defendants, Plaintiffs and their experts have cited to and included the Annenberg Study in their materials, and have not specifically challenged any of the Center's findings. *See, e.g.*, NRA 196 [11 PCS]; La Raja Decl. ¶¶ 24(h) [RNC Vol. VII] (quoting Annenberg Study), ¶ 20(b) & Figure 10 (quoting Annenberg data); Milkis[76] Decl. ¶ 49 [RNC Vol. VII] (citing Annenberg Study). *See also infra* App. ¶¶ I.B.1-I.B.6. Congress also relied on the Annenberg studies. 147 Cong. Rec. S2455 (daily ed. March 19, 2001) (statement of Sen. Olympia Snowe) ('Let there be no mistake. The record I intend to outline will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws.'); *id.* at 2456 (statement of Sen. Olympia Snowe) (citing Annenberg Report 2001). Accordingly, I rely on the Annenberg Center's results as uncontroverted evidence.

2.2.2 According to the Annenberg Center's research, issue advertisements generally fall into three categories: candidate-centered, legislation-centered, and general image-centered. Annenberg Report 2001 at 13. 'Candidate-centered advertisements make a case for or against a candidate but do so without the use of the ten words delineated in *Buckley*.' *Id.* (noting that these advertisements 'usually present a candidate in a favorable or unfavorable light and then urge the audience to contact the candidate and tell him or her to support the sponsoring organization's policy position.'). Legislation-centered advertisements 'seek to mobilize constituents or policy makers in support of or in opposition to pending legislation or regulatory policy.' *Id.* (noting that these advertisements usually mention specific, pending legislation). Finally, general image-centered advertisements are 'broadly written to enhance the visibility of an organization or its issue positions, but are not tied directly to a pending legislative or regulatory issue.' *Id.*[77] Throughout the Findings and my opinion, I will generally use the nomenclature candidate-centered issue advertisements (or electioneering issue advertisements) and genuine or pure issue advertisements. Genuine issue advertisements include both legislation-centered and general image-centered issue advertisements.

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[75] As discussed, *supra*, independent expenditures differ from coordinated expenditures in that coordinated expenditures are treated as contributions under FECA.

[76] Other commentators have referred to two types of advertisements: candidate-centered (also called electioneering) issue advertisements and genuine issue advertisements. Advertisements designed to genuinely influence debate over a particular issue are known as 'true' or 'genuine' issue advertisements, while those issue advertisements designed to influence a federal elections are known as 'electioneering' or 'candidate-centered' issue advertisements. Krasno and Sorauf Expert Report at 65 [DEV 1-Tab 2] ('Advertising data show that there are two distinct types of issue ads, those that are basically candidate-oriented and electioneering in nature, and those that only present or urge action on an issue. The former are nearly identical in format, structure, and timing to ads produced by candidates, while the latter bear little or no resemblance to electioneering.').

2.2.3 In discussing the 1999-2000 election cycle, the Annenberg Center found that '[t]he type of issue ad that dominated depended greatly on how close we were to the general election. . . . Though candidate-centered issue ads always made up a majority of issue ads, as the election approached the percent [of] candidate-centered spots increased and the percent of legislative and image ads decreased, such that *by the last two months before the election almost all televised issue spots made a case for or against a candidate*.' *Id.* at 14 (emphasis added).

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2.2.4 Overall, the Annenberg Center concludes that '[o]ver the last three election cycles the numbers of ads, groups, and dollars spent on issue advocacy has climbed.' *Id.* at 1. During the 1996 election cycle, the Annenberg Center estimated that $135 million to $150 million was spent on multiple broadcasts of about 100 advertisements. Annenberg Report 2001 at 1 [DEV38-Tab 22]. In the next election cycle (1997-1998), the Annenberg Center found that 77 organizations aired 423 advertisements at a cost of between $250 million and $340 million. *Id.*[78] In the 1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements. *Id.* For the 1999-2000 election cycle, the Republican and Democratic parties accounted for almost $162 million (31%) of this spending; Citizens for Better Medicare, $65 million (13%); Coalition to Protect America's Health Care, $30 million (6%); U.S. Chamber of Commerce, $25.5 million (5%); AFL-CIO, $21.1 million (4%); National Rifle Association, $20 million (4%); U.S. Term Limits, $20 million (4%). *Id.* These groups and the two parties accounted for two out of every three (67%) dollars spent on issue ads in the 2000 cycle. *Id.* (noting that other groups spent a combined $166.2 million (33%) on issue advocacy during the 1999-2000 election cycle); *see also* La Raja Decl. ¶ 20(b) & Figure 10 [RNC Vol. VII] (quoting Annenberg data and noting that '[t]hese figures ... closely match my own data on party-based issue ads collected by examining financial reports filed with the FEC').

2.2.5 In addition to the spectacular rise in candidate-centered issue advertising, political scientists and experts testify that by the 2000 election cycle, PAC interest groups ran dramatically fewer advertisements that referred to a federal candidate than non-PAC interest groups.

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[78] The report the Annenberg Study produced following the 1997-1998 election cycle placed this estimate at between $275 million to $340 million. Annenberg Public Policy Center, Issue Advocacy Advertising During the 1997-1998 Election Cycle ('Annenberg Report 1998') at 1 [DEV 66-Tab 6].

2.2.5.1 Political Scientist Anthony Corrado found that one of the 'most notable direct consequences of the FECA' was the 'proliferation of PACs.' Anthony Corrado, *A History of Federal Campaign Finance Law* at 18 [DEV 29-Tab 17]. Corrado's historical research concludes that 'from 1974 to 1986, the number of committees registered with the FEC increased from 1,146 to 4,157, while the amounts they contributed to candidates rose from about $12.5 million to $105 million.' *Id.* Corrado determined that campaign finance regulation was a major factor in the growth of PACs. *Id.* 'The FECA sanctioned PACs, and groups and organizations had an incentive to form PACs since the law established a higher contribution limit for PACs than for individual donors.' *Id.* at 18-19; *see also* Keller Decl. ¶¶ 57 [RNC Vol. VIII] ('[T]he unintended consequences of previous campaign finance legislation [has been] the growth of PACs and more powerful advocacy and interest groups.'), 42 ('Political action committees (PACs) have rapidly grown in numbers.'); Milkis Decl. ¶ 34 [RNC Vol. VII] ('Consequently, during the 1970s, the number of Political Action Committees (PACs) exploded.').

2.2.5.2 Defendants' expert Magleby finds that by the 2000 election cycle, the number of PACs had increased to only 4,499. Magleby Expert Report at 16 [DEV 4-Tab 8]. Plaintiffs' expert Keller notes that by March 31, 2002, the number of federal PACs had dropped to 4,328. Keller Decl. ¶ 42 [RNC Vol. VIII]; *see also* Milkis Decl. ¶ 35 [RNC Vol. VII] (same). By the 2000 election cycle, *non*-PAC interest groups ran 74,024 political advertisements referring to a federal candidate, compared to *only* 3,663 by interest group PACs. Goldstein Expert Report at 10 [DEV 3-Tab 7] (Table 1B); *see also* Rosenthal Decl. ¶ 25 (discussing that since 1995 the AFL-CIO's PAC has not made any independent expenditures); *cf.* Magleby Report at 14-15 [DEV 4-Tab 8] ('If parties and interest groups can effectively communicate a 'vote for' or 'vote against' message with party soft money and electioneering advocacy money, as the studies show they can, then it is not surprising that we have seen so much growth in this form of campaigning in recent election cycles.').

2.2.6 After studying the dramatic rise of candidate-centered issue advertisements over a seven year period, the Annenberg Center concluded *inter alia* that:

> 1) The amount of money spent on 'issue advocacy' is rising rapidly.
>
> 2) Instead of creating the number of voices *Buckley v. Valeo* had hoped, issue advocacy allowed groups such as the parties, business and labor to gain a louder voice.
>
> 3) The distinction between issue advocacy and express advocacy is a fiction.
>
> 4) Issue advocacy masks the identity of some key players and by so doing, it deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility.

Annenberg Report 2001 at 1 [DEV 38-Tab 22]. As Plaintiffs' expert Raymond J. La Raja states, "Over the last three election cycles, the number of groups sponsoring ads has exploded, and consumers often don't know who these groups are, who funds them, and whom they represent." La Raja Decl. ¶ 24(h) [RNC Vol. VII] (quoting Annenberg Report 2001 at 1).

2.2.7 It is therefore uncontroverted that '[b]y the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits.' Magleby Expert Report at 10 [DEV 4-Tab 8]. Political consultant Douglas L. Bailey explained why it was not until the 1996 election cycle that corporations and labor unions began to make heavy use of issue advocacy as a tool of electioneering. Political consultant Bailey testifies:

> When I consulted on dozens of campaigns in the 1970s and 1980s, we operated under essentially the same set of rules that governed in 1996, but many of today's practices would have been considered dangerous and wrong then, both politically and legally. In the post-Watergate era, we were worried about not only obeying the rules, but also assuring that our clients were seen as trying to clean up the image of the political process. But due to a lack of enforcement and a willingness on the part of some to win at all costs, these concerns appear to have dissipated.

Bailey Decl. ¶ 14 [DEV 6-Tab 2].

2.2.8 As this section illustrates, the uncontroverted record demonstrates that since the 1996 election cycle, candidate-centered issue advertisements have been used by corporations and labor unions to influence federal elections with general treasury funds.

2.3 *Express Advocacy Not Widely Used Nor An Effective Means of Campaign Advertising*

Exacerbating this development, is the undisputed fact that the overwhelming majority of modern campaign advertisements do not use words of express advocacy, whether they are financed by candidates, political parties, or other organizations. It is also uncontroverted that political consultants do not employ express advocacy when making campaign advertisements because they do not view it as an effective means of campaign advertising. As a result, corporations and labor unions are able to pay for the most effective form of political advertisements when seeking to influence federal elections.

2.3.1 Empirical study demonstrates that modern campaign advertisements do not use words of express advocacy. Dr. Goldstein finds, that 11.4 percent of the 433,811 advertisements aired by candidates met the express advocacy test during the 2000 federal election. Goldstein Amended Expert Report at 16 [DEV 3-Tab 7]. Conversely, 88.6 percent of candidate advertisements in 2000 'were technically undetected by the *Buckley*magic words test.' *Id.* This result demonstrates 'that magic words are not an effective way of distinguishing between political ads that have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue.' *Id.* Former Senator Rudman confirmed these empirical results observing that '[m]any, if not most, campaign ads run by parties and by candidates themselves never use . . . 'magic words.' It is unnecessary.' Rudman Decl. ¶ 18 [DEV 8-Tab 34].

2.3.2 The uncontroverted testimony of political consultants demonstrates that it is neither common nor effective to use the 'magic words' of express advocacy in campaign advertisements. The political consultants' testimony, which I adopt as part of my Findings, is worth repeating *in toto;* particularly given the fact that the testimony of these political consultants is uncontroverted on these points and is not rebutted by the production of *any* contrary political consultant testimony by Plaintiffs discussing this subject.

Republican Political Consultant Douglas L. Bailey[79]

In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.' If I am designing an ad and want the conclusion to be the number '20,' I would use the ad to count from 1 to 19. I would lead the viewer to think '20,' but I would never say it. All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat. This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians.

Contrary to what many people would like to believe, it is well known among campaign consultants that the 'swing voters' who regularly determine the outcome of elections usually vote on candidate personalities, rather than issues. Regardless of the substantive topic of any particular ad, one of the single most important message [sic] that a political ad can convey is the underlying sentiment that a candidate has values similar to or different than the target viewers of the ad. A campaign commercial is most effective if the candidate is perceived as likeable to the citizens relaxing in their living rooms, and if the viewers feel comfortable that the candidate shares their values. Often, the substantive issue is merely the vehicle used to demonstrate personal qualities.

In the era of the 30 second ad, it is a mistake to view any particular electioneering advertisement as a campaign in and of itself. Over time, a campaign defines a candidate through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these 'feels' to make up a campaign. Thirty second campaign ads, therefore, must be viewed collectively. It is impossible for the political ad consultant to truly close a positive sale until after he has had time to build the candidate's image through a series of 30 second spots.

Even if an electioneering ad aired in August, September, or October used words such as 'vote for,' 'support,' or 'cast your ballot,' it would do little good. People's minds may change from day to day about how they intend to vote, or more likely, they aren't significantly focused on whom to vote for until the days immediately prior to the election. Thus, the only real sale date is on election day in November. In the months leading up to that 'sale date,' the most important positive thing an ad can do is to create a general impression of a candidate that the voters will internalize over time, and that will hopefully sink in by election day.

Even if the goal of an early-September electioneering ad were to make a direct pitch for a vote, it would be nearly impossible to do it effectively. It is amazing how

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[79] In 1968, Bailey founded Bailey, Deardourff & Associates, which was among the first national political consulting firms, working for Republican candidates for Governor, Congress, Senate, and President. The firm's clients included Gerald Ford's Presidential Campaign, and over fifty successful campaigns for Governor or the United States Senate in 17 states. Bailey Decl. ¶ 1 [DEV 6-Tab 2]. As campaign consultant, Bailey's job was 'to plan the campaign and then create broadcast advertisements that would shape its outcome.' *Id.* ¶ 2. In 2000, Bailey was among the first eight recipients of the American University-Campaign Management Institute's 'Outstanding Contribution to Campaign Consulting Award given to the consultants 'who have best represented the ideals of the profession and shown concern for the consequences of campaigns on public attitudes about our democratic process.' *Id.* Bailey also has done work for political parties and issue advocacy groups. *Id.* ¶¶ 9-12.

> short thirty seconds really is when you are trying to craft a political ad. There is barely enough time to effectively convey a single theme. If you change course in the final five seconds of an ad, you may undo everything that you have attempted to accomplish in the previous 25 seconds. Therefore, it is uncommon that you would see a political advertisement on television that says 'Candidate X is tough on crime' and then breaks that flow and switches to the entirely separate point of' Please vote for Candidate X.'

Bailey Decl. ¶¶ 3-4, 6-8 [DEV 6-Tab 2].

Democrat Political Consultant Raymond Strother [80]

> [M]edia consultants prefer putting across electioneering messages without using words such as 'vote for.' Good media consultants never tell people to vote for Senator X; rather, you make your case and let the voters come to their own conclusions. In my experience, it actually proves less effective to instruct viewers what you want them to do. They have to come to their own conclusion. Americans like to think they make up their own minds and determine their own fate. Without even mentioning an upcoming election, the media consultant can count on the electoral context and voters' awareness that the election is coming. Voters will themselves link your ad

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[80] Strother is a political consultant, and President and founder of Strother/Duffy/Strother. Strother Decl. ¶ 1 [DEV 9-Tab 40]. He is also Chairman of the Board of the American Association of Political Consultants, and last year served as its President. *Id.* Since 1967, he has worked for more than 300 campaigns. *Id.* Representative clients at the presidential, congressional, and gubernatorial levels have included Lloyd Bentsen, Paul Simon, Gary Hart, Bill Clinton, Al Gore, Mary Landrieu, and Zell Miller. *Id.* In the last two decades alone, his firm has 'helped elect candidates in 44 states and five countries, including 13 Senators, 8 Governors, and scores of Congress members. [His firm has] won more Democratic Primaries than any other firm.' *Id.*

> to the upcoming election. When viewed months or years after the election a particular ad might look like pure issue advocacy unrelated to a federal election. However, during the election, political ads-whether candidate ads, sham issue ads, true issue ads, positive ads, negative ads or whatever-are each seen by voters as just one more ingredient thrown into a big cajun stew. Thus, there is precious little difference in how you go about crafting 'issue ads' and candidate ads.

Strother Decl. ¶ 4 [DEV 9-Tab 40]. During the cross-examination period, Strother made another observation:

> What you're trying to do is give people enough information [sic] they can make up their own minds. Of course, you're leading them to make up their minds in one direction, but I don't call that hard sale. People tend not to vote for issues anyway, most of the time. They tend to vote for the individual, and they measure the individual by issues.

Strother Cross Exam. at 43 [JDT Vol. 32]; *see also id.* at 44 (observing that 90% of candidate advertisements Strother has put together in his career have *not* used express advocacy).

2.3.3 Unrebutted expert testimony confirms the view of political consultants. Krasno and Sorauf state that...

> the practices of political advertisers are not dissimilar from those of commercial advertisers. Car ads rarely exhort viewers to 'buy' a Chevrolet, nor do soft drink ads urge people to 'drink' their product. The most aggressive ads usually urge viewers to do no more than call or visit a website for information. . . . This atmospheric approach to commercial advertising-where the product is presented in various desirable tableaus-has become increasingly popular. It serves the general strategy of advertisers to present viewers with a variety of reasons to choose their product, hoping that they will

> latch onto one. Too heavy-handed an approach might interfere with this process by raising viewers' defenses. Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls. That may or may not be an effective approach, but it is the one that advertisers use and that regulators and courts must reckon with.

Krasno and Sorauf Expert Report at 54 [DEV 1-Tab 2] (footnote omitted); *see also* Magleby Report at 15 [DEV 4-Tab 8] ('The absence of magic words in electoral communications does not impede the ability of media consultants to craft an electioneering message. In fact, candidates rarely use the magic words in their own ads.').

2.4 *Current Federal Law Does Not Distinguish Between Pure Issue Advertisements and Candidate-Centered Issue Advertisements* Not only are words of express advocacy uncommon and ineffective in campaign advertising, it is also undisputed that they are ineffective criteria for distinguishing between genuine issue advertisements and advertisements that do not use express advocacy but are designed to influence a federal election.

2.4.1 Experts provided uncontroverted testimony to support this point. 'The 'magic words' defined in *Buckley v. Valeo* do not provide an effective way to determine whether advertisements have the purpose and/or effect of supporting or opposing particular candidates.' Magleby Report at 5 [DEV 4-Tab 8]; *see also* Krasno and Sorauf Expert Report at 58 [DEV 1-Tab 2] ('The magic words test, however, does not distinguish between [pure issue advertisements and candidate-oriented issue advertisements]; indeed it does not distinguish between ads sponsored by candidates and any type of issue ad, or even between political and commercial advertising. Whatever its utility might once have been, this standard is now irrelevant to how political ads are designed.').

2.4.2 Present and former officeholders and candidates likewise provide uncontroverted testimony that 'magic words' do not distinguish pure issue advertisements from candidate-centered issue advertisements. 147 Cong. Rec. S3072 (2001) (Senator Russ Feingold) ('People didn't need to hear the so-called magic words to know what these ads were really all about.'); 147 Cong. Rec. S3036 (Senator John McCain) ('[W]e can demonstrate that the Court's definition of'express advocacy'-magic words-has no real bearing in today's world of campaign ads.'). Senator Carl Levin made the following statement on the floor of the Senate in 1998:

> To show the absurd state of the law, at least in some circuits, we can just look at one of the 1996 televised ads that was paid for by the League of Conservation Voters and which referred to House Member Greg Ganske, a Republican Congressman from Iowa, who was then up for reelection. This is the way the ad read:
>
> > *It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.*
>
> The ad sponsor claimed that was an issue ad, an ad that discussed issues rather than a candidate, and so could be paid for by unlimited and undisclosed funds. If one word were changed, if instead of 'Call Congressman Ganske,' the ad said, 'Defeat Congressman Ganske,' it would clearly qualify as a candidate ad subject to contribution limits and

> disclosure requirements. In the real world, that one word difference doesn't change the character or substance of that ad at all. Both versions unmistakably advocate the defeat of Congressman Ganske.

144 Cong. Rec. S10073 (1998) (Senator Carl Levin) (advertisement text in italics); *see also* Decl. of Elaine Bloom ¶ 5 [DEV 6-Tab 7] ('In my experience in campaigns for federal, state and local office, including my involvement in the television advertising we ran in my race for Congress, no particular words of advocacy are needed for an ad to influence the outcome of an election. Many so-called 'issue ads' are run in order to affect election results.').[81] As former Senator Dale Bumpers testifies:

> Soft money also finds its way into our system through so-called 'issue advertisements' sponsored by outside organizations that mostly air right before an election. Organizations can run effective issue ads that benefit a candidate without coordinating with that candidate. They have experienced professionals analyze a race and reinforce what a candidate is saying. These ads influence the outcome of elections by simply stating 'tell him [the opponent] to quit doing this.' The 'magic words' test is completely inadequate; viewers get the message to vote against someone, even though the ad may never explicitly say 'vote-against-him.'

Bumpers Decl. ¶ 26 [DEV 6-Tab 10]; *see also* Chapin Decl. ¶ 7 [DEV 6-Tab 12] ('Based on my experience in campaigns for federal and local office, including the television advertising we ran in my races for County Chairman and Congress, I am familiar with political campaign ads. No particular words of advocacy are needed in order for an ad to influence the outcome of an election.').[82] Congressman Christopher Shays, a Defendant-Intervenor, testifies:

> Although the Supreme Court has identified a limited category of 'magic words' that make an advertisement a campaign advertisement, my experience as a candidate and a Member of the House is that this limited test is inadequate to identify campaign ads. Campaign ads need not include phrases such as 'vote for,' 're-elect' or 'vote against' to be effective campaign tools, and the practice of large numbers of so-called 'issue ads' before an election proves it.

Shays Decl. ¶ 12 [DEV 8-Tab 35].

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[81] Elain Bloom is currently engaged in consulting, public speaking, and community activities. Bloom Decl. ¶ 2 [DEV 6-Tab 7]. In 2001, Bloom was a candidate for Mayor of Miami Beach, Florida. *Id.* In 2000, Bloom was the Democratic candidate in the general election to represent Florida's 22nd Congressional District, running against the incumbent Republican Clay Shaw, who had served in Congress for nearly 20 years. *Id* (Shaw won the race by approximately 500 votes out of over 200,000 cast). Prior to the 2000 race, Bloom served as a member of the Florida House of Representatives for over 18 years, from 1974 to 1978 (representing Northeast Dade County) and from 1986-2000 (representing Miami Beach and Miami). *Id.* Bloom was Speaker Pro- Tempore of the Florida House from 1992 to 1994, and also served as chair of several legislative committees, including the Health Care Committee, the Joint Legislative Management Committee, the Joint Legislative Auditing Committee, and the Tourism and Cultural Affairs Committee. *Id.*

[82] Since early 2001, Linda Chapin has been the Director of the Metropolitan Center for Regional Studies at the University of Central Florida. Chapin Decl. ¶ 2 [DEV 6-Tab 12]. Chapin was the Democratic candidate in the 2000 general election to represent Florida's Eighth Congressional District, which was an open-seat race. *Id.* ¶ 4. In the November 2000 general election, her Republican opponent received about 51% of the votes cast, and Chapin received about 49% of the votes cast. *Id.* ¶ 4. From 1998 to 2000, Chapin directed the Orange County (Florida) Clerk's Office. *Id.* ¶ 2. Prior to that, Chapin was elected to two successive four- year terms, in 1990 and 1994, as County Chairman of Orange County. *Id.* The County Chairman is a strong executive position roughly equivalent to a mayoral office. *Id.* Prior to her tenure as County Chairman, she was elected to a four-year term on the Orange County Commission in 1986.

2.4.2.1 Federal officeholders and candidates also testify that, based on their experience, the intent behind issue advertisements that mention the name of a federal candidate, are aired right before the election, and broadcast to the candidate's electorate, is to influence the election. Chapin Dep. at 27 [JDT Vol. 5] ('It's possible that you could debate the [fact that issue advertisements run within 60 days of an election can be both intended to influence the outcome of an election and intended to promote a particular perspective on a particular public policy issue], but in my experience those ads are almost entirely intended to influence the outcome of an election.'); *see also* Paul Dep. at 27-28 [JDT Vol. 25] (Plaintiff Congressman Ron Paul testifying that the outside group issue ads run in his 2000 Congressional campaign were intended to influence the election.).

2.4.3 The uncontroverted testimony of political consultants confirms that there is no difference between campaign advertisements that contain words of express advocacy and candidate-centered issue advertisements that are designed to influence federal elections but that do not use the 'magic words' of *Buckley*. Consequently, it is uncontroverted that political consultants are able to easily create advertisements designed to influence federal elections that do not use words of express advocacy, and therefore, can be paid for with funds from prohibited sources (corporation and labor union general treasury funds).

Republican Political Consultant Douglas L. Bailey

> The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as 'vote for' is at best a historical anachronism. When I first entered this business, and up through the mid-1980s, we were regularly able to purchase five minute slots of air time. In a five minute spot, I could introduce a candidate, bring the viewer to a comfort level with the candidate, cover a few different substantive issues, and at the end, have the candidate make a direct appeal for a vote. In this by-gone era, it made sense for a candidate to appeal directly for votes using words such as 'vote for,' 'support,' or'cast your ballot' on the basis of a more full or substantive story told in a five minute time period. By contrast, in a 30 second ad, there is not enough time to make a positive direct sale.

Bailey Decl. ¶ 5 [DEV 6-Tab 2].

Democrat Political Consultant Raymond Strother

> Because it is so easy for consultants in my business to make ads that will influence federal elections without triggering the need to use hard dollars to pay for them, the difference between hard money and soft money is a joke. If I want to use soft money to influence an election, there is no real difference in what I do to create the ad. The only thing that is different is the tag line at the end. From the point of view of a media consultant, there is no real difference between ending an advertisement with 'Vote for Senator X' versus ending an advertisement with 'Tell Senator X to continue working hard for America's families.' The public simply does not differentiate between ads that are otherwise identical, but contain these slightly different tag lines at the very end.
>
> When we design, produce, and run 'issue ads' that mention specific candidates for federal office and that are aired in proximity to an election, these ads are for only one purpose: to effect [sic] the outcome of an election. To call these ads 'issue ads' is a sham. We know that these ads have been paid for with soft money; we know why we have been hired; and we know how easy it is to make sham issue ads that comply with the law, but nevertheless affect federal elections. We know

this even without explicit instructions from our clients. Any media consultant who says otherwise isn't telling the truth. This is what everyone in the business does and you know what you are supposed to produce. It is playing within the current set of rules, but these rules need to be changed.

One common trick that makes the job of creating sham issue ads even easier is the two-camera candidate shoot. Sometimes, the media consultant for the candidate's campaign committee will shoot the film and sell it to the media consultant for a third party for a reasonable rate. They simply take 2 cameras on a shoot when they are filming the candidate's ad. Camera A shoots the footage for the candidate's ad, and Camera B takes nearly identical footage that is then sold to other media consultants for a nominal fee. The media consultant for the third party just has to buy the film from Camera B and put on a clever tag line at the end. In this way, the candidate's media consultant gets direct control over the images of the candidate used in the issue groups' ads.

Strother Decl. ¶¶ 3, 8, 11 [DEV 9-Tab 40].

Republican Political Consultant Rocky Pennington

Many soft money ads that avoid the magic words are clearly intended to affect federal elections. Parties and interest groups would not spend hundreds of thousands of dollars to runs [sic] these ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after. The usual final tag line for soft money electioneering is to 'call' or 'ask' or 'tell' a candidate to stop or continue doing something, often something vague like fighting for the right priorities. This is pretty silly, because it's hard to imagine

thousands of people calling the candidate in response to the ad and saying, keep doing this, this is wonderful. These standard final words, like 'tell,' have become the real 'magic words' in modern campaigning. I imagine some smart lawyer came up with them, because the real audience for them is not the voters, but the courts who may be examining the ad after the election.

Pennington Decl. ¶ 10 [DEV 8-Tab 31]. Both the Chamber of Commerce and AFL- CIO admit that '[t]he ultimate way to tell an elective official to do something is through the voting process.' G. Shea Dep. at 46 [JDT Vol. 30]; Josten Dep. at 230 [JDT Vol. 12] ('I would say that [voting against a candidate] is probably one of the best ways to tell a politician you don't like what they are doing.'). Plaintiffs attempt to challenge this premise by citing text from Senator Feingold's deposition that his constituents do call him about issues they may have seen in issue advertisements; however, a careful reading of the colloquy makes clear that the type of advertisements his constituents may have seen is never clarified. I cannot conclude from this exchange that the advertisements that led to those telephone calls would be covered by Title II of BCRA. During his deposition, Senator Feingold only indicates that he receives calls from constituents in response to television advertisements. Senator Feingold was not specifically asked if these advertisements were the type covered under Title II of BCRA. Feingold Dep at 238-39 [JDT Vol. 6] ('Q. . . . You mentioned ads, and I have shown you ads which say call Senator so and so, contact Senator so and so. Your constituent sometimes do call you and contact you, do they not? A. Yes, they do. Q. And they sometimes talk about issues including abortion, right to life issues and other issues, do they not? A. Yes, they do. Q. In your opinion, are they sometimes affected by advertisements that they have seen on television? A. I'm sure they are.').

Democrat Political Consultant Terry S. Beckett

> I am aware of the idea that particular 'magic words' might be required in order for an advertisement to influence an election. However, in fact no particular words of advocacy are needed in order for an ad to influence the outcome of an election. No list of such words could be complete: if you list 50, savvy political actors will find 100 more. For example, many so-called 'issue ads' run by parties and interest groups just before an election attack a candidate, then end by supposedly urging the viewer to 'tell' or 'ask' the candidate to stop being that way. These ads are almost never really about issues. They are almost always election ads, designed to affect the election result, and many do affect the election result. You can see this most clearly in the ones that amount to personal attacks, or that criticize a candidate on several unrelated 'issues.' In fact, in my experience, candidates tend to shy away from such negative attack ads because there would be political repercussions for them. But entities like the DCCC [Democratic Congressional Campaign Committee] and the Club for Growth do not have such constraints. Based on my observations, the candidate ads in the 2000 Congressional race, which were financed with federal funds ('hard money'), were actually more about 'issues' than the supposed 'issue ads' run by political parties and interest groups, which I understand were financed at least in part with non-federal funds('soft money').

Beckett Decl. ¶ 8 [DEV 6-Tab 3].

Democrat Political Operative Joe Lamson

> Based on my experience in managing many federal election campaigns, I am familiar with campaign advertising. No particular words of advocacy are needed in order for an advertisement to influence the outcome of an election. When political parties and interest groups run 'issue ads' just before an election that say 'call' a candidate and tell her to do something, their real purpose is typically not to enlighten the voters about some issue, but to influence the result of the election, and these ads often do have that effect. Parties and groups generally run these pre-election 'issue ads' only in places where the races are competitive. These 'issue ads' generally stop on the day of the election. For example, these groups could run ads explaining Nancy Keenan's position on the issues after the November general election so that people could discuss them over the Thanksgiving dinner table, but it doesn't seem to work that way.

Lamson Decl. ¶ 6 [DEV 7-Tab 26].

Former Chair of Plaintiff NRA Political Victory Fund Tanya K. Metaksa[83]

> Today, there is erected a legal, regulatory wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing.

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[83] Metaksa served as Chairman of the National Rifle Association Political Victory Fund and as Executive Director of the NRA Institute for Legislative Action. She made the statement above in her opening remarks to the American Association of Political Consultants' Fifth General Session on 'Issue Advocacy.' INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on 'Issue Advocacy,' Jan. 17, 1997, at 2 [DEV 38-Tab 25]. During this litigation, NRA Executive Vice President Wayne LaPierre testified that Ms. Metaksa is 'someone who was knowledgeable about NRA's political strategies' and was someone who was 'a reliable and trustworthy employee of NRA.' LaPierre Dep. at 11 [JDT Vol. 14]. Plaintiffs have not objected to Ms. Metaksa's statement on hearsay grounds and given Mr. LaPierre's comments, I find Ms. Metaksa's statement trustworthy and rely on it for purposes of my Findings.

> Everyone sees it. No one believes it. It is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.
>
> We engaged in issue advocacy in many locations around the country. Take Bloomington, Indiana, for example. Billboards in that city read,
>
> 'Congressman Hostettler is right.'
>
> 'Gun laws don't take criminals off Bloomington's streets.'
>
> 'Call 334-1111 and thank him for fighting crime by getting tough on criminals.'
>
> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did. When we're three months away from an election, there's not a dime's worth of difference between 'thanking' elected officials and 'electing' them.

INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on 'Issue Advocacy,' Jan. 17, 1997, at 2 [DEV 38-Tab 25].

2.4.4 As a result of these developments, Congress found that FECA, as construed by the Courts to limit only independent expenditures containing *Buckley*-defined express advocacy, was no longer relevant to modern political advertising. *See, e.g.*, 148 Cong. Rec. S2117 (2002) (Statement of Sen. James Jeffords) ('The 'magic words' standard created by the Supreme Court in 1976 has been made useless by the political realities of modern political advertising. Even in candidate advertisements, what many would say are clearly advertisements made to convince a voter to support a particular candidate, only 10 percent of the advertisements used the 'magic words.''); *see also* 148 Cong. Rec. S2116 (2002) (Statement of Sen. Carl Levin) ('[T]he Brennan Center study found that of the ads actually run by candidates and paid for with hard money specifically on behalf of their election or defeat, only 9 percent used the seven magic words and phrases identified by the Supreme Court. That is compelling evidence that the magic words identified by the Supreme Court are not a complete test of what constitutes electioneering ads. More is at work here than just the seven magic words identified by the Supreme Court.').

2.5 *Candidate-Centered Issue Advocacy Has Risen Because it Permits Corporations & Labor Unions to Influence Federal Elections with General Treasury Funds While Avoiding FECA's Restrictions*

It is uncontroverted that the shift toward using issue advocacy can be explained by three phenomena. 'First, it permits groups and individuals to avoid disclosure. Second, it allows them to avoid contribution limits. Third, it permits some groups (such as corporations and labor unions) to spend from generally prohibited sources.' Magleby Report at 18 [DEV 4-Tab 8]; *see also* Krasno and Sorauf Expert Report at 50 [DEV 1-Tab 2] (Avoiding FECA allows advertisers to collect any sum ofmoney from any source they can. Avoiding FECA allows advertisers to conduct their operations without disclosing their activities to the public.').

2.5.1 *Avoid Disclosure*

It is not disputed that one advantage to using candidate-centered issue advertising to influence federal elections is that the advertisements are outside FECA's purview. Accordingly, disclosure is not required for the organization paying for these advertisements. Magleby Expert Report at 18 [DEV 4-Tab 8] ('The 1996, 1998 and 2000 election cycles all saw examples of groups who sought to avoid accountability for their communications by pursuing an electioneering advertising/election advocacy strategy rather than limiting their activities to independent expenditures or other activities expressly permitted by the FECA.'). Indeed, Plaintiffs' expert Sidney M. Milkis notes:

> It is important to point out, however, that interest groups have also increased their political advertisements that connect, indeed subordinate the discussion of issues to electioneering, much of it negative in tone. As an Annenberg Public Policy Center study indicates, the ads of special interest groups represented 68% of all spending on issue ads in the 1999-2000 cycle; interest groups spent more than $347 million on these issue advertisements. The names of these groups did little to tell viewers who the sponsors of these messages were; indeed, in some cases they were misleading. For example, The Citizens for Better Medicare, which spent $65 million on television ads, is funded primarily by the pharmaceutical industry. Not only were the funding sources of interest groups ads more misleading than party-sponsored ads, they also tended to be more negative, especially in the early stages of the 2000 campaign.

Milkis Decl. ¶ 49 [RNC Vol. VII] (citing Annenberg Report 2001). Aside from the observation of Plaintiffs' expert Milkis about the lack of disclosure relating to political advertisements, two further examples illustrate this point:

- In 1998, the AFL-CIO helped pay for ads in the Connecticut Fifth Congressional District race through a group named the 'Coalition to Make Our Voices Heard.' Steven Rosenthal defended campaigning under an obscure name in this case saying, 'Frankly we've taken a page out of their book [other interest groups] because in some places it's much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.''

Magleby Expert Report at 18-19 [DEV 4-Tab 8] (citing Rosenthal's comments at a lunchtime discussion panel at the Pew Press Conference).

- One or more sources of the funds used by Plaintiff NRA to finance at least one political advertisement that identified a candidate and that was broadcast on television or radio within the 60 days preceding a general election in a state or Congressional district in which that candidate was running for federal office has not been publicly disclosed.

Resps. of the NRA and the NRA Political Victory Fund to Def. FEC's First Req. for Admis., No. 12, 5 [DEV 12-Tab 9] ('The NRA is not required under applicable law to disclose the specific individuals who provide it with funding, and it respects the strong desire of many of its members and contributors to remain anonymous.').

2.5.2 *Avoid Source Limitations*

Federal law has long prohibited corporations and labor unions from using their general treasury funds for federal election purposes. Therefore, another advantage to candidate-centered issue advertising is that the advertisements can be paid for with general treasury funds and thereby avoid FECA's source restrictions. Magleby Expert Report at 19 [DEV 4-Tab 8] ('The ability of corporations and trade unions to effectively campaign through electioneering advertisements and election advocacy' under the rubric of issue advocacy by avoiding the magic words, 'makes a sham of these longstanding federal laws.').

2.5.3 *Avoid Contribution Limitations*

As donations of nonfederal funds are not limited by federal law, 'groups can raise larger amounts of money in less time.' Magleby Expert Report at 19 [DEV 4-Tab 8] (For example, 'groups like Citizens for Better Medicare, Pharmaceutical

Research and Manufacturers of America, NAACP National Voter Fund, and NARAL, were able to far exceed what individuals, PACs or parties could do through hard money contributions.'); *id.* at 10 ('[T]his method of advocacy allows groups to accept unlimited contributions to pay for the communications.'). This fact provides another advantage of using candidate- centered issue advocacy.

2.6 *Organizations' Use of Candidate-Centered Issue Advocacy*

Examples from the record demonstrate that organizations use candidate- centered issue advertising as a means of avoiding FECA's restrictions.

2.6.1 *AFL-CIO's Issue Advocacy Media Campaign Surrounding the 1996 Federal Election*

The evidence demonstrates that the AFL-CIO's issue advertising campaign in and around the 1996 federal general election was designed to influence the election and was paid for with general treasury funds.

2.6.1.1 Denise Mitchell,[84] Special Assistant for Public Affairs to AFL- CIO President John J. Sweeney, states that

she 'realize[s] that AFL-CIO advertising could affect how citizens vote. . . . [T]hey may in some cases have an indirect effect on election outcomes. . . . This, however, has never been the point of our broadcast advertising program. . . .' Mitchell's statement is controverted by evidence from the record that the AFL-CIO did not attempt to rebut or discount:

- A September 18, 1996, memorandum from a polling firm analyzed the potential impact of five issue advertisements in terms of their likely effect on voters. Memorandum from Guy Molyneux and Molly O'Rourke of the polling firm Peter D. Hart Research Associates, Inc., to the AFL-CIO's Special Assistant for Public Affairs, Denise Mitchell, 'Ad Targeting' (Sept. 18, 1996), AFL-CIO 001614-16 [DEV 124] ('[The advertisement] Taxes appears to be the single strongest spot, in terms of *reaching the widest range of voters and affecting people's impression of the incumbent's Issue position.* It should especially be directed to younger voters. [The advertisement] Kids is also very strong, and again should be directed to young people. [The advertisements] Medicare, Homes, and Retire are most effective with older audiences. If you can only run 4 spots, [the advertisement] Retire is probably the one to drop.') (emphasis added); *see also* Memorandum from Geoff Garin and Guy Molyneux of Peter D. Hart Research Associates, Inc. to Denise Mitchell, 'AFL-CIO Mall Intercepts Survey' (Sept. 13, 1996), AFL-CIO 001582-84 [DEV 124] (Mall Intercept Survey of individuals' reactions to these advertisements including *how the advertisements made the respondents feel about fictitious congressman's position on each issue*); *see also* Mitchell Cross Exam. at 66-75 [JDT Vol. 23].

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[84] Denise Mitchell is the Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney. Mitchell Decl. ¶ 1 [6 PCS]. She was appointed to this position on November 1, 1995, shortly after Sweeney was elected President of the AFL-CIO. *Id.* Prior to assuming this position, Mitchell had worked with Sweeney in a similar role for a number of years when he was President of the Service Employees International Union and she had assisted in his campaign for election to the position of AFL-CIO President. *Id.* Mitchell has worked in marketing and media relations for unions and other non-profit organizations on working family issues for more than 20 years. *Id.* In her current position, Mitchell has the primary responsibility for overseeing all public relations activities of the AFL-CIO including all AFL-CIO use of broadcast and print media. *Id.* ¶ 2. Mitchell is responsible for making the operational decisions as to both the substance and the method of communication of the AFL-CIO's message to union members and to the general public. *Id.* Mitchell makes the strategic and logistical decisions regarding the AFL-CIO's media buys, and, within policy guidelines, makes the editorial decisions regarding the content of the AFL-CIO's communications.

- On March 29, 1996, Mitchell received a memorandum from a campaign consultant analyzing political media consultants for the AFL-CIO. The memorandum stated:

> Political campaigns are superheated environments where the objective is not, always, to make the best looking spot. The objective is to communicate with the persuadables at the time they are making their decision. Being able to pivot the entire campaign at exactly the right time is the real talent of a media consulting firm. Consequently, there is little reward for great spots.
>
> No one knows better than you how consuming this can be. . . .
>
> [These advertisements can be done], but you must understand that you will be asking these political consultants to do it under rules they have never had to follow before. . . .
>
> What [all of these firms can do] is manage the political message in a volatile environment.

Memorandum from Joe Cowart of Joseph Cowart Campaign Consulting to Denise Mitchell, 'Political Media Consultants' (Mar. 29, 1996), AFL-CIO 001702-04 [DEV 124].

- An October 9, 1996, internal memorandum from the AFL-CIO's Brian Weeks to AFL-CIO's Mike Klein discussed where media buys might be placed to help Dick Durbin in his Illinois Senate race, based on Mr. Durbin's lack of resources to air advertisements in certain markets. Memorandum from Brian Weeks to Mike Klein, 'Electronic Buy for Illinois Senator' (Oct. 9, 1996), AFL-CIO 005244 [DEV 125].

Accordingly, with regard to the AFL-CIO's issue advertising campaign that aired before the 1996 general election, I find that Mitchell's statement that the indirect effect on election outcomes has never been the point of the AFL- CIO's broadcast advertising program, Mitchell Decl. ¶ 70 [6 PCS], carries no weight in light of these internal documents.

2.6.1.2 It is clear that the AFL-CIO's issue advocacy campaign was designed to influence the 1996 general election and was accomplished through candidate- centered issue advocacy so as to avoid FECA's source limitations. Independent expert testimony, which has not be countered by the AFL-CIO with any contrary expert testimony, demonstrates that the AFL-CIO's 1996 issue advocacy campaign was designed to influence federal elections:

> The 1996 initiative by labor into unregulated and unlimited electioneering communications was substantial. The AFL-CIO spent a reported $35 million dollars (see Deborah Beck, Paul Taylor, Jeffrey Stanger, and Douglas Rivlin, 'Issue Advocacy Advertising During the 1996 Campaign: A Catalog,' report series by the Annenberg Public Policy Center, no. 16, 16 September 1997, 10), much of it on television, aimed at defeating 105 members of Congress, including 32 heavily targeted Republican freshmen. See Paul Herrnson, *Congressional Elections: Campaigning at Home and in Washington,* (Washington, D.C.: Congressional Quarterly, 1998), 123. Labor broadcast television commercials in forty districts, distributed over 11.5 million voter guides in twenty-four districts and ran radio ads in many others. See 'Labor Targets,' *Congressional Quarterly Weekly Report,* 26 October 1996, 3084; Jeanne I. Dugan, 'Washington Ain't Seen Nothin' Yet,' *Business Week Report,* 13 May 1996, 3.

Magleby Expert Report at 10 n.7 [DEV 4-Tab 8] (citation omitted); Mann Expert Report at 28 [DEV 1-Tab 1] ('The AFL-CIO was one of the first nonparty groups in 1996 to seize the opportunity to broadcast electioneering ads under the guise of issue advocacy (Dwyre 1999); they continue to avail themselves of that opportunity today (Magleby 2002).');

Krasno and Sorauf Expert Report at 52 [DEV 1-Tab 2] ('For example, the AFL-CIO in the first issue ad campaign in House elections in 1996 acknowledged its intent to help Democratic candidates, and its results were measured accordingly.') (footnote omitted); *see also* Mitchell Dep. at 96-97 [JDT Vol. 23] (stating that in 1996, in the 60 days before the election, in terms of dollars spent by the AFL-CIO on broadcast advertising, the substantial majority of that money was spent on advertisements that mentioned members of the House of Representatives).

2.6.1.3 In fact, Mitchell admits that some of the AFL-CIO's advertisements were intended to directly orindirectly influence the 1996 general election. Mitchell testifies that after Congress adjourned on October 3, 1996, the AFL- CIO discontinued its broadcast advertisements 'aimed at immediately pending legislative issues.' Mitchell Decl. ¶ 42 [6 PCS]. The AFL-CIO then began to run 'electronic voter guides' which compared the positions of congressional candidates on various issues. *Id.;* Mitchell Cross Exam. at 183-84 [JDT Vol. 23] ('Is there any ad which the AFL-CIO ran in the 60-day period prior to the federal elections of 2000, 1998 and 1996 where you concede that a purpose was to affect the vote in the forthcoming election? . . . A Well, would you include indirectly affect? Do you want to ask it that way? Q I will start with that way. A Okay. You know, certainly the voter guides in particular had that as a purpose.'); *see also id.* at 184 ('Q You do concede that the ads that you ran in the 60 days prior to 2000, 1998 and '96 might have had the effect of influencing votes in the forthcoming election, don't you? A I don't—right, I don't deny that among other things they might have had an effect on how citizens perceived office holders and had an effect on their vote.').

2.6.1.4 In an FEC investigation into organized labor's role in the 1996 election, the General Counsel found:

> In the nine flights broadcast between late June and mid-September, 1996, the advertisements would criticize the incumbent member of Congress named therein, frequently in harsh terms, about his or her record on the issue that was the subject of the advertisement. However, with the exception of a flight of advertisements on the topic of the minimum wage that aired in late June and early July, 1996, there was no clear connection between the content of the advertisements and any legislation that was then the subject of intensive legislative action at the time of the advertisements. The targets of these advertisements were uniformly both Republicans and incumbents. In the eight flights that began in late September and continued through election day, the advertisements took the form of so-called 'electronic voter guides,' comparing the Republican incumbent and the Democratic challenger (or the Republican and Democratic nominees, in the cases of open seats) on a particular issue; the Democratic candidate's record was uniformly presented more favorably than the Republican candidate's. The scripts of both kinds of advertisements appeared to have been carefully designed to avoid 'express advocacy' of the election or defeat of any candidate. . . .

FEC MUR 4291, General Counsel's Report, June 9, 2000, at 5-6, INT003837-38 (footnote omitted) [DEV 52-Tab 3]. The investigation into the AFL-CIO's tactics sought to ascertain whether AFL-CIO had coordinated election-related communications with candidates for Federal office, their campaigns, or with political parties. *Id.* at 1. The investigation 'developed no evidence of any instance in which the AFL-CIO made any communication to the general public after coordination with a recipient candidate or party committee that meets the standard for coordination set forth in *FEC v. The Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999).' *Id.* at 3. As a result of this conclusion, the General Counsel recommended to the Commission that the investigation into organized labor's role in the 1996 elections be closed. *Id.* at 1. Although the FEC concluded that there was no coordination under governing caselaw, the agency did find that with one exception the issue advertisements were directed at particular officeholders and candidates during the election cycle.

2.6.1.5 Other political organizations viewed the AFL-CIO's issue advertising campaign as designedto influence federal elections. One of the complaints filed with the FEC against the AFL-CIO was brought by the National Republican Congressional Committee ('NRCC'). McCain Decl., Attach. F [DEV 8-Tab 29] (Complaint in MUR 4307). The NRCC stated in their complaint:

> The [AFL-CIO] TV ads are careful not to specifically violate phrases contained in Sec. 100.22(a) such as 'vote against Old Hickory' or 'defeat accompanied by a picture of one or more candidate/s/' or 'reject the incumbent'. However there is clearly a violation of Sec. 100.22(b). *If one reads the language of that section and looks at the entire picture including external events it is obvious that any informed American clearly knows that the purpose of these ads is 'expressly advocating' defeat of the Republican who is the subject of the ad.*

Id. at 1 (emphasis added).

2.6.1.6 The AFL-CIO has presented no uncontroverted evidence to substantiate their claim that the intended purpose of their issue advocacy with regard to the 1996 general election was unrelated to electing or defeating candidates for federal office. The AFL-CIO does concede, in fact, that its issue advocacy does have an affect on voters during the election cycle. Moreover, there is no dispute that the AFL-CIO's advertising campaign did affect the 1996 general election. Of the 32 House Republican freshmen the AFL-CIO targeted in 1996, 12 were defeated. Annenberg Report 1997 at 13 [DEV 38-Tab 21].

2.6.2 *The Coalition-Americans Working for Real Change's Issue Advocacy Media Campaign Surrounding the 1996 Federal Election*

The evidence demonstrates that similar to the AFL-CIO's issue advertising campaign during the 1996 election cycle, business interests (known as The Coalition-Americans Working for Real Change) responded with their own issue advocacy campaign designed to influence the election and paid for with corporate general treasury funds thereby permitting these corporations to evade FECA's source limitations. The record also demonstrates that by running candidate-centered issue advertisements The Coalition was able to avoid FECA's disclosure requirements and hide its corporate sponsors behind an ambiguous and unobjectionable pseudonym.

2.6.2.1 In their proposed findings, the Chamber of Commerce, NAM, and the Associated Builders and Contractors claim that 'Defendants' assertion that The Coalition's 1996 activities show that preelection issue ads are merely candidate ads in disguise is mistaken. Participants in The Coalition were unanimous that its ads were intended to respond to issue ads being run by the AFL-CIO.' Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, *et. al.* ¶ 24. Bruce Josten, Executive Vice President for Government Affairs for the U.S. Chamber of Commerce, testifies that the purpose of the advertisements aired during the 1996 federal election was to respond to attack advertisements paid for by the AFL-CIO and organized by its president, Mr. John Sweeney, and not to influence the election of any federal candidate. Josten Dep. at 165 [JDT Vol. 12] ('The purpose of this coalition, specifically, only, uniquely was to respond to [John Sweeney's] ads and the false statements in them, in some cases, up to 75 Congressional districts. That was the mission of this coalition.'). Mr. Josten explained that there 'were TV markets where John Sweeney ran an ad accusing a member of Congress about their votes on the issues that I mentioned earlier, and in the spring he started running ads that were not true, and we would follow him' with television ads paid for by the Coalition. *Id.* at 44. According to Mr. Josten, the AFL-CIO commercials attacked Members of Congress who had supported pro-business initiatives and legislation favored by the Coalition. 'My objective was to knock down impressions that Mr. Sweeney and his advertisers and campaigns were trying to undertake and express our viewpoints exactly the opposite of that and let the viewers make their own decision about that dialogue that was being imposed on them.' *Id.* at 88.

2.6.2.2 Josten's testimony is controverted by specific evidence in the record that indicates that one purpose of the advertising campaign was to influence the 1996 general election:

- In 1996, the Coalition sought proposals from advertising firms for a 'campaign to re-elect a pro-business Congress.' TC00698 [DEV 121]. Media consultant Alex Castellanos of National Media, Inc. opened his proposal to the Coalition by stating: 'Thank you for the opportunity to present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress.' *Id.*

- The Coalition commissioned firms to conduct polls and focus groups to measure voter responses to their advertisements. AV0024-40, 0046-47, 0060-64, 0106-118, 0139-41 [DEV 121]. The Coalition retained two polling organizations in 1996, the Tarrance Group and American Viewpoint, to test whether specific Coalition and AFL-CIO advertisements would make participants more or less likely to vote for particular federal candidates. FEC MUR No. 4624, General Counsel's Report, April 20, 2001, at 22-23 [DEV 53-Tab 6]; Josten Dep. at 68- 114 [JDT Vol. 12]. One firm surveyed 'voter attitudes nationwide,' TC 00513-37 [DEV 121], and another survey tested possible Coalition ads on focus groups, including one of 'Swing Voters.' AV0139-41, AV0037-40 [DEV 121].

- A June 28, 1996, Tarrance Group memorandum to the Coalition stated: 'The net result among swing voters in Cleveland was that 25% of participants were moved closer to voting for a Republican candidate for Congress and about half of the participants were moved against national labor leaders. In other words, the response ads not only leveled the playing field, but put some points on the board for Republican candidates as well.' AV139 [DEV 121] (stating that Republican Members of Congress are 'currently under attack by AFL-CIO advertising' and are 'outgunned and outclassed' and if 'targeted Republicans ever hope to be operating on an even playing field during the 1996 election, it will require that an outside voice come to their defense.').

- A July 12, 1996, memorandum to the Coalition from American Viewpoint on 'Key Findings of the Pre-Test in Des Moines Media Market of Iowa 4' concludes that Congressman 'Greg Ganske is in deep trouble in the Des Moines Market,' and states that 'this is one of the most challenging districts that could have been chosen to assess the impact of your advertising. . . . If advertising can move numbers in this district, it should be effective in most other districts. Voters have not yet focused on the union's campaign as only 25% has seen the commercials. As a result, there is still time to reach them with a substantial buy.' Memorandum from Gary

Ferguson to the Coalition Steering Committee, 'Key Findings of the Pre-Test in the Des Moines Market of Iowa 4' (July 12, 1996), NAW0002, 05 [DEV 121].

- One Coalition document included five headings referring to 1996 Congressional races: 'Lean/Tilt DEM,' 'Toss-Up/Tilt GOP,' 'Lean GOP,' 'GOP Favored,' and 'Watch List.' TC-00662-63 [DEV 121]. Under each heading is a list of candidates, and next to the names an indication of whether there has been a single or double media buy, or whether the buy has been pulled. *Id.*
- In late 1996, the Coalition commissioned the Tarrance Group to conduct a detailed post-election analysis. The Tarrance Group, *Coalition Post-Election Survey Analysis,* NAM0206-27, at NAM0213 [DEV 121]. The Tarrance Group reported:

> The Coalition commissioned this research to assess the impact of their two-month advertising campaign and its relative effect on voters in the face of the very aggressive, year-long campaign sponsored by the AFL-CIO. Given that four of the six Republican candidates tested in this research won their respective races, one could conclude that the Coalition's efforts were a success-as they were in the vast majority of the targeted districts in which the Coalition was involved.
>
> To be sure, the most compelling empirical evidence that Coalition dollars were spent effectively is the fact that although the AFL-CIO outspent the Coalition by nearly 7 to 1 and began their onslaught almost a year earlier, voters in the tested districts were only twice as likely (36% average) to recall having seen, read, or heard the labor union's advertising as they were the business coalition's advertising (16% average).

Memorandum from Brian Tringali and Gary Ferguson of American Viewpoint and the Tarrance Group to Chuck

Greener of the Coalition, 'Key Findings from Post- Election Surveys in OH-6, IA-4, WA-1, WA-5, WA-9, and KY-1,' (November 22, 1996), NAM0208 [DEV 121]; *see also* 'Report on Accomplishments' TC00610-13 [DEV 121] (document Coalition sent to its members noting the successes of the Coalition's campaign among swing voters).

Accordingly, as to The Coalition's issue advertising campaign that aired before the 1996 general election, I find that Josten's statement that the purpose of the coalition was 'only' to respond to the advertising campaign of the AFL-CIO, Josten Dep. at 165 [JDT Vol. 12], carries no weight in light of these internal documents.

2.6.2.3 It is clear that The Coalition's issue advocacy campaign was designed to influence the 1996 general election and was accomplished through candidate- centered issue advocacy so as to avoid FECA's source and disclosure limitations. Independent evidence confirms that The Coalition's issue advertising campaign surrounding the 1996 general election was designed to influence the election. This expert testimony, which has not been controverted by any contrary expert testimony by Plaintiffs, concludes that:

> The business community responded to [the 1996 initiative by labor into unregulated and unlimited electioneering communications] with their own unlimited and undisclosed communications, again avoiding any of the magic words. Partners in the business response were the National Federation of Independent Business (NFIB), U.S. Chamber of Commerce, the National Association of Wholesaler-Distributors, the National Restaurant Association and the National Association of Manufacturers. Their group, called the 'Coalition-Americans Working for Real Change,' was active in thirty-seven House races, spent an estimated $5 million on over thirteen thousand television and radio commercials, and mailed over two

> million letters mainly in support of Republicans, to owners of small business. *See* Paul Herrnson, 'Parties and Interest Groups in Postreform Congressional Elections,' in *Interest Group Politics*, 5th ed., ed. Allan Cigler and Burdett A. Loomis (Washington, D.C.: Congressional Quarterly, 1998), 160-61.

Magleby Report at 10 n.7 [DEV 4-Tab 8]; *see also* Josten Dep. at 29 [JDT Vol. 12]; Huard Dep. at 58 [JDT Vol. 11] (both noting that Coalition spent roughly $5 million on the campaign).

2.6.2.4 The FEC likewise concluded that the purpose of the Coalition's 1996 issue advocacy campaign was to influence the federal election. FEC MUR No. 4624, General Counsel's Report, April 20, 2001, at FEC MUR 4624, General Counsel's Rep., April 20, 2001, at 35 [DEV 53-Tab 6] ('The factsset out above establish that the Coalition's communications were undertaken for the purpose of influencing federal elections . . . .'); *id.* at 44-45 (recommending that the case against the Coalition be closed). Like the AFL-CIO, although the FEC recommended that the case be closed, that decision does not change the fact that it found that the Coalition sought to influence the 1996 general election with its issue advertising campaign.

2.6.3 *Citizens for Better Medicare*

Citizens for Better Medicare ('CBM') is an organization funded by the pharmaceutical industry that spent heavily on candidate-centered issue advertisements designed to influence the 2000 general election and paid for with the general treasury funds of their corporate members, thereby avoiding the source limitations of FECA. Like The Coalition, CBM also used issue advocacy to avoid FECA's disclosure requirements.

2.6.3.1 Timothy Ryan, former executive director of CBM, testifies that CBM is an organization sponsored by PhRMA, an industry trade association, and its activities were primarily financed by major drug companies. Ryan Dep. at 13 [JDT Vol. 27] ('We solicited funding from the pharmaceutical companies to underwrite our efforts.'); *id.* at 10-11 ('PHRMA was really the leading organization to organize and fund CBM.'); PH 0379 [DEV 128-Tab 2] (Letter from PhRMA President and CEO to Amgen, 'enclosing a contribution form for the grassroots and local media activities of CBM . . . . All information in your reply will be kept in strict confidence except as required by law or a court of competent jurisdiction.'); CBM 0029 [DEV 128-Tab 1] (tally of donations from major drug companies to CBM in FY 2001, totaling $39,586,892.32). Despite the source of its funding, CBM describes itself as 'a grassroots organization representing the interests of patients, seniors, disabled Americans, small businesses, pharmaceutical research companies and many others concerned with Medicare reform.' *CBM: Who We Are* . . . [DEV 128-Tab 1]. Given that it is undisputed that the pharmaceutical industry financed CBM, CBM stands as an example of how FECA's disclosure requirements can be avoided by running candidate-centered issue advertisements behind a misleading name like 'Citizens for Better Medicare.'

2.6.3.2 At the point in time the House of Representatives was considering a prescription drug benefit bill, Ryan testifies that CBM ran a series of advertisements that did not refer specifically to individual Members of Congress. Ryan Dep. at 42 [JDT Vol. 27]; *see also* Castellanos Dep. at 103-04 [JDT Vol. 4]. This practice changed during the 60 days before the election where CBM's advertising focused on specific federal candidates. *See supra* Findings ¶ 2.6.3.3.

2.6.3.3 Judith Bello, senior adviser to PhRMA, states that PhRMA supported a market-oriented approach to prescription drug coverage, and Republicans typically endorsed that type of plan. Bello Dep. at 149-50 [JDT Vol. 1]. Alex Castellanos, a political consultant with National Media, testifies that CBM understood that the Democrats planned to use the prescription drug issue as a major theme in the 2000 election. Castellanos Dep. at 94-95. In response, in the *60 days* prior to the 2000 general election, CBM and the U.S. Chamber of Commerce spent heavily on 'issue ads' supporting those Members and attacking Democratic candidates. Annenberg Report 2001 at 4, 20-22 [DEV 38-Tab 22]. Castellanos states that these advertisements mentioned Members' names. Castellanos Dep. at 63-66 [JDT Vol. 4]; *see also* Ryan Dep. at 68-72, 79-85 [JDT Vol. 27]; Josten Dep. at 191-97 [JDT Vol. 12]; Bloom Decl. ¶¶ 6, 14, 16 [DEV 6- Tab 7]; Mitchell Dep. at 198-204 [JDT Vol. 23]; USA-CBM 00004 [DEV 128-Tab 1] (October 20, 2000, Memorandum to CBM file outlining 'CBM Campaign Summary') (noting that for Fall2000 the advertising theme was 'Keep it Local' and discussing advertising strategy '[a]s the November 2000 elections grew closer').

2.6.3.4 According to Timothy Ryan, much of CBM's advertising strategy leading up to the 2000 election was aimed at supporting candidates attacked in AFL-CIO advertising. Ryan Dep. at 68-72 [JDT Vol. 27]; Castellanos Dep. at 63-66 [JDT Vol. 4]. CBM spent about $65 million on television advertising in the 2000 election cycle. Ryan Dep at 15 [JDT Vol. 27]. 'Citizens for Better Medicare . . . spent almost as much money on issue ads as either political party,' accounting for 13 percent of issue ad spending for the 1999-2000 cycle. La Raja Decl. ¶ 20(b) & Tbl. 10 [RNC Vol. VII] (reproduced from the Annenberg Public Policy Center).

2.6.3.5 The issue advocacy campaign of CBM run in the 60 days prior to the 2000 federal election demonstrates that these advertisements were designed to influence the federal election and evade FECA's source restrictions. This example also illustrates how organizations are able to use campaign-centered issue advocacy to avoid FECA's disclosure limitations and hide their identities behind euphemistic organizational names.

2.6.4 *The National Rifle Association*

In addition to the AFL-CIO, The Coalition, and CBM, the National Rifle Association's ('NRA') use of issue advocacy around the 2000 federal election also clearly establishes that corporations use issue advocacy to directly influence federal elections and evade FECA's source limitations.

2.6.4.1 The NRA used issue advocacy to influence the 2000 federal election. Documentary evidence demonstrates this point:

- The NRA's media consultant, Angus McQueen, wrote an August 2000 memo entitled 'NRA National Election Media Recommendations.' The memo notes that the NRA's first objective is to 'influence [the] outcome of [the] presidential election and other key congressional seats in 10 'battle ground' states.' McQueen Cross Exam., Ex. 2, NRA-ACK 17913-15 [JDT Vol. 22]. McQueen is an advertising professional whom the NRA produced to testify specifically about the NRA's paid media program. *See generally* McQueen Decl. [11 PCS].
- Executive Vice President of the NRA, Wayne LaPierre, sent out a fundraising letter from the NRA to its members that stated that he 'spent what it took [in 2000] to defeat Al Gore, which amounted to millions more than we had on hand.' LaPierre Dep. Ex. 3 at 3 (NRA02575 [DEV 120]) [JDT Vol. 14]. LaPierre testified: 'We took some money out of the reserves to cover the deficit that NRA had at the end of the 2000 year. . . . [The Gore advertising] was probably . . . the main contributing factor.' LaPierre Dep. at 105 [JDT Vol. 14].
- The fundraising letter from LaPierre also stated that 'I could choose to spend as much as the NRA possibly could, to get our message to gun-owning voters in critical swing states—or I could hold funds in reserve for battles during 2001 and beyond.' LaPierre Dep. Ex. 3

at 3 (NRA02575 [DEV 120]) [JDT Vol. 14]; *see also* LaPierre Dep. at 95-106 [JDT Vol. 14] (observing that the NRA spent $5 million to defeat Al Gore). During his deposition, Mr. LaPierre was asked repeatedly if he had 'spent what it took to defeat Al Gore.' *Id.* at 95-102. Mr. LaPierre admitted that the statement was truthful, *id.* at 102, but sought to characterize it as about more than the Presidential election, *id.* at 101-02 ('Q. Is it true that regular NRA 'spent what it took to defeat Al Gore'? A. If you include the culture of the country, yes. Al Gore was trying to change the culture of the country. We prevented him from doing it. That was the battle. It wasn't only an election battle. All these politicians think of this stuff only in election terms. And it's like-it's like they're 30 years out of date. The fact is this is about the air. It's about the airwaves. It's about the hearts and minds of America. And that's where the battle is being fought. And they're not willing to concede that. Yet we live it every day. So I'm not willing to concede the point that this was only about the elections, because the elections were about the air. And the air is what we were fighting for, that people breathe. We didn't want it to be only anti-firearm second amendment air, which is what they were trying to put out there.').

- LaPierre also testifies that he chose to do as much as he could for critical swing voters in swing states, meaning battleground states with respect to the Presidency, and in what were perceived to be close Congressional races. LaPierre Dep. at 157-58 [JDT Vol. 14]; *see also id.* at 159-165, 220-21.

2.6.4.2 The NRA created an advertising campaign in which 'infomercials' would be run from September 1, 2000 to November 6, 2000. Two of the NRA's objectives were to 'influence political elections where Republican seats are jeopardized' and 'increase awareness of key gun issues as the Presidential election approaches.' Memorandum from Jay Finks of the NRA's media firm Ackerman-McQueen to Melanie Hill of the NRA, 'NRA Infomercial Fall Focus Campaign,' June 5,2000, NRA-PVF 00429-00432, at NRA-PVF 00429 [DEV 120].

2.6.4.3 Wayne LaPierre also testifies that the NRA 'hoped [an NRA infomercial critical of Presidential candidate Al Gore] would impact the election.' LaPierre Dep. at 177 [JDT Vol. 14]. When asked if the advertisement was designed in part to persuade viewers that they ought to vote against Gore, LaPierre testified: 'We're happy if it did that. And, yeah, we're thrilled if it did that.' *Id.* at 174-75. LaPierre thought that the Gore infomercials would have a 'positive' political impact on the election: 'Positive impact would mean a vote . . . against Al Gore.' *Id.* at 277.

2.6.4.4 Not only does internal documentation and testimony from NRA officials demonstrate that the purpose of the group's 2000 issue advocacy campaign was to influence the federal election, the text of two radio advertisements illustrates the point as well. Moreover, these radio advertisements demonstrate that there is no meaningful difference between candidate-centered issue advertisements and campaign advertisements that use *Buckley*'s magic words. As the following demonstrates, at least one of the 'issue ads' paid for with funds from the NRA's general treasury was virtually identical to express advocacy paid for by the NRA's PAC, with the terms of express advocacy in the PAC advertisement simply being omitted:

PAC Advertisement	Non-PAC Advertisement
MR. HESTON:	HESTON: Other issues may come and go, but no issue is as important as our freedom. And the day of reconing is at hand.

Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to any firearm? No handgun, no rifle, no shotgun.	Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to any firearm? No handgun, no rifle, no shotgun.
And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges handpicked by Al Gore if he wins this election.	And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges hand-picked by Al Gore if he wins this election.
Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Dianne Feinstein do to your gun rights?	Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Dianne Feinstein do to your gun rights?
And what you think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.	And what you think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.
When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of fire-arms, that's the end of your Second Amendment rights.	When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of fire-arms, that's the end of your Second Amendment rights.
Please, vote freedom first. Vote George W. Bush for President.	
ANNCR: Paid for by the NRA Political Victory Fund and not authorized by any candidate or candidate's committee.	ANNCR: Paid for by the National Rifle Association.
NRA-ACK 14190 [DEV 120] (emphasis in original).	NRA-ACK 14192 [DEV 120] (emphasis in original).

NRA-ACK 14190, 14192 [DEV 120]. When confronted with these two scripts during his cross-examination, Angus McQueen, who created these two advertisements, admitted that one of his purposes in designing the commercials was to influence the results of the federal election. McQueen Cross Exam. at 41 [JDT Vol. 22] ('Insofar as providing information to an informed citizenry, the answer is a qualified yes.'). Indeed, Mr. Wayne LaPierre testifies that these two scripts were 'exactly the same.' LaPierre Dep. at 269 [JDT Vol. 14]; *id.* at 270-71 (observing that in the Non-PAC advertisement, Mr. Heston's reference to the 'day of reckoning' is a reference to the 2000 federal election). These two advertisements are emblematic of the meaningless distinction between candidate- centered issue advocacy run in close proximity to a federal election and advertisements that use express words of advocacy and are paid for with federal funds from a corporate or union PAC. Accordingly, I find that the NRA's issue advocacy campaign paid for with general treasury funds and run during the 2000 election was designed to influence that election and evade FECA's restrictions.

2.6.5 *The Club for Growth*

2.6.5.1 The Club for Growth provides another example of a corporation using general treasury funds on issue advocacy designed to influence a federal election. *See* CFG 000421 [DEV 130-Tab 5] (Board of Directors' minutes) [document sealed].

2.6.5.2 David Keating, The Club for Growth's Executive Director admits that CFG's issue advocacy, 'although educational, may also affect elections.' Keating Decl. ¶ 8 [8 PCS]. Keating comments that 'CFG has an overarching desire to change public policy which far exceeds any desire to affect elections.' *Id.* It is clear from documentary evidence and independent evidence that The Club for Growth aims to change public policy by influencing federal elections.

2.6.5.3 The Club for Growth's mission statement states that the Club 'is primarily dedicated to promoting the election of pro-growth, pro-freedom candidates through political contributions and issue advocacy campaigns.' CFG 000217 [DEV 130-Tab 5].

2.6.5.4 In a brochure soliciting donations, The Club for Growth noted: 'Before the elections, the Club plans to invest $1 million in television advertising in key congressional districts to advance our pro-growth issues. This is a tactic the unions have used so effectively against pro-growth candidates. These issue advocacy campaigns can make all the difference in tight races.' CFG 000223 [DEV 130-Tab 5]; *cf.* NRW-02814 [DEV 129-Tab 2] (January 2, 2001, fundraising letter from the National Right to Work Committee noting that it had run 'more than 1,000 television ads in Virginia, Nevada, Florida and Nebraska shining a spotlight on the differences between the candidates in those states on Right to Work').

2.6.5.5 The testimony of political consultant Rocky Pennington, who worked for Republican candidate Bill Sublette is that:

> [i]nterest group broadcast ads had a very significant effect on the outcome of the 2000 Congressional race [in Florida's Eighth district], especially the ads run by the Club for Growth. . . . [T]he Club for Growth and [competing Republican candidate Ric] Keller had made their relationship well known, and the Club for Growth ads clearly reflect an intent to help elect Mr. Keller. . . . In my view, the ad entitled 'Keller Sublette Higher Taxes' . . . was a very, very effective one, and had it not run just before the primary, I believe Mr. Sublette would have reached 50% and there would have been no run-off. Our polling at that time indicated that we were in good shape, until the Club for Growth ads began.

Pennington Decl. ¶ 15 and Ex. 3-1 [DEV 8-Tab 31]; *see also* Keating Decl. ¶ 17 ('Within thirty days of the 2000 primary election in Florida, [The Club for Growth] ran approximately $90,000 in television and radio voter education advertising discussing the tax voting record of Bill Sublette.').

2.6.5.6 Independent expert testimony confirms that The Club for Growth uses issue advocacy to influence federal elections. Krasno and Sorauf Report at 52 [DEV 1-Tab 2] ('The Club for Growth, a conservative Republican group, bluntly discusses its electioneering activities on its website; they include direct contributions, bundled contributions, and issue ads.').

2.6.5.7 Without question, The Club for Growth aggressively used issue advocacy to influence the 2000 federal elections. The Club for Growth paid for these advertisements with corporate general treasury funds and thereby evaded FECA's restrictions.

2.6.6 *Candidate-Centered Issue Advertisements May Be Run About Issues In Which the Group Running Them Has No Particular Interest*

Aside from the foregoing examples, another indicia that an issue advertisement has an electioneering purpose is that, in certain instances, candidate-centered issue advertisements are run by organizations who have no organizational interest in the advertisement's 'issue.'

2.6.6.1 Federal candidate Linda Chapin testifies that

> [t]he Florida Women's Vote project of EMILY's List also ran a television ad in the [2000 Florida Eighth District Congressional] campaign[,] . . . which as I recall was run in the two months prior to the general election[.] The ad praises my record on gun safety and ends with

> the line: 'Tell Linda Chapin to continue fighting.' This ad is clearly intended to influence the election result. Based on my observations, EMILY's List is not particularly interested in gun control issues. However, they are interested in supporting pro-choice female candidates like me, and this ad serves that purpose.

Chapin Decl. ¶ 13 [DEV 6-Tab 12]; *id.*, Ex. 4 (advertisement storyboard); *see also* Chapin Dep. at 35-36 [JDT Vol. 5] ('Q. Did the ads [run by EMILY's List] mention your commitment to being pro-choice? A. No, and I think that's one thing that was interesting about these ads was that they were not about choice; they were about other subjects.'); Beckett Decl. ¶ 13 [DEV 6-Tab 3] (The advertisement run by EMILY's List 'praises Ms. Chapin's record on gun safety . . . . EMILY's List is all about being pro-choice; gun safety is not their issue. Clearly, this ad is trying to elect Ms. Chapin. And I was not the only one who thought so. This ad was up during a period in the first half of October 2000 when the Chapin campaign was not on the air, in order to save resources. The [Republican candidate Ric] Keller['s] campaign noticed this and complained to a reporter, saying that this was a clear sign of coordination. I explained . . . that I had been advised by our consultants in Washington that under the current rules I was allowed to tell anyone what my plans were, as long as no one told me what their plans were. EMILY's List clearly knew what my plans were, they knew I was going dark at that time. I can only surmise that they decided to run this ad at that time based on that information. Obviously, the Keller campaign viewed this ad as one designed to assist Ms. Chapin's candidacy.'); *id.* Ex. 4 (advertisement storyboard).

2.6.6.2 The Associated Builders and Contractors' Edward Monroe, in testifying about an ABC issue advertisement that discussed federal candidate Melissa Hart's past actions of pushing for the 'strongest possible penalties for child molesters who attempt to lure children over the internet,' admitted that pushing for such penalties was not a particular concern of ABC members as compared to the general public. Monroe Dep. at 65-67, 90-91 [JDT Vol. 23]. Indeed, Monroe testifies, '[a]s previously answered, no, [the pushing for strongest possible penalties for child molesters who attempt to lure children over the Internet] is not a particular concern to the general public of contractors or general group of contractors.' *Id.* at 91. ABC attempts to explain this away in their proposed findings of fact by citing Monroe's redirect examination where Plaintiffs attempted to rehabilitate his testimony. Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, *et. al.* ¶ 26 ('ABC's membership has a distinctive ethos: 'very strong patriotic red, white and blue God and country association,' so that issues like children and pornography are important and pushed by state affiliates.') (citing Monroe Cross at 100-01). On re-cross examination, Defense counsel confirmed the following:

> Q Would you turn to page 66 of your deposition. I will read to you starting with line 20. Do you see that? A Yes. Q Question, 'Do your contractor and builders members have any different or special interest in child molestation as compared to the general public?' Answer, 'No.' Did you give that testimony and was it truthful? A Yes.

Monroe Cross Exam. at 102 [JDT Vol. 23]. Accordingly, I find that Plaintiff ABC has not cast any doubt on the conclusion that ABC ran candidate-centered issue advertisements about issues that were not of greater concern to its membership than to the general public. This conclusion leads me to find that the ABC advertisements relating to Melissa Hart's views on punishment for child molesters were designed to influence the election.

2.6.6.3 David Keating, executive director of The Club for Growth, testifies that during the 2000 election cycle, The

Club for Growth gave $20,000 to the American Conservative Union to support an issue advertisement which discussed Senate candidate Hillary Clinton's residency in New York. Keating Dep. at 58- 59 [JDT Vol. 12] ('Q. Whether or not Hillary Clinton is a resident of New York State really doesn't have anything to do with the Club for Growth's interest in pro-growth conservative Republican elected officials, does it? A. It doesn't seem to directly, no.').

2.6.6.4 The testimony of Defense expert Magleby notes the following example of an advocacy organization running an issue advertisement not connected to its mission:

> An example of an interest group which not only masked its identity through an innocuous name, but ran ads on a topic unrelated to the function or purpose of the group was The Foundation for Responsible Government (FRG). In 1998 FRG spent nearly $300,000. Who was 'The Foundation for Responsible Government?' The trucking industry. Upon investigation, Professor Eric Hrzik of the University of Nevada-Reno found that the trucking industry was upset with Senator Reid for supporting legislation that would have banned triple trailer trucks. Rather than discuss their policy difference with Reid on triple-trailer trucks, FRG ran mostly positive ads late in the campaign, discussing Reid's opponent, John Ensign's positions on health care and taxes.

Magleby Report at 28-29 [DEV 4-Tab 8] (footnotes omitted).

2.6.6.5 A Citizens for Life press release, issued on January 9, 2000, about three weeks before the New Hampshire Republican Presidential primary, announced that the organization had begun airing an advertisement entitled 'Funny Diseases' on several New Hampshire radio stations with the following script:

> Four million Americans suffer from Alzheimer's disease—a brain disorder that causes progressive mental impairment. According to a September 1, 1999 Associated Press report, here is what Senator John McCain once had to say about the devastating memory loss produced by this disease: 'The nice thing about Alzheimer's is you get to hide your own Easter eggs.' . . . McCain also once jokingly referred to the Leisure World home for senior citizens as 'Seizure World.' This information is brought to you by Citizens For Life, a New Hampshire pro-life organization.

NRLC-00017 [DEV 130-Tab 1]; *see also* NRLC-00016 (Press Release) (claiming that the advertisement is timely because the New Hampshire State Senate will be voting in January on a bill to legalize assisted suicide). I find that this advertisement was designed to influence the primary election.

2.6.6.6 These examples indicate that corporations spend general treasury funds on candidate-centered issue advertisements to influence federal elections and thereby avoid FECA's requirements.

2.6.7 *Candidate-Centered Issue Advertisements May Be Run About Past Votes Without Discussing Upcoming Legislation or May Be Run About Issues Not Pending Before the Legislature*

The record indicates that organizations often run candidate-centered issue advertisements about Members' past votes on bills without discussing any future legislation or run advertisements about a Member's position on an issue that is not pending before Congress at the time the advertisement is aired. These kinds of advertisements are another indication of organizations running candidate-centered issue advertisements, paid for with general treasury funds, that are designed to influence a federal election.

2.6.7.1 A series of advertisements run by the AFL-CIO illustrates the point that issue advertisements designed to influence federal elections can focus on a past vote of a particular member and not on encouraging a Member to vote in a particular way on pending or future issues or legislation. Issue advertisements that fall into this category provide strong indicia that these purpose of these commercials is to influence the outcome of a federal election because they only provide analysis of the Member's past vote. *See, e.g.*, Mitchell Decl. ¶ 61 [6 PCS] (AFL-CIO advertisement 'Job,' which ran between September 13 and 25, 2000, criticized candidates for already having voted 'to prevent an importantOSHA regulation intended to prevent repetitive motion injuries from being implemented') Ex. 1 at 101-02, 141-42 ('Yet Congressman_____________ voted to block federal safety standards that would help protect workers from this risk.') [6 PCS]; *id.* ¶ 58 (AFL-CIO advertisement 'Help' targeted 'Republican Representatives who had voted against the Patient's Bill of Rights when it passed the House in October, 1999'), Ex. 138 ('Yet Melissa Hart has sided with the insurance companies, opposing the real Patients' Bill of Rights.'); *id.* ¶ 59 (AFL-CIO advertisements 'Sky' and 'Protect,' run in July and August of 2000, criticized 'twelve different Representatives who had voted at the end of June to pass prescription drug legislation that failed to guarantee drug benefits under Medicare'), Ex. 139 ('Sky') ('Yet Congressman Kuykendall voted *against* guaranteeing seniors prescription benefits under Medicare. . . .) (emphasis in original), Ex. 140 ('Protect')[85] ('Yet Congressman Jay

Dickey sided with the drug industry. He voted no to guaranteed Medicare prescription benefits that would protect seniors from runway [sic] prices.').

2.6.7.2 Another example of candidate-centered issue advertisements designed to influence federal elections is Plaintiff U.S. Chamber of Commerce's advertisements run during the 2000 federal election attacking various Members on the prescription drug issue that was not pending before Congress at the time the advertisement was aired. *See* Josten Dep. 191-230 & Exs. 23-23I [JDT Vol. 12]. Most of these advertisements concluded by instructing viewers to tell the targeted Members to 'stop supporting a big government prescription drug plan.' *Id.* Exs. 23-23I. However, these same advertisements included no telephone number to call, *see id.* at 194, and by the time the advertisements aired, there was no prescription drug issue then pending before Congress, *id.* at 208-11. Indeed, a few of these advertisements were run against candidates who were not even incumbents. Josten Dep. at 197, 212, 227 & Exs. 23A, 23D, 23E, 23I [JDT Vol. 12]. Hence, the point of these advertisements was likely *not* to influence any pending issue before the Congress, because the candidate mentioned was not even a Member of Congress.

2.6.7.3 These examples demonstrate that organizations run advertisements about past votes or about issues no longer before Congress. The purpose of these types of candidate-centered issue advertisements is to influence a federal election with general treasury funds and to avoid FECA's restrictions.

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[85] The full text of 'Protect' is: PHARMACIST: The Senior Citizens today can't afford their medication. They come in and I know they're skipping medication so they can pay for their food. With the rising cost of medication today, it could wipe out anybody at any time.

> VOICE: Yet Gongressman Jay Dickey sided with the drug industry. He voted no to guaranteed Medicare prescription benefits that would protect seniors from runway [sic] prices. Tell Dickey quit putting special interests ahead of working families.
>
> PHARMACIST: Watching people walk away without the medication takes a little bit out of me every day.

Mitchell Decl. Ex. 140 [6 PCS].

2.6.8 *Candidate-Centered Issue Advertisements Often Permit the Candidate to Avoid Running 'Negative' Advertising or Otherwise Assist the Candidate by Running Advertising While the Candidate is Low on Funds*

Two other indicia that candidate-centered issue advocacy is designed to influence a federal election and thereby avoid FECA's restrictions over organizations (a) helping a candidate by running negative advertisements[86] so as to permit the candidate to run positive advertisements and (b) helping a candidate by running advertisements where and when the candidate cannot due to budget constraints.

2.6.8.1 Political consultants testify that electioneering issue advertisements often focus on candidates as opposed to issues. Raymond Strother testifies:

> Character ads were once the province of the candidate committees. Now, however, candidates often avoid 'going negative' themselves, and rely on third parties to do this dirty work for them. If a trade association or a labor union runs an ad about the honesty and integrity-or lack thereof-of a candidate for federal office, their intent to influence the election is obvious and unmistakable.

Strother Decl. ¶ 9 [DEV 9-Tab 40]; *see also* Beckett Decl. ¶ 8 [DEV 6 -Tab 3] ('[I]n my experience, candidates tend to shy away from . . . negative attack ads because there would be political repercussions for them. But entities like the DCCC [Democratic Congressional Campaign Committee] and the Club for Growth do not have such constraints. Based on my observations, the candidate ads in [one] 2000 Congressional race, which were financed with federal funds ('hard money'), were actually more about 'issues' than the supposed 'issue ads' run by political parties and interest groups, which I understand were financed at least in part with non-federal funds ('soft money').').

2.6.8.2 Former Representative Larry LaRocco[87] testifies:

> In my 1994 Congressional reelection campaign, many outside interest groups targeted me for defeat, and they used soft money to advance their goal. These organizations ran television advertisements in markets my opponent did not. For example, to my knowledge, my opponent did not buy any media in the Spokane market-which covered 40% of my district-but other groups, such as pro-term limit organizations, ran ads in that market which criticized my policies. Unlike my opponent, these outside organizations were not required to disclose the sources of their funding. This tactic suggested there may have been some communication between the advertisers and my opponent's campaign.

LaRocco Decl. ¶ 5 [DEV 7-Tab 27].

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[86] Two examples of 'negative' candidate-centered issue advertisements are:

> *Americans For Job Security Advertisement 'Are you Taxed Enough Already?'*

In this advertisement, an announcer states that 'Gore plans to squeeze more money out of middle class families at the gas pump. . . . Gore's ideas are so extreme. If they ever came to pass, Americans would truly be Gored at the pump.' CMAG Storyboards [DEV 48-Tab 3].

Cheney Myanmar

This advertisement, run by an unknown group, stated that a 'brutal military regime in Myanmar . . . forced men, women and children into slave labor to assist the building of an oil pipeline by . . . Haliburton . . . we just can't trust Dick Cheney a heartbeat away from the presidency.' CMAG Storyboards [DEV 48, Tab 3; IER Tab 15.].

[87] LaRocco served as a Member of Congress from 1990 to 1995, representing the First Congressional District of Idaho. LaRocco Decl. ¶ 2 [DEV 7-Tab 27]. He served two terms and lost his 1994 reelection campaign. *Id.*

2.6.8.3 Evidence in the record also demonstrates that organizations run issue advertisements to assist candidates when their campaigns are low on funds, which is an indication that these advertisements serve an electioneering purpose. For example, an advertisement run during Linda Chapin's campaign for the House of Representatives by EMILY's List, praising Chapin's record on gun safety, was aired 'during a period in the first half of October 2000 when the Chapin campaign was not on the air, in order to save resources. . . . EMILY's List . . . knew I was going dark at that time. I can only surmise that they decided to run this ad at that time based on that information.' Beckett Decl. ¶ 13 [DEV 6-Tab 3]; *see also supra* Findings ¶ 2.6.1.1 (AFL-CIO memorandum discussing where media buys could be placed to help the Durbin Senate campaign which could not air advertisements due to a lack of resources).

2.6.8.4 Both negative candidate-centered issue advertisements aired to enable federal candidates to run positive advertisements and candidate-centered issue advertisements run in areas where candidates lack funding to purchase air time, provide additional indicia that corporate and labor union issue advertising is focused on influencing federal elections while avoiding FECA's restrictions.

2.6.9 In sum, I find that these examples and characteristics of electioneering issue advertisements illustrate that corporations and labor unions routinely use candidate-centered issue advocacy as a means of influencing federal elections.

2.7 *Federal Candidates and Political Parties Know and Appreciate Who Runs Candidate-Centered Issue Advertisements in Their Races*

Candidate-centered issue advertisements paid for with corporate and labor union general treasury funds and designed to influence the federal election permit corporations and labor unions to inject immense aggregations of wealth into the process. Candidate-centered issue advertisements paid for from the general treasuries of these organizations radically distorts the electoral landscape.

2.7.1 Campaign consultants and a lobbyist testify that candidates are acutely aware of third-party interest groups who run candidate-centered issue advertisements on behalf of their candidates and that candidates appreciate the support of those organizations. Political consultant Strother testifies:

> Campaign consultants, and candidates themselves, pay very close attention to the political advertisements broadcast in their districts. Every campaign that I have been associated with in the past several years has kept very close watch on who is advertising, and when and where. Candidates, who are often already elected officials, all keep track of who is helping them, who is sitting on the sidelines, and who is attacking them. Candidates in tight races are especially grateful to the issue groups who run ads on the candidate's behalf.

Strother Decl. ¶ 13 [DEV 9-Tab 40]; *see also* Lamson Decl. ¶ 19 [DEV 7-Tab 26]; Beckett Decl. ¶ 16. The uncontroverted testimony of lobbyist Wright Andrews provides:

> Sophisticated political donors-particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups-are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. Sophisticated donors do not show up one day with a contribution, hoping for a favorable vote the next day. Instead, they build longer term relationships. The donor seeks to convey to the member that he or she is a friend and a supporter who can be trusted to help the federal elected official when he or she is needed. Presumably, most federal elected

officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.

Often, corporate clients seek their lobbyists' advice concerning how their money is best spent, whether it be by contributing their PAC's hard money directly to candidates, donating soft money to the political parties, or funding independent expenditures such as broadcast 'issue ads.' Although the answer for each client will depend upon various circumstances, including the goals that client is working to achieve, unregulated expenditures-whether soft money donations to the parties or issue ad campaigns-can sometimes generate far more influence than direct campaign contributions.

Another practice used to secure influence in Washington is for an interest group to run so called 'issue ads.' 'Issue ads' run in close proximity to elections may influence the outcome of the election. Moreover, such ads may influence the elected official who is seeking reelection to come out in support of or opposition to particular legislation due to the response local voters have to the ads. These ads are noticed by the elected officials on whose behalf, or against whom, these ads are run. An effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party that is used for political purposes in his or her district or state. These ads often have the effect of showing an elected official that a lobbyist's particular issue can have consequences at the ballot box. Given how useful 'issue ads' can be in creating political clout with candidates, it is laughable to have a system that prohibits corporations and labor unions from giving even a penny to a candidate, but allows them to funnel

> millions into positive or negative advertising campaigns that may influence election outcomes and that many candidates are likely to be influenced by.

Andrews Decl. ¶ 8, 13, 17 [DEV 6-Tab 1]. Plaintiffs have put forth no contrary evidence to rebut the testimony of these consultants and lobbyist.

2.7.2 Former officeholders and candidates confirm the view of the consultants that Members of Congress and federal candidates are very aware of who ran advertisements on their behalf and feel indebted to those who spend money to help get them elected. Former Senator Bumpers testifies:

> Members or parties sometimes suggest that corporations or individuals make donations to interest groups that run 'issue ads.' Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups. In fact, Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.
>
> Politicians especially love when a negative 'issue ad' airs against their opponents. If these politicians did not feel that the issue ads were helping them, they would call the people sponsoring them and tell them to stop, or they would hold a press conference and angrily denounce the ads. But that rarely, if ever, happens.

Bumpers Decl. ¶¶ 27-28 [DEV 6-Tab10]; *see also* Chapin Decl. ¶ 16 [DEV 6-Tab 12] ('Federal candidates appreciate interest group electioneering ads like those described above that benefit their campaigns, just as they appreciate large donations that help their campaigns. I appreciated the ads run by EMILY's List on my behalf. In general, candidates in the midst of a hard-fought election like mine appreciate any help that comes their way.').

2.7.3 Indeed, interest groups can be the ones who apprise politicians of the advertisements that they run on their behalf.

For example, The Coalition sent tapes of the advertisements it aired in 1996 to Joyce Gates, assistant to House Republican Conference Chairman John Boehner. FEC MUR No. 4624, General Counsel's Rep., April 20, 2001, at 30 [DEV 53-Tab 6]. As the General Counsel's Report publicly indicates, the Coalition's Alan Kranowitz testified in an FEC investigation that the Coalition sent the tapes to 'show the Republican Members of the House that we were, indeed, doing something, after the fact.' *Id.* The Coalition also provided tapes of the ads to RNC Political Director Curt Anderson. *Id.* at 32; *see also* Josten Dep. at 266-67 [JDT Vol. 12] ('Those ads after they were aired were shown to Congressman Bayner [sic].'). 2.7.4 Politicians who benefit from the help provided by corporate and labor union general treasury fund spending on their races raise money for these organizations to demonstrate their appreciation. Congressman Ric Keller, for whose 2000 open-seat campaign the Club for Growth had run issue advertising, signed a Club for Growth fundraising letter dated July 20, 2001. The letter stated:

> The Club for Growth selected my race as one of its top priorities. . . .
>
> *Since the Club targets the most competitive races in the country, your membership in the Club will help Republicans keep control of Congress.*

CFG000208-210, at CFG000208, 09 (emphasis in original) [DEV 130-Tab 5]; *see supra* Findings ¶ 2.6.5.5 (Pennington) (describing how The Club for Growth's candidate-centered issue advertisements helped Keller win the primary election).

2.7.5 Groups aggressively push to be recognized for the role they played in helping a candidate get elected to office. After Election Day, the Coalition listed ideas 'on maximizing the credit the Coalition should get for its 1996 activities,' including whether to '[m]ake a report to each Member that [it] helped and actively solicit formal thanks.' Memorandum to Alan Kranowitz, Bruce Josten and Elaine Graham from

Larry McCarthy of Cannon McCarthy Mason Limited, Next Steps for the Coalition, dated Nov. 17, 1996, TC00802-04, at TC00803 [DEV 121].

2.7.6 The AFL-CIO admits that it made the financing of at least one political advertisement that identified a Candidate and was broadcast on television or radio within the 60 days preceding a general election in a state or congressional district in which that Candidate was running for federal office known to a Member or Candidate, and known to a Political Party. Resps. AFL-CIO and COPE to FEC's First RFA's, Nos. 20-21 [DEV 12-Tab 5].

2.7.7 The AFL-CIO admits that at least one candidate or Member of Congress has expressed appreciation or gratitude for its financing of at least one political advertisement that identified a Candidate and was broadcast on television or radio within the 60 days preceding a general election in a state or congressional district in which that Candidate was running for federal office. Resps. AFL-CIO and COPE to FEC's First RFA's No. 22 [DEV 12-Tab 5].

2.7.8 Some candidates or their political committees requested or suggested that the AFL-CIO broadcast advertisements in their districts in 1996. FEC MUR 4291, General Counsel's Rep., June 9, 2000, at 21 [DEV 52-Tab 3].

2.7.9 Mellman and Wirthlin, based on their August-September 2002 poll, state:

> Americans see very little difference between the influence of a soft money donation to a political party and the funding of political ads on television and radio.... *If an individual, issue group, corporation, or labor union paid for 50,000 dollars or more worth of political ads on the radio or TV that benefitted a Member of Congress, how likely would the Member of Congress be to give their opinion special consideration because of the ads-would they be very likely, somewhat likely,*

> *somewhat unlikely, or very unlikely to give them special consideration because of the ads, or don't you have an opinion on this?*
>
> *80% TOTAL LIKELY*
>
> *37% Very likely*
>
> *43% Somewhat likely*
>
> *10% TOTAL UNLIKELY*
>
> *5% Somewhat unlikely*
>
> *5% Very unlikely*
>
> *9% Don't have opinion*
>
> *0% Don't know Refused*

Mellman and Wirthlin Report at 9-10 [DEV 2-Tab 5]; *see also* Resp. NAB to FEC's First RFA's, No. 3. [DEV 12-Tab 7] (admitting 'that access to members of Congress and Executive branch officials is one factor out of many that might conceivably affect federal legislation and executive decisions and policies assuming all other circumstances are equal').

2.7.10 Political parties are equally grateful for the support that issue advocacy organizations perform for their candidates.

2.7.10.1 An internal RNC document entitled 'Coalitions Plan' states:

> The RNC Coalitions effort should be judged by the simple question-will it get us more votes on election day?
>
> Their [sic] will no doubt need to be countless meetings, committees, and tribunals to provide *all the customary access that the myriad of entities have come to expect,* but ultimately every activity that we engage in should be done to win votes. . . .
>
> There are many organizations that can routinely deliver measurable influence of behalf of Republicans, but there are five groups that have distinguished themselves. The RNC should give these five organizations a great deal of attention. These groups are the:
>
> National Rifle Association
>
> National Right to Life Committee
>
> National Right to Work Committee
>
> National Federation of Independent Business
> Christian Coalition
>
> These organizations deliver a disproportionate percentage of the Republican Base on election day. They should receive special and constant attention. We must prioritize our limited resources toward these organizations. . . .
>
> An important aspect of any RNC Coalitions work will be done to engage the many other organizations that work within the political arena. . . .
>
> The RNC will establish a regular meeting of key organizations. This meeting should be held at least three times a year. The emphasis should by on the free exchange of important information about the upcoming elections. Each meeting should be an event featuring the Chairman, Co-Chair, RNC Regional Field Representatives and at least one high pro-file [sic] Member of Congress. Examples would be Newt Gingrich, Trent Lott, Dick Armey, etc.

RNC0275390-RNC0275396, at RNC0275390-91 [DEV 97] (emphasis added).

2.7.10.2 An RNC slide show presented how interest group broadcast issue advocacy was used to help candidates in the 2000 election cycle:

> Outside Help for Democrats in 2000
>
> > Liberal groups spent record amounts assisting Democrats in 2000. Highest Issue Advertising Spenders: Planned Parenthood-$14 million, NAACP-$10.5 million, Sierra Club-$9.5 million. NARAL-$7.5 million.
>
> (Annenberg Public Policy Center of the University of Pennsylvania, 'Issue Advertising in the 1999-2000 Election Cycle').
>
> Outside Help for Republicans
>
> > Business Roundtable-$6 million (2/3rds supporting Republicans), NRA-$15/20 Million
>
> (Annenberg Public Policy Center of the University of Pennsylvania, 'Issue Advertising in the 1999-2000 Election Cycle').
>
> Impact of Third Party Spending for the 2000 Cycle
>
> > In 2000 it was estimated that more than $509 million was spent on issue advocacy television and radio advertising. Third parties accounted for almost $347 million (68%) of this spending.
>
> Republican Party-$83.5 million (16%), Democratic Party-$78.4 million (15%).
>
> > (Annenberg Public Policy Center of the University of Pennsylvania, 'Issue Advertising in the 1999-2000 Election Cycle').

RNC Counsel's Office, ''Soft' Dollars: What They Mean for the Republican Party,' RNC0248802-RNC0248809, at RNC0248808-09 [DEV 97] (emphasis in original).

2.7.10.3 An RNC document states that 'third party special interests [sic] groups . . . are permitted to raise and spend soft money for issue advocacy purposes. Liberal special interest groups spent record amounts assisting Democrats in 2000 . . . . In fact, of the $500 million spent on issue advertisements during the 2000 cycle, 68% ($347 million) was spent by third part[y] special interest groups—more than twice the amount spent by both political parties combined.' 'Issue Updates Campaign Finance Reform Concerns and Effects,' RNC0318573-RNC0318576, at RNC0318575 [DEV 98].

2.7.10.4 On October 18, 1996, the RNC, through its non-federal component, the Republican National State Elections Committee, gave $500,000 to the National Right to Life Committee with a cover letter from RNC Chairman Haley Barbour to NRLC Executive Director David O'Steen stating: 'Your continued efforts to educate and inform the American public deserves [sic] recognition.' RNC0065691A [DEV 134-Tab 8]; *see also* RNC0065691 [DEV 134-Tab 8] (copy of the check). In October 1999, the National Right to Life Committee received a $250,000 donation from the NRCC which was 'put in NRLC's general fund.' Resps. Nat'l Rt. Life Pls. to Defs' First Interrogs., No. 3 [DEV 10-Tab 15]. NRLC representatives 'were present at a meeting with Rep. Tom Davis when he presented the check to National Right to Life.' *Id.*

2.7.10.5 DNC Political Director Gail Stoltz spoke generally about the recent developments of using issue advertising for electioneering purposes. Stoltz stated: 'In my experience, issue ads affect elections. The ads can either demoralize or confuse voters so that they do not vote, or they can energize a voter base for or against a party or its candidates. During a presidential election year, the ads definitely make a difference when a presidential candidate is featured.' Stoltz Decl. ¶ 16 [DEV 9-Tab 39].

2.7.10.6 Political parties and candidates have directed donors who have maxed out their federal contributions to give money to nonprofit corporations who can then spend money on issue advocacy. Robert W. Hickmott provides the following uncontroverted testimony:

> As both a contributor to candidates and parties, and as a lobbyist who advises clients about political spending, I am personally aware of the fundraising practices of federal candidates. Once you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to the national party committees, the relevant state party (assuming it can accept corporate contributions), or an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign. These types of requests typically come from staff at the national party committees, the campaign staff of the candidate, the candidate's fundraising staff, or former staff members of the candidate's congressional office, but they also sometimes comes [sic] from a Member of Congress or his or her chief of staff (calling from somewhere other than a government office). Regardless of the precise person who makes the request, these solicitations almost always involve an incumbent Member of Congress rather than a challenger. As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate financially in his or her election effort, both with hard and soft money.

Hickmott Decl. ¶ 8 [DEV 6-Tab 19]. 2.7.11 While the record does not have any direct examples of votes being exchanged for candidate-centered issue advocacy expenditures, I find that the record demonstrates that candidates and parties appreciate and encourage corporations and labor unions to deploy their large aggregations of wealth into the political process. If nothing else, I find that the record presents an appearance of corruption stemming from the dependence of officeholders and parties on advertisements run by these outside groups.

2.7.12 Accordingly, I find that Congress was correct in concluding that a problem existed with the state of FECA. Corporations and labor unions were routinely spending general treasury funds on advertisements designed to influence federal elections and they were able to use general treasury funds to pay for the most potent form of political advocacy-advertisements that do not use words of express advocacy. This conclusion leads to the following question: are candidate-centered issue advertisements objectively distinguishable from pure issue advertisements so that one may distinguish genuine issue advocacy from electioneering without considering subjective factors? The record unequivocally answers that question in the affirmative.

2.8 *Candidate-Centered Issue Advertisements Are Empirically Distinguishable from 'Pure' Issue Advertisements*

Pure issue advertisements are empirically distinguishable from candidate-centered issue advertisements designed to influence an election on a number of bases: (a) issue advertisements designed to influence federal elections almost always identify a candidate for federal office; (b) issue advertisements designed to influence federal elections are generally run in close proximity to a federal election; and (c) issue advertisements designed to influence a federal election are run in states and congressional districts with close races.

2.8.1 *Candidate-Centered Issue Advertisements Almost Always Identify a Candidate for Federal Office*

I find that issue advertisements designed to influence a federal election almost always refer to specific candidates by name. Generally speaking, pure issue advertisements are less likely to refer to a federal candidate by name.

2.8.1.1 The uncontroverted testimony of political consultants who have designed genuine issue advertisements confirms this finding. Plaintiffs failed to produce any political consultants who have designed issue advertisements to rebut directly this testimony.

- Political consultant Doug Bailey testifies:

> In addition to the work we did for candidates at Bailey, Deardourff, we also did political ads for political parties and issue groups. When we were creating true issue ads (e.g, for ballot initiatives . . .), and when we were creating true party building ads, *it was never necessary for us to reference specific candidates for federal office in order to create effective ads*. For instance, we created a serious [sic] of ads opposing a . . . referendum in Florida which made no reference to any candidates. We were successful in conveying our message, and the referendum failed two to one. . . .
>
> Similarly, issue organizations can design true issue ads without ever mentioning specific candidates for federal office. *In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections*. From a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election. This is true not only in the 60 days immediately prior to an election, but probably also in the 90 or 120 days beforehand.

Bailey Decl. ¶¶ 9, 11 [DEV 6-Tab 2] (emphasis added); *see also* Strother Decl. ¶ 7 [DEV 9-Tab 40] (emphasis added)

(observing that the pure issue advertisements he had made during his career 'did not mention any candidates by name. Indeed, there is usually no reason to mention a candidate's name unless the point is to influence an election.').

2.8.1.2 Uncontroverted expert testimony likewise confirms the view that issue advertisements designed to influence a federal election almost always mention the name of a federal candidate. Krasno and Sorauf Expert Report at 55-56 [DEV 1-Tab 2] ('The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates. Candidate names appear in virtually all of these spots, with candidates most likely to identify themselves in their ads and candidate-oriented issue ads most likely to identify the opposing candidate (in some pejorative way). Pure issue ads, on the other hand, were much less likely to mention a candidate for federal office . . . .'').

2.8.1.3 A sampling of issue advertising campaigns demonstrates that candidates are often mentioned in the advertisements only as election day approaches.[88]

- *Citizens for Better Medicare ('CBM')*

During the final three weeks before the 2000 federal election, CBM aired 6,010 spots that mentioned a candidate and only eight spots that did not mention a candidate. Goldstein Expert Report, App. A, Tbl. 17A [DEV 3-Tab 7]. In the final 63 days before the election, CBM ran a total of 14,975 advertisements. *Id.* Of these advertisements 10,876 mentioned a federal candidate, while 4,099 did not mention a federal candidate. *Id.* From January 1 through September 4, 2000, CBM ran 23,867 television spots, *none* of which mentioned a candidate. *Id.*

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[88] Evidence for this finding is based on the Expert Report of Kenneth M. Goldstein. Goldstein compiled this information from data supplied by Campaign Media Analysis Group (CMAG). Goldstein Expert Report at 2 [DEV 3-Tab 7]. Although Plaintiffs question the completeness and accuracy of the CMAG data, I accept the CMAG data as a valid database. *See infra* Findings 2.12.1. Moreover, nowhere do Plaintiffs challenge the data of when candidates' names were mentioned in the advertisements.

- *Chamber of Commerce*

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the Chamber of Commerce ran a total of 7,574 advertisements. *Id.* Tbl. 17B. *All* of these advertisements were run in the seven weeks before the election and *all* of these advertisements mentioned a federal candidate. *Id.*

- *Planned Parenthood*[89]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), Planned Parenthood ran a total of 6,523 advertisements. *Id.* Tbl. 17C. In the 63 days before the election, 185 advertisements were run that did not mention a federal candidate, while 5,916 advertisements were run that mentioned a federal candidate. *Id.* (noting that the only time Planned Parenthood ran advertisements that mentioned a federal candidate's name was in the five weeks prior to the election).

- *AFL-CIO*

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the AFL-CIO ran a total of 18,324 advertisements. *Id.* Tbl. 17D. In the 63 days before the election 10,099 advertisements were run and each mentioned a federal candidate. *Id.* During this same time period, the AFL-CIO ran no advertisements that did not mention a federal candidate. *Id.*

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[89] The Annenberg Report describes Planned Parenthood as 'a pro-family planning political advocacy group.' Annenberg Report 2001 at 24 [DEV 38 -Tab 22].

- *Women Voters: A Project of Emily's List*[90]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), Emily's List ran a total of 2,680 advertisements. *Id.* Tbl. 17E. In the 63 days before the election, 7 advertisements were run that did not mention a federal candidate, while 2,665 advertisements were run and each mentioned a federal candidate. *Id.* (noting that the only time Emily's List ran advertisements that mentioned a federal candidate's name was in the seven weeks prior to the election).

- *Americans for Job Security*[91]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), Americans for Job Security ran a total of 6,062 advertisements. *Id.* Tbl. 17F. In the 63 days before the election, 5,073 advertisements were run and each mentioned a federal candidate. *Id.* During this same time period, Americans for Job Security ran only advertisements that mentioned federal candidates. *Id.*

- *Business Round Table*[92]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the Business Round Table ran a total of 8,158 advertisements. *Id.* Tbl. 17G. In the 63 days before the election, 4,571 advertisements were run and each mentioned a federal candidate. *Id.* During this same time period, the

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[90] The Annenberg Report describes Emily's List as 'an organization dedicated to helping Democratic women who support abortion rights get into office.' Annenberg Report 2001 at 22 [DEV 38-Tab 22].

[91] The Annenberg Report describes Americans for Job Security as a 'pro- business lobbying group.' Annenberg Report 2001 at 23 [DEV 38-Tab 22].

[92] The Annenberg Report describes the Business Round Table as 'an organization that represents the CEO's of America's largest corporations.' Annenberg Report 2001 at 20 [DEV 38-Tab 22].

Business Round Table ran only advertisements that mentioned federal candidates. *Id.*

- *Handgun Control*[93]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), Handgun Control ran a total of 3,383 advertisements. *Id.* Tbl. 17H. In the 63 days before the election, 3,146 advertisements were run and each mentioned a federal candidate. *Id.* During this same time period, Handgun Control ran only advertisements that mentioned federal candidates. *Id.*

- *Sierra Club*[94]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the Sierra Club ran a total of 2,270 advertisements. *Id.* Tbl. 17I. In the 63 days before the election, 22 advertisements were run that did not mention a federal candidate, while 1,707 advertisements were run that did mention a federal candidate. *Id.*

- *League of Conservation Voters*[95]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the League of Conservation Voters ran a total of 5,027 advertisements. *Id.* Tbl. 17J. In the 63 days before the election, 371 advertisements were run and each advertisement did not mention a federal candidate, while 1,705 advertisements were run that mentioned a federal

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[93] The Annenberg Report describes Handgun Control as an 'advocacy group supporting legislation to promote gun safety.' Annenberg Report 2001 at 25 [DEV 38-Tab 22].

[94] The Annenberg Report describes the Sierra Club as 'a pro-environment advocacy group.' Annenberg Report 2001 at 23 [DEV 38-Tab 22].

[95] The Annenberg Report describes the League of Conservation Voters as a 'pro-conservation advocacy and education group.' Annenberg Report 2001 at 23 [DEV 38-Tab 22].

candidate. *Id.* (noting that the only time the League of Conservation Voters ran advertisements mentioning a federal candidate's name was in the eight weeks prior to the election).

2.8.1.4 Candidate-centered issue advertisements almost always name a federal candidate. This finding is neither surprising nor controverted. As the examples of the interest group advertisements indicate, however, issue advertisements generally start naming a federal candidate only as the election draws near.

2.8.2 *A Majority of Candidate-Centered Issue Advertisements are Run in Close Proximity to a Federal Election*

As the sampling of interest group advertisements above illustrates, as the election draws near, advertisements that name a federal candidate are much more common than issue advertisements that do not name a federal candidate. I find that most candidate-centered issue advertisements appear in close proximity to a federal election. In the case of the general election, which has been most heavily studied, it is clear that candidate-centered issue advertisements are most prevalent within sixty days of a federal election.

2.8.2.1 The Annenberg Public Policy Center found that by the last two months before the election, almost all televised issue spots made a case for or against a candidate. Annenberg Report 2001 at 14 [DEV 38-Tab 22]. The Annenberg Report, a study relied on by Plaintiffs, concluded:

> The type of issue ad that dominated depended greatly on how close we were to the general election. During the two-year election cycle 71% of distinct issue ads were candidate-centered, 16% were legislation-centered, and 13% were general-image centered. However, distinct ads from before the final two months of the election were 43% candidate-centered, 35% legislation centered, and

22% general-image oriented. That picture flipped when looking at unique ads from the last two months of the election. In that case fully 89% of unique ads were candidate-centered, while just 3.6% were legislative centered, and 7.4% were general-image issue ads. *In other words candidate-centered issue ads became much more prominent as the election approached. . . .*

When we took into account how many times these ads aired and not just the number of different ads, we found an even greater percent were candidate-centered. Television spots airing after Super Tuesday were 87% candidate centered, 9.5% legislative-centered, and 3.6% image oriented. By breaking that time period down further and looking only at spots that aired September to November, we found that there was a greater percentage of candidate-centered ads in the last two month of the campaign than in the last eight. *Fully 94% of issue ads aired after August made a case for or against a candidate.* Just 3.1% were legislative ads, and 2.3% were general image ads. Though candidate-centered issue ads always made up a majority of issue ads, as the election approached the percent candidate-centered spots increased and the percent of legislative and image ads decreased, such that *by the last two months before the election almost all televised issue spots made a case for or against a candidate. Id.* (emphasis added).

2.8.2.2 In the sixty days prior to a federal election, interest group advertisements that mention a federal candidate rise dramatically, whereas issue advertisements that do not mention a federal candidate remain fairly constant during the course of the year.[96] A graph using data from the 2000

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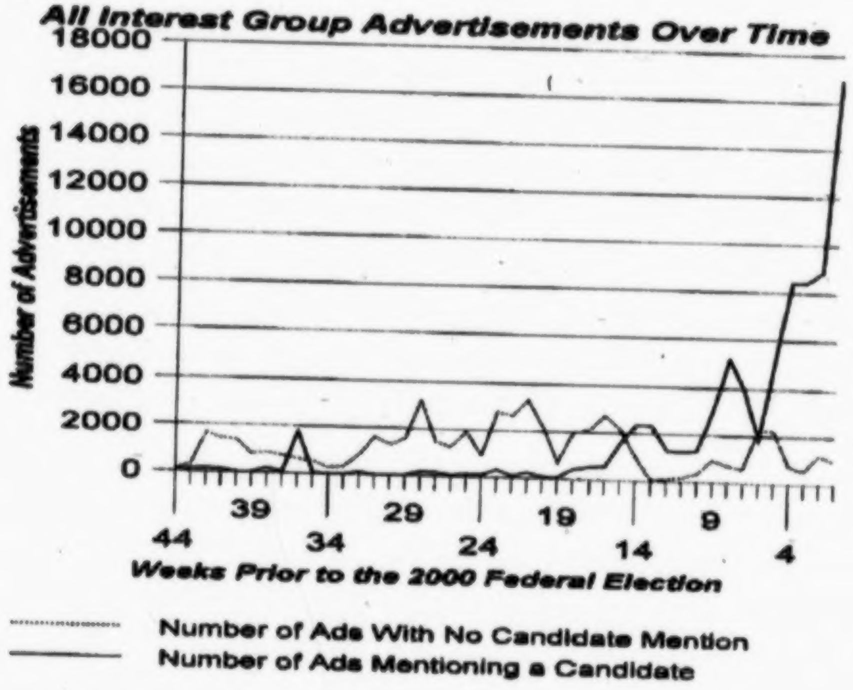
[96] The Chart is based on data compiled by Kenneth Goldstein. Goldstein Expert Report, App. A, Table 16 [DEV 3-Tab 7]. Goldstein observed all interest group advertisements run during the forty-four weeks prior to the election using CMAG data. Although Plaintiffs dispute the

election cycle compiled by Kenneth Goldstein illustrates this point:

by Kenneth Goldstein illustrates this point:



2.8.2.3 The uncontroverted testimony of experts confirms that the airing of issue advertisements designed to influence a federal election is at its zenith in the final weeks prior to an election. Magleby Expert Report at 18 [DEV 4-Tab 8] ('Genuine issue ads are more generic or 'educational' on their face than ads that are electioneering in nature. They are also rare in the period before an election.'); *id.* at 33 ('In the contests we monitored in 1998, most interest group electioneering advocacy came in the final weeks of the campaign. In 2000, 58% of the interest group electioneering advocacy came in the last two weeks of the election.');

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completeness of his data set, *see* Appendix, none of the experts have criticized that the data demonstrates that in the sixty days prior to a federal election, the clear majority of issue advertisements mention the name of a federal candidate.

Goldstein Expert Report at 17 [DEV 3-Tab 7] ('The CMAG database provides empirical evidence of a strong positive correlation between [an advertisement's reference to a federal candidate and the proximity in time of the broadcast of the advertisement to the federal election] and consequently of its validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office.'). The conclusions of these experts has not been contradicted by any contrary expert testimony introduced by Plaintiffs in this litigation.

2.8.2.4 As the Annenberg Center, experts in this case, and the empirical data establish, candidate-centered issue advocacy is run in close proximity to federal elections.

2.8.3 *A Majority of Candidate-Centered Issue Advertisements Are Run in States and Congressional Districts with Close Races*

2.8.3.1 The empirical data and the uncontroverted testimony of experts and political consultants in this case demonstrate that candidate-centered issue advertisements are run in congressional districts or states where there are close races.

2.8.3.2 Defense expert Magleby states that:

> Interest groups . . . take aim at particular states with competitive U.S. Senate races or congressional districts where the outcome is in doubt. In 1998, 2000, and 2002, I conducted numerous interviews with key staff in scores of interest groups to assess where they engage in electioneering advertisements. . . . The widely shared view of interest groups is that they campaign where their investment can make a difference and that is almost always in competitive contests. This tendency has been reinforced by the exceedingly close margin of party control in Congress in recent years. Interest groups routinely do their own polls to inform them on where to spend their electioneering advocacy money. For example, before they sent mailings, the NEA [National Education Association] conducted surveys to determine 'if they could make a difference' with their spending.

Magleby Report at 31 (footnotes omitted) [DEV 4-Tab 8]; *see also* Krasno and Sorauf Report at 57 (footnote omitted) [DEV 1-Tab 2] (Candidate and candidate-oriented issue ads 'are narrowly targeted to air in only the most closely contested elections.').

2.8.3.3 Political consultants also provide uncontroverted testimony that candidate-centered issue advertisements are concentrated on competitive races in the weeks before a federal election. Political consultant Strother testifies:

> In addition to mentioning a candidate and proximity in time to election day, another informative factor is to look at where the ad was run. When media consultants want to influence elections, they air their ads in competitive districts and battleground states. Thus, in addition to looking at the ad itself, to discern electioneering intent you might also look at the Cook Report of competitive or 'toss-up' races. Those are the most likely places where the advertisements could have an impact on the outcome of an election. Thus, when a political party or an issue group focuses an advertising campaign on competitive districts, the intent to influence the election is clear. By contrast, when the goal is to persuade members of Congress to vote one way or another on a piece of pending legislation, an issue ad campaign will be targeted at the undecided members.

Strother Decl. ¶ 9 [DEV 9-Tab 40]; *see also* Lamson Decl. ¶ 6 [DEV 7-Tab 26] ('Parties and groups generally run these pre-election 'issue ads' only in places where the races are competitive.').

2.8.3.4 Empirical data likewise demonstrates that candidate-centered issue advertisements are concentrated in congressional districts and states with contested elections. 'The CMAG database[97] shows that interest group financed television ads that mentioned a candidate and were broadcast within 60 days of an election were highly concentrated in states and congressional districts with competitive races.' Goldstein Expert Report at 20 [DEV 3-Tab 7] ('As shown in Table 5, during the 2000 senatorial elections, 89.2 percent of such interest group ads ran in states where the race was competitive. Four states accounted for 77 percent of the ads broadcast by interest groups; political parties broadcast 65 percent of their ads in these four states. Interest group ads were particularly important in Michigan, where interest groups broadcast 22 percent of the total ads broadcast in the race.');[98] *id.* at 21 ('The geographical distribution of interest group ads in Senate elections closely paralleled that of the political parties, which ran 90.6 percent of their ads in those competitive states. The same was true in House elections. As demonstrated in Table 6, during 2000, 85.3 percent of interest group financed ads broadcast within 60 days of the election were aired in congressional districts with competitive elections. Similarly, the political parties ran 98.2 percent of their ads in those districts.') (footnotes omitted); *see generally id.* at 3, 20-24, Tbls. 5-6; Krasno and Sorauf Report, App. Tbls. 4-5 [DEV 1-Tab 2]; *see also Buying Time 2000* at 53 [DEV 46] ('The competitiveness of candidate races also affects the magnitude and timing of political advertising.'). This expert testimony has not been challenged by Plaintiffs with any contrary expert evidence.

2.8.3.5 Indeed, even Plaintiff NRA admits that it targets its issue advocacy campaigns toward competitive races. NRA Executive Vice President Wayne LaPierre testified that ' the other thing that makes an impact on what the NRA does is NRA-NRA, in terms of its election efforts-and when I say NRA, I'm including the whole organization-tends to focus on competitive races.' LaPierre Dep. at 118 [JDT Vol. 14]; *see also id.* at 105 ('Q. Is it correct that the NRA spent as much as it could to get its message to gun owning voters in critical swing states? A. That's true.') 196 ('Okay. Now, we've talked a little bit about the location of your ads and that they were at least concentrated on close races or battleground states. You and I may differ on whether that-A. Right. Q.-where the proportion is, but they're concentrated on those races. A. Right.'); *supra* Findings ¶ 2.6.4.1 (national election media recommendations by NRA media consultant who proposes focusing issue advocacy on ten congressional seats in 'battle ground' states).

2.8.4 In sum, the uncontroverted record establishes that pure issue advocacy is empirically distinguishable from candidate-centered issue advocacy on the basis of (a) whether the federal candidate is named; (b) whether the advertisement is run in close proximity to a federal election; and (c) if the advertisement is run in a competitive race. As the uncontroverted testimony of Defense expert David Magleby states:

> A number of indicia make clear that the ads run by individuals and interest groups are in reality

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[97] The CMAG data is discussed in detail in the Appendix to my opinion and Finding ¶ 2.12.1.

[98] In determining which races were competitive, Goldstein relied on his professional judgment as informed by various media sources including the Cook Report which he attached to his expert report. Goldstein Expert Report at 20 n.17 [DEV 3-Tab 7]. The Cook Report is also used by Plaintiffs to handicap races. LaPierre Dep. at 196 [JDT Vol. 14] ('Q. What were your sources of information from which you determined which races were close or which races were in battleground states or whatever? A. Newsletters, the media, just the general turning on the television. I mean, everybody-there are no secrets in-when you get into a campaign, I mean, everybody knows. I mean, it's-the columnists, the TV, the radio, the-I mean, every newsletter you pick up, whether it's the Cook Report. . . ."); Ryan Dep. at 76-77 [JDT Vol. 27] (recalling that he would check the Cook Report to find out which races of Congress were competitive).

> electioneering ads that are meant to influence, and do influence, elections: These electioneering ads *generally* name a candidate, run close in time to the election, target the named candidate's district, are run primarily in competitive races, and generally track the themes in the featured candidate's campaign.

Magleby Report at 6 [DEV 4-Tab 8] (emphasis added). Magleby outlines a general rule that candidate-centered issue advertising is distinguishable from pure issue advertising.

2.8.5 Despite being able to empirically distinguish candidate-centered issue advocacy from pure issue advocacy, the record demonstrates that it is very difficult, if not impossible, to determine the objective behind an advertisement by simply listening or viewing the advertisement; particularly when that advertisement is viewed outside the context of the election.

2.8.5.1 Political Consultant Raymond Strother testifies:

> None of us, without understanding the context and the time, can tell you what a sham ad is and a nonsham ad. You can't do that by looking at pictures or even looking at the ads. When I was teaching at Harvard, I brought Doug Bailey up to lecture my class. He showed [a] series of commercials, and he said, 'Okay, which is the best commercial,' and everybody voted. 'The worse commercial,' and everybody voted. He said, 'You're all wrong. There is no best or worse commercial because none of you are qualified to judge these commercials because you don't know the context in which they were run or the problems they were to solve.' When I look at storyboards, I have no way of knowing if they're fake, real, et cetera, because I don't know the time—I don't know anything about them.

Strother Cross Exam. at 90-91. Strother's testimony demonstrates that it is difficult to discern the true purpose of an advertisement without viewing it in its context. Rather, as discussed above, the best way to distinguish pure issue advocacy from candidate-centered issue advocacy is through empirical variables dealing with when and where the advertisement is run, and whether it mentions a federal candidate.

2.8.5.2 An example of the difficulty of discerning the objective behind an advertisement is presented by Defendants and comes from the 1998 Senate campaign between incumbent Senator Lauch Faircloth and now-Senator John Edwards. An advertisement run during the campaign by the American Association of Health Plans ('AAHP') told viewers to call Senator Faircloth 'today and tell him to keep up his fight' against trial lawyers' efforts to pass new liability laws. Gov't Opp'n at 82-83; Def. App. C, Tab 1 at 1 ('Look Out for the Lawyers').[99] Defendants point out that this advertisement might appear to be an example of 'genuine issue advocacy' if not for the fact that '[a]t the time this ad was run, the airwaves in North Carolina were saturated with millions of dollars of ads run by Senator Faircloth's campaign, by the Republican party, and by interest groups portraying Edwards as a 'deceptive,' truth stretching trial lawyer. Edwards' own campaign ads trumpeted Edwards as a trial lawyer 'fighting for the people.'' Gov't Opp'n at 83; *see also* Def. App. C, Tab 1 at 2 (Faircloth-sponsored advertisement titled 'Stretch the Truth,' asking: 'Who teaches other lawyers how to stretch the truth? Meet personal injury lawyer John Edwards.'); *id.* at 3 (Faircloth-sponsored advertisement titled 'You are,' telling voters they were paying for Edwards' campaign because '[h]e makes millions suing people. Our hospitals and family doctors, so we all pay more for medical care'); *id.* at 4 (Faircloth-sponsored advertisement titled 'The Truth,' stating 'Newspapers say '. . . [Edwards] has the lawyer's habit of stretching the truth.'); *id* at 7 (Edwards-sponsored advertisement titled 'Who I Am,' which states: 'As a young lawyer, I decided to represent people, not big insurance companies.'); *id* at 5-6, 8-12.

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[99] The text of the advertisement is as follows:

> Worried about rising healthcare costs? Then look out for the trial lawyers. They want Congress to pass new liability laws that could overwhelm the system with expensive new healthcare lawsuits. Lawsuits that could make the trial lawyers richer. That could make healthcare unaffordable for millions. Senator Lauch Faircloth is fighting to stop the trial lawyers [sic] new laws. Call him today and tell him to keep up his fight. Because if trial lawyers win, working families lose.

Def. App. C, Tab 1 at 1. This advertisement was submitted by Plaintiffs on a CD as a 'powerful illustration of the . . . type of issue advocacy that would be prohibited by BCRA's primary definition of 'electioneering communications." McConnell Br. at 61.

2.9 BCRA's Restriction on 'Electioneering Communication'

As discussed earlier, Congress clearly recognized that labor unions and corporations were easily evading FECA's prohibition on their use of general treasury funds to influence federal elections by running broadcast advertisements that did not use words of express advocacy but were clearly designed to influence federal elections. Moreover, as discussed above, these general treasury funds purchased the most effective form of political communication. In *Buckley,* the Supreme Court observed that 'the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.' *Buckley,* 424 U.S. at 42. For this reason, the Supreme Court made clear that a test distinguishing between a discussion of issues and a discussion of candidates that relied on the subjective intent of the listener was problematic. *Id.* at 44 ('In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and

meaning. Such a distinction offers no security for free discussion.') (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)). In enacting Title II's restriction on 'electioneering communication,' Congress recognized the Supreme Court's admonition in *Buckley* that legislation distinguishing between issue advocacy and candidate discussion must, if at all possible, avoid reliance on the subjective impressions of the listener. BCRA accomplishes this feat with the primary definition of electioneering communication.

2.9.1 Section 203 of BCRA extends the prohibition on corporate and labor union general treasury funds being used in connection with a federal election to cover 'electioneering communication'. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. § 441b(b)(2). Section 201 of BCRA amends section 304 of FECA by adding the following definition of an 'electioneering communication':

> (i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which—
>
> > (I) refers to a clearly identified candidate for Federal office; (II) is made within—
> >
> > > (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> > >
> > > (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> >
> > (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A). Under this definition, in order to constitute an electioneering communication, therefore, the communication (a) must be disseminated by cable, broadcast, or satellite, (b) must refer to a clearly identified Federal candidate, (c) must be distributed within certain time periods before an election, and (d) must be targeted to the relevant electorate. *Id.* The fact that the communication must be 'targeted to the relevant electorate,' means that, in the case of House and Senate races, the communication will not constitute an 'electioneering communication' unless 50,000 or more individuals in the relevant Congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. BCRA § 201; FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C).

2.9.2 By adopting a definition of electioneering communication that by and large is premised on the empirical determinants that Congress found distinguish pure issue advocacy from candidate-centered issue advocacy, Congress adopted a definition of electioneering communication that rejected reliance on the subjective impressions of the listener and focuses on objective variables that do an impressive job, in most circumstances, of distinguishing between candidate-centered issue advertising and pure issue advertising. The lone question remaining is whether the primary definition of electioneering communication is narrowly tailored to capture candidate-centered issue advocacy from pure issue advocacy. After carefully reviewing the evidence in the record, I conclude that it is narrowly tailored.

2.10 *The Primary Definition of Electioneering Communication is Narrowly Tailored to Radio & Television Advertisements*

Electioneering communication is narrowly defined to only include communications disseminated by cable, broadcast, or satellite. By including only the media that were found by Congress to be problematic, the primary definition of electioneering communication is narrowly tailored.

2.10.1 Defense expert Magleby observes that broadcast advertising is the most prevalent form of communicating candidate-centered issue advocacy. Magleby states that

> [b]roadcast advertising is the most visible mode of communicating an electioneering message and is believed to be the most effective for reaching a mass audience. In all of the contests we monitored in 1998 and 2000, interest groups used broadcast, including television and radio, to communicate with voters. . . .

Broadcast advertising was an especially important element in all of the competitive races we monitored in 2000. . . . In Senate races, television and radio were also major components of the candidate and outside money campaigns. . . .

Radio is also an effective communications tool for electioneering by interest groups. As with television, if the communications do not use the particular language of express advocacy, the groups do not report the expenditures to the FEC, and stations do not provide the same disclosure that they provide for campaign communications by candidates. Academics monitoring our sample of competitive contests in 2000 found the interest groups making use of radio for electioneering efforts included the NRA, Americans for Limited Terms, U.S. Chamber of Commerce, NFIB, NEA, League of Conservation Voters, Million Mom March PAC, Planned Parenthood and the National Right to Life PAC. Of the 105 radio ads we recorded, only 20 ads contained the magic words. Magleby Expert Report at 22 [DEV 4-Tab 8].

2.10.2 Those intimately involved in making candidate-centered issue advertisements confirm this expert testimony.

- Denise Mitchell, Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney, confirms this conclusion. Mitchell states:

  > The AFL-CIO also sometimes purchases newspaper advertising for its issue advocacy. We have usually done

> so in newspapers with high readership among Members of Congress and their staffs . . . . When we are seeking to influence and mobilize public opinion, however, we almost always have used broadcast advertising because it is far more cost-effective; most people get their news and information from broadcast sources; newspaper readership is tilted toward higher-income readers, and we try to reach working and middle-class families; and broadcasts simply have a more potent effect, including the ability to generate additional 'free media' . . . . Also, newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human, personal impact of legislative issues—a key part of our strategy and effectiveness.

Declaration of Denise Mitchell ¶ 28 [6 PCS]; *see also id.* ¶ 29 (explaining why the AFL-CIO does not use direct mail or telephone banks to reach the general public).

- Political consultant Rocky Pennington testifies that

> [e]ffective electioneering is crucial in political campaigns. Television, an emotion-based medium, is the most effective. Radio can also be effective, depending on the specific market you're trying to reach. For example, if you're in a Republican primary and want to reach Republican males between the ages of 18 and 45, Rush Limbaugh radio is probably a good buy. Direct mail can also be very effective, in a different way, since it is more of an information-based medium. You're reaching voters at different levels, and it's good to have a good mix. The above media are good for both candidate and third party communications in a campaign.

Pennington Decl. ¶ 9 [DEV 8-Tab 31]. Pennington provides an example of a particularly effective candidate-centered issue advertisement run on the radio:

> Other interest groups also ran ads trying to elect Mr. Keller in the Republican primary and the run-off. One ad run against Mr. Sublette that I thought probably cost us a couple points in the primary was a radio spot run, as I recall, primarily on conservative talk radio and maybe some Christian stations by Americans for Limited Terms. This ad attacked Mr. Sublette on tax and other issues, basically calling him a big government liberal, while praising Mr. Keller as a real conservative.

Id. ¶ 16.

Communications consultant Angus McQueen, who has 'provided strategic communications advice and services to the' NRA and the NRA PVF for approximately 22 years, states that among the various media outlets 'for conveying [NRA's] message, the most powerful is the use of 'paid broadcast media,' which simply refers to paid media that is broadcast over network, cable, or satellite television, or over the radio.' McQueen Decl. ¶¶ 3, 10 [11 PCS].

2.10.3 As a result of the following testimony and discussion, I disagree with the NRA's contention that '[a]ds broadcast over the internet are comparable to those broadcast over TV and radio in terms of their public reach and impact.' Proposed Findings of Fact of the NRA and NRA PVF ¶ 22. In support of this finding, the NRA cites only to three items of evidence. This evidence does not support the NRA's conclusion.

2.10.3.1 The first piece of evidence is the declaration of Angus McQueen, the NRA's long-time communications consultant, which notes that the Internet has become an '*increasingly important* part of how information becomes disseminated in our society,' resulting in 'information [being] disseminated more rapidly, by a greater variety and multitude of diverse sources, than in was in the past.' McQueen Decl. ¶ 17 [11 PCS] (emphasis added). 'Thus, as illustrated by the popularity of the NRA's website and its 'NRA Live!' service [a daily NRA webcast news program], groups like the NRA have in a sense taken over part of the role previously played by the media.' *Id.* This testimony only observes that the Internet is becoming an 'increasingly important' means of communication. It makes no effort to compare traditional communication. It makes no effort to compare traditional television and radio advertising to Internet communications. With the NRA's webcast, 'NRA Live!', viewers make a choice to go to the website and download or watch the program, while advertisements on television and radio are aired throughout programming without any viewer choice. The NRA fails to explain this critical distinction. The Internet and television and radio advertising are completely different forms of media and without testimony comparing the two, I find this evidence does not support the NRA's conclusion.

2.10.3.2 The second piece of evidence is a submission of 'NRA Live!' viewership statistics for the periods of March 1999 through March 2000 and March 2001 through August 2002. NRA App. at 322-23. The NRA makes no effort to compare these numbers to traditional television and radio ratings and therefore it is impossible from this submission to determine if the NRA Internet program has a comparable impact to that of traditional television and radio advertising. Moreover, the viewership statistics are missing data during the period of April 2000 through to March of 2001; precisely the period around the 2000 federal election. As a result, the data does not even demonstrate if the NRA program was being viewed more or less during the election cycle.

2.10.3.3 Third, the NRA provides two videotapes containing multiple editions of 'NRA Live!' Broadcasts. NRA App. I. This evidence does absolutely nothing to prove that the Internet has the same impact as television and radio broadcasting.

2.10.3.4 In sum, I do not find that the Internet is now, or was, a comparable medium to television and radio broadcast advertising. Indeed, the NRA's own media consultant testifies that 'paid media that is broadcast over network, cable, or satellite television, or over the radio,' is the 'most powerful' medium for conveying its message. McQueen Decl. ¶ 10 [11 PCS]. If the Internet medium was as effective as the NRA claims, then it is unclear why the NRA spent as much money on candidate-centered broadcast issue advertising as it did during the 2000 elections. Why not just spend the funds on Internet advertising if that were as effective? The NRA does not answer this question.

2.10.4 Although there seems to be agreement that direct mail is an important tool of campaigning, there is no evidence in the record that it is nearly as effective as broadcast advertising. Defendants' expert Magleby states that campaign mail 'can be very effective.' Magleby Expert Report at 25 [DEV 4-Tab 8]. Rocky Pennington, a political consultant, comments that direct mail is usually a component of political campaign plans. Pennington Decl. ¶ 3 [DEV 8-Tab 31]. Much like newspaper advertising, direct mail is 'a more passive medium, with less immediacy than broadcast, and [is] less likely to generate action.' Mitchell Decl. ¶ 28 [6 PCS]. Accordingly, I do not find direct mail to be as effective or as problematic as broadcast candidate-centered issue advertising.

2.10.5 For the same reason I do not find newspaper advertising to be as effective as candidate-centered issue advertisements broadcast on radio and television. The NRA proposes the following finding:

> Newspaper ads often dwarf broadcast ads, especially radio ads, in terms of their expense. For instance, a full-

> page ad in the *New York Times* would cost $65,000 whereas a 60 second radio broadcast that recites precisely the same text in a small market such as Peoria would cost only $75.

Proposed Findings of Fact of the NRA and NRA PVF ¶ 20. In support of this statement, the NRA cites to two pieces of evidence: a statement by their communications consultant, Angus McQueen, that a 60 second radio commercial in a major media market costs $850, while one in a smaller market sells for $75, McQueen Decl. ¶ 24 [NRA App. 34], and a declaration that is unidentified stating that a group called 'Campaign for America' purchased a full-page advertisement in July 1998 in the *New York Times* which cost $64,581.30, NRA App. 256-57 ¶ 12. Simply because a print advertisement is more expensive in the *New York Times* than a local radio spot in Peoria does not mean that the latter is relatively more effective. The far more useful comparison would be between an advertisement in *The New York Times*, a newspaper with nationwide circulation, and a broadcast advertisement aired on a national broadcast network. The NRA has not produced any evidence to demonstrate that when the comparison is properly restated it is more effective to communicate in print advertising. Indeed, Plaintiffs concede that it is not as effective. Mitchell Decl. ¶ 28 [6 PCS] ('When we are seeking to influence and mobilize public opinion, however, we almost always have used broadcast advertising [as opposed to newspaper advertising] because it is far more cost-effective; most people get their news and information from broadcast sources; newspaper readership is tilted toward higher-income readers, and we try to reach working and middle- class families; and broadcasts simply have a more potent effect, including the ability to generate additional 'free media' . . . . Also, newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human, personal impact of legislative issues—a key part of our strategy and effectiveness.'). Accordingly, I do not find that newspaper advertising poses a comparable problem to that of broadcast advertisements detailed *supra*.

2.10.6 The primary definition of electioneering communication is narrowly tailored to only the communication media that was problematic. The evidence demonstrates that more than any other medium, broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections. This focus is neither overbroad nor underinclusive in scope as my Findings demonstrate.

2.11 *The Primary Definition of Electioneering Communication is Narrowly Tailored by Broadcast Advertisements Appearing Sixty Days Before a General Election and Thirty Days Before a Primary Election, That Name a Candidate, and Are Targeted to that Candidate's Electorate*

BCRA only applies to broadcast advertisements that refer to a federal candidate, that are targeted at the candidate's electorate, and that are broadcast within sixty days of a general election and thirty days of a primary election. By focusing on these characteristics, the primary definition of electioneering communication demonstrates narrow tailoring.

2.11.1 As an initial matter, it is important to observe that Dr. Milkis, Plaintiffs' expert, testifies that advertising aired *more* than 30 days before a primary or *more* than 60 days before an election 'can serve to frame the terms of debate.' Milkis Rebuttal Decl. ¶ 9 [RNC Vol. VII]. For example, there are examples of arrangements between political parties and candidates, whereby political parties have run advertisements for the candidates during the summer months when the candidate was low on funds, which permitted the candidate to save money to be spent on advertisements later in the election cycle. Magleby Expert Report at 47 [DEV 4-Tab 8] (noting such arrangements between Senators Debbie Stabenow and Chuck Robb and their political parties during the 2000 election cycle). Nevertheless, even though advertisements aired outside the thirty and sixty day period can influence voters, Congress recognized that most candidate-centered issue advertisements were targeted in close proximity to a federal election. *See supra* Findings ¶¶ 2.8.1.3, 2.8.2 (discussing the fact that candidate-centered issue advocacy is concentrated in the weeks surrounding federal elections).

2.11.2 It is also important to note that it is unrebutted that advertisements naming federal candidates, targeted to their electorate, and aired in the period before the election, influence voters. Political consultant Raymond Strother, testifies that in his experience consulting for candidates' campaigns, all political advertisements that mention a candidate's name in the weeks leading up to an election, regardless of intent and regardless of whether express advocacy is used, influence voters. Strother Cross Exam. at 70 [JDT Vol. 32] ('I do not believe there are issue ads run immediately before an election that mentioned the candidate that aren't important in the decision- making process of the voter.'). Strother's belief is based on his view that voters assimilate and process information from a variety of different sources; creating, in his parlance, a 'big cajun stew.' *Id.* at Ex. 1 (Strother Declaration) ¶ 4. These various sources ultimately combine to help a voter make a decision. Strother elaborated on this point during cross examination:

> [P]eople, although they're interested, they're casually interested voters. Often you'll run an ad with a certain line in it, and when you poll or go into a focus group, they credit the line to your opponent. That's how casually they watch television, but it's in this climate where they don't know where they get their information. Samuel Popkin wrote a book called, *The Reasoning Voter*, and Popkin says that Americans assimilate information through thousands of different sources to make their opinions, and they're not sure where they came from, but it's a big stew. It's a bit of information here from a brother-in- law, a bit of information here from the barber, a bit of information here from a television ad or a radio ad, and they forget where the information came from.

Strother Cross Exam. at 34-35 [JDT Vol. 32]. This explanation is the reason that Strother concludes that advertisements run immediately prior to a candidate's election that mention the candidate ultimately have some influence on the decision-making process of the voter. *See id.* at 70; *see also* Resp. of NAB to FEC's First RFA's, No. 4 [DEV 12-Tab 7] ('NAB admits that a Political Advertisement might conceivably influence a federal election without the use of any particular words as might many other factors depending upon the circumstances of each individual race.'); *supra* Findings ¶ 2.3.2 (Bailey) ('Over time, a campaign defines a candidate through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these 'feels' to make up a campaign.').

Plaintiffs do not challenge Strother's conclusion with contrary testimony from other political consultants. Instead they rely on their own self-serving testimony and self-selected advertisements they claim are pure issue advertisements that would be unfairly captured by BCRA's primary definition of electioneering communication. BCRA's primary definition of electioneering communication presents an empirical test that ignores this type of self-serving *ex post facto* rationalization by focusing on purely objective criteria: broadcast advertisements, referring to a federal candidate, targeted to that candidate's electorate, and aired in close proximity to a federal election influence voters.

2.11.3 For example, the McConnell Plaintiffs provide this three-judge District Court with 21 advertisements aired during the 1998 and 2000 election cycles, claiming they serve as 'powerful illustrations of the amount and type of issue advocacy that would be prohibited by BCRA's primary definition of 'electioneering communications.'' McConnell Br. at 61; PCS CD 8.

2.11.3.1 With regard to these allegedly 'powerful illustrations' of BCRA's overbreadth, Defendants point out that nine of the twenty-one advertisements proffered by the McConnell Plaintiffs would not have been affected by BCRA; eight were not run within 60 days of a general election or 30 days of a primary contest, and one was run in the Washington, D.C. media market where the two Senators mentioned, Senator Jesse Helms of North Carolina, and Senator Joseph Biden of Delaware, were not running for office. Gov't Opp'n at 78 & n.78 (identifying PCS CD 8 at Tracks 5, 7, 10, 12-17). Plaintiffs do not rebut these statements.

2.11.3.2 Of the advertisements that remain, four highlight past votes of the candidate, PCS CD 8 at Tracks 9 ('Stabenow Death Tax,' Def. App. C, Tab 2 at 2), 18 ('Job,' Mitchell Decl. Ex. 141 [6 PCS]), 19, 20, four urge action on upcoming votes, *id.* at Tracks 2, 3 ('Save,'[100] Mitchell Decl. Ex. 113 [6 PCS]), 6 ('Label,' Mitchell Decl. Ex. 132 [6 PCS]), 11, three criticize candidate positions on term limits, Medicare funding and a prescription drug plan, *id.* at 1, 8, 21, and one

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[100] According to the AFL-CIO, 'Save' was run '[a]fter the [Taxpayer Relief Act] passed the House and was being considered in the Senate.' Mitchell Decl. ¶ 52 [PCS 6]. This advertisement was 'intended to influence House Members in the event that the bill returned for another vote in the Senate [sic].' *Id.* It was run between October 2 to October 9, 1998. *Id.*

commends the candidate's fight against trial lawyers,[101] *id.* at 4 ('Look Out For the Lawyers,' Def. App C, Tab 1 at 1).

2.11.3.3 Of this meager showing, I do not consider the four advertisements on a candidate's past votes as probative. Criticizing a candidate on past votes in the period of time immediately before a federal election with no indication of future legislation on the issue likely serves no purpose other than to affect the outcome of the election. As a result I find those four advertisements to be examples of electioneering. *See supra* Findings ¶ 2.6.7.

2.11.3.4 What the McConnell Plaintiffs are left with is *at most* eight advertisements that they claim are pure issue advertisements that would be affected by BCRA. As I have already concluded that it is very difficult, if not impossible, to discern retroactively the true intent of an issue advertisement, *see supra* Finding ¶ 2.8.5, I do not engage in a similar parsing of these advertisements. I would note that it is very likely that these eight advertisements did influence federal elections because they refer to a federal candidate in a broadcast advertisement aired in close proximity to a federal election, and targeted to the candidate's electorate. *See supra* Finding ¶ 2.11.2. Moreover, Defendants, Defendant-Intervenors, and my own Findings cast doubt on Plaintiffs' assertion that these advertisements did not serve an electioneering purpose, *see, e.g., supra* Finding ¶ 2.8.5.2 (discussing trial lawyer advertisements around the Edwards/Faircloth election). Nevertheless, the primary definition of electioneering communication focuses on objective criteria precisely to avoid trying to guess the true intent of an advertisement. For the foregoing reasons even assuming these eight advertisements were pure issue advertisements, I do not find that they demonstrate overbreadth. Simply put, eight advertisements covering a pool of at least two election cycles-including both primaries and general elections-do not serve as 'powerful illustrations' of the overbreadth of BCRA's primary definition of 'electioneering communications.' McConnell Br. at 61.

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[101] *See supra* Finding ¶ 2.8.5.2 (discussing this advertisement).

2.11.4 Defendants identify an additional 39 advertisements Plaintiffs use in their briefings as examples of genuine issue advertisements which would be unfairly affected by BCRA's provisions. Gov't Opp'n at 77-94. Plaintiffs do not rebut this figure. In addition to these advertisements, I have found four additional advertisements alleged in declarations to be examples of legislative-centered advertisements that would be affected by BCRA.

2.11.4.1 For twelve of these advertisements, Plaintiffs provide the Court with no specific information regarding the dates they were run except that they were aired in 1994. These twelve advertisements were sponsored by the NRA and concerned the Brady gun law and a crime bill. NRA App. 885-88 [12 PCS]; *see also* LaPierre Decl. ¶ 21 [11 PCS] (stating only that the crime bill commercials were run in 1994). Without any information as to their airing dates, I am unable to reach any conclusion about them and therefore do not consider them. Thirteen other commercials, also sponsored by the NRA, would escape BCRA's effects because they were run in 2000 and referred only to President Clinton who was not a candidate for office at that time. NRA App. 914-16 [12 PCS]. Accordingly, I exclude from consideration these thirteen advertisements as well.

2.11.4.2 Another advertisement, sponsored by the ACLU, I exclude from consideration because it was clearly designed simply to provide the corporation standing to challenge BCRA. The ACLU cites, as an example, an advertising campaign directed at Speaker Dennis Hastert, who represents the fourteenth district of Illinois, run in March of 2002, urging him to bring the Employment Non-Discrimination Act (ENDA) to a full vote in the House. Murphy[102] Decl. ¶ 10 [3 PCS]; *see also* Text of advertisements, 3 PCS/ACLU 14-17. The advertisement was broadcast on multiple Chicago and Aurora, Illinois radio stations throughout the weekend of March 15-March 17, 2002. *Id.* Since the advertisement was run within thirty days of a primary election, the commercial would have constituted an electioneering communication under BCRA and would have violated BCRA because it was paid for with the general treasury funds of a corporation. *Id.* (observing that the 'ACLU also hoped to highlight the constitutional flaws of BCRA'). An internal ACLU document demonstrates that the ACLU's purpose in running the advertisement was to create a commercial that would violate BCRA. A March 10, 2002, e-mail from Laura Murphy, legislative director of the ACLU, to her colleagues, explained why the ACLU's March 2002 Hastert ad was run:

> Anthony wants the ACLU to be in a position to challenge Shays-Meehan when it becomes law as early as during the Easter recess. As you know the issue advocacy restrictions would select groups like the ACLU if we want to take out and [sic] ad 30 days before a primary or 60 days before a general election in broadcast, satellite or cable outlets. These ads would have to reach 50,000 people or more and would have to mention the name of a candidate. *Steve thinks that the ads that we ran during the 2000 election cycle would not qualify to give us clear standing to challenge the law.*
>
> Anthony wants us to run these ads and he has said that he has 501(c) 4 money to do them! I have a chart in my office, but I can also fax one to you from New York tomorrow 3-1-02, that show all of the primary dates around the country. When You [sic] get that, I need you

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[102] Laura W. Murphy has served as the ACLU's legislative director since 1993. Murphy Decl. ¶ 1 [3 PCS].

> to look at the states where there are primaries and see if *you can find a candidate whom we could target for an issue ad.* For example it is too soon to do an ad by Tuesday, but Tuesday, March 12 is the Texas primary and we could decide that Chet Edwards is on the fence about something and run an ad that says, 'Call Chet Edwards and ask him to support xyz.' Anthony said that he has money to pay for such an ad. Or we could target a Senator on election reform. Remember it does not have to be TV, as the broadcast restriction in Shays-Meehan covers radio as well. We would like to run these ads before the bill becomes law. WHICH ONLY GIVES US ABOUT TWO WEEKS TO PULL THIS TOGETHER!!
>
> Phil, I know you have been busy with the web crisis (which you did not tell me about), so you are probably crazed. But I was hoping that Greg could take the lead on finding the issue that will still be important in tow [sic] weeks where we can target a member and it will make sense. I think that the issue we pick should be a priority so that we do not waste 501(c)(4) money on something we are not really concerned about.

Email Message Attached as Ex. to Resps. of American Civil Liberties Union to Defendant's Second Set of Requests for Production of Documents, Ex. B; USA- ACLU-00003 [DEV 130-Tab 4] (italics added). Defense experts Krasno and Sorauf comment on the ACLU's Hastert advertisement:

> In short, BCRA is remarkably successful in differentiating between the vast majority of pure issue ads and candidate-oriented issue ads.
>
> Nevertheless, the ACLU has demonstrated with a commercial about gay rights, aired in House Speaker Dennis Hastert's district last spring before the GOP primary, that it is possible to deliberately create a pure issue ad that runs afoul of BCRA. This episode deserves special scrutiny, and we would emphasize several points. It is telling, from our perspective as students of elections and campaigns, that the ACLU was forced to fabricate its own example of a pure issue ad that would be improperly categorized by BCRA. Given the huge numbers of issue ads broadcast in 1998 and 2000, if plaintiffs are correct in their dire predications about how BCRA would damage free speech rights, it should have been easy to find numerous real-life examples to illustrate the same point. In fact, very few pure issue ads would have been affected by BCRA. Even more telling, however, the ad that the ACLU ran was designed in a specific way to trigger BCRA. It need not have done so.

Krasno and Sorauf Report at 62-63 [DEV 1-Tab 2]; *see also* Text of ads, 3 PCS/ACLU 16-17 (noting script of advertisement that the ACLU ran in the print media over this issue). Given this information surrounding the background of the ACLU advertisement, I exclude it from consideration.

2.11.4.3 Another advertisement run by the AFL-CIO, titled 'Sky,' criticized Members of Congress for a past vote. Mitchell Decl. Ex. 139 ('Sky'); *see also id.* ¶ 59 (failing to note whether there was any upcoming legislation related to the past votes that the advertisement might have been targeting). Similar to my conclusion above, I do not consider this advertisement because I find it to be electioneering.

2.11.4.4 Of the remaining twelve advertisements, four commercials are discussed in detail in other paragraphs of my Findings or the appendix to my opinion. *See* Findings ¶¶ 2.6.6.2 (ABC advertisement concerning penalties for child molesters), App. ¶ I.D.7.i, I.D.8.c (Anti-abortion commercial identifying Senators Kohl and Feingold); Findings ¶ 2.11.8.2 ('Deny' and 'Barker'). Another advertisement run by CBM was aired in response to commercials aired by the AFL-CIO to 'correct the issue debate and counter the distortions in the ads that we just saw.' Ryan Dep. at 74-75. Of the remaining seven advertisements, four are NRA-sponsored 30-minute 'news magazines' (titled 'California,' 'It Can't Happen Here,'[103] 'Million Mom March,' and 'Tribute'[104]), NRA Reply at 22-24, one was run by the Southeastern Legal Foundation,[105] 60-Plus Association, the Center for Individual Freedom, and the National Right to Work Committee, praising Senator McConnell's stance on campaign finance reform, McConnell Br. at 63, one was sponsored by the National Right to Life Committee and criticized Senator McCain's position on campaign finance reform, O'Steen Cross Exam. at 52, and one was a Chamber of Commerce-sponsored commercial aired in Utah which pointed out that a candidate had not taken a position on two competing drug prescription plans, Chamber/NAM Br. at 5.[106]

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[103] 'California' and 'It Can't Happen Here' are discussed in greater detail *supra*, App. ¶ I.D.8.h.

[104] 'Tribute' includes the following statement delivered by Charlton Heston:

> The NRA is baaaaaaack. [Much applause] All of this spells very serious trouble for a man named Gore. [Applause]. That leads me to that one mission that is left undone—winning in November. . . . So, as we set out this year to defeat the divisive forces that would take freedom away, I want to say these fighting words for everyone within the sound of my voice to hear and to heed and especially for you, Mr. Gore. 'From my cold dead hands.' [Much Applause].

NRA App. at 947 (emphasis in the original). The NRA states that this passage 'simply reflect[s] the NRA's practice of soliciting members by mentioning anti-gun politicians.' NRA Reply at 24.

[105] The Southeastern Legal Foundation is a 501(c)(3) organization, McConnell Second Amend. Compl. ¶ 36, which is exempt from BCRA's restrictions on electioneering communication. Final Rule, Electioneering Communications, 67 Fed. Reg. 65,190, 65,199-200 (Oct. 23, 2002) (to be codified at 11 C.F.R. 100.29(c)(6)).

[106] Defendants dispute the argument that this advertisement did not have an electioneering purpose based on the context in which the advertisement was run. Gov't Opp'n at 85-86. Defendants note the commercial was run only between November 1 and 6, 2000, when Congress was not in session. *Id.* at 85. The race was labeled a 'toss-up' by the Cook Report, and the advertisement's 'tag line—'Tell Matheson to make a decision. This issue is too important to ignore.'—played to the overall campaign theme that voters should elect someone who is decisive and who shares their values.' *Id.* The Chamber does not respond to these observations.

2.11.4.5 I have been able to find an additional four advertisements that were cited by Plaintiffs in declarations as being motivated by pending legislation and happened to run within the 30 or 60-day BCRA windows. (AFL-CIO's 'No Two Way,' 'Spearmint,' 'Spear,' and the Gun Owners of America's armed pilots advertisement). For purposes of this analysis I accept Plaintiffs' characterization of these commercials.

2.11.4.6 Given my finding that it is very difficult to determine the objective behind the advertisement without a thoroughgoing contextual analysis of the advertisement, *see supra* Finding ¶ 2.8.5, I do not attempt to parse these remaining sixteen advertisements to determine if their true purpose was to affect an election. I make this statement even though I recognize that these advertisements likely did influence the election by virtue of referring to a federal candidate, in close proximity to a federal election, and targeted to the candidate's electorate, *see supra* Finding ¶ 2.11.2, and even though Defendants, Defendant-Intervenors, and my own Findings demonstrate that some of these advertisements were likely electioneering, *See, e.g., supra* Finding ¶ 2.6.6.2 (discussing ABC's advertisement on a candidate's record on child molestation legislation). Rather, I simply conclude that the evidence of these advertisements cited in Plaintiffs briefing is not sufficient to render BCRA overbroad. If Plaintiffs were correct, that BCRA would have such an indelible effect on their ability to advertise about issues of importance to their organization, I would have expected a more robust showing; particularlywhen the examples they submitted are from as far back as 1996 and include advertisements aired in close proximity to both primary *and* general elections. As a result of all these considerations, I conclude that these remaining sixteen advertisements do not demonstrate BCRA's overbreadth; even if taken in conjunction with the eight advertisements raised by the McConnell Plaintiffs and discussed *supra*.

2.11.5 The AFL-CIO Plaintiffs have adopted a similar tactic as the McConnell Plaintiffs in regard to primary elections and attempt through a series of examples to show that BCRA's thirty day window is overbroad. The AFL-CIO Plaintiffs have put forth a number of advertisements which they claim are 'genuine issue advertisements' relating to pending legislation that BCRA would capture because they ran on television and radio within 30 days of a primary election. AFL-CIO Br. at 10-11 (citing Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59). Instead of discussing these at length in my Findings, I have analyzed them in my Appendix. *See* App. ¶¶ II.A.[107]

2.11.5.1 These AFL-CIO examples constitute 336 cookie-cutter advertisements selected from a pool of at least three different election cycles. Of this number, I determine that only 50 of these advertisements would have been arguably affected by BCRA. *Id.* ¶ II.A.10. While I have some doubt that all of these fifty remaining advertisements were designed purely to influence the pending legislative debate and not a primary election outcome, given my finding that discerning

the true intent behind an advertisement is nearly impossible without a fulsome understanding of the context in which the advertisement ran, *see supra* Finding ¶ 2.8.5, I do not attempt to make that judgment with these advertisements even though they likely had that effect given their content and timing. *See supra* Finding ¶ 2.11.2. Given these factors and the fact that at best the AFL-CIO Plaintiffs were only able to find fifty advertisements that would be affected by BCRA out of federal primary elections covering at least three election cycles, I conclude that the AFL-CIO Plaintiffs have not shown that BCRA's thirty day period is overbroad. Moreover, the record contains other evidence that demonstrates that the thirty day primary window is narrowly tailored.

2.11.5.2 Defendants' experts comment that the

> hodgepodge of different primary dates makes it difficult to factor [the 30 day primary window] into the analysis, but we are confident that it would have little effect on the proportion of pure issue ads incorrectly captured by BCRA for the simple reason that so few of these advertisements mention candidates at all. Indeed, our examination of 1998 shows this to be true: no pure issue ads would have been captured by the 30-day primary period.

Krasno and Sorauf Expert Report at 61 [DEV 1-Tab 2].

2.11.5.3 The experts' thesis is substantiated by empirical evidence regarding the thirty day period. Defendant Intervenors are the only party that conducted a study of the data to determine the impact of BCRA on advertisements run during the 2000 primary election period. Def. Int. Reply at 59. They found 76 distinct advertisements, which aired more than 60 days before the election from the CMAG database, comprising 16,916 airings. *Id.* at 59 & n.201. Of these advertisements, three percent of the airings (522 out of 16,916) named a candidate and were aired within 30 days of the candidate's primary. *Id.* at 59 & n.202. Examining the student codings, the Defendant Intervenors found the majority of the advertisements had been deemed 'electioneering,' resulting in a finding that of the advertisements identifying a candidate and airing within 30 days of a 2000 primary election, 1.2 percent were 'genuine issue advertisements.' *Id.* at 59. As none of the other parties submitted any study dismissing these results or objecting to Defendant-Intervenors' study, I accept the conclusions reached therein. As I have already found that candidate- centered issue advertisements are used to influence primary elections, *see* Findings ¶¶ 2.6.5.5, 2.10.2 (Pennington), 2.6.6.5 (New Hampshire Presidential primary advertisement referencing Senator McCain), I conclude that on the basis of my Findings relating to the AFL-CIO advertisements, Defense experts Krasno & Sorauf's results, and Defendant-Intervenors' analysis, BCRA's thirty day window is narrowly tailored.

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[107] The AFL-CIO Plaintiffs also cite to a handful of advertisements that they claim are pure issue advertisements that would appear within the sixty-day period. I have already discussed these in my findings on the McConnell Plaintiffs' twenty-one advertisements, in the context of the thirty-nine advertisements spotted by Defendants and Defendant-Intervenors in their briefing, and with regard to the four additional advertisements that I found reviewing Plaintiffs' submissions.

2.11.6 As discussed in this section, Plaintiffs have focused on examining the intent behind their advertisements to demonstrate BCRA's purported overbreadth. However, Plaintiffs have not been able to provide any evidence to support this position that is not either self-serving testimony or evidence rebutted by contrary evidence.

2.11.7 There is a disputed issue of fact about whether advertisements that name a federal candidate, are aired in that candidate's electorate, and broadcast in close proximity to the candidate's election are ever pure issue advertisements. Given this disputed issue, I cannot agree with Plaintiffs that the primary definition of electioneering communication is overbroad.

2.11.7.1 Political consultants testify that there is minimal utility in running a genuine issue advertisement in the 60 days before a federal election. As a result, issue advertisements run in that time frame are most likely designed to influence the outcome of a federal election. Pennington Decl. ¶ 10 [DEV 8-Tab 31] ('Parties and interest groups would not spend hundreds of thousands of dollars to run these [soft money] ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after.'); Lamson Decl. ¶ 6 [DEV 7-Tab 26] ('These 'issue ads' generally stop on the day of the election.'); Strother Decl. ¶ 7 [DEV 9-Tab 40] ('[T]hese issue advertisements were run when there were no pending elections. For these true issue ads, we specifically avoided the months right before the election because (a) air time would be more expensive; and (b) each ad would just become part of the election season gumbo and viewers would assume that it was just another election-related ad.'); Strother Cross Exam. at 70-71 [JDT Vol. 32]; Bailey Decl. ¶ 12 [DEV 6-Tab 2]. Plaintiffs have provided no contrary political consultant testimony to rebut these conclusions.

2.11.7.2 Defense expert testimony confirms the political consultants' view that it is impractical to run genuine issue advertisements in the weeks leading up to an election, unless you are aiming to influence a federal election. Dr. Goldstein states:

> One concern sometimes raised by those opposed to the BCRA regulations is that the restriction may harm interest groups by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics. There is no reason to believe that BCRA would significantly hinder interest groups from effectively getting out their messages on public policy issues. Running genuine issue ads near an election does not increase the effectiveness of those ads; in fact, it is likely that the ads' effectiveness actually decreases. . . .
>
> In addition to being less effective at conveying their messages, issue ads run close to an election are also less cost-effective, since the price of scarce television and

radio air time is higher near an election than during the rest of the year.

Goldstein Expert Report at 32-33 [DEV 3-Tab 7]; *see also infra* App. ¶ I.C.8; Magleby Expert Report at 20 [DEV 4-Tab 8] ('In contrast, genuine issue ads are more likely to run earlier since rates are cheaper and proximity to an election is less important.'); Krasno and Sorauf Expert Report at 57 [DEV 1-Tab 2] ('Pure issue ads are more likely to respond to the congressional calendar or an advertising strategy unrelated to an election.').

2.11.7.3 Plaintiffs' experts dispute the Defense experts' position and contend that it is effective and necessary for corporations and labor unions to spend general treasury funds on broadcast advertisements in the weeks before an election that mention the name of a federal candidate and are targeted to the candidate's electorate. Monroe Decl. ¶¶ 18-19 [10 PCS] ('The defendants in this proceeding have argued that ads run near the time of an election are evidence that the association's actual intent is to advocate the election of one candidate or another. However, there are other, more valid, explanations for the timing of our advertising. One is that serious legislative initiatives or regulatory proposals often are considered near the time of elections. Also, it is clear that members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near. If that is the time when people will listen, that is the time to speak. And once an election occurs, there seems to be a period of fatigue during which political matters are of less interest, making issue ads then less effective.'); Huard Decl. ¶ 10 [10 PCS] ('NAM has run issue ads at times when no election was impending. In broad terms, however, Americans tend to have greater interest in political matters as an election approaches. At the same time, elected officials are most attuned to the views of their constituents in the pre-election period. Thus, for many purposes, the pre-election

season is a critical time for issue ads. Conversely, after an election public interest in public policy matters fades, perhaps due to fatigue. Then, few issue ads are run soon after an election.'); Murphy Decl. ¶ 12 [3 PCS] ('Finally, it is important to emphasize that the blackout periods imposed by the BCRA-60 days before a general election and 30 days before a primary-are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of this debate occurs against the backdrop of pending legislative action or executive branch initiatives. Some of the President's or Attorney General's boldest initiatives are advanced during election years-often within 60 days of a general election. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period.'); *but see supra* Finding ¶ 2.11.4.2 (only example of a pure issue advertisement created by ACLU that would be effected by BCRA was intentionally created to violate BCRA in order to provide ACLU with standing to challenge law).

2.11.7.4 Plaintiffs' expert Dr. Gibson agrees that running issue advertisements in proximity to federal elections is effective; however, he does not respond to Defendants' expert's view that commercials aired close to an election are more expensive, or the fact that genuine issue advertisements tend to air in conjunction with the legislative calendar as opposed to the federal election cycle. *See infra* App. ¶ I.C.8.

2.11.8 On the basis of this dispute and my earlier Findings, I disagree with Plaintiffs' claim that the legislative calendar can necessitate the running of issue advertisements during the final days of an election campaign that refer to a federal candidate and are targeted to the candidate's electorate.

2.11.8.1 Many deponents merely state that 'serious legislative initiatives or regulatory proposals often are considered near the time of elections,' without providing actual examples of advertisements run in response to the legislative activity. Monroe Decl. ¶ 18 [10 PCS]; *see also* Huard Decl. ¶ 11 [10 PCS] ('[I] ssue ads supporting a particular tax bill may well be needed as the bill approaches a vote. If it happens that primaries or elections are imminent, that does not diminish the need to be ableto speak out right then.'); Murphy Decl. ¶ 12 [3 PCS] (commenting that 'the blackout periods imposed by the BCRA . . . are often periods of intense legislative activity,' noting consideration of the Homeland Security Department bill occurred within 60 days of the 2002 election, but listing political activities conducted that would not have been affected by BCRA). This evidence is so general that, even if I were to consider Plaintiffs' point valid, I would find that it was not probative.

2.11.8.2 While two other organizations provide examples of advertisements run about legislative issues that were actually pending before the legislature, this testimony does not demonstrate that the primary definition of electioneering communication is overbroad. Other than the AFL-CIO and the Gun Owners of America ('GOA'), no other groups examples were provided of advertisements run in the 60 days prior to an election or 30 days prior to a primary directly addressing pending legislative activity. The examples from the AFL-CIO included advertisements regarding an 'upcoming budget fight over education programs' in September 1996. Mitchell Decl. ¶ 41 & Ex. 59 [6 PCS] ('No Two Way').[108] The labor group also ran commercials between

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[108] The FEC's investigation of the AFL-CIO's 1996 political advertisement concluded that

> [i]n the nine flights broadcast between late June and mid-September, 1996, the advertisements would criticize the incumbent member of Congress named therein, frequently in harsh terms, about his or her record on the issue that was the subject of the advertisement. However, with the exception of a flight of advertisements on the topic of the minimum wage that aired in late June and early July, 1996, there was no clear connection between

September 21 and 25, 1998, in eight congressional districts, opposing 'fast track' trade legislation, which was scheduled for a vote in the House of Representatives on September 25, 1998. Mitchell Decl. ¶ 52 & Ex. 116 [6 PCS] ('Barker'). During the same month, the AFL-CIO also ran a 'flight of broadcasts' aimed at a scheduled Senate vote on HMO legislation that the AFL-CIO considered to be inadequate, *id.* ¶ 51 & Exs. 105-07 ('Deny'), and opposing the Taxpayer Relief Act which had been recently marked up by the House Ways and Means Committee, *id.* ¶ 52 & Exs. 108-09 ('Spearmint' and 'Spear'); G. Shea Decl. ¶ 43 [7 PCS]. In 2002, the GOA ran a radio advertisement in New Hampshire within 30 days of the primary election for the New Hampshire Republican U.S. Senatorial nominee, which supported legislation allowing airline pilots to be armed. Declaration of Lawrence D. Pratt ¶ 5.

2.11.8.3 As I have stated throughout, it is nearly impossible to determine retroactively the objective behind an issue advertisement, see supra Finding ¶ 2.8.5, and consequently, I do not attempt to engage in an analysis of the true intent behind these advertisements, even though it is highly likely that these advertisements influenced the election on the basis of their content and timing, *see supra* Finding ¶ 2.11.2. Rather, I conclude that this minimal showing from the AFL-CIO and GOA does not provide a basis for concluding that the primary definition of electioneering communication is overbroad.

> the content of the advertisements and any legislation that was then the subject of intensive legislative action at the time of the advertisements.

General Counsel's Report, MUR 4291 (Jun. 9, 2000) at 5-6 [DEV 52-Tab 3]. The AFL-CIO responds, stating that 'No Two Way' was 'broadcast in order to influence the 'upcoming budget fight on education programs' and referred to related past votes to make its point.' AFL-CIO Reply at 4 n.3 (quoting Mitchell Decl. ¶ 41 [6 PCS]).

2.12 *Expert Reports on BCRA's Effect on Political Advertising*

Plaintiffs have not produced any studies of their own analyzing BCRA's purported effect on pure issue advertising. Instead, as discussed above, Plaintiffs prefer to rely on picking out advertisements they claim are pure issue advertisements affected by BCRA and criticizing studies relied on by Congress during their deliberations that Defendants have produced for the litigation. In my Appendix, I describe the various expert reports purporting to demonstrate the problems created by issue advocacy advertisements affecting federal elections, as well as the narrow tailoring BCRA has achieved to avoid affecting federal non-electioneering advertisements. *See infra* Appendix. My Appendix examines the criticism of these studies. *id.* Overall, I find that much, though not all, of the relevant evidence presented by the Defendants has merit and has not been discredited by Plaintiff's expert, Dr. Gibson, whose criticism focused on the *Buying Time* studies.

2.12.1 At the outset, it is clear that the data underling a majority of the studies, provided by CMAG, is not without its limitations. App. ¶ I.A. I am aware that CMAG's coverage is not universal, that advertisements can be, and apparently are missed, and that some information may not be present on the four-second snapshot storyboards. *Id.* ¶ I.A.3. The most notable deficiency in the data appears to be its inability to identify different 'cookie cutter' advertisements (advertisements identical except for mentioning different candidates). *Id.* Despite pointing out these gaps, Dr. Gibson has not demonstrated how these shortcomings affect a majority of the conclusions that can be drawn from the CMAG data. *Id.* ¶ I.A.4. Furthermore, Plaintiffs have failed to demonstrate that the efforts taken by experts to remedy the 'cookie cutter' effect for their studies were deficient. *Id.* In addition, no evidence has been presented that the data is biased in one way or the other based on the fact that CMAG does not cover 20 percent of American households or local cable channels. *Id.* Dr. Gibson's hypothesis that the CMAG is more likely to miss 'genuine issue advertisements' is pure conjecture, and contradicted by Dr. Goldstein's testimony regarding the overinclusive nature of the advertisements provided to CMAG by CMR. *Id.* ¶ I.A.3. Finally, the evidence shows that CMAG is used as the basis for many political science studies which are peer-reviewed and published by the top political science journals in the country, and is a regular resource for politicians and political parties. *Id.* ¶ I.A.5. Given the widespread acceptance of CMAG in academic and political circles, and the fact that Plaintiffs were unable to demonstrate that its flaws result in bias, I accept the CMAG data as a legitimate source of data for use in studies seeking to understand the contours of political advertising, recognizing it has certain limitations.

2.12.2 The Annenberg studies, discussed in Findings ¶¶ 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.6 (conclusions), 2.8.2.1, *supra,* as far as I can discern, have not been challenged by anyone. In fact, as mentioned above, the record shows that Members of Congress, Defendants' experts, and even Plaintiffs' experts rely on the Annenberg Reports, and as such I find no reason not to accept their conclusions as well. *See* Findings ¶ 2.2.6 (Annenberg Center concluding *inter alia* that '[i]nstead of creating the number of voices *Buckley v. Valeo* had hoped, issue advocacy allowed groups such as the parties, business and labor to gain a louder voice' and that the 'distinction between issue advocacy and express advocacy is a fiction').

2.12.3 Dr. Goldstein provides an expert report based on his own findings derived from his own version of the CMAG data from the 2000 election, which he had updated since providing it to the *Buying Time 2000* authors. App. ¶ I.C. Unrebutted are his findings that: interest group advertising in 2000 was concentrated in so-called 'battleground' states; roughly 11 percent of candidate-sponsored advertisements in

2000 used express advocacy terminology; interest group advertisements, which identified a candidate in 2000, tended to be broadcast within the final 60 days of the election campaign, whereas those that did not identify a candidate were spread more evenly throughout the year; and interest group advertisements that mentioned candidates in 2000 were highly concentrated in 'battleground states.' *Id.* Dr. Goldstein's uncontroverted conclusions further demonstrate that BCRA's primary definition of 'electioneering communication' narrowly focuses on the key empirical determinants that separate genuine issue discussion from electioneering. I accept these uncontroverted findings.

2.12.4 Plaintiffs have attempted to discredit the *Buying Time* reports specifically through the expert reports of Dr. Gibson. Dr. Gibson presents various criticisms of the reports in an effort to have the Court dismiss them or find Dr. Gibson's alternative conclusions more acceptable. The effort is not unlike that of a piñata party: if one hits the piñata enough, it will eventually crack apart. Although some of these 'hits' have merit, I point out that neither Plaintiffs nor Dr. Gibson have attempted to conduct their own similar study, or even replicate a discrete portion of the *Buying Time* studies, despite the fact that the underlying materials were provided to them by Defendants. Presenting the Court with contradictory results from such a study would have been far more persuasive than the recalculations of incorrect versions of the *Buying Time* data sets and the often conjectural and speculative criticism proffered by Plaintiffs and Dr. Gibson.

2.12.5 In terms of the *Buying Time* reports in general, I would not discount the studies because they were approached with a particular result in mind. The testimony shows that policy perspectives and effective scientific research are not mutually exclusive. App. ¶ I.D.7.b. The 'cleaning' of the data that Dr. Gibson finds suspicious appears, from the testimony, to be a necessary function for databases of the size produced

for the *Buying Time* reports and not the function of bias. *Id.* ¶ I.D.7.n. Fixing miscodings and resolving the 'cookie cutter' issues required such actions. *Id.* The confusion among the experts as to the correct database to use to analyze the studies' findings, *see id.* ¶ I.D.7.d, decreases the utility of Dr. Gibson's Expert Report, but also undermines the notion that the *Buying Time* authors manipulated the data in order to achieve their desired results. The fact that the Brennan Center maintained previous versions of the *Buying Time* data sets suggests that their changes were not part of an effort to introduce bias into the data set.

2.12.6 I also do not take issue with the studies' designers seeking to determine the mental perceptions of ordinary viewers. Studies based on subjective opinions are an accepted practice in the social sciences. *Id.* ¶ I.D.7.i. The evidence also demonstrates that although university students are not necessarily representative of society as a whole, relying on student impressions as the basis for academic conclusions is an accepted scholarly practice. *Id.* ¶ I.D.7.h.

2.12.7 Much, if not all, of the objective findings in the *Buying Time* reports have not been undermined by Plaintiffs' expert. For example, Plaintiffs have not challenged the findings in *Buying Time* that very few advertisements utilize express advocacy terminology, and that interest group advertisements, which identify candidates, are concentrated toward the end of the election campaign. *Id.* ¶ I.D.7.a. I find that this objective data is insulated from the great majority of criticism leveled at the *Buying Time* reports. *Id.* (Dr. Gibson commenting that '[e]ntirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad) present few threats to reliability.'). Furthermore, some of these results are supported by those of the unrebutted Annenberg Report 2001. *See id.* ¶ I.B.1.

2.12.8 However, I am troubled by the fact that coders in both studies were asked questions regarding their own perceptions of the advertisements' purposes, and that these perceptions were later recoded. *See, e..g., id.* ¶ I.D.8.c. When such changes are made, it is difficult to determine their effect on the findings in the reports. The principal casualty in this regard are the conclusions the *Buying Time* studies make regarding the percentage of'genuine' issue advertisements 'captured' by BCRA. *Buying Time 1998* finds that seven percent of genuine issue advertisements aired over the course of 1998 were aired in the final 60 days of the election campaign and mentioned a candidate, and Dr. Krasno determined that out of all of the advertisements identifying a candidate sixty days before the election, 14.7 percent were 'genuine' issue advertisements. *Id.* ¶ I.D.6.a, I.D.7.r.(2). Dr. Gibson found figures from the *Buying Time 1998* data ranging from 16 percent to 60 percent. *Id.* ¶ I.D.7.r.(3). *Buying Time 2000* finds that 0.6 percent of the advertisements aired in the final sixty days of the 2000 campaign which identified a candidate were 'genuine' issue advertisements. *Id.* ¶ I.D.6.b. The results from both *Buying Time* studies are based on coders' answers to the questions asking for their opinions on the commercials' purpose. *Id.* ¶ I.D.4.

2.12.9 For *Buying Time 1998*, it is clear that a small number of advertisements disputed in this litigation, which aired a considerable number of times, were coded as 'genuine' issue advertisements, but that the coders continued to fill out the survey sheets as if they had found the advertisements to be 'electioneering' commercials. *Id.* ¶ I.D.7.r.(3). This fact undermines Dr. Gibson's, Dr. Krasno's, and *Buying Time 1998*'s conclusions about the impact BCRA would have had on genuine issue advertisements over the course of 1998 or within the final 60 days of the election. I cannot determine based on the record which view of the student coding is correct, and as such I find this matter in dispute and do not accept either side's conclusion on this particular point.

2.12.10 *Buying Time 2000* suffers from a similar infirmity, although the reasons for the changes appear to be more the result of the authors' perceptions than on coding irregularities, *id.* ¶ I.D.8.c, and for that reason, I cannot accept its finding that, of all of the issue advertisements run within 60 days of the 2000 election that mentioned a candidate, 0.6 percent were genuine advertisements, *id.* ¶ I.D.6.b. However, Dr. Goldstein finds that if one includes all of the advertisements that Plaintiffs allege were recoded from genuine to electioneering commercials, the most 'conservative' calculation of advertisements aired in the final 60 days of the 2000 election also identifying a candidate, which were 'genuine,' is 17 percent. *Id.* ¶ I.D.8.c. This figure is not rebutted by Plaintiffs or their expert.

2.12.11 Dr. Gibson also argues that since the majority of advertisements coded as electioneering were also coded as having policy matters as their primary focus, the studies in fact demonstrate that the vast majority of advertisements captured by BCRA are genuine issue advertisements. App. ¶¶ I.D.7.p, I.D.8.e. I reject this argument. As Defendants' experts have clearly demonstrated, the fact that an advertisement may focus on issues does not preclude the possibility that the advertisement is designed to promote a candidate. *Id.* ¶ I.D.7.p. Dr. Lupia's beer commercial analogy illustrates this point effectively. *Id.* (Lupia observes that many beer commercials do not focus on the product, but rather people 'engaged in a range of activities that we can call 'wild nights out.'' Accordingly, it is not unreasonable to 'perceive that the purpose of the ad is to get' the viewer to buy the beer, 'but to judge its primary focus as wild times.') Furthermore, the results for candidate-sponsored advertisements demonstrate that even when a person running for office airs an advertisement in an effort to win election, he or she more often than not focuses those commercials on policy matters as a means of conveying a candidate's values and not directly on the personal characteristics of the candidates. *Id.* ¶ I.D.7.p;

see also supra ¶ 2.3.2 (Bailey) (Over time, a campaign defines a candidate through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these 'feels' to make up a campaign.').

2.12.12 In any event, I view these calculations as largely an academic exercise. The expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one person's genuine issue advertisement can be another's electioneering commercial. *Id.* ¶ I.D.7.i, I.D.8.c. Determining the purpose of an advertisement is a subjective enterprise, and that appears to be why BCRA's framers have used objective criteria to define 'electioneering communication.' Furthermore, as Dr. Lupia explains, these exercises can help us determine what BCRA's impact would have been on past behavior, but they do not necessarily tell us how BCRA will affect non-electioneering issue advertisements in the future. *Id.* ¶ I.D.7.r.(4).

2.12.13 I also address Dr. Gibson's assertion that 30,108,857 group-citizen genuine issue communications would have been affected by BCRA. App. ¶ I.D.7.q. Dr. Gibson applied gross rating point data to 707 of the 713 genuine issue advertisement airings Krasno and Sorauf found would be captured by BCRA to reach this figure. *Id.* Defendants have not responded to Dr. Gibson's calculation, in part because Dr. Gibson raises it for the first time in his rebuttal expert report. *Id.* Although 30 million group-citizen communications is certainly an impressive figure on its face, a closer inspection reveals that the figure is not as oppressive as it sounds.

2.12.13.1 First, these thirty million communications are airings of three distinct advertisements aired 707 times. Therefore, these 30 million communications actually

represent only three messages transmitted during programs whose aggregate viewership constitutes 30 million households. As Dr. Gibson has not provided a citation to the source of the gross rating point data he used, I cannot verify his figures. However, it is clear that one advertisement, 'HMO said no' represents the majority of the 707 airings, having been broadcast 118 times in Greensboro, 126 times in Raleigh-Durham, and 211 in St. Louis (I cannot determine where the other two advertisements, 'CENT/Breaux' and 'CCS/No Matter What' were aired). *Id.* ¶ I.D.7.r.(2) n.201. The data shows that even if 'HMO said no' had reached every household in Greensboro, Raleigh- Durham, and St. Louis with a television, the number of households receiving the message would be 2,529,450. *Id.* Given this calculation, and the lack of direction provided by the experts in this case, it appears that while 30 million genuine issue *communications* would have been affected by BCRA, the actual number of *households* affected is much lower, although not necessarily insignificant, because many of the 30 million households obviously received the group-citizen communications numerous times.

2.12.13.2 Second, Dr. Gibson provides no context for his 30 million communications figure. He does not discuss whether or not these 707 airings were received by a greater or lesser percentage of households than the other 4140 airings which were run within 60 days of the 1998 election and identified a candidate. If one takes the average number of households that received a single airing of one of the three genuine advertisements in 1998, 42,586 (30,108,857/707), and multiplies it by the total airings of commercials mentioning a candidate and run within 60 days of the election, the result is 206,414,342 group-citizen issue communications (42,586 *4847). This figure, admittedly not precise, demonstrates that the amount of group-citizen genuine issue communications (Dr. Gibson's 30 million figure) is likely a small proportion of the total amount of group-citizen issue communications captured by BCRA's 'electioneering communication' definition (represented by the 206 million communications figure above). In fact, this exercise is merely an amplification of the Krasno and Sorauf analysis and results in the same 14 percent figure that Drs. Krasno and Sorauf determined represents the amount of genuine issue advocacy that would be captured by BCRA. App. ¶ I.D.7.r.(2). Again, Dr. Gibson's 30 million communications figure could constitute a greater or lesser percentage of the universe of communications mentioning a candidate and airing within 60 days of the 1998 election, but I am given no basis for making such a determination.

2.12.13.3 Therefore, although I do not reject Dr. Gibson's calculation, I find that the record does not provide me with a sufficient basis for assessing its significance and therefore its utility for determining whether BCRA is overbroad is minimal at best.

2.13 *Conclusion*

Based on the extensive evidence presented in the record, it is entirely possible to distinguish pure issue advocacy from candidate-centered issue advocacy without relying on the listener/viewer attempting to discern the 'true' intent of the advertisement. These empirical determinants form the basis of the primary definition's objective test: issue advertisements that mention a federal candidate, are broadcast on radio or television, are aired in the candidate's electorate, and are aired in close proximity to a federal election. While there may be advertisements sharing these characteristics that are not intended to influence an election, the record demonstrates that as an objective matter advertisements sharing these characteristics influence the outcome of federal elections. When corporations and labor unions pay for these advertisements with general treasury funds, they are in violation of longstanding federal policy.

TITLE III: MISCELLANEOUS

3.1 The Federal Election Commission has recommended that Congress take measures to prevent contributors from using their minor children as a method of circumventing campaign finance laws. FEC Annual Report 1992 at 69 (recommending that Congress 'establish a minimum age for contributors' due to the FEC's finding that 'contributions are sometimes given by parents in their children's names') [DEV 14-Tab 1]; FEC Annual Report 1993 at 50 (recommending that Congress adopt a 'presumption that contributors below age 16 are not making contributions on their own behalf' due to the FEC's finding that 'contributions are sometimes given by parents in their children's names' and noting that 'Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another') [DEV 14-Tab 2]; FEC Annual Report 1994 at 56 (same) [DEV 14-Tab 3]; FEC Annual Report 1995 at 56 (same) [DEV 14- Tab 4];FEC Annual Report 1996 at 55-56 (same) [DEV 14-Tab 5]; FEC Annual Report 1997 at 54 (same) [DEV 15-Tab 6]; FEC Annual Report 1998 at 44 (same) [DEV 15-Tab 7]; FEC Annual Report 1999 at 50 (same) [DEV 15-Tab 8]; FEC Annual Report 2000 at 43 (same) [DEV 15-Tab 9].

3.2 The Thompson Committee Majority Report recommended precluding 'those ineligible to vote ... from making contributions to candidates for federal office.' Thompson Comm. Report at 4506. The majority found 'substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors.' *Id.*

3.3 Senator Christopher Dodd stated on the Senate floor: 'Normally when we go out and solicit campaign contributions we do not limit it to the individual. We also want to know whether or not their spouse or their minor or adult children would like to make some campaign contributions. As long as such contributions are voluntary, then those individuals may contribute their own limit . . . .'' 147 Cong. Rec. S2933 (daily ed. Mar. 27 2001) (Sen. Christopher Dodd).

3.4 Senator McConnell testifies that he 'occasionally' asks donors who have given the maximum level of federal money to his campaign if they have family members who would be willing to contribute to the campaign as well. McConnell Dep. at 99-100 [JDT 19]. He also states that 'occasionally' donors send checks on behalf of their children. *Id.* at 132.

3.5 The evidence shows that at least four investigations into contributions made by minors were initiated in response to press articles. *See* Pre-MUR 318, 00890-933 [DEV 43-Tab 4]; *see also* FEC MUR 4254, FEC 119-0016 [DEV 43-Tab 4] (letter from a father under investigation to the FEC stating that the FEC's investigation relied on a newspaper article).

3.6 Defendants cite to 14 newspaper articles which discuss contributions by minors. *See* Alan C. Miller, Minor Loophole, L.A. Times, Feb. 28, 1999, reprinted in 148 Cong. Rec. S2146-S2148 (2002); David Mastio, The Kiddie-Cash Caper: Gifts from minors are the next big campaign loophole, Slate, May 21, 1997, INT013275-INT013280 [DEV 134-Tab 3]; Rise in student gifts begs question: Was law broken?, USA Today, May 20, 1997, at 12A, FEC101-0001 [DEV 134-Tab 3]; Chris Harvey, The Young and the Generous: Md. Children Give to Campaigns, Wash. Post, Nov. 20, 1995, at B01, FEC137-0009-0011 [DEV 134-Tab 3]; Alex Knott, Members Cash In on Kid Contributions, Roll Call, June 5, 1995, at A-1, reprinted in 148 Cong. Rec. S2146 (2002); Jerry Landauer, Kiddies Go Krazy Over Carter, Break Open Piggy Banks, Wall St. J., July 8, 1976, at 1, 27, FEC137- 0008 [DEV 134-Tab 3]; John Kruger, Youths 2-17 follow parents' lead in political contributions, The Hill, Nov. 27, 1999, INT013287 [DEV 42-Tab 2], at 1, 53; Michelle Malkin, Kiddie-case collections open fund-raising loophole, Seattle Times, May 27, 1997, INT013272-INT013274 [DEV 42-Tab 2]; Kid Stuff, Roll Call, June 15, 1995, INT013262 [DEV 42-Tab 2]; Youthful Donors, Political Finance and Lobby Reporter, June 14, 1995 [DEV 42-Tab 2], at 10; Kids count, especially in campaign gifts, The Knoxville News-Sentinel, June 11, 1995, INT013265-INT013266 [DEV 42-Tab 2], at F3; Karin Wahl-Jorgensen, Some Folks Channel Political Gifts Through Children, Plain Dealer, May 28, 1995, INT013282-INT01328 [DEV 42-Tab 2], at 9A; David Mastio, Students Donate to Candidates, Tulsa World, March 11, 1995, INT013258-INT013260 [DEV 42-Tab 2].

3.7 It is clear that not all campaign contributions by minors are in fact donations by their parents. *See, e.g.,* Decl. of Jessica Mitchell ¶ 9 ('. . . I made a contribution to [Tim Feeney's] campaign just recently, in the amount of Five Dollars.') [1 Echols ES Tab 5]; Decl. of Pamela Mitchell ¶ 20 ('I have never used my daughter's name, or any other person's, in making a political donation, in order to avoid limits that the law places on my ability to support candidates of whom I approve.') [1 Echols ES Tab 10].

3.8 There have been a number of instances where the FEC has found that individuals have made contributions in their children's names in violation of campaign finance laws prohibiting the making of contributions in the name of another person.

3.8.1 The FEC found that an individual violated campaign finance laws by 'making four (4) contributions—$1,000 each—to four (4) Federal campaign committees in the name of his infant son during the calendar years 1992 and 1993.' FEC MUR 4484, INT 15778 [DEV 52-Tab 5]. The four campaign committees either returned the funds or disclosed the contribution as a debt owed to the contributor in an amended quarterly report in response to inquiries by the FEC. *Id.* at INT 15826-29. The contributor and the FEC entered into a conciliation agreement that included a civil penalty of $4,000. *Id.* at INT 15789-94.

3.8.2 The FEC found that a contributor contributed $1,000 in the names of his two daughters, ages 4 and 8, on November 7, 1988, the same day he made a $1,000 contributions in his own name. FEC MUR 3268, INT 15612 [DEV 43-Tab 3]. The Commission elected not to pursue its case against the contributor, in part because he had pled guilty to criminal charges of defrauding investors and had filed for bankruptcy. *Id.* at INT 15613.

3.8.3 The FEC found that a contributor donated $4,000 in postage stamps in 1993 to a federal campaign committee in the names of his seven and eleven year old children. FEC MUR 4048, FEC119-0008-09 [DEV 43-Tab 5]. The FEC and the contributor entered into a conciliation agreement, pursuant to which the contributor agreed to pay a $7,500 civil fine. *Id.* at FEC 119-0012.

3.8.4 The FEC found that a contributor took money from the bank accounts of his one year old and three year old children to make three $1,000 contributions in their names to federal candidates. FEC MUR 4255, FEC 101-0046-47 [DEV 134-Tab3].

3.9 FECA does not require political committees to seek or report the age of contributors. Gov't Br. at 202.

3.10 The FEC states that it 'faces unique and significant practical problems in attempting to investigate and prove whether a child knowingly and voluntarily made a particular contribution and thus whether the child's parent violated the contribution limits. Gov't Amended Proposed Findings of Fact ¶ 794. In some cases, parents have refused to submit their children to FEC questioning. FEC MUR 4254, USA CIV00932 [DEV 43-Tab 4] (report explaining that parents refused to allow their children to be questioned). The Commission maintains that determining whether or not children of a certain age are capable of making 'knowing and voluntary' contributions is a subjective undertaking, made more difficult by parental influence and what the FEC deems

to be 'self- serving affidavits.' Gov't Amended Proposed Findings of Fact ¶ 794; FEC MURs 4252-4255, General Counsel's Report at 5, 10, USA-CIV00925, 930-31 [DEV 43-Tab4] ('[I]t is difficult to accept the notion that children as young as eight years old are capable of 'knowingly and voluntarily' making the decisions to contribute to political campaigns. However, in the absence of anything in the Commission's regulations such as a presumption that a young child may not make contributions this becomes a very subjective decision. In this matter there does not appear to be any choice but to accept the assurance affirmed by affidavits that these were knowing and voluntary decisions.'). The FEC also claims that '[q]uerying youngsters about their knowledge of politics and their relationship with their parents may threaten the privacy of the family.' FEC Findings of Fact ¶ 794. In support of this contention, the Commission proffers a letter from an attorney representing a family investigated by the FEC which states

> [my clients] believe that the general process of inquiry of the instant FEC Docket is unduly intrusive into the privacy of their family affairs
>
> . . . .
>
> By the very act of responding truthfully to the instant Interrogatories and Document requests, [my clients] must open up their efforts to conduct their family affairs, to inculcate civic and political virtues and to teach values to their children to scrutiny by public officials . . . . The untoward effects are to . . . invade privacy and private communications of husband and wife and of parents and children and possibly to create disruption in normal family functioning merely by responding to an apparently legitimate FEC inquiry.

FEC MUR 4254, FEC119-0017, 0021 [DEV 43-Tab 4].

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(61)

No. 02-1674 *et al.*

IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,[*]

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENTS

VOLUME III

FLOYD ABRAMS SUSAN BUCKLEY BRIAN MARKLEY CAHILL GORDON & REINDEL LLP 80 Pine Street New York, NY 10005 (212) 701-3000	KENNETH W. STARR *Counsel of Record* EDWARD W. WARREN KANNON K. SHANMUGAM KIRKLAND & ELLIS 655 Fifteenth Street, N.W. Washington, DC 20005 (202) 879-5000

(*additional counsel on inside cover*)

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
1215 Cliffwood Drive
Goshen, KY 40026
(502) 473-7557

Counsel in No. 02-1674

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III. CONCLUSIONS OF LAW

I find it most appropriate to discuss BCRA's Title II first, before turning to my discussion of Title I, and the other remaining provisions of BCRA that are addressed in this opinion.

I. Title II: NONCANDIDATE CAMPAIGN EXPENDITURES

Sections 201, 203 and 204: The Prohibition on Electioneering Communications

The McConnell, NRA, Chamber of Commerce, NAB, and AFL-CIO Plaintiffs all challenge the prohibition on corporate and labor disbursements for electioneering communications. These Plaintiffs also challenge both definitions of 'electioneering communication' (the primary definition and the fallback definition).

As discussed in the *per curiam* opinion, FECA Section 441b prohibits corporations and labor unions from using their general treasury funds on contributions or expenditures in connection with a federal election. 2 U.S.C. § 441b. Sections 203 and 204 of BCRA extend this prohibition to 'electioneering communication.' BCRA provides for two definitions of electioneering communication—a primary definition and a backup definition to be substituted in the event the main definition is held to be constitutionally infirm. Given the uncontroverted record of abuse and circumvention of the longstanding prohibition of Section 441b, I find the primary definition of electioneering communication, and the corresponding restrictions in sections 203 and 204, constitutional. As a result, I find BCRA's restriction on the ability of corporations and labor unions to spend general treasury funds on electioneering communications to be facially constitutional as a matter of law, including its application to section 501(c)(4) and section 527(e)(1) corporations that do not receive an *MCFL* exemption.

As my opinion on the constitutionality of the primary definition does not command a majority, I am cognizant that the majority who have found the primary definition unconstitutional must tackle the constitutionality of the backup definition of electioneering communication. To that end, I concur in the judgment reached by Judge Leon's opinion on this question. Accordingly, the final judgment of the three-judge District Court panel reflects my support of his opinion as an alternative to my own finding that the primary definition of electioneering communication is constitutional. Given my view of the constitutionality of the primary definition, I have no further occasion to consider the constitutionality of the backup definition.

A. *Introduction*

For close to one hundred years the political branches have made the choice, consistent with the Constitution, that individual voters have a right to select their federal officials in elections that are free from the direct influence of aggregated corporate treasury wealth and-for over fifty years-free from the direct influence of aggregated labor union treasury wealth. The rationale for the prohibition is simple, persuasive, and longstanding. First, such a restriction 'ensure[s] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions.' *FEC v. Nat'l Right to Work Comm. ('NRWC'),* 459 U.S. 197, 207 (1982). Second, such a prohibition 'protect[s] the individuals[,] who have paid money into a corporation or union for purposes other than the support of candidates[,] from having that

money used to support political candidates to whom they may be opposed.' *Id.* at 208. In other words, when corporations and labor unions spend their general treasury funds to influence federal elections, our coordinate branches have stated that they must use segregated funds voluntarily and deliberately committed by individual citizens for that purpose.

Since 1996, this longstanding prohibition has become a fiction, with abuse so overt as to openly mock the intent of the law. The record persuasively demonstrates that corporations and unions routinely seek to influence the outcome of federal elections with general treasury funds by running broadcast advertisements that skirt the prohibition contained in section 441b by simply avoiding *Buckley*'s 'magic words' of express advocacy. In enacting Title II, Congress responded to this problem by tightly focusing on the main abuse: broadcast advertisements aired in close proximity to a federal election that clearly identify a federal candidate and are targeted to that candidate's electorate. In devising Title II, Congress has returned to a regime where corporations and labor unions must use federal money from a separate segregated fund explicitly designated for federal election purposes when seeking to influence federal elections.[109]

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[109] In this manner, Title II neatly dovetails with the nonfederal funds prohibitions contained in Title I. Whereas the political parties have expressed their frustration that Title I will diminish their importance relative to special interest groups, *see, e.g.*, RNC Br. at 13, Title II ensures that these special interest organizations, except those explicitly qualifying for *MCFL*-status, will have to run broadcast advertisements that influence a federal election with the same federal dollars that the political parties will have to use to pay for their advertisements (except that BCRA increases the amount of federal money that the parties can raise relative to their special interest counterparts).

Indeed, the record conclusively establishes that the 'magic words' of express advocacy identified in *Buckley* are rarely used in any form of electioneering advertisements in the modern political campaign. Findings ¶ 2.3. The perverse consequence of this situation is that advertisements that avoid express advocacy are not only the type of advertisements that political consultants generally employ for their candidate clients, they are also precisely the advertisements that corporations and labor unions, prior to BCRA, were permitted to run. Accordingly, as the record demonstrates, corporations and labor unions, with minimal effort, were able to influence federal elections with their general treasury funds; a practice long prohibited by Congress and contrary to that enforced by the judiciary.

It is for these reasons, particularly given the overwhelming record in this case, that I find facially constitutional the prohibition in Title II on corporations and labor unions using general treasury funds for electioneering communications.

B. *Standard of Review*

Plaintiffs first contend that both *Buckley* and *MCFL* foreclose any Congressional regulation of speech that does not constitute express advocacy, and as a result, Title II fails as a matter of law because BCRA's restrictions on electioneering communication apply to broadcast advertisements that do not contain express advocacy. McConnell Br. at 51 ('*Buckley* and *MCFL* condemn Congress' regulation of speech that does not constitute express advocacy.'). In other words, Plaintiffs posit that the Court does not even need to reach the question of whether BCRA is narrowly tailored to serve a compelling governmental interest, because both *Buckley* and *MCFL* announce a substantive rule of constitutional law; namely, that Congress may not regulate any speech that does not qualify as express advocacy as that term has become known.

As a matter of law, and as discussed *infra*, I find Plaintiffs' argument on this point unpersuasive. Neither *Buckley* nor *MCFL* create a rule of substantive constitutional law whereby Congress can only regulate political speech containing words of express advocacy. Rather, *Buckley* and *MCFL* used the express advocacy standard as a means of construing otherwise unconstitutionally vague portions of FECA. As I do not view *Buckley* and *MCFL* as prohibiting future Congressional regulation of political speech, I reach the question of whether BCRA is narrowly tailored to serve a compelling governmental interest.

In turning to that question, it bears pointing out that the parties argue in their briefing about who bears the 'burden' in this litigation, with each side pointing the finger at the other. *Compare* Gov't Br. at 131 ('[Plaintiffs] efforts to shoulder [their] burden all fail.') *with* McConnell Reply at 32 ('Defendants incorrectly argue throughout their briefs that *plaintiffs* bear the burden of demonstrating that BCRA's ban on electioneering communications is overly broad.') (emphasis in original). Throughout this litigation, Defendants argue that Plaintiffs bear a burden of demonstrating that the law is substantially overbroad. Defendants contend that as Plaintiffs bring a facial challenge to these sections of BCRA, they must establish that the prohibition on corporate and labor union spending of general treasury funds on electioneering communications is substantially overbroad. *See Ashcroft v. ACLU,* 122 S.Ct. 1700, 1713 (2002); *Ashcroft v. The Free Speech Coalition,* 122 S.Ct. 1389, 1398-99 (2002). As the Supreme Court instructed in *Broadrick v. Oklahoma,* 'the Court has altered its traditional rules of standing to permit-in the First Amendment area-attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973) (internal quotation marks and citation omitted).

Plaintiffs wait until their reply briefs to address Defendants' salient argument on this point. McConnell Reply at 32, Chamber/NAM Reply at 4-5. Plaintiffs essentially argue that there are two kinds of facial challenges under the First Amendment. The first, involves statutes that injure 'third parties,' and involves the *Broadrick* line of cases. Chamber Reply at 4. The second facial attack is where 'a plaintiff invokes its own First Amendment rights in a way that subjects a statute to strict scrutiny.' Chamber/NAM Reply at 5 (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 381 & n.3 (1992); *Sec'y of State of Md. v. Joseph H. Munson, Co.,* 467 U.S. 947, 965-66 & n.13 (1984)). Plaintiffs argue that they belong in this latter category.

The difficulty with Plaintiffs' position, however, is that none of their submissions describe in specific detail any advertisements, referring to particular candidates in any races, that Plaintiffs intend to produce or air at any time in the future, and that would fall within BCRA's electioneering communication provisions. As such, it is difficult to argue that Plaintiffs have demonstrated affirmatively and concretely, in any kind of detail, the scope of their claimed First Amendment injuries.

Nevertheless, none of the parties dispute the fact that the framework for reviewing the constitutionality of these sections is strict scrutiny. Tr. at 252 (Waxman) ('The standard is strict scrutiny, there's no doubt about it. This is political speech. This is core political speech.'). Moreover, a number of Plaintiffs do have a history of using corporate and labor union general treasury funds to pay for electioneering communications.

In practical terms, given the way Defendants have argued this case, the debate over the 'burden' is largely academic. Defendants present their Title II arguments by primarily demonstrating that the law meets a strict scrutiny test. Indeed, to some degree, Defendants have essentially conflated the

strict scrutiny and substantial overbreadth inquiries. *See* Tr. at 251-52 (Waxman) ('And that brings us to the real constitutional issue, whether the burdens that Congress' new law imposes on speech are narrowly tailored to serve compelling public interests; or, more precisely, again because this is a facial challenge, whether plaintiffs have demonstrated that the new provisions are substantially overbroad in relation to their legitimate goals.'). Furthermore, as I find that the provisions in Title II are constitutional under this strict scrutiny review, the question of which party bears the burden is also largely irrelevant. Consequently, although I am convinced that Plaintiffs have not demonstrated that the 'electioneering communication' provisions in Title II are substantially overbroad, I analyze the law under the strictscrutiny framework consistent with Defendants' presentation in their briefing.

In undertaking this latter analysis, I will examine whether BCRA's restrictions on electioneering communications are narrowly tailored to serve a compelling public interest. Under this strict scrutiny review, I find that the restrictions on corporate and labor union spending on electioneering communications are constitutional at this facial challenge stage, meaning that BCRA's restrictions on political speech are narrowly tailored to serve a corresponding compelling governmental interest.

The remainder of my opinion on this question is divided into four parts. The first section contains my reasons for finding that express advocacy is not a constitutional requirement. On this point, I am joined by Judge Leon and therefore speak for the Court. The second portion provides my dissenting view that the primary definition of electioneering communication is narrowly tailored to serve a compelling governmental interest. In the third and fourth sections, I write for the Court and discuss my reasons for concluding that Plaintiffs' underbreadth argument and Plaintiffs' challenge to the 'media exemption' both lack merit.

C. *Express Electoral Advocacy is Not a Constitutional Requirement*

1. The Origins of the Express Advocacy Test

I conclude that in the context of regulating federal elections, Congress may restrict corporate and union spending on political speech which does not contain words of express electoral advocacy, provided that such restrictions are narrowly tailored to serve a compelling governmental interest. In condemning Title II, Plaintiffs insist that *Buckley* announced a substantive rule of constitutional law, such that Congress is forever prohibited from regulating any political speech that does not contain explicit words of express advocacy-even if the political speech being regulated is paid for with corporate or labor union general treasury funds. McConnell Opp'n at 38 ('*Buckley* thus leaves no doubt that its expressadvocacy test is a constitutional requirement.'). Plaintiffs provide very little textual analysis of the *Buckley* and *MCFL* decisions and instead overstate the extent of the *Buckley* holding to satisfy their purpose.

In reviewing Title II, it should be noted that none of the parties dispute the fact that the electioneering communication restrictions in Title II regulate more political speech than just express advocacy. Therefore, if I conclude that the express advocacy standard is forever enshrined in the Constitution, then the restrictions on electioneering communications in Title II would be condemned as a matter of law before any analysis of substantial overbreadth is even performed. In taking a step back and analyzing *Buckley* and *MCFL*, it becomes apparent, however, that the express advocacy standard devised by the Supreme Court in *Buckley* is not a substantive rule of constitutional law that operates as a *per se* restriction on future Congressional action.

In *Buckley*, the Supreme Court considered a provision of FECA that limited the amount of money individuals and certain groups could independently expend 'relative to' a clearly identified federal candidate.[110] *See Buckley*, 424 U.S. at 39-51 (discussing section 608(e)(1) of FECA). Section 608(e)(1) of FECA provided that '[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year *advocating the election or defeat of such candidate*, exceeds $1,000.' *Id.* at 39 (omission in original) (emphasis added). Prior to directly considering the constitutionality of section 608(e)(1), the Supreme Court stated that '[*b*]*efore* examining the interests advanced in support of [the provision's] expenditure ceiling, consideration must be given to appellants' contention that the provision *is unconstitutionally vague*.'' *Id.* at 40 (emphasis added).

In undertaking the vagueness inquiry, the Supreme Court was particularly troubled by the phrase 'relative to' as it appeared in the provision under consideration. *Id.* at 40-44. Observing that the law did not define the phrase, the Supreme Court found that '[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech unless other portions of [the provision] make sufficiently explicit the range of expenditures covered by the limitation.' *Id.* at 41-42. Interpreting the phrase in its context, the Supreme Court stated that the 'context clearly permits, if indeed it does not require, the phrase 'relative to' a candidate to be read to mean 'advocating the election or defeat of' a candidate.' *Id.* at 42.

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[110] More specifically, this provision in FECA 'prohibit[ed] all individuals, who are neither candidates nor owners of institutional press facilities and all groups, except political parties and campaign organizations, from voicing their views 'relative to a clearly identified candidate' through means that entail aggregate expenditures of more than $1,000 during a calendar year.' *Buckley*, 424 U.S. at 39-40.

Accordingly, the Supreme Court, used the context of the provision to make a 'first-cut' at construing the vague phrase 'relative to.'

Even with this clarification, however, the Supreme Court found that the vagueness inquiry was merely 'refocuse[d]'' and, thus, not completely resolved. *Id.* at 42. Confronted with the challenge of interpreting 'advocating the election or defeat of a candidate' the Supreme Court was once again concerned about an interpretation of the wording of the statute that covered more speech than was actually necessary. The Supreme Court remarked that:

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Id. In other words, the Supreme Court found that even if it was permissible to construe the phrase 'relative to' as the equivalent of 'advocating the election or defeat of a candidate,' the vagueness inquiry was not complete because such a construction did not provide a bright line between permissible speech and impermissible speech and had the potential to cause speakers to self censor genuine issue discussion in order to avoid violating the statute.[111]

In fact, to underscore its apprehension that its first narrowing construction was not satisfactory, the Supreme Court quoted a passage at length from *Thomas v. Collins,* 323 U.S. 516, 535 (1945):

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (quoting *Thomas,* 323 U.S. at 535). To satisfy its concerns, therefore, the Supreme Court further construed section 608(e)(1) to apply 'only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.' *Id.* at 44. In a footnote, the Supreme Court observed that '[t]his construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'' *Id.* at 44 n. 52. These phrases have come to be known as the 'magic words,' *see* Findings ¶ 2.1.1, because a communication that invokes one of these words unquestionably qualifies as express advocacy and falls within the ambit of FECA. Notably, even with this narrowing construction, the Supreme Court struck down section 608(e)(1) as unconstitutional under the First Amendment. *See id.* at 44-51.

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[111] The McConnell Plaintiffs seize on this quotation as immutable proof that express advocacy is somehow chiseled in stone as a constitutional requirement. McConnell Opp'n at 34 (Buckley's adoption of this bright line test 'was not merely an exercise in statutory construction.'). However, as is clear from the context in which this quotation was made, the Supreme Court in making this statement was observing that the phrase 'relative to' could not be remedied by a simple reference to the context of the provision, but rather, needed further narrowing before the vagueness concerns would be ameliorated.

The Supreme Court also imported the 'express advocacy' requirement into another provision of FECA that it found unconstitutionally vague. Section 434(e) of FECA required individuals and certain groups to disclose contributions and expenditures. Contributions and expenditures were each defined in terms of the use of money or other valuable assets 'for the purpose of influencing' the nomination or election of candidates for federal office. *Id.* at 77. The Supreme Court found that the phrase 'for the purpose of influencing' was unconstitutionally vague. *Id.* ('It is the ambiguity of this phrase that poses constitutional problems.'). Finding no legislative history to help guide the statutory analysis, the Court turned to construing the disclosure provision in such a manner so as '*to avoid the shoals of vagueness.*'' *Id.* at 78 (emphasis added).

When attempting to construe the phrase in relation to expenditures, the Court encountered 'line-drawing problems.' *Id.* To resolve this difficulty, the Supreme Court, again, interpreted the phrase in the same manner in which it had interpreted the vague portion of section 608(e)(1). *Id.* at 79 ('Although the phrase, 'for the purpose of . . . influencing' an election or nomination, differs from the language used in § 608(e)(1), it shares the same potential for encompassing both issue discussion and advocacy of a political result.'). As a result, the Supreme Court found that '[t]o insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way we construed the terms of s 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.' *Id.* at 80. So construed, the

Supreme Court held that section 434(e) was narrowly tailored to serve a sufficiently important governmental interest. *Id.* at 80-82.

Ten years later in *MCFL*, the Supreme Court again invoked the express advocacy test. *MCFL*, 479 U.S. at 248-49. In doing so, the Supreme Court gave insight into the reasoning behind the origins and purpose of the express advocacy test. The *MCFL* Court wrote that in *Buckley*, 'in order to avoid problems of overbreadth, the Supreme Court held that the term 'expenditure' encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'' *Id.* (quoting *Buckley*, 424 U.S. at 80). With this in mind, the Supreme Court turned to the question before it, which was whether the term 'expenditure,' as used in section 441b, was again vague. Having found that *Buckley* had adopted the express advocacy construction for the term 'expenditure' in the provision requiring disclosure of independent expenditures, it is not surprising that the Court found the term 'expenditure' for purposes of section 441b to also require the express advocacy construction. *Id.* at 249 ('We agree with appellee that this rationale *requires a similar construction* of the more intrusive provision that directly regulates independent spending. We, therefore, hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.') (emphasis added).

2. The Express Advocacy Test is Not a Substantive Rule of Constitutional Law

As is clear from the discussion above, both *Buckley* and *MCFL* explicitly invoked the express advocacy test *only* as a means of statutory construction. In *Buckley*, the Supreme Court was confronted with two different provisions of FECA that both presented vagueness challenges for the Court. As a result, the Supreme Court turned to the ''cardinal principle' of statutory interpretation ... that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'' *Zadvydas v. Davis,* 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson,* 285 U.S. 22, 62 (1932)); *see also Frisby v. Schultz,* 487 U.S. 474, 483 (1988) (observing the ''well-established principle that statutes will be interpreted to avoid constitutional difficulties'). I do not believe that in devising the express advocacy standard, the Supreme Court in *Buckley* was announcing an unalterable principle of constitutional law that would prohibit future congressional action directed toward express and issue advocacy. *See Wisconsin Realtors Ass'n v. Ponto,* 233 F. Supp. 2d 1078, 1085 (W.D. Wis. 2002) ('I am not convinced that *Buckley* was intended to work such a significant inhibition on future legislative efforts to address problems raised by the competing state interests and constitutional imperatives inevitably associated with express and issue advocacy.'); *Nat'l Fed'n of Republican Assemblies v. United States,* 218 F. Supp. 2d 1300, 1325 (S.D. Ala. 2002) ('The plaintiffs' second error is their insistence that *Buckley* held that all political speech other than express electoral advocacy lies beyond the reach of constitutional regulation, including disclosure requirements.'); *see also Va. Soc'y for HumanLife, Inc. v. FEC,* 263 F.3d 379,392 (4th Cir. 2001) ('[W]e are bound by *Buckley* and *MCFL,* which strictly limit the meaning of 'express advocacy.' If change is to come, it must come from an imaginative Congress or from further review by the Supreme Court.'). Rather, the *Buckley* Court was particularly concerned with construing vague provisions of a statute in order to avoid reaching difficult questions of constitutional law. In the case of section 608(e)(1), the Supreme Court was unsuccessful-even after construing the statute in an effort to avoid vagueness problems, the provision still failed to satisfy exacting First Amendment scrutiny. *Buckley,* 424 U.S. at 44-45. Whereas, in the case of section

434(e), the statutory construction successfully salvaged the statute which, as narrowed, bore 'a sufficient relationship to a substantial governmental interest.' *Id.* at 80.

The McConnell Plaintiffs argue that it is 'unfathomable' that Defendants would suggest the express advocacy test was not constitutionally ordained. McConnell Opp'n at 35-36 (quoting *Buckley,* 424 U.S. at 80) ('To insure the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way we construed the terms of § 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.') (emphasis removed). However, as the quoted language explicitly indicates, the Supreme Court *construed* the statutory language in an effort to save the provision from unconstitutional overbreadth. By adopting a narrowing construction to this vague provision, the Supreme Court easily found section 434(e) constitutional. *Buckley,* 424 U.S. at 80-82. Further diminishing the credibility of the McConnell Plaintiffs' argument is the fact that the *Buckley* phrase quoted by the McConnell Plaintiffs appears in the midst of a section the Supreme Court entitled 'Vagueness Problems.' *Id.* at 76.[112]

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[112] The McConnell Plaintiffs also offer the argument that because *Buckley* invoked First Amendment caselaw during its initial discussion of 'General Principles,' it was clear that *Buckley* was creating a rule of substantive constitutional law when it articulated the express advocacy standard. McConnell Opp'n at 37, McConnell Reply at 27 (citing *Buckley,* 424 U.S. at 14) (noting that *Buckley* cited *Mills v. Alabama,* 384 U.S. 214 (1966) and *New York Times v. Sullivan,* 376 U.S. 254 (1964)). However, Plaintiffs fail to point out that these citations appear in the section *'General Principles''* and were cited for the uncontroversial proposition that the 'First Amendment affords the broadest protection to . . . political expression.' *Buckley,* 424 U.S. at 14 (emphasis added). It defies logic to argue that because the Supreme Court invoked First Amendment caselaw for the proposition that FECA's restrictions on contributions and expenditures operate in the area of the most fundamental First Amendment

Accordingly, Plaintiffs' reasoning is faulty when they argue that the 'express advocacy doctrine reflects more than a concern about vagueness.' ACLU Opp'n at 4; *accord* McConnell Opp'n at 37 ('[I]t is nonsensical to read the opinion as merely addressing statutory vagueness.'). In adopting the express advocacy doctrine, the Supreme Court was engaging in statutory construction in order to avoid unnecessarily declaring specific portions of FECA unconstitutional. In fact, nowhere in *Buckley* or *MCFL* does the Supreme Court explicitly state that the express advocacy test is a constitutional requirement. Each time the Supreme Court has invoked the express advocacy standard it has done so in the context of construing a vague portion of FECA. I would expect that if the Supreme Court were announcing a substantive rule of constitutional law it would have stated it explicitly in either of these two cases.

Plaintiff ACLU takes a snippet of the *Buckley* opinion, and without offering any textual analysis of the case, argues that *Buckley*'s clear ruling is that 'the government's regulation of expenditures can only reach 'communications that in express terms advocate the election or defeat of a clearly identified candidate. . . .'" ACLU Br. at 13 (quoting *Buckley,* 424 U.S. at 44). However, the Supreme Court stated in full: 'We agree that in order to preserve the provision against invalidation on *vagueness grounds,* § 608(e)(1) must be *construed* to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.' *Buckley,* 424 U.S. at 44 (emphasis added). When the quoted portion appears in its full context, it appears obvious the extent to which Plaintiff ACLU has misconstrued *Buckley*'s words. The express

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rights, that the Court was implicitly-thirty pages later-hewing express advocacy into constitutional stone.

advocacy test in *Buckley* was merely an appropriate exercise in statutory construction.[113]

Plaintiffs are correct that the *Buckley* Court 'did not posit a bipolar world of issue advocacy and express advocacy.' However, they err in concluding that the Supreme Court, therefore, 'permitted regulation only where it is unmistakably clear that the speech at issue can only be characterized as express advocacy.' McConnell Br. at 49; *see also* ACLU Br. at 15 ('Only 'express advocacy' can be subject to regulation; issue advocacy is free from permissible regulation.'). As Judge Richard W. Vollmer recently observed:

> The Supreme Court in *Buckley* employed no such terminology and recognized no such dichotomy. Rather, the *Buckley* Curt [sic] saw political speech as comprised of 'issue discussion' and 'advocacy of a political result.' 424 U.S. at 79. This would represent only a semantic difference if 'advocacy of a political result' were confined to express electoral advocacy, for then 'issue discussion' would occupy the same territory that the

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[113] Plaintiff ACLU also states that Title II of BCRA applies to advertisements 'that merely 'refer' to a candidate' and that, as a result, Title II 'should be struck down.' ACLU Br. at 13. The ACLU's argument lacks merit because the primary definition of BCRA does not place a 'ban on communications that merely 'refer' to a candidate.' ACLU Br. at 13. Rather, BCRA prohibits corporations and labor unions from funding *broadcast advertisements* with *general treasury funds,* which *refer to a federal candidate, run in close proximity to an election* and are *targeted to the candidate's relevant electorate.* Corporations and labor unions are, of course, free to fund as many of these prohibited advertisements as they desire from their separate segregated fund. I doubt anyone disputes the proposition that had Congress enacted a law that had banned communications that 'merely 'refer' to a candidate' that such a law would be declared overbroad and unconstitutional. *Id.* However, the restriction related to electioneering communications in BCRA is much narrower than Plaintiff ACLU describes in its briefing and is targeted to communications that influence federal elections.

plaintiffs claim for 'issue advocacy'—that is, all political speech that is not express electoral advocacy.

> The *Buckley* Court, however, recognized that advocacy of a political result extends beyond express electoral advocacy . . . . The *Buckley* Court introduced express electoral advocacy as a benchmark to provide speakers the clear boundary that the statutory cap on independent expenditures otherwise lacked. *Id.* at 43-44. *If express electoral advocacy were the only form of electoral advocacy that exists, the Court would not have been concerned that speakers could not tell the difference between issue discussion and electoral advocacy;* the Court established the express electoral advocacy standard precisely because other forms of electoral advocacy exist but may prove difficult to distinguish from issue discussion. . . .

Nat'l Fed'n of Republican Assemblies, 218 F. Supp. 2d at 1324 (emphasis added). Plaintiffs are mistaken in their conclusion that in not establishing a 'bipolar world,' the Supreme Court has necessarily decreed a rule of substantive constitutional law. As Judge Vollmer points out:

> Electoral advocacy is not automatically immune from regulation *but, to the extent it cannot easily be distinguished from issue discussion,* it may be necessary to exclude electoral advocacy from regulation so as to avoid self-censorship by uncertain speakers and the resulting abridgement of issue discussion. The bright line of express electoral advocacy was required under Section 434(e), not because all speech falling short of express electoral advocacy is immune from regulation, *but because no other means of readily distinguishing electoral advocacy from issue discussion presented itself.*

Id. at 1328-29 (emphasis added). The point of *Buckley* and *MCFL* was not that Congress can only regulate express advocacy. Rather, the Supreme Court in these cases took a vague statute and construed it in such a manner so as to create a bright line because the statute itself did not provide any 'other means of readily distinguishing electoral advocacy from issue discussion.' *Id.* at 1329.

a. *Other Cases Cited by Plaintiffs Are Not Relevant or Are Distinguishable*

Plaintiffs' briefing, while heavy on hyperbole attacking Defendants' submissions, is incredibly light on textual analysis of the *Buckley* and *MCFL* opinions. Perhaps attempting to shift attention away from their lack of a robust discussion of *Buckley,* Plaintiffs attempt to bolster their position by citing to a series of lower court cases that Plaintiffs claim uphold the express advocacy standard as a rule of constitutional law. McConnell Br. 51-53. I acknowledge that there is some dicta in these cases which suggests that the express advocacy test is a constitutional requirement. Nevertheless, the language in these cases is dicta, is not binding precedent, and for the reasons discussed in this section, is unpersuasive.

The cases cited by Plaintiffs fall mainly into two categories. First, many of their cited cases involve courts striking down FEC regulations attempting to broaden the Supreme Court's express advocacy standard. Not surprisingly, courts rejected the FEC's efforts because neither they nor the Commission has the authority to redefine the statutory test. These courts correctly observed that Congress or the Supreme Court were the appropriate branches to undertake such steps. BCRA is therefore consistent with this strand of caselaw. The second grouping of cases involve federal courts striking down state statutes and state regulations that had a variety of constitutional defects. In these cases, the state statutes at issue all captured too much pure issue advocacy without fashioning an appropriate test that predominantly regulated electoral advocacy. BCRA differs from these state provisions in that with BCRA, Congress, supported by a plethora of evidence and experience, created a narrowly tailored definition of electioneering communication that is specifically focused on communications that influence federal elections.

With regard to the cases where courts struck down FEC regulations, the Commission, and not Congress, had sought to define express advocacy broader than the Supreme Court had permitted in *Buckley*. *See, e.g.*, *Va. Soc'y for Human Life*, 263 F.3d at 385, 392 (striking down FEC regulation 11 C.F.R. § 100.22(b) that defined express advocacy in such a manner so as to include communications that 'could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates'); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (summarily affirming district court decision to strike down same regulation); *Right to Life of Dutchess Cty., Inc. v. FEC*, 6 F. Supp. 2d 248, 253 (S.D.N.Y. 1998) (striking down same regulation). In relation to this broadly defined FEC regulation, these courts held that neither they nor the FEC had the authority to change the express advocacy test, concluding that to do so required further congressional or Supreme Court action. In fact only one decision concluded that the FEC could make such a regulation, *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), a case that has been largely discredited. *See, e.g.*, *Chamber of Commerce of the United States of America v. Moore*, 288 F.2d 187, 194 (5th Cir. 2002) (citing cases disagreeing with *Furgatch*). In attempting to create these regulations, the FEC's efforts produced provisions plagued with vague terms that raised the same concerns that troubled the *Buckley* Court, placing the speaker at the mercy of the subjective intent of the listener to determine if a communication was covered by FECA. *See Buckley*, 424 U.S. at 43 (''In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these

circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'') (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Indeed, the consensus among the judiciary has been that courts 'are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy.' If change is to come, *it must come from an imaginative Congress or from further review by the Supreme Court*.'' *Va. Soc'y for Human Life*, 263 F.3d at 392 (emphasis added).[114] Unlike the present case, the absence of further congressional action led these courts to strike down the FEC's regulation.

With regard to the second category of cases involving state law provisions, Plaintiffs refer to these decisions solely in a footnote. McConnell Br. at 53 n.20. These cited cases are each distinguishable because the state laws and regulations considered by the various courts each disregarded the principles of vagueness and overbreadth articulated in *Buckley* or reached too far in regulating issue advocacy. In *Chamber of Commerce*, the Fifth Circuit pointed out that the state statute at issue 'essentially adopted the language of the Supreme Court's decisions in *Buckley* and *MCFL* [which meant that the only decision that the court needed to reach was] to determine whether the Chamber's advertisements constitute 'express advocacy' under the standard articulated [in the state statute].' *Chamber of Commerce*, 288 F.3d at 196. Accordingly, for the court in *Chamber of Commerce*, the only decision to reach was whether the communications at issue in the case constituted express advocacy. There is some unexplained dicta in the case which states that the 'Supreme Court has held that the First Amendment permits regulation of political advertisements, but only if they *expressly* advocate the election or defeat of a specific candidate.' *Id.* at 190 (no citation provided). For the reasons articulated in this section, I expressly disagree with such dicta, presented without a thoroughgoing analysis of *Buckley* or any other support. *See Nat'l Fed'n of Republican Assemblies*, 218 F. Supp. 2d at 1329-30 (citing *Chamber of Commerce*) ('While some of these cases contain unexplained dicta arguably suggesting that express electoral advocacy is a universal, constitutional limitation on disclosure requirements, none so holds and none offers any textual analysis of *Buckley* that could support such a proposition.').

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[114] Other cases relied on by Plaintiffs concern other FEC regulations relating to voter guides. *Clifton v. FEC*, 114 F.3d 1309, 1317 (1st Cir. 1997); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991).

In another case cited by Plaintiffs, *North Carolina Right to Life, Inc. v. Bartlett*, the Fourth Circuit invalidated a North Carolina statute requiring political committees to make certain disclosures. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-713 (4th Cir. 1999). The *Bartlett* court found 'unconstitutionally vague and overbroad' a state statute that reached further than FECA in extending disclosure requirements to (1) groups that only incidentally engage in express advocacy and (2) groups engaging in issue advocacy. *Id.* In the same breath as it struck down the provision, the Fourth Circuit made clear that it would have first endeavored to save the provision like the Supreme Court did in *Buckley*. *Id.* at 712 ('The question then is whether we may similarly construe North Carolina's definition of political committee to save it from being void for vagueness.'). The court in *Bartlett*, therefore, only found that the North Carolina statute was not subject to a narrowing interpretation, not that the express advocacy test was a permanent fixture of constitutional law. However, to the extent some language in *Bartlett* could arguably lead in that

direction, I find it to be dicta unaccompanied by a serious textual analysis of *Buckley*.[115]

Plaintiffs also cite *Citizens for Responsible Government State Political Action Committee v. Davidson*, a case where the Tenth Circuit severed unconstitutional portions of a Colorado campaign finance law. The state law defined independent expenditure to include not only express advocacy, but also 'expenditures for political messages which unambiguously refer to any specific public office or candidate for such office.' *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187-88 (10th Cir. 2000). The term 'political message' was in turn defined as including messages delivered by telephone, by print or electronic media, or by any other written material that applied not only to express advocacy, but also to unambiguous references to candidates. *Id.* at 1188. The *Davidson* court found that as applied to the plaintiffs, the law encroached on legitimate issue advocacy, which 'is a violation of the rule enunciated in *Buckley* and its progeny.' *Id.* at 1194 (quoting *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000)). From the plain text of the Colorado statutes, the laws were aimed not just at electioneering, but also at pure issue discussion. No effort was made to draw a different line than had been drawn in *Buckley,* and as a result, the Tenth Circuit severed those constitutionally offensive portions. *Davidson* also contains unexplained dicta that 'the [Supreme Court in *MCFL*] clarified that express words of advocacy were not simply a helpful way to identify 'express advocacy,' but that the inclusion of such words was constitutionally required.' *Id.* at 1187. For the reasons set forth above, I disagree with this statement, and consider it to constitute unpersuasive dicta.

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[115] Indeed in distinguishing *Bartlett*, the court in *National Federation of Republican Assemblies* found:

> Only a single case cited by the plaintiffs clearly stands for the proposition asserted. In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), the Court stated that Buckley 'defined political committee as including only those entities that have as a *major purpose* engaging in *express advocacy* in support of a candidate.' *Id.* at 712 (emphasis in original). The Court offered no authority for this proposition, which is plainly contrary to *Buckley* and which is dicta in any event.

Nat'l Fed'n of Republican Assemblies, 218 F. Supp. 2d at 1330 (footnotes omitted).

The other cases Plaintiffs cite are equally unpersuasive. *See Iowa Right to Life Comm., Inc. v. Williams,* 187 F.3d 963, 968-970 (8th Cir. 1999) (striking down a state regulation defining express advocacy in a similar manner as 11 C.F.R. § 100.22(b) as unconstitutional because the focus of the regulation is on 'what reasonable people or reasonable minds would understand by the communication'); *Brownsburg Area Patrons Affecting Change v. Baldwin,* 1999 U.S. App. LEXIS 23325 at *5-*6 (7th Cir. 1999) (upholding Indiana disclosure statute after Indiana Supreme Court certified that statute applied only to organizations engaging in express advocacy). Indeed, the court in *Iowa Right to Life* grounded its decision on the fact that the 'State's definition of express advocacy creates uncertainty and potentially chills discussion of public issues.' *Iowa Right to Life,* 187 F.3d at 970.

After reviewing these cases, I am convinced that none of the cases cited above offer a convincing argument that express advocacy is a constitutional requirement. The vague and subjective terms associated with the provisions of FECA impelled the *Buckley* court to offer the express advocacy construction. In turning to BCRA, it is clear that the primary definition of electioneering communication does not present this problem.

3. The Primary Definition of Electioneering Communication is Not Vague

Unlike the vagueness concerns which motivated the Supreme Court in *Buckley* and *MCFL,* the primary definition of electioneering communication is not vague. Indeed, *none* of the Plaintiffs argued in their briefing or at oral argument that the primary definition presented any vagueness concerns. *See* McConnell Br. at 57-69; Tr. at 264-65 (Waxman) ('No one is arguing—I don't believethat any of the 82 plaintiffs in this case argue that the principal definition that is the four-part test, is vague in any respect. It's hard to imagine how it could be less vague.') (none of the Plaintiffs ever objected to this characterization). In other words, there is no vagueness challenge to the primary definition presently before the Court.

Plaintiffs make a number of general arguments in opposition to the primary definition: first, they contend that the primary definition fails because it regulates more speech than express advocacy, McConnell Br. at 44-57; second, they argue that even if express advocacy is not a constitutional requirement, the primary definition is unconstitutionally overbroad, McConnell Br. at 57-69; third, they argue that the primary definition of electioneering communications is 'woefully' underinclusive, McConnell Br. at 75-77; and fourth, they argue that the primary definition violates the Fifth Amendment, McConnell Br. at 77-81. *Nowhere,* however, do any of the Plaintiffs argue that the primary definition is vague. Given that among all of the seasoned political actors and organizations that comprise the remaining 77 Plaintiffs in this case, not one has argued that vagueness is a problem plaguing the primary definition, I could decline to engage in a vagueness inquiry. *See, e.g., Tri-State Hosp. Supply Corp. v. United States,* 142 F. Supp. 2d 93, 101 n.6 (D.D.C. 2001) ('The court makes no ruling on such acts, however, because the United States has not briefed the issue.'); *Carter v. Cleland,* 472 F. Supp. 985, 989 n.4 (D.D.C.

1979) ('This issue was not briefed by the parties. No decision will be rendered on it.'); *cf. Kattan v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) ('[T]his Court has recognized that a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously.'); *United States v. Wade*, 255 F.3d 833, 839 (D.C. Cir. 2001) (issues that are not briefed are considered 'abandoned') (*citing Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997)).

However, since Judge Henderson discusses the vagueness question in her opinion, *see* Henderson Op. at Part IV.A, I note that even were I to entertain the vagueness question, I would conclude that the primary definition of electioneering communication is free from any vagueness infirmities. The primary definition of electioneering communication, as set forth in section 201 of the Act, comprises four distinct elements, each designed to be clear, objective, limited in scope, and directly responsive to the evidence concerning recent electioneering by corporations and labor unions with their general treasury funds. An advertisement falls within the definition, and therefore would have to be funded with money from a labor union or corporation's segregated fund, if, *and only if*, it satisfies *each* of the following four elements:

> A. It is broadcast by television, radio, cable, or satellite. Newspaper advertisements, direct mail, billboards, phone banks, Internet advertisements, door-to-door canvassing, or leaflets are not covered by the primary definition.
>
> B. It refers to a 'clearly identified candidate' for federal office. Broadcast advertisements dealing with issues are not electioneering communications, unless the advertiser chooses to mention or show a particular federal candidate.[116]
>
> C. It runs in the 60 days before a general election, or the 30 days before a primary.
>
> D. The advertisement is *targeted* to the identified candidate's electorate. Specifically, the advertisement must reach at least 50,000 voters in a relevant state or district.

BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A); *see also* Def.- Int. Br. at110. In a case construing a new Wisconsin statutory provision very similar to the primary definition of 'electioneering communication,' Chief Judge Barbara B. Crabb makes the compelling point that the Wisconsin statute at issue in that case actually posed less of a vagueness problem than the express advocacy standard identified in *Buckley:*

> Whatever the potential constitutional flaws of Wisconsin's new reporting and disclosure scheme, vagueness does not appear to be one of them. In fact, the state legislature's approach appears to draw a line even brighter than the one established in *Buckley*. The law makes clear that once a certain dollar threshold is

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[116] The language in the statute, 'refers to a clearly identified candidate for Federal office,' BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A), does not suffer the same problems that the *Buckley* court had with FECA's 'relative to' language. Although, the definition of 'refer' shares 'relate' as a synonym, 'refer' is a much moreprecise word. Merriam- Webster's Collegiate Dictionary, Tenth Edition 1997 (defining refer as '1 a: to have relation or connection: RELATE b: to direct attention usu. *by clear and specific mention*.'') (emphasis added). Given that 'refers to' is a much more exacting word than 'relative to,' and given that none of the Plaintiffs have complained that there is any ambiguity with this wording, I find that this phrase does not suffer from the same vagueness problems that plagued FECA when the *Buckley* court construed the phrase 'relative to.'

> surpassed, the law's disclosure requirements apply to any communication referring to a clearly identified candidate that appears within 60 days of an election. *A copy of a proposed advertisement and a calendar are all that is necessary to make a conclusive advance determination that the ad is subject to regulation.* By contrast, the *Buckley* approach to express advocacy still leaves room for a degree of uncertainty because, as plaintiffs concede, the list of words and phrases identified in that opinion as constituting express advocacy is illustrative, rather [than] exhaustive. Therefore, in a later case involving the federal statute at issue in *Buckley,* the Court noted that the definition of express advocacy it adopted in *Buckley* would also cover a communication whose message 'is marginally less direct than 'Vote for Smith.'' *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). Just how 'direct' an exhortation must be to qualify as express advocacy under *Buckley* is not free of all uncertainty for would-be political advertisers.

Wisconsin Realtors, 233 F. Supp. 2d at 1086 (emphasis added). The same could be said of the primary definition of electioneering communication in BCRA. Electioneering communication is more certain and more explicitly defined than *Buckley*'s and *MCFL*'s explanation of express advocacy in that it provides objective criteria for potential political communicators to follow. Although there is no exhaustive list of words falling under the rubric of express advocacy, the electioneering communication definition is precise as to what communications are encompassed by its terms. Accordingly, I find none of the vagueness concerns identified by the *Buckley* Court present with regard to the primary definition of electioneering communication.

D. *The Evisceration of Section 441b*

1. Introduction

As discussed in the foregoing section, the Supreme Court in *Buckley* and *MCFL* construed FECA's restrictions on independent expenditures to apply only to expenditures containing words of 'express advocacy.' While the Supreme Court was prescient in observing that such a construction with regard to limits on an *individual's* independent expenditures was bound to create loopholes in the regulatory system, *Buckley,* 424 U.S. at 45 ('It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign.'), the Supreme Court emphasized in *Buckley* that it was without a record to uphold restrictions that went beyond express advocacy, *id.* at 46 ('[T]he provision does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.') (emphasis added). In keeping with our system of constitutional checks and balances, the Supreme Court effectively sent the issue back to the political branches for further consideration. The Supreme Court, in my view, never conclusively foreclosed reconsideration of a limitation on independent expenditures, provided that such a restriction was not vague and was supported by an adequate record. Indeed, in the context of restricting corporate and labor union independent expenditures, the Supreme Court, after *Buckley,* explicitly left this door open. *See First Nat'l. Bank of Boston v. Bellotti,* 435 U.S. 765, 788 n.26 (1978) ('Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.').

The instant case presents such a record to the three-judge District Court and also demonstrates the wisdom of then-Justice Rehnquist's observation that the 'carefullegislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.' *NRWC,* 459 U.S. at 209 (internal citation and quotation marks omitted). Since 1996, corporations and labor unions have used their general treasury funds to influence federal elections in direct contravention of the original intent of Section 441b and its statutory predecessors. Congress responded to this problem by enacting Sections 201, 203, and 204 of BCRA. Therefore, before turning to a discussion of whether these sections of BCRA are narrowly tailored, I shall briefly discuss the erosion of the express advocacy test as a means of distinguishing between electoral advocacy and issue discussion. The Findings of Fact demonstrate that Congress correctly observed that Section 441b was no longer effective at preventing corporations and labor unions from using their general treasury funds to influence federal elections. Indeed, to quote a former NRA official, the state of the Section 441b prohibition prior to BCRA was 'built of the same sturdy material as the emperor's clothing.' Findings ¶ 2.4.3 (Metaksa).

The Findings of Fact with regard to the evisceration of Section 441b resemble a mosaic with each piece of evidence building on the next, and when viewed as a whole, present a damaging portrait of corporations and labor unions using their general treasury funds to directly influence federal elections. It is to this picture that I now turn.

2. The Rise of Spending on Issue Advocacy in Close Proximity to Federal Elections

As discussed *supra,* in *MCFL,* the Supreme Court construed the prohibition on expenditures in section 441b as only applying to expenditures containing words of 'express

advocacy.' *MCFL,* 479 U.S. at 249 ('We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.'). As a result of *MCFL,* corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures did not contain words of 'express advocacy.' In other words, so long as corporations and labor unions did not use any of *Buckley*'s 'magic words' in their advertisement, they could use their general treasury funds to pay for advertisements that influenced a federal election. Of course, if the corporation or labor union chose to use the magic words in an advertisement, it could still do so, provided it paid for such a communication from a segregated fund, thereby ensuring that there was political support for the advertisement.

As a consequence of the Supreme Court's decision in *MCFL,* candidate-centered issue advertisements,[117] funded with corporate and labor union general treasury funds, has dramatically increased in recent election cycles. Findings ¶ 2.2. 'By the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits.' *Id.* ¶ 2.2.7 (Magleby).[118] The 2001 Annenberg

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[117] As the Findings demonstrate, issue advertisements generally fall into three categories: candidate-centered, legislation-centered, and general image-centered. Findings ¶ 2.2.2. Candidate-centered advertisements make a case for or against a candidate but do so without using 'magic words.' *Id.* These are the advertisements that BCRA seeks to distinguish from other forms of issue advocacy.

[118] The reason why it was not until 1996 that this explosion in candidate-centered issue advocacy occurred, as political consultant Bailey explains, was that in post-Watergate campaigns, it was important for candidates to be seen as attempting to clean up the political process.

Report, relied on by Defendants, Plaintiffs, and Congress, establishes that during the 1996 election cycle, an estimated $135 million to $150 million was spent on multiple broadcasts of about 100 distinct advertisements, in the 1997-1998 election cycle, 77 organizations aired 423 distinct advertisements at a cost of between $250 million and $340 million,[119] and in the 1999-2000 election cycle, 130 groups spent over an estimated $500 million on 1,100 distinct advertisements. *Id.* ¶ 2.2.4.[120] Plaintiffs' own expert readily concedes that the number of organizations sponsoring issue advertisements has "exploded" over the last three election cycles. *Id.* ¶ 2.2.6 (La Raja).[121] From their studies, the

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Findings ¶ 2.2.7 (observing that 'due to a lack of enforcement and a willingness on the part of some to win at s advocacy into constitutional stone.

[119] The report the Annenberg Study produced following the 1997- 1998 election cycle placed this estimate at between $275 million to $340 million. *See supra* note 78.

[120] As a representative sample, the Annenberg Report 2001 found that in the 2000 election cycle, the Republican and Democratic parties accounted for almost $162 million (31%) of this spending on issue advocacy, Citizens for Better Medicare, $65 million (13%), Coalition to Protect America's Health Care, $30 million (6%), U.S. Chamber of Commerce, $25.5 million (5%), AFL-CIO, $21.1 million (4%), National Rifle Association, $20 million (4%), U.S. Term Limits, $20 million (4%). Findings ¶ 2.2.4.

[121] Interestingly, the huge rise in issue advocacy spending during federal campaigns far outpaces spending on the amount of PAC-sponsored advertising. Under the original intent of FECA, corporations and labor unions that wished to sponsor electioneering advertisements would have had to do so with segregated funds (e.g. "PAC money"). 2 U.S.C. § 441b(b)(2)(C). During the 2000 election cycle, non-PAC interest groups ran 74,024 political advertisements referring to a federal candidate, while PAC interest groups ran only 3,663 advertisements. Findings ¶ 2.2.5.2. Although none of the parties discuss this discrepancy, and although there are likely a number of factors to explain it, it does not take much imagination to conclude that one of the primary reasons that PAC advertising is so low in comparison, is that if a corporation or labor

Annenberg Public Policy Center concludes that the amount of money spent on "issue advocacy" is increasing rapidly, that this development permits the political parties, corporations, and labor unions to gain a "louder" voice, and that consequently, the "distinction between issue advocacy and express advocacy is a fiction." *Id.* Indeed, even the political parties recognize the value which these outside corporations and labor unions bring to the election with their issue advocacy. *Id.* ¶ 2.7.10.

3. "Magic Words" Are Rarely Used in Political Advertisements

As issue advocacy by corporations and labor unions has grown as a means of influencing federal elections, the trend of all forms of political advertisements has been to move away from words of express advocacy-whether they are advertisements produced by candidates, political parties, or corporations and labor unions. Findings ¶ 2.3. The unrebutted expert testimony demonstrates that only 11.4 percent of advertisements purchased by federal candidates that aired during the 2000 election cycle would qualify as electioneering under the "magic words" test. *Id.* ¶ 2.3.1 (Goldstein); *see also id.* ¶ 2.3.2 (Strother) (observing that 90% of candidate advertisements he has put together in his career have *not* used express advocacy). Moreover, the uncontroverted testimony of political consultants establishes that express advocacy is no longer considered an effective tool of political advertising. *Id.* (Strother) ("Good media consultants never tell people to vote for Senator X; rather, you make your case and let the voters come to their own conclusions. In my experience, it actually proves less

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union can fund the most effective form of electioneering with general treasury funds, there is no need to try and raise PAC money or comply with PACs' disclosure provisions simply to run electioneering advertisements that use words of "express advocacy."

effective to instruct viewers what you want them to do."); (Bailey) ("In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.'"). When *Buckley* was handed down, express advocacy in political advertising was more common. *Id.* (Bailey). Since the mid-1980s, political advertising has shifted and today the practices of political advertisers-with only a mere 30 seconds to convey their messages-parallel commercial advertisers where a "product is presented in various desirable tableaus ... present[ing] viewers with a variety of reasons to choose their product." *Id.* ¶ 2.3.3 (Krasno and Sorauf) ("Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls.").

4. Other Advantages of Using Issue Advocacy to Influence Federal Elections

Aside from the fact that candidate-centered issue advocacy is a much more powerful means to convey an electioneering message, it is uncontroverted there are other strong incentives for using "issue advocacy" to influence federal elections. *Id.* ¶ 2.5. First, by running "issue advertisements" in the immediate run-up to a federal election, corporations and unions are able to avoid any of the disclosure requirements that ordinarily attach when these groups use general treasury funds to influence federal elections. *Id.; id.* ¶ 2.5.1. Plaintiffs' Experts Milkis and La Raja equally concur that the rise of issue advocacy has permitted issue organizations to hide their true identities while running these advertisements. *Id.* ¶ 2.5.1 (Milkis); ¶ 2.2.6 (La Raja) ("Over the last three election cycles, the number of groups sponsoring ads has exploded, and consumers often don't know who these groups are, who funds them, and whom they represent."). As Plaintiffs' expert Milkis candidly observes, "For example, The Citizens for Better Medicare, which spent $65 million on television ads [during the 2000 election cycle], is funded primarily by the

pharmaceutical industry." *Id.* ¶ 2.5.1; *see also id.* (citing example of AFL-CIO running advertisements in congressional race under the name "Coalition to Make Our Voices Heard"); *id.* ("Frankly we've taken a page out of their book [other interest groups] because in some places it's much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.'") (Magleby) (citing comments of AFL-CIO representative at a lunchtime discussion panel at the Pew Press Conference). As a result, not only are corporations and unions able to fund the most effective form of political advertising with their general treasury funds, but they are able to create corporations which have euphemistic names and which, in many instances, serve as fronts for injecting corporate general treasury funds into federal elections. *Id.* In addition to avoiding FECA's disclosure requirements, it is uncontroverted that another advantage of running election advertisements as "issue advocacy" is that corporations and labor unions can use their general treasury funds to influence federal elections which, as Defense Expert Magleby observes, "makes a sham of these longstanding federal laws." *Id.* ¶ 2.5.2. The uncontroverted testimony of Defense Expert Magleby also makes clear that by avoiding PACs, these organizations can raise larger amounts of funds more quickly than if they had to raise money to pay for their advertisements using PACs. *Id.* ¶ 2.5.3.

5. The Impact of These Developments

Accordingly, when the Supreme Court's construction of Section 441b in *MCFL* is combined with the fact that very few political advertisements use words of express advocacy, the result is obvious: corporations and labor unions, long prohibited from using their general treasury funds to influence federal elections, are able to run the most effective form of political advertising and the most widely used form of political advertising from their general coffers. At the same time, the law constitutionally prohibits corporations and labor unions from using general treasury funds to influence federal elections with advertisements that use express words of advocacy-a style of advertising rarely used and described by political consultants as ineffective. The unintended result of this development is that the longstanding prohibition on the use of corporate and labor union general treasuries to influence federal elections is undermined. Indeed, the role of corporations and labor unions in federal elections is actually enhanced because these corporations and labor unions are able to fund the most potent form of political advertising using treasury funds.

The testimony from political consultants, experts, and officeholders and candidates convincingly bears this point out. The record demonstrates that the express advocacy test is not a useful benchmark for distinguishing between campaign advertising and issue advertising, that no particular words are necessary to create electioneering advertisements, and that corporations and labor unions produce advertisements that directly influence federal elections under the guise of "issue advocacy." *Id.* ¶ 2.4. Despite the fact that *MCFL* interpreted Section 441b as reaching more advocacy than the examples in *Buckley's* footnote 52, *MCFL*, 479 U.S. at 249, the test has proven ineffective at distinguishing between genuine issue advocacy and electioneering paid for with corporate and labor union general treasury funds. Indeed, as the testimony presented in this case convincingly demonstrates, no particular words of advocacy are necessary for effective campaign advertisements; it is easier for corporations and labor unions to skirt the prohibition contained in Section 441b. In sum, Congress found that the express advocacy test, grafted onto Section 441b by the *MCFL* Court, was no longer preventing corporations and labor unions from spending general treasury funds on federal elections. Findings ¶ 2.4.4.

6. Corporations and Labor Unions Routinely Spend General Treasury Funds on Advertisements Designed to Influence Federal Elections

a. *Political Consultants Testify that Candidate-Centered Issue Advertisements are Electioneering*

Advertisements designed to influence a federal election under the guise of issue advocacy usually end by telling the viewer to call, ask, or tell a candidate to do something. Findings ¶ 2.4.3 (Pennington). From the perspective of political consultants, who provide testimony in this case, there is no practical difference between these "issue advertisements" and those advertisements where express advocacy is used. *Id.* (Strother) ("From the point of view of a media consultant, there is no real difference between ending an advertisement with 'Vote for Senator X' versus ending an advertisement with 'Tell Senator X to continue working hard for America's families.'"); (Beckett) ("However, in fact no particular words of advocacy are needed in order for an ad to influence the outcome of an election. No list of such words could be complete . . . ."); (Lamson) ("When political parties and interest groups run 'issue ads' just before an election that say 'call' a candidate and tell her to do something, their real purpose is typically not to enlighten the voters about some issue, but to influence the result of the election, and these ads often do have that effect."). Plaintiffs have provided no contrary political consultant testimony to discredit the testimony of these political consultants. I find the uncontroverted testimony of the political consultants particularly compelling because it comes from well-known and respected professionals who are engaged in the business of making political advertisements. *See id.*

Ms. Tanya Metaksa, former Chair of the NRA PVF, stated in her opening remarks at the American Association of Political Consultants' Fifth General Session on "Issue Advocacy" that "[i]t is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.* (Metaksa); *see also id.* (Strother) ("When we design, produce, and run 'issue ads' that mention specific candidates for federal office and that are aired in proximity to an election, these ads are for only one purpose: to effect [sic] the outcome of an election."). In concrete terms, perhaps the most striking example of this "line in the sand drawn on a windy day," is the two camera shoot, where consultants bring two cameras to shoot an advertisement. *Id.* (Strother). The film in Camera A is used by the candidate, while the nearly identical film in Camera B is sold for a nominal fee to a third party who then "gets direct control over the images of the candidate used in the issue groups ads." *Id.* In my judgment, the testimony of political consultants provides overwhelming evidence that corporations and labor unions spend general treasury funds on advertisements that, while not using words of express advocacy, are designed to influence federal elections.

b. *Current and Former Officeholders and Candidates Testify that Corporations and Labor Unions Use General Treasury Funds to Pay for Advertisements Designed to Influence Federal Elections*

In addition to political consultants, current and former officeholders and candidates testify that the express advocacy test has become meaningless, that no particular words of advocacy are necessary to convey an electioneering message, and that corporations and labor unions were using their general treasury funds to influence federal elections. *Id.* ¶ 2.4.2. This testimony is particularly compelling given that the political actors supporting BCRA, to borrow words from Justice Byron White, "included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley,* 424 U.S. at 261 (White, J., concurring in part, dissenting in part); *see also Colorado I,* 518 U.S. at 650 (Stevens, J., dissenting) ("Congress surely has both wisdom and experience in these matters that is far superior to ours."). Even Plaintiff Congressman Ron Paul conceded during his deposition that outside group issue advertisements run during his 2000 congressional campaign were intended to influence the election. Findings ¶ 2.4.2.1 (Paul). Politicians from both political parties provide convincing testimony in this case, and also provide important guidance through floor statements made during the debate over campaign finance legislation, that in their considered judgment the express advocacy test was not preventing corporations and labor unions from influencing federal elections using general treasury funds, and that no particular words are necessary to convey an electioneering message. *Id.* ¶ 2.4.2 (including statements and testimony from Feingold, McCain, Levin, Bloom, Bumpers, Chapin, and Shays).

c. *Examples of Corporations and Labor Unions Demonstrate That These Organizations Use Their General Treasury Funds to Pay for Advertisements Designed to Influence Federal Elections*

The record, however, goes beyond the testimony of experts, political consultants, and present and past officeholders and candidates. The documented behavior of corporations and labor unions also clearly demonstrates that issue advocacy is used as a tool of electioneering by corporations and labor unions. *Id.* ¶ 2.6. The Findings, which culled the most salient examples from the substantial record submitted by the parties, demonstrate that, for example, the AFL-CIO, the Coalition, Citizens for Better Medicare, the NRA, and The Club for Growth all used corporate general treasury funds to influence recent federal elections. *Id.* ¶ ¶ 2.6.1-2.6.5. Plaintiffs dismiss this evidence as merely "anecdotal," McConnell Opp'n at 32, which is a characterization of the weight of the evidence and not a comment on whether it is rebutted. To the contrary, the examples of corporations and labor unions using general treasury funds to influence federal elections are not "anecdotal," but powerful illustrations of a regulatory regime in paralysis. Indeed, like a mosaic, these "anecdotal" examples when combined with the other evidence in the record relating to the general ineffectiveness of Section 441b, and the failure of the express advocacy test, make a compelling case for the restrictions Congress arrived at in enacting Sections 201, 203, and 204 of BCRA.

1) The NRA

The Findings relating to the activities of Plaintiff NRA, however, really drive home the point that the express advocacy test has become meaningless and that corporations spend general treasury funds on candidate-centered issue advertisements to influence federal elections. *Id.* ¶ 2.6.4. Aside from the NRA's media consultant who stated that the first objective of the NRA was to influence the outcome of the presidential election and other key congressional races, *id.* at 2.6.4.1, the NRA ran two nearly identical radio advertisements in the 2000 election: one paid for with PAC money which used express advocacy and one paid for with corporate general treasury funds which did not use express advocacy. *Id.* ¶ 2.6.4.4. The only real difference between the advertisements was that the one paid for with PAC money said "Vote George W. Bush for President" at the end of the advertisement. *Id.* In my view, this advertisement is a perfect example-the poster child-of how pointless the express advocacy test is at distinguishing between genuine issue advocacy and electioneering advertisements. In addition to this evidence, the Findings, particularly those resting on the internal documents of the NRA, *id.* ¶ 2.6.4.1, also demonstrate just how driven the NRA was to use general treasury funds, which fell outside the source and amount limitations of FECA, to directly influence the 2000 federal election. *Id.* ¶ 2.6.4.

2) Citizens for Better Medicare and The Club for Growth

Another glaring example from the Findings includes the pharmaceutical industry's uncontroverted efforts to influence the 2000 elections, *id.* ¶ 2.6.3, by admittedly spending over sixty-five million dollars on television advertising which, according to Plaintiffs' expert Dr. La Raja, was almost as much as either of the two political parties spent on issue advocacy, *Id.* ¶ 2.6.3.4. The pharmaceutical industry's efforts were cloaked behind the name "Citizens for Better Medicare." I have concluded from the testimony and documents submitted in this case that this issue advocacy campaign mounted during the 2000 election cycle was designed to influence the federal election with corporate general treasury funds in direct contravention of the historic prohibition on such activity. *See id.* ¶ 2.6.3; *see also id.* ¶ 2.6.3.4 ("Much of CBM's ad strategy leading up to the 2000 election was aimed at supporting candidates attacked in AFL-CIO advertising.").

In addition to CBM's activities, I have also found that Plaintiff The Club for Growth influenced the 2000 federal elections with corporate general treasury funds. *Id.* ¶ 2.6.5. The Club for Growth openly acknowledges in their solicitation materials that "these issue advocacy campaigns can make all the difference in tight races." *Id.* ¶ 2.6.5.4. Moreover, the activity of The Club for Growth in Florida in a 2000 Congressional race demonstrates in an uncontroverted manner the power of a corporation when it uses general treasury funds to influence federal primary elections. *Id.* ¶ 2.6.5.5.

3) AFL-CIO

With regard to the AFL-CIO's issue advocacy campaign during the 1996 federal election, I have found that the AFL-

CIO used issue advocacy to influence the 1996 general election. Findings ¶ 2.6.1. The internal documents surrounding the AFL-CIO's efforts are particularly revealing and directly contradict the AFL-CIO's self-serving declaration submitted in this case, which attempts to downplay the electoral considerations behind their advertisements. *Id.* ¶ 2.6.1.1 (observing that the indirect effect on election outcomes has "never been the point of [the AFL-CIO's broadcast advertising program"). The documents demonstrate that media consultants were hired by the AFL-CIO to test how their advertising would resonate with the electorate, how to create advertisements that "manage the political message in a volatile environment," and even how to place a media buy in Illinois to help a Senate candidate when the candidate did not have the resources to fund advertising on his own. *Id.* Moreover, other independent evidence, including expert testimony, establishes that the AFL-CIO's 1996 issue advocacy campaign was designed to influence the federal election. *Id.* ¶¶ 2.6.1.2-2.6.1.5. The AFL-CIO does not refute or explain the discrepancy between its general denial about its issue advocacy and these contrary evidentiary documents. The Findings elaborate on these points and others in more detail, but I conclude from this evidence that during the 1996 election campaign the AFL-CIO used general treasury funds to influence a federal election, and therefore was able to circumvent FECA's requirement that their efforts be paid for with federal funds from a segregated account. *See id.* ¶ 2.6.1.6 (observing that twelve of the thirty-two House Republican freshman targeted by the AFL-CIO were defeated).

4) The Coalition-Americans Working For Real Change

In response to the AFL-CIO, Plaintiffs Chamber of Commerce, National Association of Manufacturers, and National Association of Wholesaler-Distributors, and other business entities, formed a corporation entitled the

"Coalition-Americans Working for Real Change" also to influence directly the 1996 federal election. *Id.* ¶ 2.6.2. I have found that The Coalition's issue advocacy campaign around the 1996 election was designed to influence the federal election. *Id.* Like the AFL-CIO, the internal documents of the Coalition demonstrate that electoral strategies, and not "issue advocacy," were at the heart of the Coalition's efforts in 1996. *Id.* ¶ 2.6.2.2. Indeed, the Coalition sought advice from consultants and polling firms on how to maximize their ability to influence federal elections. *Id.* These internal documents, combined with independent expert testimony and the FEC General Counsel's report, *see id.* ¶ ¶ 2.6.2.3-2.6.2.4, strongly contradict the Coalition's self-serving efforts in this litigation to portray their 1996 advertising campaign as something less than electioneering advertisements in disguise. The Coalition used corporate general treasury funds to directly influence the 1996 election and, therefore, was able to circumvent FECA's policy of compelling corporations to use federal money from a segregated account. *See generally id.* ¶ 2.6.2; *see also id.* ¶ 2.6.2.2 (post-election analysis done by Coalition's polling firm).

The AFL-CIO and The Coalition presented no uncontroverted evidence that they did not try to influence the 1996 federal election with issue advertisements. Moreover, these organizations do not contest that they paid for these advertisements with general treasury funds. The effort by the AFL-CIO and The Coalition to portray themselves as engaging in issue advocacy, as opposed to electioneering, is belied by their own internal documents.

d. *Other Examples of Advertisements Demonstrate That Corporations and Labor Unions Use Their General Treasury Funds to Pay for Advertisements Designed to Influence Federal Elections*

Aside from the examples above of corporations and labor unions directly using general treasury funds to influence federal elections, the attributes of so-called "issue advertisements" in the Findings demonstrate the electioneering purpose behind these commercials.

1) Organizations Run Issue Advertisements About Which They Have No Particular Organizational Interest

First, the Findings compellingly demonstrate that many candidate-centered issue advertisements are run about issues in which the organization sponsoring the advertisement has no interest. *Id.* ¶ 2.6.6. On this basis, it is clear that these advertisements were designed to influence a federal election. For example, EMILY's List, an organization dedicated to pro-choice female candidates, ran advertisements on gun-control for federal candidate Linda Chapin. *Id.* ¶ 2.6.6.1. Other examples from the Findings include the Associated Builders and Contractors running an advertisement about a federal candidate that dealt with penalties for child molesters. *Id.* ¶ 2.6.6.2 (admitting that such an advertisement is not of a particular concern of contractors). In another situation, the Club for Growth funneled $20,000 to the American Conservative Union to fund an issue advertisement relating to Hillary Clinton's candidacy which the Club candidly admitted at deposition had nothing to do with the Club's interest in pro-growth conservative Republicans. *Id.* ¶ 2.6.6.3. Another example is an advertisement run by the trucking industry, under the pseudonym "The Foundation for Responsible Government," praising the record of an opponent of a Senator on health care and taxes. *Id.* ¶ 2.6.6.4 (observing that the Senator was a target of the group because he supported legislation banning triple trailer trucks). Finally, the group Citizens for Life, a New Hampshire Pro-Life Organization, ran advertisements in 2000 against John McCain criticizing jokes allegedly made by McCain about Alzheimer's and a home for senior citizens. *Id.* ¶ 2.6.6.5. The New Hampshire group claimed the advertisement was timely because the *New Hampshire State* Senate was close to voting on a bill to legalize assisted suicide. *Id.* I am not persuaded that any of these advertisements were anything other than electioneering advertisements. Rather, these examples demonstrate that corporations spend general treasury funds on candidate-centered issue advertisements to influence federal elections. *Id.* ¶ 2.6.6.6.

2) Organizations Run Issue Advertisements About Past Votes or About Issues No Longer Before Congress

Second, organizations run candidate-centered issue advertisements praising or criticizing candidates for past votes or discussing a Member's position on an issue not pending before Congress. These candidate-centered issue advertisements are clearly designed to influence federal elections. *Id.* ¶ 2.6.7. For example, the AFL-CIO has run a series of advertisements on past votes of particular Members of Congress. *Id.* ¶ 2.6.7.1. As discussed in my Findings, these advertisements are nothing more than campaign advertisements. *Id.* Another example of this practice is the Chamber's advertisements attacking various Members of Congress over the prescription drug issue that was not pending before Congress when the advertisements were aired. *Id.* ¶ 2.6.7.2. Many of these advertisements did not include a phone number to contact the Member, and some of the advertisements were aired against candidates who were not even Members of Congress. *Id.* The Chamber's advertising in this regard was plainly designed to influence the federal election. *Id.* These examples from the AFL-CIO and the Chamber also demonstrate that corporations and labor unions used general treasury funds to pay for candidate-centered issue advertisements designed to influence a federal election. *Id.* ¶ 2.6.7.3.

3) Organizations Air Advertisements When A Candidate Lacks Funds to Run Advertisements and So a Candidate Can Avoid Running Advertisements Attacking an Opponent

Corporations and labor unions also use general treasury funds to pay for candidate-centered issue advertisements (a) when candidates lack funds to put their own advertisements on the air and (b) to attack a candidate's opponent so that the candidate can run only "positive" advertisements. *Id.* ¶ 2.6.8. These indicators provide yet another powerful indication that these "issue advertisements" are nothing short of campaign advertisements designed to affect elections, paid for with the general treasury funds of corporations and labor unions. *Id.* ¶ 2.6.8.4. The uncontroverted testimony of political consultants is that negative character advertisements are often run by a third party because they shield the candidate from the political repercussions that are likely to result if the candidate actually ran the negative advertisement him or herself. *Id.* ¶ 2.6.8.1. In addition to allowing the candidate to refrain from running negative advertisements, organizations often run such advertisements praising a candidate or criticizing the candidate's opponent when the candidate's campaign does not have resources to run advertising on its own. *Id.* ¶ 2.6.8.2 (former Representative discussing how his opponent did not buy media in a media market that covered 40% of his district, but that other groups filled the void attacking the Representative); *id.* ¶ 2.6.8.3 (beneficial advertisements by EMILY's List ran when the Chapin campaign was not on the air to save resources); *id.* ¶ 2.6.1.1 (internal memorandum of the AFL-CIO discussing advertising buy by the union to help Illinois Senate candidate in markets where the candidate lacked resources to air advertising). I conclude that these advertisements were also clearly designed to influence a federal election and paid for with the general treasury funds of corporations and labor unions.

7. Conclusion

In sum, it again bears emphasizing that FECA has always permitted corporations and labor unions to run electioneering advertisements, provided that those advertisements were paid for with money that came from a segregated fund dedicated specifically for federal electioneering. As the examples above illustrate, the utility of Section 441b as a tool to prevent corporate and labor union general treasury funds from influencing elections has been effectively blunted. *See id.* ¶ 2.6.9. While the primary purpose of these advertisements ultimately may be difficult to determine with precision, given the reticence of these organizations to admit they are campaign advertisements, the effect of these advertisements on federal elections is legion. Consequently, as I state in my Findings, "Congress found that FECA, as construed by the Courts, to only limit independent expenditures containing express advocacy, was no longer relevant to modern political advertisements." *Id.* ¶ 2.4.4; *see also id.* ¶ 2.4.3 (unrebutted testimony of political consultant Bailey) ("The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as 'vote for' is at best a historical anachronism."). Congress appropriately concluded that corporations and labor unions were openly violating the intent of its longstanding (and long-upheld) prohibition on the use of corporate and labor union general treasury funds to influence elections.

In crafting the primary definition of electioneering communication, Congress recognized just how difficult the task of discerning a speaker's true intent can be for a court or regulatory agency. Taking heed from *Buckley*'s stringent admonition that a distinction between the discussion of issues and advocacy for the election or defeat of candidates "may often dissolve in practical application" and that a law must be construed in a manner that avoids "'put [ting] the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers,"' *Buckley,* 424 U.S. at 42, 43, Congress crafted an objective, impartial, and thoroughly simple test for distinguishing between electioneering and issue advocacy. Congress recognized, as the record in this case indicates, that candidate-centered issue advertisements influence federal elections. Congress thereafter drew an incredibly clear bright-line test that focuses on the key empirical determinants that distinguish pure issue advertisements from candidate-centered issue advertisements. The result is that broadcast advertisements paid for by corporations or labor unions, aired in close proximity to an election that clearly identify a federal candidate, and are targeted to that candidate's electorate, need to be paid for with federal funds from a segregated account. Congress, therefore, is not prohibiting speech by any corporation or labor union; it is merely requiring these organizations to pay for speech that ostensibly influences federal elections with segregated funds that are regulated under FECA.

The question remaining is whether this bright line that Congress has drawn is narrowly tailored to serve compelling governmental interests. I shall first turn to the compelling governmental interests behind Title II and then shall move to a discussion of whether Title II of BCRA is narrowly tailored to serve those compelling governmental interests.

E. *Title II of BCRA is Narrowly Tailored to Serve a Compelling Governmental Interest*

1. BCRA's Prohibition on Electioneering Communications; the Primary Definition Serves Compelling Governmental Interests

As discussed *supra,* Section 203 extends the longstanding prohibition on corporations and labor unions making contributions or expenditures from general treasuries in connection with federal elections to electioneering communications as defined in the primary definition. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. § 441b(b)(2). Corporations and labor unions are now prohibited from spending general treasury funds on electioneering communications, but are permitted to spend unlimited federal money from separate

segregated funds on electioneering communications. Even though a corporation or labor union "remains free to establish a separate segregated fund, composed of contributions earmarked for that purpose by the donors . . . the corporation [or labor union] is *not* free to use its general funds for campaign advocacy purposes [and w]hile that is not an absolute restriction on speech, it is a substantial one." *MCFL,* 479 U.S. at 253 (emphasis in original) (plurality opinion). As a result, even though the Act permits corporations and labor unions to make electioneering communications with their segregated funds, the prohibition in section 203 must be "justified by a compelling state interest." *Id.*

In discussing the compelling governmental interests in enacting sections 203 and 204, Defendants rely on long-standing precedent of the Supreme Court that has already extensively discussed the compelling interests related to government regulation of corporate and labor union general treasury funds in the context of federal elections. Gov't Br. at 133-134. The Supreme Court's prior discussions of the compelling interests needed to sustain restrictions on corporate and labor union general treasury funds are equally applicable in the context of Sections 203 and 204 of BCRA. Plaintiffs, with the exception of the NRA, do not seriously question this position, but rather focus their energies on the fact that these provisions are not narrowly tailored to serve these compelling governmental interests. As discussed *infra,* I find Plaintiffs' argumentation on that point to be rebutted by the extraordinary record in this case. Before turning to these arguments, however, I shall briefly discuss the compelling governmental interests behind sections 203 and 204 in Title II.

In defending the constitutionality of Title II, Defendants rely on the compelling governmental interest described in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and supported by a rich history of Supreme Court cases discussing Section 441b.[122] Defendants also contend that the compelling governmental interest supporting the prohibition on electioneering communications relates to the potential for the appearance of corruption that occurs when corporations and labor unions pay for electioneering communications with their general treasury funds. Tr. at 252 (Waxman) ("[T]he record in this case of the kind of *Austin* corruption, and even potential *quid pro quo* corruption, absolutely dwarfs the evidentiary record that the Supreme Court has considered in any of the cases it has decided, including *Buckley*."). As a corollary to this latter theory, Defendants also advance an anti-circumvention rationale to justify these provisions, observing that "BCRA's regulation of electioneering communications furthers the compelling governmental interest in preventing corruption of elected officials, not only on its own terms, but also by helping to ensure that the new limits on soft money will not be easily evaded." Gov't Br. at 146. I conclude that the first two theories of corruption are sufficient to uphold the challenged provisions and therefore do not reach the third.

a. *Corruption Related to Corporations and Labor Unions*

The Supreme Court has long indicated that the government has a compelling interest in placing restrictions on corporate and labor union involvement in federal elections so as to prevent "the corrosive and distorting effects of immense aggregations of wealth," facilitated by either the corporate or union forms, on federal elections. *Austin*, 494 U.S. at 660. As discussed *supra*, corporations and labor unions routinely seek to influence federal elections with broadcast advertising campaigns, paid for with general treasury funds. Sections 203 and 204 of BCRA, which are plainly designed to combat this development, fulfill the same purposes that the government identified as supporting Section 441b in *NRWC* and that the Supreme Court upheld:

> The first purpose of § 441b, the government states, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions. *See United States v. United Automobile Workers*, 352 U.S. 567, 579 (1957). The second purpose of the provisions, the government argues, is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. *See United States v. CIO*, 335 U.S. 106, 113 (1948).
>
> We agree with the government that these purposes are sufficient to justify the regulation at issue.

NRWC, 459 U.S. at 207-08. In a nutshell, *NRWC* encapsulates the compelling governmental interests behind Section 441b, which also plainly serve as a basis for upholding BRCA Sections 203 and 204.

The Supreme Court's most recent discussion of these justifications was in *Austin*, where the Supreme Court considered a Michigan state statute which was patterned after section 441b, prohibiting corporations from making independent expenditures in connection with state candidate elections. *Austin*, 494 U.S. at 655 n.1. The issue before the Court was the constitutionality of the state's ban on independent expenditures made by corporations, which the Court held to be "constitutional because the provision is narrowly tailored to serve a compelling state interest." *Id.* at 655. In finding the compelling interest justifying Michigan's statute, the Court recognized a "different type of corruption in the political arena" than the appearance of corruption that had been used to justify *Buckley*'s restrictions on individuals making independent expenditures. *Id.* at 660.

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[122] The parties to the litigation have dubbed this compelling governmental interest theory "*Austin* corruption." Even though the statute in *Austin* only applied to corporations, *Austin*, 494 U.S. at 655, the Supreme Court has long upheld a similar corruption rationale in the case of labor unions. *See Pipefitters*, 407 U.S. at 415-16, *UAW*, 352 U.S. at 585, *NRWC*, 459 U.S. at 207-08.

As a baseline, the *Austin* Court reiterated that "'[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'" *Id.* at 658 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*")) (alteration in original). The plaintiff in *Austin* had argued that because the restriction at issue focused on independent expenditures, as opposed to contributions, the danger of corruption or the appearance of corruption was not present. *See Buckley*, 424 U.S. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counter-productive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.").

The *Austin* Court responded by distinguishing this language on the basis that it applied to independent expenditures made by *individuals* as opposed to those made by *corporations*. *Austin*, 494 U.S. at 659. Indeed, *Austin* pointed out that the Court had left open the possibility in *Bellotti*, that "a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by *corporations* to influence candidate elections." *Id.* (emphasis added) (citing *Bellotti*, 435 U.S. at 788 n.26) ("The importance of the governmental interest in preventing [corruption of elected representatives through the creation of political debts] has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. *Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.*") (emphasis added).

Having set forth this analysis, the Supreme Court found that *regardless* of whether the danger of "financial *quid pro quo* corruption," *id.* at 659 (internal citations and quotation marks omitted), identified in *Buckley* as insufficient to uphold the limitation on independent expenditures made by individual donors, was present in the case of a corporation (a question clearly left open in *Bellotti*), the Court found that a "different type" of corruption rationale was sufficient to serve as Michigan's compelling interest. *Id.* at 659, 659-60. The *Austin* Court stated this rationale as "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. The Supreme Court was keen to point out that "the mere fact that corporations may accumulate large amounts of wealth is not the justification for [Michigan's restriction on independent expenditures]; rather, the unique state-conferred corporate structure that *facilitates* the amassing of large treasuries warrants the limit on independent expenditures." *Id.*

This "different" theory of corruption was not new as the *Austin* Court observed. *Id.* at 659 ("We therefore have recognized that 'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.'") (quoting *FEC v. Nat'l. Conservative

Political Action Committee, 470 U.S. 480, 500-01 (1985) ("*NCPAC*")) (also citing *MCFL,* 479 U.S. at 257). In fact, in *MCFL* the Court pointed out:

> We have described that rationale in recent opinions as the need to restrict "the influence of political war chests funneled through the corporate form," *NCPAC,* 470 U.S. at 501; to "eliminate the effect of aggregated wealth on federal elections," *Pipefitters,* 407 U.S. at 416; to curb the political influence of "those who exercise control over large aggregations of capital," [*UAW*], 352 U.S. at 585; and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," *National Right to Work Committee,* 459 U.S. at 207. This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.

MCFL, 479 U.S. at 257.

Outside the context of corporations, the Supreme Court has been generally solicitous of a similar rationale for upholding Section 441b as applied to labor unions. In *Pipefitters* and *UAW,* as the *MCFL* Court observed, the Supreme Court found that the compelling governmental interest behind the regulation of corporations was applicable to labor unions. *Pipefitters,* 407 U.S. at 415-16 ("When Congress prohibited labor organizations from making contributions or expenditures in connection with federal elections, it was, of course, concerned not only to protect minority interests within the union but to eliminate the effect of aggregated wealth on federal elections."); *UAW,* 352 U.S. at 585 ("To deny that [using union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections] constituted an 'expenditure in connection with any [federal] election' is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital."). As noted in *NRWC,* the government's interest in enacting such a provision relates to the fact that labor union members pay money into a union's general treasury and that money may be used to support candidates for office opposed by the individual union member, *NRWC,* 459 U.S. at 208, a justification that applies with equal force to corporate shareholders. *Id.* at 207.

Except for the NRA, none of the Plaintiffs who challenge Title II explicitly contest the asserted compelling governmental interests relating to preventing corruption or the appearance of corruption that emanates from the particular legal and economic attributes of corporations and labor unions. Given the longstanding history behind section 441b, this is not unexpected. Despite this fact, the NRA Plaintiffs spend significant time in their pleadings asserting that the compelling interest cannot support sections 203 and 204. NRA Br. at 9-14; NRA Opp'n at 6-17, NRA Reply at 12-14. As clarified by their reply brief, the NRA basically argues that this type of corruption only applies to those corporations that "use resources amassed in the economic marketplace, to obtain an unfair advantage in the political marketplace." NRA Reply at 12 (quoting *Austin,* 494 U.S. at 659 (in turn quoting *MCFL,* 479 U.S. at 257)). In *Austin,* the Michigan Chamber of Commerce, relying on *MCFL,* contended that the Michigan statute could not be applied to it because it was a "nonprofit ideological corporation." *Austin,* 494 U.S. at 661. The Supreme Court flatly rejected this *as-applied* challenge. *Id.* at 662-65. In this case, the NRA asserts a similar argument: that it is unlike the Michigan Chamber of Commerce in *Austin,* and therefore, broadly speaking, Title II cannot be justified as preventing *Austin* corruption. NRA Reply at 12 (stating that the NRA does not do business in the economic marketplace, nor derive market profits, nor derive more than a negligible portion of its revenues from corporate contributions).

Basically, however, the NRA is using *Austin* as a means of making an as-applied challenge to BCRA.

To begin with, in *MCFL,* the Supreme Court stressed that the rationale for regulating corporations and labor unions was "longstanding" and used to restrict "the corrosive influence of concentrated corporate wealth" on federal elections. *MCFL,* 479 U.S. at 257. The Supreme Court went on to explain that "[b]y requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace." *Id.* at 258. The resources available to the segregated fund, the Court reasoned, reflected "popular support for the political positions of the committee." *Id.* As a result, the Court observed that "[r]egulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes." *Id.*

Nevertheless, the Supreme Court concluded that the government could not uphold Section 441b *as applied* to the plaintiff in *MCFL* based on this admittedly "longstanding" rationale. *Id.* ("Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise."). Therefore, the Supreme Court never questioned the government's asserted compelling interest in regulating corporations of all types—it merely held that *as applied* to MCFL, the rationale was insufficient to support Section 441b's restrictions.

The NRA would have us believe that this form of corruption is only available to uphold Section 441b restrictions when the corporations being regulated are of the for-profit variety. NRA Reply at 12. In *Austin,* and for that matter in *MCFL,* the Supreme Court made *no* distinctions among different types of corporations when analyzing the compelling governmental interest. The *Austin* Court thus broadly recognized that all corporations benefit from the "state- conferred corporate structure that facilitates the amassing of large treasuries." *Austin,* 494 U.S. at 660; *see also MCFL,* 479 U.S. at 268 (Rehnquist, C.J., concurring in part, dissenting in part) ("I do not dispute that the threat from corporate political activity will vary depending on the particular characteristics of a given corporation; it is obvious that large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process than less successful business corporations *or nonprofit corporations* . . . . These distinctions among corporations, however are distinctions in degree that do not amount to differences in kind.") (emphasis added) (internal citation and quotation marks omitted). The Court in *MCFL* merely held that *as applied* to the plaintiff in *MCFL,* Section 441b could not be upheld by the longstanding compelling governmental interest present in avoiding the corrosive effects of large treasuries of corporations accumulated with the assistance of the corporate form. In *Austin,* the Court held that the state statute could be applied to the plaintiff because the Michigan Chamber of Commerce did not qualify for an *MCFL* exemption.

The NRA never directly disputes this proposition; rather, the organization essentially contends that like the plaintiff in *MCFL,* and unlike the plaintiff in *Austin,* sections 203 and 204 of BCRA cannot be upheld when *applied* to the NRA because as an organization it does not use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace. NRA Br. at 12; *see also* NRA Reply Br. at 12. The NRA implicitly presents the Court with an as-applied challenge couched in *Austin*-terms instead of those of *MCFL*. NRA Br. at 14 ("In any event, the NRA satisfies every criterion identified by the *Austin* Court for extending the First Amendment's protection to the independent political expenditures of a nonprofit political advocacy corporation . . . ."). Of course, in making its decision that the Michigan Chamber of Commerce did not qualify for an *MCFL* as-applied exemption, the *Austin* Court was explicitly relying on *MCFL*. *Austin*, 494 U.S. at 661-62.

On July 31, 2002, the NRA filed a joint motion to stay, *inter alia*, discovery in this case and agreed that they would also stay any as-applied challenge they had against BCRA under *MCFL* until the Supreme Court resolved the merits of Plaintiffs' challenge to BCRA. NRA Joint Mot. to Stay (Jul. 31, 2002) at 1-2. On August 13, 2002, the three-judge District Court entered an order granting this motion. *NRA v. FEC*, 02cv581 (D.D.C. Aug. 13, 2002) (order on joint motion to stay) ("ORDERED that there will be a stay of discovery and briefing of Plaintiffs' contention that BCRA's restrictions on 'electioneering communications' are unconstitutional as applied to them."). As is clear from their briefing on this point, with the *MCFL* avenue closed to them, Plaintiff NRA uses *Austin* to argue that BCRA, as applied to them, fails to satisfy any compelling governmental interest. NRA Reply at 12 (observing that Title II cannot be justified as designed to present *Austin*-type corruption because it does not amass resources in the economic marketplace.).

The NRA should not be able to litigate an as-applied challenge to Title II in direct violation of the three-judge panel's order, requested by the NRA, by merely cloaking such a challenge under *Austin* as opposed to *MCFL*. Defendants point out that they did not conduct discovery into the NRA's business practices on the basis of this order and therefore are in no position to discuss whether the NRA deserves an *MCFL*-type exemption. Gov't Opp'n at 107 n.109 ("Defendants have, thus, had no opportunity to

discover facts that might refute, *inter alia*, NRA's contention about its profits derived from business activities."); Def.-Int. Opp'n at 67 n.208 ("Indeed, the NRA specifically stipulated with defendants in this case that its as-applied challenge to coverage based on *MCFL* would be stayed pending the outcome of the general facial challenge. *See* Joint Motion to Stay (filed on July 26, 2002), at 2 (granted by the Court on Aug. 13, 2002).").

Any corporation that believes it deserves an *MCFL*-exemption may seek an exemption under the FEC's regulations-and any arguments relating to the strictness of those regulations-are open to a challenge *at that time*, by making that claim, or by resisting enforcement, just as the plaintiffs did in *Austin* and *MCFL*. Accordingly, the NRA's claim has no merit in this litigation, *NRA v. FEC*, 02cv581 (D.D.C. Aug. 13, 2002) (order on joint motion to stay),[123] and

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[123] In addition to the NRA, the ACLU also hints in its briefing that it fits within the class of corporations deserving of *MCFL*-type protection. *See* ACLU Br. at 16. I am extraordinarily skeptical that the NRA or the ACLU fit within the *MCFL* paradigm, which Justice Brennan, the author of *MCFL* described as a "small" class of exempt organizations. *Austin*, 494 U.S. at 672 (Brennan, J., concurring). First, each organization accepts corporate funding, ACLU Br. at 2 n.2, NRA Br. at 2. In *MCFL*, the corporation had an explicit policy against accepting corporate contributions. *MCFL*, 479 U.S. at 264. The NRA claims its corporate contributions are "negligible," NRA Br. at 2, while the ACLU argues that their corporate donations are "extremely modest," ACLU Br. at 17. These statements, themselves, indicate that both organizations would be minimally burdened if they were to forgo corporate funding so as to qualify for *MCFL* status. Nevertheless, the ***absolute*** amounts involved-$85,000 for the ACLU, ACLU Br. at 2 n.2, and $385,000 for the NRA, NRA Br. at 2-are not petty cash, particularly compared with what our Circuit has found to be *de minimis*.

The D.C. Circuit has held, in a case involving the NRA itself, that an organization may qualify for an *MCFL* exemption as long as it is not "a potential conduit for corporate funding of political activity." *FEC v. NRA*, 254 F.3d 173, 192 (D.C.Cir.2001). In *NRA*, the court stated that the

I conclude that the longstanding compelling governmental interests behind Section 441b are equally applicable to Sections 203 and 204 of BCRA.

b. *Appearance of Corruption*

Moreover, I find that congressional action in this case could be justified under the rationale that electioneering communications made with general treasury funds of corporations and labor unions create an appearance of corruption. The record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting.

In my judgment, the record in this case with regard to interest group issue advocacy substantially demonstrates the

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appropriate test for this inquiry is whether "[t]he harm contemplated by the statute stems from the absolute amount of corporate money an organization has to spend in the political process, not from the relationship between corporate contributions and the organization's total revenues." *Id.* (finding that $7,000 in corporate contributions in one year precluded the NRA from taking advantage of the *MCFL*-exemption).

Moreover, the NRA openly admits that it engages in business activities. *Compare* NRA Br. at 19 (discussing that it loses money on advertising in its magazines and sale of NRA memorabilia *but that it generates $1.7 million in rental income on leasing its building space) with MCFL,* 479 U.S. at 264 (observing that an *MCFL*-type corporations "cannot engage in business activities."). Furthermore, in *MCFL,* the plaintiff "was formed for the express purpose of promoting political ideas, and cannot engage in business activities." *MCFL,* 479 U.S. at 264. In addition to its primary purpose of Second Amendment advocacy, the NRA also "promotes public firearm safety, trains law enforcement agencies in the use of firearms, sponsors shooting competitions, and advances hunter safety." Findings ¶ 13.

Obviously, until a fuller factual record concerning these two organizations has been developed, an as-applied challenge to Title II of BCRA is inappropriate.

potential for the appearance of corruption given the current practices of labor unions and corporations in connection with federal elections. As noted *supra,* the Supreme Court in *Bellotti* left open the possibility that in the context of candidate elections the record in a future case might be sufficient to justify restrictions on independent expenditures paid for with the general treasury funds of corporations and labor unions. *Bellotti,* 435 U.S. at 788 n.26 ("The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem . . . ."); *see also NCPAC,* 470 U.S. at 510 n.7 (White, J., dissenting) ("The possibility was thus left open, and remains open, that unforeseen developments in the financing of campaigns might make the need for restrictions on 'independent' expenditures more compelling . . . . The time may come when the governmental interests in restricting such expenditures will be sufficiently compelling to satisfy not only Congress but a majority of this Court as well."). In my view, this case presents just such a record. *See* Findings ¶ 2.7.

The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. Findings ¶ ¶ 2.7.3, 2.7.6. The record also indicates that Members express appreciation to organizations for the airing of these election-related advertisements. *Id.* ¶ ¶ 2.7.2, 2.7.8. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as "above the fray." *Id.* ¶ 2.7.2. Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run. *Id.* ¶ 2.7.1.[124] Likewise, a prominent lobbyist testifies that these organizations use issue advocacy as a means to influence various Members of Congress. *Id.*

The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf. *Id.* ¶ 2.7.8. The Findings show that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. *Id.* ¶ 2.7.10.6; *see also id.* ¶ 2.7.4. After the election, these organizations often seek credit for their support. *Id.* ¶ 2.7.5; *see also id.* ¶ 2.7.4. In a similar manner, political parties are often grateful for the support of these organizations, *id.* ¶ 2.7.10, and parties have sent contributions to these organizations, *id.* ¶ 2.7.10.4. Finally, a large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations. *Id.* ¶ 2.7.9.

The evidence, therefore, paints a picture of corporations and labor unions targeting particular federal candidates or their opponents-that the organizations have a specific interest in getting these particular candidates elected to federal office. The candidates and political parties are well aware of these corporations and labor unions and are cognizant of which organization is running advertisements supporting their candidacy. It is also quite clear that these candidates are very appreciative of the additional electioneering support provided on their behalf from the general treasuries of corporations and

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[124] On the other hand, it is sometimes the case that when a candidate is attacked, the candidate and his/her consultants are unaware of who is running the negative advertisement because the organization running the advertisement is cloaked behind a misleading name. *See generally* Per Curiam Opinion Findings Related to BCRA's Disclosure Provisions.

labor unions. All of this creates the appearance of corruption, as is demonstrated by the polling data in the Findings.

The NRA also challenges this asserted interest, arguing that "gratitude" is not corruption. NRA Opp'n at 8-12. The NRA misses the point of Defendants' argument, which is that the electioneering broadcasts disguised as "issue advocacy," create a very significant *appearance* of corruption. Defendants never argue that "gratitude" is corruption as the NRA would have the Court believe. Rather, Defendant-Intervenors correctly observe that "[t]he result is plain: candidates can be as beholden to corporations or unions that spend money to help them through ad campaigns as they would be if the same entities wrote a check directly to the campaign, or funneled the money through the political party." Def.-Int. Br. at 108-09. In my view, the potential for the appearance of corruption-identified as the compelling justification for sections 203 and 204 of BCRA-relates to the very simple fact that when a corporation or labor union spends millions of dollars from its general treasury on a campaign, elected officials are likely to feel beholden when matters relating to these organizations arise.

In *Buckley,* the Supreme Court stated with regard to the independent expenditure restrictions on *individuals* that

> quite apart from the shortcomings of § 608(e)(1) in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending § 608(e)(1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have

> virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than § 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.

Buckley, 424 U.S. at 46-47 (emphasis added). The Court in *Buckley* wrote that the threat of independent expenditures made by individuals did not "presently appear" to pose a danger of possible corruption. Therefore, *Buckley* explicitly left open the possibility that a time might come when a record would indicate that independent expenditures made by individuals to support candidates would raise an appearance of corruption. The Court concluded, in 1976:

> [S]ection 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

Buckley, 424 U.S. at 47. This discussion in *Buckley* spoke only of the lack of evidence in that record with regard to restrictions on the independent expenditures of *individuals;* an issue that has clearly not been foreclosed for *corporations* or *labor unions*. *Bellotti,* 435 U.S. at 788 n.26 ("Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."). In my view the record assembled by the parties in this case demonstrates that a compelling governmental interest behind Congress's regulatory effort was to prevent the appearance of corruption. It is a legitimate interest and the NRA's arguments are unpersuasive.[125]

c. *Conclusion*

The compelling governmental interests identified by the Supreme Court in its campaign finance jurisprudence apply equally to Sections 203 and 204 of BCRA. Plaintiffs, aside from the NRA, do not challenge these bases as a justification for the restrictions on electioneering communications contained in Title II. Rather, Plaintiffs vigorously contend that the primary definition, as prohibited by Sections 203 and 204 of BCRA, is not narrowly tailored to serve that compelling government interest and is overbroad as a matter of constitutional law. It is this contention to which I now turn.

2. *Sections 201, 203, and 204 of BCRA are Narrowly Tailored to Serve Compelling Governmental Interests*

I find that BCRA's prohibition of corporate and labor union spending of general treasury funds on electioneering communications, as defined in the primary definition, is narrowly tailored to serve the aforementioned compelling governmental interests. In reading the floor debates leading up to BCRA's passage, I am impressed by the care with which Congress crafted BCRA's delicate balance between regulation of issue advocacy and electoral advocacy, carefully weighing the serious First Amendment interests at stake. With Title II, Congress created an objective, impartial approach based on empirical data that provides objective indicia for distinguishing between electioneering advertisements and genuine issue discussion.

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[125] The NRA also argues that Title II cannot be justified as essential to prevent circumvention of Title I, NRA Opp'n at 13-15. Because I find that the first two rationales asserted by the government are sufficient, I do not need to reach whether this rationale constitutes a compelling governmental interest. Consequently, I decline to reach the NRA's argument on this point.

a. *Introduction*

In briefing this issue, Plaintiffs take great pains to exaggerate the reach of BCRA's electioneering communication provision-a technique no doubt designed to assist their efforts at demonstrating overbreadth. By so doing, Plaintiffs' distort the actual reach and purpose of Title II. *See, e.g.*, NRA Br. at 5 (presenting the law as a close relative of the universally condemned Sedition Acts of 1798). Given the extent to which Plaintiffs contort Title II to serve their own rhetorical purposes, it is necessary to state once again what BCRA does and does not accomplish in Title II.

The primary definition in section 201 is specifically focused on the pressing problem of corporations and labor unions using general treasury funds to directly influence federal elections under the guise of issue advocacy. Plaintiffs dismiss the primary definition in Title II as a "sweeping" "condemnation of core political speech," McConnell Opp'n at 43, and characterize the restrictions in Title II as "staggeringly overbroad." McConnell Br. at 59. Despite these statements, the primary definition of "electioneering communication" includes only communications that fulfill four, very discrete components: (a) they must be disseminated by cable, broadcast, or satellite, (b) they must refer to a clearly identified Federal candidate, (c) they must be distributed within 60 days before a general election or 30 days before a primary election, and (d) they must be targeted to the relevant electorate. BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A).

Furthermore, Section 201 also contains a provision which expressly exempts four additional classes of communication from both the primary and backup definitions of electioneering communication. The four categories excluded from the definition of electioneering communication are:

> (i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;[126]
>
> (ii) a communication which constitutes an expenditure or an independent expenditure under . . . [FECA];[127]
>
> (iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or
>
> (iv) any other communication exempted under such regulations as the Commission may promulgate (consis-

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[126] The first statutorily-created exemption is almost identical to a preexisting provision of FECA, 2 U.S.C. 431(9)(B)(i), that excludes from the definition of "expenditure" news stories and editorials broadcast or published by the media. 2 U.S.C. § 431(9)(B)(i) ("[Expenditure does not include] any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."). The parties have referred to this carve-out as the "media exemption." *See infra*.

[127] This exemption prevents double reporting of an electioneering communication if it already constitutes an expenditure or independent expenditure under the Act. Electioneering Communications, 67 Fed.Reg. 65190, 65,197-98 (October 23, 2002) (to be codified at 11 C.F.R. § 100.29(c)(3)).

> tent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) [which is a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)].

BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B). The final exemption in Section 201 provides the Commission with authority to promulgate further regulatory exemptions to the definition of "electioneering communication." However, the Commission's ability to create further regulatory carve-outs is closely circumscribed. First, any future exemption must be consistent with the requirements of the electioneering communication provision. Second, a communication cannot be exempted if it is a "public communication" "that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." BCRA § 101(b); FECA § 301(2)(A)(iii); 2 U.S.C. § 431(20)(A)(iii). As this latter limitation essentially tracks the language of the fallback definition, the statute appears to require the Commission not to stray from either definition of electioneering communication when promulgating future exemptions.[128]

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[128] Since the passage of BCRA, the Commission has promulgated two exemptions to the definition of electioneering communication. The first, exempts communications paid for by candidates for state or local office where the mention of a Federal candidate is "merely incidental" and thus not in violation of Section 301(20)(A)(iii) of FECA. Electioneering

Plaintiffs present two overbreadth challenges to Title II. First, Plaintiffs argue that the primary definition of electioneering communication applies to too many genuine issue advertisements to be considered narrowly tailored. McConnell Br. at 57-69; McConnell Opp'n at 42-48; McConnell Reply 33-40; NRA Br. at 17, 24-33; NRA Opp'n at 17-25; NRA Reply at 22-25; ACLU Reply 7-10; AFL-CIO Reply at 8-9. Second, Plaintiffs contend that Title II is unconstitutional because it applies to all corporations and does not contain a special statutory carve-out for non-profit, *MCFL*-type corporations. McConnell Opp'n at 41-42; NRA Br. at 17-24; ACLU Br. at 16-17; *see also* NRA Reply at 14-20; ACLU Reply at 2-7.

Communications, 67 Fed.Reg. at 65, 198-99 (to be codified at 11 C.F.R. 100.29(c)(5)). The second, exempts communications paid for by any charitable organization operating under Section 501(c)(3) of the Internal Revenue Code, which by law are not permitted to engage in partisan political activity. *Id.* at 65,199-200 (to be codified at 11 C.F.R. 100.29(c)(6)).

Four of the McConnell Plaintiffs are Section 501(c)(3) organizations.

McConnell Second Am. Compl. ¶¶ 30, 32, 36, 37 (identifying the Indiana Family Institute, Inc., the National Right To Life Educational Trust Fund, the Southeastern Legal Foundation, Inc., and U .S. d/b/a Pro-English as 501(c)(3) organizations). Given the FEC's regulations, I find that Court does not have jurisdiction over these four Plaintiffs on both standing and ripeness grounds. These four Plaintiffs do not demonstrate any injury-in- fact, a necessary prerequisite of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Plaintiffs have the burden of establishing standing to bring their suit by demonstrating that they have: (1) suffered an "injury in fact," (2) which is "fairly traceable to the conduct complained of," and (3) is capable of judicial redress.). Moreover, as Plaintiffs have presented "a controversy that has not yet arisen and may never arise," *Wisconsin Right to Life v. Paradise*, 138 F.3d 1183, 1187- 88 (7th Cir.1998), their claim is not ripe and the Court lacks jurisdiction to resolve their specific challenge to the electioneering communications provision. Accordingly, I do not believe that the Court has any jurisdiction over the claims of these four Plaintiffs in relation to the electioneering communication provisions in Title II.

b. *BCRA's Restrictions on Electioneering Communication is Narrowly Tailored*

The restrictions in Title II on electioneering communications, as defined in the primary definition, are narrowly tailored. As discussed *supra,* Congress can permissibly regulate beyond express electoral advocacy only by ensuring that the law does not unconstitutionally burden issue discussion. In creating Title II of BCRA, Congress created a bright-line test that focuses on objective criteria common to broadcast advertisements that directly influence federal elections. By constructing this bright-line test, and avoiding a test that rests on subjectivity, Congress not only avoided the vagueness problems that plagued FECA, but also specifically linked their findings of abuse of Section 441b to the provisions in the primary definition. By using the main indicators of abuse—broadcast advertisements, aired in close proximity to a federal election, containing a reference to a candidate, and targeted to the candidate's electorate—Congress created a clear rule that constitutionally distinguishes between electioneering advertisements and genuine issue advertisements in the overwhelming majority of cases.

The Findings conclusively demonstrate that genuine issue advocacy is empirically distinguishable from issue advertisements seeking to influence a federal election. Findings ¶ 2.8. The vast majority of issue advertisements designed to influence a federal election identify a federal candidate, are run sixty days prior to a general election, or thirty days before a primary election, and are run in states or congressional districts with close races. I shall briefly examine each of these in turn.

1) Issue Advertisements Designed to Influence a Federal Election Almost Always Identify a Federal Candidate

The record in this case conclusively establish that issue advertisements designed to influence a federal election almost

always refer to a specific federal candidate. *Id.* ¶ 2.8. Political consultants who create genuine issue advertisements present uncontroverted testimony that when designing pure issue advertisements, "it was never necessary . . . to reference specific candidates for federal office in order to create effective ads." *Id.* ¶ 2.8.1.1 (Bailey) (discussing examples); *see also id.* (Strother) (pure issue ads did not mention any candidates by name). The flip side of this coin, as the consultants allude to in their testimony, is that when advertisements do mention a candidate's name, particularly in the period preceding an election, the advertisement's primary purpose is usually to influence the election. *Id.* (Bailey) ("In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections."); *id.* (Strother) ("Indeed, there is usually no reason to mention a candidate's name unless the point is to influence an election."). Expert testimony concurs in the views of the political consultants. *Id.* ¶ 2.8.1.2 (Krasno & Sorauf) ("The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates . . . . Pure issue ads, on the other hand, were much less likely to mention a candidate for federal office . . . .") (Krasno & Sorauf); ¶ 2.8.4 (Magleby) ("A number of indicia make clear that the ads run by individuals and interest groups are in reality electioneering ads that are meant to influence, and do influence, elections: These electioneering ads generally name a candidate . . . .").

This point is driven home by additional evidence, which demonstrates that advertisements run in the sixty days preceding a general election overwhelmingly mention a federal candidate and those run outside that period overwhelmingly do not mention a federal candidate. *Id.* ¶ 2.8.1.3 (discussing advertisements by Citizens for Better Medicare, Chamber of Commerce, Planned Parenthood, AFL-CIO, EMILY's List, Americans for Job Security, Business Round Table, Handgun Control, Sierra Club, and League of Conservation Voters). These facts strongly suggest that true issue advocacy need not mention a candidate's name to be effective, and that when advertisements mention a federal candidate, they are likely to be aired in close, temporal proximity to an election as part of an effort to influence that election. This pattern is manifested repeatedly in other issue advocacy organizations' campaigns, demonstrating in an objective and unbiased manner the fact that most advertisements designed to influence federal elections refer to a federal candidate.[129] *Id.* By focusing on those advertisements that specifically refer to a federal candidate, Title II of BCRA appropriately targets issue advertisements that are designed to influence an election.[130] *Id.* ¶ 2.8.1.4.

2) A Majority of Candidate-Centered Issue Advertisements are Run in the Sixty Days Prior to a General Election and Thirty Days Prior to a Primary Election

The Findings also overwhelmingly demonstrate the appropriateness of BCRA's sixty and thirty day benchmarks. While advertisements appearing outside these time frames can influence elections, Congress appropriately focused on the periods of time that most directly influence federal

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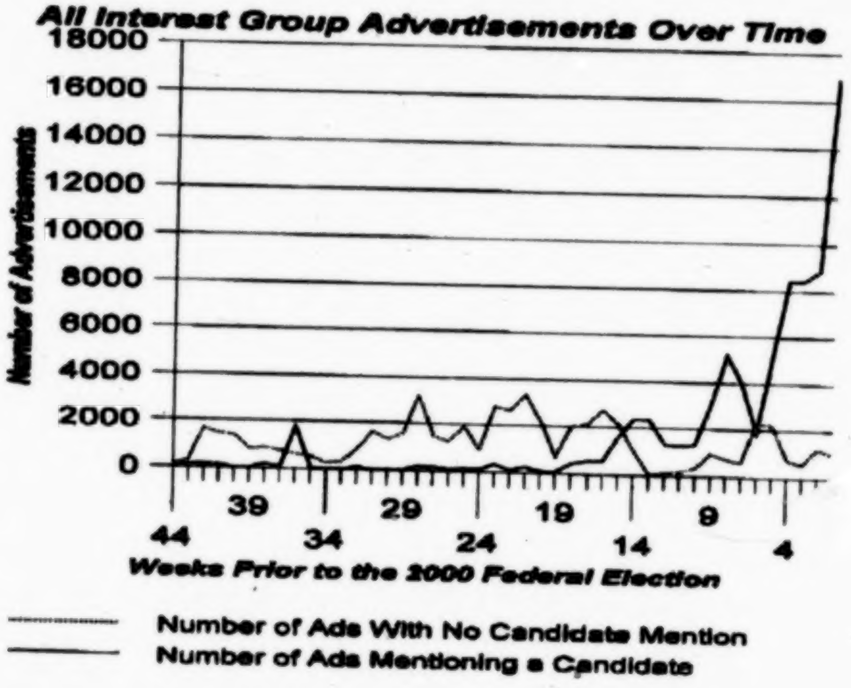
[129] No similar evidence was presented by Plaintiffs to show an opposite trend or pattern.

[130] Moreover, BCRA appropriately leaves untouched advertisements paid for with corporate and labor union general treasury funds that do not refer to a federal candidate. For example in the 63 days before the 2000 election, Citizens For Better Medicare ran 14,975 advertisements, of which 4,099 did not mention a federal candidate. Findings ¶ 2.8.1.3. *None* of these advertisements that did not mention a federal candidate would be covered under BCRA. However, the 6,000 advertisements that mentioned a federal candidate and that were aired in the final three weeks of the 2000 election potentially would need to be paid for with segregated funds if the advertisements met the other criteria of the primary definition to be considered "electioneering communication."

elections. *Id.* ¶ 2.11.1. The Annenberg Study, which was not challenged by Plaintiffs, and was relied on by Plaintiffs' experts, as well as by Congress, concluded that during the 2000 federal election "[f]ully 94% of issue ads aired after August made a case for or against a candidate." *Id.* ¶ 2.8.2.1. As the following chart from the findings illustrates, issue advertisements that mention a federal candidate dramatically increase in the period before a federal election. In this case, the picture tells the entire story:

by Kenneth Goldstein illustrates this point:



Id. ¶ 2.8.2.2. In addition, uncontroverted expert testimony in this case confirms that issue advertisements aimed at influencing federal elections are aired in the period right before an election. *Id.* ¶ 2.8.2.3; *id.* (Goldstein) ("The CMAG database provides empirical evidence of a strong positive correlation between [an advertisement's reference to a federal candidate and the proximity in time of the broadcast of the advertisement to the federal election] and consequently of its validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office."). The evidence establishes that Congress was correct to conclude that sixty days before a federal election is the time corporations and labor unions have sought to use their general treasuries to influence federal elections. *See* Findings ¶ 2.8.2.4.

The thirty-day benchmark is similarly narrowly tailored. Plaintiffs complain that no analysis of narrow tailoring "exists as to ads broadcast within 30 days of primaries or conventions, and defendants appear to have abandoned any contention that there is any basis in experience to prohibit such advertisements." AFL-CIO Reply at 3 n.2. This argument is incorrect; Defendants have put forth evidence concerning BCRA's thirty-day window and Plaintiffs have done nothing to contradict or challenge the evidence. As the Findings establish, Defendant-Intervenors were the only party to actually study the impact of BCRA on advertisements run during the 2000 primary election period. Findings ¶ 2.11.5.3. The Defendant-Intervenors found only 76 distinct advertisements which aired more than 60 days before the general election from the CMAG database, comprising 16,916 airings. *Id.* Of these advertisements, only three percent of the *airings* (522 out of 16,916) named a candidate and were aired within 30 days of the candidate's primary. *Id.* Defendant-Intervenors observed that of the advertisements identifying a candidate and airing within 30 days of a 2000 primary election, only 1.2 percent were coded as "genuine issue advertisements." *Id.* Defendants' experts Krasno and Soraufmake a similar finding. *Id.* ¶ 2.11.5.2. These experts observe that the "hodgepodge of different primary dates makes it difficult to factor [the 30 day primary window] into the analysis, but we are confident that it would have little effect on the proportion of pure issue ads incorrectly captured by BCRA for the simple reason that so few of these advertisements mention candidates at all. Indeed, our examination of 1998 shows this to be true: no pure issue ads would have been captured by the 30-day primary period." *Id.* Plaintiffs make absolutely *no* effort to challenge this data, and I find the evidence sufficient to demonstrate that the thirty-day time frame is supported by the record in this case.

Indeed, the closest Plaintiffs come to challenging Defendants' on this point is the AFL-CIO's citation to 336 cookie-cutter advertisements aired over three election cycles, only 50 of which would have been even covered by BCRA's provisions. Findings ¶ 2.11.5.1. I discuss these advertisements in more detail, *infra,* however it is clear that this evidence represents the political advertising activity of only one interest group, albeit a particularly active one. As such, this submission does not directly address Defendants' analysis which examines BCRA's effect on issue advocacy during the primary cycle in general. I, therefore, find that this AFL-CIO evidence does not change my finding that BCRA's thirty-day period is supported by the record as being narrowly tailored to achieve the governmental interest at stake.

Moreover, Defendants provide uncontroverted evidence that the effect of advertisements run during a primary can be just as damaging as advertisements run during the general election. The record demonstrates that interest group broadcast advertisements had a substantial effect on the outcome of the 2000 Congressional race in Florida's Eighth district, particularly with the advertisements run by The Club for Growth during the primary. *Id.* ¶ 2.6.5.5 (Pennington); *see also id.* ¶ 2.10.2 (Pennington) (noting that radio advertisements by Americans for Limited Terms attacking Mr. Keller's opponent on taxes and other issues was quite effective). The Club for Growth and Republican candidate Ric Keller had made their relationship well known, and the Club for Growth ran advertisements particularly helpful to Mr. Keller including one entitled "Keller Sublette Higher Taxes." *Id.* ¶ 2.6.5.5 (Pennington). Keller's Republican primary opponent, Bill Sublette, had been the front-runner until this advertising campaign by The Club for Growth began. *Id.* Rocky Pennington, Mr. Sublette's campaign consultant, observed that Sublette would have garnered 50 percent of the vote in the Republican primary and not have had to face a run-off primary contest had it not been for The Club for Growth advertisements. *Id.*

After the election, in June of 2001, Congressman Ric Keller signed a Club for Growth fundraising letter stating:

> The Club for Growth selected my race as one of its *top priorities* . . . . Since the Club targets the most competitive races in the country, your membership in the Club will help Republicans keep control of Congress.

Id. ¶ ¶ 2.7.4 (underline in original, italics added for emphasis). In my judgment, the Keller-Sublette primary election advertising example epitomizes the reason Congress extended the prohibition on electioneering communications to 30 days within primary elections. It also demonstrates that simply because a primary election does not ultimately produce an officeholder, since the winner only receives a chance to run for elected office, the risk of corruption is still clearly present. *See* Findings ¶ 2.6.6.5 (New Hampshire Presidential primary election advertisements referencing Senator McCain). The thirty-day prohibition around primaries is therefore supported by the record.

The sixty and thirty-day figures are not arbitrary numbers selected by Congress, but appropriate time periods tied to empirically verifiable data. The Findings persuasively demonstrate that advertisements designed to influence afederal election mention the name of a candidate and appear in the sixty and thirty days before a federal election or primary contest. The primary definition of electioneering communication is narrowly tailored because it focuses only on these periods of time, where it has been shown that candidate-centered issue advocacy is at its zenith and the influence of these advertisements on federal elections is at its

strongest. Indeed, expert testimony likewise concludes that the majority of issue advertisements that mention a federal candidate appear in the period before an election. *Id.* ¶ 2.8.2.3.

Unlike Judge Leon, I am equally unpersuaded by Plaintiffs' claim that the legislative calendar requires the running of issue advertisements during the periods covered by BCRA. *See, e.g.*, AFL-CIO Br. at 10-11; Findings ¶ 2.11.8. I do not find that Plaintiffs have presented sufficient evidence to demonstrate this proposition. Findings ¶ 2.11.8.3. In many instances, Plaintiffs conclusively allege that legislative activity occurs during this time frame without providing either specific examples from the legislative calendar or examples from their own issue advertising campaigns addressing these legislative issues. *Id.* ¶ 2.11.8.1. The actual examples of some advocacy tied to specific pending legislation Plaintiffs present are comparatively few and I conclude are not sufficient to demonstrate that BCRA is overbroad. *Id.* ¶ 2.11.8.2. Importantly, Plaintiffs never overcome the fact that all issue advertisements that refer to a federal candidate, that are run in close proximity to a federal election, and that are targeted to the candidate's electorate influence the outcome of the federal election. *Id.* ¶ 2.11.2. Nor do they overcome the evidence showing that most "pure" issue advertisements do not mention the name of federal candidates. *Id* ¶ 2.8.1.1. Congress properly concluded that advertisements mentioning a candidate run in this time frame have an electioneering affect, even if they are run for a different purpose, and if these advertisements were paid for by corporations and labor unions, Congress concluded, consistent with longstanding policy, to require that these advertisements be paid for with segregated funds specifically designated for election purposes.

Additionally, the record establishes that it is a disputed issue of fact as to whether it is even effective to run "genuine" issue advertisements in the immediate run-up to a federal election. Findings ¶ 2.11.7. Political consultants, current and former candidates and officeholders, and Defendants' expert witnesses contend that it is ineffective to run issue advertisements in close proximity to a federal election, and as a result, advertisements about issues run during that time frame are likely designed to influence federal elections. *Id.* ¶¶ 2.11.7.1-2.11.7.2. Plaintiffs respond that it is necessary to run issue advertisements that mention the name of a federal candidate close to an election because of the public's greater interest in public affairs during that time frame. *Id.* ¶¶ 2.11.7.3-2.11.7.4. Because this issue is disputed, I reach no conclusion on this matter. What I do conclude is that with the primary definition of electioneering communication, the test does not focus on the objective behind the advertisement but rather objective determinants that have been empirically proven to distinguish issue advertisements that influence federal elections from other types of issue advertising.

Given the record presented to the Court, I conclude that BCRA captures the overwhelming majority of advertisements that are designed to affect federal elections. Even if the primary purpose of a broadcast advertisement is to pressure a Member of Congress on pending legislation, the record demonstrates that advertisements mentioning a federal candidate that run in close proximity to a federal election that are targeted at that candidate's electorate have a serious impact on elections. Still, BCRA only requires that these advertisements be paid for with segregated funds as opposed to general treasury funds.

3) Most Candidate-Centered Advertisements That Mention a Candidate for Federal Office Are Run in States and Congressional Districts With Close Elections

The Court's Findings conclusively demonstrate from the evidence that issue advertisements designed to influence a federal election are focused predominantly on close races. Findings ¶ 2.8.3. Expert and political consultant testimony, as well as empirical data, all demonstrate this fact. *Id.* The obvious reason for focusing primarily on close races is that corporations and labor unions endeavor to receive the most value out of each dollar spent on advertising in order to maximize their influence on elections. Even Plaintiff NRA admitted to focusing its advertisements on competitive races. *Id.* ¶ 2.8.3.5.

In my judgment, tailoring BCRA to apply only to "competitive races" would create line-drawing difficulties that would make such a law unconstitutional. However, the primary definition of electioneering communication is narrowly tailored in that it only focuses on broadcast advertisements that are targeted to the relevant electorate of each candidate. This means that, in the case of House and Senate races, the communication will not constitute an "electioneering communication" unless 50,000 or more individuals in the relevant congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. BCRA § 201; FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C). Broadcast advertisements that target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude. I find that by applying only to a candidate's relevant electorate, the primary definition of electioneering communication is narrowly tailored.

4) Legal Conclusions Relating To Expert Reports and Plaintiffs' Sample Advertisements

In my Findings and in the Appendix to this Opinion, I have made an effort to describe thoroughly the various expert reports purporting to demonstrate the problems created by issue advocacy advertisements affecting federal elections, as well as the narrow tailoring Congress achieved in BCRA to avoid affecting federal non-electioneering advertisements. I have also devoted a great deal of effort and care to lay out the criticisms of these studies proffered by Plaintiffs' expert, and the responses to that criticism by Defendants' experts. I have done so because the record demonstrates that a number of the reports, such as the *Buying Time* and the Annenberg Center studies, were relied upon by Congress in its consideration of BCRA and the parties have presented the Court with a wealth of material aimed at bolstering or discrediting them. In addition, Plaintiffs have attempted to demonstrate BCRA's overbreadth by discussing a series of advertisements that they claim would be unfairly captured under the primary definition of electioneering communication. The problem with this approach is that it asks the Court to sit as the viewer and find that these advertisements were pure issue advertisements. The *Buckley* Court warned against a statutory test that relied on the viewer and listener's interpretation of a political message. I have declined, therefore, to engage in this exercise. As my Findings discuss, I have reviewed Plaintiffs' submission, including all of their cited advertisements, and conclude that they do not demonstrate BCRA's overbreadth. *See* Findings ¶ 2.11.3-2.11.5.

Turning to the experts, as indicated in my Findings, I find that much, though not all, of the relevant evidence presented by the Defendants has merit and has not been discredited by Plaintiffs' expert, Dr. Gibson, whose criticism focused on the *Buying Time* studies. *Id.* ¶ 2.12. At the outset, it is worth pointing out that the conclusions reached in Dr. Goldstein's Expert Report are unrebutted on the following points: interest group advertising in 2000 was concentrated in so-called "battleground" states; roughly 11 percent of candidate-sponsored advertisements in 2000 used express advocacy terminology; interest group advertisements, which identified a candidate in 2000, tended to be broadcast within the final 60 days of the election campaign, whereas those that did not identify a candidate were spread more evenly throughout the year; and interest group advertisements that mentioned candidates in 2000 were highly concentrated in "battleground states." *Id.* ¶ 2.12.3. Dr. Goldstein's uncontroverted conclusions further demonstrate that BCRA's primary definition of electioneering communications narrowly focuses on the key empirical determinants that separate genuine issue discussion from electioneering.

Plaintiffs have attempted to discredit the *Buying Time* reports primarily through the expert reports of Dr. Gibson. Dr. Gibson presents various criticisms of the reports in an effort to have the Court dismiss them or find Dr. Gibson's alternative conclusions more acceptable. As I mentioned in my Findings, the effort is not unlike that of a piñata party: if one hits the piñata enough, it will eventually crack apart. *Id.* ¶ 2.12.4. Although some of these "hits" have merit, I point out that neither Plaintiffs nor Dr. Gibson have attempted to conduct their own similar study, or even replicate a discrete portion of the *Buying Time* studies, despite the fact that the underlying materials were provided to them by Defendants. Presenting the Court with contrary results from such a study would have been far more persuasive than the recalculations of *Buying Time* data and the often conjectural and speculative criticism proffered by Plaintiffs and Dr. Gibson.

Importantly, much, if not all, of the objective findings in the *Buying Time* reports have not been undermined by Plaintiffs' expert. For example, Plaintiffs have not challenged the conclusions in *Buying Time* that very few advertisements utilize express advocacy terminology, and that interest group advertisements which identify candidates are concentrated toward the end of the election campaign. *Id.* ¶ 2.12.7. I find that this objective data is insulated from the great majority of criticism leveled at the *Buying Time* reports. *Id.* (Dr. Gibson commenting that "[e]ntirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad) present few threats to reliability."). Furthermore, some of these results are supported by those of the unrebutted Annenberg Reports. *Id.*

As my Findings discuss, I have not accepted either side's discussion of the conclusion in *Buying Time 1998* related to the percentage of genuine issue advertisements that would be affected by BCRA. *Id.* ¶¶ 2.12.5-2.12.9. *Buying Time 1998* finds that seven percent of genuine issue advertisements aired over the course of 1998 were aired in the final 60 days of the election campaign and mentioned a candidate, and Dr. Krasno determined that out of all of the advertisements identifying a candidate sixty days before the 1998 election, 14.7 percent were "genuine" issue advertisements. *Id.* ¶ 2.12.8. Dr. Gibson presented figures from the *Buying Time 1998* data ranging from 16 percent to 60 percent. *Id.* I have found that given the record it is impossible to determine which expert's view of the student coding is correct, and as such I find this matter in dispute and do not accept either side's conclusion on the likely effect BCRA would have based on the *Buying Time 1998* data.

In regard to *Buying Time 2000,* I do not accept its finding that, of all of the issue advertisements run within 60 days of the 2000 election that mentioned a candidate, 0.6 percent were genuine advertisements. *Id.* ¶ 2.12.10. I reached this conclusion primarily because Dr. Goldstein finds that if one includes all of the advertisements that Plaintiffs allege were recoded from genuine to electioneering commercials, the most "conservative" calculation of advertisements aired in the final 60 days of the 2000 election also identifying a candidate, which were "genuine," is 17 percent. *Id.*[131] This figure is not rebutted by Plaintiffs or their expert.

As I also explain in my Findings, I view these calculations as largely an academic exercise. *Id.* ¶ 2.12.12. The expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one person's genuine issue advertisement can be another's electioneering commercial. *Id.* ¶ 2.8.5. This is why BCRA's framers have used objective criteria to define "electioneering communication." Furthermore, as Dr. Lupia explains, these exercises can help us determine what BCRA's impact would have been on past behavior, but they do not necessarily tell us how BCRA will affect non-electioneering issue advertisements in the future. *Id.* For example, the NRA claims that its 30-minute "news magazine" titled "California," is genuine issue advocacy but it would be unfairly affected by BCRA because it showed an image of the group's periodical, which featured a picture of Vice President Al Gore on the cover for a few seconds. App. ¶ I.D.8.h. The advertisement was aired within 60 days of the 2000 election, and therefore would fall into BCRA's "electioneering communication" definition. I would note that it is clear that the NRA views Vice President Gore's presence in the advertisement as a coincidence and not a vital part of the commercial. *Id.* ¶ I.D.8.h. As such, one would expect that with the enactment of BCRA, the NRA would change its behavior. The NRA could leave the advertisement unchanged and only air it more than 60 days before an election, or more than 30 days before a primary, and escape BCRA's coverage. The NRA could also show a periodical with a different cover and air the advertisement whenever it liked. Or, the group could leave the advertisement unchanged, run it within the 60 day window and pay for the commercial from its PAC funds. This is one example, but it illustrates the point that trying to determine the number of advertisements that will be unfairly subjected to BCRA based on past behavior does not account for adaptation of that behavior based on the new reality.

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[131] Dr. Gibson also argues that since the majority of advertisements coded as electioneering were also coded as having policy matters as their primary focus, the studies in fact demonstrate that the vast majority of advertisements captured by BCRA are genuine issue advertisements. As the Findings demonstrate, I reject this argument. Findings ¶ 2.12.11. Defendants' experts have clearly demonstrated that the fact an advertisement may focus on issues does not preclude the possibility that the advertisement is designed to promote a candidate. *Id.* Dr. Lupia's beer commercial analogy illustrates this point effectively. *Id.* Furthermore, the results for candidate-sponsored advertisements demonstrate that even when a candidate running for office airs an advertisement in an effort to win election, he or she more often than not focuses those commercials on policy matters and not on personal characteristics of the candidates. *Id., see also supra* ¶ 2.3.2 (Bailey).

The fact that some genuine issue advertisements identified a candidate and were aired within 60 days of an election in the past does not mean that the candidate's presence was an essential, as opposed to an incidental, aspect of the commercial, or that such a percentage will remain constant. However, even if such conclusions could be drawn, it appears that the least contested figure presented to the Court is that 17 percent of advertisements in 2000 that would have been affected by BCRA were "genuine" issue advertisements. This figure is one of the reasons that Judge Leon finds the primary definition of electioneering communication to be substantially overbroad. I cannot agree with Judge Leon. First, I find these debates over "actual" percentages of genuine issue advocacy illustrative of why the Supreme Court in *Buckley* found that regulations relating to the subjective intent of the listener to be flawed. Trying to discern whether an advertisement is electioneering or issue advocacy is very difficult and open to debate. *See* Finding ¶ 2.8.5. Second, this number is the outermost number of "genuine" issue advertisements that would be covered under BCRA; strong arguments can be made that the number should be reduced. Given the evidence in this case that broadcast advertisements aired in close proximity to a federal election, that mention the name of a candidate, and that are targeted to the candidate's electorate directly influence federal elections, I find that Congress was correct to establish an objective test for determining what constitutes electioneering. In other words, even if I were to

accept the 17 percent figure as a valid metric for determining overbreadth, I find that the any such impact of BCRA is substantially counterbalanced by the record in this case and the objective empirical determinants related to these advertisements. For these reasons, I do not find Dr. Goldstein's conservative estimate of 17 percent to deem BCRA's primary definition of electioneering communication substantially overbroad.

Plaintiffs, as noted above, did not conduct their own empirical study like the *Buying Time* study, but instead provided the Court with examples of advertisements that they claim BCRA would have captured had it been in effect when they were aired. The McConnell Plaintiffs provided a CD-ROM containing 21 advertisements they claim provide "powerful illustrations of the amount and type of issue advocacy that would be prohibited by BCRA's primary definition of 'electioneering communications.'"[132] *Id.* ¶ 2.11.3. However, nine of these advertisements would not fall under BCRA's definition of electioneering communication because they either were not targeted at a relevant electorate or were not aired within 30 or 60 days of a primary or general election. *Id.* ¶ 2.11.3.1. Four of the remaining advertisements focus on a candidate's past votes with no reference to any pending or future legislation. *Id.* ¶ 2.11.3.2. I reject the notion that these advertisements are examples of genuine issue advocacy. *Id.* ¶ 2.11.3.3. It is difficult to imagine what purpose an advertisement would have other than to promote the election or defeat of a candidate when it is aired within 60 days of an election or 30 days of a primary, clearly identifies a candidate, runs in that candidate's electoral district, and focuses on the candidate's past voting record without referring to pending future legislation. Take, for example, the AFL-CIO's "Protect" advertisement:

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[132] As noted numerous times in this opinion, BCRA would not "prohibit" these advertisements. These advertisements can be run, unaltered, if paid for from segregated funds. In addition, if the advertisements are not run in the candidate's electorate, BCRA places no restrictions on these advertisements. If the advertisements are run more than 30 days before a primary or 60 days before a general election, BCRA imposes no restrictions on these commercials.

> PHARMACIST: The Senior Citizens today can't afford their medication. They come in and I know they're skipping medication so they can pay for their food. With the rising cost of medication today, it could wipe out anybody at any time.
>
> VOICE: Yet Congressman Jay Dickey sided with the drug industry. He voted no to guaranteed Medicare prescription benefits that would protect seniors from runaway prices. Tell Dickey quit putting special interests ahead of working families.
>
> PHARMACIST: Watching people walk away without the medication takes a little bit out of me every day.

Id. ¶ 2.6.7.1. The argument that this advertisement, and those like it, was aired to promote an issue, and not to attack a candidate, strains credulity. Therefore, out of these 21 self-selected, and presumably most self-serving advertisements McConnell Plaintiffs provided the three-judge panel, eight at most are genuine issue advertisements that would be affected by BCRA.[133] *Id.* ¶ 2.11.3.4.

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[133] I state "at most" due to the fact that Defendants have provided background for almost all of the advertisements presented by Plaintiffs to the Court as genuine issue commercials. Examining the advertisements with knowledge of the context in which they were aired raises serious doubt in my mind that the true purpose of some of these communications was to promote issues as opposed to candidates. Indeed, the uncontroverted expert testimony states that in assessing the true purpose of an advertisement it is very important to view the advertisement in the context of the election in which it was run, rather than as part of a cold, factual record. Findings ¶ 2.8.5 (Strother). For example, one advertisement submitted by the McConnell Plaintiffs exhorts viewers to "call" incumbent Senator Lauch Faircloth "today and tell him to keep up his fight [against trial lawyers]. Because if trial lawyers win, working families

In addition, Defendants identify 39 advertisements that appear in Plaintiffs' briefings, which Plaintiffs claim are genuine issue advertisements. *Id.* ¶ 2.11.4. In addition to these 39 advertisements, I have found four additional advertisements alleged in declarations to be examples of legislative-centered advertisements that would be affected by BCRA, *id.*, as well as a large number of cookie-cutter advertisements alluded to in the AFL-CIO's Opening Brief, which the group claims would be unfairly affected by BCRA's 30-day primary window, *id.* ¶ 2.11.5. I address the groupings of advertisements in turn.

The 39 advertisements scattered throughout Plaintiffs' briefs include 12 NRA advertisements which the group only identifies as having been aired sometime in 1994, and 13 commercials sponsored by the same group that aired in March of 2000, but mentioned only President Clinton who was not then a candidate for office. *Id.* ¶ 2.11.4.1. On these bases, I exclude these NRA commercials from consideration.

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lose." *Id.* ¶ 2.8.5.2. From a detached perspective, this advertisement appears to be advocating an anti-trial lawyer policy; however, when one is informed that Senator Faircloth's opponent was now-Senator John Edwards, a prominent trial lawyer, and that advertisements both supporting and opposing Senator Edwards focused on his trial lawyer credentials to the point that the phrase "trial lawyer" was synonymous with John Edwards, it is difficult to view the advertisement as anything other than electioneering. *Id.* However, as noted *supra*, ascertaining a political advertisement's true purpose is often a subjective exercise, one that Congress elected not to include in BCRA's primary definition of "electioneering communication." As such, unless there is an objective factor indicating that a proposed "genuine" advertisement is in fact an electioneering commercial, I will accept Plaintiffs' characterizations in the interests of a conservative and objective analysis. The conservative figure above also includes "Save," which criticizes a candidate's past vote but urges viewers to call the Member of Congress and "tell him to vote *no* when the Gingrich plan comes up again," intending, according to the AFL-CIO, "to influence House Members in the event that the bill returned for another vote in the [House]." Findings ¶ 2.11.3.2.

I also exclude the ACLU's advertisement as an example of a "genuine issue advertisement" since it is clear that it was engineered to provide the group standing to challenge BCRA and is the only example of a past "electioneering communication" made by the group. *Id.* ¶ 2.11.4.2. I reject another, the AFL-CIO's "Sky," since it, like the four in the McConnell Plaintiffs' 21 advertisement submission described *supra,* criticized a Member of Congress's past vote without reference to any pending or future legislation. *Id.* ¶ 2.11.4.3. Therefore, out of these 39 advertisements Plaintiffs used in their briefings to illustrate the unfairness of BCRA, 12 at most are genuine issue advertisements that would be affected by BCRA.[134] *Id.* ¶ 2.11.4.6.

Four other advertisements were cited by Plaintiffs in declarations as being motivated by pending legislation and happened to run within the 30 or 60-day BCRA windows. *Id.* ¶ 2.11.4.5 ("No Two Way," "Spearmint," "Spear," and the Gun Owners of America's armed pilots advertisement). For purposes of this analysis I accept Plaintiffs' characterization of these commercials. *But see supra* note 133.

Finally, the AFL-CIO mentions that a number of its legislation-focused advertisements would be affected by BCRA's 30-day window. Looking at the "flights" of

advertisements detailed in its submissions, it appears that the vast majority of the "cookiecutter" advertisements that made up these flights would not have been affected by BCRA. Findings ¶ 2.11.5.1; *see also* App. ¶ II.A. Out of 336 cookie-cutter advertisements cited to by the AFL-CIO, 50 would have been regulated by BCRA. Finding ¶ 2.11.5.1; *see also* App. ¶ II.A. The rest were part of the same lobbying efforts, but were not aired within 30 days of a named-candidate's primary. Finding ¶ 2.11.5.1; *see also* App. ¶ II.A.

These Plaintiff-produced advertisements provide very little insight into what effect BCRA would have had on political advertising in the past, or the effect it is likely to have in the future. Of the 400 self-selected advertisements proffered by Plaintiffs as illustrations of the overbreadth of BCRA, presumably the best examples available, less than 20 percent (79/400) would have been affected by BCRA, even if the five advertisements focusing on past votes in the absence of pending legislation are considered genuine issue advocacy. Furthermore, Plaintiffs do not attempt to compare the volume of these advertisements with a comparative total number of advertisements or airings of advertisements. Consequently, I am left with no idea as to what these advertisements represent in terms of the overall quantity of distinct advertisements aired over the *four* election cycles (1994, 1996, 1998, and 2000) in which Plaintiffs' proffered advertisements were aired. These examples do little to convince me of BCRA's overbreadth, and if anything, suggest the opposite conclusion.

5) Conclusion Relating to Narrow Tailoring

In my judgment, BCRA's restriction on electioneering communication is narrowly tailored to achieve the related compelling governmental interests. In devising Title II, Congress followed the clear instruction from the Supreme Court in *Buckley*-that limitations upon political speech could not hinge on the subjective intent of the listeners. *Buckley,* 424 U.S. at 43 (quoting *Thomas v. Collins,* 323 U.S. 516, 535

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[134] Again I use the qualifier "at most" due to the presence of advertisements whose context makes me question the notion that they are genuine issue advertisements and not electioneering commercials. *See supra* note 133. This conservative figure includes: the Associated Builders and Contractor's advertisement on penalties for child molesters, a subject that the group acknowledges "is not [an issue of] particular concern to the general public of contractors or general group of contractors;" Findings ¶ 2.6.6.2, and the NRA's "Tribute" where Charlton Heston discusses "winning in November" and states "as we set out this year to defeat the divisive forces that would take freedom away, I want to say these fighting words for everyone within the sound of my voice to hear and to heed and especially for you, Mr. Gore. "From my cold dead hands." Findings ¶ 2.11.4.4 (emphasis in original).

(1945)). Instead, Congress focused on objective facts and concluded that issue advertisements designed to influence a federal election shared a number of characteristics: first, the vast majority of issue advertisements run in the period before an election mention a federal candidate; second, these commercials are run in the sixty and thirty days before general or primary elections; and third, these advertisements are targeted at the most competitive races. In devising the primary definition of electioneering communication, Congress constructed a rule that only touched advertisements matching the criteria Congress found to be problematic: broadcast advertisements, referring to a federal candidate, targeting the candidate's electorate, run in close proximity to a federal election. Corporations and labor unions that desire to spend general treasury funds on advertisements fitting these characteristics can do so; they simply must pay for them with funding committed for that purpose by individuals who agree with the message of the union or corporation.

Congress properly determined that genuine issue advocacy can be discerned empirically from electioneering advocacy. In crafting Title II, it arrived at a definition of electioneering communication that matched its findings. It is very difficult to argue with Congress's conclusion that broadcast advertisements mentioning a federal candidate, run in close proximity to the candidate's election, and targeting the candidate's electorate do not have a significant influence on federal elections. In my judgment, Congress was correct to compel corporations and labor unions to pay for these advertisements with segregated funds committed to the purpose of electioneering in federal elections.

c. *Section 204 of BCRA Does Not Render Title II Fatally Overbroad*

Plaintiffs also argue that the restrictions on electioneering communications in Title II are not narrowly tailored because they apply to all corporations and do not provide for a specific statutory carve-out for corporations fitting the characteristics of the plaintiff in *MCFL*. With the Snowe-Jeffords' provision, BCRA appeared to provide for an exception to the electioneering communication ban for certain types of corporations; however, this exception has been eliminated by the "Wellstone Amendment," now codified in Section 204. The Snowe-Jeffords Provision would have permitted section 501(c)(4) organizations and section 527(e)(1) organizations to make electioneering communications provided that the organizations paid for these communications with money contributed by individuals, disclosed the names and addresses of those individuals who had given more than $1,000 to the account that paid for the communication, and, in the case of 501(c)(4) organizations, ensured that corporate and individual contributions were segregated into two separate accounts. The Wellstone Amendment, however, takes this exception away and requires corporations organized under section 501(c)(4) and section 527(e)(1) of the Internal Revenue Code to use segregated funding for electioneering communications. The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability; however, as I am persuaded that the Wellstone Amendment is constitutional, I do not find it necessary to sever it from BCRA.

Notably, the language in the Snowe-Jeffords Provision is silent as to whether or not corporations of the type identified in *MCFL* would be included within the parameters of its exception. In *MCFL*, the Supreme Court found that the prohibition in Section 441b on making independent expenditures containing words of express advocacy was unconstitutional *as applied* to a certain nonprofit, nonstock corporation. *MCFL*, 479 U.S. at 241. The Supreme Court's decision created an as-applied carve-out for certain nonprofit corporations that met three characteristics of the corporation at issue in the case which were "essential" to the Supreme Court's holding. *Id.* at 263. First, the corporation was "formed for the express purpose of promoting political ideas, and cannot engage in business activities [which] ensures that political resources reflect political support." *Id.* at 264. Second, the corporation did not have any "shareholders or other persons affiliated so as to have a claim on its assets or earnings [which e]nsures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Id.* Third, the corporation "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities [which] prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.*

The decision in *MCFL* stands for the proposition that the prohibition on independent expenditures containing words of express advocacy is unconstitutional as applied to a "small" group of qualified nonprofit corporations that fit the parameters set out by the majority in *MCFL*. *Austin*, 494 U.S. at 672 (1990) (Brennan, J., concurring). Although FECA was not amended by Congress in the wake of *MCFL*, the Commission eventually promulgated regulations exempting corporations fitting the criteria of *MCFL*, or Qualified Nonprofit Corporations ("QNCs"), from the prohibition on independent expenditures (expenditures containing words of express advocacy). 11 C.F.R. § 114.10(d)(1) ("A qualified non-profit corporation may make independent expenditures, as defined in 11 C.F.R. § 100.16, without violating the prohibitions against corporate expenditures contained in 11 C.F.R. part 114."). In defining what kind of corporation can receive QNC status, the Commission has hewed closely to the characteristics of the corporation in *MCFL*. *See* 11 C.F.R. § 114.10(c).

Given that Congress has never expressly codified the *MCFL* characteristics, it is not unexpected that the Snowe-Jeffords Provision never indicates whether QNCs would be included within the ambit of its exception. Nevertheless, the Snowe-Jeffords Provision, by its terms, appears to include QNCs. The Snowe-Jeffords provision applies to all section 501(c)(4) organizations and all section 527(e)(1) organizations without exception. In addition, the Snowe- Jeffords Provision permits certain section 501(c)(4) organizations and certain section 527(e)(1) organizations to make electioneering communications, provided that the funds used to pay for those communications comes from individuals who disclose their names and addresses. The regulations defining a QNC mandate that for a corporation to receive QNC-status, the corporation cannot receive corporate donations. 11 C.F.R. § 114.10(c) (4)(ii).[135] By its terms, the Snowe-Jeffords Provision would therefore appear to encompass QNCs.[136]

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[135] Some courts have found that the regulations establishing the test for which corporations qualify for QNC-status is too rigid and excludes corporations that legitimately deserve recognition under a more functional-based approach (for example, where the corporation has accepted a *de minimis* amount of corporate donations). *See North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir.1999), *cert. denied*, 528 U.S. 1153 (2000) ("We agree with those circuits that have addressed the question, each of which has held that the list of nonprofit corporate characteristics in *MCFL* was not 'a constitutional test for when a nonprofit corporation must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence to the facts in MCFL.'") (quoting *Day v. Holahan*, 34 F.3d 1356, 1363 (8th Cir.1994)); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292 (2d Cir.1995); *see also FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 190-91 (D.C.Cir.2001). Even if a QNC were permitted to accept a *de minimis* amount of corporate contributions, it would still be able to qualify for Snowe-Jeffords by paying for its communication with funds from a segregated account that contains funding from individuals only.

[136] The disclosure of names and addresses of individual contributors is not any more restrictive than the disclosure that the corporation in *MCFL* was forced to make. *MCFL*, 479 U.S. at 262 ("Even if § 441b is inapplicable, an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will

The Wellstone Amendment was added by Congress to force all corporations to fund their electioneering communications through political action committees with federal funds. 147 Cong. Rec. S2847 (daily ed. Mar. 26, 2001) (statement of Sen. Paul Wellstone) ("Let me be clear, this amendment does not say any special interest group cannot run an ad . . . . It only says these groups and organizations need to comply with the same rules as unions and corporations. Groups covered by my amendment can set up PACs, they can solicit contributions, and they can run all the ads they want. All this amendment says is they cannot use their regular treasury money. They can't use the soft money contributions to run these ads."). Under the Snowe-Jeffords Provision, individuals could have given unlimited amounts of nonfederal money to section 501(c)(4) organizations and section 527(e)(1) organizations and these groups would have been permitted to engage in electioneering communications provided that the groups paid for the advertisements with the funding contributed by the individuals. The Wellstone Amendment compels these organizations to fund all of their electioneering communications through a political action committee using federal funds.

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be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act."). Under the Snowe-Jeffords Provision, only individuals who have contributed $1,000 in the aggregate during a calendar year would have to disclose their names and addresses.

The Wellstone Amendment does not explicitly mention the status of corporations fitting the characteristics of an *MCFL* corporation. During the final passage of BCRA in the Senate, Senator McCain indicated that "[j]ust as an *MCFL*-type corporation, under the Supreme Court's ruling, is exempt from the current prohibition on the use of corporate funds for expenditures containing 'express advocacy,' so too is an *MCFL*-type corporation exempt from the prohibition in the Snowe-Jeffords amendment on the use of its treasury funds to pay for 'electioneering communications.'" 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain).[137]

Picking up on Senator McCain's statement, the FEC-in the recently promulgated regulations implementing BCRA-has created an exemption for QNCs to make electioneering communications. 11 C.F.R. § 114.10 (A qualified nonprofit corporation may make electioneering communications, as defined in 11 C.F.R. 100.29, without violating the prohibitions against corporate expenditures contained in 11 C.F.R. part 114."). Although not expressly provided for in the Wellstone Amendment, under Commission regulations, QNCs are permitted, therefore, to spend unlimited amounts of money on electioneering communications based on the implementing regulations by the FEC.

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[137] The reference Senator McCain makes to the Snowe-Jeffords' Provision is to the entire prohibition on corporate and labor union general treasury funds being used for electioneering communications, which was also known as "Snowe-Jeffords" throughout the legislative history. Thus, Senator McCain is not referring to "Snowe-Jeffords" as it has been discussed in this opinion as an exemption for section 501(c)(4) and section 527(e)(1) organizations. Electioneering Communications, 67 Fed.Reg. at 65204 ("Senator McCain specifically referred to that part of the Snowe- Jeffords amendment that prohibits the use of [a corporation's] treasury funds to pay for electioneering communications, the main provision of this amendment that remains unaltered by the passage of the Wellstone amendment.") (internal citation and quotation marks omitted) (second brackets in original).

I am convinced that Section 204 is constitutional in its present state and would leave for another day, in the context of an as-applied challenge, a determination of whether the FEC's regulations apply too narrowly and exclude corporations that should qualify for QNC-status. In my judgment, it was permissible for Congress not to exempt nonprofit corporations as a specific class from BCRA's restrictions on the general-treasury funding of electioneering communications. It goes without saying, and even Defendants concede, that *MCFL* establishes that FECA's (and now BCRA's) restrictions on the use of corporate treasury funds cannot constitutionally be applied to certain nonprofit corporations. Def.-Int. Opp'n at 65. However, given the FEC's regulations, I feel any argument relating to an *MCFL* exemption is premature. Any corporation that believes it should fall within *MCFL* may seek exemption under the FEC's regulations.[138] Moreover, if any corporation thinks that the Commission's regulations are too narrow in defining an *MCFL,* they may challenge them on that basis at the appropriate time. As the Defendant- Intervenors nicely phrase the inquiry: "The question is whether the new provisions added to FECA by BCRA may constitutionally be applied to the same set of corporations (and, of course, unions, other groups, and individuals) to which FECA's existing provisions have long applied, and continue to apply." Def.-Int. Opp'n at 67. I answer that question in the affirmative and find that organizations like the NRA or ACLU that desire *MCFL* treatment in order to be exempted under BCRA need to present such a claim in the future as was done by the plaintiffs in *Austin* and *MCFL*. Accordingly, I find that the

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[138] Future reviewing courts will not be writing on a blank slate. The Commission's regulations on the scope of the *QNC* exemption have been litigated multiple times. *See supra* note 135.

Wellstone Amendment does not render Title II substantially overbroad.[139]

d. *Conclusion Relating to Compelling Governmental Interests and Narrow Tailoring*

Based on the objective, empirical evidence, I conclude that BCRA is narrowly tailored to address the compelling governmental interests at stake in this case. As the Findings provide, Congress concluded that corporations and labor unions were using their general treasury funds to influence federal elections in violation of years of statutory prohibition. Title II of BCRA addresses the concern of Congress that corporations and labor unions were using their substantial aggregations of wealth to dominate the political environment. In that vein, Title II protects the individuals who have paid money into a corporation or union for purposes other than the support of candidate from having their money used to support political candidates to whom they may be opposed. Finally, Title II also addresses the potential for corruption that exists when corporations and labor unions make independent expenditures that have the potential to create political debts. *See Bellotti*, 435 U.S. at 788 n.26.

In addressing both forms of corruption, the primary definition of BCRA creates an objective test that identifies broadcast advertisements that influence a federal election.

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[139] Judge Leon finds Title II of BCRA unconstitutional only insofar as it applies to *MCFL*-corporations. However, I cannot agree with his conclusion that Sections 203 and 204 are unconstitutional because they do not create a specific statutory carve-out for *MCFL* corporations. *MCFL* was an as-applied challenge, and the Supreme Court did not strike down all of FECA as a result of its decision. Rather, the *MCFL* exemption is litigated on a case-by-case basis. *See MCFL*, 479 U.S. at 271 (Rehnquist, C.J., concurring in part, dissenting in part) (foreshadowing that the result of the *MCFL* decision would be to spur "costly litigation"). Therefore, I do not find a constitutional defect in the fact that BCRA does not create a statutory carve-out for *MCFL* corporations.

BCRA focuses only on those broadcast advertisements that mention a federal candidate, which, as demonstrated, is a key determinant of issue advertising that is essentially designed to influence a federal election. In addition, BCRA only applies to broadcast advertisements which, while mentioning a candidate, are targeted to that candidate's electorate. Moreover, BCRA only applies to these advertisements when they appear within the thirty days of a candidate's primary election or sixty days of the date of a general election. Nor is BCRA overbroad because it applies to certain non-profit corporations. It is obvious that the Supreme Court's decision in *MCFL* means that BCRA cannot constitutionally be applied to certain nonprofit corporations and the Commission's regulations provide for this fact. Finally, BCRA does not prohibit corporations and labor unions from making advertisements meeting the aforementioned criteria. Rather, BCRA only requires that corporations and labor unions pay for these advertisements with funding that comes from those committed to the political ideals of the corporation and labor union; namely through PACs where disclosure is present and where contributors are aligned with the political message of the corporation or labor union.

In my view, Title II is narrowly tailored to serve these compelling governmental interests. The primary definition of electioneering communication purposefully creates a new objective test that draws a bright line between issue advocacy and electoral advocacy. At this facial challenge stage, I find that it is narrowly tailored to serve compelling governmental interests and therefore respectfully dissent from the conclusions reached by Judge Henderson and Judge Leon on this point.

F. *Plaintiffs' Underbreadth Challenge*

A number of Plaintiffs also argue that Title II of BCRA is unconstitutional because it is fatally underinclusive. *See, e.g.*, McConnell Br. at 75-77, 81; NRA Br. at 34-39; Chamber/

NAM Br. at 6. For example, Plaintiffs contend that Title II is underinclusive because it does not restrict broadcast advertisements outside the thirty and sixty-day windows. McConnell Br. at 75; NRA Br. at 37-38. The Plaintiffs also contend that BCRA is underinclusive because it does not apply to print advertisements, direct mail, and the Internet, McConnell Br. at 81; NRA Br. 33-37, and because it only applies to corporations and labor unions, NRA Br. at 38.[140]

Given our Circuit's decision in *Blount v. SEC*, I am not persuaded by Plaintiffs arguments on this score. The D.C. Circuit court in *Blount* stated:

> [A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals. While the rule chosen must "fit" the asserted goals, *City of Cincinnati [v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993)], it must also, by virtue of the narrow tailoring requirement discussed below, strike an appropriate balance between achieving those goals and protecting constitutional rights. Because the primary purpose of underinclusiveness analysis is simply to "ensure that the proffered state interest actually underlies the law", *Austin*, 494 U.S. at 677 (Brennan, J., concurring), a rule is struck for underinclusiveness only if it cannot "fairly be said to advance any genuinely substantial governmental interest", *FCC v. League of Women Voters*, 468 U.S.

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[140] To the extent that the McConnell Plaintiffs argue in a brief footnote that Title II is under inclusive because it applies to advertisements that make only "passing" references to federal candidates, McConnell Br. at 77 n.37, Plaintiffs fail to state how it would be possible to create a restriction on electioneering communication that would be based on the length of time a reference to a federal candidate is mentioned. I simply do not find this argument persuasive.

> 364, 396 (1984), because it provides only "ineffective or remote" support for the asserted goals, *id.* (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 564 (1980)), or "limited incremental" support, *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 73 (1983). *See also Florida Star v. B.J.F.,* 491 U.S. 524 (1989) (government "must demonstrate its commitment to advancing [its] interest by applying its prohibition evenhandedly . . . . Without more careful and inclusive precautions against alternative forms of [the harm], we cannot conclude that Florida's selective ban . . . satisfactorily accomplishes its stated purpose."). Thus, with regard to First Amendment underinclusiveness analysis, neither a perfect nor even the best available fit between means and ends is required.

Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995) (emphasis and alterations in original). As concluded *supra,* there is a tight fit between the asserted compelling governmental interests and the statutory provisions in Title II.

Plaintiffs first complain that BCRA is underinclusive because it regulates only advertisements aired within 60 days of a general election or 30 days of a primary, as opposed to advertisements falling just outside those periods. McConnell Br. at 75-77; NRA Br. at 37-38. As extensively discussed *supra,* BCRA focuses on issue advertisements designed to influence a federal election. The law, therefore, regulates advertisements that only fall within periods before federal elections. On the basis of empirical data, Congress concluded that sixty days before a general election and thirty days before a primary election were the periods of time in which issue advertisements were being used most often to influence federal elections. While Plaintiffs expert, Dr. Milkis, observes that advertisements outside the thirty and sixty day period have some effect on federal elections, Findings ¶ 2.11.1, the Findings demonstrate that issue advertisements mentioning a federal candidate are most often aired in the sixty days before a general election and the thirty days before a primary election. *See generally id.* ¶ 2.11. Congress recognized that most candidate- centered issue advertisements were run in close proximity to a federal election. *See supra* Findings ¶ ¶ 2.8.1.3, 2.8.2 (discussing the fact that candidate-centered issue advocacy is concentrated in the weeks surrounding federal elections). In my judgment, focusing on periods outside the sixty and thirty day windows would have rendered the primary definition fatally overbroad given the empirical evidence presented about the timing of candidate-centered issue advertisements. Accordingly, I find that Title II strikes an appropriate balance between achieving the compelling governmental interests and protecting constitutional rights.

Plaintiffs next challenge Title II as underinclusive on the ground that its definition of electioneering communication covers broadcast advertisements on television and radio, but not advertisements run in other media, such as print, direct mail, or the Internet. McConnell Br. at 81; NRA Br. at 33-36; *see also* Findings ¶ 2.10. As stated, however, by the AFL-CIO Plaintiffs, "broadcast is the most potent medium available in this electronic age, which is precisely why BCRA seeks to decisively impair groups' access to it. Print advertising, telephone banks, direct mail and other forms of non-broadcast communications pale in comparison as mass communications outlet." AFL-CIO Br. at 11. The Findings similarly conclude that broadcast advertising on television and radio are the most potent form of advertising. Findings ¶ ¶ 2.10.1-2.10.2.[141]

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[141] Plaintiffs' citation to *Republican Party of Minnesota v. White,* 122 S.Ct. 2528 (2002), is misplaced. McConnell Br. at 76; NRA Br. at 33. In *Republican Party of Minnesota,* the Supreme Court struck down a state law that prohibited candidates for judicial office from announcing their views on disputed legal or political issues. The Court found the law to be underinclusive because it only prohibited a judge from announcing views on a disputed issue during the pendency of his or her candidacy.

I disagree with the NRA's conclusion that the other forms of media, like webcasts, telemarketing, direct mail, email, and print advertisements will logically become the next vehicle for corporations and labor unions looking to influence a federal election. In my view, the flaw with this argument lies in the assumption that these other media are just as effective as television and radio advertising for conveying an electioneering message. The evidence at this juncture does not support this conclusion. Therefore, I also respectfully disagree with Judge Henderson's conclusion on this matter.

The NRA, for example, contends that its webcasts of "NRA Live!" which often criticize politicians, are comparable to the NRA's issue advertising campaigns broadcast through radio or television. *See* NRA Br. at 36-37; Findings ¶ 2.10.3. The NRA's evidence in support of this assumption is not sufficient. First, the NRA offers a declaration of their communications consultant Angus McQueen who states that the Internet has become an "*increasingly* important part of how information becomes disseminated in our society." Findings ¶ 2.10.3.1 (emphasis added). However, congressional judgment regarding the "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *NRWC,* 459 U.S. at 209 (internal citation and quotation marks omitted). Merely because the Internet is "increasingly" part of how society receives and disseminates information does not make it comparable to broadcast advertisements over television and radio, which everyone acknowledges was the problem Congress sought to address with BCRA. The other evidence presented by the NRA is a submission of "NRA Live!" viewership statistics and various videotapes containing broadcasts of "NRA Live!." Findings ¶ 2.10.3.2. However, the NRA does not include any expert or other testimony that "NRA Live!" is influencing federal elections to the same degree as the NRA's broadcast advertising campaigns. It is likely that there is no evidence of such a phenomenon because in order to view "NRA Live!," individuals must "opt-in" by going to the NRA website and viewing the program. Those individuals choosing to do so are likely more predisposed to the NRA's views about political candidates than the undecided voter watching a sitcom on a Thursday evening and viewing a thirty-second issue advertisement critical of Al Gore. The risk of corrupting the political process is much more powerful in the latter example than in the former. I cannot agree that Title II is flawed because it did not extend BCRA's restrictions to the Internet.

I reach the same conclusion for direct mail and newspaper advertising. Although everyone agrees that direct mail can be "very effective," *Id.* ¶ 2.10.4 (Magleby), there is no evidence that direct mail has reached the degree of effectiveness as broadcast advertising. Until such a conclusion is reached by Congress, I find it appropriate that it did not extend the definition of electioneering communication to direct mail. In

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Republican Party of Minnesota, 122 S.Ct. at 2537 (observing that the day before an individual declares his or her candidacy and after he or she is elected are both periods where the statute did not apply). In the case of *Republican Party of Minnesota,* the Supreme Court concluded that if a judge's announcement of his or her legal views threatened his or her appearance of fairness, then that threat existed regardless of whether the announcement occurred during his or her campaign. *See id.* at 2537 (observing that "statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible"). Such is not the case with regard to the thirty and sixty day windows of BCRA. The evidence in this case demonstrates that broadcast issue advertisements airing outside the 30 and 60 day periods do not influence federal elections to anywhere near the same degree as those aired within the 30 and 60 day windows. Rather, it is in the immediate run-up to the federal election that issue advocacy is most often exploited for electioneering purposes. Congress was correct to focus on the problem and not attempt to prohibit more conduct than the record would support.

regard to newspaper advertising, the NRA presents no testimony that newspaper advertising is as effective as broadcast radio and television advertising. As Denise Mitchell, Special Assistant for Public Affairs for AFL-CIO President John J. Sweeney, observes: "newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human, personal impact of legislative issues—a key part of our strategy and effectiveness." *Id.* ¶ 2.10.2 (a conclusion, I note, that is also applicable to direct mail). I agree and find the NRA's arguments regarding print media unpersuasive. To the extent that the NRA cites advertisements that are more expensive to run in newspapers than advertisements run on radio, NRA Br. at 35; Findings ¶ 2.10.5, the NRA misses the point; failing to provide a shred of evidence that the print medium has anywhere near the effect as the broadcast media for conveying electioneering messages. Even the NRA's own communication consultant concedes that "paid broadcast media" is the most powerful means of conveying the NRA's messages. Findings ¶ 2.10.2 (McQueen).

In the final analysis, Congress appropriately tailored the primary definition of electioneering communication to radio and television advertisements. *Id.* 2.10.6. The uncontroverted testimony of experts and political consultants is that broadcast advertising is the most effective form of communicating an electioneering message. *Id.* ¶ 2.10.1-2.10.2 (Magleby, Pennington). Even Plaintiff AFL-CIO concedes this point. AFL-CIO Br. at 11. The fact that Congress did not extend the prohibition on electioneering communication to non-broadcast advertisements does not render Title II unconstitutional as underinclusive under the First Amendment.

Plaintiffs also contend that because the restrictions in Title II only apply to corporations and labor unions, the law is underinclusive as it does not cover unincorporated entities and wealthy individuals. NRA Br. at 38. Section 203 of BCRA amends 2 U.S.C. § 441b, a statute that has long regulated the activities of corporations and labor unions. The Supreme Court has already rejected a similar argument in a footnote to its *MCFL* decision:

> While business corporations may not represent the only organizations that pose this danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress' decision represents the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which we have said we owe considerable deference. *FEC v. National Right to Work Committee,* 459 U.S. 197, 209 (1982) (quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 46 (1937)).

MCFL, 479 U.S. at 259 n.11. In *Austin,* the Supreme Court found that the state statute modeled after Section 441b, which did not apply to unincorporated associations or labor unions, was not underinclusive. *Austin,* 494 U.S. at 665. The Supreme Court in *Buckley* held that Congress had not assembled a record that would permit justifying restrictions on the independent expenditures of individuals, *see Buckley,* 424 U.S. at 46; Congress should not, therefore, be penalized for not limiting the amount that wealthy individuals can spend on electioneering communications by following the dictates of a Supreme Court decision. *See Austin,* 494 U.S. at 678 (Brennan, J., concurring) (statute not underinclusive because it adheres to Supreme Court precedent). Given the prior decisions of the Supreme Court, Plaintiffs' underbreadth challenge on this ground fails.

G. *Plaintiffs' Challenge Relating to Exemption for News Stories, Commentaries or Editorials from a Broadcast Station*

Finally, the NRA Plaintiffs[142] argue that the exemption in Title II of BCRA for news stories, commentaries, or editorials-the "media exemption"—violates the Equal Protection Clause and the First Amendment in that it is underinclusive. NRA Br. at 42.[143] As discussed, *supra,* BCRA, like FECA, exempts certain communications distributed through the facilities of a broadcasting station from regulation. BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B) ("a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate" is not included in the definition of electioneering communication).

In my view, the Supreme Court foreclosed consideration of this issue with its decision in *Austin* and the evidence that the NRA has put forward is not sufficient to alter the conclusion reached in that case. In *Austin,* the Supreme Court found that the Michigan statute's exemption of media corporations from its expenditure restriction did not render the statute unconstitutional. *Austin,* 494 U.S. at 666-67 (noting that the "media exception" in the Michigan statute excluded from the definition of expenditure any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office . . . in the regular course of publication or broadcasting") (citation and footnote observing that the Michigan exemption was similar to the exemption in FECA both omitted). The Supreme Court concluded that the media exemption was bound to impose fewer restrictions on the expression of corporations that are in the media business and therefore needed to be justified by a compelling state purpose. The Supreme Court held:

> Although all corporations enjoy the same state-conferred benefits inherent in the corporate form, media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Bellotti,* 435 U.S. at 781. *See also Mills v. Alabama,* 384 U.S. 214,219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve"). The Act's definition of "expenditure," [citation omitted] conceivably could be interpreted to encompass election- related news stories and editorials. The Act's restriction on independent expenditures therefore might discourage incorporated news broadcasters or publishers from serving their crucial societal role. The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about,

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[142] The Paul Plaintiffs also raise this claim. The Paul Plaintiffs argument is discussed in the *per curiam* opinion.

[143] I disagree with the NRA's argument that the media exemption demonstrates that BCRA is, in essence, a regulation of television programming. *See* NRA Br. at 47. BCRA, in my judgment, is not akin to regulations that burden the editorial discretion of TV companies by requiring them to carry certain programming content. Again, BCRA does not prohibit speech. The NRA is free to run electioneering communications, provided they are paid for with segregated funds. As Defendants correctly observe, "The amount the NRA can spend on such ads is limited only by the willingness of its millions of individual members to contribute to the NRA's separate segregated fund, which in 2000 spent $17 million to influence federal elections." Gov't Opp'n at 104. I therefore find the NRA's argument on this score unpersuasive.

> newsworthy events . . . . A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Although the press' unique societal role may not entitle the press to greater protection under the Constitution, *Bellotti, supra,* 435 U.S. at 782, and n.18, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations. We therefore hold that the Act does not violate the Equal Protection Clause.

Austin, 494 U.S. at 667-68.

The NRA argues that the decision in *Austin* on this point was somehow a "close call" and questions whether *Austin* "was correctly decided." NRA Br. at 48. The NRA argues that "the emergence of the internet and the absorption of the broadcast networks by non-media conglomerates" change the role of media corporations in society. *Id.* at 42. According to the NRA, since *Austin* was decided in 1990, there has been such a seismic shift in the structure of the media industry that *Austin* is no longer relevant.

The NRA argues that the emergence of the Internet and the absorption of broadcast networks by nonmedia companies have altered the nature of traditional companies and therefore render Title II facially unconstitutional. NRA Br. at 42. I have discussed the problems with the NRA's Internet arguments, *supra*. With regard to the NRA's arguments about nonmedia companies purchasing media companies, the NRA's entire line of argument ignores the fact that the media exception only applies to the "facilities of any broadcasting *station*," BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B) (emphasis added), not the facilities of any broadcasting *company*. The NRA provides *no* evidence that the purchase of media corporations by other businesses has any impact on any "news story, commentary, or editorial distributed through the facilities of any broadcasting station." BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B).[144] Furthermore, it is not the role of a district court, in my judgment, to question a binding decision of the United States Supreme Court, particularly when the proffered evidence amounts to no more than a disagreement with the *Austin* result.

Given that the NRA's evidence relating to the media exemption is entirely lacking, there is no reason to engage in a further discussion of their argument. The equal protection argument was settled in *Austin,* and for the same reasons announced in that decision, I find that the NRA's underinclusiveness argument is also without merit. Simply put, *Austin* is controlling.

H. *Conclusion Regarding Title II*

I have considered and rejected Plaintiffs' other arguments made to the three- judge District Court and conclude that the restrictions on electioneering communication, as defined in the primary definition, are facially constitutional. In making this decision, I am extremely cognizant of how rare it is for a decision to uphold a content-based restriction on speech. Nevertheless, in finding these provisions in Title II constitutional I am motivated primarily by the record assembled in this case and the history of government regulation of corporations and labor unions in the context of federal elections.

In this case, the facts tell the story. The record convincingly demonstrates that corporations and labor unions use general treasury funds to influence federal elections in direct violation of years of federal policy. I am not convinced that Congress is powerless to act to channel the corporate and labor union presence in federal elections through PACs where disclosure is present and where contributors are aligned with the political message of the corporation or labor union. The express advocacy test, in my view, is not a constitutional requirement; what is required is an objective, bright-line rule that constitutionally distinguishes between issue advocacy and advocacy intended to influence a federal election.

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[144] Moreover, as the NRA points out in its brief, NBC was acquired in 1985 by General Electric, a move which *predated* the *Austin* Court's decision. NRA Br. at 44 n.31.

With the primary definition of electioneering communication, Congress fashioned a test that includes all of the major characteristics of issue advertising designed to influence a federal election: broadcast advertisements, aired in close proximity to a federal election, referring to a federal candidate, and targeted to that candidate's electorate. In Congress's judgment, these advertisements influence federal elections in the overwhelming majority of cases, despite Plaintiffs' self-serving testimony in this case which, in many instances, is belied by prior written statements and documentary evidence. In this facial challenge, on the basis of the record assembled, and on the basis of the longstanding history of congressional regulation of corporate and labor union involvement with federal elections, I find that Congress's decision to prohibit corporate and labor union spending on electioneering communications with general treasury funds is one that meets the standard of strict scrutiny.

By enacting Title II, Congress recognized the paramount importance of having legislation that controls electioneering communication and of preventing corporations and labor unions from using general treasury funds to influence federal elections. After reviewing the law under strict scrutiny review, I have found the primary definition of electioneering communication constitutional. Given the importance of this issue to Congress—*as demonstrated by their enacting a backup definition to ensure that electioneering communications would be regulated even in the event the primary definition is found unconstitutional*-I join, in the alternative, Judge Leon's opinion regarding the constitutionality of the backup definition of electioneering communication. Nevertheless, as my opinion makes plain, I strongly believe that the primary definition is fully consistent with the Constitution, and but for the position of the other judge's on this three-judge District Court, would not reach the backup definition.

Section 213

The only remaining provision of Title II that has not been addressed in my opinion or the *per curiam* opinion, is Section 213 of BCRA. For the reasons stated in Judge Leon's opinion, I agree that Section 213 is unconstitutional. While the record is replete with evidence related to the close nexus between parties and candidates in the fundraising process, there is no evidence to demonstrate that a political party's expenditures after nominating its candidate are always coordinated. *See* 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain) ("We believe that once a candidate has been nominated a party cannot coordinate with a candidate and be independent in the same election campaign."). *Colorado I* disproves this notion, and Defendants have put forward no additional evidence to demonstrate that there are any special corruption problems with having political parties make independent expenditures on behalf of their candidates. *Colorado I*, 518 U.S. at 618 ("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures."). Given the record in this case, I must concur with Judge Leon in finding Section 213 unconstitutional.

II. TITLE I: REDUCTION OF SPECIAL INTEREST INFLUENCE

Section 101: Soft Money of Political Parties

The McConnell, RNC, CDP, and Thompson[145] Plaintiffs all present a variety of constitutional challenges to Title I of BCRA, premised on the First, Fifth, and Tenth Amendments of the Constitution. After reviewing the record in this case, the governing caselaw, and the parties' lengthybriefing, I find that Plaintiffs' arguments lack merit and that Title I of BCRA is constitutional.[146]

For well over two decades, the Commission has sought to regulate the use of nonfederal funds by permitting the national, state, and local political party committees to allocate expenses on "nonfederal" activities between their federal and nonfederal accounts. The vast record in this case demonstrates that this system-a cobbled-together aggregation of FEC regulations and advisory opinions-is in utter disarray with all of the different political party units spending nonfederal money to influence *federal* elections. Congress was correct in finding that in many instances, the allocation regime was a failure. The only way to return the system to the original design of FECA was to prevent the national party committees from raising money outside of the restrictions in FECA and to restrict the use of nonfederal funds by the state and local party committees for "Federal election activity." Seen from this perspective, Title I is not a draconian realignment of the role of political parties. *See, e.g.*, RNC Br. at 42. Rather, Title I operates as a fundraising restriction aimed at restructuring the failed allocation regime that has produced a campaign finance system so riddled with loopholes as to be rendered ineffective. Concomitantly, BCRA restores in large measure, the federal campaign finance structure that had functioned effectively prior to the rise of seductive "soft money."

In other words, Congress created Title I of BCRA to fix the contribution limitations of FECA that have fallen into severe disrepair, largely as a result of these aforementioned regulations and advisory opinions. Title I accomplishes this goal by requiring the national committees of the political parties to fund their operations with federally regulated money. Equally important, the law also compels the state and local committees of the national political parties to fund their Federal election activities with money raised in compliance with federal law. Other provisions in Title I are designed to ensure the integrity of Title I, by including restrictions on the ability of the committees of the national parties and their agents to raise money for certain tax-exempt organizations and by placing limitations on federal and state candidates in regard to certain campaign and fundraising activities. At the same time, BCRA raises the limitations on "hard money" contributions to the national, state, and local party committees to facilitate raising funds within this new statutory framework.

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[145] In regard to Title I, the Thompson Plaintiffs, in their briefing, initially presented only an equal protection argument. Thompson Br. at vii; Thompson Opp'n at 1. I concur entirely in Judge Henderson's discussion of the Thompson Plaintiffs' equal protection claim. Henderson Op. at Part IV.D.4. To the extent the Thompson Plaintiffs have attempted to argue a First Amendment claim, the tenor of their argument is that candidates from economically disadvantaged areas need to be able to raise soft money to be competitive. Thompson Reply at 7. First, candidates have never been able to directly raise or spend soft money, so to the extent the Thompson Plaintiffs claim they are deprived of an effective tool of financing, it only further convinces me of the extent to which federal candidates have become dependent on nonfederal funds. Second, the Thompson Plaintiffs' argument is essentially a policy-based argument, better suited for the legislature than this three-judge District Court panel. It has long been held that Congress has broad authority to set contribution limitation amounts. *See, e.g., Nixon v. Shrink Missouri Government PAC* ("*Shrink Missouri* "), 528 U.S. 377, 395-97 (2000). Finally, to the extent it is possible, I subsume the Thompson Plaintiffs' general First Amendment claims into the rest of my discussion on the First Amendment.

[146] Plaintiffs take a scattershot approach in regard to their Title I arguments, and although I have considered all of their arguments, in the interest of both space and time, I address only the ones I have determined are the most salient. The arguments not addressed specifically lack merit.

When stripped of Plaintiffs' gloss, it becomes evident that Title I basically operates as a contribution limitation on political party fundraising, amply supported by prior Supreme Court caselaw and the immense record in this case. Given the sufficiently important governmental interests long identified by the Supreme Court to support the contribution restrictions like those at issue in Title I, Congress rightfully concluded that the only way to combat the problems related to the abusive use of nonfederal funds was to: (a) limit the funding of national committees of the political parties to money regulated by the federal government, and (b) enact a series of limited, ancillary, prophylactic measures involving state and local committees and candidates to ensure the integrity of the national committee nonfederal funds prohibition. In my judgment, Title I is constitutional.

My opinion presents a concurrence in part and a dissent in part. I concur with Judge Leon's view that in undertaking a First Amendment analysis of Title I, the relevant standard of review is the scrutiny that the *Buckley* Court applied to contribution restrictions, that the limitation in Section 323(b) on state parties' activities described in Section 301(20)(A)(iii) is constitutional, and that the restrictions on state candidates in Section 323(f) is constitutional. I also concur in the judgment of Judge Henderson that Section 323(e) is constitutional. My opinion begins with a brief discussion of the rise of nonfederal money as a tool of national party financing for federal election purposes. Given that the conclusions reached by Judge Henderson and Judge Leon turn primarily on Plaintiffs' First Amendment challenges, I next discuss those arguments, and provide the reasoning for my dissent on the remaining issues. Finally, I provide my

reasons for rejecting Plaintiffs' Fifth Amendment arguments and for finding that Plaintiffs lack standing to assert a challenge under the Tenth Amendment to Title I.

A. *Background: The Rise of Nonfederal Money as a Means of Financing Federal Elections*

As discussed at length in the *per curiam* opinion, Title I was enacted by Congress to combat the growing problem of the national committees of the political parties raising funds outside of the source and amount restrictions in FECA and using that money to influence federal elections. In creating Title I, Congress attempted to shore-up the decades-old contribution restrictions in FECA, which had been eroded as a result of a series of FEC rulemaking and advisory opinions which established an allocation system. To accomplish this goal, Congress eschewed the failed system of allocation percentages and prohibited national political party committees from raising money that is not subject to federal source and amount limitations.

The 1974 Amendments to FECA placed limitations on the source and the amount of contributions to federal candidates and political parties. The law prohibited corporations and labor unions from making contributions to political parties and federal candidates. 2 U.S.C. § 441b(a). FECA also limited an individual's contributions to $1,000 per election to a federal candidate, $20,000 per year to national political party committees, and $5,000 per year to any other political committee such as a political action committee ("PAC") or a state party committee. 2 U.S.C. § 441a(a)(1). Individuals were likewise subject to an overall annual limitation of $25,000 in total contributions. 2 U.S.C. § 441a(a)(3).[147] These limitations have been consistently upheld by the Supreme Court. *Buckley*, 424 U.S. at 23-38; *NRWC*, 459 U.S. at 207-10. The definitions of contribution and expenditure in FECA were then, and remain now, limited to the donation or use of money or anything of value "for the purpose of influencing an election for Federal office." 2 U.S.C. § 431(8)(A)(i),(9)(A)(i). The statute was therefore silent on how to draw lines around money raised outside of FECA's source and amount limitations for political parties to spend on activities that were expected not to be used for the purpose of influencing a federal election.

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[147] Under BCRA, the contribution limits have been raised. BCRA § 307(a); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(A)-(B) (increasing limit on contributions to candidates and candidates' committees from $1,000 to $2,000 for individuals, and increasing the limit on individual

As has been set out in much greater detail in the *per curiam* opinion, the FEC's opinions and rulemakings drew that line by permitting state and national political party committees to pay for the nonfederal portion of their administrative costs and voter registration and turnout programs with monies raised under relevant state laws (not FECA), even if they permitted contributions from sources such as corporations and labor unions that were prohibited under FECA. As a result, national and state political parties began to raise so-called "soft money," which described these nonfederal funds-not subject to FECA limits and restrictions-to pay for a share of election-related activities that influenced federal elections.

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contributions to national political party committees from $20,000 to $25,000); BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D) (increasing limit on contributions to state political party committees from $5,000 to $10,000); BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3) (increasing aggregate limit on individual contributions from $25,000 per year to $95,000 per two-year election cycle, of which $37,500 may be contributed to candidates); BCRA § 307(c); FECA § 315(h); 2 U.S.C. § 441a(h) (increasing limit on contributions by the Republican or Democratic Senatorial Campaign Committees from $17,500 to $35,000). Moreover, many of these contribution limits are to be increased annually to account for inflation as reflected in changes to the consumer price index. BCRA § 307(d); FECA § 315(c); 2 U.S.C. § 441a(c).

Generally, the state political parties' allocation rate was substantially lower than the national party allocation rate. The rules, therefore, furnished national political parties with an incentive to channel many of these expenditures through state political party committees, since this approach allowed a higher proportion of the parties' expenses to be paid for with nonfederal funds which were much easier to raise than those funds raised subject to FECA's restrictions.

During the 1980 election cycle, the RNC spent approximately $15 million in nonfederal funds and the DNC spent roughly $4 million, constituting nine percent of the national political parties' total spending. Findings ¶ 1.3. In 1984, the national political parties spent, collectively, approximately $21.6 million in nonfederal funds, which accounted for five percent of their total spending. *Id.* By 1988, national party nonfederal funds increased to $45 million or eleven percent of national party spending. *Id.* In 1992, nonfederal fundraising by the national parties reached $86.1 million, and nonfederal funds were used for sixteen percent of the national parties' spending. *Id.* ¶ 1.4, 1.4.1. With the 1996 election cycle, the national parties raised *$263.5 million* in nonfederal funds and nonfederal money spending constituted approximately thirty percent of the national party committees' total spending. *Id.*

The uncontroverted record demonstrates that in 1996 the dramatic rise in spending of nonfederal funds by national political parties was tied to the development of issue advocacy media campaigns. Originated by President William Clinton's political consultant Dick Morris, the move was eventually copied by the Republican Party. *Id.* ¶ ¶ 1.6, 1.7. Morris used nonfederal funds to pay for advertisements that either promoted President Clinton by name or criticized his opponent by name, while avoiding words that expressly advocated either candidate's election or defeat. *Id.* 1.6. While these advertisements prominently featured the President, none of the costs associated with these advertisements were charged as coordinated expenditures on behalf of President Clinton's campaign, subject to the FECA's contribution limits. *Id.* Rather, the political party paid the entire cost, with a mix of federal and nonfederal funds, arguing that political party communications that did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising (that is, "Vote Republican!") and financed, according to the FEC allocation rules, with a mix of federal and nonfederal funds.[148] *Id.* In many cases, the national political party committees used the state political party committees as vehicles for implementing the issue advocacy campaign because the allocation rules were much more favorable for state parties, and consequently, the advertisements could be financed with nonfederal funds. *See, e.g., id.* ¶¶ 1.26.1, 1.26.2, 1.26.6. This approach later spread to Congressional campaigns. *Id.* ¶ 1.8.

Political parties were now able to pay for such "issue advertisements" with a mix of federal and nonfederal funds because the FEC treated these advertisements as "generic" party advertisements. In order to fund these "generic" party advertisements or "issue advertisements," the political parties needed to raise an increasing amount of nonfederal money. With this strategy firmly in place, the national political parties spent $221 million in nonfederal funds on the 1998 midterm elections, or 34 percent of their total spending, which was more than double the amount of nonfederal funds spent

during the previous midterm elections. *Id.* ¶ 1.4.2. With the 2000 elections, spending of nonfederal funds by the national political parties reached $498 million, which was now 42 percent of their total spending. *Id.* 1.4.3. The top 50 nonfederal fund donors during the 2000 election cycle each contributed between $955,695 and $5,949,000. *Id.* During the first 18 months of the 2001- 2002 election cycle, the political parties reported non-federal receipts of $308.2 million, which is a 21 percent increase over the same period during the 1999-2000 cycle. *Id.* ¶ 1.4.4. The FEC notes that this increase is "all the more significant given that typically parties raise more in Presidential campaign cycles than in non-presidential campaigns." *Id.*

It was in response to its view that the use of "soft money" was a problem that Congress enacted Title I of BCRA. *See, e.g., Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns,* S. Rep. No. 105-167, at 4468 (1998) ("Thompson Committee Report") at 4468 (majority report) ("soft money spending by political party committees eviscerates the ability of FECA to limit the funds contributed by individuals, corporations, or unions for the defeat or benefit of specific candidates"); *id.* at 4565 (minority report) ("Together, the soft-money and issue advocacy loopholes have eviscerated the contribution limits and disclosure requirements in federal election laws and caused a loss of public confidence in the integrity of our campaign finance system."). The original design of the FEC's rules on allocation were to permit the political parties the opportunity to raise nonfederal funds for purposes unrelated to federal elections. The parties were permitted to pay for the nonfederal portion of their expenses with nonfederal funds. Over time, however, what started out as a fairly simplistic approach to cost allocation (nonfederal portions of administrative and get-out-the-vote ("GOTV") activities could be paid for with nonfederal funds), turned into a gaping loophole, which permitted the national political parties to raise enormous sums of money to spend on federal elections-all outside FECA's source and amount limitations. In essence, the actions by the political parties at all levels disproved the assumption that voter registration activity, voter identification, generic campaign activity, and get-out-the-vote activity in relation to a federal election could be allocated between nonfederal and federal accounts without inviting the political parties to circumvent FECA's carefully constructed contribution system and without creating anew the same problems of corruption identified in *Buckley* involving unlimited individual contributions. The parties' actions confirmed the Supreme Court's observation in *Colorado II*, that "[d]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and *parties* test the limits of the current law . . . . " *Colorado II*, 533 U.S. at 457 (emphasis added).

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[148] As discussed in the *per curiam* opinion, the FEC had ruled that party committees could sponsor issue advocacy advertisements that did not feature a federal candidate and pay for these advertisements with a combination of hard and soft dollars as permitted under the allocation regulations. Federal Election Commission Advisory Opinion 1995-25 (discussing that allocation rules were permissible to allocate funding for "RNC plans to produce and air media advertisements on a series of legislative proposals being considered by the U.S. Congress, such as the balanced budget debate and welfare reform").

Prior to BCRA, the contribution regime carefully constructed in FECA, and upheld in *Buckley*, had become nothing more than an elaborate fiction with the national political parties and their state counterparts circumventing the restrictions with ease. Prior to BCRA, federal candidates and officeholders, in conjunction with their political party committees, raised large amounts of nonfederal money for purposes directly related to federal elections. Beginning with issue advocacy strategy employed for the election campaign of President William Clinton in 1996, the system took a turn for the worse as the political parties scrambled to collect as much "soft money" as possible to fund "issue advertisements" that were nothing short of campaign commercials in disguise. While loudly complaining about the other side's tactics, neither side was willing to unilaterally disarm, and the pressure to raise more and more money outside the system became increasingly intense, as the political party committee receipts clearly demonstrate. In the face of what can only be described as FEC lassitude to these problems, the political branches, after years of deliberation

and consensus, passed Title I to tackle the threat posed by nonfederal funds. Having set forth these preliminary observations to provide context for my opinion, I now turn to Plaintiffs' various constitutional challenges to Title I and explain why I have concluded that these arguments lack merit. In engaging in the following analysis, I shall discuss the extensive record established in this case, which demonstrates that Title I is a prophylactic measure aimed both at the corruption or the appearance of corruption associated with nonfederal funds and at the evasion of FECA's source and amount limitations.

B. *Plaintiffs' First Amendment Challenges* [149]

1. *Standard of Review*

Unlike the electioneering communication provisions in Title II, the litigants contest the level of scrutiny that should control the Court's review of Title I for First Amendment purposes. Plaintiffs contend that the restrictions in Title I merit review under the lens of strict scrutiny, *see, e.g.*, McConnell Br. at 31-34; RNC Br. at 37-44, while Defendants argue that the provisions in Title I should be analyzed under the "closely drawn" scrutiny that the *Buckley* Court applied to contribution restrictions, *see, e.g.*, Def. Opp'n at 3-4; Def.-Int. Opp'n at 17-23. In my judgment, Title I is a fundraising restriction that merits review entirely under *Buckley*'s "closely drawn" scrutiny applicable for contribution limitations.

Plaintiffs are mistaken when they argue that the restrictions in Title I partly impose an expenditure cap and, therefore, Title I requires strict scrutiny. McConnell Br. at 33; RNC Br. 51-53. Title I does not in any way limit political party committee spending on *any* activity. These restrictions only indirectly affect expenditures by placing limitations on the source and amount of funds available for the party committees to use in order to make independent expenditures. Accordingly, the scrutiny applicable to contribution restrictions is appropriate for Title I.

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[149] I consider Plaintiffs' First Amendment underbreadth challenge as part of my analysis of their Equal Protection challenge, discussed *infra*.

Plaintiffs also urge this three-judge panel to apply strict scrutiny because Title I includes restrictions on the solicitation of nonfederal funds. I disagree with this theory as well. From a functional perspective, Title I presents a comprehensive contribution restriction that merits the scrutiny that *Buckley* applied to contribution restrictions. The Supreme Court in *Colorado II*, found that FECA presents "a functional, not formal, definition of 'contribution,'" because it included within the definition of contribution "coordinated expenditures." *Colorado II*, 533 U.S. at 438. According to the Supreme Court in *Colorado II*, the *Buckley* Court acknowledged Congress's functional classification, and "observed that treating coordinated expenditures as contributions 'prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.'" *Colorado II*, 533 U.S. at 443 (quoting *Buckley*, 424 U.S. at 47) (also noting that *Buckley* "enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on contributions (by individuals and nonparty groups), as defined to include coordinated expenditures").

A functional view of BCRA's solicitation restrictions demonstrates that they are designed to counter potential evasion of contribution restrictions. As is discussed *infra*, the record in this case is replete with incidents where the solicitation of nonfederal donations by party officials and candidates threatens the integrity of FECA's contribution restrictions. Hence, like the expenditure limitations discussed in *Colorado II*, which are aimed at preventing attempts to

circumvent FECA's contribution regime, BCRA's solicitation provisions are also designed to ensure the integrity of FECA's contribution limitations and not limit speech. Title I in its entirety, therefore, is properly considered within *Buckley*'s contribution framework and is reviewed under the scrutiny set out in *Buckley* applicable to contribution restrictions. *See also NRWC*, 459 U.S. at 210-11 (upholding restriction limiting a corporation's solicitation of contributions to corporation's PAC to members of the corporation on the basis of compelling governmental interests supporting the overall ban on corporate contributions to candidates).

Accordingly, I agree entirely with Judge Leon's discussion in his opinion that the three-judge District Court's analysis of the provisions in Title I merits review under the "closely" drawn scrutiny that the *Buckley* Court applied to contribution limitations and not strict scrutiny, and I concur in that portion of his opinion. We both agree that the restrictions will be upheld in Title I, if the Government demonstrates that the provisions in Title I are "closely drawn" to match a "sufficiently important interest." *Buckley*, 424 U.S. at 25; *see also Shrink Missouri*, 528 U.S. at 387-88.[150] With that standard in mind, I now turn to the sections of Title I and my analysis of whether these contribution restrictions are constitutional.[151]

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[150] Like Judge Leon, I observe that if the contribution limitations in Title I survive a claim that it infringes associational rights, then it also survives a speech challenge under the First Amendment. *Shrink Missouri*, 528 U.S. at 388; *see also id.* at n.3 (observing that contribution standard of review likewise addresses the "correlative overbreadth challenge").

[151] I also do not conclude that *Buckley*'s contribution- expenditure dichotomy is irrelevant to our review. McConnell Br. at 33 (stating that the "contributions-versus expenditures dichotomy of *Buckley* does not directly apply"). Plaintiffs assert that the reason for not applying *Buckley* is because Title I "effectively regulates the *uses* for which money is raised

2. *Title I is Constitutional Under the First Amendment*

In my judgment, this three-judge District Court need not go further than *Buckley* to uphold Title I from attack under the First Amendment. It is clear that *Buckley* provides sufficient flexibility for Congress to have enacted Title I in order to address the problems associated with political parties using nonfederal funds to influence federal elections. *See Shrink Missouri,* 528 U.S. at 404 (Breyer, J., concurring) ("*Buckley*'s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of 'soft money.'"). The primary justifications for Title I are neither original nor unprecedented.

(a) Title I Serves The Same Sufficiently Important Interests Identified in Buckley and its Progeny

Title I was enacted to fulfill the same interests in "preventing corruption or the appearance of corruption" that the *Buckley* Court had found to support FECA's limitations on contributions.[152] The *Buckley* Court held that FECA's contribution limitations served the sufficiently important interests of "the prevention of corruption and the appearance of corruption spawned by the real or imagined *coercive influence* of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley,* 424 U.S. at 25 (emphasis added). Moreover, under the rubric

of "preventing corruption or the appearance of corruption," the Supreme Court has also permitted Congress to enact contribution limitations that serve to "prevent evasion" of the individual financial contribution limitations already found constitutional by the Supreme Court. *Id.* at 38; *see also Colorado II,* 533 U.S. at 456 (observing that "all members of the [Supreme] Court agree that circumvention is a valid theory of corruption.").

Since *Buckley,* the Supreme Court has consistently reaffirmed the notion of Congress's ability to create reasonable contribution restrictions to stem the tide of corruption and the appearance of corruption that exists in a regime of private candidate financing. *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley* ("*Citizens Against Rent Control*"), 454 U.S. 290, 296-97 (1981) ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* .... "); *California Med. Ass'n. v. FEC,* ("*California Med. Ass'n.*") 453 U.S. 182, 194-195 (1981) (noting that *Buckley* held that contribution limits "served the important governmental interests in preventing the corruption or appearance of corruption of the political process that might result if such contributions were not restrained"); *see also Bellotti,* 435 U.S. at 788 n.26 ("The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted.") (internal citation omitted). Hence, the interests behind the restrictions on political party nonfederal funds have long had support in the Supreme Court's campaign finance jurisprudence.

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and spent." McConnell Br. at 33 (emphasis in original). The problem with this argument is that *all* contribution limitations "effectively regulate" the uses for which money is raised and spent. *See* Tr. at 92 ("All contribution limits have [an] indirect effect on expenditures.") (Bader). Accordingly, this argument fails to convince me that the contribution-expenditure distinction is inapplicable to the restrictions at issue in Title I.

[152] *See NCPAC,* 470 U.S. 480, 496-97 (1985) (observing that *Buckley* and *Citizens Against Rent Control* held that these rationales "are the only legitimate and compelling government interests thus far identified for restricting campaign finances").

In this case, Congress concluded that donations of nonfederal money to the political party committees had the same "coercive influence" on "candidates' positions and on their actions if elected to office" as the large contributions to candidates permitted prior to the enactment of the individual contribution limitations in 1974. *Buckley,* 424 U.S. at 25. Congress also concluded that the individual contribution limitations were being circumvented by political party committees at all levels who raised nonfederal funds and then spent those funds for federal election purposes.

In advancing these long upheld rationales to support the provisions in Title I of BCRA, I find that the evidence presented by Defendants to support these justifications is more than sufficient. As the Supreme Court observed in *Shrink Missouri*: "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri,* 528 U.S. at 391. Given the Supreme Court's discussion of contribution restrictions beginning with *Buckley,* I find that Defendants do not break from well-established precedent in offering support for Title I because *Buckley* has already established that Congress may legislate: (a) to prevent corruption or the appearance of corruption inherent in the process of raising large monetary contributions; and (b) to prevent circumvention of the valid contribution limitations. As I demonstrate *infra,* the record before this three-judge District Court is *overwhelming* and amply supports both of the asserted rationales. With the foregoing in mind, I shall now briefly describe these interests and the evidence supporting them.

(i) The *Buckley* Court's Explanation of "Prevention of Corruption"

Given that there is such disagreement in the briefing as to what the Supreme Court meant by "prevention of corruption," it is important to take stock of how the *Buckley* Court used

that phrase and the evidence it relied on to find that Congress was justified in enacting FECA's contribution restrictions. As the Supreme Court in *Buckley* held:

> It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. *Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign.* The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given *to secure a political quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. *Although the scope of such pernicious practices can never be reliably ascertained,* the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Buckley, 424 U.S. at 26-27 (footnote omitted) (emphasis added). As this passage illustrates, the *Buckley* Court understood "corruption" as something intrinsic to the fundraising process of large contributions in a "system of private financing of elections." *Id.* at 26. The Supreme Court's rationale was grounded in the realistic and pragmatic understanding that "large contributions are given to secure a political *quid pro quo;*" *Id.* at 26; *see also id.* at 27 (referring to "political *quid pro quo*" as the "*danger* of actual *quid pro quo* arrangements") (emphasis added). Indeed, in introducing the primary interest behind the individual contribution limitations, the Supreme Court stated that the primary interest in FECA's contribution limitations "is the prevention of corruption and the appearance of corruption spawned by the real or imagined *coercive influence* of large financial contributions on candidates' positions and on their actions if elected to office." *Id.* at 25 (emphasis added). Simply put, *Buckley* equates corruption with the fundraising process where access to elected officials and candidates is provided in exchange for large contributions.[153]

This point is underscored by the evidence relied on in the *Buckley* opinion to support the Supreme Court's discussion of the government's interest in preventing corruption. *See id.* at 27 n.28 (citing evidence from the Court of Appeals opinion in *Buckley* that relates to access provided to donors who contribute large sums of money). That the *Buckley* Court referred to the record from the Court of Appeals opinion deserves repeating here because it demonstrates that in upholding the individual contribution limitations in FECA, the "corruption" that concerned the *Buckley* Court was the *access* to federal candidates that large contributors receive. As the Court of Appeals found:

> Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, *in order to gain a meeting* with White House officials on price supports. The industry pledged $2,000,000 to the 1972 campaign, a pledge known to various White House officials, with President Nixon informed directly by Charles Colson in September 1970, as acknowledged by the 1974 White House paper.

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[153] Given *Buckley* 's teaching on constitutional analysis of contribution restrictions, I cannot agree with Judge Leon's theory that a reviewing court should focus its analysis on whether the *use* for which a contribution is put is corrupting. *See generally* Leon Op. *Buckley* and its progeny all instruct that the fundraising process is the focal point of the contribution restriction analysis, as my discussion in this section illustrates.

> Since the milk producers, on legal advice, worked on a $2500 limit per committee, they evolved a procedure, after consultation in November 1970 with Nixon fund raisers, to break down the $2 million into numerous smaller contributions to hundreds of committees in various states which could then hold the money for the President's reelection campaign, so as to permit the producers to meet independent reporting requirements without disclosure. On March 23, 1971, after a meeting with dairy organization representatives, President Nixon decided to overrule the decision of the Secretary of Agriculture and to increase price supports. In the meetings and calls that immediately followed the internal White House discussion and preceded the public announcement two days later, culminating in a meeting held by Herbert Kalmbach at the direction of John Ehrlichman, the dairymen were informed of the likelihood of an imminent increase and of the desire that they reaffirm their $2 million pledge.
>
> *It is not material, for present purposes, to review the extended discussion in the Final Report on the controverted issue of whether the President's decision was in fact, or was represented to be, conditioned upon or "linked" to the reaffirmation of the pledge.*

Buckley, 519 F.2d at 839 n.36 (emphasis added) (internal citations omitted) (cited in *Buckley,* 424 U.S. at 27 n.28). The Circuit Court in *Buckley,* as affirmed by the Supreme Court, found that it was unnecessary to review the disputed issue of whether President Nixon's decision on price supports was actually changed by the $2,000,000 contribution. Instead, the Supreme Court found it sufficient that the dairy farmers were given access to the President and his officials in exchange for a sizable contribution. The corruption, thus, was associated with the fact that the donation was given "in order to gain a meeting with White House officials on price supports." *Id.*

This conclusion is further borne out by other evidence discussed in the Court of Appeals opinion and cited by the Supreme Court:

> The findings document lavish contributions by groups or individuals with special interests to legislators from both parties, e.g., by the American Dental Association to incumbent Congressmen in California; by H. Ross Perot, whose company supplies data processing for medicare and medicaid programs, to members of the House Ways and Means and Senate Finance Committees, and the House Appropriations Subcommittee for HEW.
>
> The disclosures of illegal corporate contributions in 1972 included the testimony of executives that they were motivated by the perception that this was necessary as a "*calling card, something that would get us in the door and make our point of view heard,*" or "*in response to pressure for fear of a competitive disadvantage that might result.*" The record before Congress was replete with specific examples of improper attempts to *obtain governmental favor* in return for large campaign contributions.

Buckley, 519 F.2d at 839 n.37 (emphasis added) (internal citations omitted) (cited in *Buckley*, 424 U.S. at 27); *see also id.* n.38 (discussing evidence relating to large contributions given in exchange for ambassadorships).[154] The *Buckley*

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[154] The evidence in the Court of Appeals opinion relating to giving ambassadorships in exchange for large donations discusses the conviction of one fundraiser under 18 U.S.C. § 600 for having promised a current Ambassador a more prestigious post in return for a $100,000 contribution to be split between Senate candidates designated by the White House and the 1972 campaign. *Buckley*, 519 F.2d at 840 n.38. Notably, the conviction did not involve a federal candidate or officeholder and therefore does not stand for the premise that, in citing this evidence, the Supreme Court requires evidence of bribery to support a contribution restriction. The point was only made to demonstrate that "while the appointment of large contributors [to ambassadorships] is not novel," *id.*, the activity surrounding ambassadorships and the 1972 election "made the

Court, therefore, realized the problems that inhere in a "system of private financing of elections," where contributors who donate large sums of money are given access to officeholders. *Buckley*, 424 U.S. at 26. In making this point, the Supreme Court eschewed relying on evidence that the contribution was connected to the decision-making of the federal official, *Buckley*, 424 U.S. at 27 n.28 (citing *Buckley*, 519 F.2d at 839 n.36) (finding such a question "not material"); rather, the provision of a meeting in exchange for the contribution satisfied the *Buckley* Court. The *Buckley* Court therefore equated corruption with the fundraising process and, in particular, the special access given to large contributors. *See Buckley*, 424 U.S. at 30 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that *the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.*") (emphasis added).

Given the *Buckley* Court's understanding of corruption, it is not surprising that it explicitly did not require evidence of bribery of federal officeholders and candidates to support the contribution limitations in FECA. *Id.* at 27 ("Although the scope of such pernicious practices *can never be reliably ascertained*, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.") (emphasis added). In linking "corruption" with the fundraising process of large contributions in a donor-financed system of elections and not on specific evidence of bribery, the Supreme Court merely recognized the obvious: large contributions provide a "calling card" and can help "obtain" government favors. *Buckley*, 519 F.2d at 839 n.37 (cited by *Buckley*, 424 U.S. at 27 n.28). Contribution

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1972 election a watershed for public confidence in the electoral system," *id.* at 840; *see also id.* at 839 n.36 (declining to rely on evidence that a large contribution was connected to the decision-making of the federal official).

limitations served to "prevent corruption" by removing the "*coercive influence*" that large contributions have when "given to secure a *political quid pro quo*" from elected officials or candidates. *Buckley*, 424 U.S. at 25, 26 (emphasis added). In fact, implicit in *Buckley*'s rejection of the argument that bribery laws constituted a less restrictive alternative than FECA's contribution limitations was a recognition that the threat addressed by bribery laws "deal[s] with only the most blatant and specific attempts of those with money to influence governmental action." *Id.* at 28; *see also id.* at 30 ("Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.").

Hence, it was very clear that in discussing corruption the *Buckley* Court concluded that bribery laws were not simply enough and that contribution restrictions were targeted at reducing the "coercive influence" of large monetary contributions on the political process. *Id.* at 25; *see also NCPAC*, 470 U.S. at 497 ("Corruption is a subversion of the *political process*. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political *favors*.") (emphasis added). In sum, as the *Shrink Missouri* Court effectively articulated:

> In speaking of "improper influence" and "opportuneities for abuse" in addition to "*quid pro quo* arrangements," we recognized a concern not confined to bribery of public officials, *but extending to the broader threat from politicians too compliant with the wishes of large contributors*. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

Shrink Missouri, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28) (emphasis added). This statement, in a nutshell, is what *Buckley* meant by "corruption."[155]

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[155] I therefore cannot agree with Judge Henderson, who states that the Supreme Court "has not settled on a precise definition of 'corruption.'" Henderson Op. at Part IV.A n.148. To reach this proposition, Judge Henderson contrasts this quotation from the *Shrink Missouri* majority opinion with Justice Thomas' dissent in that case and the Supreme Court's statement in *NCPAC* that "[t]he hallmark of corruption is the financial *quid pro quo:* dollars for political favors." *NCPAC*, 470 U.S. at 497. Judge Henderson's footnote does not cite *Buckley* or even discuss its text in reaching this conclusion. As I have endeavored to explain at length in this section of my opinion, *Buckley* has clearly provided guidance as to what the Supreme Court meant by "corruption." *See also Colorado II*, 533 U.S. at 441 (defining "corruption [as] being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence").

Also on this point, I observe that although Judge Leon recognizes that corruption involves "something more than a quid pro quo arrangement . . . as well as improper influence or conduct by a donor that results in a legislator who is too compliant with the donor, Leon Op. at Part I.A.3 (internal quotation marks and citations omitted), Judge Leon-while stating the definition of corruption correctly-refers to corruption in his opinion as something resembling the characteristics of bribery, *id.* ("whether the corruption is actual or perceived, every traditional and accepted definition to date depends on the donor conferring, or being perceived as having conferred a benefit on the candidate in return for something") (citing and quoting to *Black's Law Dictionary* 's definition of "*quid pro quo* "). Thus, while Judge Leon and I apparently agree on the definition of corruption as defined by the Supreme Court, I cannot agree with the way Judge Leon employs his definition of corruption throughout his opinion as something akin to bribery. *See id.* at Part I.B.2 ("there is no evidence in the record of actual quid pro quo corruption") (citing evidence that there is no evidence of vote buying in the record).

(ii) The *Buckley* Court's Explanation of Prevention of the "Appearance of Corruption"

Additionally, the *Buckley* Court observed that it was not only preferential access given to large contributors through the fundraising process that was corrupting. The Supreme Court also recognized that the public perception associated with a regime of large individual contributions undermined faith in the government in the public at large. This concern was another aspect of the corruption thesis that the *Buckley* Court found supported upholding the individual limitations on contributions. As the *Buckley* Court states:

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the *appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions* . . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

Buckley, 424 U.S. at 27 (quoting *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 565 (1973)) (emphasis added). Picking up on this discussion from *Buckley,* in *Shrink Missouri,* the Supreme Court observed:

> While neither law nor morals equate all political contributions, without more, with bribes, we spoke in *Buckley* of the perception of corruption "inherent in a regime of large individual financial contributions" to candidates for public office, [*Buckley,* 424 U.S. at 27], as a source of concern "almost equal" to *quid pro quo* improbity, *ibid.* The public interest in countering that perception was, indeed, the entire answer to the overbreadth claim raised in the *Buckley* case. *Id.* at 30. This made perfect sense. Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 562 (1961).

Shrink Missouri, 528 U.S. at 390. More recently, in *Colorado II,* the Supreme Court observed that "corruption [was] understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." *Colorado II,* 533 U.S. at 441.

Within the *Buckley* framework, it does not take too much imagination to realize the appearance of corruption associated with nonfederal donations to political party committees, particularly given that "*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Shrink Missouri,* 528 U.S. at 391. In *Buckley* the evidence demonstrated that "corporations, well-financed interest groups, and rich individuals had made large contributions . . . [which was] more than sufficient to show why voters would tend to identify a big donation with a corrupt purpose." *Id.* at 391; *see also Buckley,* 519 F.2d at 838-40 (discussing "the trend revealed by the polls" that demonstrated that in 1974, 69.9 percent of individuals found that "the government is pretty much run by a few big interests looking out for themselves"). The *Buckley* Court, therefore, understood the "appearance of corruption" as the public perception that "large donors call the tune" that *inherently* exists in a donor financed election system that permits large contributions.

(iii) Circumvention as a Valid Theory of Corruption

Aside from the corruption associated with the preferential access to officeholders that large contributors receive through the fundraising process, and the public perception of corruption inherent in a regime of large individual, financial contributions, the Supreme Court recognized in *Buckley* that a circumvention of individual contribution limitations also serves as a basis for justifying contribution restrictions. Prior to BCRA's enactment, a donor was limited to give $1,000 to a candidate and his or her authorized committee for any election for Federal office. 2 U.S.C. § 441a. The same donor was limited to an aggregate of $20,000 to the political committees established and maintained by a national political party in any calendar year. In *Buckley,* the Supreme Court upheld FECA's $25,000 limitation on *total* contributions that an individual could make during any calendar year. In finding this provision constitutional, the Court held that "this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of . . . *huge contributions to the candidate's political party.*" *Buckley,* 424 U.S. at 38 (emphasis added).

In upholding the $25,000 total contribution limitation, under this "anti- circumvention" theory, the Supreme Court did not engage in *any* separate constitutional balancing. In other words, the Supreme Court never discussed whether the $25,000 limitation was "closely drawn" to match a "sufficiently important interest." Instead, in one paragraph, the Supreme Court upheld the restriction on the premise that it was "no more than a corollary of the basic individual contribution limitation" that the Supreme Court had already determined to be constitutional. *Id.* at 38. Since *Buckley,* the "anti- circumvention" rationale has been upheld by the Supreme Court and is a well- accepted theory for justifying

congressional action in the area of campaign finance. *Colorado II,* 533 U.S. at 456 (noting that "all members of the [Supreme] Court agree that circumvention is a valid theory of corruption"); *California Med. Ass'n.,* 453 U.S. at 197-199 (plurality opinion) (upholding limitations on contributions to nonparty multicandidate political committees under an anti-circumvention rationale). If the provision in FECA limiting the total amount of contributions a donor could make was found constitutional by the *Buckley* Court on the basis that it was designed to keep the individual donor restrictions intact, it follows that the provisions in Title I-which are similarly designed to prevent evasion of the individual contribution limits in FECA-are constitutional.

In *Colorado II,* the Supreme Court powerfully reaffirmed its commitment to the anti-circumvention theory. *Colorado II,* 533 U.S. at 456-65. In *Colorado II,* the Supreme Court upheld FECA's limitations on coordinated expenditures by state political parties-a question that it had remanded during the *Colorado I* litigation. *Id.* The Court observed in *Colorado II* that "[s]ince there is no recent experience with unlimited coordinated spending, the question is whether experience under the present law confirms a serious *threat* of abuse from the unlimited coordinated party spending." *Id.* at 457 (emphasis added). Put differently, because unlimited coordinated expenditures had been prohibited since FECA, there was no evidence of whether or not such a system was actually corrupting. The Supreme Court concluded, however, that even though there was no evidence that unlimited coordinated expenditures were corrupting, Congress was empowered to exercise its predictive judgment. In the words of Defendant-Intervenors, Congress could preemptively act "to close loopholes and to prevent evasion of the contribution restrictions and limits established in FECA, and upheld in *Buckley* even in the absence of past abuses." Def.-Int. Br. at 53. With no evidence of present evasion, the Supreme Court in *Colorado II* found that "[d]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties *test* the limits of the current law, and it shows beyond serious doubt how contribution limits *would be* eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Colorado II*, 533 U.S. at 457 (emphasis added).[156]

The anti-circumvention rationale articulated by the *Colorado II* Court clearly supports the idea that Congress is entitled to exercise latitude in forming predictive judgments about possible evasion and circumvention of the law and is able to act accordingly to prevent such abuse. Circumvention of a current statutory regime or congressional prediction that "evasion" will occur if a prophylactic rule is not adopted is consonant with the *Buckley* Court's understanding of corruption. The *Buckley* Court was concerned with the "real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25. Certainly, if an individual or organization is able to evade the law and engage in the kind of large financial giving that FECA was designed to prevent, then the system would be nullified and the "real or imagined coercive influence of large financial contributions" on candidates and officeholders would still exist. *Id.* In other words, the corruption would still be present. However, in such a situation, the appearance of corruption would only be worse. Where evasion is present in a carefully regulated regime, faith in the law is undermined when it is widely known that others are skirting the rules-even when what those individuals and organizations may be doing is considered legal. In *Colorado II*, for example, the Supreme Court determined that if unlimited coordinated expenditures were made legal, circumvention of the existing contribution limits *would* occur. *Colorado II*, 533 U.S. at 460 ("If suddenly every dollar of spending *could be* coordinated with the candidate, the inducement to circumvent would almost certainly intensify."). Circumvention as a theory of corruption, therefore, has a very strong lineage in Supreme Court campaign finance jurisprudence and is simply a logical outgrowth of *Buckley*'s teaching about corruption.

* * *

In sum, the *Buckley* decision represents an understanding that bribery laws are not enough to capture the more subtle and pervasive influences that large financial contributions can have on a donor-financed election system. The Supreme Court has long understood that the fundraising process, itself, is the source of corruption when large donations are given in exchange for access to influence federal officeholders and candidates. In enacting Title I of BCRA, Congress focused on this same problem that had developed with regard to fundraising of nonfederal funds.

(iv) Restrictions on Political Party Committee Fundraising are Necessary to Effectuate These Sufficiently Important Interests

As one scholar observes, "the rise of soft money, the enormous disparity between FECA's limits on individual and PAC donations to candidates and the much larger sums given in soft money, and the role of federal officeholders in soliciting soft money contributions to the parties suggest that donor-to-party-to-candidate conduit corruption is a real possibility." Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum.L.Rev. 620, 649 (2000) [hereinafter Briffault]. The record in this case demonstrates that the "donor-to-party-to-candidate conduit corruption" is no longer just a "real possibility," but a reality. *Id.*

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[156] Plaintiffs contend that in *Colorado II*, "the Court did not *really apply* an 'anticircumvention' rationale at all (despite some language in the Court's opinion to the contrary)." McConnell Opp'n at 23-24 (emphasis added). Plaintiffs' contention is erroneous given my reading of *Colorado II*.

In *Colorado II,* the Supreme Court recognized that the donor-to-party-to-candidate conduit raised a legitimate concern regarding corruption. The *Colorado II* Court found that "[w]hat a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit." *Colorado II,* 533 U.S. at 458. For this proposition, the Supreme Court cited a number of declarations, which Defendants have again included in this litigation. The Supreme Court observed that without a restriction limiting the political parties' coordinated expenditures, the contribution limitations would be rendered ineffective. *Id.* at 460 ("If suddenly every dollar of spending could be coordinated with the candidate the inducement to circumvent would almost certainly intensify.").

The evidence to support this finding bears repeating briefly here, because as the Supreme Court in *Colorado II* found donations made to the political party, as opposed to directly given to the candidate, can pose the same coercive influence that the restrictions in FECA were targeted to address. In *Colorado II,* the Supreme Court observed that "the record shows that even under present law substantial donations turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates." *Colorado II,* 533 U.S. at 461. As proof of this proposition, the Supreme Court noted in a footnote that "the DSCC has established exclusive clubs for the most generous donors, who are invited to special meetings and social events with Senators and candidates." *Id.* at 461 n.25. This evidence recognizes that large donations to *political party committees* enables contributors to gain access to elected federal officeholders and candidates.[157]

This view of political parties by the Supreme Court is confirmed by their statement in *Colorado II* that "whether they like it or not, [political parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id.* at 452. One of the pieces of evidence that the Supreme Court relied on to support this view was the testimony of former Senator Paul Simon. *Id.* at 451 n.12. Senator Simon stated, "I believe people contribute to party committees on both sides of the aisle for the same reason that Federal Express does, because they want favors. There is an expectation that giving to party committees helps you legislatively." *Id.* (recounting a debate over a bill favored by Federal Express during which a colleague exclaimed, "'we've got to pay attention to who is buttering our bread").

In *Colorado II,* the Supreme Court also found persuasive the declaration of Robert Hickmott, former Democratic fundraiser and National Finance Director for Timothy Wirth's Senate campaign, who testified that "'[w]e ... told contributors who had made the maximum allowable contribution to the Wirth campaign but who wanted to do more that they could raise money for the DSCC so that we could get our maximum [Party Expenditure Provision] allocation from the DSCC.'" *Id.* at 458 (quoting declaration of Robert Hickmott) (second set of brackets in original). The Supreme Court also recounted the testimony of Senator Timothy Wirth that he "'understood that when [he] raised funds for the DSCC, the donors expected that [he] would receive the amount of their donations multiplied by a certain number that the DSCC had determined in advance, assuming the DSCC has raised other funds.'" *Id.* (quoting declaration of Timothy Wirth). Likewise, Leon G. Billings, former Executive Director of the Democratic Senatorial Campaign Committee (DSCC), testified that "'[p]eople often contribute to party committees because they have given the maximum amount to a candidate, and want to help the candidate indirectly by contributing to the party.'" *Id.* (quoting declaration of Leon G. Billings). In addition, the Supreme Court found merit in a fundraising letter from Congressman Wayne Allard, dated August 27, 1996, explaining to a contributor that "'you are at the limit of what you can directly contribute to my campaign,'" but "'you can further help my campaign by assisting the Colorado Republican Party.'" *Id.* (quoting fundraising letter from Congressman Wayne Allard, dated Aug. 27, 1996). In *Colorado II,* the Supreme Court also observed that an "informal bookkeeping" system developed, which in the Democratic Party was known as the "tallying system," that would link donations to the party committees with the candidates that had raised the money. *Id.* at 459. As explained by Mr. Hickmott and Senator Paul Simon, the accounting system essentially was an agreement between the DSCC and the candidates' campaign such that candidates were credited with generating donations for the DSCC. The DSCC, in turn, would support the candidate based on the amount of donations the candidate had collected for the DSCC. *Id.; see also id.* at 458 n.22 (noting that "tallying is a sign that contribution limits are being diluted and could be diluted further if the floodgates were open").

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[157] Of course, it bears pointing out that the Supreme Court's discussion of these donations was in the context of contributions that were within the $20,000 limit on donations to national party committees. The record *in this case* conclusively establishes that the nonfederal funds pouring into the national party coffers is from prohibited sources and significantly larger than the federal fund donations at issue in *Colorado II.*

Accordingly, the Supreme Court has already accepted the proposition that "[p]arties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors." *Colorado II,* 533 U.S. at 451-52. Senator Simon's testimony, along with the rest of the *Colorado II* evidence cited by the Supreme Court, has been included in this litigation. Plaintiffs have not made any effort to bring into question any of this evidence, and I accept it and the conclusions reached in *Colorado II* with regard to the evidence.

(v) Evidence from the Record Supporting the Asserted Government Interests

Before turning to the evidence from this record related to the asserted interests discussed above, it is important to make one, brief observation. In the instant case, Plaintiffs contend that the record before this Court, as relied on by Defendants, is nothing short of "an onslaught of anecdotal material about the role of [nonfederal funds] in the political process." McConnell Opp'n at 3. I disagree with Plaintiffs' characterization and find that the evidence in this case is no different from evidence produced in virtually every other campaign finance case that the Supreme Court has heard. Plaintiffs' criticism of the evidence from this record as merely "anecdotal" would have applied with equal force to the evidence the Supreme Court found persuasive in *Buckley* and *Colorado II.* For example, as discussed above, in *Colorado II,* the Supreme Court credited evidence from the FEC's public records, and the testimony of politicians, political consultants, party officials, scholars, and experts. To some degree, Plaintiffs' criticism of the record evidence as "anecdotal" only underscores the difficulty that Plaintiffs have in rebutting the testimony in this record that the fundraising process related to large donations of nonfederal funds to the party committees, particularly at the national level, presents the same problems with corruption and the appearance of corruption that was identified by the Supreme Court in *Buckley.*

(1) Evidence From the Record in this Case Relating to "Corruption" and the "Appearance of Corruption" as Defined in *Buckley*

Federal Officials Control the National Party Committees and are Intimately Involved in Raising Nonfederal Funds for the National Party Committees

The record in this case makes it clear that federal officeholders and candidates control the national political party committees and are so deeply involved in raising nonfederal funds for the national party committees that there is no meaningful separation between the national committees and the federal candidates and officeholders that control them. Findings ¶ ¶ 1.50, 1.58. This finding supports the congressional decision to enact a complete ban on nonfederal funds at the national political party level.

All six national political party committees are controlled and dominated by federal officeholders or candidates. In the case of the DNC or RNC, both are headed by the President or presidential candidate of each party. Findings ¶ 1.47. In the case of the national congressional committees (DCCC, NRCC, DSCC, NRSC), the top leaders of each party in the House and the Senate head the committees and exercise control over them. *Id.* This very fact has led one of Defendants' experts to conclude that "[t]here is no meaningful separation between the national party committees and the public officials who control them." *Id.* Furthermore, "[f]or at least a century [the national party committees] have been melded into their party's presidential campaign every four years, often assuming a subsidiary role to the presidential candidate's personal campaign committee. The presidential candidate has traditionally been conceded the power to shape and use the committee, at least for the campaign." *Id.* ¶ 1.48.

The record also demonstrates that the primary purpose of the political parties is to get as many of its candidates elected

to public office. *Id.* ¶ 1.48.[158] This purpose drives the political parties' fundraising efforts. As Congressman Meehan notes, "political parties do not have economic interests apart from their ultimate goal of electing their candidates to office." *Id.*

The national political party committees request and encourage Members of Congress to solicit nonfederal money donations from contributors, and the personal involvement of high-ranking Members of Congress is a major component of the political parties' fundraising programs.[159] *Id.* ¶ ¶ 1.51, 1.53. The record is replete with testimony from current and former Members of Congress, political contributors, and lobbyists, all recounting examples or personal experiences where Members of Congress actively solicited nonfederal funds for their political parties. *Id.* 1.51. This testimony is corroborated by numerous internal documents from a Fortune 100 company requesting authorization for donations to national party committees in response to requests made by Members of Congress. *Id.* ¶ 1.74.3. An internal memorandum from this company notes that "[o]n the Democratic side, [our] advocates have already fielded soft money calls from House

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[158] The RNC presented testimony suggesting that electing its candidates is only one means of achieving its core political principles. Findings ¶¶ 1.49, 1.49.1. It claims it also strives to achieve its core principles by promoting an issue agenda that reflects its principles and governing in accordance with its principles. *Id.* ¶ 1.49.1. Its own internal documents show that its primary purpose "is to elect its candidates to public office." *Id.* Therefore, the testimony that electing candidates is not the RNC's primary purpose is rebutted and cannot be relied upon.

[159] The RNC's Finance Director states that it is rare for federal officials to make initial personal or telephonic solicitations of major donors for the RNC because the RNC has a policy against such practices. Findings ¶ 1.54. Whether such practices are rare or not, and whether or not the Finance Department has such a policy, the record is clear that such solicitations, initial and subsequent, do occur. *Id.* It is also clear that the Finance Director's statement does not extend to the NRSC or the NRCC. *See id.* ¶ 1 .51.

Democratic Leader Gephardt, House Democratic Caucus Chairman Frost, Democratic Congressional Campaign Chairman Kennedy, and Democratic Senatorial Campaign Chairman Torricelli. Similar contacts to raise soft money have been made by Republican congressional leaders." *Id.* ¶ 1.78.1. In addition, the record shows that national political party committees and candidates have formed joint fundraising committees, which share the burdens and the receipts of these joint ventures. *Id.* ¶ 1.57. These joint fundraising committees allow the national committees to collect whatever amount a particular donor gives in excess of the federal funds the candidate is permitted to accept. *Id.* All nonfederal funds raised by such joint committees go to the political party. *Id.*

Members have a number of reasons to oblige. First, as former Senator Dale Bumpers testifies, helping the party benefits the Member because it aids the party in "perform[ing] its function of keeping tabs on statements, politics and votes of opposition party members and groups." *Id.* ¶ 1.55. Former DNC and DSCC official Robert Hickmott observes that raising money for one's political party also helps the political party's efforts to maintain or obtain control of Congress, which serves the Member's own interests. *Id.* Second, the record demonstrates that while there may not be a formal commitment that the amount of money spent by the national party committees on their Members' behalf is connected to the amount of money they raise, there is, in former Senator David Boren's words, "at least a working understanding among the party officials and Senate candidates that the [nonfederal] money [raised by the candidate] will benefit the individual Senators' campaigns." *Id.; see also id.* ¶ 1.56.3, 1.56.4.

In regard to this latter point, as the Supreme Court already observed in *Colorado II,* an "informal bookkeeping" system was developed within the DSCC known as the "tallying system," which was designed to credit different members with collecting donations for the DSCC. *Colorado II,* 533 U.S. at 459 (observing that based on the members efforts, the DSCC would determine its support for the candidate). The record in this litigation reflects that the DSCC continues to maintain a "credit" program, which credits nonfederal funds raised by a Senator or candidate for that person's party. Findings ¶ 1.56.3. TheNRCC, NRSC and DCCC do not have such a system; however, they advise Members of the amounts they have raised for the respective committees. *Id.* ¶ 1.56.4. Former Senator Simpson testifies that: "[w]hen donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign." *Id.* ¶ 1.56.1.

Former Senator Simpson's observation about the donors' understanding concerning the use of the party donations is supported by other evidence in the record. A letter from an RNC contributor with an enclosed contribution states that "Congressman Scott McInnis deserve [sic] most of the recruitment credit." *Id.* ¶ 1.51. Similarly, a lobbyist testifies that donors are interested in making sure that particular Members of Congress receive "credit" for their contributions:

> Although the [nonfederal] donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly the senior officials, are likely

> to remember the donation and to recognize that such big donors' interests merit careful consideration.

Id. ¶ 1.78. Additional testimony shows that individual donors request that their nonfederal money contributions to the national party committees be applied to particular federal campaigns. *Id.* ¶ 1.56.2.[160]

Third, at least with regard to the DSCC and its "credit" program, former DSCC official Robert Hickmott testifies that Members can raise money and credit it to other candidates to obtain support from those they assisted if they plan to run for a leadership post. *Id.* ¶ 1.55. Fourth, the relationship between the candidate/Member and the party makes it difficult for the candidate/Member to avoid raising funds for the party. As Defendants' expert Donald Green puts it: "The ubiquitous role that parties play in the lives of federal officials means that no official can ignore the fundraising ambitions of his or her party." *Id.; see also id.* ¶ 1.46 (describing the unique relationship between candidates/Members and their parties).

Federal Candidates and Officeholders in Most Instances Are Aware of the Largest Contributors of Nonfederal Funds to the National Party Committees

The fact that federal officeholders are so intimately involved in the solicitation of nonfederal funds suggests that they are cognizant of the identities of the major national party committee donors, which in turn allows them to open their

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[160] The record also contains the testimony of Plaintiff Thomas McInerney, a major contributor to the Republican Party. He states that his nonfederal donations to the RNC were intended to go to state and local election activities. Findings ¶ 1.56.2.1. This testimony does not rebut the testimony of others that such donations are often given for use in federal campaigns, *id.* ¶ 1.56.2, and his practice of giving to national political party committees to assist state and local election activity appears to be an exception to the general rule. Furthermore, nothing in BCRA prevents Mr. McInerney from donating nonfederal funds to state and local parties for use in state and local elections.

doors to these donors. *Id.* ¶ 1.71-1.72. In fact, the evidence demonstrates that it is difficult for Members of Congress not to know the identities of the large donors to their political parties. *Id.* As former Senator Bumpers testifies: "you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party." *Id.* ¶ 1.71.2. Indeed, Members of Congress testify that they and their colleagues are cognizant of donations made to their parties.[161] *Id.* 1.71.2. For example, Congressman Shays stated on the floor of the House that "it's the candidates themselves and their surrogates who solicit soft money. The candidates know who makes these huge contributions and what these donors expect." *Id.* ¶ 1.71.2. Former Senator Simpson testifies:

> Party leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the person behind the donation. . . . Even if some members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what.

Id. Similarly, Senator McCain observes that "[l]egislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money," and that "[d] onors or their lobbyists often inform a particular Senator that they have made a large donation." *Id.* Former Senator Simon candidly testifies that he would likely return a telephone call to a large contributor before making other calls. *Id.* Accordingly, either as a consequence of a donor-based election system, or as a result of federal candidates and officeholders raising large amounts of nonfederal funds for the national parties, federal candidates and officeholders know who makes large donations to the national party committees, which inevitably leads to special access for these donors to influence federal lawmakers.

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[161] Other Members of Congress testify that they are *personally* unaware of who donates to the parties; however, these Members are almost all Defendant-Intervenors who were involved in the efforts to enact BCRA and, like Senator Feingold, have made efforts to distance themselves from nonfederal fundraising or had little interest in such information. *Id.* ¶ 1.71.1. Moreover, these Members do not claim to speak on behalf of all of their colleagues. *Id.*

Senator McConnell attests that he typically does not know the donation history of the individuals with whom he meets. The record demonstrates that he is aware of the donation history of some of the major donors to his campaign, and has sought nonfederal donations from at least one donor who had donated the maximum federal funds to his campaign. *Id.*

Large Nonfederal Funds Donations Provide Contributors Access to Federal Officeholders

In addition, the record clearly establishes that large nonfederal money contributors are provided with special access to federal officeholders in a manner on par with the large individual donors discussed in *Buckley. Id.* ¶ ¶ 1.75-1.80.1, 1.81. This access provides these donors with opportunities to influence legislative activity, and is a major reason large donations are made to the political parties. As one Member of Congress put it: "access is it. Access is power. Access is clout. That's how this thing works . . . " *Id.* ¶ 1.75.2.

Although no empirical study has been able to demonstrate this point conclusively, App. ¶ III, testimony from those intimately involved in national political fundraising, as well as documents submitted as part of the record, provide powerful evidence that large nonfederal money donations provide such donors access to influence federal lawmakers.[162]

Just like the Supreme Court panel that issued *Buckley,* I find this evidence-of specific examples of access given to large contributors-probative and compelling.

Numerous prominent lobbyists testify that in order to have access to Members of Congress, clients must combine their lobbying efforts with sizeable nonfederal money donations. *Id.* ¶ 1.75.1. Failure to do so, according to lobbyist Robert Rozen, will hinder a client's ability "to be treated seriously in Washington," by which he means, "to be a player and to have access" *Id.* He explains that "relationships [with Members of Congress] are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want, because you have established a relationship." *Id.* ¶ 1.74.1. The other lobbyists who testify in this case concur, including Daniel Murray, who notes that nonfederal funds, "ha[ve] become the favored method of supplying political support," which "begets . . . access to law-makers" because of the lack of any limit on how much may be donated. *Id.* ¶ 1.75.1. *Cf. Buckley,* 519 F.2d at 839 n.37 ("The disclosures of illegal corporate contributions in 1972 included the testimony of executives that they were motivated by the perception that this was necessary as a "calling card, something that would get us in the door and make our point of view heard," Hearings before the Senate Select Comm. on Presidential Campaign Activities, 93d

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[162] As an aside, I do not find it particularly surprising that an empirical study has not been able to conclusively demonstrate this point. Access to federal officials may be subtle, less open to verification, and therefore less likely to be captured by empirical review. Furthermore, the fact that the FEC does not require nonfederal contributors to disclose these contributions makes the feasibility of such a study even more remote. The inability to empirically assess this matter would be troublesome if not for the record before this three-judge panel, which is rich with testimony from individuals intimately involved in nonfederal fundraising who describe the unprecedented access given to those who contribute large sums of nonfederal funds. In my judgment, the difficulty of being able to study this phenomenon empirically is of little consequence given this evidence. *See* Findings ¶ 1.81-1.82; App. ¶ III

Cong., 1st Sess. 5442 (1973) (Ashland Oil Co. Orin Atkins, Chairman).") (citation to Findings omitted).

Plaintiffs point out that one of these lobbyists claims that he is hired because of his ability to provide access to lawmakers regardless of whether or not the client has donated money to the parties. Findings ¶ 1.75.1.2. Similarly, an RNC official states that lobbying is a better way to achieve access to lawmakers than donating to their campaigns or parties, and Plaintiffs note that many individuals and entities who donate large sums of nonfederal funds also devote substantial sums to lobbying efforts, which can dwarf their nonfederal fund donations. *Id*.. While these observations have merit, it is clear from lobbyists, such as Wright Andrews, that the "amount of influence that a lobbyist has is often *directly correlated* to the amount of money that he or she and his or her clients infuse into the political system." *Id.* ¶ 1.75.1.3 (emphasis added). In fact, Andrews notes that many lobbyists have taken to hosting fundraisers themselves, which provide them with an opportunity to interact with lawmakers in a setting of their choosing and concludes that "[t]hose who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly, the lobbyists with the most clout." *Id.* The lobbyist whom Plaintiffs tout as claiming he can achieve special access for his clients regardless of *their* contribution history, can provide that access in part because of political contributions made or arranged by his firm. *Id.* ¶ 1.75.1.2. Furthermore, lobbyists testify that traditional lobbying alone is not in and of itself sufficient to achieve a client's goals and that contributions are usually part of a lobbyist's "legislative plan." *Id.* ¶ 1.75.1.3. This point is bolstered by the numerous internal documents authored by employees of a Fortune 100 company's internal lobbying department, requesting authorization to make nonfederal donations to national party committees as part of efforts to "strengthen [its] relationship" with various federal lawmakers. *Id.* ¶ 1.74.3. In the words of one expert, "[i]t's not either or .... the fact is most of the organizations and economic interests ... lobbying, inside and outside lobbying, are also intimately involved in the political financing game and making large contributions to political parties. *Id.* ¶ 1.75.1.2.

Numerous former and current Members of Congress also testify that entities and individuals that make large contributions to the political parties do so because it provides them with special access to lawmakers which allows them to influence legislation.[163] *Id.* ¶ 1.75.2. Senator Rudman is blunt:

> Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party—to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so you should do this to help us." No one needs to say it—it is perfectly understood by all participants in every such meeting.

Id.

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[163] Some Defendant-Intervenors in this case testify that they personally do not provide special access to large donors of nonfederal funds. Findings ¶ 1.75.2.1. These Members of Congress do not claim to speak for their colleagues or contradict their colleagues' testimony that such access is provided to major donors. *Id.; see also id.* ¶ 1.75.2.

Representatives of corporate nonfederal money donors echo the lobbyists' and former Members' testimony that nonfederal donations beget access. *Id.* 1.75.3. The Chairman Emeritus of United Airlines testifies that large nonfederal donations provide donors with benefits:

> namely, access and influence in Washington. Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the opportunity to argue for their corporation's or union's position on a particular statute, regulation, or other governmental action.

Id. The record contains internal documents which support this view. *Id.* ¶¶ 1.75.3, 1.78.1. One internal corporate memorandum states that "contributions and the related activities we have participated in have been key to our increased ability to get our views heard by the right policy makers on a timely basis; in other words, a smart investment." *Id.* 1.75.3. In addition, a poll of a random sample of 300 corporate executives employed by major U.S. corporations conducted by the Tarrance Group on behalf of the Committee for Economic Development ("CED") found that 75 percent of those surveyed said that "political donations give them an advantage in shaping legislation." *Id.* ¶¶ 1.70.1-¶ 1.70.1.1.

Wealthy individuals who donate large sums of nonfederal funds also share that they were provided with unique access after they made large contributions to the political parties. *Id.* ¶ 1.75.5. One individual testifies that after he made a $500,000 contribution to the DNC he was invited to a number of events where President Clinton was in attendance, including a small dinner with President Clinton and Vice President Gore that was billed as an opportunity to "give advice to the President." *Id.* He used the opportunity to speak

in favor of campaign finance reform and to urge the President to take a leadership role in the effort. *Id.* Another donor testifies that $50,000 in political donations provided him and his wife the opportunity to attend a dinner of 10 to 12 people, including President Clinton, which lasted two to three hours and involved "primarily a conversation about issues of importance to the nation and the President's program." *Id.* One wealthy contributor who states that he does not give to the political parties in order to secure special access admits that he has been offered such opportunities. *Id.*

The record establishes in compelling fashion that large nonfederal money donors are provided access to federal officeholders and candidates in exchange for their large contributions. Political parties play a role in facilitating this access to influence.

The National Party Committees Facilitate Access to Federal Officeholders for Their Large Nonfederal Donors

Both political parties and their congressional committees have dangled access to Members of Congress as an inducement to collect larger contributions from donors; these donations often take the form of nonfederal funds. *Id.* ¶¶ 1.76-1.77.10. In fact, the political parties have institutionalized this process by creating clubs for different ranges of donations; as donations escalate, so do the opportunities to attend special events with Members of Congress as well as the intimacy of these events.*Id.* For example, the NRCC's Congressional Forum was "designed to give its members [$15,000 PAC or individual contributors or $20,000 corporate contributors] an intimate setting to develop stronger working relationships with the new Republican Congressional majority." *Id.* ¶ 1.77.2. The NRSC's Group 21 required an annual donation of $100,000 and provided members small dinners with Senators and "VIP benefits." *Id.* The DCCC also had a $100,000 donor club called the "National Finance Board," which provided donors "two private dinners with Leader Gephardt, Chairwoman Lowey, House Democratic Leadership and Ranking Members[and] two retreats with Leader Gephardt and Chairwoman Lowey . . . ." *Id.* ¶ 1.77.5. The state political parties have also used the enticement of special access to federal candidates to induce larger donations. *Id.* ¶ 1.77.6. The best example of this is a CDP brochure advertising the CDP's Trustees program, which required a $100,000 donation to the CDP. *Id.* The CDP "recognizes its extraordinary supporters with extraordinary opportunities," and provides "Trustees" with "[e]xclusive briefings, receptions and meetings with officials such as U.S. Senator Dianne Feinstein, U.S. Senator Barbara Boxer . . . and other national figures." *Id.*

Large contributions have therefore become the price of admission to attend events where relationships can be formed with Members of Congress and legislative issues can be discussed. Individual wealthy donors testify that "[p]olicy discussion with federal officials occurs at" these major donor events. *Id.* ¶ 1.75.5. The events "include speeches, question and answer sessions, and group policy discussions, but there is also time to talk to Members individually about substantive issues." *Id.* One witness testifies that, "when given the opportunity, some donors try to pigeonhole or corner Members . . . to discuss their issues at these events." *Id.* One donor to the RNC's Team 100, a club that requires a $100,000 donation every four years with $25,000 donations in each intervening year, wrote to the RNC Chairman telling him, "I do feel I have benefitted from Team 100 in the audience it has afforded me with party leaders." *Id.; see also id.* ¶ 1.77.1 (describing the Team 100 program). Lobbyist Robert Rozen describes the access provided by other political party events:

> [S]oft money contributions built around sporting events such as the Super Bowl or the Kentucky Derby, where you might spend a week with the Member, are even more useful. At the events that contributors are entitled to attend as a result of their contributions, some contributors will subtly or not-so-subtly discuss a legislative issue that they have an interest in. Contributors also use the events to establish relationships and then take advantage of the access by later calling the Member about a legislative issue or coming back and seeing the Member in his or her office. Obviously from the Member's perspective, it is hard to turn down a request for a meeting after you just spent a weekend with a contributor whose company just gave a large contribution to your political party.

Id. ¶ 1.77.9. A Fortune 100 company's internal lobbying department justified its request for a $1.4 million nonfederal funds budget for FY 1999 (from its general treasury) in part by noting:

> due to a significant [sic] in the number of events scheduled by the parties for their donors, the number of opportunities . . . to develop relationships with elected and administration officials has never been greater. As the parties compete more vigorously for soft money dollars, the number and quality of events for interacting with both the leadership and rank and file Members has been greatly increased. Between the six main committees (DNC, DSCC, DCCC, RNC, NRCC, NRSC) there are events both in and out of [Washington, D.C.] almost every day of the week.

Id. ¶ 1.78.1.

These events are touted by the parties as opportunities to meet and discuss issues with Members of Congress. *Id.* ¶ 1.77.8. For example, Senator McConnell, as head of the NRSC, wrote a solicitation letter which noted that the Republican Senate Council ($5,000 annual PAC contribution) and the Chairman's Foundation ($25,000 annual corporate gift) provide "excellent opportunities for both corporate executives and Washington representatives to meet and discuss current issues with leading Republican Senators." The RNC sought $250,000 donations as part of its Annual Gala, and offered such donors breakfast with the Senate Majority Leader and Speaker of the House, as well as a "[l]uncheon with Republican House and Senate Leadership and the Republican House and Senate Committee Chairmen of your choice." *Id.* Furthermore, the political parties accept donor requests as to which Member they would like seated at their table at political party dinners. *Id.* ¶ 1.77.7. The record shows that donors request to be seated with specific Members or with Members who sit on particular committees, and that these requests have been met. *Id.*

The parties also facilitate access to Members of Congress outside of their donor events. According to Ms. Beverly Shea, the RNC Finance Division's "policy" is to not "force" federal officeholders to meet with donors, but that it may pass along requests to a Member's scheduler and say "this is a Team 100 member,[164] could you see if you could fit them in." *Id.* ¶ 1.76.1. This statement appears to be accurate. Nothing in the record demonstrates that meetings have been literally forced on Members of Congress. However, there is ample evidence that RNC officials request meetings with Members of Congress on behalf of large donors, which intimate or state bluntly the donor's generosity to the political party. A few examples illustrate how the RNC Finance Division's policy operates. The Chairman of the RNC handwrote the following note to Senate Majority Leader Robert Dole:

> Dear Bob
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> [_____], CEO of Pfizer, has asked to see you on Wed. 11/1. He is extremely loyal and generous. He also is not longwinded. He'll tend to his business and not eat up extra time. They have proposed a [Internal Revenue Code §] 936 solution that [Republican Senator William] Roth and [Republican Congressman Bill] Archer are considering. I'm sure that is the issue. I'd appreciate it if you'd see [him]. [signed] Haley.

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[164] Team 100 is an RNC donor club requiring a $100,000 donation every four years, and $25,000 donations each intervening year. Findings ¶ 158.

Id. ¶ 1.76. Another appeal for a meeting makes the connection between access and money even more apparent. An RNC letter sent to a staffer to Senator Hagel, asks Senator Hagel to meet with a donor for four "key" reasons including: "[h]e runs [sic] $80,000,000 high tech business," and "[h]e just contributed $100,000 to the RNC." *Id.* It also appears that RNC officials are so confident that their "requests" for meetings with large donors will be granted that they are offered to donors in advance of making such requests to the Member or the Member's staff. A letter from the RNC's Team 100 director thanks a donor for "facilitating Dow [Chemical]'s generous contribution to the Republican Party" and tells the donor: "Give me a call . . . and we can figure out when is a good time to bring your Dow [Chemical] leadership into town to see [RNC Chairman] Haley [Barbour], [Senate Majority Leader Robert] Dole & [Speaker of the House] Newt [Gingrich]." *Id.*

This practice is not limited to the RNC. The former head of the DNC testifies:

> Party and government officials participate in raising large contributions from interests that have matters pending before Executive agencies, the Congress, and other government agencies. Party officials, who are not themselves elected officials, offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities—White House and congressional meetings—to press their views on matters pending before the government.

Id.

On some occasions the connection between access and donations has been made even more obvious. Call sheets in the record from the DNC and the CDP include instructions such as "Ask her to give 80k more this year for lunch with" President Clinton, and ask "if they might be able to do $25,000 for a small mtg with the President." *Id.* ¶ 1.77.10.

In sum, the record reflects that political parties facilitate access to federal candidates and officeholders in exchange for large nonfederal funds donations. It also reflects that some major donors admit that they contribute nonfederal funds, not to help with party building, but to gain access to federal candidates and officeholders.

Donors Contribute Large Nonfederal Money Donations to the National Party Committees For the Purpose of Obtaining Access to Federal Officeholders

It is clear that donors understand the system. The record is replete with examples of donors who give donations for the purpose of obtaining access to federal lawmakers and thereby influence government policy. *Id.* ¶¶ 1.74-1.74.5. Perhaps Roger Tamraz—made famous by his testimony during the Thompson Committee Hearings—summed it up best when he was asked if he made contributions to the DNC because he believed it might get him access and responded: "Senator, I'm going even farther. It's the only reason . . . ." *Id.* ¶ 1.74.3. Mr. Tamraz is not alone. One wealthy political fundraiser observes that "many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal officeholders who can protect or advance specific interests through policy action or inaction." *Id.* He notes that some nonfederal money donors give "$250,000, $500,000, or more, year after year," and that for this kind of investment "you need to see a return," just like any other investment. *Id.* Other witnesses experienced with political donations also describe these donations as an "investment" or "the cost of doing business." *Id.* One CEO comments that achieving access is important to corporate givers and that "[f]ederal officeholders actually appear to have sold themselves and the party cheaply. They could have gotten even more money, because of the potential importance of their decisions to the affected businesses." *Id.*

These donors have also discovered that nonfederal donations are more effective at obtaining access to federal lawmakers than federal contributions. *Id.* ¶ 1.78. As former DNC and DSCC official and current lobbyist Robert Hickmott observes: "If you want to get to know Members of Congress, or new Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at the various events than it would be to write fifteen $1,000 checks to fifteen different Senators, or Senators and candidates." *Id.* This sentiment is echoed by various lobbyists and major party contributors, including one lobbyist who notes that "a properly channeled $100,000 corporate soft money donation to the national Republican or Democratic congressional campaign committees can get the corporate donor more benefit than several smaller hard dollar contributions by that corporation's PAC." *Id.* Lobbyist Robert Rozen describes the mentality starkly:

> Donors to the national parties understand that if a federal officeholder is raising soft money—supposedly "non-federal" money—they are raising it for federal uses, namely to help that Member or other federal candidates in their elections. Many donors giving $100,000, $200,000, even $1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed . . . . The bigger

> soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions.

Id. As such, it is abundantly clear that, in general, a large majority of major donors of nonfederal funds to the political party committees contribute this money to gain access to federal officeholders and candidates not to support a political philosophy or "party building" activities. The fact that major nonfederal funds donors give to both political parties only underscores this point.

Contributors of Nonfederal Funds Give to Both Political Parties to Ensure Special Access

The importance to large contributors of gaining access to federal lawmakers in order to press their individual agendas leads many, in the words of one witness, to "hedge their bets, to ensure they get access to office holders on the issues that are important to them." *Id.* ¶ 1.79; *see also id.* ¶ 1.80. One CEO put it this way: "As a donor with business goals, if you want to enhance your chances of getting your issues paid attention to and favorably reviewed by Members of Congress, bipartisanship is the right way to go. Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective." *Id.* ¶ 1.79. The parties are aware of this view, as one document from the Ohio Republican party entitled "Why People Give" includes the observation: "many people give to both sides so that they will have access to whoever is the winner." *Id.* ¶ 1.80.[165]

The record also contains evidence that the political parties exploit contributors' fears of losing access if they back one political party and that party loses control of Congress. One CEO describes the situation this way:

> [I]f you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed. They'll get a message that basically asks: "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. First of all, it's hard to get attention for your issue if you're not giving. Then, once you've decided to play the money game, you have to worry about being imbalanced, especially if there's bipartisan control or influence in Washington, which there usually is. In fact, during the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. Referring to someone's financial activity in the political arena used to be clearly off limits, and now it's increasingly common.

Id. ¶ 1.80; *see also id.* ¶ 1.70-1.70.4 (facts regarding pressure placed on political donors). An internal Eli Lilly and

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[165] The RNC claims that the record "establishes that organizations and individuals may give to both parties because they desire to be actively involved in the political process." *Id.* ¶ 1.80.1. In support of this statement, the RNC provides a statement by a PhRMA representative that the group gives to the convention activities of both parties because "we are good civic participants," and a deposition statement from one of Defendants' experts acknowledging the *possibility* that donors provide support to both parties because they support some members from each party. *Id.* Although these statements suggest that donors "may" give to both parties for reasons other than access, they do not contradict the numerous statements and documents in the record that demonstrate that special access is the *primary* motivation for many donors who give to both parties. *Id.* Moreover, interests in participating in the political process and in obtaining special access to legislators to influence them are neither incompatible nor mutually exclusive.

Company document shows these concerns in action. *Id.* ¶ 1.79. The *Washington Post* had listed the company as a top donor to the Republican party. *Id.* A handwritten notation on a photocopy of the article says "Dems are upset . . . . White House stays Dem we are in trouble," and an internal memorandum refers to discussions with the White House indicating that Eli Lilly "can get back into this by giving $50[,000]-100,000 to the DNC—says they would be pleased with this." *Id.*

Another good example of this practice of giving to both political parties is that in 2000, a Fortune 100 company agreed to contribute $25,000 to the NRSC at the request of George Allen, the then-Republican-candidate in the 2000 Senatorial race in Virginia against incumbent Senator Chuck Robb. An employee noted that the company had donated to Senator Robb's Leadership PAC and that a similar contribution to the NRSC was necessary to balance out the company's support for the candidates. *Id.*

The Tarrance Group/CED poll of business leaders found that 74 percent of respondents "say pressure is placed on business leaders to make large political donations. The main reasons corporate America makes political contributions, the executives said is fear of retribution and to buy access to lawmakers." *Id.* ¶ 1.70.1. Another poll conducted in 1997 of major congressional donors found that 80 percent of those surveyed agreed that "officeholders regularly pressure donors for contributions." *Id.* ¶ 1.70.3.[166] Lobbyist Robert Rozen provides context for this fear:

> In some cases corporations and trade associations do not want to give in amounts over the hard money limits, but they feel pressured to give in greater amounts and end up making soft money donations as well. They are under pressure, sometimes subtle and sometimes direct, from Members to give at levels higher than the hard money limits. For example, some Members in a position to influence legislation important to an industry naturally wonder why a company in that industry is not participating in fundraising events.

Id. ¶ 1.70.2. Former Senator Boren notes that political donors feel that they are victims of "shake[] down[s]." *Id.* ¶ 1.70.4. One internal memorandum from a Fortune 100 company notes that "our traditional competitors continue to contribute large amounts of soft money," and predicted that failure to "maintain our soft money participation during this election cycle-given the heightened scrutiny those contributions will receive in the current competitive climate—*may* give our new and traditional competitors an advantage in Washington. *Id.* ¶ 1.78.1 (emphasis in original); *see also Buckley,* 519 F.2d at 839 n.37 ("The disclosures of illegal corporate contributions in 1972 included the testimony of executives that they were motivated by the perception that this was necessary . . . 'in response to pressure for fear of a competitive disadvantage that might result.'") (quoting statement of former chairman of American Airlines, George Spater) (internal citations omitted) (cited in *Buckley,* 424 U.S. at 27 n.28).

The evidence detailed above clearly indicates that large donations to political parties, especially nonfederal donations, open doors to federal lawmakers' offices. The record shows that the reverse is also true: failure to provide large nonfederal donations can effectively block access to federal lawmakers. As one CEO put it: "It is obvious to me that large soft money donations do buy access, that they can influence federal policy, and that they are corrupting to federal officeholders and to donors. Additionally, these unlimited donations to political parties pose a far greater risk than do hard money contributions to candidates of at least the

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[166] The poll also showed that 76 percent of the major donors surveyed believed the campaign finance system was either "broken and needs to be replaced," or "has problems and needs to be changed." *Id.* ¶ 1.70.3. Three-quarters of respondents supported a "ban on large 'soft money' donations." *Id.*

appearance, if not the reality, of special interest influence on federal policy." Findings ¶ 1.83.6; *see generally id.* (testimony and poll results demonstrating wealthy individual donors find the campaign finance system as either corrupt or as creating the appearance of corruption). In sum, the evidence demonstrates that major donors of nonfederal money primarily give these contributions to the national committees to gain access to federal officeholders. Notably, the record also demonstrates that major nonfederal money donors give to the state and local committees for the benefit of federal officeholders and candidates.

Federal Candidates Are Cognizant of the Benefits of Having Nonfederal Money Donors Contribute to State Parties

Federal candidates understand that they can benefit from donations made to the state political parties. The evidence discussed *infra* demonstrates that candidates solicit contributions to the state parties to assist their campaigns. *See infra* at 556. However, perhaps the most probative evidence of the importance federal candidates place on such contributions is a letter written by Senator Mitch McConnell to one of his contributors. He writes:

> Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2000[167] program . . . . This program was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year. *Id.* ¶ 1.60. Senator McConnell also handwrote: "This is important to me. Hope you can help." *Id; see also id.* (letter from Congressman Wayne Allard explaining to a contributor that although maxing out to his campaign, the contributor could further help his campaign by donating to the Colorado Republican Party).

These additional facts confirm that nonfederal donations to the state political parties affect federal elections and are valued by federal candidates. It is therefore clear that such donations to state political parties can result in access to federal officials while also providing a route to circumvent FECA's limitations.

Political Donations Achieve Political Results

As discussed at length earlier, in the context of supporting contribution restrictions, *Buckley* and its progeny do not require evidence that large contributions to candidates were conditioned upon a certain decision by a federal officeholder or candidate. *Buckley,* 519 F.2d at 839 n.36 (cited in *Buckley,* 424 U.S. at 27 n.28) ("It is not material, for present purposes, to review the extended discussion in the Final Report on the controverted issue of whether the President's decision was in fact, or was represented to be, conditioned upon or "linked" to the reaffirmation of the pledge."). Nevertheless, a few examples from my Findings of Fact and prior caselaw illustrate that in many instances large nonfederal donations produce the desired result for the donor. Indeed, why else would corporate executives refer to general treasury contributions to the political parties as "investments" or the "cost of doing business" if results were not obtained? *See supra* at 530. Although there is no evidence in the record before this three-judge panel that federal bribery or gratuity laws have been violated in exchange for nonfederal funds, *see* Findings ¶ 1.64, that is not what *Buckley* requires as a basis for support of a contribution restriction. As *Buckley* observed, bribery laws "deal with only the most blatant and specific attempts of those with money to influence government action." *Buckley,* 424 U.S. at 28. Contribution limitations, like those in Title I and in *Buckley,* target the "opportunity for abuse inherent in the process of raising large monetary contributions." *Id.* at 30. Former Senator Rudman speaks to this point:

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[167] Victory programs are programs designed by the state Republican parties in conjunction with the RNC and implemented by the state party with assistance from the RNC. *See* Findings ¶¶ 1.43.2.

> I understand that those who opposed passage of the Bipartisan Campaign Reform Act, and those who now challenge its constitutionality in Court, dare elected officials to point to specific [instances of vote buying]. I think this misses the point altogether. [The access and influence accorded large donors] is inherently, endemically, and hopelessly corrupting. You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty.

Id. ¶ 1.65. The record in this case confirms Senator Rudman's view that large nonfederal contributions to the national political party committees achieve access. *See id.* ¶¶ 1.75-1.80.1, 1.81. The record also contains an example demonstrating that large nonfederal donations achieve their intended result—that is, having an effect "on candidates' positions and on their actions if elected to office." *Id.* ¶ 1.66. Senator Simon testifies:

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One

> of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. *I do not think there is any question that this is the reason it passed.*

Findings ¶ 1.66; *see also Colorado II*, 533 U.S. 431, 451 n.12 (2001) (quoting Senator Simon's declaration); *see also* Findings ¶ 1.66 (Senator Feingold testifying that in the fall of 1996 a senior Senator suggested to him that he support the Federal Express amendment because "they just gave us $100,000").

In addition, the record makes clear that the national political parties lobby their Members of Congress on various legislative issues. *Id.* ¶ 1.67. A document in the record suggests that at least on one occasion the political parties have asked Members to take a position on an issue because of a donor's interest in the issue. *Id.* ¶ 1.67.1.[168] Furthermore, Plaintiffs' expert La Raja acknowledges that the "potential for quid pro quo exchange between contributor and policymaker escalates with the size of the contribution," and recommends that "[t]o reduce the potential for corruption, I recommend that Congress place a cap on hard money contributions or, if soft money is banned, raise the limits on hard money contributions." *Id.* ¶ 1.69.

Therefore, while the record contains no evidence that federal bribery laws have been broken-something not required by *Buckley* to support the contribution restrictions at issue in the case-the record does contain certain examples showing that access achieves legislative results and creates the potential for such arrangements. Findings ¶¶ 1.63, 1.68.

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[168] There is also testimony in the record suggesting that the political parties threaten to withhold financial support for Members' campaigns if they do not take the political party's position on an issue. Findings ¶ 1.68.

Even without this evidence, the access provided to federal officeholders and candidates by the political party committees is more than sufficient to justify Congress's decision to enact Title I.

Polling Data Demonstrates an Appearance of Corruption Relating to Large Donations to the Political Parties

Evidence in the record demonstrates that the public, in response to the existence of large nonfederal donations, perceives corruption in the nation's campaign finance system. Findings ¶ 1.84. A poll conducted by two prominent political pollsters, Mark Mellman and Richard Wirthlin, shows that Americans believe that large donations to political parties affect the decisions of Members of Congress. *Id.* ¶¶ 1.83.1, 1.83.1.1 The poll found that 77 percent of Americans believe that big contributions to political parties have at least some impact on decisions made by the federal government—55 percent believe the impact is great. *Id.* Results from the 2002 Mellman and Wirthlin poll are also strikingly similar to those of a survey conducted in 1974 and cited by the D.C. Circuit in *Buckley,* which reported that 69.9 percent of respondents believed that "the government is pretty much run by a few big interests." *Buckley,* 519 F.2d at 838-39. Mellman and Wirthlin's survey found that 71 percent of those polled believe that Members of Congress make decisions based on what the big contributors to their party want, even if it is not what their constituents want or what the Member thinks is in the best interests of the country. Findings ¶ 1.83.1. An even greater percentage, 84 percent, believe that Members are more likely to listen to large party contributors because of their contributions, and 68 percent think that big contributors to political parties have blocked decisions by the federal government that could improve people's everyday lives. *Id.* The poll also reflects that the public perceives that their views are given less attention than those of large contributors. Eighty-one percent of those polled believe that the views of those corporations, unions, interest groups or individuals who donate $50,000 or more to a political party would likely receive special consideration from Members of Congress, while only 24 percent believe a Member is "likely to give the opinion from someone like them special consideration." *Id.*

Professor Robert Shapiro's review of public opinion polls conducted since 1990 confirms the Mellman and Wirthlin conclusion that large nonfederal contributions are viewed as corrupting by the public. *Id.* ¶ 1.83.2. He concludes that the public is troubled and opposes large unregulated nonfederal contributions to political parties, that "a substantial proportion of the public has perceived corruption in the political system, and that we are losing ground." *Id.*

Another poll shows that 76 percent of high-level political contributors, those who know the campaign finance system first-hand, are critical of the regime. *Id.* ¶ 1.83.6. The polling data is confirmed by the testimony of corporate and individual donors stating that nonfederal donations corrupt the campaign finance system or create the appearance of corruption. *Id.*

This polling data on the appearance of corruption reflects a dispiriting reality. The public's perception of the influence and effect of large nonfederal donations justified Congressional action in enacting Title I.

Members of Congress Report that Constituents Are Concerned About Large Contributions to Political Parties Which Demonstrates an Appearance of Corruption

In addition to the polling data, Members of Congress have expressed concern that large contributions to their political parties create the appearance of corruption in the eyes of their constituents. *Id.* ¶ 1.83.3. Among them is former Senator Simpson, who testifies that "[b]oth during and after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations." *Id.* Representative Asa Hutchinson wrote to the RNC Chairman that he could not support the RNC's proposed campaign finance bill because he had to balance the RNC's concerns

> with a concern of my constituents which is that their influence in politics is being diminished by the abuses of soft money .... If our party is unable to enact meaningful campaign finance reform while we're in control of Congress, then I believe this failure to act will result in more cynicism and create a growing lack of confidence in our efforts.

Id.

Members of Congress have also expressed concern over the appearance of corruption inherent in the intersection of large contributions and legislative action on issues of concern to the contributors. For example, Senator McCain testifies:

> [T]here's an appearance [of corruption] when there's a million dollar contribution from Merck and millions of dollars to your last fundraiser that you held, and then there is no progress on a prescription drug program. There's a terrible appearance there. There's a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation.

Id. ¶ 1.83.4. In addition, Senator Feingold has remarked that "a $200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA. OK, it is not illegal. Conceded. Maybe it is not even corrupt, but it certainly has the appearance of corruption to me and I think to many people." *Id.*

Examples like these are often picked up by the press, as evidenced by the sample press articles provided by Defendants. *Id.* ¶ 1.83.5; *see also id.* (Senator Simpson and Plaintiffs' expert Primo on the effect of press reports on the public's perception of corruption); *cf. Buckley,* 519 F.2d at 839 n.36 ("Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports.").

Plaintiffs' expert La Raja comments:

> [O]ne cannot ignore the central claim of reformers that the cash-based electoral environment fosters mistrust of the political system. Observing the amounts of money raised and spent in campaigns makes the average American skeptical that the political process is fair. Such doubts raise questions about political legitimacy. Even if politicians are not corrupt—and there has been minimal evidence to prove this claim—there is certainly the appearance of corruption ....
>
> It does not help matters that parties contribute to the arms race in campaigns. By using soft money parties raise the ante in elections. Candidates feel vulnerable to parties and interest groups that sponsor issue ads so they raise more money than ever. Campaign costs increase as each side fights to a draw .... Thus, the foraging for campaign money contributes to the perspective that money corrupts the system.

Id. ¶ 1.83.7.

This testimony demonstrates that Members of Congress and political scientists were aware of the public's disaffection with the campaign finance system, and nonfederal money in particular, prior to BCRA's enactment.

Conclusion

In enacting Title I, Congress clearly was aware of the parallels between the "coercive influence" of unlimited donations to federal candidates addressed by FECA's contribution limitations, and the "coercive influence" of nonfederal money donations to the national political party committees the government asserts supports Title I. *See, e.g.*, Thompson Committee Report at 4563 (minority report) ("No one can deny that individuals who contribute substantial sums of money to candidates are likely to have more access to elected officials. And most of us think greater access brings greater influence. It was this concern over linkages between money, access and influence—amid allegations that Richard Nixon's 1968 and 1972 presidential campaigns accepted individual contributions of hundreds of thousands, even millions, of dollars—that spurred Congress to enact the original campaign finance laws. While those laws have evolved over the 20 years since that time, the goals have remained the same: to prevent wealthy private interests from exercising disproportionate influence over the government, to deter corruption, and to inform voters."); *see also id.* at 42-43 (majority report) ("Simply put, 25 years after Congress passed election reform laws intended to insulate the President from an unseemly and potentially corrupting involvement with campaign money, President Clinton spent enormous amounts of time during the 1996 election cycle raising money. In the ten months prior to the 1996 election, President Clinton attended more than 230 fundraising events, which raised $119,000,000. The President maintained such a pace for over a year before the election, often attending fundraisers five and six days each week. According to Presidential campaign advisor Dick Morris, President Clinton 'would say "I haven't slept in three days; every time I turn around they want me to be at a fundraiser . . . I cannot think, I cannot do anything. Every minute of my time is spent at these fundraisers." This frenzied pursuit of campaign contributions

raises obvious and disturbing questions. Can any President who spends this much time raising money focus adequately upon affairs of state? Is it even possible for such a President to *distinguish* between fundraising and policymaking?"). Congress appropriately recognized that nonfederal money donations are primarily "given to secure a political *quid pro quo* from current and potential office holders," which undermines "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27.

The record in this case is impressive and is much more substantial than what was found in *Buckley* to support the contribution limitations at issue in that case. Prior to BCRA, federal candidates and officials assisted their national political party committees in raising enormous funds not only well outside FECA's amount limitations, but also outside FECA's source limitations. The large nonfederal money donations were primarily given for one purpose: they provided access to federal officeholders in order to exert influence over federal legislative activity. *Buckley* and its progeny hold that Congress has broad authority to combat the corruption associated with this situation. The corruption associated with nonfederal donations to political party committees, and the appearance of corruption in the mind of the public, therefore presents a compelling justification for Congress's enactment of Title I.

(2) Evidence From the Record in this Case Relating to Circumvention

Before turning to the evidence of circumvention in the record, it bears repeating that the record before the Supreme Court in *Colorado II* contained *no* actual evidence of political parties making unlimited coordinated expenditures, but just a hypothesis of what could occur if the "floodgates" to this practice were opened. *Colorado II*, 460 U.S. at 459 n.22. In *this case*, the record before the three-judge District Court establishes in compelling fashion that prior to the passage of

BCRA, the contribution limitations in FECA were rendered edentulous and that Congress, therefore, had justification to act. With that observation in mind, I turn to the evidence in the record related to circumvention.

The National Party Committees Collect and Spend Nonfederal Funds Primarily to Avoid FECA's Contribution Limitations

The record in this case amply demonstrates that the national political parties have used nonfederal funds to circumvent FECA's contribution limits. The evidence leads me to the same conclusion reached by Plaintiffs' expert Raymond La Raja:

> By exploiting soft money rules, the parties effectively sidestep the federal ceilings that prevent them from allocating resources efficiently in the closest contests. To navigate around the federal restrictions on soft money the parties have developed close ties with their state parties because these affiliates receive special exemptions for party building activity.

Findings ¶ 1.69. As La Raja notes, the national political parties have used nonfederal funds themselves, and through their state party counterparts, to affect federal elections, in contravention of the spirit, if not the letter, of FECA.

The national political parties use nonfederal funds for electioneering purposes, despite the fact that such funds are permitted under the rationale that they be used for "party building" activities. *Id.* ¶ 1.41. The evidence shows that political parties spend a great deal of the nonfederal funds that they raise on issue advocacy, *id.* ¶ 1.23-1.25, and testimony from political party officials and experts, as well as documents in the record, show that very few of these advertisements are aimed at party building, but rather are designed to affect federal elections.

The National Party Committees Spend Nonfederal Funds on "Issue Advocacy" Advertisements That Are Designed to Influence Federal Elections

The RNC's own experts testify that "issue advocacy outside the context of electioneering by political parties is rare," and that party-sponsored issue advertisements are intended to and do support the campaigns of federal candidates. *Id.* ¶ 1.19-1.19.1. These assertions are supported by the numerous examples of these advertisements submitted for the record, *see, e.g., id.* ¶¶ 1.14, 1.15, as well as the testimony of Members of Congress, federal candidates, political consultants, and an RNC official who acknowledges that the RNC's issue advocacy efforts are aimed at achieving a primary objective of getting more candidates elected, *id.* ¶ 1.19, 1.13. Many of these advertisements focus on a candidate's characteristics or past actions (without reference to a future legislative event), such as one which noted that a Congressional candidate had voted to raise taxes while in state and local government, and concluded with the line: "If you think *your* family pays *enough* taxes . . . Call [____]. Tell her to stop raising your taxes". *Id.* ¶ 1.14. Other advertisements run by political parties compare the past records of competing candidates in a stark and loaded fashion. *Id.* ¶ 1.15. One such advertisement stated that one candidate was "the only member of Congress who did not want to tell parents when a child molester moved into their neighborhood" but that the other "supports laws that protect our children and keep violent criminals in jail for their full terms." *Id.* Another such advertisement told viewers that one candidate supported a welfare program that "is restoring responsibility, pride and self-worth," but that the other "voted *against* moving able-bodied welfare recipients from welfare to work." *Id.* (emphasis in original). The notion that such advertisements are intended to promote issues and not political campaigns strains credulity.

The empirical evidence submitted shows that political party advertisements are overwhelmingly candidate-centered. Ninety-two percent of party-sponsored advertisements aired during the 2000 election did not identify the sponsoring political party by name, or encourage voters to register with or support the party. *Id.* ¶ 1.17. During the 1998 election cycle, of the $25.6 million spent by the political parties on advertisements, $24.6 million went to commercials that referred to a federal candidate; out of the 44,485 advertisements purchased by the parties, 42,599 identified a federal candidate. *Id.* ¶ 1.18.

Furthermore, it is clear that the political parties run their advertisements largely in competitive races, where the record shows they can have a significant impact on the outcome of the election. *Id.* ¶¶ 1.16-1.16.1. The political parties also run advertisements to assist their candidates' campaigns when they are low on funds. *Id.* ¶ 1.20. For example, the RNC spent $20 million in so-called "issue advocacy" to assist the Dole campaign between March and August 1996 when the campaign had almost run out of money. *Id.* The advertisements run by the RNC at this time included "The Story," *id.* ¶ 1.20.1, and "Pledge," *id.* 1.20.2, which exemplify the two themes of the RNC's campaign: build up then-Senator Dole and attack then-President Clinton, *id.* ¶ 1.20. The record shows that the RNC had done "quantitative and qualitative research [which] strongly suggest[ed] that ["The Story"]needs to be run," but was concerned that "[m]aking this spot pass the issue advocacy test may take some doing." *Id.* 1.20.1. Nevertheless, the advertisement was run and paid for in part with nonfederal funds. *Id.*

This record convincingly demonstrates that political party advertisements, on which much of the nonfederal funds collected by the national political party committees is spent, influence federal elections and have little to do with "party building."[169] *Id.* 1.10, 1.22. The political parties are well aware of this as demonstrated by the fact one national political party committee openly solicited funds for an issue advocacy campaign by describing it as an effort "to ensure that the [Republican] party not only maintains, but expands our majorities in Congress." *Id.* ¶ 1.21. This reality, leads inevitably to the "conclusion that party soft money and electioneering in the guise of issue advocacy ha[s] rendered the FECA regime largely ineffectual." *Id.* ¶ 1.9.

National Party Committees Spend Comparatively Little Nonfederal Money on "Party Building Activities," Most of Which Have Some Impact on Federal Elections

Plaintiffs have provided examples of where national political parties have used nonfederal, or a mix of nonfederal and federal money, for what they call "party-building" activities. Activities such as state redistricting efforts, *id* ¶¶ 1.34-1.34.3, training seminars for candidates, party officials, activists and campaign staff, *id.* ¶ 1.36, state and local government affairs activities, *id.* ¶ 1.37, and minority outreach, *id.* ¶ 1.38, are all paid for with a mix of federal and nonfederal funds which demonstrates that they have an effect on federal elections, *id.* ¶ 1.40. Furthermore, the figures provided by the RNC show that these activities constituted a very small percentage of their nonfederal and combined spending for the 2000 cycle. *Id.* This finding computes with that of Plaintiffs' expert Raymond La Raja, who finds that only "8.5 percent of national party soft money expenditures went to 'mobilization' or 'grassroots'"' activities during the 2000 election cycle. *Id.* ¶ 1.25.[170]

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[169] Indeed, many of the characteristics of political party advertisements mirror those of interest group-sponsored candidate-centered issue advocacy, detailed in my discussion of Title II, *supra.*

[170] The national political parties spend more nonfederal money on administrative expenses, which constitute operating expenses such as

The national political parties also spend nonfederal money on contributions to state and local candidate campaigns. *Id.* ¶ 1.39. Defendants' expert Thomas Mann found that during the 2000 election cycle, "the national parties contributed only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000." *Id.* The RNC testifies that during the 2000 election campaign, it donated approximately $7.3 million in nonfederal funds to state and local candidates. *Id.* FEC documents show that this represents a very small percentage of the $163,521,510 in nonfederal funds the RNC spent during the 2000 election cycle. *Id.* Again, it is evident that despite Plaintiffs' examples, the vast majority of nonfederal funds are not being used for "party building" activities.

Nonfederal Money Donations Are Often Made on Behalf of Federal Candidates In Order to Circumvent FECA's Individual Limitations

Nonfederal donations to the national party committees, despite the fact they are supposed to be used for "party building" purposes, are often solicited and made with the intent that they will be used to assist a federal candidate's campaign. *Id.* 1.56. Senator Simpson observes that

> [d]onors do not really differentiate between hard and soft money; they often contribute to assist or gain favor with an individual politician. When donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they

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salaries, benefits, supplies, and travel expenses; however, Plaintiffs' expert La Raja notes that these efforts do not constitute "party building" activities. Findings ¶¶ 1.35, 1.26 .4. Furthermore, these expenses are paid for with a mix of funds demonstrating that they too have an effect on federal elections. *Id.* ¶ 1.35.

> assist the party with fundraising, be it hard or soft money, the party will later assist their campaign.

Id. ¶ 1.56.1. The Findings demonstrate that donors who give nonfederal funds to political parties to support federal candidates are doing so to evade the individual contribution limitations. *See id.* ("Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates.") (quoting Senator Simpson). One donor explains that "[t]here appeared to be little difference between contributing directly to a candidate and making a donation to the [state] party. . . . Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign." *Id.* ¶ 1.59.

These findings correlate to the record that was before the Supreme Court in *Colorado II*, which stands for the same principle, that for donors the national political parties act as conduits to federal candidates. *See supra* at 508. In the words of then-RNC Chairman Haley Barbour: "the purpose of a political party is to elect its candidates to public office . . . ." Findings ¶ 1.49.1. This sentiment is especially true with regard to the national congressional campaign committees. As Plaintiffs' expert La Raja observes, these committees traditionally limit their activities to assisting their candidates' campaigns. *Id.* ¶ 1.26.6. Therefore, the record reflects that major nonfederal money donors use political parties to produce "obligated officeholders." *Colorado II*, 533 U.S. at 452.

State and Local Party Committees Play an Integral Role in Helping the National Party Committees Spend Nonfederal Funds on Federal Elections

The record also demonstrates that the national political parties have used their state political party "branches," as

Plaintiff's expert Raymond La Raja terms them, as part of their FECA circumvention scheme. Findings ¶ 1.42. Indeed, the RNC admitted as much in its briefing:

> The Republican Party is *a single, unitary organization* that comprises various interrelated parts—the RNC, state and local parties, the RNC's 165 members, candidates identifying themselves as "Republicans," and so forth. Indeed, the state parties select the 165 voting members of the RNC, and the party through its convention and other mechanisms nominates candidates.

RNC Opp'n at 23 (emphasis added). As La Raja concludes, the closeness between the state and national political parties is a result of the attractiveness of using the state political parties' more favorable federal/nonfederal money allocation ratios to fund federal electioneering practices. Findings ¶ 1.42. Large sums of nonfederal funds have been transferred to the state political parties over the past decade. *Id.* ¶ 1.26.3. During the 2000 election cycle, over half of the nonfederal money raised by the national party committees was transferred to the state political parties, a sum reaching $266 million. *Id.* ¶¶ 1.26.3, 1.4.3. Rather than being used for "party-building" activities, as the rationale for nonfederal funds provides, a large proportion of these funds were used to finance issue advertisements intended to influence federal elections. *Id.* ¶¶ 1.26.4; *see also id.* ¶ 1.26. Plaintiffs' expert La Raja finds that when administrative expenses are excluded from the calculus, state political parties invest most nonfederal funds transferred from the national political parties on federal races, *and concludes that more nonfederal funds are used for media rather than party building. Id.* Similarly former Senator William Brock, who is also a former Chairman of the RNC, testifies that nonfederal funds are used almost exclusively to help elect federal candidates and not for "party building." *Id.* ¶ 1.11. A 1998 financial statement from the Republican Party of New Mexico shows that it received revenues of $1,524,634 in nonfederal transfers from other Republican organizations, $1,110,987 in individual contributions, and $389,552 in federal transfers from Republican organizations. The state political party spent over one-third of its revenues on "issue advocacy." *Id.* ¶ 1.26.4.1.

Moreover, representatives of all the major national congressional committees testify that they transfer nonfederal funds to state political parties in order to purchase advertisements aimed at influencing federal elections. *Id.* ¶ 1.26.6. They also state that although the state political parties may reject the national party committee's requests that transferred money be wired to specific consultants to pay for specific advertisements, they generally comply with the request. In addition, advertisements supported with congressional committee funds are not produced or recorded until the national party committees provide final approval. *Id.* ¶ 1.26.7. Documentary evidence supports this testimony, and shows that the state political parties are merely conduits in this process. *Id.* ¶ 1.26.7.2 (communications from the NRCC to the CRP providing information about money that was wired to CRP's account with instructions to wire the money to a media consulting firm, and similar documents from the DCCC to the CDP), ¶ 1.26.7.1 (NRSC memorandum suggesting an idea for an attack advertisement, and a copy of an advertisement implementing the idea paid for by the Republican State Central Committee of Nevada). These statements and documents compute with Plaintiffs' expert La Raja's observation that "[i]t would be particularly surprising for congressional campaign committees to venture outside their traditional scope of helping candidates and invest in state party organizations." *Id.* ¶ 1.26.6. The record also demonstrates that the DNC and RNC operate in the same fashion. *Id.* ¶ 1.26.7.3, 1.26.7.2. By purchasing these advertisements through the state political parties, the national political parties take advantage of the better federal- to-nonfederal spending ratios under which the state political parties operate. *Id.* ¶ 1.26.2, 1.27.

In addition, both national political parties prepare and execute detailed campaign strategies with their state affiliates for election campaigns that include state and federal elections. *Id.* ¶ 1.43. The Democratic national and state political parties implement "Coordinated Campaigns" which aim to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket. *Id.* ¶ 1.43.1. The Republican Party develops and implements similar plans with its state party affiliates called "Victory Plans." *Id.* ¶¶ 1.43.2-1.43.2.3. These plans demonstrate the close affiliation and cooperation between the national and state political parties that has led one state political party official to conclude that her state political party and national political party were "integrally related." *Id.* ¶ 1.43.1.

Therefore, it is very apparent that prior to BCRA's enactment national political party committees were using their state branches to assist in their circumvention of FECA, and in the process were integrating the state political parties into the national political party structure. Given this scenario, Congress made an appropriate predictive judgment that the enactment of BCRA's ban on nonfederal donations to the national political parties would escalate the use of nonfederal donations to state political parties to circumvent national campaign finance laws. *Id.* ¶¶ 1.44, 1.45.

It should be noted that Congress's concern—that restrictions on state and local political parties were necessary to prevent evasion of the nonfederal money ban at the national committee level—is justified not only by the record in this case, but by Congress's institutional experience in the area of campaign finance regulation. The evidence before the *Buckley* Court indicated that the $2 million contribution from the dairy industry to President Nixon's campaign was divided up into smaller amounts among hundreds of *state-level committees* in order to avoid disclosure requirements. *Buckley,* 519 F.2d at 839 n.36 (cited in *Buckley,* 424 U.S. at 27 n.28). Therefore, the technique of shifting money used to benefit a federal candidate from the national level to the state level in order to avoid a federal restriction is not new. Congress appropriately recognized the threat to the nonfederal funds prohibition at the national committee level, if the state and local political party committees were not prevented from using nonfederal funds on activities that directly influence federal elections.

Nonfederal Money Donations Are Provided to State Party Committees on Behalf of Federal Candidates In Order to Benefit the Federal Candidate

Furthermore, federal candidates and national party committees inform donors who have given the maximum amount of federal funds to their campaigns/committees that they can still help federal candidates by donating funds to state political parties. Findings ¶¶ 1.59, 1.60. An example of this is Congressman Wayne Allard's letter relied on in *Colorado II* and discussed *supra* at 510. One CEO describes the practice this way:

> In 1992, when I told the Democratic Party that I wanted to support then- Governor Bill Clinton's presidential campaign, they suggested that I make a $20,000 hard money contribution to the DNC, which I did. The Democratic Party then made clear to me that although there was a limit to how much hard money I could contribute, I could still help with Clinton's presidential campaign by contributing to state Democratic committees. . . . Accordingly, at the request of the DNC, I also made donations on my own behalf to state Democratic committees outside of my home state . . . . Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign.

Findings ¶ 1.59. One wealthy contributor provides similar testimony:

> Federal candidates have often asked me to donate to state parties, rather than the joint committees, when they feel that's where they need some extra help in their campaigns. I've given significant amounts to the state parties in South Dakota and North Dakota because all the Senators representing those states are good friends, and I know that it's difficult to raise large sums in those states. The DSCC has also requested that I provide assistance to state parties.

Id. ¶ 1.60. As former DNC and DSCC official Robert Hickmott explains, "[o]nce you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to . . . the relevant state party . . . ." *Id.* ¶ 1.59.

In addition, one CEO comments that in the past, donors who had reached their federal limit would ask candidates if a nonfederal contribution would assist the campaign and were told: "Don't bother. The soft money just doesn't do me any good." However,

> in recent election cycles, Members and national committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns. Most soft money donors don't ask and don't care why the money is going to a particular state party, a party with which they may have no connection. What matters is that the donor has done what the Member asked.

Id. ¶ 1.51; *see also id.* ¶ 1.61. It is clear that these donations are valued by the national political parties and federal candidates/officeholders who solicit them. *Id.* ¶ 1.62.

The record detailed above demonstrates that both major political parties collect nonfederal funds, and direct nonfederal contributions to their state party "branches," in order to use that money to influence federal elections. The national political parties also transfer nonfederal money through the state parties for the same purpose. The evidence shows the amounts spent on "party building" and in support of state and local candidates is a small fraction of the total amount of nonfederal funds raised by the national political parties. Not including administrative expenses, the majority of these funds are used for so-called "issue advocacy" designed to affect federal elections. After reviewing this record, I find myself in agreement with Plaintiff's expert La Raja: the parties

> are highly functional rather than responsible. Rather than use soft money to shore up weaker organizations, or reward state party members for moving closer to national party ideology, the national organizations use soft money like hard money—to pursue the short-term goal of winning elections.

Id. ¶ 1.26.5.

Political Party Committees Suggest Donors Contribute to Issue Advocacy Organizations

The record also demonstrates that prior to BCRA, political parties and candidates would solicit and donate funds to tax-exempt organizations, which would then fund activities in order to influence federal elections on behalf of the political party or candidate-donor. *Id.* ¶ 1.85. Former DNC and DSCC official Robert Hickmott testifies that

> [o]nce you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations . . . [to] an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign . . . . As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate

> financially in his or her election effort, both with hard and soft money.

Findings ¶ 1.59.

In addition, the record reflects that each Republican Party national committee has donated funds to the National Right to Life Committee, which Senator Phil Gramm, as NRSC Chairman, explained was done to "help activate pro-life voters in some key states, where they would be pivotal to the election." *Id.* ¶ 1.85.2. Other documents in the record show sizable political party donations have been made to nonprofit groups with common political views in close proximity to federal elections to be used to mobilize the party's voters. *Id* ¶¶ 1.85.2, 1.85.3.

That such donations are used to affect federal elections is also demonstrated by the fact that the national party committees and federal candidates or officeholders solicit donations for tax-exempt groups. The National Right to Work Committee ("NRTWC") admits that "certain Members [of Congress] or Executive Branch Officials have generally encouraged financial support for the Right to Work cause and, specifically, for the support of NRTWC in advocating for these issues, through lobbying as well as issue advertising." *Id.* ¶ 1.85.4. A letter in the record from Congressman Pete Sessions asks a recipient to meet with NRTWC personnel regarding the group's effort to "stop Big Labor from seizing control of Congress in November." *Id.* ¶ 1.85.5. Similarly, Congressman Ric Keller signed a fundraising letter for The Club for Growth, which assured potential donors that their money would be used to "help Republicans keep control of Congress." *Id.* The record also demonstrates that the DSCC and DNC informs donors which tax-exempt organizations are most effective at grassroots activities that affect federal elections. *Id* ¶ 1.85.1. Some of these organizations are organized as ballot measure committees or political clubs that engage in voter mobilization efforts which, when aimed at elections with federal candidates on the ballot, affect federal elections. *See id.* ¶¶ 1.85.6, 1.85.8.

In addition, evidence in the record shows that federal officeholders and candidates themselves have created their own tax-exempt organizations to assist in their election activities. According to Public Citizen, 63 Members of Congress have organizations organized under Section 527 of the Internal Revenue Code, and another 38 "have a stake in the Congressional Black Caucus [] 527 organization." *Id.* 1.85.7. These 527 organizations are used to promote the Member's career, as well as encourage strong state and local candidates and spur partisan get-out-the vote efforts. *Id.* ¶ 1.85.7.1. One large DNC contributor testifies that in early 2002 he donated $50,000 to the Daschle Democrats, a 527 organization, which ran advertisements in support of Senator Tom Daschle in response to attacks made against him. The contributor made the donation "because [he] felt that the attacks were hurting Senator Daschle and Senator Tim Johnson's re-election campaign as well." *Id.* ¶ 1.85.7.2. The DNC has made large contributions to Section 527 groups organized by candidates. *Id.* ¶ 1.85.7.3. Corporations also make large donations to federal officeholder and candidate 527 organizations. *Id.* ¶ 1.85.7.3.

Congress was obviously concerned about this practice when it enacted Title I. For example, legislative history reflects a discussion of Judith Vasquez's contribution to a tax-exempt organization. Ms. Vasquez wanted to contribute $100,000 to the DNC, however because Ms. Vasquez was not a United States citizen, the donation was "problematic." Thompson Committee Report at 3663 (majority report). Therefore, Ms. Vasquez was told to donate the money to "Vote Now '96," "a tax-exempt GOTV organization that focused on traditional Democratic constituencies." *Id.* "Vasquez ultimately donated $100,000 to Vote '96." *Id.* at

7105 (minority report). The legislative history also includes an NRSC document entitled "Coalition Building Manual," issued in 1994, the text of which was included in the congressional record. *Id.* at 5969 (minority report) (discussing the document); *see also id.* at 5987-6015 (Coalition Building Manual). The Manual states in particular that "*[w]hat we say about ourselves is suspect, but what others say about us is credible.*" *Id.* at 5990 (emphasis in original).

It is clear that political parties and candidates have used tax-exempt organizations to assist them in their efforts to win federal elections. *Id.* ¶ 1.86. Given this fact, and the fact that BCRA prohibits state and national political parties from using nonfederal funds to affect federal elections, the attractiveness of using these tax-exempt proxies would become even more attractive to the political parties if nothing had been done by Congress to address this obvious circumvention route. *Id.*

Conclusion

The massive record in this case thus clearly demonstrates that the national political party committees raise funds outside of *Buckley*'s source and amount limitations for purposes directly related to federal elections. Moreover, state and local party committees, in addition to nonprofit advocacy organizations, are used by the national party committees as part of their circumvention scheme. Congress was correct to conclude, therefore, that a prohibition on nonfederal funds at the national committee level would be ineffective at ending circumvention of FECA's contribution limitations. Accordingly, given the comprehensive record developed in this case, which presents impressive evidence that nonfederal funds secure easy evasion of the individual contribution limitations, I find that Congress was justified in enacting Section Title I under an anti-circumvention theory of corruption.

(b) *Title I Is Closely Drawn*

(i) Section 323(a) is Closely Drawn

In my view, Section 323(a) is closelydrawn to match the sufficiently important governmental interests discussed above. When a court reviews a contribution limitation enacted by a coordinate political branch, the court's review is more deferential than if the restriction at issue were an expenditure. In reviewing contribution restrictions, the Supreme Court has deferred to congressional expertise as to both the need for prophylactic measures or the particularities of those measures. *See NRWC*, 459 U.S. at 210 ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."); *see also NCPAC*, 470 U.S. at 500 (observing that deference is proper, but that it did "not suffice to establish the validity" of the *expenditure* restriction at issue in that case); Def.-Int. Opp'n at 24. As Justice Breyer wrote in his concurring opinion in *Shrink Missouri:*

> In such circumstances—where a law significantly implicates competing constitutionally protected interests in complex ways-the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative). Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments—at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from

> effective electoral challenge. *This approach is that taken in fact by Buckley for contributions . . .*

Shrink Missouri, 528 U.S. at 402 (Breyer, J., concurring) (emphasis added). Given my view that this three-judge District Court should give deference to Congress's judgment in the area of contribution restrictions, and finding that no less restrictive alternative would ameliorate the problems Congress sought to address with Section 323(a), I find the provision closely drawn.

Plaintiffs argue that Section 323(a) is overbroad because it does not focus on the amount or source of the national party committees' funding and instead bans donations of all nonfederal funds regardless of the amount. McConnell Br. at 38 ("To the extent that it is the *amount* or *source* of *donations* of [nonfederal] funds which gives rise to actual or apparent corruption, Title I contains no relevant tailoring at all.") (emphasis in original); McConnell Opp'n at 27; McConnell Reply at 21-22; *see also* RNC Br. at 45. Plaintiffs cite the Hagel amendment as an example of a more narrowly tailored approach that Congress should have adopted. McConnell Br. at 38 n.14. The Hagel amendment would have imposed a $60,000 limit on aggregate donations of federal and nonfederal funds from any one donor to a national party committee. I do not find Plaintiffs' argument persuasive.

In *Buckley,* the challengers to FECA's contribution limitations argued that the $1,000 limitation was "unrealistically low." *Buckley,* 424 U.S. at 30. In flatly rejecting this argument, the Supreme Court adopted the D.C. Circuit's statement that "'[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.'" *Id.* (quoting *Buckley,* 519 F.2d at 842) (observing that "Congress' failure to engage in such fine tuning" by scaling the contribution limitations based on the differences between congressional and Presidential campaigns was not

fatal to the contribution restrictions"). In much the same manner, Congress has made a judgment that contributions of nonfederal funds to national political party committees permits easy circumvention of FECA's contribution limitations and raises an appearance of corruption, and that the only means of addressing this problem is a complete ban at the national political party level. Much as *Buckley* instructed that courts should not use a scalpel to probe to see if a less restrictive means might be available, this three-judge District Court should defer to Congress's judgment that any cap on nonfederal funds would not ameliorate the abuses it sought to be extinguished. Indeed, a cap on nonfederal funds would likely be constitutionally suspect because the potential for circumvention would still exist and the appearance of corruption surrounding $60,000 in donations to the national political party committees would still be present.

In short, Congress would not have accomplished its goal with such a cap because the national political party committees would still be able to use the allocation percentages to inject nonfederal funds into federal elections. Congress concluded that the FEC's approach for allocation was no longer acceptable at the national political party committee level. In my judgment, Congress is entitled to make that judgment.[171] Moreover, all nonfederal funds, regardless of the source, pose the same potential for corruption. While corporate and labor union donations of nonfederal funds may be more egregious in their use, given longstanding federal policy against their use in federal elections, it is not simply corporate and labor union donations that pose a problem. Contribution limitations are being directly circumvented by individuals as well as corporations and labor unions. Plaintiffs' argument that BCRA could have been tailored better had it focused on particular sources is therefore unavailing.

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[171] Plaintiffs also argue that Section 323(a) is particularly overbroad with respect to "minor parties" like the Libertarian Party which receives virtually no donations of large amounts or donations from corporations. McConnell Br. at 38; McConnell Opp'n at 28-29. *Buckley* forecloses this argument. In *Buckley,* the Supreme Court observed that "minor-party candidates may win elective office or have a substantial impact on the outcome of an election." *Buckley,* 424 U.S. at 35; *see also id.* at 70. The *Buckley* Court, therefore, refused to exempt minor parties, one of which was the Libertarian Party, *see id.* at 34 n.40, from the contribution limitations. Accordingly, I do not find that BCRA is overbroad because it applies to minor party candidates, and I also find that Plaintiffs have not

Plaintiffs also contend that Section 323(a) is overbroad because it bans the receipt and disbursement of nonfederal funds "no matter the purpose for which the funds are being given or spent." McConnell Br. at 39; McConnell Opp'n at 28; *see also* McConnell Reply at 22; RNC Opp'n at 30-31. The critical assumption that Plaintiffs make is that the "use" of nonfederal funds is what creates the actual or apparent corruption. McConnell Br. at 38. The assumption by Plaintiffs is fatal to their argument.

As demonstrated above, the corruption associated with nonfederal funds is much greater than the "uses" for which the money is put. Merely preventing the national political party committees from spending nonfederal funds on certain activities would do nothing to address the corruption associated with the national political party committees soliciting and collecting nonfederal funds. The law is targeted at the *collection and solicitation* of nonfederal funds, which are precisely the types of activities that Congress found posed the greatest threat of corruption. Moreover, simply preventing the national political party committees from using "soft money" to pay for the kinds of "issue" advertisements at which Title II is directed, would do little, if anything, to prevent, in *Buckley*'s words, "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27. As amply demonstrated above, simply because the political party is the solicitor of the funds is of no import, given that the political party committees are "agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452. Regardless of the ultimate use of nonfederal funds, Congress appropriately concluded that the solicitation and raising of nonfederal funds posed such a significant threat of corruption that the only means of addressing the problem was a complete ban at the national committee level.

In this vein, Plaintiffs argue that "the Supreme Court itself has already concluded that the opportunity for corruption posed by unregulated soft money contributions to a party for certain activities such as electing candidates for state office or for voter registration and get out the vote drives is at best, attenuated." RNC Br. at 45 (quoting *Colorado Republican Fed. Campaign Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604, 616 (1996)) (emphasis removed) (internal quotation marks omitted). I disagree and find that the plurality opinion in *Colorado I* actually provides authority for Congress's enactment of Section 323(a). Justice Breyer's plurality opinion demonstrates this point:

> We recognize that FECA permits individuals to contribute more money ($20,000) to a party than to a candidate ($1,000) or to other political committees ($5,000). 2 U.S.C. § 441a(a). We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, see § 431(8)(A)(i), or for voter registration and "get out the vote" drives, see § 431(8)(B)(xii). But the opportunity for corruption posed by these greater opportunities for contributions is,

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presented sufficient evidence to re-evaluate *Buckley*'s conclusion regarding minor parties.

> at best, attenuated. Unregulated "soft money" contributions *may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute.* See § 431(8)(B).

Colorado I, 518 U.S. at 616 (emphasis added). As is clear from the emphasized language, the critical assumption behind Justice Breyer's conclusion relating to nonfederal funds is that "'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute." *Colorado I,* 518 U.S. at 616. However, as the record demonstrates in *this* case, Congress found that nonfederal funds were being used in massive amounts to influence federal campaigns. The pre-BCRA situation obviously changes the fundamental supposition underlying Justice Breyer's statement, which was premised on a factual record developed prior to the rise of soft money as a financing tool for federal election purposes.[172] Indeed, as Justice Breyer

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[172] The Defendant-Intervenors point out that in *Colorado I*

> [t]he initial administrative complaint which led to the civil action was filed on June 12, 1986, and the parties' cross-motions for summary judgment in the civil action were filed in 1990, thereby shutting off further discovery. *See FEC v. Colorado Republican Fed. Campaign Comm.,* 839 F.Supp. 1448, 1451 (1993), *rev'd, FEC v. Colorado Republican Fed. Campaign Comm.,* 59 F.3d 1015 (10th Cir.1995), *vacated, Colorado I, 518* U.S. 604 (1996). The *Colorado I* plurality was careful to acknowledge that its conclusions about the link between independent expenditures and corruption were premised on the Court's precedents in the absence of contrary factual evidence in the record. See *Colorado I,* 518 *U.S.* at 617-18 (Court lacked "convincing evidence"; "Government does not point to record evidence"). The language in the controlling opinion suggests that the Court could revisit its conclusions if faced with evidence calling those conclusions into doubt; for example, the Court did not say that there could not be any "special dangers of corruption associated with political parties," only that it was "not

more recently observed in his concurrence in *Shrink Missouri,* "After all, *Buckley*'s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of 'soft money.'" *Shrink Missouri,* 528 U.S. at 404 (Breyer, J., concurring). Accordingly, I do not find Plaintiffs' argument relating to *Colorado I* to have merit. With BCRA, Congress responded to the wholesale evasion of the contribution limitations and on the basis of empirical evidence and experience, enacted Section 323(a), concluding "that the potential for evasion of the individual contribution limits was a serious matter." *Colorado I,* 518 U.S. at 617.

Plaintiffs also argue that Section 323(a) is not closely drawn because it "sweeps in activity relating only to state and local elections and therefore does not serve to get federal candidates elected at all." McConnell Br. at 39; McConnell Opp'n at 29; McConnell Reply at 20-21. Plaintiffs' argument, however, ignores the compelling reason behind Section 323(a): namely, that the close relationship between national political parties and federal officials justified nothing else but a complete prohibition on raising nonfederal funds at the national party committee level.[173]

> *aware* of any" such dangers. *Id.* at 616 (emphasis added). Def.-Int. Reply Br. at 38 n. 114.

[173] This point applies equally to Plaintiffs' suggestion that a more narrowly tailored approach would have been to simply prohibit labor unions and corporations from contributing nonfederal funds to the national political party committees. *See* McConnell Opp'n at 27. Such a prohibition would not address the actual or apparent corruption Congress sought to address with Section 323(a). The record amply demonstrates that the corrupting potential of nonfederal funds donations was not simply confined to a particular source but with the actual or apparent corruption posed by the solicitation of nonfederal funds by federal officeholders and candidates and the problems created by the national committees' efforts to evade federal contribution limitations.

Supreme Court precedent, the legislative history, and the record before this Court powerfully demonstrate the need for the nonfederal funds prohibition at the national political party committee level. As the Supreme Court observed in *Colorado II*, "[w]hat a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit." *Colorado II*, 533 U.S. at 458. The Findings of Fact establish that there is "no wall between the national parties and the national government." Findings ¶ 1.47; *see also* Briffault at 651-52 (observing the web of relations linking major donors, party committees and elected officials) (quoted with approval in *Colorado II*, 533 U.S. at 462-63). As Congress recognized, given the blurring of the lines between federal officials and the national political party committees, the only way to address the problem with nonfederal funds was to prohibit the national committees from raising it. Findings ¶ 1.62.

As discussed, *supra*, federal officeholders hold positions of power in both the national political parties and the federal government. Briffault at 651 ("Under the current campaign finance system, however, the 'party-as-organization' and the 'party-in-government' are increasingly merged. Members of Congress constitute and control the CCCs [Congressional Campaign Committees] that play the leading role in providing party money and campaign services to congressional candidates. The President typically controls his party's national committee, and once a favorite has emerged for the presidential nomination of the other party, that candidate and his party's national committee typically work closely together. As a result, large donations to the party organization are effectively donations not just to specific candidates but to the party-in- government's leadership, who use that money to protect or expand their power in government, by spending in congressional races and the presidential election."). Indeed, officeholders and candidates who are successful fundraisers gain enhanced stature in Congress as a result of their

fundraising prowess. Findings ¶ 1.66 (statement of Senator Boren). In other words, it is often the case that those who are the best "soft money" fundraisers are the most influential government officials.

Given that the national political party committees and federal officeholders and candidates are "inextricably intertwined," Findings ¶ 1.62; *see also* ¶ 1.46, the national party ban is closely drawn. The record overwhelmingly demonstrates that large "soft money" donors are given access to special meetings with the President and key congressional leaders. *See, e.g., id.* ¶¶ 1.75.5, 1.77.10. Accordingly, Congress was justified in placing a complete ban on the national party committees raising nonfederal funds regardless of the ultimate use of those funds and regardless of who ultimately solicits them.

Finally, Plaintiffs contend that Section 323(a) sweeps too broadly because it will have "an immediate, debilitating, and long-lasting effect" on the national political party committees. RNC Br. at 55. I find this argument implausible. It bears emphasizing that the national political party committees have only been raising large sums of nonfederal funds in recent years. I do not take Plaintiffs to be actually arguing that prior to the explosive growth of nonfederal funds as a means of political party financing, political parties were somehow handicapped and unable to effectively communicate their message. The idea, therefore, that because political parties are now limited solely to federal funds they will be effectively silenced, is nonsensical based on the record developed in this case. *See* RNC Br. at 54 ("The net effects of BCRA will be massive layoffs and severe reduction of important core political speech at the RNC, and reduction of many state parties to a 'nominal' existence.").

As *Buckley* observed, "[t]he overall effect of [FECA's] contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Buckley,* 424 U.S. at 21-22. The same applies to Section 323(a), which will require the national committees of the political parties to raise funds from a greater number of persons. Moreover, BCRA raises the individual contribution limitation to national political parties to $25,000. Now each national political party committee is permitted to receive up to $15,000 from political action committees, 2 U.S.C. § 441a(a)(2)(B), and up to $25,000 from individuals, BCRA § 307(a)(2); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(B). In addition, in comparing the federal funds raised by the political parties during the 1996 election cycle with the 2000 election cycle, the Findings of Fact demonstrate that the amount of federal funds raised has increased. Findings ¶ 1.4.2. Given that BCRA has *increased* the federal funds limits for the national committees the suggestion that the absence of nonfederal funds from the coffers of the national committees is going to create a "severe reduction of important core political speech," RNC Br. at 54, is simply not credible.

In sum, I am convinced that a ban on nonfederal funds raised by the national political party committees is closely drawn to match the sufficiently important governmental interests. Deference to Congress's judgment is warranted and appropriate for the contribution restriction in Section 323(a). Moreover, given the record established in this case and judicial precedent on the relationship of political parties and donors, I find that all of Plaintiffs' arguments for why Section 323(a) is not closely drawn are without merit.[174]

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[174] Given my conclusion that Section 323(a), in its entirety, is constitutional, I need not reach Judge Leon's discussion narrowing Section 323(a).

(ii) Section 323(b) is Closely Drawn

Recognizing that the nonfederal funds prohibition on the national party committees in Section 323(a) would be rendered entirely ineffective without some form of corresponding restrictions on state, local, and district party committees use of nonfederal funds-a sensible proposition given the evidence discussed above-Congress enacted Section 323(b). Consistent with Congress's recognition that some state party spending does exclusively affect state elections, Congress doubled the hard money limitations available for state party committees, BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D), and permitted state party committees to raise "Levin" funds to pay for Section 301(20)(A)(i) and (ii) activities, provided that certain conditions are met. BCRA § 101 (a); FECA § 323(b)(2)(A)-(C); 2 U.S.C. § 441i(b)(2)(A)-(C).

With Section 323(b), Congress struck a compromise between requiring state and local political parties to use federal funds on "Federal election activity" and leaving to state law the state political party financing of activities related to state and local elections. Indeed, as one of the Senate sponsors stated:

> [BCRA] represents a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties, which then use those funds for Federal election activity. At the same time, the bill does not attempt to regulate State and local party spending where this danger is not present, and where State and local parties engage in purely non-Federal activities. We will not succeed in closing the soft-money loophole unless we address the problem at the State and local level. We do this, however, while preserving the rights and abilities of our State and local parties to engage in truly local activity.

148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain).

The detailed evidence discussed *supra,* convincingly demonstrates that nonfederal funds are funneled to the state political parties by the national political parties or donors at the direction of the national political parties or federal officeholders and candidates, to be used to influence federal elections. The evidence also shows that these contributions are given with the intent and effect of influencing federal elections. In addition to the evidence *supra,* representatives of all four of the national party congressional committees agree that they transfer "federal and nonfederal funds to state and/or local party committees for voter identification, voter registration and get-out-the-vote efforts. These efforts have a significant effect on the election of federal candidates." Findings ¶¶ 1.28, 1.32; *see also id.* ¶ 1.31. These statements are corroborated by documentary evidence, *id.* ¶ 1.28.1, 1.32, as well as by expert Donald Green who finds that

> [t]he evidence from California, as well as from numerous opinion surveys and exit polls that demonstrate the powerful correlation between voting at the state and federal levels, shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate. That parties recognize this fact is apparent, for example, from the emphasis that the Democrats place on mobilizing and preventing ballot roll-off among African-Americans, whose solidly Democratic voting proclivities make them reliable supporters for office-holders at all levels. As a practical matter, generic campaign activity has a direct effect on federal elections.

Id. ¶ 1.28.2; *see also id.* ¶ 1.30. Therefore these efforts by the state political parties in states that hold their elections on the same day as federal elections, which the record shows are funded in part by the national political parties, *id.* ¶ 1.28.3, 1.43.1, 1.43.2.1, affect federal elections even if they are only intended to affect the state contests, *id.* ¶¶ 1.29, 1.33.

Congress clearly understood that political party committees are essentially one, large interdependent organism and that without legislation targeted at state and local parties, the new campaign finance law would permit easy evasion of the national party committee "soft money" ban. Congress was appropriately concerned that if Title I of BCRA policed only nonfederal donations at the national committee level, donors would simply make those same donations to the state and local "branches" of the national committees, which would then use those funds to influence federal elections. Congress would have accomplished little with a direct prohibition at the national political party level if there was no corresponding restriction on nonfederal funds at the state and local level, given the unitary nature of political parties. Section 323(b) is a key provision of Title I designed to prevent the nonfederal funds prohibition on the national parties in Section 323(a) from being rendered completely ineffective.

In drafting Section 323(b), Congress was aware that under the FEC's previous allocation regime, state and local party committees were permitted to spend a mix of federal and nonfederal funds on certain activities that directly influenced federal elections. Congress found, however, that these allocation rules permitted easy evasion of the federal contribution limitations because political parties at all levels were raising amounts, in many instances, far in excess of federal contribution limitations. Those monies, instead of going to fund a portion of nonfederal activity, were actually going to finance federal election activity. Therefore, for the national political parties, Congress required that they be exclusively financed with money raised according to federal law. With regard to the state and local political parties, Congress refined the allocation rules to require that state parties use exclusively federal funds when spending money on "Federal election activity." Section 323(b), therefore, ensures that the state and local parties are no longer used as conduits for national party spending of nonfederal funds to aid federal election campaigns.

Section 323(b) accomplishes this goal by only limiting or, in some instances, completely prohibiting state, district, and local political party committees' use of nonfederal funds when it is spent on: (1) voter registration activity that occurs within 120 days of a regularly scheduled federal election; (2) voter identification, GOTV activity, or generic campaign activity *conducted in connection* with an election where a federal candidate appears on the ballot; (3) public communications that refer to a clearly identified candidate for federal office and that promotes or supports or attacks or opposes a candidate for that office; or (4) an employee who spends more than 25 percent of his or her time during a given month on activities in connection with a federal election. BCRA § 101(b); FECA § 301(20)(A)(i)-(iv); 2 U.S.C. § 431(20)(A)(i)-(iv). Plaintiffs argue that "BCRA has imposed a federally dictated clamp on the use of *all* state-regulated money." CDP/CRP Opp'n at 16 (emphasis in original); *see also* McConnell Br. at 40 (Section 323(b) regulates "activity that relates only to state and local elections and does not benefit federal candidates."); CDP/CRP Opp'n at 21 (Federal election activity "encompasses virtually all party activity"). Plaintiffs' statements are clearly inaccurate. The definition of "Federal election activity" and the corresponding restrictions on it in Section 323(b) are closely drawn to match the sufficiently important interests discussed above.[175]

It is true, no doubt, that Section 323(b) affects activity that has an impact on both federal and state elections. However, this, in and of itself, does not instantly pose First Amendment difficulties because the corruption related to nonfederal funds inheres in the fundraising process where major nonfederal donations are provided in exchange for access to federal officeholders and candidates-a process facilitated by the political party apparatus at all levels. The record demonstrates that the state political parties were equal partners and complicit in helping the national political parties raise and spend nonfederal funds for federal election purposes. Recognizing, however, that not every activity in which a state political party engages in affects federal elections, Congress sensibly limited the reach of BCRA to "Federal election activities," which are those activities at the state and local party level that strongly benefit federal candidates.

Since 1970, Congress has regulated the state and local political parties in this manner by requiring them to pay for many of these "Federal election activities" with federal and nonfederal funds. Plaintiffs' never challenge the constitutionality of having to use allocation percentages when paying for Section 301(20)(A) activities. If, as Plaintiffs' apparently concede, it is consistent with the Constitution to regulate how this activity is paid for in the first instance, then it is difficult for Plaintiffs to offer any compelling First Amendment argument that Congress is unable to require these activities to be paid for solely with federal funds, particularly given the interests articulated in the foregoing section. Plaintiffs' real complaint is that they are unable to continue to use the allocation ratios to pay for Section

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[175] Throughout their briefing, Plaintiffs proffer various examples of what they claim are "Federal election activit[ies]," which they then use to demonstrate BCRA's unconstitutionality. Many of these examples, however, are not covered under BCRA. For example, the RNC suggests that the Republican Party of Ohio could not use nonfederal funds to pay for printing a mailing of a flyer that reads "Vote Republican; John Smith for Dogcatcher on November 6." RNC Br. at 27. First, the printing and mailing of the flyer would not be GOTV activity because it is not individualized. Also, it is not "generic campaign activity" because it mentions a specific state candidate. Additionally, because it only mentions a state candidate, it is not covered by Section 301(20)(A)(iii).

301(20)(A) activities as they have done since the late 1970s. However, given the record in this case, I conclude that Congress is entitled to modify the allocation ratios as it has done statutorily in Section 323(b). To reiterate, the Supreme Court instructs that courts should not "second guess a legislative determination as to the need for prophylactic measures where the corruption is the evil feared." *NRWC*, 459 U.S. at 210; *cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("courts must accord substantial deference to the predictive judgments of Congress").

In 1987, Judge Thomas Flannery of the United States District Court for the District of Columbia required the FEC to implement regulations standardizing the allocation system. *Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987). Judge Flannery observed that "it is possible that the Commission may conclude that *no* method of allocation will effectuate the Congressional goal that *all* monies spent by state political committees on those [volunteer materials, voter registration, and GOTV activities,] be 'hard money' under the FECA." *Id.* In 1987, it was determined that the allocation regime was sufficient. At the time of BCRA's passage, however, Congress determined that the allocation system was ineffective at preventing nonfederal funds from influencing federal elections.

Congress concluded, on the basis of the evidence before it, that the problems related to nonfederal funds already existed at the state political party level and that, prospectively, a national political party "soft money" ban would be entirely ineffective at the national level without some corresponding regulations at the state and local political party level. I shall briefly turn to each of the determinants of "Federal election activity."

(1) Section 301(20)(A)(i) and (ii) Activities

With regard to Section 301(20)(A)(i) and (ii) activities, the Findings compellingly demonstrate that voter registration

activities, voter identification, GOTV activities, or generic campaign activity conducted in connection with an election where a federal candidate is on the ballot will have an influence on federal elections. As discussed *supra*, the record includes the testimony of the representatives of all four of the national party congressional committees that they transfer "federal and nonfederal funds to the state party committees for voter identification, voter registration and GOTV efforts." Findings ¶¶ 1.28, 1.32 (officials observing that "[t]hese efforts have a significant effect on the election of federal candidates"); *see also id.* ¶ 1.28.1, 1.32 (CDP touting impact it has on federal elections with voter registration, vote-by-mail, and get-out-the-vote efforts in a letter it sent to a contributor). Furthermore, it is clear that efforts to encourage a particular political party's partisans to the polls, will assist *all* of that party's candidates on the ballot, state, local and federal alike. Voter mobilization efforts are designed to get a particular political party's faithful to the polls for a particular election.

Moreover, the Levin Amendment provides further evidence that Congress sought to accommodate the interests of the state political party committees in drafting Section 323(b). Given that a majority of states hold their elections at the same time as federal elections, Congress recognized that Section 301(20)(A)(i) and (ii) activities would have a more dramatic effect on state and local elections than on other activities. As a result, Congress found it important to permit the state and local parties to supplement their federal funding with nonfederal funds raised pursuant to the Levin Amendment to pay for these activities. As long as the activity does not refer to a clearly identified candidate for federal office, the funds are not used for certain broadcast communications, and the funds are raised directly by the state or local political party according to the requirements of state law (in increments of $10,000 or less) the state political party committees can use Levin funds to pay for Section

301(20)(A)(i) and (ii) activities. When paying for activities with Levin funds, the FEC's allocation percentages apply to the expenditure.

As a result, the Levin Amendment essentially acts as a modified allocation system. Congress determined that Section 301(20)(A)(i) and (ii) activity would often have a significant effect on state elections, given that most states hold elections at the same time as the federal government. By permitting the state and local parties to raise and spend "Levin funds," Congress allowed state and local political parties to continue to raise funds not subject to FECA *in a way that would not jeopardize the rest of the nonfederal money restrictions in Title I*. It can hardly be argued that a $10,000 donation to a state political party committee poses a threat of corruption when the federal limit on individual giving to state parties is also $10,000, BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D), the limit to national parties is $25,000, BCRA § 307(a)(2); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(B), and the total cap on individual contributions is $95,000 per two-year election cycle, of which $37,500 may be contributed to candidates. BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3). In other words, even though the Levin Amendment permits some nonfederal money into the political party system, it does so in a way that will not create a new loophole and also serves to accommodate state interests regarding their elections.

Because it was Congress's desire to prevent a new loophole from emerging, when it enacted the Levin Amendment, Congress prohibited transfers among or joint fundraising by state and local political parties with respect to "Levin funds." BCRA § 101, FECA § 323(b)(B)(iv), (C); 2 U.S.C. § § 441i(b)(2)(B)(iv), (C). I am not persuaded by Plaintiffs' arguments that these provisions are not closely

drawn. McConnell Br. at 40; CDP/CRP Br. at 36-39.[176] As stated by Defendant-Intervenors, "[w]ere state and local parties free to transfer $10,000 contributions among themselves, contributors could multiply the amount of their permissible contribution to a particular party simply by funneling additional soft money through other party committees." Def.-Int. Br. at 63 n.228. By way of example, a donor attempting to gain influence with a candidate in one congressional district could make ten $10,000 contributions to ten local parties, on the understanding that the entire $100,000 would be transferred to the one party that was engaged in "Federal election activities" in that candidate's district. Def.-Int. Opp'n at 34. Of course, state and local political parties remain free jointly to raise or transfer as much nonfederal funds as they desire to pay for activities that are not considered "Federal election activity," subject only to state restrictions.

With the Levin Amendment, Congress determined that state and local political party committees should be permitted to spend limited amounts of nonfederal funds on certain "Federal election activities." Enacting this provision further demonstrates that Congress made a significant effort to tailor the nonfederal money restrictions at the state party level. Given that the provision must only be "closely drawn," I find that Congress's restrictions on Section 301(20)(A)(i) and (ii) activities are constitutional.[177]

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[176] I am also not persuaded by the doomsday scenario described by the CRP and CDP regarding the effect BCRA will have on their fundraising. Findings ¶¶ 1.98-1.99.1 (also describing their fundraising and spending generally). Their estimations of BCRA's impact on their fundraising efforts are not based on any formal analysis, but instead on an application of BCRA to past fundraising efforts which is explained in an imprecise manner that leaves as many questions as it answers. *Id.* ¶ 1.98. It is unrealistic to think that the state political parties will fundraise in exactly the same fashion under the BCRA regime as they did under FECA. Furthermore, Plaintiffs' own expert Raymond La Raja believes that BCRA will not affect some state parties' fundraising efforts at all, and while others may be affected, "[o]ne thing we can be sure of is that parties will figure out the ground rules and they will find an important role for themselves within the new campaign finance regime. *Id.*

(2) Section 301(20)(A)(iii) Activity

Turning to Section 301(20)(A)(iii)-a public communication that supports or opposes a clearly identified federal candidate-I likewise find this provision constitutional under the First Amendment. In Judge Leon's opinion, he explains why Congress' decision to restrict state and local party organizations to funding Section 301(20)(A)(iii) activities with federal funds is closely drawn to match a sufficiently

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[177] In doing so, I am also not persuaded by Plaintiffs' arguments that some of the provisions in Section 301(20)(A)(i) and (ii) are vague; particularly "get-out-the-vote activity." *See, e.g.*, CDP/CRP Br. at 33. First, I am not persuaded that a reasonable person would have difficulty understanding what is meant by these terms, and the fact that these provisions apply to political actors only strengthens my conviction. Second, the FEC has promulgated implementing regulations related to "Federal election activity." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed.Reg. 49,064, 49,083 (July 29, 2002). In my judgment, these regulations may mollify any constitutional uncertainties related to these terms. *See Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-387 (D.C.Cir.1980), *cert. denied sub nom. Nat'l Chamber Alliance for Politics v. FEC*, 449 U.S. 954 (1980). In *Martin Tractor*, the Court of Appeals determined that the advisory opinion process and the uncertainty of plaintiffs' legal rights counseled against premature constitutional adjudication because the "adversarial posture assumed by the parties and contours of their dispute," *id.* at 387, lacked clarity, unlike other cases that had found ripeness in similar circumstances. Moreover, the fact the FEC "has said or done nothing ... to indicate how it construes the term 'solicit," 'left the court "without substantial guidance to decide this case or even to frame the constitutional issues at stake." *Id.* at 387. Finally, Plaintiffs have not spent much time briefing this issue, and I am therefore chary to strike these provisions down without waiting to see if the FEC's regulations ameliorate Plaintiffs' vagueness concerns. In the interim, an Advisory Opinion process stands by to prevent any potential chill that might be incurred by Plaintiffs.

important interest. I agree with his analysis and concur with him that Section 323(b) is constitutional in restricting the state and local party committees to spending federal funds on Section 301(20)(A)(iii) activities. I would additionally point out that I am particularly persuaded by Judge Leon's discussion of the fact that Section 301(20)(A)(iii) is a restriction on a contribution (as opposed to an expenditure). To the extent that Judge Leon's opinion on this point is inconsistent with anything that I have discussed in my own opinion-for example, my view of *Buckley*'s definition of corruption or my view of what constitutes pure issue advocacy-I do not join those portions of Judge Leon's discussion.[178]

(3) Section 301(20)(A)(iv) Activity

Finally, with regard to Section 301(20)(A)(iv) activity-requiring state and local parties to use federal funds to pay the salary of an employee who spends more than 25 percent of his or her compensated time in a month in connection with a Federal election-I find that none of the Plaintiffs have articulated a specific reason for striking the provision down. In other words, Plaintiffs do not provide any specific argument as to why that provision is unconstitutional. Given the paucity of specific briefing on this provision (Defendants have also not spent any time addressing this specific provision), I would not hold Section 301(20)(A)(iv) facially unconstitutional.

(4) Conclusion

I find that Section 323(b) is closely drawn to match the sufficiently important governmental interests at stake in this case. Congress was appropriately concerned, as the record in this case tellingly indicates, that a prohibition on nonfederal funds at the national level would be entirely ineffective without corresponding restrictions on the state and local party committees. Section 323(b) is a closely drawn answer to that problem that continues to permit State and local parties to raise as much nonfederal funds as they are able to raise, consistent with state law, to be spent on activity that solely affects state elections.

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[178] This statement applies with equal force to any of the portions of my colleagues' opinions in which I am concurring.

(iii) Section 323(c)

This provision is not specifically challenged by any Plaintiff. As such, I do not pass on its constitutionality.

(iv) Section 323(d) is Closely Drawn

Section 323(d) is a measure intended to prevent political parties from using tax-exempt groups as a means of evading FECA's source, amount, allocation, and disclosure requirements. BCRA § 101; FECA § 323(d); 2 U.S.C. § 441i(d). Section 323(d) accomplishes this goal by prohibiting any political party committee or its agents from "solicit[ing]" funds for or "mak[ing] or direct[ing]" any donations to either: (i) any tax-exempt section 501 organization, *see* 26 U.S.C. § 501(c), that spends any money "in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (ii) any section 527 organization, *see* 26 U.S.C. § 527, (other thana state or local party or the authorized campaign committee of a candidate for state or local office). BCRA § 101; FECA § 323(d)(1); 2 U.S.C. § § 441i(d).

As discussed above, the record clearly indicates that prior to BCRA, the political parties used tax-exempt organizations as a means of evading FECA's requirements. Congress was appropriately concerned that without restrictions on party solicitation and party direction of federal and nonfederal money to tax-exempt interest groups, party committees would continue to use satellite party organizations disguised as tax-exempt groups to continue to circumvent FECA and also help the parties circumvent the new contribution requirements in

BCRA. Seen from this perspective, Section 323(d) is a reasonable, prophylactic measure to which this three-judge District Court owes deference. *NRWC*, 459 U.S. at 210.

Section 323(d) is closely drawn because it only applies to Section 501(c) organizations that "make[] expenditures or disbursements in connection with an election for *Federal office* (including expenditures or disbursements for Federal election activity)," BCRA § 101; FECA § 323(d)(1); 2 U.S.C. § 441i(d)(1) (emphasis added), and Section 527 organizations, which by definition have been given tax-exempt status because they engage in political activity.[179] BCRA § 101; FECA § 323(d)(2); 2 U.S.C. § 441i(d)(2). Section 323(d), therefore, focuses only on those non-profit organizations that have posed a threat to the stability of the campaign finance regime. Parties continue to be permitted to contribute to any 501(c) organization that does not engage in "Federal election activity," BCRA § 101; FECA § 323(d)(1); 2 U.S.C. § 441i(d)(1), and are free to contribute federal funds to PACs formed by tax- exempt organizations that do engage in "Federal election activities," BCRA § 101; FECA § 323(d)(2); 2 U.S.C. § 441i(d)(2).

Despite this tailoring, Plaintiffs make a number of arguments that exaggerate the reach of Section 323(d). For example, the CDP Plaintiffs contend that Section 323(d)

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[179] Section 527 of the tax code defines a "political organization" as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). An "exempt function" is defined as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed." 26 U.S.C. § 527(e)(2).

"prohibits the parties from participating in ballot measure campaigns." CDP/CRP Br. at 44. This statement is incorrect as state political parties are not in any way prohibited by BCRA from making direct expenditures to support or oppose ballot measures. BCRA does prohibit the state and local committees from soliciting donations on behalf of and directing any donations to an organization that engages in "Federal election activity." To the extent that ballot measure organizations, which the CDP Plaintiffs argue are "typically" Section 501(c)(4) organizations, engage in "Federal election activity," BCRA prohibits the political party committees at all levels from directing monetary contributions to those organizations.

There is no question that ballot measure organizations often engage in GOTV activity in and around federal elections. Indeed, the CDP should understand this fact. On October 19, 1999, Judge Garland E. Burrell, Jr. of the Eastern District of California ordered summary judgment for the Commission against the CDP because the CDP had contributed $719,000 in nonfederal funds to "Taxpayers Against Deception-No On 165," a tax-exempt California political committee opposed to a state spending referendum. *FEC v. CDP*, No. S-97-0891 (E.D. Cal. Oct. 14, 1999) (order granting summary judgment) at 2. None of the CDP's donations were reported to the FEC, *id.* at 7-8, and all but $2,000 of the money contributed by the CDP was knowingly used for partisan voter registration. *Id.* at 2, 13. The ballot committee persuaded the CDP to donate $719,000 to its organization because it promised to target potential registrants that would be predisposed to vote for Democrats based on historic voting patterns. *Id.* at 4. The district court in that case found that on the basis of this conduct, the CDP had "violated the FECA and the allocation rules by funding a generic voter drive that targeted Democrats." *Id.* at 15. Accordingly, contrary to the CDP's contention, ballot measure committees can not only help a party committee avoid disclosure requirements, but they can also help party committees avoid the allocation system. In other words, in the *FEC v. CDP* case, the $719,000 in nonfederal funds transferred to the ballot committee for voter registration did not have to be allocated between federal and nonfederal accounts, as the CDP would have had to do if it had engaged in the same spending. *See also* Findings ¶ 1.85.6.

The CDP Plaintiffs also make the argument that a party official could violate the law "simply for contributing to his or her church, if the church has engaged in non-partisan activities encouraging (or assisting) its members to vote." CDP/CRP Br. at 46. This statement is incorrect. Section 323(d) only prohibits actions by party officials "on behalf of" the party committee. BCRA § 101; FECA § 323(d); 2 U.S.C. 441i(d). A party official's personal donation of his or her own money to a church, like other donations or solicitations made by party officials individually on their own behalf, are simply not covered under Section 323(d).

Section 323(d) applies to the party committees soliciting and directing federal and nonfederal funds to these tax-exempt organizations. The evidence in this case and the record before Congress demonstrates congressional concern with the role of tax-exempt organizations in circum venting FECA's contribution restrictions. *See* Findings ¶ ¶ 1.85-1.86. As discussed earlier, the record in this case establishes that prior to BCRA, parties and candidates would solicit and donate funds to tax-exempt organizations which would then be used to influence federal elections on behalf of the party or candidate donor. The legal advantage to employing a tax-exempt organization is that it avoids the source, amount, disclosure, and allocation system of the FECA regime. Therefore, Congress recognized that continuing to permit parties to solicit and direct federal funds to these tax-exempt organizations logically posed a circumvention problem. Notably with BCRA, Congress does permit political party committees to solicit and direct federal funds to PACs, which are regulated under FECA and required to make disclosures and to accept only federal funds. Tax-exempt organizations can establish political committees under the Act to which political parties can direct funds or solicit donations to the PAC.

As the foregoing discussion indicates, I find that Congress acted prophylactically and on the basis of a compelling record to ensure that tax- exempt organizations would not undermine the Title I's restrictions on nonfederal funds. As such, and on the basis of the record before me, I determine that Section 323(d) is closely drawn and facially constitutional.

(v) Section 323(e) is Closely Drawn

I concur with Judge Henderson's conclusion that Section 323(e) is constitutional under the First Amendment, albeit on slightly different grounds. Given my conclusion regarding the definition of Federal election activity, I do not find it necessary to narrowly construe the provision.

As discussed at length, political parties dangle access to federal candidates as bait to lure large nonfederal money donors. In response to this obvious problem, Congress enacted Section 323(e), which prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending any nonfederal funds in connection with a federal election. BCRA § 101; FECA § 323(e)(1)(A); 2 U.S.C. § 441i(e)(1)(A). The statute permits federal candidates or officeholders to raise nonfederal funds in connection with a state and local election, provided that those funds do not exceed the federal contribution limitations and are from sources permitted under federal law. BCRA § 101; FECA § 323(e)(1)(B)(i) and (ii); 2 U.S.C. § 441i(e)(1)(B)(i) and (ii). Notably, a federal officeholder or candidate "may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." BCRA § 101; FECA § 323(e)(3); 2 U.S.C. § 441b(e)(3). Also, federal candidates and officeholders may solicit money on behalf of any tax-exempt Section 501(c) organization whose "principal purpose" is not 301(20)(A)(i) or (ii) activity, so long as the solicitation does not specify how the funds will be spent. BCRA § 101; FECA § 323(e)(4)(A); 2 U.S.C. § 441i(e)(4)(A). Concomitantly, a federal candidate is permitted to raise money for a tax-exempt Section 501(c) organization that does engage in Section 301(20)(A)(i) and(ii) activity, subject to the condition that he or she may solicit up to $20,000 per person per year from individuals only. BCRA § 101; FECA § 323(e)(4)(B)(i) and (ii); 2 U.S.C. § 441i(e)(4)(B)(i) and (ii).

BCRA is closely drawn because it permits federal candidates and officeholders to continue to engage and fully participate in the political process, but closely circumscribes their activities to prevent the kinds of problems that developed with their solicitation of nonfederal funds. For example, under BCRA, a federal officeholder may raise up to $2,000 from an individual for use in a state election, but may not raise money from a corporation for that purpose. However, to avoid undermining traditional political activity, BCRA permits federal candidates and officeholders to appear and speak at state and local party events. *Cf.* Findings ¶¶ 1.97, 1.96. Accordingly, Plaintiffs are simply wrong to claim that, under BCRA, "aside from speaking at and attending fundraising events, federal officeholders and candidates will otherwise be prohibited altogether from raising money directly for state and local candidates." McConnell Br. at 23-24. Rather, BCRA permits federal officeholders and candidates to raise nonfederal funds for state candidates, provided that they are within the federal source and amount limitations.

In my judgment, Defendants have adequately explained why Section 323(e) permits federal officeholders and candidates to make certain solicitations for tax-exempt organizations and why political parties and party officials under Section 323(d) are prohibited from making the same solicitation. *See* RNC Br. at 46 (arguing the "[t]hese provisions subjecting political parties to flat bans while permitting federal candidates and officeholders to engage in the same activities reveal an utter lack of tailoring in the Act's treatment of parties."). The reason for the difference is that unlike political party officials, candidates are subject to limits on solicitation at all times, not whether or not they are acting on behalf of the party. As Defendants suggest, "it was reasonable for Congress to allow candidates to make solicitations under limited circumstances that accommodate the legitimate interests of candidates in providing personal support for certain organizations, while retaining the monetary limits that help minimize the risk of corruption." Gov't Opp'n at 39. Plaintiffs' offer no real response to this in their filings.

As Judge Henderson has observed in regard to Section 323(e) in her opinion, "[i]t bears emphasizing that the plaintiffs do not challenge this provision with the same vigor as they do BCRA's other non-federal fund restrictions." Henderson Op. at 323. Given that Plaintiffs have spent little time engaging in a discussion of these issues and the fact that the record before this three- judge District Court amply supports the congressional decision to regulate federal candidates in this manner, I find that under *Buckley*'s scrutiny applicable to contribution restrictions, Section 323(e) is closely drawn and, therefore, consistent with the First Amendment.

(vi) Section 323(f) is Closely Drawn

For the reasons set forth in Judge Leon's opinion, I similarly find Section 323(f) closely drawn to match the sufficiently important governmental interests discussed above.

(c) *Conclusion*

In my judgment, Title I is a closely drawn contribution restriction targeted at reducing the corrosive influence of nonfederal funds on federal elections. As Justice Byron White remarked in *Citizens Against Rent Control:* "Every form of regulation-from taxes to compulsory bargaining-has some effect on the ability of individuals and corporations to engage in expressive activity. We must therefore focus on the extent to which expressive and associational activity is restricted by [the law at issue]." *Citizens Against Rent Control,* 454 U.S. at 310 (White, J., dissenting). Taking a comprehensive view of Title I, as I have done in my discussion above, I conclude that any infringement on First Amendment protections is more than outweighed by the significant state interests behind regulating nonfederal funds. Accordingly, I find Title I consistent with the First Amendment guarantees of speech and association and the ruling in *Buckley.*

C. *Plaintiffs' Equal Protection and Underbreadth Claims*

Plaintiffs contend that Title I is also unconstitutional because it violates the Fifth Amendment by restricting the activities of political parties without imposing similar restrictions on special interest groups. *See, e.g.,* McConnell Br. at 40-43; RNC Br. at 57. As a corollary to this argument, Plaintiffs contend that in treating political parties differently from special interest organizations, Title I is fatally under inclusive because it "does not begin to address the supposed access enjoyed by hard-money donors to political parties or by special interest groups." RNC Br. at 65. Since I find Title I consistent with the First Amendment guarantees of speech and association, I am required to reach Plaintiffs' arguments on these points. After considering the parties' arguments and the relevant caselaw, I find Plaintiffs' contentions on these points to be without merit.

Assuming that Plaintiffs' equal protection arguments are even viable after my discussion of Plaintiffs' First Amendment issues, *see* 3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law-Substance & Procedure* § 18.40 (3d ed. 1999), I find their arguments unpersuasive.[180] It is a well-worn tenet of equal protection analysis "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It is well understood, therefore, that the "Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (internal citation and quotation marks omitted). In this case, the record and prior precedent demonstrate that political parties are not "similarly situated" to special interest organizations. The law does not treat political parties "better or worse" than special interest organizations. It only treats them differently because they have different interests that need to be accommodated, and they have a different role in the campaign system and in the government than do special interest organizations.

The record in this case establishes the unique situation of political parties in the political process. As Plaintiffs' expert La Raja concludes, "[m]ost interest groups, in contrast [to political parties], seek to build relationships with officeholders as a way of improving access to the legislative process and lobbying their position . . . . Political parties . . . allocate resources for electoral strategies, meaning they contribute money to a party candidate who is in a potentially close election." Findings ¶ 1.16.2; *see also id.* ¶ 1.46 (discussing the special relationship between political parties and their candidates/officeholders). Furthermore, an RNC official agrees that interest groups can never replace political parties. *Id.* ¶ 1.89. As Senator McCain testifies,"[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected." *Id.* ¶ 1.48. In fact, FECA recognizes this difference when it defines a political party as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C 431(16). Interest groups are simply not connected to candidates in the same manner. *See Colorado II*, 533 U.S. at 449 ("[t]here is no question about the closeness of candidates to parties").

It is therefore the case that BCRA treats political parties differently than special interest organizations. For example, political parties are permitted to receive greater contributions from individuals than are interest groups. *Compare* BCRA § 307(a); FECA § 315(a)(1)(B); 2 U.S.C. § 441a(a)(1)(B) *with* 2 U.S.C. § 441a(1)(C). The political parties are permitted to make greater coordinated expenditures in support of federal candidates than special interest organizations. 2 U.S.C. § 441a(d). Moreover, the national political parties and the national Senate committees may make greater contributions to Senate candidates than special interest groups. BCRA § 307(c); FECA § 315(h); 2 U.S.C. § 441a(h). Finally, BCRA permits national political parties to transfer federal money (in any amount) to other party committees without being subject to the contribution limits that apply to such transfers by nonparty committees. 2 U.S.C. § 441a(a)(4). At the same time, special interest organizations set up as nonprofit corporations, will have to comply with the electioneering communication provisions in Title II. *See supra*. BCRA presents a symmetrical approach to the problems plaguing the campaign finance system: national political party fundraising of nonfederal funds and interest organizations using general treasury funds to influence a federal election. The law simply recognizes the unique nature of these organizations in the political process and accommodates them in different ways. *Cf. California Med. Ass'n*, 453 U.S. at 201 ("The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process."). Accordingly, I find that Title I does not violate the Fifth Amendment guarantees of equal protection.

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[180] As Professors Rotunda and Nowak discuss:

> It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights. Laws which classify persons in their exercise of these rights will have to meet strict tests for constitutionality without need to resort to the equal protection clause. Should the laws survive substantive review under the specific guarantees they are also likely to be upheld under an equal protection analysis, for they have already been found to represent the promotion of government values which override the individual interest in exercising the specific right . . . . If the Court examines the classification under the First Amendment and finds that the classification does not violate any First Amendment right, the Court is unlikely to invalidate that classification under equal protection principles.

3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law- Substance & Procedure* § 18.40 (3d ed.1999).

As a corollary of their Fifth Amendment arguments, Plaintiffs also contend that Title I is underinclusive because it does not subject interest groups to the same restrictions on nonfederal money applicable to political party committees. McConnell Br. at 41-43; RNC Br. at 57-58, 65. As the Court of Appeals has held, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does

not require the government to curtail as much speech as may conceivably serve its goals." *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995) (emphasis in original). As "the primary purpose of underinclusiveness analysis is simply to 'ensure that the proffered state interest actually underlies the law,' *Austin*, 494 U.S. at 677 (Brennan, J., concurring), a rule is struck for underinclusiveness only if it cannot 'fairly be said to advance any genuinely substantial governmental interest,' *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984)." *Id.* As I have shown above, the record in this case significantly demonstrates that Title I is carefully tailored to address the problem that was before Congress-nonfederal funds raised by the national committees of the political parties. The rationale underlying Title I simply does not apply with equal force to entities not covered by Title I. Accordingly, an underinclusive challenge is without merit.

I also agree with Defendants when they state that Plaintiffs make a policy argument better suited for the legislature than the judiciary when Plaintiffs argue that "Title I's differential treatment of parties and special interest groups will make matters worse, not better." RNC Br. at 67 (capitalization altered).[181] Def. Opp'n at 52; *Cf. Colorado II*, 533 US. at 454 n.15 ("[Wle do not mean to take a position on the wisdom of policies that promote one source of campaign funding or another."). The problem that Congress sought to solve related to the fundraising abuses and access given to large nonfederal money contributors to political parties. Title I accomplishes this goal in a narrowly tailored fashion.

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[181] As part of this argument, Plaintiffs present evidence attempting to show that under BCRA, interest group activity will escalate and supplant those activities traditionally done by political parties. Findings ¶¶ 1.87-1.88, 1.91-1.93. This change would be a negative development, Plaintiffs attempt to show, because interest groups do not operate as transparently as political parties. *Id.* ¶¶ 1.90, 1.91. A review of the facts leads to the conclusion that none of them sheds much light on what BCRA's impact will be on the activities of interest groups. *Id.* ¶ 1.95. Furthermore, the evidence regarding the lack of disclosure required of interest group political activity does not take into account BCRA's new disclosure requirements. *Id.*

Moreover, the evidence in the record is at best inconclusive as to whether nonfederal funds will suddenly flow to special interest groups. While there is some evidence in the record that interest groups are expected to receive nonfederal funds donations, there is equal evidence in the record that nonfederal funds will not flow to special interest groups since these groups cannot deliver "the special favors that only a political party can deliver by dint of its ubiquitous role in all levels of government." Findings ¶ 1.87.[182] As the Findings demonstrate, the experts are divided on this question. Accordingly, it is the choice of Congress as to whether it should refrain from offering legislation at this time directed at special interest organizations. If special interest groups create problems of corruption worthy of congressional attention, that is always the prerogative of Congress; but such an amendment to campaign finance laws would require a compelling record- a record not present here. *Cf. NRWC*, 459 U.S. at 209 ("This careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.") (internal quotation marks and citations omitted). Accordingly, in my judgment, Plaintiffs' underbreadth challenge fails.

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[182] Plaintiffs also cite to a series of newspaper articles for the fact that interest groups are now "*gearing up* "to supplant political party committees with respect to nonfederal fundraising. McConnell Br. at 42 (emphasis added). This evidence is highly speculative and since it would not form a basis for congressional action in the first instance, I am not persuaded that Congress needed to grapple with this problem; particularly when expert evidence is largely divided over whether special interest groups will even supplant political party committees in nonfederal funds fundraising.

D. *Plaintiffs' Federalism Challenge*

My colleagues, with two exceptions, do not specifically address Plaintiffs' claims that Title I violates Article I, Section 4, and the Tenth Amendment of the Constitution by "usurping the right of states to regulate their own elections." McConnell Br. at 9 (capitalization altered).[183] Given that I find Title I constitutional in keeping with *Buckley* and the First Amendment, I am also required to reach Plaintiffs' federalism arguments. However, after serious reflection, particularly in regard to the parties' answers to my questions at oral argument, I do not find that any of the Plaintiffs before this three-judge panel have standing to raise a Tenth Amendment challenge to Title I.[184]

It is true that standing for private parties challenging acts of Congress has been found when a plaintiff asserts that Congress has acted in excess of its Article I powers. Most of these cases have focused on situations where Congress plainly exceeded its power under the Commerce Clause and the statutes were declared unconstitutional. *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free

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[183] Judge Henderson rejects Plaintiffs' federalism challenge to Section 323(e). Henderson Op. Part IV.D.4, while Judge Leon rejects Plaintiffs' federalism challenge with regard to Section 301(20)(A)(iii) activities. Leon Op. Part I.B.2. Neither of my colleagues, however, address the question of whether Plaintiffs have standing to present his argument.

[184] When I refer to standing in this context, I am specifically referring to rules of prudential standing which act as self-imposed limitations on the jurisdiction of Article III courts. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982) ("Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that 'the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' *Warth v. Seldin*, 422 U.S. [490, 499 (1975)]."). It is my view, therefore, that Plaintiffs lack "third-party standing" to assert the constitutional rights of the States.

School Zones Act, making it a federal offense for any individual knowingly to possess a firearm at a place that an individual knows or has reasonable cause to believe is school zone, exceeded Congress's commerce clause authority); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Commerce Clause did not provide Congress with authority to enact civil remedy provision of Violence Against Women Act). On the other hand, courts have been reluctant to provide private parties with standing when they are asserting the rights of a State. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 144 (1939) ("As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, *have no standing in this suit to raise any question under the amendment*.") (emphasis added); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761 (10th Cir. 1980) ("Only the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment.").

In *New York v. United States*, the Supreme Court articulated this distinction in the context of a *State* bringing suit:

> In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution *See, e.g., Perez v. United States*, 402 U.S. 146 (1971); *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Lane County v. Oregon*, 7 Wall. 71 (1869). *In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the*

> *States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. See United States v. Oregon*, 366 U.S. 643, 649 (1961); *Case v. Bowles*, 327 U.S. 92, 102 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941).

New York v. United States, 505 U.S. 144, 155-56 (1992) (emphasis in original). In the context of a State bringing suit, the Supreme Court concluded that the distinction was practically irrelevant. *Id.* at 159 ("In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment."). The Supreme Court has not, however, addressed whether this distinction is of no practical difference when a private party challenges a law of Congress and indirectly asserts the Tenth Amendment as a basis for finding the law unconstitutional. Indeed, given *Lopez* and *TVA*, it would appear that this distinction is relevant when someone other than the State or the State's officials are bringing the challenge.

This distinction is the reason Plaintiffs claim at places in their briefing that their federalism challenge involves the argument that Congress lacks the affirmative power to have enacted BCRA under the Elections Clause. *See, e.g.*, McConnell Reply at 4 n.2 ("[P]rivate parties are routinely allowed to bring suit where they are claiming that Congress acted *outside* its delegated powers, rather than merely asserting that Congress violated state sovereignty in acting *under* its delegated powers.") (emphasis in original) (citing *Lopez*). Despite what Plaintiffs state, their briefing shifts between these two poles and is often not clear as to whether they are making a "Tenth Amendment" argument that

Congress is transgressing "the province of state authority reserved by the Tenth Amendment," *New York*, 505 U.S. at 155, or are simply arguing that Congress had exceeded its delegated authority, *id. See, e.g.*, CDP/CRP Br. at 21 ("In this case, plaintiffs' [sic] believe that the two inquiries [identified in *New York*] do indeed converge, but that under either inquiry, BCRA oversteps the boundary between federal and state authority.") (internal citation and quotation marks omitted).

The ease with which Plaintiffs move between these two arguments is problematic. If it is the case that Plaintiffs are making a Tenth Amendment argument that Congress, in enacting BCRA, was transgressing the province of state authority reserved by the Tenth Amendment, then *TVA* holds that Plaintiffs do not have standing to bring such a challenge.[185] However if, Plaintiffs are arguing that Congress lacks the affirmative authority to enact Title I, then presumably *Lopez* and that line of cases recognizes private parties do have standing to assert such a challenge at least in the context of the Commerce Clause.

In order to make an argument that Congress has acted *outside* its power under the Elections Clause in enacting Title I of BCRA, Plaintiffs are forced to contend that Congress is intruding on the ability of *States* to regulate their own

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[185] I would observe, that the D.C. Circuit in the *Lomont* case recently discussed the issue of private party standing under the Tenth Amendment in a footnote. *Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C.Cir.2002). While the D.C. Circuit did not rule on this issue, it certainly hinted that the Supreme Court should be the tribunal to overrule *TVA* and not the lower courts. Accordingly, to the extent Plaintiffs are claiming that they fit into the latter category of cases, I find that *Lomont* cautions against this three-judge panel finding standing. *See City of Roseville v. Norton*, 219 F.Supp.2d 130, 148 (D.D.C.2002) ("This Court is bound to apply Circuit precedent. *Lomont* implicitly recognizes that the Seventh Circuit's reasoning in *Gillespie* [a case finding private party standing under the Tenth Amendment] cannot be squared with *TVA* 's holding.").

elections. *See, e.g.*, McConnell Br. at 9 ("For the first time in the relatively short history of campaign finance regulation, Congress has enacted legislation that systematically restricts political activity not only in federal elections, but also in state and local elections. *This massive intrusion into a core area of state sovereignty-the ability of States to regulate their own elections*-violates basic principles of federalism.") (emphasis added). To the Plaintiffs in these consolidated cases, therefore, BCRA violates state sovereignty and the focus of their arguments are on the injury to the States.

This result is different from the Supreme Court striking down a law in the Commerce Clause context, like *Lopez*, where the argument is that the legislature focused on a problem unrelated to interstate commerce. *Lopez*, 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). However, given the nature of Title I, and the Elections Clause, Plaintiffs are really contending that Congress was not simply regulating federal elections, *but was impermissibly legislating state elections. See, e.g.*, McConnell Br. at 17 ("By imposing federal limits on these activities, BCRA effectively overrides the laws of numerous States . . . ."). The injury in this context is not held by an individual plaintiff, but rather the injury is only held by the State, who organizes the elections pursuant to state law. Since Title I operates as a contribution restriction, the injury to the Plaintiffs in this case rests on an interference with funds specifically regulated or not regulated by their individual States. Premising a Tenth Amendment argument based on the Elections Clause, in the context of BCRA, therefore compels Plaintiffs to present an argument that specifically rests on the rights of their individual States, who have chosen to regulate or not regulate these funds.[186]

At oral argument, CDP Plaintiffs' counsel had difficulty explaining this nuanced difference in relation to their legal positions. *See* Tr. at 29-30. RNC Plaintiffs' counsel proffered that under *Oregon v. Mitchell,* Plaintiffs had standing because the Supreme Court decided that case based on "Congress's overreach." Tr. at 43. In *Oregon v. Mitchell,* the Court considered, *inter alia,* amendments to the Voting Rights Act that would have given 18 year-olds the right to vote. The Court upheld the amendments as applied to federal elections, but struck them down as applied to state and local elections. *Oregon v. Mitchell,* 400 U.S. 112, 118 (1970) (opinion of Black, J.). Justice Black, in striking down that portion of the Act that applied to state elections, stated that "[n]o function is more essential to the separate and independent existence of the *States and their governments* than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Id.* at 125 (emphasis added); *see also id.* at 124-25 (observing that "the Framers of the Constitution intended the *States* to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections") (emphasis added).

It is correct that *Mitchell* found that Congress had acted in excess of its statutory authority, but *Mitchell* involved an *original* action in the Supreme Court brought by a number of *States* who resisted compliance with the Voting Rights Act. *Id.* at 117; *see also id.* at 117 n.1 ("No question has been raised concerning the standing of the parties or the jurisdiction of this Court."). Accordingly, in *Mitchell,* there was no question that the plaintiffs in that case were able to argue that Congress exceeded its power under the Elections Clause because the plaintiffs in that action were either the States themselves or the United States, who had each invoked the original jurisdiction of the Supreme Court of the United States. The question in this case is whether a private party can assert that right on behalf of the State. As no States are among the 77 plaintiffs to this case, and as none of the Plaintiffs bring suit as representatives of the States, I find that Plaintiffs' Tenth Amendment challenge to Title I is nonjusticiable.

The issue of third-party standing is particularly weighty in this case, where for example, the State of Kentucky has joined an *amicus* brief in support of BCRA, while Plaintiff Mitch McConnell, who represents Kentucky in the Senate, is a lead Plaintiff challenging BCRA. Moreover, this situation represents a question that the Supreme Court has not definitively addressed. *See Pierce County v. Guillen,* 123 S. Ct. 720, 732 n.10 (2003) ("[I]n light of our disposition . . . , we need not address the second question on which we granted certiorari: whether private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment where their States' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question.").[187]

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[186] In another context, therefore, Plaintiffs might have private party standing to assert that Congress exceeded its authority under the Elections Clause. However, in the context of BCRA, the parties are actually asserting the rights of their individual States in this litigation.

[187] Beside Kentucky, 18 States, the Commonwealth of Puerto Rico, and the Territory of the United States Virgin Islands support BCRA, although they take no position on the standing issue. *See* Am. and Substituted Br. of *Amici Curiae*-The States of Iowa and Vermont *et al.;* Utah and seven other states oppose BCRA and do not address the standing issue. Br. of *Amici Curiae* Utah, *et al.* The Utah *Amici* point out in a footnote that Alabama did not join the *amici* brief because Alabama's Attorney General William Pryor was a named Plaintiff in the *McConnell* action. *Id.* at 2 n.1. The footnote is silent on whether Pryor brought suit in his official capacity representing the State of Alabama. However, it is clear from the

Since I have found that Plaintiffs lack standing to raise claims under the Elections Clause and Tenth Amendment, I do not proceed further. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.").

E. *Conclusion*

In my judgment Title I in its entirety is constitutional. The evidence put forward in the record provides ample justification for Congress enacting the contribution restrictions at issue in the case. The record demonstrates that FECA's entire contribution structure has been completely gutted by political actors willing to test the limits of the law in a manner that has returned the campaign finance system to a regime equaling the troubling aspects of the 1972 regime. In response, Plaintiffs argue that "BCRA simply goes too far." CDP/CRP Br. at 46. However, reading Plaintiffs' briefing in this case, I am not sure if Plaintiffs would accept any restrictions whatsoever on nonfederal funds. Indeed, Plaintiffs' view of corruption is so incompatible with the *Buckley* Court's understanding of the term, that under Plaintiffs' governing rationale, FECA's contribution limitations upheld in *Buckley* would be struck down.

The Supreme Court has long recognized Congress' broad authority to enact measures to protect the integrity of federal elections. Title I accomplishes its purpose without unduly transgressing the rights of individuals to engage in the political process. While there may be future challenges which test some of the regulations at issue in this case, at this facial challenge stage, Title I survives constitutional attack.

III. Title III: MISCELLANEOUS

Sections 304, 305, 307, 316, and 319

I concur with Judge Henderson's with regard to: BCRA Section 305, the condition on the lowest broadcast unit charged; BCRA Section 307, regarding increased contribution limitations; and BCRA Sections 304, 316 and 319, special provisions dealing with financing campaigns against wealthy opponents (also known as the "Millionaire Provisions").

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entire record in this case that Pryor did not bring this suit in his official capacity. *See* McConnell Second Am. Compl. ¶ 18. At oral argument, Judge Henderson raised the question with Defendant-Intervenors' counsel whether Attorney General Pryor brought suit in his official capacity on behalf of Alabama. The colloquy was:

> JUDGE HENDERSON: Isn't the Alabama Attorney General, Bill Pryor, a plaintiff in the McConnell?
>
> COUNSEL: Yes, he is.
>
> JUDGE HENDERSON: Why isn't he, to the extent that that standing is needed, why doesn't he fill that?
>
> COUNSEL: Because I don't believe he's bringing the action in his capacity as a representative of the state.
>
> JUDGE HENDERSON: All right. I don't remember in the complaint.
>
> COUNSEL: I don't think the State of Alabama is a party in this case.
>
> JUDGE HENDERSON: Well, the state isn't, but he's not representing the State of Alabama.
>
> COUNSEL: I don't believe so, no.
>
> JUDGE HENDERSON: All right.

Tr. at 124-25. Plaintiffs registered no objection to this discussion and, therefore, the only conclusion to be drawn is that Mr. Pryor is not bringing suit in his official capacity on behalf of the State of Alabama.

Section 318: Prohibition of Contributions by Minors

Section 318 adds Section 324 to FECA, providing that:

> An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party.

BCRA § 318; FECA § 324; 2 U.S.C. § 441k. Section 318 is challenged by the McConnell Plaintiffs.

The Government maintains that this provision is subject to *Buckley*'s "closely drawn" scrutiny standard. Gov't Br. at 199. According to the Government, Section 318 serves the important governmental interest of preventing circumvention of contribution limits and is closely drawn to avoid unnecessary infringement of constitutional rights. *Id.* at 200-08. Plaintiffs disagree, arguing that since the provision works as a complete ban on contributions by minors to candidates and political party committees, it is subject to strict scrutiny. McConnell Pls.' Br. at 92. Plaintiffs maintain that even if exacting scrutiny is the appropriate standard, preventing circumvention is not a cognizable government interest in the campaign finance context, and that even if it were, Defendants have failed to show that Section 318 is tailored to serve that interest. *Id.* at 93.

Given the evidence presented in this case, I need not decide the appropriate standard of review, for even if exacting scrutiny were applied to the present situation, Defendants have failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important governmental interest.[188] Although it is clear that the FEC and Congress have been concerned for many years with the potential for campaign finance abuses through the use of minors' contributions,[189] Findings ¶¶ 3.1, 3.2, the evidence presented is insufficient to support government action that abridges constitutional freedoms.

Campaign finance laws prohibit anyone from making "a contribution in the name of another person or knowingly permit[ting] his name to be used to effect such a contribution," or "knowingly accept[ing] a contribution made by one person in the name of another person." 2 U.S.C. 441f. Donations made by minor children are specifically addressed in FEC regulations. *See* 11 C.F.R. 110.1(i)(2) (2002 revised ed.).[190] However, enforcing these provisions with respect to contributions by minors has been difficult due to the fact that FECA does not require reporting of a donor's age. *Id.* ¶ 3.9. The evidence also shows that when the FEC has discovered donations given by young children which raised suspicions, their investigations were stymied by the refusal of parents to allow interviews, constitutional privacy concerns, and parental and legal counsel influence. *Id.* ¶ 3.10.

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[188] This reason necessarily precludes discussion of whether the provision is narrowly tailored to meet an important governmental interest.

[189] The record also demonstrates that not all contributions to political campaigns made by minors are done by their parents in circumvention of campaign finance laws. *See, e.g.*, Findings ¶ 3.7.

[190] The regulations provide that contributions by minors that do not violate FECA's other provisions are permitted so long as

> (i)The decision to contribute is made knowingly and voluntarily by the minor child;
>
> (ii) The funds, goods, or services contributed are owned or controlled exclusively by the minor child, such as in-come earned by the child, the proceeds of a trust for which the child is the beneficiary, or a savings account opened and maintained exclusively in the child's name; and
>
> (iii) The contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or is not in any other way controlled by another individual.

11 C.F.R. 110.1(i)(2) (2002 revised ed.).

Perhaps due to these difficulties, the Government was able to provide the Court with only four instances where the FEC found contributions were made by parents in the name of their minor children in violation of existing campaign finance laws. *Id.* ¶ 3.8-3.8.4. Some of these investigations have been prompted by newspaper articles discussing contributions made by parents in their young children's names. *Id.* ¶ 3.5, 3.6. Therefore, although the record shows that the threat of circumvention in this manner exists, including statements from lawmakers that fundraising appeals include appeals for contributions from family members, *id.* ¶¶ 3.3, 3.4, the minimal evidence presented does not establish that circumvention of campaign finance laws by parents of minors supports the required governmental interest. If the Government had proffered a more robust record establishing that such corruption exists it likely would have succeeded in establishing this element of the analysis, given that all members of the Supreme Court agree "that circumvention is a valid theory of corruption." *Colorado II,* 533 U.S. at 456. The Government's failure to do so, however, dooms their arguments and Section 318 of BCRA.

IV. Title V: ADDITIONAL DISCLOSURE PROVISIONS

Section 504

For the reasons stated in Judge Leon's opinion, I concur that Section 504 is unconstitutional.

IV. CONCLUSION

For the reasons set forth in this Memorandum Opinion, I find Title I in its entirety consistent with the Constitution. Moreover, I conclude that BCRA's restrictions on electioneering communication as set out in Sections 201, 203, and 204 are constitutional. I also find Section 301 of BCRA constitutional. I further determine that Sections 213, 318, and 504 are unconstitutional. I concur with Judge Henderson's

discussion of Plaintiffs' standing with regard to BCRA's condition on the lowest broadcast unit charged, BCRA's increased contribution limitations, and BCRA's "Millionaire's Provisions."

For anyone who has great faith in the purity of this country's democracy, the factual record amassed in this case is bound to depress. The pre-BCRA campaign finance regime saw wealthy individuals, corporations, and labor unions routinely providing donations, far surpassing legal limitations, to the national party committees to influence federal elections. In some instances, this system compelled corporate entities to give massive amounts of nonfederal funds to the national party committees merely to stay on par with their competitors. Of greater concern, corporations and labor unions poured massive amounts of general treasury funds into electioneering communications designed to influence federal elections, despite longstanding federal policy against corporate and labor union general treasury funds being used for these purposes.

Judge Henderson criticizes my reasoning and conclusions as "treat[ing] a First Amendment with which [she is] not familiar." Henderson Op. at 5. My response is that my approach to adjudicating these cases and the constitutional challenges presented therein has been grounded in a textual analysis of *Buckley* and its progeny. My view of the First Amendment emanates from *Buckley*'s teachings and in resolving these cases I have continually returned to *Buckley* for insight and guidance.

Having spent much time reviewing the record submitted in this case, one thing is very clear: evidence of the wholesale evasion of FECA is not "anecdotal" or "beside the point." Rather, it is evidence of a regulatory regime in disarray. Without BCRA, the major provisions of the Federal Election Campaign Act designed to reduce the corrupting influence of large sums of money channeled into the political process are decimated. The clock will be turned back to close to 100 years of incremental and balanced campaign finance regulation.

Congress, which has concentrated on enacting a law that is true to *Buckley* to address these abuses, should not be left impotent to correct these glaring problems. In reading much of the legislative debate surrounding BCRA's passage, I am struck by the concern of Congress to abide by *Buckley*'s teachings. In my judgment, the fact that Congress was so cognizant of *Buckley* should give this three-judge panel great pause before reaching out to strike down wholesale provisions of BCRA. In declaring much of BCRA's core tenets facially unconstitutional, it is my belief that this panel's approach has strayed from the conservative, measured, and customary approach to adjudicating facial challenges that is demanded by the dictates of our constitutional tradition. Simply put, on the basis of the record assembled, the Constitution does not act as an impermissible barrier to the changes sought by our coordinate branches to improve the democratic process.

With the record firmly before it, the Supreme Court will review this three- judge panel's legal conclusions *de novo*. *Cf. Colorado II,* 533 U.S. at 458 n.21. The constitutional rights of those who participate in the election of federal officeholders are unquestionably of the highest order, but so too is the sanctity of the process that produces those public officials who participate in the governance of our democratic society.

APPENDIX

I. EXPERT REPORTS ON BCRA'S EFFECT ON POLITICAL ADVERTISEMENTS

Defendants have provided a number of expert reports to address the issue of whether BCRA is overbroad in terms of the types of advertisements it affects. *See, e.g.*, Jonathan S. Krasno & Daniel E. Seltz, Buying Time: Television Advertising in the 1998 Congressional Elections (2000) ("*BT 1998*") [DEV 47]; Craig B. Holman & Luke P. McLoughlin, Buying Time 2000: Television Advertising in the 2000 Federal Elections (2001) ("*BT 2000*") [DEV 46]; Goldstein Amended Expert Report (Oct. 2, 2002) ("Goldstein Expert Report") [DEV 3-Tab 7]; Jonathan S. Krasno & Frank J. Sorauf, Evaluating the Bipartisan Campaign Reform Act (BCRA) [DEV 1-Tab 2] ("Krasno & Sorauf Expert Report"). These studies have been subject to various criticisms, which have been responded to, and I set forth these arguments below.

A. *The CMAG Data Set*

1. All of these studies relied on data from the Campaign Media Analysis Group ("CMAG"), and for that reason, the Court considers it useful to discuss their underlying data source which becomes a point of criticism for Plaintiffs' expert, Dr. James L. Gibson, before discussing the studies' themselves. Dr. Gibson, Plaintiffs' expert witness, produced "An Analysis of the 1998 and 2000 Buying Time Reports," criticizing both Buying Time studies. James L. Gibson, Expert Report, An Analysis of the 1998 and 2000 Buying Time Reports (Sept. 30, 2002) ("Gibson Expert Report") [1 PCS].

2. CMAG tracks political television advertising in the top 75 media markets, containing more than 80 percent of U.S. residents. *BT 1998* at 6-7 [DEV 47]; *BT 2000* [DEV 46] at

18; Gibson Expert Report at 7 [1 PCS]; *see also* Goldstein Dep. (Vol. 1) at 47-49 [JDT Vol. 8] (describing how CMAG compiles its data). These 75 markets are geographically dispersed. Goldstein Rebuttal Report at 23 [DEV 5-Tab 4]; *see also* Goldstein Expert Report App. G at 1-2 [DEV 3-Tab 7] (listing the 75 markets monitored by CMAG). In 1998-1999 New York was the largest media market with 6,812,540 television households representing 6.854 percent of all television households. *See* Dr. James L. Gibson's Rebuttal to the Expert Reports of Kenneth M. Goldstein and Jonathan S. Krasno and Frank J. Sorauf (Oct. 7, 2002) ("Gibson Rebuttal Report") Ex. 2 at 1 [2 PCS] (listing 1998-1999 Nielson estimates of media markets in order of size). Shreveport was the seventy-fifth largest media market, with 370,990 television households, or 0.373 percent of all television households. *Id.* at 2. For each market, CMAG monitors the four major broadcast networks (ABC, CBS, NBC, and Fox), as well as 42 national cable networks. Goldstein Expert Report App. G at 2-3 [DEV 3-Tab 7]. The CMAG data sets include two types of data. First, for every political advertisement aired, CMAG provides a transcript of the audio portion of the advertisement and a storyboard consisting of a still capture of every fourth second of the video portion of the advertisement. Goldstein Expert Report at 6 [DEV 3-Tab 7]. Second, CMAG provides data on each airing of an advertisement, including time, length, station, show and estimated cost. *Id.*

3. The CMAG data set has some "gaps." Goldstein Dep. (Vol. 1) at 52 & Ex. 9 at 16. The CMAG does not monitor local cable advertising in the 75 markets it covers. Gibson Expert Report at 8 [1 PCS]; Gibson Rebuttal Report at 24 [2 PCS]. The 1998 and 2000 CMAG data sets did not cover advertisements broadcast in the nation's 140 smallest media markets, which are more rural than the 75 captured by CMAG. Goldstein Dep. (Vol. 2) at 9-10 & Ex. 9 at 16 [JDT Vol. 8]. For those markets covered, the evidence shows not

all advertisements are captured by CMAG. Dr. Goldstein participated in a validity study of the CMAG data by comparing the CMAG data with a sampling of invoices from eight television stations. *Id.* Ex. 9 at 16. The results show that for seven of the stations, 97 percent or more of the advertisements listed on their invoices correlated with the CMAG data. *Id.* at 16-17 and 28 (Tbl. 2). For one station, however, 20 percent of the advertisements accounted for in the station's invoices could not be found in the CMAG data. *Id.* Dr. Goldstein surmises that this could be the result of inadequate record keeping by the station as well as CMAG omissions. *Id.* at 17 n.3. Dr. Gibson, for the first time in his rebuttal report, finds this to be a major shortcoming of the CMAG data. Gibson Rebuttal Report at 5-6 [2 PCS]. He deduces from these missed advertisements that CMAG "likely missed 1,764 ads," or 5.04 percent of these eight stations' airings, and using these figures estimates "that 48,864 airings that in fact were broadcast [nationwide] . . . were not captured by the CMAG methodology." *Id.* (applying the 5.04 percent figure to the total number of advertisements captured by CMAG). Dr. Gibson assumes, without any factual support, that CMAG has missed the same percentage of advertisements in all the covered media markets. Moreover, although Dr. Gibson acknowledges that "we do not know any of the characteristics of these . . . missing airings," he nonetheless hypothesizes, without any factual research or support, that the advertisements missed are most likely those that "did not have a clear 'political purpose' that could be discerned by the CMAG analysts." *Id.* at 6; *but see* Goldstein Dep. (Vol. 2) at 12 [JDT Vol. 8] (stating that commercials provided to CMAG by Competitive Media Reporting ("CMR")[191] is "overly inclusive," including "ads for the Red Cross, [and] ads for electric companies"). Another shortcoming of the CMAG data is that although it provides 100 percent of the advertisements' audio, it only provides snapshots at four second intervals of the advertisements' video. As such, twenty-five percent of the advertisement storyboards for the 1998 data set do not display the name of the group sponsoring the advertisement. Goldstein Dep. (Vol. 2) at 21 [JDT Vol. 8]; Gibson Expert Report at 8 [1 PCS]. Another perceived shortcoming of CMAG is that it tracks markets not electoral districts, and is unable to distinguish between different versions of advertisements that are identical with the exception of the candidate or officeholder's name (also known as "cookie cutter" advertisements). Gibson Expert Report at 7 [1 PCS]; Gibson Rebuttal Report at 7 [2 PCS]; Goldstein Dep. (Vol. 2) at 113 [JDT Vol. 8].

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[191] CMAG gets [its] data from Competitive Media Reporting, a company that tracked advertising in the top 75 markets in 1998 and 2000, but now tracks advertising in the top 100 markets. Goldstein Dep. (Vol.1) at 47

4. In terms of CMAG's underinclusiveness, Plaintiffs' expert, Dr. Gibson, "presents no evidence or reason to believe that . . . including advertisements from the markets not covered would change [the] results [of studies based on the data]." Rebuttal Report of Dr. Arthur Lupia (Oct. 14, 2002) ("Lupia Expert Report") at 28 [DEV 5-Tab 5]; *see also* Goldstein Rebuttal Report at 24 [DEV 5- Tab 4] ("Moreover, Professor Gibson does not offer any reason to believe that the ads run on local cable advertising are significantly different than the broadcast ads captured by CMAG."). Dr. Gibson did not suggest that "CMAG's inability to capture local cable spots introduced any systematic bias into the data." Goldstein Rebuttal Report at 24 [DEV 5-Tab 4]. Most importantly, there is no evidence that Dr. Goldstein's efforts to identify the appropriate electoral district for advertisements in general or for "cookie cutter" advertisements in particular were flawed or failed to correct these CMAG deficiencies. Goldstein Rebuttal Report at 25-27 [DEV 5-Tab 4]; *see also* Goldstein Expert Report App. E at 3 [DEV 3-Tab 7] (detailing the process of pairing "cookie cutter" advertisements with the appropriate electoral district); Seltz Dep. at 80-84 [JDT Vol. 28] (detailing how the *Buying Time 1998* authors dealt with the "cookie cutter" issue, including consulting political contacts, experts, newspaper articles, and geographic airing of the advertisements). One of Defendants' experts characterized the filling in of this missing data as "a straightforward- though admittedly tedious-exercise to systematically compare the added data in the *Buying Time*/Goldstein database- against available records." Lupia Expert Report at 30 [DEV 5-Tab 5]. According to Dr. Goldstein, the "snapshot" style of the CMAG storyboards does not compromise the "ability to accurately analyze the content of ads, especially because CMAG provides a complete transcription of the audio portion of the ad along with the video captures." Goldstein Rebuttal Report at 24-25 [DEV 5-Tab 4]. Furthermore, Dr. Goldstein states, "there is no reason to believe that there in [sic] any systematic bias associated with the CMAG terminology capturing only one video frame every four seconds." *Id.* at 25. As for the 25 percent of 1998 storyboards which did not indicate the advertisement's sponsor, the *Buying Time 1998* authors were able to remedy this problem by referring to the "CMAG's original coding (which accurately provides the sponsor of the ad in well over 95 percent of cases), examining the content of the ad, and, in a few cases, by phoning television stations." *BT 1998* [DEV 47] at 8.

5. Defendants' expert Goldstein explains that CMAG data is relied on by "[c] andidates and political parties interested in monitoring elections across the nation (including both the Democratic and Republican Executive Committees, not to mention several of the plaintiffs in this litigation)." Goldstein Rebuttal Report at 23-24 [DEV 5-Tab 4]. Dr. Goldstein states that CMAG data has served as the basis for a number of his articles, "which have been published in the top-rank of peer-reviewed political science journals." *Id.* at 39. Dr. Goldstein also states that "[d]uring the peer-review process for these

articles, none of the academic reviewers shared Professor Gibson's concerns about the validity or reliability of the CMAG databases," which include reviews conducted by two of "the three most prestigious journals in [the political science] discipline." *Id.* at 39 & n.21 (quoting Gibson Expert Report at 2 [1 PCS]). Furthermore, Dr. Goldstein notes that during the 2000 and 2002 election cycles, the Wisconsin Advertising Project, which he heads, has provided CMAG data to journalists covering political advertising in real time. *Id.* Although "[m]uch of the data we report can cast the election strategies of particular candidates, parties or interest groups in an unfavorable light . . . . at no time have we been challenged on the accuracy of the factual data we have reported on the content and targeting of political advertising." *Id.* at 39-40. Dr. Gibson does not contest these statements in his rebuttal report, and does not suggest a better source of data for this type of study. *See* Gibson Expert Report at 6-9 [1 PCS]; Gibson Rebuttal Report at 3-7 [2 PCS].

B. *The Annenberg Public Policy Center Reports*

1. The Annenberg Public Policy Center ("Annenberg Center") "was established by publisher and philanthropist Walter Annenberg in 1994 to create a community of scholars within the University of Pennsylvania that would address public policy issues." Annenberg Report 1997 at 2 [DEV 38-Tab 21].

2. "For much of the last decade the Annenberg Center has been tracking the growth of broadcast issue advocacy advertising." Annenberg Report 2001 at 1 [DEV 38 Tab-22]. The Annenberg Center notes that to "the naked eye, these issue advocacy ads are often indistinguishable from ads run by candidates. But in a number of key respects, they *are* different. Unlike candidates, issue advocacy groups face no contribution limits or disclosure requirements. Nor can they be held accountable by the voters on election day." Annenberg Report 1997 at 3 [DEV 38 Tab-21].

3. The Annenberg Report 1997 reported that more than two-dozen organizations, including "political parties, labor unions, trade associations and business, ideological and single-issue groups" spent an estimated $135 million to $150 million worth of issue advertisements during the 1995-1996 campaign, compared to the $400 million spent on advertising by the federal candidates running for office. Annenberg Report 1997 at 3 [DEV 38 Tab-21]. Almost 86.9 percent of these advertisements mentioned a candidate for office or public official by name. *Id.* at 8. "Most" of the groups running these advertisements "declined to make known the identities of their donors." *Id.* at 4.

4. The Annenberg Center's 1998 report estimates that at least 77 groups ran issue advertisements during the 1997-1998 election cycle costing between $275 and $340 million." Annenberg Report 1998 at 1 [DEV 66-Tab 6]. Overall, 53.4 percent of these advertisements mentioned candidates by name, although 80.1 percent of those advertisements run in the final two months of the campaign mentioned candidates. *Id.*

5. As also discussed *supra*, the Annenberg Report 2001 finds that during the 1999-2000 election cycle 130 groups aired 1,100 distinct advertisements, at an estimated cost of over $500 million. Annenberg Report 2001 at 1 [DEV 38-Tab 22]. The report found that 60 percent of distinct radio and television issue advertisements (689 out of 1,139) aired from January 1, 1999 to November 7, 2000, were broadcast for the first time during the final two months of the election cycle. *Id.* at 12. In addition, 73 percent of all the distinct advertisements mentioned a candidate. *Id.* at 14. In terms of television advertisements, the closer the advertisement was aired to election day, the more likely it contained a candidate mention. *Id.* at 15. Between March 8 and August 31, 2000, candidates were mentioned in 72 percent of the television issue advertisements aired. *Id.* After August, 95 percent of the

television commercials broadcast mentioned a candidate. *Id.* The report found that during the 2000 election cycle, 89 percent of unique advertisements were "candidate- centered," meaning they made "a case for or against a candidate" without using express advocacy. *Id.* at 13, 14.

6. The Annenberg Center reports were relied on by Members of Congress, cited to during the Senate debate, and are relied on by Plaintiffs in this litigation. *See, e.g.*, 147 Cong. Rec. S2456 (daily ed. March 19, 2001) (statement of Sen. Snowe) (citing Annenberg Report 2001); Findings ¶ 2.2.1 (Lupia)

C. *The Goldstein Expert Report*

Dr. Goldstein, who was involved in assembling the data sets used in both *Buying Time* studies, produced his own expert report for the purpose of this litigation. *See generally* Goldstein Expert Report. Since Dr. Goldstein did not participate in the writing of either *Buying Time* studies or play a role in "selecting the conclusions that the authors of these reports chose to draw from the database," Goldstein Rebuttal Report at 3-4 [DEV 5-Tab 4], his report constitutes a separate assessment of the data collected. Furthermore, the database he works from differs from that provided to the *Buying Time 2000* authors, as it has corrected omissions and errors discovered after *Buying Time 2000* was completed. *Id.* at 4-5. Dr. Goldstein's study produces nine principal conclusions. Other than his problems with the CMAG database which underlies the study, *see supra* App. ¶ I.A, Dr. Gibson leaves most, but not all, of the conclusions in Dr. Goldstein's Expert Report unchallenged. *See* Gibson Rebuttal Report [2 PCS]. Dr. Goldstein's conclusions and Dr. Gibson's criticisms are discussed *infra*.

1. *Scope of Political Advertising*. The following conclusions are notrebutted, except to the extent that they rely on CMAG data. *See supra*, App. ¶ I.A. In the 2000 election

cycle (from January 1, 2000 through election day), interest groups accounted for 16 percent of all political television advertisements at an estimated cost of $93 million.[192] Goldstein Expert Report at 8. Political parties accounted for 27 percent of the political commercials at an estimated cost of $162 million, while candidates accounted for the remaining 52 percent of advertisements at an estimated cost of $338 million. *Id.* Compared to the 1998 campaign, the increase in interest group spending was the most dramatic, "rising from approximately $11 million in 1998 to an estimated $93 million in 2000." *Id.* at 9; *see also id.* at 10 (Tbls. 1A-B) (showing the increase in candidate spending (from approximately $136.6 million to approximately $338.4 million) and in political party spending (from approximately $25.6 million to $162.3 million)). The majority of interest group advertising in 2000 was "not sponsored by PACs, and fell outside FECA regulation." *Id.* at 8. According to Dr. Goldstein's figures, interest group PACs spent roughly $2 million on 3,688 political advertisements in federal races in 2000, while interest group non-PAC expenditures constituted $90 million spent on 129,647 commercials. *Id.* at 10 (Tbl. 1B).

2. *The Role of Interest Groups and Political Parties in Political Television Advertising for the 2000 Presidential Campaign:* The following conclusions are not rebutted, except to the extent that they rely on CMAG data. *See supra*, App. ¶ I.A. In terms of the presidential campaign, political parties purchased 41 percent of television advertisements aimed at the 2000 presidential race, while candidates

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[192] Dr. Goldstein notes "[t]hese figures ... underestimate television expenditures because CMAG estimates only cover markets serving 80 percent of the nation's population and make no attempt to measure the increased cost of advertising during the peak seasons of political campaigns when the demand for television advertising time pushes up spot prices." Goldstein Expert Report at 8 [DEV 3-Tab 7].

accounted for 38 percent of the commercials, and interest groups eight percent. Goldstein Expert Report at 11 & n.11 [DEV 3-Tab 7] (the remaining advertisements were coordinated expenditures). Interest group advertising in certain "battleground" states,[193] however, "rivaled that of the candidates or parties." *Id.; see also id.* at 12 (Tbl. 2). For example, in Missouri, during the last 60 days of the election, "interest groups ran almost three-quarters as many ads" identifying a candidate as did the actual candidates. *Id.* at 11. In House elections, interest group advertisements identifying a candidate and running in the last 60 days of the campaign accounted "for 17 percent of total House ad broadcasts during the 2000 election cycle," while political parties provided 22 percent of advertisements in these races, and candidates 60.6 percent. *Id.* at 13. Dr. Goldstein finds that 99.8 percent of political party-financed television advertising mentioned or depicted a candidate, while only 1.8 percent of the ads "even mentioned the name of the party and many fewer promoted the candidate by virtue of his or her party affiliation." *Id.*[194]

3. *The BCRA Universe of Interest Group Electioneering:* The following conclusions are unrebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. Dr. Goldstein finds that 35 interest groups broadcast commercials on television during the last 60 days of the 2000 election that mentioned a candidate. Goldstein Expert Report at 13 [DEV 3-Tab 7]. These electioneering advertisements were aired 59,632 times at an estimated cost of approximately

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[193] Dr. Goldstein determined what states constituted "battleground states" "based on a professional review of various media sources," such as CNN.com. Goldstein Expert Report at 12 n.12 [DEV 3-Tab 7].

[194] This assessment does not include the "tag lines" included in most advertisements identifying the commercial's sponsor that can include the political party's name. Goldstein Expert Report at 13 n.14 [DEV 3-Tab 7].

$40.5 million. *Id.* at 14; *see also id.* at 14-15 (Tbl. 3).[195] The top ten of these groups accounted for 87 percent of these expenditures. *Id.* at 13.

4. *The "Magic Words" Test:* The following findings are not rebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. The so-called "magic words" test derives from *Buckley*'s legal standard for determining whether an advertisement is designed to persuade citizens to vote for or against a particular candidate. Such advertisements were termed "express advocacy" by the Supreme Court, and defined as containing words such as "elect," "defeat" or "support." *See supra* at 211. Dr. Goldstein notes that all candidate-sponsored advertisements must be paid for with federal funds and are considered to be electioneering, regardless of whether they meet the express advocacy test. Therefore, if the use of express advocacy terminology is "an accurate way to classify an ad, then advertisements clearly and obviously created and aired to influence elections would be expected to employ such magic words." Goldstein Expert Report at 16 [DEV 3-Tab 7]. Dr. Goldstein finds, however, that 11.4 percent of the 433,811 advertisements aired by candidates met the express advocacy test. *Id.* Conversely, 88.6 percent of candidate advertisements in 2000 "were technically undetected by the *Buckley* magic words test." *Id.* This result demonstrates to Dr. Goldstein "that magic words are not an effective way of distinguishing between political ads that have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue." *Id.*

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[195] This result only reflects the 80 percent of households covered by CMAG, and according to Dr. Goldstein "[n]o comprehensive information is available for the balance of the markets or for ads airing on local cable stations." Goldstein Expert Report at 14 n.15 [DEV 3-Tab 7].

5. *Temporal Distribution of Interest Group-Financed Television Advertisements Which Mention a Candidate:* The following conclusions are unrebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. Dr. Goldstein determines that the "CMAG database provides empirical evidence of a strong positive correlation between [advertisements' reference to a candidate and the proximity in time of their broadcast to the election] and consequently of their validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office." Goldstein Expert Report at 17 [DEV 3-Tab 7]. He finds that interest group advertisements that "mention or depict a candidate tend to be broadcast within 60 days of the election," while those which do not "tend to be spread more evenly over the year." *Id.* Specifically, his calculations show 78 percent of interest group advertisements mentioning a candidate for federal office aired within 60 days of the election, while 18 percent of those that did not mention a candidate were aired during that time. *Id.* (also finding 85 percent of advertisements mentioning a presidential candidate and 76 percent of commercials mentioning a House candidate aired within 60 days of the election). In addition, Dr. Goldstein finds the distribution of those advertisements mentioning candidates for federal office to be "closely correlated to the distribution of electioneering communications broadcast by candidates and political parties." *Id.* For example, 76 percent of interest group advertisements mentioning a House candidate were broadcast within 60 days of the election, as compared to 79 percent of such advertisements run by candidates, and 94 percent of those purchased by political parties. *Id.* For Senate elections, 74 percent of interest group advertisements that mentioned a candidate were run within 60 days of the election, as were 67 percent of candidate and 81 percent of political party-sponsored commercials. *Id.* at 17-18; *see also id.* at 19 (Tbl 4).

6. *Geographic Distribution of Interest Group-Sponsored Advertisements Which Mention a Candidate and are Aired within 60 Days of an Election:* The following conclusions are unrebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. Dr. Goldstein finds that interest group advertisements that mentioned a candidate and were broadcast within 60 days of the 2000 election "were highly concentrated in states and congressional districts with competitive races." Goldstein Expert Report at 20 [DEV 3-Tab 7]. For Senate races, 89.2 percent of these commercials ran in competitive races, including Michigan where interest groups accounted for "22 percent of the total ads broadcast in the race." *Id.* Political parties were similarly focused, running 90.6 percent of their ads in the competitive states. *Id.* at 21. Four states (Michigan, Virginia, Washington, and Florida) attracted "77 percent of the ads broadcast by interest groups [aimed at Senate races]; political parties broadcast 65 percent of their ads in these four states." *Id.* at 20; *see also id.* at 21 (Table 5). House races demonstrated the same pattern, with 85.3 percent of interest group "electioneering" advertisements, and 98.2 percent of political party "electioneering" advertisements broadcast in competitive districts. *Id.* at 21; *see also id.* at 22-23 (Table 6). In some competitive congressional districts, interest groups ran more advertisements than the candidates or their parties. *Id.* at 22. Therefore, concludes Dr. Goldstein, the "CMAG database provides strong evidence that the interest group ads covered by BCRA are targeted at competitive electoral contests and closely parallel political party ads in their geographic distribution." *Id.* at 24.

7. *Coders' Perceptions of Interest Group Television Advertisements:* Dr. Goldstein had students code each interest group political television advertisement aired in the 2000 campaign. They could code the commercials' purpose as either to "'generate support or opposition for candidate,' or to 'provide information or urge action,'" and "were also given

the option of 'unsure/unclear.'" Goldstein Expert Report at 24 & n.20 [DEV 3-Tab 7]. Dr. Goldstein finds that "[t]he coders' perceptions provide evidence that BCRA's definition of Electioneering Communication accurately captures those ads that have the purpose or effect of supporting candidates for election to public office." *Id.* at 26. The coders found 97.7 percent of the 60,623 interest group sponsored television advertisements that mentioned a candidate and were broadcast within 60 days of an election as "electioneering," or supporting or opposing a candidate. *Id; see also id.* at 25 (Tbl. 7). Dr. Goldstein finds this result particularly persuasive given the fact that the students coded one-third of all interest group television advertisements run over the course of the 2000 campaign to be genuine issue advertisements. *Id.* at 26. Of the 45,001 advertisements deemed to be "genuine issue advertisements" by the coders, 3.1 percent would have been covered by BCRA in that they were run within 60 days of the election and identified a candidate. *Id.* at 27.[196] Dr. Goldstein acknowledges that in *Buying Time 2000*, and an article he co-authored with Dr. Jonathan Krasno, fewer than six advertisements were said to be unfairly captured by BCRA. *Id.* at 26 n.21. In those other publications, "certain of these six ads-particularly those as to which there was disagreement among the student coders-were ultimately treated as electioneering. In fact, [Dr. Goldstein's] own judgment is that five of these six ads were clearly intended to support or oppose the election of a candidate .... However, in this report, [Dr. Goldstein] chose[]to take the most conservative approach and count all six as Genuine Issue Ads." *Id.* However, Dr. Goldstein now acknowledges that a "most

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[196] Dr. Goldstein contends that this "percentage overstates the proportion of all Genuine Issue Ads covered by BCRA, because it does not take into account the unregulated ads run in non-election years during a single Congressional Term, such as 1999." Goldstein Expert Report at 27 n.22 [DEV 3-Tab 7].

conservative" estimate would include 6 more advertisements listed in footnote 8 of his Rebuttal Report. Goldstein Dep. (Vol. 2) at 160 [JDT Vol. 8]. Adding these six advertisements results in the finding that 17 percent of the advertisements run during the last 60 days of the 2000 campaign identifying candidates were genuine issue advertisements. *Id.* at 169; *see also infra* App. ¶ I.D.8.c (discussing these advertisements in more detail).[197] Dr. Gibson finds fault with the fact that this conclusion relies on a methodology he finds problematic. He insists the conclusion is flawed by focusing "on the highly subjective coding" of the student coders to determine the purpose of the issue advertisements (*i.e.* to promote a candidate or to urge action on an issue). Gibson Rebuttal Report at 20 [2 PCS]; *see also* Holman Dep. at 73 [JDT Vol. 10] (noting that the question asks for a subjective assessment). As discussed *infra* in connection with the *Buying Time* studies, Dr. Gibson also believes that the data shows that a large majority of the advertisements barred by BCRA "have policy matters as their primary focus," thereby destroying the distinction he draws between electioneering and genuine issue advocacy. Gibson Rebuttal Report at 20 [2 PCS]; *see also infra* App. ¶ I.D.8.e.

8. *The Effectiveness of Broadcasting Issue Ads Close to an Election:* Dr. Goldstein's final conclusion is that if an interest group is genuinely interested in promoting an issue, the least desirable time to air such an advertisement is in the final 60 days of an electoral campaign. Goldstein Expert Report at 32 [DEV 3-Tab 7]. This finding runs counter to Plaintiffs' argument that BCRA "may harm interest groups by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics." *Id.* Dr. Goldstein first comments that "while there is evidence that interest in politics and *elections* rises as

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[197] This revelation casts doubts on some of Dr. Goldstein's other conclusions which are therefore not recounted here.

Election Day approaches, there is absolutely no evidence to support the position that interest in *public policy* issues rises as well during that time." *Id.* (emphasis in original). Second, he notes that "communication theory has concluded that advertising is likely to be most effective (at informing or persuading) when viewers are exposed to one-sided flows of information in isolation from other advertising." *Id.* (citing William McGuire, The Myth of Massive Media Impact: Savagings and Salvagings, 1 Public Communication and Behavior 173 (1986); John Zaller, The Nature and Origins of Mass Opinion (1992)). Dr. Goldstein notes that since the last two months of an election campaign is when most political advertisements are aired (64.2 percent of all political advertisements run in 2000 were run in the campaign's final 60 days), "an individual interest group's message on a public policy issue is likely to become lost" if aired during that period. *Id.* Dr. Goldstein also posits that "partisan attachments . . . harden during the last two months of a campaign" which makes it "more difficult to persuade otherwise open-minded viewers of the merits of an interest group's policy stance." *Id.* at 32-33 (citing John Zaller, Nature and Origins of Mass Opinion (1992)). Finally, running issue advertisements close to an election, besides being less effective at conveying their messages, is "also less cost-effective, since the price of scarce television and radio air time is higher near an election than during the rest of the year." *Id.* at 33. Dr. Goldstein argues his theory is bolstered by the data from his study. Interest group advertisements not mentioning a candidate are spread over the course of the calendar year and are not concentrated within the last two months of a campaign. In 2000, 17.7 percent of such advertisements were aired in the final 60 days of the election campaign, slightly more than the 16.4 percent "which would have run if the ads had been equally distributed throughout the year." *Id.* at 33; *see also id.* at 31 (Table 9). In contrast, during the months of April through June 2000, 45 percent of

such issue advertisements were aired, "as against an expected 25 percent if the ads were spread evenly throughout the year." *Id.* Dr. Goldstein believes this concentration is "a likely result of groups turning on the heat to pass or defeat bills before Congress adjourned for the summer." *Id.* Therefore, Dr. Goldstein finds that the data confirms his theory that the final two months of an election campaign "is probably the worst time for an interest group to educate the public on its particular issue." *Id.* However, Dr. Gibson is critical of this conclusion. Gibson Rebuttal Report at 26 [2 PCS]. According to Dr. Gibson, political psychologists, like William McGuire (whose work Dr. Goldstein cites), have concluded "that to persuade someone involves two steps. First, one must get the attention of the person one is attempting to persuade. Second, one must overcome the strength of existing attitudes if the attempt at persuasive communication is to result in attitude change." *Id.* Given that "those with strong attitudes tend to pay attention to political communications while those with weak political attitudes tend to ignore them . . . . [t]hose most easily reached are least easily changed; those most easily changed are those most difficult to reach." *Id.* Since those with "weak attitudes" tend to pay attention during "the most extreme circumstances," the period leading up to the election provides the window in which to communication with these difficult to reach, but easily persuaded individuals. *Id.* at 27. Dr. Gibson also rejects the argument that issue advertising close to an election is unproductive because partisan allegiances harden as elections approach. *Id.* He states that this line of reasoning leads to the strange conclusion that "candidates should abandon advertising as the election approaches since these hardened attitudes are difficult to convert." *Id.* Dr. Gibson points out that "that does not happen, since, as the election approaches, candidates try to reach an even greater percentage of marginal voters, who have little interest in politics, and relatively pliable issue views." *Id.*

D. *Buying Time Studies*

1. The Brennan Center for Justice at New York University Law School ("Brennan Center") produced two studies examining television advertising in election campaigns. *See BT 1998* [DEV 47]; *BT 2000* [DEV 46]. The Brennan Center is "primarily a law firm that also does a great deal of research in a variety of social science issues that includes campaign finance along with criminal justice and other electoral issues and poverty issues." Holman Dep. at 10 [JDT Vol. 10]. The Brennan Center was involved in the crafting of BCRA and provided analysis of issues being debated in Congress to legislators, the media and the public. *Id.* at 11. The Center also put together a letter signed by 88 First Amendment scholars, concluding that the McCain-Feingold bill was constitutional. *Id.* at 19 & Ex. 3. Representatives of the Brennan Center testified in favor of the McCain-Feingold bill, *id.* at 22, and during Senate debate on the legislation, Senators cited to *Buying Time* data and Brennan Center analyses. Holman Dep. Ex. 3 at 2 [JDT Vol. 10].

2. The Pew Charitable Trust funded both *Buying Time* studies. *See BT 1998* [DEV 47]; *BT 2000* [DEV 46]. The Brennan Center's funding proposal for *Buying Time 1998* states that the study had an academic purpose, but would also be used "to fuel a continuous and multi-faceted campaign to propel reform forward." Holman Dep. Ex. 4 at 2 [JDT Vol. 10]. The proposal painted the study as part of a strategy to overcome the "obstacles to reform," and noted that the first step in achieving the goal was "to develop a reliable source of information on the nature of the problem." *Id.* at 7. The Brennan Center proposed a two-phased research plan for *Buying Time 1998*. Krasno Dep. Ex. 4 at 1 [JDT Vol. 14]. The first phase, proposed to cost $200,000, entailed acquiring data from CMAG, "adapt[ing] it so that it might be easily used, and us[ing] it to develop a strategy for responding to the threat posed by issue advocacy." *Id.* at 1, 3. The second

phase, estimated to require $800,000 to complete, would "focus on convening a formidable group of scholars and activists to create policy recommendations and reports, as well as . . . publiciz[ing] these activities on Capitol Hill and beyond." *Id.* at 3. Whether or not the study would proceed to the second phase, according to the proposal, would "depend on the judgment of whether the data provide[d] a sufficiently powerful boost to the reform movement." *Id.* at 6. In April or May of 2000, Dr. Kenneth Goldstein of the University of Wisconsin, who had worked on the data set for *Buying Time 1998* petitioned the Pew Center for another grant. Goldstein Dep. (Vol. 1) at 29 [JDT Vol. 8]. His request stated that he was "happy to work with others in the policy community to make sure that our study is designed and executed in ways that help move the reform ball forward." Goldstein Dep. (Vol. 1) at 37 & Ex. 6 at 5 [JDT Vol. 8].

3. Mr. Seltz, co-author of *Buying Time 1998*, states that there were a number of purposes behind the study, but that "the primary purpose was to contribute to the body of knowledge about campaign finance reform and specifically issue advocacy . . . and to fill what we viewed to be an empirical void in the literature about issue advocacy. Seltz Dep. at 22 [JDT Vol. 28]. "An independent but related purpose . . . was indeed to provide information to . . . proponents of campaign finance reform to help them fashion new and better arguments for reform, but arguments that would be based on research that was verifiable, checkable, transparent, reproducible." *Id.* Mr. Holman, a principal co-author of *Buying Time 2000*, did not approach the project with the purpose of producing results that would support campaign reform and had never seen the grant proposal submitted to the Pew Charitable Trust. Holman Dep. at 25-26 [JDT Vol. 10]; *see also id.* at 29-30 ("I was mostly excited about the political science aspect of [the study] . . . . It was not clear at any point and never explained to me exactly what sort of policy direction that would go in.").

4. Dr. Kenneth Goldstein provided assistance in processing and coding data for the *Buying Time* studies. Goldstein Rebuttal Report at 6 [DEV 5-Tab 4]. As part of this effort, he merged CMAG's two data sets to produce "a single, comprehensive data set." *Id.* He also had university students (at the University of Arizona for *Buying Time 1998* and the University of Wisconsin for *Buying Time 2000*) "assess[] . . . the content, tone, issues addressed, whether the ads mentioned a political candidate or provided a toll-free number to call, etc. . . . In addition to collecting certain specific information concerning each storyboard reviewed, the study also asked coders: 'In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?"' Goldstein Expert Report at 7 [DEV 3-Tab 7]. Advertisements that provided information or urged action on a bill or issue were labeled "genuine issue ads" in both studies, whereas those communications that generated support or opposition for a particular candidate were referred to as "sham issue ads" in *Buying Time 1998, see, e.g., BT 1998* [DEV 47] at 87, and "electioneering issue ad" in *Buying Time 2000, see, e.g., BT 2000* [DEV 46] at 30. Each *Buying Time* database consists of 40 million data points. *Id.* at 37.

5. As noted *supra,* App. ¶ I.A, Dr. Gibson criticizes the CMAG data underlying both reports. Dr. Arthur Lupia was asked by the Brennan Center to evaluate Dr. Gibson's Expert Report and provided a report detailing his findings. *See generally* Lupia Expert Report.

6. *Buying Time Findings*

a. *Buying Time 1998* drew a number of conclusions with regard to the nature and effect of political advertising in the United States. The study's main findings include:

- Four percent of candidate advertisements used "express advocacy" terms. *BT 1998* [DEV 47] at 9. • The proportion of issue advertisements mentioning a

candidate rises as the date of the election approaches. In July and August 1998, 61 percent of issue advertisements mentioned a candidate. By September, the percentage reached 82 percent and for the remainder of the campaign remained at 82 percent or higher, reaching a peak of 97 percent in the first half of October. *Id.* at 87, 103 (Figure 4.15).

- Forty-one percent of issue advertisements that provided information or urged action appeared within 60 days of the election, but only two of those advertisements, or seven percent, referred to a candidate. *Id.* at 109.

b. *Buying Time 2000*'s key findings from the 2000 election cycle included:

- Seven percent of all political advertisements contained express advocacy terms. *BT 2000* [DEV 46] at 73. Candidates used express advocacy terminology in 10 percent of their ads, *id.* at 15, 29, while political parties and interest groups used such terms approximately two percent of the time, *id.* at 73.

- "Genuine issue ads" (those urging action on a public policy or legislative bill) were "rather evenly dispersed throughout the year, while group-sponsored electioneering ads [which promote the election or defeat of a federal candidate] make a sudden and overwhelming appearance immediately before elections." *Id.* at 56.

- The study found that if BCRA had applied to the 2000 campaign, three genuine issue ads (which aired 331 times) would have fallen within the Act's definition of "electioneering communication." *Id.* at 73. Put another way, of the advertisements run within 60 days of the 2000 election which also depicted a candidate, 99.4 percent constituted electioneering advertisements, while 0.6 percent were genuine issue advertisements. *Id.* at 72 (Figure 8-2).

7. *Criticism of Buying Time 1998*

a. Plaintiffs' expert, Dr. James L. Gibson, while leveling various criticism at both *Buying Time* studies, does not dispute that express advocacy words "are rarely used in political advertising, or that group sponsored ads that mention candidates tended to be concentrated before an election." Goldstein Expert Report at 38-39 [DEV 3-Tab 7]; *see also* Lupia Expert Report at 9 [DEV 5-Tab 5]; Gibson Expert Report at 11 [1 PCS] ("Entirely objective characteristics of the ads . . . present few threats to reliability."). Neither does he challenge the conclusions that advertisements sponsored by political parties and interest groups comprise a significant and increasing portion of political advertising broadcast in federal races. Lupia Expert Report at 9 [DEV 5-Tab 5].

b. Dr. Gibson states that "*Buying Time 1998* should not be accepted as the product of scientific inquiry, but is instead policy advocacy written by people with a strong ideological commitment to a particular position on campaign finance reform." Gibson Expert Report at 3 & n.3 [1 PCS] (citing the research proposal and co-author Daniel Seltz's deposition testimony); *see also supra* App. ¶ I.D.2. Dr. Gibson suggests that "[t]he strong policy and ideological commitments of the investigators are not compatible with the conventional cannons of scientific objectivity and may have undermined the integrity of the data collection and analysis." Gibson Expert Report. at 3 n.3 [1 PCS]. He applies this criticism to *Buying Time 2000* as well. *Id.* at 45. Dr. Krasno confirms that *Buying Time 1998* is an advocacy document. Krasno Rebuttal Report at 2 [DEV 5-Tab3]. He admits that he believed that groups and political parties were sponsoring "thinly-veiled campaign ads masquerading as issue advocacy." *Id.* However, Dr. Krasno suggests that "[t]he fact that we expected certain results (and those expectations were largely realized) loads the issue emotionally, but misses the point. Scholars rarely embark upon research without some expectations as to its results. But more than most scholars, we had a compelling reason to insure that our results could withstand allegations of bias." *Id.* Dr. Krasno also notes that Daniel Seltz's responsibilities with regard to *Buying Time 1998* did not include data analysis. *Id.* at 3. Dr. Lupia comments that a "person's political or ideological beliefs need not prevent them from being an effective scientist," and that Dr. Gibson's allegation that "*Buying Time* cannot be the product of scientific inquiry because its authors have an ideological commitment" is erroneous. *Id.* Dr. Lupia also states that he knows of no "conventional canons of scientific objectivity," and that Dr. Gibson fails to produce one. *Id.* Lastly, Dr. Lupia observes that Dr. Gibson's claim that the policy perspective of the *Buying Time 1998* authors "may have undermined the integrity" of the study, "is pure speculation," and Dr. Gibson's report "presents no direct evidence on this point." *Id.* at 11. Dr. Goldstein rejects the charge that he or anyone under his supervision "perverted" the results of the databases, or that his approach to the project was based on anything other than "the spirit of scientific inquiry and objectivity." Goldstein Rebuttal Report at 8 [DEV 5-Tab 4]. He also claims that his "interest in creating a scientifically valid and reliable database was based on more than just abstract notions of professionalism and objectivity, as important as they were. I always intended to use-and, in fact, have used-CMAG databases in a wide variety of other scholarly studies having nothing to do with campaign finance reform." *Id.* at 8-9.

c. Dr. Gibson states that *Buying Time 1998* was not part of a peer-review process prior to its publication, meaning it "was not vetted in any way whatsoever prior to its publication, and consequently the normal process of explication of the project methodology, error correction, and review of substantive conclusions prior to publication did not take place." Gibson Expert Report at 4 [1 PCS]. Dr. Gibson maintains that this "seriously limits the confidence one can place in the Report." *Id.* Dr. Gibson makes the same criticism of *Buying Time*

2000. *Id.* at 45. Dr. Krasno states that this fact was the result of time constraints dictated by the political calendar, the funders of the study, and policymakers, and notes that "subsequent publications by myself and by Professor Goldstein have withstood the peer review process." Jonathan S. Krasno, Rebuttal to Professor James L. Gibson at 3-4 & n.3 (citing to Jonathan Krasno & Kenneth Goldstein, "The Facts About Television Advertising and the McCain-Feingold Bill," 35 Political Science 207 (2002)). Dr. Lupia finds the significance of the lack of peer-review "doubtful . . . at best." Lupia Expert Report at 13 [DEV 5-Tab 5]. He notes that Dr. Gibson "displays no apparent knowledge of whether scholars or experts had opportunities to comment on critical aspects of the *Buying Time* reports." *Id.* at 14.

d. Dr. Gibson maintains that "[n]o data base has been (nor can be, it appears) produced that will generate the specific numbers found in [*Buying Time 1998*] . . . . In the social sciences, we demand that statistical analysis be replicable . . . . This report is not replicable, and that undermines tremendously any confidence one should place in the findings produced." Gibson Expert Report at 5 [1 PCS]; *see also id.* at 23-26; Seltz Dep. at 52 [JDT Vol. 28] (stating that the *Buying Time 1998* authors did not "track the evolution of all the changes" or corrections they made to the data set). Dr. Gibson levels the same charges at *Buying Time 2000*. Gibson Expert Report at 47-48 [1 PCS]. Dr. Krasno agrees that "replication is a core precept of science," but states that Dr. Gibson "overstates the case by insisting on 'exact' replication." Krasno Rebuttal Report at 6 [DEV 5-Tab 3]. According to Dr. Krasno, perfect replication "of the results of others, even with their help, is often impossible." *Id.* (quoting Gary King, Replication, Replication, 28 Political Science 444 (1995)). Dr. Gibson was not able to consult with Dr. Krasno in order to discover "the original command files used to produce the numbers in *Buying Time 1998*,'' which Dr. Krasno maintains replicate the *Buying Time 1998* results. *Id.* at 6-7 & n. 6; *see

also id.* at 8 n.10 ("[I]t appears that Professor Gibson worked with a slightly different version of the data set than that used to create *Buying Time 1998*.''); Lupia Expert Report at 18 n.3 [DEV 5- Tab 5]. Despite using the incorrect data set, Dr. Krasno notes that where Dr. Gibson provides examples of the discrepancies between his findings and those of *Buying Time 1998*, the differences are statistically insignificant. *Id.* at 7-8 (referring to Gibson Expert Report at 24 [1 PCS]); *see also* Goldstein Expert Report at 18 n.10 [DEV 3-Tab 7] (stating that the variances in Dr. Gibson's results "are so small as to suggest their own triviality"); Lupia Expert Report at 43 [DEV 5-Tab 5] (stating "the demonstrated discrepancies are small" and the Gibson Expert Report "provides no evidence that such changes affect any of *Buying Time*'s major claims"). Dr. Goldstein contends that the reason Dr. Gibson could not replicate the results of *Buying Time 2000* was because he was using the wrong data set. Goldstein Rebuttal Report at 18, 19-20 [DEV 5-Tab 4].[198] Using the "federal.sav" data set produced by the Brennan Center, Dr. Goldstein was "able to replicate key findings of the *Buying Time* [*2000*] study," and correlate others "within a fraction of a percentage point." *Id.* at 20. Dr. Goldstein comments that Dr. Gibson had all the information to "replicate the *Buying Time* studies in the most direct fashion-that is, by re-coding all (or even a sample) of the captured advertisements and comparing the results of his coding exercise with the results of mine. Because Dr. Gibson never attempted to test the conclusions implicit in the database by replicating the coding exercise, most of his assertions about the reliability and validity of the conclusions drawn from the databases are necessarily speculative." *Id.* at 19; *see also* Lupia Expert Report at 17 [DEV 5-Tab 5] ("It is also worth noting that the Plaintiffs and their experts passed up the opportunity to resolve their concerns by replicating the data collection procedure itself."). Dr. Lupia comments that just because "a particular scientist fails in her attempt to *replicate* a study does not show that the study is not *replicable* .... The claim that 'the report is not replicable' is not proved in the [Gibson] report." Lupia Expert Report at 17 [DEV 5-Tab 5] (emphasis in original); *see also id.* at 44.

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[198] The result of this confusion is that instead of the experts arguing from the same data set, each produces conclusions from a different set of numbers. The source of the divergence in data relied upon appears to be the result of the number of data sets provided to the Plaintiffs by Defendants' experts and the late production of additional data sets. *See* Gibson Supplement to Rebuttal Expert Report of October 7, 2002: 1998 Data ("Gibson Supplemental Report") [2 PCS]. Furthermore, since the analysis of the studies occurred in the context of litigation, the two sides' experts could not confer and resolve the resulting confusion regarding the data sets. This fact has made the duel between the parties' experts more confusing, and therefore less helpful to the Court.

e. Dr. Gibson charges that the *Buying Time 1998* report "is filled with questionable statistical techniques and applications." Gibson Expert Report at 5 [1 PCS]. Dr. Lupia observes that nowhere in his report does Dr. Gibson identify mistakes in the application of statistical procedure. Lupia Expert Report at 18-19 [DEV 5-Tab 5]. Dr. Lupia characterizes Dr. Gibson's critique as a "difference in point-of-view on how to categorize certain events that has nothing to do with statistical techniques *per se*." *Id.* at 19.

f. Dr. Gibson suggests that CMAG's shortcomings, detailed *supra* App. ¶ I.A, affect the level of credence one may give the *Buying Time* reports; however, he advances no hypotheses demonstrating why any of CMAG's shortcomings affect the results of *Buying Time*. Gibson Expert Report at 7-9 [1 PCS] (noting that there are "many limitations to the CMAG data," but not suggesting the impact the limitations have on the results of *Buying Time* studies); Gibson Rebuttal Report at 5-7 [2 PCS] (stating he has no basis for verifying that the CMAG data base is accurate, that there is no way of knowing the characteristics of the missing airings, but concluding that the "apparent[]" errors caution against

relying on the CMAG data for drawing conclusions on the nature of political communications); *see also* Goldstein Rebuttal Report at 23 [DEV 5-Tab 4] (stating that Dr. Gibson "does not even attempt to explain how these alleged limitations undermine the validity of the conclusions set forth in *Buying Time*"); Krasno Rebuttal Report at 5 [DEV 5-Tab 3].

g. The division of tasks between the authors of *Buying Time 1998* and Dr. Goldstein also calls into question the results of the study according to Dr. Gibson. Dr. Gibson posits that since the study's authors engaged in secondary analysis of the data provided by Dr. Goldstein their "understanding of the nuances and peculiarities of the data base" was "most likely limit[ed]." Gibson Expert Report at 6 [1 PCS]. Given the size of the database and "various data infirmities," Dr. Gibson finds it "extremely worrisome that the results [of *Buying Time 1998*] are so heavily dependent upon the limited skills of an author [Mr. Seltz] who is a novice analyst." *Id.* Dr. Krasno, as noted *supra*, explains that Mr. Seltz did not engage in data analysis, making "Professor Gibson's fear that he contributed findings to *Buying Time 1998* ... unfounded." Krasno Rebuttal Report at 3 [DEV 5-Tab 3]. Dr. Lupia points out that "secondary analysis of data collected by others" is common in the political science discipline, and has been undertaken by Dr. Gibson himself. Lupia Expert Report at 19-20 [DEV 5-Tab 5] (citing two articles authored by Dr. Gibson which use "country-level electoral data" from a "historical archive" and a study conducted in 1954).

h. Criticism was raised that both studies relied on coding of advertisements conducted by university students. Gibson Expert Report at 9 [1 PCS]; *see also supra* App. ¶ I.D.4 (explaining the coders' role). Dr. Gibson finds troubling the following unanswered questions: "how the students were recruited, what expertise they had prior to being employed for the project, whether the students had been exposed to Dr. Goldstein's classes, whether the students had ideological and/or policy commitments to a particular outcome in the project, etc." *Id.* He also believes the fact the student coders were not trained "is a flaw of considerable proportion." *Id.* at 10. This is due to the fact that they were asked to make subjective judgments, and without training it is unknown whether or not they were competent to make such judgments. *Id.* at 18; *but see id.* ("[C]oding these advertisements is often simply difficult, irrespective of one's training and experience."); *see also* Holman Dep. at 73, 80 [JDT Vol. 10] (acknowledging the subjective nature of determining the purpose of a political advertisement). Dr. Gibson also notes that undergraduate students at Arizona State University or the University of Wisconsin are "not a representative sample of the 'average viewer,' and in the absence of training, the students were apparently free to exercise unstructured discretion in coding the ads . . . . [W]ithout training, practice coding, and discussion of coding rules based on the results of the practice coding . . . I do not believe that undergraduate student coders can make accurate assessments on highly subjective characteristics of these ads." Gibson Expert Report at 10 [1 PCS]. Dr. Krasno responds, stating that

> it is likely a training program would have caused complaints that Dr. Goldstein and I were attempting to impose our standards on the coders. Given the alternatives, I felt [foregoing formal training] was preferable, especially since we were hoping for a (reasonably informed) ordinary viewer's impression of the ads. Limited pre-testing of the coding instrument showed that training was unnecessary because coders were apparently able to understand and answer the questions without further explanation.

Krasno Rebuttal Report at 5 n.4 [DEV 5-Tab 3]. Dr. Goldstein notes that Dr. Gibson's criticism in this regard is speculative, especially given the fact "he chose not to conduct his own survey, using his own coders and his own training techniques, and compare it to the results reached by the undergraduate coders." Goldstein Rebuttal Report at 31 [DEV 5-Tab 4]; *see also* Lupia Expert Report at 33 [DEV 5-Tab 5] ("In this case, such a replication would have been relatively simple to conduct . . . and would have allowed the [Gibson] report to rely less on speculation when alleging that measurable attributes of Goldstein's coders affected the data collection or analysis."). Dr. Goldstein states the lack of training was "a deliberate choice that is well-supported by social science principles . . . . aimed at getting the untutored common-sense impression of the coders, while minimizing the possibility of biasing coders with any preconceived notions that might have been implicit in a set of instructions." Goldstein Rebuttal Report at 32 [DEV 5-Tab 4]. Formal training, Dr. Goldstein asserts, "would only undermine the independence of the coders' assessments and possibly introduce systematic bias into the survey." *Id.* The lack of training also made it easier to "simulate . . . the experience of a typical viewer watching the ads at home." *Id.* In terms of the representativeness of the coders, Dr. Goldstein comments that "the use of undergraduate subjects in studies measuring subjective perceptions of external stimuli is well- established and accepted social science procedure." *Id.* at 33. The students who coded the 1998 data were undergraduate honors students at Arizona State University, while six undergraduate students enrolled in Dr. Goldstein's upper- level Interest Group course at the University of Wisconsin coded the 2000 data. *Id.* According to Dr. Goldstein, the coders were not informed that the Brennan Center would be using their data to study the effects of campaign finance legislation, and he does not believe he "ever expressed to them any policy preference as to the desirability or undesirability of campaign finance legislation, either in the classroom or during the coding process." *Id.* at 34. Dr. Goldstein notes that if his involvement in the project suggested anything to the coders, it would have been that the project was about the tone of political advertising, one of his primary scholarly interests. *Id.* In terms of the representativeness of the coders, Dr. Lupia states that "only if we had evidence that the way in which the undergraduates were unrepresentative caused *Buying Time*'s claims to differ from what a representative population would have produced" would there be a basis to believe the coders' unrepresentativeness threatened the quality of the data, but the Gibson "report presents no such evidence." Lupia Expert Report at 35 [DEV 5-Tab 5]. Lupia also notes that "in the field of psychology . . . important discoveries about mental states such as attitudes are often generated from studies that ask undergraduates to answer opinion questions after viewing paper-based stimuli. This practice has wide acceptance in social science and is the source of many important and socially valuable discoveries." *Id.* at 36; *see also* Holman Dep. at 241-42 [JDT Vol. 10] (noting "it's common practice to use students as survey respondents especially in political work").

i. Dr. Gibson challenges the reliability, or accuracy, of the coded data. Gibson Expert Report at 11 [1 PCS]. Dr. Gibson appears not to be concerned about the coding of objective characteristics of the advertisements. *Id.* ("Entirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad) present few threats to reliability.") (footnote omitted). His main concern is over the coding of "subjective and judgmental" characteristics. *Id.* at 12. He provides Question 6 as an example:

> 6. In your opinion is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?
>
> 1. Provide information or urge action (If so, skip to Question #19)
>
> 2. Generate support/opposition for candidate
>
> 3. Unsure/unclear

Id. at 12 (citing *BT 1998* [DEV 47]) (emphasis in original). This question appears in *Buying Time 2000* as Question 11 except that the Buying Time 2000 version does not bold "particular candidate" and does not ask the coder to skip Questions. *See* Goldstein Expert Report App. F [DEV 3-Tab 7]. Dr. Gibson notes that it is not always readily apparent who the sponsor of the advertisement is, making it difficult for the coder to know whose purpose he or she is supposed to be evaluating. Gibson Expert Report at 12 [1 PCS]. This problem is exacerbated by the lack of "explicit guidelines for how to ascertain an 'ad's purpose.'" *Id.* To demonstrate the subjectivity of the question, Dr. Gibson points to an advertisement run in Wisconsin which highlights Senators Herb Kohl and Russell Feingold's positions on partial birth abortion and asks the viewer to call them. *Id.* at 12-13. To Dr. Gibson "it seems obvious that the central focus of the ad is on the policy issue of whether to ban partial birth abortions . . . . One might reasonably conclude that one purpose of the ad was to elicit support for the National Pro-Life Alliance. The most reasonable overall assessment of this ad is that it is an example of issue advocacy by an interest group." *Id.* at 13-14. Holman, in an email, wrote that the ad "reads to me like a genuine issue ad," *id.* at 14 (citing Holman Dep. Ex. 14), but he concludes that it is an electioneering advertisement, Holman Dep. at 67 [JDT Vol. 10]. Both *Buying Time* studies treat the advertisement as an electioneering advertisement, but Dr. Goldstein in his expert report treats the broadcast of the advertisement in 2000 as a genuine issue advertisement.[199] Gibson Expert Report at 14 & n.13 [1 PCS]; *see also* Shays Dep. at 121 [JDT Vol. 29] (noting he finds the advertisement to be "powerful" and that "it should be run, but it was clearly designed to influence an election");

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[199] Dr. Goldstein's explanation for this divergence in treatment is discussed, *supra* App. ¶ I.C.7; *see also infra* App. ¶ I.D.8.c.

McLoughlin Dep. at 42 [JDT Vol. 20] (stating his personal view is that the advertisement is a "genuine issue ad"). Given the subjective nature of this task, Dr. Gibson states that "certain procedures are essential so that the reliability of the data collected can be assessed." Gibson Expert Report at 16 [1 PCS]. According to Dr. Gibson, there is "no assessment whatsoever of intercoder reliability [for *Buying Time 1998*]. Thus, unlike academic research based on subjective coding, no empirical evidence exists to indicate that the coders' subjective assessments of these ads were accurate." *Id.* at 18. Dr. Gibson finds this to be a "serious flaw." *Id.* Dr. Lupia responds arguing that the "practice of treating answers to opinion questions as objective phenomena is common in science." Lupia Expert Report at 38 [DEV 5-Tab 5] (describing an article co-authored by Dr. Gibson, the main conclusion of which is based on a survey where participants were asked about how they described their own identities). He notes that Question 6 begins with "In your opinion," and seeks to understand how the advertisements are perceived. *Id.* at 37. In addition, Lupia questions the basis for Dr. Gibson's claim that "the most reasonable overall assessment" of the Wisconsin partial birth abortion advertisement is that it is pure issue advocacy, because Dr. Gibson gives no clear explanation of this judgment. *Id.* at 40.

j. Dr. Gibson explains the importance of reliability in the *Buying Time* context. He maintains that the miscoding of a single advertisement could have "quite large consequences for the statistical results." Gibson Expert Report at 22-23 [1 PCS]. He proposes that if Advertisement #11 was coded as promoting issues rather than a candidate, the percentage of pure issue advertisements in the *Buying Time 1998* data set would rise six percentage points. *Id.* This, Dr. Gibson argues, demonstrates the volatility of the data set. *Id.* at 23. As Dr. Gibson notes, he is not claiming for purposes of this argument that Advertisement #11 was coded in error; he is merely showing how one *hypothetical* error could affect the data. *Id.* at 22 n.24.

k. Dr. Gibson also challenges the validity of the *Buying Time 1998* data. Gibson Expert Report at 17 [1 PCS]. By this, Dr. Gibson means that coders may be consistent in their coding, but their coding may be incorrect. *Id.* Specifically, he suggests that:

> coders must seek easily discernable 'cues' in the advertisements as a means of making the required judgment. Since the presence of a political figure who seems to be a candidate is a readily accessible cue, the coders then develop an implicit decision rule that says: 'when a political figure is depicted in the ad, the ad involves electioneering.' Using this rule, the variable might be reliably coded. But this does not mean that the data are *valid,* since political figures appearing in ads could well be doing something other than electioneering.

Id. (emphasis in original). Dr. Lupia counters that Dr. Gibson's argument misrepresents what the coders were asked to do. Lupia Expert Report at 39 [DEV 5-Tab 5]. He argues that the question seeks the coders' perceptions of the purpose of the advertisements, not the advertisements' true purpose. *Id.* Just because coders' perceptions may not comport with reality does not threaten the validity of the data, because the survey seeks the coders' mental impressions. *Id.* However, when codings were changed on Question 6, the mental impressions of the coders, which were sought by the question, were overruled. Goldstein Dep. (Vol 2) at 208-209 [JDT Vol. 8].

l. Dr. Gibson puts forth the theory that "the confusion in the instructions regarding Questions 7 through 18 may have introduced a degree of bias into how the students coded Question 6 by suggesting that any advertisement that included the name of a candidate should be coded as having a purpose of promoting or opposing a candidate." Gibson Expert Report at 30 [1 PCS]. Dr. Gibson states that

> analysis reveals that *fully 97.7% of* [group-sponsored airings having a 'purpose' of generating support or opposition to a candidate] *were also coded as mentioning candidates*. The most important conclusion I draw from this analysis is that mentioning a candidate and promoting a candidate are virtually the same thing, as these data were coded by the undergraduate students (and/or Professor Goldstein). It seems highly likely to me that the student coders coded these three questions (6, 7, and 8) virtually simultaneously: A candidate (or what the coder thought was a candidate) was observed in the ad, and then Question 6 was coded as electioneering (in part because the coders knew that the presence of a candidate was not coded if Question 6 was coded as providing information), and then the student made the determination of whether the candidate was 'the favored candidate' (Question 7) or the 'favored candidate's opponent' (Question 8). Thus, the entire relationship—empirical and logical—between Questions 6 and Questions 7, [sic] and 8 renders the data set of little utility for answering important questions about these ads and airings.

Gibson Expert Report at 30 [1 PCS]; *but see id.* at 55-56 (characterizing his own argument as "indirect evidence or conjecture"). Dr. Krasno responds to Dr. Gibson's finding that 97.7 percent of advertisements found to be electioneering mentioned candidates by observing "[g]iven commercials mentioned candidates by observing "[g]iven their goal of helping candidates, it would be surprising to discover that electioneering ads do not identify candidates." Krasno Rebuttal Report at 10 n.13 [DEV 5-Tab 3]; *see also* Goldstein Rebuttal Report at 27 [DEV 5-Tab 4] (stating that "it is difficult to imagine an ad intended to promote or oppose a candidate that did *not* mention that candidate") (emphasis in original). He also states that Dr. Gibson's theory that the two items were "cognitively connected . . . . ignores the fact that

candidate mentions are coded *after* the purpose of the ad, and that coders did score a number of ads that mentioned actual and apparent candidates in reasonably neutral ways as genuine issue advocacy." Krasno Rebuttal Report at 10 n.13 [DEV 5-Tab 3] (emphasis in original). Dr. Lupia finds Dr. Gibson's theory to be a "wild guess. It has no apparent scientific basis, which matters because the claim in question includes a very detailed statement about an exact sequence in coders' cognitive processes . . . . Moreover, I am quite familiar with the current scientific literature on the psychology of responses to opinion questions and this claim follows nowhere from it." Lupia Expert Report at 45 [DEV 5-Tab 5]; *see also* Goldstein Rebuttal Report at 28 [DEV 5-Tab 4]. He also comments that Dr. Gibson could have easily tested his theory by showing "one set of coders with the instructions regarding questions 7 through 18 visible while showing another set of coders Question 6 without the instructions or subsequent questions." Lupia Expert Report at 44 [DEV 5-Tab 5]. I observe that Question 6 on the *Buying Time 1998* coding sheets is the last question on the first page of the survey, with Questions 7 and 8 appearing on the following page. *See, e.g.*, Gibson Expert Report Ex. 7 [1 PCS]. The coding sheets provided by Dr. Gibson do not indicate coders changed (*i.e.* crossed out) their coding of Question 6 for advertisements from issue advocacy to electioneering after seeing Questions 7 and 8 on the following page.

m. Plaintiffs challenge other aspects of Question 6 of *Buying Time 1998*. They note that the words "particular candidate" are printed in bold type, which Dr. Krasno states was done because he wanted the coders "to be thinking of candidates" when answering the question. Krasno Dep. at 123 [JDT Vol. 14]. Dr. Krasno explains that the bold type was meant to "make certain that the coders paid special attention to the appearance of candidates in these ads, so that they answered the question with respect to candidates, not with respect to something else." *Id.* at 122-23. The corresponding question used for *Buying Time 2000* did not include the bold type.

n. Dr. Gibson states that "it is apparent to me that no single *Buying Time 1998* Data Set exists. This is in part due to the fact that Dr. Goldstein was (and may still be) continuously making changes in the codes assigned to individual ads and airings." Gibson Expert Report at 11 [1 PCS]; *see also id.* at 5 ("[T]he data set is continuously being manipulated and changed . . . "). Dr. Gibson suggests that the only codes altered were those "undermining the preferred conclusions," introducing "asymmetrical bias . . . in the data set." *Id.* Dr. Gibson makes the same allegation with regard to the *Buying Time 2000* data set. *Id.* at 50 ("[T]his data set, like the 1998 data, is continuously being changed."). Dr. Krasno explains that the short time frame of the study "inevitably meant that small changes to the data set would continue even after the release of *Buying Time 1998.*" Krasno Rebuttal Report at 4 [DEV 5-Tab 3]. He claims that such changes are quite typical, and that "[v]irtually every provider of large data sets, from the National Election Studies to the Commerce Department, prepares versions of their data and continues to fix problems in subsequent releases." *Id.* The changes, Dr. Krasno maintains, reflect "the gradual filling in of missing data and the discovery of internal contradictions. There is no evidence at all in Dr. Gibson's report that any of the changes in the successive versions of the data that he examined had more than a trivial impact on his results or on those reported in *Buying Time 1998.*" *Id; but see* Goldstein Dep. Ex. 17 (email authored by Holman stating that the "missing data category is uncomfortably large in the 1998 database"). Dr. Goldstein also notes that each *Buying Time* database consists of 40 million data points, and that "errors are inevitable in any database of this size." Goldstein Rebuttal Report at 37 [DEV 5-Tab 4]. He claims that Dr. Gibson's suggestion that these errors invalidate the database fails to make the distinction

between random error and non-random error (or "systematic" bias). *Id.* Dr. Goldstein claims that it is "universally recognized that random error does not undermine the validity of a data set because random error, by definition, occurs in all directions," and that such errors "are expected to cancel each other out." *Id.* Therefore while random errors "may make the coding of a particular data point inaccurate, their aggregate effect over the whole data set is not expected to undermine conclusions." *Id.* According to Dr. Goldstein, Dr. Gibson "typically does not specify whether . . . alleged errors were random or systematic," and concludes that "the great majority of the errors that Dr. Gibson alleges are, at most, the result of random 'noise' which would not have systematically biased the study's results or undermined its validity." *Id.* at 38. Dr. Goldstein states that the production of several versions of the *Buying Time* databases is explained by the fact that "social science researchers, like all prudent people, periodically back up their work when using computers." Goldstein Rebuttal Report at 9 [DEV 5-Tab 4]. Dr. Goldstein provides two explanations for the variances in data between the two data sets. First, some differences may be the result of "routine 'cleaning' of the data sets." *Id.* at 10. Dr. Goldstein says that it is "standard social science practice to clean a data set by correcting apparent errors after the codes have been entered into the database." *Id.* (citing Herbert F. Weisberg, Jon A. Krosnick & Bruce D. Bowen, An Introduction to Survey Research, Polling, and Data Analysis (3d ed. 1996)). Corrections were made to "wild codes- that is, entries for which no corresponding code existed in our codebook." *Id.* at 11. Dr. Goldstein and his assistants also "corrected logically inconsistent answers . . . [and] also filled in missing data for some ads on a number of objective questions, such as candidate mention, in both the 1998 and 2000 databases." *Id.* More substantial differences can be attributed to the fact that Dr. Goldstein "continued updating and revising [his] own copy of the database as part of [his] continuing scholarly work." *Id.* at 11-12. Subsequent discoveries of miscodes of mostly contextual errors and 100 missing advertisements from the CMAG data set were added to Dr. Goldstein's version of the 2000 database. *Id.* at 12. Dr. Lupia reviewed the multiple databases and concludes that the changes are transparent and he finds no reason to conclude that Dr. Goldstein has attempted to hide anything. Lupia Expert Report at 22 [DEV 5-Tab 5]. Lupia agrees that Dr. Gibson's concern is a legitimate one; however, "[l]arge academic databases change for legitimate reasons, so the mere existence of the relative small changes cited in the [Gibson] report provide no basis to negate the project's credibility." *Id.* at 23. To Lupia, the important question is "why and how the changes were made," and Dr. Gibson's suggestions of illegitimacy are, in Lupia's opinion, "of varying and questionable credibility." *Id.*

o. Dr. Gibson examined "the actual student coding sheeting for 25 of the 1998 storyboards and . . . compared them to the 'final' version of the 1998 data set." Gibson Expert Report at 15 [1 PCS]. Focusing on Question 6, he found that the original student codings of eight advertisements as "genuine issue advertisements" had been changed to electioneering advertisements. *Id.* These eight advertisements were aired over 2,400 times, significantly changing the results of the survey. *Id.* Dr. Gibson is troubled by the fact that the changes were "entirely asymmetrical: In not a single instance in these storyboards was a change made on an ad originally coded as having candidate support or opposition as its 'purpose.'" *Id.* He asks: "[s]ince no documentation of how individual ads were selected for reconsideration by Professor Goldstein has apparently been produced, one is left wondering why all of these changes could have the same effect." *Id.* Dr. Krasno's explanation of the changes to the advertisements is detailed *infra*, App. ¶ I.D.7.r.(3). Dr. Lupia states that Dr. Gibson's

Report is subject to the same criticism with regard to his analysis of this matter. Lupia asks:

> why 25 storyboards and not more or less were examined. We are not told how these 25 cases were selected. Were they selected at random, were they given to Dr. Gibson by counsel (as is true in an analogous replication attempt . . .), or were they chosen by some other procedure? . . . Indeed, the [Gibson] report provides no basis for rejecting the hypothesis that the 'asymmetry' claim is an artifact of the cases being selected in a way that is biased toward this [sic] generating this particular result.

Lupia Expert Report at 41 [DEV 5-Tab 5].

p. In his report, Dr. Gibson discusses Question 22 on the coding sheet. The Question reads:

> 22. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Personal characteristics 2. Policy matters
>
> 3. Both
>
> 4. Neither

Gibson Expert Report at 31-32 [1 PCS]. Dr. Gibson observes that 98.1 percent of the advertisements aired within 60 days of the election were found to focus on policy matters, which means that "many ads were coded in Question 6 as promoting candidates but also as being 'primarily' focused on policy matters in Question 22." *Id.* at 32-33. Dr. Gibson finds this result contrary to what one might expect. *Id.* at 32. He then analyzes both questions and finds Question 22 to be more valid and reliable. Question 6, reproduced *supra*, App. ¶ I.D.7.i, does not provide coders the option of finding that the advertisement promotes *both* issues and candidates, forcing coders "to make a dichotomous judgment about the ad's 'purpose.'" *Id.* at 33-34. Dr. Gibson also observes that

"Question 6 does not ask the coder to discern the 'primary' purpose of the ad [it asks coders to provide their opinion on the advertisement's 'purpose']. Indeed, the question provides no guidance whatsoever as to how to code mixed- content ads." *Id.* at 34. For Dr. Gibson, the structure of Question 22 is superior to that of Question 6 because it provides the options of "both" and "neither," not "forcing a choice between different parts of the manifest content of the ad . . . by allowing a coding of 'mixed' content." *Id.* Furthermore, he finds Question 22's request for the advertisements' "primary purpose," as opposed to Question 6's request for the commercials' "purpose," "provides at least some guidance for how to make the judgment required." *Id.* Dr. Gibson concludes that "Question 22 is structured in such a way as to provide more reliable information than Question 6." *Id.* Dr. Gibson also observes that the advertisements coded as supporting or opposing candidates have "quite a number of characteristics of what the authors of *Buying Time 1998* refer to as 'genuine issue ads."' *Id.* at 35. He finds that:

> 95.6 percent of advertisements supporting or opposing candidates urged the viewer to take some action; 74.3 percent of these were coded as providing a toll-free telephone number and only 2.9 percent were coded as providing no telephone number
>
> 45.7 percent were coded as addressing health care issues; 30.1 percent addressed taxes; 27.8 percent addressed Social Security.

Id. at 34-35. Based on these findings, Dr. Gibson concludes that: "1) The coding in Question 6 is deeply flawed; 2) When Question 6 and Question 22 clash (i.e., the coding attributes differ), the coding of Question 22 should be considered more valid and reliable; 3) According to the coding, the vast and overwhelming majority of the ads said to be examples of illegitimate electioneering (by virtue of promoting candidates) in fact were judged by their own coders to have

'policy matters' as their 'primary focus."' *Id.* at 35. Dr. Krasno disputes Dr. Gibson's conclusion that Question 6 is deeply flawed, noting that "coders rated 99 percent of candidate ads (and 93 percent of party ads) as generating support or opposition for a candidate." Krasno Rebuttal Report at 10 [DEV 5-Tab 3] (citing *BT 1998* [DEV 47] at 41). This conclusion is bolstered in Dr. Krasno's opinion by the fact the coders were not asked to determine the sponsor of the advertisement and that the disclaimers on the storyboards provided to the coders were often difficult to read. *Id.* at 10 n.14. Dr. Krasno contends that an electioneering advertisement does not have to focus primarily on personal characteristics of a candidate. He notes that "political scientists routinely take the view that politicians frequently adopt and advertise policy positions in order to appeal to voters. *Id.* at 11 (citing as an example Anthony Downs, An Economic Theory of Democracy (1957)); *see also* Goldstein Rebuttal Report at 29 n.16 [DEV 5-Tab 4] (citing four articles for the proposition that "policy issues in electioneering ads is widely noted in the political science literature"); Seltz Dep. at 188 [JDT Vol. 28]. Dr. Krasno stated that the:

> best illustration of this point [is the fact that] coders rated 11 percent of candidate[-sponsored] ads as focused on the personal characteristics of the candidates, 64 percent as policy-related, and the remaining 25 percent as neither or both. If one assumes, as both common sense and FECA indicate, that candidates are wholly motivated by their desire to win election, then the problem with using q22 as Dr. Gibson would use it becomes obvious: it miscategorizes at least two thirds of candidate ads as not being electioneering. This is the same criticism that both editions of *Buying Time* level at the magic words test, that it does not work for the one

> group of ads whose purpose and category are already known, regardless of their language or style.

Id. at 11. Dr. Lupia comments that an advertisement's primary purpose (the question posed in Question 6) and its primary focus (the question posed in Question 22) do not have to be the same. To illustrate his point he notes that many beer commercials do not focus on the product, but rather people "engaged in a range of activities that we can call 'wild nights out."' Lupia Expert Report. at 47 [DEV 5-Tab 5]. It would not be unreasonable to "perceive that the purpose of the ad is to get" the viewer to buy the beer, "but to judge its primary focus as wild times." *Id.* at 48. Dr. Lupia argues that, contrary to Dr. Gibson's assumption, individuals can make the same distinction for campaign advertisements, *i.e.* that their purpose is to get the person to vote for candidate X, but their focus is on issue Y. *Id.* Lupia also challenges the idea that the qualifier "primary" clarifies matters for the coders. He cites a study co-authored by Dr. Gibson based on a survey question on social identity that did not mention the word "primary," but concluded that the initial responses given revealed *primary* social identities. Lupia Expert Report at 51 [DEV 5-Tab 5] (quoting James L. Gibson & Amanda Gouws, Social Identities and Political Intolerance: Linkages within the South African Mass Public, American Journal of Political Science 278-92 (2000)). This, Lupia states, is "standard practice" and the Dr. Gibson "report provides no tangible evidence or scholarly reference that Question 6 is inconsistent with standard scientific practice." *Id.* at 52. In terms of Dr. Gibson's determination that Question 22 is superior to Question 6, Lupia notes that Question 6 does provide the coder with a third option of "unsure/unclear" and the Gibson Expert Report "offers no direct evidence on how answers to the questions would have changed had we allowed the responses 'both' and 'neither' in Question 6 or the response 'unsure/unclear' in Question 22." *Id.* at 48, 50. Lupia posits in response to the criticism that Question 6 failed to provide guidance to the coders that providing instructions would open the study up to charges that the instructions themselves biased the coders' responses. *Id.* at 49.

q. Dr. Gibson observes, for the first time in his rebuttal report, that "[m] issing from the entire discussion of ads and airings in the expert reports submitted is any consideration of the people who consume these ads." Gibson Rebuttal Report at 24 [2 PCS]. He uses the "Gross Rating Points" variable in the *Buying Time* databases to assess the impact of BCRA on "the people who consume these ads." "Gross rating points are the sum of ratings for a particular time: if the local news is watched by ten percent of viewers with televisions, an ad run during the program represents ten gross rating points." *Id.* at 25 (quoting *BT 1998* [DEV 47] at 6). Starting with Krasno and Sorauf's Expert Report's finding that there were 713 "genuine issue advertisement" airings during the last sixty days of the 1998 campaign which depicted a candidate, Dr. Gibson found gross rating points for 707 of the airings. He found:

> that these 707 airings represent communications with a staggering number of household—30,108,857. Thus, were these ads (just the ads accepted by Dr. Krasno and Professor Goldstein as 'genuine issue ads') prohibited, over 30 million group-citizen political communications would be affected (and this figure is based on the quite conservative assumption that each household only has a single person viewing television).

Id. Dr. Gibson does not make a similar argument in relation to *Buying Time 2000*. For further discussion on this point *see* Findings ¶ 2.12.13.

r. *Buying Time 1998's Seven Percent Figure*

Buying Time 1998's claim that only seven percent of "genuine issue ads" in the 1998 campaign would constitute electioneering communications under BCRA is disputed.

(1) According to Dr. Jonathan Krasno, author of *Buying Time 1998*, the question he sought to answer was "what is BCRA's impact on pure issue ads?" Krasno Rebuttal Report at 12 [DEV 5-Tab 3]. Dr. Krasno aimed to determine if BCRA's framers' attempts to minimize the impact of BCRA on pure issue ads through timing and identification of candidates worked. *Id. Buying Time 1998* found that seven percent of all pure issue advertisements aired in 1998 identified a federal candidate and appeared within sixty days of the campaign. *Id.* at 13. This figure was determined by dividing the number of airings of genuine issue advertisements mentioning a federal candidate within 60 days of the election by the total number of genuine issue advertisements run in 1998. *Id.; see also* Seltz Dep. at 115-16 [JDT Vol. 28]. The Brennan Center stands by the seven percent figure, although for a period of time in 2001 it had questioned its accuracy. Holman Dep. at 142-43 [JDT Vol. 10]. During that period of time, the Brennan Center ran additional analyses and determined that seven percent of "unique issue ads- or in other words, . . . special interest groups placing issue ads" produced in 1998 would be captured unfairly by BCRA, *id.* at 123, 144, and that 13.8 percent of all issue advertisement airings mentioning a candidate and broadcast within 60 days of the 1998 election were genuine issue advertisements, *id.* at 154-55.

(2) Plaintiffs object to the use of this denominator. Dr. Gibson finds:

> using a denominator of all issue ads broadcast in 1998 for these calculations is arbitrary and makes little sense. Why use January 1, 1998, as the starting date for the total pool of issue ads (i.e., the denominator)? Why not include ads from December 1997, or even the entire election cycle beginning in November 1996? Why not limit the denominator to ads shown in the last half of 1998? The . . . selected . . . denominator . . . has no theoretical meaning.

Gibson Expert Report at 38 [1 PCS]; *see also id.* at 41 ("I can see no justification for making the denominator equal to all issue ads aired in 1998."). Furthermore, he argues that given his conclusion that more people are concentrating on political issues as elections draw near, discussed *supra* App. ¶ I.C.8, *Buying Time 1998*'s denominator, by using all issue advertisements run during the course of the year, makes "the assumption that ads aired anytime throughout the year are equally as valuable as ads aired in proximity to the election." Gibson Rebuttal Report at 27 [2 PCS]. He concludes that the "damage of prohibiting an ad within 60 days of an election cannot be ameliorated by allowing that ad to be broadcast at some other point throughout the year." *Id.* at 27-28. Dr. Krasno explains that the denominator reflects only advertisements run in 1998 because "we had no data from 1997 or the last weeks of 1996 to include in the denominator." Krasno Rebuttal Report at 14 [DEV 5-Tab 3]. He notes that the addition of such data into the denominator would simply "*decrease* the percentage of pure issue ads affected by BCRA" because all of those advertisements would have aired more than 60 days before the election and would therefore not increase the size of the numerator. *Id.* at 14-15 (emphasis in original); *see also* Krasno & Sorauf Expert Report at 62 [DEV 1-Tab 2] ("The data from which these estimates are derived cover broadcasting only during the 1998 and 2000 calendar years, not the thirteen-plus months preceding them. Were we able to factor in the total number of pure issue ads that appeared between elections, the percentage of pure issue ads affected by BCRA would decline."). Dr. Gibson also suggests the better denominator, and one that is not arbitrary, is that used in *Buying Time 2000;* namely, all airings of issue advertisements during the last sixty days of the campaign which also depict a candidate. Gibson Expert Report at 39 [1 PCS]. The formula answers the question: If one were to assume all issue advertisements mentioning a candidate in the last 60 days of an election campaign had an electioneering purpose, what percentage of the time would this assumption be erroneous? *Id.* at 38-39. By contrast, the *Buying Time 1998* formula answers the question: "What percentage of total ads run throughout the year that mentioned a candidate by name and were coded as providing information or urging action appeared *within* 60 days of the election, rather than *earlier than* 60 days before the election?" *Id.* at 39 (emphasis in original). Dr. Krasno believes that Dr. Gibson's denominator would vary in size "with the amount of candidate-oriented issue advertising before an election. This is particularly relevant because of the volume of candidate-oriented issue ads devoted to presidential campaigns. The result, of course, is highly unstable estimates of BCRA's impact from year to year." Krasno Rebuttal Report at 15 [DEV 5-Tab 3]. The effect of using the *Buying Time 1998* denominator is that the percentage is affected not only by the amount of genuine issue advertisements run within 60 days of the election, but also the number of electioneering advertisements run during that time. *Id.* at 16 n. 26. When Dr. Krasno applied Dr. Gibson's denominator to the *Buying Time 1998* data he found 14.7 percent of genuine issue advertisements would be unfairly captured.[200] *Id.; see also* Krasno & Sorauf Report at 60 n.143 [DEV 1-Tab 2]; *id.* App. at 3 (providing the calculation: 713 airings of three distinct genuine issue advertisements[201] mentioning a candidate and aired within 60 days of an election constitutes the numerator; the denominator is the 4847 airings of issue advertisements mentioning a candidate within 60 days of the election). Dr. Krasno also notes that Dr. Gibson's calculations, finding 44.4 percent or more of genuine issue advertisements unfairly captured by BCRA to be, by Dr. Gibson's own report, a result of his changes to the numerator as well as to the denominator. *Id.* at 16; *see also* Gibson Expert Report at 40 [1 PCS]. Dr. Gibson notes that the discrepancy between his figures and that of *Buying Time 1998* "is due in part to the use of different denominators," but does not indicate the extent to which the change to the denominator, as opposed to his changes to the numerator, explains the discrepancy. Gibson Expert Report at 40 [1 PCS]. Dr. Lupia observes that both denominators answer questions that are different but finds both to be reasonable. "If I were asked to assess the proposed regulation's restrictiveness, the [Gibson] report's fraction could provide information about the impact during a particular time period, while *Buying Time* 1998's fraction could provide a better measure of the regulation's impact on issue advocacy more generally." Lupia Expert Report at 25 [DEV 5-Tab 5]. Lupia states that Dr. Gibson's denominator is no less arbitrary than that of *Buying Time 1998*. *Id.* at 26. Holman comments that the *Buying Time 1998* denominator is "a justifiable way" of determining the impact of BCRA on genuine issue advertisements, although he did not use the same one for *Buying Time 2000*. Holman Dep. at 140 [JDT Vol. 10]. For Holman, the *Buying Time 1998* calculation is "not incorrect. It's a different way of assigning a number to measure a phenomenon." *Id; but see id.* at 153-54 (stating that the text of *Buying Time 1998* relating to the seven percent figure is "[m]isleading" and "ambiguous" in that it did not identify clearly to what it referred).

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[200] Dr. Gibson, using a different data set than Dr. Krasno, found that by taking *Buying Time 1998*'s "flawed numerator and using the Brennan Center's own figures for calculating the proper denominator (airings within 60 days [of the election]), 16.5 % of the group ads were 'genuine issue ads' (as defined by the Brennan Center) . . ." Gibson Expert Report at 42 [1 PCS]. He goes on to reject this figure because he "does not accept the numerator." *Id.* He also finds that by using the data set he believed was the "final" version 25.7 percent of issue advertisements aired during 1998 mentioned a candidate and were broadcast within 60 days of the election were "genuine" issue advertisements. *Id.* at 37. Dr. Krasno states that this figure is incorrect because the data set used is incorrect, resulting in a numerator "four times too large," and that based on his study with Sorauf, he now calculates the correct figure to be 6.1 percent. Krasno Rebuttal Report at 19 & App. [DEV 5-Tab 3]; *see also* Krasno & Sorauf Expert Report at 60 [DEV 1-Tab 2]. Dr. Gibson's problems with the numerator are discussed *infra*, App. I.D.7.r.(3).

[201] One of these advertisements, "HMO said No" was aired a total of 455 times (118 times in Greensboro, 126 times in Raleigh-Durham, and 211 times in St. Louis). Krasno & Sorauf Expert Report App. at 3, 20 [DEV 1-Tab 2]. We were unable to find additional information about the other two advertisements, "CCS/No Matter Who" and "CENT/Breaux." *Id.* In 1998, St. Louis had 1,110,290 television households, Raleigh-Durham had 834,260, and Greensboro had 584,900. Gibson Rebuttal Report Ex. 2 [2 PCS].

(3) Plaintiffs' and Defendants' experts also disagree as to what the appropriate numerator should be. Dr. Gibson rejected the *Buying Time 1998* numerator because based on the data he was provided he concluded that eight advertisements aired 2,405 times in the last 60 days of the campaign were originally coded as promoting an issue or urging action (genuine issue advertisements) but were overruled by Dr. Goldstein and recoded as electioneering advertisements. Gibson Expert Report at 42 [1 PCS]. When Dr. Gibson added in these advertisements he found that "nearly two-thirds of the group ads that aired within 60 days of the 1998 election were coded by the students as 'genuine issue ads.'" *Id.* at 43. Dr. Gibson in his Rebuttal Report revises this figure based on information provided during the course of the litigation, which indicated that over a quarter of the advertisements he added to the numerator did mention candidates, resulting in a figure of 50.5 percent. Gibson Rebuttal Report at 23 [2 PCS]; *see also* Krasno Rebuttal Report at 17-18 [DEV 5-Tab 3] (describing this error). Dr. Gibson concludes that "this 50.5 % figure represents the statistical floor . . . the 64 % figure cited in my report . . . provides the ceiling." Gibson Rebuttal Report at 24 [2 PCS]. Dr. Gibson, in his Supplement Report, states that Dr. Krasno had produced additional data files which included an earlier version of the data set upon which he had relied. Gibson

Supplement to Rebuttal Expert Report of October 7, 2002: 1998 Data ("Gibson Supplemental Report") at 1 [2 PCS]. The data showed that one of the eight advertisements Dr. Gibson alleged had been recoded (from "genuine issue" to "electioneering") had originally been coded as promoting the election or defeat of a candidate, and that another was missing data as to the nature of the commercial. *Id.* at 4. As a result of excluding the airings of these two commercials, Dr. Gibson calculates that his "ceiling" fell to 60 percent, and his "floor" remained unchanged. *Id.* at 5-6. Dr. Krasno rejects the inclusion of any of the airings of these eight advertisements in the numerator. *See* Krasno Response to Professor Gibson's Supplemental Rebuttal (Nov. 13, 2002) ("Krasno Response"). He objects to the notion that the recoding "reflects a deliberate effort to manipulate some of the results reported in *Buying Time 1998*," stating that the recoding aimed to "make the data set as sensible and accurate as possible." *Id.* at 1, 2. Dr. Krasno explains that the decision to recode five of the advertisements was based on their contradictory codings. *Id.* at 2. The survey was constructed so that when a coder found that an advertisement's purpose was to "provide information or urge action" (in other words, was a genuine issue advertisement) in Question 6, the coder was supposed to skip the next 12 questions. *Id.* at 2; Gibson Supplemental Report Ex. 7 [2 PCS]. For five of these advertisements, student coders found the advertisement provided information or urged action, but went on to answer the next 12 questions. Krasno Response at 2. In addition, Dr. Krasno states that "all of these ads were scored in a parallel process on another variable, 'favcan,' as favoring a Democratic or Republican candidate. Again, the potential conflict between question 6 and favcan should have attracted attention as the data set was being prepared." *Id.* Dr. Krasno argues that a review of the storyboards for these five advertisements, as well as other contextual factors such as where and when they were aired, makes it clear that they should be coded as "electioneering."

Id. at 2-4. As for the final advertisement concerning Senators Herb Kohl and Russell Feingold's positions on partial birth abortion, Dr. Krasno admits that whether or not it is a genuine issue or electioneering advertisement is a "close call," but the fact that it appeared only six times in 1998 means its coding has "no real effect on any calculations of BCRA's impact." *Id.* at 3; *see also supra* App. ¶¶ I.D.7.i, I.D.8.c (discussing the advertisement). Dr. Krasno believes that the "notion that a small handful of mistakes must be perpetuated because they were once made is both ludicrous and an extraordinary departure from the usual practice of compiling data sets. Dr. Gibson's argument would be more credible if he offered any explanation for why these commercials really are pure issue ads." Krasno Response at 5.

(4) Dr. Lupia weighs in on the fraction debate, contending that the Gibson and *Buying Time* reports "are reasonable conceptualizations of the question about how the proposed regulations will affect groups in the present and future if groups act exactly as they did in the past. If, however, we want to evaluate the regulations' likely future impact we should consider the possibility that groups will adapt to the new regulations in different ways." Lupia Expert Report at 26 [DEV 5-Tab 5]. Both sides seek to predict the impact BCRA will have if no one alters their behavior. Lupia concludes that to "the extent that affected groups are able to choose [to alter their behavior], both estimates in the denomination debate may exaggerate the extent to which this aspect of the new regulation will restrict the groups' abilities to express themselves in the future .... To the extent that we agree that such groups will adapt in various ways, the credibility of the high-percentage estimates of the likely future impact of the proposed regulations on interest groups is severely undermined." *Id.* at 27.

8. *Criticism of Buying Time 2000*

a. Many of Dr. Gibson's criticisms of *Buying Time 2000* are similar to those made of *Buying Time 1998* and are addressed *supra*, App. ¶ I.D.7.

b. Dr. Gibson states that the *Buying Time 2000* data base "has numerous errors and inconsistencies in it," and comments that these changes preclude him from replicating the findings of *Buying Time 2000*. Gibson Expert Report at 46, 47- 48 [1 PCS].[202] He is troubled by the fact that Dr. Goldstein changed the coded "purpose" of 62 out of 338 advertisements, *id.* at 52, questions the motivation behind the changes, and asks what standards Dr. Goldstein employed in making the changes, *id.* at 53; *see also id.* at 47 n.43, 64 (concluding from a review of email correspondence between *Buying Time 2000* researchers that they "were committed to drawing a particular set of substantive conclusions from the data. When the conclusions were not forthcoming, the data was scrutinized further and alterations were made in the data base."). Dr. Goldstein states that "most of the 62 'changes' [Gibson] identifies in the 2000 database are not changes at all, but rather original student coding of additional CMAG storyboards that had not previously been coded at all, and were not part of the database used by the authors of *Buying Time 2000*." Goldstein Rebuttal Report at 4 [DEV 5-Tab 4]. The problem stems from Dr. Gibson's use of the wrong database; he does not analyze the *Buying Time 2000* database, but rather "a later iteration of [Dr. Goldstein's] own version of the database containing [his] own after-the-fact updates and re-codes, including additional ads later received from CMAG .... [N]one of this re-coding ever made its way into the *Buying Time 2000* report."[203] *Id.* at 14-15. Dr. Goldstein also takes exception to the charge that he deliberately changed the data in order to decrease the number of pure issue advertisements, calling it "baseless." *Id.* at 4. In addition, Dr. Goldstein notes that he reevaluated the coding of 30 advertisements in the 2000 database in his post-*Buying Time 2000* academic research having nothing to do with campaign finance or the *Buying Time* studies and "[i]n 26 of these instances, [] changed the coding from electioneering to genuine issue." *Id.* at 5, 14-15, App. A (listing advertisements changed or added to the database and the changes made to each). Dr. Goldstein claims that for the *Buying Time 2000* database, he "did not change any of the student coders' responses to Question 11 in the data cleaning process." *Id.* at 16; *see also* Goldstein Dep. (Vol.2) at 57-59, 147-50 [JDT Vol. 8] (detailing cell phone conference call from the West Palm Beach Airport asking for his assessment of three advertisements which were subsequently changed from

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[202] Dr. Goldstein testifies that he does not have the original student coding for this study, explaining that his "political science department ... mistakenly deleted a big chunk of out files, including our access database." Goldstein Dep. (Vol.2) at 129 [JDT Vol. 8].

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[203] For example, Dr. Gibson challenges the *Buying Time 2000* finding that "[o]f all the group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4 % were found to be electioneering issue ads. In absolute numbers, *only three genuine issue ads (which aired a total of 331 times in the 2000 elections) would have been defined as electioneering communications* . . ." Gibson Expert Report at 61 [1 PCS] (quoting *BT 2000* [DEV 46] at 73 (emphasis in original)). Dr. Gibson finds that according to the database the three advertisements were only aired nine times, but the *Buying Time* authors reported 331 airings and a different data base that Dr. Gibson determines is the "original, student coded version" of Question 11 shows 1,082 airings.. *Id.* at 61-62. He declares that he "has confidence in none of these" figures. *Id.* at 62. Dr. Goldstein claims that if Dr. Gibson had used the correct database, "federal.sav," he would have been able to identify the three advertisements which comprise 331 airings. Goldstein Rebuttal Report at 21 [DEV 5-Tab 4] (finding advertisements # 627 (172 airings), # 1389 (81 airings), and # 2862 (78 airings)). He also used the database to identify "all ads run by interest groups that mentioned a candidate and aired within 60 days of the election," and using that as the denominator arrived at the same percentage as *Buying Time 2000*. *Id.* (dividing 331 by 53,840).

genuine issue to electioneering advertisements based on Dr. Goldstein's assessments). Dr. Lupia comments that Dr. Gibson fails to connect his bias concerns with actual changes in the database or demonstrate the effects directly. Lupia Expert Report at 58 [DEV 5-Tab 5]. As such, Lupia finds the charge that the investigators were committed to reaching a particular outcome to be "at best, premature and, with certainty, not proven in the [Gibson] report. *Id.*

c. Dr. Goldstein does find that three advertisements in the *Buying Time 2000* database "were re-coded on Question 11 from 'promoting a candidate' to 'providing information or urging action on an issue.'" Goldstein Expert Report at 16 [DEV 3-Tab 7]. One was a version of a "cookie cutter" advertisement run by CBM (numbered 1269), which was "extremely similar" to a number of other CBM- sponsored advertisements that (Goldstein thought) had all been coded as "electioneering." *Id.* This fact was brought to Dr. Goldstein's attention by the *Buying Time* authors and, concluding that it was not "meaningfully distinguishable from the other CBM ads, . . . [he] recoded it as electioneering." *Id.* The second was the National Pro-Life Alliance advertisement (numbered 2107) which mentioned Wisconsin Senators Kohl and Feingold. Again, the *Buying Time* authors told Dr. Goldstein that the advertisement was "virtually identical" to another advertisement run in Virginia mentioning then-Senator Charles Robb. *Id.* at 17. Dr. Goldstein reviewed the storyboards of the two advertisements and found them "not meaningfully distinguishable, and resolved the inconsistency by re-coding [the commercial] as electioneering." *Id.* The final advertisement changed was sponsored by the Rhode Island Women Voters (numbered 1367). The advertisement was originally coded as a "genuine issue advertisement" but changed by Dr. Goldstein after the *Buying Time* authors disagreed with the coding. *Id.* Dr. Goldstein believes that the advertisement "is clearly electioneering." *Id.* As noted *supra*, App. ¶ I.D.8.c, Dr. Goldstein recently discovered that the six corresponding versions of Advertisement #1269 were originally coded as "genuine issue advertisements" by the students and later changed by the *Buying Time 2000* authors to "electioneering" commercials. Goldstein Dep. (Vol. 2) at 158-59 [JDT Vol. 8]. When these six advertisements are added to the analysis, which Dr. Goldstein terms "the most conservative standard estimate," one finds that 17 percent of the advertisements aired within 60 days of the election which identified a candidate were "genuine issue advertisements." *Id.* at 169. Defendants' experts personally disagree that all of these commercials are "genuine issue advertisements." *See* Holman Dep. at 82- 83 [JDT Vol. 10] (stating he considers Advertisement #1367 to be his "poster child of sham issue advocacy"); Goldstein Expert Report at 26 n.21 [DEV 3-Tab 7] (noting that he considers all the commercials with the exception of Advertisement #2107 "were clearly intended to support or oppose the election of a candidate").

d. Dr. Gibson raises essentially the same concerns about Question 11 in *Buying Time 2000* as he does for the practically identical Question 6 in *Buying Time 1998*, discussed *supra* App. ¶ I.D.7.i. Gibson Expert Report at 54-55 [1 PCS]. Many of the rebuttal arguments posted in paragraph I.D.7.i, *supra*, are aimed at this charge as well. *See supra* App. ¶ I.D.7.i. In addition, Dr. Goldstein argues that data from the 2000 election shows that coders "were [not] systematically biased toward coding ads mentioning candidates as electioneering as opposed to issue ads." Goldstein Rebuttal Report at 29 [DEV 5-Tab 4]. Dr. Goldstein states that "79.8 percent of the group-sponsored ads classified as electioneering were coded as having run within 60 days of the election, compared to only 18.7 percent of non-electioneering ads." *Id.* at 28. As one "would expect . . . that ads designed to promote or oppose a candidate would air relatively close to Election Day," this objective data, in Dr. Goldstein's opinion, corroborates the coding in Question 11 and demonstrates that Dr. Gibson's theory is incorrect. *Id.* at 28-29.

e. Dr. Gibson also makes the argument that *Buying Time 2000*'s Question 27, identical to *Buying Time 1998*'s Question 22, is superior to Question 11, for much the same reasons he posits for the superiority of *Buying Time 1998*'s Question 22 over the same study's Question 6. Gibson Expert Report at 56-61 [1 PCS]; *see also* App. ¶ I.D.7.p. He also claims that Question 27 is more reliable "because it does not seem to have been subject to the post-coding manipulations inflicted on Question 11." Gibson Rebuttal Report at 16 [2 PCS]. The coders found 78.8 percent of the group-sponsored advertisements had policy matters as their primary focus, and 17.6 percent had both policy matters and personal characteristics as their primary focus. Gibson Expert Report at 57 [1 PCS]; *see also* Gibson Rebuttal Report at 16 [2 PCS] (applying the denominator used in Dr. Goldstein's Expert Report to conclude 84.4 percent of "electioneering" advertisements had policy matters as their primary focus.) Many of the arguments made in App. ¶ I.D.7.p, *supra*, are directed at this charge as well. In addition, Dr. Goldstein responds by stating that "most electioneering ads seek to influence votes by portraying the favored candidate as espousing reasonable policy positions on hot-button issues like taxes . . . , and the opponent as having unreasonable or even dangerous positions on the same issues." Goldstein Rebuttal Report at 30 [DEV 5-Tab 4]. The data from the 2000 election shows that "53.3 percent of candidate-sponsored ads focused on policy issues rather than personal characteristics; an additional 35 percent focused on both policy and personal issues. Only 10.8 percent focused just on personal issues." *Id.* Furthermore, in 2000, 47.4 percent of advertisements using express advocacy terminology were coded as having a policy focus, 34.5 percent focused on both policy and personal issues, and 16.5 percent focused only on personal issues. *Id.* at 30-31. Dr. Goldstein concludes that Dr. Gibson's theory is "disproved by the fact that both candidate ads and express advocacy ads, which everyone agrees are electioneering, themselves focus primarily on policy issues." Id. at 31.

f. Dr. Gibson attempts to demonstrate "the extent to which changes in a relatively small number of highly subjective codings can affect the results reported and the conclusions reached." Gibson Expert Report at 62 [1 PCS]. He does so by looking at 30 advertisements produced by counsel and assumes that they each "could fairly be coded as 'providing information.'" Id at 62-63. By treating them as such and adding them to the Brennan Center's 331 figure (which he rejects) he concludes that the so-called "genuine" airings constitute 24.1 percent of all the airings within 60 days of the election, which did not use express advocacy and mentioned a candidate. Id. at 63. He then comments that "if one assumed that airings presented within 60 days of the 2000 election, which mentioned candidates, but which did not mention 'magic words,' were intended to promote candidates . . . , one would be wrong, under this scenario, approximately 24% of the time." Id. (emphasis added); see also Gibson Dep. at 179-80 [JDT Vol. 7](confirming that he made no determination about how the advertisements should be coded); id. at 181 (stating he never looked at the storyboards for the 30 advertisements). This exercise leads Dr. Gibson to conclude that "changes in the coding of very small numbers of ads can change the results dramatically," "the current version of the 2000 data base supports many possible estimates of the number of ads with these characteristics," and "given all of the deficiencies of the data base and the coding on which it is based, the wisest course is to draw no conclusions whatsoever about these ads on the basis of the empirical evidence in the data base." Gibson Expert Report at 63 [1 PCS].[204] Dr.

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[204] In his rebuttal report, Dr. Gibson adds to his 30 advertisement data set four additional commercials deemed by Goldstein's Expert Report to be genuine issue advertisements (Dr. Goldstein found six genuine issue

Goldstein finds Dr. Gibson's exercise with the 30 counsel-chosen advertisements to be "a remarkably bizarre manipulation of the data in order to artificially inflate Buying Time 2000's 'false positive' count." Id. at 22. Dr. Goldstein notes that "if we 'assumed,'" as Dr. Gibson did for the 30 advertisements, "that 100 percent of the BCRA-related group ads were genuine issue ads, then we could arrive at a false positive percentage of 100 percent." *Id.* Dr. Lupia questions the credibility of this argument given that it is based on 30 advertisements chosen by Plaintiffs' counsel, and Dr. Gibson does not reveal the method behind their selection. Lupia Expert Report at 57 [DEV 5-Tab 5]; *see also* Gibson Dep. at 180 [JDT Vol. 7](confirming he has no understanding of how the advertisements were selected); Goldstein Expert Report at 22 [DEV 3-Tab 7] ("[W]here-as here-such assumptions are based on nothing more than the self-serving conjecture of plaintiffs' counsel, any such percentage is meaningless.").

g. Dr. Gibson notes that unlike the *Buying Time 1998* study, "it appears that the 2000 project made some serious attempt to assess the reliability of the data collected by the student coders." Gibson Expert Report at 49 [1 PCS]. He evaluates reliability testing as detailed in an article published by Drs. Krasno and Goldstein, where they found that the recoders differed from the original coders on the Question 11 "purpose" inquiry in only one instance. *Id.* (citing Jonathan Krasno & Kenneth Goldstein, The Facts about Television Advertising and the McCain-Feingold Bill," 35 PS: Political

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advertisements run in 2000, and two were already in the 30 commercials chosen). Gibson Rebuttal Report at 15 [2 PCS]. By running a similar analysis, Dr. Gibson concludes that Dr. Goldstein's "estimates of the impact of the three criteria [60 days before the election, candidate mention, not supporting or opposing a candidate] are wholly dependent on subjective assessments of the 'purpose' of individual ads, assessments that are reasonably subject to debate." *Id.*

Science and Politics 207 (Jun. 2002).[205] The procedure involved the recoding of 250 advertisements, but Dr. Gibson questions "how these ads were sampled (e.g., random versus non-random selection) and who the coders were (e.g., expert versus novice)," and notes that "variable-by-variable reliability results for the full ad coding data set are not presented." *Id.* Without this information, Dr. Gibson cannot assess whether the "inter-coder reliability methods can be accepted as producing any useful information." *Id.* Dr. Goldstein discusses his efforts to assess inter-coder reliability which appear to be different from that discussed by Dr. Gibson. *See* Gibson Rebuttal Report at 9 n. 14 [2 PCS] ("It is unclear how [this test] relates to" the one described in the article published by Drs. Krasno and Goldstein). Dr. Goldstein describes a procedure whereby he randomly chose 150 unique advertisements, had them coded by five undergraduate students and "[i]n general, [] found inter-coder reliability to be extremely high." Goldstein Rebuttal Report at 34 [DEV 5-Tab 4]. Dr. Goldstein also conducted a more recent inquiry into the reliability of the coding of Question 11. He took all 350 advertisements in the data set that were sponsored by interest groups, "randomly selected 50[206] and asked 10 undergraduate students to code them on three attributes[:] ... 1) whether the ads 'generate support or opposition for a particular candidate' or 'provide information or urge action'; 2) their tone (attack, contrast, or promote); and 3) their focus (a candidate's personal attributes or policy)." *Id.* at 34-35. The original coders had found 64 percent of the sampled advertisements to generate candidate support, 26 percent to provide information or urge action, and for two percent of the advertisements they were unsure or unclear about the commercial's purpose. *Id.* at 35. The recoders agreed with the original codes 75 percent of the time, regardless of whether the original coding was "support or oppose a candidate" or "provide information or urge action." *Id.* at 35-36. The fact "that the coders agreed with the original code in 75 percent of the cases, *regardless of what that original code was,*" Dr. Goldstein asserts, means that "there is no hint of systematic bias in the original coding." *Id.* at 36. Dr. Gibson, in his rebuttal report, challenges this test. Since Dr. Goldstein was unable to discover the original coding database used in *Buying Time 2000,* Dr. Gibson questions whether or not the reliability exercise tested correlation between the recoders and the original coders, or the recoders and a manipulated data set. Gibson Rebuttal Report at 9 [2 PCS]. Next, Dr. Gibson challenges the sample used by Dr. Goldstein. He notes that the pool from which Dr. Goldstein selected the advertisements was "highly skewed" in that very few were coded as genuine issue advertisements. *Id.* at 10. Dr. Gibson finds that "any conclusions about whether this sort of ad [group-sponsored] was in fact reliably coded cannot be accepted on the basis of an examination of such a small number of ads." *Id.* He also posits that since genuine issue advertisements were "exceedingly rare" in the sample set that "it seems quite likely that even after coding only a few ads, the coders developed a strong expectation, implicit or explicit, that the next ad they coded would be an electioneering ad. It is very difficult to make subjective assessments of infrequently occurring events. Once a coder discerns a pattern in the responses to a subjective variable, it becomes difficult indeed for the coder to 'break the habit.'" *Id.*

h. The NRA criticizes the *Buying Time 2000* study for not including two 30- minute "news magazines" in the data which it claims are "genuine issue advertisements." Proposed Findings of Fact of the NRA and the NRA PVF ¶ 9. "If these airings had been considered, 34 % of the total volume of

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[205] The procedures and results of the inter-coder reliability test are produced as Appendix I to the Goldstein Expert Report.

[206] He later had to drop four because "their codes were missing from the original dataset." Goldstein Rebuttal Report at 35 [DEV 5-Tab 4].

speech that BCRA in 2000 would have covered in the 60 days prior to the general election would have been genuine issue advertisements." *Id.* One of these "news magazines" was titled "California." LaPierre Decl. ¶ 12 [NRA App. at 5]. "California" was aired 800 times in California from August 29, 2002 to November 5, 2000. *Id.* ¶ 14. "During the entirety of the 30-minute program, there was only one fleeting reference to a federal candidate for office. Specifically, during a short segment urging viewers to join the NRA and describing the benefits of membership, a cover of an issue of the NRA's magazine 'First Freedom' depicting Vice President Gore's image, then a presidential candidate, flashed on the screen for several seconds." *Id.* ¶ 13. One other NRA 30 minute "news magazine" would similarly would be "captured" by BCRA due to the inclusion of the "First Freedom" cover. NRA App. 917, 920, 924, 929 ("It Can't Happen Here) (also referring once to the "Clinton-Gore assault weapons ban"). The NRA does not allege that the study included other 30 minute advertisements, or that the CMAG monitors such commercial broadcasts. It does not indicate how other 30 minute "news magazines" it ran during 2000 would have affected the results of *Buying Time 2000*. *See* Proposed Findings of Fact of the NRA and the NRA PVF ¶¶ 3-7.

II. AFL-CIO ADVERTISEMENTS RUN WITHIN 30 DAYS OF A PRIMARY ELECTION

A. Plaintiff AFL-CIO has put forth a number of examples of what they claim are "genuine issue advertisements" relating to pending legislation that BCRA would capture because the commercials ran on television and radio within 30 days of a primary election. AFL-CIO Br. at 10-11 (citing Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59). The advertisements cited to by the AFL-CIO ran in "flights," aimed at particular legislation pending at the time. Practically all of these flights consisted of a variety of "cookie-cutter" advertisements, meaning advertisements that are virtually identical except that they reference different candidates. *See generally* Mitchell Decl. Ex. 1 [6 PCS].[207] Ms. Mitchell describes advertising campaigns comprising 29 different sets of cookie-cutter advertisements, some of which were run within 30 days of a named candidate's primary election. Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58- 59 [6 PCS].[208]

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[207] Ms. Mitchell provides with her declaration as Exhibit 1 a chart listing all of the advertisements purchased by the AFL-CIO since 1995, which includes the advertisement's title, district where it aired, the candidate or officeholder mentioned, whether it was a radio or television advertisement, the issue(s) discussed, the commercial's audio and visual "call to action," the dates it was broadcast, the dates of the mentioned candidate/officeholder's primary and general election, and whether the advertisement was aired within 30 of the primary, or 60 days of the election date. *See* Mitchell Decl. Ex. 1 [6 PCS]; Mitchell Decl. ¶ 4 [6 PCS] (with some caveats, attesting that "Exhibit 1 is a substantially accurate list of the ads run by the AFL-CIO between 1995 and 2001."). Since the AFL-CIO brief cites to paragraphs from Ms. Mitchell's declaration, and Ms. Mitchell's declaration relies on the information contained in Exhibit 1, I look to both sources for information about these advertisements. In the event of inconsistency between Ms. Mitchell's testimony and the data in Exhibit 1, I rely on Exhibit 1 as its information is far more detailed and forms the basis for Ms. Mitchell's testimony. For example, in Paragraph 34 of her declaration, Ms. Mitchell states that "1991" ran in 28 media markets, identifying 3 candidates within 30 days of their primaries and cites to Exhibit 1 for support. *Id.* ¶ 34. However, Exhibit 1 shows advertisements aired in only 19 markets identifying one such candidate. *Id.* Ex. 1. I give credence to the information in Exhibit 1. In addition, in some cases two forms of the same advertisement were run in the same district against the same candidate. Unless the advertisements were identical, I have treated them as two separate cookie-cutter advertisements. *See e.g. id.* Ex. 1 at 33-34 (listing two "Couples" advertisements run in fourth Congressional district of North Carolina identifying Congressman Fred Heineman, but differing in that one pictured the Congressman and provided a 1-800 number while the other did not).

[208] The advertisements are: "Too Far," Mitchell Decl. ¶ 32 & Ex. 31 [6 PCS]; "1991," *id.* ¶ 34 & Ex. 33; "Raise," *id.* ¶ 35 & Ex. 35; "Votes," *id.*

In addition, Exhibit 1 shows that four more advertisements would have been captured by BCRA due to their airing within 30 days of the identified candidate's primary, but since all of the airings of three of these commercials would have been captured by BCRA's 60 day-window as well, I address only one of these advertisements in this Finding.[209]

1. "Too Far" was an advertisement which aired nationally on cable television and identified President William J. Clinton within 30 days of the Iowa primary in 1996. Mitchell Decl. ¶ 32, Ex. 1 at 17 [6 PCS].

2. During April 1996, the AFL-CIO ran a flight of advertisements entitled "1991" aimed at increasing the national minimum wage. *Id.* ¶ 34. Exhibit 1 shows that the AFL-CIO produced 19 versions of "1991," three of which ran within 30 days of an identified candidate's primary contest. *Id.* Ex. 1 at 17-20. In May 1996, the AFL-CIO ran four more

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¶ 35 & Ex. 36; "People," *id.* ¶ 35 & Ex. 38; "No," *id.* ¶ 35 & Ex. 39; "Minimum Wage," *id.* ¶ 36 & Ex. 42; "$5.15," *id.* ¶ 36 & Ex. 44; "Couple," *id.* ¶ 37 & Ex. 47; "Lady," *id* . ¶ 37 & Ex. 48; "Peace," *id.* ¶ 37 & Ex. 49; "Whither," *id.* ¶ 37 & Ex. 50; "Another," *id.* ¶ 38 & Ex. 53; "Edith," *id.* ¶ 40 & Ex. 58; "Pass," *id.* ¶ 50 & Ex. 94; "Support," *id.* ¶ 50 & Ex. 95; "Call," *id.* ¶ 50 & Ex. 98; "Failed," *id.* ¶ 50 & Ex. 99; "Liable," *id.* ¶ 50 & Ex. 100; "Soon," *id.* ¶ 50 & Ex. 100; "Basic," *id.* ¶ 50 & Ex. 102; "Label," *id.* ¶ 57 & Ex. 127; "Trust," *id.* ¶ 57 & Ex. 128; "Endure," *id.* ¶ 57 & Ex. 129; "Stand," *id.* ¶ 57 & Ex. 130; "Block," *id.* ¶ 58 & Ex. 137; "Help," *id.* ¶ 58 & Ex. 138; "Sky," *id.* ¶ 59 & Ex. 139; and "Protect," *id.* ¶ 59 & Ex. 140.

[209] These four advertisements are: "Job," Mitchell Decl. ¶ 61 & Exs. 1 (at 102), 141 [6 PCS] (All airings of "Job" took place within 60 days of the 2000 general election); "Barker," *id.* ¶ 53 & Ex. 116 (All airings of "Barker" took place within 60 days of the 2000 general election); "No Two Way," *id.* ¶ 41 & Ex. 59 (All airings of "No Two Way" took place within 60 days of the 2000 general election); and "Raiders," *id.* Ex. 1 at 36, 38-39, Ex. 58 at 10. Since the "Job," "Barker," and "No Two Way" airings would have been captured by BCRA's 60-day window, they are not addressed here but in Findings ¶¶ 2.11.3.2, 2.11.8.2.

flights of cookie-cutter advertisements related to legislation that would raise the minimum wage entitled "Raise," "Votes," "People," and "No." *Id.* ¶ 35. According to Exhibit 1, two versions of "Raise" were aired, one of which was aired within 30 days of the named candidate's primary, and 19 versions of "People" were run, two of which mentioned a candidate within 30 days of the candidate's primary. *Id.* Ex. 1 at 21-25. The AFL-CIO's data shows that five versions of "No" were aired, none during the 30 days prior to the primary of an identified candidate, and Exhibit 1 shows no airings of "Votes." *Id.* Ex. 1 at 22. In late June and July of 1996, the AFL-CIO ran two more flights of advertisements entitled "Minimum Wage" and "$5.15" on the same issue. *Id.* ¶ 36. Nine versions of "Minimum Wage" were aired, none of which implicated candidates within 30 days of their primary, while 14 versions of "$5.15" were aired, one which named a candidate within 30 days of the candidate's primary. *Id.* Ex. 1 at 17, 19, 21-22, 32-35.

3. Between late June and early August 1996, the AFL-CIO ran four flights of advertisements entitled "Couple," "Lady," "Peace," and "Whither," "intended to defeat the continuing efforts of the Republican Congress to reduce Medicare/Medicaid benefits as part of the FY 1997 federal budget legislation." *Id.* ¶ 37. The group ran 34 versions of "Couple," two of which mentioned candidates within 30 days of their primaries, and 27 versions of "Whither" were run, four of which fell within 30 days of a named candidate's primary contest. *Id.* Ex. 1 at 25-36. Five versions of "Lady," and four versions of "Peace" were run, but none of these advertisements ran within 30 days of an identified candidate's primary. *Id.* Ex. 1 at 29-34.

4. In late August and early September 1996, "the AFL-CIO sponsored another flight of advertisements entitled 'Another' in response to a series of advertisements run by business interest groups that called into question the AFL-CIO's

Medicare ads by claiming that the Republican budget would increase, rather than decrease, Medicare budgets." *Id.* ¶ 38. The group ran 26 versions of "Another," six of which ran within 30 days of a named candidate's primary contest. *Id.* Ex. 1 at 39-42.

5. In August of 1996, the AFL-CIO "sponsored a television and radio advertisement entitled "Edith" which was intended to gain support for legislation to protect the retirement savings of working families by applying the same protections to 401(k) plans as already applied to traditional defined benefit plans." *Id.* ¶ 40. Forty versions of "Edith" were broadcast, 12 of which identified candidates within 30 days of their primaries. *Id.* Ex. 1 at 36-39. Four versions of a radio advertisement on the same topic entitled "Raiders" were aired by the AFL-CIO, one of which would have been captured by BCRA's 30- day rule. *Id.* Ex. 1 at 36, 38-39.

6. In July 1998, the AFL-CIO "sponsored several flights of television and radio advertisements designed to generate support for HMO reform legislation." *Id.* ¶ 50. These advertisements were entitled "Pass," "Support," "Call," "Failed," "Liable," "Soon," and "Basic." *Id.* The group ran two versions of "Pass," six versions of "Support," three versions of "Failed," three versions of "Liable," and seven versions of "Basic." *Id.* Ex. 1 at 78-82. None of these advertisements was run within 30 days of a named candidate's primary. *Id.* Seventeen versions of "Call" were broadcast, two of which named federal candidates within 30 days of their primary, as did one of the three versions of "Soon." *Id.* Ex. 1 at 80-82.

7. From February through June 2000, the "AFL-CIO ran several flights of ads entitled 'Label,' 'Trust,' 'Endure,' and 'Stand' in opposition to President Clinton's proposal to provide permanent normal trade relations to China." *Id.* ¶ 57. The group ran 14 versions of "Label," two within 30 days of a named candidate's primary. *Id.* Ex. 1 at 92-93. Sixteen versions of "Trust" were aired, three during the 30 days before a named candidate's primary. *Id.* Ex. 1 at 93-97. Eighteen versions of "Endure" were broadcast, three of which aired within 30 days of the named candidate's primary. *Id.* Ex. 1 at 94-97. Neither of the two versions of "Stand" aired by the AFL-CIO named candidates within 30 days of their primary elections. *Id.* Ex. 1 at 97.

8. In June and July of 2000, the AFL-CIO "paid for a flight of radio advertisements entitled 'Block' aimed at pressuring the Senate to approve the Norwood-Dingell version of the Patient's Bill of Rights." *Id.* ¶ 58. Exhibit 1 shows one version of "Block" was aired, but not during the 30 days before a named candidate's primary. *Id.* Ex. 1 at 86. "In August and September, with the bill still stalled in Congress, [the AFL-CIO] ran several flights of television advertisements entitled 'Help' targeting Republican Representatives who had voted against the [bill] when it passed the House in October, 1999, urging viewers to contact each of these Members and 'tell him he's on the wrong side.' . . . One of the flights of 'Help' ran between August 18 and September 6, 2000." *Id.* ¶ 58. Nine versions of "Help" were aired during this flight, two of which aired within 30 days of a named candidate's primary. *Id.* Ex. 1 at 100.

9. Finally, during July and August of 2000, "the AFL-CIO ran television advertisements entitled "Sky" and "Protect" naming approximately twelve different Representatives who had voted at the end of June to pass prescription drug legislation that failed to guarantee drug benefits under Medicare." *Id.* ¶ 59. Twelve versions of "Sky" were aired, one of which was broadcast during the 30 days before a named candidate's primary. *Id.* Ex. 1 at 97-98. Fourteen versions of "Protect" aired, three of which aired within 30 days of a named candidate's primary. *Id.* Ex. 1 at 98-99.

10. These examples constitute 336 cookie-cutter advertisements, 50 of which would have been affected by BCRA.

III. EMPIRICAL STUDIES ON CORRUPTION

In my Title I Findings, I briefly summarize the state of the empirical studies cited to by experts which attempt to demonstrate a link between political donations and political corruption. A more detailed analysis of these studies is presented below.

A. Some studies have attempted to show that PAC donations influence roll call votes. Defense expert Donald Green testifies that he knows of no statistically valid study conducted since 1990 correlating federally-regulated PAC contributions to candidates and roll call votes. Green Cross Exam. at 58 [JDT Vol. 9]; *see also id.* at 54-55 (noting that "the picture of evidence over a range of studies does not suggest a consistent relationship" between contributions and roll call votes); Bok Cross Exam. at 18-19 [JDT Vol. 3] (studies are "flawed"). Green also testifies that some studies have even found a negative correlation between contributions and roll call votes. *Id.* at 55. Defense expert Thomas Mann comments that these studies are

> often used to buttress the argument that political contributions do not corrupt the policy process. This is an odd inference, since it is based on studies of contributions that are limited as to source and size for the very purpose of preventing corruption or its appearance. PAC contributions are capped at $5,000 per election, an amount whose real value has shrunk by two-thirds since it was enacted in 1974. Are we to assume that studies of contributions of $50,000 or $500,000 or $5 million from corporations, unions and individuals would produce the same generally negative findings?

Mann Expert Report at 33. [DEV 1-Tab 1].

The experts testify that part of the reason the existing studies linking contributions to roll call votes are flawed is that "political scientists lack the means by which to observe and determine [*quid pro quo* bribery]." Sorauf Cross Exam. at 132 [JDT Vol. 31]; *see also* Green Cross Exam. at 67-68 [JDT Vol. 9] ("[T]he literature on the relationship between roll call votes and money is murky because the problem is an extremely difficult one to solve, statistically."). Plaintiffs' expert David Primo summarizes the studies linking contributions to roll call votes:

> [I]t is well established that PAC contributions flow disproportionately to incumbent office holders, majority party members, members of powerful committees and to members on committees with jurisdictions relative to the PAC sponsor. . . .—and you could say oh, it must be bribes. But in fact, once you get deeper in it, it just can't possibly be a fact that such little money is affecting the political process.

Primo Cross Exam. at 143-44 [JDT Vol. 27].

B. Other studies have attempted to link donations to other forms of legislative activity, such as committee voting, offering amendments, or filibustering. Defendants' expert Mann notes that there are "a myriad of ways in which groups receive or are denied favors beyond roll-call votes. Members can express public support or opposition in various legislative venues, offer amendments, mobilize support, help place items on or off the agenda, speed or delay action, and provide special access to lobbyists. They can also decline each of these requests." Mann Expert Report. at 33 [DEV 1-Tab 1]. One of these studies in particular,[210] which examines PAC contributions and legislative activity, has been found to be statistically unsound. *See* Green Cross Exam at 55 [JDT Vol. 9]; *see also id.* at 68-72 (noting the study does not account for lobbying activities); Primo Cross Exam. at 136-37 [JDT Vol. 27] ("I am not convinced by their paper . . . "); Snyder Rebuttal Report at 7-9 [2 PCS] (noting that Hall and Wayman's study "has three notable flaws"). Plaintiffs' expert David Primo concludes that "there is no clear, consistent and systematic evidence that contributions play a major role in the legislative process." Primo Cross Exam. at 142 [JDT Vol. 27]. Defendants' expert Derek Bok explains that "[t]he difficulty is, of course, that the ability of researchers to get at the behavior prior to a vote is severely limited since a lot of that is not public, and therefore, it's . . . inherently difficult to prove one way or another what effect PAC contributions would have on prevoting behavior." Bok Cross Exam. at 21 [JDT Vol. 3].

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[210] Richard Hall & Frank Wayman, Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees, 84 American Political Science Review 797 (1990).

C. Other studies have attempted to establish empirically a link between donations and access to legislators. Plaintiffs' expert Primo finds "scant evidence in the political science literature that money secures access." Primo Rebuttal Report ¶ 13 [2 PCS]; *see also* FEC expert Herrnson Dep. in *RNC v. FEC* at 300 (testifying that existing studies on "access" are "kind of weak and wishy washy") [DEV 64-Tab 3]; Bok Cross Exam. at 35-37 [JDT Vol. 3] (noting that researchers studying PAC donations have failed to show that access has a significant impact on policy decisions); Green Cross Exam. at 93-95 [JDT Vol. 9] (unable to identify a study that shows PAC contributions lead to access to federal lawmakers). Defendants' experts Krasno and Sorauf note that "the absence of systematic data on access . . . prevents political scientists from searching for relationships between access and policy-makers' behavior." Krasno & Sorauf Expert Report at 5 [DEV 1-Tab 2].

VOL. IV

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No. 02-1674 *et al.*

IN THE
Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENTS

VOLUME IV

FLOYD ABRAMS	KENNETH W. STARR
SUSAN BUCKLEY	*Counsel of Record*
BRIAN MARKLEY	EDWARD W. WARREN
CAHILL GORDON &	KANNON K. SHANMUGAM
REINDEL LLP	KIRKLAND & ELLIS
80 Pine Street	655 Fifteenth Street, N.W.
New York, NY 10005	Washington, DC 20005
(212) 701-3000	(202) 879-5000

(*additional counsel on inside cover*)

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KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

JAN WITOLD BARAN
THOMAS W. KIRBY
LEE E. GOODMAN
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

VALLE SIMMS DUTCHER
L. LYNN HOGUE
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

G. HUNTER BATES
1215 Cliffwood Drive
Goshen, KY 40026
(502) 473-7557

Counsel in No. 02-1674

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MEMORANDUM OPINION

LEON, District J.

The passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[1] as the record amply indicates, was a considerable legislative achievement that many thought would never come to pass. Indeed, the law constitutes the most comprehensive reform of our national campaign finance system in the past twenty-eight years. As such, it is the latest chapter in the history of a longstanding and recurring problem that our government has been wrestling with since the administration of Theodore Roosevelt.

Titles I and II of BCRA focus principally on a major campaign finance development that has dramatically unfolded over the past decade: the use of corporate and union treasury funds, either directly or through soft money donations to political parties, to finance electioneering communications masquerading, predominantly, as "issue ads." In an attempt to prevent actual and apparent corruption arising from the funding of such sham issue advertisements, Congress enacted a sweeping set of reforms that effectively: alters the methodology of our national, state, and local parties and transforms their relationship with each other; limits the ability of corporations, unions, individuals, and interest groups to engage in communications on public policy; and diminishes the role of federal officeholders in fundraising for political parties and nonprofit interest groups.

For the reasons set forth in the following opinion, I find that the defendants have more than adequately demonstrated the constitutionally necessary basis for Congress: (1) to restrict the use of soft money donations by national, state, and local parties to fund certain types of campaign communications (particularly candidate-advocacy "issue" advertisements) which are designed to, and which do, directly affect federal elections; and (2) to restrict the airing of corporate and union electioneering communications which promote, oppose, attack, or support specific candidates for the office which they seek.

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[1] Pub.L. No. 107-155, 116 Stat. 81 (2002).

Notwithstanding this conclusion, however, I do not find that the defendants have demonstrated a sufficient constitutional basis to support Congress's decision: (1) to ban the solicitation, receipt, and use of soft money by national parties for purposes that do not directly affect federal elections; (2) to ban state and local parties from using soft money to fund a variety of election activities that do not directly affect federal elections; (3) to ban the use of corporate and union treasury monies to fund genuine issue advertisements that are aired during a particular time period preceding election even though they do not directly advocate the election or defeat of a federal candidate; (4) to ban national parties from donating to and soliciting soft money for certain Section 501(c) and Section 527 organizations under the Internal Revenue Code; (5) to prohibit federal officeholders from raising soft money for their national parties; and (6) to require broadcast licensees to collect and disclose certain records in connection with requests to purchase broadcast time. To the contrary, I find that in trying to do so Congress has unconstitutionally infringed upon the First Amendment rights of the various political actors and their supporters.

In short, the defendants, in my judgment, have been able to establish in some respects, but not in others, a sufficient basis for Congress's intervention in dealing with these problems. As to those where they succeeded, I believe it would make a mockery of existing Supreme Court precedent and the regulatory scheme that it has heretofore blessed, to hold otherwise. As to those where they have not, the protections

accorded the plaintiffs under the First Amendment more than adequately warrant their undoing.

The following is a brief outline of my opinion, which has been organized on a title by title basis. With respect to the opinion itself, to the extent I have agreed with both the judgment and reasoning of either of my colleagues (or both), I have so noted and refrained from writing. As to those sections where I have agreed only in the judgment of one or more of my colleagues, I have limited the discussion of my reasoning to that necessary to explain how I reached my holding. To the greatest extent possible I have tried to acknowledge and address any disagreements we have had factually. However, in light of the importance and enormity of the record, I have included in my opinion a complete set of my Findings of Fact which I relied upon in reaching my judgments.

* * *

* * *

I. Title I: Restrictions on Nonfederal Funds New FECA Sections 323(a), 323(b), 301(20)(a), 323(d), 323(e), and 323(f)

A. New FECA Section 323(a): Nonfederal Fund Restrictions on National Parties

I agree with Judge Henderson's conclusion, although for different reasons, that Congress, in essence, is constitutionally prohibited from regulating a national party's ability to solicit, receive, or use nonfederal funds (i.e., soft money) for nonfederal and mixed purposes. To the extent that Section 323(a) seeks to regulate donations to national parties that are used for purposes that at the most *indirectly* affect federal elections (i.e., nonfederal or mixed purposes), the defendants have failed to demonstrate that Section 323(a) serves an important government interest, or even if they had, that it is sufficiently tailored to serve that interest.

However, I find that Congress can restrict a national party's use of nonfederal money to directly affect federal elections through communications that support or oppose specifically identified federal candidates. Therefore, like Judge Kollar-Kotelly, I find constitutional Congress's ban on the use of nonfederal funds by national parties for Section 301(20)(A)(iii) communications. As a result, I concur in part in, and dissent in part from, Judge Henderson's judgment and reasoning regarding Section 323(a).

1. Standard of Review for Restrictions on Donations to Political Parties

The right to freedom of political association under the First Amendment is a fundamental right of donors to political parties, *see Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976),[2] and arguably of the political parties themselves, *see FEC v. Colorado Republican Fed. Campaign Comm. ("Colorado II")*, 533 U.S. 431, 448 n.10 (2001). Our national political structure is firmly anchored by our two major parties.[3] The

role those national parties play in defining wide-ranging political agendas and bringing together individuals (and their financial resources) on behalf of those political agendas is critical to the stability our political system has enjoyed over the past 200 years.[4]

Upon giving money to a political party, or to any political organization for that matter, a donor hopes that the organization will amplify his political perspective or candidate preference.[5] Any number of activities by a political party can amplify the donor's political voice. Some activities, like direct contributions to state candidates, are for a nonfederal purpose because they have no effect on a federal election. Others, like public communications that advocate the election or defeat of a particular federal candidate, are for a federal purpose because they *directly* affect federal elections. And still others, like generic voter registration and genuine issue advertisements,[6] are for "mixed purposes" because they *indirectly* affect both state and federal elections. Regardless of the purpose served, all of these party activities, paid for with aggregated donations, express loudly, and often effectively, the donor's political position.[7] For this reason, an individual's donation to a political party is an act of political association protected by the First Amendment. But as important as this right is, it is not absolute.

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[2] In *Roberts v. United States Jaycees*, the Supreme Court declared that "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (citing *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981)).

[3] *See FEC v. Colorado Republican Fed. Campaign Comm. ("Colorado I")*, 518 U.S. 604, 618, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (noting that political parties play an "important and legitimate role . . . in American elections"); *Davis v. Bandemer*, 478 U.S. 109, 144-45, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (O'Connor, J., concurring in judgment) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government ."); *see also* Findings of Fact ("Findings") 20-26.

[4] *See California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." (citing Noble E. Cunningham, Jr., *The Jeffersonian Republican Party*, in 1 *History of U.S. Political Parties* 239, 241 (Arthur M. Schlesinger, Jr. ed., 1973))).

[5] *See, e.g.*, Findings 14-19.

[6] For a discussion of the distinction between genuine issue advertisements and "sham" issue ads designed to directly affect a federal candidate's election, see Findings 288-89 and *infra* Parts I.A.3 & I.B.2.

[7] *See Colorado II*, 533 U.S. at 453 ("[A] party combines its members' power to speak by aggregating contributions and broadcasting messages

The Supreme Court, in *Buckley v. Valeo* and ensuing campaign finance cases, has recognized Congress's power through FECA [8] to regulate, in effect, the source and amount of contributions to political parties and candidates that donors could make *for the purpose of influencing federal elections*.[9]

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more widely than individual contributors generally could afford to do."); *FEC v. Massachusetts Citizens for Life ("MCFL")*, 479 U.S. 238, 261, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction."); *Citizens Against Rent Control*, 454 U.S. at 294 ("[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost."); *id.* at 296 (citing *Buckley*, 424 U.S. at 65-66); *Buckley*, 424 U.S. at 15, 22. Alexis de Toqueville observed:

> As soon as several of the inhabitants of the United States have conceived a sentiment or an idea that they want to produce in the world, they seek each other out; and when they have found each other, they unite. From then on, they are no longer isolated men, but a power one sees from afar, whose actions serve as an example; a power that speaks, and to which one listens.

2 Alexis de Tocqueville, *Democracy in America* 492 (Harvey C. Mansfield & Delba Winthrop eds., 2000).

[8] Federal Election Campaign Act of 1971 ("FECA"), Pub.L. No. 92-225, 86 Stat. 3 (1971 provisions) (codified as amended at 2 U.S.C. §§ 431 *et seq.*)

[9] *See Buckley*, 424 U.S. at 23-35 (upholding contribution limitations to candidates and their political committees); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390-98, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (same); *see also California Medical Ass'n v. FEC ("California Medical")*, 453 U.S. 182, 197-99, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) (upholding contribution limitations to PACs). The Supreme Court has never explicitly addressed limitations on contributions to political parties. The $20,000, now $25,000, limit on contributions to national parties was not even added to FECA until the post-Buckley 1976 amendments. *See*

In enacting such contribution limitations Congress had to demonstrate that it was doing so in furtherance of the important government interest of preventing actual or apparent corruption of either the officeholder or the federal electoral system. *Buckley*, 424 U.S. at 25; *see, e.g., Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298-99 (1981); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000).[10] Indeed, in addressing contribution limitations, preventing actual or apparent corruption is the only government interest the Supreme Court has found sufficient to interfere with associational rights. *FEC v. National Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 496-97 (1985). In *Buckley*, the Supreme Court explained:

> To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined . . . . Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from

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Pub.L. No. 94-283 § 320, 90 Stat. 475 (codified as amended at 2 U.S.C. § 441a(a)(1)(B)); *see also California Medical*, 453 U .S. at 194 n. 15; BCRA § 307(a)(2) (raising amount individuals can contribute to national parties from $20,000 to $25,000); BCRA § 102 (raising amount individuals can donate to state parties from $5,000 to $10,000); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D). Contribution limitations to parties, however, have been upheld indirectly, *see Buckley*, 424 U.S. at 38 (upholding FECA's $25,000 limitation on total contributions, which included "huge contributions to the candidate's political party"), and in dictum, *see Colorado I*, 518 U.S. at 617 (recognizing $20,000 contribution limit to political parties and citing 2 U.S.C. § 441a(a)).

[10] If a contribution limitation survives a claim that it infringes associational rights, then it also survives a speech challenge. *See Shrink Missouri*, 528 U.S. at 388. Note also that the challenge based on the donor's associational right is "correlative" to an overbreadth challenge. *See id.* at 388 n. 3.

> public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. 424 U.S. at 26-27. In each case where the Supreme Court upheld contribution limitations, *see supra* note 9, the Court reviewed those limits under *Buckley's* "closely drawn" scrutiny, a standard of review somewhat less rigorous than strict scrutiny, by which "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 420 U.S. at 25 (internal quotations omitted); *see also California Medical Ass'n v. FEC ("California Medical")*, 453 U.S. 182, 196, 196 n.16 (1981).

Nevertheless, the plaintiffs argue, and Judge Henderson agrees, that any limitation on a national party's ability to raise and use nonfederal money must pass muster under the strict-scrutiny standard of review that the Supreme Court has traditionally applied to analyze expenditures. *See, e.g.*, Republican National Committee ("RNC") Opening Br. at 51-53. I disagree.

While I agree that Section 323(a)'s prohibitions on soliciting, receiving, and using nonfederal funds restricts a party's ability to spend nonfederal money, their principal effect is to limit the ability of future donors through their contributions to use the national parties to amplify their voices.[11] Therefore, in determining to what extent Congress

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[11] That is, Section 323(a) limits an individual, wishing to express his political agenda, to donations of hard money up to $25,000, the limitation on contributions to parties under FECA. 2 U.S.C. § 441a(a)(1)(B); *see also* BCRA § 307(a)(2) (raising how much individuals can contribute to national parties from $20,000 to $25,000).

can limit donations to national and state parties,[12] this Court should review the limitations using the closely-drawn standard of review applied to contribution limitations in *Buckley*, 420 U.S. at 25, and ensuing campaign finance cases,[13] in which the Court specifically acknowledged "that restrictions on contributions require less compelling justification than restrictions on independent spending." *FEC v. Massachusetts Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 259-60 (1986); *see also Shrink Missouri*, 528 U.S. at 387. The Supreme Court lowered the hurdle for contributions, *see Shrink Missouri*, 528 U.S. at 387-88, because restrictions on contributions, in its judgment, impact associationalrights less by leaving "the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates," *id.* at 387 (quoting *Buckley*, 424 U.S. at 22) (internal quotations omitted), and by not preventing "political committees from amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21. Surely, these reasons for applying a lower standard of scrutiny for donations to candidates and their political committees are no less persuasive for analyzing contributions to political parties.

The plaintiffs, nevertheless, maintain that in *Citizens Against Rent Control*, which involved limitations on contributions to political committees with the purpose of supporting or opposing ballot measures, 454 U.S. at 291, the

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[12] This standard of review applies to all donation restrictions under Title I of BCRA.

[13] Since the practical effect is that any restriction on solicitation is subsumed within the restriction on receipt of donations, which I maintain should be reviewed under closely-drawn scrutiny, there is no reason to apply a different standard of review for the solicitation restriction. In the end, if the political parties are restricted from receiving nonfederal donations for federal purposes, then they are restricted from soliciting funds for those purposes as well.

Supreme Court settled on strict-scrutiny review for contribution limitations to political organizations.[14] This conclusion is not based on a close enough reading of the case. While the plurality does suggest the undefined standard of "exacting judicial scrutiny," *Citizens Against Rent Control*, 454 U.S. at 294, 298, the three concurring justices either specifically applied closely-drawn scrutiny, *id.* at 301 (Marshall, J., concurring),[15] or equated the plurality's "exacting scrutiny" with *Buckley's* closely-drawn scrutiny, *id.* at 302 (Blackmun, J., & O'Connor, J., concurring).[16] Thus, if

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[14] *See* McConnell Opp'n Br. at 17; *see also* J. Henderson Op. at Part IV.D.1.a.

[15] Justice Marshall observed:

> [T]his Court has *always* drawn a distinction between restrictions on contributions, and direct limitations on the amount an individual can expend for his own speech. . . . Because the Court's opinion is silent on the standard of review it is applying to this contributions limitations, I must assume that the Court is following our consistent position that this type of government action is subjected to less rigorous scrutiny than a direct restriction on expenditures.

Citizens Against Rent Control, 454 U.S. at 301 (Marshall, J., concurring).

[16] Although "exacting judicial scrutiny" is oft-cited, its parameters are loosely defined in other cases as well. The Supreme Court, for example, employed the phrase "exacting scrutiny" when reviewing FECA's disclosure requirements in *Buckley*, 424 U.S. at 64, explaining that the government interest must be "sufficiently important," *id.* at 66, and "substantial," *id.* at 80. To give another example: in *First National Bank of Boston v. Bellotti*, the Supreme Court applied "exacting scrutiny" to contribution and expenditures limitations on corporations; it stated that the government must show a "compelling" interest, 435 U.S. 765, 786, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960)), and that the interest must be "closely drawn to avoid unnecessary abridgment," *Bellotti*, 435 U.S. at 786 (quoting *Buckley*, 424 U.S. at 25). In any event, since it is uncontroverted that preventing actual and apparent corruption is a "compelling" government interest, *see, e.g., NCPAC*, 470 U.S. at 496-97, the only remaining dispute is whether any donation restriction need be "narrowly tailored" or "closely drawn" to serve the compelling

anything, *Citizens Against Rent Control* suggests that closely-drawn scrutiny should apply, even if the political organization is established exclusively for a purpose unrelated to federal campaigns. Restrictions on national political parties, which engage in both candidate-specific *and* issue-oriented activities, do not deserve to be treated with greater vigilance. Indeed, considering the standard of review adopted by the Supreme Court in *Citizens Against Rent Control* and the fact that contribution regulations are less jarring of associational rights than are expenditure restrictions, restrictions on donations to political parties should be similarly regulable if they are closely drawn to serve the compelling government interest of preventing corruption and its appearance.

2. Donations Used to Directly Affect Federal Elections are Regulable by Congress

Section 323(a) of BCRA seeks to expand Congress's authority to regulate donations that by definition did not appear to be regulable under FECA because, ostensibly, they were not given for the purpose of influencing federal elections.[17] It does so in sweeping fashion: national parties "may not solicit, receive, . . . direct . . . transfer, or spend any funds that are not subject to the limitations, prohibitions, and reporting requirements of this Act." BCRA § 101; FECA § 323(a); 2 U.S.C. § 441i(b)(1). Congress seeks this expansion, principally, because the national parties have increasingly, over the past decade, exploited a so-called

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government interest in combating corruption. And *Buckley*, coupled with the various opinions in *Citizens Against Rent Control*, seemingly foreclose that question in favor of *Buckley's* closely-drawn scrutiny.

[17] If they had been intended by the donor to influence federal elections, they should have been treated, at the time they were received, as federal money. As stated earlier, the Supreme Court has, in effect, upheld limitations on contributions to political parties, *see supra* note 9, and a "contribution," as defined by FECA, is a donation "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

"loophole"[18] in FECA that fails to regulate the use of these nonfederal funds for various types of electioneering communications that advocate the election or defeat of a specifically identified candidate.[19]

The defendants contend that Congress, in its attempt to close this "loophole," can limit *any* donation to a national party, regardless of the purpose for which it is used thereafter. *See* Intervenors Opp'n Br. at 26. I disagree. The plaintiffs, on the other hand, contend that Congress can only limit donations that are funneled thereafter through the party as coordinated expenditures, direct contributions to candidates, or uncoordinated expenditures for express advocacy as defined by the "magic words." *See, e.g.*, McConnell Opening Br. at 36; McConnell Opp'n Br. at 25-26; *see also Buckley*, 424 U.S. at 44 n.52 (providing examples of "express words of advocacy"). With that I disagree, as well. Both contentions are calculatingly indifferent to what reason, and precedent, have shown to be the only constitutionally viable antidote to corruption or its appearance: restrictions on donations to political parties based upon their *use to directly affect federal elections.*[20] In this sense, from my perspective, the issue

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[18] This so-called "loophole" was created through Federal Election Commission ("FEC") advisory opinions. *See* McCain Dep. at 63 (stating that BCRA will "close certain loopholes that have been opened by the FEC, not through acts of Congress"); FEC Advisory Op.1995-25; FEC Advisory Op.1979- 17; FEC Advisory Op.1978-10.

[19] *See, e.g.*, McCain Dep. at 192-93 (explaining that grassroots activities are "the fundamentals of a democratic process" and that "it's the broadcast television and radio ads that we believe are what is the problem"); Meehan Dep. at 218-19 (explaining that voter mobilization efforts are "good for the system" and distinguishing those efforts from candidate advocacy).

[20] Even the plaintiffs acknowledged that "[i]f BCRA limited only party activities directly related to federal candidates, Defendants might have the better argument." California Democratic Party ("CDP)/California Republican Party ("CRP") Reply Br. at 9.

before the Court is not whether Congress can limit donations to political parties,[21] but to what extent it can do so.

In *Shrink Missouri*, the Supreme Court made it clear that the amount of evidence needed to satisfy judicial scrutiny of restrictions on associational rights depends on the "novelty and plausibility of the justification raised." 528 U.S. at 391. Here, Congress relies upon the government interest of preventing actual and apparent corruption to justify the restrictions on nonfederal funds. When nonfederal funds are being used by national parties for nonfederal or mixed purposes, the government's interest in preventing corruption or its appearance to justify this restraint is so novel, and implausible, that it requires a substantial amount of evidence to withstand constitutional scrutiny. However, when nonfederal funds are being used by national parties for the federal purpose of directly benefitting the election of candidates[22] through either express advocacy or "issue" advocacy of the type defined in Section 301(20)(A)(iii),[23] the government's use of that interest to justify congressional intervention is neither novel, nor implausible, because the risk of corruption, *see infra* Part I.B.2, naturally flows from circumstances where a donor's contribution to a party is used thereafter to directly benefit a candidate's campaign. Indeed, as I discuss at length in the later in relation to Section 301(20)(A)(iii), *id.*, the record overwhelmingly demonstrates that candidates are aware of who makes the large soft money donations, and in many instances, participate in raising money from them. Furthermore, the record clearly establishes that the public perceives that those large soft money donors receive special access to the legislators and have special influence on the legislative process. *Id.*

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[21] *See supra* note 9.

[22] There is no disagreement that political parties use donations for federal purposes. *See* Findings 30-52; *see also Colorado II*, 533 U.S. at 449 ("Parties are . . . necessarily the instruments of some contributors whose object is . . . to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors."). Political parties, *inter alia*, provide direct contributions to candidates, *see* 2 U.S.C. § 441a(a)(2)(A) (setting contribution limit by political committees to candidates at $5,000); *Buckley*, 424 U.S. at 35-36, make expenditures in coordination with a federal candidate, *see* § 441a(d) (setting party expenditure limits); *Colorado II*, 533 U.S. at 464 (upholding § 441a(d) only as applied to coordinated expenditures), and spend money on uncoordinated candidate advocacy, both express and nonexpress.

[23] *See infra* Part I.B.2.

The notion that using donations for a federal purpose can implicate corruption is consistent with Congress's definition of "contribution" in FECA: "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office.*" 2 U.S.C. § 431(8)(A)(i) (emphasis added). This definition of contribution was part of FECA when the Supreme Court upheld contribution limitations in *Buckley,* stating that a donation is regulable (that is, a "contribution") because "it is connected with a candidate or his campaign," thus having "a sufficiently close relationship" to the government interest in preventing actual or apparent corruption. 424 U.S. at 78. Additionally, the contention that a party's use of a donation to influence a federal election is conducive to corruption, or its appearance, is also supported by the widely accepted premise that Congress can restrict donations used for party express advocacy as defined by the so-called "magic words" requirement of *Buckley.* Indeed, the plaintiffs concede as much,[24] and this is perfectly consistent

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[24] *See, e.g.*, RNC Opp'n Br. at 37 (conceding that *Buckley* and its progeny indicate that contributions to a party may be regulated and subjected to a federal contribution limit "only to the extent the entity uses the contributions for regulable activity," which includes "independent expenditures expressly advocating the election or defeat of federal candidates"); *id.* (stating that money political parties receive for express advocacy "may constitutionally be subjected to a federal contribution

with the regulatory scheme that was propagated by the FEC.[25] Surely, if donations used for express advocacy can be limited to prevent corruption, then donations used for candidate advocacy that is tantamount to express advocacy—assuming some minimal "quantum of empirical evidence" of corruption or its appearance, *see Shrink Missouri,* 528 U.S. at 391—should be regulable for the same reason.

The notion that Congress may limit donations based on their use for certain purposes is also consistent with Supreme Court precedent which intimates that donations closely connected to a candidate's campaign—even if they are not direct contributions or coordinated expenditures—raise, at a minimum, the specter of corruption. In *First Bank of Boston v. Bellotti,* the Court rejected a Massachusetts statute prohibiting corporations from making contributions or expenditures to influence the vote on referendum proposals. 435 U.S. 765, 787- 95 (1978). In rejecting the statute, the Court explained that the interests in preventing corruption and thus preserving the integrity of the electoral process were not served by limiting contributions and expenditures that affected referendum discussion. *Id.* at 789-92. The Court stated: "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a

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limit"); McConnell Opening Br. at 36, 37-38 (admitting that a contribution to be used for activities that exclusively serve to get a candidate elected, like express advocacy, can be corrupting).

[25] *See* FEC Advisory Op.1995-25 (not allowing use of nonfederal funds to pay for any portion of party express advocacy). One of the reasons that parties should not be able to fund uncoordinated express advocacy with nonfederal funds is that if such a restriction did not exist, corporations and labor unions could simply evade the limitations on their use of their general-treasury funds for express advocacy by funneling those funds through the parties. *See* 2 U.S.C. § 441b; *MCFL,* 479 U.S. at 241-64 (upholding prohibition against using corporate treasuries to fund uncoordinated expenditures for express advocacy).

popular vote on a public issue." *Id.* at 790. Alternatively, one can infer that perceived corruption is likely to be present in cases involving candidate elections.

The extent to which certain uses of donations create the risk of corruption was also at issue in both *California Medical,* 453 U.S. at 193-201, and *Citizens Against Rent Control,* 454 U.S. at 292-300, where the Court considered donations to organizations, not candidates. It is difficult to reconcile these two cases without drawing the conclusion that the Court was primarily concerned with the purpose for which the organizations were using the donations.[26] In *California Medical,* the Court held that Congress can restrict the amount of donations to multicandidate political committees "which advocate[] the views and candidacies of a number of candidates." 453 U.S. at 197. Multicandidate political committees assuredly spend some of their funds on "independent expenditures," as the Court in *California Medical* concedes, *id.* at 195-96, but the Court seemingly concluded that those uncoordinated expenditures, by a "multicandidate" political committee, are made *on behalf of candidates,* whether direct contributions or uncoordinated expenditures. *See* 2 U.S.C. § 441a(a)(4) (defining multicandidate political committee as a political committee "which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal office."). The Court said as much when it dismissed the ACLU's concerns that donation restrictions would hinder the

PAC's efforts to collectively express political views. *California Medical,* 455 U.S. at 197 n.17. Restricting contributions to committees like the one at issue in *California Medical,* the Court maintained, is different than efforts to regulate groups expressing common political views. *Id.* In this sense, the nature of the organization—that it is established solely to benefit federal candidates—was enough to conclude that most, if not all, of its contributions and expenditures were for the purpose, and had the effect, of benefitting a federal candidate. Conversely, in *Citizens Against Rent Control,* where the Court found that the City of Berkeley could not restrict donations to political committees that support or oppose ballot propositions, 454 U.S. at 295-300, the organization was established exclusively to advocate on behalf of a public issue, *id.* at 291 (explaining that the issue before the Court was whether donations to associations "formed to support or oppose ballot measures" could be regulated). That the association was formed only to oppose a public issue and that its speech was unrelated to candidates in any way, *id.* at 296-98, led the Court to find that the restriction "does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights," *id.* at 299.

Of course, political parties are unique; they are neither super multicandidate political committees formed entirely to support candidates for federal office nor political associations completely uninvolved in candidate advocacy. Justice Kennedy described political parties this way:

> Political parties have a unique role in serving [the principle of open, robust debate on public issues]; they exist to advance their members' shared political beliefs. . . . A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of

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[26] Not surprisingly, the defendants rely on *California Medical* for the proposition that Congress can regulate *all* donations to political organizations, *see, e.g.,* RNC Opp'n Br. at 36; the plaintiffs equally rely on *Citizens Against Rent Control* for their contention that Congress *cannot* regulate *any* donations to such organizations, *see, e.g.,* Gov't Opening Br. at 65-66. Again, both positions sweep too far and cannot be reconciled without parsing the Supreme Court's rationales in the two cases.

> particular elections, candidates are necessary to make the party's message known and effective, and vice versa.

Colorado I, 518 U.S. at 628 (Kennedy, J., concurring in the judgment and dissenting in part) (citations omitted).[27] With such varying purposes, national political parties merit a hybrid treatment in regulating the funds donated to them.

Further, *Colorado I* and *Colorado II* do not preclude Congress from regulating donations that directly affect federal elections, even if the parties use those funds independently of the candidates[28] and even if there is no coordination between the donor and the candidate. In *Colorado I*, the Supreme Court merely found that Congress could not limit uncoordinated party *expenditures*. 518 U.S. 617. Indeed, the Court even reiterated that Congress has every power to limit the amount of donations to parties that are "used for independent party expenditures for the benefit of a particular candidate." 518 U.S. at 617. Thus, if anything, *Colorado I* serves to bolster the proposition that Congress can regulate donations used "for the benefit of a particular candidate" because that is where "the greatest danger of

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[27] One Republican National Committee ("RNC") official explained his party this way:

> The RNC achieves [its core principles] through three primary means: (1) promoting an issue agenda advocating Republican positions on issues of local, state, regional, national, and international importance; (2) electing candidates who espouse these views to local, state and national offices; and (3) governing in accord with these views. . . . [T]he RNC often seeks to promote Republican positions on important issues, even in contexts outside elections.

Josefiak Decl. ¶ 22.

[28] *See* J. Henderson Op. at Part IV.D.1.c (arguing that "Congress cannot constitutionally regulate non-federal donations to political parties if the funds are then spent independently of a candidate").

corruption" arises. *Id.*[29] Reading *Colorado I* together with *Buckley, Bellotti, Citizens Against Rent Control,* and *California Medical* leaves one with a clear impression: donations used directly for the purpose of uncoordinated federal activity, like express advocacy, can engender corruption, or the appearance thereof, and are therefore regulable.[30] Finally, *Colorado II,* in which the Supreme Court determined that Congress could limit the amount of coordinated party expenditures, 533 U.S. at 440-65, is relevant because it stands for the proposition that a contribution by the party to the candidate, even absent coordination between the donor and candidate, can be regulated. Thus, donations to political parties used thereafter for purposes that directly affect federal elections, such as candidate "issue ads," even if there is no coordination between the donor and the candidates in advance of the donations to the party, should likewise be regulable. Common sense and the evidence introduced by the defendants support that conclusion. *See infra* Part I.B.2. And, until such time as *Buckley* and its progeny are overruled, allowing such donations to occur without regulation is an affront to a regulatory system that has been blessed by the Supreme Court and in place since the adoption of the 1974 amendments to FECA.

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[29] The Supreme Court also noted that the opportunity for corruption posed by nonfederal contributions to a party for certain activities, such as supporting state candidates or voter mobilizations efforts, is "at best, attenuated" because "[u]nregulated 'soft money' contributions may not be used to influence a federal campaign." *Colorado I*, 518 U.S. at 616. That observation implies that if soft money were being used "to influence a federal campaign," the opportunities for corruption would be less attenuated, perhaps even palpable. Also, note that the Supreme Court's observation that "[u]nregulated 'soft money' contributions may not be used to influence a federal campaign," *id.*, preceded the 1996 explosion of party candidate advocacy financed with nonfederal funds. *See* Mann Expert Report at 17-21. From 1996 until the enactment of BCRA, the parties used nonfederal funds for the exact purpose that the Supreme Court stated those funds cannot be used for: "to influence a federal campaign." *Colorado I*, 518 U.S. at 616.

[30] *See Jacobus v. Alaska*, 182 F.Supp.2d 881, 889 (D.Alaska 2001) (explaining that there is no appearance of corruption from political party "donations of time, money and services ... not being made for nominating and electing candidates" and holding that "donations to political parties for purposes other than nominating or electing purposes (e.g., issue advocacy, voter registration) may not constitutionally be considered contributions subject to regulation . . . .")

3. New FECA Section 323(a) Unconstitutionally Regulates the Use of Nonfederal Funds for Nonfederal and Mixed Purposes

As sure as the evidence, legal precedent, and common sense support Congress's power to regulate the use of nonfederal funds for federal purposes, they do *not* support Congress's effort to regulate nonfederal funds used for nonfederal and mixed purposes. National parties need to raise and use nonfederal funds for a variety of purposes. Sometimes they raise and use nonfederal funds for the nonfederal purpose of contributing to state and local candidates in "off-year" elections when there are no federal candidates on the ballot.[31] Other times they need to raise and

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[31] As one RNC official testified: "The RNC's national focus should not be misunderstood as a federal focus. Rather, given the RNC's state- based structure, it is not surprising that the RNC actually focuses many of its resources on purely state and local election activity." Josefiak Decl. ¶ 19. I agree. In 1999 and 2001, the RNC contributed over $9.5 million dollars, using nonfederal funds, directly to state and local candidates. Banning Decl. ¶ 28(a); *see also* Findings 57-59 (explaining, *inter alia,* that five states hold elections in odd-numbered years). For example, the RNC contributed approximately $500,000 to the 1999 Republican gubernatorial candidate in Virginia. La Raja Decl. ¶ 14. In the last two off-year elections, the RNC also transferred over $10 million to state parties and made over $1 million dollars in direct expenditures, bringing the total to $21 million dollars, not including administrative overhead, spent on the two elections where no federal candidates appeared on the ballot. Banning Decl. ¶ 28(a). In 2001 alone, the RNC spent $15.6 million on nonfederal

use funds for mixed purposes that only *indirectly* affect the election of federal candidates, such as generic voter mobilization efforts and genuine issue advertisements.[32] The

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activities (contributions to state and local candidates, transfers to state parties, and direct spending). That $15.6 million dollars represented 30 percent of all nonfederal money raised that year by the RNC. *See* Hearing Tr. (Dec. 4, 2002) at 43 (statement of Burchfield). Thus for elections in which there is *no* federal candidate on the ballot, the RNC contributes directly to state and local candidates, trains state and local candidates, and funds communications calling for election or defeat of state and local candidates. *See id.;* Josefiak Decl. ¶ ¶ 19, 41-59; La Raja Decl. ¶ 14; *see also* Bok Cross Exam. at 34-35. Even defendants' expert Thomas E. Mann agreed that donations to a gubernatorial candidate in an odd-numbered year is not something that is intended to affect a federal election. Cross Exam. of Def. Expert Mann at 71.

Of course, the RNC made direct contributions to state and local candidates during even-numbered years as well, *see* Josefiak Decl. ¶ 61, and "sometimes devote[d] significant resources toward states with competitive gubernatorial races even though the races for federal offices [were] less competitive," Josefiak Decl. ¶ 62.

[32] Portions of RNC transfers to state and local parties were used for voter mobilization efforts. One RNC official testified that "RNC transfers of non-federal funds to the state parties play a critical role in subsidizing the activities of the state parties. The state parties depend on these funds to pay for everything from their own administrative overhead to voter mobilization, grass roots organizing, and media." Banning Decl. ¶ 31; *see also* Duncan Decl. ¶¶ 11-12. In 2000, for example, the RNC transferred approximately $25 million in nonfederal funds to the Republican's Victory Plans, which were plans tailored to each state's needs and designed to mobilize voters on behalf of all the candidates on the ticket. Josefiak Decl. ¶¶ 2[illegible]40. Money for the Victory Plans was not spent on federal candidate "issue ads," Josefiak Decl. ¶ 31, and was used primarily to benefit state and local candidates, *see* Peschong Decl. ¶¶ 4, 8-9 (stating that "the RNC typically provides a very substantial share of the funding of state victory programs," which are "programs designed to support the entire Republican ticket, and frequently place more emphasis on high profile state-wide races than on federal races, especially when no federal candidate is running state-wide"). Other examples of mixed activities include party newsletters, administrative overhead, training seminars on

defendants do not deny that the national parties use nonfederal funds for both nonfederal and mixed purposes that at the most indirectly affect federal elections. They contend, nonetheless, that nonfederal donations to national parties—*regardless of their use*—create actual or apparent corruption. *See* Intervenors Opp'n Br. at 26. To support that expansion of Congress's power in contravention of the First Amendment rights of the donors and national parties, the defendants would have to demonstrate that using nonfederal funds for either nonfederal or mixed purposes gives rise to either corruption or an appearance of corruption, such that the blanket restriction on nonfederal funds is not overbroad. For the following reasons, they have not done so.

First, the suggestion that the appearance of corruption, let alone actual corruption, exists regardless of any perceived, or actual, benefit to a federal candidate does not comport with the conventional legal understanding of corruption and apparent corruption. The Supreme Court has defined corruption as something more than a quid pro quo arrangement in which a legislator sells his vote for one or more contributions to his campaign, *see, e.g., Colorado II*, 533 U.S. at 440-41, as well as "improper influence" or conduct by a donor that results in a legislator who is "too compliant" with the donor, *Shrink Missouri*, 528 U.S. at 389. Of course, the Supreme Court has also recognized that

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get-out-the-vote activities, and fundraising assistance to state and local parties. *See* Findings 71-99.

Considering the national parties' extensive involvement in so many nonfederal and mixed activities, it is not surprising that the Supreme Court has recognized that political parties do not use all of their donations to affect federal elections, explaining in *Colorado I* that FECA permits unregulated 'soft money' contributions for certain nonfederal and mixed purposes. 518 U.S. at 616 ("We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, or for voter registration and "get out the vote" drives.") (internal citations omitted).

Congress has an equally compelling government interest in preventing the appearance of corruption in the public's mind. *Id.* at 390; *Buckley*, 424 U.S. at 27. The reason for this is simple: like corruption itself, the appearance of corruption undermines the public's confidence in our system of government and frustrates participation in the political process by causing the public to believe elected representatives are not acting independently of the individuals, corporations, and unions who contribute to representatives' campaigns and parties. *Shrink Missouri*, 528 U.S. at 390. Indeed, contribution limits to federal candidates and parties were enacted, and have been upheld by the Supreme Court, to prevent this very perception in the mind of the public. *Id.; Buckley*, 424 U.S. at 23- 35. And it has been Congress's province to set the dollar limit above which this perception starts to ferment. *See Buckley*, 424 U.S. at 30; *Shrink Missouri*, 528 U.S. at 397. Thus, whether the corruption is actual or perceived, every traditional and accepted definition to date depends on the donor conferring, or being perceived as having conferred, a benefit on the candidate in return for something.[33] In *NCPAC*, for example,

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[33] *See, e.g., Buckley*, 424 U.S. at 25; *NCPAC*, 470 U.S. at 497; *see also Black's Law Dictionary* 1261 (7th ed.1999) (translating quid pro quo as "something for something"). Defense expert Donald P. Green explained that corruption, whether quid pro quo or otherwise, "redound[s] to the personal benefit of the candidate seeking to win election." Green Expert Report at 20.

Judge Kollar-Kotelly's belief that, notwithstanding my statements to the contrary, I am narrowly construing the definition of corruption as "something akin to bribery" is, in my judgment, an inaccurate reading of my opinion. *See* J. Kollar-Kotelly Op. at Part III.II.B.2.a.i. That said, regardless of how you describe the acts by an officeholder that are "contrary to their obligations of office," *NCPAC*, 470 U.S. at 497; *see, e.g.*, Intervenors Opening Br. at 43 ("legislative effort") (quoting Green Expert Report at 23-24); Gov't Reply Br. at 15-16 ("access"); *Shrink Missouri*, 528 U.S. at 389 ("politicians too compliant with the wishes of large contributors"), the more telling portion of the corruption equation the Supreme Court defined corruption in the following way: "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." 470 U.S. at 497. Without financial gain to themselves or money into their campaigns, why would candidates elect to act contrary to their obligations? In short, since donations cannot logically foster corruption, or its appearance, unless the candidate benefits or appears to benefit in some way, donations to a party with no prospect that they will be used to directly affect the candidate's election, cannot, absent substantial evidence to the contrary, give rise to either actual or apparent corruption.

Second, the defendants' contention, in essence, that Congress can regulate the use of soft money donations by national parties for either nonfederal, or mixed, purposes is equally unsupportable by the record and common sense. If a national party uses nonfederal funds to support generic voter registration, or to conduct training seminars for state parties on get-out-the vote activities, the benefit to the federal candidate, assuming his election is even being contested, is attenuated at best, *Colorado I,* 518 U.S. at 616, because it is generic in nature and diluted among a far greater number of state and local candidates. *See infra* Part I.B.1. No credible evidence has been submitted by the defendants that demonstrates that federal candidates either are, or are perceived to be, indebted to donors as a result of such mixed-purpose party activities.[34] Moreover, donations used for generic issue advertisements that may be helpful to both state and federal candidates, another example of a mixed-purpose activity by a party that indirectly affects federal elections in a way unlinked to any particular candidate's election or re-election, also do not foster actual or apparent corruption. Political parties, like many other political organizations, engage in noncandidate-related speech (i.e., genuine or pure issue ads) to influence public opinion on issues of the day.[35]

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for the purpose of understanding my opinion is the Supreme Court's description of the prospective benefit to the officeholder that supposedly influences him to act: "the prospect of financial gain to themselves or infusions of money into their campaign." *NCPAC,* 470 U.S. at 497. Only an actual or potential benefit of the kind described by the Supreme Court can lure an officeholder into conduct sufficiently corrupting to warrant Congress's regulation.

[34] Judge Kollar-Kotelly references in her opinion an identical statement by officials of the four national party congressional committees describing as "significant" the effect "that voter identification, voter registration and get out the vote efforts" have on the election of federal candidates. *See* J. Kollar-Kotelly Op. at Part III.II.B.2.b.ii. That "combined" statement is not in my judgment proof *per se* that such efforts (either individually or collectively) *directly* affect federal elections. Indeed, there is no quantitative evidence in the record demonstrating the extent to which voter registration, voter identification, and get-out-the-vote efforts assist federal candidates, as opposed to the far greater number of state and local candidates that appear on the ballot. Determining that, of course, is exacerbated by the practical reality that congressional races in many states are either noncompetitive, or uncontested. Simply stated, there is no way of knowing the election impact value of what is considered "significant" in the eyes of these party officials. Moreover, because these officials do not specify which, if any, of these were "generic" efforts, there is no way of knowing whether the activities to which they are referring were crafted in a way to specifically turn out voters for particular federal candidates. Of course, if they had been, they would not be permissible under this Court's ruling today. *See supra* Part I.A.2 & *infra* Part I.B.2. As a result, I accord limited probative value to these identical statements on this point.

[35] *See* Josefiak Decl. ¶ 91(e) ("The RNC seeks to educate the public about the positions for which the Republican Party stands ."); La Raja Decl. ¶ 16 ("Political parties use nonfederal funds to develop and disseminate political messages."); *Colorado I,* 518 U.S. at 616 (recognizing that "a political party's independent expression . . . reflects its members' views about the philosophical and governmental matters that bind them together"); *id.* at 629 (Kennedy, J., concurring in part and dissenting in part) (explaining that political parties "exist to advance their members' shared political beliefs")

Just recently, for example, the RNC funded a generic issue advertisement on the radio that touted the Republican's education proposal. It broadcasted the following:

> Male: Every child can learn . . .
> Female: . . . and deserves a quality education in a safe school.
> Male: But some people say some children can't learn . . .
> Female: . . . so just shuffle them through.
> Male: That's not fair.
> Female: That's not right.
> Male: Things are changing. A new federal law says every child deserves to learn.
> Female: It says test every child to make sure they're learning and give them extra help if they're not.
> Male: Hold schools accountable. Because no child should be in a school that will not teach and will not change.
> Female: The law says every child must be taught to read by the 3rd grade. Because reading is a new civil right.
> Male: President Bush's No Child Left Behind Law.
> Female: The biggest education reform and biggest increase in education funding in 25 years.
> Male: Republicans are working for better, safer schools . . .
> Female: . . . so no child is left behind.
> Male: That's right . . . Republicans.
> Anncr: Learn how Republican education reforms can help your children. Call .... Help President Bush and leave No Child Behind.

Josefiak Decl. ¶ 91(e) & Exhibit X. While pure issue advocacy, like the above advertisement, can *indirectly* affect a federal election,[36] it is unlikely, and there is no evidence to

the contrary, that candidates will feel indebted to those who helped fund such advertisements. Moreover, the fact that state and local parties would still be able to use nonfederal money to engage in genuine issue advocacy [37] serves to undermine Section 323(a)'s complete ban on national parties being able to do the same.[38] Lastly, if the above analysis is true with regard to the inability to demonstrate even an appearance of corruption when nonfederal funds are being used for mixed purposes that indirectly affect a federal election, it is even more true when the purpose is nonfederal and has no effect on any federal candidate's election or re-election. In short, the defendants have provided no legal basis to restrict a national party's use of nonfederal funds for nonfederal purposes.

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[36] *See Buckley*, 424 U.S. at 42-43, 43 n.50 ("Public discussion of public issues . . . tend naturally and inexorably to exert some influence on voting at elections." (quoting *Buckley v. Valeo*, 519 F.2d 821, 875 (D.C. Cir. 1975))).

[37] BCRA § 101; FECA § 323(b); 2 U.S.C. § 441i(b)(1); BCRA § 101; FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). The state and local parties could also presumably use nonfederal funds for all other mixed activities not included within Section 301(20)(A)'s definition of "federal election activity."

[38] In *United States v. National Treasury Employees Union ("NTEU")*, 513 U.S. 454, 473-75, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), the Supreme Court rejected a complete ban on honoraria for government employees because, in part, Congress exempted certain speeches that had no nexus to the government employment, explaining that the exemption "cast serious doubt on the Government's submission" that the honoraria was so "threatening ... as to render the ban a reasonable response to the threat." *Id.* at 473. The Court thus found that Congress's exemption undermined application of the ban to speeches without a connection to government employment: "[a]bsent such a nexus, no corrupt bargain or even appearance of impropriety appears likely." *Id.* at 474; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (observing that exemptions "may diminish the credibility of the government's rationale for restricting speech in the first place").

Further, Congress's decision to only restrict state and local parties from using nonfederal funds for candidate advocacy, *see* BCRA § 101; FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii), reinforces the premise that actual or apparent corruption manifests only when there is a nexus to a federal candidate.

Third and finally, the defendants' contention that candidates, who raise soft money donations for their national parties, regardless of their subsequent use, are indebted to the donors due to "internal party benefits" they subsequently receive for raising the nonfederal donations,[39] is equally tenuous from both a theoretical and an evidentiary standpoint, and, in any event, Section 323(a) remains insufficiently tailored based on that justification to pass constitutional muster. The defendants' contention is theoretically flawed because it proceeds from the premise that the corruption, or appearance of corruption, necessary to warrant congressional intervention can be satisfied by a federal candidate receiving a benefit other than personal financial gain or direct assistance, monetary or otherwise, to his election effort. The Supreme Court has never defined corruption, or its appearance, in those terms. As stated previously, the only benefit the Supreme Court has based a finding on is "the prospect of financial gain to themselves or infusions of money into their campaigns." *NCPAC*, 470 U.S. at 497.[40] Even if the Court did, however, bless the notion that a nonmonetary benefit from someone other than the donor could, under the right circumstances, give rise to an

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[39] *See* Intervenors Opp'n Br. at 26-27 (explaining that "without regard to how soft money is ultimately spent, . . . the parties reward [federal candidates and officeholders] for raising it" and that "success in the party reinforces stature in the government because federal officeholders attain leadership positions in Congress partly as a result of their success as fundraisers" (citing Bumpers Decl. ¶¶ 7-9)).

[40] *Cf.* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L.Rev. 1281, 1313 (1994) ("If candidates did not stand to gain much for their own campaigns from the money so raised, one doubts that party loyalties (or pressure) would lead to excessive diversion of candidate time to [soft money] fund-raising.").

indebtedness that the public could perceive as "corrupting" its legislator's independence, there is no evidence on this record that such corruption has either occurred or is perceived by the public to exist. The evidence relating to the appearance of corruption, such as it is, only establishes that the public believes there is a connection between large donations to national parties and the influence and access the pubic believes the donors receive. *See infra* Part I.B. It does not, however, establish that this connection exists independent of how the parties use the funds. If anything, the public's regular exposure to so-called "issue ads" sponsored by the parties and crafted to help their candidates,[41] combined with its lack of knowledge of the difference between soft and hard money and its lack of knowledge of the campaign finance regulations (both of which have been demonstrated),[42] should lead this Court to reasonably infer that the public believes that these donations are used in whole, on in part, by the parties to directly help their candidates. It is that perceived benefit, in my judgment, that gives rise to the public's view that officeholders, either out of gratitude, or in hope of similar future contributions, provide increased access and influence to those donors. And in light of the utter absence of evidence on the record establishing any other reason that the public believes accounts for federal officeholders granting increased influence and access to those who give large donations to their party, this Court should infer the same. In any event, the defendants' argument is flawed because their supposed internal-party-benefit rationale was not even relied upon by Congress to limit the national parties use of nonfederal funds. If it had been, Congress would have only restricted nonfederal funds that federal candidates themselves solicited. Thus, Section 323(a)'s sweeping restriction, even if acceptable theoretically and factually based on the internal-party-benefit rationale, is not sufficiently tailored to "alleviate [the] harm in a direct and material way." *Turner Broadcasting Sys., Inc. v. FCC ("Turner I")*, 512 U.S. 622, 664 (1994).[43]

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[41] These advertisements clearly show who funds the advertisements, stating in no uncertain terms at the end of each advertisement: "Paid for by the Republican National Committee" or "Paid for by Republican Party of Florida." *See, e.g.*, Findings 45 & 46.

[42] *See* Findings 264-67.

In sum, conduct which only indirectly affects a federal election requires a greater degree of evidence of corruption, or appearance thereof, to warrant congressional regulation. Thus, in the absence of sufficient proof to warrant expanding FECA in this direction, Congress may only prohibit the national parties from using nonfederal money for federal purposes such as those defined in Section 301(20)(A)(iii), which are clearly designed to directly affect federal elections. The use of nonfederal funds for nonfederal or mixed purposes, which at the most indirectly affect federal elections, is simply not regulable by Congress because it does not give rise to corruption or the appearance of corruption. Thus Section 323(a)'s complete ban on the use of nonfederal funds is not closely drawn to serve the designated government interest.

4. Severability of New FECA Section 323(a)

Because Section 323(a) prohibits *all* uses of nonfederal funds by national parties, and because I only uphold Congress's power to prohibit the use of nonfederal funds for federal purposes (as defined in Section 301(20)(A)(iii)), *see infra* Part I.B.2, a considerable issue is presented as to whether we can isolate and uphold that prohibition from the remaining undefined, unconstitutional prohibitions in Section 323(a) in a manner consistent with both the severance clause and Supreme Court precedent. For the following reasons, I believe we can and should.

It is a "cardinal principle" of statutory construction to save as much of a statute as possible. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (Hughes, C.J.).[44] Indeed, Congress itself in Section 401 of BCRA provided us with a severability clause which directed us to do as much.[45] In attempting to save a statute, however, the Supreme Court has made it clear that a court must take great pains to avoid

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[43] It has also been suggested by one of the defendants' witnesses that Members of Congress raising soft money donations receive the additional benefit of helping their parties retain control of Congress. *See* Hickmott Decl. Exhibit A ¶ 18. Even assuming, *arguendo*, that this benefit is not too attenuated to establish a sense of indebtedness to the large party donors, it is severely undercut if the parties cannot, as we have held, use large nonfederal donations to directly assist the election and re-election of their members. *See supra* Part I.A.2 & *infra* Part I.B.2.

[44] *See also Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting *Harper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895))); *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) ("[A] court should refrain from invalidating more of the statute than is necessary."); *Morse v. Republican Party of Va.*, 517 U.S. 186, 242, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (Scalia, J., dissenting) (explaining that a court is required to find a "limiting construction or partial invalidation" that will "remove the seeming threat or deterrence to constitutionally protected expression" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973))); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (observing that a statute should be "declared invalid to the extent it reaches too far, but otherwise left intact").

[45] The severability clause states: "If any provision of this Act or amendment made by this Act, or the application of a provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the amendments made by this Act, and the application of the provisions and amendment to any person or circumstance, shall not be affected by the holding." BCRA § 401.

"rewriting" the statute.[46] Thus, a severability clause, due in part to separation of powers concerns, is merely an "aid," not a "command," to the judiciary. Nonetheless, the Supreme Court has frequently found statutory provisions unconstitutional (or constitutional) as to particular applications without invalidating (or validating) the entire provision.[47] In the campaign finance arena, the Supreme Court in *Colorado I* and *Colorado II* did not object to severing applications of Section 441a(d), a FECA provision that caps how much

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[46] *See Chapman v. United States*, 500 U.S. 453, 464, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (Rehnquist, C.J.) ("The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" (quoting *U.S. v. Monsanto*, 491 U.S. 600, 611, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989))); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of statute . . . or judicially rewriting it." (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (internal quotations omitted))); *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) (explaining any attempt "to rewrite language enacted by the legislature . . . while purporting to be an exercise of judicial restraint, would trench upon the legislative powers vested in Congress by Article I, § 1, of the Constitution" (citing *Heckler v. Mathews*, 465 U.S. 728, 741-42, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984))); *In re Espy*, 800 F.3d 501, 505 (D.C.Cir.1996).

[47] *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 763, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (rejecting a broad ban on solicitation only as applied to the business context); *Brockett*, 472 U.S. at 502-07, 504 (partially invalidating moral nuisance law "only insofar as the word 'lust' is to be understood as reaching protected materials"); *United States v. Grace*, 461 U.S. 171, 175, 183, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (invalidating prohibition of speech activities on Supreme Court grounds "as applied to the public sidewalks"); *see also NTEU*, 513 U.S. at 487 (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing examples).

political parties can spend.[48] In *Colorado I*, the Supreme Court invalidated Section 441a(d) as applied to uncoordinated, or independent, expenditures. 518 U.S. at 613-20. It then remanded the question of whether Section 441a(d)'s application to coordinated expenditures was constitutional, directing the lower courts to determine "whether or not Congress would have wanted [Section 441a(d)'s] limitations to stand were they to apply only to coordinated, and not to independent, expenditures." *Id.* at 625-26. On remand the district court found that Section 441a(d)'s application to coordinated expenditures was severable from its application to uncoordinated expenditures. 41 F. Supp. 2d 1197, 1206- 07 (D. Co. 1999). The district court found the two applications severable because of the "strong" severability provision, which is almost identical to the provision at issue here, and because there was "no evidence" that Congress would not have rejected Section 441a(d) as applied to coordinated party expenditures. *Id.* at 1207. Both the Tenth Circuit and the Supreme Court, noting that the severability argument was not renewed upon appeal, let the district court's decision stand. *Colorado II*, 533 U.S. at 440 n.5; *FEC v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1225 n.3 (10th Cir. 2000). In the end, though the language in Section 441a(d) makes no reference to coordinated or uncoordinated expenditures, the Supreme Court upheld certain applications of the provision (coordinated party expenditures) but invalidated other applications (uncoordinated party expenditures).

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[48] Specifically, Section 441a(d) states that political parties "may not make any expenditure in connection with the general election campaign of a candidate in Federal office in a State who is affiliated with such party which exceeds" $10,000 in a House campaign and, in a senatorial campaign, the greater of $20,000 or "2 cents multiplied by the voting age population of the State." 2 U.S.C. § 441a(d)(3).

Typically the Supreme Court invalidates specific applications, while letting others stand, when it can confidently discern congressional intent. In one recent case where the Supreme Court refused to limit the application of a statute which banned all honoraria to government employees, *United States v. National Treasury Employees Union ("NTEU")*, 513 U.S. 454, 479 (1995), it did so because it was faced with considerable uncertainty as to how Congress would have defined the honoraria restriction if it had known the complete ban on honoraria would have been rejected as unconstitutional. *Id.*[49] For a number of reasons, we do not have that problem here.

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[49] The Court in *NTEU* shied away from a limiting construction, in part, because it could not be sure that it "would correctly identify the nexus Congress would have adopted in a more limited honoraria ban." 513 U.S. at 479. "[D]rawing one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn, involves a far more serious invasion of the legislative domain." *Id.* at 479 n. 26. The Court echoed this concern in *Reno v. ACLU*, where it refused to apply a tailoring construction to provisions seeking to protect minors from "indecent" and "patently offensive" internet communications. 521 U.S. 844, 883-88, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). It found that, in a facial challenge, a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Id.* at 884 (quoting *Virginia v. American Bookseller's Ass'n., Inc.*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)). The Supreme Court suggested that a statute is "readily susceptible" for a limiting construction when the statute provides "guidance ... for limiting its coverage" and "the text or other source of congressional intent identified a clear line that this Court could draw." *Reno*, 521 U.S. at 884.

Justice O'Connor, in her dissent in *NTEU*, lamented that "a court should not [ ] throw up its hands and despair of delineating the area of unconstitutionality" and that it is "inconsistent with congressional intent to strike a greater portion of the statute than is necessary to remedy the problem at hand." 513 U.S. at 486-89 (O'Connor, J., concurring in the judgment in part and dissenting in part); *see also id.* at 501-03 (Rehnquist, C.J., dissenting) (describing the majority's remedy as an "O. Henry ending").

First, with regard to Title I, Congress's intent, based on both the severability clause and the text of the statute, is unambiguous. The clause itself, of course, directs that the Court save "the application of the provisions ... to any person or circumstance." BCRA § 401. However, as stated previously, such a clause only creates a presumption of severability.[50] It does not relieve this Court of its obligation to determine if the limiting construction of Section 323(a) can stand alone, and if Congress would have enacted such a construction knowing that its broader position would be held unconstitutional.[51] With regard to both the former and the latter, Congress, by defining "federal election activity" in Section 301(20)(A)(iii) to include certain communications which directly affect federal elections and by constitutionally prohibiting state parties from engaging in such activity in Section 323(b), has unequivocally indicated its intent that such activity—as defined—would be among the undefined uses of nonfederal funds that national parties were similarly being prohibited from engaging in under Section 323(a). To conclude otherwise would be to turn a blind eye to an obvious reason why Sections 323(b) and 301(20)(A) were written in the first place: to prohibit donors (especially corporations and unions) and the national parties from circumventing Section 323(a) by funneling soft money through state and local parties for Section 301(20)(A) purposes.[52] By limiting the prohibited uses of nonfederal funds by national parties in Section 323(a) to communications of the kind defined by Congress *in its own words* in 301(20)(A)(iii), I am neither employing a saving construction that "rewrites" Section 323(a), nor ignoring Congress's clear intention to save an implicit feature of that section *consistent* with BCRA's severance clause admonition.

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[50] *See Reno*, 521 U.S. at 884 n. 49 (explaining that "[i]n part because of separation-of-powers concerns, we have held that a severability clause is 'an aid merely; not an inexorable command'" (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290, 44 S.Ct. 323, 68 L.Ed. 686 (1924))); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987); *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C.Cir.1990) (agreeing that "'the ultimate determination of severability will rarely turn on the presence or absence'" of a severability clause (quoting *United States v. Jackson*, 390 U.S. 570, 585 n. 27, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968))).

[51] *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." (quoting *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062 (1932))); *Buckley*, 424 U.S. at 108-09 (same).

Finally, by applying Section 301(20)(A)(iii), which I hold to be constitutionally acceptable for Section 323(b), *see infra* Part I.B.2, to define the prohibited conduct in Section 323(a), I avoid the Supreme Court's additional concern of creating a

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[52] *See, e.g.*, 145 Cong. Rec. S2138 (Mar. 20, 2002) (statement of Sen. McCain) ("Closing the [state and local party] loophole is crucial to prevent evasion of the new federal rules."); 147 Cong. Rec. S2928 (Mar. 27, 2001) (Sen.Schumer) ("[R]egulating soft money without dealing with the soft money that goes to State parties is like the person who drinks a Diet Coke with his double cheeseburger and fries: It does not quite get the job done."); 145 Cong Rec. H8275 (Sept. 14, 1999) (statement of Rep. Kaptur) (stating that banning nonfederal funds for national parties but allowing it for state parties is "like bolting the front door to protect yourself from burglars while hanging a neon sign on the back door that says, 'Come on in' '); 144 Cong. Rec. H7323 (Aug. 6, 1998) (statement of Rep. Roukema) (stating that allowing state parties to use federal funds creates a "loophole large enough to drive an armored car stuffed with campaign cash through."); Brock Decl. ¶ 8; Rudman Decl. ¶ 19; *see also* Gov't Opening Br. at 53 ("Section 323 contains several interrelated provisions designed to eliminate solicitation, contribution, and use of unregulated soft money by federal candidates, federal officeholders, and national political parties."); Gov't Opening Br. at 103 ("Any successful attempt to limit national party soft money activity must perforce prevent easy evasion through surrogates such as state and local parties.") (citing Mann Expert Report at 31).

definition the constitutionality of which has not been decided.[53] Accordingly, for all of the above reasons, I find that Section 323(a)'s implicit prohibition on national parties to use nonfederal money to fund communications of the kind defined in Section 301(20)(A)(iii) is constitutionally severable from its remaining unconstitutional applications.

B. New FECA Sections 323(b) and 301(20)(A): Restrictions on Nonfederal Funds for "Federal Election Activities"

Unlike Section 323(a)'s total ban on the use of nonfederal funds by national parties, Section 323(b) only prohibits state parties from using nonfederal funds for certain "federal election activities," BCRA § 101; FECA § 323(b); 2 U.S.C. § 441i(b)(1), which it defines in Section 301(20)(A). BCRA § 101; FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). Thus, in order to assess the constitutionality of the restraint on the state parties in Section 323(b), we have to simultaneously assess the constitutionality of Section 301(20)(A)'s definition of federal election activity.

Section 301(20)(A) defines federal election activity to include: (1) voter registration activity during the period 120 days before a regularly scheduled federal election; (2) "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot"; (3) "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)"; and (4) services provided by a state or local party committee employee who spends more than twenty-five percent of that individual's compensated time "on activities in connection with a Federal election." BCRA § 101; FECA § 301(20)(A); 2 U.S.C. § 431(20)(A).

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[53] *See NTEU*, 513 U.S. at 479 (refusing to adopt a limiting construction, in part, because its judicial obligation was to avoid "independent constitutional concerns"); *see also Ashwander v. TVA*, 297 U.S. 288, 346-47, 56 S.Ct. 466, 80 L.Ed. 688 (1936) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Comm'rs*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885))).

Only Section 301(20)(A)(iii), however, describes conduct which is targeted exclusively at federal elections and which directly affects federal elections. Accordingly, for the reasons set forth below, I find that Section 323(b) and Sections 301(20)(A)(i), (ii), and (iv) are substantially overbroad in that they seek to restrain state parties from using nonfederal funds for election activities, which only indirectly affect federal elections, and thus do not give rise to the appearance of corruption necessary to warrant congressional intervention. As to Section 301(20)(A)(iii), however, I find that it is constitutionally permissible because, by contrast, it focuses on election activities that directly affect federal elections and as such, give rise to the appearance of corruption necessary to warrant Congress's restraint on the First Amendment rights of the donors.

1. New FECA Sections 323(b) and 301(20)(A)(i), (ii), and (iv)

Section 323(b) is premised, in part, on the congressional belief that certain mixed-purpose activities by state parties, when funded with nonfederal funds, sufficiently affect federal elections that they give rise to an appearance of corruption between the donors and the candidates whose campaign receives the benefit of these activities. I disagree. Setting aside the considerable issue of whether the Elections Clause, U.S. Const. art. I, § 4; *Buckley*, 424 U.S. at 13 & n.16,[54] can be fairly read to allow Congress to regulate state party activities such as those defined in Sections 301(20)(A)(i), (ii), and (iv), *see* CDP/CRP Opening Br. at 20-27, the justification and evidence submitted here fail to establish that those provisions serve a sufficient government interest to justify an infringement on First Amendment rights.

The Supreme Court pointed out in *Colorado I* that "the opportunity for corruption posed by" nonfederal funds for mixed-purpose activities like voter registration and get-out-the-vote "is, at best, attenuated." 518 U.S. at 616. Though dictum it may be, it is particularly telling. *See Central Green Co. v. United States*, 531 U.S. 425, 431 (2001) ("dicta 'may be followed if sufficiently persuasive' but are not binding" (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935))). One can infer from the Supreme Court's plain statement that the opportunity for corruption is less because there is no clear link between donations used for these predominantly generic activities and whatever benefit accrues to the candidate.

When nonfederal funds go to political parties, not candidates, and are spent for purposes that do not directly affect federal elections, there is less concern about donors having quid pro quo arrangements with candidates. Indeed, given that Section 301(20)(A)(iii) prevents communications that promote federal candidates, the activities defined in Sections 301(20)(A)(i) and (ii) are necessarily "generic" or specific only to a nonfederal candidate: that is, these activities are not directed at a specific federal candidate.[55] Conversely, such activities potentially assist a considerably larger number of state and local candidates that greatly outnumber the one, or possibly two, federal candidates on the ballot,[56] many of whom invariably run unopposed or in clearly noncompetitive races. There is also evidence that state and local parties undertake voter mobilization efforts principally for state and local candidates,[57] mostly from nonfederal money they raised

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[54] Because I find these sections and Section 323(a) (aside from nonfederal funds used for federal activities) unconstitutional based on the First Amendment, I need not reach either the federalism or equal-protection claims.

[55] Under the pre-BCRA regime, political parties could not use any nonfederal funds if the voter mobilization effort supported or opposed "a

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specific candidate." *See* 11 C.F.R. § 106.5(a)(2)(iv). And in BCRA, generic campaign activity is defined as "a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate," BCRA § 101(b); 2 U.S.C. 431(21); 11 C.F.R. § 100.25 (67 Fed.Reg. 49,111 (July 29, 2002)), and "get-out-the-vote" is defined as "contacting registered voters . . . to assist them in engaging in the act of voting," *regardless of a reference to a federal candidate. See* 11 C.F.R. § 100.24(a)(3). In any event, get-out-the-vote or voter registration activities employing a "public communication," which is defined broadly to include everything from telephone banks to mass mailings, *see* BCRA § 101(b); 2 U.S.C. 431(22); 11 C.F.R. § 100.26, that promotes or attacks a clearly identified federal candidate, *see* BCRA § 101; FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii), would not be allowed if Section 301(20)(A)(iii) is upheld. *See also* Bowler Decl. ¶ 20(b) (noting that California Democratic Party's ("CDP's") direct mail programs typically do not mention federal candidates); Erwin Aff. ¶ 9 (explaining that "[t]he overwhelming amount of [voter registration] activity is 'generic' voter registration activity urging potential registrants to 'Register Republican'").

[56] *See* Bowler Decl. ¶¶ 13, 15 (explaining that in the 2002 cycle, where the only federal office on the California ballots was a congressional race, administrative expenses were required to be allocated 12.5 percent federal and 87.5 percent nonfederal based on the ballot composition formula). California holds elections for 120 legislative officers, eight statewide-elected officers, and four members of the State Board of Equalization. It also holds elections for judicial offices, local offices, and ballot measures at both the state and local levels. *See id.* ¶ 13; Erwin Aff. ¶ 5.

[57] *See* Findings 113-37, 150-54. The CDP spent more money for voter registration in 1998, a year with eight statewide elections, than in 2000, a presidential election year. Bowler Decl. ¶ 20.a; *see also* Erwin Aff. ¶ 14.a (stating that "voter registration activities are primarily driven by the desire to affect State and local races").

on their own,[58] and in elections where the federal candidates are practically uncontested.[59]

In light of this focus on state and local candidates, there is every reason for this Court to doubt whether the federal candidates themselves would view such generic activities by state and local parties as sufficiently helpful to their campaigns as to warrant even a token sense of indebtedness to the soft money donors to the political parties. The evidence, such as it is, regarding Sections 301(20)(A)(i) and (ii) activities fails to demonstrate either the degree of effect such activities have on the federal candidate's re-election, or the existence of a public perception that donations used to fund such efforts create a sense of indebtedness between the federal candidate and those who make large donations to the party. That there is no evidence that the public perceives corruption in these circumstances is not surprising. Since the public would expect state parties to engage in such voter mobilization efforts for the benefit of all of its candidates, we can, and should, reasonably infer that the public would correspondingly view a federal candidate's sense of indebtedness, if any, to be *diluted* among the numerous state and local candidates who equally benefit from these activities. *See* Feingold Dep. at 126- 27 (acknowledging that soft money being used for generic campaign activity is less likely to create an appearance of corruption). Such uncertainties are hardly a sufficient basis from which to allege that precluding state and local parties from using nonfederal funds for mixed-purpose activities serves the government interest in preventing corruption, or its appearance. Thus, in the absence of a substantial evidentiary showing to the contrary, it is "mere conjecture," *Shrink Missouri,* 528 U.S. at 392, by the defendants that an appearance of corruption arises from donations to state parties, or transfers from national parties, that are used for these generic or noncandidate-specific activities set forth in Sections 301(20)(A)(i) and (ii).

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[58] *See also* Bowler Rebuttal Decl. ¶¶ 3-4 (explaining that the CDP pays for much of its voter registration and get-out-the-vote activities with money raised by the state party); Bowler Decl. ¶ 12 (explaining that in the 1999-2000 election cycle, the CDP raised $15,617,002 in nonfederal funds, which it used to fund state and local activities). The amount of nonfederal money the California Republican Party ("CRP") and CDP raised themselves is much more than the nonfederal funds they received from national-party transfers. CDP/CRP 1171 (in the 1999-2000 election cycle, which was a presidential election cycle, only 19.1 percent of all CRP nonfederal money was from national-party transfers); CDP/CRP 35, 37, 39 (in 2000, only 36 percent of all CDP nonfederal money was from national-party transfers). While the state and local parties may spend most of their nonfederal national-party transfers on candidate advocacy, they spend very little of their overall nonfederal funds on such activities.

[59] For example, the CDP actively registered over 300,000 Democratic voters throughout California during 2002 even though there was only one competitive congressional race out of 52 races. *See* Bowler Decl. ¶ 20.a; Torres Decl. ¶ 8.

Finally, even if the defendants had demonstrated that some mixed-purpose activities do somehow create an appearance of corruption, Sections 301(20)(A)(i), (ii), and (iv) are not sufficiently tailored to be constitutionally acceptable. By limiting donations for so many unmistakably noncorrupting activities, like donations for voter registration on behalf of state candidates, these sections extend too far. It is simply not enough to claim that just because the use of a donation has *some* effect on a federal election, it must be completely funded with federal funds.[60] To reach such a conclusion would inevitably sweep in too many activities that deserve First Amendment protection. Section 301(20)(A)(iv)'s

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[60] *Cf.* Robert Post, *Regulating Election Speech Under the First Amendment,* 77 Tex. L.Rev. 1837, 1842 (1999) ("It is surely the case that election speech affects elections, but so does all public discourse. If all that were necessary to bring speech within the authority of a managerial domain were that the speech produce effects on the domain, nothing much would be left of public discourse.").

percentage based definition of the amount of time a party official must spend in connection with a federal election, BCRA § 101; FECA § 301(20)(A)(iv); 2 U.S.C. § 431(20)(A)(iv), provides the starkest example of this insufficient tailoring. If a state party employee spends 26 percent of his compensated time "in connection with a Federal election," then his entire salary must be paid using federal funds. Clearly, 74 percent of the employee's compensated time, which has no relation whatsoever to a federal election, is being regulated. There is no adequate basis in the record before us to determine whether the nature of his conduct sufficiently impacts the election to give rise to an appearance of corruption between the donors who may be funding his efforts through the state party and the candidate receiving the benefit of his services. Thus, even if Sections 301(20)(A)(i), (ii), and (iv) served to prevent some appearance of corruption, they are not drawn closely enough to survive scrutiny.

2. New FECA Section 301(20)(A)(iii)

As I indicated previously, Congress has the power to require both national and state parties to use only federal money for election activities that directly affect federal elections.[61] Section 301(20)(A)(iii) focuses on one such type of activity: "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate *for that office*." BCRA § 101; FECA

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[61] This analysis of Section 301(20)(A)(iii) is equally applicable to national, state, and local parties. Considering the coordination and financial transfers between the various party levels and that parties at all levels work on behalf of national, state, and local candidates, it is unrealistic to view the parties differently simply based on the fact that one is labeled "national" and another "state." It is the nature of the activities they undertake rather than they label they assume that defines the type of allowable regulations.

§ 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii) (emphasis added). Judge Henderson concludes in her opinion that the Supreme Court in *Buckley* required certain "magic words" that specifically advocate the election or defeat of a candidate in order for a communication to be the type of advocacy regulable by Congress. All other communications, even if they directly affect a federal election, from her perspective, are not regulable.[62] I disagree. For the same reasons, in part, set forth by Judge Kollar-Kotelly in her opinion on Title II, I believe that *Buckley* did not set forth a "bright-line test." *See* J. Kollar-Kotelly Op. at Part III.I.C.1. But, even if the Supreme Court did set forth a bright-line test for Congress's regulation of *expenditures by nonparties* in *Buckley*, 424 U.S. at 39-51, that rationale is not necessarily applicable to, and binding on, Congress's power to regulate *donations to political parties* under BCRA.

Therefore, the question before this Court is not so much whether Congress can regulate the use of nonfederal funds for uncoordinated, nonexpress advocacy that directly affects federal elections, but whether Congress has defined such nonexpress advocacy in Section 301(20)(A)(iii) in a way that will withstand constitutional scrutiny. For the following reasons, I have concluded that Congress not only can regulate uncoordinated, nonexpress advocacy which directly affects federal elections, but has defined that nonexpress advocacy in Section 301(20)(A)(iii) in a way that is sufficiently tailored to serve the government interest of preventing actual or apparent

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[62] *See, e.g.*, J. Henderson Op. at Part IV.D.1.a & Part IV.D.1.b (referring repeatedly to "protected issue advocacy"). I do not believe we should assume that just because the party advertisements are currently funded with nonfederal money that they, by definition, have a nonfederal purpose. *See* J. Henderson Op. at Part IV.D.1.c.

corruption, and in a way that is not unconstitutionally vague.[63]

In defining "candidate advocacy" as it did, Congress chose to couple two concepts together in order for communications to qualify as regulable: (1) the identification of a candidate for a federal office; and (2) words that promote, oppose, attack, or support that candidate *for that office*. BCRA § 101; FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii). Therefore, unlike genuine issue advocacy, which both national and state parties have every right to participate in with nonfederal funds, and which help all party candidates in a generic sense, Congress in this definition was seeking to focus on parties using nonfederal funds for communications intended to directly help a specific federal candidate. Because such assistance is focused ona specific candidate,[64] it is natural for that candidate to feel indebted towards those whose donations funded the communication, even if he does not know exactly which soft money donors' funds actually made it possible. Concomitantly, it is natural for the public to perceive that those whose large soft money donations funded the national and state parties' communications are not only known by the parties' staffs, but by the federal candidates who directly benefitted from the donations.

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[63] Any attempt to regulate communications that directly affect federal elections, like those regulated in Section 301(20)(A)(iii), does not exceed Congress's authority to regulate federal elections under the Elections Clause, *see* U.S. Const. art I., § 4. For this reason, I do not need to address further the plaintiffs' federalism claims in relation to Section 301(20)(A)(iii). I also reject the plaintiffs' equal-protection challenge because political parties are unique actors in the political system, *see supra* note 27 and accompanying text, such that Congress is warranted in treating contributions to them differently. *See California Medical*, 453 U.S. at 200-01 (rejecting equal-protection challenge to contribution limits for multicandidate political committees, stating that "[t]he differing restrictions placed on [different entities] reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process"). Finally, I concur with Judge Henderson's discussion of the Thompson Plaintiffs' equal- protection claim. *See* J. Henderson Op. at Part IV.D.4.

[64] *See, e.g., Colorado II*, 533 U.S. at 458 ("I understood that when I raised funds for the [Democratic Senatorial Campaign Committee ("DSCC")], the donors expected that I would receive the amount of their donations multiplied by a certain number that the DSCC had determined in advance, assuming the DSCC has raised other funds." (quoting Senator Timothy Wirth)); Simpson Decl. ¶ 7 ("Members know that if they assist

The evidence submitted by the defendants overwhelmingly corroborates these common sense conclusions. The record is clear that many, if not most, of the party so-called "issue ads" refer to a specific federal candidate.[65] And the evidence also demonstrates that the advertisements are designed to, and do, support or oppose those candidates for that office.[66] To illustrate one extreme of this genre: in 1996, the Republican National Committee ("RNC") ran a supposed "issue ad" called "The Story" which requires only a quick reading to discern its true purpose and effect.

> Audio of Bob Dole: We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in. Voice Over: Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called . . . he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.
>
> Audio of Bob Dole: I went around looking for a miracle that would make me whole again.
>
> Voice Over: The doctors said he'd never walk again. But after 39 months, he proved them wrong.
>
> Audio of Elizabeth Dole: He persevered, he never gave up. He fought his way back from total paralysis.
>
> Voice Over: Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.
>
> Voice of Bob Dole: It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.

Fabrizio Dep. Exhibit 2; McCain Decl. ¶ 15; Huyck Decl. ¶ 3; Fabrizio Dep. at 49-55. Though this advertisement transparently was intended to assist Senator Dole's campaign, it was funded in part with nonfederal funds. It is hard to disagree with Senator Levin, who described the advertisement this way: "It's not an ad about welfare or wasteful spending; it is an ad about why should we elect that particular nominee."[67]

Another and more typical form of sham issue advertisement run by parties is a candidate-centered ad that focuses on the positions, past actions, or general character

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the party with fundraising, be it hard or soft money, the party will later assist their campaign. . . . Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates ."); McCain Decl. ¶ 7 ("[P]arties encourage Members of Congress to raise large amounts of soft money to benefit their own and others' re-election."); *see also* Findings 31-35.

[65] In the 1998 election, $24.6 out of $25.6 million spent by political parties on advertisements were spent on advertisements that referred to a federal candidate. Out of 44,485 advertisements, 42,599 advertisements referred to a specific candidate. *See* Krasno & Sorauf Expert Report at tbl. 1.

[66] *See* Findings 36-52.

[67] 145 Cong. Rec. S12747 (Oct. 18, 1999) (Sen.Levin); *see also* Memorandum from Charlie Nave to Haley Barbour (May 28, 1996) (explaining that the Dole advertisement was tested to see its effect on Senator Dole's election).

traits of a given federal candidate; contrasts them to the party's view of the proper outlook on those issues; and encourages the viewers to contact the candidate to ostensibly inquire why he/she is taking those positions or actions. *See* Findings 45 & 46. In the 2000 election, for example, the National Republican Congressional Committee and the Florida Republican Party ran television advertisements criticizing Linda Chapin, the Democratic candidate for Congress:

> Announcer: Linda Chapin. Hard on taxpayers. Soft on convicts. Chapin raised taxes on your utilities, pushed to raise the county sales tax and even tried raising your property tax. Meanwhile, hard time in the county jail turned into "Chapin time." Where convicts received cable tv and lounged on padded furniture in carpeted cells. Chapin's County Commission ran this soft jail ... a jail she called a "national model." Ask Chapin why she's hard on taxpayers and soft on convicts.

Chapin Decl. Exhibit 2; Chapin Decl. ¶ 10; Beckett Decl. ¶ 10; Pennington Decl. ¶ 14.[68] This type of electioneering advertisement, and many others like it, were run by the state party, which used mostly nonfederal funds to pay for it. It takes little convincing to find that these advertisements can, and do, directly influence the outcome of a federal election[69]

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[68] Another example of negative candidate advocacy funded by parties: "We expect our public officials to be responsible, do their jobs and obey the law. But Corrine Brown missed an astonishing 187 votes in Congress. . . . Apparently, Corrine Brown thinks she's above the law. A government audit found extensive violations of federal law during her 1992 campaign. Call Corrine Brown . . . . Tell her public officials should act responsibly, do their job and obey the law." ODP0041-1024. For more examples, see Findings 41, 45, 46.

[69] *See* Findings 36-52, 138-47. The parties were clearly not using such advertisements for party building purposes since 92 percent of the advertisements did not even mention the name of the party in the body of the advertisement. Buying Time 2000 at 64 (stating that in the 2000

and that parties engaging in them are "electioneering in the guise of issue advocacy." Mann Expert Report at 26. Moreover, because the amount of money used for candidate advocacy is substantial,[70] the candidates are likely to feel even more indebted to the donors whose contributions to the political parties made possible this form of campaign assistance.[71] Not surprisingly, the use of nonfederal funds for this type of candidate advocacy was, to all appearances, Congress's primary concern in deciding to enact BCRA Sections 323(a) and 323(b).[72]

The record further demonstrates that congressional candidates know who the major soft money donors are.[73] In

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election, almost 92 percent of party advertisements never even identified the name of a political party in the body of the advertisement, let alone encouraged voters to register with or support the party or to volunteer with the local party organization).

[70] *See* Oliver Dep. at 148-49 (estimating that the RNC spent around $56-61 million dollars on "issue ads" during the 2000 campaign); Marshall Decl. ¶ 3 (stating that the largest portion of Democratic National Committee ("DNC") budget during the 2000 election cycle was used for "issue ads"). In 2000, the RNC raised $254 million, a majority of which was transferred down to the state parties mostly for "issue advertisements." Josefiak Dep. at 76; Vogel Decl. ¶ 63; McGahn Decl. ¶ 55.

[71] The donors themselves are not blind to the fact that donations to the parties are used to benefit the federal candidates. *See, e.g.*, Rozen Decl. ¶ 12 ("Donors to the national parties understand that if a federal officeholder is raising soft money—supposedly 'non-federal' money—they are raising it for federal uses, namely to help that Member or other federal candidates in their elections.").

[72] *See supra* note 19.

[73] One donor, and former political fundraiser, observed the following:

> Information about what soft money donors have given travels among the Members in different ways. Obviously the Member who solicited the money knows. Members also know who is involved with the various major donor events which they attend, such as retreats, meetings and conference calls. And there is communication

some cases, they actively assist in helping the party to raise such contributions.[74] And as to those candidates who do not, the parties and the donors keep many of them apprised of who made the large donations. For example, Robert Hickmott, lobbyist and former DNC official, advised donors in the following manner:

> [W]hen one of my clients is going to make a donation to a federal candidate or party, hard or soft money, I advise them on the manner in which they should do that. I tell them not to just send the check to the party committee, for example, to the young staff member who is collecting the checks. Instead I tell my clients that they should personally give the money to a Member of Congress who then can give the money to the Chair of the party committee, who will in turn make sure that the

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> among Members about who has made soft money donations and at what level they have given, and this is widely known and understood by the Members and their staff.

Randlett Decl. ¶ 10; *see also* Bumpers Decl. ¶¶ 18, 20 (testifying that "some Members even keep lists of big donors in their offices" and that "you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party. If someone in Arkansas gave $50,000 to the DNC, for example, I would certainly know that."); Wirth Decl. Exhibit A ¶ 17 ("[C]andidates were generally aware of the sources of the funds that enabled the party committee to support their campaigns.").

[74] *See* Findings 169, 170, 172-79; *Colorado II*, 533 U.S. at 458 ("[Y]ou are at the limit of what you can directly contribute to my campaign," but "you can further help my campaign by assisting the Colorado Republican Party." (quoting then-Congressman Wayne Allard)); *see also* Letter from Senator Mitch McConnell to Potential Donor at the Microsoft Corporation (August 17, 1998) (asking potential donor for an "immediate commitment" in support of the National Republican Senatorial Committee's ("NRSC's") issue advocacy campaign); *see also* Letter Senators Mitch McConnell and Bill Frist to Donor at Steel Service Center Institute (February 25, 1998) (thanking donor for a "nonfederal contribution of $25,000" to the NRSC).

> check reaches the young staff member. That way the donor, with one check, gets "chits" with multiple Members of Congress.

Hickmott Decl. ¶ 9.[75]

Finally, while there is no evidence in the record of actual quid pro quo corruption,[76] the record does establish that the public not only appreciates that there are many donors giving large sums of money (mostly corporations and unions) to the political parties,[77] but believes and expects that the donors—in return—receive privileged access to the legislators and special influence in the legislative process.[78] It is of little surprise that Congress was particularly concerned with the consequences of the public's perception of a correlation between large donations to parties and the special access and influence that the public believes are accorded to these donors.[79] There is ample evidence, including polls[80] and press reports,[81] to support Congress's judgment that the special access and perceived special influence accorded to those large donors have undermined the public's confidence in the independence of its elected representatives from those donors, and thereby giving rise to an appearance of corruption. The record clearly establishes that those large donations are used in large part by the parties to bombard the public with candidate advocacy of the type defined by Section 301(20)(A)(iii). *See* Findings 36-52, 138-47. Because the advertisements are recognizably sponsored by the parties, *see supra* note 41, it takes little for the public to conclude that candidates are directly benefitting from large donations to the parties. Moreover, the fact that the public neither distinguishes between "soft money" and "hard money," nor is knowledgeable of the restrictions on contributions,[82] does nothing to deter the inference that the special access and influence it perceives are accorded to the donors is in return for the plainly visible assistance the parties provide to candidates' campaigns. Given the high plausibility that federal candidates feel indebted to donors who fund, through the parties, Section 301(20)(A)(iii) communications of which they are the beneficiary, and the equally high plausibility that

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[75] *See* Findings 176, 208; *see, e.g.*, McCain Decl. ¶ 6 ("Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money," and "[d]onors or their lobbyists often inform a particular Senator that they have made a large donation."); Simpson Decl. ¶ 5 ("Even if some Members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what."); Boren Decl. ¶ 6 ("Each Senator knows who the biggest donors to his party are" because "[d]onors often prefer to hand their [soft money contribution] checks to the Senator personally, or their lobbyist informs the Senator that a large donation was just made.").

[76] *See* Findings 201-06, 209-10. Although it is possible—though not established—that the appearance of increased access alone is synonymous in the public's mind with increased influence, there is no evidence in the record that increased access necessarily results in actual influence. Since the Supreme Court has never found that access in and of itself constitutes corruption, I believe there is no evidence of actual corruption.

[77] *See* Buying Time 2000 at 62. In 2000, thirty-five of the top 50 nonfederal donors were corporations, and they gave a total of $29,447,350 to the Republican national committees in the 2000 election cycle which was 11.4 percent of all nonfederal money received by that national party. *See* Mann Expert Report at tbl. 6. Most of the other donors in the top 50 were unions and plaintiff attorneys. *Id.*

[78] Thus the Court reviews the evidence of actual or apparent corruption against the background of a plausible justification, and, as explained

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earlier, the more plausible the argument, the less evidence the defendants must marshal. *See Shrink Missouri*, 528 U.S. at 391-95.

[79] Whether because of the endless examples of donors receiving access in return for donations to parties, *see* Findings 211-43, the many press reports that made public such exchanges, *see infra* note 81, or constituent complaints about them, *see* Finding 269, members of Congress were understandably troubled with the appearance of corruption created by large nonfederal donations to parties. *See, e.g.*, 147 Cong. Rec. S2446 (Mar. 19, 2001) (Sen.Feingold) ("The appearance of corruption is rampant in our system, and it touches virtually every issue that comes before use."); 147 Cong. Rec. S3248-49 (April 2, 2001) (Sen.Levin) ("[P]ermitting the appearance of corruption undermines the very foundation of our democracy—the trust of the people in the system.").

[80] *See* Findings 251-68; *see, e.g.*, Mark Mellman & Richard Wirthlin, Research Findings of a Telephone Study Among 1300 Adult Americans 7 (Sept. 23, 2002) (poll result finding that 71 percent of Americans think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it is not what most people in the district want, or even if it is not what they think is best for the country); Robert Y. Shapiro, Public Opinion & Campaign Finance 13-14 (Sept. 18, 2002) (poll results showing that the public has been troubled by large donations to political parties).

Evidence, like these two reports, need not have been before Congress when it made its predictive judgment. *See Turner I*, 512 U.S. at 667 (explaining that to ensure that Congress drew "reasonable inferences," the Supreme Court needed "substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, *or the introduction of some additional evidence*." (emphasis added)); *Turner Broadcasting Sys., Inc. v. FCC ("Turner II")*, 520 U.S. 180, 185, 187, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997); *c.f. City of Erie v. Pap's A.M.*, 529 U.S. 277, 310-17, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (Souter, J., concurring in part and dissenting in part) (advocating a remand for development of the judicial record).

[81] Senator Rudman observed:

> Almost every day, the press reports on important public issues that are being considered in Congress. Inevitably, the press draws a connection between an outcome and the amount that interested companies have given in soft money. . . . Even if a senator is supporting a position that helps an industry for reasons other than that the industry gave millions to his party, it does not *appear* that way in the public eye.

Rudman Decl. ¶ 11 (emphasis added); *see* Finding 270; *see, e.g.*, Dan Morgan and Juliet Eilperin, *Campaign Gifts, Lobbying Built Enron's Power in Washington*, Wash. Post, December 25, 2001, at A01; R.G. Ratcliffe and Alan Bernstein, *Political Donors Have the Money, and Get the Time*, Houston Chron., May 23, 1999, at 1.

[82] *See* Findings 264-67.

the public perceives that the special access and influence it believes are accorded to these donors is in gratitude for that assistance, the evidentiary documentation more than adequately convinces me that an appearance of corruption has arisen from such arrangements. Simply stated, Congress has drawn a reasonable inference of the same based on substantial evidence.[83]

Moreover, any fear that Section 301(20)(A)(iii) is overbroad is cured by the accumulated effects of three circumstances. First, Section 301(20)(A)(iii) only regulates communications that are candidate specific, not issue specific, such that most genuine issue communications should not be subject to regulation. *See* Hearing Tr. (Dec. 4, 2002) at 17. Second, though there are some genuine issue advertisements that do specifically mention candidates,[84] the fact that the Section 301(20)(A)(iii) definition requires the communication to have language that "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office" eviscerates any remaining overbreadth by

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[83] *Turner I*, 512 U.S. at 666 (explaining that a court's role is to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence"). Though courts must "accord substantial deference to the predictive judgments of Congress," *Turner I*, 512 U.S. at 665, it does not " 'foreclose our independent judgment of the facts bearing on an issue of constitutional law," ' *id.* at 666 (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)).

[84] For example, genuine issue advertisements include: (1) advertisements that support oppose officeholder-named legislation, like the McCain-Feingold bill, which is the common label for the legislation at issue here; (2) advertisements supporting or opposing legislation that simply ends with a call-to-action line asking the viewers to contact their congressional members to vote against or for a particular bill; or (3) even advertisements that criticize a certain political personality in order to energize the party's base on a particular issue, so long as those advertisements are not broadcast within the identified candidate's district or state.

focusing on advertisements that directly influence "a candidate for that office." Finally, the fact that the "speaker" running this type of advertisement is a national or state party also supports the defendants' contention that most of the advertisements, referring to a candidate in this manner, will be intended to promote or attack that particular candidate.[85] A political party, as opposed to corporations and other nonparties, exists to a large extent for the purpose of electing candidates of its party to office.[86] In *Buckley*, the Supreme Court observed that expenditures by political parties, and other political committees with "the major purpose of which is the nomination and election of a candidate . . . can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." 424 U.S. at 79. In interpreting this language by the Supreme Court, the D.C. Circuit observed that "when an *organization* controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be *expenditures* within the statutory definition." *Akins v. FEC*, 101 F.3d 731, 742 (en banc) (D.C. Cir. 1996).[87] With this understanding of parties and other political committees, it is not surprising that the Supreme Court limited disclosure of expenditures by all other groups to express advocacy, but sanctioned disclosure of *all* expenditures by "political committees." *Buckley*, 424 U.S. at 49. While not all party advertisements are intended to *directly* influence a federal election (i.e., genuine issue advertisements), the presumptively electoralfocus of parties suggests that party communications that do mention candidates are, more likely than not, designed to have some impact on a federal election.[88] For these reasons, Section 301(20)(A)(iii) is closely drawn to serve the government's interest.

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[85] *See generally* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L.Rev. 620, 655-57 (2000).

[86] *See* Finding 27; *see, e.g.*, Brister Decl. ¶ 4 ("The Republican Party of Louisiana's primary purpose is to help elect Republicans to office 'from the courthouse to the White House.'"); RNC Chairman Haley Barbour's Update to the Members of the Republican National Committee, August 7, 1996, at 3 (stating that "[t]he purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president . . . Electing Dole is our highest priority, but it is not our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures"); *see also* Hastert Amicus Br. at 20 ("The very purpose of the National Republican Congressional Committee is to maintain Republican control of the House.").

[87] *See also* Nelson Dep. at 191 (stating that the RNC engages in "issue advocacy in order to achieve one of our primary objectives, which is to get more Republicans elected").

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[88] It bears repeating: Even though donations to political parties may be used *presumptively* for the purpose of influencing a federal election, it is clearly not an irrebuttable presumption, such that all donations should be regulated. While the Court insinuated that Congress could require disclosures for all expenditures by political parties, *Buckley*, 424 U.S. at 79, there is a simple explanation for this outcome--the Constitution affords less protection to less offensive speech infringements, like disclosure requirements, than for more offensive infringements, like expenditure limitations. *Compare id.* at 39-51 (rejecting expenditure limitations, even those on express advocacy), *with id.* at 79-81 (upholding disclosure requirements for express advocacy); *see also* Post, *supra* note 60, at 1843 ("[T]he placement of a line between election speech and public discourse must be sensitive to the nature of the proposed regulation of election speech. Relatively more benign forms of regulation . . . may constitutionally reach more deeply into the recesses of public discourse than more draconian requirements, like expenditure limitations."). Surely, the speech handicap imposed by contribution limitations, which simply requires that parties use hard money for certain activities, rests somewhere between that of expenditures limitations and disclosure requirements. *See, e.g.*, *Buckley*, 424 U.S. at 20-23, 64-68; *see also Colorado I*, 518 U.S. at 611-26 (rejecting expenditure limitation on political parties, even though parties are considered "political committees" that are subject to disclosure of *all* disbursements).

Even so, plaintiffs contend that Section 301(20)(A)(iii) is still defective because its definition of communications that must be funded with federal money is too vague to withstand constitutional scrutiny. They claim that words such as "promote," "oppose," "attack," and "support" are too vague to enable party officials to determine where the line between noncandidate advocacy (i.e., pure issue advertisements) and candidate advocacy lies. Like Section 201's fallback definition, *see* BCRA § 201(a); FECA § 304(f)(3)(A)(i); 2 U.S.C. § 434(f)(3)(A)(i), however, the definition of candidate advocacy in Section 301(20)(A)(iii) is not unconstitutionally vague because: (1) potential party speakers can simply avoid regulation by not identifying a candidate; (2) the formulation Congress chose to use—even for those not expert in the subtleties of campaign advocacy—is anchored in every day words that have to be linked to a specific candidate's election, or re-election, to a *particular office;* (3) to paraphrase defendant's counsel during oral argument, as long as the communication is not neutral—as to the candidate's election or defeat—it is covered by the definition, *see* Intervenors Opp'n Br. at 66; and (4) the opportunity to seek advisory opinions to clarify any ambiguity "mitigates whatever chill may be induced by the statute and argues against constitutional adjudication on a barren record," *see Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-85 (D.C. Cir. 1980); *see also United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973).[89] Indeed, Section 301(20)(A)(iii), as crafted, "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited," "provide[s] explicit standards for those who apply them," and where First Amendment rights are implicated, does not induce "citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

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[89] When the *Buckley* Court found unconstitutionally vague FECA expenditure provisions, which involved different language, "the vast majority of individuals and groups subject to" the Act did "not have a right to obtain an advisory opinion," 424 U.S. at 41 n .47. Subsequently, Congress amended the advisory provision to make it available to "any person." 2 U.S.C. § 437f(a)(1).

Even if the above factors were not enough to save Section 201 from a vagueness attack, those factors, combined with the identity of the speaker being restricted and the fact that it is a restriction on a contribution (as opposed to an expenditure), would still rescue Section 301(20)(A)(iii). Because political parties are sophisticated participants in the election arena, they are much more likely to recognize the line between candidate advocacy and genuine issue advocacy. *See Colorado II*, 533 U.S. at 453 ("[T]he party marshals [the power to speak] with greater sophistication than individuals generally could.").[90] Political parties, more than others, are also more likely to assume the risk that they have crossed the line.[91] In short, the argument that Section 301(20)(A)(iii) is unconstitutionally vague rings hollow as it applies to parties who are experts in the business of discerning what combination of words and images help, or harm, candidates.[92]

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[90] *See also* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L.Rev. 1751, 1792 (1999) ("[A]s skilled campaign professionals, the major political parties are in the best position to conform their activities to legal requirements.").

[91] As Justice Holmes observed: "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk." *United States v. Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 74 L.Ed. 508 (1930).

[92] That political parties are the speakers is also relevant because since most of their communications are election-based speech, especially those that identify candidates, there is less potential for chilling pure issue advocacy.

Vagueness concerns are also less pronounced with regard to *contributions* than expenditures. When restrictions on expenditures are at issue, one must be concerned that if the potential speaker cannot discriminate between issue advocacy and candidate advocacy, then the speaker will shy away from speaking at all. The restrictions at issue here, however, only require that Section 301(20)(A)(iii) communications be funded with federal money, so if the political parties are afraid that a communication may promote or attack a candidate, they can simply resort to federal funds. In any event, if despite all of the mitigations, some slight potential for vagueness remains, "uncertainty at the periphery" does not render a provision unconstitutionally vague. *See FEC v. National Right to Work Comm.*, 459 U.S. 197, 211 (1982).

In sum, Section 301(20)(A)(iii), in its application to Sections 323(a) and 323(b), is neither unconstitutionally vague, nor insufficiently tailored to serve the compelling government interest of combating the appearance of corruption. By seeking only to restrict donations that can give rise to actual or apparent corruption, it sweeps neither too far nor too near. To the extent that "issue ads" are about issues in fact, as well as in name, political parties are free to raise as much soft money as they like for such advertisements. In contrast, soft money donations topolitical parties used for communications that support or oppose a clearly identified candidate for federal office—that is, candidate advocacy—directly affect a federal election and give rise to an appearance of corruption that Congress has a substantial interest in combating. Such candidate advocacy must be funded with federal money.

A final note on Section 301(20)(A)(iii). Requiring parties to fund Section 301(20)(A)(iii) communications with federal money not only serves the government interest of preventing actual and apparent corruption, but also prevents circumvention of campaign laws and principles. *See NCPAC*, 470 U.S. at 500 (noting the Court's "deference to a congressional determination of the need for a prophylactic rule").[93] Under Section 441b of FECA, corporations and unions are prohibited from using general treasury funds for independent expenditures expressly advocating the election or defeat of a particular federal candidate. 2 U.S.C. § 441b; *see also MCFL,* 479 U.S. at 241-64. If the backup definition of "electioneering communications" under Section 203 of BCRA is upheld, BCRA § 203(a); FECA §§ 316(a), (b)(2); 2 U.S.C. §§ 441b(a), (b)(2), corporations and unions would be additionally prohibited from using their general treasuries to fund candidate advocacy pieces which promote, oppose, attack, or support federal candidates. BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii). Most of the largest nonfederal money contributions to parties are by corporations and unions. *See supra* note 77. Thus, if national and state parties were allowed to spend unlimited amounts of nonfederal money on candidate advocacy, corporations and unions could largely circumvent the new BCRA Section 203 by funneling unlimited funds through political parties to pay for advertisements that they are now prohibited from broadcasting under Section 441b of FECA. To allow such a circumvention in that manner would be ludicrous. Finally, to permit national (or state or local) parties to *convert* nonfederal donations, whether from the general treasuries of corporations and unions, or from wealthy individuals and *MCFL* groups, to the federal purpose of directly influencing a federal election through candidate advocacy of the type defined in Section 301(20)(A)(iii) is, in and of itself, a direct circumvention of a fundamental premise of the FECA regulatory scheme relating to donations, blessed by the Supreme Court in *Buckley* and its progeny: *only federal money may be used to directly influence a federal election.* As long as the *Buckley* line of cases remains the law, it would make a mockery of those Supreme Court cases and the current regulatory scheme to allow political parties to use soft money to engage in what Justice Kennedy has aptly described as "covert advocacy." *Shrink Missouri,* 528 U.S. at 406, 407 (Kennedy, J., dissenting).

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[93] Title I does not, however, prevent circumvention of existing limitations on contributions to candidates in the manner set forth by the Supreme Court in *Buckley,* 424 U.S. at 38, and *Colorado II,* 533 U.S. at 456 & n. 18. Even before BCRA was enacted, because of existing party limitations on direct contributions to and coordinated expenditures on behalf of candidates, *see* 2 U.S.C. § 441a(d); *Colorado II,* 533 U.S. at 440-65, donors could not use the parties to funnel large sums of money directly to candidates in the form of contributions. Thus, any reliance on the Supreme Court's anticircumvention rationale in *Buckley* and *Colorado II, see* J. Kollar-Kotelly Op. at Part III.II.B.2.a.iii, necessarily dictates a novel application of that precedent.

C. New FECA Section 323(d): Nonfederal Fund Restrictions on Tax-Exempt Organizations

Section 323(d) prohibits national, state, and local parties from donating either soft or hard money to, or soliciting for, either: (1) a Section 527 organization; or (2) a Section 501(c) organization if that organization makes expenditures in connection with a federal election, including expenditures for "federal election activity" as defined in Section 301(20)(A). BCRA § 01(a); FECA § 323(d); 2 U.S.C. § 41i(d). Judge Henderson strikes down the entire section as unconstitutional. I concur in her judgment, but for different reasons.

First, I would note that the defendants argue that the donation and solicitation restrictions should be reviewed under closely-drawn scrutiny. *See* Intervenors Opp'n Br. at 21-23. While I agree with the defendants that *Buckley's* closely-drawn scrutiny should apply to donation limitations to organizations as well as candidates, it is less clear which scrutiny should apply to the solicitation restriction. *See* J. Henderson Op. at Part IV.D.4. However, if the restriction on solicitation cannot even withstand closely-drawn scrutiny, there is no need to choose between the standards of review. *Cf. Blount v. S.E.C.*, 61 F.3d 938, 942-43 (D.C. Cir. 1995).

As to the statute itself, Section 323(d) prevents national parties from donating *any* funds to certain Section 501(c) organizations. This complete ban on donations infringes the various parties' abilities to effectuate their members voices, and because it is not even closely drawn to serve a sufficient government interest, it cannot withstand scrutiny. Section 323(d) is not closely drawn as to Section 501(c) organizations because it prohibits solicitation for and donations to those organizations merely because they have made, in effect, expenditures for federal purposes in the past, and *regardless* of whether those donations will be used again for that very purpose. By not specifying the purpose for which the money will be put, Congress, in effect, is prohibiting solicitation for and donations to these Section 501(c) organizations that might in turn be used for *nonfederal or mixed* purposes. Congress, of course, can only do this if it could show that a sufficient government interest was being served by doing so. It has not. As discussed at length earlier, the only restrictions on uses of nonfederal funds that can be constitutionally regulated are uses that *directly affect a federal election. See supra* Parts I.A.2 & I.B.2. Any other use of the donation is too tangential to give rise to the risk of corruption, or appearance of corruption, that is necessary to warrant this congressional infringement on First Amendment rights. To say the least, the defendants have not produced sufficient evidence to demonstrate that an appearance of corruption, let alone corruption itself, arises when organizations of this type use donations from national, state, and local parties for nonfederal or mixed purposes.

Section 323(d) is also constitutionally problematic as a result of its treatment of Section 527 organizations. Section 527 organizations, according to the applicable IRS definition, exist, in part, to influence the selection, nomination, election,

or appointment of individuals to state and local public offices, as well as to various political organizations. 26 U.S.C. §§ 527(e)(1) and (2). Accordingly, since Section 527 organizations could expend the solicited or donated funds for one of these nonfederal or mixed purposes,[94] the blanket prohibition in Section 323(d) on national, state, and local parties from assisting them in this manner is similarly not closely drawn. Perhaps if Congress had structured Section 323(d) like Section 323(b) and prohibited these organizations from using nonfederal funds—which they had received from national, state, and local parties—to directly affect federal elections, it might have been able to demonstrate that the restriction was closely drawn to serve the sufficient government interest required under any standard of review to justify these infringements. But it did not. Therefore, for all of the above reasons, I conclude that Section 323(d) is unconstitutionally overbroad.

D. New FECA Section 323(e): Nonfederal Fund Restrictions on Federal Candidates

Judge Henderson and Judge Kollar-Kotelly uphold Section 323(e) in its entirety. While I concur to the extent that this section prohibits federal officeholders and candidates from receiving, directing, transferring, or spending any nonfederal funds in connection with any election, including the kind of election activity defined in Section 301(20)(A),[95] I dissent with regard to the prohibition on a federal candidate, or officeholder, from soliciting funds for the benefit of his national party, especially since Congress can and has legally prohibited the parties (national, state, and local) from using nonfederal funds to directly influence federal elections. Accordingly, I am writing separately to dissent in part from, and concur in part in, their opinions.

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[94] For example, the California Republican Party funds Section 527 organizations to engage in voter registration activities in its Operation Bounty program. *See* Erwin Aff. ¶ 9.

[95] Soft money donations to federal candidates, regardless of whether they are used for nonfederal purposes by the candidates thereafter, can give rise to actual or apparent corruption, especially if the donation is of any magnitude. In those circumstances, it is natural for the public to presume that the donation will either be used to help the federal candidate get elected or in some other way that directly enures for his/her benefit.

With regard to the First Amendment rights of federal candidates and officeholders to solicit soft money funds for the use of their parties, I would dissent principally on the basis that the defendants have failed to demonstrate that soliciting nonfederal funds to be used by parties for purposes that, at most, indirectly affect federal elections is regulable by Congress. For example, donations used for such activities as party building, newsletters, genuine issue advocacy, and generic voter mobilization so *indirectly* affect federal elections, if at all, that they do not give rise to the minimally necessary appearance of corruption to warrant congressional intervention.

Indeed, soliciting donations to be used for the national party on such mixed (and/or nonfederal) purposes is the kind of conduct by officeholders which the public not only would expect them to participate in, but which is fundamental to the successful operation of the major national parties. To the extent that helping their parties in this way provides officeholders with some added status among other party officials, in my judgment, is too attenuated a benefit to give rise to the appearance of corruption necessary to warrant congressional intervention. *See supra* Part I.A.3. Accordingly, I concur in part in, and dissent in part from, the holding of my colleagues.

Either way, the perception of a personal gain, and the sense of indebtedness that follows therefrom, justly warrants Congress's regulation.

E. New FECA Section 323(f): Nonfederal Fund Restrictions on State Candidates

Section 323(f) prohibits state candidates from spending funds for a communication of the type discussed in Section 301(20)(A)(iii) unless the funds are subject to the limitation, prohibitions, and reporting requirements of FECA (i.e., hard money). Restricting the use of soft money by state candidates for communications that directly affect federal elections is, of course, consistent with my preceding discussion of the constitutionality of Section 301(20)(A)(iii). By placing this restriction on state candidates Congress is simply guarding against similar conversions of soft money donations to fund communications that are designed to accomplish the federal purpose of directly influencing a federal election. Since this section is closely drawn to uses of soft money by state candidates exclusively for that purpose, I similarly uphold its constitutionality.

II. Title II: Noncandidate Campaign Expenditures Sections 201, 204, 213

I join with Judge Henderson, but for different reasons, in holding that the primary definition of electioneering communications set forth in Section 201 is unconstitutional. I do not, however, join in her holding that the backup definition also provided in Section 201 is unconstitutional.

To the contrary, I uphold the backup definition's constitutionality, as does Judge Kollar-Kotelly who joins in my opinion as a necessary alternative to Judge Henderson's and my finding the primary definition unconstitutional. The following are my reasons for rejecting the primary definition and upholding the backup definition.

A. Section 201: The Primary Definition

Title II of BCRA is Congress's attempt to close certain loopholes in FECA and to regulate certain conduct arising from the use, both directly and indirectly, of corporate and union treasury funds to finance electioneering communications that directly affect federal elections, even though masquerading otherwise as "pure issue advocacy." Because, in part, Judge Henderson believes that *Buckley* and its progeny set forth a bright line test requiring the presence of certain "magic words" advocating the election or defeat of a federal candidate in order for this advocacy to be regulable by Congress, she strikes down both the primary and backup definitions.[96] Judge Kollar-Kotelly and I disagree with this reasoning, and I join in the portion of her opinion analyzing why the Supreme Court never intended the so-called express advocacy test to be a constitutional rule of law limiting the power of Congress to regulate expenditures for certain uncoordinated advocacy that directly affects federal elections, notwithstanding the absence of these words.[97]

While Judge Kollar-Kotelly and I agree regarding Congress's power to regulate the source of the funds used for these communications and the disclosures that donors must file, I do not agree that the primary definition, as crafted by Congress, is sufficiently tailored to regulate the electioneering advocacy it seeks to cover. To the contrary, the primary definition, which regulates communications referring to clearly identified federal candidates based upon when and where they are broadcast, rather than their effect on federal elections, sweeps so broadly that it captures too much First Amendment protected speech that Congress, in the absence of a demonstrated compelling government interest, has no power to regulate. What type of speech is that?

The plaintiffs have clearly demonstrated that corporations, interest groups, labor unions and other entities air genuine issue advertisements in the periods immediately preceding

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[96] *See* J. Henderson Op. at Part IV.A.

[97] *See* J. Kollar-Kotelly Op. at Part III.I.C.1 & Part III.I.C .2.

general and primary elections, the sole purpose of which is educating the viewers about an upcoming vote on pending legislation, and encouraging them to inform their elected representative to vote for or against the bill (i.e., legislation-centered advertisements). Edward Monroe, Director of Political Affairs for Associated Builders and Contractors ("ABC"), explained that "serious legislative initiatives or regulatory proposals often are considered near the time of elections." Monroe Decl. ¶¶ 18-19. Laura Murphy, legislative director for the ACLU, seconds this: "[The] 60 days before a general election and 30 days before a primary . . . are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of the debate occurs against the backdrop of pending legislative action or executive branch initiatives." Murphy Decl. ¶ 12. *See also* Mann Cross Exam. at 176 (explaining that a flurry of legislative activity occurs near the end of a congressional session, therefore, often within the 60 day period preceding a general election); Finding 359.[98]

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[98] For example, last fall alone, in the period immediately preceding the 2002 congressional election, Congress considered the following important, and controversial, pieces of legislation: a resolution authorizing the use of armed force against Iraq, (H.J.Res.114, 107th Cong.); an election reform bill to update ballot machines and provide greater access to individuals with disabilities to polling places (H.R.3295, 107th Cong.); legislation to establish the Department of Homeland Security (H.R.5710, 107th Cong.); and various appropriations bills for federal departments, including the Departments of Defense, Justice, and State. While last fall's legislative calendar may not be typical, it nevertheless illustrates BCRA's potential impact on genuine issue advocacy. Murphy Decl. ¶ 12 ("Some of the President's or Attorney General's boldest initiatives are advanced during election years—often within 60 days of a general election. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period.").

Notwithstanding defendants' expert testimony to the contrary,[99] interest groups believe, and plaintiffs expert agrees,[100] that the periods immediately preceding elections are the most effective times to run issue advertisements discussing pending legislation because the public's interest in policy is at its peak.[101] Edward Monroe of ABC explains that "it is . . . clear that members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near. If that is the time when people will listen, that is the time to speak. And once an election occurs, there seems to be a period of fatigue during which political matters are of less interest, making issue ads then less effective." Monroe Decl. ¶¶ 18-19; *see also* Finding 359. Likewise, Paul Huard, Senior Vice President for Finance and Administration for the National Association of Manufacturers ("NAM"), finds that "Americans tend to have greater interest in political matters as an election approaches. At the same time, elected officials are most attuned to the views of their constituents in the pre- election period. Thus, for many purposes, the pre-election season is a critical time for issue ads." Huard Decl. ¶ 10; *see also* Finding 359.

The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these

advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293. A quick review of a classic example of a legislation-centered genuine issue advertisement demonstrates these points.

In 1998, the AFL-CIO aired an advertisement entitled "Barker." The advertisement referred to a federal candidate by name only in the call-to-action line at the end of the advertisement where it urged viewers to call their Member of Congress and express their position regarding the pending Fast Track trade legislation. The legislation was scheduled for a vote in the House of Representatives on September 25,

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[99] *See* Finding 359 n.224.

[100] *See* Finding 358 (statement of Dr. Gibson, rejecting the defendants' argument that it is unproductive to run legislation-centered issue advertisements focusing on policy matters in the periods before elections).

[101] *See* Findings 358-60.

1998—within 60 days of the general election. The text of the advertisement is as follows:[102]

> Paid for by the Working Men and Women of the AFL-CIO. [Barker speaking]: Okay ladies and gents, step right up and see if you can follow the ball. Is it here? Is it there? Where could it be? [Voice over]: They're playing games again in Washington. Without discussion or debate, they're planning another vote on the controversial Fast Track law—special powers to ram through trade deals like NAFTA. Fast Track failed *last* year because working families don't want more trade deals that put big corporations first; deals that ignore our concerns about lost jobs; environmental problems on our borders, and dangerous, imported foods. But Newt Gingrich and the sponsors of Fast Track hope they can sneak it by this fall, while public attention is focused on other issues. [Barker speaking]: Keep your eyes on the ball now . . . [Voice over]: Call Representative _______ at xxx-xxx-xxxx and tell him to vote *no* on Fast Track. Tell him we're still paying attention. And Fast Track is *still* a bad idea.

Mitchell Decl. Exhibit 116, Exhibit 1 at 86. Defendants' own expert, David Magleby, who stated in his report that he would "presume" an advertisement is electioneering merely because it mentions a federal candidate by name,[103] candidly admitted after reviewing "Barker" that such an advertisement is a "genuine" issue advertisement. He concluded as such—even though it mentions a federal candidate's name—because

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[102] The advertisement aired in the districts of Congressman Chris John (LA-07); Congressman Scott Klug (WI-02); Congresswoman Jo Ann Emerson (MO-08); Congresswoman Anne Northup (KY-03); Congressman Jack Kingston (GA- 01); and Congressman Rick White (WA-01), and referred to those federal candidates by name. *See* Finding 368.

[103] *See* Finding 290 (discussing the indicia of electioneering advertisements).

"[t]he body of the ad has no referent to [a candidate] whatsoever. The only referent to [the candidate] is the call line." Magleby Cross Exam. at 104.

> [A] generic call your Congressman, call your Senator, when then linked to a legislation and call your Congressman or Senator about this legislation without a referent to their position on the issue, seems to me substantively different than when they are mentioned in view of what their position is on that issue. Q. When you say substantively different, are you referring to a difference with respect to whether the advertisement communicates an electioneering message? A. Yes.

Magleby Cross Exam. at 106.

Because genuine issue advertisements, like "Barker," have been, and will need to be, aired during periods of legislative activity leading up to elections, plaintiffs contend the primary definition, if upheld, will capture them as "electioneering communications."[104] As such, they will be subjected to a host of limitations and regulations which, according to the plaintiffs, will limit and chill their ability to engage in First Amendment protected speech. I agree.

The crux of the problem with the primary definition is that, unlike the backup definition, it does not depend on the effect of the communication's message on a candidate's election. As such, many genuine issue ads, like "Barker," will be treated the same as the sham "issue" ads Congress supposedly was intending to regulate. It is the absence of a link between the advocacy of an issue and a candidate's fitness, or lack thereof, for election that renders congressional intervention with respect to genuine issue ads of this type unconstitutional. Notwithstanding the absence of this link, defendants contend, and Judge Kollar-Kotelly agrees, that the evidence sufficiently demonstrates that even though some genuine issue advertisements that run in the months leading up to an election will be swept in under this definition, it is too insufficient a number to render the primary definition constitutionally defective. I disagree.

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[104] McConnell Opening Br. at 65 (arguing generally that genuine issue advocacy will be regulated by BCRA); NRA Opening Br. at 26.

The plaintiffs have met their burden in this facial challenge because they have shown that BCRA's primary definition "reaches a *substantial amount* of constitutionally protected conduct." *City of Houston v. Hill,* 482 U.S. 451, 458 (1987) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)) (emphasis added). Plaintiffs, in short, have demonstrated from the statute's "text . . . and from actual fact that a *substantial number of instances* exist in which the [l]aw cannot be applied constitutionally." *New York State Club Ass'n v. City of New York,* 487 U.S. 1, 14 (1988) (emphasis added). These instances are not merely "'some' overbreadth," *Ashcroft v. ACLU,* 535 U.S. 564, 584 (2002) (quoting *Reno v. ACLU,* 521 U.S. 844, 896 (1997)), or a "single" or "bare possibility" of an impermissible application. *Members of City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 800 & n.19 (1984) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 630 (1973) (Brennan, J., dissenting)). Instead, the plaintiffs have shown, as the Supreme Court aptly put it in *Vincent,* that BCRA presents "a *realistic danger* that the statue will *significantly compromise* recognized First Amendment protections of parties not before the Court." *Id.* at 800-801.

The evidentiary basis of both the plaintiffs' and defendants' arguments concerning the primary definition's overbreadth is the *Buying Time 1998* and *Buying Time 2000* studies. While the defendants correctly contend that plaintiffs carry the burden to show that BCRA is substantially overbroad,[105] the studies defendants rely upon to show that it is narrowly tailored[106] are, in essence, a highly controversial "survey" of the ads run in the months leading up to the 1998 and 2000 elections. Judge Henderson correctly notes in her opinion, *see* J. Henderson Op. Part IV.A, that the parties "quarrel at length" regarding the significance of the *Buying Time* studies and, in particular, its conclusions regarding the percentage of genuine issue advocacy that would be improperly regulated by Section 201 of BCRA. Unlike Judge Henderson, I believe that the *Buying Time* studies are entitled to some evidentiary weight.[107]

However, I do not believe that the studies' statistical conclusions are the last word in this Court's analysis of whether or not the primary definition is overbroad. With the respect to the percentage of protected, political speech that is, or will be, regulated by BCRA, it is, of course, impossible to quantify the exact percentage with absolute certainty. *See New York v. Ferber,* 458 U.S. 747, 773 (1982) (explaining that "[h]ow often, if ever" the statute at issue in *Ferber* would regulate protected speech "cannot be known with certainty.

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[105] Gov't Opening Br. at 159; Gov't Opp'n Br. at 68.

[106] The definition itself—a content-indifferent definition based on time and location alone—is a novel approach to regulating campaign speech. *See* Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy,* 85 Minn. L.Rev. 1773, 1777-78 (2001) (drawing a distinction between "'intent tests,'" like the backup definition, that usually require a "factfinder to determine whether the person or group sponsoring the advertisement intended to influence the outcome of an election," and the "'bright line'" tests which "attempt to regulate all advertisements that meet certain objective criteria.").

[107] Judge Henderson accords no evidentiary weight to the *Buying Time* studies. *See* J. Henderson Op. at Part III.B.2 & Part IV.A. See also Findings 322-33 and 344-48 for a discussion of how the criticisms of the *Buying Time* studies do not preclude this Court from relying on those studies for the purposes of this litigation.

Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach."). Thus, it is important not to overstate the significance of the *Buying Time* studies when using them as the basis of a finding of unconstitutional overbreadth. After all, the studies did not analyze every advertisement that ran in every market during the 1998 and 2000 elections. Instead, they analyzed the top 75 media markets, encompassing eighty percent of the advertisements runs during those elections. *See* Findings 315-17. I do not state this fact to suggest that every ad had to be reviewed before the studies could be deemed credible, rather, that the percentages produced by the studies may, in fact, be an overstatement, or understatement, of the statute's overbreadth. *See* Findings 317-18. In addition, I would note that the *Buying Time 2000* study did not analyze advertisements run in the 30 days preceding a primary or preference election, even though such ads aired during that period are entirely regulable by BCRA's primary definition. *See* Finding 316.

Furthermore, this Court, in my judgment, cannot rely upon the results of the two, *Buying Time* studies without analyzing, to some extent, the parties' dispute regarding the formulas used to produce those results. The defendants favor the formula used in the 1998 study,[108] which compares the total number of genuine issue ads regulated by BCRA to the total number of genuine issue ads run in a calendar year. *See* Findings 335, 336, 337. The result is the percentage of all genuine issue advocacy that would have been regulated by

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[108] Gov't Opp'n Br. at 74. Defendants argue that the 1998 formula best "measures the impact of BCRA on the universe of genuine issue ads aired in any particular calendar year and, thus, answers the critical question at the heart of any analysis of BCRA's potential overbreadth, i.e., the amount of genuine issue advocacy that BCRA would subject to regulation." Gov't Reply Br. at 72.

BCRA in the course of that year. The plaintiffs, however, contend that the 1998 formula misstates BCRA's impact because it includes ads that were run *outside* the 60-day period preceding a general election, and therefore would not have been subject to regulation under the primary definition. *See* Findings 336, 338. According to the plaintiffs, the formula applied in the *Buying Time 2000* study more accurately reflects BCRA's impact by focusing on the exact period of time regulated by BCRA: the 60 days preceding a general election.[109] Looking at ads aired only during that 60-day period, the 2000 formula compares the number of genuine issue ads to the total number of ads, thereby calculating the percentage of all ads that would have been regulated by BCRA that were genuine issue ads.[110]

As the Supreme Court in *Broadrick v. Oklahoma* stated that a statute's overbreadth must be "judged in relation to the statute's plainly legitimate sweep," I find that the 2000 formula more accurately measures BCRA's impact. 413 U.S. 601, 615 (1973). The results produced by the 1998 formula do not assist this Court in comparing BCRA's overbreadth to its "plainly legitimate sweep," because it measures ads that never would have been regulated by BCRA.[111] While the 1998 formula shows BCRA's impact on all genuine issue advocacy over the course of a calendar year, that information is of limited value when BCRA's primary definition applies only in the 30 days preceding a primary election and the 60 days before a general election.[112]

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[109] McConnell Opening Br. at 67; McConnell Reply Br. at 35-36 (offering an analogy to explain the methodology of the two formulas).

[110] Gov't Opp'n Br. at 73 (explaining the 2000 formula); *see also* Finding 338.

[111] *See* Finding 336.

[112] *See* Lupia Rebuttal Report at 25. Defendants' expert, Dr. Arthur Lupia, concludes that while either formula is reasonable, the 2000 formula

Applying the 2000 formula to the data collected during the 1998 and 2000 studies shows that the primary definition's overbreadth is neither speculative nor hypothetical, but real and substantial. In 1998, of the ads that met BCRA's primary definition and were aired in the 60 days preceding a general election, 14.7 percent were genuine issue advocacy. *See* Finding 339. As to 2000, however, the *Buying Time* 2000 study concluded that figure was only 2.33 percent. *See* Finding 357. That percentage, however, was later increased by Professor Goldstein, who compiled the data base that served as the foundation of the *Buying Time* studies. Professor Goldstein testified on cross examination that he had reevaluated the results of the study for the purposes of this litigation and concluded that, in fact, 17 percent of the ads that met BCRA's primary definition and were aired in the 60 days preceding the 2000 general election were genuine issue advocacy. *See* Finding 357; *see also* Goldstein Cross Exam. at 160, 169; McConnell Reply Br. at 36-37. Percentage discrepancies aside, I find that 14.7 percent and 17 percent of the ads run in the months leading up to the 1998 and 2000 elections, respectively, represents a "substantial amount" of protected speech and renders the primary definition defective as constitutionally overbroad.

But these statistics, alone, do not present the full picture of BCRA's impact on genuine issue advocacy in the 60 days preceding a general election. Indeed, determining whether BCRA's primary definition reaches a substantial amount of constitutionally protected issue advocacy is not simply a function of calculating the percentage of pure issue ads that would have been captured by that definition during the 60-day period preceding the 1998 and 2000 federal elections. Because the total amount of issue advocacy likely to be generated in any given election year is a function of both the quantity and nature of the issues Congress chooses to address in that pre-election period, those numbers should not be viewed in a legislative vacuum. Ideally, this court should additionally assess whether the legislative agendas in 1998 and 2000 were unusually active, controversial or both. Regrettably, however, the record does not lend itself to such an analysis. Obviously, the more active and/or controversial the legislative schedule, the greater (or lesser) the amount of issue advocacy one would expect it to have generated. Simply put, the amount of pure issue advocacy captured in a particularly contentious, or active, legislative period, is likely to be higher than that captured in a slow, or routine, legislative period. Furthermore, restricting 14.7 percent of genuine issue advocacy in 1998 would have restricted otherwise protected speech that would have been seen in 30 million American homes, a number that brings into sharp relief the effect BCRA will have on the amount of information available to voters. *See* Finding 335. Accordingly, for the reasons stated previously, there is reason to believe that the amount of issue advocacy likely to be generated in future election cycles will be at least as substantial as it was during those years.

"could provide information about the impact during a particular time period," that is, the 60-day period in when BCRA applies. *See also* Finding 340.

Ever mindful that overbreadth is "strong medicine" to be used "sparingly and only as a last resort," *Broadrick*, 413 U.S. at 613, I do not lightly find that the primary definition of electioneering communications is substantially overbroad. However, the realistic danger that the primary definition of electioneering communications will significantly compromise genuine issue advocacy necessitates such a finding. In circumstances such as these, "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (quoting *Broadrick*, 413 U.S. at 612). I therefore find that the primary definition of electioneering communications is unconstitutionally overbroad.

I do not, however, join in Judge Henderson's conclusion that both the primary and backup definitions of electioneering communications are unconstitutional due to underinclusion. Plaintiffs argue, and Judge Henderson agrees, that Section 201 must fail because it regulates only broadcast and cable communications, but does not regulate other mediums of communication such as print, direct mail, and the internet.[113] I disagree and join Judge Kollar- Kotelly's analysis on that issue. *See* J. Kollar-Kotelly Op. at Part III.I.F. However, one point bears emphasizing: Congress is infinitely more familiar than this Court with the circumstances and practical ramifications surrounding federal elections and campaign finance laws. The record thoroughly, and convincingly, demonstrates that Congress's decision to regulate broadcast communications, rather than other forms of communication, was well justified. Congress, as defendants argue, "need not regulate the entire universe of activity intended to influence federal elections" in order to constitutionally regulate electioneering communications. Gov't Opp'n Br. at 96. As Congress, in its expertise, has made this judgment and the record "demonstrates that the recited harms [justifying a statute] are real," plaintiffs' argument that the statute is unconstitutional for underinclusion is unavailing. *Turner I*, 512 U.S. at 664.

B. Section 201: The Backup Definition

Unlike the primary definition, the backup requires as a link between the identified federal candidate and his election to that office, certain language the purpose of which is advocacy either for, or against, the candidate. For the same reasons that

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[113] *See* McConnell Opening Br. at 75-77; J. Henderson Op. at Part IV.A.

the absence of that link doomed the primary definition, it sustains the backup.

Congress concluded, and the record more than adequately demonstrates, that in the twenty-eight years since *Buckley*, corporations, unions, and interest groups, have increasingly affected federal elections by funding out of their general treasuries uncoordinated "issue ads" that either they, or a political party, ran in the months leading up to an election. *See* Findings 280-84, 296- 301; *see also* Annenberg Study at 1, 4, 3, 7-8 (showing that the number of issue advertisements has increased, as well as the number of groups airing them, from 1996 to 1998, and that corporations, interest groups, and unions began in 1996 to actively use treasury funds to sponsor issue advertisements that "looked and sounded like campaign ads."). In order to avoid regulation as express advocacy, those so-called "issue advertisements" did not contain certain "magic words" designed to support or oppose a specific candidate's election or re-election.[114] The ads, however, were constructed in such a way that they simultaneously presented their sponsors' stand on an issue, identified a specific candidate's positions or track record thereon, and under the guise of admonishing the viewer to inform the candidate of his view, suggested that a candidate who takes (or has taken) the candidate's position should (or should not) be elected to that office. Ads such as these have been typically described as "sham issue advertisements,"[115] or candidate-centered advertisements, and the factual record unequivocally establishes that they have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that. *See* Findings 273-74. Indeed, they have been so successful that it is widely believed in the industry that old fashioned express advocacy of the "magic words" type is far less effective in winning over a viewer's vote. *See* Findings 273-74, 279; *see also* Bailey Decl. ¶¶ 1-2 (stating that "it is rarely advisable to use such words as 'vote for' or 'vote against.'"').

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[114] *See* Krasno & Sorauf Expert Report at 53; Goldstein Report at 10, 16, 31 (noting that in the 1998 election cycle, only four percent of ads sponsored by candidates or parties used words of express advocacy, and in 1996 through 2000, FECA did not regulate a majority of ads aired by interest groups: for every interest group ad regulated by FECA in 2000, twenty ads that mentioned federal candidates were not covered). *See also* Finding 272.

[115] The ads have also been described as "electioneering ads" or "issue ads." *See* Findings 288-89.

Defendants contend that because these sham issue ads, in essence, directly affect federal elections, candidates are "beholden" to those who fund them.[116] It is that indebtedness, according to the defendants, that if left unregulated, will undermine the public's confidence in the integrity and fairness of our electoral process in the same way that unregulated express advocacy otherwise would, and thereby give rise to corruption or the appearance of corruption. *See* Mellman and Wirthlin at 9-10.[117] For essentially the same reasons that I uphold Congress's definition of federal election activity in Section 301(20)(A)(iii), *see supra* Part I.B.2, I believe that large soft money expenditures to fund this type of covert advocacy, regardless of whether corporations, labor unions, and interest groups produce them themselves, give rise to a public perception that the candidate is being directly benefitted and will naturally reciprocate with either favored

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[116] Intervenors Opening Br. at 108; *see generally* Gov't Opening Br. at 142-46; Intervenors Opening Br. at 104-109.

[117] The Mellman and Wirthlin poll, which was conducted from August through September 2002, showed that 80 percent of those polled believed a Member of Congress would be likely to give special consideration to a group that had run issue ads on his or her behalf. Mellman and Wirthlin concluded that "Americans see very little difference between the influence of a soft money donation to a political party and the funding of political ads on television and radio." Mellman & Wirthlin Report at 9.

access, or increased legislative influence, or both. *See id.* Accordingly, the source of the funds used and the identity of the sponsors are both, in my judgment, regulable by Congress.

Plaintiffs raise a number of arguments as to why the backup definition of electioneering communications is "impermissibly vague." McConnell Opening Br. at 70. First, they claim that "reasonable people can, and emphatically do, disagree about whether virtually any particular advertisement meets the criteria of BCRA's fallback definition." *Id.* As proof of the definition's vagueness, plaintiffs offer the deposition testimony of one of BCRA's sponsors and one of defendants' expert witnesses, in which they disagree about whether a particular ad is a genuine issue ad, or whether it promotes or supports a particular candidate.[118] Plaintiffs also offer testimony of two Members of Congress, in which one concludes that a particular ad supports a candidate, while the other concludes that the same ad attacks the candidate.[119] While BCRA's sponsors may disagree about the purpose and effect of an ad, that fact alone does not demonstrate unconstitutional vagueness. Perfect clarity, of course, is not required when a law regulates speech. As the Supreme Court said in *Grayned,* "we can never expect mathematical certainty from our language." 408 U.S. at 110 (1972). For this reason, the Supreme Court has held that a statute's vagueness exceeds constitutional bounds only when "its deterrent effect on legitimate expression is . . . both '*real and substantial*' and . . . the statute is [not] readily subject to a narrowing construction by state courts." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (quoting *Erznoznik v.*

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[118] *See* McConnell Opening Br. at 73 (discussing Senator John McCain's opinion that a particular issue ad was a "sham" ad, while Dr. Holman, an expert witness, believed the ad was genuine issue advocacy).

[119] *See id.* at 72 (discussing deposition testimony of Senator Feingold and Representative Meehan).

City of Jacksonville, 422 U.S. 205, 216 (1975)) (emphasis added). Moreover, if a statute "gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited," it is not void for vagueness. *Grayned*, 408 U.S. at 108.

Next, plaintiffs contend that the definition's use of the words "promote," "support," "attack," and "oppose" to define the sponsor's message causes it to be unconstitutionally vague.[120] I disagree. The backup definition's language, specifically those words, is not void for vagueness because a person of ordinary intelligence would understand what is prohibited. *See Grayned*, 408 U.S. at 108. Indeed, one need only conclude, in effect, that the ad is *not* neutral as to both candidates for it to have satisfied the backup definition, and thereby have satisfied the objective First Amendment standard that a reasonable person considering the context and nature of the expression at issue is able to evaluate the speech. Such objective tests have routinely been applied in the First Amendment context. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (religious expression); *Hess v. Indiana*, 414 U.S. 105 (1973) (fighting words); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (fighting words). For example, the following advertisement entitled "No Two Way" and sponsored by the AFL-CIO is not neutral as to a federal candidate, as it attacks his or her position on the federal budget. Mitchell Decl. ¶ 41. While former Congresswoman Andrea Seastrand is named, this advertisement also ran in thirty-five other congressional districts, naming federal candidates from those districts.

> CAROLYN: My husband and I both work. And next year, we'll have two children in college. And it will be very hard to put them through, even with the two

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[120] *See* McConnell Opening Br. at 70-75.

> incomes. [Announcer]: Working families are struggling. But Congresswoman Andrea Seastrand voted with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy. She even voted to eliminate the Department of Education. Congress will vote again on the budget. Tell Seastrand, don't write off our children's future. CAROLYN: Tell her, her priorities are all wrong.

Mitchell Decl. Exhibit 114. Congress is not, and should not be, constitutionally confined to "bright line" tests such as the primary definition or the "magic words" formulation in enacting campaign finance restrictions. A person of ordinary intelligence can be expected to understand this test, and know what is prohibited.

However, while I do not believe that the words used to define the message are vague, I do believe that the backup definition's final clause, which requires the message to be "suggestive of no plausible meaning other than an exhortation to vote," is unconstitutionally vague. In my judgment, it is extremely difficult, if not impossible, for a speaker to determine with any certainty *prior to* airing an ad that it meets that requirement. Whether an ad is suggestive of no plausible meaning other than an exhortation to vote depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified.[121] The "uncertain meaning[]" of this phrase in the backup definition will, as the Supreme Court stated in *Grayned*, "inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas are clearly marked." 408 U.S. at 109. The chilling effect of this language does not doom the backup definition as unconstitutionally vague, however, because it is susceptible to a saving construction. *See Edward J. Debartolo Corp. v.*

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[121] *See* Finding 291.

Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1998) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); *see also Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560-61 (2d Cir. 1988) (finding that as "the presumption is in favor of severability," the court "dropped" the "invalid part" from an FCC regulation, i.e., the words "or indecent," because "the remainder of the statute is fully operative."), *cert. denied*, 488 U.S. 984 (1988).

The backup definition's susceptibility to a saving construction is a function of how it is written. Because the offending phrase is simply appended to the end of the definition, it can be excised without rewriting the entire definition. *See Commodity Futures Trading Comm'n*, 478 U.S. at 841 ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of statute ... or judicially rewriting it." (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (internal quotations omitted)). By so construing the backup definition to avoid vagueness, the definition assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, genuine issue advocacy, specifically of the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. *See* Findings 368-73 (providing examples of legislation-centered advertisements that do not promote, support, attack, or oppose the election of a federal candidate).

Indeed, the backup definition of electioneering communications with its final clause severed is very similar to the type of "public communication" defined by BCRA's Section 301(20)(A)(iii) as "federal election activity." *See* BCRA § 301(20)(A)(iii). While the arguments against vagueness applicable to Section 301(20)(A)(iii) are generally applicable to the backup definition, one distinction is important to note: the sophistication in electioneering communications of the parties being regulated is not equally applicable to the backup definition. That said, however, I do not believe it is necessary to make a similar finding here in regard to the comparative sophistication of corporations, labor unions, interest groups, and other participants in political speech. Additionally, whatever chilling effect, if any, the definitions of "public communications" and "electioneering communications" may have are minimized in two, substantial ways: (1) corporations, labor unions, national banks, individuals, and other entities can avoid regulation simply by not mentioning a candidate for federal office in its ad, and (2) those groups may seek an advisory opinion from the FEC to determine whether a communication is regulated by BCRA.[122]

Thus, the plaintiffs have failed to demonstrate that the vagueness of the backup definition as severed is real and substantial enough to deprive a person of ordinary intelligence a reasonable opportunity to know what is prohibited. As such, the backup definition of electioneering communications is constitutional.

C. Section 204: The Wellstone Amendment

While I join Judge Henderson in holding that Section 204 is unconstitutional as it applies to MCFL nonprofit corporations, I do not agree that it is unconstitutional as it applies to those nonprofit corporations that do *not* qualify for

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[122] *See supra* Part I.B.2.

MCFL status. Therefore, I am writing separately to explain my reasons for joining with Judge Henderson in part, and with Judge Kollar-Kotelly in part who upholds the constitutionality of Section 204 for different reasons.

Defendants concede that Section 204 does not contain an exemption for MCFL organizations. However, defendants argue that an exemption nonetheless exists for those organizations because the Supreme Court in *MCFL* "carve[d] out an *as-applied* exemption to restrictions on corporate election activity." Gov't Opening Br. at 167 (emphasis in original). It is therefore inconsequential, according to the defendants, that BCRA does not codify the *MCFL* exemption. The defendants' reasoning misses the mark.

Under FECA, nonprofit corporations were required to pay for express advocacy expenditures from a separately segregated fund, rather than general treasury funds, unless that corporation met the three requirements set forth by the Supreme Court in *MCFL*.[123] Section 203 of BCRA expands FECA's separately segregated fund requirement to apply not only to corporate expenditures for express advocacy, but to expenditures by corporations, labor unions, and national banks for electioneering communications (i.e., nonexpress advocacy), as defined by Section 201. Likewise, Section 203 *expands* the exemption for nonprofit corporations from the separately segregated fund requirement of FECA. Whereas only those nonprofit corporations that met the three requirements set forth in *MCFL* were exempt from FECA's separately segregated fund requirement, Section 203 of

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[123] That is, (1) whether the corporation is "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated," so that members have "no economic disincentive for disassociating with it if they disagree with its political activity; and (3) the corporation "was not established by a business corporation," and has a policy of refusing "contributions from such entities." *MCFL*, 479 U.S. at 264.

BCRA ignores completely the *MCFL* criteria and instead provides that *all* nonprofit corporations organized under either Section 501(c)(4) or Section 527(e)(1) of the Internal Revenue Code may pay for electioneering communications using general treasury funds, simply by virtue of their incorporation under those sections. Doing so, in my judgment, was perfectly consistent with both *MCFL* and Congress's power under the Elections Clause, U.S. Const. art. I, § 4.

What Section 203 provides, however, Section 204 takes away. As defendants acknowledge, Section 204 completely cancels out the exemption for all nonprofit corporations provided by Section 203. *See* Gov't Opening Br. at 164, n.115. Plaintiffs contend, and Judge Henderson agrees, that Section 204 is unconstitutional because, in essence, it contravenes the Supreme Court's decision in *MCFL*.[124] I, too, agree with this conclusion, but I also believe that Section 204 is unconstitutional only in its application to those nonprofit organizations exempted under *MCFL*. Congress, in my judgment, has the authority to withdraw the exemption it provided in Section 203 to those nonprofit corporations *not* exempted by *MCFL*. Thus, the fact that Section 204 applies to nonprofit corporations does not, in and of itself, impair its constitutionality; the critical factor is whether the nonprofit corporation that is being regulated is one protected from such regulation by the *MCFL* holding.

Congress's authority to withdraw the expansion of the exemption rests on the same basis as its authority to require non-*MCFL*, nonprofit corporations to use only separately segregated funds to purchase electioneering communications: the demonstrated appearance of corruption that arises if for-profit corporations and unions are able to funnel their general treasury funds through nonprofit corporations in order to purchase electioneering communications that they cannot otherwise purchase directly.[125] Judge Kollar-Kotelly sets forth this reasoning in the portions of her opinion upholding Section 203's prohibition on the use of corporate and union treasury funds, and Section 201's disclosure requirements, for corporations, unions, and nonprofit corporations. *See* J. Kollar-Kotelly Op. at Part III.I.E.1.a. I concur in her reasoning and it needs no further repetition here.

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[124] *See* NRA Opening Br. at 17-24; ACLU Opening Br. at 16-17.

Accordingly, for the reasons stated above and the relevant portions of Judge Kollar-Kotelly's opinion, I hold that Section 204 is unconstitutional only in its application to *MCFL,* nonprofit corporations.

D. Section 213: The Party Choice Provision

Under FECA, as interpreted by the Supreme Court in *Colorado I,* and *Colorado II,* national party committees could make unlimited independent expenditures on behalf of a federal candidate, as well as coordinated expenditures up to the amount provided for by the Party Expenditure Provision, 2 U.S.C. § 441a(d).[126] BCRA, however, changes this by

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[125] *See generally Austin,* 494 U.S. at 256-60; *MCFL,* 479 U.S. at 658-60; *see also* Finding 284 (explaining that corporations and labor unions do not use the "magic words" in sham issue advertisements in order to avoid source restrictions).

[126] According to the Party Expenditures Provision, 2 U.S.C. § 441a(d)(3), in elections for the United States Senate, and for elections to the House of Representatives in states entitled to only one House Representative, parties are limited to spending the greater of $20,000, adjusted for inflation, or two cents multiplied by the voting age population of the State where the election is held. In states entitled to more than one House Representative, the coordinated expenditure limit for House campaigns is $10,000, prior to adjustment for inflation. In 2000, the coordinated expenditure limit for House campaigns was $33,780 per party. The limits for Senate races were as high as $1,626,438 (the coordinated expenditure limit for the California Senate race). *See* Press Release, Federal Election Commission, FEC Announces 2000 Party Spending Limits (Mar. 1, 2000).

forcing national parties, in effect, to choose between making coordinated expenditures and unlimited independent expenditures on behalf of their federal candidates. The defendants contend that such a choice is necessary, because once a national party coordinates with a candidate, no expenditure thereafter is truly independent.[127] While I agree that Congress can constitutionally place restrictions on the ability of a national party to make coordinated expenditures, Section 213's restriction on national party independent expenditures flies in the face of the Supreme Court's holding in *Colorado I,* and is therefore unconstitutional.[128]

The provisions of Section 213 are, as plaintiffs acknowledge, "relatively straightforward." McConnell Opening Br. at 85. After the date on which a party nominates its candidate, if it first makes an independent expenditure on behalf of that candidate, any subsequent coordinated expenditure will be subject to the same $5,000 limitation that exists for multicandidate committee expenditures, and not under the higher limitation set forth in formula form in the Party Expenditure Provision of Section 441a(d) of FECA. Conversely, if the party chooses to first make a coordinated expenditure on behalf of a candidate, thereby taking advantage of the higher, formula-based dollar limitation under the Party Expenditure Provision, it cannot thereafter make *any* independent expenditures on behalf of that candidate. Additionally, Section 213 treats "all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee)" as a "single political committee." Finally, Section 213 forbids transfers, assignments, and receipt of funds by a committee of a political party that has made a coordinated expenditure for a federal candidate to a political party committee "that has made or intends to make an independent expenditure with respect to the candidate." BCRA § 213; FECA § 315(d); 2 U.S.C. § 441a(d).

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[127] *See* Intervenors Opening Br. at 147 (citing Senator McCain, who explained that Section 213 "helps to ensure that the expenditure [of the national political party] will be truly independent . . . by prohibiting a party from making coordinated expenditures for a candidate at the same time it is making independent expenditures for the same candidate." 149 Cong Rec. S2144 (daily ed. Mar. 20, 2002)).

[128] While Judge Henderson agrees with us in the result, she writes separately to state her reasons for doing so. *See* J. Henderson Op. at Part IV.C.

Plaintiffs argue that the practical effect of Section 213 is to "ban political parties from making independent expenditures *at all* (if they choose to make coordinated expenditures first), and to ban them from making coordinated expenditures *at all* (if they choose to make independent expenditures first)." McConnell Opening Br. at 86. As to the latter claim, plaintiffs undoubtedly exaggerate Section 213's reach. While it is clear that it does prevent national party committees that have made an independent expenditure on behalf of a federal candidate from making coordinated expenditures up to the increased amount as calculated under the formula in 2 U.S.C. § 441a(d), they are still able nonetheless to make coordinated expenditures (or contributions) up to the $5,000 limitation provided in 2 U.S.C. § 441a(a)(2), just like any other multicandidate committee. Thus, since the national political parties may still make coordinated expenditures after making an independent expenditure first, the real issue before this Court is the constitutionality of Congress's new provision prohibiting national political party committees from making independent expenditures if it has first made a coordinated expenditure on behalf of a federal candidate. Applying a strict scrutiny review to this prohibition,[129] I find that Section 213's

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[129] In *Colorado I*, the Supreme Court, citing *Buckley*, stated that "restrictions on independent expenditures significantly impair the ability

restriction on independent expenditures by national political parties is unconstitutional.

The Supreme Court made clear in *Colorado I* that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates or other political committees," 518 U.S. at 616, and it cannot therefore be restricted unless the expenditures pose "special dangers of corruption."[130] *Id.* Despite the FEC's contention in *Colorado I* that "all party expenditures should be treated as if they had been coordinated *as a matter of law*'' because "'party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election,'" the Supreme Court found that no such risk of corruption existed. 518 U.S. at 619, 620 (citing the brief of the FEC). "[T]he constitutionally significant fact" upon which the Supreme Court relied to determine that national political parties could, like any other political speaker, exercise their First Amendment right to make independent expenditures without posing a risk of corruption, "is the *lack of coordination* between the candidate and the source of the expenditure." *Id.* at 617 (emphasis added). Absent such evidence, the Supreme Court refused to accept "as a factual matter" the FEC's

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of individuals and groups to engage in direct political advocacy and 'represent substantial . . . restraints on the quantity and diversity of political speech." ' *Colorado I*, 518 U.S. at 615 (citing *Buckley*, 424 U.S. at 19).

[130] Specifically, the Court considered whether the parties' use of donor contributions to fund independent expenditures, or the possibility that national parties might funnel donors' contributions to candidates through independent expenditures in an effort to evade the individual contribution limits, presented a risk of corruption. *Id.* at 616-17.

contention that all expenditures by a party were *ipso facto* coordinated.[131] *Id.* at 621.

Section 213 conditions a party's exercise of its First Amendment right to make independent expenditures upon its having refrained from engaging in coordinated expenditures

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[131] While acknowledging that national political parties have a First Amendment right to make independent expenditures, the defendants also contend that *Colorado I* narrowly defines that right. According to the defendants, *Colorado I* stands for the proposition that a national political party may make independent expenditures *only if* the party has not yet selected its nominee. *See* Intervenors Opening Br. at 148-49. The defendants further argue that the Supreme Court's opinion in *Colorado II* confirms their interpretation when it states that "the Members of the Court who joined the principal opinion [in *Colorado I*] thought the payments were 'independent expenditures' as that term had been used in our prior cases, owing to the facts that the Party spent the money before selecting its own senatorial candidate and without any arrangement with potential nominees." *Id.* at 439 (citing *Colorado I*, 518 U.S. at 613-14). In advocating this argument, however, the defendants have accorded mere dicta in *Colorado I* the power of precedent. I do not find that *Colorado I* conditions a party's First Amendment right to make independent expenditures upon whether or not the party has selected its nominee. While the Supreme Court in *Colorado I* mentions "that at the time of the expenditure, the Party had not yet selected a . . . nominee," *id.* at 613-14, it did so only in its review of the summary judgment record in order to determine if a genuine issue of fact existed as to whether the Party's expenditure was coordinated. Though the fact that the Party had not yet selected its nominee was an important factor in the Court's determination that the expenditure was independent, the Supreme Court placed equal, if not greater, weight on the lack of interaction between the Party's nominee and the Party at the time the expenditure was made. *See Colorado I*, 518 U.S. at 614. The fact that the Party had not chosen its nominee is neither the sole underpinning of this factual conclusion, nor of the Supreme Court's holding that national political parties have a First Amendment right to make unlimited independent expenditures. *See id.* at 618-19 ("We do not see how a Constitution that grants individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."). *Colorado II* does not hold or find otherwise.

up to the limit of the Party Expenditures Provision. Defendants' argument that "[p]roviding . . . an option, which a party committee is free to accept or decline, does not constitute a restriction of First Amendment rights" is, at best, fanciful. Gov't Opening Br. at 180.[132] By mandating that a party that has made a coordinated expenditure cannot thereafter make independent expenditures, BCRA leaves national political parties with the familiar predicament of only being able to make expenditures up to the Party Expenditure Provision limits set forth in 2 U.S.C. § 441a(d). Indeed, this is the very situation the Supreme Court found unconstitutional in *Colorado I*.

Defendants have produced no evidence of "special dangers of corruption" posed by national parties making an independent expenditure after having made one or more coordinated ones. At most this Court is presented with defendants' own speculation and suspicion that all expenditures made after a coordinated expenditure are necessarily coordinated between candidate and party. Of course, if they had such evidence of corruption or potential corruption, then restrictions on the independent expenditures of national parties might possibly be warranted. However, the nature of the defendants' concerns about coordination between parties and candidates[133] are such that they can file a complaint with the FEC challenging whether a party's expenditure on behalf of a candidate is, in fact, independent. A complete ban on all party independent expenditures after a coordinated expenditure has occurred is just not sufficiently tailored to deal with that type of problem. Moreover, Section 213's ban on independent expenditures treats national political parties differently than other political actors even though, as mentioned previously, a party's independent expenditures are no less protected as First Amendment activity than that of others. *See Colorado I*, 518 U.S. at 616.

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[132] The defendants describe the ban on independent expenditures as the price national parties must pay to take advantage of the "special privilege" of making coordinated expenditures at the increased rate set forth in 2 U.S.C. § 441a(d), a privilege available only to national parties and not to individuals, candidates, or other political speakers. Although I do not disagree with the defendants' assessment of the Party Expenditure Provision as a "special privilege," I find unconstitutional BCRA's conditioning of this privilege on the national party forgoing its First Amendment rights.

[133] *See* Intervenors Opening Br. at 149, 149 n.537 The defendants only offer anecdotal declarations of former and current Members of Congress as well as documents produced by the national parties to support their

Having rejected Section 213's ban on independent expenditures for parties that have first made coordinated expenditures, I find it unnecessary to reach the constitutionality of the two remaining provisions of Section 213: the provision treating all committees of a party as a single committee, and the provision forbidding transfers and receipt of funds between committees of a political party. Even if I found those provisions to be constitutional, I do not believe—after finding the ban on independent expenditures unconstitutional— that a saving construction can be applied to Section 213 so that it is consistent with Congress's clear intent to provide a choice to parties between unlimited independent expenditures and coordinated expenditures up to

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contention that the "evidentiary record . . . amply supports Congress's expert judgment that, when a party chooses to coordinate efforts with its nominee, it cannot claim at the same time to be making expenditures that are truly independent of that nominee." *Id.* at 149. For example, defendants point to the declaration of Senator McCain who stated that parties and candidates "generally communicate and coordinate on a regular basis on a variety of topics," so that "[t]he idea that a party could make both 'coordinated' and 'independent' expenditures once the party has nominated a candidate, is not sensible."

the Party Expenditure Provision limit.[134] Applying a saving construction to the statute that would allow only one option, but not the other, would flout that intent. Therefore, for the reasons set forth above, Section 213 of BCRA is, in our judgment, unconstitutional.

III. Section 318: Prohibition of Donations by Minors

I concur in the judgment of Judge Henderson and Judge Kollar-Kotelly that Section 318, which prohibits children from making contributions to candidates or donations to political parties,[135] is unconstitutional. I write, however, only to explain why I believe this Court should evaluate this provision under the strict-scrutiny standard of review.

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[134] *See* 148 Cong. Rec. S2096-02, S2144 (Mar. 20, 2002) (statement of Senator McCain). Senator McCain stated:

> Section 213 of the bill allows the political parties to choose to make either coordinated expenditures or independent expenditures on behalf of each of their candidates, but not both. This choice is to be made after the party nominates its candidate, when the party makes its first post-nomination expenditure—either coordinated or independent—on behalf of the candidate. . . . This provision fully recognizes the right of the parties to make unlimited independent expenditures. But it helps to ensure that the expenditure will be truly independent, as required by Colorado Republican I, by prohibiting a party from making coordinated expenditures for a candidate at the same time it is making independent expenditures for the same candidate. We believe that once a candidate has been nominated a party cannot coordinate with a candidate and be independent in the same election campaign. After the date of nomination, the party is free to choose to coordinate with a candidate, or to operate independently of that candidate. If it chooses the former, it is subject to the limits upheld in Colorado Republican II. If it chooses the latter, it is free to exercise its right upheld in Colorado Republican I to engage in unlimited hard money spending independent of the candidate.

[135] Section 318 states: "An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party." BCRA § 318; FECA § 324; 2 U.S.C. § 441k.

If Section 318 were a complete ban on adults, instead of on minors, Supreme Court precedent would require us to review such a provision under the strictest of scrutiny. Indeed, one of the primary reasons that the Supreme Court reviewed contribution limitations in *Buckley* under the less-demanding closely-drawn standard of review was because contribution limitations permit some expression of support. 424 U.S. at 20-21. A complete ban on donations, on the other hand, prevents even a symbolic expression of support for a candidate or a party's agenda. *Id.* Similarly, Section 318 merits heightened scrutiny regardless of the age of those it silences. Simply stated, the standard of review applied by this Court should be a function of the constitutional rights being infringed upon, rather than the age of those whose rights are being infringed.

Children, like adults, are protected by the Constitution.[136] The Supreme Court, however, has made clear that minors in certain circumstances should not be treated in the same way as adults, repeatedly upholding laws that treat them differently.[137] Because the treatment of minors by the

Supreme Court has varied across a wide range of circumstances, lower courts have had to wrestle with some uncertainty in assessing when the state's power can trump the rights of children, but not those of adults. Indeed, the Supreme Court itself acknowledged that uncertainty: "The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer." *Carey v. Population Services International,* 431 U.S. 678, 692 (1977). Two years later the Supreme Court shed greater light on the matter in *Bellotti v. Baird,* when it identified certain reasons that justify the disparate treatment:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot equated with those of adults: the peculiar vulnerability of children; their inability to make critical decision in an informed, mature manner; and the importance of the parental role in child rearing.

443 U.S. at 634.

While these reasons provide clearer guidance on when children can be treated differently from adults, they do not, however, explain whether a court, having found one of those reasons present, should employ a lesser standard of review in evaluating children's constitutional rights or merely rely upon one of the reasons as a factor in recognizing a government interest justifying the regulation. In this jurisdiction, the D.C. Circuit seemingly answered that question for certain circumstances.

In *Hutchins v. D.C.,* where the D.C. Circuit upheld the District of Columbia's imposition of a curfew on minors, 188 F.3d 531, 541 (1999) (en banc), the Circuit Court, in applying the *Baird* reasons, concluded that children may be more "vulnerable to harm during curfew hours than adults," "are less able to make mature decisions in the face of peer pressure, and "are more in need of parental supervision during curfew hours." *Id.* For those reasons, it decided to review the curfew statute under intermediate scrutiny and found the curfew was substantially related to the achievement of important government interests. *Id.* Here, however, I do not believe that we should lower the level of scrutiny. In *Hutchins,* and other cases in which courts applied a lesser standard of review, the courts identified paternalistic state interests in protecting children from harm; or acting *in loco parentis.* The D.C. Circuit, in *Hutchins,* was particularly concerned that children are "vulnerable to harm during curfew hours." *Id.* And in cases concerning decisions by children that affect procreation—cases in which the Supreme Court has applied a lesser standard of review—the Court has been equally concerned that children may make decisions that harm themselves.[138]

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[136] *See Bellotti v. Baird,* 443 U.S. 622, 633, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) ("A child, merely on account of his minority, is not beyond the protection of the Constitution. . . . 'whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill or Rights is for adults alone.'" (quoting *In re Gault,* 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967))); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

[137] *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682-83, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (upholding school's decision to punish student using obscene language); *Ginsberg v. New York,* 390 U.S. 629, 638, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding criminal conviction under New York statute that prohibited the selling of sexually oriented magazines to minors).

Section 318 of BCRA was not drafted out of a concern to safeguard children against harming themselves in the absence of their parents (i.e., the state acting *in loco parentis*), but to prevent parents from using their children to circumvent existing donation limitations to political parties and politicians. Because it involves political expression, this case is not unlike *Tinker v. Des Moines Independent Community School District,* in which the Supreme Court rejected a school district's attempt to discipline students wearing black

armbands to express their opposition to the Vietnam War. 393 U.S. 503 (1969). Even in a case where the students were in the custody of the state, the Supreme Court recognized that the speech caused no harm to, nor interrupted the learning of, the state's charges. *Id.* at 508-09. It emphasized that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect." *Id.* at 511. Such cases involving government interests, unrelated to the protection of children, do not warrant review under any scrutiny less than strict. The political expression of children, especially if they are old enough to work and pay taxes, surely deserves the same level of constitutional scrutiny as a young adult old enough to attend college and vote.

This does not mean, of course, that thegovernment need entirely ignore the fact that some children do not possess "that full capacity for individual choice which is the presupposition of First Amendment guarantees," *Ginsberg,* 390 U.S. at 649-50, and that they sometimes cannot make "critical decisions in an informed, mature manner," *Baird,* 443 U.S. at 634. It simply means that the government, and the courts, can take into account these concerns when evaluating whether there is in fact a compelling government interest. Here, for example, the government could claim that children under thirteen who generally have no means independent of their parents and rarely make financial decisions independent of their parents, are vulnerable to being represented by their parents as having made donations which, in effect, circumvent contribution limits. If there were in fact more substantial evidence of such circumvention, *see* J. Kollar-Kotelly Op. at Part III.III, and the provision were more narrowly tailored to serve the circumvention concern, *see* J. Henderson Op. at Part IV.E, then restrictions, which are somewhat more onerous on children than on adults given a child's lack of independence, may be justifiable based on a compelling government interest. That is not the case here. For these reasons and for those set forth, in part, by Judge Kollar-Kotelly and Judge Henderson, I agree that the prohibition on donations by children is unconstitutional.

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[138] For example, in *Planned Parenthood of Central Missouri,* the Court reviewed a parental consent provision for abortions under lesser scrutiny, explaining that it must "examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult." 428 U.S. at 75; *see also Carey,* 431 U.S. at 693 n. 15 (applying lesser scrutiny to contraceptive regulation of minors).

IV. Section 504: Public Access to Broadcasting Records

Section 504 requires broadcast licensees to collect and disclose records of any "request to purchase broadcast time" that "is made by or on behalf of a legally qualified candidate for public office" or that relates "to any political matter of national importance," including communications relating to "a legally qualified candidate," "any election to Federal office," and "a national legislative issue of public importance." BCRA § 504; FECA § 315(e)(1); 47 U.S.C. § 315(e)(1).[139] Since "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," *Buckley,* 424 U.S. at 66, the Supreme Court insisted that any law compelling disclosure of campaign information must be reviewed under "exacting scrutiny," *id.* at 64, such that the government interest served is "substantial," *id.* at 80, and "sufficiently important to outweigh the possibility of infringement," *id.* at 66. For the following reasons, I find that the record does not establish the existence of a substantial governmental interest necessary to warrant the disclosure requirements set forth in Section 504.

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[139] The record must include whether the request to purchase was accepted or rejected; the rate charged for the broadcast; the date and time on which the communication aired; the class of time that is purchased; the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers; in the case of a request on behalf of a candidate, the name of the candidate, the authorized committee, and the treasurer of the committee; and in the case of any other request, the name of the person purchasing the time, the name and contact information for such person, and a list of chief executive officers or members of the executive committee or board of directors. BCRA § 504; FECA § 315(e)(1); 47 U.S.C. § 315(e)(1).

Section 504 is different from the other disclosure provisions in BCRA in two important ways: (1) broadcast licensees, not the purchasers, are required to make the disclosures; and (2) the disclosures are required for broadcasts on "political matters of national importance" as well as on federal candidates. In relation to disclosure of communications by, and relating to, federal candidates, the government has provided no evidence that Section 504 serves any of the government interests specified in *Buckley.*[140] Indeed, Section 201, which this Court finds constitutional in part, already requires purchasers of "electioneering communications" to disclose a wide array of information, including the amount of each disbursement and the elections to which the electioneering communications pertain. BCRA § 201(a); FECA § 304(f)(2); 2 U.S.C. § 434(f)(2). These disclosure requirements for purchasers in Section 201 mirror many of the provisions for broadcast licensees in Section 504, and the defendants have provided no evidence that such a belt-and-suspender approach is necessary. Moreover, they have provided no evidence suggesting, let alone proving, that purchasers have evaded, or will evade, disclosure requirements. And though the defendants made an offhanded reference to the importance of ensuring that broadcast requests are processed in an "even-handed fashion," Gov't Opp'n Br. at 134-35, there is nothing in the record which demonstrates that broadcast licensees have treated purchasers unfairly.

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[140] In *Buckley,* the Supreme Court outlined several sufficient government interests justifying disclosure requirements including informing voters about how candidates spend money so that they can better evaluate candidates, 424 U.S. at 66-67 (noting that disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches"), deterring actual corruption and avoiding the appearance of corruption, *id.* at 67 (explaining that "exposing large contributions and expenditures to the light of publicity" fights corruption), and gathering data to detect violations campaign finance laws, *id.* at 67-68.

As to noncandidate-focused communications which supposedly relate to "political matters of national importance" (e.g., "a national legislative issue of public importance"),[141] disclosure requests are even more difficult to justify. First, such disclosure requirements fail to serve any of the three sufficient government interests set forth in *Buckley* because those interests are specific to evaluating, and preventing corruption of, federal candidates. *See supra* note 135. Second, the defendants' contention that there is a substantial government interest in helping the public identify the sponsors of political broadcasts and evaluate the credibility of the political message, *see* Gov't Reply Br. at 89-90, does not quite square with the holding in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). In *American Constitutional Law Foundation*, the Supreme Court did recognize a substantial government interest in disclosing the names and addresses of ballot-initiative proponents who pay circulators to collect signatures, explaining that disclosure was "a control or check on domination of the initiative process by affluent special interest groups." *Id.* at 202. Here, however, the defendants have provided no evidence that "special interest groups" have, as yet, dominated or co-opted broadcast communications relating to political issues of national importance. *See id.* at 203 (refusing to require disclosure of petition circulators' names and amounts paid because the "lower courts fairly determined from the record as a whole" that the benefit of such information had not been demonstrated).

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[141] Any understanding of broadcasts "relating to any political matter of national importance" necessarily includes broadcasts above and beyond those referring to federal candidates. Though, as the plaintiffs contend, the scope of those required disclosures is unclear because of the language's vagueness.

Absent such evidence, the government lacks a constitutionally acceptable justification to enact a disclosure provision that imposes an onerous collection and disclosure system on broadcast licensees; infringes the associational rights of groups and their members who engage in broadcasting; and potentially curtails political speech invaluable to an informed electorate. In *Buckley v. Valeo*, the D.C. Circuit rejected FECA Section 437a, a disclosure requirement that also encompassed "completely nonpartisan public discussion of issues of public importance." *See Buckley v. Valeo*, 519 F.2d 821, 870, 869-78 (D.C. Cir. 1975).[142] In so doing, the court explained:

> [I]ssue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.

Id. at 873. I could not agree more. In the absence of evidence that disclosure of nonelection-related broadcasts serves a substantial government interest, Section 504 cannot withstand scrutiny.

V. Findings of Fact

Despite our best efforts to produce a complete set of Findings of Fact, in which two or more members of this Court concur, we were unable to do so.

Because of the critical importance of the facts to the holdings in the case, and the sheer enormity of the record developed by the parties, I believe it necessary to set out, for the most part,[143] those facts which in my judgment are sufficiently relevant and probative to rely upon in reaching my conclusions. Accordingly, while there may be other relevant and probative facts in the record, I do not accord them sufficient weight to warrant either relying on them in my judgments, or including them in my Findings.

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[142] The D.C. Circuit's decision on Section 437a was not appealed. *See Buckley*, 424 U.S. at 10 n. 7.

Moreover, in some instances where evidence was submitted by one side or another (or both) on a particular point, but in my judgment that evidence did not meet this standard, I have either commented specifically to that effect, or simply stated that there was "no probative evidence in the record" as to that point. In other instances, where I accorded great weight to the relevant and probative evidence submitted on a particular point, I have specifically acknowledged that that evidence was "substantial" or "overwhelming" as to that point. In those limited circumstances where the evidence submitted by one side was not controverted by the other, I have acknowledged the "uncontroverted" nature of the evidence on that point.

Finally, I would be remiss to not acknowledge the herculean effort expended by the parties in assembling this

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[143] In those sections where I have concurred in the judgment and reasoning of one of my colleagues, she may be basing her opinion on her individual Findings of Fact that relate to that section. Unless otherwise necessary, I have, to the extent possible, refrained from repeating those findings in my Findings of Fact. Hence, to that extent, my set of Findings does not include *all* of the facts that I have relied upon in reaching my various judgments. Finally, in a footnote to the introduction of her Findings of Fact, Judge Henderson comments that she has a "'definite and firm conviction that a mistake has been committed' with respect to several of [the] findings" in Judge Kollar-Kotelly's and my opinions. J. Henderson Op. at Part III.B (citing *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001)). Two of the five examples she lists thereafter are Findings 292 and 250 of my opinion. Because Judge Henderson does not explain why either one or both of these Findings are "mistaken," I am not in a position to respond to her concerns.

"elephantine"[144] record over a seven-month time period. It is a testament, indeed, to their sense of professionalism and duty on a matter of utmost importance to our system of government. Moreover, the job of reviewing and evaluating this record would have been substantially more difficult, and less reliable, in my judgment, if they had not assembled these factual materials with such extraordinary care.

That said, upon reviewing the record as a whole, I make the following Findings of Fact:

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As to BCRA's restrictions on nonfederal funds, I find that

National Parties and Their Congressional Campaign Committees

1. The national committees of the two major political parties are: the Republican National Committee ("RNC"); the National Republican Senatorial Committee ("NRSC"); the National Republican Congressional Committee ("NRCC"); the Democratic National Committee ("DNC"); the Democratic Senatorial Campaign Committee ("DSCC"); and the Democratic Congressional Campaign Committee ("DCCC"). Vogel[145] Decl. ¶ 6 [DEV 9-Tab 41]; McGahn[146] Decl. ¶ 6 [DEV 8-Tab 30]; Jordan[147] Decl. ¶ 6 [DEV 7-Tab 21]; Wolfson[148] Decl. ¶ 6 [DEV 9-Tab 44].

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[144] Hearing Tr. (Dec. 4, 2003) at 152 (Abrams).

[145] Alexander Vogel is General Counsel for the NRSC. Vogel Decl. ¶ 1 [DEV 9-Tab 41].

[146] Donald McGahn is General Counsel for the NRCC. McGahn Decl. ¶ 1 [DEV 8-Tab 30].

[147] James Jordan is the Executive Director of the DSCC. Jordan Decl. ¶ 1 [DEV 7-Tab 21].

[148] Howard Wolfson is Executive Director of the DCCC. Wolfson Decl. ¶ 1 [DEV 9-Tab 44].

National Party Nonfederal Fundraising and Spending

2. According to defendants' expert Mann

> In 1980 the national Republican party spent roughly $15 million in soft money, the Democrats $4 million. This constituted 9% of total spending by the two national parties. In 1984 the amount of soft money spent by the national parties increased marginally to $21.6 million but it constituted a smaller share (5%) of total national party activity. In 1988 . . . . [p]arty soft money spending more than doubled to $45 million, which was 11% of national party totals . . . . By 1988, both parties had developed effective means of courting large soft money donors. After the election, Republicans revealed that they had received gifts of $100,000 each from 267 donors; Democrats counted 130 donors contributing $100,000 or more . . . .

Mann Report at 12-13 [DEV 1-Tab 1] (citations omitted).

3. The 1992 election cycle was the first in which nonfederal donations were tracked by the FEC. During that cycle the Democratic and Republican parties together raised $86.1 million in nonfederal funds. During the 1994 election cycle the two major parties raised $101.6 million in nonfederal funds. During the 1996 cycle the combined total rose to $263.5 million but dropped to $222.5 million during the 1998 cycle. During the presidential election cycle of 2000 they raised a combined total of $487.5 million in nonfederal funds. In the past election cycle of 2002 cycle they raised $495.8 million in nonfederal funds. *See* Press Release, FEC, Party Fundraising Reaches $1.1 Billion in 2002 Election Cycle (Dec. 18, 2002), *available at* http:// ww.fec.gov/press/20021218party/20021218party.html.

4. There was

> a threefold increase in national party soft money activity between 1992 and 1996—from $80 million to $272 million. Soft money as a share of total national party

> spending jumped from 16% to 30%. Both parties and their elected officials worked hard to solicit soft money donations from corporations, wealthy individuals, and labor unions. During the 1996 election the national party committees received . . . approximately 27,000 contributions from federally prohibited sources . . . Less than $10 million of the $272 million was contributed directly to state and local candidates in the 1996 cycle. . . . The two parties transferred a total of $115 million in soft money to state party committees, which financed two-thirds of state party soft money expenditures. . . . State party soft money expenditures for political communication/advertising jumped from less than $2 million in 1992 to $65 million in 1996.

Mann Report at 21-22 [DEV 1-Tab 1] (citation omitted). During the 1996 election cycle, the top 50 nonfederal money donors made contributions ranging from $530,000 and $3,287,175. *Id.* at 22.[149] "The total amount of soft money spent [in the 1998 midterm election cycle]—$221 million—was less than in 1996 but more than double the previous midterm election. And soft money as a share of total spending by the national parties jumped to 34%. The congressional party campaign committees put a premium on raising and spending soft money to advance the election prospects of their candidates . . . . Both national party committees had discovered they could finance campaign activity on behalf of their senatorial candidates with soft money in the form of 'issue advocacy.' The same pattern, more pronounced with the Democrats than the Republicans, was evident in the House campaign committees." Mann Report at 23 [DEV 1-Tab 1] (citation omitted).

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[149] Four of the top 50 soft money donors to the national parties in 1999, but not 2000, were state parties. Mann Expert Report at tbl. 5, tbl. 6.

5. Defense expert Mann has reported that "soft money financing of party campaigning exploded in the 2000 election cycle. Soft money spending by the national parties reached $498 million, now 42% of their total spending. Raising a half billion dollars in soft money [in 2000] took a major effort by the national parties and elected officials, but they had the advantage of focusing their efforts on large donors. That focus paid substantial dividends: 800 donors (435 corporations, unions and other organizations and 365 individuals), each contributing a minimum of $120,000, accounted for almost $300 million or 60 percent of the soft money raised by the parties. The top 50 soft money donors ... each contributed between $955,695 and $5,949,000. Among the many soft money donors who gave generously to both parties were Global Crossing, Enron and WorldCom." Mann Report at 24-25 [DEV 1-Tab 1] (citation omitted). "A total of $280 million in soft money—well over half the amount raised by the six national party committees—was transferred to state parties [in 2000], along with $135 million in hard money." *Id.* at 26. In 2000, thirty-five of the top 50 donors were corporations. Most of the other top 50 donors were unions and plaintiff attorneys. Mann Expert Report at tbl. 6.

6. During the first 18 months of the 2001-2002 election cycle the parties reported nonfederal receipts of $308.2 million, which is a 21 percent increase over the same period during the 1999-2000 cycle. The FEC notes that this increase is "all the more significant given that typically parties raise more in Presidential campaign cycles than in non-presidential campaigns." Press Release, FEC, Party Fundraising Growth Continues (Sept. 19, 2002), *available at http://www.fec.gov/press/20020919*-partyfund/20020919partyfund.html. By October 16, 2002, the parties had raised over $421 million in nonfederal funds. Press Release, FEC, National Party Fundraising Strong in Pre-Election Filings (Oct. 30, 2002), *available at* http:// www.fec.gov/press/20021030party pre.html/20021030partypre.html.

7. Experts attribute the accelerated rise in nonfederal money expenditures to President Bill Clinton and his political consultant Dick Morris' use of such funds during the 1996 campaign to fund

> television ads designed to promote Clinton's reelection. While the ads prominently featured the President, none of these costs were charged as coordinated expenditures on behalf of Clinton's campaign. Instead the party paid the entire cost, based on a legal argument never before made: that party communications which did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising and financed, according to the FEC allocation rules, with a mix of soft and hard money.

Mann Report at 18 [DEV 1-Tab 1]. Defense Expert David Magleby notes that this development

> ran counter to the stated purposes of soft money which were to permit parties to raise unlimited amounts of money for 'party building' purposes, unlike hard money which is subject to the contribution limits given to the parties to help elect or defeat candidates. . . . The strategy to deploy soft money for these purposes is described in a series of memos from Dick Morris. . . . Morris says, "I met with . . . attorney[s] . . . and explained the kinds of ads I had in mind. Fortunately, they said the law permitted unlimited expenditures by a political party for such "issue-advocacy" ads. By the end of the race, we had spent almost thirty-five million dollars on issue-advocacy ads (in addition to about fifty million dollars on conventional candidate-oriented media), burying the Republican proposals and building a national consensus in support of the president on key issues."

8. Magleby Expert Report at 11 (quoting Dick Morris, Behind the Oval Office: Getting Reelected Against All Odds

141, 624 (1999) [DEV 4-Tab 8]. "The national Democratic party managed to finance two-thirds of its pro-Clinton 'issue ad' television blitz by taking advantage of the more favorable allocation methods available to state parties. They simply transferred the requisite mix of hard and soft dollars to party committees in the states they targeted and had the state committees place the ads." Mann Expert Report at 22 [DEV 1-Tab 1]; *see also* Plaintiff's Expert Raymond La Raja Dep. Exhibit 3 at 14, 37-48 [JDT 15] (Raymond Joseph La Raja, American Political Parties in the Era of Soft Money (2001) (unpublished Ph.D. dissertation, University of California at Berkeley) (discussing the emergence of "party soft money").

9. According to Defense experts, "It did not take the Republican party long to respond in kind by promoting Bob Dole and Jack Kemp." Magleby Expert Report at 11 [DEV 4-Tab 8].

> In May of 1996, the Republican National Committee announced a $20 million "issue advocacy" advertising campaign. Its purpose, in the words of the chairman, would be "to show the differences between Dole and Clinton and between Republicans and Democrats on the issues facing our country, so we can engage full-time in one of the most consequential elections in our history." These presidential candidate-specific ads, like the Democratic ones, were targeted on key battleground states and financed with a mix of hard and (mostly) soft money. Both parties were now financing a significant part of the campaigns of their presidential candidates outside of the strictures of the FECA and well beyond the bounds of the 1979 FEC ruling that national parties may raise corporate and union funds and solicit unlimited donations from individuals "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office."

Mann Expert Report at 20 (citation omitted) [DEV 1-Tab 1].

10. This approach for the use of nonfederal funds spilled over into congressional races. Mann Expert Report at 20 [DEV 1-Tab 1]; *see also* Lamson[150] Decl. ¶ 9 (describing both parties' national committees' use of soft money to run advertisements in a race for Congress in Montana).

Senator McConnell

11. Senator McConnell routinely participates in political and fundraising events for state and local candidates and party committees.

12. Since his election to the Senate, Senator McConnell has been a member of the NRSC, which promotes the Republican position on a wide range of issues and supports Republican candidates at the federal, state, and local levels. Senator McConnell chaired the NRSC in the 1998 and 2000 election cycles and, as chairman, he raised funds not subject to the restrictions and prohibitions of federal law. These nonfederal funds were used for voter registration and identification, get-out-the-vote activities, "issue advocacy," building funds, and national support for state and local candidates. As NRSC Chairman, Senator McConnell directed nonfederal NRSC

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[150] Since January 2001, Lamson has served as the Communications Director for the Office of Public Instruction of the State of Montana, a post he also held from early 1997 until January 2000. During 2000, Lamson managed Nancy Keenan's campaign to represent Montana's Congressional district. During 1996, Lamson managed Bill Yellowtail's campaign to represent Montana's congressional district. From 1983 through 1996, Lamson served as the state director for United States Representative Pat Williams' congressional office in Montana. During this same period, Lamson also managed Congressman Williams' election campaigns in Montana. From 1981 to 1983, Lamson was Executive Director of the Montana Democratic Party. Lamson provided a sworn declaration in *Colorado Republican Fed. Campaign Comm. v. FEC*, 41 F.Supp.2d 1197 (D.Colo.1999), *aff'd*, 213 F.3d 1221 (10th Cir.2000), *rev'd*, 533 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001). Lamson Decl. ¶¶ 2-3 [DEV 7-Tab 26].

donations to dozens of state and local candidates, including Virginia Republican gubernatorial candidate Jim Gilmore (in 1997); California Republican gubernatorial candidate Dan Lungren (in 1998); and the Republican candidate for mayor of Warwick, Rhode Island (in 2000). *Id.* ¶ 8.

13. The overwhelming majority of the people with whom Senator McConnell has met during his tenure in the Senate do not donate funds to the Republican Party at the national, state, or local level. Typically Senator McConnell is unaware of the donation history of the individuals with whom he meets. *Id.* ¶ 13.

Thomas McInerney

14. Thomas McInerney, a resident of New York, shares the Republican Party's general philosophy on policy issues such as lower taxes, smaller government, free trade, and a strong national defense. He has pursued his political and public policy goals by making donations to Republican organizations at the national, state, and local levels in order to promote Republican principles and candidates at the federal, state, and local levels. McInerney Aff. ¶¶ 2-3.

15. Prior to BCRA's enactment in 2002 McInerney donated amounts in excess of BCRA's aggregate amount limit of $57,500 per cycle to the national political party committees of the Republican Party and in excess of $10,000 per year to state and local Republican party organizations. His donations were intended to support state and local candidates voter registration activities for state and local parties; voter identification activity; get-out-the-vote activity; generic campaign activity for state and local parties, including broadcast communications that promote the Republican party when a federal candidate is on the ballot; slate cards, palm cards, and sample ballots for state and local parties; absentee ballot programs for state and local parties; phone bank programs for state and local parties; public communications discussing policy issues, including communications that mention federal candidates in a manner that could be construed to "promote, support, attack or oppose" such candidates; staff salaries of employees who spend 25 percent of their time in any given month on any of these activities. *Id.* ¶ 4.

16. In the 2002 election cycle McInerney donated more than $57,500 to Republican Party organizations at the national, state, and local levels "to be used on certain activities" described above. *Id.* ¶ 10.

17. In the 2000 election cycle McInerney donated more than $57,500 to Republican Party organizations at the national, state, and local levels "to be used on certain activities" described above. *See Id.* ¶ 12.

18. McInerney's support for Republican Party organizations at the national, state, and local levels reflect his shared philosophy and values with the Party.

19. Nothing in the record suggests that McInerney's support for the Republican Party at the national, state, and local levels is dependent upon gaining access to federal officeholders. McInerney would support the Republican Party whether or not he was solicited by a federal officeholder and whether or not his contribution resulted in attendance at an event that included federal officeholders. *See id.* ¶ 17.

The Role of Political Parties in Democracies

20. Both sides experts testify that political parties play a critical role in democracies. *See* Mann Expert Report at 28 ("Political parties play an indispensable role in democratic societies . . . ."); Krasno & Sorauf Expert Report at 21-22 ("While most political scientists may not literally agree with E.E. Schattschneider that 'parties created democracy, and . . . democracy is unthinkable save in terms of parties' they would recognize and appreciate the sentiment. We certainly place ourselves in their number."); La Raja Decl. ¶ 11 ("Political

parties are essential institutions in democracies."). Experts testify that political parties have played and continue to play certain critical roles in helping us to maintain a stable political order.

21. First, they note that the parties have coordinated and reconciled various national, state, and local entities within our federal system of government. *See* Milkis Expert Report at 13-14; Keller[151] Expert Report at 6-7.

22. Next, they state that the parties encourage "democratic nationalism" by nominating and electing candidates and by engaging in dialogues concerning public policy issues of national importance. Milkis Expert Report at 14-19. An example of this is the RNC's recent participation in public policy debates concerning a balanced budget amendment, welfare reform, and educational policy. *See* Josefiak[152] Decl. ¶ 91; RNC Exhibit 1711, Exhibit 2428, Exhibit 2440.

23. Experts note that the parties recruit and nominate candidates, aggregate public preferences, and provide a means of democratic accountability. *See* D. Green Expert Report at 7; Magleby Expert Report at 33; Mann Expert Report at 28. Political scientists also credit parties with increasing voter turnout, encouraging volunteer grassroots political participation, fostering broader electoral competition by supporting challengers against incumbents, and diluting the influence of organized interests. *See* Cross Exam. of Green at 83-84; Cross Exam. of Mann at 53; Keller Expert Report at 5-6; Milkis Expert Report at 12-13; La Raja[153] Expert Report at 5, 7-8.

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[151] Sidney Milkis and Morton Keller are experts for the plaintiffs.

[152] Thomas Josefiak is Chief Counsel of the RNC. Josefiak Decl. ¶ 1.

[153] Raymond La Raja is one of plaintiffs' experts.

24. Plaintiffs' expert Keller states that party competition in general is healthy for democracy; it was a major force behind the expansion of the electorate through the enfranchisement of blacks in the South, reduction of the voting age to eighteen, and the elimination of poll taxes and other constraints on voting registration. *See* Keller Expert Report at 15. Intense competition among the post-Civil War parties led to increased voter turnout and close presidential elections. *See id.* at 11-12.

25. In addition, experts find that the parties act as critical agents in developing consensus in the United States. *See* Milkis Expert Report at 19. In the words of one defense expert, parties are "the main coalition building institution[s] . . . by a good measure." Cross Exam. of Green at 84; *see* Cross Exam. of Mann at 53, 56 ("[n]o other group could come close to political parties" in moderating extreme views); Krasno & Sorauf[154] Expert Report at 24 ("Parties with their necessary 'big tent' compete for the allegiances of multiple groups . . . .").

26. Furthermore, experts find that the parties cultivate a sense of community and collective responsibility in American political culture. *See* Milkis Expert Report at 19-21; La Raja Expert Report at 3-4. Parties have been integral in forming a consensus on publicly divisive issues. *See* Milkis Expert Report at 4.

27. Finally, it is also noted by experts that it is a major purpose of the political parties to elect candidates to office. *See* Bumpers[155] Decl. ¶ 4 [DEV 6-Tab 10]; Wolfson Decl. ¶ 6 [DEV 9-Tab 44]; Jordan Decl. ¶ 6 [DEV 7-Tab 21]; Shea

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[154] Jonathan Krasno and Frank Sorauf are experts for defendants.

[155] Senator Dale Bumpers served two terms as Governor of Arkansas, from 1971 to 1975. After his service as Governor, he served as a Member of the United States Senate, representing the State of Arkansas, from 1975 to 1999. Bumpers Decl. ¶ 2 [DEV 6-Tab 10].

Dep. Tr (Sept. 24, 2002) at 15, 88-90; Knopp Cross Tr. at 10; Brister Decl. ¶ 4 ("The Republican Party of Louisiana's primary purpose is to help elect Republicans to office 'from the courthouse to the White House'"); ODP0021-02001-19, ODP0021-02386-90, ODP0025-02641-45 [DEV 70-Tab 48] (internal RNC Memoranda from then-Chairman Haley Barbour); RNC's Resp. to FEC RFA's in RNC, No. 40 [DEV 68-Tab 35]; ODP0021-02003 [DEV 70-Tab 48] (RNC Chairman Haley Barbour stated: "The purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president. . . . Electing Dole is our highest priority, but it is not our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures."); *see generally* ODP0021-02001 to 19; ODP0021-02386 to 90; ODP0025-02641 to 45 [DEV 70-Tab 48] (internal RNC memoranda from then-Chairman Haley Barbour).

Republican National Committee

28. As a national party, the RNC has historically participated and participates today in electoral and political activities at the federal, state, and local levels. According to its general counsel, "[t]he RNC's national focus should not be misunderstood as a federal focus." *See* Josefiak Decl. ¶¶ 19, 41-59. The RNC seeks to advance its core principles—a smaller federal government, lower taxes at all levels of government, individual freedom, and a strong national defense—by promoting an issue agenda advocating Republican positions, electing Republican candidates, and encouraging governance in accord with these Republican views. *See* Josefiak Decl. ¶ 22; *see also* La Raja Expert Report ¶¶ 11, 16.

29. In pursuit of its objectives, the RNC engages in frequent communications with its members, officeholders, candidates, state and local party committees, and the general public. These communications occur both during campaign

seasons and at all other times. *See* Banning[156] Decl. ¶¶ 28(d)-28(f); Josefiak Decl. ¶¶ 88-89, 100-101.

The RNC's Federal Election Activities

30. The RNC, and its national party committees, engage in a wide range of activities that influence federal elections. For example, the RNC spends federal funds on: (i) recruiting and training candidates; (ii) contributing to federal candidate campaign committees; (iii) making coordinated expenditures on behalf of federal candidates; (iv) making communications calling for the election or defeat of federal candidates; (v) funding, in part, research and issue development; and (vi) funding, in part, voter registration, voter identification, and get-out-the-vote campaigns. *See* Banning Decl. ¶ 28(d); Josefiak ¶¶ 26, 35, 89; *see also* La Raja Decl. ¶ 11(d); Magleby Expert Report at 33-34. Prior to the enactment of BCRA, some of these activities were funded only with federal money; others were funded with a combination of federal and nonfederal money.

National Party Use of Nonfederal Money to Benefit Federal Candidates

31. Nonfederal money is often given to national parties with the understanding that it will be used to assist the campaigns of particular federal candidates, and, indeed, it is often used for that purpose.

32. Senator Simpson[157] testified that "[d]onors do not really differentiate between hard and soft money; they often contribute to assist or gain favor with an individual politician.

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[156] Jay Banning has served as the RNC's Director of Administration and Chief Financial Officer since 1983, and has been employed by the RNC in these and other capacities for twenty-six years. Banning Decl. ¶ 1.

[157] Senator Alan Simpson served as United States Senator from Wyoming from 1979 to 1997. Simpson Decl. ¶ 2 [DEV 9-Tab 38].

When donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign." Simpson Decl. ¶ 6 [DEV 9-Tab 38]. "Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates." *Id.* ¶ 7; *see also* Bumpers Decl. ¶¶ 10-12 [DEV 6-Tab 10]; McCain Decl. ¶ 7 ("[P]arties encourage Members of Congress to raise large amounts of soft money to benefit their own and others' reelection."); Simon[158] Decl. ¶ 10 [DEV 9 Tab 37]; Beckett[159] Decl. ¶ 6 [DEV6-Tab 3];

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[158] Senator Paul Simon served as a United States Senator for Illinois from 1985 to 1997, and was a Member of the House of Representatives from 1975 to 1985. Prior to being elected to Congress, Senator Simon served as Lieutenant Governor of Illinois from 1968 to 1972, and served in the Illinois House of Representatives from 1954 to 1962 and in the Illinois State Senate from 1962 to 1966. Simon Decl. ¶ 1 [DEV 9-Tab 37].

[159] Terry S. Beckett is a Democratic political consultant who has spent about 25 years working on political campaigns. Beckett Decl. ¶ 2 [DEV 6-Tab 3]. Beckett worked on the 1976 and 1980 Presidential campaigns of Jimmy Carter, the 1978 Bill Nelson Congressional campaign, and she ran Dick Batchelor's 1982 Congressional campaign. *Id.* Beckett also endeavored to establish a House Democratic Caucus within the Alabama legislature in the mid 1980s. *Id.* Beckett ran Gary Hart's 1988 Presidential campaign in Florida and Louisiana, and Dick Gephardt's 1988 Presidential campaign in Florida. *Id.* In 1986, Beckett did the polling on Linda Chapin's campaign for Orange County (Florida) Commissioner, and ran Chapin's 1990 and 1994 campaigns for Orange County Chairman. *Id.* Beckett also served as general consultant on Ms. Chapin's 2000 campaign to represent Florida's Eighth congressional district, overseeing the work of the campaign manager and the media and polling consultants. *Id.* Beckett has also been involved in government having worked on the Executive Staff for Bob Graham from 1981-82 when he was the Governor of Florida and also serving as Ms. Chapin's Chief of Staff from 1991 to 1994 when she was County Chairman. *Id.* In addition, Beckett worked for a polling firm during the 1980s. *Id.*

Bloom[160] Decl. ¶ 3 [DEV 6-Tab 7]; Buttenwieser[161] Decl. ¶ 16 [DEV 6- Tab 11]; ODP0018-00501-02 [DEV 69-Tab 48] (letter from federal candidate regarding "how you can further help my campaign by assisting the Colorado Republican Party"); Shays Decl. ¶ 12 [DEV 68-Tab 40]; Hiatt[162] Dep. at

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[160] Elaine Bloom is currently engaged in consulting, public speaking, and community activities. Bloom Decl. ¶ 2 [DEV 6-Tab 7]. In 2001, Bloom was a candidate for Mayor of Miami Beach, Florida. *Id.* In 2000, Bloom was the Democratic candidate in the general election to represent Florida's 22nd congressional district, running against the incumbent Republican Clay Shaw, who had served in Congress for nearly 20 years. *Id.* (Shaw won the race by approximately 500 votes out of over 200,000 cast). Prior to the 2000 race, Bloom served as a member of the Florida House of Representatives for over 18 years, from 1974 to 1978 (representing Northeast Dade County) and from 1986-2000 (representing Miami Beach and Miami). *Id.* Bloom was Speaker Pro-Tempore of the Florida House from 1992 to 1994, and also served as chair of several legislative committees, including the Health Care Committee, the Joint Legislative Management Committee, the Joint Legislative Auditing Committee, and the Tourism and Cultural Affairs Committee. *Id.*

[161] Peter Buttenwieser is a large contributor to the Democratic Party. He estimates that from the 1996 election cycle through the 2002 cycle, he has donated over $2.8 million in nonfederal funds to national committees of the Democratic Party, including over $1.2 million in the 2000 election cycle. Also from the 1996 election cycle through the current cycle, he estimates that he and his wife have contributed approximately $100,000 per cycle in federal funds to federal candidate committees and other federal political committees not affiliated with political parties. During this same period, he has also hosted many hard money fundraising events for federal candidates in Philadelphia. Buttenwieser Decl. ¶ 6 [DEV 6-Tab 11].

[162] Arnold Hiatt engaged in substantial political spending for a number of years. He estimates that from the 1992 election cycle through 1997, he donated approximately $60,000 in federal funds, mostly to federal candidates, with a few contributions to federal political action committees ("PACs"). In October of 1996, he gave a $500,000 nonfederal donation to the DNC. In February of 2001, he made a $5000 hard money donation to

114-16 [JDT Vol. 10] (explaining that anyone donating nonfederal money is indirectly giving it to the campaigns of federal candidates and officeholders); Buttenwieser Decl. ¶ 15 [DEV 6-Tab 11] (explaining that there is little difference between federal and nonfederal money beyond the source and amount limitations on federal money, because national and state political parties use nonfederal money to influence federal elections); Rudman Decl. ¶ 19 [DEV 8-Tab 34].

33. Senator Wirth[163] understood that when he raised funds for the DSCC, donors expected that he would receive the amount of their donations multiplied by a certain number that the DSCC had predetermined, assuming that the DSCC had raised other funds. Wirth Decl. Exhibit A ¶¶ 5, 8 [DEV 9-Tab 43]; *see also Colorado II,* 533 U.S. at 458.

34. In 2000, a Fortune 100 company agreed to contribute $25,000 to the NRSC at the request of George Allen, the then Republican candidate in the 2000 Senatorial race in Virginia against incumbent Senator Chuck Robb. An employee noted that the company had donated to Senator Robb's Leadership PAC and that a similar contribution to the NRSC was necessary to balance out the company's support to the candidates. Internal memorandum (Oct. 26, 2000) [citation sealed].

35. Individual nonfederal money donors have made specific requests that the RNC apply their nonfederal money gifts to particular campaigns. RNC0035464 [DEV99], RNC0032733-34 [DEV 92] (fundraising letters requesting that soft money donations be used for particular federal elections); *see* Hiatt Dep. at 90-91, 117-18 [JDT Vol. 10] (stating that soft money donations to the DNC are earmarked for particular candidates, but saying he does not know if the money was actually spent on those candidates).

National Party Use of Nonfederal Money for Federal-Candidate Advocacy

36. The national parties spend a large proportion of their nonfederal money on so-called "issue advertisements" that are really designed to help elect specific federal candidates. In 2000, for example, the RNC spent a large portion of their nonfederal money, an estimated $70-75 million dollars, on the production and broadcasting of television and radio "issue ads." Oliver[164] Dep. at 148-49 [DEV Supp.-Tab 1]. Of that amount, approximately $14 million were coordinated expenditures, and the rest were so-called "issue ads." *Id.; see also* Marshall[165] Decl. ¶ 3 (largest single portion of DNC budget during 2000 election cycle was used for issue ads) [DEV 8-Tab 28].

37. By the end of the 2000 election cycle, it was clear that parties were using corporate and labor union soft money donations to influence federal elections, often through candidate-specific issue ads, and not primarily for state and local elections. Mann Expert Report at 25-26.

38. The RNC has offered to run these so-called "issue ads" for Members of Congress in their districts, and to have the national committees provide the soft money portion of the funds required to place the ads, if those Members provide the federal portion. *See* ODP0021-01365 to 67 [DEV 70-Tab 48],

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the League of Conservation Voters' PAC, and believes that is the only hard money donation he has given since 1997. Hiatt Decl. ¶ 5 [DEV 6-Tab 18].

[163] Senator Timothy Wirth served in the U.S. House of Representatives from 1974 to 1986, representing the Second Congressional District of the State of Colorado. From 1987 through 1992 he served as Senator for the State of Colorado in the United States Senate. Wirth Decl. Exhibit A ¶ 2 [DEV 9-Tab 43].

[164] John Oliver is Deputy Chairman of the RNC.

[165] Brad Marshall has served as Chief Financial Officer of the DNC since 1994. Marshall Decl. ¶ 1 [DEV 8-Tab 28].

ODP0025-02936 [DEV 70-Tab 48] (memorandum and email from the RNC offering to pay the soft money portion of political advertisements for Members of Congress who are willing to pay the federal portion).

39. Evidence submitted suggests that during the 2000 election, party ads were not aimed at party building. Almost 92% of party ads never even identified the name of a political party in the body of the advertisement, let alone encouraged voters to register with or support the party or to volunteer with the local party organization. Buying Time 2000 at 64 [DEV 46].

40. Defendants' expert Green states:

> [T]he original exemptions for soft-money were justified partly on the grounds that get-out-the-vote activity would help strengthen parties. As it happened, only a small fraction of the soft money (or hard money, for that matter) that flowed to state and national parties was spent on voter mobilization activity, even broadly conceived to include direct mail and commercial phone banking. According to the classification system presented by La Raja and Javish Shean (2001, p.3), 8.5% of national party soft money expenditures went to 'mobilization' and 'grassroots.' The figures for state and local parties are each 15%.") (citing Raymond La Raja and Elizabeth Jarvis-Shean, Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections. (Unpublished manuscript: Institute of Governmental Studies and Citizens' Research Foundation 2001).

D. Green Report at 14 n.17 [DEV 1-Tab 3].

41. What has been permitted as "issue advocacy" has not only included genuine issue ads that promote legislation and public policy positions but communications, paid for in whole or part with nonfederal money, that attack or support a

candidate by name without using the "magic words" described in *Buckley.*[166] *See* 144 Cong. Rec. S10071-73 (1999) (Sen. Levin) ("issue ads" indistinguishable from candidate ads which are subject to contribution limits and disclosure requirements); 146 Cong. Rec. H428 (2000) (Rep. Ganske); ODP0021-01365-67 [DEV 70-Tab 48]; ODP0022-00277-88 [DEV 70-Tab 48]; ODP0023- 02358-65 [DEV 70-Tab 48]; ODP0023-03560-660 [DEV 70-Tab 48]; ODP0025-01560 [DEV 70-Tab 48]; ODP0025-02720-21 [DEV 70-Tab 48]; ODP0031-00424 [DEV 71-Tab 48]; ODP0033-00534 [DEV 71-Tab 48]; ODP0036-03603 [DEV 71-Tab 48]; ODP0037-00062 [DEV 71-Tab 48]; ODP0037-00884 [DEV 71-Tab48]; ODP0037-02271 [DEV 71-Tab 48] (examples of advertisements); *see also* Shays Decl. in RNC ¶¶ 7, 8 [DEV 68-Tab 40]; Meehan Decl. in RNC ¶ 13 [DEV 68-Tab 30]; Rudman Decl. ¶ 12 [DEV 8-Tab 34]; Beckett Decl. ¶ 11, Exhibit 3 [DEV 6-Tab 3]; Chapin[167] Decl. ¶ 11 [DEV 6- Tab 12]; Lamson Decl. ¶¶ 9, 17, Exhibits 2-4 [DEV 7-Tab 26];

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[166] *Buckley*, 424 U.S. at 44 n. 52. See description of the difference between "genuine issue ads" and "candidate-centered" advocacy ads in *supra* Parts I.A.3 & I.B.2.

[167] Since early 2001, Linda Chapin has been the Director of the Metropolitan Center for Regional Studies at the University of Central Florida. Chapin Decl. ¶ 2 [DEV 6-Tab 12] received about 49 percent of the votes cast. *Id.* ¶ 4. From 1998 to 2000, Chapin directed the Orange County (Florida) Clerk's Office. *Id.* ¶ 2. Prior to that, Chapin was elected to two successive four-year terms, in 1990 and 1994, as County Chairman of Orange County. *Id.* The County Chairman is a strong executive position roughly equivalent to a mayoral office. *Id.* In recognition of Chapin's work as County Chairman, she received a Public Service Excellence Award from then-President Bill Clinton in 1997, and an Alumni Achievement Award from the Kennedy School of Government at Harvard University in 1999. *Id.* Prior to her tenure as County Chairman, she was elected to a four-year term on the Orange County Commission in 1986.

Pennington[168] Decl. ¶ 13 [DEV 8-Tab 31]; Brock[169] Decl. ¶ 8 [DEV 6-Tab 9]; Williams[170] Cross Exam. at 47 [JDT Vol. 32].

42. Whether or not party ads used so-called "magic words"—and only about 2.3 percent of party spots did in 2000—all 231,000 party spots viewed by coders in the *Buying Time 2000* study were perceived as electioneering in nature—that is, designed to campaign for or against candidates. These ads—96 percent of which mentioned or depicted a candidate—were focused on electing candidates. Buying Time 2000 at 64 [DEV 46].

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[168] Rocky Pennington is a Republican political consultant. Pennington Decl. ¶ 2 [DEV 8-Tab 31]. He is the owner and President of three Florida companies engaged in political activities: Southern Campaign Resources, Direct Mail Systems, Inc., and Summit Communications. *Id.* Southern Campaign Resources, which Pennington founded in 1982, does general consulting primarily for Florida state campaigns, but has also done Congressional races in Florida, including Congressman Cliff Steams' first race in 1988 in Ocala, Bill Sublette's 2000 campaign in the Eighth Congressional district, and Congressman Jeff Miller's 2001 special election in the Panhandle. *Id.* Direct Mail Systems, founded in 1981, is a direct mail company with roughly 100 employees that has done fundraising and has sent voter contact mail for candidates, parties and interest groups in Florida and elsewhere. *Id.* Direct Mail Systems has also sent voter contact mail for some of Florida's Republican congressional delegation, as well as for state Republican parties in many other states. Finally, Summit Communications, which Pennington founded in 2000, creates political advertising for television and radio and buys airtime for various campaigns, such as Congressman Miller's 2001 general election campaign. *Id.*

[169] Senator William Brock he served as United States Representative from Tennessee from 1963 until 1971. From 1971 until 1977, he served as a United States Senator from the State of Tennessee. From 1977 until 1981, he served as Chairman of the Republican National Committee. Brock Decl. ¶ 2 [DEV 6-Tab13].

[170] Pat Williams was a Member of the U.S. Congress from 1979 to 1997. Williams Dep. at 8.

43. Defense expert David Magleby finds that over half, and sometimes as much as three-quarters, of party soft money expenditures go to broadcast advertising. The focus and content of these ads is candidate centered. "The content, tactics and strategy are generally indistinguishable from the candidate campaigns, except that party campaign communications are generally more negative in tone." *Id.* at 45.

44. The RNC's expert Professor La Raja acknowledges that so-called "issue ads" are intended to and do support the campaigns of federal candidates. La Raja Cross, Exhibit 3 at 14, 15, 101, n.11 [JDT Vol. 15]. RNC political operations director Terry Nelson[171] testified that the RNC engages in so-called "issue advocacy in order to achieve one of our primary objectives, which is to get more Republicans elected." Nelson Dep. at 191.

45. Many so-called "issue ads" by political parties were actually electioneering advertisements that focused on the positions, past actions, or general character traits of federal candidates, but not on upcoming federal executive action or pending legislation. *See, e.g.*, ODP0021-01393 [DEV 70-Tab 48]; ODP0023-02288-95 [DEV 70-Tab 48]; ODP0023-02308 [DEV 70-Tab 48]; ODP0023- 02312-13 [DEV 70-Tab 48]; ODP0023-02314 [DEV 70-Tab 48]; ODP0023-02326-28, ODP0025-01729-32 [DEV 70-Tab 48]; ODP0025-01811-12 [DEV 70-Tab 48]; ODP0025- 01861-64 [DEV 70-Tab 48]; ODP0025-02227-28 [DEV 70-Tab 48]; ODP0023-00327-28 [DEV 70-Tab 48]; ODP0023-02389-92 [DEV 70-Tab 48]; ODP0029-00010-25 [DEV 70-Tab 48]; ODP0029-00031-33 [DEV 70-Tab 48]; ODP0029-00041 [DEV 70-Tab 48]; ODP0029-00114 [DEV 70-Tab 48]; ODP0029-00169 [DEV 71-Tab 48]; ODP0029-00177-79 [DEV 71-Tab 48];

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[171] Mr. Terry Nelson is the RNC's Deputy Chief of Staff and Executive Director of Political Operations. Nelson Dep. at 8-9 [JDT Vol. 24].

ODP0029-00235-37 [DEV 71-Tab 48]; ODP0029-00329 [DEV 71-Tab 48]; ODP0029-00339 [DEV 71-Tab 48]; ODP0041-00177-78 [DEV 71-Tab 48]; ODP0041-00202- 06 [DEV 71-Tab 48]; ODP0041-00220-23 [DEV 71-Tab 48]; ODP0041-00280-82 [DEV 71-Tab 48]; ODP0041-00352-54 [DEV 71-Tab 48]; ODP0041-01261 [DEV 71-Tab 48]; ODP0041-01275 [DEV 71-Tab 48]; ODP0029-00138-47 [DEV 71-Tab 48]; ODP0036-01403- 06 [DEV 71-Tab 48]; ODP0036-02931-32 [DEV 71-Tab 48]; ODP0041-00269-71 [DEV 71-Tab 48]; ODP0041-01024-27 [DEV 71-Tab 48]; ODP0041-01219 [DEV 71-Tab 48] (scripts of so-called "issue ads" by political parties).

46. Many so-called "issue ads" by political parties were actually electioneering advertisements that compared the positions, or past actions, of two competing federal candidates, rather than focusing on pending federal legislation. *See, e.g.*, ODP0023-02375-80 [DEV 70-Tab 48]; ODP0023-02387 [DEV 70-Tab 48]; ODP0023-02393-94 [DEV 70-Tab 48]; ODP0029-00149 [DEV 71-Tab 48]; ODP0029-00159 [DEV 71-Tab 48]; ODP0029-00329 [DEV 71-Tab 48]; ODP0036-02984 [DEV 71-Tab 48]; ODP0041-00457-61 [DEV 71-Tab 48]; ODP0041-00585-86 [DEV 71-Tab 48]; ODP0041-00729-32 [DEV 71-Tab 48]; ODP0041-01152 [DEV 71-Tab 48]; ODP0041-01164 [DEV 71-Tab 48]; ODP0041-01177 [DEV 71-Tab 48]; ODP0041-01189 [DEV 71-Tab 48]; ODP0041-01198 [DEV 71-Tab 48]; ODP0041-01266 [DEV 71-Tab 48]; ODP0041- 01337 [DEV 71-Tab 48]; ODP0041-01474-76 [DEV 71-Tab 48]; ODP0041-01479-81 [DEV 71-Tab 48]; ODP0041-01850 [DEV 71-Tab 48]; ODP0041-01854 [DEV 71-Tab 48]; ODP0041-01859 [DEV 71-Tab 48]; ODP0041-01884 [DEV 71-Tab 48] (scripts of political party advertisements).

47. Parties aim their nonfederal money largely at competitive races. The party committees spend millions of soft dollars in competitive U.S. Senate races and hundreds of

thousands of dollars or more in competitive U.S. House races. Magleby Report at 39 [DEV 4-Tab 8]; *see also* Bumpers Decl. ¶ 4 [DEV 6-Tab 10]; McCain Decl. ¶ 22 [DEV 8-Tab 29] ("parties generally focus their soft money spending first on taking care of the parties' current officeholders and on the candidates running for open seats and after that on the challengers running against incumbents"); McConnell Dep. at 237 [JDT Vol. 19] ("I think every Senator realizes that the resources of the [NRSC] are going to be deployed to the ... maximum extent in places where there are competitive races").

48. From late March 1996 through the Republican National Convention, the RNC spent approximately $20 million on advertisements designed to boost Senator Dole's image at a time when he had virtually run out of federal matching primary funds. The RNC paid for a portion of its issue advocacy advertisements with nonfederal funds, including the costs of creating and/or disseminating advertisements that attacked President Clinton's record on welfare reform, taxes, and budgetary policy. Huyck[172] Decl. in *Mariani* ¶¶ 3, 5 [DEV 79-Tab 60]; *see also id.* at Attach. A [DEV Supp.-Tab 9] (text of advertisements paid for by the RNC and other Republican party committees in part with soft money). The RNC conducted a detailed analysis of several advertisements it was planning to run in various markets. The advertisements consisted essentially of two themes: build up Bob Dole and attack Bill Clinton. These advertisements were tested in focus groups to see the effects they had on undecided voters. The advertisement used to build up Bob Dole told his life story and never mentioned the words "vote for," "elect," or any of the so-called "magic words" of express advocacy. The second set of advertisements showed Bill Clinton speaking on a certain issue, then publicly stating

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[172] Pat Huyck was the RNC's Director of Accounting as of 1999. Huyck Decl. in *Mariani* ¶¶ 3, 5 [DEV 79-Tab 60].

the opposite. All of the ads were tested to see which would most help Bob Dole and hurt Bill Clinton in the polls. Memorandum to Haley Barbour from Charlie Nave and Joel Mincey, dated May 28, 1996, FEC MUR 4553, Fabrizio Dep., Exhibit 5 [DEV 55-Tab 113]; FEC MUR 4553, Fabrizio Dep. at 83-94 [DEV 55-Tab 113] (despite working as a consultant for Senator Dole, Fabrizio McLaughlin and Associates were sharing their data with the RNC, NRSC, and NRCC).

49. An example of a 1996 RNC "issue ad" is "The Story":

> Audio of Bob Dole: We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in.
>
> Voice Over: Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called . . . he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.
>
> Audio of Bob Dole: I went around looking for a miracle that would make me whole again.
>
> Voice Over: The doctors said he'd never walk again. But after 39 months, he proved them wrong.
>
> Audio of Elizabeth Dole: He persevered, he never gave up. He fought his way back from total paralysis.
>
> Voice Over: Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.
>
> Voice of Bob Dole: It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.

Fabrizio Dep. Exhibit 2; McCain Decl. ¶ 15. The RNC paid for "The Story," in part with soft money even though it was

obviously intended to help Bob Dole in the Presidential election. Huyck Decl. in *Mariani* ¶ 3 [DEV 79-Tab 60]; FEC MUR 4553, Fabrizio Dep. at 50 [DEV 55-113]; McCain Decl. ¶ 15 [DEV 8-Tab 29]. The RNC's Curt Anderson and Wes Anderson wrote to the RNC Chairman regarding the Dole "Story" advertisement, stating: "We could run into a real snag with the Dole Story spot. Certainly, all the quantitative and qualitative research strongly suggests that this spot needs to be run. Making this spot pass the issue advocacy test may take some doing." ODP0025-02018-20 [DEV 70-Tab 48]. "Any reasonable person looking at that ad at that particular time in the Presidential season would say: It's not an ad about welfare or wasteful spending; it is an ad about why should we elect that particular nominee." 145 Cong. Rec. S12747 (1999) (Sen. Levin). Senator Dole himself stated that "The Story" "never says I'm running for President. I hope that it's fairly obvious since I'm the only one in the picture." Center for Responsive Politics, A Bag of Tricks: Loopholes in the Campaign Finance System (1996) at 13, ODP0018-00172 [DEV 69-Tab 48]; *see also* McCain Decl. ¶ 15 (citing Attach. D) [DEV 8-Tab 29].

50. During the 1998 election cycle, the NRCC in coordination with the RNC conducted "Operation Breakout," an "issue advocacy" campaign designed to expand the Republican majorities in Congress. ODP0031-00299 [DEV 71-Tab 48] (September 25, 1998, letter from RNC Chair Nicholson to donor thanking him for his donation to "Operation Breakout," describing it as an issue advocacy campaign designed to expand the Republican majorities in Congress); ODP0043-00679 [DEV 71-Tab 48]. *See generally* ODP0043-00673-703 [DEV 71-Tab 48]; ODP0033-00258 [DEV 71-Tab 48]; ODP0041-00176-78 [DEV 71-Tab 48]; ODP0029-00138-49 [DEV 71-Tab 48]; *see also* ODP0030-00002-3 (fundraising letter requesting support for coalition of Republican state and national campaign organizations to

mount the largest issue advocacy campaign in party history) [DEV 71-Tab 48].

51. Television and radio electioneering advertising by political parties played an important role in the 2000 congressional elections in Florida's Eighth and 22nd Districts. Political parties on both sides of these campaigns ran so-called "issue ads" that were financed partly with nonfederal money, but clearly directed at influencing the outcome of the election. In the Eighth District, for example, the DCCC ran television advertising praising Linda Chapin, the Democratic candidate, or criticizing the Republican candidates, through the Democratic State Party in order to take advantage of the more favorable hard money-soft money allocation ratios enjoyed by state parties. Beckett Decl. ¶ 9, Exhibit 1 [DEV 6-Tab 3]; Chapin Decl. ¶ 9 [DEV 6-Tab 12]; *see also* Bloom Decl. ¶ 10, Exhibits 1-1, 1-4, (Democratic party ads in 2000 Florida 22nd congressional district race) [DEV 6-Tab 7]. The NRCC and the Florida Republican Party also ran television ads in the two months prior to the general election, most of which criticized Chapin's record or positions, and which witnesses testify were clearly intended to influence the election results. Chapin Decl. ¶ 10 Exhibit 2 [DEV 6-Tab 12]; Beckett Decl. ¶ 10 Exhibit 2 [DEV 6-Tab 3]; Pennington Decl. ¶ 14 Exhibit 3 [DEV 8-Tab 31]; *see also* Bloom Decl. ¶ 11 Exhibit 2 (Republican party ads in 2000 Florida 22nd district congressional race) [DEV 6-Tab 7].

52. For example, one so-called "issue ad" stated the following:

> Announcer: Linda Chapin. Hard on taxpayers. Soft on convicts. Chapin raised taxes on your utilities, pushed to raise the county sales tax and even tried raising your property tax. Meanwhile, hard time in the county jail turned into "Chapin time." Where convicts received cable tv and lounged on padded furniture in carpeted cells. Chapin's County Commission ran this soft jail . . .

> a jail she called a "national model." Ask Chapin why she's hard on taxpayers and soft on convicts.

Chapin Decl. Exhibit 2; Chapin Decl. ¶ 10; Beckett Decl. ¶ 10; Pennington Decl. ¶ 14.

The RNC's Involvement in Nonfederal Activities

53. The RNC also undertakes activities exclusively in connection with state and local elections. RNC General Counsel Josefiak testified that "given the RNC's state-based structure, it is not surprising that the RNC actually focuses many of its resources on purely state and local election activity. This frequently involves significant resources to grassroots activities, some of which exclusively benefit state and local candidates." Josefiak Decl. ¶ 19.

54. Testimony by RNC officials states that for elections in which there is a federal candidate on the ballot, the RNC still funds the training state and local candidates, contributes to state and local candidate campaign committees, and supports get-out-the-vote activities.

55. In 2000 the RNC donated approximately $5.6 million in nonfederal funds to state and local candidates. Josefiak Decl. ¶ 61.

56. The RNC devotes resources to state and local political activities during federal election years even when the federal races are not competitive in a particular state in the hopes of influencing a gubernatorial race (as in California in 2002 and Indiana in 2000). Josefiak Decl. ¶ 62 (testifying that "the RNC sometimes devotes significant resources toward states with competitive gubernatorial races even though the races for federal offices are less competitive"); Peschong[173] Decl. ¶¶ 4, 8-9 (stating that "the RNC typically provides a very substantial share of the funding of state victory programs," which are "programs designed to support the entire

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[173] John Peschong is the RNC's Regional Political Director for the Western Region. Peschong Decl. ¶ 1.

Republican ticket, and frequently place more emphasis on high profile state-wide races than on federal races, especially when no federal candidate is running state- wide."). In 2000, according to Josefiak, most observers believed that Indiana was a "safe" state for George Bush and that it also did not have a competitive Senate race. Nevertheless, the RNC "committed significant resources to the state in hopes of influencing the gubernatorial race." Josefiak Decl. ¶ 62.

57. For elections in which there is *no* federal candidate on the ballot, the RNC frequently trains state and local candidates, contributes to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates, and supports get-out-the-vote activities. *See* Banning Decl. ¶ 28(a); Josefiak Decl. ¶¶ 19, 41-59; La Raja Decl. ¶ 14; *cf.* Bok[174] Cross Exam. at 34-35.

58. Five States—Kentucky, Louisiana, Mississippi, New Jersey and Virginia— hold elections for state and local office in odd-numbered years when there are normally no federal candidates on the ballot. *See* Josefiak Decl. ¶ 41. Likewise, numerous cities—including Houston, Indianapolis, Los Angeles, Minneapolis and New York City—hold mayoral elections in odd-numbered years. *See id.;* Erwin[175] Decl. ¶ 5; Green Reb. Decl. App. C at 10 (GOTV study conducted on 2001 elections in Bridgeport, Columbus, Detroit, Minneapolis, St. Paul, and Raleigh).

59. For the 2001 election, an "off-year" election with no federal candidates on the ballot, the RNC spent more than $15.6 million in nonfederal funds on state and local election activity through contributions to state and local candidates, transfers to state parties, and direct spending. *See* Banning

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[174] Derek Bok is an expert for plaintiffs.

[175] Ryan Erwin is the Chief Operating Officer of the CRP. Erwin Aff. ¶ 1.

Decl. ¶ 28(a). In the last two off-year elections combined, the RNC spent over $21 million in nonfederal funds to support state and local election activity, not including substantial commitments of staff time and other resources. *Id.* This includes over $9.5 million in direct contributions to state and local candidates, over $10 million dollars to state parties, and over $1 million dollars in direct expenditures. *Id.; see also* Duncan[176] Decl. ¶¶ 14-15 (discussing RNC contributions to state and local races); Josefiak Decl. ¶¶ 19, 41-59 (discussing RNC electoral activity when no federal candidates appear on the ballot); Cross Exam. of Defense Expert Mann at 71 (agreeing that donations gubernatorial candidate in an odd-numbered year is not something that is intended to affect a federal election); La Raja Expert Report ¶ 15. For example, the RNC contributed approximately $500,000 to the Republican gubernatorial candidate in Virginia in 1999. La Raja Decl. ¶ 14(b).

60. Until BCRA's effective date the RNC maintained twelve nonfederal accounts, known as RNSEC accounts. *See* Banning Decl. ¶¶ 6, 17.

61. Because of the variations among state campaign finance laws, the RNC set up different rules to govern each RNSEC account according to the type and amount of contributions that could be deposited therein and the type of disbursements that could be made therefrom. *See id.* ¶ 7.

62. Some RNSEC accounts were reserved for corporate funds, which were used to make contributions or expenditures in states permitting the use of such funds in connection with state and local elections. *See id.* ¶ 8.

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[176] Robert Duncan is a Member of the RNC from the State of Kentucky. At the time the RNC's Complaint in this case was filed, he served as Treasurer of the RNC, but as of July 2002 he became its General Counsel. Duncan Decl. ¶ 1.

63. Other RNSEC accounts were reserved for individual funds, which were used to make contributions or expenditures in states not permitting the use of corporate funds in connection with state and local elections. *See id.* ¶ 10.

64. Still other RNSEC accounts held funds raised and spent pursuant to the unique legal requirements of particular states; the RNC set up state-specific RNSEC accounts for California, Massachusetts, Michigan, Missouri, New York, North Carolina, and Rhode Island. *See id.* ¶¶ 11-12, 17.

The RNC's Involvement in "Mixed" Activities

65. Prior to the effective date of BCRA the RNC also engaged in "mixed" activities—that is, activities that *indirectly* influence both federal and state or local elections (e.g., administrative overhead, genuine issue ads, non-broadcast party building communications, state redistricting litigation, training for state party officials, and generic voter registration and get-out-the-vote activities). As required by the FEC, the RNC paid for these activities with a combination of federal and nonfederal funds.

66. The FEC historically allowed the RNC to pay for its administrative overhead—including salaries, benefits, equipment, and supplies for party operations at RNC headquarters in Washington, D.C.—with a mix of federal and nonfederal funds. *See* Banning Decl. ¶ 27; *see also* Bowler[177] Decl. ¶ 15.

67. "During the 2000 election cycle, the RNC spent $35.6 million of nonfederal funds and $52.9 million of federal funds on administrative overhead." Banning Decl. ¶ 27. "Administrative overhead includes the operating costs of RNC facilities, such as utility bills and maintenance, fundraising costs, and routine expenses for travel and supplies. Administrative overhead also includes the salaries of RNC

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[177] Kathleen Bowler is the Executive Director of the CDP. Bowler Decl. ¶ 1.

employees." *Id.; see also* Bowler Decl. ¶ 15 (stating that allocation is required for administrative expenses like rent, utilities, and salaries).

68. The RNC regularly broadcasts ads for the purpose of influencing an issue or policy. *See, e.g.,* Josefiak Decl. ¶ 91(e); La Raja Decl. ¶ 16(b) ("Political parties use nonfederal money to develop and disseminate political me sages.").

69. According to Josefiak: "The RNC seeks to educate the public about the positions for which the Republican Party stands." Josefiak Decl. ¶ 91(e).

70. According to Josefiak: "The RNC is currently airing a 60-second radio spot entitled 'Leave No Child Behind.' This genuine issue advertisement, which features a man and a woman discussing education issues, states the following:

> Male: Every child can learn . . .
> Female: . . . and deserves a quality education in a safe school.
> Male: But some people say some children can't learn . . .
> Female: . . . so just shuffle them through.
> Male: That's not fair.
> Female: That's not right.
> Male: Things are changing. A new federal law says every child deserves to learn. Female: It says test every child to make sure they're learning and give them extra help if they're not.
> Male: Hold schools accountable. Because no child should be in a school that will not teach and will not change.
> Female: The law says every child must be taught to read by the 3rd grade. Because reading is a new civil right.
> Male: President Bush's No Child Left Behind Law.

Female: The biggest education reform and biggest increase in education funding in 25 years.

Male: Republicans are working for better, safer schools . . .

Female: . . .so no child is left behind.

Male: That's right . . . Republicans.

Anncr: Learn how Republican education reforms can help your children. Call . . . . Help President Bush and leave No Child Behind.

The advertisement mentions President Bush's name for the purpose of identifying the precise proposal supported by the Republican Party ('President Bush's No Child Left Behind Law'), but mentions no federal candidate currently facing reelection. It concludes with a request that listeners call a toll-free number to learn more about Republican education reform." Josefiak Decl. ¶ 91(e); RNC Exhibit 2428. 71. The RNC has used a mix of federal and nonfederal funds to engage in nonbroadcast communications with its supporters. The RNC's magazine "Rising Tide," is designed to provide readers with "a more in-depth education about the Republican issue agenda than is possible in the more traditional 30-second television advertisements." Josefiak Decl. ¶ 99; RNC Exhibit 977. Also, political parties use the internet, e-mail, and direct mail to spread their messages to adherents. *See* La Raja Expert Report ¶ 16(a); Magleby Expert Report at 42.

72. The RNC used a mix of federal and nonfederal funds to support redistricting efforts, including state redistricting litigation. Josefiak Decl. ¶ 74. In 2002, for example, the RNC budgeted approximately $4.1 million on redistricting. Seventy percent of the redistricting budget was to be funded with nonfederal money. Banning Decl. ¶ 28(i). The RNC spends more overall on state legislative redistricting than on congressional redistricting. Josefiak Decl. ¶ 74.

73. The RNC has used a mix of federal and nonfederal funds to conduct training seminars for Republican candidates, party officials, activists and campaign staff, many of whom are involved in state and local campaigns and elections. Topics included grassroots organizing, fundraising and compliance with campaign finance regulations. During the 2000 election cycle at least 10,000 people attended RNC-sponsored training sessions, including 117 "nuts and bolts" seminars on grassroots organizing and get-out-the-vote activities. During the same cycle the RNC spent $391,000 in nonfederal funds and $671,000 in federal funds on such training and support. *See* Banning Decl. ¶ 28(c); *see also* La Raja Expert Report at 11 (parties "help candidates by training them and their campaign staff," support which "can make an important difference in whether a candidate chooses to run for office, particularly in an era of cash- intensive campaigning that requires skillful application of advanced campaign technologies").

74. The RNC has used a mix of federal and nonfederal funds to support interstate cooperation on state issues among Republican state and local activities. For example, the RNC provided $100,000 of seed money for the formation of a Republican state attorneys general association that focuses on state issues. RNC Exhibit 978; *see also* Josefiak Decl. ¶¶ 82-84. In addition, during the 2000 election cycle the RNC spent $199,000 in nonfederal funds and $33,500 in federal funds on state and local governmental affairs. *See* Banning Decl. ¶ 28(b).

75. The RNC has used a mix of federal and nonfederal funds to support efforts to increase minority involvement and membership in the Republican Party. During the 2000 election cycle, for example, the RNC spent $1,211,000 in nonfederal funds and $2,163,000 in federal funds on support of allied groups and minority outreach. *See id.* ¶ 28(e).

76. Pursuant to FECA and FEC regulations in force prior to BCRA's effective date, the RNC paid for mixed activities using a predetermined "allocation" formula for federal and

nonfederal funds. Josefiak Decl. ¶ 23 ("Since the FEC has long recognized that the RNC is heavily involved in activities at the federal and state levels, the RNC has historically paid for its overhead using an allocation, or 'split,' between federal and nonfederal funds: activities that are purely federal are paid for with 100% federal funds; activities that are purely state or local are paid for with 100% nonfederal funds; and activities that relate to both federal and state elections are paid for with a combination of federal and nonfederal funds.").

77. During presidential election years national party committees were required to pay for their mixed activities with at least 65 percent in federal funds. *See* 11 C.F.R. § 106.5(b)(2)(i) (2001).

78. During nonpresidential election years national party committees were required to pay for their mixed activities with at least 60 percent in federal funds. *See id.* at § 106.5(b)(2)(ii).

The RNC's Assistance to State and Local Parties for Nonfederal and Mixed Activities

79. Prior to BCRA's effective date the RNC also provided financial and fundraising assistance to state and local candidates and parties through a variety of means. *See* B. Shea[178] Decl. ¶¶ 32-40; Josefiak Decl. ¶¶ 63-72; Banning Decl. ¶ 28.

80. During the 2000 election cycle the RNC made transfers of approximately $129 million—$93.2 million in nonfederal funds and $35.8 million in federal funds—to state and local parties. *See* Press Release, FEC, National Party Transfers to State/Local Committees: January 1, 1999 to December 31, 2000, *available at* http://www.fec.gov/press/051501 party fund/tables/nat2state.html.

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[178] Beverly Shea is the RNC's Finance Director. Shea Decl. ¶ 1.

81. The RNC helped state and local parties through donor list exchanges; joint fundraising events; promotion of state party fundraising events; facilitating contributions from interested donors; providing matching incentives to encourage state parties to develop their in-house fundraising capabilities through the RNC's "Finance PLUS" program; and devoting personnel to state party fundraising needs. *See* Dendahl[179] Decl. ¶ 10; Duncan Decl. ¶ 13; Josefiak Decl. ¶ 44, 65-72; B. Shea Decl. ¶¶ 32-40; *see also* La Raja Expert Report ¶ 12(b) (discussing national party support for state parties generally).

82. RNC officers have sent fundraising letters on behalf of state and local candidates even during off-years. *See, e.g.*, Josefiak Decl. RNC Exhibit 292 (RNC 0332976) (fundraising letter signed by Deputy RNC Chairman Jack Oliver on behalf of Bret Schundler's New Jersey gubernatorial campaign); Josefiak Decl. RNC Exhibit 1162 (fundraising letter signed by Haley Barbour on behalf of George Allen's Virginia gubernatorial campaign); RNC Exhibit 1766 (fundraising letter signed by Haley Barbour on behalf of New Jersey Republican Party); Feingold Dep. Exhibit 12 [JDT Vol. 6] (fundraising letter from Jim Nicholson on behalf of Norm Coleman's Minneapolis mayoral campaign).

83. RNC officers have been involved in helping state and local parties and candidates raise money in accordance with state and federal law.

84. After becoming Chairman of the RNC in February 2002, Marc Racicot made 82 trips to 67 cities in 36 states in his capacity as Chairman. "The majority of these trips have had significant fundraising components to them." Josefiak Decl. ¶ 70.

85. RNC Co-Chairwoman Ann Wagner and Deputy Chairman Jack Oliver respectively made 31 and 33 trips.

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[179] John Dendahl is the State Chairman of the Republican Party of New Mexico. Dendahl Decl. ¶ 1.

"The majority of these trips have had significant fundraising components to them." *See id.*

86. Robert Duncan, current General Counsel and former Treasurer of the RNC, was actively involved in fundraising activities for the Republican Party of Kentucky and for Kentucky state candidates. Since 1992 when he became a member of the RNC, Duncan has sponsored a reception to support the reelection of a Kentucky state senator and he also hosted and attended numerous fundraising dinners in support of the Kentucky Republican Party. Duncan Decl. ¶¶ 5-6.

87. RNC support has been used by state and local parties to engage in voter registration, get-out-the-vote, and generic grassroots organizing. *See* Banning Decl. ¶ 31.

88. "RNC transfers of non-federal funds to the state parties play a critical role in subsidizing the activities of the state parties. The state parties depend on these funds to pay for everything from their own administrative overhead to voter mobilization, grass roots organizing, and media." Banning Decl. ¶ 31; *see also* Duncan Decl. ¶¶ 11-12.

89. The RNC also helped state and local parties fundraise for these voter mobilization efforts. *See* Josefiak Decl. ¶¶ 63, 65-72; Benson[180] Decl. ¶ 10 ("[T]he Republican national party committees also assists [the Colorado Republican Party] in raising money for these party building programs.").

90. Evidence presented shows that the RNC cooperates and works closely with state and local political parties to support the entire Republican platform and ticket at the federal, state, and local levels.

91. Both sides' experts agree that "relationships among local, state, and national organizations have strengthened in the past three decades" and they attribute the cohesion to "the role of the national parties in providing resources and expertise to lower levels of the party." La Raja Expert Report at 7 (citations omitted); *see* Mann Expert Report at 30-31 ("The relationship between the national parties and their state parties has never been closer than it is today.").

92. Plaintiff's expert La Raja states that cooperation among national, state, and local parties is generally healthy for American democracy:

> Cohesive parties enhance electoral accountability by linking the campaigns and platforms of federal, state and local candidates. In this way, they provide voters with clear signals about what the party stands for collectively. The joint campaigns of political parties across federal, state and local candidates also generate electoral economies of scale that mobilize greater numbers of voters. The national parties have been catalysts for party integration because they possess the resources to coordinate such activity.

La Raja Rebuttal Report ¶ 9.

93. Examples of national, state, and local political parties working together are the Republican Party "Victory Plans" and the Democratic Party "Coordinated Campaigns." All levels of the Republican party structure actively participate in the design, funding, fundraising and implementation of Victory Plans, *see* Josefiak Decl. ¶¶ 26-40, just as all levels of the Democratic Party participate in the design, funding, fundraising, and implementation of Coordinated Campaigns, *see* Bowler Decl. ¶ 29.

94. The RNC's Victory Plans are voter contact programs designed to support the entire Republican ticket at the federal, state, and local levels. The RNC works with every state party to design, fund, and implement the Plans. *See* Benson Decl. ¶ 8; Josefiak Decl. ¶ 26; Peschong Decl. ¶¶ 4-5.

95. Victory Plans are formulated and implemented after extensive and continuous collaboration between the RNC and the state parties; each Plan is tailored to the unique needs of

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[180] Bruce Benson is Chairman of the Colorado Republican Party. Benson Decl. ¶ 1.

each state and designed to stimulate grassroots activism and increase voter turnout in the hopes of benefitting candidates at all levels of the ticket. Josefiak Decl. ¶¶ 25-40.

96. In 2000 the RNC transferred approximately $42 million to state parties to use in Victory Plan programs, 60 percent (about $25 million) of which was nonfederal money and none of which was spent on broadcast "issue advertising." Josefiak Decl. ¶ 31.

97. Although Victory Plans are designed to benefit Republican candidates at the federal, state, and local levels, they often place the greatest emphasis on state and local races because in most instances there are far more state and local candidates than federal candidates on the ballot. *See* Benson Decl. ¶ 8; Bennett[181] Decl. ¶ 17.k (stating that the average ratio of state and local candidates to federal candidates in Ohio in 2002 is 18 to 1). 98. "By their nature, the Victory Plans and the programs specified in them span the calendar year, not just the 60 or 120 days prior to the election." Peschong Decl. ¶ 4.

99. The Victory Plans generally incorporate rallies, direct mail, telephone banks, brochures, state cards, yard signs, bumper stickers, door hangers, and door-to-door volunteer activities. *Id.*

RNC Fundraising

100. In 2000 the RNC raised $99,178,295 in nonfederal funds and $152,127,759 in federal funds. *See* Shea Decl. RNC Exhibit 2259.

101. The RNC engages in fundraising through direct marketing—i.e., direct mail, telemarketing and internet solicitations—and through "major donor" programs. In 2000 the RNC raised $105,860,700 through direct marketing and $146,929,900 through major donor programs. B. Shea Decl. ¶ 7. In 2001 the RNC raised $56,117,600 through direct marketing and $25,909,700 through major donor programs. *See id.*

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[181] Robert Bennett has served as Chair of the Ohio Republican Party since 1988. Bennett Decl. ¶¶ 1-2.

102. On average, 60 percent of the total amount the RNC raises each year is obtained through direct marketing. *See id.;* Knopp[182] Decl. ¶ 5. Ms. Knopp testifies that she has observed that direct marketing messages that "perform the best are those that emphasize the Republican Party's core political philosophy of lower taxes and less government and the RNC's important role in federal and state elections. In short, the RNC's fundraising success depends on its appeal to persons desiring to associate with its governing philosophy." Knopp Decl. ¶ 25.

103. "Major donors" are defined by the RNC as individuals who give $1,000 or more per year. *See* B. Shea Decl. ¶ 6. In Ms. Shea's experience, like its smaller donors, the RNC's major donors are most responsive to appeals based on the RNC's ideology. *See id.* ¶¶ 23-24. The RNC has six major programs: the President's Club is designed to raise federal contributions of $1,000 per person or $2,000 per couple per year, *see id.* ¶ 14.b; the Chairman's Advisory Board is designed to raise federal or nonfederal contributions of $5,000 per year, *id.* ¶ 14.c.; the Eagles program, the RNC's oldest major donor program, is designed for members who either contribute $15,000 in federal funds or donate $20,000 in nonfederal funds per year, *id.* ¶ 14.d; the Majority Fund is directed at PACs that donate $15,000 in either federal or nonfederal funds per year, *id.* ¶ 14.e; Team 100 is designed for members who donate $100,000 in nonfederal funds upon joining and then donate $25,000 in each of three subsequent

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[182] Janice Knopp is the RNC's Deputy Director of Finance/Marketing Director. Knopp Decl. ¶ 1.

years, *id.* ¶ 14.f; and the Regents program is designed for members who give an aggregate amount of $250,000 in nonfederal funds per two-year election cycle, *id* ¶ 14.g. In addition, every four years the RNC establishes a special "Presidential Trust," designed for contributions of $20,000 in federal funds. *See id.* ¶ 15.

104. Over the last nine years the average donation to the RNC, including both federal and nonfederal funds, has been approximately $57. Knopp Decl. ¶ 5; RNC Exhibit 2430.

105. In 2000 the RNC raised the majority of its nonfederal money from individuals—not corporations—and the average corporate donation of nonfederal funds is significantly lower than the average individual donation. In 2000, for example, the average corporate donation on nonfederal funds was $2,226, while the average individual donation of nonfederal funds was $10,410. Knopp Decl. ¶ 9. Knopp further testifies that in the 2000 election cycle the RNC raised $65 million in nonfederal funds from individuals, and $51 million from corporations. *Id.*[183] However, it should be noted that out of the top 50 soft money donors to both parties combined, thirty-five corporations gave 11.4 percent ($29,447,350) of all nonfederal money received by the Republican national committees in the 2000 election cycle. *See* Mann Expert Report at tbl. 6.

The California Democratic Party ("CDP") and the California Republican Party ("CRP")

106. The CDP and the CRP each maintain a federal committee registered with the FEC. In turn, the federal committee maintains a federal account, contributions to which comply with FECA's source-and-amount limitations

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[183] These figures, including the corporation/individual breakdown, apparently do not include approximately $134 million in donations to Republican national committees aside from the RNC.

and reporting requirements. *See* Bowler Decl. ¶ 9; Morgan[184] Aff. ¶ 3.

107. The CDP and the CRP are each registered as political party committees in accordance with California law. Each maintains a nonfederal account into which contributions permissible under California law are deposited. The parties' nonfederal campaign activities are subject to direct regulation by the California Fair Political Practices Commission and each party regularly files disclosure reports of receipts and expenditures with the Secretary of State. *See* Bowler Decl. ¶ 11; Morgan Aff. ¶ 3.

108. Prior to BCRA's effective date the costs of the CDP's and the CRP's "mixed" activities were "allocated" between each party's federal account and nonfederal account.

109. The CDP was required to allocate funds for administrative expenses such as rent or employee salaries; generic voter identification activities; voter registration activities; get-out-the-vote activities that were not candidate- specific; fundraising expenses; and communications on behalf of both federal and nonfederal candidates. *See* Bowler Decl. ¶ 15.

110. Bowler testifies that the CDP allocated funds in accordance with the FEC's regulations. They allocated funds for administrative expenses, generic voter identification activities, voter registration activities, and get-out- the-vote activities based on a "ballot composition" formula that calculated the ratio of federal offices and nonfederal offices expected to be on the general ballot in a given election cycle. They allocated funds for public communications supporting or opposing federal and nonfederal candidates using a "time-and-space" formula. And they allocated funds for fundraising expenses on a "funds raised" basis. *See id.* ¶ 15.

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[184] Timothy Morgan is the Republican National Committeeman from California, elected by the state central committee of the CRP. Morgan Aff. ¶ 1.

Proposition 34

111. In November 2000 California voters adopted Proposition 34 to govern campaign contributions in the state. Under Proposition 34, expenditures by political party committees on behalf of state candidates are unlimited. Contributions by political party committees to state candidates are likewise unlimited, although contributions by other contributors other than political parties to state candidates are limited depending upon the elective office. Contributions to state and local political parties for the purpose of making contributions to state candidates are limited to $25,000 per year per contributor. Contributions to state and local political parties for other purposes—e.g., funding administrative and overhead costs, voter registration or generic get-out-the-vote activities or supporting ballot measures or issue advocacy—are unlimited. Contributions to state and local political parties are not source-limited; that is, corporations and labor unions may contribute funds in accordance with generally applicable limits. *See id.* ¶ 11; Erwin Aff. ¶ 5; *see also* CAL. GOV'T CODE § § 85301, 85303(B), 85303(C), 85312.

112. By adopting Proposition 34, California voters approved the statement that "[p]olitical parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions." CDP App. at 1193 ("Proposition 34: Text of Proposed Law").

The CDP's and CRP's Focus on State and Local Activities

113. The CDP and CRP focus the majority of their resources on supporting state and local candidates, participating in state and local elections, and influencing state and local policies.

114. In California, state and local races on any particular ballot substantially outnumber federal races, of which there

will be, at most, three in any election cycle. *See* Bowler Decl. ¶ 13; *id.* ¶ 15 (explaining that in the 2002 cycle, where the only Federal office on the California ballots was a congressional race, administrative expenses were required to be allocated 12.5 percent federal and 87.5 percent nonfederal based on the ballot composition formula; in the 2000 cycle which included a Presidential race, administrative expenses were required to be allocated 43 percent federal and 57 percent nonfederal).

115. California holds elections for 120 legislative officers, eight statewide-elected officers and four members of the State Board of Equalization. It holds still more elections for judicial office and local office and ballot measures at both the state and local levels. *See id.* ¶ 13; Erwin Aff. ¶ 5.

116. During the 2002 election cycle—in which, according to CDP Chair Art Torres, there was only one "contested" congressional race "as a practical matter"—the CDP was actively involved in eight statewide nonfederal races and a dozen state legislative races. *See* Torres[185] Decl. ¶ 8.

117. The CDP actively participates in municipal elections. In recent years the CDP has spent several million dollars in nonfederal funds supporting candidates in major cities such as Los Angeles and San Francisco. Torres Decl. ¶ 8.

118. The CDP actively supports and opposes state and local ballot measures. Bowler Decl. ¶ 8.

CDP & CRP Voter Registration Activities

119. Evidence shows that the CDP and the CRP conduct voter registration primarily for state and local elections.

120. Erwin testified that "[t]he overwhelming amount of [voter registration] activity is 'generic' voter registration

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[185] Art Torres is the elected chair of the CDP. Torres Decl. ¶ 1.

activity urging potential registrants to 'Register Republican.'" Erwin Aff. ¶ 9.

121. CDP and CRP officials testified that "it is often the case that voter registration activities are primarily driven by the desire to affect State and local races." Erwin Aff. ¶ 14a; Bowler Decl. ¶ 20.a.

122. The CDP actively registered over 300,000 Democratic voters throughout California during 2002 even though there was "only one closely contested Congressional race" among the 52 races for the U.S. House of Representatives. *See* Bowler Decl. ¶ 20.a.

123. The CDP's expenditures on voter registration—consisting of a mix of federal and nonfederal funds—were approximately $145,000 in the 1996 election cycle; $300,000 in the 1998 cycle; $100,000 in the 2000 election cycle; and $185,000 during the period from January 1, 2001 to June 30, 2002. *See id.*

124. The CDP's expenditures for voter registration were higher in 1998 (a year with eight statewide elections) than in 2000 (a presidential election year). *Id.*

125. The CRP has paid for voter registration—with a mix of federal and nonfederal funds—through its "Operation Bounty" program in which Republican county central committees, Republican volunteer organizations, and Republican candidates for federal and state office participate. Through Operation Bounty drives, the CRP has typically registered over 350,000 Republican voters in each election cycle since the 1984 cycle (except 1997-98). *See* Erwin Aff. at 13; *see also* CDP App. at 1185 (charting CRP's voter registration activity by election cycle since 1984 cycle).

CDP and CRP Direct Mail Activities

126. The CDP and the CRP conduct direct mail campaigns primarily for state and local elections.

127. The CDP typically spends approximately $7 million to $8 million in nonfederal funds on its mail program in support of state and local candidates that does not include federal candidates. *See* Bowler Decl. ¶ 20(b).

128. In 2000, the CDP produced and sent out over 350 different mail pieces for its state and local candidates and ballot measures. These mailings do not reference federal candidates or any federal races. Bowler Decl. ¶ 20(b). This mail often gives both the election date and the person's polling places. *Id.*

129. In most election cycles the CRP mails an absentee ballot application to registered Republican households. In the 1994, 1996, and 1998 cycles the CRP sent between 2.25 and 2.5 million absentee ballot mailers to Republican voters. In the 2000 cycle the CRP sent approximately 5.2 million absentee ballot mailers. Erwin Aff. ¶ 10.b.

CDP and CRP Get-Out-the-Vote Activities

130. The CDP conducts get-out-the-vote telephone banks primarily for state and local elections.

131. Approximately 40 to 50 percent of the CDP's paid phone banking is conducted in connection with a specific state or local race and does not make reference to any federal candidate. *See* Bowler Decl. ¶ 20.b.

132. Prior to BCRA's effective date, to the extent the CDP's phone banking referred to both federal and nonfederal candidates, expenditures therefor consisted of a mix of federal and nonfederal funds. *Id.*

133. Prior to BCRA's effective date, to the extent the CDP's phone banking did not endorse any federal candidate, expenditures therefor consisted entirely of nonfederal funds. *Id.*

134. The CDP and the CRP conduct get-out-the-vote door-to-door canvassing campaigns primarily to influence state and local elections.

135. The CDP and the CRP routinely mail slate cards and hand deliver door hangers listing endorsed candidates, urging voters to vote on election day, and informing voters of the date of the election and the polling place. *Id.;* Erwin Aff. ¶ 10.c; Bowler Decl. Exhibit H, Exhibit I.

136. Slate cards and door hangers are usually tailored for a particular local area, and state and local races dominate numerically over federal races. Bowler Decl. ¶ 20.b; Erwin Aff. ¶ 10.c.

137. Prior to BCRA's effective date, to the extent slate cards or door hangers mentioned both federal and nonfederal candidates, expenditures therefore consisted of a mix of federal and nonfederal funds. *See id.;* Bowler Decl. ¶ 20.b.

State Party "Issue Ads" that Directly Affect Federal Elections

138. State parties also use nonfederal money to fund federal-candidate centered "issue ads" that are really electioneering advertisements intended to directly affect federal elections.

139. State parties use a large portion of the transferred nonfederal money to finance public communications (principally broadcast and cable advertisements) that support or oppose a federal candidate. *See* Wolfson Decl. ¶ 63; Marshall Decl. ¶ 3 (noting that in 2000, the largest single portion of the DNC budget was used for issue advertising, but that "[t]he DNC typically did not expend money for these issue ads itself, but instead transferred both federal and non-federal money to the state parties to make these expenditures"); Nelson Dep. Tr. at 121, 123. National party "issue advocacy" advertising focusing on electing federal candidates is often bought by state parties, but funded by national party committees, who transfer the funds needed to the state parties. *See, e.g.*, ODP0021-01365-67, ODP0023-02358-65, ODP0023-03560-660, ODP0025-01560, ODP0025-2720-21

[DEV 70-Tab 48] (internal RNC correspondence referencing "issue ads" to berun through state parties).

140. Defense Expert Magleby states that

> Parties can stretch their soft money even further by transferring soft and hard money to state parties where they can achieve a better ratio of soft to hard dollars than if they spent the money themselves. This is because the ratio of soft to hard dollars for party spending if done by the national patty committees is 35 percent soft and 65 percent hard for presidential years, and 40 percent soft and 60 percent hard for off years, but if done by state parties the ratio of soft to hard dollars is greater. The reason for this difference is state parties are allowed to calculate their soft/hard ratio based on the ratio of federal offices to all offices on the ballot in any given year. Both political parties have found spending soft money with its accompanying hard money match through their state parties to work smoothly, for the most part, and state officials readily acknowledge they are simply "pass throughs" to the vendors providing the broadcast ads or direct mail.

Magleby Expert Report at 37 [DEV 4-Tab 8]; *see also* Marshall Decl. ¶ 3 [DEV 8-Tab 28] (testifying that in 2000 the DNC transferred funds to the state parties to take advantage of their allocation rates); ODP0021-1365 to 1367 [DEV 70-Tab 48] (memorandum from Haley Barbour to the California House Republicans, discussing the need to make a media buy in California and stating that "[t]o accomplish this buy, the [RNC] would transfer funds to the California Republican Party, which would actually buy the advertising. Under FEC regulations, the California Republican Party must pay for the advertising with one-third FEC contributions and two thirds nonfederal dollars"); McConnell Dep. at 267-77 [JDT Vol. 19] (stating that the NRSC prefers to transfer funds to state parties who then purchase NRSC advertisements with a more favorable federal/nonfederal fund allocation ratio); Nelson Dep at 76-77 [JDT Vol. 24] (stating that purchasing political advertisements through state parties has two advantages: (1) better federal/nonfederal fund allocation ratios and (2) "having [a] state disclaimer [on the advertisement] is generally better than having a national disclaimer on it").

141. The national party committees transferred $9,710,166 in federal funds to state party committees during the 1992 election cycle, $9,577,985 during the 1994 election cycle, $49,967,893 during the 1996 election cycle, $30,475,897 during the 1998 election cycle, and $131,016,957 during the 2000 election cycle. The national party committees transferred $18,646,162 in nonfederal funds to state party committees during the 1992 election cycle, $18,442,749 during the 1994 election cycle, $113,738,373 during the 1996 election cycle, $69,031,644 during the 1998 election cycle, and $265,927,677 during the 2000 election cycle. Biersack Decl. tbls. 4, 8 [DEV 6-Tab 6].

142. The RNC transferred federal and nonfederal money to state Republican party committees to pay for electioneering "issue ads." Huyck Decl. in *Mariani* ¶ 4 [DEV 79-Tab 60]; Josefiak Dep. at 97; Hazelwood Dep. at 118-19; *see also* INT810-1605 to 12 (RNC NM0406326—33) [DEV 114] (1998 financial statement for the Republican Party of New Mexico ("RPNM") shows that it received revenues of $1,524,634 in nonfederal transfers from other Republican organizations, $1,110,987 in individual contributions, and just $389,552 in federal transfers from Republican organizations; the RPNM spent over one-third of its 1998 revenues, $1,062,095, on "issue advocacy—television, radio and mail"). In 2000, the RNC raised $254 million, a majority of which was transferred down to the state parties for various activities, including issue advertising. Josefiak Dep. at 76 [JDT Vol. 11]. Most of the transfers are used to pay for issue ads. *See* Vogel Decl. ¶ 63; McGahn Decl. ¶ 55.

143. The DSCC and DCCC support Democratic state political party committees in producing and disseminating electioneering communications, and the large majority of their nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. These communications frequently refer to Democratic Senate or House candidates or their Republican opponents, even though "not expressly advocating any candidate's election or defeat." Wolfson Decl. ¶¶ 63, 71 [DEV 9-Tab 44]; Jordan Decl. ¶¶ 68, 77 [DEV 7-Tab 21]; CDP 02095-101, 2103-04, 2106 [IER Tab 12] (wire transfer instructions from the DNC to the CDP for media buys); CDP 02984-89 [IER Tab 12] (detailing transfer of funds from DCCC to CDP for media buy).

144. When the national parties transfer money to state parties to fund so-called "issue ads," they insist on control of the communications, participate in the creative process, and work with the consultants to determine the content, timing, and placement of the communications. Wolfson Decl. ¶¶ 65-67, 70 [DEV 9-Tab 44]; Jordan Decl. ¶¶ 71-73, 76 [DEV 7-Tab 21]; Vogel Decl. ¶¶ 63, 67-68 [DEV 9-Tab 41]; McGahn Decl. ¶¶ 55, 58-59 [DEV 8-Tab 30]; Castellanos Dep. Tr. (Sept. 27, 2002) at 111-12 (stating that when working on ads for state parties, National Media dealt with an RNC representative, not a state party member); Marshall Decl. ¶ 4 (noting that the DNC normally approved the content of the ad and the amount of money to be spent before calling the state party in question "to let it know that an ad was coming").

145. These so-called "issue ads" are intended to and do support the campaigns of federal candidates. *See* La Raja Cross Exhibit 3 at 15, 101-04; Pennington Decl. ¶¶ 10, 13, 14 [DEV 8-Tab 31]; *see also, e.g.*, CRP 0369, 371, 373 [IER Tab 12] (transcripts of television advertisements paid for with nonfederal money transferred from NRCC to CRP).

146. Certainly, party communications that promote, support, attack, or oppose a clearly identified candidate for federal office directly affect federal elections. *See* McCain Decl. ¶¶ 15-18; Beckett Decl. ¶¶ 8-9 [DEV 6-Tab 3]; Chapin Decl. ¶ ¶ 8-10; Lamson Decl. ¶ 9; Pennington Decl. ¶¶ 10, 13-14; 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

147. Out of the estimated $25.6 million spent by political parties on ads in the 1998 election cycle, $24.6 million went to fund ads that referred to a federal candidate. *See* Krasno & Sorauf Expert Report at tbl. 1. Out of 44,485 ads, 42,599 referred to a federal candidate. *Id.* Viewers perceived 94 percent of these ads as electioneering in nature. *Id.* at tbl. 7.

148. National party committees have directed donors to give nonfederal money to state parties in order to assist the cam-paigns of federal candidates. Kirsch[186] Decl. ¶¶ 6, 9 [DEV 7-Tab 23]; Hassenfeld[187] Decl. ¶¶ 9-10 [DEV 6-Tab 17]; Hickmott[188] Decl. ¶ 8 [DEV 6-Tab 19]; Randlett[189] Decl. ¶ 9 [DEV 8-Tab 32].

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[186] Mr. Kirsch is founder and Chief Executive Officer of Propel Software Corporation. He has donated millions of dollars to the Democratic Party and to "progressive candidates and groups." Kirsch Decl. ¶ ¶ 2, 4 [DEV 7-Tab 23].

[187] Mr. Hassenfeld has served as Chairman of the Board and Chief Executive Officer of Hasbro, Inc. since 1989, a global company based in Rhode Island—with annual revenues in excess of $3 billion. Hasbro designs, manufactures, and markets toys, games, interactive software, puzzles and infant products. He also sits on a number of civic and philanthropic boards. He is a member of the Board of Trustees of the University of Pennsylvania and Deerfield Academy, serves on the Dean's Council of the Kennedy School of Government at Harvard, and sits on the board of Refugees International. He also run three charitable foundations: the Hasbro Charitable Trust, the Hasbro Children's Foundation, and a family foundation. Hassenfeld Decl. ¶¶ 2-3.

[188] In 1980, during President Carter's re-election campaign, Robert Hickmott worked at the DNC as an Associate Finance Director. Hickmott Decl. ¶ 2 [DEV 6-Tab 19]. Following the general election, Hickmott became the Executive Director of a new DNC entity, the Democratic Business Council ("DBC"), where he served until 1983. *Id.* During 1985-86, Hickmott served as National Finance Director for then-Congressman Timothy Wirth's Senate campaign, and from 1987 until early 1989, on Senator Wirth's Senate staff. *Id.* After that, Hickmott was in private practice as an attorney until January 1991, when he joined the DSCC as Deputy Executive Director. *Id.* In 1993, Hickmott worked for four years as the Associate Administrator for Congressional Affairs at the Unites States Environmental Protection Agency, then for two years as a counselor to then-Secretary Andrew Cuomo at the United States Department of Housing and Urban Development ("HUD"). *Id.* In 1999, Hickmott left HUD and joined The Smith-Free Group ("Smith-Free"), a small governmental affairs firm located in Washington, D.C. *Id.* ¶ 3. Hickmott is currently a Senior Vice President at Smith-Free and one of the six principals in the firm. *Id.* Hickmott is a regular contributor to presidential and congressional candidates and the national party committees. He donates primarily to Democratic candidates, but also to several Republicans. *Id.* In the 1999-2000 cycle, he contributed just over $7,000 and in the 2001-2002 cycle, he has contributed a little more than $10,000. *Id.* Hickmott provided a declaration in *Federal Election Commission v. Colorado Republican Federal Campaign Committee,* 41 F.Supp.2d 1197 (D.Colo.1999), *aff'd,* 213 F.3d 1221 (10th Cir.2000), *rev'd,* 533 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) ("Colorado II"); *See Colorado II,* 533 U.S. at 458.

[189] Mr. Randlett is Chief Executive Officer of Dashboard Technology, a World WideWeb technology consulting firm based in San Francisco, California. Prior to founding Dashboard Technology, Mr. Randlett served on the management teams of two other software companies. He was the Democratic political director at the Technology Network, also known as TechNet, a Palo Alto-based nonprofit corporation and political service organization which he co-founded in 1996. Prior to starting TechNet, he spent many years as a political fundraiser and general political consultant, working primarily in the Silicon Valley area of Northern California, but also throughout California and to some extent in major metropolitan areas in other parts of the nation. Randlett Decl. ¶ 2 [Dev 8-Tab 32].

149. Both federal officeholders and the national parties have directed contributors to the state parties when the contributors have "maxed out" to the candidate or when it appears that the state party can most effectively use additional money to help that officeholder or other federal candidates. *See* Kirsch Decl. ¶¶ 8-9; Philp[190] Dep. Tr. at Exhibit 14 [IER Tab 1.F]; CRP 07164 [IER Tab 1.F]; La Raja Cross Exhibit 3 at 54 ("it is common practice for a candidate to encourage donors to give to the party when they have 'maxed' their federal contributions to his or her committee"); Josefiak Decl. ¶ 68; MMc0014 [DEV 117-Tab 2] (letter to a contributor stating "Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2000 program .... This program was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year" signed by Senator McConnell with the handwritten note: "This is important to me. Hope you can help"); Buttenwieser Decl. ¶¶ 15-16 [DEV 6-Tab 11] ("Federal candidates have often asked me to donate to state parties, rather than the joint committees, when they feel that's where they need some extra help in their campaigns. I've given significant amounts to the state parties in South Dakota and North Dakota because all the Senators representing those states are good friends, and I know that it's difficult to raise large sums in those states. The DSCC has also requested that I provide assistance to state parties."); Hassenfeld Decl. ¶ 9 [DEV 6-Tab 17] ("In 1992, when I told the Democratic Party that I wanted to support then-Governor Bill Clinton's presidential campaign, they suggested that I make a $20,000 hard money contribution to the DNC, which I did. The Democratic Party then made clear to me that although there was a limit to how much hard money I could contribute, I could still help with Clinton's presidential campaign by contributing to state Democratic committees. There appeared to be little difference between contributing directly to a candidate and making a donation to the party. Accordingly, at the request of the DNC, I also made donations on my own behalf to state Democratic committees outside of my home state of Rhode Island .... Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign."); [IER Tab 9] (letter from Congressman Wayne Allard, paid for by the Colorado Republican Party, informing contributor that he was "at the limit of what you can directly contribute to my campaign" but at a future breakfast the contributor would be told how he could "further help my campaign by assisting the Colorado Republican Party").

150. While state parties invest much of their nonfederal money transferred to them from the national parties into federal races, La Raja Dep. at 139, they spend the majority of the nonfederal money they raise on administrative overhead, voter registration, voter mobilization, and other party building activities and not on "issue ads." *See* La Raja Decl. ¶ 22.a; Bowler Decl. ¶ 15 (explaining that "[t]he majority of [national transfers] were for issue advocacy, although money has been transferred for voter registration, get-out- the-vote activities, and even administrative expenses. We are able to raise a substantial amount of money for our non-Federal activities and do not rely on national party transfers for those purposes"); Bowler Decl. ¶ 12 (explaining that in the 1999-2000 cycle, the CDP raised $15,617,002 in nonfederal funds, which it used to fund state and local activities); Bowler Rebuttal Decl. ¶ 3-4 (explaining that the CDP pays for much of its voter registration and get-out-the-vote activities with money raised by the state party).

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[190] Alan Philp testified on behalf of the Colorado Republican Party. Philp Dep. at 9 [JDT Vol. 26].

151. The amount of nonfederal money the CRP and CDP raises themselves is much more than the nonfederal funds it receives from transfers from the national party. CDP/CRP 1171 (in 1999-2000, which was a presidential election year, only 19.1 percent of all CRP nonfederal money was from national party transfers); CDP/CRP 35, 37, 39(in 2000 only 36 percent of all CDP nonfederal money was from national party transfers).

CDP and CRP Cooperation with the National Parties

152. The CDP and the CRP cooperate and work closely with their national counterparts to support their candidates and platforms at all levels of the ticket.

153. Ms. Bowler testifies that the CDP works closely with the DNC in planning and implementing Coordinated Campaigns, the purpose of which is to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket. Party officials, candidates at all levels of the ticket, and their agents participate in Coordinated Campaigns and collectively make decisions regarding the solicitation, receipt, directing, and spending of the CDP's funds, both federal and nonfederal. Bowler Decl. ¶¶ 5, 29. According to Bowler, the CDP is "integrally related to the [DNC]." *Id.* ¶ 5.

154. The CRP works closely with the RNC in planning and implementing a Victory Plan, the purpose of which is to allocate resources and coordinate plans for the benefit of Republican candidates up and down the entire ticket. The Victory Plan is implemented in the general election cycle with the full involvement of RNC staff, CRP staff, state legislative leadership, and representatives from the top of the ticket campaigns. *See* Erwin Aff. ¶ 4.

Reduction in CDP and CRP Fundraising and Voter Mobilization Efforts

155. The CDP has always raised more nonfederal money than federal money.

156. The CDP has raised a relatively constant amount of federal money. It raised $4,316,528 in federal funds in the 1996 election cycle; $4,076,870 in federal money in the 1998 cycle; $4,837,967 federal money in the 2000 cycle; and $3,455,887 in federal money during the 2002 election cycle as of June 30, 2002. The funds were raised directly by the CDP; the figures do not include any transfers from other party committees or from candidates. *See* Bowler Decl. ¶ 10, Exhibit A.

157. Ms. Bowler believes that even with increased efforts, it may be difficult for the CDP to raise substantially more federal money than it has in the past. *Id.* ¶ 10.

158. The CDP has tried many methods of raising more federal funds, with little success. Through the telemarketing program, which Bowler states has been its most successful method of raising federal funds, the CDP has raised between $800,000 and $2 million with an average contribution of $27. The telemarketing program, however, is very expensive to run; it costs approximately $0.40 to $0.50 for every dollar raised. *Id.* ¶ 35.

159. Since 1995 the number of contributions made to the CDP at the $5,000 level—the FECA federal maximum—was very small, usually accounting for less than five percent of the CDP's total in federal contributions. The total amount the CDP has received from maximum federal contributions has ranged from $170,000 (in the 2000 election cycle) to $355,000 (in the 1996 cycle). Because the number of contributions at the $5,000 level make up a small percentage of CDP's federal money fundraising, Bowler does not believe BCRA's doubling the limit from $5,000 to $10,000 will result

in a substantial increase in federal funds contributed to the CDP. *See id.* ¶ 35.

160. Prior to BCRA's effective date the CDP raised a relatively constant amount of nonfederal money. It raised $12,991,251 in nonfederal funds in the 1996 election cycle; $15,957,831 in nonfederal money in the 1998 cycle; $15,617,002 in nonfederal money in the 2000 cycle; and $13,928,496 in nonfederal money during the 2002 election cycle up to June 30, 2002. The funds were raised directly by the CDP; the figures do not include any transfers from other party committees or from candidates. *See Id.* ¶ 12, Exhibit A.

161. Approximately 76 percent to 86 percent of the nonfederal donations the CDP has received have been from donations exceeding $10,000. *See id.* ¶ 19, Exhibit A; Torres Decl. ¶ 7.

162. The CRP has employed a wide variety of fundraising techniques to raise more federal money. *See* Erwin Aff. ¶ 12.a.

163. The CRP raises federal funds through direct mail. Erwin states that to maintain a current and effective direct mail fundraising donor list, the CRP must continually spend funds prospecting for new donors and that such prospecting is expensive and often loses money. Federal returns on direct mailings range, on average, from $20 to $40 per contributor and that CRP direct mail returns reached a high in 1986 of over $2 million and have declined to under $1 million since 1997. *Id.;* CDP App. at 1189 (charting CRP's major funding sources by year since 1985).

164. The CRP also uses telemarketing to raise federal funds. Federal returns on the CRP's telemarketing range, on average, from $20 to $40 per contributor. Erwin testifies that like direct mail prospecting, telemarketing prospecting is "expensive and often unproductive." *See* Erwin Aff. ¶ 12.b; CDP App. at 1189. The CRP also relies on "Major Donor Programs" and "Event Fundraising" for its federal money fundraising. Erwin Aff. ¶ 12.c-d.

165. During the 2000 election cycle, the CRP raised $5,397,400 in nonfederal funds from the 166 donors who gave $10,000 or more. Erwin Aff. ¶ 13(B); Erwin Aff. Chart 5. Those donations totaled $5,397,400. The aggregated amount above $10,000 from those donations accounted for $3,737,400 ($5,397,400 minus $1,660,000 (166 donors multiplied by $10,000)). Erwin Aff. Chart 5, Chart 6A. Thus, if the CRP had been limited in funding certain electoral activities with donations raised within the $10,000 limit specified in the Levin Amendment, $3,737,400 of the $5,397,400 raised from donations above $10,000 would have been unavailable for those purposes. Erwin Chart Aff. Chart 6B. This also means that the CRP would have had 10.5 percent less total revenue to use for Levin- Amendment activities (i.e., $3,737,400 of $35,649,993, the total revenue for the 2000 election cycle, could not have been used for those activities). Erwin Aff. Chart 1.

166. Erwin testifies that BCRA's ban on national party transfers will reduce the CRP's available budget by approximately 40 percent in presidential election cycles and 20 percent in nonpresidential election cycles. Erwin Aff. ¶ 15.a.

167. On average, Erwin attests that between 1993 and 2000 BCRA would have reduced the CRP's overall spending from $30 million to $18 million during presidential election cycles and from $17.5 million to $14 million during nonpresidential election cycles. *Id.*

168. Party officials believe that under BCRA the CDP will have to reduce their communications with voters. Not only will administrative costs have to be reduced, accounting costs will likely increase because of BCRA's additional reporting requirements. Moreover, fundraising costs will increase because only federal money can be used to raise federal or

Levin funds. Thus, even *maintaining* current fundraising efforts will come at a direct cost to the parties' programmatic and candidate-support activities. Because candidate support and get-out-the-vote activities are likely to remain the parties' first priorities, voter registration, generic party-building and grassroots activities will likely be reduced or even eliminated. Bowler Decl. ¶ 23; Torres Decl. ¶ 9.

Federal Officeholder Solicitation of Nonfederal Money

169. It is a common practice for Members of Congress to be involved in raising both federal and nonfederal dollars for the national party committees, sometimes at the parties' request. McCain Decl. ¶¶ 2, 21 [DEV 8-Tab 29] ("Soft money is often raised directly by federal candidates and officeholders, and the largest amounts are often raised by the President, Vice President and Congressional party leaders."); Feingold Dep. at 91-93 [JDT Vol. 6]; Shays Decl. ¶ 18 [DEV 8-Tab 35] ("Soft money is raised directly by federal candidates, officeholders, and national political party leaders. National party officials often raise these funds by promising donors access to elected officials. The national parties and national congressional campaign committees also request that Members of Congress make the calls to soft money donors to solicit more funds."); *see also* Rudman Decl. ¶ 12 [DEV 8-Tab 34]; Bumpers Decl. ¶¶ 7-8 [DEV 6-Tab 10]; Simon Decl. ¶ 7 [DEV 9-Tab 37]; Wolfson Decl. ¶¶ 34-35 [DEV 9-Tab 44]; Randlett Decl. ¶¶ 6-9 [DEV 8-Tab 32]; Murray[191] Dep.

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[191] Mr. Daniel Murray served as a government relations specialist for Sprint, GTE, and BellSouth Corporations from 1982 until 1995. As Executive Director of those companies, he assisted them and their PACs in selecting candidates and political groups for financial support in both federal and nonfederal funds. During this period he also served on the Democratic Business Council of the DNC, the Advisory Council of the Democratic Leadership Council, the 1998 and 1992 DNC Convention Site Selection Committees, the DSCC Leadership Circle, the DCCC Annual Dinner Committee, the RSCC Annual Dinner Committee, and steering committees for many House and Senate campaigns. Since 1995, he has

in *Mariani* at 41-42 [DEV 79-Tab 58]; Rozen[192] Decl. Exhibit A ¶ 7 [DEV 8-Tab 33]; Simpson Decl. ¶ 4 [DEV 9-Tab 38]; Jordan Decl. ¶¶ 32-33 [DEV 7-Tab 21].

170. Federal officeholders and candidates solicit large nonfederal donations for their parties. ODP0031-00440 (letter from donor to RNC, stating that "I am happy to deliver a check for one hundred thousand dollars to you that fulfills the commitment I made to my good friend Bob Dole in a letter I sent him); ODP0031-00821 (letter from contributor to RNC with contribution, stating "Congressman Scott McInnis deserve [sic] most of the recruitment credit"), ODP0037-00882 (a solicitation letter from Senator McConnell to potential donor at Microsoft Corporation, expressing the hope that this person would "take a leadership role with [McConnell] at the NRSC in support of the Committee's issue advocacy campaign. The resources we raise now will allow us to communicate our strategy through Labor Day . . . . Your immediate commitment to this project would mean a great deal to the entire Republican Senate and to me personally"); ODP0037-01171-72 [DEV 71-Tab 48] (correspondence referencing solicitations by federal officeholders and candidates); Shays Decl. in RNC ¶ 12 [DEV 68-Tab 40]. In general, the personal involvement of high-ranking leaders of Congress is a

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acted as a government relations consultant for business and other clients. Murray Aff. in *Mariani* ¶¶ 3-5 [DEV 79-Tab 59].

[192] Mr. Robert Rozen worked as a lobbyist for various interests at the law firm Wunder, Diefenderfer, Cannon & Thelen from 1995 until 1997. For the last six years, he has been a partner in a lobbying firm called Washington Counsel; now Washington Council Ernst & Young. Mr. Rozen represents a variety of corporate, trade association, non-profit, and individual clients before both Congress and the Executive Branch. His work includes preparing strategic plans, writing lobbying papers, explaining difficult and complex issues to legislative staff, and drafting proposed legislation. He also organizes fundraisers for federal candidates and from time-to-time advises clients on their political contributions. Rozen Decl. ¶ 4 [DEV 8-Tab 33].

significant component of raising federal and nonfederal money from major donors. *See* Bumpers Decl. ¶¶ 8-9 [DEV 6-Tab 10]; Meehan Decl. ¶ 6 [DEV 68-Tab 30]; Simon Decl. ¶ 7 [DEV 9-Tab 37]; Rozen Decl. ¶ 15 [DEV 8-Tab 33]; Kolb Decl. II, Exhibit A ¶ 8 [DEV 7-Tab 25].

171. However, the Finance Director of the RNC stated that it is "exceedingly rare" for the RNC to rely on federal officeholders for personal or telephonic solicitations of major donors. *See* B. Shea Decl. ¶ 17. She states that by RNC policy and practice, the RNC Chairman, Co-Chairwoman, Deputy Chairman, fundraising staff or members of major donor groups—not federal officeholders—undertake initial contact and solicitation of major donors of both federal and nonfederal funds. *Id.*

172. Republican incumbents and candidates solicit donations of federal and nonfederal money for both the NRSC and the NRCC. Vogel Decl. ¶¶ 25-28, 32 [DEV 9-Tab 41]; McGahn Decl. ¶¶ 27-30, 33-37 [DEV 8-Tab 30]; ODP0018-00137 (Victory '96 Brochure outlining the RNC's donor programs and describing the uses of Victory '96 proceeds and Presidential candidate Dole's assistance raising these funds); ODP0018-00139-41, ODP0018-00151-52 [DEV 69-Tab 48] (Victory '96 solicitation letters signed by Senator Dole).

173. "National party committees often feel they need to raise a certain amount of soft money for a given election cycle. To reach that overall goal, they may divide up potential donors by geography, affiliated organization, or issue interests. The party committees decide which Members of Congress should contact these potential donors, and these Members then put in a certain amount of call time at the national committee soliciting the money. A Member and a potential donor may be matched because the Member is on a legislative committee in which the donor has a particular interest, whether economic or ideological." Randlett Decl. ¶ 6 [DEV 8-Tab 32]; *see* Rozen Decl. ¶ 15 [DEV 8-Tab 33]; Krasno and Sorauf Report at 12-13 [DEV 1-Tab 2].

174. The House and Senate congressional campaign committees and their leadership ask Members of Congress to raise funds in specified amounts or to devote specified periods of time to fundraising. Jordan Decl. ¶ 33 [DEV 7-Tab 21]; Vogel Decl. ¶¶ 32-33 [DEV 9-Tab 41]; McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Wolfson Decl. ¶ 35 [DEV 9-44] (stating that the DSCC, NRSC, NRCC, and DCCC ask members of Congress to raise money for the committees).

175. The DSCC maintains a "credit" program that credits nonfederal money raised by a Senator or candidate to that Senator or candidate's state party. Jordan Decl. ¶¶ 36-39 [DEV 7-Tab 21]. Amounts credited to a state party can reflect that the Senator or candidate solicited the donation, or can serve as a donor's sign of tacit support for the state party or the Senate candidate. Jordan Decl. ¶¶ 37-40, Tabs F, G [DEV 7-Tab 21].

176. Both the NRCC and NRSC are aware of which Members have raised funds for their committees, and may advise Members of amounts they have raised. McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Vogel Decl. ¶¶ 33, 36 [DEV 9-Tab 41]. Similarly, although the DCCC uses "no formal credit or tally program," it "advises Democratic House Members of the amounts they have raised for the DCCC, ascribing particular contributions to the fundraising efforts of the Member in question." Wolfson Decl. ¶ 36 [DEV 9-Tab 44]; Thompson Dep. at 28-29 [JDT Vol. 32].

177. Federal candidates of both parties raise nonfederal money through joint fundraising committees formed with national committees. *See* Buttenwieser Decl. ¶¶ 8-14 [DEV 6-Tab 11].

178. One common method of joint fundraising is for a national committee to form a separate joint fundraising

committee with a federal candidate committee. A joint fundraising committee collects and deposits contributions, pays related expenses, allocates proceeds and expenses to the participants, keeps required records, and discloses overall joint fundraising activity to the FEC. Wolfson Decl. ¶ 40 [DEV 9-Tab 44]; Vogel Decl. ¶¶ 39-45 [DEV 9-Tab 41]; Jordan Decl. ¶¶ 41, 50 [DEV 7-Tab 21]; Oliver Dep. at 258 [DEV Supp.-Tab 1]. Similarly, the most common method of NRSC joint fundraising activity is for the NRSC to form a separate joint fundraising committee under FEC regulations with a Republican Senate candidate. Vogel Decl. ¶¶ 39-45.

179. Parties often ask officeholders to solicit soft money from individuals who have maxed out to the officeholder's campaign. Simpson Decl. ¶ 6 [DEV 9-Tab 38]. *See* Bumpers Decl. ¶¶ 9-11 [DEV 6-Tab 10]; Meehan Decl. in RNC ¶ 6 [DEV 68-Tab 30]; Billings Decl. Exhibit A ¶ 12 [DEV 6-Tab 5]; Jordan Decl. ¶ 27 [DEV 7- Tab 21]; Oliver Dep. at 188 [DEV Supp.-Tab 1] (pertaining to 2000 Bush/Cheney legal defense fund); Sorauf/Krasno Report in *Colorado Republican,* at 13-14 [DEV 68-Tab 44]; ODP0018-00620-21 [DEV 69-Tab 48] (federal candidate noting that he "recently sent a letter to [his] maxed out donors suggesting contributions to the NRCC"). The parties prefer that donors first "max out" on federal money gifts before contributing nonfederal money. Kirsch Decl. ¶ 8 [DEV 7-Tab 23]. As one candidate stated, "[Y]ou are at the limit of what you can directly contribute to my campaign," but "you can further help my campaign by assisting the Colorado Republican Party." *FEC v. Colorado Republican Fed. Campaign Comm.,* 533 U.S. 431, 458 (2001) (quoting an August 27, 1996 fundraising letter from then-Congressman Allard).

Political Parties and Nonprofit Groups

180. Political parties and federal candidates work with nonprofit groups on campaign activities. Moreover, they have raised nonfederal money for, directed nonfederal money to and transferred nonfederal money to nonprofits for use in federal elections.

181. The national party committees direct donors to donate nonfederal money to certain interest groups for broadcast issue advertisements and other activities to influence federal elections. For example, Steve Kirsch testified that the national Democratic Party played an important role in his decisions to donate soft money to "certain interest groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL. The assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential election." Kirsch Decl. ¶ 10 [DEV 7-Tab 23]; *see also* 144 Cong. Rec. S1048 (1998) (Sen. Glenn).

182. Parties raise funds for, or donate nonfederal money to, tax-exempt organizations, which in turn use funds to influence federal elections. Kirsch Decl. ¶ 10 [DEV 7-Tab 23]; Marshall Decl. ¶ 9 [DEV 8-Tab 28].

183. The RNC, NRSC, and NRCC have all made nonfederal donations to the National Right to Life Committee, an independent group that assists Republican candidates through "issue advocacy" activities. Resps. Nat'l Rt. Life Pls. To Defs.' First Interrogs., No. 3 [DEV 10-Tab 5]; RNC0065691A, RNC0065691 [DEV 134-Tab 8, DEV Supp.-Tab 3, DEV 101]. After the NRSC's 1994 donation, then-NRSC Chairman Senator Phil Gramm told The Washington Post that the party made this donation because it knew the funds would be used on behalf of several specific Republican candidates for the Senate, saying he had "made a decision . . . to provide some money to help activate pro-life voters in some key states where they would be pivotal to the election." *Id.* at 5975; *see also* RNC 0373365 [IER Tab 31] (letter from the Republican National State Elections Committee to the American Defense Institute notifying the group of a $300,000 donation from the RNSEC's "non-federal component" to

assist the groups "efforts to educate and inform Americans living overseas of their civic responsibilities"); RNC0373370, 0373376, 0373381 (three letters to Americans for Tax Reform all dated in October 1996 providing the group $1,000,000, $2,000,000, $600,000 donations in recognition of the group's "efforts to educate and inform the American public).

184. The National Right to Work Committee "pays for its advertising from its treasury, [and] admits that certain Members or Executive Branch Officials have generally encouraged financial support for the Right to Work cause and, specifically, for the support of NRTWC in advocating for these issues, through lobbying as well as issue advertising." Resp. Nat'l Rt. Work Comm. to Defs. First RFAs, No. 17 [DEV 12-Tab 2]; *see also* NRW-2812 [DEV 129-Tab 2] (letter from Congressman Pete Sessions asking the recipient to meet with National Right to Work Committee personnel regarding the Committee's effort to "stop Big Labor from seizing control of Congress in November").

185. Congressman Ric Keller signed a Club for Growth fundraising letter dated July 20, 2001 which credited the Club for his own 2000 electoral success and assured potential donors that their money would be used to "help Republicans keep control of Congress." CFG00208-10 [DEV 130-Tab 5]; *see* Pennington Decl. ¶¶ 15, 19 [DEV 8-Tab 31].

186. The 2000 Democratic coordinated campaign in Florida's Eighth Congressional District was funded primarily by EMILY's List through its Florida Women's Vote project, though the DCCC and Congressional candidate Linda Chapin also raised funds for it. Florida Women's Vote gave money to the State Party, which then set up the coordinated campaign and hired the staff. EMILY's List also sent some staff to assist in the coordinated campaign, which they also did in their other targeted races throughout the country. Beckett Decl. ¶ 6 [DEV 6- Tab 3]; Chapin Decl. ¶ 6 [DEV 6-Tab 12].

187. Defendants' expert Green testifies that "[n]ational parties . . . transferred large sums of money to tax-exempt organizations because, unlike state parties, these tax-exempt organizations are not bound by allocation formulas that specify how much hard money must be spent in conjunction with soft money expenditures." Green Expert Report at 17-18 n.17 [DEV 1-Tab 3].

188. Most committees that are organized to support or oppose ballot measures in California are organized as 501(c)(4) committees. Bowler states that virtually all of the ballot measure committees in California engage in activity that can be characterized as get-out-the-vote activity under BCRA. Bowler Decl. ¶ 30.

189. Most Members of Congress either in a formal leadership position, or aspiring thereto, have his or her own 527 group. Public Citizen Congress Watch, Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 6 [DEV 29-Tab 3]. "For congressional leaders, 527 groups appear to collect about as much money as their campaign committees and often as much as their leadership PACs." *Id.* at 9.

190. Most of the 527s active in federal politics exist to either promote certain politicians (which Public Citizen calls "politician 527s") or promote certain ideas, interests and partisan orientations in election campaigns. "Politician 527s generally serve as soft-money arms of 'leadership PACs,' which incumbents use to aid other candidates and otherwise further their own careers. Like the campaign committees of members of Congress, leadership PACs can receive only 'hard money' contributions, which are limited in amounts and may not come directly from corporations or unions. Politician 527s use their soft money mainly to sponsor events that promote their own careers, help create a 'farm team' of successful state and local candidates, and spur partisan 'get-out-the-vote (GOTV)' efforts." *Id.* at 6.

191. Many donors to Member 527 organizations donate with the intent of influencing federal elections. For example, Peter Buttenwieser testified that in early 2002 he donated $50,000 to a 527 organization, Daschle Democrats, which ran broadcast ads in South Dakota supporting Senator Tom Daschle in response to the attacks that had been made against him. Mr. Buttenwieser stated: "I was willing to do this because I felt that the attacks were hurting Senator Daschle and Senator Tim Johnson's re-election campaign as well." Buttenwieser Decl. ¶ 20 [DEV 6-Tab 11].

192. Twenty-seven industries (including individuals, such as executives, associated with the industries) contributed $100,000 or more in just a single year to the top 25 politician 527 groups. These industries accounted for 52 percent of all contributions to the top 25 politician 527s. The top 10 industries contributing were: computers/Internet, securities & investments, lawyers/law firms, telephone utilities, real estate, TV/movies/music, air transport, tobacco, oil & gas, and building materials and equipment. Top corporate contributors included AT&T, SBC Communications, Philip Morris, Mortgage Insurance Companies of America, Clifford Law Offices, U.S. Tobacco and American Airlines. Overall, only 15 percent of total contributions to the top 25 politician 527's came in amounts of less than $5,000. Democratic party committees and unions also contributed over $100,000 to the top politician 527s. In fact, Democratic party committees (mainly the DNC) were the single largest contributor to politician 527s. Almost all of this money (81 percent) went to the Congressional Black Caucus 527. Public Citizen Congress Watch, Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 10-11 [DEV 29-Tab 3].

193. Section 527 organizations include political clubs. The CDP has contributed to Democratic clubs engaged solely in state-focused grassroots, voter registration, and get-out-the-vote activities. *See id.* ¶ 31. Likewise, most of the organizations participating in the CRP's Operation Bounty Program are Section 527 organizations. Erwin Aff. ¶ 9.

194. Interest groups are funded by persons and entities—whether corporations, unions, trade associations, advocacy groups, or the like—that (1) are intensely concerned about a particular issue or set of issues; (2) participate in the political process; and (3) associate with others of like mind.

195. "Most interest groups, in contrast [to political parties], seek to build relationships with officeholders as a way of improving access to the legislative process and lobbying their position. In political science, there is strong empirical support for the theory that interest groups allocate resources primarily to pursue the "access" strategy, meaning they give to candidates who are most likely to win office, which is usually the incumbents (see, for example, Herrnson 2000). Political parties, however, allocate resources for electoral strategies, meaning they contribute money to a party candidate who is in a potentially close election." La Raja Expert Report ¶ 14.

196. Interest groups are subject to less regulation than political parties. Unlike political parties, for example, special interest groups have rarely been required to make public disclosure of their receipts, donors, disbursements, and activities. *See* Beinecke[193] Decl. ¶¶ 3, 9 (prior to BCRA, National Resources Defense Council did not have to file disclosure forms with FEC or disclose to the public amounts donated by foundations); Gallagher Decl. ¶ 15 (prior to BCRA National Abortion and Reproductive Rights Action League ("NARAL") was not required to track whether it received donations from persons outside United States);

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[193] Frances Beinecke is the Executive Director of the NRDC. Beinecke Decl. ¶ 1.

Sease[194] Decl. ¶ 11 (Prior to BCRA, Sierra Club was not generally required to report identity of individual donors to any government entity); *see also* Keller Expert Report ¶ 42 (stating that the political activities of interest groups "are far less transparent than those of parties").

Interest Groups Compared to Political Parties

197. Interest groups engage in voter registration, voter identification, get- out-the-vote activities, and lobbying of officeholders, Dendahl Decl. ¶ 11, and witnesses predict that under BCRA such activities by interest groups will expand, *see* Bennett Decl. ¶ 11; Benson Decl. ¶ 12; Cross Exam. of Green at 158- 59.

198. Interest groups have increased their grassroots, direct mail, telephone bank, and door-to-door mobilization efforts and they increasingly distribute absentee ballots and provide supporters with transportation to the polls. *See* Peschong Decl. ¶¶ 13-14; Cross Exam. of Green at 21-22.

199. During the closing weeks of the 2000 campaign the NAACP National Voter Fund registered over 200,000 people, put 80 staff in the field, contacted 40,000 people in each target city, promoted a get-out-the-vote hotline, ran three newspaper print ads on issues, made several separate direct mailings, operated telephone banks, and provided grants to affiliated organizations. *See* Cross Exam. of Green at 15-20, Exhibit 3; Cross Exam. of McCain at 70-72. The NAACP reports that the program turned out a million additional black voters and increased turnout (over 1996 numbers) among targeted groups by 22 percent in New York, 50 percent in Florida and 140 percent in Missouri. *See* Cross Exam. of Green Exhibit 3. The NAACP's effort, which cost approximately $10 million, was funded in large part by a single

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[194] Deborah Sease is the Legislative Director of the Sierra Club. Sease Decl. ¶ 1.

$7 million donation by an anonymous individual. *See id.* at 20, Exhibit 3; Cross Exam. of McCain at 73-74.

200. NARAL's Executive Vice President, in 2000 NARAL spent $7.5 million and mobilized 2.1 million pro-choice voters. The group also made 3.4 million phone calls and mailed 4.6 million pieces of election mail. *See* Gallagher Decl. ¶ 24.

The Record Contains No Evidence of Quid Pro Quo Corruption

201. The record does not include any evidence that nonfederal donations to political parties have resulted in "actual" quid pro quo corruption, such as vote buying.

202. There is no evidence presented in the record that any Member of Congress has ever changed his or her vote on any legislation in exchange for a donation of nonfederal funds to his or her political party. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-3 (conceding lack of evidence); McCain Dep. at 171-74 (unable to identify any federal officeholder in quid pro quo corruption); Snowe Dep. at 15-16 (same); Jeffords Dep. at 106-07 (same); Meehan Dep. at 181-83 (same); Shays Dep. at 171 (same); *see also* 148 Cong. Rec. S2099 (daily ed. March 20, 2002) (statement of Sen. Dodd) ("I have never known of a particular Senator whom *[sic]* I thought cast a ballot because of a contribution."); 147 Cong. Rec. S2936 (daily ed. March 27, 2001) (statement of Senator Wellstone) ("I don't know of any individual wrongdoing by any Senator of either party.").

203. Testimony from other former Members of Congress describe, at best, their personal conjecture regarding the impact of soft money donations on the voting practices of their present and former colleagues. *See* Simpson Decl. ¶ 10 ("Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does

not alter the way one thinks about—and quite possibly votes on—an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation."). Senator Simon testifies that

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.

Simon Decl. ¶¶ 13-14 [DEV 9-Tab 37]; *see also Colorado II*, 533 U.S. 431, 451 n.12 (2001); Feingold Dep. at 62 [JDT Vol. 6] (testifying that in the fall of 1996 a senior Senator suggested to Senator Feingold that he support the Federal Express amendment because "they just gave us $100,000").

204. To the extent that there is any statistical evidence in the record which would support the conclusion that nonfederal donations to political parties or their committees has resulted in actual quid pro quo corruption of federal candidates or officeholders, it has been so seriously called into question that it is of no probative value.

205. Defense expert Green testified that there are no statistically valid studies showing a correlation between political donations (either federal or nonfederal) and legislative voting behavior. *See* Cross Exam. of Green at 58-61. Indeed, Green acknowledged that "[s]ome studies have even found a negative correlation." *Id.* at 54-55; *see also* Cross Exam. of Sorauf at 132 ("political scientists lack the means to observe . . . such things"; Cross Exam. of Bok at 18-21, 35-36 (some existing studies erroneously assume "that because money goes to people who vote a particular way, the money must have caused the vote"). Moreover, Green opines in his expert report that "the literature on the relationship between roll call votes and money is murky because the problem is an extremely difficult one to solve, statistically." Cross Exam. of Green at 67-68. Green further explained in his expert report that the "[c]orrelations between contributions and legislative behavior cannot disentangle whether contributions reward fealty, create it, or merely affect ideological affinity between legislators and their financial backers." Green Expert Report at 24. But Green does note that corruption, whether quid pro quo or otherwise, "redound[s] to the personal benefit of the candidate seeking to win election." *Id.* at 20.

206. To the extent that there is any statistical evidence presented in support of the conclusion that nonfederal donations influence other legislative actions such as committee voting, offering amendments, or filibustering, it is so undermined by challenges to its validity that it has no probative value. *See* Cross Exam. of Green at 55, 68-72, 95 (noting that one study that attempts to find such evidence fails

to take lobbying and other activities into account); Cross Exam. of Primo at 136-38, 142-43 (existing study's findings are mathematically unsupported); Snyder Rebuttal Report at 7-9 (existing study critically flawed). Defendants' expert Mann acknowledges that "[t]here is little statistical evidence that campaign contributions to members of Congress directly affect their roll call decisions: Party, ideology, constituency, mass public opinion and the president correlate much more with voting behavior in Congress than do PAC contributions." Mann Expert Report at 32[DEV 1-Tab 1]; Milkis Expert Report ¶ 41 (political parties reduce the risk of quid pro quo corruption by providing a "protective layer of decision makers between candidates and donors"). However, he notes that "[w]hen these variables are less significant, there is evidence that interest group contributions, particularly to junior members of Congress, have influenced roll call votes - for example, on financial services regulation." *Id.* at 32-33 (citing Thomas Stratmann, Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation. Paper (prepared for delivery at the 2002 Annual Meeting of the American Political Science Association, Boston, 29 August-1 September), *available at* http://apsa proceedings.cup.org/Site/papers/022/022023 StratmannT.pdf. 2002.

While Some Federal Candidates Are Aware of the Identities of Party Contributors, Others Are Not

207. Some federal candidates and officeholders are unaware of who donates money to either their campaigns, the parties, or both. *See e.g.*, Feingold Dep. at 115-16 ("Q: How generally are . . . Senators made aware of, if at all, the amounts and identities of soft money donors to the national committees? A: I don't know exactly how that's done or how much it's done."); Snowe Dep. at 223-24 (unaware of nonfederal donors to the RNC); Jeffords Dep. at 94-97 (generally unaware of nonfederal donors to RNC and DNC); Meehan Dep. at 179 (aware of few nonfederal donors to national party committees, and only because "from time to time I read who they are in the newspaper"); *see also, e.g.*, Rudman Dep. at 76 (unaware); Wirth Dep. at 66-67 (unaware); Hickmott Dep. at 66-68 (noting that as Deputy Chief of Staff to former Senator Wirth he was unaware who donated nonfederal funds to national party committees).

208. Others, however, not only acknowledged their own awareness but their belief that other federal officeholders and candidates are typically aware of who donates to their campaigns and to their parties. Indeed, one Member of Congress suggested that he did not know the identity of contributors to his party because he made a conscious effort to remain unaware. Bumpers Decl. ¶¶ 18, 20 (explaining that officeholders of both parties are aware of contributors' identities, and that he had "heard that some Members even keep lists of big donors in their offices" and that "you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party. If someone in Arkansas gave $50,000 to the DNC, for example, I would certainly know that"); Senator Rudman Decl. ¶ 6, Rudman Dep. at 75-78 (explaining that while he did not know the identity of contributors who donated "either hard or soft money" to the RNC, that the RNC "probably" provided him with that information and that "if they came to the office, the [administrative assistant] took them and probably read them." Rudman also explains that sitting Members of Congress are the ones raising nonfederal and federal party donations, and that the party committees decide which donors should contact which members); Congressman Shays, 148 Cong Rec. H352 (2002) (recognizing that "it's the candidates themselves and their surrogates who solicit soft money. The candidates know who makes these huge contributions and what these donors expect"); Randlett Decl. ¶ 10 ("Information about what soft money donors have given travels among the Members in different ways. Obviously the Member who solicited the

money knows. Members also know who is involved with the various major donor events which they attend, such as retreats, meetings and conference calls. And there is communication among Members about who has made soft money donations and at what level they have given, and this is widely known and understood by the Members and their staff."); Wirth Decl. Exhibit A ¶ 17 ("[C] andidates were generally aware of the sources of the funds that enabled the party committee to support their campaigns."); Senator Simpson Decl. ¶ 5 (explaining that "[p]arty leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the person behind the donation . . . . Even if some members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what."); Senator Boren Decl. ¶ 6 (testifying that "[e]ach Senator knows who the biggest donors to the party are" because "[d]onors often prefer to hand their [nonfederal money contribution] checks to the Senator personally, or their lobbyist informs the Senator that a large donation was just made."); McCain Decl. ¶ 6 ("Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money," and "[d] onors or their lobbyists often inform a particular Senator that they have made a large donation."); Vogel Decl. ¶¶ 25-28 (explaining that the parties distribute lists of potential donors to incumbents so that they can solicit donations); McGahn Decl. ¶¶ 21, 34-37 (same); Jordan Decl. ¶¶ 20, 25-28 (same); Wolfson Decl. ¶¶ 21, 28-31 (same); Jordan Decl. ¶¶ 52, 58; Wolfson Decl. ¶ 49; Josefiak Dep. at 117-18; Andrews[195] Decl. ¶ 14; Letter from RNC Chairman

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[195] Mr. Wright Andrews is an attorney and lobbyist at the Washington, D.C. firm of Butera & Andrews, specializing in government relations and

Jim Nicholson to Donald Fisher, August 18, 1998, (copies to House Speaker Newt Gingrich, House Majority Leader Dick Armey and Congressman John Linder (stating "I appreciate your interest in helping us hold onto our majority in the House . . . . I can tell you every single dollar of your contribution will go directly into *Operation Breakout* . . . . If you will make your check out (which can be personal or corporate) to the Republican National Committee and annotate it for *Operation Breakout* I will personally show a copy of it to Newt, Dick Armey and John Linder. Please feel free to accompany it with a transmittal letter containing any other message that you choose."); Senator Feingold Dep. at 115 (explaining that while he does not know how Senators are made aware of the identity of donors of nonfederal money to national parties, it is because he "made a real effort to be far away from that part of the process so [he is] not privy to or aware of exactly how that's done and to what extent it's done."); Congressman Meehan Dep. at 178-79 (explaining that he was unaware of the Democratic National Committee's "tallying" process, by which the amount of money the DNC spends on a particular candidate is related to the amount of nonfederal money that candidate raised for the DNC, however, that he was "probably one of the last people that they would let know about the tallying process"). One

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federal legislative representations. He has been an active lobbyist before Congress since 1975. Prior to that time, he served as Chief Legislative Assistant to then United States Senator Sam Nunn. Prior to forming Butera & Andrews, he worked in the government relations practice at the Washington office of the law firm of Sutherland, Asbill & Brennan. During his career, he has represented clients from throughout the nation and abroad, and they have included major corporations, trade associations, coalitions, and state governmental entities. He has worked with clients on a broad array of issues including environmental matters, federal taxation, banking, financial services, housing, and many others. He has served two terms as President of the American League of Lobbyists, and Washingtonian magazine named him as one of "Washington's Top 50 Lobbyists." Andrews Decl. ¶ 1 [DEV 6-Tab 1].

lobbyist, and former DNC official, observed that [W]hen one of my clients is going to make a donation to a federal candidate or party, hard or soft money, I advise them on the manner in which they should do that. I tell them not to just send the check to the party committee, for example, to the young staff member who is collecting the checks. Instead I tell my clients that they should personally give the money to a Member of Congress who then can give the money to the Chair of the party committee, who will in turn make sure that the check reaches the young staff member. That way the donor, with one check, gets "chits" with multiple Members of Congress.

Hickmott Decl. ¶ 9.

There is No Probative Evidence That National Parties Use Nonfederal Donations to Induce Federal Officeholders to Support or Oppose Legislation

209. There is no probative evidence that national parties have attempted, through the use of nonfederal donations, to get federal officeholders to change their position on legislation. Senator Rudman testifies that the RNC never asked him to take a particular position because a donor had contributed soft money to the party. Rudman Dep. at 77-82. Senator McCain testifies that "there are many times where the Republican National Committee tried to change my votes and other votes of other Republicans ... [T]he Republican National Committee constantly weighs in on legislation before the Congress of the United States," McCain Dep. at 171-72, but he also states that he does not "know [if it was] in exchange for donations or not").

210. There is no probative evidence in the record which suggests that national party committees support or withhold support from federal officeholders based on their voting records. *See, e.g.,* Vosdingh Dep. at 89 (FEC unaware of any national party committee using nonfederal funds to induce

federal officeholder to support or oppose specific legislation); Mann Cross Exam. at 113-15 ("I would be shocked if [the RNC] ever did such a thing .... [T] he point is to win the margin seat, to control the majority for the party, not to weaken a potentially vulnerable candidate .... It would be self-defeating. That isn't how it works.").

The Relationship Between Access and Donations

211. The record contains substantial probative evidence that donors of both federal and nonfederal donations to parties receive greater access, both in the amount of time they spend with federal officeholders and in the priority with which their interests are accorded in comparison to nondonors. *See* Bumpers Decl. ¶ 14; McCain Decl. ¶ 6; Boren Decl. ¶ 9; Senator Glenn (144 Cong. Rec. S1048 (1998); Shays Decl. ¶ 9 (the overall message of the statements of these current and former federal officeholders is that the expectation of the donor is that he or she has access when needed by virtue of his contribution, and that donors often give soft money in response to an invitation for an event that will allow them face-to-face access with a federal officeholder); *see also* Senator Simon Decl. ¶ 16 (stating that he was more likely to first return the telephone call of a donor to his campaign than someone who had not donated, and that increased access for those who give large contributions to the party is not fair to those who cannot afford to give contributions at all).

The RNC

212. The RNC's Finance Director Beverly Shea testifies that the RNC does not arrange meetings with government officials for any of its donors—federal or nonfederal—and whenever a donor attempts to condition a donation on obtaining such a meeting, the RNC rejects the donation. *See* B. Shea Decl. ¶ 44. Ms. Shea maintains that the RNC Finance Division, "[a]s a matter of policy," passes along requests

from donors for meetings with a federal officeholder to that officeholder's scheduling staff "without inquiring into the purpose of the proposed meeting"; to "neither to advocate a meeting nor ascertain whether a meeting has been arranged"; to not provide to the officeholder's scheduler the amount of the money that donor has contributed to the party; and to reject any donation that is conditioned on obtaining a meeting with an officeholder. *Id.* at 44, 46. The record, however, includes examples of documents provided by a national party which suggest a link between contributions to the party and the occurrence of meetings with party leadership. *See e.g.*, ODP0025-02456 to 57 [DEV 70-Tab 48] (RNC Chair asking Senate Majority Leader Dole to meet with the "loyal and generous" CEO of Pfizer); RNC0044465 [DEV 93] (RNC employee asking to establish a contact in Senator Dole's office for a "generous" RNC contributor); ODP0030-03512 to 13 [DEV 71-Tab 48] (notes of RNC Chair Jim Nicholson stating he will take up a donor's issue with Senator Trent Lott).

213. Based upon a review of the RNC's donor files, the RNC's Finance Director, Beverly Shea, testifies that during each two-year election cycle the RNC receives no more than 15 requests—most from contributors of *federal* funds—for meetings with Members of the Congress. *See* B. Shea Decl. ¶ 45.

214. Federal candidates and officeholders appear at events held for donors of federal funds as well as for donors of nonfederal funds. *See id.* at 22; *see also* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4-5 (conceding that both federal and nonfederal donors attend political party fundraisers and that all six major national political party committees' fundraisers are open to both types of donors).

Statistical Evidence Regarding Donations and Access

215. No valid statistical evidence supports the conclusion that nonfederal donations secure any different access to

federal candidates and officeholders. Experts for the plaintiffs and for the defendants agree that there exists no valid study linking types of donations and "access" or "legislative effort." Cross Exam. of Defense Expert Green at 55, 69-72 (existing studies fail to control for effect of lobbying expenditures and are not "statistically sound"); *id.* at 95 (studies make no effort to "track access specifically"); Krasno & Sorauf Expert Report at 5 ("[T]he absence of systematic data on access . . . prevents political scientists from searching for relationships between access and policy-makers' behavior."); Primo Expert Report at 8-9 (noting only "scant evidence in the political science literature that money secures access" and stating that existing literature is statistically flawed); *see also RNC v. FEC*, Civ. No. 98-CV-1207 (D.D.C.) (Herrnson Dep. at 300 (testifying on behalf of FEC and stating that existing studies on "access" are "kind of weak and wishy washy")).

Federal Officeholders Are Not More Likely to Meet With Nonfederal Donors Than Federal Donors

216. The defendants have submitted no probative evidence that federal officeholders are more likely to meet with nonfederal donors than with federal donors. In fact, certain legislators testifying in this case stated that they personally do not provide special access to individuals or corporations that provide large contributions to parties based upon whether the donation was federal or nonfederal. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4 (conceding lack of evidence); *see also* Feingold Dep. at 116 ("I cannot imagine a situation where . . . I would meet with somebody because they gave soft money."); Snowe Dep. at 210-11 (stating she has never given preferential access to any donor, federal or nonfederal, and that "[e]verybody has access to my office to the extent that I have time available"); Jeffords Dep. at 96-97 (stating person's status as a donor to national party committee does not "affect [his] decisions as to who [he] meet[s] with or give[s] access to"); Meehan Dep. at 180

(stating he provides no preferential access to nonfederal donors); Cross Exam. of Shays at 20-21 (acknowledging that, like most congressman, he "pretty much [has] an open door policy to meet people who want to talk to [him] about important legislative issues").

Lobbyists, Former Members of Congress, Business Leaders, and Donors Believe that Soft Money Donations to Parties Increase Access to Officeholders

217. Lobbyist Robert Rozen testifies:

> I know of organizations who believe that to be treated seriously in Washington, and by that I mean to be a player and to have access, you need to give soft money. As a result, many organizations do give soft money. While some soft money is given for ideological purposes, companies and trade associations working on public policy for the most part give to pursue their economic interests. In some cases, that might limit their contributions to one political party. More often, they give to both. They give soft money because they believe that's what helps establish better contacts with Members of Congress and gets doors opened when they want to meet with Members.

Rozen Decl. ¶ 10 [DEV 8-Tab 33]; *see also id.* ¶ 14.

218. Lobbyist Daniel Murray's testimony in a prior case, which has been incorporated into the records of this case, states that "contribution of soft money . . . has proven to provide excellent access to federal officials and to candidates for federal elective office. Since the amount of soft money that an individual, corporation or other entity may contribute has no limit, soft money has become the favored method of supplying political support . . . . [S]oft money begets both access to law-makers and membership in groups which provide ever greater access and opportunity to influence." Murray Aff. in *Mariani* ¶ 14 [DEV 79-Tab 59].

219. Senator Rudman explains: "By and large, the business world, including corporations and unions, gives money to political parties . . . [because] they believe that if they decline solicitations for such contributions, elected and appointed officials will ignore their views or, worse, that competing business interests who do make large contributions to the party in question will have an advantage in influencing legislation or other government decisions. The same is true in the preponderance of cases where wealthy individuals give $50,000, $100,000, $250,000, or even more to political parties in soft money donations." Rudman Decl. ¶ 5 [DEV 8-Tab 34]; *see also id.* ¶ 6 (stating that sitting members of Congress raise money from these entities knowing that they contribute large sums to the parties in order to achieve such access). Senator Rudman also states that

> [s]pecial interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party—to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: 'We gave money so you should do this to help us.' No one needs to say it—it is perfectly understood by all participants in every such meeting."

Id. ¶ 7.

220. Chairman Gerald Greenwald[196] testifies that some unions and corporations

> give large soft money contributions to political parties —sometimes to both political parties—because they are afraid to unilaterally disarm. They do not want their competitors alone to enjoy the benefits that come with large soft money donations: namely, access and influence in Washington. Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the opportunity to argue for their corporation's or union's position on a particular statute, regulation, or other governmental action. Labor and business leaders believe—based on experience and with good reason—that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties."

Greenwald Decl. ¶ 12 [DEV 6-Tab 16]; *see also* Greenwald Decl. ¶ 10 [DEV 6-Tab 16.

> "[L]abor and business leaders are regularly advised that—and their experience directly confirms that—organizations that make large soft money donations to political parties in fact do get preferred access to government officials. That access runs the gamut from attendance at events where they have opportunities to present points of view informally to lawmakers to direct, private meetings in an official's office to discuss pending legislation or a government regulation that affects the company or union.").

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[196] Mr. Greenwald is currently Chairman Emeritus of United Airlines, the largest employee majority-owned company in the United States. From 1994 through his retirement in 2000, he served as the Chairman and CEO of United. Prior to that, he was vice chairman at Chrysler Corporation and worked at Ford Motor Company. Greenwald Decl. ¶ 2 [DEV 6-Tab 16]

221. Individual donor Peter Buttenwieser testifies:

> Events, meetings and briefings held for soft money donors provide opportunities for the donors to hear speeches and engage in policy discussions with federal office holders. There is also a certain amount of politicking and lobbying at these events. This is true particularly in the side discussions, in which donors can approach office holders and discuss their issues.

Buttenwieser Decl. ¶ 25 [DEV 6-Tab 11]. Arnold Hiatt testifies that

> [A]s a result of my $500,000 soft money donation to the DNC, I was offered the chance to attend events with the President, including events at the White House, a number of times. I was offered special access as a result of the contributions I had made, though I generally never took advantage of that access. One event that I did attend was a dinner at the Mayflower Hotel in Washington, D.C. in approximately March 1997 with President Clinton and Vice- President Gore. The dinner was for the largest donors to the DNC, about thirty people. I did not plan on attending but I went because several people urged me to use the occasion to speak in favor of campaign finance reform. I used the opportunity to talk to the President about how the campaign finance system in this country had become a crisis, and argued that the crisis provided an opportunity for the President to provide some leadership. I don't think that we got the leadership I was seeking on the campaign finance issue, but I did get the chance to make a personal pitch to the President as a result of my donation.

Hiatt Decl. ¶ 9[DEV 6-Tab 18]. Hiatt testifies that others in attendance also shared their views on policy matters of importance to them as the event was advertised as an opportunity to "give advice to the president." Hiatt Dep. at

119-21 [JDT Vol. 10]; *see also* Hassenfeld Decl. ¶ 12-13 [DEV 6-Tab 17] ("[W]hen given the opportunity, some donors try to pigeonhole or corner Members, in a less than diplomatic way, to discuss their issues at these events."); Geschke Decl. ¶ 5 [DEV 6-Tab 14] (testifying that in connection with $50,000 in donations made to the DNC he and his wife attended a dinner of 10 to 12 people with President Clinton "last[ing] two or three hours, and consist[ing] primarily of a conversation about issues of importance to the nation and the President's program").

222. Evidence shows that party leaders have in some instances facilitated direct communications between soft money donors and officeholders on certain policy matters. A handwritten note dated October 27, 1995, from RNC Chairman Haley Barbour asks Senate Majority Leader Bob Dole to meet with the CEO of Pfizer, a member of the RNC's "Team 100" soft money donor group, to discuss an extension of the lucrative Section 936 tax credit:

> Dear Bob
>
> Bill Steere, CEO of Pfizer, has asked to see you on Wed. 11/1. He is extremely loyal and generous. He also is not longwinded. He'll tend to his business and not eat up extra time. They have proposed a [Internal Revenue Code §] 936 solution that [Republican Senator William] Roth and [Republican Congressman Bill] Archer are considering. I'm sure that is the issue. I'd appreciate it if you'd see Bill. [signed] Haley.

ODP0025-02456 to 57 [DEV 70-Tab 48]; *see also* July 10, 1996, letter from John Palmer to [redacted addressee] (reminding addressee that Palmer had asked him to join the RNC's Team 100, and noting that RNC Chair Barbour escorted new Team 100 member and Energy CEO Lupberger on four appointments that were "very significant" in legislation affecting companies like his and made him "a hero in his industry"); ODP0023-02043 [DEV 70-Tab 48]; RNC0240565-RNC0240566 [DEV 97], Sept. 28 [no year] (discussing an upcoming meeting requested by Bristol-Myers Squibb, *in connection with its consideration of joining the RNC's "Season Pass" major donor program;* scheduled attendees included representatives of major pharmaceutical companies and "Active Team 100 members" Bristol-Myers Squibb, Glaxo Wellcome, and Pfizer; the memo stated: "This group is particularly interested in the White House's proposal to add a prescription drug benefit to the Medicare program. They vehemently oppose it and are helping to fund a million-dollar campaign that began in July and features an older woman named Flo, who declares, 'I don't want bureaucrats in my medicine cabinet.'" The memorandum includes as a "Key Talking Point" the directive to "[l]et them know how crucial it is we have their financial support this election cycle"); *see also* Vogel Decl. Tab D at NRSC 066-000009 (draft letter from chairmen of the NRSC and NRCC Technology Committees inviting High Technology CEOs to the 1998 Republican House-Senate Dinner in response "to your industry's plea for a voice on the cutting edge issues so important to the future of high technology" and noting that the dinner is the "most prestigious annual event, and all Republican members of the U.S. House and Senate will be in attendance") [DEV 9-Tab 41]. Former Senator Wirth testifies:

> The Democratic national campaign committees sometimes asked me to meet with large donors to the party whom I had not met before. At the party's request, I met with the donors. I understood that the donors' goal in making the large contributions was often to occasion meeting(s) with me or other prominent Democratic congressional leaders to press their positions on legislative issues. On these occasions, sometimes all I knew about the donor would be the issue in which he was interested. Wirth Decl. Exhibit A ¶ 15 [DEV 9-Tab 43]; RNC0177216 [DEV 95] (note written on stationery of RNC's Team 100 Director, Haley Barbour, stating "they have pretty much decided to join T-100 . . . . They

want access to political players .... Their top issue is tort reform"); RNC0044465 [DEV 93] (Memorandum from Tim Barnes of the RNC to Royal Roth noting that someone from Moore Capital Management had been "trying to establish a contact in Senator Dole's office for Mr. Bacon. As you know, Mr. Bacon [of Moore Capital Management] has been very generous to the RNC. If there is any way you can assist, it would be greatly appreciated.").

Party Donation Programs Show That Increased Access Corresponds With Larger Donations

223. RNC documents show that the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors. ODP0018-00113 to 36 [DEV 69-Tab 48] (RNC Brochure "Donor Programs"); *see also* Resps. RNC to FEC's First RFA's, No. 62 [DEV 12-Tab 10]. The RNC offers its donors a range of different donor programs, for a range of different donor financial levels and interests. ODP0025-00375 to 79 [DEV 70-Tab 48] ("Summary of RNC's Donor Programs"). The RNC President's Club required a $1,000 annual contribution and offered at least one meeting per year, which included policy briefings and discussions led by Republican congressional and other leaders. *Id.* at ODP0025-00375. The Chairman's Advisory Board required a $5,000 annual hard money contribution and offered a "vigorous and informal exchange of views among Board members and party leaders .... Board meetings include three or four panel discussions, each chaired by a Congressional leader or senior policy adviser with particular expertise in the area under consideration." *Id.* at ODP0025-00375 to 77 [DEV 70-Tab 48]. According to the document, the Chairman's Advisory Board was established "to enlist the personal energy and professional expertise of Republican leaders in business and community affairs in developing policy and campaign strategies at the highest levels for the party." *Id.* The Republican Eagles required an annual contribution of $15,000 (individual) or $20,000 (with spouse or corporate). *Id.* at ODP0025-00377-0378, ODP0025-00429 [DEV 70-Tab 48]. The Eagles program offered a series of national and regional meetings with elected Republican congressional leaders, special access to Republican events, and other benefits. ODP0025-00428 [DEV 70-Tab 48]; ODP0030-02838-39 [DEV 71-Tab 48]. The Team 100 program required a donation of $100,000 upon joining and every fourth year thereafter, with $25,000 donations required in each of the three intervening years; ODP0014-00983, ODP0014-01457 to 58 [DEV 69-Tab 48]. The Team 100 program offered members national and regional meetings with the Republican Party leadership throughout the year, special events, membership in the Eagles program, the opportunity to participate in international trade missions, and other benefits. ODP0025-00377, ODP0025-00424, ODP0025-01705 to 13 [DEV 70-Tab 48]. The Season Ticket program required a donation of $250,000 upon joining and renewals thereafter. ODP0022-03045-46, ODP0023-02480, ODP0025-01569 [DEV 70-Tab 48]; ODP0030-03408 [DEV 71-Tab 48]. The "Season Ticket" or "Season Pass" program offered the greatest and most exclusive range of RNC donor program benefits, including one Team 100 membership, two Eagle memberships, special access to a range of Republican Party events, and the assistance of RNC support staff. ODP0025-01569 [DEV 70-Tab 48].

224. The NRSC offered several major donor programs. In 1995 and 1996, the NRSC offered a corporate donor program called "Group 21" or "G21," which required an annual donation of $100,000. ODP0037-02246, ODP0037-02275, ODP0037-02281 [DEV 71-Tab 48]. The "Group 21" program offered donors "small dinners with [then-NRSC Chairman] Senator D'Amato and other senators" and other "VIP benefits." ODP0037-02275 [DEV 71-Tab 48]. The Chairman's Foundation required an annual corporate (meaning

nonfederal funds) donation of $25,000. ODP0036-03603 [DEV 71-Tab 48]. The Senatorial Trust required an annual donation of $10,000 (personal) or $15,000 (corporate). ODP0036-03873-74 [DEV 71-Tab 48]. The Presidential Roundtable required an annual donation of $5,000 in personal or corporate funds. ODP0037-00315 [DEV 71-Tab 48]; *see also* ODP0036-03525 (letter signed by Senator McConnell to NRSC member asking him to renew his membership, noting that "[y]our non-federal contribution to the Chairman's Foundation will allow us to put our federal dollars directly towards the Senate campaigns, where they are desperately needed."); ODP0036-3562 (letter signed by Senator McConnell thanking addressee for joining the Chairman's Foundation); ODP0036-03595 (letter signed by Senator McConnell soliciting someone to join the Chairman's Foundation); ODP0037-01861-69 (NRSC brochure) [DEV 71-Tab 48]; Vogel Decl. ¶¶ 20 ("When donors have reached their federal contribution limit, the NRSC may encourage them to make additional donations to the NRSC's nonfederal account."), 51, Tabs A, J [DEV 9-Tab 41] (2002 Senatorial Trust materials).

225. The NRCC Congressional Forum "has been designed to give its members an intimate setting to develop stronger working relationships with the new Republican Congressional majority," ODP0042-01226 [DEV 71-Tab 48], and the "benefit that attracts most Forum members are the dinners with Committee Chairmen and the Republican members from each Committee." ODO0042-00028 [DEV 71-Tab 48]; *see also* CDP 0098 [DEV 106] (CDP brochure showing that those who contribute $100,000 to the CDP are classified by the party as "Trustees," and that the CDP "recognizes its extraordinary supporters with extraordinary opportunities," and provides "Trustees" with "[e]xclusive briefings, receptions and meetings with officials such as U.S. Senator Dianne Feinstein, U.S. Senator Barbara Boxer, Lt. Governor Gray Davis, Controller Kathleen Connell and other national figures.").

226. The evidence shows that contributors request to be seated with certain lawmakers at these donor events. For example, an RNC "Table Buyer's Guest List" sheet for "The Official 1995 Republican Inaugural Gala" filled out by "Am. Banker's Ass'n/Nation's Bank" contained a request to sit with certain Members of Congress and "anyone on House Banking Comm." ODP0023-3288 [DEV 70-Tab 48]; *see also* 2000 RNC Gala Leadership Levels, undated, RNC0022509 [DEV 92]; 2000 RNC Attendance Forms, April 20, 2000, RNC0236323 [DEV 97] (filled out by Microsoft attendee requesting to be seated with a particular Senator or "Leadership Commerce Comm. or Judiciary"); RNC 0032805-32806, RNC 0032799 [DEV 92] (request for Burger King Chairman and Team 100 member who donated $100,000 to be seated with Senator Fred Thompson and three other Senators, and document showing Senator Thompson was placed at the Burger King table). PhRMA's Judith Bello testified that the five Members of Congress that PhRMA listed as options for the "VIP" to be seated at its table at the 2000 Republican House-Senate dinner were all Members who had responsibility or oversight over issues of importance to the pharmaceutical industry. Bello Dep. at 82 [JDT Vol. 1].

227. The parties appear to have used such opportunities to promote their various donor clubs. For example, a letter from the chairmen of the Congressional Forum of the NRCC sent a letter to the Association of Trial Lawyers of America regarding an upcoming Congressional Forum Chairman's Dinner, in which they wrote: "[o]ur event will give you an excellent opportunity to meet with the Members of the [Judiciary Committee] to discuss issues relevant to your organization." ODP0042-00025 [DEV 71-Tab 48]; *see also* ODP0042-000654 (memorandum to all Congressional Forum members from the chairmen, informing them of an upcoming dinner featuring members of the Banking Committee, noting that "[o]ur event will give you an excellent opportunity to meet with members of the committee to discuss issues

relevant to your organization"); Fowler Decl. ¶ 8 [DEV 6-Tab 13] (testifying that "[p]arty and government officials participate in raising large contributions from interests that have matters pending before Executive agencies, the Congress, and other government agencies. Party officials, who are not themselves elected officials, offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities—White House and congressional meetings—to press their views on matters pending before the government."); RNC 0026901 [IER Tab 7] (note from the director of the RNC's Team 100 program thanking a donor for "facilitating Dow [Chemical]'s generous contribution to the Republican Party. It's a timely donation as we head into the final hours of the campaign. Give me a call . . . and we can figure out when is a good time to bring your Dow [Chemical] leadership into town to see [RNC Chairman] Haley [Barbour], [Senate Majority Leader Robert] Dole & [Speaker of the House] Newt [Gingrich]."); RNC 0194817 [IER Tab 1.E] (letter from RNC to a pharmaceutical company asking the company for its opinion and suggestions on the enclosed RNC "health care package" and a $250,000 donation to join the RNC's Season Pass program).

228. According to lobbyist Robert Rozen:

> [S]oft money contributions built around sporting events such as the Super Bowl or the Kentucky Derby, where you might spend a week with the Member, are even more useful. At the events that contributors are entitled to attend as a result of their contributions, some contributors will subtly or not-so-subtly discuss a legislative issue that they have an interest in. Contributors also use the events to establish relationships and then take advantage of the access by later calling the Member about a legislative issue or coming back and seeing the Member in his or her office. Obviously from the Member's perspective, it is hard to turn down a request for a meeting after you just spent a weekend with a contributor whose company just gave a large contribution to your political party.

Rozen Decl. ¶ 11 [DEV 8-Tab 33].

229. Some evidence shows the connection between large donations and access to elected officials as being even more direct. A call sheet prepared for then-DNC Chair Fowler instructs him to call a number of large givers ask for donations, and invite them for lunch with the President of the United States ("POTUS"). DNC 113-00137 to 38 [DEV 134-Tab 7] ("Ask her to give 80k more this year for lunch with Potus on October 27th.") ("Ask him to write another 100K to become a Managing Trustee for the campaign and come to lunch with POTUS on Oct. 27."). A CDP call sheet entitled "Child Call List, 5/16/96" includes the notation that a potential donor should be asked "if they might be able to do $25,000 for a small mtg with the President, you know it's steep, but want to include them in these types of meetings." CDP 00124 [IER Tab 11].

Donors Make Donations to National Parties With the Expectation of Building Relationships and Receiving Access

Lobbyists Believe That Donations Will Enable Donors to Establish Relationships With Officeholders

230. Lobbyist Robert Hickmott testifies that he advises his clients to make contributions in order to "establish relationships. Having those relationships in many ways then helps us get meetings and continue that relationship." Hickmott Dep. at 50 [JDT Vol. 10]. Hickmott testifies that when Senator Robb was chairman of the DSCC he would go to the DSCC offices where he would "accept checks from individuals or organizations who wanted to give money to the DSCC and they wanted face time with Chairman Chuck Robb." *Id.* at 94-95. Donors would "use this as an opportunity not only to make a contribution to the DSCC, but also to convey to Senator Robb what their group or individual

position was on an issue." *Id.* at 95; *see also* Hickmott Decl. Exhibit A. ¶ 46 (stating that "[t]here is a very rare strata of contributors who contribute large amounts to the DSCC because they actually believe in Democratic politics . . . . The majority of those who contribute to political parties do so for business reasons, to gain access to influential Members of Congress and to get to know new Members.").

231. As Wright Andrews explains:

> Sophisticated political donors—particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups—are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. Sophisticated donors do not show up one day with a contribution, hoping for a favorable vote the next day. Instead, they build longer term relationships. The donor seeks to convey to the member that he or she is a friend and a supporter who can be trusted to help the federal elected official when he or she is needed. Presumably, most federal elected officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.

Andrews Decl. ¶ 8 [DEV 6-Tab 1].

232. Some lobbyists believe that donations to parties are beneficial to their clients' business interests. *See* Rozen Decl. ¶ 10 ("[L]arge political contributions are worthwhile because of the potential benefit to the company's bottom line.") [DEV 8-Tab 33].

Current and Former Federal Officeholders Acknowledge That Donors Expect to Establish Relationships With and Obtain Access to Federal Officeholders

233. Some former and current federal officeholders acknowledge that donors expect to establish relationships with officeholders in return for their nonfederal donations to the national parties. Senator Bumpers Decl. ¶ 13 (testifying that people that give money to party committees feel that they are "ingratiating themselves" with the federal officeholder who solicits the donation); Wirth Decl. Exhibit A. ¶ 5 (stating that those donors who made contributions to the state party "almost always did so because they expected that the contributions would support my campaign," and that, generally, "they expected that [the Senator] would remember their contributions"); Brock Decl. ¶ 5(a) (testifying that "contributors . . . feel they have a 'call' on . . . officials" when they contribute soft money); Senator Boren Decl. ¶ 8 (testifying that he knows from "first hand experience and from [his] interactions with other Senators that they feel beholden to large donors."); Senator Simpson testifies that groups used "to give to someone who was for your philosophy," but now "[i]t's giving so you can get access and kiss butt and do all the rest of the things so you won't get knocked off the perch." Simpson Dep. at 11-12 [JDT Vol. 30].

Donors Hope to Establish Relationships or Receive Access With Their Donations

234. Steven Kirsch testifies that:

> Policy discussion with federal officials occurs at major donor events sponsored by political parties. I have attended many such events. They typically involve speeches, question and answer sessions, and group policy discussions, but there is also time to talk to Members individually about substantive issues. For example, at a recent event. I was able to speak with a Senator representing a state other than California and we had a short conversation about how our respective staffers were working together on a particular issue.

Kirsch Decl. ¶ 12 [DEV 7-23]; *see also* Hiatt Decl. ¶ 11 (stating that "[l] arge soft money donors give in order to obtain access and influence."). In fact, corporate donors view nonfederal donations as the "cost of doing business." Hassenfeld Decl. ¶ 16 (testifying that nonfederal donations are viewed by the "corporate world" as "a good investment relative to the potential economic benefit to their business."); Hassenfeld Decl. ¶¶ 23-24 ("I think companies in some industries have reason to believe that because their activities are so closely linked with federal government actions, they must participate in the soft money system in order to succeed.") [DEV 6-Tab 17]; Randlett Decl. ¶ 5 (stating that "many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal officeholders who can protect or advance specific interests through policy action or inaction. Some soft money donors give $250,000, $500,000, or more, year after year, in order to achieve these goals. For most institutional donors, if you're going to put that much money in, you need to see a return, just as though you were investing in a corporation or some other economic venture."); Randlett Decl. ¶ 14 (explaining that "many members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game. They are caught in an arms race that is accelerating, but that many feel they cannot afford to leave or speak out against."); Kirsch Decl. ¶ 14 (stating that "[major] donors perceive that they are getting a business benefit through their special access, and that it is a good investment for them.") [DEV 7-Tab 23].

235. Roger Tamraz, an American businessman involved in investment banking and international energy projects, made donations to the DNC during the 1996 election cycle. When asked during congressional hearings by Senator Levin whether one of the reasons he made the contributions was because he "believed it might get [him] access?," Mr. Tamraz

responded: "Senator, I'm going even farther. It's the only reason-to get access . . . . " Thompson Comm. Report at 2913 n.46 (quoting page 63 of Mr. Tamraz's testimony before the committee).

236. Donor Peter Buttenwieser, a large donor to Democratic party committees, testified that

> [t]here is no question that those who, like me, make large soft money donations receive special access to powerful federal office holders on the basis of the donations. I am close to a number of Senators, I see them on a very consistent basis, and I now regard the Majority Leader as a close friend. I understand that the unusual access I have correlates to the millions of dollars I have given to political party committees, and I do not delude myself into thinking otherwise. Not many people can give soft money on that scale, and it naturally limits the number of those with that level of access.

Buttenwieser Decl. ¶ 22.

237. An Eli Lilly and Company memorandum states that its 1995-96 political "contributions and the related activities we have participated in have been key to our increased role and ability to get our views heard by the right policy makers on a timely basis; in other words, a smart investment." Eli Lilly and Company Memorandum (Jan. 15, 1997), ODP0018-00481-86 [DEV 69-Tab 48].

238. Documents submitted indicate that a Fortune 100 company contributes nonfederal money to national party committees with the expectation that its contributions will cultivate or strengthen its "relationships" with particular Members of Congress. *See* internal Fortune 100 company memorandum titled "Senator Earnest Hollings/South Carolina Democratic Party" (June 29, 2000) [citation sealed] (requesting a "check for $10,000.00 on behalf of Senator Ernest 'Fritz' Hollings to the South Carolina Democratic Party," noting that "Senator Hollings has been a friend to [our

company] for many years and he has shown himself to be a thoughtful voice regarding issues in our industry," that "[h]e currently serves on the Commerce, Science and Transportation Committee, the Budget Committee and the Appropriations Committee," and concluding "I feel this would be a great opportunity to strengthen our relationship with Senator Hollings."). An internal Fortune 100 company memorandum entitled "Justification for donation to [DSCC]" (October 25, 2000) [citation sealed], stated

> I am requesting a check for $50,000.00 to the Democratic Senatorial Campaign Committee (DSCC). Senator Robert Torricelli is the chairman for the DSCC and in a recent conversation with the Senator, he requested the above amount from [our company]. Senator Torricelli has been a friend to [our company] for many years and he has shown himself to be a thoughtful voice regarding issues in our industry. He currently serves on the Judiciary, Foreign Relations & Governmental Affairs and Rules and Administration Committees. I feel this would be a great opportunity to strengthen our relationship with Senator Torricelli and the DSCC.

One legislative advocate from this company described the benefits reaped from contributing $100,000 to the NRCC: "I think we established some goodwill with [Congressman] Tauzin, both by [our company] contributing at the $100,000 level to the NRCC dinner he chaired last month and by my participation in the NRCC Finance Committee for the dinner. Tauzin understood that [our company] participated at the same level as [others in our industry] did, and he expressed genuine interest in trying to begin to reach out to the competitive industry. In sum, I think the event was a real positive for [our company]." Internal Fortune 100 company memorandum entitled "NRCC Leadership Winner 2000," dated April 4, 2000, [citation sealed].

Effectiveness of Giving Nonfederal Donations as Opposed to Federal Donations

239. Some donors give nonfederal money, rather than federal money to parties or direct contributions to a candidate's campaign, because they believe nonfederal money is more effective than several small contributions in obtaining access. *See, e.g.*, Hickmott Decl. Exhibit A. ¶ 47 (explaining that "[i]f you want to get to know Members of Congress, or new Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at the various events than it would be to write fifteen $1,000 checks to fifteen different Senators, or Senators and candidates."); Wright Andrews, a lobbyist, stated that

> a properly channeled $100,000 corporate soft money donation to the national Republican or Democratic congressional campaign committees can get the corporate donor more benefit than several smaller hard dollar contributions by that corporation's PAC. Although the donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly the senior officials, are likely to remember the donation and to recognize that such big donors' interests merit careful consideration.

Andrews Decl. ¶ 14; Randlett Decl. ¶ 13 [DEV 8-Tab 32] ("[Soft money donors] get a level of attention that a $1,000 hard money donor never will. Even someone who wrote 25 $1,000 hard money checks but no soft money is going to get much less attention and appreciation than someone who wrote one large soft money check."). Rozen, a lobbyist, stated that

> Donors to the national parties understand that if a federal officeholder is raising soft money—supposedly 'non-federal' money—they are raising it for federal uses, namely to help that Member or other federal candidates in their elections. Many donors giving $100,000, $200,000, even $1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed . . . . The bigger soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions.

Rozen Decl. ¶¶ 12-13 [DEV 8-Tab 33]; Geschke[197] Decl. ¶ 9 [DEV 6-Tab 14] ("Corporations and individuals can use soft money donations to get special access to federal office holders and at least the appearance of influence on issues that are important to them financially or politically. Hard money contributions do not provide the same opportunities for influence on federal policy as soft money donations do."); Fowler[198] Decl. ¶ 6 [DEV 6-Tab 13] ("Many contributors of large sums of money—both Republicans and Democrats—

gain access to party and governmental officials that they otherwise would not have. With this access, contributors are able to make their cases to people who make public policy and take official governmental action. Those who contribute small amounts of money do not have this advantage and thus are unable to influence government with the same effectiveness.").

240. In a memorandum to a high-level Fortune 100 company executive outlining a proposed $1.4 million nonfederal fund budget for FY1999, members of the Company's governmental affairs staff noted that

> With both houses of Congress and the White House hotly contested this cycle, the importance of soft money, and consequently the efforts by the parties to raise even more soft money, is greater than ever. On the Democratic side, [our company's] advocates have already fielded soft money calls from House Democratic Leader Gephardt, House Democratic Caucus Chairman Frost, Democratic Congressional Campaign Chairman Kennedy, and Democratic Senatorial Campaign Chairman Torricelli. Similar contacts to soft money have been made by Republican congressional leaders. In addition to the increased pressure from party and congressional leaders, it is clear that our direct competitors and potential competitors are weighing in with big soft money donations.

Memorandum from a Fortune 100 company's legislative advocate to a high-level executive, dated March 4, 1999, [citation sealed].

Donors Often Times Give to Both National Parties in Order to Receive Access to Members of Both Parties

241. Evidence presented shows that many "companies and associations that do give soft money typically contribute to both parties . . . because they want access to Members on

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[197] Mr. Charles Geschke is Chairman of the Board of Adobe Systems, Inc., which he co-founded in 1982. Geschke Decl. ¶ 1 [DEV 6-Tab 14]. Since 1994, Mr. Geschke estimates that he has donated over $150,000 in federal funds to federal political committees, and over $18,000 in nonfederal funds to national party committees. *Id.* ¶ 3.

[198] Mr. Donald Fowler from 1971 until 1980, he served as Chairman of the South Carolina Democratic Party and from January 1995 until January 1997 he served as Chairman of the Democratic National Committee. Fowler Decl. ¶ 2 [DEV 6-Tab 13].

both sides of the aisle." Rozen Decl. ¶ 7 [DEV 8-Tab 33]; *see also* Hiatt Decl. ¶ 12 [DEV 6-Tab 18] (testifying "[p]eople give soft money donations to both parties because they want to make sure they have access regardless of who's in the White House, filling the Senate seat, or representing the Congressional district."); RNC OH 0418778 [IER Tab 1.H] (an Ohio Republican Party document entitled "Why People Give," including the observation: "many people give to both sides so that they will have access to whoever is the winner").

242. An Eli Lilly and Company memorandum indicates the company was worried about a *Washington Post* article listing it as a significant donor to the Republican party. The memorandum discusses contributions being made at Democratic party events occurring in the near future. The memorandum concludes with: "Jay has talked to the White House and we can get back into this by giving $50-100,000 to the DNC—says they would be pleased with this." ODP0018-00463 [DEV 69-Tab 48]; *see also id.* at ODP0018-00461 (the *Washington Post* article), ODP0018-00462 (photocopy of part of the article with handwritten note stating "Dems are upset. Calls from employees about imbalance. White House says Dem we are in trouble").

243. CEO Randlett comments that "[a]s a donor with business goals, if you want to enhance your chances of getting your issues paid attention to and favorably reviewed by Members of Congress, bipartisanship is the right way to go. Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective." Randlett Decl. ¶ 11 [DEV 8-Tab 32]. He explains

> [I]f you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed. They'll get a message that basically asks: "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. First of all, it's hard to get attention for your issue if you're not giving. Then, once you've decided to play the money game, you have to worry about being imbalanced, especially if there's bipartisan control or influence in Washington, which there usually is. In fact, during the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. Referring to someone's financial activity in the political arena used to be clearly off limits, and now it's increasingly common.

Id. ¶ 12. *See also* Buttenwieser Decl ¶ 23 [DEV 6-Tab 11] ("I am aware that some soft money donors, such as some corporations, give substantial amounts to both major political parties. Based on my observations, they typically do this because they have a business agenda and they want to hedge their bets, to ensure they get access to office holders on the issues that are important to them. This occurs at the national and state levels."); Geschke Decl. ¶ 10 [DEV 6-Tab 14] ("In my view, donors who give large amounts of soft money to both major parties are probably hedging their bets in trying to get influence. They may feel that influence with one party is not sufficient to achieve their financial or policy goals, especially now that power in Congress is pretty evenly balanced.").

Lobbying and Donations of Nonfederal Money

244. According to some national party officials and former Members of Congress, lobbying is more effective in

obtaining access to legislators than donations to campaigns and parties.

245. According to the RNC Finance Director, lobbying is far more effective in securing "access" to federal officeholders than donating campaign funds. *See* B. Shea Decl. ¶ 45 ("It is obvious why major donors to the RNC do not regularly use their donations as a means to obtain 'access.' All or virtually all who have personal or organizational business with the federal government retain or employ professional lobbyists."); *see also* Primo Cross Exam. at 164.

246. As Former Senator Bumpers (who testified on behalf of the defendants in this case) has testified previously, lobbying expenditures are more likely to obtain nonincidental contact with a federal officeholder than are campaign donations. *See RNC v. FEC,* Civ. No. 98-CV-1207 (D.D.C.); Bumpers Dep. at 38-40.

247. Many entities and individuals who donate federal funds to political parties also spend considerable sums of money lobbying federal officeholders. Indeed, the amount of money spent by such organizations on lobbying is often geometrically larger than the amount they donate to political parties. *See* Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24 (admitting that top five corporate donors of nonfederal funds during 1995 and 1996 donated $9,009,155 to national party committees and same five corporations spent $27,107,688 on lobbying during 1996 along); *see id.* at 24-25 (admitting that top five corporate donors of nonfederal funds during 1997 and 1998 donated $7,774,020 to national party committees and same five corporations spent $42,000,000 on lobbying during that same period).

248. Some of the lobbyists who testified in depositions and on cross examination state that their corporate clients hire them in large part because of their contacts on Capitol Hill and because they have access to federal officeholders whether or not their clients have donated money to candidates, officeholders, or parties. *See* Hickmott Dep. at 46-47, 50-51; Cross-Exam. of Andrews at 19-20. However, the evidence clearly shows that some lobbyists believe that contributions help them gain access to lawmakers. Lobbyist Andrews states:

> The amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients infuse into the political system. Some lobbyists help raise large "soft money" donations and/or host many fundraising events for key legislators. Some simply represent a single client with very deep pockets and can easily reach into large corporate or union funds for "soft money" donations or other allowable expenditures that may influence legislative actions. Those who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly, the lobbyists with the most political clout.

Andrews Decl. ¶ 12 [DEV 6-Tab 1]. Andrews testifies that it has become a common practice for lobbyists to "host a number of fundraisers." He explains that "[w]hereas the political parties periodically organize 'gala' events in large ballrooms filled with hundreds of donors, lobbyists now often prefer attending smaller events hosted by other lobbyists, with only ten or fifteen people participating, all sitting at a dinner or breakfast table with the invited guest elected official. This type event allows lobbyists a better opportunity to build more personal relationships and to exchange views." *Id.* ¶ 16.

249. Some lobbyists maintain that "basic" or traditional lobbying activities are alone insufficient to be effective in many instances in lobbying endeavors. To have true political clout, the giving and raising of campaign money for

candidates and political parties is often critically important." Andrews Decl. ¶ 5 [DEV 6-Tab 1]. Lobbyist Daniel Murray testified that

> [a]long with each . . . legislative plan [a plan to "advance the client's legislative agenda"], and essential to achieving the client's goals, I develop a parallel political financial support plan. In other words, I advise my clients as to which federal office-holders (or candidates) they should contribute and in what amounts, in order to best use the resources they are able to allocate to such efforts to advance their legislative agenda. Such plans also would include soft money contributions to political parties and interest groups associated with political issues. Murray Aff. in *Mariani* ¶¶ 6-7 [DEV 79-Tab 58]; *see also* Meehan Dep. in *RNC* at 40-41 [DEV 66-Tab 4] ("[P]ower and influence in Washington is not just the amount of soft money an industry contributes to the political parties. I would say that also it's the amount of PAC money that they contribute to the political candidates, it's the amount of hard money they contribute, it's the amount of lobbying money that they expend in order to influence members of Congress.").

Public Perception of Corruption

250. The defendants have offered substantial evidence that the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of access to, and influence with, the officeholders of that party that the donor enjoys thereafter.

251. The principal evidence submitted by the defendants in support of their contention that the public perceives an appearance of corruption due to large nonfederal donations to parties is a research poll of 1,300 adult Americans conducted by two prominent pollsters: Mark Mellman[199] and Richard Wirthlin[200] ("Mellman and Wirthlin Report").

252. The survey was conducted over a period of five days (August 28, 2002, through September 1, 2002), and the pollsters made an average of 4.58 dialings per telephone number in the sample set in order to ensure that the sample was representative. *See* Mellman and Wirthlin Report at 22-23.

253. The study's contact rate was 38 percent, more than double the industry average of 15 percent. *See* Mellman and Wirthlin Report at 23.

254. The rate of refusal of the respondents who refused to be polled was within the normal range for a random telephone

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[199] Mark Mellman is "CEO of The Mellman Group, a polling and consulting firm . . . . Mellman has helped guide the campaigns of some fifteen U.S. Senators, over two dozen Members of Congress, and three Governors, as well as numerous state and local officials. In addition, Mellman works with a variety of public interest organizations ranging . . . and corporate clients . . . He has served as a consultant on politics to CBS News, a presidential debate analyst for PBS, a contributing analyst for The Hotline, National Journal's daily briefing on politics, and is currently on the faculty of The George Washington University's Graduate School of Political Management." Mellman and Wirthlin at 2 [DEV 2-Tab 5].

[200] Richard Wirthlin is "Chairman of the Board of Wirthlin Worldwide, a strategic opinion research firm he founded in 1969, which now is one of the top companies in its field. Wirthlin is perhaps best known as President Reagan's strategist and pollster . . . . *Id.* at 2-3. He is widely respected in the "field of social science research and one of this country's most respected political and business strategists." *Id.* Wirthlin "was chief strategist for two of the most sweeping presidential victories in the history of the United States. In 1981 he was acclaimed Adman of the Year by Advertising Age for his role in the 1980 campaign and in 2001 was one of four Republicans awarded American University's 'outstanding contribution to campaign consulting.' In the same year, he was designated 'Pollster of the Year' by the American Association of Political Consultants." *Id.* at 3. The *Washington Post* named Wirthlin "the prince of pollsters" and George Gallup, Jr. said Wirthlin is "one of the very best at our craft." *Id.*

survey conducted in the United States. *See* Mellman and Wirthlin Report at 23.

255. The pollsters took several steps to avoid bias. *See* Mellman and Wirthlin Report at 24. *See also* Wirthlin Cross Exam. at 40 (explaining that the pollsters took steps to avoid bias by randomly ordering the questions, "so that there is no sequence developed where one question may, if always asked in the same order, affect[] the second question.").

256. The statistical margin of sampling error, that is, the error due to sampling versus if the pollsters talked to every American in the United States, is 2.7 percentage points: the actual opinions of Americans will be within 2.7 percentage points of those reported in the study 95 percent of the time. *See* Mellman and Wirthlin Report at 22. All regions of the United States were represented in the study, based on 2001 Current Population Survey results. *Id.* at 24.

257. No evidence has been presented to show that the methodology used by Mellman and Wirthlin is improper or invalid. *See generally* Wirthlin Cross Exam. (demonstrating that while plaintiffs generally dispute the wording of the questions, they do not contest the validity of the sampling or methodology for conducting the poll).

258. The principal finding of the Mellman and Wirthlin Report relating to whether an appearance of corruption arises out of large contributions to political parties is that: "A significant majority of Americans believe that those who make large contributions to political parties have a major impact on the decisions made by federally elected officials." In addition, Mellman and Wirthlin find that many Americans believe that the "views of these big contributors sometimes carry more weight than do the views of constituents or the best interests of the country." Mellman and Wirthlin Report at 6.

259. The Mellman and Wirthlin Report established that 77 percent of Americans believe that big contributions to political parties have at least some impact on decisions made by the federal government. Fifty-five percent thought big contributions had a great deal of impact; 23 percent thought it had some impact. *Id.*

260. The Mellman and Wirthlin Report established that 71 percent of Americans "think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or even if it's not what they think is best for the country." *Id.* at 7.

261. According to the Mellman and Wirthlin Report, a "large majority (84%) think that members of Congress will be more likely to listen to those who give money to their political party in response to their solicitation for large donations." *Id.* at 8.

262. According to the Mellman and Wirthlin Report, "[o]ver two-thirds of Americans (68%) . . . think that big contributors to political parties sometimes block decisions by the federal government that could improve people's everyday lives." *Id.* at 8.

263. Further, the Mellman and Wirthlin Report found that "about four in five Americans think a Member of Congress would be likely to give special consideration to the opinion of an individual, issue group, corporation, or labor union who donated $50,000 or more to their political party (81%) or who paid for $50,000 or more worth of political ads on the radio or TV (80%). By contrast, only one in four Americans (24%) think that a member of Congress is likely to give the opinion of someone like them special consideration." *Id.* at 9.

264. The Mellman and Wirthlin Report did not measure the public's understanding of the campaign finance system, and did not ask if the respondents understood the difference between nonfederal and federal donations. *See* Cross Exam.

of Mellman at 31-35. Mellman testifies that the purpose of the poll was to measure the public's perceptions. *Id.* at 31.

265. The public does not understand the distinction between federal and nonfederal donations and is not aware of campaign finance regulations. *See* Ayres Expert Report ¶ 8(a).

266. The Mellman and Wirthlin Report did not show, nor is there any evidence to suggest, that a correlation exists in the public's mind between the amount of a donor's contribution to a party and the amount of access and influence the donors enjoys thereafter with officeholders, exists *independent* of the use to which the money is used by parties.

267. Moreover, there is no evidence, either in the Mellman and Wirthlin Report or elsewhere in the record, that the public would hold to the same conclusion if it believed that no portion of nonfederal donations could be either given to any federal candidate, or used by the parties to directly affect the election of any federal candidates.

268. Robert Shapiro, a professor at Columbia University, also analyzed public perception of soft money contributions to political parties, by reviewing all publicly available opinion survey data sources. *See* Shapiro Expert Report at 7-8. [DEV 2, Tab 6]. The survey data Shapiro examined was comprised mostly of telephone opinion polls. *Id.* at 8. Specifically, Shapiro focused on "public opinion data based on responses to surveys that were fielded since 1990" to determine the public's answers to several questions, including two questions which read: "To what degree has the public perceived corruption in politics connected to the influence of money and large campaign donations?" and "What have been the public's perceptions and opinions toward the substantial political donations in the form of soft money contributions to political parties?" *Id.* at 3, 8. According to Shapiro, poll results show that the "public has opposed large unregulated

soft money contributions to political parties [and] that the public has been troubled by large soft money donations." *Id.* at 13. In addition, Shapiro concluded that the poll data showed "that a substantial proportion of the public has perceived corruption in the political system, and that we have been losing ground." *Id.* at 11.

269. The defendants also submitted substantial, anecdotal evidence from former and current Members of Congress that their constituents believe that these large contributions to parties present an appearance of corruption. *See* Simpson Decl. ¶ 14 (testifying that "[b]oth during and after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations"); Senator Baucus, 144 S. Cong. Rec. S1041 (1998) (stating that "[p]eople tell me they think that Congress cares more about 'fat cat special interests in Washington' than the concerns of middle class families like theirs. Or they tell me they think the political system is corrupt."); Senator Feingold, 146 Cong Rec. S4262 (2000) (stating that "[t]he appearance of corruption. . . . We all know it's there. We hear it from our constituents regularly. We see it in the press, we hear about it on the news."); Letter from Representative Asa Hutchinson to RNC Chairman Nicholson dated July 9, 1997, ODP0014-00003-4 (declining to support Nicholson's proposed campaign finance legislation because Hutchinson had to balance Nicholson's concerns "with a concern of my constituents which is that their influence in politics is being diminished by the abuses of soft money . . . . If our party is unable to enact meaningful campaign-finance reform while we're in control of Congress, then I believe this failure to act will result in more cynicism and create a growing lack of confidence in our efforts."); Senator Feingold stated that "[t]he appearance of corruption is rampant in our system, and it touches every issue that comes before us," 147 Cong. Rec. S2446 (Mar. 19, 2001), but also acknowledged that soft

money being used for generic campaign activity is less likely to create an appearance of corruption, Feingold Dep. at 126-27; 147 Cong. Rec. S3248-49 (April 2, 2001) (Sen. Levin) ("[P]ermitting the appearance of corruption undermines the very foundation of our democracy—the trust of people in the system.").

270. The defendants have also submitted a substantial number of press reports which suggest that large donations present the appearance of corruption. *See, e.g.*, Jackie Koszczuk, *Soft Money Speaks Loudly on Capitol Hill This Season*, Cong. Q., June 27, 1998, at 1736; Jill Abramson, *Money Buys A Lot More Than Access*, N.Y. Times, Nov. 9, 1997, at 4; Jane Mayer, *Inside the Money Machine*, The New Yorker, Feb. 3, 1997, at 32; Don Van Atta, Jr. and Jane Fritsch, *$25,000 Buys Donors 'Best Access to Congress'*, N.Y. Times, Jan. 27, 1997. at A1; Dan Morgan and Juliet Eilperin, Campaign Gifts, Lobbying Built Enron's Power in Washington, Wash. Post, December 25, 2001, at A01; R.G. Ratcliffe and Alan Bernstein, Political Donors Have the Money, and Get the Time, Houston Chron., May 23, 1999, at 1; *see also* Rudman Decl. ¶ 11; Krasno and Sorauf Report at 19-20; Primo Rebuttal at ¶ 7 (stating that "[t]he news media reinforces this view [that money distorts the political process] by portraying the political process as being driven by campaign contributions . . . . "). Senator Rudman has also commented on the press's reporting that soft money donations create an appearance of corruption: "Almost every day, the press reports on important public issues that are being considered in Congress. Inevitably, the press draws a connection between an outcome and the amount that interested companies have given in soft money . . . . Even if a senator is supporting a position that helps an industry for reasons other than that the industry gave millions to his party, it does not appear that way in the public eye." Rudman Decl. ¶ 11.

271. Finally, the defendants have submitted no evidence that the public either believes, or perceives, that federal officeholders are motivated by anything other than the receipt of financial assistance for their own campaigns when they raise funds for their respective parties.

As to BCRA's restrictions on noncandidate campaign expenditures, I find that

Issue Advocacy in Modern Campaigns

272. The record convincingly demonstrates that the overwhelming majority of modern political advertisements do not use words of express advocacy,[201] whether they are financed by candidates, political parties, or other organizations. As a result of this development, Congress found that FECA, as construed by the courts to only limit independent expenditures containing express advocacy, as defined by *Buckley*, was no longer relevant to modern political advertisement. *See, e.g.*, 148 Cong. Rec. S2117 (2002) (Senator James Jeffords) ("The 'magic words' standard created by the Supreme Court in 1976 has been made useless by the political realities of modern political advertising. Even in candidate advertisements, what many would say are clearly advertisements made to convince a voter to support a particular

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[201] In *MCFL*, the Supreme Court held that the prohibition on corporations and labor unions using general treasury funds on expenditures in connection with a federal election was overbroad, narrowing the restriction to corporate and union spending on "express advocacy." *MCFL, 479 U.S. at 249* ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."). In *Buckley*, the Supreme Court provided examples of express advocacy: "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject." '*Buckley*, 424 at 44 n. 52. These examples have been referred to as the "magic words" because if they are invoked by an organization, they trigger FECA's limitations. *See e.g., FEC v. Christian Action Network*, 110 F.3d 1049, 1052-53 (4th Cir.1997) ("[T]he court declined to 'strictly limit' express advocacy to the 'magic words' of *Buckley's* footnote 52").

candidate, only 10 percent of the advertisements used the 'magic words.'").

> Federal candidate ads appeared nearly 236,000 times in the top 75 media markets in 1998, 430,000 times in 2000. In 1998, just 4 percent of these spots used verbs like 'vote for', 'elect', or 'defeat'; in 2000, just 5 percent did. Including slogans like 'Smith for Congress,' 10 percent of the candidate ads aired in 2000 would qualify as electioneering using the magic words test. The remaining 90 percent could have been categorized as issue advocacy had a party or group sponsored them.

Krasno & Sorauf Expert Report at 53-54 [DEV 1-Tab 2] (citing Jonathan Krasno & Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (PS: Political Science and Politics, No. 2:207-212), 2002).

273. The absence of "magic words" does not impede the ability of media consultants to create an electioneering message. "In fact, candidates rarely use the magic words in their own ads." Magleby Expert Report at 15 [DEV 4-Tab 8]. Former Senator Warren Rudman observed that "[m]any, if not most, campaign ads run by parties and by candidates themselves never use . . . 'magic words.' It is unnecessary." Rudman Decl. ¶ 18 [DEV 8-Tab 34].

274. Political consultants clearly support the conclusion that modern political advertisements rarely use the "magic words" to convey their message.

Republican Political Consultant Douglas L. Bailey[202]

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[202] In 1968, Bailey founded Bailey, Deardourff & Associates, which was among the first national political consulting firms, working for Republican candidates for Governor, Congress, Senate, and President. The firm's clients included Gerald Ford's Presidential Campaign, and over fifty successful campaigns for governor or the United States Senate in 17 states. Bailey Decl. ¶ 1 [DEV 6-Tab 2]. As campaign consultant,

> In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as "vote for" or "vote against." If I am designing an ad and want the conclusion to be the number "20," I would use the ad to count from 1 to 19. I would lead the viewer to think "20," but I would never say it. All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat. This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians.
>
> The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as "vote for" is at best a historical anachronism.

Bailey Decl. ¶ ¶ 3-8 [DEV 6-Tab 2].

Democrat Political Media Consultant Raymond Strother[203]

Bailey's job was "to plan the campaign and then create broadcast advertisements that would shape its outcome." *Id.* ¶ 2. In 2000, Bailey was among the first eight recipients of the American University-Campaign Management Institute's 'Outstanding Contribution to Campaign Consulting' Award given to the consultants "who have best represented the ideals of the profession and shown concern for the consequences of campaigns on public attitudes about our democratic process." *Id.*

[203] Strother is a political media consultant, and President and founder of Strother/Duffy/Strother. Strother Decl. ¶ 1 [DEV 9-Tab 40]. He is also Chairman of the Board of the American Association of Political Consultants, and last year served as its President. *Id.* Since 1967, he has worked for more than 300 campaigns. *Id.* Representative clients at the presidential, congressional, and gubernatorial levels have included Lloyd Bentsen, Paul Simon, Gary Hart, Bill Clinton, Al Gore, Mary Landrieu, and Zell Miller. *Id.* In the last two decades alone, his firm has "helped

> [M]edia consultants prefer putting across electioneering messages without using words such as "vote for." Good media consultants never tell people to vote for Senator X; rather, you make your case and let the voters come to their own conclusions. In my experience, it actually proves less effective to instruct viewers what you want them to do. They have to come to their own conclusion. Americans like to think they make up their own minds and determine their own fate. Without even mentioning an upcoming election, the media consultant can count on the electoral context and voters' awareness that the election is coming. Voters will themselves link your ad to the upcoming election. When viewed months or years after the election a particular ad might look like pure issue advocacy unrelated to a federal election. However, during the election, political ads-whether candidate ads, sham issue ads, true issue ads, positive ads, negative ads or whatever-are each seen by voters as just one more ingredient thrown into a big cajun stew.

Strother Decl. ¶ 4 [DEV 9-Tab 40]; *see also* Strother Cross Exam. at 44 (observing that 90 percent of candidate advertisements Strother has put together in his career have *not* used express advocacy).

The Distinction Between Candidate-Centered Advocacy and Pure Issue Advocacy Is Not a Function of the Presence or Absence of the Buckley "Magic Words"

275. The presence or absence of "magic words," as defined in *Buckley v. Valeo,* does not alone determine whether the advertisement was designed to, and will, support or oppose a particular candidate. *See* Magleby Expert Report at 5 [DEV 4-Tab 8]; *see also* Krasno & Sorauf Expert Report at 58 [DEV 1-Tab 2] ("The magic words test, however, does not distinguish between [candidate-oriented issue advertisements and pure issue advertisements]; indeed it does not distinguish between ads sponsored by candidates and any type of issue ad, or even between political and commercial advertising. Whatever its utility might once have been, this standard is now irrelevant to how political ads are designed.").

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elect candidates in 44 states and five countries, including 13 Senators, 8 Governors, and scores of Congress members. [His firm has] won more Democratic Primaries than any other firm." *Id.*

276. Some current and former elected officials also believe that "magic words" no longer help distinguish genuine issue advertisements from electioneering advertisements. 147 Cong. Rec. S3072 (2001) (Senator Russ Feingold) ("People didn't need to hear the so-called magic words to know what these ads were really all about."); 147 Cong. Rec. S3036 (Senator John McCain) ("[W]e can demonstrate that the Court's definition of "express advocacy"-magic words-has no real bearing in today's world of campaign ads.").

277. Indeed, Senator Carl Levin made the following statement on the floor of the Senate in 1998:

> To show the absurd state of the law, at least in some circuits, we can just look at one of the 1996 televised ads that was paid for by the League of Conservation Voters and which referred to House Member Greg Ganske, a Republican Congressman from Iowa, who was then up for reelection. This is the way the ad read:
>
> *It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.*
>
> The ad sponsor claimed that was an issue ad, an ad that discussed issues rather than a candidate, and so

> could be paid for by unlimited and undisclosed funds. If one word were changed, if instead of 'Call Congressman Ganske,' the ad said, 'Defeat Congressman Ganske,' it would clearly qualify as a candidate ad subject to contribution limits and disclosure requirements. In the real world, that one word difference doesn't change the character or substance of that ad at all.Both versions unmistakably advocate the defeat of Congressman Ganske.

144 Cong. Rec. S10073 (1998) (Senator Carl Levin) (advertisement text in italics); *see also* Bloom Decl. ¶ 5 [DEV 6-Tab 7] ("In my experience in campaigns for federal, state and local office, including my involvement in the television advertising we ran in my race for Congress, no particular words of advocacy are needed for an ad to influence the outcome of an election. Many so-called 'issue ads' are run in order to affect election results.").

278. In addition, former Senator Dale Bumpers testified:

> Soft money also finds its way into our system through so-called 'issue advertisements' sponsored by outside organizations that mostly air right before an election. Organizations can run effective issue ads that benefit a candidate without coordinating with that candidate. They have experienced professionals analyze a race and reinforce what a candidate is saying. These ads influence the outcome of elections by simply stating "tell him [the opponent] to quit doing this." The "magic words" test is completely inadequate; viewers get the message to vote against someone, even though the ad may never explicitly say "vote-against-him."

Bumpers Decl. ¶ 26 [DEV 6-Tab 10];[204] *see also* Chapin

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[204] After Bumpers retired from the Senate, he spent one year directing the Center for Defense Information, a nonprofit think-tank based in Washington, D.C. Bumpers Decl. ¶ 2. He currently practices law in Washington D.C. at the law firm Arent Fox Kintner Plotkin & Kahn, PLLC. *Id.* ¶ 3.

Decl. ¶ 7 [DEV 6- Tab 12] ("Based on my experience in campaigns for federal and local office, including the television advertising we ran in my races for County Chairman and Congress, I am familiar with political campaign ads. No particular words of advocacy are needed in order for an ad to influence the outcome of an election."); *see also* Paul Dep. at 27-28 [JDT Vol. 25] (Plaintiff Congressman Ron Paul testified that the outside group issue ads run in his 2000 Congressional campaign were intended to influence the election.). Congressman Christopher Shays also testified:

> Although the Supreme Court has identified a limited category of "magic words" that make an advertisement a campaign advertisement, my experience as a candidate and a Member of the House is that this limited test is inadequate to identify campaign ads. Campaign ads need not include phrases such as "vote for," "re-elect" or "vote against" to be effective campaign tools, and the practice of large numbers of so-called "issue ads" before an election proves it.

Shays Decl. ¶ 12 [DEV 8-Tab 35].[205]

279. Some political consultants believe that there is no difference between political advertisements that contain words of express advocacy (i.e., "magic words") and advertisements that are designed to influence federal elections but do not use the "magic words" of *Buckley*.

Democrat Political Media Consultant Raymond Strother[206]

> Because it is so easy for consultants in my business to make ads that will influence federal elections without triggering the need to use hard dollars to pay for them, the difference between hard money and soft money is a

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[205] Shays has served in the House of Representatives since 1987 as a Representative of the Fourth District of Connecticut. Shays Decl. ¶ 1 [DEV 8-Tab 35].

[206] *See supra* Finding 274 n.203.

> joke. If I want to use soft money to influence an election, there is no real difference in what I do to create the ad. The only thing that is different is the tag line at the end. From the point of view of a media consultant, there is no real difference between ending an advertisement with "Vote for Senator X" versus ending an advertisement with "Tell Senator X to continue working hard for America's families." The public simply does not differentiate between ads that are otherwise identical, but contain these slightly different tag lines at the very end. Strother Decl. ¶¶ 3, 8, 11 [DEV 9-Tab 40].

Republican Political Consultant Rocky Pennington

> Many soft money ads that avoid the magic words are clearly intended to affect federal elections. Parties and interest groups would not spend hundreds of thousands of dollars to runs [sic] these ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after.

Pennington Decl. ¶ 10 [DEV 8-Tab 31].[207]

Democrat Political Consultant Terry S. Beckett

> I am aware of the idea that particular "magic words" might be required in order for an advertisement to influence an election. However, in fact no particular words of advocacy are needed in order for an ad to influence the outcome of an election. No list of such words could be complete: if you list 50, savvy political actors will find 100 more. For example, many so-called "issue ads" run by parties and interest groups just before an election attack a candidate, then end by supposedly urging the viewer to "tell" or "ask" the candidate to stop being that way. These ads are almost never really about issues. They are almost always election ads, designed to affect the election result. You can see this most clearly in the ones that amount to personal attacks, or that criticize a candidate on several unrelated "issues."

Beckett Decl. ¶ 8 [DEV 6-Tab 3].

Democrat Political Operative Joe Lamson

> Based on my experience in managing many federal election campaigns, I am familiar with campaign advertising. No particular words of advocacy are needed in order for an advertisement to influence the outcome of an election. When political parties and interest groups run "issue ads" just before an election that say "call" a candidate and tell her to do something, their real purpose is typically not to enlighten the voters about some issue, but to influence the result of the election, and these ads often do have that effect. Parties and groups generally run these pre-election "issue ads" only in places where the races are competitive. These "issue ads" generally stop on the day of the election. For example, these groups could run ads explaining Nancy Keenan's position on the issues after the November general election so that people could discuss them over the Thanksgiving dinner table, but it doesn't seem to work that way.

Lamson Decl. ¶ 6 [DEV 7-Tab 26].

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[207] Senator Feingold, during his deposition indicated that he receives calls from constituents in response to television advertisements. However, Senator Feingold was not specifically asked if these advertisements were the type covered under Title II of BCRA. Feingold Dep. at 238-239 ("Q . . . . You mentioned ads, and I have shown you ads which say call Senator so and so, contact Senator so and so. Your constituents sometimes do call you and contact you, do they not? A. Yes, they do. Q. And they sometimes talk about issues including abortion, right to life issues and other issues, do they not? A. Yes, they do. Q. In your opinion, are they sometimes affected by advertisements that they have seen on television? A. I'm sure they are.").

Former Chair of Plaintiff NRA Political Victory Fund Tanya K. Metaksa[208]

> Today, there is erected a legal, regulatory wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it. It is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.
>
> We engaged in issue advocacy in many locations around thecountry.
>
> Take Bloomington, Indiana, for example. Billboards in that city read,
>
> "Congressman Hostettler is right."
>
> "Gun laws don't take criminals off Bloomington's streets."
>
> "Call 334-1111 and thank him for fighting crime by getting tough on criminals."
>
> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did. When

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[208] Metaksa served as Chairman of the National Rifle Association Political Victory Fund and as Executive Director of the NRA Institute for Legislative Action. She made the statement above in her opening remarks to the American Association of Political Consultants' Fifth General Session on "Issue Advocacy." INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on "Issue Advocacy," Jan. 17, 1997, at 2 [DEV 38-Tab 25]. During this litigation, NRA Executive Vice President Wayne LaPierre testified that Ms. Metaksa is "someone who was knowledgeable about NRA's political strategies" and was someone who was "a reliable and trustworthy employee of NRA ." LaPierre Dep. at 11 [JDT Vol. 14]. Plaintiffs have not objected to Ms. Metaksa's statement on hearsay grounds and given Mr. LaPierre's comments, I find it trustworthy and rely on it for purposes of these findings.

> we're three months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them.

INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on "Issue Advocacy," Jan. 17, 1997, at 2 [DEV 38-Tab 25].

The Rise of "Issue Advocacy" Campaigns Funded by Corporate and Labor Union General Treasuries

280. The Annenberg Center for Public Policy ("Annenberg Center") has been studying "issue advocacy" since the early 1990s. *See* Annenberg Public Policy Center, Issue Advocacy Advertising During the 1999-2000 Election Cycle ("Annenberg Report 2001") at 1 [DEV 38 Tab-22]. Based on their research, the Annenberg Center concluded that "[o]ver the last three election cycles the numbers of ads, groups, and dollars spent on issue advocacy has climbed." *Id.*

281. The Annenberg Center estimated that, during the 1996 election cycle, $135 million to $150 million was spent on multiple broadcasts of about 100 advertisements. Annenberg Report 2001 at 1 [DEV 38-Tab 22]. In the next election cycle (1997-98), the Annenberg Center found that 77 organizations aired 423 advertisements at a cost of between $250 million and $340 million. *Id.*[209] In the 1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements. *Id.*

282. After studying "issue advocacy" over a seven year period, the Annenberg Study, which was relied on by Congress in drafting BCRA, concluded *inter alia* that:

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[209] The report the Annenberg Study produced following the 1997-98 election cycle placed this estimate at between $275 million to $340 million. *Annenberg Public Policy Center, Issue Advocacy Advertising* During the 1997-1998 Election Cycle ("Annenberg Report 1998") at 1 [DEV 6-Tab 6].

> 1) The amount of money spent on "issue advocacy" is rising rapidly.
>
> 2) Instead of creating the number of voices *Buckley v. Valeo* had hoped, "issue advocacy" allowed groups such as the parties, business and labor to gain a louder voice.
>
> 3) The distinction between "issue advocacy" and express advocacy is a fiction.
>
> 4) "Issue advocacy" masks the identity of some key players and by so doing, it deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility.

Annenberg Report 2001 at 1 [DEV 38-Tab 22]. As plaintiffs' expert Raymond J. La Raja stated, "'Over the last three election cycles, the number of groups sponsoring ads has exploded, and consumers often don't know who these groups are, who funds them, and whom they represent.'" La Raja Decl. ¶ 24(h) (quoting Annenberg Report 2001 at 1).

283. The Annenberg Center estimated that in the 1999-2000 election cycle, more than $509 million was spent on television and radio "issue advocacy." Annenberg Report 2001 at 4-5 [DEV 38-Tab 22]. The Republican and Democratic parties accounted for almost $162 million (31%) of this spending; Citizens for Better Medicare, $65 million (13%); Coalition to Protect America's Health Care, $30 million (6%); U.S. Chamber of Commerce, $25.5 million (5%); AFL-CIO, $21.1 million (4%); National Rifle Association, $20 million (4%); U.S. Term Limits, $20 million (4%). *Id.* These groups and the two parties accounted for two out of every three (67%) dollars spent on issue ads in the 2000 cycle. *Id.* (noting that other groups spent a combined $166.2 million (33%) on issue advocacy during the 1999-2000 election cycle); *see also* La Raja Decl. ¶ 20(b) & fig. 10 (quoting Annenberg data and noting that "[t]hese figures . . . closely match my own data on party-based issue ads collected by examining financial reports filed with the FEC").

284. Interest groups developed a strategy "by the early 1990s, and especially by 1996. . . to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits." Magleby Expert Report at 10 [DEV 4-Tab 8]. Indeed, defendants' witness and political consultant Douglas L. Bailey noted that it was not until the 1996 election cycle that corporations and labor unions began to make heavy use of "issue advocacy" as a tool of electioneering. Bailey Decl. ¶ 14 [DEV 6-Tab 2].

Explaining the Shift Toward "Issue Advocacy"

285. According to defense expert Magleby, the shift toward using "issue advocacy" can be explained by three phenomena. "First, it permits groups and individuals to avoid disclosure. Second, it allows them to avoid contribution limits. Third, it permits some groups (such as corporations and labor unions) to spend from generally prohibited sources." Magleby Expert Report at 18-19 [DEV 4-Tab 8]; *see also* Krasno & Sorauf Expert Report at 50 [DEV 1-Tab 2] ("Avoiding FECA allows advertisers to collect any sum of money from any source they can. Avoiding FECA allows advertisers to conduct their operations without disclosing their activities to the public.").

286. The corresponding rise in "issue advocacy" between the 1996 and 2000 election cycles highlighted the fact that disclosure information relating to the organization purchasing the advertisement was not available because the advertisement was not subject to FECA's restrictions. Magleby Expert Report at 18 [DEV 4-Tab 8] ("The 1996, 1998 and 2000 election cycles all saw examples of groups who sought to avoid accountability for their communications by pursuing an electioneering advertising/election advocacy strategy rather than limiting their activities to independent expenditures or other activities expressly permitted by the FECA.").

287. Groups can raise larger amounts of money in a shorter time frame if they are not bound by FECA's contribution limitations. Magleby Expert Report at 19 [DEV 4-Tab 8] (stating, for example, "groups like Citizens for Better Medicare, Pharmaceutical Research and Manufacturers of America, NAACP National Voter Fund, and NARAL, were able to far exceed what individuals, PACs or parties could do through hard money contributions.").

Candidate-Centered "Issue Advertisements" That Do Not Contain Words of Express Advocacy Are Distinguishable from "Genuine" Issue Advertisements

288. "Issue advertisements," according to one study, fall into three categories: candidate-centered, legislation-centered, and general image-centered. Annenberg Report 2001 at 13 [DEV 38-Tab 22]. "Candidate-centered advertisements make a case for or against a candidate but do so without the use of the ten words delineated in *Buckley*." *Id.* (noting that these advertisements "usually present a candidate in a favorable or unfavorable light and then urge the audience to contact the candidate and tell him or her to support the sponsoring organization's policy position."). Legislation-centered advertisements "seek to mobilize constituents or policy makers in support of or in opposition to pending legislation or regulatory policy." *Id.* (noting that these advertisements usually mention specific, pending legislation). Finally, general image-centered advertisements are "broadly written to enhance the visibility of an organization or its issue positions, but are not tied directly to a pending legislative or regulatory issue." *Id.*

289. Other commentators separate "issue advertisements" into two types of categories: candidate-centered (also called electioneering) issue advertisements and genuine issue advertisements. Advertisements designed to genuinely influence debate over a particular issue are known as "true" or "genuine" issue advertisements, while those issue advertisements designed to influence a federal elections are known as "electioneering" or "candidate-centered" issue advertisements. Krasno & Sorauf Expert Report at 65 [DEV 1-Tab 2] ("Advertising data show that there are two distinct types of issue ads, those that are basically candidate-oriented and electioneering in nature, and those that only present or urge action on an issue. The former are nearly identical in format, structure, and timing to ads produced by candidates, while the latter bear little or no resemblance to electioneering.").

290. Defendant's expert Magleby testified, in effect, that although mentioning a candidate's name is an indicia of an electioneering advertisement, it is not *per se* determinative, as some advertisements that refer to a candidate by name are nonetheless genuine issue advocacy. Defense expert David Magleby wrote:

> A number of indicia make clear that the ads run by individuals and interest groups are in reality electioneering ads that are meant to influence, and do influence, elections: *These electioneering ads generally name a candidate, run close in time to the election, target the named candidate's district, are run primarily in competitive races, and generally track the themes in the featured candidate's campaign.*

Magleby Expert Report at 6 [DEV 4-Tab 8] (emphasis added). Later, when questioned about whether the "presence of the name or likeness of a candidate [in an ad] preclude[s] it from being treated a as . . . genuine issue" advocacy in his study, Magleby stated that he and his team of academics would "presume [an ad] was electioneering" if it referred to a candidate by name or by image and was aired "within the district or state in which the person named or whose image is represented is the incumbent" and "that person is running for office." Magleby Cross Exam. at 79-80. Upon further questioning, however, it became clear that the type of reference to a candidate to which Magleby was referring was not the type *exclusively* contained in a call-to-action line at the end of an advertisement, but rather one or more references to the candidate in the "body of the ad" in connection with either what the candidate has said about an issue, or how the candidate has voted on an issue. *See* Magleby Cross Exam. at 103-105.

> Q. Didn't you tell me a few minutes ago that there is no such thing as an election issue ad that—well, first of all, haven't you told me that a genuine issue ad, to be characterized as a genuine issue ad, you cannot mention a name of a candidate? A. No. In the context of the ad, not the call lines and so forth. It doesn't mention how [the candidate] voted. It doesn't represent what [the candidate] has said about the issue. The body of the ad has no referent to [the candidate] whatsoever. The only referent to [the candidate] is the call line.

291. Defendants' political consultant Raymond Strother testifies, in effect, that it is very difficult to determine the objective behind an advertisement, particularly when that advertisement is viewed outside the context and time of the election:

> None of us, without understanding the context and the time, can tell you what a sham ad is and a nonsham ad. You can't do that by looking at pictures or even looking at the ads. When I was teaching at Harvard, I brought Doug Bailey up to lecture my class. He showed series of commercials, and he said, "Okay, which is the best commercial," and everybody voted. "The worse commercial," and everybody voted. He said, "You're all wrong. There is no best or worse commercial because none of you are qualified to judge these commercials because you don't know the context in which they were run or the problems they were to solve." When I look at storyboards, I have no way of knowing if they're fake, real, et cetera, because I don't know the time—I don't know anything about them.

Strother Cross Exam. at 90-91.

292. While electioneering issue advertisements almost always refer to specific candidates by name, especially those seeking to influence an officeholder's upcoming vote on pending legislation, genuine issue advertisements are less likely to refer to a federal candidate by name.

Raymond Strother testified:

> In addition to our work for candidates, my firm has also done some (though limited) advertising work for the political parties and for third parties. I would characterize these ads as falling into two distinct categories: true issue ads and electioneering or "sham" issue ads.
>
> True issue advocacy does exist. Over the years, I have designed issue advertising campaigns for, among other issue, tightening seat belt laws, education reform, and the removal of the confederate battle cross from the Mississippi state flag. The education reform ads promoted policies such as reducing class sizes and loosening the protections afforded by tenure so that bad teachers could be more easily fired. These ads were run all across the South; and their sole purpose was simply to educate the public. In Mississippi, my client wanted to change attitudes about the confederate cross on the flag, and explain how it was holding back the state economically. These advertisements were not made to elect or defeat anyone.
>
> These true issue ads did not mention any candidates by name. Indeed, there is usually no reason to mention a candidate's name unless the point is to influence an election.

Strother Decl. ¶¶ 5-7 [DEV 9-Tab 40]. During Strother's cross examination, he candidly admitted that during the course of his 35 year career, less than 10 percent of his work was for issue organizations as opposed to candidates, Strother Cross Exam. at 48 [JDT Vol. 15], and that he had never spent much time working for an ideological organization. *Id.* at 56-59. Indeed, he admitted on cross examination that he did not think he had "ever advised a client who wanted to run an advertisement campaign of some kind that spoke to pending legislation before a sitting legislature." Strother Cross Exam. at 119.

293. Political consultant Raymond Strother, further acknowledged when questioned regarding advertisements that specifically encourage voters to call their legislators regarding pending legislation that a candidate's name would be mentioned in the context of this type of advertisement.[210]

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[210] Moreover, Mr. Strother went on to characterize an interest group's need to refer to a candidate in a legislation-centered advertisement during that time as a "loophole," through which interest groups would evade campaign laws. *Id.* at 119-120. Mr. Strother candidly revealed his personal belief that "independent groups" should be taken "out of our election process" because they "taint it with our money." *Id.* at 120-21. He observes:

> Q. What I'm getting at here is just that there is a possibility, isn't there, that there will be pending legislation, in a period immediately before a federal election, where a group would like to run a campaign targeted at the legislation and not at the election. But, in order for them to do that, they have to refer to the politician who is also a candidate. Isn't that true? A. I think it's a great loophole. Q. Have you thought about this issue before today's cross examination? A. In the context of what I do for a living, you think about things like that, sure. Q. Given that you've never advised a client who has had a legislative initiative that they were trying to oppose or support, have you given concrete thought to the specific problem that, when there's a legislative initiative pending right before an election issue groups need to refer to the candidates, because they are also the office holders, in advocating for or against that pending legislation? A. There are a lot of ways I can look at that considering my opinion on the First Amendment, et cetera. I would like to see those groups out of our of election process. Q. Why is

> Q. Have you ever advised a client who wanted to run an advertisement campaign of some kind that spoke to pending legislation before a sitting legislature? A. I don't think so, but I could be wrong. Maybe my memory isn't good, but I don't think so. Q. Do you have any reason to believe, if you were to do that, that you would not want to run advertisements that specifically encourage the voters to call their member and to tell them which way they should vote on that pending legislative initiative? A. Yes, there's a good chance we would say, "Call Candidate X and let your views be known."

Strother Cross Exam. at 119. *See also* Huard Decl. ¶ 12 ("There are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect . . . . Also, if an

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> that? A. Because I think they taint it with their money. I think they can come in and overwhelm an election. I give you the example of somebody sending $1,000 and someone else comes in and spends $1 million on the other side. No matter what you want to call it, they have tainted that election. They have influenced that election. They are going to win that election. I don't care if you call it issue advocacy or what you call it. They're going to overwhelm their opponent with the shear volume of what they're doing. I would rather see these independent groups stay out of our elections completely. I wish there was a law that would keep them from interfering, and I wish there was a law that would keep these night riders, which I would call the Triad and people like that, out of our elections. They sweep in with no address but a fax machine, and spread anti-Semitism and then leave and hide. I think it's insidious. I think there ought to be a law against it. I think candidates should run their own ads. Their names should be on the bottom of them. They should spend their own money. If we have to, let's raise the limit so they can raise money, appreciable money.

issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*") (emphasis added); Mitchell Decl. ¶ 11 (stating that "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question.").

294. Political consultant Doug Bailey testifies:

> In addition to the work we did for candidates at Bailey, Deardourff, we also did political ads for political parties and issue groups. When we were creating true issue ads (e.g, for ballot initiatives or more general issues such as handgun control), and when we were creating true party building ads, it was never necessary for us to reference specific candidates for federal office in order to create effective ads. For instance, we created a serious [sic] of ads opposing a gambling referendum in Florida which made no reference to any candidates. We were successful in conveying our message, and the referendum failed two to one.

Bailey Decl. ¶¶ 9-11 [DEV 6-Tab 2] (emphasis added).

295. In contrast, expert testimony in the record also indicated that candidate-centered issue advertisements almost always mention the name of the federal candidate. Krasno & Sorauf Expert Report at 55-56 ("The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates. Candidate names appear in virtually all of these spots, with candidates most likely to identify themselves in their ads and candidate-oriented issue ads most likely to identify the opposing candidate (in some pejorative way).").

The Use of Issue Advocacy by Organizations For Electioneering Purposes

296. Defense experts Krasno and Sorauf stated:

> Many of [the sponsors of issue advocacy designed to influence federal elections] have been frank about their intent to influence elections. For example, the AFL-CIO in the first issue ad campaign in House elections in 1996 acknowledged its intent to help Democratic candidates, and its results were measured accordingly. The Club for Growth, a conservative Republican group, bluntly discusses its electioneering activities on its website; they include direct contributions, bundled contributions, and issue ads. The goals of the parties, especially in presidential elections where candidates and their agents have been intimately involved in planning and paying for their party's ads, can hardly be doubted. Survey results show that citizens overwhelmingly view these advertisements as intended to influence their support or opposition to particular federal candidates.

Krasno & Sorauf Expert Report at 65 [DEV 1-Tab 2].

297. Defense expert Magleby explains in his expert report that both labor unions and corporations engaged in extensive electioneering communications during the 1996 election cycle.

> The 1996 initiative by labor into unregulated and unlimited electioneering communications was substantial. The AFL-CIO spent a reported $35 million dollars, much of it on television, aimed at defeating 105 members of Congress, including 32 heavily targeted Republican freshmen. Labor broadcast television commercials in forty districts, distributed over 11.5 million voter guides in twenty-four districts and ran radio ads in many others. The labor campaign triggered a complaint to the Federal Election Commission by the National Republican Congressional Committee, which charged that when the AFL-CIO's ads are "heard, read, and seen" as a whole "a reasonable person can only view them as advocating the defeat of a clearly identified

> candidate in the 1996 Congressional election." *See In the Matter of AFL-CIO Project '95* (complaint filed with the Federal Election Commission Feb. 13, 1996).
>
> The business community responded to this major effort by labor with their own unlimited and undisclosed communications, again avoiding any of the magic words. Partners in the business response were the National Federation of Independent Business (NFIB), U.S. Chamber of Commerce, the National Association of Wholesaler-Distributors, the National Restaurant Association and the National Association of Manufacturers. Their group, called the "Coalition- Americans Working for Real Change," was active in thirty-seven House races, spent an estimated $5 million on over thirteen thousand television and radio commercials, and mailed over two million letters mainly in support of Republicans, to owners of small business. Others using this tactic in 1996 included Triad Management Services. The activity of Triad Management Services is documented at Center for Public Integrity, "The 'Black Hole' Groups," *The Public-I,* at <www.public-i.org/watch_04_033000.htm>.

Magleby Expert Report at 10 n.7 [DEV 4-Tab 8] (citations omitted); *see also* Mitchell Dep. at 96-97 [JDT Vol. 23] (stating that in 1996, in the 60 days before the election, in terms of dollars spent by the AFL-CIO on broadcast advertising, the substantial majority of that money was spent on ads that mentioned members of the House of Representatives).

298. Evidence presented in the record demonstrates that electioneering advocacy is, at times, a consideration of the AFL-CIO. For example:

1) Mitchell testified that after Congress adjourned on October 3, 1996, the AFL-CIO discontinued its broadcast advertisements "aimed at immediately pending legislative issues." Mitchell Decl. ¶ 42 [PCS 6]. The AFL-CIO then began to run "electronic voter guides" which compared the positions of congressional candidates on various issues. *Id.; see also* FEC MUR No. 4291, General Counsel's Report, June 9, 2000, at 6, INT003838 [DEV 52-Tab 3].

2) A September 18, 1996, memorandum from a polling firm analyzed the likely impact of five issue advertisements in terms of their likely effect on voters. Memorandum from Guy Molyneux and Molly O'Rourke of the polling firm Peter D. Hart Research Associates, Inc., to the AFL-CIO's Special Assistant for Public Affairs, Denise Mitchell, "Ad Targeting" (Sept. 18, 1996), AFL-CIO 001614-16 [DEV 124] ("[The advertisement] Taxes appears to be the single strongest spot, in terms of *reaching the widest range of voters and affecting people's impression of the incumbent's Issue position.* It should especially be directed to younger voters. [The advertisement] Kids is also very strong, and again should be directed to young people. [The advertisements] Medicare, Homes, and Retire are most effective with older audiences. If you can only run 4 spots, [the advertisement] Retire is probably the one to drop.") (emphasis added); *see also* Memorandum from Geoff Garin and Guy Molyneux of Peter D. Hart Research Associates, Inc. to Denise Mitchell, "AFL-CIO Mall Intercepts Survey" (Sept. 13, 1996), AFL-CIO 001582-84 [DEV 124] (Mall Intercept Survey of individuals' reactions to these advertisements including *how the advertisements made the respondents feel about fictitious congressman's position on each issue*); *see also* Mitchell Cross Exam. at 66-75 [JDT Vol. 23]. *But see* Proposed Findings of Fact of the AFL-CIO and AFL-CIO COPE PCC ¶ 19 ("[t]he selection of these subjects [for its broadcast advertising campaign between 1995 and 2001] was not motivated by partisan political

considerations"); Mitchell Decl. ¶ 70 [6 PCS] ("[The indirect effect on election outcomes] has never been the point of our broadcast advertising program, within or outside the 30-and 60-day periods.").

3) On March 29, 1996, Mitchell received a memorandum from a campaign consultant who analyzed political media consultants for the AFL-CIO. The memorandum stated:

> Political campaigns are superheated environments where the objective is not, always, to make the best looking spot. The objective is to communicate with the persuadables at the time they are making their decision. Being able to pivot the entire campaign at exactly the right time is the real talent of a media consulting firm. Consequently, there is little reward for great spots. No one knows better than you how consuming this can be.... [These advertisements can be done], but you must understand that you will be asking these political consultants to do it under rules they have never had to follow before.... What [all of these firms can do] is manage the political message in a volatile environment.

Memorandum from Joe Cowart of Joseph Cowart Campaign Consulting to Denise Mitchell, "Political Media Consultants" (Mar. 29, 1996), AFL-CIO 001702-04 [DEV 124]. *But see* Proposed Findings of Fact of the AFL-CIO and AFL-CIO COPE PCC ¶ 19 ("[t]he selection of these subjects [for its broadcast advertising campaign between 1995 and 2001] was not motivated by partisan political considerations"); Mitchell Decl. ¶ 70 [6 PCS] ("[The indirect effect on election outcomes] has never been the point of our broadcast advertising program, within or outside the 30-and 60-day periods.").

4) An October 9, 1996, internal memorandum from the AFL-CIO's Brian Weeks to AFL-CIO's Mike Klein discussed where media buys might be placed to help Dick Durbin in his Illinois Senate race, based on Mr. Durbin's lack of resources to air advertisements in certain markets. Memorandum from Brian Weeks to Mike Klein, "Electronic Buy for Illinois Senator" (Oct. 9, 1996), AFL-CIO 005244 [DEV 125]. *But see* Proposed Findings of Fact of the AFL-CIO and AFL-CIO COPE PCC ¶ 19 ("[t]he selection of these subjects [for its broadcast advertising campaign between 1995 and 2001] was not motivated by partisan political considerations"); Mitchell Decl. ¶ 70 [6 PCS] ("[The indirect effect on election outcomes] has never been the point of our broadcast advertising program, within or outside the 30-and 60-day periods.").

5) Denise Mitchell indicated that in 1996, in the 60 days before the election, in terms of dollars spent by the AFL-CIO on broadcast advertising, the substantial majority of that money was spent on ads that mentioned members of the House of Representatives. Mitchell Dep. at 96-97 [JDT Vol. 23].

299. Bruce Josten, Executive Vice President for Government Affairs for the U.S. Chamber of Commerce, testified repeatedly that the purpose of the electioneering communications aired during the 1996 federal election was not to influence the election of any federal candidate, but to respond to attack ads paid for by the AFL-CIO and organized by its president, Mr. John Sweeney. Mr. Josten explained that there "were TV markets where John Sweeney ran an ad accusing a member of Congress about their votes on the issues that I mentioned earlier, and in the spring he started running ads that were not true, and we would follow him" with television ads paid for by the Coalition. Josten Cross Exam. at 44. According to Mr. Josten, the AFL-CIO ads attacked Members of Congress who had supported pro-business initiatives and legislation favored by theCoalition. "My objective was to knock down impressions that Mr. Sweeney and his advertisers and campaigns were trying to

undertake and express our viewpoints exactly the opposite of that and let the viewers make their own decision about that dialogue that was being imposed on them." *Id.* at 88. *See also* Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, et. al. ¶ 24 ("Defendants' assertion that The Coalition's 1996 activities show that preelection issue ads are merely candidate ads in disguise is mistaken. Participants in The Coalition were unanimous that its ads were intended to respond to issue ads being run by the AFL-CIO.").

300. There is other probative evidence presented in the record, however, that influencing the elections of federal candidates was also a consideration for the U.S. Chamber of Commerce when crafting "issue advertisements."

> In 1996, the Coalition sought proposals from advertising firms for a "campaign to re-elect a pro-business Congress." TC00698 [DEV 121]. Media consultant Alex Castellanos of National Media, Inc. opened his proposal to the Coalition by stating, "Thank you for the opportunity to present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress." *Id.;*
>
> The Coalition commissioned firms to conduct polls and focus groups to measure voter responses to their advertise-ments. AV0024-40, 0046-47, 0060-64, 0106-118, 0139-41 [DEV 121]. The Coalition retained two polling organizations in 1996, the Tarrance Group and American Viewpoint, to test whether specific Coalition and AFL-CIO advertisements would make participants more or less likely to vote for particular federal candidates. FEC MUR No. 4624, General Counsel's Report, April 20, 2001, at 22-23 [DEV 53-Tab 6]; Josten Dep. at 68-114 [JDT Vol. 12]. One firm surveyed "voter attitudes nationwide," TC 00513-37 [DEV 121], and another survey tested possible Coalition ads on focus groups, including one of "Swing Voters." AV0139-41, AV0037-40 [DEV 121].

> A June 28, 1996, Tarrance Group memorandum to the Coalition stated that "The net result among swing voters in Cleveland was that 25% of participants were moved closer to voting for a Republican candidate for Congress and about half of the participants were moved against national labor leaders. In other words, the response ads not only leveled the playing field, but put some points on the board for Republican candidates as well." AV139 [DEV 121] (stating that Republican Members of Congress are "currently under attack by AFL-CIO advertising" and are "outgunned and outclassed" and if "targeted Republicans ever hope to be operating on an even playing field during the 1996 election, it will require that an outside voice come to their defense.").
>
> A July 12, 1996, memorandum to the Coalition from American Viewpoint on "Key Findings of the Pre-Test in Des Moines Media Market of Iowa 4" concludes that Congress-man "Greg Ganske is in deep trouble in the Des Moines Market," stating that "this is one of the most challenging districts that could have been chosen to assess the impact of your advertising .... If advertising can move numbers in this district, it should be effective in most other districts. Voters have not yet focused on the union's campaign as only 25% has seen the commercials. As a result, there is still time to reach them with a substantial buy." Memorandum from Gary Ferguson to the Coalition Steering Committee, "Key Findings of the Pre-Test in the Des Moines Market of Iowa 4" (July 12, 1996), NAW0002, 05 [DEV 121].
>
> In late 1996, the Coalition commissioned the Tarrance Group to conduct a detailed post-election analysis. The Tarrance Group, *Coalition Post-Election Survey Analysis,* NAM0206-27, at NAM0213 [DEV 121]. The

Tarrance Group reported:

> The Coalition commissioned this research to assess the impact of their two-month advertising campaign and its relative effect on voters in the face of the very aggressive, year-long campaign sponsored by the AFL-CIO. Given that four of the six Republican candidates tested in this research won their respective races, one could conclude that the Coalition's efforts were a success-as they were in the vast majority of the targeted districts in which the Coalition was involved.

301. There is substantial evidence in the record which shows that candidate advocacy was also a consideration for Citizens for Better Medicare ("CBM"), an organization that was primarily financed by major drug companies and sponsored by PhRMA, an industry trade association. Ryan Dep. at 13 [JDT Vol. 27] ("We solicited funding from the pharmaceutical companies to underwrite our efforts."); *id.* at 10-11 ("PHRMA was really the leading organization to organize and fund CBM."); PH 0379 [DEV 128-Tab 2]; CBM 0029 [DEV 128-Tab 1] (tally of donations from major drug companies to CBM in FY 2001, totaling $39,586,892.32). CBM describes itself as "a grassroots organization representing the interests of patients, seniors, disabled Americans, small businesses, pharmaceutical research companies and many others concerned with Medicare reform." According to the Annenberg Report, CBM spent $65 million on broadcast advocacy in the 60 days prior to the 2000 general election. Annenberg Report 2001 at 4, 20-22 [DEV 38-Tab 22]. There is substantial evidence in the record that this advocacy was candidate-centered. Alex Castellanos, a political consultant with National Media, testified that CBM advertisements often mentioned Members' names. Castellanos Dep. at 63-66; *see also* Ryan Dep. at 68- 72, 79-85. Timothy Ryan, former executive director of CBM, testified that much of CBM's ad strategy leading up to the 2000 election was aimed at supporting candidates attacked in AFL-CIO advertising. Ryan Dep. at 68-72; Castellanos Dep. at 63-66.

302. The NRA's media consultant noted that the first objective of its advertising campaign was to "influence outcome of presidential election and other key congressional seats in 10 'battle ground' states." McQueen Cross Exam. Exhibit 2, NRA-ACK 17913-15 [JDT Vol. 22].

303. According to its mission statement, the Club for Growth "is primarily dedicated to promoting the election of pro-growth, pro-freedom candidates through political contributions and issue advocacy campaigns." CFG 000217 [DEV 130-Tab 5]. In a brochure soliciting donations, the Club for Growth noted that "Before the elections, the Club plans to invest $1 million in television advertising in key congressional districts to advance our pro-growth issues. This is a tactic the unions have used so effectively against pro-growth candidates. These issue advocacy campaigns can make all the difference in tight races." CFG 000223 [DEV 130-Tab 5]; *cf.* NRW-02814 [DEV 129-Tab 2] (January 2, 2001, fundraising letter from the National Right to Work Committee noted that it had run "more than 1,000 television ads in Virginia, Nevada, Florida and Nebraska shining a spotlight on the differences between the candidates in those states on Right to Work").

304. More than two-dozen organizations, including "political parties, labor unions, trade associations and business, ideological and single-issue groups" spent an estimated $135 million to $150 million worth of "issue advertisements" during the 1995-96 campaign, compared to the $400 million spent on advertising by the federal candidates running for office. *See* Annenberg Report 1997 at 3 [DEV 38 Tab-21]. Almost 86.9 percent of these advertise-ments mentioned a candidate for office or public official by name. *Id.* at 8. "Most" of the groups running these advertisements "declined to make known the identities of their donors." *Id.* at 4.

305. The Annenberg Center reported in 1998 that at least 77 groups ran issue advertisements during the 1997-1998 election cycle costing between $275 and $340 million." Annenberg Report 1998 at 1 [DEV 66-Tab 6]. Overall, 53.4 percent of these advertisements mentioned candidates by name, although 80.1 percent of those advertisements run in the final two months of the campaign mentioned candidates. *Id.*

306. The Annenberg Center further finds that during the 1999-2000 election cycle 130 groups aired 1,100 distinct advertisements, at an estimated cost of over $500 million. Annenberg Report 2001 at 1 [DEV 38-Tab 22]. The report found that 60 percent of distinct radio and television issue advertisements (689 out of 1,139) aired from January 1, 1999, to November 7, 2000, were broadcast for the first time during the final two months of the election cycle. *Id.* at 12. In addition, 73 percent of all the distinct advertisements mentioned a candidate. *Id.* at 14. In terms of television advertisements, the closer the advertisement was aired to election day, the more likely it contained a candidate mention. *Id.* at 15. Between March 8 and August 31, 2000, candidates were mentioned in 72 percent of the television issue advertisements aired. *Id.* After August, 95 percent of the television commercials broadcast mentioned a candidate. *Id.* The report found that during the 2000 election cycle, 89 percent of unique advertisements were "candidate-centered," meaning they made "a case for or against a candidate" without using express advocacy. *Id.* at 13, 14.

Electioneering Advertisements Have Been Run About Issues In Which the Group Running Them Has No Particular Interest

307. Candidate-centered issue advertisements, designed to directly affect federal elections but not employing the "magic words" of express advocacy, have been run about issues not pending before Congress. *See* Chapin Decl. ¶ 13 [DEV 6-Tab 12] (testifying that "[t]he Florida Women's Vote project of EMILY's List also ran a television ad in the [2000 Florida Eighth district Congressional] campaign[,] which as I recall was run in the two months prior to the general election[.] The ad praises my record on gun safety and ends with the line: 'Tell Linda Chapin to continue fighting.' This ad is clearly intended to influence the election result. Based on my observations, EMILY's List is not particularly interested in gun control issues. However, they are interested in supporting pro-choice female candidates like me, and this ad serves that purpose."). The Associated Builders and Contractors ("ABC") have also run advertisements that discuss issues that are not of concern to its members. *See* Monroe Dep. at 65-67, 90-91 [JDT Vol. 23] (answering a question regarding advertisements run by the Associated Builders and Contractors which discussed penalties for child molesters, Monroe stated "no, [stronger penalties for child molesters] is not a particular concern to the general public of contractors or general group of contractors." *Id.* at 91; *but see* Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, et. al. ¶ 26 ("In fact, ABC's witness explained that the cited ABC ads [that Defendants assert address subjects distant from the policy concerns of the ABC] reflected public policy concerns of ABC's membership.").

308. During the 2000 election cycle, the Club for Growth gave $20,000 to the American Conservative Union to support an issue advertisement which discussed Senate candidate Hillary Clinton's residency in New York. Keating Dep. at 59 [JDT Vol. 12] ("Q. Whether or not Hillary Clinton is a resident of New York State really doesn't have anything to do with the Club for Growth's interest in pro-growth conservative Republican elected officials, does it? A. It doesn't seem to directly, no.").

The Buying Time Studies

309. The Brennan Center for Justice at New York University Law School ("Brennan Center") produced two studies entitled *Buying Time 1998* and *Buying Time 2000* which examined television advertising during the 1998 and 2000 election cycles. *See BT 1998; BT 2000.* Both *Buying Time* studies were funded by the Pew Charitable Trust. *See BT 1998; BT 2000.* The Brennan Center is "primarily a law firm that also does research on a variety of social science issues that includes campaign finance along with criminal justice and other electoral issues and poverty issues." Holman Dep. at 10. The Brennan Center was also involved in the crafting of BCRA and providing analysis of issues being debated in Congress to legislators, the media, and the public. *Id.* at 11. Representatives of the Brennan Center testified in favor of the McCain-Feingold bill, *id.* at 22, and during Senate debate on the legislation, Senators cited to *Buying Time* data and Brennan Center analyses. Holman Dep. Exhibit 3 at 2 [JDT Vol. 10].

310. While the Brennan Center's funding proposal for *Buying Time 1998* states that the study had an academic purpose, evidence in the record demonstrates that the primary purpose was "to fuel a continuous and multi-faceted campaign to propel reform forward." Holman Dep. Exhibit 4 at 2 [JDT Vol. 10]. The proposal reveals that the study was part of a larger strategy to overcome the "obstacles to reform," and notes that the first step in achieving the goal was "to develop a reliable source of information on the nature of the problem." *Id.* at 7. The study had two phases, and it would not even proceed to the second phase if it did not "provide a sufficiently powerful boost to the reform movement." *Id.* at 6; Krasno Cross Exam. Exhibit 4 at 1, 3, 6 [JDT Vol. 14] (explaining that the first phase was to acquire data "and use it to develop a strategy for responding to the threat posed by issue advocacy," and the second phase was to "create policy recommendations and reports, as well as .... publiciz[ing] these activities on Capitol Hill and beyond").

311. In April or May of 2000, Dr. Kenneth Goldstein of the University of Wisconsin, who had worked on the data set for *Buying Time 1998*, indicated in a request to the Pew Center for another grant that the purpose of the *Buying Time* studies was to further campaign finance reform. Goldstein Dep. (Vol. 1) at 29 [JDT Vol. 8]. Goldstein's request stated that he was "happy to work with others in the policy community to make sure that our study is designed and executed in ways that help move the reform ball forward." Goldstein Dep. (Vol. 1) at 37 & Exhibit 6 at 5 [JDT Vol. 8]. Mr. Seltz, co-author of *Buying Time 1998*, states that while there were a number of purposes behind the study, "the primary purpose was to contribute to the body of knowledge about campaign finance reform and specifically issue advocacy . . . and to fill what we viewed to be an empirical void in the literature about issue advocacy." Seltz Dep. at 22 [JDT Vol. 28]. "An independent but related purpose . . . was indeed to provide information to . . . proponents of campaign finance reform to help them fashion new and better arguments for reform, but arguments that would be based on research that was verifiable, checkable, transparent, reproducible." *Id.* Mr. Holman, a principal co-author of *Buying Time 2000*, did not approach the project with the purpose of producing results that would support campaign reform and had never seen the grant proposal. Holman Dep. at 25-26; *see also id.* at 29-30 ("I was mostly excited about the political science aspect of [the study] .... It was not clear at any point and never explained to me exactly what sort of policy direction that would go in.").

312. Dr. Kenneth Goldstein provided assistance in processing and coding data for the *Buying Time* studies. Goldstein Rebuttal Report at 6. In addition to assembling data sets used in the *Buying Time* studies, Dr. Goldstein also produced an expert report for the purpose of this litigation. *See* Amended Expert Report of Kenneth M. Goldstein (Oct.

2, 2002) ("Goldstein Expert Report"). As part of processing and coding data for the studies, he merged CMAG's two data sets to produce "a single, comprehensive data set." *Id.* He also had university students (at the University of Arizona for *Buying Time 1998* and the University of Wisconsin for *Buying Time 2000*) "assess[] the content, tone, issues addressed, whether the ads mentioned a political candidate or provided a toll-free number to call, etc . . . . In addition to collecting certain specific information concerning each storyboard reviewed, the study also asked coders: 'In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?'" Goldstein Expert Report at 7. Advertisements that provided information or urged action on a bill or issue were labeled "genuine issue ads" in both studies, whereas those communications that generated support or opposition for a particular candidate were referred to as "sham issue ads" in *Buying Time 1998, see e.g. Buying Time 1998* at 87; and "electioneering issue ads" in *Buying Time 2000, Buying Time 2000* at 30. Each *Buying Time* database consists of 40 million data points. *Id.* at 37.

313. As noted in Findings 316-317, *infra,* Dr. Gibson criticizes the CMAG data underlying both reports. Dr. Arthur Lupia was asked by the Brennan Center to evaluate Dr. Gibson's Expert Report and provided a report detailing his findings. *See* Rebuttal Expert Report of Dr. Arthur Lupia (Oct. 14, 2002) ("Lupia Rebuttal Report").

CMAG Data Set

314. The CMAG data set is the basis of the *Buying Time* studies as well as the expert report of Dr. Kenneth Goldstein, which was produced for the defendants.

315. CMAG tracks political television advertising in the top 75 media markets, containing more than 80 percent of U.S. residents. *BT 1998* at 6-7; *BT 2000* at 18; Gibson Expert Report at 7; *see also* Goldstein Dep. (Vol. 1) at 47- 49 [JDT Vol. 8] (describing how CMAG compiles its data). These 75 markets are geographically dispersed. Goldstein Rebuttal Report at 23; *see also* Goldstein Expert Report App. G at 1-2 (listing the 75 markets monitored by CMAG). In 1998-99 New York was the largest media market with 6,812,540 television households representing 6.854 percent of all television households. Gibson Rebuttal Report Exhibit 2 at 1 (listing 1998-99 Nielson estimates of media markets in order of size). Shreveport was the seventy-fifth largest media market, with 370,990 television households, or 0.373 percent of all television households. *Id.* at 2. For each market, CMAG monitors the four major broadcast networks (ABC, CBS, NBC, and Fox), as well as 42 national cable networks. Goldstein Expert Report App. G at 2-3. The CMAG data sets include two types of data. First, for every political advertisement aired, CMAG provides a transcript of the audio portion of the advertisement and a storyboard consisting of a still capture of every fourth second of the video portion of the advertisement. Goldstein Expert Report at 6. Second, CMAG provides data on each airing of an advertisement, including time, length, station, show, and estimated cost. *Id.*

316. The CMAG data is underinclusive in that it does not track every political advertisement that is aired. Goldstein Dep. (Vol. 1) at 52 & Exhibit 9 at 16.

1) The CMAG does not monitor local cable advertising in the 75 markets it covers. Gibson Expert Report at 8; Gibson Rebuttal Report at 24.

2) The 1998 and 2000 CMAG data sets did not cover advertisements broadcast in the nation's 140 smallest media markets, which are more rural than the 75 captured by CMAG. Goldstein Dep. (Vol. 2) at 9-10 & Exhibit 9 at 16 [JDT Vol. 8]. For those markets covered, the evidence shows not all advertisements are captured by CMAG. Dr. Goldstein participated in a validity study of the CMAG data by comparing the CMAG data with a sampling of invoices

from eight television stations. *Id.* Exhibit 9 at 16. The results show that for seven of the stations, 97 percent or more of the advertisements listed on their invoices correlated with the CMAG data. *Id.* at 16-17 & 28 (tbl. 2). For one station, however, 20 percent of the advertisements accounted for in the station's invoices could not be found in the CMAG data. *Id.*

3) Another shortcoming of the CMAG data is that although it provides 100 percent of the advertisements' audio, it only provides snapshots at four second intervals of the advertisements' video. As such, 25 percent of the advertisement storyboards for the 1998 data set do not display the name of the group sponsoring the advertisement. Goldstein Dep. (Vol. 2) at 21 [JDT Vol. 8]; Gibson Expert Report at 8.

4) Another perceived shortcoming of CMAG is that it tracks markets not electoral districts, and is unable to distinguish between different versions of ads that are identical with the exception of the candidate or officeholder's name (also known as "cookie cutter" advertisements). Gibson Expert Report at 7; Gibson Rebuttal Report at 7; Goldstein Dep. (Vol. 2) at 113 [JDT Vol. 8].

5) The CMAG Data Set does not measure advertisements aired in the 30-day period preceding primary elections. *See* Krasno Rebuttal Report at 13.

317. In regard to the gaps in station invoices when compared to the number of advertisements captured by CMAG, *see supra* Finding 316, Dr. Goldstein believes it could be the result of inadequate record keeping by the station as well as CMAG omissions. *See* Goldstein Dep. Exhibit 9 at 17 n.3. Dr. Gibson, however, finds this to be a major shortcoming of the CMAG data. Gibson Rebuttal Report at 5-6. He deduces from these missed advertisements that CMAG "likely missed 1,764 ads," or 5.04 percent of these eight stations' airings, and using these figures estimates "that 48,864 airings that in fact were broadcast [nationwide]. . . were not captured by the CMAG methodology." *Id.* (applying the 5.04 percent figure to the total number of advertisements captured by CMAG). Dr. Gibson assumes that CMAG has missed the same percentage of advertisements in all the covered media markets. Moreover, although "we do not know any of the characteristics of these . . . missing airings," Dr. Gibson believes those airing were missed because they "did not have a clear 'political purpose' that could be discerned by the CMAG analysts." *Id.* at 6; *but see* Goldstein Dep. (Vol. 2) at 12 [JDT Vol. 8] (stating that commercials provided to CMAG by Competitive Media Reporting[211] is "overly inclusive," including "ads for the Red Cross, [and] ads for electric companies").

318. While acknowledging CMAG's underinclusiveness, Dr. Lupia believes that Dr. Gibson, "presents no evidence or reason to believe that . . . including advertisements from the markets not covered would change [the] results [of studies based on the data]." Lupia Rebuttal Report at 28; *see also* Goldstein Rebuttal Report at 24 ("Moreover, Professor Gibson does not offer any reason to believe that the ads run on local cable advertising are significantly different than the broadcast ads captured by CMAG."). According to Dr. Goldstein, Dr. Gibson did not suggest that "CMAG's inability to capture local cable spots introduced any systematic bias into the data." Goldstein Rebuttal Report at 24. According to Dr. Goldstein, the "snapshot" style of the CMAG storyboards does not compromise the "ability to accurately analyze the content of ads, especially because CMAG provides a complete transcription of the audio portion of the ad along with the video captures." Goldstein Rebuttal Report at 24-25.

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[211] CMAG gets [its] data from Competitive Media Reporting, a company that tracked advertising in the top 75 markets in 1998 and 2000, but now tracks advertising in the top 100 markets. Goldstein Dep. (Vol.1) at 47.

Furthermore, Dr. Goldstein states, "there is no reason to believe that there in [sic] any systematic bias associated with the CMAG terminology capturing only one video frame every four seconds." *Id.* at 25. As for the 25 percent of 1998 storyboards which did not indicate the advertisement's sponsor, the *Buying Time 1998* authors were able to remedy this problem by referring to the "CMAG's original coding (which accurately provides the sponsor of the ad in well over 95 percent of cases), examining the content of the ad, and, in a few cases, by phoning television stations." *BT 1998* at 8.

Buying Time Findings 319. *Buying Time 1998* drew a number of conclusions with regard to the nature and effect of political advertising in the United States. The study's main findings include:

1) Four percent of candidate advertisements used "express advocacy" terms. *BT 1998* at 9.

2) The proportion of issue advertisements mentioning a candidate rises as the date of the election approaches. In July and August 1998, 61 percent of issue advertisements mentioned a candidate. By September, the percentage reached 82 percent and for the remainder of the campaign remained at 82 percent or higher, reaching a peak of 97 percent in the first half of October. *Id.* at 87, 103 (fig. 4.15).

3) Forty-one percent of issue advertisements that provided information or urged action appeared within 60 days of the election, but only 2 of those advertisements, or seven percent, referred to a candidate. *Id.* at 109.

320. *Buying Time 2000*'s key findings from the 2000 election cycle included:

1) Seven percent of all political advertisements contained express advocacy terms. *BT 2000* at 73. Candidates used express advocacy terminology in 10 percent of their ads, *id.* at 15, 29, while political parties and interest groups used such terms approximately two percent of the time, *id.* at 73.

2) "Genuine issue ads" (those urging action on a public policy or legislative bill) were "rather evenly dispersed throughout the year, while group-sponsored electioneering ads [which promote the election or defeat of a federal candidate] make a sudden and overwhelming appearance immediately before elections." *Id.* at 56.

3) The study found that if BCRA had applied to the 2000 campaign, three genuine issue ads (which aired 331 times) would have fallen within the Act's definition of "electioneering communication." *Id.* at 73. Put another way, of the advertisements run within 60 days of the 2000 election which also depicted a candidate, 99.4 percent constituted electioneering advertisements, while 0.6 percent were genuine issue advertisements. *Id.* at 72 (fig. 8-2).

321. Plaintiffs' expert, Dr. James L. Gibson, while leveling various criticism at both *Buying Time* studies, does not dispute that express advocacy words "are rarely used in political advertising, or that group sponsored ads that mention candidates tended to be concentrated before an election." Goldstein Expert Report at 38-39; *see also* Lupia Rebuttal Report at 9; *see also* Gibson Expert Report at 11 ("Entirely objective characteristics of the ads . . . present few threats to reliability."). Neither does he challenge the findings that advertisements sponsored by parties and interest groups comprise a significant and increasing portion of political advertising broadcast in federal races. Lupia Rebuttal Report at 9.

Criticism of Buying Time 1998

322. Dr. Gibson raises several objections to *Buying Time 1998* and *Buying Time 2000* reports, and ultimately concludes that neither report can "be accepted as accurate and valid descriptions of the nature of political advertising in the 1998 and 2000 elections." Gibson Expert Report at 66. While not listing every objection, Dr. Gibson's chief objections are as follows: (1) *Buying Time* is not a product of scientific inquiry

as scientific principles of objectivity were not adhered to, *see* Gibson Expert Report at 3 & n.3, 45; (2) neither *Buying Time* study was subject to peer review, *id.* at 4, 45; (3) the results of the *Buying Time* studies could not be replicated, and social science "demand[s] that statistical analysis be replicable, *id.* at 5. *See also id.* at 47-48; (4) the statistical techniques employed by the *Buying Time* authors were questionable, *id.* at 5; (5) the shortcomings of the CMAG database preclude reliance on the *Buying Time* results, *id.* at 5-9; (6) the student coders were not trained, and steps were not taken to ensure their impartiality, *id.* at 9-10; (7) the reliability of the coded data due to the lack of guidelines for coders answering questions and the coding of subjective characteristics of the advertisements, *id.* at 11-12; (8) the results cannot be relied upon because the miscoding of a single document can have "quite large consequences for the statistical results," *id.* at 22-23; (9) inaccurate coding of questions, even if the coding was consistent, *id.* at 17; (10) the wording and coding of Question 6 in *Buying Time 1998* is flawed, and Question 22 is superior, *id.* at 32-34; and (11) "no single *Buying Time 1998* Data Set exists" due to continual changes by Dr. Goldstein, *id.* at 11. Defendants' witnesses Dr. Kenneth Goldstein, Dr. Jonathan Krasno and Dr. Frank Sorauf, and Dr. Arthur Lupia each counter Dr. Gibson's allegations in their expert reports and rebuttal reports. *See generally* Goldstein Expert Report; Goldstein Rebuttal Report; Krasno & Sorauf Expert Report; Krasno Rebuttal Report; Lupia Rebuttal Report. After reviewing the expert reports, I find that although the *Buying Time* studies contain some flaws and shortcomings, as pointed out by Dr. Gibson, those shortcomings do not detract from the studies' credibility and reliability. I make the following findings in regard to Dr. Gibson's objections:

323. First, while I agree that the primary purpose of the *Buying Time* studies wasto further campaign finance reform, I do not find that this fact has skewed the results of the study. *See* Krasno Rebuttal Report at 2 (admitting that *Buying Time 1998* is an advocacy document, but stating that "[s]cholars rarely embark upon research without some expectations as to its results. But more than most scholars, we had a compelling reason to insure that our results could withstand allegations of bias"); Lupia Rebuttal Report at 10-11 (stating that Dr. Gibson's claim that the policy perspective of the *Buying Time 1998* authors "may have undermined the integrity" of the study "is pure speculation," and that a "person's political or ideological beliefs need not prevent them from being an effective scientist," and that he knows of no "conventional canons of scientific objectivity"); Goldstein Rebuttal Report at 8 (denying the charge that he or anyone under his supervision "perverted" the results of the databases, and maintaining that his approach to the coding was based on nothing other than "the spirit of scientific inquiry and objectivity").

324. Second, I find that while the submission of statistical studies to peer review processes is preferable, it does not "seriously limit[] the confidence one can place in the Report," as Dr. Gibson alleges. Gibson Expert Report at 45; *but see* Lupia Rebuttal Report at 13 (stating that the significance of the lack of peer-review is "doubtful . . . at best").

325. Third, while Dr. Gibson maintains that his inability to replicate the *Buying Time 1998* and *Buying Time 2000* results "undermines . . . any confidence one should place in the findings," Gibson Expert Report at 5, his inability seems attributable to his using the incorrect data set. *See* Krasno Rebuttal Report at 6-7 & n.6, 8 n.10 (attributing Dr. Gibson's failure to replicate the results to Dr. Gibson's not using "the original command files used to produce the numbers in *Buying Time 1998*,'' and maintaining that the original command files replicate the *Buying Time 1998* results); *see also* Goldstein Rebuttal Report at 18, 19-20 (stating that the reason Dr. Gibson could not replicate the results of *Buying Time 2000* was because he was using the wrong data set); *id.* at 20 (using the "federal.sav" data set produced by the Brennan Center, Dr. Goldstein was "able to replicate key

findings of the *Buying Time* [*2000*] study," and correlate others "within a fraction of a percentage point"); Lupia Rebuttal Report at 17 ("It is also worth noting that the Plaintiffs and their experts passed up the opportunity to resolve their concerns by replicating the data collection procedure itself."). Replication, as Dr. Krasno admits, "is a core precept of science," but Dr. Gibson "overstates the case by insisting on 'exact' replication." Krasno Rebuttal Report at 6. Notwithstanding the debate between the experts on replication, Dr. Krasno finds, and I agree, that the discrepancy between Dr. Gibson's findings using one data set and the findings of the *Buying Time 1998* and *Buying Time 2000* studies are statistically insignificant. *See* Krasno Rebuttal Report at 7-8 (referring to Gibson Expert Report at 24); *see also* Goldstein Expert Report at 18 n.10 (stating that the variances in Dr. Gibson's results "are so small as to suggest their own triviality"); Lupia Rebuttal Report at 43 (stating "the demonstrated discrepancies are small" and the Gibson Expert Report "provides no evidence that such changes affect any of *Buying Time's* major claims").

326. Fourth, Gibson alleges that the statistical techniques used by the *Buying Time* authors are questionable; despite this charge, Dr. Gibson does not specifically identify how statistical procedure was misapplied. *See* Lupia Rebuttal Report at 18-19; *see also id.* at 19 (characterizing Dr. Gibson's critique as a "difference in point-of-view on how to categorize certain events that has nothing to do with statistical techniques *per se.*").

327. Fifth, I find that although the CMAG database has some shortcomings, Dr. Gibson has not demonstrated that these shortcomings undermine the conclusions of the *Buying Time* studies. *See* Gibson Rebuttal Report at 5-7 (stating he has no basis for verifying that the CMAG data base is accurate, that there is no way of knowing the characteristics of the missing airings, but concluding that the "apparent[]" errors caution against relying on the CMAG data for drawing

conclusions on the nature of political communications); *see also* Goldstein Rebuttal Report at 23 (stating that Dr. Gibson "does not even attempt to explain how these alleged limitations undermine the validity of the conclusions set forth in *Buying Time*"); Krasno Rebuttal Report at 5.

328. Sixth, I find that the failure to train the student coders is justified given Dr. Krasno's concerns that a "training program would have caused complaints that Dr. Goldstein and I were attempting to impose our standards on the coders" and that the researchers "were hoping for a (reasonably informed) ordinary viewer's impression of the ads." Krasno Rebuttal Report at 5 n.4; *see also id.* (explaining that "[l]imited pre-testing of the coding instrument showed that training was unnecessary because coders were apparently able to understand and answer the questions without further explanation."); Goldstein Rebuttal Report at 32 (stating that the lack of training was "a deliberate choice that is well-supported by social science principles .... aimed at getting the untutored common-sense impression of the coders, while minimizing the possibility of biasing coders with any preconceived notions that might have been implicit in a set of instructions," and that formal training "would only undermine the independence of the coders' assessments and possibly introduce systematic bias into the survey."); *id.* (contending that the lack of training also made it easier to "simulate ... the experience of a typical viewer watching the ads at home."). Furthermore, although Dr. Gibson is concerned with the training of the coders, his concerns are, as Dr. Goldstein explains, speculative because Dr. Gibson did not "conduct his own survey, using his own coders and his own training techniques, and compare it to the results reached by the undergraduate coders." Goldstein Rebuttal Report at 31; *see also* Lupia Rebuttal Report at 33 ("In this case, such a replication would have been relatively simple to conduct ... and would have allowed the [Gibson] report to rely less on speculation when alleging that measurable attributes of

Goldstein's coders affected the data collection or analysis."). Finally, I also find that evidence has not been presented to substantiate Dr. Gibson's concern that the student coders were unrepresentative of the general population, thereby threatening the accuracy of the *Buying Time* results. *See* Lupia Rebuttal Report at 35 (stating that "only if we had evidence that the way in which the undergraduates were unrepresentative caused *Buying Time*'s claims to differ from what a representative population would have produced" would there be a basis to believe the coders' unrepresentativeness threatened the quality of the data, but the Gibson "report presents no such evidence."); Holman Dep. at 241-42 (noting "it's common practice to use students as survey respondents especially in political work").

329. Seventh, I find that Dr. Gibson's objections regarding the reliability, or accuracy, of the coded data due to the coding of "subjective and judgmental" characteristics do not prevent this Court from relying on these studies as the *Buying Time* authors were seeking to measure the coders' opinions and perceptions. Gibson Expert Report at 12. Dr. Gibson uses Question 6 as an example.[212] Question 6 appears in *Buying Time 2000* as Question 11, except that the *Buying Time 2000* version does not bold the words "particular candidate" and does not ask the coder to skip Questions. *See* Goldstein

Expert Report App. F [DEV 3-Tab 7]. Dr. Gibson believes that it is not always readily apparent who the sponsor of the advertisement is, making it difficult for the coder to know whose purpose he or she is supposed to be evaluating. Gibson Expert Report at 12. According to Dr. Gibson, this problem is exacerbated by the lack of "explicit guidelines for how to ascertain an 'ad's purpose,'" and, given the subjective nature of this task, "certain procedures are essential so that the reliability of the data collected can be assessed." Gibson Expert Report at 12, 16. Further, Dr. Gibson states that there is "no assessment whatsoever of intercoder reliability [for *Buying Time 1998*]. Thus, unlike academic research based on subjective coding, no empirical evidence exists to indicate that the coders' subjective assessments of these ads were accurate." *Id.* at 18. Dr. Lupia responds arguing that the "practice of treating answers to opinion questions as objective phenomena is common in science." Lupia Rebuttal Report at 38 (describing an article co-authored by Dr. Gibson, the main conclusion of which is based on a survey where participants were asked about how they described their own identities). He notes that Question 6 begins with "In your opinion," and seeks to understand how the advertisements are perceived. *Id.* at 37.

330. Eighth, while I acknowledge that the impact on the *Buying Time 1998* results due to miscoding hypothetically could have, in the words of Dr. Gibson, "quite large consequences for the statistical results," Gibson Expert Report at 22-23, Dr. Gibson admits he is providing only an example of how one error *could* affect the *results*. *See id.* (explaining that if Advertisement #11 was coded as promoting issues rather than a candidate, the percentage of pure issue advertisements in the *Buying Time 1998* data set would rise six percentage points). As the evidence regarding the impact of miscoding is hypothetical, or speculative, I find that it does not undermine the conclusions of the study.

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[212] The text of Question 6 in *Buying Time 1998* is as follows:

> In your opinion is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?
>
> 1. Provide information or urge action (If so, skip to Question # 19)
> 2. Generate support/opposition for candidate
> 3. Unsure/unclear

Gibson Expert Report at 12 (citing *Buying Time 1998*) (emphasis in original).

331. Ninth, I find that Dr. Gibsons' argument that even though the coders may be consistent in their coding, their coding could still be incorrect, misrepresents the purpose of the *Buying Time* studies and what the coders were asked to do. Gibson contends that:

> coders must seek easily discernable 'cues' in the advertisements as a means of making the required judgment. Since the presence of a political figure who seems to be a candidate is a readily accessible cue, the coders then develop an implicit decision rule that says: 'when a political figure is depicted in the ad, the ad involves electioneering.' Under this rule, the variable might be reliably coded. But this does not mean that the data are *valid*, since political figures appearing in ads could well be doing something other than electioneering.

Gibson Expert Report at 17 (emphasis in original). While Dr. Gibson may be correct that an advertisement may "be doing something other than electioneering," the study instead is seeking the coders' perceptions of the purpose of the advertisements, not the advertisements' true purpose. *See* Lupia Rebuttal Report at 39. Just because coders' perceptions may not comport with reality does not threaten the validity of the data, because the survey seeks the coders' mental impressions. *Id.* However, when codings were changed on Question 6, the mental impressions of the coders, which were sought by the question, were overruled. Goldstein Dep. (Vol 2) at 208-209 [JDT Vol. 8].

332. Tenth, I reject Dr. Gibson's argument that Question 22 of *Buying Time 1998* is superior to Question 6, and that where the coding of Question 6 and Question 22 are inconsistent, Question 22 should be relied upon. The text of both questions is listed below:

> 6. In your opinion is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?
>
> 1. Provide information or urge action (If so, skip to Question #19)
>
> 2. Generate support/opposition for candidate
>
> 3. Unsure/unclear
>
> 22. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Personal characteristics
>
> 2. Policy matters 3. Both
>
> 4. Neither

Gibson Expert Report at 12 (citing *Buying Time 1998*) (emphasis in original), 31-32. Dr. Gibson notes that, according to Question 6, 55.6 percent of the advertisements were coded as "promoting candidates." *Id.* at 31. Dr. Gibson also notes that, in response to Question 22, 98.1 percent of the advertisements "aired within 60 days of the election and depicting a candidate were coded as having a "primary focus" on policy matters." *Id.* at 32 (emphasis in original). While Dr. Gibson finds these results contrary to what one might expect, he also finds it "reasonable" that coders would conclude that almost all (98.1 percent) advertisements have a "primary focus" on policy, but also conclude that half of those same advertisements have the "purpose" of promoting a candidate. *Id.* at 32-33. Nonetheless, Dr. Gibson argues that coding of Question 6 is "deeply flawed," and where Question 6 and Question 22 "clash . . . the coding of Question 22 should be considered more valid and reasonable." *Id.* at 34, 35. Although I acknowledge that Question 6 does not provide coders the option of finding that the advertisement promotes *both* issues and candidates, and "does not ask the coder to discern the 'primary' purpose of the ad" but instead asks coders to provide their opinion on the advertisement's "purpose," *id.* at 33-34, I find that the coding of Question 6 can be relied upon by this Court. As Dr. Krasno points out, "coders rated 99 percent of candidate ads (and 93 percent of party ads) as generating support or opposition for a candidate." Krasno Rebuttal Report at 10 (citing *BT 1998* at 41). This conclusion is bolstered in Dr. Krasno's opinion by the fact the coders were not asked to determine the sponsor of the advertisement and that the disclaimers on the storyboards provided to the coders were often difficult to read. *Id.* at 10 n.14. An electioneering advertisement does not have to focus primarily on personal characteristics of a candidate; in fact, "political scientists routinely take the view that politicians frequently adopt and advertise policy positions in order to appeal to voters." *Id.* at 10-11 (citing as an example Anthony Downs, An Economic Theory of Democracy (1957)); *see also* Goldstein Rebuttal Report at 29 n. 16 (citing four articles for the proposition that "policy issues in electioneering ads is widely noted in the political science literature"); Seltz Dep. at 188 [JDT Vol. 28]. Moreover, as Dr. Lupia explains, an advertisement's purpose (the question posed in Question 6) and its primary focus (the question posed in Question 22) do not have to be the same. Lupia Rebuttal Report at 46-48. To illustrate this point, Dr, Lupia notes that many beer commercials do not focus on the product, but rather people "engaged in a range of activities that we can call 'wild nights out.'" *Id.* at 47. It would not be unreasonable to "perceive that the purpose of the ad is to get" the viewer to buy the beer, "but to judge its primary focus as wild times." *Id.* at 48. Further, I find that the evidence supports Dr. Lupia's argument that individuals can make the same distinction for campaign advertisements, i.e., that their purpose is to get the person to vote for candidate X, but their focus is on issue Y. *See id.* In addition, I do not believe that Question 6 must include a qualifier, such as the word "primary" in Question 22, in order to be valid. A study co-authored by Dr. Gibson based on a survey question on social identity does not mention the word "primary," but concludes that the initial responses given revealed *primary* social identities. *See* Lupia Rebuttal Report at 51 (quoting James L. Gibson & Amanda Gouws, Social Identities and Political Intolerance: Linkages within the South African Mass Public, American Journal of Political Science 278-92 (2000)). Dr. Gibson's report "provides no tangible evidence or scholarly reference" that suggests that Question 6's failure to include a qualifier is "inconsistent with standard scientific practice." Lupia Rebuttal Report. at 52. Similarly, Dr. Gibson "offers no direct evidence on how answers to the questions would have changed had we allowed the responses 'both' and 'neither' in Question 6 or the response 'unsure/unclear' in Question 22." *Id.* at 48, 50.

333. Finally, I do not find that the updating and changing of the *Buying Time 1998* Data Set invalidates the database, such that reliance on the *Buying Time 1998* conclusions is unfounded. As Dr. Krasno explained, the short time frame of the study "inevitably meant that small changes to the data set would continue even after the release of *Buying Time 1998*." Krasno Rebuttal Report at 4. Furthermore, the changes in the database reflect "the gradual filling in of missing data and the discovery of internal contradictions. There is no evidence at all in Dr. Gibson's report that any of the changes in the successive versions of the data that he examined had any more than a trivial impact on his results or on those reported in *Buying Time 1998*." *Id.* Dr. Goldstein attributes the changes in the database to random error inevitable in a database, such as that used in *Buying Time 1998*, which consists of 40 million data points, Goldstein Rebuttal Report at 37; "routine 'cleaning' of the data sets," *id.* at 10; and the "standard social science practice" of cleaning "a data set by correcting apparent errors after the codes have been entered in the database," *id.* (citing Herbert F. Weisberg, Jon A. Krosnick & Bruce D. Bowen, An Introduction to Survey Research, Polling, and Data Analysis (3d ed. 1996)). Dr.

Lupia reviewed the multiple databases and concludes that the changes are transparent and he finds no reason to conclude that Dr. Goldstein has attempted to hide anything. Lupia Rebuttal Report at 22. Lupia agrees that Dr. Gibson's concern is a legitimate one; however, large academic databases change for legitimate reasons, so the mere existence of the relative small changes cited in the [Gibson] report provide no basis to negate the project's credibility." *Id.* To Lupia, the important question is "why and how the changes were made," and Dr. Gibson's suggestions of illegitimacy are, in Lupia's opinion, "of varying and questionable credibility." *Id.*

Buying Time 1998's Calculation of the Percentage of Genuine Issue Advocacy Captured by BCRA

334. *Buying Time 1998*'s claim that only seven percent of "genuine issue ads" in the 1998 campaign would constitute electioneering communications under BCRA is disputed.

335. *Buying Time 1998* found that seven percent of all pure issue advertisements aired in 1998 identified a federal candidate and appeared within sixty days of the campaign. Krasno Rebuttal Report at 13. This figure was determined by dividing the number of airings of genuine issue advertisements mentioning a federal candidate within 60 days of the election by the total number of genuine issue advertisements run in 1998. *Id.; see also* Seltz Dep. at 115-16. According to Dr. Jonathan Krasno, author of *Buying Time 1998,* the question he sought to answer with this formula was "what is BCRA's impact on pure issue ads?" *Id.* at 12. The Brennan Center stands by the seven percent figure, although for a period of time in 2001 it had questioned its accuracy. Holman Dep. at 142-43. During that period of time, the Brennan Center ran additional analyses and determined that seven percent of "unique issue ads—or in other words . . . special interest groups placing issue ads" produced in 1998 would be captured unfairly by BCRA, *id.* at 123, 144, and that 13.8 percent of all issue advertisement airings

mentioning a candidate and broadcast within 60 days of the 1998 election were genuine issue advertisements, *id.* at 154-55. Dr. Gibson contends in his rebuttal report that the number of genuine issue advertisements aired in 1998 that would have been captured by BCRA represents affects the "communications with a staggering number of household[s]—30, 108, 857. Thus, were these ads . . . prohibited, over 30 million group-citizen communications would be affected." Gibson Rebuttal Report at 25. Defendants' experts do not address this point in their expert and rebuttal reports.

336. Plaintiffs object to the use of the total number of genuine issue advertisement run in 1998 as the denominator. Dr. Gibson finds:

> using a denominator of all issue ads broadcast in 1998 for these calculations is arbitrary and makes little sense. Why use January 1, 1998, as the starting date for the total pool of issue ads (i.e., the denominator)? Why not include ads from December 1997, or even the entire election cycle beginning in November 1996? Why not limit the denominator to ads shown in the last half of 1998? The . . . selected . . . denominator . . . has no theoretical meaning.

Gibson Expert Report at 38; *see also id.* at 41 ("I can see no justification for making the denominator equal to all issue ads aired in 1998."). Furthermore, he argues that given his conclusion that more people are concentrating on political issues as elections draw near, discussed *infra* Finding 357, *Buying Time 1998*'s denominator, by using all issue advertisements run during the course of the year, makes "the assumption that ads aired anytime throughout the year are equally as valuable as ads aired in proximity to the election." Gibson Rebuttal Report at 27. Thus, Dr. Gibson concludes that the "damage of prohibiting an ad within 60 days of an election cannot be ameliorated by allowing that ad to be broadcast at some other point throughout the year." *Id.* at 27-28.

337. Dr. Krasno explains that the *Buying Time 1998* denominator reflects only advertisements run in 1998 because "we had no data from 1997 or the last weeks of 1996 to include in the denominator." Krasno Rebuttal Report at 14. Dr. Krasno believes that the addition of such data into the denominator would simply "*decrease* the percentage of pure issue ads affected by BCRA" because all of those advertisements would have aired more than 60 days before the election and would therefore not increase the size of the numerator. *Id.* at 14-15 (emphasis in original); *see also* Krasno & Sorauf Expert Report at 62 ("The data from which these estimates are derived cover broadcasting only during the 1998 and 2000 calendar years, not the thirteen-plus months preceding them. Were we able to factor in the total number of pure issue ads that appeared between elections, the percentage of pure issue ads affected by BCRA would decline.").

338. Dr. Gibson suggests the better denominator, and one that is not arbitrary, is that used in *Buying Time 2000;* namely, all airings of issue advertisements during the last sixty days of the campaign which also depict a candidate. Gibson Expert Report at 39. The Buying Time 2000 formula answers the question: If one were to assume all issue advertisements mentioning a candidate in the last 60 days of an election campaign had an electioneering purpose, what percentage of the time would this assumption be erroneous? *Id.* at 38-39. By contrast, the *Buying Time 1998* formula answers the question: "What percentage of total ads run throughout the year that mentioned a candidate by name and were coded as providing information or urging action appeared *within* 60 days of the election, rather than *earlier than* 60 days before the election?" *Id.* at 39 (emphasis in original). Dr. Krasno believes that Dr. Gibson's denominator would vary in size "with the amount of candidate-oriented issue advertising before an election. This is particularly relevant because of the volume of candidate-oriented issue ads devoted to presidential campaigns. The result . . . is highly unstable estimates of BCRA's impact from year to year." Krasno Rebuttal Report at 15.

339. The effect of using the *Buying Time 1998* denominator is that the percentage is affected not only by the amount of genuine issue advertisements run within 60 days of the election, but also the number of electioneering advertisements run during that time. *Id.* at 16 n.26. When Dr. Krasno applied Dr. Gibson's denominator to the *Buying Time 1998* data he found 14.7 percent of genuine issue advertisements would be unfairly captured.[213] *Id.; see also* Krasno & Sorauf Expert Report at 60 n.143; *id.* App. at 3 (providing the calculation: 713 airings of three distinct genuine issue advertisements[214] mentioning a candidate and aired within 60 days of an election constitutes the numerator;

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[213] Dr. Gibson, using a different data set than Dr. Krasno, found that by taking *Buying Time 1998's* "flawed numerator and using the Brennan Center's own figures for calculating the proper denominator (airings within 60 days [of the election]), 16.5% of the group ads were 'genuine issue ads' (as defined by the Brennan Center) . . . ." Gibson Expert Report at 42. He goes on to reject this figure because he "does not accept the numerator." *Id.* He also finds that by using the data set he believed was the "final" version 25.7 percent of issue advertisements aired during 1998 mentioned a candidate and were broadcast within 60 days of the election were "genuine" issue advertisements. *Id.* at 37. Dr. Krasno states that this figure is incorrect because the data set used is incorrect, resulting in a numerator "four times too large," and that based on his study with Sorauf, he now calculates the correct figure to be 6.1 percent. Krasno Rebuttal Report at 19 & Appendix [DEV 1-Tab 2]; *see also* Krasno & Sorauf Expert Report at 60. Dr. Gibson's problems with the numerator are discussed *infra* Findings 340-341.

[214] One of these advertisements, "HMO said No" was aired a total of 455 times (118 times in Greensboro, 126 times in Raleigh-Durham, and 211 times in St. Louis). Krasno & Sorauf Expert Report App. at 3, 20. We were unable to find additional information about the other two advertisements, "CCS/No Matter Who" and "CENT/Breaux." *Id.* In 1998, St. Louis had 1,110,290 television households, Raleigh-Durham had 834,260, and Greensboro had 584,900. Gibson Rebuttal Report Exhibit 2.

the denominator is the 4847 airings of issue advertisements mentioning a candidate within 60 days of the election).

340. Dr. Lupia concludes that although the *Buying Time 1998* and *Buying Time 2000* denominators answer different questions, either formula is reasonable. "If I were asked to assess the proposed regulation's restrictiveness, the [Gibson] report's fraction could provide information about the impact during a particular time period, while *Buying Time* 1998's fraction could provide a better measure of the regulation's impact on issue advocacy more generally." Lupia Rebuttal Report at 25. Lupia states that Dr. Gibson's denominator is no less arbitrary than that of *Buying Time 1998*. *Id.* at 26. Holman comments that the *Buying Time 1998* denominator is "a justifiable way" of determining the impact of BCRA on genuine issue advertisements, although he did not use the same one for *Buying Time 2000*. Holman Dep. at 140. For Holman, the *Buying Time 1998* calculation is "not incorrect. It's a different way of assigning a number to measure a phenomenon." *Id; but see id.* at 153-54 (stating that the text of *Buying Time 1998* relating to the seven percent figure is "[m]isleading" and "ambiguous" in that it did not identify clearly to what it referred).

341. Plaintiffs' and Defendants' experts also disagree as to what the appropriate numerator should be. Dr. Gibson rejected the *Buying Time 1998* numerator because based on the data he was provided he concluded that eight advertisements aired 2,405 times in the last 60 days of the campaign were originally coded as promoting an issue or urging action (genuine issue advertisements) but were overruled by Dr. Goldstein and recoded as electioneering advertisements. Gibson Expert Report at 42. When Dr. Gibson added in these advertisements he found that "nearly two-thirds of the group ads that aired within 60 days of the 1998 election were coded by the students as 'genuine issue ads.'" *Id.* at 43. Dr. Gibson in his Rebuttal Report revises this figure based on information provided during the course of the litigation, which indicated that over a quarter of the advertisements he added to the numerator did mention candidates, resulting in a figure of 50.5 percent. Gibson Rebuttal Report at 23; *see also* Krasno Rebuttal Report at 17-18 (describing this error). Dr. Gibson concludes that "this 50.5% figure represents the statistical floor . . . the 64% figure cited in my report . . . provides the ceiling." Gibson Rebuttal Report at 24. Dr. Gibson, in his Supplement Report, states that Dr. Krasno had produced additional data files which included an earlier version of the data set upon which he had relied. Gibson Supplement to Rebuttal Expert Report of October 7, 2002: 1998 Data ("Gibson Supplemental Report") at 1. The data showed that one of the eight advertisements Dr. Gibson alleged had been recoded (from "genuine issue" to "electioneering") had originally been coded as promoting the election or defeat of a candidate, and that another was missing data as to the nature of the commercial. *Id.* at 4. As a result of excluding the airings of these two commercials, Dr. Gibson calculates that his "ceiling" fell to 60 percent, and his "floor" remained unchanged. *Id.* at 5-6.

342. Dr. Krasno rejects the inclusion of any of the airings of these eight advertisements in the numerator. *See* Krasno Response to Professor Gibson's Supplemental Rebuttal (Nov. 13, 2002) ("Krasno Response"). He objects to the notion that the recoding "reflects a deliberate effort to manipulate some of the results reported in *Buying Time 1998*,'' stating that the recoding aimed to "make the data set as sensible and accurate as possible." *Id.* at 1, 2. Dr. Krasno explains that the decision to recode five of the advertisements was based on their contradictory codings. *Id.* at 2. The survey was constructed so that when a coder found that an advertisement's purpose was to "provide information or urge action" (in other words, was a genuine issue advertisement) in Question 6, the coder was supposed to skip the next 12 questions. *Id.* at 2; Gibson Supplemental Report Exhibit 7. For five of these

advertisements, student coders found the advertisement provided information or urged action, but went on to answer the next 12 questions. Krasno Response at 2. In addition, Dr. Krasno states that "all of these ads were scored in a parallel process on another variable, 'favcan,' as favoring a Democratic or Republican candidate. Again, the potential conflict between question 6 and favcan should have attracted attention as the data set was being prepared." *Id.* Dr. Krasno contends that a review of the storyboards for these five advertisements, as well as other contextual factors such as where and when they were aired, makes it clear that they should be coded as "electioneering." *Id.* at 2-4. Dr. Krasno believes that the "notion that a small handful of mistakes must be perpetuated because they were once made is both ludicrous and an extraordinary departure from the usual practice of compiling data sets. Dr. Gibson's argument would be more credible if he offered any explanation for why these commercials really are pure issue ads." Krasno Response at 5.

343. Dr. Lupia weighs in on the fraction debate, contending that the Gibson and *Buying Time* reports "are reasonable conceptualizations of the question about how the proposed regulations will affect groups in the present and future if groups act exactly as they did in the past. If, however, we want to evaluate the regulations' likely future impact we should consider the possibility that groups will adapt to the new regulations in different ways." Lupia Rebuttal Report at 26. Both sides seek to predict the impact BCRA will have if no one alters their behavior. Lupia concludes that to "the extent that affected groups are able to choose [to alter their behavior], both estimates in the denomination debate may exaggerate the extent to which this aspect of the new regulation will restrict the groups' abilities to express themselves in the future .... To the extent that we agree that such groups will adapt in various ways, the credibility of the high-percentage estimates of the likely future impact of the proposed regulations on interest groups is severely undermined." *Id.* at 27.

Criticism of Buying Time 2000

344. Many of Dr. Gibson's criticisms of *Buying Time 2000* are similar to those made of *Buying Time 1998* and are addressed, *supra*.

345. Dr. Gibson states that the *Buying Time 2000* data base "has numerous errors and inconsistencies in it," and comments that these changes preclude him from replicating the findings of *Buying Time 2000*. Gibson Expert Report at 46, 47-48.[215] He is troubled by the fact that Dr. Goldstein changed the coded "purpose" of 62 out of 338 advertisements, *id.* at 52, questions the motivation behind the changes, and asks what standards Dr. Goldstein employed in making the changes, *id.* at 53. Dr. Goldstein states that "most of the 62 'changes' [Gibson] identifies in the 2000 database are not changes at all, but rather original student coding of additional CMAG storyboards that had not previously been coded at all, and were not part of the database used by the authors of *Buying Time 2000*." Goldstein Rebuttal Report at 4. The problem stems from Dr. Gibson's use of the wrong database; he does not analyze the *Buying Time 2000* database, but rather "a later iteration of [Dr. Goldstein's] own version of the database containing [his] own after-the-fact updates and re-codes, including additional ads later received from CMAG. . . . [N]one of this re-coding ever made its way into the *Buying Time 2000* report."[216] *Id.* at 14-15. Dr. Goldstein

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[215] Dr. Goldstein testifies that he does not have the original student coding for this study, explaining that his "political science department . . . mistakenly deleted a big chunk of out files, including our access database." Goldstein Dep. (Vol.2) at 129 [JDT Vol. 8].

[216] For example, Dr. Gibson challenges the *Buying Time 2000* finding that "[o]f all the group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4% were found to be electioneering issue ads. In absolute numbers, *only three genuine issue ads (which aired*

also takes exception to the charge that he deliberately changed the data in order to decrease the number of pure issue advertisements, calling it "baseless." *Id.* at 4. In addition, Dr. Goldstein notes that he reevaluated the coding of 30 advertisements in the 2000 database in his post-*Buying Time 2000* academic research having nothing to do with campaign finance or the *Buying Time* studies and "[i]n 26 of these instances, [] changed the coding from electioneering to genuine issue." *Id.* at 5, 14-15. Dr. Lupia comments that Dr. Gibson fails to connect his bias concerns with actual changes in the database or demonstrate the effects directly. Lupia Rebuttal Report at 58. As such, Lupia finds the charge that the investigators were committed to reaching a particular outcome to be "at best, premature and, with certainty, not proven in the [Gibson] report." *Id.*

346. Dr. Goldstein does find that three advertisements in the *Buying Time 2000* database "were re-coded on Question 11 from 'promoting a candidate' to 'providing information or urging action on an issue.'" Goldstein Rebuttal Report at 16. One was a version of a "cookie cutter" advertisement run by CBM (numbered 1269), which was "extremely similar" to a

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a total of 331 times in the 2000 elections) would have been defined as electioneering communications . . . ." Gibson Expert Report at 61 (quoting *BT 2000* at 73 (emphasis in original)). Dr. Gibson finds that according to the database the three advertisements were only aired nine times, but the *Buying Time* authors reported 331 airings and a different data base that Dr. Gibson determines is the "original, student coded version" of Question 11 shows 1,082 airings. *Id.* at 61-62. He declares that he "has confidence in none of these" figures. *Id.* at 62. Dr. Goldstein claims that if Dr. Gibson had used the correct database, "federal.sav," he would have been able to identify the three advertisements which comprise 331 airings. Goldstein Rebuttal Report at 21 (finding advertisements #627 (172 airings), #1389 (81 airings), and #2862 (78 airings)). He also used the database to identify "all ads run by interest groups that mentioned a candidate and aired within 60 days of the election," and using that as the denominator arrived at the same percentage as *Buying Time 2000*. *Id.* (dividing 331 by 53,840).

number of other CBM-sponsored advertisements that (Goldstein thought) had all been coded as "electioneering." *Id.* This fact was brought to Dr. Goldstein's attention by the *Buying Time* authors and, concluding that it was not "meaningfully distinguishable from the other CBM ads, . . . [he] recoded it as electioneering." *Id.* at 17. The second was a National Pro-Life Alliance advertisement (numbered 2107) which mentioned Wisconsin Senators Kohl and Feingold. Again, the *Buying Time* authors told Dr. Goldstein that the advertisement was "virtually identical" to another advertisement run in Virginia mentioning then-Senator Charles Robb. *Id.* Dr. Goldstein reviewed the storyboards of the two advertisements and found them "not meaningfully distinguishable, and resolved the inconsistency by re-coding [the commercial] as electioneering." *Id.* The final advertisement that was changed was sponsored by the Rhode Island Women Voters (numbered 1367). The advertisement was originally coded as a "genuine issue advertisement" but changed by Dr. Goldstein after the *Buying Time* authors disagreed with the coding. *Id.* Dr. Goldstein believes that the advertisement "is clearly electioneering." *Id.* As noted *infra,* Finding 356, Dr. Goldstein recently discovered that the six corresponding versions of Advertisement #1269 were originally coded as "genuine issue advertisements" by the students and later changed by the *Buying Time 2000* authors to "electioneering" commercials. Goldstein Dep. (Vol. 2) at 158-59 [JDT Vol. 8]. When these six advertisements are added to the analysis, which Dr. Goldstein terms "the most conservative standard estimate," one finds that 17 percent of the advertisements aired within 60 days of the election which identified a candidate were "genuine issue advertisements." *Id.* at 169. Defendants' experts personally disagree that all of these commercials are "genuine issue advertisements." *See* Holman Dep. at 82-83 (stating he considers Advertisement #1367 to be his "poster child of sham issue advocacy"); Goldstein Expert Report at 26 n.21 (noting that he considers all the commercials with the exception of Advertisement # 2107 "were clearly intended to support or oppose the election of a candidate").

347. Dr. Gibson raises essentially the same concerns about Question 11 in *Buying Time 2000* as he does for the practically identical Question 6 in *Buying Time 1998*, discussed *supra*. Gibson Expert Report at 54-55. Dr. Goldstein states that "79.8 percent of the group-sponsored ads classified as electioneering were coded as having run within 60 days of the election, compared to only 18.7 percent of non-electioneering ads." *Id.* at 28. As one "would expect . . . that ads designed to promote or oppose a candidate would air relatively close to Election Day," this objective data, in Dr. Goldstein's opinion, corroborates the coding in Question 11 and demonstrates that Dr. Gibson's theory is incorrect. *Id.* at 28-29.

348. The NRA criticizes the *Buying Time 2000* study for not including two 30- minute "news magazines" in the data which it claims are "genuine issue advertisements." Proposed Findings of Fact of the NRA and the NRA PVF ¶ 9. "If these airings had been considered, 34% of the total volume of speech that BCRA in 2000 would have covered in the 60 days prior to the general election would have been genuine issue advertisements." *Id.* One of these "news magazines" was titled "California." LaPierre Decl. ¶ 12 [NRA App. at 5]. "California" was aired 800 times in California from August 29, 2002, to November 5, 2000. *Id.* ¶ 14. "During the entirety of the 30-minute program, there was only one fleeting reference to a federal candidate for office. Specifically, during a short segment urging viewers to join the NRA and describing the benefits of membership, a cover of an issue of the NRA's magazine 'First Freedom' depicting Vice President Gore's image, then a presidential candidate, flashed

on the screen for several seconds." *Id.* ¶ 13.[217] The NRA does not allege that the study included other 30 minute advertisements, or that the CMAG monitors such commercial broadcasts. It does not indicate how other 30 minute "news magazines" it ran during 2000 would have affected the results of *Buying Time*. *See* Proposed Findings of Fact of the NRA and the NRA PVF at ¶ ¶ 3-7.

The Goldstein Expert Report

349. Although Dr. Goldstein was involved in assembling the data sets used in both *Buying Time* studies, he did not participate in the writing of either *Buying Time* study or play a role in "selecting the conclusions that the authors of these reports chose to draw from the database," Goldstein Rebuttal Report at 3-4. His report, therefore, constitutes a separate assessment of the data collected for the *Buying Time* studies. The database he works from differs from that provided to the *Buying Time 2000* authors, as it has corrected omissions and errors discovered after *Buying Time 2000* was completed. *Id.* at 4-5. Dr. Goldstein's study produces nine principal conclusions.

350. *Scope of Political Advertising*. In the 2000 election cycle (from January 1, 2000, through election day), interest groups accounted for 16 percent of all political television advertisements at an estimated cost of $93 million.[218] Goldstein Expert Report at 8. Political parties accounted for

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[217] One other NRA 30 minute "news magazine" would similarly would be "captured" by BCRA due to the inclusion of the "First Freedom" cover. NRA App. 917, 920, 924, 929 ("It Can't Happen Here) (also referring once to the "Clinton-Gore assault weapons ban").

[218] Dr. Goldstein notes "[t]hese figures . . . underestimate television expenditures because CMAG estimates only cover markets serving 80 percent of the nation's population and make no attempt to measure the increased cost of advertising during the peak seasons of political campaigns when the demand for television advertising time pushes up spot prices." Goldstein Expert Report at 8.

27 percent of the political commercials at an estimated cost of $162 million, while candidates accounted for the remaining 52 percent of advertisements at an estimated cost of $338 million. *Id.* Compared to the 1998 campaign, the increase in interest group spending was the most dramatic, "rising from approximately $11 million in 1998 to an estimated $93 million in 2000." *Id.* at 9; *see also id.* at 10 (tbl. 1A-B) (showing the increase in candidate spending (from approximately $136.6 million to approximately $338.4 million) and in political party spending (from approximately $25.6 million to $162.3 million)). The majority of interest group advertising in 2000 was "not sponsored by PACs, and fell outside FECA regulation." *Id.* at 8. According to his figures, interest group PACs spent roughly $2 million on 3,688 political advertisements in federal races in 2000, while interest group non-PAC expenditures constituted $90 million spent on 129,647 commercials. *Id.* at 10 (tbl. 1B).

351. *The Role of Interest Groups and Political Parties in Political Television Advertising for the 2000 Presidential Campaign:* In terms of the presidential campaign, political parties purchased 41 percent of television advertisements aimed at the 2000 presidential race, while candidates accounted for 38 percent of the commercials, and interest groups eight percent. Goldstein Expert Report at 11 & n.11 (the remaining advertisements were coordinated expenditures). Interest group advertising in certain "battleground" states,[219] however, "rivaled that of the candidates or parties." *Id; see also id.* at 12 (tbl. 2). In House elections, interest group advertisements identifying a candidate and running in the last 60 days of the campaign accounted "for 17 percent of total House ad broadcasts during the 2000 election cycle," while parties provided 22 percent of advertisements in these

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[219] Dr. Goldstein determined what states constituted "battleground states" "based on a professional review of various media sources," such as CNN.com. Goldstein Expert Report at 12 n.12.

races, and candidates 60.6 percent. *Id.* at 13. Dr. Goldstein finds that 99.8 percent of political party-financed television advertising mentioned or depicted a candidate, while only 1.8 percent of the ads "even mentioned the name of the party and many fewer promoted the candidate by virtue of his or her party affiliation." *Id.*[220]

352. *The BCRA Universe of Interest Group Electioneering:* Dr. Goldstein finds that 35 interest groups broadcast commercials on television during the last 60 days of the 2000 election that mentioned a candidate. Goldstein Expert Report at 13. These electioneering advertisements were aired 59,632 times at an estimated cost of approximately $40.5 million. *Id.* at 14; *see also id.* at 14-15 (tbl. 3).[221] The top ten of these groups accounted for 87 percent of these expenditures. *Id.* at 13.

353. *The "Magic Words" Test:* The so-called "magic words" test derives from *Buckley's* legal standard for determining whether an advertisement is designed to persuade citizens to vote for or against a particular candidate. Such advertisements were termed characterized "express advocacy" by the Supreme Court, and defined as containing words such as "elect," "defeat" or "support." *See supra* Finding ¶ 272 n.57. Dr. Goldstein finds that 11.4 percent of the 433,811 advertisements aired by candidates met the express advocacy test. Goldstein Expert Report at 16. Conversely, 88.6 percent of candidate advertisements in 2000 "were technically undetected by the *Buckley* magic words test." *Id.* This result demonstrates to Dr. Goldstein "that magic words are not an effective way of distinguishing between political ads that

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[220] This assessment does not include the "tag lines" included in most advertisements identifying the commercial's sponsor that can include the party's name. Goldstein Expert Report at 13 n.14.

[221] This result only reflects the 80 percent of households covered by CMAG, and according to Dr. Goldstein "[n]o comprehensive information is available for the balance of the markets or for ads airing on local cable stations."

have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue." *Id.*

354. *Temporal Distribution of Interest Group-Financed Television Advertisements Which Mention a Candidate:* Dr. Goldstein determines that the "CMAG database provides empirical evidence of a strong positive correlation between [advertisements' reference to a candidate and the proximity in time of their broadcast to the election] and consequently of their validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office." Goldstein Expert Report at 17. He finds that interest group advertisements that "mention or depict a candidate tend to be broadcast within 60 days of the election," while those which do not "tend to be spread more evenly over the year." *Id.* In addition, Dr. Goldstein also finds the distribution of those advertisements mentioning candidates for federal office to be "closely correlated to the distribution of electioneering communications broadcast by candidates and political parties." *Id.*

355. *Geographic Distribution of Interest Group-Sponsored Advertisements Which Mention a Candidate and are Aired within 60 Days of an Election:* Dr. Goldstein finds that interest group advertisements that mentioned a candidate and were broadcast within 60 days of the 2000 election "were highly concentrated in states and congressional districts with competitive races." Goldstein Expert Report at 20. For Senate races, 89.2 percent of these commercials ran in competitive races. *Id.* Political parties concentrated 90.6 percent of their ads in the competitive states. *Id.* at 21. House races demonstrated the same pattern, with 85.3 percent of interest group "electioneering" advertisements, and 98.2 percent of political party "electioneering" advertisements broadcast in competitive districts. *Id.* at 21.

356. *Coders' Perceptions of Interest Group Television Advertisements:* Dr. Goldstein had students code each interest group political television advertisement aired in the 2000 campaign. They could code the commercials' purpose as either to "'generate support or opposition for candidate,' or to 'provide information or urge action,'" and "were also given the option of 'unsure/unclear.'" Goldstein Expert Report at 24 & n.20. The coders found 97.7 percent of the 60,623 interest group sponsored television advertisements that mentioned a candidate and were broadcast within 60 days of an election as "electioneering," or supporting or opposing a candidate. *Id; see also id.* at 25 (Tbl. 7). Dr. Goldstein finds this result particularly persuasive given the fact that the students coded one-third of all interest group television advertisements run over the course of the 2000 campaign to be genuine issue advertisements. *Id.*

357. Of the 45,001 advertisements deemed to be "genuine issue advertisements" by the coders, 3.1 percent would have been covered by BCRA in that they were run within 60 days of the election and identified a candidate. Goldstein Expert Report at 27.[222] Dr. Goldstein acknowledges that in *Buying Time 2000* and an article he co-authored with Dr. Jonathan Krasno fewer than six advertisements were said to be unfairly captured by BCRA. *Id.* at 26 n.21. In those other publications, "certain of these six ads-particularly those as to which there was disagreement among the student coders-were ultimately treated as electioneering. In fact, [Dr. Goldstein's] own judgment is that five of these six ads were clearly intended to support or oppose the election of a candidate . . . . However, in this report, [Dr. Goldstein] chose[] to take the most

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[222] Dr. Goldstein contends that this "percentage overstates the proportion of all Genuine Issue Ads covered by BCRA, because it does not take into account the unregulated ads run in non-election years during a single Congressional Term, such as 1999." Goldstein Expert Report at 27 n.22.

conservative approach and count all six as Genuine Issue Ads." *Id.* However, Dr. Goldstein now acknowledges that a "most conservative" estimate would include 6 more advertisements listed in footnote 8 of his Rebuttal Report. Goldstein Dep. (Vol. 2) at 160 [JDT Vol. 8]. Adding these six advertisements results in the finding that 17 percent of the advertisements run during the last 60 days of the 2000 campaign which identified candidates were genuine issue advertisements. *Id.* at 169; *see also* Finding 354 *supra.* Dr. Gibson objects to Dr. Goldstein's reliance "on the highly subjective coding" of the student coders to determine the purpose of the issue advertisements (i.e., to promote a candidate or to urge action on an issue). Gibson Rebuttal Report at 20; *see also* Holman Dep. at 73 (noting that the question asks for a subjective assessment).

358. *The Effectiveness of Broadcasting Issue Ads Close to an Election:* Dr. Goldstein's final finding is that if an interest group is genuinely interested in promoting an issue, the least desireable time to air such an advertisement is in the final 60 days of an electoral campaign. Goldstein Expert Report at 32. This finding runs counter to Plaintiffs' argument that BCRA "may harm interest groups by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics." *Id.* Dr. Goldstein first comments that "while there is evidence that interest in politics and *elections* rises as Election Day approaches, there is absolutely no evidence to support the position that interest in *public policy* issues rises as well during that time." *Id.* (emphasis in original).[223] Dr. Goldstein

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[223] *But see* Finding 358, *infra.* Edward Monroe, Director of Political Affairs for the Associated Builders and Contractors, testified that "members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near . . . ." Monroe Decl. ¶ ¶ 18-19. Paul R. Huard, Senior Vice President for Finance and Administration of the National Association of Manufacturers ("NAM") testified that "[i]n broad terms . . . Americans tend to have

notes that since the last two months of an election campaign is when most political advertisements are aired (64.2 percent of all political advertisements run in 2000 were run in the campaign's final 60 days), "an individual interest group's message on a public policy issue is likely to become lost" if aired during that period. *Id.* Dr. Goldstein also posits that "partisan attachments . . . harden during the last two months of a campaign" which makes it "more difficult to persuade otherwise open-minded viewers of the merits of an interest group's policy stance." *Id.* at 32-33 (citing John Zaller, Nature and Origins of Mass Opinion (1992)). According to Dr. Goldstein's Expert Report, in 2000, 17.7 percent of such advertisements were aired in the final 60 days of the election campaign, slightly more than the 16.4 percent "which would have run if the ads had been equally distributed throughout the year." *Id.* at 33; *see also id.* at 31 (tbl. 9). In contrast, during the months of April through June 2000, 45 percent of such issue advertisements were aired, "as against an expected 25 percent if the ads were spread evenly throughout the year." *Id.* Dr. Goldstein believes this concentration is "a likely result of groups turning on the heat to pass or defeat bills before Congress adjourned for the summer." *Id.* Dr. Gibson is critical of Dr. Goldstein's finding. Gibson Rebuttal Report at 26. According to Dr. Gibson, political psychologists, like William McGuire (whose work Dr. Goldstein cites), have concluded "that to persuade someone involves two steps. First, one must get the attention of the person one is attempting to persuade. Second, one must overcome the strength of existing attitudes if the attempt at persuasive communication is to result in attitude change." *Id.* Given that "those with strong attitudes tend to pay attention to political communications while those with weak political attitudes tend to ignore them . . . . [t]hose most easily reached are least

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greater interest in political matters as an election approaches." Huard Decl. ¶ 10.

easily changed; those most easily changed are those most difficult to reach." *Id.* Since those with "weak attitudes" tend to pay attention during "the most extreme circumstances," the period leading up to the election provides the window in which to communication with these difficult to reach, but easily persuaded individuals. *Id.* at 27. Dr. Gibson also rejects the argument that issue advertising close to an election is unproductive because partisan allegiances harden as elections approach. *Id.* He states that this line of reasoning leads to the strange conclusion that "candidates should abandon advertising as the election approaches since these hardened attitudes are difficult to convert." *Id.* Dr. Gibson points out that "that does not happen, since, as the election approaches, candidates try to reach an even greater percentage of marginal voters, who have little interest in politics, and relatively pliable issue views." *Id.*

Genuine Issue Advertisements About Legislation and Public Policy Issues Are Run During the Sixty Days Before A Federal Election Notwithstanding the Competition for Air Time With Candidate-Centered Advertisements

359. Notwithstanding the disadvantages of running genuine issue advertisements during the 60 day period leading up to a general election,[224] plaintiffs have demonstrated that it can be

effective and necessary for them to run legislation-centered advertisements in the weeks before an election. Monroe Decl. ¶¶ 18-19 [10 PCS] ("The defendants in this proceeding have argued that ads run near the time of an election are evidence that the association's actual intent is to advocate the election of one candidate or another. However, there are other, more valid, explanations for the timing of our advertising. One is that serious legislative initiatives or regulatory proposals often are considered near the time of elections. Also, it is also clear that members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near. If that is the time when people will listen, that is the time to speak. And once an election occurs, there seems to be a period of fatigue during which political matters are of less interest, making issue ads then less effective."); Huard Decl. ¶ 10 [10 PCS] ("NAM has run issue ads at times when no election was impending. In broad terms, however, Americans tend to have greater interest in political matters as an election approaches. At the same time, elected officials are most attuned to the views of their constituents in the pre- election period. Thus, for many purposes, the pre-election season is a critical time for issue ads. Conversely, after an election public interest in public policy matters fades, perhaps due to fatigue. Then, few issue ads are run soon after an election."); Murphy Decl. ¶ 12 [3 PCS] ("Finally, it is important to emphasize that the blackout periods imposed by the BCRA—60 days before a general election and 30 days before a primary—are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of this debate occurs against the backdrop of pending legislative action or executive branch initiatives. Some of the President's or Attorney General's boldest initiatives are advanced during election years-often within 60 days of a general election. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period."). Plaintiffs' expert Dr. Gibson agrees that running issue advertisements in proximity to federal elections is effective. *See* Finding 357, *supra*.

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[224] Some political consultants believe there is limited utility in running a genuine issue advertisement in the 60 days before a federal election. *See* Strother Decl. ¶ 7 [DEV 9-Tab 40]. ("[T]hese issue advertisements were run when there were no pending elections. For these true issue ads, we specifically avoided the months right before the election because (a) air time would be more expensive; and (b) each ad would just become part of the election season gumbo and viewers would assume that it was just another election-related ad."); Strother Cross Exam. at 70-71; Bailey Decl. ¶ 12 [DEV 6-Tab 2]. Dr. Goldstein also believes that it is ineffective to run genuine issue advertisements in the weeks leading up to an election. "Running genuine issue ads near an election does not increase the effectiveness of those ads; in fact, it is likely that the ads' effectiveness actually decreases . . . . In addition to being less effective at conveying their messages, issue ads run close to an election are also less cost-effective, since the price of scarce television and radio air time is higher near an election than during the rest of the year." Goldstein Expert Report at 32-33 [DEV 3-Tab 7]; Magleby Expert Report at 20 [DEV 4-Tab 8] ("In contrast, genuine issue ads are more likely to run earlier since rates are cheaper and proximity to an election is less important."); Krasno & Sorauf Expert Report at 57 [DEV 1-Tab 2] ("Pure issue ads are more likely to respond to the congressional calendar or an advertising strategy unrelated to an election.").

360. The legislative calendar can necessitate the running of issue advertisements during the final days of an election campaign. Edward Monroe states that "serious legislative initiatives or regulatory proposals often are considered near the time of elections," without providing actual examples of advertisements run in response to the legislative activity. Monroe Decl. ¶ 18 [10 PCS]; *see also* Huard Decl. ¶ 11 [10 PCS] ("[I]ssue ads supporting a particular tax bill may well be needed as the bill approaches a vote. If it happens that primaries or elections are imminent, that does not diminish the need to be able to speak out right then."); Murphy Decl. ¶ 12 [3 PCS] (commenting that "the blackout periods imposed by the BCRA . . . are often periods of intense legislative activity," noting consideration of the Homeland Security Department bill occurred within 60 days of the 2002 election, but listing activities that would notbe affected by BCRA). Some deponents provide concrete examples of merging electoral and legislative calendars and their actions during those periods. The AFL-CIO aired advertisements regarding an "upcoming budget fight over education programs" in September 1996. Mitchell Decl. ¶ 41 & Exhibit 59 ("No Two Way"). The labor group ran another "genuine" issue advertisement between September 21 and 25, 1998, in eight congressional districts opposing "fast track" trade legislation which was scheduled for a vote in the House of Representatives on September 25, 1998. Mitchell Decl. ¶ 52 & Exhibit 116 ("Barker"). During the same month, the AFL-CIO ran a legislation-centered advertisements aimed at a scheduled Senate vote on HMO legislation that the AFL-CIO considered to be inadequate, *id.* ¶ 51 & Exhibits 105-07 ("Deny"),[225] and opposing the Taxpayer Relief Act which had been recently marked up by the House Ways and Means Committee, Mitchell Decl. ¶ 52 & Exhibits 108-09 [PCS 6] ("Spearmint" and "Spear"); Shea Decl. ¶ 43 [PCS 7]. In 2002, the GOA ran a radio advertisement in New Hampshire within 30 days of the primary election for the New Hampshire Republican U.S. Senate nominee, which supported legislation allowing airline pilots to be armed. Pratt Decl. ¶ 5. *See also* Mann Cross Exam. at 176 (explaining that a flurry of legislative activity occurs near the end of a congressional session, therefore, often within the 60 day period preceding a general election).

361. The ACLU seeks to influence how members vote on pending legislation by educating the public about its concerns and using the public to communicate their concerns to their elected representatives. Murphy Decl. ¶ 8 [3 PCS/ACLU 9] ("Inevitably, many of the ACLU's statements involving legislation or executive branch policies, including print and broadcast communications, refer to a clearly identified candidate, member or executive branch official."). The ACLU cites as an example an advertising campaign directed at Speaker Dennis Hastert, who represents the fourteenth district of Illinois, in March of 2002 urging him to bring the Employment Non-Discrimination Act ("ENDA") to a full vote in the House. *Id.* ¶ 10; *see also* Text of Advertisement, 3

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[225] According to Defendants, "Deny" continued to run "well after the legislative action the ad was supposedly timed to influence." Gov't Opp'n Br. at 93. The AFL-CIO denies this point. AFL-CIO Reply Br. at 6 n.6.

PCS/ACLU 14-17. The ad was broadcast on multiple Chicago and Aurora, Illinois radio stations throughout the weekend of March 15-March 17, 2002. *Id.* Since the advertisement was run within thirty days of a primary election, the commercial would have constituted an electioneering communication under BCRA and would have violated BCRA because it was paid for with the general treasury funds of a corporation. *Id.* (observing that the "ACLU also hoped to highlight the constitutional flaws of BCRA").

362. The text of the Hastert ad is as follows:

> Sound Effect: Long Tympani/Drum Roll
>
> Male announcer—Master of Ceremonies (during sound effect): *And now . . .*
>
> Sound Effect: Drum Roll Ends with Cymbal Crash
>
> Sound Effect: *2 Seconds of Silence*
>
> Male Announcer: . . . . *We're waiting.*
>
> Sound Effect: Long Tympani/Drum Roll Starts Again
>
> Sound Effect: Drum Roll Ends with Cymbal Crash
>
> Sound Effect: *2 Seconds of Silence*
>
> Male Announcer: . . . . *Still waiting.*
>
> Female Announcer: *Waiting for our Congressman,* (Sound Effect Music Up—Pop Goes the Weasel or Circus Music) *Dennis Hastert, to protect everyone from discrimination on the job.*
>
> *As speaker of the House, Representative Hastert has the power to stop the delays and bring the Employment Non-Discrimination Act—ENDA—up for a vote in Congress. It's about fairness. It's time to ensure equal rights for all who work, including lesbians and gay men, and make sure that it's the quality of our work that counts, and nothing else.* (Music Out.)

> Male Announcer: *So Congressman Hastert*
>
> Sound Effect: Tympani/Drum Roll
>
> Male Announcer—Master of Ceremonies (during sound effect): *What will it be?*
>
> Sound effect: Drum Roll Ends with Cymbal Crash
>
> Male Announcer: *Protecting Workers from discrimination, or more delays?*
>
> Female Announcer: Take action now. Send Speaker Hastert a letter urging him to support fairness and bring ENDA to the floor by going to www.aclu.org/enda.
>
> Male Announcer: Paid for by the American Civil Liberties Union.
>
> Murphy Decl. Exhibit 15 (script of ACLU radio ad, "ENDA Delays").

363. The ACLU's purpose in running the advertisement was to create a commercial that would violate BCRA and thereby provide standing to challenge the constitutionality of the Act. A March 10, 2002, e-mail from Laura Murphy, legislative director of the ACLU, to colleagues explained why the ACLU's March 2002 Hastert ad was run:

> Anthony wants the ACLU to be in a position to challenge Shays-Meehan when it becomes law as early as during the Easter recess. As you know the issue advocacy restrictions would select groups like the ACLU if we want to take out and [sic] ad 30 days before a primary or 60 days before a general election in broadcast, satellite or cable outlets. These ads would have to reach 50,000 people or more and would have to mention the name of a candidate. *Steve thinks that the ads that we ran during the 2000 election cycle would not qualify to give us clear standing to challenge the law.*

Email Message Attached as Exhibit to Resps. of American Civil Liberties Union to Defendant's Second Set of Requests for Production of Documents, Exhibit B; USA-ACLU-00003 [DEV 130-Tab 4] (italics added).

364. The ACLU asserts that it does not engage in any federal election activity as defined by the FECA. A. Romero Decl. ¶ 3, 3 PCS/ACLU 2. The ACLU likewise asserts that it has never taken a position in a partisan political election in its 82-year history. A. Romero Decl. ¶ 3, 3 PCS/ACLU 2.

365. Krasno and Sorauf comment on the ACLU's Hastert advertisement:

> [T]he ACLU has demonstrated with a commercial about gay rights, aired in House Speaker Dennis Hastert's district last spring before the GOP primary, that it is possible to deliberately create a pure issue ad that runs afoul of BCRA.

Krasno & Sorauf Expert Report at 62 [DEV 1-Tab 2]; *see also* Text of ads, 3 PCS/ACLU 16-17 (noting script of advertisement that the ACLU ran in the print media over this issue).

366. The AFL-CIO's broadcast advertising campaigns were focused, in part, on issues of importance to AFL-CIO members. In her testimony, Denise Mitchell,[226] Special

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[226] Denise Mitchell was appointed to the position of Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney on November 1, 1995, shortly after Sweeney was elected President of the AFL-CIO. Mitchell Decl. ¶ 1 [6 PCS]. Prior to assuming this position, Mitchell had worked with Sweeney in a similar role for a number of years when he was President of the Service Employees International Union and she had assisted in his campaign for election to the position of AFL-CIO President. *Id.* Mitchell has worked in marketing and media relations for unions and other nonprofit organizations on working family issues for more than 20 years. *Id.* In her current position, Mitchell has the primary responsibility for overseeing all public relations activities of the AFL-CIO including all AFL-CIO use of broadcast and print media. *Id* . ¶ 2. Mitchell is responsible for making the operational decisions as to both the substance and the method of communication of the AFL-CIO's message

Assistant for Public Affairs to AFL-CIO President John J. Sweeney, explains how the AFL-CIO selected the particular issues discussed in the advertisements:

> In both election and non-election years, my goal in selecting the issues to be addressed in the AFL-CIO's broadcast advertising has been to focus attention on a series of national policy issues of importance to working families. I have been guided in selecting these issues by input from the Executive Council of the AFL-CIO, which regularly discusses and focuses on a legislative and policy agenda for the organization, the AFL-CIO's ongoing lobbying program, polling and other opinion research, conducted primarily by the Washington, D.C, firm of Peter Hart Associates, and the views of affiliated unions. Most of the issues addressed in our advertisements, such as budget priorities, tax fairness, Medicare, and health care, recur in virtually every session of Congress; others, such as fast-track trade legislation or the trade status of China, may be current for a period of years and then become inactive for awhile.

Mitchell Decl. ¶ 10 [6 PCS]; *see also id.* ¶ 70 [6 PCS] ("[The indirect effect on election outcomes] has never been the point of our broadcast advertising program, within or outside the 30-and 60-day periods.").

367. Plaintiff AFL-CIO has provided a number of examples of "genuine issue advertisements" which relate to pending legislation that BCRA would capture because the commercials ran on television and radio within 30 days of a primary election. AFL-CIO Opening Br. at 10-11 (citing Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59). The

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to union members and to the general public. *Id.* Mitchell makes the strategic and logistical decisions regarding the AFL-CIO's media buys, and, within policy guidelines, makes the editorial decisions regarding the content of the AFL-CIO's communications.

advertisements cited to by the AFL-CIO ran in "flights," aimed at particular legislation pending at the time. Practically all of these flights consisted of a variety of "cookie-cutter" advertisements, meaning advertisements that are virtually identical except that they reference different candidates. *See generally* Mitchell Decl. Exhibit 1. Ms. Mitchell describes advertising campaigns comprising 29 different sets of cookie-cutter advertisements, some of which were run within 30 days of a named candidate's primary election. Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59.[227] In addition, Exhibit 1 shows that four more advertisements would have been captured by BCRA due to their airing within 30 days of the identified candidate's primary, but since all of the airings of three of these commercials would have been captured by BCRA's 60 day-window as well.[228]

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[227] The advertisements are: "Too Far," Mitchell Decl. ¶ 32 & Exhibit 31; "1991," *id.* ¶ 34 & Exhibit 33; "Raise," *id.* ¶ 35 & Exhibit 35; "Votes," *id.* ¶ 35 & Exhibit 36; "People," *id.* ¶ 35 & Exhibit 38; "No," *id.* ¶ 35 & Exhibit 39; "Minimum Wage," *id.* ¶ 36 & Exhibit 42; "$5.15," *id.* ¶ 36 & Exhibit 44; "Couple," *id.* ¶ 37 & Exhibit 47; "Lady," *id.* ¶ 37 & Exhibit 48; "Peace," *id.* ¶ 37 & Exhibit 49; "Whither," *id.* ¶ 37 & Exhibit 50; "Another," *id.* ¶ 38 & Exhibit 53; "Edith," *id.* ¶ 40 & Exhibit 58; "Pass," *id.* ¶ 50 & Exhibit 94; "Support," *id.* ¶ 50 & Exhibit 95; "Call," *id.* ¶ 50 & Exhibit 98; "Failed," *id.* ¶ 50 & Exhibit 99; "Liable," *id.* ¶ 50 & Exhibit 100; "Soon," *id.* ¶ 50 & Exhibit 100; "Basic," *id.* ¶ 50 & Exhibit 102; "Label," *id.* ¶ 57 & Exhibit 127; "Trust," *id.* ¶ 57 & Exhibit 128; "Endure," *id.* ¶ 57 & Exhibit 129; "Stand," *id.* ¶ 57 & Exhibit 130; "Block," *id.* ¶ 58 & Exhibit 137; "Help," *id.* ¶ 58 & Exhibit 138; "Sky," *id.* ¶ 59 & Exhibit 139; and "Protect," *id.* ¶ 59 & Exhibit 140.

[228] These four advertisements are: "Job," Mitchell Decl. ¶ 61 & Exhibits 1 (at 102), 141 (All airings of "Job" took place within 60 days of the 2000 general election); "Barker," *id.* ¶ 53 & Exhibit 116 (All airings of "Barker" took place within 60 days of the 2000 general election); "No Two Way," *id.* ¶ 41 & Exhibit 59 (All airings of "Job" took place within 60 days of the 2000 general election); and "Raiders," *id.* Exhibit 1 at 36, 38-39, Exhibit 58 at 10. "Job," "Barker," and "No Two Way" were captured by BCRA's 60-day window.

Representative Examples of Genuine Issue Advertisements Aired Within 30 Days of a Primary Election, or 60 Days of a General Election, and Mentioning the Name of a Federal Candidate

368. The AFL-CIO aired a radio advertisement entitled "Barker" within 60 days of the 1998 general elections.[229] Mitchell Decl. Exhibit 1 at 86. The advertisement urged the candidates to Fast Track trade legislation, and only mentions that candidate's name with respect to asking the viewer to tell the candidate to "vote no on Fast Track." The following is the audio of the ad:

> Paid for by the Working Men and Women of the AFL-CIO. [Barker speaking]: Okay ladies and gents, step right up and see if you can follow the ball. Is it here? Is it there? Where could it be? [Voice over]: They're playing games again in Washington. Without discussion or debate, they're planning another vote on the controversial Fast Track law—special powers to ram through trade deals like NAFTA. Fast Track failed *last* year because working families don't want more trade deals that put big corporations first; deals that ignore our concerns about lost jobs; environmental problems on our borders, and dangerous, imported foods. But Newt Gingrich and the sponsors of Fast Track hope they can sneak it by this fall, while public attention is focused on other issues. [Barker speaking]: Keep your eyes on the ball now . . . [Voice over]: Call Representative ______ at xxx-xxx-xxxx and tell him to vote *no* on Fast Track.

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[229] "Barker" aired in the districts of Congressman Chris John (LA- 07); Congressman Scott Klug (WI-02); Congresswoman Jo Ann Emerson (MO-08); Congresswoman Anne Northup (KY-03); Congressman Jack Kingston (GA-01); and Congressman Rick White (WA-01). Mitchell Decl. Exhibit 1 at 86.

> Tell him we're still paying attention. And Fast Track is *still* a bad idea.

Mitchell Decl. Exhibit 116. Defense Expert Magleby, examined "Barker" during his cross examination and stated that he would rate it as a "genuine" issue ad. Magleby Cross Exam. at 108-109. Even though "Barker" mentioned the name of a candidate, Magleby determined that it was a genuine issue advertisement because it "doesn't mention how [the candidate] voted. It doesn't represent what [the candidate] has said about the issue. The body of the ad has no referent to [the candidate] whatsoever. The only referent to [the candidate] is the call line." Magleby Cross Exam. at 103-105; *see also id.* at 106 (explaining that "a generic call your Congressman, call your Senator, when then linked to a legislation and call your Congressman or Senator about this legislation without a referent to their position on the issue, seems to me substantively different than when they are mentioned in view of what their position is on that issue. Q. When you say substantively different, are you referring to a difference with respect to whether the advertisement communicates an electioneering message? A. Yes.").

369. The AFL-CIO paid for the following television advertisement, entitled, "Call." "Call" aired within 30 days of the 1998 primary elections of Congressman Jim Tanner (TN-08) and Senator Kit Bond (MO). The ad urged the candidates to support the Patient Bill of Rights Act.[230] *See* Mitchell Exhibit 1 at 80. The following is the text of the advertisement:

> Nurse at nursing station, direct-to-camera: I love nursing. But it's so much harder that it's ever been. These bureaucrats from the insurance companies. They routinely deny care, and they make decisions that only the doctors should be making." Today the insurance industry is spending millions to block a law in Congress that would protect our rights—and our lives—in the new world of HMOs and managed care. Call Congresswoman Chenowith. Tell her to stand up for us and support the Patient Bill of Rights Act. "If Congress would just do their job . . . then I can do mine."

Mitchell Exhibit 99 (while the script of "Call" produced by the AFL-CIO mentions Congresswoman Chenowith's name, a version of "Call" was broadcast on July 15-21, 1998, but using Congressman Tanner's name and Senator Bond's name).

370. The AFL-CIO paid for the following television advertisement, entitled, "Deny." "Deny" aired within 60 days of the 1998 general elections of Senator Kit Bond (MO), Senator Charles Grassley (IA), the late Senator Paul Coverdell (GA), and Senator Lauch Faircloth (NC). Mitchell Decl. Exhibit 1 at 83-84. The advertisement urges the candidates to oppose S, 2330, a patients' rights bill, and only mentioned that candidate's name with respect to asking the viewer to tell the candidate to vote "no" on the legislation. The following is the audio of the ad:

> A young cancer victim needs an outside specialist . . . But the HMO says no. A man with chest pains goes to the nearest emergency room . . . But his HMO won't pay. An elderly patient needs more hospital time . . . But her doctors are over- ruled [*sic*] by bureaucrats. Still, Republicans in Washington are pushing an empty HMO proposal that won't stop these abuses. Tell Senator ___ to vote no on S. 2330 . . . . .. and demand a real patient protection law. [Chyron showing 1-800 number for viewers to call].

Mitchell Decl. Exhibit 105.

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[230] According to Ms. Mitchell, "Call" was one of "several flights of television and radio advertisements designed to generate support for HMO reform legislation" that were sponsored by the AFL-CIO. Mitchell Decl. ¶ 50. Seventeen versions of "Call" were broadcast, two of which named federal candidates within 30 days of their primary. *Id.* Exhibit 1 at 80-82.

371. The AFL-CIO paid for the following television advertisement, entitled, "Spearmint." "Spearmint" aired within 60 days of the 1998 general elections of the following Members of Congress: Congressman Rick White (WA-01); Congressman Jim Leach (IA-01); Congressman Jim Nussle (IA-02); Congresswoman Anne Northup (KY-03); Congressman Jim Bunning (KY-04); Congressman Mike Parker (MS-04); Congressman Virgil Goode (VA-05); Congressman Scott Klug (WI-02); Congressman Steve Chabot (OH-01). Mitchell Decl. Exhibit 1 at 84-85. The advertisement urged the candidates to oppose tax cuts and to protect Social Security, and only mentioned that candidate's name with respect to asking the viewer to tell the candidate to "vote no on this tax scheme." The following is the audio of the ad:

> After years of deficits, the politicians in Washington say we're *rolling* in money. But here's something they're *not* saying. Virtually every dollar of the budget surplus comes from Social Security. Now the Republican Congress wants to spend this Social Security surplus on an eighty billion dollar election-year tax cut . . . . . even as there's talk about cutting Social Security for future retirees. Call Congressman ______, and tell him to vote no on this tax scheme. Tell ______ to put Social Security first!

Mitchell Decl. Exhibit 108.[231]

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[231] The AFL-CIO aired another advertisement entitled "Spear" that was virtually identical to "Spearmint." "Spear" aired within 60 days of the 1998 general elections of the following Members of Congress: Congressman Robert Aderholt (AL-04); Congressman Mike Crapo (ID-02); Congresswoman Helen Chenoweth (ID-01); and Congressman John Ensign (NV-01); Congressman Mark Neumann (WI-01). Mitchell Decl. Exhibit 1 at 85-86. Like "Spearmint," "Spear" urged the candidate to protect Social Security, and only mentioned the candidate's name with respect to asking the viewer to tell the candidate to "vote no on this election-year tax scheme." Mitchell Decl. Exhibit 109.

372. The AFL-CIO paid for the following television ad, entitled, "Label." "Label" aired within 30 days of the 2000 primary elections of the following Members of Congress: Congressman Silvestre Reyes (TX-16) and Congressman Ron Paul (TX-14). Mitchell Decl. Exhibit 1 at 92. The ad urged the candidates to oppose a trade bill to benefit China.[232] The following is the audio of the ad:

> Behind this label is a shameful story. Of millions herded into forced labor camps, and average working wages of just thirteen cents an hour. Of a nation that routinely violates trade agreements; flooding our markets with low-wage imports; undercutting American jobs. Yet know Congress is poised to reward China with permanent free trade status, instead of a one-year deal. Call Congressman ______, and tell him to keep China on probation. Until this label stands for fairness.

Mitchell Decl. Exhibit 127.[233]

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[232] "Label," as well as the advertisements entitled "Trust" and "Endure," *see infra* n.233, were run in February through June 2002 as part of "several flights of ads . . . in opposition to President Clinton's proposal to provide permanent normal trade relations to China." Mitchell Decl. ¶ 57. AFL-CIO ran 14 versions of "Label," two within 30 days of a named candidate's primary. *Id.* Exhibit 1 at 92-93.

[233] The AFL-CIO also aired two other advertisements that were similar to "Label": "Trust" and "Endure." Sixteen versions of "Trust" were aired, two within 30 days of the 2000 primary elections of Congressman Steve Buyer (IN-05) and Congresswoman Eva Clayton (NC-01). Mitchell Decl. Exhibit 1 at 94-97. "Trust," like "Label," urged the candidates to oppose the China trade bill, and only mentioned the candidate's name with respect to asking the viewer to tell the candidate to "keep China on probation." Mitchell Decl. Exhibit 128. "Endure" also aired within 30 days of the 2000 primary elections of Members of Congress (Congressman Edward Whitfield (KY- 01), Congressman Steve Buyer (IN-05), and Congresswoman Eva Clayton (NC- 01)), and urged candidates to oppose a trade deal for China. Mitchell Decl. Exhibit 129.

373. The AFL-CIO paid for the following television advertisement, entitled, "Endure." "Endure" aired within 30 days of the primary elections of the following Members of Congress: Congressman Edward Whitfield (KY-01); Congressman Steve Buyer (IN-05); and Congresswoman Eva Clayton (NC-01). Mitchell Decl. Exhibit 1 at 95-96. The advertisement urged the candidate to oppose a trade deal for China. The following is the audio of the ad:

> "I voiced my opinion that China ought to protect worker's rights, people ought to have human rights . . . . For that, I spent 18 years in prison and was very nearly executed." Wei Jingsheng endured years of torture for challenging a brutal system of slave wages and sweat shops, through which Chinese workers are exploited, and Americans lose jobs. But instead of pressuring China to stop these practices, Congress is set to scrap its annual review of China's record, and reward Beijing with a permanent trade deal,,, a permanent trade deal though China's broken every trade pact it's signed with the U.S. for the past decade. "If you give China permanent trade status, and don't talk about it once a year, every year, and evaluate how they treat the Chinese people, they'll feel they can do whatever they want, however they want. This will be incredibly detrimental to human rights in China." Tell your member of Congress to keep China on probation . . . until China earns our trust. [Text on screen reads: Call Your Member of Congress 800-378-1844].

Mitchell Decl. Exhibit 129.

Representative Examples of Candidate-Centered Issue Advertisements Aired Within 30 Days of a Primary Election or 60 Days of a General Election

374. The AFL-CIO paid for the following radio advertisement entitled "No Two Way," which aired in 35 congressional districts within 60 days of the 1996 general election. Mitchell Decl. ¶ 41. "No Two Way" targeted those candidates who, as Members of Congress, had voted "to cut the college loan program in October, 1995." *Id.*

> CAROLYN: My husband and I both work. And next year, we'll have two children in college. And it will be very hard to put them through, even with the two incomes. [Announcer]: Working families are struggling. But Congresswoman Andrea Seastrand voted with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy. She even voted to eliminate the Department of Education. Congress will vote again on the budget. Tell Seastrand, don't write off our children's future. CAROLYN: Tell her, her priorities are all wrong.

Mitchell Decl. Exhibit 114.

375. The AFL-CIO paid for the following television advertisement entitled "Retire," which aired within 60 days of the 1996 general election. Mitchell Decl. ¶ 42. "Retire" was one of the "'electronic voter guide []''' advertisements run by the AFL-CIO "beginning in late September and continuing until the November election." *Id.*

> What's important to America's families? [middle-aged man, interview style]: "My pension is very important because it will provide a significant amount of my income when I retire." And where do the candidates stand? Congressman Charlie Bass voted to make it easier for corporations to raid employee pension funds. Arnie Arnesen opposes that plan. She supports new safeguards to protect employee pension funds. When it comes to your pension, there is a difference. Call and find out.

Mitchell Decl. Exhibit 63.

376. The AFL-CIO paid for the following television advertisement entitled "Job," which aired in fourteen congressional districts within 60 days of the 2000 general election. Mitchell Decl. ¶ 61 and Exhibit 1 at 101-102. The

advertisement targeted Members of Congress who had voted "to prevent an important OSHA regulation intended to prevent repetitive motion injuries from being implemented." *Id.* at ¶ 61. The regulation was part of the Departments of Labor and Health and Human Services budget bill, which President Clinton had threatened to veto if it included a rider removing the OSHA regulation. *Id.* Initially, the House leadership had agreed to a compromise, but then "backed out in October 2000." *Id.*

> [Machine operator]: "Well when you're lifting 70 thousand pounds of castings a day and you do this for 24 years, you're gonna hurt yourself. I had surgery on both hands but I'll be in pain the rest of my life." Every year, tens of thousands of Americans suffer permanent and crippling repetitive motion injuries on the job. Yet Congressman _______ voted to block federal safety standards that would help protect workers from this risk. Tell ________________ his/her politics causes pain. [Machine operator]: "We're all human beings we need to help each other so that this stuff doesn't happen to us."

Mitchell Decl. Exhibit 141.

* * *

VI. CONCLUSION

For the reasons set forth in my opinion, with regard to Title I of BCRA, I find constitutional: new FECA Section 323(a) only to the extent that it bans national parties from using nonfederal funds for Section 301(20)(A)(iii) activities; new FECA Section 323(b) as applied to Section 301(20)(A)(iii) only; new FECA Section 323(e) except to the extent that it prevents federal candidates from soliciting funds for their national parties; and new FECA Section 323(f). I find unconstitutional: new FECA Section 323(a) except to the extent it bans national parties from using nonfederal funds for Section 301(20)(A)(iii) activities; Section 323(b) as applied to Sections 301(20)(A)(i), (ii), and (iv); new FECA Section 323(d); and new FECA Section 323(e) to the extent that it prevents federal candidates from soliciting funds for their national parties. With regard to Title II, for the reasons set forth in my opinion, I find constitutional: Section 201's backup definition of electioneering communications as severed and Section 204 to the extent that it applies to non-*MCFL* organizations. I find unconstitutional: Section 201's primary definition; Section 204 insofar as it applies to *MCFL* organizations; and Section 213. For the reasons set forth in this opinion, I also find unconstitutional Section 318 and and Section 504. All of my other judgments are set forth in the Per Curiam opinion.

FINAL JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and the four opinions of the three-judge District Court hearing these eleven consolidated actions, it is this 1st day of May, 2003, hereby

ORDERED that Plaintiffs' Motion for Judgment [#206] is GRANTED IN PART and DENIED IN PART; it is further

ORDERED that Defendants' and Intervenors' Motion for Judgment [#204] is GRANTED IN PART and DENIED IN PART; it is further

ORDERED that in regard to Section 101 of BCRA, judgment for Plaintiffs is entered in part with regard to new FECA Sections 323(a) and 323(b) and judgment for Defendants is entered in part with regard to new FECA Sections 323(a) and 323(b), in accordance with Judge Leon's Memorandum Opinion. Section 323(a) is constitutional only to the extent it bans national party committees from using nonfederal funds for Section 301(20)(A)(iii) activities and Section 323(b) is constitutional only as applied to Section 301(20)(A)(iii) activities; it is further

ORDERED that in regard to Section 101 of BCRA, judgment for Plaintiffs is entered with regard to new FECA Section 323(d); it is further

ORDERED that in regard to Section 101 of BCRA, judgment for Defendants is entered with regard to new FECA Sections 323(e) and 323(f); it is further

ORDERED that in regard to Section 201 (challenged disclosure provisions only), with the exception of subsection (5), and in regard to Sections 202, 214(a), 214(d), and 311 of BCRA, judgment for Defendants is entered in accordance with the *per curiam* opinion; it is further

ORDERED that in regard to subsection (5) of Section 201, judgment for Plaintiffs is entered in accordance with the *per curiam* opinion; it is further

ORDERED that in regard to Sections 214(b), 214(c), and 212, Plaintiffs' motion is DENIED on justiciability grounds in accordance with the *per curiam* opinion; it is further

ORDERED that in regard to Section 203 of BCRA, judgment is entered for Defendants with regard to that provision's applicability to the backup definition of "electioneering communication" as defined in Section 201 of BCRA, in accordance with Judge Leon's Memorandum Opinion; it is further

ORDERED that in regard to Section 204 of BCRA, judgment is entered for Defendants in accordance with Judge Leon's Memorandum Opinion; it is further

ORDERED that Judgment for Plaintiffs is entered with regard to Sections 213, 318, and 504 of BCRA; it is further

ORDERED that in regard to Sections 304, 316, 319, 305, and 307, Plaintiffs' motion is DENIED on justiciability grounds; it is further

ORDERED that Defendants and their agents are permanently enjoined from enforcing, executing or otherwise applying those sections of BCRA found unconstitutional by this three-judge District Court.

SO ORDERED.